

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 MOTION FOR STAY
OF ENFORCEMENT**

Mailed Date: November 2, 2022

Adopted Date: October 26, 2022

I. BY THE COMMISSION

A. Statement

1. By this Decision, the Commission denies the Expedited Motion for Stay of Enforcement and Waiver of Response Time (Motion for Stay), filed October 17, 2022, by Wild Side 4 x 4 Tours, LLC (Wild Side).

2. Consistent with the discussion below, we deny the request to strike the Motion for Stay filed by intervenors, Fun Tyme Trolleys, LLC doing business as Estes Park Trolleys, and Estes Park Charter Corp., doing business as Estes Park Shuttles (Intervenors), but grant Intervenor's alternative request to consider their response and objection to the Motion to Stay. We also grant Wild Side's request filed October 25, 2022, to respond to Intervenor's reply pleading.

B. Background, Findings, and Conclusions

3. Through our final decisions in this proceeding, we upheld the Recommended Decision¹ denying the Petition for Declaratory Order (Petition) filed on November 23, 2020, by Wild Side that requested a declaration that Wild Side's operations are outside the Commission's jurisdiction.

4. In our Exceptions Decision,² we upheld the reasoning in the Recommended Decision that rejected arguments made by Wild Side in this proceeding that the Commission should conclude it is equitably estopped from asserting jurisdiction over the company because the company made business decisions and investments in reliance on statements of the Commission's Transportation Staff.

5. The Commission's Exceptions Decision also rejected a related argument Wild Side raised for the first time – *i.e.*, that the Commission should be estopped from now denying the company the right to provide transportation in the market based on any arguments raised that the market is already saturated (a remedy Wild Side termed “partial estoppel”).

6. The Exceptions Decision granted, in part, Wild Side's request for an extension of a stay of enforcement actions. The Commission noted that, on June 13, 2022, Wild Side submitted an application for temporary authority to provide call-and-demand sightseeing services in Proceeding No. 22A-0266CP-TA and extended the stay of enforcement while the permit for temporary permitting authority was pending. The Commission further reminded Wild Side that it may seek a stay of enforcement action in other proceedings involving applications for operating authority.³

¹ Decision No. R22-0233, issued April 19, 2022, by ALJ Melody Mirbaba (Recommended Decision).

² Decision No. C22-0507, issued August 30, 2022 (Exceptions Decision).

³ Exceptions Decision, at ¶ 33.

7. Following our Exceptions Decision, through our RRR Decision,⁴ we denied Wild Side's September 19, 2022, request for Rehearing, Reargument, or Reconsideration (RRR), and again rejected Wild Side's arguments regarding equitable estoppel and "partial estoppel." Wild Side requested no further stay of enforcement through RRR.

8. On October 17, 2022, Wild Side filed its Motion for Stay in this proceeding. Wild Side states that on October 12, 2022, it was served with Civil Notice of Penalty Assessment or Notice of Compliant to Appear (CPAN) attached to its Motion to Stay, in which Staff of the Colorado Public Utilities Commission (Staff) alleges Wild Side is in violation of certain Commission rules and statutes.

9. Wild Side seeks a stay of enforcement through this proceeding, stating that it previously only sought a stay through the Fall of 2022 because it had "good reason"⁵ to believe it would be granted temporary operating authority and that it believed it was able to operate most if not all of its tours under the ORC permit that Wild Side obtained in August of 2022. Wild Side raises arguments in opposition to the CPAN issued against it by Staff in October of 2022; claims that it is likely to succeed on the merits of its ongoing permanent authority application proceeding; and that it risks irreparable injury if it must "close its doors" for five months or more. Wild Side claims that no parties will be harmed if it continues to operate in the off-season, and that "[o]n information and belief" Intervenors do not operate in the National Park in cold months.

10. While it notes that all parties to this proceeding oppose the Motion to Stay, Wild Side asks that response time be waived given its need to respond to the CPAN by the end of October.

⁴ Decision No. C22-0628, issued October 19, 2022 (RRR Decision).

⁵ Wild Side footnotes that its temporary authority was not opposed by certificated carriers, but does not state further the basis of its reasoning under the temporary authority standard or otherwise.

11. On October 21, 2022, Intervenor responded in opposition to the Motion to Stay, asking that the Commission strike the pleading or, in the alternative, accept their objection to the stay of enforcement request and request to waive response time.

12. Intervenor state that stays of enforcement have already been granted to Wild Side in recent years and argue that – subject to those stays of enforcement – violations were not further litigated in 2019 and 2020. Intervenor also point out that the Commission clearly stated in its Exceptions Decision in this proceeding that Wild Side could seek stays of enforcement in other proceedings, including those involving applications for operating authority, but argue that further consideration in this proceeding is improper where final decisions have issued resolving the request for declaratory order.

13. Intervenor argue that – while a stay of enforcement may have been appropriate while the Commission determined whether it had jurisdiction – Wild Side should not be provided further stay of enforcement, particularly if it is found that Wild Side continues to operate at full capacity despite having been informed that it needs to pursue CPCN authority. Intervenor state that “the safety of the public has been at stake for as long as Wild Side has been allowed to continue to operate without oversight.”

14. On October 25, 2022, Wild Side provided a motion seeking leave to respond to Intervenor’s pleading, claiming that Intervenor’s response misrepresents facts and includes incorrect statements of law.

15. We permit Wild Side leave to respond, particularly given that Intervenor’s pleading included a motion to strike, and in recognition of clarifications to certain statements, including that Wild Side received a warning letter in 2020, not a CPAN in 2019. Much of Wild Side’s reply underscores that the Commission has broad discretion and reiterates Wild Side’s

desire and arguments to seek a stay of enforcement in this proceeding. Wild Side further points out that by holding an ORC Permit issued in August of 2022 its vehicles are required to pass safety inspections and meet insurance requirements.

16. However, while we grant Wild Side leave to respond, we deny Wild Side's request to further stay enforcement actions against Wild Side through orders issued in this proceeding. The Commission was clear in its Exceptions Decision that a stay of enforcement could be sought in other appropriate proceedings, and no further requests were sought through RRR in response to the Exceptions Decision. At the time, Wild Side had ongoing considerations for temporary and permanent authority. Permanent authority considerations remain ongoing. In addition, and as Wild Side notes, Staff has issued a CPAN. We agree with Intervenors that determinations regarding Wild Side's declaratory judgment request in this proceeding are concluded. Arguments raised here regarding the CPAN, and permanent authority are best raised in the contexts of those respective proceedings. Wild Side is not prohibited from raising arguments and making appropriate filings or requests in proceedings that are ongoing.

17. The Motion to Stay is denied. Consistent with our discussion above, Intervenors' request to strike the Motion to Stay in its entirety is denied, and we grant the alternative request from Intervenors to consider their response and objections.

II. ORDER

A. It Is Ordered That:

1. The Expedited Motion for Stay of Enforcement and Waiver of Response Time, filed October 17, 2022, by Wild Side 4 x 4 Tours, LLC (Wild Side), is denied, and remaining response time is waived.

2. The Motion to Strike or in the Alternative Objection to [Wild Side's] Expedited Motion for Stay of Enforcement and Waiver of Response Time filed October 21, 2022, by Fin

Tyme Trolleys, LLC d/b/a Estes Park Trolleys, and Estes Park Charter Corp. d/b/a Estes park Shuttles, is denied, in part, consistent with the discussion above, and remaining response time is waived.

3. Wild Side's Response to Intervenor's Motion to Strike Motion for Leave to Reply, and Reply in Support of Expedited Motion for Stay, filed on October 25, 2022, by Wild Side, is granted, consistent with the discussion above, and remaining response time is waived.

4. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
October 26, 2022.**

(S E A L)



ATTEST: A TRUE COPY

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

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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JOHN GAVAN

MEGAN M. GILMAN

Commissioners