

Decision No. R04-0516-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03A-381BP

IN THE MATTER OF THE APPLICATION OF EDWIN W. SIFFERLIN, DOING BUSINESS AS DENVER EXPRESS SHUTTLE, FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO OPERATE AS A COMMON CARRIER BY MOTOR VEHICLE FOR HIRE.

DOCKET NO. 04A-143CP

IN THE MATTER OF THE APPLICATION OF AURORA LIMOUSINE, LLC, DOING BUSINESS AS AURORA AIRPORT SHUTTLE, FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO OPERATE AS A COMMON CARRIER BY MOTOR VEHICLE FOR HIRE.

**INTERIM ORDER OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
DENYING MOTION TO CONSOLIDATE
AND DENYING AS MOOT THE MOTION
TO SHORTEN RESPONSE TIME**

Mailed Date: May 20, 2004

I. STATEMENT

1. On May 15, 2004, Edwin W. Sifferlin, doing business as Denver Express Shuttle (Sifferlin), filed an Application for a Certificate of Public Convenience and Necessity to Operate as a Common Carrier by Motor Vehicle for Hire (DES Application). Mr. Sifferlin seeks authority to operate as a common carrier of passengers and their baggage in scheduled and call-and-demand limousine service between Denver International Airport, on the one hand, and all points within a seven-mile radius of the intersection of Colfax Avenue and Broadway, Denver, Colorado, on the other. The DES Application commenced Docket No. 04A-115CP. Golden

West Commuter, LLC (Golden West), Nemarda Corporation (Nemarda), Metro Taxi, Inc. (Metro), and SuperShuttle International Denver, Inc. (SuperShuttle), intervened of right in Docket No. 04A-115CP; and all intervenors oppose the granting of the DES Application.

2. On March 24, 2004, Aurora Limousine LLC, doing business as Aurora Airport Shuttle (Aurora Limousine), filed an Application for a Certificate of Public Convenience and Necessity to Operate as a Common Carrier by Motor Vehicle for Hire (Aurora Application). Aurora Limousine seeks authority to operate as a common carrier of passengers and their baggage in scheduled service between, on the one hand, Denver International Airport and, on the other hand, all points in Aurora, Colorado, all points within a four-mile radius of the intersection of Main Street and Colorado Highway 83, in Parker, Colorado, and all points within a four-mile radius of the intersection of Wilcox Street and 5th Street, in Castle Rock, Colorado. The Aurora Application commenced Docket No. 04A-143CP. Metro, SuperShuttle, and Nemarda intervened of right in Docket No. 04A-143CP;¹ and each intervenor opposes the granting of the Aurora Application. The hearing in that proceeding is scheduled for June 7, 2004.

3. On May 4, 2004, in Docket No. 04A-115CP Golden West filed, *inter alia*, a Motion to Dismiss and Alternate Motion *in Limine*. On May 17, 2004, SuperShuttle filed in that docket a Motion to Limit Applicant's Evidence and to Dismiss Application. By Decision No. R04-0514-I, the undersigned Administrative Law Judge (ALJ) denied those motions. In that order the ALJ also vacated the hearing date and scheduled a prehearing conference for May 24, 2004, to establish a procedural schedule and a hearing date in that proceeding. Thus, at present, there is no hearing scheduled in Docket No. 04A-115CP.

¹ Golden West is not an intervenor in Docket No. 04A-143CP.

4. On May 4, 2004, Metro filed in Docket No. 04A-143CP a Motion to Dismiss Application. That motion is now pending before ALJ Fritzell to whom Docket No. 04A-143CP is assigned.

5. On May 4, 2004, Metro filed a Motion to Consolidate Applications in the Event its Contemporaneously Filed Motion to Dismiss and for Other Relief is not Granted in Docket No. 04A-143CP (Motion to Consolidate) and to Shorten Response Time. That motion requests consolidation of Dockets No. 04A-115CP and No. 04A-143CP and was filed in both proceedings.

6. The time for filing a response to the Motion to Consolidate has expired. Review of the Commission's files reveals that no response was filed in either case. Thus the Motion to Consolidate is unopposed.

7. In the Motion to Consolidate Metro argues that Mr. Sifferlin and Aurora Limousine each seeks to serve, by scheduled service, "portions of the same geographic area" (*id.* at ¶ 1); that the Commission will determine whether to grant the applications by applying the principles and criteria of "regulated monopoly" (*id.* at ¶ 2); and that consolidation is appropriate under the principles of *Ashbacker Radio Corporation v. Federal Communications Commission*, 326 U.S. 327 (1945) (*Ashbacker*) because "at best, only one of the applications can be granted" (Motion to Consolidate at ¶¶ 4, 6).

8. Rule 4 *Code of Colorado Regulations* 723-1-79(a) states: "The Commission may consolidate proceedings where the issues are substantially similar and the rights of the parties will not be prejudiced." Granting a motion to consolidate is discretionary. For the reasons discussed below, the Motion to Consolidate, although unopposed, will be denied.

9. First, as Metro states, there is an area of geographic overlap between the two applications. Metro does not state the extent of the geographic overlap, referring only to “portions of the same geographic area” (Motion to Consolidate at ¶ 1). To decide the Motion to Consolidate, however, it is necessary to know the extent of the overlap.

10. The ALJ takes administrative notice of the fact that the area of overlap occurs at three widely-separated points (one each on the eastern, southeastern, and southern edges) on the perimeter of the geographic area which Mr. Sifferlin seeks to serve. As one can see by looking at a map, the geographic area of overlap is *de minimis* both on its face and when compared to the total geographic area each applicant seeks to serve. In addition, the ALJ finds it difficult, at best, to imagine evidence concerning this tiny area of overlap being presented during the hearing in either docket, let alone being determinative of the outcome.

11. Second, the *Ashbacker* doctrine has no applicability here.² The Commission can separately decide each application on its merits because they are not mutually exclusive. The Motion to Consolidate fails to demonstrate that granting one application will effectively preclude the granting of the other application,³ and the ALJ can discern no such preclusive effect. In addition, “it may be possible to make workable adjustments so that both applications can be granted,” *Ashbacker*, 326 U.S. at 332, a factor which the United States Supreme Court recognized as militating against the need for consolidation.

12. Third, consolidating these two proceeding would unduly complicate the proceedings and the record. The authorities sought are not the same (Mr. Sifferlin seeks to

² The Commission has adopted the principles enunciated in *Ashbacker*. See Decision No. C96-594 at ¶ 3.

³ This is the essential test in *Ashbacker*.

provide both scheduled and call-and-demand limousine service, and Aurora Limousine seeks to provide only scheduled service), and the parties are not the same.

13. Fourth, granting the Motion to Consolidate would prejudice Aurora Limousine. Consolidation would require Aurora Limousine to participate in the proceeding regarding the DES Application, a case in which it has no interest, in order to obtain a decision on its application. The increase in expense and the delay in obtaining a decision would clearly and adversely affect Aurora Limousine.⁴

14. Fifth and finally, there is a significant difference in the present status of the two proceedings: Docket No. 04A-143CP is scheduled for hearing on June 7, 2004, while Docket No. 04A-115CP has neither a procedural schedule nor a scheduled hearing date. The Commission has an interest in the prompt resolution of the matters before it. The Motion to Consolidate contains no persuasive reason to delay resolution of Docket No. 04A-143CP in order to consolidate that case with Docket No. 04A-115CP.

15. The Motion to Consolidate does not establish that the issues in these two dockets are substantially similar and that consolidation will not prejudice the rights of the parties in these proceedings.

16. Response time to the Motion to Consolidate expired on May 18, 2004. As a result, the Motion to Shorten Response Time will be denied as moot.

⁴ Consolidation would also have an adverse effect on Golden West because it would be drawn into the Aurora Application case, a proceeding in which Golden West has no interest, thus increasing its litigation costs.

II. ORDER

A. It Is Ordered That:

1. The Motion to Consolidate Applications in the Event its Contemporaneously Filed Motion to Dismiss and for Other Relief is not Granted in Docket No. 04A-143CP filed by Metro Taxi, Inc., in Dockets No. 04A-115CP and No. 04A- 143CP is denied.

2. The Motion to Shorten Response Time filed by Metro Taxi, Inc., is denied as moot.

3. This Order is effective immediately.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge