

Service Date: August 4, 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 Home James, LTD., Billings, |) | |
| Montana for a Class B Certificate |) | DOCKET NO. T-8904 |
| of Public Convenience and |) | |
| Necessity. |) | ORDER NO. 5724 |

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FINAL ORDER

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APPEARANCES

FOR THE APPLICANT:

Tim O'Leary and Eric Purcell, 310 Clark Avenue, Billings, Montana 59101, appearing on behalf of the Applicant

FOR THE PROTESTANT:

Wayne F. Kimmet, 2937 Lynn Avenue, Billings, Montana 59102, appearing on behalf of the Protestant, VIP Limousine Service

FOR THE COMMISSION:

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

BEFORE:

TOM MONAHAN, Commissioner & Hearing Examiner
CLYDE JARVIS, Chairman
DANNY OBERG, Commissioner

BACKGROUND

On or about March 31, 1986 the Commission received an application from Home James LTD. for Intrastate Temporary Operating Authority, Class B, authorizing the transportation of passengers between all points and places in Yellowstone County.

On April 7, 1986, the Commission Denied this application for temporary authority.

On April 4, 1986, the Commission received an application from Home James LTD., Billings, Montana, for a Certificate of Public Convenience and Necessity, Class B, authorizing the transportation of passengers, between all points and places in Yellowstone County.

After publication of the permanent application, the Commission received protests from the following authorized carriers: City Cab of Billings, Montana (PSC No. 7489); Karst Stages, Inc. (PSC No. 3596); and VIP Limousine Service (PSC No. 8920).

A notice of public hearing was issued under a service date of June 3, 1986. Pursuant to that notice, a hearing was conducted on June 27, 1986, in Room 2222, Federal Building, Billings, Montana.

At the hearing, the Applicant clarified its application before the Commission; the Applicant is seeking authority to operate as a limousine service only, and transportation would be limited to passenger vehicles having a capacity not to exceed nine persons. With this restriction, the protest of Karst Stages, Inc., was withdrawn.

FINDINGS OF FACT

Testimony of the Applicant

Tim O'Leary, appeared and testified on behalf of the Applicant. Mr. O'Leary sponsored the following exhibit:

Exhibit A: A multi-page document consisting of Market Sta-

tistics, Background Information, insurance license, and title information, photographs of the Applicant's vehicle, breakdown of financial investment, letters of support, and various brochures. This exhibit was admitted without objection.

Mr. O'Leary described the market statistics contained in Exhibit A regarding the need for the services proposed by the Applicant. Mr. O'Leary also described the proposed operations. The Applicant operates a "classic" limousine service, utilizing a fully restored 1961 Cadillac limousine. The focus of the operation is upon special occasions, such as weddings and anniversaries, as opposed to business or corporate services. Mr. O'Leary described the Applicant's services as a unique alternative to the limousine services currently operating in Billings. Mr. O'Leary stated that the Applicant would operate within the limitations traditionally placed upon limousine services.

Mr. O'Leary also provided background regarding the Applicant's insurance coverage, indicating that the coverage required by law had been acquired. The Applicant also obtained all necessary operating licenses from the City of Billings. Mr. O'Leary further described the vehicle to be operated by the Applicant, and provided an itemized breakdown of the investment in said vehicle.

On cross, Mr. O'Leary admitted that the Applicant had operated illegally for a period of time. He testified that these

operations were initially conducted without knowledge that authority from the Commission was required. However, Mr. O'Leary stated that when the request for temporary authority was denied, the Applicant continued to operate illegally, with knowledge that said operation was in violation of the law. Mr. O'Leary stated that the Applicant was advised to continue its operations in this manner by both a member of the state legislature, and a Public Service Commissioner. Subsequently, the Applicant was fined for said illegal operations by the Commission enforcement officer, located in Billings. According to Mr. O'Leary, the Applicant's operations since that time have been conducted free of charge.

Testimony of Shipper Witnesses

Patricia Jaffray, Billings, Montana, appeared and testified in support of the application. Ms. Jaffray is the proprietor of PJ's Bed and Breakfast, also in Billings. Ms. Jaffrey testified that she often utilized the Applicant's services in connection with her business to provide transportation to the airport and downtown. She also stated that she had used the Applicant's services for quite some time prior to April.

Ms. Jaffray also related one instance where she was unable to obtain limousine service from the available carriers. This occurred during secretaries week. On cross, however, she admitted that she had never actually tried to contact the other

carriers, but had heard that they were unavailable. In general, she was unfamiliar with the other limousine services available in the Billings area.

Susan Timpane, Billings, appeared and testified in support of the application. Ms. Timpane is the manager of Jakes, a local restaurant in downtown Billings. Ms. Timpane described several package arrangements made by the restaurant and the Applicant, combining transportation services and a dinner. She also testified that during the last 4-5 years, she was aware of several requests for limousine service to the restaurant. She also stated that there were times when apparently no limousine service was available, although she admitted that she was generally unfamiliar with other such services in the Billings area. Ms. Timpane further testified that she was approached by the Applicants in regards to a possible package arrangement.

Monte Smith, Billings, appeared and testified in support of the application. Mr. Smith is the manager of the Black Angus Steakhouse and Lounge, in Billings. Mr. Smith stated that he had used the Applicant's services for approximately five weeks in conjunction with a Comedy Night program. In addition, several dinner/transportation packages were being considered. Currently, the Applicant's services were being provided at no charge. Mr. Smith testified that the Applicant's services were an asset to his business, and were also useful in limiting the liability of the

lounge for intoxicated patrons. Mr. Smith stated that he had never been approached by any other limousine service, and did not know if any others existed in the Billings area. According to Mr. Smith, he is able to schedule the use of the Applicant's services two months in advance.

Christian Degele, Billings, Montana, appeared and testified in support of the application. Mr. Degele is the president of Cormac, a distributor of word processing equipment in the Billings area. Mr. Degele stated that he has used the Applicant's services, and found them to be excellent. According to Mr. Degele, the services offered by the Applicant are unique, and the classic limousine is preferable over more traditional vehicles. Mr. Degele testified that he would choose the Applicant's services over other limousine services, although he was not familiar with the other services that were available. Mr. Degele also stated that he was not charged by the Applicant for use of its services.

Dave Hawkins, Billings, appeared and testified in support of the application. Mr. Hawkins is part-owner of Treasure State Electrical, located in Billings. Mr. Hawkins testified that he has used the services of the Applicant on several occasions, both for business and personal use. He emphasized the unique nature of the Applicant's services as an important feature, although he admitted that he would use the other limousine services if the application were not granted. Mr. Hawkins testified that he had used the

Applicant's services on several occasions since the beginning of the year.

Testimony of Protestants

Mr. Wayne Kimmet appeared and testified in opposition to the application. Mr. Kimmet is a partner in VIP Limousine Service, Billings, Montana. VIP Limousine Service is the holder of Certificate of Authority PSC No. 8920, authorizing the transportation of passengers between all points and places in Yellowstone and Sweetgrass Counties as a limousine service. Mr. Kimmet pointed out that the statistical analysis presented by the Applicant should be viewed with caution, as it failed to take into account the differences in transportation regulation between states.

Mr. Kimmet also pointed out that another authority for limousine service in the Billings area has been granted by the Commission, referring to Kindsfather Limousine Service (hereinafter Kindsfather). Mr. Kimmet testified that Kindsfather has not yet begun operating their service, in conformance with the Commission's rules. In contrast, the Applicant has operated illegally, and to grant authority based upon those illegal operations would punish Kindsfather for obeying the law. However, Mr. Kimmet acknowledged that Kindsfather had not protested this application.

Mr. Kimmet also testified that he had assisted the

Commission's enforcement officer in citing the Applicant for illegal operations. Mr. Kimmet also compared the rates to be charged by the Applicant, and questioned their ability to stay in business at those rates.

On cross, Mr. Kimmet admitted that VIP operated for approximately seven weeks in violation of the City Code, and was currently operating in violation of state law, as they had not obtained a state business license. Mr. Kimmet also stated that their operation was not full time, although the service was available at any time on 24 hours notice. Mr. Kimmet testified that their business had actually increased since the Applicant had begun operations.

Mr. Kimmet also described the services offered by the Protestant VIP. Their operations primarily target corporate clientele, and some hotels. VIP uses a 1981 Fleetwood Stretch Limousine, and is an established operation with substantial regular clientele. Mr. Kimmet stated that VIP could not revise its rates to meet the rates offered by the Applicant, as this would not allow them to break even. Mr. Kimmet admitted that as a result, some of the business sought by the Applicant could not be served by VIP.

COMMISSION ANALYSIS AND DECISION

A threshold determination to be made by the Public

Service Commission in ruling on an application for a Certificate of Public Convenience and Necessity is 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; 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. Although lacking in experience, the partners of the Applicant Home James are not unfamiliar with operating a business. Further, their equipment is certainly adequate to perform the service. 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 conducted its operations for several months before learning that they needed authority from the Commission. This good faith illegal operation does not disqualify the Applicant in its attempt to gain authority. In fact, a record of these operations can be used as evidence of need for the services

provided.

However, the Applicant continued to operate illegally after being informed that it did not have the requisite authority.

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 operations 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-Various 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. The partners in the application are unsophisticated in the ways of public service regulation. When the Applicant began its operations, it complied with every business requirement of which they were aware. When the Applicant learned that they were operating illegally they continued service and immediately applied for authority. The fact that they continued

service cannot be condoned, but it can and should be distinguished from the following, much more egregious forms of willful misconduct: 1) the situation in which a carrier, knowing that it needs and lacks authority, begins to operate, and then applies for authority, basing its case for public convenience and necessity on a bad faith illegal operation; and 2) the situation, as in Power Fuels, where a carrier, experienced with public service regulation and in little danger of financial hardship due to possible delays in receiving legal authority, continues to operate in bad faith. Accordingly, the Commission finds that the Applicant is fit, willing and able to provide the service applied for.

The next question is whether or not public convenience and necessity require that we grant the requested authority.

Section 69-12-323(2), MCA, provides:

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.

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.

The first question, therefore, in determining public convenience and necessity, is whether there is shipper demand and need for the service applied for. 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.

With this analytical framework in mind, the Commission finds that the Applicant has demonstrated that "public convenience and necessity require the authorization of the proposed service."

From the testimony provided at hearing, it is evident that the Applicant and the Protestant are, for the most part, targeting different sectors of the market. The Applicant primarily intends to serve hotels, restaurants, and special occasions such as weddings and anniversaries. The unique "classic" limousine operated by the Applicant reinforces this image. A few of the shipping witnesses found this unique aspect of the Applicant's services to be very important. In contrast, Mr. Kimmet testified that VIP targeted corporate and business clientele. Mr. Kimmet even stated that it was too costly for VIP to serve many of the customers sought by the Applicant. In this sense, the Applicant is proposing to offer a specialized service. Accordingly, all that needs to be established is a need for the specialized service. The Applicant has met this burden.

The second question is whether this clearly expressed need can be satisfied as well by existing carriers. As previously discussed, Mr. Kimmet stated that VIP could not serve all of the market sought by the Applicant, as it would not be profitable. Further, at least one shipper witness testified that the "classic" limousine operated by the Applicant was a unique feature which caused the Applicant's services to be preferable. The Protestant operates a 1981 Fleetside Stretcher Limousine. Obviously, the Protestant cannot meet the expressed need as well as the Applicant.

Third, the Commission must consider the impact that the proposed service would have upon existing transportation services which would be contrary to the public interest. The burden is upon the Protestant to establish this aspect of the Commission's analysis. Mr. Kimmet testified that since the commencement of the Applicant's operations, VIP's business has actually increased. Clearly, the Protestant has failed to meet its burden.

For all of the foregoing reasons, the application of Home James, LTD., for a Certificate of Public Convenience and Necessity is GRANTED.

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. Based upon the evidence in this record, the Commission finds that the Applicant has met his burden.

5. Applicant has demonstrated that Public Convenience and Necessity supports authorization of the proposed service in the requested area.

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

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

ORDER

NOW THEREFORE IT IS ORDERED that the application in Docket No. T-8904 be granted. Section 69-12-323(2)(a), MCA. Applicants are granted a Certificate of Public Convenience and Necessity, Class B, authorizing the transportation of passengers by limousine between all points and places in Yellowstone County with the following limitations: 1) Transportation is restricted to passenger vehicles having a capacity not to exceed nine (9) passengers. 2) Transportation is limited to limousine service only. 3) Transportation as a jitney or taxi is prohibited. 4) Service is restricted to that provided by reservations made at least 24 hours in advance.

IF IS FURTHER ORDERED, that the Applicant, must, within thirty (30) days of the mailing of the notice of the rights herein granted, comply with all rules and regulations of the Montana Public Service Commission.

IT IS FURTHER ORDERED, that a full, true and correct copy of this Order be sent forthwith by certified mail to the Applicant herein and by first class United States mail to Protestant herein.

Done and Dated this 4th day of August, 1986 by a vote of 3-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

TOM MONAHAN, Commissioner &
Hearing Examiner

CLYDE JARVIS, Chairman

DANNY OBERG, 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.