





COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P.O. BOX 3265, HARRISBURG, PA 17105-3265

**DOCKETED**

JUN 02 1997

MAY 28, 1997

REFER TO OUR FILE

**DOCUMENT  
FOLDER**

A-00112531  
A-00112531C9601  
C-00957264

JOHN D MICHELIN ESQUIRE  
46 NORTH SIXTH STREET  
STROUDSBURG PA 18360

Application of Valentino DiGiacomo, t/a Stars Moving Company, for the right to begin to transport, as a common carrier, by motor vehicle, household goods in use, between points in the counties of Monroe and Pike, and from points in the said counties to points in Pennsylvania, and vice versa

PENNSYLVANIA PUBLIC UTILITY COMMISSION  
v.  
VALENTINO DIGIACOMO, t/a STARS MOVING COMPANY

PENNSYLVANIA PUBLIC UTILITY COMMISSION  
v.  
STARS MOVING COMPANY

To Whom It May Concern:

This is to advise you that an Opinion and Order has been adopted by the Commission in Public Meeting on MaY 22, 1997, in the above entitled proceeding.

An Opinion and Order has been enclosed for your records.

Very truly yours,

John G. Alford,  
Secretary

smk  
Encls.  
Cert.Mail

**PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
HARRISBURG, PA 17105-3265**

Public Meeting held May 22, 1997

Commissioners Present:

John M. Quain, Chairman  
Robert K. Bloom, Vice Chairman  
John Hanger  
David W. Rolka  
Nora Mead Brownell

**DOCUMENT  
FOLDER**

Application of Valentino DiGiacomo, t/a Stars Moving Company, for the right to begin to transport, as a common carrier, by motor vehicle, household goods in use, between points in the counties of Monroe and Pike, and from points in the said counties to points in Pennsylvania, and vice versa.

A-00112531<sup>1</sup>

*and*

Pennsylvania Public Utility Commission

A-00112531  
C9601<sup>1</sup>

v.

Valentino DiGiacomo, t/a Stars Moving Company

*and*

Pennsylvania Public Utility Commission

C-00957264<sup>1</sup>

v.

Stars Moving Company

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<sup>1</sup> We shall consolidate these proceedings inasmuch as the records in the two Complaint proceedings have become an integral element of the record in the Application proceeding.

## OPINION AND ORDER

### BY THE COMMISSION:

Before us for disposition is a document which we shall deem to be a Petition for Reconsideration (Petition) filed by Valentino DiGiacomo (Mr. DiGiacomo or Applicant), t/a Stars Moving Company,<sup>2</sup> relative to our Final Order entered on February 20, 1997, in the above-captioned application proceeding.

### History of the Proceedings

#### Application Proceeding – A-00112531

On October 16, 1995, Mr. DiGiacomo filed the subject Application, seeking a certificate of public convenience evidencing this Commission's approval of the right and privilege to begin to transport household goods in use. The Application was published in the Pennsylvania Bulletin on October 28, 1995. Specifically, the Applicant seeks the right to begin to transport, as a common carrier, by motor vehicle, household goods in use, between points in Monroe and Pike Counties, and from points in said counties to points in Pennsylvania, and vice versa. The Applicant initially proposed to use 1970 Ford F600 box truck. The Applicant additionally plans to use a 1987 Dodge Ram cargo van. The Applicant would employ less than five employees depending on the demands of the business.

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<sup>2</sup> We note that Mr. DiGiacomo uses "Stars Moving Company" as his t/a in the subject Application and "Stars' Moving Company" in the instant Petition. It is incumbent upon Mr. DiGiacomo to chose one or the other and to be consistent in his usage henceforth, with particular regard to the fact that virtually all of his transactions with this Commission have used the "Stars" designation rather than the "Stars'" designation.

On November 7, 1995, AAA Moving and Storage (AAA or Protestant), Docket No. A-00106910, F0001, Am-A, filed a Protest to the Application. The Protestant utilizes a full range of equipment to provide service as a Class D carrier of, inter alia, household goods and personal effects; store, museum, institution, hospital, and other furniture and fixtures; and art, displays, and exhibits from and to points in portions of Monroe, Northampton, and Luzerne Counties to and from points in Pennsylvania. The Protestant employs 18 to 25 employees depending on the demands of the business. The Protestant offered to withdraw its Protest if the Applicant would restrict the proposed service territory to exclude all of Wayne, Lackawanna, Monroe, Luzerne, and Pike Counties.

On June 5, 1996, a hearing was held before Administrative Law Judge (ALJ) George M. Kashi. The Applicant produced no public witnesses in support of the Application. Mr. DiGiacomo and his wife, Mrs. Star DiGiacomo, testified and identified three (3) exhibits which were not admitted into evidence. A further hearing was held on August 23, 1996. The Protestant's president testified on behalf of the Protestant and as an agent of Mayflower Transit in opposition to the Application. No briefs were filed. On September 9, 1996, the Honorable Joseph Battisto, Member of the House of Representatives, Commonwealth of Pennsylvania, filed a letter (First Letter) professing his support for the Application and asserting that there have been "many requests" for the proposed service. Rep. Battisto did not testify at either hearing. There is no proof that Rep. Battisto's First Letter was ever served upon the Protestant.

The ALJ's Initial Decision was issued on December 30, 1996. ALJ Kashi denied the Application, concluding: That granting the Application would not serve a useful public purpose, responsive to a public need or demand; that the Applicant possessed the requisite financial and technical fitness to provide the proposed service; that the Applicant lacked the propensity to operate safely or legally; and that granting the Application would not endanger or impair existing common carriers to such an extent that granting the authority

would be contrary to the public interest. On February 20, 1997, a Final Order was entered indicating that, in the absence of Exceptions, the Initial Decision had become final without further Commission action.

On February 28, 1997, the Applicant filed the instant Petition. Neither the Petition nor the record herein reflects that the Petition was served upon the Protestant at the time of filing. On March 5, 1997, Rep. Battisto filed a second letter (Second Letter) indicating his continued support for the Application. On or about May 12, 1997, the Commission's Office of the Secretary, by express mail, served a copy of the Petition and Rep. Battisto's First and Second Letters on the Protestant's counsel.<sup>3</sup> The Protestant was given ten (10) days to respond to the Petition.

**Complaint Proceeding -- C-00957264**

On September 28, 1995, this Commission's Bureau of Transportation and Safety (BTS) filed a Complaint against Stars Moving Company for holding itself [sic] out as doing business in the absence of authority to conduct such business. Stars Moving Company had quoted rates to an undercover Commission enforcement officer for moving some office furniture. (The Applicant then filed the subject Application on October 2, 1995.) The \$500 fine was paid without contesting the allegations. No service was actually rendered.

**Complaint Proceeding -- A-00112531, C9601**

On April 18, 1996, the BTS filed a Complaint against the Applicant, alleging that the Applicant was operating without authority due to the discovery of undated flyers advertising Dino's d/b/a Man-With-Van Hauling and Moving. There were no allegations of

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<sup>3</sup> In the interest of expediting this proceeding, copies were also sent to counsel for the Protestant via FAX.

uncertificated service actually being provided. On May 20 1996, the Applicant was given the opportunity to respond to the Complaint or to pay a fine of \$750. On May 31, 1996, the Applicant paid the \$750 fine.

### **Cease and Desist Letters**

On July 12, 1995, the BTS sent Stars Moving Company a cease-and-desist letter asserting that Stars Moving Company "may be holding yourself" out to transport household goods for compensation without Commission authority. The mailing included an application form. The matter was handled at IC-95-217. There were no allegations of uncertificated service actually being provided.

On January 25, 1996, the BTS sent Mr. DiGiacomo, t/a Stars Moving Company, a cease-and-desist letter, asserting that he had held himself out in the Wilkes-Barre Donnelley Talking Yellow Pages to transport household goods for compensation without Commission authority. The mailing was handled at Docket No. A-00112531, IC-96-0001 and recognized that the subject Application was pending. There were no allegations of uncertificated service actually being provided.

### **Discussion**

At this stage in the proceeding, the Applicant has filed a document purporting to take exception to the Initial Decision but which document we have deemed to be a Petition for Reconsideration. The document bears a date of January 18, 1997, but was not received by the Prothonotary until February 28, 1997. Exceptions, to have been timely, were to have been filed by January 21, 1997. Thus, we shall deem the document

to be a Petition for Reconsideration of our Final Order.<sup>4</sup> The Applicant has provided us with the necessary information and arguments upon which his requested relief is grounded.

Consistent with Section 703(g) of the Public Utility Code, 66 Pa. C.S. §703(g), relating to reconsideration, rescission, and amendment of an order, Section 5.572 of our Regulations, 52 Pa. Code §5.572, relating to relief following a final decision, and judicial and administrative precedent, the standards for review of a petition for relief following a final decision were set forth in Duick v. PG&W, 56 Pa. P.U.C. 553 (December 17, 1982) (Duick).

Duick, held that a petition for relief under Section 703(g) of the Public Utility Code, may properly raise any matter designed to convince this Commission that we should exercise our discretion to reconsider, rescind, or amend a prior Order, in whole or in part. Such petitions, however, are likely to succeed only when they raise “new and novel arguments” not previously heard or considerations which appear to have been overlooked or not addressed by us. (Duick, p. 559.) The Commonwealth Court case, AT&T v. Pa. PUC, 568 A.2d 1362 (Pa. Cmwlth. 1990), further elucidated these standards.

In applying these standards to the instant Petition, we note that the Applicant presents a matter designed to convince us that we should exercise our

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<sup>4</sup> Pursuant to Sections 1.2(a) and (c) and 1.4(d) of our Regulations, 52 Pa. Code §§1.2(a) & (c) and 1.4(d), the Prothonotary waived the absence of the requisite number of copies and waived the lack of a petition format in lieu of the narrative format of the Applicant’s letter. We cannot, however, waive the proof of service of the Petition on the Protestant.

discretion to reconsider our Final Order.<sup>5</sup> Specifically, the Applicant asserts that he was more than willing to reach a compromise with the Protestant which the ALJ attempted to facilitate but that the Protestant would not compromise. Furthermore, the Applicant offered credible explanations for the actions deemed to have been illegal operations giving rise to ALJ's conclusion that the Applicant lacked a propensity to operate legally. Finally, while the Applicant's Petition does not address the issue of need or demand for the proposed service, we have Rep. Battisto's First and Second Letters<sup>6</sup> in favor of the Application.

Before discussing the merits of the Applicant's Petition, we will review the requirements of law regarding the granting of an application to provide service as a common carrier. Section 1102 of the Public Utility Code, 66 Pa. C.S. §1102, states that it shall be lawful to provide service as a public utility only after applying for and obtaining a certificate of public convenience from this Commission. Section 1103(a) of the Public Utility Code, 66 Pa. C.S. §1103(a), further states that:

A certificate of public convenience shall be granted by order of the commission, only if the commission shall find or determine that the granting of such certificate is necessary or

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<sup>5</sup> Mr. DiGiacomo, *inter alia*, cites ineffective representation by counsel. It is not within our jurisdiction to evaluate the performance of an applicant's counsel or to formulate a remedy for an applicant who may have been represented by less than effective counsel. Accordingly, we express no opinion as to the competency of the Applicant's counsel or the adequacy of his representation before us.

<sup>6</sup> Rep. Battisto, in his capacity as the elected representative of his constituents, asserted in his First Letter that the Applicant had "many requests from the people in the Marshalls Creek/Stroudsburg area to move household items within a narrow corridor for Monroe County. In fact, [the Applicant] would fill a niche in the area of moving goods which larger companies would not respond to." In his Second Letter, Rep. Battisto "stress[ed] that the market area [the Applicant] intends to work **needs** the services of a small mover who can provide more affordable rates to the people in need of trucking services between points only a few miles apart, or at the most, between locations wholly within Monroe County." (emphasis added.)

proper for the service, accommodation, convenience, or safety of the public.

In applying these requirements to motor carrier applications, we adopted Section 41.14 of our Regulations, 52 Pa. Code §41.14, which states that:

- (a) An applicant seeking motor common carrier authority has the burden of demonstrating that approval of the application will serve a useful public purpose, responsive to a public demand or need.
- (b) An applicant seeking motor common carrier authority has the burden of demonstrating that it possesses the technical and financial ability to provide the proposed service, and, in addition, authority may be withheld if the record demonstrates that the applicant lacks a propensity to operate safely and legally.
- (c) The Commission will grant motor carrier authority commensurate with the demonstrated public need unless it is established that the entry of a new carrier into the field would endanger or impair the operations of existing common carriers to such an extent that, on balance, the granting of authority would be contrary to the public interest.

In Application of Blue Bird Coach Lines, Inc., 72 Pa. P.U.C. 262, 274, (1990), (Blue Bird), we stated that:

When, through relevant, probative, competent and credible evidence of record, a motor common carrier applicant has shown that the applicant's proposed service will satisfy the supporting witness' asserted transportation demand/need, the applicant has sustained its burden of proof under subsection 41.14(a) by establishing that "approval of the application will serve a useful public purpose, responsive to a public demand or need." E.g., Seaboard Tank Lines, Inc., 502 A.2d 194 (Pa. Cmwlth. 1974). This interpretation of subsection 41.14(a) is consonant with our avowed reason for

promulgating the transportation regulatory policy statement at 52 Pa. Code §41.14, namely, to eliminate monopolistic protection of existing motor carriers and to promote healthy competition among motor carriers for the purpose of assuring the availability of transportation service commensurate with the demonstrated public demand/need.

We further stated that:

Moreover, the supporting witnesses must identify Pennsylvania origin and destination points between which they require transportation, and these points must correspond with the scope of the operating territory specified in the application. E.g., Re Nothstein Bros. Inc., 64 Pa. P.U.C. 411 (1987); Re Purolator Courier Corp., 50 Pa. P.U.C. 308 (1976).

The particular circumstances of a case determine what constitutes sufficient evidence of a public demand/need for the applicant's proposed service. Noerr Motor Freight, Inc. v. Pa. PUC, 181 Pa. Superior Ct. 322, 124 A.2d 493 (1956); Re Purolator Courier Corp., supra.

(Blue Bird, pp. 274-275.)

Our most recent review of these standards was our action in Application of Harrisburg Taxicab & Baggage Co., t/a Yellow Cab Co. (Yellow), Docket No. A-00079143, F0008, Am-E, (Order adopted on May 8, 1997). In Yellow, we addressed the issue of proof of need, saying that where inadequate service exists in a market, new service providers must be allowed to fill that vacuum. We also evaluated what evidence constitutes proof of a propensity to operate illegally.

Thus, it is within these parameters that the Applicant herein must establish the merits of his case relative to his request that we reconsider our Final Order adopting

the Initial Decision. We note that the ALJ faulted the Applicant on his failure of proof of need and the question of his propensity to operate legally or safely based squarely on the record before him. The ALJ did conclude that the Applicant satisfied the requirements of Section 41.14(b) relative to financial and technical fitness and the requirements of Section 41.14(c) relative to the Applicant's potential impact on existing carriers. Accordingly, we shall confine our review to questions of need and the Applicant's propensity to operate safely and legally.

In looking for evidence of need, we note that the Applicant has produced not one single witness who testified that he or she would use the Applicant if the Applicant were to be granted the authority requested. In Blue Bird, we stated that supporting witnesses **must** identify origin and destination points between which they require transportation, that these points **must** correspond with the scope of the operating territory specified in an application, and that the particular circumstances of a case determine what constitutes sufficient evidence of a public demand/need for an applicant's proposed service. Further, in Yellow, we required the Applicant to present witnesses to testify explicitly as to need and the inadequacy of existing service. Thus, at least one supporting witness is indispensable.

We have referred previously to Rep. Battisto's Letters. It may seem apparent from the representations of the Applicant and Rep. Battisto that need, in addition to the inadequacy of the existing service, arguably could be proven by probative, competent, admissible evidence from supporting witnesses were the Applicant afforded the opportunity to call such witnesses. We hasten to emphasize, however, that neither the Letters nor the Applicant's assertions are **evidence** of need or inadequacy of existing service. Rep. Battisto did not testify, even in a representative capacity. The Letters were not even provided to the Protestant until May 12, 1997. At best, the Letters, as well as the Applicant's assertions, serve as a proffer of proof as to what the Applicant would seek

to prove if he were permitted to present additional evidence. As a question of fundamental due process, we cannot find need or inadequacy of existing service based on the Letters. Thus, we have no evidence of public demand or need or inadequacy of existing service in the record.

Under the circumstances, the record as developed in this proceeding supports a dismissal of the Application. We can find no fault with the ALJ's analysis of the record before him as to need and inadequacy of existing service. If we choose not to disturb our Final Order, the Applicant has the right to file a new application, commencing a new proceeding. Alternatively, we could remand this proceeding to the Office of Administrative Law Judge (OALJ) for the development of a record as to need and inadequacy of existing service which will lend itself to an analysis consistent with Blue Bird and Yellow, *supra*. We note especially that, in the considered opinion of the ALJ, the Applicant has already established several elements of his case which would allow a proceeding on remand to reach a conclusion more expeditiously than a new proceeding would.

Accordingly, we conclude that remanding the Application proceeding to the OALJ to allow the Applicant a chance to establish by probative, competent, admissible evidence, subject to objection and cross examination by the Protestant, is reasonable, appropriate, and in the public interest. In any such proceeding on remand, the Applicant is explicitly reminded of his obligation to respond to the Protestant's discovery requests and to provide witness lists and copies of proposed exhibits to counsel for the Protestant consistent with due process and our Regulations.

We shall next address the question of the Applicant's propensity to operate legally and safely. Section 41.14(b) of our Regulations provides that an applicant must prove that it has the requisite financial and technical ability to provide the proposed

service. The ALJ specifically found that the Applicant had met his burden of proof relative to his financial and technical fitness under Section 41.14(b). The standard is, however, slightly different with respect to an applicant's burden of proof relative to safe and legal operations. Section 41.14(b) explicitly provides that "authority may be withheld if the record demonstrates that the applicant lacks a propensity to operate safely and legally." (emphasis added.) Thus, it is the record which must demonstrate that an applicant will not operate safely or legally rather than an applicant which must prove that it will operate safely and legally.

As in Yellow, the record herein reveals no consumer or competitor complaints of illegal service. The only uncontroverted evidence implicating the Applicant's propensity to operate illegally is a quotation of rates in a sting operation which predated the Application and flyers advertising a name other than the Applicant's proposed t/a of Stars Moving Company which flyers also arguably and plausibly predated the Application. While either of these violations could have resulted in the provision of service without authority, neither of the violations resulted in any actual illegal service which has been proved of record in these proceeding. In each instance, the Applicant paid a fine without contesting the allegations.

As for the two cease-and-desist letters, the record supporting the July 12, 1995 cease-and-desist letter merely asserts that the Applicant might have held himself out to do business. The second cease-and-desist letter, in January 1996, cites a Yellow Pages advertisement. We recognize that Yellow Pages advertisements must be contracted for well in advance of publication and are year-long commitments with rolling renewal dates. We further recognize that disconnecting the Applicant's listed number would have damaged Mrs. DiGiacomo's business operations. Neither of these cease-and-desist letters cited any instances of any actual illegal service. Finally, there have been no further allegations of impropriety by the Applicant in over a year.

We do note that the Applicant admitted on the record to providing some service in the Spring and Summer of 1995. (Tr., pp. 9 & 31-35.) The Complaints and cease-and-desist letters are dated chronologically July 25, 1995, September 28, 1995, January 25, 1996, and April 18, 1996. Thus, the Applicant's admissions corroborate illegal service only in conjunction with the allegations in the cease-and-desist letter of July 12, 1995. We find the Applicant's explanations credible. We are further impressed by the Applicant's ability to refrain from uncertificated service for the past year.

From the record before us, we cannot conclude that the record demonstrates a propensity of the Applicant to operate illegally or *unsafely*<sup>7</sup> as required to withhold authority under Section 41.14(b) of our Regulations. We do not find either a pattern of conduct evidencing a deliberate, flagrant, and persisting disregard for the law or the likelihood of future violations indicative of a propensity to operate illegally.<sup>8</sup>

Finally, we again note that the remainder of the Applicant's burdens under Sections 41.14(b) and (c) have been satisfied.

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<sup>7</sup> As in Yellow, the record herein reflects nothing to implicate the Applicant's propensity to operate safely. We believe that the ALJ's seeming implication of the Applicant's propensity to operate safely was merely a result of the conjunctive nature of the language of Section 41.14(b) and not a specific conclusion that the Applicant had been proved to have a propensity to operate unsafely.

<sup>8</sup> While we are remanding this proceeding specifically for a determination as to need, if proof of such need relies or appears to rely on any evidence of uncertificated service by the Applicant, then the Applicant, consistent with Yellow, may attempt to justify such uncertificated service through proof that the uncertificated service was to fill a vacuum created by the inadequacy of existing carriers.

### Conclusion

Based upon our review of the record as developed in this proceeding, we find that it is reasonable, appropriate, and in the public interest to remand this proceeding to the OALJ to clarify the record as to need and inadequacy of existing service, consistent with this Opinion and Order. In the alternative, if the Protestant were to stipulate to need based upon the representations of Rep. Battisto or if the Protestant were to enter into a compromise as to territory and withdraw its Protest, the ALJ could resolve the proceeding without further hearing; **THEREFORE,**

#### **IT IS ORDERED:**

1. That the Petition for Reconsideration filed by Valentino DiGiacomo, t/a Stars Moving Company, February 28, 1997, be, and is hereby, granted, consistent with this Opinion and Order.
2. That this proceeding be, and is hereby, remanded to the Office of Administrative Law Judge for further hearings or disposition and the preparation of an Initial Decision on Remand, consistent with this Opinion and Order.

3. That, if the Protestant files a response to the documents served upon it on May 12, 1997, as provided herein, said response shall be directed to the Administrative Law Judge for consideration in his Initial Decision on Remand.

**BY THE COMMISSION,**



John G. Alford  
Secretary

(SEAL)

Order Adopted: May 22, 1997

Order Entered: **MAY 28 1997**