

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 21A-0020CP

IN THE MATTER OF THE APPLICATION OF ESTES PARK GUIDED TOURS LLC FOR A
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO OPERATE AS A
COMMON CARRIER BY MOTOR VEHICLE FOR HIRE.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
STEVEN H. DENMAN
RULINGS ON MOTION FOR CLARIFICATION
OF LAW AND MOTION TO STRIKE AND OBJECTION**

Mailed Date: May 7, 2021

TABLE OF CONTENTS

I. STATEMENT.....	2
A. Summary.....	2
B. Procedural History.....	2
II. APPLICANT’S MOTION FOR CLARIFICATION OF LAW	6
A. Applicable Law.	7
1. Legal Standards Governing the Application.	7
2. Burden of Proof.....	10
III. ESTES PARK SHUTTLE’S MOTION TO STRIKE.	13
1. Objections to Applicant’s Exhibits	15
2. Objections to Applicant’s Witnesses.....	21
IV. ORDER.....	24
A. It Is Ordered That:	24

I. STATEMENT

A. Summary

1. By this Decision, the Administrative Law Judge (ALJ) grants in part, and denies in part, the Motion to Strike and Objection (Motion to Strike) filed on March 1, 2021 by Fun Tyme Trolleys, LLC, doing business as Estes Park Trolleys (now known as Estes Park Shuttle).¹ This Decision also denies Applicant's Motion for Clarification of Law on the Burden of Proof for Sightseeing (Motion for Clarification of Law), filed on April 15, 2021 by Estes Park Guided Tours LLC (Applicant or Estes Park Guided Tours).

B. Procedural History

2. On January 5, 2021, Estes Park Guided Tours filed an Application for a Certificate of Public Convenience and Necessity to Operate as a Common Carrier by Motor Vehicle for Hire (Application). That filing commenced this proceeding.

3. On January 11, 2021, the Public Utilities Commission (Commission or PUC) issued its Notice of Application Filed (Notice). As originally noticed, the Application was:

For authority to operate as a common carrier for hire for the transportation of passengers in call-and-demand sightseeing service

between all points in Estes Park Colorado, on the one hand, and all points in Rocky Mountain National Park located in the Counties of Boulder, Grand, and Larimer, State of Colorado, and Grand Lake, Colorado, on the other hand.

The 30-day intervention deadline set by the Notice expired on February 10, 2021.

¹ See Decision No. R20-0228-I (issued on April 14, 2021), granting the Motion for Exchange of Intervening Parties and Corresponding Legal Counsel (Motion for Exchange) filed on April 8, 2021 by Estes Park Charters Corp., doing business as Estes Park Shuttle (Estes Park Shuttle), the successor in interest of Estes Valley Transport, Inc. When appropriate, the name Estes Park Shuttle will be substituted for references to the former intervenors Estes Park Trolleys and Estes Valley Transport, Inc.

4. Applicant did not file testimony and exhibits with its Application and, therefore, seeks a Commission decision within 210 days after the Application was deemed complete, or no later than August 15, 2021.²

5. Applicant filed amendments to the Application on January 14, 2021, to amend Sections 2 (Contact Person for questions about the Application), 8 (Designated Agent for service of process), and 10(a) (Proposed Authority), and on February 19, 2021, to again amend Sections 2 and 8.³

6. The procedural history of the above captioned proceeding is set forth in Decisions previously issued in this matter and is repeated here as needed to put this Decision into context.

7. On January 22, 2021, Estes Park Trolleys, through counsel, filed its Entry of Appearance and Intervention. At the same time, Estes Park Trolleys filed its Certificate PUC No. 55845S as Attachment 01, claiming to be an intervenor by right. Under Certificate PUC No. 55845S, Estes Park Trolleys may transport passengers in call-and-demand sightseeing service between all points within 30 miles of the intersection of U.S. Highway 34 and U.S. Highway 36 in Estes Park, Colorado. Decision No. R20-0094-I (issued on February 22, 2021) acknowledged the intervention by right of Estes Park Trolleys.

8. On February 8, 2021, Estes Valley Transport, Inc. (Estes Valley Transport), through counsel, filed its Entry of Appearance and Intervention, claiming to be an intervenor by right. On March 1, 2021, Estes Valley Transport filed an Amended Intervention, *nunc pro tunc*, and attached a copy of its Certificate PUC No. 54696. Under that Certificate, Estes Valley

² See § 40-6-109.5(2), C.R.S. (2019).

³ The January 14, 2021 amendment to Section 10(a) of the Application amended the statement of the Proposed Authority to conform to the Commission's Notice.

Transport may transport passengers in call-and-demand sightseeing service, between all points within a ten-mile radius of the intersection of U.S. Highways 34 and 36 in Estes Park, Colorado, and between said points, on the one hand, and all points within a 75-mile radius of the intersection of U.S. Highways 34 and 36 in Estes Park, Colorado, on the other hand.

9. On February 19, 2021, Estes Park Guided Tours timely filed Applicant's Witness Summaries and Exhibit List, as well as copies of its proposed hearing exhibits.

10. On January 22, 2021, Estes Park Trolleys timely filed Intervenor's Exhibit and Witness Summary, along with copies of eight proposed hearing exhibits.

11. On March 1, 2021, Estes Valley Transport timely filed Intervenor's Exhibit and Witness Summary, along with a copy of one proposed hearing exhibit.

12. Decision No. R21-0113-I (issued on March 1, 2021) acknowledged the intervention by right of Estes Valley Transport.

13. The parties to this proceeding now are Estes Park Guided Tours and Estes Park Shuttle. Both parties are represented by counsel.

14. Decision No. R21-0142-I (issued on March 11, 2021) scheduled a remote evidentiary hearing for May 17 and 18, 2021 at 9:30 a.m. for each day.

15. On April 5, 2021 at 3:05 p.m., Estes Park Guided tours filed Applicant's First Amended Witness Summaries and Exhibit List (First Amended Witness and Exhibit List), as well as copies of 19 proposed hearing exhibits. In this amended pleading, Applicant removed six endorsed witnesses but added three new potential witness and added three new proposed hearing exhibits (20 through 22). The First Amended Witness and Exhibit List showed the correct proceeding number (21A-0020CP) for the instant proceeding, but it erroneously stated the

caption as *Estes Valley Transport, Inc. and Fun Tyme Trolleys, LLC, doing business as Estes Park Trolleys, Complainants v. Estes Park Guided tours, Respondent*.⁴

16. Decision No. R21-0203-I (issued on April 6, 2021) *inter alia* directed Estes Park Guided Tours, no later than April 8, 2021, to correct the caption on the First Amended Witness and Exhibit List and to request leave of the ALJ to amend the original Applicant's Witness Summaries and Exhibit List filed on February 19, 2021. Decision No. R21-0203-I also allowed Estes Park Trolleys to amend, by April 15, 2021, its Motion to Strike to address the amended witness list and exhibits in the corrected Applicant's First Amended Witness Summaries and Exhibit List, and allowed Estes Park Guided Tours and Estes Valley Transport to file responses to an amended Motion to Strike by April 22, 2021. Estes Park Trolleys did not file an amended Motion to Strike, so no such responses were filed.

17. On April 7, 2021, Estes Park Guided Tours filed the Motion for Leave, the corrected Applicant's First Amended Witness Summaries and Exhibit List, as well as copies of 22 proposed hearing exhibits. After conferral, counsel for Estes Park Trolleys advised that he would not oppose the filing of the corrected First Amended Witness and Exhibit List, although he would reserve the same objections he made prior in the pending Motion to Strike and Objection filed March 1, 2020.

18. On April 8, 2021, Estes Park Shuttle, the successor in interest of Estes Valley Transport, filed a Motion for Exchange of Intervening Parties and Corresponding Legal Counsel (Motion for Exchange).

⁴ This caption was for Proceeding No. 20F-0290CP, which involved the same parties. *See* Decision No. R20-0906 (issued December 22, 2020).

19. Decision No. R21-0216-I (issued on April 9, 2021) granted Estes Park Guided Tours' unopposed Motion for Leave and shortened response time to April 13, 2021 (at Noon) for filing responses to the Motion for Exchange. No such responses were filed by that deadline. Decision No. R20-0228-I (issued on April 14, 2021), granted the unopposed Motion for Exchange.

II. APPLICANT'S MOTION FOR CLARIFICATION OF LAW

20. On April 15, 2021, Estes Park Guided Tours filed Applicant's Motion for Clarification of Law requesting "clarification of the demonstration that EPGT must make to be granted common carrier authority for sightseeing service."⁵

21. While Applicant suggests it is merely requesting clarification regarding the requisite burden of proof on its Application, Applicant in fact appears to be asking the Commission to apply a different standard of law. First, Applicant suggests it "should not have to bear the burden of proving that the service provided by some other company is inadequate."⁶ Second, Applicant requests the definition of "public need" as it is used in Rule 6203 of the Commission's Rules Regulating Transportation by Motor Vehicle, 4 *Code of Colorado Regulations* (CCR) 723-6 (2020), be "broadly construed when applied to sightseeing – requiring a showing only that the public has some interest in the service, not having to prove there is some real or urgent need for sightseeing."⁷

⁵ Motion for Clarification, at p. 1.

⁶ *Id.*

⁷ *Id.*

22. Estes Park Shuttle's Response to Applicant's Motion for Clarification of Law (Intervenor's Response) filed on April 27, 2021, attempts to refute Applicant's need for clarification by quoting at length from Recommended Decision No. R20-0906 (issued December 22, 2020) in Proceeding No. 20F-0290CP⁸ before charting the history of numerous statutory provisions and extensive applicable case law.⁹

23. At the outset, in both Applicant's Motion and Intervenor's Response, the parties appear to treat the pleadings as an opportunity to argue *ad nauseam* about numerous issues, including both those that are at issue in this proceeding and those that are not. Insofar as these pleadings present or attempt to present legal argument beyond Applicant's request for clarification of the burden of proof, the ALJ declines to make any such findings prior to the scheduled hearing in this proceeding.

24. Section II.A of this Decision, discussed below, provides what the ALJ finds to be an adequate clarification regarding the applicable law and Applicant's burden of proof on its Amended Application.

A. Applicable Law.

1. Legal Standards Governing the Application.

25. The Amended Application seeks authority to operate as a common carrier by motor vehicle for hire for the transportation of passengers in call-and-demand sightseeing service between all points in Estes Park Colorado, on the one hand, and all points in Rocky Mountain

⁸ As noted above, Proceeding No. 20F-0290CP was a complaint proceeding involving the same parties as this proceeding.

⁹ See generally, Intervenor's Response, pp. 1-11.

National Park located in the Counties of Boulder, Grand, and Larimer, State of Colorado, and Grand Lake, Colorado, on the other hand.¹⁰

26. Section 40-10.1-104, C.R.S., provides that: “A person shall not operate or offer to operate as a motor carrier in this state except in accordance with this article [10.1].” Section 40-10.1-201(1), C.R.S., provides that: “A person shall not operate or offer to operate as a common carrier in intrastate commerce without first having obtained from the commission a certificate declaring that the present or future public convenience and necessity requires or will require such operation.”

27. Section 40-10.1-203(1), C.R.S., provides that, “The commission has the power to issue a certificate to a common carrier or to issue it for the partial exercise only of the privilege sought, and may attach to the exercise of the rights granted by the certificate such terms and conditions as, in the commission’s judgment, the public convenience and necessity may require.”

28. Several definitions in the Commission’s Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6 (2020), are applicable to this Application:

- a) 6001(g) – “Call-and-Demand,” “On Call-and-Demand,” or “Call-and-Demand Service” means the transportation of Passengers by a Common Carrier, but not on a Schedule.
- b) 6001(i) – “Certificate of Public Convenience and Necessity,” “Certificate,” or “CPCN” means the Authority issued to a Common Carrier declaring that the present or future public convenience and necessity requires or will require the stated operation.
- c) 6001(p) – “Common carrier” is a public utility as defined in § 40-1-102, C.R.S., and includes the obligation to indiscriminately accept and carry Passengers for Compensation. Common Carrier includes every Person directly or indirectly affording a means of transportation, or any service or facility in connection therewith, within this state, by Motor Vehicle; except that the term does not include a Contract Carrier as defined by § 40-10.1-101(6), C.R.S.; a Motor Carrier that provides transportation not

¹⁰ Amended Application, §§ 9 and 10, p. 3.

subject to regulation pursuant to § 40-10.1-105, C.R.S.; a Limited Regulation Carrier defined by § 40-10.1-301, C.R.S.; a Large Market Taxicab Service defined by § 40-10.1-101(9.5) C.R.S.; and a Transportation Network Company defined under § 40-10.1-602, C.R.S.¹¹

(See § 40-1-101(4)(a), C.R.S.)

- d) 6001(q) – “Compensation” means any money, property, service, or thing of value charged or received or to be charged or received, whether directly or indirectly.

(See § 40-10.1-101(5), C.R.S.)

- e) 6001(z) – “Duplicating or Overlapping Authority” means transportation of the same Common Carrier Type of Service between the same points under two or more separate Authorities which are held by the same Fully Regulated Intrastate Carrier.

- f) 6001(gg) – “Fully Regulated Intrastate Carrier” means a Motor Carrier that is subject to market entry, economic, operational, and safety regulation by the Commission as a public utility pursuant to Article 10.1 of Title 40, C.R.S. *Fully Regulated Intrastate Carriers include Common Carriers, such as Taxicab Carriers, Shuttle Service, formerly known as Limousine Service, Sightseeing Service, or Charter Service, and Contract Carriers. (Emphasis added.)*

- g) 6001(jjj) – “Passenger,” except as otherwise specifically defined or contextually required, means any Person, other than a Driver, occupying a Motor Vehicle including any assistance animals as defined in § 24-34-803, C.R.S.

- h) 6001(ttt) – “Sightseeing Service” means the transportation of Passengers by a Common Carrier on a Call-and-Demand basis originating and terminating at the same point for the sole purpose of viewing or visiting places of natural, historic, or scenic interest.

- j) 6001(dddd) – “Type of Service” means any one of the following services provided by a *Common Carrier* under its Certificate of Public Convenience and Necessity: Charter, Shuttle, *Sightseeing*, Taxicab, or Scheduled. (Emphasis added.)

¹¹ None of the listed statutory exceptions applies to the new authority sought in the Amended Application in this proceeding.

2. Burden of Proof

29. As the proponent of the order on the Amended Application, Estes Park Guided Tours bears the burden of proof by a preponderance of the evidence.¹² The preponderance standard requires that the evidence of the existence of a contested fact outweighs the evidence to the contrary. That is, the trier of fact must determine whether the existence of a contested fact is more probable than its non-existence. A party has met this burden of proof when the evidence, on the whole, slightly tips in favor of that party.¹³

30. When the preponderance standard applies, the evidence in the record must be substantial. Substantial evidence “is more than a scintilla[;] ... it must do more than create a suspicion of the fact to be established. It means 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.”¹⁴

31. Before the Amended Application can be granted, Estes Park Guided Tours must prove by a preponderance of the evidence all the essential elements required by Colorado law for the Commission to grant the authority sought. Then the ALJ must determine whether Estes Park Guided Tours has satisfied its burden of proof, and whether a decision to grant the Amended Application is supported by substantial evidence in the record.

¹² See §§ 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 (2020).

¹³ See *Mile High Cab, Inc. v. Colorado Public Utilities Commission*, 302 P.3d 241, 246 (Colo. 2013); *Swain v. Colorado Department of Revenue*, 717 P.2d 507, 508 (Colo. App. 1985).

¹⁴ *City of Boulder v. Public Utilities Comm’n.*, 996 P.2d 1270, 1278 (Colo. 2000) (internal citation omitted).

32. If an intervenor proposes any restriction on the authority sought, the burden of proving the need for the restriction by a preponderance of the evidence rests on the intervenor proposing the restriction.¹⁵

33. In *Durango Transportation, Inc. v. Colorado Public Utilities Comm'n.*, 122 P.3d 244 (Colo. 2005), the Colorado Supreme Court (Court) held that the Commission's purpose in granting transportation authority is to ensure that adequate transportation is available to the public.¹⁶ The Court reviewed relevant Colorado case law extending back to 1961 and succinctly explained the essential elements of proof for an application for authority to operate as an intrastate common carrier by motor vehicle for hire for the transportation of passengers:

The doctrine of regulated monopoly governs motor-vehicle passenger carriers. ... Under this doctrine, an applicant for authority to operate a passenger service must demonstrate that the public convenience and necessity require the service. ... When an existing carrier holds authority in the territory the applicant seeks to serve, this requires a showing both that the existing carrier's service is substantially inadequate and that the public convenience and necessity require the service proposed by the applicant. ... An applicant must also demonstrate its [financial and operational] fitness to hold the requested authority. ...¹⁷

34. Whether an incumbent's service is substantially inadequate is a question of fact that the Commission must determine.¹⁸ The Court in *Durango Transportation* found that, when the Commission analyzes whether an incumbent carrier's service is substantially inadequate, the public utilities law authorizes the Commission to consider a broad range of factors.¹⁹ One of those factors the Commission may consider is the overall context of the

¹⁵ See *Western Distributing Co. v. Diodoso*, 841 P.2d 1053, 1057-1059 (Colo. 1992).

¹⁶ *Id.*, 122 P.3d at 250 [citations omitted].

¹⁷ *Durango Transportation, Inc. v. Colorado Public Utilities Comm'n.*, 122 P.3d 244, 247 (Colo. 2005) [citations omitted].

¹⁸ *RAM Broadcasting v. Public Utilities Comm'n.*, 702 P.2d 746, 751 (Colo. 1985); *Durango Transp. Inc.*, 122 P.3d at 248.

¹⁹ *Durango Transp. Inc.*, 122 P.3d at 251.

transportation needs of the public in the area the applicant seeks to serve and in the service area of the incumbent carriers.²⁰

35. The Court then discussed in detail the proof an applicant can introduce in a hearing in order to demonstrate that an incumbent carrier's service is substantially inadequate:

An applicant for passenger-service authority can demonstrate the substantial inadequacy of an incumbent carrier by showing that the incumbent carrier is not "ready, willing, and *able* at all times to render service to anyone who might demand it." ... This requires more than a showing that there is "sufficient business to warrant two certified carriers." ... Moreover, an applicant cannot show substantial inadequacy through "expressions of mere opinion, preference, and desire and willingness to use the services of [the applicant] over the services of" an incumbent carrier. ... Instead, the applicant must show "a general pattern of inadequate service" on the part of the incumbent carrier. ... Whether the incumbent carrier's service is substantially inadequate is a question of fact that is to be determined by the Commission. ...

The Commission is authorized to consider a broad range of evidence in determining whether an incumbent carrier's service is substantially inadequate. ... Consistent with [§ 40-3-101(2), C.R.S.], this Court has observed that "public convenience and necessity may be established by any relevant evidence, ... and we have expressly approved the Commission's consideration of the incumbent carrier's schedules, the speed and efficiency of its services, and the quality of its facilities, organization, equipment, and personnel."²¹

36. Although the Applicant bears the burden of proving, by a preponderance of the evidence, that the incumbent carrier's service is substantially inadequate, when "an applicant's evidence tend[s] to prove the existing carrier's substantial inadequacy, 'it [is] incumbent upon [the existing carrier] to rebut this evidence.'"²²

37. As to Applicant's specific requests in its Motion for Clarification of Law, the burden it bears is quite clear in both the applicable rules and statutes as well as the decades of

²⁰ *Id.*, 122 P.3d at 246, 247, and 251.

²¹ *Id.*, 122 P.3d at 247-248, 250-251 [citations omitted; emphasis in the original].

²² *Id.*, 122 P.3d at 250 (quoting *Ephraim Freightways Inc. v. Public Utilities Comm'n*, 380 P.2d 228, 231-232 (Colo. 1963)).

case law interpreting Colorado motor carrier law. To the extent Applicant is dissatisfied with the existing statutory provisions or case law, Applicant is reminded that it is beyond the power of this Commission to alter or amend statutes or to overrule appellate case law – this would require legislative action by the Colorado General Assembly. Applicant’s Motion for Clarification of Law is therefore denied.

III. ESTES PARK SHUTTLE’S MOTION TO STRIKE.

38. On March 1, 2021, Estes Park Trolleys (now known as Estes Park Shuttle)²³ filed the initial Motion to Strike, requesting that Applicant’s Witness Summaries and Exhibit List be stricken in its entirety, or in the alternative, that certain of Applicant’s exhibits be stricken and witness testimony be limited only to the issues and facts relevant to this proceeding. On March 11, 2021, Estes Park Guided Tours timely filed Applicant’s Response to Motion to Strike and Objection (Response), opposing the arguments in the Motion to Strike.

39. On April 5, 2021, Estes Park Guided Tours filed Applicant’s First Amended Witness Summaries and Exhibit List. Decision No. R21-0203-I (issued on April 6, 2021) *inter alia* allowed Estes Park Shuttle to amend its Motion to Strike, by April 15, 2021, to address the amended witness list and exhibits in the corrected Applicant’s First Amended Witness Summaries and Exhibit List; and allowed Estes Park Guided Tours and Estes Valley Transport, by April 22, 2021, to file responses to address the amended Motion to Strike.

40. On April 7, 2021, Estes Park Guided Tours filed its Unopposed Motion for Leave to File First Amended Witness Summaries and Exhibit List along with Applicant’s First Amended Witness Summaries and Exhibit List. Said motion was granted by Decision

²³ From this point forward for the sake of simplicity and accuracy, this Decision will refer to Intervenor Estes Park Trolleys by its current name of Estes Park Shuttle.

No. R21-0216-I (issued April 9, 2021). Estes Park Shuttle did not amend its Motion to Strike in response to Applicants' First Amended Witness Summaries and Exhibit List.

41. As grounds for striking the entire pleading, Estes Park Shuttle argues that “the focus of this proceeding should be on determining whether or not granting Applicant authority to operate as a common carrier of passengers for hire would or would not be in direct competition with Intervenor and, therefore, would not be in the public interest.”²⁴ Estes Park Guided Tours responds that granting its Application “will alleviate some of the traffic congestion in Estes Park and [Rocky Mountain National Park] RMNP and offer visitors more choices for seeing RMNP. [Estes Park Shuttle] is using the PUC to attempt to block any perceived competition.”²⁵

42. Estes Park Shuttle also argues that Applicant's Witness Summaries and Exhibit List “is practically identical to the Witness Summaries and Exhibit List it offered as Respondent in Proceeding No. [20F-0290CP],” *Estes Valley Transport, Inc. and Fun Tyme Trolleys, LLC, doing business as Estes Park Trolleys v. Estes Park Guided Tours*, uses the same caption as that proceeding, is redundant of that proceeding, and is irrelevant to the instant proceeding.²⁶ Estes Park Guided Tours counters that Applicant's Witness Summaries and Exhibit List is substantially the same as those presented in Proceeding No. 20F-0290CP but this does not make them irrelevant.²⁷

43. The ALJ denies Estes Park Shuttle's request to strike the entirety of Applicant's First Amended Witness Summaries and Exhibit List. As discussed in detail in the Applicable Law section of this Decision, Estes Park Guided Tours has the burden to prove by a

²⁴ Motion to Strike, at ¶ 5 at pp. 2 and 3.

²⁵ Response, at p. 1.

²⁶ Motion to Strike, at ¶ 6 at p. 3.

²⁷ Response, at p. 2.

preponderance of the evidence the essential elements to demonstrate that the Amended Application should be granted. After a review of Applicant's corrected witness summaries and proposed hearing exhibits, the ALJ concludes that some of the proposed testimony and hearing exhibits are relevant to proof of those essential elements, while other are not.

44. In the following paragraphs, the ALJ discusses each of Estes Park Guided Tours' proposed testimony and hearing exhibits that Estes Park Shuttle moves to strike, the grounds for objection, Estes Park Guided Tours' Response, and the ALJ's ruling on each.

1. Objections to Applicant's Exhibits

45. *Applicant's Exhibit 1* – Commercial Use Authorization Application for Rocky Mountain National Park, which expired on November 15, 2019. Estes Park Shuttle argues that this exhibit is not relevant to the instant proceeding as the exhibit does not speak to Estes Park Guided Tours' argument that it should be granted the authority requested in its Amended Application.²⁸ In addition, Estes Park Shuttle argues that such passes are generally granted in RMNP without consideration or confirmation as to whether the entity requesting the pass is compliant with PUC regulations.²⁹ In its Response, Estes Park Guided Tours argues that the proposed exhibit "is relevant to EPGT's experience and desire to play by the rules by obtaining authorizations necessary to do business."³⁰

46. While this proposed exhibit may have been relevant to defense of the complaint in Proceeding No. 20F-0290CP (hereinafter referred to as, the Complaint Proceeding), because the proposed exhibit has expired it indicates nothing about the issues in this proceeding and is

²⁸ Motion to Strike, at ¶ 8 at p. 3.

²⁹ *Id.*

³⁰ Response, at p. 3.

therefore irrelevant to this proceeding. Estes Park Shuttle's Motion to Strike is granted as to Exhibit 1, and the exhibit will thereby be stricken and will not be admitted into evidence at the hearing.

47. *Applicant's Exhibit 2* – 2020 ROMO CUA/SUP Guide Pass No. 1087 (Guide Pass). Estes Park Shuttle argues the exhibit is irrelevant to the instant proceeding except to show that Estes Park Guided Tours was operating in violation of PUC regulations.³¹ In its Amended Exhibit List, Estes Park Guided Tours substituted the Guide Pass that expired in December 2020 with a 2021 ROMO CUA/SUP Guide Pass No. 435, expiring December 31, 2021, which Estes Park Guided Tours claims is relevant to its “permission from RMNP to do business.”³² The ALJ finds that Exhibit 2 is relevant to the instant proceeding and that Estes Park Shuttle's objection goes to the weight of the exhibit rather than its admissibility. The Motion to Strike is denied as to Exhibit 2.

48. *Applicant's Exhibit 3* – Town of Estes Park Business 2021 License No. 164. Estes Park Shuttle again argues the exhibit is irrelevant to the instant proceeding except to show that Estes Park Guided Tours was operating in violation of PUC regulations.³³ Estes Park Guided Tours argues that the exhibit is relevant to it having permission from the Town of Estes Park to do business.³⁴ As with Exhibit 2, the ALJ finds that Exhibit 3 is relevant to the instant proceeding and that the objection goes to the weight of the exhibit rather than its admissibility. The Motion to Strike is denied as to Exhibit 3.

³¹ Motion to Strike, at ¶ 9 at p. 3.

³² Response, at p. 3.

³³ Motion to Strike, at ¶ 10 at p. 4.

³⁴ Response, at p. 3.

49. *Applicant's Exhibit 4* – Photography Certificate for Ben Legzdins. Estes Park Shuttle argues that the exhibit is both redundant and irrelevant as the exhibit does not provide information regarding the specifics of attaining the certificate nor what the requirements to receive the certificate may be.³⁵ Estes Park Guided Tours claims that the exhibit is relevant to show how its business model differentiates itself from other tour companies.³⁶ The ALJ finds that the exhibit may be relevant only as to the alleged substantial inadequacy of the incumbent in the instant proceeding and finds that Estes Park Shuttle's objections to this exhibit go only to the weight of the exhibit and not its admissibility. The Motion to Strike is therefore denied as to Exhibit 4.

50. *Applicant's Exhibit 6* – Undated bear cub and elk photographs. Estes Park Shuttle argues that the exhibit is redundant and irrelevant and does not demonstrate any difference between Estes Park Guided Tours and the Intervenors.³⁷ Estes Park Guided Tours responds that the exhibit shows photographs which can be purchased by its customers, which it claims is a service not offered by the Intervenors.³⁸ The ALJ finds that the proposed exhibit may be relevant only to the element of alleged substantial inadequacy of the incumbent, and finds that Estes Park Shuttle's objection to the exhibit goes to the weight of the exhibit and not its admissibility in this proceeding. The Motion to Strike is therefore denied as to Exhibit 6.

51. *Applicant's Exhibit 9* – Letter from Adam Shake dated September 16, 2020. Estes Park Shuttle argues this exhibit is redundant given that Estes Park Guided Tours proposed a

³⁵ Motion to Strike, at ¶ 11 at p. 4.

³⁶ Response, at p. 3.

³⁷ Motion to Strike, at ¶ 12 at p. 4.

³⁸ Response, at p 4.

second letter from Mr. Shake as Exhibit 17.³⁹ In addition, Estes Park Shuttle argues the exhibit is irrelevant to the instant proceeding and “demonstrates a very strong bias against intervenors.”⁴⁰ Estes Park Guided Tours responds by arguing that the exhibit is relevant to showing “longtime local community support for EPGT’s business.”⁴¹ To be clear, Estes Park Shuttle’s objection appears to be that Exhibit 9 is redundant because of the existence of Exhibit 17, a short letter from Mr. Shake dated February 12, 2021. Mr. Shake’s letter here proposed as Exhibit 9 was Exhibit 108 in the Complaint Proceeding and was written to support Estes Park Guided Tours’ defense in that proceeding. It appears that Mr. Shake’s letter that has been proposed here as Exhibit 17 was likely filed in support of Estes Park Guided Tours’ application for temporary authority, an application that was denied by the Commission in Decision No. C21-0188 in Proceeding No. 21A-0097CP-TA on March 30, 2021. Based on these facts, the ALJ finds that Exhibit 9 is relevant as it is a support letter for a motor carrier CPCN, and the objections raised by Estes Park Shuttle go to the weight of the exhibit and not its admissibility. The Motion to Strike is denied as to Exhibit 9.

52. *Applicant’s Exhibit 11* – Letter from Eric Lund dated March 12, 2020. Estes Park Shuttle argues the exhibit is redundant and irrelevant and does not differentiate Estes Park Guided Tours from the Intervenors with respect to passenger transportation service.⁴² Estes Park Guided Tours responds that the letter is relevant as it shows “continuing local community support for EPGT’s business.”⁴³ The ALJ finds that, like Exhibit 9, this exhibit is relevant to the current proceeding as a motor carrier CPCN support letter, and he finds that Estes Park Shuttle’s

³⁹ Motion to Strike, at ¶ 13 at p. 4.

⁴⁰ *Id.*

⁴¹ Response, at p. 4.

⁴² Motion to Strike, at ¶ 14 at p. 5.

⁴³ Response at p. 4.

objections go to the weight of the exhibit rather than its admissibility. The Motion to Strike is denied as to Exhibit 11.

53. *Applicant's Exhibit 12* – Helen Rodriguez Reservation (no transportation), dated September 13, 2020. Estes Park Shuttle objects to the admission of this exhibit, arguing it is both redundant and irrelevant as the Complaint Proceeding determined that Estes Park Guided Tours was operating as a common carrier of passengers for hire.⁴⁴ Estes Park Guided Tours, in its response, argues the exhibit is relevant to showing that transportation is not the most important part of its business and repeats arguments that it is in the public interest to allow it to give the tours that it does.⁴⁵ The ALJ finds that this exhibit was dated and the underlying reservation occurred when Estes Park Guided Tours was operating without lawful PUC authority, does not speak to the issues raised in this proceeding, and is therefore irrelevant. The Motion to Strike is granted as to Exhibit 12, which will thereby be stricken and will not be admitted into evidence at the hearing.

54. *Applicant's Exhibit 13* – Amanda Holman Reservation (no transportation), dated August 29, 2020. Estes Park Shuttle objects to the admission of this exhibit arguing it is both redundant and irrelevant as the Complaint Proceeding determined that Estes Park Guided Tours was operating as a common carrier of passengers for hire. Estes Park Guided Tours, in its response, argues the exhibit is relevant to showing that transportation is not the most important part of its business and repeats arguments that it is in the public interest to allow it to give the tours that it does.⁴⁶ The ALJ finds that this exhibit was dated and the underlying reservation occurred when Estes Park Guided Tours was operating without lawful PUC authority, does not

⁴⁴ Motion to Strike, at ¶ 15 at p. 5.

⁴⁵ Response at p. 4.

⁴⁶ Response at p. 4.

speak to the issues raised in this proceeding, and is therefore irrelevant. The Motion to Strike is granted as to Exhibit 13, which will thereby be stricken and will not be admitted into evidence at the hearing.

55. *Applicant's Exhibit 18* – Letter from Jackie Robinson/Blue Door Inn, undated. Estes Park Shuttle argues the exhibit is redundant and irrelevant as the letter does not indicate whether the author of the letter has first-hand knowledge of Estes Park Guided Tours' claims with respect to the transportation of passengers, and Estes Park Shuttle argues that the letter is not an affidavit and is therefore "little more than hearsay."⁴⁷ Estes Park Guided Tours responds that the letter is relevant "as an example of community and public support for EPGT's business."⁴⁸ The ALJ finds that the exhibit is relevant as a motor carrier CPCN support letter, and he finds that Estes Park Shuttle's objections go to the weight of the evidence rather than its admissibility. The Motion to Strike is denied as to Exhibit 18.

56. *Applicant's Exhibit 19* – Letter from Lacey James/McGregor Mountain Lodge, undated. Estes Park Shuttle objects to the exhibit, arguing the exhibit is both redundant and irrelevant because proposed Exhibit 10 is also a letter of support from McGregor Mountain Lodge. Estes Park Shuttle also argues that this letter asks the Commission to grant Estes Park Guided Tours access to RMNP, which is not within its power.⁴⁹ Estes Park Guided Tours responds that the exhibit is relevant "as an example of community and public support for EPGT's business."⁵⁰ The ALJ finds that the exhibit is relevant as a motor carrier CPCN support letter. The ALJ agrees with Estes Park Shuttle that this Commission does not have the power

⁴⁷ Motion to Strike, at ¶ 17 at p. 5.

⁴⁸ Response at p. 4.

⁴⁹ Motion to Strike, at ¶ 18 at p. 5.

⁵⁰ Response at p. 4.

specifically to grant visitors access to RMNP, other than to include RMNP within the service areas of a motor carrier under Colorado law. This part of Estes Park Shuttle's objection is granted, and Exhibit 19 may not be offered to support that purpose. The ALJ finds that Estes Park Shuttle's other objections go to the weight of the evidence rather than its admissibility. With the limitations expressed in this paragraph, the Motion to Strike is granted in part and denied in part as to Exhibit 19.

2. Objections to Applicant's Witnesses

57. Applicant's witnesses Ben Legzdins and Shannon Reilly proposed testimonials. Estes Park Shuttle argues that item e on the summaries provided by Estes Park Guided Tours for each of these witnesses indicates "proposed testimonials from customers."⁵¹ Estes Park Shuttle continues by arguing that "[b]ecause these folks would be repeating what others have said, rather than asking that such persons appear and speak for themselves, this would be hearsay testimony and, as such, should be disallowed."⁵² The ALJ agrees that this testimony would be hearsay. Further, in its response, Estes Park Guided Tours does not attempt to argue that this testimony is not hearsay nor that the testimony is admissible as any exception to the hearsay rule.⁵³ Therefore, the ALJ grants the Motion to Strike as to item e (testimonials from customers and the business community) and these witnesses will not be permitted to offer hearsay testimony on these subjects, but may otherwise provide testimony relevant to the issues in this proceeding.

58. Applicant's witness Brad Manard. This witness was removed as a potential witness in Estes Park Guided Tours' First Amended Exhibit List, filed

⁵¹ Motion to Strike, at ¶ 20 at p. 5.

⁵² *Id.*

⁵³ *See* Response at p. 5.

April 5, 2021. Estes Park Trolleys' objections to this witness's testimony on the basis of relevance are therefore moot and the Motion to Strike as to this witness will thereby be denied as moot.

59. Applicant's witness Adam Shake, CEO of the Estes park Economic Development Corporation. Estes Park Shuttle objects to this witness given his public position within the community and as CEO of an organization that Estes Park Shuttle claims should promote community economic development in an unbiased matter.⁵⁴ Estes Park Guided Tours, in its Response, argues that the witness can testify about "the general support and need for EPGT by the Estes Park Economic Development Corporation within the community," and takes exception to Estes Park Shuttle's attempt to prevent Mr. Shake from testifying by "alleging that he should be unbiased."⁵⁵

60. The ALJ finds that Estes Park Shuttle's objections to this witness go purely to the weight of the testimony and that any alleged bias of the witness may be explored on cross-examination. The Motion to Strike will be denied as to proposed witness Adam Shake. However, in its First Amended Exhibit List, Estes Park Guided Tours indicates that Mr. Shake is expected to give testimony regarding "[t]ransportation not being a reason to go on EPGT tours."⁵⁶ This assertion may have been relevant to Estes Park Guided Tours' unsuccessful defense in the Complaint Proceeding, but it is not at issue in this proceeding, and it is not relevant to proof of the essential elements required by Colorado law for the Commission to grant the authority sought in this Amended Application. The Motion to Strike as to testimony from this witness on the topic of "transportation not being a reason to go on EPGT tours" will be

⁵⁴ Motion to Strike, at ¶ 22 at p. 6.

⁵⁵ Response at p. 5.

⁵⁶ Applicant EPGT's First Amended Witness Summaries and Exhibit List, filed April 5, 2021, at p. 2.

granted. Mr. Shake will be prohibited from testifying or offering an opinion that transportation is not a reason to go on trips offered or to be offered by Estes Park Guided Tours.

61. Applicant's witnesses numbered (in original witness list): 4 (Adam Shake), 5 (Eliot Kroll), 7 (Margaret Phillips), 8 (Marlene Wagner), and 9 (Kevin Gisolf). Estes Park Shuttle argues that any testimony provided by these witnesses related to "[t]ransportation not being a reason to go on EPGT tours" would be redundant to Proceeding No. 20F-0290CP, and the testimony is therefore irrelevant to this proceeding.⁵⁷ Estes Park Guided Tours argues in its Response that these witnesses should be allowed to testify about how transportation is not a reason to go on its tours and claims that, although the Commission has ruled that it must have authority in order to carry passengers, this "does not change the fact that EPGT's business, as today when it has customers follow in their own vehicles, is more about photography and wildlife experiences than about transportation, which differentiates EPGT from the Intervenors."⁵⁸

62. As a threshold matter, witness 5 (Eliot Kroll), witness 8 (Marlene Wagner), and witness 9 (Kevin Gisolf) are not included in Estes Park Guided Tours' First Amended Exhibit List, and objections to their testimony will therefore be denied as moot. As to the remaining witness, Ms. Phillips,⁵⁹ the ALJ agrees with Estes Park Shuttle that any proposed testimony or opinion that transportation is not a reason to go on trips offered or to be offered by Estes Park Guided Tours, it is not relevant to proof of the essential elements required by Colorado law for the Commission to grant the authority sought in this Amended Application. For this reason, the

⁵⁷ Motion to Strike, at ¶ 23 at p. 6.

⁵⁸ Response at p. 5.

⁵⁹ As discussed in paragraph 59 of this Decision, the Motion to Strike as to Mr. Shake's proposed testimony on this subject has already been granted and Mr. Shake is prohibited from testifying or offering an opinion on this topic.

Motion to Strike as testimony from this witness on that topic will be granted. Ms. Phillips also will be prohibited from testifying or offering an opinion that transportation is not a reason to go on trips offered or to be offered by Estes Park Guided Tours.

63. For all witnesses, Estes Park Shuttle argues that all testimony should be limited to the focus of this proceeding which is, according to Estes Park Shuttle, whether it would be in the public interest for Estes Park Guided Tours to receive authorization to operate as a motor carrier sightseeing service, or whether it would be detrimental to that interest.⁶⁰ Estes Park Shuttle is partially correct although, as discussed above, this statement is not necessarily a complete encapsulation of the essential elements Estes Park Guided Tours needs to prove to have the Amended Application granted. Nevertheless, Estes Park Guided Tours' counsel is directed to present only evidence relevant to prove by a preponderance of the evidence all the essential elements required by Colorado law for the Commission to grant the authority sought. Both parties' counsel is advised that any attempts to introduce evidence or to elicit testimony outside the scope of this proceeding or otherwise in contravention of this Decision will not be permitted.

64. Additional procedural requirements may be issued in future Interim Decisions.

IV. **ORDER**

A. **It Is Ordered That:**

1. The Applicant's Motion for Clarification of Law on the Burden of Proof for Sightseeing filed on April 15, 2021 by Estes Park Guided Tours LLC (Applicant or Estes Park Guided Tours), is denied.

⁶⁰ See Motion to Strike, at ¶ 24 at p. 6.

2. The Motion to Strike and Objection filed on March 1, 2021 by Fun Tyme Trolleys, LLC, doing business as Estes Park Trolleys (now known as Estes Park Shuttle), is granted in part and denied in part, consistent with the discussion above.

3. In accordance with this Decision, the following proposed exhibits filed by Estes Park Guided Tours will be stricken and not admitted into evidence at the evidentiary hearing: Applicant's Exhibit 1, Applicant's Exhibit 12, and Applicant's Exhibit 13. The use at hearing of Applicant's Exhibit 18 will be limited consistent with the discussion in Paragraph 55 of this Decision. The use at hearing of Applicant's Exhibit 19 will be limited consistent with the discussion in Paragraph 56 of this Decision. Estes Park Shuttle's Motion to Strike is denied as to Applicant's Exhibits 2, 3, 4, 6, 9, and 11.

4. As discussed, Estes Park Guided Tours' proposed witness testimony will be limited to testimony relevant to its evidentiary burden to prove by a preponderance of the evidence all the essential elements required by Colorado law for the Commission to grant the authority sought. Attempts by either party to introduce evidence or to elicit testimony outside the scope of this proceeding will not be permitted.

5. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

STEVEN H. DENMAN

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director