

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19A-0188CP

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

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
STEVEN H. DENMAN
ON REPRESENTATION, SCHEDULING HEARING, AND
ESTABLISHING PROCEDURAL SCHEDULE**

Mailed Date: June 5, 2019

I. STATEMENT

1. On April 9, 2019, Kep Expeditions LLC (Applicant or Kep) filed the above-captioned application for a Certificate of Public Convenience and Necessity to operate as a common carrier by motor vehicle for hire and commenced this proceeding. Applicant did not file direct testimony, a list of witnesses, detailed summaries of testimony, or copies of exhibits with its application.¹

2. On April 11, 2019, Applicant filed an Amendment to the application, adding a clearer statement of the proposed authority and adding a restriction that the proposed authority would be restricted to the use of vehicles with wheelchair accessibility.

¹ Pursuant to § 40-6-109.5(2), C.R.S., therefore, the Commission's decision in this proceeding shall be issued no later than 210 days after the Application was deemed complete, or no later than December 18, 2019.

3. On April 15, 2019, the Commission issued a Notice of Applications Filed, including the application in this proceeding, stating that the application is:

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

passengers in call-and-demand sightseeing service

between all points in Larimer County and Rocky Mountain National Park, State of Colorado.

RESTRICTION:

This [authority] is restricted to the use of vehicles with wheelchair accessibility.

The 30-day intervention deadline set by the Notice ended on May 15, 2019.

4. On May 15, 2019, Estes Valley Transport, Inc. (Estes Valley or Intervenor), by and through its counsel, filed its Entry of Appearance and Intervention (Intervention). The Intervention asserts that the operating rights sought by Applicant would partially overlap the rights granted to Estes Valley in Certificate PUC No. 54696, which was attached to the Intervention. Therefore, Intervenor concludes, it has a legally protected right in the subject matter of the application. Estes Valley requests that the application be denied.

5. While Intervenor makes the general allegation that the authority sought overlaps its authority, Item V of Certificate PUC No. 54696 grants authority to Estes Valley for:

Transportation of

passengers, in sightseeing service,

between all points within a 12-mile radius of Estes Park, Colorado, on the one hand, and that portion of Boulder County which lies north of a line beginning at the intersection of Colorado State Highway 52 and the Boulder County, Weld

County line, then west over Colorado State Highway 52 as extended to the Boulder County, Grand County line, on the other hand.

Item V is apparently the portion of its authority overlapped by the application. The Administrative Law Judge (ALJ) finds that Estes Valley is an intervenor by right and a Party to this proceeding.

6. Applicant and Estes Valley are the Parties to this proceeding.

7. During the Commission's weekly meeting held on May 22, 2019, this matter was referred to an ALJ for disposition. Subsequently this proceeding was assigned to the undersigned ALJ.

A. Representation

8. The application states that Applicant is a Colorado limited liability company (LLC). The application was signed by Brian Kaepplinger, as the owner. Kep Expeditions LLC is the Applicant and is not represented by counsel in this proceeding.

9. Rule 1201(a) of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1 (2015), requires a party in an adjudicatory proceeding before the Commission to be represented by an attorney authorized to practice law in the State of Colorado, unless certain exceptions are satisfied. To prove in a Commission adjudicatory proceeding that a non-attorney managing member² of an LLC can represent its interests, under the criteria of Rule 1201(b)(II), 4 CCR 723-1, the LLC must show the Commission that: (1) it is a closely-held entity, (that is, an entity with no more than three owners);³ (2) no more than \$15,000 is in controversy in this proceeding; and (3) the managing

² As pertinent here, § 13-1-127(2.3)(c), C.R.S., states that a "person in whom the management of a limited liability company is vested or reserved" shall be "presumed to have the authority to appear on behalf of the closely held entity upon providing evidence of the person's holding the specified office or status[.]"

³ Section 13-1-127(1)(a), C.R.S.

member has the authority to represent the interests of the LLC.⁴ The Commission has emphasized that this requirement is mandatory and has found, if a party does not meet the criteria of this Rule, that a filing made by a non-attorney on behalf of that party is void and of no legal effect and that a non-attorney may not represent a party in Commission adjudicative proceedings.⁵

10. This proceeding is an adjudicatory proceeding before the Commission.

11. Applicant has the burden to prove that Kep meets the criteria of Rule 1201(b)(II), 4 CCR 723-1, and is entitled to proceed in this case without an attorney. To meet that burden of proof, Applicant is required do the following: **First**, Applicant must establish that it is a closely-held entity. This means that Applicant must establish that it has “no more than three owners.” Section 13-1-127(1)(a), C.R.S. **Second**, Applicant must demonstrate that it meets the requirements of § 13-1-127(2), C.R.S. That statute provides that an officer⁶ may represent a closely-held entity before an administrative agency if **both** of the following conditions are met: (a) the amount in controversy does not exceed \$15,000; **and** (b) the officer provides the administrative agency with evidence, satisfactory to the agency, of the authority of the officer to represent the closely-held entity.⁷

12. The original application filed by Applicant establishes sufficient facts to demonstrate all of the criteria described in the foregoing paragraph satisfactorily.⁸ Therefore, the

⁴ Section 13-1-127(2.3)(c), C.R.S.

⁵ See, e.g., Decisions No. C05-1018, Proceeding No. 04A-524W issued August 30, 2005; No. C04-1119, Proceeding No. 04G-101CP issued September 28, 2004; and No. C04-0884, Proceeding No. 04G-101CP issued August 2, 2004.

⁶ Section 13-1-127(1)(i), C.R.S., defines “Officer” as “a person generally or specifically authorized by an entity to take any action contemplated by” § 13-1-127, C.R.S.

⁷ See § 13-1-127(2.3)(c), C.R.S.

⁸ See Application filed on April 9, 2019, ¶ 20(f) at page 7 of 7.

ALJ finds and concludes that Applicant is entitled to proceed without an attorney, pursuant to Rule 1201(b)(II), 4 CCR 723-1, and that Brian Kaepplinger may represent Applicant in this proceeding.

B. Procedural Schedule and Advisements

13. Pursuant to Rule 1405(k) of the Rules of Practice and Procedure, 4 CCR 723-1, Applicant was required to file and to serve its list of witnesses and copies of its exhibits within ten days of the end of the notice period, or no later than May 28, 2019.⁹

14. Despite the fact that Applicant's deadline for filing its list of witnesses and copies of exhibits has passed, no such information was filed by Applicant by the deadline. In order to expedite the most efficient consideration of this application, a new procedural schedule will be adopted, and an evidentiary hearing will be scheduled. In addition to lists of witnesses and copies of their exhibits, the Parties will also be ordered to pre-file detailed summaries of the testimony of their witnesses.

15. Applicant has specifically asked that the hearing be scheduled in Denver, Colorado.¹⁰

16. **The Parties are advised and on notice** that no witness will be permitted to testify, except in rebuttal, unless that witness is identified on a list of witnesses and in a summary of testimony filed and served in accordance with the procedural schedule adopted in this Decision. **The Parties are advised further** that no exhibit will be received in evidence, except

⁹ Since the ten-day deadline under Rule 1405(k) fell on Saturday, May 25, 2019, and since Monday, May 27, 2019 was the Memorial Day Holiday, the deadline was extended by operation of law until the next business day, or until Tuesday, May 28, 2019. Section 40-6-121, C.R.S.

¹⁰ See Application filed on April 9, 2019, ¶ 18 at page 6 of 7.

in rebuttal, unless filed and served in accordance with the procedural schedule adopted in this Decision.

17. Any party wishing to make an oral closing statement may do so immediately following the close of the evidence (*i.e.*, after presentation of evidence near the end of the hearing).

18. **The Parties are advised and on notice** that this proceeding is governed by the Rules of Practice and Procedure found at 4 CCR 723-1, Part 1. Even though Applicant will be represented by a non-attorney, these rules apply equally to Applicant and its non-attorney representative, Mr. Kaepplinger. The ALJ expects all Parties to comply with these rules. The Rules of Practice and Procedure are available on the Commission's website (<http://www.dora.colorado.gov/puc>)¹¹, as well as in hard copy from the Commission upon request.

19. **The Parties are advised and are on notice** that they are each responsible for filing pleadings and other documents with the Commission. Pursuant to Rule 1204 of the Rules of Practice and Procedure, 4 CCR 723-1, a filing is made when the Commission receives the document. Thus, if a document is placed in the mail on the date on which the document is to be filed, the document is not filed with the Commission in a timely manner. Pleadings and other documents are filed with the Commission either by using the E-filings System or by filing a paper document, including the original and three copies. If you email pleadings and other documents to the Commissioners, the Director of the Commission, an ALJ, or other employees

¹¹ This link will take you to the Commission's Home Page. Then scroll down to the link to "PUC Rules" in the Regulatory Information tab. When you arrive at the PUC Rules page, scroll down to the link "723-1 Practice and Procedure." By clicking on that link, you will find a PDF version of the currently effective Rules of Practice and Procedure.

of the Commission **you have not properly filed your pleading**, as required by Rule 1204 of the Rules of Practice and Procedure, 4 CCR 723-1.

20. **Each party is specifically advised** that all filings with the Commission must also be served upon all other Parties in accordance with *Rule 1205 of the Rules of Practice and Procedure*, 4 CCR 723-1.

21. **Each party is specifically advised** that, pursuant to *Rule 1400(b) of the Rules of Practice and Procedure*, 4 CCR 723-1, responding Parties in this proceeding (*i.e.*, the Parties that did not file a motion) have the procedural right to file a written response to the motion 14 days after service of the motion, unless the Commission or the ALJ shortens the response time.

22. **The Parties are advised and are on notice** that the Commission has an E-Filings System available. One may learn about -- and if one wishes to do so, may register to use -- that system at www.colorado.gov/dora/puc.

23. **The Parties are advised and on notice** that, absent an enlargement of time or a waiver of § 40-6-109.5, C.R.S., the final Commission decision in this matter must be issued on or before December 18, 2019. This date will be considered by the ALJ in the event any party seeks an extension of time to make any filings or seeks a continuance of the hearing date. The Parties are reminded that there must be sufficient time after the hearing to issue a recommended decision, for the filing of exceptions, for the filing of responses to exceptions, and for the Commission to issue its decision on any exceptions that have been filed.

II. **ORDER**

A. **It Is Ordered That:**

1. A hearing in this matter shall be conducted at the following date, time, and place:

DATE: July 22, 2019 (and July 23, 2019, if needed)

TIME: 10:00 a.m.

PLACE: Commission Hearing Room
1560 Broadway, Suite 250
Denver, Colorado

2. Kep Expeditions LLC (Applicant) has satisfied its burden of proof under Rule 1201(a) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1, that it is entitled to proceed without an attorney. Brian Kaepplinger may represent Applicant in this proceeding.

3. Applicant shall file its list of witnesses, detailed summaries of the testimony of its witnesses, and copies of the exhibits that it will present at hearing no later than June 19, 2019.

4. Estes Valley Transport, Inc. shall file its list of witnesses, detailed summaries of the testimony of its witnesses, and copies of the exhibits that it will present at hearing no later than July 10, 2019.

5. The Parties shall comply with the requirements established in this Interim Decision and shall make the filings as required by the procedural schedule established by this Decision.

6. This Decision shall be effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

STEVEN H. DENMAN

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director