

Service Date: December 28, 1994

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

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IN THE MATTER OF THE)	TRANSPORTATION DIVISION
APPLICATION OF DAVID O'NEILL,)	
Billings, Montana for a)	
Class B, Montana Intrastate)	DOCKET NO. T-93.175.PCN
Certificate of Public)	
Convenience and Necessity.)	ORDER NO. 6286a

FINAL ORDER

APPEARANCES

FOR THE APPLICANT:

Jerome Anderson, Esq., P.O. Box 866, Helena, Montana 59624

FOR THE PROTESTANTS:

David L. Jackson, Esq., 203 N. Ewing Street, Helena, Montana 59601, representing Buena Vista Trucking, Dick Irvin, Inc., Mike McGinley Trucking, Inc., and Prince, Inc.

FOR THE COMMISSION:

Denise Peterson, Staff Attorney, and Bonnie Lorang, Program Director, Transportation Division, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana 59620-2601

BEFORE:

NANCY MCCAFFREE, Commissioner and Hearing Examiner
DAVE FISHER, Commissioner

BACKGROUND

1. On December 20, 1993 David O'Neill filed an application with the Montana Public Service Commission (Commission) for Class B authority to transport fertilizer and fertilizer ingredients between all points in Montana. This application was properly noticed.

2. Buena Vista Transport, Inc., Huntley, Montana (Protestant) filed an Answer and Protest and served Interrogatories on the Applicant on January 24, 1994. Protestant holds a lease of PSC Certificate No. 9188 for Class C statewide authority to transport commodities as are dealt with or used by farm supply cooperatives.

3. Others protesting the application included Prince, Inc., Dixon Bros., Inc., Cenex, Inc., Mike McGinley Trucking, Inc., WT, Inc., and Dick Irvin, Inc.

4. Dixon Bros., Inc., withdrew its protest upon acceptance of the following language: "Fertilizer and fertilizer ingredients (except anhydrous ammonia fertilizer and liquid commodities when moving in tank vehicles) between all points in Montana." Cenex also agreed to withdraw upon acceptance of this stipulated language.

5. On February 17, 1994, Protestant Buena Vista filed a Motion to Compel Production of Discovery, alleging that inadequate answers made it difficult to prepare for hearing. Applicant responded that he provided true and correct answers and would give the same answers again to the same questions.

6. The Commission duly served notice of the Application for public hearing on February 25, 1994, to be conducted beginning at 9:00 a.m. on Friday, March 25, 1994 in the hearing room at the offices of the Commission, 1701 Prospect Avenue, Helena, Montana.

7. At a publicly noticed work session held March 8, 1994, the Commission granted Protestant's Motion to Compel. Order No. 6286 directed Applicant to file responsive answers on or before March 17, 1994. Applicant's pro se appearance did not relieve him of the duty

to comply with procedural requirements. The Commission vacated the hearing date and Applicant obtained counsel.

8. The Commission conducted a publicly noticed hearing on May 19, 1994 at the Commission offices in the Gordon Bollinger Room, 1701 Prospect Avenue, Helena, Montana. A quorum was not present and parties stipulated to a final order following a briefing schedule.

Summary of Testimony

Applicant's Witnesses

9. **David O'Neill** (Applicant), Billings, Montana, is presently a sole proprietor doing bulk hauling of fertilizer, coal and grain. He has been in the hauling business since 1963 when he began hauling gravel at Baker on lease. Later he hauled meat on lease from Billings to all points in the United States. Through the years he has taken care of equipment, dispatched, and leased his equipment for sundry types of operations. Now he is hauling coal to Wyoming and North Dakota, grain to North Dakota and Minnesota and fertilizer to North Dakota on his interstate authority, and feed products in Montana.

10. Applicant has a satisfactory rating from the Department of Transportation and has a certificate from Montana Motor Carriers Association to work on his own equipment. His 35 by 70 foot shop with a drive through bay can hold four tractors. His equipment includes a 1989 truck and 1992 trailer. He has available initially for lease seven trucks and six trailers. Applicant intends to serve all points and places in Montana -- plant sites, farms, warehouses and ranches. He and his lessees will have insurance, with him as named insured.

11. Mr. O'Neill was recalled to answer questions about hauling herbicides with fertilizer. In a three by eight foot part of tractor behind the sleeper cab, there is a tarped, secure, separate area from the bulk fertilizer. Also, in the rear end there is an eight by eight foot area segregated apart from the bulk load. He is offering to shippers the service of carrying bags of herbicide apart from the bulk

fertilizer. He had not costed out a separate tariff category for additives.

12. **Danny C. Henrichs**, Billings, has a 1989 Peterbilt truck and a set of grain trailers which can legally haul 37 tons. He has been in the trucking business 13 years, without authority; he leases to individuals. Today he is under lease to C & A Trucking, Billings, for ICC operations. He has also leased to Buena Vista and Cenex in the past. He cancelled his lease to Buena Vista in December, 1993 because he was not getting paid. He was willing to lease equipment to O'Neill. He testified that most owner operators provide insurance and put the certificate holder on as additional insured.

13. **Harry Croft**, Billings, father of Charles Croft, holder of PSC No. 3467 purchased from Yellowstone Molasses, testified that he has hauled fertilizer and livestock under both interstate and intrastate authority. After meeting with Cenex, no one would lease to Buena Vista, he testified.

14. **Clyde Ryder**, sole proprietor of C & A Trucking, Billings, hauls fertilizer under ICC authority. Previously he leased to Buena Vista for two years. It took two months to get paid. He has two tractors, one set of grain hoppers and one set of doubles. He intended to lease intrastate to O'Neill and operate under his own ICC authority at the same time.

15. **Allen Halsne**, Laurel, Montana, fertilizer plant manager for Laurel Cooperative Association, retails fertilizer products. The plant food division is located at Edgar, 15 miles south of Laurel, and Bridger, 15 miles south of Edgar. Edgar is served by rail carrier, while Bridger is not, but both are served by Class A motor carriers, he testified. The Coop distributes products into Wyoming and Reed Point area, west, Billings, Pryor, generally within a 100 mile radius of Edgar and Bridger. They serve farmers and ranchers to the plant site and directly to the ranch. They purchase from Silver Bow or Billings.

16. Mr. Halsne has used regulated service to deliver fertilizer in the past. There were not enough trucks to go around this year. The service is seasonal, daily in the spring and fall seasons. Storage is limited. As the season progresses, the demand for the product increases. This year, after being told that truckers no longer had authority, he arranged for out-of-state supply points in Idaho, changing the pattern of purchase. Prince solicited his business last fall, and Dick Irvin the previous week. Customers demand prompt service. With Croft out of the picture, there is the loss of six or seven trucks. Dick Irvin has provided service as recently as the last week.

17. Mr. Halsne testified that one-third, or 2,000 tons were inbound interstate in 1993; of this about 1,200 tons were shipped by rail. Rail rates out of Florida are about \$45-47 per ton. Simplot out of Idaho charges \$19 per ton into Edgar. Mr. Halsne stated that the intrastate rate was \$5.85 from Billings to Edgar or \$6.85 to Bridger. He will buy from Pocatello if the overall price is cheaper, but cannot get same day service, which is a drawback. He uses some general common carriers for bagged fertilizer, about 30 tons. Mr. Halsne testified at length about the chemical nature of fertilizers. There was some discussion on whether he could transport herbicides and insecticides when mixed with the fertilizer, or bagged separately. He believed that when mixed with the fertilizer, these ingredients were part of the fertilizer.

18. Mr. Halsne testified that Prince and Irvin have provided service, but not W T, Inc. He does not know Mike McGinley. He has tendered traffic to Prince, but not in the past year. He does not like pneumatic loaders, which Prince has. He likes hopper bottoms because the loader can look down and see if it is contaminated. He is only able to inspect those trucks loaded at his plant. He expects truckers to solicit him, which they have not done. In conclusion on cross-examination, Mr. Halsne testified that he does not make the arrangements for shipping. He calls the manager, Keith, in Billings Cenex who lines up the truck or sends Cenex's own truck. The price for shipping is included in the price for the fertilizer, and he gets the bill from Cenex. Typically, he receives no bills for transportation, but the cost is "delivered cost," so he concluded that he pays the freight.

19. **Bernard Kehrwald**, Billings, managed Farmers Union Oil at Worden, a cooperative affiliated with Cenex, for 19 years. Its primary source is Billings Cenex for Montana traffic. Cenex buys and stocks fertilizer, and Farmers Union purchases directly through Cenex as a member. Most fertilizer is provided FOB Billings. He usually does not call and arrange for carriers. While Croft has provided satisfactory service, he would like to see service continued under O'Neill who provided service under lease until recently. Keith has arranged all transportation up to this year. This year so far, he used storage in Billings.

20. **Dan Marx**, Bozeman, is a farm store supplier, Gallatin Farmers Co. in Belgrade. He serves 120 mile radius from Belgrade, moving 5,500 tons of fertilizer. Although he obtains fertilizer from the Port of Butte and Cenex Soil Center of Billings, he prefers to pull out of state to get the cheaper rate on back hauls. In 1992-94, he obtained most shipments from out of state. Probably 7-800 tons came from the Billings warehouse by truck. He only has 2,300 tons of storage in Belgrade. He mixes herbicide at the plant. He used Mike

McGinley in the past, who did a "real respectable" job. As well, he has used W T, Inc. (dependable) and Croft (timely in past).

21. When Mr. Marx needs service, he needs it in six hours. He felt that truckers should solicit his business, and had not received calls from Irvin. Prince called the "other day," but generally has failed to drum up business. He has heard from Mike McGinley in the past, but not from Buena Vista. He testified that Keith usually organizes the trucks. Occasionally, Mr. Marx will send directions. Mr. Marx had no preference for carriers, only who would get the product delivered in a timely fashion.

22. **Paul Seilstad**, Winifred, Montana, operates Harvest States Cooperative (out of St. Paul, Minnesota, not part of Cenex) for both Winifred and Lewistown plants. Lewistown has 1,000 tons fertilizer storage. They mix the fertilizer blends there and distribute along the Missouri River to Roundup, Jordan to Monarch. Their sources are the Cenex Soil Service in Billings and Butte Silver Bow. They average 2,000 to 5,000 tons distributed a year, with 3,500 to 4,000 to the date of the hearing. Most shipments came from out of state, he testified; ten percent of the shipments come from instate.

23. On cross-examination, Mr. Seilstad clarified his testimony. Keith lines up the trucks; most transportation is through the Billings Cenex. Keith pays and the freight is added into the price. But the customer pays in the long run. He has used Buena Vista, but has not been solicited by other carriers. He does not pay the trucker.

Protestants' Witnesses

24. **Mark Cole**, Shelby, Montana, is the general manager of Dick Irvin, Inc., an irregular route motor common carrier in the United States and Canada. Irvin's principal business is in dry bulk pneumatic carriers, but it has hoppers, flatbeds and intermodal units, too. Irvin has equipment stationed in Billings, Helena and Shelby, with shop work done in Helena and Shelby.

25. Irvin dispatches from Shelby, with 17 inbound line and six dispatchers, 24 hours a day, 7 days a week on a 1-800 toll free number. Irvin also accepts collect calls. Irvin's gross revenue from fertilizer is about 25 to 26 percent of its business. Irvin has 65 employees, of which 35-40 drivers are located throughout Montana. Both Cole and Mike Irvin solicit business. They participate in agricultural associations, advertise in the Yellow Pages in 25 telephone books, make calls and follow-up on the customer base. They have not had direct contact with Mr. Marx of Gallatin County Cooperative, but have had contact with others. They called Farmers Union and received no answer last week. He talked to Mr. Halsne last week, and in fact, they talk frequently about interstate transportation. Halsne has not demanded intrastate service. Irvin has worked for Laurel Coop and Harvest States, both Lewistown and Winifred. Mr. Cole was not aware of any difficulty. He was unaware of any shippers' difficulties, and would provide service by hopper bottom, or whatever was requested. Cenex Soil was one of their biggest accounts, and they have already felt the effects of competition.

26. On cross-examination, Mr. Cole testified that Irvin's total gross revenues are about \$15 million annually, and less than 1 percent comes from the Cenex Warehouse in Billings, or \$15-16,000 in 1993. Intrastate movements from Silver Bow account for about \$100-125,000 per year. Interstate transportation is arranged by Simplot in Billings or Laurel coop or Harvest States. There was some cross-examination on the cement hauling business, which Mr. Cole said is reduced as a result of shipments by rails. Mr. Cole conceded that if the application is granted, the net result to Irvin, Inc., would be about \$7,500.

27. **Carroll Kaup**, Forsyth, Montana, is the dispatcher, rate person and solicitor of accounts for Prince, Inc., a dry bulk commodity hauler. Prince has 50 power units, including 36 pneumatic co-owned units available for bulk fertilizer. Eight units are in Billings, one in Three Forks, one in Glendive, and the rest in Forsyth. Prince has a terminal in Billings. There are around 100 employees, of which 40-50 are drivers (8 in Billings, 1 in Three Forks, 1 in Glendive, and the rest in Forsyth). Prince has five telephone lines and accepts collect calls. For solicitation, they call anyone who they think may need a load hauled. In 1993, Prince hauled 20-25 loads of bulk fertilizer, or \$10-12,000 out of \$2.5 million gross revenues. They would accept more traffic. If the application were granted, Prince would lose business and suffer some harm.

28. **Mike McGinley**, Bozeman, recently acquired authority. He worked for five years for Peavey at Belgrade and leased to W T, Inc. for 17 years. He has three employees and five owner operators. As a new operator, he is trying to get solicitation going. He has sent letters to shippers and made telephone calls and personal contacts. His efforts have not been rewarding. He has the financial capacity to add authority if needed. His wife does most of the dispatching. The trucks have cellular phones. He will accept collect calls. He wants traffic and will provide service. Granting this application would cause him some difficulty.

FINDINGS AND DISCUSSION

29. 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. To obtain 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.

30. 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.

31. 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

32. 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 appli-

cant; (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.

33. Applicant meets the threshold requirement of fitness, having the ability to perform the service, the experience, the financial wherewithal, the intention to perform the service, and adequate equipment available. There were no allegations of illegality.

Public Need and Convenience

34. 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. at 203.

35. The public need to meet in an application for a certificate of public convenience and necessity is shipper need. The Commission finds that Applicant did not demonstrate a shipper need that cannot be met or is not being met, despite the extensive testimony. The witnesses who distribute the fertilizer do not actually arrange for the shipments or pay the freight, i.e., they are not "shippers." Other witnesses testified only that their equipment was available for lease.

Essentially, there was no shipper testimony and no demonstration of shipper need. Therefore, the Commission finds that the application should be denied.

36. The Commission does not need to address the issue of harm to existing carriers since shipper need was not established. Obviously, the major established carriers would not be harmed by the proposed operation, while the newer, less entrenched carrier might suffer.

37. This decision follows traditional analysis, which was turned on its head by an Act of Congress that will become effective on January 1, 1995. After that date, intrastate motor carriers of property will not be regulated by the Commission, unless there is an extraordinary and unanticipated reversal of this Act. Based on the record in this Docket, the Commission could not approve the application. The Commission notes that the matter will become moot on January 1, 1995 when Applicant, along with other carriers, will not require a certificate of public convenience and necessity. The Commission, however, supports insurance requirements which may still be subject to the state jurisdiction, according to the Act. At a minimum, insurance requirements will protect the public as it ships in an unregulated market.

CONCLUSIONS OF LAW

38. 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.

39. 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.

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

41. Applicant has failed to demonstrate a public demand or need for the proposed service which existing carriers cannot meet.

ORDER

NOW THEREFORE IT IS ORDERED that the application of DAVID O'NEILL, Billings, Montana for a Class B Certificate of Public Convenience and Necessity to haul fertilizer and fertilizer ingredients between all points and places in the State of Montana is DENIED.

Done and Dated this 21st day of December, 1994 by a vote of 5 -
0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

BOB ANDERSON, Chairman

BOB ROWE, Vice Chairman

DAVE FISHER, Commissioner

NANCY MCCAFFREE, Commissioner
& Hearing Examiner

DANNY OBERG, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: You may be entitled to judicial review in this matter.
Judicial review may be obtained by filing a petition for
review within thirty (30) days of the service of this order.
Section 2-4-702, MCA.