Decision No. R15-0306-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14F-0806CP

COLORADO JITNEY, LLC,

COMPLAINANT,

V.

CITY AND COUNTY OF DENVER AND
EVERGREEN TRAILS, INC., DOING BUSINESS AS HORIZON COACH LINES,

RESPONDENTS.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
ADDRESSING MOTIONS REFERRED
TO ALJ BY DECISION NO. C15-0302-I**

Mailed Date: April 7, 2015

TABLE OF CONTENTS

I. STATEMENT

1. On July 25, 2014, Colorado Jitney, LLC (Jitney or Complainant), filed a Complaint against the City and County of Denver (Denver) and Evergreen Trails, Inc., doing business as Horizon Coach Lines (Horizon). That filing commenced this Proceeding.

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

3. Denver and Horizon, collectively, are the Respondents. Complainant and Respondents, collectively, are the Parties. Each party is represented by legal counsel.

4. The procedural history of this Proceeding is set out in previously-issued Interim Decisions and is repeated here as necessary to put this Interim Decision in context.

II. DISCUSSION

A. Background.

5. On August 20, 2014, by Decision No. R14-1005-I, among other things, the ALJ advised the Parties that they must be familiar with, and must abide by, the Commission's Rules of Practice and Procedure.

6. Each respondent filed an answer to the Complaint. As a result, the matter was at issue. On September 10, 2014, by Decision No. R14-1104-I, the ALJ scheduled an evidentiary hearing on the merits of the Complaint for April 30 and May 1, 2015 and established a procedural schedule.

7. The procedural schedule included two dates that are pertinent here: (a) not later than October 10, 2014, Complainant was to file "a motion to amend the Complaint" (Decision No. R14-1104-I at Ordering Paragraph No. 2); and (b) not later than November 7, 2014, Respondents were to file "motion[s] to dismiss the Complaint, including motions addressed to the Commission's subject matter jurisdiction in this matter" (*id.*). On an unopposed motion filed by Horizon, by Decision No. R14-1213-I,[1] the ALJ modified -- to October 14, 2014 -- the date by which Complainant was to file its motion to amend.

8. On October 14, 2014, Jitney filed a Motion to Amend Complaint. The Amended Complaint accompanied that filing. On November 19, 2014, by Decision No. R14-1389-I, the ALJ granted the motion and permitted Jitney to file an Amended Complaint.[2]

9. On October 17, 2014, Horizon filed its Answer to the Amended Complaint. In that filing, Horizon raises the issue of the Commission's subject matter jurisdiction in this matter.

[1] That Interim Decision was issued in this Proceeding on October 2, 2014.

[2] In the remainder of this Interim Decision, unless the context indicates otherwise, reference to the Complaint is to the Amended Complaint.

10. On October 28, 2014, Denver filed a motion to dismiss the Amended Complaint. In that filing, Denver raises the issue of the Commission's subject matter jurisdiction in this matter.

11. On November 4, 2014, Horizon filed a Motion to Dismiss which addresses both the Complaint and the Amended Complaint.[3] In that filing, Horizon raises the issue of the Commission's subject matter jurisdiction in this matter.

12. On November 18, 2014, Complainant filed its Response in Opposition to Motions to Dismiss.

13. The Motions to Dismiss question whether the Commission has subject matter jurisdiction in this Proceeding. The Motions to Dismiss raise issues of fact that must be resolved in order to decide the motions.

14. On December 10, 2014, by Decision No. R14-1456-I, the ALJ scheduled a February 25 and 26, 2015 hearing to take evidence on the disputed facts concerning the Commission's subject matter jurisdiction and established the procedural schedule for that portion of this Proceeding.

15. Each party filed a list of witnesses and copies of its exhibits for the hearing on subject matter jurisdiction. Complainant and Denver each filed a corrected list of witnesses and exhibits.

16. On February 9, 2015, Denver filed (in one document) a Motion *in Limine* to Exclude Testimony of Legislative Intent [First Motion *in Limine*], Request to Shorten Response

[3] In this Interim Decision, unless the context indicates otherwise, the phrase Motions to Dismiss refers, collectively, to the Denver motion to dismiss filed on October 28, 2014 and to the Horizon motion to dismiss filed on November 4, 2014.

Time [Request to Shorten], and Request for an Expedited Ruling [Request to Expedite] (in its entirety, February 9 Filing).

17. On February 9, 2015, by Decision No. R15-0147-I, the ALJ shortened response time to the First Motion *in Limine*. In doing so, the ALJ stated:

> The ALJ finds that the Request to Shorten states good cause. In addition, **if the response time to the [First] Motion *in Limine* and the Request to Expedite is not shortened**, Denver's filing -- for all practical purposes -- will be rendered moot as **the ALJ will not have sufficient time to issue a ruling in advance of the scheduled hearing dates**. Further, the ALJ finds that **shortening response time as requested will maintain the scheduled hearing dates**. Finally, the ALJ finds that no party will be prejudiced if the Request to Shorten is granted.

Decision No. R15-0147-I at ¶ 22 (italics in original; bolding supplied).

18. On February 12, 2015, counsel for Jitney requested that the ALJ issue subpoenas in this Proceeding for Messrs. Doug Dean, Chuck Ford, Peter Gray, Ron Jack, James Kerr, and Terry Willert. By electronic mail sent on February 13, 2015, the ALJ informed counsel for Jitney that she would not sign the subpoenas because the affidavit was insufficient as it did not meet the § 40-6-103(1), C.R.S., specificity requirements and because one of the individuals (Mr. Gray) was not a witness identified on a list of witnesses filed in this Proceeding. Because a request for issuance of subpoenas is made *ex parte* and because the issuance or non-issuance of a requested subpoena is done *ex parte*, the ALJ communicated only with counsel for Jitney by electronic mail.

19. On February 12, 2015, Denver filed (in one document) a Motion *in Limine* to Exclude Colorado Jitney's Exhibit 7 [Second Motion *in Limine*], Request to Shorten Response Time [Request to Shorten], and Request for an Expedited Ruling [Request to Expedite] (in its entirety, February 12 Filing).

20. On February 13, 2015, by Decision No. R15-0155-I, the ALJ shortened response time to the Second Motion *in Limine*. In doing so, the ALJ stated:

> The ALJ finds that the Request to Shorten states good cause. In addition, **if the response time to the Second Motion *in Limine* and the Request to Expedite is not shortened**, Denver's filing -- for all practical purposes -- will be rendered moot as **the ALJ will not have sufficient time to issue a ruling in advance of the scheduled hearing dates**. Further, the ALJ finds that **shortening response time as requested will maintain the scheduled hearing dates**. Finally, the ALJ finds that no party will be prejudiced if the Request to Shorten is granted.

Decision No. R15-0155-I at ¶ 21 (italics in original; bolding supplied).

21. On February 13, 2015, Complainant filed (in one document) its Motion to Set Aside Interim Decision No. R15-0147-I [Motion to Set Aside], to Stay Said Decision Pending Resolution of Motion to Set Aside [Motion to Stay], to Waive Response Time to Motion to Stay [Motion to Waive] and for Expedited Ruling on Motion to Stay [Complainant's Motion to Expedite] (in its entirety, February 13 Filing).

22. On February 13, 2015, Denver filed its Corrected Witness and Exhibit Lists.

23. On February 17, 2015, Horizon filed its Response to the February 13 Filing (February 17 Response).

24. On February 17, 2015, by Decision No. R15-0160-I, the ALJ addressed the February 13 Filing and vacated the February 25 and 26, 2015 evidentiary hearing.

25. For the reasons stated in Decision No. R15-0160-I at ¶ 27, the ALJ waived response time to the Motion to Set Aside.

26. On the substance of the relief sought, the ALJ stated:

> In the Motion to Set Aside, Complainant: (a) asserts that the ALJ should not have shortened the response time to the Motion *in Limine* because Denver failed to support its request for shortened response time to that motion;[Note 3] (b) equates shortening response time to a denial "on procedural grounds" of

Complainant's "right to oppose the motion in limine" (February 13 Filing at 5); and (c) argues that it has been denied procedural due process, and its substantive rights have been violated, because the ALJ "arbitrarily and capriciously" shortened response time to the Motion *in Limine*. February 13 Filing at 5. In addition, addressing (in one sentence) the substance of the Motion *in Limine*, Complainant asserts that the Motion *in Limine* should be denied on the basis of laches. *Id*. Finally, Complainant states, "In the alternative, Complainant should be given the full 14 days in which to respond [to the Motion in Limine], *even if it means postponing the hearing*." *Id*. (emphasis supplied).

In the February 17 Response, Horizon opposes the relief sought in the February 13 Filing, particularly the request to vacate the evidentiary hearing. In that filing, Horizon asserts: (a) Complainant's argument about the insufficiency of its time to respond to the motion *in limine* is unpersuasive because

> [m]otions *in limin*e by their nature are normally filed close on hearing or trial dates and are decided shortly before hand to resolve evidentiary issues that otherwise would be made at trial or hearing and potentially delay the orderly presentation of evidence. They are normally salutary and arise from a tribunal's inherent authority to shorten trial time, to simplify the issues and to reduce the possibility for mistrial. *Uptain v. Huntington Lab, Inc.*, 723 P.2d 1322, 1330 (1986); *Good v. A.B. Chance Co.*, 565 P.2d 217, 221 (Colo. App. 1977)[,]

and, therefore, "having nine days instead of 14 days to respond to the M*otion in Limine* [cannot] reasonably be said to have prejudiced any of the Complainant's fundamental or due process rights (February 16 Response at 2); and (b) given that Complainant voluntarily dismissed its prior complaint raising the identical issues in Proceeding No. 13F-1372CP, it is "time that the issues in [the instant] complaint proceeding be decided and be placed on the road to administrative finality" because "Horizon has endured substantial expense and distraction from its business for a hoped-for final resolution of this dispute encompassing two separate complaint proceedings" (February 16 Response at 2). For these reasons, Horizon asks that the ALJ deny the relief sought in the February 13 Filing because Complainant has not justified the requested relief, especially its request to vacate the hearing.

Based on the arguments, the filings, and the record in this Proceeding, the ALJ will grant the Motion to Set Aside and other relief.

As stated in Decision No. R15-0147-I at ¶ 22 and Decision No. R15-0155-I at ¶ 21, the ALJ waived response time to Denver's two Requests to Shorten and shortened response time to the motions *in limine* in order to meet these objectives: (a) preserve the scheduled February 25 and 26, 2015 evidentiary hearing dates; and (b) issue a ruling on the two motions *in limine* sufficiently in advance of the scheduled hearing to assist the Parties in their trial preparation.

It now is clear that Complainant would rather have the full 14-day response time to the motions *in limine* than proceed to hearing as scheduled. As Complainant bears the burden of proof on the issue of the Commission's subject matter jurisdiction and thus has both the burden of going forward and the burden of persuasion,[Note 4] its stated preference on this issue -- where practicable, all else being equal -- should be given significant weight in determining how to proceed at this juncture. In addition and also of significant importance, if the scheduled hearing is vacated, the Parties will have time to take the written rulings on the motions *in limine* into account in their trial preparation. Further, this is the first request to vacate the evidentiary hearing on subject matter jurisdiction that Complainant has made in this Proceeding.[Note 5] Finally, there is at present no date by which this Proceeding must be decided.

Given the totality of the circumstances of this case and its present procedural posture, and considering the arguments of Complainant and Horizon, the ALJ finds on balance that the better course is to adopt Complainant's alternative suggestion; to permit Complainant to have the full 14-day response time to both motions *in limine*; to vacate the February 25 and 26, 2015 hearing; and, by an Interim Decision to be issued concurrent with or following the rulings on the motions *in limine*, to schedule the evidentiary hearing on subject matter jurisdiction.

For the reasons discussed, the ALJ will: (a) grant the Motion to Set Aside; (b) deny as moot the Motion to Stay; (c) deny as moot the Motion to Waive; (d) deny as moot Complainant's Motion to Expedite; and (e) waive response time to the Motion to Set Aside. In addition, the ALJ will vacate Decisions No. R14-0147-I and No. R15-0155-I to the extent that each shortens the response time to a motion *in limine*. Finally, because the evidentiary hearing has been vacated, the ALJ will deny Denver's two Requests to Expedite.

Note 3 states: The ALJ finds this argument to be unpersuasive because, as discussed in Decision No. R15-0147-I, Denver did support its request for shortened response time.

Complainant also makes this assertion in support of its February 13 Filing: Denver "gives no reason why it waited 31 days after being given notice of Complainant's intent to provide testimony on legislative intent and only 16 days prior to [the] hearing in which to file its motion in limine. Fundamental fairness dictates that this complete failure to explain its delay in filing should have been fatal to its motion." February 13 Filing at 2. The ALJ finds this assertion to be unpersuasive and not pertinent to the issue of the shortened response time which is the principal subject of the February 13 Filing because: (a) the procedural schedule contains no date by which prehearing motions, including motions *in limine*, must be filed; (b) in the absence of a date for filing prehearing motions, Denver would have been within its right to make an oral motion *in limine* at hearing, in which event Jitney would have made an immediate and oral response; (c) by filing the Motion *in Limine* in advance of the hearing, Denver gave Jitney an opportunity to research and to prepare a written response; and (d) under the

> circumstances, Denver was under no obligation to explain the timing of its filing of the Motion *in Limine*.
>
> Note 4 states: Complainant asserts that "*the ALJ shift[ed] the burden* of the evidentiary hearing *on [Denver's] Motion to Dismiss to Complainant ... to disadvantage the Complainant*[.]" February 13 Filing at 3 (emphasis supplied). This is incorrect. As a matter of law, when the issue of subject matter jurisdiction is raised (as it is in the Motions to Dismiss), Complainant bears the burden of proving the existence of the Commission's jurisdiction to decide the case or claim. *Medina v. Colorado*, 35 P.3d 443, 452 (Colo. 2001). If Complainant fails to establish that the Commission has subject matter jurisdiction, the Commission must dismiss the complaint or claim. *City of Boulder v. Public Service Company of Colorado*, 996 P.2d 198, 203 (Colo. App. 1999).
>
> Note 5 states: **The Parties are advised and are on notice that** any future motion or request made by Complainant to vacate an evidentiary hearing on subject matter jurisdiction must establish the existence of one or more unusual circumstances that support vacating the hearing. The ALJ finds this requirement will benefit all Parties because: (a) Respondents are entitled to a ruling on the motions to dismiss; and (b) it is in Complainant's interests to establish the Commission's subject matter jurisdiction so that (assuming the Commission has jurisdiction) the substance of the Complaint can be addressed as soon as possible. In addition, the ALJ agrees with Horizon that it is "time that the issues in [the instant] complaint proceeding be decided and be placed on the road to administrative finality" (February 17 Response at 20).

Decision No. R15-0160-I at ¶¶ 29-35 (italics and bolding in original) (footnote 6 omitted).

27. On February 18, 2015, Denver withdrew the Second Motion *in Limine*.

28. On February 23, 2015, Jitney filed its Response in Opposition to the First Motion *in Limine*.

29. On February 26, 2015, by Decision No. R15-0192-I, the ALJ granted the First Motion *in Limine* and limited evidence on legislative intent to documentary evidence as defined in Decision No. R15-0192-I at ¶ 22 (set out in full below).

30. On March 10, 2015, by Decision No. R15-0226-I and as pertinent here, the ALJ: (a) scheduled an April 22 and 24, 2015 evidentiary hearing on the Motions to Dismiss; (b) modified the established procedural schedule; (c) shortened response time to certain motions;

and (d) as discussed in *id*. at ¶¶ 21-22, provided advisements to the Parties concerning availability of witnesses to testify at the scheduled evidentiary hearing. On March 24, 2015, by Decision No. R15-0269-I, the ALJ granted an unopposed motion filed by Denver and modified the date by which Parties must file their prehearing motions.

31. As modified, the procedural schedule is: (a) not later than April 6, 2015, each party shall file its prehearing motions; (b) not later than 3:00 p.m. Mountain Daylight Time on April 10, 2015, a party that seeks to substitute one or more witnesses shall file a motion to substitute witnesses; (c) not later than April 15, 2015, each party shall file its response to a prehearing motion filed on April 6, 2015; and (d) not later than April 15, 2015, each party shall file its response to a motion to substitute witnesses filed on April 10, 2015.

32. On March 13, 2015, Complainant filed its Motion Contesting Interim Decision No. R15-0192-I.

33. By correspondence dated March 13, 2015, Jitney requested that the ALJ issue six subpoenas. An Affidavit in Support of Subpoenas[4] and the six requested subpoenas accompanied the correspondence.

34. On March 17, 2015, the ALJ informed Jitney that the ALJ would issue the requested subpoena for Peter C. Gray; that the subpoena would be available for pick-up at the Commission's reception desk at 10:00 a.m. on March 18, 2015; and that the ALJ would not issue the requested subpoenas for Messrs. Doug Dean, Chuck Ford, Ron Jack, James Kerr, and Terry Willert. In refusing to issue the requested subpoenas to Messrs. Dean, Ford, Jack, Kerr,

[4] The Affidavit in Support of Subpoenas is appended to the Motion to Strike Response of City and County of Denver to Complainant's Motion Contesting Interim Decision No. R15-0192-I, Motion for Attorney Fees and Costs and Shortened Response Time filed by Complainant on March 26, 2015.

and Willert, the ALJ cited Decision No. R14-0192-I, which precludes testimonial evidence on legislative intent. Because a request for issuance of subpoenas is made *ex parte* and because the issuance or non-issuance of a requested subpoena is done *ex parte*, the ALJ communicated only with counsel for Jitney by electronic mail.[5]

35. The Subpoena to Testify was signed by the ALJ on March 17, 2015.

36. On March 20, 2015, counsel for Jitney picked up the signed Subpoena to Testify addressed to Mr. Peter C. Gray.

37. On March 20, 2015, Horizon filed its Response to Motion by Complainant Contesting Interim Decision No. R15-0192-I.

38. On March 25, 2015, Complainant filed a Motion to Strike Response of Evergreen Trails, Inc., d/b/a Horizon Coach Lines to Complainant's Motion Contesting Interim Decision No. R15-0192-I, Motion for Attorney Fees and Costs and Shortened Response Time.

39. On March 25, 2015, Denver filed its Response to Motion by Complainant Contesting Interim Decision No. R15-0192-I.

40. On March 26, 2015, Complainant filed a Motion to Strike Response of City and County of Denver to Complainant's Motion Contesting Interim Decision No. R15-0192-I, Motion for Attorney Fees and Costs and Shortened Response Time.

41. On March 27, 2015, Denver filed its Response to Complainant's Motion to Strike Response of Denver to Complainant's Motion Contesting Interim Decision No. R15-0192-I, Motion for Attorney Fees and Costs and Shortened Response Time.

[5] The ALJ's electronic mail dated March 17, 2015 is appended to the Motion to Strike Response of City and County of Denver to Complainant's Motion Contesting Interim Decision No. R15-0192-I, Motion for Attorney Fees and Costs and Shortened Response Time filed by Complainant on March 26, 2015.

42. On March 30, 2015, Horizon filed its Response to Complainant's Motion to Strike Response of Evergreen Trails, Inc., d/b/a Horizon Coach Lines to Complainant's Motion Contesting Interim Decision No. R15-0192-I and for Attorney Fees and Costs.

43. On April 3, 2015, by Decision No. C15-0302-I, the Commission referred Complainant's motions to the ALJ. The Commission stated:

> Consistent with our earlier referral of this proceeding to ALJ Jennings-Fader, we refer to ALJ Jennings-Fader Colorado Jitney's motion contesting the interim decision and its related motions to strike the responses of Denver and Horizon. Commission Rule 1502(d) requires motions seeking certification for immediate appeal to be directed to, and decided by, ALJ Jennings-Fader, who issued the contested decision. It is within the authority of ALJ Jennings-Fader to treat this motion as a motion seeking certification for appeal under Commission Rule 1502(d) or as a motion for reconsideration of the interim decision granting the motion *in limine* filed by Denver.

Decision No. C15-0302-I at ¶ 7. The referenced Commission Rule 1502(d) is Rule 4 *Code of Colorado Regulations* (CCR) 723-1-1502(d).[6]

B. Motions.

44. The Commission referred to the ALJ these motions: (a) Jitney's Motion Contesting Decision No. R15-0192-I; (b) Jitney's Motion to Strike Response of City and County of Denver to Complainant's Motion Contesting Interim Decision No. R15-0192-I, Motion for Attorney Fees and Costs and Shortened Response Time; and (c) Jitney's Motion to Strike Response of City and County of Denver to Complainant's Motion Contesting Interim Decision No. R15-0192-I, Motion for Attorney Fees and Costs and Shortened Response Time. Respondents have filed responses to these motions.

45. The ALJ addresses each motion separately.

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

1. Motion Contesting Interim Decision No. R15-0192-I.

46. The ALJ treats the Motion Contesting Interim Decision No. R15-0192-I as a Motion for Reconsideration of Decision No. R15-0192-I.[7] Denver and Horizon each filed a response in opposition to the Motion for Reconsideration.[8]

47. For the reasons discussed below, the ALJ will reconsider and will affirm her ruling in Decision No. R15-0192-I at ¶ 23 that precludes "*testimony* concerning the General Assembly's legislative intent at the time it enacted [House Bill (HB)] 11-1198 (and more particularly § 40-101.1-105(1)(j), C.R.S.)" (emphasis in original).

a. Complainant's Position.

48. Jitney seeks reconsideration of the ruling in Decision No. R15-0192-I that precludes the presentation of testimony on legislative intent. Jitney states two bases for the relief sought: (a) the ruling "is incorrect and based on an incomplete and inaccurate citation of the law by" Denver (Motion for Reconsideration at 6); and (b) the unavailability of the ALJ (*id*. at 9).

49. In support of its argument that the ALJ's ruling is incorrect, Complainant states: (a) "there was no absolute prohibition against testimony of legislative intent" (Motion for Reconsideration at 7); (b) the policy regarding testimony on legislative intent stated in *Colorado Department of Social Services v. Board of County Commissioners of County of Pueblo*, 697 P.2d 1 (Colo. 1985) (*Colorado Department of Social Services*), the Colorado Supreme Court decision relied on by Respondents, was changed by *Board of County Commissioners of the County of Pueblo, Colorado v. Romer*, 931 P.2d 504 (Colo. App. 1996) (*Board of County*

[7] Unless the context indicates otherwise, reference in this Interim Decision to the Motion for Reconsideration is to the Motion Contesting Interim Decision No. R15-0192-I.

[8] Complainant moved to strike each response filed. As discussed *infra*, the ALJ will deny these motions. As a result, the ALJ considers the responses here.

Commissioners), a Colorado Court of Appeals decision that "quoted with approval testimony by then Senator Meiklejohn concerning the legislative intent behind the legislation in question" and "left unchanged the procedural process permitting testimony of legislative intent" (*id*.); (c) Decision No. R15-0192-I relies on *Colorado Department of Social Services*, which "is not the law since Board of County Commissioners ... was rendered" (*id*. at 8); and (d) in view of the *Board of County Commissioners* decision,

> Complainant has a due process and fundamental fairness right to present evidence of legislative intent through *both documentation **and** the testimony* of its witnesses, who, among other matters, could testify to the authenticity of the Court Reporter's transcript of the legislative hearings on HB 11-1198 because they were there and the transcript contains their testimony. Moreover, it is often said by opponents to admission of a document into evidence that they "cannot cross-examine the document". By having the participants of the legislative hearings testify at the PUC evidentiary hearing and be subjected to cross-examination on their testimony [given at the legislative hearing], this objection can be eliminated.

Id. at 8-9 (italics and bolding in original).

50. In support of its argument that the ALJ is unavailable and that immediate relief must be sought from the Commission, Complainant states: (a) it did not file a motion to vacate the February 25 and 26, 2015 evidentiary hearing on subject matter jurisdiction, and the ALJ *sua sponte* vacated that hearing; (b) the evidentiary hearing on subject matter jurisdiction is now scheduled to be held on April 22 and 24, 2015; (c) in Decision No. R15-0192-I at ¶ 29, the ALJ stated that "she is not available in March and early April 2015" (Motion for Reconsideration at 9); and (d) Jitney

> is concerned that said extended period of unavailability of the ALJ may delay [Jitney's] pre-hearing preparations, such as the issuance of and service of subpoenas and may even cause further postponement of the proceeding[.] Fundamental fairness dictates that this case not be kicked down the road for six weeks because the ALJ assigned to the case is not available between now [*i.e.*, March 13, 2015, the date on which the Motion for Reconsideration was filed] and

> mid April 2015, [*sic*] to handle the pre-trial matters that come up in preparation for hearing even if it means assigning a new ALJ to this matter.

Id.

51. For these reasons, Complainant requests this relief from the Commission: set aside Decision No. R15-0192-I "to the extent that it prohibits Complainant from presenting both testimony **and** documentation in support of its case-in-chief to establish the PUC's subject matter jurisdiction." Motion for Reconsideration at 9 (underlining and bold in original).

b. Respondents' Positions.

52. Both Respondents oppose, and request denial of, the Motion for Reconsideration. Horizon presents one argument. Denver concurs with Horizon's argument and presents two additional arguments.

53. In support of the *first argument* in opposition to the Motion for Reconsideration, Horizon states: (a) assuming the Motion for Reconsideration asks the Commission *en banc* to decide this case, Complainant has not met its burden under § 40-6-109(6), C.R.S., and Rule 4 CCR 723-1-1505(d) to

> show that "due and timely execution of [the Commission's] functions imperatively and unavoidably ... requires ..." that the Commission assume jurisdiction over this case, assigned as it is already to an administrative law judge fully familiar with the dispute, who has already issue[d] numerous preliminary rulings in the docket, and before whom a hearing has been scheduled on dates that Colorado Jitney has stated it is available. Suffice it to say that the [Motion Contesting Interim Decision No. R15-0192-I] points to absolutely no evidence that due and timely execution of the Commission's functions requires that this extraordinary action take place.[Note 4]
>
> Note 4 states: At page nine of its motion, Colorado Jitney suggests that the waiting time involved in the relatively few weeks until the scheduled April 22 and 24 evidentiary hearing could justify "... assigning a new ALJ to this matter." The tough sledding that Colorado Jitney must think it has so far experienced in the case before the present administrative law judge may have more to do with the relief sought than whether the Commission itself should really decide the case. Colorado Jitney may think its problems might be cured by reassignment of this

> complaint to a different administrative law judge. If so, this would be blatant forum shopping.

Horizon's Response to Motion by Complainant Contesting Interim Decision No. R15-0192-I (Horizon Response) at 4; and (b) the correct process is:

> resolution of the two motions to dismiss should take place in an orderly way before the [ALJ] whom the Commission has designated to hear the case, and who will make a recommended decision to dismiss the complaint, or to deny [the motions to dismiss] and set the matter for hearing on the merits.

Id. at 5, note 5. Denver concurs with this argument.

54. In support of the *second argument* in opposition to the Motion for Reconsideration, Denver states: in its Response to the Motions *in Limine*, Complainant stated:

> Respondents contend that "post-enactment testimony about legislative intent is inadmissible." **Fair enough**. Monday morning quarter-backing does not change the result of Sunday's game. However, a review of Jitney's Witness Lists and Exhibits clearly shows that Jitney intends to provide the Commission with evidence of contemporaneous recorded legislative history, indeed, statements made before a legislative committee, which is permissible under Colorado law.

Denver's Response to Complainant's Motion Contesting Interim Decision No. R15-0192-I (Denver Response) at 3 (*quoting* Complainant's Response in Opposition to Motions in Limine at 6) (bolding and underlining in the Denver Response). Denver asserts that Complainant, having conceded that the testimony is inadmissible, cannot now assert a right to present post-enactment testimony on legislative intent.

55. In support of the *third argument* in opposition to the Motion for Reconsideration, Denver states:

> It is well established law that post-enactment testimony is not admissible evidence for the purpose of proving legislative intent. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation."); s*ee also General Instrument Corp. v. FCC*, 213 F.3d 724, 733 (D.C. Cir. 2000) (referring to post-enactment statements as "legislative future" rather than legislative history); 2A Sutherland Statutory Construction § 48:20 (7th ed.). Simply put, "[t]he

> post-enactment recollections of a legislator do not constitute legislative history and are not admissible to establish legislative intent." *Legro v. Robinson*, 328 P.3d 238, 244 n.2 (Colo. App. 2012); *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026, 1030 (Colo. App. 1993); *Colorado Department of Social Services v. Board of County Commissioners of County of Pueblo*, 697 P.2d 1 (Colo. 1985).

Denver Response at 4-5. In addition, Denver argues that Complainant's

> reliance on *Board of County Commissioners of the County of Pueblo, Colorado*, 931 P.2d 504, for the proposition that post enactment testimony is admissible is misplaced. The testimony of then Senator Meiklejohn contained within *Board of County Commissioners of the County of Pueblo, Colorado* and referenced by Jitney is not post-enactment testimony but rather contemporaneous evidence of legislative intent. As made clear by the court's citation on page 510, the quoted testimony of Senator Meiklejohn occurred during Hearings on S.B. 374 before the Subcommittee of the House Judiciary Committee and were thus prior to the eventual enactment of the statute. *Commissioners of the County of Pueblo, Colorado*, 931 P.2d at 510.

Denver Response at 5-6.

56. For these reasons, Respondents request that the Motion for Reconsideration be denied.

c. Ruling on Motion: Affirming Decision No. R15-0192-I.

57. On February 26, 2015, by Decision No. R15-0192-I, the ALJ granted the First Motion *in Limine* and limited evidence on legislative intent to documentary evidence as defined in *id*. at ¶ 22 (set out in full below).[9] In doing so, the ALJ stated:

> In the First Motion *in Limine*, Respondents request that the ALJ issue an order to preclude Complainant from presenting testimony concerning the General Assembly's legislative intent in enacting § 40-10.1-105(1)(j), C.R.S.
>
> Respondents state these facts: (a) Jitney's January 9, 2015 witness list is clear that Jitney intends to call James E. Kerr to testify, among other matters, about "the purpose of [§ 40-10.1-105(1)(j), C.R.S.,]" and "that there was no legislative intent to deregulate transportation covered by the referenced section which pertains only to towing" (January 9, 2015 witness list at 2) and that Jitney

[9] Decision No. R15-0192-I cites § 40-10.1-105(1)(j), C.R.S., as § 40-10.1-105(i)(j), C.R.S. The instant Interim Decision corrects that incorrect citation when it quotes from Decision No. R15-0192-I.

may call four additional witnesses to testify concerning testimony given during the General Assembly's consideration of House Bill (HB) 11-1198 (and more particularly § 40-10.1-105(1)(j), C.R.S.) and the General Assembly's intent when it enacted HB 11-1198 (and more particularly § 40-10.1-105(1)(j), C.R.S.);[Note 2] and (b) "contemporaneous evidence of legislative intent exists" in the form of recordings of the testimony presented during committee consideration of HB 11-1198 (and more particularly § 40-10.1-105(1)(j), C.R.S.) (First Motion *in Limine* at 6).

Given these facts and as good cause for granting the motion, Respondents argue: (a) the Commission may not inquire into the legislative history because the language of § 40-10.1-105(1)(j), C.R.S., is clear; (b) assuming the statutory language is ambiguous or unclear (which Respondents assert it is not), the proper way to establish legislative intent is through admission into evidence of available "contemporaneous recorded legislative history" including legislative debates, legislative committee deliberations, and testimony before legislative committees[Note 3] (First Motion *in Limine* at 5-6); and (c) assuming the statutory language is ambiguous or unclear (which Respondents assert it is not), the Commission may not entertain post-enactment testimony concerning legislative intent[Note 4] (First Motion *in Limine* at 5).

Respondents state that it is clear that Jitney seeks to present improper post-enactment testimony concerning legislative intent through the testimony of the legislative intent witnesses. Respondents assert that the ALJ should grant the First Motion *in Limine* and should preclude the presentation of improper post-enactment testimony.

On February 23, 2015, Jitney filed its Response in Opposition to the First Motion *in Limine*. In that filing, Jitney argues: (a) the language of § 40-10.1-105(1)(j), C.R.S., is vague and ambiguous (Response at 2-6); (b) in view of the ambiguity, resort to the contemporaneously recorded legislative history is appropriate[Note 5] (Response at 6); (c) in this Proceeding, Jitney filed (on February 17, 2015 as Exhibit No. 7 to its Corrected Witness List and Exhibits) a court reporter's certified "transcript of the tapes of the legislative committee hearings on HB 11-1198, the bill that created Article 10.1" of title 40, C.R.S. (Response at 7); and (d) "Exhibit 7 is a proper tool [to use] in determining legislative intent because it is a contemporaneous record of statements made before a legislative committee" (Response at 8). Complainant also states that, if Respondents "stipulate to the admission of Exhibit 7, there would be no need for [Mr.] Kerr ... to testify" (Response at 7). Finally, Complainant appears to agree with Respondents and to concede that "post-enactment testimony about legislative intent is inadmissible" (Response at 6).

Based on the foregoing, Complainant asserts that the contemporaneous legislative history (*i.e.*, Exhibit No. 7 to its Corrected Witness List and Exhibits) should not be excluded and that the First Motion *in Limine* should be denied.

The ALJ will grant the First Motion *in Limine* and will exclude *testimony* from any person concerning the General Assembly's intent in enacting HB 11-1198 and, more particularly, § 40-10.1-105(1)(j), C.R.S.

First, the ALJ will not rule at this time on the question of whether the language of § 40-10.10105(1)(j), C.R.S., is vague, ambiguous, or unclear. The ALJ will hold this issue in abeyance for the present.[Note 6] This will permit Complainant to present its case in full, including evidence concerning legislative intent, and at one time. The ALJ will consider the evidence concerning legislative intent (assuming it is admitted) in the event the ALJ finds the language of § 40-10.1-105(1)(j), C.R.S., to be vague, ambiguous, or unclear. This approach is efficient and preserves the resources of the Commission and the Parties.

Second, in accordance with § 2-4-203, C.R.S., and the authorities cited by the Parties, the ALJ will permit Complainant to present *documentary* evidence concerning the legislative history of HB 11-1198 (and more particularly § 40-10.1-105(1)(j), C.R.S.). To be clear, this includes only official General Assembly recordings of legislative debates, legislative committee deliberations, and testimony before legislative committees and court reporter transcripts of those official recordings. The Parties appear to agree that this includes Exhibit 7 to Complainant's Corrected Witness List and Exhibits.[Note 7]

Third, in accordance with the authorities cited by the Parties, the ALJ will exclude *testimony* concerning the General Assembly's legislative intent at the time it enacted HB 11-1198 (and more particularly § 40-10.1-105(1)(j), C.R.S.). This includes the testimony of the legislative intent witnesses or any other person on the General Assembly's intent in enacting HB 11-1198.

For these reasons, the ALJ will grant the First Motion *in Limine* and will exclude testimony concerning legislative intent.

Note 2 states: Unless the context indicates otherwise, reference in this Interim Decision to the legislative intent witnesses is to these five individuals.

Note 3 states: As support for this proposition, Respondents cite *People v. Rockwell*, 125 P.3d 410. 418 (Colo. 2005); *State v. Nieto*, 993 P.2d 493, 503-04 (Colo. 2000); and *Colorado Department of Social Services v. Board of County Commissioners of County of Pueblo*, 697 P.2d 1, 21 (Colo. 1985).

Note 4 states: Respondents cite *Colorado Department of Social Services*, 697 P.2d at 20-21, as support for this proposition.

Note 5 states: As support for this proposition, Complainant cites *State v. Nieto*, a case also cited by Respondents.

Note 6 states: That the ALJ holds this issue in abeyance is not -- and is not intended to be -- any indication of the ruling that the ALJ will make on this issue.

Note 7 states: Complainant asks that the ALJ take administrative notice of Exhibit 7 and also suggests a stipulation concerning the admissibility of Exhibit 7

> as a means to avoid calling a sponsoring witness. Response at 7. Complainant may wish to consider whether Exhibit 7 is self-authenticating or otherwise admissible without a sponsoring witness. In any event, the ALJ will address the admissibility of Exhibit 7 at the time the exhibit is offered into evidence.

Decision No. R15-0192-I at ¶¶ 14-24 (italics in original).

58. By the Motion for Reconsideration, Complainant asks that the ALJ reconsider and reverse the ruling excluding "*testimony* concerning the General Assembly's legislative intent at the time it enacted HB 11-1198 (and more particularly § 40-10.1-105(1)(j), C.R.S.)" (Decision No. R15-0192-I at ¶ 23 (emphasis in original)). For the following reasons, the ALJ reconsiders her ruling and will affirm the ruling.

59. First, when the ALJ issued Decision No. R15-0192-I, she carefully considered the arguments presented and the authorities cited by the Parties. Complainant has failed to demonstrate that the ruling to exclude post-enactment testimony on legislative intent is erroneous or not in accord with Colorado law.

60. Second, Complainant's reliance on *Board of County Commissioners*, a 1996 Colorado Court of Appeals decision that Complainant did not cite previously to the ALJ, is misplaced. From the following discussion, it is clear that, when seeking to ascertain legislative intent, one refers to testimony presented to legislative committees *prior to* enactment of the legislation at issue:

> Secondly, we note that *in the legislative hearings on Senate Bill 374* that became § 24-4-102(12), the General Assembly specifically noted the necessity to provide legislatively for county boards of commissioners to have standing to challenge state agency actions that have aggrieved their counties beyond the narrow issues of the state agency itself. *When introducing Senate Bill 374, Senator Meiklejohn testified*:
>
> > The state supreme court has held that a local government -- county, school district, municipality, or whatever -- is not a person within the meaning of the administrative procedure act, and therefore, has no standing for review. ... In an effort to continue to try to find some way that local

> governments may address themselves for what they believe to be unlawful actions of the state of Colorado and, in my own judgment, are unlawful actions from time to time ... we are introducing in the senate a bill which would permit counties to appeal from decisions of administrative agencies which aggrieved them.

Hearings on S.B. 374 before the Subcommittee of the Senate Judiciary Committee, 52nd General Assembly, First Session (Feb. 21, 1979).

Furthermore, *Representative Spano commented* that: "Senate Bill 374 gives counties standing to attain judicial review of agency action. ... This bill restricts the judicial review to counties." Hearings on S.B. 374 before the Subcommittee of the House Judiciary Committee, 52nd General Assembly, First Session (April 10, 1979). In addition, *Representative Spano reiterated the prime reason for Senate Bill 374, stating*:

> The Colorado Supreme Court has, on several occasions, stated that the county has no standing in court; the reason for this bill is that if the county is to have standing in court, then it's necessary that the legislature grant such authority. ... In the simplest concept of the bill, it enables a political subdivision, which is a county, by express statutory language, to be considered as a person with standing in court, either as ... [a plaintiff] or the defendant.

Hearings on S.B. 374 before the Subcommittee of the House Judiciary Committee, 52nd General Assembly, First Session (April 10, 1979).

Finally, a *former president and then current member of the Executive Committee of the Colorado County Attorneys' Association testified* that Senate Bill 374 was in response to several cases ... wherein a county was found to have no standing to seek judicial review of a state agency action. The member further testified that the bill provided that:

> You have to have a cause of action, or be an aggrieved party before you can bring any action under the administrative code, and by adding "county" in this particular section, along with other people ... it would be my position that they are subject to the same requirements of proof of actual injury, or of being aggrieved, at least, before any district court would entertain this action.

Hearings on S.B. 374 before the Subcommittee of the House Judiciary Committee, 52nd General Assembly, First Session (April 10, 1979).

Board of County Commissioners, 931 P.2d at 510 (emphasis supplied).

61. In each instance, the quoted testimony was given during legislative hearings held on the legislation before it was enacted. Nothing in the Court of Appeals decision supports

Complainant's assertion of a right to present evidence of legislative intent through the testimony presented in this Proceeding of witnesses who testified before legislative committees on HB 11-1198. Nothing in the Colorado Court of Appeals *Board of County Commissioners* decision is inconsistent with, and certainly that decision does not overrule, the Colorado Supreme Court *Colorado Department of Social Services* decision on the issue of the sources to which one looks to determine legislative intent.

62. Third, Complainant seeks to present post-enactment testimony on legislative intent. The ALJ agrees with Denver that, as stated in Decision No. R15-0192-I, Complainant previously conceded that it cannot present post-enactment testimony of legislative intent.

63. Fourth, the following judicial decisions support the ALJ's ruling that precludes the presentation of post-enactment testimony on legislative intent: *Colorado Department of Social Services v. Board of County Commissioners of County of Pueblo*, 697 P.2d 1 (Colo. 1985); *Legro v. Robinson*, 328 P.3d 238, 244 (Colo. App. 2012); *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026, 1030 (Colo. App. 1993). Each is good and controlling law on the issue. In addition, as discussed above, *Board of County Commissioners* (the case relied on by Jitney) is consistent with and supports the ALJ's ruling that limits evidence on legislative intent to "official General Assembly recordings of legislative debates, legislative committee deliberations, and testimony before legislative committees and court reporter transcripts of those official recordings" (Decision No. R15-0192-I at ¶ 22).

64. Fifth and finally, Complainant's assertion of a fundamental fairness right and a due process right to present, in this Proceeding, evidence on legislative intent through the testimony of witnesses who testified before legislative committees on HB 11-1198 because those witnesses can "testify to the authenticity of the Court Reporter's transcript of the legislative

hearings on HB 11-1198 because they were there and the transcript contains their testimony" and can stand "cross-examination on their testimony" given at the legislative hearing (Motion for Reconsideration at 9) is baseless. As discussed above, there is no right to present through the post-enactment testimony of witnesses in this Proceeding evidence on the General Assembly's intent when it passed HB 11-1198.

65. Complainant sought immediate relief from the Commission because the ALJ is unavailable until mid-April 2015 and Complainant must have a prompt ruling on the Motion for Reconsideration so that it can prepare for the April 22 and 24, 2015 evidentiary hearing on subject matter jurisdiction. By referring the Motion for Reconsideration to the ALJ, the Commission implicitly found unpersuasive Complainant's claim that the Commission must take up Decision No. R15-0192-I because the ALJ is unavailable.[10]

66. For these reasons, the ALJ will affirm her ruling in Decision No. R15-0192-I at ¶ 23 precluding "*testimony* concerning the General Assembly's legislative intent at the time it enacted HB 11-1198 (and more particularly § 40-101.1-105(1)(j), C.R.S.)" (emphasis in original).

2. Motion to Strike Response of Evergreen Trails, Inc., d/b/a Horizon Coach Lines to Complainant's Motion Contesting Interim Decision R15-0192-I, Motion for Attorney Fees and Costs and Shortened Response Time.

67. The Motion to Strike Response of Evergreen Trails, Inc., d/b/a Horizon Coach Lines to Complainant's Motion Contesting Interim Decision R15-0192-I, Motion for Attorney Fees and Costs and Shortened Response Time (March 25 Motion) contains three separate

[10] As discussed *infra*, the ALJ finds Complainant's assertion to be inaccurate and misleading.

motions: (a) a motion to strike the Horizon Response; (b) a motion for attorney fees and costs; and (c) a motion for shortened response time.

68. Horizon has filed its Response to the March 25 Motion. As a result, the ALJ will deny as moot the Motion for Shortened Response Time.

69. For the reasons discussed below, the ALJ will deny the Motion to Strike and will deny the Motion for Attorney Fees and Costs.

a. Complainant's Position.

70. Complainant seeks a decision that strikes the Horizon Response and awards Complainant its attorney fees and costs for preparing and filing the March 25 Motion. In the filing, Complainant states its view of the background of the case.

71. As its summary of the bases for the Motion for Reconsideration, Jitney states:

> 1. Respondents mis-stated the applicable law. In its Motion Contesting Interim Decision [No.] R15-0192-I, Complainant provides case law support that it is now proper to provide testimony of legislative intent.
>
> 2. The testimony of legislative intent is essential to Complainant meeting its burden of proof.
>
> 3. The ALJ, without reserve, states in Interim Decision No. R15-0192-I, that "... she is not available in March and early April, 2015 ..."
>
> 4. Complainant needs to prepare to meet its burden of going forward at hearing on April 22, 2015, and cannot wait until the ALJ becomes available in mid April.
>
> 5. In reliance on the veracity of the statement that the ALJ is not available in March and early April, and not being able to wait until mid April for a reversal of the ruling precluding the use of testimony of legislative intent, Complainant sought extraordinary relief for an extraordinary situation: It availed itself of [Rule] 4 CCR 723-1-1502(d) which appears uniquely designed to remedy such a situation.

March 25 Motion at 4.

72. As grounds for granting the Motion to Strike the Horizon Response, Complainant states: (a) "Horizon's Response does not address the issues raised in Complainant's Motion Contesting Interim Decision No. R15-0192-I. Instead, it misconstrues Complainant's Motion and fabricates a fanciful 'analysis' of Complainant's motion" (March 25 Motion at 5); (b) the Horizon "analysis" is incorrect; and (c) because it addresses an argument that is not at issue, the Horizon Response "is irrelevant, burdens the record, inflames the parties, prejudices the ALJ against the Complainant, and should be stricken" (*id*. at 6).

73. Complainant provides these additional grounds in support of its request to strike the Horizon Response:

> Significantly, Horizon does not address the real issue in Complainant's Rule 1502(d) Motion, namely, that Interim Decision R15-0192-I is based on a mis-statement of the law proffered by Respondents in their Motion in Limine. Instead, Horizon attempts to set up a smoke screen to cover up the damning fact that Respondents proffered a material mis-statement of the law on which the ALJ relied in granting Respondents' Motion in Limine precluding Complainant from proffering testimony of legislative intent. Complainant believes that Horizon's Response to Complainant's Rule 1502(d) Motion is a concerted effort to divert attention from its complicity in proffering over-ruled law to support its Motion in Limine, was filed for an improper purpose, and should be stricken.
>
> Complainant contends that Horizon's pleading is another in a series of pleadings filed by Respondents to create procedural hurdles to keep Complainant from being able to present its facts on the evidentiary issues on jurisdiction. It is fairly obvious that big government and big business would like Complainant to just go away and will argue deregulation if that is what it takes to get this matter completed quickly. Indeed, Horizon has the temerity to suggest that this proceeding has been protracted because of Complainant's ***opposition*** to motions in limine (Horizon Response, page 2 paragraph 3)! [Colorado Rule of Civil Procedure (Colo.R.Civ.P.)] 11 and [Rule] 4 CCR 723-1-1202(d) both eschew pleadings that are filed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. It is Complainant's position that Respondent's pleading violates both of these rules and should be stricken.

March 25 Motion at 6-7 (bolding and italics in original).

74. As grounds for granting the Motion for Attorney Fees and Costs, Complainant states: (a) Colo.R.Civ.P. 11 allows for the imposition of sanctions on one who signs a pleading that is filed "for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation" (March 25 Motion at 7); (b) Colo.R.Civ.P. 11 imposes four duties on the author of a pleading; and (c) for a variety of reasons, including that the Horizon Response "is a thinly veiled attempt to distract from the real relief sought by Complainant in its [Motion Contesting Interim Decision No. R15-0192-I], thereby requiring Complainant to file this motion to strike" (March 25 Motion at 8), Horizon met none of its four duties prior to filing its Response.

75. Because the request for shortened response time is moot, the ALJ does not include Complainant's bases for seeking that relief.

76. Complainant provides the following summation of its argument and its requests for relief: The Horizon Response

> does not address the relief sought by Complainant. Instead, it seeks to prejudice Complainant in the eyes of the ALJ by contending that the motion seeks to jettison the present ALJ. Horizon's response also seeks to distract from the relief sought, the reversal of Interim Decision R15-0192-I's ruling that Complainant is precluded from presenting testimony of legislative intent. Significantly, Horizon's response does not address the issues raised by Complainant in its motion. When viewed as a whole, Horizon's pleading falls far short of the duties required by [Colo.R.Civ.P.] 11 and [Rule] 4 CCR 723-1-1501(d). Horizon's response should be stricken, ..., and Complainant [should be] awarded its attorney fees and costs for having to file this pleading.

March 25 Motion at 9.

b. Respondent Horizon's Position.

77. Horizon opposes, and requests denial of, the March 25 Motion.

78. In support of its opposition, Horizon asserts that the March 25 Motion "is in reality just an impermissible reply" to the Horizon Response to the Motion for Reconsideration. Horizon Response to March 25 Motion at 1. Horizon states: (a) Rule 4 CCR 723-1-1400(e) provides that a "movant may not file a reply to a response [to a motion] unless the Commission orders otherwise[, and] Colorado Jitney has not sought leave to file such a reply" (Horizon Response to March 25 Motion at 2); (b) Complainant

> has engaged in a transparent attempt to utilize the expedient of a motion to strike to masquerade what is in reality a reply to the Response that Horizon has filed to Colorado Jitney's request that the Commissioners take over deciding the complaint. This is a familiar ploy practitioners before the Commission have unsuccessfully tried to use for over 40 years to the memory of Horizon's counsel. That the disingenuously titled ten page "Motion to Strike" is in reality an impermissible reply to [the Horizon Response] appears readily from a review of the

Horizon Response to March 25 Motion (*id*.); and (c) "Horizon's resistance to Colorado Jitney's groundless attempts to sidetrack the real issues in the Complaint hardly justifies an award of attorneys fees or an award of costs" and Horizon joins in Denver's "observation that the unusually substantial prehearing record speaks for itself" (*id*. at 3).

c. Ruling on Motion.

79. As the moving party, Complainant bears the burden of proof with respect to the relief sought in the March 25 Motion. Rule 4 CCR 723-1-1500. For the following reasons, the ALJ finds that Complainant has not met its burden of proof with respect to the request to strike the Horizon Response. The ALJ will deny the March 25 Motion.

80. First, Horizon has a due process right and a fundamental fairness right to file a response to the Motion for Reconsideration. In addition, Rule 4 CCR 723-1-1400(b) specifically allows for the filing of responses. That Complainant does not agree with the Horizon Response

is not a reason to strike the Horizon Response, the striking of which would deprive Horizon of its recognized due process right and fundamental fairness right to file a response.

81. Second, the arguments presented by Complainant in the March 25 Motion are directed to the substance of the Horizon Response. In short, Complainant attempts to use the March 25 Motion as the vehicle to reply to the Horizon Response.

82. In Decision No. R14-1005-I at ¶ 22 and Ordering Paragraph No. 8,[11] the ALJ expressly advised the Parties that they must comply with the Rules of Practice and Procedure. In addition, in Interim Decisions subsequently issued in this case, the ALJ included the following Ordering Paragraph: "The Parties are held to the advisements in the Interim Decisions issued in this Proceeding."

83. Rule 4 CCR 723-1-1400(e) is found in the Rules of Practice and Procedure and, as stated by Horizon, prohibits the filing of a reply to a response to a motion absent a decision that permits the movant to file a reply. The Rule also establishes the content of a motion for permission to file a reply. Complainant has not filed a motion for permission to file a reply in this Proceeding, and no decision permitting Complainant to file a reply to the Horizon Response has been issued in this Proceeding. Consequently, Complainant is not permitted to reply to the substance of the Horizon Response; and its attempt to do so through the March 25 Motion is unavailing.

84. Third and finally, the Horizon Response addresses at least one of Complainant's stated bases for the Motion for Reconsideration: the need for immediate Commission relief. In support of its argument in the Motion for Reconsideration that the ALJ is unavailable and that

[11] That Interim Decision was issued on August 20, 2014.

immediate relief must be sought from the Commission, Complainant states: (a) the evidentiary hearing on subject matter jurisdiction is scheduled to be held on April 22 and 24, 2015; (b) in Decision No. R15-0192-I at ¶ 29, the ALJ stated that "she is not available in March and early April 2015" (Motion for Reconsideration at 4); and (c) Jitney

> is concerned that said extended period of unavailability of the ALJ may delay [Jitney's] pre-hearing preparations, such as the issuance of and service of subpoenas and may even cause further postponement of the proceeding[.] Fundamental fairness dictates that this case not be kicked down the road for six weeks because the ALJ assigned to the case is not available between now [*i.e.*, March 13, 2015, the date on which the Motion for Reconsideration was filed] and mid April 2015, [*sic*] to handle the pre-trial matters that come up in preparation for hearing *even if it means assigning a new ALJ to this matter*.

Id. (emphasis supplied). The Horizon Response speaks to this point and particularly to the suggestion that the Commission assign a new ALJ to this Proceeding.

85. In ruling on the March 25 Motion, the ALJ considered Complainant's statement: "The ALJ, without reserve, states in Interim Decision No. R15-0192-I, that '... she is not available in March and early April, 2015 ...[,]'" which is the principal reason that "Complainant seeks the extraordinary relief of an interlocutory appeal directly to the Commission" (March 25 Motion at 4).

86. The quoted language concerning the ALJ's asserted unavailability first appeared in the Motion for Reconsideration. There, Complainant uses the quoted language to support its assertion that immediate relief must be sought from the Commission. Complainant states: (a) the evidentiary hearing on subject matter jurisdiction is now scheduled to be held on April 22 and 24, 2015; (b) in Decision No. R15-0192-I at ¶ 29, the ALJ stated that "she is not available in March and early April 2015" (Motion for Reconsideration at 9); and (c) Jitney

> is concerned that said extended period of unavailability of the ALJ may delay [Jitney's] pre-hearing preparations, such as the issuance of and service of subpoenas and may even cause further postponement of the proceeding[.]

> Fundamental fairness dictates that this case not be kicked down the road for six weeks because the ALJ assigned to the case is not available between now [*i.e.*, March 13, 2015, the date on which the Motion for Reconsideration was filed] and mid April 2015, [*sic*] to handle the pre-trial matters that come up in preparation for hearing even if it means assigning a new ALJ to this matter.

Id. Complainant uses the quoted ALJ statement to support Complainant's assertion that the ALJ is unavailable *for all purposes* until mid-April 2015.

87. The quoted ALJ statement is taken out of context. The quoted ALJ statement appears in the following discussion in Decision No. R15-0192-I:

> **B. Filing Regarding Hearing Date.**
>
> In its Response, Jitney offers its available dates for the evidentiary hearing on subject matter jurisdiction. Respondents have not offered their available dates.
>
> To schedule new hearing dates, the ALJ will order Jitney to consult with Respondents and to make, not later than **March 6, 2015**, a filing that contains three proposed hearing dates that are acceptable to the Parties. The ALJ will order Respondents to cooperate with Complainant with respect to the March 6, 2015 filing.
>
> To assist the Parties, the ALJ states that *she is not available in March and early April 2015*. The ALJ is available on April 28 and 29, 2015.

Decision No. R15-0192-I at ¶¶ 27-29 (bolding in original; italics supplied). The italicized language is the language repeatedly quoted by Complainant. It is clear that the ALJ made the statement in the context of assisting the Parties in their discussions of proposed hearing dates. Read in context (as it ought to be), the statement simply informs the Parties that the ALJ is not available *for hearing* until mid-April 2015. The statement does not support Complainant's assertion that the ALJ is unavailable *for all purposes* until mid-April 2015.

88. Complainant then compounds its original misuse of the ALJ's statement in the Motion for Reconsideration by using the ALJ's statement in the March 25 Motion, which was filed after Complainant's counsel knew that use of the statement to suggest or to imply that the

ALJ is unavailable for all purposes is inaccurate and misleading. This sequence of events made Complainant's counsel aware that the ALJ is available: (a) the quoted ALJ statement is contained in Decision No. R15-0192-I, which was issued on *February 26, 2015*; counsel for Jitney was served (through the E-Filings System) with that Interim Decision on February 26, 2015; (b) on *March 10, 2015*, the ALJ issued Decision No. R15-0226-I, which scheduled the April 22 and 24, 2015 evidentiary hearing and modified the procedural schedule in this Proceeding; counsel for Jitney was served (through the E-Filings System) with that Interim Decision on March 10, 2015; (c) on *March 13, 2015*, Complainant's counsel sent correspondence to the ALJ; in that correspondence, Complainant's counsel requests issuance of subpoenas in this Proceeding;[12] and (d) on *March 17, 2015*, the ALJ signed one of the requested subpoenas and sent electronic mail correspondence to Complainant's counsel to inform him of the disposition of his request for subpoenas and to inform him that the signed subpoena was available at the Commission's reception desk; counsel for Complainant attached this correspondence to the motion to strike the Denver response.

89. The ALJ will deny the March 25 Motion.

3. Motion to Strike Response of City and County of Denver to Complainant's Motion Contesting Interim Decision R15-0192-I, Motion for Attorney Fees and Costs and Shortened Response Time.

90. The Motion to Strike Response of City and County of Denver to Complainant's Motion Contesting Interim Decision R15-0192-I, Motion for Attorney Fees and Costs and Shortened Response Time (March 26 Motion) contains three separate motions: (a) a motion to strike Denver's response to the motion for reconsideration; (b) a motion for attorney fees and costs; and (c) a motion for shortened response time.

[12] This is not the action of an individual who thinks the ALJ is unavailable.

91. Denver has filed its Response to the March 26 Motion. As a result, the ALJ will deny as moot the Motion for Shortened Response Time.

92. For the reasons discussed below, the ALJ will deny the Motion to Strike and will deny the Motion for Attorney Fees and Costs.

a. Complainant's Position.

93. Complainant seeks an order that strikes the Denver Response and awards Complainant its attorney fees and costs for preparing and filing the March 26 Motion. In that filing, Complainant states its view of the background of the case.

94. As its summary of the bases for the Motion for Reconsideration, Jitney states:

> 1. Respondents mis-stated the applicable law. In its Motion Contesting Interim Decision [No.] R15-0192-I, Complainant provides case law support that it is now proper to provide testimony of legislative intent.
>
> 2. The testimony of legislative intent is essential to Complainant meeting its burden of proof.
>
> 3. The ALJ, without reserve, states in Interim Decision No. R15-0192-I, that "... she is not available in March and early April, 2015 ..."
>
> 4. Complainant needs to prepare to meet its burden of going forward at hearing on April 22, 2015, and cannot wait until the ALJ becomes available in mid April.
>
> 5. In reliance on the veracity of the statement that the ALJ is not available in March and early April, and not being able to wait until mid April for a reversal of the ruling precluding the use of testimony of legislative intent, Complainant sought extraordinary relief for an extraordinary situation: It availed itself of [Rule] 4 CCR 723-1-1502(d) which appears uniquely designed to remedy such a situation.

March 26 Motion at 4.

95. As grounds for granting the Motion to Strike the Denver Response, Complainant states: (a) Denver concurs with the Horizon Response and, thus, the reasons stated in support of the Motion to Strike the Horizon Response also support striking the Denver Response (March 26

Motion at 5-7[13]); (b) Denver's assertion that Complainant has changed its position with respect to the presentation of testimony regarding legislative intent "is a material misrepresentation of Complainant's position" because Complainant consistently has sought to "present contemporaneous testimony of legislative intent," which Complainant defines as a witness "identify[ing] and confirm[ing] the transcript of the legislative hearings on HB 11-1198 and ... stand[ing] cross-examination on the witness' [*sic*] testimony at the legislative hearings" (*id*. at 8); and (c) because

> Interim Decision R15-0192-I is based on [Denver's] mis-statements of the law which misled the ALJ and caused her to issue an erroneous ruling which needs to be overturned. [Denver] has misled on the law and misrepresents Complainant's position in its Response. Such a Response has no place in the record and should be stricken in its entirety.

Id. at 8-9.

96. As grounds for granting the Motion for Attorney Fees and Costs, Complainant states: (a) Colo.R.Civ.P. 11 allows for the imposition of sanctions on one who signs a pleading that is filed "for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation" (March 26 Motion at 9); (b) Colo.R.Civ.P. 11 imposes four duties on the author of a pleading; and (c) for a variety of reasons, including that Denver concurred with the Horizon Response and "add[ed Denver's] own off point arguments," the Denver Response "is a thinly veiled attempt to distract from the real relief sought by Complainant in its [Motion Contesting Interim Decision No. R15-0192-I], thereby requiring Complainant to file this motion to strike" (March 26 Motion at 10), Denver met none of its four duties prior to filing its Response.

[13] In these pages, Complainant restates the arguments presented in the March 25 Motion at 5-7.

97. Because the request for shortened response time is moot, the ALJ does not include Complainant's bases for seeking that relief.

98. Complainant provides the following summation of its argument and its requests for relief: The Denver Response

> does not address the relief sought by Complainant. Instead, it seeks to prejudice Complainant in the eyes of the ALJ by contending that the motion seeks to jettison the present ALJ. [Denver's] response also seeks to distract from the relief sought, the reversal of Interim Decision R15-0192-I's ruling that Complainant is precluded from presenting testimony of legislative intent. Significantly, [the Denver] Response does not address the issues raised by Complainant in its motion. When viewed as a whole, [Denver's] pleading falls far short of the duties required by [Colo.R.Civ.P.] 11 and [Rule] 4 CCR 723-1-1501(d). [Denver's] response should be stricken, ..., and Complainant [should be] awarded its attorney fees and costs for having to file this pleading.

March 26 Motion at 11.

b. Respondent Denver's Position.

99. Denver opposes, and requests denial of, the March 26 Motion.

100. In support of its opposition, Denver states that the

> administrative record speaks for itself. If there has been any misrepresentation in this matter[,] it has been done by Jitney in reference to the position of Denver and [the] evolution of [Jitney's] own position.

Denver Response to March 26 Motion at 2. Denver has been consistent that "post-enactment testimony concerning legislative intent is inadmissible and contemporaneous recorded legislative history is admissible." *Id.* In contrast, Jitney's position on post-enactment testimony on legislative intent constantly has changed over the course of this case: (a) Jitney first agreed that post-enactment testimony on legislative intent is inadmissible; (b) Jitney then sought, in the Motion Contesting Interim Decision No. R15-0192-I, to present that testimony and (c) Jitney now seeks to present in this Proceeding "'contemporaneous testimony of legislative intent,' a

contradiction in terms" (Denver Response to March 26 Motion at 2 (*quoting* March 26 Motion at 8)).

101. "Given the baseless accusations contained within [the March 26 Motion, Denver] asks that Jitney's requested relief be denied." Denver Response to March 26 Motion at 2.

c. Ruling on Motion.

102. As the moving party, Complainant bears the burden of proof with respect to the relief sought in the March 26 Motion. Rule 4 CCR 723-1-1500. For the following reasons, the ALJ finds that Complainant has not met its burden of proof with respect to the request to strike the Denver Response. The ALJ will deny the March 26 Motion.

103. First, Denver has a due process right and a fundamental fairness right to file a response to the Motion for Reconsideration. In addition, Rule 4 CCR 723-1-1400(b) specifically allows for the filing of responses. That Complainant does not agree with the Denver Response is not a reason to strike the Denver Response, the striking of which would deprive Denver of its recognized due process right and fundamental fairness right to respond.

104. Second, the arguments presented by Complainant in the March 26 Motion are directed to the substance of the Denver Response. In short, Complainant attempts to use the March 26 Motion as the vehicle to reply to the Denver Response.

105. In Decision No. R14-1005-I at ¶ 22 and Ordering Paragraph No. 8,[14] the ALJ expressly advised the Parties that they must comply with the Rules of Practice and Procedure. In addition, in Interim Decisions subsequently issued in this case, the ALJ included the following

[14] That Interim Decision was issued on August 20, 2014.

Ordering Paragraph: "The Parties are held to the advisements in the Interim Decisions issued in this Proceeding."

106. Rule 4 CCR 723-1-1400(e) is found in the Rules of Practice and Procedure and prohibits the filing of a reply to a response to a motion absent an order that permits the movant to file a reply. The Rule also establishes the content of a motion for permission to file a reply. Complainant has not filed a motion for permission to file a reply in this Proceeding, and no decision permitting Complainant to file a reply to the Denver Response has been issued in this Proceeding. Consequently, Complainant is not permitted to reply to the substance of the Denver Response; and its attempt to do so through the March 26 Motion is unavailing.

107. Third and finally, the Denver Response addresses at least one of Complainant's stated bases for the Motion for Reconsideration: the assertion that governing Colorado law permits post-enactment testimony on legislative intent. This is discussed *supra*.

108. In ruling on the March 26 Motion, the ALJ also considered Complainant's statement: "The ALJ, without reserve, states in Interim Decision No. R15-0192-I, that '... she is not available in March and early April, 2015 ...[,]'" which is the principal reason that "Complainant seeks the extraordinary relief of an interlocutory appeal directly to the Commission" (March 26 Motion at 4).

109. The quoted language first appeared in the Motion for Reconsideration. There, Complainant uses the quoted language to support its assertion that immediate relief must be sought from the Commission. Complainant states: (a) the evidentiary hearing on subject matter jurisdiction is now scheduled to be held on April 22 and 24, 2015; (b) in Decision

No. R15-0192-I at ¶ 29, the ALJ stated that "she is not available in March and early April 2015" (Motion for Reconsideration at 9); and (c) Jitney

> is concerned that said extended period of unavailability of the ALJ may delay [Jitney's] pre-hearing preparations, such as the issuance of and service of subpoenas and may even cause further postponement of the proceeding[.] Fundamental fairness dictates that this case not be kicked down the road for six weeks because the ALJ assigned to the case is not available between now [*i.e.*, March 13, 2015, the date on which the Motion for Reconsideration was filed] and mid April 2015, [*sic*] to handle the pre-trial matters that come up in preparation for hearing even if it means assigning a new ALJ to this matter.

Id. Complainant uses the quoted ALJ statement to support Complainant's assertion that the ALJ is unavailable *for all purposes* until mid-April 2015.

110. The quoted ALJ statement is taken out of context. The quoted ALJ statement appears in the following discussion in Decision No. R15-0192-I:

> **B. Filing Regarding Hearing Date.**
>
> In its Response, Jitney offers its available dates for the evidentiary hearing on subject matter jurisdiction. Respondents have not offered their available dates.
>
> To schedule new hearing dates, the ALJ will order Jitney to consult with Respondents and to make, not later than **March 6, 2015**, a filing that contains three proposed hearings dares that are acceptable to the Parties. The ALJ will order Respondents to cooperate with Complainant with respect to the March 6, 2015 filing.
>
> To assist the Parties, the ALJ states that *she is not available in March and early April 2015*. The ALJ is available on April 28 and 29, 2015.

Decision No. R15-0192-I at ¶¶ 27-29 (bolding in original; italics supplied). The italicized language is the language repeatedly quoted by Complainant. It is clear that the ALJ made the statement in the context of assisting the Parties in their discussions of proposed hearing dates. Read in context (as it ought to be), the statement simply informs the Parties that the ALJ is not available *for hearing* until mid-April 2015. The statement does not support Complainant's assertion that the ALJ is unavailable *for all purposes* until mid-April 2015.

111. As discussed above, Complainant compounded its original misuse of the ALJ's statement in the Motion for Reconsideration by using the ALJ's statement in the March 25 Motion, which was filed after Complainant's counsel knew that use of the statement to suggest or to imply that the ALJ is unavailable for all purposes is inaccurate and misleading.

112. Complainant further compounds its previous misuses of the ALJ's statement by using the ALJ's statement in the March 26 Motion, which was filed after Complainant's counsel had additional reason to know that use of the statement to suggest or to imply that the ALJ is unavailable for all purposes is inaccurate and misleading. This sequence of events made Complainant's counsel aware that the ALJ is available: (a) the quoted ALJ statement is contained in Decision No. R15-0192-I, which was issued on *February 26, 2015*; counsel for Jitney was served (through the E-Filings System) with that Interim Decision on February 26, 2015; (b) on *March 10, 2015*, the ALJ issued Decision No. R15-0226-I, which scheduled the April 22 and 24, 2015 evidentiary hearing and modified the procedural schedule in this Proceeding; counsel for Jitney was served (through the E-Filings System) with that Interim Decision on March 10, 2015; (c) on *March 13, 2015*, Complainant's counsel sent correspondence to the ALJ; in that correspondence, Complainant's counsel requests issuance of subpoenas in this Proceeding;[15] (d) on *March 17, 2015*, the ALJ signed one of the requested subpoenas and sent electronic mail correspondence to Complainant's counsel to inform him of the disposition of his request for subpoenas; counsel for Complainant attached this correspondence to the March 26 Motion; (e) on *March 23, 2015*, Denver filed an unopposed motion to modify the procedural schedule; and (f) on *March 24, 2015*, the ALJ issued Decision No. R15-0269-I, which granted

[15] This is not the action of an individual who thinks the ALJ is unavailable.

the motion and modified the procedural schedule in this Proceeding; counsel for Jitney was served (through the E-Filings System) with that Interim Decision on March 24, 2015.

113. The ALJ will deny the March 26 Motion.

C. Rulings Not Certified as Immediately Appealable.

114. Rule 4 CCR 723-1-1502 governs interim decisions. As pertinent here, that Rule provides:

> (a) Interim decisions are issued after ... a proceeding is opened by Commission decision or otherwise, other than a decision that may become a final decision of the Commission.
>
> (b) *Interim decisions shall not be subject to exceptions* or applications for RRR, *except that any party ... aggrieved may challenge the matters determined in an interim decision in exceptions to a recommended decision* or in an application for RRR of a Commission decision. ...
>
> (c) Any person aggrieved by an interim decision may file a written motion with the presiding officer entering the decision to set aside, modify, or stay the interim decision.
>
> (d) The Commission, hearing Commissioner or *Administrative Law Judge may certify any interim decision as immediately appealable* through the filing of a motion subject to review by the Commission en banc. Such motion shall be filed pursuant to rule 1400 and shall be titled "Motion Contesting Interim Decision No. [XXX-XXXX-I]."
>
> (e) Nothing in this rule prohibits a motion for clarification of an interim decision or a motion to amend a procedural schedule set forth in an interim decision.

(Emphasis supplied.)

115. The Motion for Reconsideration pertains to the scope of the testimony that may be presented during the evidentiary hearing on the Commission's subject matter jurisdiction. The March 25 Motion and the March 26 Motion pertain to the responses to the Motion for Reconsideration.

116. The Commission referred the three motions addressed in this Interim Decision to the ALJ. In doing so, the Commission states: Rule 4 CCR 723-1-1502(d) "requires motions seeking certification for immediate appeal to be directed to, and decided by, ALJ Jennings-Fader, who issued the contested decision." Decision No. C15-0302-I at ¶ 7. Thus, only the ALJ who issues the interim decision may certify that interim decision as immediately appealable to the Commission.

117. Each of the three motions decided by this Interim Decision is a prehearing motion filed in the ordinary and usual course of litigation. Neither this Interim Decision nor any of the motions addresses or raises an issue that warrants immediate appeal to the Commission. In addition, to the extent a party is aggrieved by one or more rulings made in this Interim Decision, the party can raise the issue in its exceptions to the recommended decision issued in this Proceeding.

118. For these reasons, the ALJ will not certify any ruling in this Interim Decision as immediately appealable to the Commission.

III. ORDER

A. It Is Ordered That:

1. Consistent with the discussion above, the Motion Contesting Interim Decision No. R15-0192-I, which motion was filed on March 13, 2015, is treated as a motion for reconsideration of a ruling in Decision No. R15-0192-I at ¶ 23.

2. Consistent with the discussion above, the ruling in Decision No. R15-0192-I at ¶ 23 that precludes "*testimony* concerning the General Assembly's legislative intent at the time it enacted HB 11-1198 (and more particularly § 40-101.1-105(1)(j), C.R.S.)" (emphasis in original) is affirmed.

3. The rulings in Ordering Paragraph No. 1 and No. 2 are not certified as immediately appealable pursuant to Rule 4 *Code of Colorado Regulations* 723-1-1502(d).

4. Consistent with the discussion above, the Motion to Strike Response of Evergreen Trails, Inc., d/b/a Horizon Coach Lines to Complainant's Motion Contesting Interim Decision R15-0192-I, Motion for Attorney Fees and Costs, which filing was made on March 25, 2015, is denied.

5. The ruling in Ordering Paragraph No. 4 is not certified as immediately appealable pursuant to Rule 4 *Code of Colorado Regulations* 723-1-1502(d).

6. Consistent with the discussion above, the Motion to Strike Response of City and County of Denver to Complainant's Motion Contesting Interim Decision R15-0192-I, Motion for Attorney Fees and Costs, which filing was made on March 26, 2015, is denied.

7. The ruling in Ordering Paragraph No. 6 is not certified as immediately appealable pursuant to Rule 4 *Code of Colorado Regulations* 723-1-1502(d).

8. Consistent with the discussion above, the Motion for Shortened Response Time, which motion was filed on March 25, 2015, is denied as moot.

9. Consistent with the discussion above, the Motion for Shortened Response Time, which filing was made on March 26, 2015, is denied as moot.

10. The Parties are held to the advisements in the Interim Decisions issued in this Proceeding.

11. This Interim Decision is effective immediately.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MANA L. JENNINGS-FADER

Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean,
Director