

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14A-0337CP

IN THE MATTER OF THE APPLICATION OF COY CLUB, LLC DOING BUSINESS AS DENVER BAR CART 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
MELODY MIRBABA
GRANTING AMENDED APPLICATION**

Mailed Date: December 17, 2014

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I. STATEMENT, FINDINGS, DISCUSSION, AND CONCLUSIONS**A. Procedural Background.**

1. On April 14, 2014, CoY Club, LLC, doing business as Denver Bar Cart (Applicant) filed the above-captioned application.

2. The Commission provided public notice of the Application on April 21, 2014.

3. MKBS LLC, doing business as Metro Taxi (Metro), Colorado Cab Company LLC, doing business as Denver Yellow Cab and Boulder Yellow Cab (Colorado Cab), Shamrock Taxi of Fort Collins Inc. (Shamrock), Colorado Springs Transportation LLC (Colorado Springs Transportation), and Colorado Cruisers Inc., doing business as Colorado Crewz-In (Colorado Cruisers) timely intervened of right.

4. During the Commission's weekly meeting held May 28, 2014, the Commission deemed the Application complete and referred it to an administrative law judge (ALJ) for disposition.

5. The ALJ permitted Colorado Cruisers to be represented by a non-attorney, Mr. Justin Grimmett, pursuant to Colorado Cruisers' request. Decision No. R14-0677-I issued June 16, 2014. Colorado Cruisers was warned that its non-attorney representative will be bound by the same rules as attorneys. *Id.* at ¶ 12.

6. This matter was originally scheduled for an evidentiary hearing for August 4, 5, 6, and 7, 2014. Decision No. R14-0661-I issued June 16, 2014. At the date, time and location designated, the evidentiary hearing was convened. All parties appeared. The hearing was vacated upon Applicant's request, in order to allow Applicant time to amend the Application significantly. At the same time, Applicant agreed to waive the 210-day statutory deadline set by

§ 40-6-109.5(2), C.R.S., for a Commission decision to issue. Decision No. R14-0946-I issued August 5, 2014.

7. The ALJ has accepted multiple proposed amendments to the Application, the most significant of which was to change the Application from seeking a common carrier authority to a contract carrier authority. Decision Nos. R14-0946-I issued August 5, 2014, R14-1129-I issued September 15, 2014, R14-1388-I issued November 20, 2014.

8. The hearing was rescheduled for December 1, 2, and 3, 2014. *Id.* The December 2, 2014 hearing was vacated based upon Metro's Unopposed Motion to Modify the Procedural Schedule.

9. On November 28, 2014, Applicant filed a "Stipulation for Imposition of Restrictive Amendments and Motion for Conditional Withdrawal of Interventions" (Stipulation). The Stipulation is executed by Applicant, Metro, Colorado Cab, Shamrock, and Colorado Springs Transportation. Colorado Cruisers is not a party to the Stipulation. The Stipulation proposes to amend the Application to include the following restrictive provisions: (1) for a period of one calendar year commencing on the date of the approval of this Application, Applicant may operate no more than five electric golf carts at any given time; and (2) Applicant may not provide transportation to or from motels, hotels, or airports. Upon acceptance of these proposed amendments, Metro, Colorado Cab, Shamrock, and Colorado Springs Transportation withdraw their interventions.

10. At the date, time and location noticed, the evidentiary hearing was convened. All parties appeared. Colorado Cruisers indicated that it objected to the proposed Stipulation because it does not state that Applicant would be limited to the use of golf carts. Applicant requested that the Application be amended to include a restriction limiting all

transportation to the use of golf carts. The ALJ approved the above proposed restrictive amendments.

11. As Metro, Colorado Cab, Shamrock and Colorado Springs Transportation's interventions were withdrawn upon the approval of the restrictive amendments, they were excused from the evidentiary hearing and did not participate further.

12. As amended, the Application seeks the following authority:

Authority to operate as a contract carrier by motor vehicle for hire for the transportation of

passengers

within and between the following borders in the City of Denver:

Interstate 70 to Colorado Boulevard, Colorado Boulevard to Buchtel Boulevard, Buchtel Boulevard to Mississippi Avenue, Mississippi Avenue to Sheridan Boulevard, and Sheridan Boulevard to Interstate 70.

RESTRICTIONS: This Application is restricted:

- (1) To providing transportation service for Denver Bar Cart Social Club;
- (2) Applicant may not provide transportation to or from motels, hotels or airports;
- (3) Applicant may only provide transportation through the use of electric golf carts; and
- (4) For a period of one calendar year commencing on the date of the approval of this Application, Applicant may operate no more than five electric golf carts at any given time.

13. Prior to beginning the evidentiary portion of the hearing, Applicant requested that the December 1, 2014 hearing be vacated and instead commence on December 3, 2014. There being no cause to do so, the ALJ denied this request. Colorado Cruisers requested that the hearing be vacated so that it may obtain counsel to represent it in this proceeding. The ALJ denied this request for several reasons. First, Colorado Cruisers purposely sought permission for a non-attorney to represent it in this proceeding, an intentional and voluntary decision.

Colorado Cruisers appeared at the August 2014 evidentiary hearing prepared to be represented by its non-attorney designate. Based on statements made by Mr. Grimmatt, it was apparent that Colorado Cruisers assumed that the other interveners' counsel would participate in the hearing so as to satisfy Colorado Cruiser's interests.¹ With the other interveners no longer participating, Colorado Cruisers decided that it should have counsel. It is unreasonable for Colorado Cruisers to rely upon interveners to represent its interests. And in any event, since the Application was filed on April 14, 2014, Colorado Cruisers has had ample opportunity to obtain counsel prior to the December 1, 2014 hearing, and it provided no justification for its failure to obtain counsel in the ample time it had to do so.

14. During the course of the evidentiary hearing, Hearing Exhibits 100, 102, 103, 105, 106, 111, 112, 113 were identified, offered and admitted into evidence.² The following witnesses testified on behalf of Applicant: Mr. Kevin Healey, Ms. Mycah Healey, Mr. Daniel Shea, and Mr. Harold Rulon. Mr. Justin Grimmatt testified as an adverse witness for Applicant. Mr. John Qualley and Mr. Grimmatt testified on behalf of Colorado Cruisers. Mr. Qualley was permitted to testify by telephone (to which Applicant did not object). Colorado Cruisers attempted to call Mr. Keith Coville to testify on its behalf. Applicant objected to the witness's testimony on the grounds that the witness was not disclosed as a potential witness. Pursuant to Decision No. R14-0946-I, which warned that non-disclosed witnesses may not be permitted to testify, the ALJ did not permit Mr. Coville to testify.

¹ Mr. Grimmatt commented that he found out late on November 28, 2014 that the other interveners had entered into a stipulation with Applicant, and that this impacted his ability to prepare for the hearing, notwithstanding the fact that the stipulation actually narrows the scope of the Application.

² Hearing Exhibit 112 was redacted by Applicant to exclude account numbers and loan numbers (among other information redacted). However, on the second and third pages of the exhibit, a loan number and account number were not redacted. Given the confidential nature of account and loan numbers, and Applicant's clear intent to redact that information, the ALJ has *sua sponte* directed that the account and loan numbers appearing on pages 2 and 3 of Hearing Exhibit 112 be redacted.

15. At the conclusion of the hearing, the ALJ set a deadline of December 16, 2014 for the parties to file closing statements of position. Colorado Cruisers filed its “Closing Argument” (Statement of Position) on December 15, 2014. The Statement of Position references evidence that was not admitted into evidence during the hearing. *See e.g.*, Cruisers’ Statement of Position, ¶ 2 (regarding past history of prior applications), and fn. 1 and 2. The ALJ disregards all references to evidence not admitted in this proceeding.

16. Applicant timely filed its “Closing Statement” (Statement). The Statement requests that Colorado Cruisers’ intervention be dismissed for lack of standing. Not only is this request grossly untimely, but it lacks merit. In particular, it is undisputed that Colorado Cruisers owns and operates under its common carrier authority which overlaps the geographical territory that Applicant seeks to serve. This gives Colorado Cruisers the ability to intervene as of right in this proceeding. Applicant’s request to dismiss Colorado Cruisers’ intervention for lack of standing is denied.

B. Evidence Offered in Support of Application.

17. Applicant seeks authority to operate as a contract carrier providing golf cart transportation to the Denver Bar Cart Social Club, LLC (Social Club or Club) within limited geographical areas in the City of Denver. In addition to restrictions noticed above, Applicant seeks a restriction to its authority to limit transportation to streets with a speed limit of 35 miles per hour or less.³

³ Ms. Healey testified that this is a restriction the Applicant seeks, although it has not been memorialized in the Application or written amendments thereto. Nevertheless, since Applicant seeks the use of golf carts only, this restriction is necessary and appropriate to protect the public safety and will be included.

18. Applicant is a limited liability company, owned by ten people, eight of which take an active role in Applicant's operation. The other two owners are silent partners. Applicant's owners also are owners of the Social Club, which is an entirely separate legal entity.

19. Ms. Mycah Healey is co-owns and operates Applicant. She is responsible for Applicant's operational matters. She is also the channel sales manager with CenturyLink and has been there since July 2013. Before that, she was a partner sales manager with hosting.com for a year and three months. She also worked at Awareness Technologies, Inc. as a channel sales manager for approximately a year and a half, and at McAfee, Inc., for three years as a channel account manager. In all of these roles, she has taken on significant management duties involving complex business structures. She has also been involved with recruiting, hiring and firing employees. Ms. Healey has an undergraduate degree in sociology.

20. Ms. Healey operates Applicant's office functions out of her home office and, because Applicant's needs are met through use of Ms. Healey's home office, she has no plans in the foreseeable future to obtain a formal office space for Applicant. Ms. Healey donates the use of her personal computer and printer free of charge to Applicant. Other equipment has been donated by Applicant's other owners, including the use of a trailer to transport the golf carts when necessary for maintenance.

21. Applicant owns two electric golf carts. Applicant used a line of credit to purchase one of the golf carts, and still owes approximately \$7,000 on that cart. There is no debt associated with the other golf cart. Each golf cart is electric, seats six people including the driver, and includes seatbelts for all. They both meet all requirements of neighborhood electric vehicles, and are "street legal." Applicant pays for a storage space to store both golf carts.

22. Applicant intends to start operations by using one golf cart, but is willing to purchase additional golf carts as the business expands, up to five golf carts. A new golf cart can cost as much as \$14,000, while a used one may be as low as \$3,000. Applicant would likely renegotiate its contract with the Social Club in the event it becomes necessary to employ additional golf carts to satisfy the Social Club's needs. Applicant will devote all of its resources to meeting the Club's needs.

23. Applicant has researched the costs for insurance as required by Commission rules and Colorado statutes. Ms. Healey did not know how much the insurance would cost, but was confident that the Company would be able to pay for the required insurance. Applicant did not obtain the required insurance because it is not licensed to provide the service proposed by the Application, and therefore, does not need insurance meeting the Commission's requirements. She believes it would be a waste of money to purchase insurance that the company does not currently need.

24. The owners will drive the golf carts once the authority is granted. None of the owners are currently taking a salary or any compensation for their services.

25. Applicant does not intend to use a dispatch system for the transportation service it will provide to the Social Club for several reasons. First, Applicant will not operate as a call-and-demand transportation carrier. It will provide transportation to the Social Club's members during events the Club hosts, so Applicant will be on notice of when and where it needs to be in order to fulfill its contractual obligations. In addition, the Social Club will require Applicant to transport its members to the Club's clients' venues. Because the Social Club hosts events involving multiple clients that are located in close proximity to each other, Applicant intends to ensure its drivers inform members that it will be shuttling between all the venues on a set

schedule (*e.g.*, that it will come to each location approximately every 15 minutes). If it later becomes apparent that a dispatch system is necessary, Applicant is willing to purchase and employ a dispatch system.

26. Applicant has a \$10,000 line of credit, of which, approximately \$3,000 is currently available. Hearing Exhibit 112. Applicant also has an operating bank account with available funds. *Id.* Ms. Healey estimated that Applicant's operating account has approximately \$1,000 as of the time of the evidentiary hearing. Ms. Healey testified that she has excellent credit and is willing to use her credit to access money as necessary for Applicant's funding. She is also willing to contribute additional funds from her annual gross income at CenturyLink. She is aware that Applicant's other owners are in a similar financial condition and are willing to access their credit or cash to provide additional capital that Applicant may need.

27. Applicant is funded by investments made by its ten owners. All of the owners have already contributed lump sums to Applicant and continue to contribute by making quarterly "dues" payments of \$200 each. This results in a minimum of \$8,000 in annual contributions. Applicant's sole source of income will be the contract to provide transportation to the Social Club for a \$750 monthly charge. Hearing Exhibit 111. The monthly charge may be increased by renegotiating the contract with the Social Club as necessary (*e.g.*, if additional golf carts are needed to perform the contracted-for service.).

28. During cross examination, Mr. Grimmatt questioned the viability of Applicant's financial fitness based upon Applicant's potential inability to meet its financial needs due to lack of adequate anticipated income. The focus of the discussion was Hearing Exhibit 106, a profit and loss statement for Applicant for 2013. Ms. Healey testified that the profit and loss statement covered a period of time during which Applicant did not operate its business as

proposed under the Application. Applicant could not charge for transportation because it did not have authority to operate as a transportation carrier by the Commission.⁴ Indeed, to date, Applicant has been unable to operate as proposed by the Application because it does not have a Commission-issued authority. In addition, Ms. Healey explained that many of the expenses noted on the profit and loss statement would be reduced as necessary to ensure Applicant's future viability. For example, Applicant could eliminate the \$2,373.00 annual storage fee by storing golf carts in personal garages. Other expenses, such as computer and internet expenses (\$215) could be eliminated by donating those items. Expenses for meals and entertainment, and printing (total of \$331) could also be either reduced or eliminated.

29. Ms. Healey believes Applicant's service is specialized, distinct and tailored to the Social Club because Applicant is dedicated to providing service to the Social Club exclusively, and to transport the Social Club's members only to those destinations designated by the Social Club.

30. Mr. Daniel Shea co-owns Applicant. He also owns a restaurant in Fort Collins, Colorado. Mr. Shea has made financial contributions to Applicant since it was created two years ago. He continues to make the \$200 quarterly payment and anticipates no problems with continuing to do so in the future. Mr. Shea has excellent credit which he is willing to use to access additional funds to contribute to Applicant as necessary in the future. He currently has a credit line of \$13,000 immediately available. He is also willing to contribute cash-on-hand (from his savings account) to Applicant as necessary.

⁴ During that time, Applicant was transporting family and friends at no charge. Applicant did not accept tips or any other form of compensation during that time. Applicant primarily worked at the marketing aspects of the business during that time (*e.g.*, advertising signs for the golf carts).

31. Mr. Shea is committed to supporting Applicant. As a business owner, Mr. Shea understands that it can take several years for a new company to make a profit. He does not expect an immediate profit, and will not cease investing in Applicant if it does not turn an immediate profit upon commencing operations under a Commission authority.

32. Mr. Harold Rulon co-owns Applicant. He is responsible for Applicant's book keeping, a duty he also performs with the drywall company he co-owns. He has been in the drywall business for ten years. Mr. Rulon also has several other investments, including rental properties. He has made financial contributions to Applicant since it was created two years ago. He continues to make the \$200 quarterly payment and anticipates no problems with continuing to do so in the future. Mr. Rulon is committed to supporting and contributing to Applicant's success for the foreseeable future. As a business owner, Mr. Rulon understands that it can take several years for a new company to make a profit. He does not expect an immediate profit from Applicant, and will not cease investing in Applicant if it does not turn an immediate profit after starting its operation.

33. Mr. Rulon has excellent credit which he is willing to use to access additional funds to contribute to Applicant as necessary in the future. He has \$30,000 in credit immediately available.

34. Mr. Kevin Healey testified primarily on behalf of the Social Club, although he is also one of Applicant's owners. In addition to running the Social Club, Mr. Healey also works for "Creating Margins," a company specializing in information technology services. Creating Margins is a "spinoff" of a company Mr. Healey worked at for 5 years; he has worked for Creating Margins for one year. He is the vice president of sales for Creating Margins.

Mr. Healey has an undergraduate degree in business legal studies and international marketing, as well as a master's degree in business administration.

35. The Social Club is a limited liability company formed approximately one year prior to the time of the hearing. Mr. Healey manages the Social Club, and is the vice president of sales for the Club. He has served in that role for approximately two years. The Social Club is funded by investments made by its owners. The Social Club is an experiential marketing firm serving bars, restaurants and entertainment venues in the Denver area. The Social Club's source of income derives from marketing and promotions it conducts for its clients, which are bars, restaurants and other entertainment venues. The Social Club markets its clients to potential patrons aged 21 and over, and offers those patrons membership in the Club. The Social Club's goal is to bring its clients as many patrons as possible, in an effort to increase the client's revenues. Social Club members have access to promotions, coupons and discounts at the Social Club's clients' venues. Access to the Club's promotions, coupons and discounts are limited to members. If the Application is granted, members will also have free transportation during promotional events to the Social Club's clients' venues. This enables the Social Club to physically deliver patrons to its clients' door, thus increasing the potential impact of its promotions and marketing efforts to the benefit of its clients.

36. The Social Club currently has approximately 3,000 members. A person can become a member of the Social Club by downloading its application on their mobile device, attending a Social Club event, or requesting membership to a Social Club representative, who will provide the member with a token that proves its membership. People can also join by requesting a subscription to the Social Club's publication. The Social Club maintains a list of all of its members, which is updated daily.

37. The Social Club has entered into a contract with Applicant for Applicant to provide transportation to its members free of charge. Hearing Exhibit 111. The contract is not effective until Applicant is granted authority by this Commission to provide the transportation services governed by the contract. *Id.* Under the terms of the contract, the Social Club will pay Applicant \$750 a month for the transportation services. It also provides that members have the discretion to tip the drivers. *Id.* Although not stated in the contract, Applicant agrees to post advertisements for the Social Club's clients on the golf carts.

38. The Social Club seeks Applicant's services, as opposed to other providers, including Colorado Cruisers, because Applicant is willing to dedicate itself exclusively to providing transportation for the Social Club. *See* Hearing Exhibit 113. Having a transportation carrier dedicated to serving the Social Club's needs ensures that transportation is available for its members during the events the Social Club hosts, irrespective of whether there is a high demand from the general public for transportation. The Social Club is concerned that other providers cannot guarantee their availability for the Social Club's events. This concern appears to be based, at least in part, with experience with other carriers. Mr. Healey investigated the possibility of using Colorado Cruisers for the Social Club's transportation needs. For example, Mr. Healey testified that in the preceding two years, he called Colorado Cruisers approximately 100 times and was never able to reach anyone, or to leave a message (because the voice mail was full). He also was under the impression that Colorado Cruisers only operates from April to November, which would limit the Social Club's ability to provide transportation during many months of the year during which it continues to do promotional events for its clients. Mr. Healey was concerned that the lack of a dedicated motor carrier serving the Social Club's needs may result in unreliable service that will vary based upon Colorado Cruiser's

(or another non-exclusive carrier's) availability on a given evening. This is a major problem for the Club because it is crucial to its business to be able to reliably deliver patrons to its clients' establishments during its events.

39. In addition, the Club believes its needs are distinct and specialized because it seeks to direct transportation to its clients' venues only, during events and promotions it hosts for its clients. The Social Club needs a provider who would not have the option of transporting its members to a location of the members' choosing (if that location is not one of the client-venues designated for the particular day or evening). Moreover, the Social Club seeks transportation only for its members, and not indiscriminate transportation for non-members. The Club has determined that contracting with a motor carrier to provide the specialized and distinct transportation service it seeks is the best way to guarantee its distinct needs are met.

40. Most of the events the Social Club hosts involve multiple clients who are located in close proximity to each other, so that the transportation can easily be provided for large numbers of people through a series of short trips, similar to a scheduled shuttle service.

41. The Social Club will ensure that Applicant will only transport its members by requiring members to prove their membership to Applicant's driver prior to being transported. The most common way this will be done is by having the member show his or her mobile device displaying the Club's mobile application, or by showing the token the member obtained when joining. In addition, the Social Club will provide Applicant with a list of all of its members, which is updated daily. Hearing Exhibit 111.

42. Mr. Healey believes that the transportation service it seeks from Applicant is critical to the Social Club's success because, without it, the Social Club could not guarantee the level of participation in its clients' events that is promised to clients.

C. Evidence Offered in Opposition to the Application.⁵

43. Colorado Cruisers is incorporated and is owned by Justin Grimmatt and Keith Coville. Colorado Cruisers has a Commission-issued common carrier call-and-demand authority to transport passengers on roads with speed limits of 30 miles per hour or less in the City and County of Denver. The company uses gas powered golf carts for the transportation service it provides under its common carrier authority. The company has been operating for approximately three years.

44. Mr. Grimmatt is the Chief Executive Officer for Colorado Cruisers. He believes that Applicant is proposing to conduct business in the same manner as Colorado Cruisers. Colorado Cruisers obtains its income through advertisements on the golf carts that is paid for by its clients, which includes restaurants and bars in Denver. Although the company does not charge passengers for transportation, it receives income through discretionary tips provided by passengers. The company does not exclusively transport patrons of a given entity, nor is it bound to transport passengers only to its client's establishments.

45. Mr. Grimmatt does not believe that Applicant has done the necessary research into the necessary expenses for operating its business. He believes Applicant has underestimated its expenses, and that Applicant's underestimation of its expenses means it will not be financially fit to conduct the service it proposes in the Application. He argued that because Ms. Healey testified that she did not know how much insurance would cost, that Applicant is unprepared to meet its financial obligations. He also believes that Applicant has underestimated golf cart maintenance expenses, because Colorado Cruisers' average annual golf cart maintenance for its

⁵ The ALJ places discussion of Mr. Grimmatt's testimony under the title of "Evidence Offered in Opposition of Application" for ease of reference, despite the fact that Applicant offered a portion of Mr. Grimmatt's testimony during Applicant's case in chief, in support of the Application.

five gas powered golf carts is significantly higher than the maintenance costs incurred and anticipated by Applicant for its two golf carts. On cross-examination, Mr. Grimmett acknowledged that he did not know everything about operating his business when he first started operating it.

46. Mr. Grimmett believes that Colorado Cruisers can fulfill the Social Club's demand for transportation better than Applicant. Mr. Grimmett testified that Colorado Cruisers has devoted itself to serving particular events. However, Mr. Grimmett also testified that when it devoted itself to serving the particular events, it did not exclusively transport passengers related to that event. He analogized it to the way that taxicab companies operate. In particular, if the demand for transportation from the public was high during the event, patrons of the event would be required to wait for transportation so that Colorado Cruisers can also meet the transportation needs of the public. Mr. Grimmett also gave a similar answer in response to a hypothetical question wherein his company is hired to transport Club members from Old Chicago. He testified that Colorado Cruisers could provide that transportation, but would also provide transportation to people who were not Club members. Mr. Grimmett was clear that the wait times and availability would depend on how busy the company is during the particular event.

47. Mr. John Qualley is an owner of the Appaloosa Grill (the Grill), located in downtown Denver. His company pays for advertising on Colorado Cruisers's vehicles; Colorado Cruisers transports the Grill's patrons at no charge to the patrons. Colorado Cruisers does not exclusively transport patrons of the Grill. On occasion, Colorado Cruisers has been unavailable to transport the Grill's customers when they are too busy. Mr. Qualley testified that is rare occurrence and that when it happens, he arranges for other transportation for his patrons.

Mr. Qualley has had good experiences working with Colorado Cruisers and believes it has had a positive impact on his business.

D. Governing Legal Authority.

1. Burden of Proof.

48. Applicant, as the proponent of an order, bears the burden of proof by a preponderance of the evidence. §§ 13-25-127(1) and 24-4-205(7), C.R.S.; Rule 1500 of the Commission's Rules of Practice and Procedure, 4 CCR 723-1. The preponderance standard requires the fact finder to determine whether the existence of a contested fact is more probable than its non-existence. *Swain v. Colorado Department of Revenue*, 717 P.2d 507, 508 (Colo. App. 1985). A party has met this burden of proof when the evidence, on the whole and however slightly, tips in favor of that party.

49. Although the preponderance standard applies, the evidence must be substantial. Substantial evidence is defined as "such relevant evidence as a reasonable person's mind might accept as adequate to support a conclusion . . . it must be enough to justify, if a trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *City of Boulder v. Colorado Public Utilities Commission*, 996 P.2d 1270, 1278 (Colo. 2000) (internal citation omitted).

2. Requirements for a Contract Carrier Permit.

50. Applicant seeks authority to operate as a contract carrier for the transportation of passengers within boundaries of the City and County of Denver. Rule 6203(e), 4 CCR 723-6, provides that applicants seeking contract carrier authority bear the burden of proving that the service it proposes is superior, special, of a distinctive nature, or that the service will otherwise be specifically tailored to meet the potential customers' needs. Such a showing is overcome by

an intervener's showing that the intervener is ready, willing, and able to meet the potential customers' needs. If the intervener makes such a showing, the applicant shall bear the burden of proving that the applicant is better suited than the intervener to meet the needs of the potential customer. The intervener may overcome such a demonstration by establishing that the applicant's proposed operation will impair the efficient public service of any common carrier then adequately serving the same geographic area.

51. In addition, a contract carrier applicant must prove it is fit to provide the service it proposes. *Acme Delivery Service, Inc., v. Cargo Freight Systems, Inc.*, 704 P.2d 839, 843 (Colo. 1985). Applicant's fitness burden includes managerial, operational, and financial fitness to provide the service proposed. In general, operational fitness encompasses a consideration of whether an applicant has the equipment, personnel, facilities, and the managerial experience to conduct the proposed operation. Whether the applicant is willing and able to comply with applicable public utilities laws also bears upon the question of fitness. *See, Thacker Brothers Transportation v Public Util's Comm'n*, 543 P.2d 719, 721 (Colo. 1975). Although the Commission has no rules quantifying a financial fitness standard, the applicant must make some showing, however minimal, that it either has or has access to financial resources that will enable it to implement the proposed service. *Acme Delivery Service, Inc. v. Cargo Freight Systems, Inc.*, 704 P.2d 839, 843 (Colo. 1985). Fitness must be evaluated on a case-by-case basis upon the unique circumstances of each applicant and the proposed service. *See e.g.*, Decision No. C09-0207, issued February 27, 2009, Consolidated Proceeding Nos. 08A-241CP, 08A-283CP, 08A-284CP-Extension, and 08A-300CP.

52. The Commission has provided the following guidelines for the evidentiary factors that are relevant to the fitness inquiry:

- minimum efficient scale, that is, whether a minimum size of operation is required and, if such a minimum does exist, conceptually what is the approximate magnitude for markets at issue;
- credit worthiness and access to capital;
- credit history and assessment of financial health over the near future;
- capital structure and current cash balances;
- managerial competence and experience;
- fixed physical facilities such as office space and maintenance garages, as appropriate;
- appropriate licenses and equipment necessary to operate a radio dispatch system; and
- vehicles of appropriate type.

Decision No. C08-0933, at ¶ 7, issued September 4, 2008 in Consolidated Proceeding Nos. 08A-241CP, 08A-281CP-Extension, 08A-283CP, 08A-284CP-Extension, and 08A-300CP (*Union Taxi* decision).

53. Contrary to Colorado Cruisers' assertions in its Statement of Position, Applicant is not required to prove that there is a public need for the authority it seeks, nor is Applicant required to prove that other motor carriers (including Colorado Cruisers) provide inadequate service. Such standards relate to requests for a common carrier authority, not a contract carrier authority.

E. Discussion and Conclusions.

1. The Extent to Which Applicant's Proposed Service Is Superior, Special, of a Distinctive Nature or Specially Tailored to Meet the Potential Customer's Need.

54. As explained above, Applicant must show that its proposed service is superior, special, of a distinctive nature, or that the service will otherwise be specifically tailored to meet the potential customers' needs. Applicant's proposed authority would permit it to provide transportation only for the Social Club. As described through the evidence, the Applicant will provide transportation for the Social Club's members during the events the Social Club hosts.

Having a transportation carrier dedicated to serving the Social Club's needs ensures that transportation is available for its members during the events the Social Club hosts, even if there is a high demand from the public for transportation. It further eliminates uncertainty with wait times for transportation of the Club's members during the events. For these reasons, it is important to the Social Club that their motor carrier be able to guarantee exclusive use of their transportation service for the Social Club's events. This is a specialized and distinct need.

55. The Social Club's needs are also distinct because the Club seeks transportation only for its members, as opposed to indiscriminate transportation for all of the public. In addition, the Club seeks to direct transportation to its clients' venues only, during events and promotions it hosts for its clients. In so doing, the Club seeks a carrier that does not have the option of transporting members to locations other than its clients' venues. For these additional reasons, the Social Club's needs are specialized and distinct.

56. Applicant's proposed authority aims to meet the Club's specialized and distinct needs. In particular, under the proposed authority, Applicant would be authorized only to provide service to the Club, to the exclusion of any other person or entity. This means Applicant would have no option but to turn down requests for transportation from anyone other than the Club. Moreover, because Applicant's service is exclusive to the Club, Applicant can guarantee its availability for the Social Club. This ensures that transportation is available for the Social Club's events, eliminates uncertainty with wait times for transportation, and further ensures that Applicant's resources are not diluted by providing service for other entities or persons (thereby, potentially decreasing the timeliness of the service it gives to the Club). Based on the foregoing, the ALJ concludes that Applicant met its burden to show by a preponderance of the evidence that the service it proposes is superior, special, or of a distinctive nature.

57. For the same reasons stated above, the ALJ concludes that Applicant showed by a preponderance of the evidence that its service is specially tailored to meet the Social Club's needs.

58. Applicant's showing may be overcome by Colorado Cruisers demonstrating that it is ready, willing, and able to meet the Social Club's needs. Mr. Grimmatt testified that Colorado Cruisers is ready, willing and able to meet the Social Club's needs, and that it is better suited to do so than Applicant. However, this assertion is belied by Mr. Grimmatt's testimony that, in the past, when Colorado Cruisers has devoted itself to a particular event, it has not exclusively transported patrons related to that event. Indeed, Mr. Grimmatt explained that Colorado Cruisers would operate as a taxicab company—if there is a high demand from the public for transportation, patrons of the particular event will be required to wait for Colorado Cruisers to be available to transport them. When responding to a hypothetical question concerning whether Colorado Cruisers would exclusively transport Club members from Old Chicago (for a given event or evening), he testified that Colorado Cruisers could provide that transportation, but that it would also provide transportation to people who were not Club members during that event or evening.

59. This manner of operation does not serve the Social Club's distinct need to have a motor carrier exclusively dedicated to serving it during its events. In fact, one reason that the Social Club seeks to use Applicant's service is that having a dedicated motor carrier means that transportation is guaranteed to be available, without the uncertainty associated with availability and wait times resulting from serving the general public. Although Mr. Grimmatt testified that Colorado Cruisers is willing to meet the Social Club's needs, he did not testify that Colorado Cruisers' operation would be any different than it has in the past when it has attempted to devote

itself to a particular event. His answer to the hypothetical question further confirms that Colorado Cruisers would operate no differently than it has in the past in similar situations. Moreover, Mr. Qualley's testimony that there have been occasions (although rare) where Colorado Cruisers was unavailable to transport its patrons, further confirms that Colorado Cruisers' will not meet the Club's distinct needs for exclusivity in transportation service. The ALJ is unconvinced that Colorado Cruiser is ready, willing and able to meet the Social Club's distinct needs. The ALJ concludes that Colorado Cruisers did not meet its burden to overcome the Applicant's showing that its proposed service is superior, special, of a distinctive nature, and that the service is specifically tailored to meet the potential customers' needs by a preponderance of the evidence.

60. In the interests of providing a thorough decision, the ALJ will consider the other factors set forth in Rule 6103(e), 4 CCR 723-6. Even if it could be determined that Colorado Cruisers is ready, willing and able to meet the Social Club's distinct needs, Applicant showed by a preponderance of the evidence that Applicant is better suited than Colorado Cruisers to meet the Social Club's needs. In particular, Applicant's entire business is devoted to meeting the Social Club's needs. Applicant will not provide any transportation to anyone outside the scope of its contract with the Social Club. Thus, Applicant can guarantee that transportation is available to meet the Social Club's needs, and that the Club's members will not be required to wait an indeterminate period of time while the motor carrier transports members of the public. As discussed above, Colorado Cruisers did not provide evidence to show that it would provide a similar service for Applicant.

61. Colorado Cruisers failed to produce evidence showing that Applicant's proposed operation will impair the efficient public service of any common carrier then adequately serving

the same geography area. *See* Rule 6203(e)(IV), 4 CCR 723-6. Indeed, Colorado Cruisers did not so much as provide testimony as to how granting the authority would impact its business.

62. Based on the foregoing, the ALJ concludes that Applicant met its burdens under Rule 6203, 4 CCR 723-6.

2. Applicant's Fitness.

63. As explained above, in addition to meeting the burdens set forth in Rule 6203, 4 CCR 723-6, Applicant must also show it is fit to provide the service proposed by the Application. The person primarily responsible for Applicant's management, Ms. Healey, has experience managing people and complex business relationships. She has been successful in her prior ventures, including, among other things, sales, generating revenue, and providing customer service. While Ms. Healey has no experience managing a transportation business, her prior business experience gives her adequate background to competently manage Applicant. And in any event, given Ms. Healey's prior success, the ALJ is confident that she will be able to quickly learn how to manage transportation business. Ms. Healey has also been heavily involved with planning for all of Applicant's operations, and thus, is in a position to start the business operations as soon as Applicant is able. In addition, several of Applicant's other managing owners, Mr. Rulon and Mr. Shea, have experience managing successful businesses. They are both committed to ensuring Applicant's success; they are both prepared to continue to contribute and support Applicant for the foreseeable future. The ALJ has no doubt that they will bring their management experience to bear upon Applicant's management as necessary. The ALJ finds that Applicant met its burden to show by a preponderance of the evidence that it is managerially fit to provide the proposed service.

64. While Applicant has no fixed physical facilities (such as an office or garage), Applicant is able to meet its operational needs by the use of Ms. Healey's home office, and renting storage space for the golf carts. Applicant already has two electric golf carts that it may use for the business. Applicant's owners will drive the golf carts at no charge to Applicant (at least for the foreseeable future).

65. Given that the events which Applicant will be called upon for transportation are planned in advanced, Applicant should have no difficulty ensuring there are an adequate number of drivers available for the events.⁶ Applicant's business model does not call for a dispatch system, but if it becomes necessary, Applicant will purchase a dispatch system. There was no evidence as to the minimum efficiency scale necessary to operate the proposed authority. Indeed, no other motor carrier providing transportation as proposed by the Application was involved in this proceeding. And the only intervener in this proceeding who participated in the evidentiary hearing provided no evidence as to an appropriate efficiency scale. As to the other metrics required to meet fitness, the ALJ finds that Applicant's proposals for vehicles and physical facilities have been sufficiently addressed and supported through testimony to provide adequate service under the authority sought. Based on the foregoing, the ALJ finds that Applicant met its burden to show by a preponderance of the evidence that it is operationally fit to provide the proposed service.

66. As to financial fitness, Applicant has already been able to obtain a \$10,000 line of credit and investments from its ten owners, even though it has not been operational. Although Applicant currently has \$1,000 available in its bank account, that is not determinative of the financial resources available to Applicant. Its owners continue to contribute a total of

⁶ Eight of Applicant's owners will be drivers.

\$8,000 a year and will continue to do so for the foreseeable future. Ms. Healey, Mr. Healey, Mr. Rulon, and Mr. Shea all have good credit and are willing to use that credit to access capital as necessary for Applicant's use in the future. Indeed, between Mr. Shea and Mr. Rulon, Applicant could have immediate access to \$43,000 in credit. And, Ms. Healey testified that the other owners are also willing to use their good credit to access capital for Applicant. Ms. Healey, Mr. Rulon and Mr. Shea are also willing to contribute their personal cash-on-hand as the Applicant may need. Applicant's owners understand that a profit may not be immediate, and are willing to continue to support Applicant for the foreseeable future so that Applicant has the opportunity to make a profit.

67. Colorado Cruisers was focused on the potential that Applicant will not be able to support its business because its anticipated expenses are much higher than it projected, and it will not be able to make a profit. Applicant's financial health over the near future is relevant to its fitness, but that question does not turn into an inquiry into whether Applicant will be a profitable and successful business. Given Applicant's access to credit and capital, it has shown that its financial health over the near future is sufficient to support its proposed operation. Moreover, the speculative nature inherent in all business plans cannot be overlooked. A business plan is a basic design for a business reflecting the company's major ideas, strategies, and management team. A business plan should be fluid so that it may adapt as the business evolves to meet the demands of reality. Applicant appears to understand this, and plans to adapt and modify its business to evolve as needed. That includes proposing an increase to the amount that the Social Club will pay for its services, and budgeting for increased expenses.

68. The test of fitness is not perfection. While there may be gaps in the plan Applicant presented at hearing in terms of planning for expenses, this uncertainty is not fatal to a

finding of fitness. Given the competence of Applicant's primary managing member, and the fact that many of its owners also own other business, ALJ is confident that once Applicant is able to start operations, it will address any gaps in financial planning to ensure that its capital resources are spent appropriately and that more capital is infused into the business as necessary to meet its contractual obligations with the Social Club. The ALJ concludes that Applicant's financial situation is sufficient to support the operations sought. It has adequate cash on hand, access to capital, and equipment to support initial operations and meet short-term contingencies. The ALJ finds that Applicant met its burden to prove by a preponderance of the evidence that it is financially fit to provide the proposed service.

69. In sum, the ALJ finds that Applicant met its burden to prove by a preponderance of the evidence that it is financially, managerially, and operationally fit to provide the proposed service.

70. Consistent with the above findings, the ALJ concludes that Applicant met its burdens of proof for the authority proposed by the Application, as amended. The ALJ recommends that the Commission grant the amended Application. However, to ensure clarity, several minor modifications should be made to the language concerning the geographical boundaries within which Applicant would be permitted to operate.⁷ These minor modifications do not change the substance of the boundaries proposed by Applicant, neither enlarging nor reducing, or otherwise changing the proposed geographical boundaries.

⁷ The modifications add words such as "thence proceeding" south, north, northwest, west, or east along a particular boundary. It does not modify the substance of the boundaries, instead providing clarification of the geographical area covered by the boundaries.

71. In addition, as discussed in footnote 3, the authority should include an additional restriction (as stated during Ms. Healey's testimony) that Applicant be restricted to providing transportation on streets with a speed limit of 35 miles an hour or less. Given that Applicant is limited to the use of electric golf carts, it is important to protect the public safety as well as the safety of the passengers to limit transportation to streets with a speed limit of 35 miles an hour or less. This restriction will be added to the authority which is recommended by this decision.

72. Pursuant to § 40-6-109(2), C.R.S., the ALJ hereby transmits to the Commission the record and exhibits in this proceeding as well as a recommended decision that the Commission enter the following order.

II. ORDER

A. The Commission Orders That:

1. Applicant's request in its Closing Statement to dismiss the intervention of Colorado Cruisers Inc., doing business as Colorado Crewz-In is denied.

2. Commission administrative staff is directed to redact loan numbers and account numbers appearing on pages 2 and 3 of Hearing Exhibit 112.

3. The "Stipulation for Imposition of Restrictive Amendments and Motion for Conditional Withdrawal of Interventions" is approved and granted.

4. The interventions filed by MKBS LLC, doing business as Metro Taxi (Metro), Colorado Cab Company LLC, doing business as Denver Yellow Cab and Boulder Yellow Cab (Colorado Cab), Shamrock Taxi of Fort Collins Inc. (Shamrock), Colorado Springs Transportation LLC (Colorado Springs Transportation) are withdrawn. Metro, Colorado Cab, Shamrock and Colorado Springs Transportation are dismissed as parties to this proceeding.

5. Consistent with the discussion above, the Application, as amended and modified, for a Permit to Operate as a Contract Carrier by Motor Vehicle for Hire filed by CoY Club, LLC, doing business as Denver Bar Cart (Applicant) is granted.

6. Applicant's is granted a permit to operate as a contract carrier by motor vehicle for hire as follows:

Transportation of
passengers

within and between the following borders in the City of Denver:

Beginning at the intersection of Interstate 70 to Colorado Boulevard, thence proceeding south on Colorado Boulevard to its intersection with Buchtel Boulevard, thence proceeding northwest on Buchtel Boulevard to its intersection with Mississippi Avenue, then proceeding west on Mississippi Avenue to its intersection with Sheridan Boulevard, thence proceeding north on Sheridan Boulevard to its intersection with Interstate 70, thence proceeding east on Interstate 70 to the point of the beginning.

RESTRICTIONS: This permit is restricted:

- (1) To providing transportation service for Denver Bar Cart Social Club LLC;
- (2) Against providing transportation to or from motels, hotels or airports;
- (3) To the use of electric golf carts for all transportation;
- (4) To the operation of golf carts on streets with a speed limit of 35 miles per hour or less; and
- (5) For a period of one calendar year commencing on the date the decision granting this authority becomes a final Commission decision, this permit is restricted against the operation of more than five electric golf carts at any given time.

7. Applicant shall operate in accordance with all applicable Colorado law and Commission rules.

8. Applicant shall not commence operation under the authority granted until it has complied with the requirements of Colorado law and Commission rules, including without limitation:

- (a) causing proof of insurance (Form E or self-insurance) or surety bond (Form G) coverage to be filed with the Commission;
- (b) paying to the Commission, the motor vehicle fee (\$5) for each vehicle to be operated under authority granted by the Commission, or in lieu thereof, paid the fee for such vehicle(s) pursuant to the Unified Carrier Registration Agreement;
- (c) having an effective tariff on file with the Commission. Applicant shall file an advice letter and tariff on not less than ten days' notice. The advice letter and tariff shall be filed as a new Advice Letter proceeding and shall comply with all applicable rules. In calculating the proposed effective date, the date received at the Commission is not included in the notice period and the entire notice period must expire prior to the effective date. (Additional tariff information can be found on the Commission's website at dora.colorado.gov/puc and by following the transportation common and contract carrier links to tariffs); and
- (d) paying the applicable issuance fee (\$5).

9. If Applicant does not cause proof of insurance or surety bond to be filed, pay the appropriate motor vehicle fees, file an advice letter and proposed tariff, and pay the issuance fee within 60 days of the effective date of this Decision, then the grant of the authority shall be void. For good cause shown, the Commission may grant additional time for compliance if the request for additional time is filed within 60 days of the effective date of this Decision.

10. The Commission will notify Applicant in writing when the Commission's records demonstrate compliance with ordering paragraph 8.

11. Proceeding No. 14A-0337CP is closed.

12. 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.

13. 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.

14. 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)



ATTEST: A TRUE COPY

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

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge