

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the) Docket No. B-1499
Application of Murvel LeRoy) Supplement 1
Fentress, a partnership, dba)
Fairbury Taxi, Fairbury,) GRANTED AS MODIFIED
Nebraska, seeking authority as)
a common carrier in Nebraska)
intrastate commerce in the)
transportation of passengers)
between points in Jefferson)
County and points in Nebraska,) Entered: JUNE 6, 2000
all trips to originate or)
terminate in Jefferson County.)
RESTRICTION: The transporta-)
tion of railroad train crews)
and their baggage is not)
authorized.)

BY THE COMMISSION:

On May 14, 1999, Murvel LeRoy Fentress and Spencer M. Fentress, a partnership d/b/a Fairbury Taxi, Fairbury, Nebraska ("Applicant" or "Fairbury Taxi") filed an application with the Commission for authority as a common carrier in Nebraska intrastate commerce between points in Jefferson County and points in Nebraska, all trips to originate and terminate in Jefferson County. On July 8, 1999, this Commission granted the application of Fairbury Taxi as modified, to wit:

"Transportation of passengers by taxi in and within a five-mile radius of Fairbury over irregular routes. RESTRICTION: The transportation of railroad train crews and their baggage is not authorized."

Notice of the authority granted by the Commission was sent to the Applicant on July 9, 1999. On December 13, 1999, the certificate holder (also, Applicant) filed a request for a supplemental authority. The requested application seeks to extend the authority "as a common carrier in Nebraska intrastate commerce in the transportation of passengers by taxicab between points in Jefferson County, and between points in Jefferson County, on the one hand, and, on the other hand, points in Nebraska over irregular routes. RESTRICTION: The transportation of railroad train crews and their baggage is not authorized." Notice of the application was published in The Daily Record, Omaha, Nebraska, on December 14, 1999.

Protests were filed on December 21, 1999, by Prince of the

Road through its attorney, John Boehm, and on January 3, 2000, by Yellow Cab & Limo, Inc., through its attorney, Jack Shultz. On February 28, 2000, a hearing was held at the City Council Chambers of the Fairbury City Hall in Fairbury, Nebraska. Notice of the hearing was mailed to the parties by the Executive Director of the Commission on January 20, 2000 and on January 26, 2000. Appearing at the hearing for the Applicant was Elaine A. Waggoner, Lincoln, Nebraska; for the Protestant, an appearance was entered by Jack L. Shultz, Lincoln, Nebraska; appearing for the Commission was Michael T. Loeffler.

Spencer Fentress, co-operator of Fairbury Taxi Service, and son of Murvel LeRoy Fentress, the other co-operator, testified in favor of the application. Mr. Fentress testified that the Applicant's current authority allows the applicant to service customers by taxicab within a five mile radius of Fairbury. His application for extended authority was made because of his belief that other transportation needs were not being met. He reported that he had taken several calls for transportation to other parts of Jefferson County, specifically Steele City and Gage City, but that because of his limited authority, he could not provide service. He refers these people to Yellow Cab. He testified that it is his belief that Yellow Taxi had pulled its regular taxi service out of Jefferson County but still made runs into the county for Nebraska Department of Health and Human Services (NDHHS) clientele.

Mr. Fentress testified that his cab company operated one vehicle and that he averaged approximately eight calls per day. He further indicated that, if the requested authority were granted, he would purchase an additional one or two vehicles.

Vickie Banahan also testified for the Applicant. Ms. Banahan a secretary for the Fairbury Police Department, testified that in her work experience with the persons receiving services from the local Salvation Army, she has encountered situations where persons in need of transportation services were unable to obtain those services. She noted that transportation services were especially difficult to find for late hours and for trips to Beatrice. She conceded, under cross-examination, that she had never attempted to contact Yellow Cab and was unaware if Yellow Cab was authorized to provide the service that those clients needed to Beatrice.

Joe Casson of Fairbury also testified for the Applicant. Mr. Casson is a city attorney, a consultant for the Economic Development Corporation, and an attorney in private practice. He testified that an expansion of taxicab service in the area would

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benefit economic development and the tourist trade. He cited local attractions such as the pony express station at Rock Creek.

Donna Osmond, a Fairbury resident, testified that on her last birthday, she and her husband had dinner in Beatrice. Afterward, their car encountered mechanical trouble. She and her husband were unable to obtain emergency transportation services. She called Yellow Cab, but they were closed. This occurred on a Saturday night around 5:00 p.m.

Three other witnesses, Michael Fitzgerald, Ruth Wagner, and Troy Siems, testifying in favor of the application, indicated that they were in situations in which they required taxicab service but were unable to obtain taxi services. Mr. Fitzgerald testified that Yellow Cab was closed on 7:30 p.m. on a Saturday night. Ms. Wagner testified that Yellow Cab was closed when she called for cab service on a Saturday afternoon. She had wanted to travel to Steele City which is about 12 miles from Fairbury. Mr. Siems wanted to go to Steele City on a Friday. He called Yellow Cab. Yellow Cab told him that they would call him back in one hour to give him rates. Mr. Siems needed to be in Steele City in 45 minutes. He did not use Yellow Cab on that occasion because of the timeliness of his travel needs.

Donna Sailors also testified in support of the application. She related that she wanted to arrange transportation for her mother, who is elderly, who needed to go to Fairbury from Beatrice for dialysis treatment. She was told by Yellow Cab that she needed to make transportation requests six hours in advance.

Dee Coatney testified that she wanted to get from Reynolds to Beatrice. She called Fairbury Cab and was told that the travel she required was outside of their jurisdiction. She called Yellow Cab and was told that there were no cabs available. This occurred on a Saturday in the early afternoon.

Angela Fentress, who is married to the applicant's brother, testified that she is employed at the Salty Dog in Steele City. She testified that the Salty Dog is a restaurant and bar. As a waitress there, she frequently has to arrange for transportation for persons who have had too much alcohol to drink. She testified that a call to Yellow Cab from Steele City is a long-distance call. She has had to make such arrangements about 15-20 times in the last seven months.

Ron Hippen testified for the Protestant in opposition to the application. Mr. Hippen is the operator of Yellow Cab which

operates from Beatrice. He testified that he still services the Fairbury area. He transports clients of NDHHS into and out of Fairbury. Since Mr. Fentress began service, he has had very little regular taxicab business in Fairbury. He stated that he maintains a Yellow Page ad in the Fairbury telephone directory. He further testified he operates four vehicles for taxicab service but that Yellow Cab maintains no vehicles in Fairbury. Mr. Hippen also stated that he currently has excess capacity in that not all of his cars are in service at the same time.

Mr. Hippen related that Yellow Cab's hours of operation are Monday-Friday, 7:30 a.m. until 10:00 p.m., and Saturday from 8:00 a.m. until about 5:00 or 5:30 p.m. He further testified that, in the case of a request from NDHHS, the company will meet those requests 24 hours a day.

Mr. Hippen further testified that his company, including the limousine service, currently operates at a loss. He testified that he tried to station a vehicle in Fairbury but that the service generated did not justify the expense of keeping the car in Fairbury. He stated that if he lost a segment of service in Jefferson County, it would cause him to reduce his fleet elsewhere. On cross-examination, Mr. Hippen stated that 90-95% of his business in Jefferson County was in the provisioning of transportation services to NDHHS clients.

In rebuttal testimony, Mr. Mike Baumfaulk, resource developer for the NDHHS testified that he is responsible for arranging transportation for Jefferson and Thayer counties. It was his recollection that, at some time in 1999, Yellow Cab refused to provide requested services for NDHHS clients within Jefferson County.

FINDINGS AND OPINION

The granting of a certificate of public convenience and necessity is governed by Neb. Rev. Stat. § 75-311 (Reissue 1996) which states,

A certificate shall be issued to any qualified applicant authorizing the whole or any part of the operations covered by the application of 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. Neb. Rev. Stat. §75-311(1) (Reissue 1996).

In other words, the Commission must apply a two-part test. First, the Commission must determine if an applicant is "fit, willing, and able." In a supplemental application, such as the one that is applied for in the instant case, the applicant has already been granted a certificate based on an earlier meeting of the fitness standard. In that process, the Commission examines the financial abilities of the applicant, looks for any prior problems such as infractions, criminal wrongdoing, or complaints, looks at the fitness of the vehicles proposed to be used by the applicant, and makes a determination on the overall managerial fitness of the applicant. In a grant for a supplemental authority, the Commission makes a "fitness" judgment on the ability of the applicant to cover the expanded area or scope of the authority sought. Based on the evidence before us and adduced from the record in the instant case, we find that applicant is fit and able to proceed to offer taxicab service within the constraints as later delineated in this order and, in that regard, the applicant has met the fitness test of § 75-311.

The second test of § 75-311 requires us to examine if the applicant demonstrated whether the proposed service is required by the present and future public convenience and necessity, commonly referred to as "need and necessity." The elements to a need and necessity finding were detailed by the Nebraska Supreme Court,

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. *In Re Application of Kilthau*, 236 Neb. 811, at 815.

The Court went on to say,

Of the three public convenience and necessity factors, not all need to be addressed, because an affirmative response to the second factor negates any response to the first factor...The existence of an adequate and satisfactory service is complete negation of public need

and demand for added service by another carrier. *Id.*, at 816.

We find that the application should be granted with a modification that limits the authority to the provisioning of taxicab service within points of Jefferson County. This expands the applicant's current scope which includes only the provisioning of transportation services within a five mile radius of Fairbury, however, it falls short of allowing the applicant to transport persons, on the one hand, from within Jefferson County to points outside of Jefferson County. We find that this amendment is warranted and necessitated by consideration of the second part of the two-part legislative test, often referred to as "public need and necessity."

Given the restrictions governing the modifications to this application, we find that the applicant has shown that the purpose proposed to be served by the applicant cannot or has not been served as well by existing carriers. The record before us shows that the Protestant has failed to provide satisfactory service within points in Jefferson County. The Protestant has failed to station a vehicle outside of Beatrice. There was credible evidence that persons within Jefferson County have received less than adequate service in terms of times of day served. On the contrary, there was evidence that the Applicant was willing to serve these residents on a more consistent and predictable manner.

Further, there was evidence that a significant number of people faced additional long-distance toll charges when requesting taxicab service from Yellow Cab. The Protestant stated that he was willing to give 24 hour a day service and to accept calls from outside his dialing area, but only if those potential customers were in-standing NDHHS clients. The Applicant can provide satisfactory service to that population of customers who are not NDHHS clients.

Having disposed of the threshold issue placed by the Nebraska Supreme Court, we turn our attention to the other two factors. First, we find that there is a public demand that this application will be responsive to. We heard testimony that persons who were in immediate need of transportation services, whether because of time scheduling or automobile failures, needed a service that could be time responsive. The current provider of services was shown to be unable to meet these time-responsive demands. The Applicant, with the local stationing of a vehicle, accessibility through dialing of a local number, and his willingness to service customers at later and more expanded hours will allow the Applicant to meet that

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public demand.

The final question, then, is whether existing carriers would be endangered or impaired by the granting of this Application. Most of the testimony at the hearing centered around the continued granting of exclusive authority in the transportation of NDHHS clients. The granting of the expansion of authority in this order should not meaningfully impair and certainly not endanger the continued business of the Protestant with the NDHHS. Beatrice, which constitutes one of the larger hubs in the delivery of service by the NDHHS, remains outside of the jurisdiction granted to the applicant in this order. While there will be some local, short-run trips lost to the Applicant, the Applicant would still be restricted from transporting persons outside of Jefferson County, which includes the city of Beatrice. The Protestant presented the Commission ambiguous and unconvincing evidence that the grant of authority in this order would harm or endanger the operations of the Protestant, especially given the Protestant's current authority to operate within a seven county region.

Accordingly, we find that this modified grant of expansion of authority fulfills the public need and necessity requirement of the statutes and the analysis of those statute provided by the state's Supreme Court.

AUTHORITY GRANTED

We find that an expansion of authority for the Applicant should be granted, but modified in conformance with the findings of this opinion. Accordingly, we find that Application B-1499, Supplement 1, should granted as modified with the following authority:

SERVICE AND TERRITORY AUTHORIZED:

Transportation of passengers between points within Jefferson County over irregular routes. RESTRICTION: The transportation of railroad train crews and their baggage is not authorized.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Application B-1499, Supplement 1 be, and is hereby, granted as modified; and that upon compliance with the terms and

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conditions as set forth in this Order, a Certificate of Public Convenience and Necessity shall be issued to Murvel LeRoy Fentress and Spencer M. Fentress, a partnership, d/b/a Fairbury Taxi of Fairbury, Nebraska, authorizing the operations as set forth in the foregoing findings.

IT IS FURTHER ORDERED that the applicant shall not be issued the Certificate of Public Convenience and Necessity authorized by the Commission unless and until applicant has fully complied, within a reasonable time from the effective date of this Order, with Neb. Rev. Stat. §75-305 (fees), 75-307 (insurance), and 75-308 (rates), and with the rules and regulations of the Commission; and if upon expiration of such time applicant has not complied with such terms and conditions, this Order shall, after reasonable notice to 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.

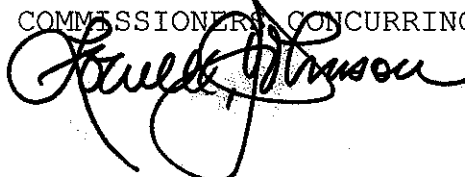
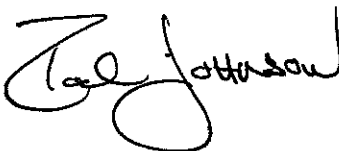
IT IS FURTHER ORDERED that applicant shall render reasonably continuous and adequate service to the public pursuant to the authority authorized.

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 in Lincoln, Nebraska on this 6th day of June, 2000.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:


Chairman

//s//Frank E. Landis

ATTEST:



Executive Director