

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 22A-0559CP

IN THE MATTER OF THE APPLICATION OF JEREMY RICHARD JENKIN DOING BUSINESS AS AMAZING ADVENTURES TOURS 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
ALENKA HAN
DENYING APPLICATION**

Mailed Date: August 7, 2023

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I. STATEMENT AND PROCEDURAL HISTORY

A. Summary

1. This Decision recommends that the Public Utilities Commission (Commission or PUC) deny the Application for a Certificate of Public Convenience and Necessity to Operate as a Common Carrier by Motor Vehicle for Hire (Application) filed by Amazing Adventures Tours (Amazing Adventures or Applicant) on December 16, 2022.

2. In accordance with § 40-6-109, C.R.S., the Administrative Law Judge (ALJ) now transmits to the Commission the record in this proceeding and recommends that the Commission enter the following order.

B. Appearances and Exhibits

3. A fully remote hearing in this proceeding was held on Thursday, June 15, 2023, as scheduled and noticed by Decision No. R23-0277-I, issued April 27, 2023.

4. All four parties to this Proceeding appeared at the hearing. No party was represented by counsel. Rather, the following individuals appeared on each party's behalf:

- Applicant Amazing Adventures, was represented by its owner-operator Jeremy Jenkin;
- Intervenor Mountain Star Transportation, LLC, doing business as Explorer Tours (Explorer Tours), was represented by its owner-operator, Roman Lysenko.
- Intervenor CKIMY, LLC, doing business as iLIMO (iLIMO), was represented by its owner-operator, Yassine Chanane; and,
- Intervenor Aspire Tours LLC (Aspire Tours) was represented by its owner-operator, Kathrin Troxler.

5. Jenkin, Troxler, and Lysenko each testified at the hearing on behalf of their respective parties. Although Chanane cross-examined Jenkin, Troxler, and Lysenko, he did not testify on behalf of iLIMO. No other witnesses testified.

6. During the hearing, Applicant's Hearing Exhibits 1, 2, 3, 4, and 5; Aspire Tour's Hearing Exhibit 100; and Intervenor Explorer Tours' Hearing Exhibits 200 and 201 were admitted into evidence. iLIMO offered no exhibits into evidence.

7. Although parties had the opportunity to file Statements of Position (SOP) by June 30, 2023, none took advantage of that opportunity.

II. BACKGROUND AND FACTUAL FINDINGS

A. Procedural History

8. On December 16, 2022, Amazing Adventures Tours initiated this matter by filing an Application for Permanent Authority to Operate as a Common Carrier by Motor Vehicle for Hire (Application). The Application was filed on behalf of Amazing Adventures by Jeremy Richard Jenkin, who identified himself as the owner and designated agent of Amazing Adventures. On December 19, 2022, the Applicant amended the Application.

9. On December 27, 2022, the Commission provided public notice under § 40-6-108(2), C.R.S., of the Application, describing the authority sought here, consistent with the December 19, 2022, Amendment to the Application.¹ As noticed, the Application sought authority:

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 in the Counties of Arapahoe, Denver, Douglas, and Jefferson, and between said points on the one hand, and all points in the Counties of Moffatt, Routt, Grand, Boulder, Rio

¹ See Notice of Applications and Petitions filed on December 27, 2022 (Notice), p. 2.

Blanco, Garfield, Eagle, Clear Creek, Gilpin, Larimer, Jackson, Summit, Mesa, Delta, Gunnison, Pitkin, Lake, Chaffee, Fremont, Montrose, Ouray, San Miguel, Dolores, San Juan, Montezuma, La Plata, Hinsdale, Mineral, Archuleta, Rio Grande, Conejos, Alamosa, Saguache, Fremont, Teller, Park, and El Paso, on the other hand..²

10. On December 28, 2022, after the Commission provided the above public notice, Amazing Adventures made a filing amending its Application (December 28th Amendment). The December 28th Amendment specifies that “Transportation will originate and terminate in the counties of Arapahoe, Denver, Douglas, and Jefferson and no other counties.”

11. Four entities filed pleadings to intervene in this proceeding. On January 23, 2023, Ullr Tours, LLC, doing business as The Colorado Sightseer (The Colorado Sightseer), filed its “Intervention and Appearance as a Matter of Right to Application of a Transportation Utility.” By Decision No. R23-0192-I, issued March 23, 2023, The Colorado Sightseer was ordered to correct omissions in its Intervention. It did not do so. Consequently, by Decision No. R23-0277-I, issued April 27, 2023, The Colorado Sightseer’s Intervention was dismissed. It therefore is not a party to this proceeding.

12. On January 23, 2023, Aspire Tours LLC (Aspire Tours), which holds PUC Certificate No. 55865, filed a “Petition for Intervention and Entry of Appearance.” Although Aspire Tours’ Intervention did not omit any information, Decision No. R23-0192-I ordered it to provide additional information concerning its representation by a non-attorney, Ms. Troxler. Because it did so in a timely manner, it was permitted to proceed with its Intervention and be represented by Ms. Troxler in this proceeding.³ Aspire Tours is thus also a party to this proceeding.

² *Id.*

³ *See* Decision No. R23-0277-I, issued April 27, 2023.

13. On January 24, 2023, iLIMO, which holds CPCN No. 55931, filed a timely “Intervention & Entry of Appearance” (iLIMO’s Intervention). However, because it was unclear that iLIMO could intervene as of right, the ALJ ordered iLIMO to provide additional information supporting its request to permissively intervene in this proceeding.⁴ iLIMO filed the requested additional information, to which no party objected. The ALJ therefore granted iLIMO’s unopposed motion to intervene by Decision No. R23-0392-I, issued June 12, 2023.

14. Finally, on January 25, 2023, Explorer Tours, which holds CPCN No. 55952, filed a timely “Petition for Intervention and Entry of Appearance” (Explorer Tours’ Intervention). Explorer Tours’ intervention as of right was acknowledged by the undersigned ALJ in Decision No. R23-0192.

15. The Intervenors to this Proceeding therefore are Explorer Tours, Aspire Tours, and iLIMO (collectively Intervenors).

16. On February 1, 2023, the Commission deemed the Application complete and referred the matter to an Administrative Law Judge (ALJ) by minute entry for disposition.

17. On May 4, 2023, Amazing Adventures further amended its Application, to restrict the area of its proposed service as follows:

Transportation will originate and terminate in the county of Denver and no other counties.

Transportation of passengers in sightseeing service between all points in the counties of Denver, and all points in the counties of Jefferson County (not including Lookout Mountain), Garfield, Clear Creek (not including Mt Evans), Gilpin, Summit, Gunnison, Lake, Chaffee, Montrose, Ouray, San Juan, La Plata, Alamosa, Teller, Douglas, and El Paso on the other hand.

⁴ See Decision No. R23-0192-I, issued March 23, 2023.

By Decision No. R23-0392-I, the undersigned ALJ granted Applicant's request to amend and further restrict its Application.

18. Consequently, in this proceeding, Amazing Adventures seeks authority to:
 1. Operate as a common carrier by motor vehicle for hire for the transportation of passengers in call-and-demand sightseeing service.
 2. Transportation will originate and terminate in the county of Denver and no other counties.
 3. Transportation of passengers in sightseeing service between all points in the counties of Denver, and all points in the counties of Jefferson County (not including Lookout Mountain), Garfield, Clear Creek (not including Mt. Evans), Gilpin, Summit, Gunnison, Lake, Chaffee, Montrose, Ouray, San Juan, La Plata, Alamosa, Teller, Douglas, and El Paso on the other hand.

19. On May 19, 2023, Amazing Adventures filed an Objection to Witness and Intervention. In its objection, Applicant contended that the Intervenors to this proceeding were “conspiring and working together to prevent competition.” Applicant requested that all the Interventions therefore be dismissed. The merits of Amazing Adventures’ Objection will be addressed below.

20. At the June 15, 2023 evidentiary hearing, after Amazing Adventures had presented its case in chief, Explorer Tours orally moved for the dismissal of this proceeding. Explorer Tours argued that Amazing Adventures had not established the criteria necessary for obtaining a new CPCN authority. In particular, Explorer Tours contended that Applicant has not shown the requisite financial fitness nor that the existing transportation providers’ service was “substantially inadequate” to meet public demand. The merits of Explorer Tours’ verbal motion will likewise be addressed below.

21. Parties were given the opportunity to file post-hearing written Statements of Position (SOPs) by June 30, 2023, but no SOPs were filed.

B. Background Facts

22. Amazing Adventures is a tour company operating out of Parker, Colorado, that offers sightseeing excursions, camping, skiing, snowshoeing, and hiking and biking tours on trails in parts of Colorado's Front Range and mountain regions. Its business model is to transport clients/customers from a location in Denver to a site within certain counties in the State for guided hikes or bike rides, and then transport the clientele back to the pick-up location. Its owner, Jenkin, seeks a CPCN to carry out this business plan of transporting clients to and from Denver to various hiking and biking locations in certain counties in the State.

23. iLIMO is a transportation provider which holds CPCN No. 55931, and is authorized to provide the following service:

Transportation of passengers in call-and-demand shuttle service between all points in the Counties of Denver, El Paso, Jefferson, and Larimer, State of Colorado.

RESTRICTIONS: This certificate is restricted against transportation:

- (1) between points within 10 miles of the intersection of U.S. Highways 34 and 36 in Estes Park; and
- (2) between points in that radial area, on the one hand, and points in Larimer County within 75 miles of that intersection, on the other hand.

24. iLIMO also hold CPCN No. 55822 which authorizes it to provide the following additional service:

- I. Transportation of passengers in call-and-demand shuttle and charter service between all points in the Counties of Adams, Arapahoe, Denver, Douglas, Jefferson, Clear Creek, Eagle, and Summit, State of Colorado;

- II. Transportation of passengers in call-and-demand shuttle and charter service between all points in the Counties of Adams, Arapahoe, Denver, Douglas, and Jefferson, State of Colorado on the one hand, and all points in Grand County, State of Colorado on the other hand;
- III. Transportation of passengers in call-and-demand shuttle service between all points in the Counties of Adams, Arapahoe, Denver, and Douglas, State of Colorado and 18300 West Alameda Parkway, Red Rocks Park and Amphitheater, Morrison, Colorado on the other hand.

RESTRICTIONS: Item II is restricted:

- (A) against providing service between points in Grand County;
- (B) against providing service to or from Denver International Airport; and,
- (C) to the use of vehicles with a minimum seating capacity of no less than twelve (12) passengers.

25. Aspire Tours is a transportation and tour company which provides call-and-demand sightseeing and shuttle services, holds CPCN No. 55865, and is authorized to provide the following service:

Transportation of passengers:

- IV. In call-and-demand sightseeing service between all points in the Counties of Adams, Arapahoe, Boulder, Broomfield, Denver, Douglas, and Jefferson, State of Colorado.
- V. In call-and-demand sightseeing service originating in the Counties of Adams, Arapahoe, Boulder, Broomfield, Denver, Douglas, El Paso, and Jefferson, to all points in the Counties of Boulder, Chaffee, Clear Creek, Eagle, El Paso, Fremont, Gilpin, Grand, Gunnison, Hinsdale, Lake, Larimer, Montrose, Ouray, Park, Pitkin, Routt, Saguache, San Juan, San Miguel, Summit, and Teller, State of Colorado, returning to the origination point.
- VI. In call-and-demand sightseeing service originating in the County of Chaffee, State of Colorado, to all points in the Counties of Chaffee, Fremont, Gunnison, Lake, Park, Saguache, and Teller, State of Colorado returning to the origination point.
- V. In call-and-demand shuttle service between all points in the Counties of Adams, Arapahoe, Boulder, Broomfield, Chaffee, Denver, Douglas, El Paso, Jefferson, Eagle, Gilpin, Larimer, Pitkin, San Juan, San Miguel, and Summit, State of Colorado.

RESTRICTIONS:

1. Against transportation of passengers in call-and-demand shuttle service or call-and-demand sightseeing service to: (a) any location on the Pikes Peak Highway in the County of El Paso, Colorado; and (b) any location on Colorado Highway 5 (Mount Evans Road) in the County of Clear Creek, Colorado.
2. Against transportation of passengers to Garden of the Gods Park, 1805 N 30th St, Colorado Springs, Colorado, unless the transportation either (a) originates in the County of Chaffee, State of Colorado, or (b) transports passengers to additional destinations that are not located in the Counties of Denver, El Paso, Jefferson, or Larimer, State of Colorado.

26. Finally, Explorer Tours likewise provides call-and-demand sightseeing and shuttle services on Colorado's Front Range and in the High Country. It holds CPCN No. 55952 which authorizes it to provide:

- I. Transportation of passengers in call-and-demand sightseeing service originating in Denver and Boulder Counties, to all points in the Counties of Denver, Boulder, Clear Creek, Douglas, El Paso, Grand, Jefferson, and Larimer, State of Colorado, returning to the origination point.
- II. Transportation of passengers in scheduled service and call-and-demand shuttle service:
 - (D) Between all points in Denver County, on the one hand, and all points in Eagle County, on the other hand;
 - (E) Between all points in Denver County, on the one hand, and all points in Pitkin County, on the other hand; and
 - (F) Between all points in the Counties of Eagle and Pitkin, State of Colorado.

RESTRICTION:

Item (II) is restricted against the transportation of passengers in vehicles with a manufacturer's rated passenger capacity of less than 9 passengers, including the driver.

27. Jenkin provided background information about himself and Amazing Adventures in support of the Application. After high school, Jenkin enlisted in the Army and “served in the headquarters of the 82nd airborne division at Fort Bragg as an administration specialist.”⁵ After his honorable discharge, Jenkin hiked the entire Appalachian Trail and then, the following year, biked across the United States from Oregon to North Carolina.⁶ He earned a B.A. in sociology from Appalachian State in 2005,⁷ and a Master’s in Asia-Pacific Studies from National Chengchi University in Taipei, Taiwan in 2013.⁸ In between, he traveled extensively, hiking, biking, and pursuing commercial fishing.⁹

28. In 2016, he started a touring company in western China in the Sichuan region.¹⁰ There, he ran a successful hiking and biking tour company in China for ten years. Although the first few years his revenue did not exceed his expenses, in “the last six or seven years” his business was “for profit” and he earned money.

29. In 2022, Jenkin left China because the pandemic had made it more difficult to run his Chinese tour company there.¹¹ He returned to the United States and settled in Colorado “with the idea of doing tours in Colorado.” He chose Colorado because his sister lives in the State “and it had beautiful scenery [akin to] where [he] was in China.”

30. In his testimony, Jenkin highlighted Colorado’s extensive tourism industry, pointing out that tourism to the State is increasing. He stated that his research revealed that approximately

⁵ Hearing Exhibit 001, p. 3.

⁶ *Id.*

⁷ Hearing Exhibit 002, p. 2.

⁸ *Id.*, at p. 3; Hearing Exhibit 002, p. 4.

⁹ Hearing Exhibit 002, pp. 3-4.

¹⁰ *Id.*, at p. 4.

¹¹ *Id.*

48 million tourists visit Colorado each year; the Pikes Peak region sees about 24 million visitors each year, and about 500,000 people “go to Pikes Peak”; while Rocky Mountain National Park sees about 4.5 million visitors per year.

31. He also noted that studies show a “huge increase” of 96-97 percent in the number of solo tourists. He theorized that individuals traveling solo may be more interested in joining a tour or planned excursion. And, he explained, while other tour companies are generally reluctant or unwilling to transport or provide a tour to just one customer, he takes “a lot of individual travelers.”

32. In addition, he indicated that his research revealed that hiking is becoming a more popular activity in the United States, with 59 million people engaging in at least some hiking activity in 2021. Likewise, he stated, the number of cyclists has also increased.

33. Amazing Adventures would follow the same business plan Jenkin employed in China. It would offer hiking, biking, snowshoeing, and camping excursions on a small scale. Jenkin testified that he has only one vehicle — a 2017 Chrysler Pacifica that seats six passengers¹² — and will act as both owner and driver. Among the tours he is contemplating offering, is a week-long biking excursion in the State.

34. Jenkin stated that “half” of the tours he offers “are bike tours,” which, he indicated, he does not believe any of the Intervenors offer.

¹² See Amazing Adventures’ Application for New Permanent Authority, p. 4, filed Dec. 14, 2022.

35. He does not expect to do “much sightseeing except for . . . Pikes Peak [and] Garden of the Gods.” Nor would he offer shuttle runs. Rather, Amazing Adventures would pick up customers at the client’s hotel in Denver and return the individual to the same hotel.

36. Although Jenkin indicated an interest in obtaining a second vehicle, in part to provide back-up transportation and to transport bicycles, he did not express any concrete or immediate plans to do so. Rather, he indicated that he has no current plan to hire any employees but would consider hiring an employee if he got busier. For now, he plans to run his business and his tours solo.

37. Jenkin has purchased and/or acquired equipment to support his tours, including backpacks, hiking poles, snowshoes, stamps, bikes, and a roof rack. He has created a website, obtained the requisite insurance coverages, secured a business license tradename, and is taking wilderness first aid response classes.

38. Jenkin testified that, to be successful and achieve earnings of \$50,000-\$60,000, requires the inclusion of at least “one sightseeing spot” — Pikes Peak and/or Garden of the Gods — or the business model is unlikely to be successful. However, Applicant did not offer into evidence a written business plan or any financial data of any kind.

39. On cross examination, Jenkin stated that he has offered tours to existing clientele, family, and friends, who have sought out his expertise. On such excursions, he has not taken customers or guests to “touristy” areas. However, he admitted that has done so without “any sort of permit from the PUC.”

40. Jenkin testified that he currently is “really, really poor” and does not have sufficient funds to afford his own apartment. He stated that at the time of hearing he has approximately

\$3,000 in his bank account. To make ends meet, Jenkin teaches English and drives Lyft. As a result, he does not currently have funds to purchase a second vehicle.

41. Jenkin also points out that it could be “very dangerous” for inexperienced hikers to venture out into the State’s scenic areas. He posits that with so many visitors coming to Colorado annually, it would be “good to have more people to take these millions of people who are coming out to these national parks” and contends that with so many visitors even with “three companies” using all of their vans, there is still likely to be a “big gap” between tourist demand and available sightseeing tours.

42. Aspire Tours’ representative, Kathrin Troxler, disputed Jenkin’s characterization of the existing demand and the services Aspire Tours provides. She testified that Aspire Tours has “thousands and thousands of [five-star] reviews” and “is able to really accommodate” customers, with only a “very, very few exceptions.” Aspire Tours offers a variety of tours, including hiking tours for larger or smaller groups. It also offers private tours for a higher price. By way of example, Troxler offered into evidence one of Aspire Tours’ booking pages for the month of June 2023, showing availability for hiking tours to Rocky Mountain National Park.¹³

43. Explorer Tours advertises its tour offerings in numerous places, including its online website; on Viator.com, a centralized website for Colorado tours; and physically at motels, concierges, and at the Visit Denver offices. Explorer Tours also has a presence on Google and presented evidence of over 350 five-star reviews on Google.¹⁴ Given its broad advertising net, Explorer Tours’ representative, Roman Lysenko, expressed skepticism that customers were unable to find his tour offerings.

¹³ See Hearing Exhibit 100.

¹⁴ See Hearing Exhibit 201.

44. Lysenko also testified that Explorer Tours is able to serve “ninety-nine percent” of the customers that contact it. Contrary to Jenkin’s assertion, Lysenko testified that, as of the date of the hearing, Explorer Tours was “having trouble filling up our vans,” and therefore has additional available capacity to serve more customers. He stated that he is not seeing any “unmet demand.” On those occasions when Explorer Tours is unable to accommodate a potential client — because, for example, it may not offer a specific tour on a certain date — Lysenko refers the clients to other tour companies in the area, including Aspire Tours, iLIMO, and The Colorado Sightseer.

45. Lysenko emphasized that Explorer Tours is “financially ready” to purchase more vehicles and hire more tour guides but admitted that the pandemic and inflation have impacted Explorer Tours’ business.

46. Notably, a review of the evidence and testimony offered confirmed that none of the Intervenors offers bike tours like those offered by Amazing Adventures.

47. Nonetheless, Jenkin conceded that he seeks authority that would cover “parts of the same niche” occupied by the Intervenors, that there “could be a small overlap” between the areas and services they provide and those he proposes to provide, and that there “will be a little bit where I am going to step on the toes [of] the other businesses.” However, he contended, any overlap will not be “huge” and that some of his proposed services “aren’t a part of what they are doing.” He expressed the belief that the Intervenors “are doing pretty well” and will continue to do so even if he pursues his small business.

48. In an effort to minimize overlap with existing services, Jenkin stated that he has “removed every tourist place except Pikes Peak, . . . Garden of the Gods, and Red Rocks” from the scope of his Application.

49. Jenkin indicated that his business would be distinguishable from the Intervenor’s because he would be willing and able to provide sightseeing service to just one paying customer. In contrast, he claimed, Intervenor’s have received negative reviews from customers whose planned excursions Intervenor’s canceled if not have enough customers had registered for the excursion. To illustrate and support this distinction, Applicant offered the written statement of a client who took a hiking tour with Amazing Adventures. The client, Isabell Nehmeyer-Srocke, wrote that she contacted Aspire Tours about taking a guided hiking trek but they “either wanted to sell their standard tour which is not sportive at all or a private tour. But what about people who cannot afford a private tour, but still want something more individual? [Amazing Adventures] offered it and delivered it.”¹⁵

50. A repeat client from Hong Kong who now lives in Canada also sent a letter supporting Amazing Adventures’ Application. Jenkin customized a week-long hiking, sightseeing, and skiing tour for the Canadian. The client, Michael Xuesi Tang, wrote that Amazing Adventures’ tours are “well organized, off the beaten track and have high quality service.”¹⁶ Mr. Tang stated that he toured with Jenkin in China and specifically came to Colorado when he learned that Jenkin

¹⁵ Hearing Exhibit 3, p. 1.

¹⁶ Hearing Exhibit 4.

was offering tours in this State. Mr. Tang “hope[s Jenkin] can continue to do tours there so I can visit again and explore more of what Colorado has to offer.”¹⁷

51. Finally, Jenkin described taking a client who traveled to the State from India “winter hiking and camping and [climbing] 14ers,” which was a unique, customized trip not offered by other tour companies in the State.

52. These clients illustrate Jenkin’s plan to advertise his tours to Chinese and Indian tourists, on Chinese and Indian marketing platforms, to target a market he suggests is overlooked by Intervenors’ tour companies.

III. RELEVANT LAW

A. Commission Jurisdiction.

53. The Commission has authority to issue certificates to operate as a common carrier under Colo. Const. art. XXV, §§ 40-10.1-103(1) and 203(1), C.R.S. *See Miller Bros., Inc. v. Pub. Utils. Comm’n*, 525 P.2d 443, 446 (Colo. 1974). Common carriers may only operate with a Commission-issued certificate declaring that the present or future public convenience and necessity requires or will require the common carrier’s operation. §§ 40-10.1-103(1) and 203(1), C.R.S. A common carrier is defined as

a public utility as defined in § 40-1-102, C.R.S., and includes the obligation to indiscriminately accept and carry Passengers for Compensation. Common Carrier includes every Person directly or indirectly affording a means of transportation, or any service or facility in connection therewith, within this state, by Motor Vehicle

¹⁷ *Id.*

53. Rule 6001(p) of the Rules of Practice and Procedure, 4 *Code of Colo. Regulations* (CCR) 723-1.

54. Motor carriers providing call-and-demand shuttle service are common carriers. Rule 6001(gg) and (nnn), 4 CCR 723-6. Thus, carriers seeking to provide call-and-demand shuttle service must obtain a Commission-issued certificate of public convenience and necessity.

55. Shuttle service is transportation of passengers by a common carrier on a call-and-demand basis charged at a per-person rate, using vehicles that are not exclusive to any individual or group. Rule 6001(nnn), 4 CCR 723-6.

56. A sightseeing service is the transportation of passengers by a common carrier on a call-and-demand basis “originating and terminating at the same point for the sole purpose of viewing or visiting places of natural, historic, or scenic interest.” Rule 6001(ooo), 4 CCR 723-6.

B. Legal Standards.

57. Amazing Adventures Tours, as the proponent of this decision and the Applicant seeking a common carrier, or CPCN, certificate, bears the burden of proof by a preponderance of the evidence. §§ 13-25-127(1) and 24-4-105(7), C.R.S.; Rule 1500, 4 CCR 723-1. The preponderance standard requires the fact finder to determine “whether the existence of a contested fact is more probable than its non-existence.” *Swain v. Colo. Dep’t 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. *See Schocke v. Colo. Dep’t of Revenue*, 719 P.2d 361, 363 (Colo. App. 1986).

58. Although the preponderance standard applies, substantial evidence in the record must support the Commission's decision. *City of Boulder v. Pub. Utils. Comm'n*, 996 P.2d 1270, 1278 (Colo. 2000).

The evidence underlying the agency's decision must be adequate to support a reasonable conclusion. Substantial evidence is more than a scintilla . . . it must do more than create a suspicion of the fact to be established. It means 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.

Id., (quoting *CF&I Steel, L.P. v. Pub. Utils. Comm'n*, 949 P.2d 577, 585 (Colo. 1997)).

59. Applicants for a certificate of public convenience and necessity must establish their financial, managerial, and operational fitness to conduct the proposed operations. Rule 6203(a)(XI), 4 CCR 723-6. In general, operational fitness encompasses a consideration of whether the applicant has the equipment, personnel, and facilities to operate the proposed service. The Commission has identified the following evidentiary factors as relevant to the fitness inquiry: minimum efficient scale to operate under the proposed authority; 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. *See e.g.*, Decision No. C08-0933, at ¶ 7, Consolidated Proceeding Nos. 08A-241CP, 08A-281CP-Extension, 08A-283CP, 08A-284CP-Extension, and 08A-300CP issued September 4, 2008. Whether the applicant is willing and able to comply with applicable public utilities laws also bears upon the question of fitness. *See Thacker Bros. Transp. v. Pub. Utils. Comm'n*, 189 Colo. 301, 303, 543 P.2d 719, 721 (1975).

60. In addition to fitness, applicants must show that the public convenience and necessity requires the certificate. See *Yellow Cab Coop. Ass'n v. Pub. Utils. Comm'n*, 869 P.2d 545, 548, (Colo. 1994) (“[A]pplications for authority to operate a motor vehicle service require a showing that the public convenience and necessity require such service.”). In deciding that question, the Commission must apply the regulated monopoly doctrine. *Ephraim Freightways Inc. v. Pub. Utils. Comm'n*, 151 Colo. 596, 599, 380 P.2d 228, 230 (1963). Commission Rules reflect the regulated monopoly doctrine by requiring an applicant seeking a common carrier certificate to demonstrate the public need for the proposed service, that granting the authority is in the public interest, and that the existing service is inadequate. Rule 6203(a)(XVII), 4 CCR 723-6. More specifically, an applicant seeking a common carrier certificate “must demonstrate that existing services are *substantially* inadequate to meet public needs because ‘the test of inadequacy is not perfection’ and some legitimate complaints will arise regarding any common carrier that provides service to many customers.” *RAM Broad. v. Pub. Utils. Comm'n*, 702 P.2d 746, 750, (Colo. 1985).

61. The regulated monopoly doctrine 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 e.g., *Denver & R.G. W.R. Co. v. Pub. Utils. Comm'n*, 142 Colo. 400, 405, 351 P.2d 278, 280 (1960). Under this doctrine, a common carrier serving a particular area is only entitled to protection against competition if its service is adequate to satisfy the public’s needs. *Ephraim*, 151 Colo. at 599, 380 P.2d at 230. As a result, the public need and adequacy elements are closely related. See *id.* The Commission has “wide discretionary powers in determining the demands of ‘public convenience and necessity.’” *Pub. Utils. Comm'n v. Donahue*, 138 Colo. 492, 498, 335 P.2d 285, 288 (1959).

62. “Whether the incumbent carrier’s service is substantially inadequate is a question of fact that is to be determined by the Commission.” *Durango Transp. Inc. v. Pub. Utils. Comm’n*, 122 P.3d 244, 248 (Colo. 2005); *see also RAM Broad.*, 702 P.2d at 751. The Commission may consider “a broad range of evidence in determining whether an incumbent carrier’s service is substantially inadequate.” *Durango Transp. Inc.*, 122 P.3d at 250. That is because common carriers must “furnish, provide, and maintain such service, instrumentalities, equipment, and facilities as shall promote the safety, health, comfort, and convenience of its patrons, employees, and the public, and as shall in all respects be adequate, efficient, just and reasonable.” § 40-3-101(2), C.R.S.; and *see* § 40-10.1-103(1), C.R.S. Consistent with this statute, the Colorado Supreme Court has noted that the Commission may consider “any relevant evidence” in determining whether the public convenience and necessity requires additional service. *Durango Trans. Inc.*, 122 P.3d at 250-51. The Court has expressly approved as relevant consideration of various aspects of incumbents’ service and operation, including rates and charges, speed and efficiency, and quality of its facilities, organization, equipment, and personnel. *Id.* at 251. For example, in *Durango Transportation, Inc.* the Court approved the Commission’s reliance on evidence that the incumbent’s rates were so high as to be “tantamount to a denial of service to the tourist population requiring transportation” *Id.* at 249. This is consistent with the Commission’s purpose in granting a transportation authority to “ensure that the public’s transportation needs are met.” *Id.* at 250.

63. An applicant may demonstrate that the incumbent provider(s)’s service is substantially inadequate through evidence that the incumbent is *not* “ready, willing and able at all times to render service to anyone who might demand it, including all of applicant’s customers.” *Ephraim*, 380 P.2d at 232; *see also Durango Transp. Inc.*, 122 P.3d at 247. But the Commission

is not required to find that the incumbent “has failed or refused to provide service to a requesting customer,” because the Commission is authorized “to consider a broad range of factors in its substantial-inadequacy analysis.” *Durango Transp. Inc.*, 122 P.3d at 251. Rather, an applicant must show that the incumbent has demonstrated a general pattern of inadequate service. *Id.*, at 248.

64. Although the applicant bears the burden of proving that the incumbent carrier’s service is substantially inadequate, “where an applicant’s evidence tend[s] to prove the existing carrier’s substantial inadequacy, ‘it [is] incumbent upon [the existing carrier] to rebut this evidence.’” *Ephraim*, 151 Colo. at 601, 380 P.2d at 232.

65. Based in the foregoing, Amazing Adventures must show by a preponderance of the evidence that: (1) it is financially, operationally, and managerially fit to conduct the proposed service; (2) the public needs the proposed service; (3) the current service in the area is substantially inadequate; and (4) granting the Application is in the public interest. If Amazing Adventures meets its burdens, the Intervenors must rebut evidence concerning substantial inadequacy by a preponderance of the evidence.

IV. DISCUSSION, ANALYSIS, AND CONCLUSIONS

A. Amazing Adventures’ Objection to Interventions

66. In the weeks preceding the evidentiary hearing, Amazing Adventures sought the dismissal of all of the Intervenors on the grounds that the Intervenors had conspired to stymie his business, had worked collaboratively to derail the Application, and had conspired to set prices. In support of these contentions, Amazing Adventures cited to the temporal proximity of the Interventions, noting that all were filed within days of each other.

67. However, Amazing Adventure offered no evidentiary support establishing a conspiracy of any kind other than the mere speculation that Intervenors had colluded to stall Amazing Adventures' business.

68. To the contrary, Intervenors testified that they had not communicated for several years. They denied any kind of conspiracy.

69. The ALJ notes that the deadline for filing Interventions is thirty days after the Commission issues Notice of an Application. With each Application, the Commission sends out the Notice to any holders of current letters of authority who may be impacted by the Application. In this case, the Commission issued its Notice on December 27, 2022. Interventions were therefore due by January 26, 2023. The Interventions in this proceeding were all filed on January 23, 24, or 25, 2023, in advance of the deadline.

70. The ALJ finds and concludes that, contrary to Amazing Adventures' assertion that this is evidence of a conspiracy, Intervenors were merely filing their Interventions in advance of the January 26, 2023, deadline.

71. For these reasons, Amazing Adventures' Objection will be denied.

B. Fitness.

72. Jenkin ran a tour operation in China for ten years before coming to Colorado to set up a similar business here. He testified that his Chinese tour company was successful and profitable its last six to seven years. Clients who toured with him in China have sought him out and booked Colorado tours with him, as exemplified by Hearing Exhibit 4, Mr. Tang's letter of support. Further, Jenkin testified that his Google reviews are overwhelmingly positive. This demonstrates that Jenkin's services and Amazing Adventures are sought after and have an existing

clientele. No contrary evidence was received into the record. Based on this evidence, the ALJ finds and concludes that Jenkin has demonstrated the managerial fitness and skills to run Amazing Adventures successfully.

73. However, Amazing Adventures offered no documentation or evidence demonstrating its current financial fitness and stability or its operational fitness. The record is devoid of documentation illustrating Amazing Adventures' account ledgers, its revenue flow, its profit margins, its credit history, its projected earnings, its access to capital, its credit worthiness, or the like. Contrary to the notion of financial stability and fitness, Jenkin testified that he is "very, very poor" with only approximately \$3,000 in his bank account at the time of the hearing.

74. Although Jenkin indicated his intent to have Amazing Adventures adhere to the business plan and/or model he followed while offering tours in China, he did not offer a business plan into evidence. Jenkin testified that he has no immediate plan to purchase another vehicle, but stated that he hopes to do so eventually, presumably if his revenue flow permits such a purchase. The Application identifies the vehicle Amazing Adventures currently owns and intends to use should it secure a common carrier certificate: a 2017 Chrysler Pacifica minivan with a 7-person seating capacity.

75. Finally, no evidence was offered concerning Amazing Adventures' physical facilities, office or maintenance space; hence that aspect of Amazing Adventures' fitness to operate is largely unknown. The undersigned ALJ is under the impression that Amazing Adventures is currently — and for the foreseeable future will be — run out of Jenkin's apartment. However, the record is unclear on this point.

76. To successfully secure a certificate of public convenience and necessity, an applicant must demonstrate operational fitness, which must be assessed by analyzing whether an applicant has the equipment, personnel, and facilities to operate the proposed service. Further, in prior Commission decisions, the Commission has identified the following evidentiary factors as relevant to the fitness inquiry: minimum efficient scale to operate under the proposed authority; 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. *See e.g.*, Decision No. C08-0933, at ¶ 7.

77. Based on the foregoing, the ALJ finds that Amazing Adventures has not met its burden of demonstrating by a preponderance of the evidence that it has sufficient equipment, personnel, facilities, and financial resources to operate the proposed service. It therefore has not established its operational fitness. Likewise, the ALJ finds that in the absence of any documents supporting Amazing Adventures' financial situation, it has not met its burden of demonstrating its financial fitness by a preponderance of the evidence. Although the ALJ finds that Jenkin is managerially fit to operate Amazing Adventures, this represents only one aspect of fitness and alone is insufficient to demonstrate the Applicant's fitness. The absence of any documentation supporting Amazing Adventures' financial fitness, and the dearth of evidence establishing its ability to maintain and operate its vehicles, leads the undersigned ALJ to conclude that Applicant has not met its burden of establishing either its financial or its operational fitness. §§ 13-25-127(1) and 24-4-205(7), C.R.S.; Rule 6203(a)(XI), 4 CCR 723-6; and Rule 1500, 4 CCR 723-1.

C. Public Need and Substantial Inadequacy.

78. The parties disputed the public need for new service and the adequacy of the services currently provided. Specifically, Intervenor argued that Amazing Adventures has failed to demonstrate both that Intervenor's services are not meeting public demand or that unmet public demand exists necessitating Amazing Adventures' proposed new service.

79. Amazing Adventures offered no witnesses testifying to their inability to obtain a desired service. Nor did it offer testimony or evidence establishing that an unmet need exists for sightseeing services to "touristy" areas such as Pikes Peak or Garden of the Gods. The evidence established that at least one of his customers, Ms. Nehmeyer-Srocke, was unable to provide the type of hiking tour she sought. But her written statement does not show an inability to access so-called "touristy" areas.

80. Jenkin argued that the service he intends to provide — which would incorporate individualized and customized tour— will be more specialized than those offered by any of the Intervenor. Notably, he expressed an intent to offer extensive bike tours up to a week in duration, which he indicated none of the Intervenor offered. The Intervenor did not offer evidence disputing Jenkin's characterization of their services. Although, while questioning Jenkin, Troxler represented that Aspire Tours can "accommodate cycling travelers," "hik[ing] 14ers," or "camping in the snow," she did not make this statement under oath. In this respect, then, Amazing Adventures' services are somewhat unique.

81. With respect to iLIMO's services, the ALJ finds that Amazing Adventures' tours are distinct from and do not overlap the services offered by iLIMO. Although iLIMO offers services to some of the same counties as Amazing Adventures — in particular, Jefferson and El

Paso Counties — its service is limited to shuttle and charter services, i.e. the transportation of passengers. Nothing filed in the record with iLIMO's Intervention nor anything offered either through testamentary or documentary evidence suggests iLIMO offers any sightseeing tours at all. Given that Amazing Adventures' tours are *only* sightseeing tours and offer no shuttle or charter service whatsoever, the ALJ finds and concludes that Amazing Adventures' Application does not interfere with iLIMO's business.

82. But the inquiry does not cease there, because the test for inadequacy requires more than just a showing that some service is distinctive. Rather, a showing must be made that the existing service is *substantially inadequate*. Thus, Amazing Adventures was required to establish that the existing service is *not* "ready, willing and able at all times to render service to anyone who might demand it, including all of applicant's customers." *Ephraim*, 380 P.2d at 232. But no evidence was offered establishing that any riders were unable to obtain requested transport to and from any specific location. As Lysenko testified, his business is doing well, but it has unused capacity. He testified that not every seat on his vehicles is occupied and that he is "having trouble" filling up the vans. This supports Intervenors' argument that Amazing Adventures has not demonstrated that the existing sightseeing services are "substantially inadequate." *See id.*

83. Amazing Adventures nevertheless argues that it should be permitted to conduct its business because it has a constitutional right to "the pursuit of happiness" and the "ability to make money." Jenkin asks that he be given the "opportunity . . . to fail and not to have . . . the government or other people decide that I shouldn't have the opportunities." If his business fails, Jenkin wants the failure to be "because of my own merit, that I didn't work hard enough." However, Jenkin's argument disregards the public safety oversight granted this Commission. The Commission is granted the broad authority "to inspect the motor vehicles, facilities, and records and documents"

of motor carriers. § 40-10.1-102, C.R.S. If every entity that wished to provide transport to the public were permitted to do so, regardless of the entity's ability or safety record, the public could be placed at peril should unregulated or minimally regulated transportation providers operate unsafe vehicles or otherwise expose the public to unsafe conditions. Thus, when assessing a CPCN application, the finder of fact must consider many factors in addition to an applicant's desire to conduct a business.

84. The ALJ therefore finds and concludes that Amazing Adventures has not established that the existing service provided by Aspire Tours or Explorer Tours is "substantially inadequate" warranting the granting of a new CPCN.

85. The ALJ notes, however, that even if she were to conclude that Applicant's business model is sufficiently unique so as not to overlap with that of Intervenor, or that Applicant's business fills a niche not satisfied by either of the Intervenor offering sightseeing services, she nonetheless would deny the Application. As set out above, an Applicant for a CPCN must establish *all* of the following elements: (1) that it is financially, operationally, and managerially fit to conduct the proposed service; (2) that the public needs the proposed service; (3) that the current service in the area is substantially inadequate; *and* (4) that granting the Application is in the public interest. *See Ephraim*, 380 P.2d at 232; *see also Durango Transp. Inc.*, 122 P.3d at 247. Here, Applicant offered no evidence of its current financial fitness and did not meet its burden of establishing its operational fitness. In the absence of such evidence, Applicant cannot establish the first prong of the CPCN test, which is fatal to the Application for a certificate of public convenience and necessity.

D. Conclusion

84. For the reasons and authorities discussed, the ALJ concludes that Amazing Adventures has failed to meet its burden to prove by a preponderance of the evidence that there is a public need for the proposed service, that the incumbents' service is substantially inadequate, and that granting the Application is in the public interest. As such, the ALJ recommends that the Commission deny the Application.

E. Explorer Tours' Motion to Dismiss

84. As noted above, at the conclusion of Amazing Adventures' presentation of its case in chief, Explorer Tours moved to dismiss the Application on the grounds that Amazing Adventures had not met its burden of proof.

85. Because this Decision recommends the denial of the Application, Explorer Tours' motion to dismiss is denied as moot.

V. ORDER

A. It Is Ordered That:

1. Consistent with the above discussion, the above-captioned Application filed by Amazing Adventures Tours, on December 16, 2022, is denied.

2. Amazing Adventures' Objections to Witness and Intervention, filed May 19, 2023, is denied.

3. The motion to dismiss made orally at the hearing by Mountain Star Transportation, LLC, doing business as Explorer Tours, is denied as moot.

4. Proceeding No. 22A-0559CP is closed.

5. This Recommended Decision will 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.

6. 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 twenty (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.

7. Response time to exceptions shall be shortened to seven (7) days.

8. 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.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ALENKA HAN

Administrative Law Judge

ATTEST: A TRUE COPY

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

Rebecca E. White,
Director