

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 GRANTING, IN PART,
AND DENYING, IN PART, APPLICATION FOR
REHEARING, REARGUMENT, OR RECONSIDERATION
OF DECISION NO. C24-0280**

Issued Date: July 2, 2024
Adopted Date: June 17, 2024

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

1. By this Decision, the Commission grants, in part, and denies, in part, the Application for Rehearing, Reargument, or Reconsideration (“RRR”) of Decision No. C24-0280, filed by intervenor Green Jeep Tours, LLC (“Green Jeep”) on June 3, 2024. As discussed below, the Commission upholds the grant of authority to Purple Mountain Tour Company, LLC, now doing business as Purple Points Tour Company, LLC (“Purple Mountain”), authorizing it to provide transportation of passengers in call-and-demand sightseeing service.

B. Background**1. Procedural History**

2. On February 15, 2023, Purple Mountain commenced this Proceeding by filing the above-captioned Application for a Certificate of Public Convenience and Necessity (“CPCN”) to provide call-and-demand sightseeing service authority between all points within a 136-mile radius of 24401 County Road 390 Granite, Colorado (“CPCN Application”).

3. The Commission deemed the CPCN Application complete and referred the matter for disposition to an Administrative Law Judge (“ALJ”) by minute entry on March 29, 2023. The ALJ held evidentiary hearings on September 14 and September 18, 2023. On January 19, 2024, the ALJ issued Recommended Decision No. R24-0036 (“Recommended Decision”) granting Purple Mountain its requested sightseeing authority.

4. On February 12, 2024, Green Jeep filed a motion requesting an extension of time to file exceptions to the Recommended Decision. Green Jeep made this request, in part, on grounds that the hearing transcripts were unavailable prior to the deadline for filing exceptions.

Through Decision No. C24-0132, issued March 1, 2024, the Commission extended the deadline for filing exceptions to March 8, 2024.

5. On March 8, 2024, Green Jeep filed its exceptions; however, it did not file the hearing transcripts contemporaneously. The Commission therefore denied Green Jeep's exceptions on April 29, 2024, through Decision No. C24-0280. The Commission explained, because Green Jeep failed to file transcripts with its exceptions, Green Jeep could not challenge the Recommended Decision's factual findings and therefore the ALJ's findings were deemed complete and accurate. After review of the ALJ's conclusions and the record as a whole, the Commission found the ALJ's conclusions well-reasoned and upheld the Recommended Decision in its entirety.

6. On May 7, 2024, Purple Mountain was assigned a CPCN number authorizing it to provide the sightseeing services sought in its CPCN Application.

7. On May 13, 2024, more than a month after the extended deadline for filing exceptions, and two weeks after the Commission's decision denying exceptions had issued, hearing transcripts were filed into this Proceeding.¹ On May 20, 2024, Green Jeep filed a motion requesting an extension of time to file an application for RRR to Decision No. C24-0280, pursuant to § 40-6-114, C.R.S., and Rule 1506 of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* ("CCR") 723-1. Purple Mountain filed a response opposing this request. By Decision No. C24-0390, issued June 5, 2024, the Commission extended the deadline for filing RRR to June 10, 2024.

¹ We note that while the transcripts were indeed filed into the Proceeding on May 13, 2024, for administrative reasons, they appear in the Commission's E-Filings system backdated to the date and time the hearings commenced.

8. On June 3, 2024, and Green Jeep filed its application for RRR, seeking reconsideration of its challenges to the ALJ's findings of fact and certain arguments raised in its exceptions filing and denied in Decision No. C24-0280.

2. Recommended Decision

9. The Recommended Decision analyzed Purple Mountain's CPCN Application under the regulated monopoly doctrine. 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.² As such, an applicant for a common carrier CPCN must demonstrate the public needs the proposed service; that granting the requested authority is in the public interest; and that the existing services are substantially inadequate.³ The ALJ concluded that, considering the evidence presented at hearing as well as the record as a whole, Purple Mountain satisfied its burden of proof regarding each of the three prongs. The ALJ then concluded that Green Jeep, which had only presented a single witness at hearing (its owner), did not sufficiently rebut the evidence presented by Purple Mountain. Therefore, the ALJ concluded there was a public need for Purple Mountain's service, the incumbent carrier's services were substantially inadequate, and granting Purple Mountain the CPCN was in the public interest. In reaching this determination, the ALJ relied on evidence of the accessibility of Purple Mountain's service as well as the ever-increasing demand for sightseeing services in the Rocky Mountain National Park area particularly considering the park's timed-entry system.

² *Ephraim Freightways Inc. v. Pub. Utils. Comm'n*, 380 P.2d 228, 230 (Colo. 1963).

³ *RAM Broad. of Colorado, Inc. v. Pub. Utils Comm'n*, 702 P.2d 746 (Colo. 1985) and Rule 6203(a)(XVII), 4 CCR 723-6.

3. Exceptions to Recommended Decision

10. By Decision No. C24-0280, the Commission denied Green Jeep's exceptions in their entirety and upheld the Recommended Decision's grant of authority to Purple Mountain.

11. Among other arguments in its exceptions, Green Jeep contended the ALJ erroneously concluded Purple Mountain had met its evidentiary burden regarding the demonstration of public need and the demonstration that existing services are substantially inadequate. Green Jeep argued the ALJ made inaccurate findings of fact and did not appropriately weigh the evidence before it. The Commission found no merit to these claims. In Decision No. C24-0280, the Commission explained that Green Jeep could not challenge the ALJ's findings of fact because it had not contemporaneously filed hearing transcripts with its exceptions (as required by § 40-6-113(4)) that would have enabled the Commission to review the hearing record and make its own factual findings. The Commission deemed the ALJ's findings complete and accurate and found the ALJ's conclusions were adequately supported by the record.

12. In its exceptions, Green Jeep also claimed that the Commission's notice of Purple Mountain's CPCN Application was defective because the address listed as the center of Purple Mountain's service radius was inaccurate and that the ALJ had inappropriately amended the address by order instead of re-noticing the application. The Commission denied this exception. The Commission determined this notice issue had been properly considered, and denied, by the ALJ.

4. Application for RRR

13. Green Jeep raises four arguments on RRR that challenge the Recommended Decision and Commission Decision No. C24-0280. First, Green Jeep contends the Commission

erred in declining to consider Green Jeep's challenges to the ALJ's factual findings. Green Jeep asserts that while § 40-6-113(2), requires a party to order and pay for a transcript, the official reporter is the one who files the transcript. Green Jeep proceeds to assert that the official reporters timely filed the transcripts into this Proceeding and therefore it was error and a violation of Green Jeep's right to procedural due process for the Commission to not consider Green Jeep's challenges to the ALJ's findings of fact.

14. Second, Green Jeep contends the Commission erred by finding Green Jeep's existing service to be substantially inadequate. Specifically, Green Jeep argues that the ALJ and ultimately the Commission erroneously analyzed Green Jeep's services under a luxury limousine standard rather than a common carrier standard. Green Jeep objects that the ALJ's conclusions in the Recommended Decision were erroneously based on Green Jeep's lack of luxury features and that the Commission's finding that Green Jeep's vehicles were inaccessible for the elderly was unfounded because no elderly witnesses offered testimony to this effect.

15. Third, Green Jeep argues that Purple Mountain illegally engaged in selling individual tickets prior to being granted its CPCN and that the witnesses Purple Mountain presented at hearing were sold individual tickets. Green Jeep therefore asserts Purple Mountain's witness testimony should not have been considered by the ALJ when finding a public need for Purple Mountain's service.

16. Finally, Green Jeep reasserts its argument that the notice of Purple Mountain's CPCN Application notice was defective because the address listed as the center of its service radius did not appear in the County Assessor's Office records or the U.S. Postal Service records. Green Jeep reiterates that the ALJ should have re-noticed the application with the proper address

instead of changing the address by order. Green Jeep asserts that the incorrect address may have resulted in a lack of interventions from other counties. Green Jeep further asserts that by failing to re-notice the application, the grant of authority to Purple Mountain is *ex parte* and invalid.

17. As to relief, Green Jeep requests the Commission grant its RRR, remand this Proceeding to a different ALJ to be re-heard on the merits and stay the matter during the 30-day RRR period such that Purple Mountain cannot act under its CPCN authority.

C. Findings and Conclusions

1. Responsibility to Timely File Hearing Transcripts

18. We find Green Jeep's contention on RRR that the official reporter bears responsibility for filing the transcript into the proceeding misconstrues § 40-6-113(2), C.R.S., and will not be adopted. Green Jeep unduly focuses on the instruction in § 40-6-113(2) that the transcript "shall be prepared by the official reporter and certified by such reporter, and when completed shall be filed with the commission." However, we do not read this statement—"shall be filed with the commission"—to shift legal responsibility to the reporter to ensure the transcript is filed, as required by § 40-6-113(2), "on or before the time the first pleading is required to be filed with the commission by the party." To the contrary, the party filing exceptions bears ultimate responsibility to file or cause to be filed the transcript within the statutory deadline or seek an extension of time from the Commission.⁴ A statute must be read and considered as a whole, and each part of the statute must be given consistent and harmonious effect,⁵ which this interpretation accomplishes. This interpretation is also consistent with past Commission practice and case law, which recognizes the party filing exceptions bears responsibility to cause a transcript of the hearing

⁴ Instead of seeking an extension of time, Green Jeep proceeded to file exceptions before causing the transcripts to be filed into the Proceeding.

⁵ *Farmers Reservoir & Irrigation Co. v. City of Golden*, 113 P.3d 119, 130 (Colo. 2005).

to be timely filed.⁶ We therefore deny Green Jeep's RRR on this issue and reject its contention that it was not obligated to file transcripts contemporaneously with its exceptions.

2. Limited Reconsideration of Green Jeep's Exceptions' Factual Challenges

19. We do recognize, however, that transcripts were eventually filed into the proceeding on May 13, 2024. In the interest of ensuring the Commission's conclusions are based on an accurate understanding of the record in this Proceeding, we will in this limited circumstance review the record—now including the hearing transcripts—to confirm there is no cause to revisit our prior decisions in this matter. To this end, we address in turn each of Green Jeep's factual challenges raised on exceptions. As discussed below, we conclude that, even considering the now-filed transcript, we uphold the prior decisions in this Proceeding and the grant of authority to Purple Mountain.

20. First, Green Jeep challenged the ALJ's findings regarding the existence of a public need for Purple Mountain's service. Specifically, Green Jeep took issue with the ALJ's finding that the evidence indicated a need for more accessible services for young children and members of the public who have health or mobility issues.⁷ While Green Jeep did not cite to any part of the transcripts to challenge this finding, it argued that the ALJ erred in making this finding because "no testimony or exhibit support the finding."⁸ Upon review of the record, including the hearing transcripts, we disagree with Green Jeep. There are multiple instances in the transcripts of Purple Mountain's witnesses emphasizing that Purple Mountain's tours are more accessible than

⁶ *Howard v. Pub. Utils. Comm'n*, 528 P.2d 1303, 1304 (1974); *Colorado Pub. Utilities Comm'n*, No. 05G-424BP, 2006 WL 1210840 (Apr. 18, 2006); *Colorado Pub. Utilities Comm'n*, No. 06G-036EC, 2006 WL 2689831, at *1 (Sept. 18, 2006); *Colorado Pub. Utilities Comm'n*, No. 00G-616CP, 2001 WL 34092658 (Mar. 15, 2001).

⁷ Green Jeep's Exceptions at p. 6.

⁸ *Id.*

Green Jeep's.⁹ We find these instances form a sufficient basis for a finding of public need based on accessibility. We therefore find no reason to disturb the ALJ's findings on this point.

21. Second, Green Jeep challenged the ALJ's findings regarding Green Jeep's services being substantially inadequate to provide comparable service to Purple Mountain. Green Jeep specifically focused on capacity and whether Green Jeep has enough availability to keep up with demand and whether the ALJ's substantial inadequacy findings were sufficient to support the conclusion that Green Jeep's service is substantially inadequate. Green Jeep maintained there is "no basis in fact" for a finding of substantial inadequacy and that the ALJ ignored Green Jeep's testimony in making its findings.¹⁰ Reviewing the record including the hearing transcripts, the Commission finds multiple instances in which Purple Mountain's witnesses testified to the difficulty in arranging a tour without several weeks of lead time.¹¹ And as mentioned above, multiple witnesses testified to the accessibility differences between the two carriers. We also note that, contrary to Green Jeep's assertion, the Recommended Decision noted Green Jeep's testimony on these points, and pointed out that Green Jeep's witness testimony contradicted but did not sufficiently rebut the credible evidence presented by Purple Mountain that its services offered much needed accessibility features that Green Jeep's did not.¹² We find the ALJ's substantial inadequacy findings to be complete and accurate and find no reason to disturb these findings.

22. Third, Green Jeep challenged the ALJ's findings concerning allegations that Purple Mountain engaged in unauthorized individual ticket sales under its luxury limousine and off-road charter permit and therefore does not satisfy the fitness prong of the regulated monopoly

⁹ 09/14/2023 p.m. Hearing Transcript pp. 134:25-138:1, 214:6-215:1; 09/14/2023 am Hearing Transcript pp. 21:13.

¹⁰ Green Jeep's Exceptions at p. 7.

¹¹ 09/14/2023 p.m. Hearing Transcript pp. 173:6-10, 233:5-25.

¹² Recommended Decision at ¶¶ 82 and 89.

doctrine. Because this challenge overlaps with Green Jeep's third RRR argument in which it contends that the unauthorized ticket sales undermine the ALJ's public need finding, we address both together.

23. In its exceptions, Green Jeep objected that the ALJ should have found that Purple Mountain sold individual tickets, without authority, and that these unauthorized individual ticket sales should have been considered either in the ALJ's fitness or public need analysis. We do see some merit to this factual challenge in that, indeed, certain portions of the testimony from Purple Mountain's witnesses suggest that Purple Mountain likely sold individual tickets prior to being granted a common carrier permit.¹³ Consequently, the Recommended Decision should have included these findings in its analysis. Nonetheless, we are not persuaded that these unauthorized individual ticket sales are compelling grounds to reverse the ALJ's ultimate fitness and public need findings.

24. Green Jeep continued this argument on RRR, contending that because several of Purple Mountain's witnesses were sold individual tickets, the Commission cannot consider their testimony as evidence in support of Purple Mountain's CPCN Application. Green Jeep cites to two cases in support of this proposition¹⁴; however, neither case is directly on point, and we do not see either as requiring the Commission to alter the Recommended Decision or the Commission's decision on exceptions. The cases involve carriers attempting to use extra-territorial service to justify Commission approval of their applications for extension of service territory. In *McKenna v Nigro*, a common carrier of freight sought judicial review after the Commission denied its request to extend its authority under its CPCN to include the right to transport from Denver to Greeley.

¹³ 09/14/2023 a.m. Hearing Transcript pp. 63:17-64:2; 09/18/2023 Hearing Transcript 85:25-86:14, 118:7-18.

¹⁴ *McKenna v. Nigro*, 372 P.2d 744 (Colo. 1962); *G&G Trucking v. P.U.C. of Colorado*, 745 P.2d 211 (Colo. 1987).

The carrier argued that even if the Commission did not interpret its CPCN to permit service between the two cities, the Commission should still grant the extension of authority because it was on notice that the carrier had been hauling freight between the two cities for years and had not taken action against the carrier. On the other hand, *G&G Trucking v. P.U.C. of Colorado* involved a carrier, permitted to provide services within four specific counties, seeking approval to operate beyond its designated authority. The recommended decision in that proceeding approved the extension of authority based, in part, on the fact that the carrier had been providing service outside of its service territory regularly and in good faith. The Commission reversed the recommended decision on exceptions and the carrier sought district court review. The Colorado Supreme court denied the applications in each case. The Court reiterated both times that unlawful “usurpation of authority” and demonstration of the success of such unlawful operation cannot form the basis for the grant of authority to continue such operation. In both, the Supreme Court held that the carriers’ extra-territorial operations did not support a grant of authority to continue those operations. Green Jeep argues this means the Commission cannot consider the testimony of witnesses who purchased individual tickets to support a finding of substantial inadequacy. This argument is not convincing. The ALJ’s findings and conclusions were not based on Purple Mountain’s witnesses having purchased single tickets in excess of its authority, but rather they were based on witness testimony regarding the accessibility of Purple Mountain’s vehicles and the general difficulty in booking sightseeing tours.¹⁵ Unlike the cases Green Jeep cites, the alleged unauthorized prior service was not used by Purple Mountain to justify its proposed new service. Here, the ALJ’s

¹⁵ Recommended Decision at ¶ 76.

decision was supported by substantial evidence,¹⁶ including appropriate support from witnesses who may or may not have purchased individual tickets. We are not persuaded by Green Jeep that the Commission must discount or entirely disregard Purple Mountain's testimony on these points. While we expect transportation providers to only provide services in accordance with their permits or certificates of authority, we decline to find in this Proceeding that any individual ticket sales by Purple Mountain must or should lead to the conclusion that Purple Mountain is not fit to provide common carrier services, or that public need for the services has not been demonstrated.

3. Finding of Substantial Inadequacy of Existing Services

25. Green Jeep reiterates the same argument on RRR that it did on exceptions—that the ALJ, and now the Commission, erred in finding that Green Jeep's services were substantially inadequate under the regulated monopoly 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. Therefore, an applicant for common carrier authority must show that the incumbent's service is substantially inadequate. Whether an incumbent's service is substantially inadequate is a question of fact that the Commission must determine, and the Commission may consider a broad range of evidence in making this determination.¹⁷

26. The Commission already fully considered and denied this argument in its exceptions decision, and Green Jeep's RRR argument does not convince us that our decision was unjust or unwarranted. Even if the Commission construes Green Jeep's argument on RRR as a new argument challenging the Commission's findings, upon review of the record we do not find

¹⁶ See *Durango Transp. Inc. v. Pub. Utils. Comm'n*, 122 P.3d 244, 250 (Colo. 2005) (explaining that substantial evidence means "such relevant evidence as a reasonable person's mind might accept as adequate to support a conclusion").

¹⁷ *RAM Broadcasting v. Pub. Utils. Comm'n*, 702 P.2d 746, 751 (Colo. 1985); *Durango Transp. Inc. v. Pub. Utils. Comm'n*, 122 P.3d 244, 248 (Colo. 2005).

sufficient evidence to reverse the Recommended Decision or the Commission's decision on exceptions. Contrary to Green Jeep's assertions, and as already discussed above, the Recommended Decision did not premise its finding of substantial inadequacy solely on Green Jeep's lack of luxury accommodations, but rather on the accessibility of Purple Mountain's vehicles and tours which, according to multiple witnesses, are more accessible for younger and older passengers because the vehicles are easier to enter and exit and are better insulated from adverse weather conditions. As mentioned above, the Commission is authorized to consider a broad range of evidence in its substantial inadequacy analysis. In addition, the Commission decides what weight to give the evidence.¹⁸ The ALJ therefore properly considered accessibility to be a determining factor in its analysis and we find that the ALJ's conclusions on this point were supported by substantial evidence.

27. Moreover, as the Commission already discussed on exceptions, once an applicant's evidence tends to prove the existing carrier's substantial inadequacy, it is incumbent on the existing carrier to rebut this evidence. Green Jeep did not adequately rebut Purple Mountain's evidence. It called only one witness who did not rebut Purple Mountain's numerous witness testimonies regarding accessibility. We reiterate that the evidence before the ALJ supports its conclusion that Green Jeep's existing service is substantially inadequate. We therefore deny this RRR.

4. Notice of CPCN Application

28. Green Jeep's final argument on RRR reiterates its exception that notice of Purple Mountain's CPCN Application was defective because Green Jeep could not verify the address that Purple Mountain provided as the center of its service radius. This argument already fully considered by the Commission in its decision on exceptions and by the ALJ earlier in the

¹⁸ *Id* at 750.

proceeding, and rejected in both instances.¹⁹ The ALJ found the address was not defective and that any issues or concerns with the address could be cured by simply spelling out “County Road” in the address. Green Jeep has not raised any new arguments or presented new evidence on RRR that the Commission’s previous decisions are unlawful, unjust, or unwarranted which would convince us to reconsider it here. We therefore deny this RRR.

D. Conclusion

29. In sum, while we grant Green Jeep’s RRR application for the limited purpose of reconsidering its challenges to the Recommended Decision’s factual findings, neither these challenges nor Green Jeep’s other arguments raised on RRR convince us to reverse the Recommended Decision’s grant of sightseeing authority to Purple Mountain. We therefore deny the remainder of Green Jeep’s RRR application and deny its requests to stay and to remand this matter for further proceedings.

II. ORDER

A. The Commission Orders That:

1. The Application for Rehearing, Reargument, or Reconsideration (“RRR”) filed by Green Jeep Tours, LLC (“Green Jeep”) on June 3, 2024, is granted, in part, and denied, in part, consistent with the discussion above.

2. The requested relief in the RRR filed by Green Jeep regarding staying and remanding this Proceeding is denied, consistent with the discussion above.

3. 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.

¹⁹ Interim Decision No. R23-0605-I.

4. This Decision is effective upon its Issued Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
June 17, 2024.**

(S E A L)



ATTEST: A TRUE COPY

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

Rebecca E. White,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ERIC BLANK

MEGAN M. GILMAN

TOM PLANT

Commissioners