

Service Date: April 6, 1995

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

\* \* \* \* \*

IN THE MATTER OF GROUSE MOUNTAIN )	TRANSPORTATION DIVISION
TRANSPORTATION COMPANY, Whitefish, )	
Montana, Application for Montana Intrastate )	DOCKET NO. T-93.162.PCN
Certificate of Public Convenience and Necessity. )	ORDER NO. 6362

FINAL ORDER

APPEARANCES

FOR THE APPLICANT:

Debra D. Parker, Murphy, Robinson, Heckathorn, and Phillips, P.C., Attorneys at Law, P.O. Box 759, Kalispell, Montana, 59903, and J. Daniel Hoven, Browning, Berry, Kaleczyc, Berry, and Hoven, P.C., P.O. Box 1697, Helena, Montana, 59624

FOR THE PROTESTANTS:

Bradley J. Luck, Garlington, Lohn, and Robinson, Attorneys at Law, P.O. Box 7909, Missoula, Montana, 59807, for Rocky Mountain Transportation

James E. Michael, pro se (Kalispell Taxi Service and Airport Shuttle Service), P.O. Box 2508, Kalispell, Montana, 59901

Randall Eugene Johnson, pro se (Flathead-Glacier Transportation Co. and Whitefish Sober Chauffeur) P.O. Box 1707, Whitefish, Montana, 59937

FOR THE COMMISSION:

Martin Jacobson, PSC Staff Attorney, and Wayne Budt, Administrator, PSC Transportation Division, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana, 59620-2601

BEFORE:

BOB ROWE, Commissioner, Presiding

NANCY MCCAFFREE, Chair  
DAVE FISHER, Vice Chair

### INTRODUCTION

1. In November, 1993, Grouse Mountain Transportation Co. (GMT), a proposed limited liability company and intended wholly-owned subsidiary of Grouse Mountain Associates, Ltd., dba Grouse Mountain Lodge (GML), a lodge and conference center in Whitefish, Montana, filed before the Public Service Commission (PSC) an Application for Intrastate Certificate of Public Convenience and Necessity (motor carrier authority) pursuant to Title 69, Chapter 12, MCA. In its application GMT requested Class C (contract) passenger authority, solely for the account of GML, for registered guests of GML, for transportation between all points and places in Flathead County.

2. The application apparently is an effort by GML to remedy the effects of a previous ruling by the PSC. The process leading to that ruling commenced on March 9, 1993, when, following a number of years of providing local courtesy transportation of its guests without motor carrier authority (under informal opinion by PSC staff) and the filing, in February, 1993, of a legal action by a local motor carrier challenging such operations (Johnson v. Grouse Mountain, Cause No. DV-93-82A, Montana Eleventh Judicial District), GML petitioned the PSC for a Declaratory Ruling to determine whether its transportation operations were subject to PSC regulation (after GML's petition to the PSC the court action was stayed and, apparently, remains in that status). In ruling on GML's petition the PSC determined that GML's courtesy transportation of guests between local points of connection with common carriers (e.g., airlines, passenger trains) was not regulated, being merely incidental to GML's principal business of providing lodging, but that GML's courtesy transportation to a local ski resort (Big Mountain) and to the local community (Whitefish) was regulated. See, Matter of Grouse Mountain, PSC Docket No. T-93.33.DR, Declaratory Ruling, September 1, 1993, and Order on Reconsideration, Order No. 6193b, October 14, 1994 (as of November 10, 1994, that matter is pending judicial review in Grouse Mountain v. PSC, originally Cause No. CDV-94-1790, Montana First Judicial District, subsequently transferred on stipulation to the Montana Eleventh Judicial District). Commissioners Rowe and Anderson

dissented from the rulings, preferring a conclusion that GML's transportation of guests be exempt from regulation.

3. After determining that it would request motor carrier authority, in order to conduct its lodging business and a guest transportation aspect of that business in a way viewed as legally and practically appropriate in its view GML did not apply for motor carrier authority itself. It did so through GMT, with the intent to create GMT as a subsidiary, if authority were obtained; GMT would obtain operating capital from GML, primarily through a transfer of equipment (vehicles), in exchange for GML receiving all of the equity in the company.

4. The PSC ruling in Grouse Mountain, id., formally establishes what has long been informal PSC policy -- incidental to their principal business, motels (and hotels, lodges, etc.) may lawfully, without motor carrier authority, transport their guests between their lodging facilities and points of connection with common carriers. Although GML needs no authority to provide such service, GMT does require authority as it will be an entity separate from GML, its principal business will be transportation, and its operations therefore will be within the definition of regulated "motor carrier," as provided by § 69-12-101(6), MCA.

5. Protests to GMT's application for motor carrier authority were filed by: Valet Limousine, Inc.(Valet); Randall Johnson, dba Flathead-Glacier Transportation Co., and on behalf of Whitefish Sober Chauffeur Taxi, Inc.; James Michael, dba Kalispell Taxi Service and Airport Shuttle Service; and Rocky Mountain Transportation, Inc. (Rocky Mountain). Each protestant is a motor carrier holding PSC authority affected by that applied for by GMT. Valet withdrew its protest after stipulation by GMT that GMT's transportation would not be by limousine. The PSC approves that stipulation and will, accordingly, so limit any authority granted to GMT.

6. A public hearing on GMT's application was held September 14, 1994 in Whitefish. Given unanticipated time constraints, the hearing was continued, for receipt of remaining or additional evidence, to September 26, 1994 in Helena. Initial briefs were filed November 15, 1994 (GMT also included proposed findings of fact and conclusions of law). Reply briefs were filed November 29, 1994.

## FINDINGS OF FACT

### Preliminaries

7. All introductory statements which can properly be considered findings of fact and which should be considered as such to preserve the integrity of this Order are incorporated herein as findings of fact.

8. Witnesses for GMT included: Tim Grattan (Grattan), managing general partner of GML and intended manager of GMT; Harry Crutcher, general partner in GML; Christy Rogers, front desk and transportation manager for GML; and Mark Schroeder, maintenance supervisor of GML. Additionally, Larry Hutchinson, Winter Sports, Inc. (Big Mountain), testified in support of the application. Witnesses for the protestants included: Randall Johnson (Johnson) for his taxi operations; James Michael (Michael) for his taxi operations; and Dale Duff (Duff) for Rocky Mountain. Additionally, Cyrus Mace, Rocky Mountain Tours, and Norman Kurtz, formerly of Winter Sports, Inc., testified on behalf of Rocky Mountain.

### Facts Bearing on Need for Services

9. Testimony on behalf of GML and GMT is predominantly through Grattan. This testimony shows that GML, the intended contract "shipper" in GMT's proposed transportation service, is a lodge and conference center located near Whitefish, Flathead County, Montana. GML states that it provides lodging, resort, vacation, and conference services to its guests. It defines itself as a "destination resort" providing a special environment and guest-centered atmosphere offering unique resort and conference experiences, including enjoyment of the splendor and recreational opportunities of the Flathead area. GML states that it caters to the sophisticated traveler and businessperson by selling total vacation, recreation, and convention packages. GML promotes itself nationally and internationally, competing with other resort and conference centers nationwide.

10. GML testified that it has a need for transportation services for its guests. GML's guests can arrive by air or rail at points in or near Whitefish and need transportation between those points and GML facilities to meet travel connections. Also, GML is located

about one mile from the nearest community (again, Whitefish) and its guests need transportation to and from that community. Additionally, GML's guests commonly want to visit points of interest (e.g., Glacier National Park, Kalispell, Bigfork) or engage in recreational activities (e.g., skiing, golfing, rafting, hiking, sight seeing) throughout the Flathead area and need transportation to do that.

11. The PSC finds that GML's guests generally need transportation services and generally need a variety of transportation services, as identified above, including services in the nature of individual or small group local taxi service, small group shuttle service, and larger group shuttle or bus service, charter, or otherwise. No party to the case presented evidence that would demonstrate anything to the contrary insofar as GML's or GML's guests' transportation needs are concerned. It is uncontradicted that there is this need.

12. The record is not clear on precise numbers or different sizes or types of transportation movements required by GML or its guests at any given time. The record is also not clear on exactly when the transportation movements are required during a particular day or particular season. However, generally, transportation may be required at almost anytime (the predominance may be during the winter ski season, but it appears that GML guests have summer interests also). All of this is support for GML's acknowledged inability to precisely quantify its or its guests exact needs for its own purposes in transporting guests or engaging the services of any of the existing carriers to do so. The PSC finds that GML's or its guests' transportation needs fluctuate. They are not quantifiable or predictable with certainty and it is fair to conclude that such needs may vary hour to hour, day to day, season to season, and, possibly, year to year. There is no evidence in the record that demonstrates otherwise.

13. It is GML's opinion that it must be able to provide its guests with transportation services between points and places within Flathead County in order to maintain its competitive rating and reputation and in order to successfully compete with others in the resort and conference center industry nationwide (the record does not reflect how, or even if, GML's competitors provide for the transportation needs of their guests). GML states that its ability to provide its guests with certain expected amenities, particularly including transportation, is critical to its business. It is GML's opinion that this transportation service

must be full-time (24 hour), on demand, meeting its guests' local transportation needs, whatever they might be, in a timely, efficient, flexible, and responsive way. Within reason, the PSC finds that GML's guests need transportation available full time, on demand, and otherwise, as generally described by GML. As was the case with the other aspects of need discussed above, no substantial evidence in the record demonstrates otherwise.

14. On the issue of need (in support of GMT, primarily on the potential for improvement in area transportation by a PSC grant of authority to GMT), Larry Hutchinson testified as a public witness. Hutchinson, employed by Winter Sports (Big Mountain) as its chief operating officer, read a statement into the record. However, cross-examination fairly demonstrated that Hutchinson's statement was principally hearsay, based on little personal experience, and that Hutchinson was not familiar with the specific transportation needs. The written statement was not admitted into evidence.

#### Facts Bearing on Ability of Existing Carriers to Meet the Need

##### Preliminaries

15. To some extent the provable ability of the existing carriers to meet GML's needs has been influenced by the fact that GML and its guests have never really needed to rely to any significant extent on the existing carriers. GML has been providing some local service for its guests since establishing operations a number of years ago. (As indicated earlier, this transportation was done initially under an informal PSC staff opinion and subsequently pursuant a stay of enforcement of a formal PSC ruling.) For GML's registered guests this transportation has included movements between GML and points of connection with common carriers, the local community, the local ski resort. Presently, GML operates four vehicles in providing this service to its guests. The vehicles used by GML include two large vans (about 15 passengers each) and two small buses (about 22 passengers each).

16. GML maintains that the existing taxi services (Johnson and Michael) have been unable to provide the type of transportation services that GML and its guests require. GML states that it has at times used or attempted to use the existing taxi services. It expressed a number of concerns about those services, the significant ones relate to response time or ability

and willingness to respond at all and contributing factors, such as the availability of equipment. More specifically, in GML's view the existing taxi carriers do not have full-time (24 hour) capabilities, do not provide year round service, do not serve with a reasonable response time, or do not have the ability to meet spontaneous demands. GML, itself, has been meeting these requirements and has created GMT to meet them in the future.

17. The PSC finds that GML's opinion that the existing taxi companies cannot meet its or its guests requirements has prevailing support in the record. The facts (described below) demonstrate that both existing taxi carriers, at times and through periods of time, have not been able to meet GML's or GML's guests' transportation needs.

18. In regard to service requirements, GML states that a wait of longer than ten minutes for a taxi is unacceptable to its guests. GML states that the existing taxi companies' operations are located several miles from Whitefish, too far away to provide immediate service as needed by GML and its guests. Johnson's and Michael's testimony verifies that the waiting time for service to GML is likely to be longer than ten minutes. However, it should be noted that, contrary to GMT's assertions, there is no indication in the record that either Johnson or Michael admit that the response time could not be improved, if the need of GML were more certain and steady and not merely that which is merely to handle the slack in GML's own service to its guests. It appears that this qualification may also extend to the problem with the availability of vehicles and refusal to serve.

19. In any event the facts show that Johnson has recently relocated his business to a point about 11 miles (or 15 minutes) from Whitefish and concentrates on airport transportation during certain times of the year. Johnson indicated that his drivers live in Whitefish and his vehicles could be located with them for more rapid response in Whitefish, as needed, but that this is not now done. Johnson admits that his response time to GML can vary and that, at times, he has advised GML that service could not be done, possibly for a particular entire afternoon, because of prior obligations. Johnson admits that he has ceased operations altogether for periods of time in the past.

20. It is GML's experience and opinion that Johnson is not a timely, efficient, or reliable transportation source for GML. The facts support this. Although this is not a

proceeding to determine the fitness of Johnson, and no part of this Order bears on that, Johnson's protest is fairly weak, leaving much of what possibly could have been demonstrated (if anything) to the imagination. Johnson's testimony is not clear on how Johnson could or would correct the existing problems. Johnson did not file a brief. Whatever the circumstances causing it all, the finding of delays in response, refusal of service at times, and ceasing operations at times, fairly demand that the PSC also find that the situation remains that Johnson's operations have not met the needs of GML. The record does not sufficiently reflect how (or if) Johnson would do so (correct the problems) if given the opportunity.

21. The PSC recognizes that a smaller carrier, such as Johnson (and Michael), may have a difficult time mustering resources to present an effective protest to an application for competing motor carrier authority. Nevertheless, Johnson presented a less than minimal case, providing no basis for the PSC to conclude anything but that Johnson has not adequately met the needs of GML or its guests.

22. Michael testified that he is based in Kalispell, but began serving Whitefish, stationing a vehicle there for evening and early morning service in October, 1993, as Johnson then did not provide service during certain times of the day. Michael also indicated that he serves Whitefish during other hours, from Kalispell, with about a 20 minute response time. Michael provided an extensive list of types of persons and entities served by him in Whitefish and Kalispell. Many are those having no or limited public transportation options (e.g., senior citizens, nursing homes, the disabled, or unruly school children). Michael's operations are ADA equipped, investment being made by him in one or more required specialized vehicles. Michael also serves customers such as airline crews, airline passengers, motel guests, and courier agencies.

23. Michael categorizes GMT's proposed service as including the "bread and butter" of a taxi operation. Although Michael believes that, given the opportunity (a denial of authority to GMT and a PSC policy that other motels not be able to transport their own guests without limitation), Michael could and would correct the taxi service transportation problems described by GML, the evidentiary details of whether there would then be sufficient

need to justify a change in Michael's operations and how this change would be accomplished is not in the record. Michael did not file a brief.

24. GMT characterizes Michael's testimony as demonstrating that Michael is not a timely, efficient, and reliable transportation source for GML. This characterization is partially unsupported without some distortion of the facts. Again, it must be remembered that GML does not customarily use Michael (or Johnson for that matter), as GML provides transportation to its guests itself. To a significant extent, it is unreasonable for GML to expect that a taxi service would stand ready or make itself available for immediate service for those rare occasions that GML might not be able to provide the transportation itself.

25. GMT also proposes several additional findings of fact bearing on Michael's operations which are not supported by the record or are immaterial. Briefly, contrary to GMT's assertions: Michael does base a vehicle in Whitefish for service during part of the day; it is immaterial that Michael's Airport Shuttle does not have authority in Whitefish, as Michael's Kalispell Taxi does; and GMT's reliance on the limited number of "bingo stamps" (three) maintained by Michael is without merit, as Michael could easily obtain more.

26. Nevertheless, given the record, the PSC finds that, presently, Michael is not capable of responding to GML's guests' needs. This is not as much unwillingness as it is a result of adjustment to the circumstances, some of which may be caused by GML, some of which are not. Michael admits that his response time is likely to be more than that required by GML and its guests. Whether and how Michael could correct the problems with service, if there would be business enough to justify such efforts, and other important details were not discussed or presented by Michael. Also, as indicated above, the law allows GML to transport its guests to points of connection with common carriers, and that pertinent factor is unlikely to change.

27. GML maintains that the existing bus service (Rocky Mountain) has been unable to provide the type of transportation services that GML and its guests require. GML states that it has, at times, used the service for some purposes and found it satisfactory. However, it expressed a concern about a perceived need for a rigid schedule required by Rocky Mountain, in light of GML or its guests' needs for flexibility. GML itself has been meeting the

requirement of flexibility and has created GMT to do so in the future. GML comments that Rocky Mountain cannot meet GML's guests' spontaneous needs for small local moves. GML also comments that the larger moves cannot be adequately handled through Rocky Mountain's required rigid schedule, as the moves are not predictable or quantifiable and subject to the ever-changing demands of GML's clientele at odd and unexpected times of the day. Based on the following facts, the PSC finds (for the most part) that GMT's concerns about the service of Rocky Mountain are unfounded.

28. Testimony on behalf of Rocky Mountain is primarily through Duff, its president. Rocky Mountain testified that it has a rental car division, a school bus division, and a motor coach division. Its motor coach division operates a wide range of equipment, from vans to motor coaches, in Class B and Class C operations. The record reflects that Rocky Mountain's capabilities, equipment, and operations are far beyond any reasonable criticism. Rocky Mountain testified that it has an investment of about \$1.5 million in equipment. In 1993 its payroll was about \$400,000. Its annual gross income is just over \$400,000.

29. In 1993 Rocky Mountain had about 75 trips from GML, 6 of which were arranged by GML itself, the rest by guests of GML. GML generated about \$20,000 of Rocky Mountain's revenue in 1993 (about 5 percent of total revenue). Rocky Mountain testified that at the time of hearing it was on about the same level of trips with GML for 1994. It also testified that it has done short-notice trips for GML, without problem.

30. Rocky Mountain stated that it contacted GML when GML was first established in 1984, expressing a willingness to provide all of GML's transportation needs, staff a desk, and pay for a Rocky Mountain phone at GML. This was apparently denied by GML. Rocky Mountain stated that it has been in communication with GML about transportation needs since that time, with essentially the same result (GML's denial or unwillingness to consider it). Rocky Mountain stated that it is able and willing to take care of 100 percent of GML's transportation needs and has expressed that to GML continually. Rocky Mountain states that fairly detailed plans and options have been discussed with GML, some including a purchase of GML's existing vehicles. It is Duff's opinion, which was not refuted, that GML's costs of transportation per year is about \$50 thousand. At least one of Rocky Mountain's bids to

provide 90 percent of GML's needs was in the range of about \$28 thousand per year (Duff did comment that the two costs should not be compared).

31. Contrary to GMT's assertion that Rocky Mountain must operate on a fixed rigid timetable or schedule, Rocky Mountain made it clear that it need not operate on a fixed schedule and is willing to make virtually any arrangement to provide for the transportation needs of GML or its guests. Rocky Mountain did admit that it would be a fair statement that GML cannot define what its need is on a day-to-day basis. Rocky Mountain does not have a taxi division, but states that it could accommodate similar transportation under contract. Duff's testimony does leave some doubt as to Rocky Mountain's ability or willingness to provide for, full time, spontaneous moves (taxi in nature) for individuals.

32. Considering the above, the PSC disagrees with GML's opinion that it and only it (now through GMT) can properly provide for its guests transportation needs. Although the record may show this to be the case as to the existing taxi services, and spontaneous taxi service to individuals, the record simply does not otherwise support GML's opinion as to Rocky Mountain's capabilities. The PSC finds that GML's opinion that the existing bus service (Rocky Mountain) cannot meet GML's transportation requirements is not supported by substantial evidence. Rocky Mountain can meet virtually all of the needs of GML, including in the demonstrated timely, efficient, flexible, and responsive way.

33. Cyrus Mace, Rocky Mountain Tours and Norman Kurtz, formerly of Winter Sports, testified in support of the abilities of Protestant, Rocky Mountain. Given the PSC's findings concerning Rocky Mountain to this point, these witnesses' testimony need not be further analyzed.

#### **Facts Bearing on Harm to Existing Transportation Service**

34. A factor (corresponding to GML's prior service to its guests and the informal staff opinion on which that was based) which must influence any findings on harm (also the provable ability of the existing carriers, as described above) is the fact that the existing carriers have never availed themselves of any formal complaint process (although informal complaints and inquiries may have been made) before the PSC to test the informal staff opinion under

which GML has operated. (In 1993, about nine years after GML commenced operations, Johnson did file a court action, referenced in the introduction to this Order.) Rocky Mountain stated that it has been reluctant to file a complaint. Johnson and Michael did not provide any explanation as to why a formal complaint was not filed when GML's operations first became known to them.

35. Johnson testified that his business has suffered in the past years, due in part to transportation by GML, other motels, and the creation of WART (local public transportation). He estimates that his gross revenue was cut by more than 50 percent after GML acquired new vehicles between 1990 and 1992. It is his opinion that GML has contributed to forcing him to reduce his business. He also expressed a concern that any diminished carrier ability to generate revenue will be an impediment to those needing transportation in the community who are not served by a motel's own transportation. He sees this as a serious public policy question.

36. Michael indicated that his operations are not firmly entrenched in Whitefish and a grant of authority to GMT would not significantly harm his operations. However, Michael did express a concern that motel, hotel, and lodge operations like GML doing the same thing (obtaining authority) in his established service area (Kalispell) would have a direct adverse effect on him.

37. Rocky Mountain believes that each move that GML has made for its guests in the past is a move that Rocky Mountain could have done. Rocky Mountain could not specifically quantify harm, but this does not mean that there would be no harm (as was the case with GML's inability to specifically quantify need). Confining Rocky Mountain's testimony only to the potential loss of its historic service to GML or GML's guests (about \$20,000 per year), Rocky Mountain indicated that such would affect its operations and ability to serve. The PSC agrees and further finds that the scope of authority requested by GMT has a substantial potential for additional harm to Rocky Mountain.

#### Facts Bearing on Fitness of GMT

38. The final point pertaining to facts relevant in GMT's application are facts bearing on the fitness of GMT to be a motor carrier. GML, through a transfer of its motor vehicle equipment and "shared" management, proposes to establish GMT. GMT is to provide required transportation services to GML (GML's registered guests), under contract with GML, in exchange for reimbursement of expenses, plus a 10 percent fee. GML's plan and ability to properly form and equip GMT as a fit motor carrier were not materially challenged by the protestants. In GML, GMT has sound financial backing, good equipment, trained personnel, established equipment maintenance provisions, equipment and driver safety programs, insurance capabilities, and a transportation operating history. There is no legitimate reason to doubt whether these will carry over to GMT. GML has expressed that they will.

39. The PSC finds that GMT has demonstrated sufficient facts that support that it is fit, willing, and able to provide the transportation services that it has applied for. No substantial evidence exists to the contrary.

### CONCLUSIONS OF LAW

#### Preliminaries

40. All findings of fact which can properly be considered conclusions of law and which should be considered as such to preserve the integrity of this Order are incorporated herein as conclusions of law.

41. The PSC has jurisdiction over GMT's application for motor carrier authority pursuant to Title 69, Chapter 12, MCA. The application of GMT is proper in form and was properly noticed, protested, and heard in accordance with Title 69, Chapter 12, MCA, and Title 2, Chapter 4, MCA (Montana Administrative Procedures Act or MAPA).

#### GMT's "Non-Existence" -- Motion by Rocky Mountain

42. At the time of GMT's application and at the time of hearing GMT remained an entity "to be formed." On September 13, 1994, the day prior to hearing, Rocky Mountain objected to this, filing a Motion to Dismiss (or alternatively a Motion to Vacate). The motion

argued that GMT, as a non-entity, has no competence or standing to proceed before the PSC. Rocky Mountain raised the motion at hearing, which motion was denied, and has again raised it in briefing.

43. As the record shows (and as indicated earlier), in order for GML to conduct its lodging business and a guest transportation aspect of that business in a way viewed as legally and practically appropriate to it, GML did not apply for motor carrier authority itself, but through GMT, with the intent to create GMT if authority were to be granted. Upon grant, GMT would be formed as a subsidiary of GML, GMT to provide the transportation aspects of GML's operations, obtaining the operating capital from GML.

44. GMT's status of "to be formed" was clearly indicated on GMT's application. Rocky Mountain waited until the eve of hearing to raise the point, a point which could have been addressed and easily remedied by GMT, if it so chose or thought necessary, within a reasonable time subsequent to its application and prior to hearing. Neither Rocky Mountain nor the other protestants have shown any prejudice resulting from GMT's "non-existence." Rocky Mountain and the other protestants engaged in no prehearing discovery, including to explore the "non-existence" issue or determine potential or actual problems that might arise from it. At hearing GML and GMT submitted adequate and complete evidence on all significant points and issues involved in any material part of this question, including pro forma financial statements, all subject to cross-examination.

45. The PSC reaffirms its earlier denial of the Motion. Obtaining a motor carrier authority is seldom a thing certain. For this reason, it has been the PSC's policy that investment in facilities, power units, trailing equipment, insurance, and like things need not be made prior to receipt of authority, so long as an ability to obtain these things has been established and the means to do so has been thoroughly explored and planned. In situations such as the GML and GMT relationship there is no reason why the same policy should not extend to the task of formal organization and the expenses involved in that. ARM 38.3.601 contemplates this, allowing for a 30-day period for compliance with pre-operational and operating statutes and rules after receipt of motor carrier authority. GMT will have to be formally established prior to commencing operations. Under the circumstances, it need not

be formed for purposes of applying for or presenting a case in an effort to obtain operating authority.

#### **Public Convenience and Necessity in General**

46. The merits of GMT's case, as in all applications for motor carrier authority, turn on the elements of public convenience and necessity. The PSC will generally grant motor carrier authority when the "public convenience and necessity" requires authorization of the service proposed. In this regard, § 69-12-323(2), MCA, provides:

(a) If after hearing upon application for a certificate, the commission finds from the evidence that public convenience and necessity require the authorization of the service proposed or any part thereof, as the commission shall determine, a certificate therefor shall be issued. In determining whether a certificate should be issued, the commission shall give reasonable consideration to the transportation service being furnished or that will be furnished by any railroad or other existing transportation agency and shall give due consideration to the likelihood of the proposed service being permanent and continuous throughout 12 months of the year and the effect which the proposed transportation service may have upon other forms of transportation service which are essential and indispensable to the communities to be affected by such proposed transportation service or that might be affected thereby.

47. Additionally, § 69-12-415, MCA (Ch. 156, L. 1993), provides that an authority may not be issued (or remain in force) unless the holder is fit, willing, and able to perform the service authorized and conforms to applicable legal requirements.

48. There are specific elements involved in reaching a determination on public convenience and necessity. Public convenience and necessity will be deemed as requiring a grant of intrastate motor carrier authority when each of the required elements demonstrate that authority should be granted. Matter of Jones Brothers Trucking, Inc., PSC Docket No. T-9469, Order No. 5987a, p. 8 (July 17, 1990), includes a narrative statement of the required elements (the elements have been described in numerous other PSC opinions, sometimes in slightly different ways, but all the same in substance):

Applying this language [§ 69-12-323(2), MCA] to the facts presented by any application for authority, the Commission has traditionally undertaken the following analysis: First, it asks whether the Applicant has demonstrated that there is a public need for the proposed services. If the Applicant has not demonstrated public need then the application is denied and there is no further inquiry. Second, if the Applicant has demonstrated a public need for the proposed service, then the Commission asks whether existing carriers can and will meet that need. If demonstrated public need can be met as well by existing carriers as by an Applicant, then, as a general rule, an application for additional authority will be denied. Third, once it is clear that there is public need that cannot be met as well by existing carriers, the Commission asks whether a grant of additional authority will harm the operations of existing carriers contrary to the public interest. If the answer is yes, then the application for new authority will be denied. If the answer is no, then the application will be granted, assuming the Commission determines the Applicant fit to provide the proposed service.

49. The "fit, willing, and able" language of § 69-12-415, MCA (referenced previously), was enacted subsequent to the opinion in Jones Brothers. However, as the quote from Jones Brothers indicates, the PSC has historically treated fitness as an element.

50. The PSC also notes that, as of January 1, 1995, state economic regulation of motor carriers of property has been preempted by the federal government. In the wake of this deregulation, or for other reasons, the 54th Montana Legislature (1995) has considered further deregulation. At least one proposal, SB 315, pertaining to transportation of passengers, would have exempted lodges and like facilities (including GML) from regulation by providing an exemption for "courtesy transportation provided to registered guests by a resort, hotel, motel, or other lodging facility." This bill was tabled in committee. The PSC draws no conclusion from this, but all involved should recognize that the legislature has left the applicable law intact.

51. As a final general point, GMT argues that the PSC should not treat this case as a proceeding on industry-wide transportation issues. The PSC will treat this matter simply as an application that is considered on its own merits. However, all cases have an impact or potential impact on the overall motor carrier environment and industry and, if in accordance

with law, must be considered with that in mind. The record contains no evidence on statewide impact, but the PSC does have expertise sufficient to understand the implications of its rulings and the effect that rulings will have on motor carrier regulation and must consider those things in accordance with law.

### Need

52. The first element to consider in determining whether public convenience and necessity requires a grant is public need. (It and the second element, "ability of existing carriers to fill that need," have been, at times, considered and discussed as one element. The PSC has separated the elements for burden of proof purposes and considers them separately as a matter of convenience and to promote clarity.) There must be a need for transportation services (or additional transportation services) before authority will be granted. In regard to public need, GMT and GML have established that there is a public need: GML is a lodge, as a lodge it has guests (many without their own means of ground transportation on-site), GML is located about one mile from the nearest community, it is in an area of a wide range of recreational opportunities, guests visit the community and local points of interest, engage in recreational activities, and transportation is needed to do so. GML, as a shipper witness was present at hearing, established this need, and stood cross-examination thereon. No evidence of record refutes that there is such need. The PSC concludes that GMT has established a need for transportation services.

53. GMT argues that GML's need is specific, requiring a timely, efficient, flexible, and responsive transportation service available for its guests. GMT argues that GML's survival as a destination resort depends on this need being met. The PSC doubts whether the survival of GML would be governed by ability of GMT to provide transportation itself, but agrees that the need, as expressed (timely, efficient, flexible, and responsive), does exist. The PSC also determines from the record that the need established by GMT is an immediate and urgent need within the context of public convenience and necessity. The PSC concludes that GMT has established that the need includes timely, efficient, flexible, and responsive transportation.

54. Rocky Mountain argues that any authority granted to GMT, if any, should be limited to that for the transportation in which GML has customarily engaged and previously represented to the PSC as the scope of its services (in Docket No. T-93.33.DR, referenced earlier). It suggests that representations GML made previously should be recognized and made determinative today. It argues that the record in GML's previous action should be dispositive in this regard. The PSC disagrees, as GMT's application is what it is on its face, not what GML had done (requested) before. If authority is granted and limitations are imposed on it in this Order, it will be because the record requires it or supports discretion the PSC may have to do so, not because of what occurred in a previous proceeding.

55. However, to some extent GML's past practices may bear on what need has existed and what need existing carriers were able or unable to meet as far as GML's transportation needs are concerned. Past practices (or previous representations of such) can provide support for findings on need and the sufficiency of existing services. The PSC is cognizant that GML has represented that it has provided the transportation service because of inadequacies in the existing carriers to provide that same service. At the same time the PSC is aware that GML has, for all practical purposes, provided for its guests transportation needs.

56. Rocky Mountain also argues that GML, because previously declared to be a motor carrier by the PSC (again, Docket No. T-93.33.DR, the Declaratory Ruling), cannot now be a shipper. Rocky Mountain concludes that this undercuts the entire presentation of GML and the application should be dismissed for lack of support. The PSC disagrees, as Rocky Mountain's logic is unsound. GML was not a motor carrier, it was supposed to be one for what it was doing in its guest courtesy transportation operations. It is now proposing that GMT be a motor carrier so that its operations will be in accordance with law. Furthermore, nothing in law precludes a motor carrier from being a shipper in the present context.

57. Rocky Mountain also criticizes GML's inability to quantify its need. The PSC agrees that GML's precise needs have not been quantified. This presents only a minor problem in context. The inability to quantify them with precision is not a fatal deficiency. GML's guests simply have needs in varying quantities at varying times. The record clearly discloses that a need exists.

**Ability of Existing Carriers**

58. The second element in public convenience and necessity is ability of existing carriers to meet the demonstrated public need. A need having been demonstrated, it must be determined whether that need can be met by the existing carriers. Each of the protestants is a motor carrier authorized to transport passengers in the area of operations intended by GMT.

59. GMT argues that the existing carriers have failed to demonstrate that they can meet the established need. GMT argues that the existing carriers, individually and in combination, cannot satisfactorily meet the transportation needs of GML. Generally GMT argues that the existing carriers are not designed to meet GML's needs. The PSC has already found as fact that Johnson and Michael cannot meet the needs of GML. The PSC now concludes this as a matter of law.

60. GMT has little substantial criticism of Rocky Mountain's operations, arguing only that Rocky Mountain does not provide taxi service or spontaneous individual movements for short distances and must operate shuttle or bus services on a rigid, predetermined schedule. GMT argues that a rigid schedule does not allow for GML's needs. GMT argues that Rocky Mountain cannot timely, efficiently, or cost-effectively meet the need demonstrated. However, in the findings of fact the PSC has determined that GMT's position on Rocky Mountain is not supported by the record. The record shows that Rocky Mountain can meet the needs.

61. In regard to meeting the need, Rocky Mountain argues that the existing carriers first must be given the opportunity to serve before the PSC can conclude that the existing carriers cannot meet the established need. The PSC agrees, existing carriers must be given an opportunity to meet the need before it can be concluded that the need is unmet by existing carriers. Rocky Mountain argues that it has never been given an opportunity to meet the needs of GML and its guests. The PSC agrees and, under the circumstances, it would be improper to find that GML has given Rocky Mountain an opportunity to provide service to GML or GML's guests. GML has never negotiated with Rocky Mountain to the point where

it could be reasonably determined that Rocky Mountain cannot provide the services. Rocky Mountain has not been given the opportunity to serve.

62. However, this pertains to shuttle and bus service, not to local individual taxi service. There is no substantial evidence in the record that Rocky Mountain can or is willing to readily provide local taxi service to individuals to the local community (downtown Whitefish), on demand (spontaneous) as required by GML.

63. As a remaining minor point of dispute, Rocky Mountain argues that public convenience and necessity requires an affirmative showing that GMT's proposed operations are superior to those of the existing carriers. GMT argues that the record shows that its proposed operations are superior (year round, 24 hour, on demand, immediate response) and none of the existing carriers have offered or demonstrated a willingness to do the same. There is apparently some confusion in these two parties. Except when there is inadequate service, superior service is not a factor in a grant of authority in Montana (except in Class D authorities where competition is a valid consideration). A grant or denial turns on the elements identified above; consideration of superior service is not within those elements. Superior service (in all but Class D authorities) is approached through ability to serve (if a carrier is adequately serving, whether the carrier or the applicant have the "superior" service is inconsequential).

#### Harm to Existing Transportation Services

64. The third element for consideration is harm to existing transportation services. The PSC must consider harm to existing transportation services, including motor carriers. Even with a demonstrated need and showing that the existing carriers might not be able to meet that need, the PSC will not grant authority if the grant would result in a harm contrary to the public interest. However, this does not extend to the absurd and must be placed in proper perspective. It does not mean that a derelict motor carrier can prevent an applicant from obtaining authority because there will be some harm. It means that both an existing motor carrier performing its obligations, particularly including providing adequate services, and the public relying on those services can expect that those services and related operations

will not be impeded or harmed by a grant of additional authority, unless the public interest demands it. Additionally, there can be harm to existing carriers, even those who provide adequate service, to the extent that the harm is not contrary to the public interest.

65. No transportation service other than the motor carrier protestants participated in this proceeding through intervention, providing of comments, or otherwise. Although there is reference in the record to the existence of at least one other transportation service (i.e., WART), there is no indication that harm of any kind contrary to the public interest will come to it if GMT is granted authority.

66. As it pertains to the existing carriers, a determination of the extent of harm and whether that harm is contrary to the public interest if GMT's application is granted is somewhat unique to each of the types of carriers. It also depends on the extent to which the PSC determines that GMT has otherwise established that authority should be granted: the more limited the grant of authority the more limited the harm.

67. GMT argues that the existing taxi carriers have failed to meet their burden of establishing that a grant of authority to GMT will adversely affect them. In a sense, GMT's basis for this is simply a discounting of harm to the local taxi services and an inflation of the existing taxi carriers' apparent inadequacies. GMT argues that Johnson is unable to respond to calls and has concentrated on the airport business, that Michael has many private contracts including airport and train connections and various services in Kalispell, and that both taxis are located too far away to serve GML in a timely manner.

68. GMT's arguments confuse the element of ability to serve with the element of harm. The element of harm generally plays a role when it has been shown that the existing carriers cannot meet the need. An analysis of GMT's application could have ceased before this point, if the existing carriers had demonstrated an ability to meet all of the need established.

69. Johnson, to the extent he testified on harm, apparently sees harm as having already occurred. It can be inferred from his testimony (his opinion GML's transportation of guests has already contributed to the decline of his business) that GML's operations have harmed him and that GMT's proposed operations will continue to do so (or at least not remedy the past harm). However, given Johnson's relatively weak presentation in this case, it would

be difficult to conclude that the harm is contrary to the public interest. If for no other reason, there simply is no evidence that, if GMT's requested authority were denied, GML's resulting required use of Johnson (or other existing carriers) would be that one significant factor that would place Johnson in a position to operate a full-time, on demand, responsive service as required by GML or GML's guests. The PSC concludes that, to the extent Johnson is harmed by a grant of limited authority to GMT, the harm is not contrary to the public interest, under the circumstances. Regardless of the decision in this case GML will be able to transport guests between it and points of connection with common carriers.

70. Michael, stating that he is not firmly entrenched in the Whitefish area, sees harm in theory. It is his opinion that a harm is likely to result if GMT is granted authority and similar requests and grants occur with lodges in Michael's more immediate service area. The PSC concludes that this theoretical harm is too speculative under the circumstances to bar a grant of limited authority to GMT.

71. Rocky Mountain sees past harm in that each move by GML has been a move that Rocky Mountain could have done. It sees each move by GMT in the future as being one that Rocky Mountain could do. This is apparently not true of local (between GMT and Whitefish) spontaneous individual taxi service, which the record does not establish Rocky Mountain can do.

72. The PSC concludes that Rocky Mountain would be harmed by a grant of authority to the full extent as applied for by GMT. Rocky Mountain established that GMT's proposed operations have an adverse impact on it, the extent of the established adverse impact is not minimal and would be contrary to the public interest. The benefits do not outweigh the harm that may exist in this instance. GMT's application is broad. Regardless of what might be GML's intention on how it would employ GMT, the authority requested allows for transportation service far beyond that which GML, itself, has supplied for its guests to date. Essentially, it allows unlimited size and number of transportation movements (including charter by motor coach).

73. The PSC does not agree with GMT's argument that there is no evidence that Rocky Mountain will suffer harm as a result of a grant of authority to GMT. Although, to

some extent, the PSC agrees with GMT's argument that Rocky Mountain is ambiguous on the element of harm, it does not agree that loss of up to six GML movements with Rocky Mountain arranged by GML itself, (as occurred in 1993) is a negligible potential harm or that the \$20 thousand generated (5 percent of its annual motor coach division revenue) by the GML and GML guest-generated moves would not be reduced.

### Fitness

74. The fourth element is fitness. An applicant for motor carrier authority must establish that it is fit, willing, and able to provide the services proposed. See, § 69-12-415, MCA. The facts disclose that GMT has established this (primarily through the ability of its parent, GML, to properly form GMT as a fit motor carrier) and that when formed and operating it will be fit, willing, and able to provide adequate service within the scope of its proposed authority (or any part of it that might be granted by the PSC). The facts show that GMT will be of adequate financial condition, has established the intent to perform the services proposed, and (through GML staff and GML management) has experience through prior operations of GML. There is no substantial evidence to the contrary. There is no reasonable legal argument to the contrary. The PSC concludes that GMT is fit for purposes of its application.

### ORDER

75 All conclusions of law which can properly be considered an Order and which should be considered as such to preserve the integrity of this Order are incorporated herein as an Order.

76 All pending motions, objections, and arguments, not ruled on previously or in this Order (if any) are denied to the extent that such denial is consistent with this Order.

77 The PSC, being fully apprised of all premises, **HEREBY ORDERS** that the application of Grouse Mountain Transportation Company be **GRANTED IN PART, SUBJECT TO LIMITATIONS AND CONDITIONS**, as follows (precise language, but not substance, subject to change in certificate to promote continuity with authorities in general):

**CLASS C, passengers, service to Grouse Mountain Lodge for its registered guests, between Grouse Mountain Lodge and (a) all local points of connection with common carriers and (b) all points within the City of Whitefish. Service by limousine is prohibited.**

**78 The grant of authority will be effective on GMT's compliance with pre-operational statutes and rules administered by the PSC.**

**Done and Dated this 6th day of April, 1995, by a vote of 2 -1.**

**BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION**

---

**NANCY MCCAFFREE, Chair**

---

**DAVE FISHER, Vice Chair**

---

**BOB ROWE, Commissioner, Presiding  
(Voting to Dissent - Attached)**

**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 ARM 38.2.4806.**

**FINAL ORDER NO. 6362, DOCKET NO. T-93.162.PCN**

**DISSENT OF COMMISSIONER ROWE**

**I dissent from the majority's decision to limit Grouse Mountain Transportation's authority to points of connection with common carriers and to points within the City of Whitefish.**

**First, as argued in my dissent in Matter of Grouse Mountain, PSC Docket No. T-93.33.DR (Petition for a Declaratory Ruling) , I do not believe accommodative transportation of lodging guests by the lodge, at no charge to the guest, should be regulated. The Commission majority's restrictive interpretation of the "primary business test" exception to regulation potentially subjects to regulation activities currently undertaken by unregulated lodging operators. Beyond ensuring that such transportation is safe and reliable, I am not persuaded that this extension of regulation is either in the public's interest or in the interest of the regulated passenger industry in Montana. Instead, it may create an unsustainable tension between two important Montana industries.**

**Second, if such transportation is to be regulated, I believe the grant of authority in this case is too narrow. The decision prohibits Grouse Mountain from carrying guests to and from the Big Mountain ski area, an activity integral to its resort lodging business. Historically, Grouse Mountain has provided its guests this service. It should be permitted to continue to do so.**

**The grant of authority is also inadequate in that it fails to address Grouse Mountain's need for spontaneous transportation of small groups. Grouse Mountain owns several 15 passenger vans, which are ideally suited for transporting small groups to area golf courses and other attractions. The record does not indicate that this service may satisfactorily be provided either by the two taxi services or by Rocky Mountain Transportation's busses.**

**I strongly disagree with the Commission's decisions concerning accommodative transportation of lodging guests. However, I commend the care with which the Commission made those decisions. Determining the proper interpretation of the "primary business test" exception to motor carrier regulation involved a number of proceedings brought by various parties, including a declaratory ruling and a rulemaking procedure, as well as district court**

**litigation undertaken by one party displeased with a determination that a potential rival was exempt from regulation. While my position did not prevail, the Commission acted responsibly in attempting to consistently address conflicting claims in various cases.**

**Additionally, throughout the time the Grouse Mountain declaratory ruling, the rulemaking proceeding, and the present application for public convenience and necessity were pending, Grouse Mountain was allowed to continue transporting guests as it had done previously. I appreciate the Commission's willingness to avoid harming the applicant while it considered the allegations of harm by protestants.**

**Finally, this case concerned in part a dispute between several outstanding Flathead-area businesses, each of which will play an important role in the area's continued vitality. The background issue was the continued adequacy and availability of transportation services for the region generally. I hope the parties to this case will work together where possible to provide continually-improving transportation service to the area's residents, businesses and visitors.**

**RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of April, 1995**

---

**BOB ROWE, Commissioner**