

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,	)	MOTION FOR RECONSIDERATION
Nebraska, seeking authority as)		GRANTED; APPLICATION DENIED
a common carrier in Nebraska	)	
intrastate commerce in the	)	
transportation of passengers	)	
between points in Jefferson	)	
County and points in Nebraska,	)	Entered: October 3, 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. Appearing at the hearing for the Applicant were Elaine A. Waggoner, Lincoln, Nebraska; and for the Protestant, Jack L. Shultz, Lincoln, Nebraska.

On June 6, 2000, the Commission entered an order granting the application extension with a modification that restricted the Applicant to provide transportation of passengers by taxicab only to points within Jefferson County. On June 15, 2000, the Applicant filed a motion for rehearing and oral argument protesting the restrictive modification placed on the Applicant in the grant of authority. The Commission granted the motion for rehearing and reconsideration and held oral arguments on the motion on July 18, 2000 in the Commission Hearing Room, 1200 N Street, Lincoln, Nebraska. Notice of the hearing was sent by the Executive Director to the interested parties by first-class mail on June 21, 2000.

#### FINDINGS AND OPINION

The basis of argument for the Applicant was that the Commission erred in restricting the Applicant from its originally requested scope of authority. The Respondent argued that Applicant had failed to meet the fitness requirement prescribed by statute and had failed to prove the public need and necessity provision required by state law.

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."

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In our original grant of authority on June 6, 2000, we stated in our order that,

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. *Order of the Commission, Docket B-1499, Supp.1, June 6, 2000.*

Upon further review and examination, we find that statement to be in error. Neb. Rev. Stat. section 75-311 does not allow for the presumption of fitness to be given to an applicant for supplemental authority. To comply with the fitness requirement of 75-311, the applicant must offer separate and distinct proof that the applicant is financially fit. See *In Re Application of Overland Armored Exp.*, 428 N.W.2d 166, 229 Neb. 524, at 528 (1988) (*burden of proof rests on the applicant for a certificate of public convenience and necessity to show that the applicant meets all of the requirements of the statute*).

Upon review, we find that the record is totally void of any evidence respecting Applicant's financial fitness. The Overland court held, in part, that financial information which has been made part of the application but which has not been introduced into evidence cannot be used by the Commission in support of the application.

Until such time as the Nebraska Legislature sees fit to relax the requirements for certification, this Commission must follow the rule of law and, therefore, upon reconsideration, we deny in its entirety, the application in Docket B-1499, Supp.1.

We find that the expansion of authority for the Applicant previously granted as modified should be, and is hereby, reversed and denied in conformance with the findings of this opinion.

#### ORDER

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Application B-1499, Supplement 1 as was granted by this Commission on June 6, 2000 be, and is hereby, overturned and the application is denied.

IT IS FURTHER ORDERED that the applicant shall cease and desist from operations that are not in compliance with the findings of this Commission and this order.

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MADE AND ENTERED in Lincoln, Nebraska on this 3rd day of  
October, 2000.

COMMISSIONERS CONCURRING:

NEBRASKA PUBLIC SERVICE COMMISSION

*Howard Johnson*

*Mark Sauer*  
Chairman

*Anne C. Bayle*

ATTEST:

*Frank E. Landis*

*And S. Pollock*

Executive Director

//s//Frank E. Landis

//s//Daniel G. Urwiler