

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

IN THE MATTER of the Petition of)
the MONTANA DEPARTMENT OF COMMERCE) TRANSPORTATION DIVISION
and the MONTANA DEPARTMENT OF)
SOCIAL AND REHABILITATIVE SERVICES)
for a Declaratory Ruling on the)
Meaning of "Commercial Basis" in) DOCKET NO. T-9597
Section 69-12-101(6), MCA, and the)
Application of the "Primary Busi-)
ness Test," in Regard to Certain)
Nonprofit Providers of Transporta-) DECLARATORY RULING
tion Service.)

TO: All Interested Persons

INTRODUCTION

1. On August 10, 1990 the Montana Public Service Commission (PSC) received Petitions for Declaratory Ruling from the Montana Department of Commerce (DOC) and the Montana Department of Social and Rehabilitative Services (SRS). The petitions presented by DOC and SRS are similar in all material concerns and have been consolidated.

2. On September 7, 1990 the PSC issued a Notice of Petition for Declaratory Ruling, referencing the procedure applicable, setting forth the facts, identifying the questions of law, and establishing a comment period. Although the PSC allowed for hearing for good cause, it has determined that there is adequate written information on this matter and no hearing is warranted -- this determination does not diminish the importance of the questions presented.

3. Every effort has been made by the PSC to review and consider all comments and arguments received in this matter. However, any material comment or argument not specifically addressed in this ruling is overruled. Additionally, all motions or requests not otherwise disposed of by this ruling are denied.

FACTS

4. DOC and SRS are administrative agencies of this state. Each has a broad range of responsibilities, some of which include administering, coordinating, or funding certain human service programs or certain aspects of such programs. An example of a program that could be administered by SRS is a community home, education, and work program, including related transportation, for the developmentally disabled. An example of one that could be funded by DOC is a transportation program for a community senior citizen group. The human service programs usually involve some transportation by motor vehicle. Predominantly this transportation is of passengers, but conceivably it could be of property. The persons directly benefiting from the programs, the individual group of recipients

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of a particular human service program, will be referred to herein as "groups."

5. DOC and SRS do not directly provide the total human services or the transportation element of the services. They contract with persons or organizations that do so. These persons or organizations will be referred to as "providers." Insofar as transportation is concerned, a provider might supply it as an element of a total service, as the only service, or in some combination to different groups or programs.

6. Payment for the transportation element of the services is made to the provider from state or federal government funds by DOC or SRS. The group, as passengers, do not pay the provider for the transportation service.

7. The transportation element of the service does not extend to the public at large, but is limited to those persons who are within the group. The transportation element of the service does not extend beyond a geographical area which includes the place of residence and places serving the members of the group, but might include transportation to the incidents of a total human service, such as social events or shopping.

8. The providers are nonprofit or of similar status. The providers do not have PSC transportation authority.

QUESTION OF LAW

9. Under the facts set forth above, is the provider within the definition of "motor carrier" provided by Section 69-12-101(6), MCA, and thereby subject to PSC authority, or excluded from the definition of "motor carrier" as either: (1) not conducting transportation services "on a commercial basis;" or (2) through application of the "primary business test?"

COMMENTS RECEIVED

10. The PSC received about 30 written comments. The majority were from providers or groups and generally favored exclusion from regulation. With the exception of the comments received from DOC, none were substantially legal argument, but provided information and views. The PSC determines that it is appropriate to summarize the comments received, not necessarily to establish additional facts, but to represent all that appears to be involved.

11. There is a common belief that the transportation element of the total human service programs is essential to the total service. There is a common belief that the service is a good thing. There is general and sincere appreciation for the service. There is a common belief that the service meets the needs of the persons served.

12. It is asserted that in some areas of the state there are no authorized carriers in existence and there are no municipal transportation services available. In this regard, it is also asserted that, if there are such services available, they might not be designed or equipped to meet special transportation needs. These needs may include convenience, flexibility,

wheel chair lifts, and drivers or attendants trained in responding to problems more common to a particular group being served than to the general public.

13. It also appears that not only do the providers receive funds from state or federal sources, they might, in some instances, receive funds from local governments, receive donations from persons being transported, or receive contributions from other human service programs in exchange for services.

14. It also appears that there is an effort to coordinate the transportation elements of the total human services. This is apparently done by extending transportation service providers and resources serving one group to other groups. Apparently this is done to maximize efficiency and eliminate waste and idle time of vehicles and operators. There is also a fear that, without coordination, some groups would be without transportation because of limitations on funding.

PRELIMINARY COMMENT

15. It appears to the PSC that the situation it finds itself in might be one where two worthy state goals collide. In one instance there is the worthy goal of providing for the welfare of people through the funding of human service programs, including transportation, increasing options available for improving life for the groups in general. In the other instance it has long been recognized that it is in the public interest to maintain a strong motor carrier industry through regulation. This ruling demonstrates that the existing law pertaining to motor carriers does not permit certain transportation activities now engaged in by the providers and therein lies the conflict.

16. In this regard, this ruling intrudes on what the DOC, SRS, groups, and providers would, from all appearances, prefer to have been the case. However, even if the PSC were to be inclined to exercise it, the PSC does not have that degree of discretion, the authority to change the law, that would be necessary to answer DOC, SRS, groups, and providers on a more positive note. Whether it is to be the case that the transportation activities herein found to be regulated as motor carriage, more reasonably in the interests of the public should not be regulated, is a matter for the Montana legislature to consider and determine.

LEGAL ANALYSIS

Introduction

17. There are a number of types of transportation by motor vehicle which are not subject to regulation by the PSC. Some of them fall within the definition of "motor carrier," see, Section 69-12-101(6), MCA, but are expressly exempted from regulation by other statutory provisions. See e.g., Sections 69-12-102(1), 69-12-105 and 69-12-405(2), MCA. These types are commonly referred to as "exempt carriage." Some of

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them fall outside the definition of "motor carrier" and are thereby excluded from regulation. These types are commonly referred to as "private carriage."

18. No express statutory exemption is applicable to the petition presented by DOC and SRS. All questions pertain to whether the type of transportation identified in the facts presented falls outside the definition of "motor carrier." The questions pertain to the "motor carrier" and "private carrier" distinction.

19. "Private carriage" may exist by any means causing the transportation activity to fall outside of the definition of "motor carrier." DOC and SRS have raised a question concerning the meaning of "on a commercial basis" as used in this definition. However, questions on "private carriage" more commonly arise in two other instances. One is when the transportation is of the carrier's own person or property. The other is when the transportation is merely incidental to a principal non-transportation service of the carrier. DOC and SRS have also raised a question in this regard and concerning the "incidental" transportation or, as will be later explained, "the primary business test."

20. In the interests of background information, the PSC has interpreted "private carriage" based on the transportation of the carrier's own person or property or on the transportation being merely incidental to the carrier's principal non-transportation service as being an exclusion or status applicable or available to virtually any entity, including individuals, businesses, organizations and governments. There is nothing unique about the providers herein that would not permit them to be private carriers if all other requirements for that status are met.

21. Also, there are some exceptions to these general aspects of private carriage. These exceptions include mere subterfuge to evade the law, see, generally, Board of Railroad Commissioners v. Reed, 102 Mont. 382, 385, 58 P.2d 271, 272 (1936), and buy and sell or brokerage arrangements where remuneration is received for transportation, see, Section 69-12-102(5), MCA. There is no indication that any exception to private carrier status would apply to the providers herein. This is merely stated for information.

Meaning and Application of "On a Commercial Basis"

22. DOC and SRS suggest that the nonprofit providers of the transportation service, under the facts presented, do not provide the service "on a commercial basis," as that language is used in Section 69-12-101(6), MCA. The PSC does not agree that such is the case.

23. To fall within the definition of "motor carrier" and thereby be subject to PSC authority, a person operating a motor vehicle over the public highways must do so "for hire on a commercial basis." See, Section 69-12-101(6), MCA. "For hire" is defined by statute. It means "for remuneration of any kind, paid or promised, either directly or indirect-

ly...." Section 69-12-101(5), MCA. "On a commercial basis" is not defined by statute.

24. Determining the meaning and proper application of this statutory language, "on a commercial basis," is statutory construction. In construing a statute, the PSC views its function as a judicial function or quasi-judicial function, similar, if not identical to that 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).

25. This would normally require an application of the rules of statutory construction found in Title 1, chapter 2, MCA, and case law. However, in this instance the PSC has the benefit of existing case law on the meaning and application of the language. The PSC determines that independent analysis, if necessary, should only follow a consideration of the existing case law.

26. The case law applies to Chapter 154, L. 1923, which defined "transportation companies" (now "motor carriers") as being any person operating a motor vehicle "used in the business of transportation of persons or property or as a common carrier for compensation over any public highway...." Section 1(c), Ch. 154, L. 1923. It defined "for compensation" to mean "transportation of any person for hire in any motor vehicle; provided, that the Railroad Commissioners may exempt from the operation of this Act the transportation of freight or passengers by motor vehicle in rural communities when not done on a commercial basis." Section 1(e), Ch. 154, L. 1923.

27. In State v. Johnson, 75 Mont. 240, 243 P. 1073 (1926), the Montana Supreme Court held that the above provisions of Chapter 154, L. 1923, expressed the legislature's intention "to include within the prohibition of the Act every person operating a vehicle of the nature described for hire and as a regular business, on a commercial basis, between fixed termini, and to exclude from its operation those residing in rural communities who may occasionally carry either passengers or freight with or without compensation, but not 'on a commercial basis,' and not as a regular business." Johnson, 243 P. at 1078-1079.

28. Johnson did not provide a meaning of "on a commercial basis." Its importance is twofold, however. It used the terminology in harmony with "for hire" and "regular business" and in contrast with "occasional." It also served as a basis for the following case.

29. In State v. Flagg, 75 Mont. 424, 242 P. 1023 (1926), the court, in reference and relation to the Johnson holding, did provide an explanation from which a definition of "on a commercial basis" can be derived. It explained that "the phrase 'on a commercial basis' differentiates the carrier who is engaged in the business of carriage for hire from the person in a rural community who occasionally carries persons or property either for or without compensation." Flagg, 242 P. at 1024.

30. Absent from both the Johnson and Flagg cases is any discussion of profit or nonprofit as being what "on a commercial basis" relates to. Although both cases speak to "on a commercial basis," as used or applied in Chapter 154, L. 1923, as relating to "business," in context, it is only meaningful in the sense that "business" implies that which occurs regularly or habitually, busying or engaging the time and effort, as opposed to that which merely occurs in occasional or isolated instances.

31. "On a commercial basis" was used in Chapter 154 L. 1923, as a qualification for exemption from regulation or from the definition of "transportation company." Transportation was regulated if it was done "in the business ... for compensation," it was done "for compensation" if it was done "for hire." However, it was exempted (in rural communities) if not done "on a commercial basis." If "on a commercial basis" in "when not done on a commercial basis" related to profit, gain, or like matters, it would have been meaningless, as the activity would have not fallen within the definition of "transportation company" to begin with. If "on a commercial basis" related to "business" in the sense that "business" may imply profit, gain, or like matters, the same reasoning would apply. In context, the only way that "on a commercial basis" makes sense is if it means as a business in the sense that "business" may imply activity regularly or habitually engaging in the time and effort as opposed to activity that is isolated or occasional.

32. The PSC determines that the meaning of "on a commercial basis," as used in or applied to Chapter 154 L. 1923, as interpreted by the court as the intention of the legislature, was to reference that activity which occurred as a business in the sense that business means regularly or habitually busying or engaging the time and effort of the carrier. The PSC determines that the meaning of "on a commercial basis" did not relate to profit or nonprofit or like financial aspects.

33. Chapter 154, L. 1923, was replaced by Chapter 184, L. 1931. Relevant to the present matter, it incorporated the reasoning and related language of Johnson and Flagg into the definition of "motor carrier." It defined "motor carrier" as every person operating motor vehicles upon any public highway for the transportation of persons or property "for hire, on a commercial basis" under contract or as a common carrier. It went on to exclude transportation "done occasionally and not as a regular business." See, Section 1, Ch. 184, L. 1931.

34. Under the reenactment doctrine it is presumed that in adopting a statute the legislature acted with knowledge of the previous construction of similar statutes by courts or administrative agencies and adopted such construction. See, Hovey v. Department of Revenue, 203 Mont. 27, 33, 40 St. Rptr. 272, 276, 659 P.2d 280, 283 (1983). With the legislature's adoption of the language from court cases interpreting "on a commercial basis," it seems clear that the reenactment doctrine applies. The PSC determines that the legislature adopted the previous construction of "on a commercial basis" in enacting Chapter 184, L. 1931.

35. In all regards "for hire on a commercial basis" in the definition of "motor carrier" provided by Chapter 184, L. 1931, remains unchanged to date. It follows that the meaning of "on a commercial basis" remains unchanged. The PSC determines that at this present time, given all of the above, Section 69-12-101(6), MCA's, "on a commercial basis" does not relate to whether a carrier conducts activities under profit or nonprofit status. "On a commercial basis" is language intended by the legislature to mean as a business, not in the sense of having profit as a primary aim or any other similar sense, but in the sense of being a serious concern regularly and habitually engaging the time and effort of a carrier.

36. In regard to the question presented by DOC and SRS, the PSC holds that mere nonprofit status, in and of itself, does not cause the provider to fall outside of the definition of "motor carrier" on the basis of the meaning and application of the language "on a commercial basis" in Section 69-12-101(6), MCA.

The Primary Business Test

37. DOC and SRS suggest that the nonprofit providers of the transportation services, under the facts presented, may be deemed "private carriers" as the service is incidental to a principal nontransportation service. The PSC does not agree that such is necessarily the case. However, as will be explained below, "private carrier" status might be available to those providers that provide total human services to which transportation is merely incidental.

38. As indicated above, "private carriage" most commonly exists in two related instances -- when the transportation is of the carrier's own person or property or when it is merely incidental to a principal nontransportation service. Both of these aspects of private carriage are founded in Montana case law. Neither has been expressly defined in Montana statute.

39. DOC and SRS do not raise a question concerning "private carriage" based on transportation of the carrier's own person or property. However, because the aspect is related to the aspect of transportation incidental to a principal service and originated at the same time, the two will be discussed together.

40. Although originating in Stoner v. Underseth, 85 Mont. 11, 19, 277 P. 437, 440 (1929), under Chapter 154, L. 1923, and, in applicable part, carried forward in Christie Transfer and Storage Co. v. Hatch, 95 Mont. 601, 605, 28 P.2d 470, 472 (1934), into Chapter 184, L. 1931, the most recent and complete Montana case analyzing and explaining these aspects is Board of Railroad Commissioners v. Gamble-Robinson Co., 111 Mont. 441, 448-450, 111 P.2d 306, 310-311 (1941).

41. The Montana Supreme Court, in Gamble-Robinson held that it is well settled that to fall within the definition of "motor carrier" the transportation must be of the person or property of another. 111 P.2d at 310. It also reasoned that "engaged in the transportation" (found in the title of Chapter

184, L. 1931) did not mean engaged in some other service and merely transporting in connection therewith, and held that transportation "as an incident to the conduct of their lawful business" was not motor carriage. 111 P.2d at 310-311.

42. Under Gamble-Robinson, for "private carriage" to exist as being merely an "incidental" service, two things are essential -- there must be a "principal" service to which the transportation element is "incidental" and the principal service cannot be a transportation service. All analysis of the exclusion from motor carrier regulation for transportation that is "incidental" is based on these two things. However, since Gamble-Robinson, the analysis has developed considerably.

43. Some history of this development is important. Interstate motor carriers have been regulated by the federal government since 1935. Some of the principles of motor carrier regulation at the state level are the same as those at the federal level. One of the paralleling concepts is private carriage based in "incidental" transportation. At the federal level, the analysis used to determine such status is called the "primary business test."

44. A good starting point for understanding the "primary business test" is Brooks Transportation Co., Inc. v. United States, 93 F.Supp. 517, 522 (1950), and the Interstate Commerce Commission (ICC), motor carrier cases (MCC), cited therein. The test was codified at 49 USC 203(c) in 1958. An explanation of this codification and the "primary business test" is contained in Red Ball Motor Freight, Inc. v. Shannon, 377 U.S. 311, 315-316, 84 S.Ct. 1260, 1262, 12 L.Ed.2d 341, 343 (1964) and the ICC, MCC cases cited therein. The "primary business test" remains codified today at 49 USC 10524.

45. Federal court and administrative opinions concerning the "primary business test" have occurred with considerable frequency. There are no Montana Supreme Court cases on the topic since Gamble-Robinson. The PSC has drawn from federal court and administrative rulings, to the extent they are applicable and the reasoning in them is supportable under, or adaptable to, Montana law.

46. As indicated above, the essential elements in Gamble-Robinson for "private carriage" to arise from "incidental" transportation are: (1) there must be a "principal" service to which the transportation element is "incidental;" and (2) the "principal" service cannot be a transportation service. The PSC "primary business test," as has developed since Gamble-Robinson, is a means through which the existence of these essential elements may be determined. It requires that: (1) there be a real nontransportation service, business, or occupation that is principal in relation to any transportation element of the service; and (2) the transportation element of the principal nontransportation service be merely incidental -- (a) in the scope of the principal service, (b) done in furtherance of the principal service, and (c) clearly subordinate in relation to the principal service.

47. In instances where there is a real service other than transportation and the transportation element of the ser-

vice is in the scope and furtherance of a nontransportation service, determining whether transportation is "incidental" requires a comparison of the nontransportation element or elements of the service to the transportation element of the service, in regards to investment, at-risk assets, operating expenses, payroll, revenues or benefits received, value to persons served, and like things.

48. Under the facts presented the providers contracting with DOC and SRS might supply transportation as: (1) an element of a total service; (2) as the only service; or (3) in some combination to different groups or programs -- meaning it might be an element of a total service as to one group and the only service to another group. Each of these three possibilities require a separate analysis insofar as "private carriage" based on "incidental" transportation is involved.

49. In the instance where the provider supplies transportation services as an element of a total service it is conceivable that status as a "private carrier" may be held. Under the facts presented, it is impossible to further declare this, as such would require a detailed analysis of each provider's total service. This type of a determination must be made on a case-by-case basis. However, if DOC and SRS merely apply the "primary business test" as outlined in paragraph 46 above, the answer should be obtainable.

50. In the instance where the provider supplies transportation service as the only service, there simply is no question. There is no nontransportation service for the transportation to be in the scope of, in furtherance of, or subordinate to. It cannot qualify for exclusion from regulation on the basis of the "primary business test." However, although the question is not raised, if the provider is the group itself, it might, under the proper circumstances, qualify for "private carrier" status as transporting its own person (members).

51. In the instance where the provider supplies transportation services in some combination -- as an element of a total service to one group and as the only service to another group -- the same analysis as given above applies to the service as confined to each individual group. If it is part of a total service it is possible that it is excluded. If it is the only service it does not qualify for the exclusion. However, the mere fact that a provider may provide transportation services "incidentally" to one group does not allow all transportation service engaged in to be categorized as "incidental."

52. In regard to the question presented by DOC and SRS, the PSC holds that the providers are not, as a matter of course under the facts presented, providing transportation services incidental to a principal nontransportation service and do not fall outside of the definition of "motor carrier" in Section 69-12-101(6), MCA, under the "primary business test." However, the providers who provide a total human service with transportation as an element incidental to the total human service appear to have that status available to them.

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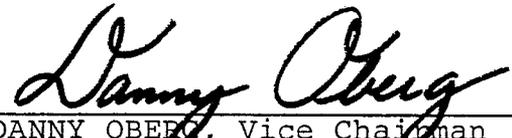
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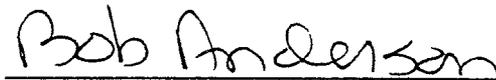
53. Under the facts presented, the provider is within the definition of "motor carrier" provided by Section 69-12-101(6), MCA, and thereby subject to PSC authority. All elements in the definition are met, including "on a commercial basis." However, on a case-by-case basis, "private carrier" status may be available to the providers under the "primary business test" when the transportation service provided is merely incidental to the total human service provided.

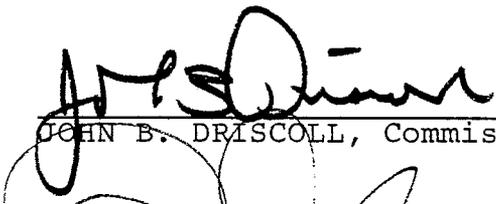
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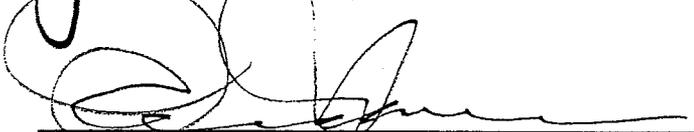
BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION


 HOWARD L. ELLIS, Chairman

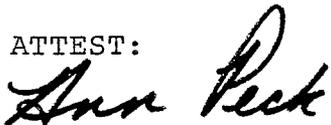

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 WALLACE W. "WALLY" MERCER, Commissioner

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.