Service Date: July 1, 1985

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 DONALD R. SULLIVAN, Chinook, Montana, for a Class D Certificate of Public Convenience and Necessity.	)))))	DOCKET NO. T-8752 ORDER NO. 5388

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FINAL ORDER

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APPEARANCES

FOR THE APPLICANT:

Robert Morrison, Morrison, Barron & Young, Attorneys-at-Law, 339 Third Street, P.O. Box 1070, Havre, Montana 59501

FOR THE PROTESTANT:

Keith A. Maristuen, Bosch, Kuhr, Dugdale, Warner, Martin & Kaze, Attorneys-at-Law, P.O. Box 7152, Havre, Montana 59501, appearing on behalf of James E. Inman

FOR THE COMMISSION:

Robert A. Nelson, Staff Attorney, 2701 Prospect Avenue, Helena, Montana 59620

BEFORE:

DANNY OBERG, Commissioner & Hearing Examiner

BACKGROUND

1. On April 23, 1985, the Commission received an application from Donald R. Sullivan, P.O. Box 104, Chinook, Montana, seeking a Certificate of Public Convenience and Necessity, Class D, to transport garbage within the City of Chinook, Montana.

2. Following receipt of a protest and issuance of notice, the Commission held a public hearing to consider the application on June 14, 1985, in the Blaine County Courthouse, Chinook, Montana.

3. Pursuant to an expedited briefing schedule agreed to by the parties, all briefs were received by June 24, 1985.

4. All parties have stipulated to issuance of a Final Order by the Commission.

SUMMARY OF TESTIMONY

5. Ken Harshman, Frank DePriest, and George VandeVen, all Chinook City officials, appeared and testified in support of the application. All three testified regarding the considerations and process which resulted in the City's award of a garbage service contract to Applicant.

6. Protestant, James E. Inman, has held an exclusive contract to provide garbage services to the City of Chinook for the past several years. Inman is the owner of a Class D Certificate of Public Convenience and Necessity, PSC No. 1341, authorizing such

service. Inman's contract expired September 30, 1984, but was extended for nine additional months while the City examined the wisdom of providing its own garbage service. After substantial public comment, the City concluded that competitive bidding by private carriers should be continued.

7. The City's bid process was concluded early in 1985. Applicant's bid undercut Protestant Inman's by roughly $5,000. After investigating Applicant's qualifications, the City determined that he was a responsible bidder and should be awarded the contract. Applicant's contract contemplates that service will commence July 1, 1985.

8. Applicant's witnesses all agreed that competitive bidding was the only reason for their support of the application. None had any complaints regarding the existing service provided by Inman.

9. Donald R. Sullivan, Applicant, also appeared and testified generally regarding his qualifications and ability to provide the service.

10. Six witnesses appeared and testified that the existing service provided by Inman has been good. These witnesses also generally supported the concept of competitive bidding.

11. James E. Inman appeared and testified in opposition to the application. Mr. Inman noted that he has been in the garbage business for nine years. He explained that he had bought his

Certificate in 1978, along with some miscellaneous equipment, for $12,000, and currently owes roughly $30,000 on additional purchased equipment. Inman agreed with several other witnesses that the Chinook area cannot support two garbage services. He also noted that a very small portion of his business is conducted outside the City.

DISCUSSION, ANALYSIS AND FINDINGS

12. Parties desiring to haul garbage for hire are required to first obtain a Class D certificate of public convenience and necessity from the Commission. Section 69-12-314, MCA.

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

> (2)(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.
>
> (b) For purposes of Class D certificates, a determination of public convenience and necessity may include a consideration of competition.

14. Although Paragraph (2)(b) of Section 69-12-323, MCA, specifically relates to Class D authorities, the basic standard traditionally applied by the Commission in considering applications for Class D operating authority remains as stated in Paragraph (2)(a). In adding the provisions of Paragraph (2)(b), the 1983 Legislature did not repeal or otherwise modify any of the provisions of Paragraph (2)(a). The Commission has interpreted Paragraph (2)(a) as requiring it to address three issues prior to granting additional operating authority (Finding No. 59, Order No. 4296, Docket No. T-6167):

a) First, the Commission must determine that "public convenience and necessity require the authorization of the service proposed." This necessarily will include consideration of the existing service.

b) Second, the Commission must consider the ability and dependability of the applicant to meet any perceived additional public need.

c) Third, the Commission must consider the impact that the proposed service would have upon existing transportation services.

15. At the same time, however, the Commission must give effect to the provisions contained in Paragraph (2)(b). In the construction of a statutory provision, it will be presumed that the

legislature, in adopting it, intended to make some change in existing law. State ex rel. Dick Irvin, Inc. v. Anderson, 525 P.2d 564, 164 Mont. 513 (1974).

16. It is evident from a reading of Paragraph (2)(b) that the legislature had deemed it proper for the Commission to consider, inter alia, the concept of competition in determining public convenience and necessity relative to Class D certificates. The use of the word "may" indicates that such consideration is discretionary on the Commission's part. Enactment of Paragraph (2)(b) was clearly in response to prior case law which had held that consideration of competition was not appropriate in determining public convenience and necessity.

> There is no Montana case law defining "public convenience and necessity," in reference to the use of competition as a basis for a grant of authority. This Court adopts the reasoning of the federal cases and finds that there is no legal basis for the competition to be the basis for establishing proof of "public convenience and necessity." (Opinion of Judge Peter Meloy, p. 2, issued November 19, 1981 in Mintyala v. Public Service Commission, Cause No. 44849, First Judicial District Court.)

17. Having established that the Commission is now free to consider competition in ruling upon applications for Class D certificates, the question remains as to what the scope and nature of such consideration should be. In enacting Paragraph (2)(b), the legislature has expressed its opinion that the advent of competition brought about by the grant of a new Class D certificate

may be beneficial in some instances. Paragraph (2)(b) should not be read as a legislative statement that such competition would be beneficial in all instances. Had this been the feeling of the legislature, the appropriate action would have been to deregulate garbage hauling operations.

18. By maintaining a policy of limited entry into the garbage hauling business, the legislature has continued to recognize that competition in that area may be harmful in some instances. Garbage collection is a somewhat capital intensive operation. Lively competition might prevent one or both competitors from making the necessary capital investment or performing the necessary maintenance to assure the long-term viability of the operations.

19. On the other hand, by enacting Paragraph (2)(b), the legislature recognized that competition might be beneficial and needed in some instances. The Commission can conceive of instances where competition would exert a positive influence in the maintenance of good quality service and reasonable rates. It must be remembered that, although there is restricted entry into the garbage hauling business, the Commission does not have any control over the rates charged for the service.

20. Consequently, it is incumbent upon the commission in applications for Class D authority to determine on a case-by-case

basis whether the competition that would arise from granting an additional authority is needed and would be beneficial to the public interest. Such a determination can only appropriately be made after a careful examination and analysis of the specific circumstances and factors present in the given situation.

21. The Commission's inquiry must go beyond a consideration of the concept of competition in the abstract. Even before the enactment of Paragraph (2)(b), the Commission was regularly inundated with testimony from public witnesses and other lay persons lauding the righteousness of competition and free enterprise. Invariably, a consumer will look forward to the emergence of an additional supplier who will compete with others to provide the consumer with services. The consumer will support the advent of that competition even if he is totally satisfied with the service he receives from the existing supplier. Such an attitude is entirely rational from the limited perspective of the consumer. However, such abstract support for the concept of competition is not alone sufficient to evidence the potential need for competition contemplated in Paragraph (2)(b). Rather, an applicant contending that there is a need for competition which supports his application must establish a record evidencing that need based upon specific circumstances and factors relating to the situation at hand. This would most likely include observations concerning the nature of the existing carrier's service.

22. In this particular case, all parties appear to agree that the services provided by Protestant Inman are satisfactory. There is also general agreement that Inman will not be able to continue providing service if this application is granted.

23. Applicant takes the unique position that the mere fact of successfully bidding for the City contract establishes the requisite need for the grant of a certificate. This argument is based on the rationale that the City has a "need" to satisfy its competitive bidding obligation for contracts over $10,000, pursuant to Section 7-5-4302, MCA.

24. As noted above, the Legislature has not deregulated garbage haulers. Although the Commission may consider the benefits of competition in particular cases, the basic showing of need for additional services is still required. Moreover, this "need" relates to transportation service, not incidental needs to fulfill other perceived obligations.

25. Carried to its logical conclusion, the Applicant's (as well as the City's) position would have one believe that the Commission may not make an independent determination, and that <69-12-323, MCA, is inoperable, where municipalities have called for competitive bids from garbage haulers. The Commission is compelled to reject this position.

26. It is a well accepted principle of statutory construction that full effect is to be given to each word, and that statutes

will be reconciled where it is possible to do so. Montana Power Co. v. Public Service Commission, ____Mont.____, ____P.2d____, 41 St. Rptr. 2332 (1984). In this case, it is reasonable to give effect to both statutory provisions (municipal contracting and motor carrier regulation) by disqualifying bidders who do not have, or do not receive, required operating authority. Whether bidders would have to be "pre-qualified," or qualify within a specified amount of time, is a decision for the contracting municipality.

27. In addition to its claim that need is established simply by the municipal bidding provisions, Applicant contends that Protestant Inman cannot fulfill existing needs, due to his failure to secure a contract with the City. The Commission rejects this proposition. The inability to serve must be inherent in the existing carrier's operations, and not be caused by the shipper's actions. Any other conclusion would allow shippers to simply reject reasonable service offered in good faith by existing carriers, without regard to the level and quality of existing services.

28. Aside from traditional criteria, then, the remaining consideration is whether the application should be granted for reasons of competition. To be sure, the City's bidding process is designed to sharpen competition between providers of garbage services. The question remains, however, as to the role, if any,

this competitive bidding process should play in the Commission's consideration of competition in Class D applications.

29. As noted above, the Commission does not believe that <69-12-323(2)(b), MCA, was designed to promote competition in the abstract. That, however, does appear to be the purpose of <7-5-4302, MCA. We conclude, therefore, that the competitive bid process of <7-5-4302, MCA, should not give rise to an automatic presumption regarding competitive benefits for purposes of <69-12-323(2)(b), MCA. This interpretation is buttressed by the fact that the two provisions can be consistently construed and applied, and that the Legislature could easily have made such an explicit presumption, or deregulated successful municipal garbage service bidders altogether. In fact, such deregulation was proposed to, and rejected by, the 1983 Legislature. Section 69-12-323, MCA, now provides such partial deregulation only for Federal and State contracts.

30. The Commission is finally left with the question, then, whether the record in this particular case supports a finding that competition would, in fact, be beneficial to the public. The likelihood of such possible benefits could be found in view of such factors as unreasonably high rates (i.e., rates that are not based on cost of service or are excessive in comparison to similarly situated carriers), or inadequate service.

31. In this case, there is no question as to the quality of existing service. Likewise, there is nothing in the record to indicate that Protestant Inman's rates are unreasonable. While it is true that Inman's bid was somewhat higher than Applicant's, the difference between the two is relatively small. With approximately 1700 customers and a $120,000 contract, the monthly cost would be roughly $5.88. An additional $5,000 would result in a 25 cent, or 4 percent, increase. In view of the testimony presented, the Commission cannot conclude that this rate differential justifies admittedly destructive competition. In fact, we cannot even say whether Inman's new bid represents a decrease or increase in existing rates, with which everyone seemed satisfied.

32. Balanced against the small rate differential discussed above is the effect granting the application would have on the existing carrier. It is undisputed that the service area cannot economically support two carriers. The Commission concludes that Inman would shortly be out of business. This leaves some concern regarding service to non-City residents currently provided by Inman. Applicant has not requested authority to serve those customers. The Commission finds that, on balance, this loss of service is not justified by the slight rate advantage offered by Applicant.

33. As a final matter, the Commission is compelled to address Applicant's assertion that competitive bidding is the City's only

protection against excessive rates. This claim is not entirely correct. The Commission is empowered to, and will, consider rate matters in connection with Class D applications. As noted above, this examination will be conducted on a case-by-case basis. While competition may not be as aggressive as it would be under a strict competitive bidding process, it nevertheless will remain a factor to be considered, and some protection will be afforded. While the Commission may not necessarily agree that this is the wisest approach regarding municipal garbage contracts, it conforms with legislative direction.

CONCLUSIONS OF LAW

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

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

3. Section 69-12-323(2), MCA, requires that "public convenience and necessity" be shown prior to the granting of additional operating authority in an area.

4. Section 69-12-323(2)(b), MCA, authorizes the Commission to consider competition in determining public convenience and necessity.

5. Following hearing on the application and based upon the evidence in the record and further giving consideration to any need for competition, the Commission concludes that public convenience and necessity do not require the granting of the application herein.

ORDER

NOW THEREFORE IT IS ORDERED that the application of Donald R. Sullivan for a Certificate of Public Convenience and Necessity authorizing the transportation of ashes, trash, waste, refuse, rubbish, garbage, organic and inorganic matter, Class D, between all points and places in the City of Chinook, Montana is DENIED.

DONE IN OPEN SESSION this 1st day of July, 1985 by a vote of 4 -0 .

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION.

_____
DANNY OBERG, Commissioner and
Hearing Examiner

_____
CLYDE JARVIS, Chairman

_____
HOWARD L. ELLIS, Commissioner

_____
TOM MONAHAN, Commissioner

ATTEST:

Trenna Scoffield
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.