

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application) Application No. B-1441
of R & F Hobbies, Inc., d/b/a) Supplement 2
Prince of the Road, Ravenna,)
seeking to extend its authority)
as a common carrier of)
passengers in Nebraska)
intrastate commerce in open) GRANTED AS MODIFIED
class service including clients)
of the Nebraska Department of)
Health and Human Services or)
subcontractors thereof between)
points in Nebraska over)
irregular routes.) Entered: November 26, 2002

APPEARANCES:

For the Applicant:

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For the Protestant A-1
Ambassador:

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For the Commission Staff:

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For the Protestant Servant
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Yellow Cab Company and
Capital Cab Company:

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BY THE COMMISSION:

B A C K G R O U N D

By application filed May 3, 2001 R & F Hobbies, d/b/a Prince of the Road (Prince of the Road), of Ravenna, Nebraska seeks to extend its authority as a common carrier of passengers in Nebraska intrastate commerce in open class service including clients of the Nebraska Department of Health and Human Services or subcontractors thereof between points in Nebraska over irregular routes. Notice of the application was published in The Daily Record, Omaha, Nebraska, on May 11, 2001. Protests to the application were filed by Brown's Crew Car of Wyoming d/b/a Armadillo Express on May 22, 2001; Yellow Cab & Limo, Inc., on

May 24, 2001, A-1 Ambassador Limousine on May 25, 2001; and by Husker Cabs, Inc. (n/k/a Servant Cab) on May 26, 2001. On January 17, 2002, a restrictive amendment was filed by the applicant. On January 18, 2002, Brown's Crew Car of Wyoming, Inc., d/b/a Armadillo Express withdrew its protest. On June 11, 2002, applicant filed a second restrictive amendment to its application which read as follows: "RESTRICTION: The transportation of passengers, except for disabled individuals point to point within the city of Lincoln is not authorized."

On June 6, 2002, applicant filed two motions objecting to A-1's and Servant Cab's protests. The Hearing Officer overruled those motions. On June 10, 2002 A-1 filed a motion to dismiss the application. That motion was also overruled.

A hearing on the application was held via video conference on June 12, 2002 and June 13, 2002 with appearances as listed above.

PRELIMINARY MATTERS

Mr. Boehm renewed his motion objecting to the standing and the propriety of the protests filed by both A-1 and Servant Cab. Those motions were again overruled. Mr. Shultz on behalf of Servant Cab again moved to substitute Servant Cab as the protestant in this proceeding. Mr. Boehm objected to Servant Cab's motion. The Commission reserved ruling on the motion but permitted Servant Cab's testimony. A-1 Ambassador renewed its motion to dismiss the application.

Upon review of the motions and objections the Commission stands by its initial rulings and makes the following findings. The Commission finds that A-1 had standing to protest the application of Prince of the Road. Although the Commission had previously determined by interim policy and by rule making that a carrier holding only limousine authority was restricted to traditional limousine service and could not transport HHS clients, the interim policy and the rule making were both on appeal at the time the protest was filed by A-1. At the time A-1's protest was filed the Commission's interim policy and rule were stayed pursuant to Neb. Rev. Stat. § 75-134 (2000 Supplement) pending the Nebraska Supreme Court's ruling on appeal. At the time of the hearing, the interim policy and rule were still held in abeyance pending A-1's motion for reconsideration of the Nebraska Supreme Court's ruling. Therefore, the Commission finds that A-1 had a continuing interest in this proceeding and that its protest meets the requirement in Neb. Admin. R. & Regs., title 291, ch. 1, section 1.014.01.

The Commission further overrules the objection voiced by Applicant during the course of the hearing with respect to the sufficiency of the A-1 protest. Applicant objected to the participation of A-1 on the grounds that A-1 cited certificate number B-1469 in its protest. A-1 does not have a contract with HHS under number B-1469, rather A-1 Ambassador Limousine, Inc. d/b/a Haymarket Limousine, under certificate number B-1470, which is under the same ownership, has the contract with HHS. Certificate B-1470 is under the control of the Protestant A-1. In the past, the Commission has deemed protests which make no reference whatsoever to the protestant's certificate number to be sufficient. If A-1 would have left its certificate number off of the protest entirely, Applicant and the Commission would still have been able to identify A-1's averred interest in this proceeding. Neither Commission rule 5.07 nor 014.01 require protestants to include their own certificate numbers on the face of their protest. Rather, with regard to the protestant's identity, our rules simply require that a protest contain the name and address of the protestant. We find that A-1's protest was sufficient and placed Applicant and the Commission on notice of A-1's identity and interest in the proceeding. We further find that Applicant was not prejudiced by virtue of A-1's error.

Applicant also renewed its motion to restrict the participation of Servant Cab. Servant was formed as a limited liability company on February 18, 2002. On March 18, 2002, Servant Cab purchased the authority of Husker Cabs, Inc., which had filed a timely protest. The protest period in this matter expired on June 10, 2002.

Prior to the hearing, Applicant treated Servant Cab as a proper protestant by negotiating with it regarding potential restrictive amendments and by serving interrogatories on Servant Cab to which Servant Cab responded. Servant Cab's counsel, identifying himself as a protestant obtained a continuance of the hearing. Applicant, for at least two months prior to the hearing, treated Servant Cab as a proper protestant. Servant Cab filed a motion to substitute it as a protesting party in the shoes of Husker Cab, Inc. There is no question as to the interest held by Husker Cab, Inc. or Servant Cab as the application directly conflicts with authority held by Husker Cab, Inc., which was transferred to Servant Cab.

The Commission finds that in all fairness, it should permit the substitution of Servant Cab in the place of Husker Cab, Inc. The Commission has, on past occasions, permitted one party protestant to substitute for another so long as the substituting party bears some relation to the original protesting party and

where the substituting party possesses an interest in the proceeding. The Commission finds *In re Application of Morris Transfer, Inc., of Norfolk*, 198 Neb. 491, 253 N.W. 2d 313 (1977) inapplicable to this particular case. Moreover, we find Applicant has waived any objection it may have had by engaging in discovery and negotiating with Servant Cab as a protestant and in all other respects treating Servant Cab as a protestant. Accordingly, the Commission grants Servant Cab's motion for substitution and overrules Applicant's objections.

We likewise overrule the motion to dismiss filed and renewed at the hearing by A-1. A-1 filed the motion to dismiss because it was not served the interrogatories Applicant propounded to Servant Cab. While we recognize this is a violation of the Nebraska Supreme Court's and our own discovery rules, we do not think that the appropriate remedy in this situation is dismissal of the application. We find that A-1 was not unduly prejudiced by Applicant's failure in this particular case.

Finally, the Commission concludes that it was proper to exclude the testimony of Vicky Harding. Ms. Harding testified that she was the president of Transport Plus which transports persons 60 years of age, the visually impaired, disabled persons and children. Ms. Harding was called by A-1. The purpose of Ms. Harding's testimony appeared to be to rebut the testimony of Ms. Riekenberg and Ms. Reed relative to need and necessity. The Commission excluded the testimony of Ms. Harding based on the decision *In re Application of Abbott Transport*, Case No. A-99-1366 (Feb. 27, 2001). Ms. Harding should have filed a protest to the application. Then she would have been permitted to testify against the application. However, permitting an officer or agent of a competing carrier to testify against Applicant on need and necessity would circumvent the Commission's rules and regulations with respect to the filing of protests. Neb. Admin. R. & Regs., title 291, ch. 1, section 014.01 provides that "failure to timely file a protest shall be construed as a waiver of opposition and participation in the proceeding." The Commission finds that permitting Ms. Harding to testify about whether there was a need for an additional carrier in Lincoln would have had the effect of circumventing the Commission's rules regarding protests.

E V I D E N C E

Applicant's Evidence:

Applicant offered the Commission's Rules of Procedure as Exhibit 4 and the Commission's Motor Carrier Rules and

Regulations as Exhibit 5. These exhibits were received into the record.

Applicant then called ten witnesses in support of its application. These witnesses testified as follows:

Ms. Cindy Riekenberg, Transportation and Independent Living Specialist for the League of Human Dignity, testified that their agency assists people in making requests for transportation services to transportation providers. The League of Human Dignity refers whatever resources may be available. Some transportation resources they refer include Star Tran services, Madonna's services, Transport Plus, Prince of the Road, and taxicab companies. She primarily works in Lincoln.

Ms. Riekenberg testified, however, that the staff members actually coordinate transportation services for individuals. She did not supervise the staff members that coordinate transportation.

The League of Human Dignity receives a number of calls from individuals in Lincoln needing transportation services and particularly for wheelchair accessible transportation to medical specialists in Omaha. Upon further questioning, Ms. Riekenberg testified that the agency also has occasions where the individuals need transportation services within the city of Lincoln. Wheelchair accessibility is the greatest need in her observation.

She testified that they have encountered problems finding transportation services. Ms. Riekenberg recalled a situation where a woman that Prince of the Road brought from Fairbury to Lincoln was unable to find transportation back to Fairbury. Prince of the Road could not provide that transportation because it was outside the scope of its authority. This woman borrowed a van to take her back to Fairbury. She could not recall any other specific incident where transportation services were unavailable. Ms. Riekenberg summed up her testimony by stating that from her observations she would say that there is a shortage of transportation available to transport people from Lincoln to other locations in the state as well as to transport disabled individuals within the city of Lincoln.

Upon cross-examination, Ms. Riekenberg testified that she did not actually select the carriers for the people she served. She did not call the transportation providers for service. Much of the information she has regarding the availability of service is secondhand information told to her by someone else. Ms. Riekenberg further admitted that her agency does not pay for the

transportation services. With respect to the incident where the woman was transported from Fairbury to Lincoln and then had to make alternative arrangements, Ms. Riekenberg did not personally contact any transportation providers. She did not have any first-hand knowledge of that circumstance. The Medicaid service coordinator relayed that information to the witness.

Upon further questioning, Ms. Riekenberg stated that she had not referred anyone to A-1. She was not aware of whether the Medicaid staff had either. She admitted that she could not correctly say that the needs are not being met by current providers because she did not know who the providers were that could meet her client's needs.

The applicant next called Mr. Bryan Allen, a protection and safety supervisor with the Nebraska Department of Health and Human Services (HHS) in Kearney. Mr. Allen testified that he arranges transportation for the clients of HHS. Prince of the Road performs about 80 percent of their transportation because they are close in proximity and they can handle the requests promptly.

Although Mr. Allen did not have any specific numbers, he testified that he has had some difficulty finding alternative transportation providers. He testified that the department, on occasion, had to utilize staff to transport the clients out of Lincoln. Mr. Allen gave one example of a case where he had difficulty in obtaining a commercial provider to transport someone from Lincoln to another location. On that occasion, Mr. Allen stated he used Bryan LGH which was a good experience. He also thought of using law enforcement to assist him with the clients who have criminal propensities. Mr. Allen supported the application of Prince of the Road.

Upon cross-examination, Mr. Allen testified that of the 20 percent of traffic Prince of the Road does not handle, very little traffic originates in Lincoln. Mr. Allen also calls upon the services of Midwest Special Services and A-1. Mr. Allen stated that roughly ten percent of his clientele require transportation services out of Lincoln. Mr. Allen admitted that Prince of the Road declined to transport passengers from Kearney to Lincoln. Mr. Allen testified that he has never contacted Midwest Special Services to transport passengers from Lincoln to other points in the state. He has never contacted the Lincoln cab companies for transportation services out of Lincoln to another point in the state. He stated that the reason he failed to contact them is his lack of knowledge about them. He never investigated the availability of other carriers. Mr. Allen was

unaware of whether A-1 or Haymarket Limousine could provide transportation services originating in Lincoln.

Mr. Allen testified that two years ago, he tried to contact A-1 but A-1 did not answer its phone. He has not tried to contact A-1 since that time.

Under redirect, Mr. Allen testified that he did not know whether Servant Cab had the authority to transport people out from Lincoln to Kearney or other places outside the city of Lincoln. Under further questioning, Mr. Allen testified that he was aware that Prince of the Road was able to transport passengers from places outside Lincoln to Lincoln. Mr. Allen reversed his earlier statement and stated that Prince of the Road has not declined to take passengers to Lincoln.

Ms. Kathy Nicholson, a protection and safety worker for the HHS office in Falls City, testified next. From time to time she arranges transportation services for her clients. She utilizes the transportation services of Applicant. She testified that Prince of the Road has been very good about responding quickly. She testified that she has never had a situation where she needed to transport somebody from Lincoln where she could not get a provider. However, she testified that, on occasion, it takes a long time. She has resorted to transporting some of her clients herself. She has used Midwest Special Services and A-1 in the past. She testified that these carriers are pretty good if she calls them between the hours of 8:00 a.m. and 5:00 p.m. She testified that based on her observations, there is a need for an additional transportation provider that can transport people out of the city of Lincoln.

Upon cross-examination, Ms. Nicholson testified that after 5:00 p.m. she gets answering machines or pagers and they do not contact her back quickly enough. She testified that what she was actually talking about was convenience. She stated that convenience and need were one in the same to her. She further stated that there was a need for another ten transportation providers. She did not know whether the Lincoln cab companies could transport clients for HHS and that she did not know that the Lincoln cab company had a contract with HHS.

Ms. Nicholson admitted that for the specific example she gave on direct examination that nothing would have precluded her from using one carrier and that would have been more convenient. She stated that A-1 did not answer its pager or check its machine periodically through the night. Then she was told on a couple of occasions that it would take three to four hours before someone came to pick up the ward. She clarified that

would not be situations where she needed to transport someone from Lincoln to somewhere else. Her example pertained to a pick-up in Falls City to somewhere else. The time frame for pick-up with Prince of the Road was shorter. She testified that on a couple of occasions Prince of the Road did not respond to her phone call either. It was on those occasions that she ended up driving the ward herself.

Ms. Kelli Mitchell, a child protection and safety worker for HHS in Omaha, was called as Applicant's next witness. Ms. Mitchell testified that part of her duties involved arranging for transportation for her clients. She has arranged for transportation for some of her clients from Lincoln to other locations in Nebraska. She worked in the Lincoln local office for ten and one half years prior to moving to Omaha. She has been with the Omaha office for approximately 15 months. She has encountered a situation where she has had difficulty arranging transportation for her wards from Lincoln to other locations. She gave the example of when she needed a consistent plan of visitation where the ward would be transported from Lincoln to Omaha and then returned. She had difficulty arranging this transportation because the service provider she had chosen, Prince of the Road, could not pick up in Lincoln. She contacted other service providers trying to arrange this and was not able to get a guarantee of picking the child up and bringing it to Omaha or a guarantee on the return trip. Therefore, she had the ward transported to the county line and Prince of the Road picked up the ward and completed the transportation. That was the only client she has had originating out of Lincoln in the last 15 months.

Ms. Mitchell testified that she did not contact Midwest Special Services. She did not contact the Lincoln cab company either. She did not contact the cab company because in her estimation, the cost would have been prohibitive. She stated that the Lincoln cab company was also reputed to be late. She last used the Lincoln cab company sometime in 2000. Ms. Mitchell testified that she did not contact A-1 or Haymarket. Other than Visinet she did not try to use any other certificated service providers. Ms. Mitchell stated that she wanted a choice in service providers.

Ms. Geri Rutledge was sworn in as the applicant's next witness. Ms. Rutledge, a protection and safety worker for HHS, works in the York office. She makes transportation arrangements for her clients when needed. She testified that she has experienced difficulty with arranging transportation for her clients from Lincoln to locations elsewhere in the state. One example she gave was moving a ward to a placement at South Sioux

City. She contacted Prince of the Road who could not perform the services because they cannot pick up in Lincoln. However, then she contacted Midwest Special Services and they transported the ward to South Sioux City.

On another occasion, she needed someone to pick up a child from Lincoln General. Prince of the Road could not and Midwest Special Services could not pick her up because she was at Lincoln General. She ended up transporting the child herself. On another occasion she had to transport an individual at 2:00 a.m. She could not get transportation from Applicant because the child was in Lincoln. She could not get a hold of Midwest or the cab company. She used law enforcement to take the child to a shelter.

Ms. Rutledge testified that she had to use someone other than a regular carrier for the last three moves out of Lincoln. Occasionally, Ms. Rutledge stated, she needs to transport someone point to point in Lincoln, but not very often. Most of her cases are rural.

Upon cross-examination, Ms. Rutledge testified that she was directed by her supervisor not to use the cab company for trips out of Lincoln. Therefore, she has no discretion in using Husker Cab in certain circumstances. There may be other available authorized carriers she has been directed not to use for some of these movements.

On certain occasions she did not receive a callback from Midwest Special Services or the cab company. She testified that she got a machine and a pager and she left messages but she was never called back. Ms. Rutledge further testified that she did not know that she could use A-1 for transportation services. She was instructed to use Prince of the Road and Midwest Special Services first.

Ms. Teresa Reicks, rural dispatcher for Prince of the Road testified next. Ms. Reicks testified that she receives phone calls and faxes from caseworkers to arrange transportation services. She testified that she receives requests for transportation out of Lincoln at least once a week. She testified that she does not receive requests for point-to-point transportation in Lincoln as often. Ms. Reicks further testified that she has kept records of requests for transportation originating from Lincoln and point-to-point in Lincoln. Exhibit 6 was identified as a list of transportation requests she started compiling. Exhibit 7 was identified as a list of transportation requests she started compiling in February. Exhibits 8, 9, 10, 12, 13, and 14 were identified as

requests for transportation services received by Prince of the Road which they could not fulfill because of the geographic limitations on its authority. Exhibit 11 was identified as a discontinuance notice from HHS for a client that moved into Lancaster County.

Based upon what she has heard as a dispatcher for Prince of the Road, she believes that there is an ongoing and current demand for transportation services originating in the city of Lincoln. She also believes that there is a demand for wheelchair accessible transportation within the city of Lincoln.

Upon cross-examination Ms. Reicks testified that she did not know the date that Exhibit 8 was faxed to her office. Exhibit 9 was sent to Applicant on October 24, 2001. She did not know the date of the request of Exhibit 10. She did not know the date of request of Exhibit 12, however, the date of the appointment was October 30, 2001. She could not tell when Exhibit 13 was sent to Prince of the Road. She cannot tell by Exhibit 14 when that request was sent to Prince of the Road.

Upon further examination, Ms. Reicks testified with respect to Exhibit 6 and 7 that she did not record every request for transportation services. She admitted that one could not determine how many requests were for point-to-point transportation in Lincoln. She did not know if any of the point-to-point requests in Lincoln were for wheelchair bound passengers. Ms. Reicks testified that she did not refer any business out to other carriers when Prince of the Road could not provide transportation service. Ms. Reicks did not know whether the passengers identified in Exhibits 6-14 found alternative transportation providers.

Ms. Kierstin Reed was called to testify next for the applicant. Ms. Reed testified that she was an individual and family support services coordinator for the Association for Retarded Citizens (ARC). Ms. Reed testified that part of her job duties entail referring people to transportation providers in the area. They do not arrange the transportation for them. Some of the transportation requests are for point-to-point transportation services in Lincoln. Most of the requests she receives are for wheelchair accessible transportation services. She has encountered some problems in assisting people meet their transportation needs. She testified that there were a number of instances where they wanted to use Prince of the Road but were unable to do so. Ms. Reed testified that there were seven major service providers of vocational and residential services which may include transportation in the Lincoln area, but some may not be willing to take a long trip using their local provider. Ms.

Reed testified that in her opinion, ARC could always use more transportation options.

Ms. Reed testified that she knew Transport Plus and Midwest Special Services could provide transportation services in addition to the public transportation services. Ms. Reed testified that she has never referred any individual to A-1.

Ms. Diana Williams testified next on behalf of Prince of the Road. Ms. Williams is a dispatcher for Prince of the Road. She receives requests from caseworkers and other individuals for transportation services. She has received requests for services originating in Lincoln about three times a month. She started making records of these requests the prior month. Exhibits 15 and 16 were identified as the witness' lists of transportation requests originating in Lincoln. Exhibits 15 and 16 represented three requests for transportation.

Upon cross-examination, Ms. Williams testified that she did not have any personal knowledge as to whether the transportation needs of the individuals identified in Exhibits 15 and 16 were actually met. Ms. Williams testified that the applicant has four dispatchers that work from 8:00 to 5:00 and then the other three take turns taking the pager home.

Mr. Sean Schroll, Chief Operating Officer for the applicant testified next. Mr. Schroll testified that he oversees accounting, dispatch, and marketing. Prince of the Road has approximately 70 vehicles located throughout the state. Most vehicles are leased to the company from the drivers who operate as independent contractors for applicant. Applicant has roughly 20 vehicles within a 50-mile radius of Lincoln. If applicant received the requested authority, it would most likely hire more drivers to fulfill the need. Applicant has five handicapped accessible vehicles in its fleet. The application, Mr. Schroll says, was filed in response to the continuing demand for services out of Lincoln and within Lincoln.

Exhibit 18 listed the restriction offered by Prince of the Road for point-to-point transportation service in Lincoln. A granting of the application would authorize an expansion of the fleet to utilize sedans and sport utility vehicles in addition to the vans now authorized.

Applicant operates 24 hours a day, seven days per week. The dispatchers take turns with the pager beyond the normal office hours of 8:00 a.m. to 5:00 p.m. Applicant provides transportation services mainly to HHS, the League of Human Dignity, the Area Office on Aging, Curtis & Associates, Options

and other governmental agencies. Applicant also will provide transportation services to private individuals. Applicant trains its drivers to handle the restrained passengers, and intends to become more familiar with transportation needs of disabled passengers. Five handicapped equipped vans are currently used in Applicant's business. The majority of applicant's trips involve the transportation of a single individual. Mr. Schroll testified that the transportation could be provided more efficiently with sedans. He stated that fuel costs and insurance would be lower for sedan transportation than they are for vans. Applicant offered Exhibit 31 which is a fuel economy comparison prepared by the Department of Energy in 2001 and a similar report was introduced covering 2002 as Exhibit 32. Exhibit 33 provided information on fuel efficiency standards for vehicle manufacturers. If Applicant were allowed to use sedans, it would continue to operate its vans which are presently in service. Any additional traffic would be handled with sedans.

Mr. Schroll further testified in response to a complaint filed with the Commission shortly before the hearing. The complaint alleged that Applicant was providing service in Lincoln which was outside the scope of its authority. Mr. Schroll testified that there was no violation because it involved one of the Applicant's drivers using the vehicle to drop off his daughter and that the trip was not on a for-hire basis.

Upon questioning Mr. Schroll testified that he was unable to distinguish the type of service which Applicant proposed from traditional taxi service as defined by the Commission. He testified that drivers have been terminated by Applicant in the past for smoking in a vehicle. He further testified that he believed that it was in the public interest to arrange transportation where a ward was taken to the Lancaster County line and picked up by the Applicant to take the ward to his or her final destination. Mr. Schroll could not recall an incident involving a wheelchair passenger who allegedly was tipped over while in transit.

Gerald Stover, a driver of Applicant, testified that he owns three vans which he leases to Applicant. On May 31, 2002, a complaint was filed regarding a white 1993 Plymouth van, one of the three vans he owns. He stated he was operating his vehicle in Lincoln on May 31, 2002, when he transported a for-hire passenger from Wilber to Lincoln and then took the passenger to a second medical appointment and returned him to Wilber. He stopped at 14th Street and Arapahoe and filled his vehicle with gasoline. On May 30, 2002, he used his van to

transport his daughter from Madonna to her home and then to the doctor's office.

Protestant's Evidence:

Mr. Dennis Wagner, Vice President of A-1 Ambassador Limousine, Inc., testified as follows: A-1 has several entities which hold PSC authority including Ambassador Limousine, Haymarket Limousine and Lincoln Limousine. Lincoln Limousine is owned by a separate corporation, J.L.R.D., Inc., of which he is the secretary. J.L.R.D., Inc. dispatches vehicles from Beatrice. A-1 also has dispatchers located in Lincoln and McCook. He filed a complaint with the Commission regarding an alleged unauthorized movement in Lincoln with a Prince vehicle which was introduced as Exhibit 36. He testified there are at least five entities that are authorized to transport passengers from Lincoln to various points in Nebraska. Transport Plus and Midwest Special Services both have wheelchair accessible vans. His company has recently brought a lift van to Lincoln which is not yet operational. His company rarely receives requests for handicap accessible vans. He does not believe that there is a need for an additional service and that there are adequate carriers now, all of whom would be injured by the entry of an additional carrier. Without a definition of disability, the Applicant's proposed service point-to-point in Lincoln goes far beyond the transportation of wheelchair bound passengers.

Mr. Wagner testified that he also received some of the same requests for transportation as identified by Applicant. A-1 can guarantee a specifically timed pick-up and delivery such as that described by Ms. Mitchell. Mr. Wagner testified that it was dangerous to drop a child off at a point outside the county line to be picked up by another carrier such as the movements described by Applicant's witnesses in support. He is concerned that Applicant is trying to circumvent the Commission's rules and authority. Those witnesses, he stated could have contacted A-1, Midwest Special Services, Transport Plus or Servant Cab to make the same movements described. He would expect HHS caseworkers to know with whom they had contracts.

With respect to the testimony given by Applicant's witnesses in support, Mr. Wagner testified that his company did not have an answering machine and has never had one so therefore Ms. Nicholson could not have left a message with A-1 as she described. All after-hour calls ring directly into his cell phone.

Ms. Donna Corey, part owner of Servant Cab and Vice President, testified as follows. On March 23, 2002, Servant Cab

began operations of cab authority which it acquired from Husker Cab. She was previously the office manager of Husker Cab. Exhibit 45, a copy of the protest filed by Husker Cab was accepted into the record. Exhibit 46, a copy of the current authority held by Servant Cab was also accepted into the record.

Since Servant Cab began operations, it has transported passengers point to point in Lincoln and to points outside Lancaster County. Exhibit 26 demonstrates movements more than 25 miles outside of Lincoln but does not include those within 25 miles of Lincoln.

Servant Cab's dispatchers are there 24 hours a day, seven days a week. It would have been impossible for Ms. Rutledge to have reached an answering machine because neither Servant Cab nor Husker Cab has had answering machine. The calls have always been answered by a person.

Ms. Corey further testified that Servant Cab intends to add a wheelchair accessible van within the next thirty days. Servant Cab intends to add more wheelchair accessible vans if the demand exists.

Servant Cab currently contracts with HHS. HHS traffic comprises a large part of their business. She also received Exhibit 16; therefore, she assumes that the request was made to a number of carriers. Ms. Corey testified that Servant Cab was not a profitable operation in 1999, 2000 or 2001. The HHS traffic is critical to the survival of Servant Cab's operations. A loss of the HHS traffic may reduce the number of vehicles which they can place on the street. Servant Cab routinely transports passengers outside the city of Lincoln for HHS. Contrary to Mr. Allen's testimony, Servant Cab has transported passengers for the Kearney district of HHS from Lincoln to Minden.

Mr. John Schmidt, the Director of Rates and Services in the Commission's Transportation Division testified that he received two complaints regarding Applicant within the last year. The investigation regarding the complaint filed by Dennis Wagner on May 31, 2002 had not been concluded. He received another complaint by e-mail from HHS.

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

In this particular case, Applicant is seeking to extend its authority so that it may provide transportation which originates in Lancaster County and so that it can provide point-to-point transportation for disabled persons in Lancaster County which

includes Lincoln. Applicant is currently restricted from providing intrastate for-hire transportation services which originate in Lancaster County and from providing point-to-point transportation services within Lancaster County. Applicant also sought approval to use sedans and sport-utility vehicles throughout its certificated area. Applicant is currently limited to the use of buses and vans.

Applications for common carrier authority are governed by Neb. Rev. Stat. § 75-311 (Reissue 1996), 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 is 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 shall be denied.

In order to be successful, an applicant must provide that it is fit, willing and able to provide the proposed service and that the proposed service "is or will be required by the present or future public convenience and necessity." From the evidence adduced at the hearing, we find that Applicant is fit, willing and able properly to perform the proposed service and able to conform to Neb. Rev. Stat. § 75-301 et seq. Applicant demonstrated that it is financially fit and possesses the business acumen to provide the proposed service.

The traditional analysis for determining "need and necessity" was set forth by the Supreme Court in the case of In re Application of Nebraskaland Leasing & Assocs., 254 Neb. 583, 591 (1998), wherein the Court stated:

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.

The issue of whether an applicant has met its burden of demonstrating that the proposed service is required with public convenience and necessity is ordinarily a factual issue. Id. The statute requires us to determine whether the proposed operation will serve a useful public purpose that is responsive to the public demand or need. Neb. Rev. Stat. § 75-311 (Reissue 1996).

From the evidence adduced at the hearing, we find that the Applicant has not sufficiently demonstrated an existing need for the proposed service expansion which would permit Applicant to provide point-to-point transportation services for disabled individuals within Lancaster County. Neither Ms. Riekenberg nor Ms. Reed had knowledge about whether the persons they referred transportation providers to ultimately received the services they required from another carrier. The testimony provided by the four HHS witnesses, likewise, did not sufficiently demonstrate a need for an additional carrier to provide service point to point in Lancaster County. Specifically, the evidence provided that Mr. Allen did not have a need for wheelchair accessible vans and very little point-to-point in Lincoln traffic. He never contacted Midwest Special Services or Servant Cab, even though he knew HHS had contracts with these entities. Ms. Rutledge, an HHS protection worker from York, testified that she generally had no need for wheelchair service and seldom required service point-to-point in Lincoln. She testified that she had been directed by her supervisor to use Prince of the Road's services and to use Servant Cab for point-to-point transportation in Lincoln only. Ms. Mitchell testified that generally Midwest Special Services' and the cab companies' services were good. The Commission finds that Applicant has not demonstrated adequate public demand or need for the proposed service to provide point-to-point transportation within Lancaster County.

We next turn to Applicant's request to provide transportation services which originates in Lancaster County and terminates in points outside Lancaster County. For this determination, we again consider Neb. Rev. Stat. § 75-311 (Reissue 1996) and Nebraskaland Leasing. Although Ms. Nicholson testified that she would like to see ten additional carriers, she testified that it would be more convenient for her to use one carrier for trips terminating and originating in Lincoln. Ms. Nicholson expressed dissatisfaction with the other carriers she had tried in the past, particularly after 5:00 p.m. Ms. Mitchell also preferred to use Applicant. Collectively, the HHS witnesses demonstrated a desire to use Applicant's services for

traffic originating in Lincoln. Much of the testimony here indicated a preference rather than a need for Applicant's proposed service. Although we find that much of the testimony indicated a personal preference to use Applicant's service, we do find there is some evidence of need in circumstances where caseworkers must hire two transportation providers for one client where there is a break in a round trip because of the restriction placed on Applicant's authority. The caseworkers testified that they have very heavy case loads and do not have very much time to search for existing carriers and attempt to arrange transport an individual to and from Lincoln where there is a break in the return trip of a few days. Accordingly, we find that Applicant should be permitted to provide a continuation of a trip that originated outside Lancaster County. Applicant may not originate transportation services in Lancaster County in all other instances.

With respect to Applicant's ability to use sedans, we find that applicant has demonstrated to a certain degree that using sedans would be more cost efficient when used in long distance transportation. However, as this Commission has held on previous occasions, a distinction is necessary between taxi service and open class to prevent unintended harm to the availability of taxicabs all Nebraska communities.¹ Although the Applicant's focus admittedly is not on the local fares, if the Commission granted the application as requested, Applicant could, in essence, provide a taxi service and drive other necessary taxi operations out of Nebraska communities. The consequential result of this would therefore, not be in the interest of public convenience and necessity. We find Applicant may use sedans in its distance operations, but may not use sedans to compete with local taxi companies. There was no evidence of a need for sedan-type service point to point within those communities. Therefore, Applicant should be restricted from using sedans point-to-point within communities where taxicab companies are currently operating. We also place a

¹ Throughout the proceedings in Rule and Regulation No. 148, we found that it was necessary to protect taxicab service providers from other classes of carriers. Specifically, in our April 3, 2001, order, we found "The identification of an open class of services is not intended, and should not be construed, to jeopardize existing or future certificates of authority to provide taxi service." We further believe it is consistent with Neb. Rev. Stat. § 75-311 (Reissue 1996) to decide, on a case by case basis, whether the proposed service would serve public convenience and necessity or whether the service would endanger existing operations. The use of sedans in direct competition with taxicab providers, we believe, would endanger existing taxicab operations.

reservation in Applicant's authority so that we do not insulate communities from obtaining a taxi service in the future.²

Next, we turn to the issue of whether existing carriers would be endangered or impaired by the granting of this application. The evidence indicates that the Protestants are willing and able to handle additional traffic. Approximately forty percent of Servant Cab's revenue comes from HHS traffic. We find that this is a significant source of revenue which if diverted would have a detrimental impact on Servant Cab's operations. The A-1 witness also testified that his company would be harmed if the Commission granted the application. While some level of harm may be caused the Protestants if the Application were granted in full, we conclude that the Protestants will not be harmed by the very limited grant of this application as modified herein.

Territory Requested:

Common: Transportation of passengers in Nebraska intrastate commerce in open class service including clients of the Nebraska Department of Health and Human Service or subcontractors thereof between points in Nebraska over irregular routes.

From the evidence adduced and being fully informed in the premises, the Commission is of the opinion and finds:

1. The applicant is fit willing and able properly to perform the service proposed and to conform with the provisions of Neb. Rev. Stat. § 78-301 to 75-322 and the requirements, rules and regulations of the Commission thereunder.

2. The proposed intrastate service is or will be required by the present or future Public Convenience and Necessity to the following extent:

C E R T I F I C A T E A U T H O R I Z E D

² See, e.g., United States v. Rock Island Motor Transit Co., 340 U.S. 419 (1951) where the Interstate Commerce Commission's (ICC's) authorized certificate of convenience and necessity contained a reservation that the ICC may impose such further restrictions as may be necessary to insure the service at issue remained auxiliary or supplemental to the train service of the railroad. The U.S. Supreme Court further held that this reservation did not offend the provision in section 212 which required a willful failure to comply with the act, orders or rules of the ICC be demonstrated prior to certificate modification, suspension or revocation. Id.

SERVICE AND TERRITORY AUTHORIZED: Common: Transportation of passengers and their baggage in open class service by passenger van, handicapped equipped passenger and cutaway vans, sport utility vehicles and sedans between points in Nebraska over irregular routes. RESTRICTION: The transportation of railroad train crews and their baggage is not authorized. The transportation of passengers and their baggage point-to-point in Lancaster County is not authorized. The transportation services of passengers and their baggage originating within Lancaster County is not authorized, except for a continuation of a trip originating outside Lancaster County and returning to a destination outside Lancaster County and shown on the same billing document as a continuation of the originating trip. The transportation services of passengers and their baggage by sedan originating from or point-to-point within any territory where a taxicab company holds a certificate or permit is not authorized. RESERVATION: The Commission expressly reserves the right to further restrict this authority with respect to the use of sedans, on its own motion or the motion of another, in the event that a carrier, which, meets all the requirements of Article 75, Chapter 3 of the Nebraska Revised Statutes and all applicable Commission rules and regulations thereunder, offers taxi services in territories unserved as of November 26, 2002.

3. The application should be granted as modified. In all other respects, the application should be denied.

Operations in violation of this or any other order of the Commission or operations outside the scope of Applicant's certificated area will result in civil penalties of up to ten thousand dollars per day as provided in Neb. Rev. Stat. § 75-156 (2000 Supp.) or in a suspension or revocation of Applicant's certificate.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the above-captioned application filed by R & F Hobbies d/b/a Prince of the Road should be granted as modified as provided herein.

IT IS FURTHER ORDERED that a Certificate of Public Convenience and Necessity shall not be issued unless and until the applicant has complied, within a reasonable time frame from the effective date of this order, with Neb. Rev. Stat. Sections 75-305 (fees), 75-307 (insurance), and 75-308 (rates) and with the rules and regulations of the Commission, and if upon the expiration of such time applicant has not complied with the

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

Application No. B-1441, Supplement 2

PAGE 20

terms and conditions, this order, shall after reasonable notice to the applicant, be of no further force and effect.

IT IS FURTHER ORDERED that applicant shall not conduct operations until a Certificate of Public Convenience and Necessity is issued.

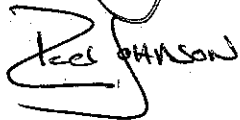

IT IS FURTHER ORDERED that applicant shall render reasonably continuous and adequate service to the public pursuant to the authority authorized.

IT IS FURTHER ORDERED that the Certificate of Public Convenience and Necessity authorized shall be subject to the terms, conditions, and limitations which have been, or may hereafter be prescribed by the Commission.

MADE AND ENTERED at Lincoln, Nebraska, this 26th day of November 2002.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:



//s//Anne C. Boyle
//s//Frank E. Landis


Chair

ATTEST:


Executive Director