

# SECRETARY'S RECORD, PUBLIC SERVICE COMMISSION

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## BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of Upper Hand ) APPLICATION NO. B-1975  
Transportation, LLC, seeking to )  
institute a new service as a )  
common carrier in open class )  
service in the transportation of )  
passengers by van in Douglas, )  
Sarpy, Lancaster, Washington, and ) DENIED  
Cass Counties, on the one hand, )  
and, on the other hand, points in )  
Nebraska over irregular routes. )  
HHS Designation: Yes. )  
RESTRICTION: The transportation )  
of railroad train crews and their )  
baggage is not authorized. )

) Entered: June 30, 2020

For Applicant:

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For the Protestants:

Camelot Transportation,  
Triumph Transportation, Action  
Cab, and the Z-Trip Companies:

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For Commission Staff:

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BY THE COMMISSION:

### B A C K G R O U N D

On April 10, 2018, Upper Hand Transportation, LLC ("Applicant"), Omaha, filed an application seeking authority as a common carrier to transport passengers in open class by van in Cass, Douglas, Lancaster, Sarpy, and Washington Counties over irregular routes. The transportation of railroad train crews and their baggage is not authorized, and Applicant applied for HHS Designation. Notice of the application was published in The Daily Record, Omaha, Nebraska, on April 18, 2018.

Timely protests were filed by Golden Plains Services Inc. d/b/a GPS Transportation ("GPS"); Camelot Transportation ("Camelot") and Triumph Transportation ("Triumph"); Action Cab; and Happy Cab Company, d/b/a Checker Cab Company, Happy Cab Company, and Yellow Cab Company; DonMark, Inc. d/b/a Cornhusker Cab Company; Valor Transportation, d/b/a Safeway Cabs (Omaha Cab Companies, now known as "zTrip"). Protests were granted on July 9, 2018.

On August 2, 2018, the Hearing Officer entered an Order Adopting Procedural Schedule and Setting Hearing. A Hearing was originally scheduled for October 3, 2018. On September 25, 2018, Z-Trip filed a motion to compel discovery and continue the hearing alleging the Applicant had failed to respond to any discovery request. A telephonic hearing was held on that motion on October 1, 2018. Commission staff attempted to contact Applicant by email, letter, and telephone regarding discovery and setting a new hearing date. On December 18, 2018, the Commission entered an Order of Pending Dismissal setting a deadline for action to be taken by Applicant by January 2, 2019. A planning conference was held on January 30, 2019 to set the amended procedural schedule and to set new hearing date. An order setting the procedural schedule was issued on February 8, 2019.

Hearing on the application was held pursuant to the amended procedural schedule on April 3, 2019, in the Commission Hearing Room with appearances as shown above.

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### E V I D E N C E

#### *Witness Testimony*

In support of its application, Applicant first produced Mr. Fadlekarim Dood, the owner of Upper Hand Transportation. Mr. Dood has experience driving for numerous certificated transportation carriers in the State of Nebraska.<sup>1</sup> Mr. Dood testified that he learned a need existed for more timely transportation services in Nebraska from his former passengers; who complained of the treatment and service they received from other carriers.<sup>2</sup> On cross-examination, Mr. Dood indicated these conversations were the sole foundation for his belief that a need existed. He further noted he did not perform any market research or analysis in order to prove that a need existed.<sup>3</sup>

Mr. Dood then testified regarding the source of his passengers, stating that he has already had conversations with Intelliride, the Nebraska Family Collaborative<sup>4</sup>, and members of his community concerning the potential provision of transportation services he would provide. Specifically, Mr. Dood explained the need for specialized service that certain members of his community require.<sup>5</sup> On cross-examination, Mr. Dood explained that the Nebraska Family Collaborative initiated conversations with him about providing service to its clientele.<sup>6</sup> Later, Mr. Dood testified that he is aware that passengers using Intelliride do not have the choice of which provider transports them.<sup>7</sup>

Dood concluded his testimony discussing the availability of the necessary vehicles and materials needed to conduct the proposed service.<sup>8</sup> Mr. Dood testified he does not have any problems maintaining his own vehicles. He further explained he is aware of the impact that the long driving times have on the vehicles and the importance of having continuous service.<sup>9</sup>

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<sup>1</sup> Hrg. Transcr. 15:2 - 16:3(May 31, 2019).

<sup>2</sup> *Id.* at 11:15 - 13:9.

<sup>3</sup> *Id.* at 37:10 - 38:6.

<sup>4</sup> The Commission is aware that the Nebraska Family Collaborative changed its name to "PromiseShip" in January, 2018. Throughout the course of this proceeding, a reference is made to "the Nebraska Family Collaborative" to stay consistent with the testimony.

<sup>5</sup> *Id.* at 13:12 - 14:19.

<sup>6</sup> *Id.* at 33:17 - 34:12.

<sup>7</sup> *Id.* at 36:20 - 36:25.

<sup>8</sup> *Id.* at 14:20 - 15:1.

<sup>9</sup> *Id.* at 16:4 - 16:11.

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Responding to questions from Commission staff, Mr. Dood testified a local mechanic in downtown Omaha would provide the maintenance for his vehicles.<sup>10</sup> Mr. Dood ended his testimony stating he would be able to provide transportation services upon approval of the application.<sup>11</sup>

On cross-examination, Mr. Shultz questioned Mr. Dood regarding the vehicles proposed to be used and his available assets. Mr. Dood stated that only one of the two vehicles listed currently had insurance.<sup>12</sup> In response to a question concerning the legend on one of his vehicle's title stating it was previously salvaged, Mr. Dood testified that he understood a salvaged title to indicate only some part of the vehicle had been previously damaged. He noted he was not sure what it meant for a vehicle's odometer to be exempt.<sup>13</sup> Mr. Dood testified that the cash-on-hand referenced in his application is now less than what it was at the time of his application. This is the result of transferring some monies between Upper Hand's bank account and his personal bank account.<sup>14</sup> Mr. Dood further testified that it is possible that the vehicles are now worth less than what they were when he initially applied due to depreciation.<sup>15</sup>

Mr. Shultz further questioned Mr. Dood regarding whether he had prepared a business plan or any financial projections. Mr. Dood noted that he projects 40 total trips per day between his two vehicles.<sup>16</sup> Later, Mr. Dood clarified he did not submit a business plan with his application and this was simply a projection.<sup>17</sup> Mr. Dood testified these trips would come from his community, Intelliride, and the Nebraska Family Collaborative.<sup>18</sup> He further stated that he thought that the Nebraska Family Collaborative would not have contacted him if there were not a need for additional carriers.<sup>19</sup> Later, Mr. Dood noted he did not contact any current carriers regarding their ability to meet the need in the service areas requested.<sup>20</sup>

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<sup>10</sup> *Id.* at 42:12 - 42:16.

<sup>11</sup> *Id.* at 16:12 - 16:22.

<sup>12</sup> *Id.* at 18:16 - 18:19.

<sup>13</sup> *Id.* at 29:6 - 30:10.

<sup>14</sup> *Id.* at 20:5 - 20:8.

<sup>15</sup> *Id.* at 20:18 - 21:5.

<sup>16</sup> *Id.* at 21:12 - 22:19.

<sup>17</sup> *Id.* at 38:13 - 39:7.

<sup>18</sup> *Id.* at 22:20 - 24:17. *See Also*, at 13:11 - 14:19.

<sup>19</sup> *Id.* at 22:20 - 24:17.

<sup>20</sup> *Id.* at 39:19 - 39:25.

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Mr. Dood indicated he intends to operate his business from 5:00 a.m. to midnight every day.<sup>21</sup> On later questioning, Mr. Dood noted he is familiar with the hours of services rules for drivers transporting passengers.<sup>22</sup> He further noted he intends to have drivers as both employees and independent contractors, dependent upon each drivers' individual preferences or needs.<sup>23</sup>

In response to a question from Ms. Pence, Mr. Dood testified he had never operated a business prior to Upper Hand.<sup>24</sup> Ms. Pence questioned Mr. Dood regarding whether he had experience in managing a transportation company. He explained that he gained management experience during his time as a driver. He noted that through experience gained during his time with previous employers and the daily operations of driving, he encountered and handled various issues that he would classify as management duties.<sup>25</sup>

Mr. Dood was questioned as to why he chose to apply for authority to operate as a common carrier as opposed to a contract carrier. Mr. Dood indicated his understanding was that as a contract carrier he would not be able to provide service to those who he was not under contract with.<sup>26</sup> Mr. Dood indicated he intends to provide both contract carriage and carriage to the general public. He noted he understood the general public would have to pay him directly.<sup>27</sup> The Commission then took administrative notice of the remainder of the application package within Docket B-1975 in order to clarify that Mr. Dood applied to operate as an open class carrier.<sup>28</sup>

Next, Applicant called Ms. Rosie Smith, a dialysis patient who has received transportation services from Mr. Dood. Ms. Smith testified that she began receiving transportation services from Mr. Dood after a driver for GPS failed to pick her up on time for a dialysis appointment.<sup>29</sup> Later, Ms. Smith testified that Intelliride informed her that the reasons her trip was delayed was because the carrier in question was dispatched out

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<sup>21</sup> *Id.* at 26:20 - 26:25.

<sup>22</sup> *Id.* at 35:25 - 36:8.

<sup>23</sup> *Id.* at 27:7 - 27:16.

<sup>24</sup> *Id.* at 31:1 - 31:22.

<sup>25</sup> *Id.* at 31:23 - 32:16.

<sup>26</sup> *Id.* at 44:9 - 46:6.

<sup>27</sup> *Id.* at 46:10 - 47:3.

<sup>28</sup> *Id.* at 47:8 - 48:17.

<sup>29</sup> *Id.* at 54:8 - 58:19.

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late by Intelliride.<sup>30</sup> Ms. Smith testified that when she would schedule transportation services with Intelliride she would request Mr. Dood be her driver, but that he would not always be assigned to her trips. Ms. Smith indicated she prefers to ride with Mr. Dood because of his reliability and kindness.<sup>31</sup>

Ms. Smith testified her trips with Mr. Dood were arranged through Intelliride, but she could not recall what company he drove for at the time.<sup>32</sup> Later, Ms. Smith explained that she would pay out of pocket for these trips.<sup>33</sup> Mr. Shultz further questioned Ms. Smith regarding how frequently she requires transportation services from Intelliride. Ms. Smith testified she requires transportation from Intelliride maybe three or four times a week. She noted that for these trips, Intelliride would select the driver.<sup>34</sup> Ms. Smith testified that outside of transportation received from Intelliride, she does not have a need for private pay transportation services and only requires transportation services within Douglas County.<sup>35</sup>

When asked whether she filed a complaint with Intelliride or HHS regarding her experiences with GPS, Ms. Smith stated she talked to someone at dispatch about the issue but did not file a formal complaint.<sup>36</sup> Ms. Smith further explained drivers are almost always late to pick her up for scheduled trips. She explained this has been an issue for almost eight years and has resulted in two different hospital stays because of her missing dialysis appointments.<sup>37</sup>

Applicant next called Ms. Nedra Neal, another dialysis patient who received transportation services from Mr. Dood. Ms. Neal received transportation service from Mr. Dood three times a week for her dialysis appointments. Ms. Neal testified she prefers receiving service from Mr. Dood because of his timeliness and reliability.<sup>38</sup> Ms. Neal indicated that since April, the providers Intelliride has dispatched have been arriving on time. Ms. Neal explained that she has no complaints regarding the services provided by GPS, but she believes they

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<sup>30</sup> *Id.* at 56:19 - 57:12.

<sup>31</sup> *Id.* at 55:20 - 56:13.

<sup>32</sup> *Id.* at 57:14 - 58:2.

<sup>33</sup> *Id.* at 59:13 - 59:16.

<sup>34</sup> *Id.* at 58:13 - 58:14.

<sup>35</sup> *Id.* at 58:15 - 58:20; 58:23 - 59:4.

<sup>36</sup> *Id.* at 59:25 - 60:3.

<sup>37</sup> *Id.* at 60:18 - 62:7.

<sup>38</sup> *Id.* at 64:5 - 65:3.

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need more drivers because at times Intelliride will inform her GPS did not have an available driver to provide her transportation.<sup>39</sup>

On cross-examination, Ms. Neal testified that she is pleased with the service she receives from GPS.<sup>40</sup> Later, Ms. Neal noted she has been generally satisfied with the service she has received from Z-Trip. She further noted she has not received service from Camelot or Triumph Transportation.<sup>41</sup> Ms. Neal testified her dialysis and other doctor appointments take place within Douglas County.<sup>42</sup> Ms. Neal testified that these rides are arranged through Intelliride and that Intelliride selects the carrier that performs the trip.<sup>43</sup>

Ms. Neal was asked whether she has filed a complaint with Intelliride or HHS regarding her issues. Ms. Neal explained that she has not filed a formal complaint but has called Intelliride to see what happened regarding her trips. Ms. Neal indicated there has been times when a provider dispatched by Intelliride has been late and then GPS would come and transport her to her appointment. She further noted there are certain providers she can depend on through Intelliride, those being, GPS, Z-Trip, and Mr. Dood when he was providing those services.<sup>44</sup> Ms. Neal was further questioned regarding how frequently she is either late for her appointments or waiting for an extended period of time for a return trip. Ms. Neal testified that prior to an employee at the Dialysis center getting involved; she would always be the last person sitting in the lobby or outside waiting for a ride home.<sup>45</sup>

Finally, Ms. Brenda Cain testified on behalf of Applicant. Ms. Cain testified to an experience she had with a driver who refused her entry into his vehicle, leaving Ms. Cain stranded with no transportation to a subsequent appointment. She explained the driver had provided her transportation to her first doctor's appointment that day and was aware she needed a ride to an additional doctor's appointment immediately after the first appointment. Ms. Cain testified she believed this was a

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<sup>39</sup> *Id.* at 65:10 - 66:16.

<sup>40</sup> *Id.* at 66:22 - 66:25.

<sup>41</sup> *Id.* at 67:16 - 68:4.

<sup>42</sup> *Id.* at 67:1 - 67:10.

<sup>43</sup> *Id.* at 68:5 - 68:10.

<sup>44</sup> *Id.* at 68:17 - 69:18.

<sup>45</sup> *Id.* at 70:2 - 71:15.

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driver for Ambassador but she was unsure.<sup>46</sup> Ms. Cain noted she mentioned this instance to Mr. Dood, who informed her that the next time she called Intelliride to ask for him.<sup>47</sup>

On cross-examination, Mr. Shultz inquired as to how frequently Ms. Cain receives transportation from Intelliride. Ms. Cain testified she previously received services from Intelliride twice a week, but now it is not as often because she is able to drive herself to her appointments.<sup>48</sup> Ms. Cain testified that Intelliride tells her which carrier is going to provide her transportation. She further noted that the State pays for her trips through Intelliride and that she does not have a need for private pay transportation services.<sup>49</sup> Ms. Cain testified that all her trips from Intelliride take place within Douglas County.<sup>50</sup> Later, Commission Staff questioned Ms. Cain regarding whether she currently takes trips through Intelliride. Ms. Cain testified that she only needs them if her vehicle breaks down and if her daughter is unable to give her a ride. Ms. Cain testified she has not had to utilize Intelliride within the thirty days due to not having a doctor's appointment in the last three months.<sup>51</sup>

Responding to Commissioner questions, Ms. Cain stated she had not filed a complaint with anyone concerning her transportation services. She explained she thought she might need services again and did not want to face any consequences of filing a complaint; she specifically feared possible retaliation.<sup>52</sup> Ms. Cain further noted that carriers arrived late more often than they arrived on time. She explained that on various occasion she has had to wait for hours at a time for transportation services.<sup>53</sup>

Next, Protestants offered witnesses. First, Alissa Kern testified on behalf of Camelot Transportation ("Camelot") and Triumph Transportation ("Triumph"). Ms. Kern is the Managing Director for Camelot and Triumph.<sup>54</sup> Ms. Kern indicated Camelot and Triumph provide transportation services statewide. The primary difference between services offered by Triumph and

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<sup>46</sup> *Id.* at 74:13 - 74:16.

<sup>47</sup> *Id.* at 74:18 - 74:20.

<sup>48</sup> *Id.* at 75:22 - 76:10.

<sup>49</sup> *Id.* at 76:11 - 76:25.

<sup>50</sup> *Id.* at 77:3 - 77:8.

<sup>51</sup> *Id.* at 77:15 - 78:5.

<sup>52</sup> *Id.* at 78:10 - 78:18 and 79:1 - 79:9.

<sup>53</sup> *Id.* at 79:14 - 80:11.

<sup>54</sup> *Id.* at 83:5 - 83:10.

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Camelot is that Triumph primarily services clientele in need of wheelchair services.<sup>55</sup> Ms. Kern testified Camelot and Triumph have 60 vehicles, of which 54 are active. Three of those vehicles are wheelchair accessible.<sup>56</sup>

Ms. Kern explained that Camelot and Triumph have drivers located throughout the state, but in the Applicant's proposed territories, there are twenty drivers.<sup>57</sup> She testified Camelot could handle a minimum of ten additional trips per vehicle in these areas.<sup>58</sup> Ms. Kern stated Camelot is not using all of its drivers every day. She explained Camelot's routing system enables her to view how many vehicles Camelot has used within any day in a particular month. She testified that in the previous month, the most vehicles used in any particular day was 41 out of the company's possible 54 active vehicles.<sup>59</sup> Ms. Kern indicated that drivers for Camelot and Triumph would not sit idle waiting on a passenger. Drivers for Camelot and Triumph are employees and if they do not have trips to complete, they do not leave their homes.<sup>60</sup>

Ms. Kern testified that within the last two years Triumph's requested number of trips have decreased drastically to almost nothing. She noted that if Triumph does receive a call, it is a private pay client.<sup>61</sup> Ms. Kern testified that during this same period, Camelot is relatively at status quo. She indicated there has neither been an influx nor a decrease in their requested number of trips over the last two years.<sup>62</sup> Ms. Kern testified she would describe the market within the five counties indicated on the application as over-saturated. She further noted she does not believe there is a need for transportation services outside of those five counties as well.<sup>63</sup>

Ms. Kern testified that most of Camelot and Triumph's business is contract related through contracts with the State of Nebraska, Medicaid, DHHS, and the Nebraska Family Collaborative. Ms. Kern testified that to her knowledge, her companies are the only provider contracted to provide service to the Nebraska

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<sup>55</sup> *Id.* at 83:16 - 83:19.

<sup>56</sup> *Id.* at 83:24 - 84:9.

<sup>57</sup> *Id.* at 84:10 - 84:19.

<sup>58</sup> *Id.* at 84:10 - 85:8.

<sup>59</sup> *Id.* at 85:9 - 85:24.

<sup>60</sup> *Id.* at 86:2 - 86:9.

<sup>61</sup> *Id.* at 86:10 - 86:16.

<sup>62</sup> *Id.* at 86:16 - 86:22.

<sup>63</sup> *Id.* at 88:22 - 89:13.

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Family Collaborative. She further explained that their contract prevents them from denying any trips.<sup>64</sup> Ms. Kern testified to an email she received that states that within the last sixty days, all of their needs have been met.<sup>65</sup>

Ms. Kern testified that within the five counties indicated on the application, her companies have had 122 trips from Intelliride and 289 non-Medicaid trips in the last twelve months.<sup>66</sup> Ms. Kern testified that over the last two years Camelot's and Triumph's DHHS services has been about the same, but over the last eight years it has decreased.<sup>67</sup>

Ms. Kern testified to the process of how a carrier receives a trip from Intelliride. She explained Intelliride can either dispatch a trip to a provider or can prioritize trip assignments utilizing a tablet system. Ms. Kerns indicated that a driver does not have the ability to accept or deny the trips if a driver has one of Intelliride's tablets.<sup>68</sup> Later, Ms. Kern explained that a carrier under contract with Intelliride is either a preferred provider or in overflow status. If a company rents a tablet, the company is a preferred provider. Whereas, if a company does not rent a tablet, the company is placed in "overflow status," meaning they are assigned trips only when preferred providers are unable to fulfill a trip request.<sup>69</sup> Ms. Kern explained the tablets will no longer be an option in a few months when the system will have three Medicaid brokers instead of just one.<sup>70</sup>

Ms. Kern testified Triumph and Camelot protested this application because of the "on the other hand" language. Ms. Kern explained the other counties outside of the proposed service areas Applicant wishes to provide service are already over-saturated with providers. She noted that her drivers outside of the five counties Applicant seeks to operate in would be affected if another carrier comes into the market.<sup>71</sup> Ms. Kerns testified that if the application would have only stated point to point within those five listed counties, Camelot would not

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<sup>64</sup> *Id.* at 87:3 - 87:20.

<sup>65</sup> *Id.* at 87:23 - 88:7.

<sup>66</sup> *Id.* at 89:19: - 90:10.

<sup>67</sup> *Id.* at 90:11 - 90:16.

<sup>68</sup> *Id.* at 90:17: 91:6.

<sup>69</sup> *Id.* at 110:21 - 111:21.

<sup>70</sup> *Id.* at 90:17 - 91:11.

<sup>71</sup> *Id.* at 92:14 - 94:5.

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have protested.<sup>72</sup> Ms. Kern testified if the application is granted it will have a negative impact on Camelot's and Triumph's drivers. She explained that more competition attempting to serve an artificial need would do nothing but take away income from current drivers.<sup>73</sup> Ms. Kern testified Camelot already possesses the requisite vehicles and drivers necessary to meet the need.<sup>74</sup>

O n cross-examination, Mr. Nicholls inquired about the total number of DHHS trips Camelot and Triumph did prior to Intelliride becoming the broker. Ms. Kern indicated she could not accurately provide a number but she would assume it was close to 100 trips a week from AMR.<sup>75</sup> Ms. Kern noted the broker reconstruction caused her to close down an office in Omaha with an entire other fleet of vehicles.<sup>76</sup> Ms. Kern testified she has discussed this issue with Intelliride many times. She indicated Intelliride would rather a provider pay for their tablets, so she presumes the tableted providers are receiving the vast majority of the trips Intelliride has.<sup>77</sup>

Ms. Kern stated she did not know what the current price of the Intelliride tablets were, but she indicated that when she had previously researched the tablets they were between \$150 and \$200.<sup>78</sup> Later, Ms. Kern testified Camelot and Triumph previously used the tablets but discontinued using them after seven months without receiving any additional trips.<sup>79</sup> Ms. Kern testified that her companies do not currently receive calls from stranded Intelliride clients, but in the past she has. Ms. Kern noted she originally would dispatch drivers to transport stranded dialysis patients but was told by the CEO of Intelliride to cease such activities.<sup>80</sup>

Commissioner Schram then asked Ms. Kern to discuss the reasons why she believes clients have to wait for rides or why carriers fail to show up. Ms. Kern indicated that Camelot and Intelliride utilize the same routing software. She explained that from her experience, and hearing the testimony of the

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<sup>72</sup> *Id.* at 94:6 - 94:12.

<sup>73</sup> *Id.* at 94:13 - 95:5.

<sup>74</sup> *Id.* at 95:6 - 95:10.

<sup>75</sup> *Id.* at 97:6 - 97:13.

<sup>76</sup> *Id.* at 97:17 - 98:1.

<sup>77</sup> *Id.* at 98:2 - 98:12.

<sup>78</sup> *Id.* at 99:11 - 99:19.

<sup>79</sup> *Id.* at 103:21 - 104:18.

<sup>80</sup> *Id.* at 106:14 - 107:15.

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witnesses, it seems the issue is a matter of internal unfamiliarity with the routing software.<sup>81</sup> Ms. Kern reiterated that with the current unused capacity right now her companies could handle a total of 200 additional trips per day in the five counties listed in the application.<sup>82</sup> Later, Ms. Kern testified that it is an ongoing problem for Intelliride to assign trips to a provider outside of its service area. She noted she has reported a few carriers to the Commission for completing such trips.<sup>83</sup>

Ms. Kern then provided testimony describing her usual practices regarding the length of time she keeps vehicles in service and the procedures for purchasing new vehicles. She stated that the length of time a vehicle stays in service depends on the mileage and location of the particular vehicle. Ms. Kern explained that in Omaha, her vehicles are in service for approximately a year and a half. In rural Nebraska, the vehicles last a lot longer, closer to three years, because of the different driving conditions.<sup>84</sup> Ms. Kern explained that her companies purchase new vehicles with about 80,000 miles. She explained that service area is a determining factor in how long vehicles remain in operation. Ms. Kern noted that she has vehicles with as few as 80,000 miles and vehicles with as many as 300,000 miles. Ms. Kern further noted she has two full time mechanics that service each vehicle every 3,000 miles.<sup>85</sup>

Mr. John Davis testified next on behalf of Z-Trip. Mr. Davis is the general manager of the Nebraska operations.<sup>86</sup> Mr. Davis stated Z-Trip serves Lancaster, Douglas, Sarpy and Cass Counties.<sup>87</sup> He further noted they have 148 active vehicles, sixteen of which are wheelchair accessible.<sup>88</sup> Mr. Davis testified his current fleet is considerably smaller than it was two years ago due to the over-saturation of the market.<sup>89</sup>

Specifically, he cited the presence of party buses and the introduction of TNCs as competition to taxicab operations. More specifically, the ability of TNCs to operate as a boutique

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<sup>81</sup> *Id.* at 99:20 - 101:3.

<sup>82</sup> *Id.* at 101:18 - 102:10.

<sup>83</sup> *Id.* at 109:3 - 109:19.

<sup>84</sup> *Id.* at 107:16 - 107:24.

<sup>85</sup> *Id.* at 107:24 - 108:25.

<sup>86</sup> *Id.* at 113:5 - 113:10.

<sup>87</sup> *Id.* at 113:18 - 113:21.

<sup>88</sup> *Id.* at 114:4 - 114:14.

<sup>89</sup> *Id.* at 114:15 - 114:22.

service, allowing TNCs to cherry pick rides.<sup>90</sup> He further commented on how TNCs provide service primarily to areas with the most lucrative rides.<sup>91</sup> He explained the effect of the TNCs cherry-picking rides is that the number of drivers decrease because historically drivers have been able to use the lucrative rides on the weekend to make up for slow periods in the beginning of the week, but with TNCs the drivers lose this ability to make up these trips.<sup>92</sup> He further noted that this affects the community as a whole. He explained that taxicabs provide services that TNCs do not and when drivers decide to quit, because they feel they cannot make a living, it has a ripple effect on the entire transportation industry.<sup>93</sup>

In response to a question regarding the operating capacity of Z-Trip, Mr. Davis testified to Z-Trip's ability to serve additional clients. Mr. Davis explained that Z-Trip is currently down in terms of the amount of drivers they should be operating with, but the current state of the market is not supporting the amount of drivers they have previously employed. Mr. Davis stated that over the last five years his companies have continued to bleed money because of this decrease in trips.<sup>94</sup>

Mr. Davis testified that the number of DHHS trips have decreased over the last eight years. He explained the transition from AMR to Intelliride and the subsequent introduction of the tablet system forced his company to make an economical decision to forego purchasing the tablets at the outset because of the sheer cost to equip Z-Trip's entire fleet.<sup>95</sup> Mr. Davis noted being placed in "overflow status" drastically reduced the amount of DHHS trips Z-Trip was receiving and so Z-Trip stopped providing services to Intelliride.<sup>96</sup> He explained Z-Trip recognized a need for such services so decided to reengage with Intelliride. Mr. Davis reported that when Z-Trip began providing services for Intelliride again, there were 32 to 35 drivers who invested in the tablets. That number is now down to between 12 and 14 drivers who have the Intelliride tablets.<sup>97</sup> Mr. Davis further noted that historically 95% of his drivers would provide service for Intelliride, now maybe 10% of his drivers serve

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<sup>90</sup> *Id.* at 114:23 - 115:21.

<sup>91</sup> *Id.* at 115:22 - 115:24.

<sup>92</sup> *Id.* at 118:13 - 119:13.

<sup>93</sup> *Id.* at 119:14 - 120:3.

<sup>94</sup> *Id.* at 115:25 - 117:13.

<sup>95</sup> *Id.* at 120:4 - 121:9.

<sup>96</sup> *Id.* at 121:9 - 121:18.

<sup>97</sup> *Id.* at 121:20 - 122:14.

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Intelliride.<sup>98</sup> Mr. Davis testified he has attempted to get more drivers on the Intelliride system by seeking more tablets from Intelliride but Intelliride has been unable to provide any additional tablets.<sup>99</sup>

Mr. Davis testified that he has no questions regarding Mr. Dood's driving ability or his standing with customers. He explained his concerns arise out of Mr. Dood's ability to operate a transportation company.<sup>100</sup> Mr. Davis further explained his biggest concern remained the clear and present danger an additional carrier in the market would have on his business model, specifically regarding the HHS trips.<sup>101</sup> He continued that he has a duty to ensure his drivers are able to drive as long as they want to. He further explained that while providing consumers with options is great, at some point the industry will suffer if new operators continue to enter the market pushing out the stalwarts.<sup>102</sup>

Mr. Davis testified that Z-Trip would have no issues in meeting any increased need of either Intelliride or the general public.<sup>103</sup> He explained Z-Trip could handle as many additional trips as Intelliride could provide. He noted that with most of his drivers in the Omaha and Lincoln markets it would not been an issue meeting any additional need. He further noted that his companies used to serve between 300 and 400 trips a day for Medicare.<sup>104</sup>

In response to further questions from Commissioner Schram, Mr. Davis stated the price for the Intelliride tablets have never changed. He further explained that he was very involved in the original deployment of the tablet system. Mr. Davis further explained that Z-Trip has continued to use the same tablets and network used by Intelliride; however, Intelliride has continuously rejected his request to allow Z-Trip to use Intelliride's application on their own tablets rather than purchasing them from Intelliride.<sup>105</sup> Mr. Davis further testified from his perspective the missing link in the provision of transportation to DHHS clients is the lack of communication

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<sup>98</sup> *Id.* at 122:16 - 122:25.

<sup>99</sup> *Id.* at 123:1 - 124:14.

<sup>100</sup> *Id.* at 125:6 - 125:17.

<sup>101</sup> *Id.* at 125:17 - 125:24.

<sup>102</sup> *Id.* at 126:4 - 127:7.

<sup>103</sup> *Id.* at 127:8 - 128:3.

<sup>104</sup> *Id.* at 128:17 - 129:8.

<sup>105</sup> *Id.* at 129:9 - 131:9.

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between Intelliride and carriers in addition to inefficient system.<sup>106</sup> Commissioner Schram inquired whether an additional carrier in the market would alleviate consumer concerns. Mr. Davis stated that it would not because the issue is not a lack of resources but an issue of inappropriately using current resources.<sup>107</sup>

Commissioner Ridder asked Mr. Davis whether providers who have the Intelliride tablets and those who do not are compensated at the same rate. Mr. Davis stated that is the case. He further added that the inability for taxicabs to multi-load passengers hinders their ability to get preference in Intelliride's system because Intelliride's preference is for carriers who can multi-load.<sup>108</sup> Mr. Davis reiterated that Intelliride has told him their policy is to give preference to providers who rent their tablets.<sup>109</sup>

The final witness was Mr. John Bartu on behalf of Action Cab. Mr. Bartu is the vice president of Action Cab.<sup>110</sup> Mr. Bartu indicated Action Cab currently provides transportation service statewide. He further explained the company is based out of Grand Island, but has vehicles in Hastings and York.<sup>111</sup> Mr. Bartu testified Action Cab recently purchased a new authority in order to allow it to provide service statewide. He noted Action Cab was able to purchase this authority because the original holder had not had enough business to keep it going. He explained he thought that purchasing this authority would provide Action Cab more business out of town doing open class work but that did not result.<sup>112</sup>

Mr. Bartu testified Action Cab has 16 licensed vehicles. He added that Action Cab is never running all of its vehicles at any one time.<sup>113</sup> Mr. Bartu explained Action Cab is an open class but also provides an on-call taxicab services in Grand Island and Hastings. He noted Action Cab provided four distance trips last month. He described distance trips as those between Grand Island and Omaha.<sup>114</sup> Mr. Bartu explained that without these

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<sup>106</sup> *Id.* at 131:10 - 133:14.

<sup>107</sup> *Id.* at 133:15 - 133:22.

<sup>108</sup> *Id.* at 135:2 - 137:12.

<sup>109</sup> *Id.* at 138 - 138:7.

<sup>110</sup> *Id.* at 139:5 - 139:7.

<sup>111</sup> *Id.* at 139:12 - 139:25.

<sup>112</sup> *Id.* at 141:18 - 142:9.

<sup>113</sup> *Id.* at 140:1 - 140:8.

<sup>114</sup> *Id.* at 140:9 - 140:20.

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distance trips his company would not survive. He further commented that the 20 runs per day per vehicle suggested by Mr. Dood would not even pay for his driver's gas for the day. Mr. Bartu reiterated there is just not enough business to support an additional carrier in the market with the introduction TNCs and party buses.<sup>115</sup>

Mr. Bartu indicated DHHS clients make up between 65% and 70% of Action Cab's business. He noted this is substantially down from what Action Cab used to receive prior to AMR being the broker. At that time Action Cab provided non-emergency medical transportation and essential shopping trips.<sup>116</sup> Mr. Bartu testified that while Action Cab receives a lot of business from Intelliride, they have the ability to handle even more. He explained it is difficult to provide approximately how much more business Action Cab can handle because it would be dependent upon the type of trip his business would be asked to perform.<sup>117</sup> Mr. Bartu indicated his current drivers do not work full-time.<sup>118</sup>

Mr. Bartu testified to his frustration with Intelliride. He explained the tablets do not work for his business because Action Cab is an on-call taxicab business. He noted that part of the problem with the Intelliride system are the inconsistencies concerning return trips. He explained a lot of the issues regarding passengers waiting for return trips arise out of different carriers providing pick up trips and return trips. He further explained that wait times would be reduced if Intelliride would provide proper notice to the carriers.<sup>119</sup> Mr. Bartu ended his testimony stating Action Cab protested the application because of its need for the above-mentioned distance trips.<sup>120</sup> Mr. Bartu testified Action Cab would be able to meet an increased need in respect to both Intelliride rides and rides from the general public without adding additional infrastructure.<sup>121</sup>

Ms. Reyes asked Mr. Bartu to clarify whether Intelliride presents trips as one-way or round-trip. Mr. Bart explained Intelliride will give one carrier the first leg of a trip, but

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<sup>115</sup> *Id.* at 130:21 - 141:17.

<sup>116</sup> *Id.* at 142:10 - 142:22.

<sup>117</sup> *Id.* at 142:23 - 143:20.

<sup>118</sup> *Id.* at 143:21 - 144: 2.

<sup>119</sup> *Id.* at 144:3 - 145:14.

<sup>120</sup> *Id.* at 145:15 - 145:21.

<sup>121</sup> *Id.* at 146:1 - 146:12.

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will give a different carrier the return trip.<sup>122</sup> Commissioner Schram asked Mr. Bartu how many additional trips his company could handle in Central Nebraska. Mr. Bartu noted that he could handle a lot of trips within Grand Island but he would not be able to handle as many additional trips to Omaha because of how long of a drive it is.<sup>123</sup> Commissioner Schram asked Mr. Bartu if he thought Intelliride would see more efficient services provided if Intelliride assigned a carrier an entire round trip. Mr. Bartu testified he believes it would.<sup>124</sup> Commissioner Rhoades inquired into the age of Action Cab's vehicles. Mr. Bartu explained Action Cab purchases vehicles that have between 70,000 and 100,000 miles, but no more than 10 years old. He noted he does not have a vehicle with more than 200,000 miles.<sup>125</sup>

### *Exhibits*

At the outset of the hearing, Protestants objected to the introduction of all evidence and testimony on behalf of the applicant. Protestants claimed the failure of Applicant to provide timely notice of exhibits and witnesses deprived the Protestants of due process.<sup>126</sup> Protestants claimed without action, a hearing officer's order would become unenforceable.<sup>127</sup> Applicant responded that the Protestants were made aware of this information months ago and therefore no harm exists.<sup>128</sup> The Hearing officer overruled the objection, stating there would be no evidence entered at the hearing that either Commission staff had not already entered or would not enter at some point during the hearing.

During the hearing, Camelot and Triumph entered into evidence an email correspondence between Ms. Kern and the Nebraska Family Collaborative detailing that within the last sixty days, all of their needs had been meet. The Commission accepted this as Exhibit 14.<sup>129</sup> The Commission requested three late-filed exhibits. Subsequent to the hearing, Z-Trip filed the requested Late-Filed Exhibit 15 showing an email correspondence

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<sup>122</sup> *Id.* at 146:23 - 147: 14.

<sup>123</sup> *Id.* at 147: 22 - 148:20.

<sup>124</sup> *Id.* at 148:21 - 149:8.

<sup>125</sup> *Id.* at 149:15 - 149:24.

<sup>126</sup> *Id.* at 4:15 - 5:17.

<sup>127</sup> *Id.* at 5:21 - 6:15.

<sup>128</sup> *Id.* at 6:18 - 7:13.

<sup>129</sup> This exhibit was initially accepted as Exhibit 14, but mistakenly marked as Exhibit 13. Applicant was to file late-filed exhibits 12 and 13, which were not accepted.

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between Michael Noel from Z-Trip and Juan Arroyo on behalf of Intelliride regarding lack of available Intelliride tablets.<sup>130</sup> Applicant attempted to file its two late-filed exhibits after the filing deadline along with a request for an extension of time despite warnings regarding the consequences of filing its exhibits late. The Hearing Officer denied Applicant's extension request to file its late-filed exhibits.<sup>131</sup>

### O P I N I O N S   A N D   F I N D I N G S

Applicant is seeking authority as a common carrier to provide transportation of passengers by van in open class service between points in Douglas, Sarpy, Lancaster, Washington, and Cass Counties on the one hand, and, on the other hand, points in Nebraska over irregular routes. Applicant is also seeking HHS Designation to provide transportation to passengers pursuant to a provider agreement with the Nebraska Department of Health and Human Services ("HHS").

Applications for common carrier authority are governed by Neb. Rev. Stat. § 73-311(1) (2018), which provides:

A certificate shall be issued to any qualified Applicant authorizing the whole or any part of the operations covered by the application if it is found after notice and hearing that (a) the Applicant is fit, willing, and able properly to perform the service proposed.. and (b) the proposed service, to the extent to be authorized by the certificate, whether regular or irregular, passenger or household goods, is or will be required by the present or future public convenience and necessity. Otherwise, the application should be denied.

The Commission must apply this two-part test in order to grant an application for common carrier authority.

First, an applicant must prove that it is fit, willing, and able to provide the proposed service. Applicant presented little evidence establishing financial fitness. The application form, entered into the record as an exhibit, showed that Applicant has the means to start his business, but little evidence was presented to show how Applicant would meet the financial costs

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<sup>130</sup> See Exhibit 15.

<sup>131</sup> See Docket B-1975, Order Denying Motion To Extend Time And File Exhibit, Entered April 23, 2019.

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associated with operating his business. The Commission has previously stated that a reference to the financial information contained on the application, without more, is not in and of itself sufficient to satisfy the statutory burden.<sup>132</sup> Given that Applicant owns the vehicles, the need for available capital would be limited to the cost of insurance, vehicle maintenance, and other applicable start-up costs. Applicant received insurance premium quotes from multiple insurance companies, but did not supply the Commission with those cost figures.<sup>133</sup> Without more information, it is difficult to say that Applicant made a determination of the costs required to operate the business.

Mr. Dood testified that he planned to operate with only two drivers who will each complete twenty (20) trips per day.<sup>134</sup> However, Applicant provided no evidence to support these projections. Mr. Dood's sole evidence of what will subsidize his business operations was his testimony regarding conversations with IntelliRide and Nebraska Family Collaborative. The Commission has concerns that the projected trip numbers are not realistic when taking into account the Commission's hours of service rules that limit drivers to driving no more than ten hours following eight consecutive hours off duty or any period after having been on duty fifteen hours following eight consecutive hours off duty.<sup>135</sup> Additionally, Mr. Dood testified to his lengthy experience as a driver for multiple transportation companies and management experience in other fields<sup>136</sup>, but did not connect this experience to the operation of a transportation company.

The Commission is unsure how to evaluate viability of a new carrier when major factors such as finances and costs are unknown or seemingly un contemplated by an applicant. Due to the limited evidence presented by Applicant at the hearing, the Commission will not reach a finding on Applicant's fitness.

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<sup>132</sup> See Application No. B-1634, *In the Matter of the Application of Liberty Transportation, Inc., Omaha, seeking authority as a common carrier of passengers and their baggage in open class service by van over irregular routes between points in Douglas, Sarpy, Cass and Washington counties to include the transportation of clients of the Nebraska Department of Health and Human Services clientele and subcontractors thereof. RESTRICTION: The transportation of railroad train crews and their baggage is not authorized*, Order Denying Application, Entered July 20, 2004.

<sup>133</sup> Hrg. Transcr. at 49:13 - 49:21.

<sup>134</sup> Hrg. Trans. at 21:12 - 22:19.

<sup>135</sup> Title 291, Chapter 3, § 005.05, Effective January 16, 2019.

<sup>136</sup> Hrg. Transcr. at 31:23 - 33:1.

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We next turn to the issue of whether the proposed service that Applicant wishes to provide is required by the present or future public convenience and necessity. The Nebraska Supreme Court set forth the analysis for determining "public convenience and necessity," stating:

In determining public convenience and necessity, the deciding factors are (1) whether the operation will serve a useful purpose responsive to a public demand or need, (2) whether this purpose can or will be served as well by existing carriers, and (3) whether it can be served by the Applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to the public interest.<sup>137</sup>

The issue of whether an applicant has met its burden of demonstrating that the proposed service is required by public convenience and necessity is ordinarily a factual issue.<sup>138</sup> Utilizing the factors set forth by the Nebraska Supreme Court, the record does not present sufficient evidence for the Commission to determine that Applicant's proposed services would meet a public need that could not be served as well by existing carriers.

The Commission has previously stated that a common carrier applicant seeking the additional HHS designation must prove that a present and future public need and necessity exist for the common carrier authority and the HHS designated transportation.<sup>139</sup> Applicant presented testimony of three witnesses who described times when they experienced significant delays or missed trips. However, testimony focused on experiences that are mainly the result of the provision of services by Intelliride, the transportation brokerage company contracted with HHS to schedule and dispatch transportation services for eligible clients. When asked specifically whether they were satisfied with the services offered by Protestants,

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<sup>137</sup> *In re Application of Nebraskaland Leasing & Assocs.*, 254 Neb. 583, 591 (1998).

<sup>138</sup> *Id.*

<sup>139</sup> See Application No. B-1966, *In the Matter of the Application of Mojo Mobility, LLC, Omaha, seeking authority as a common carrier in Nebraska intrastate commerce in the transportation of passengers by van in open class between points in Thurston, Dakota, Cuming, Burt, Dodge, Washington, Douglas, Sarpy, Saunders, Cass, Otoe, Butler, Colfax, Lancaster and Seward Counties, on the one hand, and, on the other hand, points in Nebraska over irregular routes. RESTRICTIONS: The transportation of railroad train crews and their baggage is not authorized. HHS Designation: Yes, Order Denying Application, Entered March 5, 2019.*

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the witnesses testified that they were generally satisfied with the services currently being offered.<sup>140</sup>

Additionally, Protestants offered evidence that they are currently meeting all of the needs required to be met under their contract with the Nebraska Family Collaborative.<sup>141</sup> Applicant was given opportunity to file exhibits to illustrate the unmet need of Intelliride and the Nebraska Family Collaborative for transportation services over the sixty days prior to the hearing; however, Applicant's filing was not timely and not accepted into the record for consideration. Thus, the Commission was given little evidence to demonstrate that Applicant's proposed services would meet a general need or that there was a need that could not be met by existing carriers.

From the evidence adduced and being fully informed in the premises, the Commission is of the opinion and finds that the proposed application of Upper Hand Transportation, LLC, should be denied.

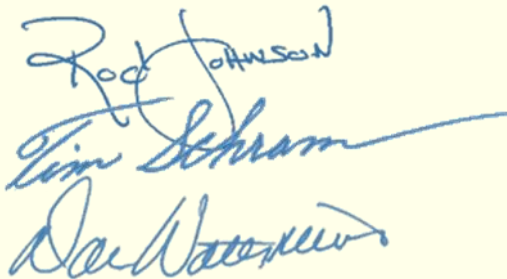
### O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Application No. B-1975 be, and is hereby, denied.

ENTERED AND MADE EFFECTIVE at Lincoln, Nebraska, this 30<sup>th</sup> day of June, 2020.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:



Chair

ATTEST:



Executive Director

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<sup>140</sup> *Id.* at 66:22 - 66:25 and 67:16 - 68:1.

<sup>141</sup> Exhibit 14.

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Dissenting and Concurring in Part:

The Commission in the majority opinion concludes: "The application form, entered into the record as an exhibit, showed that Applicant has the means to start his business, but little evidence was presented to show how Applicant would meet the financial costs associated with operating his business. The Commission has previously stated that a reference to the financial information contained on the application, without more, is not in and of itself sufficient to satisfy the statutory burden."

I find this to be a dubious assertion. The Commission has a duty to be clear with applicants about what information they need to provide to establish financial fitness. There has been inconsistency between dockets on what meets the definition of financial fitness. While it is true that each application needs to be evaluate individually, it is unreasonable to expect applicants to be able to divine what needs to be included beyond what is asked for in the application. If the Commission wants insurance quotes or additional information in order to evaluate financial fitness, we must ask the applicant for the information before or at the hearing and criteria should be consistent from one docket to another. We should not deny an applicant because they didn't provide information, we did not require them to provide.

Also in the majority opinion: "Mr. Dood testified that he planned to operate with only two drivers who will each complete twenty (20) trips per day.<sup>134</sup> However, Applicant provided no evidence to support these projections. Mr. Dood's sole evidence of what will subsidize his business operations was his testimony regarding conversations with IntelliRide and Nebraska Family Collaborative. The Commission has concerns that the projected trip numbers are not realistic when taking into account the Commission's hours of service rules that limit drivers to driving no more than ten hours following eight consecutive hours off duty or any period after having been on duty fifteen hours following eight consecutive hours off duty.<sup>135</sup> Additionally, Mr. Dood testified to his lengthy experience as a driver for multiple transportation companies and management experience in other fields<sup>136</sup>, but did not connect this experience to the operation of a transportation company."

The applicant has extensive experience as a driver and that experience is sufficient for him to make projections about the

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number of rides he could realistically provide, and he explicitly stated he would follow all rules and regulations of the Commission. Further, given that the protestants acknowledged Mr. Dood's satisfactory performance while under their employ it would be unreasonable for the Commission to conclude he will not follow Commission rules related to hours of service and rest periods. There is no evidence that would lead the Commission to conclude he could not or would not follow Commission rules and regulations. Finally, Mr. Dood's experience as a long-term driver is relevant experience as he is already familiar with the rules and regulations for drivers and vehicles, substantially reducing any learning curve associated with starting a new business. The Commission has granted certificates to carriers who have similar experience or who have no relevant transportation experience so to deny Mr. Dood's application on the basis he is not an existing common carrier is inappropriate.

"The Commission has previously stated that a common carrier applicant seeking the additional HHS designation must prove that a present and future public need and necessity exist for the common carrier authority and the HHS designated transportation.<sup>139</sup> Applicant presented testimony of three witnesses who described times when they experienced significant delays or missed trips. However, testimony focused on experiences that are mainly the result of the provision of services by Intelliride, the transportation brokerage company contracted with HHS to schedule and dispatch transportation services for eligible clients. When asked specifically whether they were satisfied with the services offered by Protestants, the witnesses testified that they were generally satisfied with the services currently being offered."

The testimony of the witnesses to significant delays and missed trips is enough to demonstrate need and necessity. The applicant has a duty to prove that there is need and necessity, witnesses testified there was need. The reason for the need is not a matter for this Commission to consider when granting or denying an application. Who is to blame for the inadequate service is not the question of this proceeding, this docket is charged with determining if there are unmet needs and the testimony affirmatively demonstrates that there is an unmet need regardless of who is to blame for that need.

That being said, the applicant was asked to provide additional information and evidence related to the number of times the protestants were declining or cancelling trips and did

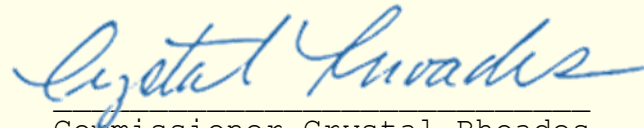
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not do so. That information was needed to determine whether or not granting Mr. Dood's application would "endanger or impair operation of existing carriers." However, since Mr. Dood did not provide that information to the Commission as requested, I concur with the majority that the applicant should be denied.



Commissioner Crystal Rhoades