

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.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
MELODY MIRBABA
ACCEPTING PROPOSED AMENDMENTS AND
GRANTING APPLICATION SUBJECT TO CONDITIONS**

Mailed Date: July 8, 2020

I. STATEMENT, BACKGROUND, FINDINGS, AND CONCLUSIONS

A. Summary

1. This Decision grants Powderhorn Pacific, LLC's (Powderhorn) requests to amend its Application for a Certificate of Public Convenience and Necessity to Operate as a Common Carrier by Motor Vehicle for Hire (Application), and grants the Application, as amended by this Decision.

B. Background, Findings, Analysis, and Conclusions.

2. Powderhorn initiated this matter by filing its Application with the Public Utilities Commission (Commission) on March 5, 2020.¹ As filed, 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,

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

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. Application, ¶ 10.

3. After the Commission gave public notice of the Application, Pali-Tours, Ltd. (Pali) Filed an Entry of Appearance and Intervention (Intervention). Absolute Prestige Limousine, Ltd. (Absolute) also made a filing purporting to intervene in this matter. Powderhorn objected to Absolute's intervention. *See* Response in Opposition of Powderhorn Pacific LLC to the Intervention of Absolute Prestige Limousine Service Ltd.

4. By Decision No. R20-0324-I, the Administrative Law Judge (ALJ) rejected Absolute's intervention as failing to comply with Commission rules. Thus, the only parties to this proceeding are Powderhorn and Pali.

5. After holding a prehearing conference with the parties, on May 14, 2020, the ALJ scheduled a remote evidentiary hearing for June 30, 2020 on the merits of the Application, and established procedures and deadlines relating to that hearing. Decision No. R20-0364-I.

6. On June 25, 2020, Powderhorn filed an Unopposed Motion for Restrictive Amendment (First Motion). The First Motion states that it is unopposed. The First Motion seeks to add the following restriction to the Application's proposed authority, "[t]he authority is restricted to transportation of passengers with their bicycles, skis, snowboards, snowshoes or similar recreational equipment and may include transportation of passengers who obtain their bicycles, skis, snowboards, snowshoes or similar recreational equipment at one of the authorized terminating or originating points." First Motion, 2.

7. On June 29, 2020, Powderhorn filed an Unopposed Motion to Amend Proposed Authority, Vacate Evidentiary Hearing, and Waive Settlement Deadline (Second Motion). The

Second Motion states that it is unopposed, and seeks approval for additional amendments to the Application. Second Motion, ¶ 1. The Second Motion also states that if the Commission grants Powderhorn's requests to amend its authority therein and in the First Motion, that Pali agrees to withdraw its Intervention. *Id.* at ¶ 1 and 8. The Second Motion asserts that this obviates the need for an evidentiary hearing, and requests the evidentiary hearing be vacated. *Id.* at ¶ 10. It also asks that the June 24, 2020 deadline established by Decision No. R20-0364-I to file a settlement agreement be waived. *Id.* at ¶ 9.

8. Later on June 29, 2020, the ALJ granted the Second Motion's request to vacate the June 30, 2020 evidentiary hearing. Decision No. R20-0476-I.

9. Because the First and Second Motions are unopposed, the ALJ finds good cause to waive the response time to them, and will do so. Rule 1400(b) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1.

10. The below shows the amendments proposed in the First and Second Motions, with proposed additional language in strike-through format, and proposed added language underlined:

Transportation of passengers in call-and-demand shuttle and charter service that originates or terminates ~~within a 2-mile radius of~~ at the following locations:

1) ~~The intersection of 3rd and Main Street in Palisade, CO;~~

a. The Palisade Rim trailhead located at the intersection of U.S. Highway 6 and Rapid Creek Road;

b. The Palisade Plunge parking lot located between Kluge Avenue, Main Street, and the BNSF railway in Palisade, Colorado

c. Hotels, motels, and other lodging establishments renting rooms to the public located within a 2-mile radius of the intersection of 3rd Street and Main Street in Palisade, Colorado;

d. RV parks located within a 2-mile radius of the intersection of 3rd Street and Main Street in Palisade, Colorado;

e. Private residences located within a 2-mile radius of 3rd Street and Main Street in Palisade, Colorado holding current and valid short-term vacation rental permits.

and that originates or terminates within a 2-mile radius of the following locations:

2) Powderhorn Mountain Resort, located 48338 Powderhorn Rd, Mesa CO 81643;

3) The Mesa Top Trailhead managed by the United States Forest Service along Colorado Highway 65.

Restrictions:

I) The authority is restricted to transportation of passengers with their bicycles, skis, snowboards, snowshoes, or similar recreational equipment and may include transportation of passengers who obtain their bicycles, skis, snowboards, snowshoes, or similar recreational equipment at one of the authorized terminating or originating points.

II) Service that originates at one of the locations listed in Item (1) may not terminate at a location listed in Item (1).

Second Motion, ¶ 2.

11. Both Motions argue that the proposed amendments are restrictive, clear, understandable, and administratively enforceable.

12. 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.

13. The ALJ finds that the First Motion's proposed amendment, (shown as Restriction I above) is restrictive because it reduces the scope of the authority the original Application seeks to passengers with recreational equipment (or who obtain such equipment at one of the authorized locations). See First Motion, ¶ 3; Application, ¶ 10.

14. The Second Motion explains that the locations identified under Item 1(a) through (e) (above) are either specific locations or describe types of locations that are all within a two-mile radius of 3rd and Main Streets in Palisade, Colorado. Second Motion, ¶ 4. Because the Application seeks to limit transportation to a two-mile radius of 3rd and Main Streets in Palisade, Colorado, and the proposed amendments do not expand the scope of the proposed service territory beyond that two-mile radius, the ALJ finds that Item 1(a) through (e)'s proposed amendments are restrictive. *See* Second Motion, ¶¶ 2 and 4; Application, ¶ 10.

15. The final proposed change under Item 1 states: “and that originates or terminates within a 2-mile radius of” the locations listed in Items 2 and 3. Second Motion, ¶ 2. Because the Application seeks to limit transportation to a two-mile radius of the locations listed in Items 2 and 3, and the proposed amendment does not expand the scope of the proposed service territory beyond that two-mile radius, the ALJ finds that the referenced proposed amendment is restrictive. *See* Second Motion, ¶¶ 2 and 5; Application, ¶ 10.

16. The proposed amended under Restriction II (above) would prohibit Powderhorn from transporting passengers from locations under Item 1 to other locations under Item 1. Second Motion, ¶¶ 2 and 5. The ALJ finds this change is also restrictive because it is an additional limitation on the proposed authority.

17. For the reasons discussed, the ALJ concludes that none of the proposed amendments expand the scope of the original authority sought by the Application, but instead add layers of additional restrictions without going beyond the original proposed service territory. The ALJ finds that the proposed amendments are restrictive, clear and understandable, and administratively enforceable. The ALJ concludes that the proposed amendments meet the

remaining requirements discussed above. Consequently, the Application is amended as proposed in the First and Second Motions.²

18. The Second Motion also states that amending the Application as requested will resolve Pali's "concerns with the Application as filed," and that "Pali Tours has authorized Powderhorn to state that Pali Tours agrees to withdraw its intervention if the Commission accepts the above proposed modifications to Powderhorn's Application." Second Motion, ¶ 8. The Second Motion also asks that the ALJ "waive the June 24, 2020 deadline for filing a settlement agreement established by Decision No. R20-0364-I." *Id.* at ¶ 8. The ALJ construes this to mean that the parties' settlement agreement is in the Second Motion, that is: if Powderhorn's proposed amendments are accepted, that Pali withdraws its Intervention and objection to the amended Application. Indeed, there would be no need for Powderhorn to ask that the June 24, 2020 deadline to file settlement agreements be waived if the Second Motion did not also include the parties' agreement to resolve their disputes.

19. The June 24, 2020 deadline to file a settlement agreement was established to encourage the parties to timely discuss settlement and submit their agreement to the Commission before expending further resources to prepare for the June 30, 2020, hearing. The hearing has been vacated; as such, there is no need to enforce the deadline. *See* Decision No. R20-0476-I issued June 29, 2020. In fact, doing so at this stage would be meaningless. As such, the ALJ accepts the parties' settlement, and waives the June 24, 2020, deadline.

² The ALJ is making minor non-substantive modifications to the proposed amendments, such as including "or" before Item (1)(E), and between Items (2) and (3).

20. Because the Application has been amended as requested and the settlement is accepted, per the terms of the parties' agreement, Pali's Intervention is deemed withdrawn. This renders the amended Application uncontested.

21. Because the amended Application is uncontested, is verified, includes sufficient facts to make a determination on the relief sought, is supported by the required documents and information, and a hearing is not required or requested, the ALJ will consider the Application, as amended by this Decision, based on the record without a formal hearing. § 40-6-109(5), C.R.S., and Rule 1403, 4 CCR 723-1.

22. Powderhorn is a foreign limited liability corporation organized in Nevada, and has filed its Statement of Trade Name with the Colorado Secretary of State. Application, ¶ 6; Statement of Trade Name (filed March 10, 2020). The verified Application establishes that Powderhorn is a fully functional winter and summer ski and bicycle resort, which has administrative offices, marketing and sales services, a ticket and call center, guest services, multiple food and beverage outlets, lodging, and vehicle maintenance facilities. Application, ¶ 12. Powderhorn is familiar with the Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6, and agrees to be bound by, and comply with, those rules. *Id.* at ¶ 22. The verified Application establishes that Powderhorn has sufficient equipment with which to render the proposed service and is financially fit to conduct operations under the authority requested. *Id.* at ¶¶ 10 and 13; Confidential Powderhorn Pacific CPCN Financials filed March 5, 2020. Powderhorn's General Manager, Ryan Schramm, has approximately 15 years of management experience, including direct experience in the hospitality business and specific experience managing ski resorts. Application, ¶ 14; Ryan Schramm's Resume (attached to Application).

23. Based on all of this and the record as a whole, the ALJ concludes that Powderhorn is managerially, operationally, and financially fit to operate under the requested authority. Finally, a review of the verified Application indicates a need for the proposed service. Application, ¶ 11. Based on the record and the foregoing, the ALJ concludes that Powderhorn has met all other prerequisites for receiving the requested authority. *See e.g.*, Rule 6203, 4 CCR 723-6. As such, the ALJ recommends that the amended Application be granted, subject to the below conditions.

24. In accordance with § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record in this proceeding and recommends that the Commission enter the following order.

II. ORDER

A. The Commission Orders That:

1. The response time to the Unopposed Motion for Restrictive Amendment filed on June 25, 2020 and the Unopposed Motion to Amend Proposed Authority, Vacate Evidentiary Hearing, and Waive Settlement Deadline (Second Motion) filed on June 30, 2020 are waived. Both Motions are granted.

2. Powderhorn Pacific LLC's (Powderhorn) Application for a Certificate of Public Convenience and Necessity to Operate as a Common Carrier by Motor Vehicle for Hire (Application) is amended consistent with the above discussion. The June 24, 2020 deadline to file a settlement agreement is waived. The parties' settlement agreement included within the Second Motion is accepted, and Pali-Tours Ltd.'s Intervention is withdrawn.

3. Consistent with the above discussion, Powderhorn's Application, as amended by this Decision, is granted, subject to the conditions identified below. Powderhorn is granted a Certificate of Public Convenience and Necessity to Operate as a Common Carrier of Passengers by Motor Vehicle as follows:

Authority to operate as a common carrier by motor vehicle for hire for the
Transportation of
passengers in call-and-demand shuttle and charter service
that originates or terminates at the following locations:

- 1)
 - A. The Palisade Rim trailhead located at the intersection of U.S. Highway 6 and Rapid Creek Road;
 - B. The Palisade Plunge parking lot located between Kluge Avenue, Main Street, and the BNSF railway in Palisade, Colorado;
 - C. Hotels, motels, and other lodging establishments renting rooms to the public located within a 2-mile radius of the intersection of 3rd Street and Main Street in Palisade, Colorado;
 - D. RV parks located within a 2-mile radius of the intersection of 3rd Street and Main Street in Palisade, Colorado; or
 - E. Private residences located within a 2-mile radius of 3rd Street and Main Street in Palisade, Colorado holding current and valid short-term vacation rental permits.

And that originates or terminates within a 2-mile radius of the following locations:

- 2) Powderhorn Mountain Resort, located 48338 Powderhorn Road, Mesa CO 81643; or
- 3) The Mesa Top Trailhead managed by the United States Forest Service along Colorado Highway 65.

Restrictions:

- I) This authority is restricted to transportation of passengers with their bicycles, skis, snowboards, snowshoes, or similar recreational equipment and may include transportation of passengers who obtain their bicycles, skis, snowboards, snowshoes, or similar recreational equipment at one of the authorized terminating or originating points.
- II) Service that originates at one of the locations listed in Item (1) may not terminate at a location listed in Item (1).

4. Powderhorn must operate in accordance with all applicable Colorado laws and Commission rules.

5. Powderhorn may not commence operation under the authority granted until it has complied with the requirements of Colorado law and Commission rules, including without limitation:

- (a) causing proof of insurance (Form E or self-insurance) or surety bond (Form G) coverage to be filed with the Commission;
- (b) paying to the Commission, the motor vehicle fee for each vehicle to be operated under authority granted by the Commission, or in lieu thereof, paid the fee for such vehicle(s) pursuant to the Unified Carrier Registration Agreement;
- (c) having an effective tariff on file with the Commission. To this end, Powderhorn must file an advice letter and tariff on not less than ten days' notice. The advice letter and tariff must be filed as a new Advice Letter proceeding and must comply with all applicable rules. In calculating the proposed effective date, the date received at the Commission is not included in the notice period and the entire notice period must expire prior to the effective date. (Additional tariff information can be found on the Commission's website at www.colorado.gov/pacific/dora/common-carriers); and
- (d) paying the applicable issuance fee.

6. If Powderhorn does not cause proof of insurance or surety bond to be filed, pay the appropriate motor vehicle fees, file an advice letter and proposed tariff, and pay the issuance fee within 60 days of the effective date of this Decision, then the grant of the Permit will be void. For good cause shown, the Commission may grant additional time for compliance if the request for additional time is filed within 60 days of the effective date of this Decision.

7. The Commission will notify Powderhorn in writing when the Commission's records demonstrate compliance with ordering paragraph 5.

8. Proceeding No. 20A-0089CP is closed.

9. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

10. As provided by § 40-6-106, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

- a. If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the recommended decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.
- b. If a party seeks to amend, modify, annul, or reverse a basic finding of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge; and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

11. If exceptions to this Recommended Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)



ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge