

SECRETARY'S RECORD, PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska) Docket No. MR-1025/PI-238
Public Service Commission, on)
its own motion, seeking to)
investigate the use of) ORDER ISSUING FINDINGS AND
differential rates and charges) COMPLIANCE DEADLINE
by motor carriers providing)
intrastate passenger)
transportation services.) Entered: September 14, 2021

BY THE COMMISSION:

On June 29, 2021, the Nebraska Public Service Commission ("Commission"), on its own motion, opened the above-captioned docket to investigate the use of certain differential rates and charges by motor carriers providing for-hire intrastate passenger transportation in the state of Nebraska and scheduled the matter for public hearing. Notice of the hearing was published in The Daily Record, Omaha, Nebraska, on July 16, 2021.

Hearing on this matter was held on July 27, 2021, in the Commission Hearing Room and via WebEx. Mr. Dillon Keiffer-Johnson and Ms. Jamie Reyes appeared on behalf of Commission Staff. No other appearances were made.

E V I D E N C E

Ms. Reyes, Director of the Motor Transportation Department, made a statement on behalf of Commission staff. Ms. Reyes stated that the purpose of this docket was to discuss the use of differential rates by certificated carriers. She stated the department conducted a review of the published rates for passenger carriers and based on that review, along with past Commission precedent, the department felt it was necessary to update the Commission's position on the use of differential rates.¹

Ms. Reyes noted that the Commission operates under several statutes that relate to the establishment and amendment of published rates for passenger carriers. She explained that all common and contract passenger carriers must have their rates approved by the Commission prior to utilizing those rates in their service.² In later testimony, Ms. Reyes explained that contract carriers differ from common carriers in that the Commission sets a bar for their rates and they are permitted to negotiate a rate

¹ *Hrg. Transcr.* 8:20 - 9:6 (July 27, 2021).

² *Id.* at 9:12 - 9:22.

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within that bar. Whereas common carriers must adhere to their published rates.³ Ms. Reyes stated that she uses Neb. Rev. Stat. § 75-126 as a guide when reviewing applications to establish or amend rates for both common and contract carriers. She explained that this statute provides specific enumerated circumstances under which a carrier is permitted to charge, demand, collect or receive greater or lesser compensation for services rendered.⁴

Ms. Reyes then discussed Docket No. BR-332. She explained that in that case, the League of Human Dignity reviewed passenger carrier rates and noticed that several carriers were providing services for wheelchair passengers at a higher rate than for their ambulatory passengers. The League of Human Dignity alleged these were differential rates, meaning these carriers had a rate structure in which a charge for one group of customers had a different, higher rate, than another group of customers, creating a discriminatory effect.⁵ Ms. Reyes explained that during the time Docket No. BR-332 was before the Commission, the Nebraska Department of Health and Human Services ("NDHHS") was the payor for certain transportation services that passenger carriers provided. A carrier operating with HHS Designation and providing non-emergency medical transportation ("NEMT") pursuant to an agreement with NDHHS would be paid by NDHHS.⁶ Ms. Reyes stated the Commission looked at both the rates charged for NDHHS transportation and the rates charged to the general public and found that the differential rates charged for general public transportation should be eliminated. However, the Commission further found that because NDHHS is a governmental subdivision, NDHHS transportation is different than transportation provided to the general public and the rates charged in conjunction with NDHHS transportation could be negotiated and charged at a lesser amount than at the carrier's published rate.⁷

Ms. Reyes testified that in 2019 changes were made to the provision of transportation services through NDHHS. She explained that NEMT services were transitioned from a direct line from NDHHS to Managed Care Organizations ("MCO"). Under the new scheme, the MCOs would receive funding from NDHHS for the provision of their contracted Medicaid-eligible services; an aspect of which is transportation services. Ms. Reyes explained that under this new regime, an MCO contracts with a broker, and the broker is then

³ *Id.* at 11:4 - 11:9.

⁴ *Id.* at 9:23 - 11:3.

⁵ *Id.* at 11:10 - 12:2.

⁶ *Id.* at 12:3 - 12:15.

⁷ *Id.* at 12:16 - 13:15.

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tasked with working with transportation carriers to provide non-emergency medical transportation services.⁸ Ms. Reyes testified that in response to this change, the department sent a letter in June 2019 to all passenger carriers stating that MCOs would not be considered governmental subdivisions and thus the carriers would have to provide their NDHHS and NEMT transport based on their published rates approved by the Commission.⁹ Ms. Reyes clarified that this change did not affect contract carriers as they always have the ability to negotiate rates nor did this change affect any portions of NDHHS transportation that is not part of the Medicaid and long-term care program.¹⁰ She provided the example of Children and Family Services, which are still reimbursed directly from NDHHS and would still follow the finding from the BR-332 Order.¹¹

Ms. Reyes explained that the department conducted a review of the rate sheets for each current certificated carrier. Referring to Exhibit 5, Ms. Reyes noted that 42 carriers were found to have some form of a differential rate. Of those 42 carriers, 8 were Taxi carriers, 27 Open Class, 2 Bus, and 5 Limousine. She noted that the 8 Taxi carriers and 20 of the 27 Open Class carriers had HHS designation.¹² Ms. Reyes testified that of the various differential rates, wheelchair rates were by far the most prominent. Other differential rates uncovered in the department's review were for stretcher vehicles, senior citizen rates, military/veteran rates, friends/family rates, and corporate rates. Ms. Reyes explained that one carrier had a school rate in its published rates, but that rate may not be an issue because if the rate applies to a public school, the rate may qualify under an exemption under Neb. Rev. Stat. § 75-126.¹³

Ms. Reyes noted that the carriers who have wheelchair rates coincide with the carriers who have HHS Designation. She hypothesized that these carrier rates were set prior to the 2019 change based on the last time some of these carriers have applied for a rate adjustment. She explained that prior to the change in 2019, the carriers would have needed to have published rates in place to negotiate a rate with NDHHS.¹⁴

⁸ *Id.* at 14:1 - 14:19.

⁹ *Id.* at 14:19 - 15:5.

¹⁰ *Id.* at 15:6 - 15:13.

¹¹ *Id.* at 15:19 - 16:2.

¹² *Id.* at 16:3 - 16:22.

¹³ *Id.* at 16:23 - 17:10.

¹⁴ *Id.* at 17:11 - 17:25.

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Ms. Reyes explained that with the changes to NDHHS transportation, it is necessary for the Commission to take a harder look at the rates being approved for carriers to ensure there is no discriminatory effects on specific groups of people.¹⁵ Ms. Reyes noted that in BR-332, the Commission recognized the added expenses associated wheelchair-accessible vehicles. She expressed sympathy for the carriers that experience these added costs, but that sympathy does not trump ensuring an equitable policy. She suggested carriers be mindful of these added expenses when proposing their rates so that their customers are all paying the same rate for their transportation.¹⁶

Ms. Reyes recommended that the Commission reenter the finding from BR-332 to state that differential rates of any kind are not allowed under § 75-126 and should be eliminated from the published rates of certificated carriers.¹⁷ She further stated that the department would work with carriers who have direct reimbursement contracts with NDHHS on a case-by-case basis to discuss the particular services they provide.¹⁸ Ms. Reyes further recommended that carriers be given thirty (30) days to amend their current published rates. She also endorsed waiving the associated application fee and treating all such applications on an emergency basis to ensure there are no breaks in service.¹⁹

In response to Commissioner questions, Ms. Reyes noted that anything eligible for non-emergency medical transportation should be funneled through the brokerage system only to ensure it is processed correctly. She further explained that while there are statutes that specifically address non-emergency medical transportation, there also are provisions that address certain transportation services outside of non-emergency medical transportation and how those rates are calculated.²⁰ Ms. Reyes also clarified that only differential rates for employees are allowed under § 75-126.²¹ Ms. Reyes stated that she believes there are close to 200 certificated carriers.²² In response to specific questions regarding the applicability of the America's with Disabilities Act ("ADA"), Ms. Reyes advised that in BR-332 the Commission discussed its reliance on the ADA and that even without

¹⁵ *Id.* at 18:1 - 18:7.

¹⁶ *Id.* at 18:18 - 19:6.

¹⁷ *Id.* at 19:7 - 19:12.

¹⁸ *Id.* at 19:13 - 19:22.

¹⁹ *Id.* at 19:23 - 20:11.

²⁰ *Id.* at 20:19 - 22:7.

²¹ *Id.* at 22:8 - 22:13.

²² *Id.* at 23:12 - 23:21.

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binding orders on the Commission, it is still good policy to keep in mind when discussing differential rates.²³ She indicated that to her knowledge, all the federal rules cited in BR-332 remain the same at this point in time.²⁴

Exhibits one through four were entered into evidence. The hearing was closed with no party providing public comment.

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

The Commission opened this docket, on its own motion, to examine differential and discounted rates charged and collected by certificated carriers. Evidence and testimony were presented to update the Commission on the status of such rates since the issuance of its January 19, 2011 Order.²⁵

Neb. Rev. Stat. § 75-126 states that a common carrier shall not charge, demand, collect, or receive more or less compensation for any services rendered than what it charges, demands, collects, or receives from anyone for rendering the same services. The statute allows carriers to perform services for free or at a reduced rate for the following groups:

- (a) The United States, the State of Nebraska, or any governmental subdivision;
- (b) The employees, both present and retired, of the common carrier;
- (c) Any person when the object is to provide disaster relief;
- (d) Any person who transports property for charitable purposes;
- (e) Ministers and others giving their entire time to religious or charitable work;
- (f) Any person who is legally blind or visually handicapped.

In its January 19, 2011 Order, the Commission ordered differential rates eliminated from certificated carriers' published rates to the extent that those rates were in violation of § 75-126. Published rates used for HHS transportation were not deemed to be in violation of the statute, as HHS would be

²³ *Id.* at 24:10 - 25:13.

²⁴ *Id.* at 25:16 - 25:21.

²⁵ See Hrg. Ex. 3, Application No. BR-332 *In the Matter of the League of Human Dignity, Petitioner, vs. R & F Hobbies, Inc., d/b/a Prince of the Road, Midlands Services Link, A-1 Transportation, LLC, d/b/a A-1 Special Services, Hope Transportation, Inc., Prime Consultants, Inc., d/b/a Goodwill Medical Transportation, Respondents*, Order (Entered January 19, 2011).

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considered part of the statutory allowance for the State of Nebraska. Such rates continued as part of the allowance so long as the carrier received payment for its services directly from HHS through the transportation broker. However, HHS now contracts with Managed Care Organizations (MCOs) to provide multiple services for its clientele, including non-emergency medical transportation. The MCOs utilize funds received as part of this contract to pay for the carriers' services through the transportation brokers.

The MCO is a private organization and not a government agency or subdivision. The statutory allowance for transportation services directly funded by NDHHS does not apply to transportation services funded by private organizations. Since payments for NEMT services are no longer received directly from NDHHS, the ability to charge differing rates is no longer an option for certificated carriers and must be discontinued instantaneously. Those transportation services still funded directly by NDHHS may still be provided at a discounted rate as allowable under § 75-126.

Evidence presented at the hearing also showed carriers charging various discounted rates for different groups of passengers, such as senior citizens, military, and family/friends. Some of these discounts have been charged by carriers for some time. Section 75-126(2) very clearly states the circumstances under which a carrier may provide transportation services for free or for a reduced rate. Any carrier rendering services for free or for a reduced rate for any group of passengers not listed in § 75-126(2) must discontinue the practice or be in violation of the statute.

Based on the above, the Commission finds that differential and discounted rates not enumerated under Neb. Rev. Stat. § 75-126 must be eliminated from the published rates of certificated carriers. All certificated carriers who are charging a differential or discounted rate must file an application to amend their published rates no later than **Thursday, October 14, 2021**. The normal rate application fee will be waived for those companies that file their rate application by the specified deadline. Applications will also be considered on an emergency basis to facilitate carriers' ability to utilize the new rates right away.

Any certificated carrier that fails to file a rate application in accordance with this Order by **October 14, 2021** will be deemed to be charging an unauthorized rate and may be subject to adverse Commission action.

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O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that differential and discounted rates be eliminated from the published rates of certificated carriers to the extent that such rates are in violation of Neb. Rev. Stat. § 75-126 and other applicable statutes.

IT IS FURTHER ORDERED that all certificated carriers who have such differential rates shall apply to the Commission by **October 14, 2021** for a rate change to comply with this Order. The application fee for such applications will be waived.

ENTERED AND MADE EFFECTIVE at Lincoln, Nebraska, this 14th day of September, 2021.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Rock Johnson
Crystal Brander
Mary Kidden
Tim Schram

Don Wooten
Chair

ATTEST:

Sharice Knutson
Deputy Director