Service Date: April 22, 1994

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

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IN THE MATTER Of the Complaint of FALCON PRESS PUBLISHING COMPANY, INC.,	)	TRANSPORTATION DIVISION
Complainant,	)	
-vs-	)	DOCKET NO. T-93.89.COM
UNITED PARCEL SERVICE,	)	ORDER NO. 6290
Defendant.	)	

FINAL ORDER

1. On June 28, 1994 Falcon Press Publishing Company, Inc. (Falcon Press) filed a complaint with the Montana Public Service Commission against United Parcel Service (UPS). The complaint alleged that UPS Local and Joint Parcel Tariff UPSS 201-E, Term 560, which requires customer payment within 7 days of the receipt of a bill, was unrealistic and causing hardship for Falcon.

2. The complaint was noticed and UPS filed an answer. UPS raised no defense concerning the fairness or reasonableness of its terms of payment. A public hearing was subsequently held on October 14, 1994 to determine whether Term 560 is unfair, unjust,

unreasonable or unduly discriminatory.

Discussion

3. The only statute applicable to Falcon Press' complaint is Section 69-12-503, MCA, which requires that all rates, fares, charges, classifications, or rules of service for the transportation of property and/or persons upon the public highways of the State of Montana must be fair, just, reasonable, and nondiscriminatory. Therefore, the sole issue before the Commission is whether UPS's tariff provision requiring customer payment within 7 days of the receipt of bill is fair, just, reasonable, and nondiscriminatory.

4. The crux of Falcon Press' argument is that the 7-day payment provision is unreasonable and unjust because it imposes a hardship on Falcon Press. Mr. Bill Schneider, publisher of Falcon Press, testified that Falcon Press' accounts receivable average approximately 80 days. In order to preserve cash flow Falcon Press has found it necessary to obtain extended terms of payment from all its vendors. These terms range from 30 to 90 days, and have been procured from all vendors except UPS.

5. UPS argues that it is entitled to set the terms and conditions of payment and Falcon Press should resort to the

marketplace if it finds these terms unfavorable. This argument ignores the reality of motor carrier regulation and the marketplace. Intrastate rates and rules of service are fully regulated by the Montana Public Service Commission. See § 69-12-501, MCA, et seq. UPS is entitled to set terms and conditions of payment, but subject to the jurisdiction and authority of the Commission. In regard to the marketplace, as Mr. Schneider correctly pointed out, UPS is the dominant carrier in the small package delivery business in Montana and Falcon Press is without many alternatives. In fact, the only alternative for Falcon Press appears to be the United States Postal Service.

6. That said, Falcon Press still has not established that requiring payment for services rendered within 7 days is unjust or unreasonable. As a general principle business are entitled to payment at the time services are rendered and the extension of credit is discretionary. Aside from the statutory regulation of motor carrier rates and rules of service, no Montana statute affects a regulated entity's ability to set credit terms. Mr. Schneider himself admitted that Montana Power Company and US West Telecommunications, both regulated entities, could demand any payment terms but choose to extend 30-day credit. However, he provided no basis for finding that regulated motor carriers are

not similarly entitled to set their own credit terms.

7. On the question of whether the particular terms chosen by UPS should be found unjust or unreasonable, the evidence presented merely established that the 7-day requirement is a problem in regard to Falcon Press' particular cash flow situation. Falcon Press did demonstrate that it receives and provides better payment terms, but this alone does not make UPS terms are unjust and unreasonable. The UPS requirement must be viewed in the context of general business practice and the motor carrier industry. As noted above, businesses are generally entitled to expect payment at the time services are rendered. Assuming this expectation is reasonable, the Commission cannot conclude that UPS's extension of credit is unjust or unreasonable.

8. Similarly, there is no indication the 7-day payment term is unjust or unreasonable in the context of the motor carrier industry. The Interstate Commerce Commission (ICC) does not require interstate carriers to extend credit to shippers. See 49 C.F.R. 1320.2. In fact, carriers are only "authorized to extend credit." 49 C.F.R. 1320.2(a). Interstate carriers are therefore under no obligation to extend credit terms to shippers. Possibly more on point is the fact that the ICC actually *limits* the extension of credit by interstate carriers to 30 days. See

49 C.F.R. 1320.2(2)(ii)(d). Assuming the ICC's rules on the extension of credit are indicative of reasonable practices in the motor carrier industry, UPS 7-day requirement falls within the boundaries of reasonableness.

9. UPS is under no legal obligation to act as a banker for Falcon Press, nor is the Commission inclined to create such an obligation as a matter of convenience for Falcon Press. The Commission recognizes the need for regulatory oversight of the conditions of service imposed in a monopoly or oligopoly market. However, there is no indication UPS is abusing its market position in Montana when it requires payment within 7 days. It's primary competitor in Montana, the United Postal Service, requires advance payment. The 7-day requirement is uniformly applied by UPS to all its customers across the country and throughout Montana. Finally, no other UPS customer appeared at the hearing to challenge the 7-day payment provision. The Commission did receive several letters from businesses supporting Falcon Press' position. However, pursuant to the Montana Rules of Evidence, these letters are not properly considered as part of the record.

10. Therefore, based on the foregoing, the Commission finds UPS' 7-day payment provision just and reasonable.

Done and Dated this 11th day of April, 1994 by a vote of 2-1.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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BOB ROWE, Vice Chairman
(Voting to Dissent - Attached)

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DAVE FISHER, Commissioner

_____
NANCY MCCAFFREE, Commissioner

ATTEST:

Kathlene M. Anderson
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 ARM 38.2.4806.

DISSENT OF COMMISSIONER ROWE
DOCKET NO. T-93.89.COM, ORDER NO. 6290

The majority's decision denying Falcon Press's request for 30 day terms is legally sound. Overly harsh criticism of that decision would ignore the seriousness with which the Commission approached this matter, and would be unfair.

My dissenting vote is more a matter of equity than of law. The Commission's responsibility is to ensure good motor carrier services at fair prices, including reasonable terms. Falcon Press made a good case that 30 day terms for intrastate service were reasonable, and would be an appropriate accommodation to shippers.

In 1985 the Interstate Commerce Commission (ICC) authorized but did not require interstate carriers to extend credit for up to 30 days. 49 C.F.R. Section 1320.2(d). The ICC's action evinces the reasonableness of 30 day terms.[1]

Arguments raised by UPS in opposition to 30 day terms, while having some logic, tended to be poorly grounded in the facts of this complaint. For example, it was suggested that 30 day terms would give larger carriers such as UPS a competitive advantage

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[1] Electric, telephone and other utilities regulated by the Montana Public Service Commission set out billing practices in Commission-approved tariffs. While the "due dates" vary from utility to utility, the Commission has not approved residential late payment charges accruing before the next monthly bill, basically 30 days.

against smaller carriers less able to carry any costs associated with 30 day credit. However, no evidence showed either a reasonable competitive alternative in this instance or any specific anti-competitive effect of 30 day terms. More significantly, if UPS does someday face meaningful competition it will remain free to file new tariffs for Commission approval providing more generous credit terms. It is hard to imagine the Commission rejecting such a tariff.[2]

UPS also argued that because the Montana Commission regulates only intrastate transportation shippers would be confused by different credit terms on their inter- and intrastate UPS shipments. First, under the ICC rule, UPS is free to offer 30 day terms interstate. Second, Montana shippers would be free to pay their intrastate bills within seven days.

Finally, UPS argued that the per package cost in Montana is already higher than in most other states, although rates are the same. This was perhaps UPS's most compelling affirmative argument. First, however, UPS offered no evidence of the estimated additional costs which granting 30 day terms might add to its

[2] Although not a part of the record, UPS apparently does offer more favorable terms (the use of credit cards) for air freight, which is a competitive service.

Montana operations. Any such costs remain unquantified and speculative. Second, UPS regularly files proposed rates with the Commission demonstrating an appropriate ratio of expenses to revenue; those rates are reviewed and approved by the Commission. Third, UPS's intrastate operations are in significant part a means to obtain the more lucrative interstate business.

I recognize that UPS has made some real efforts to accommodate Falcon Press's needs. So too, Falcon sought relief from the Commission's complaint proceeding as a last resort. I hope efforts by both parties will continue.

RESPECTFULLY SUBMITTED this 15th day of April, 1994.

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BOB ROWE
Vice Chair