

Decision No. R20-0714

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19A-0652CP

IN THE MATTER OF THE APPLICATION OF STRAWBERRY PARK HOT SPRINGS SHUTTLE LLC 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
DENYING APPLICATION**

Mailed Date: October 9, 2020

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I. STATEMENT

A. Summary.

1. This Decision recommends that the Public Utilities Commission (Commission or PUC) deny Strawberry Park Hot Springs Shuttle LLC's (Strawberry Park) Application for Permanent Authority to Operate as a Common Carrier by Motor Vehicle for Hire (Application) filed on November 21, 2019.¹

2. In accordance with § 40-6-109, C.R.S., the Administrative Law Judge (ALJ) now transmits to the Commission the record in this proceeding and recommends that the Commission enter the following order.

II. BACKGROUND AND FACTUAL FINDINGS

A. Background.

3. Only the relevant portion of the procedural history is included. On November 21, 2019, Strawberry Park initiated this proceeding by filing its verified Application with the Colorado Public Utilities Commission. Hearing Exhibit 105. The Application seeks to provide call-and-demand shuttle service between all points in Routt County, Colorado, and is restricted to providing transportation services to and from the Strawberry Park Hot Springs (the Hot Springs) in Steamboat Springs, Colorado. *Id.*

4. The Commission gave public notice of the Application on November 25, 2019. During the Commission's weekly meeting held January 2, 2020, the Commission deemed the Application complete and referred this matter to an ALJ for disposition.

¹ In reaching this Decision, the Administrative Law Judge has considered all evidence and arguments presented, including those not specifically discussed. The headers in this Decision are for ease of reference only and are not findings of any kind.

5. Hot Springs Shuttle LLC, doing business as The Hot Springs Shuttle (Hot Springs Shuttle) and Sweet Pea Tours SBS, Inc., doing business as Sweet Pea Tours (Sweet Pea) timely intervened in this matter.

6. On January 14, 2020, the ALJ found that all parties established that they may be represented by non-attorneys in this proceeding, consistent with the relevant legal requirements. Decision No. R20-0030-I. At the same time, the ALJ scheduled the matter for a prehearing conference in order to schedule an evidentiary hearing on the Application and establish a procedural schedule with the parties' input. *Id.*

7. At the prehearing conference held on January 28, 2020, the ALJ established a procedural schedule and set the matter for an in-person hearing at the Routt County Combined Courthouse for May 7, 2020. Decision No. R20-0061-I issued January 28, 2020.

8. On March 30, 2020, due to the COVID-19 pandemic, the ALJ scheduled a remote status conference for April 6, 2020 to discuss the forward movement of this matter. Decision No. R20-0203-I. Strawberry Park and Hot Springs appeared at the remote status conference, but Sweet Pea did not. Decision No. R20-0227-I. During the status conference, Strawberry Park agreed to waive the statutory deadline for a final Commission decision to issue. The ALJ scheduled a new hearing date for September 10, 2020 to take place in person at the Routt County Combined Courthouse and established new procedural deadlines relating to the hearing. Decision No. R20-0227-I issued April 7, 2020. The ALJ also ordered Sweet Pea to show cause for its failure to appear at the status conference by making an appropriate filing by April 27, 2020. *Id.* Sweet Pea failed to make the show cause filing as required. As a result, on April 28, 2020, the ALJ dismissed Sweet Pea as a party. Decision No. R20-0312-I.

9. Because conditions relating to COVID-19 had not progressed to allow for an in-person hearing, on August 6, 2020, the ALJ converted the September 10, 2020 evidentiary hearing to a video-conference hearing, and established additional procedures for conducting the hearing. Decision No. R20-0580-I.

10. The ALJ called the matter for an evidentiary hearing as noticed on September 10, 2020. Mr. Abdallah Batayneh appeared and testified on behalf of Strawberry Park, and Mr. Daniel White appeared and testified on behalf of Hot Springs Shuttle. In addition, Mr. Ben Beall, and Mr. Michael VanVliet testified in support of Strawberry Park's Application. The following exhibits were admitted into evidence during the hearing: Hearing Exhibits 1 through 13; Hearing Exhibits 15 and 16, and Hearing Exhibits 100 through 107. After closing the evidentiary portion of the hearing, the ALJ set a deadline of September 25, 2020 for the parties to file written statements of position.

11. Strawberry Park timely filed its statement of position on September 24, 2020, and Hot Springs Shuttle did not file a statement of position.

B. Factual Findings.

12. Mr. Batayneh started Strawberry Park in order to exclusively serve people seeking transportation to and from the Hot Springs.² Strawberry Park is a limited liability company formed or registered in Colorado and is in good standing. Hearing Exhibit 6. Mr. Batayneh intends to operate a shuttle service that picks up and drops off passengers from a central point in Steamboat Springs and transports them to and from the Hot Springs. He intends to operate the business out of his home and will have a voice mail service to capture missed calls while he

² During the course of the hearing, both parties mentioned that Mr. Batayneh has filed a prior Application seeking to provide similar or the same transportation services.

is driving. Mr. Batayneh has been approved to purchase a 15-passenger, all-wheel-drive Ford Transit van, which he plans to use to operate his company's shuttle service. Hearing Exhibit 9. If the Application is approved, Strawberry Park plans to charge \$15 round-trip to and from the Hot Springs. He believes that adding an affordable shuttle service will decrease traffic and improve safety for the traveling public. In the Application, Mr. Batayneh verifies that he has reviewed the Commission's regulations, and commits to complying with them. Hearing Exhibit 105. He also testified that if his Application is approved, he will continue to familiarize himself with the applicable regulations. Mr. Batayneh has approximately seven years' experience driving in snowy conditions, and has driven professionally for Uber. And, he has approximately two years' experience getting to and from the Hot Springs on a regular basis, including in bad weather conditions.

13. Mr. Batayneh has been working at the Hot Springs for approximately two years. His responsibilities include taking admission fees, reserving lodging for guests, cleaning lodging, ensuring the pools are at an appropriate temperature, answering the phones, helping guests seeking transportation to and from the Hot Springs, managing the parking lot, and turning away visitors or stopping traffic two miles from the Hot Springs on County Road 36. The Hot Springs's parking lot has 55 parking spots. Mr. Batayneh helps manage parking in order to fit as many cars as possible, and to attempt to decrease traffic caused by those waiting for a parking spot. In the years he has worked at the Hot Springs, Mr. Batayneh has observed significant traffic, accidents, vehicles stuck on the side of the road, and many road closures on County Road 36 to the Hot Springs. *See e.g.*, Hearing Exhibit 13. He also operates his own cleaning business, while continuing to work at the Hot Springs.

14. During the time Mr. Batayneh has worked at the Hot Springs, he has grown to love it. He sees how busy the Hot Springs is, and how difficult it is for people to get back and forth from the Hot Springs. He is passionate about helping people get to the Hot Springs to enjoy its natural beauty. This is why the Application seeks to exclusively provide transportation to and from the Hot Springs.

15. Mr. Batayneh believes that an additional shuttle service is necessary because, in his experience, many people seeking shuttle service are not able to pay Hot Springs Shuttle's rates of \$45 per person; for a large group, that adds up quickly (*e.g.*, a ten-person group would pay \$450 for shuttle service). It was later clarified that Hot Springs Shuttle's \$45 charge includes the entry fee into the Hot Springs. Mr. Batayneh also believes an additional shuttle service is necessary to decrease traffic on County Road 36 to the Hot Springs, which he believes is significant, and as discussed later, creates safety issues for the travelling public. He also testified that many guests complain they are unable to reach Hot Springs Shuttle when they need transportation to or from the Hot Springs.

16. Mr. Batayneh testified that the Hot Springs is busy year-round. Of course, during the holidays and weekends, the Hot Springs is even busier, with people waiting for entry before it opens. Due to COVID-19 restrictions, the Hot Springs currently operates at 50 percent capacity (allowing a maximum of 50 visitors); requires reservations for all visitors; limits visitors to two hours; and has limited its hours of operation to 10 a.m. to 10 p.m. *See* Hearing Exhibits 10 and 106. Despite these restrictions, the Hot Springs routinely sells out. On occasion, the Hot Springs allows walk-ins, but only when someone does not show up for their reservation.

17. It was undisputed that County Road 36 to the Hot Springs experiences heavy traffic at times, particularly during winter weather conditions. It also sees activity and traffic

unrelated to the Hot Springs. For example, within the vicinity, there is a school, a residential community, and recreational areas for hunting, biking, and hiking.

18. Hearing Exhibit 13 includes a compilation of photos that Mr. Batayneh took over the last year along County Road 36 leading to the Hot Springs, and of the Hot Springs parking lot.³ The photos show significant traffic in various road conditions; the road conditions at different times of year; closed roads; vehicles stuck on the side of the road (in the snow); tow trucks; parked vehicles; and signs indicating that chains are required. Hearing Exhibit 13. Mr. Batayneh took photos of tow trucks on the road to the Hot Springs to demonstrate that tow truck operators often go out to the area, pull over, and wait for someone who will most certainly need to be towed after getting stuck or in an accident. *Id.* at 5 to 8, and 10. He also spoke with a tow truck operator (Chuck's Automotive), who confirmed this practice. Vehicles which are not capable of making the drive back from the Hot Springs parking lot (*e.g.*, vehicles without snow tires or chains) are also sometimes towed from the Hot Springs parking lot. Indeed, from November 1 to May 1, all vehicles travelling on County Road 36 to the Hot Springs must either have chains, or have four wheel drive with snow tires. *Id.* at 28.

19. Mr. Batayneh testified that drivers attempting to help others who are stuck in the snow often get stuck themselves. *See e.g., id.* at 11. In addition to challenging road conditions, drivers must also avoid wildlife running into the road, such as moose. *See e.g., id.* at 28. They are not always successful; last year, a vehicle hit a juvenile moose traveling on or near the road.

³ County Road 36 leading to the Hot Springs is also depicted in an aerial map on the first page of Hearing Exhibit 13. In addition, most of the photos include a handwritten note stating the date the photo was taken, but some do not include the year. Mr. Batayneh testified that any photo which includes a date but not a year was taken in 2020. In addition, page 28 of Hearing Exhibit 13 includes several photos without any date at all; Mr. Batayneh testified that those photos were taken between September 2019 and July 2020.

20. When the conditions are particularly bad, County Road 36 is closed. When this happens, no one can leave until the road is cleared. Vehicles sometimes are not able to stop quickly enough when the road is closed, which causes accident pile-ups. Mr. Batayneh testified that there are always at least a few vehicles sliding on the road in poor conditions. According to the Routt County Sheriff's Office (Sheriff), since September 1, 2012, it has received 49 reports of accidents occurring along the last 5 miles of County Road 36 up to and including the Hot Springs's parking lot. Hearing Exhibit 3. This number reflects only those accidents that were reported to the Sheriff. Mr. Batayneh testified that people do not always contact the Sheriff, especially when the accident involves spinning out and getting stuck in a ditch. In addition, since September 1, 2012, the Sheriff has issued 101 citations (mostly for speeding) in the same area. Hearing Exhibit 3.

21. When the Hot Springs's parking lot is full, the Hot Springs turns people away. *See e.g.*, Hearing Exhibit 13 at 13 and 20. The Hot Springs attempts to turn people away as far as possible from the most treacherous area of the drive in order to decrease traffic and the associated safety concerns. *See e.g.*, Hearing Exhibit 13, at 3, 5, 7, 17, and 20. Many people refuse to turn around, instead waiting on the road or circling the area so they can get into the Hot Springs as soon as a parking spot opens up; this causes even more traffic.

22. Mr. Batayneh circulated a petition asking people in the community whether they would like to add an additional shuttle service for the Hot Springs. Hearing Exhibit 1. He personally met with all 32 people who signed the petition supporting an additional shuttle service for the Hot Springs. *Id.* Everyone he spoke with said they support adding another shuttle service for the Hot Springs. He also reached out to another Hot Springs employee, Ms. Natalie Loomer, who wrote a letter supporting the Application. Hearing Exhibit 11. She believes that adding a

shuttle service will be beneficial because it may decrease the traffic at the end of County Road 36 leading to the Hot Springs. *Id.* She believes this will make travel on the road safer in the winter, which will also help the people who live off the same stretch of road. *Id.* In addition, she commented that the Hot Springs has to turn people away at times when the parking lot is full; adding a shuttle service could help address this. *Id.*

23. Mr. Batayneh also reached out to an Uber driver, Mr. Kevin Williams, about his experience driving passengers to the Hot Springs. Hearing Exhibit 12. It is challenging to get passengers to the Hot Springs, and in fact, most Uber drivers will no longer take passengers there because they cannot get online to request a ride home. *Id.* He believes that an additional alternative for travelling to the Hot Springs would be very valuable. *Id.*

24. The Hot Springs's general manager, Joseph Stepan, submitted a letter stating that accessibility to the Hot Springs is an ongoing operational concern given the road conditions and need for four-wheel drive, snow tires, and chains during the winter. Hearing Exhibit 2. Having available and properly equipped transportation for guests is always a top priority for the Hot Springs. *Id.* Mr. Batayneh testified that the Hot Springs's owner, Don Johnson, asked his general manager to author the letter that was submitted. In addition, according to Mr. Batayneh, one of the shuttle companies serving the Hot Springs, Sweet Pea, has been failing to respond to calls for shuttle service, and sometimes does not provide services for a month at a time. That's one reason he believes that the Hot Springs's management wants another shuttle company serving the Hot Springs.

25. Mr. Batayneh reached out to Ms. Kara Stoller, CEO of the Steamboat Springs Chamber (Chamber) to seek support for the Application. Hearing Exhibit 16. The Chamber

supports Strawberry Park's proposed service, as being aligned with the Chamber's focus to have an effective, well-maintained infrastructure with multi-modal transportation. *Id.*

26. The marketing director for the Chamber, provided Mr. Batayneh statistical data concerning tourism in Steamboat Springs. Hearing Exhibit 8. The Chamber estimates that Steamboat Springs sees approximately 400,000 to 500,000 visitors annually from May to October. *Id.* The Chamber estimates that primary reason for tourists coming to Steamboat Springs from late April to early November is vacation and leisure. No data was provided as to how many of those tourists visit the Hot Springs. Likewise, Strawberry Park provided no data from the Hot Springs indicating the number of day-guests it sees annually.

27. Hearing Exhibit 4 is a compilation of data from annual reports filed with the Commission by Hot Springs Shuttle, Sweet Pea, and Hot Springs Adventures going back to 2009. All those operators either currently provide transportation to and from the Hot Springs, or have done so in the past. The data lists the annual number of trips, total number of passengers transported, annual revenue, and number of vehicles and staff members for three shuttle providers. Hearing Exhibit 4. Hot Springs Shuttle's data goes back to 2015, and shows an increase in the number of passengers transported from 2,419 in 2015 to 9,836 in 2019. Sweet Pea's data goes back to 2009, and shows an increase in the number of passengers transported from 4,139 in 2009 to 6,902 in 2019. *Id.* Hot Springs Adventures's data covers 2010 through 2014, and shows a decline in the number of passengers transported from 3,377 in 2010 to 2,896 in 2014. *Id.*

28. Mr. Beall testified in support of the Application. He has been a Strawberry Park resident for 42 years, and sits on the board of directors for the Strawberry Park Group Homeowner's Association (HOA). He was a Routt County Commissioner for eight years. During

that time, the Routt County Commission required the Hot Springs to institute shuttle service to and from its facility due to traffic and safety concerns. He recalls that at one time, there were three shuttle services to the Hot Springs, but now there are only two shuttle services. Given the decline in the number of shuttle services, Mr. Beall believes that adding another shuttle provider is appropriate. Mr. Beall explained that the last two miles of the drive to the Hot Springs on County Road 36 presents additional safety concerns, both for residents and visitors. He testified that those last two miles includes a steep gravel road that has seen a fair share of accidents, especially in the winter months.

29. He believes that the Strawberry Park community would like to create more shuttle systems to help decrease the number of vehicles making the difficult drive to the Hot Springs and address safety issues. Mr. Beall's HOA initiated a program now called Destination Management. It hired a consultant from the University of Colorado to perform a study, which includes whether more shuttle service is needed in Routt County. According to Mr. Beall, the consultant concluded that the current shuttle service is inadequate due to the number of vehicles still using the road to the Hot Springs. He believes that the proposed shuttle service will help address the need for additional shuttle service, and assist with decreasing the traffic on county roads.

30. Mr. Beall believes that the current available shuttle service is inadequate because there is still a lot of traffic to and from the Hot Springs; he believes that this means the current service is not picking up enough of the available business. He also believes that the traffic is dangerous for citizens in Strawberry Park, especially those who live off the steep gravel road that leads to the Hot Springs. He thinks it's important for citizens to have the option of a shuttle service that picks up at a designated service point and goes to the Hot Springs. He sees this as different than other call-and-demand services (like taxis).

31. Mr. VanVliet testified in support of the Application. He owns and operates Storm Mountain Express, Inc. which he founded in 1996. He has been providing transportation service in Routt County for just under 24 years under a luxury limousine permit. Approximately 85 to 90 percent of his operations are in Routt County. Since starting up his company, the demand for transportation in Steamboat Springs and Routt County has increased, causing him to attempt to adjust to that increased demand by hiring more drivers and getting more equipment. Mr. VanVliet hires approximately 25 drivers annually, and provides transportation to and from the airport, for weddings and special events, and to and from the Hot Springs. Even though he has grown his business due to increased demand, Mr. VanVliet believes that there are still not enough transportation options in Routt County and that the available shuttle options are especially weak.

32. In Mr. VanVliet's experience, during the winter, holiday seasons, and other high volume seasons, the road to the Hot Springs is extremely congested. He believes there are too many people using their personal vehicles to drive to the Hot Springs, especially considering the dangerous weather and road conditions. Many of these people are inexperienced in driving in the uniquely challenging conditions, and use vehicles with inadequate snow tires, which increases the danger to everyone on the road. Drivers cannot control their vehicles, creating added hazards, especially in the winter during high-volume usage. Mr. VanVliet believes that in poor weather conditions, the drive to the Hot Springs requires a professional skill level, equipment designed to handle the weather conditions, and an experienced driver. Put another way, he said that it is a technical and hazardous road. He explained that the road on the last two miles to the Hot Springs is narrow, with no room for shoulders. Given that weather conditions change so abruptly, it is difficult to maintain safe conditions on that part of the road. He believes that added shuttle

service options to the Hot Springs using professional and skilled drivers and appropriate vehicles would increase the number of seats available and help keep inexperienced drivers off the roads.

33. Mr. VanVliet clarified that it is not his opinion that the current transportation service is inadequate, but that the road conditions are inadequate, especially given that the road is often traversed by people who lack the experience or ability to manage it. As to whether the current available transportation service is meeting the public's needs, Mr. VanVliet opined that during high volume season, the existing and available transportation services is weak. During high volume season, he believes that the significant traffic congestion is comparable to traffic volume on Los Angeles county roads. He believes the congestion is a direct result of poor road conditions combined with unskilled drivers.

34. Mr. VanVliet believes that a Ford Transit all-wheel-drive van with adequate snow tires can handle the difficult road conditions to the Hot Springs. During high volume seasons, Mr. VanVliet operates his vehicles at close to full capacity, doing as many as nine trips a day. When it's off season, the vehicles are not as full. COVID-19 restrictions have impacted Mr. VanVliet's business by limiting the number of passengers per vehicle; this means there is less passenger capacity for each trip. There remains a great deal of uncertainty as to what the capacity restrictions will be leading into the winter season (which is a high volume season). Generally, Mr. VanVliet is not a fan of the regulated monopoly system; he believes it takes away people's right to operate a business of their choosing based on a state regulation that is 150 years old.

35. Mr. Daniel White owns and operates Hot Springs Shuttle, which has a PUC permit to operate a call-and-demand shuttle service between all points within a ten-mile radius of the intersection of Lincoln Avenue and Seventh Street and the Hot Springs, in Steamboat Springs. Hearing Exhibit 103. Before starting up his company, he worked at the Hot Springs

(starting in 2002). In approximately 2003, he was promoted to manager of the Hot Springs, a position he held until 2007 when the current manager took over. At that point, Mr. White started driving for Sweet Pea, where he stayed until 2015, when he started up Hot Springs Shuttle. Hot Springs Shuttle has three 14-passenger vans that it uses to operate under its authority. Much of the shuttle service his company provides is requested at the last minute.

36. During the busier times, Mr. White has an extra driver on standby, and has staff answering the phones. Starting around 1:30 p.m., when skiers are finishing skiing for the day, the demand for shuttle service picks up; he plans for this and ensures he has drivers and vans lined up and ready to go. During the holidays, business picks up. Due to COVID-19 restrictions, Hot Springs Shuttle has been forced to operate at 50 percent capacity. *See* Hearing Exhibit 106 at 3.⁴ This means that Hot Springs Shuttle can have up to 7 passengers in its 14-passenger vans at one time. And, the shuttle must operate with the vehicle's windows open during the transport. *Id.* at 3. Mr. White testified that at no time since the relevant public health orders have been in place, has Hot Springs Shuttle transported more than seven passengers at one time. The Hot Springs holds a number of reservations for Hot Springs Shuttle so that the company can use those openings to make reservations for people who call Hot Springs Shuttle without having first made a reservation.

37. Mr. White believes that there is significant unused capacity to transport passengers to the Hot Springs, both through Hot Springs Shuttle and Sweet Pea. In support, he put together an analysis considering available capacity and demand for transportation. Hearing

⁴ Hearing Exhibit 106 is an incomplete copy of the most recent public health orders relating to COVID-19; Mr. White provided only those portions of the public health order applicable to shuttle service in Routt County because the full public health order is voluminous. Hearing Exhibit 106 does not include an end-date, but Mr. White believes it is open-ended, meaning there is no expiration date.

Exhibit 107. His analysis considers the number of trips per day that his company can manage, the number of seats available for each of his three 14-passenger vans, and the number of days that his company operates, as compared to the number of trips and passengers actually transported in 2019. *Id.* Without COVID-19 restrictions, Mr. White believes that Hot Springs Shuttle can manage 9 trips per day, with a total of 378 passengers per day (14 passengers per vehicle), resulting in an annual potential passenger capacity of 137,970. *Id.* In 2019, Hot Springs Shuttle transported 9,836 passengers in the course of 1,497 trips, resulting in an average of approximately 7 passengers per trip. Hearing Exhibit 4. In 2019, Hot Springs Shuttle had 16 days where it transported over 100 passengers per day. Mr. White believes those busiest days were in the winter season, during or near major holidays. Mr. White believes this analysis shows that most of the time, Hot Springs Shuttle has available capacity in its vans and that adding another shuttle company would simply increase traffic by having another van on the road.

38. Mr. White also stated that Sweet Pea does not run to the Hot Springs in the summer, which benefits his company because it gives him more business in the traditionally slower summer months.

39. In response to questions about complaints that people are unable to reach Hot Springs Shuttle when they need service, Mr. White testified that he does not answer the phone when driving, and that he has multiple phone lines so that people generally will not get a busy signal. His phone lines go to voice mail when he is unable to pick up, but many people refuse to leave a message, and instead call him and the Hot Springs repeatedly in order to reach someone live. When Mr. White is at the Hot Springs (on a run), he connects to the Hot Springs's internet and returns calls for transportation; he has to connect to the Hot Spring's internet to do this because there typically is no cell phone reception at or near the Hot Springs. He also returns calls

when he is back at his office. When people call for transportation while Mr. White is driving guests to the Hot Springs, they have to wait between an hour and 15 minutes to an hour and a half before the next shuttle run. During the busiest times, he employs someone to answer the phones.

40. Mr. White believes that some people complaining that they cannot get transportation from him to the Hot Springs either fail to leave a message, or are complaining because he does not transport guests without reservations (at least while the COVID-19 restrictions are in place).

41. Mr. White obtained a letter from the concierge of the Sheraton Steamboat Resort and Villas (Sheraton), Mr. Matthew Keyser. Hearing Exhibit 100. In his letter, Mr. Keyser states that the Sheraton is one of the largest resorts in Steamboat Springs, and that he has been in charge of the Sheraton's concierge team for the last seven years. *Id.* Mr. Keyser explains that from the beginning, the Sheraton has had a great relationship with Mr. White and his staff at Hot Springs Shuttle. He believes that they provide an excellent end-to-end safe shuttle service with great customer service. *Id.* He is confident using Hot Springs Shuttle based on their excellent customer service, reliability, and safety. Guests have told him that the shuttle service was such a great experience that it made the trip more special. *Id.*

42. Mr. White also obtained a letter from the front desk operator for The Porches of Steamboat Springs's (The Porches), Ms. Mari Webb. Hearing Exhibit 101. The Porches is a large property with townhomes for rent. Ms. Webb states that she has used Hot Springs Shuttle to transport guests to the Hot Springs, and that it has been extremely rare that Hot Springs Shuttle has been unable to accommodate guests. She also states that Hot Springs Shuttle provides timely,

safe, and courteous service, and that she receives outstanding feedback from guests who have used Hot Spring Shuttle's service. *Id.*

II. RELEVANT LAW

A. **Commission Jurisdiction.**

43. The Commission has authority to issue certificates to operate as a common carrier under Colo. Const. art. XXV, §§ 40-10.1-103(1) and 203(1), C.R.S. (2019). *See Miller Brothers, Inc. v. Public Utilities Comm'n*, 525 P.2d 443, 446 (Colo. 1974). Common carriers may only operate with a Commission-issued certificate declaring that the present or future public convenience and necessity requires or will require the common carrier's operation. §§ 40-10.1-103(1) and 203(1), C.R.S. Motor carriers providing call-and-demand shuttle service are common carriers. Rule 6001(gg) and (sss), Rules Regulating Transportation by Motor Vehicle, 4 *Code of Colorado Regulations* (CCR) 723-6. Thus, carriers seeking to provide call-and-demand shuttle service must obtain a Commission-issued certificate of public convenience and necessity. Shuttle service is transportation of passengers by a common carrier on a call-and-demand basis charged at a per-person rate, using vehicles that are not exclusive to any individual or group. Rule 6001(sss), 4 CCR 723-6.

B. **Legal Standards.**

44. Strawberry Park, 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 Dep't 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. *Schocke v. Dep't of Revenue*, 719 P.2d 361, 363 (Colo. App. 1986). Although the preponderance standard applies, the evidence must be substantial. Substantial evidence is such relevant evidence as a reasonable person's mind might accept as adequate to support a conclusion; it must be enough evidence to justify, if the 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. Public Utilities Comm'n*, 996 P.2d 1270, 1278 (Colo. 2000).

45. Applicants for a certificate of public convenience and necessity must establish their financial, managerial, and operational fitness to conduct the proposed operations. Rule 6203(a)(XI), 4 CCR 723-6. In general, operational fitness encompasses a consideration of whether the applicant has the equipment, personnel, and facilities to operate the proposed service. The Commission has identified the following evidentiary factors as relevant to the fitness inquiry: minimum efficient scale to operate under the proposed authority; 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. *See e.g.*, Decision No. C08-0933, at ¶ 7, Consolidated Proceeding Nos. 08A-241CP, 08A-281CP-Extension, 08A-283CP, 08A-284CP-Extension, and 08A-300CP issued September 4, 2008. Whether the applicant is willing and able to comply with applicable public utilities laws also bears upon the question of fitness. *See Thacker Brothers Transp. v. Public Utilities Comm'n*, 543 P.2d 719, 721 (Colo. 1975).

46. In addition to fitness, applicants must show that the public convenience and necessity requires the certificate. In deciding that question, the Commission must apply

the regulated monopoly doctrine. *Ephraim Freightways Inc. v. Public Utilities Comm'n*, 380 P.2d 228, 230 (Colo. 1963). Commission Rules reflect the regulated monopoly doctrine by requiring an applicant seeking a common carrier certificate to demonstrate the public need for the proposed service, that granting the authority is in the public interest, and that the existing service is inadequate. Rule 6203(a)(XVII), 4 CCR 723-6.

47. The regulated monopoly doctrine is based on the principle that fewer carriers who can make a reasonable return will give the public safe, efficient, and more economical service, and that increasing the number of providers ultimately results in a deterioration of service and higher rates for the public. *See e.g., Denver & R.G. W. R. Co., v. Public Utilities Comm'n*, 351 P.2d 278, 280 (Colo. 1960). Under this doctrine, a common carrier serving a particular area is only entitled to protection against competition if its service is adequate to satisfy the public's needs. *Ephraim*, at 230. As a result, the public need and adequacy elements are closely related. *See id.* The Commission has "wide discretionary powers in determining the demands of 'public convenience and necessity.'" *Public Utilities Comm'n v. Donahue*, 335 P.2d 285, 288 (Colo. 1959).

48. Whether an incumbent's service is substantially inadequate is a question of fact that the Commission must determine. *RAM Broadcasting v. Public Utilities Comm'n*, 702 P.2d 746, 751 (Colo. 1985); *Durango Transp. Inc. v. Pub. Utilities Comm'n*, 122 P.3d 244, 248 (Colo. 2005). The Commission may consider "a broad range of evidence in determining whether an incumbent carrier's service is substantially inadequate." *Durango Transp. Inc.*, at 250. That is because common carriers must "furnish, provide, and maintain such service, instrumentalities, equipment, and facilities as shall promote the safety, health, comfort, and convenience of its patrons, employees, and the public, and as shall in all respects be adequate,

efficient, just and reasonable.” § 40-3-101(2), C.R.S.; and *see* § 40-10.1-103(1), C.R.S. Consistent with this statute, the Colorado Supreme Court has noted that the Commission may consider any relevant evidence in determining whether the public convenience and necessity requires additional service. *Durango Trans. Inc.*, 122 P.3d at 250. The Court has expressly approved as relevant consideration of various aspects of incumbents’ service and operation, including rates and charges, speed and efficiency, and quality of its facilities, organization, equipment, and personnel. *Id.* at 251. For example, in *Durango Transportation, Inc.* the Court approved the Commission’s reliance on evidence that the incumbent’s rates were so high as to be “tantamount to a denial of service to the tourist population requiring transportation . . .” *Id.* at 249. This is consistent with the Commission’s purpose in granting a transportation authority to “ensure that the public’s transportation needs are met.” *Id.* at 250.

49. An applicant may demonstrate substantially inadequate service through evidence that the incumbent is not “ready, willing and *able* at all times to render service to anyone who might demand it” *Ephraim*, 380 P.2d at 232 (emphasis in original); and *Durango Transp. Inc.*, at 247. But the Commission is not required to find that the incumbent “has failed or refused to provide service to a requesting customer,” because the Commission is authorized “to consider a broad range of factors in its substantial-inadequacy analysis.” *Durango Transp. Inc.*, at 251.

50. Regardless, an applicant must show that the incumbent has demonstrated a general pattern of inadequate service. *Durango Transp. Inc.*, at 248. But, “the test of inadequacy is not perfection.” *Ephraim*, 380 P.2d at 232. That is because any common carrier providing service to many clients will receive some legitimate complaints. *RAM Broadcasting*, 702 P.2d at 750.

51. Although the applicant bears the burden of proving that the incumbent carrier's service is substantially inadequate, “where 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.’” *Durango Transp. Inc.*, 122 P.3d at 250 (quoting *Ephraim*, 380 P.2d at 231-32).

52. Based in the foregoing, Strawberry Park must show by a preponderance of the evidence that: (1) it is financially, operationally, and managerially fit to conduct the proposed service; (2) the public needs the proposed service; (3) the current service in the area is substantially inadequate; and (4) granting the Application is in the public interest. If Strawberry Park meets its burdens, Hot Springs Shuttle must rebut evidence concerning substantial inadequacy by a preponderance of the evidence.

III. DISCUSSION, ANALYSIS, AND CONCLUSIONS

A. Fitness.

53. Mr. Batayneh plans to operate Strawberry Park himself out of his home, and will manage it himself. He already operates his own cleaning business, while continuing to work at the Hot Springs. This demonstrates that Mr. Batayneh is capable of managing a business. He understands the Hot Springs’s operations, including how it partners with shuttle operators. He has many years of experience driving in snowy conditions, including going to and from the Hot Springs. The Application demonstrates that Mr. Batayneh has reviewed the Commission’s regulations, and commits to complying with them. Hearing Exhibit 105. He also testified that if his Application is approved, he will continue to familiarize himself with the applicable regulations. He has been approved to purchase a 15-passenger all-wheel-drive Ford Transit van that he will use for the business. The evidence was undisputed that such a van is capable of handling the most challenging winter road conditions.

54. Based on the foregoing, the ALJ finds that the preponderance of the evidence establishes that Mr. Batayneh has sufficient equipment, personnel, facilities, and financial resources to operate the proposed service, and that he is managerially fit to operate. As a result, the ALJ finds that Strawberry Park met its burden to show by a preponderance of the evidence that it is operationally, managerially, and financially fit to operate the proposed service. *See* §§ 13-25-127(1) and 24-4-205(7), C.R.S.; Rule 6203(a)(XI), 4 CCR 723-6; and Rule 1500, 4 CCR 723-1.

B. Public Need and Substantial Inadequacy.

55. It is undisputed that there is traffic on County Road 36 to the Hot Springs, and that the traffic is exasperated during winter weather conditions. But traffic alone does not prove a public need for an additional shuttle service to and from the Hot Springs. For instance, the evidence does not establish how much of that traffic is caused by people driving to the Hot Springs, as opposed to driving home or to other attractions or locations along the same road. Notably, the evidence does not establish that adding a shuttle service is likely to decrease traffic. Even assuming that the majority of the traffic on County Road 36 is caused by people driving themselves to the Hot Springs, the evidence does not demonstrate one way or the other whether such people would opt to use a shuttle service if an additional one is available. There was simply no evidence presented on this issue. Instead, it was simply assumed that if another shuttle option is available, people will use it. This assumption may or may not be accurate. That is why evidence is needed; the ALJ cannot rely on assumptions. What is more, evidence concerning Hot Springs Shuttle's available and unused capacity (discussed in more detail below), could indicate that the referenced may not be not accurate.

56. The preponderance of the evidence establish that even under the current COVID-19 restrictions, Hot Springs Shuttle has the capacity to transport approximately 126 passengers per day to the Hot Springs.⁵ This is more than the Hot Springs is able to currently accommodate under COVID-19 restrictions. Without COVID-19 restrictions, Hot Springs Shuttle rarely transported more than 100 people per day. The ALJ concludes that this demonstrates Hot Springs Shuttle has unused capacity that can be used to meet the public's needs. And, while there was evidence concerning the volume of tourists visiting Steamboat Springs annually, there was no evidence indicating the number of tourists who visit the Hot Springs. Assuming *arguendo* that these tourists wish to use a shuttle service, it is not possible to determine whether the tourist demand for shuttle service exceeds Hot Springs Shuttle's capacity.

57. It was undisputed that in winter weather conditions, County Road 36 to the Hot Springs is particularly difficult to drive, and that a significant amount of traffic on the roads creates safety hazards for the travelling public. These issues raise genuine concerns for the public safety. As discussed, the evidence does not establish that adding a shuttle service will decrease traffic. The ALJ concludes that based on the evidence presented, it is unknown whether adding a shuttle service would improve safety by decreasing traffic to the Hot Springs.

58. Likewise, the study that Mr. Beall referenced is unhelpful. The study was not provided, so it cannot be determined how the consultant reached the conclusions, and more specifically, whether the basis for the conclusions relate to public need for an additional service

⁵ This figure is derived by first determining the number of two-hour slots available to the Hot Springs guests each day based on hours of operation (10 a.m. to 10 p.m.), to determine the total potential number of trips that can be made; the total is six trips per day, then multiplying that by the number of passengers that can be transported by Hot Springs Shuttle using all three of its vehicles at the maximum COVID-19 capacity (seven passengers per vehicle). Hearing Exhibits 10 and 106. The ALJ acknowledges that there may be other factors (such as unanticipated cancellations) that may allow for additional trips.

or inadequacy of existing service. As already explained, the relevant legal standards require that the ALJ determine that there is both a public need and that the current service is substantially inadequate in order to grant the Application. Mr. Beall's testimony concerning the referenced study does not shed light on these issues.

59. As to the adequacy of Hot Springs Shuttle's service, Mr. Batayneh testified that people complain they are unable to reach Hot Springs Shuttle, and that the company's rates are too high for many people. There was no evidence indicating how many people fall into this category. Without such information, it cannot be determined whether Hot Springs Shuttle's rates are so high as to be tantamount to denying service, or have created a general pattern of inadequate service. At best, this establishes that some customers or potential customers may not be satisfied with Hot Springs Shuttle's rates, and therefore, its offered service. But the test for inadequacy of service is not perfection, because any common carrier providing service to many clients will receive some legitimate complaints. *Ephraim*, 380 P.2d at 232; *RAM Broadcasting*, 702 P.2d at 750.

60. For the reasons and authorities discussed, the ALJ concludes that Strawberry Park failed to meet its burden to prove by a preponderance of the evidence that there is a public need for the proposed service, that the incumbent's service is substantially inadequate, and that granting the Application is in the public interest. As such, the ALJ recommends that the Commission deny the Application.⁶

⁶ The ALJ notes that Strawberry Park seeks to solely transport guests to and from the Hot Springs, and that there was evidence indicating that the Hot Springs's manager or owner wants more shuttle options for its guests. If the Hot Springs wishes to contract with Strawberry Park to provide such services, Strawberry Park may be able to provide such services through a contract carrier permit. The ALJ makes no determination on whether a contract carrier permit application would be granted, but notes this because the evidence showed that this Application is Strawberry Park's second attempt to obtain a common carrier permit.

IV. ORDER**A. The Commission Orders That:**

1. Consistent with the above discussion, the above-captioned application filed by Strawberry Park Hot Springs Shuttle LLC on November 21, 2019 is denied.
2. Proceeding No. 19A-0652CP is closed.
3. This Recommended Decision will 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.
4. As provided by § 40-6-106, C.R.S., copies of this Recommended Decision will 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 will 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.

5. If exceptions to this Recommended Decision are filed, they must 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

MELODY MIRBABA

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director