

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20A-0107CP

IN THE MATTER OF THE APPLICATION OF ORIGINAL GRAVITY BEER TOURS 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
REQUIRING FILINGS, ADDRESSING ORIGINAL
GRAVITY'S REPRESENTATION, AND SCHEDULING
REMOTE PREHEARING CONFERENCE**

Mailed Date: May 29, 2020

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I. STATEMENT, BACKGROUND, INDINGS, AND CONCLUSIONS

A. Procedural Background.

1. On March 17, 2020, Original Gravity Beer Tours LLC (Original Gravity) 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). On April 2, 2020, Original Gravity amended its Application. As amended, the Application¹ seeks authority to operate as a common carrier for the transportation of passengers in call-and-demand charter and shuttle service between all points within Larimer and Weld Counties, with service originating in Larimer County, State of Colorado. *See* Commission Notice of Applications and Petitions Filed, dated April 6, 2020.

2. The Commission gave public notice of the Application on April 6, 2020, consistent with Rule 1206 of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1. *Id.*

3. On April 7, 2020, Estes Valley Transport, Inc. (Estes Valley) filed an Entry of Appearance and Intervention (Estes Valley Intervention) objecting to the Application and seeking to intervene of right in this proceeding. Estes Valley filed a copy of its PUC authority with its Intervention.

4. On April 24, 2020, Fun Tyme Trolleys LLC, doing business as Estes Park Trolleys (Fun Tyme), filed an Entry of Appearance and Intervention (Fun Tyme's Intervention) objecting to the Application and seeking to intervene of right. Fun Tyme filed a copy of its PUC authority with its Intervention.

5. On May 11, 2020, Original Gravity filed an "Entry of Response to Intervention by Fun Tyme Trolleys d/b/a Estes Park Trolleys" (Response). The Response objects to Fun Tyme's Intervention.²

¹ All references herein to the Application are to the amended Application.

² Original Gravity's counsel did not file this Response; instead, the company's CEO, Christopher Hoops, a non-attorney filed it. As discussed later, Original Gravity has not established it may be represented by a non-attorney.

6. During the Commission's weekly meeting on May 13, 2020, the Commission deemed the Application complete and referred this matter to an Administrative Law Judge (ALJ) for disposition.

7. Also on May 13, 2020, Fun Tyme filed an "Amendment to the Entry of Appearance and Intervention" (Amendment). The Amendment supplements Fun Tyme's original Intervention by adding a request to permissively intervene. The Amendment fails to include a certificate of service. Because the Amendment was filed electronically using the Commission's E-Filing System, the E-Filing system automatically generates a certificate of service. That certificate of service does not state that counsel for Original Gravity was served with the Amendment.

8. On May 19, 2020, counsel for Original Gravity, Nicholas Ores, filed a Notice of Withdrawal (Notice). The Notice indicates that counsel withdraws as attorney of record for Original Gravity in this proceeding.

B. Interventions

9. Commission rules require an intervener in a transportation proceeding to: include a copy of its letter of authority with its intervention; show that its authority is in good standing; identify specific parts of the authority in conflict with the application; explain the consequences to the carrier and the public interest if the application is granted; and, if applicable, include a description of the services the intervener is ready, willing, and able to provide or has provided to the persons or class of persons supporting the application. Rule 1401(e)(I) and (III), 4 CCR 723-1.

10. Estes Valley generally asserts that the Application is in conflict with its authority, but fails to identify the specific parts of its authority in conflict with the Application, in violation

of Rule 1401(e)(I), 4 CCR 723-1. *See generally* Estes Valley Intervention. The Intervention states that granting the Application would endanger Estes Valley's investments and the public interest, and that there is no unmet need for the services the Applications seeks to provide. The Intervention also states that Estes Valley is willing and able to provide its authorized service, is capable of handling a substantially greater volume of traffic, and has sufficient equipment and capacity to meet the needs of the traveling public within the scope of its authority. The ALJ construes this as Estes Valley's description of the services the intervener is ready, willing, and able to provide to the persons or class of persons supporting the application. Estes Valley incorporates its PUC letter of authority into its Intervention.

11. Fun Tyme's Intervention is nearly identical to Estes Valley's; it makes the same assertions that Estes Valley made, as described in ¶ 10 above. While Fun Tyme's Intervention generally asserts that its authority is in conflict with the Application, it also fails to identify specific parts of the Application in conflict with Fun Tyme's authority, in violation of Rule 1401(e)(I), 4 CCR 723-1. Fun Tyme's Amendment fails to address to this issue.

12. The ALJ construes Fun Tyme's statement that it is willing and able to provide its authorized service, is capable of handling a substantially greater volume of traffic, and has sufficient equipment and capacity to meet the needs of the traveling public within the scope of its authority as Fun Tyme's description of the services it is ready, willing, and able to provide to the persons or class of persons supporting the Application. Like Estes Valley, Fun Tyme incorporates its PUC letter of authority into its Intervention.

13. The ALJ finds that both Interventions meet the majority of the requirements in Rule 1401(e), 4 CCR 723-1. But as discussed above, both Interventions fail to identify specific parts of their PUC authority in conflict with the Application, in violation of Rule 1401(e)(I),

4 CCR 723-1. As such, the ALJ will require Fun Tyme and Estes Valley to make a filing that includes this missing information, as required by Rule 1401(e)(I).³

14. *Estes Valley and Fun Tyme are on notice* that if they fail to make the filing required by this Decision by the stated deadline, they may not be permitted to intervene in this proceeding.

15. Finally, Fun Tyme's failure to include a certificate of service showing it served counsel for Original Gravity with its Amendment (and any attachments thereto) violates Rule 1205(d) and (e), 4 CCR 723-1. Specifically, Rule 1205(d) requires that when an attorney represents a party, service must be made upon the attorney. And, Rule 1205(e) requires a party to provide proof of service in the form of a certificate of service; where no such certificate is provided, it is presumed that the document was not served. Rule 1205(e), 4 CCR 723-1. While there is a certificate of service which was systematically generated through the E-Filing System, it does not show that counsel for Original Gravity was served. As such, the ALJ presumes that counsel was not served with the Amendment. *Id.* Fun Tyme will be ordered to submit a certificate of service showing that counsel for Original Gravity has been served with the Amendment and attachments.

C. Notice of Withdrawal and Original Gravity's Representation.

16. Commission Rule 1201(d) governs an attorney's withdrawal as counsel in Commission proceedings. Among other requirements, the withdrawing attorney must "specifically advise the party represented of its right to object." Rule 1201(d), 4 CCR 723-1. Objections to withdrawal of an attorney must be filed with ten days of the date the notice of

³ While Fun Tyme also seeks to permissively intervene, the critical missing information speaks to whether this proceeding may substantially impact Fun Tyme's pecuniary or tangible interests, which is relevant to whether Fun Tyme may permissively intervene. *See* Rule 1401(c), 4 CCR 723-1.

withdrawal is filed. *Id.* If an objection is filed, the Commission must approve counsel's withdrawal or a substitution of counsel. *See id.* Thus, if no objection is filed, an attorney's notice of withdrawal becomes effective without the need for a Commission order.

17. Counsel's Notice fails to advise Original Gravity of its right to object to the Notice, and counsel has made no other filing indicating that it advised Original Gravity of this right. This is contrary to Rule 1201(d), 4 CCR 723-1.

18. To facilitate the forward movement of this proceeding, this Decision will serve as the required advisement to Original Gravity of its right to object to counsel's Notice of Withdrawal. Because the record does not establish that Original Gravity was advised of its right to object to counsel's Notice of Withdrawal, the ALJ will extend the time for Original Gravity to file an objection to the Notice of Withdrawal. If Original Gravity does not object to the Notice by the below deadline, counsel's withdrawal will become effective without the need for an order approving the withdrawal.

19. Counsel's withdrawal, if effective, raises an additional issue that must be addressed. Specifically, Commission Rule 1201(a) requires parties in proceedings before the Commission to be represented by an attorney. Rule 1201, 4 CCR 723-1. There are exceptions to this general rule. As relevant here, a non-attorney may represent the interests of a closely-held entity after demonstrating eligibility to do so in accordance with § 13-1-127(2), C.R.S. Rule 1201(b)(II), 4 CCR 723-1. To be eligible to be represented by a non-attorney under Rule 1201(b)(II), Original Gravity must establish that it 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 Original Gravity has authority to do so. § 13-1-127(2), C.R.S.; Rule 1201(b)(II), 4 CCR 723-1.

20. Original Gravity's filings to date do not establish that it is eligible to be represented by a non-attorney in this proceeding under Rule 1201(b)(II). In fact, information in the Application indicates that Original Gravity is not eligible because the Application states that Original Gravity has four owners. *See* Application at ¶ 12. As such, if counsel's withdrawal becomes effective, Original Gravity must either have new counsel enter an appearance on its behalf, or establish its eligibility to be represented by a non-attorney. If Original Gravity opts to attempt to establish it is eligible to be represented by a non-attorney, it must address statements in the Application indicating that it has four owners.

21. *Original Gravity is on notice that* if counsel's withdrawal becomes effective, and it fails to have new counsel enter an appearance on its behalf, or it fails to make a filing establishing it is eligible to be represented by a non-attorney as required by this Decision, its Application may be dismissed without prejudice.

D. Prehearing Conference

22. Because the Application is contested, an evidentiary hearing must be held on whether it 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. 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.

23. The remote prehearing conference will be held using the web-hosted video conferencing service, GoToMeeting. Information and requirements for using GoToMeeting to attend the hearing by video conference is provided in Attachment A to this Decision. The ALJ strongly encourages the parties 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 exhibit 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 confer with each other and attempt to reach an agreement on a proposed procedural schedule and hearing date. To that end, the parties are on notice that the ALJ anticipates completing an evidentiary hearing no later than August 20, 2020 to allow enough time for a final Commission decision to issue by the statutory deadline in § 40-6-109.5, C.R.S.

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.

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.

E. Other Advisements to Parties and Counsel

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 already noted, each party has made filings which fail to comply with the Commission's Rules. This has already created avoidable delay and wasted resources. The ALJ strongly encourages the parties and counsel to review the Commission's Rules of Practice and procedure to ensure that no further violations occur.

24. The ALJ notes that counsel of record for Original Gravity does not appear to be a registered filer with the Commission's free E-Filing System. The Commission's E-Filing System facilitates efficiency in proceedings because it allows for immediate service of Decisions and other documents through the E-Filing System. Information on registering to use the Commission's free E-Filing System may be found on the Commission's website at: <https://www.dora.state.co.us/pls/efi/EFI.homepage>.

23. As the party seeking a Commission-issued authority, Original Gravity 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, on or by the close of business on June 4, 2020, Estes Valley Transport, Inc. and Fun Tyme Trolleys LLC, doing business as Estes Park Trolleys (Fun Tyme) must make a filing which specifically identifies the portions of their Commission authorities in conflict with the above-captioned Application.

2. On or by the close of business on June 5, 2020, Fun Tyme must file a certificate of service showing that counsel for Original Gravity Beer Tours LLC (Original Gravity) has been served with its Amendment to the Entry of Appearance and Intervention and attachments thereto.

3. The time for Original Gravity to object to its counsel's Notice of Withdrawal filed May 19, 2020 is extended to close of business on June 5, 2020. If no objection is filed by this deadline, counsel's Notice of Withdrawal will automatically become effective.

4. If the Notice of Withdrawal becomes effective, on or by the close of business on June 9, 2020, Original Gravity must 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, Original Gravity's filing must establish that: Original Gravity is a closely-held entity with no more than three owners; the amount in

controversy here is less than \$15,000; and the person identified to represent Original Gravity has authority to do so.

5. A remote prehearing conference is scheduled as follows:

DATE: June 11, 2020

TIME: 1:30 p.m.

METHOD: Join by video conference online at:
<https://app.gotomeeting.com/?meetingId=947848485>
(If necessary, use 947848485 as the access or ID code)

6. To minimize the potential for disruption by non-parties, the parties and counsel may not distribute the GoToMeeting link, access, or ID code to anyone not participating in the hearing.

7. All parties and counsel must comply with the requirements in Attachment A to this Decision, which is incorporated herein.

8. 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

Doug Dean,
Director