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

IN THE MATTER of the Petition of DEAN WAYNE HALSE for a Declaratory Ruling on the Application of PSC Motor Carrier Laws to Transportation Aspects of a Mail Processing Business.	)))))	TRANSPORTATION DIVISION DOCKET NO. T-9565 DECLARATORY RULING

TO: All Interested Persons

INTRODUCTION

1. On March 29, 1990 the Montana Public Service Commission (PSC) received a Petition for Declaratory Ruling from Dean Wayne Halse (Halse), doing business as Executive Services Mailing Division in Bozeman, Montana.

2. On June 7, 1990 the PSC issued a Notice of Petition for Declaratory Ruling, referencing the procedure applicable, setting forth the facts, identifying the issue of law and establishing a comment period.

3. The facts upon which a ruling will be made are as follows. Halse engages in a business of processing mail for customers. He processes approximately 5,000 pieces of mail per day. Processing includes collecting, sorting, counting, metering, bundling and delivering to a post office for mailing. He is paid by customers at a rate per each piece processed. The collected customer mail occasionally contains pieces to which postage is already affixed. Halse views this postage-paid mail as being incidental or commingled. It may constitute 50-100 pieces daily. Halse delivers this mail to a post office with the processed mail, but does not consider it for billing purposes.

4. The question of law upon which a ruling will be made is as follows. Whether Halse becomes a "motor carrier" for which PSC authority is required when he transports the postage-paid mail. This question primarily involves the application of Section 69-12-101(6), MCA, and related provisions.

5. Written comments were received from Security Armored Express, Inc. (Security Armored), La Courier and Halse. Security Armored argues that the transportation of postage-paid mail is neither occasional nor a small amount, that mere difficulty or impracticability in sorting the postage-paid mail is not grounds for exemption, and that the assertion of no compensation is unpersuasive because transportation would not occur without compensation for other services. La Courier argues that the transportation of the postage-paid mail is part of a package deal -- inferring that the total services, however described or defined in terms of compensation for the transportation of postage-paid mail remains for hire. Halse argues that transportation of the postage-paid mail is not done for hire and is merely incidental and in furtherance of his mail processing business.

LIBRARY DOCUMENT
Do Not Remove

ANALYSIS

6. Halse is engaged in a mail processing business. Insofar as transportation of the mail to be processed is concerned -- to collect, process and deliver -- it appears to be excluded from PSC regulation as it is in furtherance of a primary nontransportation business and is therefore considered private carriage. No question on this is presently before the PSC.

7. However, during the course of collecting mail to be processed, Halse finds certain postage-paid mail commingled. This postage-paid mail requires no processing by Halse.

8. If Halse were to engage in the business of transporting postage-paid mail by itself for others, PSC authority would be required as such act clearly falls within the definition of motor carrier in Section 69-12-101(6), MCA, and related provisions, and is not subject to any recognized exemption including those found in Section 69-12-102, MCA. The question then is whether the nature of transporting postage-paid mail in connection with the mail processing business changes this requirement.

9. To begin analysis in general, the PSC is charged with administering certain laws applicable to motor carriers. See generally, Section 69-1-102, MCA; see also, Section 69-12-201, MCA. Primarily, these laws concern the granting of authority to operate as a motor carrier (certificates of public convenience and necessity) and regulation of the practices and operations of authorized motor carriers in their dealings with shippers and the public. See generally, Title 69, chapter 12, MCA.

10. In administering the laws the PSC necessarily construes and applies the laws. In doing so the PSC views its function as a judicial function or quasi judicial function, similar, if not identical to the function of a court -- to effect the intent of the legislature. See generally, Thiel v. Taurus Drilling Ltd., 218 Mont. 201, 205, 42 St. Rptr. 1520, 1522, 710 P.2d 33, 35 (1985).

11. Properly effecting the intent of the legislature requires application of rules of construction. These rules are provided both by statute, see, Title 1, chapter 2, MCA, and by case law. There may be specific rules of construction applicable to specific instances. These will be referenced herein if applied. However, the basic rules are set forth in the following paragraphs. These basic rules may be applied without further reference.

12. In constructing legislative intent, statutes must be read and considered in their entirety and legislative intent may not be gained from the wording of any particular section or sentence, but only from a consideration of the whole. Vita-Rich Diary, Inc. v. Department of Business Regulation, 170 Mont. 341, 348, 33 St. Rptr. 760, 765, 553 P.2d 980, 984 (1976). In construction, the office of the judge is simply to ascertain and declare what is in terms or substance contained in a statute, not to insert what has been omitted or to omit what has been inserted. Section 1-2-101, MCA; Blake v.

State, 226 Mont. 193, 198, 44 St. Rptr. 580, 584, 735 P.2d 262, 265 (1987). If the language of a statute is clear and unambiguous, the statute speaks for itself and there is nothing for the court to construe. Yearout v. Rainbow Painting, 222 Mont. 65, 67-68, 43 St. Rptr. 1063, 1065, 719 P.2d 1258, 1259 (1986). If the intent of the legislature can be determined from the plain meaning of the words utilized in the statute, courts will not go further and apply any other means of interpretation. Phelps v. Hillhaven Corp., 231 Mont. 245, 251, 45 St. Rptr. 582, 586, 752 P.2d 737, 741 (1988).

13. Additionally, although technically not rules of construction, certain standards of judicial review may be considered in construction by administrative agencies. Although courts need not "rubber stamp" all interpretations that agencies give statutes, Bay v. State Department of Administration, 212 Mont. 258, 265, 41 St. Rptr. 1725, 1729, 688 P.2d 1, 4 (1984), great deference must be shown to the interpretation given to a statute by the agency charged with its administration, Montana Power Co. v. Cremer, 182 Mont. 277, 280, 36 St. Rptr. 1158, 1160, 596 P.2d 483, 485 (1979), so long as the interpretation is reasonable so as to avoid absurd results and is not contrary to legislative intent. Montana Tavern Association v. State Department of Revenue, 224 Mont. 258, 265, 43 St. Rptr. 2180, 2185, 729 P.2d 1310, 1316 (1986). Also, the persuasiveness of administrative construction depends on the thoroughness evident in its consideration, the validity of its reasoning, and its consistency with earlier and later pronouncements. State Department of Highways v. Midland Materials Co., 204 Mont. 65, 71, 40 St. Rptr. 666, 670 P.2d 1322, 1325 (1983).

14. Furthermore, it has long been held that regulation of motor carriers for the protection of the public is a legitimate and wise exercise of the police power of the state -- including protection from abusive use of the roads and evils incident to unregulated competition. See, Board of Railroad Commissioners v. Reed, 102 Mont. 382, 385, 59 P.2d 271, 272 (1936), and cases cited therein. Legislation enacted to promote protection of the public is entitled to liberal construction and is to have liberal construction. See, State ex rel. Florence-Carlton School District v. Board of County Commissioners, 180 Mont. 285, 291, 590 P.2d 602, 605 (1978). Accordingly, exemptions and exceptions are generally given narrow interpretation. Id., 590 P.2d at 605. The PSC views this as allowing, if not requiring, it to apply the definition of motor carrier broadly and apply the exemptions and exclusions narrowly. The PSC is mindful, however, that clear legislative intent and reasonableness could not be abrogated under the guise of broad or narrow construction.

15. Turning to Halse's arguments, the PSC identifies two general ones as to why his activities with the postage-paid mail do not constitute him a motor carrier. One is that, because he does not consider the postage-paid mail for billing purposes, his activities are not for hire and are also merely accommodative transportation. Two is that, because the post-

LIBRARY DOCUMENT
Do Not Remove

age-paid mail is only a small percentage of the mail processed and is commingled, it is merely incidental. These arguments intertwine and have details that will be expressed and considered in the following paragraphs.

16. It is a fact that Halse does not consider the postage-paid mail for billing purposes. However, it does not necessarily follow that Halse is not acting "for hire." "For hire" as that term is statutorily defined includes the receipt of "remuneration of any kind, paid or promised, either directly or indirectly." Section 69-12-101(5), MCA. Even if Halse's intention were that he render the services pertaining to postage-paid mail gratuitously, voluntarily, without expectation of some form of payment, it is inescapable that Halse's activities pertaining to postage-paid mail exist, and are allowed to exist, by dependence upon other activities which are considered for billing purposes -- mail processing. Halse's postage-paid mail activities are sustained by the mail processing activities. The remuneration received by Halse is imputed to the postage-paid mail activities as the receipt of indirect "remuneration of any kind."

17. Additionally, whether by design or not, Halse's services in regard to postage-paid mail would, as a matter of course, make his overall services more attractive to his customers. It follows that this would lead to more business or more value in the services offered and likely result in some increase or benefit to Halse. This increase is properly categorized as the receipt of indirect "remuneration of any kind."

18. Furthermore, in the case that the element of receiving payment is a prerequisite to invoking regulation, as it is in motor carrier 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. This would especially be the case when regulation of the activity is to protect the public and the activities are closely associated and interdependent. Halse's mail processing and postage-paid mail activities are closely associated, in fact intertwined. Halse's postage-paid mail activities are dependent on his mail processing activities. Such activities cannot be severable for receipt of payment purposes when the result is to exclude from regulation. Halse's billing practices are mere form. Whether by design to avoid regulation or not, the form cannot override the substance. The substance of Halse's activities is that he provides a total service for which he receives remuneration. Postage-paid mail activities are included in Halse's total service.

19. It is also a fact that postage-paid mail constitutes 50 to 100 pieces daily out of the 5,000 pieces processed by Halse. This calculates to 1 or 2 percent of mail processed. Halse argues that this minuscule or small amount is incidental. However, it makes no difference how the amount is categorized because a review of the applicable laws discloses no exception from regulation on the basis that what would otherwise be regulated is done in a small amount or is incidental.

20. Also, in motor carrier regulation, the term "incidental" arises only in the context of defining the transportation element of a primary business. If the transportation merely furthers the nontransportation primary business it is incidental and qualifies as private carriage under the primary business test. The term has no legal connotation in regard to categorizing other nontransportation aspects of the primary business so as to render transportation regarding them private carriage.

21. Halse references Thorneycroft v. Emery Air Freight Corporation, 122 Ariz. 408, 595 P.2d 200 (Ariz. App. 1979), as support that incidental aspects of a primary business may be considered as in furtherance of the primary business. In Thorneycroft the Arizona court held that a limited pickup and delivery service provided only to customers of the primary business, air freight forwarding, was in furtherance of the primary business and exempt from regulation. The PSC recognizes the holding, but finds it unpersuasive. The Arizona court, at 595 P.2d at 202, analyzes the pickup and delivery service as if it could be incidental to the primary business. This is not proper in Montana for two reasons. First, the primary business in Montana must be a nontransportation business. Pickup and delivery is purely transportation. Second, the incidental applies only to the transportation element of a nontransportation primary business, not elements of the business itself.

22. Halse also argues that his postage-paid mail activities are accommodative transportation and not for hire pursuant to Section 69-12-105, MCA. Accommodative transportation, however, applies only to a narrow setting. It does not extend to any transportation movement by a person in the transportation business. See, Section 69-12-105, MCA. It is not an exemption from regulation for a transportation business, it does not permit one in the transportation business to "accommodate" another. Halse is in the transportation business as determined by the foregoing paragraphs and the provision does not apply. Furthermore, the meaning of accommodative is to do a favor for, to be helpful, to oblige. See generally, Webster's Third New International Dictionary, p. 12 (G. and C. Merriam Co. 1979). Accommodation implies no consideration. See, Black's Law Dictionary, p. 15 (rev. 5th ed. 1979). Although Section 69-12-105, MCA, permits the person being accommodated to "share in the cost or pay for the movement," to interpret this as allowing anything more than mere reimbursement or allowing the same to be done on a commercial basis where profit or livelihood is involved, would create an ambiguity in the provision on accommodative transportation and also would conflict with the definition of motor carrier in general.

DECLARATORY RULING

23. Based on the foregoing reasons and analysis, it is hereby ruled that Dean Wayne Halse becomes a motor carrier for which Montana Public Service Commission authority is required

LIBRARY DOCUMENT
Do Not Remove

when he transports any mail, to which postage is already affixed, for others, even though such mail may constitute a small amount of, or may be merely incidental or co-mingled with, the mail to be processed and is not considered for billing purposes.

24. All motions not otherwise disposed of by this ruling are denied.

Done and Dated this 4th day of September, 1990 by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

HOWARD L. ELLIS, Chairman

DANNY OBERG, Vice Chairman

JOHN DRISCOLL, Commissioner

REX MANUEL, Commissioner

WALLACE "WALLY" W. Mercer, 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.