

Service Date: December 23, 1993

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

* * * * *

IN THE MATTER Of the Application of) TRANSPORTATION DIVISION
Schlegel & Sons Contractors, Inc.,)
Kalispell, Montana to amend their) DOCKET NO. T-93.41.PCN
Montana Intrastate Certificate of)
Public Convenience and Necessity.) ORDER NO. 6247a

FINAL ORDER

APPEARANCES

FOR THE APPLICANT:

David L. Astle, Astle & Astle, 705 Main Street, Kalispell,
Montana 59901

FOR THE PROTESTANTS:

David L. Jackson, Jackson, Murdo, Grant and McFarland, 203
North Ewing, Helena, Montana 59601, appearing on behalf of
James A. Slack, Inc., Dick Irvin, Inc. and Monty Petersen
Trucking

FOR THE COMMISSION:

Denise Peterson, Staff Attorney and Wayne Budt, Transporta-
tion Division Administrator, 1701 Prospect Avenue, P.O. Box
202601, Helena, Montana 59620-2601

BEFORE:

BOB ROWE, Vice Chairman & Hearing Examiner

Pursuant to §2-4-621 and 2-4-623, MCA, Montana Administrative Procedures Act (MAPA), the Montana Public Service Commission (Commission) issues the following final order adopting the Findings of Fact, Conclusions of Law and proposed decision issued in this Docket on November 2, 1993 as Order No. 6247. The parties have filed exceptions and response to the exceptions. The Commission addresses the exceptions and response at the conclusion of the Findings and Discussion, beginning on page 31.

A clerical correction is made to Finding No. 66. Christoferson Logliners states that the payroll figure of \$12.5 million should be \$1.5 million.

BACKGROUND

1. On February 23, 1993 the Montana Public Service Commission (Commission) received an application from Louis W. Schlegel, Schlegel & Sons Contractors, Inc. (Applicant or Schlegel), Kalispell, Montana for a Class B certificate of public convenience and necessity to transport heavy machinery and contractors' equipment within 150 mile radius of Kalispell, Montana. The proposed service would extend into Flathead, Lincoln, Sanders, Missoula, Powell, Lewis and Clark, Teton, Pondera and

Glacier counties.

2. On March 17, 1993 Applicant filed a clarification that the request was for a Class B authority to provide the same service provided under its existing Class C authority. The application was duly noticed and published in April, 1993.

3. The Commission received protests from James A. Slack, Inc., McElroy & Wilken, Inc., and Cameron Heavy Hauling, all from Kalispell, Montana; and from Christofferson Logliners, Inc. and Petersen Trucking, Inc., both from Missoula. Dick Irvin, Inc., Shelby, Montana, filed a petition to intervene on May 28, 1993 which was granted at the Commission's regularly scheduled meeting on June 7, 1993.

4. The Commission duly noticed and published and conducted the public hearing on June 17, 1993 in the Glacier Room of the North Valley Hospital, 6576 Highway 93 South, Whitefish, Montana. Commissioner Bob Rowe presided as hearing examiner.

SUMMARY OF TESTIMONY

Applicant's Witnesses

5. Ronald Buentemeier, logging and lands manager for F.H. Stoltze Land and Lumber Company (Stoltze), sponsored a prepared statement on the record. Applicant and his sons worked for the company for ten years as employee, logging contractor, log

hauling contractor, road contractor, and equipment hauling contractor. The industry has changed, requiring numerous moves for small jobs as compared to the larger jobs of the past. In the past 20 years Stoltze moved 90 percent of its equipment on its own lowboy and contracted to move the other 10 percent. Following the death of a key employee, and because of DOT requirements, Stoltze now mostly contracts for moves. In the previous four weeks without Schlegel's service, Stoltze had to shut a loader down and idle four logging trucks to use its operator to move logging equipment. Mr. Buentemeier testified that he needs to be able to make one call and arrange for a move. He has not called Slack in three years because he understood Slack was only interested in hauling his own equipment. Earl Cameron's equipment cannot meet most of Stoltze's needs, although his service is good. Mr. Buentemeier stated that his company needs another lowboy service which can haul light and heavy loads legally and that there is ample business for all.

6. Under cross-examination, Mr. Buentemeier testified that Stoltze has 25 pieces of equipment to move on a regular basis, including log loaders, cats, skidders, feller bunchers, patrols and backhoes. The backhoe is the lightest at about 20,000 pounds and T-D-25 is probably the largest at about 80,000 pounds. Mr. Buentemeier testified that Schlegel has for a year and a half

occasionally transported Stoltze's excess equipment. Before December and the death of Stoltze's operator, Schlegel only transported his equipment when contracting roads for Stoltze. Mr. Buentemeier did not know how many moves Schlegel made in 1992, nor which were of Stoltze's or Schlegel's equipment. In 1993, Schlegel moved logging equipment about once a week (or about 15 moves to the date of the hearing). Mr. Buentemeier believed that Schlegel had acquired the same authority Elgin had, and did not inquire further. They did not discuss the issue of contract authority or six-contract limitation.

7. Mr. Buentemeier was unable to list all its timber sales locations in the previous 12 months, but estimated there were over 50 different sales. Mr. Buentemeier said that Schlegel charges \$55 per hour as negotiated when he took over the contract from Elgin one and a half years ago. Stoltze had never asked Irvin, Inc., to do any heavy hauling and did not know that it advertised in the yellow pages with a toll-free number. He objected to using Irvin, Inc. because of the location in Shelby.

If Irvin placed equipment locally he might consider using the service. He likewise testified as to the use of Monty Petersen, noting that he was located in Missoula. He believed that Petersen did not have equipment to haul the Charlie Decker 777 scratcher yarder, over 100,000 pounds, a heavy line skidder owned

by one of Stoltze's contractors. However, if Petersen could provide the trailing equipment and timely service, he would not object to using his service.

8. Mr. Buentemeier testified that three years before Slack did not know when his lowboy would be available. Mr. Buentemeier did not know how many days Slack's lowboys were available, but he frequently passes Slack's shop and sees the trailer sitting while the truck is gone. He admitted that he had not called Slack so he really did not know. He did not object to using Slack and believed Slack's equipment could haul Stoltze's machinery. He recalled a conversation with Slack in a parts store in which Slack indicated that he was going back to the logging business, because he had too much money owing him and was not interested in hauling.

9. Mr. Buentemeier testified that normally he can give two days notice for a move, but in an emergency he needs the most immediate service possible. He has only received such service from Schlegel, he testified. He stated that another hauler should have no effect on existing haulers because there will continue to be a lot of more frequent, smaller timber sales.

10. Rick Smith, president of Smith Logging Company, testified that he primarily contracts for Plum Creek and has substantial need for hauling six pieces of heavy equipment. Schlegel

has done all his hauling for two years under contract. Mr. Smith was very satisfied with his service and found it timely. Because Schlegel has two lowboys he can get the job done.

11. Before Schlegel, Mr. Smith had used Slack's service. When Mr. Slack personally did the job, the service was excellent. However, when Mr. Smith called afterward, Mr. Slack's equipment was tied up and he could not do the job for a couple of days. Mr. Schlegel can always give immediate service. Mr. Smith testified that there is a need for an additional hauler of Schlegel's calibre in the area. Mr. Slack's idle time, if any, has resulted from his reputation of being unable to provide service when called, he stated. Under cross-examination, Mr. Smith testified that once McElroy could not provide service for three days (unsatisfactory), Cameron does not have "the drop" to handle some of his equipment, and he would not use Petersen because of the distance from Missoula. On Schlegel's contract rate, Mr. Smith believed that he paid \$60 per hour for the heavier equipment and \$50 for the lighter. He said that he would consider using Irvin, Inc. if he could get his equipment moved timely.

12. Numerous other logging contractors from the area appeared and testified in support of the application: Wally Jordt, Mark Swanson, Patrick Hanley, Kendall DuPuis, Joseph

Bybee, Ken Swanstrom, Brandon Owens, Jim Butts, Doug Stoner, James Norvell, Dan McEntyre, Allen Hanson, Ronald St. Onge, Bob Shanks, Ted Lunde and Allen Hanson. These witnesses all testified that they have a need for heavy equipment hauling in the area of the application. They variously testified that their chief criticism of Slack, Inc. is that its service is not always available. For most moves, they required one to two day lead time, with some occasional need for immediate service. The witnesses all testified that Mr. Schlegel had hauled their heavy equipment and he did an excellent job at a reasonable rate. For most of the witnesses, however, Mr. Schlegel did the hauling without a PSC approved contract. These witnesses did not realize that they had to have a contract with Mr. Schlegel in order for him to legally haul under Class C authority and that he was limited to six contracts. In fact, they had switched to him from Elgin after Applicant purchased Elgin's authority.

13. The logging contractors generally testified that Mr. Slack did a good job for them when he personally did the haul. They would have had no problem using his service again if he had seemed available. The witnesses testified that there was a need for additional haulers as a result of more frequent, smaller jobs. These smaller jobs also mean a need for shorter lead times, from immediate service to one-to-two day notice. Some

witnesses did not know or had not contacted Petersen or Irvin. While some would use their services if available, others expressed a preference for locally owned service in part, because they know the area. The logging contractors who had Class C contracts with Applicant attested to his excellent service and availability.

Paragraphs 14-18 are in addition to the preceding general testimony of the logging contractors.

14. Mr. Jordt, in the logging business for 35 years, testified that Mr. Slack sent a letter two weeks before and talked to him the previous week. Mr. Slack said he was updating, would be more available, and may have another lowboy soon (he has had only one).

15. Mark Swanson testified that he had not had satisfactory service from McElroy and found him less and less available. He was told the last time he called Mr. Slack that the lowboy's driver had log bunks on it. The driver referred him to Mr. Schlegel and he started using that service. Mr. Schlegel always responds quickly. Mr. Swanson testified that he would not use Irvin, Inc.'s service. Patrick Hanley, a logging contractor for 20 years, also testified that he was satisfied with Slack's service until he converted to a log truck and then was unavailable when called for service.

16. Joseph Bybee, who has an approved contract with Schlegel, testified that his service has been very satisfactory. He has accommodated Bybee's needs, even working on weekends. He only needs moves from every six weeks to six months. He further testified that he had observed a need of other logging contractors for Mr. Schlegel's service. Mr. Bybee had used Elgin before Schlegel, but he did not have a contract.

17. Ken Swanstrom, Brandon Owens and Doug Stoner testified on the unavailability of service in the area and the need for Applicant's service. Ken Swanstrom testified that Cameron had unsafe equipment, so he switched to Slack in the early '80's. With Slack's driver problems, Swanstrom shifted to Elgin and then Schlegel when he bought Elgin. He observed that Slack was more available in the early years, but later became more involved in his own machinery and log hauling. Mr. Swanstrom testified that with any less than the present service, log haulers would be forced to get their own trucks and trailers. He stated that he last requested service from Slack a year ago and was told to find someone else. Brandon Owens, a logging contractor with a Class C contract with the Applicant, testified that in an emergency he contacted both Slack and McElroy & Wilken and was told it would be three or four days. Doug Stoner testified that he called Mr. Slack in '88 or '89 and was referred to one of his drivers who

then never called back.

18. Dan McEntyre, a Class C contract shipper, testified on the excellent accommodations Mr. Slack has made, including getting on the same radio frequency and responding immediately to radio contact.

Paragraphs 19-23 are shippers other than logging contractors.

19. In addition to the logging contractors, Michael Harp, John McClure, Arden Olsen and Bill Sudan appeared and testified in support of the application. Mr. Harp is a utilities contractor for Harp Line Construction in Kalispell, Montana; Mr. Olsen and Mr. Sudan are road building contractors. Mr. McClure is branch manager of Triple W Equipment in Kalispell which sells and services John Deere equipment.

20. Mr. Harp testified that Harp Line Construction has heavy excavation equipment and not enough lowboys to haul it all. He was unaware of Slack's hauling authority and thought Slack only hauled for himself. He had not had much luck in contacting McElroy. When he needs a lowboy, he cannot give it much lead time, he testified. Before Mr. Schlegel, he had used Elgin's service.

21. Mr. McClure testified that Triple W Equipment requires

hauling of heavy equipment ten times a month. Triple W has a Class C contract with the Applicant, but is free to use other haulers. He had not used Slack's service for two or three years and was not solicited by Slack until the previous two weeks. He has used McElroy and Wilken to his satisfaction. In the heavy equipment and rental business, he testified to observing loggers' need to have immediate service. He testified that the area needs more good, "concerned" carriers like Mr. Schlegel. He would object to using Petersen because of the distance, but if Petersen stationed equipment locally, he still probably would not use its services, preferring local truckers. He had thought Mr. Slack was doing his own logging. He indicated that if he had wanted to provide service, Mr. Slack should have contacted him and not expected him to check the telephone book.

22. Mr. Olsen testified that on occasion he required heavy equipment hauling of his road building equipment, primarily a large loader and excavator. About 10 or 12 years previously, Mr. Olsen had testified in support of Class B authority for Mr. Slack. He is satisfied with the services of Slack, Mr. McElroy & Wilken, and Cameron, but is aware of additional need in the area, because he has turned down requests for use of his own lowboys to move equipment. In the past he used Elgin's service, unaware of the scope of his authority. Mr. Olsen prefers local carriers

because they are familiar with the equipment, know the roads and area, and are not likely to get stranded up a strange logging road. In his testimony on redirect, Mr. Olsen recalled Irvin, Inc.'s protest of Slack's application years before. The same question was asked whether he would use Irvin, Inc.'s service if it brought equipment into the area. Mr. Olsen testified that Irvin, Inc. had not brought in heavy hauling equipment.

23. Mr. Sudan testified in support of the application because of his need for heavy hauling as a road-building contractor. He has used the hauling services of Slack, Elgin (and subsequently Schlegel), Cameron and Irvin. (Only Irvin had authority for a Canada haul and he used equipment located elsewhere. Service was expensive.) When Mr. Slack drove, the service was good, but Mr. Sudan had a problem with one of Slack's drivers. Mr. Schlegel solicited his business when he took over Elgin's authority. Even with the existing haulers (including Schlegel), Mr. Sudan had to purchase his own lowboy. He still needs 30-40 additional hauls per year for which he uses Schlegel.

He does not have a Class C contract. Mr. Schlegel has been very accommodating, working late or early, as needed, Mr. Sudan testified. Mr. Sudan has to have immediate service, he testified, and cannot give two days notice. He will move it himself, but prefers to find an available local carrier.

Applicant's Testimony

24. Louis W. "Bill" Schlegel (Applicant) appeared and testified in support of the application. He is a road contractor and "lowboy service," he testified, with a PSC permit acquired from Jim Elgin two years before on July 1, 1991. The Class C permit allows him to haul for six customers, which was not what he understood when he bought the permit. In the last year that he used Elgin's service, Elgin said they should have a contract.

Mr. Schlegel did not understand the situation. Elgin hauled for everyone throughout the area, so Mr. Schlegel understood he was acquiring the right to do the same. When he acquired the Class C permit, he did not know he was limited to six people, he testified. He "just knew it was a lowboy classification," he "thought it was the whole works," and he "was just as proud as punch," he testified. One social night out together Mr. Slack, an old friend, told him he should have a Class B permit. Now that he has found out, he "would just like to be legal so [he] can haul these people. These people need service." Since Mr. Schlegel had testified for Mr. Slack 13 years before, he assumed Mr. Slack would do likewise. Mr. Slack had told him that there was "plenty ... for everybody" and that he was not interested in hauling because he did not get paid, according to Mr. Schlegel's testimo-

ny.

25. Mr. Schlegel testified that he has been hauling for the same contractors as Elgin did. To his knowledge, there are four heavy haulers with six trailers in the valley. Mr. Schlegel has three, but one is too heavy to pull; McElroy has two, Cameron has an old one; and Slack has one. Six trailers cannot meet the need, he testified. He is busy at night trying to take care of the customers. He has a radio system and five different phones.

"[T]here's just too many people out there wanting to get moved," and "[s]omebody has to take care of them...." Slack said he did not want the business, Mr. Schlegel testified. He had experience with waiting on haulers before he got into the business. He testified that a new driver cannot find the way around logging roads without an experienced driver. He has received complaints from shippers who could not get their equipment moved. "Someone had to move it." He has had requests from all the counties in a 150 mile radius.

26. Mr. Schlegel listed the following equipment he uses exclusively in heavy equipment hauling: 1985 and 1983 Kenworth and a spare 1979; a short 1973 Load King trailer; 1992 Witzco trailer, and a 1985 Kolyn. He has other equipment he uses for road-building. The Load King will haul up to 96,000 pounds; put together with another, he will be able to haul 116,000 pounds.

Mr. Schlegel sponsored a number of exhibits, including pictures of the equipment. All his equipment has passed DOT inspections.

Mr. Schlegel had a financial report prepared for the year ending April 30, 1992 which reflects his assets, liabilities and income, demonstrating a sound financial base. He testified that his current financial position is stronger and offered to submit an updated report, which was considered unnecessary by the hearing examiner.

27. On further direct examination, Mr. Schlegel admitted that he had made hauls outside his authority. To correct this matter, he had creatively used notarized bills of sale, thinking it was legal. Finding out that it was wrong, he has now made this application.

28. On cross-examination, Mr. Schlegel testified that he paid \$25,000 for his Class C authority from Jim Elgin. He also acquired two tractors and two lowboys for the price. He testified that he only charged the tariffed rates (\$50 for light, \$60 for heavy), but one witness may have misread the statement and averaged to \$55 per hour. Mr. Schlegel stated that he had only one account receivable unpaid a long time ago (since paid). He admitted that he was not the bookkeeper and did not readily understand the financial documents. He agreed to submit the computer print-out of moves since June 1, 1992.

29. In 1991 around Christmas, Mr. Schlegel became aware he was transporting illegally under the Elgin authority. He did not know what to do, finally got some advice and was prepared to take his "licks." He had not consulted an attorney when he purchased the authority. He admitted that he continued to haul because he "didn't know what to do with these people." He testified that there was no way the valley could manage without his two lowboys.

Protestants' Witnesses

30. Jacque Christofferson, Missoula, Montana, Vice President of Christofferson Logliners, Inc., appeared and testified opposing the application. She expressed her company's concern that the application would affect Logliner's territory and asked that Schlegel not be given the full 150 mile radius. She stated that having a Class B authority in the Missoula area could harm Logliner's certificate. The payroll of Logliners is \$12.5 million, she further testified.

31. James A. Slack, James A. Slack, Inc., Kalispell, Montana, appeared and testified in opposition to the application. He has been in the logging business the past six years and heavy hauling business since 1970. He advertises his motor carrier operations in the paper, phone book and different magazines, he testified. In 1970, he leased authority and acquired his own in

1974, operating two lowboys from 1974 to 1980 and three from 1980 to 1985. In 1986 he cut back to one lowboy because "Elgin got his and he was running loose," i.e., "hauling everybody everywhere," in violation of his Class C six contract limit. Elgin took all his business, Mr. Slack testified, so he put some trucks "on belly dumps" and some hauling logs, sold a couple, "and there was just no business any more." When customers called and he told them he would have to put on an extra axle for the extra weight, they would just use Elgin, saying he did not need the extra axle.

32. Mr. Slack testified that he would figure out a way to pay for it and acquire additional equipment right away, if he had the* business. He said that the calls for hauling are off and on, and he is forced to haul logs to meet his fixed costs. According to his testimony, he was available for hauling 190+ days in 1992 and 63 days to the date of the hearing in 1993. With respect to the testimony from shippers, Mr. Slack said that he could take care of their business. He testified that he had just purchased two new trucks and was looking at another trailer.

33. On the calls where his driver could not be located, Mr. Slack explained that his driver was probably out on a haul until late that night. When his driver tried to call, the logger might have been in bed already.

34. Mr. Slack testified that he has nine employees. His wife does the books. The business itself does 90 percent of its repair work in its own shop. He does not have equipment to haul the largest machinery, and would have to use a Jeep out in the front of it as Applicant does. But the large equipment only moves two or three times a year. He accepts long distance calls, but does not have a toll free number or fax machine, or answering machine service. He, his wife and his driver do most of the solicitation, which worked until "Elgin got turned loose."

35. Mr. Slack testified that he had told Mr. Schlegel he would have to be Class B to expand his business. He denied saying there was plenty of business for everyone. He did state, "At the time he [Schlegel] didn't understand what he was getting into, I guess, when he bought this thing from Elgin."

36. Mr. Slack testified that as a logging contractor he only needs two days lead time for moving. For emergencies, of course, a logging contractor needs to get the equipment to the shop right away. He testified that it only takes 20 minutes to switch from a log trailer to a lowboy. Transportation (i.e., heavy haul as clarified by counsel), not log hauling, is his primary business, he testified. If the application is granted, Mr. Slack will not be hauling for too many customers, he testified. Sixty percent of these customers were his before Elgin

came along, he said. The revenue dropped about \$80,000 per year as a result of "Elgin and Bill's activities," he testified. His revenues would increase if the application were denied. He testified that he had a lot of trouble collecting fees from loggers in the past, but that has improved in the past year.

37. On cross-examination, Mr. Slack testified that in addition to his primary business of logging and heavy hauling, he also has one-half partnership in the Diamond R Guest Ranch at Spotted Bear, Montana, at the south end of Hungry Horse. He spends nearly every weekend there and two weeks at hunting season, he testified. His wife, driver and boys run the lowboy business when he is gone. Shippers can call the office and the wife talks to them on the two-way radio. Shippers usually have to contact his driver so he does not overbook himself. If his driver said he could not serve shippers, he was probably busy, Mr. Slack stated. Mr. Slack testified that he needs four hours lead time if he is serving someone else. He denied that he had made shippers wait or turned down movements of heavy equipment to haul his own. "My logging equipment I'd move last. I take care of my customers first." He denied that he had ever turned a contractor down but could not speak for his driver.

38. In the previous week he had called about 17 people and 8-10 others in the last two months, asking if they were dissatis-

fied with his service. They said they were not but that they wanted more lowboys. He stated that he could not meet the need of all the shippers at the hearing with his existing equipment, but had trucks coming soon. He denied that his certificate would be less valuable if the application were granted.

39. Mr. Slack's certificate of authority PSC #4787 covers hauls of heavy machinery and supplies used and or useful in logging operations, Mr. Slack testified. He testified that hauling road building equipment for building logging roads was included under "logging operations." Nearly every road involved logging because you have to get logs out of the way, his testimony indicated.

40. Dick Irvin, Columbia Falls, Montana, appeared on behalf of Dick Irvin, Inc., Shelby, Montana, and testified in opposition to the application. He has hauled under various Commission authorities since the '50's. In the early '70's Irvin, Inc. obtained statewide authority for equipment and building materials. He testified that twice in the late '70's and early '80's Irvin, Inc. had equipment stationed locally and it was not profitable. He lives full-time in the area. Mark Cole, Dick's brother Dwane Irvin, and his son Mike Irvin solicit business. He had not recently contacted the local shippers, thinking the business was being handled and there was not enough to go around

with Slack, Schlegel, and McElroy and Wilken, plus Petersen in Missoula. He was surprised at the need demonstrated at the hearing.

41. Mr. Irvin further testified that if the market would support it, he would buy and bring in more equipment. He would use three or four local drivers with power units who have been pulling other types of trailers. Dick Irvin, Inc. has its primary terminal in Shelby, Montana, with 24 hour a day, 365-day dispatch, including Watts lines and fax. "[S]omebody's on the phone all the time." Billing, accounting and repair work is mostly done in Shelby, with operations in Helena, Billings, and Calgary, plus the small shop in Columbia Falls.

42. Dick Irvin, Inc. employs over 100 people including one in Eureka, two in Kalispell, and one in Ovando, Mr. Irvin testified. Irvin has no lowboy equipment in the Flathead. Irvin, Inc. could cover the area if some equipment were stationed there, but at this time it had no equipment to handle "the heavy stuff." Irvin, Inc. advertises in the Flathead area yellow pages, with a toll free number, Mr. Irvin testified. He proposed to use local people who knew the terrain, giving the same lead time as everybody else if it had equipment stationed here. He testified that no matter what size the business, granting this application would have some effect on the business.

43. On cross-examination, Mr. Irvin testified that the two employees living in Kalispell (one pulling his own trailer) are not hauling heavy equipment at this time. If called, Irvin would not have an available driver to haul heavy equipment. Mr. Irvin had been unaware of all the business until the day of hearing. Mr. Irvin recalled protesting Slack's application, and after the Slack hearing bringing the driver to the area, but it did not work out.

44. Monty Peterson, President of Monte Petersen Trucking, Missoula, Montana, appeared and testified, in opposition to the application. He, his wife, his son, and his drivers solicit business. Petersen advertises on the radio, in the newspapers, in the yellow pages, through hand cards, and on two-way radios. In 1979 Petersen acquired authority, expanding from one lowboy to five tractors and seven trailers, with its principal terminal in Missoula. Repair work and billing are handled in Missoula. Petersen has four employees. Petersen primarily hauls heavy machinery for mining, logging and road construction and can legally haul up to 125,000 pound loads. Petersen accepts long distance collect calls 24 hours a day. For lead time, Mr. Petersen likes to have his customers call two days ahead. He would consider placing equipment in the Flathead, but would have to acquire more equipment, he testified. He recognized the concern

on additional deadhead from Missoula, and would have to first evaluate whether there would be enough business to justify it.

45. Mr. Petersen testified that his primary concern, if the application is granted, is the sale of authority. He said that there are already too many permits in the Missoula area. Too many haulers, legal or illegal, result in lower revenues for his business.

46. On cross-examination, Mr. Petersen admitted that he does not have the authority to move from Flathead County to Flathead or Lincoln Counties. In these counties, the permit would not affect him. He stated that his area of concern geographically is 70 road miles from Missoula, to Polson and the Swan. Primarily, Mr. Petersen was concerned about movements originating or terminating in Missoula County. Petersen tries to schedule back hauls to save people money.

DISCUSSION AND FINDINGS

47. 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.

48. Section 69-12-323, MCA, governs the requirements for a Commission decision on whether an application 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.

49. 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

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

51. The present application does not present an issue with respect to the first four factors. Applicant is in sound financial condition and fully intends to perform the service sought year-round upon the granting of the application. Further, Applicant's experience in transporting heavy machinery and equipment is unquestioned, as is the adequacy of the equipment to perform the service. However, the question of Applicant's past

illegal operations raises concerns about Applicant's fitness.

52. Applicant operated the business transporting heavy machinery after acquiring a Class C certificate from James Elgin. He took over the operation as he understood Mr. Elgin had performed it, soliciting the same customers. Mr. Schlegel credibly testified that he had not realized the certificate was limited to six accounts. His illegal operation beyond the six contracts was at this time in good faith. Even Protestant Slack testified that Schlegel did not realize what he was getting into when he purchased the business from Elgin. When he learned that he was not "legal," he attempted to cure the problem with "buy/sell agreements," temporarily "purchasing" the heavy equipment so that it would be private carriage. He stopped this practice upon learning it was illegal. The period of time between when he learned that "buy/sells" were not "legal" and when he applied for the Class B authority is not certain. The computer printouts of the previous year show movements made without authority. Mr. Schlegel never denied making these moves; in fact, he brought in numerous witnesses who further attested to this fact and to their need for this service.

53. Mr. Schlegel was credible that he knowingly made the illegal moves because "[t]hese people need service." Upon realizing he was illegal, he just wanted to become legal so that

he could haul for "these people." Knowingly operating without authority, however, takes a good faith illegal operation into the bad faith category. Bad faith illegal operations under some circumstances justified a finding of unfitness without further consideration of the applicant's case. See H.R. Ritter Trucking Co., Extension, 111 M.C.C. 771 (1970); and Antietam Transit Company, Inc., Common Carrier Application, 84 M.C.C. 459 (1961).

In the Application of Power Fuels, Inc., Docket No. T-4986, Order No. 3038, the Commission found that "evidence [of knowledgeable illegal operations] casts a serious doubt as to whether Applicant is fit to provide the proposed service should this application be granted."

54. Although the Commission condemns bad faith illegal operations, such operations are not automatic grounds for denial of an application. See, Application of Smith Oilfield Water Service, Docket No. T-8360, Order No. 5633a, issued February 19, 1986, .. 25-30. Willful misconduct is one element in determining present and future fitness, as in accord with the ICC positions.

See, Armored Carrier Corporation v. United States, 260 F.Supp. 612, 615 (1966). (Willful illegality a bar to a grant of authority.) However, under the facts, the ICC has found the reverse. See, B.D.C. Corporation, Extension - Five Counties, 99 M.C.C. 126 (1965); and Howard Sober, Inc., Extension - Various States, 83

M.C.C. 361 (1960).

55. In determining fitness of an applicant who has engaged in willful illegality, the Commission balances the severity and circumstances of the illegal conduct and the public interest in the proposed service. In both B.D.C. Corporation and Howard Sober, supra, the ICC found the willful illegalities minor compared with the public interest in the anticipated service. By contrast, in Power Fuels, the Commission found that a sophisticated carrier, knowledgeable of public service regulation, willfully violated those regulations. To overcome such misconduct, an applicant must make a clear case for public convenience and necessity, which was not done in Power Fuels, resulting in denial.

56. In the present application, Applicant has made a clear and convincing showing of public convenience and necessity, with one shipper after another attesting to the need for Applicant's service. In assessing the willful illegality, the Commission finds that Applicant was not sophisticated and knowledgeable about public service regulation. He acquired the "lowboy business" just two years before and proceeded to operate it as the previous owner had, unaware for some time that he was violating the law. Upon realizing that he did not have authority, he attempted to comply, admittedly with the illegal stratagem of

phony "buy/sells," a rudimentary, unsophisticated band-aid approach. Upon learning that he could not operate legally with "buy/sells," he determined that he should apply for Class B authority. Meanwhile, he was upset about the business not being what he had thought, but felt an obligation to continue to meet the pressing needs of the shippers.

57. The Commission finds that Applicant's illegal operations, both good faith and bad faith, are not an insuperable bar to obtaining authority. Applicant did not set out to thwart the Commission's authority by continuing operations. Applicant found pressing need for his "lowboy service," and, unaware of possible legal consequences, continued to deliver service to customers who relied upon Applicant, while attempting to become legal. The Commission cautions Applicant, however, that any future illegal operations will subject Applicant to fines and penalties to the full extent of the law.

Public Need and Convenience

58. The next question is whether the public need and convenience require the proposed service. 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.

59. Seldom is there a hearing with such overwhelming shipper testimony and support. Without a doubt, the proposed service will serve a useful public purpose responsive to a public need and demand. All the shippers testified that they need Applicant's service, indicating that the area would suffer if Applicant's two "lowboys" could no longer serve them. Balancing this need with Applicant's illegal operations, the Commission determines that Applicant, while in error, felt an overriding obligation to meet the need. While doing so, Applicant provided excellent service, as witness after witness testified.

Existing Carriers

60. Can and will the existing carriers, i.e., protestants, meet the public (shippers) need for the proposed service? At the time of the hearing Slack and Irvin could not meet the need, and for some time the shippers had turned to Elgin and subsequently Applicant to meet their pressing need for hauling heavy equip-

ment. Petersen's authority overlaps with some of the proposed five county Class B authority, and he is concerned with the 70 road miles from Missoula to Missoula and Lake Counties. He cannot provide the moves from Flathead County to Flathead or Lincoln Counties.

61. Neither Slack nor Irvin had made equipment and drivers available in the area for some time. Slack converted some trucks to log haulers and sold a couple of others, alleging that there was no longer the business, blaming Schlegel's predecessor's (illegal) activities. He told customers who called that he would have to put on an extra axle, and they chose to use Elgin instead. Mr. Slack said that he would figure out a way to get additional equipment if he had the business. He indicated his driver, not he, had not been available to provide the service, being busy elsewhere. Yet the supporting shipper witnesses generally testified that Slack had not made his service available, nor had he or his driver appeared willing to solicit and provide service, once he put "log bunks" on his trucks. The Commission finds that there is no evidence to support a finding that Slack can and will provide the service. Mr. Slack has had a certificate to operate during this time and pursued other endeavors rather than make his service available.

62. Irvin, Inc., operates out of Shelby. Mr. Irvin testi-

fied that his company had unsuccessfully brought in heavy hauling equipment more than 10 years before in response to Slack's application for a certificate. He thought that Irvin, Inc. could probably acquire the heavy hauling equipment and provide the service if it stationed the equipment locally. The testimony was too speculative to support a finding that Irvin, Inc. can and will provide the service, or that its service would fulfill the public need and convenience.

63. The Commission recognizes Irvin, Inc.'s financial ability to acquire equipment, locate it in the area and hire local drivers. Mr. Irvin was surprised at the need shown at the hearing, which may result in Irvin, Inc.'s relocating a portion of its business west of the divide again. However, considering the demonstrated immediate need at the hearing, it is doubtful that Irvin, Inc. could meet all the need at this time.

64. Mr. Petersen testified that Petersen Trucking would also consider placing equipment in the Flathead, recognizing the concern on deadhead from Missoula. Petersen's authority, however, only relates in part to the service proposed and would not suffice to meet the same need met by Applicant. Petersen has only four trucks now which primarily serve the Missoula area. The Commission finds that Petersen cannot and will not meet the proposed need.

Harm to Existing Carriers

65. Finally, the Commission addresses the question of harm to existing carriers if the application is granted. Mr. Slack apparently conceded the service to Elgin long before Schlegel acquired the "lowboy service," thus revamping his business and pursuing other business. He testified his revenues would increase if the application were denied. Yet, his and the shippers' testimony did not indicate certainty that he would be willing to provide the service and pick up the \$80,000 annual revenue allegedly lost so many years before. Since he has not been providing the service or soliciting the business, the Commission finds that granting this application will not harm this carrier with existing authority.

66. Likewise, Irvin, Inc. has not provided the service in this area and therefore will not be harmed by a grant of this authority, nor will Petersen Trucking. Mr. Petersen's concern was that there would now be another certificate "out there" for potential sale. This concern is speculative and does not amount to a showing of harm to or adverse impact on his existing business. Given the size and success of Petersen Trucking and Irvin, Inc. in their respective centers of Missoula and Shelby, the Commission finds that granting this application will not harm

these existing carriers. Similarly, Christofferson Logliners, Inc. with its \$1.5 million payroll will not suffer any harm if this application is granted. Further, it is unlikely that those shippers from the Missoula area will make extensive requests for service to the Kalispell area.

67. Therefore, the Commission finds that this application to amend PSC No. 9130 from Class C contract authority to Class B common carrier authority should be granted. As amended, the Class B authority will allow Applicant to haul heavy machinery and contractor's equipment between points and places within a radius of 150 miles of Kalispell, Montana.

EXCEPTIONS AND RESPONSE

I. Protestants have jointly filed Exceptions to Proposed Order, taking exception to the findings (1) that Applicant has demonstrated a public need, (2) that the admitted illegal activities do not render Applicant unfit to provide service, and (3) that the proposed service will not have an adverse effect on existing transportation service. Applicant responded (1) that shippers' testimony supported the need for the proposed service, (2) that Applicant is fit to provide the service, and (3) that the existing carriers have shown no harm from the proposed operations.

II. The Commission determines that the issues and/or arguments raised in the Exceptions were fully addressed in the proposed decision. In Findings of Fact Nos. 56-59, the proposed order discussed the public convenience and necessity, finding that there was a clear and convincing need supported by shipper testimony for the proposed Class B heavy-hauling authority.

III. Findings of Fact Nos. 50-57 exhaustively addressed the issue of fitness and found that Applicant's previous illegal heavy hauling activities were not automatic grounds for a finding of unfitness. Weighing the public need with the severity and circumstances of the illegal activities, the Commission concludes that Applicant is fit to provide the service. However, the Commission reiterates that Applicant is now knowledgeable and future illegal operations will subject Applicant to full enforcement of the law.

IV. Finally, the Commission accepts without modification the findings in the proposed order that there was no demonstrated harm to existing carriers, based on the record. Findings of Fact Nos. 60-66. The hearing examiner found, based on the testimony and credibility of the witnesses, that the existing carriers would not be harmed. The order outlines why the examiner made these findings.

CONCLUSIONS OF LAW

68. 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.

69. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter.

70. Applicant has demonstrated a public demand or need for the proposed service.

71. Illegal operations are one factor in a fitness determination. Financially, Applicant has demonstrated fitness to provide the proposed service. Balancing the need for the proposed service with the nature of the illegal operations, the Commission concludes that the Applicant remains fit to provide the service.

72. The Commission further concludes that Applicant, upon obtaining this authority, shall abide by the rules and regulations of the Commission or face fines and penalties. After this proceeding, any illegal operations shall be deemed violations with full knowledge, subject to full enforcement.

73. The proposed service will not have an adverse impact on existing transportation service.

ORDER

NOW THEREFORE IT IS ORDERED that the application in Docket No. T-93.41.PCN shall be GRANTED for the following authority:

Class B - Heavy machinery and contractor's equipment between points and places within a radius of 150 miles of Kalispell, Montana, over all highways and roads within such radius.

IT IS FURTHER ORDERED that the Applicant must, within thirty (30) days of the mailing of the notice of the rights herein granted comply with all rules and regulations of the Montana Public Service Commission.

Done and Dated this 21st day of December, 1993 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.

