

Service Date: June 27, 2012

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

IN THE MATTER OF Billings Yellow Cab	)	REGULATORY DIVISION
LLC, Billings, Montana, Application for a	)	
Montana Intrastate Certificate of Public	)	DOCKET T-12.2.PCN
Convenience and Necessity	)	ORDER 7222

**CONCURRING OPINION OF  
COMMISSIONER TRAVIS KAVULLA**

The law that commands this regulatory commission to consider whether the oblique concept “public convenience and necessity” permits the entry of the applicant into an already competitive market gives rise to this bizarre proceeding. MCA §69-12-323(2)(a). The statute is an odious one from the point of view of anyone who believes that, with few exceptions, a person should have and does have a right to his own labor and accordingly the right to start or expand a small business in this, a nation that prides itself on an embrace of free enterprise. It is a law that is enforced by me today only very reluctantly and which I hope will be repealed one day or considered on constitutional grounds by a body with judicial review powers.

The State of Montana’s public convenience and necessity (PCN) regulation of motor carriers has the practical effect of conferring a veto power to the very persons who would face competition were PCN applicants like Billings Yellow Cab permitted to compete in the market. MCA §69-12-321(1). The statute compels this regulatory commission to consider applications through criteria that are inherently subjective and from time to time arbitrarily applied to Commission favorites. The law requires applicants for PCN certificates to make the following showings that are difficult, if not impossible, to prove: 1) that need exists in the market they wish to serve, 2) that the incumbents are unwilling or unable to meet that need, 3) that the economic interests of those incumbents will not be damaged contrary to the public interest, and that 4) the

applicant would be a fit operator of the service contemplated. ¶¶ 20-22, Order 7222, Docket No. T-12.2.PCN.

Billings Yellow Cab in this case is applying for a *statewide* charter passenger authority. To be successful in its application, Billings Yellow Cab would have had to prove that need exists throughout the entire State of Montana. That clearly has not been proven. Even if it had been, the applicant would similarly need to show that each of the protesting carriers is unwilling to serve that need in the areas they have certification to serve. That burden, too, has not even remotely been met, and the uncontroverted evidence of the proceeding is direct testimony from the owner of one of the protesting companies, Willson LLC dba Billings Van and Shuttle, that his company and other certificated carriers could meet every supposedly unmet need suggested at the hearing. Tr., pp. 190-92. There is no evidence in this proceeding that the two shipper witnesses purporting to need service related to the Bakken even attempted to call any protesting carrier. The two other shipper witnesses similarly offer no specifics of their attempts to procure service from other carriers.

Even were the Commission liberally to construe the proof of need that is the first tenet of the test established by traditional PCN regulation, and believe that need had been limitedly established for transport to and from the Bakken oil patch area—this was the most credible evidence presented, and even then it was presented in testimony by the applicant himself, the applicant's son, and his associate—there still is no evidence to support the proof of the second tenet of the PCN test, that existing certificated carriers are unwilling and unable to fulfill those needs. Again, the only direct testimony suggests, instead, that they are.

The third tenet of the PCN test, that no economic damage to the incumbents be done by the applicant's certification contrary to the public interest—a circular concept premised on a discredited economic theory which is discussed below—was the subject of mere speculation about potential economic outcomes, not credible testimony by any party. Intuitively, of course, any additional carriers' entry into the market will have the impact of reducing the market share of other certificated carriers providing similar services, unless the entry of a new carrier has the effect of increasing total demand in the market for the service. Similarly, there is no evidence that certification of additional suppliers of this good, transportation, would itself increase total demand for transportation. There was no testimony or briefing on the point of whether this harm

would or would not be contrary to the public interest. The Commission in its Order does not even consider whether this tenet was or was not satisfied—and rightly so, because the failure of the applicant to meet the burden of the first two tenets precludes the necessity of conducting an evaluation under the third tenet’s Alice in Wonderland lens.

The standard of proof in this proceeding is very high, and an honest reading of the transcript would not allow a reasonable person to conclude that the applicant had even come close to meeting it. Yet, the dissenters, perhaps feeling sorry about the absurd outcome that the law demands, instead want the Commission to perform an end-run around the law by playing favorites. At the work session resulting in the Order, one commissioner asserted that the test for PCN certification should be modified administratively, without notice and without any party in this proceeding advocating such a revision, and just a week after the Commission *unanimously* denied a PCN certificate, using the same four-part test, to an applicant who made as good of, if not a better, case before the Commission to be granted a PCN certificate. Order 7211a, June 20, 2012, Docket T-11.26.PCN. To grant one a PCN certificate while denying another in this way would be the height of arbitrariness.

The Commission was recently given the opportunity to promote the repeal of PCN regulation as it pertains to charter passenger service. It declined to do so.<sup>1</sup> Supporting a repeal or modification of this law, whose only purpose is to prevent entrenched carriers from facing economic competition, is a far more transparent manner in which to reform this industry than for the Commission to decide simply to ignore the law’s well-established meaning and enforce it selectively, picking favorites in an arbitrary and capricious manner. As was written in a lengthy memorandum from 1994 which addressed the very issue of the administrative flexibility the Commission has in interpreting the PCN law: “The fundamental law (four basic elements) of PCN in motor carrier authority is simply too well developed and accepted at this point to be viewed as susceptible to change other than through legislation.”<sup>2</sup> The interceding 18 years have only strengthened the hand of precedent relative to PCN certification’s four-part test.

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<sup>1</sup> Minute No. 185, Minutes of the June 19, 2012, meeting of the Montana Public Service Commission. Motion of Commissioner Travis Kavulla to adopt as a PSC “agency bill” a legislative draft that would partially deregulate the motor-carrier industry.

<sup>2</sup> Memorandum of Martin Jacobson to Commissioner Robert Rowe, Re: Discussion of “Alternative” Interpretations of “Public Convenience and Necessity” in Motor Carrier Context. May 3, 1994.

I sympathize with the applicant in this proceeding, and although I cannot conscientiously vote to grant the application, part of me would have been glad to see my opinion be a dissent and not a concurrence, since the practical effect of a perversion of a perverse law would be to allow Bob and Sue Young, the owners of Billings Yellow Cab, to do what is their natural right: to make a living as they see fit, in a manner which harms no one, and provide the public a service which, if needed, will cause their business to thrive and, if not needed, will cause their business to fail. But the law, as now written, does not permit that conclusion. Under the framework the statute imposes, the applicant has not met his burden; indeed, it would be hard for *anyone* to meet that burden, when faced with a significant protest from already-certificated carriers who represent, in a manner which is difficult if not impossible to controvert, that they stand ready to meet the suggested need.

I believe the law is on shaky ground, however, in a manner which was not raised at hearing and over which the Commission, as a body that lacks judicial powers, has no real authority. In my view, the law seems to lack a rational basis, and causes the Commission to engage by necessity in an arbitrary discrimination between government-sanctioned “winners” and those less lucky, who are not granted PCN certificates simply because they were late entrants to the market.

The law may have had a rational basis when first promulgated. Montana statute duplicates a part of the federal Motor Carrier Act of 1935, and many other similar state laws. The federal law, since repealed, required applicants to demonstrate the services they wished to offer in the market were “required by the present or future public convenience and necessity.”<sup>3</sup> The law is a vestige of a bygone era when it was widely believed that barrier-to-entry and economic regulation was necessary in many industries because the competitive and free market was dysfunctional and self-destructive. Similar regulations existed for airlines but, in time, experience in industries thought at one point to be innately monopolistic, from grain terminals to telecommunications, has since proven the merits of competition virtually everywhere.

PCN regulation runs contrary to how nearly every other industry in the State of Montana operates. While there are outright quotas and licensing provisions for certain industries, PCN

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<sup>3</sup> Previously, 49 U.S. Code 307(a).

regulation does not otherwise exist in Montana except for natural monopolies—the electric grid, for instance—in which competition would be inherently duplicative, destructive to market participants, and ultimately raise the fixed costs to which consumers are subject. Historically, this cost-raising phenomenon of natural monopolies is the *only* public interest which PCN regulation exists to protect, while of course it also acts as a bulwark against competition to the incumbents in an industry who are frequently the only constituency for the law’s continued survival.

A “natural monopoly” exists only when an industry displays, in the words of the economist and regulator Alfred Kahn, “an inherent tendency to decreasing unit costs over the entire extent of the market” by virtue of its monopolization.

This is so only when the economies achievable by a larger output are internal to the individual firm—if, that is to say, it is only as more output is concentrated in a single supplier that unit costs will decline.

The principal source of this tendency is the necessity of making a large investment merely in order to be in a position to serve customers on demand. The railroad has to construct a roadbed and lay a track before it is in a position to carry any passengers or freight at all; water, gas, electricity, and [landline] telephone companies have to dig up the streets and lay down pipes or build poles and string wires from the point of production to every single point of potential consumption and install meters before a single drop, cubic foot, or kilowatt hour can be sold or a single call placed.<sup>4</sup>

Allowing for duplication of these natural-monopoly systems would inevitably increase the ratio of customers to wire or piping, spreading greater fixed costs over the same pool of users, whose demand is not subject to dramatic elasticity.<sup>5</sup>

Even a casual examination of the charter passenger carrier industry demonstrates that it is not analogous to fields in which destructive competition is a real concern because of their characteristics of natural monopoly. NorthWestern Energy, the state’s largest electric utility, requires a capitalization of billions of dollars to serve its few hundred thousand customers and

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<sup>4</sup> Alfred Kahn, *The Economics of Regulation: Principles and Institutions, Vol. II*, (Cambridge: MIT Press, 1995), pp. 119-20.

<sup>5</sup> Even here, of course, competition has existed horizontally based on end uses. Natural gas is delivered via a natural monopoly through a local distribution company, but a user of natural gas really does not want the gas *per se*; he wants home heating, and competition is erected through electricity, wood, and heating oil. The irruption of disruptive technologies in fields such as telecommunications further demonstrates that industries parochially thought to be natural monopolies can in fact be hotbeds of competition.

the bulk of that infrastructure is immovably fixed in place to render service to similarly immobile customers.<sup>6</sup> A passenger service in the manner of Billings Yellow Cab requires far less, and the primary costs to that industry are associated with 1) a type of labor that is fungible inasmuch as it requires only a respectable individual with a driver's license and 2) vehicles that are movable and modular—that, indeed, is their purpose. There is nothing but regulation which makes it difficult to enter and exit the market, and render service in that market, unlike those public-utility industries whose associated infrastructure is costly and fixed in place. Although in some motor carrier industries, such as garbage hauling, vehicles constitute a network following a consistent route with sustained fixed costs, Billings Yellow Cab's proposed service would have dispatched vehicles sporadically, for *ad hoc* transactions, and required only eight vehicles and the labor of a handful of persons.

The law also arbitrarily discriminates against such small, privately owned companies, and establishes an imbalance between larger or differently organized operators and smaller, mom-and-pop operations with low fixed costs. Were Billings Yellow Cab differently organized, the law would exempt them from regulation altogether. If, rather than a Lincoln town car, Hummer, or 24-seat Freightliner bus that are listed in Billings Yellow Cab's inventory of equipment, the company instead used a 26-seat bus to provide the same service, the applicant in this proceeding would be exempt from the Commission's jurisdiction and not have to bother applying for a PCN certificate. MCA §69-12-102(l)(i). Likewise, if Billings Yellow Cab were organized into an IRS-recognized non-profit organization, it could operate its service without a PCN certificate or any intrusion by this Commission. MCA §69-12-102(k) and Decl. Ruling in Docket No. T-11.21.DR.<sup>7</sup> These distinctions serve little purpose, except to discriminate irrationally based on the size of the motor vehicle and the legal organization of the entity providing service.

In the hearing, Billings Yellow Cab's owner and attorney conveyed their impression that the company had a right to engage in charter passenger transport without a Commission-issued PCN. Tr., pp. 73, 77-78, 128-32. I have no opinion on the matter and the issue is not properly before the Commission, because it has been definitively settled by the Legislature with the

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<sup>6</sup> NorthWestern reported its total utility plant to be valued at \$2.46 billion as of the utility's last annual report. Annual Report of NorthWestern Energy to the Montana Public Service Commission, 2011.

<sup>7</sup> The declaratory ruling, attempting to make sense out of this bit of legal discrimination, is available online at: <http://psc.mt.gov/transportation/pdf/T1121DRPSCDRFinal.pdf>

passage of Senate Bill 140 in last year's legislative session. The law directed the Commission to issue statewide charter passenger certificates to those companies who, before Jan. 1, 2011, provided charter service and had obtained a USDOT number from the U.S. Department of Transportation. Billings Yellow Cab, although it engaged in substantially the same business as parties now protesting this application, had not obtained a USDOT number, which it would have had to do months before the law was even passed. Its competitors had obtained a USDOT number, on the other hand. Billings Yellow Cab was thus excluded from grandfather treatment in a manner which seems to discriminate against the company not for any public purpose—the company was, after all, already providing the service it is now asking the Commission to sanctify in this application—but merely to exclude the company from a market in which he was already competing. Billings Yellow Cab accordingly filed this PCN application, essentially asking permission to re-enter the market from which the Legislature had excluded it. While one might read the company's prior participation in the market as an indication of the establishment of need under the PCN test, Billings Yellow Cab nonetheless did not show that the grandfathered competitors could not or would not meet that need, and therefore the law compels a denial of the PCN certificate.

There is, in my opinion, a sufficient amount of evidence to call the law, in its entirety or in part, into question on constitutional grounds were it ever seriously subjected to the rational basis test, because the law appears to be unrelated to a legitimate state interest. *Craigmiles v. Giles*, 312 F.3d 220 (6<sup>th</sup> Cir., 2002); *Merrifield v. Lockyer*, 547 F.3d 978 (9<sup>th</sup> Cir., 2008). While there is a legitimate government interest in the fourth element of PCN regulation—carrier fitness, such as a requirement to hold adequate insurance or to be without significant criminal motor-carrier convictions—carrier fitness in itself is unrelated to the determination of public need that is the core of PCN regulation. As discussed above, charter passenger service is not a natural monopoly, and the other three elements of the PCN test explicitly exist only to prevent economic competition. Since there is no credible public interest in preventing that competition, there would seem to be no rational basis to subject new entrants to a need-based test whose only practical purpose is to delineate and give a veto to the incumbents who are protected by the presumptions of the PCN test—three such parties are protesting the application before us in this case—and the applicant who is called upon by the PCN test to prove a negative, that his would-be competitors cannot or will not serve a need he wishes to serve. There is no level playing field

between those operators, and this imbalance between the incumbents and the new entrant raises serious questions under Due Process and Equal Protection clauses of the Fourteenth Amendment of the United States Constitution.

I hope this matter can be taken up by a court of law that does have jurisdiction over constitutional questions or by the Legislature, since it hardly seems conceivable that PCN regulation of passenger service like that proposed by Billings Yellow Cab remains a compelling state interest.

Reluctantly, I CONCUR with the Order,

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Travis Kavulla, Commissioner