

Service Date: October 2, 1989

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

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IN THE MATTER of the Application of)	TRANSPORTATION DIVISION
TABISH BROTHERS DISTRIBUTORS, INC.,)	
Missoula, Montana, for a Class C)	DOCKET NO. T-9363
Montana Intrastate Certificate of)	
Public Convenience and Necessity.)	ORDER NO. 5936a

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ORDER ON RECONSIDERATION

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BACKGROUND

On May 17, 1989 the Commission held a hearing on the application of Tabish Brothers Distributors, Inc. (Tabish) for authority to transport certain specified petroleum products and industrial gases. The Commission granted the industrial gases portion of the application and denied the petroleum products portion (granted Protestants' Motion to Dismiss). See Order No. 5936, Docket No. T-9363, Service Date: June 13, 1989.

On June 23, 1989 Tabish filed a Motion for Reconsideration of the Commission's ruling granting the Motion to Dismiss. The Protestants thereafter filed briefs in opposition.

DISCUSSION AND ANALYSIS

The primary question presented for reconsideration is whether or not storage capacity may be considered in an application for a Certificate of Public Convenience and Necessity. The three main issues to be considered in determining "public convenience and necessity" are:

- a. Whether the new operation will serve a useful public purpose,
- b. Whether the purpose can be served as well by existing carriers, and
- c. Whether the applicant's operation would endanger or impair the operations of existing carriers contrary to the public interest.

Pan American Bus Lines Operation, 1 M.C.C. 190, 203 (1936). Tabish argues that the availability of storage capacity satisfies a "distinct need" of Empire Airlines, citing numerous Federal and I.C.C. cases. However, these cases are based upon a specific federal statute which enumerates the shippers' "distinct needs" as a consideration for contract carriage. 49 U.S.C. § 10102 formerly 49 U.S.C. § 303(a)(155). There is no similar Montana statute. However, the question remains whether storage capacity may serve a "useful public purpose" under the first Pan American test. The I.C.C. has answered this in the affirmative. See Delaware Express Co. Extension - Liquid Fertilizers, 92 M.C.C. 718 (1963) and Buss Extension - Hewitt, N.J., 67 M.C.C. 635 (1956). The crucial determination which this Commission still must consider is whether or not the storage capacity provided by Tabish constitutes "warehousing" (which is not a transportation service) or "incidental to transportation" service under the standards established by the I.C.C. and federal courts. See Niedert v. United States, 583 F.2d 954, 959-962 (1978), National Bus Traffic Association v. United States, 249 F.Supp. 869, 873 (1965) and Practices of Motor Carriers of Household Goods, 17 M.C.C. 467, 494-495 (1939). The Commission has therefore determined that further evidence should be received into the record to fully consider these questions.

The Protestants argue that the Tabish storage capacity is not incidental to transportation service. However, the evidence on this issue was not fully developed at the hearing as a result of the Commission's rulings on certain Protestants' objections. Upon reconsideration, the

Commission now reverses its decision on these rulings. Therefore, Tabish will be allowed to present further evidence on this issue. The Protestants' may, of course, reiterate these arguments following rehearing, but they fail to address the real issue at this time.

The Protestants argue that mere preference for one carrier over another cannot serve as the basis for the grant of authority. The Commission has taken this position previously and agrees. However, the question of whether the storage supports the application remains.

The Protestants also argue that the Federal statutes concerning applications for contract carriage differ from Montana law. The Commission notes these differences, but they also fail to determine the real issue before us.

CONCLUSIONS OF LAW

1. The Montana Public Service Commission properly exercises jurisdiction over the parties and matters in this proceeding pursuant to Title 69, Chapter 12, MCA.
2. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter, pursuant to the Montana Administrative Procedure Act.
3. Section 69-12-323(2), MCA, requires that "public convenience and necessity" be shown prior to the granting of additional operating authority.
4. Upon reconsideration, the Commission has determined that a rehearing is necessary to receive further evidence and fully consider whether the proposed storage capacity service would serve a useful public purpose, relevant to public convenience and necessity. ARM 38.2.4805 and 38.2.4806.

ORDER

Based upon the foregoing, the Commission hereby ORDERS that:

1. The motion by Tabish to re-open the hearing in this matter is GRANTED.
2. The evidence which Tabish may offer on rehearing shall be limited to that which is directly relevant to the nature of the storage capacity (ie, "warehousing" or "incidental to transportation") and shippers' investigation or utilization of other carriers (solely with respect to their availability of storage capacity or other reasonable alternatives).

3. Following the additional evidence from Tabish, the Protestants may present their entire case-in-chief.

DONE AND DATED this 2nd day of October, 1989 by a vote of 3-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

CLYDE JARVIS, Chairman

JOHN B. DRISCOLL, Commissioner

WALLACE W. "WALLY" MERCER, Commissioner

ATTEST:

Ann Purcell
Acting 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.