

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

PROCEEDING NO. 23A-0552CP-EXT

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IN THE MATTER OF THE APPLICATION OF 303 PARTY BUS LLC FOR AUTHORITY TO  
EXTEND OPERATIONS UNDER CERTIFICATE OF PUBLIC CONVENIENCE AND  
NECESSITY NO. 55846.

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**RECOMMENDED DECISION DENYING APPLICATION  
AND CLOSING PROCEEDING**

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Issued Date: August 20, 2024

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**I. STATEMENT**

**A. Background**

1. On November 3, 2023, 303 Party Bus LLC (“303 Party Bus” or “Applicant”) filed an application seeking to extend its operations under its Certificate of Public Convenience and Necessity No. 55846 (“Application”).

2. On November 6, 2023, 303 Party Bus filed an amendment to the Application (“Amended Application”).

3. On November 13, 2023, the Commission issued public notice of the authority sought by 303 Party Bus in the Amended Application as follows:

Currently, CPCN No. 55846 authorizes the following:

Transportation of passengers in call-and-demand shuttle and charter service between 6232 Beach Street, Denver, Colorado and the following venues: Red Rocks Amphitheater, 18300 West Alameda Parkway, Golden, Colorado 80401; 1st Bank Center, 11450 Broomfield Lane, Broomfield, Colorado 80021; Sports Authority at Mile High Stadium, 1701 Bryant Street, Denver, Colorado 80204; Coors Field, 2001 Blake Street, Denver Colorado 80205; Ogden Theater, 935 East Colfax Avenue, Denver, Colorado 80218; Fiddlers Green, 6230 Greenwood Plaza Boulevard, Englewood, Colorado 80111; Pepsi Center, 1000 Chopper Circle, Denver, Colorado 80204; Dicks’ Sporting Goods Park, 6000 Victoria Way, Commerce City, Colorado 80022; Bluebird Theater, 3317 East Colfax Avenue, Denver, Colorado 80206. RESTRICTIONS. This authority is restricted: (a) to the use of one vehicle; (b) to the use of a vehicle with a maximum capacity of 44 passengers; (c) to round-trips originating and terminating at 6232 Beach Street,

Denver, Colorado that may include stops only at the addresses identified herein; and (d) against service to or from hotels, motels, or airports.

If the extension is granted, CPCN No. 55846 will read:

Transportation of passengers in call-and-demand shuttle service and call-and-demand charter service between points in the Counties of Arapahoe and Denver, and between said points on the one hand, and points in the Counties of Adams, Arapahoe, Boulder, Broomfield, Clear Creek, Denver, Douglas, El Paso, Gilpin, Jefferson, and Larimer, on the other hand.

4. On November 15, 2023, Mountain Star Transportation LLC, doing business as Explorer Tours (“Explorer Tours”) filed a Petition for Intervention and Entry of Appearance stating that the proposed extended authority, if granted, would conflict with its CPCN No. 55952, which provides Explorer Tours with the authority to provide “Transportation of passengers in call-and-demand shuttle service between all points in Denver County, on the one hand, and Red Rocks Park and Amphitheatre, State of Colorado, on the other hand.”

5. On December 20, 2023, the Commission deemed the Application complete and referred the proceeding by minute entry to an Administrative Law Judge (“ALJ”). The proceeding was subsequently assigned to the undersigned ALJ.

6. On January 11, 2024, the ALJ issued Decision No. R24-0029-I that set deadlines of March 15, 2024 and April 5, 2024 for 303 Party Bus and Explorer Tours, respectively, to file and serve witness and exhibit lists and exhibits.

7. 303 Party Bus and Explorer Tours both filed and served witness and exhibit lists and exhibits by the deadlines established in Decision No. R24-0029-I.

8. The hearing went forward on May 1, 2024, at which time 303 Party Bus made an oral motion to continue the hearing and agreed to waive the statutory deadline in § 40-6-109.5(2), C.R.S. (“Motion”). Explorer Tours opposed the Motion. The ALJ granted the Motion and continued the hearing until June 26, 2024. The ALJ also set deadlines for 303 Party

Bus and Explorer Tours to supplement their witness and exhibit lists and exhibits by May 29, 2024 and June 12, 2024, respectively.

9. On May 7, 2024, the ALJ memorialized the decisions made orally at the May 1, 2024 hearing in Decision No. R24-0297-I.

10. The parties timely supplemented their witness and exhibit lists.

11. The continued hearing took place on June 26, 2024. Amanda Miculinich, Don Van Guildler, Blair Watkins, Evelyn Casias, and Nicholas Casias testified on behalf of 303 Party Bus. Roman Lysenko testified on behalf of Explorer Tours. Exhibits 100-102, 200, 201, 202, 203, 204, and 206 were admitted into the evidentiary record. At the conclusion of the hearing, the ALJ took the case under advisement.

## II. **BURDEN OF PROOF**

12. Except as otherwise provided by statute, the Administrative Procedures Act imposes the burden of proof in administrative adjudicatory proceedings upon “the proponent of an order.”<sup>1</sup> 303 Party Bus, as the party seeking an order by the Commission, bears the burden of proof by a preponderance of the evidence.<sup>2</sup> The evidence must be “substantial evidence,” which is defined as “such relevant evidence as a reasonable [person’s] mind might accept as adequate to support a conclusion ... it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.”<sup>3</sup> This standard requires the finder of fact to determine whether the existence of a contested fact is more probable than its non-existence.<sup>4</sup>

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<sup>1</sup> § 24-4-105(7), C.R.S.

<sup>2</sup> Section 24-4-105(7), C.R.S.; § 13-25-127(1), C.R.S.; Rule 1500 of the Rules of Practice and Procedure, 4 CCR 723-1.

<sup>3</sup> See, e.g., *City of Boulder v. PUC*, 996 P.2d 1270, 1278 (Colo. 2000) (quoting *CF&I Steel, L.P. v. PUC*, 949 P.2d 577, 585 (Colo. 1997)).

<sup>4</sup> *Swain v. Colorado Department of Revenue*, 717 P.2d 507 (Colo. App. 1985).

### III. FINDINGS OF FACT

#### A. **303 Party Bus**

13. The Commission issued CPCN No. 55846 to 303 Party Bus on April 28, 2014. CPCN No. 55846 authorizes 303 Party Bus to provide call-and-demand shuttle and charter service between 6232 Beach Street, Denver, Colorado and various event venues in the Denver metropolitan area, including Red Rocks Amphitheater. CPCN No. 55846 also includes restrictions that require 303 Party Bus to originate and terminate its service at 6232 Beach Street, operate only one vehicle limited to 44 passengers, and not to provide service to any hotels, motels, or airports.<sup>5</sup>

14. If granted, 303 Party Bus would be permitted to provide shuttle and charter service originating in Arapahoe and Denver counties to any point in those counties, as well as in Adams, Boulder, Broomfield, Clear Creek, Douglas, El Paso, Gilpin, Jefferson, and Larimer counties. The restrictions in CPCN No. 55846 would also be eliminated. The Application thus seeks to vastly expand the scope of the authority in CPCN No. 55846.

15. 303 Party Bus also has a luxury limousine permit issued by the Commission. It has been offering luxury limousine, shuttle, and charter services pursuant to its Commission-issued authorities since 2014.<sup>6</sup> At the time of the hearing, 303 Party Bus operated ten “party buses,” employed 26 part-time, and two full-time, employees, and had fixed physical facilities.<sup>7</sup>

16. According to 303 Party Bus, the distinctive characteristics of a “party bus” are bench seats attached to the inside walls of the bus that face the interior of the vehicle, LED lighting, a built-in bar, and a sound system.<sup>8</sup> 303 Party Bus contends that their party buses foster

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<sup>5</sup> Hr. Ex. 205.

<sup>6</sup> Hr. Tr. June 26, 2024, p. 80:8-17.

<sup>7</sup> *Id.* at pp. 74:17-18, 82:1-5.

<sup>8</sup> *Id.* at pp. 8:10-16, 10:3-12, 96:19-98:2.

a more fun and social experience than traveling on a motor coach with seats that face forward because facing the interior of the bus encourages customers to be more social with their fellow riders.<sup>9</sup> 303 Party Buses employs its ten party buses to provide transportation pursuant to CPCN No. 55846 and its luxury limousine service.

17. There is no evidence in the evidentiary record about the current physical facilities of 303 Party Bus. However, the Application states that the address of the principal office of 303 Party Bus is “1401 E 73<sup>rd</sup> Ave, Denver, CO 80229” and its mailing address is “5100 E 112<sup>th</sup> Ct, Thornton, CO 80233.”<sup>10</sup> The same two addresses are listed for 303 Party Bus in the Application and in the Commission’s Integrated Filing Management System (“IFMS”).

18. 303 Party Bus testified that a significant portion of its transportation business (presumably both shuttle and luxury limousine service) is to and from Red Rocks Amphitheater.<sup>11</sup> Mr. Van Gilder, Ms. and Mr. Casias, and Mr. Blair testified that the demand for transportation services to Red Rocks Amphitheater and in the “Denver metro area” exceeds the existing supply of transportation services.<sup>12</sup> Mr. Casias testified that he believes there is a particular need for transportation services using the types of party buses used by 303 Party Bus because of the distinctive experience they provide.<sup>13</sup>

19. Similarly, Mr. Watkins testified that the demand for transportation service to Red Rocks Amphitheater exceeds the supply of such services, and that party buses offer a different product than the type of transportation offered by Explorer Tours.<sup>14</sup> Mr. Watkins owns and

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<sup>9</sup> *Id.* at p. 97:17-98:2.

<sup>10</sup> Application at 1.

<sup>11</sup> Hr. Tr. June 26, 2024, p. 78:4-21.

<sup>12</sup> *Id.* at pp.27:23-28:1 (Mr. Van Gilder, Red Rocks), 41:19-44:7 (Mr. Blair, Red Rocks), 45:8-46:13 (same), 52:9-17 (Mr. Blair; Denver metro area), 78:16-21 (Ms. Casias, Red Rocks), 93:11-94:6 (Mr. Casias, Denver metro area).

<sup>13</sup> *Id.* at pp. 92:22-94:6.

<sup>14</sup> *Id.* at pp. 41:19-44:7, 45:8-46:13.

operates Elevate Rides, a party bus company that competes with 303 Party Bus in providing transportation to Red Rocks Amphitheater pursuant to a Commission-issued luxury limousine permit.<sup>15</sup> Mr. Watkins did not testify specifically about the alleged inadequacy of Explorer tours' service.

20. For transportation services to and from Red Rocks Amphitheater, 303 Party Bus and Elevate Rides charge \$50 and \$55 per rider, respectively.<sup>16</sup> 303 Party Bus charges \$50 per customer for its shuttle service to/from Red Rocks Amphitheater regardless of bus capacity or number of passengers, while Elevate Rides offers only luxury limousine service to/from Red Rocks Amphitheater in which a single person is charged a flat-rate for the exclusive use of the vehicle. Mr. Watkins testified that the flat-rate price works out to \$55 per rider if its vehicles are filled to capacity.<sup>17</sup>

21. 303 Party Bus has provided shuttle transportation service from Recess Beer Garden in Denver to Red Rocks Amphitheater.<sup>18</sup> While the exact location of Recess Beer Garden was not established during the hearing, there is no dispute that it is not located at 6232 Beach Street in Denver.<sup>19</sup> 6232 Beach Street in Denver is the location of the former storage lot for 303 Party Bus and the location from which CPCN No. 55846 requires 303 Party Bus pick up and return shuttle or charter service customers.<sup>20</sup>

22. At the hearing, Mr. Casias testified that 303 Party Bus filed annual reports with the updated address of 303 Party Bus, and he believed doing so effectively amended CPCN

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<sup>15</sup> *Id.* at pp. 39:16-40:4, 41:13-15.

<sup>16</sup> Hr. Tr. June 26, 2024, pp. 49:5-15, 112:12-15, 159:23-160:2.

<sup>17</sup> *Id.* at p. 49:5-15.

<sup>18</sup> *Id.* at pp. 31:22-33:10, 75:1-76:7, 114:25-119:7.

<sup>19</sup> *Id.* at pp. 75:22-76:7.

<sup>20</sup> *Id.*

No. 55846 to allow 303 Party Bus to originate its shuttle service from the new address.<sup>21</sup> As found above, the two addresses listed for 303 Party Bus in the Application and in IFMS are 1401 E. 73<sup>rd</sup> Ave., Denver CO 80229 and 5100 E. 112<sup>th</sup> Ct., Thornton, CO 80233. There is no dispute that Recess Beer Garden is not located at either 1401 E. 73<sup>rd</sup> Ave., Denver CO 80229 or 5100 E. 112<sup>th</sup> Ct., Thornton, CO 80233.

23. 303 Party Bus introduced six letters of support for the Application that generally address the service of 303 Party Bus.<sup>22</sup> None of the authors of the correspondence testified at the hearing and, thus, were not subject to cross-examination. Five of the letters include conclusory statements that the demand for shuttle service to Red Rocks Amphitheater outstrips the supply of such service. In addition, the letters do not address any alleged inadequacy in Explorer Tours' service. Accordingly, the undersigned ALJ finds that the letters are of limited value in this proceeding because of their lack of detail and the lack of opportunity for Explorer Tours to question the authors regarding their written statements.

24. Mr. Casias testified that 303 Party Bus does not currently plan to add vehicles to accommodate its requested expanded authority, even though it currently regularly sells out during the concert season, from April to October and the demand for shuttle service during the concert season exceeds the supply of transportation services to Red Rocks Amphitheater.<sup>23</sup> Instead, the extended authority would allow 303 Party Bus to use more than a single vehicle for shuttle service, rather than the one to which it is currently limited under CPCN No. 55846.<sup>24</sup> Mr. Casias testified that he did not intend to increase 303 Party Bus'

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<sup>21</sup> *Id.* at pp. 105:1-106:4.

<sup>22</sup> Hr. Ex. 203.

<sup>23</sup> Hr. Tr. June 26, 2024, pp. 76:25-78:21, 93:17-24, 122:22-123:25, 134:15-23.

<sup>24</sup> *Id.* at pp. 135:21-136:7.

operations in the near term because he worries that doing so would add operational risk to 303 Party Bus.<sup>25</sup>

25. 303 Party Bus does not have a written business plan to expand its operations if the Application is granted.<sup>26</sup> Mr. Casias does not believe that a written business plan is necessary, because 303 Party Bus has been operating for ten years. Mr. Casias stated that he considers himself an expert in transportation services and does not believe that producing a written business plan would be “a good use of his time.”<sup>27</sup>

26. The financial documents submitted into evidence establish that, as of December 31, 2023, 303 Party Bus had approximately \$250,000 in cash-on-hand and access to existing lines of credit. However, the limit of those lines of credit is unclear.<sup>28</sup> 303 Party Bus did not submit evidence of its credit history or its credit worthiness for obtaining additional credit.

### **B. Explorer Tours**

27. The Commission issued CPCN No. 55952 to Explorer Tours on May 23, 2023. CPCN No. 55952 authorizes Explorer Tours to provide, among other things, call-and-demand shuttle service between all points in Denver and Red Rocks Amphitheater. CPCN No. 55952 restricts Explorer Tours from providing shuttle service to/from Denver International Airport.<sup>29</sup> Prior to receiving CPCN No. 55952, Explorer Tours operated pursuant to a Commission-issued luxury limousine permit for 12 years.<sup>30</sup>

28. Explorer Tours has six Sprinter vans that can each transport up to fourteen people, and a 56-person motor coach. Explorer Tours has contracted to purchase a second 56-person

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<sup>25</sup> *Id.* at pp. 93:11-24, 122:22-123:25, 134:15-135:1.

<sup>26</sup> *Id.* at pp. 112:6-11.

<sup>27</sup> *Id.* at pp. 135:8-135:20.

<sup>28</sup> Hr. Ex. 204.

<sup>29</sup> Hr. Ex. 100.

<sup>30</sup> Hr. Tr. June 26, 2024, pp. 137:18-138:5.

motor coach and a 32-seat bus.<sup>31</sup> Explorer Tours attempts to maintain a fleet of vehicles that are five years old or less. Its fleet is paid off, it paid cash for the currently under-contract 56-seat motor coach and 32-seat bus, and it has the financial means to purchase more vehicles as necessary. Explorer Tours has ten full-time, and six part-time, drivers.<sup>32</sup>

29. Explorer Tours has never sold-out its available seats for shuttle service to an event at Red Rocks Amphitheater. Mr. Lysenko testified that there is more demand for luxury limousine service to events at Red Rocks Amphitheater than for shuttle service. He believes that, following the Covid pandemic, attendees of events at Red Rocks Amphitheater are more willing to share transportation to Red Rocks with people they know via luxury limousine service versus with people they do not know via shuttle service. As a result, Mr. Lysenko believes that there is more demand for luxury limousine service to Red Rocks Amphitheater than there is for shuttle service.<sup>33</sup>

30. Mr. Lysenko further testified that Explorer Tours previously attempted to use party buses for shuttle service to Red Rocks Amphitheater. However, he found that transporting unrelated customers, including multiple separate groups of related customers, in party buses led to friction between customers, including disagreements and even fights over seats, which are not assigned or clearly demarcated in party buses, and whether to stop the party bus to allow customers to use restrooms because party buses, unlike motor coaches, typically do not have an onboard restroom. In addition, the party buses used by Explorer Tours did not have seatbelts. For these reasons and the reasons stated above, Explorer Tours sold its party buses and now uses Sprinter Vans and its motor coach for shuttle service to and from Red Rock Amphitheater.

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<sup>31</sup> *Id.* at pp. 138:6-23, 147:20-24.

<sup>32</sup> *Id.* at pp. 138:6-139:12.

<sup>33</sup> *Id.* at pp. 139:6-141:10, 161:10-18.

Mr. Lysenko testified that if there was demand exclusively for shuttle service on party buses to Red Rocks Amphitheater, Explorer Tours would reacquire party buses to satisfy the demand.<sup>34</sup> However, in his experience, there is no such demand.<sup>35</sup>

31. Finally, Mr. Lysenko testified that Explorer Tours offered to Jason Romero, the CEO of Recess Beer Garden,<sup>36</sup> to provide shuttle service to Red Rocks Amphitheater from Recess Beer Garden. However, Explorer Tours is not providing such service.<sup>37</sup>

#### IV. CONCLUSIONS OF LAW

##### A. Legal Standard

##### 1. Regulated Monopoly

32. The granting of a certificate to operate a call-and-demand shuttle and charter service is governed by the doctrine of regulated monopoly. 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 economical service, and that increasing the number of providers ultimately results in a deterioration of service and higher rates for the public.<sup>38</sup> The corollary to this principle is that incumbent carriers are afforded some protection from competition. However, an incumbent common carrier is only entitled to protection from new competition if it provides service that is adequate to satisfy the needs of the public.<sup>39</sup> Accordingly, under the regulated monopoly doctrine, an applicant must prove that: (a) it is fit to conduct the proposed service;

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<sup>34</sup> *Id.* at pp. 144:10-147:20.

<sup>35</sup> *Id.* at pp. 147:20-149:15.

<sup>36</sup> See Exhibit 203 at 7 (letter of support for 303 Party Bus from Jason Romero, who identifies himself as the CEO of “Recess Holdco, LLC dba Recess Beer Garden.”).

<sup>37</sup> Hr. Tr. June 26, 2024, pp.178:18-180:8.

<sup>38</sup> See *Archibald v. PUC*, 171 P.2d 421, 423 (Colo. 1946); *Morey v. PUC*, 629 P.2d 1061, 1066-67 (Colo. 1981).

<sup>39</sup> *Ephraim Freightways, Inc. v. PUC*, 380 P.2d 228, 231 (Colo. 1963); *Miller Bros., Inc. v. PUC*, 525 P.2d 443, 446-447 (Colo. 1974).

(b) any existing certificated carrier's service in the proposed service area is substantially inadequate; and (c) there is a public need for the service proposed by the applicant.<sup>40</sup>

## **2. Fitness to Conduct the Proposed Service**

33. The fitness element consists of three sub-elements: (a) operational; (b) managerial; and (c) financial fitness. Fitness must be evaluated on a case-by-case basis upon the unique circumstances of each applicant and the proposed service.<sup>41</sup>

### **a. Operational Fitness**

34. In general, operational fitness encompasses a consideration of whether the applicant has the equipment, personnel, and facilities to conduct for-hire passenger carrier operations. The following factors are relevant to the fitness inquiry: (a) whether the applicant has at least the minimum efficient scale necessary to run the proposed service (which addresses the question of whether a minimum size of operation is required) and, if such a minimum does exist – what is the approximate magnitude for the market at issue; (b) whether the applicant has fixed physical facilities such as office space and maintenance garages, as appropriate; and (c) whether the applicant has a sufficient number of vehicles of the appropriate type to provide the proposed service.<sup>42</sup>

### **b. Managerial Fitness**

35. The managerial fitness factor addresses whether the applicant has the business management experience of managing employees, setting and maintaining budgets, and

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<sup>40</sup> See *Durango Trans., Inc. v. PUC*, 122 P.3d 244, 247-252 (Colo. 2005).

<sup>41</sup> See, e.g., Decision No. C09-0207 at ¶¶ 6, 454 issued in Consolidated Proceeding Nos. 08A-241CP, 08A-283CP, 08A-284CP-Extension, and 08A-300CP on February 27, 2009.

<sup>42</sup> See Decision No. C08-0933 at ¶ 7 issued in Consolidated Proceeding Nos. 08A-241CP, 08A-281CP-Extension, 08A-283CP, 08A-284CP-Extension, and 08A-300CP on September 4, 2008.

complying with applicable laws and regulations.<sup>43</sup> Managerial experience in business involving a common carrier regulated by the Commission is particularly relevant to this factor. A business plan demonstrating that an applicant can balance the operational, financial, and legal requirements of running a common carrier business is particularly good evidence of managerial fitness.

**c. Financial Fitness**

36. The Commission has never promulgated rules or regulations specifying a financial fitness standard. However, as a general matter, the applicant must make some showing, however minimal, that it either has or has access to financial resources that will enable it to implement the proposed service. Factors that are relevant to the analysis are: (a) the applicant's credit worthiness and access to capital; (b) the applicant's credit history and assessment of financial health over the near future; and (c) the applicant's capital structure and current cash balances. The evidence of financial fitness need not be overwhelming in order for an applicant to satisfy its burden.<sup>44</sup>

**3. Substantial Inadequacy of Existing Service/Public Need for the Proposed Service**

37. While the substantial inadequacy of existing service and the public need for the proposed service are separate factors, they are closely related. Indeed, the adequacy of the incumbent's service is integral to the question of whether the public needs the proposed

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<sup>43</sup> See Decision No. R10-0339 at ¶ 103 issued in Proceeding No. 09A-073CP on April 9, 2010.

<sup>44</sup> Decision No. R15-0376 at ¶ 72 issued in Proceeding No. 14A-1008CP on April 24, 2015; *Thacker Brothers Transportation v Public Utilities Commission*, 543 P.2d 719, 721 (Colo. 1975).

additional service.<sup>45</sup> If the existing service is adequate, the Commission cannot find that the public convenience and necessity requires the addition of a carrier.<sup>46</sup>

38. Whether the incumbent carrier's service is substantially inadequate is a question of fact that must be analyzed on a case-by-case basis.<sup>47</sup> Substantially inadequate service is established by evidence of "a general pattern of inadequate service" on the part of the incumbent carrier.<sup>48</sup> Substantial inadequacy can also be demonstrated with evidence that the incumbent carrier "is [not] ready, willing, and able to provide transportation to anyone who might request it."<sup>49</sup> Such a showing can be made by evidence that the public perceives the incumbent's rates as prohibitively expensive, and that the incumbent does not have sufficient personnel and/or equipment to service the demand for its transportation service.<sup>50</sup>

39. A mere showing that there is enough business to warrant more than one certified carrier is insufficient to establish substantial inadequacy.<sup>51</sup> Likewise, substantial inadequacy is not established through "expressions of mere opinion, preference, and desire and willingness to use the services of [the applicant] over the services of" an incumbent carrier.<sup>52</sup> Finally, the incumbent carrier is not held to a standard of perfection because "when a common carrier renders services to numerous customers in a wide territory undoubtedly some dissatisfaction will arise and some legitimate complaints result."<sup>53</sup>

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<sup>45</sup> *Ephraim Freightways, Inc.*, 380 P.2d at 231.

<sup>46</sup> *See Yellow Cab Cooperative Association v. PUC*, 869 P.2d 545, 548-49 (Colo. 1994).

<sup>47</sup> *Durango Trans., Inc.*, 122 P.3d at 248.

<sup>48</sup> *Id.* (quoting *Ephraim Freightways, Inc.*, 380 P.2d at 232).

<sup>49</sup> *Id.* at 248.

<sup>50</sup> *Id.* *See also id.* ("If the incumbent carrier's rates are so high as to amount to a denial of service, . . . the Commission must consider this fact in determining whether carrier's service is substantially inadequate.")

<sup>51</sup> *Durango Trans., Inc.*, 122 P.3d at 248 (citing *Donohue v. PUC*, 451 P.2d 448, 449 (1960)).

<sup>52</sup> *Id.* (quoting *PUC v. Weicker Transfer & Storage Co.*, 451 P.2d 448, 449 (Colo. 1969)).

<sup>53</sup> *Ephraim Freightways, Inc.*, 380 P.2d at 232.

40. While the foregoing summarizes the evidence relied upon in prior cases, the Commission is authorized “to consider a broad range of factors in its substantial-inadequacy analysis.”<sup>54</sup> Such an approach is consistent with the Commission’s directive to grant sufficient transportation authority to “ensure that the public’s transportation needs are met.”<sup>55</sup>

**B. Scope of Application Versus Evidence Presented at Hearing**

41. As noted above, the Application thus seeks to vastly expand the scope of the authority in CPCN No. 55846 to allow 303 Party Bus to provide shuttle and charter service originating in Arapahoe and Denver counties to any point in those counties, as well as in Adams, Boulder, Broomfield, Clear Creek, Douglas, El Paso, Gilpin, Jefferson, and Larimer counties. Yet, all, or virtually all of the evidence presented at the hearing addressed removing the restrictions in CPCN No. 55846 on providing shuttle and charter service *to Red Rocks Amphitheater*. In fact, there is insufficient evidence in the record addressing the fitness of 303 Party Bus to support the increased territory it seeks to serve with shuttle and charter service beyond which it currently serves. Nor is there sufficient evidence in the record regarding the adequacy of the existing charter and shuttle service to anywhere other than the event venues listed in CPCN No. 55846. Finally, 303 Party Bus has not requested to restrictively amend the Application to seek only the elimination of the restrictions on its shuttle and charter service to Red Rocks Amphitheater, or any of the other event venues it is currently permitted to serve by CPCN No. 55846.

42. In its closing argument, 303 Party Bus argued that Explorer Tours had not contested the great majority of the extended authority sought by 303 Party Bus and,

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<sup>54</sup> *Durango Trans. Inc.*, 122 P.3d at 250.

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

consequently, the undisputed extended authority should be granted.<sup>56</sup> On cross-examination, Explorer Tours stated that, after 303 Party Bus filed the Application, Explorer Tours provided to 303 Party Bus a list of the places to which it objected 303 Party Bus providing shuttle and charter service within the proposed extended service. However, Mr. Lysenko did not identify all of the locations on the list during the hearing, and instead testified that he would have to review the Application to reproduce the entire list of places to which he objected.<sup>57</sup> The intervention of Explorer Tours also does not identify any particular subset(s) within the requested authority that Explorer Tours objects. Instead, the intervention states that Explorer Tours is opposed to the Application. As a result, the evidentiary record does not support the granting of any particular subset of the authority sought by Applicant.

43. Even if the record reflected that list of locations, the ALJ would be reluctant to grant a subset of the authority sought in the Application for two reasons. First, 303 Party Bus was unable to cite any authority for the proposition that the Commission must grant the subset of requested authority to which an intervenor or intervenors do not object. The ALJ is not otherwise aware of any such authority. Second, Explorer Tours provided the list of locations in settlement negotiations with 303 Party Bus. Because offers to compromise in settlement negotiations cannot be used for purposes of proving a party's liability for, the invalidity of, or amount of a claim when these issues are disputed, the ALJ would be reluctant to use such an offer to grant any authority in a contested Application proceeding.<sup>58</sup>

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<sup>56</sup> Hr. Tr. June 26, 2024, p. 186:1-9.

<sup>57</sup> *Id.* at pp. 157:18-159:7, 164:3-165:3.

<sup>58</sup> C.R.E. 408.

44. Based on the foregoing, and as explained in more detail below, the ALJ finds and concludes that 303 Party Bus has not carried its burden of establishing that the Application should be granted in whole or in part.

**C. Application of Law to Facts**

**1. Fitness to Conduct the Proposed Service**

**a. Financial and Operational Fitness**

45. As found above, 303 Party Bus currently operates ten party buses, employs 26 part-time, and two full-time, employees, and has fixed physical facilities.<sup>59</sup> As of December 31, 2023, 303 Party Bus had approximately \$250,000 in cash-on-hand and access to existing lines of credit (though the amount of those lines is unclear), but there is no evidence of the ability of 303 Party Bus to obtain additional credit.<sup>60</sup> The cost of an “average” party bus in good condition is approximately \$150,000.<sup>61</sup>

46. As further found above, Mr. Casias testified that 303 Party Bus does not currently plan to add vehicles to accommodate its requested expanded authority.<sup>62</sup> Instead, if the Application is granted, 303 Party Bus would use more than the single vehicle for shuttle service to which it is currently restricted.<sup>63</sup> However, the record does not reflect how many vehicles 303 Party Bus currently uses for luxury limousine service to Red Rocks Amphitheater on concert nights and, thus, whether approval of the application would have any impact on the demand for transportation services to Red Rocks Amphitheater.

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<sup>59</sup> Hr. Tr. June 26, 2024, p. 74:17-18, 82:1-5.

<sup>60</sup> Hr. Ex. 204.

<sup>61</sup> Hr. Tr. June 26, 2024, p. 148:13-21.

<sup>62</sup> *Id.* at pp. 93:17-24, 122:22-123:25, 134:15-23.

<sup>63</sup> *Id.* at pp. 135:21-136:7.

47. There is no conclusive evidence in the record of the demand for shuttle or charter service in the requested extended service sought by 303 Party Bus, other than to Red Rocks Amphitheater. Likewise, the evidence in the record is inconclusive concerning the operational or financial fitness of 303 Party Bus to meet that demand. The evidence establishes that 303 Party Bus regularly sells out, at least during the concert season from April to October.<sup>64</sup> It thus follows that 303 Party Bus would require a larger operation to serve the expanded authority sought by the Application. But, as noted, 303 Party Bus does not have any plans to expand its operation.<sup>65</sup>

48. Based on the foregoing, the ALJ finds and concludes that 303 Party Bus has not carried its burden of establishing that it has the financial and operational fitness to serve the expanded authority requested in the Application.

**a. Managerial Fitness**

49. The record establishes that 303 Party Bus has operated outside of the scope of the authority granted by CPCN No. 55846, which requires 303 Party Bus to pick up shuttle and charter customers from, and return them to, 6232 Beach Street in Denver. Specifically, Ms. Casias, Mr. Casias, and Mr. Van Guilder testified that 303 Party Bus has provided shuttle transportation service to and from Recess Beer Garden, which is not located at 6232 Beach Street.<sup>66</sup> While Mr. Casias testified that he believed the filing of annual reports with the updated address of 303 Party Bus effectively amended CPCN No. 55846 to allow 303 Party Bus to originate its shuttle service from the new address,<sup>67</sup> this is an incorrect statement of law and an unreasonable interpretation of CPCN No. 55846 and the impact thereon of the annual filings.

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<sup>64</sup> *Id.* at pp. 76:25-78:21.

<sup>65</sup> *Id.* at pp. 76:25-78:21, 93:25-94:6, 134:15-23.

<sup>66</sup> *Id.* at pp. 31:22-33:10, 75:1-76:7, 114:25-119:7.

<sup>67</sup> *Id.* at pp. 105:1-106:4.

Moreover, Recess Beer Garden is not located at the updated addresses 303 Party Bus filed with the Commission. Thus, even if the ALJ credited Mr. Casias' testimony regarding his belief that the amendment of its authority by filing annual reports with the new address of 303 Party Bus, Applicant still was not authorized to commence shuttle service from Recess Beer Garden. Mr. Casias' testimony establishes that he was aware of the limitation on where 303 Party Bus is authorized to commence shuttle service, but acted – at a minimum – in reckless disregard of that limitation. As a result, the ALJ finds and concludes that the shuttle service provided from Recess Beer Garden by 303 Party Bus violated the limitations of its authority under CPCN No. 55846.

50. As noted above, compliance with legal requirements bears on the question of managerial fitness.<sup>68</sup> Accordingly, the ALJ finds and concludes that 303 Party Bus has not carried its burden of establishing that it is managerially fit to provide the proposed extended service.

## **2. Substantial Inadequacy of Explorer Tours' Service/Public Need for Proposed Service**

51. Mr. Casias testified at length about the differences in the customer “experience” between transportation on the “party buses” offered by 303 Party Bus and the motor coaches offered by Explorer Tours.<sup>69</sup> He also suggested, as did the attorney for 303 Party Bus, that Explorer Tours' failure to sell out the seats on its buses for concerts at Red Rocks (while 303 Party Bus regularly does), is attributable to the difference in customer experience. 303 Party Bus thus effectively argued that it is serving a different sub-market within the general shuttle service market than Explorer Tours is serving. For this reason, 303 Party Bus contends that there is a

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<sup>68</sup> See Decision No. R10-0339 at ¶ 103 issued in Proceeding No. 09A-073CP on April 9, 2010.

<sup>69</sup> Hr. Tr. June 26, 2024, pp. 91:21-93:16, 96:19-98:2.

public need for the service provided by 303 Party Bus and Explorer Tours' service to this sub-market is substantially inadequate.<sup>70</sup>

52. As noted, the six letters of support for the Application include conclusory statements that the demand for shuttle service to Red Rocks Amphitheater outstrips the supply of such service. However, because of their lack of detail concerning these conclusions, their failure to address the service of Explorer Tours' service, and the fact that Explorer Tours did not have the opportunity to cross-examine the authors, the ALJ found that the letters are of limited evidentiary value. Further, to the extent the letters can be construed as expressing the view that the service provided by 303 Party Bus is superior to that of Explorer Tours, such opinion is the type of "expression[] of mere opinion, preference, and desire and willingness to use the services of [the applicant] over the services of" an incumbent carrier" that does not establish substantial inadequacy of the incumbent carrier's service.<sup>71</sup>

53. As found above, 303 Party Bus and Elevate Rides charge \$50 and \$55 per rider, respectively, for transportation services to and from Red Rocks Amphitheater.<sup>72</sup> In contrast, Explorer Tours charges \$65 per rider for its shuttle round trip service from Denver to Red Rocks Amphitheater.<sup>73</sup> At the hearing, 303 Party Bus did not submit evidence addressing whether this price difference is the reason that 303 Party Bus and Elevate Rides, but not Explorer Tours, regularly sells out their trips to Red Rocks Amphitheater. In other words, 303 Party Bus did not submit any evidence addressing, much less negating, the conclusion that the lower prices charged by 303 Party Bus and Elevate Rides is the cause of the difference in demand for the

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<sup>70</sup> See *id.* at pp. 91:21-93:16, 184:12-185:24, 187:23-188:19.

<sup>71</sup> *Durango Trans., Inc.*, 122 P.3d at 248 (quoting *Weicker Transfer & Storage Co.*, 451 P.2d at 449).

<sup>72</sup> Hr. Tr. June 26, 2024, pp. 49:5-15, 112:12-15, 159:23-160:2.

<sup>73</sup> *Id.* at pp. 159:23-160:7.

transportation services to Red Rocks Amphitheater of 303 Party Bus and Elevate Rides, on the one hand, and Explorer Tours, on the other.

54. As a result, the evidence establishes that there may be enough business to warrant more than one certified carrier. However, such a showing is insufficient to establish substantial inadequacy.<sup>74</sup> Instead, it must also be established that the incumbent carrier is not ready, willing, and able to provide transportation to satisfy that demand.<sup>75</sup> 303 Party Bus has not presented any such evidence. On the contrary, the evidence establishes that Explorer Tours is ready, willing, and able to acquire party buses if, in fact, there is a demand for shuttle service on a party bus.<sup>76</sup>

55. In fact, the evidence establishes that Explorer Tours has 140 seats in its six 14-seat Sprinter Vans and one 56-seat motor coach. Because it never sells out, Explorer Tours has excess seats in those vehicles to accommodate at least some additional demand. In addition, Explorer Tours is in the process of acquiring a second 56-seat motor coach and a 32-seat bus, which will allow Explorer Tours to serve even more demand for shuttle service to Red Rocks Amphitheater and elsewhere within its authorized territory.<sup>77</sup> There is no evidence in the record that Explorer Tours is unwilling to serve any additional demand for shuttle service to Red Rocks Amphitheater.

56. Finally, the assertion by 303 Party Bus that there is sufficient business to support at least two providers is based, at least in part, on evidence that 303 Party Bus provided transportation service to and from Red Rocks Amphitheater outside the scope of its Commission-issued authority. “The law is clear that a carrier cannot establish a public need for additional

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<sup>74</sup> *Durango Trans., Inc.*, 122 P.3d at 248 (“a showing that there is ‘sufficient business to warrant two certified carriers’” is insufficient to establish a public need for the applicant’s proposed service) (citing *Donohue*, 451 P.2d at 449).

<sup>75</sup> *Id.* at 248.

<sup>76</sup> *Id.* at pp. 144:10-149:15.

<sup>77</sup> Hr. Tr. June 26, 2024, pp. 138:6-23, 147:20-24.

service by its unauthorized operations. . . . [if] the carrier knowingly carried on an unauthorized operation with the intent to violate the law or with a reckless disregard for the law.”<sup>78</sup> As found and concluded above, by providing shuttle service from Recess Beer Garden to Red Rocks Amphitheater, 303 Party Bus acted in reckless disregard of the limitations on its Commission-issued authority.<sup>79</sup> As a result, the ALJ concludes that the unauthorized operations by 303 Party Bus cannot establish the substantial inadequacy of Explorer Tours’ operations. This conclusion is particularly appropriate here because Explorer Tours has offered to provide shuttle service to Red Rocks Amphitheater from Recess Beer Garden, but has not been taken up on its offer.<sup>80</sup> It is reasonable to conclude that the unauthorized provision of such shuttle service by 303 Party Bus played a role in Recess Beer Garden’s rejection of Explorer Tours’ offer.

57. In its closing argument, the ALJ asked counsel for 303 Party Bus for authority supporting the argument that evidence of substantial adequacy/public need within a sub-market of the overall shuttle market is a basis for granting the Application in this proceeding. Counsel for 303 Party Bus was not aware of any such authority. The ALJ’s research uncovered that Decision Nos. C19-0941, issued September 19, 2019, and R19-0784, issued September 24, 2019, (both in Proceeding No. 19A-0144CP), arguably stand for the proposition stated above. Out of an abundance of caution, the ALJ will address them.

58. In Decision No. R19-0784, the ALJ recommended granting the application of Explorer Tours (the intervenor in this proceeding) over the opposition of several incumbent carriers. Explorer Tours argued that there was a public need for its proposed sightseeing service conducted in Ukrainian, Belarusian, Usbek, Russian, Armenian, and Bulgarian (collectively, the

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<sup>78</sup> *Durango Trans., Inc.*, 122 P.3d at 248 (citing *Donohue*, 451 P.2d at 449); *Red Ball Motor Freight, Inc. v. PUC*, 525 P.2d 439, 441 (Colo. 1974) (citations omitted)).

<sup>79</sup> *Red Ball Motor Freight, Inc.*, 525 P.2d at 441.

<sup>80</sup> Hr. Tr. June 26, 2024, pp.178:18-180:8.

relevant six eastern European languages).<sup>81</sup> The estimated annual need for such a sightseeing service in the relevant six eastern European languages was estimated to be 12,500 to 14,500 tours in the requested service area.<sup>82</sup> Explorer Tours also argued that the incumbents' services were not substantially adequate because they did not offer the services in any of the relevant six eastern European languages.

59. The ALJ agreed with Explorer Tours, holding that "Interveners' failure to provide sightseeing service in any of the relevant six eastern European languages is tantamount to denying sightseeing service to a significant number of people only speaking the relevant six eastern European languages."<sup>83</sup> For the same reason, the ALJ concluded that there was a public need for the sightseeing service in the relevant six eastern European languages.<sup>84</sup> The ALJ rejected the argument that desiring sightseeing service in the six relevant eastern European languages is a mere preference, holding instead that it is "evidence . . . of accessibility of service."<sup>85</sup> The Commission upheld the Recommended Decision on exceptions.<sup>86</sup>

60. Here, providing shuttle or charter service in motor coaches and Sprinter Vans with seats that face forward, instead of in party buses, is not "tantamount to denying sightseeing service to a significant number of people." As a result, the fact that Explorer Tours offers its service in motor coaches and Sprinter Vans does not render its service substantially inadequate. Instead, desiring to ride in a party bus rather than a motor coach or Sprinter Van with the seats facing forward is an "expression of mere opinion, preference, and desire and willingness to use the services of [the Applicant] over the services of" Explorer Tours that cannot serve as the basis

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<sup>81</sup> Decision No. R19-0784 at ¶ 11 issued in Proceeding No. 19A-0144CP on September 24, 2019.

<sup>82</sup> *Id.* at ¶ 79.

<sup>83</sup> *Id.* at ¶ 87.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at ¶ 70.

<sup>86</sup> Decision No. C19-0941 issued in Proceeding No. 19A-0144CP on November 19, 2019.

for a finding of the substantial inadequacy of Explorer Tours' service.<sup>87</sup> Decision Nos. R19-0784 and C19-0941 thus do not require a different result in this proceeding.

61. Accordingly, based on the foregoing, the undersigned ALJ finds and concludes that 303 Party Bus failed to carry his burden of establishing the substantial inadequacy of Explorer Tour's service and the public need for the service proposed in the Application.

62. Pursuant to § 40-6-109, C.R.S., the ALJ hereby transmits to the Commission the record of this proceeding, a written recommended decision containing findings of fact and conclusions of law, and a recommended order.

## V. ORDER

### A. The Commission Orders That:

1. The above-captioned application filed by 303 Party Bus LLC on November 3, 2023 is denied.

2. Proceeding No. 23A-0552CP-EXT is closed.

3. 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.

4. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a. If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b. If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the

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<sup>87</sup> *Durango Trans., Inc.*, 122 P.3d at 248 (quoting *PUC v. Weicker Transfer & Storage Co.*, 451 P.2d 448, 449 (Colo. 1969)).

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.

5. 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)



ATTEST: A TRUE COPY

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

CONOR F. FARLEY

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Administrative Law Judge

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

Rebecca E. White,  
Director