

Service Date: April 27, 2005

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

* * * * *

IN THE MATTER of the application of) TRANSPORTATION DIVISION
Catch-A-Cab Taxi Service, LLC)
For a Certificate of Public Convenience and) Docket No. T-04.54.PCN
Necessity) Order No. 6559a

FINAL ORDER

APPEARANCES

FOR THE APPLICANT:

John D. Greef, Attorney at Law, P.O. Box 657, Hamilton, MT 59840.

FOR THE PROTESTANTS:

All Valley Cab

John P. Atkins, Attorney at Law, P.O. Box 1953.

Wild Trout Outfitters, Inc., dba Mountain Taxi, and Classic Limo Inc.

David Weaver, Attorney at Law, Neal Zimmer and Weaver, Aspen Professional Center,
1700 West Koch, Suite 4, Bozeman, MT 59715-1330.

COMMISSION STAFF:

Robin A. McHugh, Attorney, Legal Division, 1701 Prospect Ave., Helena, MT 59620.

BEFORE:

Robert H. Raney, Commissioner and Hearing Examiner.

BACKGROUND TO PROPOSED ORDER AND
RESPONSE TO EXCEPTIONS

On March 15, 2005 Commissioner Raney issued Proposed Order No. 6559 in this docket, granting the Applicant operating authority as follows:

Class B - Passengers in taxi service (1) between all points and places in Gallatin County; (2) transportation within a 20 mile radius of Big Sky, Montana is prohibited; (3) transportation in limousine service is prohibited; (4) operation must begin and end between the hours of 10:00 p.m. and 6:00 a.m.; (5) transportation originating from or terminating at the Gallatin Field Airport is prohibited.

The Applicant filed exceptions to the Proposed Order ("Response Brief of Commissions Proposed Order") on April 4, 2005, and Protestant All Valley Cab filed a "Rebuttal Brief" on April 14, 2005.

Applicant urges the Commission to allow 12 hours of operation daily rather than the 8 hours authorized in the Proposed Order. Applicant indicates it cannot be profitable when limited to 8 hours of operation. It also argues that it should be able to transport to the bars those persons who will become intoxicated and need rides from the bars. In addition, Applicant contends it has demonstrated a need for taxi service to and from Gallatin Field Airport. Applicant claims to have spoken with officials of the airport who support the application. Applicant also claims support for the application from the "Youth and Family Liaison for the Adolescent Resource Center." In sum, the Applicant asks on exceptions that it be allowed to operate daily between 6:00 p.m. and 6:00 a.m., and that it be allowed to serve Gallatin Field Airport 24 hours per day.

Applicant's exceptions to the Proposed Order are denied. The evidentiary record cannot be supplemented on exceptions. The advice to the Applicant's from its financial advisors, along with the opinion of Ms. Maher and the Gallatin Field Airport Authority are not on the record and must be disregarded. (Moreover, evidence of financial impossibility, in the absence of some showing of need, generally will not support expanded operating authority.)

With respect to expansion of the hours of operation the Commission finds that allowing operation from 10:00 p.m. to 6:00 a.m. is generous in light of the record. There is no evidence of need on the record for transportation to the bars in the early evening, and the Commission will not infer such need from the obvious fact that a certain percentage of bar customers have too much to drink, should not drive, and need a ride home. In addition, even accepting the dubious

proposition that those irresponsible enough to become intoxicated have the wisdom to take a taxi to the bar in anticipation of their irresponsibility, there is no indication on this record that existing carriers are not willing and able to transport persons to the bars in the early evening.

Regarding service to the airport, Applicant did not present a single shipper witness to testify on a need for additional taxi service at Gallatin Field Airport. Evidence on increased airport usage does not establish need for additional airport taxi service.

The Commission determines that Proposed Order No. 6559 should be adopted as the Final Order in this docket.

INTRODUCTION AND PRELIMINARY DECISIONS

1. On September 15, 2004 the Commission received an application from Kaycee Anderson, dba Catch-A-Cab Taxi Service, LLC (Applicant) for a Certificate of Public Convenience and Necessity, Class B, authorizing the transportation of passengers in taxi service between all points and places in Gallatin County.

2. Timely protests to the application were received from David and Marla Francis, dba All Valley Cab; VIP Taxi, Inc.; Wild Trout Outfitters, Inc., dba Mountain Taxi; and Classic Limo, Inc. At hearing Catch-A-Cab agreed to limit its application against the provision of limousine services in Gallatin County, and also agreed not to provide taxi service within a 20 mile radius of Big Sky, Montana. Given those limitations Mountain Taxi and Classic Limo withdrew their protests. TR 8-11. It was also established at hearing, TR 111-117, and from the Commission's review of its own records, that the authority of VIP Taxi does not overlap the authority applied for in this docket. Therefore, VIP Taxi does not have a legal interest in this docket and it is dismissed as a party and its protest is denied. The possibility that an applicant may operate outside its authority, if granted, does not create a legal right to protest in an existing carrier. (See Application of Miller, Docket No. T-03.47.PCN, Order No. 6543a, ¶ 22.) Also, the possibility that an existing carrier may in the future apply for authority that would overlap an applicant's requested authority does not create a right to protest. Therefore, the only protestant that remains to this application is All Valley Cab (All Valley).

3. Following issuance of proper notice a hearing was held on January 14, 2005 at the Bozeman City Commission Room, Bozeman City Hall, Bozeman, Montana. At the close of

hearing it was decided that a proposed order would be issued. Briefs were submitted by the Applicant and All Valley on February 18, 2005, and by the Applicant on February 28, 2005.

SUMMARY OF TESTIMONY

Testimony for the Applicant:

4. Nicole Maher testified in support of the application. Ms. Maher is a 911 dispatcher and occasionally has been asked by police officers to call a cab for intoxicated persons, usually persons leaving the downtown Bozeman bars late at night. Ms. Maher testified that she has called All Valley and often finds that they are not available. She could not testify about the cab service after she had successfully made a request.

5. Brooke Lannon testified in support of the application. Ms. Lannon is a 911 dispatcher who has experience calling for cab service for intoxicated persons. She testified that she calls All Valley exclusively on those occasions and that the response is mixed: sometimes the call is not answered; sometimes the call is answered and service is not available; sometimes the call is answered and All Valley indicates that service will be provided. Ms. Lannon could not testify with certainty about whether, on those occasions when All Valley indicated service would be provided, it was provided successfully.

6. Rachel Willis testified in support of the application. Ms. Willis recently worked at the Bozeman hospital and occasionally was asked to call a cab for persons leaving the hospital. Generally, the calls were made for persons at the hospital being treated for intoxication. Ms. Willis testified that she called All Valley, and that the response was mixed. Sometimes there was no answer; sometimes the response was rude, both on the phone and in person after arriving at the hospital.

7. Mary Wagner, a police officer with the City of Bozeman, appeared and testified in support of the application in her individual capacity. Ms. Wagner stated that she frequently either calls a cab, or asks a dispatcher to call a cab for intoxicated persons late at night. She indicated that often cab service from All Valley is simply not available, especially weekday nights.

8. Douglas Lichte, a business owner in the Bozeman area and, until recently, a Bozeman police officer, appeared and testified in support of the application. Mr. Lichte explained that when a police officer he had numerous times called All Valley for cab service for

persons too intoxicated to drive. He further explained that at night, when most of these calls were made, the taxi service was “very little or non-existent.” TR 57. He clarified that the response from All Valley was mixed; sometimes All Valley responded and provided service quickly; other times there were long delays in providing service; and other times All Valley did not answer the phone. Mr. Lichte, one of the owners of Catch-A-Cab, LLC, described the Applicant’s business plan and financial resources.

9. Gregory Lannon, another co-owner of the Applicant, LLC, testified in support of the application. Mr. Lannon is a Bozeman city police officer. He affirmed the business plan as described by Douglas Lichte, and explained his own financial resources to support the Applicant business. Mr. Lannon indicated that as a police officer he is sometimes required to call a cab for intoxicated persons. Similar to testimony from other witnesses he indicated that when he called All Valley the response would vary from no response, to delayed service, to excellent prompt service.

10. Kaycee Anderson, a Bozeman police officer and co-owner of the Applicant, LLC, testified in support of the application in her individual capacity. She also testified about the mixed response from Valley Cab to requests for service late at night. She indicated that weekday evenings are a “bigger problem” than weekends.

Testimony of Protestant:

11. David Francis, owner of All Valley, testified in opposition to the application. Mr. Francis described All Valley and indicated it has a location close to the airport and a good relationship with the airport. He said he has not received complaints about the All Valley service. He described the Cat Cab program run by All Valley, that is designed to get students home safely from the bars for a nominal fee. He stated Cat Cab operates Thursday through Saturday. Mr. Francis stated that All Valley operates 24 hours a day, and that a person is available to answer the phone 24 hours per day in order to respond to service requests.

Testimony of Public Witnesses:

12. Carey Sarles, owner and operator of VIP Taxi, Inc., appeared as a public witness in opposition to the application. Mr. Sarles’ basic point appeared to be that establishing public

convenience and necessity for taxi service should require more than evidence and testimony about the transportation of intoxicated persons. TR 105.

13. Ashley Branning, former owner of All Valley, testified in opposition to the application. He stated that the testimony at hearing did not support a conclusion that existing service is not adequate to serve the general public. He further stated that “All I’m hearing is that they’re not doing an adequate job of service the intoxicants.” TR 120. The reason for this failure, he opined, is that the demand for taxi service at the peak time after the bars close is too great for any company to handle. He emphasized that All Valley’s service should be measured by its response to the general demand, not the peak demand of a particular group of customers. Finally, Mr. Branning averred that “there is no way that it is fiscally possible for two valid taxi companies to operate in this community at this time.” TR 121.

EXHIBITS

14. The following exhibits were either admitted at hearing, or are now admitted into the record in this docket: Applicant’s 1 (Doug and Sonye Lichte - Net Worth), 2 (Montana RV Consulting - Profit & Loss), and 5 (Greg Lannon financial statement) were introduced to demonstrate the financial fitness of the Applicant to run a taxi service; Applicant’s 3 is a description of the Applicant business plan; Applicant’s 4 shows certain graphs demonstrating Gallatin County population and employment projection trends; Applicant’s 6 shows statistics reflecting increasing use of the Gallatin County Airport; Applicant’s 7 purports to show recent increases in DUI arrests in the Bozeman area; Applicant’s 8 reflects grades given the State of Montana by MADD (Mothers Against Drunk Driving) related to drinking and driving; Applicant’s 9 is a letter from a Gallatin County resident in support of the application; Applicant’s 10 is a letter from a MSU student critical of the taxi service provided by All Valley.

DISCUSSION, ANALYSIS AND FINDINGS

15. In considering applications for operating authority, the Commission is governed by the provisions of 69-12-323, MCA. Paragraph (2)(a) of that section provides as follows:

If after hearing upon application for a certificate, the commission finds from the evidence that public convenience and necessity require the authorization of the service proposed or any part thereof, as the commission shall determine, a certificate therefore shall be issued. In

determining whether a certificate should be issued, the commission shall give reasonable consideration to the transportation service being furnished or that will be furnished by any railroad or other existing transportation agency and shall give due consideration to the likelihood of the proposed service being permanent and continuous through 12 months of the year and the effect which the proposed transportation service may have upon other forms of transportation service which are essential and indispensable to the communities to be affected by such proposed transportation service or that might be affected thereby.

16. Applying this language to the facts presented by any application for transportation authority, the Commission has traditionally undertaken the following analysis: First, it asks whether the applicant has demonstrated that there is a public need for the proposed service. If the applicant has not demonstrated public need then the application is denied and there is no further inquiry. Second, if the applicant has demonstrated a public need for the proposed service, then the Commission asks whether existing carriers can and will meet that need. If demonstrated public need can be met as well by existing carriers as by an applicant, then, as a general rule, an application for additional authority will be denied. Third, once it is clear that there is public need that cannot be met as well by existing carriers; the Commission asks whether a grant of additional authority will harm the operations of existing carriers contrary to the public interest. If the answer is yes, then the application for new authority will be denied. If the answer is no, then the application will be granted, assuming the Commission determines the applicant fit to provide the proposed service.

17. The traditional analysis described above has perhaps been stated most concisely in the case of Pan American Bus Lines Operation, 1 M.C.C. 190, 203 (1936):

The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines of carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.

18. Establishment of public need requires the testimony of “shipper witnesses.” The Commission has stated that it “has traditionally relied upon shipper witnesses to establish and substantiate public need -- a shipper witness being one who can testify as to a personal need for the service, as opposed to a witness who merely opines

that others have a need for the proposed service.” Application of Jones Brothers Trucking, Docket No. T-9469, Order No. 5987a, p. 9 (1990). In the context of passenger transportation this means that the best evidence is from persons who actually use, or have tried to use, or who desire to use a particular kind of transportation. There is no such evidence on this record. There is, however, much evidence on this record from third parties, mostly police officers, who have had considerable experience observing intoxicated persons who need cab service, and arranging for, or attempting to arrange for, such service. In this case, third party testimony is sufficient to establish need; in fact, given the particular alleged need that the Applicant focused on at hearing, third party testimony may be the only available evidence. The Commission finds that the Applicant established a public need for taxi service to transport intoxicated persons at particular times of the day.

19. The record on the willingness and ability of Valley Cab to meet the demonstrated need is mixed. Even Applicant witnesses did not contend that Valley Cab is completely remiss in meeting the need. Often Valley Cab has been very responsive and prompt. However, there is considerable and essentially unrebutted evidence that Valley Cab has failed to respond to this need. The most damaging such evidence is that Valley Cab often does not answer the phone, while holding itself out as providing “24/7” service. Valley Cab’s response to this testimony was to express surprise and puzzlement; not to offer any plausible explanation or to demonstrate that the testimony must be mistaken. TR 94-103. It is obviously correct, as public witness Branning pointed out, TR 120-121, that it is not realistic to expect the same level of cab service at both peak and non-peak times. However, it is reasonable to expect of a “24/7” cab company that a call for service always be answered promptly and courteously, and that the service be provided as quickly as possible consistent with the other service demands of the period. Modern phone systems can obviously be designed to assist in accomplishing this. The Commission finds that All Valley is not willing to meet the public need demonstrated.

20. Once need has been established, along with the unwillingness or inability of existing carriers to meet the need, the Commission must decide whether a grant of additional authority will harm existing carriers contrary to the public interest. The burden to establish such harm is on the Protestant All Valley, a burden that All Valley did not

carry or attempt to carry. Some reference to this issue may be inferred from All Valley's answer to the following question: "Q. Is your business doing well? A. I would say "well." We've, um -- we're maintaining." TR 98. Public witness Branning stated that "there is no way that it is fiscally possible for two valid taxi companies to operate in this community at this time." TR 121. Mr. Branning invited the Commission to "look at the financial statements and income and expense statements that [All Valley] has provided [,]" which he contended supports the conclusion that two carriers are not financially sustainable. All Valley, however, did not provide any financial evidence at hearing designed to show that it cannot survive an additional grant of authority, and the Commission will not reason to such a conclusion based on annual report information, unchallenged by the Applicant.

21. A determination of carrier fitness must be made prior to granting operating authority. The Applicant members presented on the record financial information and a business plan that indicates an ability to initiate a cab service and sustain it for a reasonable start up period. Beyond that, there is no guarantee of success, as there is not for any business. Additionally, the background of the Applicant members, and their demeanor at hearing, indicated a seriousness of purpose and a determination to succeed in this venture. Determination may not be enough, time will tell, but the Commission finds the Applicant fit.

DECISION AND LIMITATION

22. The Commission finds that the Applicant has satisfied the elements of public convenience and necessity, and that some carrier authority should be granted. The need that the Applicant demonstrated, however, is narrow, and does not support a general grant of taxi authority for all points and places in Gallatin County. Public witness Branning is correct that taxi service is more than transporting intoxicated persons. But "24/7" taxi service includes such transportation and, more importantly, includes service availability at all times. Therefore, the Commission finds that the application should be granted, with the limitations that transportation should begin no earlier than 10:00 p.m., and end no later than 6:00 a.m., between all points and places in Gallatin County,

consistent with Applicant stipulations, but transportation originating and terminating at the Gallatin Field Airport is prohibited.

CONCLUSIONS OF LAW

1. The Montana Public Service Commission properly exercises jurisdiction over the parties and matters in this proceeding pursuant to Title 69, Chapter 12, Montana Code Annotated.
2. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter.
3. Applicant has demonstrated some public demand or need for the proposed service, and has demonstrated that existing carriers cannot meet that demand or need as well.
4. Applicant has demonstrated fitness to provide the proposed service.
5. The authority granted by this Order will not have an adverse impact on existing transportation service contrary to the public interest.
6. On this record the Commission has the legal discretion to grant some operating authority.

ORDER

Now, therefore, it is ordered that the application in this docket is granted as follows: Class B - Passengers between all points and places in Gallatin County. LIMITATIONS: (1) transportation within a 20 mile radius of Big Sky, Montana is prohibited; (2) transportation in limousine service is prohibited; (3) operation must begin and end between the hours of 10:00 p.m. and 6:00 a.m.; (4) transportation originating from or terminating at the Gallatin Field Airport is prohibited.

DONE and dated this 26th day of April, 2005.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

GREG JERGESON, Chairman

BRAD MOLNAR, Vice Chairman

DOUG MOOD, Commissioner

ROBERT H. RANEY, Commissioner

THOMAS J. SCHNEIDER, 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 issued in Docket T-04.54.PCN in the matter of Catch-A-Cab Taxi Service LLC, 8 Sanders Avenue, Bozeman, Montana has today been sent to all parties listed.

MAILING DATE: April 27, 2005

FOR THE COMMISSION

FIRST CLASS MAIL

Catch-A-Cab Taxi Service LLC
8 Sanders Avenue
Bozeman, MT 59718

Classic Limo, Inc.
20 Lower Rainbow Road
Bozeman, MT 59718

David D. and Marla J. Francis
dba All Valley Cab
290 Frank Road
Belgrade, MT 59714

Mr. David L. Weaver
Attorney at Law
PO Box 1330
Bozeman, MT 59715

VIP Taxi, Inc.
PO Box 738
Livingston, MT 59047

Mr. John D. Greef
Attorney at Law
PO Box 657
Hamilton, MT 59840

Wild Trout Outfitters, Inc.
dba Mountain Taxi
PO Box 160003
Big Sky, MT 59716

John P. Atkins
Attorney at Law
PO Box 1953
Bozeman, MT 59771-1953

AS ITS INTERESTS MAY APPEAR:

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