

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 22A-0074CP

IN THE MATTER OF THE APPLICATION OF COLORADO MOBILE MUSIC INC. FOR A
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO OPERATE AS A
COMMON CARRIER BY MOTOR VEHICLE FOR HIRE.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
ALENKA HAN
DENYING APPLICATION**

Mailed Date: February 3, 2023

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I. STATEMENT**A. Summary**

1. This decision recommends that the Public Utilities Commission (Commission or PUC) deny Colorado Mobile Music Inc.'s (Colorado Mobile Music) Application for a Certificate of Public Convenience and Necessity to Operate as a Common Carrier by Motor Vehicle for Hire (Application) filed on February 14, 2022.

2. In accordance with § 40-6-109, C.R.S., the Administrative Law Judge (ALJ) now transmits to the Commission the record in this proceeding and recommends that the Commission enter the following order.

B. Appearances and Exhibits

3. A hearing in this proceeding was held via Zoom on November 17, 2022, as scheduled, and noticed by Decision No. R22-0566-I. At the hearing, Colorado Mobile Music was represented by counsel Cody Riley. Ryan Thomsen, CEO of Colorado Mobile Music, also appeared.

4. Intervenor Mountain Star Transportation, LLC, doing business as Explorer Tours (Mountain Star), was represented by its owner-operator, Roman Lysenko.

5. The following witnesses testified on behalf of Colorado Mobile Music: Ryan Thomsen; Cami Rosine; Kevin Frazier; Marla Dashiell; Tony Dassinger; and Jovan Blea.

6. Mr. Lysenko testified on behalf of Mountain Star.

7. Colorado Mobile Music presented no rebuttal testimony.

8. Applicant's Exhibits 1 through 7, 10, and 11 were admitted without objection. Applicant's Exhibit 9 was admitted over objection.¹ Applicant's Exhibit 8 was marked for identification but was not offered into evidence.

9. Intervenor's Exhibit 301 was admitted without objection. Intervenor's Exhibit 302 was admitted over objection.

II. BACKGROUND AND FACTUAL FINDINGS

A. Procedural Background

10. Only the procedural history relevant to the disposition of this matter will be addressed in this decision.

11. On February 14, 2022, Colorado Mobile Music initiated this proceeding by filing its verified Application with the Commission seeking permanent authority to operate as a common carrier of passengers by motor vehicle for hire. *See* Application of Colorado Mobile Music, Inc., filed Feb. 14, 2022.

12. On February 22, 2022, the Commission issued its Notice of Application Filed (Notice). As originally noticed, the Application sought

authority to operate as a common carrier by motor vehicle for hire for the transportation of passengers in call-and-demand charter, call-and-demand shuttle, and call-and-demand sightseeing service between all points within a 100-mile radius of the intersection of South Santa Fe Drive and West Hampden Avenue in Englewood, Colorado.

See Commission Notice of Applications and Petitions Filed, issued Feb. 22, 2022.

¹ Exhibits were taken into evidence electronically via box.com, and were added to the record in this Proceeding by Commission Staff on November 18, 2022.

13. On February 16, 2022, and August 22, 2022, Colorado Mobile Music filed amendments to its Application restricting the scope of its proposed authority. The restrictions limited its proposed authority as follows:

RESTRICTIONS: Restricted against any transportation service to or from any points located:

- (1) within Grand County, State of Colorado.
- (2) within a 5-mile radius of the intersection of 1st Street and Bennett Avenue, Cripple Creek, Colorado.
- (3) within a 5-mile radius of the intersection of Colorado Highway 119 and Gregory Street, Black Hawk, Colorado; and
- (4) within a 12-mile radius of the intersection of U.S. Highways 34 and 36 in Estes Park, Colorado.

See Colorado Mobile Music Amendments to Proceeding, filed Feb. 16, 2022, and August 22, 2022.

14. The following entities timely intervened of right: Ullr Tours, LLC, doing business as The Colorado Sightseer (Colorado Sightseer); Ckimy, LLC, doing business as iLIMO (iLIMO); Estes Park Charters Corp. (Estes Park Charters); Fun Tyme Trolleys, LLC, doing business as Estes Park Trolleys (Fun Tyme); and Mountain Star. Over the course of the proceeding, all the Intervenorors except Mountain Star withdrew their Interventions. At the time of the hearing, Mountain Star was the only remaining Intervenor.

15. During the Commission's weekly meeting on March 30, 2022, the Commission deemed the Application complete and referred the proceeding to an ALJ for disposition.

16. As acknowledged in Decision No. R22-0551-I, Applicant Colorado Mobile Music waived the applicable statutory period in § 40-6-109.5, C.R.S.

B. Background Facts

17. Applicant Colorado Mobile Music is a corporation that provides luxury limousine bus transportation services for weddings, corporate events, parties, concerts, gatherings at Red Rocks Amphitheater, high school dances, bachelorette parties, as well as DJ, video, photography and photos booth services on the party buses. Colorado Mobile Music has been in business since 2009 and has provided luxury limo buses since 2018.

18. Colorado Mobile Music holds PUC Luxury Limousine Permit No. LL-03493 to transport people in its luxury buses/vans/limousines, but it does not have a common carrier certificate. *See* Exhibits 1 and 2.

19. Ryan Thomsen is Colorado Mobile Music's CEO and has served in that capacity since its founding. Testifying on Colorado Mobile Music's behalf, Mr. Thomsen suggested that because the number of common carrier certificates has fallen in recent years, Colorado Mobile Music should be granted a certificate. Mr. Thomsen pointed to two admitted documents in support of his position: (a) a 2022 Annual Report prepared by the Commission pursuant to Transportation Rule 6020, which included a graph illustrating a decrease in the number of "existing and new" common carrier permits and certificates issued in 2017 (36 issued) versus 2021 (18 issued) (*see* Exhibit 4); and an article published on 9News.com on October 7, 2021, authored by Jennifer Meckles addressing an increase in the number of weddings performed in 2021 when compared with the number of weddings performed in 2022. *See* Exhibit 5. Mr. Thomsen also discussed a graph illustrating an increase in gas prices from 1994 through 2022. *See* Exhibit 7. Mr. Thomsen suggested that "from [his] understanding" when "transportation gets more expensive as gas prices increase" there is a "greater need" for transportation services and that "when gas prices hit[] . . . roughly \$5, this summer, [he] notice[d an] inflection of people using his luxury limousine service."

20. Mr. Thomsen has not yet completed a business plan for the services he hopes to provide should Colorado Mobile Music secure a common carrier certificate; he would like the ability to offer can-and-demand services for events such as weddings at which guests/individuals can pay for their own transportation ticket rather than one party being responsible for the entire transportation bill. Mr. Thomsen indicated, though, that he does not intend to purchase additional vehicles dedicated to common carrier services and/or call-and-demand services. Rather, he plans to sell tickets, monitor demand, and purchase new vehicles as revenue permits.

21. Although business contracted during the pandemic, Mr. Thomsen testified that business has returned to pre-pandemic levels. Demand for his services has recently exceeded his capacity and he has “turn[ed] customers away.”

22. The Affidavit of Ms. Lori Duryea was also admitted into evidence. *See* Exhibit 9. Ms. Duryea is a certified public accountant who has served as the accountant for Colorado Mobile Music since February 2018. In her Affidavit, Ms. Duryea attested to Colorado Mobile Music’s “historical financial and operational fitness” and its ability to “operate a profitable business, even through the COVID-19 pandemic, when so many other companies were unable to do so.” *See* Exhibit 9. She also opined that Colorado Mobile Music is well-positioned financially “to expand its operations to provide common carrier services.” *See* Exhibit 9. However, her Affidavit offers no specific information about Colorado Mobile Music’s finances nor does it indicate what documents or accounting Ms. Duryea relied upon to reach her conclusion about Colorado Mobile Music’s financial fitness.

23. The application filed by Colorado Mobile Music seeks a broad common carrier authority. Mr. Thomsen acknowledged at the hearing that Colorado Mobile Music’s application seeks licensure for call-and-demand service, charter service, shuttle service, and sightseeing

services within a 100-mile radius of South Santa Fe Drive and West Hampden Avenue in Englewood, Colorado, with the above-described restrictions against service to Grand County, Cripple Creek, Black Hawk, and Estes Park, Colorado. He testified that the 100-mile radius is necessary “because anything can be a wedding venue,” including “public park[s], . . . any kind of national park, . . . [or] just on people’s farms.” Many of these locations have no public transportation, however, impeding guests ability to, for example, “get from the farm back to the hotel.”

24. Cami Rosine, a photographer/videographer for Colorado Mobile Music who also handles some of its scheduling, testified that approximately 30-50 bridal couples have expressed interest and made inquiries seeking to arrange call-and-demand self-pay transportation services for their wedding guests so that the bridal couple need not foot the entire transportation bill to get their guests to and from a wedding venue. Ms. Rosine further testified that she has also received inquiries about providing self-pay common carrier services for school dances such as prom and homecoming.

25. As further explained by Jovan Blea, who now owns his own transportation service and used to drive for Colorado Mobile Music, unlike a common carrier letter of authority, a luxury limousine permit like that currently held by Colorado Mobile Music limits the sale of transportation services “to one person.” Mr. Blea testified that selling “per seat . . . would free up free up buses that may only have 10 passengers on it, but are rated for” more passengers, which would, in turn, “alleviate some of the congestion.”

26. Marla Dashiell, the owner Meridian Transportation that provides bus services for events such as weddings, student field trips, school dances, and college sorority gatherings,

testified that Colorado Mobile Music has hired her services when Colorado Mobile Music could not meet demand.

27. Another area to which Colorado Mobile Music seeks to provide common carrier transportation services is to Red Rocks Amphitheater. An online article published by Billboard identified the top concert venues of 2021. Red Rocks was identified as the top destination among venues having a 5,000-10,000 seat capacity, with 134 shows and 996,570 attendees, which represents nearly five times as many shows and seven-and-a-half times as many attendees as the next venue in that capacity range, Park Theater in Las Vegas. See Exhibit 6, p. 6.

28. Ms. Dashiell testified that transportation options to Red Rocks are inadequate and do not meet the need or the demand.

29. Kevin Frazier — a contractor providing driving, mechanic, and fleet management services for Colorado Mobile Music and for a now-defunct bus service called “Bus to Show” that provided common carrier transportation to concerts at Red Rocks Amphitheater — also testified about the need for more bus service to Red Rocks. Bus to Show was a nonprofit transporting people to and from Red Rocks concerts “with the sole intent of decreasing DUIs.” Mr. Frazier testified that in his last year with Bus to Show, 2018, the nonprofit sold 125,000 tickets to transport individuals to and from Red Rocks. Since Bus to Show’s pandemic-caused demise, he believes there is “a massive underserved market” to provide bus services to the concert venue, in part because of the “drop in common carrier licensing.” To the best of Mr. Frazier’s knowledge “no common carriers [currently] serve that particular venue.”

30. Tony Dassinger, who works in transportation management and has been in the transportation industry for a number of years, corroborated Mr. Frazier’s testimony that there is a need for bus service to replace the “fleet of over 30 buses” lost when Bus to Show ceased

operations. He acknowledged that “there’s probably several” services providing shuttle service to the venue, but believes “there is enough work for everybody” because there is unmet need for such services.

31. Mr. Blea echoed the opinions expressed by Ms. Dashiell, Mr. Frazier, and Mr. Dassinger concerning the need for additional transportation services to Red Rocks to “pick up [the] slack” left by the loss of “lots of Bus to Show” buses.

32. But, as Mr. Dassinger further explained, one reason transportation service providers have not been able to meet public demand is because of a shortage of bus drivers. He stated that although his company “ha[s] the buses. . . . [it] just do[esn’t] have the drivers.”

33. And, importantly, although Ms. Dashiell, and Mssrs. Blea, Frazier, and Dassinger all testified about the decrease in transportation options to Red Rocks, none identified any customers who were unable to get to Red Rocks or had to find another means to get to the venue because of the lack of transportation services. No witness testified about Red Rocks visitors being denied requested transportation services.

34. Mountain Star intervened in this Proceeding. Mountain Star is owned and operated by Roman Lysenko, who has worked in the transportation field for eleven years. Mr. Lysenko appeared at the hearing and testified on Mountain Star’s behalf.

35. Mountain Star holds a common carrier Letter of Authority, PUC Certificate No. 55952. *See* Exhibit 301. Mountain Star’s Letter of Authority grants it the exclusive authority to provide the following services:

(I) Transportation of passengers in call-and-demand sightseeing service originating in Denver and Boulder Counties, to all points in the Counties of Denver, Boulder, Clear Creek, Douglas, El Paso, Grand, Jefferson, and Larimer, State of Colorado, returning to the origination point.

(II) Transportation of passengers in scheduled service and call-and-demand shuttle service:

(A) Between all points in Denver County, on the one hand, and all points in Eagle County, on the other hand;

(B) Between all points in Denver County, on the one hand, and all points in Pitkin County, on the other hand; and

(C) Between all points in the Counties of Eagle and Pitkin, State of Colorado.

RESTRICTION:

Item (II) is restricted against the transportation of passengers in vehicles with a manufacturer's rated passenger capacity of less than 9 passengers, including the driver.

(Exhibit 301.)

36. Mountain Star maintains a fleet of 10-15 vehicles, the precise number of which fluctuates dependent on the seasonal demand for its services.

37. Mr. Lysenko testified that Mountain Star does not and has not operated at full capacity. It "always" has room "to gain some new customers," and "almost never" cancels tours or turns customers down.

38. He also pointed out that a common carrier certificate carries with it "responsibilities" necessitating operating vehicles even when a bus carries only one or two paying customers "just to make the customers happy."

39. Mr. Lysenko refuted Mr. Thomsen's claim that there is an increased demand for common carrier services to locations such as Red Rocks. In Mr. Lysenko's view, Mr. Thomsen and Colorado Mobile Music are "assuming" the demand exists for transportation services, without demonstrating that individuals who asked for rides were unable to obtain transport. To the contrary, Mr. Lysenko described that in his recent experience, the demand for common carrier services has fallen and demand has "shifted" in favor of luxury limousine services. In his opinion,

post-pandemic, people are “actually afraid of being stuck in the van or bus with other strangers.” He stated that, to the best of his knowledge, most individuals who sought a ride service to and from Red Rocks were transported to the venue in “private vehicles, with private drivers, not in . . . random 50 person coach with . . . strangers.” Consequently, he opined, the common carrier shuttle and common carrier sightseeing businesses are now “in pretty bad shape,” whereas his business has been experiencing “better luck with the private transportation . . . not with the common carrier” certificate. He, acknowledged, though, that with the pandemic’s effects easing, he is seeing demand “picking up a little bit” in both the luxury limousine and common carrier services Mountain Star provides, and plans to add more vehicles to his fleet “if [demand] keeps going up.”

40. Mr. Lysenko also challenged the Applicant’s witnesses’ implicit assumption that a busy Red Rocks season would necessarily translate into increased demand for common carrier services. In Mr. Lysenko’s words, just because Red Rocks is “pretty sold out” for the 2023 season “does not mean that people will [actually use] a shuttle service.” Mr. Lysenko clarified that Mountain Star will “definitely” be providing common carrier services to Red Rocks during the 2023 concert season.

41. Further, Mr. Lysenko questioned the authority and knowledge of the witnesses who testified on Colorado Mobile Music’s behalf. He pointed out the none of the witnesses indicated they possessed a CPCN certificate, had not testified to advertising common carrier services, and therefore had little personal knowledge of the demand for common carrier transportation.

42. Mr. Lysenko further testified that issuing new common carrier letters of authority in the midst of shifting demand could harm the public. He explained that additional competition could lower rates, which, in turn, could cause common carriers to cut spending on critical expenses such as insurance and vehicle maintenance.

43. Finally, Mr. Lysenko refuted the assertion that there is inadequate public transportation to Red Rocks, stating to the contrary that he knows “for a fact [that] there are . . . two other shuttle companies that do provide public transportation to Red Rocks.” However, Mr. Lysenko neither supported this claim with specific information nor provided the names of the other carriers he claimed provided transportation services to Red Rocks.

III. RELEVANT LAW

A. **Commission Jurisdiction.**

44. The Commission has authority to issue certificates to operate as a common carrier under Colo. Const. art. XXV, §§ 40-10.1-103(1) and 203(1), C.R.S. *See Miller Bros., Inc. v. Pub. Utils. Comm’n*, 525 P.2d 443, 446 (Colo. 1974). Common carriers may only operate with a Commission-issued certificate declaring that the present or future public convenience and necessity requires or will require the common carrier’s operation. §§ 40-10.1-103(1) and 203(1), C.R.S. A common carrier is defined as

a public utility as defined in § 40-1-102, C.R.S., and includes the obligation to indiscriminately accept and carry Passengers for Compensation. Common Carrier includes every Person directly or indirectly affording a means of transportation, or any service or facility in connection therewith, within this state, by Motor Vehicle.

Rule 6001(p) of the Rules of Practice and Procedure, 4 *Code of Colo. Regulations* (CCR) 723-1.

45. Motor carriers providing call-and-demand shuttle service are common carriers. Rule 6001(gg) and (nnn), 4 CCR 723-6. Thus, carriers seeking to provide call-and-demand shuttle service must obtain a Commission-issued certificate of public convenience and necessity.

46. Shuttle service is transportation of passengers by a common carrier on a call-and-demand basis charged at a per-person rate, using vehicles that are not exclusive to any individual or group. Rule 6001(nnn), 4 CCR 723-6.

47. A sightseeing service is the transportation of passengers by a common carrier on a call-and-demand basis “originating and terminating at the same point for the sole purpose of viewing or visiting places of natural, historic, or scenic interest.” Rule 6001(ooo), 4 CCR 723-6.

48. Charter service is transportation of passengers by a common carrier on a call-and-demand basis of individuals or groups of individuals who share a personal or professional relationship “whereby all such individuals are members of the same affiliated group, including a family, business, religious group, social organization, or professional organization” and expressly excludes unrelated individuals brought together by a carrier, transportation broker, or other third party. Rule 6001(ooo), 4 CCR 723-6.

B. Legal Standards.

49. Colorado Mobile Music, as the proponent of this decision and the Applicant seeking a common carrier, or CPCN, certificate, bears the burden of proof by a preponderance of the evidence. §§ 13-25-127(1) and 24-4-105(7), C.R.S.; Rule 1500, 4 CCR 723-1. The preponderance standard requires the fact finder to determine “whether the existence of a contested fact is more probable than its non-existence.” *Swain v. Colo. Dep’t of Revenue*, 717 P.2d 507, 508 (Colo. App. 1985). A party has met this burden of proof when the evidence, on the whole and however slightly, tips in favor of that party. *See Schocke v. Colo. Dep’t of Revenue*, 719 P.2d 361, 363 (Colo. App. 1986).

50. Although the preponderance standard applies, substantial evidence in the record must support the Commission’s decision. *City of Boulder v. Pub. Utils. Comm’n*, 996 P.2d 1270, 1278 (Colo. 2000).

The evidence underlying the agency's decision must be adequate to support a reasonable conclusion. Substantial evidence is more than a scintilla . . . it must do more than create a suspicion of the fact to be established. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . . it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

Id., (quoting *CF&I Steel, L.P. v. Pub. Utils. Comm'n*, 949 P.2d 577, 585 (Colo. 1997)).

51. Applicants for a certificate of public convenience and necessity must establish their financial, managerial, and operational fitness to conduct the proposed operations. Rule 6203(a)(XI), 4 CCR 723-6. In general, operational fitness encompasses a consideration of whether the applicant has the equipment, personnel, and facilities to operate the proposed service. The Commission has identified the following evidentiary factors as relevant to the fitness inquiry: minimum efficient scale to operate under the proposed authority; credit worthiness and access to capital; credit history and assessment of financial health over the near future; capital structure and current cash balances; managerial competence and experience; fixed physical facilities such as office space and maintenance garages, as appropriate; appropriate licenses and equipment necessary to operate a radio dispatch system; and vehicles of appropriate type. *See e.g.*, Decision No. C08-0933, at ¶ 7, Consolidated Proceeding Nos. 08A-241CP, 08A-281CP-Extension, 08A-283CP, 08A-284CP-Extension, and 08A-300CP issued September 4, 2008. Whether the applicant is willing and able to comply with applicable public utilities laws also bears upon the question of fitness. *See Thacker Bros. Transp. v. Pub. Utils. Comm'n*, 189 Colo. 301, 303, 543 P.2d 719, 721 (1975).

52. In addition to fitness, applicants must show that the public convenience and necessity requires the certificate. See *Yellow Cab Coop. Ass’n v. Pub. Utils. Comm’n*, 869 P.2d 545, 548, (Colo. 1994) (“[A]pplications for authority to operate a motor vehicle service require a showing that the public convenience and necessity require such service.”). In deciding that question, the Commission must apply the regulated monopoly doctrine. *Ephraim Freightways Inc. v. Pub. Utils. Comm’n*, 151 Colo. 596, 599, 380 P.2d 228, 230 (1963). Commission Rules reflect the regulated monopoly doctrine by requiring an applicant seeking a common carrier certificate to demonstrate the public need for the proposed service, that granting the authority is in the public interest, and that the existing service is inadequate. Rule 6203(a)(XVII), 4 CCR 723-6. More specifically, an applicant seeking a common carrier certificate “must demonstrate that existing services are *substantially* inadequate to meet public needs because ‘the test of inadequacy is not perfection’ and some legitimate complaints will arise regarding any common carrier that provides service to many customers.” *RAM Broad. v. Pub. Utils. Comm’n*, 702 P.2d 746, 750, (Colo. 1985).

53. The regulated monopoly doctrine is based on the principle that fewer carriers who can make a reasonable return will give the public safe, efficient, and more economical service, and that increasing the number of providers ultimately results in a deterioration of service and higher rates for the public. See *e.g.*, *Denver & R.G. W. R. Co. v. Pub. Utils. Comm’n*, 142 Colo. 400, 405, 351 P.2d 278, 280 (1960). Under this doctrine, a common carrier serving a particular area is only entitled to protection against competition if its service is adequate to satisfy the public’s needs. *Ephraim*, 151 Colo. at 599, 380 P.2d at 230. As a result, the public need and adequacy elements are closely related. See *id.* The Commission has “wide discretionary powers in determining the demands of ‘public convenience and necessity.’” *Pub. Utils. Comm’n v. Donahue*, 138 Colo. 492, 498, 335 P.2d 285, 288 (1959).

54. “Whether the incumbent carrier’s service is substantially inadequate is a question of fact that is to be determined by the Commission.” *Durango Transp. Inc. v. Pub. Utils. Comm’n*, 122 P.3d 244, 248 (Colo. 2005); *see also RAM Broad.*, 702 P.2d at 751. The Commission may consider “a broad range of evidence in determining whether an incumbent carrier’s service is substantially inadequate.” *Durango Transp. Inc.*, 122 P.3d at 250. That is because common carriers must “furnish, provide, and maintain such service, instrumentalities, equipment, and facilities as shall promote the safety, health, comfort, and convenience of its patrons, employees, and the public, and as shall in all respects be adequate, efficient, just and reasonable.” § 40-3-101(2), C.R.S.; and *see* § 40-10.1-103(1), C.R.S. Consistent with this statute, the Colorado Supreme Court has noted that the Commission may consider “any relevant evidence” in determining whether the public convenience and necessity requires additional service. *Durango Trans. Inc.*, 122 P.3d at 250-51. The Court has expressly approved as relevant consideration of various aspects of incumbents’ service and operation, including rates and charges, speed and efficiency, and quality of its facilities, organization, equipment, and personnel. *Id.* at 251. For example, in *Durango Transportation, Inc.* the Court approved the Commission’s reliance on evidence that the incumbent’s rates were so high as to be “tantamount to a denial of service to the tourist population requiring transportation . . .” *Id.* at 249. This is consistent with the Commission’s purpose in granting a transportation authority to “ensure that the public’s transportation needs are met.” *Id.* at 250.

55. An applicant may demonstrate that the incumbent provider(s)’s service is substantially inadequate through evidence that the incumbent is *not* “ready, willing and able at all times to render service to anyone who might demand it, including all of applicant’s customers.” *Ephraim*, 380 P.2d at 232; *see also Durango Transp. Inc.*, 122 P.3d at 247. But the Commission

is not required to find that the incumbent “has failed or refused to provide service to a requesting customer,” because the Commission is authorized “to consider a broad range of factors in its substantial-inadequacy analysis.” *Durango Transp. Inc.*, 122 P.3d at 251. Rather, an applicant must show that the incumbent has demonstrated a general pattern of inadequate service. *Id.*, at 248.

56. Although the applicant bears the burden of proving that the incumbent carrier’s service is substantially inadequate, “where an applicant’s evidence tend[s] to prove the existing carrier’s substantial inadequacy, ‘it [is] incumbent upon [the existing carrier] to rebut this evidence.’” *Ephraim*, 151 Colo. at 601, 380 P.2d at 232.

57. Based in the foregoing, Colorado Mobile Music must show by a preponderance of the evidence that: (1) it is financially, operationally, and managerially fit to conduct the proposed service; (2) the public needs the proposed service; (3) the current service in the area is substantially inadequate; and (4) granting the Application is in the public interest. If Colorado Mobile Music meets its burdens, Mountain Star must rebut evidence concerning substantial inadequacy by a preponderance of the evidence.

IV. DISCUSSION, ANALYSIS, AND CONCLUSIONS

A. Fitness.

58. Mr. Thomsen has served as CEO of Colorado Mobile Music since 2009 and is consequently knowledgeable about its operations. He led Colorado Mobile Music through the pandemic successfully, while other transportation businesses, such as Bus To Show, failed. This demonstrates that Mr. Thomsen is capable of managing a business and possesses the skills to expand Colorado Mobile Music’s services.

59. Ms. Duryea, Colorado Mobile Music's accountant, offered her professional opinion that Colorado Mobile Music is financially stable and financially capable of expanding into common carrier service. No contrary evidence was received into the record. More specifically, no evidence was offered tending to dispute Ms. Duryea's professional assessment of Colorado Mobile Music's financial stability.

60. However, no documentation supporting Ms. Duryea's professional opinion was offered, either. The record establishes that Mr. Thomsen has successfully run and operated Colorado Mobile Music prior to and through the pandemic, which supports a finding that Colorado Mobile Music is financially stable. Nonetheless, the record is devoid of documentation illustrating Colorado Mobile Music's account ledgers, its revenue flow, its profit margins, its credit history, its projected earnings, its access to capital, its credit worthiness, or the like. Aside from Ms. Duryea's conclusory statement, no other documentary evidence demonstrating Colorado Mobile Music's financial fitness has been offered.

61. Nor has Mr. Thomsen formulated a business plan as he seeks to start offering common carrier services. He has no immediate plan to purchase additional vehicles, instead testifying that his intent is to purchase new vehicles as Colorado Mobile Music's revenue stream permits. The Application identifies two vehicles Colorado Mobile Music currently owns and intends to use should it secure a common carrier certificate: a 2012 Ford F550 vehicle with a 20-person seating capacity; and a 2008 Nabi with a 24-person seating capacity. *See* Application of Colorado Mobile Music, Inc., filed Feb. 14, 2022, p. 4. No evidence was offered concerning Colorado Mobile Music's physical facilities, office or maintenance space; hence that aspect of Colorado Mobile Music's fitness to operate is entirely unknown.

62. To successfully secure a certificate of public convenience and necessity, an applicant must demonstrate operational fitness, which must be assessed by analyzing whether an applicant has the equipment, personnel, and facilities to operate the proposed service. Further, in prior Commission decisions, the Commission has identified the following evidentiary factors as relevant to the fitness inquiry: minimum efficient scale to operate under the proposed authority; credit worthiness and access to capital; credit history and assessment of financial health over the near future; capital structure and current cash balances; managerial competence and experience; fixed physical facilities such as office space and maintenance garages, as appropriate; appropriate licenses and equipment necessary to operate a radio dispatch system; and vehicles of appropriate type. *See e.g.*, Decision No. C08-0933, at ¶ 7.

63. Based on the foregoing, the ALJ finds that Colorado Mobile Music has not met its burden of demonstrating by a preponderance of the evidence that it has sufficient equipment, personnel, facilities, and financial resources to operate the proposed service. Although the ALJ finds that Mr. Thomsen is managerially fit to operate Colorado Mobile Music, this alone is insufficient to demonstrate the Applicant's fitness. Moreover, although Ms. Duryea's statement about Colorado Mobile Music's financial fitness is uncontradicted, her conclusory statement is of little persuasive value in the absence of any supporting documentation explaining the basis for her professional opinion. Nor could inquiries about supporting documentation be asked of Ms. Duryea because she did not testify at the hearing. The ALJ consequently finds Ms. Duryea's Affidavit unpersuasive. §§ 13-25-127(1) and 24-4-205(7), C.R.S.; Rule 6203(a)(XI), 4 CCR 723-6; and Rule 1500, 4 CCR 723-1.

B. Public Need and Substantial Inadequacy.

64. The parties disputed the public need for new service and the adequacy of the services currently provided. Specifically, Mountain Star argued that Colorado Mobile Music has failed to demonstrate both that the former's services are not meeting public demand or that unmet public demand exists necessitating Colorado Mobile Music's proposed new service.

65. Numerous witnesses testified that an unmet need exists for public transportation services to Red Rocks following the demise of Bus To Show. Ms. Dashiell and Msrs. Dassinger, Frazier, and Blea all testified that the bus service to Red Rocks is inadequate. Mr. Lysenko disputed this, contending that in his experience, customers had moved away from public transportation options and were instead seeking private, group transport. Certainly, the loss of Bus To Show's services and the 30 buses it operated offering transport to and from Red Rocks suggests that bus service to Red Rocks has been reduced. The inquiry does not cease there, though, because the test for inadequacy requires more than just a showing that some service has been lost. Rather, a showing must be made that the existing service is *inadequate*. Thus, Colorado Mobile Music was required to establish that the existing service is *not* "ready, willing and able at all times to render service to anyone who might demand it, including all of applicant's customers." *Ephraim*, 380 P.2d at 232. But no evidence was offered establishing that any riders were unable to obtain requested transport to and from Red Rocks. A dearth of transportation options does not mean that the service offered is necessarily inadequate. As Mr. Lysenko testified, his business has experienced a slump in demand for common carrier transportation since the pandemic. Although it is possible demand will rebound in the 2023 season as, optimistically, the pandemic continues to recede and its negative effects on the community and the economy continue to lessen, any such trend is mere speculation at this time. The ALJ therefore finds that Colorado Mobile Music has

failed to demonstrate that service to Red Rocks, and the public need for additional shuttle service to and from that venue, is “substantially inadequate.” *See id.*

66. Moreover, even if Colorado Mobile Music successfully established the need for additional common carrier certificates to be issued for service to Red Rocks, it seeks much broader authority than just providing public transportation service to and from that concert venue. As discussed above, Colorado Mobile Music’s Application seeks approval for common carrier services over a 100-mile radius from the intersection of South Santa Fe Drive and West Hampden Avenue in Englewood, Colorado, with restrictions against serving Grand County, Cripple Creek, Black Hawk, and Estes Park, Colorado. The Application area encompasses everything from Fort Collins and Cheyenne, Wyoming, to the north; Pueblo to the south; Limon to the east; and Vail Pass to the west. Mr. Thomsen and Ms. Rosine testified that such a large area is necessary because weddings can occur in any venue and in any location throughout the designated area. Further, Ms. Rosine stated that, as scheduler for Colorado Mobile Music, she has fielded 30-50 calls from bridal couples inquiring about public transportation or self-pay transportation services for wedding guests.

67. While the undersigned ALJ is persuaded that weddings may occur in venues throughout Colorado and, specifically, within a 100-mile radius of Englewood, no evidence was offered exemplifying a wide range of wedding locations. Indeed, no specific wedding locations or venues were discussed to illustrate that the breadth of the demand corresponds to the wide area encompassed by the Application. Without more specific evidence, it is not possible to determine whether demand exists over the entire breadth of the area designated in the Application. It is even possible, for example, that all the inquiries Ms. Rosine received were for weddings occurring in

the same location. Accordingly, the evidence presented does not support that there is unmet demand for shuttle and charter services across the entire area covered by the Application.

68. In addition, neither Mr. Thomsen nor Ms. Rosine testified that customers — i.e. wedding guests — were unable to travel to wedding locations. Nor did they, or any other witness, address specific travel challenges encountered by bridal parties or guests. Although the evidence offered suggests that the number of weddings increased from 2020 to 2021, the evidence was unpersuasive that the number of weddings in Colorado continues to grow into 2023. And, while 30-50 inquiries about self-pay shuttle or charter services is not insignificant, neither does it demonstrate that the services currently are inadequate. No evidence was offered showing that customers were turned away by other service providers. Thus, the evidence does not support a showing that the currently available shuttle and charter services are inadequate to meet demand.

69. Moreover, Colorado Mobile Music offered no evidence whatsoever indicating a need for sightseeing services in the designated area, which its Application also encompasses. Mr. Thomsen did not address any plans formulated by Colorado Mobile Music to offer sightseeing services, even though the Application seeks a certificate for such services. Nor did he discuss the inadequacy of the sightseeing services currently available to the public. Contrary to Mr. Thomsen, Mr. Lysenko testified persuasively on behalf of Mountain Star that the latter offers sightseeing services. He credibly testified that demand for its services has not exceeded Mountain Star's capacity. Rather, Mr. Lysenko testified that with few exceptions, Mountain Star has been able to accommodate its sightseeing customers. And even if the undersigned ALJ were to assume that Mountain Star could not accommodate most of its customers — an assumption which is not supported by the evidence in the record — a few unsatisfied customers are insufficient to establish the inadequacy of the existing, incumbent services because the test for inadequacy of service is

not perfection; any common carrier providing service to many clients will receive some legitimate complaints. *See Ephraim*, 380 P.2d at 232; *RAM Broad.*, 702 P.2d at 750. The ALJ concludes that this demonstrates Mountain Star has unused capacity that can be tapped to meet the public's needs. Consequently, Colorado Mobile Music has not met its burden of demonstrating by a preponderance of the evidence that currently available sightseeing services are inadequate to meet the public needs and demands.

70. Finally, the ALJ is persuaded that granting Letters of Authority for an area as broad as that sought by Colorado Mobile Music could have the detrimental effect of decreasing revenues for existing carriers, which, in turn, could harm the public by limiting carriers' available revenue to maintain their fleets and financial responsibilities. *See., Denver & R.G. W. R. Co.*, 142 Colo. at 405, 351 P.2d at 280.

C. Conclusion

71. For the reasons and authorities discussed, the ALJ concludes that Colorado Mobile Music has failed to meet its burden to prove by a preponderance of the evidence that there is a public need for the proposed service, that the incumbent's service is substantially inadequate, and that granting the Application is in the public interest. As such, the ALJ recommends that the Commission deny the Application.

V. ORDER

A. It Is Ordered That:

1. Consistent with the above discussion, the above-captioned Application filed by Colorado Mobile Music, Inc., on February 14, 2022, is denied.

2. Proceeding No. 22A-0074CP is closed.

3. This Recommended Decision will be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

4. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

- a. If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.
- b. If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

5. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ALENKA HAN

Administrative Law Judge

ATTEST: A TRUE COPY

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

G. Harris Adams,
Interim Director