

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
REQUESTING UPDATES ON MOTION
TO STRIKE AND RESPONSE**

Mailed Date: April 6, 2021

I. STATEMENT

A. Summary

1. By this Decision, the Administrative Law Judge (ALJ) addresses procedures related to Estes Park Guided Tours LLC's (Applicant or Estes Park Guided Tours) filing of Applicant's First Amended Witness Summaries and Exhibit List on April 5, 2021.

B. Procedural History

2. On January 5, 2021, Estes Park 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.

3. 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.

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. The procedural history of the above captioned proceeding is set forth in Decisions previously issued in this matter and is repeated here as needed to put this Decision into context.

6. 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

7. On January 22, 2021, Fun Tyme Trolleys, LLC, doing business as Estes Park Trolleys (Estes Park Trolleys), through counsel, filed its Entry of Appearance and Intervention, including its Certificate PUC No. 55845S as Attachment 01, claiming to be an intervenor by

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.

right. Decision No. R21-0094-I (issued on February 22, 2021) acknowledged the intervention by right of Estes Park Trolleys.

8. On February 8, 2021, Estes Valley Transport, Inc. (Estes Valley Transport), through counsel, filed its Entry of Appearance and Intervention, claiming to be an intervenor by right. On March 1, 2021, Estes Valley Transport filed an Amended Intervention, *nunc pro tunc*, and attached a copy of its Certificate PUC No. 54696. Decision No. R21-0113-I (issued on March 1, 2021) acknowledged the intervention by right of Estes Valley Transport.

9. The parties to this proceeding are Estes Park Guided Tours, Estes Park Trolleys, and Estes Valley Transport. All parties are represented by counsel.

10. Decision No. R21-0142-I (issued on March 11, 2021) scheduled a remote evidentiary hearing for May 17 and 18, 2021 at 9:30 a.m. for each day.

11. On February 19, 2021, Estes Park Guided Tours timely filed Applicant's Witness Summaries and Exhibit List, as well as copies of 19 proposed hearing exhibits. While Applicant's Witness Summaries and Exhibit List showed the correct proceeding number (21A-0020CP) for the instant proceeding, the caption erroneously stated the proceeding as *Estes Valley Transport, Inc. and Fun Tyme Trolleys, LLC, doing business as Estes Park Trolleys, Complainants v. Estes Park Guided Tours, Respondent*.³

³ That caption was for Proceeding No. 20F-0290CP, in which Decision No. R20-0906 (issued on December 22, 2020) concluded that Estes Park Guided Tours had been operating as a common carrier of passengers for hire within the State of Colorado without a valid Certificate issued by the Commission, in violation of §§ 40-10.1-104 and 40-10.1-201, C.R.S. Decision No. R20-0906 ordered Estes Park Guided Tours to cease and desist, as of the effective date of that Decision, from operating or offering to operate as a common carrier of passengers for hire and from providing any and all transportation of passengers for hire by motor carrier within the State of Colorado without a valid Certificate of Public Convenience and Necessity issued by the Commission and without complying with applicable Commission rules. *Id.*, Paragraphs 145 and 146 at p. 52 and Ordering Paragraphs 4 and 5 at p. 56.

12. On January 22, 2021, Estes Park Trolleys timely filed Intervenor's Exhibit and Witness Summary, along with copies of eight proposed hearing exhibits.

13. On March 1, 2021, Estes Valley Transport timely filed Intervenor's Exhibit and Witness Summary, along with a copy of one proposed hearing exhibit.

14. The mere filing of proposed hearing exhibits by the parties to this proceeding does not mean that prefiled hearing exhibits will be admitted into evidence during the hearing. Prefiled hearing exhibits must still be marked for identification, offered into evidence, and admitted into evidence by the ALJ.

15. On March 1, 2021, Estes Park Trolleys filed a Motion to Strike and Objection (Motion to Strike), requesting that Applicant's Witness Summaries and Exhibit List be stricken in its entirety, or in the alternative that certain exhibits of Applicant be stricken and witness testimony be limited only to the issues and facts relevant to this proceeding. On March 11, 2021, Estes Park Guided Tours timely filed Applicant's Response to Motion to Strike and Objection (Response), opposing the arguments in the Motion to Strike.⁴

16. On April 5, 2021, the ALJ was in the midst of preparing an Interim Decision ruling on the Motion to Strike.

17. On April 5, 2021 at 3:05 p.m., Estes Park Guided Tours filed Applicant's First Amended Witness Summaries and Exhibit List, as well as copies of 19 proposed hearing exhibits. In this amended pleading, Applicant has removed six endorsed witnesses but has added three new possible witnesses and added three new proposed hearing exhibits (20 through 22). Applicant's First Amended Witness Summaries and Exhibit List showed the correct proceeding

⁴ Estes Park Guided Tours' Response showed the correct proceeding number and caption for the instant proceeding.

number (21A-0020CP) for the instant proceeding, but again the caption erroneously stated the proceeding as *Estes Valley Transport, Inc. and Fun Tyme Trolleys, LLC, doing business as Estes Park Trolleys, Complainants v. Estes Park Guided Tours, Respondent*.

C. Ruling Requiring Additional Filings.

18. Among other things, Decision No. R21-0094-I (Paragraph 25 at page 9) advised the parties that, “**The parties are advised and on notice** that this proceeding is governed by the Rules of Practice and Procedure found at 4 *Code of Colorado Regulations* (CCR) 723-1, Part 1. The ALJ expects counsel and all parties to comply with these rules.” (Emphasis in the original.)

19. Rule 1405(k)(I) of the Rules of Practice and Procedure, 4 CCR 723-1 (2020), 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 ten days after the conclusion of the notice period. In this proceeding, Applicant’s list of witnesses and copies of its exhibits were due on February 22, 2021. On February 19, 2021, Estes Park Guided Tours timely filed Applicant’s Witness Summaries and Exhibit List, as well as copies of 19 proposed hearing exhibits.

20. Rule 1001 of the Rules of Practice and Procedure, 4 CCR 723-1, provides that: “Where not otherwise inconsistent with Title 40 or these rules, the Commission, a hearing Commissioner, or an Administrative Law Judge may seek guidance from or may employ the Colorado Rules of Civil Procedure.”⁵

⁵ Pursuant to Rule 1004(h) of the Rules of Practice and Procedure, 4 CCR 723-1, the 2012 edition, and not later amendments or editions, of Colorado Rules of Civil Procedure (C.R.C.P.) are incorporated by reference into the Commission’s Rules of Practice and Procedure. Citations and discussion in this decision to the C.R.C.P. are to the 2012 edition of those rules.

21. Rule 15(a), Colorado Rules of Civil Procedure (C.R.C.P.), provides that:

Amendments. *A party may amend his pleading once as a matter of course at any time before a responsive pleading is filed or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it any time within 21 days after it is filed. Otherwise, a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 14 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.*⁶ (Emphasis added.)

22. Rule 1405(k) provides no process for filing amendments to witness and exhibit lists. However, Rule 1309(a) of the Rules of Practice and Procedure, 4 CCR 723-1, on Amendment or Withdrawal, provides in pertinent part that: “[A]fter the close of the intervention and notice period, if any, the commencing party shall obtain leave of the Commission to amend or supplement.” No statute in Title 40, C.R.S., governs amending pleadings in Commission proceedings.⁷

23. Therefore, the provisions of Rule 15(a), C.R.C.P., are not inconsistent with Title 40 or the Rules of Practice and Procedure. Hence, the ALJ may employ the provisions of Rule 15(a), C.R.C.P., in this proceeding.

24. In this proceeding, Estes Park Guided Tours filed Applicant’s Witness Summaries and Exhibit List on February 19, 2021. Under Rule 15(a), C.R.C.P., an amendment to that pleading could have been filed without leave of the ALJ on or before March 12, 2021. However,

⁶ The 2012 version of Rule 15(a), C.R.C.P., is identical to the current version of the rule. Generally, the word “court” in the material incorporated from the C.R.C.P. shall be deemed to mean the Commission. *Cf.*, Rule 1406(a)(II) of the Rules of Practice and Procedure, 4 CCR 723-1.

⁷ Section 40-6-112, C.R.S., addresses the Commission’s authority to amend any decision it has issued, but that statute does not concern amendments to pleadings in Commission proceedings.

Applicant's First Amended Witness Summaries and Exhibit List was not filed until April 5, 2021, without leave of the ALJ.

25. Section 40-6-101(1), C.R.S., requires the Commission to conduct its proceedings in a manner "as will best conduce the proper dispatch of business and the ends of justice."

26. Instead of rejecting Applicant's First Amended Witness Summaries and Exhibit List for being filed with an incorrect caption and without seeking leave to amend the original Applicant's Witness Summaries and Exhibit List, the ALJ will order the following:

- a) No later than April 8, 2021 (two business days after the issue date of this Decision), Estes Park Guided Tours shall correct the caption on Applicant's First Amended Witness Summaries and Exhibit List and request leave of the ALJ to amend Applicant's Witness Summaries and Exhibit List. (Applicant may choose a suitable manner, consistent with the Rules of Practice and Procedure and this Decision, by which to correct and to file its pleading, including whether to refile its proposed hearing exhibits or to incorporate them by reference in the corrected filing.)
- b) No later than April 15, 2021 (five business days after the filing of Estes Park Guided Tours' corrected pleading), Estes Park Trolleys may amend its Motion to Strike to address the amended witness list and exhibits in the corrected Applicant's First Amended Witness Summaries and Exhibit List.
- c) No later than April 22, 2021 (five business days after the filing of Estes Park Trolleys' amended Motion to Strike), Estes Park Guided Tours may file a Response to address the amended Motion to Strike.
- d) No later than April 22, 2021, Estes Valley Transport may also file a response to the amended Motion to Strike.

27. The ALJ believes that these procedures will provide fundamental fairness to all the parties, while respecting the Commission's Rules of Practice and Procedure, and will allow the ALJ to resolve Estes Park Trolleys' Motion to Strike in sufficient time before the remote hearing.

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

II. ORDER**A. It Is Ordered That:**

1. No later than April 8, 2021, Estes Park Guided Tours LLC (Estes Park Guided Tours) shall correct the caption on Applicant's First Amended Witness Summaries and Exhibit List and request leave of the Administrative Law Judge to amend Applicant's Witness Summaries and Exhibit List.

2. No later than April 15, 2021, Fun Tyme Trolleys, LLC, doing business as Estes Park Trolleys (Estes Park Trolleys) may amend its Motion to Strike and Objections to address the amended witness list and exhibits in the corrected Applicant's First Amended Witness Summaries and Exhibit List.

3. No later than April 22, 2021, Estes Park Guided Tours may file a response to Estes Park Trolleys' amended Motion to Strike and Objections.

4. No later than April 22, 2021, Estes Valley Transport, Inc. may also file a response to the amended Motion to Strike and Objections.

5. This 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