

Decision No. R22-0550-I

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

PROCEEDING NO. 22F-0337EC

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ESTES PARK CHARTERS CORP. DOING BUSINESS AS ESTES PARK SHUTTLE AND  
FUN TYME TROLLEYS, LLC, DOING BUSINESS AS ESTES PARK TROLLEYS,

COMPLAINANTS,

V.

GREEN JEEP TOURS LLC,

RESPONDENT.

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**INTERIM DECISION OF  
ADMINISTRATIVE LAW JUDGE  
CONOR F. FARLEY  
DENYING MOTION TO DISMISS, SCHEDULING  
REMOTE PREHEARING CONFERENCE, ORDERING  
PARTIES TO CONFER, AND ORDERING ESTES PARK  
TROLLEYS TO FILE CONFERRAL REPORT**

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Mailed Date: September 16, 2022

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**I. STATEMENT**

**A. Relevant Background**

1. On July 26, 2022, Estes Park Charters Corp. doing business as Estes Park Shuttle and Fun Tyme Trolleys, LLC, doing business as Estes Park Trolleys (Estes Park Trolleys) filed a Formal Complaint (Complaint) against Green Jeep Tours, LLC (Green Jeep).

2. On August 1, 2022, the Commission scheduled the Complaint for an evidentiary hearing to be held on October 4, 2022 starting at 9:00 a.m. On the same date, the Commission served the Complaint on Green Jeep, and filed and served an Order Setting Hearing and Notice of Hearing, an Order to Answer or Satisfy, and other documents on the parties.

3. On August 10, 2022, the Commission referred this proceeding to an Administrative Law Judge (ALJ). The proceeding was subsequently assigned to the undersigned ALJ.

4. On August 22, 2022, Green Jeep filed a Motion to Dismiss (Motion).

5. On September 2, 2022, Estes Park Trolleys filed a Response to the Motion (Response).

**B. Complaint**

6. The Complaint alleges that: (a) Green Jeep “operates [solely] pursuant to a permit to provide off road scenic charter service;”<sup>1</sup> (b) such a permit requires the operator to provide service “using a route that is wholly or partly off of paved roads;”<sup>2</sup> and (c) “Green Jeep provides

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<sup>1</sup> Complaint at 2 (¶¶ 4-5).

<sup>2</sup> *Id.* at 2 (¶ 6).

service that does not follow a route that is wholly or partly off of paved roads,” including the “Rocky Mountain Winter Safari [Tour], the Rocky Mountain Safari [Tour], the Best of Rocky [Tour], the Ruttin’ Around Elk Viewing [Tour], and the Grand Lake Tour.”<sup>3</sup> The Complaint concludes that Green Jeep has operated without authority and requests the Commission to “order Respondent to pay civil penalties pursuant to the Commission’s rules, that its permit be revoked, and that it be ordered to cease and desist offering service.”<sup>4</sup>

### C. Motion to Dismiss

#### 1. Motion

7. In the Motion, Green Jeep states that the Complaint includes only “broad, unspecified, actions allegedly performed by Respondent,” and provides “neither date nor time of the alleged illegal operations . . . with which [Green Jeep] can compare its records.”<sup>5</sup> It concludes that the allegations in the Complaint are “scurrilous” and that Estes Park Trolleys filed the Complaint as a “nuisance lawsuit.”<sup>6</sup> Green Jeep requests that the Complaint be dismissed with prejudice and that Green Jeep be awarded its attorneys fees for Estes Park Trolleys’ alleged violation of Colorado Rule of Civil Procedure (C.R.C.P.) 11.<sup>7</sup> In support of its Motion, Green Jeep submits five letter from alleged employees of Green Jeep stating that the tours they drive for Green Jeep traverse unpaved roads, at least for part of the tours.

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<sup>3</sup> *Id.* 2 (¶¶ 7, 12).

<sup>4</sup> *Id.* at 4 (¶ 24).

<sup>5</sup> Motion at 1 (¶ II).

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

<sup>7</sup> *Id.* at 2 (¶ V and request for relief).

## 2. Response

8. In its response, Estes Park Trolleys notes that the Motion does not cite any authority as the basis for the requested dismissal of the Complaint.<sup>8</sup> Estes Park Trolleys also states that it has alleged sufficient facts to support its claim and requested relief and to provide Green Jeep with sufficient notice of the legal claim and the relief sought and the basis for both.<sup>9</sup> Estes Park Trolleys concludes that the Complaint provides the required notice to Green Jeep, states a plausible claim for relief, and there is no basis for the C.R.C.P. 11 sanctions requested by Green Jeep.<sup>10</sup>

### D. Legal Standard

9. Green Jeep has not identified the legal basis for its Motion. However, the ALJ construes the Motion as a motion to dismiss pursuant to C.R.C.P. 12(b)(5), which allows dismissal of a complaint for “failure to state a claim upon which relief can be granted.”<sup>11</sup>

10. In ruling on a C.R.C.P. 12(b)(5) motion, the Complainant’s allegations of material fact must be accepted as true. However, this tenet is inapplicable to legal conclusions.<sup>12</sup> The Commission “may consider only matters stated in the complaint and must not go beyond the confines of the pleadings,”<sup>13</sup> except for documents that are referenced in, and central to, the complaint.<sup>14</sup> The ALJ may also consider documents that are subject to administrative notice.<sup>15</sup>

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<sup>8</sup> Response at 1-2.

<sup>9</sup> *Id.* at 2-4.

<sup>10</sup> *Id.* at 4-6.

<sup>11</sup>

<sup>12</sup> *Warne v. Hall*, 373 P.3d 588, 591 (Colo. 2016) (adopting the standard for review of motions to dismiss for failure to state a claim enunciated by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

<sup>13</sup> *Ashton Props., Ltd. v. Overton*, 107 P.3d 1014, 1018 (Colo. App. 2004).

<sup>14</sup> *Prospect Dev. Co. v. Holland & Knight*, 433 P.3d 146, 149 (Colo. App. 2018).

<sup>15</sup> *Walker v. Van Laningham*, 148 P.3d 391, 397-398 (Colo. App. 2006).

11. To survive a motion to dismiss, a complaint must contain sufficient factual allegations that, if accepted as true, to “state a claim to relief that is plausible on its face.”<sup>16</sup> A claim has facial plausibility when the complainant pleads factual content that allows the court to draw the reasonable inference that the respondent is liable for the misconduct alleged.<sup>17</sup> The plausibility standard is not akin to a “probability requirement.” Indeed, it asks for more than a sheer possibility that a respondent has acted unlawfully.<sup>18</sup> Where a complaint pleads facts that are “merely consistent with” a respondent’s liability, it “stops short of the line between possibility and plausibility of 'entitlement to relief.'”<sup>19</sup> Put differently, a complaint that alleges facts that are equally consistent with both legal and illegal conduct has not alleged a plausible claim and must be dismissed.<sup>20</sup>

12. “The chief function of a complaint is to give notice to the defendant of the transaction or occurrence that is the subject of plaintiff’s claims.”<sup>21</sup> As a result, motions to dismiss “are viewed with disfavor.”<sup>22</sup> Nevertheless, “only a complaint that states a plausible claim for relief will survive a motion to dismiss.”<sup>23</sup>

## **E. Analysis**

### **1. Materials Outside of the Pleading**

13. Both Green Jeep and Estes Park Trolleys presented materials outside of the pleading in support of the Motion and Response, respectively. In ruling on the Motion, the ALJ

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<sup>16</sup> *Warne v. Hall*, 373 P.3d 588, 591 (Colo. 2016).

<sup>17</sup> *Twombly*, 550 U.S. at 556 (2007).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 557.

<sup>20</sup> *See Warne*, 373 P.3d at 596-597 (citing *Twombly* and *Iqbal*).

<sup>21</sup> *Rosenthal v. Dean Witter Reynolds*, 908 P.2d 1095, 1099-1100 (Colo. 1995). (Internal citations omitted)

<sup>22</sup> *Hirsch Trust v. Ireson*, 399 P.3d 777, 779 (Colo. App. 2017)

<sup>23</sup> *Warne*, 373 P.3d at 591 (quoting *Iqbal*, 556 U.S. at 679).

has not considered the materials outside of the pleadings provided by the parties. Accordingly, those matters are excluded and the Motion will not be converted to a motion for summary judgment.<sup>24</sup>

## 2. Motion

14. The ALJ concludes that Estes Park Trolleys has pled sufficient facts supporting the claim alleged in the Complaint. Taken as true, the factual allegations in the Complaint “state a claim to relief that is plausible on its face”<sup>25</sup> because those allegations, and Estes Park Authority’s plausible interpretation of § 40-10.1-301(12), C.R.S. and Rule 6301(f),<sup>26</sup> allow the ALJ to draw the reasonable inference that Green Jeep is liable for the misconduct alleged.<sup>27</sup> Accordingly, the Motion shall be denied.

### F. Remote Prehearing Conference

15. It is appropriate to hold a remote prehearing conference in this proceeding. Accordingly, a remote prehearing conference shall be scheduled for September 28, 2022, at 1:00 p.m. The remote prehearing conference will be conducted over the Zoom videoconferencing platform. The ALJ or a member of Commission Staff will email the log-in information in advance of the hearing.

16. Estes Park Trolleys shall confer with Green Jeep in advance of the remote prehearing conference regarding potential alternative date(s) for the hearing, the method by which the hearing should be conducted, a schedule for this proceeding, and any discovery procedures that are inconsistent with the Commission’s rules governing discovery. As to the

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<sup>24</sup> C.R.C.P. 12(b).

<sup>25</sup> *Id.*

<sup>26</sup> 4 *Colorado Code Regulations* 723-6.

<sup>27</sup> *Twombly*, 550 U.S. at 556 (2007).

method by which the hearing should be conducted, the Commission can conduct in-person, remote, or hybrid hearings. A remote hearing is one in which all of the participants appear and participate from remote locations over the Zoom web conferencing platform. A hybrid hearing involves the ALJ and at least one party and/or witness participating from one of the Commission's hearing rooms in Denver, and the remaining party(ies) and witness(es) participating from one or more remote locations using the Zoom web conferencing platform. An in-person hearing is one in which the ALJ and all parties and witnesses participate in the hearing at the same location. The hearing is currently scheduled for October 4, 2022 at 9:00 a.m.

17. Estes Park Trolleys shall file a report of the results of the conferral. The conferral report shall detail any agreements and/or disagreements regarding the topics noted above. If there are disagreements between the parties, the report shall identify the competing hearing dates, schedules, discovery procedures, and/or methods for conducting the hearing proposed by the parties. The parties are on notice that the ALJ will retain the discretion to change the method by which the hearing will be conducted.

18. If either party or both parties desire to vacate and reset the hearing to a later date, the party or parties must review the Commission's public calendar to identify suitable days for the hearing in this proceeding and propose more than one date or consecutive dates for the hearing.

19. The deadline for Estes Park Trolleys to file the conferral report is 12:00 p.m. on September 26, 2022.

20. All parties must appear at the remote prehearing conference. Failure to attend or to participate in the remote prehearing conference is a waiver of any objection to the rulings

made, to the procedural schedule established, and to the hearing dates scheduled during the remote prehearing conference.

**II. ORDER**

**A. The Commission Orders That:**

1. For the reasons stated above, the Motion to Dismiss filed by Green Jeep Tours, LLC on August 22, 2022, is denied.

2. A remote prehearing conference in this proceeding is scheduled as follows:

DATE: September 28, 2022

TIME: 1:00 p.m.

WEBCAST: Hearing Room B

METHOD: Join by video conference using Zoom at the link to be provided in an email from the Administrative Law Judge<sup>28</sup>

3. Nobody should appear in-person for the remote prehearing conference.

4. Estes Park Charters Corp. doing business as Estes Park Shuttle and Fun Tyme Trolleys, LLC, doing business as Estes Park Trolleys shall file the report of the conferral identified above on or before 12:00 p.m. on September 26, 2022.

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<sup>28</sup> Additional information about the Zoom platform and how to use the platform are available at: <https://zoom.us/>. All are strongly encouraged to participate in a test meeting prior to the scheduled hearing. See <https://zoom.us/test>.

5. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

CONOR F. FARLEY

\_\_\_\_\_  
Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,  
Director