

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

Mile High Cab, Inc's Exceptions to Decision No. R10-0745

Comes now, Professor Thomas D. Russell, Ph.D., as attorney of record for the applicant
Mile High Cab, Inc., and files these exceptions to Decision No. R10-0745.

I. OVERVIEW

Applicant Mile High Cab, Inc. is a startup taxicab company that seeks a Certificate of Convenience and Necessity to operate 150 taxis between all points in the Counties of Adams, Arapahoe, Denver, Douglas, and Jefferson, State of Colorado, and between these counties and all points in the State of Colorado. In 2009, these five counties had a population of 2.4 million people--just about half of Colorado's population. Mile High Cab seeks to add one taxi for every 16,000 people living in these counties--one additional cab for every 25 square miles.

Administrative Law Judge Paul Gomez concludes that Mile High Cab is operationally and financially fit. But the ALJ rejects Mile High Cab's application because he believes more competition will hurt the public. Allowing one more taxi company to compete will hurt the public interest according to the ALJ. (Decision No. R10-0745.)

The ALJ misapplies the law and lacks sufficient evidence to support his findings.

During the first six days of an eleven-day hearing, Mile High Cab demonstrated that it was financially and operationally fit. During the remaining five days of the hearing, the intervenors failed to prove that granting a certificate of public convenience and necessity to Mile High Cab would harm the public interest, and they failed to prove that the public convenience

and necessity does not require granting the application.

Mile High Cab prays the Commission reject the ALJ's decision and grant its application.

II. APPLICABLE LAW

With regard to Adams, Arapahoe, Denver, Douglas, and Jefferson Counties, C.R.S.

§40-10-105(2)(b) sets forth the legal standards for the issuance of certificates, as follows:

(II) In an application for a certificate of public convenience and necessity to provide taxicab service within and between the counties of Adams, Arapahoe, Boulder, Broomfield, Denver, Douglas, El Paso, and Jefferson:

(A) 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.

(B) If the applicant sustains its initial burden of proof as set forth in sub-subparagraph (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.

No applicant must prove the inadequacy of existing taxicab service in Adams, Arapahoe, Denver, Douglas, or Jefferson counties in order to obtain a Certificate of Public Convenience and Necessity.

The ALJ found that Mile High Cab is operationally and financially fit to provide the service that Mile High Cab proposes. Having been found fit as a firm, Mile High Cab enjoys the legislative presumption of public need for the service.

The statute creates a two-part test for rebuttal of the legislative presumption of public need for the service. The parties opposing the application--the intervenors--bear the burden of proving

1. that the public convenience and necessity does not require granting the application **and**
2. that the issuance of the certificate would be detrimental to the public interest.

The two standards are distinct. This is important for two reasons. First, the Commission has made clear that the failure of a party opposing an application to prove one standard means the applicant succeeds. With regard to the successful applications of the Union Taxi Cooperative and Freedom Cab, for example, the Commission held that:

We find, therefore, that the opponents in this docket have failed to prove that issuance of certificates to Union Taxi and Freedom Cabs would be detrimental to the public interest. **Because HB 1227 is phrased in the conjunctive**, we need not consider whether intervenors proved that the public convenience and necessity does not require granting the application.

¶537, Decision C09-0207 (emphasis supplied).

The conjunctive character of the statutory standard is important for a second reason. During the 2009 legislative session, the General Assembly passed SB09-294, which bill Senator Chris Romer and Representatives Buffie McFadyen and Jeanne LaBuda sponsored. That bill substituted “or” for “and” and created a disjunctive standard. Mile High Cab had submitted its application on September 11, 2008. Senator Romer and Representative McFadyen knew that Mile High Cab’s application was then pending before the Commission, and for that reason SB294 specifically provided that “This act shall take effect July 1, 2009, and shall apply to applications submitted on or after said date and shall not apply to applications submitted prior to said date.” The new disjunctive standard does not apply to Mile High Cab’s application.

III. THE ADMINISTRATIVE LAW JUDGE MISAPPLIES THE LAW.

A. The ALJ imposes a “public need” test upon the applicant.

C.R.S. § 40-10-105(2)(b)(II)(A) specifically notes that “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.” Nonetheless, the ALJ writes that: “While the requirement for an applicant to sustain its burden of proof of public need for its proposed service has been abolished by HB08-1227; nevertheless, the issue of public need remains a crucial factor in the Commission’s determination.” ¶ 136. The statute eliminated the requirement under the doctrine of regulated monopoly that the applicant prove the inadequacy of existing service, and the ALJ recognizes that HB08-1227 abolished the requirement that the applicant proved the need for the proposed service. Even so, unbeknownst to Mile High Cab, the ALJ retained “public need” as a “crucial factor,” which means that the applicant bore the burden of proving this factor. This misapplication of the law violates due process.

The statute does not require that Mile High Cab prove public need. However, if Mile High Cab had been required to prove “public need,” then Mile High Cab believes that it did so during the hearing. Mile High Cab offered seven public witnesses during one afternoon of the hearing. (Tr. Vol. 5: pp. 172 -211). These witnesses--Mrs. Beverly Dickinson, Mrs. Betsy Baetty, Mr. Michael Annison, Mrs. Rebecca Dickman, Mr. Dennis Cyr, Mr. Had Baetty, and Mr. John Hallin--all testified as to the public need for better cab service and all agreed that the public interest would be served by granting authority. To the extent, then, that that ALJ has retained “public need” as a “crucial factor” in the Commission’s decision, Mile High Cab has provided evidence to satisfy this factor. Once again, however, the statute eliminates the requirement that the applicant prove that existing service is inadequate.

B. The ALJ ties proof of public need to an incorrect “public convenience and necessity” standard

The ALJ reverses the statutory burden related to public convenience and necessity and

ties this reversed burden to proof of the public need. The ALJ writes that “Under the public need standards of § 40-10-105(2)(b)(II)(B), C.R.S., the Commission may only grant authority sought if the public convenience and necessity so require, coupled with a finding that there is no detriment to the public interest.” ¶ 130.

First, there is no “public need” standard in C.R.S. § 40-10-105(2)(b)(II)(B); rather, there is just the opposite: a rebuttable presumption of public need for firms that are operationally and financially fit. That section (B), in its entirety, is:

(B) If the applicant sustains its initial burden of proof as set forth in sub-subparagraph (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.

Second, the ALJ misapplies the burden regarding “public convenience and necessity.” The ALJ believes that the statute permits the Commission to grant authority only when the “public convenience and necessity so require,” which means that Mile High, as applicant, would have the burden of proving that public and convenience and necessity required the granting of the application. With HB08-1227, the General Assembly reversed the burden so that the intervenors--those opposing the application--bear the burden of proving “that the public convenience and necessity does not require granting the application.” The ALJ describes this burden as exactly the opposite of what the General Assembly intended, and he puts the burden on the applicant rather than on the intervenors. In so doing, the ALJ reimposes the very high burden of proof that HB08-1227 removed from applicants for Certificates of Public Convenience and Necessity. This misapplication of the law violates due process.

C. The ALJ ties public need to proof that “the application is in the public interest”

As with the “public convenience and necessity” standard, the ALJ ties proof of “public need” to an improperly stated public interest standard. The ALJ writes that “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.” ¶ 194. Again, the applicant need not prove public need, and so “public need” cannot be an “overarching issue.” And, the statute specifically reverses the question of whether the “application is in the public interest.” In this docket, the intervenors carried the burden of proving “that the issuance of the certificate would be detrimental to the public interest.” Requiring that the intervenors prove harm to the public interest is entirely different than saying that “the application is in the public interest.” This misapplication of the law violates due process.

D. The ALJ explicitly jumbles the doctrinal strands together.

The ALJ jumbles three distinct doctrinal strands together. He writes that:

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. ¶ 197.

Notwithstanding the analytic and linguistic difficulty that the ALJ identifies, the ALJ’s method violates due process. First, as noted, the General Assembly eliminated the requirement that the applicant prove public need and instead put in place a legislative presumption that there is a public need for additional taxi service. The statute is unambiguous on this point. Second,

the statute distinguishes the doctrinal standards that the ALJ jumbles. The statute identifies two separate tests--separated by the word "and"--that the intervenor must prove. The first strand requires that the intervenor "shall bear the burden to prove that the public convenience and necessity does not require granting the application." The second strand requires that the intervenor shall bear the burden of proving that "the issuance of the certificate would be detrimental to the public interest." Whereas the ALJ blends these doctrines, due process requires they be kept separate just as the legislature wrote them.

E. Among the jumbled strands, the ALJ allows the "public detriment" strand to trump all.

At the conclusion of his decision, the ALJ writes that "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."

¶ 231. Leaving aside the ALJ's conclusion regarding detriment to the public interest--which Mile High Cab disputes below--the ALJ has equated proof of one of the two standards with proof of the other standard. In so doing, the ALJ has negated the dual-pronged, conjunctive analysis that the General Assembly created, and he has substituted instead a single-prong analysis. He has collapsed two standards into one. This is a clear misapplication of the statute as it existed until amended by SB09-294 and, again, a violation of due process.

F. The ALJ has expanded the statute's requirement of fitness with two new tests.

Although the ALJ found that Mile High Cab satisfied the C.R.S. § 40-10-105(2)(b)(II)(A) burden of "proving that it is operationally and financially fit to provide the proposed service," the ALJ nonetheless imposed additional tests beyond the statutory requirements.

First, the ALJ has imposed a test of "differentiation." The ALJ writes that "in order to be

successful. that company must enter with a differentiated product or identify a niche market. . . .”

¶ 200. In at least 16 places within the decision, the ALJ refers to the notion of differentiation. See ¶¶ 200, 209, 210, 212, 223, 229, and 230. The ALJ’s superimposing of the “differentiation” requirement upon Mile High Cab is a misapplication of the statute, which requires *only* operational and financial fitness. During the hearing, the ALJ never mentioned his requirement of “differentiation,” and therefore Mile High Cab could not address this secret, though critical requirement. This is a violation of due process. As well, the ALJ’s fabrication of a requirement of “differentiation” is rulemaking within the Mile High Cab docket, a violation of the Colorado Administrative Procedure Act. In the Union Taxi/Freedom Cabs docket the Commission rejected Metro Taxi’s attempted rulemaking. See Decision No. C09-0207, ¶ 458 at pp. 119-20.

If “differentiation” were part of the statutory fitness standard, then Mile High Cab believes that it presented a superabundance of evidence at the hearing that its company and service are “differentiated” as follows:

- Fares:** Mile High Cab’s fares will be 11 percent lower than Yellow Cab and Metro Taxi’s with no charge for extra passengers, bags, or luggage. Bags and friends ride free with Mile High. All incumbent companies now charge for additional passengers and bags.
- Service:** Mile High Cab will increase the quality of cab service, expand that service to underserved areas of Adams, Arapahoe, Denver, Douglas, and Jefferson Counties, and increase the overall demand for taxi services. Lower lease rates will reduce short-trip resistance and reduce the number of hours that drivers must be on the streets.
- Experienced Drivers:** Mile High Cab’s owner/operators are experienced, current drivers who know the streets and businesses of the five-county area. Most are independent contractor drivers for incumbent cab companies, and most have existing customer lists.
- Colorado Business:** Mile High Cab is locally owned by community members. With cabs painted like the Colorado flag and branding identified with the Denver metro area, Mile High Cab is not a generic taxi company nor a franchise of a multinational corporation.
- Advertising and Marketing:** Mile High Cab’s business plan includes a marketing and advertising budget that exceeds that of at least two larger taxi firms.

Second, the ALJ also imposes upon Mile High Cab an extra-statutory standard related to

chance of success. The ALJ writes that “the Commission must add capacity and firms in a manner which maximizes the chances that new taxicab entrants will be able to sustain themselves.” ¶ 205. This misstates the legal standard of fitness. The members of Mile High Cab are capitalists prepared to put their capital and time at risk. They expect no guarantee of success from the PUC. In exchange for risking their capital, they may reap rewards in the form of business success and profit. As Assistant Attorney General Mariya Barmak recently wrote in a brief on behalf of the Commission: public need “is about whether that applicant should be allowed to compete, regardless of whether it ultimately is successful in doing so.”¹

IV. THE EVIDENCE WAS INSUFFICIENT TO FIND DETRIMENT TO THE PUBLIC INTEREST

A. Destructive Competition

The Commissioners have made clear that opponents of an application must provide specific evidence to support a claim of destructive competition. In this docket, the intervenors specifically declined to argue that destructive competition would result if the commission granted Mile High Cab’s application. Although the intervenors did not argue that granting the application would result in destructive competition, the ALJ nonetheless found that destructive competition *could* result. The only evidence of the possibility of destructive competition was based upon theoretical discussion by paid opinion witnesses whose testimony the Commission had rejected in the Union Taxi/Freedom Cabs docket.

Colorado Cabs (hereafter Yellow Cab of Denver) opposed Mile High Cab’s application

¹ Mariya Barmak, “Reply in Support of Motion to Dismiss for Failure to State a Claim upon which Relief can be Granted,” RDSM Transportation v. Colorado PUC *et al.*, (2009CV7921, Denver District Court) (November 24, 2009).

only with the argument that Mile High Cab, Inc. was not operationally and financially fit. Yellow Cab of Denver did not challenge the public need for additional service. Indeed, for Yellow Cab of Denver to have done so would have been peculiar at best since Yellow Cab of Denver currently has its own application for 150 additional cabs pending before the Commission. See Docket 09A-490CP-EXT. Yellow Cab of Denver therefore did not argue that the grant of Mile High Cab's application would result in public detriment nor that the public convenience and necessity does not require granting the application. As Yellow Cab's lawyer, Mr. Ric Fanyo clearly stated: "We're not contesting the public interest or public convenience and necessity issues in this case, only the fitness issues." (Tr. Vol. 10:171 ln. 7-9.)

Similarly, Metro Taxi limited its arguments. Metro Taxi did argue that the grant of the application would harm the public interest, but Metro Taxi limited its arguments to claims that there were already too many taxis and that Mile High Cab would generate pollution.² Metro Taxi did not, however, offer any argument or evidence whatsoever that destructive competition would result from the grant of authority to Mile High Cab. Like Yellow Cab, Metro Taxi offered no evidence that its own operations would be hurt by a grant of authority to Mile High Cab. From the records of the intervenors themselves, then, there is not a scintilla of evidence to support a finding of destructive competition.

The Commission has made clear that any incumbent taxi companies arguing that destructive competition will result from the grant of an application should be prepared to open

² Mile High Cab argued during the hearing and in its Statement of Position that federal law preempted any claim concerning pollution. The Second Circuit Court of Appeals has recently ruled consistent with Mile High Cab's argument, and the ALJ properly excluded Metro Taxi's pollution claims from his opinion. See *Metropolitan Taxicab Bd. of Trade v. City of New York*, --- F.3d ----, 2010 WL 2902501 (C.A.2 (N.Y.), July 27, 2010).

their financial records. As the Commissioners wrote in the Union Taxi/Freedom Cab Matter,

35. In the event that at least one applicant proves financial and operational fitness, the burden of proof will shift to the party or 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. It is important to differentiate between adverse financial impact caused by a normal competitive process and adverse financial impact caused by competition that harms the public interest. Adverse financial impact *per se*, is not sufficient to prove public detriment – such adverse financial impact may serve the public interest or be neutral with respect to the public interest. A reasonable conclusion can be derived only from analysis of facts and data – including actual and forecasted financial information. To the extent that an incumbent taxi carrier wishes to demonstrate public detriment due to an adverse financial impact on its financial condition, then the incumbent should be prepared to open its books and records as a means of demonstrating such impact and provide evidence of a nexus with detriment to the public interest.

C08-0933, ¶ 35, p 19.

The intervenors in this case did not open their books, but they should not be faulted for this because they also did not argue that destructive competition would result from granting the application. Instead, the ALJ made this argument for them, and the ALJ has made this argument without data from the opened books of the intervenors. Just as it would have been invalid for the intervenors to claim destructive competition without their books being opened, so too is the ALJ's argument invalid. There is no evidence from the financial records of the intervenors to support his argument.

The Commission has expressed its view that merely theoretical arguments about destructive competition are not persuasive. Mile High Cab relied upon the Commission's view in presenting its application before the ALJ. The Commissioners have written that:

we expect the ALJ to look for specific evidence of a cause-and-effect relationship between such negative impacts and the particular applications pending before the Commission. Evidence that is theoretical in nature or without any risk assessment as to the likelihood of those impacts occurring as a result of these applications will have less probative value than such evidence tied to these particular applications.

Decision C08-0933, ¶ 36, pp. 19-20. In deciding to grant the applications of Union Taxi and Freedom Cab, the Commission made the point again:

We also reiterate our statement that theoretical evidence or evidence without any risk assessment will have less probative value than evidence tied to the applications in this docket. The testimony summarized above concerning detriment to the public interest is certainly more than mere theory (the testimony concerning Washington, D.C., and Kansas City, for example), but that testimony deals almost exclusively with deregulation or open entry. We agree with Union Taxi that we are not dealing with a deregulated or open entry model in this docket. Considering our multi-faceted evaluation of fitness in this docket, we are certainly not dealing with Dr. Mundy's description of open entry as a low or non-existent fitness standard. Rather, we are dealing with a model that allows the Commission to authorize, on a case-by-case basis, such additional, incremental, and fit entry as would benefit the public (or at least not harm it). We also regulate the taxi industry by promulgating and enforcing applicable rules.

C09-0207, ¶ 535.

When the Commission rejected the destructive competition arguments in the Union Taxi/Freedom Cab dockets, the configuration of parties, witnesses, and arguments was nearly identical to those in the Mile High Cab docket. Yellow Cab and Metro Taxi were intervenors, then as now. Professor Ray Mundy, Professor Paul Dempsey, and Mr. Joseph Rubino were paid opinion witnesses for the intervenors, as they are in this docket. The written reports of Professors Mundy and Dempsey were the very same reports--not one word changed--in this docket as in the UnionTaxi/Freedom Cab docket. Professors Mundy and Dempsey admitted that they had not conducted any additional empirical research before testifying against Mile High Cab. As detailed in Mile High Cab's Statement of Position (attached as Appendix 1), Professors Mundy and Dempsey admitted to *never* having conducted any research concerning Adams, Arapahoe, Jefferson, or Douglas Counties. Professor Dempsey, when asked on cross-examination whether he had "personally conducted research, survey, or examination of taxicabs" in Denver County

answered that “I have -- I have -- as a student of transportation, I have observed the taxi environment in Denver, and I am well acquainted with it. I have done no formal studies, but I have made anecdotal observations of what I perceive to be the environment.” Tr. Vol. 9:24, ln. 6-11. In light of this admission, Mile High Cab objected to the admission of Professor Dempsey as an expert on the Denver taxicab market, but the ALJ did not sustain the objection.

Professor Dempsey has made the same argument regarding the likelihood of destructive competition at least three times since 1994 as a paid opinion witness for Metro Taxi. Each time, the Commission has rejected his argument. In 1994, Professor Dempsey testified that destructive competition would result if Freedom Cab were allowed to begin operations. The Commission rejected his argument. C95-0456. In 2002, Professor Dempsey testified that destructive competition would result if Freedom Cab were allowed to expand operations. The Commission rejected his argument. R02-218. Again in 2008 in the Freedom Cab/Union Taxi docket, Professor Dempsey testified for Metro against the grant of authority. By this time, Professor Dempsey had formalized his testimony as a self-published article or report titled “Economic Regulation of the Taxicab Industry.” Again, the Commission rejected his analysis. C09-0207. Nothing became more robust about Professor Dempsey’s arguments when he testified on behalf of Metro Taxi against Mile High Cab in 2009. Indeed, his testimony and arguments were weaker, as he admitted that they reflected no additional research or analysis since he had testified against Union and Freedom the year before. That is, Professor Dempsey had no data concerning the impact upon the five-county area of the grant of authority to Union Taxi and Freedom Cab.

Mile High Cab asks that the Commission again reject Professor Dempsey’s theoretical argument that the grant of authority to a competitor of Metro Taxi will result in destructive

competition.

The ALJ also relies heavily upon the work of Professor Ray Mundy. As a preliminary matter, Professor Mundy's work is tainted by its origins as a paid opinion for the incumbent taxi companies and also by methodological weakness. In his opinion, the ALJ fails to discuss the origins of Professor Mundy's study. As described in Mile High Cab's Statement of Position, the intervenors Metro Taxi and Yellow Cab funded Professor Mundy's \$75,000 study, which the Denver Convention and Visitors Bureau commissioned. (Tr. Vol. 10:44 ln. 19 – 48 ln. 19.) Professor Mundy's study is not a neutral, objective, academic study; rather, the study is a work of advocacy. Mr. Mitchell testified that the Bureau issued no RFP for the preparation of the study, nor did the Bureau contact any universities about conducting the study. (Tr. Vol. 10:44 ln. 22-24.) Industry insiders pointed the Bureau to Professor Mundy as someone who might prepare a report. (Tr. Vol. 10:10 ln. 1 – 11.) Together, the Bureau and Professor Mundy created a study that portrayed Yellow Cab and Metro Taxi as excellent companies, supported Yellow Cab and Metro Taxi's application for surplus authority during the Democratic National Convention, and served as ammunition against Union Taxi, Freedom Cab, and, later, Mile High Cab.

Professor Mundy's study lacks statistical rigor, as Professor Mundy himself admits. At the heart of the study, Professor Mundy employs "Secret Shoppers" who took notes on their rides around downtown in taxicabs. Professor Mundy describes "convenience samples" for the Secret Shoppers and also for the surveys of persons within the tourism industry. He admitted that "You really couldn't apply any kind of statistical significance to the test, chi-squared, anything like that, to these type of questionnaires." (Tr. Vol. 7:140 ln. 17-21.) Mile High Cab's unpaid expert witness, Professor Robert Hardaway, later testified that another word for "convenience sample"

was “It’s not scientific.” (Tr. Vol. 11:49, ln. 15-17.)

Professor Mundy’s report focused largely on downtown Denver. He writes that “since there was concern about the upcoming Democratic National Convention, there was an emphasis on the downtown hotels and the willingness of cab drivers to accept credit cards.” (Ex. 53, p. 16.) Mr. Mitchell, who commissioned the study, testified that the “emphasis was really more Denver than sort of the outlying areas, if you will, JeffCo, Commerce City, Adams County, and places like that.” (Tr. Vol. 10:52 ln. 22-24.) The focus of Professor Mundy’s study, he testified, was the “central business district.” (Tr. Vol. 10:53 ln. 10.)

As noted in Mile High Cab’s Statement of Position, the comments drawn from Professor Mundy’s unscientific surveys largely excoriate the existing taxicab service in downtown Denver, which at the time was dominated by Yellow Cab of Denver and Metro Taxi--Union did not yet exist. One respondent wrote: “Cab service is a serious flaw in our city that is highlighted by many visitors and meeting planners.” Another wrote that “It would be better if Metro Taxi or Yellow Cab wouldn’t make our guests wait for more than an hour to be picked up.” (See Appendix 2.) Prof. Mundy notes:

As shown by these summary statistics, written responses, and comparisons with other cities, there would appear to be considerable dissatisfaction with Denver taxicabs expressed by the frequent user groups represented in this survey. A 70% negative comment score on our scales could be taken as an immediate need for the community to address the issues raised by this survey.

(Ex. 53, p. 34-35.) The ALJ does not mention the very low ratings for taxi companies before the entry of Union Taxi and instead emphasizes the cheerful evaluation that Professor Mundy gives later in the report to the two companies that funded his study. However, the negative reviews that Professor Mundy collected using his surveys are consistent with evidence that Mile High

Cab introduced during the hearing. At the time of the hearing, Metro Taxi's Better Business Bureau ratings was **F** while Yellow Cab was performing slightly better with a **D-**. (Hearing Exhibits 6 and 7; Tr. Vol. 2:102 ln. 13 – 110 ln. 17.)

The ALJ adopts Professor Mundy's theoretical narrative regarding destructive competition. Again, the Commission has already rejected the very same analysis by Professor Mundy. Professor Mundy's study predated the expanded grant of authority to Freedom Cab and also the initial grant of authority to Union Taxi. Professor Mundy's study had included no updated data concerning the operation of the taxicab industry at the time of Mile High Cab's hearing before the ALJ. In short, Mundy's study, rejected by the Commission when it was relatively fresh, is now old news. The Commission has emphasized the need for actual not merely theoretical data in order to support the claim of destructive competition. The ALJ had no such data--none from Dempsey, none from Mundy, and none from the financial accounts of the intervenors. The Commission should again reject Professor Mundy's destructive competition prophecy.

The ALJ denied Mile High Cab the opportunity to present Dr. Diana Moss as a rebuttal witness to the theoretical claims of Professors Mundy and Dempsey. Because the Commission does not permit depositions, Mile High Cab had no opportunity to know, before the hearing, what Professors Dempsey and Mundy would testify regarding Mile High Cab. As noted, neither Professor Dempsey nor Professor Mundy provided any written testimony that concerned the impact that granting Mile High Cab's application would have on the public interest nor with regard to public convenience and necessity. For this reason, everything that Professor Mundy and Dempsey said at the hearing regarding Mile High Cab or the post-Union-Taxi cab market

was previously unknown to Mile High Cab. With regard to testimony for which Mile High Cab could have no way to prepare, Mile High Cab should have been allowed to present Dr. Moss as a rebuttal witness. The ALJ's refusal to permit her testimony was an abuse of discretion.

Mile High Cab presented an offer of proof as to what Dr. Moss would have testified had the ALJ not excluded her testimony. The offer of proof--a three-page summary of what she would have said if permitted to appear as a witness--is attached as Appendix 3. With regard to Professor Mundy's and Dempsey's testimony, Dr. Moss would have testified that:

the recent entry of the Union Taxi Cooperative lowered concentration and increased competition in a duopoly market. She would have also testified that, given the effectiveness of the market adjustment process, entry by Mile High will likely reallocate market shares among more efficient and innovative competitors. This, she would have testified, would further reduce concentration and produce competition on the merits. (Vol. 11:176 ln. 21 - 177 ln. 4.)

In short, the testimony of Dr. Moss--which the ALJ improperly excluded--would have rebutted the theoretical claims of Professors Mundy and Dempsey concerning Mile High Cab.

The Commission is already familiar with the analysis and credibility of Dr. Moss concerning the Colorado taxi market. The Commissioners have agreed with her analysis of the benefits of competition. In the Union Taxi/Freedom Cab docket, the Commissioners wrote:

513. We believe that, as the new entrants to the market gain customers and revenue over time, the market shares of revenue will be more evenly distributed. The market share of the largest incumbent firms will likely decline, imparting pressure on those incumbents to act in a manner consistent with the competitive process described by Dr. Moss. Generally, this means that incumbents will respond by cutting costs where possible in order to meet or beat the prices, terms, and conditions offered by its new competitors.

C09-0207, ¶ 513. (See Appendix 4.) Importantly, the Commissioners have described with approval the changes that competition brings to the cab market.

Finally, concerning the issue of alleged destructive competition, the ALJ makes three

inconsistent findings, findings that when considered together do not support his conclusion of detriment to the public interest. In the section of the decision titled “Conclusions and Findings,” the ALJ writes that: “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.” ¶ 230, emphasis supplied. In this docket, the applicants bear the burden of showing by a preponderance of evidence that granting the application will result in detriment to the public. This burden means that the intervenors must show that it is more likely than not that there will be detriment to the public. The ALJ’s finding that granting the application *could very well result* in detriment does not satisfy the burden of proof. To take a simple example, the Colorado Rockies could very well win the World Series, but that does not mean that they are more likely than not to become the world champions. Leaving aside that there is not evidence to support a finding of destructive competition, the ALJ’s statement means only that there is a possibility of destructive competition. If there is only a possibility, then the applicant and not the intervenor prevails.

The ALJ also describes the possibility of destructive competition in conditional terms of possibility rather than likelihood in reference to the theoretical testimony of Professors Mundy and Dempsey. The ALJ writes that “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 and public interest outcomes.” ¶ 227 This finding doubly emphasizes that destructive competition is only a possibility--a possibility that, in turn, very well could have negative outcomes. Once again, the ALJ’s finding is, as a matter of law, a finding that the intervenors have failed to meet their burden of proving that public detriment is more

likely than not. In the following sentence, the ALJ again describes destructive competition as merely a conditional possibility. He writes that “Specifically, unhealthy competition could result in higher rates, poor service, poorly maintained vehicles, and the possible exit by some firms.” ¶ 227. This finding does not support the intervenors opposition to the application. Indeed, the ALJ’s explicit finding of only a possibility--a conditional chance--of destructive competition reflects the absence of sufficient evidence to support a finding of destructive competition and reveals that there is only speculative, theoretical, less-than-probable support for the finding.

In a third place within the section titled “Conclusions and Findings,” the ALJ uses more definite language regarding the possibility of destructive competition. The ALJ writes that he “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.” Unlike other conditional statements regarding the possibility that grant of the application could result in harm, the ALJ instead uses the word “would.” However, what follows the word “would” is not destructive competition. As noted above, the Commission recognizes that additional competition in the taxicab market will result in the more even distribution of market shares of revenue across firms. The Commission further recognizes that some firms may be hurt in this process.

The Commission makes clear that destructive competition means harm to the public interest, not harm to an individual firm. So, while the ALJ predicts harm to incumbent carriers’ ability “to provide safe, economical and efficient service,” the ALJ does not find that the public will be unable to find safe, economic, and efficient service provided by another firm. In the Union Taxi/Freedom Cab docket, the Commissioners explained that:

534. We reiterate the important distinction between adverse financial impact caused by a normal competitive process and adverse financial impact caused by competition that harms the public interest. To the extent that the intervenors attempted to show the latter by demonstrating both an adverse financial impact and its nexus to the public detriment, they have failed to do so. While there is some testimony in the record indicating that investments will be negatively impacted, such as investments in handicapped-accessible vehicles, there was no testimony that such investments would not be made by other taxi companies. We find that a normal competitive process will determine which companies will make sound, efficient, and revenue-generating investments.

Decision C09-0207, ¶ 534. The example of handicapped-accessible vehicles is instructive. The entry of new firms into the taxi market may cause an incumbent firm to cut back on its investment in handicapped-accessible vehicles, but other, more efficient firms may step in to fill that market niche. The ALJ specifically refers to “the ability of *those* carriers to provide safe, economical and efficient service.” A proper finding of destructive competition would require the ALJ to find that entry into the market by Mile High Cab destroyed the ability of *any* carrier to provide service. To hold otherwise makes the doctrine of regulated competition the protector of inefficient, ancient firms that are unprepared to adapt to changing market conditions. Absent a showing that more competition will harm the public interest by creating a desert of taxi service, there is no destructive competition.

On his own terms, then, the ALJ has not found destructive competition. He predicts that some incumbent firms will suffer economic harm, which in turn may affect those particular firms’ provision of services. He makes no finding that the public will lack any type of taxi service and, further, his only description of harm to the public interest is as a possibility. The finding of a mere possibility of harm rather than a greater than 50 percent probability of harm is not proof by a preponderance of evidence that there will be public detriment. The statute is clear that “the party or parties opposing the application shall bear the burden to prove . . . that the

issuance of the certificate would be detrimental to the public interest.” With regard to destructive competition, the ALJ’s own findings do not support the conclusion that the intervenors have proven that granting Mile High Cab’s application will be detrimental to the public. And, the absence of actual evidence for the ALJ’s conclusion--he relies on theory rather than evidence--moves the ALJ’s finding further distant from the proof for which the statute calls and to which, as a matter of due process, Mile High Cab is entitled.

The ALJ bases the conclusion that the intervenors “sustained their burden of proof rebutting the presumption of a public need for the proposed service” on the putative finding of destructive competition. ¶ 534 The putative finding of destructive competition, in turn, supports the ALJ’s finding of detriment to the public interest, which finding in turn supports his conclusion that the public convenience and necessity does not require the granting of the application. ¶ 534 These conclusions are all built upon the faulty finding of destructive competition. As the finding of destructive competition falls, so must the other findings. Having shown no detriment to the public interest, the opposition of the intervenors fails.

B. Competition of Firms

Throughout the decision, the ALJ fails to identify the benefits of competition among taxi firms.

1. The ALJ does not think lower fares are beneficial to the public interest.

Mile High Cab has proposed a tariff that will be 25 cents lower than the \$2.25 per mile that Yellow and Metro Taxi charge. This is an 11 percent reduction in fares for the public. In addition, Mile High Cab will not charge extra for additional passengers nor for additional bags and luggage. For example, two or more senior citizens living together in an apartment building

might share a Mile High Cab home from the grocery store without paying extra for either their friends or their grocery bags.³ Drunk clubgoers might be more likely to pile into a cab for a safe ride home if they don't have to pay more for each additional passenger. And, public agencies paying for Medicaid and other vouchered services may save on taxi fares.

In his opinion, the ALJ referred only to “marginally lower fares” ¶ 534, and during the hearing, in response to Metro Taxi’s objection, the ALJ held that differences in rates were irrelevant to the public interest. He ruled that “Fares are not typically an issue with regard to the public interest” and also that “the relationship for fares to the public interest is pretty tenuous.” (Tr. Vol. 10:76 ln. 23-25; 10:77 ln. 1-2; 10:78 ln 20-25.) Consequently, Mile High Cab had no choice but to back away from presenting evidence regarding lower fares during the hearing. However, Mile High Cab believes that the ALJ erred in holding that the Commission believes that lower fares are only tenuously related to the public interest. The public is better off paying 25 cents less to travel a mile.

The Commissioners have specifically identified downward pressure on fares as a desirable outcome when they wrote in the Union Taxi/Freedom Cabs docket:

We also expect that a more competitive market may create additional benefits. For example, we expect less upward pressure on retail prices - either in the form of decreases or through longer time intervals between proposed increases. We also expect a similar effect on service quality and consumer choice among more taxicab providers. Further, we expect that there will be competition among cab companies for drivers due to an increase in the number of taxicab companies, with possible implications for wholesale lease rates.

³ See, for example, Karen Auge, “Family's monthly shopping trip shows food can be close at hand, but far away,” *Denver Post* (May 20, 2010) (Metro Taxi charged a woman on fixed income \$11.85 for a 1.3 mile ride from the grocery store.) http://www.denverpost.com/search/ci_15121937

Decision C09-0207, ¶ 534.

2. The ALJ disregards the pressure that competition between firms places on lease rates.

Just as the ALJ disregarded a host of benefits to the public interest brought by competition between additional taxi firms, so too did the ALJ disregard the beneficial effects upon taxi lease rates. As noted above, the Commissioners anticipate that additional inter-firm competition will generate competition between the cab companies for drivers with concomitant downward pressure upon lease rates as companies compete to buy the services of the independent contractor drivers. In a footnote, the Commissioners make clear their preference for increasing the number of cab companies rather than having the Commission directly regulate lease rates. The Commissioners wrote:

At this time, we conclude that increasing the number of companies that lease cabs is a superior regulatory solution than directly regulating the lease rate. However, we will continue to monitor these lease rates. We believe that the introduction of new lease options in the form of alternative sources of supply will impose market discipline on those lease rates.

Decision C09-0207, ¶ 534, note 137.

Mile High Cab's expert witness Professor Robert Hardaway emphasized the need for additional firms competing in the taxi market. This opinion is consistent with the Commission's pro-competition policy and also with the legislative intention to enhance competition in the Colorado taxi market. As described in Mile High Cab's statement of position, Professor Hardaway testified that rather than asking whether there were too many taxicabs, the right question is to ask whether there are enough firms. That number is reached, Professor Hardaway argued, when the transaction costs of collusion among firms become too high. Mile High Cab believes that the exclusive agreement between Cherry Creek Mall and Yellow Cab and Metro

Taxi (See Docket 09F-892CP), which went into effect shortly after the conclusion of the hearing in *this* docket would be less likely to have taken place and also less likely to be problematic in a market with more competing firms.

C. Number of Taxis.

The authority that Mile High Cab seeks--150 taxis--would make it the smallest of the four firms in the Adams-Arapahoe-Denver-Douglas-Jefferson County market. The four largest firms in that market--Metro Taxi, Yellow Cab, Union Taxi, and Freedom--have authority to operate a total of 1,262 cabs, although the authority of more than one of these firms extends beyond the five counties in which Mile High Cab intends to operate. (Yellow Cab of Colorado Springs also overlaps slightly with Mile High Cab in the southern part of Douglas County.) The authorization that Mile High Cab seeks is just 12 percent of the existing number of cabs the PUC authorizes. Mile High Cab seeks authority to add one more cab per 16,000 persons living in these counties or one more cab for every 25 square miles.

As noted, Yellow Cab of Denver did not argue that the grant of Mile High Cab's application would damage the public interest. Yellow Cab has not argued that there are too many taxis, and Yellow Cab is unlikely to do so given that presently Yellow Cab seeks authorization for an additional 150 cabs in the Denver metro area. Yellow Cab, a sophisticated business with a sophisticated French multinational corporation, Veolia, as its parent, might be presumed to be making good projections about the taxi market.

No intervenor or witness has presented a shred of evidence that there are too many taxis in any part of Adams, Arapahoe, Douglas, or Jefferson Counties.

When asked whether he had "received complaints from business travelers that there are

too many cabs” in downtown Denver, Mr. William Mitchell, of the Denver Convention and Visitor’s Bureau, answered “No, not to the extent of, Wow, you have too many cabs sitting out there, no.” (Tr. Vol. 10:81 ln. 15-18.)

The ALJ, however, presumes that there are too many taxis. As described in Mile High Cab’s statement of position, the only evidence that there might be too many taxis comes from a narrow section of Denver’s central business district--hotel and convention center cabstands--on weekdays from morning to late afternoon. Metro Taxi and its drivers are clearly irritated by the competition with Union Taxi. The testimony showed that in the earliest weeks of Union’s operation, the ground transportation authorities excluded Union Taxi from DIA, which led to more Union Taxis downtown than might otherwise have been there. Feathers were ruffled. The memory lingers.

However, Metro’s own drivers testified that the cab stands have always been crowded. In the past, one Metro driver testified, there were too many yellow cabs; now, there are too many orange cabs. Another Metro driver testified that after Union entered the market, he was forced to leave his usual Capitol Hill/Downtown haunts and instead started driving to DIA, where he now makes more money. At most, the evidence concerning crowding at downtown hotel cab stands is equivocal. But, as Mile High Cab’s Edem Archibong emphasizes, sitting in cab stands is not Mile High Cab’s business plan. Experienced cab drivers call that parking, not driving a taxi.

Nearly all of Mile High Cab’s owners currently drive for existing cab companies, which means that they have existing customers, favorite neighborhoods, and patterns of doing business. There is no reason to presume that when granted authority, Mile High Cab’s drivers will suddenly flood downtown Denver.

Mile High Cab challenged the idea of derived demand and presented plans to expand the demand for cab services. Professor Dempsey presumes that demand for taxi services is static and limited like a fenced, common grazing area for cows. Mile High Cab believes that there is considerable opportunity to expand demand. Mile High Cab knows that more people would use taxicabs if service were more available, more reliable and less expensive. Mile High Cab intends to market itself at shopping malls, restaurants, and businesses throughout the five-county area. A dependable taxi company can also assist parents. For example, Edem Archibong has provided cab service to parents with children who play hockey. Ms. Beverly Dickinson testified that:

My sister and her husband have four boys, young boys. And they have used Archie extensively, and they are hockey players -- they were hockey players, but they are bigger now. From a very young age, they would start traveling by themselves. And they entrusted Archie to pick them up. I can't even -- countless times, deliver them, bring them home, all hours of the night and day. (Tr. Vol. 5:175 ln. 1-9.)

Finally, even if there were sufficient evidence that there are too many taxicabs in Denver's central business district, that fact should not keep every other neighborhood, town, or city in the five-county area from receiving additional taxi service. There was not a bit of evidence that any part of Denver apart from Downtown had too many taxis--not Park Hill, Hilltop, Five Points, Lowry, Washington Park, Capitol Hill, the Highlands or anywhere else. Even the airport cannot be said to have too many taxis because DIA officials have capped the number of cabs there. There is not even a shred of an argument that any of the other four counties that Mile High Cab proposes to serve has an overabundance of cab service. The addition of Union Taxi to the market clearly upset Metro Taxi, but that is nothing more than a growing pain in a competitive market.

V. THE ALJ DID NOT FIND THAT THE PUBLIC CONVENIENCE AND NECESSITY DOES NOT REQUIRE GRANTING THE APPLICATION.

The ALJ has not made a proper finding that the public convenience and necessity does not require the granting of the application. Instead, as noted above, the ALJ purports to find that “intervenor’s have sustained their burden of proof that the proposed service would be detrimental to the public interest and as a result,” he writes, “the public convenience and necessity does not require the granting of the application.” The ALJ offers no separate proof that the intervenors met their burden of proving that “the public convenience and necessity does not require granting the application.” Instead, the ALJ simply eliminates the statutory requirement of proof of the second prong of C.R.S. § 40-10-105(2)(b)(II)(B) by declaring that proof of the first prong equals proof of the second prong as well. That is a misapplication of the law and a violation of due process.

Because the ALJ has not found proof of the second prong of C.R.S. § 40-10-105(2)(b)(II)(B), that alone is a sufficient basis for the Commission to overturn the ALJ’s decision and grant Mile High Cab’s Application.

VI. MILE HIGH CAB’S ORGANIZATION

The ALJ has properly found that Mile High Cab is operationally and financially fit. Mile High Cab’s Statement of Position supplements the information that the ALJ provides. Mile High would like to clarify one point and correct another.

Mile High Cab is a cooperative that is organized as a corporation. Cooperatives take a variety of organizational forms in Colorado and may be formally organized as cooperatives, like Union Taxi Cooperative, but more cooperatives take the form of LLCs and corporations.

Mile High Cab is owned in equal shares by its 150 members. This is a fundamental principle of Mile High Cab. The Board of Directors has decided against the formal issuance of shares in the corporation before achieving success with its application for a Certificate of Public Convenience and Necessity.

In the midst of a recession, Mile High Cab has raised enough capital from its members to form a business that, with gradual start to its operations, is projected to be in the black within four of five quarters of operation. In times of tight credit, Mile High Cab has formed without having to borrow and also without having to yield a share of the company to venture capitalists.

The ALJ adopts one aspect of Mr. Rubino's erroneous analysis of the Mile High Cab business plan. The ALJ writes that "Mile High has based its entire projections on the assumptions 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." ¶ 114. See also, ¶ 109. This is simply incorrect. Mile High Cab has anticipated breakdowns, accidents, attrition, and other factors that will lead to less than 100 percent collection of lease revenue through a one-month, lease-free driver bonus. Mile High Cab's pro forma includes the expectation that one month out of every twelve, drivers will pay no lease fees. Drivers may use this time for breakdowns, accidents, vacations, and other times when they are not generating income and therefore not paying weekly lease fees. One month out of twelve is a projection that Mile High Cab members will not be generating revenue for the company 8.3 percent of the year.

The second error that the ALJ makes concerns the availability of additional capital, if needed. First, as noted, Mile High Cab members currently drive for and pay lease fees to other companies. Testimony during the hearing revealed that lease rates are as high as \$822 per week. Mile High Cab expects to set weekly lease rates at approximately 30 percent of that amount. This means, quite simply, that drivers will have additional capacity to generate money for special assessments or even increases in the lease rate if the Board determines there is a need. And, of course, once Mile High Cab holds a Certificate of Public Convenience and Necessity, then access to commercial credit will expand.

VI. ORAL ARGUMENT

Per Rule 1505(c), Mile High Cab moves for oral argument regarding these exceptions. Mile High Cab asks to address all the arguments included in these exceptions and appendices hereto and the responses, if any, of the intervenors.

In addition, Mile High Cab prays the Commission allow Mile High Cab to present witnesses concerning the five-county taxi market for the period from September 2009, when the hearing before the ALJ concluded, to whatever date the Commission sets for oral argument.

VII. TRANSCRIPTS

Per Rule 1505(b) transcripts for the entire proceeding before the ALJ and the Commission have already been filed with the Commission in this docket.

VIII. CONCLUSION

The ALJ's findings and conclusions are contrary to the law and evidence. The ALJ has misapplied the law. While finding that Mile High Cab is operationally and financially fit, he expanded the statute's requirements with a new standard of differentiation as well as an

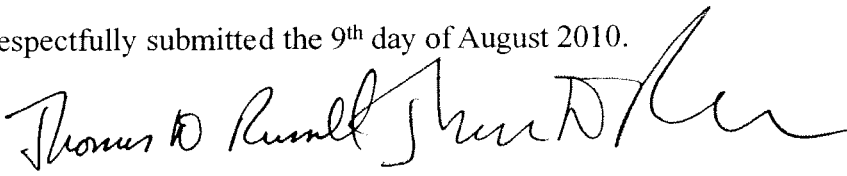
expectation of guaranteed success. Neither standard exists in the law. The ALJ has misapplied the law, engaged in impermissible rule-making, and has otherwise violated due process.

Having found Mile High Cab to be operationally fit, the ALJ's duty was to apply the conjunctive test of C.R.S. § 40-10-105(2)(b)(II)(B). Instead, the ALJ jumbled into his analysis an irrelevant public need strand and then conflated the two prongs of C.R.S. § 40-10-105(2)(b)(II)(B). In the end, though, the ALJ allows the first prong--detriment to the public interest--to serve as proof of the second.

In addition to misapplying the law, the ALJ did not have sufficient evidence to reach the conclusion that the grant of the application would result in detriment to the public interest. The ALJ found detriment to the public interest based upon his conclusion that there would be destructive competition. However, in finding destructive competition, the ALJ had no evidence drawn from the financial records of the intervenors. Instead, he relied upon purely theoretical discussions that the Commission has heard--and specifically rejected--in the Union Taxi/Freedom Cab docket. The ALJ's conclusion that the addition of one more taxi firm to the five-county market will hurt the public interest by causing destructive competition is without evidentiary support.

Having met the requirements for the grant of a certificate of public convenience and necessity, Applicant Mile High Cab, Inc. prays the Commission will approve its application.

Respectfully submitted the 9th day of August 2010.

s/ 

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CERTIFICATE OF SERVICE

I certify that on the date indicated below, I served the foregoing document with appendices upon the following parties via U.S. mail with adequate postage

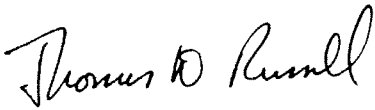
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