

PUBLIC VERSION

ORIGINAL

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, LLC,
– PETITION FOR DECLARATORY ORDER –
MOTOR CARRIER TRANSPORTATION OF PASSENGERS IN COLORADO

REBUTTAL
OF
EAST WEST RESORT TRANSPORTATION, LLC,
AND TMS, LLC, d/b/a
COLORADO MOUNTAIN EXPRESS, LLC

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ORIGINAL



September 30, 2005

24-788

VIA HAND DELIVERY - RETURN COPY

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW (7th fl.)
Washington, DC 20423-0001

Dear Secretary Williams:

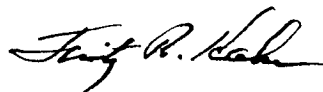
Enclosed for filing in STB Docket No. MC-F-21008, East West Resort Transportation, LLC, and TMS, LLC, d/b/a Colorado Mountain Express-Petition for Declaratory Order-Motor Carrier Transportation of Passengers in Colorado, are the original and ten copies of the public version and of the highly confidential version, filed under seal, of the Petitioners' Reply. *Rebuttal*

Rebuttal
Additional copies of this letter and of the Replies are enclosed for you to stamp to acknowledge your receipt of them and to return to me via the messenger.

Service of this letter and the Reply has been effected by arranging for the hand delivery of copies thereof to Respondent's counsel.

If you have any question concerning the foregoing which you believe I may be able to answer or if I otherwise can be of assistance, please let me know.

Sincerely yours,


Fritz R. Kahn

enc.

cc: David A. Beckett, Esq.
Edward D. Greenberg, Esq.
Thomas J. Burke, Jr., Esq.

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A

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Petitioner, East West Resort Transportation, LLC, and TMS LLC, d/b/a Colorado Mountain Express, LLC (“CME”), pursuant to the Board’s Decision, served August 30, 2005, responds to the Reply of the Public Utilities Commission of the State of Colorado (“CPUC”), filed September 9, 2005, as follows:

I.

BACKGROUND AND PRELIMINARY STATEMENT

The legal and regulatory issues before the Board involve in each of their particulars two central themes which created the necessity for CME to have petitioned for declaratory relief, pursuant to section 5(d) of the Administrative Procedure Act, 5 U.S.C. 554(e).

The first involves the dogged, institutional preoccupation of CPUC with its State-law based jurisdiction, including in the instant proceeding the assumption of jurisdiction which the agency has been denied by Federal preemption, but which CPUC endeavors to exercise nonetheless. Colorado remains one of the few states which comprehensively regulates motor common carriers – adhering to the largely discredited regulated monopoly theory of regulation – and CPUC simply is unwilling to face the fact that its efforts to have Federally franchised motor common carriers operating within Colorado conform to its regulations are unlawful, having been preempted by Congressionally enacted legislation. The second, and more important, factor focuses on the near-revolutionary change in modern commercial practices in arranging for both the interstate and intrastate transportation of passengers occasioned by the adoption and widespread use of the Internet.

The CPUC. The first factor, of course, speaks to CPUC's attempt to force-fit its rate regulatory regime on the single-state regular route passenger transportation which CME performs under Federally-issued certificates of public convenience and necessity, both in interstate and intrastate commerce, as initially authorized by section 6 of the Bus Regulatory Reform Act of 1982, Pub. L. 97-261, 96 Stat. 1102, at 49 U.S.C. 10922(c)(2)(B), and, as revised, continued in effect by the ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803 ("ICTA"), at 49 U.S.C. 13902(b)(3).

Before turning to the specific points offered in rebuttal set forth in the Argument, CME believes it may be helpful to the Board's analysis to offer a few examples of the long-standing hostility of CPUC toward Federal jurisdiction over matters formerly exclusively addressed under State law, but which have been either partially or wholly preempted.

The dispute underlying the instant declaratory order proceeding began after CPUC issued a Civil Penalty Assessment Notice under Colorado state law accusing and proposed to fine CME

\$6,400 for carrying passengers and advertising fares other than those on file with CPUC.¹ CME contested the proceeding's propriety, and more importantly CPUC's subject matter jurisdiction, by instituting a civil action seeking declaratory and injunctive relief in the United States District Court for the District of Colorado in Civil Action No. 04-B-105(MJW), and by later filing with the Board its Petition for Declaratory Order, raising the preemption issue in both venues. The Federal court case remains pending but stayed under the primary jurisdiction doctrine by order of Chief United States District Judge Lewis T. Babcock.²

In imposing its stay, the Court's ruling categorically rejects CPUC's contention that the Court lacked subject matter jurisdiction to enjoin the CPUC Commissioners' attempted compulsion of compliance by CME with CPUC's rate prescription regime.³

There are more examples of historical CPUC recalcitrance. In 1997, the Board granted authority under 49 U.S.C.14303 in Docket No. MC-F-20902 to one of CME's corporate predecessors of the same name to acquire the properties and operating authorities, including State-issued operating authorities, of another Colorado-based interstate and intrastate motor carrier of passengers. CPUC filed a pleading with the Board, which the Board treated as a petition to reopen, objecting to the

¹ Mr. Gary Gramlick takes the puzzling position that "CPUC Staff's enforcement action concerns only the issue of advertising rates to the general public that are different from the rates on file at the CPUC . . ." CPUC's Reply, Verified Statement of Gary Gramlick, p. 4, ¶ 9. Yet the Civil Penalty Assessment Notice clearly states in each instance that the claimed violations by CME were for "[c]arrying and advertising to carry persons at rates different from those on file with the Commission [emphasis added]." CPUC's Reply, Verified Statement of Gary Gramlick, Ex. 3.

² See East West Resort Transportation, LLC v. Sopkin, 371 F.Supp. 2d 1253, 1267 (D.Colo. 2005).

³ *Id.*, at 1263.

Board's authorizing order and contending that Congress lacked the Constitutional power to enact provisions authorizing Board approval of the transfer of state-issued operating rights. The Board rejected CPUC's position, stating:

. . . Colorado may not take the position that any action affecting state licensing or certification that would in any way interfere with the applicant's consummation of the instant transaction. Nor may it purport to regulate the transfer of intrastate operating rights which we have authorized to be transferred in connection with our approval of applicant's request to merge their interstate and intrastate operations. With respect to intrastate transportation on interstate routes by applicants and any other motor passenger carriers in regular route or charter service (other than intrastate commuter bus operations), Colorado may require up to 30 days' notice of regular route schedule changes but may not otherwise regulate operating schedules or rate changes.⁴

CPUC relates in its Reply that, in response to the Board's order in MC-F-20902, it dutifully complied with Federal law and authorized the transfer of the pertinent State-issued operating rights with no further proceedings before the CPUC.⁵ What CPUC disingenuously omits, however, is that it has recently changed its mind yet again regarding Congress' right to authorize the Board's approval of transfer of State-issued operating rights, and now seemingly rejects the authority conferred on the Board by Congress in 49 U.S.C. 14303. Attached at Tab B to this Rebuttal is a copy of Decision No. C05-1026 of CPUC, dated August 10, 2005, served August 30, 2005, which rejects the Board's recent authorization to transfer CPUC-issued operating rights in Docket No. MC-F-21013, Casino Transportation, Inc.–Acquisition of Control and Lease–Four Winds, Inc., d/b/a People's Choice Transportation, Inc., served July 8, 2005, and declines to recognize the Board's

⁴ Docket No. MC-F-20902, Colorado Mountain Express, Inc. and Airport Shuttle Colorado, Inc., d/b/a Aspen Limousine Service, Inc.–Consolidation and Merger–Colorado Mountain Express, served February 28, 1997, at p. 4.

⁵ “The Board's series of merger decisions involving CME . . . have all been acknowledged by the CPUC.” CPUC's Reply, p. 10.

preemptive jurisdiction over their transfer absent a decision of the United States Court of Appeals for the 10th Circuit compelling it to do so.

CPUC, also, argues here that it is perfectly equipped to entertain claims of Federal preemption of CPUC's regulatory jurisdiction in connection with its Civil Penalty Assessment procedures.

“ . . . the CPUC would be perfectly qualified to apply the longstanding federal standard for what constitutes bona fide and substantial regular route motor carrier operations under a federally issued certificate, which certificate permits the simultaneous provision of intrastate transportation service.”

CPUC Reply, Verified Statement of Mr. Gary Gramlick, ¶ 10, pages four and five. CPUC omits to disclose, however, that, apparently except for its purposes in this proceeding, it has conceded elsewhere that it lacks any such right. In its Decision No. C05-1037, entered on July 8, 2005, and served on August 30, 2005 the CPUC, on exceptions, adopted new rules governing transportation by motor vehicle in In The Matter of the Proposed Repeal and Reenactment of All Rules Regulating Transportation by Motor Vehicle, as Found in 4 CCR 723-6, 9, 15, 23, 31, 33, and 35, Docket No. 03R-554TR, Decision No. C05-1037, pages two and three. A copy of this decision is attached at Tab C. In response to the suggestion that CPUC should adopt a rule authorizing it to do what CPUC has told the Board it “. . . is perfectly qualified . . .” to do, CPUC admits that it has no such power.

. . . Alpine Taxi also believes the ALJ erred in failing to adopt any type of rule defining what constitutes a “common arrangement” for purposes of determining whether a trip within the state of Colorado is a trip in interstate commerce or intrastate commerce. The reply filed by CME notes that the Commission is currently involved in proceedings before the STB which would aid in its resolution of the matters raised in Alpine Taxi's exceptions.

. . . We deny Alpine Taxi's exceptions because federal law provides the legal framework to be used in determining whether transportation services are intrastate or interstate in nature. To the extent that federal law is unclear, prudent agency practice dictates that we wait for the STB to clarify any uncertainties. A state rulemaking may not alter federal law. Attempting to summarize federal law, in this instance would be imprudent and would risk inaccuracy and conflict. When the federal legal framework requires case-specific interpretation, STB or federal court proceedings are more appropriate venues than rulemaking proceedings.

CME believes that CPUC has by its own words demonstrated that it habitually takes positions before this Board which are either inconsistent with what it has said elsewhere or which otherwise are defiant of the Federal statutory framework administered by the Board. CME asks that these circumstances be kept in mind as the Board evaluates what CME believes is an internally inconsistent, and in numerous respects, less than candid Reply.⁶

Evolving Commercial Practice. The practice of assembling a vacation package for travelers in Colorado's ski and ski-related resort areas now makes wide use of the Internet's World Wide Web, so much so as to make it fair to characterize this change in commercial practice as revolutionary. Much of the following material refuting CPUC's blinkered view of the legal underpinning for these changes will emphasize how the Internet has vastly expanded interstate commerce and not, as CPUC argues, contracted it.

As will become evident in this Rebuttal, the practice of air carriers of establishing "through ticketing" or similar "common arrangements" is fast disappearing if it has not already disappeared altogether. Most air carriers, for example, no longer even issue hard-copy tickets for air service, and those which do assess the passenger a significant service charge. Modern air carrier practice

⁶ If the Board were to have any lingering doubt about CPUC's recalcitrance in this declaratory order proceeding, it need only look to allay them to CPUC's evasive responses to CME's written discovery requests. See Tab D.

overwhelmingly now involves Internet e-mail confirmation sent to the originator's e-mail address. The practice of carrier-sponsored through ticketing with a ground carrier, if not totally dead, is fast disappearing and has been substantially replaced by use of the Internet.⁷ In one of its interrogatories, CME asked CPUC to identify the airlines serving the Denver International Airport ("DIA") and/or the Eagle County Regional Airport ("EGE") from or to points beyond Colorado which themselves – not through web sites, ski resorts, travel agents or other third-party providers – sell through tickets with motorbus operators providing scheduled, regular-route service within Colorado. CPUC named none. Tab D, Response by CPUC to CME 1-9.

Airlines have eliminated or so reduced the commissions paid travel agents or other third-party providers that it no longer pays for travel agents to book airline reservations when planning a ski vacation or other holiday for their customers. Furthermore, when planning for their ski vacations or other holidays, travelers often use their frequent-flyer miles to purchase their airline tickets or to upgrade their tickets. Travel agents or other third-party providers, however, cannot accept payment for airline tickets with their customers' frequent-flyer miles.⁸ The traveler has to book his flight directly with the airline if he intends to use his frequent-flyer miles.

It will be CME's purpose in this Rebuttal, therefore, to demonstrate that the so-called "through ticketing" rubric resulting from the holdings of decisions such as James T. Kimball–Petition for Declaratory Order, 131 M.C.C. 908, 918 (1980), decided in the context of the incidental-to-air exemption now found at 49 U.S.C. 13506(a)(8)(A), and not in connection with operations under

⁷ Verified Statement of Jay R. Ufer, p. 5, ¶ 12; Tab E, Verified Rebuttal Statement of Jay R. Ufer, p. 3, ¶3.

⁸ Tab F, Verified Statement of Christopher Jarnot, p. 62 (extract).

Federally issued operating certificates, must yield not only to the several decisions of Federal courts applying broader standards of definition as to what constitute interstate operations within a single state, as is the situation here, but also to the reality of society's wholesale adoption of the Internet as a potent tool with which to engage in such commerce.

II.

ARGUMENT

A.

CPUC IS FORECLOSED FROM REGULATING CME'S RATES.

49 U.S.C. 14501(a) is explicit in preempting state regulation of the interstate or intrastate rates of motor carriers of passengers subject to the jurisdiction of the Board when operating on their Interstate Commerce Commission ("ICC") or Federal Motor Carrier Safety Administration ("FMCSA") certificated routes, in the case of CME commonly controlled or merged pursuant to the decisions of the Board. The subsection reads, as follows:

No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation standard, or other provision having the force and effect of law relating to scheduling of interstate or intrastate transportation (including discontinuance or reduction in the level of service) provided by motor carrier of passengers subject to jurisdiction under subchapter 1 of chapter 135 of this title on an interstate route or relating to the implementation of any change in the rates for such transportation or for any charter transportation except to the extent that notice, not in excess of 30 days, of changes in schedules may be required. This subsection shall not apply to intrastate commuter bus operations.

The text of the subsection has remained virtually unchanged since its enactment by section 17 of the Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102. Its provisions are

unambiguous and unmistakably pass the first prong of the Chevron test. See, Chevron USA v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984):

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoke to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

If, however, there were any doubt as to what the Congress intended by the enactment of the subsection, it is resolved by reference to its legislative history. At pages 7-8 of S. Rep. No. 97-411, reproduced at 1982 U.S. Code Cong. & Admin. News 2314-15, the rationale for the subsection's enactment is set forth, as follows:

State regulation is one of several significant factors contributing to this inadequate performance [by the bus industry]. An individual bus moving in interstate commerce often will pick up and carry many passengers who are strictly intrastate. Thus, that vehicle is regulated by both Federal and State authorities at the same time. State regulatory restrictions on entry, exit, and/or service frequency, and slow action by State regulatory commissions on fare increases, often have significant adverse impacts on intercity bus operations. Thus, these actions impose an unreasonable burden on interstate commerce and must be preempted.⁹

CME is an interstate motor carrier of passengers. Copies of the relevant certificates which it or its predecessors were issued were included as Exhibits 1-8 of the Document Appendix submitted by CME together with its Petition for Declaratory Order, filed September 24, 2004. CPUC in the past may have certificated CME to render intrastate operations over some of the same Colorado routes; however, contrary to CPUC's assertion, at page three and again at page nine of its

⁹ The quoted legislative history comports with CME's own experience. See, Verified Statement of Jay R. Ufer, p. 7, ¶ 16. ("CPUC-authorized operations . . . require cumbersome 30-day delays in changing rates, providing that such newly proposed rates are not suspended by CPUC so that hearings on their reasonableness can take place at some later date. Changes in CPUC schedules also require thirty days' notice and publication in a newspaper of general circulation, and these, too, are subject to possible suspension and subsequent hearing.")

Reply, CPUC may not exercise “its power to regulate an intrastate motor carrier it has licensed,” when the Congress, in enacting 49 U.S.C. 14501(a), has preempted a State’s right to regulate the interstate or intrastate fares of an interstate motor carrier of passengers.

Nevertheless, CPUC persists in endeavoring to regulate CME’s fares. At pages seven through nine of the argument section of its Reply, in one of its ever-shifting rationales, CPUC disputes CME’s assertion and maintains that by no means is the agency attempting to regulate CME’s fares. It contends that CME’s allegation “is purely hypothetical and present a case which is not in controversy.” In responding to CME’s interrogatories, however, CPUC was not at all reluctant to state, “As to calendar year 2003, CPUC believes that CME should have collected fares authorized by tariffs on file with the CPUC.” See, Tab D, Interrogatories CME 1-7, 1-8.

The testimony offered by Mr. Gary Gramlick, one of the two witnesses upon whom CPUC relies contradicts the Reply’s assertion. At pages three and four of his Verified Statement, Mr. Gramlick readily acknowledges that the Civil Penalty Assessment Notice, served on CME on October 1, 2003, charged CME with “*advertising* rates to the general public that are different from the rates on file at the CPUC [emphasis added].” The Civil Penalty Assessment Notice, moreover, a copy of which was submitted as Exhibit 17 in CME’s Document Appendix, cites as violations of CPUC’s regulations CME’s “[c]arrying and advertising to carry persons at rates different from those on file with the Commission [emphasis added].” If penalizing a motor carrier of passengers for advertising to carry passengers and actually carrying passengers at rates other than those on file with the State agency, or both, does not constitute the regulation of rates, it is difficult to conceive what would.

In its interrogatories, CME inquired of CPUC whether, before issuing the Civil Penalty Assessment Notice, CPUC had made an inquiry to determine whether CME's operations on September 29 and 30, 2003, between DIA or EGE, on the one hand, and, on the other, points in Pitkin, Eagle or Summit Counties were in interstate or intrastate commerce or whether those operations were being rendered by CME pursuant to its ICC certificates. CPUC acknowledged that it had not. See, Tab D; Interrogatory CME-1-13 .

In the argument portion of its Reply, CPUC attempts to disavow the wording of the Civil Penalty Assessment Notice. At page eight of its Reply, CPUC contends that subsection 14501(a) "unambiguously provides that 'rate' schedules may be required by a State so long as the notice requirement does not exceed 30 days," and, at page nine, it continues, "[T]he Staff of the CPUC has alleged only that CME failed to provide 30 days' notice to the CPUC and the public of the rates that it intended to charge upon the expiration of the notice period." Of course, neither the text of the statute nor that of the Civil Penalty Assessment Notice read as CPUC has endeavored to portray them.

The thirty-day notice provision of subsection 14501(a) by its express terms relates only to "changes in schedules," that is, the passenger carrier's published motor vehicle departure and arrival times. If CPUC in the argument portion of its Reply had difficulty in distinguishing between tariffs and schedules, Mr. Gramlick did not. At pages two and three of his Verified Statement, Mr. Gramlick testified:

CME's rate schedule, as known as a tariff, sets forth the rates, terms, rules, regulations, and conditions of CME's intrastate transportation service as of the tariff's effective date. The tariff is required by law in furtherance of the public convenience and necessity. A copy of CME's tariff in effect on September 29-30, 2003, Colorado PUC No. 12, is attached as Exhibit 2.

As distinguished from the copy of CME's tariff, attached to Mr. Gramlick's Verified Statement as Exhibit 2, is a copy of one of CME's schedules, showing the departure times of its vehicles operated in regular-route service, which is attached as Exhibit 9 to Mr. Gramlick's Verified Statement.¹⁰

CPUC seems to find something contradictory in CME's attempting to accommodate CPUC's demands while at the same time challenging its authority to regulate its rates. At page four of its Reply, CPUC notes, "[A]s explained in the attached Verified Statement of Gary Gramlick, CME has continued to make rate schedule, time schedule, route change and intervention filings at the CPUC subsequent to both the issuance of the CPUC civil penalty assessment and the action commenced at this Board." That's perfectly understandable, however. CME does not wish to be served with additional Civil Penalty Assessment Notices, and it most certainly does not wish to expend the time and incur the expense of waging battles with CPUC in addition to the District Court action during the pendency of this Board declaratory order proceeding which CME instituted.¹¹ Moreover, its

¹⁰ Even as to such operating schedules, CPUC has never pretended that it has promulgated a rule requiring that they be filed in advance of their effectiveness.

¹¹ At page 7 of its Reply, CPUC seems to fault CME for bringing this matter to the Board's attention by quoting from H. Rep. No. 104-311, reproduced at 1995 U.S. Code Cong & Ad. News 793, 799-88. The admonition not to expend its resources needlessly was directed at what is now FMCSA and specifically was limited to "essentially private disputes" under 49 U.S.C. 14704(a)(2). It was not directed at the Board and assuredly not when endeavoring to delineate the scope of Federal preemption of State rate regulation. Simply put, a declaratory order proceeding before this Board testing the jurisdictional limitations of a state regulatory agency attempting to effect regulation of a motor carrier of passengers' operations under Federally issued operating rights is hardly a "private dispute."

local charter or other for hire operation of a local nature remain within CPUC's regulatory jurisdiction, and there is no point in CME's alienating CPUC more than is absolutely necessary.¹²

In approving the financial transaction in STB Docket No. MC-F-20902, Colorado Mountain Express, Inc., and Airport Shuttle Colorado, Inc., d/b/a Aspen Limousine Service, Inc.–Consolidation and Merger–Colorado Mountain Express, served February 28, 1997, a copy of which was included as Exhibit 8 of CME's Document Appendix, the Board, at page three, declared:

[T]here are two . . . preemptions from state regulation that relate to operations and are conferred independently under the statute and do not result from our jurisdiction over a specific transaction under 49 U.S.C. 14303. Specifically, with respect to interstate and intrastate motor passenger carriers on interstate routes, 49 U.S.C. 14501(a) provides that states may not regulate either: (1) operating schedules (except that states may require not more than 30 days' notice of schedule changes); or (2) rate changes in regular-route or charter operations [footnote omitted].

The Board was correct at the time in recognizing the totality of the Federal preemption of State regulation of the rates of motor carriers of passengers subject to its jurisdiction, and it would be correct in repeating that very same conclusion today. How CPUC can claim, as it does in its footnote on page eight of its Reply that "[t]he applicable text of 49 U.S.C. §14501 . . . no longer squares with the [foregoing] Board's interpretation of this provision" is completely unfathomable, as, we respectfully submit, is so much of CPUC's Reply.

¹² Colorado may have a doctrine of regulated monopoly, as CPUC maintains at pages one and four of its Reply. CME, however, denies that it is without competition in rendering its interstate operations within Colorado, and it knows all too well that it can encounter additional competition if only someone were interested in completing Forms MCS-150 and OP-1(P) and paying FMCSA the \$350 filing fee. Indeed, if CME did not face daily competition in its business, there would have been little reason for CME's insistence on entry by the Board of the protective order in this proceeding.

B.

**CME IS PROVIDING INTERSTATE PASSENGER TRANSPORTATION
OVER ITS FEDERALLY FRANCHISED COLORADO ROUTES.**

1.

The incidental-to-air exemption is inapplicable.

At pages 22-23 of its Reply, CPUC advances the patently absurd argument that CME's regular-route operations between Eagle and Vail are being conducted by it pursuant to the incidental-to-air exemption of 49 U.S.C. 13506(a)(8)(A), formerly 49 U.S.C. 303(b)(7a).¹³

CPUC, however, surely must know that the certificate issued by the ICC on November 17, 1983, a copy of which is attached as Exhibit 1 of CME's Document Appendix, authorized CME to render regular-route service as a motor carrier of passengers over Interstate Highway 70 and U.S. Highway 6 between Denver and Grand Junction, serving all intermediate points, which include Eagle and Vail.

CPUC's purpose in offering this far fetched notion is transparent. It was primarily in the ICC proceedings delineating the scope of the incidental-to-air exemption that the requirement that for the motor carrier to be deemed to be engaged in interstate commerce, rather than in purely local pick-up and delivery service, there was to be through ticketing or some other common arrangement with the air carrier. See, i.e., Docket No. MC-C-30225, Minnesota Department of Transportation – Petition for Declaratory Order – Operation of Rochester Limousine Service, Inc., served March 24, 1995; San Juan Air Services, Inc., d/b/a Shuttle Express – Petition for Declaratory Order, 1988 Fed. Car.

¹³ At page 11 of his Verified Statement, CPUC's witness, Mr. Dino Ioannides, would therefore deduct the 58,900 passengers transported between Eagle and Vail in 2003 from the 62,807 passengers which CME submits it transported in interstate commerce in scheduled, regular-route service over its Federally franchised routes.

Cases ¶37,574; James T. Kimball -- Petition for Declaratory Order, *supra*; Portland Airport – Petition for Declaratory Order, 118 M.C.C. 45 (1973); Motor Transp. of Passengers Incidental to Air, 95 M.C.C. 526 (1964).¹⁴ See, also, Pennsylvania Public Utility Com'n v. U.S., 812 F.2d 8 (D.C. Cir. 1987).¹⁵

The requirement for through ticketing or some other common arrangement with the air carrier also was applied by the ICC in a few application proceedings. See, i.e., Midwest Transp., Inc., Common Carrier Application, 98 M.C.C. 362 (1965); Moore Service, Inc., Extension – Migrant Workers, 89 M.C.C. 180 (1962); Alabama Coaches Co., Inc., Contract Carrier Application, 1 M.C.C. 271 (1936).

Through ticketing or some other common arrangement with the air carrier, however, never has been found by the Board to be a requirement for finding that a motor carrier is providing interstate transportation of passengers over its Federally franchised routes, for purposes of the preemption provision of 49 U.S.C. 13902(b)(3). 49 U.S.C. 13902(b)(3) provides:

A motor carrier of passengers that is registered by the Secretary under subsection (a) is authorized to provide regular-route transportation entirely in one State as a motor carrier of passengers if such intrastate transportation is to be provided on a route over which the carrier provides interstate transportation of passengers.

¹⁴ If CME were operating pursuant to the incidental-to-air exemption, as CPUC contends, CME would be unable to carry walk-up passengers between Eagle and Vail, because, by definition, walk-up passengers do not have through tickets or other common arrangements with the air carriers. Yet that comprises a substantial part of CME's scheduled, regular-route business.

¹⁵ The requirements for satisfying the incidental-to-air exemption appear to have been the bases for Secretary Strickland's letter, Exhibit 1 of CPUC's Reply, Director Grimm's letter, Exhibit 2, and Secretary Mineta's letter, Exhibits 3 and 4.

This was the subsection to which the Board was referring when in STB Docket No. MC-F-20902, Colorado Mountain Express, Inc. and Airport Shuttle Colorado, Inc., d/b/a Aspen Limousine Service, Inc. – Consolidation and Merger – Colorado Mountain Express, served February 28, 1997, supra, a copy of which was attached as Exhibit 8 to CME’s Document Appendix, at pages three and four, the Board said, “49 U.S.C. 13902(b)(3) provides that interstate motor passenger carriers, subject to our jurisdiction under 49 U.S.C. 13501 (and registered with the Secretary of Transportation), are automatically authorized to provide intrastate, regular-route passenger transportation over any route they use to provide interstate passenger transportation [footnote omitted].” This was a correct statement of the law then, and is today.

2.

The Funbus standards have been statutorily repealed.

At page six of it Reply, CPUC contends “that a notice and comment proceeding is required if the Board desires to amend the controlling test [of the ICC’s Funbus decision on remand] . . . *in view of the absence of recent changes to federal law which might affect the test.* [emphasis added].”

CPUC is completely in error. The precursor of subsection 13902(b)(3) was section 6 of the Bus Regulatory Reform Act of 1982, which amended 49 U.S.C. 10922(c)(2)(B) to confer jurisdiction on the ICC to authorize motor carriers of passengers to conduct regular-route operations, in intrastate commerce, over the same routes on which they could operate in interstate commerce. See, i.e., Funbus Systems, Inc.— Intrastate Operations – Petition for Declaratory Order, 133 M.C.C. 406 (1984), rev’d and remanded, sub. nom., Funbus Systems, Inc., 801 F.2d 1120 (9th Cir. 1986).

While the Funbus proceeding was pending before the ICC on remand from the Ninth Circuit Court of Appeals, the Congress enacted a significant amendment to subsection 10922(c)(2)(B). By

section 340 of the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132, the Congress added a new subsection, subsection (J), which provided, “Each certificate issued [by the ICC] under this paragraph to provide intrastate transportation of passengers on any route shall be subject to the condition which limits the authority of the carrier to provide intrastate transportation service under the certificate only if the carrier provides regularly scheduled interstate transportation service on the route.”

The Conference Report, H. Rep. 100-27, at page 242, reproduced at 1987 U.S.Code Cong. and Adm. News 226, declared, “Moreover, the interstate service must be a substantial bona fide interstate service and it must involve actual service in more than one State.”

In its Funbus decision on remand, Funbus Systems, Inc.–Intrastate Operations–Petition for Declaratory Order, 1988 Fed. Car. Cases ¶37,536, the ICC paraphrased the Conference Report in explaining what service an interstate motor carrier of passengers must render to be certificated to perform intrastate operations over its authorized route, saying. “[T]he required interstate transportation must be actual regularly scheduled service, it must be *bona fide* and involve service in more than one State, and it must be substantial [footnote omitted].” The ICC thereafter followed the Funbus standards in proceedings arising under 49 U.S.C. 109022(c)(2)(B). See, i.e., Boulder Airporter, Inc. v. Stapleton Stagecoach Co., 8 I.C.C.2d 553 (1992); Collins Coaches Ltd. Common Carrier Application, 1990 Fed. Car. Cases. ¶37,781, following remand by Airporter of Colorado, Inc. v. I.C.C., 866 F.2d 1238 (10th Cir. 1989); Erin Tours, Inc.– Intrastate Operations – Petition for Declaratory Order, 1988 Fed. Car. Cases ¶37,520; O’Hare Wisconsin Limousine Service, Inc – Intrastate Operations – Petition for Declaratory Order, 1988 Fed. Car. Cases ¶37,534.

Significantly, none of the grants of operating authority issued to CME or its predecessors was conditioned by the Funbus standards. At pages four and five of its Reply, CPUC alleges that CME operating authorities were restricted, as follows:

CONDITION: The carrier is authorized to provide intrastate passenger transportation service under this certificate *only* if the carrier also provides substantial regularly scheduled interstate passenger transportation service over the same route.

CPUC misrepresents the conditions which were attached to CME's certificates. The conditions, in fact, provided,

The carrier is authorized to provide intrastate transportation service on a route under this certificate only if the carrier provides regularly scheduled interstate transportation service on the route.

Not one of the certificates which CME or its predecessors received from the ICC, copies of which were attached as Exhibits 1-7 of CME's Document Appendix, reads as CPUC contends.

CPUC errs, as well, when it argues, as it does at page 12 of its Reply, that, in order to be able to transport intrastate passengers over its Federally franchised routes, the interstate operations of a motor carrier "must (a) be a regularly scheduled service; (b) be actual; (c) be bona fide; (d) involve service in more than one state; and (e) be 'substantial' in relation to the intrastate service provided." CPUC seems oblivious of the fact that the provisions of subsection 10922(c)(2)(B) and the requirement that the ICC actually certificate the intrastate operations over a passenger carrier's authorized interstate routes, which were the premise for the Funbus and related decisions, were repealed by the ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803 ("ICTA"). There has been a very important change in the law, and the standards of the Funbus case no longer apply.

In reaching its decision in this proceeding the Board necessarily will need to determine the full extent of the changes effected by ICCTA in the enactment of 49 U.S.C. 13902(b)(3). Two

features, however, are obvious: (1) Under the statute as currently worded, a motor carrier of passengers over regular routes no longer specifically must apply for certificated authority to transport passengers in intrastate commerce over its interstate regular route; the authorization instead is implicitly and nearly automatically conferred; and (2) Congress, which is charged with knowledge of the holdings of the various U.S. Circuit Courts of Appeal cited at pages 13 through 15 of CME's Petition for Declaratory Order, chose not to overrule them, and it certainly did not impose the requirements for single-state motor carrier to come within the incidental-to-air exemption of 49 U.S.C. 13506(a)(8)(A) on the operations of a certificated motor carrier of passengers rendering scheduled, regular-route operations and seeking to pick up and discharge intrastate passengers, as authorized by 49 U.S.C. 13902(b)(3). These factors more than justify the inference that, rather than an "absence of recent changes" to federal law, as contended by CPUC, the Congress, in enacting ICCTA, instead intended to promote an all-but-automatic and modern means for interstate motor carriers of passengers rendering scheduled, regular-route service to transport intrastate passengers over their authorized interstate routes.

3.

CME's single-state operations are in interstate commerce.

The essence of CPUC's position is its reluctance to face the fact that CME can provide interstate transportation over its Federally franchised routes wholly within Colorado, in satisfaction of the preemption provision of 49 U.S.C. 13902(b)(3), without its passengers having purchased through tickets or entered into some other common arrangement with the air carriers on whose flights they traveled in advance of or following CME's ground transportation.

Of course, the bellwether case, cited at page 14 of CPUC's Reply, is U.S. v. Yellow Cab Co., 332 U.S. 218 (1947). While the Supreme Court in its opinion in that case found that Parmelee Transportation Company was engaged in interstate commerce for purposes of the Sherman Anti-Trust Act, 15 U.S.C. 1, 2, when arranging for between-station passenger transportation in Chicago under contracts with the railroads and the railroad terminal associations, the Supreme Court left no doubt that this was not the *sine qua non* of interstate transportation wholly within a single state. The Supreme Court, 332 U.S. at 228-229, was careful to note:

When persons or goods move from a point of origin in one state to a point of destination in another, the fact that a part of that journey consists of transportation by an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character. That portion must be viewed in its relation to the entire journey rather than in isolation. So viewed, it is an integral step in the interstate movement [citations omitted].¹⁶

In other words, in its Yellow Cab Co. decision the Supreme Court made it evident that there needn't be through ticketing or a common arrangement with the out-of-state carrier for a single-state motor carrier of passengers to be found to be engaged in interstate commerce.

Only two years earlier, in United States v. Capital Transit Co., 325 U.S. 357, affirming Passenger Fares Between D.C. and Nearby, VA., 258 I.C.C. 559 (1944), the Supreme Court found the Capital Transit Company, which operated only in Washington, DC, and the Alexandria, Barcroft & Washington Transit Company and other bus companies, which largely operated in Virginia, were engaged in interstate commerce when transporting passengers between their homes in Washington and their places of employment in Virginia, and, hence, their fares were subject to ICC regulation. The Supreme Court, in speaking of the passengers, declared, 325 U.S. at 363:

¹⁶ This language was quoted in Pennsylvania Public Utility Com'n v. U. S., 812 F.2d 8, 10 (D.C. Cir. 1987), cited at page 14 of CPUC's Reply.

True, their interstate trip was broken at the District termini of the Virginia buses, when they stepped from one vehicle to another. But in the commonly accepted sense of the transportation concept, their entire trip was interstate. And the fact that except as to Transit, they paid a combination of two rates, one for travel wholly within the District, and the other for travel between the District and Virginia, and the journey from their residences to Virginia and back again was taken in two segments, does not mean that the total interstate trip was not on a ‘through route’ [citations omitted].

Again, the Supreme Court found that the single-state motorbus operators were transporting passengers in interstate commerce notwithstanding that there was no through ticketing or other common arrangement between the carriers.

In yet a third decision, New York, N.H. & H. R. Co. v. Nothnagle, 346 U.S. 128 (1953), the Supreme Court found the passenger to be traveling in interstate commerce even though there was a break in continuity between the single-state train she took between Meriden and New Haven, Connecticut, and the train she subsequently took from New Haven to Fall River, Massachusetts. The Supreme Court, 346 U.S. at 310, declared:

We have little doubt that the transaction [giving her bag to a redcap] was incident to an interstate journey within the ambit of the Interstate Commerce Act. Neither continuity of interstate movement nor isolated segments of the trip can be decisive. “The actual facts govern. For this purpose, the destination intended by the passenger when he begins his journey and known to the carrier determines the character of the commerce” [citation omitted].

Once more, there was no indication in the opinion of the Supreme Court that it was looking to through ticketing or some other common arrangement between the single-state carrier and the carrier which would carry the passenger to another state to establish that the passenger was on an interstate journey.

The lower court cases decided subsequent to the Supreme Court’s decisions were discussed in some detail at pages 13-15 of CME’s Petition for Declaratory Order, and there would seem to be

little point in reiterating what there was said. At pages 17 and 18 of its Reply, CPUC makes a feeble attempt to distinguish the decisions, but the fact remains that they permit of no doubt that a single-state motor carrier of passengers can be engaged in interstate commerce without there being through ticketing or some other common arrangement with the carrier which operates to or from out-of-state points.

One decision, however, warrants special mention, for the very reason that it was cited by the ICC in the Funbus case on remand, on which CPUC relies so heavily in its Reply, Funbus Systems, Inc. – Intrastate Operations – Petition for Declaratory Order, *supra*. In discussing the *bona fides* of the single-state motor carrier's interstate operations which needed to be established pursuant to 49 U.S.C. 10922(c)(2)(B), the ICC, citing Charter Limousine, Inc. v. Dade County, 678 F.2d 586 (5th Cir. 1982), noted, "One court has held that the common arrangement need not necessarily be between the air carrier and the ground carrier."

In Charter Limousine Inc. v. Dade County, *id.*, the ground transportation from and to the Miami International Airport was arranged by the Carey Corporation and its franchisees. There was no suggestion that the passengers procured their airline tickets through the Carey Corporation and its franchisees. Nevertheless, the court found, 678 F.2d at 588-589:

Charter's use of the interstate Carey Corporation network to accept reservations, and its voucher payment system, satisfies the special arrangement criterion stated by the Supreme Court in *Yellow Cab*. Other decisions support this view.

* * *

It is the conclusion of this Court that Charter's prearrangements place their operations within the stream of interstate commerce, even though they take place wholly within a single state.

At page 18 of its Reply, CPUC concedes that the Charter Limousine decision may be good authority for the Board to find that a travel agent or other third-party provider need to do no more than prearrange for the single-state ground transportation for it to be in interstate commerce. Of course, Executive Town & Country Services, Inc. v. City of Atlanta, 789 F.2d 1523 (11th Cir. 1986), which cites the Charter Limousine decision, is good authority, as well. Indeed, in that case the single-state motor carrier was found to be operating in interstate commerce in transporting its passenger on telephonically prearranged trips. A travel agent or other third-party was not even involved. The Charter Limousine decision, also, was cited by the court in Town of LaPointe v. Madeline Island Ferry Line, 508 N.W.2d 440 (Wisc. 1993), yet another case in which the single-state carrier was found to be operating in interstate commerce in transporting passengers which were completing their interstate journeys, which they themselves arranged without the intervention of a travel agent or other third-party provider.

In insisting, as it does, that CME's passengers carried over its Federally franchised routes can be considered to be in interstate commerce only if a travel agent or other third-party provider sold the passengers their airline tickets, CPUC is guilty of an egregious *ipse dixit*. It cites not a single judicial expression, not to mention Board decision, rendered under 49 U.S.C. 13902(b)(3), which supports its wholly unsubstantiated position.

All of the passengers transported by CME in prearranged scheduled, regular-route service between DIA or EGE, on the one hand, and, on the other, the ski resorts or hotels in Pitkin, Eagle or Summit Counties over its ICC certificated routes, commonly controlled or merged pursuant to the Board's decisions, are traveling in interstate commerce, and such passengers comprise approximately

a fourth of the total number of passengers carried annually by CME on its scheduled, regular-route runs.

4.

CME's interstate operations are substantial

In the internally contradictory fashion which characterizes CPUC's reply, at page 19 of the argument portion of its Reply, CPUC first alleges that CME did not "submit a traffic study as evidence in this proceeding," only to turn around in the very next paragraph to assail the contents of the traffic study which CME did submit in response to CPUC's discovery requests, and which is attached to CPUC's Reply submission as "Addendum to Ioannides Statement, CME Discovery Responses."

The traffic study for 2003 which CME produced and CPUC requested and submitted in CD-Rom format under "highly confidential" designation as "Addendum to Ionnides Statement" in CPUC's Reply, gives the name of every last passenger transported by CME in its scheduled, regular-route service from or to the DIA and EGE, on the one hand, and, on the other, the ski resorts and hotels in Pitkin, Eagle and Summit County, and whether the passenger was a "walk-up" or whether his or her ground transportation on CME's vehicles had been prearranged. If it had been prearranged, the traffic study gave the name of the travel agent or other third-party provider which arranged for the passenger's ground transportation, as well as the airline, flight number and arrival or departure times.

Corresponding data for 2004 and to the most recent date available to CME in 2005 have been included in a "Highly Confidential" CD-ROM filed under seal to demonstrate CME's continued

rendition of scheduled, regular-route intrastate transportation over its Federally franchised Colorado routes.¹⁷

In his Verified Statement submitted together with CME's Petition for Declaratory Order, Mr. Jay R. Ufer, President and CEO of CME, testified that in 2003 CME transported a total of 262,897 passengers in its scheduled, regular-route service, and of these 63,394 or 24.1 percent were transported by CME pursuant to prearrangements by travel agents or other third-party providers.¹⁸ The numbers subsequently were adjusted, and, in his interrogatory responses, Mr. Ufer stated that the number of passengers CME transported in scheduled, regular-route service in 2003 was 256,965, of whom 62,807 or 24.4 percent were transported by CME pursuant to prearrangements by travel agents or other third-party providers.¹⁹

Obviously, the 62,807 passengers carried by CME pursuant to prearranged ground transportation plans were concluding or embarking on their out-of-state trips. The passengers were

¹⁷ See Tab G, consisting of a CD-ROM containing traffic data obtained from the books and records of CME for such periods. The interstate component, computed as CME's presentations suggests it should be, is 24.7 % for 2004 and 25.4 % for 2005 to the last date available. 2003 is a period representative of CME's ongoing business, and shows that as its business has grown, its interstate component has grown with it in approximately the same proportion.

¹⁸ At page 21 of the argument portion of its Reply, CPUC questions whether CME has rendered scheduled, regular route service because its schedules, posted on its web, are coordinated with the arrival and departure times of flights in and out of DIA and EGE. In short, CME's schedules have been established to meet its passengers' transportation needs. That on occasion a scheduled trip has been cancelled for want of passengers is simply a sound business practice, regularly followed by other ground or air passenger carriers, as is the practice of not wasting precious fuel on trips with no passengers traveling either one way or the other.

¹⁹ Tab H, Deposition of Jay R. Ufer, pp. 178-179; (extract) As the result of an inadvertent error in preparing the summary referred to in Mr. Ufer's initial Verified Statement corrections were made to the passenger totals and resulting percentage breakdowns of interstate and intrastate passengers. The differences are insignificant, however.

traveling in interstate commerce, and CME's carriage of them, although wholly over routes within Colorado which had been certificated by the ICC and authorized to be commonly controlled or merged by decisions of the Board, was in interstate commerce.

At page 19 of its Reply, CPUC makes the outlandish assertion that "CME has failed to persuasively demonstrate that *any* of its passengers it transported in its regularly scheduled shuttle service in 2003 were transported in interstate commerce [emphasis added]." CPUC's incomprehensible contention is in flat contradiction to the Supreme Court's holdings in U.S. v. Yellow Cab Co., supra, United States v. Capital Transit Co., supra, and New York, N.H. & H. R. Co. v. Nothnagle, supra, and the conclusions subsequently reached by the United States Courts of Appeals, most notably, Charter Limousine, Inc. v. Dade County, supra, and Executive Town & Country Services, Inc. v. City of Atlanta, supra. The very fact that the passengers' transportation on CME's motor vehicles had been prearranged in connection with trips from or to points beyond the State rendered CME's scheduled, regular-route service within Colorado over its ICC certificated routes in interstate commerce.

What really troubles CPUC, as it explains at page 19 of the argument section of its Reply, is that "the information set forth in CME's traffic study does not inform the data reviewer whether the CME passenger purchased a package from the third party, which package also included an interstate air travel movement." The allegedly omitted link, however, never has been a requirement for allowing a motor carrier of passengers rendering scheduled, regular-route interstate service over its Federally franchised routes to pick up or deliver passengers within a single state, pursuant to 49 U.S.C. 13902(b)(3). As we explained above, in part B.1. of our Argument, the need for through ticketing or some other common arrangement with the air carrier pertains to the incidental-to-air

exemption of 49 U.S.C. 13506(a)(8)(A). It at no time has been a prerequisite for authorizing intrastate service in connection with the performance of scheduled, regular-route interstate operations over Federally franchised routes, pursuant to 49 U.S.C. 13902(b)(3).

In fact, however, the largest of CME's third-party providers do arrange the passengers' air transportation, as well as CME's ground transportation. Obviously, Mark Travel, the vacation booking agent for United Airlines and several other airlines and CME's fifth largest third-party provider, and American Vacations, the vacation booking agent for American Airlines and CME's seventh largest third-party provider, include travel on the airlines, in addition to ground transportation by CME. CPUC does not contend otherwise.

In his Verified Statement, Mr. Christopher Jarnot, Vice President of Marketing and Sales for Vail Resorts Management Company, testified that his company had arranged for 20,115 of its various resorts' guests to use CME's airport transportation services. At his deposition, Mr. Jarnot explained that while Vail Resorts Management Company cannot book frequent flyer ticket travel, it always tries to sell the airline portion in its vacation packages when it can. It has gone so far as to enter into contractual bulk ticket purchasing arrangements with various airlines at EGE and DIA for discounted airline tickets, which it then resells with the airlines' permission to the purchasers of its ski holiday or vacation packages. The air carriers, in turn, imposes conditions on the sale of its discounted tickets, namely, that they be sold as part of the ski holiday or vacation packages sold by Vail Resorts Management.²⁰ Nevertheless, as noted by CPUC's witness, Mr. Dino Ioannides, at pages six and seven of his Verified Statement, Vail Resorts Management Company's witnesses could not unequivocally state at their depositions that each of the 20,115 guests for whom it had arranged

²⁰ Tab I, Deposition of Christopher Jarnot, pp. 59-72 (extract).

ground transportation by CME also had booked the airline reservation through it. Based on the *ipse dixit* announcement that a passenger cannot have purchased his own airline ticket and furnished the information to a third party arranger and have a trip qualify as interstate in character, Mr. Ioannides has arbitrarily, and impermissibly, determined that *none* of the 20,115 guests could be counted as having been transported by CME in interstate commerce.

At page 12 of his Verified Statement, and in the same vein, Mr. Ioannides claims that altogether 24,733 of the passengers carried by CME in prearranged scheduled, regular-route service in 2003 should not be considered to have been interstate passengers, because the third-party providers could not state that in every instance the preceding or subsequent airline transportation had been booked through them. Thus, Mr. Ioannides concludes that only 38,074, or 14.8 percent, of the passengers transported by CME over its Federally franchised routes were actually transported in interstate commerce.²¹

We respectfully submit whether it was 62,807 or 24.4 percent of its passenger which were transported by CME in interstate commerce, as CME calculates, or only 38,074 or 14.8 percent of its passengers, as Mr. Ioannides contends, or 13.7% as CPUC's counsel now contends, CME rendered substantial scheduled, regular-route operations over its Federally franchised Colorado routes by any count and, accordingly, could transport intrastate passengers on such routes, pursuant to 49 U.S.C. 13902(b)(3). Black's Law Dictionary, Revised Fourth Edition, 1968, defines "substantial" as "[o]f real worth and importance; of considerable value; valuable . . . , [b]elonging

²¹ In an extraordinary Confidential Supplement of Counsel to Statement of Dino Ioannides, CPUC disavows Mr. Ioannides' count, deducts another 2,920 passengers because their airline reservations allegedly were not booked by S&L Travel Partners, Inc., and reduces the interstate passenger count to 35,154 or 13.7 percent.

to substance, actually existing; real; not seeming or imaginary, not illusive; solid; true; veritable. . .” (citations omitted).

Of aid in determining what constitutes substantial operations in interstate commerce is Morris v. McComb, 332 U.S. 422 (1947). In that case the Supreme Court held that a motor carrier whose drivers spent only three to four percent of their time actually operating in interstate commerce nevertheless was subject to the ICC’s jurisdiction, and the motor carrier’s affected employees were governed by the ICC’s hours-of-service regulations, rather than the Fair Labor Standards Act.

Thus, CME’s operations would fully satisfy the standards of the Funbus decision on remand, although, as we pointed out in part B.2. of our Argument, the statutory provisions on which the decision was based have been repealed and, therefore, the Funbus standards do not any longer apply. 49 U.S.C. 13902(b)(3), as currently worded, simply requires that, in order to be able to provide regular-route transportation entirely in one state the motor carrier of passengers must transport the intrastate passengers on a Federally franchised route over which it actually provides interstate transportation of passengers.²²

The record in this proceeding permits of no doubt that CME actually provides scheduled, regular-route service in the interstate transportation of passengers between DIA and EGE, on the one hand, and, on the other, the ski resorts and hotels of Pitkin, Eagle and Summit Counties over

²² As earlier noted, one immediately noticeable difference between the former 49 U.S.C. 10922(c)(2)(B) and the present provisions of 49 U.S.C. 13902(b)(3) is that the right to transport intrastate passengers over an intrastate route appears to be automatic upon grant of Federal operating authority by the FMCSA. Yet CPUC continues to argue that the two enactments admit of no difference. Whatever may be their differences, it is clear that Congress did not intend to curtail Federal authority in enacting 49 U.S.C. 13902(b)(3).

Interstate Highway I-70, U.S. Highway 6 and Colorado Highway 82, its Federally franchised routes. CME, without reliance on whatever grants of authority it may have received from CPUC, therefore can transport intrastate passengers in scheduled, regular-route service over its authorized routes without any interference by CPUC as to what fares it may advertise and collect.

5.

The Internet has profoundly affected CME's operations.

The Rebuttal Verified Statement of Jay R. Ufer, CME's President and Chief Executive Officer, directly discusses the pervasive effect on interstate transportation occasioned by his company's extensive use of the Internet and, indeed, the remainder of the travel industry with which CME interacts on a daily basis.²³

As Mr. Ufer's Verified Rebuttal Statement discloses, no other single medium of commercial discourse has affected the motor carrier passenger transportation industry to a greater extent. Passengers who do not travel on a prearranged package basis can, and do, make reservations on CME's vehicles utilizing one of two World Wide Web sites operated by CME, which interface with CME's own internal reservations databases essentially without prior human intervention until the day of such passengers' trips. Of course, the travel agents' and other third-party providers' which pre-arrange the ground transportation on CME's motor vehicles following or preceding their customers flights are similarly established and communicated via the Internet. Air carriers' websites, such as that of United Airlines operated by Mark Travel Corporation, seldom if ever issue traditional tickets, much less "through tickets," and instead direct confirmations of ground transportation reservations and other trip package elements via Internet e-mail to their customers together with

²³ Tab E, Verified Rebuttal Statement of Jay R. Ufer, p. 3, ¶ 3.

pertinent flight information so as to establish a seamless air-ground transition for travelers. While CME maintains a long-distance 800-number “inside sales” function for its customers and for customer service functions, the clear and continuing trend has been toward increasing use of the Internet.

The Internet, if nothing else, has vastly expanded interstate and, let it be said, foreign commerce as well. Rather than rendering CME’s ground transportation in Colorado subject to intense State regulation, as suggested by CPUC, the Internet, itself an instrument of interstate commerce, makes use of a host of other instrumentalities of intrastate commerce to make reservations of both air and ground carriage, and to integrate lodging and other, related vacation-oriented commercial transactions at little cost per passenger. The end result logically cannot be other than transportation in interstate commerce.

III.

CONCLUSION

At page 6 of its Reply, CPUC seeks to portray the controversy between it and CME as involving nothing more than whether CPUC properly could find that CME, on September 29 and 30, 2003, violated Colorado law in advertising to carry and actually carrying passengers between DIA and EGE, on the one hand, and, on the other, ski resorts and hotels in Pitkin, Eagle and Summit Counties, at fares other than those on file with CPUC. CPUC cannot escape the consequences of its actions quite that easily. CME has been rendering essentially the same operations long before the two days of the Civil Penalty Assessment Notice and, of course, since then, as its President and CEO, Mr. Jay R. Ufer, testifies in his Verified Statement.

The issues which were raised by CME's Petition for Declaratory Order were whether CME, now, as then, transported intrastate passengers in scheduled, regular-route service on its Federally franchised Colorado routes over which CME actually provided interstate transportation of passengers, in accordance with 49 U.S.C. 13902(b)(3), and, accordingly, whether CPUC now, as then, is preempted from regulating CME's interstate and intrastate fares, pursuant to 49 U.S.C. 14501(a).

The referring court, Chief Judge Lewis T. Babcock, in East West Resort Transportation LLC v. Sopkin, supra, (an advance-sheet version of which was filed with the Board on June 8, 2005), recognized that more was involved than merely the cramped construction that CPUC urges.

Here, the *extent* and *nature* of CME's *interstate* operations present central questions of fact and law not within my conventional experience, but with the specialized expertise of the STB. My limited functions of review are more rationally informed by preliminary resort to the STB's expertise. And preliminary reference of this issue to the STB will promote the relationship between court and agency that the primary jurisdiction doctrine seeks to maintain.

Id., 371 F. Supp. 2d at 1256.

At page 6 of its Reply, CPUC contends that "the Board must apply the law as it existed in 2003." The argument is altogether at odds with the well-established principle that an administrative agency must administer the law as it is in effect at the time it renders its decision. As the court declared in In re San-Su Lee, 277 F.3d 1338, 1346 (Fed. Cir. 2002), "Sound administrative procedure requires that the agency apply the law in accordance with statute and precedent." Indeed, in the Funbus decision upon which CPUC so heavily relies, the ICC did just that and applied the provisions of 49 U.S.C. 10922(c)(2)(B) as amended by section 340 of the Surface Transportation and Uniform

Relocation Assistance Act of 1987, enacted by the Congress while the proceeding was before the agency on remand from the reviewing court.

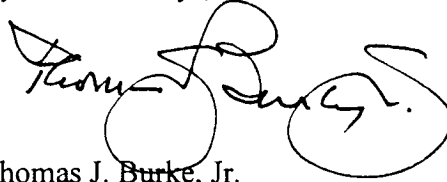
As it happens, neither subsection 13902(b)(3) nor subsection 14501(a) has been amended since 2003; they read today exactly as they did then. Then, as now, CPUC was preempted from regulating CME's interstate or intrastate fares when rendering scheduled, regular-route service over its ICC-certificated routes, authorized to be commonly controlled or merged pursuant to decisions of the Board, and then, as now, CME lawfully could transport intrastate passengers in scheduled, regular-route service over such routes, because its intrastate transportation of passengers was rendered by CME on routes over which it actually provided interstate transportation of passengers.

WHEREFORE, Petitioner, East West Resort Transportation, LLC, and TMS, LLC, d/b/a Colorado Mountain Express, ask the Board to find (1) that the Petitioner actually has operated scheduled, regular-route service in interstate commerce over its Interstate Commerce Commission certificated Colorado routes, commonly controlled or merged pursuant to decisions of the Board, that, accordingly, the Petitioner may carry intrastate passengers when operating over those routes and that the Colorado Public Utilities Commission is preempted from regulating Petitioner's interstate or intrastate fares; and (2) that CPUC may not undertake to conduct CPUC administrative enforcement proceedings against CME in determining the nature and extent of its interstate operations for purposes of determining CME's eligibility to transport intrastate passengers on its authorized interstate routes. Petitioner, further, asks that the Board's decision be forwarded to the reviewing court, contemporaneously with service upon the parties.

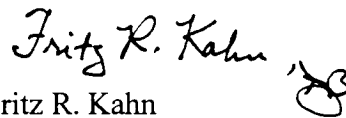
Respectfully submitted,

EAST WEST RESORT TRANSPORTATION, LLC.
AND TMS, LLC, d/b/a
COLORADO MOUNTAIN EXPRESS

By their attorneys,

A handwritten signature in black ink, appearing to read "Thomas J. Burke, Jr.", with a large, stylized flourish at the end.

Thomas J. Burke, Jr.
Jones & Keller, P.C.
1625 Broadway, (#1600)
Denver, CO 80202
Tel.: (303) 573-1600

A handwritten signature in black ink, appearing to read "Fritz R. Kahn", with a small flourish at the end.

Fritz R. Kahn
Fritz R. Kahn, P.C.
1920 N Street, NW (8th fl.)
Washington, DC 20036-1601
Tel.: (202) 263-4152

Dated: September 29, 2005.

CERTIFICATE OF SERVICE

I certify that I this day have served a copy of the foregoing Rebuttal upon the Public Utilities Commission of the State of Colorado by arranging for the hand delivery of a copy to Edward D. Greenberg, Esq., and by mailing a copy thereof by prepaid first-class mail to:

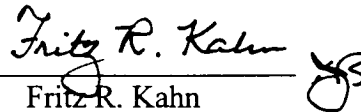
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UNITED STATES MAIL

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HAND DELIVERY

^{30th}
Dated at Washington, DC, this ~~29th~~ day of September 2005.


Fritz R. Kahn

B

Decision No. C05-1026

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 05M-332CP

IN THE MATTER OF THE TENTATIVE APPROVAL UNDER 49 U.S.C. SECTION 14303 OF THE PURCHASE BY CASINO TRANSPORTATION, INC., OF ALL THE ISSUED AND OUTSTANDING SHARES OF STOCK OF FOUR WINDS, INC., DOING BUSINESS AS PEOPLE'S CHOICE TRANSPORTATION, INC., RECORD OWNER OF CERTIFICATE NOS. 14641 AND 48716 AND CONTRACT CARRIER PERMIT NO. A-9792; AND TITLE 40, ARTICLES 16 REGISTRATIONS, LL-53, CSB-74, AND ORC-97; AND THE SIMULTANEOUS LEASE OF AUTHORITIES FROM FOUR WINDS, INC., DOING BUSINESS AS PEOPLE'S CHOICE TRANSPORTATION, INC. TO CASINO TRANSPORTATION, INC.

DECISION DENYING PETITION

Mailed Date: August 30, 2005
Adopted Date: August 10, 2005

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of a pleading filed by Casino Transportation, Inc. (CTI) and Four Winds, Inc., doing business as People's Choice Transportation, Inc. (People's Choice). The pleading is entitled as follows:

Joint Notification to the Colorado Public Utilities Commission by Casino Transportation, inc. and Four Winds, Inc. D/B/A People's Choice Transportation, Inc. of Tentative Approval Under 49 U.S.C. Section 14303 of the Transfer of Control of Four Winds, Inc. D/B/A/ People's Choice Transportation Inc. to Casino Transportation, Inc. Through Stock Purchase and the Simultaneous Lease by Casino Transportation, Inc. of Authorities from Four Winds, Inc. D/B/A People's Choice Transportation, Inc.

As part of the transaction described in the title of this docket, CTI is to lease the certificates of public convenience and necessity and contract carrier authorities issued by the Commission to People's Choice. Typically, a carrier would file an application with the Commission pursuant to

§ § 40-5-105 and 40-11-104, C.R.S., if they wanted to lease their authorities to another carrier. We construe the pleading as a petition for declaratory judgment asking this Commission to determine that it does not have to file an application to lease the authorities.

2. The "notification" asserts that the Commission does not have jurisdiction over any transfer of Commission issued authorities because federal statute preempts the Colorado statute that gives us jurisdiction over the proposed lease of authorities. People's Choice and CTI state that 49 U.S.C. § 14303(f) preempts our authority:

(f) Effect of Approval. A carrier or corporation participating in or resulting from a transaction approved by the Board under this section, or exempted by the Board from the application of this section pursuant to section 13541, may carry out the transaction, own and operate property, and exercise control of franchises acquired through the transaction without the approval of a State authority.

CTI and People's Choice are required to obtain approval from the Surface Transportation Board (Board), and the Board has issued an order stating its intention to approve the merger which was attached to the "notification." On its face, the statute would appear to preempt the authority granted to us in §§ 40-5-105 and 40-11-104, C.R.S. Courts, however, have interpreted the statute differently with respect to preemption. In *Leaseway Transportation Corp. v. Illinois Commerce Comm'n*, 888 F.2d 1212 (7th Cir. 1989), the 7th Circuit stated that the language of the statute was very clear that the Interstate Commerce Commission has exclusive authority over the transaction, and that the transaction could be carried out without state approval. *Id.* at 1214.¹

3. The 11th Circuit expressed a different point of view in *North Alabama Express, Inc. v. Interstate Commerce Comm'n*, 62 F.3d 361 (11th Cir. 1995), when faced with a situation similar to the one at issue here.² The Court stated that, "[w]hile the statute requires no showing

¹ The statute in question was 49 U.S.C. § 11341(a) which was the predecessor to the statute referenced by CTI and People's Choice.

² The statute in question was 49 U.S.C. § 11341(a) which was the predecessor to the statute referenced by CTI and People's Choice.

of necessity to approve such a transfer, obviously there must exist some relationship between the interstate and intrastate authority being transferred...it would appear that the ICC's [Interstate Commerce Commission] authority must rest on a sufficient connection between the interstate transfer and the attempted intrastate transfer to make the ICC's action reasonable." *Id.* at 366. The Court then set aside the ICC's order granting the transfer as it pertained to the intrastate authorities. *Id.* The 10th Circuit has not issued an opinion on this jurisdictional question.

4. In this matter, there is no demonstration that the validly-issued intrastate authorities are somehow connected to or affect interstate commerce. It would be inappropriate for this Commission to determine which federal circuit court of appeals has correctly interpreted the statute, and it is of note that the arguments put before each court were different. Since federal courts are split on this issue, and since the 10th Circuit has not weighed in on the debate, we believe we should uphold the jurisdiction provided us by the General Assembly, and require CTI and People's Choice to file an application for authority to lease the certificates at issue in the transaction.

B. Conclusions

5. We construe the "notification" as a petition for declaratory judgment asking this Commission to determine that CTI and People's Choice do not have to file an application to lease the authorities. The petition for declaratory judgment is denied for the reasons stated above.

II. ORDER

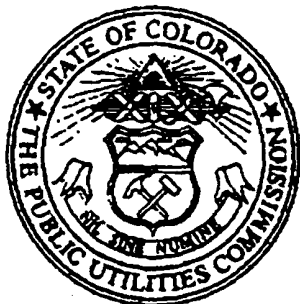
A. The Commission Orders That:

1. We construe Casino Transportation, Inc. (CTI) and Four Winds Inc., doing business as People's Choice Transportation, Inc.'s (People's Choice) joint "notification" to the Commission as a petition for declaratory judgment.

2. The petition for declaratory judgment is denied.
3. People's Choice and CTI shall file an application for authority to lease the Commission issued authorities at issue in their merger.
4. The 20-day time period provided by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the Commission mails or serves this Order.
5. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
August 10, 2005.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

GREGORY E. SOPKIN

POLLY PAGE

CARL MILLER

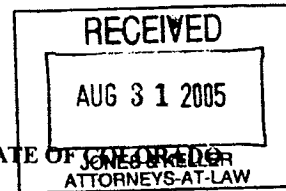
Commissioners

C

Decision No. C05-1037

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03R-554TR



IN THE MATTER OF THE PROPOSED REPEAL & REENACTMENT OF ALL RULES
REGULATING TRANSPORTATION BY MOTOR VEHICLE. AS FOUND IN 4 CCR 723-6,
9, 15, 23, 31, 33, AND 35.

COMMISSION ORDER DENYING EXCEPTIONS

Mailed Date: August 30, 2005

Adopted Date: July 8, 2005

I. BY THE COMMISSION:

A. Statement

1. This matter comes before the Commission for consideration of exceptions filed to Recommended Decision No. R05-0450, issued on April 20, 2005. That decision set forth proposed rules for the regulation of transportation by motor vehicle as found in 4 *Code of Colorado Regulations* (CCR) 723-6, 9, 15, 23, 31, 33, and 35. Exceptions were timely filed by Alpine Taxi/Limo, Inc. (Alpine Taxi) and Harvey Mabis. Responses to Alpine Taxi's exceptions were filed by Black Diamond Limousine, Inc. (Black Diamond) and East West Resort Transportation, LLC doing business as Colorado Mountain Express (CME). We deny the exceptions, but delete proposed rule 6504. The proposed rules are attached as Attachment A.

B. History

2. This docket is part of the Commission's overall effort to repeal and reenact its entire body of rules. This docket was opened by Decision No. C03-1454 in which the Commission issued its Notice of Proposed Rulemaking (NOPR). The NOPR was subsequently published in the February 10, 2004 issue of *The Colorado Register*. Public hearings were held in

this matter on March 22 and 23, 2004, September 13 and 14, 2004 and on March 15, 2005. The Commission received comments from various parties in both oral and written form. The Administrative Law Judge took the comments under advisement, and issued Recommended Decision No. R05-0450 on April 20, 2005. In Decision No. C05-0537, the Commission then stayed the recommended decision as authorized by § 40-6-109(2), C.R.S. in order that it have enough time to thoroughly consider any exceptions filed by parties to this docket. By Decision No. C05-0562, we extended the time to file exceptions until May 24, 2005. As noted above, Alpine Taxi and Mr. Mabis filed exceptions by the deadline, and Black Diamond and CME submitted replies.

C. Discussion

1. Alpine Taxi Exceptions

3. The issues raised in the exceptions filed by Alpine Taxi relate to matters currently before the United States Surface Transportation Board (STB), an agency of the U.S. Department of Transportation. Alpine Taxi asserts that the ALJ erred in failing to adopt Alpine Taxi's proposed rule 6407 which would require for-hire passenger carriers to hold Commission issued authority before offering intrastate service within a federally prescribed exempt zone.

4. Alpine Taxi also believes the ALJ erred in failing to adopt any type of rule defining what constitutes a "common arrangement" for purposes of determining whether a trip within the state of Colorado is a trip in interstate commerce or intrastate commerce. The reply filed by CME notes that the Commission is currently involved in proceedings before the STB which would aid in its resolution of the matters raised in Alpine Taxi's exceptions.

5. Black Diamond and CME also assert that the Commission may not determine federal jurisdiction or determine what federal authority may exist with respect to intrastate service in relation to interstate service.

6. We deny Alpine Taxi's exceptions because federal law provides the legal framework to be used in determining whether transportation services are intrastate or interstate in nature. To the extent that federal law is unclear, prudent agency practice dictates that we wait for the STB to clarify any uncertainties. A state rulemaking may not alter federal law. Attempting to summarize federal law, in this instance, would be imprudent and would risk inaccuracy and conflict. When the federal legal framework requires case-specific interpretation, STB or federal court proceedings are more appropriate venues than state rulemaking proceedings.

7. Alpine Taxi also suggests that the ALJ erred in not adopting a definition of "luxury motor vehicle" which is set forth in § 40-16-101(3), C.R.S., but not defined. We decline to do so because the Commission currently does not have broad rulemaking authority under this Article. We understand Alpine Taxi's complaint that what it believes to be garden-variety sedans are being registered as luxury limousines. However, because we do not currently have rulemaking authority, we cannot set forth a definition of the statutory term at this time.

2. Harvey Mabis Exceptions

8. Mr. Mabis's exceptions are with respect to the proposed rules on towing carriers. The first exception is with respect to proposed Rule 6000. Mr. Mabis states that the ALJ should have made clear in this rule that the PUC would only apply its towing rules to those entities whose business is primarily towing, and would not make the rules applicable to those business for which towing is an ancillary service. Proposed rule 6000 is a general statement of applicability. The applicability of a particular rule will depend upon myriad circumstances.

We believe that the ALJ has properly set forth the general applicability of the proposed rules in proposed rule 6000, and decline to change it as Mr. Mabis suggests.

9. Mr. Mabis also objects to proposed rule 6001. Mr. Mabis states that “We have asserted our position in this matter again and again and we believe that it is the affirmative requirement that the commission make every definition that are used in these rules to be as clear and defined as possible and that no referral or reference be acceptable [sic].” Mr. Mabis may feel he has repeated himself in vain, but that does not make his position one we must accept. He cites no legal authority blocking our reference to statutes or other rules or regulations. The proposed rules refer to statutory provisions for definitions because statutes control our rules. By referring to statute, we ensure that we are using the definition that the legislature enacts into law, in whatever form the definition may take, currently or in the future. We decline to adopt Mr. Mabis's proposal.

10. Mr. Mabis also objects to proposed rule 6007 which sets forth insurance requirements for towing carriers among others. Mabis argues that the insurance requirements are too high, and that there is no justification for the limits in the proposed rules. Mr. Mabis would prefer the limits set forth in § 42-7-510, C.R.S. We believe that the limits we have chosen better protect the public. While Mr. Mabis may be correct that in many cases towed vehicles are not worth even close to the limits we propose, it is not always the case that a tow company's liability with respect to a particular accident would be less than the limits proposed by Mr. Mabis. We believe that the proposed limits are appropriate and, as the ALJ notes, achieve a sensible balance between affordability and public protection. It is noteworthy that federal regulations prescribe the same limits and that no other tow carriers have objected to the limits as financially prohibitive.

11. Mr. Mabis objects to proposed rule 6500 because he believes we incorrectly allow municipalities the power to regulate tow carriers, particularly local law enforcement agencies. Mr. Mabis's second submission dated May 23, 2005, suggests that "there is an underlying plan between the staff of the commission and these entities of CSU University and political subdivisions in Fort Collins and Larimer County to impose a form of dual regulation based upon this rules [sic] as it is currently written." Judging from the May 23 submission, Mr. Mabis feels he has been unfairly kept off of the list of carriers eligible to tow for various government entities in Larimer County. We emphasize that if Mr. Mabis believes this to be the case, his remedy will not be found at this Commission, because we have no jurisdiction over how municipalities or Colorado State University accept bids and contracts for towing services. The ALJ notes that municipalities may adopt more stringent rules with respect to towing carriers, as permitted by law, and has modified the proposed rule to emphasize this. Section 42-4-1813, C.R.S., specifically allows municipalities or other governmental entities of the State to execute contracts for the removal, storage, or disposal of abandoned motor vehicles, and allows local entities to pass ordinances governing procedures for the towing of abandoned or illegally parked motor vehicles. We believe proposed rule 6007 to be well drafted, and decline to make the changes suggested by Mr. Mabis in his exceptions.

12. Mr. Mabis also proposes new rules to be set forth as proposed rule 6500(b), (c), (d), (e), and (f). These all relate to the applicability of the towing rules and the authority of tow carriers in general. We believe the proposed rule 6500 adopted by the ALJ to be more appropriate given the statutes passed by the legislature, and more clear and concise than the new additions proposed by Mr. Mabis, and thus decline to adopt his suggestions.

13. Mr. Mabis also asserts that proposed rule 6501 should contain definitions distinguishing the difference between a "public tow operator" and a "private tow operator." We decline to adopt Mr. Mabis's suggestions because the definitions in the proposed rules are sufficient, more concise, and more integrated with our governing statutes and the other towing rules being adopted by the Commission. We note that to the extent that a tow carrier has problems interpreting the rules, Commission Staff are available to assist in resolving any difficulties.

14. With respect to proposed rule 6504 which states that the towing carrier must provide, in writing, the name of its insurance or surety-company and its policy number within two days after receiving a written request for that information from the owner of a towed vehicle, Mr. Mabis suggests that the Insurance Commission and not the PUC has jurisdiction. We deny Mr. Mabis's exceptions, but will delete the proposed rule so that the towing carrier need not provide the information which is already on file at the Commission. We believe the public is adequately protected by the availability of this information at the Commission, and note that other carriers regulated by the Commission are not required to provide this information upon request by a customer. This could potentially prevent conflict between the tow carrier and the public.

15. Mr. Mabis submits exceptions to several subsections of proposed rule 6507, generally objects to Commission regulation of storage of towed vehicles, and believes that regulation of storage should take place under the Uniform Commercial Code. We believe that under §40-13-107, C.R.S., we have the duty to regulate storage, and do not believe we are preempted by federal statute. Storage of the towed vehicle is an inherent part of towing. Mr. Mabis apparently believes that, with respect to 6507(a), "the only necessary notification and

reasonably practical one is that the local jurisdiction be notified to affirm that the transaction of the vehicle's custody is certainly correct and lawful." We understand that this would mean that the tow carrier would only have to notify the local law enforcement agency of the hookup location and legality of the performed tow. Mr. Mabis's suggestion includes nothing regarding giving notice of the whereabouts of the stored vehicle. We believe that the proposed rule is more clear and better protects the public, and thus deny Mr. Mabis's exceptions on this rule. Owners must have access to their vehicles. It is a matter of economic necessity and public safety. While vehicles may be legally towed, they must be available for reclamation by their owners.

16. Mr. Mabis suggests in his exceptions that the Commission does not have authority to regulate the storage and release from storage of towed vehicles as set forth in proposed rule 6507(d). We reject this suggestion, and again note that § 40-13-107, C.R.S., clearly allows us to regulate storage.

17. With respect to proposed rule 6508(b), Mr. Mabis believes the Commission unlawfully intervenes in a contractual relationship between a private individual and a tow carrier, by preventing a tow carrier from authorizing on behalf of the property owner a non-consensual tow. Mr. Mabis suggests that the rule be stricken in its entirety as violative of 49 U.S.C. § 14501 and the Colorado Constitution. We do not believe that those two authorities deprive this Commission of jurisdiction over a towing carrier's non-consensual removal of a vehicle parked on private property. Section 14501(c) reads:

§ 14501. Federal authority over intrastate transportation

(c) Motor Carriers of Property.—

(1) General rule.— Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier

affiliated with a direct air carrier covered by section 41713 (b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered.— Paragraph (1)—

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the transportation of household goods; and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

Pursuant to subsection (C), the Commission may regulate non-consensual tows and prevent a tow carrier from acting as a property owner's agent. We note that, under our rules, a written contract will allow a tow carrier to act as a property owner's agent under certain circumstances.

18. Mr. Mabis also objects to proposed rule 6508(c) as being violative of 49 U.S.C. § 14501, and believes it should be stricken. We disagree with his interpretation of the federal statute. Proposed Rule 6508(c) pertains to authorization for non-consensual tows. As set forth in the statute above, we believe federal law allows us to regulate non-consensual tows. The proposed rule protects the public and we decline to strike it.

19. Mr. Mabis objects to the phrase "drop charge" as set forth in proposed rule 6511(a), and suggests that it be struck in favor of "service call fee." We will use "drop charge" because it is commonly understood in the towing industry, and we believe it is better understood than Mr. Mabis's proposed "service call fee." We thus deny Mr. Mabis's exception to this rule.

20. Mr. Mabis also objects to the phrase "off road retrieval" as set forth in proposed rule 6511(b) as being not sufficiently clear. We believe that a more easily defined or more clear phrase might exist, but Mr. Mabis does not suggest one. This phrase has worked in past iterations of the Commission's rules and we see no reason why it should not in the future. We thus decline to adopt a new definition.

21. Mr. Mabis believes that the towing rates set forth in proposed rule 6511(c) are outdated and suggests we stay the proposed rules to allow further consideration of what would be an appropriate rate. The ALJ found the rates to be sufficient, and was not convinced of the merits of Mr. Mabis's proposals. The ALJ found the proposed rates to be just and reasonable, and so do we. We deny Mr. Mabis's exception to this rule because the age of the rates does not by itself mean they are unjust or unreasonable. Mr. Mabis sets forth at length the various steps required to tow a vehicle, but provides no suggestions as to new rates. We appreciate Mr. Mabis's perspective, but decline to stay the rules as he suggests.

22. Mr. Mabis also objects to proposed rule 6513 which concerns civil penalties. Apparently Mr. Mabis wants an exhaustive list of Commission procedures with respect to the issuance of civil penalties. The issuance of such penalties is a matter left to the discretion of the staff of the Commission.¹ It would be impossible to provide the list Mr. Mabis seeks because the facts surrounding each civil penalty assessment notice (CPAN) are unique. The statute and the Commission's rules provide adequate due process to individuals subject to the CPAN. In addition, the statute and the Commission's rules set forth the processes and procedures

¹ While staff of the Commission may issue a CPAN, the decision to assess the civil penalty is made by an ALJ or the Commission, subject to appeal, after giving the respondent an opportunity to put on a case, cross-examine witnesses, and present argument.

involved in a hearing on a CPAN. We do not believe there is merit to Mr. Mabis exceptions to this rule and thus deny them.

D. Conclusions

23. The exceptions filed by Alpine Taxi are denied as set forth in the discussion above.

24. The exceptions filed by Harvey Mabis are denied.

25. Proposed Rule 6504 shall be deleted as discussed above. The proposed rules are attached as Attachment A.

26. In order to make these rules effective the Commission must lift the stay ordered in Decision No. C05-0537, and we do so by this order.

27. In order that these rules become effective at the same time as the new rules of practice and procedure with which they are tied, the effective date of these rules shall be March 1, 2006.

II. ORDER

A. The Commission Orders That:

1. The exceptions filed by Alpine Taxi are denied.
2. The exceptions filed Harvey Mabis are denied.
3. Proposed rule 6504 is deleted consistent with the discussion above.
4. The stay of Recommended Decision No. R05-0450, as ordered in Decision No. C05-0537, is lifted.
5. The rules as amended by this decision, attached as Attachment A shall go into effect on March 1, 2006.

6. The 20-day period provided for in §40-6-114, C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the effective date of this Order.

7. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
July 8, 2005.**

(SEAL)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

GREGORY E. SOPKIN

POLLY PAGE

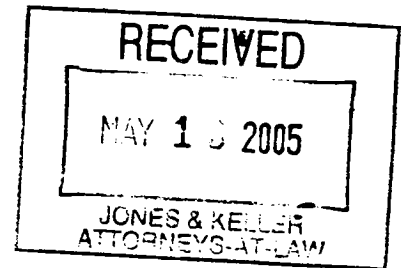
CARL MILLER

Commissioners

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D

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

RESPONSES OF THE COLORADO PUBLIC UTILITIES COMMISSION TO
THE FIRST SET OF INTERROGATORIES AND DOCUMENT PRODUCTION REQUESTS
PROPOUNDED BY PETITIONERS

East West Resort Transportation, LLC	)	First Set of Discovery
and TMS, LLC, d/b/a Colorado Mountain Express	)	of CME
	)	
Petition for Declaratory Order –	)	
Motor Carrier Transportation of Passengers in Colorado	)	
	)	
STB Docket No. MC-F-21008	)	

INTERROGATORY NO. CME1-1

How many passengers does CPUC believe CME transported in scheduled, regular-route service (a) from DIA to points in Summit, Eagle and Pitkin Counties and (b) from points in Summit, Eagle and Pitkin Counties to DIA during each of the calendar years 2003 and 2004?

OBJECTION:

As to calendar year 2004, CPUC objects to this interrogatory because it seeks information that is not relevant to the subject matter of this action and therefore is not reasonably calculated to lead to the discovery of evidence admissible in the instant proceedings.

Notwithstanding this objection, CPUC provides the following response.

Sponsored by: David Beckett

Date Responded: May 13, 2005

RESPONSE:

If the information given to CPUC by CME is accurate, CPUC believes that it is CME's contention that 262,897 passengers represent CME's total passengers transported in scheduled, regular route service regardless of route. As to calendar year 2003, if the information given to CPUC by CME is accurate, CPUC believes that CME transported somewhere between zero and 183,326 passengers in scheduled, regular-route service (a) from DIA to points in Summit, Eagle and Pitkin Counties and (b) from points in Summit, Eagle and Pitkin Counties to DIA.

Sponsored by: Gary Gramlick

Date Responded: May 13, 2005

East West Resort Transportation, LLC	)	First Set of Discovery
and TMS, LLC, d/b/a Colorado Mountain Express	)	of CME
	)	
Petition for Declaratory Order –	)	
Motor Carrier Transportation of Passengers in Colorado	)	
	)	
STB Docket No. MC-F-21008	)	

INTERROGATORY NO. CME1-2

How many passengers does CPUC believe CME transported in scheduled, regular-route service (a) from EGE to points in Summit, Eagle and Pitkin Counties and (b) from points in Summit, Eagle and Pitkin Counties to EGE during each of the calendar years 2003 and 2004?

OBJECTION:

As to calendar year 2004, CPUC objects to this interrogatory because it seeks information that is not relevant to the subject matter of this action and therefore is not reasonably calculated to lead to the discovery of evidence admissible in the instant proceedings.

Notwithstanding this objection, CPUC provides the following response.

Sponsored by: David Beckett

Date Responded: May 13, 2005

RESPONSE:

If the information given to CPUC by CME is accurate, CPUC believes that it is CME's contention that 262,897 passengers represent CME's total passengers transported in scheduled, regular route service regardless of route. As to calendar year 2003, if the information given to CPUC by CME is accurate, CPUC believes that CME transported somewhere between zero and 72,871 passengers in scheduled, regular-route service (a) from EGE to points in Summit, Eagle and Pitkin Counties and (b) from points in Summit, Eagle and Pitkin Counties to EGE.

Sponsored by: Gary Gramlick

Date Responded: May 13, 2005

East West Resort Transportation, LLC	)	First Set of Discovery
and TMS, LLC, d/b/a Colorado Mountain Express	)	of CME
	)	
Petition for Declaratory Order –	)	
Motor Carrier Transportation of Passengers in Colorado	)	
	)	
STB Docket No. MC-F-21008	)	

INTERROGATORY NO. CME1-3

Of the passengers transported by CME from (a) DIA or (b) EGE in scheduled, regular-route service to points in Summit, Eagle and Pitkin [sic] Counties during each of the calendar years 2003 and 2004, how many passengers does CPUC believe had CME's ground transportation prearranged as part of a vacation package that included the airline transportation from points beyond Colorado obtained from a web site, ski resort, travel agent or other third-party provider?

OBJECTION:

As to calendar year 2004, CPUC objects to this interrogatory because it seeks information that is not relevant to the subject matter of this action and therefore is not reasonably calculated to lead to the discovery of evidence admissible in the instant proceedings.

Notwithstanding this objection, CPUC provides the following response.

Sponsored by: David Beckett

Date Responded: May 13, 2005

RESPONSE:

For purposes of this response, CPUC assumes that some passengers were transported in scheduled, regular route service.

If the information provided to CPUC by CME is accurate, CPUC believes that it is CME's contention that 63,394 passengers represent CME's total passengers transported in 2003 in scheduled, regular route service between (a) DIA or (b) EGE and points in Summit, Eagle and Pitkin Counties as part of a vacation package that included the airline transportation from points beyond Colorado obtained from a web site, ski resort, travel agent or other third-party provider regardless of direction of travel. As to calendar year 2003, CPUC believes that CME transported less than 63,394 passengers in scheduled, regular route service from (a) DIA or (b) EGE to points in Summit, Eagle and Pitkin Counties as part of a vacation package that included the airline transportation from points beyond Colorado obtained from a web site, ski resort, travel agent or other third-party provider.

Sponsored by: Gary Gramlick

Date Responded: May 13, 2005

East West Resort Transportation, LLC	)	First Set of Discovery
and TMS, LLC, d/b/a Colorado Mountain Express	)	of CME
	)	
Petition for Declaratory Order –	)	
Motor Carrier Transportation of Passengers in Colorado	)	
	)	
STB Docket No. MC-F-21008	)	

INTERROGATORY NO. CME1-4

Of the passengers transported by CME from points in Summit, Eagle and Pitkin Counties in scheduled, regular-route service to (a) DIA or (b) EGE during each of the calendar years, 2003 and 2004, how many passengers does CPUC believe had CME's ground transportation prearranged as part of a vacation package that included the airline transportation to points beyond Colorado obtained from a web site, ski resort, travel agent or other third-party provider?

OBJECTION:

As to calendar year 2004, CPUC objects to this interrogatory because it seeks information that is not relevant to the subject matter of this action and therefore is not reasonably calculated to lead to the discovery of evidence admissible in the instant proceedings.

Notwithstanding this objection, CPUC provides the following response.

Sponsored by: David Beckett

Date Responded: May 13, 2005

RESPONSE:

For purposes of this response, CPUC assumes that some passengers were transported in scheduled, regular route service.

If the information provided to CPUC by CME is accurate, CPUC believes that it is CME's contention that 63,394 passengers represent CME's total passengers transported in 2003 in scheduled, regular route service between (a) DIA or (b) EGE and points in Summit, Eagle and Pitkin Counties as part of a vacation package that included the airline transportation from points beyond Colorado obtained from a web site, ski resort, travel agent or other third-party provider regardless of direction of travel. As to calendar year 2003, CPUC believes that CME transported less than 63,394 passengers in scheduled, regular route service from points in Summit, Eagle and Pitkin Counties to (a) DIA or (b) EGE as part of a vacation package that included the airline transportation from points beyond Colorado obtained from a web site, ski resort, travel agent or other third-party provider.

Sponsored by: Gary Gramlick

Date Responded: May 13, 2005

East West Resort Transportation, LLC	)	First Set of Discovery
and TMS, LLC, d/b/a Colorado Mountain Express	)	of CME
	)	
Petition for Declaratory Order –	)	
Motor Carrier Transportation of Passengers in Colorado	)	
	)	
STB Docket No. MC-F-21008	)	

INTERROGATORY NO. CME1-5

Does CPUC believe that the passengers transported by CME from DIA or EGE in scheduled, regular-route service to points in Summit, Eagle and Pitkin Counties pursuant to vacation packages that included their airline transportation from points beyond Colorado obtained from a web site, ski resort, travel agent or other third-party provider were concluding travel in interstate commerce, and, if not, on what basis does CPUC believe that they were not concluding travel in interstate commerce?

OBJECTION:

CPUC objects to this interrogatory because it calls for a legal conclusion; the purpose of discovery in general is to discover facts not legal opinions or conclusions.

Sponsored by: David Beckett

Date Responded: May 13, 2005

East West Resort Transportation, LLC	)	First Set of Discovery
and TMS, LLC, d/b/a Colorado Mountain Express	)	of CME
	)	
Petition for Declaratory Order –	)	
Motor Carrier Transportation of Passengers in Colorado	)	
	)	
STB Docket No. MC-F-21008	)	

INTERROGATORY NO. CME1-6

Does CPUC believe that the passengers transported by CME from points in Summit, Eagle and Pitkin Counties in scheduled, regular-route service to DIA or EGE pursuant to vacation packages that included their airline transportation to points beyond Colorado obtained from a web site, ski resort, travel agent or other third-party provider were commencing travel in interstate commerce, and, if not, on what basis does CPUC believe that they were not commencing travel in interstate commerce?

OBJECTION:

CPUC objects to this interrogatory because it calls for a legal conclusion; the purpose of discovery in general is to discover facts not legal opinions or conclusions.

Sponsored by: David Beckett

Date Responded: May 13, 2005

East West Resort Transportation, LLC	)	First Set of Discovery
and TMS, LLC, d/b/a Colorado Mountain Express	)	of CME
	)	
Petition for Declaratory Order –	)	
Motor Carrier Transportation of Passengers in Colorado	)	
	)	
STB Docket No. MC-F-21008	)	

INTERROGATORY NO. CME1-7

[Part 1] What fares did CME collect during each of the calendar years 2003 and 2004 for the scheduled, regular-route transportation of passengers whose ground transportation from (a) DIA or (b) EGE to points in Summit, Eagle and Pitkin Counties had been prearranged as part of a vacation package that included the airline transportation from points beyond Colorado obtained from a web site, ski resort, travel agent or other third-party provider, and [Part 2] what fares does CPUC believe should have been collected by CME?

OBJECTION:

CPUC objects to this interrogatory because it seeks information that is not relevant to the subject matter of this action and is not reasonably calculated to lead to the discovery of evidence admissible in the instant proceeding. CPUC further objects because the relevant fare is the fare paid by the passenger and not the packager of the vacation.

ADDITIONAL OBJECTION to Part 1:

As to calendar year 2004, CPUC objects to this interrogatory because it seeks information that is not relevant to the subject matter of this action and therefore is not reasonably calculated to lead to the discovery of evidence admissible in the instant proceedings.

Sponsored by: David Beckett

Date Responded: May 13, 2005

RESPONSE to Part 2:

As to calendar year 2003, CPUC believes that CME should have collected fares authorized by its tariffs on file with the CPUC. The relevant tariffs are attached in response to Document Production Request No. CME1-1.

Sponsored by: Gary Gramlick

Date Responded: May 13, 2005

East West Resort Transportation, LLC	)	First Set of Discovery
and TMS, LLC, d/b/a Colorado Mountain Express	)	of CME
	)	
Petition for Declaratory Order –	)	
Motor Carrier Transportation of Passengers in Colorado	)	
	)	
STB Docket No. MC-F-21008	)	

INTERROGATORY NO. CME1-8

[Part 1] What fares did CME collect during each of the calendar years 2003 and 2004 for the scheduled, regular-route transportation of passengers whose ground transportation from points in Summit, Eagle and Pitkin Counties to (a) DIA or (b) EGE had been prearranged as part of a vacation package that included the airline transportation to points beyond Colorado obtained from a web site, ski resort, travel agent or other third-party provider, and [Part 2] what fares does CPUC believe should have been collected by CME?

OBJECTION:

CPUC objects to this interrogatory because it seeks information that is not relevant to the subject matter of this action and is not reasonably calculated to lead to the discovery of evidence admissible in the instant proceeding. CPUC further objects because the relevant fare is the fare paid by the passenger and not the packager of the vacation.

ADDITIONAL OBJECTION to Part 1:

As to calendar year 2004, CPUC objects to this interrogatory because it seeks information that is not relevant to the subject matter of this action and therefore is not reasonably calculated to lead to the discovery of evidence admissible in the instant proceedings.

Sponsored by: David Beckett

Date Responded: May 13, 2005

RESPONSE to Part 2:

As to calendar year 2003, CPUC believes that CME should have collected fares authorized by its tariffs on file with the CPUC. The relevant tariffs are attached in response to Document Production Request No. CME1-1.

Sponsored by: Gary Gramlick

Date Responded: May 13, 2005

East West Resort Transportation, LLC	)	First Set of Discovery
and TMS, LLC, d/b/a Colorado Mountain Express	)	of CME
	)	
Petition for Declaratory Order –	)	
Motor Carrier Transportation of Passengers in Colorado	)	
	)	
STB Docket No. MC-F-21008	)	

INTERROGATORY NO. CME1-9

Identify the airlines serving DIA and/or EGE from or to points beyond Colorado which themselves – not through web sites, ski resorts, travel agents or other third-party providers – sell through tickets with motorbus operators providing scheduled, regular-route service within Colorado.

OBJECTION:

CPUC objects to this interrogatory because it is unduly burdensome and seeks information that is not readily available to CPUC.

Sponsored by: David Beckett

Date Responded: May 13, 2005

East West Resort Transportation, LLC	)	First Set of Discovery
and TMS, LLC, d/b/a Colorado Mountain Express	)	of CME
	)	
Petition for Declaratory Order –	)	
Motor Carrier Transportation of Passengers in Colorado	)	
	)	
STB Docket No. MC-F-21008	)	

INTERROGATORY NO. CME1-10

Identify the web sites, ski resorts, travel agents or other third-party providers which sell vacation packages that include airline transportation to or from DIA and/or EGE from or to points beyond Colorado and the ground transportation by motor bus operators providing scheduled, regular-route service within Colorado.

OBJECTION:

CPUC objects to this interrogatory because it is unduly burdensome and seeks information that is not readily available to CPUC. Further, CPUC objects to this interrogatory to the extent that it is overly broad in that it seeks the identity of all web sites, ski resorts, travel agents or other third-party providers, wherever located, that sell vacation packages that include airline transportation to or from DIA and/or EGE from or to points beyond Colorado and the ground transportation by motor bus operators providing scheduled, regular-route service within Colorado.

Notwithstanding these objections, CPUC provides the following response.

Sponsored by: David Beckett

Date Responded: May 13, 2005

RESPONSE:

CPUC is aware that CME has identified various third party providers that allegedly sell vacation packages. These alleged third party providers are: Vail Resorts Management Company; Moguls Mountain Travel, a division of Resort Reservations, Inc. doing business as Moguls Mountain Travel; S&L Travel Partners, Inc. (that owns Aspen Ski Tours, Inc. and Ski.com); The Mark Travel Corporation, United Airlines, Orbitz, Travelocity, Expedia, Lynx Ski and Golf Vacations, and Aspen Snowmass Central Reservations.

Sponsored by: Gary Gramlick

Date Responded: May 13, 2005

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)
)
STB Docket No. MC-F-21008)

First Set of Discovery
of CME

INTERROGATORY NO. CME1-11

THERE IS NO INTERROGATORY NO. CME1-11

East West Resort Transportation, LLC	)	First Set of Discovery
and TMS, LLC, d/b/a Colorado Mountain Express	)	of CME
	)	
Petition for Declaratory Order –	)	
Motor Carrier Transportation of Passengers in Colorado	)	
	)	
STB Docket No. MC-F-21008	)	

INTERROGATORY NO. CME1-12

Preceding its issuance of the Civil Penalty Assessment Notice, what knowledge did CPUC have of the authorization which CME had received from the ICC and/or STB to render scheduled, regular-route operations as a motor carrier of passengers in interstate commerce between (a) DIA or (b) EGE, on the one hand, and, on the other, points in Summit, Eagle and Pitkin Counties?

RESPONSE:

CPUC, through the registration requirements of § 40-10-120, C.R.S., maintains copies of each operating authority contained in the September 24, 2004 Document Appendix to Petition for Declaratory Order of East West Resort Transportation, LLC, and TMS, LLC, d/b/a Colorado Mountain Express. CPUC staff also knew that the United States Surface Transportation Board had issued the decisions related to CME mergers, which decisions are contained in the September 24, 2004 Document Appendix to Petition for Declaratory Order of East West Resort Transportation, LLC, and TMS, LLC, d/b/a Colorado Mountain Express.

Sponsored by: Gary Gramlick

Date Responded: May 13, 2005

East West Resort Transportation, LLC	)	First Set of Discovery
and TMS, LLC, d/b/a Colorado Mountain Express	)	of CME
	)	
Petition for Declaratory Order –	)	
Motor Carrier Transportation of Passengers in Colorado	)	
	)	
STB Docket No. MC-F-21008	)	

INTERROGATORY NO. CME1-13

Preceding its issuance of the Civil Penalty Assessment Notice, what inquiries were made by CPUC to determine whether CME's scheduled, regular-route operations on September 29 and 30, 2003, between (a) DIA or (b) EGE, on the one hand, and, on the other, points in Summit, Eagle and Pitkin Counties were in interstate commerce or in intrastate commerce and on what criteria did CPUC rely in arriving at its conclusion?

RESPONSE:

For purposes of this response, CPUC assumes that CME conducted scheduled, regular route operations on September 29 and 30, 2003.

None. Irrespective of whether CME's subject operations were in interstate commerce or intrastate commerce, CPUC had probable cause to issue the Civil Penalty Assessment Notice. As a result of CME's possession of a CPUC operating authority and its having tariffs on file with the CPUC that require the active conducting of scheduled operations, CPUC staff believes that CME is subject to the Colorado laws regulating intrastate motor carriers of passengers. CPUC staff believes, therefore, that CPUC had adjudicatory jurisdiction over the issues presented by the Civil Penalty Assessment Notice. To the extent that CME disputes the jurisdictional authority of the CPUC administrative hearings section to issue a penalty under the facts of the case, then CME should make this argument as part of an affirmative defense in CPUC Docket No. 03G-472CP.

Sponsored by: Gary Gramlick

Date Responded: May 13, 2005

East West Resort Transportation, LLC	)	First Set of Discovery
and TMS, LLC, d/b/a Colorado Mountain Express	)	of CME
	)	
Petition for Declaratory Order –	)	
Motor Carrier Transportation of Passengers in Colorado	)	
	)	
STB Docket No. MC-F-21008	)	

INTERROGATORY NO. CME1-14

Preceding its issuance of the Civil Penalty Assessment Notice, what inquiries were made by CPUC as to whether CME was making substantial use of the authorization which CME had received from the ICC and/or STB to render intercity bus operations in scheduled, regular-route service over authorized routes between (a) DIA and (b) EGE, on the one hand, and, on the other, points in Summit, Eagle and Pitkin Counties?

RESPONSE:

None. Irrespective of whether CME was making substantial use of the authorization which CME had received from the ICC and/or STB to render intercity bus operations in scheduled, regular-route service over authorized routes between (a) DIA and (b) EGE, on the one hand, and, on the other, points in Summit, Eagle and Pitkin Counties, CPUC had probable cause to issue the Civil Penalty Assessment Notice. As a result of CME's possession of a CPUC operating authority and its having tariffs on file with the CPUC that require the active conducting of scheduled operations, CPUC staff believes that CME is subject to the Colorado laws regulating intrastate motor carriers of passengers. CPUC staff believes, therefore, that CPUC had adjudicatory jurisdiction over the issues presented by the Civil Penalty Assessment Notice. To the extent that CME disputes the jurisdictional authority of the CPUC administrative hearings section to issue a penalty under the facts of the case, then CME should make this argument as part of an affirmative defense in CPUC Docket No. 03G-472CP.

Sponsored by: Gary Gramlick

Date Responded: May 13, 2005

East West Resort Transportation, LLC	)	First Set of Discovery
and TMS, LLC, d/b/a Colorado Mountain Express	)	of CME
	)	
Petition for Declaratory Order –	)	
Motor Carrier Transportation of Passengers in Colorado	)	
	)	
STB Docket No. MC-F-21008	)	

INTERROGATORY NO. CME1-15

What is scheduled, regular-route service when rendered by a motor carrier of passengers operating pursuant to authority conferred by the ICC and/or STB and how does it differ from scheduled service when rendered by a motor carrier of passengers pursuant to authority conferred by CPUC?

OBJECTION:

CPUC objects to this interrogatory because calls for a legal conclusion; the purpose of discovery in general is to discover facts not legal opinions or conclusions.

Sponsored by: David Beckett

Date Responded: May 13, 2005

East West Resort Transportation, LLC	)	First Set of Discovery
and TMS, LLC, d/b/a Colorado Mountain Express	)	of CME
	)	
Petition for Declaratory Order –	)	
Motor Carrier Transportation of Passengers in Colorado	)	
	)	
STB Docket No. MC-F-21008	)	

INTERROGATORY NO. CME1-16

Can CPUC determine whether a motor carrier of passengers is rendering scheduled, regular-route intercity bus operations in interstate commerce over its ICC and/or STB authorized routes, that is, [Part 1] can it set a standard for determining what constitutes interstate commerce rendered over ICC and/or STB authorized routes, if those routes coincides with CPUC authorized routes, and, [Part 2] if so, what is the source of its jurisdiction for doing so?

OBJECTION:

CPUC objects to this interrogatory because calls for a legal conclusion; the purpose of discovery in general is to discover facts not legal opinions or conclusions.

Notwithstanding this objection, CPUC provides the following response.

RESPONSE to Part 1:

No. However, CPUC may apply an existing standard.

RESPONSE to Part 2:

Not applicable.

Sponsored by: David Beckett

Date Responded: May 13, 2005

East West Resort Transportation, LLC	)	First Set of Discovery
and TMS, LLC, d/b/a Colorado Mountain Express	)	of CME
	)	
Petition for Declaratory Order –	)	
Motor Carrier Transportation of Passengers in Colorado	)	
	)	
STB Docket No. MC-F-21008	)	

INTERROGATORY NO. CME1-17

What constitutes substantial use by a motor carrier of passengers rendering scheduled, regular-route service of its ICC and/or STB authorized routes?

OBJECTION:

CPUC objects to this interrogatory because calls for a legal conclusion; the purpose of discovery in general is to discover facts not legal opinions or conclusions.

Notwithstanding this objection, CPUC provides the following response.

Sponsored by: David Beckett

Date Responded: May 13, 2005

RESPONSE:

CPUC is aware that the Interstate Commerce Commission has determined that “substantial” interstate transportation was could be between 24 and 25 percent of total interstate and intrastate passenger traffic. *See e.g., Boulder Airporter, Inc. v. Stapleton Stagecoach Co.*, 1991 WL 20995 (Oct. 17, 1991).

Sponsored by: Gary Gramlick

Date Responded: May 13, 2005

East West Resort Transportation, LLC	)	First Set of Discovery
and TMS, LLC, d/b/a Colorado Mountain Express	)	of CME
	)	
Petition for Declaratory Order –	)	
Motor Carrier Transportation of Passengers in Colorado	)	
	)	
STB Docket No. MC-F-21008	)	

INTERROGATORY NO. CME1-18

Can CPUC determine whether a motor carrier of passengers is rendering substantial service in interstate commerce in rendering scheduled, regular-route intercity bus operations over its ICC and/or STB authorized routes, that is, [Part 1] can CPUC specify the percentage of the motor carrier's total scheduled, regular-route operations which must be in interstate commerce for the motor carrier to be deemed by CPUC to be rendering substantial interstate operations over its authorized routes, and, [Part 2] if so, what is the source of its jurisdiction for doing so?

OBJECTION:

CPUC objects to this interrogatory because it is unintelligible, vague, uncertain and ambiguous.

ADDITIONAL OBJECTION as to Part 1:

CPUC objects to this interrogatory because calls for a legal conclusion; the purpose of discovery in general is to discover facts not legal opinions or conclusions. Further, CPUC cannot prejudge the ruling on the evidence and argument that may ultimately be made by the administrative law judge and/or the Commission in their respective adjudicatory capacities in Docket No. 03G-472CP.

ADDITIONAL OBJECTION as to Part 2:

CPUC objects to this interrogatory because calls for a legal conclusion; the purpose of discovery in general is to discover facts not legal opinions or conclusions.

Notwithstanding these objections, CPUC provides the following response.

RESPONSE as to Part 1:

No. However, CPUC can apply existing federal law standards. *See e.g., Trans Shuttle, Inc. v. Public Utilities Commission*, 89 P.3d 398 (Colo. 2004).

RESPONSE to Part 2:

Not applicable.

Sponsored by: David Beckett

Date Responded: May 13, 2005

East West Resort Transportation, LLC	)	First Set of Discovery
and TMS, LLC, d/b/a Colorado Mountain Express	)	of CME
	)	
Petition for Declaratory Order –	)	
Motor Carrier Transportation of Passengers in Colorado	)	
	)	
STB Docket No. MC-F-21008	)	

INTERROGATORY NO. CME1-19

Identify all members, officers, employees or agents of CPUC who have personal knowledge of the alleged violations by CME of the Colorado Revised Statutes, §40-10-117 which gave rise to the Civil Penalty Assessment Notice.

RESPONSE:

In this response, the CPUC assumes that CME desires to know the identity of those persons that performed the investigation that resulted in the issuance of the Civil Penalty Notice. Given this assumption, the person is Gary Gramlick, Transportation Rate/Financial Analyst, Colorado Public Utilities Commission, 1580 Logan Street, OL-1, Denver, CO 80203, and (303) 894-2870

Sponsored by: Gary Gramlick

Date Responded: May 13, 2005

East West Resort Transportation, LLC	)	First Set of Discovery
and TMS, LLC, d/b/a Colorado Mountain Express	)	of CME
	)	
Petition for Declaratory Order –	)	
Motor Carrier Transportation of Passengers in Colorado	)	
	)	
STB Docket No. MC-F-21008	)	

DOCUMENT PRODUCTION REQUEST NO. CME1-1

Each document purporting to support the responses to the foregoing interrogatories.

RESPONSE:

Except for case law and the documents appended to CME's Witness List and Copies of Exhibits of Respondent filed on February 11, 2004 in CPUC Docket No. 03G-472CP, see attached.

East West Resort Transportation, LLC	)	First Set of Discovery
and TMS, LLC, d/b/a Colorado Mountain Express	)	of CME
	)	
Petition for Declaratory Order –	)	
Motor Carrier Transportation of Passengers in Colorado	)	
	)	
STB Docket No. MC-F-21008	)	

DOCUMENT PRODUCTION REQUEST NO. CME1-2

Each document received or copied at, pertaining to, summarizing or memorializing the meeting between representatives of CPUC, the Attorney General's Office and CME at CME's offices in Edwards. CO, on April 21, 2004.

OBJECTION:

CPUC object to this document production request to the extent that it seeks information protected by the attorney-client privilege or any other privilege and to the extent that it seeks information protected by the attorney-work product privilege.

RESPONSE:

Except for documents appended to CME's Witness List and Copies of Exhibits of Respondent filed on February 11, 2004 in CPUC Docket No. 03G-472CP, see attached. In addition, while CPUC does not recall specifically obtaining the email thread concluding on April 28, 2004, the May 7, 2004 letter from Carol Riley of Ski.com, the May 11, 2004 letter of Pete Sanchez of Moguls Mountain Travel, the May 20, 2004 e-mail from Tom Burke, or the e-mail thread concluding on May 25, 2004 in relation to the April 21, 2004 meeting, CPUC is including them with this response.

East West Resort Transportation, LLC	)	First Set of Discovery
and TMS, LLC, d/b/a Colorado Mountain Express	)	of CME
	)	
Petition for Declaratory Order –	)	
Motor Carrier Transportation of Passengers in Colorado	)	
	)	
STB Docket No. MC-F-21008	)	

DOCUMENT PRODUCTION REQUEST NO. CME1-3

Each document received or copied at, pertaining to, summarizing or memorializing the meeting between Assistant Attorney General John Robert and CME's co-counsel, Thomas J. Burke, Jr., at his office in Denver, CO, on July 2, 2004.

RESPONSE:

See attached.

East West Resort Transportation, LLC	)	First Set of Discovery
and TMS, LLC, d/b/a Colorado Mountain Express	)	of CME
	)	
Petition for Declaratory Order –	)	
Motor Carrier Transportation of Passengers in Colorado	)	
	)	
STB Docket No. MC-F-21008	)	

DOCUMENT PRODUCTION REQUEST NO. CME1-4

Each document received or copied at, pertaining to, summarizing or memorializing the audit by CPUC's Compliance Investigator, Mr. Reinhard A. Wolf, at CME's offices in Edwards, CO, on October 12 and 13, 2004.

RESPONSE:

See attached.

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, LLC,
– PETITION FOR DECLARATORY ORDER –
MOTOR CARRIER TRANSPORTATION OF PASSENGERS IN COLORADO

PUBLIC VERSION OF
TRAFFIC DATA

State of Colorado,
City and County of Denver,
SS:

GARY GRAMLIC being duly sworn, deposes and says that he has read the foregoing discovery, knows the facts asserted there are true and that the same are true as stated.

Signed

Gary Gramlic

Subscribed and sworn to before me in the County of Denver, State of Colorado, this
day of May 13 2005.

Julius Beach

NOTARY PUBLIC

My Commission expires:

November 18, 2008

DATED this 13th day of May, 2005.

Respectfully submitted,

JOHN W. SUTHERS
Attorney General

A handwritten signature in cursive script, reading "David A. Beckett", is written over a horizontal line.

DAVID A. BECKETT, 23098*
Assistant Attorney General
Business and Licensing Section

Attorney for Staff of the Public
Utilities Commission

1525 Sherman Street, 5th Floor
Denver, Colorado 80203
Telephone: (303) 866-5135
FAX: (303) 866-5395
*Counsel of Record

AG ALPHA: RG PV DFDYS

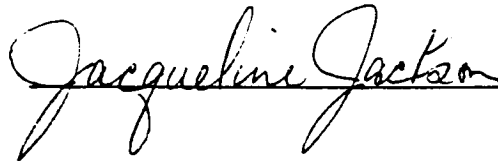
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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within RESPONSES OF THE COLORADO PUBLIC UTILITIES COMMISSION TO THE FIRST SET OF INTERROGATORIES AND DOCUMENT PRODUCTION REQUESTS PROPOUNDED BY PETITIONERS upon all parties herein by depositing same in the United States mail, first class postage prepaid, or as otherwise indicated, at Denver, Colorado, this 13th day of May, 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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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

VERIFIED REBUTTAL STATEMENT OF JAY R. UFER

1. My name is Jay R. Ufer. I am the President and Chief Executive Officer of the Petitioners (hereinafter collectively referred to as "CME"), and am the author of the Verified Statement furnished with CME's initial submission to this Board in the referenced declaratory order proceeding. It will be my purpose to offer a short verified statement to rebut certain of the statements made in the submission of Intervenor the Public Utilities Commission of the State of Colorado ("CPUC") or to clarify issues which, in light of CPUC's submission, may require it.

2. With regard to the various statements made in the Reply submission by CPUC which suggest that CME's operating year of calendar 2003 was somehow selected as a "fluke" year with which to portray CME's business in a light favorable to its assertion that its operations in interstate commerce were "substantial," I would like to dispel that contention. Since 2003, CME's revenues will have increased by approximately 15 per cent. The proportion of what CME considers its

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interstate, regular route revenues, however, have increased proportionately with CME's increased regular route revenues overall. To demonstrate this, CME has furnished at Tab G a CD-ROM showing the accuracy of my statement. The CD-ROM identified as "Highly Confidential" shows the total number of passengers transported over CME's Federally-authorized regular routes for calendar years 2004 and 2005 to date. These files are labeled on the CD-ROM as "2004 puc sched gsi all" and "2005 puc sched gsi all." These two files show prearranged fares with a third party's involvement, plus so-called "walk-ups" who either arrive at one of CME's airport counters without prior arrangement, who walk into CME's office in Edwards, Colorado to book passage unaccompanied by air carrier information, who call CME to book a trip on the telephone, or who individually book a CME trip over the Internet. The other two files, entitled respectively as "2004 puc sched gsi third party with air" and "2005 puc sched gsi third party with air" represent trips on CME with respect to which CME has been furnished air, ground transfer and other information reflecting a third party provider's prearrangement of a vacation "package" for a CME passenger.

2. CME notes that CPUC seems to make much of the fact that when a passenger who is traveling on a package prearranged by a third party flies utilizing an air carrier's accumulated frequent flyer mileage has thereby had to book his or her own air fare. CPUC has announced that in its opinion this fact disqualifies such a passenger from status as an interstate passenger. However, when an integrated air-ground transportation trip is furnished to CME, ordinarily via the Internet, together with other elements such as lodging or lift tickets, it is impossible to tell who actually paid for the airline tickets. When CME receives the described information it is identical both in format and in the fact of its prearrangement to one with regard to which the third party pre-arranger has itself booked the passenger's air passage. CME believes CPUC's contentions in this regard are

therefore flawed in concept and also inaccurate in their attempt to discard the entirety of all of a given third party's prearranged trips in counting as an interstate operation.

3. Although it has been dealt with elsewhere, I want to emphasize with the Board the degree to which the booking of multi-element travel packages with air travel involving interstate origin or destination, or both, has been facilitated enormously by CME's adoption of the Internet as a tool for making and documenting multi-element ground-air transportation service prearranged by third parties. In this regard, I understand CPUC contends that the only sort of documentation of an interstate trip over CME's Federally-authorized routes must be one with an air carrier and not a third party, presumably involving the use of a so-called through ticket. Airlines, however, no longer wish to issue tickets today, but prefer to send passengers an Internet e-mail confirming an airline booking. Those few airlines which do issue traditional tickets often discourage their issuance by charging a passenger an additional fee if he or she for some reason wants a traditional airline ticket. Most other airlines, in my experience, no longer will issue tickets at all, and also make decreasing use of travel agents who could be in a position to arrange for a through air-ground ticket. The Internet has largely supplanted this industry and has replaced the business practices of what is fast becoming a bygone era. Moreover, many so-called "walk-up" passengers, which for purposes of this proceeding CME has chosen to concede are intrastate passengers, also prearrange their transportation on CME's vehicles using Internet or 800-number reservations. If CME's regular-route operations' interstate character was to be determined by the fact of such prearrangement alone, fully 91% of CME's regular-route transportation would be in interstate commerce.

4. Finally, I wish to point out an error, which I believe is an insignificant one, in CME's percentage passenger breakdown described in my initial verified statement. In paragraph 10 of that

statement, I reported that CME transported 63,394 interstate passengers during 2003. Subsequent to preparation of the data I reported in my verified statement, CME discovered that certain intrastate charter traffic was somehow included in the total. I directed that these errors, which were not large ones in terms of a percentage breakdown between the interstate and intrastate categories, nonetheless be corrected. I did so in my deposition, and reduced these passengers both from the overall total and from the total of interstate passengers to 256,965 overall and 62,807 interstate passengers, as CME has defined them. The ratio of interstate passengers to all passengers in 2003, as corrected, is therefore as stated by counsel in CME's rebuttal: 24.4 %.

Dated this 28th day of September, 2005.

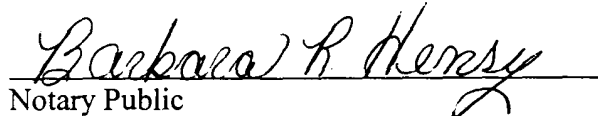

Jay R. Ufer

STATE OF COLORADO)

) ss:

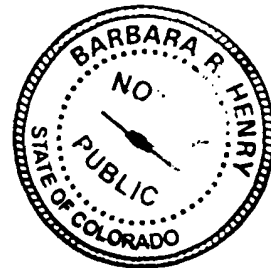
CITY AND COUNTY OF DENVER)

Subscribed and sworn to before me this 28th day of September, 2005, by Jay R. Ufer.


Notary Public

My Commission Expires:

July 27, 2007



F

BEFORE THE SURFACE TRANSPORTATION BOARD

WASHINGTON, D.C.

STB Docket No. MC-F-21008

DEPOSITION OF CHRISTOPHER JARNOT

COPY

EAST WEST RESORT TRANSPORTATION, LLC, AND TMS, LLC,
d/b/a COLORADO MOUNTAIN EXPRESS

Thursday, July 14, 2005

9:20 a.m.

PURSUANT TO NOTICE the above-entitled proceeding was taken at 137 Benchmark Road, Avon, Colorado before Michele Koss, Certified Shorthand Reporter and Notary Public within Colorado.



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303.696.7680 • Fax: 303.696.7675
prvs@pattersonreporting.com

1 passengers for whom it books both airline and grand
2 transportation, would not distinguish between passengers
3 that were booking a flight from Colorado Springs to
4 Eagle County, a flight that takes place inside, within
5 Colorado and one that comes from, say, Chicago or Los
6 Angeles? You would view both of those as an airline, a
7 combined airline and ground transportation package,
8 correct?

9 A. I believe we would, yes.

10 Q. Okay.

11 MR. BECKETT: I have nothing further. Thank
12 you very much.

13 EXAMINATION

14 BY MR. BURKE:

15 Q. I have a few questions for you, if you are
16 willing.

17 A. Okay.

18 Q. I was interested, Mr. Jarnot, in your
19 description of the practice of bulk ticket purchases
20 that you mentioned earlier in your deposition.

21 Would you tell me a little bit about how
22 that works from your company's perspective, how the
23 practice of bulk ticketing purchases works?

24 A. Well, from the customers' perspective it is
25 irrelevant and they do not know whether -- there might

1 require that as a condition of selling that bulk ticket,
2 if I can call it that, another component must be sold
3 along with it?

4 A. I believe I said it that way. I am not
5 certain of any that do not have that requirement.

6 Q. Give us, if you would, an example or two, if
7 you can, of the kinds of components that need to be sold
8 when you sell a ticket purchased as part of this bulk
9 ticketing arrangement.

10 A. I haven't looked at one of these contracts
11 in a couple of years, but I am familiar with them.
12 Some of them have in the past specifically required
13 lodging to be booked in connection with that plane
14 ticket. Others have just required any other component
15 that adds another price along with the airline price.
16 It could be a ground transportation element or car
17 rental or lodging or a combination of those.

18 Q. Okay. If you know, what is the reason for
19 an airline's interest in insisting on some additional
20 component going along with the naked fare that you are
21 able to put together?

22 A. Again, it is to create a situation where
23 the naked fare, as you describe it, is not exposed to
24 the customer and they do not know exactly what they are
25 paying for the plane ticket and I would assume that

1 be some discussion if they are on a particular type
2 ticket, there are different policies associated with
3 it, but for the most part to them it is irrelevant.

4 For us, we have contractual relationships
5 with the airlines. They provide us with these bulk
6 wholesale fares. During the course of the ski season,
7 for example, doing business as we have the opportunity
8 to sell an airline ticket to a customer say from Chicago
9 to Eagle. If the bulk fare allows us to either capture
10 a greater margin on the ticket that we are selling or
11 provide a better price to the customer or both, we would
12 use the bulk fare that we contracted with the airline
13 for. If not, we would use the retail fare generally
14 available in the market.

15 Q. It matters when you set a greater margin?
16 We are talking about a better mark up, are we not?

17 A. Yes.

18 Q. And that is in Vail Resorts Management's
19 interest to do that to maximize its revenue?

20 A. Yes.

21 Q. Shall I say net revenue?

22 A. Right.

23 Q. When you do that, did I correctly understand
24 that some but perhaps not all of the airlines with which
25 you enter into this bulk ticket purchase relationship

1 their competitors don't know either.

2 Q. That provides an opportunity then for a
3 package price to be paid for both the required component
4 and the airline ticket, neither of which is priced
5 individually?

6 A. Correct.

7 Q. With regard to the number of questions you
8 were asked as to airline information that you acquire in
9 which a person booking a package with Vail Resorts
10 Management has purchased his or her own airfare, is it
11 fair to say that a good portion of those involve a
12 frequent flyer airline ticket purchase?

13 A. Yes, it is fair to say.

14 Q. To what extent do you have knowledge as to
15 whether or not the individual passed your must book a
16 frequent flyer ticket himself or herself as opposed to
17 through a third party such as Vail Resorts Management?

18 A. My understanding is that a customer who is
19 a member of an airline frequent flyer program has to
20 handle that themselves. We cannot handle that for
21 them.

22 Q. Is it fair to say that in a situation like
23 that, that you have just described, the package
24 purchaser furnishes the airline arrival and departure
25 information to Vail Resorts when it books the remainder

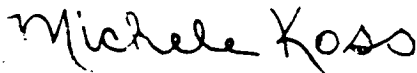
1 STATE OF COLORADO)
2) SS. REPORTER'S CERTIFICATE
3 COUNTY OF DENVER)

4 I, Michele Koss, do hereby certify that I am a
5 Certified Shorthand Reporter and Notary Public within
6 the state of Colorado; that previous to the commencement
7 of the examination, the deponent was duly sworn by me to
8 testify to the truth.

9 I further certify that this deposition was
10 taken in shorthand by me at the time and
11 place herein set forth and was thereafter reduced
12 to typewritten form, and that the foregoing
13 constitutes a true and correct transcript.

14 I further certify that I am not related to, employed
15 by, nor of counsel for any of the parties or attorneys
16 herein, nor otherwise interested in the result of the
17 within action.

18 In witness whereof, I have affixed my signature
19 this 28th day of July, 2005.

20 
21

22 PATTERSON REPORTING & VIDEO
23 Michele Koss
24 Certified Shorthand Reporter
25 and Notary Public

PATTERSON REPORTING & VIDEO
2170 South Parker Road, Suite 263
Denver, Colorado 80231

July 28, 2005

DAVID A. BECKETT, ESQ.
Office of the Attorney General
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Re: EAST WEST RESORT TRANSPORTATION, LLC, AND TMS, LLC,
d/b/a COLORADO MOUNTAIN EXPRESS

Dear Mr. Beckett:

Re: Deposition of: CHRISTOPHER JARNOT

_____ Previously filed. Forwarding signature page
and any amendment sheet(s).

_____ Signed, no changes.

_____ Signed, with changes, copy of which is enclosed.

_____ No signature required.

__x__ Signature waived.

_____ Forwarding original transcript unsigned;
Signature pages and/or amendments will be
forwarded if received.

_____ Original exhibits included in ongoing notebook
and will be filed with counsel at conclusion of
discovery

_____ Via Email

Enclosures: (As above noted)

cc: Thomas J. Burke, Jr., Esq.

G

H

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

DEPOSITION OF JAR R. UFER

PURSUANT TO NOTICE by the
Colorado Public Utilities Commission, the above-
entitled deposition was taken on behalf of the
Colorado Public Utilities Commission at 1625
Broadway, 16th Floor, Denver, Colorado, on
May 20, 2005, at 9:03 a.m., before Dawn E.
Eastman (Calderwood), Certified Shorthand Reporter,
Registered Professional Reporter, and Notary
Public.

178 1 Q. First off, "TA," is that travel 2 agents? 3 A. Yes. 4 Q. Is the 32,000 third-party number a 5 subset of the 63,394 number? 6 A. Yes. 7 Q. How did CME come up with the 63,394 8 passenger count number? 9 A. At that time, we generated a report 10 that was provided for you in the interrogatory 11 responses. I believe it's 1.3 – or 1 point – can 12 I look? 13 Q. Certainly. 14 A. I believe that this report is the one 15 that is answered under CPUC 1-5, PUC shuttle third 16 party with air travel, date 2003. 17 Q. Okay. 18 A. Which was in response to what 19 information was in Mr. Burke's office. 20 Q. So the 63,394 is a number that was 21 obtained using CME data; is that correct? 22 A. Yes. 23 Q. And the subtotal related to the 24 letterhead, is that from – is that from CME data, 25 as well? Or is it CME as adjusted by a third party?	180 1 A. Not a problem. 2 Q. Two other, hopefully, very simple 3 questions: Your Great Rates Program. 4 A. Yes. 5 Q. Is that a program that is available to 6 which types of transaction sources? Did I get that 7 right? No, I'm sorry. I've done that again; I 8 apologize. 9 Which guest sources are eligible to 10 take advantage of Great Rates' offerings? 11 A. All. 12 Q. Okay. So a group – a grouping of 13 persons that meets the requirements to obtain a 14 Great Rate can be a grouping put together by a FIT? 15 A. Yes. 16 Q. Or it could be a grouping put together 17 by a travel agent? 18 A. Yes. 19 Q. Or a wholesaler? 20 A. Yes. 21 Q. Okay. Are commissions then offered to 22 wholesalers and those entitled to commissions or 23 other discounts taken from the Great Rate rate? 24 A. Yes, where applicable. FITs do not 25 qualify for commission.
179 1 A. CME data as adjusted by the third 2 party. 3 Q. So the 63,394, does that represent the 4 as adjusted third-party numbers that, I guess, 5 totals 32,613? And then the remainder, 6 approximately 31,000, is without any sort of 7 verification; is that right? Is that how I 8 understand this? I'm just trying to understand the 9 document, so... 10 A. I believe that is correct. 11 Q. Okay. And that 63,394 number was then 12 further refined to 62,807 following the GSI tier 13 view filter? 14 A. That is correct. It was determined, 15 upon review of counsel, that there were some 16 transaction sources identified as airport walk-ups 17 that were inadvertently included in that; and they 18 were removed. 19 Q. Okay. 20 A. Giving us the resulting 62,807. 21 Q. Okay. So the 63,394 was arrived at 22 independently of the 32,613; is that right? 23 A. Yes. 24 Q. Okay. All right. Thank you very 25 much.	181 1 Q. Right, okay. 2 Last question – and feel free to use 3 this printout again. 4 The PUC sched GSI Third Party with Air 5 No Walk-Up file – are you with me? 6 A. If I heard you correctly that's CPUC 7 1-10. 8 Q. That's correct. Is the – each of 9 the – are all of the spreadsheet responses, be they 10 Adobe or Excel, to 1-14 subsets of that response to 11 1-10? At least that was the intent – 12 MR. BURKE: Excuse me, Counsel. I 13 didn't hear a question, I heard a statement. 14 Q. (By Mr. Beckett) I believe it was a 15 question. 16 Are the files provided in response to 17 Interrogatory 1-14 intended to be subsets of 1-10, 18 each and every one of them? 19 A. I believe that the subset in CPUC 1-14 20 was in relationship to the third-party letter 21 verification. 22 Q. Correct. But were they verifying 23 their portion of the data -- 24 A. Yes. 25 Q. In other words – and perhaps this is

1 I have read the foregoing
2 transcript of my testimony and have indicated the
3 same by my signature.
4

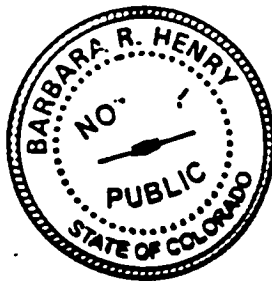
5
6 
7 JAY R. UFER

8 STATE OF COLORADO

9 CITY AND COUNTY OF DENVER

10 Subscribed and sworn to before me by
11 JAY R. UFER, on this June 3, 2005.

12 My commission expires: July 27, 2007.
13
14



21 
22 Notary Public
23 1625 Broadway, Suite 1600
24 Denver, CO 80202
25 Address

21 Reporter: DEE
22 Trial/Hearing Date: June 10, 2005
23
24
25

1 CERTIFICATE 2 STATE OF COLORADO) 3)ss. 4 CITY AND COUNTY OF DENVER) 5 I, Dawn E. Eastman (Calderwood), 6 Certified Shorthand Reporter, Registered 7 Professional Reporter, and Notary Public for the 8 State of Colorado, do hereby certify that previous 9 to the commencement of the examination, the said 10 JAY R. UFER was duly sworn by me to testify the 11 truth in relation to the matters in controversy 12 between the said parties. 13 I further certify that said deposition 14 was taken in shorthand by me and was reduced to 15 typewritten form by computer-aided transcription, 16 that the foregoing is a true transcript of the 17 questions asked, testimony given, and proceedings 18 had. 19 I further certify that I am not an 20 attorney nor counsel nor in any way connected with 21 any attorney or counsel for any of the parties to 22 said action or otherwise interested in its event. 23 IN WITNESS WHEREOF, I hereunto affix my 24 hand and notarial seal this 27th day of May, 2005. 25 My commission expires September 20, 2006. _____ Dawn E. Eastman (Calderwood) CSR, RPR, Notary Public Calderwood-Mackelprang, Inc.	194	1 CALDERWOOD-MACKELPRANG, INC. 2 4410 Zuni Street 3 Denver, Colorado 80211 4 (303) 477-3500 5 DAVID A. BECKETT, ESQ. 6 Assistant Attorney General 7 1525 Sherman Street, 5th Floor 8 Denver, Colorado 80203 9 Re: STB Docket No. MC-F-21008 10 Dear Mr. Beckett: 11 Enclosed is the deposition of: JAY R. UFER 12 _____ Previously filed. Forwarding signature page 13 and amendment sheets. 14 _____ Signed, no changes. 15 _____ Signed, with changes, copy enclosed. 16 _____ Unsigned, notice duly given _____ 17 pursuant to the Rules of Civil Procedure. 18 _____ Not signed, notice duly given _____ 19 since trial is set for _____ 20 _____ No signature required. 21 _____ Signature waived. 22 _____ To be signed in court. 23 XXX Signature pages/amendment sheets to be 24 returned to court on date of trial if not 25 provided by June 8, 2005, pursuant to reading and signing notification letter. XXX Hand-delivered on _____ DAWN E. EASTMAN (CALDERWOOD) CSR, RPR cc: Counsel of Record	196
1 CALDERWOOD-MACKELPRANG, INC. 2 4410 Zuni Street 3 Denver, Colorado 80211 4 (303) 477-3500 5 May 27, 2005 6 THOMAS J. BURKE, JR., ESQ. 7 Jones & Keller 8 1625 Broadway, 16th Floor 9 Denver, Colorado 80202 10 Re: STB Docket No. MC-F-21008 11 Deposition of: JAY R. UFER 12 The deposition in the above-entitled matter is ready 13 for reading and signing. Please attend to this 14 matter by complying with ALL blanks checked below: 15 _____ arranging with us at the number listed below 16 to read and sign the deposition in our 17 office. 18 XXX having deponent read your copy and sign 19 amendment sheets, if any (original signature 20 page enclosed.) 21 XXX reading enclosed deposition, signing 22 signature page and correction sheets if any. 23 _____ by June 8, 2005 due to trial/hearing date of 24 June 10, 2005. 25 Please be sure that the signature page and amendment sheets, if any, are signed before a Notary public and returned to our office by June 8, 2005. If this matter has not been taken care of within said period of time, the deposition will be filed unsigned pursuant to the Rules of Civil Procedure (SEE FOLLOWING LETTER FOR MORE INFORMATION.) DAWN E. EASTMAN (CALDERWOOD), CSR, RPR cc: Counsel of Record	195		

I

BEFORE THE SURFACE TRANSPORTATION BOARD

WASHINGTON, D.C.

STB Docket No. MC-F-21008

DEPOSITION OF CHRISTOPHER JARNOT

COPY

EAST WEST RESORT TRANSPORTATION, LLC, AND TMS, LLC,
d/b/a COLORADO MOUNTAIN EXPRESS

Thursday, July 14, 2005

9:20 a.m.

PURSUANT TO NOTICE the above-entitled proceeding was taken at 137 Benchmark Road, Avon, Colorado before Michele Koss, Certified Shorthand Reporter and Notary Public within Colorado.



Patterson
Reporting & Video Service, Inc.

Highpoint • 2170 South Parker Road • Suite 263 • Denver, Colorado 80231
303.696.7680 • Fax: 303.696.7675
prvs@pattersonreporting.com

59 1 passengers for whom it books both airline and grand 2 transportation, would not distinguish between passengers 3 that were booking a flight from Colorado Springs to 4 Eagle County, a flight that takes place inside, within 5 Colorado and one that comes from, say, Chicago or Los 6 Angeles? You would view both of those as an airline, a 7 combined airline and ground transportation package, 8 correct? 9 A. I believe we would, yes. 10 Q. Okay. 11 MR. BECKETT: I have nothing further. Thank 12 you very much. 13 EXAMINATION 14 BY MR. BURKE: 15 Q. I have a few questions for you, if you are 16 willing. 17 A. Okay. 18 Q. I was interested, Mr. Jarnot, in your 19 description of the practice of bulk ticket purchases 20 that you mentioned earlier in your deposition. 21 Would you tell me a little bit about how 22 that works from your company's perspective, how the 23 practice of bulk ticketing purchases works? 24 A. Well, from the customers' perspective it is 25 irrelevant and they do not know whether -- there might	61 1 require that as a condition of selling that bulk ticket, 2 if I can call it that, another component must be sold 3 along with it? 4 A. I believe I said it that way. I am not 5 certain of any that do not have that requirement. 6 Q. Give us, if you would, an example or two, if 7 you can, of the kinds of components that need to be sold 8 when you sell a ticket purchased as part of this bulk 9 ticketing arrangement. 10 A. I haven't looked at one of these contracts 11 in a couple of years, but I am familiar with them. 12 Some of them have in the past specifically required 13 lodging to be booked in connection with that plane 14 ticket. Others have just required any other component 15 that adds another price along with the airline price. 16 It could be a ground transportation element or car 17 rental or lodging or a combination of those. 18 Q. Okay. If you know, what is the reason for 19 an airline's interest in insisting on some additional 20 component going along with the naked fare that you are 21 able to put together? 22 A. Again, it is to create a situation where 23 the naked fare, as you describe it, is not exposed to 24 the customer and they do not know exactly what they are 25 paying for the plane ticket and I would assume that
60 1 be some discussion if they are on a particular type 2 ticket, there are different policies associated with 3 it, but for the most part to them it is irrelevant. 4 For us, we have contractual relationships 5 with the airlines. They provide us with these bulk 6 wholesale fares. During the course of the ski season, 7 for example, doing business as we have the opportunity 8 to sell an airline ticket to a customer say from Chicago 9 to Eagle. If the bulk fare allows us to either capture 10 a greater margin on the ticket that we are selling or 11 provide a better price to the customer or both, we would 12 use the bulk fare that we contracted with the airline 13 for. If not, we would use the retail fare generally 14 available in the market. 15 Q. It matters when you set a greater margin? 16 We are talking about a better mark up, are we not? 17 A. Yes. 18 Q. And that is in Vail Resorts Management's 19 interest to do that to maximize its revenue? 20 A. Yes. 21 Q. Shall I say net revenue? 22 A. Right. 23 Q. When you do that, did I correctly understand 24 that some but perhaps not all of the airlines with which 25 you enter into this bulk ticket purchase relationship	62 1 their competitors don't know either. 2 Q. That provides an opportunity then for a 3 package price to be paid for both the required component 4 and the airline ticket, neither of which is priced 5 individually? 6 A. Correct. 7 Q. With regard to the number of questions you 8 were asked as to airline information that you acquire in 9 which a person booking a package with Vail Resorts 10 Management has purchased his or her own airfare, is it 11 fair to say that a good portion of those involve a 12 frequent flyer airline ticket purchase? 13 A. Yes, it is fair to say. 14 Q. To what extent do you have knowledge as to 15 whether or not the individual passed your must book a 16 frequent flyer ticket himself or herself as opposed to 17 through a third party such as Vail Resorts Management? 18 A. My understanding is that a customer who is 19 a member of an airline frequent flyer program has to 20 handle that themselves. We cannot handle that for 21 them. 22 Q. Is it fair to say that in a situation like 23 that, that you have just described, the package 24 purchaser furnishes the airline arrival and departure 25 information to Vail Resorts when it books the remainder

1 of the components through Vail Resorts Management?

2 A. The customer provides that information to
3 Vail Resorts. We are booking the rest of the package,
4 correct.

5 Q. That information then becomes part of the
6 bundle of data that is associated with the arrival of
7 that passenger, the ground transportation that is
8 provided for that passengers, in this case CME, and the
9 lodging and possibly such things as lift ticket,
10 correct?

11 A. Correct.

12 Q. And when that information is given to CME,
13 that then already reflects the prearrangement of all of
14 those components, including the air package, correct?

15 A. Yes.

16 Q. And when you give CME that information, do
17 you differentiate for purposes of furnishing the
18 reservation information to CME between airline tickets
19 that are purchased through Vail Resorts Management or
20 tickets which have been separately purchased?

21 A. I don't know.

22 Q. Would Ms. Rubin-Stewart know that?

23 A. I believe she would.

24 Q. All right. In any event, when that
25 information comes to CME, if you know, all of that

1 information is contained in a document or an electronic
2 transmission which reflects each of the components,
3 including the air transportation, correct?

4 A. It is my understanding. I don't have
5 first-hand knowledge of it. That is how it was
6 explained to me.

7 Q. In any event, that is your understanding of
8 how it all works?

9 A. Correct.

10 Q. Would you be the person to ask as to whether
11 or not the ability for the ground transportation
12 provider who is part of this series of packages to have
13 flexibility to increase and decrease and adjust rates on
14 a frequent basis? Is that important to Vail Resorts
15 Management in assembling these packages?

16 A. Is it important to us -- am I the right
17 person to ask whether it is important to CME to be able
18 to adjust --

19 Q. No, whether it is important to Vail Resorts
20 Management to be able to request and get the actuality
21 of rate adjustments on a frequent basis.

22 A. I do not understand the situation or the
23 question.

24 Q. I apologize. I was probably asking three
25 questions in one.

1 Let us presume that in operating as it does
2 CME has the ability to adjust its rates for ground
3 transportation provided to Vail Resorts upon request.

4 A. Okay.

5 Q. Without having to go anywhere else to get
6 permission to do that.

7 A. Okay.

8 Q. Presuming the accuracy of that, when Vail
9 Resorts Management puts its packages together, is the
10 ability to have flexibility with respect to the pricing
11 of the ground transportation important or beneficial to
12 Vail Resorts Management?

13 A. Yes.

14 Q. Why would that be?

15 A. Well, I do not spend a lot of time thinking
16 about that, but I am going to editorialize here a
17 little bit.

18 Q. That is what I am asking you to do. Tell us
19 about your business and why you like that or do not like
20 that.

21 A. It is important to us that our customers
22 are able to get to our resorts so that we can generate
23 revenue for our company based on the services that we
24 provide at those resorts. Colorado Mountain Express
25 has been an excellent business partner in providing

1 ground transportation services that allow us to get our
2 customers to our resorts. To the extent that it is
3 helpful for their business for them to be able to
4 operate the way you described, that is good for their
5 business, it keeps them in business and it keeps us, it
6 allows to us continue to have a good partner to get our
7 customers to our resorts. From that perspective that
8 is why it would be important to Vail Resorts.

9 Q. If it is -- let us presume that you bring to
10 CME a booking for ground transportation a group of 200
11 people, each of whom gets an individual ground
12 transportation ticket of course.

13 A. Okay.

14 Q. Do you negotiate discounts with CME for that
15 kind of transportation tender?

16 A. Yes.

17 Q. Is that important to be able to do that for
18 your company?

19 A. Yes.

20 Q. It is in its business interest to do that?

21 A. Yes.

22 Q. Getting back to the airline ticketing, does
23 Vail Resorts Management have an arrangement whereby it
24 extends a sum of money in order to induce an airline to
25 come into a particular airport?

67 1 A. We have contractual relationships with 2 airlines to provide service to Vail-Eagle County 3 Airport. 4 Q. That is not necessary at Denver 5 International, correct? 6 A. We don't have any relationships with 7 Denver. 8 Q. The Eagle-Vail Airport is little bit out of 9 the way, correct? 10 A. It is out of the way? 11 Q. Compared to LAX for example? 12 A. It is closer to me than LAX. 13 Q. I am thinking in the national context. 14 A. From the population, yes. 15 Q. It is in your interest to get your 16 passengers and your customers to a close-by airport if 17 that is what they want? 18 A. Yes. 19 Q. That is worth money to Vail Resorts to be 20 able to do that, correct? 21 A. Yes. 22 Q. That is why it is willing to spend money to 23 essentially subsidize some airlines coming into 24 Eagle-Vail Airport? 25 A. Yes.	69 1 customer specifically requests them by name or if CME 2 is booked or for some reason and cannot provide the 3 service during a busy time of year, for example. 4 Q. In any event, they are first choice? 5 A. Yes. 6 MR. BURKE: That is all that I have. 7 FURTHER EXAMINATION 8 BY MR. BECKETT: 9 Q. I have some follow-up questions. The bulk 10 ticketing practices that you described and discussed, do 11 those only involve airline travel in and out of the 12 Eagle County Airport? 13 A. They don't. We have similar contracts into 14 Denver. 15 Q. Okay. Do you have more seats into Eagle 16 County that you do bulk ticketing with than you do into 17 Denver? 18 A. I do not know honestly. 19 Q. Okay. 20 A. We are more focused on it in Eagle for sure 21 because of their guarantee relationships there. 22 Q. Okay. What percentage of your passengers 23 that fly into Eagle spend their ski vacation in Summit 24 County? 25 A. A smaller percentage, less than ten
68 1 Q. To what extent is that part of your overall 2 business plan of assembling these packages that we have 3 been discussing at such great length today? 4 A. The fact that we guarantee the flights at 5 Eagle and how does that relate? 6 Q. To the ability to put packages together. 7 A. Well, obviously we are guaranteeing the 8 flights to increase the service to the airport 9 close-by, and we want to generate as much business into 10 that airport for the airlines as we can so that they 11 will increase service and our guarantees will go down 12 and that sort of thing. It is very important to us. 13 Q. CME provides service from that airport? 14 A. Yes. 15 Q. Did I understand that you consider that an 16 important part of the service that Vail Resorts 17 Management provides from the Eagle-Vail Airport? 18 A. Yes. We don't provide the ground 19 transportation service, but we consider it to be 20 important that our customers can get to our resorts 21 from there. 22 Q. Do I correctly understand that CME is the 23 sole ground service provider? 24 A. I believe that occasionally we will make a 25 reservation with another company but only if our	70 1 percent. 2 Q. Okay. So the Eagle County Airport serves 3 essentially the two resorts, Vail and Beaver Creek, 4 correct? 5 A. And other parts of western Colorado 6 actually too. 7 Q. From Vail Resorts' perspective in its 8 business relationship with the travel industry, it is 9 interested in selling packages that involve a ski 10 vacation at Vail or Beaver Creek or summer vacation with 11 travel in and out of Eagle County Airport? 12 A. We are interested in selling it to all four 13 resorts. Customers tend to use Denver more for the 14 Summit County resorts, and they don't use Eagle as much 15 as they use Denver for the Summit County resorts. 16 Q. Okay. Historically has CME and Vail 17 negotiated a set price for passenger service between an 18 airport and a ski resort which price stays in effect 19 throughout a ski season? 20 A. For individual travel where it is an 21 individual family or an individual customer traveling 22 in, that is generally how it has worked. For a group, 23 if we have a large group we tend to negotiate on a 24 case-by-case basis. 25 Q. You have done that historically?

1 A. Correct.

2 Q. Over the last ten or 15 years?

3 A. Yes.

4 Q. That relationship has not changed with a
5 large group, on a case-by-case basis you negotiate a
6 rate for CME's transportation and on individual family
7 basis it is whatever was the agreed upon rate for that
8 ski season?

9 A. Generally, but I cannot say with certainty
10 that there have not been rate changes within a season,
11 but that is generally how it works.

12 Q. Okay. Lastly, you mentioned that a good
13 portion of your customer base uses frequent flyer miles.

14 Can you elaborate any more on a good
15 portion?

16 A. I don't know a percentage, no, but people
17 tend to use their frequent flyer miles to take vacation
18 trips, not business trips; and the majority of the
19 travel to our resorts is vacation travel and not
20 business travel. We tend to see a relatively
21 significant percentage of the passengers on the flights
22 to the local airport and into Denver for people who are
23 coming to our resorts, they are taken with frequent
24 flyer miles.

25 Q. However, there would appear to be no

1 increase correlation between a frequent flyer customer,
2 frequent flyer ticket using customer and a CME
3 passenger; is that correct? There is no correlation?
4 You have all kinds of clients that come to you and
5 regardless of whether they are using frequent flyer
6 miles or whether they have purchased the airline on
7 their own or they have purchased the airline through
8 you, there is no correlation between those customers and
9 the volume of business that is then directed to CME from
10 each of those customer groups?

11 A. I would assume that they are all equally
12 likely to book a CME ground transfer with their plane
13 ticket.

14 Q. What is your basis for equally likely?

15 A. Because there is no difference in the
16 nature of the customer. They are flying to the
17 airport. They are coming to the resort. They have to
18 have a way to get there. I would assume they are just
19 as likely to rent a car as to take a CME shuttle.

20 I cannot perceive any difference in the kind
21 of customer that would make one of them prefer a CME
22 shuttle or more likely to book a CME shuttle with us or
23 less likely to book a CME shuttle with us, no.

24 MR. BECKETT: Thanks. That is all.

25 MR. BURKE: That is all that I have.

1 STATE OF COLORADO)
2) SS. REPORTER'S CERTIFICATE
3 COUNTY OF DENVER)

4 I, Michele Koss, do hereby certify that I am a
5 Certified Shorthand Reporter and Notary Public within
6 the state of Colorado; that previous to the commencement
7 of the examination, the deponent was duly sworn by me to
8 testify to the truth.

9 I further certify that this deposition was
10 taken in shorthand by me at the time and
11 place herein set forth and was thereafter reduced
12 to typewritten form, and that the foregoing
13 constitutes a true and correct transcript.

14 I further certify that I am not related to, employed
15 by, nor of counsel for any of the parties or attorneys
16 herein, nor otherwise interested in the result of the
17 within action.

18 In witness whereof, I have affixed my signature
19 this 28th day of July, 2005.

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Michele Koss

PATTERSON REPORTING & VIDEO
Michele Koss
Certified Shorthand Reporter
and Notary Public

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July 28, 2005

DAVID A. BECKETT, ESQ.
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Denver, Colorado 80203

Re: EAST WEST RESORT TRANSPORTATION, LLC, AND TMS, LLC,
d/b/a COLORADO MOUNTAIN EXPRESS

Dear Mr. Beckett:

Re: Deposition of: CHRISTOPHER JARNOT

_____ Previously filed. Forwarding signature page
and any amendment sheet(s).

_____ Signed, no changes.

_____ Signed, with changes, copy of which is enclosed.

_____ No signature required.

___x___ Signature waived.

_____ Forwarding original transcript unsigned;
Signature pages and/or amendments will be
forwarded if received.

_____ Original exhibits included in ongoing notebook
and will be filed with counsel at conclusion of
discovery

_____ Via Email

Enclosures: (As above noted)

cc: Thomas J. Burke, Jr., Esq.