

Decision No. C03-0215

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

DOCKET NO. 02A-464CP

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IN THE MATTER OF THE APPLICATION OF DSC/PURGATORY, LLC, DOING BUSINESS AS MOUNTAIN TRANSPORT, #1 SKIER PLACE, DURANGO, CO. 81301, FOR AN EXTENSION OF CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY NO. 54985.

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**COMMISSION ORDER DENYING APPLICATION FOR  
REHEARING, REARGUMENT, AND RECONSIDERATION**

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Mailed Date: February 25, 2003

Adopted Date: February 5, 2003

**I. BY THE COMMISSION**

**A. Statement**

1. This matter comes before the Commission for consideration of applications for Rehearing, Reargument, or Reconsideration (RRR) of Commission Decision No. C03-0018 filed by Durango Transportation, Inc. (Durango Transportation), and DSC/Purgatory, LLC, doing business as Mountain Transport (Mountain Transport or Applicant). Our Decision granted in part, Mountain Transport's application for temporary authority to extend operations under its Certificate of Public Convenience and Necessity (CPCN), PUC No. 54985.

2. Now, being duly advised in the matter, we deny the applications for RRR, and clarify our decision consistent with the discussion below.

## II. DISCUSSION

3. This proceeding involves an application by Mountain Transport for temporary authority to extend operations under its CPCN as follows:

Transportation of

passengers and their baggage, in call-and-demand limousine service,

between Durango Mountain Resort, on the one hand, and all points in the Counties of La Plata, Montezuma, Ouray, and San Juan, State of Colorado, on the other hand.

### RESTRICTION:

This temporary application is restricted against providing transportation service for passengers who originate or terminate at Cascade Village Resort (which is defined to include all points within its present development and within the current Cascade Village Resort master Plan, and any renamed or successor resort at the same location) located in the County of San Juan, except for providing transportation service between Durango Mountain Resort and Cascade Village Resort for owners of properties, or overnight guests registered at lodging facilities, located at Durango Mountain Resort, which for purposes of this restriction shall be defined as the existing Durango Mountain Resort and all property located within the current Durango Mountain Resort Master Plan.

4. Mountain Transport's current CPCN allows it to provide scheduled service between Durango Mountain Resort and points within the city limits of Durango. However, we noted in our Decision that the La Plata County Airport is located outside the city limits of Durango.

5. Durango Transportation filed an intervention opposing the grant of the application for temporary authority. Durango Transportation is authorized to provide taxi, charter, and call-and-demand limousine service under CPCN PUC No. 14916, between La Plata County Airport, on the one hand, and on the other hand, all points within a 100-mile radius of the intersection of U.S. Highway 160 and U.S. Highway 550 in Durango, Colorado.

6. In its application for temporary authority, Mountain Transport submitted various letters from travel related companies such as American Airlines Vacations, Adventure Tours USA, High Point Travel, Inc., and from a resident of Durango Mountain Resort. Also included as support were various filings and letters relating to its permanent application. Based on the support letters, we determined that pursuant to § 40-6-120(1), C.R.S., Mountain Transport had not shown an immediate or urgent need for service between Durango Mountain Resort and all points in the counties of La Plata, Montezuma, Ouray, and San Juan. However, we did find that the support indicated an immediate and urgent need for temporary authority for transportation service between La Plata County Airport and Durango Mountain Resort beyond what Durango Transportation could accommodate.

**A. Mountain Transport RRR**

7. Mountain Transport urges that the evidence it submitted with its temporary application demonstrated an immediate and urgent need for all the service it requested. According to Mountain Transport, the evidence of need for service in the other requested routes, was at least equal to, and sometimes greater than, the evidence regarding travel between the La Plata County Airport and Durango Mountain Resort. Additionally, Mountain Transport points out that evidence it submitted reveals that Durango Transportation makes few trips between Durango Mountain Resort and downtown Durango. Consequently, Mountain Transport requests that the Commission reconsider the partial grant of its temporary authority application.

8. In the alternative, Mountain Transport asks for clarification of the Commission's decision to grant in part its temporary authority application. Specifically, Mountain Transport requests clarification as to why the Commission did not find an immediate and urgent need for the other portions of the requested authority.

**B. Durango Transportation's RRR**

9. Durango Transportation argues that under the legal standards required to grant temporary authority, Mountain Transport's proof fails, therefore its application must be denied because granting the application will cause harm to Durango Transportation. Specifically, Durango Transportation contends that Mountain Transport failed to demonstrate an immediate and urgent need for the proposed temporary extension of its authority, and did not demonstrate by substantial, reliable, and competent evidence that Durango Transportation is incapable of meeting the public need.

**C. Immediate and Urgent Need**

10. Durango Transportation takes exception to the evidence submitted by Mountain Transport for its application for temporary authority, finding that it does not meet the standard required under § 40-6-120, C.R.S., of an immediate and urgent need. For example, Durango Transportation points out that the support from American Airlines vacations is moot because it has elected not to fly to or from Durango during the 2002 through 2003 season. Additionally, Durango Transportation argues that the 5,000 "enplanements" cited by Adventure Tours as need for airport service translates into only about 40 passengers per flight who are traveling to Durango Mountain Resort. Nor do the additional letters of support prove the existence of an immediate or urgent need, according to Durango Transportation.

11. Citing *Ephraim Freightways, Inc. v. Public Utilities Commission*, 151 Colo. 596, 380 P.2d 228, (Colo. 1963), Durango Transportation advises that the standard for determining a grant of temporary authority is "not whether the extent of business in a particular area is sufficient to warrant more than one carrier, but rather whether public convenience and necessity demand the service of an additional transport facility." *Id* at 380 P.2d 231. Therefore, a

demonstration of appropriate public convenience requires more than a showing that the proposed services may be better than the status quo. Citing *Donahue v. Public Utils. Comm'n*, 145 Colo. 449, 359 P.2d 1024, 1028 (Colo. 1961). Additionally, Durango Transportation cites *Public Utils. Comm'n v. Weicker Transfer & Storage Co.*, 168 Colo. 339, 451 P.2d 448, 450 (Colo. 1969) for the proposition that evidence of opinions favoring competition is insufficient to demonstrate public convenience. As such, Durango Transportation concludes that even if Mountain Transport can prove that it may be more convenient or better for the public for an additional transportation provider to operate between the resort and airport, this alone is insufficient to justify additional service.

**D. Durango Transportation's Capabilities**

12. Durango Transportation additionally urges that Mountain Transport has failed to show that Durango Transportation is incapable of meeting the current need. Despite complaints of existing service or the lack of any service found in Mountain Transport's support letters, Durango Transportation argues that this evidence in no way demonstrates that it is incapable of meeting existing needs. Rather, Durango Transportation maintains that it has a full fleet of vehicles and staff ready, willing, and able to meet the public need.

13. It is not enough if the evidence of inadequacy consists only of expressions of mere opinion, preference, or a desire or willingness to use Applicant's services, according to Durango Transportation, citing *Weicker Transfer*, 451 P.2d at 449. Under this standard, Durango Transportation opines that a few instances of customer dissatisfaction and some negative findings regarding its existing service is not enough to conclude that a general pattern of inadequate service exists.

14. Finally, Durango Transportation maintains that there is no evidence that its services are inadequate, and that it can quickly modify its operations at any time to meet changing demands. Therefore, this negates any public need -- immediate, urgent, or otherwise for additional service. Because it claims its services are adequate, Durango Transportation posits that it must follow that there is no immediate or urgent need in the area at issue.

### **III. FINDINGS AND CONCLUSIONS**

15. While we find no fault with Durango Transportation's citation of relevant case law regarding the granting of a temporary authority, we disagree with its application of that case law to the matter at hand. Given the required standards pursuant to § 40-6-120, C.R.S., articulated by the Colorado Supreme Court, we find that Mountain Transport has met its burden of proof for the partial grant of temporary authority as articulated in Decision No. C03-0018.

16. In *Yellow Cab Co-op. Ass'n. v. Public Utilities Commission*, 869 P.2d 545 (Colo. 1994), the court enumerated the standards required in granting authority to a carrier, in a territory where an existing carrier already holds authority. According to the court, the Commission possesses the power to license and regulate motor vehicle passenger carriers based on principles associated with the doctrine of regulated monopoly. *Id.* at 548, citing *Ephraim Freightways, Inc.*, 151 Colo. at 599, 380 P.2d at 230; and *Colorado Transportation Co. v. Public Utils. Comm'n*, 158 Colo. 136, 142, 405 P.2d 682, 685 (1965) (*Colorado Transportation II*). Under the doctrine, applications for authority to operate a motor vehicle service require a showing that the public convenience and necessity require the requested service. *Colorado Transport II*, 158 Colo. at 142-44, 405 P.2d at 685-87. However, this comes with the caveat that a finding of public convenience and necessity is not justified unless the existing service is

determined to be substantially inadequate. *Yellow Cab*, 869 P.2d 545 at 548 (citations omitted).

The court illustrated this point in *Ephraim Freightways, Inc.* as follows:

The question involved in the granting or denial of a [CPCN] in a particular area is not whether the extent of business in a particular area is sufficient to warrant more than one certified carrier ... but rather whether public convenience and necessity demand the [additional service] ... While it may be more convenient for [the public users of the service] if there be another service added to the area, this alone is not enough and there must also be a necessity for such service shown by the inadequacy of the existing service.

*Ephraim Freightways, Inc.* 151 Colo. at 599-600, 380 P.2d at 231.

17. The court provided further guidance in *Donahue*, 138 Colo. 492, 335 P.2d 285, concerning the regulated monopoly doctrine where it offered the following:

We must bear in mind that the PUC has wide discretionary powers in determining the demands of ‘public convenience and necessity.’ We must also bear in mind that a person serving the public under a [CPCN] is a part of the public, and public convenience and necessity requires that he be treated fairly and that no new or extended operations be authorized which endanger or impair the operations of existing carriers contrary to the public interest.

*Id.* 138 Colo. at 498, 335 P.2d at 288.

18. Finally, relevant to this matter, the court has defined “inadequate service” as follows:

[T]he test of [inadequate service] is not perfection, and when a common carrier renders services to numerous customers in a wide territory, undoubtedly some dissatisfaction will arise and some legitimate complaints result; but for a new service to be authorized in the area already served by a common carrier, inadequacy of the present service must be shown to be substantial.

*Ephraim Freightways, Inc.*, 151 Colo. at 603, 380 P.2d at 232.

19. Application of the foregoing standards to this matter clearly reveals that Mountain Transport has met its burden of proof to show that Durango Transportation’s service is inadequate to meet the general public’s need for service between Durango Mountain Resort and

La Plata County Airport. Mountain Transport provided evidence beyond mere instances of unsatisfactory service by Durango Transportation. Mountain Transport was able, through its support letters and other evidence, to show that the current transportation service between Durango Mountain Resort and the airport was virtually non-existent and inadequate to meet current demands, and therefore substantially inadequate. Consequently, Mountain Transport has met its burden to show an immediate and urgent need for service between these two service points. Further, under the *Donahue* standard, we find that the limited temporary authority granted to Mountain Transport will not impair the operations of Durango Transportation. Without providing specific support as to its ability to provide the service at issue, Durango Transportation offers nothing to rebut Mountain Transport's evidence of substantially inadequate service between the resort and the airport. Rather, Durango Transportation only states that it has the ability to handle all traffic in the area.

20. However, we note that Mountain Transport's support letters and evidence failed to convince us that additional service is needed beyond what we granted in the temporary authority. The only evidence provided by Mountain Transport for a full grant of the authority it sought was general complaints of the inadequacy of transportation services between Durango Mountain Resort and the town of Durango. This alone is insufficient to grant the entire temporary authority Mountain Transportation seeks.

**A. Conclusion**

21. For the reasons discussed above, we deny the applications for RRR filed by Mountain Transport and Durango Transportation, and affirm our Decision No. C03-0018. To the extent that decision was not clear as to our grant of partial temporary authority, we clarify our language consistent with the discussion above. We find that pursuant to § 40-6-120, C.R.S.,



Mountain Resort met its burden of proof for grant of temporary authority to provide service only between Durango Mountain Resort and La Plata County Airport.

**IV. ORDER**

**A. The Commission Orders That:**

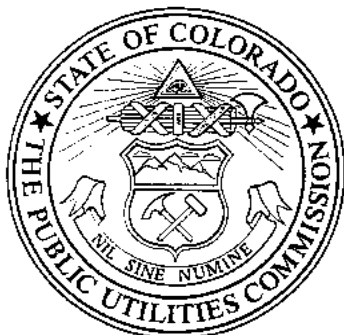
1. The Application for Rehearing, Reargument, or Reconsideration of Commission Decision No. C03-0018 filed by DSC/Purgatory, LLC, doing business as Mountain Transportation is denied consistent with the discussion above.

2. The Application for Rehearing, Reargument, or Reconsideration of Commission Decision No. C03-0018 filed by Durango Transportation, Inc., is denied consistent with the discussion above.

3. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING  
February 5, 2003.**

(S E A L)



ATTEST: A TRUE COPY

Bruce N. Smith  
Director

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

GREGORY E. SOPKIN

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Commissioners