

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 POWDERHORN'S MOTION FOR HIGHLY
CONFIDENTIAL PROTECTION**

Mailed Date: June 23, 2020

I. STATEMENT, BACKGROUND, FINDINGS, AND CONCLUSIONS

A. Procedural History.

1. Only the procedural history necessary to understand this Decision is included.

This matter concerns Powderhorn Pacific LLC's (Powderhorn) Application for New Permanent Authority to Operate as a Common Carrier by Motor Vehicle for Hire (Application). The Administrative Law Judge (ALJ) scheduled this matter for a remote evidentiary hearing, to be held by video-conference on June 30, 2020. Decision No. R20-0364-I issued May 14, 2020. The ALJ also established filing deadlines and procedures to facilitate holding the hearing by video-conference. *Id.*

2. On June 9, 2020, Powderhorn filed its exhibits, consistent with the deadline to do so in Decision No. R20-0364-I. Among those exhibits, Powderhorn filed an exhibit designated as "highly confidential." *See* Powderhorn's Hearing Exhibit 1. Powderhorn did not file a motion seeking extraordinary protection for the exhibit designated as highly confidential. On June 15, 2020, the Administrative Law Judge (ALJ) issued a Decision noting Powderhorn's highly

confidential exhibit filing, and reminding it that Rule 1101 of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1, creates a process that parties must follow when seeking the Commission to afford extraordinary protection of information through a highly confidential designation. Decision No. R20-0442-I. The same Decision put Powderhorn on notice that unless it complies with Rule 1101, and ensures that the exhibit is disclosed to Pali-Tours Ltd., (Pali) its highly confidential designation of Hearing Exhibit 1 will be rejected and the exhibit may not be admitted into evidence.

3. On June 17, 2020, Powderhorn filed an Unopposed Motion for Highly Confidential Protection (Motion) with a proposed non-disclosure agreement for Pali to sign in order to access the alleged highly confidential exhibit.

4. Any party claiming that information is highly confidential bears the burden of proof to establish the need for highly confidential protection. Rule 1101(d), 4 CCR 723-1. Parties seeking such protection must file a motion demonstrating: that the relevant information is highly confidential; that Commission rules governing confidential information are insufficient to protect the highly confidential information; and that if the proposed extraordinary protections are adopted, they will afford appropriate protection. Rule 1101(b)(IV), 4 CCR 723-1. The motion must also: provide a detailed description of the information sought to be protected; state the specific relief sought; advise all other parties of the request and subject of the information at issue; include an affidavit identifying the people with access to the information and timeframe for extraordinary protection; include the form nondisclosure agreement sought to be executed; and include an exhibit with the highly confidential information or show why doing so is overly burdensome, impractical, or is too sensitive to file. Rule 1101(b)(I), (II), (III), (V), (VI), and (VII), 4 CCR 723-1.

5. In violation of Rule 1101(b)(I), (III), and (IV), Powderhorn's Motion does not: (1) provide a detailed description¹ of the information sought to be protected; (2) advise all other parties of the subject of the information at issue; or (3) include an affidavit identifying the people with access to the information and timeframe for extraordinary protection.²

6. While the ALJ appreciates that the Motion is unopposed, that is not the only consideration in determining whether the Motion should be granted. Granting the Motion has a greater impact. Specifically, because documents filed with the Commission are public records open to inspection per Rule 1100(n) and the Colorado Open Records Act, when the Commission grants a motion for extraordinary protection of highly confidential information, the documents are no longer available for public inspection. *See* Rule 1101(i) and (c), 4 CCR 723-1. Rule 1101's requirements enables the Commission to make decisions on whether to afford highly confidential status to a document in a transparent manner that informs the public that the extraordinary protection afforded is justified. Indeed, a motion which complies with Rule 1101 informs *both* the public and opposing parties of the grounds for highly confidential designation upon which the Commission relies. Powderhorn's Motion fails to do this.

7. Instead, the Motion merely concludes that the information is highly confidential, sensitive, and may provide competitors with an advantage. The Motion does not provide support for these conclusions (e.g., reasons why the information is sensitive and may provide competitors with an advantage). And, as mentioned above, the Motion fails to meet several requirements under Rule 1101, 4 CCR 723-1.

¹ The Motion includes only a passing reference to the nature of the alleged highly confidential information as a profit and loss statement. *See* Motion at 1.

² Powderhorn also failed to file an exhibit containing the information claimed highly confidential with its Motion, in violation of Rule 1101(b)(VII), but that failure is harmless given that Powderhorn filed it on June 9, 2020 with its other exhibits.

8. For the reasons discussed, the ALJ concludes that Powderhorn failed to meet its burden to establish that the information at issue is highly confidential and should be afforded extraordinary protection. As such, the Motion will be denied.³

9. Although the Motion will be denied, the ALJ addresses Powderhorn's proposed non-disclosure agreement, so that Powderhorn is on notice of matters relating to its proposed agreement in the event it files another motion under Rule 1101 with the same proposed agreement. The proposed non-disclosure agreement includes terms that are well beyond that which the Commission ordinarily approves for protection of highly confidential information. Language in the last two paragraphs of the proposed non-disclosure agreement purports to modify the burden of proof in future actions that may involve Powderhorn and Pali. *See* Exhibit A to Motion. Approving that language as part of the non-disclosure agreement in this proceeding may have unintended consequences that the ALJ will not risk.

II. ORDER

A. It Is Ordered That:

1. Consistent with the above discussion, Powderhorn Pacific LLC's Unopposed Motion for Highly Confidential Protection filed on June 17, 2020 is denied.

³ If Powderhorn still wishes to use the exhibit designated as highly confidential at the hearing, it must be disclosed to Pali.

2. 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