



COMMONWEALTH OF PENNSYLVANIA
 PENNSYLVANIA PUBLIC UTILITY COMMISSION
 P.O. BOX 3265, HARRISBURG, PA 17105-3265
 ISSUED: April 17, 1992

KJR

IN REPLY PLEASE
 REFER TO OUR FILE

A-109823

LEGAL
 FOLDER

- Joseph F. Saporito, Esquire
 Saporito & Saporito
 490 North Main Street
 Pittston, PA 18640

- Application of P. A. Mangione Trucking, Inc.

TO WHOM IT MAY CONCERN:

Enclosed is a copy of the Initial Decision of Administrative Law Judge Richard M. Lovenwirth. 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-18, NORTH OFFICE BUILDING, NORTH STREET AND COMMONWEALTH AVENUE, HARRISBURG, PA OR MAILED TO P.O. BOX 3265, HARRISBURG, PA 17120, 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,

Allison K. Turner

Allison K. Turner
 Chief Administrative Law Judge

jam
 Encls.

Certified Mail

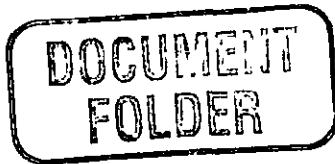
Receipt Requested

JUDGE RICHARD M. LOVENWIRTH, ALJ, OSA, CHAIRMAN, COMMISSIONERS, BUREAU OF S/C, OUR FILE, NEW FILING SECTION, MR FRAZIER, LAW BUREAU, BUREAU OF TRANS.
 Copy of Initial Decision Letter to: See Attached List.

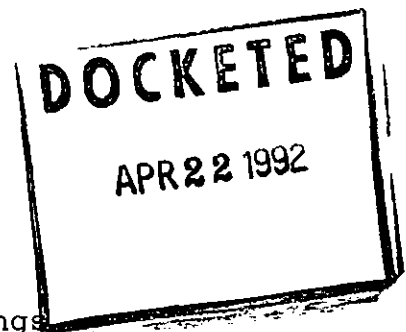
BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of P. A. Mangione Trucking, Inc., : A-109823
for approval of the transfer and to exercise :
the right as a common carrier, described at :
Docket Number A.00108238, Folder No. 1, :
issued to Joseph W. Knorr for transportation :
of property. :

INITIAL DECISION



Before
Richard M. Lovenwirth
Administrative Law Judge



I. History of the Proceedings

An Application was filed by P. A. Mangione Trucking, Inc. (hereinafter "Applicant") on June 17, 1991, wherein Applicant seeks the approval of the transfer of the common carrier certificate of public convenience issued to Joseph W. Knorr (hereinafter "Knorr") by this Commission at A-00108238, so as to permit Applicant:

"To transport, as a class D carrier, coal, culm, silt, cinders, sand, gravel and stone between points in the City of Scranton, Lackawanna County, and within an airline distance of fifty (50) statute miles of the limits thereof.

"subject to the following conditions:

"That no right, power or privilege is granted to transport coal from points in the counties of Luzerne and Schuylkill to points in the counties of Sullivan and Lycoming.

"That no right, power or privilege is granted to render service in the counties of Monroe and Pike."

The Commission set as the last date for the filing of Protests July 29, 1991.

Advertisement of the filing of the Application and of the last date for the filing of Protests was effectuated in the Pennsylvania Bulletin on July 6, 1991. Thereafter, Protests were filed as follows: on July 18, 1991 by Joseph Mihalka and Robert Romanski, t/d/b/a J & R Trucking Co. (hereinafter "J & R"); on July 22, 1991 by Joseph Mihalka, t/d/b/a Mihalka Trucking (hereinafter "Mihalka"); and on July 23, 1991 by Robert Romanski, t/d/b/a Romanski Trucking (hereinafter "Romanski").

An evidentiary hearing was scheduled for, and convened on, October 8, 1991, at the State Office Building, Scranton, Pennsylvania. The transcript of testimony for said hearing consists of ninety-one typewritten pages. Applicant moved seven exhibits into the record.

At the conclusion of the hearing the parties filed briefs.

II. Summary of Testimony

On November 21, 1991, the undersigned administrative law judge authored a briefing letter wherein it was requested:

"...that an impartial summary of testimony be included in the initial brief, with reference to the pages of the record or exhibits where referred evidence may be found; with any proposed modifications to the said summary of testimony to be included in the responding brief(s)."

(emphasis in the original)

Pursuant to said briefing letter, Applicant set forth a summary of testimony in its brief. The protestants, in their joint reply brief, requested certain additions to the summary of testimony as presented by Applicant.

The following summary of testimony represents Applicant's presentation of "summary of testimony" in its brief, plus all additions to same suggested by protestants in their reply brief; all as augmented and modified by the presiding officer.

Applicant's Case

All parties stipulated that the Application, as filed, will become part of the record (N.T. 9).

Joseph W. Knorr, transferor, testified: He is the current holder of Certificate of Public Convenience No. A-00108238 issued on January 24, 1989 (Applicant's Exhibit #1; N.T.

12, 15). The Certificate confers the following operating authority:

"To transport, as a class D carrier, coal, culm, silt, cinders, sand, gravel and stone between points in the City of Scranton, Lackawanna County, and within an airline distance of fifty (50) statute miles of the limits thereof.

"subject to the following conditions:

"That no right, power or privilege is granted to transport coal from points in the counties of Luzerne and Schuylkill to points in the counties of Sullivan and Lycoming.

"That no right, power or privilege is granted to render service in the counties of Monroe and Pike." (Applicant's Exhibit #2; N.T. 14).

Mr. Knorr stated that he has been operating under the certificate since the date of its issuance, and he has conformed to all Public Utility Commission requirements since that time, including those pertaining to insurance, tariffs and annual assessment reports (N.T. 16). He further testified that he entered into an agreement with the proposed transferee (Applicant) on January 29, 1991 to sell his rights under the certificate subject to approval of the Commission (Applicant's Exhibit #3; N.T. 18). He also testified that the agreed upon purchase price for the certificate of \$2,000.00 was fair and reasonable (N.T. 19).

On cross-examination, the witness testified: Mr. Knorr hauled coal and ash during the period when he owned the rights (N.T. 22). He generated "very little" business under his

certificate of public convenience during 1991 because he thought that the transfer of his certificate would be finalized soon after the agreement with Applicant was executed (1/29/91) (N.T. 21-23). The only vehicle he is presently using (primarily for himself) is a 1984 Highlift vehicle, and his other vehicles are presently out of service (N.T. 23).

On redirect examination, Mr. Knorr stated that if the transfer was not approved, he would continue to operate under the certificate and will honor requests for his service (N.T. 24).

Peter A. Mangione testified: He is the president and secretary of Applicant, a Pennsylvania business corporation, which currently operates an interstate trucking business under certificate number MC-221472 issued by the Interstate Commerce Commission in 1989 (Applicant's Exhibits 4, 6; N.T. 26, 30, 34). The company owns two tractors, one freight liner trailer and three (3) dump trailers, which would be used in the business if the transfer is approved (N.T. 35-36), and which would be adequate for that purpose (N.T. 39). Mr. Mangione stated that he currently has a safety program in place for his drivers (N.T. 39) and performs his own maintenance on the trucks (N.T. 35). The witness identified Applicant's Exhibit #7, which is an Income Statement for Applicant for the twelve-month period ending December 31, 1990, and which shows net income of \$13,056.00 resultant from the provision by it of interstate transportation.

On cross examination, Mr. Mangione stated: His father had transferred certain rights under a Commission certificate to J & R Trucking, protestant herein, in February, 1989 (N.T. 41). He testified that at the time his father sold his rights, he had no money to purchase them (N.T. 42).

On redirect, the witness testified: He has had numerous requests to haul on the intrastate level but he was unable to accommodate these prospective customers because he lacked a proper certificate.

On examination by the presiding officer the witness indicated that he presently stores his vehicles and performs maintenance on them out-of-doors either at a rented location in West Pittston or behind his mother's home at 510 South Main Street, Pittston, Pa. (N.T. 56-57).

Protestant's Cases

Robert Romanski testified: He is a protestant both in his capacity as owner of Romanski Trucking Co. and as a partner of J & R Trucking Company (N.T. 64). Both Romanski and J & R possess Class D Commission issued certificates which overlap some of the territory covered by Mr. Knorr's certificate (N.T. 65-68). He stated that J & R acquired its certificate of public convenience from Mr. Mangione's father, Alphonso, in 1989 for a consideration of \$50,000.00 (N.T. 68, 69). He indicated that Romanski Trucking, owned solely by him, had one piece of

equipment and that J & R, owned by both he and Joseph Mihalka, has seven tri-axles, seven tractors, and ten trailers (N.T. 69). He testified that J & R is currently working at seventy (70) per cent capacity. He felt there was no need for additional Class D service in the area (N.T. 71). Mr. Romanski stated that to his knowledge Mr. Knorr has not carried on a trucking business under the certificate for the past year (N.T. 71). He also indicated that he did not feel there was a need for any additional Class D service in the area being served by him, and that there were numerous other Class D carriers in the Luzerne/Lackawanna County area. Applicant would be providing the same type of service as is currently being provided by J & R, and an approval of the transfer requested by Applicant would divert traffic and revenue from the witness's business, putting him in a "downhill slump." (N.T. 71-72) In addition to Commission rights, J & R purchased I.C.C. rights from Alfonso Mangione for a total of \$50,000.00, including some equipment, and it also picked up some of his customers (N.T. 74).

On cross-examination, Mr. Romanski stated that J & R has been cited by the Commission in the past for illegal moves; i.e., moves outside the territory authorized by its certificate.

Joseph Mihalka testified: He is the owner of Mihalka Trucking Co., and his business is conducted chiefly by J & R Trucking, in which company he is a partner (N.T. 84). He

testified that their business was down about 30% and that they had trucks sitting idle (N.T. 84). He further asserted that his traffic and revenue might be diverted to the Applicant if the transfer was to be approved (N.T. 85). He also testified that his territories overlap to some extent those held by Mr. Knorr (N.T. 85).

On cross-examination, Mr. Mihalka stated: Since 1973 he was engaged in the trucking business and for that period Consumer Coal Co. operated under the same Commission rights which were transferred to Mr. Knorr and which Mr. Knorr now proposes to transfer to Applicant (N.T. 87-88).

III. Discussion

Concerning cases where the applicant for a certificate of public convenience is seeking to have transferred to it the existing rights of another, a body of law has evolved stating that if the transferor has not abandoned the rights in question, then the applicant who proves its fitness is entitled to a certificate of public convenience unless the protestant can rebut the presumption that there is a continuing public need for the service. See Byerly v. Pa. P.U.C., 440 Pa. 521, 270 A.2d 186 (1970); South Hills Movers, Inc. v. Pa. P.U.C., Pa. Cmwlth. ; A.2d ;(No. 555 C.D. 1991); Morgan Drive-A-

Way, Inc. v. Pa. P.U.C., 6 Pa. Cmwlt. 229; 293 A.2d 895 (1972);
and in re: Edward R. Simpson, 50 Pa. P.U.C. 655 (1977).

In the instant case, the protestants have argued that there is no presumption of a continuing public need for the transportation service sought by Applicant because there has been an abandonment by the transferor of the rights granted to him by the Commission's certificate of public convenience.

In Feather v. Pa. P.U.C., 41 Pa. Cmwlt. 544, 399 A.2d 829 (1979), at page 830, the Commission stated:

"The facts, briefly summarized, are in dispute in only one area. It is undisputed that the transferor obtained this authority on June 17, 1965, along with other rights. He has always maintained a tariff showing this authority along with the other rights, but did not exercise this authority from June 17, 1965 until the date of this application for transfer, i.e., December 15, 1976. It is disputed as to whether he knew he had the rights. There is some confusion in the record on this point, but there is testimony to support the finding that he had knowledge of the authority when he received it and that he never intended to abandon the authority.

"Byerly v. Pennsylvania Public Utility Commission, 440 Pa. 521, 270 A.2d 186 (1970) is controlling. In that case Justice Cohen, without dissent, made it quite clear that on facts remarkably similar to the instant case, absence of use alone cannot establish abandonment. To establish abandonment requires an affirmative showing of intent to abandon. Further, in a transfer situation, as here, the applicant can rely on the presumption of a continuing necessity, at least until the protestants introduce evidence of no need. No such evidence was introduced here." (emphasis in original)

In the instant case, we cannot find from either the Applicant's or the Protestants' sides of the case that an abandonment has been effectuated. To the contrary, the transferor (Knorr) became a certificated carrier on January 18, 1989 (Applicant's Exhibit No. 1; N.T. 15). He has been operating under that certificate (at A-00108238) since the date of its issuance, and he has conformed to all Commission requirements since that time, including those pertaining to insurance, tariffs, and annual assessment reports (N.T. 16). After he entered into an agreement of sale with Applicant (for the transfer of the certificate) on January 29, 1991, he did very little business because he thought that the transfer of his certificate would be finalized soon after the said agreement was executed (N.T. 21-23). He presently uses a vehicle for public conveyance (a 1984 Highlift vehicle), although his other vehicles are out of service (N.T. 23). If the transfer was not approved, the said transferor would continue to operate under the certificate, and will presently honor requests for his transportation service (N.T. 24). From this record, as applied to the definition of "abandonment" as supplied by our appellate courts in Feather v. Pa. P.U.C., supra, and Byerly v. Pa. P.U.C., supra, we must conclude that no abandonment has occurred. Ergo, there is a presumption of a continuing public need for the public utility service which has not been rebutted. None of the

evidence presented by protestants in any way rebutted the presumption with which our courts have clothed applicants in transfer proceedings (of continuing public need). Said protestants testified that their business was currently not operating at 100% capacity, and that there were numerous other Class D carriers within the area of certification. They concluded that a diversion of revenue from their operations would result if the instant Application was to be granted. These facts do not rebut the presumption of continuing public need, however. If anything, they merely tend to show that the granting of the instant Application will cause a financial hardship to protestants in that it might divert shippers away from said protestants. The essence of said argument, therefore, presupposes a "public need" represented by shippers whose business might be diverted to Applicant.

The only remaining issues are those attendant upon the question of whether Applicant has met its burden of proving its fitness. Applicant is currently providing common carrier service pursuant to its ICC certificate (Applicant's Exhibits 4, 6; N.T. 26, 30, 34). For that purpose, it owns two tractors, one freight liner trailer and three dump trailers, which it will also use for its intrastate freight if certificated, said equipment being adequate for that purpose (N.T. 35-36, 39). Applicant's income statement for the twelve-month period ended December 31,

1990 showed a net profit realized by it in the sum of \$13,056.00 which has resulted from its provision of interstate transportation. We thus conclude that financial fitness has been proven. Applicant's technical fitness has also been proven, in our view. As an interstate provider of common carriage, Applicant has in effect a safety program for its drivers, as well as a maintenance program for its equipment, which it will continue for the provision of intrastate service, if certificated (N.T. 35, 56, 57).

Protestants point out that they purchased their authority from the father of the sole officer and stockholder of Applicant. The inference to be drawn by this assertion by protestants is that since they paid valuable consideration to its transferor, his son should be precluded from competing. If there is any merit to this contention (and we find none) then the proper forum to redress that issue is the law court.

IV. Findings of Fact

1. Applicant is P. A. Mangione Trucking, Inc., a Pennsylvania business corporation, which currently operates an interstate trucking business under certificate number MC-221472 issued by the Interstate Commerce Commission in 1989 (Applicant's Exhibits 4, 6; N.T. 26, 30, 34).

2. Applicant owns two tractors, one freight liner trailer and three dump trailers, all of which will be used for intrastate common carriage if the instant Application is approved, and all of which would be adequate to provide the transportation which Applicant seeks (N.T. 35-36, 39).

3. Applicant has never been issued a certificate of public convenience or a contract carrier's permit from this Commission.

4. Concerning Applicant's provision of interstate transportation service, it has a safety program in place for its drivers, and it has a maintenance program in effect, as well, all of which will be continued for the provision of intrastate service if the instant Application is granted (N.T. 35, 39, 56, 57).

5. For the twelve-month period ended December 31, 1990, Applicant enjoyed net profit of \$13,056.00 resultant from its provision of interstate transportation (Applicant's Exhibit No. 7).

6. The proposed transferor in this proceeding is Joseph W. Knorr, who received a certificate of public convenience from this Commission at A-108238 on January 24, 1989 (Applicant's Exhibit No. 1; N.T. 12, 15). The certificate confers the following operating authority:

To transport, as a class D carrier, coal, culm, silt, cinders, sand gravel, and stone between points in the City of Scranton, Lackawanna County, and within an airline distance of fifty (50) statute miles of the limits thereof.

subject to the following conditions:

That no right, power or privilege is granted to transport coal from points in the counties of Luzerne and Schuylkill to points in the counties of Sullivan and Lycoming.

That no right, power or privilege is granted to render service in the counties of Monroe and Pike. (Applicant's Exhibit #2; N.T. 14).

7. The said proposed transferor, Joseph W. Knorr, has been operating under a certificate of public convenience since the date of its issuance, and he has conformed to all public utility requirements since that time, including those pertaining to insurance, tariffs and annual assessment reports (N.T. 16).

8. Applicant and Joseph W. Knorr entered into an agreement on January 29, 1991, to transfer the certificate of public convenience issued by the Commission to Joseph W. Knorr to Applicant for the sum of \$2,000.00 (Applicant's Exhibit #3, N.T. 18, 19).

9. During the period that the transferor, Joseph W. Knorr, has operated under common carrier rights at A-108238, he hauled coal and ash (N.T. 22).

10. The proposed transferor, Joseph W. Knorr, generated very little business under his certificate of public

convenience during the year 1991 because he thought that the transfer to Applicant of his certificate would be finalized soon after the agreement with Applicant was executed (on January 29, 1991) (N.T. 21-23).

11. The proposed transferor, Joseph W. Knorr, has never abandoned the rights granted to him by this Commission on January 18, 1989 at A-00108238.

12. There is a public need for the transportation which is the subject matter of this Application.

13. Applicant is financially fit.

14. Applicant is technically fit.

15. There is no evidence upon this record upon which a conclusion could be made that Applicant lacks a propensity to operate lawfully.

V. Conclusions of Law

1. This Commission has jurisdiction over the subject matter of this proceeding and over the parties thereto.

2. In cases where an applicant for a certificate of public convenience is seeking to have transferred to it the existing rights of another, the said applicant is entitled to a certificate of public convenience if the transferor has not abandoned the rights in question, and if the applicant proves its fitness; unless the protestant rebuts a presumption that there is

a continuing public need for the service. See Byerly v. Pa. P.U.C., 440 Pa. 521, 270 A.2d 186 (1970); South Hills Movers, Inc. v. Pa. P.U.C., Pa. Cmwlth. ; A.2d ;(No. 555 C.D. 1991); Morgan Drive-A-Way, Inc. v. Pa. P.U.C., 6 Pa. Cmwlth. 229, 293 A.2d 895 (1972); and in re: Edward R. Simpson, 50 Pa. P.U.C. 655 (1977).

3. Joseph W. Knorr, the proposed transferor, has not abandoned the common carrier rights he acquired by the issuance of a certificate of public convenience to him by this Commission at A-108238 on January 18, 1989.

4. Applicant is financially fit.

5. Applicant is technically fit.

VI. Order

Upon consideration of the foregoing, we enter the following ORDER:

1. That the Application of P. A. Mangione Trucking, Inc., for the transfer of all the rights held by Joseph W. Knorr at A-00108238 be APPROVED and that a certificate be issued granting the following rights:

To transport, as a class D carrier, coal, culm, silt, cinders, sand, gravel and stone between points in the City of Scranton, Lackawanna County, and within an airline distance of fifty (50) statute miles of the limits thereof.

subject to the following conditions:

That no right, power or privilege is granted to transport coal from points in the counties of Luzerne and Schuylkill to points in the counties of Sullivan and Lycoming.

That no right, power or privilege is granted to render service in the counties of Monroe and Pike.

Subject, further, to the following general conditions:

A. That the approval hereby given is not to be understood as committing this Commission, in any proceedings that may be brought before it for any purpose, to fix a valuation on the rights to be acquired by applicant from the present certificate holder equal to the consideration to be paid therefore, or equal to any value that may be placed thereon by applicant, or to approve or prescribe rates sufficient to yield a return thereon.

B. That applicant shall not record in its utility accounts any amount representing the rights herein granted, in excess of the actual cost of such rights to the original holder thereof.

C. That the applicant charge to Account 1550, Other Intangible Property, the sum of \$2,000.00, being the amount of consideration payable by it for the rights and going concern value attributable thereto; less any amount recorded under Condition B above.

2. That the operating authority granted herein, to the extent that it duplicates authority now held by or subsequently

granted to the carrier, shall not be construed as conferring more than one operating right.

3. That the applicant shall not engage in any transportation granted herein until it shall have complied with the requirements of the Pennsylvania Public Utility Code and the rules and regulations of this Commission relative to the filing and acceptance of a tariff establishing just and reasonable rates.


4. That the certificate holder shall not transfer, sell, or in any way convey any of its outstanding capital stock to any individual, partnership, corporation or any entity, without the prior filing of an application and approval thereof by this Commission under Section 1102(3) of the Public Utility Code, 66 Pa. C.S.A. §1102(3).

5. That in the event said applicant has not, on or before 60 days from the date of service of this order, complied with the requirements set forth above, the application shall be dismissed without further proceedings.

6. That upon compliance with this order the rights granted the transferor, Joseph W. Knorr (at A-00108238), be cancelled and the record be marked closed.

Date

March 10, 1992


RICHARD M. LOVENWIRTH
Administrative Law Judge

KIR

Act 294

Case Identification:

A-00109823; Application of P.
A. Mangione Trucking, Inc.

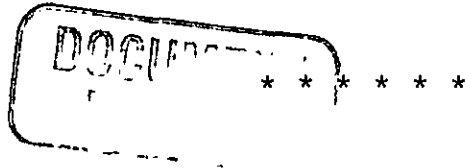
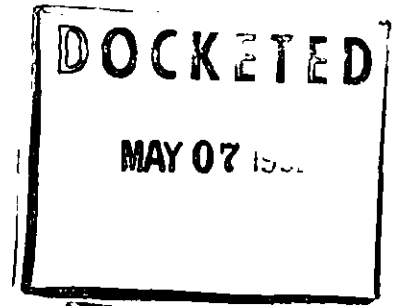
Initial Decision By:

ALJ Richard M. Lovenwirth

Deadline for Return to OSA:

May 1, 1992

This decision has not been reviewed by OSA.



I want full Commission review of this decision.

Commissioner

Date

I do not want full Commission review of this decision.

David W. Rolla
Commissioner

5-1-92
Date

Act 294

Case Identification: A-00109823; Application of P.
A. Mangione Trucking, Inc.

Initial Decision By: ALJ Richard M. Lovenwirth

Deadline for Return to OSA: May 1, 1992

This decision has not been reviewed by OSA.

* * * * *

I want full Commission review of this decision.

Commissioner

Date

I do not want full Commission review of this decision.

1. Joseph Rhodes, Jr.
Commissioner

5/5/92
Date

Act 294

Case Identification: A-00109823; Application of P.
A. Mangione Trucking, Inc.

Initial Decision By: ALJ Richard M. Lovenwirth

Deadline for Return to OSA: May 1, 1992

This decision has not been reviewed by OSA.

RECEIVED

APR 22 1992

* * * * *

COMMISSIONER HOLLAND

I want full Commission review of this decision.

Commissioner

Date

I do not want full Commission review of this decision.

Kendall F. Spilland
Commissioner

5/1/92
Date