

Service Date: July 17, 1990

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 Jones Brothers Trucking, Inc. )	
DBA Executive Limousine Service, )	DOCKET NO. T-9469
for a Class B Montana Intrastate )	
Certificate of Public Convenience )	ORDER NO. 5987a
and Necessity. )	

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FINAL ORDER

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APPEARANCES

FOR THE APPLICANT:

Samuel M. Warren, Worden, Thane and Haines, P.C., P.O. Box 4747, Missoula, Montana  
59806

FOR THE PROTESTANTS:

Richard Courtney, Courtney's Limousine Service, 2004 Cannon Street, Helena, Montana  
59601, appearing protestants

Debbie Kindsfather, Limo-scene, Limousine Service, 1509 Rosebud Lane, Billings, Montana  
59101, appearing protestants

Leona Knutson, Bell-A-Limo, Limousine Service, 1520 Ashley Lake Road, Kalispell,  
Montana, appearing protestants

Barbara Morrow, Butterfield Stage Limousine, Box 951, Bonner, Montana 59823, appearing protestants

Shellie Berry, A-Limo Limousine Service, P.O. Box 50550, Billings, Montana 59105, appearing protestants

FOR THE COMMISSION:

Robin A. McHugh, Staff Attorney, Dave Burchett, Supervisor of Motor Carriers, 2701 Prospect Avenue, Helena, Montana 59620

BEFORE:

HOWARD L. ELLIS, Commissioner and Hearing Examiner

BACKGROUND

On October 23, 1989 the Commission received an application from Jones Brothers Trucking, Inc., dba Executive Limousine Service (Applicant) for a Certificate of Public Convenience and Necessity, Class B, authorizing the transportation of passengers by limousine service from points in Missoula County to all points and places in the State of Montana and from all points and places in the State of Montana to Missoula County, Montana. By letter dated January 25, 1990 the Applicant limited the authority requested to limousine service from points in Missoula County to all points and places in the State of Montana. The amended request would not allow transportation from points outside Missoula County to points inside Missoula County, unless the transportation movement were a round trip originating in Missoula County. The application is limited to transportation of six passengers or less and to limousine transportation only. Transportation as a jitney or a taxi is prohibited.

The Commission received written protests from the following carriers: Lonnie and Leona Knutson, PSC No. 7172; Ron and Debbie Kindsfather, PSC No. 8949; Beach Transportation Company, PSC No. 4884; DAKETOKACATE, PSC No. 9044; Shellie D. Berry, dba "A"--LIMO Limousine Service, PSC No. 8943; Richard and Barbara Courtney, dba Courtney's Limousine Service, PSC No. 9020; Mike and Debra Dailey, dba Benton Stage Line, PSC No. 8991; and David L. Morrow, dba Butterfield Stage Limousine, PSC No. 9031.

Following issuance of proper notice, a hearing was held on January 31, 1990 in the City Council Chambers, City Hall, 201 West Spruce, Missoula, Montana. At the conclusion of the hearing the Applicant requested that the Commission issue a proposed order.

On May 9, 1990 the Commission issued Proposed Order No. 5987.

On June 4, 1990 Applicant filed an Exception and Brief to said Proposed Order.

#### SUMMARY OF TESTIMONY

##### Testimony of Applicant

William Paul Jones Jr., President of Jones Brothers Trucking, appearing and testified in support of the application. Mr. Jones testified that Jones Brothers is an interstate carrier regulated by the Interstate Commerce Commission and the Department of Transportation. Mr. Jones stated that approximately one year ago Jones Brothers looked to expand its operation and perceived a need for a professional limousine service in the Missoula area. The company did some market studies and the results of those studies convinced the company to purchase a vehicle and to begin a limousine business. The company obtained a business license from the City of Missoula but was not aware that a limousine service requires a certificate of public convenience and necessity from the Montana Public Service Commission. Mr. Jones testified that there was no intention on the part of the company to evade the laws of the State of Montana. The company, since becoming informed of the need for a certificate, has not operated. Mr. Jones testified that the proposed limousine service would like to serve the entire state from Missoula. He also testified that Executive Limousine Service would be a wholly-owned subsidiary of Jones Brothers, Inc. Mr. Jones testified that, in his opinion, existing limousine services in the Missoula area are not marketing their product adequately and therefore there exists a need for an additional limousine service.

Robert L. DeMarois, General Manager of DeMarois Oldsmobile GMC and the manager of Budget Rent-a-Car in Missoula, appeared and testified in support of the application. Mr. DeMarois indicated that Budget Rent-a-Car receives requests for limousine service. He said Budget Rent-a-Car receives between one and two dozen requests for limousine service each year and that until recently he did not know where to refer persons making the requests. Mr. DeMarois testified that he did not look in the Yellow Pages to see if there were other limousine services listed there. He further indicated that he does not have a personal need for a limousine service.

Karen Lynn Rausch, Manager of Thrifty Travel, appeared and testified in support of the application. Ms. Rausch testified that Thrifty Travel receives between 30 and 40 calls per year from persons seeking limousine service. She also testified that she is not aware if there is an existing service in the Yellow Pages.

Linda Simpson, a bookkeeper at Jones Brothers Trucking, appeared and testified in support of the application. She described generally how Executive Limousine Service was created and indicated that in her opinion another limousine service is needed in the Missoula area.

Three exhibits were offered into evidence and admitted by the Hearings Examiner in support of the application. Exhibit A is a City Business License granted to Executive Limousine Service. Exhibit B is a Certificate of Registration from the Secretary of State of the State of Montana for the name Executive Limousine Service. Exhibit C is a promotional brochure for Executive Limousine Service.

#### Testimony of Protestants

As noted, several existing carriers protested the application. The Commission determines, however, that only two Protestants have standing given the limitations on the present application, as amended:

Leona and Lonnie Knutson (Leona Knutson testified) have Class B authority for persons and baggage in limousine service between all points and places in Flathead, Lincoln, Missoula, Lake and Glacier Counties.

David L. Morrow, dba Butterfield Stage Limousine (Barbara Morrow testified), has Class B authority for passengers by chauffeured limousine between all points and places in Missoula, Lake, Flathead and Ravalli Counties.

The other Protestants, identified as making an appearance, have Montana authority that does not overlap or conflict with the authority sought by the Applicant. Of the two Protestants with standing, the Commission is most concerned with the protest of Butterfield Stage. Butterfield Stage has been operating in the Missoula area since October of 1989. Ms. Morrow indicated that Butterfield Stage has advertised in the Yellow Pages, but that business for the limousine service has been slow. Butterfield Stage has 24 hour phone service.

#### SUMMARY OF PROPOSED ORDER

Proposed Order No. 5987 denied the application on the basis that the Applicant had failed to demonstrate either a public need for the proposed service or, assuming such a need, that existing carriers could not meet the demand or need.

### SUMMARY OF EXCEPTION

Applicant's Exception to the Proposed Order challenged the Commission's finding that Applicant failed to demonstrate a public need for the proposed service. Applicant's challenge is based on its contention that shipper testimony is not necessary to establish public need. Additionally, Applicant took issue with the Commission's consideration, under § 69-12-323(2)(a), MCA, of the impact the proposed service would have on existing limousine carriers. Applicant contends that such consideration is appropriate only when existing service is "essential and indispensable" to the communities affected; and application of § 69-12-323(2)(a), MCA, in the instant matter was "illogical and absurd" since limousine service is not essential or indispensable.

### DISCUSSION, ANALYSIS AND FINDINGS

In considering applications for operating authority, the Commission is governed by the provisions of 69-12-323, MCA. Paragraph (2)(a) of that section provides as follows:

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 therefor 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.

Applying this language to the facts presented by any application for transportation authority, the Commission has traditionally undertaken the following analysis: First, it asks whether the Applicant has demonstrated that there is a public need for the proposed service. If the Applicant has not demonstrated public need then the application is denied and there is no further inquiry. Second, if the applicant has demonstrated a public need for the proposed service, then the Commission asks whether existing carriers can and will meet that need. If demonstrated public need can be met as well by existing carriers as by an applicant, then, as a general rule, an application for additional authority will be denied. Third, once it is clear that there is public need that cannot be met as well by existing carriers, the Commission asks whether a grant of additional authority will harm the operations of existing carriers contrary to the public interest. If the answer is yes, then the application for new authority will be denied. If the answer is no, then the application will be granted, assuming the Commission determines the applicant fit to provide the proposed service.

The traditional analysis described above has perhaps been stated most concisely in the case of Pan American Bus Lines Operation, 1 M.C.C. 190, 203 (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.

The first question to be addressed therefore, is whether the Applicant has demonstrated a public need for the proposed limousine service. The Commission finds that it has not. No witness presented could testify from personal experience that he or she has had a need for limousine service. Two of the witnesses presented are employed by Applicant Jones Brothers

Trucking, owner of Executive Limousine Service. A third witness manages a car rental company that has received requests for limousine service and another witness works at a travel agency that has received requests for limousine service. It is axiomatic that in order to demonstrate need to support a certificate of public convenience and necessity an applicant must present shipper witnesses who can testify from their personal experience that a need exists for the proposed service. No such witnesses were presented by the Applicant in this case. Therefore the Commission finds that the Applicant has failed to meet its threshold burden as described above in paragraphs 16 and 17.

In the Exception to the Proposed Order, Applicant argues that 1) public convenience and necessity was in fact established, and 2) evidence of personal need "is not statutorily or logically required to establish 'public convenience and necessity.'" (See Exception of Applicant, pp. 5-6.) The Commission finds, however, that these arguments lack basis in either fact or law. Section 69-12-201, MCA, bestows upon the Commission broad powers and authority for the supervision and regulation of motor carriers. This power and authority is carried over into Section 69-12-323(2)(a), MCA, which vests discretionary authority in the Commission to determine public convenience and necessity. And while Section 69-12-323(2)(a), MCA, requires the Commission to take certain factors into account, "the fact remains that all that is required is that the "Commission" must give a full hearing to all interested parties; and, when it has done that, it must then make decisions for itself on its own responsibility, based upon all the evidence and facts before it." See State v. Healow, 98 Mont. 177, 186 (1934). In making this discretionary determination, the Commission has traditionally relied upon shipper witnesses to establish and substantiate public need -- a shipper witness being one who can testify as to a personal need for the service, as opposed to a witness who merely opines that others have a need for the proposed service. In this regard, the Commission

notices the criteria of the Interstate Commerce Commission, as set forth in John Novack - Extension, FCC §36417 (1970):

Further, shipper testimony supporting the application for authority must identify clearly the commodities it ships or receives, the points to and from which the traffic moves, the volume of freight it would tender to applicant, the transportation service now used for moving the traffic, and any deficiencies in existing service.

Though the presence or absence of shipper witnesses is not determinative, their Novack-type testimony is invaluable in establishing the type and extent of service needed. As previously noted, Applicant failed to produce a single shipper witness. Without qualified and detailed evidence establishing the existence of public need, the Commission is hard-pressed to understand Applicant's contention that public convenience and necessity was in fact proven. Therefore, the Commission finds Applicant's exception on this point to be without merit.

Recognizing the discretionary process inherent in the determination of public convenience and necessity, the Commission now addresses Applicant's contention that a showing of public need is neither statutorily or logically required. Section 69-12-323(2)(a), MCA, specifically provides that the Commission shall issue a certificate for the proposed service only upon a finding of public convenience and necessity. (Emphasis added). While the Commission admits broad discretionary authority, such authority does not extend to rewriting the legislative command of Section 69-12-323(2)(a), MCA, i.e., the Commission may not grant authority on the basis of convenience alone. In regard to the logic of requiring public convenience and necessity before a grant of authority will issue, the Commission again defers to the Legislature. However, the Commission wishes to point out that a showing of public need is not outside the realm of logic. Restaurants and hotels come immediately to mind as potential shipper witnesses. Additionally,

business concerns wishing to transport executives and clients would also be helpful in establishing public need. Therefore, the Commission finds Applicant's contention on this point to also be without merit.

Applicant also contends in its Exception that existing limousine service should not be a consideration under 69-12-323(2)(a), MCA, because limousine service is not "essential or indispensable." Applicant has misread § 69-12-323(2)(a), MCA. Said section provides in pertinent part:

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 the effect which the proposed 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.  
(emphasis added)

The statutory command here is to give reasonable consideration to railroads and other existing transportation agencies. Beyond this consideration, the statute directs the Commission to consider those transportation services which are essential and indispensable to the communities affected. To summarize, the consideration of existing transportation agencies (e.g., other limousine services) is separate and distinct from the consideration given to essential and indispensable transportation services (e.g., bus lines, ambulance services). While Applicant may find even the threshold consideration of existing limousine service "illogical and absurd," the legislature has deemed such consideration appropriate. Further, if the Commission's authority was limited to only those cases involving "essential and indispensable" transportation, the Public Service Commission would become nothing more than a licensing bureau -- a result not supported by the provisions of

Chapter 12 of Title 69. The Commission therefore finds proper its consideration of the existing limousine services, and finds Applicant's exception without merit.

The Commission does not doubt that the Applicant would provide a quality limousine service. However, nothing in this record supports the conclusion that existing carriers are not already providing quality service. Because this record contains no evidence of need, and no evidence that existing carriers cannot meet that need, the application must be denied.

#### CONCLUSIONS OF LAW

The Montana Public Service Commission properly exercises jurisdiction over the parties and matters in this proceeding pursuant to Title 69, Chapter 12, MCA.

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

Applicant has not demonstrated a public demand or need for the proposed service.

Assuming, arguendo, public demand or need, Applicant has not demonstrated that existing carriers cannot meet that demand or need.

Following hearing on the application and based upon the evidence in the record, and after considering Applicant's Exception, 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-9469 be denied.

IT IS FURTHER ORDERED that all motions made and not ruled on are hereby denied.

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 2nd day of July, 1990 by a vote of 5 - 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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HOWARD L. ELLIS, Vice Chairman

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JOHN B. DRISCOLL, Commissioner

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REX MANUEL, Commissioner

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WALLACE W. "WALLY" MERCER, Commissioner

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DANNY OBERG, Commissioner

ATTEST:

Ann Peck  
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.