Decision No. C14-0304

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 08A-407CP

IN THE MATTER OF THE APPLICATION OF MILE HIGH CAB, INC., FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO OPERATE AS A COMMON CARRIER BY MOTOR VEHICLE FOR HIRE

DECISION DENYING EXCEPTIONS AND DENYING MOTION TO ENLARGE TIME TO RESPOND TO EXCEPTIONS

Mailed Date: March 21, 2014
Adopted Date: March 5, 2014

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I. BY THE COMMISSION

A. Statement

1. Colorado Cab Company, LLC (Colorado Cab) filed exceptions to Decision No. R13-1518 (Recommended Decision), which granted the application of Mile High Cab, Inc. (Mile High) for a certificate of public convenience and necessity (CPCN) to operate a

taxicab company. Colorado Cab requests the Commission reopen the record on operational and financial fitness on the basis of allegations and findings in a separate district court action. Consistent with the discussion below, we deny the exceptions. We find that the facts presented by Colorado Cab in support of its request to reopen the record on Mile High's operational and financial fitness, even if applied to this proceeding, would not diminish the Commission's prior findings and conclusions on that issue.

B. Background

2. This proceeding commenced on September 11, 2008, when Mile High filed an application for a CPCN to operate a taxicab company. The Commission assigned the matter to Administrative Law Judge (ALJ) Paul Gomez. Several incumbent taxicab carriers intervened in opposition to the application, including Colorado Cab and MKBS, LLC, doing business as Metro Taxi &/or Taxis Fiesta &/or South Suburban Taxi &/or Northwest Suburban Taxi (Metro Taxi). The ALJ held evidentiary hearings from August 24, 2009 to September 14, 2009.

3. The ALJ denied the application by Recommended Decision No. R10-0745, issued July 20, 2010. He found that Mile High proved its operational and financial fitness to operate as a taxi carrier. Under § 40-10-105(2)(b)(II), C.R.S. (2008), this finding shifted the burden to the parties opposing the application to demonstrate the public convenience and necessity does not require granting the application and that issuance of the certificate will be detrimental to the public interest. The ALJ ruled that Metro Taxi[1] satisfied its burden of proof, and thus the certificate was denied. The Commission affirmed Decision No. R10-0745 by Decision No. C10-1354, issued December 20, 2010.

[1] Metro Taxi was the only intervenor to present evidence on the issues of public convenience and necessity and public interest. Colorado Cab limited its advocacy to operational and financial fitness issues.

4. Mile High sought judicial review, eventually arguing to the Colorado Supreme Court that the Commission had not applied the correct burden of proof to the elements that must be demonstrated by the parties opposing certification under § 40-10-105(2)(b)(II), C.R.S. (2008). The Supreme Court agreed and remanded the matter to the Commission. *Mile High Cabs, Inc. v. Pub. Utils. Comm'n*, 302 P.3d 241, 248 (Colo. 2013).

5. Upon remand, the Commission referred the matter to Hearing Commissioner James K. Tarpey to conduct further proceedings as directed by the Court and issue a recommended decision.[2]

6. On October 9, 2013, Colorado Cab and Metro Taxi filed motions requesting the Commission reopen its record to allow the introduction of new evidence regarding Mile High's fitness. Colorado Cab and Metro Taxi cited § 40-6-112(1), C.R.S., which authorizes the Commission to rescind, alter, or amend its decisions. Colorado Cab and Metro Taxi alleged that another action pending in Denver District Court[3] among Mile High and its founding principals raised issues of Mile High's operational and financial fitness to operate a taxicab service.

7. The Hearing Commissioner denied the motions to reopen the record. He found that the district court action among Mile High's principals did not justify a reevaluation of Mile High's operational and financial fitness and did not demonstrate the company as a whole was not fit.[4]

8. The Hearing Commissioner concluded, based upon the existing evidentiary record, Metro Taxi had not demonstrated by a preponderance of the evidence that granting the

[2] Decision No. C13-0766-I, mailed June 21, 2013.
[3] Denver District Court, Case No. 12 CV 6730, consolidated with Case No. 13 CV 30782.
[4] *Id.*, ¶¶ 10-13.

certificate to Mile High would actually be detrimental to the public interest. Thus, he granted the portion of Mile High's application before him on remand.[5]

9. Colorado Cab[6] filed exceptions to the Hearing Commissioner's Recommended Decision on December 30, 2013. Mile High responded to the exceptions on January 14, 2014. In a motion filed on January 15, 2014, Colorado Cab requested the Commission suspend Mile High's response to exceptions because the response was filed one day late and Mile High had failed to show good cause for the late filing.[7] On January 17, 2014, Mile High filed a motion to enlarge the time to respond to exceptions.

10. We deny Mile High's motion to enlarge time to respond to exceptions and do not consider Mile High's response, because Mile High did not show good cause for its late filing.[8] In addition, as Colorado Cab states, Mile High previously filed pleadings late in this proceeding.

C. Exceptions

11. Colorado Cab requests the Commission reopen its record to consider new evidence relevant to Mile High's financial and operational fitness that did not exist at the time of the evidentiary hearings in 2009. Colorado Cab cites to the district court action between Mile High and two of its founding principals, Rowland Nwankwo and Edem Archibong. Colorado Cab argues that the case consists of claims of unjust enrichment, non-compliance with corporate bylaws, fraud, misrepresentation, and tortuous interference with business relationships.

[5] This authority is as follows: Transportation of passengers in call-and-demand taxi service: (1) between all points within the area comprised of the Counties of Adams, Arapahoe, Denver, Douglas, and Jefferson, State of Colorado; (2) from said points, on the one hand to all points in the Counties of Boulder, Broomfield, and El Paso, State of Colorado; and (3) from all points in the City and County of Denver, State of Colorado to all points in the State of Colorado. This authority is restricted to the use of a maximum of 150 vehicles in service at any time.

[6] On December 30, 2013, Metro Taxi joined in the exceptions filed by Colorado Cab.

[7] On January 15, 2014, Metro Taxi joined in that motion.

[8] Mile High's counsel states he incorrectly calculated the due date for the response, as a result of his misunderstanding over mountain and central time zones. Counsel says he thought Colorado Cab filed after 5 p.m. on the due date, which would have granted Mile High an additional day to respond.

Colorado Cab contends that the case is relevant to Mile High's operational and financial fitness to operate a taxicab service because it raises the following issues, as stated by Colorado Cab:

- Whether Mile High is a cooperative or a C corporation and how resolution of this issue relates to Mile High's application to the Commission;
- Given resolution of the dispute over the corporate structure, who actually owns Mile High and in what share(s);
- The identity of the officers and board members, if any, in control of Mile High, the scope of their authority, and how resolution of these issues impact the evidence in this record and the Commission's fitness findings; and
- Whether funds were improperly withdrawn from the corporate entity, what happened to those funds if so, and, how does resolution of these disputes affect Mile High's financial fitness.[9]

12. Colorado Cab argues the Commission must evaluate Mile High's operational and financial fitness at the time it makes an overall decision on the application, rather than limit itself to evidence introduced four years earlier. Finally, Colorado Cab argues § 40-6-112(1), C.R.S., grants the Commission the legal authority to alter or amend its previous decisions at any time, even if the proceeding in which the previous decision was entered is still pending.

D. Discussion

13. We deny the exceptions and affirm the Recommended Decision. Section 40-6-112(1), C.R.S., vests the Commission with discretion on whether to rescind, alter, or amend its prior decisions.[10] Even if this statute may be invoked while the original proceeding

[9] Exceptions, pp. 5-6.

[10] Section 40-6-112(1), C.R.S., states:

> The commission, at any time upon notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints, **may** rescind, alter, or amend any decision made by it. Any decision rescinding, altering, or amending a prior decision, when served upon the public utility affected, shall have the same effect as original decisions.

Emphasis added. The word "may" denotes a grant of discretion and is usually permissive. *See, e.g., Cagle v. Mathers Family Trust*, 295 P.3d 460, 467 (Colo. 2013).

is pending, the district court matter does not amount to extraordinary circumstances justifying reopening the record and reevaluating Mile High's operational and financial fitness.[11]

14. The district court order, dated December 31, 2013,[12] addressed only three narrow issues and made no findings on the other issues listed by Colorado Cab. The court found that: (1) Mile High is a cooperative whereby each member owned one share and had one vote; thus, Mr. Nwankwo does not own 30 percent of the company; (2) Messrs. Nwankwo and Archibong are no longer members and directors of Mile High and are not entitled to inspect Mile High's financial records; and (3) Mr. Nwankwo is permanently enjoined from representing himself as the president of Mile High. The district court order does not address any allegations of improper withdrawal of Mile High's funds or make any findings of improper conduct by Mile High.

15. In finding Mile High to be operationally and financially fit, the ALJ applied the following metrics set forth in a prior proceeding:[13]

> [T]he ALJ should, without limitation, solicit evidence and develop findings of fact on the following topics with respect to each applicant: (a) minimum efficient scale, that is, whether a minimum size of operation is required and, if such a minimum does exist, conceptually what is the approximate magnitude for markets at issue in this docket; (b) credit worthiness; (c) access to capital; (d) capital structure; (e) current cash balances; (f) credit history and assessment of financial health over the near future; (g) managerial competence and experience; (h) fixed physical facilities such as office space and maintenance garages, as appropriate; (i) appropriate licenses and equipment necessary to operate a radio dispatch

[11] Decision No. C05-1472, Proceeding No. 05A-161E, issued December 15, 2005, ¶ 2 ("authority granted by § 40-6-112, C.R.S., should only be used in extraordinary circumstances.").

[12] On January 9, 2014, Mile High notified the Commission of this order. On February 14, 2014, Colorado Cab informed the Commission the order has been appealed to the Colorado Court of Appeals, Case No. 2014 CA 000160.

[13] Proceeding No. 08A-0241CP.

system; (j) vehicles of appropriate type; and (k) other metrics that may be appropriate.[14]

The district court's order addresses only two of the fitness metrics listed above: capital structure and management. An analysis of the ALJ's decision finding Mile High to be operationally and financially fit[15] and the district court's final order demonstrates that the ALJ's findings of fitness have not been affected or diminished.[16]

1. Capital Structure

16. The district court order states that Mile High is a cooperative whereby each member owns one share and has one vote. The ALJ found Mile High is a corporation, with the drivers, also known as "owner/operators," each owning a single share. Each driver will not have an equity interest in the business, but merely a voting interest. The overall operation of the company will be entrusted to the board of directors, with owner/operators voting on matters presented to them by the board.[17]

17. The ALJ found the testimony on Mile High's corporate structure to be unclear and inconsistent. Yet, according to the ALJ, this uncertainty was not fatal to fitness.[18] Rather, the overall strategy was for the drivers to provide start-up capital and any additional capital in the initial phases of operations, bypassing outside investors. The ALJ found this was a legitimate strategy that may keep the company from incurring debt or losing control to outside investors.[19]

18. Thus, the finding on Mile High's fitness was not based on whether the company is a cooperative or a C corporation but rather on the overall business strategy of owners and

[14] Decision No. R10-0745, ¶¶ 102-103, mailed July 20, 2010, citing Decision No. C08-0933.
[15] *Id.*, ¶¶37-126.
[16] No party filed exceptions to the ALJ's findings that Mile High was operationally and financially fit.
[17] Decision No. R10-0745, ¶¶ 40 and 41.
[18] *Id.*, ¶ 122.
[19] *Id.,* ¶¶ 68 and 113.

operators maintaining control over the company, with each person having an equal interest. The precise allocation of shares among owners does not affect the ALJ's conclusions on fitness, because the ALJ made no findings on this issue. Accordingly, the district court order on Mile High's corporate structure, even if considered upon reopening of the record, does not contradict or undermine the ALJ's ruling.

2. Managerial Competence and Experience

19. The ALJ noted that Mile High's initial board of directors was comprised of nine members, including Messrs. Archibong and Nwankwo.[20] Four of the nine persons on the board of directors, including Messrs. Archibong and Nwankwo, were officers of the company.[21]

20. The district court found Messrs. Archibong and Nwankwo no longer hold their positions with Mile High. There is no evidence that the remaining officers or board members have changed. A change in two out of the nine persons in charge of Mile High does not amount to an extraordinary circumstance that affects the fitness of the company as a whole. The ALJ found Mile High was fit based on all relevant metrics and not only the qualifications of two of its principals. We also agree with the Hearing Commissioner that the Commission ordinarily does not reexamine its decisions regarding fitness of regulated entities whenever the management changes.[22] Finally, there is no evidence that Mile High's remaining and replacement officers are not fit or will not act in the public interest.

21. In sum, even if we considered the findings issued in the district court case, these findings do not affect or diminish the Commission's conclusion on Mile High's financial and

[20] *Id.,* ¶ 72, Hearing Exhibit No. 5.
[21] Hearing Transcript August 27, 2009, p. 63, lines 14-25.
[22] Recommended Decision, ¶ 12.

operational fitness. Accordingly, we decline to reopen the record to address the new evidence proffered by Colorado Cab, and we deny Colorado Cab's exceptions.

II. ORDER

A. The Commission Orders That:

1. The motion to enlarge time to respond to exceptions filed on January 17, 2014, by Mile High Cabs, Inc. (Mile High) is denied.

2. Exceptions to Decision No. R13-1518 filed on December 30, 2013, by Colorado Cab Company, LLC, are denied.

3. Mile High shall not commence operation until it has:

(a) caused proof of insurance (Form E or self-insurance) or surety bond (Form G) coverage to be filed with the Commission;

(b) paid to the Commission, the motor vehicle fee of $5 for each vehicle to be operated under authority granted by the Commission, or in lieu thereof, paying the fee for such vehicle(s) pursuant to the Unified Carrier Registration Agreement;

(c) has an effective tariff on file with the Commission. Mile High shall file an advice letter and tariff on not less than ten days' notice. The advice letter and tariff shall be filed as a new Advice Letter proceeding and shall comply with all applicable rules. In calculating the proposed effective date, the date received at the Commission is not included in the notice period and the entire notice period must expire prior to the effective date;

(d) paid the applicable issuance fee ($5); and

(e) received notice in writing from the Commission that it is in compliance with the above requirements and may begin service.

4. If Mile High does not cause proof of insurance or surety bond to be filed, pay the appropriate motor vehicle fees, file an advice letter and proposed tariff, and pay the issuance fee within 60 days of the effective date of this Decision, then the grant of the authority shall be void. For good cause shown, the Commission may grant additional time for compliance if the request for additional time is filed within 60 days of the effective date of this Decision.

5. The 20-day time period provided by § 40-6-114, C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Decision.

6. This Decision is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING March 5, 2014.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

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Commissioners