

Decision No. R10-0745

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 08A-407CP

IN THE MATTER OF THE APPLICATION OF MILE HIGH CAB, INC. 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
PAUL C. GOMEZ
DENYING APPLICATION FOR
CERTIFICATE OF PUBLIC
CONVENIENCE AND NECESSITY**

Mailed Date: July 20, 2010

Appearances:

Thomas D. Russell, Esq., Law Office of Prof. Thomas D. Russell, Ph.D.,
Denver, Colorado, for Applicant, Mile High Cab, Inc.;

Richard L. Fanyo, Esq., Dufford & Brown, P.C., Denver, Colorado, for
Colorado Cab Company, LLC, doing business as Denver Yellow Cab,
and/or Boulder Yellow Cab;

Duane H. Kamins, Esq., Houston, Texas, for RDSM Transportation, Ltd.,
doing business as Yellow Cab Company of Colorado Springs;

Charles M. Williams, Esq., Charles M. Williams, P.C., Denver, Colorado,
and Robert W. Harris, Esq., Harris Karstaedt Jamison & Powers, P.C.,
Denver, Colorado, for MKBS, LLC, doing business as Metro Taxi &/or
Taxi's Fiesta &/or South Suburban Taxi; and

Charles J. Kimball, Esq., Kimball & Nespor, P.C., Arvada, Colorado, for
Applicant, for Estes Park Express, Ltd., Rounds and Casey, doing business as
Estes Valley Transport, and Valera Lea Holtorf, doing business as Dashabout
Shuttle Company and Roadrunner Express.

TABLE OF CONTENTS

I. STATEMENT.....3

II. PROCEDURAL HISTORY4

III. FINDINGS OF FACT15

 A. Operational and Financial Fitness15

 1. Company Structure.....15

 2. Management Experience18

 a. Mr. Nwankwo18

 b. Mr. Archibong.....21

 3. Company Capitalization23

 4. Corporate Governance.....24

 5. Vehicles and Facilities25

 6. Staffing25

 7. Expert Testimony of Mr. Joseph Rubino26

 B. Findings on Operational and Financial Fitness33

 1. Minimum Efficient Scale34

 2. Credit Worthiness; Access to Capital; Capital Structure; Current Cash Balances;
 and Credit History and Financial Health Over the Near Future.....34

 3. Managerial Competence and Experience37

 4. Fixed Physical Facilities.....38

 5. Dispatch.....39

 6. Vehicles39

 7. Conclusions39

IV. REBUTTABLE PRESUMPTION OF PUBLIC NEED.....41

 A. Dr. Mundy44

 B. Dr. Dempsey.....52

 C. Professor Hardaway.....57

V. DISCUSSION AND CONCLUSIONS61

 A. Conclusions and Findings.....74

VI. ORDER.....77

 A. The Commission Orders That:77

I. STATEMENT

1. On September 11, 2008, Mile High Cab, Inc. (Mile High or Applicant) filed an application for authority to operate as a common carrier by motor vehicle for hire (Application).

2. On September 15, 2008, the Commission issued notice of the Application as follows:

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

passengers and their baggage, in call-and-demand taxi service, call-and-demand limousine service, call-and-demand charter service, call-and-demand sightseeing service, and scheduled service,

between all points in the Counties of Adams, Arapahoe, Boulder, Broomfield, Denver, Douglas, and Jefferson, State of Colorado; and

between said points on the one hand, and all points in the State of Colorado, on the other hand.

The Application further sought authority to operate 150 vehicles of all makes and models, 2000 or newer model year, with a seating capacity of 5 or more persons.

3. On September 23, 2008, in its Weekly Meeting, the Commission, by minute entry, shortened the notice period of the application to 16 days. Subsequently, on September 29, 2008, the Commission re-noticed the Application and shortened the notice period to 16 days from that date.

4. On October 27, 2008, Mile High filed a pleading that was construed as a motion to restrictively amend the Application. The motion to amend the Application requested the

authority be restricted to operate as a common carrier by motor vehicle for hire for the transportation of passengers and their baggage in call-and-demand taxi service between all points in the Counties of Adams, Arapahoe, Denver, Douglas, and Jefferson, State of Colorado, and between said points, on the one hand, and all points in the State of Colorado, on the other hand. The motion was granted pursuant to Decision No. R09-0066-I.

5. The interventions of Estes Park Express, Ltd. and Stanley Brothers Taxi Company (Estes Park); Valera Lea Holtorf, doing business as Dashabout Shuttle Company and/or Roadrunner Express (Dashabout); Alpine Taxi/Limo, Inc. (Alpine Taxi); AEX, Inc., doing business as Alpine Express (Alpine Express); RDSM Transportation Ltd., doing business as Yellow Cab Company of Colorado Springs (Yellow Cab); SuperShuttle International Denver, Inc. and Colorado Cab Company, LLC, doing business as Denver Yellow Cab and/or Boulder Yellow Cab and/or Boulder SuperShuttle and/or Boulder Airporter and/or Boulder Airport Shuttle and/or Boulder Express Shuttle (Colorado Cab); Casino Transportation, Inc. and Four Winds, Inc., doing business as People's Choice Transportation, Inc. (CTI); and, MKBS LLC, doing business as Metro Taxi & Taxis Fiesta (Metro Taxi) were all granted.

II. PROCEDURAL HISTORY

6. Numerous motions were filed and Interim Orders issued in this docket; however, only significant procedural issues are enumerated here.

7. Pursuant to Decision No. R09-0066-I, a pre-hearing conference in this matter was scheduled for January 30, 2009. Appearances were entered at the pre-hearing conference on behalf of Mile High, Estes Park, Dashabout, Colorado Cab, Alpine Taxi, Alpine Express, Yellow Cab, CTI, and Metro Taxi. Counsel for CTI represented that based on the restrictive amendments to the Application approved by the undersigned Administrative Law Judge (ALJ),

CTI's interests were no longer affected and therefore CTI withdrew as an intervenor in this matter.

8. In addition to discussions concerning Mile High's failure to file either a business plan or document detailing its financial structure as part of its Application, the parties also expressed some confusion and concern regarding the Commissioner's deliberations in the Union Taxi Cooperative (Union Taxi) application matter in Docket No. 08A-241CP. Primarily, the parties inquired as to the extent of the applicability of the doctrine of regulated competition as it applies to the new standards of § 40-10-105(b)(II), C.R.S. The parties also indicated that the Union Taxi deliberations seemed to focus more on the applicant side than on what the intervenors' burden of proof should be in such an application. As such, the parties expressed confusion as to the appropriate burdens of proof and the proper use of expert witnesses.

9. In light of these questions, the parties were in general agreement that they were not at that time prepared to discuss the scope of the case, nor a possible procedural schedule in light of the comments raised by the Commission in deliberations meetings regarding the application of Union Taxi. Rather, it was agreed that it would be more appropriate to set a pre-hearing conference after the Commission issued its written decision in the Union Taxi matter. As a consequence, Mile High voluntarily agreed to waive the 210-day deadline in which to issue a Commission Decision in this matter, pursuant to § 40-6-109.5(3), C.R.S. As a result, the pre-hearing conference was to be re-scheduled no earlier than three weeks subsequent to the issuance of the Commission Decision in Docket No. 08A-241CP.

10. On February 27, 2009, the Commission issued Decision No. C09-0207 in Docket Nos. 08A-241CP, 08A-283CP, 08A-284CP-Extension, and 08A-300CP. The Decision addressed the areas of concern raised by the parties to this Docket at the January 30, 2009 pre-hearing

conference. Consequently, a second pre-hearing conference was scheduled for March 25, 2009 at which time the parties were ordered to be prepared to discuss the scope of this docket in light of the Commission's findings in Decision No. C09-0207, as well as the procedural matters addressed in Decision No. R09-0066-I.

11. Discussion at the February 7, 2009 pre-hearing conference involved the scope of the docket given the restrictive amendments to the Application, the different burdens of proof given the scope of the Application, and a procedural schedule that incorporates the scope of the Application as well as the various burdens of proof required.

12. Intervenors argued that the Application requests authority for call-and-demand taxi service between all points in the Counties of Adams, Arapahoe, Denver, Douglas, and Jefferson, State of Colorado. The burden of proof standard applicable to that portion of the Application is the standard articulated by House Bill (HB) 08-1227 and incorporated into §§ 40-10-105(b)(II)(A) and (B), C.R.S. However, the Application additionally seeks service between those counties on the one hand, and all points in the State of Colorado on the other hand. Intervenors argued that there are two burdens applicable to that portion of the Application, which, depending on the size of the county to which service is sought, the burden of proof falls under the standard of regulated competition or regulated monopoly.

13. The scope of the Docket was addressed in Decision No. R09-0493-I. Under the terms of the Application, three separate burdens of proof are required. Under the portion of the Application that seeks authority to provide service between the Counties of Adams, Arapahoe, Denver, Douglas, and Jefferson, the standard is pursuant to HB08-1227. That is, pursuant to § 40-10-105(2)(b)(I)-(II)(A)-(B), C.R.S., the applicant has the initial burden of proof that it is "operationally and financially fit to provide the proposed service." *Id.* at (2)(b)(II)(A). Should

the applicant sustain its initial burden, there is then a rebuttable presumption of public need for the service, and the intervenors opposing the Application will then bear the burden to “prove that the public convenience and necessity does not require granting the application and that the issuance of the certificate would be detrimental to the public interest.” Id. at (2)(b)(II)(B).

14. Regarding that portion of the Application that seeks authority to provide taxi service between the Counties of Adams, Arapahoe, Denver, Douglas, and Jefferson on the one hand, and all points within the State of Colorado, on the other hand, it was determined that two separate burdens of proof are required. For those counties Applicant wishes to serve with a population of 70,000 or greater, that portion of the Application shall not be deemed to be an exclusive grant or monopoly, therefore, “the doctrine of regulated competition shall prevail.” Id. at (2)(b)(I). For those counties Applicant wishes to serve with a population of less than 70,000 - that portion of the Application shall be governed by “the doctrine of regulated monopoly.” Id. at (2)(a). As a result, it was determined that a hearing should be crafted that most effectively addresses those three standards, while ensuring administrative efficiency, limiting waste, and ensuring the due process rights of Applicant and intervenors.

15. In setting a procedural schedule in this matter, it was additionally found that despite the various burdens of proof required in this matter, some commonality exists as to what Applicant must prove. For example, whether the burden of proof is subject to HB 1227, the doctrine of regulated monopoly or regulated competition, Applicant must first prove it is operationally and financially fit to provide the proposed service. If Applicant meets that burden, under regulated competition and regulated monopoly Applicant must further prove that the present and future public convenience and necessity require a grant of the Application. In other

words, Applicant must show there is a public need for the proposed service. However, that latter standard is not applicable to an application under HB 08- 1227.

16. Under HB 08-1227, if Applicant proves fitness, the burden then shifts to the incumbent carriers to show that the public convenience and necessity does not require granting the application and that the issuance of the certificate would be detrimental to the public interest. Under regulated competition, incumbent carriers are generally required to show that the proposed service would result in destructive competition. Under regulated monopoly, incumbents must generally show that they are capable of providing adequate service.

17. It was further determined that based on the above standards, the hearing would be conducted in three phases. Phase I was to include testimony and evidence of Applicant's operational and financial fitness. Since fitness is a threshold issue, an initial decision (discussed in more detail below) was to be made at the end of Phase I as to whether Applicant had met its burden of proof on this issue. If it was found that the Phase I burden was met, then the hearing would move to Phase II, which was to include testimony and evidence regarding whether there is a public need for the proposed service. Finally, Phase III was to include the intervenors' rebuttal case in which intervenors must establish that the public convenience and necessity does not require granting the application and that the issuance of the certificate would be detrimental to the public interest under HB 1227. Additionally, intervenors would be required to show during Phase III, that under regulated competition, the proposed service would result in destructive competition, and under regulated monopoly, that they are capable of providing adequate service.

18. It was anticipated that during Phase I, Applicant would carry the bulk of the hearing, presenting its witnesses, including managers, owners, employees, and people associated with or expected to be associated with the proposed operations of the company, as well as any

expert witnesses Applicant intended to provide, in order to meet its burden of proof under the standards discussed above. Intervenors would have the opportunity to cross-examine Applicant's witnesses as well as provide their own witnesses regarding Applicant's operational and financial fitness.

19. At the conclusion of Phase I of the hearing, the ALJ was to make a determination of whether Applicant had presented a *prima facie* case as to its operational and financial fitness. If it was determined that Applicant had made a *prima facie* case as to its operational and financial fitness, the Decision would be in the form of an Interim Order and the case would move on to Phase II, the public need phase of the case. On the other hand, should it be determined that Applicant failed to prove it is operationally and financially fit, the Decision would be in the form of a Recommended Decision and the matter would end there. Applicant of course could appeal the finding to the Commission in the form of exceptions.¹

20. It was anticipated that Phase II of the docket, the public need phase, would include mostly testimony from public witnesses; however, Applicant could also put on its own witnesses in this Phase as well. Again, the determination at the conclusion of Phase II would be whether Applicant had made a *prima facie* case for public need regarding its proposed taxi service. It was noted that Applicant's *prima facie* case on public need was applicable only to the burdens of proof required under the doctrines of regulated monopoly and regulated competition. Section 40-10-105, C.R.S., contains no such required showing on the part of Applicant. Indeed, subsection (2)(b)(II)(B) requires the parties opposing the application to bear the burden to prove that the public convenience and necessity does not require granting the application, and that the

¹ It was noted that in the event it was found that Applicant had made a *prima facie* case in Phase I, this was not a final decision and intervenors could still present rebuttal testimony regarding Applicant's operational and financial fitness in Phase II.

issuance of a certificate of public convenience and necessity (CPCN) would be detrimental to the public interest for that portion of the Application that seeks authority within the five counties (Adams, Arapahoe, Denver, Douglas, and Jefferson).

21. Phase III of the hearing was anticipated to consist of the Intervenor's responsive case in which they presented testimony and evidence regarding the rebuttable presumption of public need, that the public convenience and necessity does not require granting the application, and the issuance of the CPCN would be detrimental to the public interest, pursuant to the HB 1227 standards. Intervenor would also present testimony and evidence that under regulated competition, the proposed service would result in destructive competition, and under regulated monopoly, that they are capable of providing adequate service.

22. In addition, Intervenor could also present their rebuttal case with responsive testimony and evidence regarding Applicant's fitness during Phase III. Upon the conclusion of Phase III and the hearing, the ALJ would issue a Recommended Decision. That Recommended Decision was to include, among other things, final findings on Applicant's fitness and on public need. The Recommended Decision was to also make final findings on destructive competition as it relates to that portion of the Application that seeks authority to provide taxi service to counties in the State of Colorado with a population of 70,000 or greater, and final findings on whether intervenors can provide adequate service as it relates to that portion of the Application that seeks authority to provide taxi service to counties in the State of Colorado with a population of less than 70,000. If the Application is granted, the Recommended Decision will also, among other things, contain a finding regarding the number of taxicabs that Applicant will be authorized to maintain.

23. Based on the parties' representations at the pre-hearing conference, an evidentiary hearing in this matter was scheduled for August 24 through 31, 2009 and September 9 through 15, 2009. Statements of Position were to be filed no later than the close of business on October 7, 2009.

24. On July 23, 2009, Gregg Rounds and Thomas Casey, doing business as Estes Valley Transport (EVT) filed a Motion to intervene out of time in this matter. The Motion stated that EVT had been granted temporary authority from the Commission to operate the authority of another intervenor in this case, Estes Park Express, Ltd. Additionally, EVT also had a pending permanent authority application before the Commission. Since it appeared that EVT was merely stepping into the intervenor status of Estes Park, the ALJ found good cause to grant the motion.

25. On July 31, 2009, Metro Taxi and Colorado Cab (collectively, Intervenors) filed a Joint Motion in Limine. The Joint Motion requested that two of Applicant's witnesses be precluded from testifying at hearing.

26. The Joint Motion requested that Representative. K. Jerry Frangas be precluded from testifying in his capacity as a member of the Colorado General Assembly concerning competition, the statutory regulation of the taxicab industry in Colorado, and regarding the background and intention of HB 1227. Intervenors argued that Representative Frangas' proposed testimony was improper and should be excluded because his opinion concerning HB 1227 and what he believes it was intended to do was irrelevant as a matter of law. Further, Intervenors asserted that the Commission had already construed HB 1227 and there was no need for testimony to assist the Commission in interpreting either statutes within the scope of its jurisdiction or its own decisions. Finally, Intervenors argued that to introduce an expert to opine on conclusions of law is improper.

27. The undersigned ALJ found Intervenors' arguments regarding Representative Frangas unpersuasive. It was determined that while it was unusual for a Legislator to testify at a Commission hearing, his opinions and insight regarding the passage of HB 1227 and the legislative intent behind its passage would nonetheless provide insight not typically available through Commission hearings. Since The Application in this matter was guided by the requirements of HB 1227 codified at § 40-10-105, C.R.S., it was found that testimony from a lawmaker involved in its passage would be proper.

28. Intervenors also requested that the testimony of Ms. Diane King be precluded. Intervenors stated that her testimony was to include employment and labor practices in the Denver taxicab market. Intervenors indicated that Ms. King is an attorney representing a group of current and former Colorado Cab drivers in a pending arbitration before the American Arbitration Association, in which her clients asserted multiple claims against Colorado Cab.

29. Intervenors argued that Ms. King's testimony was hearsay in nature and involved matters directly in dispute in the pending arbitration discussed above. According to Intervenors, her summary of testimony referred to racial discrimination in employment practices in the Colorado taxi industry, which is beyond the Commission's jurisdiction and involves disputed issues of fact and law. Intervenors asserted that Ms. King's only knowledge concerning employment, labor, or other practices in the Denver taxicab market was hearsay based on her representation of taxi drivers.

30. While the Commission may allow hearsay testimony not admissible under the rules of evidence if it is relevant, probative, and not prejudicial to the party against whom it is offered, it was nonetheless found that Ms. King's proposed testimony did not rise to the level that would be allowable here. Nothing in Applicant's witness list and summary of testimony

indicated that Ms. King possessed distinct expertise in employment or labor practices in the Denver taxicab market beyond her representation of Colorado Cab taxi drivers in a pending arbitration matter. While it was not disputed that racial discrimination in employment practices in the Colorado taxicab industry exists or that such discrimination is a serious matter, it was found that both those issues were beyond the scope of a taxicab application under § 40-10-105, C.R.S. Therefore, Ms. King was precluded as a witness for Applicant.

31. Between June 29 and 30, 2009, Rockies Cab Company, LLC; Denver Cab Co-operative, Inc., doing business as Denver Cab Co-op; and Liberty Taxi Corporation filed applications for a CPCN to operate as a common carrier by motor vehicle for hire for taxi service in generally the same geographic area as Mile High's Application. On July 24, 2009, Metro Taxi and Colorado Cab filed a joint motion to consolidate the cases captioned above with this docket.

32. While the Motion to Consolidate regarding the applications of Rockies Cab Company, LLC; Denver Cab Co-operative, Inc., doing business as Denver Cab Co-op; and Liberty Taxi Corporation was granted, the Motion was denied regarding its request to consolidate this docket with those dockets.

33. Due to the large volume of motions filed prior to the commencement of the evidentiary hearing, the ALJ issued Decision No. R09-0929-I holding that he would provide an oral decision to those motions not already addressed by Interim Order at the beginning of the hearing on August 24, 2009. The ALJ addressed approximately 26 motions at the first day of evidentiary hearings in this matter, which occupied the entire day.

34. The evidentiary hearing was called to order at the scheduled date and time. Appearances were entered by counsel for Applicant, Estes Park, (EVT),² Dashabout, Yellow Cab, Colorado Cab, and Metro Taxi. Some 73 exhibits were offered into evidence and 71 exhibits were admitted. Specifically, Hearing Exhibit Nos. 1-3, 5-10, 12-39, 44, 46-69, and 70-72 were admitted into evidence. Hearing Exhibit Nos. 4, 11, 40, 41, 45(A), and 45(B) were admitted as confidential exhibits. Hearing Exhibit No. 42 was withdrawn. Approximately 14 witnesses testified on behalf of Applicant, of which 11 witnesses were public witnesses, including general members of the public and drivers for Union Taxi, while 16 witnesses testified on behalf of Intervenors, with the majority of those witnesses (13) sponsored by Metro Taxi.

35. Pursuant to Decision No. R09-0493-I, the date for the filing of Statements of Position was set as no later than October 7, 2009. However, because transcripts of the hearing were not available to counsel for the various parties to this docket prior to the week of October 7, 2009, upon the Commission's own motion, Decision No. R09-0493-I was modified and the deadline for filing Statements of Position was extended to the close of business on October 14, 2009.

36. Pursuant to § 40-6-109, C.R.S., the ALJ hereby transmits to the Commission the record and exhibits of this proceeding, as well as a written recommended decision.

² See, ¶24 above, which describes the circumstances under which EVT assumed the intervenor status of Estes Park. In addition, the intervention of Stanley Brothers was withdrawn.

III. FINDINGS OF FACT

A. Operational and Financial Fitness

1. Company Structure

37. As described above, Applicant seeks permanent authority to operate as a common carrier by motor vehicle for hire for the transportation of passengers and their baggage in taxi service, between all points in the Counties of Adams, Arapahoe, Denver, Douglas, and Jefferson, and between said points, on the one hand, and all points in the State of Colorado, on the other hand.

38. Applicant's original Application filed on September 11, 2008 (Hearing Exhibit No. 1), and its Amended Application filed on July 22, 2009 (Hearing Exhibit No. 2) provide some information on the basic structure of the proposed taxi company. Mr. Rowland Nwankwo and Mr. Edem Archibong were the primary witnesses on behalf of the Applicant. While the Application and Amended Application provide dissimilar identifications of the initial directors and officers of the corporation, it appears that Mr. Nwankwo currently serves as president and Mr. Archibong serves as Chairman of the Board of Mile High Cab, Inc. (Hearing Exhibit No. 5).

39. Mile High Cab, Inc. was incorporated in Colorado on July 15, 2008. As of the date of the hearing, its Board of Directors (Board) was comprised of nine members. The names of the additional members of the Board other than Mr. Archibong and Mr. Nwankwo are confidential and are listed in Confidential Hearing Exhibit No. 5.

40. The basic structure of the company is that of a corporation, but with owner/drivers, identified as "owner/operators" by Mr. Nwankwo, each owning a single share of the corporation. However, each owner/operator, while owning a single share of the company and

one vote on company matters, will not have an equity interest in the business. The overall operation of the company will be entrusted to the Board, with owner/operators voting on matters presented to them by the Board. Consistent with the number of taxicabs sought in the Application, the number of owner/operators will be limited to 150 at any given time.

41. While each owner/operator is a fractional owner of the company, the structure of the company is not that of a cooperative association, but is rather a corporation. Each owner/operator will essentially be considered an independent contractor. It is not anticipated at this time that the owner/operator will own an equity interest in the company, but merely a voting interest.

42. Despite having a voting interest in the company through their single voting share, owner/operators must nonetheless enter into a lease agreement with the company.³ Owner/operators must provide their own vehicles and will be responsible for maintenance on those vehicles. Owner/operators may utilize “associate drivers,” that is, they may allow use of their taxicab to another person on days they do not drive. The negotiated agreement between the owner/operator and the associate driver remains between those parties and no approval from the company is required.

43. Owner/operators have contributed an initial amount of money to Mile High, which is being held in an escrow account pending the outcome of its Application.⁴ While the owner/operators have made an initial contribution of capital to the company, they have not received shares of stock in return.

³ The weekly lease rate is confidential and is provided in Confidential Hearing Exhibit No. 5.

⁴ This figure is also confidential and contained in Confidential Hearing Exhibit No.5.

44. Upon an owner/operator's determination to sever ties with Mile High, he or she may sell his or her share in the company to another person, subject to approval of the Board. If a satisfactory replacement for the departing owner/operator is not approved by the Board, it may exercise an option to purchase the departing owner/operator's share and find a new driver on its own. In any event, upon an owner/operator's departure from the company, their initial contribution will be refunded.

45. Members of the Board will not contribute cash to capitalize the company and will be paid by the owners of the company, but not directly by the company itself. Members of the Board will be paid out of a separate account.

46. Mr. Nwankwo's reasons for seeking authority to operate a new taxicab company were varied. Primarily, Mile High seeks to provide better cab service than is currently provided in the Denver area. This is proposed to be accomplished by offering lower fares and eliminating customer charges such as for loading and unloading grocery bags. Mr. Nwankwo also proposes to provide a higher level of customer service through proper training of Mile High's drivers. While acknowledging that drivers would be classified as independent contractors, Mr. Nwankwo nonetheless expressed a preference for having drivers wear uniform shirts and for drivers that operate at Denver International Airport (DIA) to wear a coat and tie.

47. The company's philosophy would be that drivers are the real customers. In order to ensure that drivers are happy in their positions, Mr. Nwankwo proposes a lower weekly lease rate as indicated supra. He also proposes to allow drivers to take a month off from lease payments once a year. Drivers may continue to drive during this one month free period, or they may choose to take the time off to spend with family if they so choose. Mr. Nwankwo believes

that lower lease rates will allow drivers to pick up shorter fares since there will be less pressure to meet high weekly lease payments.

2. Management Experience

a. Mr. Nwankwo

48. Mr. Nwankwo, one of the founders and current president and a member of the Board of the company testified as to his taxi and managerial experience.

49. For the past 16 years, Mr. Nwankwo has been employed as a taxi driver for Metro Taxi. He started in the taxicab industry in 1981 as a driver for Yellow Cab Co-op. Within one year of the start of his employment with Yellow Cab, Mr. Nwankwo accumulated enough shifts to become an owner/operator and purchased his own vehicle for use as a taxicab. At the time he began driving for Yellow Cab Co-op, there were two other taxi companies in the Denver area – Zone Cab and Ritz Cab.

50. While Mr. Nwankwo initially only drove a cab for Yellow Cab Co-op, in approximately 1987 or 1988 he was allowed to purchase additional taxicabs, at which time he purchased two additional cabs. As a result, Mr. Nwankwo owned a three-cab fleet within Yellow Cab Co-op that he managed and operated. As part of his duties overseeing his three-cab fleet, Mr. Nwankwo hired drivers, set drivers' schedules, collected lease fees, paid fees to Yellow Cab Co-op, and ensured he was properly credited each month for fees collected from his drivers. However, this arrangement ended in approximately 1991 when Yellow Cab Co-op filed for bankruptcy.

51. Mr. Nwankwo next worked at Zone Cab and became an owner/driver and operated mainly at the airport, which did not require interaction with the dispatcher or with

company management.⁵ He then went to work at Metro Taxi in 1993 and began as a lease driver. Within one year he became an owner/driver at Metro Taxi.

52. At some point in approximately 1995, Mr. Nwankwo, along with other individuals, attempted to form a cab company of their own; however, despite assistance from an organization known as the Institute for Justice, the application was denied. Subsequently, Mr. Nwankwo again attempted to obtain authority for taxi service in the Denver area under the name Mile High Cab. However, that Mile High Cab application was denied.

53. While Mr. Nwankwo was an owner/driver for Metro Taxi, in 2003 he relinquished ownership of his vehicle and became a lease driver and has continued in that capacity for Metro Taxi as of the date of the hearing. Mr. Nwankwo served as a trainer for Metro Taxi from 2003 to 2004. In addition to training on proper driving and safety techniques, Mr. Nwankwo also taught Metro Taxi drivers about proper customer service skills and how to make money through good customer service. He imparted the importance of putting in sufficient time in order to be able to make lease payments to the company.

54. Mr. Nwankwo's academic and employment history prior to his career as a taxi driver were also discussed. Regarding his academic credentials, Mr. Nwankwo graduated from high school in his native country of Nigeria. In 1976 he emigrated to the U.S. and studied pre-med at the University of Wisconsin, Superior for one semester. He then moved to Denver where he enrolled at the Community College of Denver and received associate degrees in accounting and management. Upon receiving his degrees from the Community College of Denver, Mr. Nwankwo taught business math there for a period of time. Mr. Nwankwo subsequently

⁵ Mr. Nwankwo testified that during his initial tenure at Zone Cab, he was required to pay the dispatcher in order to get calls for trips. As a result, he operated exclusively at the airport, as well as picking up passengers at hotels and hails.

enrolled at Metropolitan State College of Denver where he received a bachelor of science degree in accounting.

55. Mr. Nwankwo's employment began in Nigeria upon his graduation from high school. His first job was with the Nigerian Ministry of Economics where he worked for six months. He then worked for a year at the Pan African Bank as a public relations officer where he advertised for the bank and convinced people to open accounts there.

56. Mr. Nwankwo was employed by the Southland Corporation from 1977 to 1983 where he started as a night clerk at 7-Eleven stores and was eventually promoted to manager of his own store. As part of his management duties at 7-Eleven, Mr. Nwankwo was responsible for hiring and firing employees and had overall responsibility for his store. He ordered and tracked inventory; scheduled employees; conducted shift analyses; and prepared daily reports. The shift analysis compared sales and cash receipts during various shifts to determine trends in sales and to verify that no theft of funds was occurring. In addition, Mr. Nwankwo provided reports to upper management in Southland Corporation and discussed the store's performance.

57. Mr. Nwankwo received management training from the Southland Corporation during his tenure there in which he was taught all aspects of managing a 7-Eleven store. He was trained in hiring people and in the proper way to deal with underperforming employees prior to actually having to terminate them. Mr. Nwankwo also received training in customer relations which included the proper method to greet customers, and ways to continuously improve the customer's experience at 7-Eleven in order to improve store revenue.

58. Mr. Nwankwo was required to manage store inventory and interact with suppliers on a regular basis. This required ensuring that invoices matched delivered inventory. Additionally, Mr. Nwankwo dealt with store security, ensuring that employees kept a minimal

amount of money in the cash register, and training employees as to how to deal with store robberies.

59. During Mr. Nwankwo's term as store manager, he also established relationships with neighboring businesses and with customers who lived in the area. These relationships established a means for neighboring businesses to watch out for each other and the neighborhood.

b. Mr. Archibong

60. Mr. Edem Archibong, one of the founders of Mile High Cab and currently serving as Chairman of the Board offered testimony as to his taxi experience and general background.

61. Mr. Archibong is currently a driver for Freedom Cabs, Inc. (Freedom) and has been driving for Freedom since 1995. He has been driving full-time since 1997. While he has been offered management positions within Freedom, Mr. Archibong prefers to drive and has therefore declined several offers of management level promotions within the company.

62. Mr. Archibong initially assisted Freedom in its bid for a CPCN, offering testimony regarding the need for taxi service in the Five Points area where he worked as an optician. Mr. Archibong began as an investor in Freedom when it was formed by providing a vehicle to the company for use as a taxicab. However, because he was required to pay significant repair bills, he failed to receive any financial return on his investment of a vehicle. It was suggested to Mr. Archibong that he drive for the company in order to earn more money. Because he saw a need for service in the Five Points area, especially at night, Mr. Archibong obtained his Herdic license from the City of Denver and began driving part-time Friday through Sunday. Eventually, Mr. Archibong began driving a cab every night.

63. In addition to driving a taxi at night for Freedom, Mr. Archibong was also employed as an optician for the Colorado Optometric Center (Center), located in Five Points. The Center provided optometric services for low income clients and was funded in part by United Way. Mr. Archibong and others also solicited contributions to help fund the Center. In addition to making glasses for low income patients, Mr. Archibong also trained optometric students from several universities.

64. Prior to his employment at Freedom and the Colorado Optometric Center, Mr. Archibong managed an optical store in Lakewood, Colorado known as the Lakewood Clinic. There he learned how to inventory frames. His duties included training employees and managing other staff including secretaries and floor staff. Prior to his employment at the Lakewood Clinic, Mr. Archibong was an assistant laboratory manager at a LensCrafters optical center located at the Westminster Mall. There, he trained employees to make glasses in one hour.

65. Mr. Archibong is originally from Calabar, Nigeria. Upon his graduation from high school, he was enrolled in a seminary for three years, studying basic courses such as math, chemistry, and engineering. He then taught French at the high school level and also taught chemistry for nine months. He was then employed at the Standard Charter Bank in Nigeria from 1973-'77 as an entries clerk. Mr. Archibong was subsequently promoted to cashier, where he handled deposits and foreign exchange, and then to advancing manager's assistant, where he conducted background checks on customers seeking bank loans.

66. In 1978, Mr. Archibong emigrated to the United States where he enrolled at the University of Indiana, and in 1982 received a degree in chemistry. Shortly after graduation,

Mr. Archibong joined the U.S. Army. While in the Army, he was briefly trained in cytology.⁶ He then was trained in optics. His final assignment was at Fitzsimmons Army Medical Center which was at that time active in Aurora, Colorado. There, he performed eye exams for new recruits. He was discharged from the Army in 1986 and then enlisted in the Army Reserves until he was discharged in 1992 at the rank of sergeant.

67. As to why he became involved in Mile High, Mr. Archibong noted that he has always been an advocate for taxi drivers and wanted to provide an environment where drivers had better opportunities to earn more money under better driving conditions. He has witnessed poor driver treatment at other taxi companies and at DIA, and feels that he can provide a system that puts drivers first, which ultimately benefits the company by having more productive drivers who are happy in their work.

3. Company Capitalization

68. While it was initially proposed to seek outside investors to capitalize Mile High, the Board ultimately determined that the best alternative which provided more control over the company was to allow the drivers themselves to capitalize the company. As a result, 150 drivers were recruited with each driver providing an initial amount of funding which was placed in an escrow account pending the outcome of the Application. These initial investors are known as “owner/operators,” although initially, none of those owner/operators were given shares in the company in exchange for their initial investment.

69. Mr. Archibong testified that the benefits of this arrangement, in addition to more company control include higher driver loyalty since they have a stake in the company than lease

⁶ Cytology refers to a branch of pathology that deals with making diagnoses of diseases and conditions through the examination of tissue samples from the body.

drivers as well as better customer service, fewer accidents, and better marketing and promotional opportunities. While drivers will be known as owner/operators, the company structure is not intended to be that of a cooperative. Further, Mile High intends to treat its drivers as independent contractors.

70. Testimony from the initial members of the Board indicate that the amount of money raised from the owner/operators is sufficient to fund the initial operations of the company which includes obtaining facilities and equipment, as well as paying wages of salaried employees. However, if additional start up funding is necessary, the Board is confident that the owner/operators will freely contribute more money as needed.

4. Corporate Governance

71. Some of the characteristics of the company structure are detailed supra in Mr. Nwankwo's testimony. Mr. Archibong provided more detail regarding the make up and governance of the company.

72. The initial Board is comprised of nine members. Formal meetings have been regularly conducted and a chairman, treasurer, assistant treasurer, secretary, and legal counsel have been elected. The functions and duties of the officers are typical of any corporation. The treasurer and assistant treasurer collect funds from the owner/operators and manage deposits. The secretary is charged with keeping the minutes from Board meetings. The Board meets weekly, however, just prior to the commencement of the hearing in the Application, the Board met bi-weekly.

73. While company decisions will be made by the Board and carried out by the president, the main function of the Board at this time is to carry out and implement the vision created by the president - Mr. Nwankwo. The overall concept for Mile High is that

Mr. Nwankwo's and the Board's initial priorities have been to attempt to implement that conceptual plan.

74. One of the main goals of Mile High is to thoroughly educate the public through advertising and word of mouth as to the products and services the taxicab industry as a whole and Mile High in particular provides. Mile High also intends to focus on educating the public about the different fares currently offered by the various cab companies. The company's ultimate goal is to provide a level of customer service that no other taxi company is currently providing, and provide a system for drivers to earn more money than at other companies.

5. Vehicles and Facilities

75. It is proposed that the bulk of the initial fleet of vehicles will be Ford Crown Victoria automobiles. Some mini-vans will also be used. Arrangements have already been made with several body and paint shops to paint vehicles in the Mile High colors. Decals, meters, and two-way radios will be installed by Mile High at its facilities.

76. Mr. Nwankwo offered testimony that he has spoken with members of the Aurora City Council proposing to place Mile High's offices and facilities in that city. Several sites have been identified as providing adequate office and maintenance space for the company's operations. It is anticipated that drivers will initially utilize privately owned repair and body shops to service vehicles. At some point, Mile High intends to provide maintenance and repair services at its own facilities.

6. Staffing

77. In addition to the 150 owner/operators, Mile High intends to employ several managers, call-takers, dispatchers, cashiers, and salespeople. It is expected that managers will assume duties as dispatchers and call-takers when necessary to fill in for absent employees or

during times of high volume. As business increases, Mile High proposes to hire additional employees as needed.

7. Expert Testimony of Mr. Joseph Rubino

78. Colorado Cab offered the testimony of Mr. Joseph Rubino regarding the operational and financial fitness of Applicant. Mr. Rubino is an independent transit consultant who specializes in the area of passenger ground transportation. He has been engaged in the transit consulting business since 2002.

79. Prior to his work as a transit consultant, Mr. Rubino worked in the transportation industry as a taxicab driver. He began driving a taxi in 1974 as a means to put himself through school. He became a taxicab manager in 1976 for a taxi company in Miami, Florida known as Metro Transportation that operated 39 vehicles. During his tenure from 1976 to 1984, the company grew from 39 taxis to over 300 vehicles that included taxis, paratransit transportation, Medicaid transportation, and limousines. Mr. Rubino served as an executive vice president of the company, even after it was acquired by Coach USA, in 1997. Mr. Rubino was in charge of the company on a day-to-day basis and played a prominent role in developing additional taxi companies to cater to specific target markets.

80. Metro Transportation was one of the earliest taxi companies to install computerized dispatch systems. Computerization was initiated in about 1978 and the company operated a fully computerized dispatch system by 1982.

81. Mr. Rubino was also involved in business development and marketing of the company. He utilized a full-time marketing department which reported directly to him. Business development involved marketing, advertising, community outreach and involvement, and

networking. He also oversaw the accounting functions of the company which included collecting fees and charges from drivers and processing vouchers.

82. In 1984 Mr. Rubino helped create a new company as a part of Metro Transportation known as Health Trans, Inc. That company was a for-hire medical van company that did business directly with hospitals and medical centers. Mr. Rubino oversaw that company in addition to his executive management duties with Metro Transportation. He served in that capacity until approximately 2002.

83. As indicated above, Mr. Rubino offers consulting services as an independent transit consultant who specializes in the area of passenger ground transportation. He was previously associated with Total Contract Solutions, while simultaneously operating his own consulting business as J.M. Rubino Consulting. As a consultant, Mr. Rubino has worked with some of the largest companies in the country where he was brought in to review the company's taxicab operations and to establish a series of best practices.

84. Since 2007, Mr. Rubino has been solely a transit consultant working with passenger transportation companies, particularly taxi companies. As a transit consultant, Mr. Rubino addressed the issue of recruiting and retaining taxi drivers, among other things. He advised on best methods to attract taxi drivers and provide them the proper training and environment to earn money. He also advised on the best methods to retain drivers. He advised as to how to improve the overall operation of the company, which incorporated all processes from the proper way to answer the phone; the proper methods for the company and dispatchers to communicate with drivers; employee interactions; business development; to suggesting and instituting best practices to ensure the taxi company's success.

85. As a consultant, Mr. Rubino typically spends time at a taxi company reviewing and analyzing all aspects of the operations in order to make recommendations for improved processes. Mr. Rubino testified that a large portion of his consulting business involves what he terms "Taxicab 101," which is a training program that trains drivers as business people based on basic business principles as applied to the taxi industry. The program includes training in business development, marketing, planning, and customer service. In addition to training drivers, the program includes training for managers, phone operators, and trainers. As part of Taxi 101, Mr. Rubino also publishes a weekly newsletter called Taxi Tips which reinforces the business principles he teaches. The program has been taught to approximately 40 taxi companies.

86. Mr. Rubino reviewed Mile High's confidential business plan (Hearing Exhibit No. 4) and prepared his expert opinion report based on his review and analysis (Hearing Exhibit No. 40).

87. Mr. Rubino indicated the initial section of his report dealt with the background on the taxicab cooperative. He did so because his primary interest was the reason the Applicants wanted to form this business venture and seek Commission approval for authority to operate as a taxicab common carrier. According to Mr. Rubino, drivers are typically unhappy with their current company and want to do better and make more money and consider this the best way to accomplish that goal.

88. While Mile High is legally considered a corporation, Mr. Rubino refers to it as a cooperative. Operationally, Mile High is structured as a cooperative, where drivers share ownership, responsibility, and profits. Mr. Rubino finds the structural characteristics of Mile

High very similar to Union Taxi. While the underlying concept of a cooperative may be sound, Mr. Rubino identifies the characteristics of cooperatives that succeed and those that do not.

89. Characteristics of successful cooperatives include those that form merely for the purpose of driving taxis, while utilizing existing taxi companies to provide dispatch services, repair services, and accident prevention services. Such an arrangement would be successful because those processes which drivers are unfamiliar with such as call center operations and physical plant would be operated by an experienced entity. That would enable drivers to concentrate on what they do best, providing taxi service and customer service to people according to Mr. Rubino. This type of arrangement would tend to be very successful.

90. On the other hand, when drivers do not contract for those support services and propose to oversee those types of services with which they have little experience, they tend not to be successful. Mr. Rubino indicated it was his understanding that Mile High intended to operate under the latter system.

91. He also expressed concern regarding Mile High's reliance on the owner/operator model to ensure its success. While Mile High believes owner/operators will be more loyal and motivated, Mr. Rubino believes drivers with such independent status will be more difficult to motivate and will be more likely to leave for another company if they are not earning a desired level of income.

92. Mr. Rubino also expressed concern regarding Mile High's understanding of the independent contractor model. While Mile High indicated its preference to incorporate certain standards regarding driver appearance and response times, Mr. Rubino notes that such standards cannot be unilaterally imposed as requirements on independent contractor drivers due to their independent contractor status. Mr. Rubino also finds this troubling given the method of

compensation proposed by Mile High. While it is Mr. Rubino's contention that management may suggest such customer service and dress standards, as independent contractors, Mile High management may not impose such standards on its drivers.

93. Mr. Rubino also found Mile High's revenue projections overly optimistic because they made the assumption that each and every owner/operator would pay 100 percent of their fees every week. The likelihood of achieving 100 percent compliance of payment of weekly fees is remote at best due to many factors such as to vehicles out of service, because of accidents and breakdowns; and the transient nature of the business in general. While testimony was provided that a waiting list existed for owner/operators, Mr. Rubino noted that turnover was not accounted for in the business plan revenue projections. Additionally, he indicated that a waiting list did not necessarily ensure uninterrupted revenue since it would take new drivers some period of time to leave their previous company and de-hack, then hack-up their vehicle in order to drive for Mile High.

94. According to Mr. Rubino, driver turnover is common in the taxi industry, as are breakdowns and accidents that keep vehicles out of service for extended periods of time. Without provisions for additional, spare vehicles in the Mile High fleet, Mr. Rubino doubts it can meet its revenue projections as indicated in its business plan.

95. Regarding Mile High's proposal to utilize a voice dispatch system, Mr. Rubino considers this the most problematic area of the business plan. This is a system the entire industry has moved away from in favor of a computer dispatch system. Mr. Rubino points out that a voice dispatch system is very labor intensive and it takes significantly longer than a computer system to take a call and dispatch it to a driver, generally up to three to four times longer. Further, once the call is taken, it must be dispatched in what is known as a "bidding process."

The dispatcher identifies an intersection and drivers then bid for the call by responding to dispatch by a recognized number or indicating that they are at or near the identified intersection. However, this type of system is easy to manipulate in that drivers will give false locations in order to get the fare even though they may be some distance from the pickup location. Without a Global Positioning System (GPS) there is no way to confirm drivers' locations. This is likely to add significant time to the passenger pickup.

96. A radio based dispatch system is also labor intensive. For example, as the number of drivers increase, so will the required number of phone operators. In addition, a set number of dispatchers will no longer be able to handle the number of drivers calling in on the radio requiring additional dispatchers as well, which will increase costs significantly. Mr. Rubino also indicated that the margin for error in a radio dispatch system is large. Operators can transpose numbers or hear one number or letter when another was actually stated. This system is also much slower than a computerized system. Mr. Rubino estimates that on average, it takes approximately two to three minutes to process a call. At best, a good operator can process approximately 230 to 240 calls during an eight-hour shift; however, an average call operator can only process approximately 160 to 180 calls in an eight-hour period. A computerized system can process significantly more calls in the same period of time. Additionally, fewer errors occur with a computerized system.

97. Mr. Rubino expressed concern that a radio based dispatch system is susceptible to graft. If a dispatcher has a friend as a driver or makes an arrangement with a driver, he or she may divert more lucrative fares to that driver resulting in an uneven distribution of fares. Even if no graft exists, Mr. Rubino cautions that drivers may nonetheless perceive that it exists. Drivers

may feel slighted because they believe they are not getting more lucrative fares to the airport and other longer distance fares as other drivers.

98. Mr. Rubino discussed his opinions regarding Mile High's staffing proposals. He found its proposed staffing levels unrealistic and too low. Based on his experience, Mr. Rubino posits that in a voice dispatch system as proposed by Mile High, one office employee is required for approximately every seven drivers for the period of 6:00 a.m. through 9:00 p.m. In order to provide support for the initial number of drivers Mile High proposes to employ in its initial stages, Mr. Rubino estimated that it will have to field approximately 900 calls in that time period, which will require at least four operators.

99. Mr. Rubino takes the position that Mile High needs to account for other specific positions such as safety trainers, road supervisors, and accident investigators. A single manager will not be able to handle these functions in addition to managerial duties as proposed by Mile High. Mr. Rubino represented that Mile High will also need a dedicated human resources staff person to handle driver background checks, drug testing, insurance matters, and any other human resources issues that may arise. Additionally, a full time accountant or bookkeeper is necessary to process payments, payouts, credit card transactions, and vouchers. It is therefore necessary to include the salaries of these additional personnel into Mile High's pro forma statements contained in its business plan.

100. Because of these additional costs and the Applicants' failure to account for out of service vehicles or driver turnover, Mr. Rubino believes that Mile High has understated its costs and overstated its revenue projections significantly.

B. Findings on Operational and Financial Fitness

101. Section 40-10-105(2)(b)(II), C.R.S. (2008), requires that:

(A) “[i]n an application for a [CPCN] to provide taxicab service within and between the counties of Adams, Arapahoe, Boulder, Broomfield, Denver, Douglas, El Paso, and Jefferson:

The applicant shall have the initial burden of proving that it is operationally and financially fit to provide the proposed service. The applicant shall not be required to prove the inadequacy of existing taxicab service, if any, within the applicant’s proposed geographic area of operation.

102. While the Commission has not promulgated rules regarding the operational and financial fitness standard, it did set out in some detail in Decision No. C09-0207, the considerations in making such a determination. Foremost, the Commission determined that “operational and financial fitness of an applicant must be evaluated on a case-by-case basis upon unique circumstances of each applicant and the proposed service.”

103. In providing direction to the ALJ in the Union Taxi matter, the Commission also set out detailed guidelines to be considered in determining operational and financial fitness.⁷

There, the Commission stated:

The ALJ should endeavor to compile a record regarding each applicant’s financial and operational fitness. In doing so, the ALJ should, without limitation, solicit evidence and develop findings of fact on the following topics with respect to each applicant: (a) minimum efficient scale, that is, whether a minimum size of operation is required and, if such a minimum does exist, conceptually what is the approximate magnitude for markets at issue in this docket; (b) credit worthiness; (c) access to capital; (d) capital structure; (e) current cash balances; (f) credit history and assessment of financial health over the near future; (g) managerial competence and experience; (h) fixed physical facilities such as office space and maintenance garages, as appropriate; (i) appropriate licenses and equipment necessary to operate a radio dispatch system; (j) vehicles of appropriate type; and (k) other metrics that may be appropriate.

⁷ See, Decision No. C08-0933, Consolidated Docket Nos. 08A-241CP, 08A-283CP, 08A-284CP-Extension, and 08A-300CP, issued September 4, 2008.

104. In the interim since Decision No. C09-0207, the Commission has not promulgated rules regarding the standards to determine operational and financial fitness. However, the undersigned ALJ finds it appropriate to employ those comprehensive standards developed in Decision No. C09-0207 to determine operational and financial fitness here.

1. Minimum Efficient Scale

105. Mile High seeks authority to operate 150 taxis in the Denver metro area. Comparing this level of service with other similar sized cab companies in the metro area, and taking into consideration testimony from Mr. Nwankwo and Mr. Archibong regarding Mile High's gradual approach to building the company to its maximum number of authorized taxis, it appears that a fleet of 150 cabs is at or above the minimum efficient scale of the Denver taxicab market.

2. Credit Worthiness; Access to Capital; Capital Structure; Current Cash Balances; and Credit History and Financial Health Over the Near Future

106. As indicated by Mr. Rubino, the structure of Mile High, while organized as a corporation, is nonetheless very similar to Union Taxi in that owner/operators are integrated into some form of ownership of the company. As such, the Commission's admonition that the company must be analyzed for operational and financial fitness as a whole, rather than an analysis of its individual owner/operators will be adhered to in this proceeding.

107. As indicated previously, Mr. Rubino, an expert witness for Colorado Cab, claimed that Mile High's business plan and pro forma financial statements failed to consider expenses attributable to growth of the company, as well as failed to consider unforeseen contingencies such as vehicle breakdowns, attrition, and inevitable driver turnover that would tend to reduce revenues considerably.

108. Metro Taxi argues in its Statement of Position that Mile High's evidence of financial fitness was merely an articulation of the Union Taxi criteria for operational and financial fitness and promises to fulfill some of those requirements at a future date. Additionally, Metro Taxi notes the concern that the money raised by Mile High appears to be from an undefined entity under undefined circumstances. Nothing in Mile High's testimony or evidence addresses the circumstances concerning the capital raised and the rights and obligations attached to those contributions. It is Metro Taxi's contention that the capital structure of Mile High and its access to capital was wholly undeveloped by the evidence presented by Mile High's witnesses.

109. Regarding Mile High's current cash balance, Metro Taxi takes the position that Mile High failed to address the circumstances surrounding its current cash on hand, nor can the record support a finding, absent additional evidence that Mile High's current cash balances are appropriate. The same is true for Mile High's creditworthiness according to Metro Taxi. Mile High provided no evidence of a credit history or creditworthiness of any of the members of its organization, or of any officer, director, or owner/driver. Metro Taxi doubts that Mile High has any creditworthiness based on its perceived lack of evidence.

110. In its Statement of Position, Mile High points out that it has not had to borrow or seek outside investors to provide capital for initial operations. While Metro Taxi questions the equity positions of Mile High's owner/operators, Mile High characterizes the capitalization of the company as equity financed by its owner/operators. Further, Mile High argues that it is inconsequential that it may have underestimated expenses or overestimated revenue in its pro forma financial statements in its business plan, because it has access to additional capital due to considerable leeway in its owner/operator lease rates. Since most of its owner/operators will

be paying less for weekly lease rates, Mile High posits that if necessary, it can call upon the owner/operators for additional capital if necessary.

111. Mile High takes the position that its current cash balances contained in two accounts – a capital account and an operational expense account, as of the date of the hearing was untouched and would not be spent until the Application was granted.⁸ In the event the Application is denied, the money will be refunded to the owner/operators who made an initial contribution of cash. It is anticipated that funds from the capital account would be used for Mile High's startup costs and to cover anticipated operating losses during the initial quarters of operation. Mile High calculates that the anticipated losses plus anticipated expenses during the first two quarters of operation will not deplete its cash balances and provide additional flexibility for any over estimation of revenues or under estimation of expenses during the initial phases of Mile High's operations.

112. Many questions surround the accuracy of Mile High's business plan and financial projections. There is some validity to the criticism of the projections proffered by Colorado Cab and Metro Taxi. For example, Mile High has based its entire projections on the assumption that 150 drivers will at all-times pay weekly lease fees except for exemptions as provided in the business plan. It does not account for vehicle breakdowns, accidents, driver attrition, or other factors that will most likely have an impact on its revenue and cost projections. Mile High has placed great faith in its owner/operators' loyalty and willingness to contribute additional capital, in addition to weekly lease fees if necessary.

⁸ The exact balances of the capital account and operational expense account are confidential and are contained in Hearing Exhibit Nos. 45A and 45B.

113. With the caveat that Mile High's pro forma financial statements may have failed to consider factors that could affect projected revenues and expenses, on the whole, it reflects the financial requirements necessary to operate a taxi company in the Denver area. The capital structure of Mile High appears to be generally sound and provide for the company's initial growth. It appears that the company has determined a strategy for the availability of necessary capital to provide for initial expenses and allow for some growth. In addition, Mile High has chosen to bypass outside investors to capitalize growth. Additional capital necessary to sustain the company in its initial phases will come from owner/operators themselves. While such a strategy may not be typical and a bit risky, it is nonetheless a legitimate strategy that may keep the company from incurring high debt or losing management control to outside investors.

3. Managerial Competence and Experience

114. Both Mr. Rubino and Metro Taxi were critical of the management experience of Mr. Nwankwo and Mr. Archibong. Mr. Rubino noted that a good taxi driver does not necessarily translate into a good taxicab company manager. Metro Taxi argues that Mr. Nwankwo's 25 years of experience as a manager of a convenience store and Mr. Archibong's extensive experience as a successful taxi driver fail to meet the burden of proof regarding managerial competence and experience. Metro Taxi takes that position that a good taxi driver does not necessarily make a good manager or trainer.

115. While Metro Taxi's assertion may be true, the converse of its statement is true as well. While Mr. Nwankwo and Mr. Archibong may have limited experience managing a taxi company, each possesses extensive experience and skill in the industry. Their individual experiences in not only driving taxis, but training new drivers and interacting with all facets of the industry in one form or another are crucial to providing the knowledge and experience to

oversee a taxi company on a day-to-day basis. The ALJ disagrees with Metro Taxi and Colorado Cab that Mr. Nwankwo's managerial experience of a convenience store should be dismissed out of hand as irrelevant. Rather, the skills learned in that position regarding customer service, employee relations, and the like are easily transferable to his management position at Mile High. Mr. Nwankwo also brings his extensive experience as a successful taxi driver to that position which cannot be discounted. Further, Mr. Archibong's substantial experience as a successful driver provides additional management competence to Mile High. Testimony from several public witnesses attests to the fact that Mr. Archibong is regarded as a trusted driver in the community. It is clear he has built a strong personal business based on his customer service skills and determination. Such attributes are readily transferable to his managerial competence at Mile High.

4. Fixed Physical Facilities

116. Metro Taxi notes that Mile High provided no evidence that it has any physical facilities such as office space or maintenance garages. Nor was any evidence provided regarding cost. Metro Taxi argues that Mile High has failed to meet its burden of proof regarding fixed physical facilities.

117. Mr. Nwankwo presented testimony regarding Mile High's plans to acquire office space and maintenance facilities should its Application be approved. He has been in negotiations with Aurora officials regarding appropriate locations to house a taxi company, which includes locations where a communications antenna would be appropriate, and facilities adequate to house officer personnel as well as maintenance facilities. Mr. Nwankow also indicated he had secured commitments from repair shops to repair Mile High taxis, which would minimize the need for maintenance facilities, at least in the short run.

5. Dispatch

118. The previous discussion details Mr. Rubino's concerns regarding Mile High's proposed radio dispatch system. He generally argues that the proposed system is less than efficient, may be difficult for drivers used to a computerized system to adjust to, and may be susceptible to graft or manipulation. Metro Taxi states that it is arguable whether the proposed radio dispatch system would be in compliance with Commission Rule 4 CCR 723-6-6254(a), as it is unclear whether Mile High's proposed radio dispatch system would have the ability to broadcast to all taxis in the fleet at the same time.

119. As was noted in the Union Taxi Order, there is no Commission regulation requiring a digital dispatch system. While a radio dispatch system may not be as technically advanced and efficient as a digital system, it is nonetheless not an obsolete system without a viable and effective use. In the short-term, a radio dispatch system is adequate.

6. Vehicles

120. No intervenor raised a concern regarding the types of vehicles proposed by Mile High to be included in its taxi fleet. Indeed, testimony indicated that most, if not all of Mile High's 150 drivers currently drive for other taxi companies and many of those drivers own their own taxis. Those vehicles will have to be de-hacked and then hacked up with Mile High appropriate equipment and painted in Mile High's colors. Testimony indicated that Mile High proposes to use only model year 2000 or newer vehicles. The bulk of its vehicles will be Ford Crown Victorias, a standard in the industry.

7. Conclusions

121. The speculative nature inherent in all business plans cannot be overlooked. A business plan (and the pro forma financial projections contained therein) is a basic blueprint for a

business which reflects the major points of the company's ideas, strategies, and management team. However, a business plan is not expected to be static, but instead is a fluid document that will change and adapt as the business evolves to meet the demands of reality. As such, projections and estimates made in a business plan must be analyzed from the point of view that they are inherently inaccurate and subject to change as the company moves forward. Nonetheless, a business plan must also be analyzed to determine whether management understands the realities of the industry in which it is attempting to compete and whether the projections and milestones contained in the plan in some way reflect those realities.

122. While Mile High's business plan may contain apparent flaws, its usefulness to determine the company's operational and financial fitness has been clearly established. As the Commission noted in the Union Taxi Order, the test of fitness is not perfection. The structure of Mile High has not been thoroughly vetted, that much is obvious. The testimony on the corporate structure and governance was at times unclear and inconsistent. While Mr. Nwankwo prefers a cooperative type structure, the company was organized as a corporation and the equity ownership structure is unsettled. However, this uncertain structural issue is not fatal to a finding of fitness.

123. It also appears that Mile High's financial situation is sufficient to initially support it as a start up taxi company. It has adequate cash on hand to support initial operations and meet short term contingencies. In addition, the company has a concrete plan to meet additional capitalization needs.

124. As to the other metrics required to meet fitness, it is found that Mile High's proposals for vehicles, fixed physical facilities such as maintenance and operational facilities are sufficiently addressed in the business plan and supported through testimony.

125. The experience of Mr. Nwankwo and Mr. Archibong is more than adequate to provide the managerial expertise and direction for Mile High, especially during the start up period. Their years of experience in not merely driving a taxi, but also successfully operating as an entrepreneurial taxi driver provides the managerial fitness required for a new taxi company.

126. Based on these findings, it is found that Mile High has met its initial burden of proving its operational and financial fitness to provide the proposed service under § 40-10-105(2)(b)(II)(A), C.R.S. Consequently, the burden proof shifts to the parties opposing the Application to prove that the public convenience and necessity does not require granting the application and that the issuance of the certificate would be detrimental to the public interest. § 40-10-105(2)(b)(II)(B), C.R.S.

IV. REBUTTABLE PRESUMPTION OF PUBLIC NEED

127. As it is found that Applicant has sustained its burden of proof pursuant to subsection (b)(II)(A) of § 40-15-105(2), C.R.S., the provisions of subsection (b)(II)(B) are therefore implicated. Subsection (b)(II)(B) provides as follows:

(B) If the applicant sustains its initial burden of proof as set forth in sub-paragraph (A) of this subparagraph (II), there shall be a rebuttable presumption of public need for the service, and the party or parties opposing the application shall bear the burden to prove that the public convenience and necessity does not require granting the application and that the issuance of the certificate would be detrimental to the public interest.

Additionally, except as otherwise provided in § 40-10-105(2)(b)(II), C.R.S., the granting of a CPCN to operate as a taxicab provider “within and between counties with a population of seventy thousand or greater, based on the federal census conducted in 2000, shall not be deemed to be an exclusive grant or monopoly, and the doctrine of regulated competition shall prevail.” Id. (Emphasis added).

128. In Decision No. C08-0933, issued September 4, 2008, the Commission noted that HB 08-1227 which amended § 40-15-105, C.R.S., did not repeal the doctrine of regulated competition for the eight metropolitan area counties, but instead, among other things, reallocated the burdens of proof. Under the public need standards of § 40-10-105(2)(b)(II)(B), C.R.S., the Commission may only grant the authority sought if the public convenience and necessity so require, coupled with a finding that there is no detriment to the public interest.

129. The Colorado Supreme Court has determined that the doctrine of regulated competition, which governs taxicab companies operating in the Denver metropolitan area, focuses more on the “public interest” or “public need.” *Trans-Western Exp., Ltd. v. Pub. Utils. Comm’n*, 877 P.2d 350, 353 (Colo. 1994) (“Under the doctrine of ‘regulated competition,’ the controlling consideration is public need.”); see also *Morey v. Pub. Utils. Comm’n*, 629 P.2d 1061, 1064 (Colo. 1981) (*Morey II*); *Morey v. Pub. Utils. Comm’n*, 582 P.2d 685, 687 (1978) (*Morey I*); *Miller Bros., Inc. v. Pub Utils. Comm’n*, 525 P.2d 443, 452 (1974).

130. In *Morey II*, the supreme court clarified the distinction between the “public convenience and necessity” generally, and the “public interest”-“public need” standard pursuant to regulated competition:

The difference between the test of “public interest” and the test of “public convenience and necessity” (as that test evolved under the doctrine of 'regulated monopoly') is...one of degree, i.e., the extent to which governmental regulation will be used to inhibit free competition. The legislative policy...is to regard motor carrier competition as desirable and to subject that competition to regulation only to the extent that it is necessary to do so in serving the public interest. Stated in another way, the policy is to protect existing carriers from the competition arising out of the granting of new permits only if there is a necessity for such protection. There is no necessity for such protective regulation unless the granting of a new permit will presently or prospectively impair the ability of carriers with existing permits to adequately serve the public. Established carriers are entitled to

protection only insofar as they need to be shielded from the danger of an oversupply of transportation services.⁹

Morey II, 629 P.2d at 1066-67 (omissions in original).

131. In considering an application under the doctrine of regulated competition, the supreme court has held that the Commission may consider:

[T]he impact additional competition may have, not only on the conflicting economic interests of competing carriers, but also on the ability of existing carriers to provide their customers and the public generally with safe, efficient and economical transportation services. The obligation to safeguard the general public against the impaired services and/or higher rates accompanying destructive or excessive competition is at the heart of the policy of regulated competition.

Id. at 1066.

132. In Decision No. C02-733, issued July 2, 2002, the Commission, noting its previous analysis in Decision No. C95-456, issued May 22, 1995, which in turn cited to Miller Bros., discussed the considerations in determining public need and the factors the Commission may consider such as:

the availability and adequacy of existing service; the desirability of increasing competition among carriers; and the necessity for avoiding impairment of operations of existing carriers. Decision No. C95-456, at 10. While the Commission is not bound by its prior decisions, we consider the supreme court's blessing of our previous criteria an indication of their merit, and determine that they continue to be useful to our deliberations. These criteria likewise adequately take into consideration the requirement that what is known as excessive or destructive competition must be avoided.

citing Trans-Western, 877 P.2d at 353.

133. In Decision No. C02-733, the Commission reinforced its policy for determining whether there is a public need for additional taxicab authority under the doctrine of regulated

⁹ This quote refers to "public interest" instead of "public need," however, the *Morey II* court used both terms interchangeably in this context.

competition by considering and properly balancing "... the availability and adequacy of existing service; the desirability of increasing competition among carriers; and the necessity for avoiding impairment of operations of existing carriers, specifically with an eye toward avoiding 'excessive' or 'destructive' competition." Id. at ¶7, pp. 13-14.

134. While the requirement for an applicant to sustain its burden of proof of public need for its proposed service has been abolished by HB 08-1227; nevertheless, the issue of public need remains a crucial factor in the Commission's determination. Indeed, the Commission, in Decision No. C09-0207 determined that "[r]egulated competition remains the scheme by which we will oversee the taxicab markets at issue in this matter. Accordingly, we will strive to achieve the necessary balance between market forces and regulatory instrumentalities." Id. at ¶ 508, p. 139. It is these well-established canons to which this Recommended Decision will strive to adhere.

A. Dr. Mundy

135. Dr. Ray A. Mundy appeared as an expert witness for Metro Taxi. Dr. Mundy is an endowed professor at the University of Missouri, St. Louis and serves as director of the Center for Transportation Studies. Dr. Mundy also is on the faculty of Marketing and Effective Logistics Operations and Management. He is a co-founder of, and consultant for, Tennessee Transportation & Logistics Foundation, as well as an Executive Director of the Airport Ground Transportation Association. Dr. Mundy has nearly 40 years of experience in the transportation industry. Hearing Exhibit No. 50 is Dr. Mundy's comprehensive curriculum vitae.

136. Dr. Mundy authored a study for the Denver Convention and Visitors Bureau detailing his empirical findings of the taxicab industry in the Denver metro area entitled Denver Metropolitan Taxi Study (Hearing Exhibit No. 53). The report illustrated the existing Denver

metro area taxi services, the companies that provide taxi service, the specific taxi services at DIA, as well as recommendations regarding entry into the Denver taxi market and how best to support full service taxi companies for the long run.¹⁰

137. In addition to his Denver Metro Taxi Study, Dr. Mundy has conducted similar studies in Winnipeg, Canada; Miami, Florida; Salt Lake City, Utah; Anaheim, California; Palm Springs, California; and Anchorage, Alaska. Dr. Mundy's Denver Metro Taxi Study remains the most current and specific study of the Denver taxi market.

138. Dr. Mundy's testimony centered on his impressions regarding the Denver taxicab market and the addition of an additional carrier subsequent to the grant of authority to Union Taxi and the additional cabs granted to Freedom. Dr. Mundy cites many reasons why granting the Union Taxi application was in error and how that mistake could be compounded by allowing yet more taxicabs into the Denver market. In support of his assertions, Dr. Mundy references his taxi study of the Denver market (Hearing Exhibit No. 53), as well as anecdotal evidence and judgments based on his experience in the industry.¹¹

139. Dr. Mundy's study, the most recent study conducted of the Denver taxicab market, differentiates taxi companies on a scale of 1 to 5.¹² A Category 1 taxicab company is identified as a more traditional, full service company that owns its own fleet of vehicles and individual drivers are employees of the company. A Category 1 company provides comprehensive liability insurance for the company as a whole, as well as providing marketing functions to develop

¹⁰ See, Hearing Exhibit No. 53, p.1, Introduction.

¹¹ Dr. Mundy discussed a wide array of issues regarding the entry of a new taxi company in the Denver metro area. While his testimony was wide-ranging, only those portions the ALJ finds most relevant to the issue of public need and public interest will be addressed here. If portions of Dr. Mundy's testimony are not specifically addressed, it is because the ALJ finds that testimony overlaps other more salient testimony or was not relevant to a finding regarding public need and public interest.

¹² See, Hearing Exhibit No. 53, p. 12, *Sec. 3 Framework for Analysis*.

corporate relations to develop a robust voucher system. Category 1 taxi companies make commitments to the community, are more likely to address environmental concerns by utilizing alternative fuel vehicles, and will generally operate new vehicles. Additionally, far more managerial control will be asserted over the quality of vehicles, daily inspections, and will generally utilize modern dispatching and electronic data capturing techniques. Category 1 companies are rare. Dr. Mundy identified only Reno and Las Vegas, Nevada as markets operating Category 1 taxi companies.

140. Dr. Mundy described a Category 2 taxi company as similar to Category 1, but utilizing independent contractor drivers rather than hiring drivers as employees of the company and owns the bulk of the vehicles. Otherwise, Category 2 companies similarly operate as full service taxi companies. Dr. Mundy estimated that approximately 90 percent of cab companies utilize independent contractor drivers.

141. Category 3 taxi companies are characterized as owning a number of permits which it leases out to drivers who own their own vehicles. Category 3 taxi companies provide some form of dispatch such as a radio dispatch system. Drivers pay a fee for installation of the meter and other required hardware and pay a weekly fee, as well as a small fee for a credit card system.

142. A Category 4 taxi company provides limited resources such as airport or hotel cab stand type activities. Category 4 companies provide limited or no dispatch services.

143. Category 5 taxi companies are characterized as providing a permit or medallion only, whereby a company leases out the permit or medallion to a driver who owns his or her own car and are affiliated with the company in name only. Dr. Mundy provided Miami, Florida as an example of a metropolitan area that operates in this manner.

144. Dr. Mundy finds Category 1 and 2 companies better serve the public interest because the company owns the vehicles and focuses on development of a company orientation. In Dr. Mundy's opinion, it is beneficial to have Category 1 and 2 companies in a market because as owners of the taxicabs, these companies are less likely to oversupply the marketplace with taxicabs. On the other end of the spectrum, a holder of a number of permits (Category 5) will have an interest in maximizing capital from each permit and is less interested in whether the driver makes money.

145. Dr. Mundy also finds Category 1 and 2 companies more desirable because they are more likely to carry individual insurance on each taxicab, as well as an umbrella policy. With companies lower on the continuum, individual drivers would be responsible for their own vehicles and carry their own insurance.

146. Category 1 and 2 companies better serve the community as well, according to Dr. Mundy because they interact with other organizations in developing voucher programs for their drivers. Additionally, since these companies utilize electronic dispatch systems with GPS capabilities, they are better able to serve the disadvantaged and handicapped community. Dr. Mundy posits that since Category 1 and 2 companies utilize dispatch systems with the capability of tracking and capturing data, those companies better serve these communities (as well as voucher services) since they are able to electronically track and verify every trip. This allows those companies to provide verification data to social service agencies or companies utilizing voucher contracts to provide information on the number of trips, the length of the trip, and the charge. Lower category companies that only provide radio dispatch or no dispatch services are not able to provide such information.

147. Additionally, while some may argue that when drivers own their own vehicles they take better care of them, Dr. Mundy notes that no empirical study on that issue has ever been conducted to his knowledge to verify those claims. Dr. Mundy posits that the opposite is in fact true because Category 1 and 2 companies have the vehicles in their facilities every day and are capable of servicing the vehicles on a regular schedule.

148. There was no testimony on the record from Dr. Mundy as to which category described each taxi company operating in the Denver metro area. However, in Decision No. C09-0207, it was noted that Dr. Mundy considered Metro Taxi and Colorado Cab to be full-service taxi companies with full-service dispatch capabilities. He further characterized Metro Taxi and Colorado Cab as invested heavily in the enterprise with respect to facilities, personnel, marketing programs, and modern dispatch systems and described both those companies as community-oriented companies since the bulk of their respective business is derived from call centers, hotel stands, voucher trips, accounts, and markets developed by individual drivers.¹³

149. Regarding Freedom, Dr. Mundy characterized it as fitting somewhere in the middle of his scale since it utilizes primarily owner-operators (as also proposed by Mile High here), which provides fewer facilities and less marketing.¹⁴

150. Dr. Mundy characterizes a radio dispatch system as subject to abuse and fraud. Dr. Mundy used the example of when a dispatcher puts out a call for a pickup, all drivers can respond if they want to take the fare. If it is a particularly lucrative fare, a driver will indicate he or she is in close proximity whether or not they are. However, with an electronic dispatch system with GPS tracking, the dispatcher is able to determine which cab is closest to the fare and

¹³ See, Decision No. C09-0207, ¶331, p. 86.

¹⁴ *Id.* at ¶332.

which cab is most eligible to take the call. Additionally, if the dispatch system has quality issues or limitations on the number of calls that can be answered and dispatched, Dr. Mundy opines that in such a situation, drivers will tend to utilize hotel stands or taxi stands more often since the dispatch system cannot be relied upon.

151. Dr. Mundy also responded to a question as to whether a taxi company that is adequately providing taxi service in a particular market could be negatively impacted by a new entrant. In such a scenario, Dr. Mundy maintains that drivers for the incumbent can be negatively impacted by a decrease in revenue proportional to the percentage increase of the market supply. This is especially true in the short run according to Dr. Mundy, since the addition of new driver and new taxis results in a derived demand. Those trips that drivers for the incumbent taxi company provided will not be shared with the newcomers.

152. Dr. Mundy goes on to posit that this may be detrimental to the public interest if the potential income in the marketplace is watered down to a level that causes established drivers to leave the industry. As a result, new drivers enter the marketplace and may seek more lucrative, longer fares to the detriment of shorter lower revenue fares. This is true according to Dr. Mundy, because a new taxicab entrant does not have an established call base. Drivers realize that if they take a call in the suburbs, they run the risk of not receiving additional calls during the period of time required to service the suburban fare, therefore, they forsake these types of fares in the hopes of receiving more lucrative fares. This is because drivers will not behave in a manner that provides service to the community or that serves the company, but will behave in a manner that benefits the driver economically.

153. Dr. Mundy's report also details his analysis of taxicab operations in the Denver market prior to the grant of authority of Union Taxi and the extension of authority for Freedom.

His broad empirical study looked at the three incumbent carriers in operation at that time, Colorado Cab (Denver Yellow Cab), Metro Taxi, and Freedom. The study was commissioned by the Denver Metro Convention & Visitors Bureau and provided an analysis of the Denver metropolitan area taxi services, the incumbent taxi providers at that time, and specific taxi services at DIA. Dr. Mundy provides two groups of recommendations. The first group consists of recommendations in light of the then pending Democratic National Convention. The second group of recommendations consists of long range recommendations directed at eliminating the debates regarding entry into the Denver taxi market and how best to support full service taxi companies for the long run.

154. At the behest of Dr. Mundy as part of his study, Colorado Cab conducted an internal study regarding its driver retention levels and estimates of lease driver incomes.¹⁵ The driver income data was compiled and aggregated by Colorado Cab and provided to Dr. Mundy. Dr. Mundy found that the determinant that most influenced driver income was the type of cab service provided. For example, bell runners averaged gross revenues of \$69,000 annually with an income range of \$45,000 to \$105,000. The airport/cabstand/walk-up drivers earned a gross revenue average of \$46,000 annually.¹⁶

155. Regarding Colorado Cab's driver retention and turnover rates, Dr. Mundy's report finds that 16 percent of Colorado Cab's driver pool is comprised of drivers with 10 plus years experience which earn 24 percent of its revenue; 17 percent of the driver pool is comprised of

¹⁵ In looking at lease driver incomes, the internal study was based on 100 drivers selected by a cross section of driver leases and driver numbers. It was assumed that the average driver drives 45,000 miles per year based on Colorado Cab maintenance records. Revenue per driver was based on actual vouchers, credit cards, and other payments processed by the Colorado Cab cashier system. Additionally, cash fares and tips varied by driver type and were imputed into the gross revenue number based on industry knowledge and driver interviews. *See*, Hearing Exhibit No. 53, p.56.

¹⁶ *See*, Hearing Exhibit No. 53, p. 53.

drivers with 5 to 10 years' experience, which earn 30 percent of its revenue; while 67 percent of the driver pool has 0 to 5 years experience, which earn 46 percent of the revenue. Colorado Cab retains approximately 71 percent of its drivers, which according to Dr. Mundy, is a very low rate of turnover for the taxi industry.

156. Dr. Mundy finds Metro Taxi to be very similar to Colorado Cab in several respects. He notes that it has invested heavily in a technologically advanced electronic dispatching system that includes GPS capabilities. Metro Taxi also possesses large, modern facilities with maintenance, extensive marketing, driver training and lounge areas, and corporate offices. Metro Taxi also committed to hybrid vehicles by utilizing Toyota Prius vehicles as a way to reduce gas consumption and contribute less to air pollution.

157. Freedom pales in comparison to Colorado Cab and Metro Taxi according to Dr. Mundy. All of Freedom's taxis are owner operated, while Colorado Cab and Metro Taxi own the majority of their taxis. According to Dr. Mundy, Freedom's drivers are reluctant to accept bells or take calls as they are offered, ostensibly because its drivers are independent contractors using their own vehicles who determine when and where they choose to work.

158. While Freedom provides low lease rates to its drivers, taking into consideration the cost of insurance, little can be left for overhead and profit, leading Dr. Mundy to conclude that Freedom is seriously undercapitalized.

159. Based on his overall analysis of the Denver taxicab market through user surveys, "secret shoppers" and his analysis of the three incumbents at that time, Dr. Mundy concludes that while several areas of concern exist, overall the Denver metropolitan area is provided with adequate taxi service and the level of service is considered acceptable.

160. Through his testimony and as indicated in the Denver Taxi Study, Dr. Mundy advocates for regulation of the taxi market in Denver. He notes that the necessity to regulate taxi service in Colorado is mandated by the Colorado Legislature which requires the Commission to economically regulate taxicab companies in Colorado and ensure the safe use of public taxis and promote the provision of public taxi services within the community.

161. Dr. Mundy states that it is in the public interest to regulate taxicabs which confirms the social commitment the community has to both its citizens and its visitors to provide available, safe, and economical taxicab service. Regulation further assists entry into the taxi industry by protecting the user from onerous services and arbitrary fares, while at the same time allowing providers to earn a reasonable profit.

162. Dr. Mundy expresses concern that oversupplying the Denver market with taxicabs will result in fractionalization and ultimately in a deterioration of service. With increased fragmentation in the taxi industry, less capitalized companies with limited taxicabs will not be able to provide adequate service in a large area such as the Denver metropolitan area. Dr. Mundy asserts that the demand for cab service is a derived demand, so the increase in the number of taxicabs will not affect the demand for service in the Denver area. Given Union Taxi's grant of authority and the extension of authority for Freedom to add additional cabs, the addition of an additional 150 cabs in this proceeding would create an oversupply leading to a litany of issues in the Denver market.

B. Dr. Dempsey

163. Dr. Paul Stephen Dempsey also testified as an expert witness for Metro Taxi. Dr. Dempsey is a Tomlinson Professor of Law at the Science Institute of Air & Space Law at McGill University. He has four college degrees: a Bachelor of Arts and a Juris Doctorate degree

from the University of Georgia; a Master of Laws degree from George Washington University; and a Doctor of Civil Laws degree from McGill University.

164. Dr. Dempsey worked with the Interstate Commerce Commission and the Civil Aeronautics Board. He became a Transportation Lawyers Associate Professor of Law and Director of the Transportation Law Program at the University of Denver College of Law. He was faculty editor of the Transportation Law Journal and Director of the National Center for Intermodal Transportation (a national transportation center established by the United States Congress).

165. In 1994, Dr. Dempsey participated in the revival of Frontier Airlines. The airline grew to serve approximately 50 cities in the United States, Canada, and Mexico, with approximately 50 aircraft. He is currently Vice Chairman of the holding company for the airline. He is also chairman of Linx Aviation, which flies Bombardier Q400s out of Denver, feeding the Frontier fleet and network.

166. Since 2003, Professor Dempsey has been Director of the Institute of Air & Space Law at McGill University. He holds the endowed chair there in law and global governance. Professor Dempsey has extensively published in the field of transportation law and economic policy. His expert report in this matter, entitled Economic Regulation of the Taxicab Industry, was entered into evidence as Hearing Exhibit No. 65.

167. Dr. Dempsey identified three subcomponents of the taxicab industry that attempt to address market demand. These subcomponents include: (1) radio dispatch to respond to calls; (2) the cabstand business; and, (3) the cruising car side of the business where passengers hail the taxi from the sidewalk. The dispatch side of the business has evolved into digital dispatching where more sophisticated companies install monitors in taxicabs that provide information to

drivers to assist in determining availability to pick up fares. This type of system is costly and therefore difficult for small start up companies to implement.

168. New entrants often rely on cabstands and cruising for business and hope that the patron is going to request a long trip. The less than full-service type of business can create congestion on the streets and lead to an increase in air pollution, according to Dr. Dempsey.

169. Dr. Dempsey takes the position that the taxi industry has unique economic characteristics that do not function well in a totally unregulated market, or a market in which there is an excessive amount of entry. Dr. Dempsey notes that the taxi market is not perfectly competitive and it would be extraordinarily difficult to create a perfectly competitive market in this industry. For example, potential customers cannot price shop at cabstands. Generally, people utilize taxi service to get somewhere quickly. Customers are less concerned with price than getting to their destination in a timely manner. As a result, Dr. Dempsey concludes that a competitive market in the traditional sense is not possible in the taxi industry.

170. Based on that characterization of the taxi industry, Dr. Dempsey agrees with Dr. Mundy that derived demand exists in the taxi industry. People utilize taxi services to get to a specific destination. The ability to negotiate a price or a service level is extremely difficult. It is for this reason that the community relies on regulators to sort out these issues. Regulation of the taxi industry keeps transaction costs low by regulating the price for taxi service and the level of service, and by regulating the optimal number of taxis operating in a given market to satisfy demand without flooding the market with too many taxis. Such an oversupply most likely would exacerbate problems of congestion, pollution, carbon monoxide levels, ozone, and many of the other problems experienced by urban areas.

171. Referring to his report, Economic Regulation of the Taxicab Industry (Hearing Exhibit No. 65), Dr. Dempsey reiterated his opinion that putting more taxis on the street does not necessarily result in more demand. Because taxi demand is derived by something other than the number of taxis in operation, oversupply of taxicabs reduces efficiency and productivity. Dr. Dempsey notes that the ability to stimulate higher demand for taxicab services merely because more taxis are on the street is minimal. Rather, when taxi markets are oversupplied, the number of customers remains relatively static, causing them to be spread among more taxis, which results in more taxis traveling empty more often, which in turn reduces productivity. Cabstands then become more congested and more taxis are cruising the streets looking for fares. As a result, driver income falls since there are more taxis competing for the relatively same number of passengers, which causes drivers to work longer hours and stay on the road longer, which further exacerbates congestion and pollution.

172. Dr. Dempsey also contends that with fewer taxis relative to demand, a higher quality of taxis at a lower price can exist. He uses the Washington, D.C./Baltimore area as an example. According to Dr. Dempsey, Washington, D.C. has an oversupply of taxis on the streets due to a regime that generously authorized more and more taxis. This has created two problems: first, drivers routinely cheat on the price, according to Dr. Dempsey; second, the quality of taxis is extremely poor with broken shock absorbers, rust on vehicle exteriors, and torn upholstery. Dr. Dempsey attributes this to an excess number of taxis relative to the number of customers.

173. On the other hand, Baltimore provides taxi service at its airport through one taxi company. As a result, Dr. Dempsey claims that the taxis there are new and clean and the fare from the airport in Baltimore into downtown Washington, D.C. was only \$55, while Washington, D.C. based taxis charge \$85 from downtown to the Baltimore airport.

174. Dr. Dempsey takes the position that Colorado is already on the path to a Washington, D.C. type taxi environment with the approval of Union Taxi's authority and the increase in taxis for Freedom. Dr. Dempsey foresees a situation where taxi service will become very poor quality and drivers will be unhappy because they will not make much money and as a result, the tourist business in Denver and Colorado will suffer.

175. Dr. Dempsey characterizes the Denver taxi market as oversupplied prior to the Union Taxi and Freedom grants of additional cabs. Those additional 362 approved additional cabs, coupled with incumbent carriers, resulted in a total of 1,304 cabs, of which 1,262 may be operated at any one time in the Denver market. As a result, Dr. Dempsey advises the Commission to be cautious and analyze how the market absorbs that additional capacity before authorizing any more taxis.

176. Regarding the consequences of oversupplying the taxi market in the Denver area, Dr. Dempsey again urged the Commission to take time to evaluate how the market has absorbed the additional supply of taxis previously granted before adding additional cabs. Dr. Dempsey points out that long queues at cabstands, large numbers of taxis cruising around empty, drivers struggling to earn reasonable income, and an increase in consumer complaints of poor service or price gouging are all indicia of an oversupply of taxis. It is also possible that bankruptcies of less financially viable taxi companies could occur, however, this would most likely be a longer term occurrence.

177. Dr. Dempsey also indicates that he is pessimistic that stimulating demand through marketing or pricing will mitigate any oversupply concerns. While it may result in some increase in demand for taxi service, Dr. Dempsey does not predict that such an increase will be

significant, especially to fill 470 additional cabs that would be added to the Denver market with Union Taxi, Freedom, and Mile High if this application is granted.

178. Dr. Dempsey characterizes the Commission as a gatekeeper to mitigate oversupply concerns by carefully following the doctrine of regulated competition. He notes that the Commission can open the door a crack or open it wide, or close it shut completely. Relevant to the Commission's gate keeping charge is the concern of destructive competition, which can occur when individual rational behavior becomes collectively irrational.¹⁷ Consequently, Dr. Dempsey advises to open the door slowly and measure what occurs as more entrants are allowed into the market. However, opening the door completely could result in dire consequences according to Dr. Dempsey.

C. Professor Hardaway

179. Professor Robert M. Hardaway testified as an expert for Mile High. Professor Hardaway is currently a professor of law at the University of Denver Sturm College of Law. He has held that position since 1979. He also served as a visiting professor at the University of California-Hastings Law School in San Francisco, California and as a visiting professor at George Washington University Law School in Washington, D.C.

180. Professor Hardaway holds a B.A. degree with a major in economics, cum laude from Amherst College in Massachusetts and a juris doctor from New York University Law School in New York City, Order of the Coif. Professor Hardaway generally teaches civil

¹⁷ This is a reference to a dilemma described in an influential article by that name written by Garrett Hardin and first published in the journal *Science* in 1968. The article describes a situation in which multiple individuals, acting independently, and solely and rationally consulting their own self-interest, will ultimately deplete a shared limited resource even when it is clear that it is not in anyone's long-term interest for this to happen.

procedure and evidence, as well as constitutional law and contract law. He has also taught and supervised courses in transportation law.

181. Professor Hardaway has published approximately 17 books and co-authored a treatise on aviation law with Dr. Dempsey. He also wrote a book on airport regulation and a number of law review articles in the *Transportation Lawyer*, including articles on taxicabs.

182. Professor Hardaway has published several articles regarding transportation in the *Transportation Law Journal* as well. He co-authored several law review articles with Professor Dempsey. He published a paper in the *Hamline Journal of Public Law and Policy*.¹⁸ Professor Hardaway also practiced law in the U.S. Navy JAG Corps, and for several years served as an Arapahoe County Assistant Deputy District Attorney. He practiced as a public defender and was an associate for the law firm of Rovera, Demuth and Iberger. Professor Hardaway is currently the faculty advisor for the University of Denver *Transportation Law Journal*.

183. In addition, Professor Hardaway has also authored law review articles on climate control and laws relating thereto, which was published in the *University of Denver Law Review*, as well as an article on the housing bubble crisis, among other topics.

184. Professor Hardaway supports Mile High's application primarily on the belief that the market forces mechanism is superior to regulation. He advocates for the proposition that regulation should be minimized and limited to health and safety regulation and little else. He notes that many analysts attempt to meld health and safety regulation and economic regulation. However, those two forms of regulation should be distinguished and analyzed separately. Professor Hardaway favors the regulatory environment in London where health and safety

¹⁸ See, Hearing Exhibit No. 14. *Taxi and Limousines: The Last Bastion of Economic Regulation*, *Journal of Public Law & Policy*.

regulations for taxis are highly stringent. However, he disfavors economic regulation that attempts to keep out competition. Professor Hardaway advocates the position that greater reliance on the forces of competition rather than on regulation result in greater efficiencies.

185. With regard to the term “deregulation,” Professor Hardaway cautions on how it is interpreted and analyzed. When discussing deregulation, the distinction should be made as to whether it relates to health and safety regulation or deregulation; or whether it applies to purely economic effect which Professor Hardaway characterizes as designed purely to exclude competition or to fix prices.

186. Professor Hardaway also advocates that price competition can occur in the taxicab market generally and in the Denver market specifically. While Professor Hardaway has collaborated with Dr. Dempsey on several publications, he nonetheless disagrees with Dr. Dempsey regarding the viability of price competition in taxicab markets. While he concedes that markets in general, and the Denver taxicab market specifically, are not perfectly competitive, there is some price competition in the Denver market since taxi companies can charge different rates for service even though those rates must be approved by the Commission. However, Professor Hardaway did note that this limited price competition is virtually unknown by the general public.

187. Regarding whether competition is possible in the taxicab industry and can be vigorous and viable and serve as a substitute for more stringent regulation, he identified several distinct market segments in declining order of competition potential: hails, contracts, cabstands, dispatch, and, cell phone-based personal customers. Professor Hardaway believes that some form of price competition is possible with each market segment.

188. Professor Hardaway also disagrees with Dr. Mundy and Dr. Dempsey that the concept of derived demand exists in the taxi industry. He disagrees that demand is inelastic or at least somewhat inelastic and no matter how much of a supply of cabs exist, demand will not increase. Rather, Professor Hardaway takes the position that as quality and service increase, so does the level of demand. It is basic economic theory that as quality goes up and prices go down, demand increases. Consequently, Professor Hardaway does not see a point where the taxi market would be oversaturated with cabs.

189. After reviewing Dr. Mundy's report on the Denver taxi market, Professor Hardaway concludes that there is a high level of dissatisfaction with current taxi service in the Denver metropolitan area. As a result, increased competition will put pressure on incumbents to provide better service and lower prices. He again emphasizes his stand that regulation of the taxi industry should entail only health and safety matters to ensure that cabs are clean, safe, and well maintained.

190. Professor Hardaway believes that taxi companies can engage in non-price competition at some level and such competition could be a complement to, and a partial substitute for, price competition. While he advocates for quality of service regulation, he nonetheless believes that it can also be a component of non-price competition. However, he also testifies that under a regulatory program, cab companies would have no incentive to provide good service, clean cabs, or provide the extra incentives necessary to attract and retain customers because there is no pressure to do so.

191. Professor Hardaway expressed concerns regarding the formation of a cartel with a limited number of taxi companies in a market. He used the level of five to six taxicab companies as enough to avoid a cartel because it is then impractical for those five or six firms to collude to

set prices on their own. While he used the example of five to six taxicab companies, Professor Hardaway explained that it is not so much a set number, as it is the point where it is impractical for the existing carriers to collude. Past that point, a more competitive environment exists and competition will weed out the poorest producers and the best, the most efficient firms will remain. He uses deregulation in the airline industry as an example of this phenomenon. However, according to Professor Hardaway, oversupply can occur in a regulated market where there is no way for a firm to fail.

V. DISCUSSION AND CONCLUSIONS

192. It is axiomatic that “public need” is the paramount concern under the regulated competition doctrine. HB 08-1227 certainly shifted the burden of proof regarding public need from the applicant to those opposing the application. Nonetheless the “public need” standard remains one of the overarching issues in determining whether to grant a common carrier authority application for taxi service in the Denver metropolitan area, coupled with a determination as to whether the application is in the public interest.

193. In determining public need under the doctrine of regulated competition, the ALJ reiterates that factors such as the availability and adequacy of existing service may be considered, along with the competitive character of the existing service. See *Miller Bros.*, 185 Colo. At 434, 525 P.2d at 453. Further, in *Morey II*, the Colorado Supreme Court stated in relevant part that:

As a corollary of our holding that the “public need” is broader than the individual needs and preferences of an applicant’s customers, we agree that the Commission may consider the impact additional competition may have, not only on the conflicting economic interests of competing carriers, but also on the ability of existing carriers to provide their customers and the public generally with safe, efficient and economical transportation service. The obligation to safeguard the general public against the impaired services and/or higher rates accompanying

destructive or excessive competition is at the heart of the policy of regulated competition.

Morey II, 629 P.2d at 1066 (citations omitted). As noted supra, the court further noted that:

The legislative policy...is to regard motor carrier competition as desirable and to subject that competition to regulation only to the extent that it is necessary to do so in serving the public interest. Stated in another way, the policy is to protect existing carriers from the competition arising out of the granting of new permits only if there is a necessity for such protection. There is no necessity for such protective regulation unless the granting of a new permit will presently or prospectively impair the ability of carriers with existing permits to adequately serve the public. Established carriers are entitled to protection only insofar as they need to be shielded from the danger of an oversupply of transportation services.

Id. At 1066-67 (omissions in original).

194. In ascertaining whether intervenors have rebutted the presumption of public need under the regulated competition doctrine, the ALJ must look not only to classic public need criteria, but also, inter alia, to criteria such as the public's need for low prices and quality service, the expected by-products of a healthy competitive market. In determining whether intervenors have successfully met their burden of proof to rebut the presumption of public need and whether the public convenience and necessity does not require granting the application, and that the issuance of the certificate would be detrimental to the public interest, the testimony and evidence of the expert witnesses must be compared and contrasted with the testimony of witnesses such as taxi drivers themselves. This juxtaposition serves to inject a measure of street level experience into the theoretical foundations in order to substantiate or refute those theories. It is therefore the ALJ's task to balance the testimony of the three expert witnesses presented in this proceeding, along with the testimony of the lay witnesses.

195. There is no bright line that separates the doctrinal standards at issue here. “Public need,” “public interest,” and “public convenience and necessity” are standards that overlap one another and the issues that affect one, in some way touch on the resolution of the others. Indeed, § 40-10-105(2)(b)(II)(B), C.R.S., blends those three standards together in establishing an intervenor’s burden of proof. Consequently, the ALJ’s analysis, while touching on all three standards, nonetheless incorporates the three doctrines as a single analysis.

196. It is clearly established that the Commission is charged with regulating the taxicab market in Colorado. In the Denver metropolitan area, the market is to be regulated pursuant to the doctrine of regulated competition. As such, the Commission has determined that it will strive to achieve the necessary balance between market forces and regulatory instrumentalities.¹⁹ The Commission recognized that both market forces and regulatory measures have limitations. As a result, there is no specific algorithm available which can be executed and repeatedly return a result that is in the public interest. Each application for taxicab authority must be considered pursuant to its own merits and consistent with the situation and environment at that time.

197. Dr. Mundy and Dr. Dempsey testified that prior to the Union Taxi Consolidated Dockets applications, the Denver taxicab market was already oversupplied with 942 cabs spread between Colorado Cab, Metro Taxi, and Freedom. That capacity was increased by approximately 34 percent with the approval of 262 taxis with a maximum of 220 taxis in service at any one time for Union Taxi and the addition of 100 taxis for Freedom.²⁰ At the time the Commission approved those applications (in part) it was concerned with what it perceived as a highly concentrated market. Notably however, the Commission granted only a portion of the

¹⁹ See, Decision No. C09-0207, p. 139, ¶508.

²⁰ If Mile High’s application is granted in full, then relative to the market prior to the Union Taxi and Freedom applications, the number of cabs authorized would increase from 942 to 1412, an increase of 49.9 percent.

vehicles sought by Union Taxi and Freedom because it was concerned with how the market would absorb the number of vehicles it did authorize for those two companies. The Commission indicated that it intended to monitor the market with specific attention to prices, service quality, and other variables to ensure that the market does not re-concentrate.²¹

198. Overcapacity in the Denver market is a critical concern to the public interest determination and indeed to whether intervenors successfully rebutted the presumption of public need. Dr. Mundy espouses the concept of a “full service taxicab company” as necessary to positively affect a particular market. Dr. Mundy posits that a less than full service company such as Mile High cannot effectively compete in the Denver market. Its lack of a state-of-the-art electronic dispatch system and mostly fleet ownership will result in a dumping of undifferentiated cabs onto the streets of Denver cruising downtown streets and clogging cab stands in search of revenue until and if steady business can be established by Mile High. The ALJ, while finding Dr. Mundy’s arguments compelling, declines to go that far. Certainly, a new entrant need not enter the market as a Category 1 or 2 company in order to be successful. A taxicab company can enter with less than state-of-the-art facilities or in a limited geographic area and be successful, at least in the short run. However, the caveat to that determination is that in order to be successful, that company must enter with a differentiated product or identify a niche market, especially as is the case here, where the market appears to be at or near capacity. While choice is generally a good thing in a market, nevertheless, overcapacity still looms as an issue.

199. Dr. Dempsey also favors regulation over the free market concept, at least in the context of certain taxicab markets. He implies that while certain markets exist in which little or no regulation is appropriate, Denver is not one of those markets. Dr. Dempsey points to the

²¹ *Id.* at pp. 141-142, ¶¶510-515.

negative effects of an oversupplied market by citing Washington, D.C. as an example of the ill effects of too many cabs on the street. As mentioned above, he notes the poor condition of those cabs and the price gouging he suggests occurs. In contrast, he notes the stark contrast of cabs operating from the Baltimore/Washington D.C. airport where supply is strictly limited. There, cabs are newer, clean and well-serviced, and fares involving similar distances are significantly less than those charged by the Washington, D.C. cabs.

200. Professor Hardaway on the other hand, advocates for a free market system in which oversupply is not an issue. He espouses the notion that in such a scenario, the good drives out the bad and those companies that provide superior service and competitive prices will survive, while those less able or willing to do so will exit the market, thus taking care of any oversupply.

201. While it is clear that differences exist between a fully deregulated market and a regulated one with excess capacity, the effect on the public interest is nevertheless similar. Those include deterioration of quality of service, insufficient revenue to maintain some or all taxicab companies, and the resulting exit of companies from the market or mergers and acquisitions of less viable companies by stronger companies. To this the expert witnesses do not disagree.

202. While the ALJ agrees with Professor Hardaway that the addition of competition to a market can result in so-called good market forces, at least in the short run, overcapacity cannot be characterized as a benefit in either an open market or a regulated market. Simply adding capacity is not sufficient to engage the beneficial market forces and indeed can result in otherwise competitive forces having negative market outcomes. For example, imprudent additions of capacity can set recent and new entrants up for failure and drag otherwise healthy companies down with them.

203. Certainly, adding capacity in any market can cause a reallocation of revenue but in the current market situation where the Commission is seeking to induce more healthy competitors and move the Denver taxicab market to a higher competitive plane, the Commission must add capacity and firms in a manner which maximizes the chances that new taxicab entrants will be able to sustain themselves. Entry at any cost, in and of itself is simply not sufficient to encourage the type of competition the Commission seeks to obtain. New entrants must have staying power. Spreading existing customers and revenues over more carriers at this point of the transition to a more competitive market increases the chances of new entrant failure, thereby negating progress to a more competitive market structure, which was the concept of HB 08-1227 to begin with.

204. Up to a point, adding firms and capacity can assist the Commission in its goal. However, the Commission must exercise caution by adding capacity that the market can absorb. Adding capacity beyond that absorption point will not assist the Commission in its state goal of adding competitive pressure to the market. Indeed, new capacity can have the opposite effect. Indeed, the court in *Morey II* instructs the Commission that “the obligation to safeguard the general public against the impaired services and/or higher rates accompanying destructive or excessive competition is at the heart of the policy of regulated competition.” *Id.* In affecting such a transition, the Commission should strive to approach market capacity from below since it is nearly impossible for the Commission to trim excess capacity through regulatory means. The market mechanism can trim capacity but both the adjustment process and the outcome may have significant negative attributes such as service quality erosion and higher concentration through forced consolidation of capacity. The Commission has the obligation to manage this market and affect a transition to increased market forces and less regulation where possible. A 50 percent

capacity increase in the taxicab market over an 18-month span is not consistent with the Commission's responsibilities and goals.

205. Mile High failed to rebut Dr. Mundy's and Dr. Dempsey's analysis regarding derived demand and the absence of demand stimulation through simple capacity additions. They argued that merely increasing the supply of taxicabs in a market will not result in a significant increase in demand. As a result, overcapacity in the Denver market results in too many cabs chasing too few customers with revenues divided too thinly among market participants. The consequences are less drivers working more hours for less revenue; a deterioration in customer service and vehicle maintenance and the resulting market exit of firms with the lowest financial reserves typically, and in this case, the smallest firms and most recent entrants.

206. Excess capacity clearly favors the deepest pocket firms. Because those firms tend to be price leaders, other firms compete by charging less than those leaders, a strategy proposed to be employed by Mile High. That situation can be beneficial in the short run, if the leader does not object. However, if price leaders respond with lower wholesale and retail prices, that response may jeopardize the smaller companies by reducing their revenue and possible market share. Over time, the excess capacity in the market would disappear as smaller companies reduce their deployment or even exit the market. Market leaders can sustain themselves during this period and may even remain profitable while smaller taxi companies cannot, even though they are financially and operationally fit under the statutory definition. While scale matters in the taxi industry, so does the distribution and number of authorities to provide taxi service. It is the ALJ's concern that oversupply or adding capacity to a market beyond the market's ability to absorb significant additional capacity can trigger such a cycle of consolidation that cycles the market back to a highly concentrated market with even fewer taxi companies than prior to the

recent increase in supply. Entry itself is of little or no social or economic benefit if nascent competitors cannot sustain their market presence.

207. The issue of oversupply and adding additional entrants is further exacerbated when there is no differentiation between at least some of the incumbents and the entrant. Here, Mile High proposes a company virtually identical to Union Taxi and Freedom. In fact, it appears that observing Union Taxi's success in its application and the addition of 100 cabs for Freedom, Mile High's business strategy was to model itself in the image of those two companies. The ALJ finds this strategy less than beneficial for Mile High and for the public interest.

208. Based on the testimony of Dr. Dempsey and especially Dr. Mundy, the ALJ finds that a lack of differentiation of a new entrant from existing carriers could very well result in a lower chance for survival than for a well-differentiated entrant, even assuming identical financial resources. This is so because a well-differentiated entrant into the taxi market, especially the Denver market, has a better chance of establishing itself with customers and building a solid customer base, which in turn offers the benefit of cutting into the share of the market leaders, at least for a while. If those market leaders fail to adjust, then they will most likely continue to lose market share in proportion to the new capacity of the new, differentiated entrant. This type of competition benefits the public interest by providing for a wider range of choice rather than the homogeneous product offered by Mile High.

209. The concern is that Mile High offers nothing innovative, new, or even different to spur demand for its taxi service, other than a promise of better customer service and marginally lower fares. While this may be enough to minimally sustain it for a limited period of time, it does not seem plausible that this strategy can contribute to a robust competitive taxi market. Considering the longer view, with the Commission must be concerned, the negatives of Mile

High's entry strategy and the resulting oversupply, at least in the short run, simply outweigh any potential minimal short run benefits that could be derived by granting its application.

210. The undifferentiated new capacity proposed by Mile High does not advance – and indeed may harm - the public interest here. In an underserved market where the lack of capacity is evident, the addition of a homogeneous product may contribute to the competitiveness of the market and make it healthier and more robust. However, here, where it is apparent that the market is reasonably close to being oversupplied, any additional undifferentiated capacity, especially the addition of 150 cabs in a year's time, offers a high likelihood of undesired market outcomes including but not limited to exit by newer entrants. While it is true that the Commission has no obligation to protect any single carrier in this market and is not doing so with its regulation of this market, the Commission is nonetheless obliged to not create, through its regulatory choice, a market structure that functions in a manner contrary to the public interest. In the short run it is difficult to differentiate between healthy and perverse competition, therefore gradual and cautious steps are needed to allow for the maintenance of healthy competition over the longer run.²² While Mile High offered some opinion as to why market forces are superior to some form of regulation as provided by § 40-10-105, C.R.S., it ultimately failed to rebut the testimony and evidence provided by the intervenors that destructive competition and ultimately, harm to the Denver taxicab market is a plausible outcome of granting Mile High's authority to provide undifferentiated capacity of an additional 150 cabs.

²² Indeed, Both Dr. Dempsey and Professor Hardaway agree that assessment of market condition is an after-the-fact analysis and cannot be reasonably predicted prior to market changes.

211. As to whether competition can exist in the Denver market regarding price, Dr. Mundy takes the position that some price competition can exist that may or may not benefit the public interest. According to Dr. Mundy, price competition will not be in the public interest, if although a taxi company offers lower fares, that company does not service the entire community. While Dr. Mundy concedes that price competition coupled with a taxi company that is committed to serving the entire community (including providing service to e.g., handicapped customers and elderly customers taking short trips to the grocery store) may be in the public interest, he notes that the issue nonetheless looms that price competition can nonetheless starve a new entrant of necessary capital required for survival. Especially a new entrant with limited capital.

212. Professor Hardaway, on the other hand believes that price competition can and does exist in the Denver taxicab market. He advocates for a law to increase consumer awareness of prices, terms, and conditions across all carriers. For example, he holds that hotels be required to distribute price cards to potential taxi customers. Professor Hardaway also believes that as dispatch systems improve and cell phones are more widely used by drivers, price competition will be facilitated. While informed consumers are necessary to sustain a price competitive market, Professor Hardaway offered no suggestions as to how this would occur under the current statutory regime, at what cost and at what net benefit.

213. It is noted that some limited price competition can and does occur in the Denver market, albeit on a very limited scale. Companies and firms negotiating contracts for voucher service certainly raise price as an issue. Additionally, some customers may inquire about price or hail taxis based on signage that indicates lower fares. However, it is found that overall, price competition and awareness of price competition is extremely limited without a concerted and

expensive advertising campaign to inform consumers of price choices for taxi service. Until that occurs, it is found that adding additional capacity to the Denver taxi market at this point will do little or nothing to increase awareness of price differential among carriers, or to spur vigorous price competition among carriers. This is additionally evident by Mile High's limited marketing budget and minimal proposals to inform consumers as to its rates.

214. Driver lease rates and income were also broached as part of the "public interest" analysis. Several drivers who moved from incumbents to Union Taxi testified as to the benefits of driving for a company with lower lease rates. Those drivers generally testified that they were under less stress and had more time for family and friends due to the lower weekly lease rates they pay to Union Taxi. The gist of the testimony was that quality of life is improved when the stress of having to pay a higher lease rate is alleviated. However, there was no testimony that drivers earned more at Union Taxi or provided a higher level of customer service due to their improved quality of life. Nor was testimony or evidence offered which showed that driver income could remain stable with additional capacity.

215. Driver lease rates vis-à-vis income is an issue that also arises from whether the Denver taxicab market has excess capacity. Dr. Mundy argues that lease rates are a direct function of the degree of service provided by the company. Higher lease rates are generally due to the fact that the company provides a technologically advanced dispatch system and a high degree of marketing to develop specialized services with local schools and companies in order to generate a high number of trips per vehicle.

216. It is uncontroverted that Colorado Cab and Metro Taxi charge the highest lease rates, while Freedom and Union Taxi charge significantly lower lease rates. However, lease rates are inextricably tied to driver net income. It is apparent that the lease rate and what it provides

are inconsequential if a driver's net income is less than adequate to sustain a reasonable wage or income. While some testimony was received from drivers implying driver mistreatment as a result of overcharging on leases and leasing too many units relative to demand, which together limit driver income, this was mostly anecdotal evidence with little substantiation.

217. Testimony was also received that high driver turnover from Colorado Cab and Metro Taxi occurred upon the approval of Union Taxi's and Freedom's applications. While this may implicate that the lease rate of those incumbents was too high, the turnover rate by itself is insufficient as a basis for a reliable conclusion regarding driver income or lease rates. Additionally, there was no specific testimony received that although Union Taxi drivers paid lower lease rates, their net income increased relative to those lower lease rates. As a result, it is found that additional analysis is necessary to determine whether the addition of capacity into the Denver taxi market will adequately affect lease rates and driver net income. However, in this matter, that evidence simply does not exist and as a result, the ALJ finds it inappropriate to make a public interest finding as to the benefits accruing to drivers regarding lower lease rates and high net income by granting Mile High's application on the limited testimony presented here.

218. Mile High did not offer a comprehensive strategy to navigate the economic issues that it will surely face, especially in its infancy. While Mr. Nwankwo and Mr. Archibong offered some guidelines they intend drivers to follow regarding good customer service, as independent contractors, enforcement of such customer service standards is unachievable. Additionally, Mile High's financial strategy for long term survival is also woefully inadequate. If it does in fact find itself struggling financially due to its proposal to offer lower fares, merely hitting its drivers up for more capital as needed may in the short term prove rewarding, but will eventually reap fewer and fewer dollars. Further, Mile High has put forth no viable marketing strategy or plan as to

how it intends to increase price competition in the market. The key to vigorous price competition is to adequately inform the public of price differences among carriers. Mile High has no real marketing plan that focuses on achieving that level of awareness among the public. While it is not a certainty that Mile High will starve itself of necessary capital to sustain adequate price competition, nonetheless, the probability of this eventuality is relatively high given its limited long term marketing and financial strategies.

219. While the Commission held that it was embarking on a policy of balancing market forces and regulatory instrumentalities to determine whether to introduce additional capacity into the Denver taxicab market, it also tempered that policy with the realization that it had increased the market supply significantly. The Commission indicated that it intended to implement regulations pertaining to service quality and other issues, as well as closely monitor the status of competition in the wholesale and retail markets with particular attention to prices, service quality, and other variables.

220. The Commission also intended to consider appropriate measures to prevent re-concentration of the market.²³ Most notably, the Commission recognized its obligation under the doctrine of regulated competition to structure the competitive landscape in a manner which both minimizes the likelihood of socially-damaging carrier behavior, while maximizing the possibility for healthy competition and beneficial rivalrous activity between carriers. It is also notable in that Decision, the Commission, in granting Union Taxi's and Freedom's applications, nonetheless reduced the amount of vehicles sought by each provider in order to "achieve an appropriate balance in the market, including not just overall capacity but also the distribution of

²³ See, Decision No. C09-0207 at p. 140, ¶510.

those authorizations.”²⁴ Clearly, the Commission was concerned about over-saturating the market with taxis until it could be determined whether the Denver market had in fact effectively absorbed the 34 percent increase in supply.

A. Conclusions and Findings

221. The testimony of Dr. Mundy and Dr. Dempsey was compelling and persuasive. While Professor Hardaway advocates for a free market system, that is not the scheme under which the Commission authorizes taxicab applications in the Denver taxicab market. The Commission is bound by the doctrine of regulated competition and the required findings which that entails. Open or nearly open entry is not consistent with the Commission’s statutory charge and its regulatory responsibilities. The ALJ acknowledges that it is not necessary for an applicant to be a Category 1 or Category 2 provider as Dr. Mundy characterizes the various levels of taxicab companies, to be fit or to have a reasonable chance to succeed in the Denver taxicab market. An entrant need not have state-of-the-art facilities nor is it necessary for an applicant to blanket an entire service territory. It is reasonably possible that a new provider can enter the market and sustain itself without the latest technologies. Certainly, new technology can assist a new entrant in entering and being viable in the Denver taxicab market; however, technology is neither necessary nor sufficient either for entry or continued market presence. New or different technologies can serve the public interest through service innovation, efficiency, and provider differentiation. However, as indicated previously, when a market is at or near capacity, a homogeneous, undifferentiated entrant such as Mile High, does not serve the public interest.

²⁴ *Id.* at p. 146, ¶525.

222. The intervenors here successfully rebutted the presumption of public need. As indicated earlier, while the applicant is no longer required to carry the burden of proof regarding public need, it is nonetheless a critical component of the ALJ's overall findings here. Intertwined with "public need" is the impact additional competition may have on incumbents not only economically, but regarding their ability to provide their customers and the public generally with safe, efficient, and economical transportation services.

223. The ALJ finds the testimony and evidence here sufficient to find that the grant of Mile High's application would significantly harm incumbent taxicab providers economically and impede the ability of those carriers to provide safe, economical, and efficient service. Little or no rebuttal was offered regarding Dr. Mundy's and Dr. Dempsey's positions that the Denver taxicab market was oversupplied. Both testified as to the negative ramifications of an oversupplied market, especially if an additional 150 cabs were to be introduced.

224. The uncontroverted testimony of Metro Taxi taxi drivers regarding overcrowded cab stands and conflicts arising as a result, the increased number of cabs cruising downtown streets waiting for cab stand spots to open or looking for hails, coupled with the evidence presented regarding the limits placed on the number of cabs that can operate at DIA were all compelling and persuasive in finding that granting Mile High's application would do nothing more than exacerbate existing problems of over supply and is therefore contrary to the public interest.

225. The expert testimony of Dr. Mundy and Dr. Dempsey was also persuasive regarding the real possibility of destructive or excessive competition that could very well could have negative market and public interest outcomes. Specifically, unhealthy competition could result in higher rates, poor service, poorly maintained vehicles, and the possible exit by some

firms, new entrants, and incumbents. While Professor Hardaway finds this oversupply preferable in the long run, the ALJ notes that while it is not the Commission's duty to protect incumbents, it is the Commission's duty to protect the public interest by ensuring that existing carriers are able to adequately serve the public to avoid creation of a market where oversupply of transportation services is a distinct possibility.

226. It does not appear that it was the intent of the legislature under HB 08-1227 that the Commission merely "rubber stamp" all comers into the taxi market and let market forces dictate the outcome. If this was indeed the legislative intent, it then is not plausible that it would have kept the doctrine of regulated competition as the standard under which the Commission is to determine "public need" and "public interest." Therefore, as indicated supra, the Commission, while balancing market forces with regulatory principles to consider whether to allow new entrants into the market, must nevertheless protect the market from oversupply and the resulting destructive competition.

227. The addition of Mile High's 150 cabs likely will cause an oversupply of the market and result in inefficiencies such as reduced customer service, inadequate vehicles, lower driver net income, as well as a re-concentration of the market if smaller or newer firms exit due to insufficient income and reserve capital to sustain them. This is aggravated by the fact that Mile High not only offers to place 150 more cabs on the streets, but it proposes to place 150 undifferentiated cabs on the street. In effect, this additional capacity is nearly the functional equivalent, in market and public interest terms, of granting another 150 cab authorizations to Union Taxi or Freedom.

228. There is nothing innovative or creative in Mile High's application that would cause incumbents to respond either through higher standards of customer service, lower prices,

or more innovative service. It is highly unlikely that this kind of undifferentiated oversupply of the market can lead to the type of healthy, robust competition envisioned by the Commission or the legislature under HB 08-1227. Rather, the ALJ finds that granting Mile High's application and putting 150 undifferentiated cabs on the street could very well result in impaired services, higher rates, and ultimately the type of destructive competition this Commission is charged with protecting against.

229. As a result, it is found that intervenors have sustained their burden of proof rebutting the presumption of a public need for the proposed service. In addition, intervenors have sustained their burden of proof that the proposed service would be detrimental to the public interest and as a result, the public convenience and necessity does not require the granting of the application.

230. In accordance with § 40-6-109, C.R.S., it is recommended that the Commission enter the following order.

VI. ORDER

A. The Commission Orders That:

1. The application of Mile High Cab, Inc. to operate as a common carrier by motor vehicle for hire to provide call-and-demand taxi service between all points in the Counties of Adams, Arapahoe, Boulder, Broomfield, Denver, Douglas, and Jefferson, State of Colorado, and between those points on the one hand, and all points in the State of Colorado, on the other hand, is denied consistent with the discussion above, without prejudice.

2. The docket is now closed.

3. 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.

4. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a.) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b.) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

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

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

PAUL C. GOMEZ

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director