

Decision No. R22-0641-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 22A-0215CP

IN THE MATTER OF THE APPLICATION OF GREEN JEEP TOURS, LLC FOR A
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO OPERATE AS A
COMMON CARRIER BY MOTOR VEHICLE FOR HIRE.

PROCEEDING NO. 22A-0310CP

IN THE MATTER OF THE APPLICATION OF WILD SIDE 4 X 4 TOURS LLC, FOR A
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO OPERATE AS A
COMMON CARRIER BY MOTOR VEHICLE FOR HIRE.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
AVIV SEGEV
DENYING WILD SIDE 4 X 4, LLC’S MOTION
TO MODIFY INTERIM DECISION**

Mailed Date: October 25, 2022

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I. STATEMENT**A. Procedural Background Regarding Proceeding No. 22A-0215CP**

1. On May 23, 2022, Green Jeep Tours, LLC (Green Jeep) filed with the Commission a Permanent Authority Application (Green Jeep's Application), through which Green Jeep seeks a Certificate of Public Convenience and Necessity (CPCN) to operate as a common carrier by motor vehicle for hire. This filing commenced Proceeding No. 22A-0215CP.

2. On May 31, 2022, in Proceeding No. 22A-0215CP, the Commission issued its Notice of Applications Filed, wherein the Commission gave notice of Green Jeep's Application and established a 30-day intervention period (Notice dated May 31, 2022).

3. On June 7, 2022, in Proceeding No. 22A-0215CP, Estes Park Charters Corp. and Fun Tyme Trolleys, LLC d/b/a Estes Park Trolleys timely intervened of right.

4. On July 6, 2022, the Commission, via a minute entry, deemed Green Jeep's Application complete and referred Proceeding No. 22A-0215CP to an Administrative Law Judge (ALJ) for disposition.

5. On July 14, 2022, Wild Side 4 X 4 Tours LLC (Wild Side) filed a Motion to Intervene Out of Time and Entry of Appearance of Wild Side 4 X 4 Tours (Wild Side's Motion to Intervene) in Proceeding No. 22A-0215CP.

6. By Interim Decision No. R22-0527-I, issued September 7, 2022, the undersigned ALJ consolidated Proceeding Nos. 22A-0215CP and 22A-0310CP¹ and designated Proceeding No. 22A-0215CP the primary proceeding.

7. On September 16, 2022, Wild Side filed a Motion to modify Interim Decision No. R22-0527-I, through which Wild Side seeks to have Proceeding No. 22A-0215CP be bifurcated

¹ Proceeding No. 22A-0310CP is Wild Side's CPCN Application proceeding which is discussed further below.

and the interventions of Green Jeep and Wild Side in each other's application proceeding be denied (Wild Side's Motion to Bifurcate). Wild Side's Motion to Bifurcate is the subject of this Interim Decision.

8. By Decision No. R22-0589-I, issued September 29, 2022, the ALJ established procedures, scheduled a hearing, and vacated the prehearing conference in this proceeding.

9. On September 30, 2022, Green Jeep filed its Response in Opposition to Motion to Modify Interim Decision.

B. Procedural Background Regarding Proceeding No. 22A-0310CP

10. On June 29, 2022, Wild Side filed a Permanent Authority Application (Wild Side's Application), through which Wild Side seeks a CPCN to operate as a common carrier by motor vehicle for hire. This filing commenced Proceeding No. 22A-0310CP.

11. On July 5, 2022, in Proceeding No. 22A-0310CP, the Commission issued its Notice of Applications Filed, through which the Commission gave notice of Wild Side's Application and established a 30-day intervention period (Notice dated July 5, 2022).

12. On August 3, 2022, in Proceeding No. 22A-0310CP, Green Jeep filed a Petition for Leave to Intervene in Wild Side's Application proceeding (Green Jeep's Petition to Intervene).

13. On August 10, 2022, in Proceeding No. 22A-0310CP, Wild Side filed Wild Side 4 X 4 Tours, LLC's Response to Green Jeep Tours, LLC's Petition for Leave to Intervene, objecting to Green Jeep's Petition to Intervene.

14. On August 17, 2022, the Commission, via a minute entry, deemed Wild Side's Application complete and referred Proceeding No. 22A-0310CP to an ALJ for disposition.

C. Legal Standards

15. Rule 1402 of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1, states that: “[e]ither on its own motion or on the motion of a party, the Commission may consolidate proceedings where the issues are substantially similar, and the rights of the parties will not be prejudiced.”

16. The Commission previously recognized the filing of pending applications close in time seeking to serve overlapping territory as appropriate subjects for consolidation. *See* Decision No. R01-1237-I in Proceeding Nos. 01A-511CP, 01A-488CP, and 01A-503CP-Extension, issued December 6, 2001 (consolidating three common carrier applications involving dissimilar transportation types (taxi versus limousine) in an overlapping geographical area); *see also* ¶ 26 of Decision No. R09-0360-I, issued April 7, 2009, in Proceeding No. 09A-080CP, *citing* Decision No. C05-0291 at ¶¶ 5-7.

17. The legal standard governing pending applications for authority operate as a common carrier by motor vehicle for hire is that of regulated monopoly. *Rocky Mountain Airways v. P.U.C.*, 181 Colo. 170, 509 P.2d 804 (1973). Under the doctrine of regulated monopoly, before a common carrier can be admitted into an area already served by existing carriers, the service of such existing carriers must be shown to be substantially inadequate. *Id.*; *Ephraim Freightways, Inc. v. P.U.C.*, 151 Colo. 596, 380 P.2d 228 (1963).

18. According to *Ashbacker* doctrine, “where two bona fide applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity for a hearing...” *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333, 66 S. Ct. 148, 151 (1945). The *Ashbacker* doctrine has been adopted by the Commission. *See e.g.*, Decision No. C09-0530

(Adopted April 9, 2009; Effective May 18, 2009); Decision No. C00-188 (Adopted February 24, 2000; Effective Mach 1, 2000).

19. The Commission previously consolidated applications proceedings under the *Ashbacker* doctrine pursuant to its own motion. *See, e.g.*, Decision No. C00-188, adopted February 24, 2000, in Proceeding No. 00K-089CP and Decision No. R12-0868, issued July 27, 2012 in Proceeding No. 12A-571CP.

D. Commission Rule 1402

20. It has been found by the ALJ that the authorities sought by Green Jeep and Wild Side partially, but substantially, overlap as to call-and-demand sightseeing service within defined overlapping radii from points in Estes Park, Colorado.² This finding was not contested by the Parties.

21. Wild Side argues that the Green Jeep’s Application is not substantially similar to Wild Side’s Application because “Green Jeep seeks much broader authority under its application” and the services provided by Green Jeep and Wild Side are not substantially similar to those provided by Green Jeep.³ Wild Side argues that its vehicles include photography-related customization which Green Jeep’s vehicles do not include, and that the content and location of Wild Side’s tours are different than Green Jeep’s. The facts that Green Jeep may be seeking broader authority than authority sought by Wild Side and that Wild Side and Green Jeeps *currently* provide different services do not make Green Jeep’s and Wild Side’s Applications (Applications) ‘not substantially similar. Rather, the Applications, as noticed, are substantially similar because they both entail the provision of the same service (call-and-demand sightseeing) in a substantially

² *See* Interim Decision No. R22-0527-I, issued September 7, 2022.

³ Wild Side’s Motion to Bifurcate at p.8.

overlapping geographical area. As noted above, the Commission has previously consolidated application proceedings similar to the one at hand, including wherein the type of transportation to be used under the relevant applications was different.⁴

22. Wild Side also argues that the consolidation of Proceeding Nos. 22A-0215CP and 22A-0310CP prejudices Wild Side because "... the issues in Green Jeep's application are significantly broader, and because two intervening Common Carriers oppose Green Jeep's application but not Wild Side's..." First, even if Proceeding No. 22A-0215CP was to be bifurcated and Green Jeep was to be prohibited from intervening on Wild Side's Application proceeding,⁵ the mere timing of the Commission's approval of either Green Jeep's Application or Wild Side's Application could affect whether, and/or to what extent, the other Application could be approved. In other words, the grant of one of the Applications, without hearings on the merits as to both Applications, could deprive the loser of an opportunity for a hearing to which the loser was otherwise entitled. This is the very scenario *Ashbacker* sought to avoid by consolidation. Second, the mere requirement to litigate a case on the merits does not, on its own, prejudice a party. Third, the ALJ is not convinced that Green Jeep's opposed Application being broader than Wild Side's would have an adverse material effect on Wild Side's ability to show a substantial inadequacy as to the service *it* seeks to provide.

⁴ See Decision No. R01-1237-I in Docket Nos. 01A-511CP, 01A-488CP, and 01A-503CP-Extension, issued December 6, 2001 (consolidating three common carrier applications dockets involving dissimilar transportation types (taxi versus limousine) in an overlapping territory).

⁵ In Wild Side's Motion to Bifurcate, Wild Side also seeks, upon the bifurcation of this proceeding, to have Green Jeep's intervention in Wild Side's Application proceeding be denied because Green Jeep is not currently a common carrier, and its pecuniary interests would not be affected by Wild Side's Application. Wild Side's Motion to Bifurcate at p.10.

E. Ashbacker Doctrine

23. As noticed, Green Jeep seeks to operate as a common carrier by motor vehicle for hire for the transportation of passengers in:

(1) Sightseeing service, on call and demand, between all points within the area comprised of (a) the 20 mile radius of the intersection of Moraine and Elkhorn, Estes Park, Colorado, (b) all of Rocky Mountain National Park beyond the 20 mile radius of the intersection of [*sic*] Moraine and Elkhorn, Estes Park, and (c) all points within the 10 mile area beyond the boundary of Rocky Mountain National Park beyond the 20 mile radius of the intersection of Moraine and Elkhorn, Estes Park, Colorado...

RESTRICTIONS:

1. Items 1, 2 and 5 are restricted to the use of vehicles with a rated seating capacity of 8 passengers or more including the driver;
2. Items 1 and 2 are restricted to the use of vehicles with a rated seating capacity of 15 passengers or less including the driver...

24. As noticed, Wild Side seeks 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 20-mile radius of the intersection of West Elkhorn Avenue and Moraine Avenue in Estes Park, Colorado. This application is restricted: (a) to providing transportation services in customized Wild Side 4 x 4 tour vehicles, and (b) to using vehicles with a seating capacity of 15 passengers or less, including the driver.

25. To demonstrate that Green Jeep’s Application may substantially affect its pecuniary or tangible interests, Wild Side stated in its Motion to Intervene:

Wild State has a specific tangible and pecuniary interest in ensuring that its business interests are protected in light of the overlap Green Jeep claims exists between its services and Wild Side’s. Wild Side has a direct and substantial pecuniary interest to the extent Green Jeep will seek to preclude or limit Wild Side’s transportation services as a result of this CPCN Application.

26. To demonstrate that Wild Side’s Application may substantially affect its pecuniary or tangible interests, Green Jeep stated in its Petition to Intervene: “[Wild Side] seeks to provide

service in a territory where Green Jeep stands ready, willing, and able to provide adequate service and is providing adequate service in the public interest at this time.”

27. Wild Side contends that the *Ashbacker* doctrine is inapplicable because the services of Green Jeep and Wild Side are not mutually exclusive.⁶ The ALJ disagrees. The Applications are mutually to the extent they substantially overlap.⁷

28. Wild Side explains that “[s]ightseeing tours are much different from competing broadcasting stations which would physically interfere with each other’s ability to operate. Indeed, it is hard to see how sightseeing tours are a ‘utility’ which should be strictly regulated under the doctrine of regulated monopoly.”⁸ Whether or not, or to what extent, overlapping sightseeing services resemble competing broadcasting stations is of no consequence in this matter. The fact of the matter is that the Applications are governed by the doctrine of regulated monopoly and the principles of *Ashbacker* apply.

29. In as much as Wild Side argues that the proposed restriction noted in Wild Side’s Application for it to use only “customized Wild Side 4 x 4 tour vehicles”⁹ renders the Applications mutually exclusive,¹⁰ the ALJ disagrees. To be granted, a CPCN application must be clear, understandable, and administratively enforceable. Both the authority and any restrictions on that authority must be unambiguous and must be contained wholly within the CPCN. Both must be worded so that a person will know from reading the CPCN, without having to resort to another document, the exact extent of the authority and of each restriction. Clarity is essential because the

⁶ Wild Side’s Motion to Bifurcate at p.7.

⁷ See Decision No. C00-188 at p.2.

⁸ *Id.*

⁹ Notice dated July 5, 2022 at p.2.

¹⁰ This argument, while not asserted in so many words in Wild Side’s Motion to Bifurcate, could possibly be deduced from the same.

scope of a CPCN must be found within the four corners of the authority, which is the touchstone by which one determines whether the operation of a common carrier is within the scope of its Commission-granted authority. The restriction contained in Wild Side's Application to use "customized Wild Side 4 x 4 tour vehicles," is ambiguous and not administratively enforceable. It is not clear the extent to which this could overlap with equipment used by Green Jeep or an incumbent provider. This proposed restriction would be best addressed in a hearing.

30. Wild Side also argues that this matter is distinguishable from the one addressed in *Ashbacher* because this case does not entail a "race to the finish."¹¹ The ALJ disagrees. As noted in paragraph 22 of this Interim Decision, but for the consolidation, the timing of a Commission's decision on either Application could deprive the loser of an opportunity for a hearing to which the loser would have otherwise been entitled.

F. Intervention

31. Wild Side argues that Green Jeep and Wild Side should be disallowed from intervening in each other's application proceedings because neither party is currently a common carrier with a pecuniary interest in the competing Application.¹²

32. Given the above discussion, this Proceeding will remain consolidated. As such, Green Jeep and Wild Side will have the opportunity to participate in each other's application proceedings. This renders moot Wild Side's request to deny Green Jeep's and Wild Side's interventions in each other's application proceedings.

¹¹ Wild Side's Motion to Bifurcate at p.7.

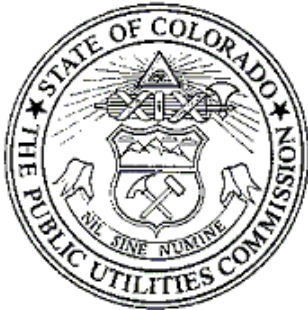
¹² *Supra*, Note 3. It is worth noting that Wild Side made a contradictory argument in Wild Side's Motion to Intervene when it stated that Wild Side has a specific tangible and pecuniary interest in ensuring that its business interests are protected in light of the overlap Green Jeep claims exists between its services and Wild Side's." Wild Side's Motion to Intervene at p.3.

II. ORDER

A. It Is Ordered That:

1. Wild Side 4 x 4 Tours, LLC's Motion to Modify Interim Decision No. R22-0527 is denied.
2. This Decision shall be effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

AVIV SEGEV

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director