

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20A-0089CP

IN THE MATTER OF THE APPLICATION OF POWDERHORN PACIFIC 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
MELODY MIRBABA
DENYING INTERVENTION, REQUIRING
PALI TO MAKE FILING, AND SCHEDULING
REMOTE PREHEARING CONFERENCE**

Mailed Date: May 1, 2020

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I. STATEMENT, BACKGROUND, INDINGS, AND CONCLUSIONS

1. On March 5, 2020, Powderhorn Pacific LLC (Powderhorn) initiated this proceeding by filing a verified Application for New Permanent Authority to Operate as a Common Carrier by Motor Vehicle for Hire (Application) with the Colorado Public Utilities Commission (Commission or PUC). The Application seeks authority to operate as a common carrier for the transportation of passengers in call-and-demand shuttle and charter service that

originates or terminates within a two-mile radius of the following locations: (1) the intersection of 3rd Street and Main Street in Palisade, Colorado; (2) Powderhorn Mountain Resort, located at 48338 Powderhorn Road, Mesa, Colorado 81643; and (3) the Mesa Top Trailhead managed by the United States Forest Service along Colorado Highway 65 in the Grand Mesa National Forest.

2. The Commission gave public notice of the Application on March 9, 2020, consistent with Rule 1206 of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1.

3. On March 31, 2020, Pali-Tours Ltd. (Pali) filed an Entry of Appearance and Intervention (Pali's Intervention) seeking to intervene of right in this proceeding, with a copy of its PUC authority.

4. On April 6, 2020, Absolute Prestige Limousine Service Ltd. (Absolute) filed a "Notice of Intervention and Alternative Petition for Intervention and Entry of Appearance of Home James Transportation Services, Ltd and Request for Hearing" (Absolute's Intervention).

5. During the Commission's weekly meeting on April 15, 2020, the Commission deemed the Application complete and referred this matter to an Administrative Law Judge (ALJ) for disposition.

6. On April 15, 2020, Powderhorn filed a "Response in Opposition . . . to the Intervention of Absolute Prestige Limousine Service Ltd" (Opposition). The Opposition objects to Absolute's Intervention, arguing that Absolute has not met Commission requirements to intervene in this proceeding.

A. Pali's Intervention and Representation

7. The ALJ finds that Pali has properly intervened of right, consistent with Commission Rule 1401(e)(I), 4 CCR 723-1. Specifically, Pali's letters of authority includes at

least one service territory in conflict with the authority Powderhorn seeks here. *See* Pali's Intervention, at 4. As a result, Pali is a party and intervener in this proceeding.

8. Pali is a company, not an individual. *See generally*, Pali's Intervention. A non-attorney, Dave Smith, filed Pali's Intervention. *Id.* at 2. According to Pali's Intervention, Mr. Smith owns Pali. *Id.*

9. Commission Rule 1201(a) requires parties in proceedings before the Commission to be represented by an attorney. 4 CCR 723-1. Nevertheless, under Rule 1201(b)(II), non-attorneys may represent the interests of a closely-held entity after demonstrating eligibility to do so in accordance with § 13-1-127, C.R.S. Pali's Intervention does not establish that it is eligible to be represented by a non-attorney in this proceeding. To date, no attorney has entered an appearance on behalf of Pali. In order to continue to participate in this proceeding, Pali must either have an attorney enter an appearance on its behalf or make a filing establishing that it is entitled to be represented by a non-attorney, as detailed in the ordering paragraphs below.

10. *Pali is on notice that* if it fails to have counsel enter an appearance on its behalf, or make a filing establishing it is eligible to be represented by a non-attorney as required by this Decision, it will be dismissed as a party and will not be permitted to participate in this proceeding.

B. Absolute's Intervention

11. Powderhorn argues that Absolute's Intervention should be rejected for failing to comply with Commission Rule 1401, 4 CCR 723-1. Opposition at ¶ 3. Specifically, Powderhorn argues that, contrary to Rule 1401(e)(I), Absolute failed to: include a copy of its letter of authority; show that its authority is in good standing; identify specific parts of its authority in

conflict with the Application here; and explain the consequences to it and the public interest should the Application be granted. *Id.* at ¶¶ 3 and 5.

12. Powderhorn notes that Absolute's Intervention includes an incorrect proceeding number and caption, and that the title of the Intervention indicates that it was filed by Home James Transportation Services, Ltd. (Home James) in another proceeding. Powderhorn asserts that Absolute substituted its name for Home James in a filing that Home James made in Proceeding No. 20A-0003CP. *Id.* at ¶¶ 4-5. Powderhorn argues that Absolute's Intervention describes the authority sought in Proceeding No. 20A-0003CP, not in this proceeding, and that it describes Home James's authority, not Absolute's. *Id.* at ¶ 7. As a result, Powderhorn argues that Absolute's Intervention makes it impossible to determine whether any overlap exists between its authority and that which Powderhorn seeks here. *Id.* Powderhorn concludes that Absolute's Intervention fails to state the claimed legally protected right that may be impacted by this proceeding, in violation of Commission Rule 1401(b), 4 CCR 723-1. *Id.*

13. Powderhorn also argues that the PUC Certificate numbers which Absolute asserts that it owns, Certificate Nos. 01035 and 01716 are not common carrier permit numbers, but are luxury limousine permit numbers. *Id.* ¶ 5. Powderhorn argues that Absolute's failure to provide a common carrier permit number and a copy of its letter of authority puts the burden on the Commission and it to investigate whether its common carrier authority is in good standing. Powderhorn asserts that Absolute's authority cannot conflict with the Application because the type of authority the Application seeks, shuttle and charter authority, is different from luxury limousine authority. Powderhorn argues that a luxury limousine authority does not confer an exclusive right to serve.

14. For all these reasons, Powderhorn argues that Absolute's Intervention should be denied. *Id.*

15. Absolute has not filed a response or made any other filing addressing the issues that Powderhorn raises in its Opposition. Absolute has made no attempt to cure any defects in its Intervention, including filing a copy of its letter of authority. The time to file a response has elapsed. Rule 1400(b) 4 CCR 723-1 (allowing 14 days to respond).

16. The ALJ finds that Absolute's Intervention asserts facts unrelated to this proceeding and the Application here. For example, it states that the Commission provided public Notice of the Application on January 21, 2020, and that the Application seeks authority to provide call-and-demand charter service between the ski resorts at Arapahoe Basin, Beaver Creek, Breckenridge Copper Mountain, Keystone, Loveland, Ski Cooper, Vail, and Winter Park and Denver International Airport. Absolute's Intervention at ¶1. As already noted, the Commission provided public Notice of the Application on March 9, 2020, and the authority the Application seeks is not the authority which Absolute's Intervention describes. *Supra*, at ¶¶ 1-2. Given these significant errors, the ALJ finds it unreasonable to rely on Absolute's assertion that it owns a certificate of public convenience and necessity which conflicts with the authority sought here. Indeed, Rule 1401(e)(I)'s requirement that interveners file a copy of their letter of authority with their intervention eliminates the need to rely on an intervener's assertions about the nature of its authority. 4 CR 723-1. Lacking that, the Commission cannot determine if an intervener has properly intervened, whether of right or permissively.

17. The ALJ concludes that Absolute's Intervention fails to establish that it has an authority in conflict with the Application or that its authority is in good standing. As such, the ALJ concludes that Absolute's Intervention does not meet the requirements of Commission

Rule 1401(e)(I), 4 CCR 723-1. As a result, Absolute has not established that it may intervene of right. For the same reasons, the ALJ finds that Absolute has also failed to establish that this proceeding may substantially impact its pecuniary or tangible interests, and as such, has failed to establish that it may permissively in this proceeding under Rule 1401(c). Because Absolute has failed to establish that it may intervene of right or permissively, the ALJ will deny Absolute's Intervention. Absolute is not a party to this proceeding.

C. Prehearing Conference

17. Although Absolute is not a party, Pali still is. This renders the Application contests. As a result, the ALJ will hold an evidentiary hearing on whether the Application should be granted. In anticipation of the evidentiary hearing, the ALJ is scheduling a prehearing conference in accordance with Rule 1409(a), 4 CCR 723-1. The parties will appear at the prehearing conference from remote locations by video conference or telephone. Parties may not appear in person for the prehearing conference. The ALJ encourages the parties to attend the hearing by video conference, as this will provide helpful information on appropriate next steps, including whether the evidentiary hearing may be held by video conference. Indeed, given the uncertainty created by the COVID-19 pandemic relating to future public gatherings, it is helpful for the forward movement of this proceeding to determine at the prehearing conference whether the parties are capable of participating in an evidentiary hearing by video conference.

18. The remote prehearing conference will be held using the web-hosted video conferencing service, GoToMeeting. Information on how to use GoToMeeting to attend the hearing by video conference is provided in Attachment A to this Decision. The web link and access code to attend by video conference are included in Ordering ¶ 3, below. Instructions to attend by telephone are also included below. The ALJ strongly encourages the parties planning to

attend the prehearing conference by video conference to test their capability to use GoToMeeting before the remote prehearing conference.

19. At the prehearing conference, a hearing date will be scheduled, and deadlines to file and exchange witness and exhibits lists and exhibits will be established. As a result, the parties must be prepared to discuss how much time they will require to present their evidence at hearing, the timing for a hearing, and the referenced deadlines. Any party may raise other issues relevant to this proceeding at the prehearing conference, including any agreements impacting this proceeding. The ALJ encourages the parties to discuss and agree to a proposed procedural schedule and hearing date before the prehearing conference.

20. *All parties are on notice that* failure to appear at the prehearing conference may result in decisions adverse to their interests, including granting the complete relief opposing parties seek. This may include dismissing the Application for having failed to prosecute it, granting the authority the Application seeks, or dismissing an intervener as a party for abandoning its intervention.

21. *All parties are on notice that* the ALJ will deem any party's failure to appear at the prehearing conference to be a waiver of that party's objection to the rulings made during the prehearing conference.

D. Other Advisements

22. The Commission's Rules of Practice and Procedure, 4 CCR 723-1, and Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6, apply to this matter. The ALJ expects the parties to be familiar with and comply with these Rules. Parties may obtain copies of the Rules from the Commission in paper form or on the Commission's web-site at <https://www.colorado.gov/pacific/dora/pucrules>.

23. As the party seeking a Commission-issued authority, Powderhorn bears the burden of proof by a preponderance of the evidence that all applicable legal requirements are met. §§ 13-25-127(1) and 24-4-205(7), C.R.S.; Rule 1500, 4 CCR 723-1; *see also* Rule 6203, 4 CCR 723-6. The preponderance standard requires the fact finder to determine whether the existence of a contested fact is more probable than its non-existence. *Swain v. Colorado Dep't 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. *Schocke v. Dep't of Revenue*, 719 P.2d 361, 363 (Colo. App. 1986). Although the preponderance standard applies, the evidence must be substantial. Substantial evidence is evidence that a reasonable person might accept as adequate to support a conclusion; it must be enough evidence to justify, if the 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 Utilities Comm'n*, 996 P.2d 1270, 1278 (Colo. 2000).

II. ORDER

A. It Is Ordered That:

1. Consistent with the above discussion, Absolute Prestige Limousine Ltd.'s (Absolute) Intervention is denied; Absolute is not a party to this proceeding.

2. On or by the close of business on May 11, 2020, Pali-Tours Ltd. (Pali) is required to either have an attorney file an entry of appearance on its behalf, or make a filing establishing that it is eligible to be represented by a non-attorney consistent with Rule 1201(b), 4 *Code of Colorado Regulations* 723-1, and § 13-1-127(2), C.R.S. To be eligible to be represented by a non-attorney, Pali's filing must establish that: Pali is a closely-held entity with no more than three owners; the amount in controversy here is less than \$15,000; and that the person identified to represent Pali has authority to do so.

3. A remote prehearing conference is scheduled as follows:

DATE: May 12, 2020

TIME: 2:00 p.m.

METHOD: Join by video conference online at:
<https://global.gotomeeting.com/join/363387509>
(If necessary, use 363387509 as the access or ID code)

OR

Join by telephone:
Dial +1 571-317-3122, and
when prompted, enter access or ID code: 363387509

4. 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