

Decision No. R24-0371-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 24F-0073CP

GREEN JEEP TOURS LLC,

COMPLAINANT,

V.

PURPLE MOUNTAIN TOUR COMPANY LLC AND ZACHARY BUGG AND BROOKE
LYNN CARSWELL,

RESPONDENTS.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
ALENKA HAN
GRANTING RESPONDENTS' MOTION FOR
PROTECTIVE ORDER IN PART, AND
DENYING COMPLAINANT'S
MOTIONS TO STRIKE AND
FOR ATTORNEY FEES AND COSTS**

Mailed Date: May 31, 2024

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I. STATEMENT AND PROCEDURAL HISTORY

1. On February 12, 2024, Green Jeep Tours LLC (Complainant or Green Jeep) commenced this Proceeding by filing a Formal Complaint against Purple Mountain Tour Company LLC (Purple Mountain); Zachary Bugg, Lay Representative of Purple Mountain; and Brooke Lynn Carswell, Managing Director of Purple Mountain (collectively, Respondents). Green Jeep's Formal Complaint alleges that Respondents have "offered to sell and ha[ve] sold individual tickets" for transportation services without the proper certificate of public convenience and necessity in violation of Rule 6016 of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-6, and requests relief.

2. Specifically, Green Jeep asserts 13 enumerated grounds for relief from Purple Mountain's alleged regulatory violation, including entering findings that Purple Mountain violated Commission rules; that Bugg and Carswell "aided and abetted" Purple Mountain in violating Commission rules; that Respondents be enjoined from engaging in violative behavior; that cease and desist orders be entered against Respondents and their activities; and that Respondents be barred from obtaining Commission authority to operate in the future.

3. On February 16, 2024, after receiving the Formal Complaint, the Commission issued a Notice of Hearing setting this Proceeding for an evidentiary hearing to be held on April 22, 2024, commencing at 9:00 a.m.

4. Also on February 16, 2024, the Commission issued and sent to Respondents an Order to Satisfy or Answer the Formal Complaint notifying Respondents that a Formal Complaint had been asserted against them. The Order to Satisfy or Answer advised Respondents that a responsive pleading to the Formal Complaint or evidence that they had satisfied the allegations of the Formal Complaint was due "20 days from service upon you of this order and

copy of the attached complaint.” The Order to Satisfy or Answer was accompanied by a copy of the Notice of Hearing, Formal Complaint, verification, and attachments to the Formal Complaint. Respondents’ responsive pleading to the Formal Complaint was thus due 20 days after the February 16, 2024 service of the Formal Complaint, or on or before March 7, 2024.

5. On February 21, 2024, the Commission referred this Proceeding to an Administrative Law Judge (ALJ) for disposition. The Proceeding was subsequently assigned to the undersigned ALJ.

6. Because the Commission had not received a response from Respondents, on March 22, 2024, the undersigned ALJ issued Decision No. R24-0188-I ordering Respondents to file a responsive pleading within seven days of the Decision and requesting the parties to advise the ALJ of their preferred hearing format.

7. On March 29, 2024, Respondents moved for a one-week extension of time, up to and including April 5, 2024, within which to respond to the Formal Complaint.¹ Respondents represented that they had conferred with Complainant about the Motion for Extension of Time to Respond to Complaint (Motion for Extension of Time) and that Complainant objected to the motion.

8. On April 5, 2024, Respondents filed their Evidence of Satisfaction, Response to Complaint and Statement Regarding Hearing, along with exhibits suggesting that Respondents were no longer offering or accepting payment for single-ticket transportation sales.

9. On April 9, 2024, Complainant filed a Response in Opposition to Motion for Extension of Time to Respond to Complaint.

¹ See Respondents’ Motion for Extension of Time to Respond to Complaint (Motion for Extension of Time), filed Mar. 29, 2024.

10. By Decision No. R24-0229-I, issued April 12, 2024, the undersigned ALJ granted Respondents' Motion for Extension of Time and accepted their pleading responding to the Formal Complaint into the record.

11. After a prehearing conference held April 11, 2024, the ALJ issued Decision No. R24-0246-I on April 18, 2024, vacating the original April 22, 2024 hearing date and rescheduling the evidentiary hearing to be held June 27, 2024, in Estes Park, Colorado. A precise location for the Estes Park hearing was established by Decision No. R24-0332-I, issued May 16, 2024.

12. Decision No. R24-0246-I also established a procedural schedule to govern this Proceeding, and set a May 31, 2024, deadline by which the parties were to conduct discovery.

13. On May 6, 2024, Respondents filed a Motion to Protective Order and Request for Hearing (Motion for Protective Order), seeking relief from certain discovery requests propounded by Complainant.

14. Instead of responding to the assertions made by Respondents in their Motion for Protective Order, on May 20, 2024, Complainant filed a Motion to Strike Respondents' Motion for Protective Order Together with Complainant's Motion for Attorney Fees and Costs.

15. Respondents filed a Response in Opposition to Complainant's Motion to Strike on May 24, 2024.

II. MOTION FOR PROTECTIVE ORDER

A. Respondents' Position

16. In their Motion for Protective Order, Respondents raise three main arguments: (a) Complainant is seeking to relitigate issues decided in Proceeding No. 23A-0078CP, which resulted in the award of a Certificate of Public Convenience and Necessity (CPCN) to

Respondent Purple Mountain; (b) the scope of discovery Complainant seeks is impermissibly broad; and (c) the procedural time strictures affecting this Proceeding warrant treating this Proceeding as an accelerated complaint proceeding under Rule 1405(i) of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1, which limits each party "to a total of not more than 20 interrogatories."²

17. Respondents note that Recommended Decision No. R24-0036, issued January 19, 2024, in Proceeding No. 23A-0078CP, granted Purple Mountain's Application and awarded it permanent authority to operate under a CPCN. Complainant here was an Intervenor in Proceeding No. 23A-0078CP, contested Purple Mountain's Application, presented grounds for its challenge to the Application at a fully-adjudicated evidentiary hearing, and filed exceptions to Recommended Decision No. R24-0036 with the Commission. The Commission considered Complainant's exceptions at length at its Weekly Meeting, but, by Decision No. C24-0280 issued April 29, 2024, ultimately denied all the exceptions Complainant asserted and upheld Recommended Decision No. R24-0036. Thus, although Complainant continues to challenge the granting of Purple Mountain's CPCN, — still pending is Complainant's Motion for Extension of Time to File Application for Rehearing, Reargument or Reconsideration filed May 20, 2024 — Purple Mountain's Letter of Authority to operate is still on track to be issued soon.

18. Respondents also assert that the written discovery requests propounded by Complainant are overly burdensome and delve into unrelated and "overly intrusive" matters. By way of example, Respondents state that Complainant has asked for Purple Mountain's "gross revenue" and "a copy of each and every discount coupon or card that you have used."³ Indeed,

² Rule 1405(i)(III)(B) of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1.

³ Respondents Motion to Protective Order and Request for Hearing (Motion for Protective Order), p. 2, ¶ 10, filed May 6, 2024.

attached to Respondents' Motion for Protective Order are copies of the discovery requests Complainant propounded, establishing that Complainant had, indeed, propounded these questions on Respondents.⁴

19. Respondents' counsel, J. Aaron Atkinson, reached out to Complainant's counsel by letter sent via email on May 3, 2024, summarizing these same concerns about Complainant's discovery requests. In the letter, Respondents pointed out that "Green Jeep has already made these arguments through evidence at the hearing" in Proceeding No. 23A-0078CP; that "this case involves the claim by Green Jeep that Purple Mountain continues to sell individual tickets through its website"; that "many other discovery requests" exceed "the permissible realm of discovery beyond Rule 26(b)"; and that the discovery requests exceed the limitations of Rule 1405(i)(III)(B).⁵ However, it does not appear that Complainant responded to the letter before Respondents filed their Motion for Protective Order on May 6, 2024.

20. As a remedy, Respondents request that discovery in this Proceeding be limited "to discovery originating after the hearing in [Proceeding] No. 23A-0078CP."⁶

B. Complainant's Response

21. As noted above, Complainant failed to respond to the arguments asserted by Respondents in their Motion for Protective Order. Complainant offers no response whatsoever to Respondents' contention that the discovery requests are overly burdensome and seek information about issues thoroughly litigated in Proceeding No. 23A-0078CP.

22. Instead, Complainant rehashes its argument that Respondents did not timely respond to the Formal Complaint, an issue which was addressed and determined by Decision No.

⁴ See Exhibit B to Motion for Protective Order, pp. 29-31 of 35.

⁵ Exhibit A to Motion for Protective Order.

⁶ Motion to Protective Order, p. 2, ¶ 6.

R24-0229-I which both granted Respondents' request for an extension of time to respond to the Formal Complaint and accepted Respondents' responsive pleading.⁷

23. In addition, Complainant alleges that Respondents did not confer with Complainant's counsel, Richard Bara, before filing the Motion for Protective Order. Complainant asserts that "there was no follow-up phone call or voice mail to Complainant's counsel by Respondents when they failed to receive a response from Complainant's counsel."⁸

24. Complainant represents that Mr. Bara "was out of state until returning for the weekend" and first saw Mr. Atkinson's letter and the Motion for Protective Order upon "his return to Denver."⁹

25. Complainant argues that Respondents have thus not satisfied the requirement to make "a good faith effort to resolve the discovery dispute" and the Motion for Protective Order should accordingly be denied.¹⁰

C. Findings and Conclusions

26. Having reviewed the Motion for Protective Order, Complainant's response, and Respondents' Response to Complainant's Motion to Strike, the ALJ is persuaded by Respondents' arguments.

27. First, the ALJ notes that the issues raised in the Motion for Protective Order and responding Motion to Strike are not complex and neither warrant nor necessitate a hearing on the issues raised therein. The ALJ finds and concludes that the parties' pleadings offer sufficient information for the ALJ to issue a ruling on the pending motions.

⁷ Complainant's Motion to Strike Respondents' Motion for Protective Order Together with Complainant's Motion for Attorney Fees and Costs (Motion to Strike), p. 2, filed May 20, 2024.

⁸ *Id.* at p. 3.

⁹ *Id.*

¹⁰ *Id.*

28. Second, the ALJ rejects Complainant's contention that Mr. Atkinson failed to make a good faith effort to confer. Exhibit A to Respondents' Motion for Protective Order clearly shows that Mr. Atkinson sent Mr. Bara a letter via email on May 3. Further, Respondents' Response in Opposition to Complainant's Motion to Strike includes a screenshot showing that the email was sent to Mr. Bara's known email address on May 3, 2024, by Mr. Atkinson's Legal Assistant, Georgia Deyoe.¹¹ Although it may be true that Mr. Bara did not see the email until his return to Denver, the fact remains that Mr. Atkinson sent the letter via email in a timely fashion and, thus, most assuredly, made a "good faith" effort to reach him. A "good faith" effort does not mean that the sender confirms the other party received the message, nor does it require the sender to try multiple forms of communication. Rather, a "good faith" effort means only that the sender demonstrated an honest and timely attempt to reach the other person before filing a Motion for Protective Order, which Respondents have persuasively established here.

29. Further, the Commission's records show that Respondents' Motion for Protective Order was filed at 4:23 p.m. on May 6, 2024. Thus, if Mr. Bara returned to Denver by that day, he should have had time during the day on May 6, 2024, to respond to the letter before the Motion for Protective Order was filed but did not do so.

30. The ALJ is also skeptical that Mr. Bara had no access to his email while out of state. The ALJ herself has a Gmail app on her phone that sends all email received to her Gmail account directly to her phone in any location she may be, so long as she has cell phone service.

31. Although the undersigned ALJ is sympathetic to the plight of Mr. Bara's client whose immigration "matter is no walk in the park" and could result in horrific consequences if

¹¹ Respondents' Response in Opposition to Complainant's Motion to Strike, p. 3, filed May 24, 2024.

the client is deported,¹² Mr. Bara may not disregard other important correspondence matters pertaining to his other clients while attending to the immigration case.

32. Third, the ALJ agrees with Respondents that issues that pre-date the evidentiary hearing held on September 14 and 18, 2023, in Proceeding No. 23A-0078CP are irrelevant to this Proceeding. Issues raised and addressed at the evidentiary hearing in Proceeding No. 23A-0078CP were thoroughly addressed therein and cannot be relitigated here. Indeed, Complainant is collaterally estopped from relitigating those issues.

33. Moreover, having not responded to this contention, Complainant does not dispute this point.

34. Any discovery in this Proceeding will therefore be limited to activities and actions Respondents took or may have taken *after* the evidentiary hearing in Proceeding No. 23A-0078CP held on September 14 and 18, 2023. Discovery of information preceding the September 14 and 18, 2023, evidentiary hearing will be barred.

35. Fourth, the ALJ finds and concludes that discovery requests seeking information about Respondents' "gross revenues" and copies of "each and every discount coupon or card" Respondents' may have used are overly broad and burdensome.¹³ The Formal Complaint alleges only that Respondents improperly sold tickets to individual clients without the proper CPCN. Obtaining every discount coupon or card and information about all gross revenues casts a net far wider than the improper sale of individual tickets alleged in the Formal Complaint.

36. Here, again, Complainant has not responded to or addressed Respondents' allegations that discovery is overbroad. Nor has Complainant offered any explanation as to why

¹² Motion to Strike, p. 4.

¹³ See, e.g. Interrogatories P-8 and I-14 through I-18, Exhibit B to Motion for Protective Order, pp. 29-31 of 35.

this information is necessary for it to pursue its Formal Complaint against Respondents. Without any such explanation or guidance, the ALJ is hard-pressed to understand why Complainant seeks this information.

37. Finally, the ALJ is not persuaded to limit discovery in this Proceeding to only 20 interrogatories from each party, pursuant to Rule 1405(i)(III)(B) as suggested by Respondents. Although the ALJ agrees with Respondents that the timeline leading to the evidentiary hearing in this Proceeding is short, the ALJ notes that Respondents did not raise this objection until two business days before the responses to the discovery requests were due.

38. Nor has this Proceeding declared an “accelerated complaint proceeding” within the meaning of Rule 1405. Any such declaration should have been made early in this Proceeding and certainly before service of any discovery requests. It was not. Without such a designation, Complainant could not have known that discovery could be limited by Rule 1405(i)(III)(B) and had no reason to believe it may have been so limited when it propounded its discovery requests.

39. Rather, it appears that Complainant’s discovery requests fall within the limitations set by C.R.C.P. 26(b)(2). C.R.C.P. 26(b)(2) limits the discovery “a party may serve on each adverse party” to 30 interrogatories, 20 requests for production of documents, and 20 requests for admissions. Reviewing Exhibit B to the Motion for Protective Order, it appears that Complainant has propounded 19 interrogatories, 20 requests for production of documents, and 11 requests for admissions on Purple Mountain; 18 interrogatories, seven requests for production of documents, and 18 requests for admissions on Respondent Bugg; and 18 interrogatories, seven requests for production of documents, and 18 requests for admissions on Respondent Carswell. This does not exceed the limits set by C.R.C.P. 26(b)(2).

40. Moreover, even if the ALJ were inclined to limit discovery to 20 questions per party, Respondents have not indicated which questions they would answer and the ALJ is reluctant to determine or choose which of the many interrogatories Complainant has propounded should be answered by Respondents.

41. And, the ALJ finds, ordering Complainant to winnow down its discovery requests to just 20, serve them on Respondents, and have Respondents answer the same before the evidentiary hearing schedule for June 27, 2024, could cause further and unnecessary delay.

42. The Motion for Protective Order will thus be granted in part. Discovery will be limited to actions and activities the Respondents did or may have taken *after* the September 14 and 18, 2023, evidentiary hearing held in Proceeding No. 23A-0078CP. Discovery is also limited against the overly burdensome interrogatory requests exemplified by Interrogatories P-8 and I-14 through I-18, Exhibit B to the Motion for Protective Order, pp. 29-31.

III. MOTION TO STRIKE

43. In response to the Motion for Protective Order, Complainant filed its Motion to Strike the Motion for Protective Order, arguing primarily that Respondents did not make the requisite good faith effort to confer with Complainant through Mr. Bara before filing the Motion for Protective Order. Complainant asks that the Motion for Protective Order be stricken and that it be awarded its ensuing attorney fees and costs.

44. Having determined that Mr. Atkinson made a good faith effort to contact Mr. Bara, the ALJ has thus already rejected the basis for Complainant's Motion to Strike.

45. Moreover, having granted the Motion for Protective Order in part, Complainant's Motion to Strike is now moot.

46. The ALJ will therefore deny the Motion to Strike and will decline Complainant's invitation to award it its attorney fees and costs.

IV. ORDER

A. It Is Ordered That:

1. Respondents' Motion for Protective Order and Request for Hearing, filed May 6, 2024, is granted in part.

2. Discovery will be limited to actions and activities the Respondents did or may have taken *after* the September 14 and 18, 2023, evidentiary hearing held in Proceeding No. 23A-0078CP.

3. Discovery is also limited against the overly burdensome discovery requests seeking information about "each and every discount coupon" Respondents may have issued and Respondents' "gross revenues," as exemplified by Interrogatories P-8 and I-14 through I-18, Exhibit B to the Motion for Protective Order, pp. 29-31.

4. Discovery will *not* be limited according to Rule 1405(i)(III)(B) of the Commission's Rules of Practice and Procedure, 2 *Code of Colorado Regulations* (CCR) 723-1.

5. Except for requests and responses now prohibited by the above-ordered limitations and restrictions on discovery, Respondents will respond to Complainant's written discovery requests within 14 days of this Decision.

6. Complainant's Motion to Strike Respondents' Motion for Protective Order Together with Complainant's Motion for Attorney Fees and Costs is denied.

7. This Decision is effective immediately.

(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