Decision No. R14-1023

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 13A-1186CP-EXTENSION

IN THE MATTER OF THE APPLICATION OF HIGH COUNTRY SHUTTLE, INC., TO EXTEND OPERATIONS UNDER CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY NO. 55806.

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE MELODY MIRBABA DENYING APPLICATION

Mailed Date: August 22, 2014

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I. STATEMENT, FINDINGS, AND CONCLUSIONS

A. Procedural Background.

1. On November 1, 2013, High Country Shuttle Inc. (Applicant), filed an Application to Extend Operations under Certificate of Public Convenience and Necessity No. 55806 (Application).

2. The Commission provided public notice of the Application on November 4, 2013.

3. The Application seeks an order authorizing the extension of Certificate of Public Convenience and Necessity (CPCN) PUC No. 55806. Currently, CPCN PUC No. 55806 reads as follows:

> Transportation of
>
> passengers
>
> (I) in scheduled service between all points within the County of Clear Creek, State of Colorado, on the one hand, and Denver International Airport, on the other hand; and
>
> (II) in call-and-demand limousine service between all points in the County of Clear Creek, State of Colorado, on the one hand, and the Mountain Family Health Center, 562 Gregory Street, Black Hawk, Colorado, on the other hand.
>
> RESTRICTION:
>
> Item II is restricted against providing transportation services for passengers whose trips are paid for by Medicaid.

4. If the extension is granted, the scheduled service will be abandoned, the restriction will be eliminated, and CPCN No.55806 will authorize the following:

> Transportation of
>
> passengers in call-and-demand shuttle service:
>
> (I) between all points within the Counties of Clear Creek, Gilpin, and Summit, State of Colorado, on the one hand, and Denver International Airport, on the other hand;

(II) between all points within the Counties of Clear Creek, Gilpin, and Summit, State of Colorado; and

(III) between all points within the Counties of Clear Creek, Gilpin, and Summit, State of Colorado, on the one hand, and all points in Jefferson County, State of Colorado, on the other hand.

5. On December 4, 2013, Colorado Coach Transportation LLC (Colorado Coach) and MT Acquisitions LLC, doing business as Mountains Taxi (Mountains Taxi) (collectively, interveners), timely intervened of right (by separate filings).

6. During the Commission's weekly meeting held December 11, 2013, the Commission deemed the Application complete and referred it to an administrative law judge (ALJ) for disposition.

7. On December 16, 2013, by Decision No. R13-1545-I, the ALJ scheduled this matter for a prehearing conference for January 8, 2014 at 10:00 a.m. at the Commission's Offices. At the designated date, time, and location, the ALJ convened the prehearing conference. Mr. Imre Zelizi, Applicant's sole owner, appeared on behalf of Applicant. Mr. Charles Kimball appeared by telephone on behalf of interveners.

8. At the hearing, it was established that Applicant's authority had been recently revoked for failing to have proof of financial responsibility on file with the Commission. Decision No. R13-1472 in Proceeding No. 13C-1255-INS issued November 27, 2013. Because the authority which Applicant sought to be extended was revoked, the ALJ dismissed the Application as moot. Decision No. R14-0040 issued January 13, 2014.

9. On January 14, 2014, Mr. Zelizi made a filing in Proceeding No. 13C-1255-INS seeking Applicant's authority be reinstated. By Decision No. C14-0095 issued January 24, 2014, the Commission reinstated Applicant's authority contingent upon Applicant filing proof of insurance by February 7, 2014. Applicant filed its proof of insurance on January 29, 2014.

10. On January 21, 2014, Applicant filed exceptions to the ALJ's Decision dismissing the Application in this proceeding. On February 12, 2014, the Commission granted Applicant's exceptions because Applicant's authority had been reinstated. Decision No. C14-0169-I. The same Decision referred the Application to an ALJ for disposition on the merits.

11. On February 19, 2014, by Decision No. R14-0187-I, the ALJ scheduled a hearing for April 3 and 4, 2014 to take place at the Commission's office in Denver, Colorado.

12. On March 7, 2014, Applicant filed a "Motion to Change Hearing Location Request" (Motion) to Georgetown, Colorado. As grounds, Applicant argued that he is unable to get his witnesses to travel from Georgetown to testify in Denver, Colorado. Interveners objected to the Motion. A telephone hearing was held on March 13, 2014 regarding Applicant's Motion. The ALJ vacated the April 3 and 4, 2014 hearing after Applicant waived the statutory deadline for a Commission Decision to issue. Decision No. R14-0305-I, issued March 20, 2014. The ALJ rescheduled the hearing to take place in Georgetown on June 24 and 25, 2014. *Id.*

13. At the date, time and location designated (June 24, 2014), the ALJ convened the hearing. Mr. Imre Zelizi appeared on behalf of Applicant and Mr. Charles Kimball appeared on behalf of interveners. The parties requested that the hearing be delayed while they discussed settlement. After approximately 45 minutes, the parties notified the ALJ on the record that they had reached a settlement of their disputes. The ALJ did not approve the settlement at the time of the hearing and instead ordered that it be submitted in writing. Based upon the parties' representation that they have resolved the matter, the ALJ vacated the remaining portion of hearing.

14. The parties were ordered to file their final agreement by July 9, 2014, or if they were unable to finalize their agreement, to make an appropriate filing by that same deadline,

indicating the status of their agreement and what action, if any, may be necessary for this matter to be concluded. Decision No. R14-0703-I issued June 25, 2014.

15. On July 10, 2014, counsel for interveners emailed the undersigned ALJ indicating the parties were unable to finalize a written settlement agreement.[1]

16. On July 14, 2014, Applicant filed a letter with the Commission requesting a new hearing be scheduled on the Application. The letter states that an agreement could not be reached with interveners, and that Applicant seeks to defend the Application as originally written "without compromise."

17. The ALJ scheduled a hearing on the merits of the Application for August 21 and 22, 2014 to be held at the Commission's office in Denver, Colorado.[2] Decision No. R14-0816-I issued July 14, 2014. The Decision acknowledged Applicant's prior statements that it would be difficult to obtain witnesses to travel to Denver for a hearing. *Id.*, at ¶17. The Decision further informed Applicant that if its witnesses cannot appear in person in Denver for the hearing, that Applicant is encouraged to submit a written motion requesting that the witness be permitted to testify by telephone, as permitted by Rule 1405(a)(I) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1. *Id.* The Decision included information on the items that should be included in such a motion. *Id.*

18. Applicant never filed any motion requesting that his witnesses be permitted to testify by telephone (or by any other remote means).

[1] Interveners' counsel did include Applicant on the email. The email has been placed in the administrative record in this proceeding.

[2] The ALJ already accommodated Applicant's request to hold a hearing in Georgetown. After commencing that hearing, Applicant's owner stated he had reached an agreement settling the disputes in the proceeding. The hearing was vacated based on this representation. The expenditure of additional resources to travel to Georgetown for a second time is not justified under the circumstances.

19. On the date, time and location designated, (August 21, 2014), the ALJ convened the evidentiary hearing. Mr. Imre Zelizi appeared on behalf of Applicant and Mr. Charles Kimball appeared on behalf of interveners. Before commencing the evidentiary portion of the hearing, the parties requested that the ALJ accept an amendment to the Application to include the following restriction: "Against transportation of passengers between points in Central City and Black Hawk, Colorado." Both parties clearly indicated on the record that they wished for this restrictive amendment to be approved and accepted. Finding the proposed amendment to be restrictive, clear and understandable, and administratively enforceable, the ALJ accepted the proposed amendment, thereby amending the Application to include the restriction.

20. Upon the acceptance of the restrictive amendment, Colorado Coach withdrew its intervention. The ALJ accepted Colorado Coach's withdrawal of its intervention and dismissed Colorado Coach as a party to this proceeding. Thus, at the time the evidentiary portion of the hearing began, Applicant and Mountains Taxi were the sole remaining parties.

21. Mountains Taxi made a verbal motion that Applicant be held to the verbal agreement reached during the first hearing. Applicant objected, and stated that it did not agree to the settlement terms discussed at the last hearing.

22. The ALJ has previously been clear that the agreement reached at the first hearing was never approved, and that it had to be submitted in writing to be approved. Decision No. R14-0703-I. The ALJ reviewed the terms that were proposed at the last hearing, and again reiterated that the agreement had to be put in writing to be accepted. The ALJ explained that this requirement was necessary because the terms of the agreement, as relayed during the hearing, were unclear and confusing. The ALJ denied Mountains Taxi's verbal motion to enforce the verbal agreement made at the first evidentiary hearing.

23. During the course of the hearing, Mr. Zelizi testified on behalf of Applicant. Although exhibits were prepared for introduction at the evidentiary hearing, no exhibits were offered into evidence; therefore, no exhibits were admitted into evidence.

24. After Applicant rested its case, Mountains Taxi made a verbal motion to dismiss, arguing Applicant failed to meet its burden of proof to show it is fit to provide the proposed service, and that the service of the existing carriers in the geographical area is substantially inadequate. Applicant objected to the motion. The ALJ considered the evidence and all arguments presented, and found that Applicant failed to meet its burdens. As a result, the ALJ denied the Application. This Decision memorializes that ruling.

B. Evidence Offered in Support of Application.

25. Mr. Zelizi is Applicant's owner and operator. He has been in business for approximately three and a half years.

26. He filed the Application based on statements made to him from members of his community in Georgetown indicating that an additional transportation service is needed. He has witnessed higher traffic in Clear Creek County, and because of that believes that the extended authority is needed to transport passengers from Clear Creek County to other counties. Mr. Zelizi believes that granting the extended authority will better serve the Clear Creek County community.

27. Mr. Zelizi believes that by operating for three and a half years under his current authority, he has shown that alternate transportation is necessary, at least from Clear Creek County to Denver International Airport. He also believes alternate transportation is necessary based upon statements made to him by others in the Clear Creek County community.

C. Legal Standards Governing Application.

1. Burden of Proof.

28. Applicant, as the proponent of an order, bears the burden of proof by a preponderance of the evidence. §§ 13-25-127(1) and 24-4-205(7), C.R.S.; Rule 1500 of the Commission's Rules of Practice and Procedure, 4 CCR 723-1. The preponderance standard requires the finder of fact to determine whether the existence of a contested fact is more probable than its non-existence. *Swain v. Colorado Department of Revenue*, 717 P.2d 507, 508 (Colo. App. 1985). A party has met this burden of proof when the evidence, on the whole and however slightly, tips in favor of that party.

29. Although the preponderance standard applies, the evidence must be substantial. Substantial evidence is defined as "such relevant evidence as a reasonable person's mind might accept as adequate to support a conclusion . . . it must be enough to justify, if a trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *City of Boulder v. Public Utils. Comm'n*, 996 P.2d 1270, 1278 (Colo. 2000) (internal citation omitted).

2. Regulated Monopoly Doctrine.

30. The Application seeks to extend Applicant's current authority. The Application seeks an extension in order to operate as a common carrier by motor vehicle for hire for the transportation of passengers in call-and-demand shuttle service: between all points within the Counties of Clear Creek, Gilpin, and Summit, State of Colorado, on the one hand, and Denver International Airport, on the other hand; between all points within the Counties of Clear Creek, Gilpin, and Summit, State of Colorado; and between all points within the Counties of Clear

Creek, Gilpin, and Summit, State of Colorado, on the one hand, and all points in Jefferson County, State of Colorado, on the other hand.

31. The doctrine of regulated monopoly applies to Applicant's request for an extension to its authority. *Yellow Cab Cooperative Association v. Public Util's Comm'n*, 869 P.2d 545, 548 (Colo. 1994); *see e.g.,* Decision No. R13-0441 issued April 16, 2013 in Proceeding No. 12A-1090CP and Decision No. R13-0370, issued March 28, 2013 in Proceeding No. 12A-1185CP. Indeed, unless legislatively dictated otherwise, the doctrine of regulated monopoly applies. *Rocky Mountain Airways, Inc. v. Public Util's Comm'n,* 509 P.2d 804, 807 (Colo. 1973). No statute dictates a standard other than regulated monopoly to applications seeking to provide call-and-demand shuttle service.

32. Under the regulated monopoly doctrine, an applicant must show: (1) it is financially, operationally, and managerially fit to provide the proposed service; (2) that the present or future public convenience and necessity requires or will require the service proposed; and (3) that the service of existing carriers within the proposed service area is substantially inadequate. *Yellow Cab Cooperative Association,* 869 P.2d at 548.

33. Although the Commission has no rules quantifying a financial fitness standard, the applicant must make some showing, however minimal, that it either has or has access to financial resources that will enable it to implement the proposed service. *Acme Delivery Service, Inc. v. Cargo Freight Systems, Inc.,* 704 P.2d 839, 843 (Colo. 1985). Fitness must be evaluated on a case-by-case basis upon the unique circumstances of each applicant and the proposed

service. *See e.g.,* Decision No. C09-0207, issued February 27, 2009, Consolidated Proceeding Nos. 08A-241CP, 08A-283CP, 08A-284CP-Extension, and 08A-300CP.

34. In general, operational fitness encompasses a consideration of whether the applicant has the equipment, personnel, facilities, and the managerial experience to conduct for-hire passenger carrier operations. Whether the applicant is willing and able to comply with applicable public utilities laws also bears upon the question of fitness. *See, Thacker Brothers Transportation v Public Utilities Commission*, 543 P.2d 719, 721 (Colo. 1975).

35. The number of witnesses testifying for a given proposition does not force the Commission to reach a particular result on that issue. *RAM Broadcasting v. Pub. Utils. Comm'n*, 702 P.2d 746, 750 (Colo. 1985).

36. Regulated monopoly is based on the principle that fewer carriers who can make a reasonable return on their investment will give the public safe, efficient, and more economical service, and that increasing the number of providers ultimately results in a deterioration of service and higher rates for the public. *See Archibald v. Pub. Utils. Comm'n et al.,* 171 P.2d 421, 423 (Colo. 1946); *see e.g., Morey v. Pub. Utils. Comm'n,* 629 P.2d 1061, 1066-67 (Colo. 1981). This principle is the guiding force behind the protections given to existing carriers; an incumbent carrier is only entitled to protection from new competition if it provides adequate service to the public. *Ephraim Freightways, Inc. v. Pub. Utils. Comm'n.*, 380 P.2d 228, 231 (Colo. 1963).

37. Whether the incumbent carrier's service is substantially inadequate is a question of fact that the Commission must determine. *RAM Broadcasting*, at 751; *Durango Transportation*, *Inc. v. Pub. Utils. Comm'n*., 122 P.3d 244, 247 (Colo. 2005). Thus, the question necessarily must be answered on a case-by-case basis upon the unique facts of the given case. Substantially inadequate service is shown by evidence of "a general pattern of inadequate

service" on the part of the incumbent carrier. *Durango Transportation*, at 247-48; *Ephraim*, at 232. Substantial inadequacy can also be demonstrated with evidence that the incumbent carrier is not ready, willing, and able at all times to provide the requested service. *Durango Transportation*, at 247-48. The incumbent carrier is not held to a standard of perfection. *Ephraim,* at 232.

3. Standard of Review for a Motion to Dismiss Made After Applicant Has Presented Its Evidence and Rested.

38. Rule 1001 of the Rules of Practice and Procedure, 4 CCR 723-1, provides that where not inconsistent with Title 40 of Colorado Revised Statutes (Title 40), or the Rules of Practice and Procedure, an ALJ may seek guidance from or may employ the Colorado Rules of Civil Procedure (Colo. R. Civ. P.).

39. Colo. R. Civ. P. 41(b)(1) does not conflict with Tile 40 or with the Rules of Practice and Procedure. The ALJ elects to employ the rule, as it speaks directly to the verbal Motion to Dismiss made in this proceeding. Rule 41(b)(1) motions provide the court with an opportunity to evaluate the evidence and to determine whether the plaintiff has satisfied its burden of proof so as to require the other side to present its case. *City of Aurora v. Simpson (In Re Water Rights of Park County Sportsman Ranch),* 105 P.3d 595, 614 (Colo. 2005).

40. Rule 41(b)(1) provides that in a trial to the court, at the conclusion of plaintiff's case (here, the Applicant), the defendant (here, the Intervener), without waiving his right to offer evidence in the event the motion is not granted, may move for dismissal on the ground that upon the facts and the law, the plaintiff (here, the Applicant), has shown no right to relief. The court as trier of fact may then determine them and render judgment against the plaintiff (here, the Applicant), or may decline to render judgment until the close of all evidence. Accordingly, the

standard under Colo. R. Civ. P. 41(b)(1) is not whether the applicant established a *prima facie* case, but whether judgment in favor of the intervener is justified on the evidence presented.[3] *City of Aurora,* 105 P.3d at 614.

D. Discussion and Conclusions.

41. As previously stated, Mountains Taxi made a verbal Motion to Dismiss (Motion) after Applicant completed presenting all evidence in support of the Application. The ALJ construed that verbal Motion under Colo. R. Civ. P. 41(b)(1), and applied the standards of that rule.

42. Here, the Applicant presented no evidence at all that addresses the question of fitness. Nor did Applicant present evidence that establishes that the public convenience or necessity requires or will require the proposed service, or that the service of the carriers in the service territory is substantially inadequate. At best, Applicant presented evidence indicating that he believes, based on statements from other individuals, that an alternate transportation option would benefit his community in Clear Creek County. This is not enough to meet the hefty burdens imposed under the regulated monopoly doctrine.

43. For the foregoing reasons and authorities, the ALJ concludes that Applicant failed to meet its burden to prove by a preponderance of the evidence that it is fit to provide the proposed service, that the public convenience or necessity requires or will require the proposed service, or that the service of the carriers in the service territory is substantially inadequate.[4] Consequently, Applicant failed to show a right to relief and the Application should be denied.

[3] The ALJ notes that this is no different than the analysis to be applied after all parties present their evidence.

[4] The ALJ does not reach this conclusion because Applicant called only one witness. The ALJ evaluated the evidence presented as a whole to reach this conclusion.

44. Pursuant to § 40-6-109, C.R.S., the ALJ transmits the record of this proceeding and, for the foregoing reasons and authorities, the ALJ recommends that the Commission enter the following order.

II. ORDER

A. The Commission Orders That:

1. Consistent with the discussion above, High Country Shuttle Inc.'s Application to Extend Operations Under Certificate of Public Convenience and Necessity PUC No. 55806 is denied.

2. Proceeding No. 13A-1186CP-Extension is closed.

3. 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.

4. 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 Commis-0387BPsion 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.

5. 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.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean,
Director