

Decision No. R14-1281

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14A-0749CP-LEASE

IN THE MATTER OF THE APPLICATION OF HEART OF THE ROCKIES, LLC, LESSOR,
AND BROTHERS AIRPORT SHUTTLE EXPRESS, LLC, LESSEE, FOR APPROVAL OF
THE LEASE OF CPCN NO. 55779.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
GRANTING MOTION TO STRIKE; STRIKING
INTERVENTION BY RIGHT AND
DENYING ALTERNATIVE PETITION TO
INTERVENE PERMISSIVELY FILED BY
1ST ABC TRANSPORTATION, LLC, DOING
BUSINESS AS ABC SHUTTLE; AND
GRANTING MOTION TO FILE REPLY**

Mailed Date: October 24, 2014

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I. STATEMENT

1. On July 9, 2014, Heart of the Rockies Tours, LLC, and Brothers Airport Shuttle Express, LLC (collectively, Applicants), filed a verified Application for Lease Approval (Application). That filing commenced this Proceeding. Applicants are represented by legal counsel in this matter.

2. On July 14, 2014, the Commission issued its Notice of Application Filed (Notice) in this Proceeding (Notice at 6); established an intervention period; and established a procedural schedule. On August 22, 2014, Decision No. R14-1022-I, among other things, vacated the procedural schedule.

3. On August 20, 2014, by Minute Order, the Commission deemed the Application complete as of that date. Pursuant to § 40-6-109.5(2), C.R.S., and absent an enlargement of time by the Commission or Applicants' waiver of the statutory provision, a Commission decision on the Application should issue not later March 18, 2015.

4. On August 20, 2014, by Minute Order, the Commission referred this matter to an Administrative Law Judge (ALJ).

5. On August 12, 2014, 1st ABC Transportation, LLC, doing business as ABC Shuttle (ABC Shuttle), filed (in one document) its Entry of Appearance and Notice of Intervention by Right [Intervention by Right], or Alternative Petition to Intervene Permissively [Petition to Intervene] (collectively, August 12 Filing). ABC Shuttle is represented by legal counsel in this matter.

6. On August 19, 2014, Applicants filed a Motion to Strike Interventions (Motion to Strike).¹ In this Decision, the ALJ addresses the Motion to Strike only as it pertains to ABC Shuttle (*i.e.*, August 12 Filing).

7. By Decision No. R14-1022-I, the ALJ enlarged, to and including September 18, 2014, the time within which to file a response to the Motion to Strike.

8. On September 19, 2014, ABC Shuttle filed its Response to the Motion to Strike (Response).

9. On September 22, 2014, Applicants filed (in one document) a Motion for Leave to Reply and Reply. The time for filing a response to that motion has expired, no response was filed, and the motion is unopposed. In addition, as permitted by Rule 4 *Code of Colorado Regulations* (CCR) 723-1-1400(d),² the ALJ deems the failure to file a response to be a confession of the motion. Finally, the motion states good cause. As no party will be prejudiced, the ALJ will grant the Motion for Leave to Reply; will permit Applicants to file a Reply; and will consider the Reply in ruling on ABC Shuttle's intervention.

II. FINDINGS, DISCUSSION, AND CONCLUSIONS

10. Rule 4 CCR 723-1-1401 governs intervention. The Rule provides for two types of intervention: intervention by right and intervention by permission.

¹ For ease of reference, in Decision No. R14-1022-I, the ALJ referred to ABC Shuttle as a party in this matter. The ALJ also stated that the reference to ABC Shuttle as a party "indicates nothing, and is not intended to indicate anything, with respect to the ALJ's future ruling on the pending Motion to Strike[.]" Decision No. R14-1022-I at ¶ 7.

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

11. ABC Shuttle filed (in one document) an Intervention by Right and a Petition to Intervene. Applicants move to dismiss ABC Shuttle as an intervenor by right and oppose the Petition to Intervene.

12. The ABC Shuttle Intervention by Right and Petition to Intervene are discussed separately *infra*.

A. Intervention by Right (Notice of Intervention by Right).

13. An intervenor by right is a party in a proceeding provided the intervention meets the applicable rule requirements. If ABC Shuttle meets the applicable rule requirements, Applicants may challenge -- and have challenged -- ABC Shuttle's intervention by right. Once the intervention by right is challenged, ABC Shuttle bears the burden of proof and of persuasion to establish that it may intervene by right. Section 24-4-105(7), C.R.S.; § 13-25-127(1), C.R.S.; Rule 4 CCR 723-1-1500.

14. Rule 4 CCR 723-1-1401(e)(I) governs intervention by right in transportation proceedings. The Rule provides:

A notice of intervention as of right [a] must include a copy of the common carrier's letter of authority, [b] must show that the common carrier's authority is in good standing, [c] must identify the specific parts of that authority that are in conflict with the application, and [d] must explain the consequences to the common carrier and the public interest if the application is granted.

The common carrier referenced in the Rule is the common carrier that is intervening by right: ABC Shuttle.

15. Heart of the Rockies Tours, LLC (Lessor), seeks approval to lease Certificate of Public Convenience and Necessity (CPCN) PUC No. 55779 to Brothers Airport Shuttle Express, LLC (Lessee). CPCN PUC No. 55779, which is attached to the Application as Appendix A, specifies: (a) the type of transportation service that the holder of that CPCN is authorized to

provide (*i.e.*, call-and-demand limousine service); (b) the four geographic areas in which the holder of that CPCN is authorized to provide service; and (c) the restrictions on the provision of service pursuant to that CPCN.

16. ABC Shuttle owns and operates CPCN PUC No. 25810. ABC Shuttle attached a copy of CPCN PUC No. 25810 to the August 12 Filing.

17. As pertinent here, CPCN PUC No. 55779, the subject of the lease at issue in this Proceeding, authorizes transportation “between Denver International Airport [DIA], on the one hand, and, on the other hand, all points located within one mile of” two separate and identified routes. Application at Appendix A. In the Intervention by Right at unnumbered page 3, ABC Shuttle states that the lease sought in the Proceeding “[d]irectly conflicts with the authority granted to” ABC Shuttle but fails to identify the specific parts of the ABC Shuttle authority that conflict with the lease. Thus, the Intervention by Right fails to meet the requirements established in Rule 4 CCR 723-1-1401(e)(I).

18. In its Response at ¶ 1, ABC Shuttle states that both it and Lessor “have authority to pick up and return passengers to [DIA] under their existing Letters of Authority. Lessor would have overlapping authority at” DIA. The ALJ will treat that statement as sufficient to meet the Rule 4 CCR 723-1-1401(e)(I) requirement that the carrier seeking to intervene by right “identify the specific parts of [its] authority that are in conflict with the application[.]”

19. In the Motion to Strike and in the Reply, Applicants seek to strike ABC Shuttle’s intervention by right. As good cause for granting the Motion to Strike, Applicants state: (a) although Lessor and ABC Shuttle hold CPCNs that overlap at DIA, that is not relevant in this Proceeding because when “the Commission decides whether a carrier has authority in conflict with authority sought by an Applicant, [the Commission] looks to seek whether the Intervenor

can transport the subject traffic” (Reply at 1) and, in this case, there is no showing that ABC Shuttle can “handle trips which [Lessee] seeks authority to handle” (*id.*); (b) Lessor’s CPCN PUC No. 55779, which is the subject of the lease at issue in this Proceeding, is “under suspension [and] may be transferred without respect to prior activity” (*id.* at 2); and (c) ABC Shuttle’s

complaint is with DIA and how it allows carriers to drop off and pick up at DIA. That is a matter within DIA’s jurisdiction, not the Commission’s jurisdiction.

If [ABC Shuttle has] a problem with the loading and unloading situation at DIA, [it] should address those concerns with DIA.

Id. at 2. Applicants also state in support of the motion that, in the intervention by right, ABC Shuttle does not assert that either Lessor or Lessee is operationally unfit or financially unfit. Motion to Strike at 1. Applicants conclude that the intervention by right should be stricken because ABC Shuttle has no standing to intervene in this Proceeding. *Id.*

20. In response to the Motion to Strike, ABC Shuttle states: (a) Lessor and ABC Shuttle hold CPCNs that overlap at DIA; (b) Lessor’s CPCN PUC No. 55779, which is the subject of the lease at issue in this Proceeding, has been inactive for three years; (c) the inactivity was caused, in part, by lack of demand and, in part, by Lessor’s financial problems,

which problems may have been caused by the lack of demand, which is caused by too many carriers having overlapping authority, and by added airport access fee charges because of the circling, required by the airport due to congestion

(Response at ¶ 2); and (d) if the Application is granted, there will be a conflict between Lessee and ABC Shuttle

due to the constricted space at the airport, which highly regulates its parking areas, doles out spaces to PUC and Federal licensed carriers as it sees fit,

and apparently takes a position that conflict among the local carriers is a PUC issue

(*id.* at ¶ 4). ABC Shuttle describes the restrictions that DIA places on carriers when they pick up and drop off passengers, describes the number of parking spaces that DIA makes available to carriers, and states that DIA's imposition of an "active loading" rule (which occurs when "there are too many carriers competing at the same time for the same limited space the airport has" (*id.* at ¶ 9)) may result in higher costs to carriers in general (*id.* at ¶¶ 9 and 10).

21. For the following reasons, the ALJ finds that ABC Shuttle has not established that it may intervene by right in this Proceeding.

22. First, as ABC Shuttle acknowledges in its Response, DIA is the single point of overlap between the geographic area served pursuant to CPCN PUC No. 55779 (the subject of the lease at issue in this Proceeding) and the geographic area served pursuant to CPCN PUC No. 25810 (ABC Shuttle's CPCN). The single point of overlap (*i.e.*, DIA) is a point of origination or of termination of transportation service. The ALJ finds that, in this case and without more, this single point of overlap in authority is an insufficient basis to support the ABC Shuttle intervention by right.

23. In addition, Applicants seek approval of a lease of an existing CPCN authority and do not seek to obtain (*i.e.*, do not ask the Commission to create) an entirely new CPCN authority. When the existing CPCNs were issued, the Commission took into consideration any points of overlap between the geographic area served by Lessor under its CPCN and that served by ABC Shuttle under its CPCN and determined (either explicitly or implicitly) that the points of overlap were not contrary to the public interest and did not impair the ability of the two carriers to provide their authorized transportation services. Thus, the ALJ finds that the overlap of

authority at DIA carries virtually no weight as support of ABC Shuttle's intervention by right in this lease-of-an-existing-authority proceeding.

24. Second, ABC Shuttle's asserted interest in this Proceeding appears to rest on these assumptions: (a) lease of an existing authority is tantamount to creation of a new authority; and (b) denial of the Application will prevent the financial harms identified by ABC Shuttle in its August 12 filing and Response. For the reasons discussed *infra* at ¶¶ 33-39, these assumptions are incorrect. The ALJ finds that the asserted interest does not support ABC Shuttle's intervention by right.

25. Third, the ALJ agrees with Applicants that: (a) ABC Shuttle's bases for its intervention by right are really issues that ABC Shuttle has with DIA's management of carriers as they pick up and drop off passengers at DIA; (b) the Commission has no jurisdiction over those identified issues; and (c) ABC Shuttle should take those issues to DIA for resolution. The ALJ finds that ABC Shuttle's asserted bases for its intervention by right pertain at most tangentially to the lease at issue in this Proceeding and rest largely on speculation and unfounded assumptions. In addition, given the filings to date, the ALJ finds it likely that ABC Shuttle will attempt to litigate in this Proceeding issues that are beyond the jurisdiction of this Commission; this attempt, in turn, has a significant potential to confuse the issues in this case, to increase the costs of this case, and to result in delays in this case.³

26. Fourth, the ALJ relies on additional rationales as set out in the discussion *infra* concerning ABC Shuttle's request to intervene by permission.

³ Limiting ABC Shuttle's participation in this Proceeding is unlikely to reduce significantly these effects due to the logistics of establishing the parameters of the participation and then enforcing those parameters (for example, through ruling on objections to questions asked at hearing).

27. The ALJ finds that ABC Shuttle has not established that it may intervene by right. As a result, the ALJ will grant the Motion to Strike insofar as it seeks to strike ABC Shuttle's intervention by right. The ALJ will strike the Intervention by Right filed by ABC Shuttle.

B. Intervention by Permission (Alternative Petition to Intervene Permissively).

28. ABC Shuttle also seeks to intervene by permission. As the party seeking permission to intervene in this Proceeding, ABC Shuttle bears the burden of proof on the issue of its intervention by permission. Section 24-4-105(7), C.R.S.; § 13-25-127(1), C.R.S.; Rule 4 CCR 723-1-1500.

29. Rule 4 CCR 723-1-1401(c) governs intervention by permission. In relevant part, that Rule provides:

A motion to permissively intervene shall state [a] the specific grounds relied upon for intervention; [b] the claim or defense within the scope of the Commission's jurisdiction on which the requested intervention is based, including the specific interest that justifies intervention; and [c] why the filer is positioned to represent that interest in a manner that will advance the just resolution of the proceeding. The motion must demonstrate that the subject proceeding may substantially affect the pecuniary or tangible interests of the movant ... and that the movant's interests would not otherwise be adequately represented. ... The Commission will consider these factors in determining whether permissive intervention should be granted. Subjective, policy, or academic interest in a proceeding is not a sufficient basis to intervene. ...

(Emphasis supplied.) Whether to grant intervention by permission lies solely in the Commission's sound discretion.

30. In support of its Petition to Intervene and as good cause to grant the Petition to Intervene, ABC Shuttle states: (a) Lessor and ABC Shuttle hold CPCNs that overlap at DIA;⁴ (b) Lessor's CPCN PUC No. 55779, which is the subject of the lease at issue in this Proceeding,

⁴ This overlap in authority is discussed *supra*.

has been inactive for three years; (c) the inactivity was caused, in part, by lack of demand and, in part, by Lessor's financial problems,

which problems may have been caused by the lack of demand, which is caused by too many carriers having overlapping authority, and by added airport access fee charges because of the circling, required by the airport due to congestion

(Response at ¶ 2); and (d) if the Application is granted, there will be a conflict between Lessee and ABC Shuttle

due to the constricted space at the airport, which highly regulates its parking areas, doles out spaces to PUC and Federal licensed carriers as it sees fit, and apparently takes the position that conflict among the local carriers is a PUC issue

(*id.* at ¶ 4). ABC Shuttle describes the restrictions that DIA places on carriers when they pick up and drop off passengers, describes the number of parking spaces that DIA makes available to carriers, and states that DIA's imposition of an "active loading" rule (which occurs when "there are too many carriers competing at the same time for the same limited space the airport has" (*id.* at ¶ 9)) may result in higher costs to carriers in general (*id.* at ¶¶ 9 and 10).

31. In sum, ABC Shuttle states its interest in this Proceeding as: (a) given the small number of parking spaces that DIA makes available to carriers, "having another carrier allowed by the Commission to share this limited space would cause [ABC Shuttle] great financial hardship in that a large portion of [its] business originates or terminates at the airport" (Response at ¶ 7); and (b) granting the Application may increase ABC Shuttle's expenses as DIA may impose an "active loading" rule due to congestion.

32. In the Motion to Strike⁵ and in the Reply, the Applicants oppose the Petition to Intervene and ask the Commission to deny ABC Shuttle's intervention. As their grounds for

⁵ The Motion to Strike addresses the Petition to Intervene and opposes that petition. Thus, the ALJ here treats the Motion to Strike as a response in opposition to the Petition to Intervene.

opposing the Petition to Intervene, Applicants state: (a) that Lessor and ABC Shuttle hold CPCNs that overlap at DIA “miss[es] the point [because when] the Commission decides whether a carrier has authority in conflict with authority sought by an Applicant, [the Commission] looks to seek whether the Intervenor can transport the subject traffic” (Reply at 1) and, in this case, there is no showing that ABC Shuttle can “handle trips which [Lessee] seeks authority to handle” (*id.*); (b) Lessor’s CPCN PUC No. 55779, which is the subject of the lease at issue in this Proceeding, is “under suspension and may be transferred without respect to prior activity” (*id.* at 2); and (c) ABC Shuttle’s

complaint is with DIA and how it allows carriers to drop off and pick up at DIA. That is a matter within DIA’s jurisdiction, not the Commission’s jurisdiction.

If [ABC Shuttle has] a problem with the loading and unloading situation at DIA, [it] should address those concerns with DIA.

Id. at 2.

33. The ALJ will deny the Petition to Intervene filed by ABC Shuttle because ABC Shuttle failed to demonstrate that this Proceeding “may substantially affect [ABC Shuttle’s] pecuniary or tangible interests” (Rule 4 CCR 723-1-1401(c)).

34. First, Lessor’s CPCN PUC No. 55779, which is the subject of the lease at issue in this Proceeding, is under suspension at present. Pursuant to Decision No. C14-0079⁶ at Ordering Paragraph No. 3, however, “[o]n December 16, 2014, CPCN PUC No. 55779 shall be administratively reactivated.” On December 16, 2014, Lessor may recommence operations to and from DIA as authorized by CPCN PUC No. 55779. Thus, as of that date, ABC Shuttle may

⁶ This Decision granted the suspension of operations under CPCN PUC No. 55779. This Decision was issued on January 21, 2014 in Proceeding No. 13A-1344CP-Suspension, *In the Matter of the Application of Heart of the Rockies Tours, LLC, for an Order of the Commission Authorizing a Suspension of Certificate of Public Convenience and Necessity No. 55779.*

experience the conflict it describes in its Response (as set out above in ¶ 20); but the conflict will be with Lessor and not with Lessee.

35. Second, the issue in this Proceeding is whether the Commission should approve the lease of CPCN PUC No. 55779 to Lessee. If the Application is granted, Lessee will be substituted for Lessor as the carrier that may conduct transportation operations pursuant to CPCN PUC No. 55779. If the Application is denied, Lessor will continue to be the carrier that may conduct transportation operations pursuant to CPCN PUC No. 55779. Irrespective of the outcome of this Proceeding, no new authority will be created; and CPCN PUC No. 55779 will remain the authority pursuant to which a carrier (either Lessor or Lessee) may conduct transportation operations to and from DIA. Thus, ABC Shuttle's concern that

having another carrier allowed by the Commission to share [the limited assigned parking space at DIA] would cause [ABC Shuttle] great financial hardship in that a large portion of [its] business originates or terminates at the airport

(Response at ¶ 7) does not support the intervention because this Proceeding will *not* result in the addition of a new (*i.e.*, another) authorized carrier providing shuttle service to and from DIA.

36. Third, as discussed above, DIA is the single point of overlap in the geographic areas served pursuant to CPCN PUC No. 55779 (the subject of the lease at issue in this Proceeding) and the geographic area served pursuant to CPCN PUC No. 25810 (ABC Shuttle's CPCN). The ALJ finds that, in this case, this single point of overlap in authority fails to establish that ABC Shuttle has authority to provide transportation service in the area in which Lessor (or Lessee, if the Application is granted) has authority to provide transportation service. This reduces the impact of the proposed lease on ABC Shuttle.

37. Fourth, based on the Response, whatever financial harm there may be to ABC Shuttle from transportation operations under CPCN PUC No. 55779

(whether those operations are performed by Lessor or Lessee) appears to result from actions taken by DIA to manage congestion at DIA. The ALJ agrees with Applicants that ABC Shuttle has identified issues it has with DIA's management of carriers as they pick up and drop off passengers; that the Commission has no jurisdiction over those issues; and that ABC Shuttle should take those issues to DIA for resolution, not bring them to the Commission.

38. Fifth, ABC Shuttle states in its Response at ¶ 5 that carriers with Commission authority and carriers with federal authority transport passengers to and from DIA and identifies itself, Lessee (assuming the Application is approved), and three other companies as providing shuttle service to and from DIA. While the list does not appear to include all carriers with authority to provide shuttle service to DIA,⁷ it serves to highlight the speculative nature of ABC Shuttle's claimed financial harm arising from the lease of CPCN PUC No. 55779 to Lessee. ABC Shuttle leaves Lessor off the list, apparently based on the assumption that Lessor will not resume operations under CPCN PUC No. 55779 on December 16, 2014; this assumption is wholly speculative. In addition, as addressed elsewhere in this Decision, whether the Application is granted or denied, ABC Shuttle is in no different position *vis-à-vis* the number of carriers authorized to provide service to DIA and the resulting financial impact on ABC Shuttle.

39. Given the number of carriers providing shuttle service to and from DIA, given the ability of Lessor to resume operations under CPCN PUC No. 55779 on December 16, 2014, given the nature of a lease arrangement, and given the speculative nature of the asserted financial

⁷ For example, the list does not include Chajari LLC, doing business as Atlas Express Shuttle, which is another Commission-authorized carrier seeking to intervene in this Proceeding.

harm, the ALJ finds that ABC Shuttle has failed to meet the Rule 4 CCR 723-1-1401(c) requirement that it “demonstrate that [this Proceeding] may *substantially* affect [its] pecuniary or tangible interests” (emphasis supplied). In addition, the ALJ finds that ABC Shuttle has failed to meet the Rule 4 CCR 723-1-1401(c) requirement that the Petition to Intervene state a “claim or defense *within the scope of the Commission’s jurisdiction* on which the requested intervention is based” (emphasis supplied).

40. For the foregoing reasons, the ALJ finds that ABC Shuttle has not established that it should be granted intervention by permission. The ALJ will deny the Petition to Intervene.

41. As the Intervention by Right is dismissed and the Petition to Intervene is denied, ABC Shuttle is not an intervenor, and thus is not a party, in this Proceeding.

42. 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 Strike Interventions insofar as it seeks to strike the intervention by right of 1st ABC Transportation, LLC, doing business as ABC Shuttle, is granted.

2. Consistent with the discussion above, the Notice of Intervention by Right filed on August 12, 2014 by 1st ABC Transportation, LLC, doing business as ABC Shuttle, is stricken.

3. Consistent with the discussion above, the Alternative Petition to Intervene Permissively filed on August 12, 2014 by 1st ABC Transportation, LLC, doing business as ABC Shuttle, is denied.

4. Consistent with the discussion above, 1st ABC Transportation, LLC, doing business as ABC Shuttle, is not an intervenor, and thus is not a party, in this Proceeding.

5. Consistent with the discussion above, the Motion for Leave to Reply is granted and the Reply is permitted.

6. 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.

7. 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.

8. 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