

Service Date: October 14, 1994

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

* * * * *

IN THE MATTER OF GROUSE MOUNTAIN)	TRANSPORTATION DIVISION
ASSOCIATES, LTD., dba GROUSE)	
MOUNTAIN LODGE, Petition for)	DOCKET NO. T-93.33.DR
Declaratory Ruling on the)	
Application of Motor Carrier Laws)	ORDER NO. 6193b
to the Transportation of Hotel)	
Guests.)	

ORDER ON RECONSIDERATION

1. On September 1, 1993 the Public Service Commission (PSC) issued a Declaratory Ruling in the above-entitled matter (Grouse Mountain). That ruling held that certain "courtesy transportation" by Grouse Mountain Associates, Ltd., dba Grouse Mountain Lodge (Grouse Mountain), is in part regulated motor carriage, as being within the definition of "motor carrier," and in part unregulated private carriage, as being incidental to Grouse Mountain's principal business of providing lodging, food, and beverages.

2. On September 9, 1993, Randall Johnson, dba Flathead Glacier Transportation and Whitefish Sober Chauffeur Taxi, Inc. (Johnson), a participant in opposition to Grouse Mountain's requested ruling, filed a Request for Partial Reconsideration. On September 13, 1993 Grouse Mountain filed a Motion to Reconsider and Brief pertaining to the PSC's ruling. On September 23, 1993 Johnson filed a response to Grouse Mountain's motion.

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3. On October 25, 1993 the PSC deferred action on reconsideration and stayed enforcement of the September 1, 1993 ruling, pending consideration of administrative rules on the principal legal theory applying, the "primary business test." Rules codifying this existing law were noticed to the public, comments were then received and considered, and rules were adopted by the PSC, effective June 23, 1994. See, ARM 38.3.1001 through 38.3.1005.

4. The objective of rulemaking was to take the governing legal concept (primary business test) out of several then-pending fact-specific contexts and place it in a setting where it could be considered "in general." The PSC believes that the objective was met and that the resulting rules, although confined only to the basics of the primary business test, will be a benefit in considering primary business test matters.

5. The adopted rules will apply on reconsideration of Grouse Mountain. However, the PSC is not making "new" law apply retroactively. In a Declaratory Ruling the PSC merely declares activity lawful or unlawful, not in past, but in the present. Furthermore, the rules merely codify existing law and amount to no more than that which could have been stated on reconsideration by order, without rules. Nevertheless, where the new rules might be applicable, but mere citation might be inadequate explanation, discussion will be included.

6. On reconsideration the PSC concludes that the September 1, 1993, Declaratory Ruling will be affirmed. Although the PSC

could simply deny reconsideration without opinion, it is believed that a written opinion is appropriate in an effort to assist all involved in better understanding the basis for the initial ruling and this ruling on reconsideration.

7. On reconsideration Johnson argues that the case law upon which the Montana primary business test is based, Board of Railroad Commissioners v. Gamble-Robinson Co., 111 Mont. 441, 111 P.2d 306 (1941), "specifically states" that the test does not apply to the transportation of persons. On this same point, Johnson also argues that at least one federal case, Red Ball Motor Freight v. Shannon, 377 U.S. 311, 84 S.Ct 1260, 12 L.Ed.2d 341 (1964), implies the same at the federal level. Johnson therefore concludes that the primary business test does not apply to Grouse Mountain's transportation operations (transportation of persons).

8. Johnson's argument was overruled in the initial ruling and, with all respect, it is again overruled. Johnson is simply wrong. Gamble-Robinson makes no statement (as referenced by Johnson or similar to it), "specifically" or otherwise, that the primary business test does not apply to the carriage of persons. Furthermore, the opinion does not even include reasoning or language upon which support for Johnson's argument can be inferred. As a matter of law, all reasonable interpretation of Gamble-Robinson is directly contrary to the argument submitted by Johnson. Even the quotation cited by Johnson to support the

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argument makes reference to "transportation of the persons and property of others" (emphasis added).

9. More importantly, although it is true that Gamble-Robinson involved only facts pertaining to the transportation of property, the Court was interpreting statutory law which directly pertained to both the transportation of property and persons. Therefore, the legal reasoning of the Court would logically apply equally to both. In context, there simply is no identifiable distinction between property and persons even remotely significant enough to support a proposition that the legal reasoning in Gamble-Robinson does not apply to the carriage of persons.

10. In regard to Red Ball, Johnson's referenced federal opinion, regardless of what it or any other federal case or federal statute pertaining to the primary business test actually maintains in regard to the carriage of persons, it remains only federal law governing transportation only at the federal level (interstate) and is not controlling in intrastate matters. The PSC may draw from federal cases for sound reasoning on interpretation of legal concepts in general. However, it cannot draw upon federal statutes or cases as controlling authority in intrastate matters.

11. Johnson's next argument on reconsideration pertains to the PSC's departure from its prior "competition" or "carrier business growing up around" ruling in Matter of Shock, Declaratory Ruling, PSC Docket No. T-9157 (May 3, 1988). ARM 38.3.1004, one of the new primary business test rules, provides that trans-

portation incidental to a principal business remains unregulated even though it might compete with regulated motor carriage. The PSC has settled the matter by rule. However, as indicated above, when a new rule is cited as authority, explanation will be included.

12. In this regard, Johnson argues that the PSC's basis for the departure from Shock (Johnson asserts that the PSC's basis is that a strict application of the competition factor would render the primary business test meaningless) misses the point that Shock specifically deals with those situations in which a common carrier industry has grown up around the transportation involved. In this argument, Johnson misunderstands that the concept of a carrier industry "growing up around" transportation must be preceded by a determination that competition is a factor to begin with. If the PSC departs from competition as a factor (which it has) it departs from the "growing up around" aspect.

13. The PSC determines that Gamble-Robinson simply does not include "competition" as a required and determinative factor in an analysis of whether transportation is incidental. Gamble-Robinson's reference to "does not compete for the transportation of persons and property of others, with those engaged in the transportation business" is within a mere preliminary statement (or restatement) of the question presented to the Court. The referenced question is immediately restated by the Court without reference to "competition." Furthermore, "competition" is not referenced again in the Court's opinion or used as a factor

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essential to (or, arguably, even related to) any of the controlling legal reasoning and rationale expressed by the Court.

14. Johnson also argues that the PSC has refused to examine the facts from his point of view (apparently in denying Johnson's request for hearing). Johnson's argument pertains to potential evidence of his business "growing up around." The PSC now views such evidence as immaterial. Furthermore, again with all respect, declaratory ruling proceedings are not contested case proceedings. In a Declaratory Ruling proceeding, an evidentiary hearing will be held only if, on a material point, a hearing is necessary to understand the facts presented by the petitioner.

15. On reconsideration, Grouse Mountain argues that the supplemental information provided in its initial comments in support of its Petition for Declaratory Ruling demonstrates that Grouse Mountain has a significant recreational component in its business. It argues that the providing of recreational experiences to guests is an integral and essential component of its business. It states that it has a business sales focus on recreation, employing full time staff to sell recreational packages and advise guests of recreational opportunities. It states that recreational opportunities include hiking, biking, fishing, skiing, boating, sailing, golfing, and others in the area of Whitefish, Big Mountain, Glacier National Park, and Flathead Lake. Grouse Mountain reiterates that it transports only its guests and not the public in general. Grouse Mountain concludes that its transportation to recreational opportunities

(transportation to Big Mountain Ski and Summer Resort is the only transportation specifically in issue) is incidental to the recreational aspects of its business and a proper application of the primary business test would so dictate that it is unregulated private carriage.

16. Grouse Mountain's argument is overruled. The facts forming the basis for the argument were known by the PSC initially. The PSC understands that Grouse Mountain operates in an area that could be easily described as a recreational environment, rich in recreational opportunities. The PSC understands that Grouse Mountain promotes and packages recreational ventures for its guests. The PSC understands that a large part of Grouse Mountain's business turns on the existence of recreational opportunities.

17. However, Grouse Mountain, as a business itself, owns and operates facilities to provide lodging, meal, and beverage services. Grouse Mountain does not actually, as a business itself, own and operate facilities which provide the referenced recreation itself. By way of example (actual issue), transportation to and from Big Mountain Ski and Summer Resort, it is Big Mountain's ski and summer resort business, not Grouse Mountain's lodging, meals, and beverages business, that is the business to which the transportation in question would be incidental.

18. Related to this point, Johnson argues (in his response) that, given Grouse Mountain's argument that transportation is an integral part of its business, Grouse Mountain is admitting that

transportation is not incidental. The PSC disagrees. Transportation can be an integral part of a principal business and remain incidental. New rules also allow for this. Transportation can remain important to, even essential to, the principal business and remain incidental. See, ARM 38.3.1002(d).

19. Johnson's Request for Partial Reconsideration is DENIED. Grouse Mountain's Motion to Reconsider is DENIED. The Declaratory Ruling is AFFIRMED on reconsideration.

Done and dated this 30th day of August, 1994, by a vote of
3-2.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

Bob Anderson

BOB ANDERSON, Chairman
(Voting to Dissent)

Bob Rowe

BOB ROWE, Vice Chairman
(Voting to Dissent-Attached)

Dave Fisher

DAVE FISHER, Commissioner

Nancy McCaffree

NANCY MCCAFFREE, Commissioner

Danny Oberg

DANNY OBERG, Commissioner

ATTEST:

Kathlene M. Anderson
Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: You may be entitled to judicial review of this ruling. Judicial review may be obtained by filing a petition for review within thirty (30) days of the service date of this order. Sections 2-4-501 and 2-4-702, MCA.

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DISSENT OF COMMISSIONER ROWE

I would grant Grouse Mountain's motion for reconsideration, and hold that its transportation of resort guests at no direct charge is not subject to Public Service Commission regulation. My reasons are more fully stated in my dissent to the original order and in my concurrence to the stay of enforcement. I will refrain from unduly repeating those arguments.

The transportation at issue should not be subject to regulation because it is incidental to Grouse Mountain's primary business and because it is not made available to the general public. Safety is a legitimate concern. However, full "public convenience and necessity" regulation will serve no substantial public purpose, will unnecessarily interfere with private activity, and will potentially drain public resources if the Commission finds itself attempting to supervise similar transportation provided by other resorts and lodges.

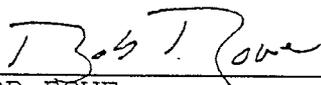
Within statutory constraints, the Commission should promote policies which produce reasonable results. Public convenience and necessity regulation of transportation of resort guests to and from a ski area, when that transportation is not provided at an additional charge and when it is not offered to the general public is not reasonable.¹ Finding such transportation to be

¹ The majority opinion states that while transportation by Grouse Mountain to the ski area would be subject to regulation, transportation from Grouse Mountain provided by the ski area would be "incidental to" the ski area's business, and so presumably unregulated. (Order, page 7.) The distinction strikes me as arid scholasticism. I fail to see what significant purpose it serves.

exempt from motor carrier regulation as "incidental to" Grouse Mountain's primary business would produce a reasonable result. Such a real-world application of the "primary business test" would help keep regulation from interfering in economic activity where it serves no substantial purpose.

The majority grounds its decision in a sincere belief in the theory of "ruinous competition." I respect the majority's genuine concern to promote and preserve high quality motor carriage, especially for rural areas. Montana's certificated motor carriers do provide generally excellent service, often under adverse conditions. I agree they deserve a level playing field against direct competitors. I do not believe these legitimate ends are furthered by the intrusion of regulation in this instance.

RESPECTFULLY SUBMITTED this 6th day of October, 1994.



BOB ROWE
Vice Chairman