

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20A-0097CP

IN THE MATTER OF THE APPLICATION OF ESTES PARK GUIDED TOURS 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 INTERVENTIONS; REGARDING REPRESENTATION;
AND REQUIRING PARTIES TO CONFER AND TO FILE A
JOINT STATUS REPORT ON PROCEDURAL MATTERS**

Mailed Date: May 7, 2020

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I. STATEMENT

A. Procedural History

1. On March 9, 2020, Estes Park Guided Tours (Applicant or EP Guided Tours) filed an Application for a Certificate of Public Convenience and Necessity to Operate as a Common Carrier by Motor Vehicle for Hire (Application). That filing commenced this proceeding.

2. On March 16, 2020, the Commission issued its Notice of Application Filed (Notice). As originally noticed, the Application was:

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 the Estes Park Visitors Center, 500 Big Thompson Avenue, Estes Park, Colorado, on the one hand, and all points in Rocky Mountain National Park and Grand Lake, Colorado, on the other hand.

The 30-day intervention deadline set by the Notice expired on April 15, 2020.

3. During the Commission's weekly meeting held on April 22, 2020, the Commission deemed the Application complete and referred it to an Administrative Law Judge (ALJ) for disposition. Subsequently, the undersigned ALJ was assigned to preside over this proceeding.

4. Applicant did not file testimony and exhibits with its Application and, therefore, seeks a Commission decision within 210 days after the Application was deemed complete, or no later than November 18, 2020.¹

5. On March 23, 2020, Estes Valley Transport, Inc. (EV Transport), through counsel, filed its Entry of Appearance and Intervention. EV Transport's Certificate PUC No. 54696 was attached to the Intervention. EV Transport also filed an Exhibit and Witness Summary, with the most recent version of Certificate PUC No. 54696.

6. EV Transport asserts that the operating rights sought by Applicant would partially overlap the rights granted to it under Certificate PUC No. 54696. EV Transport argues that it has legally protected rights in the subject matter of the Application and that its rights would be

¹ See § 40-6-109.5(2), C.R.S. (2019)

affected if the Application were to be granted. EV Transport argues that the Application should not be granted for several reasons.²

7. On March 23, 2020, EV Transport filed with the Commission an application to suspend operations under Certificate PUC No. 54696 from March 19, 2020 through May 1, 2020 due to the coronavirus pandemic.³ The Commission noticed this application on March 30, 2020. The Commission has never issued a decision on this application. Since the suspension sought by EV Transport ended on May 1, 2020, the application is now moot.

8. After a review of Certificate PUC No. 54696 and the authority granted therein, the ALJ agrees that the authority sought in the Application does overlap a portion of the authority granted to EV Transport; that is, under Section III for providing transportation of passengers in call-and-demand sightseeing service between all points within a 10-mile radius of the intersection of U.S. Highways 34 and 36 in Estes Park, Colorado, and between said points, on one hand, and all points within a 75-mile radius of the intersection of U.S. Highways 34 and 36 in Estes Park, Colorado, on the other hand. The ALJ finds that EV Transport is an intervenor by right.

9. On April 9, 2020, Ms. Kimberly O'Malley filed an Objection and Protest against granting the Application. Ms. O'Malley did not file an intervention pleading.

10. On April 13, 2020, Fun Tyme Trolleys, LLC, doing business as Estes Park Trolleys (EP Trolleys), through counsel, filed its Entry of Appearance and Intervention. EP Trolleys' Certificate PUC No. 55845S was attached to the Intervention. EP Trolleys also filed an Exhibit and Witness Summary, with Certificate PUC No. 55845S as an exhibit.

² EV Transport Intervention, ¶¶ 3 and 4 at pages 1 and 2.

³ Proceeding No. 20A-0117CP-SUSPENSION.

11. On April 7, 2020, EP Trolleys filed an application to suspend operations under Certificate PUC No. 55845S from April 1, 2020 through May 22, 2020 due to the COVID-19 pandemic. The Commission granted the suspension application in Decision No. C20-0337 (mailed on May 6, 2020) in Proceeding No. 20A-0157CP-SUSPENSION. Rule 1401(e)(II) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1, provides that, in regulated intrastate transportation carrier proceedings: “A common carrier holding either temporary or suspended authority in conflict with the authority sought in the application shall not have standing to intervene as of right, but may file a motion to permissively intervene.” Since EP Trolleys’ Certificate PUC No. 55845S is under suspension, EP Trolleys lacks standing to intervene by right. Here, EP Trolleys did not request alternatively to intervene permissively. Therefore, EP Trolleys Intervention by right will be denied.

12. On April 15, 2020, Aspire Tours LLC (Aspire), through counsel, filed its Petition for Intervention and Entry of Appearance. Aspire’s Certificate PUC No. 55865 was attached to the Petition for Intervention.

13. Aspire asserts that the operating rights sought by Applicant would overlap the rights granted to it under Certificate PUC No. 55865 to the extent that Applicant proposes to provide call-and-demand sightseeing service in Rocky Mountain National Park and in Larimer and Grand Counties. Aspire argues that it has a legally protected right in the subject matter of the Application and that its rights would be affected if the Application were to be granted. Aspire argues that the Application should not be granted for several reasons.⁴

⁴ Aspire Intervention, ¶¶ 3 and 4 at pages 1 and 2.

14. After a review of Certificate PUC No. 55865 and the authority granted therein, the ALJ finds that Aspire does *not* have the authority to transport passengers in call-and-demand sightseeing service between Estes Park, Colorado, on the one hand, and all points in Rocky Mountain National Park and Grand Lake, Colorado, on the other hand, which is within the authority Applicant seeks.⁵ Rather, Certificate PUC No. 55865 grants to Aspire the authority to transport passengers in call-and-demand sightseeing service that *originates* in a number of Colorado Counties *other than* Larimer County, in which Estes Park is located. Section II of Certificate PUC No. 55865 does grant to Aspire the authority to transport passengers in call-and-demand sightseeing service *originating* in eight Front Range counties to all points in a number of Colorado counties, including Larimer and Grand Counties, and then returning to the origination point.⁶ The ALJ finds, however, that Certificate PUC No. 55865 does not overlap the authority sought in the Application. The ALJ finds, therefore, that since there is no overlap with the authority sought in the Application, Aspire is *not* an intervenor by right.

15. Alternatively, Aspire argues, if the Commission finds that it has not demonstrated that it should be permitted to intervene by right, that the Commission should grant it permissive intervention.

16. Rule 1401(c) of the Rules of Practice and Procedure, 4 CCR 723-1, states the minimum standards for permissive intervention in Commission proceedings and requires that:

A motion to permissively intervene shall state the specific grounds relied upon for intervention; the claim or defense within the scope of the Commission's jurisdiction on which the requested intervention is based, including the specific interest that justifies intervention; and why the filer is positioned to represent that interest in a manner that will advance the just resolution of the proceeding.

⁵ Rocky Mountain National Park is located in both Larimer and Grand Counties and Grand Lake, Colorado, is located in Grand County.

⁶ See Certificate PUC No. 55865, pages 2 and 3, attached to Aspire's Intervention. The restrictions to Certificate PUC No. 55865 are not relevant to this Application.

The motion must demonstrate that the subject proceeding may substantially affect the pecuniary or tangible interests of the movant (or those it may represent) and that the movant's interests would not otherwise be adequately represented. ... The Commission will consider these factors in determining whether permissive intervention should be granted. Subjective, policy, or academic interest in a proceeding is not a sufficient basis to intervene. Motions to intervene by permission will not be decided prior to expiration of the notice period.

(Emphasis added.)

17. The Commission and its ALJs have the discretion to grant or to deny motions for permissive intervention.⁷ Pursuant to Rule 1401(c), that discretion is based upon the ALJ's determination of whether the person seeking permissive intervention has satisfied the required standards of Rule 1401(c). Pursuant to Rule 1500, 4 CCR 723-1, the person seeking leave to intervene by permission bears the burden of proof with respect to the relief sought and their motion's compliance with the requirements of Rule 1401(c).⁸

18. An initial motion for permissive intervention, filed pursuant to Rule 1401(c), must show that the subject proceeding may substantially affect the tangible or pecuniary interests of the movant. If an intervenor is granted a permissive intervention without meeting the full requirements of Rule 1401(c), the litigation costs to the applicant and other intervenors, as well as the consumption of the Commission's resources, will needlessly increase.

19. Aspire's Petition for Intervention makes no argument about how or why this proceeding may substantially affect its tangible or pecuniary interests. It does not even mention the words "substantially affect" or "tangible interests," or "pecuniary interests." Neither the Commission nor the ALJ has a duty to "read between the lines" or to attempt to divine whether

⁷ *Public Service Co. v. Trigen-Nations Energy Co., L.L.P.*, 982 P.2d 316, 327 (Colo. 1999).

⁸ Decision No. R20-0073-I (mailed on January 30, 2020), ¶ 25 at page 10, in Consolidated Proceeding Nos. 19F-0620E and 19F-0621E (Denying motions for permissive intervention for failure to satisfy the standards required by Rule 1401(c)).

statements in the intervention pleading satisfy the required standards of Rule 1401(c). The movant has the burden of proof to demonstrate the standards of Rule 1401(c) have been satisfied. Here Aspire failed in its burden of proof, and its request to be granted permissive interventions is denied.

20. EP Guided Tours and EV Transport are the Parties to this proceeding.

B. Legal Counsel/Self Representation.

21. The Application states that Applicant is a Colorado limited liability company (LLC). The Application was signed by Ben Legzdins, as “Owner.”⁹ EP Guided Tours is a Party and is not represented by counsel in this proceeding.

22. This Application is an adjudicatory proceeding before the Commission.

23. Rule 1201(a) of the Rules of Practice and Procedure, 4 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 member¹⁰ 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);¹¹ (2) no more than \$15,000 is in controversy in the proceeding; and (3) the managing member has the authority to represent the interests of the LLC.¹² This requirement is mandatory. If a party does not meet the criteria of this Rule, any filing made by a

⁹ See Application filed on March 9, 2020, at pages 2 and 7.

¹⁰ 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[.]”

¹¹ Section 13-1-127(1)(a), C.R.S.

¹² Section 13-1-127(2.3)(c), C.R.S.

non-attorney on behalf of that party is void and of no legal effect, and a non-attorney may not represent the party in Commission adjudicatory proceedings.¹³

24. Applicant has the burden to prove that EP Guided Tours 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 must 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 officer¹⁴ 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.¹⁵

25. The Application satisfactorily established that EP Guided Tours is entitled to proceed without an attorney, pursuant to Rule 1201(b)(II), 4 CCR 723-1,¹⁶ and that Ben Legzdins, the Owner, may represent EP Guided Tours in this proceeding.

26. EV Transport is represented by legal counsel. EP Guided Tours may retain legal counsel to represent its interests in this proceeding, and is strongly encouraged to do so. If EP Guided Tours retains counsel, its counsel shall file an entry of appearance and serve the same on counsel for EV Transport no later than **May 15, 2020**.

¹³ See, e.g., Decisions No. C05-1018 (issued August 30, 2005) in Proceeding No. 04A-524W; No. C04-1119 (issued September 28, 2004) in Proceeding No. 04G-101CP; and No. C04-0884 (issued August 2, 2004) in Proceeding No. 04G-101CP.

¹⁴ 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.

¹⁵ See § 13-1-127(2.3)(c), C.R.S.

¹⁶ See Application filed on March 9, 2020, at page 7.

27. If EP Guided Tours does not retain counsel, EP Guided Tours and Mr. Legzdins are advised and on notice that they will be bound by, and held to, the same procedural and evidentiary rules that all attorneys must follow in Commission proceedings. EP Guided Tours and Mr. Legzdins will not be held to a lesser standard because EP Guided Tours has chosen not to be represented by an attorney in this proceeding.

C. Process for Setting a Procedural Schedule and Scheduling the Hearing.

28. It is necessary to schedule an evidentiary hearing in this proceeding. To schedule the hearing date and location, the ALJ will order EP Guided Tours to confer with counsel for EV Transport regarding two sets of consecutive hearing dates when the Parties and their witnesses will be available **during the weeks of July 26, 2020; August 2, 2020; or August 9, 2020.**¹⁷

29. EP Guided Tours and counsel for EV Transport shall file a Joint Status Report, **no later than May 15, 2020**, informing the undersigned ALJ of the results of their conferral. If the Parties agree to the proposed hearing dates within the date ranges noted above, the Joint Status Report shall identify the agreed-upon dates. The Joint Status Report should also state the estimated number of days needed for the hearing. The ALJ will choose, if possible, one of the dates proposed in the Joint Status Report.

30. If counsel for EV Transport fails to confer with EP Guided Tours, Applicant shall file an individual Status Report, **no later than May 15, 2020**, stating: (a) the reasonable, good faith efforts made to confer with counsel for EV Transport; and (b) EP Guided Tours' available

¹⁷ EP Guided Tours did not request a specific location for the hearing. See Application filed on March 9, 2020, ¶ 18 at page 6. In ordinary circumstances, a Commission hearing room in Denver is the default location for hearings. As observed earlier in this Decision, depending on the status of Governor Polis' and the Commission's responses to the continuing coronavirus pandemic, the hearing may be held remotely via video conference.

dates for the hearing within the date ranges noted above and the estimated number of days needed for the hearing. If EP Guided Tours fails to confer with counsel for EV Transport, counsel for EV Transport shall file an individual Status Report, **no later than May 15, 2020**, stating that EP Guided Tours did not confer with it and identifying EV Transport's available dates for the hearing within the date ranges noted above and the estimated number of days needed for the hearing. The ALJ will choose, if possible, one of the dates proposed in the filed Status Report.

31. **The Parties are advised and are on notice that** failure to file the Joint Status Report, or individual Status Report, or failure to agree on proposed hearing dates by the deadline ordered in this Decision will result in the ALJ selecting a hearing date without further input from the Parties. In that event, after scheduling the hearing, the ALJ will not consider future requests to reschedule the hearing, unless upon filing a motion with a showing of good cause.

32. After selecting the date(s) for the hearing, the ALJ will issue an Interim Decision that schedules the dates(s) and location of the evidentiary hearing and establishes a procedural schedule for each Party to file its list of witnesses, detailed summaries of the testimony of its witnesses, and copies of the exhibits that it intends to offer into evidence at the hearing. That decision will also advise the Parties whether the hearing will be in-person or remotely via video conference.

33. The Notice established a schedule for filing lists of witnesses and copies of exhibits, consistent with Rule 1405(k) of the Rules of Practice and Procedure, 4 CCR 723-1. The Notice required Applicant to file and to serve its list of witnesses and copies of its exhibits not later than ten days after April 15, 2020 (the expiration of the notice period), or in this case by Monday April 27, 2020. The Notice required intervenors to file and to serve their list of

witnesses and copies of its exhibits not later than 20 days after the notice period expires, or in this case by May 5, 2020.

34. Given the process adopted by the ALJ in this proceeding for scheduling the evidentiary hearing and establishing the procedural schedule, the ALJ will vacate the schedule in the Notice dated March 16, 2020 for filing lists of witnesses and copies of exhibits for this proceeding.

D. Additional Advisements. (Please read and understand these Advisements.)

35. **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 a non-attorney who has been given permission to represent Applicant in this proceeding. 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>), as well as in hard copy from the Commission upon request.

36. **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. Emailing pleadings and other documents to the Commissioners, the Director of the Commission, an ALJ, or other employees of the Commission **does not** constitute proper filing under Rule 1204, 4 CCR 723-1.

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

38. **Each Party is specifically advised** that, pursuant to Rule 1400(b) of the Rules of Practice and Procedure, 4 CCR 723-1, in this proceeding the responding Party (*i.e.*, the Party that did not file a motion) has the procedural right to file a written response to the motion no later than 14 days after service of the motion.

39. **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 <http://www.dora.colorado.gov/puc>.

40. **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 November 18, 2020. 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. The Parties are reminded that there must be sufficient time after the hearing for the issuance of a recommended decision, for filing of exceptions if needed, for filing of responses to any exceptions, and for the Commission to issue a decision on exceptions, if exceptions are filed.

II. ORDER

A. It Is Ordered That:

1. Estes Park Guided Tours LLC (EP Guided Tours) is entitled to proceed without an attorney, pursuant to Rule 1201(b)(II) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1. Ben Legzdins, a non-attorney and the Owner of EP Guided Tours, may represent EP Guided Tours in this proceeding.

2. The Intervention as of right filed on March 23, 2020, by Estes Valley Transport, Inc. (EV Transport) is acknowledged.

3. The Intervention as of right filed on April 13, 2020, by Fun Tyme Trolleys, LLC, doing business as Estes Park Trolleys, is denied, consistent with the reasons, findings, and conclusions discussed in this Decision.

4. The Petition for Intervention filed by Aspire Tours LLC on April 15, 2020, is denied, consistent with the reasons, findings, and conclusions discussed in this Decision.

5. The schedule for filing lists of witnesses and copies of exhibits by each of the Parties, established in the March 16, 2020 Notice of Applications Filed, is vacated.

6. As described in Paragraph Nos. I.C. 29 through 33 above, EP Guided Tours shall confer with counsel for EV Transport about suitable hearing dates and the estimated number of days needed for the hearing. EP Guided Tours and counsel for EV Transport shall file a Joint Status Report no later than May 15, 2020, identifying the Parties' available hearing dates within the date ranges provided in this Decision and the estimated number of days needed for the hearing. If the Parties agree to the proposed hearing dates within the date ranges provided in this Decision, the Joint Status Report shall identify the agreed dates.

7. If counsel for EV Transport fails to confer with EP Guided Tours, EP Guided Tours shall file an individual Status Report, no later than May 15, 2020, stating: (a) the reasonable, good faith efforts made to confer with counsel for EV Transport; and (b) EP Guided Tours' available dates for the hearing within the date ranges provided herein and the estimated number of days needed for the hearing.

8. If EP Guided Tours fails to confer with counsel for EV Transport, counsel for EV Transport shall file an individual Status Report, no later than May 15, 2020, stating: (1) that

EP Guided Tours did not confer with him; and (2) identifying EV Transport's available dates for the hearing within the date ranges provided herein and the estimated number of days needed for the hearing.

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

10. Failure of a Party or its counsel to comply with the requirements established in this Interim Decision or to make the filings as required by this Decision may result in consequences adverse to that Party's interests.

11. Additional procedural requirements may be issued in future Interim Decisions.

12. This Interim Decision is 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

Doug Dean,
Director