

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

DOCKET NO. 02A-412CP

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IN THE MATTER OF THE APPLICATION OF BOULDER EXPRESS, LLC , DOING  
BUSINESS AS BOULDER EXPRESS SHUTTLE, FOR PERMANENT AUTHORITY TO  
CONDUCT OPERATIONS AS A COMMON CARRIER BY MOTOR VEHICLE FOR HIRE.

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**ORDER DENYING EXCEPTIONS**

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Mailed Date: September 15, 2003

Adopted Date: August 13, 2003

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**I. BY THE COMMISSION**

**A. Statement**

1. This matter comes before the Commission for consideration of exceptions to the

Recommended Decision of the Administrative Law Judge (ALJ), Decision No. R03-0436

(Recommended Decision), filed by Applicant, Boulder Express, LLC, doing business as Boulder Express Shuttle and Blue Sky Shuttle (Boulder Express) on May 27, 2003. Boulder Express cites several points of error with the Recommended Decision. In addition, Boulder Express also filed a Motion to Reopen and Supplement the Record, filed on June 2, 2003.

2. In its exceptions, Boulder Express, among other things, claims error on the part of the ALJ in denying Boulder Express' motion for administrative notice as untimely and prejudicial to the intervenors. Boulder Express also claims error with the ALJ's rejection of its Exhibit 29 from the record, which consisted of a group of letters in support of its application. Additionally, Boulder Express claims it was given inadequate hearing time in which to present its case. Boulder Express also filed a motion to reopen and supplement the record with information it claims to have gathered subsequent to the hearings on this application.

3. SuperShuttle International Denver, Inc. (SuperShuttle), filed responses to the exceptions and motion to reopen and supplement the record. Generally, SuperShuttle opposed the claims of error of Boulder Shuttle in its exceptions and argued that Boulder Express had sufficient time to place a record into evidence, and therefore its motion to reopen and supplement the record should be denied.

4. Now, being duly advised in the matter, we deny Boulder Express' exceptions, and deny the motion to reopen and supplement the record.

## **II. BACKGROUND**

5. The original application was filed with the Commission on August 8, 2002 by Owner/Driver United Corporation, doing business as Blue Sky Shuttle (Blue Sky). The application sought Emergency (ETA), Temporary (TA), and Permanent authority to provide

scheduled and call-and-demand limousine passenger transportation services between Denver International Airport (DIA) on the one hand, and various points in the Denver Metro area<sup>1</sup> on the other hand. The application also sought authority to provide charter passenger transportation services between various points in the Denver Metro area on the one hand, and all points in the State of Colorado on the other hand. It should be noted here that the authority sought by Blue Sky was identical to SuperShuttle's existing authority.

6. Timely interventions were filed in this matter by Metro Taxi, Inc. (Metro), SuperShuttle, Golden West Commuter, LLC (Golden West), Nemarda Corporation, Boulder Express, Schafer-Schonewill and Associates, Inc, doing business as Englewood Express and/or Wolf Express Shuttle (Wolf Express), and Kids Wheels, LLC.

7. The Commission granted Blue Sky's ETA application on August 13, 2002, in Decision No. C02-876. In that Decision, the Commission found that Blue Sky's application stemmed from driver contracting problems incurred by SuperShuttle, which holds Certificate of Public Convenience and Necessity (CPCN) PUC No. 55686. That CPCN allows SuperShuttle to provide mainly scheduled and call-and-demand service between DIA and most points in the Denver Metro area. However, on August 7, 2002, due to a contract dispute with its drivers, SuperShuttle's Denver operations were rendered virtually paralyzed. As a result of that contract dispute, and because there was no other carrier capable of meeting the need created by the contract dispute, the Commission, pursuant to § 40-6-120(1), C.R.S., found that Blue Sky met the required test under that statutory authority for emergency temporary authority and granted the

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<sup>1</sup> The "Denver Metro area" in this application was defined to include the counties of Denver, Adams, Arapahoe, Douglas, and Jefferson, State of Colorado.

ETA for a period of 30 days. The Commission also noted that SuperShuttle was attempting to secure additional vehicles and drivers to fully restore its service. However, because that process was admittedly slow, the Commission found good cause to grant the ETA application.

8. Concerning Blue Sky's TA application, the Commission found in Decision No. C02-1003 (mailed on September 11, 2002) that Blue Sky had met its burden to show an immediate and urgent need and no other carrier capable of providing the service in question. Although SuperShuttle stated in a supplement to its intervention that it had fully restored its call-and-demand limousine service and there was no immediate and urgent need for Blue Sky's temporary call-and-demand limousine service, the Commission found that the support letters submitted by Blue Sky overcame this contention. Therefore, Blue Sky was granted a TA to conduct operations as a common carrier.

9. Blue Sky provided service under its ETA and TA until it entered into an agreement to lease its TA to Boulder Express. The Commission granted Boulder Express' request to temporarily control the Blue Sky TA pursuant to a lease agreement entered into between the two parties. *See* Decision Nos. C02-1195 and C02-1291. The lease of the TA was effective on October 22, 2002, and Boulder Express has provided service under Blue Sky's TA since that date.<sup>2</sup>

10. On November 5, 2002, by Decision No. R02-1251, this application was consolidated with two similar applications, and the request of Blue Sky and Boulder Express that Boulder Express be substituted as the applicant in this matter was granted. The substitution was

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<sup>2</sup> Blue Sky's TA was extended until a final Commission order was issued in this docket. In Decision No. C03-0393, Boulder Express' temporary lease of the TA was extended pending issuance of a final Commission order in Docket No. 02A-531CP-Lease.

conditioned upon Boulder Express filing an amended application on or before November 13, 2002. Boulder Express timely filed such an application which was noticed by the Commission on November 18, 2002. The scope of the common carrier authority Boulder Express sought in its application was identical to that sought by Blue Sky in its original application.

11. The application was heard over 11 days during January 2003. Appearances were entered on behalf of Boulder Express, Overseas Emporium, SuperShuttle, Denver Taxi, Boulder Shuttle, Metro, Golden West, and Wolf Express. Testimony was submitted on behalf of Boulder Express by several principals of Boulder Express and Blue Sky. Additionally, Boulder Express presented testimony from 30 public witnesses. SuperShuttle, Denver Taxi, and Boulder Taxi presented testimony in opposition to the application from several of its principals, as well as from eight public witnesses. Wolf Express also presented evidence from one of its principals.

12. At the conclusion of Boulder Express' case, SuperShuttle moved to dismiss certain portions of the application, to which Boulder Express acquiesced. The resulting amended and revised application is set forth as follows:

For a certificate of public convenience and necessity to operate as a common carrier by motor vehicle for hire for the:

- I. Transportation of  
passengers, in scheduled service:
  - A. Between Denver International Airport, on the one hand, and all transient hotels and motels located within a one-mile radius of the intersection of Colfax Avenue and Broadway, on the other hand;
  - B. Between Denver International Airport, on the one hand, and, on the other hand, all transient hotels and motels and all bus stations and railway stations, within an area bounded as follows: commencing at 20th Street and Broadway; thence northwest along 20th Street to Wynkoop Street; thence southwest along Wynkoop Street to Speer Boulevard; thence northwest on Speer Boulevard to Alcott Street; thence south on Alcott Street to 26th Avenue; thence

east on 26th Avenue to Zuni Street; thence north on Zuni Street to Speer Boulevard; thence southeast along Speer Boulevard to West Colfax Avenue; thence east on West Colfax Avenue to Broadway; thence south on Broadway to 10th Avenue; thence east on 10th Avenue to Logan Street; thence north on Logan Street to 20th Avenue; thence west on 20th Avenue to Broadway; thence north on Broadway to the point of beginning; and

- C. Between Denver International Airport, on the one hand, and, on the other hand, all transient hotels and motels located in the following described area: beginning at the intersection of East Arizona Avenue and Colorado Boulevard; thence south along Colorado Boulevard, as extended, to its intersection with County Line Road; thence east along County Line Road, as extended, to its intersection with Havana Street as extended; thence north along Havana Street as extended, to its intersection with Arizona Avenue, as extended, thence west along Arizona Avenue, as extended, to the point of beginning.

## II. Transportation of

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

- A. Between all points in the area comprised of the Counties of Denver, Arapahoe, and Douglas, State of Colorado, on the one hand, and Denver International Airport, on the other hand;
- B. Between Denver International Airport, on the one hand, and, on the other hand, all transient hotels and motels and all bus stations and railway stations, within an area bounded as follows: commencing at 20th Street and Broadway; thence northwest along 20th Street to Wynkoop Street; thence southwest along Wynkoop Street to Speer Boulevard; thence northwest on Speer Boulevard to Alcott Street; thence south on Alcott Street to 26th Avenue; thence east on 26th Avenue to Zuni Street; thence north on Zuni Street to Speer Boulevard; thence southeast along Speer Boulevard to West Colfax Avenue; thence east on West Colfax Avenue to Broadway; thence south on Broadway to 10th Avenue; thence east on 10th Avenue to Logan Street; thence north on Logan Street to 20th Avenue; thence west on 20th Avenue to Broadway; thence north on Broadway to the point of beginning;
- C. Between Denver International Airport, on the one hand, and, on the other hand, all transient hotels and motels located in the following described area: beginning at the intersection of East Arizona Avenue and Colorado Boulevard; thence south along Colorado Boulevard, as extended, to its intersection with County Line Road; thence east along County Line Road, as extended, to its

intersection with Havana Street, as extended; thence north along Havana Street, as extended, to its intersection with Arizona Avenue, as extended; thence west along Arizona Avenue, as extended, to the point of beginning;

- D. Between Denver International Airport, on the one hand, and, on the other hand, all transient hotels and motels located in the following described area: beginning at the intersection of Martin Luther King Boulevard and Quebec Street; thence west on Martin Luther King Boulevard to its intersection with Holly Street; thence north on Holly Street, to its intersection with Interstate 70; thence east along Interstate 70, to Quebec Street; thence south along Quebec Street to the point of beginning; and
- E. Between all points within the City and County of Denver, State of Colorado.

**RESTRICTIONS:** This application is restricted as follows:

- 1. Item I is restricted as follows:
  - A. To the extent that Items I(A) and I(B) authorize duplicating authority, only one operating right exists.
  - B. Item I(A) is restricted to the use of vehicles with a passenger capacity of not less than nine passengers, including the driver, nor more than 12 passengers, excluding the driver.
  - C. Items I(B) and I(C) are restricted to the use of vehicles having a seating capacity of not less than nine (9) nor more than 20, excluding the driver.
  - D. Transient hotels or motels referenced in Item I are defined as hotels or motels ordinarily reserving at least 50 or more rooms for the accommodation of the traveling public.
- 2. Item II is restricted as follows:
  - A. Transient hotels or motels referenced in Item II are defined as hotels or motels ordinarily reserving at least 50 or more rooms for the accommodation of the traveling public.
  - B. Item II(A) is restricted to the use of vehicles with a passenger capacity of not less than nine passengers, including the driver, nor more than 12 passengers, excluding the driver.
  - C. Item II(A) is restricted against providing service to or from transient hotels and motels, bus stations, and railway stations located within the areas described in Items II(B), II(C), and II(D).

- D. Item II (A) is restricted against providing service to, from, or between points on or west of Sheridan Boulevard; and
- E. Items II(B), II(C), and II(D) are restricted to the use of vehicles having a seating capacity of not less than nine (9) nor more than 20, excluding the driver.

**A. ALJ's Findings**

13. The findings of fact of the ALJ in his Recommended Decision were detailed and comprehensive. We touch on the highlights of those findings here, to the extent the findings are relevant to our analysis.

14. As indicated *supra*, this matter arose when SuperShuttle informed its drivers that their prior contractual agreements with the company would terminate on August 7, 2002, unless they entered into new franchise agreements on or before that date. Of the 67 drivers affected, 66 initially refused to execute new agreements. This resulted in the temporary inability of SuperShuttle to provide service at its previous level. On the same day SuperShuttle terminated its driver agreements, a substantial number of those 66 drivers who opted out of the new agreement with SuperShuttle filed this application under the name Owner/Driver United Corporation, doing business as Blue Sky Shuttle.

15. Blue Sky provided service under the ETA and TA until its insurance carrier advised that its coverage would be canceled unless the balance of its premiums was paid by October 23, 2002. Blue Sky subsequently entered into an agreement with Boulder Express whereby Boulder Express would lease Blue Sky's TA. The agreement would allow Blue Sky to utilize Boulder Express' counter at DIA. The lease of the TA became effective on October 22, 2002 and Boulder Express has operated Blue Sky's TA since that time.



16. The record indicates that Boulder Express operates the leased TA separately from its operations under its permanent operating authority. Boulder Express designates the leased TA operations as the Southern Operations, and its operations under its permanent authority as its Northern Operations. As of the date of the hearing, it was unclear how Boulder Express planned to integrate the two operations if the application was granted.

17. Boulder Express began the Southern Operations with approximately 55 to 65 vans and a similar number of drivers. At the time of the hearing however, the pool of active vans had been reduced to 18, with 15 drivers. The record indicates that of the 66 drivers who were terminated by SuperShuttle on August 7, 2002, 35 had returned as of January 31, 2003 because of their inability to generate sufficient revenue with Boulder Express.

18. When Boulder Express assumed Blue Sky's TA under the lease agreement, it also adopted Blue Sky's tariff and time schedules. The time schedule provided for scheduled service every 15 minutes between DIA and 15 downtown hotels from 5:15 a.m. through 6:45 p.m. daily. The schedule also called for the provision of scheduled service between DIA and six hotels located in the southeast Denver Metro area every 20 to 60 minutes from 5:10 a.m. through 6:05 p.m. daily. However, due to the reduction in available equipment and drivers, Boulder Express was forced to eliminate approximately one-half of the number of runs called for by the time schedule.

19. Between August 17, 2002 and December 27, 2002, the record shows that Boulder Express and Blue Sky transported between 59 and 456 passengers daily in its Southern Operations, for an average daily passenger count during this period of 182 passengers. During December 2002 and continuing through the Christmas/New Year holiday season, Boulder

Express discontinued scheduled service completely and provided only call-and-demand limousine service.

20. Concerning SuperShuttle's operations during this period, the record indicates that by mid-September 2002, SuperShuttle had expanded its fleet to 60 vehicles and by mid-October 2002 had restored its service to the levels prevailing prior to the date it terminated its drivers' contracts.

21. The scheduled service operated by SuperShuttle consists of approximately 50 pickups at each of the downtown hotels listed in its time schedule at 15-minute intervals, and approximately 25 pickups at each of the listed southeast metro area hotels at 30-minute intervals. SuperShuttle utilizes approximately 29 vehicles and 58 drivers to provide this scheduled service. This equates to approximately 6,200 passengers per day on a scheduled basis between DIA and the Denver metro area. At the time of the hearing, SuperShuttle's load factor was 20 percent.<sup>3</sup>

22. SuperShuttle also provides call-and-demand limousine service between DIA and points in the Denver Metro area utilizing three to ten vans daily, depending on demand. The call-and-demand service is provided on a "shared ride" basis, where passengers are not entitled to exclusive use of vehicles. According to the record, a van makes no more than three to four stops prior to delivering a passenger to his or her destination.

23. At hearing, SuperShuttle's witness testified that it has been placing more emphasis on its call-and-demand service, rather than its scheduled service. According to the testimony, at the time SuperShuttle was acquired by SuperShuttle International in late 2000, its

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<sup>3</sup> Load factor is calculated by dividing the total number of passengers by the total number of van seats available.

traffic mix was approximately 80 percent scheduled and 20 percent call-and-demand. Currently, call-and-demand service comprises approximately 25 to 30 percent of its overall traffic.

24. As part of its testimony, SuperShuttle admitted it occasionally misses or is late in making pick-ups in connection with its scheduled and call-and-demand service as a result of various service problems. For example, SuperShuttle claims mechanical breakdowns, larger than expected passenger counts at pick-up points and unanticipated driver problems all contribute to missed or late pick-ups. According to SuperShuttle, its policy is to either dispatch additional vehicles or reimburse the affected passenger for taxi fare to his or her destination.

25. SuperShuttle testified that the overall volume of traffic it handled during the period August through November, from 1998 through 2002 had generally declined. The volume of call-and-demand service provided during July through August 2002 has remained fairly constant, according to SuperShuttle.

26. Wolf Express holds authority pursuant to three CPCNs issued by the Commission to provide scheduled and call-and-demand limousine transportation services between DIA and portions of the Denver Metro area. Its first CPCN provides for scheduled service between DIA and downtown Denver, as well as scheduled service between DIA and two hotels located in the southeast Denver Metro area. This authority also provides for call-and-demand service between the southeast area and DIA, but only in conjunction with the scheduled service to or from that area. Its second authority provides for call-and-demand service only between portions of Douglas County and DIA. Wolf Express' third operating authority provides for scheduled service between DIA and five specified points located generally in the southern portion of the

Denver Metro area. The call-and-demand service authorized under this third CPCN may only be rendered in conjunction with scheduled service to or from the scheduled points.

27. The record shows that Wolf Express currently provides daily scheduled service between DIA and downtown Denver in a tiered schedule. Between 4:55 a.m. and 4:55 p.m. its scheduled service originates at five downtown Denver hotels, with departures every 20 minutes. Other hotels in the downtown area are served during this time on a call-and-demand basis in conjunction with the scheduled service. Between the hours of 7:20 p.m. and 11:20 p.m., Wolf Express' scheduled service originates at DIA with departures to downtown Denver every 30 minutes. Scheduled service between the two southeastern Denver Metro area hotels is provided twice daily.

28. Wolf Express now provides service with 12 vans seating 15 passengers each. According to its testimony, the number of reservations Wolf Express received for service to DIA generally declined between August 2002 and January 2003. The number of passengers Wolf Express transported from 11 hotels that appeared in support of Boulder Express' application declined during the same period, according to Wolf Express.

29. Also of note in the record is the fact that the hotel occupancy rate in the Denver Metro area has declined for the past three years from 68.6 percent in 2000 to 60.3 percent in 2002. According to the record, hotel occupancy rates are expected to remain flat for 2003 and to increase by 2 to 3 percent in 2004.

30. According to the ALJ, of the 38 public witnesses presented by Boulder Express in support of its application, most were concentrated in the downtown Denver area or in the southern portion of the Denver Metro area. The ALJ found that very little testimony was

presented in support of Boulder Express' proposal to provide scheduled service between DIA and the southern metro area, as well as the proposed call-and-demand service between DIA and the Stapleton area, or between points within the City and County of Denver.

31. The witnesses provided by Boulder Express identified various problems with SuperShuttle and Wolf's service. Generally, the witnesses complained of late pick-ups, full vans on scheduled runs, missed pick-ups, delays in getting to or from DIA, faulty equipment, and poor customer service by drivers. Of the witnesses who testified to service difficulties as a result of SuperShuttle's cancellation of its drivers' contracts on August 7, 2002, most testified that the problems were short-lived and that SuperShuttle promptly restored service to pre-August 7, 2002 levels.

32. Although Boulder Express' witnesses testified as to general service problems associated with SuperShuttle and Wolf Express, the ALJ found that there was little evidence that the two carriers' problems were chronic. Indeed, the evidence showed that these problems, if anything, were rare given the number of trips and pick-ups performed by the two carriers daily. The ALJ further found that much of the support of Boulder Express' downtown Denver portion of the application was motivated "by a desire to secure additional choices among available carriers rather than by problems encountered with attempts to use the existing services provided by SuperShuttle or Wolf."

33. As for the southern metro area, the ALJ found the problems encountered by witnesses in connection with their use of existing call-and-demand services more acute. The ALJ found that missed or late pick-ups were more frequent and resulted in more severe consequences to passengers. The ALJ also found complaints regarding equipment and drivers more

pronounced. The result of these problems is that entities in the southern metro area either discontinued their use of SuperShuttle and Wolf Express, or minimized the use of their call-and-demand services. Further, the ALJ found these problems pre-dated the August 2002 SuperShuttle service disruption.

34. The legal standard applied by the ALJ in this matter was that of regulated monopoly. Under this doctrine, an applicant for passenger carrier authority has the burden of proving by substantial and competent evidence that there is a public need for the proposed service, and that the service being provided by current carriers with authority in the area sought is substantially inadequate. *See, Rocky Mountain Airways v. P.U.C.*, 181 Colo. 170, 509 P.2d 804 (1973); *Colorado Transportation Co. v. P.U.C.*, 158 Colo. 136, 405 P.2d 682 (1965); § 40-10-105(1), C.R.S. However, the test for substantial inadequacy is not perfection. A general pattern of inadequate service, as opposed to isolated incidents of dissatisfaction must be established in order to demonstrate substantial inadequacy. *Ephraim Freightways, Inc. v. P.U.C.*, 151 Colo. 596, 380 P.2d 228 (1963).

35. Additionally, the ALJ determined that an applicant for common carrier authority must establish its fitness both financially and operationally to conduct the service it proposes. Operational fitness generally includes whether an applicant possesses the personnel, facilities, equipment, and managerial experience to conduct for-hire passenger carrier operations. The applicant must also show it has the ability and willingness to comply with applicable Commission law governing motor carrier operations. *Thacker Brothers Transportation v. Public Utilities Commission*, 543 P.2d 719 (Colo. 1975).

36. Given the competent evidence contained in the record, the ALJ found that Boulder Express established a need for additional call-and-demand limousine service, as well as the substantial inadequacy of any existing service within the southern area of the Denver Metro area, as described as follows:

For a certificate of public convenience and necessity to operate as a common carrier by motor vehicle for hire for the transportation of

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

- I. Between Denver International Airport, on the one hand, and, on the other hand, all transient hotels and motels located in the following described area:

Commencing at the intersection of Quincy Avenue and Holly Street, thence east on Quincy Avenue, as extended, to Yosemite Street, thence south on Yosemite Street to East Belleview Avenue, thence east on East Belleview Avenue to Peoria Street, thence south on Peoria Street, as extended, to County Line Road, thence west on County Line Road to Holly Street, thence north on Holly Street to the point of beginning.

- II. Between Denver International Airport, on the one hand, and, on the other hand, all points in the following described area of Douglas County, State of Colorado:

Commencing at the intersection of University Boulevard and County Line Road, thence east on County Line Road to Peoria Street, thence south on Peoria Street to Lincoln Avenue, thence west on Lincoln Avenue to University Boulevard, thence northwest on University Boulevard to the point of beginning.

**RESTRICTIONS:**

- A. Transient hotels or motels referenced in Item I are defined as hotels or motels ordinarily reserving as least 50 or more rooms for the accommodation of the traveling public.
- B. Item I is restricted to the use of vehicles having a seating capacity of not less than nine nor more than 20, excluding the driver.
- C. Item II is restricted to the use of vehicles with a passenger capacity of not less than nine passengers, including the driver, nor more than 12 passengers, excluding the driver.

The ALJ also found that Boulder Express established that it had sufficient operational resources to serve that area.

37. The ALJ indicates that the evidence failed to establish the need for any additional scheduled or call-and-demand service between DIA and the downtown Denver area. Rather, he determined that the evidence revealed the overall demand for service within this area has generally declined within the past three years. The evidence also failed to establish that the existing service of SuperShuttle or Wolf Express within the downtown Denver area was substantially inadequate as required under the doctrine of regulated monopoly. Although Boulder Express' witnesses supported its application to expand the pool of carrier services as large as possible, the ALJ determined that such a result would be inconsistent with the doctrine of regulated monopoly.

38. Given the evidence presented, the ALJ concluded that there was virtually no support demonstrated for scheduled or call-and-demand service within the areas encompassed by Items I.A., I.B., I.C., II.B., II.D., or II.E. of the application.

#### **B. Boulder Express' Exceptions**

39. In its exceptions to the Recommended Decision, Boulder Express lists 44 conclusory statements it identifies as points of error it claims were committed by the ALJ in the Recommended Decision. None of the 44 points cite any specific evidence to support them, nor does Boulder Express provide any supporting argument or analysis. Virtually all of the points of error relate to SuperShuttle's service problems and take the ALJ to task for not considering those points in the Recommended Decision.



40. In addition, Boulder Express provides approximately nine pages of excerpts of testimony from various witnesses it presented at hearing. Nothing in the exceptions provides explanatory support for those pieces of testimony presented. We will nonetheless construe the nine pages of summarized testimony as Boulder Express' argument to overturn the ALJ's decision to deny Boulder Express operating authority between DIA and the downtown Denver area.

41. Boulder Express makes similar conclusory statements under the caption, SOUTHERN AREA AND OTHER AREAS. Boulder Express provides pieces of direct testimony of several of its witnesses. Although much of the testimony is unsupported by analysis, Boulder Express does conclude that the "substantial adequacy [sic] of the [SuperShuttle] service in the southern area is also evidence of the substantial inadequacy of its service between DIA and the Denver Metro area in general..."

42. Finally, Boulder Express makes several claims of procedural error committed by the ALJ. Two of these claims are unsupported by any argument or analysis. First, Boulder Express claims error in denying its motion for administrative notice. Boulder Express also claims error in the denial of its motion for additional time to present public witnesses. In its only supported argument, Boulder Express claims the ALJ committed a procedural error by rejecting the support statements (identified at hearing as Exhibit 29) it offered in evidence of firms and individuals that did not appear at the hearing. According to Boulder Express, the Commission has often received and considered written statements and letters from individuals and firms not offering testimony at hearing.

43. Boulder Express concludes that the record clearly shows a need for its scheduled and call-and-demand service in the areas not granted by the ALJ, particularly downtown Denver and “nearby areas.” Boulder Express asserts that it is fit, able, and willing to provide the service. According to Boulder Express, granting its exceptions would not jeopardize the continued service under the SuperShuttle or Wolf Express authorities.

**C. SuperShuttle’s Response**

44. In its response to Boulder Express’ exceptions, SuperShuttle points out that virtually all of the 44 points of error listed are without support. SuperShuttle does, however, respond to the procedural points of error claimed by Boulder Express.

45. SuperShuttle conjectures that Boulder Express’ assignment of error regarding administrative notice may refer to Boulder Express’ motion for administrative notice of certain tariffs and time schedules made on the last day of the hearing, after the presentation of evidence had closed. On the other hand, SuperShuttle also speculates that the claim of error could refer to Boulder Express’ written motion for administrative notice of the same documents filed on March 4, 2003. The ALJ denied both motions on the grounds that they were untimely and were prejudicial to the intervenors.<sup>4</sup> SuperShuttle points out that the exceptions present no argument to overturn the ALJ’s findings here.

46. SuperShuttle argues that contrary to Boulder Express’ assertions, it was not error for the ALJ to reject Exhibit 29 at the hearing. This exhibit consisted of support letters for the application from people who did not testify at the hearing. According to SuperShuttle, these were unverified and unauthenticated letters. When given the opportunity, SuperShuttle claims

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<sup>4</sup> See the January 31, 2003 volume of the hearing transcripts at page 241, and the ALJ’s Interim Order No. R03-0411-I, mailed April 21, 2003.

Boulder Express' witness could not identify the people whose names appeared on the letters, nor could he confirm the signatures. Further, the witness knew nothing about the circumstances under which the letters were purportedly signed. The ALJ therefore rejected Exhibit 29 as having no probative value and as prejudicial, since intervenors had no opportunity to cross-examine the signatories in an attempt to authenticate the letters.

47. SuperShuttle also disputes the assertion that the Commission often has received and considered similar documents. According to SuperShuttle, it was Boulder Express' burden to authenticate the documents and it could not do so. Additionally, SuperShuttle asserts Boulder Express is confusing the standards of evidence applicable to summary, temporary authority applications with the more stringent requirements in an adjudicatory hearing regarding a permanent application.

48. In response to Boulder Express' assertion in its 44th assignment of error that it was denied additional hearing time to present public witnesses, SuperShuttle argues that in fact, Boulder Express did not use all of the hearing time allotted to it for public witnesses. Additionally, Boulder Express declined the opportunity for an additional day of hearing to present public witnesses, as well as the accommodations of the ALJ and the intervenors for additional time.

49. In support of the ALJ's findings regarding the application, SuperShuttle raises several issues. Although SuperShuttle acknowledges that the application was solely the result of its contract dispute with its drivers in August 2002, it points out that the record shows that SuperShuttle rapidly rebuilt its fleet to 45 vans by the end of August 2002, and by late January 2003, it was operating 80 vehicles with 84 drivers. As a result, SuperShuttle argues that

it has the means, resources, and experience to provide scheduled and call-and-demand service in the downtown and southeast areas under its operating authority and according to its schedule, which is the schedule Blue Sky and subsequently Boulder Express adopted in full. Therefore, SuperShuttle concludes that the original basis for the permanent authority application by Blue Sky no longer exists.

50. SuperShuttle points out that overall demand for airport shuttle service has declined over the last three years with no indication of improvement until 2004, while the supply has increased. SuperShuttle cites evidence that indicates overall hotel occupancy rates are down over the last several years, and the prediction that this trend will continue, at least through the rest of this year. This decline is evident, according to SuperShuttle, in Boulder Express' traffic analysis for 2002 that showed a sharp decline in passengers during the Christmas and New Year holiday season that year. Although SuperShuttle concedes that a normal decline in passenger traffic typically occurs this time of year, it points out that demand for call-and-demand service usually stays static or increases during the holiday season.

51. Taking the evidence as a whole, SuperShuttle maintains that the ALJ was correct in finding that Boulder Express showed no public need for scheduled service in the southeast metro area. In fact, SuperShuttle points out that Boulder Express discontinued service in December and January to hotels in that area. Based on the evidence, SuperShuttle also supports the ALJ's finding that Boulder Express failed to demonstrate a need for additional scheduled authority between downtown Denver hotels and DIA. SuperShuttle cites the ALJ's finding that the substance of the witnesses' testimony in support of additional service to downtown was the desire to secure additional transportation options, not that current service was substantially inadequate. Finally, SuperShuttle agrees with the Recommended Decision that the evidence

failed to establish a need for additional call-and-demand airport shuttle service, or that SuperShuttle's service was substantially inadequate beyond the authority granted by the ALJ.

**D. Motion to Reopen Record**

52. Boulder Express filed a Motion to Reopen and Supplement Record on May 30, 2003. The motion attempts to introduce into evidence a document which, according to Boulder Express, shows the substantial traffic it has booked. Boulder Express asserts that it is important the items attached to the motion be considered so the record reflects "the current situation."

53. SuperShuttle responded in opposition to the motion. It opposes the motion on several grounds. First, SuperShuttle argues that the Commission has already denied a portion of the motion concerning affidavits of Mr. Howard D. Davey. SuperShuttle also maintains that the motion is untimely, would undermine the integrity of the hearing process, would deny SuperShuttle its right to due process, and is not reliable.

**E. Analysis**

54. We find Boulder Express' exceptions to the Recommended Decision lacking and without merit. We agree with the ALJ that the correct legal standard with which to determine the merits of this application is that of regulated monopoly. The Colorado Legislature and legal precedent have made it evident that a determination of whether the facts indicate a need for additional common carrier service in a particular area is entirely predicated on that standard. We are bound by the law and may not deviate from its tenets.

55. We further find that the ALJ applied the standard of regulated monopoly correctly in his analysis of the facts presented at hearing. In order to determine a public need for the proposed service, the applicant has the burden of proving by substantial and competent evidence

that a public need exists for its service, and that the service of existing certificated carriers is substantially inadequate. *See, Rocky Mountain Airways, supra.*

56. It has been an unambiguous precedent for a number of years that a common carrier serving a particular area is entitled to protection against competition, as long as the offered service is adequate to satisfy the needs of the area. *See, Public Util. Comm'n v. Donahue*, 138 Colo. 492, 335 P.2d 285 (1959); *Denver & R.G.W.R.R. v. Public Util. Comm'n*, 142 Colo. 400, 351 P.2d 278 (1960); *Ephraim Freightways, Inc., supra.* When an applicant seeks authority in an area where a common carrier already provides transportation services, the applicant must do more than simply show that the existing common carrier's authority can be taken away by certain means. It must also show more than the fact that it can provide "better" service. *Public Util. Comm'n v. Verl Harvey, Inc.*, 150 Colo. 158, 371 P.2d 452 (1962).

57. The issue implicated in granting or denying a CPCN for a common carrier is not whether the extent of business in the proposed area is sufficient to warrant an additional certified carrier, but whether the public convenience and necessity demand additional service. *Denver & R.G.W.R.R., supra; Ephraim Freightways, Inc., supra.* The existence of an adequate and satisfactory service by common carriers already in the area is a negation of a public need and demand for added service by another carrier. *Id.* The adequacy, availability, and competitive character of existing service are proper factors to consider in concluding that the applicant's service is not required to serve the public convenience and necessity. *Trans-Western Express, Ltd. v. Public Util. Comm'n*, 877 P.2d 350 (Colo. 1994).

58. Therefore, given the parameters within which we must navigate, we find the ALJ's analysis to be correct in all respects. Analyzing the competent evidence contained in the

record, nothing has been presented to dissuade us that the ALJ was correct in finding that Boulder Express failed to establish a need for additional scheduled, or call-and-demand limousine service for those portions of its application that included virtually all portions of the Denver Metro area. We further agree with the ALJ that the competent evidence reveals that Boulder Express did establish a need for additional call-and-demand limousine service, as well as the substantial inadequacy of any existing service within the southern portion of the Denver Metro area. We also agree that Boulder Express demonstrated its ability and fitness to provide the call-and-demand service in the southern Denver Metro area, as that area is more fully described *supra*.

59. The record also supports the ALJ's finding that many of the witnesses presented by Boulder Express in support of its application for service in the downtown area merely wished to secure as large a pool of carrier services as possible, rather than indicating the substantial inadequacy of existing service. Public need means the need of the public as a whole, not simply the needs of witnesses who testify in favor of an applicant's proposed services. *Morey v. Public Util. Comm'n*, 629 P.2d 1061 (Colo. 1981). Therefore, we find that the ALJ applied the correct legal standard in his analysis of the evidence presented, and in making his findings and conclusions.

60. Boulder Express argues that it was error for the ALJ to reject Exhibit 29 at hearing. According to Boulder Express, it is common for the Commission to accept and consider such documents. The record shows that Boulder Express' witness was not able to identify any of the parties associated with the letters included as part of the Exhibit. The witness could not confirm the signatures on the letters, nor could he relate any information as to the circumstances under which the signatures appeared. As a result, the ALJ rejected Exhibit 29, finding it had no

probative value and was prejudicial to the intervenors because of the inability to cross-examine witnesses to authenticate the letters.

61. The adjudicatory proceedings of the Commission are conducted within the ambit of the *Colorado Rules of Civil Procedure*, and concomitantly the *Colorado Rules of Evidence* (CRE). Pursuant to *CRE Rule 901(a)*, the “requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” *Id.* In relevant part, this may include testimony that a matter is what it is claimed to be. *CRE 901(b)(1)*. Authentication as a condition precedent to the admissibility of documentary evidence is satisfied by evidence sufficient to support a finding that the document in question is what its proponent claims it to be. *See, Rojhani v. Meagher*, 22 P.3d 554 (Colo.App. 2000); *People v. Lesslie*, 939 P.2d 443 (Colo.App. 1996).

62. It is apparent that Boulder Express failed to authenticate the documents it attempted to admit into the record, as was its burden. Its witness was unable to provide any testimony as to the authenticity of the documents. As a threshold matter, without authentication, the ALJ was correct to find that the documents had no probative value and reject Exhibit 29 in its entirety. We further agree with SuperShuttle that Boulder Express confuses the standards of evidence applicable to temporary authority applications versus the requirements at hearing for a permanent application. Consequently, we uphold the ALJ’s findings here and deny Boulder Express’ exceptions regarding the admissibility of Exhibit 29.

63. Boulder Express also assigns as error the ALJ’s findings and conclusions “[i]n denying [Boulder Express’] motion for administrative notice.” In its response, SuperShuttle



speculates that, because Boulder Express failed to provide any support as to this assignment of error, it must assume that Boulder Express' arguments relate to the ALJ's denial of Boulder Express' motions at hearing and on March 4, 2003, for administrative notice of certain tariffs and time schedules made on the last day of the hearing. As indicated *supra*, the ALJ denied both motions. Boulder Express offers no support for its contention that it was error for the ALJ to deny the motions. We find nothing in the record to overturn the ALJ's findings. Therefore, we deny Boulder Express' exceptions regarding this issue.

64. Boulder Express also argues that it was denied additional hearing time to present public witnesses. Again, this assertion is unsupported; however, we construe the argument to be that Boulder Express asserts prejudice as a result of its claim. In its response, SuperShuttle points to the record to indicate that Boulder Express had ample time to present its public witnesses but instead declined the opportunity for an additional day of hearings.

65. SuperShuttle points out that when offered the opportunity to present public witnesses on January 9 and 10, 2003, Boulder Express declined. As a result, the testimony of Boulder Express' public witnesses was to begin on the next scheduled hearing day, which was January 13, 2003; however, Boulder Express had no witnesses to present. Due to a conflict in Boulder Express' counsel's schedule, the afternoon of January 16, 2003, and most of the day on January 17, 2003, was made available for Boulder Express to present its public witnesses. Boulder Express' public witnesses did not begin testifying until 2:30 p.m. on January 16, 2003. Boulder Express declined to present any witnesses on January 17, 2003, as had previously been arranged.

66. At the close of the hearing on January 23, 2003, according to SuperShuttle, Boulder Express again requested additional time for public witnesses. The ALJ made January 28, 2003 available for Boulder Express' public witnesses, subject to allowing intervenors time to present their case January 29 through 31, 2003, as scheduled, and on February 10 and 11, 2003. Boulder Express declined this offer at the January 28, 2003 hearing.

67. A review of the record supports SuperShuttle's assertions. We find that Boulder Express was offered every opportunity by the ALJ to present its public witnesses, but for unknown reasons failed to take advantage of those opportunities. Our review of the record supports SuperShuttle's assertions that it is disingenuous for Boulder Express to now claim error. We therefore reject Boulder Express' claim that it had insufficient time to present public witnesses.

68. Consistent with the above analysis, we uphold the ALJ's Recommended Decision in its entirety, and deny Boulder Express' exceptions in their entirety.

69. In its Motion to Reopen Record and Supplement Record, Boulder Express requests that the record be reopened in this matter to receive and consider documents it attached to the motion. The documents purportedly consist of information regarding traffic booked by Boulder Express and convention traffic it has handled since February 2003. The documents submitted also contain affidavits submitted by Mr. Howard Davey which purport to show that he monitored Wolf Express traffic at various downtown Denver hotels.

70. SuperShuttle objects to the motion on several grounds. Specifically, SuperShuttle contends the motion should be denied because it: 1) is untimely; 2) seeks to undermine the

integrity of the hearing process and evidentiary record; 3) seeks to deny fundamental fairness and due process to SuperShuttle; and 4) is inaccurate and unreliable in several aspects.

71. We agree with SuperShuttle that the motion should be denied. We find no good cause stated by Boulder Express to reopen the record to receive the proposed new evidence. Nothing in the motion convinces us that this grossly out-of-time evidence should be accepted. The record clearly reveals that Boulder Express had ample opportunity to present its case in chief. There is no indication that Boulder Express was not afforded due process at any time during the application process. The Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations*, 723-1-91(b) provides in relevant part that "[t]he Commission ..., for good cause shown, may order ... that the record be reopened for further proceedings." We find that the motion fails to state good cause to reopen the record to receive the requested information. Therefore, Boulder Express' Motion to Reopen and Supplement Record is denied.

### **III. ORDER**

#### **A. The Commission Orders That:**

1. The exceptions filed by Boulder Express, LLC, doing business as Boulder Express Shuttle and Blue Sky Shuttle to Recommended Decision No. R03-0436 are denied in their entirety consistent with the discussion above.

2. The findings and conclusions of the Administrative Law Judge in Recommended Decision No. R03-0436, in granting in part and denying in part the application of Boulder Express, LLC, doing business as Boulder Express and Blue Sky Shuttle are upheld in their entirety.

3. The motion of Boulder Express, LLC, doing business as Boulder Express Shuttle and Blue Sky Shuttle to Reopen Record and Supplement Record is denied.

4. The 20-day time period provided by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the Commission mails or serves this Order.

5. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING  
August 13, 2003.**

(S E A L)



ATTEST: A TRUE COPY

Bruce N. Smith  
Director

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

POLLY PAGE

Commissioners

CHAIRMAN GREGORY E. SOPKIN  
CONCURRING.

COMMISSIONER JIM DYER RECUSED  
HIMSELF.

**IV. CHAIRMAN GREGORY E. SOPKIN CONCURRING**

1. Today we put a large part of a transportation company out of business. We did so not because of any improper conduct by the company, but because it dared to exercise the very quality to which a market-based society otherwise aspires. It dared to compete.

2. We had no choice in the matter because the Commission is a creature of law, and therefore bound to the law. As painstakingly demonstrated in the Commission's decision – with which I concur in all respects – Colorado statute and case law apply the doctrine of “regulated monopoly” to forbid new transportation companies from entering an existing company's territory unless the former demonstrates “substantially inadequate” service by the latter.<sup>5</sup> This, mind you, is more than ordinary bad service. It must be a general pattern; dissatisfaction and legitimate complaints will not do.<sup>6</sup>

3. Faced with this burden, it is no wonder that Boulder Express, LLC, doing business as Boulder Express Shuttle and Blue Sky Shuttle (Boulder Express) failed to satisfy the standard for the majority of services it sought to provide. The record is replete with evidence that Boulder Express in fact provided better service than the incumbent monopoly carrier in many instances.<sup>7</sup> But this did not win the day, because better service is not the standard.<sup>8</sup>

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<sup>5</sup> *Rocky Mountain Airways v. P.U.C.*, 509 P.2d 804 (Colo. 1973); § 40-10-501(1), C.R.S. There are some minor exceptions to the doctrine, for example, luxury limousine providers, and taxicabs in counties with a population greater than 60,000. See §§ 40-10-105(2) and 40-16-101 *et seq.*, C.R.S. But for most intrastate passenger providers, the rule holds firm. Even for taxicabs in populations greater than 60,000, the doctrine of “regulated competition” applies, which, given the legal and economic barriers involved with having to try and satisfy the standard, is hardly different from “regulated monopoly.”

<sup>6</sup> *Ephraim Freightways*, *supra*.

<sup>7</sup> The problems with the monopoly carrier included late pick-ups, full vans on scheduled runs, missed pick-ups, delays in getting to or from Denver International Airport, faulty equipment, and driver-related inadequacies. See Decision No. R03-0436, ¶ 37.

<sup>8</sup> *Verl Harvey*, *supra*.

4. It matters not, then, that a competitor may offer better service, safer vehicles, lesser prices, more courteous drivers. Whether or not the competitor or incumbent would succeed in an open marketplace, or the public would benefit from competition, are irrelevancies. If the monopolist's service is merely "adequate," the inquiry is at an end.<sup>9</sup>

5. Whatever rationale once existed to justify monopoly transportation carriers has long since disappeared. The foundation of plenary regulation by utility commissions is that of "natural monopoly" – that an industry is so capital-intensive that society benefits (in the form of lower prices and greater efficiency) by having only one provider supply the service in question. This theory was greatly diminished after airline and trucking deregulation both proved to be enormously successful.

6. No one seriously argues anymore that transportation providers such as shuttles and taxis are a natural monopoly. Instead, they assert an oxymoron – "destructive competition" – meaning only a few carriers can survive. Assuming the premise to be true, this fails to differentiate transportation from virtually any other industry. Manufacturers of cars or microchips, banks, barbers, bistros – only a finite number will survive. Those that do generally will have some combination of better product, service, or price. This is the result of an open marketplace, to be desired, not curtailed.

7. The monopoly providers also predict a parade of horrors – unsafe vehicles, dozens of vehicles clogging hotels and airports – if transportation is deregulated. These arguments are wanting. Concerning safety, requirements such as proof of insurance and even

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<sup>9</sup> *Ephraim Freightways, supra* (existence of adequate and satisfactory service by existing carrier negates public need and demand for another carrier's service).

vehicle inspections<sup>10</sup> can continue without having the full panoply of other regulations, such as monopoly turf protection, apply. Regarding congestion, hotels and airports are free to enter contracts and thereby restrict the number of providers who may serve their location.

8. Greater minds than I have extensively described the benefits that flow from competition, such as increased efficiency, better service, and lesser prices. There is every reason to believe these benefits would apply equally to transportation.

9. Yet almost every year some legislator introduces a bill to deregulate some aspect of transportation, and every year the majority of some committee crushes it. Even when dozens of would-be entrepreneurs of almost every race and nationality show up to testify, in essence, “let me compete” (as happened a few years ago), the bill gets defeated.

10. What we are left with in the ostensibly free market State of Colorado is not unlike rent control in New York City. Everybody seems to realize that it subsidizes the few at the expense of the many and leads to perverse results, but those that benefit are better organized than the diffuse majority. So nothing gets changed, and it remains easier to open a transportation business in Russia than Colorado.<sup>11</sup> And attorneys with straight faces come to the Commission

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<sup>10</sup> Proof of insurance should suffice, because insurance companies mandate their own safety requirements to be followed as a precondition to liability insurance protection. It is somewhat naive to believe that a state agency can adequately ensure the safety of thousands of vehicles (unless you had an enormous increase in personnel to do the job, which would probably be cost-prohibitive); although continuing an inspection program is a small price to pay if that is the only way to gain the benefits of a competitive market.

<sup>11</sup> This statement was made to me years ago by a Russian immigrant seeking to open a transportation business in Colorado.



and argue that allowing a new entrant leads to “destructive competition” – but argue it they do, because that is the law. I make the modest suggestion that perhaps it is time to revisit the law.

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

GREGORY E. SOPKIN

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Chairman