Service Date: March 22, 2016

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

IN THE MATTER of L&L Site Services, Inc. Belgrade, Montana, Application for a Montana Intrastate Certificate of Public Convenience and Necessity.	))))	TRANSPORTATION DIVISION DOCKET NO. T-15.23.PCN ORDER NO. 7477

CONCURRING OPINION OF COMMISSIONER ROGER KOOPMAN

On occasion, the Commission so strains over the minor details that it misses the obvious facts and fundamental principles that guide us into the safe harbor of public trust.

In L&L Site Services' application for Class D Carrier authority, dissenting Commissioners, had they prevailed, would have navigated the Commission into troubling precedential waters, and visited serious injustice upon not only the applicant, but on every garbage collection customer in Gallatin County.

In whatever industry you care to look at, protectionist policies that erect barriers to new market entry, can rarely if ever be viewed as serving the public good. In the absence of competition, the existing protected enterprise has little incentive to do its best, i.e., to improve its services or keep rates low. Thus, we know both empirically and intuitively, that monopolies should be avoided. This is equally true, whether we are talking about "natural" monopolies or ones established by law, through statutory restrictions that block competitors from entering the market.

Montana law is not particularly unique in this protectionist aspect, the effect of which has been to establish garbage hauling monopolies and near-monopolies in communities all across the state. It is the most obvious reason why those Gallatin County and City residents have few choices for garbage collection - Republic, McGree, or the municipal services provided by the city.

However, what is unique about Montana statute is that while the Certificate of Public Convenience and Necessity process produces profitable monopolies and consumers without choice, our law makes no provision for the effective regulation of the monopolies it creates. The

Commission engages in a very limited quality of service regulation, and the Commission does not approve their rates (as we do all other monopoly public utilities). It is therefore not surprising that while, according to testimony at hearing of Kristin Mitchell, Oregon trash haulers operate at typical profit margins of eight (8) to twelve (12) percent, Republic Service's 2014 Montana annual report reveals an eye-popping statewide average profit level of 41 percent. While it is true that Gallatin County is not specifically broken out from this figure, it should be further noted that Republic's own testimony of area manager Jason Vietch established that their target net profit for the county is twenty-two (22) percent.

It can be argued that the net effect of current Montana law is highly anti-consumer, both in its protectionist aspects and its refusal to rate regulate. But the Montana Public Service Commission does not write the law. It is the Commission's job to apply and enforce the law as it exists, promulgating just rules that assist in that process, while establishing reasonable precedents that render the process even-handed, equitable, and relatively predictable. Within these legal confines, our goal must always be the same: serving the long-term best interests of the general public, through the exercise of informed agency discretion. Commissioners are not robots. Outcomes matter.

According to Mont. Code Ann. § 69-12-323(2), "public convenience and necessity" must be shown prior to the granting of additional operating authority in an area. The Commission has historically applied a four part test to determine public convenience and necessity. *See In re L&L Site Services, Inc.*, Dkt. T-10.36.PCN, Order 7147 ¶ 83 (May 23, 2011). The Commission is also required to make a threshold determination that the applicant is fit and able to perform the proposed service. *Application of Sanitation, Inc.*, Docket No. T-97.91.PCN, Order No. 6444, ¶ 86 (1998).

While protestants raised a number of other issues in this docket, including alleged procedural irregularities, Commissioners were in general consensus that those issues lacked merit. Commissioners' deliberations focused primarily on (1) the four-part test and (2) the broader question of how competition in the Gallatin County market – or the lack thereof – impacts the greater public good. While each of these factors must be examined separately, Commissioners were free to weigh their relative importance to the public interest standard in arriving at a final decision.

Perhaps the most essential of the four benchmarks is applicant fitness, since this factor goes directly to the applicant's ability to deliver the required services, and to do so safely. Parties conceded this factor by stipulation at the outset of the proceeding. In the scope of its current operations, L&L has an undeniably strong record of carrier fitness and service reliability.

Through a series of shipper and non-shipper witnesses, L&L did a more than adequate job of satisfying the minimum requirements of the other three tests, i.e., to show unmet market need, the apparent unwillingness of the incumbent carrier to meet those needs, and the lack of any evidence to suggest that competition would "harm" Republic Services (a $10.5 billion dollar national corporation) "contrary to the public interest."

While it is the burden of the applicant to demonstrate conformity with these tests, it is also the responsibility of Commissioners to point out where the standards are both elusive in definition and vague in application – which in turn requires greater latitude in Commission judgment, consistent with the unique and specific circumstances of each application. It is not only the rights of the parties, but also the public interest that is at stake.

The "need" requirement truly tests Commissions' sense of fair play and reasonableness. Certainly, if the applicant failed to bring forth any convincing testimony from shipper witnesses, explaining circumstances where the incumbent hauler has not met their specific needs, there would be no foundation for application approval under law. But L&L did in fact produce multiple witnesses who so testified. Taken individually, none of their stories were especially shocking or compelling, but "shocking" testimony is not required for commissioners to recognize need. And how many witnesses are enough? Is it reasonable to assume that for every dissatisfied consumer L&L was able to identify – and who was willing to come forward at hearing – there are many others in the local market who are at least moderately dissatisfied with the service they are now receiving and/or the prices they are paying? Is this not a reasonable assumption, when considering the very broad issue of need?

Yet possibly the most powerful testimony came from a non-shipper witness. Robert Webb, a current Republic employee, showed considerable courage in testifying to a wide variety of service and safety concerns he has observed during his seven year tenure with the company. According to Mr. Webb, these problems have gotten progressively worse and, in response to my question, indicated that at least seven (7) or eight (8) of his co-workers share his concerns.

Webb believes the lack of competition greatly contributes to Republic's alleged complacency -- raising the question of whether competition, in and of itself, is a consumer "need."

Protestants, as expected, brought forth a series of equally credible witnesses, attesting to their complete satisfaction with the performance of incumbent Republic Services. The Commission was obliged to weigh their positive statements against the negative testimony of the previous witnesses. But let us be clear on this. The question before us was not whether Republic Services is a fine company, providing excellent service to many people. We grant that. The question was whether a lack of need on the part of some consumers, constitutes a lack of need on the part of all? Does one customer's satisfaction negate another customer's dissatisfaction? If it does not, then can the Commission reasonably infer that need exists? And can we, by any objective measure, determine that there is "enough" need to grant the application?

State law is silent on how much need is "enough" need, or for that matter, how it can be empirically determined. This is why need is such a difficult and elusive criteria for the Commission to address. But we must constantly remind ourselves that the standard by which we make our decisions starts with the question "what is in the public's best interest?" The worst thing we can do under these circumstances is engage in analysis paralysis, or require a level of "need proof" so high that practically speaking, it is almost unattainable. Always, we must default to what is fair and reasonable. If, fearing criticism, we allow the law to be stretched into a tool of anti-consumer protectionism, we have flouted our higher public duty, and as a commission, lost our vision and public purpose.

A dissenting Commissioner referenced the recent Bull Mountain (T-15.2.PCN) decision as an example of where, in his view, need was more clearly established. Certainly, the facts in each docket will vary, with individual cases standing on their own merits. In the Bull Mountain matter, one strong evidence of need was the pre-existence of seventy (70) customers being ably served by that yet uncertified company. L&L, realizing the necessity of certification, made no similar effort to secure Class D customers before Commission action, although it was able to present a list of 23 unsolicited new customer inquiries. It should also be noted that I was on the short side of a 4 to 1 Commission vote, denying Bull Mountain temporary operating authority, which forced them to shut down for over two months – despite the demonstrated need of those seventy (70) customers, left in the lurch by the Commission's shortsighted decision.

Fortunately, both law and precedent allow for the separate consideration of competition as an additional need factor in the local marketplace. Far from being an "abstract" concept, the introduction of competition in markets where little or none exists, will typically produce higher service quality, greater consumer choice and lower cost. The difficulty, of course, is in establishing the likelihood and extent of these competitive improvements, since the Commission has no magic spy glass that can look into the future. Predictions and speculations aren't helpful, but a healthy dose of common sense can be. I will return to this point.

Regarding test number two, whether an existing carrier is able and willing to meet unaddressed needs, perhaps, the most pertinent questions raised were ones of willingness. This prompts the question of how the commission can objectively measure a company's "will?" The law is again silent on this, and the commission can claim no special powers to read a company's mind. Consequently, the willingness question can only be answered by history. If, in fact, it can be shown that the incumbent carrier was unwilling to address certain needs or fix certain problems in the past, then we must conclude that in the present, there is a lack of willingness. Through competition, that can change. But it is not sufficient evidence for Republic to assert that they are "now ready and willing," when according to shipper and non-shipper testimony, they were apparently not ready and willing before.

The final "test" question had limited relevance in this case. Commissioners were charged with assuring that competition by L&L Site Services would not "harm" the existing operations of Republic Services "contrary to the public interest." Given that Republic is the second largest trash hauler in the nation, "harm" inflicted by L&L is an implausible proposition. But even if we granted that L&L might visit some market share losses on Republic in Gallatin County, and even if we further granted that those customer declines might result in employee layoffs by Republic, how, we must ask, does this natural give-and-take of a competitive marketplace work to the detriment of local consumers? How does the consumer ultimately not benefit? The rather irrelevant testimony of Oregon official Mitchell notwithstanding, I can think of no scenario in Gallatin County, Montana, where competition to a company with a 41% statewide profit margin would do anything but improve the condition of local consumers. Certainly, no evidence was provided by Republic to the contrary.

Thus, in my judgment, L&L Site Services more than adequately supported its application for Class D Carrier authority on the basis of the four-part test. Yet if any doubt remained in

Commissioners' minds, it should have been dispelled by the additional consideration of competition as a public benefit in and of itself. Given the monopolistic and near-monopolistic conditions currently existing in Gallatin County, looking at competition as a key factor was highly appropriate.

In Mont. Code Ann. § 69-12-323(2)(b), the Commission is clearly authorized to weigh competition as a separate and distinct factor, alongside the four traditional factors already discussed. Moreover, in *Waste Management. Partners* the court affirmed that the Commission may assign competition any value it chooses in the order of importance, to establish the public interest. *Waste Mgmt. Partners v. Mont. Dep't of Pub. Serv. Regulation*, 284 Mont. 245, 252, 944 P.2d 210 (1997). While not evidentiary in nature, the Commission should note, in this regard, that the preponderance of public comment during the three-day hearing spoke favorably – often passionately – to the introduction of garbage carrier competition in the Gallatin market area. As one would expect, they argued with considerable logic that competition could not hurt, and would very likely help the position of local consumers, in demanding better service and fewer rate increases.

During the hearing, Commissions got at least a small glimpse at how competition from L&L might affect rates and services at Republic. Witness Michael Kassidy, owner of several McDonald's restaurants, testified that in the city of Bozeman, where Republic faces competition from municipal collection, their rates are significantly lower than in nearby Belgrade, where Republic is the only carrier. Witness Rocky Nelson from the Yellowstone Club, spoke of a variety of service-related issues with Republic, adding that the current issues were only resolved after it became known by Republic that Nelson had submitted an affidavit supporting L&L's application.

These and other indications of Republic's responsiveness to competition -- and to the threat of competition -- do not suggest that Republic is currently abusing their captive customers. But what it does show is that competitive forces produce strong markets, and lack of competition produces weaker markets that ill-serve the consumer. Monopolistic companies are not, by definition, bad providers. They are simply creatures of the market conditions under which they operate. If there is no competition to drive down rates, there is much less incentive to keep rates low. The function of price signals in the marketplace is removed. Likewise, if there is no threat

of losing market share to another carrier, there is less reason to vigorously pursue a consumer's business with new offerings, better deals, etc. Where else can that consumer go?

How very different it is when two or more companies are vying for market share, and actively seeking to attract public patronage. In such a dynamic market, where consumers are empowered to direct their dollars to where they feel they are getting the best value, everyone wins. While it is impossible to predict the exact impact L&L's new Class D services will have on the local market, it's a fundamental economic truth that when companies are striving to attract customers, they produce better services, more choices, and lower rates. This is precisely what Gallatin County needs – and should not be denied.

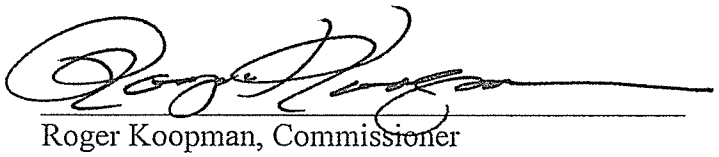
In closing, a word about so-called "cherry picking." Based on the applicant's testimony that he will begin by concentrating on certain areas of the county, some Commissioners expressed concerns that he was "cherry picking" the market. Johnson apparently even used this term himself. But it is unfair to seize upon those words, to conjure up the notion that L&L will ignore customers in all but the easiest areas to serve. This is not the case. Commissioners should be reminded that a Class D Carrier certificate carries with it the obligation to serve the needs of any and all consumers within the company's geographic area of operation authority. Clearly, all the applicant was testifying to was that, like most businesses entering a new market, he will have a marketing plan and a plan for orderly and staged growth. It only makes sense to begin by concentrating on those areas where you can most quickly establish yourself. This does not imply that L&L will refuse to accept business in other areas of the county, nor that the law would even allow that. It doesn't.

We often speak of believing in competition in the abstract, but when faced with concrete choices, elected officials will frequently show more deference to existing enterprises than to those that are trying to get started. As I indicated at the work session on this docket, when the Commission can make a decision that will produce significant public benefit, and the evidence is strong in support of that decision, it is irresponsible to wring ones hands and find reasons to cast a "safe" no vote. Our default position – within the clear limits of the laws that guide and control us – must be to more freedom, not less. To greater competition, not less. To more choice, not less. To greater market incentives for better service at lower rates, not less.

In Gallatin County, the record would indicate that there is considerable room for rate relief and improved garbage hauling services. Yet it is doubtful that will ever happen in the

absence of competition. L&L Site Services has proven itself worthy and legally qualified to provide that measure of healthy competition and consumer choice. It was a happy day for county residents, when the Commission showed both the wisdom and courage to do the right thing, by approving their application.

Therefore, I respectfully CONCUR with the Order,



Roger Koopman, Commissioner