



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

ISSUED: April 16, 1996

REFER TO OUR FILE
 IN REPLY PLEASE

A-00112055 F0002

WILLIAM H R CASEY ATTY
 99 EAST COURT STREET
 DOYLESTOWN PA 18901

Application of David M. Krmpotich, Inc.

DOCUMENT
 FOLDER

TO WHOM IT MAY CONCERN:

Enclosed is a copy of the Initial Decision of Administrative Law Judge Herbert Smolen. This decision is being issued and mailed to all parties on the above specified date.

If you do not agree with any part of this decision, you may send written comments (called Exceptions) to the Commission. Specifically, an original and nine (9) copies of your signed exceptions **MUST BE FILED WITH THE SECRETARY OF THE COMMISSION IN ROOM B-20, NORTH OFFICE BUILDING, NORTH STREET AND COMMONWEALTH AVENUE, HARRISBURG, PA OR MAILED TO P.O. BOX 3265, HARRISBURG, PA 17105-3265**, within twenty (20) days of the issuance date of this letter. The signed exceptions will be deemed filed on the date actually received by the Secretary of the Commission or on the date deposited in the mail as shown on U.S. Postal Service Form 3817 certificate of mailing attached to the cover of the original document (52 Pa. Code §1.11(a)) or on the date deposited with an overnight express package delivery service (52 Pa. Code 1.11(a)(2), (b)). If your exceptions are sent by mail, please use the address shown at the top of this letter. A copy of your exceptions must also be served on each party of record. 52 Pa. Code §1.56(b) cannot be used to extend the prescribed period for the filing of exceptions/reply exceptions.

If you receive exceptions from other parties, you may submit written replies to those exceptions in the manner described above within ten (10) days of the date that the exceptions are due.

Exceptions and reply exceptions shall obey 52 Pa. Code 5.533 and 5.535 particularly the 40-page limit for exceptions and the 25-page limit for replies to exceptions. Exceptions should clearly be labeled as "EXCEPTIONS OF (name of party) - (protestant, complainant, staff, etc.)".

If no exceptions are received within twenty (20) days, the decision of the Administrative Law Judge may become final without further Commission action. You will receive written notification if this occurs.

Very truly yours,

John G. Alford

Secretary

law

Enc's.

Certified Mail

Receipt Requested

cc: ALJ SMOLEN/ OFFICE OF ALJ/ OSA/ PIO/ LAW/ T&S-LEGAL/ T&S-WAGGONER/ OUR FILE/ NEW FILE/ CHAIRMAN/
 COMMISSONERS

PETER MARZOLF

PA PUC TRANS & SAFETY -

P O BOX 3265

3RD FLOOR BARTO BLDG

HARRISBURG PA 17105-3265

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

DOCUMENT
FOLDER

Application of : Docket Number
: :
David M. Krmpotich, Inc. : A-00112055, F0002

INITIAL DECISION

Before
HERBERT SMOLEN
Administrative Law Judge

DOCKETED
APR 23 1996

HISTORY OF THE PROCEEDING

Applicant filed its Application on June 30, 1995. Notice thereof was published in the Pennsylvania Bulletin on or about August 26, 1995 at page 5360 with a Protest due date of September 18, 1995. Under date of September 19, 1995, Clemmer Moving and Storage, Inc. filed a Petition to Intervene together with a Protest to the Application, both of which were received in the Secretary's Office on September 20, 1995. The Certificate of Service attached to the Petition certifies that a copy thereof was mailed to Applicant and another Protestant (since withdrawn as a result of a restrictive amendment) on said date of September 19, 1995. At no time thereafter did Applicant file a Response in opposition to the aforesaid Petition and Protest.

The Petition to Intervene avers, inter alia, that "Due to inadvertence and Petitioner's absence on vacation, applicant's

notice in the Pennsylvania Bulletin was overlooked until today¹ when Petitioner became aware of it and that the last day for filing protests was yesterday, September 18, 1995." At the time Petitioner filed its Petition and Protest, another Protest to the Application had been previously and timely filed by Hoy Transfer, Inc. (Hoy) and no Administrative Law Judge had been assigned, nor any hearing scheduled. Subsequently, the Protest of Hoy Transfer, Inc. was settled by Stipulation between the Applicant and Hoy whereby the Hoy Protest was withdrawn based and conditioned upon an amendment to the Application. The Stipulation was filed with the Secretary of the Commission on October 24, 1995. Petitioner's Petition and Protest, as aforesaid, was filed under date of September 19, 1995 and received in the Secretary's Office September 20, 1996 while the Hoy Protest was still pending and before it was resolved by Stipulation. As aforesaid, Applicant did not and has not filed any opposition to Clemmer's late-filed Petition and Protest.

On March 21, 1996, this matter was assigned to the undersigned Administrative Law Judge and a hearing was scheduled to be held on May 7, 1996. A review of the record discloses, as aforesaid, that Applicant has not filed any opposition to Clemmer's late-filed Petition and Protest.

¹ September 19, 1995

Section 5.74(a) of the Pennsylvania Code, 52 Pa. Code §5.74(a) provides, inter alia, as follows:

(a) Petitions to intervene and notice of intervention may be filed following the filing of an application, . . . no later than the date fixed for the filing of petitions to intervene in an order or notice with respect to the proceedings, or, except for due cause shown, date fixed for filing protests are published in the Pennsylvania Bulletin.

With respect to the time for filing Protests, Section 3.381(d) of the Pennsylvania Code, 52 Pa. Code §3.381(d) provides as follows:

(d) Protests: time of filing. A protest shall be filed within the time specified in the notice appearing in the Pennsylvania Bulletin, which shall be no less than 15 days from the date of publication thereof. Failure to file such a protest in accordance with this subsection shall be a bar to subsequent participation in the proceeding, except where permitted by the Commission for good cause shown.

Allowance of intervention is a matter within the discretion of the Commission, and "[t]he interest of a petitioner seeking intervention must be direct and immediate." Re Pennsylvania Power & Light Company, 50 Pa.P.U.C. 38, 40 (1976).

A late-filed intervention which does not set forth "due cause" as to why it is untimely filed is properly dismissed. Re Mercer Gas Company, 71 Pa.P.U.C. 19 (1989).

Further, the Commission has interpreted 52 Pa. Code §3.381 in Re S.T.S. Motor Freight, Inc., 54 Pa. P.U.C. 343 (1980), and has provided the following interpretation:

Failure to file a timely protest is a bar to subsequent participation in an application proceeding, except where a potential intervenor can show good cause for its late appearance. 52 Pa. Code §3.381. Traditionally, this commission has been liberal in its interpretation of the "good cause" requirement and its allowance of intervention in common carrier application proceedings. Specifically, the commission has permitted late intervention: (1) where the petitioner has a reasonable excuse for missing the protest due date; (2) where the proceeding is contested at the time of the filing of a petition for intervention; (3) where the grant of intervention will not delay the orderly progress of the case; and (4) where the grant of intervention will not broaden significantly the issues, or shift the burden of proof.

Thus, all four of the standards must be met before late intervention will be permitted. Re Milton Transportation, Inc., 56 Pa.P.U.C. 623 (1982). See, also, Application of Touch of Class Limo, Inc., 1995 Pa. PUC LEXIS 62, Application of Douglasville Water Company, 1990 Pa. PUC LEXIS 58.

In the instant matter, Petitioner asserts that due to inadvertence and Petitioner's absence on vacation, Applicant's notice in the Pennsylvania Bulletin was overlooked until one day after the expiration of the Protest period (9/18/95). This reason does not meet the very first criteria set forth in Re S.T.S. Motor Freight, Inc., supra, i.e., a reasonable excuse. The explanation offered by Petitioner-Protestant, as aforesaid, is inadvertence and Petitioner's absence on vacation. However, it must be noted that Petitioner-Protestant is a corporation not an individual and nowhere in Petitioner's Petition and Protest is it explained how

the corporation could be on vacation. If the "away on vacation" and "inadvertence" excuse related to a corporate director, officer, employee, agent or representative charged with the responsibility for reviewing the Pennsylvania Bulletin, it is not set forth in the Petition and Protest. Under these circumstances, the proffered explanation set forth in the Petition/Protest is, on its face, simply not a satisfactory, complete and reasonable excuse for missing the due date, even by only one or two days. Therefore, Clemmer's Petition to Intervene will be denied.

Inasmuch as the duly filed Protest of Hoy Transfer, Inc. was withdrawn conditioned upon Commission acceptance of a restrictive amendment set forth in the Stipulation of the parties, a copy of which Stipulation is attached hereto as Appendix A; this proceeding is now unprotested and will be referred to the Commission's Bureau of Transportation and Safety for modified procedure processing.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the Respondent in this proceeding.
2. Allowance of intervention is a matter within the discretion of the Commission.
3. 52 Pa. Code §§5.74(a) and 3.381(d) provide, inter alia, that Petitions to Intervene and Protests, respectively, filed

after the date fixed for filing protests as published in the Pennsylvania Bulletin are granted only upon due cause shown.

4. In accordance with Re Mercer Gas Company, 71 Pa.P.U.C. 19 (1989), a petition to intervene that does not set forth within itself due cause as to why it is untimely filed is properly dismissed.

5. The criteria for granting a late-filed petition to intervene were developed in such cases as Re S.T.S. Motor Freight, Inc., 54 Pa.P.U.C. 343 (1980).

6. All four of the standards must be met before late intervention will be permitted. Re Milton Transportation, Inc., 56 Pa. P.U.C. 623 (1982), Application of Touch of Class Limo, Inc., 1995 Pa. PUC LEXIS 62.

7. Petitioner Clemmer, a corporation, has not presented a satisfactory and reasonable excuse for missing the protest due date in filing its Petition to Intervene in this case.

8. There are no other outstanding Protests.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Petition to Intervene and Protest filed by Clemmer Moving and Storage, Inc. in this case is denied.

2. That the Initial Hearing in this matter now scheduled to be held on Tuesday, May 7, 1996, is hereby cancelled.

3. That inasmuch as there are no outstanding Protests in this matter, the record in this case, together with the Stipulation between Applicant and Hoy Transfer, Inc. restrictively amending the Application is hereby referred to the Bureau of Transportation and Safety for processing under the Commission's modified procedure.

4. That a copy of the Initial Decision and the Commission's Order in this matter shall be served upon the Commission's Bureau of Transportation and Safety as well as upon all parties, including Hoy Transfer, Inc.

Date:

April 9, 1996

Herbert Smolen

HERBERT SMOLEN
Administrative Law Judge