

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19A-0343CP

IN THE MATTER OF THE APPLICATION OF STRAWBERRY PARK HOT SPRINGS SHUTTLE LLC FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO OPERATE AS A COMMON CARRIER BY MOTOR VEHICLE FOR HIRE.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
ROBERT I. GARVEY
DENYING APPLICATION**

Mailed Date: November 4, 2019

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I. STATEMENT

1. On June 18, 2019, Strawberry Park Hot Springs Shuttle LLC (Applicant or Strawberry Park) filed an Application seeking a Certificate of Public Convenience and Necessity to Operate as a Common Carrier of Passengers by Motor Vehicle for Hire (Application) with the Colorado Public Utilities Commission (Commission).

2. On the same date, the Commission provided public notice of the Amended Application by publishing a summary of the same in its Notice of Applications Filed:

For authority to operate as a common carrier by motor vehicle for hire for the transportation of

passengers in call-and-demand shuttle service

between all points in Routt County, State of Colorado.

3. On July 2, 2019, Alpine Taxi/Limo, Inc., doing business as Alpine or Go Alpine (Go Alpine) filed its Notice of Intervention by Right and Alternative Petition for Intervention and Entry of Appearance through its counsel, Mark Valentine. This filing attached Commission Authority No. 26246 held by Go Alpine.

4. On July 16, 2019, Sweet Pea Tours SBS, Inc., doing business as Sweet Pea Tours (Sweet Pea) filed its Petition for Leave to Intervene through Jorge Espinosa. This filing did not identify Mr. Espinosa as an owner or member, nor did it include a Commission authority held by Sweet Pea.

5. On July 17, 2019, Hot Springs Shuttle LLC, doing business as the Hot Springs Shuttle (Hot Springs) filed its Notice of Intervention by Right and Entry of Appearance through Daniel W. White. Mr. White is identified as the owner in the filing. This filing attached Commission Authority No. 55857 held by Hot Springs.

6. On July 25, 2019, the Commission deemed the application complete and referred it to the undersigned Administrative Law Judge (ALJ) for disposition.

7. On September 10, 2019, a prehearing conference was held and the parties agreed to a procedural schedule.

8. On October 17, 2019, the Applicant filed an Amendment to its application.

9. On October 18, 2019, Hot Springs filed its Motion to Dismiss and Motion in *Limine*.

10. On October 18, 2019, a status conference was held. At the status conference the ALJ deferred ruling on the Amendment and the Motion to Dismiss and Motion in *Limine* until the start of the evidentiary hearing scheduled for October 22, 2019.

11. On October 22, 2019 an evidentiary hearing was held in Steamboat Springs, Colorado. At the start of the hearing the Amendment was accepted and based upon the acceptance of the Amendment, Go Alpine withdrew its intervention. The Motion to Dismiss and the Motion in *Limine* filed by Hot Springs on October 18, 2019 were denied. Prior to the start of the hearing Sweet Pea made an oral motion to dismiss the proceeding claiming that the application filed by Applicant was incomplete. Sweet Pea's oral motion was denied.

12. During the course of the hearing, testimony was received from Mr. Abdallah Batayneh and Mr. Ben Beall for the Applicant. Hearing Exhibits 1 through 3, 7, 10 through 14, and 17 were offered and admitted into the evidentiary record, and Hearing Exhibits 9 and 15 were offered but not admitted. At the conclusion of the Applicant's presentation, the Intervenors moved to dismiss the proceeding based upon a failure of the Applicant to present any evidence in support of managerial or substantial inadequacy of the incumbent carrier pursuant to Colorado Rule of Civil Procedure (Colo. R. Civ. P.) 41(b)(1). The undersigned ALJ granted the motion to dismiss. This recommended decision memorializes that ruling

II. FINDINGS OF FACT

13. The Applicant Abdallah Batayneh is the owner of Strawberry Park.
14. Mr. Batayneh is currently employed at the Strawberry Park Hot Springs.
15. Mr. Batayneh has worked at the Strawberry Park Hot Springs for two years.

16. Mr. Batayneh does many things at the Strawberry Park Hot Springs. He works in the parking lot, maintains the springs, and also trains new employees.

17. The road to the Strawberry Park Hot Springs is dangerous and requires vehicles with tire chains or four wheel drive vehicles in snowy conditions.

18. Sweet Pea and Hot Springs currently provide shuttle service in Route County to the Strawberry Park Hot Springs.

19. Mr. Ben Beall is the president of the Strawberry Group and has lived in Steamboat Springs, Colorado since 1977.

20. Mr. Beall was a Route County Commissioner from 1993 to 2001.

21. Mr. Beall believes that more and better transportation service needs to be provided to the Strawberry Park Hot Springs.

22. The parking lot at the Strawberry Park Hot Springs is able to accommodate 50 vehicles.

23. Previously, cars had been allowed to park on the road to the Strawberry Park Hot Springs. Parking is no longer allowed on this road.

24. Mr. Beall is part of a group of community members that have banded together to address various problems around Steamboat Springs including the parking issue at Strawberry Park Hot Springs. This group has not contacted the current providers of shuttle service.

III. ISSUE

25. Is there sufficient evidence to grant the application for a certificate of public convenience and necessity filed by the Applicant?

IV. APPLICABLE LAW

A. Burden of Proof

26. Applicant, as the proponent of an order, bears the burden of proof by a preponderance of the evidence. §§ 13-25-127(1) and 24-4-205(7), C.R.S.; Rule 1500 of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1. The preponderance standard requires the finder of fact to determine whether the existence of a contested fact is more probable than its non-existence. *Swain v. Colorado Department of Revenue*, 717 P.2d 507, 508 (Colo. App. 1985). A party has met this burden of proof when the evidence, on the whole and however slightly, tips in favor of that party.

27. Although the preponderance standard applies, the evidence must be substantial. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . . it must be enough 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 one of fact for the jury." *City of Boulder v. Public Utils. Comm'n*, 996 P.2d 1270, 1278 (Colo. 2000) (internal citation omitted).

B. Legal Standards

28. The doctrine of regulated monopoly controls in determining whether to grant a certificate to operate the service requested here. § 40-10.1-203, C.R.S. Regulated monopoly is based on the principle that fewer carriers who can make a reasonable return will give the public safe, efficient, and more economical service, and that increasing the number of providers ultimately results in a deterioration of service and higher rates for the public. *See Archibald v. Commission*, 171 P.2d 421, 423 (Colo. 1946); *see e.g., Morey v. Pub. Utils. Comm'n.*, 629 P.2d 1061, 1066-67 (Colo. 1981). This principle is the guiding force behind the protections given to

existing carriers; an incumbent carrier is only entitled to protection from new competition if it provides adequate service to the public. *Ephraim Freightways, Inc. v. Pub. Utils. Comm'n.*, 380 P.2d 228, 231 (Colo. 1963).

29. To be granted the requested authority, Applicant must show: (1) that it is fit to conduct the proposed service; (2) that the public needs the proposed service; and (3) the current service in the area is substantially inadequate.

30. Applicant carries the burden to establish its “fitness,” both financially and operationally, to conduct the service it proposes. Although the Commission has never promulgated rules or regulations quantifying a financial fitness standard, it is generally agreed that the Applicant must make some showing, however minimal, that it either has or has access to financial resources that will enable it to implement the proposed service. Fitness must be evaluated on a case-by-case basis upon the unique circumstances of each applicant and the proposed service. *See e.g.*, Decision No. C09-0207, issued February 27, 2009, Consolidated Proceeding Nos. 08A-241CP, 08A-283CP, 08A-284CP-Extension, and 08A-300CP.

31. In general, operational fitness encompasses a consideration of whether the applicant has the equipment, personnel, facilities, and the managerial experience to conduct for-hire passenger carrier operations. Whether the applicant is willing and able to comply with applicable public utilities laws also bears upon the question of fitness. *See, Thacker Brothers Transportation v Public Utilities Commission*, 543 P.2d 719, 721 (Colo. 1975). The Commission

has provided the following guidelines for the evidentiary factors that are relevant to the fitness inquiry:

- minimum efficient scale, that is, whether a minimum size of operation is required and, if such a minimum does exist, conceptually what is the approximate magnitude for markets at issue;
- credit worthiness and access to capital;
- credit history and assessment of financial health over the near future;
- capital structure and current cash balances;
- managerial competence and experience;
- fixed physical facilities such as office space and maintenance garages, as appropriate;
- appropriate licenses and equipment necessary to operate a radio dispatch system; and
- vehicles of appropriate type.

Decision No. C08-0933, at ¶ 7, issued September 4, 2008 in Consolidated Proceeding Nos. 08A-241CP (Union Taxi), 08A-281CP-Extension (Colorado Cab Company, LLC), 08A-283CP (Castle Rock Taxi Cab Company, LLC), 08A-284CP-Extension (Freedom Cab, Inc.), and 08A-300CP (Flatiron Cab Corporation).

32. The number of witnesses testifying for a given proposition does not force the Commission to reach a particular result on that issue. *RAM Broadcasting v. Pub. Utils. Comm'n*, 702 P.2d 746, 750 (Colo. 1985).

33. Under the doctrine of regulated monopoly, an applicant for common carrier authority carries a heavy burden to prove both that:

The present or future public convenience and necessity requires or will require its service. § 40-10-104, C.R.S.; see, § 40-10-105(1), C.R.S., and *Denver and Rio Grande Western Railroad v. Pub. Utils. Comm'n*, 351 P.2d 278, 280 (Colo. 1960); and

The service of existing certified carriers within the proposed service area is substantially inadequate. *RAM Broadcasting v. Pub. Utils Comm'n*, 702 P.2d

746, 750 (Colo. 1985); *Rocky Mountain Airways, Inc. v. Pub. Utils. Comm'n.*, 509 P.2d 804, 805 (Colo. 1973).

34. These two elements are closely related. Indeed, the adequacy of the incumbent's service is integral to the question of whether the public needs the proposed additional service. *Ephraim*, at 231. If the existing service is adequate, the Commission cannot find that the public convenience and necessity requires the addition of a carrier. *Yellow Cab Cooperative Association v. Pub. Utils. Comm'n.*, 869 P.2d 545, 548-49 (Colo. 1994).

35. Whether the incumbent carrier's service is substantially inadequate is a question of fact that the Commission must determine. *RAM Broadcasting*, at 751; *Durango Transportation, Inc. v. Pub. Utils. Comm'n.*, 122 P.3d 244, 247 (Colo. 2005). Thus, the question necessarily must be answered on a case-by-case basis upon the unique facts of the given case. Substantially inadequate service is shown by evidence of "a general pattern of inadequate service" on the part of the incumbent carrier. *Durango Transportation*, at 247-48; *Ephraim*, at 232. Substantial inadequacy can also be demonstrated with evidence that the incumbent carrier is not ready, willing, and able at all times to provide the requested service. *Durango Transportation*, at 247-48. However, the incumbent carrier is not held to a standard of perfection. *Ephraim* at 232. Indeed, legitimate complaints are expected to arise against any common carrier that provides service to a large number of customers. *RAM Broadcasting*, at 750.

36. Substantial inadequacy requires more than a showing that there is enough business to warrant more than one certified carrier. *Ephraim*, at 231. Likewise, substantial inadequacy is not shown through "expressions of mere opinion, preference, and desire and willingness to use the services of [the applicant] over the services of" an incumbent carrier. *Pub. Utils. Comm'n. v. Weicker Transfer & Storage Co.*, 451 P.2d 448, 449 (Colo. 1969).

V. DISCUSSION**A. Operational Fitness**

37. The Applicant testified that he has managed people at his job at the Strawberry Park Hot Springs. While the testimony was not lengthy, it did provide some evidence of his operational fitness.

38. The evidence was sufficient to support the proposition that the Applicant is operationally fit.

B. Financial Fitness

39. Although the Commission has never promulgated rules or regulations quantifying a financial fitness standard, it is generally agreed that the Applicant must make some showing, however minimal, that it either has or has access to financial resources that will enable it to implement the proposed service.

40. In Decision No. C08-0933, the Commission listed the following relevant factors that may be considered in when determining financial and operational fitness of an applicant:

- (a) minimum efficient scale, that is, whether a minimum size of operation is required and, if such a minimum does exist, conceptually what is the approximate magnitude for markets at issue in this docket;
- (b) credit worthiness;
- (c) access to capital;
- (d) capital structure;
- (e) current cash balances;
- (f) credit history and assessment of financial health over the near future;
- (g) managerial competence and experience;
- (h) fixed physical facilities such as office space and maintenance garages, as appropriate;
- (i) appropriate licenses and equipment necessary to operate a radio dispatch system;

- (j) vehicles of appropriate type; and
- (k) other metrics that may be appropriate.

41. At the conclusion of the Applicant's direct case the Intervenors moved to dismiss the proceeding pursuant to Colo. R. Civ. P. 41(b)(1) based upon due process and the failure of the Applicant to present any evidence in support of managerial fitness or the substantial inadequacy of the incumbent.

42. The Applicant failed to request that Administrative Notice be taken of any aspect of the application filed in this proceeding.

43. None of the financial fitness factors listed by the Commission in Decision No. C08-0933, were addressed during the Applicant's direct case.

44. The Applicant failed to address its financial fitness in any way during the hearing.

45. The test or standard to be applied in deciding a motion to dismiss at the end of an Applicant's case is: whether a judgment in favor of Applicant is justified on the basis of the evidence presented by Applicant in its direct case. Colo.R.Civ.P. 41(b)(1);¹ *City of Aurora v. Simpson (In re Water Rights of Park County Sportsmen's Ranch)*, 105 P.3d 595, 613-14 (Colo. 2005).

46. The Applicant failed to present evidence of a necessary element for the approval of its application. Without any evidence of financial fitness being shown, judgment in favor of the Applicant is not justified. Even though financial fitness was not specifically mentioned by the Intervenors in its Colo. R. Civ. P. 41(b)(1) motion, the motion will still be granted due to the

¹ As pertinent here, Colo.R.Civ.P. 41(b)(1) states: in a trial to the court, at the conclusion of plaintiff's case, the defendant [here, Intervenor], without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff [here, Applicant] has shown no right to relief. The court as trier of fact may then determine them and render judgment against the plaintiff [here, Applicant] or may decline to render judgment until the close of all the evidence.

failure to address this necessary element. The motion to dismiss is granted and the Application is therefore denied.

VI. ORDER

A. The Commission Orders That:

1. The Motion to Dismiss pursuant to Colorado Rule of Civil Procedure (Colo. R. Civ. P.) 41(b)(1) is granted.

2. The above-captioned application filed by Strawberry Park Hot Springs Shuttle LLC filed on June 18, 2019 is denied.

3. 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.

4. As provided by § 40-6-109, 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 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 basic findings 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.

5. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded y.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ROBERT I. GARVEY

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director