

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14A-0964CP

IN THE MATTER OF THE APPLICATION OF LOONEY LOOP FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO OPERATE AS A COMMON CARRIER BY MOTOR VEHICLE FOR HIRE.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
DISMISSING APPLICATION WITHOUT
PREJUDICE, VACATING REQUIREMENT
TO FILE PROCEDURAL SCHEDULE,
AND CLOSING PROCEEDING**

Mailed Date: December 5, 2014

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I. STATEMENT

1. On September 25, 2014, Looney Loop (Looney Loop or Applicant) filed an Application for New Permanent Authority to Operate as a Common Carrier of Passengers by Motor Vehicle for Hire (Application). That filing commenced this Proceeding.

2. On October 6, 2014, the Commission issued its Notice of Application Filed (Notice) in this Proceeding (Notice at 5); established an intervention period; and established a procedural schedule. On November 13, 2014, Decision No. R14-1365-I vacated that procedural schedule.

3. Colorado Jitney, LLC, doing business as Colorado Jitney (Intervenor), timely intervened. Intervenor opposes the Application and is represented by legal counsel in this matter.

4. Applicant and Intervenor, collectively, are the Parties.

5. On November 12, 2014, by Minute Order, the Commission deemed the Application complete as of that date. Pursuant to § 40-6-109.5(2), C.R.S., and absent an enlargement of time by the Commission or Applicant's waiver of the statutory provision, a Commission decision on the Application should issue not later than June 10, 2015.

6. On November 12, 2014, by Minute Order, the Commission referred this matter to an Administrative Law Judge (ALJ).

II. FINDINGS AND CONCLUSION

7. For the reasons discussed below, the ALJ finds and concludes that, by its inaction, Applicant has evidenced little or no interest in pursuing the Application. By this Decision, the ALJ will dismiss the Application without prejudice.

A. Applicant's Failure to Obtain Legal Counsel.

8. Rule 4 *Code of Colorado Regulations* (CCR) 723-1-1201(a)¹ requires a party in an adjudication before the Commission to be represented by an attorney except that, pursuant to Rule 4 CCR 723-1-1201(b)(II) and as relevant here, an individual may appear without an

¹ This Rule is found in the Rules of Practice and Procedure, Part 1 of 4 *Code of Colorado Regulations* 723.

attorney to represent the interests of a closely-held entity, as provided in § 13-1-127, C.R.S. The Commission has held that, unless an exception applies, a party must be represented by counsel in an adjudication. In addition, the Commission has held that, if a party does not establish that an exception applies to it, there are two consequences: *first*, any filing made by a non-attorney on behalf of the party is void and of no legal effect; and, *second*, the party must have an attorney in order to participate in a hearing, in a prehearing conference, or in an oral argument.

9. This is an adjudication before the Commission. Applicant is a Colorado limited liability company, is a party in this matter, and is not represented by an attorney in this Proceeding.

10. By Decision No. R14-1365-I at ¶ 15 and Ordering Paragraph No. 5, the ALJ ordered Applicant either to retain legal counsel for this Proceeding or to show cause why it should be permitted to proceed in this matter without legal counsel. If Applicant chose to retain counsel, its counsel was to enter an appearance no later than November 24, 2014. If Applicant chose to show cause, it was to make its show cause filing no later than November 24, 2014.

11. Decision No. R14-1365-I contained the following advisements:

Looney Loop is advised, and is on notice, that if it fails either to show cause or to have its attorney file an entry of appearance as required by this Interim Decision, the ALJ will issue a subsequent Interim Decision that requires Looney Loop to retain legal counsel to represent it in this Proceeding.

Looney Loop is advised, and is on notice, that if the ALJ issues a subsequent [Interim] Decision that requires Looney Loop to retain legal counsel and if Looney Loop then fails to retain legal counsel, the ALJ will dismiss the Application.

Id. at ¶¶ 18-19 (bolding in original).

12. Decision No. R14-1365-I at Ordering Paragraph No. 15 stated: “The Parties are held to the advisements in this Interim Decision.”

13. On November 13, 2014, the Commission served Decision No. R14-1365-I on Applicant by providing notice through the Commission's E-Filings System, with which Applicant is registered.² See Rule 4 CCR 723-1-1205(b) ("All registered filers in the E-Filings System must have expressly agreed, through attestation, to accept service in all Commission proceedings through the E-Filings System."). Applicant is presumed to have notice of Decision No. R14-1365-I.

14. No attorney entered an appearance on behalf of Looney Loop. Looney Loop did not request additional time within which to obtain counsel.

15. Looney Loop did not respond to the order to show cause (*i.e.*, Decision No. R14-1365-I). Looney Loop did not request additional time within which to respond to the order to show cause.

16. Looney Loop failed to comply with, or to respond to, the Decision No. R14-1365-I requirement that Looney Loop either obtain legal representation or show cause. That failure to comply with, or to respond to, Decision No. R14-1365-I was unexplained and unexcused. Looney Loop was advised of the consequences of failure to comply or to respond.

17. Although given reasonable opportunity to do so, Looney Loop did not establish that it comes within the Rule 4 CCR 723-1-1201(b)(II) exception. As a consequence, on November 26, 2014, by Decision No R14-1414-I and pursuant to Rule 4 CCR 723-1-1201(a), the ALJ found that Looney Loop must be represented by an attorney in this case. In that Interim Decision, the ALJ ordered Looney Loop to obtain an attorney to represent it in this matter and

² In Decision No. R14-1414-I, the ALJ stated that the Commission mailed Decision No. R14-1365-I to Applicant. This statement is incorrect. As stated above, the Commission served Decision No. R14-1365-I through the E-Filings System.

ordered Looney Loop's attorney to enter, not later than December 3, 2014, an appearance in this Proceeding.

18. Decision No R14-1414-I contained the following advisements:

Looney Loop is advised and is on notice that it is cannot proceed in this case unless it is represented by an attorney who is admitted to practice law in, and who is in good standing in, Colorado.

Looney Loop is advised and is on notice that the failure of its counsel to enter an appearance as required by this Interim Decision will result in dismissal of the Application without prejudice.

Id. at ¶ 17-18 (bolding in original); *see also* Ordering Paragraphs No. 1 - No. 3 (same).

19. By Ordering Paragraph No. 5 of Decision No R14-1414-I, the ALJ holds the Parties, including Applicant, "to the advisements in the Interim Decisions issued in this Proceeding."

20. On November 26, 2014, the Commission served Decision No. R14-1414-I on Applicant by providing notice through the Commission's E-Filings System, with which Applicant is registered. *See* Rule 4 CCR 723-1-1205(b) ("All registered filers in the E-Filings System must have expressly agreed, through attestation, to accept service in all Commission proceedings through the E-Filings System."). Applicant is presumed to have notice of Decision No. R14-1414-I.

21. As of the date of this Recommended Decision, no attorney has entered an appearance in this proceeding on behalf of Applicant.

22. As of the date of this Recommended Decision, Applicant has not requested additional time within which to obtain legal counsel.

23. Despite clear advisements of the consequences should it fail to have legal counsel, Looney Loop elected not to obtain legal counsel in this matter. Looney Loop's failure to comply

with Decision No R14-1414-I is unexplained and unexcused. Thus, in accordance with the advisements in Decision No R14-1414-I at ¶ 18 and Ordering Paragraph No. 3 and in Decision No. R14-1365-I at ¶ 19, the ALJ finds and concludes that Applicant's failure to obtain counsel in this matter warrants dismissal of the Application without prejudice.

B. Applicant's Inability to Meet Burden of Proof.

24. As the party seeking common carrier authority, Looney Loop bears the burden of proof in this case. The burden of proof is preponderance of the evidence. Section 24-4-105(7), C.R.S.; § 13-25-127(1), C.R.S.; Rule 4 CCR 723-1-1500.

25. In Decision No R14-1414-I at ¶ 6 and in Decision No. R14-1365-I at ¶ 11, the ALJ informed Applicant that, pursuant to Rule 4 CCR 723-1-1201(a), Applicant must have an attorney unless Applicant establishes that it meets the requirements of Rule 4 CCR 723-1-1201(b) and the Commission permits Applicant to proceed in this matter without legal counsel. When the ALJ ordered Applicant to retain legal counsel in this Proceeding, the ALJ also informed Applicant that, without an attorney, Applicant cannot make valid filings and cannot participate in a hearing, in a prehearing conference, or in an oral argument. Decision No R14-1414-I at ¶ 6. *See also* Decision No. R14-1365-I at ¶ 11 (same).

26. Despite these advisements and despite having reasonable opportunity to obtain legal counsel, Applicant elected not to obtain legal counsel in this matter. Thus, Applicant is barred from participating in the evidentiary hearing in this Proceeding and from making filings in this Proceeding.

27. Because it can neither participate in the evidentiary hearing nor make filings, Looney Loop cannot offer testimonial or documentary evidence in support of its Application and, thus, cannot meet its burden of proof. The ALJ finds and concludes that, because Looney Loop

cannot meet its burden of proof, dismissal of the Application without prejudice is warranted in order to conserve the resources of the Commission and the Parties.

C. Procedural Schedule Filing Date.

28. By Decision No. R14-1365-I at ¶ 31 and Ordering Paragraph No. 12, the ALJ ordered Applicant to consult with the Intervenors and to make, not later than November 28, 2014, a filing that: (a) contains a proposed procedural schedule; and (b) complies with ¶¶ 31-35 of that Interim Decision.

29. By Decision No. R14-1414-I at ¶ 21 and Ordering Paragraph No. 4, the ALJ modified Decision No. R14-1365-I by changing the date for making a filing that complies with ¶¶ 31-35 of that Interim Decision. The new filing date is December 10, 2014.

30. Given that the Application is dismissed, the ALJ will vacate the requirement, established in Decision No. R14-1414-I at ¶ 21 and Ordering Paragraph No. 4, that Applicant (through counsel) file a proposed procedural schedule not later than December 10, 2014.

31. Pursuant to § 40-6-109(2), C.R.S., the Administrative Law Judge recommends that the Commission enter the following order.

III. ORDER

A. The Commission Orders That:

1. Consistent with the discussion above, the Application for New Permanent Authority to Operate as a Common Carrier of Passengers by Motor Vehicle for Hire filed on September 25, 2014 by Looney Loop is dismissed without prejudice.

2. The requirement, established in Decision No. R14-1414-I at ¶ 21 and Ordering Paragraph No. 4, that Looney Loop (through counsel) file a proposed procedural schedule not later than December 10, 2014 is vacated.

3. Proceeding No. 14A-0964CP is closed.

4. 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.

5. 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.

6. If exceptions to this Recommended 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

MANA L. JENNINGS-FADER

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director