

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04A-115CP

IN THE MATTER OF THE APPLICATION OF EDWIN W. SIFFERLIN, DOING BUSINESS AS DENVER EXPRESS SHUTTLE, 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 MOTIONS TO DISMISS,
DENYING MOTIONS *IN LIMINE*,
GRANTING UNOPPOSED MOTION FOR
POSTPONEMENT OF DUE DATE, GRANTING
UNOPPOSED MOTION FOR POSTPONEMENT OF
HEARING, VACATING PROCEDURAL SCHEDULE
AND HEARING DATE, SCHEDULING PREHEARING
CONFERENCE, AND DENYING AS MOOT MOTION
TO SHORTEN RESPONSE TIME**

Mailed Date: May 19, 2004

I. STATEMENT

1. On May 15, 2004, Edwin W. Sifferlin, doing business as Denver Express Shuttle (Sifferlin 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). The Applicant seeks authority to operate as a common carrier of passengers and their baggage in scheduled and call-and-demand limousine service between Denver International Airport, on the one hand, and all points within a seven-mile radius of the intersection of Colfax Avenue and Broadway, Denver, Colorado, on the other. The Application commenced this docket.

2. The Commission gave public notice of the Application. *See* Notice of Applications Filed dated March 22, 2004 (Notice) at 3. That Notice established a procedural schedule for this proceeding. By this Order, the undersigned Administrative Law Judge (ALJ) will vacate that procedural schedule and set a prehearing conference to establish a new procedural schedule for this proceeding.

3. Golden West Commuter, LLC (Golden West), Nemarda Corporation (Nemarda), Metro Taxi, Inc. (Metro), and SuperShuttle International Denver, Inc. (SuperShuttle), intervened of right. All intervenors oppose the granting of the Application.

4. On April 23, 2004, the Commission issued its Order Setting Hearing and Notice of Hearing in this matter. The hearing is scheduled for May 24, 2004. By this Order, the ALJ will vacate this hearing and will schedule a prehearing conference for that date.

5. Applicant did not file with the Application his direct testimony, a detailed summary of direct testimony, or a list of witnesses and copies of its exhibits. As a result, and in accordance with the procedural schedule established by the Notice, Applicant's list of witnesses and copies of its exhibits were to be filed on or before May 3, 2004. *See* the Notice; *see also* Rule 4 *Code of Colorado Regulations* (CCR) 723-1-71(b)(4). As of the date of this Order, Applicant has filed neither a list of witnesses nor copies of exhibits. In addition, Applicant has not filed a request for enlargement of time within which to make such a filing.

6. On May 4, 2004, Metro filed a Motion to Consolidate Applications in the Event its Contemporaneously Filed Motion to Dismiss and for Other Relief is not Granted in Docket No. 04A-143CP and to Shorten Response Time. That motion, which requests consolidation of this proceeding with Docket No. 04A-143CP, will be decided by separate order.

7. On May 4, 2004, Golden West filed a Motion to Dismiss and Alternate Motion *in Limine*, Motion for Postponement of Due Date for Filing Intervenor's Witness List and Exhibits and Postponement of Hearing (Golden West Motion). Response to the Golden West Motion was due on or before May 18, 2004, and no response was filed. As a consequence, the Golden West Motion is unopposed.

8. On May 17, 2004, SuperShuttle filed a Motion to Limit Applicant's Evidence, to Dismiss Application, and to Shorten Response Time (SuperShuttle Motion).

9. This Order discusses separately and decides each portion of the Golden West Motion and of the SuperShuttle Motion.

10. As the factual basis for all the relief sought, Golden West states that it served discovery on Applicant on April 23, 2004; that responses were due on or before May 3, 2004; and that Applicant had neither objected to nor responded to that discovery. According to Golden West, the discovery was designed to disclose "Applicant's entire case-in-chief, including specifics with respect to the issues of public need for the service, material inadequacy of existing services to meet those needs, and fitness of the Applicant." Golden West Motion at ¶ IV. Golden West states that the requested "information is essential for [it] to properly prepare its case." *Id.* In addition, Golden West states that it served requests for admissions on Applicant on April 23, 2004, and that Applicant's failure to object to those requests means that each request is deemed admitted. *Id.* at ¶ XII. Finally, Golden West states that it made a written request that Applicant

provide Golden West with Applicant's list of witnesses and copies of exhibits and that Golden West had not received those documents. *Id.* at ¶¶ VII and VIII.¹

11. In light of the foregoing, Golden West seeks dismissal of the Application on the basis of Rule 4 CCR 723-1-77(c)(4) for Applicant's failure to respond to discovery and of Rule 4 CCR 723-1-71(b)(7) for Applicant's failure to meet filing requirements. *See also* the Notice (to same effect as Rule 4 CCR 723-1-71(b)(7)). Golden West argues, first, that it is fundamentally unfair to proceed to hearing when it cannot prepare its case because Applicant has not provided crucial information and, second, that a hearing is unnecessary because Applicant's failure to respond to the requests for admissions results in its admission of facts which preclude the granting of the Application.

12. The same facts, law, and arguments underpin Golden West's Motion *in Limine*. That motion seeks to preclude Applicant from presenting any testimonial or documentary evidence in support of his Application.

13. The Motion to Dismiss and the Motion *in Limine*, although uncontested, will be denied. Applicant appears *pro se*. As a matter of policy, the Commission makes allowances 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. As the prejudice which Golden West asserts as the primary basis for the Motion to Dismiss and the Motion *in Limine* can be remedied by less severe means (*see* discussion below), it is inappropriate to dismiss the Application or to limit the evidence to be presented by Applicant at this time. In addition, the

¹ Golden West argues that the support letters filed with the Application indicate that Applicant may be providing service and, thus, there is evidence of a pattern of conduct showing Applicant's disregard for Commission rules and reflecting on Applicant's fitness. *See, e.g., id.* at ¶ XIII. There is insufficient explanation of this point for the ALJ to make a determination. In any event, consideration of this point would not have changed the result.

ALJ finds that it is premature to determine, as Golden West argues, that a hearing is unnecessary in this proceeding because Applicant has failed to deny requests for admissions served on him by Golden West. Applicant appears *pro se* and may not have understood the import of his failing to respond to those requests for admissions. Given this uncertainty, at this point the ALJ is unprepared to deny Applicant the opportunity to be heard at hearing.²

14. Turning to the SuperShuttle Motion, the grounds stated for that motion are failure of Applicant to file its list of witnesses and copies of exhibits and failure of Applicant to respond to discovery propounded to him by SuperShuttle. These are the same grounds found not to support the Golden West Motion to Dismiss and Motion *in Limine*. For the reasons stated above with respect to the Golden West Motion, the SuperShuttle Motion will be denied. In addition, the request to shorten response time to the SuperShuttle Motion will be denied as moot in light of this Order.

15. The Golden West Motion included an Alternate Motion for Postponement of Due Date for Filing Intervenor's Witness List and Exhibits. Citing Rule 4 CCR 723-1-3, Golden West asks that it be granted a variance which gives Golden West 10 days from the date of Applicant's filing of a list of witnesses and copies of exhibits within which to file its witness list and exhibits. *See* Golden West Motion at ¶ XVII. This unopposed request will be granted, and no intervenor will be required to file its list of witnesses and copies of exhibits until Applicant has filed a list of witnesses and copies of exhibits. Fundamental fairness dictates that an intervenor should not have to prepare its case and to prepare for hearing in a vacuum, and the Commission encourages and expects full disclosure in advance of hearing to avoid surprise at hearing and the delay attendant to such surprise.

² This determination is based on the present record and may change based on future events or filings.

16. Finally, the Golden West Motion includes a Motion for Postponement of Hearing Date. Citing Rule 4 CCR 723-1-71(b), Golden West asks that the May 24th hearing date be vacated and that a new hearing date be scheduled. To that end Golden West provides its dates of unavailability in June and July. *See* Golden West Motion at ¶¶ XVII and XVIII. This unopposed motion will be granted because, as discussed above, the intervenors will not be prepared to proceed to hearing on May 24th due to Applicant's failure to respond to discovery and failure to make the required filing.

17. The hearing scheduled for May 24, 2004, will be vacated. That date will be used instead for a prehearing conference to set a procedural schedule and a new hearing date in this matter. The prehearing conference will begin at 10:00 a.m. to give the parties time to confer about the matter discussed below.

18. Rule 4 CCR 723-1-79(b) governs this prehearing conference. The parties' attention is called to Rule 723-1-79(b)(4), which states: "Failure of any person to attend the prehearing conference, after being served with notice of the date, time, and place, shall be a waiver of any objection to any agreement reached, or to any order or ruling made, at the pre-hearing conference."

19. The parties must be prepared to address the following at the prehearing conference: (a) date by which Applicant will file its list of witnesses and copies of its exhibits; (b) date by which each intervenor will file (or supplement) its list of witnesses and copies of its exhibits; (c) date by which each party will file its prehearing motions; (d) whether a final prehearing conference is necessary and, if it is, the date for that prehearing conference; (e) date

by which the parties will file any stipulation reached;³ (f) hearing dates; and (g) date for post-hearing statements of position and whether the statements should be written or oral and, if written, whether responses should be permitted. In addition, the parties must be prepared to discuss any discovery-related issues and, as necessary, dates pertaining to discovery. Finally, the parties must review, and be prepared to discuss to the extent relevant and not covered already, the matters contained in Rule 4 CCR 723-1-79(b)(5). Parties may raise any additional issues.

20. The parties will be directed to confer prior to the prehearing conference with respect to the listed matters.⁴ The parties are encouraged to present, if possible, a procedural schedule and hearing date(s) which are satisfactory to all parties.

21. Applicant has elected to proceed *pro se* in this matter; and, as a result, he has been, and will be, given some latitude in this proceeding. However, that latitude will not be permitted to prejudice the rights of, and fairness to, the intervenors in this proceeding. If he intends to continue *pro se*, Applicant is **strongly advised** to obtain a copy of the Commission's Rules of Practice and Procedure, 4 CCR 723-1, in order to understand what is expected of him.⁵

II. **ORDER**

A. **It Is Ordered That:**

1. The Motion to Dismiss filed by Golden West Commuter, LLC, is denied.
2. The Alternate Motion *in Limine* filed by Golden West Commuter, LLC, is denied.

³ This date should be at least seven calendar days before the first day of hearing.

⁴ As stated in ¶ I.17, *supra*, the prehearing conference will begin at 10 a.m. in order to provide time for that conference.

⁵ The rules are available on the Commission's website (www.dora.state.co.us/puc) or from the Commission's document room.

3. The Motion to Limit Applicant's Evidence and to Dismiss Application filed by SuperShuttle International Denver, Inc., is denied.

4. The Motion to Shorten Response Time filed by SuperShuttle International Denver, Inc., is denied as moot.

5. The Alternate Motion for Postponement of Due Date for Filing Intervenor's Witness List and Exhibits filed by Golden West Commuter, LLC, is granted.

6. The procedural schedule established in the Notice of Applications Filed, dated March 22, 2004, is vacated.

7. The Alternate Motion for Postponement of Hearing filed by Golden West Commuter, LLC, is granted.

8. The hearing in this matter scheduled for May 24, 2004, is vacated.

9. A prehearing conference shall be held in this matter at the following time and date:

DATE: May 24, 2004

TIME: 10:00 a.m.

PLACE: Commission Hearing Room
1580 Logan Street, OL-2
Denver, Colorado

10. The parties shall follow the procedures and shall confer in advance of the prehearing conference.

11. This Order is effective immediately.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge