

Decision No. R04-1318

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.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
GRANTING MOTIONS TO DISMISS,
DISMISSING APPLICATION WITHOUT
PREJUDICE, AND CLOSING DOCKET**

Mailed Date: November 8, 2004

I. STATEMENT, FINDINGS, AND CONCLUSION

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. The scope of the authority sought is set out in the Notice. That Notice established a procedural schedule and a hearing date of September 3, 2004, for this proceeding. By Decision No. R04-1048-I, the undersigned Administrative Law Judge (ALJ) vacated that hearing date and established a new procedural schedule and a new hearing date.

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 (collectively, Denver Taxi *et al.*), intervened of right. By Decision No. R04-1177-I, the ALJ granted the unopposed Petition to Intervene late-filed by CUSA BCCAE LLC (CUSA). 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 Applicant did not file his list of witnesses and copies of his exhibits by that date. In addition, Applicant did not request an enlargement of time within which to make the required filing.

5. Pursuant to the procedural schedule established by the Commission, each intervenor filed its preliminary list of witnesses and copies of its exhibits. Each intervenor represented that its list of witnesses and its exhibits were necessarily preliminary because Applicant had not yet filed his list of witnesses and copies of his 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. On the same date 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. On August 26, 2004, Golden West filed a Motion to

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.

Dismiss and Alternate Motion *in Limine*, Motion for Shortened Response Time and Postponement of the Hearing, Motion for Attorney's Fees.²

7. On August 26, 2004, Denver Taxi *et al.* filed their response to the motions to dismiss. In that response they stated that they joined in, and had no objection to, each motion.

8. No other party -- including Applicant -- filed a response to any of the motions to dismiss.

9. The motions to dismiss were grounded in Applicant's failure to file its list of witnesses and copies of its exhibits and in Applicant's failure to respond to discovery propounded by the movants. By Decision No. R04-1048-I, the ALJ denied the motions to dismiss based on the record as it then appeared; on the fact that Applicant appears *pro se* in this matter and may not have understood the importance of making the filings and responding to discovery; and on the finding that Applicant should be given another opportunity to make the required filing, to respond to discovery, and to present his case in support of the Application so long as that opportunity did not prejudice the rights of the other parties. Accordingly, the ALJ denied the motions to dismiss; scheduled a hearing for November 4, 2004; and established a new procedural schedule. That schedule required Applicant to file his list of witnesses and copies of his exhibits on or before September 24, 2004.

10. Consistent with the provisions of Rule 4 *Code of Colorado Regulations* (CCR) 723-1-71(b)(6) and Rule 4 CCR 723-1-71(b)(7) and as pertinent here, Decision No. R04-1048-I contained the following provisions (emphasis in original):

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

² Collectively, these three motions are referred to as the motions to dismiss.

[¶ 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. 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. [Footnote omitted.]

11. On September 17, 2004, Golden West filed a Motion to Modify Interim Order R04-1048-I. In that filing Golden West requested that Applicant be directed to respond to the discovery propounded by Golden West. By Decision No. R04-1152-I, the ALJ granted that request and modified Decision No. R04-1048-I to order Applicant to respond, on or before October 12, 2004, to the discovery propounded by Golden West on July 31, 2004.

12. Review of the Commission file in this matter reveals that Applicant did not file his list of witnesses and copies of his exhibits on or before September 24, 2004, as required by Decision No. R04-1048-I. In addition, Applicant did not request an enlargement of time within which to make the required filing.

13. On October 13, 2004, Alpine and CTI filed Joint Reoffered Motions to Dismiss, Alternative Motion *in Limine*, Alternative Motion to Modify Interim Decision No. R04-1048-I (Joint Reoffered Motions). In support of the Reoffered Motions to Dismiss, Alpine and CTI state that, despite a clear warning about the consequences of failing to make the filing, Applicant has not met the filing requirements established in Decision No. R04-1048-I. They argue that Applicant has abandoned his Application. In support of the Reoffered Alternative Motion *in*

Limine, Alpine and CTI state that Applicant should be precluded from presenting any witnesses, and from presenting any exhibits, in support of his Application because he has neither filed his list of witnesses and copies of his exhibits nor responded to discovery propounded by Alpine and CTI. The Joint Reoffered Motions echo the substance of the Motions to Dismiss filed on August 20, 2004.

14. By Decision No. R04-1216-I the ALJ shortened, to and including October 21, 2004, the response time to the Joint Reoffered Motions. Of particular relevance here, ¶ 6 of that Order stated:

Applicant is advised that failure to respond to the Reoffered Motions to Dismiss, the Alternative Motion in *Limine*, and the Alternative Motion to Modify Interim Decision No. R04-1048-I may result in one or more of the motions being granted because they are unopposed. If the Reoffered Motions to Dismiss are granted, the Application will be dismissed.

15. On October 15, 2004, Golden West filed a Renewed Motion for the Discovery Sanctions of Dismissal and Attorney's Fees and Costs (Renewed Motion). In support of the Renewed Motion, Golden West states that, despite a clear warning about the consequences of failing to make the filing, Applicant has not met the filing requirements established in Decision No. R04-1048-I. As additional support, Golden West states that Applicant has not responded to Golden West's discovery as required by Decision No. R04-1152-I. Golden West argues that these failures evidenced "a pattern, pure and simple, of a lack of fitness to hold any authority from the PUC." Renewed Motion at 2. The Renewed Motion incorporates by reference the Motion to Dismiss and Alternate Motion *in Limine* filed by Golden West on August 26, 2004.

16. By Decision No. R04-1224-I the ALJ shortened, to and including October 22, 2004, the response time to the Renewed Motion. Of particular relevance here, ¶ 6 of that Order stated:

Applicant is advised that failure to respond to the Renewed Motion for the Discovery Sanctions of Dismissal and Attorney's Fees and Costs may result in the Renewed Motion's being granted because it is unopposed. If the Renewed Motion for Sanctions is granted, the Application may be dismissed.

17. On October 19, 2004, CUSA filed a Motion to Strike or Dismiss Application or, in the Alternative, Motion *in Limine* to Limit Evidence (CUSA Motion). In support of its filing CUSA states that, on October 8, 2004, CUSA propounded discovery to Applicant and that Applicant did not respond or object to the discovery within the time permitted by Rule 4 CCR 723-1-77. As additional support, CUSA states that Applicant has neither filed nor served his list of witnesses and copies of his exhibits as required by Decision No. R04-1048-I.

18. By Decision No. R04-1236-I the ALJ shortened, to and including October 27, 2004, the response time to the CUSA Motion. Of particular relevance here, ¶ 6 of that Order stated:

Applicant is advised that failure to respond to the Motion to Strike or Dismiss Application or, in the Alternative, Motion *in Limine* to Limit Evidence may result in that motion's being granted because it is unopposed. If the motion is granted, the Application may be dismissed.

19. By Decision No. R04-1278-I the ALJ vacated the hearing in this matter scheduled for November 4, 2004.

20. Review of the Commission file in this matter reveals that, as of the date of this Decision, no one -- including Applicant -- has filed a response to the Joint Reoffered Motions, to the Renewed Motion, or to the CUSA Motion. In addition, no one -- including Applicant -- has

requested an enlargement of time within which to file a response. As a result, all three motions are unopposed.

21. Review of the Commission file in this matter also reveals that, as of the date of this Decision, Applicant has not filed his list of witnesses and copies of his exhibits.

22. After review of the procedural history of this matter detailed above and after careful consideration of the facts and arguments offered in support of the three pending motions, the ALJ determines that the motions should be granted insofar as they seek dismissal of the Application and that the Application should be dismissed without prejudice.

23. First, based on the history of this matter, the ALJ finds that Applicant has abandoned the Application. Applicant has made no filing in this matter since submitting the Application on June 23, 2004. Applicant has evidenced no interest in proceeding with this Application despite receiving a generous extension of time for filing his list of witnesses and copies of his exhibits;³ despite receiving a generous extension of time for responding to discovery;⁴ and despite receiving numerous Orders clearly stating the filing requirements, the filing dates, and the consequences of failing to meet those dates. Applicant has elected not to respond to any of the numerous motions to dismiss and motions *in limine* filed in this matter in August and in October. Applicant has not sought extensions of time to respond to motions or to make required filings. Applicant has not followed the Orders issued in this proceeding. In short, except for the Application itself, nothing in this record suggests that Applicant is interested in obtaining the requested Certificate of Public Convenience and Necessity from the Commission.

³ The additional time was 46 days (or approximately 7 weeks).

⁴ With respect to the discovery propounded by Golden West, the additional time was approximately 60 days (or two months).

In view of the abandonment, the ALJ finds that the Application should be -- and will be -- dismissed without prejudice.

24. Second, and as further support for dismissal, the ALJ finds unpersuasive the fact that Applicant is proceeding *pro se* in this case. The ALJ has provided clear and unambiguous guidance to all parties, including Applicant, throughout this proceeding. The ALJ's actions more than satisfy the Commission's policy with respect to making allowances for *pro se* litigants. The ALJ finds that the intervenors should not be required to continue to incur costs to oppose the Application when the Applicant has not taken any action to move the Application forward. This is a question of simple fairness to the intervenors.

25. Third, and finally, dismissing the Application without prejudice permits Applicant, if he wishes to do so, to file another Application to obtain a Certificate of Public Convenience and Necessity. This result is a proper balance of the rights of the Applicant and the rights of the intervenors.

26. To the extent that the Joint Reoffered Motions, the Renewed Motion, or the CUSA Motion seek relief other than or in addition to dismissal of the Application, those motions are denied.

27. In accordance with § 40-6-109, C.R.S., the ALJ recommends that the Commission enter the following order.

II. ORDER

A. The Commission Orders That:

1. The Joint Reoffered Motions to Dismiss, Alternative Motion *in Limine*, Alternative Motion to Modify Interim Decision No. R04-1048-I are granted and denied consistent with the discussion above.

2. The Renewed Motion for the Discovery Sanctions of Dismissal and Attorney's Fees and Costs is granted and denied consistent with the discussion above.

3. The Motion to Strike Application or, in the Alternative, Motion *in Limine* to Limit Evidence is granted and denied consistent with the discussion above.

4. The Application for a Certificate of Public Convenience and Necessity to Operate as a Common Carrier by Motor Vehicle for Hire filed by Malcolm Lewis, doing business as Mile High Commuter, is dismissed without prejudice.

5. Docket No. 04A-337CP is closed.

6. 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.

7. As provided by § 40-6-106, 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 recommended 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 a basic finding 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.

8. If exceptions to this Recommended 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