

Service Date: October 30, 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)	TRANSPORTATION DIVISION
of Cebulski Trucking, Inc., Seeley)	
Lake, Montana, for a Montana)	DOCKET NO. T-9408
Intrastate Certificate of Public)	
Convenience and Necessity.)	ORDER NO. 5960

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FINAL ORDER

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APPEARANCES

FOR THE APPLICANT:

John P. Atkins, Attorney at Law, P.O. Box 1371, Bozeman, Montana 59771-1371

FOR THE PROTESTANTS:

William E. O'Leary, Attorney at Law, 309 Geddis, Helena, Montana 59601, appearing on behalf of Monte Peterson d/b/a Peterson Trucking, Inc., Missoula, Montana; Gaylon Owens, Kalispell, Montana; and Western Transport Crane and Rigging, Inc., Missoula, Montana

FOR THE COMMISSION:

Timothy R. Baker, Staff Attorney, 2701 Prospect Avenue, Helena, Montana 59620

BEFORE:

HOWARD L. ELLIS, Commissioner and Hearing Examiner
WALLACE W. "WALLY" MERCER, Commissioner
CLYDE JARVIS, Chairman

BACKGROUND

On May 24, 1989 the Montana Public Service Commission (Commission) received an Application for Intrastate Certificate of Public Convenience and Necessity from Cebulski Trucking, Inc., Seeley Lake, Montana (Cebulski or Applicant). Specifically, the application sought authority to transport heavy equipment used in logging and road construction operations between all points and places in the counties of Missoula, Flathead, Lake, Lewis and Clark, Powell, Deer Lodge, Silver Bow and Cascade.

In describing the conditions relied upon as justification for the issuance of the intrastate certificate, the Applicant stated in part in its application:

Applicant is conveniently located to several shippers and major logging and road construction sites. Presently certificated carriers must deadhead their equipment approximately one hundred (100) miles round trip in order to provide the requested transportation services to loggers and road contractors in the Seeley/Swan area. Applicant will be able to provide on-site transportation services in a more timely manner and at less cost to shippers in the Seeley/Swan area because his terminal and maintenance facilities are located at Seeley Lake, Montana. In addition, existing carriers are either unable or unwilling to satisfy the transportation needs of anticipated shippers within the area applied for.

After publication, protests were received from Bob Boyd Trucking, Inc., Molerway Freight Lines, Inc., Monte Peterson d/b/a Peterson Trucking, Inc. (Peterson Trucking), Western Transport Crane and Rigging, Inc. (Western),

Shumaker Trucking and Excavating Contractors, Inc., and Lum Owens d/b/a Lum Owens Trucking (Owens).

Pursuant to proper notice, a public hearing was held by the Commission on the application on August 2, 1989 in the Commission offices, Helena, Montana.

At the hearing, an appearance was entered for the following Protestants: Peterson Trucking, Owens and Western.

TESTIMONY

Testimony Offered By Applicant

Mr. Larry Copenhaver, Seeley Lake, Montana, appeared and testified in support of the application. Mr. Copenhaver is a logging contractor in the Seeley Lake area. He would like to see a local permit in the Seeley Lake area to provide small area shippers with lowboy service. His need for service varies with the weather and job situation. On occasion, he has used Peterson Trucking from Missoula, but would like to reduce deadhead time and cost for short moves. In 1988 he made approximately three different moves to different logging sites. He believes a local carrier would increase the availability of equipment, and would be more economical. Peterson Trucking has always been available except on one occasion. Mr. Copenhaver has known Ray Cebulski for 10 years, and would utilize the services of Cebulski Trucking if they were available. Usually, when his equipment breaks down, it is moved to his own shop in Seeley Lake. Mr. Copenhaver operates in Missoula, Powell, Lewis and Clark, and Lake Counties. He has one item which he cannot move with his own equipment, a skidder, which weighs approximately 103,000 pounds.

On cross, Mr. Copenhaver testified that Peterson Trucking has generally moved his equipment for him during 1988 and 1989. On one occasion they were not immediately available and he experienced a three day delay. Mr. Copenhaver has never used either Owens or Western. Mr. Copenhaver stated that

he has used Peterson Trucking six to eight times. He generally uses these carriers to move his skidder only or when he needs to move all of his equipment quickly.

Mr. Ron Richards, Seeley Lake, Montana, appeared and testified in support of the application. Mr. Richards is a contract logger from the Seeley Lake area. He would like to see a local carrier receive a permit such as that applied for, to reduce deadhead costs, and provide a quick response on short notice. He has several pieces of equipment which would require the service sought by the Applicant. In the past he has used Peterson Trucking, or private lowboy operations in the Seeley area.

Mr. Richards stated that the private haulers (which are unauthorized carriers) are not regulated, so most of them do not carry insurance. He stated that he has used such private carriers out of necessity. On three to four occasions this year, Mr. Richards has used Peterson Trucking, and received very good service. On one occasion, they could not provide the needed service and he used another carrier. In the Seeley Lake area they are logging smaller blocks of timber which are further apart than in the past. As a result, the contract loggers are required to move their equipment more often. Mr. Richards has never contacted either Owens or Western, as he did not want to pay deadhead costs. He operates in Missoula, Powell, and Lake Counties. His equipment is usually taken to Missoula for repairs. During the last year Mr. Richards made 12 moves, 3 to a repair facility and 9 from site to site. He stated that if the application were denied, he would continue to use such private carriers.

On cross, Mr. Richards stated that he does not do any hauling for himself, and that the "private carriers" are local people in the Seeley Lake area who have their own lowboy equipment. Approximately 6-8 of the 12 moves made last year were by these unregulated carriers. The Applicant has never provided any of these services. On one occasion, Mr. Richards stated that Peterson Trucking was not available in less than 24 hours, so he used a private carrier instead. He added

that his operation needs a local carrier to provide this service, since when they are finishing up their work in an area, they are uncertain as to exactly when they will need to move. The problem with Peterson Trucking is that they charge deadhead mileage, which makes their service uneconomical. Generally, he has been happy with the services of Peterson Trucking, but does not have to pay as much deadhead to a local carrier. He also stated that for the eight or nine moves by private carriers, he made no attempt to contact Peterson Trucking.

Mr. Roger Johnson, Seeley Lake, appeared and testified in support of the application. Mr. Johnson was appearing on behalf of Pyramid Mountain Lumber Co. (Pyramid) in Seeley Lake. His company has various pieces of equipment which require lowboy service in order to be moved. In the past, they have used Peterson Trucking as well as various private carriers. Although Peterson Trucking can offer service within 24 hours, Mr. Johnson feels that in many instances, this is not timely.

Mr. Johnson also testified that Pyramid buys private timber sales and will subcontract the timber cutting to independent contractors. Part of the cost to Pyramid in these cases is the cost of moving equipment, which is a line item amount on bids which are submitted. From this he knows that a local carrier would provide a cheaper transportation service, which would result in reduced costs to Pyramid. This testimony was objected to on the grounds that it constituted hearsay.

Mr. Johnson stated that such timber sales occur in Missoula, Powell, Lewis and Clark, Deer Lodge, Cascade and Lake Counties. Pyramid's equipment is repaired in Missoula, and Mr. Johnson testified that they would use the Applicant's services on a year-round basis if the application were granted. He has not sought the services of or been solicited by either Owens or Western. The services which have been provided by Peterson Trucking have been satisfactory.

On cross, Mr. Johnson stated that Pyramid has approximately 12 pieces of equipment which would be moved by the Applicant. Two of the pieces are moved site to site and the remainder is moved when repairs are necessary. During the past year Peterson Trucking has moved their equipment three to four times, and those services have been satisfactory, except that 24 hour service is not always timely. Approximately three to four moves during the past year have been by private carriers. Although Mr. Johnson was not sure, he did not believe that Pyramid contacted Peterson Trucking before using private carriers.

On cross, Mr. Johnson stated that overall, most operations were within 40 miles of Seeley Lake, so that a local carrier would be less expensive. He acknowledged that for some moves (ie, Lake County to Missoula County) a local carrier would not be cheaper.

On redirect, Mr. Johnson stated that a local carrier would be immediately available, as opposed to the current 24 hour service offered by Peterson Trucking. Mr. Johnson admitted that he has not personally discussed this matter with anyone from Peterson Trucking.

Mr. John Jungers, Seeley Lake, appeared and testified in support of the application. Mr. Jungers is a contract logger in the Seeley Lake area. He supports the application for reasons of both availability and cost reduction. He feels the presence of a local regulated carrier would significantly reduce costs. Since June 1 of this year, Mr. Jungers has moved his operation five times, all of which have been short moves in the Seeley Lake area. All of the moves were handled by unregulated carriers, who provided service in less than 24 hours. He stated that if a regulated carrier had been used, the deadhead charges would have been substantial. Mr. Jungers stated that he would use the Applicant's services on a year-round basis if authority is granted, adding that a regulated carrier is required to carry insurance. He operates in Missoula and Powell Counties and has bid on jobs in Flathead and Lake Counties as well. His equipment is usually taken to Kalispell for repair.

On cross, Mr. Jungers indicated that he has one piece of equipment which requires the services offered by the Applicant. He has had five such moves performed for him, all by private carriers, and all in the Seeley Lake area. None of these moves were performed by the Applicant, and Mr. Jungers testified that he did not contact any of the authorized carriers. Mr. Jungers stated that in 1973, Western provided these services for him, and dumped his skidder in an accident. He has not used them since. On redirect, Mr. Jungers stated that deadhead time was critical, since he could not afford to have his equipment sitting in the woods and not being used.

Mr. Ron Matthews, Condon, Montana, appeared and testified in support of the application. Mr. Matthews is a general contractor in the Seeley Lake area. In providing his services, he often uses equipment, the movement of which requires the services sought to be provided by the Applicant. He testified that when he leases equipment, he pays transportation costs as part of the lease cost, and the lessors provide the transportation service. If a local carrier was available, they could provide the service. Mr. Matthews stated that he could not use the services of the currently authorized carriers, as the deadhead costs are too much. He stated that he may need this service as often as three times each week during his peak season. He generally operates within a 40 mile radius of Condon, including the Seeley Lake area to Bigfork. If a local carrier was available, he would use its services on a year-round basis.

On cross, Mr. Matthews stated that with leased equipment, the lessor provides transportation only to and from the site. He stated that he needs services like the Applicant's so that he can move equipment between job sites. Currently, regulated carriers are too expensive for their use to be economical.

Mr. Ray Cebulski, Seeley Lake, Montana, appeared and testified in support of the application. Mr. Cebulski is the president of Cebulski Trucking, Inc. He described the various authorities presently held by Cebulski Trucking, as well as its equipment. Cebulski Trucking currently owns three tractors and four flatbed

trailers, and could purchase a lowboy trailer within a week or ten days of receiving authority from the Commission. Mr. Cebulski stated that during the past year many people have contacted him regarding lowboy service. He added that he usually keeps one truck for local (intrastate) service, but that because of a decrease in business, this truck is not being fully utilized. If the authority sought in this proceeding were granted, there would be a more efficient use of available equipment.

Mr. Cebulski stated that if the application were granted as a Class B authority, he would file the same tariffed rates as Peterson Trucking. If a Class C authority were granted, Mr. Cebulski stated that the Class B rates would serve as the contract rates as well.

Mr. Cebulski testified that Cebulski Trucking maintains a terminal and shop in the Seeley Lake area. At the shop regular maintenance is performed, as well as required safety inspections. He also often asks for assistance in this area from the state safety inspector at Clearwater Junction. Mr. Cebulski also explained why the application covers such a large area. He indicated that many of the calls he has received regarding lowboy service have been from persons in these areas (including Cascade and Silver Bow Counties). Mr. Cebulski also stated that he would be willing to operate as a Class C carrier. If the application were granted, Cebulski Trucking would follow all PSC regulations and orders. Mr. Cebulski testified that the financial statement of Cebulski Trucking was attached to the initial application filed with the Commission.

Mr. Cebulski also described limitations upon the authority sought which were acceptable to Cebulski Trucking. This would include a restriction of operations to those originating or terminating within a 40 mile radius of Seeley Lake, except for moves to Missoula or Kalispell for repair work. Mr. Cebulski stated that a definite advantage of his proposed operation over those of currently authorized carriers would be availability, since he is based in Seeley Lake.

On cross, Mr. Cebulski stated that the flatbed trailers are used in both intrastate and interstate service. The lowboy that Mr. Cebulski intends to purchase will cost between \$6,000 and \$10,000. He also admitted that as a Class C carrier, he could charge any rate in a contract, but repeated that this was not his intention. Mr. Cebulski also clarified that the acceptable restrictions described earlier referred to traffic which either originated or terminated in Seeley Lake.

Testimony Offered by Protestants

The Protestants requested that the Commission take administrative notice of PSC No. 2629, the authority currently held by Gaylon Owens, authorizing the intrastate transportation of those commodities sought by the Applicant in this proceeding. There were no objections, and this document was marked as Exhibit A.

Mr. Monte Peterson, Missoula, Montana, appeared and testified in opposition to the application. Mr. Peterson is the president of Peterson Trucking, Inc., and sponsored the following exhibit:

Exhibit B: A copy of PSC No. 4976, the intrastate authority held by Monte Peterson Trucking, Inc., which authorizes the transportation of those commodities sought by the Applicant in this proceeding. This authority has been held by the corporation since December, 1979.

Mr. Peterson testified that Peterson Trucking does not hold any other intrastate authority. Peterson Trucking currently owns and operates five tractors and five lowboy trailers with varying axle configurations. They only operate with lowboy trailers, and currently provide the service sought to be provided by the Applicant.

Mr. Peterson testified that through the use of a two-way radio and a 24 hour answering service, someone is almost always available to respond to a request for service. Generally, Peterson Trucking provides "same day" service, as its trucks

are out in various areas most of the time. Usually, Peterson Trucking is in the Seeley Lake area at least two times each week. Mr. Peterson stated that on the day of the hearing, Peterson Trucking was providing lowboy service to the Seeley Lake area, after receiving a request for service the prior evening at 8:00 p.m. He stated that his company could have met the needs of those shippers who testified on behalf of the Applicant, usually with same day service.

Mr. Peterson testified that 75 percent of the gross revenues of Peterson Trucking are derived from services provided within a 100 mile radius of Missoula. He added that the diversion of a portion of this traffic would have detrimental financial impacts upon Peterson Trucking, which could lead to the sale of equipment or elimination of employees.

On cross, Mr. Peterson testified that the counties of Mineral, Sanders and Ravalli, do not produce much revenue for Peterson Trucking. Mr. Peterson agreed that decreases in the size of timber sales and cuts has led to greater transportation needs. Mr. Peterson also stated that he was aware of the illegal activity in the Seeley Lake area, and had discussed this problem with the Commission's enforcement officer. He testified that the approximate distance from Missoula to Seeley Lake is 60 miles.

Mr. Gary Nelson, Missoula, Montana, appeared and testified in opposition to the application. Mr. Nelson is the president of Western Transport Crane and Rigging, Missoula. Western is a carrier which specializes in heavy hauling, both on an intrastate and interstate basis. Western's terminals are located

in Missoula, Grand Island, Nebraska, and Waco, Texas. Mr. Nelson sponsored the following exhibits:

Exhibit C: PSC No. 2082, the intrastate authority held by Western Transport Crane and Rigging, which authorizes the transportation of those commodities sought by the Applicant in this proceeding.

Exhibit D: The equipment list for Western Transport Crane and Rigging.

Exhibit E: A list, compiled by Mr. Nelson, of all movements made by Western from May 1, 1989 to July 24, 1989, that fall within the scope of the authority requested by the Applicant.

Referring to Exhibit D, Mr. Nelson described Western's equipment.

The majority of the equipment is based in Missoula, but is also located in Butte, Chinook and Kalispell, as well. Most of the equipment is for lowboy service, but Western also owns several stepped trailers. Within the area covered by the application, Western operates 39 power units and 30 lowboy trailers. All of Western's trucks are radio-equipped, and with a 24 hour answering service, they are usually able to provide same day (or next morning) service.

Mr. Nelson testified that Western could handle all of the traffic described by the shipping witnesses supporting the application. Referring to Exhibit E, Mr. Nelson pointed out that Western made 68 movements between May 1 and July 21, 1989, within the scope of the application in this proceeding. Virtually all of these movements were within a 40 mile radius of Seeley Lake. The total revenue generated by these moves represents 12.8 percent of all intrastate (Montana) revenues for Western, and 1.3 percent of all revenues.

On cross, Mr. Nelson stated that Western was available to provide lowboy services in the Seeley Lake area. Mr. Nelson stated that Western has not solicited business or contacted shippers to seek their business. However, on redirect, Mr. Nelson clarified that Western has held itself out to the public in this area as a provider of the service sought by Applicant in this proceeding.

DISCUSSION, ANALYSIS AND FINDINGS

The Commission must consider several elements in judging an application for a Certificate of Public Convenience and Necessity. The first consideration is the Applicant's fitness, i.e., whether or not it is a suitable carrier to operate in Montana. The Commission is assisted in this regard by the fact that the Applicant is currently offering other services in Montana. In addition, the Applicant is well-established in the Montana transportation business. Further, Applicant appears to have the financial ability to sustain the proposed operations.

The next question is whether or not public convenience and necessity require that we grant the requested authority. Section 69-12-323(2), MCA, provides:

If after hearing upon application for a certificate, the commission finds from the evidence that public convenience and necessity require the authorization of the service proposed or any part thereof, as the commission shall determine, a certificate therefore shall be issued. In determining whether a certificate should be issued, the commission shall give reasonable consideration to the transportation service being furnished or that will be furnished by any railroad or other existing transportation agency and shall give due consideration to the likelihood of the proposed service being permanent and

continuous throughout 12 months of the year and the effect which the proposed transportation service may have upon other forms of transportation service which are essential and indispensable to the communities to be affected by such proposed transportation service or that might be affected thereby.

The concept has perhaps best been described in the landmark case 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.

The Applicant has failed to meet its burden. Five shipper witnesses appeared and testified in support of the application. Three of the witnesses testified that they had never contacted either Western or Owens regarding their services. The other two shippers had not sought out the services of any of the authorized carriers. For the most part, those shippers which indicated that they had used the services of Peterson Trucking found those services to be satisfactory.

The Applicant's case appears to rest upon a need for something more than 24 hour service. Again, those shippers using Monte Peterson Trucking generally received immediate service, with a few minor exceptions. It must be again emphasized that none of the shipper witnesses had attempted to use the services offered by either Western or Owens. Representatives of both Peterson Trucking and Western testified that they could, in most instances, provide same day service.

Most of the shippers, at one point or another, indicated that their real need for service revolved around their desire to avoid deadhead costs through the use of a locally-based carrier. Of course, such considerations are irrelevant in a PC&N proceeding such as this one. This is consistent

with the past policy of the Interstate Commerce Commission, which this Commission has found persuasive. See In the Matter of Mack E. Burgess and David L. Blatter, d/b/a Security Armored Transport, Docket No. T-6411, Order No. 4607a.

Finally, several shippers indicated that if the application is denied, they would continue to use unauthorized carriers. These shippers are reminded that the knowing use of an unauthorized motor carrier is a violation of the law.

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.
3. Applicant has not demonstrated that there exists a public demand or need which existing carriers cannot meet.
4. Following hearing on the application and based upon the evidence in the record, the Commission concludes that public convenience and necessity do not require the granting of the application herein.

ORDER

NOW THEREFORE IT IS ORDERED that the Application in Docket No. T-9408 be DENIED.

Done and Dated this 30th day of October, 1989 by a vote of 5 - 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

CLYDE JARVIS, Chairman

HOWARD L. ELLIS, Vice Chairman

WALLACE W. "WALLY" MERCER, Commissioner

ATTEST:

Ann Purcell
Acting Commission Secretary

(SEAL)

NOTE: Any interested party may request that the Commission reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.