

Decision No. C23-0223

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 22A-0059CP

IN THE MATTER OF THE APPLICATION OF PALISADE TROLLEY LLC FOR A
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO OPERATE AS A
COMMON CARRIER BY MOTOR VEHICLE FOR HIRE.

**COMMISSION DECISION GRANTING
MOTION FOR LEAVE TO RESPOND, AND DENYING
APPLICATIONS FOR REHEARING, REARGUMENT, OR
RECONSIDERATION**

Mailed Date: March 30, 2023
Adopted Date: March 22, 2023

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I. BY THE COMMISSION

A. Statement

1. This decision addresses the applications for rehearing, reargument, or reconsideration (“RRR”) filed by Rapid Creek Cycles & Sports LLC (“Rapid Creek”), Absolute Prestige Limo II, LLC, (“Absolute”), and Pali-Tours, LTD (“Pali-Tours”). It also rules on the motion for leave to file a response to the RRRs filed by Palisade Trolley LLC (“Palisade Trolley”). Being fully advised on the briefs and record, the Commission grants the motion for leave to respond, and, after consideration, denies the applications for RRR.

B. Background

2. The procedural history of this proceeding is thoroughly set forth in both the ALJ’s recommended decision¹ and the Commission’s previous decision² addressing exceptions. In short, Palisade Trolley applied for common carrier authority to operate a shuttle bus that has been retrofitted to look like an old-fashioned trolley. Palisade Trolley sought to offer “trolley” service to and from wineries and events like weddings in the Palisade area. After an evidentiary hearing on the merits of the application, the administrative law judge (“ALJ”) to whom this proceeding was assigned denied Palisade Trolley’s application. Among other things, the ALJ’s recommended decision concluded that Palisade Trolley had not met its burden to show that the service offered by existing carriers was substantially inadequate.

¹ Decision No. R22-0540, issued September 13, 2022.

² Decision No. C23-0070, issued February 1, 2023.

3. Palisade Trolley filed exceptions challenging the recommended decision. While it raised a number of issues, relevant to this history it argued that the support letters from various local citizens, officials, and groups should have been given more weight in determining whether service offered by existing carriers was inadequate, and that on balance, the evidence showed that the existing carriers' service was substantially inadequate. The Commission agreed that the support letters should be given more weight, and, when evaluating the record evidence as a whole, concluded that Palisade Trolley had met its evidentiary burden. It issued a decision granting Palisade Trolley's exceptions and granting Palisade Trolley's application.³

4. Rapid Creek, Pali-Tours, and Absolute each filed RRR to the Commission's decision. As discussed in greater detail below, they each argue that the Commission erred when concluding that Palisade Trolley had met its evidentiary burden and by granting Palisade Trolley's application. Palisade Trolley filed a response to the three RRRs and an accompanying motion seeking leave to file the response. Both Rapid Creek and Pali-Tours filed responses in opposition to Palisade Trolley's motion. We turn first to Palisade Trolley's motion and the two responses.

II. DISCUSSION, FINDINGS, AND CONCLUSIONS

A. Palisade Trolley's Motion for Leave to File a Response

5. Under Commission Rule 1506, no response to an application for RRR may be filed except upon motion for leave to file a response. The motion must demonstrate a material

³ The Commission subsequently issued an additional decision modifying the decision granting Palisade Trolley's application. Due to an oversight, the Commission had not appended its standard compliance directives and the attachment setting forth the technical description of Palisade Trolley's operating authority to its earlier decision.

misrepresentation of a fact in the record, an incorrect statement or error of law, or an attempt to introduce facts not in evidence.

6. Palisade Trolley filed such a motion. The motion and proposed response argue that Rapid Creek's RRR attempts to introduce evidence and facts not in the record because, among other things, Rapid Creek filed a copy of minutes from a Town of Palisade Trustees meeting and makes claims about authors of the letters in support of Palisade Trolley's application, none of which appear in the record. Palisade Trolley argues that Absolute's RRR also contains material misrepresentations of fact and law when, among other things, it asserts that incumbent carriers' vehicles are idle more often than not, notes the impact of COVID-19, and argues that the Commission undermined statute when it overturned the ALJ's recommended decision. With respect to Pali-Tours' RRR, Palisade Trolley argues, among other things, that Pali-Tours' description of Exhibit 26 as a "self-promoting website" is a misrepresentation of fact, as is Pali-Tours' statement that Mr. Talbott was "not officially present at the hearing to speak on CAVE's behalf", and that Pali-Tours' reference to Palisade Trolley's luxury limousine permit, as well as its claim that Palisade Trolley is undercutting fares of other wine tour companies, attempt to introduce evidence not in this record.

7. Rapid Creek's response argues that its copy of the minutes is intended to rebut Mr. Hummel's hearing testimony that the Town of Palisade Trustees discussed and voted on supporting the trolley, and that its RRR is intended to point out that Mr. Talbott did not appear as a representative of the board of Directors of CAVE, and that the mayor of Fruita's letter of support was merely in support of trolley service, not for shuttle, sightseeing, or charter services.

8. Pali-Tours takes issue with the statement of conferral in Palisade Trolley's motion, arguing that it did not have a meaningful opportunity to review the motion. It also disagrees with

Palisade Trolley's arguments that its RRR makes material misrepresentations of facts in the record and attempts to introduce facts or evidence that is outside the record. It asserts that Palisade Trolley is merely disagreeing with Pali-Tours' framing of the issues presented on RRR.

9. We conclude that Palisade Trolley has met its burden under Rule 1506 to show that at least some of the RRR filings attempt to introduce evidence not in the record and therefore we will grant the motion and accept Exhibit 1 to the motion, which is Palisade Trolley's response to the RRRs. As well, we find good cause to waive Rule 1506 to the extent necessary to accept the response. The Commission has at every step of this proceeding, relaxed procedural rules in order to ensure that the parties could be heard. We see no reason to depart from this approach now.

10. Because the evidentiary record in this proceeding has been closed since the conclusion of the hearing last year, we will not consider any evidence or statements that were not admitted or made during the hearing.

B. Rapid Creek's RRR

11. Rapid Creek's RRR argues that Palisade Trolley's authority should be restricted to vehicles defined as trolleys, and that Palisade Trolley's authority be modified to exclude the service area that Rapid Creek already serves.

12. In support, Rapid Creek argues that there was no evidence supporting the idea that there is a need for another call and demand shuttle service for locations already served by Rapid Creek. It points out, as discussed during the hearing and again in the Commission's decision on exceptions, that Rapid Creek has never come close to booking full capacity. It also makes a number of claims that are outside the evidentiary record:

- large events in the area like the Palisade Peach Festival and Wine Festival have First Student Bus service to provide shuttles.
- that it contacted the Fruita Chamber of Commerce and was told no additional shuttle services were needed for their event at this time
- that the letters in support of Palisade Trolley were written by people who did not know that Palisade Trolley was applying for unrestricted common carrier authority, and were unaware that Palisade Trolley's authority would impact existing businesses.

Additionally, Rapid Creek seeks to rebut testimony from last year's evidentiary hearing by filing minutes from a Palisade Trustees meeting showing that, contrary to testimony by Mr. Hummel, there was no formal action to support Palisade Trolley at the meeting.

13. We decline to consider the statements that are outside the long-closed evidentiary record in this proceeding as well as the arguments that rely on those statements for support.

14. With respect to Rapid Creek's remaining arguments, first, the Commission has already explained in its decision on exceptions why (full) booking capacity is a metric that may not tell the whole story of demand in an area (groups book tours and the group size may not completely fill the vehicle). Rapid Creek also argues that there was no specific evidence to show that another call and demand shuttle service was needed for the locations that it serves. But the record evidence put forth by Palisade Trolley supported its requests for each of the three authorities it sought – it need not show that there is additional need in extremely specific locations if it shows that there is additional need in the general area of service, as it did. Finally, Rapid Creek argues that “there was no indication or evidence provided that Palisade Trolley informed [the authors of the support letters] that it was applying for an unrestricted common carrier authority.” We believe the letters stand on their own as supporting additional transportation need—whether the authors were informed about the technical type of authority Palisade Trolley was requesting does not meaningfully change their evidentiary value.

15. In all, we are unmoved by the arguments in Rapid Creek's RRR and therefore we will deny the relief requested therein.

C. Absolute Prestige Limo's RRR

16. Absolute challenges the Commission's reliance on the letters in support of Palisade Trolley. It argues that the letters were not certified and that it did not have the opportunity to cross examine the authors. In particular, it challenges the letter by Fruita Mayor Mr. Kinkaid, wherein he stated that roughly 50,000 people attend the Fruita Fall Festival. It argues that no other evidence was presented to substantiate that claim. It also argues that in granting Palisade Trolley's application, the Commission has removed the burden for applicants to show that current transportation need is not being met by incumbent carriers.

17. To begin, the Commission addressed the fact that the letters were not certified in its decision on exceptions. It declined to put form over function and gave them appropriate weight because they were not certified. And during the hearing, Absolute had every opportunity to object that the letters' authors were not available for cross examination. At each of the 18 opportunities to object to one of the letters Prestige failed to raise an objection. The hearing is long concluded and Absolute's ability to raise this argument has been waived by its failure to object during the hearing. Next, the Commission does not need additional evidence to support the statement in Mayor Kinkaid's letter that roughly 50,000 people attend the Fruita Fall Festival. Finally, the Commission has not removed the burden for future applicants or applied the wrong legal standard. The decision on exceptions stated clearly that it was applying the longstanding

doctrine of regulated monopoly and stated and applied the legal and evidentiary burdens that Palisade Trolley needed to overcome.⁴

D. Pali-Tours' RRR

18. Pali-Tours argues that Palisade Trolley's application should be denied in its entirety and submits that if any authority is to be awarded to Palisade Trolley it should be restricted to the use of only two vehicles at any one time, that all vehicles will be 15 passengers or more, including the driver, and that all vehicles will fit the description of motor vehicle chassis with a body modeled on an old fashioned trolley.

19. Pali-Tours first argues that the Commission's decision-making process was arbitrary and capricious. In its RRR, it quotes statements made during the Commission's weekly meetings where the Commissioners were discussing the correct legal standard and how it should be applied to this case. It also contrasts the statement from Commissioner Gavan, indicating that he felt the Commission should move quickly in resolving this proceeding, with the length of time for the exceptions decision and its later modification, to issue. In the same vein, it argues that the Commission erred because Commissioner Gavan referred to witness Charles Talbott as "Steve Talbott" when the three Commissioners were publicly deliberating on Palisade Trolley's exceptions.⁵

20. We see no merit in these contentions. It is the written decision the Commission issues that carries legal weight, not the Commissioner's open discussions about how they view

⁴ Decision No. C23-0070, issued February 1, 2023, at ¶¶ 9, 16–17.

⁵ To the extent Pali-Tours appears to suggest that Commissioner Gavan should have recused himself, we perceive no legal argument in support of such a statement and therefore cannot respond. Additionally, Commissioner Gavan's term has since expired, and Commissioner Plant, who replaced him, deliberated on these applications for RRR and voted to deny them.

the proceeding and pleadings before them.⁶ Additionally, while one Commissioner indicated interest in issuing a decision quickly, the Commission has a tremendous workload, and it can take time for decisions to issue, particularly around the end-of-year holidays. Finally, we are unpersuaded both by the out of context quotations and Commissioner Gavan's incorrect reference to a witness's name that the decision or process was somehow arbitrary and capricious. It is clear from Commissioner Gavan's discussion that he was discussing Colorado Association of Viticulture and Enology board member and testifying witness Mr. Talbott (who was qualified here as an expert witness in agritourism) when indicating that he found Mr. Talbott's testimony persuasive.

21. Pali-Tours also raises several evidentiary challenges.⁷ It argues that the Commission should have afforded less weight to the statements that more than 1,000,000 people visit Mesa County every year. Pali-Tours argues that when testifying to that effect, Mr. Hummel was simply repeating a "vague statement" he found on Exhibit 26, which Pali-Tours describes as "a self-promoting website." But Exhibit 26 is a copy of three webpages that are part of Grand Junction's website. The website indicates that more than 1,000,000 people visit Mesa County annually. And while Pali-Tours could have objected to the admission of the exhibit, it did not.

⁶ See *Bd. of Cnty. Comm'rs of Cnty. of San Miguel v. Colorado Pub. Utilities Comm'n*, 157 P.3d 1083, 1090 (Colo. 2007) ("The gauge of the lawfulness of a PUC decision is not what the advisory staff has to say, but what the Commissioners do and say in their written decision, based on the record.").

⁷ Pali-Tours suggests, but does not put forth any legal argument or citation in support, that the Commission should have deferred to the ALJ in this case. While we do not address undeveloped arguments, we do note the Commission is statutorily empowered to ignore in whole or in part, findings and conclusions recommended by administrative law judges. See § 40-6-109(2), C.R.S.

To the extent Pali-Tours is arguing the exhibit is inadmissible it waived the right to raise that argument when it failed to object to the admission of Exhibit 26. We are unpersuaded to change the weight we gave to the exhibit or testimony simply because Pali-Tours now reminds us that the exhibit is, clearly, a website. In the end, the testimony and evidence are sufficient to support the Commission's general understanding that Mesa County sees roughly that many visitors annually.

22. Next, Pali-Tours makes two arguments that point out Palisade Trolley might have been able to introduce better evidence than it did. First, it argues that there is no clear evidence correlating the number of visitors to public need. Second, it argues that no credible references directly measuring unserved or underserved customers were brought forth. While one can imagine that better, or even perfect evidence may exist to prove a point in a legal proceeding, it does not mean that the evidence adduced at hearing is insufficient to meet the relevant evidentiary burden. In this case, we are unconvinced that the Commission's use of the visitor numbers as part of its analysis of whether the current carriers are providing substantially inadequate service is unreasonable.

23. Pali-Tours also argues that population growth data, such as that introduced in this proceeding, is not, standing alone, enough to show a need for an additional carrier. We find this argument insufficient to convince us that our prior decision was in error. As Pali-Tours recognizes by its challenge to many of the other pieces of evidence in this record, the Commission relied on more evidence than simply population growth data.

24. Additionally, Pali-Tours argues that the Commission should give less weight to the letter from Palisade River Retreat because, as was mentioned at hearing, the author is an employee of Mrs. Rhonda Hummel. However, Pali-Tours points to no evidence in the record

indicating that the author was an employee of Mrs. Hummel. It is true that at the hearing Mr. Smith attempted to object to the Palisade River Retreat letter on the asserted grounds that the author worked for Mrs. Hummel, but that objection was overruled because it was not a legal objection. And legal objections are not evidence. Even if there were such evidence, that is not enough for us to assume the statement is false. It also contends that the letter, which contains the phrase “more often than not other transportation services are booked...” is directly “disprove[d]” by Pali-Tours’ Exhibit 402, showing that Pali-Tours’ ridership has never exceeded its capacity. We disagree. It is certainly evidence that runs counter to the statement, but as discussed at length in the decision on exceptions, and mentioned above, an analysis of a carrier’s historic capacity is not always an accurate description of whether there is additional need in an area.

25. Finally, Pali-Tours argues that the other support letters are full of “mere opinions” and argues that the statements in letters from individuals who could not access or were not pleased with the availability of service from the incumbents should be ignored as incumbent carriers need not offer perfect service. We find these two brief arguments unpersuasive. In the decision on exceptions, the commission acknowledged that many of the support letters offered opinions. Pali-Tours has offered no new reason or argument that would cause us to depart from the reasoning in our decision on exceptions. Finally, considering statements from individuals who cannot access or are displeased with service offered by incumbents is a proper inquiry in this case and those like it.

26. For these reasons, we deny Pali-Tours RRR.

III. ORDER

A. It Is Ordered That:

1. The Motion for Leave to File a Response filed by Palisade Trolley on March 20, 2023, is granted.

2. The Application for Rehearing, Reargument, or Reconsideration, filed by Rapid Creek Cycles & Sports LLC on February 28, 2023, is denied.

3. The Application for Rehearing, Reargument, or Reconsideration, filed by Absolute Prestige Limo II, LLC, on March 1, 2023, is denied.

4. The Application for Rehearing, Reargument, or Reconsideration, filed by Pali-Tours, LTD, on March 1, 2023, is denied.

5. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
March 22, 2023.**

(S E A L)



ATTEST: A TRUE COPY

G. Harris Adams,
Interim Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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MEGAN M. GILMAN

TOM PLANT

Commissioners