

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 REHEARING,
REARGUMENT, OR RECONSIDERATION**

Mailed Date: January 3, 2020
Adopted Date: December 17, 2019

I. BY THE COMMISSION

A. Statement

1. Through this Decision we deny the request for Rehearing, Reargument, or Reconsideration (RRR) filed on December 9, 2019, by incumbent Intervenor, Aspire Tours LLC (Aspire).¹ As discussed below, the request to reopen the record is both unnecessary and prejudicial in these circumstances. Although we make no determination on the statements in the RRR requesting “forgiveness,” we recognize Mr. Scott Dunbar’s statements taking responsibility for certain mistakes leading to our concerns articulated in Decision No. C19-0941, issued November 19, 2019 (Decision), and agree that diligent and competent representation is expected.

B. Background

2. In the Decision, we denied exceptions filed by intervenors, Aspire and Ullr Tours, doing business as Colorado Sightseers, and upheld the determinations of the Administrative Law

¹ Subsequent to our determination at the Commissioners’ Weekly Meeting on December 17, 2019, the Applicant files a motion for leave to respond to the RRR and response in opposition. Given our determination to deny the RRR and, therefore, not reopen the record in this matter, the subsequent motion to reply is moot.

Judge (ALJ) granting the requested certificate of public convenience and necessity (CPCN) to the applicant, Mountain Star Transportation LLC, doing business as Explorer Tours (Mountain Star or Applicant). In addition, our Decision included admonishments regarding Aspire's witness, Ms. Kathrin Troxler, and representative Counsel, Scott Dunbar and Mark Valentine.

3. Intervenors' exceptions raised arguments regarding witness credibility, arguing that ALJ credibility determinations were improper. Upon review of the record in this instance, we found that this argument was not only unsupported, but it ignored concerning findings from the ALJ. Through our Decision, we raised concerns given that, although no explicit finding was made that Aspire's Exhibit 203 was intentionally manipulated, the exhibit was created in a way that excluded critical evidence. Due to this and other troubling findings in the case regarding witness credibility, which found Ms. Troxler's testimony "inconsistent at best, and intentionally misleading at worst,"² the Commission not only upheld the ALJ's findings regarding credibility, but warned that zealous advocacy does not override the Rules of Professional Conduct.

4. Aspire filed RRR³ and does not contest the substantive finding of the Commission affirming the ALJ's recommendation to grant Mountain Star's CPCN.⁴ Rather, Aspire includes in its RRR that, after the Decision issued, it obtained full records from Comcast regarding the phone call log evidence it presented through the incomplete Exhibit 203. Aspire confirms that the information it presented at hearing omitted critical call information at the hearing. Aspire admits that Mountain Star's witness did in fact make a call disputed at hearing, as shown in the full call log information ultimately provided by Comcast.

² Decision No. R19-0784, issued September 24, 2019, at ¶ 74.

³ Intervenor Ullr Tours, doing business as Colorado Sightseers did not join in the RRR pleading.

⁴ The final Decision Denying Exceptions was not stayed or postponed by the request for RRR. § 40-6-114(2), C.R.S. The requested CPCN issued December 10, 2019. *See* Issue Letter 55952.

5. Aspire pleads that in preparation for hearing it “in good faith reliance on the statements of ... Comcast.”⁵ The RRR pleading also provides further explanation of inconsistent statements made by Ms. Troxler at hearing in an effort to rehabilitate her testimony and credibility. Aspire asks that the Commission reopen the record to admit the additional information and argument, including six attachments, and find that Aspire did not provide intentionally misleading evidence.

6. Further, the pleading includes a “request for forgiveness” to the Commission, ALJ, and Applicant. The pleading admits that:

- (a) Mr. Dunbar should have inspected Hearing Exhibit 203 more closely, that it was confusing on its face, and, for that reason alone, he should not have moved for its admission;
- (b) Mr. Dunbar should not have filed Hearing Exhibit 203 the day before hearing and should have informed Aspire it was too late to file and attempt to introduce the evidence;
- (c) Mr. Dunbar should not have moved for the admission of Hearing Exhibit 203 through Ms. Troxler who did not prepare the exhibit; and
- (d) Mr. Dunbar should have attempted to rectify Ms. Troxler’s inconsistent statements in redirect.

7. The pleading also states that, although Mr. Mark Valentine’s name is added to both the exceptions pleading and the instant request for RRR, Mr. Valentine did not have any involvement in the above-discussed matters. His involvement was limited to covering for Mr. Dunbar for three weeks in June. The RRR states that:

Mr. Dunbar made mistakes that created confusion and frustration for the Commission, the ALJ, and the Applicant. Mr. Dunbar hopes that the discussion in this RRR has demonstrated that these were mistakes of judgment and that there was never any intent by anyone at [Aspire] or by Mr. Dunbar to mislead the Commission. Per the Commission’s discussion in paragraphs 44-46 of [the

⁵ RRR at p. 1.

Decision] Mr. Dunbar assures the Commission that he takes his responsibility and commitment to candor before this Commission very seriously.⁶

8. In conclusion, the RRR “does not ask the Commission to reverse its decision granting the Applicants application.... Rather, [Aspire] has filed this RRR for the purpose of, hopefully, repairing its credibility.”⁷ Aspire asks that we reopen the record to admit Attachments A, B, C, D, E, and F, and find that Aspire did not manipulate evidence and provide intentionally misleading testimony. Aspire offers that witnesses, in addition to counsel, are willing to appear and answer questions.

C. Findings and Conclusions

9. Substantively, the RRR requests only that this Commission reopen the record and introduce evidence as to Exhibit 203 and Ms. Troxler’s testimony such that this Commission “revise” findings that Aspire intentionally manipulated evidence and misled the Commission. The RRR explains that the critical data was omitted through a lack of diligence, rather than intent. The RRR misunderstands the findings of both the ALJ and this Commission. The ALJ was forced to draw conclusions and make credibility determinations given inconsistencies in testimony and Exhibit 203. When compared with other evidence and testimony, the ALJ determined Exhibit 203 omitted critical information. We clarify that neither the ALJ nor this Commission made explicit findings regarding Ms. Troxler or her counsel’s “intent.”

10. Intervenor’s arguments through exceptions highlighted the ALJ’s credibility considerations, requiring that we review the record. Upon that review, we found it necessary to address our serious concerns in rejecting the Intervenor’s exceptions, and in particular its arguments regarding witness credibility determinations. Intervenor’s ongoing arguments in

⁶ *Id.* at p. 18.

⁷ *Id.*

exceptions failed to recognize, or even address, the ALJ's troubling findings regarding inconsistencies in Aspire's testimony and Exhibit 203, while at the same time, asked that this Commission *en banc* ignore credibility determinations because of reasonable accommodations provided to two Applicant witnesses. We found the argument incredulous. The Commission explained in its Decision that the ALJ's findings regarding credibility, including that Ms. Troxler's testimony was "inconsistent at best and intentionally misleading at worst," were concerning. We included that *if* findings were made that the manipulation was intentional, it would be a serious violation of the Rules of Professional Conduct, requiring appropriate action.

11. While continued arguments in exceptions that ignored the severity of the ALJ's determinations trouble us, specific determinations regarding the intent of Aspire or its Counsel were not made. Rather, we included our sincere concerns, impressing upon all parties and counsel that candor and truthfulness is required in proceedings before this Commission. We clarify that neither the ALJ nor this Commission made definitive findings of Ms. Troxler or her counsel's intent in presenting Exhibit 203 or making inconsistent statements. The request to "revise" our statements of concern is unnecessary.

12. In addition, if the information and exhibits are accepted, through Aspire's own admissions, the substantive determinations in the proceeding remain unchanged. The RRR admits that the ALJ correctly concluded that Exhibit 203 was incomplete, and that the call in question that Aspire contested at hearing was made by Mountain Star's witness. Exhibit 203 was, in fact, created in a way that the information provided was incomplete and omits critical information at issue. That testimony and evidence was inconsistent due to a lack of diligence (including the stated reliance on Comcast), rather than nefarious manipulation of data, is

immaterial to the ALJ's determinations.⁸ In fact, the additional information would further justify and support her decision to grant the CPCN. The Applicant's case supporting its CPCN included that tour guides made calls to current sightseeing operators and could not get substantially adequate service. Consistent with the ALJ's findings, the complete call records from Comcast would persuasively support the Applicant's arguments. To reopen the record and admit evidence that further supports conclusions already made by the ALJ is unwarranted.

13. Here, particularly because we clarify that no finding of "intent" was made, and further recognize that if the additional evidence were included no substantive finding would change, we find no good cause to reopen the record and further delay conclusion of these proceedings. Permitting a party that failed to diligently present issues and rehabilitate its witness at hearing the ability to add to the record through RRR is inappropriate and unduly prejudicial in this case. The request to reopen the record and further consider evidence is denied.

14. We recognize Aspire's RRR also requests "forgiveness" and explains a number of ways in which Mr. Dunbar could have been more diligent in representing his client. Mr. Dunbar takes responsibility for the mistakes entirely, including a statement that, despite adding his name to exceptions and RRR, Mr. Valentine's participation in the case was limited. There are no determinations for us to make regarding these statements and request.

15. Albeit late, Mr. Dunbar taking responsibility for his actions is commendable. Counsel is well aware of requirements included in the Rules of Professional Conduct and our concerns. We will continue to expect professionalism, diligence, and competent representation, both at hearings and in future pleadings, particularly those signed by attorneys.

⁸ Specifically, the ALJ's finding that testimony was "inconsistent at best, and intentionally misleading at worst" supports that, regardless of intent, the ALJ found Ms. Troxler's testimony "incredible."

II. ORDER

A. The Commission Orders That:

1. The Request for Rehearing, Reargument, or Reconsideration filed on December 9, 2019, by Aspire Tours LLC is denied, consistent with the discussion above.

2. This Decision is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
December 17, 2019.**

(S E A L)



ATTEST: A TRUE COPY

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

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

FRANCES A. KONCILJA

JOHN GAVAN

Commissioners