

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 22A-0059CP

IN THE MATTER OF THE APPLICATION OF PALISADE TROLLEY LLC FOR A
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO OPERATE AS A
COMMON CARRIER BY MOTOR VEHICLE FOR HIRE.

**COMMISSION DECISION
GRANTING EXCEPTIONS, IN PART,
AND APPROVING APPLICATION**

Mailed Date: February 1, 2023
Adopted Date: November 23 & 30, 2022

TABLE OF CONTENTS

I.	BY THE COMMISSION	1
A.	Statement	1
B.	Background.....	2
C.	The Procedural Issues	2
D.	Palisade Trolley’s Application for Common Carrier Authority	4
II.	ORDER.....	9
A.	It Is Ordered That:	9
B.	ADOPTED IN COMMISSIONERS’ WEEKLY MEETING November 23 and 30, 2022.	10

I. BY THE COMMISSION

A. Statement

1. This decision grants the exceptions filed on October 4, 2022, by Palisade Trolley LLC and approves the Application for Permanent Authority to Operate as a Common Carrier by

Motor Vehicle for Hire, filed by Palisade Trolley on February 1, 2022, and as amended on May 3, 2022 (Application).

B. Background

2. This proceeding comes to us after an evidentiary hearing and recommended decision¹ denying Palisade Trolley's request for common carrier authority. Palisade Trolley retrofitted a shuttle bus chassis and replaced the vehicle body with one that looks like an old-fashioned trolley. The applicants seek to offer "trolley" service to and from wineries and events like weddings in the Palisade area. The recommended decision determined that despite the trolley body, the applicant would be providing transportation by motor vehicle, like the incumbent carriers, and that the evidence failed to show that the current carriers' service was inadequate to meet current need.

3. Palisade Trolley's exceptions raise three arguments against the recommended decision: (1) the recommended decision shouldn't have considered the maximum annual seating capacity of the incumbent carriers when determining if the incumbents' service is inadequate, (2) the service Palisade Trolley would provide is "trolley" service and therefore there is no incumbent service, and (3) support letters from various local officials and groups should have been given more weight in determining whether current service is inadequate.

C. The Procedural Issues

4. Before we address the three substantive challenges raised to the recommended decision, we must first address three procedural issues that are before us.

¹ The history of this Proceeding is set forth in the Recommended Decision.

5. The first concerns the hearing transcript filed by Palisade Trolley. Our hearing statute, C.R.S. 40-6-113, requires that a party who files exceptions challenging a factual determination (like Palisade Trolley does here) must file a hearing transcript before or contemporaneously to its exceptions. Palisade Trolley did not fully comply with this requirement. Palisade Trolley filed a request for the Commission to provide it with a transcript but otherwise timely filed exceptions. The company later filed the transcript with an explanation that the court reporter did not have the transcript ready on time. We construe their request for us to procure the transcript as a request for an extension of time to file the transcript, and grant that request pursuant to C.R.S. 40-6-113(2). Accordingly, Palisade Trolley's exceptions are properly before us.

6. The second issue concerns the response to exceptions filed by Pali-Tours. Palisade Trolley filed a Motion to Strike the Response on the grounds that it was filed 28 days out of time and contends that any consideration of the arguments in the response will delay this proceeding and prejudice Palisade Trolley. Pali-Tours then filed a "show cause for late filing of Pali-Tours' response to exceptions" which explains that it believed the deadline for filing a response to exceptions was when the transcript was filed, not when the exceptions are filed. We think it appropriate to waive Commission Rule 1505, which sets forth the 14-day filing period for responses to exceptions. Understanding Pali-Tours' position is useful to the Commission's consideration of this case and therefore we find good cause to waive the rule and accept Pali-Tours' response.

7. Next, we address Palisade Trolley's argument that the intervenors should have been dismissed from this proceeding. Palisade Trolley argues that the ALJ should have dismissed two intervenors because they failed to file their Letter of Authority alongside their

interventions pursuant to commission rule. The ALJ issued interim decision No. R22-0238-I that, among other things, addressed this issue. All three intervenors attended the prehearing conference before the ALJ, and the interim decision explains what took place during the conference when the issue arose: Of the two intervenors who had not yet filed their authorities, one of them had accidentally filed the wrong document, and the other was confused as to what exactly needed to be filed (it had filed the decision granting its authority, not the authority itself). Both intervenors properly filed their letters later that day. As a result, all three intervenors had correctly filed their letters of authority by April 14th, which is the extended deadline the ALJ set. At that point in the proceeding no party had been prejudiced by the delay in filing, and therefore it was not an abuse of discretion for the ALJ to extend the deadline for the parties to file their letters.

8. The Commission has the authority to conduct its proceedings in the interest of justice pursuant to C.R.S. 40-6-101, and we perceive no abuse of discretion in either of two remaining challenges raised by Palisade Trolley: that the ALJ should have dismissed Pali-Tours for failing in its notice of intervention to explicitly request a hearing or show that it was in good standing, and that Absolute's hearing exhibits should have been stricken as late-filed. We do not see any prejudice that accrued to Palisade Trolley from Pali-Tours' notice of intervention, and the hearing transcript indicates that Absolute's hearing exhibits were filed just after the 5 p.m. deadline on May 26, 2022. As the ALJ pointed out when she overruled the objection to their admission, no party was prejudiced by the exhibits being filed a few minutes late.

D. Palisade Trolley's Application for Common Carrier Authority

9. The legal and evidentiary standards that govern this proceeding are thoroughly set forth in the Recommended Decision. For the sake of convenience, we reiterate here that Palisade

Trolley has the burden to prove, by the preponderance of the evidence, (1) that it is financially, managerially, and operationally fit to conduct the business; (2) that there is a public need for the proposed service; (3) that the existing service is inadequate. *See Ephraim Freightways, Inc. v. Pub. Utilities Comm’n*, 380 P.2d 228, 231 (Colo. 1963); Rule 6203(a)(XVII). The ALJ found, and no party challenges, that Palisade Trolley’s owners pass the “fitness” test. It is the second two prongs of this test that Palisade Trolley contests in its exceptions.

10. We begin with Palisade Trolley’s argument that the service it seeks to provide is “trolley” service and, since the incumbent carriers do not offer trolley service, there is both a public need and the current carriers’ service is substantially inadequate with respect to the service Palisade Trolley seeks to offer. Palisade Trolley points to the hearing transcript where the incumbents were asked if they could, upon request, provide trolley service to the public. The incumbents answered in the negative. We agree with the recommended decision that trolley service contemplates passenger service over rail tracks, on a predetermined tracked route and schedule. In contrast, Palisade Trolley intends to use a motor vehicle chassis with a body modeled on an old-fashioned trolley to transport passengers along roadways. In our view, Palisade Trolley’s proposed service is common carrier service by motor vehicle, not trolley service.

11. Next, Palisade Trolley argues that analyzing how many rides the incumbent providers can and have provided is an incorrect application of the law because the court cases cited in the Recommended Decision do not use an unused seating capacity analysis. We do not find this argument persuasive. The Commission, when determining the factual question that is whether the public convenience and necessity demands another carrier, can consider any relevant evidence in the record. *See Durango Transportation v. PUC*, 122 P.3d 244, 250 (Colo. 2005).

And in this case, the incumbents provided evidence and testimony that addressed their unused capacity. They did this to rebut the argument that they were unable to meet demand or that the service they offered was substantially inadequate. The evidence was proper, the argument appropriate, and the ALJ, and the commission *en banc* may consider such evidence for that purpose.

12. But we find persuasive Palisade Trolley's third argument, which asks us to reweigh various letters in support of its application, and in so doing requires us to reconsider the balance of evidence in the record. In our view, the record evidence presents a close call. Given the evidentiary standard that governs this proceeding, in total the evidence must show that it is more likely than not that both the existing service is inadequate, and that there is a public need for Palisade Trolley's proposed service. Otherwise, we must deny Palisade Trolley's application. Having reviewed the evidence in the record and the testimony offered at hearing, we are convinced that the evidence tips slightly in favor of Palisade Trolley on both of these counts.

13. As the Recommended Decision lays out, much of the incumbent carriers' testimony and evidence adduced at hearing addressed how much passenger capacity the incumbent carriers have and how frequently they operate at maximum capacity. We highlight some of this here. The evidence indicates that each of the three incumbents operate large passenger vans or shuttle busses, ranging in capacity from 13 passengers to 43 passengers.² The record also shows that Absolute and Rapid Creek have not yet met their capacity limits (which, as we understand it, means that they have not yet had 100 percent of their available seats occupied during a weekly or monthly period).³ Additionally, the Recommended Decision

² See Hearing Exhibits 202, 402 and the Recommended Decision at ¶ 23.

³ Recommended Decision at ¶¶ 23, 25, and 28.

calculated that running only one trip per day on Friday, Saturday, and Sunday, Absolute could transport 37,284 passengers per year, Pali-Tours could transport 4,212 passengers per year, and Rapid Creek 2,730 for a total of roughly 44,000 passengers per year.⁴ The Recommended Decision observes that none of these three carriers have reached those passenger numbers.

14. Set against these numbers are testimony and evidence provided by Mr. Hummel, one of the owners of Palisade Trolley, that approximately one million people visit Mesa County each year to enjoy the area's wineries, festivals, biking events, and other attractions.⁵ The Fruita Fall Festival itself brings roughly 50,000 attendees.⁶ Yet as discussed at hearing, the total seating capacity of the incumbent carriers is only 431 seats.⁷ We square this great discrepancy between visitor numbers and the incumbents' unused capacity in part by recognizing that in common carrier passenger service large vans often have unused seats because the groups booking the trips do not have exactly the number of members as there are seats in the passenger vans or busses. Therefore, in some instances, perhaps like the surge brought on by the Fruita Fall Festival, unused seating capacity does not accurately account for how well incumbent carriers are serving demand. So, we place less weight on that metric than does the Recommended Decision.

15. This point is reinforced by the letters filed in support of Palisade Trolley's Application. In particular, the letters filed by Sauvage Spectrum,⁸ the Palisade River Retreat,⁹

⁴ Palisade Trolley's Exceptions point out that the Recommended Decision made a mistake in calculating this annual carrying capacity; it ignored the fact that Rapid Creek suspends its authority for 7 months out of the year. We agree and have attributed 2,730 possible rides to Rapid Creek (representing five months of service) in the calculation above.

⁵ Hearing Exhibit 26, and Hearing Transcript at pp. 25-26.

⁶ Hearing Exhibit 4.

⁷ Hearing Exhibit 204.

⁸ Hearing Exhibit 13.

⁹ Hearing Exhibit 6.

and Alida's Fruits,¹⁰ generally support the proposition that current service is often unavailable or provides limited service.¹¹ Mr. Hummel testified to as much, stating that in his experience as a business operator in Palisade he often referred tourists he encountered to existing common carriers who were fully booked "more than you would expect," resulting in those tourists being unable to receive service.¹² Mr. Hummel testified that this happened so frequently that it gave rise to the business idea for Palisade Trolley.¹³

16. Given this evidence, and to a lesser extent, the petition circulated by Palisade Trolley that was signed by more than 200 people, and the letters from individuals who were unable to successfully contact Absolute, we conclude that on balance, the evidence tips slightly in favor of a finding that the current service offered is substantially inadequate as defined under the regulated monopoly doctrine. We reiterate that this is a close call. But we are persuaded by the gross disparity in visitor numbers and available seats, coupled with the testimony and evidence put forth by Palisade Trolley. This is not to say that the incumbent carriers are doing a poor job when they are transporting customers. Their testimony indicates that they have been serving their customers well. We are, however, persuaded that there is additional demand that has not been met.

17. For those reasons, as well as the testimony offered by Mr. Talbert that Palisade Trolley would likely support the growing agritourism business in the Grand Valley,¹⁴

¹⁰ Hearing Exhibit 12.

¹¹ We recognize that the Recommended Decision accorded these letters less weight because they were missing a statement required by Rule 6203(a)(XVII)(D). We are wary of putting form over function in proceedings involving unrepresented parties; in any event, we take these particular letters as indicating their author's views that there is a general lack of availability in the Mesa County area.

¹² Hearing Transcript at pp. 17-18.

¹³ *Id.*

¹⁴ Hearing Transcript at pp. 89-92.

and the letters supporting the idea that an additional common carrier would reduce the possibility of alcohol-related accidents and reduce congestion at local businesses,¹⁵ we find that the public need demands the proposed service and that granting the application is ultimately in the public interest.

II. ORDER

A. It Is Ordered That:

1. The Motion for Extension of Time to File the Transcript, as we have construed it, filed by Palisade Trolley on September 19, 2022, is granted.

2. The Motion to Strike Pali Tours' Response in Opposition to Palisade Trolley's Exceptions, filed by Palisade Trolley on November 16, 2022, is denied.

3. The Exceptions filed by Palisade Trolley on October 4, 2022, are granted, in part, as discussed above.

4. The Application for common carrier authority filed by Palisade Trolley on February 1, 2022, is granted.

5. The 20-day period provided for in § 40-6-114, C.R.S., within which to file applications for rehearing, reargument, or reconsideration, begins on the first day following the effective date of this Decision.

¹⁵ *E.g.*, Hearing Exhibits 9, 10, 13, 14, 15.

6. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
November 23 and 30, 2022.**

(S E A L)



ATTEST: A TRUE COPY

A handwritten signature in cursive script, appearing to read "G. Harris Adams".

G. Harris Adams,
Interim Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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JOHN GAVAN

MEGAN M. GILMAN

Commissioners