

Service Date: November 4, 1994

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

* * * * *

IN THE MATTER Of the Application)	TRANSPORTATION DIVISION
of Joan A. Lee, dba Deep Creek)	
Freight, Libby, Montana, for a)	DOCKET NO. T-93.121.PCN
Class B Certificate of Public)	
Convenience and Necessity.)	ORDER NO. 6313a

FINAL ORDER

APPEARANCES

FOR THE APPLICANT:

David L. Jackson, Jackson, Murdo, Grant & McFarland, 203 N. Ewing Street, Helena, Montana 59601

FOR THE PROTESTANT:

Bradley J. Luck, Garlington, Lohn & Robinson, 199 West Pine, P.O. 7909, Missoula, Montana 59807-7909, representing Inter-City Freight Lines, Inc.

FOR THE COMMISSION:

Denise Peterson, Staff Attorney, and David Burchett, Chief, Motor Carrier Enforcement and Rate Bureau, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana 59620-2601

BEFORE:

BOB ROWE, Vice Chairman and Hearing Examiner

Pursuant to § 2-4-621, Montana Code Annotated (MCA), the hearings examiner issued a Proposed Order No. 6313 on June 29, 1994, granting a

portion of the authority requested in this Application, as outlined in the Findings, Conclusions and Order. Applicant filed Exceptions to the Proposed Order, with supporting brief, on July 19, 1994. A quorum of the Commission, having heard oral argument on the exceptions, finds that the Proposed Order was supported by substantial evidence in the record and denies the Exceptions. The Commission adopts the hearings examiner's proposed findings, conclusions and decision as follows.

BACKGROUND

1. On August 24, 1993 Joan A. Lee, dba Deep Creek Freight (Applicant or Deep Creek), filed an application with the Montana Public Service Commission (Commission) for a Class B Certificate of Public Convenience and Necessity to transport general commodities between Missoula, Montana and points immediately tributary thereto and Frenchtown, Huson, and Alberton, Montana and points and places in Lincoln, Mineral and Sanders Counties. Applicant proposed to prohibit transportation of the following:

- (a) Transportation of packages containing the following materials: audit and accounting media, data processing media and business records, processed and unprocessed film and microfilm and incidental supplies relating to snapshots and microfilm, nonnegotiable securities, nonnegotiable bank checks and valuable papers; (b) commodities in bulk; (c) materials and equipment which, because of its size or

weight, requires the use of special equipment or flatbed trailers; (d) blood and medical specimens.

2. Presently, Deep Creek operates under Class B certificate of authority PSC No. 8801 to transport general commodities between all points and places within Flathead and Lincoln Counties, with limitations prohibiting transportation of petroleum products, dairy products, frozen products, heavy machinery requiring a low-boy or flatbed trailer, water, and drilling mud.

3. The Commission duly published notice of the application in the Western News, Libby, Montana and the Missoulian, Missoula, Montana, and mailed the notice to all Montana intrastate motor carriers in the SEPTEMBER MONTHLY NOTICE, 1993.

4. The Commission received a letter protesting the application from Inter-City Freight Lines, Inc., 332 West Railroad St., Missoula, Montana, on September 14, 1993, signed by Nick Nichols, Vice President and General Manager (Protestant or Inter-City).

5. On September 23, 1993 Applicant requested bifurcated hearings to be held in both Missoula and Libby to allow shipper and public witnesses to testify in both locations. By Commission action, the request was granted, with the agreement of Applicant that the unusual procedure would result in delay.

6. The Commission received a copy of Applicant's Interrogatories and Requests for Production of Documents directed to Protestant on October 7, 1993. Applicant filed a Motion to Compel Answers to

Interrogatories on December 29, 1993. Inter-City filed Responses on January 10, 1994, along with a request to enter the appearance of the law firm of Garlington, Lohn & Robinson as counsel of record.

7. The Commission duly issued and published notice of the public hearing. Bob Rowe, Vice Chairman and Hearing Examiner, conducted public hearings on February 3, 1994 in the County Annex Building, 418 Mineral Avenue, Libby, Montana, beginning at 1:00 p.m., and on February 4, 1994 in the City Council Chambers, City Hall, 435 Ryman Street, Missoula, Montana, also beginning at 1:00 p.m.

SUMMARY OF TESTIMONY

Applicant's Witnesses

Libby, Montana, February 3, 1994

8. Joan A. Lee, Libby, Montana, owner and operator of Deep Creek Freight, testified in support of the application. Her experience has been varied, including secretarial work, cattle-raising, truck-driving, plumbing, electrical work, freight delivery, and running office computers and machinery. Deep Creek is a family business in which she, her husband, son, daughter-in-law and three or four additional employees work. Deep Creek has operated under PSC No. 8801 since 1985 and also holds interstate authority MC 221770, acquired in 1990 and enlarged in 1992. (Tr. pp. 6-9.)

9. Mrs. Lee testified that her husband, Aubrey Lee, is the general manager handling the general office procedures, including drug

testing (he is a chemist). She drives trucks and handles the financial business. Their son has an Associate of Science degree from Northern Montana College in Havre in diesel mechanics and has had extra training in air brakes. He does truck safety and sets up maintenance schedules. He has driven for other freight companies.

(Tr. pp. 9-12.)

10. Under cross-examination, Mrs. Lee testified that the balance sheet reflects both the personal and business assets because the family is doing business as Deep Creek. Deep Creek itself owns no real estate or docks but has a lease for docking privileges in Libby and no other leased facilities. The leased docking facility has signs for Consolidated Freightways, Molerway and United. Deep Creek has interline agreements with these carriers and other carriers and no other business relationships. **(Tr. pp. 12-17.)**

11. The Libby economy has changed with Champion cutting back, ASARCO closing, the Noranda mine site going inactive, and the Sears store leaving, Mrs. Lee testified. However, the family business has a net operating profit of \$80,000 per year. Deep Creek has two tractors, three trailers and two vans, with no present plans to purchase additional equipment if it receives the requested authority. **(Tr. pp. 17-19.)** The change in the local economy was one reason for requesting expanded authority. The small businesses need help to enlarge their service area (e.g., Payne Machinery lost a major account with ASARCO, and cannot expand because freight shipped into the area requires a

three-day transit time). To staff questions, Mrs. Lee responded that one-third of their business is intrastate. (**Tr. pp. 20-22.**)

12. Aubrey Lee appeared and testified. He is a graduate chemist. He has worked as an insurance adjuster and a teacher and has been in the freight business of 13 years. He has a full Class A, Type 1 CDL with hazardous material, doubles and triples.

13. Intrastate. Mr. Lee testified on the intrastate operations of Deep Creek. The intrastate authority for Lincoln and Flathead Counties involves a daily run from Libby up Highway 37 to Eureka, from Eureka down Highway 93 into Kalispell, including the little towns along the way, the Canoe Gulch Ranger Station and the Corps of Engineers. In Kalispell they receive intrastate interlining freight from T & T United and Molerway and return over Highway 2 to Libby, handling Troy as a pedal run out of Libby. (**Tr. pp. 23-24.**) Mr. Lee testified that Deep Creek serves every business in Libby, but does not serve the Kalispell, Whitefish or Columbia Falls areas. It does serve some of the small towns along the way. (**Tr. p. 28.**)

14. Interstate. Mr. Lee further testified that since June 1993 Deep Creek has made a daily interstate run from Libby to Missoula, interlining with Consolidated Freightways, Yellow, Roadway, and Northwest. It serves the areas along the route, such as Huson, Alberton, Superior, St. Regis, Haugan, Dixon, Perma, Hot Springs, Plains, Thompson Falls, Trout Creek, Noxon and Heron. The Missoula run begins at 5:00 a.m., or leaves earlier if there is a pick up along

the way to take to an interline carrier. The truck leaves Missoula sometime between 10:00 a.m. to 1:30 p.m. to return to Libby. (**Tr. pp. 24-25.**)

15. Deep Creek also makes an intrastate run to Eureka and Kalispell, leaving the terminal between 7:00 a.m. and 8:00 a.m., depending on whether it has to accommodate a delivery. Its return time also depends on the number of deliveries, the volume of freight and the availability of the freight in Kalispell. Mr. Lee testified that Deep Creek has had the interline business in Kalispell for many years. Deep Creek decided to interline with Consolidated Freightways and other carriers in Missoula that do not come into Kalispell, because of the diminished economic activity of the intrastate service area. (**Tr. pp. 25-27.**)

16. On its Missoula/Libby run Deep Creek provides interstate service to residential customers and a number of businesses through Huson, the Nine-mile Ranger Station, Superior, Hot Springs, Thompson Falls, Trout Creek, and Noxon. Deep Creek's principal service is delivery of general commodities, primarily interlining with other carriers, with only a small portion of pick ups as the initiating carrier, according to Mr. Lee's testimony. (**Tr. pp. 28-30.**)

17. Mr. Lee generally testified that Deep Creek makes an effort to accommodate and coordinate shippers' needs and schedules. On the interstate route to Missoula the trucks call ahead so that the customers can expect them at a certain time. Deep Creek's representatives

drop in to see customers, introduce themselves along the way, and attract new customers. (Tr. pp. 30-32.) Its equipment is adequate and regularly maintained, with a daily equipment inspection report and mechanical attention when needed. Deep Creek's equipment is standard for delivery of commodities, and interchangeable with that of the interlining carriers. Each vehicle has a program. Reports are entered daily into the computer. A Load Manifest report is done for interlines, marking hazardous material, location on the trailer, and the hazardous weight column. All freight is accounted for by a delivery receipt. (Tr. pp. 32-35.)

18. Deep Creek's terminal in Libby is a block structure built by Consolidated Freightways. Deep Creek acquired a five-year lease two years before, with an option to buy. The dock is 26 by 45, not big but adequate. The terminal has office space and facilities to store freezables. The terminal can hold three semitrailers in the three bays, with a five ton in the fourth bay. Deep Creek uses a local repair facility for oil changes and Caterpillar, Cummins or Freightliner in Missoula for service and maintenance. The Lees' son Wade operates as a dock foreman, responsible for stripping and loading trailers. He is the safety engineer, does the driver testing, conducts safety meetings, and decides whether to purchase new equipment.

In May, 1993 Deep Creek passed a full DOT inspection with a satisfactory rating. Deep Creek has extensive training and requirements for

its drivers and office staff, according to the testimony, and complies with all drug-testing requirements. (Tr. pp. 35-42.)

19. Mr. Lee testified that Deep Creek went to Missoula to offset loss of revenue in the "interstate area." He stated that they were asked why they did not pick up (intrastate) freight in Missoula and bring it to Libby (or Trout Creek or Thompson Falls). He believed that under their system for delivery of interstate freight, they could remove one to two days from delivery time from Missoula to businesses in Libby and along the way (and Eureka). If Deep Creek receives the authority, Mr. Lee believes there is adequate equipment and employees; they could purchase more equipment if needed. Mr. Lee testified that Deep Creek could receive intrastate freight in Missoula with the interstate freight it now picks up before noon and deliver it through the area to Libby the same day. When they arrive in Libby, it is usually too late for delivery the same day. (Tr. pp. 42-44.)

20. Robert J. Uithof, Libby, Montana, appeared and testified in favor of the application. He owns Golden State Oil, a convenience store and petroleum distribution business in two locations in Libby. His biggest concern is freight for cigarettes and groceries from Sheehan-Majestic in Missoula, about 1,100 to 1,500 pounds per week, usually every Friday. He also has four fuel trucks, and at times has to dispatch his own pickup truck for parts from Missoula or from Thompson Falls, which is a waste of time. Now the convenience store items are shipped by Molerway early in the morning to Kalispell, and

off-loaded. He gets it the next day in Libby. He was concerned about the possibility of freezing or melting of the goods in Kalispell, but he has not had a problem with frozen or melted commodities under the current system. He now relies first on interstate service from Spokane because the service is so much better. He testified that he can get same day service from Spokane, but service from Missoula takes two days. With one-day service from Missoula, he would increase his purchases from Missoula. (Tr. pp. 47-53.)

21. Under cross-examination, Mr. Uithof testified that transportation service has been slow and inefficient. His need for transportation might be from zero to eight or nine times a month. He gets same day service for parts through UPS from Spokane, Washington. He would like to receive his freight (groceries and cigarettes) from Sheehan-Majestic in Missoula the same day. It does not matter how late the grocery deliveries are made. He has a warehouse and is open from 4:30 a.m. until midnight. He admitted that problems of freezing or over-heating of goods is infrequent and he has not complained. Molerway has transported freight from Missoula, and it is been delivered the next day for the past seven months. Before that Sheehan-Majestic shipped the groceries on its truck to Thompson Falls, and he picked them up with his one-ton truck. He did not find this cost-effective. (Tr. pp. 53-59.)

22. Randall L. Mick, Libby, Montana appeared and testified in support of the application. He owns a truck repair shop. He receives

inbound freight nearly every day, normally from Spokane. He cannot get parts overnight from Missoula. He does receive freight from Missoula and Billings. He would prefer to spend money in Missoula. He has only had experience with UPS as a carrier in Montana, limited to 70 pound shipments. Under cross-examination, Mr. Mick testified that he does not do business or know prices for parts in Kalispell. Service from Spokane is overnight, not same-day service, the same as proposed by Deep Creek. (**Tr. pp. 60-70.**)

23. Gary Huntsberger, Libby, Montana, appeared and testified in support of the application. He has owned a business selling and servicing wood and pellet stoves since 1978. He requires inbound shipments and presently receives most of his freight through Deep Creek. Previously, he received most freight through Missoula, but with product changes he now has more freight coming from Spokane. Service since Deep Creek came to Libby has been excellent. Before, it was unpredictable. Mr. Huntsberger's service is primarily interstate. He does his business with Molerway because the freight comes through Mr. Lee. His major problem with freight service is that he has to buy in volume to get free freight, without choice on how it is shipped. If it comes through Missoula, he does not know when or how he will get it. He does not need immediate service, because he generally has stock on hand. Under cross-examination, Mr. Huntsberger testified that he primarily receives shipments of stoves from Corvallis and Helena, Montana, and Colville and Spokane, Washington. His only

problems are when the shipments are outside his control because of the volume discount. His choice would be to use Molerway, interlined with Deep Creek. (Tr. pp. 70-77.)

24. Robert Armstrong, Libby, Montana, appeared and testified in support of the application. He manages Valley Motor Supply, a corporation headquartered in Billings. The store averages 450 pounds of freight per day, five days a week, about 20 items shipped. The shipments are interlined by Deep Creek for United Truck Lines from Billings. He does not ship freight, using the company's truck once every six weeks to haul overstock to Billings. Competitors receive merchandise overnight from Spokane, while it takes Valley Motor Supply two days to get freight from Billings. He would use Deep Creek's proposed same-day or overnight service interlined from Missoula if available, instead of from Kalispell. Deep Creek's interline from Kalispell gets in late in the afternoon, too late to be delivered until the next morning. He estimated that he would save at least 12 hours time in delivery if Deep Creek were granted the authority. Under cross-examination, Mr. Armstrong admitted that none of the shipments originated in Missoula and that the only use he has for Deep Creek is on an interline basis. (Tr. pp. 77-87.)

25. Tim Hershberger, Libby, Montana, appeared and testified in support of the application. He owns Treasure Mountain Fence, a company selling parts and installing fences. He requires inbound shipment of pipe, chain link and fittings, from three times a week to

once every two weeks. His business is seasonal, summer only. His only supplier now is Alko Supply, Missoula. He keeps inventory low. He often runs out of stock on hand, and if he cannot get orders quickly he has to lay off employees for a day or two. He gets good service from Deep Creek. Molerway gives a 20 percent discount for calls before noon, picked up that day and delivered to Kalispell that night, and picked up the next day by Deep Creek. He cannot get deliveries interlined from Kalispell in less than two days, if he calls early. Otherwise, it is three days. He has 120-150 contracts per year and no time for delay. Sometimes he has to send his own truck to Missoula, which is costly with motel and gas. He would like to have service directly from Missoula. (**Tr. pp. 87-99.**)

26. Leroy Thom, Libby, Montana, appeared and testified in support of the application. He owns Montana Machine and Fabrication, machine, welding and fabrication shop. He frequently needs inbound freight, from steel supplies to bearing supplies and other parts. He has a lot of suppliers in Kalispell, Missoula, Spokane (Washington) and Coeur d'Alene (Idaho). The size of shipments varies from small packages to a 6000-8000 pound order. He uses UPS every day. He also has outbound shipments, several times a year to Three Forks and

Thompson Falls and Trout Creek every week. He testified in particular about his need for same day service to Thompson Falls. He has been making the run himself. If he could have access to Thompson Falls all the way to Missoula, it would open up options, he testified.

If he cannot get a part by UPS from Missoula, he purchases from Spokane because of the expedited freight. However, he could get them more reasonably from Missoula. (**Tr. pp. 100-108.**)

27. Linda Stubbs, Libby, Montana, appeared and testified in support of the application on behalf of Mark Owens Logging as book-keeper and receptionist. The company primarily requires shipment of equipment parts for the skidders, Cats and trucks. These parts are shipped from Spokane (70-80 percent), Kalispell and Missoula (20-30 percent). Parts from Missoula are usually ordered because the part is not available in Spokane; this causes the job to be down for an extra day, costing about \$5,000 a day. Parts are shipped overnight from Spokane through Red Label. The company receives shipments from one pound up to 500 and sometimes 5,000 pounds. The company has used Deep Creek Freight for items from Kalispell and would use its service from Missoula rather than use services from Spokane. (**Tr. pp. 109-117.**)

28. Ted Werner, Libby, Montana, owner of the Ace Home Center, appeared and testified in support of the application. As a hardware store, Ace stocks 25,000 different types of items of all sizes. Sixty percent of the products come from the Ace warehouse in Yakima, Washington, and the other 40 percent from Montana and all around the country. "... Libby is somewhat near Cicely, Alaska as far as freight is concerned." Sometimes Ace has to wait a couple of days or have two or three carriers. With the extra time, the cost is prohibitive on an item. He has owned five different hardware stores over 15 years in

Oregon, Washington and Montana. He testified that Libby has the worst inbound system, with the intrastate system causing a time lag and lost sales. Ace loses customers to Missoula or Spokane. Deep Creek, however, does an excellent job of marking invoices, noting shorts, noting damage, and working with customers, including Ace. He testified that he would like to order products from Keller Plumbing Supplies in Missoula, but it only ships by carrier so he cannot. He brings in peat moss from Yakima, Washington which he would like to get from Hamilton, Montana. Additional transportation service would enhance his sales, he testified.

29. Under cross-examination, Mr. Werner responded that he supports overnight, timely, efficient and cost-effective service. The present intrastate system limits his ability to negotiate for rates and service, he stated. He understood that it would be more expensive to move shipments to Kalispell and then to Libby, rather than to ship directly from Missoula to Libby, he further responded. (**Tr. pp. 118-123.**)

30. At the conclusion of the hearing in Libby, **Aubrey Lee** again took the stand for further cross-examination by Protestant's counsel. Mr. Lee responded to questions about the service routes. On the Kalispell run, Deep Creek begins early in the morning in Libby and tries to get to Kalispell around noon, depending upon the amount of deliveries. Deep Creek interlines with Molerway and United in Kalispell for both interstate and intrastate shipments. Their terminals

are not available to Deep Creek until noon, delaying loading and making it 4:00 p.m. before Deep Creek can leave Kalispell. Returning to Libby on Highway 2, Deep Creek usually has no deliveries on the hour and forty-five minute trip, arriving in Libby at about 6:00 p.m.

The run to Missoula takes about four hours. The truck leaves Libby about 5:00 a.m. and arrives in Missoula at 9:00 a.m. to begin picking up freight. Deep Creek picks up Molerway interstate freight for Thompson Falls, Plains and so forth (30 minutes), then picks up Consolidated Freightways (30-45 minutes), Roadway (30-45 minutes), Yellow and Northwest (perhaps an hour and a half). Penney's has a guaranteed interstate shipment from Molerway. The driver calls when ready to leave the Yellow and Northwest terminal, usually before noon.

The last terminal is the same used by Inter-city, Mr. Lee testified.

The truck returns to Libby, providing interstate service to Superior up to Haugan, cutting across from St. Regis to Thompson Falls, and arriving usually by 6:00 p.m., Mr. Lee first testified. However, upon further examination of the present interline service and timing of side trips, Mr. Lee admitted that the truck more commonly takes 16 hours, leaving at 5:00 a.m. and returning at 8:00 or 9:00 p.m. or later, if there are stops in every town. (Tr. pp. 126-136.)

The preceding summary of testimony relates to the record of the LIBBY PORTION of the hearing held on February 3, 1994. Parties agreed that Protestant's witnesses would appear and testify in the Missoula

portion held on February 4, 1994. Protestant did call as an adverse witness the Applicant, Aubrey Lee. (Finding of Fact No. 30.)

The following summary of testimony relates to the record of the MISSOULA PORTION of the hearing held on February 4, 1994.

Applicant's Witnesses

Missoula, Montana, February 4, 1994

31. Lewis Tripp, Missoula, Montana appeared and testified in support of Deep Creek's application on behalf of Transport Equipment, a retail and wholesale truck dealership. He is the sales manager directly responsible for providing customers with parts and service after the sale. The company's market area is western Montana and parts of Idaho, including customers in Missoula, Plains, Thompson Falls, Eureka, Great Falls and Libby, to name a few towns. Outside sales people travel to some areas, but on a very limited basis to the remote areas, perhaps once or twice a month. He was uncertain what customers were in Libby. Transport's shipments vary from an ounce (nut or bolt) to 5,000 pounds (engine). Probably 85 percent of Transport's shipments are intrastate, he estimated. He testified that Transport needs to be able to get parts to customers on a same-day basis, particularly the captive parts, such as Volvo products unavailable elsewhere. Customers in Libby can get parts faster from Spokane, which puts Transport at a disadvantage.

32. Mr. Tripp had heard of Inter-City, but since he does not handle shipments directly, he did not know if Transport had used the

service. Most shipments now go UPS, he testified. UPS has a weight limit, and he believed that UPS does not have same-day service to the Libby/Eureka area. If he cannot get service from UPS or does not have a parts person going to Libby, he relies on other customers or people to take parts with them (a "hit and miss deal"). He has had to send an employee or himself to take a part to satisfy a customer. Mr. Tripp believed that granting Deep Creek's application would give Transport the opportunity to increase revenue in the Libby area and make it easier to provide the area with service and parts.

33. On cross-examination, Mr. Tripp responded that he did not know how many shipments Transport had made to Lincoln County in the previous year. When asked if he knew if he had to ship to Lincoln County, he recalled that in the previous six or eight months the dump needed a part on its truck's air conditioner, probably a 10-15 pound item. He testified that he does not handle shipments directly, but he knows that they take a lot of parts to Lincoln County. They send a parts person up there with a van full of parts. He admitted that Transport has competition in Kalispell. Other than the part for the dump, he admitted that he was unaware of the specific needs for shipments from Transport to Lincoln County.

34. To questions from Commission staff, Mr. Tripp responded that if Deep Creek obtained authority, Transport would continue to use its parts people. Transport not only delivers parts, but it also stocks parts and has to take inventory. A freight company cannot do that for

Transport, but if Transport could get parts up every day it might sell more parts in the area. Usually the company ships parts UPS and the parts are not over the UPS weight limit. (Tr. pp. 2-20.)

35. David Moran, parts manager for Long Machinery, Missoula, Montana, appeared and testified in support of the application. Long Machinery handles sales, service and parts for Caterpillar equipment in western Montana, and also has a branch in Lewiston, Idaho. He oversees the transportation of parts. The company has about 50 customers in Mineral, Sanders, Lincoln and Flathead Counties. Long Machinery also has a branch in Kalispell, but his jurisdiction ends in the Trout Creek area on the county line. The Kalispell store handles Lincoln County. He does have occasion to ship parts from Missoula to Lincoln County for the Kalispell store. He testified on specific customers in Thompson Falls, Trout Creek Superior, St. Regis, Hot Springs Olney, Libby and Eureka, for a total of about 30 customers. Inter-City has never solicited his service, he stated. His customers have told him that they have gone to Spokane to purchase parts because they could not get parts timely from Missoula. His customers can lose thousands of dollars a day when their machines require parts.

36. Presently Long Machinery ships parts by UPS a lot. Occasionally, Mr. Moran uses Inter-City's transportation service when he has the time, and sometimes Long Machinery itself goes to the area. The biggest problem occurs when Long Machinery receives back-order parts from the redistribution facility in Spokane, particularly when

the parts are too big for UPS. It takes from Monday when ordered to Wednesday for delivery.

37. Under cross-examination, Mr. Moran stated that Lincoln County is handled primarily out of the Kalispell store. A problem, he stated, is that Deep Creek provides next day service on that route. He testified that he believed Deep Creek would get the parts more quickly from Missoula. On occasion, Long Machinery has used Red Label Express from Spokane to get parts to Libby more quickly. Typically, he does not deal with the Kalispell store's problems, he admitted. He testified that he routinely uses the services of Inter-City to Sanders and Mineral Counties. Inter-City's service is not always timely, he stated, sometimes not delivering until Wednesday afternoon parts back-ordered from Spokane on Monday, depending on when Inter-City receives the shipment. Most service to Sanders and Mineral Counties has been overnight, however, if picked up the evening before and delivered the next day. UPS can receive shipments until 6:00 p.m., while Inter-City does not pick up shipments after 10:00 a.m. for transportation that same day. Mr. Moran said that the transportation needs are all being met, but the needs could be met more quickly. (**Tr. pp. 21-39.**)

38. Patricia Vincent, part owner of Vincent Timber Production, a sawmill operation in Trout Creek, Montana, appeared and testified in support of the application. She does not work in the office, but everyone else was busy. She testified that Vincent needs parts almost every day. She has been called many times to go to Missoula or

Spokane to get parts needed right away. Vincent employs about 80 people, working day and night shifts. The parts needed come in all sizes, many too large for UPS. She was unaware of how often parts come to Vincent, and made fewer trips herself now, probably twice in the last year. She was aware that Vincent uses Inter-City Freight and UPS. She stated that she was told the Applicant would provide service to the door at Trout Creek on the way to Libby. On cross-examination, Ms. Vincent responded that she did not personally know whether Inter-City delivers directly to the operation. (Tr. pp. 40-46.)

39. John Reynolds, Hot Springs, Montana, appeared and testified in support of the application. He is the outside client manager for Hot Springs Telephone Company, doing repair and installation of telephone equipment. In part, he also acquires parts and materials. Most of the equipment is brought from out of state, and five to ten shipments per summer come from Ditchwitch in Billings by UPS. Most cable is shipped interstate. For intrastate service Mr. Reynolds believed that the company uses Inter-City or Yellow Freight probably five or six times a month during the construction season (May to October). Usually shipments arrive within a reasonable time. A couple of times cable was damaged and noted on the shipping label. He observed that a shipment the previous year was loaded improperly, resulting in difficulty unloading, but he did not document it. He testified that in the future the company might have to buy equipment

from Missoula. There might then be additional general commodities service required from Missoula to Mineral and Sanders Counties.

40. On cross-examination Mr. Reynolds admitted that he was not saying that Inter-City had loaded the shipment improperly or damaged the cable. He further admitted that he had no reason not to use Inter-City and that additional future need is speculative. To staff questions he responded that 85 percent of the shipments are from out of state. He was aware that on an interstate basis Deep Creek could interline in Missoula. (Tr. pp. 47-54.)

The following summarizes cross-examination in Missoula of Applicant Aubrey Lee continued from the hearing the previous day in Libby.

41. Aubrey Lee took the stand and testified further under cross-examination on the general operation of Deep Creek. Service on the "line tractor" is five days per week. For special orders under guaranteed delivery on Saturday for Penney's, one of the family members will take a light truck for pick up and delivery. He testified that he does not drive routes on a regular basis. Three employees routinely handle the transportation. They work about seven hours a day, five days a week, he testified. They leave at 5:00 a.m. and arrive back in Libby at 7:00 or 8:00 p.m., normally a 12-14 hour run, given the present deliveries. He admitted that it could take longer if there are a lot of interline deliveries, the roads are bad, or they have to wait for freight in Missoula. The employees are paid by the

hour, seven to seven and a half hours per day per driver. The drivers take turns on duty because they have sleeper units. His log books recently passed inspection at a spot check, he testified. (**Tr. pp. 55-61.**)

42. Mr. Lee further testified under cross-examination that he has no concrete plans to change his operation if granted the authority. He has four employees outside the family. He has two tractors, and no back-up tractor. Deep Creek's only facility is that leased in Libby. He admitted that he could transport a shipment from Lincoln County to Kalispell which other carriers could then interline to Missoula, standard practice done for several years. He further responded that theoretically he could interline on the Thompson Falls route on Highway 200. The actual distance going to Missoula through Kalispell is 20 miles farther and may cost the same in freight, although the shipper may lose a discount, he testified. Molerway and United have authority to go from Libby to Missoula, and Deep Creek operates for them as their agent, he responded. He cannot interline in Kalispell with Molerway or TNT United for intrastate shipments to Missoula. He does interline in Kalispell with two carriers from Missoula to transport to Libby. Intrastate freight cannot be shipped from Missoula to Libby via Highway 200. He cannot interline with Inter-City on the Libby route, he testified, because they do not have an intrastate authority in common. Perhaps interlining might be possible on Highway 200, with appropriate facilities, but his experi-

ence interlining tailgate to tailgate resulted in mishandling of freight. He would consider interlining with existing carriers in Kalispell and had done so in the past with Inter-City until they lost the docking facilities. (**Tr. pp. 62-71.**)

43. Mr. Lee admitted that the most lucrative part of the business is interstate interline freight, which is necessary to survive. Rural intrastate barely covers costs. He moved his interstate interline business from Kalispell to Missoula at the direction of Consolidated. He admitted that the big companies use smaller companies on unprofitable routes and that intrastate authority by itself would not be profitable. Without the intrastate authority, he would continue providing interline service, but he felt that he could improve his service if he had the intrastate authority. He testified that he had support for the application because of his sales efforts. He told people that his truck drives by every day and with authority he could bring the Missoula freight with the interstate freight. For Mineral and Sanders Counties he recognized that Inter-City could duplicate the service he proposed. (**Tr. pp. 72-83.**)

44. Under further cross-examination, Mr. Lee testified on options to provide the additional intrastate service with the interstate service, including using another one-ton truck and having the drivers split up and meet in Thompson Falls to have supper, then back to Libby. Another option, if the business approaches the 16 hour day, is that two drivers are considering moving into the Thompson Falls

area to shorten the route. Mr. Lee stated that he had no plans to add a Missoula terminal or more drivers. His drivers will keep track of orders by calling the terminal in Libby. All the shippers have the toll-free number. The drivers will also call Long Machinery and the Transport Company and any customer who requests daily calls. Moving all the interlines to Missoula would reduce the need and volume in Kalispell, resulting in savings and more options. (**Tr. pp. 83-88.**)

45. On further questioning, Mr. Lee testified that the Libby to Missoula route logs about 450-500 miles per day. He recognized that a grant of intrastate authority would not decrease the mileage. He hoped that intrastate carriers in Missoula could collect intrastate freight for the area. He admitted that with additional pick ups, the operational handling time increases. Mr. Lee denied that the service proposed was really overnight service. A logger, for example, could come in late at night and pick up a shipment at 4:00 a.m., which is same day service for him. Mr. Lee expressed empathy for Inter-City's concerns that granting intrastate authority in Mineral and Sanders Counties will harm its business financially. He had the exact problem when Consolidated Freightways told him to come to Missoula for interlining or else. He agreed that it is hard to make a living in Montana and was glad that he was not in Inter-City's position now. (**Tr. pp. 92-97.**)

46. Mr. Lee admitted that most shipments from Missoula to Sanders and Mineral Counties would be in the \$16-18 range, but that it

is revenue, i.e., "gravy." He did not know the cost of operating equipment per mile; he determines whether the operation is profitable on a monthly basis. He did know that the Hot Springs run is not profitable, but he believed in meeting his obligations. He could not provide overnight service interlining in Kalispell because the interlining carrier would not let him pick up the freight in the morning, even if he had a dock in Kalispell. (**Tr. pp. 97-101.**)

Protestant's Witnesses

47. Nicky Charles Nichols, Turah, Montana, appeared and testified in opposition to the application. He is vice-president and general manager of Inter-City Freight Lines, a family owned operation. He has been in the trucking business for 18 years. Inter-City picks up general commodities in Missoula to transport to Sanders and Mineral Counties and delivers freight to the Kalispell area. Inter-City has a terminal in Missoula with dock space and equipment, forklifts, tractors and trailers. Inter-City has 11 employees, including his father and him. Interstate service comprises 90 percent of the business and intrastate 10 percent, he estimated. Inter-City picks up freight from interline carriers in Missoula (e.g., Molerway, United, Northwest Transport, Mercantile) to deliver to Plains, Thompson Falls, Sanders and Elk Counties, Kalispell, Polson, Whitefish, Columbia Falls. One truck takes Highway 93 to Kalispell and another delivers on a Mineral and Sanders Counties route. On the latter route, the truck begins making local pick-ups at 6:00 or 7:00 a.m daily to pick up interline and intrastate freight. If called by 10:00 a.m., they can get shipments delivered the same day, he stated. (Tr. pp. 114-120)

48. Mr. Nichols further testified that Deep Creek uses Inter-City's dock in Missoula. Deep Creek leaves Missoula generally about 1:00 p.m. and has two drivers, he stated. Some time ago Deep Creek interlined with Inter-City through Kalispell; other carriers interline to Deep Creek through Kalispell. Available freight has dwindled, Mr.

Nichols stated, while expenses have increased. It is difficult to maintain a profit margin, he indicated. In 1992 the business suffered a small loss, but they keep their payroll and bills paid. To his knowledge, Inter-City is the only carrier to haul to Sanders and Mineral Counties for 18 consecutive years. He testified that the intrastate freight alone would not be profitable. Inter-City has never had complaints on its availability. It has always made pick-ups and deliveries timely. Inter-City has never received Public Service Commission citations, but did get a conditional rating from the Department of Transportation (DOT) related to drug screening and hazardous waste billing procedures, which they have rectified and are awaiting a re-inspection. (Tr. pp. 120-128.)

49. Mr. Nichols maintained on the issue of interlining that the big carriers do not wish to make less profitable shipments and tend to make the smaller carriers compete with each other. In his opinion, Inter-City would lose a substantial amount of interline business and be unable to compete as well if Deep Creek receives the authority it requests. He believed that Inter-City would do more interline business since that is more lucrative. In the long run the two companies would compete for the limited amount of freight, and one or both could go out of business, he maintained. A grant as requested would harm present intrastate service, and there is not enough intrastate business to justify more authority, he responded. The existing authority could provide same day or overnight service out of Missoula to Mineral

and Sanders Counties and the Kalispell area, with some arranging of schedules, he said. (**Tr. pp. 128-133.**)

50. Under cross-examination, Mr. Nichols testified that Inter-City does not have a terminal or dock in Kalispell, but delivers directly out of trailers or to places with forklifts when needed for transfer of freight. His father, president of the company, lives in Columbia Falls. They ship five days a week and on weekends when necessary. For intrastate freight they observe the 100 pound and \$1,000 freight limitations to Kalispell. He believed that the reason his interline freight business had decreased was that Deep Creek came to Missoula to pick up Consolidated Freightway's interlines. Deep Creek was serving Libby, and Consolidated promised Mineral and Sanders Counties as well for interstate interlining. Roadway and Yellow also quit interlining with Inter-City, turning freight to Deep Creek because it also picked up the Libby shipments. Further, Yellow began hauling its own freight to the Kalispell area, reducing his freight business. (**Tr. pp. 133-140.**)

51. Mr. Nichols admitted under cross-examination that he does not do much sales solicitation. He stated that he had not assessed the intrastate freight lost in Lincoln County to Spokane freight, since it is outside his service area. He concentrates instead on the freight that he serves. He also admitted that he had not assessed the excess freight in Mineral and Sanders County. To questioning he responded that briefly Inter-City provided interstate interline

service to Lincoln County, but the distance was not cost-effective given fuel costs and driver's time. He also testified that Inter-City used to provide interstate service to Huson and Frenchtown. It could not provide service to the area before 4:00 or 5:00 p.m. The freight had dwindled to the point of needing only one truck for the Sanders/Mineral Counties loop. The interline carriers and Inter-City mutually agreed to terminate the service as not feasible. (**Tr. pp. 140-152.**)

52. Mr. Nichols responded to staff questions that the harm to his operation could be minimized by a grant of limited authority for intrastate service originating or terminating in Lincoln County.

(**Tr. pp. 153-158.**)

Applicant's Rebuttal Witness

53. Applicant Mr. Lee testified on rebuttal that a limitation to service originating or terminating in Lincoln County would not be acceptable. This limitation would hamper his ability to sell and market service. Another carrier, Flathead Cartage, brings interstate freight into Libby almost daily and the competition is severe. He admitted under recross-examination that he wants more interline freight into Libby. He expressed concern that the purpose of limiting the intrastate authority from serving Sanders County might be to hold interstate freight from him. (**Tr. pp. 159-163.**)

FINDINGS AND DISCUSSION

54. Pursuant to Title 69, Chapter 12, Montana Code Annotated (MCA), the Commission supervises and regulates intrastate motor carrier service. § 69-12-201, MCA. The maintenance of an adequate common carrier motor transportation system has been declared a public purpose. § 69-12-202, MCA. Obtaining motor carrier operating authority requires an application to the Commission and a hearing whenever a protest is filed or a request for a hearing is received. § 69-12-321, MCA.

55. Section 69-12-323, MCA, governs the requirements for a Commission decision on whether an application for a certificate should be granted. The Commission will issue a certificate of public convenience and necessity upon finding that the proposed service is required. In reaching a decision, the Commission will consider existing transportation service; the likelihood of the proposed service being permanent and continuous 12 months of the year; and the effect of the proposed service on other essential transportation service in the affected communities.

56. The Commission has interpreted § 69-12-323, MCA, as requiring it to address these issues before granting an application for authority:

- a. Is the applicant fit and able to perform the proposed service?

- b. Does the public convenience and necessity require the authorization of the proposed service?
- c. Can and will existing carriers meet the public need for the proposed service?
- d. Would the proposed service have an adverse impact on existing transportation service?

Fitness

57. The Commission makes a threshold determination of whether the applicant is fit, willing and able to provide the service, considering these factors: (1) the financial condition of the applicant; (2) the intention of the applicant to perform the service sought; (3) the experience of the applicant in conducting the service sought; (4) the adequacy of the equipment the applicant has to perform the service; and (5) the nature of previous operations, if there are allegations of illegal operations.

58. The Commission finds that the Applicant is fit, willing and able to provide the service for which it has applied. There is no question of Applicant's financial capability, intention to perform the service, experience in performing motor carrier service, and adequacy of the equipment. The Commission does recognize a concern that Applicant might not be able to perform additional service within the 12-16 hour days with two drivers. In fact, the Commission questions the practice of paying its drivers for seven-hour days when two drivers are on the road, or away from home base, as much as 16-20

hours and expected to use the sleeper on a daily basis. Nevertheless, employment practices are not within the Commission's jurisdiction, unless the motor carrier is found to violate other laws. While Applicant might have to alter its operations and acquire more equipment and drivers, these adjustments are commonly made to accommodate motor carrier need. The Commission finds no evidence that Applicant has engaged in illegal operations. Therefore, the Commission finds that Applicant meets the minimum threshold of fitness.

Public Need and Convenience

59. In determining public convenience and necessity, the Commission has traditionally followed the analysis 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. 203.

60. The public need to meet in an application for a certificate of public convenience and necessity is shipper need. The Commission finds that the unmet shipper need supported by shipper testimony is for Lincoln County only. As one witness stated, Libby might as well be Cicely, Alaska. The Commission recognizes the isolation of the northwestern part of the state. Witnesses have testified that shipping service from Spokane is more readily available than from parts of

Montana. Because people living in Lincoln County have adjusted to the existing situation, testimony was not consistently supportive of intrastate authority. Some testimony indicated that the service needed is the same interline service it can now get from Deep Creek. Possibly, Deep Creek could make adjustments to its schedule to get shipments from Missoula through Kalispell in a more timely manner. However, that route would not meet the need shown between Missoula and Lincoln County along the Sanders and Mineral County route. Deep Creek could improve the available service to Lincoln County by having intrastate authority to transport on this alternative route, notwithstanding its reluctance to adjust the Kalispell connections.

61. The Protestant testified that Inter-City had ceased its interstate interline service to Lincoln County because it was not cost-effective to go that far to provide service. Deep Creek is located in Libby, has provided intrastate service under existing authority in Lincoln and Flathead Counties, daily provides interstate interline service to Lincoln County, and makes a profit serving Lincoln County. The Commission finds that the public needs additional intrastate authority to Lincoln County and that the Applicant is fit, willing and able to provide this service along a route already established for its interstate interline service.

Existing carriers' ability to meet public need

62. The Commission finds that existing carriers, including Protestant, have authority for and are able to meet the public need

between Missoula and Sanders and Mineral Counties. There is no evidence of need for additional intrastate service from Missoula to Frenchtown, Huson or Alberton, Montana or to Sanders and Mineral Counties. Therefore, the Commission finds that the proposed service will not serve any public need and convenience from Missoula to these areas which is not already served or could be served by Protestant and other existing carriers. However, Protestant and existing carriers cannot ship from these areas to Lincoln County or from Lincoln County to these areas. Therefore, to facilitate service for Lincoln County, the Commission finds that Deep Creek should be able to serve these areas, subject to limitations outlined in subsequent discussion.

63. Protestant, having no intrastate authority for Lincoln County, has no standing to protest the application as it relates to Lincoln County. Protestant cannot deliver intrastate freight from Missoula, or any place in Sanders and Mineral Counties, to Lincoln County or from Lincoln County to these locations. The Commission finds that tailgate interlining at the county line between Sanders and Lincoln Counties would be unacceptable to effect service through Inter-City or other carriers and Deep Creek to Lincoln County or vice versa. The Commission further finds that a grant of intrastate authority to Applicant between Missoula, Montana and Lincoln County along routes through Mineral and Sanders Counties, and points and places in these two counties, will serve the public convenience and necessity,

with the limitation that service originate or terminate in Lincoln County.

Harm to Existing Carrier

64 The Protestant has established that it would be harmed if it lost intrastate shipping business to the Applicant in the area in which it has authority, i.e., between Missoula and Mineral and Sanders Counties. The intrastate business by itself is not particularly profitable and is a minor part of his service, but the loss of the business would harm his overall operation and cause further loss of interstate interlining business. Protestant initially made this argument regarding service to Lincoln County. However, lack of standing makes this argument moot regarding Lincoln County. Protestant did admit that the general harm could be mitigated by limiting the authority to originating or terminating in Lincoln County. The Commission finds that this limitation will allow Applicant to provide needed service to the residents of Lincoln County.

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, Montana Code Annotated.

2 The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter pursuant to the

Montana Administrative Procedures Act (MAPA) requirements for contested case procedures. §§ 2-4-601 et seq., MCA.

3 An applicant for a certificate of Class B operating authority to transport general commodities must show that the public convenience and necessity require the proposed service. § 69-12-323, MCA.

4 Applicant has demonstrated a public demand or need for a portion of the proposed service which existing carriers cannot meet, i.e., service originating or terminating in Lincoln County through Mineral and Sanders Counties to or from Missoula, Montana and points immediately tributary thereto.

5 Granting this application with the limitations outlined in this order will not have an adverse effect on Protestant, to the extent that the Protestant has standing.

6 The Commission concludes that the Applicant is fit to provide the service as requested.

7 Pursuant to § 69-12-323, MCA, the Commission may issue the certificate for the partial exercise of the requested authority and attach limitations to the certificate as in its judgment the public convenience and necessity require.

ORDER

NOW THEREFORE IT IS ORDERED that the application of Joan A. Lee, dba Deep Creek Freight, Libby, Montana for a Class B Certificate of

Public Convenience and Necessity is granted, as modified in this Order, with the limitations imposed as follows:

Class B - General Commodities (1) between Missoula, Montana and points immediately tributary thereto, on the one hand, and all points and places within Lincoln County, on the other hand; (2) between Frenchtown, Huson and Alberton, Montana, on the one hand, and all points and places within Lincoln County, on the other hand; and (3) between points and places in Mineral and Sanders Counties, on the one hand, and all points and places within Lincoln County, on the other hand.

Limitations: Transportation must originate or terminate in Lincoln County. Transportation of the following is prohibited: (a) audit and accounting media, data processing media and business records, processed and unprocessed film and microfilm and incidental supplies relating to snapshots and microfilms, non-negotiable securities, non-negotiable bank checks and valuable papers; (b) commodities in bulk; (c) materials and equipment which, because of its size or weight, requires the use of special equipment or flatbed trailers; (d) blood and medical specimens.

Done and Dated this 27th day of October, 1994 by a vote of 3-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

BOB ROWE, Vice Chairman and
Hearing Examiner

NANCY MCCAFFREE, Commissioner

DAVE FISHER, Commissioner

ATTEST:

Kathlene M. Anderson
Commission 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.

