

Service Date: January 18, 1994

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

IN THE MATTER OF JIM LUTZ, dba) TRANSPORTATION DIVISION
LUTZ TRUCKING, Bowman, North)
Dakota, Application for Intrastate) DOCKET NO. T-93.29.PCN
Certificate of Public Convenience)
and Necessity.) ORDER NO. 6276

FINAL ORDER

APPEARANCES

FOR THE APPLICANT:

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Attorneys at Law, P.O. Box 1250, Glendive, Montana 59330.

FOR THE PROTESTANTS:

Jerome Anderson, Attorney at Law, P.O. Box 866, Helena,
Montana 59624, appearing on behalf of Dixon Brothers, Inc.

Charles A. Murray, Jr., Attorney at Law, 2812 First Avenue
North, Suite 210, Billings, Montana 59101, appearing on
behalf of Keller Transport, Inc., and S-B Transportation,
Inc.

FOR THE COMMISSION:

Martin Jacobson, PSC Staff Attorney, and Bonnie Lorang,
Program Manager, PSC Transportation Division, 1701 Prospect
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BEFORE:

DANNY OBERG, Commissioner & Hearing Examiner

FINAL ORDER BEFORE:

BOB ANDERSON, Chairman
BOB ROWE, Vice-Chairman
DAVE FISHER, Commissioner
NANCY MCCAFFREE, Commissioner
DANNY OBERG, Commissioner

INTRODUCTION

1. On February 23, 1993, Jim Lutz, dba Lutz Trucking (Lutz), of Bowman, North Dakota, filed before the Montana Public Service Commission (PSC) an Application for Intrastate Certificate of Public Convenience and Necessity. In the application Lutz requests Class C motor carrier authority, petroleum products, limited to gasoline and diesel fuel, for service between points in Dawson County and Fallon County, Montana, for the account of W.J. Inc., dba Shuck's Gas and Oil (Shuck's).

2. Protests to the application were received from Dixon Brothers, Inc. (Dixon), Keller Transport, Inc. (Keller), and S-B Transport, Inc. (S-B). All Protestants are motor carriers with existing authority to provide the transportation service proposed by Lutz.

3. A public hearing on the application was held July 16, 1993, in Glendive, Montana. The Applicant and Protestants were represented by counsel. Witnesses for the applicant and witness-

es for the Protestants testified, documentary evidence was received, and the parties stipulated to a final order. Briefs have been submitted and the PSC has now considered the matter.

4. The PSC acknowledges that the case presented by Lutz demonstrates a number of good reasons which approach being sufficient to support a grant of authority. However, as will be explained below, several important points in motor carrier law require that the PSC deny the request. This is a difficult, but necessary decision.

FINDINGS OF FACT

5. 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.

6. Lutz is the owner and operator of Lutz Trucking. He has been involved in the trucking business for about eight years and spent a number of years driving a truck prior to that. He has fuel transportation vehicles and equipment based in Bowman, North Dakota, and in Baker, Montana. He currently holds some intrastate motor carrier authority in North Dakota and some interstate motor carrier authority.

7. Shuck's, the sole proposed shipper, is an oil and gas bulk plant in Baker, Montana. Until recently, Shuck's owned and operated its own vehicle and equipment for transporting its product (fuel) in what was a North Dakota and Montana business comprised of several bulk plants. Shuck's original business has been sold, the Montana part (still named Shuck's) having been purchased by the prior manager and part owner, Larry Merwin (Merwin).

8. At the time of the sale of the original Shuck's, its vehicle and equipment were sold to Cenex and later purchased by Lutz. During the time of the sale of the business, Lutz and Merwin agreed that Merwin would engage Lutz for required transportation of fuels and Lutz would maintain the vehicle and equipment at Merwin's business and hire a local driver, Marvin Schopp (Schopp), a former employee of Shuck's. Schopp is experienced in Shuck's business, familiar with its operations and customers, and has performed various duties, including gauging inventory and keeping supplies adequate.

9. The scope of the intended operation of Lutz and the need for service by Shuck's has been stated in differing ways. Lutz, in responding to an interrogatory by Keller and S-B, which asked for the type of goods shipped, the amount shipped per week,

and the general destination, expressed that the goods are diesel fuel and gasoline, approximately 32,000 gallons per week, delivered to Baker, Montana. At hearing Lutz also testified that the only service that he proposes is a direct service from the terminal in Glendive to Baker. At hearing, Merwin's testimony expanded upon this to some extent. In support of the proposed service, Merwin also expressed an apparent need for transportation service to Shuck's area agricultural and industrial fuel customers.

10. In any event, the record discloses that Shuck's has demonstrated a need for transportation of gasoline and diesel fuel from Glendive to its Baker operation. The predominant extent of the need ranges around 100 loads per year depending on circumstances. The exact quantity per load was not specified, but the expressed amount of 32,000 gallons per week will suffice for purposes here.

11. The record also demonstrates that Lutz can provide several "special services" to Shuck's by maintaining the vehicle at Shuck's and employing Schopp as the driver. In theory this arrangement allows Shuck's to maintain lower inventory and rely on a former trusted and experienced employee. In these regards, Shuck's established a preference for Lutz providing the transpor-

tation service.

12. The Protestants, Keller, S-B, and Dixon, are motor carriers. They each hold authority to provide the services proposed by Lutz. The record indicates that the Protestants are fit, willing, and able to provide service to Shuck's.

13. Keller has three power units with body tanks and trailers available and stationed in Glendive. These are underutilized, according to Keller. Keller is willing to provide the service to Shuck's, including delivery to farms and oil fields. Dixon has a power unit, trailer, pup trailer, and an operator based in Glendive for transportation on a 24 hour basis. It can meet the expressed six-hour need to Shuck's business or contract customers and is willing to meet all service requirements expressed. Dixon testified that Shuck's business would be important to it, as it presently has underutilized equipment.

14. The weakest part of any of the Protestant's cases is that S-B does not appear to maintain a "presence" in the area. Although S-B has no equipment stationed in Glendive, it testified that can do so without problem.

15. In regard to the Protestants, Shuck's has not attempted to contact any of them for service. The Protestants, as existing carriers, have not been given the opportunity to provide service.

Absent an opportunity and any adverse results that might have developed (if any), in all pertinent regards, the record discloses that existing carriers can and will fulfill the transportation needs identified by Schuck's. One or all of the existing carriers can meet the needs expressed.

16. There is minimal evidence on the extent to which a grant of authority would harm the Protestants, as existing carriers. There would be no loss of existing market share. The closest this matter comes to demonstrating harm is that several of the existing carriers have underutilized equipment. There is no evidence of harm to other transportation services.

17. Lutz is fit to operate as a motor carrier. The facts indicate that Lutz is fit, willing, and able to provide the service proposed. The record discloses that Lutz has a good financial condition and operating record as a motor carrier, intends to and can operate permanently, trains and monitors his drivers, including hazardous materials transportation, has adequate equipment and backup available, and regularly inspects and maintains his equipment and retains records of this. The only "blemish" on fitness is that Lutz apparently engaged in illegal operations in transporting five loads of petroleum product to Shuck's in March, 1993. It is unclear whether Lutz

knew the transportation was illegal or believed that the transportation was under a proper lease of power equipment.

CONCLUSIONS OF LAW

18. 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.

19. Lutz has demonstrated some positive points. A grant to Lutz would not cause the Protestants to lose market share. It is doubtful that the Protestants would be significantly harmed. Lutz's combination of dedicated truck, experienced driver, and familiarity with Shuck's operations are notable. The isolated geography and Shuck's competitive market tend to favor a grant. In addition, three out of the four requirements for a grant are met. However, as close as all of this may come, the law simply does not allow the PSC to grant an authority.

20. The regulation of motor carriers has long been held to be "a legitimate and wise exercise of the police powers of the state." See, Stoner v. Underseth, 85 Mont. 11, 20-21, 277 P. 437, 441 (1929). The alternative of unregulated competition may have fleeting benefits, but is ultimately destructive. See

generally, Rozel Corporation v. Department of Public Service Regulation, 226 Mont. 237, 242, 44 St.Rptr. 618, 622, 735 P.2d 282, 286 (1987). The required certificate of public convenience and necessity is reasonably devised to protect the public from the evils incident to unregulated competition. Barney v. Board of Railroad Commissioners, 93 Mont. 115, 129, 17 P.2d 82, 85 (1936). The PSC cannot reasonably depart from the legal standards without placing motor carrier regulation at risk.

21. In the interests of preserving a strong motor carrier industry and promoting stability and predictability in motor carrier cases, the PSC cannot depart from established principles in an effort to meet a particular interest, even though there may be some apparent supporting rationale under the circumstances. Insofar as motor carrier laws pertaining to a grant of authority are concerned, there is a fixed and recognized standard and there are fixed and recognized elements of that standard that have historically been applied by the PSC and consistently upheld on review.

22. Lutz has argued, citing to cases and statutes applicable in federal motor carrier regulation, that protestants must demonstrate that the issuance of additional authority will be contrary to the public interest, will be inconsistent with the

public convenience and necessity, or will jeopardize existing operations. Montana uses the "public interest" and "harm" criteria in its consideration. However, these concepts should not shift any initial burden from an applicant (to prove need) to a protestant (to prove no need). Such an interpretation would clearly depart from Montana law.

23. Federal motor carrier law is generally applicable to interstate regulation not intrastate. However, for many years federal and Montana motor carrier regulation were similar and the PSC could look to federal interpretations (accepting or rejecting them) as guidance in administering Montana motor carrier law when the federal interpretations were on point and consistent with Montana law. E.g., In the Matter of L.L. Smith Trucking, PSC Docket No. T-5859, Order No. 4373, p. 20 (Sept. 13, 1982), where the PSC rejected, as not persuasive, a 1979 ICC ruling (effects of a grant on existing services would not be considered) because it was contrary to Montana statute.

24. Additionally, the federal Motor Carrier Act of 1980 (P.L. No. 96-296, 94 Stat. 793) radically changed motor carrier regulation at the federal level. The federal cases and statutes referenced by Lutz appear to stem from federal regulation applied since this change. This "new" federal motor carrier law, related

administrative rulings, and case law reviewing or interpreting the same, generally have little remaining similarity to Montana motor carrier regulation and cannot be considered as persuasive.

Cf., In the Matter of Big Z, pp. 29-30, PSC Docket No. T-9511, Order No. 6019a (Sept. 20, 1991).

25. Lutz also argues that the Protestant's testimony relates solely to competition which, under Sec. 69-12-323, MCA, may only be considered in Class D carrier applications. Lutz is correct in reference, but has misinterpreted the meaning and effect. The effect of Sec. 69-12-323, MCA, is to allow the PSC to grant a Class D authority on the basis of competition, if it appears that the competition supplied by the Class D applicant would be in the public interest. This is unique to Class D and exists because the PSC does not have power to regulate rates or quality of service of Class D carriers and therefore cannot directly substitute for competition.

26. In all other regards, statements to the effect that "competition is not a factor," e.g., H.R. Roberts, infra, 790 P.2d at 494, in motor carrier regulation are directed to the principle that competition in the carrier industry is destructive. In this "negative" sense, competition is a primary consideration in applications for motor carrier authority and would be

a point that protestants would naturally stress.

27. The PSC will grant motor carrier authority when the "public convenience and necessity" requires authorization of the service proposed. See, Section 69-12-323(2), MCA. Public convenience and necessity will be deemed as requiring a grant of intrastate motor carrier authority in Montana when each of the required elements has been demonstrated. For the elements, see generally, State ex re. H.R. Roberts v. Public Service Commission, 242 Mont. 242, 250, 47 St.Rptr. 774, 780, 790 P.2d 489, 494 (1990); Big Z, supra, at pp. 24-25.

28. In the 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:

Applying this language 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.

29. The first element concerns a "need" for the service. There must be a demonstrated need for the services proposed. If there is no such demonstrated need, public convenience and necessity does not require a grant of authority. Lutz, through his supporting shipper, Shuck's, has established a need for transportation of gasoline and diesel fuel from Glendive to Baker.

30. In arguments Lutz also relies on the existence of a special need (maintenance of vehicle at Shuck's, employment of Schopp as an experienced employee), a preference by Shuck, and an ability in Lutz to fulfill those. In this regard Lutz references In the Matter of Early Bird Enterprises, PSC Docket No. T-9651, Order No. 6069 (Nov. 1, 1991). In Early Bird the shipper had contacted an existing carrier and arrangements could not be made for special needs in the shipper. In Lutz the matter is not the same. First, existing carriers must be given the opportunity to

provide the service before the PSC can conclude that the carrier will not or cannot perform as the shipper needs. See generally, In the Matter of Keller Transport, Inc., p. 24, PSC Docket No. T-8784, Order No. 5647a (1986). Second, in Early Bird, the needs for service were transportation needs. They were not needs that fall outside of that being related to transportation which are not generally recognized as a "need" within motor carrier regulation.

31. The second element involves the ability of existing motor carriers to meet the demonstrated need. If existing carriers can meet the need, public convenience and necessity does not require a grant of an additional authority. One or more or all of the existing carriers protesting the application (Keller, S-B, and Dixon) can meet the transportation needs established by Shuck's.

32. The third element regards the affect that a grant of authority would have on existing transportation services. If existing transportation services would be harmed by a grant of authority and that harm is contrary to the public interest, public convenience and necessity does not require a grant of authority. As it pertains generally, this element applies only when existing carriers cannot meet the need. The carriers can

meet the need and harm is essentially irrelevant or need not be considered.

33. The fourth element is fitness of the applicant requesting authority to perform the services proposed. If an applicant is not fit, willing, and able to perform the services, public convenience and necessity does not require a grant of authority.

With the possible exception for several transportation movements without authority, Lutz is fit, willing, and able to provide the services.

34. From the above, in this case one of the elements of "public convenience and necessity" dictates that the requested authority for the proposed services cannot be granted. Public convenience and necessity does not require a grant of authority for the services proposed. One or more of the existing motor carriers, already authorized to perform the services, can meet the demonstrated need.

35. As a final point, Lutz has made a general argument that the "public advantages" and "convenience of the shipping public" in Sec. 69-12-202, MCA, "no harm to existing carriers" by a grant of this limited authority in this isolated community, and "reasonable consideration to existing transportation services" in Sec. 69-12-323, MCA, does not mean undue consideration, justify a

grant of authority.

36. The PSC respectfully disagrees. "Public advantages" and "convenience of the shipping public" are not "stand alone" provisions. In context, they are fully met by the law applying to the standard of public convenience and necessity. "No harm to existing carriers" is not a basis for a grant of authority. Harm to existing carriers is considered only when existing carriers cannot meet the need, but a grant would impart "harm" contrary to the public interest. The argued distinction between "reasonable consideration" and "undue consideration" might have merit in the context of harm to existing carriers, but it has none in the context of whether existing carriers can and will meet the established need.

ORDER

1. 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.

2. The Montana Public Service Commission, being fully apprised of all premises, HEREBY ORDERS that the Application for Intrastate Certificate of Public Convenience and Necessity filed by Jim Lutz, dba Lutz Trucking, Bowman, North Dakota, be DENIED.

Done and Dated this 18th day of January, 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

DANNY OBERG, 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.