

Decision No. R21-0130-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20D-0521EC

IN THE MATTER OF THE PETITION FOR A DECLARATORY ORDER FILED BY WILD
SIDE 4 X 4 TOURS LLC, PURSUANT TO THE COMMISSION'S RULE OF PRACTICE
AND PROCEDURE 4 CODE OF COLORADO REGULATIONS 723-1304(F).

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
MELODY MIRBABA
SCHEDULING REMOTE EVIDENTIARY HEARING AND
ESTABLISHING PROCEDURES AND DEADLINES**

Mailed Date: March 08, 2021

I. STATEMENT, BACKGROUND, FINDINGS AND CONCLUSIONS

A. Summary

1. By this Decision, the Administrative Law Judge (ALJ) schedules an evidentiary hearing, sets deadlines for filings, and establishes procedural requirements.

B. Background

2. On November 23, 2020, Wild Side 4 x 4, LLC (Wild Side) filed its Petition for Declaratory Order (Petition) per Rule 1304(i) of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1. Wild Side seeks an order declaring that it is exempt from regulation by the Commission, including requirements to obtain a permit pursuant to Article 10.1 of Title 40 of the Colorado Revised Statutes. Wild Side also requests that the Commission issue a stay of enforcement while the Commission determines whether to grant its Petition.

3. During its weekly meeting on December 23, 2020, the Commission accepted the Petition, issued public notice of the Petition, and referred the matter to an ALJ for disposition. Decision No. C20-0925-I adopted December 23, 2020. The Commission also stayed any enforcement action by Colorado Public Utilities Commission Staff (Staff) related to Wild Side operating without a permit. *Id.* at ¶ 3.

4. Since the Commission referred the matter, Staff, Estes Valley Transport, Inc. (Estes Valley), and Fun Tyme Trolleys LLC, doing business as Estes Park Trolleys, (Fun Tyme) filed Interventions. On February 16, 2021, the ALJ permitted Estes Valley and Fun Tyme to permissively intervene in this matter. Decision No. R21-0084-I.

5. The ALJ also scheduled a remote prehearing conference for March 2, 2021 in order to move this matter toward a resolution. *Id.*

C. Evidentiary Hearing, Discovery, and Deadlines.

6. The ALJ called the prehearing conference as noticed on March 2, 2021. All parties appeared. During the prehearing conference, the parties agreed to hearing dates and a procedural schedule, as set forth in the ordering paragraphs below.¹ The parties also asked the ALJ to approve agreements they reached relating to discovery limits, response times, and deadlines. The ALJ approves those agreements, as set forth in the ordering paragraphs below. The parties also asked for permission to file replies to dispositive motions and for the ALJ to approve their proposed deadlines to file responses and replies. The ALJ finds that replies to dispositive motions in this proceeding may be helpful and grants the parties' request to do so. The parties are not permitted to

¹ The ALJ is setting a deadline for prehearing motions; this was not discussed during the prehearing conference. Prehearing motions raise issues relating to the hearing and are not dispositive motions.

file replies to any other kind of motion without seeking leave to do so, per the Commission's Rules of Practice and Procedure, 4 CCR 723-1. The ALJ approves the parties' proposed deadlines for responses and replies, as set forth in the ordering paragraphs below.

7. Also during the prehearing conference, Staff asked that Fun Tyme and Estes Valley be ordered not to file complaints against Wild Side while this matter is pending, given the Commission's decision staying enforcement action against Wild Side. Fun Tyme and Estes Valley voluntarily agreed not to file complaints while the matter is pending. As such, an order is unnecessary.

8. As explained during the prehearing conference, the global COVID-19 pandemic prevents the Commission from holding in-person hearings. It has also resulted in restrictions on state employees' ability to travel, including travel to hold a hearing in Estes Park, Colorado. At this time, it is unknown when the Commission will be able to hold in-person hearings or when Commission staff will be permitted to travel to hold in-person hearings. Given all of this, the ALJ informed the parties during the prehearing conference that the evidentiary hearing will be held by video-conference. Based on concerns about technical difficulties, Wild Side expressed concern that holding the evidentiary hearing by video-conference may prejudice it. Wild Side asked that the hearing be scheduled for September 2021, to create the possibility that an in-person hearing may be held if circumstances change by then.

9. The ALJ disagrees that holding an evidentiary hearing by video-conference prejudices Wild Side. Indeed, the Commission has held numerous successful evidentiary hearings by video-conference since the COVID-19 pandemic began and continues to do so with success. Even so, as Wild Side requested, the ALJ scheduled the evidentiary hearing for September. This

allows additional time to pass, thereby increasing the possibility that circumstances could change so that an in-person hearing may be held. That said, it is unknown when restrictions on state employee travel and in-person hearings will be lifted. Those restrictions may still be in place at the time of the hearing in September. Given all of this, the ALJ scheduled the September hearing to be held by video-conference, with the caveat that if circumstances permit, it will be converted to an in-person hearing. Doing so balances Wild Side's concerns with the need to move this proceeding toward resolution. Scheduling the hearing for September has the added benefit of giving the parties ample time to address any concerns they have relating to technical aspects of participating in the video-conference hearing.² For all these reasons, the ALJ finds that under the current circumstances, holding the hearing remotely is in the parties' and the public interest, and is consistent with public health advisories to prevent the spread of COVID-19.

10. At least 30 days before the scheduled hearing, the ALJ will inform the parties whether the hearing will be converted from a video-conference hearing to an in-person hearing. If it is converted, a written decision will issue; if it is not, this will be communicated informally to the parties.

D. Procedures for Video-Conference Evidentiary Hearing.

11. The procedures developed for the remote evidentiary hearing are intended to replicate, as practicable, evidence presentation as it occurs when parties and witnesses are present in the hearing room. For example, participating by video-conference allows parties and witnesses

² The ALJ anticipates holding an informal practice video-conference with the parties approximately one week before the hearing to confirm the parties are prepared to participate in the remote evidentiary hearing. Exhibits will be displayed electronically during the hearing. Should the parties have technical questions relating to the electronic presentation of exhibits, they may contact Ms. Christie Nicks at Christie.Nicks@state.co.us or Mr. Ross Smith at Ross.Smith@state.co.us.

to view exhibits on the video-conference screen while the exhibits are being testified to and offered into evidence.

12. Attachment A outlines procedures and requirements for marking and formatting exhibits aimed at facilitating efficient and smooth electronic evidence presentations at the hearing. As such, it is vitally important that the parties carefully review and follow all requirements in this and Attachment A.

13. The evidentiary hearing will be conducted via video-conference using Zoom.³ To minimize the potential that the video-conference hearing may be disrupted by non-participants, the link and meeting ID or access code to attend the hearing will be provided to the parties by email before the hearing, and the parties and witnesses will be prohibited from distributing that information to anyone not participating in the hearing.⁴

II. **ORDER**

A. **It Is Ordered That:**

1. A remote evidentiary hearing on the above-captioned Petition is scheduled as follows:

DATES: September 13 and 14, 2021

TIME: 9:00 a.m. each day

METHOD: Join by video-conference online at the meeting link emailed to parties before the hearing.

2. Participants in the hearing may not distribute the hearing link, access, or ID code to anyone not participating in the hearing. Participants may not appear in person at the Commission for the above-scheduled hearing. Instead, parties will participate in the hearing from remote locations, consistent with the requirements of this Decision.

3. All participants must comply with the requirements in Attachment A to this Decision, which are incorporated into this Decision.

4. **Video-Conference Participation.** The parties and witnesses are required to participate in the evidentiary hearing by video-conference using Zoom. The parties must ensure that they and their respective witnesses are ready and able to participate in the evidentiary hearing by video-conference using Zoom.

5. **Evidence Presentation at the Evidentiary Hearing.** Because the hearing will be held remotely by video-conference, all evidence must be presented electronically. Each party is responsible for ensuring that they and their respective witnesses (a) have access to all pre-filed exhibits; and (b) are able to download and view documents available from box.com *during the hearing*.

6. **Dispositive Motions, Responses, and Replies Thereto.** The parties must file and serve dispositive motions by June 14, 2021. Responses to dispositive motions are due 21 days after the dispositive motion is served. The parties are permitted, but not required, to file replies to dispositive motions. Such replies are due 14 days after the response to a dispositive motion is served.

7. **Discovery.** Consistent with the above discussion, the parties must serve discovery requests by August 31, 2021. The parties are limited to issuing 20 interrogatories; 20 requests for production of documents; and 20 requests for admission. The parties must respond to discovery requests within 7 days of the date the discovery requests are served. The parties may not take depositions.

8. **Hearing Exhibits, Hearing Exhibit Lists, and Witness Lists.** Wild Side must file and serve pre-marked hearing exhibits, hearing exhibit lists, and witness lists by August 9, 2021. Interveners must file and serve pre-marked hearing exhibits, hearing exhibit lists, and witness lists by August 19, 2021. The parties are not required to pre-file and serve hearing exhibits which will be used solely for impeachment, to refresh recollection, or for rebuttal. Any party may use any other party's hearing exhibits during the course of the hearing and need not file them separately. Witness lists must include a brief description of the witnesses' anticipated testimony and the

witnesses' contact information. Exhibit lists must identify the hearing exhibit number, the title of each hearing exhibit (i.e. substantive title of the document), and provide a brief description of each hearing exhibit the party intends to offer into evidence during the evidentiary hearing.

9. **Stipulations and Prehearing Motions.** The parties must file and serve stipulations and prehearing motions by September 2, 2021.

11. **Statements of Position.** The parties must file and serve statements of position by October 5, 2021. No responses are permitted.

12. In addition to the requirements set forth here and in Attachment A, the parties must comply with the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1.

13. This Decision is effective immediately.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO



MELODY MIRBABA

Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean,
Director