

Decision No. R22-0527-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
CONSOLIDATING PROCEEDINGS AND SCHEDULING
PREHEARING CONFERENCE**

Mailed Date: September 8, 2022

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I. STATEMENT**A. General Background**

1. This matter comes before the Commission, on its own motion, to consider whether the principles delineated in *Ashbacker Radio Corp. v. Federal Communications Comm'n*, 326 U.S. 327 (1945), require the consolidation of Proceedings No. 22A-0215CP and 22A-0310CP.

B. Procedural Background Regarding Proceeding No. 22A-0215CP

2. 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.

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

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

5. 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.

6. 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.

7. On August 29, 2022, in Proceeding No. 22A-0215CP, Green Jeep filed a Motion to Strike Interventions and Transfer Application to the Modified Procedure (Motion to Strike). Green

Jeep requests that the interventions of Estes Park Charters and Fun Tyme Trolleys be stricken for failure to comply with disclosure requirements and that Green Jeep's Application to be ruled upon as an uncontested matter.

8. On September 6, 2022, in Proceeding No. 22A-0215CP, Estes Park Charters and Fun Tyme Trolleys filed a Response to the Motion to Strike, objecting to the Motion to Strike as premature and not supported by the record filed with the Commission to date.

9. Green Jeep, Estes Park Charters and Fun Tyme Trolleys are currently the only parties to Proceeding No. 22A-0215CP.

C. 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 Docket No. 22A-0310CP.

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

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.

15. Wild Side is currently the only party to Proceeding No. 22A-0310CP.

D. Legal Standards

16. Commission 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.”

17. The Commission previously recognized the filing of pending applications close in time seeking to serve overlapping territory as an appropriate consideration for consolidation. *See*, Decision No. R09-0360-I, issued April 7, 2009, in Docket No. 09A-080CP, *citing* Decision No. C05-0291 at ¶¶ 5-7.

18. The legal standard governing both of the 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).

19. According to *Ashbacker doctrine*, when multiple proceedings involve competing, mutually exclusive, pending applications, each applicant should be given the opportunity to participate in the proceeding involving the competing legal application. *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).

E. Consolidation

20. As noticed, Green Jeep seeks permanent authority 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 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;

(2) Sightseeing service, on schedule, between all points within a 20 mile radius of the intersection of Moraine and Elkhorn, Estes Park, Colorado on the one hand and all points within the area comprised of both Rocky Mountain National Park and all points in the 10 mile area beyond the boundary of Rocky Mountain National Park on the other hand;

(3) Shuttle service, on call and demand, between all points within a 20 mile radius of the intersection of Moraine and Elkhorn, Estes Park, Colorado on the one hand and Denver International Airport, Denver, Colorado, including all points within a five mile radius thereof, on the other hand;

(4) Shuttle service, on call and demand, between all points within a 20 mile radius of the intersection of Moraine and Elkhorn, Estes Park, Colorado on the one hand and Union Station, Denver, Colorado, including all points within a one mile radius thereof, on the other hand. (5) Shuttle service, on schedule, between all points within a 20 mile radius of the intersection of Moraine and Elkhorn, Estes Park, Colorado on the one hand and Denver International Airport, Denver, Colorado, including all points within a five mile radius thereof, on the other hand, serving the intermediate points of Union Station in Denver, Colorado and the Boulder Transit Center in Boulder, 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;

3. Items 1 and 2 are restricted to the use of open air vehicles with convertible tops;

4. Items 1 and 2 are restricted to transportation service that originates and terminates at the same point;

5. Items 2 and 5 are restricted to serving points named in carrier's schedule.

Notice dated May 31, 2022, at 2.

21. 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.

RESTRICTIONS:

(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.

Notice dated July 5, 2022, at 2.

22. It is found and concluded that the authorities sought by Green Jeep and Wild Side partially, but substantially, overlap as to requested call-and-demand sightseeing service within defined overlapping radii from points in Estes Park, Colorado.

23. The ALJ finds that consolidation is appropriate pursuant to Rule 4 CCR 723-1-1402. The issues in these proceedings are substantially similar. Each applicant must prove that existing service is substantially inadequate. If proven, it must then be determined the appropriate relief to be granted (*e.g.*, whether only one application can be approved or whether both should be partially approved).

24. There is no reason to believe that consolidating these proceedings for determination of the merits will prejudice any party. Indeed, consolidation will promote economy and more efficient use of resources by all concerned.

25. Proceeding Nos. 22A-0215CP and 22A-0310CP should be consolidated. The parties in each proceeding will be made parties in the consolidated proceeding.

26. Consolidation renders Wild Side's Motion to Intervene and Green Jeep's Petition to Intervene moot. They will be denied accordingly.

27. **All parties are advised** that this proceeding is governed by the Rules of Practice and Procedure found at 4 CCR 723-1, Part 1. The ALJ expects the parties to comply with these rules. The rules are available on the Commission's website (<http://www.dora.colorado.gov/puc>) and in hard copy from the Commission. Each party is specifically reminded that all filings with the Commission must also be served upon all other parties in accordance with *Rule 1205 of the Rules of Practice and Procedure*, 4 CCR 723-1.

F. Motion to Strike

28. The sole ground stated in the Motion to Strike is that Estes Park Charters and Fun Tyme Trolleys failed to timely file and serve their list of witnesses and copies of their exhibits.

29. In their response, Estes Park Charters and Fun Tyme Trolleys first contend there is no procedural schedule governing the proceeding and challenges Green Jeep's compliance with Rule 1405(k)(II), 4 CCR 723-1. Finally, they contend the motion is premature and should be denied as they are quite interested in the proceeding.

30. First, an intervenor's failure file copies of exhibits and its list of witnesses alone does not preclude the intervenor from participating in the hearing and opposing approval of the requested authority. Second, as a result of the consolidation, a new procedural schedule will be adopted to govern this proceeding. Thus, any potential prejudice by the failure can be negated. Foreclosing participation based solely upon such a procedural failure is unduly harsh particularly in light of the fact that a new procedural schedule must be adopted. The Motion to Strike will be denied.

G. Remote Prehearing Conference

31. In anticipation of hearing, the undersigned ALJ will schedule a prehearing conference in accordance with Rule 1409(a) of the Rules of Practice and Procedure, 4 Code of Colorado Regulations 723-1. Accordingly, a remote prehearing conference shall be scheduled as ordered below. The remote prehearing conference will be conducted over the Zoom videoconferencing platform. The ALJ or a member of Commission Staff will email the log-in information in advance of the hearing.

32. Green Jeep and Wild Side shall confer with the other parties in advance of the remote prehearing conference regarding a schedule for this proceeding, any discovery procedures that are inconsistent with the Commission's rules governing discovery, and the method by which the hearing should be conducted. The Commission can conduct in-person, remote, or hybrid hearings. A remote hearing is one in which all the participants appear and participate from remote locations over the Zoom web conferencing platform. A hybrid hearing involves the ALJ and at least one party and/or witness participating from one of the Commission's hearing rooms in Denver, and the remaining party(ies) and witness(es) participating from one or more remote locations using the Zoom web conferencing platform. An in-person hearing is one in which the ALJ and all parties and witnesses participate in the hearing at the same location. NOTE: A webcast of proceedings through the Commission's website is only available for hearings originating at the Commission's offices (*i.e.*, hybrid or in person) or fully remote.¹

33. Green Jeep and Wild Side shall file a report of the results of the conferral. If there is agreement on a schedule, including dates for the hearing, discovery procedures that are

¹ Thus, a webcast of the prehearing conference will be available through the Commission's website, unless it is vacated by separate decision.

inconsistent with the Commission's rules governing discovery, and/or the method for conducting the hearing (*e.g.*, remote, hybrid, or in-person), the report shall state as much and detail the stipulated procedural schedule, discovery procedures, and/or method for conducting the hearing. If no agreement is achieved, the report shall state as much and identify the competing schedules, discovery procedures, and/or methods for conducting the hearing proposed by the parties. The parties are on notice that the ALJ will retain the discretion to adopt procedures governing the proceeding.

34. The parties are urged to review the Commission's public calendar to identify suitable days for the hearing in this proceeding and propose more than one date or consecutive dates for the hearing.

35. All parties must appear at the remote prehearing conference. Failure to attend or to participate in the remote prehearing conference is a waiver of any objection to the rulings made, to the procedural schedule established, and to the hearing dates scheduled during the remote prehearing conference.

II. ORDER

A. It Is Ordered That:

1. Proceedings No. 22A-0215CP and 22A-0310CP are consolidated. Proceeding No. 22A-0215CP is the primary docket.

2. All parties in each proceeding, by this Order, are parties in the consolidated proceeding. The parties shall modify their certificates of service accordingly.

3. All proceeding numbers and captions in the consolidated proceeding shall be listed on all future filings, as on this Order. The primary proceeding number stated in Ordering Paragraph 1 above and its caption shall appear first.

4. The filing requirements of Rule 1204 of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1 are modified as set forth in this Ordering Paragraph. In this consolidated proceeding, parties shall file all filings in the primary proceeding, Proceeding No. 22A-0215CP; no copies shall be filed in the additional proceedings to the consolidated proceeding.

5. A prehearing conference in this proceeding is scheduled as follows:

DATE: September 29, 2022

TIME: 2:00 p.m.

WEBCAST: Hearing Room B

METHOD: Join by video conference using Zoom at the link to be provided in an email from the Administrative Law Judge²

6. All participants in the hearing must follow the instructions in Attachment A (instructions for using Zoom) to this Decision.

7. Nobody should appear in-person for the remote prehearing conference.

8. Green Jeep Tours, LLC (Green Jeep) and Wild Side 4 X 4 Tours LLC (Wild Side) shall file the report of the conferral identified above on or before September 23, 2022.

9. The Motion to Intervene Out of Time and Entry of Appearance of Wild Side 4 X 4 Tours filed by Wild Side 4 X 4 Tours LLC on July 14, 2022, is denied as moot.

10. The Petition for Leave to Intervene in Wild Side's Application Proceeding filed by Green Jeep on August 3, 2022, is denied as moot.

² Additional information about the Zoom platform and how to use the platform are available at: <https://zoom.us/>. All parties are strongly encouraged to participate in a test meeting prior to the scheduled hearing. See <https://zoom.us/test>.

11. The Motion to Strike Interventions and Transfer Application to the Modified Procedure Motion filed by Green Jeep on August 29, 2022, is denied.

12. The parties shall comply with the requirements established in this Decision and shall make the filings as required by the adopted procedural schedule. 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