

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 21A-0020CP

IN THE MATTER OF THE APPLICATION OF ESTES PARK GUIDED TOURS LLC FOR A
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO OPERATE AS A
COMMON CARRIER BY MOTOR VEHICLE FOR HIRE.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
STEVEN H. DENMAN
ADDRESSING INTERVENTIONS, REQUIRING FILING,
AND REQUIRING PARTIES TO CONFER AND TO FILE A
JOINT STATUS REPORT ON PROCEDURAL MATTERS**

Mailed Date: February 22, 2021

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I. STATEMENT

A. Procedural History

1. On January 5, 2021, Estes Park Guided Tours LLC (Applicant or EP Guided Tours) filed an Application for a Certificate of Public Convenience and Necessity to Operate as a

Common Carrier by Motor Vehicle for Hire (Application). That filing commenced this proceeding.

2. On January 11, 2021, the Commission issued its Notice of Application Filed (Notice). As originally noticed, the Application was:

For authority to operate as a common carrier by motor vehicle for hire for the transportation of passengers in call-and-demand sightseeing service between all points in Estes Park Colorado, on the one hand, and all points in Rocky Mountain National Park located in the Counties of Boulder, Grand, and Larimer, State of Colorado, and Grand Lake, Colorado, on the other hand.

The 30-day intervention deadline set by the Notice expired on February 10, 2021.

3. During the Commission's weekly meeting held on February 17, 2021, the Commission deemed the Application complete and referred it to an Administrative Law Judge (ALJ) for disposition. Subsequently, the undersigned ALJ was assigned to preside over this proceeding.

4. Applicant did not file testimony and exhibits with its Application and, therefore, seeks a Commission decision within 210 days after the Application was deemed complete, or no later than August 15, 2021.¹

5. Applicant filed amendments to the Application on January 14, 2021, to amend Sections 2 (Contact Person for questions about the Application), 8 (Designated Agent for service of process), and 10(a) (Proposed Authority), and on February 19, 2021, to again amend Sections 2 and 8.²

¹ See § 40-6-109.5(2), C.R.S. (2019)

² The January 14, 2021 amendment to Section 10(a) of the Application amended the statement of the Proposed Authority to conform to the Commission's Notice.

6. Rule 1405(k)(I) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1, requires a regulated intrastate carrier applicant, who did not file testimony (or a detailed summary) with its application, to file and serve its list of witnesses and copies of its exhibits within 10 days after the end of the notice period. In this proceeding, Applicant's list of witnesses and copies of its exhibits were due on February 22, 2021. EP Guided Tours filed Applicant's Witness Summaries and Exhibit List, as well as copies of its proposed hearing exhibits, on February 19, 2021.

7. Rule 1405(k)(II) of the Rules of Practice and Procedure, 4 CCR 723-1, requires each intervenor in this proceeding to file and serve its list of witnesses and copies of its exhibits within 20 days after the end of the notice period, or no later than March 2, 2021. On January 22, 2021, Fun Tyme Trolleys, LLC, doing business as Estes Park Trolleys (EP Trolleys) filed an Exhibit and Witness Summary, along with copies of eight proposed hearing exhibits.

B. Interventions

8. On January 22, 2021, EP Trolleys, through counsel, filed its Entry of Appearance and Intervention. At the same time, EP Trolleys filed its Certificate PUC No. 55845S as Attachment 01.

9. EP Trolleys asserts that the operating rights sought by Applicant would overlap the rights granted to it under Certificate PUC No. 55845S. Claiming to be an intervenor by right, EP Trolleys argues that it has legally protected rights in the subject matter of the Application and that its rights would be affected if the Application were to be granted. EP Trolleys states alternatively that, "Should the Commission find that the current status of Intervenor's authority prevents intervention by right (currently inactive), Intervenor hereby moves to be allowed to

permissively intervene for the same reasons provided.” EP Trolleys argues that the Application should not be granted for several reasons.³

10. On February 8, 2021, Estes Valley Transport, Inc. (EV Transport), through counsel, filed its Entry of Appearance and Intervention. EV Transport asserts that the operating rights sought by Applicant would partially overlap the rights granted to it under Certificate PUC No. 54696. EV Transport argues that it is entitled to intervene by right, because it has legally protected rights in the subject matter of the Application which would be affected if the Application were to be granted. EV Transport argues that the Application should not be granted for several reasons. EV Transport states that a copy of Certificate PUC No. 54696 was attached to its Intervention, but the Certificate was not attached or filed separately simultaneous with the Intervention.⁴

11. In regulated intrastate transportation carrier application proceedings, such as this one, Rule 1401(f) of the Rules of Practice and Procedure, 4 CCR 723-1 (2020), provides that:

- (I) A notice of intervention as of right must include a copy of the common carrier's letter of authority, must show that the common carrier's authority is in good standing, must identify the specific parts of that authority that are in conflict with the application, and must explain the consequences to the common carrier and the public interest if the application is granted.
- (II) A common carrier holding either temporary or suspended authority in conflict with the authority sought in the application shall not have standing to intervene as of right, but may file a motion to permissively intervene.

12. As for EP Trolleys, Commission records show the status of EP Trolleys under Certificate PUC No. 55845S as “Active.”⁵ EP Trolleys may appear to be “currently inactive,” because Certificate PUC No. 55845S is a seasonal authority, which is restricted to operating from

³ EP Trolleys’ Intervention, at pages 1 and 2.

⁴ EV Transport’s Intervention, at pages 1 – 3; *see Id.*, at page 4.

⁵ See Composite Report for EP Trolleys, Public Utilities Commission – Integrated Filings Management System (IFMS), viewed on February 18, 2021.

April 1st through October 31st of each year, and the authority is “inactive” during the off-season. In its Intervention, EP Trolleys states that it has applied for the removal of this restriction.⁶

13. The ALJ concludes that Certificate PUC No. 55845S is not temporary and has not been suspended by the Commission, within the meaning of Rule 1401(f)(II). Because Certificate PUC No. 55845S is not temporary and has not been suspended, EP Trolleys has standing to intervene by right in this proceeding. Certificate PUC No. 55845S grants authority to EP Trolleys for the transportation of passengers in call-and-demand charter service and call-and-demand sightseeing service between all points within 30 miles of the intersection of U.S. Highway 34 and U.S. Highway 36 in Estes Park Colorado, subject to the stated restrictions. After reviewing Certificate PUC No. 55845S and the authority granted to EP Trolleys therein, the ALJ agrees that the authority sought in the Application does overlap the territorial authority granted to EP Trolleys. Therefore, EP Trolleys is an intervenor by right.

14. As for EV Transport, Rule 1401(f)(I), 4 CCR 723-1, requires that, “A notice of intervention as of right must include a copy of the common carrier's letter of authority....” While EV Transport may have intended to attach a copy of its Certificate PUC No. 54696, it failed to do so. The ALJ must be able to review Certificate PUC No. 54696, in the record of this proceeding, to determine whether this Application, if granted, would affect operating rights granted to EV Transport. Because EV Transport failed to attach a copy of its Certificate, the ALJ cannot determine whether EV Transport is an intervenor by right. In its Intervention, EV Transport did not request alternatively to intervene permissively.

⁶ EP Trolleys’ Intervention, ¶ 4(a) at page 2. *See* Proceeding No. 21A-0052CP-EXT, commenced by EP Trolley’s application to remove existing restrictions requiring seasonal operations, on vehicle seating capacity, and on types of vehicles. This application was noticed by the Commission on January 25, 2021, and the 30-days’ notice period does not expire until February 24, 2021. Hence, this application is still pending before the Commission.

15. EV Transport's failure to comply with Rule 1401(f)(I), by attaching a copy of its Certificate, may have been an oversight by counsel. Therefore, the ALJ will give EV Transport an opportunity to cure the oversight by filing an amended Intervention pleading, *nunc pro tunc*, that includes a copy of Certificate PUC No. 54696. The amended Intervention will be due **no later than March 1, 2021**. If EV Transport fails to file an amended Intervention, including a copy of Certificate PUC No. 54696, by March 1, 2021, its attempt to intervene by right will *not* be granted.

16. As of the mailed date of this Decision, the Parties to this proceeding are EP Guided Tours and EP Trolleys. Both parties are represented by counsel.

C. Process for Setting a Procedural Schedule and Scheduling the Hearing.

17. It will be necessary to schedule a remote evidentiary hearing in this proceeding. Due to the COVID-19 pandemic, in-person hearings at the Commission's offices are currently not permitted. As background, on March 10, 2020, Colorado Governor Jared Polis declared a state of emergency over COVID-19, the novel coronavirus pandemic.⁷ Since then, Colorado State government and the Commission have been working diligently to address how to manage the challenges presented by COVID-19 safely and effectively. These efforts have focused on limiting the disruption to the services delivered by the Commission (and other State agencies), while attempting to mitigate the risks to State employees and the public. Notably, public access to the building containing the Commission's offices and hearing rooms has been restricted. As a result, currently and for the foreseeable future, the Commission is unable to hold in-person

⁷ See Executive Order D-2020 003, which has been extended numerous times since being issued.

hearings at the Commission's offices.⁸ Holding the hearing remotely is also consistent with public health advisories to prevent the spread of COVID-19 and is in the public interest.

18. On February 19, 2021, EP Guided Tours filed Applicant's Witness Summaries and Exhibit List, as well as copies of its proposed hearing exhibits. On January 22, 2021, EP Trolleys filed an Exhibit and Witness Summary, along with copies of eight proposed hearing exhibits. Because EP Guided Tours and EP Trolleys have each already filed their lists of witnesses, summaries of testimony, and copies of their proposed hearing exhibits, the ALJ will not order them to confer on due dates for filing those prehearing disclosures.

19. To schedule the remote hearing date(s), the ALJ will order counsel for EP Guided Tours to confer with counsel for EP Trolleys about dates for a remote hearing when the parties and their witnesses will be available **during the following available dates on the Commission's calendar: March 29 through April 2, 2021; April 5 and 6, 2021; April 15 and 16, 2021; or April 19 through 23, 2021.**⁹ If the interventions of other parties are acknowledged or granted before March 8, 2021, the ALJ directs counsel EP Guided Tours to confer with counsel for such parties on these scheduling matters.

20. Counsel for EP Guided Tours and counsel for EP Trolleys (as well as counsel for any other intervenors) shall file a Joint Status Report, **no later than March 8, 2021**, informing the ALJ of the results of their conferral. If the parties agree to the proposed hearing dates within the date ranges noted above, the Joint Status Report shall identify the agreed-upon dates. The

⁸ EP Guided Tours requested Estes Park as the location for the hearing. *See* Application filed on January 5, 2021, ¶ 18 at page 6. For the reasons explained in the foregoing paragraph, due to the continuing coronavirus pandemic the hearing will be held remotely via video conference.

⁹ The Commission's hearing calendar is quite busy from early April through mid-May 2021. The ALJ currently has evidentiary hearings scheduled in other cases for April 27, 2021 and for the weeks of May 3 and May 10, 2021.

Joint Status Report should also state the estimated number of days needed for the remote hearing. The ALJ will choose, if possible, a hearing date proposed in the Joint Status Report.

21. If counsel for EP Trolleys fails to confer with counsel for EP Guided Tours, Applicant shall file an individual Status Report, **no later than March 8, 2021**, stating: (a) the reasonable, good faith efforts made to confer with counsel for EP Trolleys; and (b) EP Guided Tours' available dates for the hearing within the date ranges noted above and the estimated number of days needed for the hearing.

22. If counsel for EP Guided Tours fails to confer with counsel for EP Trolleys, counsel for EP Trolleys shall file an individual Status Report, **no later than March 8, 2021**, stating that counsel for EP Guided Tours did not confer with him and identifying EP Trolleys' available dates for the hearing within the date ranges noted above and the estimated number of days needed for the hearing.

23. **The parties are advised and are on notice that** failure to file the Joint Status Report, or individual Status Report, or failure to agree on proposed hearing dates by the deadline ordered in this Decision will result in the ALJ selecting a hearing date without further input from the parties. In that event, after scheduling the hearing, the ALJ will not consider future requests to reschedule the hearing, unless a party files a motion demonstrating good cause for a continuance.

24. After selecting the date(s) for the hearing, the ALJ will issue an Interim Decision that schedules the dates(s) and location of the evidentiary hearing and establishes a procedural schedule for any other intervenor to file its list of witnesses, detailed summaries of the testimony of its witnesses, and copies of its proposed hearing exhibits.

D. Additional Advisements. (Please read and understand these Advisements.)

25. **The parties are advised and on notice** that this proceeding is governed by the Rules of Practice and Procedure found at 4 CCR 723-1, Part 1. The ALJ expects counsel and all parties to comply with these rules. The Rules of Practice and Procedure are available on the Commission's website (<http://www.dora.colorado.gov/puc>), as well as in hard copy from the Commission upon request.

26. **The parties are advised and are on notice** that they are each responsible for filing pleadings and other documents with the Commission. Pursuant to Rule 1204 of the Rules of Practice and Procedure, 4 CCR 723-1, a filing is made when the Commission receives the document. Thus, if a document is placed in the mail on the date on which the document is to be filed, the document is not filed with the Commission in a timely manner. Pleadings and other documents are filed with the Commission either by using the E-filings System or by filing a paper document, including the original and three copies. Emailing pleadings and other documents to the Commissioners, the Director of the Commission, an ALJ, or other employees of the Commission **does not** constitute proper filing under Rule 1204.

27. **Each party is specifically advised** that all filings with the Commission must also be served upon the other party and counsel, in accordance with Rule 1205 of the Rules of Practice and Procedure, 4 CCR 723-1.

28. **Each party is specifically advised** that, pursuant to Rule 1400(b) of the Rules of Practice and Procedure, 4 CCR 723-1, in this proceeding the responding party to a non-intervention (*i.e.*, the party that did not file the motion) has the procedural right to file a written response to the non-intervention motion no later than 14 days after service of the motion.

29. **The parties are advised and are on notice** that the Commission has an E-Filings System available. One may learn about -- and if one wishes to do so, may register to use -- that system at <http://www.dora.colorado.gov/puc>.

30. **The parties are advised and on notice** that, absent an enlargement of time or a waiver of § 40-6-109.5, C.R.S., the final Commission decision in this matter must be issued on or before September 15, 2021. This date will be considered by the ALJ in the event any party seeks an extension of time to make any filings or seeks a continuance of the hearing. The parties are reminded that there must be sufficient time after the hearing for the issuance of a recommended decision, for filing of exceptions if needed, for filing of responses to any exceptions, and for the Commission to issue a decision on exceptions, if exceptions are filed.

II. ORDER

A. It Is Ordered That:

1. The Intervention as of right filed on January 22, 2021, by Fun Tyme Trolleys, LLC, doing business as Estes Park Trolleys (EP Trolleys), is acknowledged.

2. The Intervention as of right filed on February 8, 2021, by Estes Valley Transport, Inc. is taken under advisement. If it wishes, no later than March 1, 2021, Estes Valley Transport, Inc. shall file an amended Intervention pleading, *nunc pro tunc*, that includes a copy of Certificate PUC No. 54696.

3. As described in Paragraph Nos. 19 through 24 above at pages 7 and 8, counsel for Estes Park Guided Tours LLC (EP Guided Tours) shall confer with counsel for EP Trolleys about suitable hearing dates and the estimated number of days needed for the remote hearing. Counsel EP Guided Tours and counsel for EP Trolleys shall file a Joint Status Report **no later than March 8, 2021**, identifying the available hearing dates for counsel, the parties, and their

witnessed within the date ranges provided in this Decision and the estimated number of days needed for the remote hearing. If the parties agree to the proposed hearing dates within the date ranges provided in this Decision, the Joint Status Report shall identify the agreed-upon dates.

4. If counsel for EP Trolleys fails to confer with counsel for EP Guided Tours, Applicant shall file an individual Status Report, **no later than March 8, 2021**, stating: (a) the reasonable, good faith efforts made to confer with counsel for EP Trolleys; and (b) EP Guided Tours' available dates for the hearing within the date ranges noted above and the estimated number of days needed for the hearing.

5. If counsel for EP Guided Tours fails to confer with counsel for EP Trolleys, counsel for EP Trolleys shall file an individual Status Report, **no later than March 8, 2021**, stating that counsel for EP Guided Tours did not confer with him and identifying EP Trolleys' available dates for the hearing within the date ranges noted above and the estimated number of days needed for the hearing.

6. The parties shall comply with the requirements established in this Interim Decision and shall make the filings as required by this Decision.

7. Failure of a party or its counsel to comply with the requirements established in this Interim Decision or to make the filings as required by this Decision may result in consequences adverse to that party's interests.

8. Additional procedural requirements may be issued in future Interim Decisions.

9. This Interim Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

STEVEN H. DENMAN

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director