

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20F-0290CP

ESTES VALLEY TRANSPORT, INC. AND FUN TYME TROLLEYS, LLC, DOING
BUSINESS AS ESTES PARK TROLLEYS

COMPLAINANTS,

V.

ESTES PARK GUIDED TOURS (NOW KNOWN AS ESTES PARK PHOTO TOURS),

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
STEVEN H. DENMAN
GRANTING THE AMENDED COMPLAINT,
ISSUING CEASE AND DESIST ORDER, AND
CLOSING THE PROCEEDING**

Mailed Date: December 22, 2020

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I. STATEMENT

A. Summary

1. This Recommended Decision adjudicates the Formal Complaint filed on June 30, 2020 by Estes Valley Transport, Inc. (Estes Valley Transport) and Fun Tyme Trolleys, LLC, doing business as Estes Park Trolleys (Estes Park Trolleys) (collectively, Complainants), against Estes Park Guided Tours (Respondent or Estes Park Guided Tours).

B. Procedural History

2. On June 30, 2020, Estes Valley Transport and Estes Park Trolleys filed the Complaint against Estes Park Guided Tours. That filing commenced this proceeding.

3. On July 2, 2020, Complainants filed a Motion to amend the second page of the Complaint (Motion to Amend), correcting the statutory reference of “CRS Title 10” to “CRS Title 40 Chapter 10.”

4. On July 7, 2020, the Commission issued an Order to Satisfy or Answer and served it on Respondent through the Commission’s E-Filing System. The Order to Satisfy or Answer also served a copy of the Complaint on Respondent. The Order to Satisfy or Answer stated prominently that:

YOU ARE NOTIFIED THAT A FORMAL COMPLAINT HAS BEEN FILED AGAINST YOU IN THE ABOVE ENTITLED AND CAPTIONED CASE. YOU ARE ORDERED TO SATISFY THE MATTERS IN THE COMPLAINT OR TO ANSWER THE COMPLAINT IN WRITING WITHIN 20 DAYS FROM SERVICE UPON YOU OF THIS ORDER AND COPY OF THE ATTACHED COMPLAINT.

... IF NO ANSWER IS FILED WITHIN THE TIME REQUIRED, THE ALLEGATIONS OF THE COMPLAINT MAY BE DEEMED ADMITTED, AND THE COMMISSION MAY GRANT SO MUCH OF THE RELIEF SOUGHT IN THE COMPLAINT

AS IS WITHIN ITS POWER AND JURISDICTION OR MAY SET THE COMPLAINT FOR HEARING.¹

5. Indeed, Rule 1308(d) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1 (2015),² states as relevant to this proceeding: “[A] a party named as a respondent shall file a response within 20 days of being served with an order to satisfy or to answer the complaint. ... A response to a complaint shall admit or deny with particularity each allegation of the complaint and shall separately state and number each affirmative defense.”

6. As required by the Order to Satisfy or Answer and Rule 1308(d), Respondent was required to file its Answer within 20 days after service of the Complaint, or no later than Monday, July 27, 2020.

7. A review of the Commission’s E-filing System for this proceeding reveals that Respondent failed to file an Answer to the Amended Complaint by July 27, 2020 or since then. Nor did Respondent file by that deadline any written evidence that the Amended Complaint has been satisfied or a timely motion for an extension of time to file its Answer or a motion to dismiss.

8. The Commission set the Complaint for hearing on September 14, 2020 at 9:00 AM in a Commission hearing room.

9. During the Commission’s weekly meeting held on July 15, 2020, the Commission referred the Amended Complaint to an Administrative Law Judge (ALJ) for disposition. Subsequently, the undersigned ALJ was assigned to preside over this proceeding.

¹ Order to Satisfy or Answer, page 1 (Italics and capitalization in the original; emphasis in bold added). See

² Amended Rules of Practice and Procedure became effective on July 30, 2020. See Decision No. C20-0177 (mailed on March 30, 2020) in Proceeding No. 19R-0483ALL and § 24-4-103(5), C.R.S. Amended rules adopted by an administrative agency are prospective. See § 24-4-102(15), C.R.S.; Article 2, § 11, *Colo. Const.*. Proceeding No. 19R-0483ALL adopted no material amendments to the rules in the Rules of Practice and Procedure relied upon in this Decision. Because this Complaint was filed on June 30, 2020, prior to the effective date of the amended rules, this Decision applies the 2015 version of the Rules of Practice and Procedure that were in effect in June 2020.

10. The Amended Complaint alleges that Estes Park Guided Tours has no Commission or federal agency authority to provide the subject passenger transportation services in Estes Park and that Respondent is operating in violation of “CRS Title 40 Chapter 10.”³ Finally, the Amended Complaint requests that the Commission order Estes Park Guided Tours to discontinue providing unauthorized services.⁴ In the language of the Colorado Public Utilities Law, Complainants seek an order requiring Respondent to cease and desist from operating as a common carrier of passengers for hire within the State of Colorado without a valid Certificate issued by the Commission.

11. On July 31, 2020, Complainants filed a Motion to Grant Relief Sought in Formal Complaint (Motion to Grant Relief). Complainants served the Motion to Grant Relief on Respondent by email at epguidedtours@gmail.com (which is the email address in the Commission’s records for Estes Park Guided Tours). The Motion to Grant Relief was also served on Respondent through the Commission’s E-Filing System.

12. The Motion to Grant Relief argued that the Complaint should be granted, because Estes Park Guided Tours had not filed an answer as required by Order to Satisfy or Answer. As relief, Complainants requested that the allegations in the Complaint be deemed to be admitted and that the Commission order Respondent to discontinue the unauthorized transportation for hire services.⁵

³ The part of the Colorado Public Utilities Law regulating motor carriers can be found in Title 40 Article 10.1, of Colorado Revised Statutes. It is unclear whether Complainant’s cite to Chapter 10 is a typographical error. House Bill 11-1098, Ch. 127, p. 416, § 2, effective August 10, 2011, repealed the former Articles 10, 11, 13, 14, and 16 of Title 40. House Bill 11-1098, Ch. 127, § 1, consolidated those former regulatory statutes into the currently effective Article 10.1 of Title 40.

⁴ Amended Complaint, at pages 2 and 3.

⁵ Motion to Grant Relief, at page 1.

13. Pursuant to Rule 1400(b) of the Rules of Practice and Procedure, 4 CCR 723-1, Respondent had 14 days after service of the motion. That deadline was Friday, August 14, 2020, but Respondent failed to file a response to the Motion to Grant Relief or to file a motion for an extension of time to file its response. Rule 1400(d), 4 CCR 723-1, states: “The Commission may deem a failure to file a response as a confession of the motion.”

14. Section 40-10.1-112(2), C.R.S., provides that:

Any person may file a complaint against a motor carrier for a violation of this article [10.1].... *The complaint may request any relief that the commission, in its authority, may grant, including an order to cease and desist... Upon proof of violation, the commission may issue an order to cease and desist ... or take any other action within the commission’s authority.* (Emphasis added.)

15. Relating to cease and desist orders, § 40-10.1-112(1), C.R.S., provides that:

Except as specified in subsection (3) of this section [relating to summary suspensions of certificates or permits], *the commission, at any time, by order duly entered, after hearing upon notice to the motor carrier and upon proof of violation, may issue an order to cease and desist ...* for the following reasons:

(a) A violation of this article [10.1] (Emphasis added.)

16. In Decision No. R20-0613-I (issued on August 20, 2020), the ALJ concluded that § 40-10.1-112(1), C.R.S., requires that a hearing be held, after notice to Estes Park Guided Tours, before the ALJ could enter a cease and desist order, assuming Complainants could prove the violation and demonstrate that entry of a cease and desist order is justified.

17. Decision No. R20-0613-I noted that an in-person hearing had already been scheduled for September 14, 2020 at 9:00 a.m. in a Commission hearing room and that on July 7, 2020, the Commission served on Estes Park Guided Tours the Complaint, an Order to Satisfy or Answer, and the notice setting the hearing for September 14, 2020. The ALJ concluded that the Commission had already given adequate notice to Estes Park Guided Tours of the hearing, as required by § 40-10.1-112(1), C.R.S.

18. Decision No. R20-0613-I gave additional notice to Complainants and to Estes Park Guided Tours of the hearing date and time, and that the primary issues to be litigated at the hearing would be:

(1) whether Estes Park Guided Tours is operating, providing, advertising, or offering to provide passenger transportation services for hire in Estes Park, in violation of Colorado Law; and

(2) if so whether the Commission should issue an order requiring Estes Park Guided Tours to cease and desist from operating as a common carrier of passengers for hire within the State of Colorado without a valid Certificate issued by the Commission.

In order to mitigate the risks of spreading COVID-19, Decision No. R20-0613-I converted the in-person hearing to a remote hearing by video conference and provided instructions for participation.⁶

19. Finally, Decision No. R20-0613-I ordered Complainants to file and to serve on Respondent on or before August 27, 2020 as prehearing disclosures: (a) a list that identifies the witnesses Complainants intend to call at the hearing; (b) a summary of the anticipated testimony of each witness; and (c) copies of the exhibits Complainants intend to present at the hearing. Respondent, Estes Park Guided Tours, was ordered to file and to serve on counsel for Complainants on or before September 8, 2020: (a) a list that identifies the witnesses Respondent intends to call at the hearing; (b) a written summary of the anticipated testimony of each witness; and (c) copies of the exhibits Respondent intends to present at the hearing.⁷

20. On August 26, 2020, Complainants filed, and served on Respondent, a Witness Summary listing Gregg Rounds and Nicholas Cassatt as witnesses with summaries of topics of their testimonies and copies of 18 hearing exhibits. Complainants also filed, and served on Respondent, the Entry of Appearance of Glenn D. Malpiede, Esq., as co-counsel with Charles J.

⁶ Decision No. R20-0613-I, Paragraphs 17 and 18 at page 5; Paragraphs 27 through 33 at pages 7 – 9.

⁷ *Id.*, Ordering Paragraphs 1 and 2 at pages 11 and 12.

Kimball, Esq., along with a List of Exhibits. On September 28, 2020, Complainants filed an Amendment to Complainants' Witness List and Exhibits to add DeAnne Shank as a witness, including a summary of her testimony, and Hearing Exhibit 19, Estes Park Guided Tours Website pages dated September 27, 2020.

21. On September 3, 2020, Respondent filed, and served on Complainants, the Entry of Appearance of Stephen A. Bain, Esq., and a Motion for Extension of Hearing Date (Motion for Continuance), which was also served electronically on counsel for Complainants. The Motion for Continuance sought "an extension of the hearing scheduled for September 14, 2020 and witness and exhibit list filing deadline of September 8, 2020, for two weeks or such other period of time as the tribunal considers appropriate."⁸ Counsel for Respondent asserted that he "learned of this matter for the first time late in the day [on] September 2, 2020, and needs additional time to learn the facts relating to the hearing, prepare exhibits, determine who may testify, and prepare an appropriate defense." The Motion for Continuance reported that counsel for Complainants did not agree to the extension.⁹

22. Decision No. R20-0650-I (issued on September 4, 2020)¹⁰ granted the Motion for Continuance and waived response time, finding that:

Based upon representations made by Respondent's newly retained counsel, however, the ALJ finds that the Motion for Continuance states good cause to grant the requested two-week continuance of the hearing and extension of time for filing Respondent's prehearing disclosures. The ALJ concludes that counsel's request for the two-week continuance and extension constitutes counsel's representation that he and Respondent will be prepared to file his prehearing disclosures by the

⁸ Motion for Continuance at page 1.

⁹ *Id.*, Paragraphs 1, 2, and 4 at page 1. Counsel also stated that Estes Park Guided Tours had changed its name to "Estes Park Photo Tours."

¹⁰ September 3, 2020 was the Thursday before the September 7, 2020 Labor Day Holiday, and Respondent's prehearing disclosures were due on Tuesday, September 8, 2020. Decision No. R20-0650-I found that time was of the essence. The ALJ ruled on the Motion for Extension of Hearing Date quickly, so that the parties had adequate time to plan accordingly.

deadline set in this Decision and to appear ready to proceed at the rescheduled remote hearing.¹¹

Decision No. R20-0650-I extended the deadline for Respondent to file its prehearing disclosures until September 22, 2020 and continued the remote evidentiary hearing to 9:00 a.m. on September 29, 2020.¹²

23. On Friday September 4, 2020, as Decision No. R20-0650-I was in the process of being issued, Complainants filed an Objection to Respondent's Motion, arguing that the Motion for Continuance was a "strategy to delay this hearing ... [and] another effort to continue operations for as long as possible without facing legal repercussions." In Respondent's Motion for Continuance, counsel had argued that, "No one will be harmed by granting the short extension of time requested."¹³ Complainants strongly disagreed, asserting that, "Respondent's operations adversely affect both ... [Complainants] by infringing on their proprietary authority, essentially luring unsuspecting tourists away from these legitimate enterprises, thereby impacting both marketing efforts and incomes."¹⁴

24. Decision No. R20-0653-I (issued on September 9, 2020) construed Complainants' Objection to Respondent's Motion as a Motion for Reconsideration of Decision No. R20-0650-I. After considering Complainant's arguments, the ALJ denied the Motion for Reconsideration. The ALJ "did not find that no one would be harmed by granting the short extension of time requested, as argued in the Motion for Continuance. Instead, the ALJ believed that the two-week continuance

¹¹ See Rule 1202(e) of the Rules of Practice and Procedure, 4 CCR 723-1; ("The signature of an attorney ... certifies that the signatory has read the filing; that to the best of the signatory's knowledge, information, and belief there are good grounds to support it; and that it is not interposed for any improper purpose, such as to harass, delay, or increase the cost of the litigation.)

¹² In Decision No. R20-0650-I, based on counsel's statement, the ALJ *sua sponte* amended the caption to reflect that Estes Park Guided Tours was now known as "Estes Park Photo Tours."

¹³ Motion for Continuance, Paragraph 2 at page 1.

¹⁴ Objection to Respondent's Motion, Paragraph 8 at page 3.

and extension of time were reasonable under the circumstances explained by Respondent's counsel."¹⁵

25. On September 22, 2020, Respondent filed, and served on Complainants, Respondent's Witness Summaries and Exhibit List, along with 16 Hearing Exhibits.

26. The remote evidentiary hearing was called to order as scheduled on September 29, 2020 at 9:00 a.m. Charles J. Kimball, Esq., and Glenn D. Malpiede, Esq., appeared on behalf of Complainants. Stephen A. Bain, Esq., appeared on behalf of Respondent. Complainants called three witnesses, and Hearing Exhibits 1 through 19 were admitted. Respondent called seven witnesses in its defense. Hearing Exhibits 100 through 110 and Hearing Exhibits 113 through 115 were admitted. Hearing Exhibits 111 and 112 were not admitted. Complainants presented no rebuttal testimony. At the end of the hearing, the parties agreed to file post-hearing statements of position by October 12, 2020.

27. On October 6, 2020, Complainants filed a Post Hearing Motion for an Order Granting Relief Sought in Complainants' Formal Complaint, essentially reiterating their arguments from their July 31, 2020 Motion to Grant Relief. On October 12, 2020, Respondent filed its Response to Post Hearing Motion, opposing the relief requested.

28. On October 12, 2020, Complainants filed their Closing Brief, and Respondent filed its Statement of Position.

¹⁵ Decision No. R20-0653-I, Paragraph 20 at page 6.

II. BURDENS OF PROOF AND APPLICABLE LAW

A. **Burdens of Proof.**

29. As the proponents of a Commission order on the Amended Complaint, Complainants bear the burden of proof in this proceeding.¹⁶ In adjudicatory proceedings, the State Administrative Procedure Act imposes the burden of proof upon “the proponent of an order.”¹⁷ This formal complaint proceeding is an adjudicatory proceeding before the Commission. Hence, Complainants bear the burden to prove, by a preponderance of the evidence, their allegations and that the relief sought by their Amended Complaint should be granted.

30. The burden of proving defenses to a formal complaint rests on the respondent in Commission proceedings (like the defendant in a civil action) asserting that defense. The defense must be proven by a preponderance of the evidence.¹⁸ In this formal complaint proceeding, the Respondent has the burden to prove the defenses it raises by a preponderance of the evidence.¹⁹

31. The preponderance standard requires that evidence of the existence of a contested fact outweighs the evidence to the contrary.²⁰ That is, the preponderance standard requires the fact finder to determine whether the existence of a contested fact is more probable than its non-existence.²¹ A party has met this burden of proof when the evidence, on the whole and however slightly, tips in favor of that party.²² Although the preponderance standard applies, the evidence must be substantial. Substantial evidence is such relevant evidence as a reasonable person’s mind

¹⁶ §§ 13-25-127(1) and 24-4-205(7), C.R.S. See Rule 1500 of the Rules of Practice and Procedure, 4 CCR 723-1 (“The burden of proof and the initial burden of going forward shall be on the party that is the proponent of a decision,” and the proponent is the party that commenced a proceeding.)

¹⁷ Section 24-4-105(7), C.R.S.

¹⁸ *Western Distributing Co. v. Diodosio*, 841 P.2d 1053, 1057-1059 (Colo. 1992).

¹⁹ See *Public Utilities Comm’n. v. Trans Shuttle, Inc.*, Decision No. R01-881 (Mailed Date of August 29, 2001) ¶ III.C. at page 9, in Docket No. 01G-218CP.

²⁰ *Mile High Cab, Inc. v. Colorado Public Utilities Commission*, 302 P.3d 241, 246 (Colo. 2013).

²¹ *Swain v. Colorado Dept. of Revenue*, 717 P.2d 507, 508 (Colo. App. 1985).

²² *Schocke v. Dept. of Revenue*, 719 P.2d 361, 363 (Colo. App. 1986).

might accept as adequate to support a conclusion; it must be enough evidence to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is a question of fact for the jury.²³

B. Applicable Law.

32. Section 40-10.1-102(1), C.R.S., provides that: “The commission has the power to and shall administer and enforce this article [10.1 on regulation of motor carriers]...” Section 40-10.1-103(1), C.R.S., provides that: “All common carriers ... are declared to be public utilities within the meaning of articles 1 to 7 of this title [40], and are declared to be affected with a public interest and subject to this article [10.1] and articles 1 to 7 of this title [40],...”

33. Section 40-10.1-104, C.R.S., provides that: “A person shall not operate or offer to operate as a motor carrier in this state except in accordance with this article [10.1].” Section 40-10.1-201, C.R.S., provides that:

(1) A person shall not operate or offer to operate as a common carrier in intrastate commerce without first having obtained from the commission a certificate declaring that the present or future public convenience and necessity requires or will require such operation.

(2) The fact that a person carries on operations, in whole or in part, between substantially fixed points or over established routes, or under contracts with more than one person, or by making repeated or periodic trips is prima facie evidence that the person is a common carrier and subject to this part 2 and part 1 of this article.

34. Section 40-10.1-101(2), C.R.S., defines “Certificate” to mean “the certificate of public convenience and necessity issued to a common carrier under part 2 of this article [10.1].”

35. Section 40-1-101(4)(a), C.R.S., defines “common carrier” to mean: “Every person directly or indirectly affording a means of transportation, or any service or facility in connection therewith, within this state by motor vehicle or other vehicle whatever by indiscriminately

²³ *City of Boulder v. Public Utilities Comm’n*, 996 P.2d 1270, 1278 (Colo. 2000).

accepting and carrying passengers for compensation....”²⁴ Section 40-10.1-101(5), C.R.S., defines “compensation” to mean “any money, property, service, or thing of value charged or received or to be charged or received, whether directly or indirectly.”

36. Section 40-10.1-101(9), C.R.S., defines “intrastate commerce” to mean “transportation for compensation by a motor vehicles over the public highways between points in this state.” Section 40-10.1-101(16), C.R.S., defines “public highway” to mean “every street, road, or highway in this state over which the public generally has a right to travel.”

37. Section 40-10.1-101(11), C.R.S., defines “motor vehicle” to mean “any automobile, truck, tractor, motor bus, or other self-propelled vehicle or any trailer drawn thereby.” Section 40-10.1-101(10), C.R.S., defines “motor carrier” to mean “any person owning, controlling, operating, or managing a motor vehicle that provides transportation in intrastate commerce pursuant to this article; except that the term does not include a transportation network company ... or a transportation network company driver....”²⁵

38. Section 40-10.1-101(1), C.R.S., defines “Advertise” to mean “to advise, announce, give notice of, publish, or call attention to by the use of any oral, written, or graphic statement made in a newspaper or other publication, on radio, television, or any electronic medium, or contained in any notice, handbill, sign, including signage on a vehicle, flyer, catalog, or letter, or printed on or contained in any tag or label attached to or accompanying any article of personal property.”²⁶

²⁴ Section 40-10.1-101(4), C.R.S., incorporates this definition into Article 10.1 of Title 40, as follows: “Common carrier” means a common carrier as defined in section 40-1-102[, C.R.S.], except for (a) contract carriers, (b) limited regulation motor carriers of passengers under § 40-10.1-301 C.R.S. *et seq.*, and (c) motor carriers of passengers providing large-market taxicab service under § 40-10.1-701 C.R.S. *et seq.*

²⁵ The exceptions to the definition of “motor carrier” in § 40-10.1-101(11), C.R.S. – transportation network company and transportation network company driver – are not relevant to this Complaint Proceeding.

²⁶ See also Rule 6001(a) the Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6.

39. Several Commission rules in the Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6 (2020), are relevant to this Proceeding. These rules are

- a) Rule 6001(g) – “Call-and-Demand”, “On Call-and-Demand”, or “Call-and-Demand Service” means the transportation of Passengers by a Common Carrier, but not on a Schedule.
- b) Rule 6001(gg) – “Fully Regulated Intrastate Carrier” means a Motor Carrier that is subject to market entry, economic, operational, and safety regulation by the Commission as a public utility pursuant to Article 10.1 of Title 40 C.R.S. Fully Regulated Intrastate Carriers include Common Carriers, such as ... Sightseeing Service....
- c) Rule 6001(jjj) – “Passenger,” except as otherwise specifically defined or contextually required, means any Person, other than a Driver, occupying a Motor Vehicle....
- d) Rule 6001(ttt) – “Sightseeing Service” means the transportation of Passengers by a Common Carrier on a Call-and-Demand basis originating and terminating at the same point for the sole purpose of viewing or visiting places of natural, historic, or scenic interest.

40. Section 40-10.1-112(2), C.R.S., provides that:

Any person may file a complaint against a motor carrier for a violation of this article [10.1].... The complaint may request any relief that the commission, in its authority, may grant, including an order to cease and desist.... Upon proof of violation, the commission may issue an order to cease and desist ... or take any other action within the commission’s authority.

41. Section 40-10.1-112(1), C.R.S., relating to cease and desist orders, provides that:

Except as specified in subsection (3) of this section [relating to summary suspensions of certificates or permits], the commission, at any time, by order duly entered, after hearing upon notice to the motor carrier and upon proof of violation, may issue an order to cease and desist ... for the following reasons:

- (a) A violation of this article [10.1]

III. FINDINGS, DISCUSSION, AND CONCLUSIONS

42. In rendering this Decision, the ALJ has carefully reviewed and considered all the evidence introduced by the Parties during the hearing, including the testimony and hearing exhibits, even if this Decision does not specifically address all of the evidence presented, or every nuance of each party’s position in each issue. Moreover, the ALJ has considered all the legal

arguments set forth in the post-hearing statement of position, even if the Decision does not explicitly address every legal argument. In rendering this Decision, the ALJ has evaluated the credibility of all the witnesses and hearing exhibits and weighed the evidence.²⁷

A. Findings of Fact.

43. On March 9, 2020, Respondent filed with the Commission an Application for a Certificate of Public Convenience and Necessity to Operate as a Common Carrier by Motor Vehicle for Hire (Application). Estes Park Guided Tours sought authority to operate as a common carrier by motor vehicle for hire for the transportation of passengers in call-and-demand sightseeing service between the Estes Park Visitors Center, 500 Big Thompson Avenue, Estes Park, Colorado, on the one hand, and all points in Rocky Mountain National Park and Grand Lake, Colorado, on the other hand.²⁸ In the Application, which was signed by Ben Legzdins as Owner, Estes Park Guided Tours described the proposed authority and operations:

We pick up guests from Estes Park Visitors Center. We will be driving through the town of Estes Park up to the Fall River entrance of RMNP. All tours are conducted inside RMNP – Sheep Lakes, Alluvial Fan, Alpine Visitors Center & areas of Grand Lake in summer time. We visit Moraine Park, Sprague Lake & Bear Lake on lower valley tours. 98% of tours are conducted inside RMNP.²⁹

As its Statement of Fact Regarding Public Need, Estes Park Guided Tours stated:

This application should be granted as we provide a great service to the many millions of people visiting RMNP. We are really helping with the traffic & congestion of the Park will be driving through the town of by transporting guests in 1 vehicle, instead of having a lot of individual vehicles all in the Park at the same time. We also educate the guests on the Park regulations & rules, as well as teaching them to respect wildlife while viewing from a distance.³⁰

²⁷ See *Durango Transportation, Inc. v. Colorado Public Utilities Comm'n.*, 122 P.3d 244, 252 (Colo. 2005); *RAM Broadcasting of Colo., Inc. v. Public Utilities Comm'n.*, 702 P.2d 746, 750 (Colo. 1985).

²⁸ Hearing Exhibit 13, Sections 9 and 10 at page 3; Hearing Exhibit 14, Decision No. R20-0563, Paragraph 2 at page 1, in Proceeding No. 20A-0097CP.

²⁹ Hearing Exhibit 13, Sections 10 and 22 at pages 3 and 7.

³⁰ Hearing Exhibit 13, Section 11 at page 4.

44. In Proceeding No. 20A-0097CP, the interventions by right of Estes Valley Transport and Estes Park Trolleys (collectively, Intervenor) were acknowledged. The ALJ authorized Mr. Legzdins, a non-attorney, to represent Estes Park Guided Tours. Then the ALJ directed Estes Park Guided Tours to confer with counsel for the Intervenor regarding mutually available hearing dates and to file a Joint Status Report no later than May 15, 2020, informing the ALJ of the results of their conferral. However, Estes Park Guided Tours failed to file the Joint Status Report.³¹

45. In Proceeding No. 20A-0097CP, the ALJ scheduled an evidentiary hearing for August 11, 2020 at 9:30 a.m. The ALJ also ordered Estes Park Guided Tours to file, and to serve on counsel for Intervenor, its prehearing disclosures on or before June 22, 2020. However, Estes Park Guided Tours failed to file by that deadline any prehearing disclosures or any motion for extension of time.³²

46. After Estes Park Guided Tours failed to file its prehearing disclosures, on July 20, 2020 Intervenor filed a Motion to Dismiss Application. Since the hearing was set for August 11, 2020, pursuant to Rule 1401(b) of the Rules of Practice and Procedure, 4 CCR 723-1, the ALJ shortened the deadline for Estes Park Guided Tours to file its response to July 29, 2020. Estes Park Guided Tours failed to file a response to the Motion to Dismiss Application, or any motion for extension of time to respond. Rule 1400(d) of the Rules of Practice and Procedure, 4 CCR 723-1, states: “The Commission may deem a failure to file a response as a confession of the motion.” The ALJ found that Estes Park Guided Tours had violated the prehearing disclosure filing order and that, “Given the history in this proceeding of Estes Park Guided Tours failing to

³¹ Hearing Exhibit 14, Decision No. R20-0563, Paragraphs 16 – 19 at pages 5 and 6, in Proceeding No. 20A-0097CP.

³² Hearing Exhibit 14, Decision No. R20-0563, Paragraphs 22 – 28 at pages 7 and 8, in Proceeding No. 20A-0097CP. The prehearing disclosures Estes Park Guided Tours failed to file and to serve on counsel for intervenor were: (a) a list that identifies the witnesses Estes Park Guided Tours intended to call at the hearing, including the last known address and telephone number of each witness; (b) a summary of the anticipated testimony of each witness; and (c) copies of the exhibits Estes Park Guided Tours intended to present at the hearing

make filings ordered by this ALJ ..., the ALJ will deem Estes Park Guided Tours' failure to file a response to the Motion to Dismiss as a confession of the merits of the motion." Therefore, the ALJ granted the Motion to Dismiss Application.³³

47. Nicholas Cassatt is the owner of Estes Park Trolleys, which offers tours and charters. Its most popular tours are in Rocky Mountain National Park (RMNP). Estes Park Trolleys offers its Lower Loop Tour in RMNP three times daily during the summer and an Alpine Tour through RMNP to the top of Trail Ridge Road. Additionally it offers a Discovery Estes Park Tour, a sightseeing tour around the Town of Estes Park, and an all-day Grand Lake Tour to Grand Lake, Colorado.³⁴ On its tours, Estes Park Trolleys uses 14-passenger and 32-passenger trolleys. An average of 15 to 25 passengers take its tours. Passengers on Estes Park Trolleys' tours take photographs of wildlife with their own cameras or cell phones.

48. Certificate PUC. No. 55845S authorizes Estes Park Trolleys to provide transportation of passengers in call-and-demand charter service and in call-and-demand sightseeing service between all points within 30 miles radius of the intersection of U.S. Highway 34 and U.S. Highway 36 in Estes Park, Colorado, subject to the following restrictions: (1) to the use of vehicles with a manufacturer's rated seating capacity of 22 or more passengers, excluding the driver; (2) to operating from April 1st through October 31st of each year; and (3) to the use of vehicles which appear to be trolleys, which have wooden seats, and which are otherwise referred to as Non-traditional Novelty Transportation Vehicles or Non-traditional Theme Transportation Vehicles.³⁵

³³ Hearing Exhibit 14, Decision No. R20-0563, Paragraphs 29 – 34 at pages 8 and 9 and Ordering Paragraphs 1 and 2 at page 10, in Proceeding No. 20A-0097CP.

³⁴ Pursuant to Rule 1502(c), 4 CCR 723-1, the ALJ takes administrative notice of the following facts: Grand Lake, Colorado, is a town in Grand County, located west of the western entrance to RMNP. The Town of Grand Lake is approximately 53 miles from the Estes Park Visitors Center via U.S. Highway 34 over Trail Ridge Road. See <http://www.townofgrandlake.com/>; <https://gograndlake.com/>.

³⁵ Hearing Exhibit 15.

49. Mr. Cassatt testified that he has observed competition from Estes Park Guided Tours' operations for about a year and a half.³⁶ Estes Park Guided Tours offers the same tours as Estes Park Trolleys, except the Discover Estes Park Tour. Estes Park Trolleys' tour business in 2020 was down due to the coronavirus and due to competition from Respondent. Mr. Cassatt estimated that reduced tour sales due to competition from Estes Park Guided Tours was at least \$15,000 per month.

50. Estes Park Guided Tours picks passengers up at the Estes Park Visitors Center at 500 Big Thompson Avenue. Photographs taken by Mr. Cassatt depict Respondents' two 14-passenger Ford vans, each with a logo advertising Estes Park Guided Tours, parked at the Visitors Center, picking up passengers there, and on a tour in RMNP.³⁷

51. Hearing Exhibit 2, pages from Respondents' website dated August 25, 2020, has links to learn about Tours, to "Buy Photos," and to view a "Photo Gallery."³⁸ On the first page, below the Estes Park Guided Tours logo, there is a link to "Choose a Tour." The website advertises three tours offered by Estes Park Guided Tours, which were offered from June 1, 2020 through October 15, 2020, as well as the prices and descriptions of each tour. The description of the 4-hour "Alpine Visitors Centre Tour," priced from \$84.99, says:

Capture stunning images of all three ecosystems and the breathtaking views at the summit. Amazing photo opportunities of waterfalls, alpine tundra, and snow capped mountains. This tour usually gets more wildlife sightings in June, July...

The description of the 8-hour "Grand Lake Tour," priced from \$149.95, says:

³⁶ Hearing Exhibit 17 indicates that the Articles of Organization for Estes Park Guided Tours were filed with the Colorado Secretary of State on September 14, 2017. According to Hearing Exhibit 18, Estes Park Guided Tours changed its name to "Estes Park Photo Tours" on August 25, 2020.

³⁷ Hearing Exhibit 1 at pages 1, 2, and 3.

³⁸ Mr. Legzdins testified that passengers could purchase an album of photographs he took on their tour for \$49.00, or they could choose and purchase five photographs for \$20.00.

Book the ultimate Rocky Mountain National Park photo experience today! The Grand Lake Tour will cover all three ecosystems, the Alpine Visitors Centre, and the continental divide.

The description of the 3-hour “Lower Valley Tour,” priced from \$79.95, says:

This is a great tour if you are focused on capturing amazing view and are a little nervous about heights. Amazing landscape, wildlife and waterfall photography. This tour stays in the lower valley regions.³⁹

Respondents’ website only lists a cost for these tours “from” the stated prices; there is no indication of how high the actual price might be or what “extras” could be included for an additional charge. The pricing listed on the website does not state that the advertised price of the tour is for anything other than for transportation of passengers to take the tour. The website does not state that the advertised price of the tour is only for a “photography tour” or for photography education, instruction, or assistance.

52. The website states the following regarding photography:

We offer personal guided photography tours throughout the Rocky Mountain National Park. If you want to take home the best photographs, as well as see the wildlife, waterfalls, lakes, and mountains, then this is one of the best things to do and see in Estes Park!

We have a love and passion for photography, and the outdoors, and would love to pass on to you all the beauty that the National Park has to offer. We are your personal photographer and are more than happy to share tips, and capture a range of photos with all the family in them.

All tours are interpretive, and our goal is for you to take home photos and memories that will last a lifetime.⁴⁰

53. In Hearing Exhibit 2, the website concludes with another offer for passengers to “Buy Photos,” but it does not explicitly offer photography education, instruction, or assistance to its paying passengers.⁴¹ From the website in Hearing Exhibit 2, prospective passengers could reasonably conclude that the advertised prices are for transportation on the advertised tours in

³⁹ Hearing Exhibit 2 at pages 1, 2, and 7.

⁴⁰ Hearing Exhibit 2 at page 5.

⁴¹ Hearing Exhibit 2 at page 7.

Respondent's vans and that, while the passengers could take their own photos, they are encouraged after the tour to purchase photographs taken by Respondent's drivers during the tour.

54. Hearing Exhibit 19 contains pages from Estes Park Guided Tours Website similar to Hearing Exhibit 2, but updated as of September 27, 2020. Hearing Exhibit 19 still has links to learn about Tours, to "Buy Photos," and to view a "Photo Gallery." On the first page, however, between the Estes Park Guided Tours logo and the link to "Choose a Tour," Respondent has added the words "Photographic Experiences of Rocky Mountain National Park | Estes Park, Colorado." The pricing for the three tours and their descriptions remain the same as in Hearing Exhibit 2. Hearing Exhibit 19, as with the pages of the website in Hearing Exhibit 2, concludes with another offer for passengers to "Buy Photos," but it does not explicitly offer photography education, instruction, or assistance to its paying passengers.⁴² The changed name of Respondent's company – Estes Park Photo Tours – does *not* appear in Hearing Exhibit 19.

55. Hearing Exhibit 3 is a schedule from Estes Park Guided Tours' website showing that, except for five days, it offered the tours daily from August 30 through October 3, 2020.

56. Hearing Exhibit 4 is the "About Us" page from Estes Park Guided Tours' website, dated August 25, 2020. It again offers passengers a chance to "Buy Photos." It describes Mr. Legzdins' experience as a guide in RMNP, touts that he can get "up close and personal to the wildlife," but says nothing about his experience as a photographer or a photography instructor.⁴³ The "Cancellation Policy" states that if a passenger cancels inside of 48 hours, "We will do our best to resell your seats, however, if we are unable to do so, you will be charged as though you are

⁴² See Hearing Exhibit 19 at pages 1, 2, 5, and 7.

⁴³ Hearing Exhibit 4 at pages 1, 2, and 5.

on the tour.”⁴⁴ A prospective passenger could reasonably conclude from the Cancellation Policy that Respondent is selling passenger transportation (*i.e.*, seats) on its vans for its tours.

57. Hearing Exhibits 5 and 6, other pages from Respondent’s website dated August 25, 2020, advertise a 3-hour “Winter in the Park” tour, which was offered from October 15, 2019 through May 31, 2020 and would be offered again starting October 15, 2020. The advertised pricing includes Adult (Ages 14+) = \$79.99; Child (Ages 2-13) = \$59.95; and Infant (Under 1 years old) = \$49.99. The description of the 3-hour Winter in the Park” tour says:

This photographic experience captures all the beauty that Estes Park, and Rocky Mountain National Park have to offer. The trees usually dusted with snow, and the Park is less congested. We cover all the prime photographic locations, and target wildlife, waterfalls, lakes and breathtaking mountain views. ... Take the stress out of your trip, and reserve your photographic winter tour today!

The page again offers passengers a chance to “Buy Photos” and to view a “Photo Gallery,” and again advertises the three summer tours.⁴⁵ The website in Hearing Exhibit 5 concludes with another offer for passengers to “Buy Photos,” but it does not explicitly offer photography education, instruction, or assistance to Respondent’s paying passengers.

58. From the website in Hearing Exhibit 5, prospective passengers could reasonably conclude that the advertised prices are for transportation in Respondent’s vans on the advertised tours and that, while the passengers could take their own photographs, they are encouraged after the tour to purchase photographs taken by Respondent’s drivers during the tour.

59. Hearing Exhibit 8 is an advertisement for Estes Park Guided Tours on TripAdvisor’s website dated August 25, 2020. The advertised pricing for Respondent’s tours differs from the prices advertised on Respondent’s website. For example, Hearing Exhibit 2 prices the 3-hour “Lower Valley Tour” from \$79.95, but Hearing Exhibit 6 lists a price from \$84.20.

⁴⁴ Hearing Exhibit 4 at page 4.

⁴⁵ Hearing Exhibit 5 at pages 1, 2, 3, and 4 and Hearing Exhibit 6.

Hearing Exhibit 2 prices the 8-hour “Grand Lake Tour” from \$149.95, but Hearing Exhibit 8 lists a price from \$157.85. Hearing Exhibit 8 also advertises a “Hidden Valley Sledding Tour” priced from \$84.99. The advertising in Hearing Exhibit 8, which is materially different than that in Hearing Exhibits 2 and 19, states, “All tours are interpretive giving you the history, as well as targeting wildlife and the beauty of the Park. We cover all 3 ecosystems and take the stress out of driving.”⁴⁶ The advertising on the TripAdvisor website in Hearing Exhibit 8 does not state that the advertised prices of the tours are only for photography education, instruction, or assistance. Moreover, the passenger reviews included in Hearing Exhibit 8 say nothing about photography education, instruction, or assistance.⁴⁷

60. From the advertising in Hearing Exhibit 8, prospective passengers could reasonably conclude that the advertised prices are for transportation in Respondent’s vans on the advertised tours and that, while the passengers could take their own photographs, they are encouraged after the tour to purchase photographs taken by Respondent’s drivers during the tour.

61. Hearing Exhibit 9 is an undated screen shot of Estes Park Guided Tours’ Facebook page. The text of the tour advertisement states, “We offer personal guided photography tours throughout Rocky Mountain National Park. Wildlife, waterfalls, lakes and mountains. We photograph it all.”⁴⁸ Coupled with advertising to “Buy Photos” in Hearing Exhibits 2, 4, 5, and 6, the quoted text in Hearing Exhibit 9 clearly implies that, while Respondent may offer “personal guided photography tours,” Respondent’s drivers will take photographs to sell to passengers after the tour. From the advertising in Hearing Exhibit 9, prospective passengers could reasonably

⁴⁶ Hearing Exhibit 8 at pages 1, 2, 3, and 4. A props

⁴⁷ See Hearing Exhibit 8 at pages 5 – 8.

⁴⁸ Hearing Exhibit 9.

conclude that, while the passengers could take their own photographs, they are encouraged after the tour to purchase photographs taken by Respondent's drivers during the tour.

62. Hearing Exhibit 10 is another undated screen shot of Estes Park Guided Tours' Facebook page. The description of Estes Park Guided Tours states:

Who's ready to take home some amazing memories from your visit to Rocky Mountain National Park? With Estes Park Guided Tours you are not just "another guest", you are the reason we love going to work each day. We go out of our way to make sure you go home with smiles on your faces, and tell all of your family how much of a great time you had. Reserve your photographic experience online at www.estesparkguidedtours.com.⁴⁹

63. Hearing Exhibit 11 is an advertisement for Respondent's Lower Valley Tour on TripAdvisor's website dated August 25, 2020. The Overview of the tour states:

This is a great tour if you are focused on wildlife and are a little nervous about heights! We cover all the lower valley key areas such as Sheep Lakes, Alluvial Fan Waterfall, Moraine Park, and either Sprague or Bear Lake. The views are amazing and this is typically where you will find most of the wildlife. Van is heated and air conditioned with high roof and high windows for better visibility. All tours are interpretive and get you to areas most people drive past. We give you plenty of time at each stop for photos and to enjoy the beauty.⁵⁰

From the advertising in Hearing Exhibits 10 and 11, prospective passengers could reasonably conclude that, while passengers could take their own photographs, they were encouraged after the tour to purchase after the tour photographs taken by Respondent's drivers during the tour.

64. For 11 years, Greg Rounds has been the owner of Estes Valley Transport; he is also a driver and the bookkeeper. Estes Valley Transport conducts group tours into RMNP, while its main business and source of revenue are from service to Denver International Airport. Its large group tours into RMNP use charter busses, while other tours carry passengers in 15-passenger vans. Mr. Rounds' passengers come to Estes Park to see RMNP and the wildlife in the Park. His

⁴⁹ Hearing Exhibit 10.

⁵⁰ Hearing Exhibit 11 at page 1.

passengers often take photos with their cameras and phones from the vehicles or when the vehicle stops. Using cameras of the passengers, his drivers also take photographs of the passengers or their groups. The drivers for Estes Valley Transport do not offer photography advice to its passengers. The tours offered by Estes Valley Transport are by duration (*e.g.*, 2-hour to 5-hour tours), not by specific location. Within RMNP, Estes Valley Transport offers daily tours to the Alpine Visitors Center and to the Lower Loop. The charge for its two and four hour tours is \$85 per person. As a longer tour, Estes Valley Transport offers a tour to Grand Lake that includes lunch. Like Mr. Cassatt, Mr. Rounds had also observed Respondent picking up passengers, taking tour groups into RMNP in 14-passenger vans, and stopping at points in RMNP similar to places on tours provided by Estes Valley Transport. Due to the coronavirus pandemic, all large groups had cancelled tours with Estes Valley Transport. During the coronavirus pandemic, Mr. Rounds has been sending his small group tours to Mr. Cassatt. Estes Valley Transport does not offer any unregulated passenger transportation services.

65. Certificate PUC No. 54696 authorizes Estes Valley Transport to provide transportation of passengers and their baggage in call-and-demand sightseeing service between all points within a 10-mile radius of the intersection of U.S. Highways 34 and 36 in Estes Park, Colorado, and between said points, on one hand, and all points within a 75-mile radius of the intersection of U.S. Highways 34 and 36 in Estes Park, Colorado, on the other hand.⁵¹ Estes Valley Transport's \$85 per person tours of RMNG are conducted pursuant to its call-and-demand sightseeing service authority.

66. Certificate PUC No. 54696 also authorizes Estes Valley Transport to provide transportation of passengers and their baggage in call-and-demand limousine service between

⁵¹ Hearing Exhibit 16, Section III at page 2.

all points within a 10-mile radius of the intersection of U.S. Highways 34 and 36 in Estes Park, Colorado, and between said points, on one hand, and all points within a 75-mile radius of the intersection of U.S. Highways 34 and 36 in Estes Park, Colorado, on the other hand.⁵²

67. DeAnn Shank was a former co-worker of Mr. Cassatt and has known Mr. Cassatt for 10 years. Ms. Shank looked on the Internet for tours of RMNP, found Estes Park Guided Tours, and booked a tour with Estes Park Guided Tours on its website. On September 17, 2020, Ms. Shank and seven other passengers boarded an Estes Park Guided Tours van at the Estes Park Visitors Center to take the Lower Loop Tour in RMNP. During the tour of RMNP, Ms. Shank took photographs with her cell phone. The tour lasted for 4 hours and the passengers disembarked at the Estes Park Visitors Center. As far as Ms. Shank was aware, no education or information about photography was provided. While the driver did take his own photographs with a camera he had in the van, Ms. Shank did not observe the driver showing any of the passengers how to use the camera. Ms. Shank took the tour with Estes Park Guided Tours because she was curious about what they offered and about their approach to the tour and because she wondered if she could learn some new information. At Moraine Park Ms. Shank, who has issues walking, stayed on the van while other passengers took a walk. At Sprague Lake, Ms. Shank took a few photographs while she and another passenger sat on a picnic bench and conversed.

68. Estes Park Guided Tours called seven witnesses in its defense against the allegations in the Amended Complaint that Respondent was offering, advertising, and providing a service to transport passengers for hire within the state of Colorado without lawful authority.

69. Lisa Neal-Graves, a sorority sister of Mr. Legzdins' wife, is an attorney who does *pro bono* work for the Justice and Mercy Legal Aid Center in Denver, Colorado. She is not familiar

⁵² Hearing Exhibit 16, Section V at page 3.

with the PUC or motor carrier regulation, and she has never represented any motor carriers that provide intrastate transportation. At the end of 2019 or in early 2020, Mr. Legzdins discussed his business and his original PUC application with Ms. Neal-Graves. Mr. Legzdins told her that he did not pick up passengers from the airport or from their homes.⁵³ She declined to represent Mr. Legzdins and advised him to hire a lawyer with PUC experience. At the hearing, Ms. Neal-Graves testified that she did not counsel Mr. Legzdins on his PUC Application (see Hearing Exhibits 13 and 14). As late as two months before the hearing (*i.e.*, in July 2020), Ms. Neal-Graves advised him to hire an attorney.

70. Benjamin. Legzdins, who was born and raised in Australia, is the owner of Estes Park Guided Tours. In 2015, he moved with his wife from Dallas, Texas to Estes Park, Colorado to work for Wild Side Tours as a guide and in sales. Mr. Legzdins described Wild Side as a “photographic tour company,” which he believed did not have a PUC certificate of authority.⁵⁴ Mr. Legzdins claimed he changed the name of his company from Estes Park Guided Tours to “Estes Park Photo Tours,” because the words “Guided Tours” drew the attention of Estes Park Trolleys and this Complaint.⁵⁵ Mr. Legzdins confirmed that Estes Park Guided Tours operates two 14-passenger vans on three different tours – Lower Valley, Alpine, and Grand Lake. With no set formula, his tours focus on what the passengers want to experience, such as viewing and

⁵³ Ms. Neal-Graves then testified that she believed that Mr. Legzdins “isn’t a carrier, common carrier.” Ms. Neal-Graves made this statement moments after the ALJ sustained Complainants’ objection to Respondent’s counsel’s question, “Do you think that he needed a license from the PUC?” Complainants did not move to strike this statement. Based on her admission that she is not familiar with the PUC or motor carrier regulation and has never represented any motor carriers that provide intrastate transportation, the ALJ finds that Ms. Neal-Graves was not qualified to provide this opinion, which is legal conclusion testimony on one of the major legal issues in this Proceeding.

⁵⁴ Arguments by Respondent that Wild Side and Green Jeeps, who Respondent believes do not have Commission authority, operate in Estes Park and RMNP with impunity are irrelevant. Any violations of Colorado Law and Commission rules by those companies do not provide a defense to unlawful conduct by Respondent. Moreover, the Commission Staff may investigate the conduct of those companies, and if appropriate file a civil penalty assessment notice against them.

⁵⁵ See Hearing Exhibit 18. On August 25, 2020, Mr. Legzdins filed Articles of Amendment with the Colorado Secretary of State to change the entity name from Estes Park Guided Tours to Estes Park Photo Tours.

photographing wildlife and scenery. He confirmed that, while his passengers take photos with their own cameras or cell phones, at the end of the tour they have the opportunity to purchase photographs taken by a guide. He also gives recommendations about cameras. Mr. Legzdins estimated that about 75 percent of his passengers take their photographs with their cell phones.

71. In late 2019 or early 2020 Mr. Legzdins received a certified letter from the Commission, stating that he was acting illegally and needed common carrier authority. Mr. Legzdins filed his call-and-demand sightseeing Application, because the letter mentioned a huge fine and because he wanted to be in compliance. In the Application, Mr. Legzdins checked off call-and-demand sightseeing, because sightseeing was the closest category to what he does. Mr. Legzdins testified he did not believe he operated a shuttle, charter, or taxi. Mr. Legzdins claimed he did not believe his business was a sightseeing tour.

72. After he received emails with objections to the Application, Mr. Legzdins reached out to Ms. Neal-Graves. He did not follow through with the Application, Mr. Legzdins claimed, because Ms. Neal-Graves was “under the impression” his business was not a common carrier. He believed his “guests” were not paying for transportation, but were paying for the experience he offered them in RMNP. Mr. Legzdins never advised the Commission that he believed his operation was not a call-and-demand sightseeing tour. As found earlier, the Application was dismissed for failure of Mr. Legzdins to comply with Commission Orders and his failure to respond to Intervenors’ Motion to Dismiss the Application.⁵⁶

73. In the spring of 2020, RMNP had been closed due to COVID-19. Mr. Legzdins had two vans for which he was still making payments. In late May or June 2020 after RMNP reopened,

⁵⁶ See Paragraph 32 *supra*; and Hearing Exhibit 14, Decision No. R20-0563, Paragraphs 29 – 34 at pages 8 and 9 and Ordering Paragraphs 1 and 2 at page 10, in Proceeding No. 20A-0097CP.

Mr. Legzdins hired Brad Manard and recommenced his tour operations. Mr. Legzdins denied he was trying “to dodge the PUC.”

74. Mr. Legzdins described a Lower Valley tour on Saturday, September 26, 2020 (three days before the hearing), on which his counsel (Mr. Bain) was a passenger, when he offered information on wildlife and advice to some passengers on lighting, composition, and shutter speeds for their photographs. He insisted, “it’s truly [a] photographic tour.” Mr. Legzdins denied he was claiming now that Estes Park Guided Tours is a photography business because of allegations in the Complaint or because the Commission sent him a non-compliance letter. Mr. Legzdins testified that his “guests” sometimes travel into RMNP in their own cars.

75. Estes Park Guided Tours does not provide off-road tours.

76. Estes Park Guided Tours carries insurance on its two 2017 Ford 14-passnger vans, although the insurance policy stated that insurance coverage was only for 8-passnger vans.⁵⁷ Estes Park Guided Tours also carries commercial general liability insurance for \$1,000,000 per occurrence and for an aggregate limit of \$2,000,000. The general liability coverage declarations page describes Estes Park Guided Tours as “Guides or Outfitters.”⁵⁸

77. As of the September 29, 2020 hearing, Mr. Legzdins’ total gross income in 2020 was about \$165,000 with \$75,000 to \$80,000 in expenses.⁵⁹ He could not separate his 2020 revenues for conducting tours from his revenues for selling photographs to passengers.

⁵⁷ Hearing Exhibit 114. Mr. Legzdins testified on cross-examination that he called his insurance agent during a recess in the hearing to change the coverage to 14-passnger vans.

⁵⁸ Hearing Exhibit 115; see page 9.

⁵⁹ Mr. Legzdins testified that his “total net income in 2020” was about \$165,000 with \$75,000 to \$80,000 in expenses. The ALJ believes that Mr. Legzdins may have misspoken. In Mr. Bain’s opening statement, he asserted that the gross income since January 2020 was \$160,000. While this discrepancy was not cleared up on redirect examination, the ALJ finds that Mr. Legzdins’ “total gross income” since January 2020 was about \$165,000.

78. Hearing Exhibit 100 is the Commercial Use Authorization Application submitted by Estes Park Guided Tours to RMNP on July 1, 2019. As the “Service for which you are applying,” Respondent checked off “Photo Tours,” but not “Vehicle Shuttle Tours.” A purpose of the application was to ensure that business activities within the National Park System “are conducted in a manner that complies with Federal laws and regulations.” The Holder of a Commercial Use Authorization “must acquire all permits or licenses of State or local government, as applicable, necessary to provide the services described above, and, must operate in compliance with all applicable Federal, State, and local laws and regulations....” The National Park System does not regulate the rates charged by the Holder, but rates for commercial services provided to park visitors must be reasonable.⁶⁰

79. Mr. Legzdins holds a Commercial Use Authorization guide pass, which will expire on December 31, 2020.⁶¹

80. Estes Park Guided Tours holds a 2020 business license issued by the Town of Estes Park, which will expire on December 31, 2020.⁶²

81. Mr. Legzdins holds a Certificate of Achievement from PhotographyAcademy.com, indicating he has completed the Photography Transformation Masterclass, which was an on-line course he completed in May of 2020.⁶³

82. Hearing Exhibit 104 lists Mr. Legzdins’ photography equipment, which he uses to photograph wildlife on tours. The total purchase price of this equipment was \$16,716. Mr.

⁶⁰ Hearing Exhibit 100, at pages 1, 3, and 7.

⁶¹ Hearing Exhibit 101.

⁶² Hearing Exhibit 102. Complainants also offered the same document as Hearing Exhibit 12, which was also admitted into evidence.

⁶³ Hearing Exhibit 103, which is undated.

Legzdins' sometimes loans the equipment to his guides, except for his personal camera. He also uses this equipment for his personal photography.

83. Hearing Exhibit 105 shows photographs of a bear cub and an elk taken by Mr. Legzdins on tours of RMNP in 2020. These photographs are typical of photographs Mr. Legzdins takes and offers for sale to passengers.

84. Adam Shake, the President and CEO of the Estes Park Economic Development Corporation, wrote a letter dated September 16, 2020, in support of Respondent's defense against the Complaint.⁶⁴

85. Chris Wood, the Owner/Manager of McGregor Mountain Lodge, wrote a letter dated March 9, 2020 in support of Estes Park Guided Tours' Application for authority to provide call-and-demand sightseeing service. The letter states that Mr. Legzdins takes hotel guests out to see wildlife and educates the guests about local wildlife. The letter also states that Estes Park Guided Tours reduces congestion in the Estes Park downtown and in RMNP and promotes safety by removing drivers "not accustomed to driving at high altitude and on mountain roads."⁶⁵ The Wood letter says nothing to support Respondent's argument that it provides only photography tours and photography education, instead of transportation of passengers for hire.

86. Eric J. Lund, President of Visit Estes Park – a destination marketing organization, wrote a letter dated March 12, 2020 in support of Estes Park Guided Tours' Application for authority to provide call-and-demand sightseeing service. The letter supports granting a license to

⁶⁴ Hearing Exhibit 108. Although endorsed as a witness for Respondent, Mr. Shake was unavailable to testify at the hearing for medical reasons. The ALJ overruled Complainants' objection to the admissibility of the Shake letter, finding the objection went to the weight and credibility of the letter, not admissibility.

⁶⁵ Hearing Exhibit 109. The ALJ overruled Complainants' objection to the admissibility of Hearing Exhibit 109, finding the objection went to the weight and credibility of the letter, not admissibility. The Chris Wood letter was filed initially in Proceeding No. 20A-0097CP in support of the Application of Estes Park Guided Tours for authority to provide call-and-demand sightseeing service.

Estes Park Guided Tours to operate in RMNP and to provide services to visitors to that destination.⁶⁶ The Lund letter says nothing to support Respondent's argument that it provides only photography tours and photography education, instead of transportation of passengers for hire.

87. Estes Park Guided Tours posts on its website comments from passengers who have taken its tours.⁶⁷ Of the 20 comments selected for Hearing Exhibit 113, only two noted that the guide offered to provide photography advice.⁶⁸ Five comments discussed only the wildlife and scenery the commenters viewed on the tour.⁶⁹ Seven comments noted that the guide took (or offered to take) photographs of the commenters to purchase.⁷⁰ Five commenters noted that they took their own photographs.⁷¹ Finally, five comments discussed a tour to Grand Lake, Colorado, located west of RMNP.⁷² One comment specifically noted that the Grand Lake Tour "included lots of stops for sightseeing and photo opportunities."⁷³

88. Brad Manard is a retired school superintendent from Iowa who now lives in Estes Park. Mr. Manard, who is an experienced wildlife photographer,⁷⁴ has worked as a guide for Estes Park Guided Tours since June 2020. Respondent pays him a daily rate plus \$10 per person over two passengers in the van. For example, if vans were full on his tours, he could make \$250 to \$300 per day; whereas, if the tour had only a couple of passengers, he would make \$125 to \$150

⁶⁶ Hearing Exhibit 110. The ALJ overruled Complainants' objection to the admissibility of Hearing Exhibit 109, finding the objection went to the weight and credibility of the letter, not admissibility. The Lund letter was filed initially in Proceeding No. 20A-0097CP in support of the Application of Estes Park Guided Tours for authority to provide call-and-demand sightseeing service.

⁶⁷ Hearing Exhibit 113.

⁶⁸ See Hearing Exhibit 113 at pages 2 and 19-1.

⁶⁹ See Hearing Exhibit 113 at pages 3, 10, 13, 14, and 17.

⁷⁰ See Hearing Exhibit 113 at pages 4, 8, 9, 12, 16, 18, and 19-2.

⁷¹ See Hearing Exhibit 113 at pages 2, 10, 11, 12, and 15.

⁷² See Hearing Exhibit 113 at pages 3, 5, 12, 14, and 16.

⁷³ See Hearing Exhibit 113 at page 16.

⁷⁴ Hearing Exhibit 107 is a photograph of a big horn sheep taken by Mr. Manard that was published on the front page of the *Estes Park News*, a local newspaper.

per day. Mr. Manard described how on a typical tour he drives passengers around RMNP to spots where they may see and photograph scenery and wildlife while he talks about the wildlife and taking pictures. He admitted that there is travel time from spot to spot. Hearing Exhibit 106 lists Mr. Manard's photography equipment that he uses in his personal photography and on tours. Mr. Manard usually takes photographs on tours, and after a tour he selects three to five photographs for passengers to purchase from Respondent. Sometimes he answers questions from passengers about his camera and lenses.

89. Keith Belovay is the CTO and co-founder of Picthrive, a photo sales and cloud marketing platform. Estes Park Guided Tours has been a customer of Picthrive since October of 2019. For a 20 percent commission, Picthrive allows Respondent to upload photographs at the end of its tours and provides a platform for Estes Park Guided Tours to sell photographs of the tours to its passengers. Picthrive's platform allows passengers to view the photographs on-line, to select their purchases, to pay by credit card, and then to download their purchases. All communications with passengers carry the branding of Estes Park Guided Tours, not Picthrive. Mr. Belovay estimated that, so far in 2020, Respondent had sold \$10,000 worth of photographs through its platform and had received about \$8,000 after paying Picthrive's 20 percent commission.

90. Margaret Phillips, who lives in Jefferson, Georgia, has taken nine or ten tours with Mr. Legzdins, including with the company for which he previously worked. On her most recent tour in September 2020, she took a group from her business on tour with Estes Park Guided Tours. On that tour, Mr. Legzdins, who she believed was "really good at photography," taught her and her colleagues about framing pictures, lighting, and using a focal point. She also took her own photographs.

91. Evan Gilsolf, who lives in Rock Valley, Iowa, is a professional photographer. In August of 2020, Mr. Gilsolf and his wife took the Grand Lake tour offered by Estes Park Guided Tours, mainly to see wildlife but also to take photographs. Mr. Legzdins helped him with taking photographs of waterfalls and reminded him to check his shutter speed when photographing wildlife. On the way to Grand Lake, Mr. Legzdins drove down a gravel road in RMNP, and the passengers saw a moose and her calf. The passengers then had lunch in Grand Lake.

92. Marlene Wagner, who lives in Posting Hill, New York, took three tours with Mr. Legzdins when he worked for another company (Wild Side). On her third tour in 2019, he advised her about upgrading her camera. On a fourth tour with Estes Park Guided Tours, Ms. Wagner, her husband, her daughter, and her son-in-law followed Mr. Legzdins in her daughter's vehicle, and Mr. Legzdins paid their admission to RMNP. He still charged them for the tour without any discount for following in their vehicle. Ms. Wagner testified that transportation was not the reason she took Mr. Legzdins' tours; it was because of his focus on photography.

B. Jurisdiction.

93. The Commission has subject matter jurisdiction over this Proceeding, pursuant to §§ 40-10.1-102(1), 40-10.1-103, 40-10.1-104, 40-10.1-112, and 40-10.1-201, C.R.S.

94. The Commission has personal jurisdiction over Estes Park Guided Tours and over Mr. Legzdins. The Amended Complaint, including notice of the alleged conduct in violation of Colorado law, was served on Estes Park Guided Tours on July 7, 2020 through the Commission's E-Filings System, along with the Order to Satisfy or Answer and with timely, adequate notice of the evidentiary hearing set for September 14, 2020. Estes Park Guided Tours was served by the Commission with Decision No. R20-0613-I, which gave additional notice to Estes Park Guided Tours of the hearing date and time, and of the primary issues to be litigated at the hearing. Finally, Estes Park Guided Tours was served by the Commission with Decision No. R20-0650-I, which

gave notice to Estes Park Guided Tours of the continued hearing date and time. Mr. Legzdins subjected himself to the Commission's jurisdiction by testifying in the evidentiary hearing.

95. The ALJ finds and concludes that the Commission provided to Estes Park Guided Tours and Mr. Legzdins adequate notice of the Complaint and notice of its alleged conduct in violation of Colorado law. The Commission also provided to Estes Park Guided Tours and Mr. Legzdins a fair and meaningful opportunity to be heard at the evidentiary hearing, to confront and to cross-examine Complainants' witnesses and hearing exhibits in support of the allegations in the Complaint, and to present a defense against the allegations in the Amended Complaint and the request for a cease and desist order.

C. Arguments by the Parties.

96. Complainants assert that Estes Park Guided Tours has been operating a sightseeing service to passengers for hire for almost two and one-half years without a required Commission Certificate. Complainants claim that Respondent changed its name to "Estes Park Photo Tours" and now claims to offer photography tours, as a "last minute invention" in order to avoid regulation by the Commission. Complainants argue that the evidence in the hearing proves that Respondent fails the primary business test used by the Commission, and that the ALJ should conclude that Respondent has been advertising, offering to provide, and providing a sightseeing service to passengers for hire in violation of Colorado statutes and Commission regulations.⁷⁵

97. As relief, Complainants argue that Respondent should be required to cease and desist operations immediately. Complainants also argue that Respondent has committed Class 2 misdemeanors and should be fined accordingly.⁷⁶

⁷⁵ Complainants' Opening Brief at pages 1 – 12; and 5.

⁷⁶ *Id.*, at pages 11 – 12.

98. Estes Park Guided Tours argues that its business focuses on photography and the transportation component of its operations is incidental. Respondent asserts that the Commission need not regulate every business that happens to involve some transportation. Estes Park Guided Tours claims it is not a competitor of Complainants, because it offers a completely different service and is not operating a sightseeing or shuttle service in violation of Colorado law, but then asserts that Complainants are trying “to take unfair advantage of administrative rules to stifle competition....”⁷⁷

99. Estes Park Guided Tours requests that the ALJ find that Estes Park Guided Tours has not violated Colorado law and dismiss the Complaint. Alternatively, if the ALJ finds that Estes Park Guided Tours should apply for common carrier authority, Respondent requests that “it be allowed to do so immediately, without any penalties or other sanctions, and that it be allowed to continue operating in the meantime on a temporary basis.”⁷⁸

D. Discussion and Conclusions.

100. The Amended Complaint alleges that Estes Park Guided Tours has no Commission or federal agency authority to provide the subject passenger transportation services in Estes Park and that Respondent is operating in violation of Colorado statutes regulating motor carriers. As relief, the Amended Complaint requests that the Commission order Estes Park Guided Tours to discontinue providing unauthorized services. That is, Complainants sought an order requiring Respondent to cease and desist from operating as a common carrier of passengers for hire within the State of Colorado without a valid Certificate issued by the Commission.

101. On July 7, 2020, the Commission properly served on Estes Park Guided Tours an Order to Satisfy or Answer along with the Formal Complaint, requiring Respondent to file its

⁷⁷ Respondent’s Statement of Position at pages 1 – 8; and 2.

⁷⁸ *Id.*, at pages 1 and 8.

Answer no later than Monday, July 27, 2020.⁷⁹ Respondent failed to file an Answer, a motion for extension of time to file its answer, or a motion to dismiss the Amended Complaint by the July 27, 2020 deadline.

102. When a respondent fails to file any response or answer to a properly served Order to Satisfy or Answer, the complaint and the relief request can be granted by the Commission.⁸⁰

103. Because the Amended Complaint sought a cease and desist order, § 40-10.1-112(1), C.R.S., required that the ALJ hold a hearing, after notice to Estes Park Guided Tours, before the ALJ could enter a cease and desist order, assuming Complainants could prove the alleged violations of law and demonstrate that entry of a cease and desist order was justified.⁸¹

104. The primary issues to be litigated at the hearing in this proceeding were:

(1) whether Estes Park Guided Tours is operating, providing, advertising, or offering to provide passenger transportation services for hire in Estes Park, in violation of Colorado Law; and

(2) if so whether the Commission should issue an order requiring Estes Park Guided Tours to cease and desist from operating as a common carrier of passengers for hire within the State of Colorado without a valid Certificate issued by the Commission.

105. For about a year and a half, Nicholas Cassatt, the owner of Estes Park Trolleys, had observed Estes Park Guided Tours operating three tours in competition with Estes Park Trolleys – the Lower Loop and Alpine Tours in RMNP and an all-day tour to the Town of Grand Lake, located west of RMNP. Greg Rounds, the owner of Estes Valley Transport had also observed Respondent picking up passengers, taking tour groups into RMNP in 14-passenger vans, and stopping at points in RMNP similar to the places on tours provided by Estes Valley Transport. Messrs. Cassatt and Rounds, and their Hearing Exhibits discussed in the Findings of Fact, demonstrated that

⁷⁹ See Rule 1308(d) of the Rules of Practice and Procedure, 4 CCR 723-1

⁸⁰ Decision No. R12-0125 (issued February 3, 2012), *Duran v. Deborah Epler DBA Action Towing*, Docket No. 12F-048TO; Decision No. R10-1303 (issued December 7, 2010), *Booth v. C&M Towing & Recovery, Inc.*, Docket No. 10F-689TO.

⁸¹ Decision No. R20-0613-I, Paragraphs 11 through 15 at pages 3 and 4.

Respondent was competing with their common carriers within the state of Colorado without a valid Certificate issued by the Commission.

106. Photographs taken by Mr. Cassatt, in Hearing Exhibit 1, prove that Respondent picked up passengers at the Visitors Center and transport passengers on tour in RMNP in 14-passenger vans, each with a logo advertising Estes Park Guided Tours. Respondents' website, in Hearing Exhibits 2 and 19, proves that Estes Park Guided Tours was advertising and offering three tours from June 1, 2020 through October 15, 2020, as well as the prices and descriptions of each tour. Respondent advertised and offered, to any person who would purchase a seat, a 4-hour "Alpine Visitors Centre Tour," priced from \$84.99. Respondent advertised and offered, to any person who would purchase a seat, a 3-hour "Lower Valley Tour," priced from \$79.95. Respondent advertised and offered, to any person who would purchase a seat, an 8-hour "Grand Lake Tour," priced from \$149.95. The pricing listed on the website does not state that the advertised price of the tour is for anything other than for transportation of passengers to take the tours. The website does not state that the advertised price of the tour is only for photography education, instruction, or assistance. From the advertised prices for Respondent's tours, prospective passengers could reasonably conclude that they were purchasing transportation for hire to take any of the three tours advertised, offered, and provided by Estes Park Guided Tours. From the advertised prices for Respondent's tours, prospective passengers could *not* reasonably conclude that they were purchasing only a photography tour instead of transportation for hire.

107. Estes Park Guided Tours' website was updated by September 27, 2020 (compare Hearing Exhibit 19 to Hearing Exhibit 2). Hearing Exhibit 19 still has links to learn about Tours, to "Buy Photos," and to view a "Photo Gallery," as well as the same pricing for the three tours shown in Hearing Exhibit 2. On the first page, between the Estes Park Guided Tours logo and the link to "Choose a Tour," Respondent has added the words "Photographic Experiences of Rocky

Mountain National Park | Estes Park, Colorado.” The changed name of Respondent’s company – Estes Park Photo Tours – does not appear anywhere in Hearing Exhibit 19. While Hearing Exhibit 19 concludes with another offer for passengers to “Buy Photos,” it does not explicitly offer photography education, instruction, or assistance to Respondent’s paying passengers. This addition to the website does not diminish the proof by a preponderance of evidence in Complainants’ case-in-chief that Estes Park Guided Tours was operating, providing, advertising, or offering to provide passenger transportation services for hire within the state of Colorado (that is, in Estes Park, in RMNP, and in the area of Grand Lake).

108. Pages from Respondents’ website in Hearing Exhibits 2 and 19 have links to “Buy Photos,” and to view a “Photo Gallery.” While the website says that Respondent offers “personal guided photography tours,” it states that the passengers could “see the wildlife, waterfalls, lakes, and mountains” and could take photographs. The website claims that the driver can be your “personal photographer” who would be “happy to share tips, and capture a range of photos with all the family in them.”⁸² Nevertheless, prospective passengers could reasonably conclude that the advertised prices were to purchase a seat (that is, transportation for hire) in Respondent’s vans on the advertised and offered tours and that, while the passengers could take their own photos, they were encouraged after the tour to purchase from Respondent photographs taken by Respondent’s drivers. Prospective passengers could *not* reasonably conclude that they were purchasing only a photography tour instead of transportation for hire.

109. Hearing Exhibit 3, a schedule from Estes Park Guided Tours’ website, proved that it continuously offered the tours daily from August 30 through October 3, 2020, except for five days.

⁸² Hearing Exhibit 2 at page 5; Hearing Exhibit 19 at page 5.

110. Hearing Exhibit 4, the “About Us” page from Estes Park Guided Tours’ website, explains Respondent’s “Cancellation Policy,” which states that if a passenger cancels inside of 48 hours, “We will do our best to resell your seats, however, if we are unable to do so, you will be charged as though you are on the tour.”⁸³ Prospective passengers could reasonably conclude from the Cancellation Policy that Respondent is selling passenger transportation (*i.e.*, seats) on its vans for its tours. Hearing Exhibit 4 proved that Respondent was selling passenger transportation for hire (*i.e.*, seats) on its vans for tours it advertised, offered, and provided within the state of Colorado.

111. Hearing Exhibits 5 and 6, other pages from Respondent’s website, proved that Respondent advertised and offered a 3-hour “Winter in the Park” tour from October 15, 2019 through May 31, 2020 and again starting October 15, 2020. The advertised prices include Adult (Ages 14+) = \$79.99; Child (Ages 2-13) = \$59.95; and Infant (Under 1 years old) = \$49.99. From the advertised prices for the Winter in the Park tour, prospective passengers could reasonably conclude that he or she would be purchasing a seat (that is, transportation for hire) in Respondent’s vans to take any of the tours advertised and offered by Estes Park Guided Tours within the state of Colorado.

112. From Respondent’s website pages in Hearing Exhibits 4, 5, and 6, prospective passengers could reasonably conclude that the advertised prices were to purchase a seat (that is, transportation for hire) in Respondent’s vans to take any of the tours advertised, offered, and provided by Estes Park Guided Tours within the state of Colorado. Prospective passengers could also reasonably conclude that, while passengers could take their own photos, they were encouraged to purchase from Respondent photographs taken by Respondent’s drivers. Prospective passengers

⁸³ Hearing Exhibit 4 at page 4.

could *not* reasonably conclude that the prices they paid for Respondent's tours were only for photography education, instruction, or assistance, rather than for transportation for hire as a passenger in Respondent's vans to see the sights, scenery, and wildlife on the tours.

113. Hearing Exhibits 3, 4, 5, and 6, proved that Respondent was selling passenger transportation for hire (*i.e.*, seats) on its vans for the tours it advertised, offered, and provided in Estes Park, in RMNP, and in the area of Grand Lake (that is, within the state of Colorado).

114. Hearing Exhibit 10, a screen shot of Estes Park Guided Tours' Facebook page, advertises that by taking its tours prospective passengers could "take home some amazing memories" from their visit to RMNP and instructs prospective passengers to reserve their "photographic experience" online.⁸⁴ Hearing Exhibit 11, an advertisement for Respondent's Lower Valley Tour on TripAdvisor's website, states: "This is a great tour if you are focused on wildlife and a little nervous about heights!" It then describes some of the scenic sights in RMNG visited by its tours and concludes, "We give you plenty of time at each stop for photos and to enjoy the beauty."⁸⁵

115. From the advertising in Hearing Exhibits 10 and 11, prospective passengers could reasonably conclude that, while passengers could take their own photographs on the tour, the tour was a sightseeing tour, whose purpose was to view the memorable scenery and wildlife in RMNP. The prospective passengers could *not* reasonably conclude that the tour was only a photography tour whose purpose was photography education, instruction, or assistance.

116. Hearing Exhibit 13 is Estes Park Guided Tours' dismissed Application for authority to operate as a common carrier by motor vehicle for hire for the transportation of passengers in

⁸⁴ Hearing Exhibit 10.

⁸⁵ Hearing Exhibit 11 at page 1.

call-and-demand sightseeing service. Mr. Legzdins, who signed the Application, described the proposed authority: “We pick up guests from Estes Park Visitors Center. We will be driving through the town of Estes Park up to the Fall River entrance of RMNP. All tours are conducted inside RMNP ... & areas of Grand Lake in summer time.”⁸⁶ In his “Statement of Fact Regarding Public Need,” Mr. Legzdins stated:

This application should be granted as we provide a great service to the many millions of people visiting RMNP. We are really helping with the traffic & congestion of the Park by transporting guests in 1 vehicle, instead of having a lot of individual vehicles all in the Park at the same time. We also educate the guests on the Park regulations & rules, as well as teaching them to respect wildlife while viewing from a distance.⁸⁷

117. The testimonies of Messrs. Cassatt and Rounds, as well as Hearing Exhibits 2, 3, 4, 5, 6, 8, 9, 10, 11, 13, 14, and 19, prove by a preponderance of the evidence that Estes Park Guided Tours has been operating, providing, advertising, or offering to provide passenger transportation services for hire the state of Colorado (*i.e.*, in Estes Park, in RMNP and in the area of Grand Lake) without a valid Certificate issued by the Commission. Complainants established a *prima facie* case that the Amended Complaint should be granted.

118. Since in the hearing Complainants proved a *prima facie* case for granting the Amended Complaint, the burden of going forward and the burden of proving its defenses by a preponderance of the evidence, shifted to Respondent.

119. Mr. Legzdins claimed in his testimony that Respondent provided photography tours and its primary business was photography and education. He believed his guests were not paying for transportation, but were paying for the experience he offered them in RMNP. Mr. Legzdins confirmed that Estes Park Guided Tours operates and provides three different tours – Lower Valley, Alpine, and Grand Lake – in two 14-passenger vans. In the Application in Proceeding No. 20A-

⁸⁶ Hearing Exhibit 13, Sections 10 and 22 at pages 3 and 7.

⁸⁷ Hearing Exhibit 13, Section 11 at page 4.

0097CP, Mr. Legzdins checked off call-and-demand sightseeing, because he believed that sightseeing was the closest to what he does. Mr. Legzdins claimed that he did not follow through with the Application, because Ms. Neal-Graves was “under the impression” his business was not a common carrier. Attorney Ms. Neal-Graves, however, testified under oath that she did not counsel Mr. Legzdins on his PUC Application, that she declined to represent Mr. Legzdins, and that she advised him to hire a lawyer with PUC experience.

120. Respondent’s other witnesses fell into 3 categories: a driver (Brad Manard) who also takes photographs on tours, the provider of a photo sales and cloud marketing platform who facilitates sales of Respondent’s photographs to passengers (Keith Belovay), and several passengers who have previously taken tours in RMNP or to Grand Lake with another company for which Mr. Legzdins worked and with Estes Park Guided Tours (Ms. Phillips, Mr. Gilsolf, and Ms. Wagner). Respondent also introduced three letters of support from Estes Park business people.⁸⁸

121. Brad Manard, an experienced wildlife photographer, described a typical tour during which he drives passengers around RMNP to spots where they may see and photograph scenery and wildlife, while he talks about the wildlife and taking pictures. He confirmed that Respondent incurs travel time from spot to spot on the tours. He confirmed that he usually takes photographs on tours, and after a tour he prepares photographs to sell to passengers. Mr. Menard’s testimony does not prove by a preponderance of the evidence that Estes Park Guided Tours offers and provides only photography tours, photography education, instruction, or assistance, and not transportation of passengers for hire.

⁸⁸ Hearing Exhibits 108, 109, and 110. In evaluating the evidence in the record, the ALJ has given little evidentiary weight to these letters. However, Hearing Exhibits 109 and 110 clearly do not support Respondent’s defense that he provides photography tours, not transportation of passengers for hire in a call-and-demand sightseeing service.

122. The testimonies of Respondent's passenger witnesses explained their personal views of Mr. Legzdins and their reasons for taking Respondent's tours. While these passengers were interested in photography, their testimonies do not prove by a preponderance of the evidence that Estes Park Guided Tours offers and provides only photography tours, photography education, instruction, or assistance, and not transportation of passengers for hire.

123. In evidentiary hearings before the Commission, the trier of fact (here the ALJ) has the discretion to evaluate and to determine the weight, credibility, and relevancy of the testimony and other evidence.⁸⁹

124. Having observed the demeanor of the witnesses during the hearing and reviewed the evidence introduced in the Hearing Exhibits, the ALJ concludes that the testimony of Mr. Legzdins consisted of self-serving assertions and statements of little or no evidentiary value. The ALJ concludes that it was no coincidence that Mr. Legzdins changed the name of Estes Park Guided Tours to "Estes Park Photo Tours" with the Colorado Secretary of State on August 25, 2020, the day before Complainants filed their pre-hearing Witness List, Witness Summary, and copies of Exhibits. The verbiage in Respondent's website, revised between August 25 and September 27, 2020 as shown in Hearing Exhibit 19, claiming "Photographic Experiences of Rocky Mountain National Park | Estes Park, Colorado" appears to have been added to bolster Respondent's defense at the September 29, 2020 hearing that his business is photography tours, not passenger transportation.

125. The most compelling and convincing evidence in the record of the actual nature of the tours advertised, offered, and provided by Estes Park Guided Tours within the state of Colorado

⁸⁹ Decision No. C12-0108, Paragraph 20 at page 10, in Docket No. 11A-044CP, *In the Matter of the Application of Mercy Medical Transportation Services, LLC*; see *Colo. Stat Bd. of Medical Examiners v Thompson*, 944 P.2d 547, 551 (Colo. App. 1996).

is Hearing Exhibit 13, its Application for authority to operate as a common carrier by motor vehicle for hire for the transportation of passengers in call-and-demand sightseeing service. Mr. Legzdins, who signed the Application, described the proposed authority: “We pick up guests from Estes Park Visitors Center. We will be driving through the town of Estes Park up to the Fall River entrance of RMNP. All tours are conducted inside RMNP ... & areas of Grand Lake in summer time.”⁹⁰ As his “Statement of Fact Regarding Public Need,” Mr. Legzdins stated that, “We are really helping with the traffic & congestion of the Park by transporting guests in 1 vehicle, instead of having a lot of individual vehicles all in the Park at the same time. We also educate the guests on the Park regulations & rules, as well as teaching them to respect wildlife while viewing from a distance.”⁹¹

126. Significantly, in this Application Mr. Legzdins never stated that his business was photography tours, instead of passenger transportation. He never discussed any plans to offer photography tours or to have his drivers provide to passengers photography education, instruction, or assistance during the tours. Mr. Legzdins’ statements in the Application directly contradict and refute his hearing testimony that his tour business was conducting photography tours and not transportation of passengers for hire.

127. On balance, the testimonies of Messrs. Cassatt and Rounds, as well as the evidence in Complainants’ Hearing Exhibits, are more credible and entitled to more weight than the testimony provided by Respondent (Mr. Legzdins and other witnesses) and the Hearing Exhibits that Respondent sponsored.

1. The Primary Business Test

128. In the past, the Commission has applied the “primary business test” to analyze whether an entity’s transportation activities are significant enough to require operating authority

⁹⁰ Hearing Exhibit 13, Sections 10 and 22 at pages 3 and 7.

⁹¹ Hearing Exhibit 13, Section 11 at page 4.

from the Commission or whether they are merely incidental to the entity's primary non-transportation business. Complainants argue that Estes Park Guided Tours fails the primary business test.⁹² Respondent does not rely on the decisions applying the primary business test.

Factors in the primary business test to resolve this issue include:

- a) Whether the entity undertakes any financial risk in the transportation connected enterprise;
- b) Whether the entity adds an amount identifiable as a transportation charge;
- c) Whether the entity holds itself out to transport for anyone other than itself;
- d) Whether the entity advertises itself as being a non-carrier business;
- e) Whether the entity's investment in transportation facilities and equipment is the principal part of its total business investment; and
- f) Whether the entity performs any real service other than transportation from which it can profit.⁹³

129. **Financial Risk in the Transportation Connected Enterprise.** In the instant case, the evidence shows that Respondent has invested in two 2017 Ford 14-passenger vans, which have been financed, and that Respondent carries insurance including general liability coverage with an occurrence limit of \$1,000,000 and an aggregate limit of \$2,000,000.⁹⁴ Respondent did not introduce evidence of the value of its two 2017 Ford 14-passenger vans. Respondent carries passengers in its vans to numerous places in RMNP, including over Trail Ridge Road, as well as to Grand Lake and back to Estes Park.⁹⁵ There is financial risk to carrying passengers to these

⁹² Complainants' Closing Brief at pages 5-9.

⁹³ Decision No. C10-0324, Paragraph 8 at page 3, (issued on April 6, 2020) in Docket No. 10D-074EC, *In the Matter of the Petition of Larry Holle, et al. for a Declaratory Order*. See also Decision No. R99-687 (issued on June 24, 1999) in Application No. 55320, *In the Matter of the Application of Come and See, Inc. D/B/A Come and See Travel Services*.

⁹⁴ See Hearing Exhibits 114 and 115.

⁹⁵ Pursuant to Rule 1502(c), 4 CCR 723-1, the ALJ takes administrative notice of the following facts: Trail Ridge Road is the highest continuous paved road in the United States, climbs to 12,183 feet, and connects the towns of Estes Park and Grand Lake, Colorado. Trail Ridge Road is generally open and ready for travel from the end of May through October, but closes during winter each year due to snow accumulation. <https://www.mycoloradoparks.com/park/trail-ridge-road>.

places if Respondent's vans were involved in an accident. The purchase price of Mr. Legzdins' personal photography equipment, which he uses to take photographs on tours, was \$16,716.⁹⁶ The evidence demonstrated that in 2020 Respondent's net profit from the tour business was about \$85,000, while it only netted \$8,000 from the sale of photographs to passengers. The ALJ concludes that the financial risk to Respondent is far greater for its transportation operations than for the alleged photography portion of its business.

130. **Amount Identifiable as a Transportation Charge.** The advertised tour prices listed on Respondent's website and on TripAdvisor do not state that the prices are for anything other than for transportation of passengers to take the tours. The website does not state that the advertised prices of the tours are only for photography education, instruction, or assistance. Respondent did not introduce competent evidence that the advertised tour prices were only for photography education, instruction, or assistance. Prospective passengers could reasonably conclude that the advertised prices are for transportation in Respondent's vans on the tours. Ms. Wagner's testimony that on one tour she and her family followed the van in her daughter's car, or Mr. Legzdins' testimony that sometimes guests travel into RMNP in their own cars, does not prove by a preponderance of the evidence that Respondent's primary business was photography tours or that his transportation operations were merely incidental. Instead the prices advertised and charged for the tours proves that Respondent charges for the transportation of passengers.

131. **Transportation for anyone other than Respondent.** The evidence, including Respondent's website and Facebook pages and the TripAdvisor advertising, demonstrated that Estes Park Guided Tours was advertising, offering, and providing tours at the advertised prices to

⁹⁶ See Hearing Exhibit 104.

all members of the travelling public who paid for seats on the tours. There was no evidence that Respondent transports passengers for any other entity.

132. **Advertising as a Non-Carrier Business.** A preponderance of the evidence demonstrates that Respondent does not advertise itself as a non-carrier business. A few places on Respondent's website proclaim a "photography (or photographic) experience" and one place mentions "photography tours."⁹⁷ However, Respondent's repeated offers for passengers to "Buy Photos," without explicitly stating that the tours are only for photography education, instruction, or assistance, fails to prove by a preponderance of the evidence that Respondent provides only photography tours that offer photography education, instruction, or assistance, and not transportation of passengers for hire.

133. **Investment in Transportation Facilities and Equipment.** For the transportation part of its operations, the evidence shows that Respondent has invested in two 2017 Ford 14-passenger vans, which have been financed. The vans also are regularly maintained at Longmont Ford.⁹⁸ The purchase price of Mr. Legzdins' personal photography equipment, which he uses to take photographs on tours, was \$16,716.⁹⁹ While Respondent did not introduce evidence of the value of the two vans, it is reasonable to conclude that the cost of the vans was significantly more than the photography equipment. The ALJ concludes that Respondent's investment in transportation facilities and equipment is greater for its transportation operations than in photography equipment.

134. **Performing Any Real Service Other Than Transportation.** The evidence shows that Respondent's drivers regularly take photographs for and of passengers and that Respondent

⁹⁷ See *e.g.*, Hearing Exhibit 2 at pages 1, 2, 5, and 7; Hearing Exhibit 19 at pages 1, 2, 5, and 7.

⁹⁸ Hearing Exhibit 13, Sections 12 and 13 at pages 4 and 5.

⁹⁹ See Hearing Exhibit 104.

offers such photographs to passengers to purchase. The evidence shows that Respondent's drivers sometimes assist passengers with photography education and instruction. Mr. Legzdins testified about the tour on Saturday, September 26, 2020 (three days before the hearing), on which his counsel was a passenger, and asserted that he offered information on wildlife and advice to some passengers on lighting, composition, and shutter speeds for their photographs. The ALJ finds this testimony to be self-serving and unconvincing. While the events described by Mr. Legzdins may have happened on that one tour, this testimony does not prove by a preponderance of the evidence that Respondent's transportation activities are merely incidental to Respondent's alleged primary non-transportation business of offering photography tours.

135. Estes Park Guided Tours argues that two other Commission decisions support its argument that transportation is incidental to the focus of its business on photography. First Respondent cites Decision No. R01-177 (issued February 22, 2001) in *Colorado Public Utilities Comm'n v. Adventure Party Cruises*, Docket No. 01G-037CP (*Adventure Party Cruises*), regarding river rafting tour operators. Respondent argues that the Commission wrote that: "The Commission has consistently held that such transportation is unregulated because no identifiable charge is assessed for the transportation service (the customer pays a fee for the river-rafting tour only), transporting river-rafting customers to and from the points at which a river-rafting tour begins and terminates is a necessary part of the tour itself, and the river rafting tour business is a non-carrier business."¹⁰⁰ Second, Respondent cites Decision No. R19-0833 (issued October 15,

¹⁰⁰ Respondent's Statement of Position at pages 2 and 3. Respondent also claims as fact that, "An Estes Park rafting company drives clients over Trail Ridge Road to Grand County for rafting the same way that EPPT drives clients there for photographing moose." While the opening argument of counsel for Respondent attempted to draw analogies to river rafting companies, there is absolutely no evidence in the record about any Estes Park rafting company. It is axiomatic that arguments by counsel are not evidence and cannot be substituted for a proper record. *In re Marriage of McSoud*, 131 P.3d 1208, 1223 (Colo. App. 2006). Indeed, the ALJ would commit reversible error if he based his decision upon arguments of counsel instead of evidence. See *People v. Smith*, 413 P.3d 195, 199-200 and Fn. 2 (Colo. App. 2017).

2019) in *In the Matter of the Petition of Rocky Mountain Amphicar Adventures*, Proceeding No. 19V-0176CP (*Amphicar Adventures*), to support the argument that Estes Park Guided Tours is not transporting passengers for compensation “over the public highways between points in this state,” as required by § 40-10.1-101(9), C.R.S. Instead, Respondent argues that the primary purpose of the transportation is to provide a guided photographic tour of RMNP. Both of these Commission decisions are distinguishable.

136. The *Adventure Party Cruises* case was a Civil Penalty Assessment Notice (CPAN) proceeding brought by Trial Staff alleging that Adventure Party Cruises violated § 40-16-103, C.R.S., on three occasions by offering to provide luxury limousine services without having first registered with the Commission.¹⁰¹ Adventure Party Cruises was not a river rafting company; instead it was a charter sailing business whose owner admitted providing transportation services for potential customers in a black armored car (the REO Speedwagon) to the gambling towns of Black Hawk and Central City. In order to rent the REO Speedwagon, a customer first had to sign an agreement, which stated that “...all payments to Adventure Party Cruises are for the sole purpose of a Sailing Party Cruise” and that “...the REO Speedwagon Party Coach is a complimentary service for the promotion of sailing parties.”¹⁰² The ALJ only dismissed the CPAN because the REO Speedwagon did not fall within the statutory definition of luxury limousine, and he found that Adventure Party Cruises (APC) did not violate the statute charged. Significantly, the ALJ found that:

The evidence presented at hearing may well have supported the imposition of a civil penalty against APC had Staff charged it with violating § 40-10-104, C.R.S. This statute prohibits the for-hire transportation of passengers over the public highways of this state in

¹⁰¹ In 2001, under Title 40, Article 16, C.R.S., luxury limousine service was exempt from regulation by the Commission, except that registration was required. Title 40, Article 16, C.R.S., was repealed in 2011 and was replaced by Title 40, Article 10.1, Part 3, C.R.S., “Motor Carriers of Passengers – Limited Regulation,” § 40-10.1-301, C.R.S., *et seq.* (See House Bill 11-1198.)

¹⁰² Decision No. R01-177, at pages 3 and 4.

intrastate commerce without first obtaining a certificate of public convenience and necessity from the Commission. [Footnote omitted.]

The “incidental transportation” exception to the general rule that compensated intrastate passenger carriers are regulated by the Commission is very narrow. It is applicable only where the transportation at issue is a necessary part of a primary, non-carrier business and is provided in conjunction with that non-carrier business.

APC’s argument that it does not receive compensation for the REO Speedwagon service by virtue of the provisions of the SPC Agreement is also tenuous. This is a “form over substance” argument.... It could just as easily be argued that APC’s customers pay for the REO Speedwagon service and receive a sailing charter for free or that the fee they pay is equally attributable to both services.¹⁰³

137. Finally, the ALJ warned Adventure Party Cruises that it was “at future risk of being cited for violating Colorado statutes and Commission rules relating to compensated intrastate passenger carriage if it continues to provide the REO Speedwagon transportation services in the manner described at the hearing.”¹⁰⁴

138. Respondent’s argument omits any discussion of the paragraphs quoted above. The text quoted by Respondent about river rafting is mere dictum and not the holding of the decision. The *Adventure Party Cruises* decision does not support Respondent’s defense.

139. In the *Amphicar Adventures* case, the owner of amphibious automobiles (Amphicars) applied to the Commission for authority to operate as a common carrier by motor vehicle for hire for the transportation of passengers in call-and-demand sightseeing service between all points within a 2-mile radius of the center of the Town of Grand Lake. He also petitioned for vehicle age waivers of his two amphibious automobiles. In its application, Amphicar Adventures proposed to provide “a unique sightseeing opportunity” to visitors to Grand Lake. It would pick up “passengers from the middle of the town of Grand Lake, driving 1.5 miles to the east boat launch (no faster than 20

¹⁰³ *Id.*, at pages 9 and 10.

¹⁰⁴ *Id.*, at page 10.

miles per hour) – approximately 6 minutes, swim the car for ten minutes, giving a short, scenic tour, then 1.5 miles back to the original pick up location.”¹⁰⁵

140. Amphicar Adventures argued that its proposed service was akin to an off-road scenic charter, pursuant to § 40-10.1-301(12), C.R.S., and offered to file an application for that authority. Trial Staff argued that the Commission lacked jurisdiction because the primary purpose of Amphicar Adventures’ business, and the monetary charge for service, was for the ride on the lake utilizing a vintage novelty ride.¹⁰⁶

141. The ALJ found that the primary purpose of the proposed transportation for compensation by Amphicar Adventures was to provide a scenic tour in a watercraft-vehicle on Grand Lake. “Any transportation of passengers on public highways in the Town of Grand Lake and along the shoreline is incidental to the primary purpose of providing a scenic tour on Grand Lake itself.” The ALJ concluded that the proposed sightseeing service was not within the regulatory jurisdiction of the Commission.

142. The *Amphicar Adventures* decision is distinguishable. Amphicar Adventures and Trial Staff agreed that the Commission would not have jurisdiction over the Amphicars when they were on the water (*i.e.*, on Grand Lake), that the Division of Parks and Wildlife (DPW) licenses watercraft that operate commercially in Colorado, and that Amphicar Adventures would be required to license the Amphicars with the DPW just like a boat. There is no such agreement in the instant proceeding. The passengers of Amphicar Adventures traveled to and from the lake in Amphicars, the same watercraft in which they cruised during the scenic tour on Grand Lake. Respondent’s passengers are transported in 14-passenger vans from Estes Park on its various tours. The round-trip distance traveled by the Amphicars was only 3 miles, for only about 12 minutes.

¹⁰⁵ Decision No. R19-0833, Paragraphs 25 and 26 at page 9.

¹⁰⁶ *Id.*, Paragraphs 17 – 19 and 27, at pages 6, 7, and 9.

On the other hand, Respondent transports passengers in three different tours – all around RMNP on 3-hour and 4-hour tours to various places in RMNP and an 8-hour 106-mile round trip tour over Trial Ridge Road to the Town of Grand Lake.¹⁰⁷ Finally, Amphicar Adventures CPCN application stated clearly that it planned to pick up passengers from the middle of the town of Grand Lake, drive 1.5 miles to the east boat launch (approximately 6 minutes) swim the car on the lake for short, scenic tour, then drive 1.5 miles (another 6 minutes) back to the original pick up location. By contrast, Respondent’s Application in Proceeding No. 20A-0097CP described tours of RMNP that squarely fit within the definition of call-and-demand sightseeing service and completely failed to mention that the proposed passenger transportation was for the alleged primary purpose of providing photography education, information, or assistance to passengers.¹⁰⁸

143. The ALJ has applied the “primary business test” to analyze whether Respondent’s transportation activities are significant enough to require operating authority from the Commission or whether they are merely incidental to the entity’s primary non-transportation business. The ALJ concludes that Estes Park Guided Tours fails the primary business test. Based upon substantial evidence in the record as a whole, the ALJ concludes that Respondent’s transportation activities are not merely incidental to any primary non-transportation business provided by Respondent, such as photography. Instead, Respondent’s transportation operations are significant enough to require operating authority from the Commission.

¹⁰⁷ See Footnote 34 at page 16. The Town of Grand Lake is located west of RMNP, approximately 53 miles one-way from the Estes Park Visitors Center via U.S. Highway 34 over Trial Ridge Road. The round trip distance would be about 106 miles.

¹⁰⁸ See Hearing Exhibit 13, Sections 9, 10, and 11 at pages 3 and 4; Rule 6001(ttt) of the Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6; and Paragraph 43 at page 14, *supra*.

2. Conclusions about Violations of Colorado Law.

144. Based upon substantial evidence in the record as a whole, the ALJ concludes that Estes Park Guided Tours failed to prove by a preponderance of the evidence its defense that its primary business was the non-carrier business of providing photography tours in which the transportation of passengers was merely incidental.

145. Based upon substantial evidence in the record as a whole, the ALJ concludes that Complainants proved in the hearing, by a preponderance of the evidence, that Estes Park Guided Tours has been operating, providing, advertising, or offering to provide passenger transportation services for a charge (*i.e.*, for hire) in Estes Park, in RMNP, and in the area of Grand Lake in the state of Colorado, in violation of Title 40, Article 10.1., specifically in violation of §§ 40-10.1-104 and 40-10.1-201, C.R.S.

146. Substantial evidence in the record as a whole establishes by a preponderance of the evidence that Estes Park Guided Tours has been operating as a common carrier of passengers for hire within the State of Colorado without a valid Certificate issued by the Commission. This conduct of Estes Park Guided Tours violates §§ 40-10.1-104 and 40-10.1-201, C.R.S.

147. Estes Park Guided Tours argues that, if the ALJ determines that has violated Colorado law, it should not be sanctioned. Respondent requests that it be allowed to continue to operate as he has been, because Mr. Legzdins acted in good faith in believing Commission authority was not necessary.¹⁰⁹ The ALJ will deny this unorthodox request for relief, which appears to be a request to allow Respondent to continue to violate Colorado law without any consequences.

¹⁰⁹ Respondent's Statement of Position at pages 7 and 8.

3. Cease and Desist Order.

148. As relief, Complainants seek an order that Estes Park Guided Tours cease and desist from operating as a common carrier of passengers for hire within the State of Colorado without a valid Certificate issued by the Commission. Complainants argue that a cease and desist order is required because Respondent has blatantly and knowingly disregarded Commission regulations for over two years.¹¹⁰

149. Complainants also argue that fines should be imposed on Respondent for its violation of two misdemeanor statutes.¹¹¹ The Amended Complaint never sought fines against Respondent, and Complainants have not previously made this argument seeking fines. The Commission is not a court of general jurisdiction. In complaint cases, the Commission does not hear the prosecution of criminal offenses and lacks the legal authority to convict a respondent of crimes or to impose fines upon conviction of crimes.¹¹²

150. Section 40-10.1-112(2), C.R.S., provides that, when a complaint requests entry of a cease and desist order, “Upon proof of violation, the commission may issue an order to cease and desist ...” Section 40-10.1-112(1), C.R.S., provides that, “[T]he commission, ... after hearing upon notice to the motor carrier and upon proof of violation, may issue an order to cease and desist ... for ... [a] violation of this article [10.1]....”

151. As found previously, Estes Park Guided Tours had adequate notice of the Complaint and of the purpose of the hearing on September 29, 2020.

¹¹⁰ Complainants’ Closing Brief at pages 10-11.

¹¹¹ *Id.* The statutes are §§ 40-10.1-113 and 40-10.1-114 (1), which make providing transportation in intrastate commerce without first obtaining a Commission certificate or permit a crime, punishable upon conviction as a Class 2 misdemeanor.

¹¹² See §§ 40-7-101, and 40-7-109, C.R.S.

152. After a hearing for which Estes Park Guided Tours had received actual, meaningful, and adequate notice, the ALJ has concluded, based upon substantial evidence in the record as a whole, that Estes Park Guided Tours has violated §§ 40-10.1-104 and 40-10.1-201, C.R.S. Based on substantial evidence in the record as a whole proving violations by Estes Park Guided Tours as found in this Decision, the ALJ further finds and concludes that entry of a cease and desist order is appropriate. Estes Park Guided Tours will be ordered to cease and desist from advertising, offering to operate, and operating as a common carrier of passengers for hire within the State of Colorado without a valid Certificate issued by the Commission.

153. Moreover, public policy supports entry of the cease and desist order. The gravity to the travelling public and to consumers of Estes Park Guided Tours' violations, for providing unauthorized services as a common carrier of passengers for hire within the State of Colorado, as required by §§ 40-10.1-104 and 40-10.1-201, C.R.S., is significant and cannot be overstated or overlooked.

154. The heart of the Commission's certificate requirements in statutes and regulations for motor carriers of passenger for hire is the protection of passengers, as consumers of for-hire services, who are entitled to rely upon the belief that the motor carriers they hire for transportation on tours follow Colorado law, as well as applicable Commission's rules. Moreover, there is a significant risk that unlicensed intrastate passenger motor carriers, like Estes Park Guided Tours, can cause harm to passengers from Colorado and other states, including but not limited to misleading passengers about prices and services, overcharging for services actually rendered, damaging personal property, and inflicting personal injury or death in accidents.

155. The Commission performs an important health, safety, and welfare function by assuring that companies that transport passengers for hire in Colorado have valid certificates of authority and adequate insurance protection for passengers. Without a valid Certificate issued by

the Commission for authority to provide passenger transportation for hire, Respondent has avoided the requirements of Colorado law and circumvented the protections to the public afforded by Colorado law and Commission rules.

156. Estes Park Guided Tours is advised, cautioned, and on notice that any violations of the cease and desist order issued by this Decision may result in the filing of CPANs and enforcement actions against it by Commission Staff, and that civil monetary penalties could be assessed by the Commission if Estes Park Guided Tours is found liable for such violations.

157. Estes Park Guided Tours may choose to file another application for call-and-demand sightseeing authority to provide passenger transportation for hire in the state of Colorado.

158. Consistent with the findings, discussion, and conclusions in this Decision, the ALJ will rule in favor of Complainants and will grant the relief requested in the Amended Complaint.

159. The Motion to Grant Relief, filed by Complainants on July 31, 2020, and the Post Hearing Motion for an Order Granting Relief Sought in Complainants' Formal Complaint, filed by Complainants on October 6, 2020, will be denied as moot.

160. In accordance with § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record and exhibits in this proceeding and recommends that the Commission enter the following order.

IV. ORDER

A. The Commission Orders That:

1. The Formal Complaint, filed by Estes Valley Transport, Inc. and Fun Tyme Trolleys, LLC, doing business as Estes Park Trolleys (Complainants), on June 30, 2020, as amended, is granted consistent with the findings, discussion, and conclusions in this Decision.

2. The Motion to Grant Relief Sought in Formal Complaint, filed by Complainants on July 31, 2020, is denied as moot.

3. The Post Hearing Motion for an Order Granting Relief Sought in Complainants' Formal Complaint, filed by Complainants on October 6, 2020, is denied as moot.

4. Estes Park Guided Tours, now known as Estes Park Photo Tours, (Estes Park Guided Tours) is ordered to cease and desist, as of the effective date of this Decision, from operating as a common carrier of passengers for hire, and from providing any and all transportation of passengers for hire by motor carrier, within the State of Colorado without a valid Certificate of Public Convenience and Necessity issued by the Public Utilities Commission of the State of Colorado and without complying with applicable Commission rules.

5. Estes Park Guided Tours is ordered to cease and desist, as of the effective date of this Decision, from advertising in any media and/or offering to operate as a common carrier of passengers for hire within the State of Colorado without a valid and proper Certificate of Public Convenience and Necessity issued by the Public Utilities Commission of the State of Colorado.

6. Proceeding No. 20F-0290CP is closed.

7. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

8. As provided by § 40-6-106, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

- a. If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the recommended decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

- b. If a party seeks to amend, modify, annul, or reverse a basic finding of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge; and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.
9. If exceptions to this Recommended Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

STEVEN H. DENMAN

Administrative Law Judge