

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

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|---------------------------------|---------------------------|
| In the Matter of the Appli-) | Application No. B-1498 |
| cation of Running Horse) | |
| Enterprises, LLC, Hastings,) | |
| Nebraska, seeking authority) | |
| as a common carrier in) | MOTION FOR REHEARING/ |
| Nebraska intrastate commerce) | RECONSIDERATION |
| in the transportation of) | DENIED |
| passengers by limousine) | |
| service between points in and) | |
| within a 200-mile radius of) | |
| Hastings over irregular) | Entered: November 4, 1999 |
| routes.) | |
| RESTRICTION: The transporta-) | |
| tion of railroad train crews) | |
| and their baggage is not) | |
| authorized.) | |

BY THE COMMISSION:

By application filed February 10, 1999, Running Horse Enterprises, LLC, Hastings, Nebraska ("Running Horse" or "Applicant") sought authority as a common carrier in Nebraska intrastate commerce by limousine service between points in and within a 200-mile radius of Hastings, Nebraska, over irregular routes. Through its attorney, John Boehm, a protest was filed by Prince of the Road. A hearing was subsequently held April 21, 1999. Due to a Commission clerical error, protestant Prince of the Road was not given proper notice of that hearing.

On May 18, 1999, this Commission, unaware of the error which prevented protestant Prince of the Road from appearing at the April 21 hearing, entered an order granting the Application of Running Horse Enterprises.

On May 27, 1999, Prince of the Road filed a "Motion for Rehearing and to Vacate." This Commission granted the motion for rehearing which was held, after a granted motion for continuance, on August 18, 1999. On August 27, 1999, the Commission received a letter from Prince of the Road through Mr. Boehm which indicated that he would waive his right to cross-examine the witnesses which testified on April 21, 1999.

On September 8, 1999, this Commission entered an order denying the Protestant's motion to vacate the original grant of authority. The Protestant then timely filed a motion for rehearing and reconsideration. An oral argument on the motion for rehearing and

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reconsideration was held on October 4, 1999. A notice was sent to all interested parties on September 21, 1999, pursuant to Commission rules.

FINDINGS AND OPINION

In the initial granting of authority, this Commission found the Applicant to be fit, willing, and able to provide the proposed services and the issue of fitness is not in question. The Protestant, we note, does not object to the granting of the Applicant's authority for limousine service, but that the applicant received a grant for vehicles other than limousines. In addition, the Commission found that the proposed intrastate service is or will be required by present or future necessity.

The rehearing focused on the "present and future necessity" finding in our original order. In addition, all of the new testimony centered around the Applicant's possible provisioning of transportation through vans.

In making the motion for rehearing and reconsideration, the Protestant objected to the original grant of authority and subsequent orders affirming the grant of authority. We summarize the Protestant's arguments and respond.

One of the main objections raised by the Protestant is that the Commission's grant of authority amounted to "rulemaking" as defined by the Nebraska Administrative Procedures Act. In our order denying the motion to vacate, we noted,

"There is some question as to whether the term "limousine" includes transportation services by multi-passenger vans as well. We have not ruled on this question directly in prior orders. We find that "limousine service" denotes a type of transportation not necessarily limited by mode to include only those vehicles colloquially known as "stretch limos." That such distinction between types of vehicle has been blurred is without doubt. Airport shuttle service vehicles use the term "Limousine"; there are luxury 15-passenger vans which are known as "limousines."

The term "limousine" is no longer identified only with the type of vehicle, typically the extra-length sedans that have traditionally transported wedding and prom parties in the past. The term, instead, refers to a mode of transportation.

For purposes of this Commission, limousine service shall

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mean a chauffeur-driven, non-metered passenger vehicle for hire including, but not limited to, full-sized sedans, extended-size sedans, passenger vans, and sports utility vehicles where the rate may be determined on an hourly, daily, weekly, or monthly rental or may be mileage-based.

Taxicab shall mean a chauffeur-driven passenger vehicle engaged in the general transportation of persons for hire, operated on an irregular route where the destination is controlled by the passenger where the route, when not directed by the passenger, must be the most direct and reasonable and where the rate is metered by the operator using a mechanical or electronic device, except where the use of such device is exempted by Commission rule due to the fact that the taxicab operator is operating in a community of 15,000 persons or less."

Docket B-1498, Order of September 8, 1998.

Prince of the Road makes objection to the language in that order arguing that in making these findings, the Commission engaged in impermissible rulemaking contrary to the provisions of the state's Administrative Procedures Act (codified at *Neb. Rev. Stat. §84-901 et seq.*)

Neb. Rev. Stat. §75-134 requires that a Commission order entered after a hearing recite 1) a discussion of the facts of the case; 2) the ultimate facts; and "(3) the Commission's reasoning or other authority relied upon by the Commission." *Neb. Rev. Stat. §75-134. (Reissue 1996).* It is imperative, then, that the Commission, when entering an order, discuss its findings and the reasoning behind those findings.

State law also gives the Commission "original exclusive jurisdiction to determine... the scope or meaning of a...rule, or regulation." *Neb. Rev. Stat. §75-118.01. (Reissue 1996).* That section of statute grants such jurisdiction "except as otherwise provided in the Administrative Procedure Act." *Id.*

The question we must confront next then is, "What is a rule for the purposes of the Administrative Procedures Act (APA)?" A rule is defined under the APA under section 84-901 of the Act. That section also tells us what a rule is not,

"Rule or regulation shall not include ... (b) permits, certificates of public convenience and necessity...and any rules of interpretation thereof..."

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Neb. Rev. Stat. §84-901(2) (Reissue 1996) (Emphasis added.)

In reading the statutes together, it becomes apparent that the Commission has been granted original exclusive jurisdiction interpreting the scope of the rules before it. Because this order merely interpreted the scope of authority of a certificate of public convenience and necessity, the statutory requirements of the APA are not offended.

Further, it is clear that the Commission, in delineating the line between limousine authority in terms of the types of vehicles used, is not inconsistent with the intents of the rules which have been adopted pursuant to the APA. Our current rules do not mandate what type of vehicle must be used when an authority is granted under the umbrella of "limousine service." In fact, the type of vehicles that may be used in the provisioning of "limousine" service are subject directly to the discretion of the Commission.

Our current rules provide that,

"Each vehicle used as a limousine shall be a closed sedan; except that upon showing that a different vehicle will serve as well or better, the commission may waive this requirement and issue a PSC plate."

Title 291, Chapter 3, Rule 010.01M (1993) (Emphasis added.)

Clearly, the Commission has the authority to interpret its rules regarding the scope of certificates of public convenience. Such interpretations do not violate the law as provided under the state's APA, and the language we adopted in the order dated September 8, 1999, is consistent with our current rules which allow the Commission to waive the rule regarding the type of vehicle used in the provisioning of limousine service.

The Commission chose the opportunity to explain in this order for the parties the distinction between the types of services under which authority could be granted to give the participants a full understanding of the Commission's reasoning. While the language here may give future parties guidance, it is not intended as rulemaking. It is an interpretation of a situation not envisioned when these provisions in the Commission rules were adopted in December, 1989. We note that the Commission is currently working on an updating of those rules and regulations.

The Protestant's second argument is that the finding is contrary to the evidence presented. We find this argument, too, to

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be without merit. Protestant Prince of the Road argues that the Commission found, in error, that Applicant had met the "need and necessity" component of Neb. Rev. Stat. §75-311 (Reissue 1996). The Protestant's argument as stated in the hearing ran along the lines that the existence of adequate and satisfactory service by an existing carrier negates the necessity of the proposed service.

To prove its claim that the Protestant is willing and able to provide the services offered by the Applicant, the Protestant witness made the claim that he has not turned away any business offered to his company. The Commission's findings, however, did not address the willingness of the Protestant to take on all comers, but rather on whether the service offered by the Protestant was adequate and satisfactory.

Applicant wants to offer van service and testified as to inquiries made of his company by the Nebraska Department of Health and Human Services ("HHS") and by a company that manages tours in the sandhill crane migration runway through the state. Protestant currently has a contract with HHS to serve its clients and HHS contacts Protestant directly for its transportation needs.

The Commission, upon the evidence adduced at the hearing, concluded that the existing service of the Protestant was not adequate because it had no presence in local phone directories throughout the territory sought by the Applicant and that even though it took on all requests from HHS, that there was a large population that was not able to be served by the existing services because the public at large could not access, through reasonable means and search, the services provided by the Protestant. For example, other than his contacts with HHS, the Protestant has no physical presence or advertising in the city of Hastings.

The Nebraska Supreme Court examined the importance of adequacy of service in regard to "need and necessity" in its ruling of May 8, 1998,

"Regarding public demand or need, the question of adequacy of service of existing carriers is implicit in the issue of whether public convenience and necessity demand the service of an additional carrier in the field."

In re Application of Nebraskaland Leasing & Assocs., 254 Neb. 583, 591 (1998).

The Protestant cannot hold a whole region of the state as off-

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limits to an additional carrier willing to make itself available to the public at large by meeting all of the proffered requests of a party with which it already has a contract for transportation services. We judge the existing service to be inadequate because, through the reasonable efforts of a large part of the population of the sought-after area, the Protestant has no presence to alert that population of the existence of its services. The result is that many persons or groups that desire the type of service offered by the Applicant could make a reasonable search and conclude that the type of service they seek is nonexistent for their immediate needs. That is simply unsatisfactory.

Finally, the Protestant argues that the Commission's findings are contrary to law. Because of the reasons expressed in the discussion of the first two arguments, which we adopt to this argument as well, this argument is also found to be without merit.

O R D E R

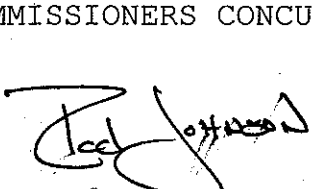
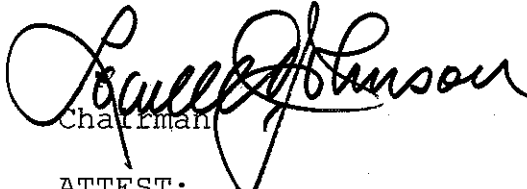
IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the motion to for rehearing/reconsideration of the authority granted in the Application B-1498 be, and it is hereby, denied.

IT IS FURTHER ORDERED that the certificate of authority conferred in this docket should be, and is hereby, affirmed subject to the conditions of the original certificate granted in this application and subject to the Commission's rules and regulations and to the laws of the state of Nebraska.


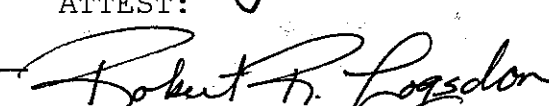
MADE AND ENTERED in Lincoln, Nebraska on this 4th day of November, 1999.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

 
Chairman

ATTEST:

 
Executive Director

//s//Lowell C. Johnson
//s//Frank E. Landis

COMMISSIONERS DISSENTING:

//s//Commissioner Daniel G. Urwiller