Decision No. C22-0628

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20D-0521EC

IN THE MATTER OF THE PETITION FOR A DECLARATORY ORDER FILED BY WILD SIDE 4 X 4 TOURS LLC, PURSUANT TO THE COMMISSION'S RULE OF PRACTICE AND PROCEDURE 4 CODE OF COLORADO REGULATIONS 723-1304(F).

COMMISSION DECISION DENYING APPLICATION FOR REHEARING, REARGUMENT, OR RECONSIDERATION OF DECISION NO. C22-0507

Mailed Date: October 19, 2022
Adopted Date: October 5, 2022

I. BY THE COMMISSION

A. Statement

1. By this Decision, the Commission denies the Application for Rehearing, Reargument, or Reconsideration (RRR) filed on September 19, 2022, by Wild Side 4 x 4 Tours, LLC (Wild Side) requesting reconsideration of Decision No. C22-0507 (Decision), issued in this Proceeding on August 30, 2022.

B. Background

2. The Commission's Decision upheld the Recommended Decision issued by the Administrative Law Judge (ALJ) in this matter.[1] The Recommended Decision denied the Petition for Declaratory Order (Petition) filed on November 23, 2020, by Wild Side 4 x 4, LLC (Wild Side) that requested a declaration that Wild Side's operations are outside the Commission's jurisdiction.

[1] Decision No. R22-0233, issued April 19, 2022, by ALJ Melody Mirbaba (Recommended Decision).

3. The Recommended Decision also rejected arguments made by Wild Side in this proceeding that the Commission should conclude it is equitably estopped from asserting jurisdiction over the company because the company made business decisions and investments in reliance on statements of the Commission's Transportation Staff that Wild Side is not subject to Commission regulation. The Recommended Decision determined that Wild Side failed to meet its burden of proof for this argument because the record does not support that Wild Side detrimentally relied on a statement of Transportation Staff during a period in which reliance would have been reasonable.

4. In addition to upholding the Recommended Decision, the Commission's Decision rejected a related argument Wild Side raised for the first time in its Exceptions to the Recommended Decision – that the Commission should be estopped from now denying the company the right to provide transportation in the market based on any arguments raised that the market is already saturated (a remedy Wild Side termed "partial estoppel").

C. Application for RRR

5. Wild Side argues the Commission should reconsider the Decision's determinations regarding equitable estoppel. It continues to argue that it has met its burden of proof to demonstrate equitable estoppel, and it repeats its contention that the equities in this proceeding justify "partial estoppel."

1. Wild Side's arguments concerning equitable estoppel

6. Wild Side claims the Decision incorrectly upheld the Recommended Decision's determination that any reliance on an opinion of Mr. Gramlick in early 2012 that Wild Side is not subject to the Commission's regulations was unreasonable because there was a high risk that Mr. Gramlick's opinion was in error. Wild Side claims that in addition to information that Mr.

Gramlick learned through his discussion with Mr. O'Malley, an owner of Wild Side, the record supports that Mr. Gramlick must have obtained information about the company from an investigator. Wild Side also states that it is "absurd" to suggest that Mr. Gramlick would have improperly represented that an entity is exempt from regulation without requesting all of the necessary information to make such a statement. Wild Side continues to state that it detrimentally relied on the opinion of Commission Transportation Staff when it decided to abandon its operating authority in 2012, including a Certificate of Public Convenience and Necessity.

7. Additionally, Wild Side argues that the Decision erred in upholding the Recommended Decision's conclusion that any reliance on the December 2013 opinion of Investigator Brandt regarding the Commission's lack of jurisdiction over Wild Side was only reasonable until July 2014, when the company received a violations warning letter as the result of another investigation. Wild Side states that the 2014 investigation occurred during historic flooding in Estes Park, where Wild Side operates, and that Mr. O'Malley initially could not recall receiving and signing for the violations warning letter because Wild Side was recovering from flood damage. Wild Side states that the record contains sufficient evidence that it has consistently maintained its business, and it continues to argue that the lack of communication between PUC Staff and Wild Side from 2014 to 2020 makes reliance on the 2013 opinion beyond July 2014 reasonable. It states that it "would have been unreasonable for the [company's owners] to intuit that they were required to reach out to Staff year after year, to ensure that the opinions made by Staff concerning their status as a utility had not changed."[2] It continues to state that the record demonstrates that Wild Side made investments in reliance on the 2013

[2] Wild Side's Application for RRR, at p. 6.

opinion between 2014 and 2020, and that it therefore has met its burden of proof to demonstrate all elements of the equitable estoppel remedy.

2. Wild Side's arguments concerning "partial estoppel"

8. Through the Decision, we rejected Wild Side's arguments concerning partial estoppel, stating that the company's support for this proposed remedy relies on the same insufficient support put forth for its other equitable estoppel claim. In response, Wild Side repeats its contention that substantial evidence in the record supports finding that Wild Side has satisfied the elements of equitable estoppel.

9. In the Decision, we also stated that providing the requested partial estoppel remedy would be inappropriate in this Proceeding. In response, Wild Side states that the Commission has the authority to grant the requested relief, and that this Proceeding is the ideal forum in which to address the request because it has examined the historic interactions between the company and the Commission and the equitable considerations.

10. In its Application for RRR, Wild Side expands on and adds to its argument for partial estoppel. It states that "[w]eighing the equities, 'public need' should not be constrained to inadequacy of service being provided by the certificated providers in the areas under Rule 6203(a)."[3] It contends that the Commission "should allow for a presumption that, in the territory of authority sought by Wild Side, (1) a public need for sightseeing transportation does currently exist equivalent to at least the average number of customers for whom Wild Side annually provides tours, (2) existing sightseeing transportation service is inadequate to meet this specific

[3] Wild Side's Application for RRR, at pp. 8-9. Rule 6203(a) sets forth the requirements for an application to seek permanent authority to operate as a Common or Contract Carrier.

need, and (3) Wild Side can fill such public need in the public interest."[4] Further, it asserts that if the Commission is not willing to grant such relief, it should "find that the ALJ must take into consideration Wild Side's unique history and the equities when applying the standards in Rule 6203(a)(XVII)."[5]

D. Findings and Conclusions

11. In an application for RRR, the challenging party must specify with particularity the grounds upon which the applicant considers the Commission's decision "unlawful." § 40-6-114(1), C.R.S. The Commission may reverse, change, or modify a decision if, after rehearing, reargument, or reconsideration, it appears the original decision of the Commission is in any aspect "unjust or unwarranted." § 40-6-114(1), C.R.S.

1. Equitable Estoppel

12. As to Wild Side's repeated argument that it has met its burden of proof the demonstrate all elements of equitable estoppel, we remain unpersuaded and continue to uphold the determinations set forth in the Recommended Decision. Wild Side's claim that Investigator Pacheco must have provided Mr. Gramlick with information on Wild Side's operations prior to Mr. Gramlick's conversation with Mr. O'Malley is unsupported by the record. The material cited by Wild Side's Application for RRR merely indicates that Investigator Pacheco said she would "check with her supervisor" on whether Wild Side was exempt from regulation, and that Mr. O'Malley later received a phone call from Mr. Gramlick.[6] Wild Side's implication that Mr. Gramlick wouldn't have provided a verbal opinion without requesting information in addition to that learned through his conversation with Mr. O'Malley is also similarly unsupported. In fact,

[4] *Id.* at p. 9.
[5] *Id.* at pp. 9-10.
[6] Hrg. Tr. (Sept. 23, 2021), at 168.

Mr. O'Malley's own recollection of the conversation indicates that Mr. Gramlick based his opinion, if he provided one, on Mr. O'Malley's description of the company's operations. According to Mr. O'Malley's live testimony, he asked if there would be follow-up from the Commission, and Mr. Gramlick[7] responded "no, as long as your business is a photographic tour company, as you are describing…."[8] Therefore, we continue to agree with the Recommended Decision's conclusion that there was a high risk that Mr. Gramlick's opinion was given in error, if it was given, and that reliance on the opinion was unreasonable.

13. As for Wild Side's argument that it was reasonable to rely on Investigator Brandt's December 2013 opinion beyond July 2014, Wild Side's arguments again are unpersuasive. Before giving her opinion in 2013, Investigator Brandt admonished the company that "you must be consistent with your company scope [as a photographic tour company], and any advertising that you do should reflect your intent. This includes your website, printed material and personal representation."[9] During the 2014 investigation, a company employee made no indication that professional photo tours were offered – when asked about photographic instruction or guidance, the employee merely stated that "all the guides know where the best photos could be taken" and that "the guides would be happy to take a group photo."[10] This, combined with a review of all the information PUC investigators had collected, led to a violations warning letter that Mr. O'Malley signed for in July 2014. We continue to agree with the Recommended Decision that after Wild Side received this violations warning letter, further reliance on Investigator Brandt's 2013 opinion was unreasonable. Additionally, the fact that Mr.

[7] It is unclear whether Mr. O'Malley's testimony here refers to Mr. Gramlick or to Mr. Laws. Through prior decisions, we concluded that the record does not support that Mr. Laws made a representation regarding the Commission's regulation of Wild Side.

[8] Hrg. Tr. (Sept. 23, 2021), at 168:9-15.

[9] Recommended Decision ¶ 21 (citing Hearing Exhibit 104 at 52).

[10] Hearing Exhibit 105 at 4.

O'Malley did not remember, in 2021, that he received the violations warning letter in 2014 does not negate the fact that as early as seven months after the interaction with Investigator Brandt, Wild Side's employees were failing to represent the company as a photographic tour company and that the company was therefore failing to operate within the limitations of the opinion given by Investigator Brandt.

2. Partial Estoppel

14. Wild Side's arguments in favor of the remedy it terms partial estoppel are supported by the same opinions and circumstances it claims supports a finding of equitable estoppel. As explained above, we continue to uphold the Recommended Decision's determination that the company has failed to meet its burden to demonstrate all elements of equitable estoppel. We decline to find that the same record that does not support Wild Side's primary requested remedy of equitable estoppel supports some other version of the remedy.

15. We also repeat our determination that granting such a remedy in this Proceeding would be inappropriate. While Wild Side contends that its requested remedy would be "weighing the equities," the presumption it proposes is centered on the fact that it has been providing a certain level of service to the Estes Park area, and on the contention that this should be taken into account when the Commission considers public need in an application proceeding for operating authority. These arguments are more properly considered in an application proceeding, and Wild Side is free to make these arguments in those other proceedings. We decline to grant the requested remedy here, without any evidence concerning public need.

16. For the same reasons, we reject Wild Side's other alternative request and decline to find that Wild Side's "unique history and the equities" must be considered when the standards in Rule 6203(a)(XVII) are applied in an application proceeding.

II. ORDER

A. It Is Ordered That:

1. The Application for Rehearing, Reargument, or Reconsideration filed on September 19, 2022, by Wild Side 4 x 4 Tours, LLC, is denied.

2. This Decision is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING October 5, 2022.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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JOHN GAVAN

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Commissioners