

Decision No. R14-0612

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14A-0035CP

IN THE MATTER OF THE APPLICATION OF GC OUTDOOR, 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
MANA L. JENNINGS-FADER
GRANTING MOTION, DISMISSING
APPLICATION WITHOUT PREJUDICE,
AND CLOSING PROCEEDING**

Mailed Date: June 5, 2014

I. STATEMENT

1. On January 8, 2014, GC Outdoor, LLC (GCO 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). Appended to the filing are several documents.¹ That filing commenced this Proceeding.

2. On January 13, 2014, the Commission issued its Notice of Application Filed (Notice) in this Proceeding (Notice at 7); established an intervention period; and established a procedural schedule. On February 20, 2014, Decision No. R14-0192-I vacated that procedural schedule.

¹ One of the documents is filed under seal as it contains information that the Applicant claims is confidential.

3. On January 21, 2014, MKBS, LLC, doing business as Metro Taxi and/or Taxis Fiesta and/or South Suburban Taxi and/or Northwest Suburban Taxi (Metro Taxi), timely intervened as of right. Metro Taxi opposes the Application and is represented by legal counsel.

4. On February 6, 2014, Colorado Cruisers, doing business as Colorado Crewz-In (Colorado Cruisers), filed a document in this Proceeding. On March 4, 2014, Decision No. R14-0232 dismissed Colorado Cruisers from this Proceeding.

5. On February 12, 2014, Colorado Cab Company, LLC, doing business as Denver Yellow Cab (Denver Yellow Cab), timely intervened as of right. Denver Yellow Cab opposes the Application and is represented by legal counsel.

6. Denver Yellow Cab and Metro Taxi, collectively, are the Intervenors. Applicant and Intervenors, collectively, are the Parties.

7. As authorized by Decision No. R14-0192-I, Applicant is represented by an individual who is not an attorney. Each intervenor is represented by legal counsel.

8. On February 19, 2014, by Minute Order, the Commission deemed the Application complete as of that date. When it filed the Application, GCO provided neither its supporting testimony and exhibits nor a detailed summary of its direct testimony and copies of its exhibits in support of the Application.

9. On February 19, 2014, by Minute Order, the Commission referred this matter to an Administrative Law Judge (ALJ).

II. DISCUSSION AND CONCLUSION

10. By Decision No. R14-0192-I, the ALJ permitted Applicant to proceed in this matter without legal counsel. In that Interim Decision, the ALJ designated Mr. Gregory

Carpenter as Applicant's non-attorney representative; advised Applicant that **"Mr. Gregory Carpenter is the only individual who is not an attorney who is authorized to be GCO's representative in this Proceeding"** (Decision No. R14-0192-I at ¶ 19 (bolding in original)); and advised both Applicant and Mr. Carpenter that **"Mr. Gregory Carpenter will be bound by, and the ALJ will hold him to, the same procedural and evidentiary rules as those that bind attorneys"** (*id.* at ¶ 20 (bolding in original)). That Interim Decision ordered that the "Parties are held to the advisements in this Interim Decision" (*id.* at Ordering Paragraph No. 12).

11. In Decision No. R14-0192-I at ¶ 40 and Ordering Paragraph No. 9, the ALJ required Applicant to consult with Intervenors and to make, not later than March 14, 2014, a filing that: (a) contained a procedural schedule, including hearing date, that is satisfactory to the Parties; and (b) addressed the issues discussed in that Interim Decision.

12. Review of the Commission file in this Proceeding shows that, on February 20, 2014, the Commission mailed, by first class mail, Decision No. R14-0192-I to the address for Applicant that is shown in the Application. As of the date of this Decision, Decision No. R14-0192-I has not been returned as undeliverable. Applicant is presumed to have received Decision No. R14-0192-I.

13. GCO did not make the filing required by Decision No. R14-0192-I and did not request additional time within which to make the filing required by Decision No. R14-0192-I. GCO failed to comply with Decision No. R14-0192-I, and that failure to comply with the requirements of Decision No. R14-0192-I was unexplained and was unexcused.

14. As a result of Applicant's failure to comply with the filing requirement in Decision No. R14-0192-I, on March 17, 2014 by Decision No. R14-0291-I, the ALJ scheduled the evidentiary hearing and established the procedural schedule in this matter.

15. The ALJ scheduled a June 6, 2014 evidentiary hearing. On May 27, 2014, by Decision No. R14-0558-I, the ALJ vacated the evidentiary hearing.

16. In Decision No. R14-0291-I, the ALJ established the procedural schedule for this matter. That Interim Decision contained the following filing requirements and advisements:

Each witness that will be called to testify (except a witness called in Applicant's rebuttal case) must be identified on the list of witnesses that [the procedural schedule] requires each party to file. The list of witnesses must contain the following information for each listed witness: (a) the name of the witness; (b) the address of the witness; (c) the business telephone number or daytime telephone number of the witness; and (d) a detailed summary of the testimony that the witness is expected to give.

The Parties are advised, and are on notice, that no person -- *including Mr. Gregory Carpenter, Applicant's representative* -- will be permitted to testify on behalf of a party (except in Applicant's rebuttal case) unless the person is identified on the list of witnesses filed in accordance with this Interim Decision.

Complete copies of all exhibits (except an exhibit offered in Applicant's rebuttal case or an exhibit to be used in cross-examination) will be filed as required in [the procedural schedule].

The Parties are advised, and are on notice, that no document -- *including the Application and its supporting documents* -- will be admitted into evidence (except in Applicant's rebuttal case or when used in cross-examination) unless that document is filed in accordance with this Interim Decision.

Decision No. R14-0291-I at ¶¶ 12-15 (bolding and italics in original); *see also id.* at Ordering Paragraphs No. 3-4 (same). That Interim Decision also ordered the "Parties ... held to the advisements in the Interim Decisions issued in this Proceeding." *Id.* at Ordering Paragraph No. 8.

17. Review of the Commission file in this Proceeding shows that, on March 17, 2014, the Commission mailed, by first class mail, Decision No. R14-0291-I to the address for Applicant that is shown in the Application. As of the date of this Decision, Decision No. R14-0291-I has not been returned as undeliverable. Applicant is presumed to have received Decision No. R14-0291-I.

18. As pertinent here, Decision No. R14-0291-I stated: “not later than **March 28, 2014**, Applicant will file its list of witnesses in its direct case and complete copies of the exhibits it will offer in its direct case[.]” *Id.* at ¶ 11 (bolding in original); *see also id.* at Ordering Paragraph No. 2 (same).

19. As pertinent here, Decision No. R14-0291-I stated: “not later than **May 16, 2014**, each party will file, if necessary, an updated and corrected list of witnesses and complete copies of the updated or corrected exhibits that it will offer in its case[.]” *Id.* at ¶ 11 (bolding in original); *see also id.* at Ordering Paragraph No. 2 (same).

20. GCO did not make the March 28, 2014 filing required by Decision No. R14-0291-I and did not request additional time within which to make that filing. In addition, GCO did not take advantage of the opportunity to make a filing on May 16, 2014. GCO failed to comply with Decision No. R14-0291-I, and that failure to comply with the requirements of Decision No. R14-0291-I was unexplained and was unexcused.

21. GCO did not file its list of the witnesses it would offer in its direct case in this Proceeding. Thus, GCO did not comply with the filing requirements established in Decision No. R14-0291-I with respect to identification of witnesses. As a consequence, pursuant to Decision No. R14-0291-I at ¶ 13 (quoted above), Applicant could not present, in its direct case, witnesses in support of the Application at the evidentiary hearing.

22. GCO did not file complete copies of the exhibits it would offer in its direct case in this Proceeding. Thus, GCO did not comply with the filing requirements established in Decision No. R14-0291-I with respect to filing of exhibits. As a consequence, pursuant to Decision No. R14-0291-I at ¶ 15 (quoted above), Applicant could not present, in its direct case, documents in support of the Application at the evidentiary hearing.

23. On January 21, 2014, Metro Taxi filed its Preliminary List of Exhibits and complete copies of the listed documents. On April 23, 2014, pursuant to Decision No. R14-0291-I, Metro Taxi filed its list of witnesses.

24. On April 25, 2014, pursuant to Decision No. R14-0291-I, Denver Yellow Cab filed its list of witnesses and complete copies of its exhibits.

25. On May 21, 2014, Metro Taxi filed a Motion to Dismiss the Application (Motion to Dismiss). On May 21, 2014, Metro Taxi served, by U.S. mail, the Motion to Dismiss on Applicant.

26. As grounds for the Motion to Dismiss, Metro Taxi states: (a) Applicant did not comply with the Decision No. R14-0192-I requirement that Applicant consult with the Intervenor and file a proposed procedural schedule and hearing date; (b) Applicant did not respond when Metro Taxi's counsel attempted to contact Applicant to discuss a proposed procedural schedule and hearing date; (c) Applicant did not comply with the Decision No. R14-0291-I requirements that it file its list of witnesses and that it file complete copies of its exhibits; (d) Applicant has the burden of proof in this matter; (e) Applicant's failure to comply with the Decision No. R14-0291-I filing requirements means that Applicant cannot offer evidence in support of the Application; and (f) Applicant's inability to meet its burden of proof, given that it cannot present evidence in support of the Application, warrants dismissal of the Application. As additional support for its Motion to Dismiss, Metro Taxi states that it has been prejudiced by Applicant's failure to comply with the filing requirements in Decision No. R14-0291-I.

27. On May 27, 2014, in Decision No. R14-0558-I, the ALJ discussed the pending Motion to Dismiss. The ALJ first reminded Applicant that its non-attorney representative is held

to the same standards as those to which attorneys are held. The ALJ then noted that Rule 4 *Code of Colorado Regulations* (CCR) 723-1-1400² provides for a 14-day response period and that, for the Motion to Dismiss, the response period would expire on June 4, 2014. Finally, with respect to the Motion to Dismiss, the ALJ advised Applicant as follows:

Rule 4 CCR 723-1-1400 governs motions. Rule 4 CCR 723-1-1400(d) provides: “The Commission may deem a failure to file a response as a confession of the motion.” **Applicant is advised, and is on notice, that** if it fails to file a response to the Metro Taxi Motion, *the ALJ will grant the motion as unopposed and will dismiss the Application.*

Decision No. R14-0558-I at ¶ 14 (bolding in original; italics supplied); *see also id.* at Ordering Paragraphs No. 2 and No. 4.

28. Review of the Commission file in this Proceeding shows that, on May 27, 2014, the Commission mailed, by first class mail, Decision No. R14-0558-I to the address for Applicant that is shown in the Application. As of the date of this Decision, Decision No. R14-0558-I has not been returned as undeliverable. Applicant is presumed to have received Decision No. R14-0588-I.

29. As of the date of this Decision, Applicant has not filed a response to the Motion to Dismiss. As of the date of this Decision, Applicant has not filed a request for additional time within which to file a response to the Motion to Dismiss.

30. Applicant has not filed a response to the Motion to Dismiss. The failure to file a response to the Motion to Dismiss is unexplained and unexcused. The Motion to Dismiss is unopposed.

31. Based on the record of this Proceeding and the arguments presented, the ALJ finds that the unopposed Motion to Dismiss should be granted.

² This Rule is found in the Rules of Practice and Procedure, Part 1 of 4 *Code of Colorado Regulations* 723.

32. *First*, Applicant was advised and was on notice that its non-attorney representative would be held to the same standards as those to which an attorney is held. Among other things, attorneys are expected to comply with requirements contained in Interim Decisions and, particularly when the consequences are stated in the Interim Decisions, to recognize that there are consequences for failing to comply. In this case, despite knowing the consequences, Applicant failed to comply with the clear and concise filing requirements in Decision No. R14-0291-I and failed to comply with filing requirements in Decision No. R14-0192-I.

33. *Second*, Decision No. R14-0291-I advised Applicant that failure to comply with the filing requirements would result in Applicant's being unable to present evidence in support of the Application. When Applicant did not comply with the filing requirements, the result was that Applicant cannot present evidence, and thus cannot meet its burden of proof, in this Proceeding.³

34. *Third*, despite having unambiguous notice that a failure to file a response to the Motion to Dismiss would result in dismissal of the Application, Applicant failed to respond to the Motion to Dismiss. The ALJ finds that, when it failed to respond, Applicant confessed the Motion to Dismiss and revealed that it does not oppose dismissal of the Application.

35. *Fourth*, the Application is the only filing that Applicant has made in this Proceeding. In addition, Applicant has not responded to Metro Taxi's contacts.

36. For the foregoing reasons, the ALJ finds that Applicant has evidenced little or no interest in pursuing the Application. In addition, and irrespective of its interest in pursuing the Application, Applicant cannot meet its burden of proof. The record supports granting the Motion to Dismiss and dismissing the Application to preserve the resources of the Commission and the

³ As the party seeking authorization to operate as a common carrier, Applicant bears the burden of proof in this Proceeding. Section 24-4-105(7), C.R.S.; § 13-25-127(1), C.R.S.; Rule 4 CCR 723-1-1500.

Parties. The ALJ will grant the Motion to Dismiss, will dismiss the Application without prejudice, and will close this Proceeding.

37. Pursuant to § 40-6-109(2), C.R.S., the Administrative Law Judge recommends that the Commission enter the following order.

III. ORDER

A. The Commission Orders That:

1. Consistent with the discussion above, the Motion to Dismiss the Application, which motion was filed on May 21, 2014, is granted.

2. Consistent with the discussion above, the Application for a Certificate of Public Convenience and Necessity to Operate as a Common Carrier by Motor Vehicle for Hire, which application was filed on January 8, 2014 by GC Outdoor, LLC, is dismissed without prejudice.

3. Proceeding No. 14A-0035CP is closed.

4. 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.

5. As provided by § 40-6-109, 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 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 basic findings 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.

6. If exceptions to this 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)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MANA L. JENNINGS-FADER

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director