

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

PROCEEDING NO. 23A-0078CP

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IN THE MATTER OF THE APPLICATION OF PURPLE MOUNTAIN TOUR COMPANY LLC  
FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO OPERATE AS A  
COMMON CARRIER BY MOTOR VEHICLE FOR HIRE.

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**RECOMMENDED DECISION OF  
ADMINISTRATIVE LAW JUDGE  
MELODY MIRBABA  
GRANTING PERMANENT AUTHORITY  
SUBJECT TO CONDITIONS**

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Mailed Date: January 19, 2024

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**I. STATEMENT AND SUMMARY<sup>1</sup>****A. Statement and Summary**

1. This Decision recommends that the Public Utilities Commission grant Purple Mountain Tour Company, LLC's (Purple Mountain) Application for Permanent Authority to Operate as a Common Carrier by Motor Vehicle for Hire filed on February 15, 2023 (Application), as amended.<sup>2</sup> The primary disputes are whether the public needs the proposed service and whether the incumbent's service is substantially inadequate. As discussed in detail, the Administrative Law Judge (ALJ) answers these questions in the positive. This Decision also denies Purple Mountain's request for attorney fees.

**II. BACKGROUND AND FACTUAL FINDINGS****A. Procedural History<sup>3</sup>**

2. Purple Mountain initiated this Proceeding on February 15, 2023 by filing the above-captioned Application (Application).

3. On March 14, 2023, Purple Mountain sought to amend its Application by restricting the proposed authority from providing service that originates or terminates within Denver, Jefferson, Adams or Arapahoe Counties or within the city limits of Boulder, Colorado.<sup>4</sup> That proposed amendment was approved on April 20, 2023.<sup>5</sup>

4. The Commission deemed the Application complete on March 29, 2023 and referred the matter for disposition to an ALJ.

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<sup>1</sup> The headers in this Decision are for ease of reference only and not findings of any kind.

<sup>2</sup> In reaching this Decision, the Administrative Law Judge (ALJ) has considered the entire record, including all evidence and arguments presented, including those discussed briefly or not at all. Any arguments not specifically discussed have been considered and are rejected.

<sup>3</sup> Only the procedural history necessary to understand this Decision is included.

<sup>4</sup> Purple Mountain's "Restrictions Amendment" filed on March 14, 2023.

<sup>5</sup> Decision No. R23-0260-I at 5-6 and 22 (mailed April 20, 2023).

5. On May 10, 2023, after holding a duly noticed prehearing conference at which all parties appeared, the ALJ scheduled a hybrid evidentiary hearing on the Application for September 11, 12, 14 and 18, 2023.<sup>6</sup> At the same time, the ALJ acknowledged that Purple Mountain waived the statutory deadline for a final Commission decision to issue per § 40-6-109.5(3), C.R.S., during the prehearing conference, and established procedural requirements and deadlines relating to the evidentiary hearing.<sup>7</sup>

6. On August 29, 2023, Purple Mountain submitted a “Joint Motion for Approval of Restrictive Amendment [*sic*], and Joint Notice of Conditional Withdrawal of Interventions” (Joint Motion to Amend) to which the following Interveners were signatories: Estes Park Charters Corp., (Estes Park Charters); Fun Tyme Trolleys, LLC, doing business as Estes Park Trolleys (Estes Park Trolleys); Home James Transportation Services, LTD (Home James); Alpine Taxi/Limo, Inc., (Alpine Taxi); AEX, Inc., (AEX); San Miguel Mountain Ventures, LLC (San Miguel) (collectively, Withdrawing Interveners).<sup>8</sup> The only Intervener who did not agree to the Joint Motion to Amend is Green Jeep Tours, LLC (Green Jeep).<sup>9</sup>

7. On September 1, 2023, Green Jeep filed a Motion to Dismiss Application Due to Defective Notice (Motion to Dismiss) and a Motion to Strike Late Filed Witness and Exhibit Lists (Motion to Strike).

8. On September 5, 2023, the ALJ denied Green Jeep’s Motion to Strike and shortened the response time to the Motion to Dismiss to September 7, 2023.<sup>10</sup>

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<sup>6</sup> Decision No. R23-0306-I at 7 (mailed May 10, 2023).

<sup>7</sup> *Id.* at 3, 8-11.

<sup>8</sup> Another Intervener, Wild Side 4 x 4 Tours LLC withdrew its intervention on July 31, 2023. Decision No. R23-0573-I acknowledges this withdrawal. Decision No. R23-0573-I at 3 and 5 (mailed August 29, 2023).

<sup>9</sup> See Green Jeep’s Response in Opposition to Joint Motion for Approval of Restrictive Amendment and Joint Notice of Conditional Withdrawal of Interventions filed September 1, 2023.

<sup>10</sup> Decision No. R23-0585-I at 6 (mailed September 5, 2023).

9. On September 7, 2023, Purple Mountain filed “Applicant Purple Mountain Tour Company LLC’s Response to Green Jeep Tours, LLC’s Motion to Dismiss Application Due to Defective Notice” (Response to Motion to Dismiss). Purple Mountain’s Response seeks an award of attorney’s fees for responding to the Motion to Dismiss on an emergency basis, which it asserts is frivolous and groundless.<sup>11</sup>

10. On September 8, 2023, the ALJ granted the Joint Motion to Amend and approved the requested amendments to the Application (Amended Application).<sup>12</sup> At the same time, the ALJ acknowledged that because the Joint Motion to Amend was granted, that Alpine Taxi, AEX, San Miguel, Home James, Estes Park Charters, and Estes Park Trolleys withdrew their Interventions and are no longer parties to this Proceeding.<sup>13</sup> The ALJ also denied Green Jeep’s Motion to Dismiss; vacated the September 11 and 12, 2023 evidentiary hearing dates while maintaining the September 14 and 18, 2023 hearing dates; and gave Green Jeep until September 22, 2023 to file a response to Purple Mountain’s request for attorney fees.<sup>14</sup>

11. The ALJ called the matter for an evidentiary hearing on September 14 and 18, 2023 as noticed. All parties appeared.

12. During the hearing, the following persons testified: Messrs. Zachary Bugg, Shawn Alder, Nicholas Hofstra, Matthew Ward, and Jeff Courtwright, and Mses. Liza Spitz, Kira Shonkwiler, Gabrielle Hibbert, Pamela Doelze, Nicole Schultz, and Brooke Lynn Carswell. The

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<sup>11</sup> Response to Motion to Dismiss at 5.

<sup>12</sup> Decision No. R23-0605-I at 11 (mailed September 8, 2023). *See* Decision Nos. R23-0573-I at 5.

<sup>13</sup> Decision No. R23-0605-I at 11.

<sup>14</sup> *Id.* At 10-11.

following Hearing Exhibits were offered and admitted into evidence during the hearing: 101 to 110;<sup>15</sup> 111; 111C; 112-120; 122-124; 126; 128; and 131-132.<sup>16</sup>

13. At the conclusion of the evidentiary portion of the hearing, each party presented closing argument in lieu of filing a statement of position.<sup>17</sup>

14. On September 22, 2023, Green Jeep filed “Intervenor Green Jeep LLC’s Response in Opposition to Motion for Attorney Fees” (Response to Motion for Attorney Fees) with attachments. This Decision addresses Purple Mountain’s request for attorney fees.

## **B. Factual Findings**

15. The Amended Application seeks a Certificate Of Public Convenience (CPCN) authorizing Purple Mountain to provide transportation of passengers in call-and-demand sightseeing service between all points within a 136-mile radius of 24401 County Road 390, Granite, Colorado, with the following two restrictions: service may only be provided from

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<sup>15</sup> Purple Mountain offered Hearing Exhibits 109C and 110C, which were initially admitted. Later during the hearing, Purple Mountain withdrew its assertion of confidentiality as to these exhibits, and unredacted versions of the same exhibits, Hearing Exhibits 109 and 110, were offered and admitted into evidence. The confidential versions (Hearing Exhibits 109C and 110C) were withdrawn and not admitted. However, because Purple Mountain did not withdraw its confidentiality assertions before witnesses testified about them, such testimony was provided during confidential session(s). Such confidential sessions (to examine witnesses on Hearing Exhibits 109C and 110C) should not be treated as confidential, including any transcript of such testimony.

<sup>16</sup> Hearing Exhibit 1000 (filed September 27, 2023) is a PDF list of pre-filed exhibits that the parties indicated they may offer into evidence during the hearing. That list includes information necessary to identify the specific document to be offered, (such as the exhibit number, file date, and filing party) as it appears in the administrative record. During the hearing, most exhibits were presented, offered, and admitted into evidence electronically using the Excel version of Hearing Exhibit 1000 with live links to each of the parties’ pre-filed exhibits, as they appear in the administrative record in this Proceeding. The majority of the admitted exhibits listed in Hearing Exhibit 1000 were admitted by administrative notice; this means that the pre-filed exhibits identified by file date and filer in Hearing Exhibit 1000 (as they appear in the administrative record) were taken into evidence in lieu of receiving an identical copy during the hearing. Hearing Exhibits 109 and 110 listed in Hearing Exhibit 1000 were not admitted into evidence. Those are redacted versions of Hearing Exhibits 109C and 110C. Instead, Hearing Exhibits 109 and 110 (unredacted) were electronically received into evidence through Purple Mountain’s box.com folder during the hearing. In addition, Hearing Exhibits 131 and 132 (not listed in Hearing Exhibit 1000) were electronically received into evidence through the parties’ box.com folders and were not admitted by administrative notice. Administrative support staff added those admitted exhibits to the administrative record on September 27, 2023.

<sup>17</sup> In addition, after Purple Mountain presented its direct case, Green Jeep made an oral motion to dismiss, which the ALJ denied.

May 1<sup>st</sup> to October 31<sup>st</sup>, and no service may originate or terminate within the county limits of Denver, Jefferson, Adams, and Arapahoe counties, Colorado or within the city limits of Boulder, Colorado.<sup>18</sup>

16. Green Jeep is the only remaining Intervener in this Proceeding.<sup>19</sup> Since Green Jeep is the only remaining Intervener, the Amended Application is opposed to the extent that it conflicts or overlaps with Green Jeep's Letter of Authority (i.e., its service territory under its Letter of Authority).

17. Purple Mountain is a Colorado limited liability company for which Mr. Zachary Bugg and Ms. Brooke Lynn Carswell are partners and managers. Purple Mountain is in good standing with the Colorado Secretary of State.<sup>20</sup> Purple Mountain owns Commission-issued off-road charter (ORC) Permit No. ORC-00248; a commercial use authorization (CUA) permit for the Rocky Mountain National Park (for both interpretive vehicle tours and hiking tours); and a Commission-issued luxury limousine permit (LL-04140).<sup>21</sup> At the time of the hearing, Purple Mountain continued to operate under these permits. Under its ORC Permit, Purple Mountain has authority as a limited regulation carrier to transport passengers on a charter basis to scenic points in Colorado, originating and terminating at the same location using a route that is wholly or partially off paved roads.<sup>22</sup> Under its luxury limousine permit, Purple Mountain is authorized to provide specialized and luxurious transportation service on a prearranged charter basis.<sup>23</sup>

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<sup>18</sup> See Decision Nos. R23-0573-I at 5 and R23-0605-I at 11; Hearing Exhibit 103 at 3; Joint Motion to Amend.

<sup>19</sup> See Decision Nos. R23-0573-I and R23-0605-I.

<sup>20</sup> Hearing Exhibit 102.

<sup>21</sup> Hearing Exhibits 104 to 106.

<sup>22</sup> See Hearing Exhibit 104 and Rule 6301(f) of the Commission's Rules Regulating Transportation by Motor Vehicle, *Code of Colorado Regulations* (CCR) 723-6.

<sup>23</sup> See Hearing Exhibit 106 and Rule 6301(e), 4 CCR 723-6.

18. Purple Mountain has a storefront located at 165 Virginia Drive, Number 2, Estes Park, Colorado, 80517.<sup>24</sup> When Purple Mountain's fleet is not in use, the vehicles are stored at this storefront.

19. Purple Mountain has its own operating bank account. Purple Mountain secured two loans, totaling \$500,000; one was acquired for the 2023 calendar year, and the second is guaranteed for the following season.<sup>25</sup> Mr. Bugg and Ms. Carswell have also personally invested approximately \$80,000 in the business. Purple Mountain's primary expenses are for vehicles and insurance. Purple Mountain also spends \$1,500 per month for rent during the summer, and \$500 per month during the winter season. While Mr. Bugg believes Purple Mountain may show a loss for the year, as of the time of the hearing, Purple Mountain was earning a profit.

20. Ms. Carswell is the primary person who manages Purple Mountain's office, with Ms. Lisa Spitz providing office support. Mr. Bugg is Purple Mountain's only driver, but Purple Mountain plans to hire additional drivers as needed.

21. Both Mr. Bugg and Ms. Carswell previously worked at Green Jeep before forming Purple Mountain. Mr. Bugg was a tour guide, and Ms. Carswell worked in the office doing receptionist and other office work. As a tour guide with Green Jeep, Mr. Bugg gave tours around the Rocky Mountain National Park five or six days a week, two or three tours per day, and drove and inspected Green Jeep's tour vehicles. Ms. Carswell made tour reservations for customers, assigned guides and vehicles for tours, and maintained park passes and vehicle clearances.

22. Mr. Bugg has a commercial driver's license with a passenger endorsement and over ten years of experience driving commercial trucks, roll-off construction dumpsters, and accessible buses. He also attended community college for business administration and worked as an assistant

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<sup>24</sup> See Hearing Exhibit 110.

<sup>25</sup> See generally Hearing Exhibits 111 and 111C.

manager of a Papa John's Pizza, which gave him experience managing employees, (including their work schedules), and business finances. During his years of experience, he held positions of lead trainer, lead driver, managing driver, and multiple positions managing a crew of a dozen or more employees.<sup>26</sup>

23. Mr. Bugg testified that the Rocky Mountain National Park is seeing approximately 4 to 4.5 million visitors each year, and roughly 65 to 75 percent come through the Estes Park corridor or from the Estes Park side of the park. Based on his experience in the industry, Mr. Bugg testified that tour companies in the area turn customers away because they are booked, particularly during peak periods (June to August).

24. Purple Mountain seeks to bring higher quality, more luxury-based tours to Estes Park, and to Colorado in general, and aims to use higher quality luxury vehicles, with safety of the utmost importance. Purple Mountain's current fleet includes one 2023 Mercedes Sprinter Van (Sprinter) and one 2023 Kia Telluride (Kia Telluride).<sup>27</sup> The Sprinter has a seating capacity of 14 plus the driver, and the Kia Telluride seats six plus the driver. Both vehicles are paid for in full and prescheduled for all routine maintenance services.

25. Mr. Bugg explained that Purple Mountain's tours involve taking passengers to high-altitude conditions with rapidly changing weather. Using vehicles that can be quickly and completely sealed from the elements and that have heated passenger cabins ensures that passengers are protected from the elements and comfortable, despite quicky and drastic weather changes. Purple Mountain seeks to avoid situations where passengers arrive at the top of the mountain during a tour, encounter snow, sleet, rain, or low temperatures, without the ability to heat the passenger area and fully seal the vehicle. To that end, the Sprinter has heating and cooling units in

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<sup>26</sup> Hearing Exhibit 103 at 5.

<sup>27</sup> *Id.*

the passenger cabin, a glass top, a glass ceiling, and glass walls with a rigid frame that are fully retractable and can be quickly and completely sealed.<sup>28</sup> The Sprinter has passed European and United States rollover safety tests and all FMCSA requirements; has a reinforced structural frame; does not contain a roll bar; and its glass top is made of Department of Transportation (DOT) approved safety glass. The Kia Telluride has dual panoramic sunroofs, heated seats, and full climate control throughout. Both vehicles have individual seats with three-point shoulder seatbelts; are FMSCA and DOT certified; and have coffee bars, snack bars, refrigerators, and other amenities (such as phone chargers). These many features are designed to provide a luxury tour experience, and to ensure that passengers continuously experience unblocked scenic views, alongside safe and comfortable climate conditions in rapidly changing weather conditions.

26. Mr. Bugg compared other tour companies' vehicles and tours (including Green Jeep's) to Purple Mountain's. While other tour companies may offer a beverage and a snack, Purple Mountain provides customers with open access during the tour to a fully stocked refrigerator with water and sparkling water, an assortment of snacks, and a coffee bar with coffee, tea, and hot chocolate. He explained that other tour companies use vehicles with canvas or vinyl plastic tops that can be rolled out to cover the top of the vehicle, and plexiglass windows or other window coverings that can be put in place on the sides. He explained that they do not completely seal up like Purple Mountain's vehicles, and do not include heating and cooling units in the passenger cabins.

27. Such is the case with Green Jeep's vehicles. Green Jeep has seven vehicles that it uses for tours, that is, five Jeep Gladiators and two Jeep Wranglers. The Jeep Wranglers are modified to remove the existing seating and add bench seating, and a roll cage on top.<sup>29</sup> The Jeep

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<sup>28</sup> Hearing Exhibit 131 at 1-7

<sup>29</sup> See Hearing Exhibit 132 at 4-7.

Gladiators are modified to add vinyl bench seating in the pick-up bed area for eight passengers.<sup>30</sup> The bench seats are situated so passengers face inward, and thus have to twist their bodies if they want to see the view behind them.<sup>31</sup> Green Jeep removes the tops that all of its vehicles come with, and replaces them with a waterproof canvas or vinyl plastic top that can be rolled-out and secured to cover the top of the vehicle.<sup>32</sup> Green Jeep's vehicles also have clear plastic vinyl that can be used to enclose the window or side areas where passengers sit, but it is unclear whether the back part of the passenger cabin through which passengers load in and out of the vehicle can be sealed from the elements.<sup>33</sup> Except for one of its vehicles, none of Green Jeep's vehicles have a heating system in the passenger cabin. The one that does have a heating system, has a "partially installed" axillary heater. Green Jeep's vehicles also have a fabricated roll bar, and flat seat belts.<sup>34</sup> For the most part, passengers get in and out of the vehicles through the back of the vehicle.<sup>35</sup>

28. Based on his experience at Green Jeep, Mr. Bugg believes there is a lack of higher quality tour offerings and that customers are not satisfied with existing tours' amenities. Mr. Bugg explained that it was a "constant struggle" to keep Green Jeep customers happy during tours if they encountered inclement weather. To close the fabricated tops on Green Jeep's vehicles, passengers would often have to get out of the vehicles while tour guides rolled out and secured the vinyl top.

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 4.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 7. *See id.* at 4-6.

<sup>34</sup> *Id.* at 4-7.

<sup>35</sup> Green Jeep has RV steps for passengers to use to get in out of its vehicles, though it was not clear whether Green Jeep makes the RV steps available during the entire tour, which would require Green Jeep to take the RV steps on tours. Green Jeep's owner, (Ms. Nicole Schultz) testified that passengers can exit through the front of the vehicle, but provided no information on the ease at which passengers can do this (*i.e.*, whether they would they have to step over bench seating or other seating to access the front of the vehicle). At least one photo of a Green Jeep vehicle implies that they would. *See e.g.*, Hearing Exhibit 132 at 5.

29. Mr. Bugg also believes many Green Jeep passengers were concerned about safety, noting that many passengers appeared apprehensive about getting into Green Jeep vehicles. When he worked for Green Jeep, he reminded customers to be careful not to hit their heads on the vehicle's roll bar, which happened "constantly" as people exited and entered the vehicles. Mr. Bugg criticized Green Jeep's seatbelts, describing them as "go-kart seatbelts."<sup>36</sup> He also described Green Jeep's seatbelts as short and "child-sized," as they would not fit many adult passengers, especially those weighing over 200 pounds. In his experience, Green Jeep's seatbelts also deteriorated quickly and broke frequently. He experienced broken or missing seatbelts in multiple Green Jeep vehicles on multiple occasions (which he reported). As a tour guide for Green Jeep, due to safety concerns, he refused to drive several of Green Jeep's vehicles, such as those with cords showing, cracks in tires, and seatbelt issues.

30. As noted, Ms. Spitz works in the office for Purple Mountain. Ms. Spitz used to work for Green Jeep. She testified about her observations and experiences with Green Jeep and Purple Mountain. Ms. Spitz highlighted the benefits of Purple Mountain's vehicles. For example, she explained that Purple Mountain's vehicles have much more comfortable passenger seating than other providers; the vehicles are easy to get in and out of; and if the weather turned mid-tour, the vehicles can quickly be closed so that customers are almost immediately protected from the elements. When working for Green Jeep, it took Ms. Spitz approximately ten minutes to roll out and secure the top during a tour; as a result, customers would be exposed to the elements during that time. She also explained that even when Green Jeep's top is in place, when it rains, water rolls down the top and into the front of the vehicle. In short, in her experience, managing the impact of

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<sup>36</sup> He believes they are go-kart seatbelts because while working for Green Jeep, he was shown an Amazon.com link for the exact seatbelts that Green Jeep used. He believes that Green Jeep's owner (Ms. Schultz) showed him this website but was not sure.

the changing weather conditions on passengers is more difficult with Green Jeep's vehicles. In fact, Green Jeep passengers regularly complained about being cold during tours. Green Jeep offers passengers blankets, but not all of the passengers can sit near or in the limited heated areas of Green Jeep's vehicles. Even those who did sit in or near the heated areas in the front could also get wet from the water coming in through the top.

31. Ms. Spitz explained that "accessibility" is a significant difference between Purple Mountain's vehicles and Green Jeep's vehicles. Customers climb in and out of Green Jeep's vehicles through the back of the vehicles, which can be difficult for elderly and young passengers.<sup>37</sup> Green Jeep's bench seating is less comfortable, which also impacts elderly and young passengers.

32. Based on her experience, Ms. Spitz believes that Purple Mountain's vehicles and tours are suited for people of all ages—including younger and older customers, and that Purple Mountain's tours are much more comfortable and more accessible than other tours on the market. She believes there is a public need for Purple Mountain's services that is not being met because there are no other tour companies offering a comparably comfortable service with a dry and smooth ride, which is particularly needed for older people.

33. Mr. Shawn Alder manages the Courtyard Shops and Flats in Estes Park; Purple Mountain is one of his company's tenants. As a property manager for at least 15 residential apartments (in addition to commercial units), Mr. Alder has experience with the overall growth that the Estes Park area has seen, and tourism in the area. His company recently converted six apartments into vacation rentals, which he manages. These units quickly became fully booked immediately upon being made available, despite the lack of any customer reviews. His company plans to convert all of its units to vacation rentals. As a part of this, his company did market

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<sup>37</sup> See e.g., Hearing Exhibit 132 at 4 (photo of back of Green Jeep vehicle where customers climb in and out of vehicle).

research into tourism in the area, and discovered that for the most part, all of Estes Park's accommodations are fully booked out every summer, and that Estes Park accommodates, on average, between five and seven million visitors from the beginning of June through the end of October each year. Given this and the growth in Estes Park, Mr. Alder believes that the tour industry in Estes Park needs to grow to meet the increased demand. He added that due to the Rocky Mountain National Park's timed-entry reservation requirement, guests often ask him how they can visit the Park when they are unable to reserve a timed-entry slot. He often refers guests to Purple Mountain since it is not required to have a timed-entry slot to enter the Rocky Mountain National Park.

34. Mr. Alder has taken tours with both Purple Mountain and Green Jeep. He believes that Purple Mountain's retractable roof and climate-controlled vehicles set it apart from other tour companies. He was impressed with the views from the vehicle and with Mr. Bugg as a tour guide. He explained that the biggest challenge with a tour in the area is that once you get to a higher elevation, the weather changes dramatically, such that it gets very cold, and there can be hail. Mr. Alder found the biggest difference between Purple Mountain and Green Jeep to be how they manage the inevitable weather change at the top of the mountain. With Green Jeep, because it can take some time to roll out and secure the top cover, customers are fully exposed to the weather, including hail. In contrast, Purple Mountain is able to quickly and easily close the glass roof and windows so customers have less exposure.

35. Ms. Kira Shonkwiler testified about Purple Mountain's "great services." She found the ride to be comfortable and pleasant, with fun things to entertain customers during the multi-hours long tour, including many opportunities to get out. She has taken tours with other providers in the area, including Green Jeep. She explained that in her experience, most other tour companies

use vehicles like Jeeps that are open to the elements, lack climate control, and have overhead bars on which passengers (including her) hit their heads. Ms. Shonkwiler also submitted a letter of support for Purple Mountain (discussed later).<sup>38</sup>

36. Ms. Gabrielle Hibbert took a half-day tour with Purple Mountain, which she described as a special, unique, and fun experience with a more accommodating vehicle than other tours she's experienced. She appreciated that Purple Mountain offered a refrigerator with beverages in the vehicle, and that its vehicle can be quickly sealed from the outdoors (and poor weather), which she finds particularly helpful for older people or young children. In her experience, other tour companies in the area do not match the luxury experience she had with Purple Mountain. For example, Ms. Hibbert also took a Green Jeep tour. She explained that Green Jeep's vehicles are completely exposed to the outdoors. Ms. Hibbert described her experience on a Green Jeep tour as "completely outdoors" and "more exposed to the elements than Purple Mountain."

37. Mr. Matthew Ward has not taken a Purple Mountain tour, but he has personally observed Purple Mountain's vehicles, and his family took a Purple Mountain tour. He believes that Purple Mountain is a revolutionary tour company providing a "really unique experience" that is different from the other tours Mr. Ward has been on, including Green Jeep's. He views Purple Mountain's vehicles as being very accommodating and "ADA-friendly," which is important. He is unaware of any other providers who have vehicles with a glass retractable roof and who serve a specific "niche target audience" that require more comfort.

38. Mr. Ward described his experience on a Green Jeep's tour as "very rugged" and akin to an African safari. He could not have taken his grandmother on Green Jeep's tour because

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<sup>38</sup> See Hearing Exhibit 120.

she would have struggled with climbing in and out of Green Jeep's vehicle, which he described as "not very accommodating." He explained it would have been challenging for anyone with any kind of disability to climb in and out of Green Jeep's vehicle, which you do from the rear of the Jeep. During a tour, passengers regularly get in and out of the vehicle to enjoy views and take photos, but the difficulty climbing in and out of Green Jeep's vehicle was, in his opinion, not "ADA-friendly" or accessible to individuals with disabilities. Given how frequently, passengers get in and out of the vehicle during a tour, accessibility is particularly important to him when choosing a tour company. Mr. Ward explained that before he took a Green Jeep tour, there were "a lot of things that we had to plan for," such as dressing to be exposed to the weather (including rain). He also testified about the weight limits of Green Jeep's vehicles, noting that he pays attention to those details and believed that the vehicle was overloaded with passengers. While he did not feel unsafe in Green Jeep's vehicle, he was "pretty nervous coming through some of the turns" and was "thinking the whole time about what I was driving in."

39. Mr. Ward believes that there is a public need for Purple Mountain's services, noting, for example, that he could easily take his grandmother on a Purple Mountain tour, but could not have taken her on Green Jeep tour due to the accessibility issues discussed above.

40. Mr. Nicholas Hofstra worked for Green Jeep last summer as a tour guide.<sup>39</sup> During his time with Green Jeep, a number of customers requested or sought a higher-end service than what Green Jeep provides. Green Jeep's tours are open-air, so passengers feel the rain and wind. He explained that some people want this experience, but there are a number of people who demand higher class services (of the nature that Purple Mountain seeks to provide).

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<sup>39</sup> It is unclear whether his reference to "last summer" was to the summer of 2023 or 2022.

41. Mr. Hofstra also explained that while working for Green Jeep, there were many times when Green Jeep could not accommodate the influx of people seeking tours in the Estes Park area and had to turn customers away. For example, while working for Green Jeep, potential customers would approach him the parking lot about joining a tour. He would refer them to office staff, then shortly thereafter, the same potential customers would come back out and tell him they were unable to join a tour because Green Jeep was sold out. He described another instance where he had family in Estes Park and his family was unable to get on any tour on three separate dates during their trip; he confirmed that Green Jeep and other companies in the area were unable to accommodate his family.

42. Ms. Pamela Doelze has taken two tours with Purple Mountain. She felt it was an amazing tour where she learned a lot and that the vehicle was well-kept, clean, safe, and well climatized. She has recommended Purple Mountain to other people.

43. Mr. Jeff Courtright chose to take a Purple Mountain tour this year based on its vehicle. He described Purple Mountain's tour as providing comfort that is next to none. He appreciated that everyone had their own seat (rather than bench seating); that the entire top of the vehicle opens and closes; and that the vehicle has a coffee bar with coffee and snacks for passengers.

44. Mr. Courtright also took a Green Jeep tour in 2022 or 2021. Green Jeep's tour was bumpier than Purple Mountain's. He had his two-year old daughter with him on the tour and had to hold her in his lap during the entire tour for safety reasons. He explained that the seat she was supposed to occupy did not have a functioning seat belt. Green Jeep's vehicles have bench seats that, in his view, appeared to be installed to squeeze in as many people as possible. There were no open seats on his tour, except for the one meant for Mr. Courtright's two-year-old daughter.

45. Mr. Courtright does not believe there are enough tour companies in the Estes Park area to meet the demand. In his experience, unless you book a tour three to four weeks in advance, you will not be able to take a tour, because tour companies are fully already booked.<sup>40</sup> He testified that there is a demand for luxury sightseeing tours in and around Estes Park and the Rocky Mountain National Park, but the current supply is not meeting this demand.

46. In addition to the witnesses who testified during the hearing, Purple Mountain submitted 12 letters supporting its Application.<sup>41</sup> The majority of the letters noted appreciation for Purple Mountain's vehicles, such as their glass roofs, unobstructed views, climate-control, and the ability to completely seal the Sprinter should the need arise.<sup>42</sup> Many of the letter authors opined that Purple Mountain's services are much needed. For example, Gloria and Dennis Erickson, who took a Purple Mountain tour in July 2023, wrote that Purple Mountain's vehicle and services are like no other currently offered in Estes Park and that Purple Mountain's services are much needed.<sup>43</sup>

47. Randy Silkwood, an Estes Park resident, wrote that Purple Mountain's offering is "unique...[and] much needed in Estes Park," and that "I wish to express my overwhelming support" for Purple Mountain.<sup>44</sup> He notes that other tour companies in the area seem more like "cattle haulers," but that with Purple Mountain, his family road in comfort and was able to enjoy the Rocky Mountain National Park like never before.<sup>45</sup>

48. Ms. Jean Torgeson wrote that people with health issues are underserved by the current providers.<sup>46</sup> She explained that due to her health condition, (resulting in widespread pain,

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<sup>40</sup> The Green Jeep tour he took was booked four or five weeks in advance.

<sup>41</sup> Hearing Exhibits 112-119, 122-124, and 126.

<sup>42</sup> Hearing Exhibits 114, 116, 119, 120, 122, 123, 124.

<sup>43</sup> Hearing Exhibit 113.

<sup>44</sup> Hearing Exhibit 122.

<sup>45</sup> *Id.*

<sup>46</sup> Hearing Exhibit 114.

decreased mobility, and heart problems), she spent 15 years being unable to enjoy the mountains. This ended when she learned about Purple Mountain. She believes the only choice for her and people like her is Purple Mountain because other providers have vehicles that are difficult to get in and out of; seating with low backs and little cushioning; handles that passengers are supposed to hold for additional security that are placed too high to reach; and little protection from poor weather conditions.<sup>47</sup> Riding in a vehicle with little protection from the elements would be miserable for her, based on her health condition.<sup>48</sup>

49. Ms. Ruth Wendland's support letter expresses similar accessibility concerns.<sup>49</sup> Specifically, she explains that when she began looking for a tour company for her July visit, she was "dismayed" to learn that most tour companies' vehicles would not meet her and her family's needs.<sup>50</sup> The majority of the vehicles required passengers to climb into an open back area to sit sideways for the drive through Rocky Mountain National Park with very little protection from the elements.<sup>51</sup> She explained that at their age, this would not have been feasible and that it would not have worked for her younger grandchildren.<sup>52</sup> Until she learned of Purple Mountain, she believed that the only option to visit the Rocky Mountain National Park would be for her family members to drive their three personal vehicles to the Park. In addition to reducing their carbon footprint, going on a tour with Purple Mountain was perfect for her party of ten, who were able to stay warm and dry when an afternoon rainstorm moved through. She cannot imagine not using Purple Mountain's services again on future trips.<sup>53</sup>

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Hearing Exhibit 123.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

50. Similarly, Ms. Jennie Horna wrote that in her experience, other tour companies in Estes Park have not always been accessible, safe, or reliable for all members of the public, and due to the high volume of tourists to the Rocky Mountain National Park, many people have had to go without the option of a guided tour.<sup>54</sup> Other tour companies' vehicles are small and crowded, and she has not always felt safe in their vehicles. She explained that Estes Park brings in excess of four million visitors annually. She supports adding Purple Mountain's much needed service, which she believes has been needed for many years.<sup>55</sup>

51. Jerome and Helen Thomason have visited the Estes Park area many times over the last 48 years.<sup>56</sup> They have considered taking one of the jeep tours in the area but have not because the weather changes quickly in the mountains.<sup>57</sup> After learning about Purple Mountain, they did not hesitate to take a tour (with Purple Mountain). They explained that their group of senior citizens felt safe and knew they would be comfortable and dry regardless of the weather conditions during their Purple Mountain tour.<sup>58</sup> They appreciated that the vehicle's large glass top and sides ensured that they would not miss any viewing opportunities. They believe that the unique aspects of Purple Mountain's tour and their vehicles serve a customer need that is currently not being met by other operators in the area.<sup>59</sup>

52. Ms. Anne Woods wrote that Purple Mountain was the only tour company that she found who could meet her needs.<sup>60</sup> She described her experience on a Purple Mountain tour as

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<sup>54</sup> Hearing Exhibit 115.

<sup>55</sup> *Id.*

<sup>56</sup> Hearing Exhibit 116.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Hearing Exhibit 112.

wonderful and comfortable. She never felt unsafe despite her fear of heights; she was impressed with the knowledgeable guide.<sup>61</sup>

53. Ms. Kathy Shonkwiler believes that Purple Mountain is the only tour company using a vehicle that provides both an open-air experience and unobstructed views in a climate-controlled environment when the vehicle needs to be sealed due to weather.<sup>62</sup> She noted that other tour companies have open vehicles with no enclosures, and when the weather gets cold, they supply you with a blanket.<sup>63</sup>

54. Ms. Kira Shonkwiler (who also testified) wrote that she has gone on many tours in the past 10 years with various tour companies in Estes Park.<sup>64</sup> She noted that Purple Mountain's vehicle lacks the negative features that she experienced with other tour companies, such as overhead bars on which people hit their heads and faulty equipment (like malfunctioning seat heaters). Based on her experience, she believes that other tour companies use makeshift fleets, many with unsafe features. She complimented Purple Mountain's original seatbelts, which she explained are much different than other tour companies who weld and bolt a grouping of seats on a separate chassis.<sup>65</sup> She appreciates that Purple Mountain's vehicle can be fully enclosed to protect passengers from the elements, noting that most other tour companies' vehicles are open-air with full exposure, which can be quite uncomfortable if one does not wear enough layers. And, contrary to her experience with other our companies, when on a Purple Mountain tour, she did not smell or breathe in the vehicle's exhaust. She believes there is a public need for Purple Mountain's services in Estes Park because there is a need for high-end touring services with reliable equipment.<sup>66</sup>

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<sup>61</sup> *Id.*

<sup>62</sup> Hearing Exhibit 119.

<sup>63</sup> *Id.*

<sup>64</sup> Hearing Exhibit 120.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

55. Mr. Simon Shonkwiler wrote that there is a “civic need” for Purple Mountain to operate in Estes Park because the community needs safe luxury touring services.<sup>67</sup> He explained that he has felt unsafe at times when on tours with other tour companies, but with Purple Mountain, the Sprinter was “a delight” and made him feel “much safer.”<sup>68</sup> He also noted that with another tour company (who he did not identify), he bumped his head multiple times on the rack system that was installed, and such tours became “very uncomfortable” for those who did not bring a heavy jacket.<sup>69</sup> Purple Mountain’s vehicle was not like this. It was comfortable, with individual seating, and an open view with retractable see-thru domes to adjust for the weather.<sup>70</sup>

56. Mr. Stephen Carlyle wrote that many of his vacation rental guests take tours because they are unable to reserve a timed-entry slot to visit the Rocky Mountain National Park.<sup>71</sup> He believes that more tour companies serving the area will help ensure that visitors who are unable to reserve a timed-entry slot can still enjoy the Rocky Mountain National Park.<sup>72</sup> He particularly values Purple Mountain’s vehicles and the amenities they offer.

57. Ms. Nicole Schultz owns and operates Green Jeep. Green Jeep operated under a Commission-issued ORC permit starting sometime in 2009. Its ORC permit was initially cancelled in 2015 and was not reinstated until January 2022. Green Jeep continued to operate tours during the during the timeframe in which it did not have an active ORC permit (or other Commission permit). Ms. Schultz explained that there were only a few providers in the area in 2014, and that several (possibly all of them) did not have a Commission permit. In 2015, she contacted the Commission to find out whether Green Jeep required a permit to operate. She was never given a

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<sup>67</sup> Hearing Exhibit 124.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Hearing Exhibit 126.

<sup>72</sup> *Id.*

definitive answer, though she believed that Green Jeep did not require a permit because its tours were educational and included hiking. In 2020, Ms. Schultz spoke with a Commission investigator about whether Green Jeep required a permit. Ms. Schultz testified that the investigator told her that Green Jeep's operations fall into a grey area; that it may need an ORC permit; and that it could apply for an ORC permit or seek a declaratory order as to whether it needs a permit. Ultimately, Green Jeep applied for an ORC permit, which the Commission issued in January 2022. Green Jeep continues to operate year-round under its ORC permit.

58. After following another case before the Commission involving another provider in the area (Wild Side 4x4 LLC), and consulting with an attorney, Ms. Schultz determined that Green Jeep should seek a CPCN. Green Jeep's CPCN permit was issued approximately two months after Purple Mountain initiated this Proceeding, in April 2023. As of the time of the evidentiary hearing, Green Jeep had operated under a Commission-issued CPCN permit for approximately five months, and for nine months under its most recent Commission-issued ORC permit.

59. As already noted, Green Jeep has two Jeep Wranglers and five Jeep Gladiators that it uses to provide tours. It modifies these vehicles to suit its needs (as already explained).<sup>73</sup> Although only one of its vehicles has heating in the rear cabin, Green Jeep provides customers with heated blankets when needed due to weather. Green Jeep also provides passengers with ponchos to use during the tour should the need arise. Green Jeep offers passengers water and granola bars, or other snacks, but does not have a coffee bar in its vehicles.

60. Ms. Schultz testified that compared to 2022, August and September of 2023 were much slower than usual. She believes that this drop in business coincided with the start of Purple Mountain's operations. She testified that Green Jeep had time blocks with no tours booked during

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<sup>73</sup> *Supra*, ¶ 27.

the fall season, and that she could not recall a time where each of Green Jeep's vehicles were out and there was no ability to give another tour. Green Jeep did not have information on the number of customers it served since obtaining its CPCN and ORC permits, or in prior years before it had permits.

61. Ms. Schultz has not run a profit-and-loss financial statement for the 2023 calendar year but stated that any summer business diversion would have an impact on her operations and ability to provide service year-round, because the winter is very slow. Ms. Schultz explained that the summer season subsidizes the winter season and pays for most of Green Jeep's winter expenses.

62. Ms. Schultz reviewed Green Jeep's records to find the individuals who testified and wrote letters indicating they took a Green Jeep tour. She stated that of the ones she was able to find, they were cancelled in the system; meaning that, in her opinion, they did not pay for or take a Green Jeep tour. Green Jeep did not offer any documentary evidence confirming this.

63. Ms. Schultz testified that there are approximately 25 to 30 other tour companies that operate in the Estes Park area, some of which have ORC permits, and many operating without a permit. She agreed that many of these companies were operating when Green Jeep received its CPCN permit in April 2023.

### **III. RELEVANT LAW**

#### **A. Commission Jurisdiction**

64. 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., (2023).<sup>74</sup> Common carriers may only operate with a Commission-issued certificate declaring that the present or future public

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<sup>74</sup> See *Miller Brothers, Inc. v. Pub. Utils. Comm'n*, 525 P. 2d 443, 446 (Colo. 1974).

convenience and necessity requires or will require the common carrier's operation.<sup>75</sup> Motor carriers providing call-and-demand sightseeing service are common carriers.<sup>76</sup> Thus, the Commission has jurisdiction to issue a certificate of public convenience and necessity allowing motor carriers, such as Purple Mountain, to provide call-and-demand sightseeing service.

## **B. Legal Standards to Obtain a CPCN**

65. As the proponent of an order, Purple Mountain bears the burden of proof by a preponderance of the evidence.<sup>77</sup> The preponderance standard requires the fact finder to determine whether the existence of a contested fact is more probable than its non-existence.<sup>78</sup> A party has met this burden of proof when the evidence, on the whole and however slightly, tips in favor of that party.<sup>79</sup> Although the preponderance standard applies, the evidence must be substantial. Substantial evidence is such relevant evidence as a reasonable person's mind might accept as adequate to support a conclusion.<sup>80</sup>

66. Applicants for a CPCN must establish their financial, managerial, and operational fitness to conduct the proposed operations.<sup>81</sup> 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 in the near future; capital structure and current cash balances; managerial competence and experience; fixed physical

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<sup>75</sup> § 40-10.1-201(1), C.R.S.

<sup>76</sup> See Rule 6001 (ooo), 4 CCR 723-6.

<sup>77</sup> §§ 13-25-127(1) and 24-4-205(7), C.R.S.; Rule 1500, 4 CCR 723-1.

<sup>78</sup> *Swain v. Colorado Dep't of Revenue*, 717 P.2d 507, 508 (Colo. App. 1985).

<sup>79</sup> *Schocke v. Dep't of Revenue*, 719 P.2d 361, 363 (Colo. App. 1986).

<sup>80</sup> *City of Boulder v. Pub. Utilis. Comm'n*, 996 P.2d 1270, 1278 (Colo. 2000).

<sup>81</sup> Rule 6203(a)(XI), 4 CCR 723-6.

facilities such as office space and maintenance garages; appropriate licenses and equipment necessary to operate a dispatch system; and vehicles of appropriate type.<sup>82</sup> Whether the applicant is willing and able to comply with applicable public utilities laws also bears upon the question of fitness.<sup>83</sup>

67. In addition to fitness, applicants must show that the present or future public convenience and necessity requires or will require the proposed service.<sup>84</sup> In deciding that question, the Commission applies the regulated monopoly doctrine.<sup>85</sup> Commission Rules reflect the regulated monopoly doctrine by requiring an applicant to demonstrate the public needs the proposed service; that granting the authority is in the public interest; and that the existing service is inadequate.<sup>86</sup>

68. 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.<sup>87</sup> With this regulated monopoly protection comes the obligation to indiscriminately accept and carry passengers (for compensation) and to “furnish, provide, and maintain such services, 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, just, and reasonable.”<sup>88</sup> As such, under the regulated monopoly doctrine, a common carrier serving a particular area is only entitled to protection against competition if its

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<sup>82</sup> See e.g., Decision No. C08-0933, at ¶ 7, Consolidated Proceeding Nos. 08A-241CP, 08A-281CP-Extension, 08A-284CP-Extension, and 08A-300CP.

<sup>83</sup> See *Thacker Brothers Transp. v. Pub. Utils. Comm'n*, 543 P.2d 719, 721 (Colo. 1975).

<sup>84</sup> See § 40-10.1-201(1), C.R.S.

<sup>85</sup> *Ephraim Freightways Inc. v. Pub. Utils. Comm'n*, 380 P.2d 228, 230 (Colo. 1963).

<sup>86</sup> Rule 6203(a)(XVII), 4 CCR 723-6.

<sup>87</sup> See e.g., *Denver & R.G. W. R. Co., v. Pub. Utils. Comm'n*, 351 P.2d 278, 280 (Colo. 1960).

<sup>88</sup> § 40-3-101(2), C.R.S. See § 40-10.1-103(1), C.R.S., (common carriers are public utilities within the meaning of articles 1 to 7 of title 40, Colorado Revised Statutes); Rule 6001(p), 4 CCR 723-6.

service is adequate to satisfy the public's needs.<sup>89</sup> Indeed, the existence of an adequate and satisfactory service by motor carriers serving the area negates a public need and demand for added service by an additional carrier.<sup>90</sup> As a result, the public need and adequacy elements are closely related.<sup>91</sup>

69. The Commission has “wide discretionary powers in determining the demands of ‘public convenience and necessity.’”<sup>92</sup> Whether an incumbent’s service is substantially inadequate is a question of fact that the Commission must determine.<sup>93</sup> The Commission may consider “a broad range of evidence in determining whether an incumbent carrier’s service is substantially inadequate.”<sup>94</sup> The Colorado Supreme Court has noted that the Commission may consider any relevant evidence in demonstrating whether the public convenience and necessity requires additional service.<sup>95</sup> 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.<sup>96</sup> 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 . . . .”<sup>97</sup> This is consistent with the Commission’s purpose in granting a transportation authority to “ensure that the public’s transportation needs are met.”<sup>98</sup>

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<sup>89</sup> *Ephraim Freightways Inc.*, 380 P.2d at 230.

<sup>90</sup> *Id.* at 231.

<sup>91</sup> *See id.* at 230-231.

<sup>92</sup> *Pub. Utils. Comm’n v. Donahue*, 335 P.2d 285, 288 (Colo. 1959).

<sup>93</sup> *RAM Broadcasting v. Pub. Utils. Comm’n*, 702 P.2d 746, 751 (Colo. 1985); *Durango Transp. Inc. v. Pub. Utils. Comm’n*, 122 P.3d 244, 248 (Colo. 2005).

<sup>94</sup> *Durango Transp. Inc.*, 122 P.3d at 250.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 251.

<sup>97</sup> *Id.* at 249.

<sup>98</sup> *Id.* at 250.

70. An applicant may demonstrate substantially inadequate service through evidence that the incumbent is not ready, willing, and able at all times to render service to anyone who might demand it.<sup>99</sup> But the Commission is not required to find that the incumbent has failed or refused to provide service to a requesting customer.<sup>100</sup> An applicant must show that the incumbent has demonstrated a general pattern of inadequate service.<sup>101</sup> But, “the test of inadequacy is not perfection.”<sup>102</sup> That is because any common carrier providing service to many clients will receive some legitimate complaints.<sup>103</sup> Expressions of mere opinion, preference, desire, and willingness to use an applicant’s service over an incumbent’s, alone, do not establish that the incumbent’s service is substantially inadequate.<sup>104</sup> Put differently, if expressions of preference are supported by evidence relating to the adequacy of the incumbent’s service, such evidence may establish substantial inadequacy.

71. 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.’”<sup>105</sup>

72. Based on the foregoing, Purple Mountain 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) approving the Amended Application is in the public interest. If Purple

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<sup>99</sup> *Id.* at 247, citing *Ephraim*, 380 P.2d at 232.

<sup>100</sup> *Id.* at 251.

<sup>101</sup> *Id.* at 248.

<sup>102</sup> *Ephraim Freightways Inc.*, 380 P.2d at 232.

<sup>103</sup> *RAM Broadcasting*, 702 P.2d at 750.

<sup>104</sup> See *Durango Transp. Inc.*, 122 P.3d at 248, quoting *Pub. Utils. Comm’n v. Weicker Transfer & Storage Co.*, 451 P.2d 448, 449 (Colo. 1969).

<sup>105</sup> *Id.* at 250 quoting *Ephraim Freightways Inc.*, 380 P.2d at 231-32.

Mountain meets its burdens, Green Jeep must rebut evidence concerning substantial inadequacy by a preponderance of the evidence.

### C. Legal Standards for an Award of Attorney's Fees

73. The Commission has broad constitutional and statutory discretion to determine when attorney's fees should be awarded in its own proceedings.<sup>106</sup> Although the statute governing a court's award of attorney fees applies to civil actions in a court of record, (§ 13-17-102, C.R.S.), the ALJ finds that the statute and related authorities provide an appropriate and helpful litmus as to whether attorney fees should be awarded here. Under § 13-17-102, C.R.S., a court must assess attorney fees if it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct.<sup>107</sup> The terms "lacked substantial justification" means substantially frivolous, groundless, or vexatious.<sup>108</sup> A claim or defense is frivolous if the proponent can present no rational argument based on the evidence or law in support of that claim or defense.<sup>109</sup> A claim or defense is groundless if, while sufficient to survive a motion to dismiss for failure to state a claim, is not supported by any credible evidence at trial.<sup>110</sup> The test for groundlessness assumes that the proponent has a valid legal theory but can offer little or nothing in the way of evidence to support the claim.<sup>111</sup> A vexatious claim is one brought or maintained in bad faith to annoy or harass.<sup>112</sup>

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<sup>106</sup> *Colo. UTE Electric Asso. v. Pub. Utils. Comm.*, 602 P.2d 861, 868 (Colo. 1979); *Mountain States Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 576 P.2d 544, 547 (Colo. 1978). See Colo. Const. art. XXV.

<sup>107</sup> § 13-17-102, (4), C.R.S.

<sup>108</sup> *Id.*

<sup>109</sup> *W. United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069 (Colo. 1984).

<sup>110</sup> *Id.*

<sup>111</sup> *Bilawsky v. Faseehudin*, 916 P.2d 586, 590 (Colo. App. 1995)

<sup>112</sup> *Bockar v. Patterson*, 899 P.2d 233, 235 (Colo. App. 1994).

#### **IV. FINDINGS, ANALYSIS, AND CONCLUSIONS**

##### **A. Fitness**

74. Based on the findings discussed in paragraphs 18 through 22, 24 and 25, and for the reasons discussed below, the ALJ finds that Purple Mountain has met its burden to show by a preponderance of the evidence that it is financially, managerially, and operationally fit to conduct the proposed service.<sup>113</sup> For example, Mr. Bugg has over ten years of experience with commercial driving, is an experienced CDL driver, and has experience managing employees and their schedules, and business finances. Both Ms. Carswell and Mr. Bugg have direct experience in the transportation industry, including the type of transportation service that Purple Mountain seeks to provide. Both Mr. Bugg and Ms. Carswell have invested in their business and have secured financing to further support their business operations. While they believe they will show a loss for the year, Purple Mountain is presently earning a profit using its existing permits. Purple Mountain will operate out of an office located in Estes Park and also plans to store their vehicles there while not in use. Purple Mountain's Sprinter and Kia Telluride are appropriate and sufficient to render the proposed service.

##### **B. Public Need and Substantial Inadequacy**

75. As an initial matter, the ALJ finds that the majority of the service territory that the Amended Application seeks to serve is outside Green Jeep's authorized service territory. As such, the ALJ concludes that the portions of the Amended Application seeking to serve areas outside of Green Jeep's authorized service territory are unopposed. To hold otherwise would be akin to allowing Green Jeep to object to and seek regulated monopoly protection for geographical areas

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<sup>113</sup> See §§ 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.

that it does not serve. This flies in the face of the regulated monopoly doctrine, which extends incumbent carriers regulated monopoly protection against competition only if their service is adequate to satisfy the public's needs.<sup>114</sup> It is axiomatic that an incumbent carrier cannot receive regulated monopoly protection against competition in a service territory that it is not authorized to serve. For the reasons discussed, to the extent that Green Jeep attempts to challenge portions of the Amended Application which do not conflict or overlap with its CPCN, such challenges are rejected.<sup>115</sup>

76. The contested portions of the Amended Application relate to call-and-demand sightseeing service in and around Estes Park, including points within the Rocky Mountain National Park. Perhaps the most compelling evidence as to public need is evidence indicating that there is a need for more accessible services for young children and members of the public who have health or mobility issues. Such persons struggle with the more rugged, open-air tour of the type that Green Jeep provides. This includes issues with exposure to the elements, mobility difficulty associated with climbing in and out of vehicles, a bumpier ride that may exasperate or negatively impact health issues and low-backed seating that fail to provide needed back support. This makes it infeasible for such persons to take a tour with Green Jeep and other similar providers. Based on the foregoing, the ALJ finds that the evidence indicating customers' preference to use Purple Mountain's services over existing providers' services due to the issues discussed above, amounts to more than mere personal preferences. Rather, such preferences are based on established facts about the nature of the service that existing providers offer (including Green Jeep), and customers' difficulty accessing and using such services due to the nature of the service. The evidence also

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<sup>114</sup> See *Ephraim Freightways Inc.*, at 230-231.

<sup>115</sup> It is not entirely clear that Green Jeep intends to challenge portions of the Amended Application that do not conflict with its CPCN.

establishes that members of the public, including those requiring more accessible tour services, require a tour service that offers more comfort than currently available, such as heated passenger compartments, a smoother ride, individual high-backed seats, and a vehicle that can be quickly and fully enclosed to the elements. For customers experiencing health and mobility issues, such added comfort is particularly significant, and impacts their ability to access tour services. For the foregoing reasons, the ALJ concludes that the existing carriers, including Green Jeep, fail to provide and maintain such services, instrumentalities, and equipment, and facilities that promote the safety, health, comfort, and convenience of its patrons, employees, and the public, and that are in all respects adequate, just, and reasonable.<sup>116</sup>

77. Evidence as to the increasing number of tourists in Estes Park each year (between four and seven million), and the timed-entry system for the Rocky Mountain National Park also support a finding that there is a public need for the proposed service. Several witnesses testified that existing tour companies turned customers away because they were fully booked, and that customers would have to book tours three to five weeks in advance to ensure they can take tour. This means that customers who plan to book a tour upon arriving in the area may be unable to go on a tour, particularly during peak season. The demand is exasperated by Rocky Mountain National Park's timed entry system. The evidence established that this system has made it more difficult for tourists to visit the Rocky Mountain National Park on their own. The Rocky Mountain National Park provides a limited number of timed-entry slots, which quickly get booked. As a result, persons who would otherwise tour the Rocky Mountain National Park on their own must turn to tour companies so they may visit the Park. This increases demand for tours.

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<sup>116</sup> § 40-3-101(2), C.R.S. *See* § 40-10.1-103(1), C.R.S.

78. For all the reasons discussed, the ALJ concludes that Purple Mountain met its burden to establish by a preponderance of the evidence that there is a public need for the proposed service, that the existing service is substantially inadequate and that granting the Amended Application is in the public interest.

79. Green Jeep disputes that there is a public need for the proposed service and that its service is substantially inadequate. Ms. Schultz testified that she could not ever recall a time where Green Jeep was fully booked and had to turn customers away. This contradicts other evidence (including credible witness testimony). Green Jeep provided no documentary evidence or testimony indicating the volume of tours it has provided in any given timeframe or the volume of passengers who have gone its tours in any given timeframe. Nor did it provide documentary evidence indicating that it has never been fully booked. Such evidence would have been helpful to rebut the credible evidence that Purple Mountain submitted indicating that Green Jeep and other tour companies are often fully booked, particularly during peak season. Nor did Green Jeep rebut Purple Mountain's evidence that potential customers must book tours many weeks in advance in order to go on a tour at all, particularly during peak season. Notably, Green Jeep did not rebut evidence indicating a need for more accessible and comfortable services for young children and members of the public who have health or mobility issues.

80. Matters are further complicated by the fact that Green Jeep has only been operating under its ORC permit since January 2022, and its CPCN permit since April 2023. Given that Green Jeep itself had to meet the same regulated monopoly doctrine standards that apply here in order to receive its CPCN, as recently as early 2023, Green Jeep had to establish that there was a public need for its service and that the existing service is substantially inadequate. Since its CPCN was issued, Green Jeep met that burden. The evidence, taken as a whole, continues to support a finding

that there is a public need for additional service of the kind that Purple Mountain seeks to provide, and that the existing service is still substantially inadequate.

81. Green Jeep also disputed witness testimony and letters from persons who took tours with Green Jeep, arguing that most of the individuals must not have taken a tour because Ms. Schultz was unable to confirm that they took a tour through Green Jeep's records. Green Jeep presented no documentary evidence supporting Ms. Schultz's findings. It is difficult to give Ms. Schultz's testimony on this issue much weight given that customers could have taken a tour that was not booked in their name or that was paid for by a credit card not in their name.<sup>117</sup> This is juxtaposed against the witnesses' testimony that credibly described their experiences on Green Jeep's tours.

82. In short, while Green Jeep presented some evidence challenging Purple Mountain's showing that there is a public need and that Green Jeep's service is substantially inadequate, on balance, considering the entirety of the evidentiary record, Green Jeep's evidence fails to adequately rebut Purple Mountain's evidentiary showing.

83. For all these reasons, the ALJ finds that Purple Mountain met its burden to establish by a preponderance of the evidence that there is a public need for the proposed service, that the existing service is substantially inadequate, and that granting the Amended Application serves the public interest. As such, the ALJ recommends that the Commission grant the Amended Application.

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<sup>117</sup> The record reveals no evidence shedding light as to whether Green Jeep has records of every passenger who takes a Green Jeep tour, such as through daily tour lists or signed passenger waivers of liability, and if so, whether Ms. Schultz reviewed such records.

**C. Purple Mountain's Request for Attorney's Fees**

84. As noted, Purple Mountain seeks an award of attorney fees for responding to Green Jeep's Motion to Dismiss. The ALJ determines whether attorney fees should be awarded using the standards outlined in § 13-17-102, C.R.S.<sup>118</sup> That standard requires a determination as to whether the Motion to Dismiss is substantially frivolous, groundless, or vexatious.<sup>119</sup> This, in turn, requires a review of the factual and legal basis for the Motion to Dismiss.

85. The factual basis for Green Jeep's Motion to Dismiss is that the address upon which the Application's requested authority is based is invalid and does not exist.<sup>120</sup> That address is 24401 Co Rd 390, Granite, Colorado (later amended by the ALJ to 24401 County Road 390, Granite, Colorado).<sup>121</sup> Green Jeep argued that the Commission's notice fails to give the public sufficient notice of the scope of the Application; fails to provide procedural due process; and that without a "valid starting point for this application" the Commission lacks jurisdiction to grant any authority to Purple Mountain.<sup>122</sup> In support, Green Jeep provided an Affidavit of Nicole Schultz stating that she attempted to plot the territorial radius of the proposed service territory using the above address, but was unable.<sup>123</sup> Subsequently, she researched the address through USPS, which indicated that "24401 Co Rd 390, Granite, Colorado 81228" is not a valid address.<sup>124</sup> Ms. Schultz enlisted the aid of the Chaffee County Assessor's office, which informed her that there was no such address on

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<sup>118</sup> *Supra*, ¶ 73.

<sup>119</sup> § 13-17-102, (4), C.R.S.

<sup>120</sup> Motion to Dismiss at 1-2.

<sup>121</sup> Decision No. R23-0605-I at 10; Application filed February 15, 2023 at 3; Notice of Applications Filed February 21, 2023 at 3.

<sup>122</sup> Motion to Dismiss at 2-3.

<sup>123</sup> Exhibit 2 to Motion to Dismiss (Affidavit of Nicole Schultz).

<sup>124</sup> *Id.*

its list of addresses.<sup>125</sup> Green Jeep also provided a printout showing that Ms. Schultz's USPS web search for 24401 Co Rd 390, Granite, Colorado 81228 indicates that the address was not found.<sup>126</sup>

86. Green Jeep filed its Motion to Dismiss on September 1, 2023, approximately two weeks before the evidentiary hearing was scheduled to commence. The ALJ shortened the response time to the Motion to Dismiss to September 7, 2023.<sup>127</sup> And, as already noted, the ALJ denied the Motion to Dismiss on September 8, 2023, finding that Green Jeep's Motion to Dismiss lacks merit.<sup>128</sup>

87. Based on the timing of Green Jeep's Motion to Dismiss, Green Jeep's lack of reasonable conferral, the lack of any basis in fact to support the Motion to Dismiss, and the likelihood of resolving this matter before expensive motions practice, Purple Mountain asserts that Green Jeep's Motion to Dismiss is frivolous and groundless, per § 13-17-102, C.R.S., and asks the Commission to award Purple Mountain its attorney fees for the time and resources to respond (on an emergency basis) to the Motion, as permitted by Rule 1405(g), 4 CCR 723-1.<sup>129</sup>

88. Green Jeep responds to Purple Mountain's request for attorney's fees by arguing that (a) the issue of whether valid public notice has been provided is not frivolous or groundless; (b) that counsel properly conferred with Purple Mountain before filing the Motion to Dismiss; and (c) that Purple Mountain's counsel did not confer with Green Jeep before requesting that attorney fees be awarded.<sup>130</sup>

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<sup>125</sup> *Id.*

<sup>126</sup> Exhibit 3 to Motion to Dismiss.

<sup>127</sup> Decision No. R23-0585-I at 6.

<sup>128</sup> Decision No. R23-0605-I at 8 and 10.

<sup>129</sup> Response to Motion to Dismiss at 5. Rule 1405(g) applies to an award of attorney fees as a sanction relating to discovery disputes, and therefore is not relevant. Rule 1405(g), 4 CCR 723-1.

<sup>130</sup> Response to Motion for Attorney Fees at 1. Green Jeep's Response is not helpful. All of Green Jeep's factual assertions relating to the address at issue, including those in Mr. Beckwith's Affidavit, rely upon the wrong address – 22401 Co Rd 390, rather than 24401 Co Rd 390, Granite, Colorado. *Id.* at 1-2; Affidavit of James A. Beckwith filed September 22, 2023 at 1, 3, and 4. Other arguments in Green Jeep's response lack merit or are irrelevant; the ALJ finds it is unnecessary to address them. *See e.g.*, Response to Motion for Attorney Fees at 2-4

89. The Motion to Dismiss includes an Affidavit, signed before a notary public, attesting to the matters therein. As noted, the Affidavit explains that Ms. Schultz attempted to map and locate the address through several methods (USPS and the Chaffee County Assessor's Office).<sup>131</sup> Green Jeep also included a printout of the USPS search results indicating that the address could not be found.<sup>132</sup> While Purple Mountain was able to produce ample and credible information demonstrating that the relevant address is locatable on a map (as demonstrated through at least four search engines) and that it is a valid address,<sup>133</sup> this does not render Green Jeep's Motion to Dismiss substantially frivolous, groundless, or vexatious. Rather, Green Jeep provided support for its factual assertions that Purple Mountain successfully overcame and rebutted. What is more, based on Green Jeep's address research, supported by Ms. Schultz's Affidavit and USPS search results, Green Jeep's legal argument finds support in the law. For all these reasons, the ALJ finds that Green Jeep's Motion to Dismiss is not substantially frivolous or groundless.<sup>134</sup>

90. Although the timing of Motion and the lack of a reasonable conferral prior to filing the Motion to Dismiss are suspect and undoubtedly resulted in Purple Mountain diverting resources from hearing preparation, the ALJ finds nothing in the record to support a finding that Green Jeep filed the Motion to Dismiss in bad faith to annoy or harass Purple Mountain. As such, the ALJ finds that Green Jeep's Motion to Dismiss is not substantially vexatious.<sup>135</sup> For all these reasons, the ALJ denies Purple Mountain's request for attorney's fees to respond to Green Jeep's Motion to Dismiss.

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(arguing that Green Jeep should get attorney fees because it performed due diligence that Purple Mountain should have done, and that Purple Mountain did not confer before requesting attorney fees).

<sup>131</sup> Exhibit 2 to Motion to Dismiss.

<sup>132</sup> Exhibit 3 to Motion to Dismiss.

<sup>133</sup> Decision No. R23-0605-I at 8.

<sup>134</sup> See § 13-17-102, (4), C.R.S.; *W. United Realty, Inc.*, 679 P.2d at 1069; *Bilawsky*, 916 P.2d at 590.

<sup>135</sup> *Bockar*, 899 P.2d at 235.

**V. CONCLUSION**

91. The ALJ concludes that Purple Mountain has met its burdens and recommends that the Commission grant the Amended Application as set forth below. In accordance with § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record in this proceeding and recommends that the Commission enter the following order.

**VI. ORDER**

**A. The Commission Orders That:**

1. Consistent with the above discussion, the above-captioned application filed by Purple Mountain Tour Company, LLC (Purple Mountain) on February 15, 2023 and amended on August 29, 2023 is granted, subject to the below conditions.

2. Purple Mountain’s request for attorney fees for its Response to Green Jeep’s Motion to Dismiss is denied.

3. Purple Mountain’s Application, as amended by Decision No. R23-0605-I, is granted subject to the conditions identified below. Purple Mountain is granted a Certificate of Public Convenience and Necessity to Operate as a Common Carrier of Passengers by Motor Vehicle as follows:

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 within a 136-mile radius of 24401 County Road 390 Granite, Colorado.

**RESTRICTIONS:**

(1) Service may only be provided from May 1st through October 31st.

(2) No service may originate or terminate within the county limits of Denver, Jefferson, Adams, and Arapahoe counties, Colorado or within the city limits of Boulder, Colorado.

4. Purple Mountain must operate in accordance with all applicable Colorado laws and Commission rules.

5. Purple Mountain may not commence operation under the authority granted until it has complied with the requirements of Colorado law and Commission rules, including without limitation:

- (a) causing proof of insurance (Form E or self-insurance) or surety bond (Form G) coverage to be filed with the Commission;
- (b) paying to the Commission, the motor vehicle fee for each vehicle to be operated under authority granted by the Commission, or in lieu thereof, paid the fee for such vehicle(s) pursuant to the Unified Carrier Registration Agreement;
- (c) having an effective tariff on file with the Commission. To this end, Purple Mountain must file an advice letter and tariff on not less than ten days' notice. The advice letter and tariff must be filed as a new Advice Letter proceeding and must comply with all applicable rules. In calculating the proposed effective date, the date received at the Commission is not included in the notice period and the entire notice period must expire prior to the effective date. (Additional tariff information can be found on the Commission's website at [www.colorado.gov/pacific/dora/common-carriers](http://www.colorado.gov/pacific/dora/common-carriers)); and
- (d) paying the applicable issuance fee.

6. If Purple Mountain does not cause proof of insurance or surety bond to be filed, pay the appropriate motor vehicle fees, file an advice letter and proposed tariff, and pay the issuance fee *within 60 days* of the effective date of this Decision, then the grant of the Permit will be void. For good cause shown, the Commission may grant additional time for compliance if the request for additional time is filed within 60 days of the effective date of this Decision.

7. The Commission will notify Purple Mountain in writing when the Commission's records demonstrate compliance with ordering paragraph 5.

8. Proceeding No. 23A-0078CP is closed.

9. 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.

10. 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.

11. 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.

12. 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.

13. 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

MELODY MIRBABA

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Administrative Law Judge

ATTEST: A TRUE COPY

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

Rebecca E. White,  
Director