Service Date: November 20, 1995

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

* * * * *

IN THE MATTER OF THE CITY OF HELENA, Petition for Declaratory Ruling on the Law Applying to Transportation of Garbage from a Transfer Station to a Landfill.	)))))	TRANSPORTATION DIVISION DOCKET NO. T-95.38.DR

DECLARATORY RULING

Introduction

On June 7, 1995 the Montana Public Service Commission (PSC) received a Petition for Declaratory Ruling from the City of Helena (Helena), Montana. In its petition Helena requests a PSC ruling on the application of PSC-administered Class D (garbage) motor carrier laws to Helena's transportation of garbage from a local solid waste transfer station owned and operated by Helena to a local solid waste landfill owned and operated by Lewis and Clark County. Helena is within Lewis and Clark County (County).

Following public notice of Helena's petition, comments were received from the Montana Solid Waste Contractors (SWC, an association of Class D motor carriers in Montana) and City County Sanitation Services (CCS, a motor carrier with Class D authority in the Helena area). Both argue that Helena's transportation in question is regulated motor carriage.

For purposes of responding to the opposition by SWC and CCS Helena requested a hearing on the matter. The PSC denied Helena's request, but allowed Helena to submit further written comments. All written comments have now been submitted and it appears that the facts and arguments are complete to the extent that no hearing is necessary for the PSC to reach a proper determination on the question presented.

Summary of Written Comments Received

Helena states that it owns and operates the solid waste transfer station from which the transportation in question originates. Helena states that its residents (individuals, businesses, and other entities within Helena's municipal boundaries) and the County (on behalf of itself and its residents) pay Helena to deposit garbage at this transfer station. Helena states that the garbage deposited in the transfer station (Helena garbage and County garbage) is then transported in vehicles and equipment owned and operated by Helena, to a

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local landfill site owned and operated by the County. Helena states that the County charges it a fee for depositing the garbage at the landfill. SWC and CCS do not dispute these things, but add that Helena's transfer station can and does also receive garbage, for a fee, even from sources outside the County (included herein as County garbage).

In relation to its transfer station operations, Helena identifies itself as being only in the business of receiving garbage. It also identifies itself as being in the much broader business of providing services to its residents. It asserts that it becomes the owner of all garbage received at its transfer station and such ownership is in accord with state and federal law (no citations). It asserts that its transportation from the transfer station to the landfill is not for hire and that it is not in the business of transporting for hire. Helena argues that its transportation of garbage from the transfer station to the local landfill is incidental to its businesses (of receiving garbage and of providing for its residents) and is for itself (as owner of the garbage) and is therefore not regulated under motor carrier laws administered by the PSC.

SWC and CCS argue that Helena is transporting garbage for persons other than residents of Helena and that such is for hire. They point out that those depositing County garbage at Helena's transfer station pay a fee to Helena for use of the transfer station and transfer station services and this fee should extend to the transportation aspect as well. CCS specifically argues that "for hire," defined in § 69-12-101(5), MCA (and material to the definition of "motor carrier" in § 69-12-101(8), MCA), includes both direct and indirect compensation. It argues that, through the fee charged for Helena's transfer station services, there is compensation for the transportation aspect of those services, direct or indirect. Helena disputes this and maintains that it charges only a tipping fee, which is solely for the use of the transfer station and is not for transportation. Helena argues that it has entered and enters no contract for the transportation in question. Helena also points out that its transfer station service includes receiving, screening, recycling, removing, compacting, and disposing of solid waste.

CCS argues that Helena's theory that it becomes the owner of the garbage has been implicitly rejected in Montana Solid Waste Contractors, et al. v. Public Service Commission, et al. (SWC v. PSC), BDV-92-448, Order on Petition for Judicial Review (Montana first Judicial District, September 21, 1993). It also argues that this theory of ownership of garbage has been rejected in previous PSC rulings (no citations). It also argues that, if Helena's theory is accepted, any municipality could haul garbage from anywhere to anywhere without authority. Helena disagrees, arguing that SWC v. PSC basically holds only that more facts were required before the PSC could make a proper determination in that case. It argues that CCS's assertion that Helena is transporting garbage for the

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County is wrong, maintaining that the garbage, once deposited at the transfer station, is Helena's garbage. It argues that it is impossible to separate Helena garbage from County garbage once deposited at the transfer station.

SWC argues that application of the primary business test (ARM 38.3.1001 through 38.3.1005, exclusion for transportation incidental to a principal business) may require more facts than have been presented by Helena. From the facts presented, SWC seems to argue that Helena's transportation does not meet the primary business test. Helena disagrees, maintaining that the transportation is but a small part of Helena's transfer station operations and also a small part of its entire business of acting on behalf of Helena citizens and businesses.

SWC argues that public policy does not justify exemption for Helena's transportation. In this regard it argues that Helena has many valid options available to it: competitive bid for services from three authorized carriers in the service area; competitive bid for lease of these authorities; application for authority; or becoming part of the County's solid waste management district. Helena disagrees, arguing that to force it to pursue one of these options is not good public policy when there is the option of no regulation available under the law.

PSC Analysis and Discussion

Preliminary Matters

Effect of SWC v. PSC

The parties rely on the District Court opinion in SWC v. PSC, (citation above) as support for various arguments. SWC uses the opinion as support for its suggestion that more facts may be necessary. CCS argues that the opinion implicitly overrules Helena's argument that it becomes the owner of the garbage it receives. Helena (interpreting the SWC and CCS arguments as being that the opinion implicitly requires Helena to obtain authority) argues that the opinion only holds that the PSC required more facts before it could issue a ruling. Helena also argues that the opinion makes it clear that Helena should be exempt from authority requirements.

The PSC disagrees with all these arguments based on SWC v. PSC. Although the District Court did state that the PSC did not do an adequate job of considering the given facts or comments of the public in that case, the opinion in SWC v. PSC stands only for the proposition that application of the primary business test to transportation incidental to landfill operations is not a feasible process. SWC v. PSC has no direct bearing on Helena's question which involves a transfer station, not a landfill. However, the PSC will certainly keep in mind the Court's caution relating to complete review of given facts and adequate consideration of public comments.

Absence of "(including pickup and disposal)"

In sec. 69-12-301(5), MCA, there has long been a parenthetical provision which, in regard to "transportation" in

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that Class D definition, included "pickup and disposal." This provision has been used in the past as support for various arguments made before the PSC. Although the PSC is not certain how it was intended to apply in this case (CCS merely included it in a reference to Montana statutes), Helena is correct in its argument that the language is no longer part of the statutory law. See, Ch. 358, L. 1995.

Effect of PSC Informal Opinions

In their comments SWC and CCS also mention that Helena has obtained informal staff opinions from the PSC which relate to the question now presented. It appears that those opinions have all suggested that Helena's transportation operations now in question are regulated.

However, as Helena notes, PSC staff opinions are informal, not binding on the PSC, and do not preclude or govern review by the PSC on an identical or related formal request for a ruling. The informal opinions may be reviewed to assist in analysis, but they are not controlling.

Effect of Failed Legislation

The Montana Legislature has considered proposed legislation which, if passed, might have made a question such as Helena's unnecessary (e.g., HB 636, 52nd Legislature, 1991, would have allowed local governments automatic proof of public convenience and necessity upon presentation of a written contract for transportation services). The Legislature has also considered proposed legislation that might have made Helena's question moot (e.g., HB 458, 54th Legislature, 1995, would have exempted transportation of garbage by local governments from regulation).

Neither bill became law and SWC and CCS reference this in their arguments. However, the PSC sees no valid reason to view the failure of these bills as either a dispositive or an influential legislative determination on Helena's transportation of garbage from its transfer station. This is so because Helena is not arguing that, because it is a local government it should be exempt (something that the failed legislation might bear on). Helena is arguing that it is excluded from regulation because its transportation is of its own garbage and is incidental to its principal business. Both of these are available exclusions, under the proper circumstances, in the law as it now exists. The failed legislation does not appear to directly bear on the question being considered.

Scope of Ruling

Although undisputed (and included for clarification only), the aspect of Helena's transportation that is legitimately the subject of this ruling is Helena's transportation of garbage deposited at Helena's transfer station by those who are not Helena residents (ie., the ruling pertains to "County garbage" and all garbage which that term encompasses herein). Helena, as well as other municipalities, can transport garbage

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as a service to their residents (those within Helena's municipal boundaries) without motor carrier authority.

PSC Analysis and Discussion

Question of Law and Specific Issues

The question of law is whether, under the facts presented, Helena's transportation of garbage between its solid waste transfer station and the County landfill is regulated motor carriage (for which motor carrier authority is required) or whether such transportation is unregulated private carriage (for which motor carrier authority is not required). Except for the preliminary matters (discussed above), the specific issues presented are: whether Helena's transportation is "for hire;" whether Helena is excluded from regulation because it is the owner of the garbage transported; and whether Helena is excluded from regulation because its transportation is merely incidental to its principal business.

For Hire

Among other things, in order for transportation to be regulated it must be done "for hire." To the extent relevant in this matter, transportation is "for hire" if it is done for remuneration of any kind, direct or indirect. See, generally, § 69-12-101(5), MCA.

Helena is a municipality engaged in an operation which regularly makes its solid waste transfer station available to persons and entities outside of Helena's municipal boundaries and does so for a fee. For all practical purposes this operation is equivalent to a business enterprise or commercial undertaking (service on a regular basis for a fee).

Helena attributes the fee it receives only to the receipt-of-garbage aspect of its operations (and possibly other on-site services identified by Helena), not to the transportation-of-garbage aspect. However, given the obvious nature of Helena's transfer station (and any transfer station), transportation of garbage away from the station is a direct, integral, and necessary part of the operations, as the station would soon fill with garbage if the garbage were not transported away.

Whether a business is private or government or a combination of both, it is relatively easy to categorize revenues received for a service in a way that disconnects them from any one particular aspect of that service. It is even relatively simple to support such through contract terms or accounting methods created by design (for that purpose) or otherwise.

Therefore, in analyzing a question of whether transportation is "for hire" in a business setting, the PSC will not view contract terms or accounting methods as controlling. In Matter of Halse, PSC Docket No. T-9565, Declaratory Ruling (September 6, 1990), the PSC stated that "in the case that the element of receiving payment is a prerequisite to invoking regulation, as it is in motor carrier

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regulation, mere accounting or billing practices which in form might demonstrate no receipt of payment for what would otherwise be a regulated activity, cannot be permitted to override the substance of what is occurring." Id., para. 18.

In such setting, where transportation is directly related, integral, or essential to the overall service or another aspect of the service to which revenues are clearly attributed, imputing revenues to the transportation aspect will occur. There is no credible reason for a contrary conclusion in Helena's case and the PSC imputes revenues obtained to the transportation aspect of Helena's services. Helena's transportation is done "for hire," as it includes remuneration of any kind, direct or indirect.

In this regard, in Matter of Grouse Mountain, PSC Docket No. T-93.33.DR, Declaratory Ruling (September 1, 1993), the PSC stated that, given the definition of "for hire," it is "unlikely that there could normally be any transportation in a for-profit setting that is not 'for hire' in some qualifying fashion." Id., para. 12. The PSC now extends that reasoning to apply in a business or commercial setting or equivalent, whether for-profit or otherwise.

Ownership of Garbage

Helena states that it becomes the owner of the garbage deposited at its transfer station. In part Helena appears to reason that, because it becomes responsible for the garbage, it owns the garbage. This ownership-by-responsibility theory is not sound, as responsibility does not necessarily create ownership. Additionally, Helena is responsible for the garbage because its agreements require it to be so, not necessarily because it owns the garbage.

As the owner of the garbage, Helena argues that it is not transporting garbage for another and is therefore not within the definition of "motor carrier." However, except for that garbage that Helena might generate itself (Helena owns such) and that which Helena residents generate (not in issue), the PSC disagrees that, within the context of motor carrier regulation, Helena is or can be the "owner" of the garbage it receives at its transfer station.

Foremost in the PSC's reasoning on this point is that, given the nature of the question of ownership of garbage (explained below), an opposite conclusion would allow regulation to be so easily circumvented that such would produce an absurd result, effectively making Class D motor carrier regulation inapplicable in most (if not all) instances. Necessarily, it must be inferred that the law did not intend that garbage would be subject to the exclusion for transportation on behalf of one's self in the instance where "ownership" has been transferred from the one who generates it to the one who transports it.

In Board of Railroad Commissioners v. Gamble-Robinson Co., 111 Mont. 441, 111 P.2d 306 (1941), it was held that to fall within the definition of "motor carrier" the

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transportation must be of the person or property of another. 111 P.2d at 310. Although garbage is not generally considered "property" in the context of motor carrier regulation, the PSC agrees (with qualification as alluded to above and explained below) that the Gamble-Robinson logic could extend to the transportation of garbage. In fact, the PSC has so extended the logic in instances where the garbage being transported is clearly not the "property" of another. Generally, a person's transportation of his or her own garbage is viewed as unregulated private carriage.

However, given the nature of garbage and that such seems to evade all customary legal analysis involved in determining ownership, the only instance in which the transportation of garbage is routinely deemed not "for another" is when it is transported by the person generating the garbage. Once garbage is collected from the person generating it or deposited by the person generating it, customary theories relating to "ownership" or transfer of ownership make little sense. Except when the garbage is deemed owned by the person who generates it, ownership becomes suspect for purposes of motor carrier regulation.

This is so because, with some exceptions (e.g., garbage to be used as fuel) not in issue, garbage is generally considered to have a negative value. In most instances the person generating the garbage must pay to have it collected, removed, and disposed of, would gladly give it away to have this done, would most likely prefer to disclaim ownership and responsibility for it, and would likely be somewhat confused if someone offered to purchase it. For garbage, in the motor carrier context, there is generally no one in the chain of possession, including the person generating it, willing to dispute another's claim to ownership. In the transfer of ownership of garbage, involved is no title, bill of sale, compensation, exchange of value, or like things. Determining title to garbage so evades customary analysis applied in determining ownership that ownership cannot be a valid factor in considering whether transportation is for one's self or for another (except where the one generating the garbage is concerned).

Therefore, for purposes of motor carrier regulation, Helena cannot be the owner of the garbage deposited at its transfer station (for motor carrier purposes) and must be viewed as transporting garbage for another. Helena's transportation of garbage is within the definition of motor carrier in this regard.

Primary Business Test

The determinations on the above issues do not preclude consideration or application of the primary business test. Transportation can be "for hire" and "for another" and remain excluded from regulation under the primary business test.

In regard to this test, Helena argues that its principal business is receiving garbage. Simultaneously, or

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alternatively, Helena argues that its principal business is providing general government services to its residents. In either case Helena argues that its transportation operations are merely incidental to a principal business.

Helena's assertion that its principal business is of providing general government service cannot be denied, insofar as its residents are concerned. However, Helena's general government services cannot be extended to encompass those outside its municipal boundaries. In regard to the PSC's primary business test, such would exceed Helena's clear economic purpose of providing general government services to its residents and therefore be outside of the qualifying scope of its principal business. See, ARM 38.3.1001(2) and 38.3.1002(1)(a) and (c). Services to those outside of Helena's municipal boundaries are all that is in issue in this instance, so Helena's argument regarding transportation being incidental on that basis cannot be upheld.

The above does not preclude analysis in regard to Helena's alternative assertion that its principal business is the business of receiving garbage at its transfer station. In this context Helena has a principal business (transfer station services).

However, it is not a qualifying principal business. To qualify for the primary business test exclusion the principal business cannot be a transportation business. ARM 38.3.1005(1)(b). By its nature transportation is a significant part of transfer station (even the name "transfer station" connotates that something will be transferred or continue to be moved). Helena's transfer station can even be reasonably viewed as nothing more than a complex unloading and loading facility. In such context it merely facilitates transportation. At Helena's transfer station garbage is deposited into a large bin, pushed by a large front end loader or blade and dragged by a large hydraulic hoe or shovel or gripping device and loaded and compressed into a trailer for transportation. The operation is as much transportation as it is anything else.

Even if Helena's transfer station operations were deemed a qualifying nontransportation business for purposes of the primary business test, Helena's transportation would not be incidental. Helena's transportation does appear to be in furtherance of such business and in the scope of such business. See, ARM 38.3.1001(2) and 38.3.1002(1)(a), (b), and (c). However, for transportation to qualify for exclusion from the definition of "motor carrier," it also must be subordinate to the principal business. "Subordinate to" means "lessor than, minor in comparison to, dependent on, existing because of, and controlled by." ARM 38.3.1002(d). It can include transportation important to, even essential to, the principal business, but it does not include transportation which is a significant enterprise itself. ARM 38.3.1002(d). Helena's transportation of garbage is such a significant and

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integral part of the overall operation that it cannot be deemed merely subordinate.

RULING

Helena's transportation of garbage, which is deposited at Helena's transfer station by anyone other than a resident or business or similar entity within the confines of Helena's municipal boundaries, between its solid waste transfer station and the local County landfill is regulated motor carriage for which motor carrier authority is required.

Done and dated this 7th day of November, 1995, by a vote of 5-0.

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BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

NANCY MCCAFFREE, Chair

DAVE FISHER, Vice Chair

BOB ANDERSON, Commissioner

DANNY OBERG, Commissioner

BOB ROWE, 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 ARM 38.2.4806.

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