

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14A-0479CP

IN THE MATTER OF THE APPLICATION OF STARRY NIGHTS LLC 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
ACCEPTING AMENDMENTS TO APPLICATION,
AND GRANTING AMENDED APPLICATION**

Mailed Date: September 18, 2014

I. STATEMENT, FINDINGS, AND CONCLUSIONS

1. On May 14, 2014, Starry Nights LLC (Applicant) filed an Application for a Certificate of Public Convenience and Necessity to Operate as a Common Carrier by Motor Vehicle for Hire (Application). Applicant amended its Application on May 22, 2014.

2. The Commission provided public notice of the amended Application on June 2, 2014. As originally noticed, the Application seeks, “authority to operate as a common carrier by motor vehicle for hire for the transportation of passengers in call-and demand shuttle service and call-and-demand sightseeing service between all points within a 1.5 mile radius of the intersection of West 1st Street and Main Street in Palisade, Colorado.”

3. GISDHO Shuttle, Inc., doing business as American Spirit Shuttle (American Spirit) and Tazco, Inc., doing business as Sunshine Taxi (Sunshine) timely intervened of right objecting to the Application.

4. During the Commission's weekly meeting held July 9, 2014, the Commission deemed the Application complete and referred it to an administrative law judge (ALJ) for disposition.

5. On July 8, 2014, Applicant filed a second amendment to the Application. The second amendment sought to remove the following language from the authority sought, "and call-and-demand sightseeing service." In other words, the amendment eliminated Applicant's original request for authority to operate call-and-demand sightseeing service.

6. On July 9, 2014, American Spirit filed a "Motion for Acceptance of Amendment to Application and Withdrawal of Intervention" (Motion). The Motion sought the Commission to accept the second amendment to the Application, and if accepted, to withdraw American Spirit's intervention and objection to the Application.

7. By Decision No. R14-0884-I issued July 24, 2014, the ALJ accepted the proposed restrictive amendment, accepted American Spirit's withdrawal of its intervention, and dismissed it as a party to this proceeding.

8. On August 12, 2014, Applicant filed a document titled in the Commission's E-filing system as "Amendment 3- in compliance to Agreement with Sunshine Taxi, LLC for Withdrawal of Intervention to Proceeding No. 14A-0479CP" (Third Amendment). The Third Amendment proposes that the Application be amended to seek the following:

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

passengers in call-and-demand shuttle service

between all points within a 1.5 mile radius of the intersection of West 1st Street and Main Street in Palisade, Colorado.

RESTRICTION: This application is restricted:

Starry Nights will offer only Golf Cart Shuttle services.

9. Although the title of the document in the Commission's E-filing system indicates that Applicant submitted its Third Amendment pursuant to an agreement with Sunshine to withdraw its intervention, there is no agreement in the record indicating that Sunshine wishes to withdraw its intervention in this proceeding subject to approval of the Third Amendment.

10. Sunshine filed no response to the Third Amendment. Thus, the Third Amendment is unopposed.

11. On September 4, 2014, the ALJ ordered Sunshine to make a filing by 5:00 p.m. on September 12, 2014 indicating whether it will withdraw its intervention in this proceeding if the Third Amendment is accepted. Decision No. R14-1077-I.

12. Sunshine failed to make the filing required by Decision No. R14-1077-I. Sunshine made no request to extend the deadline for the filing, nor did Sunshine show any cause for its failure to make the required filing.

13. Sunshine's failure to abide by the requirements of Decision No. R14-1077-I has resulted in unnecessary delay in resolving this proceeding. Sunshine's decision to ignore a lawfully issued order in this proceeding demonstrates its contempt for the Commission's authority. In addition, Sunshine's failure to make the required filing also indicates that Sunshine has abandoned and failed to prosecute its intervention.

14. Based on the above, the ALJ again ordered Sunshine to make the required filing by 5:00 p.m. on September 17, 2014. Decision No. R14-1125-I issued September 12, 2014. Sunshine was warned that if it again fails to make the filing, its intervention may be stricken and it may be dismissed as a party to this proceeding. Sunshine was warned that in such a circumstance, the ALJ will render a decision in this proceeding as if the requested relief is unopposed, without a hearing.

15. Both decisions ordering Sunshine to make the required filing were properly served on Sunshine through the Commission's e-filing system. *See* Certificate of Service for Decision Nos. R14-1077-I and R14-1125-I; Rule 1205(b) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1 (all registered e-filers agree expressly to accept service in all Commission proceedings through the Commission's e-filing system).

16. Sunshine again failed to make the required filing. Sunshine's failure to abide by two lawfully issued orders demonstrates a pattern of contempt for the Commission's authority. And, it also amounts to abandonment, and failure to prosecute its intervention in this proceeding. As a result of its failure to make the required filings, despite having been given multiple opportunities to do so, the ALJ will deem Sunshine's intervention abandoned, will strike Sunshine's intervention, and will dismiss it as a party to this proceeding.

17. Without Sunshine as a party, the Amended Application becomes unopposed. As the Amended Application is unopposed, it may be considered by a modified procedure, without a hearing. § 40-6-109(5), C.R.S., and Rule 1403, 4 CCR 723-1.

18. The Applicant's proposed Third Amendment has not been withdrawn by Applicant. To be acceptable, the proposed amendment must be restrictive in nature, must be clear and understandable, and must be administratively enforceable. Both the common carrier permit and any restriction on that permit must be unambiguous and must be contained wholly within the authority granted. Both must be worded so that a person will know, from reading the common carrier permit and without having to resort to any other document, the exact extent of the authority and of each restriction. Clarity is essential because the scope of a common carrier permit must be found within the four corners of the authority, which is the touchstone by which

one determines whether the operation of a common carrier is within the scope of its Commission-granted authority.

19. The ALJ finds and concludes that the proposed amendments in the Third Amendment are restrictive in nature, administratively enforceable, clear and understandable. For good cause shown, the restrictive amendments proposed by Applicant's Third Amendment will be accepted. The authority sought (as stated in the notice and the Application) will be amended to conform to the restrictive amendments.

20. The Application requests authority to operate as a common carrier by motor vehicle for hire. The ALJ finds that the Application and its supporting documentation demonstrate good cause to grant the requested authority. The Application establishes that Applicant is familiar with the Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6, and agrees to be bound by and to comply with, those Rules. The Application and its supporting documentation establish that Applicant has or will have sufficient equipment with which to render the proposed service, and is financially, operationally, and managerially fit to perform the proposed service. In addition, the Application and supporting documents establish that the present or future public convenience and necessity requires, or will require the transportation service as requested. Therefore, because the Applicant is fit, financially and otherwise, to perform the proposed service and because the other prerequisites have been met, the permit should be granted. For the foregoing reasons, the permit should be granted.

21. In accordance with § 40-6-109, C.R.S., the ALJ now transmits the record in this proceeding, and recommends the Commission enter the below order.

II. ORDER

A. The Commission Orders That:

1. The amendments to the Application for a Certificate of Public Convenience and Necessity to Operate as a Common Carrier by Motor Vehicle for Hire (Application) proposed by Starry Nights LLC (Applicant) by a filing made on August 12, 2014 are approved and granted. The Application is amended as set forth in ¶ 8 above.

2. The intervention filed by Tazco Inc., doing business as Sunshine Taxi (Sunshine) is stricken. Sunshine is dismissed as party to this proceeding.

3. Applicant is granted a Certificate of Public Convenience and Necessity to operate as a common carrier by motor vehicle for hire:

For the transportation of

passengers in call-and-demand shuttle service

between all points within a 1.5 mile radius of the intersection of West 1st Street and Main Street in Palisade, Colorado.

RESTRICTION: This application is restricted:

Starry Nights may only transport passengers using golf carts.

4. The hearing and procedural schedule in Decision No. R14-0950-I are vacated.

5. Applicant shall operate in accordance with all applicable Colorado laws and Commission rules. All operations under the permit granted shall be strictly common carrier operations.

6. Applicant shall not commence the operations under the permit until it has complied with the requirements of Colorado laws and Commission rules, including without limitation:

- (a) causing proof of insurance (Form E or self-insurance) or surety bond (Form G) coverage to be filed with the Commission;
- (b) paying to the Commission, the motor vehicle fee (\$5) for each vehicle to be operated under authority granted by the Commission, or in lieu thereof, paid the fee for such vehicle(s) pursuant to the Unified Carrier Registration Agreement;
- (c) having an effective tariff on file with the Commission. Applicant shall file an advice letter and tariff on not less than ten days' notice. The advice letter and tariff shall be filed as a new Advice Letter proceeding and shall comply with all applicable rules. In calculating the proposed effective date, the date received at the Commission is not included in the notice period and the entire notice period must expire prior to the effective date. (Additional tariff information can be found on the Commission's website at dora.colorado.gov/puc and by following the transportation common and contract carrier links to tariffs); and
- (d) paying the applicable issuance fee (\$5).

7. If Applicant does not cause proof of insurance or surety bond to be filed, pay the appropriate motor vehicle fees, file an advice letter and proposed tariff, and pay the issuance fee within 60 days of the effective date of this Decision, then the grant of the operations under the Permit shall be void. For good cause shown, the Commission may grant additional time for compliance if the request for additional time is filed within 60 days of the effective date of this Decision.

8. The Commission will notify Applicant in writing when the Commission's records demonstrate compliance with Ordering Paragraph 6.

9. 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.

10. As provided by § 40-6-106, 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 recommended 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 a basic finding 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.

11. If exceptions to this Recommended 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

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director