

Service Date: September 16, 1985

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

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IN THE MATTER of the Application)	TRANSPORTATION DIVISION
of MATADOR SERVICE, INC., Wichita,)	
KS for a Class C Certificate of)	DOCKET NO. T-8743
Public Convenience and Necessity.)	ORDER NO. 5629

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FINAL ORDER

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APPEARANCES

FOR THE APPLICANT:

William E. O'Leary, O'Leary & McCarthy, Suite 4G, Arcade Building, 111 North Last
Chance Gulch, Helena, MT 59601

FOR THE PROTESTANT:

Hugh Sweeney, Hibbs, Sweeney, Colberg & Koessler, P.O. Box 21715, Billings, MT 59103

FOR THE COMMISSION:

Geralyn Driscoll, Staff Attorney, 2701 Prospect Avenue, Helena, MT 59620

BEFORE:

HOWARD ELLIS, Commissioner
TOM MONAHAN, Commissioner

DANNY OBERG, Commissioner

BACKGROUND

1. On March 19, 1985 Matador Service, Inc., 411 East 37th Street N., Wichita, Kansas 67220, filed an application with the Montana Public Service Commission. Applicant seeks a certificate of Public Convenience and Necessity, Class C, authorizing the transportation of asphalt, asphalt cements, cutback asphalts and emulsified asphalts between all points and places in the State of Montana for Koch Asphalt Company only.

2. Written protests were received from H.F. Johnson, Inc., Hornoi Transport, Inc., and Dixon Bros., Inc. Following receipt of protest and issuance of notice, a public hearing was held on July 17, 1985, at 2701 Prospect Avenue, Helena, Montana.

3. At the hearing, following the completion of the Matador Service Inc.'s case-in-chief, the Protestants moved to dismiss the application on the grounds that the Applicant had not sustained its burden of proving that public convenience and necessity required the granting of the application. This motion was renewed at the close of Protestant's case.

4. At the conclusion of the hearing, briefs were ordered addressing the question of the difference, if any, of the burden of proving public convenience and necessity for contract and common carriers.

Summary of Testimony

Testimony of Applicant

5. Jack Baisch, Matador Service Division Manager, appeared and testified in support of the application. He sponsored the following exhibits:

- Exhibit 1) Montana Intrastate Certificate 2539,
- Exhibit 2) Matador's equipment list for the Northern Division as of July 12, 1985,
- Exhibit 3) Matador's list of employees for the Northern Division as of July, 1985.

6. One hundred eighty of Matador's 193 tank trucks and trailers can carry asphalt. Matador currently has a lease agreement with another carrier, Keller, to haul asphalt pending this certification process. These leases are 30-day short-term leases. If granted the authority, Matador intends to cancel the Keller leases and transfer in four units from out of state.

7. Matador has ICC authority to haul liquids in bulk from points in Montana to anywhere and has Montana authority to haul water to oil rigs.

8. Koch Industries owns Matador. Among other things, Koch Industries buys and markets asphalt. Koch Fuel, a division of Koch Oil Co., holds Koch Asphalt. Asphalt, a by-product of oil refining, is hauled at high temperatures. Because of the danger of explosion if other materials are also hauled in trucks used to haul asphalt, Koch Asphalt prefers a carrier who will dedicate trucks to that purpose. Jack Baisch testified that if this certificate is denied, Koch Asphalt will not use the local carriers; it will transfer equipment from another corporate division and haul the asphalt itself.

9. Donald Tangedol, Matador Vice President, supervises Matador's trucking fleets in 48 districts. He testified that the corporation is set up in a pyramid with Koch Industry as the parent company over the subsidiaries. Matador is wholly-owned by Koch Industry. Koch Industry's sub, Koch Oil Co., is the division which holds Matador. Koch Oil Co. explores and produces oil and

provides support services to the oil industry. It has subs in other areas of the manufacturing process.

10. Freddie Marchand, terminal dispatcher for Matador, dispatches asphalt orders throughout the state. He testified about dispatching asphalt from Billings, Casper, and Idaho Falls. Koch Asphalt opened its asphalt plant May 15, 1985. He testified that Koch has not seriously considered the availability of intrastate haulers in Montana.

11. Testimony of shipper witness Jim Kirchner, Koch Asphalt General Manager Northern Division, testified. He is responsible for the marketing of asphalt from 14 terminals in 8 states. Kirchner sponsored Exhibit 4 -- Matador's unaudited balance sheet and income statement for the period ending April 30, 1985. He testified about Koch Asphalt's and Matador's work relationship. His primary concerns were the negotiation of a shipping price, evaluation of credit for credit line purposes, and confidentiality of the material being shipped. He testified that Matador's ability to keep Koch Asphalt informed on customer problems, thus providing better service, was an important consideration in preferring Matador.

12. Kirchner testified about Koch Asphalt contracts for intrastate shipments. Koch Asphalt anticipates 2.5 million gallons of product sales this year. One million has been shipped. The remaining 1.5 million is approximately 220 truckloads. Koch Asphalt prefers to use Matador for these shipments.

13. Kirchner testified that although they are currently utilizing Keller, if the permit is denied, Koch Asphalt intends to use its own trucks. He testified that Koch Asphalt has the equipment to do so and he has the authority to allocate the equipment.

14. David Robinson, sales representative for Koch Asphalt, testified about destination points for material shipped by Koch Asphalt -- Rudyard, Cut Bank, Flowing Wells, Lavina, Billings, Lewistown, Gray Cliff, Crow Agency, Anaconda, Butte, Wolf Point, Glendive, Havre, Great Falls, Bozeman, Miles City, Twin Bridges, Loring, Jackson, Grass Range, Zortman, Roundup, West Yellowstone, Missoula, Madison and Beaverhead Counties.

15. At this point Applicant rested and Protestants, through their attorney, moved to dismiss because the Applicant failed to meet its burden of proving, by a preponderance of evidence, that public necessity dictates the applicant.

16. Applicant's attorney responded that the "try and find wanting" standard applies to contract, not to common, carriage; shipper preference should be considered because this application is limited to Koch Asphalt, not to serving the public; and, the history of Class B supports the certificate.

Testimony of Protestant Dixon Bros., Inc.

17. Loren Knittel, employee of Dixon Bros., Inc., sponsored Exhibits A, B and C:

Exhibit A) Dixon's Class B certificate, No. 3760,

Exhibit B) A map of Dixon's terminals,

Exhibit C) Dixon's equipment list.

18. Knittle testified that Dixon has operated in Montana since 1983. It hauls asphalt from Laurel and Great Falls. There is now a point of origin for asphalt in Billings because of the Koch Asphalt operations. Koch Asphalt has not contacted them about hauling.

19. Knittle testified that if requested Dixon could satisfy Koch's shipping needs and would like to do so. Dixon could not provide any credit analysis service to Koch Asphalt.

20. On cross-examination Knittle testified that Dixon primarily hauls chemicals in bulk. A very small percentage of intrastate work is asphalt and chemical. It has hauled no asphalt this year. The revenue breakdown for the company is less than 50 percent interstate and the remainder divided intrastate in four states. Dixon has never hauled for Koch.

Testimony of Protestant Hornoi Transport, Inc.

21. Jim Slough, Hornoi Transport, Inc.'s sales and safety manager, sponsored Exhibits D, E, F, G, and H:

- Exhibit D) Hornoi's Class B certificate, No. 2274,
- Exhibit E) Chart of Hornoi's asphalt/residual fuel freight revenue, 1984-85,
- Exhibit F) Chart of Hornoi's Total Freight Revenue 1984-85,
- Exhibit G) Hornoi's operating equipment.
- Exhibit H) Hornoi's PSC Annual Report for the period ending December 31, 1984.

He testified that Hornoi's is able to haul 1.5 million gallons of asphalt.

22. Applicant's attorney objected that Exhibits F and G contained interstate information and should be rejected. The objection was denied.

Testimony of Protestant H.F. Johnson, Inc.

23. Ron Hill, H.F. Johnson's Traffic Manager, sponsored Exhibit I -- Johnson's equipment list as of July 15, 1985. Hill testified that Johnson has the authority to haul asphalt under MRC No. 1364. Johnson has facilities in four Montana locations and hauls petroleum products in eight states under ICC permits. Hill testified that any H.F Johnson truck designated "insulate" could

haul asphalt. This is approximately 28 out of 54 units. Hill also testified that Koch Asphalt had not contacted H.F Johnson about hauling asphalt.

24. Protestants rested and renewed their objection.

25. In rebuttal testimony Koch Asphalt's General Manager, Jack Kirshner, testified that Koch Asphalt made a market study of asphalt demand in Montana and projects there will be a strong growth market for at least 10 years.

26. Applicant rested.

ANALYSIS

27. Parties wanting to haul asphalt for hire are required to first obtain a certification of public convenience and necessity from the Commission. Sections 69-12-311, 312 and 313, MCA.

28. To determine if an application for a Class C certificate should be granted the Commission is governed by the provisions of Section 69-12-323, MCA, which states:

(2)(a) 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 therefor 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 throughout 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.

(b) For purposes of Class D certificates, a determination of public convenience and necessity may include a consideration of competition.

29. The Commission is first required to determine if an applicant is fit, willing and able to provide the proposed service. Based on Matador's witnesses testimony concerning transportation experience and Matador's equipment and employee list, the Commission finds that Matador is fit, willing, and able to provide the proposed service.

30. After fitness of an applicant is established, the Commission must determine whether public convenience and necessity require the Commission to grant the requested authority. To determine this the Commission must consider the ability and dependability of the applicant to meet any perceived additional public need and the impact the proposed service would have upon existing transportation services. (Paragraph No. 21, Order No. 5340a, Docket No. T-7849.)

31. The question in this case is whether there is a need for a new Class C authority to haul asphalt products for Koch Asphalt. The three Protestants -- Hornoi Transport, Inc., Dixon Bros., Inc. and H.F. Johnson, Inc., all have existing Class B authority that would allow them to haul for Koch between all points and places in Montana. The Commission has considered the question of whether Class B and Class C Certificate applicants have a different burden of proof of public convenience and necessity. The Commission has determined that, in this case, there is no difference.

32. To evaluate the need for a new authority the Commission must consider the services being provided by those carriers holding existing authorities. In this case it has not been established that a grant of new authority is needed to meet the additional public need. Testimony was introduced that Koch Asphalt did not contact the existing certified carriers. Koch Asphalt testified it preferred to use Matador because of Matador's ability to negotiate shipping price, evaluate credit and maintain

confidentiality. Koch Asphalt has not established that the presently certified carriers could not provide these services.

33. The record in this docket clearly establishes that shipper Koch Asphalt prefers Matador Service, Inc. as its carriers. However, the law is clear that public convenience and necessity cannot be based upon mere shipper preference.

It is well established that additional authority cannot be predicated upon a shipper's preference for a particular carrier and that existing carriers should be allowed to transport all the traffic which they can handle efficiently and economically within the territories which they serve, before newcomers should be allowed to enter into competition with them. Application denied. Royce T. Nix, Extension, 8 FCC 32,368.

In this case Matador Service, Inc. has not established that the existing authorized carriers cannot meet Koch Asphalts need if given the opportunity to do so.

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, MCA.
2. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter.
3. Section 69-12-323(2), MCA, requires that "public convenience and necessity" be shown prior to the granting of additional operating authority.
4. Following hearing on the application and based upon the evidence in the record, the Commission concludes that public convenience and necessity do not require the grant of the application for authority.

ORDER

NOW, THEREFORE, IT IS ORDERED that the Protestants' Motion to dismiss the Docket is DENIED.

IT IS FURTHER ORDERED THAT Matador Service, Inc.'s application for a Certificate of Public Convenience and Necessity, Class C, to authorize the transportation of asphalt, asphalt cements, cutback asphalts and emulsified asphalts between all point and places in the State of Montana is DENIED.

DONE IN OPEN SESSION this 16th day of September, 1985 by a vote of 3 - 0 .

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

HOWARD L. ELLIS, Commissioner

TOM MONAHAN, Commissioner

DANNY OBERG, Commissioner

ATTEST:

Trenna Scoffield
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.