Service Date: June 27, 2003

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

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IN THE MATTER OF DAVID G. CONKLIN,	)	TRANSPORTATION DIVISION
dba CSI TOURS, Kalispell, Montana,	)	
Application for a Montana Intrastate Certificate	)	DOCKET NO. T-02.102.PCN
of Public Convenience and Necessity.	)	ORDER NO. 6534

PROPOSED ORDER

This proposed order is a proposal for decision.
It has no legal effect until approved by a majority of the PSC Commissioners
Please see note at end of order for procedure on proposed orders .

INTRODUCTION

1. On September 24, 2002, David G. Conklin, dba CSI Tours (Conklin), Kalispell, Montana, filed before the Public Service Commission (PSC) an application for motor carrier authority to transport passengers. On September 30, 2003, Conklin amended the requested authority to clarify or narrow the scope. Prior to hearing on the matter Conklin again amended the requested authority to clarify or narrow the scope.

2. In final form the authority Conklin requests is Class B authority, passengers in tour service between all points and places in Flathead, Glacier, Lake, and Lincoln counties, Montana. Conklin proposes limitations on the authority, including advance reservation only, group of passengers with common destination only, but individual members of group may have separate origination points and separate fares, and limousine and taxi service prohibited.

3. Hearing on Conklin's application was held on February 6, 2003, in Kalispell. Conklin appeared at hearing. Protestants appeared at hearing. The protestants include: Flathead Area Custom Transportation, Inc., dba Kalispell Taxi and

Airport Shuttle Service; Rocky Mountain Transportation, Inc.; Flathead Glacier Transportation, LLC; Dennis Orr, Sr., dba South Lake Taxi; and Louis W. and Geneva L. Webster, dba The Great Northern Taxi.

4. Evidence has been taken, the matter has been fully considered, and the requested authority is GRANTED, in part, with modifications or qualifications, for the reasons expressed in the following findings of fact and conclusions of law.

FINDINGS OF FACT

5. All introductory statements which can properly be considered findings of fact and which should be considered as such to preserve the integrity of this order are incorporated herein as findings of fact.

6. Conklin operates a tour service which involves motor carriage. Conklin's operations are predominantly charter transportation. Charter transportation, by Conklin or an other person, is not regulated by the PSC. Conklin's existing operations may also include what Conklin refers to as "wholesale" services, the contracting with other carriers to provide transportation of groups of passengers. Conklin's "wholesale" services are not regulated by the PSC. The protestants are motor carriers with competing authorities in the proposed service area. One or more of the protestants also provide tour services in the Flathead, Glacier, Lake, and Lincoln counties area.

7. Conklin is not seeking charter authority. Charter authority is not required by Montana law or available from the PSC. Conklin requests passenger motor carrier authority to accommodate individual passengers wishing to form or join a larger group of passengers and do so from separate origination points and with individual fares. Individual passengers transported from separate origination points and at separate fares is not charter transportation. It is regulated motor carriage of passengers and requires motor carrier authority. Essentially, Conklin wants to accommodate individual passengers to compliment Conklin's charter operations. Conklin does not intend to

perform taxi or limousine service.

8. There is a public need for at least a part of the service proposed by Conklin. The existing carriers cannot meet that need. The grant of this additional authority will not harm existing carriers contrary to the public interest. Conklin has established that he is fit, willing, and able to provide the service.

CONCLUSIONS OF LAW

9. 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.

10. The PSC has jurisdiction over applications for motor carrier authority pursuant to Title 69, Chapter 12, MCA. The application of Conklin is proper in form and was properly noticed, protested, and heard in accordance with Title 69, Chapter 12, MCA, and Title 2, Chapter 4, MCA (Montana Administrative Procedures Act). The PSC regulates motor carriers pursuant to Title 69, Ch. 12, MCA. A part of that regulation includes control over entry of additional carriers. Conklin is an additional carrier.

11. The merits of Conklin'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.

12. 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 applicable legal requirements.

13. As the above statutes reflect, there are specific elements involved in reaching a determination on whether public convenience and necessity requires authority. Public convenience and necessity will be deemed as requiring a grant of intrastate motor carrier authority in Montana when each of the required elements demonstrate that 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 (the elements have been described in numerous other PSC opinions, sometimes in slightly different ways, but all the same in substance):

> Applying this language [sec. 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.

14. The "fit, willing, and able" language of Section 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.

15. In accordance with the above, the PSC will grant additional authority when the following elements exist: (a) there is a public need; (b) existing carriers cannot meet that need; (c) additional authority will not harm existing carriers contrary to the public interest; and (d) the applicant is fit, willing, and able to provide the proposed services. The PSC determines the required elements exist regarding Conklin's application.

16. The first element to consider in determining whether public convenience and necessity requires a grant is public need. In regard to public need, Conklin presented shippers supportive of the authority applied for. Witnesses supporting Conklin's authority established a need for allowing individual passengers of small groups of passengers to join a charter movement at separate origination points and separate fares. Prospective tour participants may be staying at different locations or may not be members of a specific group that has arranged for a charter. The PSC concludes that a need exists to accommodate these types of passengers. Conklin did not establish a need for tour transportation comprised completely of individual passengers form separate origination points and at separate fares.

17. The second element in public convenience and necessity is ability of existing carriers to meet the demonstrated public need. In Conklin's operations and proposed operations it is impractical if not impossible for an existing carrier to meet the

need if the need is confined to transporting passengers (individual origination point, separate fares) in conjunction with a charter tour conducted by Conklin. The passengers simply cannot be part of the tour if another carrier is transporting them. One or more or all existing carriers can however meet any reasonable need for transportation, including tour transportation, comprised completely of individual passengers from separate origination points and at separate fares.

18. The third element is harm to existing carriers. The PSC concludes that this element needs little discussion for at least two reasons. One, although all of the existing carriers testified that Conklin's operations would have an adverse impact on them, the extent of the established adverse impact is minimal. Two, harm can exist so long as it is not contrary to the public interest and, in this case, the PSC concludes that the public interest is better served allowing Conklin to obtain limited authority which compliments Conklin's existing charter operations and accommodates individual passengers.

19. The fourth element is fitness. An applicant for motor carrier authority must establish that it is fit, willing, and able to provide the services proposed. See, Section 69-12-415, MCA. Conklin has established this. Conklin is an existing unregulated carrier, is familiar with transportation operations, and is familiar with the requirements of safe operations and other responsibilities to passengers. There is no substantial evidence to the contrary.

ORDER

20. 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.

21. 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.

IT IS HEREBY ORDERED the application of David G. Conklin, dba CSI Tours, Kalispell, Montana, is GRANTED, with modifications or qualifications as follows:

Class B -- Passengers in tour service between all points and places in Flathead, Glacier, Lake, and Lincoln Counties, Montana. Limitations: (1) transportation with less than 24 hours advance reservation is prohibited; (2) transportation must be of a passenger or group to passengers (two or more) joining, with common purpose and destination, a charter tour provided by the carrier (individual members of the group may have separate origination points and separate fares); (3) transportation in limousine service is prohibited; (4) transportation in taxi service is prohibited.

Done and dated this 26th day of June, 2003.

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BOB ROWE, Chairman, Hearings Examiner

ATTEST:

Ann Purcell
Acting Commission Secretary

(SEAL)

NOTE: This Proposed Order is a proposal for decision. Each party has the opportunity to file exceptions, present briefs, and have oral argument before the PSC prior to Final Order. *See § 2-4-621, MCA*. Exceptions and briefs must be filed within 20 days of the service date of this Proposed Order. Briefs opposing exceptions must be filed within 10 days thereafter. Oral argument, if requested, must be requested at or prior to the time of briefing. *See ARM 38.2.4803 and 38.2.4804*.

No transcript of the hearing on this matter has been ordered by any party or the PSC. If exceptions are filed as to any finding of fact, the party making the exception shall provide a complete transcript and reference the portions of the transcript which pertain to the exception. Transcripts are available though the court reporter recording the hearing.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Proposed Order, Number 6534, issued in Docket T-02.102.PCN, David G. Conklin dba CSI Tours, Kalispell, Montana has today been sent to all parties listed.

MAILING DATE: June 27, 2003

FOR THE COMMISSION

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