Service Date: May 7, 1992

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 LARRY D. KLINGER DBA BYFORD TRUCKING COMPANY, Roundup, MT for a Class B Montana Intrastate Certificate of Public Convenience and Necessity. | ) ) ) ) ) ) | TRANSPORTATION DIVISION<br><br>DOCKET NO. T-9763<br><br>ORDER NO. 6077b |

FINAL ORDER

APPEARANCES

FOR THE APPLICANT:

John R. Davidson, 2929 3rd Avenue North, Suite 307, Billings, Montana 59101

FOR THE PROTESTANTS:

John P. Atkins, Bryan & Atkins, 11 East Main, Suite D, Bozeman, Montana 59771-1371

Michael G. Majerus, #217, 404 N. 31st Street, Billings, Montana 59103-7965

FOR THE COMMISSION:

Timothy N. Sweeney, Staff Attorney, 1701 Prospect Avenue, Helena, Montana 59620

Bonnie Lorang, Transportation Division, 1701 Prospect Avenue, Helena, Montana 59620

BEFORE:

Danny Oberg, Commissioner and Hearing Examiner

BACKGROUND

1. On September 11, 1991 the Commission received an application from Larry D. Klinger, dba Byford Trucking Company (Applicant) for a Certificate of Public Convenience and Necessity, Class B, authorizing the transportation of petroleum, petroleum products, petroleum wastes, chemicals and water in single vacuum trucks not exceeding 44,000 pounds GVW between all points and places in the State of Montana, but limited for the purpose of pipeline and refinery maintenance only. The application requested both permanent and temporary authority.

2. The Commission received written protests from the following carriers: Green Oilfield Service, Inc, PSC No. 6497; Ethel Ost dba Harvey Ost Oilfield Services, PSC No. 4531; and Roosevelt Disposal, Inc., PSC No. 6871.

3. On September 17, 1991 the Commission granted Applicant's request for temporary authority. On November 11, 1991 an extension was granted.

4. Following issuance of proper notice, a hearing was held on January 17, 1992 in the Conference Room of the Yellowstone County Library, 510 North Broadway, Billings, Montana. At the conclusion of the hearing the parties stipulated to a final order.

## SUMMARY OF TESTIMONY

### Testimony of Applicant

5. Larry D. Klinger, owner of Byford Trucking (Byford), testified that Byford uses vacuum tank trucks to provide a specialized cleanup and cleaning service to refineries and pipelines. He indicated that those trucks are used for the emergency cleanup of oil spills as well as the hydrotesting of pipelines and cleaning of petroleum storage tanks. He presented an equipment list describing 11 vacuum tank trucks owned by him and used to provide the service. He stated that all his drivers receive training in the handling of hazardous materials, as required by OSHA and his customers; that these drivers were all equipped with special clothing and breathing devices; and that they were knowledgeable as to the safety requirements imposed by the individual refineries and pipelines. He further testified that his service is available 24 hours a day, 7 days each week.

6. Dan Gradle, Senior Process Engineer for Conoco Refinery, appearing in support of the application, testified as to Applicant's qualifications to provide service in accordance with various federal and state laws and regulations. He also testified that Applicant met Conoco's own safety requirements. Mr. Gradle indicated Conoco had a need for Applicant's service.

7. Richard Lohof, Manager of Pipelines and Terminals for Cenex Pipeline, appearing in support of the application, testified as to Applicant's qualifications to provide the proposed service and Cenex's need for this service.

8. Bernie Geiser, Environment, Health and Safety Director for the Cenex Refinery in Laurel, Montana, appearing in support of the application, also testified as to Applicant's qualifications and Cenex's need for the proposed service.

9. James Weisgerber, Senior Maintenance Supervisor for Exxon Pipeline, appearing in support of the application, testified on hydrotesting of pipelines and the need for the proposed service. He also stated that he had not been authorized by Exxon to appear.

Testimony of Protestants

10. Dennis Ost, Operations and Field Manager for Harvey Ost Oilfield Services (HOOS), testified that HOOS is ready and able to serve the water transportation needs of Conoco, Cenex and Exxon. He indicated that HOOS had never been contacted by any of these concerns regarding water transportation. He also testified that granting the authority would have an adverse financial impact on the cash flow of HOOS.

11. Delores Green, President of Green Oil and Field Services, Inc. (GOFS), testified that her company is also ready and able to serve the transportation needs of the shipper witnesses; that GOFS had never been solicited by any of these companies; and that the granting of the application would have an adverse financial impact on GOFS.

12. Robert Zimmerman, President of Big Z Trucking, Inc. (Big Z), testified that his company actively solicits water haul-

ing business and is ready and able to serve the water transportation needs of the shipper witnesses. He also stated that despite considerable effort Big Z has been unable to even submit bids on Conoco's water hauling work, and that the granting of the application would have an adverse financial impact on Big Z.

13. The Commission notes here that though Mr. Zimmerman testified on behalf of Big Z, his water hauling certificate is registered with the Commission under the name "Roosevelt Disposal, Inc." For purposes of this order, however, all references to Big Z will be deemed to include the operations of Roosevelt Disposal, Inc.

## DISCUSSION

14. Applicant has requested a certificate of public convenience and necessity as a common motor carrier, Class B, to transport: Petroleum, petroleum products, petroleum wastes, chemicals, and water, in single vacuum tank trucks not exceeding 44,000 pounds GVW, between all points and places in the State of Montana for the purpose of pipeline and refinery maintenance only. This authority would be used to provide emergency cleanup of petroleum spills, as well as the cleaning of petroleum tanks at refineries and tank farms around the state.

15. 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:

> (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 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 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.

16. Applying this language to the facts presented by any application for additional 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 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 ad-

ditional 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.

17. 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.

18. Accordingly, the first question to be addressed is whether the Applicant has demonstrated a public need for the proposed service. Applicant presented supporting shipper testimony from a number of representatives of refineries and pipelines. These witnesses generally testified as to the Applicant's qualifications to provide service to them in accordance with the strict federal and state requirements covering the handling of hazardous materials. These witnesses also indicated that the Applicant was familiar with the safety requirements associated with the individual refineries and pipelines. They further testified as to a need for Applicant's services. Based on this tes-

timony, the Commission believes that a public need does exist for the proposed service.

19. The second question, and primary point of contention here, is whether the needs of these shippers can be served as well by existing carriers. Three protestants filed protests against the application. All three hold certificates of authority for the transportation of water in bulk in tank vehicles between all points and places within the State of Montana, and protested that portion of the application requesting authority to transport water between all points and places within the State of Montana.

20. The protestants argue that the needs of the shipper witnesses primarily require the transportation of water, which they are capable of providing. The Commission disagrees. The witnesses and Applicant testified to a proposed service that uses vacuum tank trucks to cleanup petroleum spills, clean petroleum storage tanks, and/or hydrotest pipelines. This service requires not only specialized equipment and training, but also involves the transportation of petroleum, petroleum products, petroleum wastes, and chemicals. The hauling of water is but one indivisible component of the proposed service.

21. Further, the specialized equipment required to perform the service extends beyond that used to haul water. Robert Zimmerman indicated that Big Z would need to obtain additional authority before providing the proposed service; and Dennis Ost testified that HOOS would need to acquire additional equipment

and training before providing the proposed service and even then would need guarantees of work before making any purchases. Because of the specialized and indivisible nature of the proposed service, the Commission must find that the proposed service could not be provided by existing carriers.

22. The last question to be answered is whether the proposed service could be provided without endangering or impairing the operations of existing carriers. Though each protestant testified that their respective operations would be harmed if Applicant were granted the requested authority, there was no evidence that the protestants were currently providing the proposed service. If the protestants are not currently earning revenues from the proposed service, it is hard to understand how they would be harmed by Applicant's provision of the service.

23. For the above stated reasons, the Commission finds that 1) a public need exists for the proposed service, 2) this need cannot be served as well by the existing carriers, and 3) provision of the proposed service will not harm or endanger the existing carriers. However, the Commission also finds that the specialized and indivisible nature of the proposed service, which resulted in these findings, makes appropriate the following limitation: no part of this authority may be separately transferred or leased.

24. With this limitation, and based on the public interest, the application is granted.

## CONCLUSIONS OF LAW

1. The Montana Public Service Commission has jurisdiction over the parties and subject matter addressed in this proceeding. Section 69-12-201, MCA.

2. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter as required by Section 69-12-321 and 69-12-322, MCA.

3. The Commission has the authority to grant a certificate of operating authority if required by public convenience and necessity. Section 69-12-323.

## ORDER

NOW THEREFORE IT IS ORDERED that the application of Larry D. Klinger dba Byford Trucking Company for the following Class B Montana Intrastate Certificate of Public Convenience and Necessity is hereby granted:

> Petroleum, petroleum products, petroleum wastes, chemicals, and water, in single vacuum tank trucks not exceeding 44,000 pounds GVW, between all points and places in the State of Montana. Limitations: 1) Transportation is restricted for the purpose of pipeline and refinery maintenance only. 2) No part of this authority may be separately transferred or leased.

IT IS FURTHER ORDERED that all objections and motions made during the hearing in this Docket that were not ruled on are denied.

Done and Dated this 28th day of April, 1992 by a vote of 4-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DANNY OBERG, Chairman

WALLACE W. "WALLY" MERCER, Vice Chairman

BOB ANDERSON, Commissioner

TED C. MACY, Commissioner

ATTEST:

Ann Peck
Commission Secretary

(SEAL)

NOTE: Any interested party may request that the Commission reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.