

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.

**COMMISSION DECISION DENYING EXCEPTIONS TO
RECOMMENDED DECISION NO. R24-0036**

Mailed Date: April 29, 2024

Adopted Date: April 10, 2024

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I. BY THE COMMISSION**A. Statement**

1. Green Jeep Tours, Inc. (Green Jeep), an intervenor in this Proceeding, filed exceptions seeking to reverse the Recommended Decision¹ and stay the Proceeding. The Recommended Decision conditionally grants Purple Mountain Tour Company, LLC's (Purple Mountain) Application for Permanent Authority to Operate as a Common Carrier by Motor Vehicle for Hire (Application). As discussed below, after considering the exceptions and the evidentiary record in this Proceeding, the Commission upholds the Recommended Decision in its entirety.

B. Background

2. Purple Mountain initiated this proceeding by filing its Application pursuant to Commission Rules 6002 and 6203, *4 Code of Colorado Regulations* (CCR) 723-6, on February 23, 2023. The Commission deemed the Application complete on March 29, 2023, and referred the matter for disposition to an Administrative Law Judge (ALJ). Purple Mountain twice amended its Application to restrict its service area and to restrict the type of service that it would provide. Purple Mountain's amended Application seeks a Certificate of Public Convenience (CPCN) authorizing Purple Mountain to provide transportation of passengers in call-and-demand sightseeing service between all points within a 136-mile radius of 24401 County Road 390, Granite, Colorado.²

3. The ALJ held a two-day evidentiary hearing on September 14 and 18, 2023, in which all parties appeared. Both Purple Mountain and Green Jeep put on witnesses and submitted documentary evidence.

¹ Recommended Decision No. R24-0036 issued January 19, 2024, by Administrative Law Judge, Melody Mirbaba.

² This includes portions of Rocky Mountain National Park.

4. On January 19, 2024, the ALJ issued the Recommended Decision. The Recommended Decision conditionally granted Purple Mountain's Application. Specifically, the ALJ found that Purple Mountain met its burden to establish by a preponderance of the evidence that there is a public need for the proposed service, that the existing service is substantially inadequate, and that granting the Amended Application is in the public interest.³

5. On February 8, 2024, Green Jeep filed a Motion for Extension of Time to File Exceptions to the Recommended Decision. On March 1, 2024, the Commission granted Green Jeep's motion, in part, and extended the deadline to file exceptions to March 8, 2024. Green Jeep filed its exceptions on March 8 seeking to reverse the Recommended Decision and asking the Commission to deny the Application, or in the alternative, to stay the proceeding until its formal complaint against Purple Mountain, which is ongoing in a separate proceeding, is resolved.⁴

C. Exceptions

a. Burden of Proof

6. Green Jeep argues that the ALJ applied the incorrect burden of proof in finding that Purple Mountain had met the criteria for obtaining a CPCN under the regulated monopoly doctrine. Specifically, Green Jeep argues the ALJ should not have analyzed the Application under a "preponderance of the evidence" standard. Green Jeep asserts the preponderance of the evidence standard is only applied in cases based on the doctrine of "regulated competition" but not in cases based on the "regulated monopoly" doctrine.⁵ Green Jeep does not identify which evidentiary

³ Recommended Decision, ¶ 78.

⁴ Proceeding No. 24F-0073CP.

⁵ Green Jeep, LLC's Exceptions at p. 5-6.

standard should apply to this proceeding but asserts that the record should be reviewed under the appropriate evidentiary standard.⁶

7. Green Jeep's support for its assertion relies on a misreading of a Colorado Supreme Court case. That case, *Mile High Cab*,⁷ held that the Commission had misapplied the preponderance of the evidence standard by accepting a fact that was not "more likely than not" true. The Court did not hold that the preponderance standard is only applied in a regulated competition context as Green Jeep suggests.

8. It has long been the case at this Commission that the proponent of an order bears the burden of persuasion and that facts must be established by the preponderance of the evidence. Under Commission Rule 1500 and §24-4-105(7), C.R.S., the proponent of an order bears the burden of proof. Section 13-25-127(1), C.R.S. further states that, unless a provision of law says otherwise, the burden of proof in any civil action shall be by a preponderance of the evidence. The ALJ explicitly stated that she was applying the preponderance of the evidence standard.⁸ And, throughout the Recommended Decision the ALJ repeatedly references the standard when making findings.⁹

9. Moreover, as discussed above, the ALJ clearly and accurately explained that she was applying the preponderance standard, and that this standard requires the fact finder to determine whether the existence of a contested fact is more probable than its non-existence.¹⁰ For the reasons set forth above, we conclude that the ALJ applied both the correct burden of proof and the correct evidentiary standard and therefore deny this exception.

⁶ *Id.*

⁷ See *Mile High Cab, Inc. v. Colorado Pub. Utilities Comm'n*, 302 P.3d 241 (2013).

⁸ Recommended Decision, ¶ 65.

⁹ Recommended Decision, ¶¶ 72, 74, 78, and 83.

¹⁰ Recommended Decision, ¶ 65.

b. Public Need and Substantial Inadequacy of Existing Services

10. Green Jeep next contests the ALJ's public need and substantial inadequacy conclusions. The ALJ principally relied on two factors in granting Purple Mountain's Application –accessibility and tourism demand. Green Jeep argues that the ALJ erred in finding both that there is a public need for Purple Mountain's service and, similarly, that Green Jeep's services are substantially inadequate. Because these issues are closely related¹¹ and because Green Jeep raises similar arguments regarding each on exceptions, we analyze them together.

11. We first note that Green Jeep did not file a transcript of the evidentiary hearing with its exceptions. Pursuant to § 40-6-113(4), C.R.S., if a transcript is not filed with exceptions, “it shall be conclusively presumed that the basic findings of fact, as distinguished from the conclusions and reasons [for the ALJ's findings and orders] are complete and accurate.” Consequently, since no transcripts were filed with the exceptions, we must accept the findings of fact contained in the Recommended Decision as accurate. As a result, we accept the facts found by the ALJ and construe Green Jeep's exceptions to challenge the ALJ's conclusions as unsupported by those factual findings.

12. Green Jeep makes two principal arguments contesting the ALJ's findings and conclusions: (1) that the ALJ did not properly weigh the evidence before it in finding a public need for accessible sightseeing services and in finding that Green Jeep's tours were substantially inadequate to provide such accessible services and (2) the ALJ failed to properly weigh Green Jeep's witness testimony regarding its available capacity. We begin by analyzing the evidence as recounted by the Recommended Decision.

¹¹ *Ephraim Freightways, Inc. v. Pub. Utilities Comm'n*, 380 P.2d 228, 230–31 (1963).

13. Regarding accessibility, the ALJ concluded Purple Mountain's tours provide an accessible and comfortable sightseeing service that is needed by the public and which is not provided by existing carriers. The Recommended Decision spends thirteen pages¹² recounting testimony from Purple Mountain's witnesses¹³ regarding the public need for a more accessible sightseeing service and the reasons why Green Jeep's services are substantially inadequate. The testimony explains that Purple Mountain's fleet consists of two luxury vehicles which are easy to load into and unload from and are outfitted with climate-control technology, the ability to seal off from the elements quickly, and a fully stocked refrigerator, coffee bar, and snack bar.¹⁴ By comparison, Green Jeep's fleet consists of modified Jeeps which have had the existing seating removed for bench style seating and have had the tops replaced with canvas or vinyl plastic tops which do not necessarily seal the cabins from the elements, and which oftentimes require passengers to exit the vehicles before closing.¹⁵ Witnesses testified to difficulty in loading and unloading from Green Jeep's cars and noted that Green Jeep's cars were significantly less comfortable particularly regarding the ability to adapt to the variable temperatures at higher elevations.¹⁶ Relatedly, numerous witnesses testified that the rugged nature of the Green Jeep tours would make it prohibitively difficult for their elderly relatives to take a tour, but emphasized Purple Mountain's tours were far more accessible, felt safer, and would not present problems for older or younger passengers.¹⁷ We agree with the ALJ that Purple Mountain's evidence, which includes numerous witness testimonies as well as several written letters of support attesting to the public

¹² Recommended Decision pp. 8-21.

¹³ These witnesses include former Green Jeep employees and individuals who have either taken tours or whose families have taken tours with Purple Mountain.

¹⁴ Recommended Decision, ¶¶ 25-26.

¹⁵ *Id* at ¶ 28.

¹⁶ *Id* at ¶¶ 32, 37, 43, 51-55, and 68.

¹⁷ *Id* at ¶¶ 42, 44, 50, and 54-55.

need for Purple Mountain's accessible services, demonstrates that Green Jeep's service does not meet the demand for accessible services and is therefore substantially inadequate.

14. Where an applicant's evidence tends to prove the existing carrier's substantial inadequacy, it is incumbent upon the existing carrier to rebut this evidence.¹⁸ Because we find that Purple Mountain has met its burden of proof, Green Jeep must rebut Purple Mountain's evidence, but our review of the record indicates that it has not met this burden. Regarding accessibility, the evidence recounted by the ALJ demonstrates Green Jeep does not provide services that are comparably accessible to Purple Mountain's. The ALJ noted that Green Jeep provides customers with ponchos and heated blankets as needed and Green Jeep's exceptions maintain the company can and would make special accommodations for individuals requesting such. Green Jeep provides no other evidence regarding the accessibility of its services. It argues that existing carriers in the area provide accessible services and therefore there is no public need for Purple Mountain's service. Green Jeep cites to trolley services as a carrier that provides an accessible service comparable to Purple Mountain's. However, trolleys provide services that are distinct from the call-and-demand sightseeing tours provided by Purple Mountain, and we agree with the ALJ that the evidence specifically demonstrates a public need for Purple Mountain's proposed service which, as discussed above, emphasizes comfort, safety, and accessibility. Whether there are carriers that provide different transportation services in the area does not inform the question of whether the market for accessible sightseeing tours is being met by Green Jeep.

15. The second factor that the ALJ considered in its analysis of the public need for Purple Mountain's services was the tremendous increase in demand for sightseeing services in the Rocky Mountain National Park area. Several witnesses noted that they were turned away by fully

¹⁸ *Durango Transp., Inc. v. Colorado Pub. Utilities Comm'n*, 122 P.3d 244, 250 (Colo. 2005) (quoting *Ephraim Freightways, Inc. v. Pub. Utilities Comm'n*, 380 P.2d 228 (1963)).

booked tour companies and they would need to book tours several weeks in advance.¹⁹ The witnesses also noted that Rocky Mountain National Park now utilizes a "timed-entry" system whereby the park limits the number of timed-entry slots that individuals can book.²⁰ This means individuals who cannot gain entry into the park must turn to tour companies who are not required to have a timed-entry slot to enter the park. This system, coupled with evidence presented to the ALJ that the Estes Park corridor of Rocky Mountain National Park sees between four and seven million visitors per year, strongly weigh in favor of finding a public need for Purple Mountain's service.²¹ We again agree with the ALJ that the balance of evidence weighs in favor of a finding that Green Jeep's services are substantially inadequate.

16. Green Jeep relies on its own witness testimony to contest that increased tourism in the area necessarily means there is a corresponding increased demand for services like Purple Mountain's. Its sole witness, the owner/operator of Green Jeep, testified that her business would suffer if Purple Mountain was granted a CPCN.²² She stated that she believes her business began slowing as Purple Mountain's operations began and noted she could not recall a time when Green Jeep lacked capacity to give tours²³. Importantly, however, she was unable to provide any documentary evidence attesting to Green Jeep's slowing business. Nor did she provide any evidence or testimony indicating the volume of tours Green Jeep provided in any timeframe or the number of passengers to whom it had provided tours.²⁴ Green Jeep does not present any new evidence on exceptions concerning the availability of its service or the demand for services in

¹⁹ *Id* at ¶¶ 33, 45, and 56.

²⁰ *Id.* at ¶¶ 33 and 56.

²¹ *Id* at ¶¶ 23, 33, and 50.

²² Recommended Decision at ¶ 60.

²³ *Id.*

²⁴ *Id* at ¶ 79.

Rocky Mountain National Park but rather reiterates that it has available capacity to provide tours and maintains that it has never been forced to turn customers away during busy season.

17. On balance, we find that the ALJ correctly concluded, based on the evidence before her, that Purple Mountain established by a preponderance of the evidence that there is a public need for its proposed service which provides comfortable and accessible tours in the high-demand area of Estes Park and that the existing service is substantially inadequate. Purple Mountain presented convincing and credible evidence about the accessibility of its service, the need for such service, and the inadequacy of the existing carrier (Green Jeep) to provide accessible service. The evidence also demonstrates increasing tourism demand in the Rocky Mountain National Park area and this demand has made it more difficult to secure entry into Rocky Mountain National Park due to the timed-entry system which increases demand for tours and makes it difficult to reserve a tour without reserving space several weeks in advance. In sum, Purple Mountain's evidence demonstrates both a public need for its accessible sightseeing services and that Green Jeep's services lack the accessibility offered by Purple Mountain. Green Jeep's evidence does not persuade us that its services meet the public's accessibility needs and we are not convinced to deviate from the Recommended Decision's conclusions. We therefore deny Green Jeep's exceptions regarding public need and substantial inadequacy.

c. Fitness

18. Green Jeep next challenges the ALJ's fitness finding. Green Jeep asserts that Purple Mountain has been selling individual tickets in violation of its luxury limousine and off-road charter permits and therefore the Commission should find Purple Mountain unfit for a CPCN.²⁵ After the Recommended Decision in this Proceeding issued, Green Jeep filed a formal complaint

²⁵ Exceptions, p. 8.

with the Commission in which it alleges that Purple Mountain is violating Commission Rules by selling individual tickets without proper authority.

19. In its Exceptions, Green Jeep does not point to any evidence in this Proceeding of Purple Mountain's alleged violations and refers only to its complaint for support. Based on the record before us, and the record as it stood before the ALJ, there is no evidence of any violation. Allegations made in a separate proceeding provide insufficient support to overturn the ALJ's fitness finding that is grounded in the record. We therefore deny this exception.

d. Destructive Competition

20. Green Jeep contends that granting the Application will result in "destructive competition." It does not challenge the ALJ's findings or conclusions, but rather maintains that the Commission should deny Purple Mountain's CPCN because Green Jeep's business will suffer. Green Jeep provides little support for its position other than referencing its own testimony regarding its available capacity which it also raised (and we have already addressed) in previous arguments. Green Jeep's argument on this point does not challenge any particular findings or conclusions and therefore does not convince us that the Recommended Decision was incorrect. We therefore deny this exception.

e. Defective Notice

21. Green Jeep next argues the ALJ erred by not requiring Purple Mountain to re-notice its application because the original notice was defective. Green Jeep does not explain in its exceptions how the original notice was defective. Our review of the record shows that Green Jeep has made filings in which it argues that the address given by Purple Mountain from which the radius of its service territory will be determined is not a valid address. This was the basis for Green Jeep's Motion to Strike the Application which was dismissed by the ALJ in Decision No.

R23-0605-I in which the ALJ found, based on ample and credible information provided by Purple Mountain, that the address was valid.

22. We reiterate that Green Jeep has not put forth a developed argument as to why the original notice was defective. It appears that Green Jeep is reraising its notice argument which was thoroughly litigated before the ALJ. When balanced against the ALJ's decision, Green Jeep's single paragraph argument which fails to cite to any legal authority does not persuade us to deviate from the ALJ's reasoned conclusions. The ALJ found that Purple Mountain provided substantial evidence showing that the address on the application could be found on several search engines, by searching at the appropriate County Assessor's office, and could be found at the USPS by simply spelling out "county road."²⁶ The ALJ's decision to deny the motion was well-reasoned and Green Jeep has not raised any argument that would lead us to disagree with the ALJ's conclusion. We therefore deny this exception.

f. Denial of Interventions

23. Green Jeep next contends the ALJ erred by refusing to allow certain intervenors into the proceeding. We are unable to discern a legally supported argument on this point. It is unclear what Green Jeep is challenging and it does not cite to any legal authority to support its argument.

24. The ALJ issued reasoned decisions for its denial of interventions which cited to late, incomplete, or insufficient filings made by the parties seeking to intervene.²⁷ In fact, most intervenors withdrew from the proceeding after Purple Mountain amended its Application to

²⁶ See Interim Decision No. R23-0605-I (in which the ALJ modified the address in the application from "24401 Co Rd 390, Granite, Colorado" to "24401 County Road 390, Granite, Colorado.").

²⁷ See Decision No. R23-0260-I pp. 8-11.

restrict its CPCN to authorize sightseeing services only.²⁸ Green Jeep has not presented any argument that the ALJ was acting arbitrarily or outside the scope of its authority in denying its intervention and we see no basis in the record to overturn her decision. We therefore deny this exception.

g. Green Jeep's Request to Stay the Proceeding

25. Finally, Green Jeep asks us to stay the proceeding until its complaint proceeding is resolved. We deny this request. As explained above, the complaint merely contains allegations of wrongdoing after the issuance of the Recommended Decision. We do not see these allegations, made in a separate proceeding, as warranting a delay of this proceeding.

D. Conclusion

26. For the reasons set forth above, we deny Green Jeep's exceptions and uphold the ALJ's findings of fact and conclusions in Recommended Decision R24-0036.

II. ORDER

A. The Commission Orders That:

1. The exceptions to Decision No. R24-0036 filed by Green Jeep Tours, LLC on March 8, 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.

²⁸ Recommended Decision, ¶¶ 6–10.

3. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
April 10, 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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MEGAN M. GILMAN

TOM PLANT

Commissioners