Service Date: March 12, 2004

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

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In The Matter Of The Application of DONNA S. MILLER, d/b/a/ D&D LIMOUSINE, for a Montana Intrastate Certificate of Public Convenience and Necessity	)))))	TRANSPORTATION DIVISION DOCKET NO. T-03.47.PCN ORDER NO. 6543

PROPOSED ORDER

APPEARANCES

FOR THE APPLICANT:

Donna S. Miller, dba D&D Limousine, P.O. Box 362, Seeley Lake, MT 59868.

FOR THE PROTESTANTS:

Debra D. Parker, Esq., Connell Law Firm, 502 West Spruce, P.O. Box 9108, Missoula, MT 59807.

COMMISSION STAFF:

Robin A. McHugh, staff attorney, 1701 Prospect Ave., Helena, MT 59620

BEFORE:

Bob Rowe, Commissioner and Hearing Examiner.

BACKGROUND

1. On September 25, 2003, the Commission received an application from Donna S. Miller, dba D&D Limousine (Applicant) for a Certificate of Public Convenience and Necessity, Class B, authorizing the transportation of passengers in limousine service 1) between all points and places within Seeley Lake, Montana and a 25 mile radius thereof and 2) between all points and places within Missoula, Flathead and Lake Counties, Montana with the limitation that

transportation must originate within Seeley Lake, Montana and a twenty-five (25) mile radius thereof.

2. The Commission received written protests from: Wild Horse Limousine & Carriage Co., 704 Sixth Ave. West, Kalispell, Montana 59901, PSC No. 9397; and Valet Limousine, Inc., 3820 South 3rd West, Missoula, Montana 59807, PSC No. 7172.

3. Following issuance of proper notice a hearing was held on January 8, 2004 at the Seeley Lake Elementary School, Seeley Lake, Montana. At the close of hearing at least one party requested that a proposed order be issued. The parties agreed that each would have the opportunity to file a brief by January 21, 2004. The Applicant and Protestants each filed a brief; the Applicant's brief, with permission from Commission staff, is in the form of a letter to Commissioners. On February 5, 2004, Protestants filed a Motion to Strike Applicant's Post-Hearing Letter to the Commission and Brief.

SUMMARY OF TESTIMONY

Testimony for the Applicant

4. Applicant Donna Miller appeared and testified in support of the application. Ms. Miller explained that she and her husband bought a limousine for personal transportation, but that when they received inquiries about providing limousine service they inquired into obtaining the necessary operating authority. She expressed her belief that there is a need for limousine service in the Seeley Lake area that cannot be met by existing carriers. She claimed it is impractical for limousine carriers located in Missoula or Kalispell to provide service in Seeley Lake, and she stated her understanding that Valet Limousine requires two days notice for service to Seeley Lake and that different rates apply outside the Missoula area. Ms. Miller contended that D&D would not harm existing carriers because it does not plan to compete in their primary areas (presumably Missoula & Kalispell). She stated both she and her husband would be drivers for D&D, both have valid drivers' licenses, and are experienced drivers. She further stated that she and her husband have the resources to own a limousine service and to keep the limousine maintained and insured. She stated D&D plans to advertise in the local yellow pages. She indicated that D&D would not carry passengers beyond the vehicle capacity, and that she understood that D&D could not originate transportation from either the Missoula or Kalispell airports. Ms. Miller admitted she had not done a business plan, and recognized that the proposed service is not in addition to service already available.

Testimony of Public Witnesses and/or Shipper Witnesses in Support of the Application:

5. Cheryl Thompson, a Seeley Lake resident, appeared and testified in support of the application. Ms. Thompson explained that in August of 1997 her son was married in Seeley Lake and hired a limousine for a short trip. The limousine arrived but the driver indicated the limousine was committed elsewhere and had to leave early. Ms. Thompson tried to get a credit or rate reduction but failed. Ms. Thompson could not remember the name of the limousine company she retained in 1997. She said she might use limousine service to transport her parents around Seeley Lake, but had not sought limousine service since 1997 because of the bad experience at her son's wedding.

6. Kimberly Koppen, a Seeley Lake resident and owner of a Seeley Lake real estate firm, Great Bear Properties, appeared and testified in support of the application. She explained she would use a limousine for both personal and client needs. (Clients are persons interested in property, and a limousine may be used to show properties.) Ms. Koppen said issues for her are timing and local service. If she were to need a limousine she would need it quickly and would not consider a nonlocal service. She admitted she had not used or tried to use a limousine prior to the date of the hearing; and she acknowledged being aware of existing limousine services, but said she would not consider using them because they are not local.

7. Becky Robbins, a Seeley Lake resident and owner of a Seeley Lake hair salon, appeared and testified in support of the application. She described an instance in 2002 when she tried to hire a limousine, but the limousine was not available on the desired date. She could not remember the name of the company. She explained that she sometimes has customers from out-of-town who stay at the Double Arrow guest ranch and need transportation to her salon. She said that distance, bad roads and necessity for advance notice are all problems with using a Missoula limousine service. Ms. Robbins indicated her primary interest was for limousine service in the Seeley Lake area. She likes the idea of local service and arrangements, and would not consider special day (e.g., Mother's Day, Valentine's Day) limousine arrangements with out-of-town carriers because these would likely not be cost effective.

8. David Tonning, a Seeley Lake resident and wholesale distributor of jewelry, appeared and testified in support of the application. He said persons come to his business from out-of-town and he could use limousine service to transport them to and from motels and

restaurants. He said he normally has only a day or two notice of a need for transportation, so that local service, along with a shorter time necessary to arrange for service would be helpful. He stated he doesn't need taxi service, but would like the limousine to transport, wait at the destination, and then return with his client(s) to Seeley Lake. Mr. Tonning indicated that two hours was sometimes too long to wait for a limousine. He said he has not used a limousine for his Seeley Lake business because of the response time required by a nonlocal limousine service. He said he might use a limousine to take clients to the Missoula airport.

9. George Frasca, a retired Seeley lake resident, member of the community council and transportation advisory committee, appeared and testified in support of the application. Mr. Frasca conceded he has no need for the proposed service, but thinks a limousine service may be useful to seniors, including evacuating housebound persons, and substituting for a bus when transportation is only needed for a few people. He indicated he had not been aware that limousine service is available in Seeley Lake, and has not tried to use existing services to meet the transportation needs he describes. He contended, however, that it is not practical for a limousine to drive from Missoula to take three seniors to lunch, and existing services cannot provide emergency service. He admitted he thinks additional transportation in the Seeley Lake area is important, and it doesn't matter where the vehicle originates; but thinks a local service makes sense and existing carriers "did not seem feasible."

10. Ron Cox, a Seeley Lake resident, member of the community council transportation advisory committee and Chamber of Commerce, appeared and testified in support of the application. Mr. Cox explained that there is no public transportation in Seeley Lake, and granting this application would be a small step toward obtaining some public transportation. He indicated a strong preference for a local service, and said using a Missoula or Flathead service in Seeley Lake defies common sense. He said he has not tried to use non local service, is not familiar with such service, and wouldn't consider using it.

Testimony of Protestants:

11. Marc Rold, president of Wild Horse Carriage and Limousine Company, appeared to protest the application. Mr. Rold explained the current status of his business, saying it barely made a profit in 2003 but meets the demand in the Flathead except for select dates like prom nights and New Years Eve. He said any additional competition will cut into the already

negligible profit margin of Wild Horse. Mr. Rold conceded that Wild Horse's operating authority does not overlap with the authority sought by the Applicant, but said he is concerned that the Applicant may not comply with its authority, or may seek to expand it in the future.

12. Dawn Bierny, office manager of Valet Limousine, appeared and testified in opposition to the application. Ms. Bierny stated that if Valet gets a call for service, it provides service. She said Valet had not denied service in the six months prior to the hearing. She explained that Valet operated at a loss for the years 2002 and 2003, and granting this application would increase that loss. She said that Valet has a reservation system, would prefer two days advance notice, but can provide service, if a car is available, in as little as two hours, including to the Seeley Lake area. Ms. Biery also stated that Valet advertises in the Yellow Pages.

EXHIBITS AND NOTICE

13. The following exhibits were admitted at hearing: Applicant Exhibit 2, a picture of the Applicant's limousine (Applicant proposed Exhibit 1, the results of a market survey, was not admitted); Valet Exhibit 1, a list of Valet limousine reservations for transportation to and from Missoula and the Seeley Lake area for the years 2002 and 2003; Valet Yellow Pages (Qwestdex) ad from the Missoula phone book. The Hearing Examiner took notice of the October 21, 2003 letter of protest to the Commission from Marc Rold.

DISCUSSION, ANALYSIS AND FINDINGS

14. In considering applications for operating authority, the Commission is governed by the provisions of 69-12-323, MCA. Paragraph (2)(a) of that section provides as follows:

> 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 therefore 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 through 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.

15. Applying this language to the facts presented by any application for transportation 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 service. 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 exiting 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.

16. The traditional analysis described above has perhaps been stated most concisely in the case of Pan American Bus Lines Operation, 1 M.C.C. 190, 203 (1936):

> The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines of carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.

17. The first question to be addressed is whether the Applicant has demonstrated a public need for the limousine service proposed. The Commission determines that a public need for limousine service in the Seeley Lake area, and for limousine service from the Seeley Lake area to other points in Missoula County, was demonstrated by shipper witnesses Thompson, Koppen, Robbins and Tonning. A public need for limousine service from Seeley Lake to points in Flathead and Lake Counties was not demonstrated, and those parts of the application are denied.

18. The second question is whether existing carriers can and will meet the public need demonstrated. In theory a limousine carrier with cars located in Missoula

could meet any public need in the Seeley Lake area. In practice, however, there is some evidence on this record that the public need has not been met (See the testimony of witnesses Thompson and Robbins). In addition, there is much testimony from persons who prefer local service, but who are also so skeptical of the feasibility of limousine service from Missoula that they had not considered procuring such service. Often the Commission would give such testimony little if any weight, especially if there were little demonstrated effort to investigate and use the services of existing carriers. In this case, however, the Commission considers that this testimony reflects common sense, and the reality that Seeley Lake is located more than fifty (50) miles from Missoula, over mostly state secondary and often weather impacted roads. The idea that a limousine service operating a vehicle out of Missoula can meet public need "as well" in the Seeley Lake area is not plausible on its face, and the record supports this observation.

19. The third question is whether a grant or partial grant of the authority applied for will harm existing carriers contrary to the public interest. In this case the question is whether a grant of Seeley Lake and 25 miles, and Missoula County with the limitation that transportation must originate within Seeley Lake and 25 miles will harm Valet Limousine contrary to the public interest. There is scant evidence on the record that Valet will be harmed. Of the 65 trips evidenced by Valet Exhibit 1, occurring over 2002 and 2003, 58 could not be performed under the partial grant of Applicant authority described above. (Trips cannot originate beyond Seeley Lake and 25 miles; both Missoula and Condon are further than 25 miles from Seeley Lake.) Only the seven trips from Seeley Lake to Condon or Missoula could have been performed by Applicant under the partial grant. Even if it is assumed that Valet would lose all seven of those trips to the Applicant, the Commission cannot conclude that such loss would harm Valet contrary to the public interest.

20. In addition, statements by protesting carriers that any additional competition threatens already small or non existent profit margins will not suffice, by themselves, to defeat an application. This is especially the case when, as here, there appears to be little chance that the Applicant can or will provide service that would otherwise be provided by Valet.

21. Finally, the Commission affirms its discussion of this element at Docket No. T-9469, Order No. 5987a, pp. 12-13 (Jones Brothers Trucking), but notes that it does not consider limousine service an "essential and indispensable" service, and will not apply this third standard as rigorously as if it were dealing with an essential service.

OTHER DECISIONS

22. The Commission notes, and Mr. Rold conceded on the record that the authority held by Wild Horse Limousine does not duplicate, or overlap in any way, the authority applied for. Therefore, Wild Horse does not have a legal interest in this docket, its protest is denied and it is dismissed as a party. The possibility that an applicant may operate outside its authority does not create a legal interest that an existing carrier has a right to protect by protesting an application.

23. Protestants filed a Motion to Strike Applicant's Post-Hearing Letter to the Commission and Brief. The Motion states the "applicant's letter is an attempt to introduce new evidence after the close of evidence, and to discuss matters that are not relevant to the Commission's decision." The Motion is denied. The Commission is aware that information/argument in a brief does not constitute record evidence. To the extent that any brief filed with the Commission discusses matters not relevant to the decision, such discussion is disregarded.

FITNESS

24. The Commission finds the Applicant to be fit to operate a limousine service. The application indicates the Applicant will comply with the rules of the Commission and the laws of the State of Montana pertaining to motor carriers. The application statement of assets and liabilities indicates the financial ability of the Applicant to pay necessary fees and premiums and to keep the vehicle maintained. Nothing on this record indicates the Applicant should not be driving a limousine, such as an arrest record or other evidence of past behavior not consistent with operating a limousine. The Commission's observation of the Applicant at hearing did not give any reason to doubt that Applicant would operate the vehicle responsibly. Protestants complain that the Applicant does not have a business plan and claim it is doubtful the Applicant can make a profit. If the inability to make a consistent profit made one unfit to

operate a limousine service, there may be no limousine services in Montana. When deciding on an application for a nonessential service like limousine transportation, little consideration is due things like business plans and ability to sustain continuous operation out of limousine revenue.

CONCLUSIONS OF LAW

25. The Montana Public Service Commission properly exercises jurisdiction over the parties and matters in this proceeding pursuant to Title 69, Chapter 12, Montana Code Annotated.

26. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter.

27. Applicant has demonstrated a public demand or need for the proposed service, and has demonstrated that existing carriers cannot meet that demand or need as well.

28. Applicant has demonstrated fitness to provide the proposed service.

29. The authority granted by this Order will not have an adverse impact on existing transportation service contrary to the public interest.

ORDER

NOW THEREFORE, it is ordered that the application in this docket be granted in part as follows:

> Class B – passengers in limousine service (1) between all points and places within Seeley Lake, Montana and a twenty-five (25) mile radius thereof, and (2) between all points and places in Missoula County, Montana with the transportation originating within Seeley Lake, Montana and a twenty-five (25) mile radius thereof.

Parties are advised that this is a proposed order only, pursuant to § 2-4-621, MCA. (Please see note below.) If exceptions are filed this order may be modified. If exceptions are not filed, this proposed order may be adopted as the Commission's final order.

_____
Bob Rowe
Commissioner and Hearing Examiner

ATTEST:

Connie Jones
Commission Secretary

(S E A L)

NOTE: This Proposed Order is a proposal for decision. Each party has the opportunity to filed exceptions, present briefs, and request oral argument before the Commission prior to Final Order. See, Section 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.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Proposed Order, Number 6543, issued in Docket T-03.47.PCN in the matter of Donna S. Miller dba D & D Limousine, Seeley Lake, Montana has today been sent to all parties listed.

MAILING DATE: March 12, 2004

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FOR THE COMMISSION

FIRST CLASS MAIL

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Seeley Lake, MT 59868

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AS ITS INTERESTS MAY APPEAR:

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