

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 13A-1347CP

IN THE MATTER OF THE APPLICATION OF WESTERN SLOPE YELLOW CAB, LLC
DOING BUSINESS AS GRAND JUNCTION YELLOW CAB FOR A CERTIFICATE OF
PUBLIC CONVENIENCE AND NECESSITY TO OPERATE AS A COMMON CARRIER BY
MOTOR VEHICLE FOR HIRE.

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

Mailed Date: August 18, 2014

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I. STATEMENT, FINDINGS, DISCUSSION, AND CONCLUSIONS**A. Procedural Background.**

1. On December 19, 2013, Western Slope Yellow Cab, LLC, doing business as Grand Junction Yellow Cab (Applicant), filed an Application for a Certificate of Public Convenience and Necessity to Operate as a Common Carrier by Motor Vehicle for Hire (Application).

2. The Commission gave public notice of the Application on December 30, 2013.

3. Tazco, Inc., doing business as Sunshine Taxi (Sunshine) timely intervened of right on January 21, 2014.

4. GISDHO Shuttle, Inc., doing business as American Spirit Shuttle (American Spirit) filed an “Entry of Appearance and Notice of Intervention” on January 28, 2014.

5. On February 5, 2014, the Commission deemed the Application complete and referred the matter to an administrative law judge (ALJ) for disposition.

6. Pursuant to Decision No. R14-0166-I issued February 11, 2014, the ALJ convened a prehearing conference on March 5, 2014. All parties appeared at the prehearing conference. The parties agreed to and the ALJ approved a procedural schedule and hearing dates. Decision No. R14-0250-I. In addition, at the prehearing conference, Applicant waived the 210-day deadline for a final Commission decision to issue as permitted by § 40-6-10.5(3), C.R.S. *Id.* A hearing was scheduled to take place in Grand Junction, Colorado on July 29, 30, and 31, 2014. Decision No. R14-0250-I.

7. In addition, the ALJ ordered American Spirit to supplement its intervention by identifying which portions of its authority that were in conflict with the Application. Decision No. R14-0249-I, issued March 6, 2014. Also on March 6, 2014, the ALJ ordered that American

Spirit may be represented by its designated non-attorney, Ms. Bonnie Richards. Decision No. R14-0251-I.

8. On the dates, time and location designated (July 29, 30, and 31, 2014), the ALJ convened the evidentiary hearing on the Application. All parties appeared. Mr. Igor Raykin and Mr. Andrew Fiscella represented Applicant; Mr. Charles Williams represented Sunshine; and Ms. Bonnie Richards (non-attorney) represented American Spirit.

9. Before the evidentiary portion of the hearing began, the parties raised several preliminary matters. First, Applicant sought to substitute undisclosed witness, Mr. Jason Davis, with another witness, Mr. Melvin Johnson II, because Mr. Davis was unavailable due to an emergency. Applicant informed interveners of this sometime before the hearing (although it was unclear exactly when). Applicant anticipated that Mr. Johnson's testimony would be similar to Mr. Davis's, but narrower in scope. In particular, Mr. Davis was to testify to his experience as a manager of an assisted living community, as well as members of his community's experiences with transportation in Mesa County, Colorado. Mr. Johnson, a resident of the assisted living community that Mr. Davis manages, was to testify to his personal experiences with transportation in the same community.

10. Sunshine objected to Mr. Johnson being substituted for Mr. Davis because Applicant failed to disclose Mr. Johnson as a potential witness as required by Decision No. R14-0250-I, and because it would be prejudicial. While American Spirit joined Sunshine's objection, it did not offer any argument.

11. According to counsel, Sunshine did not attempt to interview Mr. Davis or conduct discovery relating to Mr. Davis's anticipated testimony. The ALJ found that because Mr. Johnson's testimony is narrower than Mr. Davis's anticipated testimony, interveners had

general notice of the subjects of Mr. Johnson's testimony,¹ Sunshine did not interview Mr. Davis and Sunshine did not conduct discovery relating to Mr. Davis, that there is no prejudice in allowing Mr. Johnson to testify as a substitute witness for Mr. Davis. The ALJ ordered that Mr. Melvin Johnson II could testify as a substitute witness for Mr. Jason Davis.

12. Applicant also sought to substitute another disclosed witness, Mr. Eric Wilmont, because he had become unavailable due to the unexpected death of a close friend. Applicant sought to substitute Mr. Wilmont's testimony with Ms. Alison Timmerman's testimony. Sunshine and American Spirit did not object to this substitution. However, Ms. Timmerman failed to appear at the hearing and thus, did not testify.

13. Applicant also requested permission to call a disclosed witness (Mr. Oliver) out of order, on the morning of the third day of the hearing, because that witness was not available to testify until then (July 31, 2014 at 9:30 a.m.).

14. Sunshine objected, arguing that by the time the witness would be called, interveners would likely be presenting their evidence. Sunshine argued that calling the witness out of order would prejudice Sunshine because Sunshine's evidence is shaped by the evidence Applicant presents. If Applicant's request is granted, Sunshine would be forced to present evidence without the knowledge of all the evidence that Applicant offered in support of the Application. In addition, Sunshine argued that granting the request would effectively prohibit it from making a verbal motion to dismiss, if appropriate, after Applicant rests its case. Such motions are made after the Applicant has rested its case and has presented its evidence. *See* Colorado Rule of Civil Procedure (Colo. R. Civ. P.) 41(b)(1). The ALJ declined to rule on the

¹ For example, disclosures of Mr. Davis's testimony referenced the assisted living community that he managed; Mr. Johnson lives in the referenced assisted living community. Thus, interveners had an opportunity to research their own records for information on transportation relating to that assisted living community.

request at the onset of the hearing, noting that circumstances may change by the time the Applicant finished presenting its witnesses. In addition, the ALJ indicated that the witness could appear by telephone if that would resolve the problem with the witness's availability. No party objected to the witness's telephone testimony. The ALJ also offered to start the second day of the hearing earlier than scheduled if that would accommodate the witness's schedule.

15. The parties stipulated and agreed that Mesa County's population, based on the most recent census data is more than 70,000. The ALJ accepted this stipulation.

16. Hearing Exhibits 1, 2, 4, 6, 8 and 11 were identified, offered, and admitted into evidence.² As to Hearing Exhibit 4, it was offered and admitted for the effect it had on Mr. Watson, and not for the truth of the matter asserted. Mr. Melvin Johnson II and Mr. Watson testified on behalf of Applicant.

17. Immediately after Mr. Johnson testified, Applicant requested permission to call another member of Mr. Johnson's assisted living community (the Oaks) to testify. This witness, Mr. Larry Serrano, was disclosed for the first time when Mr. Johnson completed his testimony. Applicant anticipated that he would testify to his personal experiences with transportation services in Mesa County. The interveners both objected to the addition of this witness, arguing that it would be prejudicial. The ALJ finds that Applicant did not to show good cause for its failure to disclose the witness in a timely manner. Particularly given that this witness is not a substitute witness, and is a wholly new witness added at the last minute, the ALJ finds that

² Hearing Exhibits 5, 7, 10, and 100-119 were not offered; Hearing Exhibits 3 and 9 were withdrawn by Applicant.

permitting the witness to testify would be prejudicial. The ALJ denied Applicant's request to call the undisclosed witness.³

18. Applicant completed examining all of its witnesses mid-morning on July 30, 2014 (day two of the evidentiary hearing). Applicant requested that Mr. Oliver be permitted to testify out-of-order, on the following morning, July 31, 2014. *Infra*, ¶ 14. Although given the opportunity for Mr. Oliver to testify by telephone, Applicant did not attempt to call him by telephone. Nor did Applicant indicate that starting the hearing earlier than scheduled would have accommodated its witness. Interveners renewed their objections to Mr. Oliver testifying out of order. The ALJ found that it would be prejudicial to permit Applicant's witness to testify out-of-order because Interveners would be unable to present their evidence with the additional testimony in mind. The ALJ denied Applicant's request. Applicant rested its case.

19. After Applicant rested, Sunshine made a verbal Motion to Dismiss (Motion), arguing that Applicant failed to meet its burden to show it is fit to provide the service proposed, and failed to show a public need for the authority sought. American Spirit joined the Motion. Applicant opposed the Motion and argued that it met the required burdens. The ALJ considered the parties' arguments and the evidence presented, and concluded that while Applicant met its burden to show it is fit to provide the service, Applicant failed to meet its burden to show a public need for the authority sought. As a result, the ALJ denied the Application and concluded the hearing (thereby vacating the third day of hearing, July 31, 2014). This Recommended Decision memorializes the oral ruling made at the hearing, and includes additional findings, discussion, and conclusions in support of the ruling.

³ Paragraph 13 of Decision No. R14-0250-I put Applicant on notice that failure to disclose witnesses as required by that Decision may result in an order preventing it from presenting the undisclosed witness. Decision No. R14-0250-I, ¶13.

B. Evidence Offered in Support of Application

20. Based upon the parties' factual stipulation, the ALJ finds that the population of Mesa Count, Colorado is more than 70,000 based upon the most recent available census dated.

1. Applicant.

21. Applicant is a limited liability company whose members are Mr. Kevin Watson and Ms. Laura Butziger. Applicants seek authority to operate as a common carrier by motor vehicle for hire for the transportation of passengers in call-and-demand taxi service between all points in Mesa County, Colorado. Hearing Exhibit 1.

22. Mr. Watson was a police officer in Colorado from approximately 1981 to 1990. In that role, he had approximately five people under his command. After that, he lived in California where he worked in real estate. He drove a truck for approximately five years after that. Mr. Watson currently owns and operates a web-design company. Mr. Watson has created approximately 800-1,000 websites, and has been doing web design since 1996.

23. Ms. Butziger also owns and operates a marketing company.

24. Mr. Watson currently owns and operates a transportation company in Missouri, Ride A WayZ, LLC (Ride A WayZ). Ride A WayZ offers shuttle service. Mr. Watson runs Ride A WayZ with his wife, Laura Butziger and has been doing so for approximately six years. Ride A WayZ has enjoyed success. That is demonstrated by the fact that two individuals have indicated in writing that they intend to purchase Ride A WayZ for \$120,000. Hearing Exhibit 11. If that sale does not get finalized, Mr. Watson intends to pursue other options to sell Ride A WayZ.

25. Mr. Watson has been responsible for all aspects of running Ride A WayZ, including but not limited to: dispatch, managing office staff and drivers, managing vehicle

maintenance, driving vehicles, and operating necessary software for logs and dispatch. Mr. Watson intends to bring his experience to bear upon Applicant's operation.

26. Applicant will be operated by its members, Mr. Watson and Ms. Butziger. Mr. Watson has excellent credit. He has approximately \$25,000 cash-on-hand (in a bank) available for Applicant's immediate use. If more is required, Mr. Watson is willing to utilize his credit to obtain more funding (*e.g.*, credit cards or bank loans). Mr. Watson has a \$25,000 line of credit immediately available through his bank in Missouri that he would also be willing to use if necessary for Applicant's operation. In addition, Applicant would also utilize any funding that may become available by the sale of Ride A WayZ, and by the sale of Ride A WayZ's equipment (such as vehicles). It is uncertain whether that sale will occur, and thus, whether those funds would be available for Applicant's use.⁴

27. Mr. Watson has reviewed the Commission's rules relating to transportation by motor vehicle and is prepared to comply with those rules.

28. Applicant filed the Application in this proceeding after Mr. Watson visited Mesa County twice in 2013. During those visits, Mr. Watson used Sunshine's taxi service, and spoke with various members of the community regarding the adequacy of the current available taxi services and bus service.

29. Applicant's general business plan is Hearing Exhibit 6. Mr. Watson provided further detail regarding Applicant's business plan during his testimony. Applicant intends to start with two vehicles, a 2013 Hyundai Sonata (Sonata) and a 2011 Town and Country (Town and

⁴ Hearing Exhibit 11 is a notice of intent to purchase Ride A WayZ, for \$120,000. It is not a signed agreement to purchase Ride A WayZ. It indicates that the buyers intend to close on the sale within 45 days of July 22, 2014. It is signed under oath, before a notary public.

Country). Those vehicles are titled in Mr. Watson's name, and would be brought from Missouri to Colorado for immediate use if the Application is approved. The Sonata seats four passengers and the Town and Country seats six passengers. Applicant will add vehicles as demand increases. Applicant is prepared to add vehicles as quickly as one week after starting operation if the demand requires it. Applicant intends to have the vehicles painted yellow, add roof lights, and attach signs indicating the company's name and contact information. The approximate cost for that is \$1,400 per vehicle.

30. Eventually, Applicant will have an in-house mechanic to address vehicle maintenance. Until that happens, Applicant will contract with a local mechanic to perform all vehicle maintenance.

31. Applicant has investigated various metering options and has located a metering option that will cost approximately \$250-\$350 per vehicle to install. In addition, Applicant intends to ensure that all drivers may process payments by credit cards.

32. Applicant will train drivers, which will include a road test and an apprenticeship program. Applicant would also require drug and alcohol testing for drivers. Drivers will be required to have cellular phones.

33. Applicant intends to charge drivers \$100-\$125 per shift (10-12 hour shift). Drivers will not be responsible for gas expenses; Applicant will bear those expenses.

34. Mr. Watson has researched available office space for Applicant and has located at least one space that may be appropriate, at a reasonable cost. Mr. Watson has office equipment immediately available for Applicant's use, including, but not limited to computers, desks, chairs, telephones, radios, and fax machines.

35. Mr. Watson and Ms. Butziger will initially handle all office management until additional staff may be hired (as necessary). Both have approximately six years of experience running a successful transportation business. They will also do some marketing for Applicant, including internet marketing, such as through a web page. Mr. Watson will utilize his skills in web design to create a web page for Applicant and to optimize Applicant's appearance on search engines.

36. Dispatch would initially be handled by Mr. Watson and Ms. Butziger until Applicant hires additional staff. Mr. Watson has dispatch software for Applicant's immediate use. The software would be downloaded to drivers' cellular phones. The software tracks when the call for transportation comes in, when the driver has accepted the trip (and started toward the destination), when the driver has arrived to pick up the passenger, when the passenger is on-board, when the driver has started driving to the passenger's destination, and when the driver has completed the trip. The dispatch system automatically notifies a passenger when the driver has arrived.

37. Applicant has also researched the cost for insurance for the vehicles and is prepared to purchase and maintain insurance as required by Commission rules and Colorado statutes.

2. Public Witness in Support of Application.

38. Mr. Melvin Johnson was the only public witness who testified in support of the Application. Mr. Johnson lives at The Oaks Assisted Living community (the Oaks), in Fruita, Colorado. Fruita is located in Mesa County. He has lived at the Oaks since late November, 2013, and has lived in Mesa County his entire life (32 years).

39. Mr. Johnson does not use the Mesa County public bus system due to his medical condition. He has used the bus system in the past and noted that they are usually 20 to 30 minutes late. Based on his personal experiences, Mr. Johnson does not believe the bus system in Mesa County is adequate for him and others with medical conditions.

40. Mr. Johnson has used Sunshine for transportation for several years. Every time he used Sunshine, he has waited “hours” for Sunshine to arrive. He indicated that on one occasion (in February or March 2014), he waited four hours at his doctor’s office for Sunshine to arrive. He ended up obtaining transportation from another carrier, “K2”. On another occasion, he was in a Sunshine taxi, when the driver pulled over on the highway, and forced him to get out of the vehicle because the driver received a call indicating that Mr. Johnson’s ride would not be paid for by the governmental agency who was supposed to pay for the transportation. He was dropped off on the highway, at a truck stop approximately ten miles from his home.

41. He has access to K2’s transportation services, but is limited in how often he can use the company because they are not permitted to pick up in Fruita, Colorado, where he now lives. He sometimes uses K2 for transportation back to his home after doctor appointments. He has also used another carrier “Mercy Medical” but has had some difficulties with that company appearing on time as well. Mercy Medical has recently told him it will no longer pick him up at his home at the Oaks.

42. Because transportation services have been so inconsistent, Mr. Johnson has missed many doctor appointments, which has adversely impacted him.

43. Although no other public witness testified, Hearing Exhibit 2 speaks to whether there is a public need for the authority sought here. Hearing Exhibit 2 is a letter of support from Phyllis Norris, the Chair for the Grand Valley Regional Transportation Committee (Grand

Valley). The letter states that Grand Valley feels that Mesa County is large enough to support another taxi service, that citizens in Mesa County should have access to the same transportation choices as those living in Grand Junction, and that having another taxi service will lessen wait times (presumably for transportation) and better serve Mesa County residents. Hearing Exhibit 2.

44. Hearing Exhibit 4 is a letter from the Grand Junction Area Chamber of Commerce in support of the Application.

C. Burden of Proof.

45. Applicant, as the proponent of an order, bears the burden of proof by a preponderance of the evidence. §§ 13-25-127(1) and 24-4-205(7), C.R.S.; Rule 1500 of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1. 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, 508 (Colo. App. 1985). A party has met this burden of proof when the evidence, on the whole and however slightly, tips in favor of that party.

46. Although the preponderance standard applies, the evidence must be substantial. Substantial evidence is defined as "such relevant evidence as a reasonable person's mind might accept as adequate to support a conclusion . . . it must be enough to justify, if a trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *City of Boulder v. Public Utils. Comm'n*, 996 P.2d 1270, 1278 (Colo. 2000) (internal citation omitted).

D. Legal Standards Governing Application.

47. The Application seeks authority to operate as a common carrier by motor vehicle for hire for the transportation of passengers in call-and-demand taxi service between all points in Mesa County, Colorado. Hearing Exhibit 1.

48. The doctrine of regulated competition applies to the authority sought. § 40-10.1-203(2)(b)(I), C.R.S. Under the regulated competition doctrines, an applicant must show: (1) it is fit to provide the proposed service, and (2) there is a public need for the service proposed. § 40-10.1-203(2)(b)(I), C.R.S.; *Trans-Western Express Ltd., v. Public Utils. Comm'n*, 877 P.2d 350, 353 (Colo. 1994).

49. The controlling consideration under the regulated competition doctrine is the public need. *Trans-Western Express Ltd.*, at 353; *Morey v. Public Utils. Comm'n*, 582 P.2d 685, 687 (Colo. 1978). The public need is broader than the individual needs and preferences of an applicant's customers; the question turns upon the needs of the public as a whole. *Trans-Western Express Ltd.*, at 354. The public need is advanced by "safe, efficient, and economical transportation services." *Id.* In determining the public need, the Commission may consider the adequacy or inadequacy of existing services. *Id.*

50. Although the Commission has no rules quantifying a financial fitness standard, 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. *Acme Delivery Service, Inc. v. Cargo Freight Systems, Inc.*, 704 P.2d 839, 843 (Colo. 1985). Fitness must be evaluated on a case-by-case basis upon the unique circumstances of each applicant and the proposed service. See e.g., Decision No. C09-0207, issued February 27, 2009, Consolidated Proceeding Nos. 08A-241CP, 08A-283CP, 08A-284CP-Extension, and 08A-300CP.

51. 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. Whether the applicant is willing and able to comply with applicable public utilities laws also bears upon the question of fitness. *See, Thacker Brothers Transportation v Public Utilities Commission*, 543 P.2d 719, 721 (Colo. 1975).

52. The Commission has provided the following guidelines for the evidentiary factors that are relevant to the fitness inquiry:

- 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;
- credit worthiness and access to capital;
- credit history and assessment of financial health over the near future;
- capital structure and current cash balances;
- managerial competence and experience;
- fixed physical facilities such as office space and maintenance garages, as appropriate;
- appropriate licenses and equipment necessary to operate a radio dispatch system; and
- vehicles of appropriate type.

Decision No. C08-0933, at ¶ 7, issued September 4, 2008 in Consolidated Proceeding Nos. 08A-241CP, 08A-281CP-Extension, 08A-283CP, 08A-284CP-Extension, and 08A-300CP (*Union Taxi*).

53. The number of witnesses testifying for a given proposition does not force the Commission to reach a particular result on that issue. *RAM Broadcasting v. Pub. Utils. Comm'n*, 702 P.2d 746, 750 (Colo. 1985).

E. Standard of Review for a Motion to Dismiss Made After Applicant Has Presented Its Evidence and Rested.

54. Rule 1001 of the Rules of Practice and Procedure, 4 CCR 723-1, provides that where not inconsistent with Title 40 of Colorado Revised Statutes (Title 40), or the Rules of Practice and Procedure, an ALJ may seek guidance from or may employ the Colorado Rules of Civil Procedure.

55. Colo. R. Civ. P. 41(b)(1) does not conflict with Title 40 or with the Rules of Practice and Procedure. The ALJ elects to employ the rule, as it speaks directly to the verbal Motion to Dismiss made in this proceeding. Rule 41(b)(1) motions provide the court with an opportunity to evaluate the evidence and to determine whether the plaintiff has satisfied its burden of proof so as to require the other side to present its case. *City of Aurora v. Simpson (In Re Water Rights of Park County Sportsman Ranch)*, 105 P.3d 595, 614 (Colo. 2005).

56. Rule 41(b)(1) provides that in a trial to the court, at the conclusion of plaintiff's case (here, the Applicant), the defendant (here, the Intervener), without waiving his right to offer evidence in the event the motion is not granted, may move for dismissal on the ground that upon the facts and the law, the plaintiff (here, the Applicant), has shown no right to relief. The court as trier of fact may then determine them and render judgment against the plaintiff (here, the Applicant), or may decline to render judgment until the close of all evidence. Accordingly, the standard under Colo. R. Civ. 41(b)(1) is not whether the applicant established a *prima facie* case, but whether judgment in favor of the intervener is justified on the evidence presented.⁵ *City of Aurora*, 105 P.3d at 614.

⁵ The ALJ notes that this is no different than the analysis to be applied after all parties present their evidence.

F. Discussion and Conclusions.

57. As previously stated, Sunshine made a verbal Motion to Dismiss (Motion) after Applicant completed presenting all evidence in support of the Application. The ALJ construed that verbal Motion under Colo. R. Civ. P. 41(b)(1), and applied the standards of that rule.

58. An analysis under Rule 41(b)(1) requires the ALJ to consider whether Applicant satisfied the governing legal standards for the grant of the authority sought here. As discussed in more detail above, Applicant must show by a preponderance of the evidence: (1) it is fit to provide the proposed service, and (2) there is a public need for the service proposed. *Supra*, ¶¶ 46-50.

1. Fitness.

59. Mr. Watson and Ms. Butziger, Applicant's two members, will operate and manage Applicant. Applicant has shown that Mr. Watson and Ms. Butziger have approximately six years of managerial experience directly in the transportation industry, having owned and operated a shuttle company (Ride A WayZ). *Supra*, ¶¶ 21-26; 35-36. And, they are both entrepreneurs who are accustomed to running and operating their own businesses. *Supra*, ¶¶ 22-24

60. Mr. Watson's testimony was clear that he is willing to make the sacrifices necessary for Applicant provide service in accordance with the Commission's rules and requirements.

61. Applicant's general business plan is Hearing Exhibit 6. Mr. Watson provided further detail regarding Applicant's business plan during his testimony. *Supra*, ¶¶ 26-27; 29-37. However, the speculative nature inherent in all business plans cannot be overlooked. A business plan is a basic design for a business reflecting the company's major ideas, strategies, and management plan. A business plan should be fluid so that it may adapt as the business evolves to

meet the demands of reality. Applicant's members appear to understand this, and plan to adapt the business to evolve as needed. *Supra*, ¶ 26.

62. Mr. Watson plans to fund Applicant. Mr. Watson has excellent credit, and has direct access to \$25,000 in cash that he will utilize to start Applicant's operations. He also has access to additional capital through credit cards, and bank loans. Mr. Watson is willing to access capital through his credit in order to ensure Applicant's financial health over the near future (as needed). *Supra*, ¶ 26.

63. Applicant has explored available office space options that would meet its needs, and is prepared to lease office space once the authority sought is granted. *Supra*, ¶ 34. Understandably, Applicant has not already rented or leased the office space. The ALJ is satisfied that Applicant will be able to lease fixed physical facilities to accommodate its needs.

64. Applicant has access to much of the necessary office equipment necessary for its business without any additional cost. *Supra*, ¶ 26. Applicant has an adequate dispatch software system that would immediately be available for use. *Supra*, ¶ 36.

65. There was little evidence as to the minimum efficient scale for a taxicab service in Mesa County. Although Applicant intends to start with two vehicles, Applicant will obtain additional vehicles almost immediately after beginning operation if two vehicles are not enough to meet the public needs and the Commission's rules. Applicant's two vehicles are of appropriate type for the service proposed. *Supra*, ¶ 29.

66. While Applicant's business plan may contain apparent flaws, its usefulness to determine the company's operational and financial fitness has been established. The test of fitness is not perfection. While there may be gaps in the business plan, this uncertainty is not fatal to a finding of fitness. Given the success and background of Applicant's members in the

transportation industry and as entrepreneurs, the ALJ is confident that Applicant would address any gaps in its planning to ensure that its capital resources are spent appropriately, that capital is infused into the business as necessary, and that it has sufficient equipment (including vehicles) to adequately provide the service proposed, consistent with the Commission's rules and requirements. The ALJ concludes that Applicant's financial situation is sufficient to initially support it as a start-up taxi company. It has adequate cash on hand to support initial operations and meet short-term contingencies. In addition, the company has a plan to meet additional capitalization needs. As to the other metrics required to meet fitness, the ALJ finds that Applicant's proposals for vehicles and fixed physical facilities have been sufficiently addressed and supported through testimony. Applicant provided credible evidence that it will operate in accordance with the Commission's Rules Regulating Transportation by Motor Vehicle 4 CCR 723-6, and agrees to be bound by those Rules.

67. Based upon the evidence offered at the hearing as a whole, the ALJ concludes that Applicant met its burden to prove by a preponderance of the evidence that it is financially, managerially, and operationally fit to provide the service proposed.

2. Public Need.

68. Mr. Watson testified that he believes there is a public need for the service proposed by Applicant. Mr. Watson is one of Applicant's members, and will operate Applicant should the authority be granted. Thus, Mr. Watson's perspective on whether a public need exists is viewed in light of his vested interest in obtaining the authority sought by the Application.⁶ And, in any event, Mr. Watson's opinion as to whether there is a public need for the proposed

⁶ This is not to say that Mr. Watson was not a credible witness.

service is based on very limited experience and observations of the transportation service in Mesa County. *Supra*, ¶ 28.

69. Only one public witness testified in support of the Application, Mr. Johnson. Mr. Johnson's testimony, at best, established that he has had negative experiences with taxi transportation in the area, and that he believes that others in his assisted living community have had negative experiences. *Supra*, ¶¶ 40-41. The ALJ does not discount the significance of those negative experiences. However, those experiences do not establish a public need for the authority sought here. Instead, evaluation of public need must consider the needs of the public as a whole. *Supra*, ¶ 47. The public need is broader than the individual needs and preferences of a customer wishing to use Applicant's service. *Id.* Here, that means the ALJ must consider the needs of the public in all of Mesa County, as a whole. Mr. Johnson's testimony is focused on his needs and, at best, the needs of an assisted living community. This simply does not address the needs of the public in all of Mesa County as a whole.

70. The ALJ has also considered exhibits that speak to public need.

71. While some hearsay evidence may be admissible in administrative proceedings, its admission into evidence does not make it persuasive or substantial evidence. Rule 1501(a), 4 CCR 723-1 (Commission may receive and consider evidence not admissible under the Colorado Rules of Evidence).

72. Hearing Exhibit 2 is a letter of support expressing Grand Valley's support for Mr. Watson's request to establish Applicant as a taxi service in Mesa County. *Supra*, ¶ 43. The person who wrote the letter, Ms. Phyllis Norris, did not testify, nor did anyone else from Grand Valley. Thus, the basis for Grand Valley's support of the Application can only be ascertained from the letter itself. The letter states that Grand Valley feels that Mesa County is large enough

to support another taxi service, that citizens in Mesa County should have access to the same transportation choices as those living in Grand Junction, and that having another taxi service will lessen wait times (presumably for transportation) and better serve Mesa County residents. Hearing Exhibit 2. The letter does not explain that the current wait times are unreasonable (or are in violation of the Commission's rules); nor does it explain that the referenced wait times are for transportation service that is regulated by the Commission. For instance, the Commission does not regulate public bus transportation. Based on the foregoing, the letter does not provide shed light on whether there is a public need for the authority sought here; the ALJ gives little weight to the letter.

73. Hearing Exhibit 4 is a letter from the Grand Junction Area Chamber of Commerce in support of the Application. However, Hearing Exhibit 4 was not admitted for the truth of the matter asserted. It was admitted for the effect it had on Mr. Watson (in reaching a decision to file or pursue the Application in this proceeding). Thus, the ALJ does not rely upon any of the statements in the letter for the truth of those statements.⁷

74. Although the preponderance of the evidence standard applies, the evidence must be substantial. *Supra* ¶¶ 43-44. Having considered all the evidence relating to public need, the ALJ finds and concludes that Applicant failed to submit such evidence as a reasonable person's mind might accept as adequate to support the conclusion that there is a public need for the authority sought. *See City of Boulder*, 996 P.2d at 1278.

⁷ But, even if the letter were admitted for the truth of the matter asserted, the letter would be afforded little weight because it indicates a bias toward new businesses entering the Grand Junction community. Hearing Exhibit 4 (stating that "[t]his Chamber has always supported the entrance of new businesses into our community in the belief that it is in the best interest of consumers to have a choice and that competition is a key component of our capitalist system.").

75. Consequently, the ALJ concludes that Applicant failed to meet its burden to prove by a preponderance of the evidence that there is a public need for the authority sought. In so concluding, the ALJ has considered the evidence presented as a whole, and does not conclude that the Applicant failed to meet its burden because it presented only one public witness in support of its Application. *See RAM Broadcasting*, 702 P.2d at 750 (Colo. 1985).

76. Though Applicant met its burden to show it is fit to provide the authority requested, because Applicant failed to meet its burden to show there is a public need for the authority proposed, the ALJ concludes that Applicant has failed to show a right for relief, and that the Application should be denied. § 40-10.1-203(2)(b)(I), C.R.S.; Colo. R. Civ. P. 41(b)(1); *Trans-Western Express Ltd.*, 877 P.2d at 353.

77. Pursuant to § 40-6-109(2), C.R.S., the ALJ hereby transmits to the Commission the record and exhibits in this proceeding as well as a recommended decision that the Commission enter the following order.

II. ORDER

A. The Commission Orders That:

1. The Application for a Certificate of Public Convenience and Necessity to Operate as a Common Carrier by Motor Vehicle for Hire filed by Western Slope Yellow Cab, LLC, doing business as Grand Junction Yellow Cab is denied.
2. Proceeding No. 13A-1347CP 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.

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 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.

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge