

Decision No. C03-1206

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

DOCKET NO. 02A-464CP

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THE APPLICATION OF DSC/PURGATORY, LLC, DOING BUSINESS AS MOUNTAIN  
TRANSPORT, FOR AN EXTENSION OF CERTIFICATE OF PUBLIC CONVENIENCE AND  
NECESSITY PUC NO. 54985.

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**DECISION DENYING APPLICATION FOR REHEARING,  
REARGUMENT, OR RECONSIDERATION**

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Mailed Date: October 27, 2003

Adopted Date: October 8, 2003

**I. BY THE COMMISSION**

**A. Statement**

1. This matter comes before the Commission for consideration of the Application for rehearing, reargument, or reconsideration (RRR) by Durango Mountain Transportation, Inc. (DTI), filed on September 25, 2003. DTI requests reconsideration of Decision No. C03-0929 (Decision). In that Decision, we granted Exceptions to the Recommended Decision filed by DSC/Purgatory which does business as Durango Mountain Resort (DMR), and granted DMR's application for a certificate of public convenience and necessity (CPCN). We concluded that the overall context of the situation presented demonstrated that DTI's service was substantially inadequate and that the public convenience and necessity required that DMR provide the service it proposed.

2. Having carefully considered the matter, we deny DTI's application for RRR.

**B. Discussion**

3. DTI argues that the Commission erred in finding that DMR met its burden of proving DTI's services to be substantially inadequate. The Commission's Decision stated that "[T]he narrow interpretation of the regulated monopoly doctrine applied by the ALJ in this instance ignores the overall context of the situation presented in this case, something the Commission is not at liberty to do." The Commission considered a range of facts in finding DTI's service to be substantially inadequate, and a finding of substantial inadequacy is a factual question to be determined by the Commission. *RAM Broadcasting. v. PUC*, 702 P.2d 746, 750-751 (Colo. 1985).

4. DTI asserts that the Commission should not be able to use high rates as a factor in determining that DTI was unwilling or unable to provide service because the rates "were approved by the Commission." No authority is cited for this proposition. Our Decision pointed out that during the 2001 through 2002 ski season, an estimated 20,000 persons needed transportation from the airport to DMR. DTI transported only 132 persons from the airport to the mountain, and 140 persons from the mountain to the airport. *Decision*, page 8. DTI provided service to less than 1 percent of the passenger total. In our order accepting DMR's exceptions, the Commission found DTI's rates to be very expensive, not illegal. The Commission's consideration of DTI's rates in this context is appropriate.

5. DTI believes the Commission erred in relying on "the fact that DTI has only one base of operations, that customers may have to wait a short time prior to being picked up from DMR, and that DTI did not attempt to expand to two bases of operation." Our focus was on the long wait that customers face, at least 45 minutes, which is the consequence, in part, of having

one base of operations far from the resort. *Decision page 7*. Indeed, if customer waits were not lengthy, the single base of operations, far from the resort, would not be an issue in this case.

6. DTI indicates that the Commission somehow places the burden on DTI to prove that it will take on additional bases of operation (pages 5 and 7, application for RRR). This is not the case. Rather, the Commission believes that DMR has met *its* burden of demonstrating inadequate service. The Commission has evaluated the record and determined that the evidence proffered by DMR shows that DTI's service to DMR tourists was inadequate, in part because of lengthy waits for service, and that having one base of operations contributed to that shortfall.

7. The Commission also noted that the record reflects that DTI does not have a vehicle fleet sufficient to meet the needs of the public, given the 7,000 square miles of coverage it is required to provide, and its distance from the public it is required to serve. *Decision, page 14*. As discussed in our order granting the exceptions, factual findings indicate waits of *at least* 45 minutes for service, often longer, depending on whether drivers were occupied. *Decision, page 7*. Again, the focus is on the lengthy wait for service, a result, in part, of the small vehicle fleet.

8. DTI relies on a Commission decision regarding an application of Boulder Express, LLC for a CPCN to support the notion that the Commission erred in finding substantially inadequate service in this case (Decision No. C03-1045, adopted August 13, 2003, denying the application for CPCN). The facts in the Boulder Express case were very different in that the Administrative Law Judge (ALJ) found that although SuperShuttle International Denver, Inc., had sporadic issues, "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.” *Boulder Express Decision* at 7. That case confirms the principle that a general pattern of inadequate service, as opposed to isolated incidents of dissatisfaction, must be established in order to demonstrate substantial inadequacy service. *Ephraim Freightways, Inc. v. P.U.C.* 151 Colo. 596, 380 P.2d 228 (1963). In this case, the facts led the Commission to conclude that there was substantially inadequate service.

9. DTI argues that that there was “no showing of a broad public need for increased services in the area.” DTI’s theme is that it never failed to respond to a call, and that DTI carried all requesting passengers. According to DTI, that the majority of prospective passengers use rental cars or other services demonstrates only that DTI carries a small portion of resort passengers. DTI ignores the Commission’s reliance on evidence that the reason DTI carries such a small percentage of passengers is because of its poor service, including long waits and expensive prices. There is also ample evidence in the record indicating resort demand for transportation services (*see for example*, pages 9 through 15 ALJ Recommended Decision).

10. DTI also states that the Commission erred in finding that DMR proved its fitness to operate: “no finding of fact supports that conclusion.” However, the ALJ, in the Recommended Decision, notes in her findings of fact that “there is no serious dispute about the financial fitness of the Applicant or about the operational fitness of the Applicant.” *Recommended Decision*, p.16, ¶¶50-51. To the extent there is a question, we now clarify that we uphold that finding.

11. For these reasons, the Application for RRR is denied.

**II. ORDER**

**A. The Commission Orders That:**

1. The Application for Rehearing, Reargument, or Reconsideration by Durango Mountain Transportation, Inc., is denied.

2. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING  
October 8, 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**

**POLLY PAGE**

**JIM DYER**

Commissioners