

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03A-381BP

IN THE MATTER OF THE APPLICATION OF DARREL SEGERS AND TERRY SEGERS,
DOING BUSINESS AS DESIGNATED DRIVER SERVICES, FOR AUTHORITY TO
OPERATE AS A CONTRACT CARRIER BY MOTOR VEHICLE FOR HIRE.

**INTERIM ORDER OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
DENYING SECOND MOTION TO DISMISS,
GRANTING REQUEST TO AMEND
APPLICATION, GRANTING PETITION,
AND LIMITING WITNESSES AND EXHIBITS**

Mailed Date: January 23, 2004

I. STATEMENT

1. On August 22, 2003, Darrel and Terry Segers, doing business as Designated Driver Services (Designated Driver or Applicant), filed an Application to Operate as a Contract Carrier by Motor Vehicle for Hire (Application). The Applicant seeks authority to operate as a contract carrier for the transportation of passengers between all points in Mesa County, Colorado. Applicant seeks to serve 12 establishments: Mesa Theater & Club, Thunder Mountain Tavern, The Blue Moon, Boomers, Triple Tree Tavern, V.F.W. Post 1247, Cruiser's, Wrigley Field, Brass Rail, Cheers, Eagles Lodge 595, and Jimmy's Road House. Among others, documents designated "service contracts" between Applicant and the 12 named establishments are attached to the Application. The Application commenced this docket.

2. On September 8, 2003, the Commission gave public notice of the Application. *See* Notice of Applications Filed, dated September 8, 2003 (Notice), at 1. On October 2, 2003,

Tazco, Inc., doing business as Sunshine Taxi (Sunshine Taxi or Intervenor), timely filed an intervention by right. Sunshine Taxi opposes the Application and is the only intervenor.

3. On December 3, 2003, Applicant filed a request that the Application be amended to read: Darrel Segers, an individual, doing business as Designed Driver Services. Intervenor did not file a response to the request. No party will be prejudiced by granting this request. The request is in the nature of a limiting amendment to the Application, is clear, and is administratively enforceable. The request will be granted, and the Application will be amended.

4. On November 20, 2003, in Decision No. R03-1300-I at ¶ 24, the ALJ addressed the

Applicant's repeated reference to, and reliance on, testimony provided in previous or other proceedings before the Commission and information which it has provided to Commission Staff. As Applicant appears *pro se*, the ALJ advises Designated Driver that it must produce evidence at the hearing in this case to support its Application, even if it may have produced the same evidence in another case and even if it may have provided the same information to members of Commission Staff. As this proceeding is an adjudication, the only evidence which the ALJ may consider in rendering a decision is the evidence which is presented at the hearing in this case.

5. In that same Order, at ¶ 29, the ALJ ordered Designated Driver to file, on or before December 12, 2003, a final list of witnesses and copies of its exhibits. In that paragraph the ALJ specifically advised Applicant that, if it did not make the required filing, "the Commission, either on its own motion or on the motion of a party, may dismiss the Application or may take other appropriate action (for example, the Commission may limit the evidence which Designated Driver may present at the hearing)." In ¶ 31 of that Order, the ALJ provided specifics concerning, and outlined in some detail, the filing requirement. Finally, in ¶¶ 32, 33, and 34 of that Order (emphasis in original), the ALJ advised:

[32] No person (including Darrel Segers and Terry Segers) will be permitted to testify as a witness, except in rebuttal, unless that person has been identified on a witness list filed and served in accordance with this Order.

[33] No document will be received in evidence, except in rebuttal, unless filed and served in accordance with this Order.

[34] If a party fails to comply with a filing requirement of this Order, the Commission, upon the motion of any party or upon its own motion, may take appropriate action, which may include dismissal of the Application and dismissal of the intervention.

6. On December 3, 2003, Applicant filed its list of witnesses and copies of the exhibits it would offer at the hearing. Applicant did not supplement the December 3, 2003, filing at any time, notwithstanding the cited paragraphs in Decision No. R03-1300-I.

7. On December 24, 2003, Intervenor filed a Second Motion to Dismiss Application (Motion). On January 6, 2004, Applicant filed a Response to the Second Motion to Dismiss (Response).

8. On January 8, 2004, Intervenor filed a Petition for Receipt of Supplemental Argument to Second Motion to Dismiss (Petition) and its Argument to Its Second Motion to Dismiss (Supplemental Argument). Although provided the opportunity to do so (*see* Decision No. R04-0035-I), Applicant did not file a response to this petition. The Petition is unopposed and states good cause. No party will be harmed by granting the Petition. The Petition will be granted. Accordingly, in reaching her decision on the Motion, the ALJ considered the argument advanced in the Supplemental Argument.

9. Motions to dismiss for failure to state a claim, such as the present Motion, are disfavored. Such motions must be determined on the basis of the complaint (in this case, the

Application) and documents incorporated into the complaint.¹ With respect to the Motion, the following principles apply: statements in the Application must be viewed in the light most favorable to the Applicant; all assertions of material facts must be accepted as true; and the Motion must be denied “unless it appears beyond doubt that the [Applicant] cannot prove facts in support of the [Application] that would entitle [Applicant] to relief.” *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911 (Colo. 1996). With these principles in mind, the ALJ turns to consideration of the Motion.

10. Sunshine Taxi seeks to have the Application dismissed without prejudice. *See* Motion at 4. Sunshine Taxi relies upon two principal arguments: First, Sunshine Taxi argues that, in light of the list of witnesses and copies of the exhibits filed, Applicant cannot meet its burden of proof in this proceeding. *See* Motion at 3-4. Second, Sunshine Taxi argues that, in view of admissions made by Applicant in the Response, Applicant seeks to provide a type of transportation service which is beyond the scope of this proceeding as established in the Notice. *See* Supplemental Argument.

11. In its Response, Designated Driver states that the proof supporting the Application “is in the documentation already presented.” Applicant also states that “[e]xpecting the establishment to pay for each and every ride, establishment may as well close their [sic] doors.” *Id.* This latter statement is the alleged admission upon which Intervenor’s second argument rests.

¹ To the extent that the Motion is based on Colo.R.Civ.P. 12(b)(5) (failure to state a claim) and Intervenor relies upon material and statements outside the Application and its support documents, the Motion is a motion for summary judgment. *See* Colo.R.Civ.P. 12(b) (last sentence). The motion for summary judgment, to the extent one is presented, is denied. The statements made by Applicant and relied upon by Intervenor, while material, are unclear in meaning and subject to different interpretations. As a result, genuine issues of material fact exist which preclude the granting of summary judgment in this case. *See* Colo.R.Civ.P. 56(c). At the hearing, if Mr. Segers testifies, Intervenor will have the opportunity to explore the meaning of the statements made by Applicant.

12. Considering the legal principles outlined above and the Application and its supporting documentation, the ALJ will deny the Motion. In this case the Application and documentation submitted with the Application contain sufficient information to meet the minimal standards necessary to defeat a motion to dismiss for failure to state a claim.

13. This is not to say, however, that Designated Driver will be granted the requested permit if all it proves is the information in the Application and supporting documents. Under certain circumstances, Applicant has a burden to prove facts beyond those set out in the Application. *See, e.g.,* Rule 4 *Code of Colorado Regulations* (CCR) 723-23.4.1.3 (“If an intervenor establishes it has the ability and willingness to meet the distinctly specialized and tailored needs of the [applicant’s] potential customers, the applicant must then demonstrate that it is better equipped to meet such needs of the potential customers than [is] the intervenor.”). This is an issue which cannot be resolved simply by reviewing the Application and the incorporated documents; it is a fact issue which must be resolved at hearing² or by a properly supported motion for summary judgment.

14. Denying the Motion does not end the inquiry here. Applicant appears *pro se*. As a matter of policy, the Commission recognizes that allowances must be made for *pro se* litigants

² As to the type of evidence which will meet this burden, *see, e.g., Ace West Trucking, Inc. v. Public Utilities Commission*, 788 P.2d 755 (Colo. 1990), and *Public Utilities Commission v. Donahue*, 138 Colo. 492, 335 P.2d 285 (1959). These cases also provide a complete response to Intervenor’s argument that Applicant cannot meet the burden of proof in this case because “the Applicant has not certified a single witness from any of the 12 contracting companies he seeks to serve.” Motion at 3. The cited cases hold that testimony from prospective customers is not required and that an applicant may offer other types of evidence in support of its application.

Intervenor also argues that Applicant “is not qualified to testify to any prospective customer’s distinct transportation needs.” *Id.* This presents an evidentiary question which cannot be decided in a vacuum; it should be resolved at hearing, if and when Mr. Segers seeks to offer such testimony. Further, the ALJ will not, indeed cannot, decide here the admissibility of, or the weight to be given to, documents submitted with the Application. *See* Motion at 3-4 (arguing, without elaboration, that the service contracts submitted with the Application are hearsay and should be excluded because they do not meet the criteria established in *Industrial Claim Appeals Office v. Flower Stop Marketing Corporation*, 782 P.2d 13 (Colo. 1989)). This too is an issue to be addressed at hearing if and when the documents are offered.

provided those allowances neither prejudice the due process rights of other parties nor result in unduly extending the time necessary for hearing. To assist the parties' preparation for hearing, it is appropriate to determine now whether limits should be placed on the witnesses and documentary evidence which Applicant can offer at hearing.

15. Based on the record, the ALJ finds that, to avoid prejudice to Intervenor and to avoid unduly extending the time for hearing, limits should be imposed. Therefore, *except in rebuttal*, **Applicant will be permitted to present only the following witnesses:** Darrel Segers (the Applicant); the signatories to the 12 service contracts³ attached to the Application; and the individuals listed in the December 3, 2003, list of intended witnesses. In addition, *except in rebuttal*, **Applicant will be permitted to offer only the following documents:** the Application; any document appended to the Application as submitted; and documents submitted with the December 3, 2003, filing. As to the individuals and the documents identified in this paragraph, Intervenor has had notice; has an opportunity to conduct discovery; and has an opportunity to prepare for hearing. With respect to other individuals and other documents, however, Intervenor has no advance notice and, therefore, has no reasonable opportunity to conduct discovery and to prepare. For this reason, the ALJ imposes the limitation on witnesses and exhibits to be offered by Applicant in the direct case.

16. This is not to say that the testimony of the identified witnesses will be heard and that the identified documents will be admitted. Rather, at hearing and upon motion, the ALJ will determine the admissibility of proffered testimony. Similarly, the ALJ will determine the admissibility of a document at the time it is offered into evidence at the hearing.

³ No reference to "service contracts" in this Order is a factual determination that those documents are, in fact, contracts.

II. ORDER

A. It Is Ordered That:

1. The Request to Amend Application is granted.
2. The Application is amended as follows: Darrel Segers is the Applicant, and he will conduct operations as an individual under the trade name of Designated Driver Services.
3. The Petition of Tazco, Inc., doing business as Sunshine Taxi for Receipt of Supplemental Argument to Second Motion to Dismiss is granted.
4. The Second Motion to Dismiss filed by Tazco, Inc., doing business as Sunshine Taxi, is denied.
5. Darrel Segers, doing business as Designated Driver Services, is limited in his presentation of testimony and exhibits in support of his direct case as set out in this Order.
6. This Order is effective immediately.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge