

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 23A-0078CP

IN THE MATTER OF THE APPLICATION OF PURPLE MOUNTAIN TOUR COMPANY 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
MELODY MIRBABA
ADDRESSING OUTSTANDING MOTIONS AND
VACATING SEPTEMBER 11 AND 12, 2023
HEARING DATES**

Mailed Date: September 8, 2023

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I. STATEMENT AND PROCEDURAL HISTORY

A. Summary

1. This Decision denies Green Jeep Tours LLC’s (Green Jeep) Motion to Dismiss Application Due to Defective Notice (Motion to Dismiss) filed on September 1, 2023; grants the “Joint Motion for Approval of Restrictive Andmentment [*sic*], and Joint Notice of Conditional

Withdrawal of Interventions” (Joint Motion) filed on August 29, 2023; vacates the September 11 and 12, 2023 evidentiary hearing dates; maintains the September 14 and 18, 2023 evidentiary hearing dates; defers ruling on Purple Mountain Tour Company LLC’s (Purple Mountain) request for attorney fees for responding to Green Jeep’s Motion to Dismiss; and sets a deadline for Green Jeep to respond to Purple Mountain’s request for attorney fees.

B. Procedural History¹

2. On February 15, 2023, Purple Mountain initiated this matter by filing an Application for Permanent Authority to Operate as a Common Carrier by Motor Vehicle for Hire (Application) with an attachment, which was amended on March 14, 2023.

3. On March 29, 2023, the Commission deemed the Application complete and referred the matter to an Administrative Law Judge (ALJ) by minute entry.

4. The following entities are interveners in this Proceeding: Estes Park Charters Corp. (Estes Park Charters); Fun Tyme Trolleys, LLC, doing business as Estes Park Trolleys (Estes Park Trolleys); Green Jeep; Home James Transportation Services, LTD (Home James); Alpine Taxi/Limo, Inc., (Alpine Taxi); AEX, Inc., (AEX); and San Miguel Mountain Ventures, LLC (San Miguel).²

5. After holding a duly noticed prehearing conference, the ALJ scheduled a hybrid evidentiary hearing on the Amended Application for September 11, 12, 14, and 18, 2023 and established procedural deadlines to accommodate that hearing.³

¹ Only the procedural history necessary to understand this Decision is included.

² Wild Side 4 x 4 Tours LLC was an intervener but withdrew its intervention via its Notice of Withdrawal of Intervention filed on July 31, 2023.

³ Decision Nos. R23-0260-I at 21 and. R23-0306-I at 3-6; 7-11.

6. On August 29, 2023, Purple Mountain, and Alpine Taxi, AEX, San Miguel, Home James, Estes Park Charters, and Estes Park Trolleys (Withdrawing Interveners) filed the Joint Motion.

7. Also on August 29, 2023, the ALJ shortened the response time to the Joint Motion; conditionally granted the Joint Motion and modified the hearing schedule to limit the hearing to September 14 and 18, 2023, provided that Green Jeep makes no filing objecting to the Joint Motion by September 1, 2023.⁴

8. On September 1, 2023, Green Jeep filed a Response in Opposition to Joint Motion for Approval of Restrictive Amendment and Joint Notice of Conditional Withdrawal of Interventions (Response to Joint Motion) and its Motion to Dismiss. The grounds for each were essentially the same, that is, the address provided for the authority is invalid and does not exist.

9. Also on September 1, 2023, Green Jeep filed a Motion to Strike Late Filed Witness and Exhibit Lists (Motion to Strike).

10. On September 5, 2023, the ALJ shortened the response time to the Motion to Dismiss to 12:00 p.m. on September 7, 2023, and denied Green Jeep's Motion to Strike.⁵

11. On September 6, 2023, the Withdrawing Interveners filed a Response to Motion to Dismiss (Withdrawing Interveners' Response).

12. On September 7, 2023, Purple Mountain filed a Response to Green Jeep Tours, LLC's Motion to Dismiss Application Due to Defective Notice (Response to Motion to Dismiss), before the 12:00 p.m. deadline.

⁴ Decision No. R23-0573-I (mailed August 29, 2023).

⁵ Decision No. R23-0585-I (mailed September 5, 2023).

II. DISCUSSION, FINDINGS, AND CONCLUSIONS

A. Arguments

13. The grounds for Green Jeep's Response to the Joint Motion and its Motion to Dismiss are essentially the same, that is, the address provided for the authority (24401 Co Rd 390, Granite, Colorado) is invalid and does not exist.⁶ In support, Green Jeep states that its manager was unable to plot the proposed service territory on a map of Colorado, and that the United States Postal Service (USPS) informed her that 24401 Co Rd 390, Granite, Colorado is not a valid address.⁷ Green Jeep also states that its manager was told by the Chaffee County Assessor's Office that the address is not on the Assessor's list of addresses.⁸

14. Green Jeep states that the "apparently bogus" address was identified in the Commission's Notice of the Application, and goes to the heart of the authority sought.⁹ It argues that because the address could not be located by USPS or the Chaffee County Assessor, that the Commission's notice fails to give the public sufficient notice of the scope of the Application, and therefore fails to provide procedural due process.¹⁰ It also argues that without a "valid starting point for this application" the Commission lacks jurisdiction to grant any authority whatsoever to Purple Mountain and thus, the Application should be dismissed.¹¹

15. As to its attempts to confer with Purple Mountain on the Motion to Dismiss, Green Jeep asserts that its counsel, left a message for Purple Mountain's counsel on August 31, 2023, and when no return call was received, that Green Jeep's counsel emailed Purple Mountain's counsel

⁶ Response to Joint Motion at 2; Motion to Dismiss at 1-2.

⁷ Motion to Dismiss at 1.

⁸ *Id.*

⁹ *Id.* at 2.

¹⁰ *Id.*

¹¹ *Id.* at 2-3.

“regarding the defective notice and the potential consequences of such defective notice on the course of the application process.”¹² Green Jeep states that Purple Mountain responded that it opposes the Motion.¹³ Green Jeep’s counsel responded that he is willing to discuss a potential remedy for the defective notice, and that he waited to file the Motion to Dismiss until 12:00 noon on September 1, 2023 to give Purple Mountain’s counsel an opportunity to respond, which counsel did not do.¹⁴

16. Purple Mountain provides significantly more detail on Green Jeep’s conferral on the Motion to Dismiss, along with copies of emails between counsel. Specifically, Purple Mountain explains that Green Jeep’s counsel called counsel on August 31, 2023 at 2:50 p.m. to speak with an associate attorney, and that at 3:21 p.m., Green Jeep’s counsel sent an email to the same associate attorney stating that “unless I hear from you today before 5:00 pm, I will conclude that you have no objection and file the motion as unopposed.”¹⁵ That same day, the associate attorney for whom Green Jeep’s counsel left a message called him back, and left him a message.¹⁶ The associate attorney responded to Green Jeep’s counsel’s email, copying counsel of record for Purple Mountain, and asking Green Jeep’s counsel for the basis for the Motion to Dismiss and authority for the Motion.¹⁷ The associate attorney stated that based on Green Jeep’s ongoing participation in the matter since the prehearing conference, that Purple Mountain would object to a motion to dismiss and that “[i]f you plan on filing today after giving us less than 2 ½ hours notice, please file your motion as opposed.”¹⁸ At 4:23 p.m. that same day, Green Jeep’s counsel responded via email

¹² *Id.* at 3.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Response to Motion to Dismiss at 1 quoting Exhibit 1 to Response to Motion to Dismiss at 3.

¹⁶ Exhibit 1 to Response to Motion to Dismiss at 2.

¹⁷ *Id.*

¹⁸ *Id.*

that USPS and the County Assessor could not locate the address listed as the center of the radius for the authority, which goes the heart of the Application and renders it vulnerable to a jurisdictional attack.¹⁹ He also states that there is a way to fix this issue, to call him if interested, and that he will wait for a call before filing the Motion to Dismiss.²⁰ Purple Mountain notes that at no point did Green Jeep's counsel attempt to confer with counsel of record for Purple Mountain, and that instead, Green Jeep's counsel continually removed or "left off" such counsel on the emails with the associate attorney at counsel of record's firm regarding conferral.²¹

17. Purple Mountain argues that Green Jeep's conferral, which provided less than 24 hours to confer on a motion that would dismiss the entire Application is not a good faith attempt to confer as required by Rule 1400 of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1.²² Purple Mountain also states that its counsel has continued to contact Green Jeep's counsel by telephone and email since the Motion was filed, but that Green Jeep's counsel has not responded.

18. As to the substance of the Motion to Dismiss, Purple Mountain explains that Green Jeep incorrectly asserts that the address on the Application is not valid, and that in fact, the address is valid and searchable on Bing, Mapquest, Google, and Map Developers (<https://www.mapdevelopers.com/draw-circle-tool.php>).²³ Purple Mountain provides an exhibit showing the address on the Application -- 24401 Co Rd 390, Granite, Colorado -- located through

¹⁹ *Id.*

²⁰ *Id.*

²¹ Response to Motion to Dismiss at fn. 1.

²² Response to Motion to Dismiss at 2.

²³ *Id.* Purple Mountain notes that Google search results show a Buena Vista, CO and a Granite, CO address, and that the relevant address is the Granite address. It also explains that the address is also known as "Clear Creek Ranch," and that searching those terms on Google also results in locating the address *Id.* at 2 and fn. 2. *See* Exhibit 2.

those web search engines.²⁴ Purple Mountain also explains that USPS.com reveals the address if one types “County Rd” rather than the abbreviated “Co Rd” and provides an exhibit demonstrating this.²⁵ Finally, Purple Mountain explains that the Chafee County Assessor likely could not locate the address in its records is because the address is located in Lake County.²⁶

19. Because the address in the Application is valid, Purple Mountain submits that the Commission has jurisdiction to grant the Application. Purple Mountain also responds to Green Jeep’s due process arguments, assuming *arguendo*, that the public notice was deficient.²⁷ Among those arguments, Purple Mountain points out that Green Jeep not only received adequate notice of the scope of the Application, but responded to it by intervening, participating in the prehearing conference, and filing documents, including witness and exhibit disclosures.²⁸

20. Based on the timing of the Motion to Dismiss, Green Jeep’s lack of reasonable conferral, the lack of any basis in fact to support the Motion to Dismiss, and the likelihood of resolving this matter before expensive motions practice, Purple Mountain asserts that Green Jeep’s Motion is frivolous and groundless, per § 13-17-102, and the Commission should award Purple Mountain its attorney fees for the time and resources to respond (on an emergency basis) to the Motion, as permitted by Rule 1405(g), 4 CCR 723-1.²⁹

21. The Withdrawing Interveners submit that the even if the Commission determines that there is insufficient public notice, that the case will likely be dismissed, and the Joint Motion therefore would become a nullity.³⁰ They assert that Green Jeep’s Response to the Joint Motion

²⁴ Exhibit 2 to Response to Motion to Dismiss at 1-5.

²⁵ Response to Motion to Dismiss at 3; Exhibit 5 to Response to Motion to Dismiss.

²⁶ Response to Motion to Dismiss at 3.

²⁷ *Id.* at 3-4.

²⁸ *Id.* at 4.

²⁹ *Id.* at 5.

³⁰ Withdrawing Interveners’ Response to Motion to Dismiss at 2.

does not address the restrictive amendment itself, and that standing on its own, the Joint Motion should be granted as it reduces the authority sought, removes parties from the case, promotes judicial economy, and preserves parties' resources.³¹

B. Findings, Analysis, and Conclusions

22. For the reasons stated in Purple Mountain's Response to Motion to Dismiss, the ALJ denies the Motion to Dismiss. Purple Mountain provided ample and credible information demonstrating that the address in the Application is locatable on a map (as demonstrated through at least four search engines) and that it is a valid address (as demonstrated through USPS.com) and.³² Purple Mountain also explained that the address is located in Lake County, not Chafee County, which would render the Chafee County Assessor's lack of address information irrelevant.³³ Taken together, Purple Mountain has demonstrated that Green Jeep's asserted factual basis for the Motion lacks merit and is simply incorrect. It also appears that some additional due diligence prior to filing the Motion to Dismiss could have revealed this. Indeed, as explained below, a proper conferral with Purple Mountain may have avoided the Motion, and the unnecessary expense and resource expenditures it caused.

23. The ALJ finds that Green Jeep's conferral with Purple Mountain on the Motion to Dismiss falls short of amounting to a good faith attempt to confer. To start, the ALJ takes issue with Green Jeep's counsel's conferral statement that unless he hears from Purple Mountain about the Motion within just over an hour and a half, that he would assume that counsel does not object

³¹ *Id.* at 3.

³² Response to Motion to Dismiss at 2-3; Exhibits 2, 4 and 5 to Response to Motion to Dismiss.

³³ Response to Motion to Dismiss at 3. What is more, even if the address is in Chafee County, whether the Chafee County Assessor can locate the address is in no way dispositive of whether the address exists, or is locatable on a map.

to the Motion, and will file the motion as unopposed.³⁴ The only time that counsel should represent that a motion is unopposed is if the other parties to the proceeding have *explicitly* stated that the motion is unopposed. Otherwise, the representation to the tribunal may not be accurate, and would instead amount to a representation of counsel's assumption about the lack of a response.

24. The ALJ agrees that in the circumstances presented here, providing less than 24 hours for Purple Mountain to respond to a motion that would dismiss the entire Proceeding is plainly insufficient. This is borne out by the fact that Purple Mountain's Response provides: (1) four different web search engines that locate the subject address on a map; (2) that the address is locatable on USPS.com by spelling out "County" rather than using the abbreviation; and (3) that the address is in Lake County, not Chaffee County.³⁵ Had Green Jeep conferred in good faith by giving Purple Mountain a reasonable opportunity to share such information with Green Jeep, perhaps no Motion to Dismiss would have been filed. This is precisely the type of issue that the ALJ would expect parties to be able to resolve through an appropriate and truly good faith attempt to confer.

25. In a prior Decision, the ALJ reminded Green Jeep's counsel of the obligation to confer with parties, as has been required for years per Rule 1400, 4 CCR 723-1.³⁶ This should not have been necessary, particularly given counsel's longstanding practice before the Commission.³⁷ Rule 1400(b) explicitly requires that moving counsel "shall make a reasonable good faith effort to confer about the motion." Despite the ALJ's recent reminder of this requirement, Green Jeep's

³⁴ Exhibit 2 to Response to Motion to Dismiss at 3.

³⁵ Exhibits 2 and 5 to Response to Motion to Dismiss.

³⁶ Decision No. R23-0577-I (mailed August 30, 2023) at 6.

³⁷ See Motion to Modify Interim Decision NO. R23-0260-I filed August 11, 2023 at 4 (noting that Mr. Bara has practiced for "over 45 years" before the Commission).

counsel's attempt to confer on the Motion to Dismiss amounts to no more than a "check the box" effort, not a reasonable good faith attempt to confer on the Motion to Dismiss.

26. Given that the Motion's factual basis is lacking, the ALJ will continue to consider Purple Mountain's request for attorney fees, including the assertion that the Motion to Dismiss is frivolous. Before deciding that issue, Green Jeep will be given the opportunity to file a response to Purple Mountain's request for attorney fees.

27. Turning to the Joint Motion, for the reasons discussed in Interim Decision No. R23-0573-I, the ALJ grants the Joint Motion. Given the confusion as to the address in the Application, the ALJ will amend the Application and authority sought as requested in the Joint Motion, but will modify the address reference from "24401 Co Rd 390, Granite, Colorado" to "24401 County Road 390, Granite, Colorado."

28. As the Joint Motion is granted, the Withdrawing Intervenors are no longer parties to this Proceeding and are not expected to appear at the scheduled evidentiary hearing. For similar reasons, the ALJ finds that a four-day hearing is not necessary since there are now only two parties presenting evidence. As such, the ALJ vacates the September 11 and 12, 2023 hearing dates. The ALJ will maintain two days for the hearing in an abundance of caution. As such, the September 14 and 18, 2023 evidentiary hearing dates will proceed as scheduled.

III. ORDER

A. It Is Ordered That:

1. Green Jeep Tours LLC's (Green Jeep) Motion to Dismiss Application Due to Defective Notice (Motion to Dismiss) filed on September 1, 2023 is denied consistent with the above discussion.

2. The “Joint Motion for Approval of Restrictive Amendment [*sic*], and Joint Notice of Conditional Withdrawal of Interventions” (Joint Motion) filed on August 29, 2023 is granted. The authority sought by the Application is amended as set forth in Decision No. R23-0573-I, ¶ 12, with the modification discussed in ¶ 27 above.

3. Because the Joint Motion is granted, the Interventions filed by Estes Park Charters Corp.; Fun Tyme Trolleys, LLC, doing business as Estes Park Trolleys; Home James Transportation Services, LTD.; Alpine Taxi/Limo, Inc.; AEX, Inc.; and San Miguel Mountain Ventures, LLC are deemed withdrawn and they are no longer parties to this Proceeding. As a result, the remaining parties are Purple Mountain Tour Company LLC and Green Jeep.

4. The September 11 and 12, 2023 evidentiary hearing dates are vacated.

5. The remaining two evidentiary hearing dates, September 14 and 18, 2023, will proceed as scheduled.

6. If Green Jeep wishes to respond to Purple Mountain’s request for attorney fees for responding to Green Jeep’s Motion to Dismiss, it must file a response to that request on or by close of business on September 22, 2023.

7. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads 'Rebecca E. White'.

Rebecca E. White,
Director