

Service Date: May 3, 1988

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

* * * * *

IN THE MATTER of the Petition of)
Marvin Schock, d/b/a Homes of the)
Future, for a Declaratory Ruling) TRANSPORTATION DIVISION
that Certain Transportation of)
Mobile Homes is not Transportation) DOCKET NO. T-9157
for Hire Under Title 69, Chapter)
12, MCA.)

DECLARATORY RULING

On December 1, 1987, the Public Service Commission (Commission) received a Petition for Declaratory Ruling from Marvin Schock, d/b/a Homes of the Future. The question raised by Mr. Schock for ruling is as follows:

Whether the transportation by mobile home dealers of mobile homes to dealers' sales lots, for the purpose of selling the mobile homes on consignment, or for the purpose of selling mobile homes that have been repossessed by financial institutions, is subject to regulation by the Commission pursuant to Title 69, Chapter 12, MCA.

It is Mr. Schock's position that such transportation should not be regulated by the Commission.

On January 6, 1988, the Commission issued a notice of the Petition to all regulated carriers in Montana as well as to others who may have an interest in the ruling. Comments and/or requests for hearing were to be submitted by February 1, 1988.

LIBRARY DOCUMENT
Do Not Remove

Comments in opposition to regulation of the transportation in question were received from:

Fergus County Federal Credit Union
Bill Pierce, President, Geo. R. Pierce, Inc.

Comments in support of regulation of the transportation in question were received from:

Wendell L. Keller, President, Montana Mobile Home Transport
A.E. Bonnarens, PSC Enforcement Officer
Larry Kling, President, Transit Homes of America, Inc.
Robert L. Fritz, President, Bill's Mobile Home Transport,
Inc.
Calvin Bauer, Master Movers, Inc.

An explanation of the position of the Motor Vehicle Division, Montana Department of Justice, was provided by Larry Majerus, Administrator of the Motor Vehicle Division. Daryll Schoen submitted a statement of the position of the Registrar's Bureau of the Motor Vehicle Division. Mr. Calvin Bauer requested a hearing on the Petition but did not provide good cause why a hearing should be held. The Commission finds that the Petition requires a legal conclusion on certain of its powers and obligations under Title 69, Chapter 12, MCA. The Commission finds that no factual issues are present; therefore, the request for a hearing is denied.

DISCUSSION

With certain exceptions discussed below, the Public Service Commission regulates motor carriers who transport for hire on the public highways of the State of Montana. The pertinent statutory definitions are as follows:

LIBRARY DOCUMENT
Do Not Remove

"For hire" means for remuneration of any kind, paid or promised, either directly or indirectly, or received or obtained through leasing, brokering, or buy-and-sell arrangements from which a remuneration is obtained or derived for transportation service.

69-12-101(5), MCA.

"Motor carrier" means a person or corporation, or its lessees, trustees, or receivers appointed by any court, operating motor vehicles upon any public highway in this state for the transportation of persons or property for hire on a commercial basis, either as a common carrier or under private contract, agreement, charter, or undertaking. The term includes any motor carrier serving the public in the business of transportation of ashes, trash, waste, refuse, rubbish, garbage, and organic and inorganic matter.

69-12-101(6), MCA.

The Commission does not regulate motor carrier transportation that has been made exempt pursuant to 69-12-102, MCA, nor does it regulate private motor carriage. No exemption applies to the transportation of mobile homes. The question, therefore, is whether the transportation contemplated by this Petition should be considered private carriage.

The Montana Supreme Court considered private as distinguished from "for-hire" carriage in Board of Railroad Commissioners v. Gamble-Robinson Co., 111 Mont. 441, 111 P.2d 306 (1941). In Gamble-Robinson the Commission attempted to enjoin three Billings wholesale grocers from operating motor carriers on the public highways of Montana without certificates of public convenience and necessity. Each grocer maintained a truck for the

delivery of its own merchandise to customers in Billings and the outlying area. These deliveries were found to be incidental to the wholesale business of the grocers; and it was found that the grocers were not engaged in the business of hauling property for others, nor did they compete with those who were so engaged. The Supreme Court upheld the ruling of the lower court which refused to enjoin the transportation activity of the grocers. In the process the Court stated the question as follows: "... the question here is whether a business man, a farmer, or anyone else comes within the statute who operates a motor vehicle for the delivery of his own merchandise or produce purely as an incident to his regular business and does not compete for the transportation of the persons and property of others, with those engaged in the transportation business." Gamble-Robinson, 111 Mont. at 448. In the course of a lengthy discussion of this question the Court concluded that only those persons engaged in the business of transportation for others are properly subject to regulation under Montana law.¹ Persons engaged in a business other than transportation, but who transport as an incident to that business, are not subject to regulation.

¹ But for the expense of publishing Declaratory Rulings in the Montana Administrative Register the Commission would reproduce the entire discussion of private vs. "for-hire" carriage contained in Gamble-Robinson. Interested persons are urged to read the entire case which is the most thorough, and still current, exposition of this question in Montana law.

The conclusion of the Montana Supreme Court in Gamble-Robinson, is an expression of what has come to be known as the "primary business doctrine." The "primary business doctrine" has been addressed numerous times by the Interstate Commerce Commission. See, e.g., Woitishek Common Carrier Application, 42 MCC (Motor Carrier Cases) 193, 205-206 (1943). The Commission acknowledges that there is a good argument for considering dealer transportation of mobile homes on consignment as transportation incidental to a primary business. A consignment, as used here, is an agreement whereby one person (the dealer) agrees to make a sale for another (the seller) in return for a percentage of the sale price. The object of a consignment for a mobile home dealer is to make a sale. There is no question that transportation of the mobile home can be considered incidental to that object. For the following reasons, however, the Commission finds that despite the plausible incidental nature of the transportation in question, such transportation should be regulated pursuant to Title 69, Chapter 12, MCA.

First, while dealer transportation of mobile homes on consignment may in theory be incidental to a primary business, in practice it is very difficult to verify that it is incidental. Some transportation is conspicuously incidental to a primary business, e.g., the delivery of food from a grocery store, or the delivery of furniture from a furniture store. In the case of mobile home transportation, however, it would be easy for dealers to get into the transportation business under the guise

of consignment agreements. It might be possible to determine the real nature of such transportation on a case-by-case basis, but this agency does not have the enforcement resources for such a task.

Second, a person engaged in incidental transportation should not compete with those engaged in the transportation business. See discussion of Gamble-Robinson, supra. There is a sense in which all private or incidental carriage competes with those in the transportation business. (Someone who needs groceries or furniture delivered would have to hire a common carrier in the absence of other alternatives.) However, in this case, a common carrier industry has grown up around the transportation of mobile homes. There is no question, as several comments in response to this Petition indicated, that the transportation of mobile homes to be sold on consignment is a significant part of that business. The Commission is obligated by statute to encourage common carrier motor transportation. Section 69-12-202, MCA, reads as follows:

69-12-202. Encouragement of common carrier motor transportation. To fully secure adequate motor transportation facilities for all users of such service and to secure the public advantages thereof, the commission shall encourage a system of common carrier motor transportation within the state for the convenience of the shipping public. The maintenance of a common carrier motor transportation system within Montana is hereby declared to be a public purpose.

The Commission finds that allowing dealer transportation of mobile homes on consignment would be detrimental to those engaged

in the business of transporting mobile homes. As such, allowing dealer transportation of mobile homes on consignment would discourage a sound system of common carrier motor transportation and would therefore be in violation of the Commission's statutory obligation.

With respect to the question of whether a mobile home dealer can transport to his sales lot for sale a mobile home that has been repossessed by a financial institution, the analysis is the same. A mobile home dealer can enter into a consignment agreement with a financial institution, just as he can with any other entity or person. But the dealer may not, absent the requisite authority, transport mobile homes to be sold on consignment.

Ruling

The transportation of a mobile home by a mobile home dealer to that dealer's sales lot for sale on consignment is common carriage, regulated by the Public Service Commission. The stay of enforcement of such regulation, entered by the Commission on November 9, 1987, will be lifted on May 19, 1988, one week following the publication of this ruling in the Montana Administrative Register.

Done and Dated this 2nd day of May, 1988 by a vote of

- .

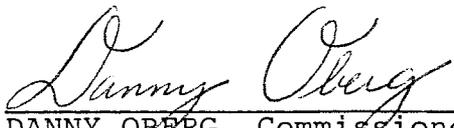
BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION


CLYDE JARVIS, Chairman

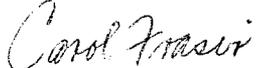

JOHN B. DRISCOLL, Commissioner


HOWARD L. ELLIS, Commissioner


TOM MONAHAN, Commissioner


DANNY OBERG, Commissioner

ATTEST:


Carol Frasier
Secretary

(SEAL)