

Service Date: December 23, 2003

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

In The Matter Of The Application of DEAN R.)
CURRY d/b/a/ DIRTY DEEDS CONTRACTING) DOCKET NO. T-03.9.PCN
Plains, Montana, Application for a Montana) ORDER NO. 6539a
Intrastate Certificate of Public Convenience and)
Necessity.)

FINAL ORDER

(A.R.M. § 38.2.4802)

APPEARANCES

FOR THE APPLICANT:

Caroline Gill, Esq., Gill Law Office, P.C., 116 E. Railroad, Plains, Montana
59859

FOR THE PROTESTANTS:

Frank Crowley, Esq., Doney, Crowley, Bloomquist, Uda, P.C., Diamond Block
Suite 200, 400 West 6th Avenue, Helena, Montana 59624, appearing on behalf of
BFI Waste Systems of North America, Inc. (BFI).

Peter P. DelGuidice and Rebecca L. DelGuidice, dba B & P Services, P. O. Box
126, Plains, Montana 59859, appearing pro se.

COMMISSION STAFF:

Al Brogan, Staff Attorney, 2701 Prospect Avenue, Helena, Montana 59620.

BEFORE:

Bob Rowe, Chairman, Montana Public Service Commission, and Hearing
Officer.

BACKGROUND

1. On February 25, 2003, the Commission received an application from Dean R. Curry, dba Dirty Deeds Contracting (Applicant) for a Certificate of Public

Convenience and Necessity, Class D, authorizing the transportation of garbage in Sanders County, Montana. On April 29, 2003, Applicant requested the Commission amend the authorization in his application to read: "Class D – Garbage between all points and places in Sanders County. Carrier is permitted to transport waste generated by construction and/or demolition to certified landfills from area authorized."

2. The Commission received written protests from the following carriers: Butte Services, Inc., PSC No.1995; BFI Waste Systems of North America, Inc. (BFI), PSC No. 1581; Peter P. DelGiudice and Rebecca L. DelGiudice dba B & P Services (B&P), PSC No. 3568; and Rus-Kins, Inc., PSC No. 9320.

3. Following issuance of proper notice a hearing was held on July 15, 2003 in the Grange Hall, on Lynch Street, in Plains, Montana. At the hearing the parties requested the Commission issue a Proposed Order. The Hearing Officer, at the request of the parties, established a briefing schedule consisting of two rounds of simultaneous briefs, with the initial briefs due on or before September 8, 2003, and the reply briefs due on or before September 22, 2003.

4. On August 20, 2003, BFI moved to reopen the administrative record. On September 9, 2003, Applicant filed a response to BFI's motion. On September 23, 2003, BFI filed a reply in support of its motion to reopen the record. This motion is dealt with in this order.

5. Applicant and BFI submitted timely briefs.

6. On October 31, 2003, the Hearing Examiner issued Proposed Order No. 6539.

7. On November 17, 2003, the Commission received BFI'S Exceptions to the Proposed Order.

8. On November 25, 2003, the Commission received Applicant's Objection to BFI's Exception to Proposed Order.

9. On December 3, 2003 the Commission received Protester B & P Services' Exceptions to Proposed Order.

DISCUSSION

10. BFI took exception to the proposed finding of fact that Applicant's proposed transportation is not incidental to its primary business of demolition, excavation, and cleanup¹ and asserted that the Proposed Order created a new "after the fact" test. The Proposed Order, at paragraph 43, stated, "Applicant is proposing to provide transportation service which appears to be more than incidental transportation. Applicant is proposing to haul much of the waste to a certified landfill near Missoula, Montana rather than to a local landfill. At this juncture, before the business is operating, it is impossible to determine if the proposed operation will be merely incidental transportation. If Applicant fails to engage in the transportation of authorized commodities on a regular basis Applicant will be in violation of § 69-12-314(2), MCA."

11. For clarification only, an "after the fact" test is not being created. The evidence is that prior to being granted a certificate of authority, the Applicant engaged only in legal incidental transportation. The evidence is that the Applicant is proposing to engage in more than incidental transportation. The finding of fact is based on this evidence. In every application involving a new service the Commission must rely on representations

¹ BFI also took exception to a determination that Applicant's current transportation of waste is not incidental to its primary business of demolition, excavation, and cleanup. No such determination was made. Footnote 8 of Proposed Order No. 6539 stated, "Applicant appears to have operated a business which offers demolition, cleanup, and transportation. Whether such transportation met the primary business test is not before the Commission and no opinion is expressed thereon."

as to the service that will be provided. The Proposed Order included a cautionary note that if the Applicant did not perform as proposed he would be in violation of the statute.

12. ARM § 38.2.4803(1) provides, “Briefs on exceptions may be filed by any party within 20 days after the proposed order is filed. Briefs opposing exceptions may be filed within ten days thereafter.” In this matter the deadline for filing briefs on exceptions was November 20, 2003, and the deadline for filing briefs opposing exceptions was November 30, 2003. B & P Services’ Exceptions to Proposed Order was not timely filed. The issue raised in B & P Services’ Exceptions is identical to that raised in one of the exceptions filed by BFI and was considered by the Commission in reaching a decision on that filing.

13. No party requested oral argument on exceptions or objections to exceptions. At a regularly scheduled, and properly noticed, work session on December 9, 2003, the Commission considered the Proposed Order, the exceptions filed by BFI, the objections to exceptions filed by the Applicant, and the late filed exceptions filed by B & P Services and reached the following decisions by a vote of 5 – 0.

ORDER

NOW THEREFORE IT IS HERBY ORDERED:

1. The exceptions filed by B& P Services are rejected for being untimely.
2. The exceptions of BFI are overruled.
3. The Findings of Fact in Proposed Order No. 6539 are adopted in their entirety.
4. The Conclusions of Law in Proposed Order No. 6539 are adopted in their entirety.
5. The application of Dean R. Curry dba Dirty Deeds Contracting, Plains, Montana for a Class D Certificate of Public Convenience and Necessity is granted as follows:

Class D – Garbage between all points and places in Sanders County. Carrier is allowed to transport authorized commodities to certified landfills from territory authorized.

Limitations:

- (1) Transportation is limited to materials from demolition or construction projects.
- (2) Transportation within a the town of Noxon, Montana and a twenty (20) mile radius thereof is limited to service provided using roll-off containers of greater than ten (10) cubic-yards capacity.
- (3) Transportation to or from any points within fifty (50) miles of Ronan, Montana is prohibited; EXCEPT that transportation for or from any points within ten (10) miles of Paradise, Montana is permitted.
- (4) Transportation to or from any points within twenty (20) miles of Hot Springs, Montana is prohibited; EXCEPT that transportation to or from any points within ten (10) miles of Plains, Montana is permitted.

6. The Applicant must, within thirty (30) days of the mailing of the final order in this matter comply with all rules and regulations of the Montana Public Service Commission.

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BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

BOB ROWE, Chairman

THOMAS J. SCHNEIDER, Vice Chairman

MATT BRAINARD, Commissioner

GREG JERGESON, Commissioner

JAY STOVALL, Commissioner

ATTEST:

Connie Jones
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Final Order Number 6539a, issued in Docket T-03.9.PCN in the matter of Dean R. Curry dba Dirty Deeds Contracting, Plains, Montana has today been sent to all parties listed.

MAILING DATE: December 23, 2003

FOR THE COMMISSION

FIRST CLASS MAIL

Dean R. Curry
dba Dirty Deeds Contracting
PO Box 484
Plains, MT 59859

Butte Services, Inc.
PO Box 846
Thompson Falls, MT 59873

Ms. Carolyn Gill
Attorney at Law
PO Box 1307
Plains, MT 59859

Peter P. & Rebecca L. DelGiudice
dba B & P Services
PO Box 126
Plains, MT 59859

Mr. Frank Crowley
Attorney at Law
PO Box 1185
Helena, MT 59624-1185

BFI Waste Systems of North America,
Inc.
PO Box 8449
Missoula, MT 59807

Rus-Kins, Inc.
PO box 1468
Noxon, MT 59853

AS ITS INTERESTS MAY APPEAR:

Montana Consumer Counsel
616 Helena Avenue
P.O. Box 201703
Helena, MT 59620-1703