

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

PETITION TO INTERVENE
OF
THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO
AND
REQUEST FOR AN ORDER ESTABLISHING A PROCEDURAL SCHEDULE

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Dated: October 14, 2004

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The Public Utilities Commission of the State of Colorado (“CPUC”), by and through the Colorado Attorney General, respectfully petitions the Board to grant it party status and to establish a procedural schedule appropriate for this petition for declaratory order submitted by East West Resort Transportation, LLC, and TMS, LLC, d/b/a Colorado Mountain Express (“CME”). In support, CPUC states as follows:

1. CPUC and CME are presently engaged in litigation in two forums – before the Colorado Public Utilities Commission and the United States District Court for the District of Colorado. In its simplest form, the litigation is about the authority of the CPUC to exercise

its constitutional police power to regulate motor carriers that it has certificated to operate in intrastate commerce.

2. As is referenced by CME in its petition for declaratory order, CME holds an active certificate of convenience and necessity issued by the CPUC. This certificate authorizes CME to provide a wide variety of services on an intrastate basis to passengers travelling, *inter alia*, between Colorado's Denver International Airport or the Eagle County Regional Airport and the major ski resorts. See Exhibit 16 attached to CME's Document Appendix to its Petition for Declaratory Order.

3. As to the vast majority of services rendered by CME, the CPUC certificate of public convenience and necessity establishes CME's right to provide its services as a common carrier of passengers under the protections afforded by the doctrine of regulated monopoly. See § 40-10-101 *et seq.*, C.R.S.; *Boulder Airporter, Inc. v. Rocky Mountain Shuttlines, Inc.*, 918 P.2d 1118, 1121 (Colo. 1996). In Colorado, the doctrine of regulated monopoly stands for the proposition that a new market entrant will not be permitted to commence operations in the same service territory absent a showing that the service provided by the existing motor carrier is substantially inadequate. *Id.*

4. CPUC is the constitutionally empowered state agency with the authority to regulate public utilities in the State of Colorado. See Colo. Const. Art. XXV. Clearly, CPUC has an interest in a matter filed by one of its licensees, which matter could substantially affect the CPUC's regulatory reach as to that public utility. CPUC also has an interest in a proceeding that, if the Board elects to issue a decision on the merits of CME's

petition for declaratory order, might potentially address the interplay between interstate and intrastate passenger services in the specific geographic context of Colorado.

5. CPUC is concerned with the issues and information presented to the Board in conjunction with CME's petition for declaratory order. As a preliminary matter, CPUC is not convinced that the Board should exercise its discretion to entertain the issues CME has presented given (1) CME's reliance on railroad matters as the basis for the exercise of authority and (2) the admonition of Congress when passing the ICC Termination Act of 1995 and creating the Board that the Board not resolve disputes involving passenger motor carrier operations (H. Rep. No. 104-311, reprinted in 1995 *U.S. Code Cong. & Ad. News* 793, 799-800). However, if the Board exercises its discretion to entertain the issues CME has presented, CPUC intends to participate for the purpose of monitoring the docket and/or presenting the CPUC's position on relevant issues, providing additional information to the Board's record of proceedings, and, to the extent necessary, ensuring that the record contains factually complete and accurate information.

6. CPUC therefore requests that it be permitted a full opportunity to present to the Board its argument as to whether the published decisions of the Interstate Commerce Commission and the courts already adequately establish the test for determining whether, as to a particular motor vehicle carrier of passengers holding a federal transportation authority, the requisite nexus exists between its interstate and intrastate operations. Specifically, this nexus is the demonstration of substantial, bona fide, and actual regularly scheduled service.

7. To this end, CPUC respectfully requests that the Board issue an order establishing a procedural schedule whereby CPUC may present to the Board its argument on the issue of whether the Board should reach the merits of CME's petition for declaratory order.

8. In the event the Board determines, without accepting CPUC's request to make argument as outlined in paragraphs 5, 6 and 7, to commence a determination of the merits of CME's petition for declaratory order, CPUC respectfully requests that the Board enter an order establishing a procedural schedule that provides for the opportunity to conduct discovery. At this time, CPUC takes no position as to whether CME's petition for declaratory order can be resolved without oral testimony in accordance with the Board's modified procedures.

WHEREFORE, the Colorado Public Utilities Commission requests that the Board grant its petition to intervene and provide an opportunity for it to present argument regarding whether this matter should be dismissed or proceed to a determination on the merits and for an order establishing a procedural schedule consistent with these requests.

Dated this 14th day of October, 2004.

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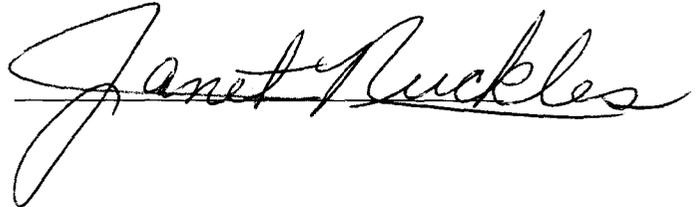
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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within PETITION TO INTERVENE OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO AND REQUEST FOR AN ORDER ESTABLISHING A PROCEDURAL SCHEDULE upon all parties herein by depositing copies of same in the United States mail, first class postage prepaid, or as otherwise indicated, at Denver, Colorado, this 14TH day of October, 2004, 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

A handwritten signature in cursive script that reads "Janet Ruckles". The signature is written in black ink and is positioned below the typed name of Fritz R. Kahn.