

Decision No. R14-1456-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14F-0806CP

COLORADO JITNEY, LLC,

COMPLAINANT,

V.

CITY AND COUNTY OF DENVER AND
EVERGREEN TRAILS, INC., DOING BUSINESS AS HORIZON COACH LINES,

RESPONDENTS.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
SCHEDULING EVIDENTIARY HEARING ON
JURISDICTION, ESTABLISHING PROCEDURAL
SCHEDULE, VACATING PREVIOUS PROCEDURAL
SCHEDULE AND HEARING DATES, GRANTING
MOTION FOR LEAVE TO REPLY, LIMITING USE
OF RESPONSE IN OPPOSITION, SHORTENING
RESPONSE TIME TO MOTIONS PERTAINING TO
DISCOVERY, AND CONTAINING ADVISEMENTS**

Mailed Date: December 10, 2014

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A. It Is Ordered That:10

I. STATEMENT

1. On July 25, 2014, Colorado Jitney, LLC (Jitney or Complainant), filed a Complaint against the City and County of Denver (Denver) and Evergreen Trails, Inc., doing business as Horizon Coach Lines (Horizon). That filing commenced this Proceeding.

2. The procedural history of this Proceeding is set out in a previously-issued Interim Decision and is repeated here as necessary to put this Interim Decision in context.

3. On August 6, 2014, by Minute Order, the Commission referred this matter to an Administrative Law Judge (ALJ).

4. On August 18, 2014, Denver filed its Answer. That filing put this case at issue as to Denver.

5. On August 19, 2014, Horizon filed its Answer. That filing put this case at issue as to Horizon.

6. Denver and Horizon, collectively, are the Respondents. Complainant and Respondents, collectively, are the Parties. Each party is represented by legal counsel.

7. On October 14, 2014, Jitney filed a Motion to Amend Complaint. The Amended Complaint accompanied that filing.

8. On October 17, 2014, Horizon filed its Answer to the Amended Complaint.

9. On October 28, 2014, Denver filed a motion to dismiss the Amended Complaint. This filing tolls the time within which Denver must file an answer to the Amended Complaint.

10. On November 4, 2014, Horizon filed a Motion to Dismiss which addresses both the Complaint and the Amended Complaint.¹

11. On November 12, 2014, Complainant filed a Motion to Consolidate and Extend Response Deadline.

12. On November 18, 2014, Complainant filed its Response in Opposition to Motions to Dismiss (Response).

13. On November 19, 2014, by Decision No. R14-1389-I, the ALJ granted the Motion to Amend Complaint and granted *nunc pro tunc* the Motion to Consolidate and Extend Response Deadline.

A. Motion for Leave to Reply.

14. On November 24, 2014, Denver filed one document that contains both a Motion for Leave to Reply (Motion) and a Reply.

15. In the Motion, Denver asks for leave to file a reply to the Complainant's Response in Opposition to Motions to Dismiss. As good cause for granting its Motion, Denver states: (a) its motion to dismiss the Amended Complaint rests, in part, on the applicability of § 40-10.1-105(1)(j), C.R.S., which (Denver argues) exempts the transportation at issue from the Commission's jurisdiction; (b) in its Response, Jitney disputes the applicability of the § 40-10.1-105(1)(j), C.R.S., exemption and relies on the legislative history of that statute to support its arguments; and (c) the Response contains material misrepresentations of fact,

¹ In this Interim Decision, unless the context indicates otherwise, the phrase Motions to Dismiss refers, collectively, to the Denver motion to dismiss filed on October 28, 2014 and to the Horizon motion to dismiss filed on November 4, 2014.

incorrect statements of law, and errors of law -- each identified in the Motion and Reply -- to which Denver wishes to respond.

16. On December 8, 2014, Jitney filed its Response in Opposition to Motion for Leave to Reply. In that filing at 2-3 and as grounds for its opposition, Jitney states: (a) although Denver takes the position that the Response in Opposition to Motions to Dismiss contains incorrect legal statements and material misrepresentations of fact, Jitney “is convinced that its position on the meaning of the involved statutes is correct” (Response in Opposition to Motion for Leave to Reply at 2) and that the asserted errors and misrepresentations “are, in fact, differences in opinion on the statutory construction given to these statutes which, in turn, affects the meaning and import of the statutes” (*id.*); and (b) pursuant to Rule 4 *Code of Colorado Regulations* (CCR) 723-1-1400(e),² Denver should not have filed the Reply, which was submitted with the Motion, until the Commission granted the Motion.

17. Rule 4 CCR 723-1-1400(e) addresses motions for leave to file a reply. That Rule provides:

- (e) A movant may not file a reply to a response unless the Commission orders otherwise. Any motion for leave to file a reply *must demonstrate*:
 - (I) a material misrepresentation of a fact;
 - (II) accident or surprise, which ordinary prudence could not have guarded against;
 - (III) newly discovered facts or issues, material for the moving party which that party could not, with reasonable diligence, have discovered at the time the motion was filed; *or*

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

(IV) an incorrect statement or error of law.

(Emphasis supplied.) If a movant meets any one of the four stated conditions, the Commission may permit the movant to file a reply. Whether to grant a motion for permission to file a reply lies in the Commission's discretion.

18. The ALJ has read and considered the Motion, the Response in Opposition to Motion for Leave to Reply, the Motion to Dismiss, the Response in Opposition to Motions to Dismiss, and Rule 4 CCR 723-1-1400(e). The ALJ finds that Denver has provided sufficient information to meet its Rule 4 CCR 723-1-1400(e) burden.³ The ALJ will grant the Motion and will permit Denver to file the Reply submitted on November 24, 2014.

19. The ALJ will consider the Reply submitted on November 24, 2014 when the ALJ rules on the Motions to Dismiss.

B. Response in Opposition to Motion for Leave to Reply.

20. In its Response in Opposition to Motion for Leave to Reply at 3-11, Complainant presents arguments that support its Response in Opposition to Motions to Dismiss and that also address the substantive arguments presented in the Reply submitted on November 24, 2014. Complainant's substantive arguments in the Response in Opposition to Motion for Leave to Reply are found in these sections: (a) "'Statutory Construction' and its role in determining Denver's motion and the outcome of this proceeding" (Response in Opposition to Motions to Dismiss at 3); (b) "HB 11-1198 contains a summary which clearly indicates the intent of the bill" (*id.* at 8); (c) "Denver's interpretation of C.R.S. Sec. 40-10.1-105(j) [*sic*] leads to an

³ As a basis for its opposition to the Motion, Complainant states that Denver inappropriately filed the Reply before the ALJ granted the Motion. The ALJ finds this argument unpersuasive because: (a) the common practice is to submit the reply with the motion for leave to file a reply; (b) if the motion for leave to file a reply is denied, the submitted reply is deemed not to be filed; and (c) if the motion for leave to file a reply is denied, neither the Commission nor the ALJ nor the parties consider the submitted reply.

absurd result” (*id.*); (d) “Denver’s contention that Jitney misstated the fact that roads in Red Rocks Park are public highways is likewise incorrect” (*id.* at 10); and (e) “Summary, Conclusions, and Requested Findings” (*id.* at 11).

21. In essence, Complainant’s substantive arguments in the above-identified sections of the Response in Opposition to Motion for Leave to Reply constitute a sur-reply. As movant, Denver is entitled to present the final argument in support of its motion to dismiss; and that final argument appears in the Reply submitted on November 24, 2014. In addition, Commission rules do not provide for the filing of a sur-reply. Finally, it is important to have a clear record concerning what will and what will not be considered with respect to the Motions to Dismiss.

22. For these reasons, the ALJ will limit the use of the Response in Opposition to Motion for Leave to Reply, including the appended exhibits. The ALJ will order the Response in Opposition to Motion for Leave to Reply to be used or to be considered solely for the purpose of supporting Complainant’s opposition to the Motion for Leave to Reply.

23. Given the limitation on the use of the document, the ALJ will not consider the Response in Opposition to Motion for Leave to Reply, including the appended exhibits, when the ALJ rules on the Motions to Dismiss. **The Parties are advised and are on notice that:** (a) this ruling *does not* prevent a party from making the arguments presented in the Response in Opposition to Motion for Leave to Reply or offering exhibits appended to the Response in Opposition to Motion for Leave to Reply, or both, in another filing, at hearing, or in oral argument (or all three); but (b) the ruling *does* prevent a party from directly relying on or citing to the Response in Opposition to Motion for Leave to Reply and its appended exhibits as support for opposition to the Motions to Dismiss.

C. Evidentiary Hearing on Jurisdiction and Procedural Schedule.

24. To the extent the Motions to Dismiss assert that the Commission lacks subject matter jurisdiction, they are Colorado Rule of Civil Procedure (Colo.R.Civ.P.) 12(b)(1) motions. In deciding the Motions to Dismiss, the ALJ will rely on Colorado court decisions interpreting and implementing Colo.R.Civ.P. 12(b)(1).

25. As discussed below, the Motions to Dismiss and the Response raise factual questions about the Commission's subject matter jurisdiction. Where there are jurisdictional facts in dispute, there must be an evidentiary hearing on those disputed facts; and the ALJ must make the factual findings necessary to rule on the Colo.R.Civ.P. 12(b)(1) portions of the Motions to Dismiss. *Medina v. Colorado*, 35 P.3d 443, 451-52 (Colo. 2001); *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 924 (Colo. 1993). Consideration of jurisdictional facts outside the four corners of the Amended Complaint does not convert the Motions to Dismiss into motions for summary judgment.

26. The Respondents assert that the Commission lacks subject matter jurisdiction because the transportation at issue is not performed in intrastate commerce, as defined in § 40-10.1-101(9), C.R.S. This assertions rests, at least in part, on the contention that the transportation does not occur over a public highway, as defined in § 40-10.1-101(16), C.R.S. Complainant asserts that the transportation at issue is performed in intrastate commerce, as defined in § 40-10.1-101(9), C.R.S. This basis for the Motions to Dismiss involves disputed jurisdictional facts and will be the subject of the evidentiary hearing.

27. In addition, the Respondents assert that the Commission lacks subject matter jurisdiction because § 40-10.1-105(1)(j), C.R.S., exempts from Commission jurisdiction the transportation at issue. Respondent contests the applicability of the claimed exemption.

The ALJ is uncertain whether this basis for the Motions to Dismiss involves disputed jurisdictional facts. If this basis for the Motions to Dismiss does involve disputed jurisdictional facts, it will be the subject of the evidentiary hearing.

28. It is necessary to take evidence on all disputed jurisdictional facts with respect to the Motions to Dismiss. To this end, the ALJ will schedule an evidentiary hearing on the Commission's subject matter jurisdiction to be held on **February 25 and 26, 2015**.⁴

29. Complainant must prove that the Commission has subject matter jurisdiction. The burden of proof is preponderance of the evidence. Section 24-4-105(7), C.R.S.; § 13-25-127(1), C.R.S.; Rule 4 CCR 723-1-1500. Complainant will have both the burden of going forward and the burden of persuasion. Thus, Complainant will present its case first.

30. The ALJ will order the following procedural schedule: (a) not later than **January 9, 2015**, Complainant will file its list of witnesses in its direct case and complete copies of the exhibits that it will offer in its direct case; (b) not later than **February 6, 2015**, each respondent will file its list of witnesses and complete copies of the exhibits that it will offer in its case; and (c) not later than **February 16, 2015**, each party will file, but only if necessary to correct an error in its previous filing, a corrected list of witnesses and complete copies of the corrected exhibits that it will offer in its case.

31. Each witness who will be called to testify (except a witness called in Complainant's rebuttal case) must be identified on the list of witnesses that ¶ 30 requires each party to file. The list of witnesses must contain the following information for each listed

⁴ By electronic mail, the ALJ twice requested counsel for Complainant to confer with other counsel and to provide a proposed hearing date in January 2015. The ALJ received no response to either request. As a result, the ALJ schedules the evidentiary hearing on jurisdiction based on her availability, taking into consideration the upcoming Holiday Season and in the hopes that additional days will not necessary.

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.

32. **The Parties are advised and are on notice that** no person will be permitted to testify on behalf of a party (except in Complainant's rebuttal case) unless the person is identified on the list of witnesses filed in accordance with ¶¶ 30 and 31 of this Interim Decision.

33. Complete copies of all exhibits (except an exhibit offered in Complainant's rebuttal case or an exhibit to be used in cross-examination) will be filed as required in ¶ 30.

34. **The Parties are advised and are on notice that** no document will be admitted into evidence (except in Complainant's rebuttal case or when used in cross-examination) unless that document is filed in accordance with ¶¶ 30 and 33 of this Interim Decision.

35. **The Parties are advised and are on notice that** each party must bring to the evidentiary hearing a sufficient number of copies of each document that it wishes to offer as an exhibit. The fact that exhibits are prefiled in accordance with this Interim Decision does *not* alter the requirement set out in this paragraph. **The Parties are advised and are on notice that** the Commission will not make copies of exhibits.

36. Rule 4 CCR 723-1-1405 will govern discovery in this Proceeding.

37. The ALJ will order that, subject to the provisions of Rules 4 CCR 723-1-1100 and 723-1-1101, all discovery requests and all discovery responses must be served on all Parties.

38. Motions pertaining to discovery may be filed at any time.

39. A motion pertaining to discovery must comply with the applicable Colorado Rules of Civil Procedure and must comply with Rule 4 CCR 723-1-1405(g).

The Parties are advised and are on notice that the ALJ will deny a motion pertaining to discovery that does not comply with the requirements of the cited rules.

40. Unless otherwise ordered, responses to a motion pertaining to discovery must be written and must be filed within *three business days of service of the motion*.⁵ **The Parties are advised and are on notice that**, pursuant to Rule 4 CCR 723-1-1400(d), the ALJ may deem to be confessed a motion pertaining to discovery to which no response is filed.

41. If necessary, the ALJ will hold a hearing on a discovery-related motion as soon as practicable after the motion and the response are filed.

42. Rules 4 CCR 723-1-1100 and 723-1-1101 will govern the treatment of information claimed to be confidential.

D. Hearing and Procedural Schedule Established in Decision No. R14-1104-I.

43. On September 10, 2014, by Decision No. R14-1104-I and as pertinent here, the ALJ established the procedural schedule and scheduled an evidentiary hearing in this Proceeding. The ALJ will vacate the evidentiary hearing and procedural schedule established in that Interim Decision because there is insufficient time to prepare for hearing between the date of the hearing on the Motions to Dismiss and the dates of the hearing on the Amended Complaint.

II. ORDER

A. It Is Ordered That:

1. The evidentiary hearing scheduled for April 30 and May 1, 2015 is vacated.
2. The procedural schedule established in Decision No. R14-1104-I is vacated.

⁵ By this Interim Decision, the ALJ will shorten response time to a motion pertaining to discovery.

3. The evidentiary hearing on the Commission's subject matter jurisdiction is scheduled for the following dates, at the following times, and in the following location:

DATES: February 25 and 26, 2015
TIME: 9:00 a.m. each day
PLACE: Commission Hearing Room
1560 Broadway, Suite 250
Denver, Colorado

4. The following procedural schedule is adopted: (a) not later than January 9, 2015, Colorado Jitney, LLC (Complainant), shall file its list of witnesses in its direct case and complete copies of the exhibits that it shall offer in its direct case; (b) not later than February 6, 2015, each respondent shall file its list of witnesses and complete copies of the exhibits that it shall offer in its case; and (c) not later than February 16, 2015, each party shall file, but only if necessary to correct an error in its previous filing, a corrected list of witnesses and complete copies of the corrected exhibits that it shall offer in its case.

5. No person shall be permitted to testify on behalf of a party (except in Complainant's rebuttal case) unless the person is identified on the list of witnesses filed in accordance with ¶¶ 30 and 31 of this Interim Decision.

6. No document shall be admitted into evidence (except in Complainant's rebuttal case or when used in cross-examination) unless that document is filed in accordance with ¶¶ 30 and 33 of this Interim Decision.

7. Rule 4 *Code of Colorado Regulations* 723-1-1405 governs discovery.

8. Subject to Rules 4 *Code of Colorado Regulations* 723-1-1100 and 723-1-1101, all discovery requests shall be served on all parties.

9. Subject to Rules 4 *Code of Colorado Regulations* 723-1-1100 and 723-1-1101, all discovery responses shall be served on all parties.

10. Unless otherwise ordered, responses to a motion pertaining to discovery shall be filed within three business days of service of the motion.

11. Rules 4 *Code of Colorado Regulations* 723-1-1100 and 723-1-1101 shall govern the treatment of information claimed to be confidential and of information that has been determined to be highly confidential.

12. The Response in Opposition to Motion for Leave to Reply shall be considered and shall be used solely for the purpose of supporting opposition to the Motion for Leave to Reply.

13. The Parties are held to advisements contained in the Interim Decisions issued in this Proceeding.

14. This Interim Decision is effective immediately.

(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