

Decision No. R24-0603-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 24F-0073CP

GREEN JEEP TOURS LLC,

COMPLAINANT,

V.

PURPLE MOUNTAIN TOUR COMPANY LLC AND ZACHARY BUGG AND BROOKE
LYNN CARSWELL,

RESPONDENTS.

**INTERIM DECISION
GRANTING IN PART AND DENYING IN PART
RESPONDENTS' MOTION FOR SUMMARY JUDGMENT,
AND DENYING COMPLAINANT'S
MOTION FOR SUMMARY JUDGMENT**

Issued Date: August 21, 2024

TABLE OF CONTENTS

I. STATEMENT AND PROCEDURAL HISTORY	2
A. Summary.....	2
B. Procedural History	2
II. UNDISPUTED FACTS AND FACTUAL BACKGROUND	8
III. RELEVANT LAW	12
A. Summary Judgment Standard.....	12
B. Law Governing Sightseeing Transportation.....	14
IV. FINDINGS, ANALYSIS, AND CONCLUSIONS	15
A. Respondents' Motion for Summary Judgment.....	15

1. Respondents' Arguments	15
2. Complainant's Arguments.....	16
B. Complainant's Motion for Summary Judgment	17
1. Complainant's Arguments.....	17
2. Respondents' Response to Motion for Summary Judgment	18
C. Findings and Conclusions.....	19
V. ORDER.....	22
A. It Is Ordered That:	22

I. STATEMENT AND PROCEDURAL HISTORY

A. Summary

1. This Decision grants in part and denies in part Respondents' Motion for Summary Judgment. It also denies Complainant's Motion for Summary Judgment. The Decision dismisses the claims asserted against Respondents Zachary Bugg and Brooke Lynn Carswell individually.

B. Procedural History

2. This Proceeding has a long and complicated procedural history. However, only the history pertinent to the parties' cross Motions for Summary Judgment will be addressed.

3. On February 12, 2024, Green Jeep Tours LLC ("Complainant" or "Green Jeep") commenced this Proceeding by filing a Formal Complaint against Purple Mountain Tour Company LLC ("Purple Mountain"); Zachary Bugg, Lay Representative of Purple Mountain; and Brooke Lynn Carswell, Managing Director of Purple Mountain (collectively, "Respondents"). Green Jeep's Formal Complaint alleges that Respondents have "offered to sell and ha[ve] sold individual tickets" for transportation services without the proper certificate of public convenience and necessity in violation of Rule 6016 of the Commission's Rules

Regulating Transportation by Motor Vehicle, 4 *Code of Colorado Regulations* (“CCR”) 723-6 and requests relief.

4. Green Jeep’s Formal Complaint asserts the following allegations against Purple Mountain.

a. That Purple Mountain did not

hold any CPCN or temporary authority from this Commission. Thus, all transportation service either performed or advertised by Purple [Mountain] up to the date this complaint was filed can only be performed under its LL or ORC permits and subject to the restrictions set forth under those permits, which among others, as charter permits, prohibit the selling of individual tickets and providing service to groups other than those permitted under the Commission’s charter rules, including .4 CCR 723-6-6001 and 4 CCR 723-6-6301.¹

b. That Purple Mountain “has offered and continues to offer to provide transportation service by individual ticket in violation of the ORC and LL restrictions which limit sales under such permits to charter service.”²

c. That Purple Mountain “has offered to sell and has sold individual tickets without a tariff for said amounts on file with the Colorado Public Utilities Commission.”³

d. And that Respondents Bugg and Carswell “have aided and abetted, and continue to aid and abet Respondent Purple [Mountain] in the performance of the activities complained of herein and in the commission of the afore mentioned acts.”⁴

5. Green Jeep asserts that if Respondents’ allegedly violative actions are not immediately curtailed, it and the public will suffer irreparable harm. In that vein, Green Jeep enumerates 13 grounds for relief from Purple Mountain’s alleged regulatory violation, including entering findings that Purple Mountain violated Commission rules and that Bugg and Carswell “aided and abetted” Purple Mountain in violating Commission rules; enjoining Respondents

¹ Formal Complaint, p. 3, § IV(a).

² *Id.* at pp. 3-4, § IV(b).

³ *Id.* at p. 4, § IV(c).

⁴ *Id.* at p. 4, § IV(d).

from engaging in violative behavior; entering cease and desist orders against Respondents and their activities; and barring Respondents from obtaining Commission authority to operate in the future.⁵

6. By way of background, Purple Mountain filed an Application for a Certificate of Public Convenience and Necessity (“Application”) on February 15, 2023, in Proceeding No. 23A-0078CP. Green Jeep intervened in that Proceeding and opposed the granting of a CPCN to Purple Mountain.⁶ An evidentiary hearing was held in Proceeding No. 23A-0078CP on September 14 and 18, 2023. After considering the evidence offered, Recommended Decision No. R24-0036 was issued on January 19, 2024, granting Purple Mountain’s Application for a CPCN. Green Jeep filed Exceptions to the Recommended Decision⁷, but the Commission denied the Exceptions and upheld the Recommended Decision.⁸ Green Jeep then appealed the Commission’s denial of its Exceptions.⁹ The Commission denied that request, as well.¹⁰

7. On May 7, 2024, Purple Mountain was issued its Letter of Authority under CPCN No. 55999S. It is now authorized by the Commission to provide the following services:

Authority to operate as a common carrier by motor vehicle for hire for the transportation of passengers in call-and-demand sightseeing service between all points within a 136-mile radius of 24401 County Road 390 Granite, Colorado.

RESTRICTIONS:

⁵ *Id.* at pp. 5-6.

⁶ See Petition for Leave to Intervene, filed by Green Jeep Tours, LLC, on Mar. 22, 2023, in Proceeding No. 23A-0078CP.

⁷ See Intervenor by Right, Green Jeep Tours LLC’s Exceptions to Decision No. R24-0036, filed Mar. 8, 2024, in Proceeding No. 23A-0078CP.

⁸ Decision No. C24-0280, Commission Decision Denying Exceptions to Recommended Decision No. R24-0036, issued Apr. 29, 2024.

⁹ Intervenor by Right, Green Jeep Tours LLC’s Application for Rehearing, Reargument, or Reconsideration of Commission Decision No. C24-0280, filed June 3, 2024.

¹⁰ Decision No. C24-0471, Commission’s Decision Granting, in Part, and Denying, in Part, Application for Rehearing, Reargument, or Reconsideration of Decision No. C24-0280, issued July 2, 2024.

(1) Service may only be provided from May 1st through October 31st.

(2) No service may originate or terminate within the county limits of Denver, Jefferson, Adams, and Arapahoe counties, Colorado or within the city limits of Boulder, Colorado.

8. On February 16, 2024, the Commission issued and sent to Respondents an Order to Satisfy or Answer the Formal Complaint notifying Respondents that a Formal Complaint had been asserted against them. The Order to Satisfy or Answer advised Respondents that a responsive pleading to the Formal Complaint or evidence that they had satisfied the allegations of the Formal Complaint was due “20 days from service upon you of this order and copy of the attached complaint.” Twenty days after service of the Formal Complaint expired on March 7, 2024.

9. On February 21, 2024, the Commission referred this Proceeding by minute entry to an Administrative Law Judge (ALJ) for disposition. The Proceeding was subsequently assigned to the undersigned ALJ.

10. Because the Commission had not received a response from Respondents within the time period established by the Order to Satisfy or Answer, on March 22, 2024, the undersigned ALJ issued Decision No. R24-0188-I ordering Respondents to file a responsive pleading within seven days of the Decision and requesting the parties to advise the ALJ of their preferred hearing format.

11. One week later, on March 29, 2024, Respondents moved for a one-week extension of time, up to and including April 5, 2024, within which to respond to the Formal Complaint.¹¹ Complainant opposed Respondents’ request for extension of time.

¹¹ See Respondents’ Motion for Extension of Time to Respond to Complaint (Motion for Extension of Time), filed Mar. 29, 2024.

12. On April 5, 2024, Respondents filed their Evidence of Satisfaction, Response to Complaint and Statement Regarding Hearing, along with exhibits suggesting that Respondents were no longer offering or accepting payment for single-ticket transportation sales.

13. By Decision No. R24-0229-I, issued April 12, 2024, the ALJ granted Respondents' Motion for Extension of Time and accepted Respondents' Evidence of Satisfaction, Response to Complaint and Statement Regarding Hearing into the record.

14. Subsequently, on April 18, 2024, the ALJ issued Decision No. R24-0246-I vacating the April 22, 2024, evidentiary hearing, and rescheduling the evidentiary hearing to be held in-person in Estes Park, Colorado, on June 27, 2024.

15. On May 29, 2024, Respondents filed their Motion for Summary Judgment, seeking the dismissal of the Formal Complaint. As described more fully below, Respondents postured that Complainant was attempting to relitigate the grant of Purple Mountain's CPCN in Proceeding No. 23A-0078CP. Respondents argued that Complainant had failed to and could not establish that the CPCN it had been granted should be revoked or was issued improperly, and that the Decisions granting its CPCN were binding. Further, Respondents maintained that they had satisfied the allegations of the Formal Complaint, meriting dismissal of the allegations. Finally, Respondents asserted that the Commission lacks jurisdiction over Respondents Bugg and Carswell.

16. Less than one week before the scheduled June 27, 2024 in-person evidentiary hearing, on June 21, 2024, Complainant moved to Vacate and Reschedule Hearing to Re-Set Pre-Hearing Deadlines Including Complainant's Witness List and Exhibits and to Waive Response Time. Complainant argued that it had not had ample opportunity to conduct discovery and was therefore unprepared for the evidentiary hearing.

17. Then, on June 26, 2024, just one day before the scheduled hearing, Complainant filed its own Motion for Summary Judgment, seeking “all other relief available to [it], including the reopening of Docket No. 23A-0078CP as provided for by C.R.S. 40-6-112 for the purpose of cancelling of CPCN 55999S in its entirety for illegal operations and the aggravated circumstances set forth above.”¹²

18. Noting that cross motions for summary judgment were pending, that the parties had not timely filed exhibits or exhibit and witness lists, and that discovery issues appeared to still linger, the undersigned ALJ agreed to vacate and reschedule the June 27, 2024 evidentiary hearing.¹³

19. By Decision No. R24-0478-I, issued July 8, 2024, the ALJ rescheduled the in-person evidentiary hearing to August 22, 2024. Decision No. R24-0478-I also modified the procedural schedule to give the parties time to file their respective exhibits and witness and exhibit lists.¹⁴ However, Decision No. R24-0478-I denied Complainant’s request to conduct additional discovery — Complainant had asked for the first time at a prehearing conference held June 27, 2024, to conduct depositions, including the depositions of Respondents — finding such request untimely and well outside the previously-set discovery period.¹⁵

20. All parties have now filed their witness and exhibit lists within the timeline set by Decision No. R24-0478-I.

21. With the completion of all discovery in this Proceeding and the filing of the parties’ respective witness and exhibit lists, the ALJ now turns to the pending cross Motions for Summary Judgment.

¹² Complainant’s Motion for Summary Judgment, p. 7, filed June 26, 2024.

¹³ See Decision No. R24-0454-I, issued June 26, 2024.

¹⁴ Decision No. R24-0478-I, p. 6, ¶ 23.

¹⁵ *Id.* at p. 7, ¶¶ 24-32.

II. UNDISPUTED FACTS AND FACTUAL BACKGROUND

22. Purple Mountain is a limited liability company providing transportation services in Colorado.¹⁶

23. Respondents Bugg and Carswell are members of Purple Mountain.¹⁷

24. Green Jeep holds PUC CPCN No. 55984, which was issued to it by the PUC on April 25, 2023. CPCN 55984 authorizes Green Jeep to provide the following sightseeing services in the vicinity of Estes Park, Colorado, and Rocky Mountain National Park:

- (1) Sightseeing service, on call and demand, between all points within the area comprised of (1) the 20-mile radius of the intersection of Moraine and Elkhorn, Estes Park, Colorado, (2) all of Rocky Mountain National Park beyond the 20-mile radius of the intersection of Moraine and Elkhorn, Estes Park, and (3) all points within the 10-mile area beyond the boundary of Rocky Mountain National Park beyond the 20-mile radius of the intersection of Moraine and Elkhorn, Estes Park, Colorado;
- (2) Sightseeing service between all points within a 20-mile radius of the intersection of Moraine and Elkhorn, Estes Park, Colorado on the one hand and all points within the area comprised of both Rocky Mountain National Park and all points in the 10-mile area beyond the boundary of Rocky Mountain National Park on the other hand.

RESTRICTIONS:

1. Items 1 and 2 are restricted to the use of vehicles with a rated seating capacity of eight passengers or more plus the driver;
2. Items 1 and 2 are restricted to the use of vehicles with a rated seating capacity of 15 passengers or less including the driver;
3. Items 1 and 2 are restricted to the use of open air vehicles with convertible tops;

¹⁶ Formal Complaint, p. 3.

¹⁷ Respondent Bugg's Responses to Green Jeep Tours LLC's First Set of Discovery, Response to Interrogatory 1; and Respondent Carswell's Responses to Green Jeep Tours LLC's First Set of Discovery, Response to Interrogatory 1.

4. Items 1 and 2 are restricted to transportation service that originates and terminates at the same point;
5. Item 2 is restricted to serving points named in carrier's tariff.¹⁸

25. Just over a year after Green Jeep was issued its CPCN, on May 7, 2024, Purple Mountain was granted PUC CPCN No. No. 55999S. The scope of Purple Mountain's authority is as follows:

Authority to operate as a common carrier by motor vehicle for hire for the transportation of passengers in call-and-demand sightseeing service between all points within a 136-mile radius of 24401 County Road 390 Granite, Colorado.

RESTRICTIONS:

- (1) Service may only be provided from May 1st through October 31st.
- (2) No service may originate or terminate within the county limits of Denver, Jefferson, Adams, and Arapahoe counties, Colorado or within the city limits of Boulder, Colorado.

26. Purple Mountain was granted its CPCN in Proceeding No. 23A-0078CP. Green Jeep intervened in that Proceeding and objected to the grant of any authority to Purple Mountain. Nonetheless and over Green Jeep's objections, Decision No. R24-0036 approved Purple Mountain's Application for a CPCN.

27. Green Jeep contested Decision No. R24-0036 to the Commission, filing exceptions and later seeking rehearing, reargument, or reconsideration. The Commission denied both challenges by Green Jeep, upholding Decision No. R24-0036 in its entirety.¹⁹

28. In addition to the CPCN it now holds, Purple Mountain holds Off-Road Charter Permit No. ORC-00248 and Luxury Limousine Permit No. LL-04140.

¹⁸ Letter of Authority, issued April 25, 2023, for CPCN No. 55984, attached as Appendix A to Notice of Green Jeep Tours LLC in Compliance with Decision No. R23-0260-I, filed Apr. 27, 2023, in Proceeding No. 23A-0078CP.

¹⁹ See Decision Nos. C24-0280 and C24-0471.

29. Respondents Bugg and Carswell are members of Purple Mountain.

30. Green Jeep commenced this action approximately one month after the issuance of Decision No. R24-0036.

31. Attached to its Formal Complaint are emails and receipts Green Jeep obtained when it attempted to book tours with Purple Mountain. Exhibit A to the Formal Complaint shows a booking with Purple Mountain for two people for Thursday, September 12, 2024, totaling \$207.76; a booking for the same date for three people, totaling \$311.64; and a booking for a longer tour for two people on Wednesday, May 1, 2024, at a total cost of \$315.88. Notably, Exhibit A to the Formal Complaint does *not* state *when* these booking were made. However, the ALJ notes that Complainant filed Exhibit A with its Formal Complaint on February 12, 2024, and therefore presumes that the bookings identified in Exhibit A were made on or before February 12, 2024.

32. Exhibit B to Green Jeep's Formal Complaint is an email confirmation dated February 7, 2024, sent by Purple Mountain to "Nikki@greenjeeptour.com" confirming the "Top of the World" tour for two people on Tuesday, June 11, 2024, at a cost of \$207.76.

33. Respondents responded to the Formal Complaint by offering evidence that they had satisfied the allegations. Specifically, Respondents attached Exhibit 1 to their Evidence of Satisfaction, Response to Complaint and Statement Regarding Hearing ("Evidence of Satisfaction"): a report generated on April 5, 2024, showing the cancellation of nine bookings for all parties listed on the report which comprised groups of four or less individuals.²⁰

²⁰ Exhibit 1 to Respondents' Evidence of Satisfaction, Response to Complaint and Statement Regarding Hearing ("Evidence of Satisfaction"), filed April 5, 2024.

34. Exhibit 2 to Evidence of Satisfaction is a screenshot of Purple Mountain's booking page, also dated April 5, 2024, with a banner stating that it is "Currently only booking private tours."²¹

35. In addition, Respondents stated in their Evidence of Satisfaction that Purple Mountain refunded the amounts paid for the nine bookings identified as "canceled" in Exhibit 1 to their Evidence of Satisfaction. However, Exhibit 1 only shows the bookings as being canceled; it does not indicate how much or even if a refund was issued.

36. Respondents filed their Motion for Summary Judgment on May 29, 2024.

37. Complainant responded to the Motion for Summary Judgment on June 10, 2024, but attached no evidence to support its response, save for the discovery responses filed by each of the three Respondents. Complainant's Response does not point to or identify any specific discovery response as supportive of Complainant's opposition to Respondents' Motion for Summary Judgment.

38. Complainant filed its own Motion for Summary Judgment one month later, on June 26, 2024. Complainant's Motion for Summary Judgment states that it received discovery from Respondents only days prior to filing its Motion for Summary Judgment.

39. Attached to Complainant's Motion for Summary Judgment are documents showing that Purple Mountain used the services of a transportation broker, including screenshots of what appears to be online advertising for Purple Mountain's transportation services. Complainant relies upon these documents to argue that these transportation brokers acted as Respondents' agents when the brokers advertised Purple Mountain's services. However, it is unclear when the offered web pages were generated.

²¹ Exhibit 2 to Evidence of Satisfaction.

40. In addition, and perhaps more importantly, though, Complainant has also attached to its Motion for Summary Judgment a five-page document listing bookings for tours occurring between September 19 and November 1, 2023, as well as one booking for a tour on May 3, 2024. The list identifies more than 90 bookings. Although the document does not state when or by whom it was generated, Complainant represents that its counsel received the document by email on June 24, 2024.²² Complainant characterizes the document as “memorializing the sale and transportation of individual tickets during the period after September 18, 2023, and prior to Respondents obtaining PUC authorization to conduct such operations.”²³

41. Complainant and Respondents each now ask that summary judgment be granted in their respective favor.

III. RELEVANT LAW

A. Summary Judgment Standard

42. Colorado Rule of Civil Procedure (“C.R.C.P.”) 56 outlines the standards and procedures for initiating or opposing a motion for summary judgment. According to Rule 56(a), a party seeking to recover on a claim, cross-claim, or counter-claim may file a motion for summary judgment 21 days after the commencement of the action.²⁴ Additionally, a party defending a claim, cross-claim, or counter-claim can also move for summary judgment. Rule 56(b).

43. When a decision maker considers a motion for summary judgment, “[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

²² Complainant’s Motion for Summary Judgment, p. 5, ¶ 7.

²³ *Id.*, pp. 5-6, ¶ 7.

²⁴ Colorado Rule of Civil Procedure (“C.R.C.P.”) 56(a) (2012).

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”²⁵ Rule 56(c). The key component for a motion for summary judgment to be successful is for the moving party to show that the case truly presents “no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.”²⁶

44. Colorado courts, in construing and further defining the summary judgment standards set forth in Rule 56, typically recognize that the purpose of summary judgment is “to permit the parties to pierce the formal allegations of the pleadings and save the time and expense connected with a trial when, as a matter of law, based on undisputed facts, one party could not prevail.”²⁷ “Thus, a [decision maker] may enter summary judgment on behalf of a moving or nonmoving party if, in addition to the absence of any genuine factual issues, the law entitles one party or the other to a judgment in its favor.”²⁸ “By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.”²⁹ “If the evidence opposing summary judgment is merely colorable or is not significantly probative, summary judgment may be granted.”³⁰

45. A “material fact” is “a fact the resolution of which will affect the outcome of the case.”³¹ If a trier of fact can draw different inferences from the application of the legal criteria to

²⁵ C.R.C.P. 56(c) (2012).

²⁶ *Id.*

²⁷ *Mt. Emmons Min. Co. v. Crested Butte*, 690 P.2d 231, 238 (Colo. 1984) (quoting *Ginter, Jr. v. Palmer & Co.*, 196 Colo. 203, 205, 585 P.2d 583, 584 (1978)).

²⁸ *Mt. Emmons Min.*, 690 P.2d at 239.

²⁹ *Anderson v. Lindenbaum*, 160 P.3d 237, 239 (Colo. 2007) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)).

³⁰ *Anderson*, 160 P.3d at 239 (quoting *Anderson* 477 U.S. at 249).

³¹ *Mt. Emmons Min.*, 690 P.2d at 239.

the facts, a motion for summary judgment should be denied.³² “Whether a genuine issue exists as to any issue of material fact is itself a question of law.”³³

46. “The moving party has the initial burden to show that there is no genuine issue of material fact.”³⁴

47. Once the moving party meets this initial burden, “the burden shifts to the nonmoving party to establish that there is a triable issue of fact.”³⁵

48. “In determining whether summary judgment is proper, the nonmoving party is entitled to the benefit of all favorable inferences that may reasonably be drawn from the undisputed facts, and all doubts must be resolved against the moving party.”³⁶ When a motion for summary judgment is made, “the opposing party’s response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial.”³⁷

B. Law Governing Sightseeing Transportation

49. The Commission’s Rules Regulating Transportation Services prohibit an entity from advertising or offering to provide transportation services unless the entity has been authorized to provide such transportation services by the Commission. Rule 6016 states:

- (a) No Person shall offer to provide a transportation service without an Authority or Permit to provide such service.
- (b) Advertising to arrange transportation service as a Transportation Broker is not an offer to provide transportation service; rather, it is an offer to broker transportation service. A Person shall be presumed to have offered transportation service if the Person has not disclosed the fact that the services are being arranged by a Transportation Broker.

³² See *id.*

³³ *Keybank Nat’l Ass’n v. Mascarenas*, 17 P.3d 209, 215 (Colo. App. 2000).

³⁴ *AviComm Inc. v. Colo. Public Utils. Comm’n*, 955 P.2d 1023, 1029 (Colo. 1998).

³⁵ *Id.*

³⁶ *Bebo Constr. Co. v. Mattox & O’Brien*, 990 P.2d 78, 83 (Colo.1999).

³⁷ *Keybank Nat’l Ass’n*, 17 P.3d at 215.

(c) Advertising to provide transportation service or advertising transportation service other than by brokerage is an offer to provide the advertised service.

50. A luxury limousine service — for which Purple Mountain has a permit — “that charges or offers to charge for transportation services on a per Person basis shall be presumed to be providing or offering to provide services as a Common Carrier.”³⁸

51. Complainant alleges, in essence, that Respondents violated Rule 6016’s prohibition against advertising and offering transportation services by offering single-ticket sales for seats on its transportation vehicles before it had secured CPCN No. 55999S.

52. Complainant also alleges that Respondents Bugg and Carswell “aided and abetted” Purple Mountain’s alleged violative actions. To prove a claim of “aiding and abetting” a claimant must show the following: “The elements of the tort of aiding and abetting a breach of fiduciary duty include: (1) breach by a fiduciary of a duty owed to a plaintiff, (2) a defendant’s knowing participation in the breach, and (3) damages.”³⁹

IV. FINDINGS, ANALYSIS, AND CONCLUSIONS

53. The parties’ cross-motions for summary judgment address many of the same issues and arguments. Where appropriate, the arguments will be therefore be addressed together.

A. Respondents’ Motion for Summary Judgment

1. Respondents’ Arguments

54. Respondents raise a number of arguments in their Motion for Summary Judgment and Response to Complainant’s Motion for Summary Judgment. Respondents first contend that the arguments and issues Complainant raises in its Formal Complaint were thoroughly addressed

³⁸ Rule 6307(b), 4 CCR 723-6.

³⁹ *Nelson v. Elway*, 971 P.2d 245, 249, (Colo. 1998).

by Decision No. R24-0036 granting Purple Mountain's CPCN, as well as the Commission's Decision Nos. C24-0280 and C24-0471 which affirmed and upheld Decision No. R24-0036. Respondents argue that because the issues were thoroughly addressed and adjudicated therein, they cannot be rehashed through Complainant's Formal Complaint.

55. Second, Respondents argue that they demonstrated they had satisfied the Formal Complaint's allegations. Because the allegations of the Formal Complaint have been satisfied, Respondents maintain that Complainant is not entitled to any of the relief it seeks.

56. Third, Respondents contend that the Commission lacks jurisdiction over Bugg and Carswell individually. Respondents point out that although Bugg and Carswell are *members* of Purple Mountain and act on Purple Mountain's behalf, they are individuals, not utilities subject to regulation by the Commission.

57. Related to their third argument, Respondents also contend that, to the extent Complainant asserts Bugg and Carswell "aided and abetted" Purple Mountain, Complainant has failed to properly allege the elements of such a claim. Specifically, Respondents contend, Complainant "did not clearly describe the fiduciary duty owed, to whom it was owed, or how it was breached."⁴⁰ Further, because Bugg and Carswell are members of Purple Mountain, as Complainant acknowledges in its Formal Complaint, they were acting as Purple Mountain's authorized agents and cannot be liable for "aiding and abetting" the entity.

2. Complainant's Arguments

58. In its Response in Opposition to Respondents' Motion for Summary Judgment, Complainant argues first and primarily, and without any supporting legal authority, that a "basic

⁴⁰ Respondents' Motion for Summary Judgment, p. 7, § D, filed May 29, 2024.

tenet of administrative law . . . is that each case must be decided on its own merits and there is no *stari* (sic) *decisis* because each case is unique.”⁴¹

59. Complainant next asserts that the undersigned ALJ “determined that the complaint had not been satisfied.”⁴² Consequently, Complainant argues, Respondents cannot now assert satisfaction of the complaint as a ground for dismissing the Formal Complaint. Complainant goes on to contend — again without any supporting legal authority — that although “there may be no *stari* (sic) *decisis* in administrative law, the PUC does recognize the ‘law of the case’ doctrine.”⁴³

60. Complainant also asserts that the Commission has jurisdiction over Bugg and Carswell for aiding and abetting Purple Mountain’s alleged improper sales and advertising because § 40-7-106, C.R.S., penalizes an “officer, agent, or employee of any public utility . . . who procures, aids, or abets any violation by any public entity . . . of articles 1 to 7 of this title.”

B. Complainant’s Motion for Summary Judgment

1. Complainant’s Arguments

61. In its Motion for Summary Judgment, Complainant attacks Respondents’ discovery responses. Complainant contends that Respondents improperly hide behind advertising made through transportation brokers over whom, Respondents state in their discovery responses, they have no control. Complainant asserts that Respondents’ statement is an admission that advertising occurred improperly and implicates the transportation broker that posted the advertisement.

⁴¹ Complainant’s Response in Opposition to Respondents’ Motion for Summary Judgment Together with Complainant’s Motion for Continuance and Attorney Fees and Costs, p. 2, ¶ 2, filed June 10, 2024.

⁴² *Id.*, p. 4, ¶ 5.

⁴³ *Id.*

62. Complainant also asserts that the listing of bookings attached to its Motion for Summary Judgment establishes that Respondents engaged in the advertising and sale of individual transportation tickets before the issuance of Purple Mountain's CPCN.

63. Last, Complainant reiterates, without any factual support or evidence, its assertion that Bugg and Carswell "aided and abetted" Purple Mountain's alleged violative actions.

2. Respondents' Response to Motion for Summary Judgment

64. In response to Complainant's assertions about Purple Mountain's use of transportation brokers, Respondents assert that they are not responsible for the attached advertisements. They state that "any advertising actions taken by Third Parties are not at the behest of Respondents."⁴⁴ In other words, Respondents do not deny that the advertising was disseminated, just that they are not responsible for posting the advertisements. Respondents further argue that, if it is found that transportation brokers can act as their agents, no Commission rule prohibits such a relationship between transportation brokers and transportation providers.

65. Second, Respondents do not dispute or deny that the listing of bookings attached to Complainant's Motion for Summary Judgment is authentic. Rather, Respondents counter that Title 40 of the Colorado Revised Statutes, pertaining to utilities, does not expressly prohibit the sale of individual ticket for transportation services. Respondents argue that accepting individual ticket sales is not a *per se* violation. Respondents suggest, without additional evidence or support, that the individual sales may collectively "constitute members of the same group exercising exclusive control for a particular duration of time."⁴⁵

⁴⁴ Respondents' Response to Complainant's Motion for Summary Judgment, p. 4.

⁴⁵ *Id.* at p. 5.

66. Finally, Respondents argue that Complainant has failed to proffer any evidence showing that either Bugg or Carswell engaged in activities that could support a claim for “aiding and abetting.” Indeed, Respondents profess their “loss” at knowing or understanding what facts support Complainant’s “aiding and abetting” claim against Bugg and Carswell.⁴⁶

C. Findings and Conclusions

67. The ALJ first addresses the “aiding and abetting” claims asserted against Respondents Bugg and Carswell individually.

68. Neither Bugg nor Carswell are utilities regulated by the Commission. They are both individuals who happen to be members of a utility, Purple Mountain.

69. The ALJ agrees with Complainant that § 40-7-106, C.R.S., prohibits officers, agents, or employees of a utility from aiding and abetting the utility in violating applicable statutes or regulations.

70. However, to support such a claim, Complainant must show that Bugg and Carswell owed it a fiduciary duty, that Bugg and Carswell knowingly participated in a breach of that duty, and that it sustained damages as a result of Bugg’s and Carswell’s actions.

71. But Complainant has not offered any supporting evidence demonstrating acts *committed by* Bugg or Carswell. Instead, Complainant relies upon evidence suggesting that Purple Mountain may have improperly booked tours before obtaining its authority, making the following conclusory allegation rather than offering evidentiary support of its position:

In discovery, Respondents supplied the operating agreement between Purple, Bugg and Carswell. From this document, also attached, it is clear that Bugg and Carswell aided and abetted Purple in the conduct of its illegal operation. There is nothing left to decide. Summary judgment is

⁴⁶ *Id.* at p. 6.

proper against all three Respondents on the charge of illegal sale of individual tickets and illegal transportation on a per ticket basis.⁴⁷

72. Complainant offers no explanation how it arrived at this conclusory allegation; no description of what actions Bugg and Carswell may have taken to aid and abet Purple Mountain; no evidence or even an allegation that Bugg and Carswell owed it a fiduciary duty; no evidence or even a claim that Bugg and Carswell acted knowingly; no statement or calculation of the damages it allegedly suffered as a result of Bugg's and Carswell's actions; and no clarification what language or statement in the operating agreement so "clearly" shows that Bugg and Carswell "aided and abetted Purple" Mountain. In short, Complainant makes no effort to point expressly to any specific evidence supporting its "aiding and abetting" claim against Bugg and Carswell. Complainant has neither plead the elements of a claim or "aiding and abetting" nor offered evidence to support the elements of such a claim.

73. In responding to a motion for summary judgment, once the moving party establishes that no genuine issue of fact exists with respect to an issue, the burden of proof shifts to the nonmoving party to bring forth specific evidence supporting the existence of a disputed material fact.⁴⁸

74. The ALJ finds and concludes that Complainant has not met this burden in either its Response to Respondents' Motion for Summary Judgment or in its own Motion for Summary Judgment. In particular, the ALJ finds and concludes that Complainant has failed to demonstrate the existence of evidence supporting any of the elements of its claim of "aiding and abetting" against Bugg and Carswell. Complainant therefore has not established either that a material fact

⁴⁷ Complainant's Motion for Summary Judgment, p. 6, ¶ 7.

⁴⁸ *AviComm*, 955 P.2d at 1029.

is in dispute concerning Bugg's and Carswell's alleged aiding and abetting or the existence of elements supporting such a claim.

75. The ALJ will therefore dismiss the claims against Bugg and Carswell individually.

76. However, the ALJ finds that the evidence is conflicting with respect to Purple Mountain's advertising and ticket sales. Respondents stated in their answer and satisfaction to the Formal Complaint that Purple Mountain refunded the fees charged for nine bookings. Yet, Complainant has now produced evidence suggesting that Purple Mountain booked more than ten times that number of tours in the period between the evidentiary hearing in Proceeding No. 23A-0078CP and the issuance of Decision No. R24-0036 granting its CPCN. This creates a disputed issue of fact.

77. Summary judgment is inappropriate where a genuine dispute of material fact exists.⁴⁹

78. Whether Purple Mountain advertised its transportation services and/or accepted individual sales for its services goes to the very crux of the dispute in this Proceeding. It is, therefore, a "material fact" within the meaning of *Mt. Emmons Min. Co. v. Crested Butte*, 690 P.2d 231, 239 (Colo. 1984) ("[A] material fact is simply a fact the resolution of which will affect the outcome of the case.").

79. The ALJ therefore finds and concludes that because there is a dispute of fact concerning whether, when, and how Purple Mountain may have advertised its transportation services and/or sold individual tickets for its transportation services, summary judgment on this

⁴⁹ *Mt. Emmons Min.*, 690 P.2d at 239 ("Because the grant of summary judgment denies the party opposing the motion the right to a trial, summary judgment is appropriate only in those circumstances where there is no dispute as to material facts and thus no role for the fact finder to play.").

issue is inappropriate. The ALJ will therefore deny Respondents' Motion for Summary Judgment seeking the dismissal of claims against Purple Mountain.

80. Notably, because the question of Purple Mountain's activities remains in dispute, summary judgment in Complainant's favor is likewise inappropriate. The only arguments raised in Complainant's Motion for Summary Judgment — outside of those concerning Bugg and Carswell which have been addressed above — address the question of Purple Mountain's allegedly improper sale of and/or advertisement for individual seats on its transportation vehicles. Because this issue remains in dispute, Complainant's Motion for Summary Judgment will be denied.

81. Having found that a dispute exists concerning a material fact in this case, it is unnecessary for the ALJ to address the parties' remaining arguments raised in their respective summary judgment motions.

V. ORDER

A. It Is Ordered That:

1. Respondents' Motion for Summary Judgment, filed May 29, 2024, is granted in part and denied in part consistent with the above discussion.

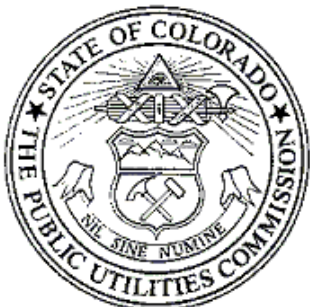
2. The claims asserted in the Formal Complaint against Respondents Zachary Bugg and Brooke Lynn Carswell are dismissed.

3. The claims asserted in the Formal Complaint against Purple Mountain Tour Company, LLC, are not dismissed.

4. Complainant's Motion for Summary Judgment, filed June 26, 2024, is denied.

5. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ALENKA HAN

Administrative Law Judge

ATTEST: A TRUE COPY

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

Rebecca E. White,
Director