

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19A-0124CP

IN THE MATTER OF THE APPLICATION OF PALI-TOURS LTD 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
MELODY MIRBABA
PARTIALLY GRANTING PALI'S REQUEST
TO AMEND ITS APPLICATION**

Mailed Date: June 7, 2019

I. STATEMENT, FINDINGS, AND CONCLUSIONS

1. Only the relevant procedural history of this proceeding is outlined. This matter concerns Pali-Tours Ltd.'s (Pali) verified Application for Permanent Authority to Operate as a Common Carrier by Motor Vehicle for Hire (Application) to which San Miguel Mountain Ventures, LLC, doing business as Telluride Express (TEX) objects. *See* Intervention and Entry of Appearance by Right of San Miguel Mountain Ventures, LLC D/B/A Telluride Express in Opposition to the Application or Alternate Motion to Permissively Intervene (TEX's Intervention).

2. During a telephonic prehearing conference on May 29, 2019 at 2:00 p.m. (scheduled by Decision No. R19-0418-I), Pali indicated that it wished to amend the Application to seek authority which does not conflict with TEX's authority. Because potential amendments could not be resolved during that hearing, the parties agreed to reconvene at a status conference to confirm agreements relating to Application amendments and a possible resolution of TEX's

Intervention. Consequently, the Administrative Law Judge (ALJ) scheduled a follow-up telephone status conference for Monday, June 3, 2019 at 11:00 a.m. Decision No. R19-0458-I.

3. On May 31, 2019, Pali made a filing requesting that the Application be amended (Request to Amend).

4. At the date, time and location noticed, the ALJ held the telephonic status conference. Pali appeared through its designated representative and TEX appeared through counsel. TEX indicated that it does not object to Pali's Request to Amend. TEX also stated that the amendments do not eliminate the conflict with its authority, and therefore, it does not withdraw its Intervention. Pali argued that the amendments eliminate the overlap between the authority it seeks and TEX's authority. The ALJ took both issues under advisement, and addresses them here.

A. Request to Amend.

5. As TEX does not object to the Request to Amend, the ALJ finds it is unopposed. Because it is unopposed, the ALJ will waive the response time to the Request to Amend. Rule 1400(b) of the Commission's Rules of Practice and Procedure, 4 *Colorado Code of Regulations* (CCR) 723-1.

6. Pali's Request to Amend seeks to exclude scheduled and charter service (leaving only shuttle and sightseeing service); limit the service area to a 30-mile radius of the intersection of 3rd and Main Streets in Palisade, Colorado; restrict service to require transportation to originate or terminate within a 1.5 mile radius of the intersection of 3rd and Main Streets in Palisade, Colorado; restrict service to points within Mesa County, Colorado; and restrict shuttle service against originating or terminating at the Walker Airfield in Grand Junction, Colorado.

7. To be acceptable, changes to an application's requested authority must be restrictive in nature, clear and understandable, and administratively enforceable. Both the authority and any restriction on that authority must be unambiguous and must be contained wholly within the permit. Both must be worded so that a person will know, from reading the 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 an authority must be found within the four corners of the permit, which is the touchstone by which one determines whether the operation of a contract carrier is within the scope of its Commission-granted authority.

8. It is unclear whether the Request to Amend contemplates that sightseeing service, by definition, must originate *and* terminate at the same point. Rule 6001(ttt), 4 CCR 723-6 of the Commission's Rules Regulating Transportation by Motor Vehicle. Based on this definition, amending the Application to restrict sightseeing service to a point originating or terminating within a 1.5 mile radius of the intersection of 3rd and Main Streets in Palisade, would effectively restrict sightseeing service to originate *and* terminate within that same 1.5 mile radius. This would render language allowing sightseeing service within a 30-mile radius of the relevant intersection meaningless. At minimum, amending the Application as requested would be unclear given the definition of sightseeing service. Because such an amendment would be unclear, and Pali's intention is ambiguous, the ALJ denies the Request to Amend to the extent that it seeks to restrict sightseeing service to originating or terminating within a 1.5 mile radius of the intersection of 3rd and Main Streets in Palisade.

9. The ALJ finds that Pali's remaining requested amendments are restrictive, clear and understandable, and administratively enforceable. Consequently, the ALJ partially grants Pali's Request to Amend its Application.

10. As amended, the Application (hereinafter Amended 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 30-mile radius of the intersection of 3rd Street and Main Street in Palisade, Colorado.

RESTRICTIONS:

1. Call-and-demand shuttle service is restricted to providing transportation that originates or terminates within a 1.5 mile radius of the intersection of 3rd Street and Main Street in Palisade, Colorado.

2. Call-and-demand shuttle service is restricted against transportation originating or terminating at the Walker Airfield in Grand Junction, Colorado.

3. This authority is restricted to providing transportation within the boundaries of Mesa County, Colorado.

B. TEX's Intervention.

11. TEX's Intervention is based on an overlap between the authority Pali seeks, and its authority. TEX's Intervention. During the June 3, 2019 hearing, Pali argued that the amendments to the Application eliminate overlap that existed with its original Application. TEX disagreed but did not specify any portion of its authority which overlaps with the Application as amended. If the amendments eliminate overlap with TEX's authority, TEX's intervention would be moot. Thus, the ALJ will address whether the amendments render TEX's Intervention moot.

12. Two classes of parties may intervene in proceedings such as this: parties with a legally protected right that may be impacted by the proceeding (intervention of right), and parties with pecuniary or tangible interests that may be substantially impacted by the proceeding (permissive intervention). Rule 1401(b) and (c), 4 CCR 723-1; *see* § 40-6-109(1), C.R.S., *RAM Broadcasting of Colo. Inc., v. Public Utilities Comm'n*, 702 P.2d 746, 749 (Colo. 1985). As Commission Rule 1401(e) implies, a carrier's letter of authority provides the basis for the legally

protected right which an intervener claims may be impacted by the proceeding. Thus, when determining whether an intervention of right is appropriate, it is important to determine whether the intervener's letter of authority shows that it has the *right* to operate in a manner that may be impacted by an application's requested authority.

13. Paragraph III of TEX's authority provides in pertinent part:

III) Transportation of passengers, in call-and-demand charter service:

. . . D) Between all points within a 20-mile radius of the intersection of 5th and Main Streets, in Grand Junction, Colorado, on the one hand, and all points within a 100-mile radius of said intersection, on the other hand . . .

. . . Item III.D is restricted against service to or from points lying within a ten-mile radius of the intersection of Colorado Highway 135 and Elk Avenue, in Crested Butte, Colorado.

Exhibit 3 to TEX's Intervention, at 3-4.

14. Pali's Amended Application covers the 30-mile area surrounding the intersection of 3rd and Main Streets in Palisade, Colorado, which plainly overlaps with the geographical territory in ¶ III(D) of TEX's authority. Pali's restriction that shuttle service originate or terminate within a 1.5 mile range of the relevant intersection in Palisade does not eliminate the overlap. That is because TEX's authority allows it to provide service within the entire geographical area covered by Pali's Amended Application, including service that originates or terminates within 1.5 mile radius of the relevant intersection in Palisade. As a result, Pali's Amended Application overlaps with the service territory covered by ¶ III(D) of TEX's authority.

15. Geographic overlap alone does not necessarily establish the right to intervene, because the entire authority should be considered in determining whether an intervener's right is impacted by an application, including the type of service authorized. *Cf. Yellow Cab Coop. Ass'n v. Public Utilities Comm'n*, 869 P.2d 545, 549 (Colo. 1994) (finding that two carriers authorized

to provide what appear to be substantially similar services in the same area must be viewed as providing different services when their authorities contain different terms or conditions).

16. Here, ¶ III(D) of TEX's authority allows for a different type of service – charter service—than what Pali seeks—shuttle and sightseeing service. Shuttle service means call-and-demand transportation of passengers charged at a per-person rate without exclusive use of the vehicle. Rule 6001(sss), 4 CCR 723-6. And, charter service means call-and-demand transportation of individuals or groups of individuals who share a personal or professional relationship, and does not include transportation of groups of unrelated individuals brought together by a carrier, broker or third party. Rule 6001(l), 4 CCR 723-6.

17. On its plain terms, the definition of shuttle service does not prevent transportation of groups sharing a personal or professional relationship; and the definition of charter service does not contradict this. Rule 6001(l) and (sss), 4 CCR 723-6. As a result, carriers with shuttle service authority may provide the same type of transportation authorized by a charter service authority. This remains true even though shuttle service requires passengers to be charged at a per-person rate. Rule 6001(sss), 4 CCR 723-6. That is because this distinction does not render the nature of shuttle service so different from charter service as to eliminate competition. *RAM Broadcasting*, 702 P.2d at 749 (allowing intervention where authority sought created competition with the intervener's authority). As a result, the ALJ concludes that the Amended Application, specifically the proposed shuttle authority, overlaps with ¶ III(D) of TEX's authority. But, this is not the only overlap.

18. Paragraph IV(E) of TEX's authority provides in pertinent part:

IV) Transportation of passengers, in sightseeing service:

. . . E) Between all points in Mesa County, and between said points on the one hand, and all points in the Counties of Moffat, Rio Blanco, Garfield, Delta,

Montrose, San Miguel, Dolores, Montezuma, La Plata, San Juan, Ouray, Gunnison, and Pitkin, State of Colorado, on the other hand.

Exhibit 3 to TEX's Intervention, at 5.

19. Because IV (E) of TEX's authority allows it to provide sightseeing service within all points in Mesa County, it overlaps with Pali's requested authority to provide sightseeing service between a 30-mile radius of the intersection of 3rd and Main Streets in Palisade.

20. For the reasons discussed above, the ALJ finds that while the amendments to the Application eliminate many overlaps with TEX's authority, the Amended Application still overlaps with ¶¶ III(D) and IV(E) of TEX's authority. Exhibit 3 to TEX's Intervention. Thus, TEX's Intervention is not moot.

C. Advisements.

21. Because the Amended Application remains contested, the case will proceed to an evidentiary hearing, as previously scheduled by Decision No. R19-0458-I. A separate decision will issue providing the parties with the address where the hearing will be held in Grand Junction, Colorado.

22. In addition to the advisements the ALJ provided during the May 29, 2019 hearing, the ALJ advises and puts Pali on notice that it must prove the following by a preponderance of the evidence:

- (a) There is a public need for the services Pali proposes in the territory that it seeks to serve;
- (b) TEX's service in such territory is substantially inadequate;
- (c) Pali is financially fit to own and to operate the requested authority; and

- (d) Pali is operationally fit, (i.e., managerially fit), to own and to operate the requested authority.

Durango Transportation, Inc. v. Colorado Public Utilities Comm’n., 122 P.3d 244, 247 (Colo. 2005); §§ 13-25-127(1) and 24-4-205(7), C.R.S.; Rule 1500, 4 CCR 723-1. The preponderance of evidence standard is met when the evidence, on the whole, slightly tips in favor of that party. *Mile High Cab, Inc. v. Colorado Public Utilities Commission*, 302 P.3d 241, 246 (Colo. 2013); *Swain v. Colorado Department of Revenue*, 717 P.2d 507, 508 (Colo. App. 1985).

23. Pali is advised and on notice that it will have the opportunity to meet these burdens during the evidentiary hearing, and that it is still bound to the requirements of prior Decisions, including Decision No. R19-0458-I, setting deadlines to file and exchange witness and exhibit lists and exhibits that will be used during the evidentiary hearing.

II. ORDER

A. It Is Ordered That:

1. Pali-Tours Ltd.’s May 31, 2019 request to amend the Application is granted in part. The Application in this proceeding is amended as stated in ¶ 10 above.

2. Consistent with the discussion in this Decision, the intervention filed by San Miguel Mountain Ventures, LLC, doing business as Telluride Express is not mooted by the amendments to the Application.

3. This Decision is effective immediately.

(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