

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19A-0144CP

IN THE MATTER OF THE APPLICATION OF MOUNTAIN STAR TRANSPORTATION LLC
DOING BUSINESS AS EXPLORER TOURS FOR A CERTIFICATE OF PUBLIC
CONVENIENCE AND NECESSITY TO OPERATE AS A COMMON CARRIER BY MOTOR
VEHICLE FOR HIRE.

COMMISSION DECISION DENYING EXCEPTIONS

Mailed Date: November 19, 2019
Adopted Date: October 30, 2019

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I. BY THE COMMISSION**A. Statement**

1. In Recommended Decision No. R19-0784, issued September 24, 2019 (Recommended Decision), Administrative Law Judge (ALJ) Melody Mirbaba found Mountain Star Transportation LLC, doing business as Explorer Tours (Mountain Star) met its burden to show a public need for the proposed call-and-demand sightseeing service, and that - based on the facts presented - the incumbents' sightseeing service is substantially inadequate. In making that finding, discussed at length in the Recommended Decision, the ALJ granted Mountain Star's request for a Certificate of Public Convenience and Necessity (CPCN).

2. Incumbent intervenors, Aspire Tours LLC (Aspire) and Ullr Tours, doing business as Colorado Sightseer (Colorado Sightseer) (collectively Intervenors) filed exceptions to the Recommended Decision: (1) claiming the ALJ used a "new" standard of review; (2) in the alternative, requesting this Commission limit Mountain Star's CPCN to provide sightseeing service only in certain languages; and (3) arguing that the ALJ made a reversible error by allowing telephonic witness testimony. As discussed below, we deny the exceptions. The ALJ used the appropriate standard in considering whether to grant a CPCN in this instance. She did not abuse her discretion in making findings in this case, including allowing reasonable accommodations for certain witnesses that were permitted to appear telephonically or use interpreter services to participate in Commission processes.

3. In addition, we discuss in this Decision our serious concern regarding the ALJ's finding that Aspire had manipulated certain evidence that it presented in this case. Given this troubling finding, we are compelled to include in this Decision statements to the parties and counsel practicing before this Commission. Zealous advocacy in the adversarial process is

understood and expected. However, knowingly making false statements of material fact or law before this tribunal is unacceptable. Parties and counsel practicing before this Commission are reminded that they must ensure, to the best of their knowledge, that the evidence presented to the Commission is true and accurate. If evidence is found to have been falsified such that it materially misrepresents critical facts, a party's ongoing reliance on that evidence raises serious concerns regarding the candor of that party and its counsel.

B. Background

4. Through its application, as amended on March 25, 2019, Mountain Star seeks authority to operate as a common carrier by motor vehicle for hire, specifically providing call-and-demand sightseeing service originating in Denver and Boulder Counties to all points in the counties of Denver, Boulder, Clear Creek, Douglas, El Paso, Grand, Jefferson, and Larimer. CKIMY, LLC, doing business as iLIMO (iLIMO),¹ and Intervenors operate as common carriers, providing call-and-demand sightseeing services within the proposed service territories, and intervened timely.

5. The Recommended Decision describes a number of factual findings underlying this matter. Findings include that Mr. Roman Lysenko owns and operates Mountain Star, which has been providing luxury limousine service under a Commission-approved permit for eight years. For the last two years, Mountain Star has been providing private sightseeing tours under the luxury limousine restrictions in its permit. The ALJ found Mountain Star's testimony and evidence credible, and that it supported Mountain Star's assertion it has built a client-base including tours to clients from Eastern Europe. Many clients often do not speak enough English

¹ Intervenor iLimo was subsequently dismissed as an intervenor by the ALJ, and is no longer a party to this proceeding. See Recommended Decision, at ¶ 6. Dismissal of iLimo's intervenor status is not at issue.

to understand a tour given in English and, in addition to English, Mountain Star offers tours in six Eastern European languages.²

6. The ALJ also includes findings of fact that tour and travel agencies have experienced difficulties finding existing tours for clients. Witnesses expressed issues booking tours with current carriers,³ finding Eastern European language tours not currently offered from multiple travel agencies,⁴ and needing sightseeing tours for significant numbers of public travelers that experience difficulties with current service offerings.⁵

7. After a two-day hearing held on July 24 and 25, 2019, the ALJ issued the Recommended Decision. She establishes the standard of review that Mountain Star must show, by a preponderance of the evidence, that: (1) it is financially, operationally, and managerially fit to conduct the proposed service; (2) there is a public need for the proposed service; and (3) the current service in the area is substantially inadequate. She addresses each topic in detail and found Mountain Star met its burden in each criteria. In particular, she found compelling that Mountain Star showed it was more likely than not that at least thousands of sightseeing customers had a need for Mountain Star's proposed service, and that current offerings were substantially inadequate to meet this need.

C. Exceptions

8. Through exceptions filed October 11, 2019, Intervenors make three primary arguments. First, Intervenors claim the ALJ "adopts the new standard for adequacy of service"⁶

² Recommended Decision at ¶¶ 10-16.

³ *Id.*, at ¶¶ 19-20

⁴ *Id.*, ¶¶ 19, 22-34

⁵ *Id.*, ¶¶ 21 and 35

⁶ Exceptions at p. 1.

when she found Mountain Star showed substantially inadequate service through consideration of sightseeing language offerings in six Eastern European languages. Second, and in the alternative, if the ALJ used the appropriate standard, Intervenors request the Commission limit Mountain Star's CPCN to offering sightseeing tours in only the six specific Eastern European languages discussed. Third, Intervenors claim the ALJ committed reversible error by permitting telephonic testimony from two of Mountain Star's witnesses. Without citation to any authority, Intervenors' claim a witnesses' demeanor is "nearly impossible to assess via telephone and completely impossible when a person is speaking via telephone through an interpreter."⁷ Exceptions claim that the ALJ should have rejected telephonic participation or "disregarded any assessment of witness demeanor."⁸

9. Mountain Star filed its response to exceptions on October 18, 2019, addressing each claim in the exceptions. Mountain Star supports that the ALJ used the correct standard in this case, noting that this Commission has broad discretion in determining whether there is a public need. Mountain Star further states that, given the finding there is a public need and current service is substantially inadequate, there simply is no basis to restrict the approved CPCN authority as requested by Intervenors.

10. Mountain Star also requests the Commission reject Intervenors' claim that its witnesses' telephonic participation was prejudicial, amounting to reversible error. Mountain Star points out that the ALJ reviewed the evidence as a whole, including but not limited to witness demeanor. Within these considerations, the ALJ found that Intervenors had manipulated phone record evidence that it presented to remove critical information. Weighing all of the evidence, the

⁷ *Id.* at pp. 16-17.

⁸ *Id.* at p. 18.

ALJ did not find Intervenors' testimony credible. Mountain Star states there is no error in allowing two witnesses to testify telephonically, but if there is, it amounts to harmless error in this instance.

D. Standard of Review

11. The proponent of the requested CPCN bears the burden of proof by a preponderance of the evidence.⁹ For a CPCN, the applicant must show financial, managerial, and operational fitness. Rule 6203(a)(XI), 4 *Code of Colorado Regulations* (CCR) 723-6 of the Commission's Rules Regulating Transportation by Motor Vehicle. The Commission then applies the monopoly doctrine by requiring an applicant seeking a common carrier certificate to demonstrate the public need for the proposed service, that granting the authority is in the public interest, and that existing service is substantially inadequate. Rule 6203(a)(XVII), 4 CCR 723-6.

12. Therefore, a CPCN for sightseeing service is appropriately granted where, by a preponderance of the evidence, through fact-specific determinations, the Commission: (1) finds financial, managerial, and operational fitness; and, (2) applies the monopoly doctrine to find a public need and substantial inadequacy for current, incumbent service offerings. Whether an incumbent's service is "substantially inadequate" is a question of fact that the Commission determines.¹⁰

13. Findings in this case rely heavily on the ALJ's determinations regarding witness and evidence credibility. The Commission reviews hearing officer rulings on credibility to determine if there was an abuse of discretion. To show an abuse of discretion, the decision must

⁹ See, Recommended Decision at ¶ 57 (citing §§ 13-25-127(1) and 24-4-205(7), C.R.S.; and Rule 1500 of the Commission's Rules of Practice and Procedure, 4 CCR 723-1).

¹⁰ See, Recommended Decision at ¶ 61 (citations omitted).

be shown to be manifestly arbitrary, unreasonable, or unfair. *See, e.g., King v. People*, 785 P.2d 596, 603 (Colo. 1990).

14. The ALJ found Mountain Star met the necessary fitness requirements to obtain a CPCN.¹¹ Exceptions do not challenge the ALJ's finding regarding Mountain Star's fitness. Rather, exceptions challenge the ALJ's application of the monopoly doctrine¹² to the facts presented here, and take issue with ALJ considerations of language barriers and witness credibility in making her determinations.

15. Specifically, regarding the standard used, the exceptions make three main arguments. Exceptions challenge the ALJ's factual findings that Intervenors were not "ready, willing, and able" to provide the requested services. Intervenors next challenge that, even if they were not ready, willing, and able, to provide services in certain European languages, the language barriers were mere "preferences" and should be rejected under *Durango Transp. Inc. v. Colo. Pub. Util' Com'n*, 122 P. 3d 244 (Colo. 2005). Intervenors then argue that the language in which the sightseeing service is provided has not been a deciding factor in past decisions, so it should not be considered here, and warn of a prospective "flood" of CPCN applications.

16. The ALJ rejected each of Intervenors' arguments raised now in exceptions.

17. We also consider and reject each argument. The ALJ appropriately applied the necessary standards to the facts at issue, which in this instance included discussion of language barriers for sightseeing guests as critical to the sightseeing service offered. The ALJ's findings that considered witness credibility were not an abuse of her discretion.

¹¹ *Id.*, at ¶¶ 66-68.

¹² Exceptions do not challenge the use of the monopoly doctrine, but focus on the factual and credibility determinations as applied in this case.

1. The ALJ did not Abuse Her Discretion in Finding Intervenors were not Ready, Willing, or Able to Provide Needed Service.

18. First, Intervenors argue that they are “ready, willing, and able” to take passengers on sightseeing tours.¹³ The ALJ found through her factual analysis that the evidence here proved, by a preponderance, to the contrary.

19. The majority of evidence on public need and substantial adequacy was offered through witness testimony. The ALJ notes that Intervenors “essentially assert that the bulk of the witness testimony against them concerning public need and substantial inadequacy is false, manufactured, or otherwise unreliable.”¹⁴ She therefore addresses conflicting testimony from Mountain Star and Intervenors.

20. On the one hand, the ALJ finds that the witnesses from Mountain Star – testifying telephonically and in person – credibly testified. Each witness testified regarding their experience, including that language-specific offerings for sightseeing tours are imperative for whether the service currently offered is substantially inadequate.¹⁵ She also found that the anticipated annual need for sightseeing tours in one or more of the Eastern European languages ranged from 12,500 to 14,500, and that the gap between need and access was in the thousands, at a minimum. She found this testimony, in addition to all other evidence as a whole, compelling to show a public need for the service offerings requested in the CPCN application.

21. On the other hand, the ALJ found Intervenor’s witness discredited herself through her actions, demeanor, evidence, and testimony. The ALJ finds testimony from Intervenors’ witness,

¹³ Exceptions at 7.

¹⁴ Recommended Decision at ¶ 73 (citing Joint Intervenors’ Statement at 7-9).

¹⁵ *Id.*, at ¶¶ 76-78.

Ms. Troxler, incredible and affords it no weight “[f]or many reasons.”¹⁶ This includes her finding that Ms. Troxler’s testimony “was inconsistent at best, and intentionally misleading at worst.”¹⁷ The ALJ found the evidence concerning Aspire’s telephone records particularly damning, comparing Exhibits 203, 303, and 15. The ALJ expressly finds that Ms. Troxler’s phone records provided as Exhibit 203 were modified to exclude critical information, and that phone record evidence presented by Mountain Star through Exhibit 15 by Mr. Tsishkou was not. By a preponderance of the evidence, she concludes that Aspire manipulated its phone records to delete evidence of Mr. Tsishkou’s calls.¹⁸ Intervenors do not contest this finding in their exceptions. In addition, the ALJ observes Ms. Troxler changing her testimony on numerous occasions (*e.g.*, stating first that the services could be provided in Eastern European languages, only to recant that statement later). Based on these observations, an analysis of the ALJ’s findings conclude that Intervenors are not “ready, willing, and able” to provide the requested services, rendering current offerings substantially inadequate.

22. The ALJ’s findings and reasoning is well laid out and supported by substantial evidence. The finding of fact that the Intervenors are not “ready, willing, or able” to provide the services needed for a significant number of the traveling public are not arbitrary. We find the ALJ did not abuse her discretion in these considerations and deny the exceptions on this point.

2. In this Case, Language Considerations were Beyond a Mere “preference” and the ALJ Correctly Differentiates the Facts here from *Durango Transp. Inc.*

23. Intervenors next raise in exceptions that *Durango Transp. Inc.*, stands for the principle that the applicant cannot demonstrate substantial inadequacy of existing service

¹⁶ *Id.*, at ¶ 74.

¹⁷ *Id.*

¹⁸ *Id.*

through “expressions of mere opinion, preference and desire and willingness to use the services ... over the services of”¹⁹ the incumbent. Consistent with their arguments rejected by the ALJ, Intervenors therefore argue that, even if evidence demonstrates that they were unable or unwilling to provide guides in certain languages, language offerings are a mere “preference” and cannot be used to determine substantial inadequacy in this case.

24. The ALJ addresses this argument directly and rejects it. She takes time to discuss a “closer look” at the cases at issue. She notes that, while expressions of preference, desire, and willingness to use an applicant’s service rather than an incumbent *alone* cannot prove substantial inadequacy, “it does not follow that expressions of preference *supported by evidence relating to the adequacy of the incumbent’s service may not prove substantial inadequacy.*”²⁰ She then finds that, even if language is a preference, Mountain Star witnesses then tie that preference directly to adequacy of sightseeing service offerings.²¹

25. We agree with the ALJ’s reasoned analysis. A sightseeing tour used to visit points of interest is reasonably tied to the ability for passengers to understand the significance and information provided. Language barriers are more than a mere “preference” in these circumstances and can contribute to the significant adequacy of sightseeing services offered, as shown through the evidence at issue in this case.

26. Notably, *Durango Transp. Inc.*, addressed call-and-demand limo services, not sightseeing tours. The case and service considered is easily differentiated, as the ALJ aptly did in her Recommended Decision. Mountain Star successfully argued that the language considerations in this

¹⁹ Exceptions at p. 5.

²⁰ Recommended Decision at ¶ 72 (emphasis added).

²¹ *Id.*

instance supported that failure to have certain language offerings caused numerous individuals the inability to adequately access sightseeing services.

27. Exceptions claiming that language offerings considered here are a mere “preference” are denied.

3. That Language has not been a Deciding Factor in Past Cases and does not Prohibit its Consideration Here, nor does it Implicate Future Findings.

28. Intervenors claim next that the Commission has never used languages spoken on a sightseeing tour to find inadequate service. Although it admits that *Durango Transp. Inc.* includes that the Commission has discretion to consider “a broad range of evidence in determining whether an incumbent carrier’s service is substantially inadequate”²² it claims that, because Intervenors could not find a prior decision that considered language considerations, the relief must be denied here. Intervenors’ pleading further opines that, because the Commission rules are silent on language considerations for sightseeing guides, it somehow follows that this adjudication cannot consider it as a determining factor.

29. The ALJ applied the standard needed to the facts of this case. This is a basic concept of adjudication. Rules of general applicability do not prohibit the Commission from making fact-specific determinations through a litigated case. Unique disputes arise all the time, which is exactly why adjudication processes exist. Simply because a matter has not been considered before does not prohibit its consideration before this Commission. Similarly, just because the Commission and stakeholders did not anticipate an argument to include it in a generally applicable rule, it does not follow that our consideration of facts at issue is prohibited.

²² Exceptions at p. 11.

30. Intervenors next argue the opposite extreme, claiming that if the Commission adopts the ALJ's findings, future CPCN applications will necessarily become unwieldy. We reject this concept. Substantial inadequacy determinations require fact-specific determinations. On the one hand, this allows the Commission to address novel concepts and cases of first impression; on the other, such a finding does not bind this Commission in future fact-specific determinations. Each case necessarily must rest on the facts presented.

31. Intervenors' arguments demonstrate a fundamental misunderstanding of the adjudication and fact-finding process. We deny the arguments in exceptions.

E. Limiting CPCN Offerings to Certain Languages

32. Exceptions next argue that, in the alternative, the Commission limit the CPCN to just providing sightseeing tours in six European languages. We disagree with Intervenors that this is an appropriate, or practically enforceable, path for the Commission in this case.

33. Ironically, this limitation proposed by Intervenors would actually create a "new" standard. The finding of inadequate service does not require the Commission to carve segments of CPCN authority to different, competitive interests. In fact, the monopoly doctrine presumes limited availability of service overall. Finding a need for more sightseeing services that current offerings are substantially inadequate, in addition to the necessary fitness determinations, is sufficient to grant the CPCN as requested.

34. Further still, granting such a request could lead to absurd and unmanageable results. The Commission would be hard-pressed to enforce a sightseeing CPCN that limited tour offerings to certain languages. Thus, we deny the request in the alternative that this Commission limit the CPCN to permit sightseeing tours in only certain language offerings.

F. Telephonic Participation

35. In its conclusion, the exceptions argue that telephonic participation by two witnesses²³ caused reversible error. Intervenors claim that the ALJ was unable to consider witness credibility through telephonic participation, and that interpreter services further caused determinations to be “impossible.” Intervenors claim that the ALJ should have disallowed this participation or, at the very least, ignored all credibility evidence, which we presume includes their own.

36. Through Decision No. R19-0600-I issued July 16, 2019, the ALJ addressed preliminary matters, including Mountain Star’s request to use an interpreter and telephonic witness participation for two of its six witnesses. Over Intervenors’ objection, the ALJ found good cause to allow testimony by telephone for the two witnesses, one of which required an interpreter, finding that:

[T]he subjects of the telephone witnesses’ testimony is relevant to the Application. The cost, time, and other constraints for in person testimony are significant. In fact, it appears that unless these witnesses are allowed to testify by telephone, they will not be able to testify at all. As a result, if telephone testimony is not permitted, Mountain Star’s ability to meet its burden, and right to represent its case through oral evidence may be impaired. *See* §§ 24-4-105(7), and 40-6-101(1), C.R.S. The ALJ finds that Mountain Star has shown good cause for an order permitting these witnesses to testify by telephone, and that doing so does not deny intervenors the right to cross-examine the witnesses.

Decision No. R19-0600-I at ¶ 10.

37. The ALJ appropriately cites authority to permit telephonic participation and allows reasonable accommodations through an interpreter. Intervenors cite no source to exclude this testimony or the ALJ’s credibility determinations.

²³ Witnesses Natalia Krasulenko and Andrey Golovan were permitted to appear telephonically through Decision No. R19-0600-I. By that same order, Ms. Krasulenko and Mr. Ludmila Kamaeff (who testified in person) were permitted use of an interpreter. The use of an interpreter was unopposed at the time.

38. Further still, error, if any, does not cause this Commission to reverse the ALJ's findings overall. Throughout the two-day hearing, Mountain Star presented six witnesses, including the two granted permission to appear telephonically. Ms. Kathrin Troxler testified for Aspire and Ms. Christin Grover and Mr. Rich Grover testified for Colorado Sightseer. Assessing all witnesses, only two of which were participating telephonically, the ALJ made her credibility and factual determinations. Taken as a whole, the record supports her findings.

39. We agree with Mountain Star's response to exceptions that there is no error here. In addition, critical factors regarding witness credibility that the ALJ found compelling in the case – in particular the ALJ's analysis of Ms. Troxler's testimony - are unaffected by the two witnesses that testified telephonically. Importantly, Ms. Troxler's testimony included phone record evidence that was compared and discussed in person. The discrepancies between these exhibits and Ms. Troxler's inconsistent statements caused the ALJ to find that Ms. Troxler discredited herself. Thus the findings of credibility most harmful to Intervenors have little to nothing to do with the two Mountain Star witnesses that participated telephonically. We therefore agree with Mountain Star's response that allowing telephonic participation was not only an appropriate use of the ALJ's discretion, but was also harmless to the outcome of the case overall.

40. The ALJ made clear that, in assessing credibility, she considered evidence as a whole in making her determinations.²⁴ The ALJ's decision to allow telephonic participation and an interpreter was well reasoned. The ALJ's determinations were not an abuse of discretion and, particularly in light of the record as a whole, telephonic participation by two witnesses in no way

²⁴ Recommended Decision at ¶ 73.

causes reversible error. Disallowing telephonic and interpreter services hinders party access to Commission processes, as the ALJ found it would in this instance.

41. We deny Intervenors' remaining argument and uphold the ALJ.

G. Manipulation of Evidence

42. We find it concerning that Intervenors' exceptions request we disregard credibility findings, particularly given the ALJ's troubling finding regarding the credibility of Intervenors' witness. Focusing on telephonic participation, Intervenors' exceptions gloss over the fact that the ALJ found numerous credibility concerns regarding the Intervenors' witness. "For many reasons"²⁵ the ALJ afforded Ms. Troxler's testimony no weight. This includes that her testimony "was inconsistent at best, and intentionally misleading at worst."²⁶ The ALJ made explicit findings that Intervenors falsified record evidence it presented through comparison of exhibits, finding that Mountain Star's records were not manipulated but that the Intervenors' manipulated exhibits to omit critical information. In addition, Ms. Troxler changed her testimony on numerous occasions at hearing (*e.g.*, whether certain language services were offered and whether she or her counsel instructed the manipulation of the phone record documents).

43. Intervenors do not argue that factual findings, including of document manipulation, were incorrect. Rather, they request that *all* ALJ credibility findings regarding witnesses be ignored. Given the findings made by the ALJ, we find this argument incredulous.

44. Intervenors fail to appreciate the severity of the findings made by the ALJ. We therefore in this Decision impress upon parties and counsel that candor and truthfulness is required in proceedings before this Commission. Attorneys are aware that presenting false or intentionally

²⁵ *Id.*, at ¶ 74.

²⁶ *Id.*

misleading evidence to this tribunal would be a serious infraction of the Rules of Professional Conduct. *See* Rule 3.3 (Duty of Candor to a Tribunal); Rule 4.1 (Truthfulness in Statements to Others). Knowingly making false statements of material fact or law in conjunction with other disciplinary rules is sufficient cause to justify disbarment. *See, e.g., People v. Mason*, 938 P.2d 133 (Colo. 1997); *In re Meyers*, 981 P.2d 143 (Colo. 1999); *People v. Rosen*, 199 P.3d 1241 (Colo. O.P.D.J. 2007).

45. Through this Decision, we reiterate that counsel representing parties before this Commission, in this instance Messrs. Scott Dunbar and Mark Valentine of the law firm Keys & Fox LLP, are on notice that candor to this tribunal is both expected and required. Zealous advocacy for one's client does not override attorney professional conduct requirements. That a party manipulated evidence to remove critical data is a serious finding from this or any other deciding body. Such a finding, along with the ALJ's other observations fully supports the credibility determination by the ALJ in this case to give Ms. Troxler's testimony no weight.

46. To be clear, the ALJ did not make an express finding that counsel knew Ms. Troxler's exhibit was manipulated to exclude material facts. If a hearing officer determines that counsel knowingly presented evidence that includes false statements of material fact, or continues to rely on false statements or evidence known to include misrepresentation of material facts, appropriate action would be warranted. *See, e.g.,* Rule 8.3, Colorado Rules of Professional Conduct (Reporting Professional Misconduct).

II. ORDER

A. The Commission Orders That:

1. The exceptions filed on October 11, 2019, by Aspire Tours LLC and Ullr Tours, doing business as Colorado Sightseer are denied, consistent with the discussion above.

2. The 20-day time period provided by § 40-6-114(1), C.R.S. 2018, to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Decision.

3. This Decision is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
October 30, 2019.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

FRANCES A. KONCILJA

JOHN GAVAN

Commissioners