

Decision No. R24-0760

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.

**RECOMMENDED DECISION
GRANTING RESPONDENT'S
MOTION FOR DIRECTED VERDICT,
GRANTING RESPONDENT'S
MOTION FOR ATTORNEY FEES,
DENYING RESPONDENT'S MOTION TO MODIFY
DECISION NO. R-24-0712-I, AND
DENYING COMPLAINANT'S MOTIONS FOR
CONTINUANCE AND FOR CONTEMPT CITATION**

Issued Date: October 23, 2024

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I. STATEMENT AND PROCEDURAL HISTORY

A. Summary

1. This Decision grants Respondents’ Motion for Directed Verdict, raised verbally at the evidentiary hearing on August 22, 2024; denies Respondent’s Motion to Modify Decision No. R24-0712-I; grants Respondent’s Motion for Attorney Fees; and denies Complainant’s Motions for continuance of the evidentiary hearing held on August 22, 2024, in Estes Park, Colorado, and for contempt citation against Respondent.

B. Appearances and Exhibits

2. The evidentiary hearing was held as scheduled on August 22, 2024, commencing at noon, at the Estes Valley Library in Estes Park, Colorado.

3. Complainant Green Jeep Tours LLC (“Complainant” or “Green Jeep”) appeared through its owner and operator, Nicole Schultz. Complainant’s counsel, Richard Bara, also appeared at the hearing, but arrived at 1:30 p.m., 1.5 hours after the commencement of the hearing.

4. Respondents, Purple Mountain Tour Company LLC (“Purple Mountain”), Zachary Bugg, and Brooke Lynn Carswell appeared with their counsel, Aaron Atkinson of Hackstaff Snow Atkinson & Griess, LLC.

5. At the hearing, Complainant’s Exhibits 105, 115, 117, 118, 120, 122, 123, and 124 were admitted into evidence.

6. Respondents Carswell and Bugg testified at the hearing, as did Nicole Schultz, owner/operator of Green Jeep.

C. Procedural History and Factual Background

7. This Proceeding has a long and complicated procedural history. A chronology of the relevant portions of that procedural history is detailed below.

8. On February 12, 2024, Green Jeep commenced this Proceeding by filing a Formal Complaint against Purple Mountain, Bugg, Lay Representative of Purple Mountain, and 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.

9. 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

10. 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 from engaging in violative behavior; entering cease and desist orders against Respondents and

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).

their activities; and barring Respondents from obtaining Commission authority to operate in the future.⁵

11. By way of background, Purple Mountain filed an Application (“Application”) for a Certificate of Public Convenience and Necessity (“CPCN”) 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. Subsequently, on January 19, 2024, an Administrative Law Judge (“ALJ”) issued Recommended Decision No. R24-0036 in Proceeding 23A-0078CP granting Purple Mountain’s Application for a CPCN. Decision No. R24-0036 found that the services Purple Mountain would be providing under its requested CPCN were sufficiently unique that Purple Mountain would be providing a service and meeting a need which Green Jeep could not and did not meet. As explained in Decision No. R24-0036:

Perhaps the most compelling evidence as to public need is evidence indicating that there is a need for more accessible services for young children and members of the public who have health or mobility issues. Such persons struggle with the more rugged, open-air tour of the type that Green Jeep provides. This includes issues with exposure to the elements, mobility difficulty associated with climbing in and out of vehicles, a bumpier ride that may exasperate or negatively impact health issues and low-backed seating that fail to provide needed back support. This makes it infeasible for such persons to take a tour with Green Jeep and other similar providers. Based on the foregoing, the ALJ finds that the evidence indicating customers’ preference to use Purple Mountain’s services over existing providers’ services due to the issues discussed above, amounts to more than mere personal preferences. Rather, such preferences are based on established facts about the nature of the service that existing providers offer (including Green Jeep), and customers’ difficulty accessing and using such services due to the nature of the service. The evidence also establishes that members of the public, including those requiring more

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.

accessible tour services, require a tour service that offers more comfort than currently available, such as heated passenger compartments, a smoother ride, individual high-backed seats, and a vehicle that can be quickly and fully enclosed to the elements. For customers experiencing health and mobility issues, such added comfort is particularly significant, and impacts their ability to access tour services. For the foregoing reasons, the ALJ concludes that the existing carriers, including Green Jeep, fail to provide and maintain such services, instrumentalities, and equipment, and facilities that promote the safety, health, comfort, and convenience of its patrons, employees, and the public, and that are in all respects adequate, just, and reasonable.⁷

12. Green Jeep filed Exceptions to the Recommended Decision⁸, but the Commission denied the Exceptions and upheld the Recommended Decision.⁹ Green Jeep then filed a Petition for Rehearing, Reargument, or Reconsideration to the Commission, essentially appealing the Commission's denial of its Exceptions.¹⁰ The Commission denied that petition, as well.¹¹

13. 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:

(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.

⁷ Decision No. R24-0036, issued Jan. 19, 2024, ¶ 76, pp. 30-31.

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

⁹ Decision No. C24-0280, Commission Decision Denying Exceptions to Recommended Decision No. R24-0036, issued Apr. 29, 2024.

¹⁰ Intervenor by Right, Green Jeep Tours LLC's Application for Rehearing, Reargument, or Reconsideration of Commission Decision No. C24-0280, filed June 3, 2024.

¹¹ 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.

14. On February 16, 2024, after receiving the Formal Complaint in this Proceeding, the Commission issued a Notice of Hearing setting this Proceeding for an evidentiary hearing to be held on April 22, 2024, commencing at 9:00 a.m.

15. While Proceeding No. 23A-0078CP was being heard by the Commission, this Formal Complaint Proceeding was also advancing. 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.” The Order to Satisfy or Answer was accompanied by a copy of the Notice of Hearing, Formal Complaint, verification, and attachments to the Formal Complaint. Twenty days after service of the Formal Complaint thus expired on March 7, 2024.

16. The Order to Satisfy or Answer and all the accompanying documents were sent to Respondents on February 16, 2024, by email to <mailto:purplemountaintours@gmail.com>, and by U.S Mail to Purple Mountain’s registered address, 165 Virginia Drive, #2, Estes Park, CO 80517.

17. On February 21, 2024, the Commission referred this Proceeding to an ALJ for disposition. The Proceeding was subsequently assigned to the undersigned ALJ.

18. 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.

19. In addition to serving Decision No. R24-0188-I at the email and physical addresses to which the Order to Satisfy or Answer had been served, Decision No. R24-0188-I was also served on Respondents at another email address, info@purplemountain.com.¹²

20. 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.¹³ Respondents represented that they had conferred with Complainant about the Motion for Extension of Time to Respond to Complaint (“Motion for Extension of Time”) and that Complainant objected to the motion.

21. 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.

22. On April 9, 2024, Complainant filed a Response in Opposition to Motion for Extension of Time to Respond to Complaint.

23. By Decision No. R24-0220-I, issued April 9, 2024, the undersigned ALJ scheduled a prehearing conference to be held April 11, 2024, to discuss issues raised by Respondents’ Motion for Extension of Time to Respond to Complaint; address the timing and location of the hearing; and establish a procedural schedule.

24. After considering the parties’ respective positions, the ALJ granted Respondents’ Motion for Extension of Time and accepted Respondents’ Evidence of Satisfaction, Response to

¹² See Certificate of Service to Decision No. R24-0188-I, dated Mar. 22, 2024.

¹³ See Respondents’ Motion for Extension of Time to Respond to Complaint (Motion for Extension of Time), filed Mar. 29, 2024.

Complaint and Statement Regarding Hearing into the record by Decision No. R24-0229-I, issued April 12, 2024.

25. 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.

26. Decision No. R24-0246-I also set a deposition deadline of May 15, 2024, and a discovery deadline of May 31, 2024. In addition, Decision No. R24-0246-I required Complainant to file its exhibits and witness and exhibit lists by May 31, 2024; Respondents were to file their exhibits and exhibit and witness lists by June 14, 2024.

27. Thereafter, on April 25, 2024, Green Jeep propounded discovery requests on all three Respondents.¹⁴

28. On May 6, 2024, Respondents moved for a protective order seeking to be shielded from some of the discovery requests Complainant propounded. Respondents argued that the discovery requests were overly burdensome and not reasonably calculated to lead to the discovery of admissible evidence.

29. Complainant failed to respond to the Motion for Protective Order. Instead, Complainant filed a Motion to Strike the Motion for Protective Order, arguing that the Motion for Protective Order was improperly postured because Respondents had not made a “good faith” effort to confer with Complainant and its counsel before filing the Motion to Protective Order.¹⁵

30. The ALJ was unpersuaded by Complainant’s Motion to Strike, finding that, contrary to Complainant’s assertion, Respondents’ counsel *had* attempted to confer with

¹⁴ See Ex. B to Respondents’ Motion for Protective Order, filed May 6, 2024.

¹⁵ Complainant’s Motion to Strike Respondents’ Motion for Protective Order Together with Complainant’s Motion for Attorney Fees and Costs, filed May 20, 2024.

Complainant's counsel before filing the Motion for Protective Order.¹⁶ Decision No. R24-0371-I, issued May 31, 2024, therefore denied the Motion to Strike and granted the Motion for Protective Order in part, limiting discovery to the time period after the evidentiary hearing in Green Jeep's Application for CPCN.¹⁷ Decision No. R24-0371-I also ordered Respondents to submit their responses to any non-protected discovery requests within 14 days of the decision.

31. In addition, on May 29, 2024, Respondents filed a Motion for Summary Judgment, seeking the dismissal of the Formal Complaint. As described more fully below, Respondents posited 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.

32. Despite the filing of a dispositive motion, neither party met the May 31 and June 14, 2024, deadlines for them to file their respective witness and exhibit lists.

33. Instead, on June 21, 2024, less than one week before the scheduled in-person evidentiary hearing, Complainant filed a Motion to Vacate and Reschedule Hearing to Re-Set Pre-Hearing Deadlines Including Complainant's Witness List and Exhibits and to Waive Response Time ("Motion to Vacate"). Complainant argued that it had not had ample opportunity to conduct discovery and was therefore unprepared for the evidentiary hearing.

¹⁶ Decision No. R24-0371-I, p. 8, ¶ 28, issued May 31, 2024.

¹⁷ *Id.* at p. 9, ¶ 32, and p. 12, Ordering ¶¶ 1-6.

34. On June 26, 2024, just one day before the scheduled hearing, Complainant subsequently 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.”¹⁸

35. 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 granted Complainant’s Motion to Vacate and vacated the June 27, 2024 evidentiary hearing.¹⁹

36. 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.²⁰ However, Decision No. R24-0478-I denied Complainant’s request to conduct additional discovery — Complainant had asked 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.²¹

37. Both parties subsequently filed their witness and exhibit lists within the timeline set by Decision No. R24-0478-I.

38. Two days before the rescheduled evidentiary hearing, on August 20, 2024, Complainant moved to continue the hearing and requested that a contempt citation be issued

¹⁸ Complainant’s Motion for Summary Judgment, p. 7, filed June 26, 2024.

¹⁹ See Decision No. R24-0454-I, issued June 26, 2024.

²⁰ Decision No. R24-0478-I, p. 6, ¶ 23.

²¹ *Id.* at p. 7, ¶¶ 24-32.

against Respondents. Complainant asserted that Respondents had not answered certain discovery requests and that, as a result, it was inadequately prepared for the hearing.

39. Because Complainant had filed its Motion for Contempt Citation, To Vacate and Re-Schedule Hearing and for Other Relief (“Motion for Contempt Citation”) less than 48 hours before the scheduled commencement of the evidentiary hearing, Respondents did not have an opportunity to respond to Complainant’s motion before the hearing. The ALJ therefore did not rule upon the Motion for Contempt Citation or the motion to continue before the hearing.

40. Instead, the day before the scheduled evidentiary hearing, on August 21, 2024, the ALJ issued Decision No. R24-0603-I, partially granting Respondents’ Motion for Summary Judgment and denying Complainant’s Motion for Summary Judgment. The ALJ found that Complainant had not established any of the elements of her claims against Respondents Bugg and Carswell, and had not produced any evidence supporting those claims. The ALJ therefore dismissed all the claims against Bugg and Carswell.²²

41. However, the ALJ found that a question of disputed fact existed concerning the claims against Respondent Purple Mountain. In particular, the ALJ found that a five-page payment log produced by Respondents and attached to Complainant’s Motion for Summary Judgment created a question of fact whether Respondents had accepted individual payment for transportation before Decision No. R24-0036 had granted Purple Mountain’s CPCN Application. The ALJ therefore denied Respondents’ Motion for Summary Judgment with respect to Purple Mountain and ruled that the claims asserted against Purple Mountain would proceed to hearing.²³

²² Decision No. R24-0603-I, issued Aug. 21, 2024, pp. 19-21, ¶¶ 70-75.

²³ *Id.* at pp. 21-22, ¶¶ 76-79.

42. Likewise, Decision No. R24-0603-I denied Complainant's Motion for Summary. The ALJ noted that because disputed facts remained, summary judgment on Complainant's claims against Purple Mountain would be inappropriate.²⁴

D. Evidentiary Hearing and Subsequent Procedural History

43. Despite Complainant's 11th hour motion to continue the evidentiary hearing, the hearing proceeded as scheduled on August 22, 2024.

44. The morning of the scheduled hearing, Bara contacted the Commission and left a message advising that he "had some office problems with the computer" and was "running late." He indicated he would be "about half an hour late" to the hearing.²⁵

45. In Bara's absence, Schultz, acting on behalf of Complainant, first requested that the hearing be delayed. Schultz stated:

Green Jeep Tours has not been well represented for this case. And this is par for the course for this attorney. Even today, he's late. I don't know if he'll be showing up with the documents. I don't believe he is. He asked me to print them, and I'm not sure if I even have all of them. Well, I don't have all of them because I did not have enough paper at home to do this today.²⁶

And I'm in the process of finding new representation. And I would graciously ask for a continuation of this hearing so I can find effective representation. I apologize that everyone drove up today and came here today.²⁷

46. Having received Bara's message and having heard from Complainant, the ALJ agreed to recess the hearing until 12:30 p.m. to allow Bara additional time to appear.

²⁴ *Id.* at p. 22, ¶ 80.

²⁵ Hearing Transcript, p. 4, lines 13-19.

²⁶ Hearing Transcript, p. 6, lines 11-18 and

²⁷ *Id.* at p. 7, lines 4-8.

47. However, because Bara still had not appeared by 1:00 p.m., the ALJ determined that continuation was inappropriate and prejudicial to Respondent. As discussed more fully below, the ALJ verbally denied the motion to continue, finding that granting a second continuance requested so close to the scheduled evidentiary hearing would be prejudicial to Respondent Purple Mountain.²⁸

48. After unsuccessfully exploring whether she could secure new representation, Schultz decided to proceed with the hearing on her own and called Carswell and Bugg as witness.²⁹

49. At 1:25 p.m., Bara arrived at the hearing and took over the presentation of Complainant's case in chief.³⁰ After Bara's arrival, the parties and counsel took an hour-long recess during which they discussed the prospects for settling the dispute but were unable to reach a resolution. Thereafter, the hearing commenced.³¹

50. After the hearing recommenced, Bara reasserted the motion for continuance, which the ALJ again denied. As the ALJ explained at the hearing, continuance would be inappropriate because (1) the hearing had been set since July 7, 2024; (2) Complainant had ample time to request a continuance and could have done so sooner than 44 hours before the start of the hearing; (3) Bara had misrepresented to the Commission how untimely he would be for the hearing; and (4) given that Respondents had traveled to Estes Park for the hearing at Bara's

²⁸ *Id.* at p. 25, line 24 – p. 28, line 23.

²⁹ *Id.* at p. 30, lines 5-22. Note: the ALJ permitted Schultz to proceed as a representative of Complainant Green Jeep because she is the sole owner/operator of Green Jeep. She therefore met the criteria for a non-attorney to represent a corporate entity before the Commission. See Rule 1201(b)(II), of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* ("CCR") 723-1; and § 13-1-127, C.R.S.

³⁰ Hearing Transcript, p. 38, line 14 – p. 39, line 13.

³¹ *Id.* at p. 41, line 22 – p. 42, line 13.

insistence and then waited an hour and a half for Bara to appear, it would inappropriate to continue the August 22, 2024 hearing.³²

51. The ALJ also verbally denied Complainant's Motion for Contempt Citation. The ALJ determined that although she had set a deadline by which Respondents were to produce documents outside the scope of the protective order Respondents had requested, Complainant never moved to compel production of discovery when it concluded that Respondent Purple Mountain³³ had not met the discovery deadline. Consequently, Respondent was not under an order compelling it to produce anything. In the absence of such an order, a contempt citation was inappropriate.³⁴

52. Although Complainant had identified a number of witnesses on its witness and exhibit lists, it called only Carswell, Bugg, and Schultz. The other witnesses identified on Complainant's witness list were never subpoenaed for the hearing. Consequently, none appeared or were available to testify. Complainant rested its case after Schultz's brief testimony.

53. After Complainant rested its case, Respondent Purple Mountain moved for a directed verdict, arguing that Complainant had failed to meet its burden of proof. Respondent never presented its case in chief. The ALJ indicated that she agreed a directed verdict was appropriate but would rule upon any motion for directed verdict in writing. The ALJ therefore granted the parties the opportunity to file respective Statements of Position.

54. Both parties filed their respective Statements of Position by the deadline of October 4, 2024.

³² *Id.* at p.46, line 19 – p. 49, line 12.

³³ Note: Because the claims against Respondents Bugg and Carswell had been dismissed, they were no longer subject to Complainant's discovery requests.

³⁴ *Id.* at p. 56, line 3 – p. 59, line 18.

55. Following the hearing, on September 11, 2024, Respondent filed a Motion for Attorney Fees and Costs (“Motion for Attorney Fees”), asserting that the Complaint was frivolous, groundless, and vexatious.

56. Complainant requested and was granted an extension up to and including October 9, 2024, to respond to the Motion for Attorney Fees.³⁵

57. On September 30, 2024, Bara moved to withdraw as Complainant’s counsel. Decision No. R24-0712-I, issued October 2, 2024, granted Bara’s request.

58. On October 4, 2024, Respondent filed a Motion to Modify Interim Decision No. R24-0712-I. Respondent represented that although it had no objection to Bara terminating his legal representation of Complainant, Respondent believed Bara should remain under the jurisdiction of the Commission for the purposes of imposing any award of attorney fees and costs jointly and severally against both Complainant and Bara.

59. Subsequently, on October 10, 2024, Complainant, through its new counsel, Matt Nadel of Welborn Sullivan Meck & Tooley, P.C., filed a response to Respondent’s Motion for Attorney Fees.

II. PREHEARING MOTIONS

A. Motion to Continue

60. On August 20, 2024, at 4:25 p.m., Complainant filed a written motion to vacate and continue the August 22, 2024 hearing titled Complainant’s Motion for Contempt Citation, to Vacate and Re-Schedule Hearing and for Other Relief. Complainant twice renewed the motion to continue verbally at the evidentiary hearing, first through its representative, Schultz, and later through its counsel, Bara.

³⁵ See Decision No. R24-0712-I, issued Oct. 2, 2024.

61. Rule 1400(b) of the Commission's Rules of Practice and Procedure, 4 CCR 723-1 grants parties 14 days to respond to a filed motion. Thus, Respondent would normally have until September 3, 2024, to file a written response to Complainant's motion for continuance. However, because the hearing was set to commence less than 44 hours after Complainant filed the motion for continuance, Respondent did not have the full time allotted by Rule 1400(b) to respond.

62. Complainant requested that response time to the motion be waived, but there was not sufficient time for the ALJ to issue an order shortening or waiving the response time, and allow Respondent to file a written response, before the schedule commencement of the hearing.

63. The ALJ therefore did not rule on Complainant's motion for continuance in advance of the August 22, 2024 hearing.

64. At the hearing, the ALJ verbally denied the motion for continuance and ordered that the hearing proceed.

65. As the ALJ explained orally at the hearing, numerous factors weighed against granting Complainant's motion for continuance. First, Complainant's motion for continuance was untimely, having been filed less than 48 hours before the scheduled commencement of the evidentiary hearing. By filing the motion so close to the hearing date, Complainant had not allowed sufficient time for Respondent to respond or for the ALJ to rule in advance of the hearing.³⁶

66. Moreover, the order setting the evidentiary hearing had been issued July 7, 2024, and the parties had been informed of the new hearing date at a prehearing conference on June 27,

³⁶ *Id.* at p. 49, line 13 – p. 50, line 18.

2024. Complainant consequently had nearly two months after the scheduling of the hearing to request a continuance but waited until the 11th hour to do so.

67. Second, although the ALJ understood Schultz's reluctance to proceed without an attorney or before she was able to retain alternative counsel, as noted above, the hearing had been set for nearly two months, during which time Schultz could have taken the opportunity to find new counsel.

68. Third, Schultz instead waited until the day of the hearing, after Respondent, Bugg and Carswell, and their counsel, Atkinson, had traveled to Estes Park for the hearing. Causing Respondent, Bugg and Carswell to incur substantial costs and fees to prepare for, travel to, and appear at the August 22, 2024 hearing only to have it vacated on Complainant's motion to continue would have been highly prejudicial to Respondent.

69. Finally, it would have been unfair and prejudicial to continue the hearing because of Complainant's counsel's failure to timely appear at the hearing.³⁷

70. For these reasons, the ALJ verbally denied and will deny herein Complainant's Motion to Vacate and Re-Schedule Hearing.

B. Motion for Contempt Citation

71. Complainant's motion for continuance also incorporated a motion for contempt citation against Respondent Purple Mountain for its alleged failure to produce certain requested discovery. Complainant represented that it had repeatedly requested the information but Purple Mountain had inappropriately delayed or refused to produce the requested information.

72. As explained above with respect to the motion to continue, the motion for contempt citation was not timely filed and did not allow sufficient time for Respondent to file a

³⁷ *Id.* at p.46, line 19 – p. 49, line 12.

response or for the ALJ to rule on the motion in advance of the August 22, 2024 hearing. Nor did the late filing allow time for the supposedly crucial documents to be produced before the hearing. The motion was simply untimely.

73. Complainant’s counsel nevertheless verbally renewed the motion for contempt citation at the August 22, 2024 hearing, arguing that Complainant had made repeated efforts to obtain the requested information but had been rebuffed.³⁸

74. Respondent verbally responded at the hearing that it had answered all the discovery, “gave a fulsome explanation of it, . . . [but] Green Jeep Tours continues to batter us over the heads with the same questions over and over. And have responded duly.”³⁹ Moreover, as Atkinson explained, Complainant’s motion for contempt citation was “mischaracterized in some kind of effort to slander Purple Mountain Tours and probably me” and should have been styled as a motion to compel.⁴⁰

75. The ALJ agreed then and agrees now. Although Decision No. R24-0371-I, which partially granted Respondents’ Motion for Protective Order, and set a deadline by which Respondents were to produce documents outside the scope of the protective order, Complainant never moved to compel production of discovery when it concluded that Respondent Purple Mountain⁴¹ had not met the discovery deadline or produced certain critical documents. Consequently, Respondent was not under an order compelling it to produce anything. In the absence of such an order, a contempt citation was inappropriate.⁴²

³⁸ *Id.* at p. 50, line 19 – p. 52, line 16.

³⁹ *Id.* at p. 54, lines 3-14.

⁴⁰ *Id.* at p. 54, lines 19-23.

⁴¹ Note: Because the claims against Respondents Bugg and Carswell had been dismissed, they were no longer subject to Complainant’s discovery requests.

⁴² *Id.* at p. 56, line 3 – p. 59, line 18.

76. Further, the ALJ noted, filing a motion for contempt citation less than 48 hours before the scheduled commencement of the evidentiary hearing was entirely inappropriate as it did not provide Respondent time to respond, the ALJ time to rule, or allow any time in advance of the hearing for Respondent to produce any discovery. Complainant had ample opportunity to pursue and conduct discovery in the two-month period after the continuance of the June 27, 2024 hearing, but waited until the eve of the August 22, 2024 hearing to seek relief for Respondent's alleged discovery violations.⁴³

77. Finally, having denied Complainant's request for a continuance, as a practical matter, any further discovery could not be completed. The motion for contempt citation therefore became moot.

78. For these reasons, the ALJ denied and will deny again here, Complainant's motion for contempt citation.

III. FINDINGS OF FACT AND FACTUAL BACKGROUND

79. Purple Mountain is a limited liability company providing transportation services in Colorado.⁴⁴

80. Respondents Bugg and Carswell are members of Purple Mountain.⁴⁵

81. Since 2009, Green Jeep has provided sightseeing tours of Rocky Mountain National Park in Jeep vehicles.⁴⁶ Green Jeep currently uses Jeep Wranglers and Jeep Gladiators.⁴⁷

82. Green Jeep is owned and managed by Schultz.⁴⁸

⁴³ *Id.*

⁴⁴ Formal Complaint, p. 3.

⁴⁵ 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.

⁴⁶ Hearing Transcript, p. 138, lines

⁴⁷ *Id.* at p. 139, lines 12-13.

⁴⁸ *Id.* at p. 138, lines 8-14.

83. 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:

- (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;
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.⁴⁹

84. Just over a year after Green Jeep was issued its CPCN authorizing it to provide call-and-demand sightseeing services in the vicinity of Estes Park, Colorado, and

⁴⁹ 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.

Rocky Mountain National Park, Purple Mountain was granted PUC CPCN No. No. 55999S, on May 7, 2024. 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.

85. 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. As addressed in ¶ 11 above, Decision No. R24-0036 found that the services Purple Mountain offered (tours in a van equipped to transport customers with mobility issues) were distinct from the services Green Jeep provides (tours in jeeps) and served a clientele that Green Jeep did not adequately serve.⁵⁰

86. 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.⁵¹

87. 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.

⁵⁰ Decision No. R24-0036, ¶ 76, pp. 30-31.

⁵¹ See Decision Nos. C24-0280 and C24-0471.

88. Green Jeep commenced this action approximately one month after the issuance of Decision No. R24-0036, which granted Purple Mountain its CPCN.

89. 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.

90. 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.

91. Respondents responded to the Formal Complaint by offering evidence that they had satisfied the allegations. Specifically, Respondents attached to their Evidence of Satisfaction, Response to Complaint and Statement Regarding Hearing ("Evidence of Satisfaction"), filed April 5, 2024, Exhibit 1, which is a report generated on April 5, 2024, showing the cancellation of bookings for all parties listed comprised of four or less individuals.⁵²

⁵² Exhibit 1 to Respondents' Evidence of Satisfaction, Response to Complaint and Statement Regarding Hearing ("Evidence of Satisfaction"), filed April 5, 2024.

92. Exhibit 2 to Evidence of Satisfaction is a screenshot of Purple Mountain’s booking page, dated April 5, 2024, with a banner stating that it is “Currently only booking private tours.”⁵³

93. 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. Complainant has offered no evidence — either in its briefs for and against summary judgment or at the evidentiary hearing — disputing that Purple Mountain refunded the amounts paid for canceled bookings.

94. Hearing Exhibit 105⁵⁴ raised numerous questions, though. It is a five-page document listing Purple Mountain’s bookings from September 9, 2023 through November 1, 2023, a period before the issuance of Decision No. R24-0036 granting Purple Mountain’s CPCN Application. Hearing Exhibit 105 shows numerous tours scheduled for the same time and lists separate payment received by Purple Mountain from different individuals scheduled to tour with Purple Mountain at the same time. There are nearly 100 bookings listed on Hearing Exhibit 105 indicating Purple Mountain received payment from different individuals booked on tours departing at the same time between September and November 2023. The ALJ notes that the last booking listed on the document is for a tour scheduled on May 3, 2024, several months after the issuance of Decision No. R24-0036 granting Purple Mountain’s CPCN application. That last listed booking is therefore not at issue.

⁵³ Exhibit 2 to Evidence of Satisfaction.

⁵⁴ Note: Hearing Exhibit 105 is identical to an exhibit attached to Complainant’s Motion for Summary Judgment and identified there as “Bookings.” In Decision No. R24-0603-I partially denying Respondents’ Motion for Summary Judgment and denying Complainant’s Motion for Summary Judgment, the ALJ found that the existence of this exhibit created a disputed issue of fact which precluded summary judgment for Respondent Purple Mountain. *See*, Decision No. R24-0603-I, pp. 21-

95. At the hearing and in its Statement of Position, Complainant argued that the list of bookings demonstrated that Purple Mountain was wrongfully scheduling individuals for tours before it had the authority to do so.

96. Bugg testified that at the time of the bookings listed in Hearing Exhibit 105, Purple Mountain possessed only a luxury limousine permit and a charter permit.⁵⁵ He conceded that “every one” of the bookings listed on page 1 Hearing Exhibit 105 was “an off-road charter” and admitted that Purple Mountain “sold individual tickets on [its] off-road charter.”⁵⁶ By way of example, he explained that individuals “paid separately” and were consolidated into the same vehicle.⁵⁷

97. Bugg emphasized, though, that the listing in Hearing Exhibit 105 was produced in the context of litigating this Proceeding and would not normally be produced by Purple Mountain “but for this lawsuit.”⁵⁸

98. Instead, he explained, the individual payees listed in Hearing Exhibit 105 had booked as a group and had “approached [Purple Mountain] to book a tour.”⁵⁹ Hearing Exhibits 115, 116, 117 and 118 are all “Charter Orders” which correspond to bookings identified on Hearing Exhibit 105 and indicate the groupings of individuals on the bookings list. As Bugg explained, before it was granted its CPCN, Purple Mountain operated by maintaining a Charter Order listing the individuals included in the particular group.

The Charter Order is for the group riding on the tour. The other is for sales, so it documents how we sold those seats to them or how we collected that revenue from them. So if a charter was put into two groups, if say two families know each other and are on vacation together and they

⁵⁵ Hearing Transcript, p. 68, lines 3-11.

⁵⁶ *Id.* at p. 68, lines 14-25.

⁵⁷ *Id.* at p. 72, line 9 – p. 73, line 5.

⁵⁸ *Id.* at p. 135, lines 7 - p. 136, line 13.

⁵⁹ *Id.* at p. 79, line 11 – p. 80, line 2.

show up to ride together, that would still be a charter, but we could split their payment amongst that group, is my understanding.⁶⁰

Bugg explained that the Charter Orders — sometimes referred to as trip sheets — identify the individuals included in one group booking.⁶¹ Purple Mountain used the Charter Orders to indicate which individuals had booked a tour together as a group.

99. Schultz testified that a Traffic Diversion Study, admitted as Hearing Exhibit 124, showed that during October 2022, Green Jeep served 885 guests.⁶² In contrast, during October 2023, Green Jeep served 457 guests, a decrease of 48.3%.⁶³ Hearing Exhibit 124 also shows that in September 2022, Green Jeep served 1,609 guests, and in September 2023 it served 1,639 guests.⁶⁴

100. By way of comparison, Purple Mountain's bookings list (Hearing Exhibit 105) indicates that Purple Mountain served 40 guests in September 2023 and 199 guests in October 2023.

IV. FINDINGS, ANALYSIS, AND CONCLUSIONS

101. As discussed above, Respondent orally moved for a directed verdict at the close of Complainant's case in chief. Respondent raised several arguments in support of its verbal motion for a directed verdict.

- a. First, Respondent argued that its response to the Formal Complaint established that it had satisfied the allegations asserted in the Formal Complaint. Specifically, it had refunded the sales of any individually-sold tickets.⁶⁵
- b. Second, Respondent pointed out that Complainant's complaint primarily rested on evidence gleaned from the bookings listing Purple Mountain had produced for the

⁶⁰ *Id.* at p. 117, lines 3-11.

⁶¹ *Id.* at p. 123, line 25 – p. 124, line 19.

⁶² *Id.* at p. 141, line 17 – p. 142, line 12; Hearing Exhibit 124.

⁶³ Hearing Transcript, p. 143, lines 3-10; Hearing Exhibit 124.

⁶⁴ Hearing Exhibit 124.

⁶⁵ Hearing Transcript, p. 148, lines 9-18.

litigation. Yet, as Bugg explained, the bookings listed on Hearing Exhibit 105 were all part of group bookings as exemplified by Hearing Exhibits 115, 116, 117, and 118, not individual sales. Therefore, contrary to Complainant's assertion, Hearing Exhibit 105 does not support Complainant's assertion that Purple Mountain had wrongfully engaged in the sale of individual tickets before securing its CPCN.⁶⁶

- c. And third, Purple Mountain asked that the Complaint be dismissed as a sanction for Complainant's actions before and during the evidentiary hearing. In particular, Atkinson noted that Barr arrived an hour and a half late for the hearing, had no witnesses subpoenaed for the hearing, and pursued the litigation to harass Respondent, Bugg, and Carswell.⁶⁷

A. Relevant Law

102. The complainant in a complaint proceeding bears the burden of proof by a preponderance of the evidence.

103. Rule 50 of the Colorado Rules of Civil Procedure ("C.R.C.P.") permits a party to move for a directed verdict at the conclusion of a complainant's case in chief. The Rule states:

A party may move for a directed verdict at the close of the evidence offered by an opponent or at the close of all the evidence. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. . . . A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.⁶⁸

104. A motion for directed verdict presents a question of law.⁶⁹ "If there is no evidence to sustain an opposite verdict, a trial court is justified in directing one, not because it would have authority to set aside an opposite one, but because there was an actual defect of proof, and, hence, as a matter of law, the party was not entitled to recover."⁷⁰

⁶⁶ *Id.* at p. 148, line 19 – p. 149, line 17.

⁶⁷ *Id.* at p. 149, line 18 – p. 150, line 22.

⁶⁸ Colorado Rule of Civil Procedure ("C.R.C.P.") 50 (2012).

⁶⁹ *See Gossard v. Watson*, 122 Colo. 271, 275, 221 P.2d 353, 355 (1950).

⁷⁰ *Id.* at 122 Colo. 271, 277, 221 P.2d at 356.

105. “The issue presented by a motion for a directed verdict is whether the jury reasonably and permissibly could conclude that the proponent of a claim has established each element of that claim by a preponderance of the evidence.”⁷¹

106. The Commission’s Rules Regulating Transportation by Motor Vehicle define several terms of relevance to this Proceeding:

- a. “Limited Regulation Carrier” means a Person who provides service by Charter Bus, Children’s Activity Bus, Fire Crew Transport, Luxury Limousine, or Off-Road Scenic Charter as those terms are defined in § 40-10.1-301, C.R.S. and rule 6301.⁷²
- b. “Off-Road Scenic Charter” means a Limited Regulation Carrier that transports Passengers, on a Charter Basis, to scenic points within Colorado, originating and terminating at the same location and using a route that is wholly or partly off of paved roads as that term is defined in § 40-10.1-301(12), C.R.S.⁷³
- c. “Charter Basis” means on the basis of a contract for transportation whereby a Person agrees *to provide exclusive use of a Motor Vehicle to a single chartering party for a specific period of time*, during which the chartering party has the exclusive right to direct the operation of the vehicle, including selection of the origin, destination, route, and intermediate stops.⁷⁴
- d. “Luxury Limousine Service” is a luxurious, specialized transportation service provided by a Luxury Limousine Carrier with great comfort, quality and ease of use that is not usually available from Common Carriers. The services provided are on a Prearranged Charter Basis memorialized in a contract prior to the provision of service.⁷⁵

107. The Rules Regulating Transportation by Motor Vehicle also restrict the advertising of transportation services. Specifically, the Rules provide:

- a. No Person shall offer to provide a transportation service without an Authority or Permit to provide such service.⁷⁶

⁷¹ *Kopeikin v. Merchants Mortg. & Trust Corp.*, 679 P.2d 599, 601, (Colo. 1984).

⁷² Rule 6001(pp), 4 CCR 723-6.

⁷³ Rule 6301(f), 4 CCR 723-6.

⁷⁴ Rule 6301(b), 4 CCR 723-6 (emphasis added).

⁷⁵ Rule 6301(e), 4 CCR 723-6.

⁷⁶ Rule 6016(a), 4 CCR 723-6.

- b. Advertising to provide transportation service or advertising transportation service other than by brokerage is an offer to provide the advertised service.⁷⁷

B. Findings and Conclusions

108. Complainant raises two primary arguments in support of its Formal Complaint. First, it argues that the evidence establishes that Purple Mountain sold individual tickets under its Off-Road Charter (“ORC”) permit in violation of Rule 6301. Second, it asserts that Purple Mountain improperly advertised individual ticket sales in violation of Rule 6016.

109. The ALJ is persuaded that Complainant failed to produce sufficient evidence to establish either of these allegations against Purple Mountain.

1. Individual Ticket Sales

110. Complainant contends that through Bugg’s testimony, Respondent admitted to selling individual tickets despite holding only ORC and luxury limousine permits. Complainant points out that the Commission’s Rules, as described above, require the holder of an ORC permit to limit the use of a regulated vehicle to a single group. The sale of individual tickets, it contends, violates that provision.

111. And, indeed, in its Statement of Position, Respondent agrees that those permits “require that a single group being transported use the motor vehicle exclusively for a specific duration.”⁷⁸

112. Complainant states, without citation to the record, that “Throughout Mr. Buggs’ testimony, he admitted that Purple sold Individual Tickets at \$119 per person. This was a clear

⁷⁷ Rule 6016(c), 4 CCR 723-6.

⁷⁸ Respondent’s Statement of Position, filed Sept. 26, 2024, as Exhibit A to Respondent’s Response in Support of Complainant’s Motion for Extension of Time, p. 2.

admission of guilt.”⁷⁹ However, in support of its position and argument, Complainant relies primarily on the bookings list admitted as Hearing Exhibit 105.

113. But, the evidence as a whole establishes otherwise. First, although the bookings list is broken down by individuals and can be calculated to determine a per-person price, it is *not* clear that Purple Mountain accepted payment from each individual for the stated amount. Complainant offered no copies of sales receipts, credit card statements, or other such evidence which would tend to show how payment was made or if payments were actually made and received individually.

114. Bugg credibly testified that the bookings list was prepared in response to Complainant’s discovery request. The document is not reflective of Purple Mountain’s usual bookkeeping practices. Rather, Bugg’s uncontroverted testimony established that the list was compiled solely for litigation purposes.

115. More importantly, even though Complainant suggests that the document should be interpreted as showing individual sales, Bugg’s uncontroverted testimony explains otherwise. Bugg stated that the individuals identified on the bookings list were part of groups and were not booked individually. His testimony is corroborated by the Charter Orders exemplified by Hearing Exhibits 115, 116, 117, and 118, which clearly showed the makeup of each charter group. Complainant offered no evidence whatsoever countering Bugg’s explanation.

116. Complainant asserts in its Statement of Position that “These were not relatives or Sorority Sisters, friends, nor groups of bridesmaids, but instead they were Individual Ticket sales that could only be serviced by a company with a Common Carrier Shuttle, or Sightseeing

⁷⁹ Green Jeep Tours’ Statement of Position, filed Oct. 8, 2024, p. 2.

CPCN.”⁸⁰ However, no evidence in the record supports this assumption. Complainant is simply assuming that because the individuals in any given group had different surnames, they did not know each other. A charter group, though, can be comprised of people who have organized themselves into a group. Bugg explained that he assumed the individuals who came to him to book a charter tour together did so “because the passengers were travelling together.”⁸¹ And no evidence in the record contradicts Bugg’s testimony that the passengers grouped together on the Charter Orders were anything but a charter group.

117. Finally, the ALJ notes that to the extent Respondent admitted in its response to the Formal Complaint that it had sold individual tickets improperly, it provided evidence that it had satisfied that claim by refunding customers their money for any such individual sales. In the absence of other specific evidence of individual sales, Complainant has not established a crucial element of its claim.

118. Complainant has thus failed to establish in its case in chief that Respondent violated the Commission’s Rules prohibiting transportation services operating under an ORC permit to sell individual tickets. A directed verdict on this issue is therefore appropriate.

2. Advertising

119. With respect to Complainant’s allegation that Respondent Purple Mountain advertised individual ticket sales in violation of Rule 6016, at first blush, Bugg’s testimony appears to support this allegation. When asked by Schultz about Purple Mountain’s website, Bugg replied “Yes, we were selling individual tickets on our website.”⁸² However, no further context or explanation was obtained. Complainant did not elicit from Bugg a time period

⁸⁰ Complainant’s Statement of Position, p. 3.

⁸¹ Hearing Transcript, p. 114, lines 4-9.

⁸² *Id.* at p. 34, line 25 – p. 35, line 4.

establishing *when* Purple Mountain allegedly listed an individual price on its website. Without any such context, the ALJ cannot ascertain what Bugg meant by the statement or when the individually listed price may have appeared on the website. The sole legible exhibit representing Purple Mountain's website — Hearing Exhibit 120— which is a photograph of a laptop displaying what appears to be Purple Mountain's website — bears a date-and-time-stamp in the lower right corner of March 28, 2024, 5:43 p.m. This indicates the image was captured *after* the issuance of Decision No. R24-0036 granting Purple Mountain's CPCN Application.⁸³ Nor has Complainant analyzed or explained the significance of Bugg's statement in its Statement of Position. Notably, the ALJ thus cannot rule out the possibility that Bugg's statement referred to a time period after the issuance of Decision No. R24-0036 granting its CPCN Application. In short, Bugg's statement simply does not establish that Purple Mountain improperly advertised its services on its website before it had been granted its CPCN.

120. Other evidence concerning the advertising of individual ticket sales does not bear out Complainant's allegation, either. Complainant offered into evidence Hearing Exhibit 123, an image from the website of Get Your Guide, purportedly showing a tour for 3 adults charged at a per person rate and departing from a location associated with Purple Mountain. However, the document appears to show a tour occurring on June 2, 2024, well *after* Purple Mountain had been issued its CPCN. The document therefore cannot establish any alleged wrongful advertising before Purple Mountain's CPCN was issued.

121. Further, even if a third party such as Get Your Guide improperly advertised for individual ticket sales at Purple Mountain, Bugg unequivocally stated that neither he nor Purple

⁸³ The ALJ notes that Hearing Exhibit 122 is also an image of what appears to be a website, but the text on the website is illegible. Bugg could not thoroughly identify or authenticate Hearing Exhibit 122. *See* Hearing Transcript, p. 129, line 24 – p. 131, line 14. The ALJ therefore cannot determine who generated the website or to whom the website is attributable.

Mountain had any control over the content or advertising third party brokers may have included on their website.⁸⁴

122. Accordingly, the ALJ finds and concludes that Complainant has not met its burden of establishing that Respondent violated Commission Rule 6016 by improperly advertising for the individual sale of tickets for its transportation services. A directed verdict on this allegation is therefore likewise appropriate.

3. Complainant is not entitled to the relief sought.

123. In its Formal Complaint and Motion for Summary Judgment, Complainant asserts that it seeks nothing less than the cancellation of Purple Mountain's CPCN. Purple Mountain's CPCN was issued, though, over Complainant's strenuous objections. Green Jeep intervened in Purple Mountain's CPCN Application; contested the Application at a full evidentiary hearing; filed exceptions with the Commission seeking review of Decision No. R24-0036 granting the Application; and filed a petition for Rehearing, Reargument or Reconsideration ("RRR") asking the Commission to reconsider its denial of Green Jeep's exceptions. The Commission denied the RRR, as well.

124. As Respondent has pointed out, Complainant raised identical allegations — that Purple Mountain was operating in violation of Commission Rules — as an Intervenor in Purple Mountain's CPCN Application Proceeding. Complainant reiterated its argument repeatedly that Purple Mountain's purported sale of individual tickets should have precluded the granting of a CPCN to it.⁸⁵ Yet, despite thoroughly considering Complainant's allegations of wrongdoing by

⁸⁴ Hearing Transcript, p. 89, lines 2-4; and p. 91, line 24 – p. 92, line 2.

⁸⁵ See Intervenor by Right Green Jeep Tours LLC's Exceptions to Decision No. R24-0036, in Proceeding No. 23A-0078CP, filed May 8, 2024, pp. 2 and 8; and Intervenor by Right Green Jeep Tours LLC's Application for Rehearing, Reargument or Reconsideration of Commission Decision No. C24-0280, in Proceeding No. 23A-0078CP, filed June 3, 2024, pp. 2-4.

Purple Mountain, the Commission granted the CPCN and denied Complainant's objections to Decision No. R24-0036.

125. Given that the Commission has already thoroughly weighed and considered Green Jeep's contention that Purple Mountain should not be entitled to operate under a CPCN, the ALJ is not persuaded to "cancel" the CPCN or reach a result contrary to the Commission as a whole.

126. Further, to the extent Complainant asks the ALJ to impose "fines" against Purple Mountain, the ALJ notes that fines and penalties can only be imposed in Commission proceedings initiated by the Commission itself. The authority to fine a utility does not extend to litigants nor are penalties available in litigation between parties.

4. Claims are moot because Purple Mountain has been issued a CPCN.

127. Last, even if the ALJ were to determine that Purple Mountain sold individual tickets in violation of the strictures of its ORC permit, or that it advertised for individual ticket sales in violation of the authority it previously held, the allegations became moot with the issuance of Purple Mountain's CPCN. Even if Purple Mountain was operating improperly in the fall of 2023, it now has the requisite authority to sell individual tickets. Any past bad behavior on Purple Mountain's part was thoroughly weighed and considered by the Commission in Proceeding No. 23A-0078CP and is therefore now inconsequential.

C. Conclusion

128. For the above stated reasons, the ALJ finds and concludes that Complainant failed to meet its burden of establishing that Respondent violated Commission Rules or that Complainant is entitled to the relief it seeks. Having failed to meet this burden as a matter of law in Complainant's case in chief, a directed verdict in favor of Respondent Purple Mountain is

appropriate and reasonable. The ALJ will therefore enter a verdict in Respondent Purple Mountain's favor and will deny and dismiss the Formal Complaint.

V. ATTORNEY FEES

129. Having determined that judgment should enter in Respondent's favor, the ALJ turns to Respondent's Motion for Attorney Fees. Respondent argues that it is entitled to an award of its fees and costs incurred in defending against Complainant's Formal Complaint on the grounds that the allegations asserted therein are "devoid of substantial justification."⁸⁶ Respondent contends that the Formal Complaint lacked substantial justification because it was "substantially frivolous, substantially groundless, or substantially vexatious."⁸⁷

A. Relevant Law

130. C.R.C.P. 121, § 1-22 permits a successful party to a civil litigation to file its Bill of Costs "within 21 days of the entry of order or judgment."⁸⁸ Likewise, a party seeking an award of attorney fees "shall file and serve" the motion "within 21 days of entry of judgment."⁸⁹

131. A motion for attorney fees

shall explain the basis upon which fees are sought, the amount of fees sought, and the method by which those fees were calculated. The motion shall be accompanied by any supporting documentation, including materials evidencing the attorney's time spent, the fee agreement between the attorney and client, and the reasonableness of the fees.⁹⁰

132. A party may be entitled to an award of attorney fees if the claims brought against it "lacked substantial justification."

⁸⁶ Respondent's Motion for Attorney Fees and Costs ("Motion for Fees"), filed Sept. 11, 2024, p. 2.

⁸⁷ *Id.* at p. 3; *see Castillo v. Koppes-Conway*, 148 P.3d 289, 292, (Colo. App. 2006) ("An action lacks substantial justification if it is "substantially frivolous, substantially groundless, or substantially vexatious.") (quoting § 13-17-102(4), C.R.S.).

⁸⁸ C.R.C.P. 121, § 1-22(1) (2012).

⁸⁹ C.R.C.P. 121, §1-22(2)(b) (2012).

⁹⁰ *Id.*

(4) The court shall assess attorney fees or licensed legal paraprofessional fees if, upon the motion of any party or the court itself, the court finds that an attorney, licensed legal paraprofessional, or party brought or defended an action, or any part of an action, that lacked substantial justification or that the action, or any part of the action, was interposed for delay or harassment or if the court finds that an attorney, licensed legal paraprofessional, or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under the Colorado rules of civil procedure or a designation by a defending party pursuant to section 13-21-111.5(3) that lacked substantial justification. As used in this article, “lacked substantial justification” means substantially frivolous, substantially groundless, or substantially vexatious.⁹¹

133. “A claim or defense is frivolous if the proponent can present no rational argument based on the evidence or law in support of that claim or defense.”⁹²

134. “A claim or defense is groundless if the allegations of the complaint, although sufficient to survive a motion to dismiss for failure to state a claim, are not supported by any credible evidence.”⁹³

135. The actions of a party or counsel may be found to be substantially vexatious if the “party persists in pursuing a claim, despite knowing that it lacks admissible evidence to support that claim.”⁹⁴

136. As the Colorado Court of Appeals summarized,

A claim is frivolous if the proponent has no rational argument to support it based on the evidence or the law. A claim is groundless if there is no credible evidence to support the allegations in the complaint. . . . A vexatious claim or defense is one brought or maintained in bad faith. Bad faith may include conduct that is arbitrary, vexatious, abusive, or stubbornly litigious, and may also include conduct aimed at unwarranted delay or disrespectful of truth and accuracy.⁹⁵

⁹¹ §13-17-102(4), C.R.S.

⁹² *Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069 (Colo. 1984).

⁹³ *Wheeler v. T.L. Roofing, Inc.*, 74 P.3d 499, 505 (Colo. App. 2003).

⁹⁴ *Consumer Crusade, Inc. v. Clarion Mortg. Capital, Inc.*, 197 P.3d 285, 291 (Colo. App. 2008).

⁹⁵ *Zivian v. Brooke-Hitching*, 28 P.3d 970, 974 (Colo. App. 2001).

B. Fees for Claims Against Bugg and Carswell

137. Respondent first argues that the claims brought against Bugg and Carswell individually were frivolous.⁹⁶ Respondent contends that Green Jeep “failed to make a rational argument” in support of its claims against Bugg and Carswell.⁹⁷

138. As described above and in Decision No. R24-0603-I— which dismissed the claims against Bugg and Carswell, the Formal Complaint asserted that Bugg and Carswell “aided and abetted” Purple Mountain. Decision No. R24-0603-I found, though, that Complainant failed to produce any evidence whatsoever to establish the elements of a claim of aiding and abetting.

139. It was clear at the time the ALJ issued Decision No. R24-0603-I that Complainant had asserted claims against Bugg and Carswell without possessing sufficient evidence to support such claims. No evidence discovered or brought forth in this Proceeding ever showed that Bugg and Carswell acted outside the scope of their roles with Purple Mountain. Although Complainant now asserts that an Operating Agreement for Purple Mountain attached to its Response to the Motion for Attorney Fees supports the claim against Bugg and Carswell,⁹⁸ this evidence is a) wholly untimely given that a response to Respondent’s Motion for Summary Judgment was due in June 2024; and b) insufficient to establish all but one of the elements of a claim of aiding and abetting.

140. Contrary to Complainant’s assertion that it diligently pursued claims against Bugg and Carswell and had unearthed evidence supporting the individual claims, the record suggests that Complainant pursued claims against Bugg and Carswell to harass them and impede Purple Mountain’s business. Complainant said as much in its own Motion for Summary Judgment when

⁹⁶ Motion for Fees, p. 3.

⁹⁷ *Id.*

⁹⁸ The ALJ notes that Complainant’s Response to the Motion for Attorney Fees has notably been filed by Green Jeep’s new counsel of record.

it asked the Commission to “cancel” Purple Mountain’s CPCN. More to the point, even if evidence eventually established that Purple Mountain had acted wrongfully, any claim should have been asserted against the utility itself, not against the individuals who work for or own the utility.

141. In short, the ALJ finds and concludes that the claims asserted against Bugg and Carswell were substantially frivolous, groundless, and vexatious. Attorney fees and costs will be awarded for the work in defending against the claims asserted against Bugg and Carswell.

C. Fees for Claims Against Purple Mountain

142. In contrast, the claims against Purple Mountain were neither frivolous nor groundless. As explained in Decision No. R24-0603-I, disputed issues of fact existed which precluded summary judgment in Purple Mountain’s favor. In particular, Hearing Exhibit 105, which was attached to Complainant’s Motion for Summary Judgment, seemed to suggest that Purple Mountain sold individual tickets before the grant of its CPCN Application. Clearly, then, Complainant’s claims against Purple Mountain, even if not ultimately successful were not frivolous and groundless.

143. Nevertheless, certain actions taken by Complainant and her then-counsel Bara during the course of this Proceeding were vexatious, harassing, “stubbornly litigious,” caused “unwarranted delay,” and/or were “disrespectful of truth and accuracy.”⁹⁹ In particular, the ALJ points to the following actions by Complainant and her former counsel, Bara:

- a. Complainant’s filing of a motion for contempt citation, asserting that Respondent had failed to respond to discovery requests, even though Complainant had never filed a motion to compel requesting that Respondent be compelled to produce the information;

⁹⁹ *Zivian*, 28 P.3d at 974.

- b. Complainant's filing of a second motion for continuance less than 44 hours before the scheduled commencement of the August 22, 2024 evidentiary hearing;
- c. Complainant's counsel's failure to prepare for the hearing, having failed to subpoena any witnesses for hearing or have exhibits ready to be offered into evidence; and,
- d. As presciently noted by Complainant in the Response to Respondent's Motion for Attorney Fees (filed by Complainant's new counsel), "[a]t the forefront of [the undersigned ALJ's] mind [is] undoubtedly . . . Green Jeep's previous counsel arriv[ing] at the scheduled evidentiary hearing over 1.5 hours late."¹⁰⁰

144. Although the undersigned ALJ is sympathetic to Complainant's predicament and notes that most of the above actions appear to have been carried out by Complainant's previous counsel, Bara, the fact remains that this Proceeding was initiated with Complainant's approval. Although Schultz appears to have made attempts encouraging Bara to seek settlement and questioning the need to proceed to hearing,¹⁰¹ Respondent, along with Bugg and Carswell, were left to defend against these vexatious actions, causing them real financial harm and prejudice.

145. Accordingly, the ALJ finds and concludes that Respondent is entitled to some portion of its attorney fees and costs for defending against the vexatious actions outlined above.

D. Amount of Fees

146. Respondent requests that it be awarded two-thirds of its fees and costs for defending the claims asserted against Bugg and Carswell. The Affidavits of Atkinson, Bugg, and Carswell state that "Respondents have incurred \$24,675.66 in attorneys' fees and costs as related

¹⁰⁰ Complainant's Response to Respondent's Motion for Attorney Fees and Costs, filed Oct. 10, 2024, p. 7.

¹⁰¹ See Exhibits B, C, and D attached to Complainant's Response to Respondent's Motion for Attorney Fees and Costs.

to this matter.”¹⁰² Respondents’ Bill of Costs, attached as Exhibit B to the Motion for Attorney Fees, enumerates \$38,998.80 in fees and \$1,024.99 in costs.¹⁰³

147. While reducing the requested sum to two-thirds of the total fees and costs is not unreasonable, the ALJ concludes that the figure is too high when compared to the time spent defending against the claims asserted against Bugg and Carswell. The claims against Bugg and Carswell were undeniably intertwined with the claims against Purple Mountain, yet the only claims asserted against the individuals were for aiding and abetting and accounted for just one-fourth of the claims asserted in the Formal Complaint. The defense of those claims could not have required the same level of research and work as defending against the claims asserted against Purple Mountain. Further, responding to the vexatious actions of Complainant and its counsel appear to have accounted for approximately two hours of Respondent’s counsel’s time (1.5 hours waiting for Complainant’s counsel to appear and 0.5 hours preparing for and verbally responding to Complainant’s motion for contempt citation and second motion for continuance).

148. Consequently, the ALJ concludes that a more reasonable breakdown of the fees and costs to be awarded is one-fourth of the fees and costs incurred. Basing the calculation of the total fees and costs set out in Exhibit B to the Motion for Attorney Fees, the ALJ finds and concludes that an award of \$10,000 in attorney fees and costs is reasonable, just and appropriate under the circumstances.¹⁰⁴

149. The attorney fees and costs are to be assessed against Complainant and Complainant’s former counsel, Bara, jointly and severally.

¹⁰² Exhibits C and D to Motion for Attorney Fees, ¶ 5.

¹⁰³ Although the ALJ has not added the sums listed in the Bill of Costs to determine whether the amounts total \$38,998.80 in fees and \$1,024.99 in costs, the ALJ notes that two-thirds of \$40,023.79 (\$38,998.80 + \$1,024.99) is \$26,682.53.

¹⁰⁴ \$10,000 is a fair rounding down from the exact figure of \$10,005.96 (\$40,023.79 ÷ .4).

E. Motion to Modify Decision No. R24-0712-I Granting Bara's Request to Withdraw

150. Finally, the ALJ addresses Respondent's Motion to Modify Decision No. R24-0712-I ("Motion to Modify"). Decision No. R24-0712-I, which was issued October 2, 2024, granted Bara's Motion to Withdraw as counsel for Complainant, finding that Bara had met his burden of establishing that withdrawal was appropriate. Indeed, given that Complainant retained new counsel within one week of Decision No. R24-0712-I's issuance, it is apparent that Complainant did not object to Bara's withdrawal.

151. Although Respondent does not object to Bara's withdrawal as counsel for Complainant, Respondent expresses its desire "to preserve their rights to sanctions," explaining that Complainant's counsel's actions "are cause of joint and several liability among Complainant and its counsel."¹⁰⁵

152. The ALJ agrees that Complainant's counsel's actions in pursuing this litigation were frequently egregious and often vexatious.

153. However, as stated in *Atlas Debt Holdings, LLC v. Seafood Express, LLC*, cited by Respondent, approval to withdraw as counsel "'should be rarely withheld and then only upon a determination that to grant said request would interfere with the efficient and proper functioning of the court.'"¹⁰⁶ Accordingly, given that Bara had met the criteria for withdrawal as counsel, and that Complainant plainly stated its desire to replace Bara as counsel, it was appropriate and reasonable for the ALJ to grant Bara's request.

154. The ALJ understands that Respondent is concerned it will not be able to recover its award of fees and costs, but Bara's withdrawal as counsel does not free him from the

¹⁰⁵ Respondents' Motion for Modification of Interim Decision R24-0712-I, filed Oct. 4, 2024, p. 3.

¹⁰⁶ *Atlas Debt Holdings, LLC v. Seafood Express, LLC*, 2024 Wash. App. LEXIS 1592, *13, 2024 WL 3650246 (quoting *Kingdom v. Jackson*, 896 P.2d 101 (Wash. Ct. App. 1995))

Commission’s jurisdiction. “*Former* counsel against whom attorney fees are sought ‘may be liable for the same debt or conduct that is already before the court.’”¹⁰⁷. Thus, the Colorado Supreme Court ruled that a *former* counsel “may be joined for the purpose of a post judgment motion seeking attorney fees under section 13-17-102.”¹⁰⁸

155. Based on the Supreme Court’s ruling in *Wesley*, the undersigned ALJ concludes that Decision No. R24-0712-I need not be modified to effectuate joint and several liability between Complainant and Complainant’s former counsel, Bara.

156. Respondent’s Motion to Modify will therefore be denied.

VI. **ORDER**

A. **It Is Ordered That:**

1. The Motion for Contempt Citation, To Vacate and Re-Schedule Hearing and for Other Relief filed by Complainant Green Jeep Tours LLC on August 20, 2024, is denied in its entirety.

2. The Formal Complaint filed by Green Jeep Tours LLC (“Complainant” or “Green Jeep”) against Respondent Purple Mountain Tour Company (“Purple Mountain”) on February 14, 2024, is denied and dismissed.

3. The Motion for Attorney Fees and Costs filed by Respondent Purple Mountain on September 11, 2024, is granted.

4. Complainant and Complainant’s former counsel, Richard Bara, are jointly and severally liable for a proportionate portion of Respondent’s costs and fees.

¹⁰⁷ *Wesley v. Newland*, 2021 COA 142, ¶ 16, 505 P.3d 318, 321 (Colo. App. 2021) (quoting *City of Aurora ex rel. Util. Enter. v. Colo. State Eng’r*, 105 P.3d 595, 623 (Colo. 2005)) (emphasis added).

¹⁰⁸ *Wesley*, ¶ 16, 505 P.3d at 321.

5. Respondent Purple Mountain and former Respondents Zachary Bugg and Brooke Lynn Carswell are awarded attorney fees and costs in the amount of \$10,000.

6. Complainant and Complainant's counsel shall pay Respondents the sum of \$10,000 for attorney fees and costs within 60 days of this Recommended Decision becoming a final decision of the Commission.

7. Respondents' Motion for Modification of Interim Decision R24-0712-I, filed October 4, 2024, is denied.

8. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

9. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a. If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b. If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

10. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

11. Proceeding No. 24F-0078CP is closed.

(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

ALENKA HAN

Administrative Law Judge