

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 13A-0798BP

IN THE MATTER OF THE APPLICATION OF COY CLUB LLC DOING BUSINESS AS
DENVER BAR CART FOR A PERMIT TO OPERATE AS A CONTRACT CARRIER OF
PASSENGERS BY MOTOR VEHICLE FOR HIRE.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
ROBERT I. GARVEY
DENYING APPLICATION FOR AUTHORITY TO
OPERATE AS A CONTRACT CARRIER**

Mailed Date: February 11, 2014

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I. STATEMENT

1. COY Club LLC, doing business as Denver Bar Cart (Bar Cart or Applicant), initiated the captioned proceeding on July 11, 2013, by filing an application seeking authority to operate as a contract carrier by motor vehicle for hire with the Colorado Public Utilities Commission (Commission).

2. On July 15, 2013, the Commission provided public notice of the application by publishing a summary of the same in its Notice of Applications Filed as follows:

For authority to operate as a contract carrier by motor vehicle for hire for the transportation of

passengers:

between all points in the following area: Beginning at the intersection of 15th Street and Little Raven Street, Denver, Colorado, thence proceeding northeast on Little Raven to its intersection with 20th Street, thence proceeding southeast on 20th Street to its intersection with Wewatta Street, thence proceeding northeast on Wewatta Street to its intersection with 22nd Street, thence proceeding southeast on 22nd Street to its intersection with Walnut Street, thence proceeding northeast on Walnut Street to its intersection with 32nd street, thence proceeding southeast on 32nd Street to its intersection with Champa Street, thence proceeding southwest on Champa Street to its intersection with Broadway, thence proceeding south on Broadway to its intersection with Alameda Avenue, thence proceeding West on Alameda Avenue to its intersection with Santa Fe Drive, thence proceeding north on Santa Fe Drive to its intersection with Colfax Avenue, thence proceeding west on West Colfax Avenue to its intersection with 7th Street, thence proceeding northwest on 7th Street to its intersection with Auraria Parkway, thence proceeding northeast on Auraria Parkway to its intersection with Chopper Circle, thence proceeding northeast on Chopper Circle/Wewatta Street to its intersection with 15th Street, thence proceeding northwest on 15th Street to the point of the beginning.

RESTRICTIONS: This application is restricted:

- (1) to operating on streets with posted signs of 35 miles per hour or below,
- (2) to operating Low-Speed Electric Vehicles (LSV) as defined in § 42-1-102(48.6) C.R.S.; and
- (3) to providing transportation services for Denver Chophouse and Brewery, 1735 19th Street Suite 100, Denver, CO 80202.

3. On July 24, 2013, MKBS, LLC, doing business as Metro Taxi and/or Taxis Fiesta and/or South Suburban Taxi (Metro Taxi) filed their Entry of Appearance and Notice of Intervention through counsel. This filing attached Commission Authority No. 1481 held by Metro Taxi and a preliminary list of witnesses and exhibits.

4. On August 13, 2013, Colorado Cruisers, doing business as Colorado Crewz-In (Cruisers) filed their Notice of Intervention. This filing attached Commission Authority No. 55825 held by Cruisers.

5. On August 14, 2013, Colorado Cab Company doing business as Denver Yellow Cab (Colorado Cab) filed their Entry of Appearance and Notice of Intervention through counsel. This filing attached Commission Authority No. 2378 held by Colorado Cab.

6. On August 21, 2013, the Commission deemed the application complete and it was referred to an Administrative Law Judge (ALJ) for disposition.

7. On September 5, 2013, by Interim Decision No. R13-1099-I issued September 5, 2013, Applicant and Cruisers were ordered to make filings concerning representation by September 16, 2013 and a prehearing conference was scheduled.

8. On October 1, 2013, a prehearing conference was held and a procedural schedule was established. The procedural schedule was later memorialized in Interim Decision No. R13- 1255-I issued on October 7, 2013.

9. On November 22, 2013, by Interim Decision No. R13-1458-I, the evidentiary hearing was rescheduled for January 21 and 22, 2014.

10. At the scheduled time and place, the ALJ called the hearing to order. All parties appeared. The Applicant and Intervenors Colorado Cab and Metro Taxi appeared through counsel, Intervenor Cruisers appeared *pro se* through owner Justin Grimmett. During the course of the hearing, testimony was received from Joann Tram, Collin McDowell, Nikolas Malinski, Maai Riga, and Daniel Shea for the Applicant. Hearing Exhibits 10, 11, 14, 31, 32, and 33 were offered and admitted evidence. At the conclusion of the Applicant's presentation the Intervenors moved to dismiss the proceeding based upon due process and a failure of the Applicant to present

any evidence in support of managerial or financial fitness. The undersigned ALJ granted the Motion to Dismiss. This recommended decision memorializes that ruling.

11. Pursuant to § 40-6-109, C.R.S., the ALJ hereby transmits to the Commission the record of this proceeding, a written recommended decision containing findings of fact and conclusions of law, and a recommended order

II. FINDINGS OF FACT

12. Bar Cart is a limited liability company consisting of ten owners. None of the owners intend to work for Bar Cart on a full-time basis at the current time. Bar Cart proposes two aspects to their proposed service. The first aspect is physical and involves shuttling passengers between establishments that have entered into a contract carrier agreement with Bar Cart. The second aspect is a digital aspect to promote establishments through social media and promote general tourism in Denver.

13. Ms. Joann Tram is the digital account manager and one of the owners of Bar Cart. Ms. Tram has a marketing degree from the University of Denver and will handle marketing strategies for establishments that have entered into a contractual agreement with Bar Cart.

14. Mr. Nikolas Malinski is an inside account manager and one of the owners of Bar Cart. Mr. Malinski graduated from the University of Colorado with a degree in business administration. Mr. Malinski has seven years of experience in sales. Mr. Malinski's responsibility with Bar Cart will be to create relationships with potential clients of Bar Cart.

15. Mr. Maai Rigga is a commercial pilot, flight instructor, and one of the owners of Bar Cart. Mr. Rigga graduated from the University of Colorado with a degree in economics and will handle the public safety requirements for Bar Cart.

16. Mr. Daniel Shea is the owner of The Colorado Room, a restaurant in Ft. Collins, Colorado and an owner of Bar Cart. Mr. Shea will handle maintenance of the vehicles owned by Bar Cart. Mr. Shea previously worked at the Denver Chop House.

17. Mr. Colin McDowell is the General Manager of the Denver Chop House, a restaurant in Denver, Colorado. Mr. McDowell is not an owner of Bar Cart.

18. Bar Cart proposes to transport passengers over a route that would begin at the Denver Chop House¹ and travel to five light rail locations: Union Station, 18th and California, Auraria Parkway, Theater District, and 20th and Welton.

19. Bar Cart intends to use Low Speed Electric Vehicles (LSVs) to transport passengers.² Each low speed vehicle will have a capacity of six to eight passengers. Each vehicle will have a certified windshield, rearview mirrors, side mirrors, impact bumpers, seatbelts, rear brake lights, reverse lights, and headlights.

20. The LSVs will be driven by the owners of Bar Cart. There are no plans for Bar Cart to hire drivers or any other employees at this time.

21. The LSVs are powered by batteries which can operate the vehicles for approximately six hours on one charge. The batteries take between 12 to 18 hours to fully charge.

22. Each LSV will be equipped with a cell phone in case of any emergency.

23. As part of their advertising and promotion plans, Bar Cart intends to give passengers a bottle cap that can be used for discounts at establishments that have entered into a contract carrier or promotional agreement with Bar Cart.

¹ The Denver Chop House is located at 1735 19th Street, Denver, Colorado.

² The LSVs currently owned by Bar Cart are a 2007 Polaris GEM6 and a 2013 Tomberlin Emerge E4.

24. Bar Cart entered into a one month advertising agreement³ with the Denver Chop House restaurant on July 1, 2013. *Hearing Exhibit 31*. The contract does not call for any transportation services and does not state any payments Denver Chop House will make to Bar Cart.

25. Mr. McDowell has the authority for Denver Chop House to enter into the advertising contracts with Bar Cart. Mr. McDowell also has the authority to enter into a contract for Denver Chop House with Bar Cart if a transportation component is added.

26. Bar Cart proposes to transport passengers for eight hours each day they are in operation. The proposed cost of the service to the Denver Chop House is \$400.00 per month. Although this amount has not been finalized by either Bar Cart or Denver Chop House.

III. DISCUSSION AND CONCLUSIONS

27. Applicant generally bears the burden of proof by a preponderance of the evidence. § 13-25-127(1), C.R.S. Applicant initiated this proceeding and is the proponent of an order of the Commission conferring authority to operate the proposed contract carriage. This falls squarely within the language of 4 *Code of Colorado Regulations* (CCR) 723-1-1500 of the Commission's Rules of Practice and Procedure. The evidence must be substantial, defined as "such relevant evidence as a reasonable person's mind might accept as adequate to support a conclusion." *City of Boulder v. Colorado Public Utilities Commission*, 996 P.2d 1270, 1278 (Colo. 2000). The preponderance standard requires the finder of fact to determine whether the existence of a contested fact is more probable than its non-existence. *Swain v. Colorado Department of Revenue*, 717 P.2d 507 (Colo. App. 1985). A party has met this burden of proof when the evidence on a whole and however slightly, tips in the favor of that party.

³ The contract renews each month unless a 30-day written notice to terminate is given by either party.

28. In the context of an application for contract carrier authority, the burden of proof for an applicant is found in the Commission's Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6-6203(e):

- (I) A contract carrier applicant shall bear the burden of proving that the service it proposes is specialized and tailored to the potential customer's distinct needs.,
- (II) Such a showing is overcome by an intervenor's showing that the intervenor has the ability and willingness to meet the customers' distinct need.
- (III) If the intervenor makes such a showing, the applicant shall bear the burden of proving that the applicant is better suited than the intervenor to meet the distinct needs of the potential customer.
- (IV) The intervenor may overcome such a demonstration by establishing that the applicant's proposed operation will impair the efficient public service of any common carrier then adequately serving the same geographic area.

29. Additionally, an applicant for contract carrier authority must also establish its "fitness", both financially and operationally, to conduct the service it proposes. *Acme Delivery Service, Inc., v. Cargo Freight Systems, Inc.*, 704 P.2d 839, 843 (Colo. 1985).

30. In general, operational fitness encompasses a consideration of whether the applicant has the equipment, personnel, facilities, and the managerial experience to conduct for-hire passenger carrier operations. It also includes consideration of whether the applicant has the ability and willingness to comply with applicable public utilities law governing regulated motor carrier operations.

31. Although the Commission has never promulgated rules or regulations quantifying a financial fitness standard, it is generally agreed that the applicant must make some showing, however minimal, that it either has or has access to financial resources that will enable it to implement the proposed service.

32. In Decision No. C08-0933, Proceeding No. 08A-241CP issued September 4, 2008, the Commission listed the following relevant factors that may be considered in when determining financial and operational fitness of an applicant:

- (a) minimum efficient scale, that is, whether a minimum size of operation is required and, if such a minimum does exist, conceptually what is the approximate magnitude for markets at issue in this docket;
- (b) credit worthiness;
- (c) access to capital;
- (d) capital structure;
- (e) current cash balances;
- (f) credit history and assessment of financial health over the near future;
- (g) managerial competence and experience;
- (h) fixed physical facilities such as office space and maintenance garages, as appropriate;
- (i) appropriate licenses and equipment necessary to operate a radio dispatch system;
- (j) vehicles of appropriate type; and
- (k) other metrics that may be appropriate.

33. At the conclusion of the Applicant's direct case the Intervenor moved to dismiss the proceeding pursuant to Colorado Rule of Civil Procedure (Colo.R.Civ.P.) 41(b)(1) based upon due process and the failure of Bar Cart to present any evidence in support of managerial or financial fitness.

34. Bar Cart presented five witnesses in support of their application.

35. Ms. Tram's testimony was limited to how Bar Cart intends to use social media to promote the clients of Bar Cart and tourism in the City of Denver.

36. Mr. Malinski described the proposed route of the LSVs that Bar Cart intends to use as a contract carrier and a promotional opportunity for the Denver Chop House using a bottle cap for drink discounts.

37. Mr. Rigga testified about the electric vehicles that Bar Cart has purchased for its proposed authority. He testified to the legality of the LSVs in the proposed area of service, the safety features of LSVs, and to the battery life of each LSV.

38. Mr. Shea testified to the standard maintenance to be performed and the insurance currently in force on the LSVs owned by Bar Cart.

39. Mr. McDowell is not an owner of Bar Cart and only testified to his desire for the Denver Chop House to enter into a contractual relationship with Bar Cart for advertising and transportation services.

40. No exhibits that were admitted into evidence speak to Bar Cart's financial fitness.

41. Bar Cart failed to request that Administrative Notice be taken of any aspect of the application filed in this proceeding.

42. None of the financial fitness factors listed by the Commission in Decision No. C08-0933, were addressed during the Applicant's direct case.

43. Bar Cart failed to address its financial fitness in any way during the hearing.

44. The test or standard to be applied in deciding a motion to dismiss at the end of an Applicant's case is: whether a judgment in favor of Applicant is justified on the basis of the

evidence presented by Applicant in its direct case. Colo.R.Civ.P. 41(b)(1);⁴ *City of Aurora v. Simpson (In re Water Rights of Park County Sportsmen's Ranch)*, 105 P.3d 595, 613-14 (Colo. 2005).

45. Bar Cart failed to present evidence of a necessary element for the approval of its application. Without any evidence of financial fitness being shown, judgment in favor of Bar Cart is not justified and therefore the motion to dismiss is granted and the Application denied.

IV. ORDER

A. The Commission Orders That:

1. The Motion to Dismiss pursuant to Colorado Rule of Civil Procedure 41(b)(1) is granted.

2. The above-captioned application filed by Applicant COY Club LLC, doing business as Denver Bar Cart filed on July 11, 2013 is denied.

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.

a) 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

⁴ As pertinent here, Colo.R.Civ.P. 41(b)(1) states: in a trial to the court, at the conclusion of plaintiff's case, the defendant [here, Intervenor], without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff [here, Applicant] has shown no right to relief. The court as trier of fact may then determine them and render judgment against the plaintiff [here, Applicant] or may decline to render judgment until the close of all the evidence.

own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) 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.

5. 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 y.

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ROBERT I. GARVEY

Administrative Law Judge