

Decision No. R04-0376

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04A-007CP

IN THE MATTER OF THE APPLICATION OF CARROLL GENE EADY, DOING
BUSINESS AS CHECKER TAXI, 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
MANA L. JENNINGS-FADER
DISMISSING APPLICATION
AND CLOSING DOCKET**

Mailed Date: April 12, 2004

Appearances:

Carroll Gene Eady, *pro se*, for Applicant Carroll Gene Eady, doing
business as Checker Taxi; and

Charles M. Williams, Esq., Denver, Colorado, for Intervenor
Tazco, Inc., doing business as Sunshine Taxi.

I. STATEMENT

1. On January 5, 2004, Carroll Gene Eady, doing business as Checker Taxi (Eady or Applicant), filed an Application for a Certificate of Public Convenience and Necessity to Operate as a Common Carrier by Motor Vehicle for Hire (Application). The Application commenced this proceeding.

2. On January 12, 2004, the Commission gave public notice of the Application in the Notice of Applications Filed, at 2, as follows:

For a Certificate of Public Convenience and Necessity to operate as a common carrier by motor vehicle for hire for the transportation of

passengers and their baggage, in taxi service,

between all points within a 4-mile radius of the intersection of McCune Avenue and Mesa Street, Fruita, Colorado, and between said points, on the one hand, and Community Hospital, 2021 North 12th, Grand Junction, Colorado; St. Mary's Hospital and Medical Center, 2635 North 7th, Grand Junction, Colorado; Veterans Administration Center, 2121 North Avenue, Grand Junction, Colorado; and Walker Field, 2828 Walker Field Drive, Grand Junction, Colorado, on the other hand.

3. On January 27, 2004, Tazco, Inc., doing business as Sunshine Taxi (Tazco), timely filed an intervention by right.

4. On February 2, 2004, Agnes Weir, doing business as Care Cars (Weir), timely filed an intervention by right. On March 8, 2004, by Decision No. R04-0232-I, the undersigned Administrative Law Judge (ALJ) granted a motion to amend the Application, accepted a stipulation signed by Applicant and Weir, and dismissed Weir's intervention in this proceeding.

5. On February 17, 2004, the Commission issued an Order Setting Hearing and Notice of Hearing. By that Order the Commission scheduled the hearing in this matter for March 17, 2004, in Fruita, Colorado.

6. On March 2, 2004, Tazco filed a Motion to Dismiss or Alternative Motion *in Limine* and a Motion to Change Hearing Location.¹ On March 12, 2004, the ALJ issued

¹ Tazco also filed a Request to Shorten Response Time, which request the ALJ granted in Decision No. R04-0219-I.

Decision No. R04-0261-I, in which the ALJ denied the motions and, for the reasons stated in that Order, limited the witnesses and exhibits which Applicant could offer at hearing.

7. The hearing commenced as scheduled on March 17, 2004. Applicant presented, and testimony was received from, two witnesses: Mr. Eady, the Applicant, and Mr. Joseph Beghan, a public witness. Each testified in support of the Application.

8. No exhibit was offered. Applicant did not offer as an exhibit either the Application or any document appended to the Application.

9. At the conclusion of Applicant's case, Tazco made an oral motion to dismiss the Application on the basis that Applicant had failed to present a *prima facie* case. The motion was argued. The motion was granted orally, and the case was dismissed.

10. Pursuant to § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record and exhibits of the proceeding together with a written recommended decision.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

11. Mr. Eady seeks to obtain Commission authority to provide taxi service within the city limits of Fruita, Colorado, between Fruita and the Grand Junction Airport, and between Fruita and three identified hospitals in Grand Junction.

12. Applicant has prior experience in the taxi business in Illinois, where he owned his own taxi business for 18 months, and in Nevada, where he worked for a taxicab business. Applicant has no experience providing taxi service or operating a taxicab in Colorado and has not been in the taxi business since 1999.

13. There is no taxi stand in Fruita, and there is no taxi service based in Fruita.

14. Based on the 1990 federal census, Mesa County, in which both Fruita and Grand Junction are located, has a population of 60,000 or more people.

15. Tazco has authority to provide taxi service throughout Mesa County, in Fruita, and between Fruita and Grand Junction.

16. On two recent occasions (one in late 2003 and one in February 2004) Mr. Eady provided transportation *gratis* to individuals who were stranded when their personal vehicles experienced mechanical difficulties. To the best of his knowledge, neither of the persons he assisted attempted to contact Tazco for taxi service.

17. Applicant has seen individuals, including school students, walking from bus stops or bus stations. In his opinion, it would have been safer for them to use taxi service.²

18. The population of Fruita is approximately 7,000 people and is expected to increase to approximately 17,000 people. The time period over which this growth is expected to occur is unknown.

19. In Mr. Eady's opinion, the people of Fruita would be better served by a taxicab company based in Fruita.

20. Mr. Eady has never used Tazco's taxi service. Mr. Eady has never called Tazco for taxi service, although he is aware that Tazco provides taxi service throughout Mesa County, including Fruita.

² Applicant attributed their walking to the absence of a Fruita-based taxi service. As this attribution is mere speculation and lacks foundation, the ALJ does not rely on this speculation in reaching her decision.

21. Mr. Beghan, the public witness, has lived in Fruita for two years and has not seen taxi service in Fruita during that time. Several times each month Mr. Beghan needs transportation to Grand Junction for medical treatment; however, his medical appointments are not at any of the locations in Grand Junction which Applicant could serve if the Application is granted. Although Tazco offers time calls (*i.e.*, reservations for pick up at prearranged times and locations), Mr. Beghan has not attempted to use the Tazco taxi service since moving to Fruita. In Mr. Beghan's opinion, the people of Fruita would be better served by a taxicab company based in Fruita.

22. There was no testimonial and no documentary evidence concerning at least the following areas of Applicant's operational fitness: the communication and dispatch system which Applicant would use in its taxi operation, the proposed hours of service, the size of the fleet which Applicant would use to provide service, and the age of the vehicles which Applicant would use to provide service.

23. There was no testimonial or documentary evidence on the Applicant's financial fitness.

24. Applicant did not adopt any statement he made in the Application.

III. DISCUSSION

25. Applicant bears the burden of proof. *See Rule 4 Code of Colorado Regulations* (CCR) 723-1-82(a)(1). Applicant must establish, by substantial and competent evidence, the legal basis for award of a certificate of public convenience and necessity (CPCN) to operate as a common carrier in taxi service.

26. According to the 1990 federal census, the population of Mesa County exceeds 60,000 people. As a result, pursuant to the doctrine of regulated competition, the Commission may grant the requested CPCN to provide taxi service if the Commission “finds that the present or future public convenience and necessity requires or will require such operation.” Section 40-105(2)(b), C.R.S. To meet his burden of proof in this case, Applicant must establish that he meets the minimum criteria to provide taxi service (*see* Rule 4 CCR 723-31-25); that he has the financial and operational fitness to provide the proposed service (*see* Rule 4 CCR 723-1-50(e)); and that the present public convenience and necessity requires, or that the future public convenience and necessity will require, the proposed taxi service.

27. The evidence of record establishes that Applicant has failed to establish a *prima facie* case.³ Therefore, the Tazco motion to dismiss will be granted.

28. In viewing Applicant’s evidence in the light most favorable to Applicant for the purposes of deciding the motion to dismiss, the ALJ finds that the record contains no evidence to establish the overall financial fitness of the Applicant and virtually no probative evidence to establish the operational fitness of Applicant. The evidentiary record, for example, contains no financial statement, no specifics about Applicant’s provisions for insurance, and no details

³ In making this determination, the ALJ relies upon *Monday v. Robert J. Anderson, P.C.*, 77 P.3d 855 (Colo. App. 2003). In that case the Court of Appeals determined that *prima facie* evidence is that evidence necessary to require a defendant (here, Intervenor) to proceed with its case. The court stated that a plaintiff (here, Applicant) “*must* present evidence regarding each essential allegation of the complaint [here, Application] to demonstrate that there is *some* factual basis for relief before the defendant [here, Intervenor] will be required to present evidence.” *Id.* at 857 (emphasis supplied). The court stated that, only after the plaintiff (here, Applicant) presents evidence on each essential allegation does the defendant (here, Intervenor) have the obligation to respond. *Id.*

concerning the operation of Applicant's proposed service. In addition, the record contains little specific evidence of Applicant's operational experience in providing taxi service. Finally, there is no record evidence that Applicant is familiar with the statutory and rule requirements pertinent to operating a taxi service in Colorado.⁴

29. Without evidence of record concerning Applicant's operational and financial fitness, the Commission cannot grant the requested CPCN to provide taxi service. Therefore, the Tazco motion to dismiss for failure of Applicant to establish a *prima facie* case will be granted.

30. Because the decision to grant the motion to dismiss rests on the stated grounds alone, it is unnecessary to address whether Applicant established that he meets the Rule 4 CCR 723-31-25 criteria and whether Applicant established that the present public convenience and necessity requires, or that the future public convenience and necessity will require, the proposed taxi service.⁵

31. Pursuant to § 40-6-109(2), C.R.S., the ALJ recommends that the Commission enter the following order.

⁴ As discussed above, Applicant's prior experience was in Illinois and Nevada. There is no evidence that the experience is transferable to Colorado or that the regulatory regime in either Illinois or Nevada is similar to that in Colorado.

⁵ Although she does not reach the issue, the ALJ notes that most (if not all) of the evidence concerning present or future need for the proposed service was hearsay. Although hearsay may provide a sufficient basis to support a Commission decision on this (or any other) issue if the hearsay is trustworthy, is reliable, and has some probative value, the hearsay presented in this proceeding on the issue of present or future need does not possess the required indicia of trustworthiness and reliability. *See Industrial Claim Appeals Office v. Flower Stop Marketing Corporation*, 782 P.2d 13, 18 (Colo. 1989) (recitation of nine factors to be considered).

IV. ORDER**A. The Commission Orders That:**

1. The motion of Intervenor Tazco, Inc., doing business as Sunshine Taxi, to dismiss the Application for a Certificate of Public Convenience and Necessity to Operate as a Common Carrier by Motor Vehicle for Hire for the failure of Applicant to establish a *prima facie* case is granted.

2. The Application for a Certificate of Public Convenience and Necessity to Operate as a Common Carrier by Motor Vehicle for Hire filed by Carroll Gene Eady, doing business as Checker Taxi, is denied.

3. Docket No. 04A-007CP is dismissed with prejudice.

4. Docket No. 04A-007CP is closed.

5. 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.

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

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

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

stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

7. 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