

Decision No. R23-0577-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 23A-0078CP

IN THE MATTER OF THE APPLICATION OF PURPLE MOUNTAIN TOUR COMPANY LLC
FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO OPERATE AS A
COMMON CARRIER BY MOTOR VEHICLE FOR HIRE.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
MELODY MIRBABA
DENYING SKI TOWN’S MOTION TO MODIFY DECISION**

Mailed Date: August 30, 2023

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I. STATEMENT AND PROCEDURAL HISTORY**A. Procedural History¹**

1. On February 15, 2023, Purple Mountain initiated this matter by filing an Application for Permanent Authority to Operate as a Common Carrier by Motor Vehicle for Hire (Application) with an attachment, which was amended on March 14, 2023.

2. On March 29, 2023, the Commission deemed the Application complete and referred the matter to an Administrative Law Judge (ALJ) by minute entry. The Commission did not address the Motion to Amend.

3. Between March 20 and 29, 2023, the following entities made filings to intervene in this Proceeding: Estes Park Charters Corp. (Estes Park Charters); Fun Tyme Trolleys, LLC, doing business as Estes Park Trolleys (Estes Park Trolleys); NDW Enterprises LLC, doing business as Ski Town Transportation (Ski Town); Green Jeep Tours LLC (Green Jeep); Home James Transportation Services, LTD (Home James); Alpine Taxi/Limo, Inc., (Alpine Taxi); AEX, Inc., (AEX); San Miguel Mountain Ventures, LLC (San Miguel); and Wild Side 4 x 4 Tours LLC (Wild Side).

4. On April 20, 2023, the ALJ scheduled a remote prehearing conference for May 4, 2023; approved Purple Mountain's request to amend its Application; acknowledged interventions of right filed by Estes Park Charters, Estes Park Trolleys, Home James, Alpine Taxi, AEX, San Miguel, and Wild Side; ordered Home James and AEX to file their updated letters of

¹ Only the procedural history necessary to understand this Decision is included.

authority; ordered Green Jeep Tours to make certain filings establishing its right intervene; and denied Ski Town's Petition for Leave to Intervene filed March 21, 2023 (Ski Town's Intervention).²

5. On April 27, 2023, Green Jeep, Home James, and AEX each made filings in an effort to comply with the above-references requirements.³

6. The prehearing conference was held as noticed. During the prehearing conference, the ALJ found that Green Jeep's April 27, 2023 filing complied with the requirements in Decision No. R23-0260-I and established that Green Jeep had properly intervened of right. The ALJ also found that, based on the filings that Home James and AEX made on April 27, 2023, the updates to their authorities did not impact the ALJ's prior conclusions that their authorities overlap and conflict with the authority sought here and thus, they remained parties to this Proceeding.

7. Also during the prehearing conference, counsel for Ski Town (who also represents Green Jeep in this Proceeding), attempted to enter an appearance on behalf of Ski Town. The ALJ reminded counsel that Ski Town is not a party to this Proceeding, per Decision No. R23-0260-I. Counsel stated that Ski Town's application for permanent authority has recently been granted, and that Ski Town plans to file a motion under Rule 1502(c) requesting that Decision No. R23-0260-I be set aside, modified, or stayed.⁴

8. During the prehearing conference, an evidentiary hearing was scheduled for September 11, 12, 14, and 18, 2023 and procedures and filing deadlines for the evidentiary hearing were established. Most significantly, the deadline for parties to file and serve their exhibits, exhibit

² Decision No. R23-0260-I at 21-23 (mailed April 20, 2023).

³ See Green Jeep, Home James, and AEX's filings made on April 27, 2023.

⁴ See Decision No. R23-0306-I at 5 (mailed May 10, 2023). See Rule 1502(c) of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1.

lists, and witness lists was set for July 31, 2023.⁵ Amendments to exhibit and witness lists and additional exhibits were due on August 21, 2023.

9. On July 31, 2023, Wild Side filed its Notice of Withdrawal of Intervention of Wild Side 4 X 4 Tours, LLC, noting that it was withdrawing its opposition and intervention of right to the Application of Purple Mountain.

10. On August 11, 2023, Ski Town filed its Motion to Modify Interim Decision R23-0260-I and for Waiver of Response Time (Motion), with Exhibits A-J attached.

11. On August 29, 2023, Purple Mountain, and Alpine Taxi, AEX, San Miguel, Home James, Estes Park Charters, and Estes Park Trolleys (Withdrawing Intervenors) filed a “Joint Motion for Approval of Restrictive Amendment [sic], and Joint Notice of Conditional Withdrawal of Interventions” (Joint Motion).

12. Also on August 29, 2023, the ALJ shortened the response time to the Joint Motion; conditionally granted the Joint Motion and modified the hearing schedule to limit the hearing to September 14 and 18, 2023, provided that Green Jeep makes no filing objecting to the Joint Motion by September 1, 2023.⁶

II. DISCUSSION, FINDINGS, AND CONCLUSIONS

13. Ski Town requests that the response time to its Motion be waived.⁷ In support, it states that the response time for the Motion will not expire until August 25, 2023, which is four days after final exhibits, exhibit lists, and witness lists are due in this proceeding. Ski Town

⁵ Decision No. R23-0306-I at 8-9.

⁶ Decision No. R23-0573-I (mailed August 29, 2023).

⁷ Motion at ¶ 9.

requests the waiver of response time so it can receive a decision prior to the August 21, 2023 deadline to timely file its witness and exhibits list.⁸ It also asserts that a waiver is appropriate because during the May 4, 2023 prehearing conference when counsel stated his intention to file a motion to reconsider, that Purple Mountain raised no objection.⁹

14. Ski Town's Motion seeks to modify Decision No. R23-0260-I to grant Ski Town status as an intervenor of right.¹⁰ Ski Town argues that the ALJ erred in denying its Intervention. Ski Town states its Intervention was based on Rule 1401(f)(II) of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1, and its temporary authority.¹¹ Ski Town argues that the ALJ rejected its Intervention because it was unknown if Ski Town would be granted permanent authority.¹² Ski Town states that, "No one knows the future," and that "Rule 1401(f)(II) does not require the holder of temporary authority to have a pending application for permanent authority."¹³

15. Ski Town also appears to argue that the ALJ erred in concluding that Ski Town failed to establish that it has a valid and active temporary authority or authorities, and therefore, failed to meet its burden to intervene.¹⁴ As grounds, Ski Town argues that it made allegations in its Intervention that supported its right or interest to intervene in this Proceeding based on its temporary authority, and its Intervention was signed by an attorney "in compliance with C.R.C. P. 11 and Commission Rule of Practice and Procedure 1202(e)."¹⁵

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at ¶ 1.

¹¹ *Id.* at ¶ 5

¹² *See generally* Motion at ¶ 1-2.

¹³ *Id.* at ¶ 2.

¹⁴ *Id.* at ¶¶ 1 and 3.

¹⁵ *Id.* at ¶ 3.

16. In support of its argument that it had a valid temporary authority when it sought to intervene, Ski Town provides attachments that include Commission-issued letters of temporary authority, an order extending a temporary authority, a decision granting a temporary authority.¹⁶

17. Ski Town asserts that it is now operating under permanent authority, PUC No. 55991, issued on July 19, 2023, which it included as Exhibit H.¹⁷

18. To start, as the timing of this Decision implies, the ALJ does not waive the response time to the Motion. Ski Town made no showing that it conferred or attempted to confer with Purple Mountain or the other parties to this Proceeding about the Motion, contrary to Rule 1400(a).¹⁸ Instead, Ski Town's Motion merely states that, "Applicant made no objection when Ski Town's counsel advised the Administrative Law Judge at a pre-hearing conference held in this matter that he would be filing this motion."¹⁹ Purple Mountain not objecting to counsel's stated *intent* to file the Motion during a prehearing conference—over three months before filing the Motion—is not the same as conferring with Applicant or the other parties to this Proceeding about their position on the Motion itself. Given that Ski Town planned to file the Motion over four months before doing so and had numerous documents in support of its Motion well before filing its Motion, there is no excuse for Ski Town's failure to confer. Ski Town and its counsel are reminded of their obligation to confer with the parties about their position on any motion it files, as has been required by the Commission's Rules for decades.

19. Ski Town's primary basis to waive the response time – so that it can meet the August 21, 2023 deadline to file its exhibits, and witness and exhibit lists – misunderstands the

¹⁶ See Exhibit A, B, D, F, and G.

¹⁷ *Id.* at ¶ 4; Exhibit H to Ski Town's Motion at 1-2.

¹⁸ See Rule 1400(a), 4 CCR 723-1. See generally Motion.

¹⁹ Ski Town's Motion at ¶ 9.

disclosure deadlines in this Proceeding. The deadline to file exhibits, and witness and exhibit lists was July 31, 2023.²⁰ As discussed during the prehearing conference, the August 21, 2023 deadline was established to allow parties to *amend prior disclosures* after having the opportunity to review the other parties' July 31, 2023 disclosures, and conducting any necessary discovery on such disclosures.²¹

20. Like its Intervention, Ski Town's Motion is less than straight-forward. In its Intervention, Ski Town admits that it did not own a permanent authority to provide common carrier service, and instead based its Intervention on two temporary authorities.²² As noted in the Decision denying Sky Town's Intervention, under Rule 1401(f)(II) a common carrier holding either temporary or suspended authority in conflict with the authority sought in the application does not have standing to intervene as of right, but may seek to permissively intervene."²³ Based on all of this, Decision No. R23-0260-I denied Ski Town's request to intervene of right because it did not have a permanent authority to provide common carrier service, and thus, lacked standing to intervene of right under Rule 1401(f)(II).²⁴ Ski Town's Motion does not establish that it had a permanent authority when it sought to intervene, and thus, the ALJ will not modify her prior findings that Ski Town failed to properly intervene of right.

21. The ALJ also considered Ski Town's Intervention under the permissive intervention standard per Rule 1401(c), 4 CCR 723-1.²⁵ Ski Town's factual basis for its Intervention was that it had two temporary authorities issued in Proceeding Nos. 22A-0117CP-ETA, 22A-0131CP-TA,

²⁰ Decision No. R23-0306-I at 8-9.

²¹ *See id.*

²² Ski Town's Intervention at 2.

²³ Decision No. R23-0260-I at ¶ 23; Rule 1401(f)(II), 4 CCR 723-1.

²⁴ Decision No. R23-0260-I at ¶ 23.

²⁵ Decision No. R23-0260-I at ¶¶ 24-27.

and that it filed an application for a permanent authority in Proceeding No. 22A-0132CP.²⁶ Ski Town failed to provide a copy of any Letter of Authority, or Commission issued-permit for either of the temporary authorities, and admitted that its request for permanent authority was not yet granted.²⁷

22. As discussed in Decision No. R23-0260-I, the Commission decision granting Ski Town the first temporary authority in Proceeding No. 22A-0117CP-ETA was conditioned upon Ski Town meeting certain conditions and included other critical restrictions impacting their continued validity. Specifically, the Commission issued Decision No. C22-0169 on March 17, 2022 granting Ski Town a *30-day* temporary that required that Ski Town provide proof of financial responsibility before it could begin operations; and mandated that such compliance occur within 30 days or the temporary authority grant would be void.²⁸ Given that the Decision granting the authority – the only evidence that Ski Town provided that the authority existed—was issued on March 17, 2022, and Ski Town’s Intervention was filed nearly a year later, Ski Town’s failure to provide any documentation establishing that a temporary Letter of Authority was actually issued and that it was valid and active at the time it filed its Intervention was, and continues to be fatal to Ski Town’s request to permissively intervene.

23. As to the second temporary authority that Ski Town’s Intervention relied upon, it provided even less evidence of its existence, providing a single typed page with its described authority.²⁹ The document does not identify to whom the authority was granted, the issue or

²⁶ Ski Town’s Intervention at 2.

²⁷ Ski Town’s Intervention at 2-3. See Decision No. R23-0260-I at ¶ 23.

²⁸ Decision No. R23-0260-I at ¶ 25, citing Appendix A to Ski Town’s Intervention at 4 (Decision No. C22-0169 (mailed March 17, 2022) in Proceeding No. 22A-0117CP-ETA).

²⁹ Decision No. R23-0260-I at ¶ 26, citing Appendix B to Ski Town’s Intervention.

expiration date, nor did it include the hallmarks of a Commission-issued Letter of Authority, such as the Commission's letterhead or the State of Colorado Seal.³⁰

24. Because Ski Town's request to permissively intervene was based on one or more temporary authorities, which it failed to establish were issued or were still valid and active, the ALJ concluded that Ski Town failed to meet the requirements to permissively intervene.³¹ For those reasons, the ALJ denied Ski Town's Intervention.³²

25. Ski Town attaches to its Motion a letter dated March 21, 2022 from the Commission granting a temporary authority "for a period of 30 days" in Proceeding No. 22A-0117CP-ETA, noting that Ski Town complied with Decision No. C22-0169.³³ Given the date of this letter, there is simply no reason for Ski Town's failure to include it with its Intervention. What is more, on its face, this letter affirms that Ski Town's temporary authority in Proceeding No. 22A-0117CP-ETA expired almost a year before it filed its Intervention in this case, and Ski Town provides no evidence to the contrary.³⁴ As such, Ski Town's Motion supports the ALJ's conclusions in Decision No. R23-0260-I, that Ski Town failed to establish that its temporary authority in Proceeding No. 22A-0117CP-ETA was valid and active at the time of its Intervention.

26. Ski Town provides as Exhibit D, a letter dated April 19, 2022 from the Commission granting it a temporary authority in Proceeding No. 22A-0131CP-TA. The letter notes that Ski

³⁰ Appendix B to Ski Town's Intervention. See Decision No. R23-0260-I at ¶ 26.

³¹ Decision No. R23-0260-I at ¶ 27.

³² *Id.* While the ALJ noted that the outcome of Ski Town's application for a permanent authority was unknown, this was plainly not the reason Ski Town's Intervention was denied. *Id.*

³³ Exhibit B to Motion.

³⁴ Ski Town appears to allege that the ALJ erred by requiring documentation of Ski Town's valid and active temporary authority, rather than taking counsel's word for it. Motion at ¶ 3. The fact that counsel submitted the Intervention does not alleviate a party from meeting the intervention standards under Rule 1401, 4 CCR 723-1. What is more, as Exhibit B to the Motion shows, a temporary authority upon which Ski Town relied was expired almost a year before it filed its Intervention.

Town is in compliance with Decision No. C22-0215 (presumably, the Decision granting the temporary authority).³⁵ That letter states that Ski Town is granted a temporary authority “for the period of time set forth in Decision No. C22-0215,” which Ski Town did not provide with its Motion.³⁶ Ski Town also provides as Exhibit F, Decision No. C22-0606, mailed on October 7, 2022 which extends the duration of the temporary authority granted in Proceeding No. 22A-0131CP-TA from September 5, 2022 “through the date that a recommended decision issued by the administrative law judge on the permanent authority application becomes a Commission decision,” and through the date a Commission decision on exceptions issues (if any).³⁷

27. The temporary authority in Proceeding No. 22A-0131CP-TA was issued 336 days before Ski Town filed its Intervention.³⁸ The Decision extending the temporary authority was issued 165 days before Ski Town filed its Intervention.³⁹ There is simply no excuse for Ski Town’s failure to include those documents with its Intervention.⁴⁰ And, given that Ski Town knew its Intervention was denied based on its failure to provide documentation establishing that it had a valid and active temporary authority when it filed its Intervention, there is simply no excuse for Ski Town waiting 113 days after its Intervention was denied to file its Motion or otherwise take any timely action to attempt to cure the defects in its Intervention.

28. During the May 4, 2023 prehearing conference, Ski Town alleged that it’s application for permanent authority was recently granted, and that it planned to file a motion under

³⁵ Exhibit D to Motion.

³⁶ Exhibit D to Motion. With the Motion, Ski Town filed Exhibit C, tiled in E-Filings as “Commission Decision Granting Temporary Authority” but no such Decision was included.

³⁷ Exhibit F at 4.

³⁸ Exhibit D to Motion.

³⁹ Exhibit F to Motion.

⁴⁰ Had Ski Town provided this documentation with its Intervention, it is highly likely that the ALJ would have reached a different conclusion as to Ski Town’s Intervention.

Rule 1502(c) requesting that Decision No. R23-0260-I be set aside, modified, or stayed.⁴¹ Thus, as long ago as May 4, 2023, Ski Town knew that it would be granted a permanent authority. With its Motion, Ski Town attached Decision No. R23-0302, mailed May 8, 2023, granting Ski Town a permanent authority, as Exhibit G. Although this Decision was issued only four days after the prehearing conference, Ski Town again failed to take timely action, waiting 95 days to file the Motion.

29. Exhibit H to the Motion shows that Ski Town was issued a permanent authority on July 19, 2023. Though it had proof that it owned a permanent authority, Ski Town continued to do nothing in this Proceeding. Instead, Ski Town waited until August 11, 2023 to file its Motion, 96 days after the evidentiary hearing was scheduled and the procedural schedule was established; 95 days after the Decision granting it a permanent authority was issued; and 23 days after its Letter of Authority was issued.

30. Nowhere in Ski Town's Motion does it provide any reason, let alone good cause, for its repeated delays to act.

31. This Proceeding has been progressing without Ski Town's involvement since April 20, 2023.⁴² With an evidentiary hearing set to begin approximately two weeks from now, granting Ski Town's untimely Motion would plainly prejudice Purple Mountain. Indeed, at this point, Ski Town has missed the July 31, 2023 deadline to file exhibits and exhibit and witness lists, and the August 21, 2023 deadline to amend exhibit and witness lists and to add exhibits and witnesses not previously included.⁴³ As noted, establishing July 31, 2023 as the deadline for

⁴¹ See Rule 1502(c) of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1.

⁴² Decision No. R23-0260-I (mailed April 20, 2023).

⁴³ Decision No. R23-0306-I at 8-9.

witness and exhibit disclosures allowed the parties sufficient time to review each other exhibits, conduct any necessary discovery on the same, and add exhibits or witnesses to their evidentiary presentations by the August 21, 2023 deadline. Under Rule 1405(c), 4 CCR 723-1, discovery responses and objections are due within 10 business days of service of a discovery request in a proceeding such as this. The gap between the initial witness and exhibit deadline – 21 days – provided time for this. Given that the Motion was filed on August 11, 2023, even if the ALJ granted the Motion on that same day, since Ski Town had made no witness and exhibit disclosures, Purple Mountain would have no opportunity to conduct discovery on Ski Town's evidence until after Ski Town made such disclosures on August 21, 2023. This would deprive Applicant the ability to amend its evidentiary disclosures at all given that the deadline to do so already passed.

32. Setting those deadlines aside, given that the hearing is approximately two weeks from now, allowing Ski Town to intervene at this time still prejudices Purple Mountain. Purple Mountain carries the burden to prove by a preponderance of the evidence that all Interveners' service is substantially inadequate.⁴⁴ If Ski Town were granted intervention status, Purple Mountain's burden would apply to Ski Town's service. Ski Town has yet to disclose any of its evidence. Purple Mountain has had no opportunity to issue discovery requests to Ski Town. And Purple Mountain will be left with approximately two weeks to reassess and revise its evidentiary presentation to address Ski Town's service.

⁴⁴ *Durango Transp. Inc. v. Pub. Utilities Comm'n*, 122 P.3d 244, 247 (Colo. 2005); *RAM Broadcasting v. Public Utilities Comm'n*, 702 P.2d 746, 751 (Colo. 1985); *Ephraim Freightways Inc. v. Public Utilities Comm'n*, 380 P.2d 228, 232 (Colo. 1963).

33. Ski Town had complete control over the timing of its Motion and whether to include documentation of its temporary authorities with its Intervention. It chose to sit on the Motion until nearly the last minute and provided no cause whatever for its delay. It also chose not to include documentation of its temporary authorities with its Intervention and did not attempt to cure the defects associated with its failure to include such documentation with its Intervention despite until nearly the last minute, also without cause. As noted, Ski Town's failure to timely act prejudices Purple Mountain. The ALJ will not reward Ski Town for its failure to timely act, to Purple Mountain's detriment, by granting its Motion. For all the reasons discussed, and because Ski Town intentionally failed to timely file its Motion or attempt to cure its rejected Intervention without good cause, the ALJ denies Ski Town's Motion.

III. ORDER

A. It Is Ordered That:

1. NDW Enterprises LLC, doing business as Ski Town Transportation's (Ski Town) Motion to Modify Interim Decision R23-0260-I and for Waiver of Response Time (Motion) filed on August 11, 2023, is denied, consistent with the above discussion.

2. This Decision is effective immediately.

(S E A L)



ATTEST: A TRUE COPY

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge

A handwritten signature in cursive script that reads "Rebecca E. White".

Rebecca E. White,
Director