

Service Date: August 18, 1986

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 Randall E. Johnson, Whitefish,)	
Montana, for a Class B Certificate)	DOCKET NO. T-8896
of Public Convenience and)	
Necessity.)	ORDER NO. 5734

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FINAL ORDER

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APPEARANCES

FOR THE APPLICANT:

Patrick Springer, P.O. Box 1112, Kalispell, Montana 59901,
appearing on behalf of the Applicant

FOR THE PROTESTANT:

Mark Payne, 1117 Second Avenue West, Columbia Falls, Montana
59912

FOR THE COMMISSION:

Timothy R. Baker, Staff Attorney, 2701 Prospect Avenue,
Helena, Montana 59620-2601

BEFORE:

HOWARD L. ELLIS, Commissioner & Hearing Examiner
CLYDE JARVIS, Chairman
TOM MONAHAN, Commissioner

BACKGROUND

On March 21, 1986, the Commission received an application from Randall E. Johnson, P.O. Box 1707 Whitefish, Montana 59937, for a Certificate of Public Convenience and Necessity, Class B, to authorize the transportation of passengers and baggage within the City of Whitefish, Montana, and a twenty (20) mile radius thereof, subject to the following limitation: Carrier is prohibited from operating vehicles with a passenger capacity above eight (8).

Applicant presently holds PSC No. 8235 authorizing the above-described service within the City of Whitefish, Montana, and a fifteen (15) mile radius thereof. The purpose of this application is to amend the scope of this authority from within fifteen (15) miles to twenty (20) miles.

On March 21, 1986, the Commission also received an Application for Intrastate Temporary Operating Authority from the Applicant, seeking temporary authority as described above. On or about April 4, 1986, the Commission approved this request for temporary authority.

Protests were received from Mark and Melba Payne, Columbia Falls, Montana, and Lonnie I. and Leona I. Knutson, Kalispell, Montana. On or about May 1, 1986, the Applicant further limited his application to exclude the transportation of passengers in limousine service. Subsequently, Lonnie and Leona Knutson withdrew their protest.

On May 8, 1986, the Applicant requested a 90 day extension of its temporary operating authority. This extension was granted by the Commission to August 7, 1986.

Pursuant to notice, the Commission conducted a public hearing to consider the application on June 4, 1986, at the Commission's Offices in Helena.

SUMMARY OF TESTIMONYTestimony of Applicant

Randall E. Johnson, appeared and testified in support of the application. Mr. Johnson operates Sober Chauffeur Taxi in Whitefish, Montana, under PSC authority No. 8235, and is the Applicant in this proceeding. Mr. Johnson described the scope of the Applicant's operations. The Applicant's business primarily consists of service to various bars and restaurants, although a significant portion also involves transportation between the airport and Whitefish, as well as the train station and Kalispell.

On a regular basis, the Applicant's hours of operation are from 5:30 a.m. to 2:30 a.m. Mr. Johnson also described the vehicles used by the Applicant, including a 12 passenger van suitable for 8 passengers and their baggage, as well as a 1978 Jeep Wagoneer and a 1985 Chevy Astro. These vehicles are stored near the Amtrak station in Whitefish. Mr. Johnson stated that approximately three times each week the Applicant would provide transportation service from the train station to Kalispell, all of which was conducted under the temporary operating authority.

Mr. Johnson also testified that the business between the train station and Kalispell would not cover the cost of obtaining the necessary authority, although the need exists. Mr. Johnson stated that he was seeking an additional five miles of authority in order to serve the bus station in Kalispell, which had recently moved. Only this additional five (5) miles would be subject to the restriction against service as a limousine.

Mr. Johnson also described the limits of his five (5) mile amendment, but emphasized that the focus of this application was to serve the bus station in Kalispell. Mr. Johnson also testified that he did not think that the Protestant could

adequately serve the train station in Whitefish. He stated that the Protestant did not make an effort to meet the incoming trains at the station. Further, the Protestant's business hours ended at 11 p.m., and trains often arrived in Whitefish after this time.

On cross, Mr. Johnson admitted that the Applicant has operated outside of its authority. This occurred prior to receipt of temporary authority. Mr. Johnson also stated that these violations were made with full knowledge of the limits of authority. Mr. Johnson described the limits of his present authority as an oversight, since the authority was intended to allow service to the bus depot in Kalispell.

Testimony of Shipper Witnesses

Neoma Anderson, Kalispell, Montana, appeared and testified in support of the application. Ms. Anderson is employed by Amtrak as a ticket agent at the Whitefish station. Ms. Anderson emphasized, however, that she was not appearing as an official representative of Amtrak. She stated that she was familiar with the Applicant's operations, as she personally knows the Applicant and has observed the Applicant at the train depot in Whitefish. Ms. Anderson testified that the Protestant, Valley Stage, is not consistent in its efforts to provide service, while the Applicant appears to satisfy the needs of the passengers departing the trains at Whitefish. She also stated that the Applicant's equipment appears to be in good condition.

On cross, Ms. Anderson admitted that she did not have any knowledge of the actual need that was involved. Further, she stated that she had never used the services of either the Applicant or Protestant. Ms. Anderson testified that she only observed that the trains arrived at the Whitefish depot and were usually met by the Applicant. She could not identify where the passengers were

being taken. Ms. Anderson also stated that the Protestant, Valley Stage, often calls the depot to find out if their services are needed. She admitted that she has to obtain transportation services for passengers only about once a month.

Mr. R.W. Blair, Whitefish, appeared and testified in support of the application. Mr. Blair is the manager of the Palace Bar in Whitefish. Mr. Blair stated that he has observed the operations of the Applicant through his customers. He testified that there was not often very many customers desiring to travel to Kalispell. However, there was a definite need for such service, especially during the winter months. Mr. Blair stated that the Applicant's response time was excellent, often within five minutes.

Mr. Blair also testified that he had never personally used the services of either the Applicant or Protestant.

On cross, Mr. Blair stated that he had not called the Protestant seeking services for approximately two years. Mr. Blair had no actual knowledge of the Protestant's operations. Mr. Blair also testified that he has never had a customer call for transportation services to either the Kalispell Bus Depot or the additional five mile radius of authority sought by the Applicant.

On redirect, Mr. Blair admitted that the need for services to the area covered by the application was "potential" in nature.

Testimony of Other Carriers

Mr. James E. Michael, Kalispell, appeared and testified in support of the application. Mr. Michael is the holder of PSC Authority No. 56 (Subs A and B), which authorizes passenger service within the City of Kalispell and a fifty (50) mile radius thereof, which includes the scope of the application in this proceeding. Mr. Michael stated that it was unprofitable for Kalispell Taxi to meet the trains in Whitefish. Mr. Michael also testified that the

Applicant's operations are excellent. He also stated that it was in the public interest to grant the application.

Stipulation

Both the Applicant and the Protestant indicated that the Commission should take administrative notice of the Applicant's prior application for authority from the Commission, including all evidence submitted in regard to the same.

Testimony of the Protestant

Mark Payne, Columbia Falls, appeared and testified in opposition to the application. Mr. Payne is the holder of PSC authority No. 8638, and owner of Valley Stage Taxi. Mr. Payne also leases authority under PSC No. 8568. Mr. Payne described the operations of the Protestant, which includes Flathead County but prohibits taxi operations within Kalispell, Montana. In addition, the Protestant operates two vehicles in Whitefish, both of which are radio-equipped. The Protestant is in the process of establishing a central dispatch in Kalispell, which includes an "800 number." Mr. Payne admitted that the Protestant is not always as visible as the Applicant. However, the Protestant does advertise in the Yellow Pages. Mr. Payne also testified that the Whitefish train depot is only eight miles from Columbia Falls, and that the Protestant's response time is usually 10-12 minutes.

On cross, Mr. Payne stated that essentially, Valley Stage did not protest and expansion of the Applicant's authority to serve the Kalispell Bus Station. Mr. Payne also explained the Protestant's hours of operation. The Protestant's operate from 6 a.m. to 11 p.m. every day, with 24 hour service on weekends. However, service is available 24 hours/day through the "800

number."

Applicant's Prior Proceedings for Authority Before the Commission

As previously mentioned, the Commission has taken official notice of the Applicant's prior application for authority. Neither party objected to this action, nor requested an opportunity to rebut the matters officially noticed.

In Order No. 4840a, Docket No. T-7432, dated March 19, 1984, the Commission granted the Applicant the following authority:

Transportation of passengers and baggage, Class B, within the City of Whitefish and a fifteen (15) mile radius thereof.

LIMITATION: Carrier is prohibited from operating vehicles with a passenger capacity above eight.

In granting the Applicant the above-described authority, the Commission recognized that approximately 250,000 skiers visit the Whitefish area each year. A significant portion of these visitors arrive by means of air flights, train, or bus, and thus need a convenient form of ground transportation on a nonscheduled basis. Finding No. 13, Order No. 4840a, Docket No. T-7432.

COMMISSION ANALYSIS, FINDINGS AND DECISION

Parties desiring to haul passengers, baggage and express for hire are required to first obtain a certificate of public convenience and necessity from the Commission. Sections 69-12-311 through 69-12-313, MCA.

In considering applications for operating authority, the

Commission is governed by the provisions of Section 69-12-323, MCA.

Paragraph (2) of that section provides as follows:

(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 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 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.

A great deal of the testimony presented by the witnesses for the Applicant appeared speculative in nature. Further, several other carriers appeared and testified in opposition to the application. In weighing the testimony of these other carriers, the Commission finds the same to be of little, if any, value. Aside from consideration of the inherent bias that may exist, the testimony of these witnesses does not relate to the needs of shippers within the scope of the application.

However, in weighing the evidence adduced in this application in conformity with the appropriate legal standards, it is pertinent to observe that, unlike many other types of application

proceedings, the very nature of a proposal to transport passengers results in somewhat generalized testimony on the part of supporting public witnesses and all of the testimony in the instant proceedings may be so characterized. This is because the nature of these application proceedings is such that the transportation proposed is normally provided infrequently, rather than regularly.

Thus, the nonrepetitive nature of the passenger operation militates against producing evidence concerning past performance and future requirements as specific as that expected in cases involving the transportation of freight. Moreover, the characteristics of leisurely passenger travel as contrasted with the needs of the shipping public for definite, continuous transportation makes it highly unlikely that passengers can give the same firm commitment for carrier use as that which may be reasonably anticipated from supporting shippers. Nevertheless, applications of this type have been denied where generalized public testimony failed to sustain applicant's burden of proving a need for the proposed service, i.e., there was no showing made that the public witnesses had attempted to use available service or there was no showing that such service was inadequate in some material respect.

As a threshold determination, the Commission must first determine whether the Applicant is fit, willing, and able to provide the service. Several factors need to be considered in

making this determination: first, the financial condition of the applicant; second, the intention of the applicant to perform the service sought; third, the experience of the applicant in conducting the service sought; fourth, the adequacy of the equipment the applicant has to perform the service; and fifth, whether the applicant has in the past performed illegal operations. The present application does not present an issue with respect to the first four factors. The Applicant is in sound financial condition and fully intends to perform the service sought upon the granting of their application. Further, the Applicant is an experienced carrier and operates excellent equipment. However, the fifth factor, concerning past illegal operations of the Applicant, presents serious questions about the fitness of this Applicant and needs to be fully discussed.

The Applicant testified that it conducted operations prior to receiving its temporary authority from the Commission, and that said operations were conducted knowingly in violation of the Commission's rules. Such bad faith illegal operation is a very serious matter and has been found on occasion to justify a finding of unfitness without further consideration of the Applicant's case. See e.g., H.R. Ritter Trucking Co., Extension, 111 M.C.C. 771 (1970); and Antietam Transit Company, Inc., Common Carrier Application, 84 M.C.C. 459 (1961). This Commission expressed its opinion of bad faith illegal operation in the Application of Power

Fuels, Inc., Docket No. T-4986, Order No. 3038, when it wrote that "evidence |of knowledgeable illegal operations⁵ casts a serious doubt as to whether Applicant is fit to provide the proposed service should this application be granted."

Despite our strong condemnation of bad faith illegal operations, this Commission does not take the inflexible position that such operations are automatic grounds for denial of an application. Rather, we consider past willful misconduct as one element in assessing an applicant's present and future fitness. This position is in accord with that taken by the I.C.C. See Armored Carrier Corporation v. United States, 260 F.Supp. 612, 615 (1966). As noted above, in Ritter and Antietam the I.C.C. has found willful illegality a bar to a grant of authority. But in other cases, with different facts, it has found the reverse. See e.g. B.D.C. Corporation, Extension-Five Counties, 99 M.C.C. 126 (1965); and Howard Sober, Inc., Extension-Variou States, 83 M.C.C. 361 (1960). We find that when determining the fitness of an applicant who has engaged in willful illegality, two things need be considered: 1) the severity and circumstances of the illegal conduct and 2) the public interest in the prospective service. In both B.D.C. Corporation and Howard Sober, supra, the I.C.C. found the willful illegalities minor compared with the public interest in the anticipated service. Therefore, it ruled that sound economic regulation justified findings of fitness and the granting of the

applications. By contrast, in our order in Power Fuels, we found that a sophisticated carrier, knowledgeable of public service regulations, willfully violated those regulations. To overcome such misconduct a clear, if not overwhelming, case for public convenience and necessity would have to be made. No such case was made in Power Fuels and the application was denied.

In this case, the circumstances surrounding the illegal operations, and the attendant public interest, militates in favor of a finding of fitness, but only as to a small portion of the authority sought by the Applicant. The Applicant was granted authority based upon the belief that it would allow him to serve the Kalispell Bus Station in providing transportation services to and from Whitefish. The public need for these services was an express ground upon which the prior grant of authority to the Applicant was based. When the bus station was moved, the Applicant applied for temporary authority which would allow continued service. Accordingly, the Commission finds that the public interest in continuing this service far outweighs the severity of the illegal operations. As to this aspect of the application, the Commission finds that the Applicant is fit, willing and able to provide the service.

However, the scope of the application is much broader than service to the Kalispell Bus Station. The Applicant testified

that he operated illegally prior to obtaining temporary authority.

The circumstances surrounding this aspect of the illegal operations indicates a more egregious form of willful misconduct.

Here, the Applicant did not even have a "color of right." The Applicant was aware that it needed additional authority, yet it began to operate before even applying for temporary authority.

Further, the facts in this proceeding do not demonstrate any public interest in the prospective services sought by the Applicant. Ms. Anderson could only relate her observations, without actual knowledge of need. Ms. Anderson could not even identify the destinations of the train passengers she observed being picked up at the train station. The testimony of Mr. Blair was not of any more value to the Commission. His testimony was not based on personal experiences, and he admitted that he had never had a customer need transportation to the area covered by the application. Accordingly, the Commission finds that the Applicant's illegal operations preclude a finding of fitness by the Commission as to this aspect of the application. Given the facts presented at the hearing, it would appear that the Applicant has not demonstrated a public need at all.

In regards to the Applicant's request for authority to continue to serve the Kalispell Bus Station, the Commission must still engage in the analysis required by Section 69-12-323(2), MCA.

The questions to be considered in determining public convenience

and necessity, implicit in the statute, were best stated in the case of Pan American Bus Lines Operation, 1 M.C.C. 190 (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.

1 M.C.C. at 203.

As previously discussed, the Applicant's prior grant of authority was expressly based in part upon the public need for service from Whitefish to the Kalispell Bus Station. The Commission believes that the circumstances giving rise to that need (ie, tourism) have not diminished. It may be that additional carriers are now able to provide a similar service, but by the very nature of the analysis applied in granting authority, this fact alone cannot be dispositive of whether or not the public need still exists or is being met. Similarly, it is difficult to see how the granting of this limited authority would have an impact upon existing transportation services which would be contrary to the public interest. Further, there is no testimony in this docket which would support such a conclusion.

For all of the foregoing reasons, the application of Randall E. Johnson, for a Certificate of Public Convenience and Necessity is Granted in part and Denied in part.

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. The Application does propose an operation that will serve a useful public purpose responsive to a public demand.

4. The foregoing public demand cannot satisfactorily be met by existing carriers and authorities.

5. The authority granted in this order will not endanger or impair the operation of existing carriers contrary to the public interest.

6. After hearing upon the application and after giving reasonable consideration to the effect of the proposed operation upon other transportation agencies, the Commission concludes from the evidence that public convenience and necessity require the authorization of the proposed service as described below. Section 69-12-323(2), MCA.

ORDER

NOW THEREFORE IT IS ORDERED that the Application in Docket No.

T-8896 be granted in part and denied in part. Applicant is granted the following authority:

Class B-Passengers and baggage between points in Whitefish, Montana, on the one hand, and the Kalispell bus depot, on the other. Limitations: 1) Carrier is prohibited from operating vehicles with a passenger capacity above eight (8); 2) Transportation of passengers in limousine service is prohibited.

Done and Dated this 18th day of August, 1986 by a vote of 3 -
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BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

HOWARD L. ELLIS, Commissioner
& Hearing Examiner

CLYDE JARVIS, Chairman

TOM MONAHAN, Commissioner

ATTEST:

Ann Purcell
Acting 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.