

Service Date: January 28, 1997

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

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IN THE MATTER OF MYRNETH (CONNIE))	TRANSPORTATION DIVISION
LACY, dba MOONLIGHT MEDICAB, Billings,)	
Montana, Application for a Montana Intrastate)	DOCKET NO. T-96.58.PCN
Certificate of Public Convenience and)	
Necessity.)	ORDER NO. 6423

FINAL ORDER

APPEARANCES

FOR THE APPLICANT:

Myrneth (Connie) Lacy, pro se, 2136 Santiago Boulevard, Billings, Montana, 59101.

FOR THE PROTESTANTS:

Charles A. Murray, Jr., Attorney at Law, 2812 First Avenue North, Suite 210, Billings, Montana, 59101, for Protestants Foosco Inc., dba City Cab, and Two Shews, Inc., dba Billings Yellow Cab.

FOR THE COMMISSION:

Martin Jacobson, PSC Staff Attorney, and Wayne Budt, PSC Transportation Division Administrator, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana 59620-2601

HEARD BEFORE:

NANCY MCCAFFREE, Chair and Hearing Examiner

FINAL ORDER BEFORE:

DAVE FISHER, Chairman
NANCY MCCAFFREE, Vice Chair
BOB ANDERSON, Commissioner
DANNY OBERG, Commissioner
BOB ROWE, Commissioner

INTRODUCTION

1. On July 18, 1996, Myrnych "Connie" Lacy, dba Moonlight Medicab (Lacy), filed before the Public Service Commission (PSC) an application for intrastate motor carrier authority, Class B, passengers, restricted to Medicaid patients, within the City of Billings, Montana, and a 20 mile radius. Protests were received from two motor carriers, Foosco, Inc., dba City Cab (City Cab), and Two Shews, Inc., dba Billings Yellow Cab (Yellow Cab), both being Billings-area taxi companies.

2. A public hearing on Lacy's application was held September 17, 1996, in Billings. Evidence was there taken before a hearings examiner, the parties stipulated that a final order be issued by the PSC on briefs, briefs have now been submitted, the PSC has considered the matter, and the PSC concludes that the authority requested by Lacy should be denied, for the reasons expressed in the following findings of fact and conclusions of law.

FINDINGS OF FACT

Applicant's Case

3. Lacy's first witness was herself. She provided a general statement of her ability to provide the transportation service proposed in her application. She stated she intends to purchase or lease the one or two vehicles (vans) that would be required. She also stated she has a good driving record, knowledge of the area, and previous experience as a carrier.

4. On cross-examination Lacy agreed she has had no experience as a common carrier of passengers, but stated she has transported passengers for the Catholic school system. During cross-examination Lacy also provided a general description of the Medicaid patient transportation environment in which her intended operations would be conducted and the role of Integrated Transportation Management (ITM), a coordinator of Medicaid transportation for the state of Montana. Lacy agreed ITM is not the actual passenger to be transported and that ITM does not actually pay for the transportation service.

5. Lacy also indicated she has done a review of the anticipated costs of transportation and could operate on what Medicaid will pay, which is apparently a fixed rate of \$10.07 when transportation is under 16 miles, one-way. Lacy also indicated she has been in the medical profession for over thirty years.

6. Lacy's next witness was Garrett Johnston (Johnston), center manager for ITM. Johnston described ITM as a company contracted with the state of Montana to confirm eligibility of Medicaid recipients and arrange transportation for recipients to medical appointments. Johnston generally described ITM, ITM's role in obtaining transportation providers, and the transportation needs of the variety of Medicaid patients. Johnston stated ITM currently uses the services of taxi companies, ambulance companies, and wheelchair service companies. Johnston indicated ITM uses five transportation providers in the Billings area, including City Cab and Yellow Cab.

7. Johnston indicated ITM requested that Lacy apply for authority because recipients are being denied transportation or are being transported by wheelchair van instead of by regular means. Johnston stated recipients were being refused service for financial reasons and in this regard City Cab and Yellow Cab have refused service to recipients within their authorized area of service, identified generally those areas in which there was no transportation, and indicated the taxi's also impose a "no go" status on some recipients in the Billings metropolitan area. Johnston described "no go" status as a mechanism through which the taxi companies will not provide service to a particular recipient until first paid for prior requests to transport but finding the recipient not at the designated location. Johnston also testified that late pick ups contributed to the "no go" problem. Johnston also stated ITM has had to deny transportation to recipients because of lack of providers and because providers have refused service.

8. Through Johnston a map was provided indicating the area in which City Cab and Yellow Cab would serve. Through voir-dire Johnston agreed the map indicated the area in which the companies could serve in accordance with their tariffed rates and Medicaid's payment policy. Through Johnston "no go" letters sent to ITM from City Cab and Yellow Cab were provided. Johnston stated ITM does not pay for "no go's," the recipient must. Johnston indicated ITM does not currently have a problem with City Cab or Yellow Cab. At the same time Johnston indicated that in his opinion the recipients are not getting the punctual and proper services that they are entitled to from the taxi companies. In Johnston's opinion there is a great need for another transportation provider in the community.

9. Johnston stated on rebuttal or recall near the close of the hearing that there are well over 20 recipients obtaining rides through ITM per day and about one-half of those are

through taxi providers. He also expressed the opinion that, even after listening to the hearing, he still feels there is a need for additional transportation. Johnston also indicated that, depending on the situation, it might be helpful that providers have medical background.

Protestants' Case

10. City Cab's witness was Mark Foos (Foos), sole shareholder of Foosco, Inc., dba City Cab. Foos provided further details on the "no go" status and related letters, explaining that when a taxi is sent to a recipient and the recipient is not there, a "no go" status is imposed pending investigation on fault and receipt of payment. Foos explained that fault can be in the taxi, ITM, the recipient, medical services providers, and others involved. Foos also explained that "no go's" can arise when a recipient is not physically or mentally able to manage travel in a taxi, a problem that is usually first identified by the taxi driver. Foos stated that out of the 52 "no go's" occurring since the end of 1995, only four remain in that status and could possibly have been refused service.

11. Foos also described typical problems for carriers in the Medicaid environment, problems generally precipitated by the recipients. Foos also indicated that in his opinion to have a good understanding of the actual problems one would have to speak to the parties involved. To Foos such would require an investigation on a personal level. However, Foos also stated taxis can be late for pickups, but such is rare and depends on mechanical problems, weather, and demand. Foos stated taxi vehicles are reserved for Medicaid scheduled transportation, but that does not mean that problems with traffic or accidents will not exist. Foos indicated the taxis make every effort to provide service and have filled in for other service providers when those have become inoperable due to weather.

12. Foos stated his fleet has been reduced in number from 14 to 4 in four years and the existing fleet at present is underutilized when volume is down. Foos stated his belief that this decline exists because other fleets are subsidized by tax dollars, mentioning non-profit and government transportation competing for the same primary customer base as taxis. To Foos a problem also exists with lodging facilities providing their own guest transportation. Foos also commented deregulation has taken some customer base.

13. Foos explained that City Cab's total services to Medicaid recipients for 1995 amounted to about \$8,425, which is equal to about 2.44 percent of City Cab's gross revenues for that year and is greater than City Cab's profit of about \$7,265. To Foos, loss of Medicaid transportation would be detrimental overall and would tend to reduce the revenue, but not necessarily the overhead, of City Cab.

14. In Foos's opinion, a Lacy's transportation service to Medicaid with one vehicle would be unrealistic, the vehicle would have to be several places at once. To Foos, without radio dispatch it would be unworkable, as it has been his experience that communications with the driver must be done up to four to six times in Medicaid moves.

15. On cross-examination, Foos indicated that the boundaries in which City Cab and Yellow Cab will transport Medicaid recipients are fixed as the area in which the taxis can transport and remain in accordance with tariffs, as Medicaid fixes an amount and will pay no more. Foos commented that the map submitted into evidence is an older version and has been updated to extend the boundaries for certain Medicaid patients.

16. Yellow Cab's witness was Theodore Foos, its manager. He testified to some preliminary matters regarding his experience, Yellow Cab's equipment, and revenues. He testified Yellow Cab's Medicaid revenues were about \$9,444 in 1995 and established that amount as approximately two-thirds of Yellow Cab's 1995 profit margin. He testified that a grant of authority to Lacy would have a drastic effect on Yellow Cab and adversely affect its ability to provide service.

CONCLUSIONS OF LAW

Preliminaries

17. All findings of fact which can properly be considered conclusions of law and which should be considered as such to preserve the integrity of this order are incorporated herein as conclusions of law.

18. The PSC has jurisdiction over applications for motor carrier authority pursuant to Title 69, Chapter 12, MCA. The application of Lacy is proper in form and was properly noticed, protested, and heard in accordance with Title 69, Chapter 12, MCA (motor carriers), and Title 2, Chapter 4, MCA (Montana Administrative Procedures Act).

Elements of Public Convenience and Necessity

Introduction

19. The merits of Lacy's case turn on the elements of public convenience and necessity. The PSC will generally grant motor carrier authority when the "public convenience and necessity" requires authorization of the service proposed. In this regard, § 69-12-323(2), MCA, provides:

(a) 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.

20. Additionally, § 69-12-415, MCA, provides that an authority may not be issued (or remain in force) unless the holder is fit, willing, and able to perform the service authorized and conforms to all applicable legal requirements.

21. There are specific elements involved in reaching a determination on whether the public convenience and necessity requires authority. Public convenience and necessity will be deemed as requiring a grant of intrastate motor carrier authority when each of the required elements demonstrate that the authority should be granted. Matter of Jones Brothers Trucking, Inc., PSC Docket No. T-9469, Order No. 5987a, p. 8 (July 17, 1990), includes a narrative statement of the required elements:

Applying this language [§ 69-12-323(2), MCA] to the facts presented by any application for 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 services. 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.

22. The "fit, willing, and able" language of § 69-12-415, MCA, was enacted subsequent to the opinion in Jones Brothers. However, as the quote from Jones Brothers indicates, the PSC has historically treated fitness as an element.

Element 1 -- Public Need

23. The first element to consider in determining whether public convenience and necessity requires a grant is public need. (It should be noted that this element and the second element, "existing carrier ability to fill that need," can be discussed as one element. The PSC has separated the elements for burden of proof purposes and considers them separately as a matter of convenience and clarity.)

24. For all material purposes following briefing it is clear that the parties have agreed that there is a public need for transportation of Medicaid patients. Lacy argues that because the protestants agree that there is a need, the authority should be granted. Grant of authority cannot occur unless the other elements demonstrate that authority should be granted.

Element 2 -- Ability of Existing Carriers to Meet the Need

25. The second element in public convenience and necessity is ability of existing carriers to meet the demonstrated public need. This is the point at which the parties most disagree.

26. Lacy argues it has been shown that the protestants are frequently late in picking up Medicaid patients because the protestants have other transportation obligations to the public for which demand is too great. Lacy argues the protestants admit to being late in pick ups of Medicaid recipients. Lacy also argues it has been shown that the protestants have refused to transport passengers. Further Lacy argues there are areas within Billings and the vicinity where the protestants will not pick up Medicaid recipients, and these areas within the protestants' service areas. Lacy also argues it has been shown that there are times when no transportation providers are available and up to 20 recipients are denied transportation each month. Lacy argues the authority should be granted on this basis.

27. The protestants argue there is not a single instance to which anyone has testified to the specifics of a failure in service. Protestants argue the problems in the outlying areas of service are problems with the tariff filed with the PSC. Protestants argue ITM expresses a preference, not a failure in service, and preference is not accepted as a basis for a grant of authority. The protestants argue the fact that Medicaid will not pay the tariffed rate does not qualify as a failure of service. The protestants further argue that even if some problems exist in a particular segment of service it does not constitute proof of need.

28. The PSC determines the protestant existing carriers have the ability to meet the demonstrated need. The PSC determines there has been no demonstration that the protestants cannot meet the need or have failed in providing reasonable and adequate service. To the extent that the protestants' service to Medicaid recipients has some problems, most appear to be related to the rate which has been fixed by Medicaid. Furthermore, the protestants seem to indicate a

willingness to continue to attempt to resolve those problems and any other problems that might remain. It appears to the PSC the protestants are operating within any reasonable standard of adequacy in service, considering the circumstances, and making an effort to adapt well to the Medicaid fixed rate.

Element 3 -- Harm to Existing Carriers

29. The third element is harm to existing carriers. A requested authority will not be granted if a grant would result in harm to the operations of existing carriers in a way that is contrary to the public interest. Harm to existing carriers can exist so long as it is not contrary to the public interest.

30. The protestants argue that harm is indisputable in this case. To the protestants a grant would seriously jeopardize their existing services to Medicaid recipients as well as to other sectors of the public using taxi services. The protestants have submitted evidence that their customer base has been eroding and they argue that this, which is caused by deregulation and exceptions to regulation, should not be compounded by the grant of an additional authority.

31. Lacy disputes there would be harm if authority were granted. Lacy argues the small profit evidenced by the protestants as to their overall operations does not make sense. She suggests that evidence allows calculation that the protestants receive much more than claimed from Medicaid transportation. Lacy also argues the protestants' profits from transporting, if accurate, are so minute that the protestants will not be harmed by an additional authority.

32. The PSC determines the grant of authority to Lacy would cause harm to the protestants. The PSC also determines such harm would be contrary to the public interest. Although it can be argued that one element of the public interest, the convenience to ITM in having an additional provider and the corresponding potential that Medicaid recipients will have increased providers available, might not be harmed cannot override the threat to those other passengers or potential passengers who must rely on taxi services from further erosion of the taxis' customer base.

Element 4 -- Fitness

33. The fourth element is fitness. Lacy, as an applicant for motor carrier authority, must establish that she is fit, willing, and able to provide the services proposed. § 69-12-415, MCA. Lacy argues the evidence demonstrates that she is fit to conduct the services applied for. She argues she has the equipment necessary, or can readily obtain it, and she has the experience, including as a motor carrier, the means, and the ability to adequately perform the transportation services proposed. The protestants argue that Lacy has failed to prove this element of PCN.

34. The PSC determines that Lacy has established she is fit, willing, and able to provide the proposed transportation services. The PSC might agree with the protestants that Lacy did not establish this to perfection. However, all things considered, Lacy did not fail to meet at least the minimum satisfactory burden on this element and the protestants have submitted nothing demonstrating that the contrary is, or even reasonably might be, true.

35. Related to fitness, at the close of hearing Lacy indicated she had additional equipment available (four cars, radio-equipped). The protestants objected to this because in Lacy's responses to discovery she had only indicated she was making arrangements to obtain one vehicle. The PSC sustains the protestants' objection. However, the PSC's decision on fitness remains the same as expressed above.

ORDER

1. All conclusions of law which can properly be considered an order and which should be considered as such to preserve the integrity of this Order are incorporated herein as an order.

2. All pending objections, motions, and arguments not specifically having been ruled on in this Order (if any) shall be deemed denied, to the extent that such denial is consistent with this Order.

3. The Public Service Commission, being fully apprised of all premises, **HEREBY ORDERS** that the Application for Intrastate Certificate of Public Convenience and Necessity filed by Myrneth (Connie) Lacy, dba Moonlight Medicab, be denied.

Done and dated this 22nd day of January, 1997, by a vote of 5 - 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chairman

NANCY MCCAFFREE, 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 38.2.4806, ARM.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Final Order issued in Docket T-96.58.PCN in the matter of Myrneth (Connie) Lacy dba Moonlight Medicab (Billings, Montana has today been sent to all parties listed.

MAILING DATE: January 28, 1997

FOR THE COMMISSION

FIRST CLASS MAIL

Myrneth (Connie) Lacy
dba Moonlight Medicab
2136 Santiago Blvd.
Billings, MT 59101

Charles A. Murray, Jr.
Attorney at Law
2812 First Avenue North
Suite 210
Billings, MT 59101

Foosco, Inc.
dba City Cab
2319 Mont. Avenue
P.O. Box 2333
Billings, MT 59103-2333

Two Shews, Inc.
dba Billings Yellow Cab
18 Burlington Avenue
P.O. Box 1831
Billings, MT 59103

AS ITS INTERESTS MAY APPEAR:

Montana Consumer Counsel
34 West Sixth Avenue
P.O. Box 201703
Helena, MT 59620-1703