

Decision No. R24-0555-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 24F-0236CP

MOUNTAIN STAR TRANSPORTATION, LLC DOING BUSINESS AS RED ROCKS SHUTTLE,

COMPLAINANT,

V.

ON LOCATION EVENTS, LLC DOING BUSINESS AS SHUTTLES TO RED ROCKS, AND ACE EXPRESS COACHES, LLC AND RAMBLIN' EXPRESS, INC.,

RESPONDENTS.

**INTERIM DECISION
VACATING EVIDENTIARY HEARING AND
SCHEDULED LIMITED HEARING**

Issued Date: August 1, 2024

I. STATEMENT

A. Procedural History

1. This proceeding concerns the formal complaint filed by Mountain Star Transportation, LLC ("Mountain Star") doing business as Red Rocks Shuttle on May 24, 2024, against On Location Events, LLC, doing business as Shuttles to Red Rocks ("On Location"), Ace Express Coaches, LLC, ("Ace Express") and Ramblin' Express, Inc. ("Ramblin Express").

2. On June 5, 2024, the Commission issued its Order Setting Hearing and Notice of Hearing and Order to Satisfy or Answer, which was then amended on June 6, 2024. The Order to Satisfy or Answer, as amended, required the respondents to satisfy the matters in the complaint or to answer the complaint within 20 days from service.

3. On June 12, 2024, the Commission referred this proceeding to an ALJ by minute entry.

B. COMPLAINT ALLEGATIONS

4. The Complaint, which includes 14 exhibits, is verified by Roman Lysenko, owner of Mountain Star.

5. Mountain Star is a common carrier holding and operating certificate of public convenience and necessity, No. 55952. Exhibit 14. That certificate authorizes:

(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.

(III) Transportation of passengers in call-and-demand shuttle service between all points in Denver County and Origin Hotel Red Rocks at 18485 West Colfax Avenue in Golden, CO 80401, on the one hand, and Red Rocks Park and Amphitheatre, State of Colorado, on the other hand.

RESTRICTIONS:

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

Item (III) is restricted against the transportation of passengers to and/or from Denver International Airport.

6. On Location owns no operating authority and holds no permits. However, On Location advertises and provides shuttle service from Denver and Jefferson counties to Red Rocks Amphitheater. On Location advertises its own brand "Shuttles to Red Rocks"—without PUC authority—through search engines, its own website <https://www.rrxshuttles.com>, and a reseller website AXS.com. See Exhibit 1-4.

7. On Location sells tickets on a per-seat basis at the rate of \$55 per seat to unrelated individuals and combines unrelated individuals in charter buses provided by Ace Express and Ramblin Express.

8. Mountain Star contends it is harmed by On Location illegally diverting traffic and revenues away from Complainant.

9. Mountain Star conditionally alleges that "if" On Location acts as a broker, then it advertises its own shuttle brand in violation of Rule 6016(a), (b), and (c) of the Rules Regulating Transportation by Motor Vehicle, 4 *Code of Colorado Regulations* (CCR) 723-6, and orders charter buses to transport unrelated individuals in violation of Rules 6001(l) and 6301(a), (b), and (c), 4 CCR 723-6.

10. Ace Express is a common carrier and holding the following authorities: CSB-00214, 44908, B-9941, B-10102.

11. Ramblin Express is a common carrier and holding the following authorities: CSB-83, 45392, 47966, B-10104, and L48419-is no longer a lease.

12. Mountain Star states that Ace Express and Ramblin Express provide charter buses to On Location to unrelated individuals for the purpose of shuttle service between Denver and Jefferson Counties on one hand and Red Rocks Amphitheater on the other hand.

13. Mountain Star states that neither Ace Express nor Ramblin Express are authorized to provide shuttle service between Denver and Jefferson Counties on one hand and Red Rocks Amphitheater on the other hand. See Exhibits 5-13. Therefore, Mountain Star contends that Ace Express and Ramblin Express are illegally diverting traffic and revenues away from Complainant.

C. Ace Express and Ramblin Express Motion to Dismiss

14. On June 26, 2024, the Motion to Dismiss and the Notice of Technical Difficulty was filed by was filed by Ace Express and Ramblin Express (collectively, "Joint Movants"). Based upon the technical difficulties incurred, the Motion to Dismiss was filed nunc pro tunc to June 25, 2024. Rule 1201(d) of the Rules of Practice and Procedure, 4 CCR 723-1.

15. Joint Movants contend that the Complaint should be dismissed for the failure to state a claim for which relief can be granted. In the case at bar, Joint Movants contend the transportation provided was authorized pursuant to Rule 6301, 4 CCR 723-6. At all times relevant to the Complaint, Joint Movants respectively provided transportation by charter bus under limited regulation permits CSB-00214 and CSB-83. In sum, it is argued that the Complaint alleges transportation was provided outside of that authorized as common carriers, yet a CPCN is not required for providing the subject transportation. Accordingly, the holder of a CPCN is not protected from competition by Limited Regulation Carriers.

D. On Location Motion to Dismiss

16. On June 25, 2024, the On Location Events, LLC Motion to Dismiss was filed by On Location. Pointing to Complainant's acknowledgement and admission that On Location is a separate and unaffiliated company from both Ace Express and Ramblin Express, On Location states that its Shuttles to Red Rocks program works with Commission-authorized transportation providers that provide round-trip transportation services for concertgoers.

17. On Location contends that the Complaint should be dismissed "based on several independent grounds, including lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted."

18. On Location argues that the Commission does not have jurisdiction over it and its business activities because is not a public utility or any other regulated provider. Based thereupon and admissions within the Complaint, the Complaint should be dismissed.

19. On Location next argues that the Complaint should be dismissed because it fails to state a claim against On Location.

20. Finally, On Location contends that the Complaint should be dismissed because Complainant failed to comply with Rule 1201, 4 CCR 723-1, and § 13-1-127, C.R.S. Further, the obligation cannot be satisfied because the amount in controversy exceeds \$15,000.

E. Complainant Response

21. On July 10, 2024, the "Response to Motion to Dismiss" was filed by Complainant. Complainant does not address the merits of the motions, but rather contends such matters should be addressed at the scheduled evidentiary hearing.

II. REPRESENTATION

22. On Location contends that the Complaint should be dismissed because Complainant failed to comply with Rule 1201, 4 CCR 723-1, and § 13-1-127, C.R.S. Further, the obligation cannot be satisfied because the amount in controversy exceeds \$15,000.

23. The Complaint was signed “Mountain Star Transportation LLC DBA Red Rocks Shuttle by Roman Lysenko.” The Verification of Roman Lysenko filed as part of the Complaint states “I am the owner of Mountain Star Transportation, LLC DBA Red Rocks Shuttle.” Mr. Lysenko makes no representation to be a licensed attorney.

24. As the owner, Mr. Lysenko has previously been permitted to represent Mountain Star before the Commission. *See e.g.*, Decision Nos. R22-0001-I issued in Proceeding No. 21A-0548CP (January 4, 2022) and R22-0587-I issued in Proceeding No. 22A-0326CP-EXT (September 29, 2022). Different here, On Location also contends the amount in controversy exceeds \$15,000 because, in addition to monetary penalties, it is requested that On Location cease and desist its business operations in Colorado, where it has lawfully operated for nearly a decade. On Location contends that its lost revenues as a result of the requested relief are in controversy.

25. Rule 1201(a), 4 CCR 723-1, requires a party in a proceeding before the Commission to be represented by an attorney authorized to practice law in the State of Colorado, except that, pursuant to Rule 1201(b), 4 CCR 723-1, an individual may appear without an attorney: (a) to represent her/his own interests; or (b) to represent the interests of a closely-held entity, as provided in § 13-1-127, C.R.S. The Commission has emphasized that this requirement is mandatory and has found, if a party does not meet the criteria of this Rule, that a filing made by non-attorneys on behalf of that party is void and of no legal effect and that a non-attorney

may not represent a party in Commission adjudicative proceedings. *See, e.g.*, Decisions No. C05-1018, Proceeding No. 04A-524W issued August 30, 2005; No. C04-1119, Proceeding No. 04G-101CP issued September 28, 2004; and No. C04-0884, Proceeding No. 04G-101CP issued August 2, 2004.

26. To proceed in this matter without an attorney, Mountain Star must meet the criteria of Rule 1201(b)(II), 4 CCR 723-1, and establish that it is a closely held entity. This means that a party must establish that it has “no more than three owners.” Section 13-1-127(1)(a), C.R.S. It must also demonstrate that it meets the requirements of § 13-1-127(2), C.R.S. That statute provides that an officer¹ may represent a closely held entity before an administrative agency if both of the following conditions are met: (a) the amount in controversy does not exceed \$15,000; **and** (b) the officer provides the administrative agency with evidence, satisfactory to the agency, of the authority of the officer to represent the closely held entity.²

27. In the Complaint the requested relief is:

- a. Respondents to pay civil penalties pursuant to the Commission’s rules;
- b. Respondents desist offering shuttle service to and from Red Rocks Amphitheater; and
- c. Suspension of Ace and Ramblin authorities to be suspended.

¹ Section 13-1-127(1)(i), C.R.S., defines “officer” as “a person generally or specifically authorized by an entity to take any action contemplated by” § 13-1-127, C.R.S.

² As pertinent here, § 13-1-127(2.3), C.R.S., states that an officer of a corporation “shall be presumed to have the authority to appear on behalf of the closely held entity upon providing evidence of the person’s holding the specified office or status[.]”

28. The Court of Appeals determined that the amount in controversy is the amount involved in the overall litigation:

While the hearing on the request for a preliminary injunction did not, itself, involve a request for monetary relief, the pertinent statute is not intended to be applied on such a piecemeal basis. That statute does not permit a closely held corporation to be represented by a lay person on a motion simply because the motion itself will not result in any monetary liability; it is, rather, the amount involved in the overall litigation that is the test under section 13-1-127(2)(a).

Keller Corp. v. Kelley, 187 P.3d 1133, 1136 (Colo. App. 2008)

29. Mountain Star may either obtain counsel or to show cause why Rule 4 CCR 723-1-1201 does not require it to be represented in this matter by an attorney at law currently in good standing before the Supreme Court of the State of Colorado. Mountain Star will be afforded an opportunity to present evidence during the hearing scheduled below.

III. VACATING EVIDENTIARY HEARING AND SCHEDULING LIMITED HEARING

30. It is noteworthy that subject matter jurisdiction is appropriately examined at any stage in the proceeding. "Absence of subject matter jurisdiction may be noticed at any stage of an action, including appeal." People v. Lockhart, 699 P.2d 1332, 1335 n.7 (Colo. 1985), *citing* Denver Urban Renewal Authority v. Byrne, 618 P.2d 1374 (Colo. 1980).

31. Commission rules permit defenses of lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted to be made by separate motion filed on or before the date the answer or reply to a Complaint is due. Rule 1308(e), 4 CCR 723-1.

32. Rule 12(d) C.R.C.P. expressly provides that motions seeking the same relief as the pending motions shall be heard and determined before trial unless it is ordered that

determination thereof be deferred until the trial. Rule 12(d) C.R.C.P. Similarly, the undersigned finds it appropriate that pending motions be resolved.

33. In order to provide sufficient time to consider the Motions to Dismiss, and for the Parties to prepare for a limited hearing scheduled herein, the evidentiary hearing scheduled shall be vacated. An evidentiary hearing shall be rescheduled, if necessary, after determination of pending motions.

34. In *Cnty. Banks of Colo. v. Landy*, 2015 Colo. Dist. LEXIS 1913, Judge Charles M. Pratt, District Court Judge in Arapahoe County, summarized a hearing employed to determine subject matter jurisdiction:

A motion made under Colorado Rule of Civil Procedure 12(b)(1) based upon lack of subject matter jurisdiction may go beyond the allegations in the complaint and challenge the facts upon which subject matter jurisdiction depends. *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 924 (Colo. 1993). "The burden of establishing subject matter jurisdiction rests on the party asserting jurisdiction" and the "court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." *Firstier Bank, et al. v. F.D.I.C.*, 935 F.Supp. 2d 1109, 1115 (D. Colo. 2013). Colorado courts look to the federal rules of civil procedure for guidance because of their similarities. *Trinity Broadcasting of Denver*, 848 P.2d at 924. It is the claimants who have "the burden of proving jurisdiction..." *Barry v. Bally Gaming, Inc.*, 320 P.3d 387, 390, 2013 COA 176, 2013 COA 176 (Colo. App. 2013).

35. It is appropriate that a limited evidentiary hearing be held in order to take testimony or other evidence on the disputed facts concerning the Commission's subject matter jurisdiction to hear this Formal Complaint with Complainant carrying the burden of proof.

A. Remote Hearing and Unified Numbering System for Hearing Exhibits

36. The hearing will be held remotely by Zoom, as ordered below. A webcast of proceedings will be available to the public through the Commission's website.

37. This Decision, Attachment A, and Attachment B provide important information and instructions to facilitate holding the remote hearing, which all parties must follow.

38. The procedures developed for the remote hearing are intended to replicate, as practicable, evidence presentation as it occurs when parties and witnesses are present in the hearing room. For example, participating by videoconference allows parties and witnesses to view exhibits on the video conference screen while the exhibits are being offered into evidence and witnesses testify about them.

39. The remote hearing will be conducted via videoconference using the Zoom platform. Attachment A to this Decision provides information about the Zoom platform and how to use Zoom to participate in the remote hearing. To minimize the potential that the remote hearing may be disrupted by non-participants, the link and meeting ID, or access code to attend the hearing will be provided to the parties by email approximately one week before the hearing, and the parties and witnesses will be prohibited from distributing that information to anyone not participating in the hearing.

40. At the hearing, the parties may call witnesses, present evidence, and make arguments in support of their position. Evidence includes documentary exhibits, testimony, and other tangible items that a party wishes the ALJ to consider in reaching a decision as to the allegations in this proceeding. Given that the hearing will accommodate remote participation by videoconference, exhibits must be presented electronically.

41. The Public Utilities Commission Administrative Hearings Section uses box.com to receive and manage exhibits that are first presented in this type of remote hearing.³ As such, it

³ Box.com is a web-based document sharing service. When exhibits are first presented during the hearing, the Commission will receive them electronically from each party's box.com folder for display.

is essential that the parties ensure they are able to access and use box.com prior to the hearing. To this end, the parties will be provided box.com links and instructions to: (a) upload exhibits for use during the hearing; and (b) download exhibits once they are presented during the hearing.

42. Each party must (a) pre-mark all hearing exhibits with a hearing exhibit number within their assigned number block before uploading the exhibits to the party's designated box.com folder; (b) sequentially page-number each page of exhibits longer than two pages, with the first page number as page 1, regardless of content, before uploading the exhibits to the party's designated box.com folder; and (c) upload all pre-marked exhibits into each party's respective designated box.com folder prior to presenting them during the hearing.

43. Attachment B outlines procedures and requirements for marking and formatting exhibits aimed at facilitating efficient and smooth electronic evidence presentation at the remote hearing. It is very important that the parties carefully review and follow all requirements in this Decision and Attachments A and B.

44. In order to efficiently organize the numbering and preparation of exhibits for the hearing, the parties shall use a unified numbering system for all hearing exhibits. Blocks of hearing exhibit numbers are assigned as follows:

- Mountain Start is assigned hearing exhibit numbers 100 to 199;
- On Location is assigned hearing exhibit numbers 200 to 299; and
- Ace Express and Ramblin Express are assigned hearing exhibit numbers 300 to 399.

B. Additional Procedural Notices and Advisements

45. The parties are on notice that the ALJ will retain the discretion to change the method by which the hearing will be conducted.

46. Additional procedural requirements may be addressed in future Interim Decisions.

47. The parties are advised that this proceeding is governed by the Rules of Practice and Procedure found at 4 CCR 723-1. The ALJ expects the parties comply with these rules. The rules are available on the Commission's website (<http://puc.colorado.gov/pucrules>), and in hard copy from the Commission.

48. Each party is specifically advised that all filings with the Commission must also be served upon all other parties in accordance with Rule 1205 of the Rules of Practice and Procedure, 4 CCR 723-1.

49. The Parties are also on notice that failure to appear at the scheduled hearing may result in decisions adverse to their interests.

C. Informational Videoconference Practice Session

50. The ALJ will hold an informal practice videoconference session if requested by any Party to give the Parties an additional opportunity to practice using Zoom and box.com before the hearing.

51. The Parties may contact the Commission Legal Assistants by email at casey.federico@state.co.us or stephanie.kunkel@state.co.us to schedule an informal practice video conference session.

52. The Parties will receive information and a link to participate in the informal practice session by email.

IV. **ORDER**

A. **It Is Ordered That:**

1. The evidentiary hearing scheduled for August 12, 2024, is vacated.
2. A limited hearing to address representation and subject matter jurisdiction shall be

conducted at the following date, time, and place:

DATE: September 9, 2024

TIME: 10:00 a.m.

LOCATION: Commission Hearing Room
1560 Broadway, Suite 250
Denver, CO 80202

WEBCAST: Commission Hearing Room A

METHOD: Fully remote by videoconference using Zoom at the link to be provided to counsel and the parties via email prior to the hearing.⁴ No party should appear at the Commission in person.

3. The parties shall comply with the requirements established in this Decision and shall make the filings as required by the adopted procedural schedule.

4. The parties and witnesses may not distribute the Zoom link and access code to anyone not participating in the remote hearing.

5. All participants in the hearing must comply with the requirements in Attachments A and B to this Decision, which are incorporated herein and, in the discussion above.

6. **Videoconference Participation.** Counsel for the parties, parties, and witnesses must participate in the evidentiary hearing by videoconference using the Zoom platform.

7. **Evidence Presentation at the Evidentiary Hearing.** Because the hearing will accommodate remote participation by videoconference, all evidence must be presented

⁴ Instructions for using the Zoom videoconference platform are provided in Attachment A to this Decision.

electronically. Each party is responsible for ensuring that they and their respective witnesses: (a) have access to all pre-filed exhibits; and (b) can download and view documents available from box.com during the hearing.

8. An informal Zoom practice session will be held upon request.
9. This Decision is effective immediately.

(S E A L)



ATTEST: A TRUE COPY

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

G. HARRIS ADAMS

Administrative Law Judge

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

Rebecca E. White,
Director