Decision No. R04-0261-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04A-007CP

IN THE MATTER OF THE APPLICATION OF CARROLL GENE EADY, DOING BUSINESS AS CHECKER TAXI, FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO OPERATE AS A COMMON CARRIER BY MOTOR VEHICLE FOR HIRE.

INTERIM ORDER OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
DENYING MOTION TO DISMISS AND
ALTERNATIVE MOTION, DENYING MOTION
TO CHANGE HEARING LOCATION, AND
SETTING LIMITS ON WITNESSES AND EXHIBITS

Mailed Date: March 12, 2004

I. STATEMENT

1. On January 5, 2004, Carroll Gene Eady, doing business as Checker Taxi (Eady or Applicant), filed an Application for a Certificate of Public Convenience and Necessity to Operate as a Common Carrier by Motor Vehicle for Hire (Application). Filed with the Application were several documents, including seven letters of support. The Application commenced this docket.

2. On January 12, 2004, the Commission gave public notice of the Application in the Notice of Applications Filed. *See* Notice of Applications Filed, dated January 12, 2004 (Notice), at 2. In that Notice, among other things, the Commission established the procedural schedule for this proceeding. The procedural schedule established the dates by which Applicant and Intervenor were each to make specified filings with the Commission. The Commission served the Notice on Applicant on January 12, 2004. During the March 12, 2004 telephone conference (discussed below), Applicant informed the ALJ that he received and read the Notice.

3. On January 27, 2004, Tazco, Inc., doing business as Sunshine Taxi (Tazco or Intervenor), timely filed an intervention by right. With the intervention, Tazco filed its preliminary list of witnesses and copies of its exhibits. On that same day Tazco served the intervention and attached documents on Applicant.

4. On February 2, 2004, Agnes Weir, doing business as Care Cars (Weir), timely filed an intervention by right. On March 8, 2004, by Decision No. R04-0232-I, the undersigned Administrative Law Judge (ALJ) granted a motion to amend the Application, accepted a stipulation signed by Applicant and Weir, and dismissed Weir's intervention in this proceeding.

5. On February 17, 2004, the Commission issued an Order Setting Hearing and Notice of Hearing. By that Order the Commission scheduled the hearing in this matter for March 17, 2004, in Fruita, Colorado.

6. Pursuant to the procedural schedule established in the Notice, Applicant's list of witnesses and copies of his exhibits were due February 23, 2004. Applicant did not file either a list of witnesses or copies of his exhibits on that date. As of the date of this Order, Applicant has filed neither a list of witnesses nor copies of exhibits.

7. On March 2, 2004, Tazco filed its First Supplement to List of Witnesses and Exhibits. On that same date Tazco served a copy of this filing on Applicant.

8. On March 2, 2004, Tazco filed a Motion to Dismiss or Alternative Motion *in Limine* (Motion to Dismiss) and a Motion to Change Hearing Location (Motion to Change). Tazco also filed a Request to Shorten Response Time, which request the ALJ granted in Decision No. R04-0219-I. That Order shortened, to and including March 10, 2004, the response time to the Motion to Dismiss and to the Motion to Change.

9. Applicant did not file a response to either Motion. However, during the March 12, 2004, telephone conference (discussed below), Mr. Eady stated his opposition to the Motion to Change.

10. On March 12, 2004, at 11 a.m., the ALJ held a telephone conference with Applicant and counsel for Intervenor.[1] The ALJ gave each party an opportunity to address the Motion to Change and, to a lesser extent, the Motion to Dismiss. In view of the fast-approaching March 17, 2004 hearing date and to allow the parties time to prepare for hearing in light of her rulings, the ALJ informed the parties of her rulings on the Motion to Dismiss (including the alternative motion) and on the Motion to Change. This Order memorializes those rulings and sets forth the bases for each ruling.

11. The ALJ first addresses the Motion to Dismiss.

12. Motions to dismiss for failure to state a claim, such as the one at issue, are disfavored. Such motions must be determined on the basis of the complaint (in this case, the Application) and the documents incorporated into the complaint.[2] With respect to the Motion to Dismiss, 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 to Dismiss must be denied "unless it appears beyond doubt that the [Applicant]

[1] This telephone conference was arranged shortly before it occurred. There was no court reporter present.

[2] To the extent that the Motion to Dismiss is based on Colo.R.Civ.P. 12(b)(5) (failure to state a claim) and Tazco relies upon material and statements outside the Application and its supporting documents, the Motion to Dismiss 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 in response to discovery, and relied upon by Tazco, are unclear and ambiguous. *See* Motion to Dismiss at Exhibit 3. In addition, the statements do not appear to be inconsistent with the Application. 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. Eady testifies, Tazco will have the opportunity to explore all relevant issues.

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). A Rule 12(b)(5) motion to dismiss is simply a vehicle "to test the formal sufficiency of the [Application]." *Id.*

13. Tazco seeks to have the Application dismissed on two grounds. First, Intervenor argues that, in light of statements made by Applicant in response to discovery, Applicant "intends to provide service outside the scope of the authority being requested[,]" which scope is described and defined in the Notice.[3] Motion to Dismiss at ¶ 5. Second, Intervenor argues that Applicant's failure to file his list of witnesses and copies of his exhibits warrants dismissal.[4] *Id.* at ¶ 6.

14. Considering the legal principles outlined above and the Application and its supporting documentation, the ALJ will deny the Motion to Dismiss and the alternative motion.

15. The Application and the documentation submitted with the Application contain sufficient information, state a claim for relief, and are sufficient to defeat the Motion to Dismiss for failure to state a claim. This is not to say, however, that Mr. Eady will be granted a certificate of public convenience and necessity (CPCN) if he proves only the information contained in the Application and supporting documents. In order to obtain a CPCN in this

[3] As an alternative to dismissal, Tazco moves for renotice of the Application because "[t]here is no need to go to hearing when the scope of the authority requested, even if granted, will not permit the Applicant to provide his intended service." Motion to Dismiss at ¶ 5.

[4] As an alternative to dismissal, Tazco moves for "entry of an Order prohibiting the Applicant from submitting any public witness testimony in support of his application." Motion to Dismiss at ¶ 6.

proceeding, Applicant must address, must offer evidence on, and bears the burden of proof on issues beyond the four corners of the Application.[5]

16. The argument that dismissal is warranted because Mr. Eady's discovery responses show that Applicant "intends to provide service outside the scope of authority being requested" (Motion to Dismiss at ¶ 5) is not a proper basis for a motion to dismiss for failure to state a claim because it does not address the sufficiency of the Application. *See* discussion of legal principles and note 1. In addition, the argument is unpersuasive. The statements relied upon by Tazco (*see* Motion to Dismiss at Exhibit 3) are ambiguous and, when read one way, do not appear to conflict with either the Application or the Notice issued in this proceeding.[6] For these reasons, the Motion to Dismiss and the alternative motion for renotice will be denied.

17. The argument that the Application should be dismissed because Applicant has not filed a list of witnesses and copies of exhibits is likewise unavailing. Applicant appears *pro se*. As a matter of policy, the Commission recognizes that allowances ought to be made for *pro se* litigants *provided* those allowances neither prejudice the due process rights of other parties nor result in unduly extending the time necessary for hearing. In the circumstances of this case, the second basis for the Motion to Dismiss fails because Intervenor has not demonstrated that it has suffered harm or prejudice; because at least some of the information provided by a list of

[5] For example, Applicant seeks to provide transportation service within Tazco's certificated service area. As a result, in order to obtain the requested CPCN in this proceeding, Applicant must establish that Tazco's transportation service is substantially inadequate within the geographic area which Applicant seeks to serve. *See, e.g., Yellow Cab Cooperative Association v. Public Utilities Commission*, 869 P.2d 545, 548 (Colo. 1994). This information is beyond that contained in the Application itself. There may be other matters which Applicant must establish to obtain the requested CPCN.

[6] In essence, the Motion to Dismiss asks that the ALJ (a) presume, on the basis of unsworn discovery responses, that the Applicant will not operate within the scope of a CPCN issued in this proceeding and (b), based on that presumption, dismiss the Application. The ALJ is aware of, and has been directed by Intervenor to, no such presumption in existing law. The ALJ will not rely upon such a presumption in this proceeding. To the extent this issue is relevant, it is a matter for hearing.

witnesses and copies of exhibits has been available to Intervenor since the Application was filed; and because there is a less drastic remedy available (as discussed and ordered below). For these same reasons, the alternative motion to prohibit Mr. Eady from presenting public witnesses will be denied.

18. Based on the record, the ALJ finds that, to reduce possible prejudice to Intervenor and to avoid unduly extending the time for hearing, reasonable limits must be placed on Applicant's presentation of his direct case. First, *except in rebuttal*, **Applicant will be permitted to present only the following witnesses**: Carroll Gene Eady (the Applicant); Mr. Joseph Beghan, a signatory to a letter of support attached to the Application;[7] and any individual identified by Applicant in response to discovery. 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 any document provided to Intervenor in response to discovery. As to the individuals and the documents identified in this paragraph, Intervenor has had notice; has had an opportunity to conduct (or has conducted) discovery; and has had an opportunity to prepare for hearing. With respect to other individuals[8] and other documents, however, Intervenor has had no advance notice and, therefore, has had no reasonable opportunity to conduct discovery and to prepare.

[7] During the March 12, 2004 telephone conference, the ALJ asked Mr. Eady to identify the persons he intended to call as witnesses at the hearing. In response, Mr. Eady identified Mr. Beghan as a witness. Mr. Eady did not identify any other person who signed a letter of support attached to the Application. On the basis of Mr. Eady's identification of proposed witnesses, of the signatories to the seven letters of support attached to the Application, only Mr. Beghan will be permitted to testify.

[8] For example, during the March 12, 2004 telephone conference, in response to a question from the ALJ, Mr. Eady identified as witnesses two individuals who had not signed support letters attached to the Application. Those individuals will not be permitted to testify.

19. This is not to say that the testimony of the identified witnesses will be heard and that the identified documents will admitted. Rather, at hearing, the ALJ will determine the admissibility of proffered testimony and of proffered documents.

20. Turning now to the Motion to Change, the ALJ will deny this Motion. The ALJ has determined that at least limited public testimony may be offered (*see* ¶ 18, above). Mr. Eady represented during the telephone conference that a medical condition makes it difficult for Mr. Beghan (the public witness) to travel to Denver. In addition, Applicant requested that the hearing be held in Fruita, Colorado. *See* Application at ¶ 11. Finally, Commission policy is to hold the hearing in a transportation application proceeding in the locale to be served, in part to facilitate the testimony of public witnesses. For these reasons, the Motion to Change will be denied.

II. ORDER

A. It Is Ordered That:

1. The Motion to Dismiss or Alternative Motion *in Limine* is denied.

2. The Motion to Change Hearing Location is denied.

3. Carroll Gene Eady, doing business as Checker Taxi, is limited in his presentation of testimony and exhibits in his direct case as set out in this Order.

4. This Order is effective immediately.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

_____
Administrative Law Judge

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