Decision No. R15-0308-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
GRANTING MOTION FOR PROTECTIVE
ORDER, ISSUING PROTECTIVE ORDER,
AND CONTAINING OTHER RULINGS**

Mailed Date: April 7, 2015

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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. On October 14, 2014, Jitney filed a Motion to Amend Complaint. The Amended Complaint accompanied that filing. On November 9, 2014, by Decision No. R14-1389-I, the ALJ granted the motion and permitted Jitney to file an Amended Complaint.[1]

7. 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.

8. 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.

9. On November 4, 2014, Horizon filed a Motion to Dismiss which addresses both the Complaint and the Amended Complaint.[2] In that filing, Horizon raises the issue of the Commission's subject matter jurisdiction in this matter.

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

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

12. 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

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

[2] 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.

Commission's subject matter jurisdiction and established the procedural schedule for that portion of this Proceeding. The ALJ later vacated these hearing dates.

13. In accordance with the established procedural schedule, each party filed a list of witnesses and copies of its exhibits for the hearing on subject matter jurisdiction. Complainant and Denver each filed corrected lists of witnesses and exhibits.

14. 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 Decision No. R15-0226-I 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.

15. By correspondence dated March 13, 2015, Jitney requested that the ALJ issue six subpoenas. Among the requested subpoenas was one addressed to Peter C. Gray. An Affidavit in Support of Subpoenas[3] and the six requested subpoenas accompanied the correspondence.

16. On March 17, 2015, as pertinent here, the ALJ informed Jitney that the ALJ would issue the requested subpoena for Peter C. Gray and that the subpoena would be available for pick-up at the Commission's reception desk at 10:00 a.m. on March 18, 2015. Because a request for issuance of subpoenas is made *ex parte* and because the issuance or non-issuance of a

[3] 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.

requested subpoena is done *ex parte*, the ALJ communicated only with Jitney's counsel by electronic mail.[4]

17. On March 17, 2015, the ALJ signed the requested Subpoena to Testify addressed to Peter C. Gray.

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

19. On March 24, 2015 at 10:56 p.m., Jitney's counsel served on Respondents' counsel (by electronic mail) a Notice to Take Deposition of Peter Gray. The notice states that the deposition is scheduled to occur on March 31, 2015 at 2:00 p.m.

20. On March 30, 2015, Denver filed a Motion for Protective Order. In that filing, Denver requests an order that vacates the scheduled March 31, 2015 deposition of Peter Gray.

21. On March 30, 2015, by Decision No. R15-0293-I and for the reasons stated in that Interim Decision, the ALJ stayed the deposition of Peter Gray pending further order.

22. On April 2, 2015, Jitney filed its Response in Opposition to the Motion for Protective Order.

B. Denver's Motion for Protective Order.

23. Denver filed a Motion for Protective Order (Denver Motion). In that filing, Denver requests that the ALJ grant Denver a protective order that vacates the March 31, 2015 deposition of Mr. Peter C. Gray. Jitney filed its Response in Opposition to the Motion for Protective Order (Jitney Response).

[4] 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.

24. For the reasons discussed below, the ALJ will grant the Denver Motion and will issue the protective order described below.

1. Denver's Position.

25. As good cause for granting the motion, Denver asserts: (a) counsel for Jitney failed to provide the required seven days' notice of the deposition; (b) counsel for Jitney failed to confer in good faith prior to issuing the notice of deposition; and (c) counsel for Denver are not available at the date and time of the scheduled deposition.

26. With respect to its *first argument* in support of its motion, Denver states: (a) Rule 4 *Code of Colorado Regulations* (CCR) 723-1-1405[5] incorporates by reference Colorado Rule of Civil Procedure (Colo.R.Civ.P.) 30(b); (b) Colo.R.Civ.P. 30(b)(1) states:

> Consistent with [Colo.R.Civ.P.] 121, sec. 1-12, a party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action[;]

(c) § 1-12 of Colo.R.Civ.P.121 provides that "reasonable notice for the taking of depositions pursuant to [Colo.R.Civ.P.] 30(b)(1) shall not be less than 7 days"; (d) Denver received the notice setting the deposition as an attachment to electronic mail correspondence sent by Jitney's counsel on March 24, 2015 at 10:56 p.m.; (e) the deposition of Mr. Gray was noticed for March 31, 2015 at 2:00 p.m.; and (f) the notice of deposition was sent to Denver fewer than the required seven days before the date on which the deposition was scheduled.

27. With respect to its *second argument* in support of the motion, Denver states: (a) § 1-12 of Colo.R.Civ.P. 121 provides that, "[b]efore serving a notice to take a deposition, counsel seeking the deposition shall make a good faith effort to schedule it by agreement at a

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

time reasonably convenient ... to ... counsel for all" Parties; (b) Jitney's counsel left a voice message for Assistant City Attorney Charles T. Solomon, counsel for Denver, on March 24, 2015 at 3:52 p.m.; (c) Jitney's counsel left a voice message for Special Counsel Brandon M. Dittman, counsel for Denver, on March 24, 2015 at 4:02 p.m.; (d) prior to serving the Notice of Deposition, Jitney's counsel did not speak with -- indeed, had no communication with -- either Mr. Solomon or Mr. Dittman concerning scheduling the deposition of Mr. Gray; and (e) "without meaningfully engaging either counsel for Denver" (Denver Motion at 2), Jitney's counsel served the notice of Mr. Gray's deposition on Denver by electronic mail on March 24, 2015 at 10:56 p.m.

28. With respect to its *third argument* in support of the motion, Denver states: (a) on March 25, 2015, Denver sent electronic mail correspondence to Jitney's counsel in which Denver requested that Jitney's counsel withdraw the notice of deposition because, *inter alia*,

> the scheduled date of March 31, 2015, will not work for Denver. On that day we must appear before the Commission on an all day hearing concerning [Public Service Company of Colorado's] 2015-2016 [Demand Side Management] Plan (Proceeding No. 14A-1057EG) and will thus be unavailable.

Denver Motion at electronic mail correspondence from Brandon M. Dittman to Richard Bara and Tom Burke dated March 25, 2015 12:50 p.m. (unnumbered attachment to the Denver Motion) at 1; (b) the City of Boulder (Boulder) is a party in Proceeding No. 14A-1057EG and, because March 30, 2015 is a Denver City holiday, on March 30, 2015, Boulder will participate in that case "on behalf of Denver. On [March 31, 2015,] Denver will be doing the same for Boulder" (Denver Motion at 4); and (c) "Denver ... has other business than just the proceeding at issue here. Contrary to [counsel for Jitney's] belief, counsel for Denver are not available at any time without notice" (*id.*).

29. For these reasons, Denver requests that the ALJ issue a protective order that vacates the March 31, 2015 deposition of Peter C. Gray.

2. Colorado Jitney's Position.

30. Jitney opposes the Denver Motion and asks that the motion be denied. In addition, although the request is not set out in the title of the filing, Jitney also asks that it "be awarded its costs for having to respond to the" Denver Motion. Jitney Response at 9.

31. In support of its request that the Denver Motion be denied, Jitney asserts: (a) as a procedural matter, the Denver Motion should be denied because the certificate of service is faulty; and (b) on the substance of the motion, Colo.R.Civ.P. 26(c)

> provides that a protective order may issue to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense" for "good cause shown". It is Complainant's position that Respondent [Denver] has failed to meet this burden.

Jitney Response at 8.

32. With respect to its *first (i.e., procedural) argument* in opposition to the Denver Motion, Jitney states: (a) the certificate of service attached to the Denver Motion states that the motion was served on Jitney's counsel on Friday, March 27, 2015 by means of the Commission's E-Filing System; (b) because Denver submitted the motion to the E-Filing System on Friday, March 27, 2015, after 5:00 p.m., Jitney's counsel was not served until Monday, March 30, 2015, at 8:00 a.m.; (c) "[Denver's] counsel knew, or should have known, that filings made after 5:00p.m. will be deemed filed, and served, on the next business day, which in the case of a Friday, would be the following Monday. [Rule] 4 CCR 723-1-1204(b)" (Jitney Response at 7); (d) Denver did not serve the Denver Motion by electronic mail on March 27, 2015

"contemporaneously with the filing of the Motion with the PUC as the [certificate of service] implied" (*id.*); (e) because service was not made on Jitney

> on March 27, 2015, as represented in the Certificate of Service of the Motion for Protective Order, [Denver] will be unable to provide the proof of service on March 27, 2015. Accordingly, there is a presumption that the motion was not served upon Complainant's counsel, a presumption that cannot be overcome. [Rule] 4 CCR 723-1-1205(e).

(Jitney Response at 7); (f) because Jitney's counsel did not receive notice of the Denver Motion until Monday, March 30, 2015, at 8:00 a.m., Jitney was "deprived ... of the time needed to properly respond to [the] motion by 8:00a.m. Monday, March 30, 2015 so that the potential of a deposition still taking place on March 31, 2015, would be preserved" (*id.*); (g) as a result of the Denver's statement that it served the Denver Motion on March 27, 2015 when the motion was served on March 30, 2015, there were

> substantial negative consequences for Complainant. Because the Certificate of Service represented that Complainant was served on March 27, 2015, a presumption was raised that if Complainant deemed the deposition date of March 31, 2015, to be critical, it would have a response filed by 8:00a.m. on Monday, March 30, 2015. Because Complainant was not served on March 27, 2015, it could not respond by 8:00a.m. on March 30, 2015 and therefore was unable to rebut the presumption. The ALJ, not knowing that Complainant had not been served on March 27, 2015, stayed the deposition less than two hours after the Complainant was served with the motion. This left Complainant with insufficient time to prepare and file a reply.

Jitney Response at 7-8.

33. With respect to its *second (i.e., substantive) argument* in opposition to the Denver Motion, Jitney states:

> [Denver] has failed to show how the deposition of Peter Gray would cause it "annoyance, embarrassment, oppression, or undue burden or expense". In both letters to Complainant, [Denver] insisted that March 31, 2015 was unavailable on both the calendars of Solomon and Dittman because both were scheduled to appear at a hearing in [Proceeding No.] 14A-1057EG. However, despite Complainant's reasonable requests for such information, [Denver] failed or refused to explain why two attorneys were required to attend the second day of

> hearing despite the fact that both of them would be absent for the entire first day of hearing in [Proceeding No.] 14A-1057EG. The veracity of this claim is put into serious question where, in the Motion for Protective Order, [Denver] opines that it also had "other business" for its attorneys to handle without any specifics what this "other business" was that was so important as to make both attorneys totally unavailable on March 31, 2015.
>
> [Denver] does not have "clean hands" when it argues lack of conferral. "Conferral" presupposes a dialogue. Complainant made good faith attempts to confer, calling BOTH of [Denver's] counsel of record. NEITHER had the courtesy to respond. A party cannot refuse to pick up the phone and return a call and then argue "lack of conferral" on the part of the party making the calls.
>
> [Denver] relies on the phrase "consistent with [Colo.R.Civ.P.] 121, Sec. 1-12" found in [Colo.R.Civ.P.] 30(b) to argue that the PUC has incorporated [Colo.R.Civ.P.] 121 by reference. [Denver] cites no case support for this proposition. There is no such case support because the PUC could not have done so without making a substantial number of its rules superfluous if not contradictory.
>
> [Colo.R.Civ.P.] 30(b) stops short of requiring the 7 day notice period set forth in [Colo.R.Civ.P.] 121, Sec. 1-12, be etched in stone. Rather it states that the notice be "reasonable". [Denver] has failed to show why a notice period of 6 days and 15 hours is unreasonable. Courts have not found the 7 day notice to be absolute. Indeed, even a three day notice served in Colorado for a deposition to be conducted in Los Angeles CA was still subjected to the reasonableness test and not rejected out of hand merely because 3 days was less than 7 days. Nielsen v. Nielsen, 141 P.2d 415 (Colo. 1943).
>
> All the remaining arguments of [Denver] are without merit and should be rejected. The cases cited are off-point. The Motion for Protective Order should be denied and Complainant awarded its costs for having to file this motion.

Jitney Response at 8-9 (capitals in original).

34. For these reasons, Jitney requests that the Denver Motion be denied.

3. Ruling.

35. As the moving party, Denver bears the burden of proof with respect to the relief sought in the Denver Motion. Rule 4 CCR 723-1-1500. For the following reasons, the ALJ finds that Denver has met its burden of proof with respect to the Denver Motion. The ALJ will issue the protective order described *infra*.

a. Procedural Issue.

36. As established by the record in this Proceeding and for the reasons discussed below, the Denver Motion's certificate of service is correct and accurate.

37. The certificate of service submitted to the Commission on March 27, 2015 with the Denver Motion states:

> I hereby certify that I have on this 27th day of March, 2015, I have [*sic*] duly served a true and correct copy of the foregoing **CITY AND COUNTY OF DENVER'S MOTION FOR PROTECTIVE ORDER** upon all parties *via the Public Utilities Commission's E-Filing system and thereby to be served electronically and automatically on any persons for whom such automatic electronic filing is provided by the Commission's e-filing system in this docket on this date*.

(Bolding and capitals in original; italics supplied.) The certificate unequivocally states that Denver Motion is "to be served electronically and automatically" through the Commission's E-Filing System "on any persons for whom such automatic electronic filing is provided by the Commission's e-filing system in this docket on" March 27, 2015. There is no hint or implication that Denver will serve its motion by any other means.

38. Denver apparently submitted the Denver Motion to the E-Filings System after 5:00 p.m. on Friday, March 27, 2015. This is outside the Commission's normal business hours of Monday through Friday, 8:00 a.m. to 5:00 p.m. As a result, and in accordance with Rule 4 CCR 723-1-1205(b), the Denver Motion was "deemed filed with the Commission pursuant to" the Commission's normal business hours. Thus, by rule, the Commission deemed the Denver Motion to be filed on Monday, March 30, 2015, at 8:00 a.m.

39. As a consequence, the Commission's E-Filing System automatically created on Monday, March 30, 2015, at 8:00 a.m. the certificate of service that accompanied the notice of

filing issued by the E-Filing System to the listed registered users on that date and at that time. The E-Filing System-generated certificate of service states, in relevant part:

> I, Brandon Dittman, hereby certify that on Mon 03/30/2015 08:00 a.m., I [*sic*] served a true and correct copy of *City and County of Denver Motion for Protective Order, CCD Email #1, Jitney Response #1, CCD Email #2, Jitney Response #2, Notice of Deposition, Brandon Dittman Missed Call Log, Chuck Solomon Missed Call Log* in Proceeding No. 14F-0806CP upon each of the persons appearing below either through the E-Filing system or by other means in accordance with applicable law.

(Underlining and italics in original.) Jitney's counsel is named on that certificate of service.

40. Jitney's counsel is a registered user of the E-Filing System. In accordance with Rule 4 CCR 723-1-1205(b), "*[f]iling through the E-Filings System constitutes service on [Jitney's counsel* as a] registered user[] of the system" (emphasis supplied). In addition, by his own admission, Jitney's counsel received notice of the Denver Motion from the E-Filing System on Monday, March 30, 2015 at 8:00 a.m. For these reasons, Denver has demonstrated

> [p]roof of service of [the Denver Motion] ... through one or more certificates of service identifying the document served and filed with the Commission. *Certificates of service may be ... filed through the Commission's E-Filings System, or they can be systematically created and attached in the filing process through the E-Filings System. ...*

Rule 4 CCR 723-1-1205(e) (emphasis supplied).

41. For the foregoing reasons, the ALJ finds that the Denver Motion certificate of service is accurate and correct.

42. With respect to the accuracy of the Denver Motion's certificate of service, Jitney's counsel makes two assertions. The ALJ finds neither assertion to be persuasive or supported.

43. The *first assertion* is: "[b]ecause service was not made upon Complainant on March 27, 2015, as represented in the Certificate of Service of the Motion for Protective Order, [Denver] will be unable to provide the proof of service on March 27, 2015" (Jitney Response

at 7). The facts do not support the first assertion because: (a) the Denver Motion has a certificate of service that was "systematically created and attached in the filing process through the E-Filings System[,]" as permitted by Rule 4 CCR 723-1-1205(e); (b) the E-Filing System-generated certificate of service contains the required information, including the March 30, 2015 date of service on Jitney's counsel; and (c) the E-Filing System-generated certificate of service accurately reflects and is consistent with the statements made in the certificate of service that Denver submitted with the Denver Motion on March 27, 2015.

44. The *second assertion* is: because Denver will not be able to provide proof service on March 27, 2015, "there is a presumption that the [Denver Motion] was not served upon Complainant's counsel, *a presumption that cannot be overcome*." Jitney Response at 7 (emphasis supplied), citing Rule 4 CCR 723-1-1205(e) for this asserted and apparently conclusive presumption. As relevant to this point, Rule 4 CCR 723-1-1205(e) provides:

> *For any filing for which there is no certificate of service demonstrating service upon ... a party's counsel of record in any of the identified forms*, the Commission will presume that the document has not been served on omitted ... counsel of record. *This presumption may be overcome by evidence of proper service*.

(Emphasis supplied.) The facts do not support the second assertion because: (a) Jitney's counsel admits that the Denver Motion was served on him; (b) the Denver Motion had an E-Filing System-generated certificate of service demonstrating service on Jitney's counsel; and (c) even had there been no certificate of service (in this instance, there was a certificate or service), the plain language of Rule 4 CCR 723-1-1205(e) creates a rebuttable -- and not, as Jitney's counsel apparently claims , a conclusive -- presumption.

45. In addition, Jitney's counsel states (Jitney Response at 7-8):

> Because the Certificate of Service represented that Complainant was served on March 27, 2015, *a presumption was raised* that if Complainant deemed the deposition date of March 31, 2015, to be critical, it would have a response filed by

> 8:00a.m. on Monday, March 30, 2015. Because Complainant was not served on March 27, 2015, it could not respond by 8:00a.m. on March 30, 2015 and therefore was unable to rebut the presumption. *The ALJ, not knowing that Complainant had not been served on March 27, 2015, stayed the deposition less than two hours after the Complainant was served with the motion. This left Complainant with insufficient time to prepare and file a reply.*

(Emphasis supplied.) Each of these statements lacks foundation.

46. *First*, Jitney's counsel cited no authority, and the ALJ is aware of none, for the proposition that the certificate of service appended to the Denver Motion (or any motion) raises a presumption under any circumstances that the response must be filed by the beginning of the next business day.

47. *Second*, if Jitney's counsel considered the March 31, 2015 deposition date to be critical and wished to maintain the scheduled deposition of Mr. Gray, Jitney's counsel had the opportunity to file -- and nothing precluded or prevented him from taking full advantage of the opportunity to file -- the Jitney Response by noon or 1:00 p.m. on March 31, 2015 in order to obtain a ruling on the Denver Motion in advance of the March 31, 2015 2:00 p.m. deposition. Jitney's counsel chose instead to file the Jitney Response on April 2, 2015, well past the scheduled deposition date and time.

48. *Third*, the ALJ received the E-Filing System notice of the filing of the Denver Motion on March 31, 2015 at 8:00 a.m. That notice and the E-Filing System-generated certificate of service state clearly that the Denver Motion was filed on Monday, March 31, 2015, at 8:00 a.m. Contrary to the assertion in the Jitney Response at 8 that the ALJ stayed the deposition "not knowing that Complainant had not been served on March 27, 2015," the ALJ knew precisely the date and time of the filing and the service of the Denver Motion when she issued Decision No. R15-0293-I.

49. *Fourth*, Decision No. R15-0293-I did not vacate the scheduled deposition. Rather, as stated in Decision No. R15-0293-I at ¶ 6, the ALJ *stayed* the deposition *pending further order* in order "[t]o provide time for the orderly resolution of the [Denver] Motion and to prevent the [Denver] Motion from becoming moot because the ... deposition has been held[.] [The ALJ also stated that staying the deposition] is consistent with the Committee Comment to Colorado Rule of Civil Procedure ... 26[.]"[6] Had Jitney's counsel considered the March 31, 2015 deposition date to be critical and had he wished to maintain the scheduled deposition of Mr. Gray, Jitney's counsel had the opportunity to file -- and nothing precluded or prevented him from taking full advantage of the opportunity to file -- the Jitney Response by noon or 1:00 p.m. on March 31, 2015 in order to have a ruling on the Denver Motion in advance of the deposition scheduled for March 31, 2015 at 2:00 p.m. Jitney's counsel elected to file the Jitney Response on April 2, 2015, well past the scheduled deposition date and time.

50. Any perceived or asserted prejudice or disadvantage to Jitney was of its own making. None of counsel for Jitney's assertions with respect to the certificate of service is supported or well-taken; as a result, the ALJ finds each to be unpersuasive.

b. Substantive Issues.

51. On August 20, 2014 by Decision No. R14-1005-I at ¶ 22 and Ordering Paragraph No. 8, 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."

[6] The Committee Comment to Colo.R.Civ.P. 26 states: "a Motion for Protective Order stays a deposition under" Colo.R.Civ.P.121, § 1-12.

52. Rule 4 CCR 723-1-1004(g) is found in the Rules of Practice and Procedure. That Rule provides: The Commission incorporates by reference the

> Colorado Rules of Civil Procedure, as published in the 2012 edition of the Colorado Revised Statutes. No later amendments to or editions of the incorporated material are incorporated into these rules.

(Footnote omitted.) Thus, the ALJ's discussion of the Colorado Rules of Civil Procedure rests on the 2012 version that the Commission has incorporated by reference.

53. Rule 4 CCR 723-1-1405 is found in the Rules of Practice and Procedure and governs discovery. Subject to stated exceptions that are not relevant here, Rule 4 CCR 723-1-1405(a)(I) incorporates by reference Colo.R.Civ.P. 26-37. Rule 4 CCR 723-1-1405(a)(III) provides: "Unless the Commission orders otherwise, the Colorado Rules of Civil Procedure incorporated by reference govern discovery."

54. Colo.R.Civ.P. 30 is one of the Colorado Rules of Civil Procedure incorporated by reference; pertains to depositions on oral examination; and is the rule that governs the scheduling and taking of such depositions,[7] including the deposition of Peter C. Gray. As pertinent here, Colo.R.Civ.P. 30(b) states:

> *Consistent with [Colo.R.Civ.P.] 121, sec. 1-12*, a party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. ...

(Emphasis supplied.)

55. For the following reasons, the ALJ concludes: (a) the Commission incorporated by reference § 1-12 of Colo.R.Civ.P. 121; and (b) § 1-12 of Colo.R.Civ.P. 121 applies with respect to discovery in Commission proceedings. First, the Commission incorporated by

[7] Colo.R.Civ.P. 32 governs the use of a deposition "[a]t trial or upon the hearing of a motion or an interlocutory proceeding" before the Commission.

reference Colo.R.Civ.P. 30(b) in its entirety; this includes the phrase "[c]onsistent with [Colo.R.Civ.P.] 121, sec. 1-12," in Colo.R.Civ.P. 30(b)(1). Second, as stated in Rule 4 CCR 723-1-1405(a)(II), the Commission did not incorporate by reference language found in Colo.R.Civ.P. 30(a), among other Colorado Rules of Civil Procedure. If it had intended not to incorporate by reference the phrase "[c]onsistent with [Colo.R.Civ.P.] 121, sec. 1-12," in Colo.R.Civ.P. 30(b)(1), the Commission would have stated that the phrase was not incorporated by reference. The Commission made no such statement. Third, the plain language of Colo.R.Civ.P. 30(b)(1) references only Colo.R.Civ.P. 121, § 1-12; it does not reference Colo.R.Civ.P. 121 in its entirety.[8]

56. As modified to reflect its use in this Proceeding and to use deposition in the singular throughout, Colo.R.Civ.P. 121, § 1-12, states:

> Unless otherwise ordered by the [ALJ], reasonable notice for the taking of [a] deposition[] pursuant to [Colo.R.Civ.P.] 30(b)(1)[, as made applicable in Commission proceedings by Rule 4 CCR 723-1-1405,] *shall not be less than [seven] days*. *Before serving a notice to take a deposition, counsel seeking the deposition shall make a good faith effort* to schedule it by agreement at a time reasonably convenient and economically efficient to the proposed deponent and counsel for all [Parties]. *Prior to scheduling or noticing any deposition, all counsel shall confer in a good faith effort* to agree on a reasonable means of limiting the time and expense of that deposition. Pending resolution of any motion pursuant to [Colo.R.Civ.P.] 26(c)[, as made applicable in Commission proceedings by Rule 4 CCR 723-1-1405,] the filing of the motion shall stay the discovery at which the motion is directed.

(Emphasis supplied.)

[8] That the Commission incorporated by reference only Colo.R.Civ.P. 121, § 1-12, when the Commission incorporated by reference Colo.R.Civ.P. 30(b)(1) is a complete answer to the argument in the Jitney Response at 9 that the Commission could not have incorporated by reference Colo.R.Civ.P. 121 in its entirety "without making a substantial number of its rules superfluous if not contradictory." Plainly, the Commission did not incorporate by reference Colo.R.Civ.P. 121 in its entirety.

57. Colo.R.Civ.P. 121, § 1-12, establishes that *reasonable notice for the taking of a deposition* is not less than seven days. There is no dispute that Jitney's counsel served notice of Mr. Gray's deposition fewer than seven days prior to the date on which the deposition was scheduled. Thus, Jitney's counsel did not give Denver's counsel reasonable notice of Mr. Gray's deposition.[9]

58. Colo.R.Civ.P. 121, § 1-12, also requires that, *prior to serving notice of Mr. Gray's deposition*, Jitney's counsel was obligated to make a good faith effort to schedule that deposition at a time reasonably convenient to counsel for all Parties. As established by the Denver Motion and as confirmed by the Jitney Response, Jitney's counsel -- who placed one late-in-the-business-day telephone call to each of Denver's counsel on March 26, 2015, who left a voice message for each of Denver's counsel, and who served the notice of Mr. Gray's deposition at 10:56 p.m. that same night without having spoken to either to Denver's counsel -- made neither a reasonable effort nor the required good faith effort to schedule the deposition of Mr. Gray at a time reasonably convenient for Denver's counsel.

59. Colo.R.Civ.P. 121, § 1-12, further requires that, *prior to either scheduling or noticing a deposition*, all counsel must confer "in a good faith effort to agree on a reasonable means of limiting the time and expense of that deposition." As established by the Denver Motion and the Jitney Response, no such conference occurred.[10] This requirement of a prior conference was not met.

[9] The ALJ finds *Nielsen v. Nielsen*, 141 P.2d 415 (Colo. 1943), a decision cited and relied on by Jitney's counsel, to be inapposite. The decision predates the effective date of the 2012 version of Colo.R.Civ.P. 26-37 and of Colo.R.Civ.P. 121, § 1-12. The later-enacted rules superseded the cited decision on the issue of reasonable notice.

[10] Logically, the attorney seeking to take the deposition should initiate this conference.

60. As pertinent here, Colo.R.Civ.P. 26(c) provides that a protective order may issue "to protect a party ... from ... undue burden or expense[.]" The ALJ finds that the totality of the circumstances surrounding Mr. Gray's deposition (that is, Jitney's counsel served the notice of deposition fewer than seven days in advance of the deposition; Jitney's counsel utterly failed to comply with Colo.R.Civ.P. 121, § 1-12, prior to the scheduling of Mr. Gray's deposition; Jitney's counsel utterly failed to comply with Colo.R.Civ.P. 121, § 1-12, prior to the issuance of the notice of Mr. Gray's deposition; Denver's counsel were scheduled to be in hearing before the Commission on the date and at the time of the scheduled deposition; and Jitney's counsel, after Denver's counsel informed him of their scheduling conflict, refused without basis to reschedule the deposition of Mr. Gray to a date and time reasonably convenient to Denver's counsel) establishes -- and the ALJ finds -- that permitting the noticed deposition of Peter Gray to proceed will be an undue burden on Denver.[11]

61. The ALJ finds that Denver has met its burden of proof with respect to the Denver Motion. The ALJ will grant the Denver Motion and will issue a protective order.

c. Terms of the Protective Order.

62. Having determined to grant the Denver Motion, the ALJ must establish the terms of the protective order to be issued. Based on the Denver Motion, the Jitney Response, and the entire record in this Proceeding, the ALJ finds each of the following three protective order terms to be necessary and reasonable.

[11] The ALJ again notes: (a) the deposition of Mr. Gray was noticed for March 31, 2015 at 2:00 p.m.; (b) to obtain a ruling on the Denver Motion in advance of the scheduled deposition, Jitney's counsel could have filed a response to the Denver Motion on March 30, 2015 and on March 31, 2015 until 1:00 p.m.; and (c) Jitney's counsel elected instead to file the Jitney Response on April 2, 2015, a decision that assured that the deposition of Mr. Gray would not be held as noticed.

63. First, the protective order will vacate the March 31, 2015 deposition of Peter Gray. Jitney's counsel did not comply with Colo.R.Civ.P. 30(b)(1) and Colo.R.Civ.P. 121, § 1-12, when he scheduled and noticed that deposition.

64. Second, the protective order will include a provision to assure that, in the future, there is no confusion or misunderstanding about the scheduling and noticing of depositions in this Proceeding. The protective order will include the following provision: ***a party that seeks to take a deposition in this Proceeding must comply with § 1-12 of Colo.R.Civ.P. 121***, which provides (as modified to reflect the use in a Commission proceeding and to use deposition in the singular throughout):

> Unless otherwise ordered by the [ALJ], reasonable notice for the taking of [a] deposition[] pursuant to [Colo.R.Civ.P.] 30(b)(1)[, as made applicable in Commission proceedings by Rule 4 CCR 723-1-1405,] shall not be less than [seven] days. Before serving a notice to take a deposition, counsel seeking the deposition shall make a good faith effort to schedule it by agreement at a time reasonably convenient and economically efficient to the proposed deponent and counsel for all [Parties]. Prior to scheduling or noticing any deposition, all counsel shall confer in a good faith effort to agree on a reasonable means of limiting the time and expense of that deposition. ...

In addition, the attorney who seeks the deposition must initiate the conference on a reasonable means of limiting the time and expense of the deposition.

65. Third, the protective order will include a provision to inform the Parties of the immediate effect of the filing of a Colo.R.Civ.P. 26(c) motion for protective order and to obviate the need for the ALJ to issue an interim decision to stay the contested discovery. The protective order will include the following provision: pursuant to § 1-12 of Colo.R.Civ.P. 121, "[p]ending resolution of any motion pursuant to [Colo.R.Civ.P.] 26(c)[, as made applicable in Commission proceedings by Rule 4 CCR 723-1-1405,] the filing of the motion [for protective order] shall stay the discovery at which the motion is directed."

C. Ruling Not Certified as Immediately Appealable.

66. 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.)

67. On April 3, 2015, by Decision No. C15-0302-I issued in this Proceeding, the Commission stated: 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.

68. The Denver Motion pertains to the deposition of Peter Gray scheduled for March 31, 2015 and requests a protective order with respect to that deposition. The ALJ grants the Motion and issues the protective order described above.

69. The Denver Motion is a prehearing motion filed in the ordinary and usual course of litigation. Neither this Interim Decision nor the Denver Motion addresses or raises an issue that warrants immediate appeal to the Commission. In addition, to the extent a party is aggrieved by a ruling made in this Interim Decision, the party can raise the issue in its exceptions to the recommended decision issued in this Proceeding.

70. For these reasons, the ALJ will not certify this Interim Decision as immediately appealable to the Commission.

III. ORDER

A. It Is Ordered That:

1. Consistent with the discussion above, the Motion for Protective Order, which motion was filed on March 30, 2015, is granted.

2. Consistent with the discussion above, the deposition of Peter C. Gray scheduled for March 31, 2015 is vacated.

3. Consistent with the discussion above, a party that seeks to take a deposition in this Proceeding must comply with § 1-12 of Colorado Rule of Civil Procedure 121, which provides (as modified to reflect the use in a Commission proceeding and to use deposition in the singular throughout):

> Unless otherwise ordered by the [Administrative Law Judge], reasonable notice for the taking of [a] deposition[] pursuant to [Colorado Rule of Civil Procedure] 30(b)(1)[, as made applicable in Commission proceedings by Rule 4 *Code of Colorado Regulations* 723-1-1405,] shall not be less than [seven] days. Before serving a notice to take a deposition, counsel seeking the deposition shall make a good faith effort to schedule it by agreement at a time reasonably convenient and economically efficient to the proposed deponent and counsel for all [Parties]. Prior to scheduling or noticing any deposition, all counsel shall

> confer in a good faith effort to agree on a reasonable means of limiting the time and expense of that deposition.

In addition and consistent with the discussion above, the attorney who seeks the deposition shall initiate the required conference on a reasonable means of limiting the time and expense of the deposition.

4. Consistent with the discussion above, in accordance with § 1-12 of Colorado Rule of Civil Procedure 121 (as modified to reflect the use in a Commission proceeding), "[p]ending resolution of any motion pursuant to [Colorado Rule of Civil Procedure] 26(c)[, as made applicable in Commission proceedings by Rule 4 *Code of Colorado Regulations* 723-1-1405,] the filing of the motion shall stay the discovery at which the motion is directed."

5. No ruling made in this Interim Decision is certified as immediately appealable pursuant to Rule 4 *Code of Colorado Regulations* 723-1-1502(d).

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

7. 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