Service Date: November 1, 1989

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

* * * * *

IN THE MATTER of the Petition of Northern Tank Line, Inc. and Keller Transport, Inc. for an Interpretation of Operating Authority, PSC No. 2255.	)))))	TRANSPORTATION DIVISION DOCKET NO. T-9065

DECLARATORY RULING

BACKGROUND

1. On or about March 24, 1987 the Montana Public Service Commission (Commission) received a Petition for Declaratory Ruling from Northern Tank Lines (Northern) and Keller Transport, Inc. (Keller), collectively "Petitioners."

2. The Petitioner Northern alleges that it is the holder of Montana Intrastate Certificate No. 1927 which authorizes the transportation, as a Class B Carrier, of bulk commodities, liquid, in tank vehicles and petroleum and petroleum products, in bulk, in tank vehicles between all points and places within the State of Montana, subject to certain limitations.

3. The Petitioner Keller alleges that it is the owner and holder of Montana Intrastate Certificate No. 1060 which authorizes the transportation of petroleum and petroleum products, between all points and places in the State of Montana.

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4. Both Petitioners contend that they operate daily under these certificates and maintain terminals and equipment in the conduct of their business. The Petitioners transport, and have transported, varying types of petroleum and petroleum products, between points in the State of Montana. The Petition also alleges that these Petitioners transport these products on road building and construction projects throughout all of Montana, and that these latter shipments comprise a substantial volume of the Petitioners' traffic and revenue annually. Further, these shipments included asphalt saturated aggregate, liquid asphalt and various types of road oils.

5. The Petition also states that L.L. Smith Trucking, Inc. (Smith), is the owner and holder of Montana Intrastate Certificate No. 2255, which authorizes the transportation, as a Class B Carrier, between all points and places in the State of Montana, of the following:

> Heavy equipment of unusual size and weight requiring special equipment; including dredge, mining, milling, road building and logging machinery, equipment and supplies; machinery, equipment and supplies used in construction, operation and maintenance of electrical power plants and transmission systems; machinery, equipment and supplies used in construction, operation and maintenance of natural gas and petroleum transmission systems; including compressor and pumping stations; machinery, equipment and supplies used in construction, operation and maintenance of telephone and telegraph lines and systems; machinery, equipment, and supplies used in refining and processing ore and rock, or in manufacturing finished products; tanks; equipment, materials and supplies used and useful in control of forest

> fires, construction of forest service improvements, or fire, or pest control; equipment, materials and supplies used and useful in transporting or retrieving air craft or other mobile equipment. Subject to the following limitation: the transportation of property between points served by rail carriers, or between points served by Class A motor carrier, is prohibited.

6. The Petition indicates that in 1986, Willard R. and Leta F. Drinkwalter, dba W.R. Drinkwalter and Sons Trucking (Drinkwalter) leased the above-described Smith certificate and commenced hauling petroleum and petroleum products, between points in the State of Montana. These hauls included asphalt saturated aggregate, liquid asphalt, and various road oils. The Petition alleges that these transportation movements by Drinkwalter were conducted under that portion of the Smith certificate which authorizes the transportation of "road building ... supplies." The Petition also states that on December 31, 1986, Drinkwalter renewed the lease of the Smith certificate and was a participating carrier under Intermountain Tariff Bureau Tariff-29A, which establishes rates and charges for common carriers transporting petroleum products in intrastate traffic in Montana.

7. The Petitioners indicate that the Smith certificate is the subject of a transfer proceeding currently pending before the Commission, Docket No. T-8945, in which Drinkwalter is attempting to purchase the Smith authority. According to the Petition, that proceeding is presently in abeyance and is not being

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actively processed. The Petitioners are protestants in the transfer proceeding.

8. The Petitioners allege that PSC No. 2255, is not an intrastate certificate that permits the transportation of any petroleum or petroleum products between points in the State of Montana. The following question is presented to the Commission for a Declaratory Ruling:

> Whether certificate PSC No. 2255 can be construed as authorizing the transportation of petroleum or petroleum products, including asphalt saturated aggregate, liquid asphalt, or road oils, or in the alternative, construed as a heavy machinery and equipment certificate including machinery and equipment for road building purposes and such "supplies" directly affiliated to the operation of the road building machinery and equipment, but not including petroleum or petroleum products.

9. On April 7, 1987 the Commission issued a Notice of Petition for Declaratory Ruling in this docket. The notice indicated that the Commission had received a Petition for a Declaratory Ruling as described above and stated that the Commission did not intend to hold a hearing on this petition unless good cause was shown. Interested persons were required to inform the Commission and/or request a hearing in writing on or before May 7, 1987.

10. On or about May 7, 1987 the Commission received a Response to the Petition for Declaratory Ruling filed by L.L. Smith Trucking, Inc., and Willard R. and Leta F. Drinkwalter, collectively Respondents. The Respondents requested that the

Commission deny the request of Petitioners for further proceedings.

11. Intervention in this proceeding was also sought by Dixon Brothers, Inc. (Dixon), H.F. Johnson, Inc. (Johnson), and Hornoi Transport, Inc. (Hornoi), collectively Intervenors. The Intervenors sought to participate in this proceeding in support of the Petition for Declaratory Ruling.

12. On May 20, 1987 the Commission received a request from the Respondents pursuant to ARM 38.2.2701 for a prehearing conference in this proceeding, for the purpose of the orderly dispensation of this matter. A prehearing conference was held in this matter on July 15, 1987, and was attended by counsel for all of the respective parties. At this conference, it was determined that there were potential deficiencies in the notice which had been issued in this proceeding. Accordingly, the Commission issued an amended notice of the petition for declaratory ruling on August 5, 1987. The parties to this proceeding agreed at the prehearing conference that this amended notice was adequate. In the amended notice, a new intervention deadline of August 25, 1987 was established, and another prehearing conference in this proceeding was set for September 2, 1987. There were no additional intervenors.

13. A second prehearing conference was held in this matter on September 2, 1987. At this conference a procedural schedule was drafted which would govern this proceeding. It was determined that the Respondents' request for denial of the Petition

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for Declaratory Ruling should be briefed by the parties. On September 9, 1987 the Commission issued a procedural order which embodied the drafted procedural schedule. During the briefing of Respondents' request for denial of the Petition for Declaratory Ruling, this procedural order was amended by agreement of the parties.

14. On January 29, 1988 the Commission issued a Preliminary Order Limiting Scope of Hearing on Petition for Declaratory Ruling. In that Order, the Commission disposed of the Respondents' request that the Commission refuse to hold further proceedings in this matter. The Commission limited the factual question to be further addressed in the proceeding as follows:

> Whether those certain "petroleum and petroleum products" which have been transported by Drinkwalter under the Smith certificate, namely, asphalt saturated aggregate, liquid asphalt, and various road oils, are supplies intended for use in road building.

15. On July 6, 1988, and pursuant to proper notice, a hearing was held in this proceeding to address the factual question described above. At the close of the hearing, the various parties agreed to submit simultaneous "post-hearing" opening and reply briefs.

TESTIMONY

Testimony of Petitioners

16. Mr. E.G. Balsam, Miles City, Montana, appeared and testified on behalf of Northern Tank Line, Inc. (Northern), Peti-

tioner. Mr. Balsam is the president, and principal stockholder of Northern. He described his background in the trucking industry. He started driving trucks in 1932 and occasionally drove during the summer while attending school. In 1943 he purchased a trucking business, including interstate authority and equipment. The authority consisted of hauling from Laurel and Billings, Montana to the southwest corner of North Dakota. The authority purchased was a petroleum products authority, and Mr. Balsam's firm moved such products as gasolines, kerosene, diesel fuels and burner fuels (TR 20, 21).

17. Mr. Balsam made several applications to this Commission for petroleum products authority in 1945 and 1946, but these applications were denied. In 1945, Mr. Balsam purchased a certificate for crude oil, road oil, asphalt and fuel oil, not refined petroleum products. At that time, Mr. Balsam traded part of the acquired authority to Bice Truck Lines for the right to use their intrastate petroleum and petroleum products authority for five years (TR 22).

18. Subsequently, Mr. Balsam applied for and received interstate authorities into North Dakota, and purchased a certificate for the only intrastate authority for North Dakota, the entire state from any point to any place. Prior to that time, and for about four or five years, Mr. Balsam's company was hauling products from Laurel to all of Western North Dakota. They had truck stations in Fargo and Grand Forks. All of the products moved were petroleum and petroleum products, primarily gaso-

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line and diesel fuel. Mr. Balsam also obtained a small intrastate petroleum and petroleum products authority around Roundup, Montana (TR 23).

19. Mr. Balsam described proceedings before this Commission in 1954. The Yellowstone Pipeline was built, opening terminals at Bozeman, Helena, Missoula and Great Falls. At about the same time the Cenex Pipeline went to Minot with terminals at Glendive and Sidney. Many applications for authority were filed with the Commission. Thirteen people received intrastate authority out of the Yellowstone Pipeline terminals for petroleum products. From 1954 to the 1960's those carriers, including Mr. Balsam, operated in Montana intrastate traffic. Mr. Balsam expanded his business, and acquired virtually all of the Farmers Union business in eastern Montana (TR 24). At this point his authority was almost statewide in nature.

20. Mr. Balsam also described proceedings before this Commission in 1961. According to Mr. Balsam, the Commission attempted to "straighten out the mess that the petroleum hauling had gotten into." The Commission called in six people who were actively engaged in hauling petroleum products in Montana. The meeting was noticed in the newspapers and all interested parties were invited to participate. According to Mr. Balsam, six carriers were granted statewide authority for petroleum and petroleum products. These carriers included Greenup, Rice, Consolidated Freightways, H.F. Johnson, Mr. Al Houck and Bice (TR 25, 26).

According to Mr. Balsam, the Commission eliminated Class C petroleum and petroleum products authorities (TR 26).

21. Mr. Balsam testified that subsequent to this proceeding, the six carriers were required to participate in a Montana intrastate tariff. This particular tariff still exists today, and Northern has operated under this tariff and the intrastate certificate since 1961. According to Mr. Balsam, he has never encountered anyone in the Montana trucking industry transporting petroleum or petroleum products under the term "supplies," other than the Respondents. He testified that he believed that it was not appropriate to do so, and added that he has never participated in a hearing that involved petroleum or petroleum products which was an application seeking authority for "supplies." Mr. Balsam stated that in the 1940's and 1950's he was trying to obtain a statewide authority for refined petroleum products (TR 28). He stated that in discussions with the Commission staff members, a "supplies" authority would not allow such movements, but that a petroleum and petroleum products authority was required.

22. Mr. Balsam testified that it was his custom, as well as the custom of those carriers with whom he was associated, to move petroleum and petroleum products under the petroleum or petroleum products authorities in Montana intrastate traffic. Mr. Balsam noted that there are carriers who have authority to transport crude oil, residual fuels, and aviation fuels, which are also petroleum and petroleum products (TR 30).

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23. According to Mr. Balsam, asphalt is a tar that comes out of some crude oil, but not all crude oils. If it is cooler than about 200 degrees it is solid, so it has to be transported hot. It is usually loaded at a temperature of 350 to 375 degrees and unloaded at about 250 degrees. Liquid asphalt is hauled in an insulated tank truck, either under heat, or hot to start with. Road oils are derivatives of asphalt and can be made to any desired specifications, by the addition of gasoline or burner fuel. These specifications include using such oils for mixing, or applying seal coats (TR 32). The various classes of road oils differ by specific gravity, and include 100-150 penetrating (pen) asphalt, and 150-200 pen asphalt (TR 33). Liquid asphalt is also used on flat roofs to seal tar paper (TR 34).

24. Mr. Balsam stated that Northern has suffered a change in its financial picture in regard to the transportation of petroleum and petroleum products during the last several years. He stated that they have been losing money for the last five or six years, and their revenues have been cut in half. In 1980 Northern received two million dollars for asphalt hauling, and this year they will be fortunate to receive a million dollars (TR 35). In 1980 Northern was operating 85 petroleum and petroleum product units. This year Northern has licensed 45 similar units. According to Mr. Balsam, the loss of revenue and volumes is due to a great deal of competition in the asphalt business. In both Montana and interstate, there has been a lot of rate

cutting. There are minority carriers who are receiving preference, which is adversely affecting Northern's operations (TR 36). Further, the Respondents have been transporting petroleum and petroleum products under the term "supplies," which has also adversely affected Petitioner's operations. Mr. Balsam stated that there were several other carriers with authority similar to that of Respondents. If the Commission were to decide in favor of Respondents, several new carriers would enter the petroleum and petroleum products market. All of these additional operations have hurt the ability of Northern to function as a common carrier (TR 37).

25. On cross, Mr. Balsam testified that asphalt saturated aggregate, liquid asphalt, and road oils are part of the end product in a finished road. These commodities form the permanent road structure that results from the road building process. Mr. Balsam also elaborated upon Northern's participation in the Intermountain Tariff Bureau. The tariffs were applicable to the intrastate movement of petroleum and petroleum products, and were established as a result of meetings between the participating carriers and their members (TR 40). According to Mr. Balsam, neither the respondents nor their predecessors in interest were participants in this tariff, or hauled petroleum or petroleum products (TR 41). According to Mr. Balsam, participation in this tariff bureau was restricted to only those carriers possessing authority to haul petroleum.

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26. Mr. Balsam also described an earlier Commission proceeding involving the authority at issue in this docket, when that authority was owned by Mr. Burleson. According to Mr. Balsam, Northern did not participate in that hearing. Mr. Balsam testified that the Commission's notice procedure at that time involved notifying each certificate holder whom they thought would be interested in a proceeding. Mr. Balsam stated that Northern did not receive any notice of the Burleson proceeding (TR 42, 43).

27. On cross, Mr. Balsam also testified that, in his opinion, there is actually more road building involving asphalt now than during the early 1980's, as completed surfaces are being repaved and oiled. Northern has cut its rates since 1980 to meet the changed market (TR 46, 47).

28. Mr. Harold Ankrum, Billings, Montana appeared and testified on behalf of Keller Transport. Mr. Ankrum is the president of Keller. Mr. Ankrum offered a description of his background in the motor carrier industry. He has been involved in the transportation industry for approximately 40 years, during which time he has served as a driver, dispatcher, mechanic, supervisor and manager. Mr. Ankrum has worked for Keller for 16 years, and has been the president of that corporation for 5 years. Keller is primarily engaged in the transportation of petroleum and petroleum products, both on an interstate and intrastate basis. The products moved by Keller under this authority include liquid asphalt. Mr. Ankrum generally agreed with the

descriptions of asphalt saturated aggregate, liquid asphalt, and road oils which were offered by Mr. Balsam in his testimony (TR 48, 49).

29. Mr. Ankrum also testified that Keller had been adversely affected by the diversion of traffic for liquid asphalt to other carriers. He attributed this diversion to minority preference, rate cutting, and the proliferation of private carriers. Keller has had unutilized equipment because of these diversions of traffic. This equipment has in the past been used for the movement of refined products including road oil, liquid asphalt, and other petroleum and petroleum products (TR 50-52).

30. Mr. Ankrum also agreed with Mr. Balsam that he did not believe that the term "supplies" in an authority encompassed the the commodities at issue in this proceeding. To his knowledge, he was unaware of any carrier moving these commodities pursuant to a "supplies" authority. Mr. Ankrum stated that Keller is a successor in interest to Greenup trucking, one of the six carriers that was certificated in the 1961 proceeding described by Mr. Balsam (TR 52). Mr. Ankrum stated that the loss of traffic and revenue has hurt Keller, and has not contributed to that carrier's well-being (TR 52-53).

Testimony of Respondents

31. Mr. Richard Blossom, Great Falls, Montana, appeared and testified. Mr. Blossom is the vice-president and equipment

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manager of Hilde Construction Company. Up to last year, Mr. Blossom served as the grading superintendent and was extensively involved in the road building process. Mr. Blossom had served in this capacity for 35 years (TR 56).

32. Mr. Blossom described in detail the process that is entailed in building a road. After the plans are provided, the road site must be cleared, and appropriate drainage structures must be installed. The necessary grade must be established and the aggregate, gravel, asphalt, cement, or a mixture is applied. First, a layer of base gravel is applied, which consists of gravel from three inches to one and one-half inches in size. Then a cushion is put down, consisting of three-quarter inch gravel. This layer is primed with oil or asphalt, to bind the top layer together. The next layer to be applied is called the primary mix, which differs between interstate or primary secondary roads. For interstate roads, a plant mix seal is applied. This consists of aggregate which is mixed with oil and put on hot. With a secondary road, an emulsion is applied and chipped with rock chips (TR 58).

33. Mr. Blossom stated that in road building terminology, asphalt and road oil are the same item, and are used as a binding agent. Emulsion is asphalt mixed with water. A plant mix is heavy grade asphalt which is mixed with aggregate at a plant and heated. A road mix is aggregate and road oil which is mixed as applied to the roadway (TR 59).

34. Mr. Blossom testified that gravel is used in building a road, and is either applied separately or in combination with asphalt. Similarly, asphalt cement, or lime cement, is also used and may be added to the aggregate (TR 60). The aggregate and gravel is obtained from nearby gravel pits, while the asphalt is obtained from refineries. The aggregate is moved in belly dump trucks and the asphalt and road oils are transported in tankers from the refinery to the job site, where it is often placed in temperature-controlled storage tanks (for plant mix) (TR 61). On other occasions, the asphalt product is applied directly by the carrier to the roadway, such as for priming or chip sealing.

35. Mr. Blossom stated that the prime application on top of the gravel serves to bind the cushion together. The next application is usually of plant mix, which is applied and spread out with a paver (TR 63). Road oil is also used for dust control when it is applied as a prime. There are also several other petroleum products besides asphalt and road oils which are used in road building, including: diesel fuels and lubricants, which are used for the various pieces of equipment, and; propane, which is used for heating the asphalt storage containers (TR 63-64).

36. According to Mr. Blossom, plant mix is approximately 93 percent aggregate, 6 percent asphalt, and 1 percent lime. The asphalt may be cutback with a thinner to soften the tar (TR 64-65). Emulsion is approximately 60 percent asphalt and 40

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percent water. Usually, the same mixtures are used for new road construction, or overlays on existing roads (TR 65-66). There are usually heating requirements for the asphalts and road oils in both transportation and application. For emulsion, it usually must be heated to the 145 to 150 degree range. For other asphalt products, the temperature range is approximately 350 degrees (TR 66-67). Mr. Blossom stated that the asphalt product is transported to the job site (or hot mix plant) from the refinery by a common carrier, and added that the Respondent Drinkwalter has provided that service for Hilde Construction (TR 68).

37. On cross, Mr. Blossom further described the road building process. The base gravel is compacted with rollers and equipment, and is then watered down to make a more compact surface (TR 68). Each separate layer, involving the aggregates, plant mix, and asphalt concrete is rolled with a vibratory roller to remove all air spaces and voids (TR 69). Water is used throughout this process, to achieve the optimum moisture content required by the plans. Tests are conducted by the State to insure compliance with these requirements. The moisture content remains at that level after the road is built, for the life span of the road (TR 69-70, 72).

38. Mr. Willard Drinkwalter, Billings, Montana, appeared and testified. Mr. Drinkwalter is the operator of Respondent W.R. Drinkwalter and Sons Trucking, and the applicant for the transfer of the certificate at issue in this proceeding. Mr. Drinkwalter described his background in the motor carrier indus-

try. He started driving a truck in 1947, and bought his first truck and worked for a firm in Denver, Colorado from 1954 through 1957, hauling road oils, gasolines and propane. In 1957 he went to work for another firm in Cheyenne, Wyoming, which transported all petroleum products. In 1961 he went to work for H.F. Johnson, Inc., of Billings, hauling road oil and gasolines. In 1976 he went to work for Hornoi Transport and worked for that company through 1986. In 1986 Mr. Drinkwalter purchased the authority at issue in this proceeding (Smith certificate) to haul road oil and asphalt products (TR 73).

39. Mr. Drinkwalter stated that under the Smith certificate he has hauled road oils, asphalts and emulsified asphalts, but no saturated aggregate. Specifically, they have hauled AE-150 (emulsified), CSS-1 (emulsified), CRS-2 (emulsified), HF-100 (emulsified), 85-100 (asphalt), 120-150 (asphalt), MC-70 (road oil), MC-250 (road oil), MC-800 (road oil), MC-3000 (road oil), and dust oil for dust control (TR 74). Mr. Drinkwalter stated that the emulsified asphalts are used for chipping and sealing, the pen asphalts are from the hot plant and are laid on the road, and the road oils are used for a prime coat. MC-250, MC-800 and MC-3000 are all primarily used for patch repair (TR 75).

40. Mr. Drinkwalter testified that each of these products are to be transported at different temperature requirements, which are noted at the refinery. Mr. Drinkwalter stated that his company operates the equipment necessary to meet these specific requirements, including two spreader trucks or distribu-

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tors. The asphalt products are usually obtained from the refinery which has contracted to supply the project (TR 76). These refineries are located in Great Falls, Billings and Laurel. Mr. Drinkwalter testified that when he purchased the Smith certificate, it was his intent to haul road oil. In purchasing the Smith certificate, Mr. Drinkwalter stated that he believed that road oils could be hauled because of a decision of this Commission in 1973 (TR 77). Specifically, he stated that he was shown a copy of a 1973 letter from the Commission to Richard Carlson indicating that the authority at issue authorized the transportation of asphalt, asphalt saturated aggregate, and road oil (TR 78). The witness sponsored the following exhibit:

> Respondent's Exhibit A: Mr. Drinkwalter's handwritten notes, listing commodities transported by Drinkwalter and Sons Trucking. This list was prepared from freight bills which were prepared and maintained in the regular course of business.

41. Mr. Roger Smith, Riverton, Wyoming, appeared and testified. Mr. Smith is employed by Respondent L.L. Smith Trucking, and serves as the president of that company. Mr. Smith has been associated with that Company for 29 years, serving as a truck driver and manager. Mr. Smith stated that the company acquired the certificate at issue in 1982 (TR 83). Mr. Smith testified that prior to acquiring this authority, they discussed the scope of the authority with Mr. Carlson, who referred to the 1973 letter from the Commission. Mr. Carlson also showed Mr. Smith the order of the Commission concerning activities by Mr. Frank

Burleson under the certificate (Burleson order). Based on this information, Mr. Smith and his company purchased the authority.

42. Mr. Howard C. Anderson, Billings, Montana, appeared and testified. Mr. Anderson is a chemist who recently retired from Conoco (TR 86). He sponsored the following exhibit:

> Respondent's Exhibit B: A resume synopsis of Mr. Anderson, showing his educational and employment experience. The admission of this exhibit was objected to as irrelevant, and the document was admitted over that objection. This document establishes Mr. Anderson's credentials as an expert in the field of chemistry (TR 89).

Mr. Anderson testified that he worked for Conoco for 40 years, and since 1967 had been involved in asphalt chemistry at the Billings refinery. Mr. Anderson also defined SC and MC asphalt products (TR 89). An SC is a slow cure asphalt cement that is cut back with a heavy diesel fuel to cure slowly when used in the field. An MC is a medium cure which is asphalt cement cut back with a kerosene, and the kerosene evaporates at a moderate rate as compared to the diesel. There are also rapid cures, or RCs, where a naphtha or a narrow range gasoline fraction is blended with the asphalt cement, and quickly evaporates. Following the development of cutback asphalts, Mr. Anderson was involved with making the full range of asphalt cements at the refinery, both by vacuum tower distillation, and propane deasphalting, where the gas oils are removed by a solvent or propane from the heavy bottom of the crude oil. These processes concentrate the asphalt and remove the valuable gas oils which are used for cracking into gasoline. From that point it is a

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matter of refining or blending these to the point that they meet an acceptable specification as established by the State of Montana (TR 90).

43. Mr. Anderson also described the various refining steps that crude oil passes through to obtain asphalt. First, the light oils are removed as a flash, then the bottom oils are separated by topping. The crude topping is further refined by a high temperature distillation. There is no particular chemical formula for asphalt. It is a large conglomerate of a myriad of molecules. Asphalt is a bituminous product which by definition, is all hydrocarbon, completely soluble in carbon disulfide (TR 91).

44. Mr. Anderson described the transportation of asphalt products. He stated that in his experience, 99 percent of all asphalt either went by tank car or tank truck. Asphalt has to be hot enough to be loaded, but not too hot to be dangerous (TR 92). Asphalt needs to be moved in an insulated vehicle to prevent heat loss, because the asphalt itself is a semisolid. At high temperatures of 300 to 350 degrees, asphalt becomes fluid enough to handle and pump. At low temperatures, such as room temperatures, it will be firm. Since it is a semisolid, it is necessary to preserve the heat. According to Mr. Anderson, heat in asphalt cement is money because energy is spent to raise it to the necessary temperature (TR 93).

45. Mr. Anderson also explained various tests applied to asphalt, and their importance to the asphalt industry. A viscos-

ity test is the standard method for grading. The basic definition of viscosity is resistance to flow. The hotter the temperature, the lower the viscosity because there is resistance to flowing. The asphalts and the cutback asphalts are graded primarily by viscosity, to meet the required specifications. All grades are the same regardless of the source of the asphalt. Penetration grading is also used in Montana (TR 93, 94). Flash point and conductivity tests are also performed. Flash point tests are important from a safety standpoint, to insure that the asphalt is safe to transport and use. Conductivity tests measure the ability of the asphalt to resist shock (TR 95).

46. Mr. Anderson explained the cutback classes of road oils. A cutback is an asphalt that is cut with a hydrocarbon solvent. These are the SCs, MCs and RCs described earlier (TR 96). The evaporation of the solvent occurs after the road oil has been applied to the road. Eventually all of the solvent evaporates, at a rate which is dependent upon the type of solvent used (TR 98). One of the purposes of cutbacks is to be able to transport the product and handle it at a much lower temperature than asphalt cement. Asphalt cement would need to be at 300 to 350 degrees, while the cutbacks can be handled at 130 to 150 degrees (TR 98).

47. Mr. Anderson also provided a brief description of water emulsified asphalts. The water comprises approximately one-half of the product, and the water breaks out and spreads into the concrete after it is applied. The water eventually evapo-

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rates leaving the asphalt (TR 98, 99). Dust control oils are often used in road building. Most of these oils are not asphalt products, but are still petroleum products (TR 99).

48. Mr. Anderson also described laboratory tests which simulate the aging of asphalt in the road, which shows what happens to the asphalt over time after application. The asphalt tends to evaporate or oxidize. After the water or cutback solvent dissipates, all that is left is the asphalt cement (TR 100, 101).

49. Mr. Thomas J. Schneider, Helena, Montana, appeared and testified. Mr. Schneider is the president and owner of Thomas Schneider and Associates, a consulting firm. He is a professional engineer by background (TR 104, 105), and received a bachelor of Science Degree in petroleum engineering from Montana Tech. Mr. Schneider was employed in the petroleum industry for over six years (TR 106), where his duties ranged from being a roustabout to a full-time petroleum engineer. He was involved with supervising drilling operations, production operations and completion operations (TR 107). Part of this responsibility included constructing and maintaining the access roads into the field sites (TR 109). The roads were actually built by another company under contract with Mr. Schneider's employer (TR 111). The contract work was supervised by Mr. Schneider to ensure that the roads were adequately constructed (TR 111). Over objection by Petitioners and Intervenors, Mr. Schneider was allowed to testi-

fy concerning his knowledge of road building requirements (TR 113).

50. Mr. Schneider described the typical requirements for roads constructed on an oil exploration site. There were various stages of materials to be applied, starting with a heavy, coarse base material followed by a medium grade material, such as gravel. Each of these stages was compacted with a roller, and was watered to allow for greater compaction. This was followed by a finer topping for the finished surface. These roads were designed to provide all-weather access (TR 114). The roads must also be able to support very heavy equipment, which moves in and off the site (TR 115). Water or oil is often used around the sites for dust control (TR 117).

51. Mr. Schneider also described other uses for water in the oil fields. Water is the primary constituent of drilling mud, which is used in drilling the well. The mud is pumped down into the well, and it resurfaces, removing the fresh cuttings (TR 118). The water is then directed into a mud pit, where some of it may be recirculated, and some of it becomes waste product (TR 122). Water is also used as the base of the oil field drilling cementing process. The purpose of the cementing process is to place cement around the casing and bond to the formation to provide a seal to prevent contamination of the hole (TR 122). Both the mud and the cement column remain in the hole (TR 123). Water is also used during well stimulation to improve the flow of oil or gas into the well bore (TR 123-124). Again, the major-

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ity of this water would tend to remain in the hole after injection (TR 123-125). Mr. Schneider sponsored the following exhibit:

> Respondent's Exhibit C: A document consisting of several pages, including a description of Mr. Schneider's professional background, a schematic drawing of an oil field site, schematic drawings of a down hole drilling operation, and the vertical cross-section of a well and a plan view, both illustrating fracture stimulation. That portion of the exhibit referring to Mr. Schneider's qualifications was admitted over relevancy objections. Similar objections to the remainder of the exhibit were taken under advisement. (TR 127)

52. On cross, Mr. Schneider agreed that the end product in a road construction project is the road itself (TR 127). With an oil well, the end product to be produced is oil to be sold, and the only way to get this end product is to drill a well (TR 128).

53. Mr. David Carlson, Clancy, Montana, appeared and testified. Mr. Carlson is a professional engineer and land surveyor for Morrison-Maierle Consulting Engineers. Morrison-Maierle is basically engaged in consulting for civil engineering. Mr. Carlson studied at Montana State and has a degree in construction technology. Construction technology is the construction aspect of civil engineering, including construction surveying, design, strength of materials, pavement designs, concrete design, structural design and thermodynamics. Since receiving his degree, most of his experience has been with street improvement projects, water and sewer collection and distribution, and airport engineering. According to Mr. Carlson, airport engineering

and highway engineering are similar disciplines, particularly in the area of pavements, pavement design and pavement construction (TR 130). Presently Mr. Carlson is the chief civil engineer for Morrison-Maierle, concerning the disciplines of airport and highway engineering. During the last 22 years Mr. Carlson has been involved with all of the pavement construction at four of the air carrier airports in Montana, including Helena, Bozeman, Kalispell and Butte. During the last 12 years he has been involved with the pavement construction at Billings Logan International Airport. He has also worked on various street projects, including several in Conrad, Chester, Helena, Bozeman and Billings (TR 131-132). Mr. Carlson sponsored the following exhibit:

> Respondent's Exhibit D: Mr. Carlson's resume and qualifications. The exhibit was admitted.

54. Mr. Carlson also described the various stages involved in the construction of a road:

> Respondent's Exhibit E: An enlarged view of a typical highway cross section. This exhibit was objected to as irrelevant, and the objections were taken under advisement (TR 155).

Assuming that the road is designed and the course is set, the compacted subgrade is developed. That is the finished profile that has been set for the street, highway, or road. This is reached through cutting and filling operations (TR 134). Creating the compacted subgrade involves the use of various pieces of compaction equipment and the introduction of water. In some cases it may even involve the removal of water if the material that is on site is excessively wet. There is always some form

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of water conditioning to reach an optimum moisture. Optimum moisture is the moisture content of the soil or aggregate at which point the material is easily compacted (TR 134-135). This is usually determined in a laboratory for the specific materials being used. In the compaction process, water serves as a lubricant, as the particles undergo a reorientation. There are various courses in an aggregate base course, starting with a fairly inexpensive and readily available uncrushed material. This is followed by a two-inch minus crushed base with more granular and angular particles, and eventually, a paving surface is placed on top. Through surface tension in the water a cohesive force develops which holds the material together, and the water functions as a lubricant so the particles can be reoriented (TR 135, 136). Granular material is rolled with a vibratory roller, and the particles are reoriented so that the gradation fills the voids. Therein lies the strength, and the cohesiveness of the mass will remain after the section is constructed. The moisture remains in the compacted material for many years after the section is constructed. Tests have been conducted beneath pavement sections on a number of airports, including Helena, and found that in the range of 10 to 15 years after those pavement sections were constructed, perhaps 50 percent of the moisture that was introduced in the construction process still remained in the compacted base course. If the moisture was completely lost and the base course was not protected by the surface, compaction

would be lost, and the road would not be able to carry the designed load (TR 136).

55. Mr. Carlson also described the importance of aggregate size and shape in the compaction process. The strength of the base course, and the increasing strength of the overlying courses is derived by the aggregate interlock, which results from highly fractured or crushed faces that are angular and develop a lot of frictional force between them when they are compacted. The strength of these courses is based on that aggregate interlock (TR 137). The lubrication feature of water is essential to the compaction of the base courses. When the load is imposed, the density of the material has to be such that it is not densified or compacted further. That has already been achieved in the process of construction (TR 138).

56. Mr. Carlson described the purpose for using a pavement surface instead of gravel. Pavement in stronger per inch of depth. An inch of asphalt concrete is as strong structurally as an inch and a half of the crushed base (TR 138-139). Pavement provides a wearing surface that protects the underlying base courses. The base courses develop the same structural strength and the same load carrying capability as the surfacing. The underlying courses are really the structural load bearing capability of the section (TR 139).

57. Mr. Carlson also described the process of constructing the asphalt concrete. A common application is of a cutback asphalt on the top of the three-quarter inch crushed base, with a

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penetration of about a half an inch. Then there is an application of three inches of asphalt concrete, which is a mixture of aggregate and penetration grade asphalt. This normally is done in a hot plant and applied through a process of lay down and compaction (TR 139).

58. According to Mr. Carlson, the asphalt provides a lubrication feature similar to the water in the under courses. In the case of a hot mix asphalt, virtually all of the water is driven out of that mixture before it is laid, through a heating process. The asphalt is introduced at approximately 400 degrees and the rock is heated to 300 degrees. Those two are mixed together, and in that process of heating the rock, most of the moisture is removed. In the case of an asphalt concrete surface, water does not act as a lubricant to facilitate compaction or densification. That is one of the purposes asphalt serves in that process, as a lubricant (TR 140).

59. According to Mr. Carlson, there are three basic forms of asphalt, the penetration grades, the cutbacks, and the emulsified asphalts (TR 140). Asphalt is a product of the refining of crude, and what remains in all cases is a residual asphalt. With a cutback, the cutter stock is volatile and evaporates. In the case of an emulsion, after it is applied it breaks, and the water separates from the asphalt and evaporates (TR 141). In the case of the application of asphalt in an asphalt concrete mix, it is in a very fluid state. Once the heat dissipates from an asphalt concrete, it very quickly achieves a stable state

which is desired as the ultimate surface. For example, with an emulsion on a 70 degree day, the separation or break occurs in perhaps 20 to 30 minutes (TR 142).

60. Mr. Carlson stated that the strength of asphalt concrete is derived from a crushed base, and the aggregate interlock, or friction of those particles against each other. Stability is specified and achieved in construction, and is a function of the asphalt content. Stability is the resistance to the load, and a lack of stability is characterized in an asphalt surface by rutting, or displacement under high daytime temperatures. The major source of strength is aggregate interlock and the degree of crushed faces or the fracture in the rock itself (TR 143). The aggregate interlock is obtained by the lubrication of the asphalt.

61. Mr. Carlson described the results of research conducted at the Helena airport, concerning compaction and moisture with paved surfaces. Approximately ten years after the paved sections were constructed, there was still on average about half of the amount of water that would have been considered optimum moisture in the base courses. There was more moisture in the subgrade. The base courses and the subgrade essentially still had the same density as when they were constructed. The purpose of the study was to design an overlay of asphalt concrete for a change in aircraft, and this depended upon the moisture content and the density of the pavement courses (TR 145).

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62. Mr. Carlson stated that in his opinion, asphalt is both a supply and a material, in that it both becomes a permanent part of the road project (material), and is used or consumed in the project (supply) (TR 147, 149-150). His opinion was admitted over the objection that Mr. Carlson was not an expert qualified to draw such a conclusion (TR 147-149).

63. On cross, Mr. Carlson stated that asphalt becomes a permanent part of the road structure, and acts as a lubricant, which is essential to the compaction of the materials used. Ultimately, asphalt is applied to the road, and becomes a part of the permanent road structure. This is the case whether the asphalt is used in asphalt concrete, or aggregate in a mixing process at a hot plant (TR 151). From the hot plant, the mix is transported to the highway project and laid down at a uniform depth. At this point, the process of compaction and the action as a lubricant begins immediately. The mix then cools and ultimately remains as a permanent part of the road structure (TR 152). Mr. Carlson also stated that there was no way to be sure that water found under pavement after several years was the original water used during the compaction process. There were other possible sources of such water (TR 154).

ANALYSIS

64. The Petitioners and Intervenors continue to assert that the Smith certificate is a heavy equipment authority only,

including the transportation of equipment and machinery. In making this argument, the Petitioners cite to the ICC descriptions cases as authority for the proposition that transported products are classified by Class or Generic headings. Similarly, the Petitioners and Intervenors continue to assert that the custom of the industry supports their narrow reading of the Smith certificate. Petitioners allege it is "incumbent" on Smith and Drinkwalter to establish their authority to move petroleum and petroleum products in Montana intrastate traffic.

65. For several reasons, the Commission finds these arguments to be without merit. First, and as previously described, the Commission has already considered these arguments in this proceeding, resulting in the Preliminary Order Limiting Scope of Hearing, dated January 29, 1988. As the Commission noted in that order, any ambiguities which may exist in the Smith certificate concerning the movement of "road building ... supplies" were resolved in Matter of Burleson. There the Commission specifically considered the relationship between the language authorizing the movement of heavy equipment and that concerning "road building ... supplies." This includes any arguments concerning the positioning of punctuation on the face of the Smith certificate. Clearly, by that decision the holder of the Smith certificate is authorized to transport those commodities which are intended for use as road building supplies, apart from any restriction relating to the movement of heavy equipment. See

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Preliminary Order Limiting Scope of Hearing, Docket No. T-9065, Order No. 5826 (January 29, 1988).

66. Similarly, the reliance upon the prior activities of the predecessors of the Smith certificate is not of any value to the Commission in its deliberations in this matter. In its preliminary order in this hearing, the Commission found these activities irrelevant: Dormancy does not exist in Montana. The Commission also rejected similar arguments relating to the characterization of this proceeding as revolving around a determination of PC&N: class or generic headings are not the only standards used in the interpretation of certificates. Even the ICC has recognized that its own Descriptions cases do not result in a completely inflexible categorization of commodities. This matter, of course, was also put to rest in Matter of Burleson. See Preliminary Order Limiting Scope of Hearing.

67. In the Preliminary Order, the Commission found that several of the issues raised in this proceeding, had already been determined in a previous Commission Order in Matter of Burleson, which dealt specifically with the certificate at issue in this proceeding. Thus, the Commission chose to adhere to its precedent, which was plainly applicable. In raising these issues again, the Petitioners and Intervenors have not presented any arguments which would persuade the Commission to overrule Burleson as it applies to the Smith certificate. This is so even though it is not clear that this Commission would reach the same result today looking at the Smith certificate. By the very

nature of a declaratory proceeding such as this one, the ruling itself is limited only to the facts presented, and has no application beyond this scope. Along these lines, the Petitioners incorrectly contend that it is somehow incumbent upon Smith and Drinkwalter to make any showing in this proceeding. As previously determined in the Preliminary Order in this proceeding, the nature of a proceeding for declaratory ruling really precludes that anyone bears a burden of proof. If this were the case, then the Commission would be forced to serve as a trier of contested fact, which is not appropriate in these proceedings. A determination by the Commission in this proceeding that the Smith certificate authorizes the movement of asphalt, for example, does not preclude the Commission from later citing Drinkwalter for illegally moving asphalt, if the facts at that time differ from the facts presented in this proceeding. See Preliminary Order Limiting Scope of Hearing, Docket No. T-9065, Order No. 5826 (January 29, 1988).

68. Intervenor Dixon also contends that the Class A and rail carrier limitations found in the Smith certificate would have a limiting effect upon any operations under the Smith certificate. Smith counters that the restrictions are largely inapplicable, as through time and due to the changing nature of the services provided by Class A carriers and railroads, this restriction has become meaningless. Smith argues for removal of this restriction for lack of definiteness. These arguments are echoed by Drinkwalter. The Commission does not see any need to

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resolve this question in this proceeding. To do so would likely be beyond the appropriate scope of this proceeding.

69. Intervenor Dixon also argues that the Smith certificate was originally issued as a Class C Contract Carrier Authority, and was changed to a Class B authority without notice "to anyone of the proposed expansion of authority." Dixon adds that no formal application was ever filed to request such expansion, and that, therefore, no competing motor carriers were ever given the opportunity to object. In summary, Dixon concludes that "Certainly there was no statutory or regulatory justification for such a blatant disregard of the required statutory and regulatory process." Smith points out that the classification change was in fact noticed to the public, and that the Commission was applying § 69-12-302(1), MCA, in changing the certificate from Class C to Class B. At best, the records of the Commission are unclear on this point. The 1970 minutes of the Commission refer to the Smith certificate as a Class B authority. In any event, Dixon does not elaborate upon the value of these facts, if they are accurate, to the Commission in its deliberations in this proceeding. Even Dixon notes that looking at these facts only leads to conjecture. The Commission chooses not to rely upon conjecture during its deliberations in this proceeding and will disregard this discussion by the Intervenor Dixon.

70. Intervenor Dixon also describes as "pertinent" the activity of Hughes Hauling while it held the Smith authority

from October, 1963 to May, 1970. Dixon contends that cement destined for highway construction projects falls within the same commodity classification as "asphalts and road oils." Dixon further argues that in 1968, Hughes Hauling applied to the Commission for separate cement authority, which it received. Dixon contends that this is evidence of the Commission's belief (in 1968) that the term "supplies," as used in the Smith certificate, did not include those materials which make up the permanent end result of a road building construction project (presumably like asphalt and road oils). Smith counters that Dixon's contentions are based upon unproven assumptions, such as the intentions of Hughes Hauling to haul cement for road building projects. Further, Smith challenges Dixon's claim that cement is a "building" material, but instead contends that cement is rather a "construction" material. Finally, Smith points out that it would appear to be unlikely that cement in bags or sacks (which was the authority granted to Hughes Hauling) would be used by a road contractor.

71. First, that Hughes sought separate "cement (in bags or sacks)" authority in 1968 is not indicative of anything. Smith is correct: Dixon's argument, as presented, rests upon too many unproven assumptions. Further, and as elaborated upon the preliminary order in this docket, that Hughes felt compelled to seek separate authority for cement does not mean that cement could not be a road building supply. See Preliminary Order Limiting Scope of Hearing, Docket No. T-9065, Order No. 5826, para.

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45; see also In the Matter of Dixon Bros., Docket No. T-8842 (Declaratory Ruling, July 28, 1986). Finally, the Commission will not determine in this proceeding whether or not cement destined for highway construction projects falls within the same commodity classification as "asphalts and road oil" (Smith claims cement is a construction material, not a building material). This issue is clearly beyond the proper scope of this proceeding.

72. The Intervenor Dixon also addresses the existence of an "escape clause" in the sale agreement between Smith and Drinkwalter, which allows Drinkwalter to "escape" the agreement in the event of an adverse Commission ruling. Dixon argues that the ultimate disposition of the agreement should not control the Commission's decision in this proceeding. Smith responds that the existence of an escape clause in the purchase and sale agreement is totally irrelevant to this proceeding. The Commission agrees, and accordingly, disregards this evidence in its deliberations in this matter.

73. Respondents continue to place reliance and weight upon the May, 1973 letter from the Commission staff, concerning the scope of the authority at issue. The Respondents note that the "opinion" letter contains no warnings about its "informal" nature, and that it is issued on Commission letterhead, under the names (but not signatures) of the then current Commissioners. The letter, Respondent notes, "states there was a meeting about the matter, and it states Carlson was authorized."

74. In the preliminary order in this proceeding, the Commission found that the letter, as an "informal and advisory ruling," could not be dispositive of the issues in this proceeding. The Commission continues to take this position. Again, reliance upon such informal rulings is taken at risk of a subsequent, and different "formal" determination. See Preliminary Order Limiting Scope of Hearing.

75. The Commission finds that as a matter of both law and sound policy, such informal opinions cannot be dispositive. The request for this opinion was filed by Carlson on May 31, 1973. Despite the existence of appropriate and legal administrative procedures governing the issuance of "formal" rulings, an "opinion" letter was issued on the same day by Commission counsel. Although the letter does not clearly state its "informal" nature, it clearly does not either reflect the substance of a formal determination. As a final order from an administrative proceeding, determinative of Carlson's substantive rights as well as those of other interested parties, the May, 1973 letter would be woefully inadequate, and far short of the appropriate standards maintained by law and this Commission as a matter of policy.

76. The final matter to be considered by the Commission in this proceeding primarily concerns the interpretation to be given by the Commission to the term "supplies" as it appears in the Smith certificate. The Petitioner and Intervenors contend that the term "supplies" is distinct from the term "materials," that

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the commodities at issue in this proceeding, predominately asphalts, are in fact "materials" used in road building, and that the Smith certificate thus does not authorize the transportation of those commodities.

77. Respondents assert that the commodities at issue serve both a "supply" and "material" function, that the distinction between the terms "supplies" and "materials" is largely nonexistent, and that the Smith certificate authorizes the transportation of these commodities.

78. The Commission finds that there is an important distinction between the terms "supplies" and "materials" which relates to the issues in this proceeding, and adopts the general distinction drawn by the Interstate Commerce Commission in several pertinent proceedings, including Builders Express, Inc., Interpretation of Certificate, 51 M.C.C. 103 (November 22, 1949), and P.B. Mutrie Motor Transportation, Inc. v. Blue Line Express, Inc., 53 M.C.C. 530 (November 7, 1951). More specifically, the Commission finds the following language from Builders Express to be pertinent:

> In its generally accepted meaning, the term "contractor's material" means materials used by a building or construction contractor, which are to become a permanent part of a building or other construction project. In contrast contractor's "supplies" are those things used or consumed in a contractor's work other than those which become a part of the structure such as forms, hoists, and gasoline for construction power.

51 M.C.C. 106-7. The Commission believes that many of the cases cited by Respondents in this proceeding miss the mark, as they relate to the distinction, if any, between materials and supplies under circumstances which are substantially different from those before the Commission, which involve the regulated transportation industry.

79. The distinction between "materials" and "supplies" was also drawn in P.B. Mutrie Motor Transportation, Inc. v. Blue Line Express, Inc., 53 M.C.C. 530, wherein the ICC stated:

> The term "supplies" has a very broad meaning and should not be confused with "materials" or "ingredients." It embraces those things furnished for the purpose of operation, as distinguished from "materials," which are furnished for original construction.

53 M.C.C. 530. The Respondents attempt to blur this distinction by pointing to various ICC decisions which, they claim, acknowledge that the distinction between materials or supplies may be nonexistent in other contexts. For various reasons, the Commission rejects these arguments.

80. First, at no point in these proceeding have the Respondents claimed that the original grant of authority was also intended to include "materials" as well as "supplies." Thus, their reliance on George Grifall Common Carrier Application, 62 M.C.C. 763 (1954), is misplaced. Further, that decision involved a general imperfection in terminology which had been corrected by the time of that proceeding. No such imperfection is claimed here. Second, Respondents have not introduced any evi-

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dence that removing the distinction between "materials" and "supplies" is necessary to enable established carriers to continue in their traditional field of service. The ICC decision in H. Messick, Inc., Extension-Explosives, 102 M.C.C. 492 (1966) is thus of little help, and is clearly distinguishable factually.

81. The recognition of the distinction between "materials" and "supplies" by this Commission, however, does not end this inquiry. The Respondents also argue that the commodities at issue in this proceeding are both "materials" and "supplies." This contention appears to exist independent of any Commission determination regarding the necessity for a distinction between "materials" and "supplies."

82. Respondents contend that asphalt is both a material and a supply, since the asphalt also serves certain functions when it is put upon the road surface. Respondents point out that asphalt must be mixed with other components prior to application, must be kept hot in order to be used, and must be compacted in order to perform its lubricating and sealing functions. According to Respondents, the asphalt mix acts as a "supply" in that it lubricates the aggregate to allow compaction, and as a "material" in that it provides a seal or a bonding element.

83. The Commission rejects these narrow contentions. Although it may be true that asphalt, in its various forms, serves these different functions, it is obvious to the Commission from the record that, from a broad view, the whole purpose of asphalt

in any road construction project is to build a permanent highway surface. This is the case whether that purpose is accomplished through either the lubricating or sealing function, or both. The asphalt base is an essential permanent component of the resulting roadway, and asphalt itself, although it may deteriorate with time is not a consumable in road building, but rather remains as the resulting surface of the road. This is the ultimate result of the road building process.

84. As a policy matter, to accept the Respondent's contentions herein would be to promote the eventual blurring of the clear distinction between materials and supplies recognized and affirmed by the Commission in this order. This decision is reinforced by the absence of the term "materials" in the contested portion of the Smith certificate, and the presence of that term (along with "supplies") at other places in the certificate. The Commission also notes that the arguments advanced by Respondents bear no similarity to previous Commission determinations regarding the overlapping nature of various types of commodity descriptions (ie, generic class and intended use).

85. Respondents place great weight upon this Commission's determination in Green Oil Field Services Docket No. T-8854 (May 19, 1986), wherein the Commission determined that the term oil field supplies includes water and waste oil in bulk in tank vehicles. However, a review of that decision reveals that it did not address any of the concerns raised and discussed in this

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proceeding. Similarly, many of the other decisions relied upon by Respondents are factually or legally distinguishable.

86. During the hearing on this matter, the parties agreed that the consideration of "asphalt saturated aggregate" should be stricken. Further, it was testified that in road building terminology, asphalt and road oil are the same.

87. Based on the foregoing discussion and analysis, the Commission finds and declares as follows:

> Asphalt is not a supply intended for use in road building.

Done and Dated this 30th day of October, 1989 by a vote of 3 - 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

HOWARD L. ELLIS, Vice Chairman

JOHN B. DRISCOLL, Commissioner

DANNY OBERG, Commissioner

ATTEST:

Ann Purcell
Acting Commission Secretary

(SEAL)

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

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