

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

PROCEEDING NO. 22A-0059CP

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IN THE MATTER OF THE APPLICATION OF PALISADE TROLLEY LLC FOR A  
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO OPERATE AS A  
COMMON CARRIER BY MOTOR VEHICLE FOR HIRE.

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**RECOMMENDED DECISION OF  
ADMINISTRATIVE LAW JUDGE  
MELODY MIRBABA  
DENYING APPLICATION**

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Mailed Date: September 13, 2022

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**I. STATEMENT<sup>1</sup>****A. Summary**

1. This Decision recommends that the Public Utilities Commission (Commission) deny Palisade Trolley LLC's (Palisade Trolley or the Company) Application for Permanent Authority to Operate as a Common Carrier by Motor Vehicle for Hire, filed on February 1, 2022, and as amended on May 3, 2022 (Application).<sup>2</sup> The primary disputes are whether the public needs the proposed service and whether the incumbents' service is substantially inadequate. As discussed in detail, the Administrative Law Judge (ALJ) answers these questions in the negative; for that reason, the prevailing law requires that the Application be denied.

**II. BACKGROUND AND FACTUAL FINDINGS****A. Procedural History<sup>3</sup>**

2. As amended, Palisade Trolley's Application seeks authority to operate as a common carrier by motor vehicle for hire for the transportation of passengers in call-and-demand shuttle, sightseeing, and charter service between all points in Mesa County, State of Colorado, that are located within a 35-mile radius of the intersection of 2<sup>nd</sup> Street in Palisade, Colorado with the following restrictions: (I) providing transportation to passengers with their bicycles, skis, snowboards, snowshoes, or similar recreational equipment to locations within a 2-mile radius of Powderhorn Mountain Resort, located at 48338 Powderhorn Road, Mesa, Colorado 81643 and (II) providing transportation to location within a 2-mile radius of the Mesa Top Trailhead managed by the United States Forest Service along Colorado Highway 65 or to locations within a 20-mile

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<sup>1</sup> The headers in this Decision are for ease of reference only and are not findings of any kind.

<sup>2</sup> In reaching this Decision, the Administrative Law Judge has considered all evidence and arguments presented, including those discussed briefly or not at all.

<sup>3</sup> Only the procedural history necessary to understand this Decision is included.

radius of the Shirttail Point and Wild Rose Trailheads managed by the US Forest Service along Lands End Road.<sup>4</sup>

3. The following parties are interveners in this Proceeding: Rapid Creek Cycles & Sports, LLC, doing business as Palisade Plunge Cycle and Shuttle (Rapid Creek); Pali-Tours LTD (Pali-Tours); and Absolute Prestige Limousine Service II, LLC (Absolute).<sup>5</sup> These Interveners all have common carrier permits to transport passengers within the Application's proposed service territory.

4. During a prehearing conference held on April 14, 2022, at which all parties appeared, the ALJ scheduled an evidentiary hearing on the Application for June 14, 2022 at 9:00 a.m. in Grand Junction, Colorado.<sup>6</sup>

5. On June 7 and 10, 2022, Palisade Trolley filed a Motion for Administrative Notice and Amended Motion for Administrative Notice (collectively, Motions).

6. The ALJ called the matter for an evidentiary hearing on June 14, 2022 as noticed. All parties appeared. Before the evidentiary portion of the hearing began, the ALJ heard argument on the Motions, which all Interveners opposed. Generally, the Motions request that the Commission take administrative notice of the fact that the State of Colorado placed restrictions on Mesa County's private transportation industry in 2020 through 2022, due to Public Health Orders issued by the Colorado Department of Public Health and Environment. The ALJ found that the relevant Public Health Orders could be read to except the private transportation industry, to a

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<sup>4</sup> See Hearing Exhibit 400 at 3; Amendment; Decision No. R22-0309-I (mailed May 19, 2022).

<sup>5</sup> Powderhorn Pacific LLC, doing business as Powderhorn Mountain Resort (Powderhorn), also intervened, but later agreed that its intervention should be dismissed once Palisade Trolley's May 3, 2022 restrictive amendments are approved; as such, Powderhorn's intervention was dismissed when those amendments were approved. Decision No. R22-0287-I at 4 (mailed May 19, 2022).

<sup>6</sup> Decision No. R22-0238-I.

certain degree, from the Public Health Orders' restrictions on business activities.<sup>7</sup> Separately, the ALJ also found that the Public Health Orders upon which Palisade Trolley relies indicate that they expired in 30 days, and that Palisade Trolley failed to provide other information or documentation showing that the orders were extended beyond that initial 30-day period. The ALJ concluded that this renders Palisade Trolley's request for administrative notice overly broad. For all these reasons, the ALJ denied Palisade Trolley's Motions.

7. During the hearing, the following persons testified: Messrs. Rick Hummell and Harry Charles Talbott (for Palisade Trolley); Mr. Scott Winans (for Rapid Creek); Mr. Dave Smith (for Pali-Tours); and Ms. Sheryl Harmon and Mr. James Hutton (for Absolute). The following Hearing Exhibits were offered and admitted into evidence during the hearing: 1 to 21; 25 to 26; 32; 34; 101; 104(b); 200 to 207; and 400 to 404.

## **B. Factual Findings**

8. Ronda and Rick Hummell, spouses, own Palisade Trolley. Ms. Hummell also owns and operates Hummell Real Estate, which has two locations; has operated since 1992; and employs between 15 to 40 agents.<sup>8</sup> She also owns and operates the Purple Bee, a lavender farm operated since 2015 out of the Hummell's residence and a downtown storefront.<sup>9</sup> The Purple Bee seasonally employs up to five employees.<sup>10</sup> Ms. Hummell also owns two commercial buildings and four rental properties.<sup>11</sup> Mr. Hummell operated a directional drilling company for 26 years; Ms. Hummell helped him manage that company. While working as a utility contractor, Mr. Hummell researched and identified new clients for nationwide utility services. This experience helped him become

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<sup>7</sup> During the hearing, Palisade Trolley argued that only private transportation industries serving some sort of government function were excepted from the Public Health Orders' restrictions on business activities.

<sup>8</sup> Hearing Exhibit 400 at 6.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 7.

<sup>11</sup> *Id.* at 6.

familiar with the public utilities commission regulations in various states, including transportation regulations, and matters surrounding maintaining transportation equipment. Mr. Hummell also has had a commercial driver's license (CDL) for approximately 40 years, which he used for at least some part of his work when operating his directional drilling company.

9. Palisade Trolley owns one 2002 Freightliner American Supreme Trolley that can hold up to 26 passengers.<sup>12</sup> The Company will use that vehicle to operate the business and is prepared to purchase more vehicles if necessary. Palisade Trolley does not propose to operate its trolley vehicle in the traditional or historic manner that trolleys operate (over tracks that operate over a predetermined tracked route and schedule).<sup>13</sup> At a cost of approximately \$138,000, the Company had its trolley completely rebuilt to its original form.<sup>14</sup> Palisade Trolley plans to provide transportation on its trolley for wine tours, weddings, bachelorette parties, corporate parties, festivals, and other similar transportation. The Company plans to use a trolley because they are unique vehicles that are part of American history.<sup>15</sup> There are no other trollies being used to serve the area. The Company submits that using a trolley fills a public need since the existing authorities are not able to provide a transportation on a trolley. Palisade Trolley is willing to restrict its authority to only using only trolley-type vehicles.

10. Palisade Trolley is debt free.<sup>16</sup> Mr. Hummell will drive the trolley himself using his CDL. The Company will also hire an additional driver if needed. Palisade Trolley will use a maintenance facility located at the Hummells' residence and Mr. Hummel will run a maintenance program that ensures both that Commission vehicle requirements are met and that work is

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<sup>12</sup> *Id.* at 5.

<sup>13</sup> *See generally*, Hearing Exhibit 400.

<sup>14</sup> *Id.* at 6.

<sup>15</sup> *See id.* at 5.

<sup>16</sup> *See id.* at 6.

performed by a certified mechanic. Ms. Hummell owns an office building on Main Street in Palisade that will be used to take walk-in bookings and the Company will also use its website and brochures to secure bookings.<sup>17</sup>

11. When Mr. Hummell operated businesses in Palisade, he often referred tourists he encountered to existing common carriers in the area. He testified that the common carriers serving the area were fully booked “more than you would expect,” resulting in tourists being unable to receive service. He believes that this shows a public need that was not being fulfilled by the existing common carriers. This, combined with the fact that there were no trolleys running in Mesa County, inspired the Hummells to create Palisade Trolley. In addition, Mr. Hummell researched whether there is a public need for Palisade Trolley’s services. Specifically, he obtained data on Mesa County’s population from the Mesa County’s Visitor and Tourist Board showing an estimated population of 157,987, with an estimated growth rate of 0.80% in the last year, and an 8.02% growth rate since 2010.<sup>18</sup> He also looked at tourism data indicating that approximately one million visitors and tourists come to Mesa County each year to enjoy the area’s wineries, festivals, biking events, and other attractions.<sup>19</sup> This information convinced the Hummells that Mesa County has experienced substantial growth both in population and tourism, and that therefore, there is a need for more and different types of public transportation options.

12. Mr. Hummell also reviewed information that Absolute gathered concerning carriers authorized to provide transportation in Mesa County under a Commission-issued common carrier

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<sup>17</sup> *Id.* at 6.

<sup>18</sup> Hearing Exhibit 25.

<sup>19</sup> Hearing Exhibit 26 at 1 and 4.

permit.<sup>20</sup> That data lists the total passenger seating capacity for all such common carriers as 431.<sup>21</sup> Mr. Hummell does not believe this is sufficient to meet the public need.

13. The Hummells also sought and received letters supporting the proposed service from local government officials, local businesses and organizations, and residents in the area. The following persons or entities provided letters supporting the proposed service: the Mayor of Fruita (Mr. Joel Kincaid); the Mayor of the Town of Palisade, (Mr. Greg Mikolai);<sup>22</sup> Wine Country Inn; Colorado Vintners Collective; Vines 79 Wine Barn; Colterris Winery; Graystone Winery; Sauvage Spectrum; Red Fox Cellars; Two Rivers Winery & Chateau; Talon Wines; Palisade Peach Shack; the Palisade River Retreat; Alida's Fruits; Talbott and Sons LLC (Talbott and Sons); Carboy Winery; the Palisade Chamber of Commerce; and The Colorado Association for Viticulture & Enology (CAVE).<sup>23</sup>

14. The letters' authors support the proposed service for a variety of reasons, including that they: simply want any additional transportation options;<sup>24</sup> favor competition among carriers;<sup>25</sup> support new businesses;<sup>26</sup> believe that the transportation market is not saturated or that there are few existing options;<sup>27</sup> believe that more transportation options are beneficial to their or their communities' economic interests, including by enhancing tourism;<sup>28</sup> trust that more options will improve safety (by reducing incidents of drunk driving or generally being safer than walking or

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<sup>20</sup> Hearing Exhibit 204.

<sup>21</sup> *Id.*

<sup>22</sup> In a second letter (Hearing Exhibit 104(b), Mayor Mikolai clarified comments in his first letter (Hearing Exhibit 1), stating that he intended to provide general support of transportation services, not support for a specific company or entity, and that his reference to public need is to providing safe transportation services for winery visits (rather than public need in a general sense). Hearing Exhibit 104(b).

<sup>23</sup> Hearing Exhibits 1 to 18 and 104(b).

<sup>24</sup> See Hearing Exhibits 3, 11, 104B,

<sup>25</sup> See Hearing Exhibits 1, 11, 12, 14, and 15.

<sup>26</sup> See Hearing Exhibit 11.

<sup>27</sup> See Hearing Exhibits 5, 7, 9, 12, 13, and 16.

<sup>28</sup> See Hearing Exhibits 1, 3, 4, 5, 7, 9, 12, 17, and 18.

biking);<sup>29</sup> expect that more options will reduce traffic or alleviate parking constraints;<sup>30</sup> and believe the service would be a unique, niche, charming, or enjoyable experience.<sup>31</sup>

15. Several letters suggest that the area needs additional transportation options because there are very few carriers serving the area; existing carriers are turning away business because they do not have enough vehicles; existing carriers are booked more often than not; or because their businesses have not been served by the existing carriers.<sup>32</sup>

16. The Company's representatives also circulated a petition in the Palisade area seeking support for Palisade Trolley. The Petition states that:

There were over 1 million tourist visitors in Mesa County last year; currently there are over 160 thousand residents in Mesa County. There is a need for more companies to service tourism in the tour guide industry. This is not a saturated market and we believe the uniqueness of Palisade Trolley would bring a new and fun opportunity for people visiting the Grand Valley whether wine tours, corporate events, wedding parties, ect [sic]. Help us ask the Public Utilities Commission to grant our request to obtain a common carrier permit and be able to do Tours in the Grand Valley.<sup>33</sup>

17. Mr. Hummel testified that approximately 200 to 250 signatures were collected, and that this supports his conclusion that there is a public need for the proposed service.

18. Ms. Wendy Justin provided a letter stating that she has "been trying to make contact with [Absolute] for the past 3 months. I have sent messages three times through the website . . . They have never responded. I then called them two more times and left messages for return calls and never received any assistance from this company."<sup>34</sup> Likewise, Ms. Cheryl Shepherd-Barlow provided a letter stating, "I attempted to get quotes for a wine tour . . . neither company was

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<sup>29</sup> See Hearing Exhibits 1, 2, 3, 8, 9, 10, 13, 15, 16, and 104B.

<sup>30</sup> See Hearing Exhibits 6, 8, 9, 13, 14, and 16.

<sup>31</sup> See Hearing Exhibits 1, 2, 4, 5, 8, 9, 10, 13, 14, 18

<sup>32</sup> Hearing Exhibit 6, 9, 12, 13, and 16.

<sup>33</sup> Hearing Exhibit 19 at 1.

<sup>34</sup> Hearing Exhibit 21.

available to talk to. Absolute . . . did answer after several rings . . . telling me that she was the only one in the office and had 2 other clients she was dealing with at the time. She said she would call be right back, which she never did.”<sup>35</sup> She also states that based on her experience, there is not enough transportation for the Grand Valley tourism industry.<sup>36</sup>

19. Mr. Talbott testified in support of the proposed service.<sup>37</sup> Mr. Talbott’s family has been farming in the area since 1907, and he has lived in the area for most of his life. Mr. Talbott also owns a farm in Palisade (which he leases to his family’s farm). In 2015, Mr. Talbott started up his own winery and hard cider company. He is a board member of CAVE and the Western Colorado Horticulture Society. Mr. Talbott is a big proponent of agritourism, which he describes as tourism that provides the public with an opportunity to learn more about where their food comes from. Agritourism also provides agricultural businesses an opportunity to make additional money beyond the agriculture that is produced (such as by hosting tours, weddings or other entertaining events). This helps make farming viable. Agritourism has become an attraction in the area.

20. In Mr. Talbott’s opinion, with the increase in the number of new businesses in the area, there is a huge need for an increase in transportation in Palisade and the Grand Valley. Mr. Talbott estimates that there are 30 different wineries and five to seven farm stands in Palisade that would benefit from the trolley service. He also believes that additional transportation services are needed to decrease traffic and help alleviate parking constraints. Mr. Talbot is not involved with helping visitors book transportation services in the area, and is unaware of instances where such services have been fully booked or unavailable.

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<sup>35</sup> Hearing Exhibit 20.

<sup>36</sup> *Id.*

<sup>37</sup> Mr. Talbott was qualified to testify as an expert in agritourism.

21. Mr. Talbott also spoke to statements in CAVE and Talbott and Sons' support letters. He testified that there is always a need for more transportation in the Grand Valley; that there are no Grand Valley transportation services that go through the east Orchard Mesa and transport customers to wineries; and that there are no public services in Palisade that serve as an alternative to customers driving themselves, renting a bike, or existing people organizations. Mr. Talbott believes that Palisade Trolley would be a "step in the right direction" in terms of helping meet the public's needs.

22. Mr. Scott Winans testified on behalf of Rapid Creek. He operates Rapid Creek with his business partner, Mr. Buechler. Rapid Creek has a common carrier permit that it obtained in September 2021.<sup>38</sup> Its permit allows Rapid creek to provide call-and-demand shuttle service between all points within a 29-mile radius of 239 Main Street in Palisade, Colorado, with restrictions that require service to originate within 100 yards of 239 Main Street and terminate at specific locations (mostly trailheads).<sup>39</sup>

23. Rapid Creek currently has three 14-passenger vans, as well as trailers to transport passenger's bicycles, recreation materials, or other items. It has only been actively using two of those vans, but the third is available, and can be used when needed. If it uses all three vans, Rapid Creek can transport a maximum of 42 passengers per trip. Rapid Creek typically provides two passenger trips per day using much less than its vehicles' full capacity. With two trips per day using all vehicles at maximum capacity, Rapid Creek can transport 84 passengers per day, which equals approximately 2,555 passengers per month or 30,660 passengers per year.<sup>40</sup> If it runs two trips per

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<sup>38</sup> Hearing Exhibit 101.

<sup>39</sup> *Id.*

<sup>40</sup> These figures are calculated by multiplying the maximum daily passenger capacity (84) by the number of days in the year (365), to reach the annual maximum of 30,660 passengers, which, divided by the number of months in the year (12), equals approximately 2,555 passengers per month.

day at maximum capacity three days a week (*e.g.*, Fridays, Saturdays, and Sundays) it could transport approximately 1,092 passengers per month or 13,104 passengers per year.<sup>41</sup> To date, Rapid Creek has not hit its capacity limit, but is prepared to do so should the need arise. And, Rapid Creek is also prepared to expand its capacity by buying another vehicle if needed. Mr. Winans also believes that there is sufficient service in the region because the majority the eight common carriers in the area are actively providing service.

24. Mr. Dave Smith testified on behalf of Pali-Tours, which he owns and operates. Pali-Tours has a common carrier permit that it obtained in September 2019.<sup>42</sup> Its permit allows Pali-Tours to provide call-and-demand sightseeing service between all points located within a 30-mile radius of the intersection of 3<sup>rd</sup> and Main Street in Palisade.<sup>43</sup> The majority of the transportation that Pali-Tours provides falls under this part of its authority. Pali-Tour's permit also allows it to provide call-and-demand shuttle service between all points in Mesa County within a 30-mile radius of the intersection of 3<sup>rd</sup> and Main Streets in Palisade, with restrictions that require service to originate or terminate within a 1.5 mile radius of specific locations (trailheads, parks, and 3<sup>rd</sup> and Main Street).<sup>44</sup>

25. Pali-Tours has two vehicles; one can seat 14 passengers and the other can seat 13, for a maximum per-trip capacity of 27 passengers (using both vehicles).<sup>45</sup> While Pali-Tours sometimes reaches capacity, Mr. Smith rents vehicles to meet demand.<sup>46</sup> With two trips per day

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<sup>41</sup> These figures are calculated by multiplying the maximum daily passenger capacity (84), by the number of days the trips are run per week (3), to reach the weekly maximum of 252 passengers, which, multiplied by the number of weeks in the year (52), equals 13,104 passengers per year, which, divided by the number of months in the year (12), equals 1,092 approximately passengers per month.

<sup>42</sup> Hearing Exhibit 401 at 3.

<sup>43</sup> *Id.* at 2.

<sup>44</sup> *Id.*

<sup>45</sup> *See* Hearing Exhibit 402 at 2.

<sup>46</sup> The evidence did not establish how often Pali-Tours has to rent an additional vehicle to meet demand beyond its capacity.

using both vehicles at maximum capacity, Pali-Tours is able to transport 54 passengers per day, which equals approximately 1,642 passengers per month or 19,710 passengers annually.<sup>47</sup> If it runs two trips per day at maximum capacity three days a week (*e.g.*, on Fridays, Saturdays, and Sundays), it could transport approximately 702 passengers per month or 8,424 passengers per year.<sup>48</sup> This available capacity is significantly higher than the number of passengers that Pali-Tours has transported since it began operating. Specifically, in 2020, Pali-Tours transported 896 passengers; in 2021, it transported 1,658 passengers.<sup>49</sup> Pali-Tour's largest volume month was in June 2021, when it transported 305 passengers, far less than its available monthly capacity.<sup>50</sup>

26. Based on a list that Mr. Smith compiled of motor carriers with active luxury limousine and common carrier permits serving the area, and of other local transportation options (that do not require a Commission permit), Mr. Smith submits that there are many ways to get around Palisade and that the public's transportation needs are being met.<sup>51</sup> While he agrees that a trolley is unique, Mr. Smith argues that the unique nature of a trolley does not prove a need for a trolley service. Mr. Smith believes that the perception in Palisade about the proposed authority is that the trolley would run like a bus, meaning that you can get on and off any time; he notes that this is not what the Application seeks.

27. Ms. Sheryl Harmon testified on behalf of Absolute. She is Absolute's office manager. Absolute owns common carrier permit number 55925 and is authorized to provide call-

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<sup>47</sup> These figures are calculated by multiplying the maximum daily passenger capacity for two trips (54) by the number of days in the year (365), to reach the annual maximum of 19,710 passengers, which, divided by the number of months in the year (12), equals approximately 1,642.5 passengers per month.

<sup>48</sup> These figures are calculated by multiplying the maximum daily passenger capacity for two trips (54), by the number of days the trips are run per week (3), to reach the weekly maximum of 162 passengers, which, multiplied by the number of weeks in the year (52), equals 8,424 passengers per year, which, divided by the number of months in the year (12), equals approximately 702 passengers per month.

<sup>49</sup> Hearing Exhibit 402 at 2.

<sup>50</sup> *Id.*

<sup>51</sup> Hearing Exhibit 404.

and-demand shuttle, charter, and sightseeing service between all points in Mesa County, Colorado.<sup>52</sup> Absolute also owns Commission-issued luxury limousine permit no. LL-01716.<sup>53</sup>

28. Absolute has 13 drivers with CDL licenses.<sup>54</sup> It uses the same vehicles to provide luxury limousine service as it does to provide common carrier service. Absolute has seven vehicles, that is: a 43-passenger Freightliner M2 shuttle bus; a 20 to 25-passenger Ford F550 limousine bus; a 27-passenger Ford F550 shuttle bus, a 35-passenger Ford F650 limousine bus; a 35-passenger Ford F650 shuttle bus; a 35-passenger Ford F6501 shuttle bus; and a 39-passenger Freightliner M2 shuttle bus.<sup>55</sup> Absolute's maximum seating capacity using all of its vehicles is 239 passengers for one trip.<sup>56</sup> If Absolute does two trips per day at maximum capacity, it can transport up to approximately 14,539 passengers per month, or 174,470 passengers per year.<sup>57</sup> If it does this only three days a week (*e.g.*, Fridays, Saturdays, and Sundays), it can transport up to approximately 6,214 passengers per month or 74,568 passengers per year.<sup>58</sup> But even if Absolute runs only one trip per day using all of its vehicles at full capacity, it has significant capacity. Specifically, using all vehicles at maximum capacity running one trip per day, Absolute can transport up to approximately 7,269 passengers per month, or 87,235 per year.<sup>59</sup> If it does this only three days a week (*e.g.*, Fridays, Saturdays, and Sundays) it could transport up to approximately 3,107

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<sup>52</sup> See Hearing Exhibit 201 at 1; see Decision No. R22-0238-I, ¶ 14 (discussing Absolute's Letter of Authority, filed on April 14, 2022.).

<sup>53</sup> See Hearing Exhibit 201s at 1; 205 and 206.

<sup>54</sup> Hearing Exhibit 203.

<sup>55</sup> Hearing Exhibit 202.

<sup>56</sup> *Id.*

<sup>57</sup> These figures are calculated by multiplying the maximum daily passenger capacity for two trips (478) by the number of days in the year (365), to reach the annual maximum of 174,470 passengers, which, divided by the number of months in the year (12), equals approximately 14,539.17 passengers per month.

<sup>58</sup> These figures are calculated by multiplying the maximum daily passenger capacity for two trips (478), by the number of days the trips are run per week (3), to reach the weekly maximum of 1,434 passengers, which, multiplied by the number of weeks in the year (52), equals 74,568 passengers per year, which, divided by the number of months in the year (12), equals approximately 6,214 passengers per month.

<sup>59</sup> These figures are calculated by multiplying the maximum daily passenger capacity for one trips (239) by the number of days in the year (365), to reach the annual maximum of 87,235 passengers, which, divided by the number of months in the year (12), equals approximately 7,269.58 passengers per month.

passengers per month or 37,284 per year.<sup>60</sup> All of these figures are significantly higher than the number of passengers that Absolute has transported in recent years. Indeed, Absolute has never met its maximum capacity, though it is willing to do so.

29. In 2019, Absolute did no common carrier transportation, but transported a total of 2,019 passengers under its luxury limousine permit.<sup>61</sup> In 2020, Absolute transported 21 passengers, but none were common carrier transportation.<sup>62</sup> Ms. Harmon explained that the COVID-19 pandemic resulted in no common carrier transportation demand in 2020.<sup>63</sup> In 2021, Absolute transported 3,758 passengers, of which 97 were common carrier transportation passengers.<sup>64</sup>

30. Like Pali-Tours, Ms. Harmon submits that the design or uniqueness of a vehicle (such as a trolley) does not equal public need for more transportation, but instead, that need has nothing to do with what the vehicle looks like.

31. Absolute suggests that the active common carriers in the area have significant unused seating capacity that can be used to meet the public's needs. This is based, in part, on a compilation of data that Absolute gathered by looking at Commission records for common carrier certificate holders serving Mesa County. Ms. Harmon submits that the area's common carriers have up to 431-passenger capacity per day, which accounts for each carrier performing one trip at full capacity.<sup>65</sup>

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<sup>60</sup> These figures are calculated by multiplying the maximum daily passenger capacity for one trip (239), by the number of days the trips are run per week (3), to reach the weekly maximum of 717 passengers, which, multiplied by the number of weeks in the year (52), equals 37,284 passengers per year, which, divided by the number of months in the year (12), equals approximately 3,107 passengers per month.

<sup>61</sup> Hearing Exhibit 205 at 13.

<sup>62</sup> Hearing Exhibit 206.

<sup>63</sup> Hearing Exhibit 200 at 3.

<sup>64</sup> Hearing Exhibits 207 at 13 and 201 at 3.

<sup>65</sup> See Hearing Exhibit 204.

### III. RELEVANT LAW

#### A. Commission Jurisdiction

32. The Commission has authority to issue certificates to operate as a common carrier under Colo. Const. art. XXV, §§ 40-10.1-103(1) and 203(1), C.R.S., (2021).<sup>66</sup> Common carriers may only operate with a Commission-issued certificate declaring that the present or future public convenience and necessity requires or will require the common carrier's operation.<sup>67</sup> Motor carriers providing call-and-demand shuttle, charter, and sightseeing service are common carriers.<sup>68</sup> Thus, the Commission has jurisdiction to issue a certificate of public convenience and necessity allowing motor carriers, such as Palisade Trolley, to provide call-and-demand shuttle, charter, and sightseeing service.

#### B. Legal Standards

33. Palisade Trolley, as the proponent of an order, bears the burden of proof by a preponderance of the evidence.<sup>69</sup> The preponderance standard requires the fact finder to determine whether the existence of a contested fact is more probable than its non-existence.<sup>70</sup> A party has met this burden of proof when the evidence, on the whole and however slightly, tips in favor of that party.<sup>71</sup> Although the preponderance standard applies, the evidence must be substantial. Substantial evidence is such relevant evidence as a reasonable person's mind might accept as adequate to support a conclusion.<sup>72</sup>

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<sup>66</sup> See *Miller Brothers, Inc. v. Public Utilities Comm'n*, 525 P.2d 443, 446 (Colo. 1974).

<sup>67</sup> § 40-10.1-201(1), C.R.S.

<sup>68</sup> Rule 6001 (l), (nnn), and (ooo) of the Rules Regulating Transportation by Motor Vehicle, 4 *Code of Colorado Regulations* (CCR) 723-6.

<sup>69</sup> §§ 13-25-127(1) and 24-4-205(7), C.R.S.; Rule 1500, 4 CCR 723-1.

<sup>70</sup> *Swain v. Colorado Dep't of Revenue*, 717 P.2d 507, 508 (Colo. App. 1985).

<sup>71</sup> *Schocke v. Dep't of Revenue*, 719 P.2d 361, 363 (Colo. App. 1986).

<sup>72</sup> *City of Boulder v. Public Utilities Comm'n*, 996 P.2d 1270, 1278 (Colo. 2000).

34. Applicants for a certificate of public convenience and necessity must establish their financial, managerial, and operational fitness to conduct the proposed operations.<sup>73</sup> In general, operational fitness encompasses a consideration of whether the applicant has the equipment, personnel, and facilities to operate the proposed service. The Commission has identified the following evidentiary factors as relevant to the fitness inquiry: minimum efficient scale to operate under the proposed authority; credit worthiness and access to capital; assessment of financial health in the near future; capital structure; cash balances; managerial competence and experience; fixed physical facilities such as office space and maintenance garages; licenses and equipment necessary to operate a radio dispatch system; and vehicles of appropriate type.<sup>74</sup> Whether the applicant is willing and able to comply with applicable public utilities laws also bears upon fitness.<sup>75</sup>

35. In addition to fitness, applicants must show that the present or future public convenience and necessity requires or will require the proposed service.<sup>76</sup> In deciding that question, the Commission must apply the regulated monopoly doctrine.<sup>77</sup> Commission Rules reflect the regulated monopoly doctrine by requiring an applicant seeking a common carrier certificate to demonstrate: the public need for the proposed service; that granting the authority is in the public interest; and that the existing service is inadequate.<sup>78</sup> And, the question is not whether the extent of business in a particular area is sufficient to warrant more certified carriers, but whether the public convenience and necessity demand the service of an additional carrier.<sup>79</sup> Letters of

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<sup>73</sup> Rule 6203(a)(XI), 4 CCR 723-6.

<sup>74</sup> See e.g., Decision No. C08-0933, at ¶ 7, Consolidated Proceeding Nos. 08A-241CP, 08A-281CP-Extension, 08A-284CP-Extension, and 08A-300CP.

<sup>75</sup> See *Thacker Brothers Transp. v. Public Utilities Comm'n*, 543 P.2d 719, 721 (Colo. 1975).

<sup>76</sup> See § 40-10.1-201(1), C.R.S.

<sup>77</sup> *Ephraim Freightways Inc. v. Public Utilities Comm'n*, 380 P.2d 228, 230 (Colo. 1963).

<sup>78</sup> Rule 6203(a)(XVII), 4 CCR 723-6.

<sup>79</sup> See *Ephraim Freightways Inc.*, at 231.

support submitted to demonstrate public need must contain the author's name, address, telephone number, signature; must describe the public need; explain whether and how the existing service is inadequate; and include a statement that the letter contains only information that is true and correct to the best of the author's knowledge and belief.<sup>80</sup>

36. The regulated monopoly doctrine is based on the principle that fewer carriers who can make a reasonable return will give the public safe, efficient, and more economical service, and that increasing the number of providers ultimately results in a deterioration of service and higher rates for the public.<sup>81</sup> With this regulated monopoly protection comes the obligation to indiscriminately accept and carry passengers (for compensation).<sup>82</sup> Indeed, common carriers must "furnish, provide, and maintain such service, instrumentalities, equipment, and facilities as shall promote the safety, health, comfort, and convenience of its patrons, employees, and the public, and as shall in all respects be adequate, efficient, just and reasonable."<sup>83</sup> As such, under the regulated monopoly doctrine, a common carrier serving a particular area is only entitled to protection against competition if its service is adequate to satisfy the public's needs.<sup>84</sup> Indeed, the existence of an adequate and satisfactory service by motor carriers serving the area negates a public need and demand for added service by an additional carrier.<sup>85</sup> As a result, the public need and adequacy elements are closely related.<sup>86</sup>

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<sup>80</sup> Rule 6203(a)(XVII)(A) to (E), 4 CCR 723-6.

<sup>81</sup> See e.g., *Denver & R.G. W. R. Co., v. Public Utilities Comm'n*, 351 P.2d 278, 280 (Colo. 1960).

<sup>82</sup> See Rule 6001(p), 4 CCR 723-6.

<sup>83</sup> § 40-3-101(2), C.R.S.; see § 40-10.1-103(1), C.R.S., (common carriers are public utilities within the meaning of articles 1 to 7 of title 40, Colorado Revised Statutes).

<sup>84</sup> *Ephraim Freightways Inc.* at 230.

<sup>85</sup> *Id.* at 231.

<sup>86</sup> See *id.* at 230-231.

37. The Commission has “wide discretionary powers in determining the demands of ‘public convenience and necessity.’”<sup>87</sup> Whether an incumbent’s service is substantially inadequate is a question of fact that the Commission must determine.<sup>88</sup> The Commission may consider “a broad range of evidence in determining whether an incumbent carrier’s service is substantially inadequate.”<sup>89</sup> The Colorado Supreme Court has noted that the Commission may consider any relevant evidence in demonstrating whether the public convenience and necessity requires additional service.<sup>90</sup> The Court has expressly approved, as relevant, consideration of various aspects of incumbents’ service and operation, including rates and charges, speed and efficiency and quality of its facilities, organization, equipment, and personnel.<sup>91</sup> For example, in *Durango Transportation, Inc.* the Court approved the Commission’s reliance on evidence that the incumbent’s rates were so high as to be “tantamount to a denial of service to the tourist population requiring transportation . . .”<sup>92</sup> This is consistent with the Commission’s purpose in granting a transportation authority to “ensure that the public’s transportation needs are met.”<sup>93</sup>

38. An applicant may demonstrate substantially inadequate service through evidence that the incumbent is not ready, willing, and able at all times to render service to anyone who might demand it.<sup>94</sup> But the Commission is not required to find that the incumbent has failed or refused to provide service to a requesting customer.<sup>95</sup> An applicant must show that the incumbent has demonstrated a general pattern of inadequate service.<sup>96</sup> But, “the test of inadequacy is not

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<sup>87</sup> *Public Utilities Comm’n v. Donahue*, 335 P.2d 285, 288 (Colo. 1959).

<sup>88</sup> *RAM Broadcasting v. Public Utilities Comm’n*, 702 P.2d 746, 751 (Colo. 1985); *Durango Transportation Inc. v. Pub. Utilities Comm’n*, 122 P.3d 244, 248 (Colo. 2005).

<sup>89</sup> *Durango Transportation Inc.*, at 250.

<sup>90</sup> *Durango Transportation, Inc.*, at 250.

<sup>91</sup> *Id.* at 251.

<sup>92</sup> *Id.* at 249.

<sup>93</sup> *Id.* at 250.

<sup>94</sup> *Durango Transportation Inc.*, at 247, citing *Ephraim*, 380 P.2d at 232.

<sup>95</sup> *Durango Transportation Inc.*, at 251.

<sup>96</sup> *Durango Transportation Inc.*, at 248.

perfection.”<sup>97</sup> That is because any common carrier providing service to many clients will receive some legitimate complaints.<sup>98</sup> Expressions of mere opinion, preference, desire, and willingness to use an applicant’s service over an incumbent’s, alone, do not establish that the incumbent’s service is substantially inadequate.<sup>99</sup> The Commission has found that it does not follow that expressions of preference supported by evidence relating to the adequacy of the incumbent’s service may not prove substantial inadequacy.<sup>100</sup> Put differently, if expressions of preference are supported by evidence relating to the adequacy of the incumbent’s service, such evidence may establish substantial inadequacy.

39. Although the applicant bears the burden of proving that the incumbent carrier’s service is substantially inadequate, “where an applicant’s evidence tend[s] to prove the existing carrier’s substantial inadequacy, ‘it [is] incumbent upon [the existing carrier] to rebut this evidence.’”<sup>101</sup>

40. Based on the foregoing, Palisade Trolley must show by a preponderance of the evidence that: (1) it is financially, operationally, and managerially fit to conduct the proposed service; (2) the public needs the proposed service; (3) the current service in the area is substantially inadequate; and (4) approving the Application is in the public interest. If Palisade Trolley meets its burdens, Intervenor must rebut evidence concerning substantial inadequacy by a preponderance of the evidence.

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<sup>97</sup> *Ephraim Freightways Inc.*, 380 P.2d at 232.

<sup>98</sup> *RAM Broadcasting*, 702 P.2d at 750.

<sup>99</sup> *See Durango Transportation Inc.*, at 248, quoting, *Public Utilities Comm’n v. Weicker Transfer & Storage Co.*, 451 P.2d 448, 449 (Colo. 1969). Put differently, if expressions of preference are supported by evidence relating to the adequacy of the incumbent’s service, such evidence may establish substantial inadequacy.

<sup>100</sup> *See* Decision No. C19-0941 at 10 (mailed November 19, 2019) in Proceeding No. 19A-0144CP (affirming Decision No. R19-0784 in same proceeding); *see also Weicker*, at 449, citing *Donohue v. Public Utilities Comm’n*, 359 P.2d 1024 (Colo. 1961); *Denver & R.G. W. R. Co. v. Public Utilities Comm’n*, 351 P.2d 278 (Colo. 1960); and *Public Utilities Comm’n v. Harvey*, 371 P.2d 452 (Colo. 1962).

<sup>101</sup> *Durango Transportation Inc.*, 122 P.3d at 250 (quoting *Ephraim Freightways Inc.*, 380 P.2d at 231-32).

**IV. FINDINGS, ANALYSIS, AND CONCLUSIONS****A. Fitness**

41. Based on the findings discussed in paragraphs 8 through 10 and the reasons discussed below, the ALJ finds that Palisade Trolley has met its burden to show by a preponderance of the evidence that it is financially, managerially, and operationally fit to conduct the proposed service.<sup>102</sup> For example, the Hummells have over 30 years' experience managing numerous business, most in the proposed service territory, and an experienced CDL driver (Mr. Hummell) who will operate the Company's vehicle. Based on his 26 years working in the utility industry, Mr. Hummell is familiar with public utilities commission rules and regulations across numerous states. Likewise, through his prior work experience, Mr. Hummell has owned, managed, and maintained various transportation equipment. Both of the Hummells have operated businesses in the area and thus are familiar with the proposed service territory.

42. The Hummells incurred no debt in forming Palisade Trolley, despite investing a significant sum to rebuild its trolley. Palisade Trolley has one rebuilt trolley that can seat up to 26 passengers that is immediately available for use.<sup>103</sup> If the demand exists for more capacity, Palisade Trolley is financially prepared to purchase an additional trolley and hire additional personnel to assist with driving. Palisade Trolley will use Mr. Hummell's maintenance facility (located at his home), and will ensure that work on the trolley is performed by a certified mechanic and that the trolley meets the Commission's requirements. Palisade Trolley will operate out of an office located in Palisade and already has a website that it will use to promote its business and accept

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<sup>102</sup> See §§ 13-25-127(1) and 24-4-205(7), C.R.S; Rule 6203(a)(XI), 4 CCR 723-6; and Rule 1500, 4 CCR 723-1.

<sup>103</sup> Hearing Exhibit 400 at 5-6.

reservations.<sup>104</sup> For the reasons discussed, the ALJ finds that Palisade Trolley met its fitness burden.

**B. Public Need and Substantial Inadequacy of Existing Services<sup>105</sup>**

43. Palisade Trolley submits that Mesa County's population and tourism growth establish that there is a public need for different types of transportation in Mesa County. Specifically, the area sees approximately one million visitors each year, and has experienced an estimated population growth rate of 0.80 percent in the last year. The Company asserts that the total seating capacity for common carrier permit holders authorized to serve the area is 431 passengers, which, it argues, is not sufficient to meet the public's need given the significant volume of tourists visiting the area each year.<sup>106</sup> For the reasons discussed below, the ALJ rejects this argument.

44. This argument is more directed at whether the extent of business in the area is sufficient to warrant another carrier, rather than whether the public convenience and necessity demand an additional carrier.<sup>107</sup> Conceptually, an increase in population and tourism could increase demand for common carrier transportation to the point of establishing public need for an additional common carrier. But this has to be established by evidence – not assumptions – that connects the increased population and tourism to an increase in demand for service that cannot be met or is not being met by the existing carriers.<sup>108</sup> Palisade Trolley failed to provide this evidence. To the contrary, the evidence contradicts Palisade Trolley's assumption that the increase in the area's population and tourism increased demand that cannot be met by the existing carriers.

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<sup>104</sup> *Id.* at 6.

<sup>105</sup> Given that public need and substantial inadequacy are closely related, they are addressed together.

<sup>106</sup> This 431 figure assumes that the existing carriers are limited to providing only one trip per day. *See supra*,

¶ 31.

<sup>107</sup> *See Ephraim Freightways Inc.*, 380 P.2d at 231.

<sup>108</sup> *See id.* at 230-231.

45. Specifically, the evidence concerning the Interveners' maximum passenger capacities and the number of passengers they transported in recent years belies the Company's assumptions.<sup>109</sup> With two trips per day at maximum capacity, combined, Absolute, Pali-Tours, and Rapid Creek can transport up to 616 passengers per day, which equals approximately 18,736 passengers per month or 224,840 passengers annually.<sup>110</sup> If they run two trips per day at maximum capacity only three days a week, combined, the Interveners can transport approximately 8,008 passengers per month or 96,096 passengers annually.<sup>111</sup> But even if the Interveners limit themselves to one trip per day at maximum capacity, combined, they can transport up to 308 passengers per day, which equals up to approximately 9,368 passengers per month or up to 112,420 passengers annually.<sup>112</sup>

46. In recent years, Pali-Tours and Absolute have not experienced demand that comes close to any of these volumes, even when including Absolute's non-common carrier transportation.<sup>113</sup> And, except for Pali-Tours who rents additional vehicles to meet demand that exceeds its capacity, the other two Interveners have not exceeded their passenger capacity limits.<sup>114</sup> As such, even with an increase in population and one million visitors per year, the majority of the Interveners have not experienced demand that exceeds their capacity limits, and the one Intervener whose demand exceeded its capacity, met the increased demand by renting additional vehicles. For

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<sup>109</sup> The evidence does not confirm the reliability and accuracy of the total estimated passenger capacity for all common carriers serving the area (431); as such, the ALJ relies only on the evidence concerning the Interveners.

<sup>110</sup> See *supra* ¶¶ 23, 25, and 28. These figures are calculated by adding the relevant total capacities discussed in paragraphs 23, 25, and 28.

<sup>111</sup> See *supra* ¶¶ 23, 25, and 28. These figures are calculated by adding the relevant total capacities discussed in paragraphs 23, 25, and 28.

<sup>112</sup> See *supra* ¶¶ 23, 25, and 28. These figures are calculated by adding the relevant total capacities discussed in paragraphs 23, 25, and 28.

<sup>113</sup> See *supra* ¶¶ 25, 28 and 29. The evidence was silent as to Rapid Creek's passenger volumes. The ALJ acknowledges that in 2020, the COVID-19 pandemic decreased demand for common carrier transportation, and thus, considers the evidence as a whole, without giving significant weight to transportation volumes in 2020.

<sup>114</sup> See *supra*, ¶¶ 23, 25, and 28.

all these reasons, the ALJ finds that the evidence does not establish that the increase in population and tourism has created a public need for the proposed service that cannot be met by the existing carriers.

47. The majority of the other evidence on public need is conclusory and unsupported by factual evidence, rendering it unpersuasive. And, notably, much like the evidence discussed above, the much of the remaining evidence is directed at whether the extent of business in the area is sufficient to warrant more than carrier, rather than whether the public convenience and necessity demand an additional carrier.<sup>115</sup>

48. For example, Mr. Talbott testified that there is always a need for more transportation in the Grand Valley but did not explain how the public's needs are not being met through the existing providers. He also opined that transportation services will help continue to grow agritourism in the area. This may be true, but it does not establish a public need for the proposed transportation service. Likewise, Mr. Talbott's opinion that there is a huge need for more transportation in the area given the increase in the number of new businesses is not supported by facts explaining how and to what extent new businesses have increased the public's need for transportation. Notably, he also did not testify that the Interveners have been unable to meet the purported increased demand caused by new businesses (or agritourism). Instead, Mr. Talbott testified that he is not involved in helping visitors book transportation services in the area, and is unaware of instances where such services have been fully booked or unavailable.

49. Mr. Talbott's testimony that there are no Grand Valley transportation services that go through the east Orchard Mesa and drop passengers off at wineries or that serve Palisade is

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<sup>115</sup> See *Ephraim Freightways Inc.*, at 231.

contradicted by the Interveners' common carrier permits and testimony.<sup>116</sup> Mr. Talbott's testimony that additional transportation services are needed to decrease traffic and help alleviate parking constraints does not establish a public need for the service, and also assumes, without a factual basis, that an additional transportation provider will actually create the desired results. Given that the majority of the Interveners have been operating at far less than their maximum capacities, the evidence does not support this assumption. Put differently, adding a transportation option does not mean that people will use it, particularly given that they have not been using Interveners' transportation services to their maximum allowable extent.

50. Palisade Trolley also relies on the Petition supporting its Application as evidencing a public need for its proposed service.<sup>117</sup> Assuming that everyone who signed the Petition agreed with or adopted the Petition's assertions, the Petition's statement as to need is based on the premise that the increase in population and tourism has created a need for more transportation carriers.<sup>118</sup> As discussed above, the evidence does not establish this. The remaining statements in the Petition also do not establish public need. For example, assuming that the area's transportation market is not saturated, it does not follow that there is a public need for more carriers, or that the existing carriers are unable to meet the public's needs.<sup>119</sup> Instead, that speaks to whether the extent of the business in the area is sufficient to warrant another carrier, not whether the public convenience and necessity demands another carrier.<sup>120</sup> Illustratively, a single carrier serving a given area may meet the public's need with sufficient equipment and resources, even though the market is not saturated. But more importantly, the evidence does not establish a connection between an unsaturated motor

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<sup>116</sup> Mr. Talbott's testimony was somewhat vague on these points.

<sup>117</sup> Hearing Exhibit 19.

<sup>118</sup> *Id.*

<sup>119</sup> Hearing Exhibit 19.

<sup>120</sup> See *Ephraim Freightways Inc.*, at 231.

carrier market and public need. Other Petition statements express sentiments unrelated to public need, such as support for a “new and fun opportunity” for visitors, and general support for the Company’s request for authority.<sup>121</sup> For all these reasons, the ALJ affords little weight to the Petition, and finds that it does not establish public need or that the existing carriers provide substantially inadequate service.

51. Palisade Trolley argues that its support letters confirm that there is a public need for more transportation options in the area. None of the letters include a statement that they contain only information that is true and correct to the best of the author’s knowledge and belief, contrary to Rule 6203(a)(XVII)(D), 4 CCR 723-6.<sup>122</sup> Except for Mr. Talbott, no one from any of these entities testified at the evidentiary hearing. As discussed in paragraphs 14 and 15 above, the letters support the proposed service for a variety of reasons. But, contrary to Rule 6203(a)(XVII), most of the letters fail to describe a public need for the proposed service or whether and how the existing service is inadequate.

52. For example, whether transportation by trolley would be a unique or charming attraction does not speak to public need for it. Nor is public need established simply because other carriers provide transportation in vehicles other than a trolley vehicle. A preference to ride in a trolley vehicle<sup>123</sup> instead of a van, bus or other vehicle is just that, a preference. Opinions or preferences to use one service over another without a factual basis as to the adequacy of the

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<sup>121</sup> Hearing Exhibit 19 at 1.

<sup>122</sup> Rule 6203(a)(XVII)(D), 4 CCR 723-6; *see* Hearing Exhibits 1 to 18. Commission Rules do not address the repercussion for failing to include the referenced statement in the support letters, but letters that include the statement would plainly be more reliable than those which do not.

<sup>123</sup> Palisade Trolley does not propose to operate its trolley vehicle in the traditional or historic manner that trolleys operate (over tracks that operate over a predetermined tracked route and schedule). *See generally*, Hearing Exhibit 400.

existing services does not establish public need or that the existing service is substantially inadequate.<sup>124</sup>

53. Similarly, assertions that there are very few options currently available does not speak to whether the existing options (*i.e.* the existing carriers) are insufficient to meet the public's needs.<sup>125</sup> Indeed, where other carriers in the area provide adequate service, this negates a public need and demand for service by an additional carrier.<sup>126</sup>

54. For the same reasons discussed above, statements that the market is not saturated does not establish public need for more transportation or that the existing services are inadequate.<sup>127</sup> Likewise, wanting more transportation options to advance economic interests such as enhancing tourism and agritourism, or to encourage new business formation or competition in the transportation industry do not speak to the public's need for the actual service or whether the existing service is inadequate. Wanting more options is not the same as needing more options.

55. Whether more transportation options will reduce traffic, alleviate parking constraints, or improve safety by reducing drunk driving, walking, or biking does not speak to the adequacy of the existing services. A public need (if any) for an additional transportation option to address these issues would only exist if the existing carriers' service is substantially inadequate.<sup>128</sup> What is more, these assertions assume, without factual support, that if another transportation option is available, traffic will be reduced; parking constraints will be alleviated; incidents of drunk

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<sup>124</sup> See *supra*, ¶ 38.

<sup>125</sup> Hearing Exhibit 16.

<sup>126</sup> See *Ephraim Freightways Inc.*, at 231.

<sup>127</sup> See *supra*, ¶ 50.

<sup>128</sup> See *Ephraim Freightways Inc.*, at 231.

driving will decrease; and fewer people will walk or bike.<sup>129</sup> Given that Interveners continue to have significant unused capacity, the evidence contradicts these assumptions.

56. Other evidence about the existing carriers' service falls short of showing public need or that the existing carriers provide substantially inadequate service. For example, Alida's Fruits' statement that the existing carriers have never served its business and have not approached it for inclusion in their services does not speak to the public's need for the service, or whether the existing service is inadequate.<sup>130</sup> Instead, this complaint focuses on the existing carriers failing to proactively, and without prompting or request, to provide or offer to provide transportation that serves this business.<sup>131</sup> Alida's Fruits does not allege that the existing carriers are not ready, willing or able to provide transportation if called upon to do so, or any other facts speaking to the adequacy of the existing services.<sup>132</sup>

57. Other evidence speaking to need or the adequacy of the existing services fail to include enough information for the ALJ to assess the purported need or purported inadequacy of the existing services. For example, while Sauvage Spectrum states that tour operators are turning away business due to lack of vehicles, it does not identify the carriers who have turned customers away; the number of times this has occurred; when this occurred; how many customers have been unable to receive service; and when and how Sauvage Spectrum came to learn this information.<sup>133</sup> Likewise, although Palisade River Retreat asserts that transportation services are booked more

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<sup>129</sup> This argument is akin to the concept that "if you build it, they will come." Though a popular concept, this does not align with the regulated monopoly doctrine's legal standards that require proof *before* you build it, so to speak, that there is a public need for the service, and the existing providers' service is substantially inadequate. *See supra*, ¶¶ 35 to 38.

<sup>130</sup> Hearing Exhibit 12.

<sup>131</sup> The existing motor carriers are obligated to meet and serve the public's needs within the scope of their authority. *See* §§ 40-3-101(2); 40-10.1-103(1), C.R.S.; and Rule 6001(p), 4 CCR 723-6. Nothing in the law requires the carriers to proactively contact businesses to seek out work.

<sup>132</sup> Hearing Exhibit 12; *Ephraim*, at 232; *see Durango Transportation Inc.*, 122 P.3d at 247-248.

<sup>133</sup> Hearing Exhibit 13.

often than not, it does not identify the carriers who have been fully booked; the number of times this has occurred; when this occurred; how many customers have been unable to receive service; and when and how Palisade River Retreat came to learn this information (*e.g.*, from personal or second-hand knowledge).<sup>134</sup> Without more information about the assertions concerning the existing carriers' service, the ALJ is unable to give weight to these statements. Even so, taken at face value, the statements fall short of establishing a pattern of inadequate service given their vagueness and lack of detail.<sup>135</sup>

58. Palisade Trolley also submitted two emails from individuals complaining that they attempted to make contact with or otherwise get information from Absolute about arranging transportation, and that Absolute did not call them back after leaving numerous messages (voice mail and online messages), or did not call them back after a brief conversation.<sup>136</sup> Taken at face value, these complaints show that Absolute failed to respond to requests for service from two customers, one of which left numerous messages over several months. While this may show several incidents of poor customer service, it does not meet the evidentiary burden to establish a general pattern of inadequate service.<sup>137</sup> Indeed, because any common carrier providing service to many customers will receive some legitimate complaints, the test of inadequacy is not perfection.<sup>138</sup> These complaints fall into that category – they are potentially legitimate complaints that indicate that Absolute is not perfect, but they do not establish a pattern of inadequate service.

59. Notably, Palisade Trolley failed to present evidence as to the adequacy of Rapid Creek's and Pali-Tours' service. Thus, even setting aside the evidentiary shortfalls as to Absolute's

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<sup>134</sup> Hearing Exhibit 6.

<sup>135</sup> *Durango Transportation Inc.*, at 248.

<sup>136</sup> See Hearing Exhibits 20 and 21.

<sup>137</sup> *Durango Transportation Inc.*, at 248; *Ephraim*, at 232.

<sup>138</sup> *RAM Broadcasting*, 702 P.2d at 750; *Ephraim*, at 232.

service, the Company failed to meet its burden to show that the remaining Interveners' service is substantially inadequate. And, when viewed in light of the Interveners' significant available capacity and evidence that they are ready and willing to use that capacity to meet the public's needs, this evidentiary gap is more pronounced.

60. For all these reasons, the ALJ finds that Palisade Trolley failed to meet its burden to establish by a preponderance of the evidence that there is a public need for the proposed service and that the Interveners' service is substantially inadequate.

## V. CONCLUSION

61. While Palisade Trolley has demonstrated widespread support for the proposed service, it fell far short of meeting its burden to prove by a preponderance of the evidence that there is a public need for its service, and that the Interveners' service is substantially inadequate. For all these reasons, the ALJ concludes that Palisade Trolley failed to meet its burden to establish that the public convenience and necessity requires the proposed service; as such, the ALJ recommends that the Commission deny the Application.

## VI. ORDER

### A. **The Commission Orders That:**

1. Consistent with the above discussion, the above-captioned application filed by Palisade Trolley LLC (Palisade Trolley) on February 1, 2022 and amended on May 3, 2022 is denied.

2. Proceeding No. 22A-0059CP is closed.

3. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

4. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

5. If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

6. If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

7. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)



THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

MELODY MIRBABA

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Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean, Director