

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04A-337CP

IN THE MATTER OF THE APPLICATION OF MALCOLM LEWIS, DOING BUSINESS AS
MILE HIGH COMMUTER, FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND
NECESSITY TO OPERATE AS A COMMON CARRIER BY MOTOR VEHICLE FOR HIRE.

**INTERIM ORDER OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
GRANTING MOTIONS TO VACATE
HEARING, VACATING HEARING,
SCHEDULING NEW HEARING DATE,
ESTABLISHING NEW PROCEDURAL
SCHEDULE, AND DENYING OTHER MOTIONS**

Mailed Date: September 2, 2004

I. STATEMENT

1. On June 23, 2004, Malcolm Lewis, doing business as Mile High Commuter (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 docket.

2. The Commission gave public notice of the Application. See Notice of Applications Filed dated June 28, 2004 (Notice) at 3. That Notice, *inter alia* and as pertinent here, established a procedural schedule and a hearing date of September 3, 2004, for this proceeding.

3. Alpine Taxi/Limo, Inc. (Alpine), intervened of right. Metro Taxi, Inc. (Metro), intervened of right.¹ Casino Transportation, Inc. (CTI), intervened of right. Golden West Commuter, LLC (Golden West), intervened of right. SuperShuttle International Denver, Inc., and Denver Taxi, LLC,² intervened of right. Each intervenor opposes the Application.

4. Pursuant to the procedural schedule established by the Commission, Applicant's list of witnesses and copies of his exhibits were due on or about August 9, 2004. Review of the Commission file in this proceeding reveals that, to date, Applicant has not filed its list of witnesses and copies of its exhibits.

5. Pursuant to the procedural schedule established by the Commission, each intervenor has filed its preliminary list of witnesses and copies of its exhibits. Each intervenor represents that its list of witnesses and its exhibits are necessarily preliminary because Applicant has not yet filed its list of witnesses and copies of its exhibits.

6. On August 20, 2004, Alpine filed a Motion to Dismiss, First Alternative Motion *in Limine* or Second Alternative Motion to Vacate Hearing, Request for Shortened Response Time and for Expedited Action (Alpine Motion). By Decision No. R04-0995-I, the Administrative Law Judge (ALJ) shortened, to and including noon on August 31, 2004, the response time to this filing. This Order addresses the merits of the filing.

7. On August 20, 2004, CTI filed a Motion to Dismiss, First Alternative Motion *in Limine* or Second Alternative Motion to Vacate Hearing, Request for Shortened Response Time and for Expedited Action (CTI Motion). By Decision No. R04-0995-I, the ALJ shortened, to and

¹ By Decision No. R04-0993-I, the ALJ granted the Joint Motion filed by Metro and MKBS, LLC, doing business as Metro Taxi, for Substitution of Intervenor and Intervenor's Counsel. Reference to Metro in this Order is to MKBS.

² These two intervenors are referred to collectively as Denver Taxi *et al.*

including noon on August 31, 2004, the response time to this filing. This Order addresses the merits of the filing.

8. On August 26, 2004, Golden West filed a Motion to Dismiss and Alternate Motion *in Limine*, Motion for Shortened Response Time and Postponement of the Hearing, Motion for Attorney's Fees (Golden West Motion). By Decision No. R04-1035-I, the ALJ shortened, to and including noon on August 31, 2004, the response time to this filing. This Order addresses the merits of the filing.

9. On August 26, 2004, Denver Taxi *et al.* filed their response to the CTI Motion and to the Alpine Motion. In that response they stated that they join in, and have no objection to, each motion.

10. No other party filed a response to the Alpine Motion by the due date for response.

11. No other party filed a response to the CTI Motion by the due date for response.

12. No party filed a response to the Golden West Motion by the due date for response.

13. Alpine makes three alternative motions, each of which is addressed in this Order.

14. First, Alpine argues that Applicant is in material default for failure to respond to discovery and for failure to comply with filing requirements. Alpine asserts that, on July 13, 2004, it served Applicant with interrogatories and requests for production of documents. Responses were due on or before July 23, 2004. By letter dated July 24, 2004, but not received by Alpine until July 30, 2004, Applicant responded to the requests for production of documents but not to the interrogatories. *See* Alpine Motion at ¶ 2 and Exhibit 2.³ Alpine asserts that the responses are inadequate and unresponsive. In addition, Alpine notes that Applicant has stated

³ Alpine sent Applicant a letter dated July 28, 2004, requesting that Applicant respond to the pending discovery and informing Applicant of the consequences of his failure to respond. *See id.* at Exhibit 3.

that “[t]here will be no exhibits [Applicant] will use at the hearing.” *Id.* at Exhibit 2. Finally, Alpine states that Applicant has not filed a list of witnesses and copies of its exhibits as required by the Notice and by Commission rules. For these reasons, Alpine seeks dismissal of the Application based on Applicant’s failure to comply with filing requirements and its failure to provide adequate and responsive answers to discovery.

15. Second, Alpine argues that these same facts support granting its First Alternative Motion *in Limine*. In that first alternative motion Alpine seeks an order precluding Applicant “from presenting any testimony or evidence on the issues of public need for the proposed service and/or the inadequacy of existing services generally, but specifically for transportation within or to and from points in Routt County.” *Id.* at ¶ 6. The information sought in the discovery, according to Alpine, addresses these issues. Applicant’s failure to respond, Alpine asserts, warrants the relief requested.

16. Third, Alpine argues that, for these same reasons and in the event its other requests are denied, its second alternative motion should be granted. *See id.* at ¶ 7. That second alternative motion seeks an order vacating the hearing scheduled for September 3, 2004 and rescheduling the hearing to a later date. Alpine asserts this is necessary to avoid the prejudice to it caused by Applicant’s failure to respond to discovery and to comply with filing requirements. Alpine provides a list of unavailable dates in August, September, and October 2004.

17. CTI makes three alternative motions, each of which is addressed in this Order.

18. First, CTI argues that Applicant is in material default for failure to respond to discovery and for failure to comply with filing requirements. CTI asserts that, on July 16, 2004, it served on Applicant interrogatories and requests for production of documents. Responses were due on or before July 26, 2004. By letter dated July 24, 2004, but not received by CTI until

July 30, 2004, Applicant responded to the requests for production of documents but not to the interrogatories. See CTI Motion at ¶ 2 and Exhibit 2.⁴ CTI asserts that the responses are inadequate and unresponsive. In addition, CTI notes that Applicant has stated that “[t]here will be no exhibits [Applicant] will use at the hearing.” *Id.* at Exhibit 2. Finally, CTI states that Applicant has not filed a list of witnesses and copies of its exhibits as required by the Notice and by Commission rules. For these reasons, CTI seeks dismissal of the Application based on Applicant’s failure to comply with filing requirements and its failure to provide adequate and responsive answers to discovery.

19. Second, CTI asserts that these same facts support granting its First Alternative Motion *in Limine*. In that first alternative motion CTI seeks an order precluding Applicant “from presenting any testimony or evidence on the issues of public need for the proposed service and/or the inadequacy of existing services generally, but specifically for transportation within or to and from points in Gilpin County.” *Id.* at ¶ 6. The information sought in the discovery, according to CTI, addresses these issues. Applicant’s failure to respond, CTI argues, warrants the relief requested.

20. Third, CTI asserts that, for these same reasons and in the event its other requests are denied, its second alternative motion should be granted. See *id.* at ¶ 7. That second alternative motion seeks an order vacating the hearing scheduled for September 3, 2004 and rescheduling the hearing to a later date. CTI argues this is necessary to avoid the prejudice to it caused by Applicant’s failure to respond to discovery and to comply with filing requirements. CTI provides a list of unavailable dates in August, September, and October 2004.

⁴ CTI sent Applicant a letter dated July 28, 2004, requesting that Applicant respond to the pending discovery and informing Applicant of the consequences of his failure to respond. See *id.* at Exhibit 3.

21. Golden West makes four motions, each of which is addressed in this Order.

22. First, Golden West moves to dismiss the Application. Golden West asserts that, on July 31, 2004, it served Applicant with a set of discovery containing interrogatories, requests for production of documents, and requests for admissions.⁵ Responses were due on or before August 10, 2004. By letters dated August 10 and 19, 2004, Golden West informed Applicant of his obligation to respond to the pending discovery. As of the date of the motion, Golden West represents, Applicant had not responded to the discovery.⁶ See Golden West Motion at 2. In addition, as of the date of the motion, according to Golden West, Applicant had not denied the requests for admission served on July 31, 2004. See *id.* at 5-6. Finally, Golden West states that Applicant has filed neither its list of witnesses nor copies of its exhibits. From these facts Golden West argues that Applicant is in material default of its filing obligations and has failed to comply with the Commission's rules governing discovery, which warrants dismissal of the Application. Golden West also argues that Applicant's failure to deny the pending requests for admissions warrant dismissal because they are deemed admitted and, once admitted, leave nothing to decide. Golden West further argues that Applicant's behavior (as outlined above) "calls into serious question its fitness." *Id.* at 7. Golden West finally argues that dismissal serves the public interest because it would "allow[] Applicant to start over when it is better prepared [and would] accordingly save everyone a lot of time and money." *Id.*

23. Second, Golden West asserts that these same facts support granting its Alternative Relief in the Form of a Motion *in Limine*. By that request Golden West seeks an order

⁵ Referenced documents are attached to the Golden West Motion.

⁶ From the Golden West Motion at 2, it appears that there was an exchange of correspondence concerning a settlement offer made by Golden West on August 10, 2004, to which Applicant made a counter-offer on August 16, 2004.

precluding Applicant “from presenting any testimony or evidence on the issues of public need for the service proposed, any testimony or evidence on the ability of Golden West to meet that public need, and any testimony or evidence on the alleged inadequacy of existing services to meet those needs.” *Id.* at 8. The information sought in the discovery, according to Golden West, addresses these issues. Applicant’s failure to respond, Golden West argues, warrants the relief requested.

24. Third, Golden West asserts that, for the foregoing reasons, the Commission should issue an order vacating the hearing scheduled for September 3, 2004 and rescheduling the hearing to a later date. Golden West argues this is necessary to avoid the material prejudice to it caused by Applicant’s total failure to disclose its case. Golden West provides a list of unavailable dates in September, October, and November 2004.

25. Fourth and finally, Golden West moves for recovery of its attorney’s fees caused by Applicant’s inaction, as outlined above. Specifically, Golden West seeks recovery of the fees and costs necessary “to prepare and [to] file” the Golden West Motion. *Id.* at 10.

26. The procedural schedule governing this case required Applicant to file its list of witnesses and copies of its exhibits on or before August 9, 2004. *See* Notice. Consistent with the Commission’s procedures, the Notice advised Applicant that no witness would be permitted to testify, except in rebuttal, and no exhibit would be received in evidence at the hearing, except in rebuttal, unless filed and served in accordance with this requirement. *See id.*; *see also* Rule 4 *Code of Colorado Regulations* (CCR) 723-1-71(b)(6).

27. As stated above, review of the Commission’s files in this matter reveals that Applicant did not make the required filing of its list of witnesses and copies of its exhibits. In addition, Applicant did not request an enlargement of time within which to make the required

filing. Further, Applicant did not respond fully and timely to the discovery served by Alpine, by CTI, and by Golden West. These facts are not in dispute.

28. Review of the Commission file reveals that Applicant did not file a response to any of the motions by the due date and time for response. The motions are unopposed.

29. The ALJ turns first to the motions to dismiss and alternative motions *in limine* filed by Alpine, by CTI, and by Golden West. As a matter of policy, the Commission makes allowances for *pro se* litigants, such as Applicant in this case, *provided* those allowances neither prejudice the due process rights of other parties nor result in unduly extending the time necessary for hearing. As the prejudice which Alpine, CTI, and Golden West assert as at least one basis for their Motions to Dismiss and Alternative Motions *in Limine* can be remedied by less severe means (*see* discussion below), it is inappropriate, at this time, to dismiss the Application or to limit the evidence to be presented by Applicant at the hearing.

30. In addition, the ALJ finds that it is premature to determine, as Golden West argues, that a hearing is unnecessary in this proceeding because Applicant has failed to deny requests for admissions served on him by Golden West. Applicant appears *pro se* and may not have understood the import of his failing to respond to those requests for admissions. Given this uncertainty, at this point the ALJ is unprepared to deny Applicant the opportunity to be heard at hearing.⁷

31. As a further ground for denying the three alternative motions *in limine*, the ALJ notes that granting the motions *in limine* would preclude Applicant from presenting evidence in support of his Application, a result tantamount to denying the Application filed by this *pro se*

⁷ This determination is based on the present record and may change based on future events or filings.

Applicant. This is the very result which the Commission seeks to avoid by its policy (discussed above) favoring some allowance for *pro se* parties. This is an additional basis on which the alternative motions *in limine* will be denied.

32. Turning now to the three alternative motions to vacate and to reschedule the hearing, these motions will be granted because, as each has amply demonstrated, Alpine, CTI, and Golden West will not be prepared to proceed to hearing on September 3, 2004 due to Applicant's failure to respond to discovery and failure to make the required filing.⁸ The hearing scheduled for September 3, 2004, will be vacated. A new hearing date and a new procedural schedule will be established by this Order.

33. The following procedural schedule and hearing date will be adopted for this proceeding: (a) on or before **September 24, 2004**, Applicant will file and serve its list of witnesses and copies of its exhibits; (b) on or before **October 15, 2004**, each intervenor will file and serve its final list of witnesses and copies of its exhibits;⁹ (c) on or before **October 29, 2004**, parties will file and serve any stipulation reached; and (d) hearing in this matter will be held on **November 4, 2004**.¹⁰

34. **Applicant is advised that failure to meet the filing and service requirements of this Order may be grounds for dismissal of the Application.**

35. **All parties are advised that no witness will be permitted to testify, except in rebuttal, unless the witness's name appears on a witness list filed and served on all parties.**

⁸ From the fact that they joined in the Alpine Motion and the CTI Motion, the ALJ concludes that Denver Taxi *et al.* are similarly-situated and will be prejudiced if the hearing goes forward on September 3, 2004.

⁹ If an intervenor is satisfied with its list of witnesses and copies of its exhibits already filed, it need not file anything on this date.

¹⁰ According to the filings made by Alpine, by CTI, and by Golden West, each is available on this date.

All parties are advised that no document or exhibit will be admitted into evidence, unless offered in rebuttal, unless that document or exhibit has been filed and served on all parties.

36. Applicant has elected to proceed *pro se* in this matter. As a result, he has been, and will be, given some latitude in this proceeding. However, that latitude will not be permitted to prejudice the rights of, and fairness to, the intervenors in this proceeding. If he intends to continue *pro se*, Applicant is **strongly advised** to obtain a copy of the Commission's Rules of Practice and Procedure, 4 CCR 723-1, in order to understand what is expected of him.¹¹

37. Golden West's Motion for Attorney's Fees for having to prepare the motion filed on August 26, 2004 will be denied.

38. On August 31, 2004, the parties received notification by telephone that the hearing scheduled for September 3, 2004, is vacated.

II. ORDER

A. It Is Ordered That:

1. The Motion to Dismiss filed by Alpine Taxi/Limo, Inc., on August 20, 2004, is denied.

2. The First Alternative Motion *in Limine* filed by Alpine Taxi/Limo, Inc., on August 20, 2004, is denied.

3. The Second Alternative Motion to Vacate Hearing filed by Alpine Taxi/Limo, Inc., on August 20, 2004, is granted.

¹¹ The rules are available on the Commission's website (www.dora.state.co.us/puc) or from the Commission's document room.

4. The Motion to Dismiss filed by Casino Transportation, Inc., on August 20, 2004, is denied.

5. The First Alternative Motion *in Limine* filed by Casino Transportation, Inc., on August 20, 2004, is denied.

6. The Second Alternative Motion to Vacate Hearing filed by Casino Transportation, Inc., on August 20, 2004, is granted.

7. The Motion to Dismiss filed by Golden West Commuter, LLC, on August 26, 2004, is denied.

8. The Alternate Motion *in Limine* filed by Golden West Commuter, LLC, on August 20, 2004, is denied.

9. The Motion for Postponement of the Hearing filed by Golden West Commuter, LLC, on August 20, 2004, is granted.

10. The Motion for Attorney's Fees filed by Golden West Commuter, LLC, on August 20, 2004, is denied.

11. The hearing in this matter scheduled for September 3, 2004, is vacated.

12. The procedural schedule set out above is adopted.

13. Hearing in this matter will be held on the following date, at the following time, and in the following place:

DATE: November 4, 2004

TIME: 9:00 a.m.

PLACE: Commission Hearing Room
1580 Logan Street, OL-2
Denver, Colorado

14. The parties shall follow the procedures and shall make the filings as set out above.

15. This Order is effective immediately.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge