

Decision No. C22-0507

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).

**COMMISSION DECISION DENYING EXCEPTIONS TO
RECOMMENDED DECISION NO. R22-0233**

Mailed Date: August 30, 2022

Adopted Date: June 22, 2022

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I. BY THE COMMISSION**A. Statement**

1. By this Decision the Commission addresses the exceptions (Exceptions) filed by Wild Side 4 x 4 Tours, LLC (Wild Side or the Company) to Decision No. R22-0233, issued April 19, 2022, by Administrative Law Judge (ALJ) Melody Mirbaba (Recommended Decision). The Recommended Decision denies the Petition for Declaratory Order (Petition) filed on November 23, 2020, by Wild Side requesting a declaration that Wild Side's operations are outside the Commission's jurisdiction. Consistent with the discussion below, we deny Wild Side's exceptions.

B. Background

2. In the Petition, Wild Side states that it has provided photographic tours in Rocky Mountain National Park and in and around Estes Park since 2008,¹ and that it operated under an Off-Road Scenic Charter (ORC) permit with the Commission until 2012. It states that after interactions with staff from the Commission's Transportation Section (Transportation Staff), it believed its operations are not subject to Commission jurisdiction and therefore let its permit lapse in 2012. It explains that in April 2020, it received a violation warning letter from Transportation Staff stating that Wild Side was operating as an ORC without a permit in violation of § 40-10.1-302(1)(a), and that it has been advised by Transportation Staff to apply for a permit or receive a Civil Penalty Assessment Notice (CPAN).

3. Wild Side argues that because the transportation it provides is incidental to its primary non-transportation business of photography tours, its operations are outside the

¹ Wild Side was first operated under the name Rocky Mountain Rush LLC, then Rocky Mountain Rush Tours, LLC, and ultimately Wild Side 4 x 4 Tours, LLC. Wild Side is owned and operated by Neil and Kimberly O'Malley. Unless otherwise stated, "Wild Side" refers to the business that has been operated under these names and where appropriate, to its owners.

Commission's jurisdiction. Wild Side also argues that the Commission should be estopped from now requiring it to obtain regulatory authority because it made business decisions and investments in reliance on statements from Transportation Staff that its photographic tour company is not subject to Commission regulation. Wild Side also requested that the Commission issue a stay of enforcement action while the Commission determines whether to grant its Petition.

4. By Decision No. C20-0925-I, issued December 30, 2020, the Commission accepted the Petition, granted the requested stay of enforcement action, and referred the matter to an ALJ. By Decision No. R21-0084-I, issued February 16, 2021, the ALJ allowed the intervention of Estes Park Charters Corp., doing business as Estes Park Shuttles (Estes Park Shuttles), and Fun Tyme Trolleys, LLC, doing business as Estes Park Trolleys (Fun Tyme), and recognized the intervention as of right by Commission Trial Staff (Trial Staff). A three-day evidentiary hearing was held on September 23, 24, and 29, 2021.

C. Recommended Decision

5. In the Recommended Decision, ALJ Mirbaba determined that the transportation provided by Wild Side is not merely an incidental part of its operations. The ALJ applied the fact-specific "primary business test" and considered factors including: whether the entity's investment in transportation facilities and equipment is the principal part of the entity's its total business investment; whether the entity advertises itself as being a noncarrier business; and whether the entity performs any real service other than transportation from which it can profit. After consideration of all the required factors, the ALJ was persuaded that photography is an added benefit to Wild Side's tours, and that at its core, Wild Side's business is to provide

transportation to the public. Therefore, the ALJ determined that Wild Side is a motor carrier subject to Commission regulation under the primary business test.

6. In addressing Wild Side's estoppel arguments, the ALJ set forth the applicable standard: a party claiming estoppel must show (1) ignorance of the true facts in question; (2) reasonable reliance upon the statements or conduct of the party to be estopped; and (3) action based on that reasonable reliance that results in injury.² The Recommended Decision explains that Colorado law does not favor equitable estoppel claims, that the doctrine is not applied as freely against the government as against a private individual, and that whether circumstances give rise to equitable estoppel are questions of fact.³

7. The ALJ also reasoned that because the statements Wild Side claims it relied on were informal opinions given by government employees, "the circumstances surrounding how the opinions were reached and provided are critical to determining whether equitable estoppel applies," and that "[i]f the circumstances surrounding the officials' opinions created a high risk that the opinions were wrong or unreliable, [Wild Side] could not have reasonably relied on them."⁴

8. The Recommended Decision makes detailed and comprehensive findings of fact. We touch on the highlights of the findings regarding the numerous interactions between Wild Side and Transportation Staff since 2008 that were reflected in the record, to the extent the findings are relevant to our analysis.

² Recommended Decision ¶ 121 (citing *Comm. for Better Health Care for All Colo. Citizens v. Meyer*, 830 P.2d 884, 891-92 (Colo. 1992)).

³ Recommended Decision ¶ 122.

⁴ Recommended Decision ¶ 124.

9. In early 2012, Mr. O'Malley, an owner of Wild Side, had discussions with Investigator Pacheco from the Commission's Transportation Staff. Mr. O'Malley referenced another company he described as providing photo tours, and Investigator Pacheco stated that the Commission does not regulate photo tours. After Mr. O'Malley provided information to Investigator Pacheco indicating that Wild Side provided photo tours, Investigator Pacheco told him that Wild Side "may not" be regulated by the Commission and that she would check with her supervisor.⁵ Mr. O'Malley testified that Investigator Pacheco identified Mr. Bob Laws and Mr. Gary Gramlick as supervisors within the Commission and that he spoke with them. The ALJ found that Commission records confirm Mr. O'Malley spoke with Mr. Gramlick, although the records provide little information about the timing and nature of the conversation, and that the evidence in the proceeding failed to establish any discussion with Mr. Laws.⁶

10. The Recommended Decision finds that during their conversation, Mr. Gramlick asked Mr. O'Malley questions including what the Company does, how the Company does it, whether the Company goes to commercial locations, and whether the tours are always a "photo tour," and that Mr. O'Malley responded "yes, I do." The Recommended Decision states Mr. O'Malley maintains that during this conversation, Mr. Gramlick concluded the Company is not subject to the Commission's regulation. The Recommended Decision notes that Mr. O'Malley did not provide the specifics of the information that he shared with Mr. Gramlick, upon which Mr. Gramlick rendered an opinion. The ALJ also noted that "[a]t no point did Mr. O'Malley testify that he provided documents to Mr. Gramlick," and that no evidence suggests Mr. Gramlick reviewed any such materials prior to rendering an opinion.⁷ During a subsequent

⁵ Recommended Decision ¶ 11 (citing 9/23/21 Tr. 168: 12-17).

⁶ Recommended Decision ¶ 12.

⁷ Recommended Decision ¶ 13.

Commission investigation, Mr. O'Malley maintained that Mr. Gramlick told him that his business was not regulated.⁸ Based on the evidence in the record, the ALJ concluded it is more likely than not that sometime in early 2012, Mr. Gramlick shared a verbal opinion with Mr. O'Malley that Wild Side is not subject to the Commission's regulation. Wild Side's permits were revoked on June 5, 2012 for failing to purchase vehicle identification stamps, and Mr. O'Malley testified that he had decided not to continue permitting with the Commission due to statements made by Mr. Gramlick and Mr. Laws.

11. In August 2013, during another investigation into Wild Side, Investigator Cummings reviewed information posted on Wild Side's website and a brochure obtained at the store front. Investigator Cummings spoke with Mr. Gramlick who then reviewed the Company's brochure and concluded that based on the brochure, a permit was required. After additional investigation, a violation warning and cease and desist letter was sent to the Company. Investigator Brandt then spoke with Mr. O'Malley, who stated that he did not believe his Company requires a Commission permit based on Mr. Gramlick's prior statements, but that the Company was working on brochure and website updates.

12. Following this discussion, Investigator Brandt emailed Mr. O'Malley with the definition of off-road scenic charter and told him the Company does not need a permit if its scope of business falls outside of this definition as being a photographic experience. Investigator Brandt also warned that "you must be consistent with your company scope, and any advertising that you do should reflect your intent. This includes your website, printed material and personal

⁸ Recommended Decision ¶ 14.

representation.”⁹ Mr. O’Malley emailed Investigator Brandt an updated brochure, and Investigator Brandt responded on November 12, 2013 that she thought the updates described the photo experience Wild Side was offering, that it met the Commission’s criteria for Wild Side to be exempt from having a permit at the time, and that if the website was consistent with the updated brochure, Investigator Brandt would be able to close the investigation. Investigator Brandt reviewed the Company’s website on December 12, 2013, concluded that the website’s language indicated it offered photo tours, and closed the investigation on December 18, 2013.

13. In the course of another investigation starting in April 2014, Investigator Gates researched the Company’s website, history with the Commission, and records on file with the Colorado Secretary of State. Mr. O’Malley testified that in May 2014, he spoke with Investigator Gates, referred him to Investigator Brandt, and stated that the issue was resolved in December 2013. After Investigator Brandt visited the store front and spoke with an employee about the nature of Wild Side’s tours, Investigator Gates reviewed the information gathered through the investigation with other investigators, and they all agreed that Wild Side’s operations required a permit. Investigator Gates issued a violation warning letter to the Company for operating as a motor carrier without obtaining a permit, and Mr. O’Malley admitted on cross-examination that he signed for and received the letter on July 11, 2014. On July 16, 2014, Investigator Gates closed the case.

14. The Recommended Decision finds that the next interactions between Wild Side and Staff occurred in 2019 and 2020, when Commission investigators looked into complaints from competitors that Wild Side was operating without a permit. After a discussion with Investigator Estrada in 2020, during which Investigator Estrada informed Mr. O’Malley that

⁹ Recommended Decision ¶ 21 (citing Hearing Exhibit 104 at 52).

failure to get a permit would result in a civil penalty assessment proceeding, Wild Side sought legal advice and filed the Petition.

15. Based on the interactions reflected in the record, the Recommended Decision examines two opinions at issue. The first is the opinion given by Mr. Gramlick in 2012. The ALJ notes that Mr. O'Malley described a single conversation with Mr. Gramlick, during which Mr. Gramlick asked some questions, and based on Mr. O'Malley's answers, opined that Wild Side was not subject to Commission regulation. The Recommended Decision notes that Mr. O'Malley did not testify he directed Mr. Gramlick to the Company's website or brochure, or that the discussion referenced the website or brochure, and that when Mr. Gramlick reviewed the Company's brochure in 2013, he concluded a permit was necessary. Further, the opinion was never reduced to writing. The ALJ concluded there was a high risk that Mr. Gramlick's opinion was in error given the nature of the discussion, and that his opinion was informal, not given through any formal channels or with the Commission's ultimate approval and was provided without the benefit of time to reflect upon the facts and law. Thus, the Recommended Decision determines that any reliance on Mr. Gramlick's opinion to make significant business decisions was unreasonable.

16. The Recommended Decision also examines the opinion given by Investigator Brandt in December 2013, in which Investigator Brandt reviewed the Company's brochure and indicated that if the Company's website was consistent, Wild Side would be exempt from having a permit at that time. The ALJ determined that Wild Side could have reasonably relied on this opinion, which was in writing and was given after considering information including brochures and the Company's website. However, the ALJ also determined that such reliance was reasonable only within limits established by Investigator Brandt's admonishments that Wild

Side's representation of its business as a "photographic experience" must be consistent, and that Investigator Brandt's opinion was not an infinite declaration that Wild Side will never be subject to Commission regulation. Following a subsequent investigation beginning in April 2014, Mr. O'Malley received a violation warning letter on July 11, 2014. Therefore, the ALJ determined that Wild Side could have reasonably relied on Investigator Brandt's opinion from December 2013 to July 11, 2014, and that after receiving the violations warning letter, Wild Side was on notice that the Commission believed the Company was subject to its regulation.

17. The ALJ then reviewed the evidence concerning the timing of investments Wild Side made into its business. The ALJ noted that little could be determined about the timing of the Company's investments into vehicles, despite requests for this information made by another party during discovery. Further, the ALJ found that where evidence does establish the timing of investments into Wild Side, those investments were not made between December 2013 and July 11, 2014. Thus, the Recommended Decision concludes the preponderance of the evidence fails to establish that the Company detrimentally relied on Investigator Brandt's 2013 opinion. The ALJ rejected Wild Side's equitable estoppel arguments because it failed to meet its burden to establish all of the equitable estoppel elements by a preponderance of the evidence.

D. Wild Side Exceptions

18. Wild Side states that it is willing to accept the ALJ's determination that it is subject to the Commission's authority under the primary business test, but it repeats its arguments concerning equitable estoppel and contends that the ALJ erred in rejecting its estoppel claim. Alternatively, it argues that in determining the applications seeking regulatory authority that Wild Side plans to file, the Commission should be prevented from now denying Wild Side regulatory authority on the basis that there is no public necessity for its business.

19. Wild Side takes issue with the Recommended Decision's determination that any reliance on Mr. Gramlick's 2012 opinion was unreasonable because it was based on incomplete information, arguing that "the existence of the representation, not the state of mind of Mr. Gramlick, is the inquiry relevant to equitable estoppel." Wild Side also contends the "undisputed facts" establish that in early 2012, Investigator Pacheco "suggested" Wild Side was exempt from Commission regulation, and that this was confirmed by Mr. Laws and Mr. Gramlick.¹⁰ Wild Side asserts that the ALJ failed to address or dispute that Mr. Laws and Ms. Pacheco also made representations in 2012, and it argues that it was justified in relying on the opinion of three employees, two of which were supervisors.

20. With regards to the ALJ's determination that Wild Side could have reasonably relied on Investigator Brandt's opinion from December 2013 to July 11, 2014, the Company argues that this time period is unreasonably limited. The Company notes that following the violations warning letter received on July 11, 2014, Transportation Staff took no further action. Wild Side argues that because the investigation begun in April 2014 was closed, the Company was justified in continuing to believe, past July 11, 2014, that it was not regulated by the Commission. Further, it contends that between 2012 and 2020, "the period of justifiable reliance," Wild Side made many investments in reliance on Staff's opinions that it was not subject to Commission regulation.¹¹

21. Wild Side also asserts that even if the Commission determines it is not estopped from regulating Wild Side as a motor carrier, "the equities weigh in favor of at least partial estoppel with regards to such regulation."¹² The Company states that it intends to apply for

¹⁰ Exceptions at p. 8.

¹¹ Exceptions at p. 13.

¹² Exceptions at p. 14.

regulatory authority, and it raises concerns that competitor companies will protest such authority. Wild Side asserts that “such competitors should not be permitted to successfully claim that the grant of Wild Side’s applications will supplant their business operations” because it has been operating in the market for over a decade.¹³ It argues that the Commission should be estopped from denying Wild Side the right to provide transportation in the market based on arguments that the market is already saturated.

22. Finally, Wild Side requests that the administrative stay of enforcement be extended an additional six months from the mailed date of the Recommended Decision. It states that that bulk of its operations and profits involve the summer season in Estes Park, and that if Staff commences an enforcement action during this time and Wild Side cannot operate during its primary season, it will face irreparable financial harm. The Company also states that an extension of the stay would conserve administrative resources by allowing it to file applications for a CPCN and permits prior to any investigation Staff may commence.

E. Intervenor Responses

23. On May 20, 2023, Trial Staff filed its response to Wild Side’s exceptions, and on May 23, 2022, Fun Tyme Trolleys and Estes Park Shuttles filed their response to the exceptions. Staff and the other intervenors argue that Wild Side’s exceptions present no new legal argument and fail to refute valid points made by the ALJ in the Recommended Decision. Concerning Wild Side’s request that the Commission find it is estopped from denying a certificate or permit application that has not yet been submitted to the Commission, the intervenors state this would be inappropriate and that the Commission cannot act on an application not yet filed. They also oppose an extension of the stay of enforcement, especially where Wild Side has not yet applied

¹³ Exceptions at p. 15.

for operating authority, because it would put the safety of the traveling public at risk, and because Wild Side has already operated for nearly ten years without a permit or CPCN unlike its competitors.

24. In their responses and other pleadings, Staff and the other intervenors also argue that Wild Side failed to file a hearing transcript prior to submitting its first pleading on exceptions, as is required by § 40-6-113, C.R.S., and Commission Rule 1505, 4 *Colorado Code of Regulations* (CCR) 723-1. The intervenors claim this means that the findings of fact made by the ALJ must be accepted, and Wild Side is precluded from disputing the findings of fact set forth in the Recommended Decision.

F. Wild Side Motions and Reply

25. On May 10, 2022, Wild Side filed a Motion for Waiver from Commission Rule 1505(b), explaining that its primary counsel inadvertently failed to timely file a Notice for Request of Transcript pursuant to Commission Rule 1505. On May 25, 2022, Wild Side filed a Motion for Leave to Reply to Staff and Intervenors' Responses to Exceptions and a Reply. The Company notes that the full transcripts were filed into this proceeding in September 2021 and that the requirements in § 40-6-113, C.R.S., relating to the filing of transcripts have been satisfied. Wild Side also provides an update that it applied for an ORC permit on May 23, 2022, and that it is in the process of applying for temporary and permanent operating authority as a motor carrier.

G. Findings and Conclusions

26. We find good cause to grant Wild Side's Motion for Leave to Reply, consistent with Rule 1308(b), 4 CCR 723-1, and Wild Side's Reply is therefore accepted. Regarding Wild Side's request to waive Commission Rule 1505(b), Wild Side correctly states in its Reply that the

full transcripts from the evidentiary hearing were filed into this proceeding on September 23, 24, and 29, 2021. We therefore find no grounds to grant the requested waiver of Rule 1505(b), as the Commission and the parties have been able to access the transcripts since September 2021 and there were no further steps for Wild Side to take in compliance with Rule 1505(b).

27. We are not persuaded by Wild Side's contentions regarding interactions with Investigator Pacheco and Mr. Laws in 2012, and we find Wild Side's characterization of the Recommended Decision inaccurate with regards to these interactions. The Recommended Decision determined that the interaction with Investigator Pacheco as established by the evidence was not an opinion that Wild Side is not subject to the Commission's regulation, and could not be relied upon for purposes of equitable estoppel.¹⁴ We find no reason to overturn the ALJ's determination. As the ALJ set forth in her findings of fact, Mr. O'Malley testified that Investigator Pacheco stated Wild Side "may not" be regulated.¹⁵ This statement does not constitute an opinion one way or the other.

28. We also find no reason to diverge from the Recommended Decision's finding that the evidence establishes that Mr. O'Malley only spoke with Mr. Gramlick, despite Mr. O'Malley's claim that he spoke with both Mr. Gramlick and Mr. Laws in 2012.¹⁶ The ALJ thoroughly reviewed the evidence in this proceeding and was in the best position to assess the credibility and persuasiveness of live witness testimony. Further, the Recommended Decision notes that during a subsequent investigation, Mr. O'Malley maintained that Mr. Gramlick told him Wild Side was not regulated.¹⁷ The notes of that subsequent investigation do not indicate

¹⁴ Recommended Decision ¶ 126 n. 320.

¹⁵ September 23, 2021 Tr. 168: pp. 9-17; Recommended Decision ¶ 11.

¹⁶ Recommended Decision ¶ 12 n. 27.

¹⁷ Recommended Decision ¶ 14 (citing Hearing Exhibit 104 at p. 3).

that Mr. O'Malley mentioned Mr. Laws (or Investigator Pacheco) as having given him a similar opinion.¹⁸ Therefore, we reject Wild Side's argument that it was justified in relying on the combined opinions of Investigator Pacheco, Mr. Laws, and Mr. Gramlick.

29. Regarding Wild Side's argument that "the existence of the representation, not the state of mind of Mr. Gramlick, is the inquiry relevant to equitable estoppel,"¹⁹ and that the ALJ erred in determining any reliance on Mr. Gramlick's 2012 opinion was unreasonable, we are also unpersuaded to overturn the ALJ's conclusion. The Recommended Decision correctly states that one element of equitable estoppel is "reasonable reliance upon the statements or conduct of the party to be estopped."²⁰ The ALJ concluded that there was a high risk that Mr. Gramlick's opinion was in error given the nature of the discussion, and that his opinion was informal, not given through any formal channels or with the Commission's ultimate approval, and was provided without the benefit of time to reflect upon the facts and law. Given the circumstances of the conversation between Mr. O'Malley and Mr. Gramlick as reflected in the record of this proceeding, we agree with the Recommended Decision's determination that any reliance on Mr. Gramlick's 2012 opinion was unreasonable, and we reject Wild Side's exception on this point.

30. We are similarly unpersuaded that the Recommended Decision errs in limiting the period of reasonable reliance on Investigator Brandt's 2013 opinion from December 2013 to July 11, 2014. We agree with the ALJ that after Wild Side received the violation warning letter on July 11, 2014, the Company could no longer reasonably rely on Investigator Brandt's 2013 email

¹⁸ Hearing Exhibit 104.

¹⁹ Exceptions at p. 9.

²⁰ Recommended Decision ¶ 121 (citing *Comm. for Better Health Care for All Colo. Citizens v. Meyer*, 830 P.2d 884, 891 (Colo. 1992)).

stating that she thought an updated brochure and similarly updated website would meet the criteria for being exempt from having a permit “at this time.” During the 2014 investigation, Mr. O’Malley referred the investigator to Investigator Brandt, and Transportation Staff still issued a violation warning letter. The fact that Transportation Staff did not take further action does not make reliance on a prior opinion, one in conflict with the violation warning letter, reasonable.

31. Therefore we do not find, as Wild Side requests, that the Commission is estopped from declaring that Wild Side is required to obtain a CPCN or permit. We reject Wild Side’s exceptions to the Recommended Decision concerning the ALJ’s determination that Wild Side failed to meet its burden to establish all of the equitable estoppel elements by a preponderance of the evidence and we uphold the ALJ’s conclusions.

32. We also reject Wild Side’s alternative argument concerning “partial estoppel,” which requests that the Commission estop itself from denying Wild Side regulatory authority on the basis that there is no public necessity for its business in 2022. We find that making such a determination in this Proceeding is inappropriate. Further, this alternative argument as set forth in Wild Side’s Exceptions inherently relies on the same unpersuasive attempt to establish the elements of equitable estoppel that the Recommended Decision, and this Decision, rejects.

33. Regarding Wild Side’s request for an extension of the stay of enforcement action, we grant the request in part.²¹ On June 13, 2022 Wild Side submitted an application for temporary authority to provide call-and-demand sightseeing service in Proceeding No. 22A-0266CP-TA. The stay of enforcement action shall remain in place while the permit for

²¹ Commissioner Gavan voted to deny Wild Side’s request for an extension for any length of time, and he therefore dissents from the Commission’s Decision on this point.

temporary operating authority is pending.²² We remind Wild Side that it may seek a stay of enforcement action in other proceedings involving applications for operating authority.

II. ORDER

A. The Commission Orders That:

1. The Motion for Leave to Reply to Staff and Intervenors' Responses to Exceptions, filed by Wild Side 4 x 4 Tours, LLC (Wild Side) on May 25, 2022, is granted.
2. The motion for Waiver from Commission Rule 1505(b) filed by Wild Side on May 10, 2022, is denied, consistent with the discussion above.
3. The exceptions to Decision No. R22-0233, filed by Wild Side on May 9, 2022, are denied.
4. Wild Side's request for an extension of the stay of enforcement action is granted in part, consistent with the discussion above.
5. Except for an extension of the stay of enforcement action, as discussed above, Decision No. R22-0233 is upheld in its entirety and will be adopted by the Commission.
6. The 20-day period provided for in § 40-6-114, C.R.S., within which to file applications for rehearing, reargument, or reconsideration, begins on the first day following the effective date of this Decision.

²² By Decision No. C22-0416, issued July 18, 2022, the Commission denied the application for temporary authority. Due to the mailed date of this Decision, the Commission's extension of the stay of enforcement action does not extend the stay past the pendency of this Proceeding.

7. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
June 22, 2022.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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JOHN GAVAN

MEGAN M. GILMAN

Commissioners