

Decision No. R20-0563

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20A-0097CP

IN THE MATTER OF THE APPLICATION OF ESTES PARK GUIDED TOURS 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
STEVEN H. DENMAN
GRANTING MOTION TO DISMISS
APPLICATION AND CLOSING PROCEEDING**

Mailed Date: August 3, 2020

I. STATEMENT

A. Procedural History

1. On March 9, 2020, Estes Park Guided Tours (Applicant or 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.

2. On March 16, 2020, the Commission issued its Notice of Application Filed (Notice). As originally noticed, the Application was:

For authority to operate as a common carrier by motor vehicle for hire for the transportation of

passengers in call-and-demand sightseeing service

between the Estes Park Visitors Center, 500 Big Thompson Avenue, Estes Park, Colorado, on the one hand, and all points in Rocky Mountain National Park and Grand Lake, Colorado, on the other hand.

The 30-day intervention deadline set by the Notice expired on April 15, 2020.

3. During the Commission’s weekly meeting held on April 22, 2020, the Commission deemed the Application complete and referred it to an Administrative Law Judge (ALJ) for disposition. Subsequently, the undersigned ALJ was assigned to preside over this proceeding.

4. Applicant did not file testimony and exhibits with its Application and, therefore, Applicant seeks a Commission decision within 210 days after the Application was deemed complete, or no later than November 18, 2020.¹

5. On March 23, 2020, Estes Valley Transport, Inc. (Estes Valley Transport), through counsel, filed its Entry of Appearance and Intervention. EV Transport’s Certificate PUC No. 54696 was attached to the Intervention. Estes Valley Transport also filed an Exhibit and Witness Summary, with the most recent version of Certificate PUC No. 54696.

6. Decision No. R20-0353-I (mailed on May 7, 2020) acknowledged the intervention by right of Estes Valley Transport.

7. On April 9, 2020, Ms. Kimberly O’Malley filed an Objection and Protest against granting the Application. Ms. O’Malley did not file an intervention pleading.

8. On April 13, 2020, Fun Tyme Trolleys, LLC, doing business as Estes Park Trolleys (Estes Park Trolleys), through counsel, filed its Entry of Appearance and Intervention. EP Trolleys’ Certificate PUC No. 55845S was attached to the Intervention. Estes Park Trolleys sought to intervene by right, but it did not alternatively request to intervene permissively. In Response to Estes Park Trolleys’ April 7, 2020 application, the Commission had suspended Estes Park Trolleys’ operations under Certificate PUC No. 55845S from April 1, 2020 through May 22,

¹ See § 40-6-109.5(2), C.R.S. (2019)

2020 due to the COVID-19 pandemic.² Therefore, the ALJ found that Estes Park Trolleys lacked standing to intervene by right and denied Estes Park Trolleys' intervention.³

9. On May 11, 2020, Estes Park Trolleys filed a Motion to Intervene by Permission. Estes Park Guided Tours failed to file a response to the Motion to Intervene by Permission. Decision No. R20-0445-I (mailed on June 16, 2020) granted Estes Park Trolleys' Motion to Intervene by Permission.

10. On April 15, 2020, Aspire Tours, LLC (Aspire), through counsel, filed a Petition for Intervention and Entry of Appearance. Aspire asserted that the operating rights sought by Applicant would overlap the rights granted to it under Certificate PUC No. 55865 to the extent that Applicant proposes to provide call-and-demand sightseeing service in Rocky Mountain National Park and in Larimer and Grand Counties. Aspire argued that it has a legally protected right in the subject matter of the Application and that its rights would be affected if the Application were to be granted.⁴ Aspire's Certificate PUC No. 55865 was attached to the Petition for Intervention.

11. After a review of the authority granted in Certificate PUC No. 55865, the ALJ found that Certificate PUC No. 55865 does not overlap the authority sought in the Application and concluded, therefore, that Aspire is *not* an intervenor by right.⁵ The ALJ then turned to Aspire's

² Decision No. C20-0337 (mailed on May 6, 2020) in Proceeding No. 20A-0157CP-SUSPENSION.

³ Decision No. R20-0353-I, Paragraph Nos. 10 – 11 at pages 3 and 4. The ALJ relied upon Rule 1401(e)(II) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1, which provides that, in regulated intrastate transportation carrier proceedings: "A common carrier holding either temporary or suspended authority in conflict with the authority sought in the application shall not have standing to intervene as of right, but may file a motion to permissively intervene."

⁴ Aspire Intervention, ¶¶ 3 – 4, at pages 1 and 2.

⁵ Decision No. R20-0353-I, ¶¶ 15 – 19, at pages 5 through 7.

alternative argument that, if the Commission found that it had not demonstrated an intervention by right, the Commission should grant it a permissive intervention.

12. Rule 1401(c) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1 (2015), states the minimum standards for permissive intervention in Commission proceedings and requires that:

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

(Emphasis added.)⁶

13. The Commission and its ALJs have the discretion to grant or to deny motions for permissive intervention.⁷ Pursuant to Rule 1401(c), that discretion is based upon the ALJ's determination of whether the person seeking permissive intervention has satisfied the required standards of Rule 1401(c). Pursuant to Rule 1500, 4 CCR 723-1, the person seeking leave to

⁶ Amended Rules of Practice and Procedure were to become effective on July 30, 2020. See Decision No. C20-0177 (mailed on March 30, 2020) in Proceeding No. 19R-0483ALL and § 24-4-103(5), C.R.S. New rules adopted by an administrative agency have a “future effect” (*i.e.*, adopted rules are prospective). § 24-4-102(15), C.R.S. Because Applicant filed this Application on March 9, 2020, prior to the effective date of the new rules, this Decision applies the 2015 version of the Rules of Practice and Procedure that were in effect on March 9, 2020. Article 2, § 11, *Colo. Const.*

⁷ *Public Service Co. v. Trigen-Nations Energy Co., L.L.P.*, 982 P.2d 316, 327 (Colo. 1999).

intervene by permission bears the burden of proof with respect to the relief sought and their motion's compliance with the requirements of Rule 1401(c).⁸

14. The ALJ found that Aspire's Petition for Intervention made no argument about how or why this proceeding may substantially affect its tangible or pecuniary interests. The ALJ concluded that Aspire failed its burden of proof to demonstrate that the standards of Rule 1401(c) have been satisfied. The ALJ denied Aspire's request for permissive intervention.⁹

15. The parties to this proceeding are Estes Park Guided Tours, Estes Valley Transport, and Estes Park Trolleys. The same counsel represents Estes Valley Transport and Estes Park Trolleys (collectively, the Intervenors).

16. Decision No. R20-0353-I (mailed on May 7, 2020) found that Estes Park Guided Tours is a Colorado limited liability company (LLC), that the Application was signed by Ben Legzdins, as "Owner,"¹⁰ and that Estes Park Guided Tours was not represented by counsel. After reviewing statements in the Application, the ALJ concluded that the Application satisfactorily established that Estes Park Guided Tours was entitled to proceed without an attorney, pursuant to Rule 1201(b)(II) of the Rules of Practice and Procedure, 4 CCR 723-1,¹¹ and that Ben Legzdins, the Owner, may represent Estes Park Guided Tours in this proceeding.¹²

17. Decision No. R20-0353-I also established a process through which Mr. Legzdins, on behalf of Estes Park Guided Tours, was required to confer with counsel for Intervenors

⁸ Decision No. R20-0073-I (mailed on January 30, 2020), ¶ 25, at page 10, in Consolidated Proceeding Nos. 19F-0620E and 19F-0621E (Denying motions for permissive intervention for failure to satisfy the standards required by Rule 1401(c)).

⁹ Decision No. R20-0353-I, ¶¶ 12 – 14, at pages 4 and 5.

¹⁰ See Application filed on March 9, 2020, at pages 2 and 7.

¹¹ See Application filed on March 9, 2020, at page 7.

¹² Decision No. R20-0353-I, ¶¶ 21 – 27, at pages 7 through 9.

regarding hearing dates when the Parties and their witnesses would be available during certain weeks in July and August of 2020. The Decision ordered the Parties to file a Joint Status Report, no later than May 15, 2020, informing the ALJ of the results of their conferral, including the agreed-upon hearing dates.¹³

18. Decision No. R20-0353-I warned the Parties that:

The Parties are advised and are on notice that failure to file the Joint Status Report, or individual Status Report, or failure to agree on proposed hearing dates by the deadline ordered in this Decision will result in the ALJ selecting a hearing date without further input from the Parties. In that event, after scheduling the hearing, the ALJ will not consider future requests to reschedule the hearing, unless upon filing a motion with a showing of good cause.¹⁴

19. Estes Park Guided Tours failed to file the required Joint Status Report by the May 15, 2020 deadline, nor did counsel for Intervenors file an individual Status Report.

20. Finally, Decision No. R20-0353-I advised the Parties, and gave them notice, of certain important procedural requirement, including that: (1) that this proceeding is governed by the Rules of Practice and Procedure found at 4 CCR 723-1, and that even though Applicant would be represented by a non-attorney, the rules apply equally to a non-attorney given permission to represent Applicant in this proceeding; (2) each Party was responsible for filing pleadings and other documents with the Commission and serving them on other Parties; and (3) pursuant to Rule 1400(b) of the Rules of Practice and Procedure, 4 CCR 723-1, the responding Party (*i.e.*, the Party that did not file a motion) has the procedural right to file a written response to the motion no later than 14 days after service of the motion.¹⁵

¹³ *Id.*, ¶¶ 28 – 30, at pages 9 and 10. If Applicant failed to confer with counsel for Intervenors before the deadline, Intervenors' counsel had the option of filing his own Status Report.

¹⁴ *Id.*, ¶ 31, at page 10 (emphasis in original).

¹⁵ *Id.*, ¶¶ 35 – 40, at pages 11 and 12.

21. In Decision No. R20-0382-I (mailed on May 20, 2020), the ALJ scheduled an evidentiary hearing for Tuesday, August 11, 2020, in a Commission Hearing Room in Denver, Colorado, commencing at 9:30 a.m.

22. To facilitate the orderly and efficient litigation of this proceeding, the ALJ adopted a procedural schedule for the filing of prehearing disclosures, so that each party would have an opportunity prior to the hearing to review a summary of the anticipated testimony of the other party's witnesses and to review copies of the exhibits the other party intended to present at the hearing. Decision No. R20-0382-I ordered Estes Park Guided Tours to file and to serve on counsel for Intervenor, on or before June 22, 2020: (a) a list that identifies the witnesses Estes Park Guided Tours intended to call at the hearing, including the last known address and telephone number of each witness; (b) a summary of the anticipated testimony of each witness; and (c) copies of the exhibits Estes Park Guided Tours intended to present at the hearing.¹⁶

23. Decision No. R20-0382-I advised Estes Park Guided Tours and its owner, Mr. Legzdins, that Estes Park Guided Tours' failure to file its prehearing disclosures by the June 22, 2020 deadline "shall be just cause for dismissal of this Application for failure to comply with a valid Commission decision."¹⁷

24. Decision No. R20-0382-I ordered Intervenor to file and to serve on Estes Park Guided Tours, on or before July 20, 2020: (a) a list that identified the witnesses each Intervenor intended to call at the hearing, including the last known address and telephone number of each

¹⁶ Decision No. R20-0382-I, Ordering ¶ 2, at page 7.

¹⁷ *Id.*, ¶ 17, at page 5. *See also id.*, at Ordering ¶ 4, at page 8, "The Parties shall comply with the requirements established in this Decision, and they shall make the filings as required by the procedural schedule established by this Decision."

witness; (b) a written summary of the anticipated testimony of each witness; and (c) copies of the exhibits each Intervenor intended to present at the hearing.¹⁸

25. On July 20, 2020, Estes Valley Transport and Estes Park Trolleys each filed an Intervenor's Exhibit and Witness Summary.

B. Intervenor's Motion to Dismiss.

26. On July 20, 2020, Intervenor filed a Motion to Dismiss Application (Motion to Dismiss). Pursuant to Rule 1401(b) of the Rules of Practice and Procedure, 4 CCR 723-1 (2015), Estes Park Guided Tours would "have 14 days after service of the motion, or such lesser or greater time as the Commission may allow, in which to file a response." That deadline (14 days after July 20, 2020) would have been Monday, August 3, 2020.

27. Since the hearing was scheduled for August 11, 2020, the ALJ determined there was insufficient time before the hearing for him to analyze the Motion to Dismiss, and any response thereto, and to prepare and issue a decision ruling on the Motion to Dismiss. Therefore, pursuant to Rule 1401(b) of the Rules of Practice and Procedure, 4 CCR 723-1, the ALJ shortened response time to the Motion to Dismiss to nine calendar days, or to and including July 29, 2020.¹⁹

28. Estes Park Guided Tours failed to file a response to the Motion to Dismiss.

II. DISCUSSION, FINDINGS AND CONCLUSIONS

29. The Motion to Dismiss argues that the Application should be dismissed because Estes Park Guided Tours has not filed its list of witnesses, summaries of testimony, and copies of

¹⁸ Decision No. R20-0382-I, Ordering ¶ 3, at pages 7 and 8.

¹⁹ Decision No. R20-0532-I (mailed on July 21, 2020).

exhibits, as required by Decision No. R20-0382-I. Intervenors argue that they thereby have been deprived of an opportunity to prepare for the August 11, 2020 hearing.²⁰

30. Rule 1400(d) of the Rules of Practice and Procedure, 4 CCR 723-1, states: “The Commission may deem a failure to file a response as a confession of the motion.” Given the history in this proceeding of Estes Park Guided Tours failing to make filings ordered by this ALJ and failing to file responses to other motions, the ALJ will deem Estes Park Guided Tours’ failure to file a response to the Motion to Dismiss as a confession of the merits of the motion.

31. Moreover, the purpose of requiring the Parties to file their lists of witnesses, summaries of testimony, and copies of exhibits was to provide each Party with an opportunity to prepare for the hearing. That is, prior to the hearing each Party would have an opportunity to review a summary of the anticipated testimony of the other Party’s witnesses and to review copies of the exhibits the other party would offer into evidence at the hearing.

32. The ALJ finds and concludes that the failure of Estes Park Guided Tours to file its list of witnesses, summaries of testimony of each witness, and copies of exhibits it intended to offer into evidence at the hearing violated the ALJ’s prehearing disclosure filing order in Decision No. R20-0382-I.

33. The ALJ finds and concludes that the failure of Estes Park Guided Tours to file its list of witnesses, summaries of testimony of each witness, and copies of exhibits it intended to offer into evidence at the hearing deprived Intervenor and their counsel of the opportunity to prepare for hearing and of a meaningful opportunity to be heard at the August 11, 2020 hearing.

34. Therefore, the ALJ will grant the Motion to Dismiss.

²⁰ Motion to Dismiss at page 1.

35. The evidentiary hearing scheduled for August 11, 2020 will be vacated.

III. ORDER

A. The Commission Orders That:

1. The Motion to Dismiss Application, filed by Estes Valley Transport, Inc. and Fun Tyme Trolleys, LLC, doing business as Estes Park Trolleys on July 20, 2020, is granted, consistent with the discussion, findings, and conclusions in this Decision.

2. The Application for a Certificate of Public Convenience and Necessity to Operate as a Common Carrier by Motor Vehicle for Hire, filed by Estes Park Guided Tours on March 9, 2020, is dismissed.

3. The evidentiary hearing scheduled for August 11, 2020, is vacated.

4. Proceeding No. 20A-0097CP is closed.

5. 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.

6. As provided by § 40-6-106, 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 recommended 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 a basic finding 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.

7. If exceptions to this Recommended Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

STEVEN H. DENMAN

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director