

Decision No. C24-0241

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 23A-0621CP-EXT

IN THE MATTER OF THE APPLICATION OF MOUNTAIN STAR TRANSPORTATION LLC
DOING BUSINESS AS EXPLORER TOURS AND/OR RED ROCKS SHUTTLE, FOR
AUTHORITY TO EXTEND OPERATIONS UNDER CERTIFICATE OF PUBLIC
CONVENIENCE AND NECESSITY NO. 55952.

**COMMISSION DECISION DENYING EXCEPTIONS TO
RECOMMENDED DECISION NO. R24-0128**

Mailed Date: April 17, 2024
Adopted Date: March 27, 2024

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of exceptions filed by
Denvers Airport Transportation, LLC (Denvers Airport) to Recommended Decision No.
R24-0128, issued February 29, 2024, by Administrative Law Judge (ALJ), Melody Mirbaba
(Recommended Decision).

2. The Recommended Decision granted the applicant, Mountain Star Transportation,
LLC's¹ (Mountain Star or Applicant), Motion to Strike Intervention as of Right, or Response to
Motion to Permissively Intervene (Motion to Strike), in which the Applicant had opposed the
intervention of Denver Airport in this matter. The Recommended Decision also rejected the
out-of-time notice of intervention filed by Denver Airport, as well as denying its motion to

¹ Doing business as Explorer Tours and/or Red Rocks Shuttle.

permissively intervene. The Recommended Decision granted Mountain Star's application to extend its shuttle service authority (Application), subject to certain conditions.

3. Denvers Airport now requests that the Commission grant its intervention, reverse the conditional grant to Mountain Star of extended authority and remand the Proceeding to the ALJ for further proceedings.

4. Now, being fully advised in the Proceeding, we deny the exceptions filed by Denver Airport and uphold the Recommended Decision in its entirety.

B. Background

5. On December 26, 2023, Mountain Star filed its Application, seeking to extend operations under its Certificate of Public Convenience and Necessity (CPCN) No. 55952 to provide call-and-demand shuttle service between all points in the City and County of Denver and the Origin Hotel Red Rocks at 18485 West Colfax Avenue in Golden, Colorado 80401, on the one hand, and Red Rocks Park and Amphitheatre (Red Rocks), in the State of Colorado, on the other hand.

6. As indicated above, the Recommended Decision granted Mountain Star's Motion to Strike, rejecting the out-of-time notice of intervention filed by Denver Airport and denying Denver Airport's alternative motion to permissively intervene, and conditionally granting the Application.

7. As grounds for denying Denver Airport's intervention, the ALJ concluded Denver Airport had failed to file a response to the motion to strike, as a result, the ALJ deemed the motion confessed pursuant to, 4 *Code of Colorado Regulations* (CCR) 723-1-1400(d) of the Commission's Rules of Practice and Procedure.

8. The Recommended Decision also denied Denver's Airport's notice of intervention as of right, finding it had failed to meet the express filing requirements of Rule 1401(f)(I), applicable to a notice of intervention of right filed in an intrastate carrier application proceeding. The ALJ pointed out Denver's Airport failed to file a Letter of Authority and certificate of good standing with its intervention and had otherwise failed to demonstrate that it had a Commission-issued permit. Nor did Denver's Airport file the previous Commission decision conditionally granting it a CPCN upon which Denver's Airport solely relied as its source of authority to intervene as of right.

9. It was also noted Denver's Airport failed to disclose in its intervention that its CPCN was conditionally granted, did not assert it had met the necessary conditions to be granted authority, did not provide a Commission-issued permit number, and did not aver its permit was in good standing. The ALJ noted even though Applicant's motion to strike Denver's Airport's notice of intervention had expressly raised these issues, Denver's Airport nonetheless failed to file its letter of authority by the time the Recommended Decision was issued.² Consequently, the ALJ found Denver's Airport failed to establish it may intervene as of right under Rule 1401(f)(I).

10. Regarding permissive intervention under Rule 1401(c), 4 CCR 723-1, the ALJ reiterated that the Applicant's motion to strike or response to motion to permissively intervene was deemed confessed, that Denver's Airport had failed to establish that it had a Commission-issued permit, and additionally concluded that Denver's Airport failed to sufficiently assert how the Application, which seeks to provide transportation to and from a single hotel, may substantially impact its pecuniary or tangible interests and therefore Denver's Airport's motion to

² *Id.* at ¶ 24.

permissively intervene failed to meet the permissive intervention requirements under Rule 1401(c).

11. Pursuant to § 40-6-109(2), C.R.S., and Rule 1505(a), 4 CCR 723-1, Denver's Airport timely filed exceptions to the Recommended Decision and included, for the first time in this Proceeding, its Letter of Authority and certificate of good standing. Mountain Star timely filed a response, opposing the exceptions. We address the exceptions and response below.

C. Discussion

1. Exceptions and Response

12. Denver's Airport seeks reversal of the Recommended Decision in its entirety, thereby granting its intervention and reversing the Recommended Decision's conditional grant of extended authority to Mountain Star. Denver's Airport requests the Commission order the ALJ to set a procedural schedule in this Proceeding to determine the Application of Mountain Star on the merits.

13. Denver's Airport argues its failure to timely intervene and file its Letter of Authority and certificate of good standing was due to "excusable neglect." Under Rules 6(b) and 60(b) of the Colorado Rules of Civil Procedure (C.R.C.P.), which permit courts to grant enlargements of time for performance of an act and relief from a final judgment for excusable neglect, the Commission should grant its intervention and reverse the conditional grant of extended authority to the Applicant.³

14. In support of its "excusable neglect" argument, Denver's Airport claims staffing turnover resulted in its legal counsel becoming aware of the Application on February 2, 2024, one day after the 30-day notice and intervention period had expired. Denver's Airport's legal

counsel further claims staffing issues caused it to fail to review and properly docket the Applicant's motion to strike Denvers Airport's intervention, leading to a failure to respond within the 14-day response time, and its failure to timely provide its Letter of Authority and certificate of good standing.⁴

15. In addition, Denvers Airport goes on to assert the ALJ erred by denying its permissive intervention. According to Denvers Airport, it sufficiently established the Application may substantially affect its pecuniary and tangible interests. Denvers Airport contends it does not need to have a Commission-issued permit to permissively intervene in this Proceeding and cites to previous Commission decisions in support of this assertion. It also argues its pecuniary interests are substantially impacted by the Application since Denvers Airport has authority to provide service over the county in which the Origin Hotel is located and therefore has an interest in protecting this authority and has expended resources in obtaining this authority.⁵

16. Denvers Airport also raises a technical argument in which it argues the ALJ erred in deeming the Applicant's motion to strike or response to motion to permissively intervene confessed.⁶ Denvers Airport argues the Applicant's pleading included both a motion to strike the notice of intervention, and a response to Denvers Airport's previously-filed motion to permissively intervene. Denvers Airport maintains it was therefore not required to respond to Applicant's pleading addressing Denvers Airport's motion to permissively intervene. Nonetheless, Denvers Airport concedes the ALJ would have been better positioned to fully

³ Denvers Airport Transportation's Exceptions at p. 2.

⁴ Exceptions at p. 6-7.

⁵ Exceptions at p. 10-11.

⁶ Exceptions at p. 11-12.

consider the pecuniary and tangible interests at stake had Denver's Airport timely filed its intervention⁷ but reiterates that it failed to do so due to its legal counsel's neglect.

17. Finally, Denver's Airport stresses while the Commission can remand the intervention back it to the ALJ for further proceedings, such option may not be administratively efficient⁸

18. On the other hand, Mountain Star responds that Denver's Airport made certain misrepresentations in its exceptions regarding filing dates and deadlines. It highlights Denver's Airport's failure to timely file its letter of authority and argues that it should not be able to take advantage of the C.R.C.P. 6(b) "excusable neglect" exception. Mountain Star also challenges Denver's Airport's invocation of prior Commission decisions and reminds the Commission that past precedent does not necessarily inform current Commission decisions.

2. Findings and Conclusions

19. We are unpersuaded by Denver's Airport's argument that its errors and omissions in this Proceeding were the result of excusable neglect. Whether a party's failure to meet a deadline was due to excusable neglect will turn on the facts of each case. Generally, courts in Colorado have indicated that because enlargement of time requests under C.R.C.P. 6(b) within the timeframe a pleading is due are readily granted by decision makers, the failure to seek a timely enlargement within such timeframe would rarely appear to be excusable.⁹ Generally, situations of excusable neglect are defined by unforeseen occurrences such as illness, family death, destruction of files, and other similar occurrences, which would cause a reasonable

⁷ Exceptions at p. 12-13.

⁸ Exceptions at p. 13.

⁹ See, *Freeman v. Cross*, 305 P.2d 759 (1957).

prudent person to overlook a required deadline.¹⁰ Here, we fail to see how counsel's staffing turnover constitutes excusable neglect pursuant to the criteria of C.R.C.P. 6(b) as established by relevant case law. We therefore deny Denver's Airport's exceptions on this point.

20. Denver's Airport maintains its exceptions are similar to a request for relief from default judgment under Rule 60(b) and asserts it has satisfied the three criteria necessary to grant it relief.¹¹ We disagree. Construing the exceptions as a Rule 60(b) motion, Denver's Airport must show: (1) its failures were due to excusable neglect; (2) it alleged a meritorious claim or defense; and, (3) any relief provided from the challenged order would be consistent with considerations of equity.¹²

21. A tribunal may deny a Rule 60(b) motion for failure to satisfy any one of the three criteria.¹³ As we found above, Denver's Airport failed to demonstrate its legal counsel's missed deadlines were due to excusable neglect. After careful review of the record, including the reasoned judgment made in the Recommended Decision, we find that the oversights articulated by Denver's Airport, which form the basis for the Recommended Decision's denial of intervention, do not constitute excusable neglect. Additionally, Denver's Airport has failed to assert a meritorious claim or defense. Finally, as discussed below, the equities in granting the relief Denver's Airport requests do not weigh in its favor.

22. Denver's Airport missed the intervention deadline. Moreover, its intervention failed to accurately represent that it had only been granted a conditional permit, subject to its meeting certain compliance filings. Additionally, Denver's Airport failed to respond to the

¹⁰ *Farmers Ins. Grp. v. Dist. Ct. of Second Jud. Dist.*, 181 Colo. 85, 89, 507 P.2d 865, 867 (1973).

¹¹ *McMichael v. Encompass PAHS Rehab. Hosp., LLC*, 2023 CO 2, 522 P.3d 713 (quoting *Buckmiller v. Safeway Stores, Inc.*, 727 P.2d 1112 (Colo. 1986)).

¹² *Id.*

¹³ *Id.* at 719.

Motion to Strike which had not only raised these issues but further raised the question whether permitting shuttle service between a single hotel and Red Rocks could be construed to substantially affect Denver's Airport's pecuniary interests. We find on the whole, the actions (or failure to act) of Denver's Airport represent a pattern of carelessness. Consequently, we find the ALJ properly denied Denver's Airport's intervention.

23. We find Denver's Airport's argument that it was not required to respond to the Motion to Strike unavailing. Denver's Airport states it was unaware of the 14-day response deadline. We agree with the ALJ it was proper to deem Denver's Airport's failure to respond as confessing the Motion pursuant to Rule 1400(d) and further find that the ALJ was correct to deny Denver's Airport's permissive intervention.

24. We find Denver's Airport failed to satisfy the permissive intervention requirements under Rule 1401(c). Notwithstanding the untimely filing of the intervention, we find Denver's Airport failed to sufficiently establish how such a narrow grant of extension of authority would substantially affect its pecuniary interests. Denver's Airport's motion to intervene merely claims that the extended authority requested by Mountain Star will divert passengers and revenues from Denver's Airport. However, as Mountain Star asserts, Denver's Airport's conditional grant of authority grants it the ability to provide service over several counties.¹⁴ A grant of extension of authority between Red Rocks and a singular hotel within a single county is unlikely to substantially affect Denver's Airport's interests.

25. Weighing the equities in consideration of whether to grant Denver's Airport's relief, we find Denver's Airport's actions, or failure to act, do not establish excusable neglect. Denver's Airport failed to meet deadlines clearly set out in Commission Rules. It failed to meet

the standards for intervention as of right because it failed to show it possessed an active operating authority. It failed to show how the extension of authority sought would adversely affect its pecuniary or tangible interest. Taken all together, we find it would be inequitable even under the best circumstances to unravel Mountain Star's grant of extension of its operating authority to allow Denver's Airport to argue that extension is adverse to its operating authority, which argument would be dubious at best.

II. ORDER

A. The Commission Orders That:

1. The exceptions to Decision No. R24-0128 filed by Denver's Airport Transportation, LLC on February 2, 2024, are denied consistent with the discussion above.

2. The 20-day time period provided by § 40-6-114, C.R.S., to file an Application for Rehearing, Reargument, or Reconsideration shall begin on the first day after the effective date of this Decision.

¹⁴ These counties include Adams, Arapahoe, Boulder, Denver, Douglas, and Jefferson.

3. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
March 27, 2024.**

(S E A L)



ATTEST: A TRUE COPY

Rebecca E. White,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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Commissioners