

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03A-461CP

IN THE MATTER OF THE APPLICATION OF KYLE BUIS, DOING BUSINESS AS PEGASUS TRANSIT, 4421 SOUTH STOVER, SUITE 4, FORT COLLINS, COLORADO 80525 FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO OPERATE AS A COMMON CARRIER BY MOTOR VEHICLE FOR HIRE.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
DALE E. ISLEY
DISMISSING APPLICATION**

Mailed Date: February 25, 2004

I. STATEMENT, FINDINGS, AND CONCLUSIONS

1. The captioned application of Kyle Buis, doing business as Pegasus Transit (Pegasus), was filed with the Colorado Public Utilities Commission (Commission) on October 21, 2003, and was published in the Commission's "Notice of Applications Filed" on October 27, 2003.

2. Timely interventions have been filed in this matter by Shamrock Taxi of Fort Collins, Inc., doing business as Shamrock Shuttle, Inc. (Shamrock Taxi), and Greeley Airport Shuttle, Inc., doing business as Rocky Mountain Shuttle, Ltd. (RMS).

3. This matter was originally scheduled for hearing on December 30, 2003, in Ft. Collins, Colorado. However, the hearing was vacated as a result of Pegasus' failure to properly file and serve its witness/exhibits list as required by Rule 71 of the Commission's *Rules*

of Practice and Procedure, 4 Code of Colorado Regulations (CCR) 723-1-71(b)(4). See, Decision No. R03-1457-I.¹

4. The matter was then re-scheduled for hearing on March 11 and 12, 2004, in Ft. Collins, Colorado. See, Decision No. R04-0030-I. That decision also established a procedural schedule requiring Pegasus to submit a witness/exhibits list in compliance with Rule 71 on or before February 11, 2004.

5. On February 10, 2004, Pegasus filed three pleadings in this matter, a Notice of Retraction, a Witness and Exhibits List (Pegasus W&E List), and a Notice of Availability of Hearing Dates. Because these pleadings raised issues requiring clarification before a hearing could be conducted, a pre-hearing conference was set in this matter on February 20, 2004. See, Decision No. R04-0160-I.² That decision advised the parties that the pre-hearing conference would deal with all issues contemplated by 4 CCR 723-1-79(b)(4). This would include the resolution of any pending motions.

6. On February 13, 2004, Shamrock Taxi submitted a pleading entitled “Objections of Intervenor to Applicant’s Recent Witness and Exhibit List.” This pleading renewed Shamrock Taxi’s motion for dismissal of the application on the ground that Pegasus’ W&E List failed to comply with Rule 71.

7. The pre-hearing conference was held on February 20, 2004. Appearances were entered by Shamrock Taxi and RMS through their respective legal counsel. No appearance was

¹ Decision No. R03-1457-I denied a motion submitted by Shamrock Taxi for dismissal of the application resulting from Pegasus’ failure to properly file and serve its witness/exhibits list.

² Decision No. R04-0160-I describes the issues that led to the setting of the pre-hearing conference. Among these was the sufficiency of the Pegasus W&E List.

entered by or on behalf of Pegasus.³ A 30-minute recess was taken to allow Pegasus a further opportunity to appear. In addition, the administrative law judge (ALJ) attempted to contact Pegasus by calling the telephone numbers previously provided to the Commission or members of its Staff by the applicant. However, those attempts were unsuccessful.

8. During the course of the pre-hearing conference, RMS joined in the Shamrock Taxi motion to dismiss the application. After hearing and considering the comments and arguments of counsel for the appearing parties, the ALJ granted that motion.⁴

9. As previously pointed out to Pegasus, except for witnesses or exhibits endorsed by another party or that are necessary for rebuttal or impeachment purposes, an applicant in a case such as this must file with the Commission and serve all parties with a list of witnesses it intends to call and copies of exhibits it intends to offer into evidence at hearing. *See*, Decision No. R03-1457-I. Witness list filings must identify the witness by name or the entity he/she represents and must also provide the address of the witness/entity. Rule 71 specifically provides that an application may be dismissed if an applicant fails to comply with these filing requirements. *See*, 4 CCR 723-1-71(b)(7).

10. The Pegasus W&E List fails to comply with Rule 71. It refers generally to “witnesses requesting to be heard on the hearing date” without any further identification. The names of potential witnesses contained on support letters filed with the application are, in many

³ Mr. Gramlick, a member of the Commission’s Transportation Staff attended the pre-hearing conference. He indicated that Pegasus’ representative, Mr. Buis, had contacted him earlier in the week and had indicated that no one associated with Pegasus would be available to attend the pre-hearing conference. Mr. Gramlick advised Mr. Buis that any request to vacate and re-schedule the conference would have to be made in the form of a written motion and filed with the Commission prior to February 20, 2004. However, no such motion was filed.

⁴ Pegasus’ failure to appear at the pre-hearing conference constitutes a waiver of any objection it might have to this ruling. *See*, 4 CCR 723-1-79(b)(4).

cases, illegible. To the extent they are not, they contain no other identifying information such as an address or telephone number. Pegasus indicates that its witnesses prefer that their identities not be disclosed “due to their safety.” However, it has presented nothing to substantiate the apparent claim that witnesses have somehow been intimidated, harassed, or otherwise discouraged from appearing to testify. No exhibits were included with the Pegasus W&E List. Instead, it refers only to “support letters received” and unidentified “public records.”

11. Pegasus’ failure to comply with Rule 71 deprives Shamrock Taxi and RMS of an opportunity to adequately prepare their cases in opposition to this application. In addition, it effectively deprives Pegasus of the ability to present a *prima facie* case for a grant of the authority it requests. *See*, 4 CCR 723-1-71(b)(6) (no witness will be permitted to testify and no exhibit will be received in evidence, except in rebuttal, unless filed and served as provided in Rule 71).

12. Pursuant to § 40-6-109, C.R.S., it is recommended that the Commission enter the following order.

II. ORDER

A. The Commission Orders That:

1. The motion to dismiss this application submitted by Shamrock Taxi of Fort Collins, Inc., doing business as Shamrock Shuttle, Inc., and Greeley Airport Shuttle, Inc., doing business as Rocky Mountain Shuttle, Ltd., is granted.

2. The hearing of this matter scheduled for March 11 and 12, 2004, in Ft. Collins, Colorado, is vacated.

3. Docket No. 03A-461CP is closed.

4. 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.

5. 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 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.

6. 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.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge