

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

STB Docket No. MC-F-21008

EAST WEST RESORT TRANSPORTATION, LLC,
AND TMS, LLC, d/b/a
COLORADO MOUNTAIN EXPRESS
-PETITION FOR DECLARATORY ORDER-
MOTOR CARRIER TRANSPORTATION OF PASSENGERS IN COLORADO

COLORADO PUBLIC UTILITIES COMMISSION'S
MOTION FOR LEAVE TO FILE A REPLY TO CME'S REPLY

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Dated: April 5, 2005

BEFORE THE
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The Public Utilities Commission of the State of Colorado ("CPUC"), by and through the Colorado Attorney General, respectfully moves the Board for leave to file a reply to the April 4, 2005 reply filed on behalf of East West Resort Transportation, LLC, and TMS, LLC, d/b/a Colorado Mountain Express ("CME"). CPUC makes this motion pursuant to 49 C.F.R. § 1110.9 as a petition for waiver of 49 C.F.R. § 1104.13(c). In support, CPUC states as follows:

1. On April 1, 2005, CPUC filed its Motion for Extension of Time to File Verified Reply Statement to CME's Opening Evidence. On April 5, 2005, CME filed its reply to CPUC's motion.
2. CPUC seeks a waiver of the rule prohibiting a reply to a reply (49 C.F.R. § 1104.13(c)).

3. A waiver of 49 C.F.R. § 1104.13(c) is warranted with respect to the pending motion for extension because the record, as presently before the Board, is incomplete. The incompleteness results from certain representations made in CME's reply. Without an opportunity to clarify the record with respect to these representations, CPUC believes that the Board will be left with the wrong impression of (1) the motive behind the CPUC's motion, (2) the history related to Civil Action No. 04-B-0105, East West Resort Transportation, et al. V. Gregory E. Sopkin, et al., and (3) the scope of Mr. Reinhard A. Wolf's October 12 and 13, 2004 audit.

4. CPUC's seeks to file a limited reply to CME's reply, which CPUC reply is narrowly focused to issues raised, in the first instance, by CME's reply. CPUC's reply does not broaden the issues before the Board and should not cause any delay in the rendering by the Board of its decision on CPUC's motion for extension.

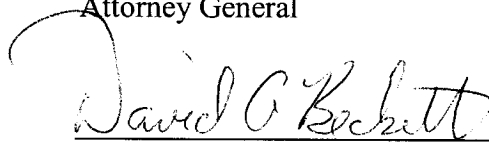
5. For the Board's convenience, CPUC's Reply to the Verified Reply of CME is attached to this motion as Attachment 1.

WHEREFORE, the Colorado Public Utilities Commission requests that the Board grant this motion for leave to file a reply to CME's reply pursuant to 49 C.F.R. § 1110.9 and consider the attached reply to reply when rendering a decision on CPUC's motion for extension related to the filing of its verified reply statement.

Dated this 5th day of April, 2005.

JOHN W. SUTHERS

Attorney General

A handwritten signature in cursive script, reading "David A. Beckett". The signature is written in dark ink and is positioned above a horizontal line.

DAVID A. BECKETT, 23098*

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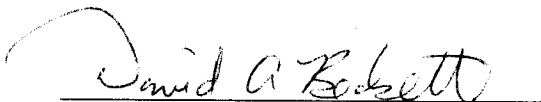
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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within COLORADO PUBLIC UTILITIES COMMISSION'S MOTION FOR LEAVE TO FILE A REPLY TO CME'S REPLY upon all parties herein by electronic mail and depositing copies of same in the United States mail, first class postage prepaid, or as otherwise indicated, at Denver, Colorado, this 5th day of April, 2005, addressed as follows:

Thomas J. Burke Jr.
Jones & Keller
1625 Broadway, Suite 1600
Denver, CO 80202

Fritz R. Kahn
Fritz R. Kahn P.C.
1920 N Street NW 8TH Floor
Washington, DC 20036-1601



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COLORADO PUBLIC UTILITIES COMMISSION'S
REPLY TO CME'S REPLY

The Public Utilities Commission of the State of Colorado ("CPUC"), by and through the Colorado Attorney General, replies to the Verified Reply of East West Resort Transportation, LLC, and TMS, LLC, d/b/a Colorado Mountain Express ("CME"), which reply was filed April 5, 2005, as follows:

1. The Board must understand that CPUC's motion for extension was made so that any declaratory order the Board may issue in this matter is supported by a complete factual record. Absent an opportunity for discovery, CPUC cannot verify or refute many of the factual statements submitted by CME with its opening evidence. CPUC submits that 120 days is a reasonable period within which to conduct such discovery.

2. As explained in paragraph 6 of CPUC's motion, CPUC did not have party status in this matter until March 21, 2005. Under the Board's rules, including 49 C.F.R. § 1114.21(d)

cited by CME, the only persons that may conduct discovery are persons that have status as a party. Nowhere do the Board's discovery rules permit a person that has merely requested intervention in a docket the opportunity to take discovery. Thus, the fact that over five months elapsed between October 14, 2004, when CPUC petitioned to intervene, and March 21, 2005, when the Board granted CPUC's petition to intervene, should not be held against CPUC with respect to its pending motion for extension.

2. CPUC's election to not conduct formal discovery in Civil Action No. 04-B-0105, East West Resort Transportation, et al. V. Gregory E. Sopkin, et al., was a direct result of six months of settlement discussions between CPUC and CME. These settlement discussions continued until shortly before CME filed its petition for declaratory order with the Board and sought procedural relief, in the form of a stay, in Civil Action No. 04-B-0105. Further, no evidentiary hearing (on CME's motion for preliminary injunction, or otherwise) has been held in Civil Action No. 04-B-0105, and none is presently scheduled. Moreover, whether or not CPUC has conducted discovery in Civil Action No. 04-B-0105 should have no bearing on its need for discovery in this matter. At the end of the day, CPUC will be permitted in the US District Court case to conduct live cross-examination of any witnesses that appear at hearing; CPUC can perform this function without the benefit of verified statements.¹ Such is not the case under the Board's modified procedures where CPUC must present its case in the form of verified statements. This is a critical difference that is not evident from CME's reply.

¹ By this statement, CPUC does not contend that it will perform this function without the benefit of verified statements obtained through discovery. To the contrary, CPUC may re-raise the discovery issue in Civil Action No. 04-B-0105 at such time as the US District Court, if it denies CPUC's pending motion to dismiss, contemplates the setting of a hearing on the merits.

3. As to the implication that CPUC has failed to take advantage of prior opportunities to review documents, it should be pointed out that, contrary to the representation made in paragraph 6 of CME's reply, CPUC did review the referenced documents at the Denver office of CME's co-counsel. This occurred on July 2, 2004 – the earliest opportunity available on each party's schedule. Moreover, to date, all documents that CPUC has reviewed in connection to Civil Action No. 04-B-0105, and the statements of CME and its attorney explaining the documents, have occurred in meetings in which it was agreed that Federal Rule of Evidence 408 (Compromise and Offers to Compromise) controlled.

4. The October 12 and 13, 2004, audit conducted by Mr. Reinhard Wolf was a safety audit limited to the safety of operations conducted by CME under its intrastate, CPUC-issued operating authority. Mr. Wolf's evaluation of CME's records had nothing to do with the evaluation of routes, schedules and passenger reservations to the extent that those records do not bear on safety issues.

5. CPUC inspectors have not conducted interviews of the authors of the sworn verified statements appended to CME's Petition for Declaratory Order. Any interviews that were conducted were performed by previous co-counsel, Mr. John Roberts; moreover no interview of Mr. Bruce Rosard, President of Moguls Mountain Travel, has been conducted. As to those interviews that were conducted, the interviews were informal and off of the record. Thus, nothing presently exists with respect to the interviews that would support a verified statement appended to CPUC's verified reply statement. Moreover, given the inability to conduct cross-examination of witnesses under the Board's modified procedures, CPUC will have no opportunity to attempt to impeach each author as to the author's rebuttal to whatever "recounting

of conversations” the CPUC might append to its verified reply statement. Only if depositions and related discovery are permitted prior to the filing of CPUC’s verified reply statement will CPUC be afforded an opportunity to fully and verifiably reply to the statements appended to CME’s verified opening evidence.

6. In considering CPUC’s motion for extension of time, CPUC urges the Board to consider the following supplemental information provided for the purpose of clarifying the presently incomplete record informing CPUC’s motion for extension.

WHEREFORE, the Colorado Public Utilities Commission restates its request that the Board grant its April 1, 2005 motion for extension of time.

Dated this 5th day of April, 2005.

JOHN W. SUTHERS
Attorney General



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