Service Date: November 3, 1993

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

* * * * *

IN THE MATTER Of the Application of SANITATION, INC., Lewistown, Montana for a Montana Intrastate Certificate of Public Convenience and Necessity.	)))))	TRANSPORTATION DIVISION DOCKET NO. T-93.54.PCN ORDER NO. 6251

PROPOSED ORDER

APPEARANCES

FOR THE APPLICANT:

William A. Spoja, Attorney at Law, Box 882, Third and Broadway, Lewistown, Montana 59457, appearing pro se

FOR THE PROTESTANT:

G. Steven Brown, 1313 Eleventh Avenue, Helena, Montana 59601, appearing on behalf of Marvin D. Mintyala, dba City Garbage and Mr. "M" Disposal, Lewistown, Montana

FOR THE COMMISSION:

Denise Peterson, Staff Attorney and Wayne Budt, Transportation Division Administrator, P.O. Box 202601, 1701 Prospect Avenue, Helena, Montana 59620-2601

BEFORE:

BOB ANDERSON, Chairman & Hearing Examiner

The Hearing Examiner, having taken evidence and being fully advised in the premises, issues the following Proposed Findings of Fact, Conclusions of Law, and Order pursuant to Section 2-4-621, MCA.

BACKGROUND

1. On April 21, 1993 the Montana Public Service Commission (Commission) received an application from Sanitation, Inc. (Applicant) for a Class D certificate of public convenience and necessity to transport garbage and recyclable goods in Wheatland County.

2. Marvin E. Mintyala, dba Mr. "M" Disposal (Protestant, Mintyala or Mr. "M"), Lewistown, Montana, filed a protest and petition to intervene on May 26, 1993. Mr. "M" operates under PSC No. 3819 authority to transport garbage and recyclable goods between all points and places in Wheatland County, plus other authority.

3. The Commission duly noticed a public hearing on the application to be conducted on July 8, 1993 at the Harlowton Kiwanis Club, Harlowton, Montana. On June 11, 1993 Mr. "M"'s Disposal filed a Motion for Continuance because its counsel would be unavailable from June 28 through July 18, 1993. Applicant filed an Agreement to Continuance on June 28, 1993, which was

granted on June 30, 1993.

4. On July 9, 1993 the Commission served notice of the public hearing date for August 5, 1993. The Commission received copies of Mr. "M"'s Interrogatories and Requests for Production directed to Sanitation, Inc. on July 21, 1993, along with a Motion to Shorten Period for Answering Discovery Requests due to the hearing date. The Commission granted this motion on July 26 and served notice on July 28, 1993. On August 3, 1993 Mr. "M" filed a Motion to Compel Production of Documents, in particular copies of a buy-sell agreement and a termination of sale and/or lease agreement between Jimmie Wineteer, former manager, and Sanitation, Inc. These documents were submitted as confidential during the hearing.

5. The Commission held a public hearing in Harlowton, Montana on August 5, 1993 beginning at 10:45 a.m. at the Harlowton Kiwanis Club. At the conclusion, parties agreed to a proposed order followed by the opportunity for exceptions and briefing. On August 10, 1993 Mr. "M"'s attorney requested the opportunity to file a brief, after ordering a transcript, and therefore asked permission for parties to file simultaneous briefs. The hearing examiner allowed this request and counsel submitted briefs.

SUMMARY OF TESTIMONY

Applicant's Witnesses

6. Rick Billadeau, mayor of Harlowton and a local property owner, appeared and testified in support of the application. Harlowton is closing its landfill, and he felt that he owed it to Harlowton "to find every possibility ... for the disposal of their garbage." Therefore, the city council prepared a petition and obtained 200 plus names requesting Sanitation, Inc. to get licensed for Wheatland County. He recognized that there was already a licensed carrier, but he wanted competition and an alternative for the community. Otherwise, because the Commission does not regulate rates, the existing garbage hauler would be a monopoly, he stated. The mayor and the council members personally distributed the petition and knew all the names as residents of Harlowton or Wheatland County. He testified that Sanitation, Inc. had nothing to do with the petition.

7. On cross-examination, Mr. Billadeau admitted that the petition was not a criticism of the carrier in Wheatland County, Mr. "M." In fact, the petition did not mention Mr. "M." Mr. Billadeau had no criticism of Mr. "M" and had heard no criticisms, he testified. He admitted that the City of Harlowton was not picking up the garbage of the rural areas of Wheatland County. Harlowton is leaving the garbage/landfill business

because of the new federal landfill requirements and the fact that its landfill is almost full. He admitted that those still in the landfill business would have to charge a lot more. Harlowton paid to have published Mr. "M"'s rates in the local newspaper. The city had charged $6.98 per month for each of about 420 residential accounts and between $12.00 and $26.00 per month for each of the 80 commercial accounts. If Harlowton had accepted Big Timber's proposal, it would have cost $11 per month residential for the landfill plus $4 to $5 per month for transporting the garbage to Big Timber, and a commensurate increase for commercial rates.

8. Under further cross-examination, Mr. Billadeau testified that in April, Jimmie Wineteer, former manager of Sanitation, Inc. brought a truck to Harlowton to pick up recyclables at no charge. On redirect, Mr. Billadeau stated that Mr. Wineteer was disposing the recyclable materials for the city. To Commissioner Anderson, Mr. Billadeau stated that competition was the primary reason Harlowton sought out Sanitation, Inc.

9. Harlowton council president Frank Scally appeared and testified in support of the application. He testified that the city council put out the petition because it wanted a competitive carrier, i.e., "the best people came to pick up our garbage, the best, cheapest way ..." since the dump would be closed. He had

no criticism of Mr. "M"'s service.

10. A number of Harlowton residents appeared and testified in favor of the application, primarily on the ground that competition is desirable to keep prices down. None of these residents had a criticism of the service provided by Mr. "M." One testified that he would be satisfied to have Mr. "M" pick up his garbage. Another stated that if a sole carrier upset people, they might "dump" their garbage anywhere, "making a mess out of our whole community." One witness was concerned about the advertisement the town published on the rates Mr. "M" would charge, but admitted that any garbage hauler would have to raise rates with the new landfill rules. Another witness, in the auto repair and machine shop business, testified that he would like to see recyclable pick up. This witness had personally looked into the cost to develop a landfill site and found it prohibitive.

11. Steve Olson, co-owner of Petek's AG Supermarket, Harlowton, appeared and testified in favor of the application, also on the ground of competition. He was concerned that his commercial rate could go from $26 per month to $170 per month, based on his volume of waste. He feels it is a necessity to have an option to keep costs down, he testified. Under cross-examination he admitted that he did not know what Sanitation, Inc. might charge to provide service, nor had he discussed rates with Mr.

"M."

12. In support of the application, Tom Horan, economic development director for Wheatland County and in the manufacturing business, testified in favor of competition. He had no complaints against Mr. "M." In fact, rural customers have told him that they are very happy with his service. He believed, however, that people should have a choice. Under cross-examination, he testified that he hauls his business waste to the dump. When the landfill is closed, he may haul his waste to landfills in Big Timber or Lewistown if it is more economical to do so. To examination by Commissioner Anderson, Mr. Horan admitted that he was unfamiliar with the concept of regulation of entry (as in motor carrier regulation) and was comparing competition to regulation of monopoly prices.

13. Melody White, a resident of Two Dot in Wheatland County, appeared and testified in support of the application with respect to the county at large. She was a member of the county committee which examined closure of the landfill. The committee had discussed the issue of competition and what would happen to the county if Mr. "M"'s landfill closed. She testified that she called the Commission office to find out how a carrier enters an area and what it would take to get another carrier. She had nothing against Mr. "M" which carries her garbage and was very

pleased with Mr. "M"'s service. As with other witnesses, she wanted to see the county have the opportunity to have two carriers.

14. Sharon Ferrar, office manager for Sanitation, Inc. in Lewistown, appeared and testified on the company's business practices. Since January 1, 1993 to the date of hearing, Sanitation, Inc. has acquired 227 new accounts with little advertising. With Lewistown and outlying customers, the company has about 800 residential, 200 commercial and perhaps 300 other landfill or on-call customers. Sanitation, Inc. bills monthly with billing options for quarterly, semi-annually or annually. Customers can discontinue service on a day's notice, but have done so normally only because they are moving. In October, 1992 Sanitation, Inc. acquired garbage hauling authority for Judith Basin and Petroleum Counties, which accounted for the increased accounts in 1993. These customers pay the same rates as do Lewistown customers.

15. Ms. Ferrar testified that Sanitation, Inc. now has two garbage trucks. Previously it also had a 1975 Chevy and later a van, both used for cardboard recycling. The former office manager, Jimmie Wineteer, also personally used a 1993 Chevy diesel King Cab to pick up garbage. She testified that before Mr. Wineteer's resignation, he did what he wanted without consulting anyone.

16. Allen C. Gallagher, Jr., manager of Sanitation, Inc., appeared and testified. He assumed his role upon resignation of Mr. Wineteer on or about June 9, 1993. His job has been "to rid the disarray that the landfill was in," to bring the shop area, equipment and landfill up to standard. The state had inspected the landfill before his employment with Sanitation, Inc. and ordered compliance. Because of equipment failure, Sanitation, Inc. hired a dozer and operator. He came to Helena and talked to representatives of the Solid Waste Bureau, Department of Health and Environmental Sciences. Mr. Gallagher indicated he thought the Bureau was pleased with their efforts. He testified that he also visited the Waste Management landfill in Great Falls and would like to model Sanitation, Inc.'s landfill after that one. Two weeks after this trip to Helena, Mr. Pat Crowley of the Bureau inspected and took pictures of Sanitation's landfill. Mr. Gallagher observed that Mr. Crowley seemed to be impressed by the improvement. Mr. Gallagher expected the landfill to be in compliance by October, 1993 and to be a "top notch landfill."

17. On equipment, Mr. Gallagher testified that Sanitation, Inc. has two garbage trucks in running condition, an '81 Ford and a '75 Ford. Sanitation, Inc. hopes to bring two spare trucks into service which have not been in use. It has a large Clark forklift, Uniloader, "Bobcat-type" machine, dump truck, D-7 dozer

and TD-24 International dozer. The D-7 is out of commission, too. Mr. Gallagher testified that the company also has a recycle-conveyor system to separate and a scale to weigh recycling materials, and a bailer to compact aluminum and cardboard. If the application is granted for Wheatland County, Mr. Gallagher would consider adding additional equipment, but did not think more equipment was necessary to provide the proposed service to Wheatland County. Mr. Gallagher testified that since he became manager the company has obtained necessary funds from Mr. Spoja, the major stockholder, for emergencies and repairs.

18. On cross-examination, Mr. Gallagher testified that upon starting work June 9, "it was instantaneous" in beginning cleanup of the landfill and covering everything that was uncovered. At first, he said it took about a week to come into compliance, but then recalled that it took about a week from the time Sanitation, Inc. leased the dozer after its dozer broke down. He guessed that by the end of June the garbage was covered. The landfill had been a disaster -- three to four acres uncovered and collecting for some time -- because the former manager did not take care of business.

19. Mr. Gallagher testified that the cover requirements are for six inches of soil over compacted garbage covered at the end of each day. The landfill requirements include a liner in the

pit with water monitoring wells, methane gas monitoring, and an access test hole at the bottom of the pit. An engineering consultant is helping with the requirements. Mr. Gallagher admitted that Sanitation, Inc. did not comply with the cover requirements during the period of rain. It mixed the garbage in with the mud as well as it could and continued to pile garbage.

20. Mr. Gallagher's work experience includes 14 years managing equipment and personnel in the oil field and several years in the construction business. His goal is to bring Sanitation, Inc. into compliance with the law.

21. Applicant called Sandra Mintyala to testify in his case-in-chief. She admitted that at some time before 1980, as the only garbage hauler in Lewistown, she billed every person named in the phone book in Lewistown. She also testified that was an unwise, one-time only, billing decision.

22. Mr. William A. Spoja, Jr., testified in narrative in support of the application as the chief stockholder and president of Sanitation, Inc. Mr. Wineteer, former manager, filed this application with his full knowledge and consent. Mr. Spoja had been unaware of problems with his management, and admitted that his "somnolence" contributed to the problem. Since then, he has put $20,000 into the company. After initiating an audit, Mr. Spoja has learned of a shortfall in the company of about $50,000,

which is now the subject of a civil lawsuit.

23. Mr. Spoja testified that he hoped that the company would in the future be in compliance with state agencies' requirements. He believed that the Department of Health was satisfied to this point and required nothing further. He testified that Sanitation, Inc. was making a delinquent application for its landfill, because the prior management did not bother to get it done. He discussed efforts to recycle as part of his business, although his research indicates it would be risky and marginal. Mr. Spoja confirmed that the company has the equipment testified to by Mr. Gallagher and that he personally would assure the availability of a third vehicle to Harlowton, if needed. Mr. Wineteer left the company's records in poor condition so Mr. Spoja had no documents to submit on the financial condition. However, he confirmed the accuracy of Mr. Wineteer's submission of assets and liabilities to the Commission.

24. Under cross-examination, Mr. Spoja stated that he was born in 1930 and raised in Fergus County. He served as its County Attorney from 1969 for about 13 years and as an appointed member of the State Board of Health from 1970 to the mid-'80's. While on the Board, he participated in adopting landfill rules, including those for daily cover. After 1991 he deeded the landfill to Sanitation, Inc., of which he owns 97 percent of the

stock and has been president since 1987. He inherited the landfill from his father. Previously, he leased the landfill site to other operators. The lease agreement between Spoja and Sanitation, Inc. requires the lessee to comply with all laws. He testified that he terminated his agreement with Mr. Wineteer, former manager and vice president, because of his operation of the landfill and alleged embezzlement.

25. Mr. Spoja further testified that the landfill operation is a critical part of the garbage hauling business. On the original landfill application of Sanitation, Inc. filed May 3, 1987, Mr. Spoja agreed to construct and operate the landfill in accordance with requirements of state law. He stated in the application that as owner he was in the area of the landfill almost daily and retained overall control and supervision of the landfill. But with Mr. Wineteer, Mr. Spoja stated that it was a constant battle to keep control.

26. Mr. Spoja testified that Mr. Wineteer had worked as a driver for six months before assuming management in October, 1991. Mr. Spoja became aware that the frequent emergencies and financial problems were the fault of Mr. Wineteer, he testified. He wrote letters to Mr. Wineteer addressing the issue of appropriate handling of the landfill, including covering on a daily basis and following the rules. He found it impossible to meet

with the manager. He did not receive the $350 per month lease payments. In 1993 discussions turned to financial matters, resulting in termination of the purchase agreement option for transfer of stock.

27. Mr. Spoja admitted that Mr. Wineteer had not been covering the garbage, as indicated by the inspection report of February, 1992, five months after he was on the job. When Mr. Wineteer did not compact the garbage or cover the trenches for weeks, Mr. Spoja testified that they had loud, perpetual discussions. As a former member of the Board of Health, Mr. Spoja was very embarrassed. He did not terminate the agreement, however, because it was the middle of winter and could create problems. He had hoped Mr. Wineteer would improve.

28. Mr. Spoja admitted that there were probably dead animal carcasses on site, as noted in the February inspection report, and admitted that these violations posed a public health threat. Water was running through garbage and the Department of Health directed that berms be constructed. He repeated that after each inspection he tried to get Mr. Wineteer to correct the problems, but it became obvious it would not get done. The June 16, 1993 Health Department inspection found violations so severe that the Health Department threatened not to renew the landfill license, Mr. Spoja conceded. He also admitted that he had similar prob-

lems with a previous operator/lessee which resulted in a court injunction preventing the operator from operating the landfill. He believed that by July, 1993 the landfill was in substantial compliance, although there were difficulties with the extreme wet conditions.

29. Further, Mr. Spoja testified that it was less expensive to comply with landfill requirements than to operate by just dumping garbage in the ground. He believed that there was no competitive advantage to leaving garbage uncovered, because it is costly to go back and clean up the mess. Mr. Spoja testified that the income statement on the annual report shows $194,842 in revenues, which is primarily from transportation, i.e., garbage hauling. Profit was about $13,000. He himself bore the costs to hire the dozer and begin compliance with landfill requirements, he testified. He believed that he would be in compliance with the Department of Health, when compliance is due. He admitted that Sanitation, Inc. had considered not continuing the landfill. The engineer determined it would cost $40,000 to comply, and the company decided to proceed. Mr. Spoja indicated that the company could comply with the regulations without raising rates, now that "several thousand dollars" was not disappearing every month. Yet he admitted that since 1987 Sanitation, Inc. first showed a profit of $13,000 under Mr. Wineteer, and in fact lost $8,000 in

1990, $14,000 in 1989, $10,500 in 1988, and $11,000 in the seven months it operated in 1987.

Protestant's Witnesses

30. Lara Dando, environmental specialist for the Solid and Hazardous Waste Bureau, Department of Health, Helena, Montana, appeared and testified under subpoena as Protestant's witness. She does compliance work for the Solid Waste program, inspecting landfills and doing licensing work. She sponsored official records of the Department, including inspection records. She personally conducted several inspections. She testified that Sanitation, Inc.'s landfill was a problematic site with failure to cover garbage with six inches of cover each day and blowing litter. By comparison, violations noted for Mr. "M"'s landfill were minor. She testified on the extensive (and expensive) requirements for future compliance of landfills, including groundwater monitoring, methane monitoring, lining requirements, leachate collection system, hazardous waste screening, PCB screening, a closure plan and post-closure care plan, plus financial assurance that the landfill owner will be able to meet future liabilities upon closure. To date, Sanitation, Inc. had not submitted a groundwater monitoring plan, while Mr. "M" had done so.

31. Under cross-examination, Ms. Dando testified that Mr.

"M"'s license was denied in 1985 and on appeal in 1987, Sanitation, Inc. did not have a record of denial of a license, although there were problems with its lessee, Severson. On redirect, she testified that since 1989 Mr. "M"'s landfill problems have been minor, while Sanitation, Inc.'s have been major, including unburied animal carcasses, water running through garbage and acres of uncovered garbage.

32. L.W. McMurtry, mayor of Ryegate, Montana, appeared and testified on behalf of Mr. "M"'s Disposal. Ryegate could not afford its landfill, so closed it in May, 1992. Mr. "M"'s customers in Ryegate had no complaint on Mr. "M"'s service. Dave Miller, residing five miles east of Harlowton in Wheatland County, also attested to Mr. "M"'s service.

33. Tom Powell, a retired police officer for Lewistown, appeared and testified on Protestant Mr. "M"'s behalf. He helped Mr. "M" set up garbage routes after retirement. He testified that sometime after June 16, 1993 he hauled some trash to Sanitation, Inc.'s landfill. Since he had experience helping Mr. "M" cover its garbage, he recognized that there was garbage in the trenches not correctly covered. He took six or eight loads over ten days and never saw the garbage covered. A tractor was running only once, and that was when they were working on it, not covering garbage. On cross-examination, he admitted he was not

sure of the dates, but that it was the end of June or first of July. He recalled a lot of rain and mud.

34. Barbara Jean Lynn, Shawmut, Wheatland County, appeared and testified on behalf of Protestant. She has been a customer of Mr. "M" since 1974 and has been very happy with the service. Likewise, Dr. John P. Humphrey, Lewistown, has been Mr. "M"'s customer since about 1979 and has had satisfactory service.

35. Robert W. Gillespie, a resident of both Lewistown and Sanford, Maine, appeared and testified as Protestant's witness. He is a geotechnical engineer contracted with Mr. "M" to do site characterization for licensing. He has a B.S. in civil engineering from Northeastern University and an M.S. in geotechnical engineering from Massachusetts Institute of Technology. He and his wife own or control two engineering companies. He has represented the City of Great Falls and has done work for Bozeman and Missoula in landfill issues. To stay in operation, landfills will have to spend a lot of money, which will mean greatly increased disposal rates, he testified. Mr. "M" will pay $25,000 just for the landfill plan to deliver to the state. He testified at length as to the excellent site characteristics of Mr. "M"'s landfill, as well as the extensive testing and efforts to do the site characterization for the past year. Although he did not go on Sanitation, Inc.'s property, he observed that it appears to be

in the Falls River sandstone which is considerably more pervious than the shales on which Mr. "M"'s landfill is situated. Mixing the coarse material properly with bentonite, as proposed, would be expensive, he testified. Closing a landfill before the Subtitle D regulations become effective does not relieve the owner of liability.

36. Marvin E. Mintyala, owner of Mr. "M" disposal and City Garbage and Lewistown Landfill, Lewistown, Montana (Protestant or Mr. "M"), appeared and testified in opposition to the application. Since 1974 he has been in the landfill and garbage business in Lewistown and has expanded his authority to other counties. He presently has PSC authority for and runs garbage routes in Wheatland County. He has no customers in the town of Harlowton which has been served by the city's garbage service. He has plans to serve Harlowton. His equipment includes four garbage trucks, two D-9's and a scraper, plus a 1150 track loader. He has enough equipment to handle an increase in garbage service, he testified. Running a landfill, excluding engineering fees, will cost between $80,000 and $100,000 per year to comply with state law. Even then one will have a couple of papers sticking up and a noncompliance order, he stated. He testified that it costs money to run heavy equipment over a large space to lay out the garbage, compact it, and put dirt on it every day. Contrary to

Mr. Spoja's testimony, there would be substantial savings in only doing this every three or four months. The savings to Sanitation, Inc. from not covering its garbage would exceed $45,000 per year, according to Protestant's testimony.

37. Mr. Mintyala testified that he observed Mr. Wineteer using his personal pickups to transport garbage and recyclables. He has also observed Sanitation, Inc.'s non-compliance with the daily cover requirement between June 16th and August 2, 1993. He can see Sanitation, Inc.'s landfill from his own landfill. He personally took a video from a location closer to Sanitation, Inc. The video, as Mr. Mintyala testified as it was being shown, demonstrates the condition of uncovered garbage on July 18th, July 21st, August 2nd and August 3, 1993. Mr. Mintyala testified that the video was taken at times of day after the crews had gone home or on Sunday when the landfill is closed. All these times, Mr. Mintyala testified, the garbage was supposed to be covered with six inches of dirt and was not covered.

38. Under cross-examination, Mr. Mintyala responded that he was receiving no revenue from the town of Harlowton. Questioned on events in Lewistown around 1979-1981 during which Mr. "M" had a monopoly for eight months, Mr. Mintyala admitted that there had been some difficult times. The carrier selling one of the authorities had given an inadequate customer list and Mr. "M"

unwisely resorted to billing from the telephone book, but only once, and he conceded that problems resulted. He admitted he had made a mistake and hoped he had learned from it.

39. Mr. Mintyala responded to further cross-examination that the video was taken from one mile away. What he saw was compacted garbage and truckloads of garbage south of the compacted garbage, he testified. The garbage from the day before was still showing. To Commission questioning, Mr. Mintyala testified that a grant of the application would cost him customers and adversely affect his operations.

Applicant's Rebuttal Testimony

40. Mr. Gallagher was recalled to testify on the video. He stated that Sanitation, Inc. was trying to create a working face at a bevel, which could be seen from a top view or from the north. He got the idea from Waste Management, Inc. Admitting that it did not look good in the video, he said that a closer view would show a workable landfill with a face. On recross-examination, he admitted that the Health Department requires coverage with six inches of dirt and that an exposed working face violated the Department's rules. In Great Falls, Waste Management, Inc. has a variance from the Department to cover the face with an artificial tarp to pull over it (an experiment). Sanita-

tion, Inc. hopes to be able to do the same thing, he testified, but does not have a variance.

ANALYSIS AND FURTHER FINDINGS

41. Pursuant to Title 69, Chapter 12, Montana Code Annotated (MCA) the Commission supervises and regulates intrastate motor carrier service. § 69-12-201, MCA. The maintenance of an adequate common carrier motor transportation system has been declared a public purpose. § 69-12-202, MCA. To obtain motor carrier operating authority requires an application to the Commission and a hearing whenever a protest is filed or a request for a hearing is received. § 69-12-321, MCA.

42. Section 69-12-323, MCA, governs the requirements for a Commission decision on whether an application for a certificate should be granted. The Commission will issue a certificate of public convenience and necessity upon finding that the proposed service is required. In reaching a decision, the Commission will consider existing transportation service; the likelihood of the proposed service being permanent and continuous 12 months of the year; and the effect of the proposed service on other essential transportation service in the affected communities.

43. The Commission has interpreted § 69-12-323, MCA, as requiring it to address these issues before granting an applica-

tion for authority:

a. Is the applicant fit and able to perform the proposed service?

b. Does the public convenience and necessity require the authorization of the proposed service?

c. Can and will existing carriers meet the public need for the proposed service?

d. Would the proposed service have an adverse impact on existing transportation service?

44. The Commission makes a threshold determination of whether the applicant is fit, willing, and able to provide the service, considering these factors: (1) the financial condition of the applicant; (2) the intention of the applicant to perform the service sought; (3) the experience of the applicant in conducting the service sought; (4) the adequacy of the equipment the applicant has to perform the service; and (5) the nature of previous operations, if there are allegations of illegal operations.

Fitness

45. The Commission cannot ignore the evidence and the testimony of Sanitation, Inc.'s own witnesses that the company has had some major financial difficulties for years, before and

after the management by Mr. Wineteer. The company is presently struggling to comply with landfill requirements. Its owner has invested $20,000 recently and intends to invest more. However, Protestant's unrefuted testimony states that landfill compliance will cost between $80,000 and $100,000 per year. Acquiring the requested authority might also raise the need for Applicant to acquire a third truck. Mr. "M" already has four operating trucks, plus additional equipment. Applicant may intend to perform the service expanded to Wheatland County. However, the Commission finds that the company has problems to attend to with its existing business based on its existing authority before expanding. (The allegations of illegal operations by Mr. Wineteer are considered isolated and not attributed to the Applicant.)

Public Need and Convenience

46. If there were no existing operating authority in Wheatland County, the Commission might presume that Applicant could overcome the fitness concerns to meet the public need and convenience. However, with two competing garbage haulers, it is questionable whether only a partial share of the business in Wheatland County would improve Applicant's financial fitness, given the necessary additional investment. In determining public convenience and necessity, the Commission has traditionally followed the analysis of Pan-American Bus Lines Operation, 1 M.C.C. 190 (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. 1 M.C.C. at 203.

47. The Commission finds that the proposed operation does not fulfill a need that cannot be met as well or better by the carrier with existing authority for Wheatland County, Mr. "M." There is no doubt that the public in Wheatland County needs garbage service, which serves a useful public purpose. However, Protestant Mr. "M" is fit, willing and able to meet the public

need and already has the necessary operating authority, equipment and a landfill in substantial compliance. Mr. "M" has provided excellent service in Wheatland County, according to the testimony even of Applicant's witnesses. Further, the Commission finds that a grant of this application would harm Mr. "M"'s operation, which already has the authority and relies on Wheatland County's business. Drawing from Mr. "M"'s customer base could leave both carriers with marginal operations and adversely affect Protestant's service.

48. The opportunity to provide service to Harlowton arises because of the City's decision to close its landfill and cease garbage hauling operations. The City circulated a petition to both City and County residents requesting Applicant to get licensed for Wheatland County. The Mayor and the City council knew that there was already a licensed carrier, but wanted alternative competition. The Mayor and others testified to the fear that without competition Mr. "M" would have a monopoly in Wheatland County. The City's council, of course, can only speak for itself and not the County. The City had a "monopoly" in Harlowton, but could not continue at the artificially low rates, now that landfill compliance and out-of-county transportation would be so costly.

49. If two carriers replaced the City's garbage service,

they could not lower rates below the costs of providing service just for the sake of competition, without one or both ceasing to provide service. Pursuant to § 69-12-323(2)(b), MCA, the Commission may consider competition in determining public need and convenience, but it is not mandatory that it do so. Here there was no demonstration that competition in Wheatland County would be in the public interest. The public's desire for lower rates, by itself, is not a sufficient ground for granting an application for new authority. If there were a showing that competition would result in better service at reasonable rates, the Commission could consider competition as a factor of public convenience and necessity. But the public testimony was speculative as to the benefits of competition, while establishing that the Protestant has satisfactorily met the public need for service. None of the public complained about Protestant's existing tariffed rates. Protestant has further shown that Mr. "M" now has the better capability of meeting the additional need created by the City's ceasing garbage service and already has the authority to provide this service. Therefore, the Commission does not find competition a determinative factor and will deny the application.

50. The public expressed the fear that the Protestant would have a monopoly and take advantage of the public. According to

the testimony, Mr. "M" once billed the citizens of Lewistown from the telephone book perhaps 15 years ago. Mr. "M"'s witness testified that she had learned her lesson. There was no testimony of recent oppressive or discriminatory practices, only testimony of satisfaction with Mr. "M." Based on the record, Wheatland County does not need another authority at this time. If the public encounters unmet need, inadequate service or unreasonable rates, the Commission may reexamine the matter upon a future application and consider competition as a factor. At this time, however, the application should be denied.

CONCLUSIONS OF LAW

51. 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.

52. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter pursuant to the Montana Administrative Procedures Act (MAPA) requirements for contested case procedures. .. 2-4-601 et seq., MCA.

53. An applicant for a certificate of Class D operating authority to transport garbage must show that the public convenience and necessity require the proposed service. § 69-12-323,

MCA.

54. The Commission may consider competition as a factor in determining public convenience and necessity for purposes of Class D certificates. § 69-12-323, MCA.

55. Before the Commission may consider competition as a factor, there must be a showing that without competition there will be unmet need, unsatisfactory or inadequate service, and/or unreasonable or discriminatory rates. Rozel Corporation v. Department of Public Service Regulation, 226 Mont. 237, 735 P.2d 282 (1987). The public desire for competing carriers, by itself, does not establish competition as a factor of public convenience and necessity.

56. Applicant has failed to demonstrate a public demand or need for the proposed service which the existing hauler cannot meet. Further, granting this application would have an adverse effect on the existing carrier.

57. Since there is no public need for an additional authority at this time, the Commission will not address the issue of fitness of the Applicant.

ORDER

NOW THEREFORE IT IS ORDERED that the application of Sanitation, Inc. for Class D garbage hauling authority in Wheatland

County is DENIED.

IT IS FURTHER ORDERED, pursuant to Section 2-4-621, MCA, that this is a proposed order only. Any party has the opportunity to file exceptions to this initial decision, present briefs, and make oral arguments before the full Commission. Exceptions and supporting briefs must be filed with the Commission within twenty (20) days from the date of service of this proposed order.

Done and Dated this 3rd day of November, 1993.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

_____
BOB ANDERSON, Chairman
& Presiding Officer

ATTEST:

Kathlene M. Anderson
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, 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.