(Decision No. C93-888)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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APPLICATIONS FOR PERMANENT AUTHORITY TO OPERATE AS COMMON CARRIERS BY MOTOR VEHICLE FOR HIRE TO SERVE DENVER INTERNATIONAL AIRPORT.	)	DOCKET NO. 92M-303CP
	)	INTERIM ORDER DENYING MOTION TO SET ASIDE, AMEND, OR ALTER INTERIM ORDER, AND ORDER MODIFYING INTERIM ORDER

Mailed Date: August 3, 1993
Adopted Date: July 23, 1993

STATEMENT

BY THE COMMISSION:

This matter comes before the Colorado Public Utilities Commission ("Commission") on the Motion to Set Aside, Amend, or Alter Interim Order (Decision No. R93-771-I) filed by Aspen Limousine Service, Inc. ("ALS"). For the reasons discussed herein, we will deny the motion, but modify Decision No. R93-771-I as set forth below.

DISCUSSION

On July 8, 1993, Administrative Law Judge Ken F. Kirkpatrick issued Interim Decision No. R93-771-I ("Interim Decision") which sets forth findings of fact and conclusions of law regarding the seven foundational issues that we asked the parties to address in Decision No. C93-562. Of particular importance to ALS' motion is the Administrative Law Judge's decision to allow carriers currently serving Stapleton International Airport ("SIA") to serve Denver International Airport ("DIA"). ALS argues that the Interim Decision is contrary to law and is not factually supported by the record. It requests that we set aside the Interim Decision and require in those up-coming individual hearings in which the application is contested that carriers which currently have authority to serve only SIA, or have authority for neither SIA or DIA, prove that carrier service at DIA is substantially inadequate.

Several parties filed objections to ALS' motion. Zone Cab, in addition to filing an objection to the merits of ALS' motion, also filed a motion to strike ALS' motion because it was not filed within ten days of the Interim Decision.

Even if ALS' Motion to Set Aside was not timely filed, ALS would be free at the conclusion of the individual case to renew the motion. Rather than allowing the individual cases to run their course only to be redone if we were to modify the Interim Decision, we believe it is most prudent to consider ALS' motion at this time. Therefore, we will deny Zone Cab's motion to strike.

ALS requests we set aside the Interim Decision's "follow the traffic" theory and require existing SIA carriers which do not have authority for DIA to demonstrate that DIA carriers are providing substantially inadequate service at DIA. However, ALS requests that its motion be limited to only those applications that are contested. Uncontested applications would, according to ALS' motion, receive extensions to serve DIA under the "follow the traffic" theory.

A. "Follow the Traffic"

Issuance of applications for certificates of convenience and necessity for common carriers of passengers is governed by § 40-10-105(1), C.R.S. (1992). The statute is general in its provisions:

> The commission has the power to issue a certificate of public convenience and necessity to a motor vehicle carrier or to issue it for the partial exercise only of the privilege sought and may attach to the exercise of the rights granted by said certificate such terms and conditions as, in its judgment, the public convenience and necessity may require.

Of paramount concern is the public interest. Our responsibility is to assure that transportation is made available to the public as is convenient and necessary.

The opening of DIA presents this Commission with a unique case of extraordinary importance to the public interest. SIA is a major international airport. On December 19, 1993, SIA will shut down and, in a "flash cut," its operations will move overnight to the newly opened DIA. Traffic at DiA will in the near term be similar to SIA, but it is anticipated to grow. In addition, December 19, 1993, is at the beginning of, if not well into, the crush of the busiest travel season of the year. This switch in operations will present an enormous challenge to common carriers of passengers.

To meet this challenge and in order to assure that the transportation needs of the airport are met, the Administrative Law Judge concluded that application of the theory of "follow the traffic" was in the public interest. Under the Interim Decision, carriers currently serving SIA will be permitted to serve DIA upon proof that they have the proper insurance and tariffs and proof of operations at SIA. These carriers have previously established, and we have previously found, that the public convenience and necessity require that they be permitted to serve the airport.

ALS urges us to reject the "follow the traffic" theory and require existing SIA carriers whose authority does not geographically encompass DIA to prove that ALS is providing substantially inadequate service. This, of course, cannot be established because neither ALS nor anyone else is currently providing service to DIA.

ALS argues that the Interim Decision is contrary to Colorado law and is unsupported in the record. Specifically, ALS argues that there would be an adverse impact on carriers currently certificated for DIA, that there is no proof that carriers currently serving SIA will be adversely impacted if they are not permitted to "follow the traffic," and that the public interest would not be adversely affected if the "follow the traffic" theory were not applied. We firmly disagree.

Application of "follow the traffic" in this case is one of first impression in Colorado. The theory comes from the Federal Interstate Commerce Commission ("ICC") which developed this theory over a number of years. The first reported ICC case where "follow the traffic" was applied is Petroleum Transportation Company, Extension of Operations - Umatilla, 19 M.C.C. 637 (1939). There, supply points for petroleum products moved from the coast of Washington state to points upstream on the Columbia River. Carriers which were serving the coastal supply points requested permission to modify their certificates to serve the new distribution points. There were no carriers certificated for the Columbia River prior to the relocation upstream of the distribution points. However, Petroleum Transportation Company's application was contested by other carriers which had received their revised certificates sometime before Petroleum Transportation Company. The ICC, which was affirmed on appeal, found under these circumstances that the carriers serving the coastal points should be permitted to "follow the traffic" to the new distribution points.

> Accordingly, we are confronted with a situation where applicant, through no fault of its own, is faced with the possibility of losing a large percentage of its former business owing to the development of the Columbia River. In this connection it may be well to point out that this same situation confronted a number of motor carrier transporting petroleum prod-

> ucts from Portland and that many of them have sought and obtained authority from us to serve their same destination territory from the new points of origin along the Columbia River. In the circumstances, it is our opinion that we should view the issues herein as merely permitting the applicant to continue to perform the same services as it has heretofore.

The "follow the traffic" theory has been reaffirmed by the ICC and federal courts in subsequent cases. Petroleum Carrier Corporation v. United States, 253 F.Supp. 611 (D.C., M.D. Fla. 1966); Ben Reugsegger trucking Service, Inc. v. ICC, 600 F.2d 591 (6th Cir., 1979).

As to ALS' first point that it will be adversely impacted if SIA carriers are permitted to "follow the traffic," ALS argues that it is certificated to serve the geographic area on which DIA will be built and that it is entitled as a matter of law to all growth within its certificated area unless and until some other carrier can prove that it is providing substantially inadequate service. ALS also argues that it can provide better service if its competitors are excluded from DIA. Permitting other SIA carriers to serve DIA, ALS argues, will adversely impact it by denying it growth opportunities and making it more difficult to survive financially.

We noted at the outset that our paramount concern is that the public, and DIA in particular, be assured that it has all necessary transportation services. In this regard, we find Petroleum Carrier Corporation v. United States, 253 F.Supp. 611 (D.C., M.D. Fla. 1966) to be instructive.[1] In that case, a large petroleum pipeline supply source was diverted from one location to another. As in the case of Petroleum Transportation Company, *supra*, the carriers sought to "follow the traffic" to the new point. The new distribution point had an existing carrier, but until the new diversion it had not hauled petroleum products. The existing carrier objected to other carriers being allowed under the "follow the traffic" theory to serve the new distribution points, arguing, much as ALS does in this case, that the other carriers must first prove that it was providing substantially inadequate service. It argued that it had several idle trucks which could handle the increased traffic.

Both the ICC and appellate court rejected the existing carrier's claim. The court found that a specific finding of substan-

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[1] It is of no small import to note that the Petroleum Carrier case was subsequent to Smith & Solomon Trucking Co. v. United States, 120 F. Supp. 277 (D.C., N.J. 1954). Of the few cases where the "follow the traffic" theory was not applied, the Smith case is the strongest.

tially inadequate service need not be found under these unique circumstances. It cited with approval Nashua Motor Express v. United States, 230 F. Supp. 646, 652 (D.C., N.H. 1964), in which the court held,

> . . . cases show that the inadequacy of present service is not a term that is convertible with that of public convenience and necessity but is, rather, only one element to be considered in arriving at the broader determination of public convenience and necessity.

The court also noted when the Commission is considering the public convenience and necessity, it need not leave open to the uncertain future to see if the existing carrier could in fact handle the new and important transportation need:

> [N]either the uncertainties as to the future nor the inability or failure of existing carriers to show sufficiency of their plans to meet future traffic demands need paralyze the Commission into inaction. It may be that the public interest requires that future shipping needs be assured rather than left uncertain. The Commission has the discretion to so decide.

Petroleum Carrier Corporation, *supra* at 616, citing United States v. Detroit and Cleveland Navigation Company, 326 U.S. 236, 66 S.Ct. 75, 90 L.Ed. 33 (1945) (emphasis added in Petroleum Carrier).

We wholeheartedly agree. DIA will be a major international airport. It opens December 19, 1993, - the busiest travel time of the year. The prognostications ALS would like us to require of SIA carriers as to whether or not a carrier's service for an airport not yet open will be substantially inadequate would be so difficult and so speculative that they would be of little value.[2] By no stretch of the imagination do we believe, as ALS suggests we should, that the public interest is served by leaving to the future the question of whether the airport can operate with fewer carriers than SIA. Rather than gambling what the future may or may not

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[2] ALS, itself, expressed some level of frustration in its motion over the dearth of information available regarding forecasts of demand at DIA. It notes that the available information is very general and is aggregated. We share in ALS' frustration. However, if there are any predictions of future demand at DIA that appear undisputed, it is that the demand will grow. Thus, we find no substantial basis to conclude that DIA requires fewer carriers than presently serve SIA.

bring, we believe that DIA and the enormous and unquestionably important demand for transportation that it represents requires unequivocal assurances that its transportation needs will be met.

Our decision here is reinforced by a number of other aspects of this case. First, and as discussed above, neither ALS nor any other carrier is currently serving DIA. DIA is not yet complete and, until recently, was vast farm land. Therefore, allowing carriers currently serving SIA to serve DIA when it opens will not adversely impact ALS. Indeed, it will find itself in the very same position at DIA that it was in at SIA.

As to its claim that it is entitled to future growth within its certificated area, we note that Reugsegger Trucking service, Inc. v. ICC, 600 F.2d 591 (1979), the court was faced with the claim of an existing carrier that it was entitled to future growth and that "follow the traffic" should not be applied to limit that opportunity. Consistent with the decision in Petroleum Carrier Corporation and Petroleum Transportation Company, *supra.*, as well as other cases, the court deferred to the Commission's discretion, recognizing that the public interest was a balancing not only of the carrier's claim for future growth, but also of the public interest, the impact on other carriers, and the needs of the shipper.

> In granting the [new applicant's] certificate [to expand into a new area], the Commission balanced [the shipper's] needs and the needs of the public, plus the fact that [new applicant] would otherwise lose all of its previous traffic, against the fact that [the existing carrier] would lose the potential expanded service [of the shipper relocating to the new area].

ALS cites us to cases where the court held that an intervening carrier must establish that the existing carrier is providing substantially inadequate service before it can receive a certificate. These cases are not dispositive. They all deal with the circumstance where there is a carrier actually providing service. Here, ALS is not providing service to DIA. No one is. While it is generally appropriate to require that a newly entering carrier establish that existing carrier service is substantially inadequate, no one is usurping a transportation need being met by another carrier in this case.

Moreover, even if ALS were currently serving DIA, which it is not, ALS is never assured that it will receive all future growth in its service territory. Other transportation carriers with distinct new services, such as that that permitted ALS and other van companies to compete with previously certificated taxi cab companies at SIA, may receive certificates for DIA and compete for passengers at DIA.

Nor are we persuaded by ALS' contention that the record does not support the conclusion that existing SIA carriers are substantially and adversely impacted if "follow the traffic" is not adopted. In our view, whether a carrier services 1 percent or 50 percent of SIA traffic is not dispositive. Carries receive certificates upon a finding that the public convenience and necessity require their service. This carrier service, whether large or small, is serving the public interest. The impact on these carriers is but one aspect to be considered in balancing the many and often times conflicting interests and needs. Indeed, circumstances can be such that even if it were established that there would be no adverse impact on carriers serving the existing transportation if "follow the traffic" were not applied, we could still determine that the balance favors application of "follow the traffic."

We have determined over the course of many years the appropriate mix of transportation services for SIA. As individual applications have come before us, we made determinations as to the adequacy of existing service as well as the public convenience and necessity. On December 19, 1993, the entire transportation system at SIA for which we have already certificated carriers to serve will move intact to DIA. Given this "flash cut" to DIA we will presume that that mix we have previously found to be required by the public convenience and necessity at SIA will exist at DIA. However, this is only a presumption. We will permit Intervenors to submit evidence in the individual application dockets that rebuts the presumption in the context of those individual applications. Thus, we amend the second sentence of the last paragraph on page 3 of the Interim Decision to read:

> Upon proof of these operations, and that the carrier is in good standing with the Commission (i.e., proper tariffs and insurance on file), the applicant will be presumed to have met its burden, and the carrier's certificates of public convenience and necessity will be reissued authorizing identical service substituting DIA for SiA, unless an intervenor presents sufficient evidence to overcome the presumption.

B. Uncontested Cases

ALS suggests in its motion that rejecting the "follow the traffic" theory will not leave DIA without carriers. It suggests that many of the carriers' applications are uncontested and will be able to serve DIA. We disagree. If we were to adopt ALS' theory of the case, the Administrative Law Judge must determine in the uncontested cases whether the application sets forth sufficient facts to demonstrate that carriers previously certificated for DIA are providing substantially inadequate service. A we discussed above, proving that DIA carriers are providing inadequate service when DIA is not even open would prove to be a daunting, if not insurmountable task. Thus, we do not believe ALS is correct in its contention that because their applications are uncontested most of the existing carriers at SIA will also be able to serve DIA.

THEREFORE THE COMMISSION ORDERS THAT:

1. Zone Cab's Motion to Strike is denied.

2. ALS' Motion to Set Aside, Alter, or Amend Interim Decision is denied.

3. Interim Order No. R93-771-I is modified as stated herein, and remains effective as so modified.

This Order is effective on its Mailed Date.

ADOPTED IN OPEN MEETING July 23, 1993.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Robert E. Temmer

Vincent Majkowski

Commissioners

COMMISSIONER CHRISTINE E. M. ALVAREZ DISSENTING.

COMMISSIONER CHRISTINE E. M. ALVAREZ DISSENTING:

Commissioner Christine E. M. Alvarez dissents in an opinion to be filed later.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Christine E. M. Alvarez

Commissioner