

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20D-0521EC

IN THE MATTER OF THE PETITION FOR A DECLARATORY ORDER FILED BY WILD SIDE 4 X 4 TOURS LLC, PURSUANT TO THE COMMISSION'S RULE OF PRACTICE AND PROCEDURE 4 CODE OF COLORADO REGULATIONS 723-1304(F).

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
MELODY MIRBABA
ADDRESSING INTERVENTIONS AND SCHEDULING
REMOTE PREHEARING CONFERENCE**

Mailed Date: February 16, 2021

I. STATEMENT, BACKGROUND, ARGUMENTS, FINDINGS, AND CONCLUSIONS

A. Summary

1. By this Decision, the Administrative Law Judge (ALJ) addresses interventions and schedules the matter for a remote prehearing conference to: discuss with the parties the manner in which this matter should move toward a resolution; schedule an evidentiary hearing (if necessary); and establish procedural deadlines, including deadlines to file dispositive motions.

B. Background

2. On November 23, 2020, Wild Side 4 x 4, LLC (Wild Side) filed its Petition for Declaratory Order (Petition) per Rule 1304(i) of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1. Wild Side seeks an order declaring that it is exempt from regulation by the Commission, including requirements to obtain a permit pursuant to Article 10.1 of Title 40 of the Colorado Revised Statutes. Wild Side also requests that

the Commission issue a stay of enforcement while the Commission determines whether to grant its Petition.

3. During its weekly meeting on December 23, 2020, the Commission found that evaluating the question presented in the Petition will remove uncertainty as to whether Wild Side must obtain a permit under § 40-10.1-301(12), C.R.S., or is otherwise subject to Commission regulation. Decision No. C20-0925-I adopted December 23, 2020, at ¶ 9. Accordingly, the Commission accepted the Petition, issued public notice of the Petition, referred the matter to an ALJ, and established a 30-day period for notice, interventions, and responsive briefs. *Id.* at ¶¶ 1-2. The Commission ordered that interventions and any responsive briefs, including from Colorado Public Utilities Commission Trial Staff (Staff), must be filed by 5:00 p.m. on January 29, 2021. *Id.* at ¶ 2. The Commission stayed any enforcement action by Staff related to Wild Side operating without a permit. *Id.* at ¶ 3.

4. On January 11, 2021, Staff filed a “Notice of Intervention as of Right by Staff, Entry of Appearance, and Notice Pursuant to Rule 1007(a) and Rule 1401” (Staff’s Intervention). Staff’s Intervention states that it is intervening of right and will participate in this proceeding.

5. On January 22, 2021, Estes Valley Transport, Inc. (Estes Valley) filed an “Entry of Appearance, Intervention and Response of Estes Valley Transport, Inc.” (Estes Valley’s Intervention). Estes Valley’s Intervention asserts that it is intervening of right. Estes Valley’s Intervention at 1. It also purports to attach a copy of its Commission-issued Certificate of Authority (Authority), but the Authority was not included with the Intervention or filed separately simultaneous with the Intervention. *Id.*

6. On January 25, 2021, Fun Tyme Trolleys LLC, doing business as Estes Park Trolleys, (Fun Tyme) filed an “Entry of Appearance and Intervention” (Fun Tyme’s Intervention).¹ Fun Tyme asserts that it is intervening of right. Fun Tyme’s Intervention at 1. Fun Tyme also states that its Authority is inactive, and that it alternatively requests permissive intervention, should its inactive permit status prevent intervention of right. *Id.* at 1-2. Like Estes Valley, Fun Tyme’s Intervention also claims to attach a copy of its Commission-issued Authority, but none was attached. *Id.*

7. On January 28, 2021, Estes Valley filed “Intervenor/Respondent Estes Valley Transport, Inc.’s Responsive Brief Filed in Opposition to the Declaratory Order Sought by Petitioner Wild Side 4x4 Tours, LLC” (Responsive Brief). In its Responsive Brief, Estes Valley presents arguments in opposition to granting the Petition.

8. On January 29, 2021, Fun Tyme filed “Intervenor’s Brief Statement of Position” (Brief) with Exhibits 1 through 11. In its Brief, Fun Tyme presents more detailed argument against granting the Petition.

9. Also on January 29, 2021, Staff filed a “Response to Verified Petition of Wild Side 4x4 LLC For Declaratory Order and Request for Stay of Enforcement” with Exhibits A through D. Staff argues that Wild Side is subject to the Commission’s regulatory authority and should be required to apply for and obtain a permit to continue its operations.

¹ In their pleadings to date, the parties have used acronyms to reference Fun Tyme and Estes Valley, that is “EVT” and “EPT.” Moving forward, the ALJ encourages the parties to use the same short references for Fun Tyme and Estes Valley that the ALJ uses in this Decision. The ALJ strongly disfavors using acronyms, especially in the circumstances here, where the distinction between parties can easily be mistyped or misheard. Referring to Interveners as Fun Tyme and Estes Valley eliminates much potential confusion.

10. On February 2, 2021, Wild Side filed “Wild Side 4x4 LLC’s Response to Interventions of Estes Valley Transport, Inc. and Estes Park Trolleys” (Response), objecting to Fun Tyme’s and Estes Valley’s Interventions.

11. On February 2, 2021, Fun Tyme filed an “Amendment to Entry of Appearance and Intervention” (Amendment). On February 3, 2021, it filed a copy of its Authority, and a printout from the Commission’s E-Filing System showing its company name, permit number, permit type, permit status (inactive) and permit issue date (collectively, Fun Tyme’s February 3, 2021 filings).

12. On February 12, 2021, Estes Valley filed a “Response to Response of Petitioner, and Motion to Strike” (Motion to Strike). With its Motion to Strike, Estes Valley filed a copy of its Authority.

C. Parties’ Intervention Arguments.

13. Wild Side states that its Response to Estes Valley’s and Fun Tyme’s Interventions is untimely because, under Rule 1401(c), 4 CCR 723-1, responses to motions to permissively intervene must be filed within seven days of service of the intervention. Response at 2. Wild Side states that counsel incorrectly calendared the response due date based on Rule 1401(b), 4 CCR 723-1, which requires responses to motions to be filed within 14 days of service. *Id.* Wild Side states that as soon as counsel identified its calendaring error, it filed the Response. *Id.* Wild Side submits that no other party will be harmed by accepting the untimely Response, particularly given that when it was filed, no decision had issued relating to Interventions. It also argues that rejecting the Response would prejudice Wild Side. *Id.*

14. Wild Side argues that Fun Tyme’s Intervention should be considered under Rule 1401(c), 4 CCR 723-1, because Fun Tyme’s Authority is currently inactive and it did not provide a copy of its Authority with its Intervention. As a result, Wild Side argues that Fun Tyme cannot

show that its Authority is in conflict with Wild Side's operations. Wild Side asserts that Fun Tyme's Intervention fails to meet the standards for permissive intervention under Rule 1401(c), and is instead "full of self-serving statements concerning its alleged pecuniary interest in this proceeding." *Id.* at 3. Wild Side points to Fun Tyme's arguments that granting a declaratory order as requested would divert traffic from Fun Tyme, wastefully duplicate Fun Tyme's service, endanger Fun Tyme's investments, and that there is no unmet need for Wild Side's services. *Id.* Wild Side asserts that these arguments are relevant to whether it should be granted authority to operate, but not to the primary and narrow question at issue here, whether it is subject to the Commission's jurisdiction as a motor carrier under § 40-10.1-1 *et seq.*, not *Id.* at 3-4. Wild Side points to Fun Tyme's irrelevant arguments to support its assertion that granting Fun Tyme's Intervention will unduly broaden the scope of this proceeding.

15. Wild Side also argues that Staff has intervened of right and that it will adequately represent the interests of transportation customers and competitors. *Id.* at 4. Wild Side submits that because Staff takes the position that Wild Side must have a permit to operate, Fun Tyme's participation is duplicative. *Id.*

16. In response, Fun Tyme admits that it erred by not filing its Authority with its Intervention. Amendment at 1. Fun Tyme states this was an oversight, and asks that it be permitted to amend its Intervention with the missing attachments. *Id.* Fun Tyme filed its Authority and a printout from the Commission's E-Filing System showing its company name, permit number, permit type, permit status (inactive) and permit issue date. *See* Fun Tyme's February 3, 2021 filings.

17. As to Estes Valley's Intervention, Wild Side argues that because Estes Valley failed to file a copy of its Authority and did not identify parts of its authority in conflict in this proceeding,

Estes Valley has failed to meet the requirements of Rule 1401(f), 4 CCR 723-1, to intervene of right. *Id.* As such, Wild Side argues that Estes Valley's Intervention should be considered a request to permissively intervene. *Id.* at 5. Wild Side asserts that it has operated for years, and it is therefore unclear how it could endanger Estes Valley's investments or wastefully duplicate its service. *Id.* In addition, Wild Side submits that Estes Valley's Intervention will unduly broaden the scope of this proceeding and, in turn, unnecessarily increase the resources needed to complete this proceeding both for Wild Side and the Commission. *Id.* Wild Side also argues Staff will adequately represent Estes Valley's interests. For all these reasons, Wild Side argues that Estes Valley's Intervention should be denied.

18. Estes Valley responds by arguing that its Intervention is of right, and not permissive, and therefore, Wild Side is not authorized to file a response to its Intervention. For that reason, Estes Valley asserts that Wild Side's Response should be denied and stricken. Motion to Strike, at 2. Estes Valley argues that it is not necessary to identify parts of its Authority in conflict here because Wild Side does not limit the relief it seeks to a particular territory, and thus, all of Estes Valley's service territory is relevant. *Id.* Estes Valley also asserts that Staff is well represented, but the Commission's Decision No. C20-0925-I authorizes interventions by interested parties such as Estes Valley. *Id.*

19. Estes Valley characterizes Wild Side's Response as a motion to strike, which are not specifically authorized by Decision No. C20-0925-I. *Id.* Estes Valley asserts that Commission rules do not allow replies to interventions or replies to responses without Commission approval, and that Wild Side's Response was late in any event. For all these reasons, Estes Valley asks that the Response be denied and stricken.

20. Estes Valley also denies that it failed to submit a copy of its Authority with its Intervention, but, nevertheless, includes a copy of its Authority with its Motion to Strike.²

D. Analysis, Findings, and Conclusions.

21. As to the timeliness of Wild Side's Response, the amount of time a party has to file a response to an intervention depends on whether it is responding to an intervention of right or a permissive intervention. Under Rule 1401(b), 4 CCR 723-1, a party may object to an intervention of right by filing a motion to strike, but the rule does not set a deadline for such a filing, though generally, responses to motions are due within 14 days of service. *See* Rule 1400(b), 4 CCR 723-1. Under Rule 1401(c), 4 CCR 723-1, a party has seven days from the service date to file a response to a motion seeking to permissively intervene.

22. Here, Estes Valley and Fun Tyme's Interventions purport to be of right, but Wild Side argues they should be treated as permissive interventions. Thus, if Fun Tyme's and Estes Valley's Interventions are taken at face value, Wild Side's Response is timely, though it should be a motion to strike. Rule 1401(b); *see* Rule 1400(b), 4 CCR 723-1. But, if they are actually permissive interventions, Wild Side's Response is untimely. Rule 1401(c); *see* Rule 1400(b), 4 CCR 723-1. Regardless of which applies, the Response was filed early enough in the proceeding so as to not prejudice any Intervener. Indeed, if the Interventions are permissive, Wild Side's response to Estes Valley's Intervention was due on January 29, 2021, and its response to Fun Tyme's Intervention was due February 1, 2021. *See* Rule 1401(b), 4 CCR 723-1. Wild Side filed

² Estes Valley denies the accuracy of Wild Side's statement that Estes Valley failed to attach its Authority and statement of good standing to its Intervention, and reasserts that it filed the documents. Motion to Strike at 1. It appears that Estes Valley did not perform due diligence to determine the basis for Wild Side's statement, because, had Estes Valley reviewed its filing within the Commission's E-Filing System, it would have discovered that Wild Side's statement is accurate. Estes Valley did not, in fact, file the referenced attachments with its Intervention. In the future, Estes Valley's counsel should perform due diligence to ensure that its representations to this tribunal are accurate.

its Response on February 2, 2021. This is a short delay that does not negatively impact the parties, but striking the Response may prejudice Wild Side. No evidentiary hearing or procedural schedule has been established, and thus, accepting the filing does not affect the forward movement in this proceeding. And, given that both Estes Valley and Fun Tyme filed responses to Wild Side's Response, it makes little difference that its titled as a response instead of a motion to strike. For all these reasons, to the extent that Wild Side's Response is untimely, the ALJ accepts the late filing. For the same reasons, Estes Valley's Motion to Strike is denied.

23. Turning to the Interventions, the ALJ first finds that the parties' reliance on Rule 1401(f), 4 CCR 723-1, is misplaced. That rule does not apply. By its plain language, Rule 1401(f) applies to interventions of right in "[t]ransportation regulated intrastate carrier *application* proceedings." Rule 1401(f), 4 CCR 723-1 (emphasis added). This is not an application proceeding. To the contrary, this is a declaratory order proceeding.

24. Because Rule 1401(f) does not apply, the ALJ turns to other rule provisions governing intervention, that is Rules 1401(b) and (c), 4 CCR 723-1.

25. Rule 1401(b) governs interventions of right (except for transportation application proceedings). 4 CCR 723-1. To intervene of right, a party must "state the basis for the claimed legally protected right that may be affected by this proceeding." Rule 1401(b), 4 CCR 723-1. Both Estes Valley and Fun Tyme assert a legally protected right in the subject matter of this proceeding based upon their Authorities to operate as regulated transportation carriers in areas in which Wild Side operates or will operate without a permit, if a declaratory order is entered in Wild Side's favor. Estes Valley's Intervention at 1; Fun Tyme's Intervention at 1. Both Interventions make conclusory assertions about the legally protected right at issue and cursory factual allegations in support thereof. *See generally*, Estes Valley's Intervention and Fun Tyme's Intervention. Neither

Interventions were accompanied by the Interveners' Authorities or proofs of good standing before the Commission.

26. It is significant that this is a declaratory judgment proceeding, and not an application proceeding. Generally, in transportation application proceedings, a carrier seeks to obtain a new common carrier authority or extend an existing one, and an intervener's legally protected right in that proceeding derives from the regulated monopoly doctrine. That doctrine generally gives an intervener with a common carrier certificate, (or authority), the exclusive right to provide service at issue in the application. *See e.g., Donahue v. Public Utilities Comm'n*, 359 P.2d 1024, 1027 (Colo. 1961); *Public Service Co. v. Public Utilities Comm'n*, 765 P.2d 1015, 1021 (Colo. 1988); *see also, Ephraim Freightways Inc. v. Public Utilities Comm'n*, 380 P.2d 228, 230 (Colo. 1963). That exclusive right to serve is an underpinning to an intervener's legally protected interest in an application proceeding. Unlike an application proceeding, a declaratory order proceeding does not threaten to grant a certificate of authority to provide service in an existing common carrier's exclusive service territory. Thus, the exclusive right to serve simply does not carry the same meaning or gravitas in this type of proceeding as it does in an application proceeding, even in the circumstances here. Indeed, this proceeding is unrelated to applying, implementing, or enforcing the doctrine of regulated monopoly and the exclusive right to serve that comes with it.

27. For all the reasons discussed above, the ALJ finds that the Fun Tyme's and Estes Valley's Interventions fall short of establishing intervention of right under Rule 1401(b), 4 CCR 723-1. The ALJ next determines whether the relevant Interventions meet Rule 1401(c)'s requirements to permissively intervene.

28. To permissively intervene, an intervener must state the grounds upon which the intervention relies, including the specific interest that justifies intervention, and must establish that the subject proceeding “may substantially affect the pecuniary or tangible interests of the movant . . . and that the movant’s interests would not otherwise be adequately represented.” Rule 1401(c), 4 CCR 723-1.

29. As noted, neither Fun Tyme nor Estes Valley filed their Authorities with their Interventions. Instead, they filed copies of their Authorities after Wild Side filed its Response. As Their Authorities demonstrate that they each have a certificate to operate as a common carrier in Estes Park, Colorado. *See* Fun Tyme’s Intervention at 1-2; Amendment; Fun Tyme’s Letter of Authority filed February 3, 2021; Estes Valley’s Intervention at 1; and Motion to Strike at 2 and 4-8. The Petition states that Wild Side has already, and seeks to continue to provide service in the Estes Park area without a Commission-issued authority or certificate. *See* Petition at 2-10. Given this, the ALJ finds that a Commission order declaring that Wild Side does not need a permit to operate in the same geographical area as Fun Tyme and Estes Valley could substantially impact their tangible and pecuniary interests in their businesses and in their certificates. For these reasons, the ALJ concludes that Estes Valley and Fun Tyme’s Interventions provide a sufficient basis for them to permissively intervene under Rule 1401(c), 4 CCR 723-1.³ As such, the ALJ allows Fun Tyme and Estes Valley to permissively intervene.

30. That said, the ALJ acknowledges Wild Side’s concerns about the scope of this proceeding being unduly expanded by virtue of Estes Valley’s and Fun Tyme’s Interventions. The

³ The ALJ notes that Wild Side argues that Fun Tyme’s Intervention should be rejected because its Authority is inactive. Given that Fun Tyme’s Authority does not authorize it to provide service from November 1st to March 31st, it is unsurprising that it is currently inactive. As such, in the circumstances here, Fun Tyme’s inactive status does not impact its ability to intervene. *See* Fun Tyme’s Letter of Authority filed February 3, 2021.

ALJ notes that both Estes Valley and Fun Tyme already raise issues pertinent to an application proceeding, such as the public need for an additional service, and their ability to handle a greater volume of service. *See e.g.*, Estes Valley's Intervention at 2; Fun Tyme's Intervention at 2-3. As explained in detail, this is not an application proceeding; all parties should be mindful of this fact moving forward.

31. If it becomes necessary, the ALJ will enter orders to ensure that the parties do not unnecessarily expand the scope of this declaratory order proceeding. Any party may bring such matters to the ALJ's attention by filing a motion, or making an objection during the evidentiary hearing.

E. Prehearing Conference.

32. The ALJ is scheduling a prehearing conference to move this matter toward a resolution. The ALJ anticipates several potential avenues to resolve this proceeding. For example, the parties may wish to stipulate to and present undisputed material facts and to file dispositive briefs based on those undisputed facts. The parties may instead wish to present evidence at a hearing and argument via statements of position filed after the hearing. Or, the parties may wish to do both. If an evidentiary hearing is necessary, during the prehearing conference, the ALJ will schedule the evidentiary hearing and establish procedural deadlines relating to the hearing. The parties must be prepared for all of this. To this end, the parties are required to confer with each other prior to the prehearing conference on these issues, specifically including the manner in which this matter should progress to a resolution.

33. For the reasons explained below, the prehearing conference will be held remotely by video-conference. Due to the COVID-19 pandemic, in-person hearings at the Commission's offices are currently not permitted. By way of background, on March 10, 2020, Colorado Governor

Jared Polis declared a state of emergency over COVID-19, the novel coronavirus pandemic. Executive Order D-2020 003. Since then, Colorado State government and the Commission have been working diligently to address how to safely and effectively manage the challenges presented by COVID-19. These efforts have focused on limiting the disruption to the services delivered by the Commission (and other State agencies), while attempting to mitigate the risks to State employees and the public. Notably, public access to the building containing the Commission's offices and hearing rooms has been restricted. As a result, the Commission is currently unable to hold in-person hearings at the Commission's offices.

34. The ALJ also finds that holding the hearing remotely is consistent with public health advisories to prevent the spread of COVID-19 and is in the public interest.

35. At this time, it is unknown when the Commission will be able to hold in-person hearings. If an evidentiary hearing is scheduled, it will be a video-conference hearing, and the parties, counsel, and witnesses will be expected to appear by video-conference and present all tangible evidence electronically.

36. The Commission will use the web-hosted service, GoToMeeting, to hold the prehearing conference remotely. This Decision and Attachment A hereto includes important technical information and requirements to facilitate holding the prehearing conference remotely. As such, it is vitally important that the parties carefully review and follow all requirements in this Decision and Attachment A.

37. To minimize the potential that the video-conference hearing may be disrupted by non-participants, the link and meeting ID or access code will be provided to the parties by email

before the hearing, and the parties will be prohibited from distributing that information to anyone not participating in the hearing.⁴

38. *Intervenors are on notice* that their failure to appear at the prehearing conference may result in a decision dismissing their Interventions and prohibiting them from participating in this proceeding. *Wild Side is on notice* that failing to appear at the prehearing conference may result in a decision dismissing the Petition without prejudice. *All parties are on notice* that the ALJ will deem any party's failure to appear at the prehearing conference as a waiver to any objection to any ruling made during the prehearing conference.

II. ORDER

A. **It Is Ordered That:**

1. Estes Valley Transport, Inc.'s (Estes Valley) "Response to Response of Petitioner, and Motion to Strike" is denied and "Wild Side 4 x 4, LLC's Response to Interventions of Estes Valley Transport, Inc. and Estes Park Trolleys" is accepted.

2. Consistent with the above discussion, Estes Valley and Fun Tyme Trolleys LLC, doing business as Estes Park Trolleys, may permissively intervene in this proceeding.

3. A remote prehearing conference on the above-captioned Petition is scheduled as follows:

DATE: March 2, 2021

TIME: 10:00 a.m.

METHOD: Join by video-conference online at the meeting link emailed to parties before the hearing.

⁴ This information will be emailed to counsel for all parties at the email addresses on file for counsel in this proceeding.

4. Participants in the prehearing conference may not distribute the GoToMeeting link, access, or ID code to anyone not participating in the hearing. Participants may not appear in person at the Commission for the above-scheduled hearing. Instead, parties will participate in the hearing from remote locations, consistent with the requirements of this Decision.

5. All participants must comply with the requirements in Attachment A to this Decision, which are incorporated into this Decision.

6. As discussed above, the parties are required to confer with each other before the prehearing conference.

7. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director