(Decision No. C93-1364){PRIVATE }

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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IN THE MATTER OF THE APPLICATION OF THE STOUFFER HOTEL MANAGEMENT CORPORATION, D/B/A STOUFFER CONCOURSE HOTEL, 3801 QUEBEC STREET, DENVER, COLORADO 80207-1629, FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO OPERATE AS A COMMON CARRIER BY MOTOR VEHICLE FOR HIRE.	DOCKET NO. 93A-166CP DECISION DENYING EXCEPTIONS

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Mailed Date: November 4, 1993
Adopted Date: October 12, 1993
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STATEMENT

BY THE COMMISSION:

This matter comes before the Colorado Public Utilities Commission on exceptions filed by applicant, Stouffer Hotel Management Corporation doing business as Stouffer Concourse Hotel ("Stouffer"), regarding Recommended Decision No. R93-934. For the reasons stated below, the exceptions will be denied.

DISCUSSION

Stouffer has applied in this case for authority to provide shuttle limousine service between Denver International Airport ("DIA") and its Stouffer Concourse Hotel. The matter was set for hearing. Recommended Decision No. 93R-934 was issued by the Administrative Law Judge ("ALJ") who found that Applicant offers and has offered for some period of time shuttle service between Stapleton

International Airport ("SIA") and its hotel and parking facilities. This service is offered free of charge to hotel guests and customers using its parking facilities. The ALJ concluded that the application should be denied because applicant established only a need for free transportation service, and that the service offered was a special service only for applicant's customers, as opposed to a need of the general public.

Applicant takes a number of exceptions with the Recommended Decision. Applicant asserts that public need has been established in this case. It cites to the record which shows that it has offered its service for seven years, that demand for its service has steadily increased over time, that on an annualized basis it expects over 100,000 customers for 1993, and that it has several letters of support. The Commission agrees with applicant that the evidence in this record establishes a public need for transportation service between SIA and its hotel and parking facilities. There is no reason to believe that this need will diminish when SIA closes and DIA opens.

With respect to the question of "free" service, the Commission finds that although the service has been offered for free in the past, and even if it were assumed that demand for this service may decrease if it were no longer offered free of charge, nevertheless, applicant has established some level of public need for this service. Moreover, and for the reasons stated in Applicant's exceptions, the Commission rejects the Recommended Decision's characterization that the services here are specialized and do not establish a need of the general public.

Therefore, the Commission will modify the Recommended Decision to the extent that it states that public need has not been established.

Applicant requests that this Commission determine that applicant need not establish that carriers currently authorized to serve DIA will offer substantially inadequate service. This Commission declines to do so. Decision No. C93-875 entered in Docket No. 92M-303CP sets forth the criteria carriers must meet in order to serve DIA. In particular, carriers that are not authorized to serve SIA but that desire to serve DIA must meet the traditional criteria to provide service. These criteria include proof that existing carriers will provide inadequate service. *Ephraim Freightways, Inc. v. Public Utilities Commission*, 151 Colo. 596, 380 P.2d 228 (1963).

On the other hand, carriers presently serving SIA have established, as determined by this Commission in prior decisions granting certificates of public convenience and necessity to these carriers, that there is a public need for their service, that there was an inadequacy of existing carrier service, and that the applicants in those individual cases were fit to provide the service. Having previously made those findings, the Commission permits those individual carriers to transfer their specific SIA authorities to DIA.

Unlike those carriers that currently serve SIA with prior

authorization from this Commission, the applicant in this case has never had a Commission determination that, among other things, existing carriers' service is inadequate to meet the public need at issue in this case.[1] Therefore, the presumption that is permitted with previously authorized carriers does not apply here. This means, then, that the applicant in this case must establish that carriers currently authorized to serve will provide substantially inadequate service.

A contrary conclusion would lead to inconsistent results. For example, a carrier which has no prior authority to serve SIA but desires to serve the airport traffic could avoid having to prove inadequacy of existing carrier service by simply applying for authority to serve DIA and not SIA. On the other hand, if the same carrier first applied to serve SIA for the few months that it will remain open and then transferred its authority to DIA under Decision No. C93-875, it would have to prove inadequacy of existing service. This would be manifestly unfair. The Commission, therefore, finds that Applicant must establish that carriers currently authorized to serve will provide substantially inadequate service.[2]

Having reviewed the record, the Commission finds that applicant

[1] Applicant is able to offer its transportation service without this determination or Commission authorization because Applicant provides its service at no charge.

[2] Evidence concerning the reasons for Applicant instituting free service might be relevant to this issue.

has failed to carry its burden that existing carrier service is substantially inadequate. The Recommended Decision denying the application will be affirmed.

THEREFORE THE COMMISSION ORDERS THAT:

1. Recommended Decision No. R93-934 is modified to conform to the decision herein and, as amended, is affirmed.

2. The exceptions of Stouffer Hotel Management Corporation, doing business as Stouffer Concourse Hotel are denied.

This Order is effective on its Mailed Date.

ADOPTED IN OPEN MEETING October 21, 1993.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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Commissioners

COMMISSIONER CHRISTINE E. M. ALVAREZ
SPECIALLY CONCURRING.

COMMISSIONER CHRISTINE E. M. ALVAREZ SPECIALLY CONCURRING:

I agree with my colleagues that the Commission reached the result required by statute and the precedent set in Decision No. C93-875.

But the technically correct result here speaks volumes against the majority's opinion in Decision No. C93-875 to adopt the follow-the-traffic doctrine as a short-cut procedure to establish which carriers should serve DIA.

The procedure adopted in Decision No. C93-875, when combined with the firmly established law governing passenger carriers--regulated monopoly--forces an absurd result here.

Applicant's evidence adequately established substantial demand for its service. It provided 51,793 passengers (112,000 on an annualized basis) with one-way trips to SIA from January 15, 1993 to June 30, 1993. The Hotel, while offering its service free of charge, obviously recovered costs from Hotel guest charges and parking charges from its "Park and Fly" customers. As was discussed by the Commission during its deliberations, there is little reason to believe that the demand for Stouffer's Shuttle service would diminish greatly because it proposed to charge for the airport shuttle service--since it would still be the most convenient option for Hotel guests. (Though, it is reasonable to assume that, because the Hotel will no longer be located close to the airport, the attractiveness of its "Park and Fly" program may fade and the demand for that part of the service may diminish.)

In Decision No. C93-875, the Commission stated that the public interest was "[o]f paramount concern." The decision to adopt the "follow the traffic" doctrine was tied to the Commission's concern that the public and DIA "be assured that it has all necessary transportation services."

In this case we have an Applicant that has undeniably served a substantial portion of the travelling public at SIA. But because the Applicant's proven needed service was provided free of charge--and therefore without this agency's official imprimatur or Certificate of Public Convenience and Necessity--it is forced to meet the evidentiary tests imposed by the doctrine of regulated monopoly. These are tests which the Commission has admitted are impossible to meet in these circumstances because there is no evidence regarding either demand or service quality provided by existing carriers to the yet unopened airport. *See* Decision No. C93-875, at 3.

Instead, under Decision No. C93-875, carriers currently holding authority to serve SIA need only prove that they have provided "continuous and substantial" service and that they have insurance. This evidence, while important, is not truly relevant to the questions the Commission should be asking in the case of each and every carrier

desiring to serve DIA. That question is: Will this service, combined with others, best meet the needs of the public under the new circumstances created by the opening of a new international airport located some 35 miles from Downtown Denver?

Because of this Commission's policy, the Hotel's options are either to continue offering the service at no charge (perhaps losing money); or to hope that it will not lose the business of guests who will be forced to make their travel arrangements to and from the airport with commercial passenger carriers whose charges, reliability, and courtesy the Hotel cannot affect.[3]

It is important to note here, that neither Commission Decision No. C93-875, nor Judge Kirkpatrick's Interim Decision No. R93-771-I addresses the question of continued service requirements in the geographic area around SIA once the airport leaves that sight. Decision No. R93-771-I establishes procedures for substituting "DIA" for "SIA" in Certificates of Public Convenience and Necessity authorizing identical service. Anyone desiring to serve the SIA area is required to start anew under the doctrine of regulated monopoly.

[3] As has been proven recently by casino operators in Central City and Blackhawk, there may be other contract options available to the Hotel which I have not discussed here.

I fail to see how the public has been served by these results.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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Commissioner