

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Applica-)	Application No. B-1500
tion of Raymond D. Kurtzuba)	Supplement No. 1
dba Total Transportation)	
Services, Omaha, Nebraska,)	
seeking to extend the)	APPLICATION GRANTED
authority as a common carrier)	
in Nebraska intrastate)	
commerce in the transportation)	
of passengers between points)	
in Douglas, Sarpy, Washington)	
and Lancaster Counties over)	Entered: November 4, 1999
irregular routes.)	

BY THE COMMISSION:

By application filed July 30, 1999, Raymond D. Kurtzuba, dba Total Transportation Services, ("Applicant") Omaha, Nebraska, seeks to extend the authority as a common carrier in Nebraska intrastate commerce in the transportation of passengers between points in Douglas, Sarpy, Washington, and Lancaster Counties over irregular routes. A copy of notice of the application was published in the Daily Record, Omaha, Nebraska, on August 4, 1999. Protests to the Application were filed on August 5, 1999, by Armadillo Express through its attorney, Brad Kistler; on August 12, 1999, by Prince of the Road through its attorney, John Boehm; on August 19, 1999, by Happy Cab Co. through its attorney, Angela Burmeister; and, on August 27, 1999, by Accent Limousine and Old Market Limousine, through their attorney, Marshall Becker. On September 29, 1999, Armadillo Express, Prince of the Road, and Happy Cab withdrew their protests.

A hearing was held September 30, 1999, in the Commission Library, Lincoln, Nebraska. A notice of the hearing was sent by first class mail to all interested parties on September 10, 1999. The Applicant was represented by David Wintroub. Mr. Becker appeared representing Accent Service and Old Market Limousine ("Protestant").

Mr. Raymond F. Kurtzuba, owner of Total Transportation Services, testified in support of the application. He has owned Total Transportation since early 1999 and began operations in April or May 1999. He has operated one vehicle, a larger limousine. The original authority granted to Total Transportation was limited to 14 passenger limousines. The Applicant is also leasing to Luxor Limousine two six passenger vehicles.

Application No. 1500
Supplement No. 1

Page 2

Mr. Kurtzuba testified that he has found that there is a need for the smaller limousines because the vehicles which he leased to Luxor were being consistently used while there was less demand for the larger 14-passenger limousines. On cross-examination, Mr. Kurtzuba testified that the vehicles leased to Luxor are maintained and driven by Luxor.

Mr. Walter Fowler testified in support of the application. Mr. Fowler owns Luxor Limousine and has been in business since July, 1998. He testified that, in his capacity, he takes phone calls for limousine service and that, in his opinion, there is a need for additional limousines in the Omaha area. He has been able to keep his vehicles fully booked with appointments for transportation services. He expected that the vehicles he operated would still be fully booked even if the application of Mr. Kurtzuba were granted. On cross-examination, Mr. Fowler testified that the two vehicles he leased from the Applicant will be taken back by the Applicant, but that he would look to purchase two additional vehicles. Although he stated that he has received requests from persons who could not get service from existing carriers, he could not recall specific requests by dates and times.

Jodi Jones was called to testify for the Protestant. Ms. Jones is vice-president of Old Market Limousine Service. Old Market Limousine Service holds statewide authority from the Commission for the transportation of passengers by luxury limousine. Ms. Jones testified that the limousines which her company offers includes limousines and sedan cars.

Ms. Jones presented evidence on her company's monthly sales figures from previous years which she contended demonstrate that certain months are more productive with the "off" months being January, February, March, July and November. During the "off" months, the company welcomes all of the business that it can get. She also testified that an additional competitor, particularly during the slow months of the year, would be detrimental to her business. The same holds true for the slow days of the week, she stated. She also testified that the Applicant in this case testified during the proceedings of the original grant of certification that there was no additional need for vehicles of eight passengers or less.

On cross-examination, Ms. Jones stated that customers do call in and request newer vehicles such as 1998 or newer. Her company currently has three such vehicles. Her figures showed that there has been an increase in sales over the years.

Application No. 1500
Supplement No. 1

Page 3

Mr. Thomas Schreckenberger testified for the Protestants. Mr. Schreckenberger is the president of Accent Limousine and has been since November, 1994. His company's fleet includes five limousines, a van and three sedans for a total of nine vehicles. He also testified that his company has the same experiences as Old Market Limousine as far as slow months and days of the week. He also testified that his current profit margin is about 6% and that an additional entrant into the market would detract from his ability to provide the same quality of service because he would not be able to afford additional newer vehicles. He agreed with the other Protestant witness that there was no need for additional authority to be granted.

FINDINGS AND OPINION

The Applicant testified that additional demands for smaller limousines presented a case for necessity and he was supported by a witness who also is a competitor. The Commission also heard testimony that, especially during slow times, there is no need for additional limousine service.

The Applicant suggested that additional hotels, restaurants and west Omaha development presented additional demand for the limousine service offered by the Applicant.

For a grant of authority, the Applicant must prove that they are fit, able, and willing to provide the proposed service and that the proposed service "is or will be required by the present or future public convenience and necessity." Neb. Rev. Stat. §75-311 (Reissue 1996). Applicant currently holds a certificate of authority previously granted and fitness is not an issue, rather the issue argued by the Protestant regards the issue of public need and necessity.

The traditional analysis for determining "need and necessity" was laid out by the Supreme Court in its May 8, 1998 ruling,

"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."

Application No. 1500
Supplement No. 1

Page 4

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

The application at point presents an unusual situation in that granting of the application will not necessarily result in additional vehicles in the market. The testimony at the hearing indicated that, upon a grant of authority, the applicant would simply take back two smaller limousines that he has leased to another certificate holder. The Protestant did not dispute that the two vehicles in question being leased to another certificate holder were in continuous use and that there was sufficient demand to keep the two vehicles utilized. The Applicant presented testimony showing that the Applicant received enough inquiries to form a reasonable belief that sufficient demand existed. The operator of the two vehicles stated that after he turned the limousines back to the applicant, assuming a grant of authority, he thought demand was such to invest in two additional vehicles. Accordingly, we find that the Applicant has met the first factor of the Court's test, namely that a useful purpose will be served and that the application is responsive to public demand.

We next address the third factor presented by the Court. The Commission finds that the Applicant can offer the proposed service without impairing or endangering the operations of the existing carriers. First, because no additional vehicles will be put into the market as a direct result of the granting of this application. The limousines that would be added are already in service. Logically, the granted application cannot impair because it does not "weaken" or "diminish" market share for the existing carriers. See *Black's Law Dictionary, Fifth Edition*.

Second, the evidence presented by the Protestant is unpersuasive. Although the witnesses for the Protestant did successfully show that there exists "slow" months in the operation of their limousine service, overall, monthly sales have increased from year to year and, with few exceptions, monthly sales for one year have increased from the year before. The standard for determining whether an existing carrier will have their operations impaired was articulated by the Court in their holding that the Protestants had failed to demonstrate such harm. There is no harm where,

"...there is no specific evidence indicating *probable* harm, only general fears of potential diversion." *Id.* At 597. (*Emphasis added.*)

Application No. 1500
Supplement No. 1

Page 5

The Protestants failed to show specific evidence of probable harm. The showing that the existing operators had "slow" months is insufficient to meet that standard. We find, therefore, that a grant of the proposed authority will not result in an impairment or endangerment in the operation of existing carriers.

Having disposed of the first and the third factors to be considered as outlined by the Court, we turn to the second factor, whether an existing carrier can meet the purpose of the application.

This second factor is the most troublesome, in our analysis. The Court has said that,

"...an affirmative response to the second factor negates the need for any consideration of the first factor." *Id.*

In *Nebraskaland*, the Court found an exception to the usual public need and necessity analysis it proposed. In *Nebraskaland*, a common carrier of household goods that had operated under 'color of authority' argued that it should be allowed to continue service because the prior successful operation of that service created was evidence of public convenience and necessity. The Court, citing an earlier case before it, wrote,

"'Successful operation in the past creates a presumption that public convenience and necessity require a continuance of such operation'" *Id.* at 594.

While the Court carved out this exception specifically to carriers who have previously operated under 'color of authority' we apply its reasoning by analogy. The authority which the Applicant seeks would shift two vehicles, already successfully operating under another authority, to the Applicant. In effect, these vehicles have already been successfully operating, there is created a presumption that public convenience and necessity exists. The traditional analysis does not control.

Because the Applicant has met the "need and necessity" conditions for certification by this Commission, the Commission, therefore, finds that the application should be granted.

Application No. 1500
Supplement No. 1

Page 6

CERTIFICATE AUTHORIZED

SERVICE AUTHORIZED: An extension of the previously granted authority as entered by the original order in Docket B-1500, dated July 13, 1999, to include transportation as a common carrier in Nebraska intrastate commerce in the transportation of passengers between points in Douglas, Sarpy, Washington and Lancaster Counties over irregular routes. The restriction of the authority restricting operations of limousines with a capacity of 12 passengers or more is removed. RESTRICTION: The transportation of railroad train crews and their baggage is not authorized.

ORDER

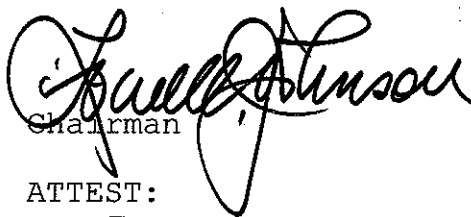
IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Application B-1500, Supplement No. 1, be, and it is hereby, granted.

IT IS FURTHER ORDERED that the terms of conditions of the original grant of authority issued July 13, 1999, not amended by the terms in this order continue to remain in full force and effect.

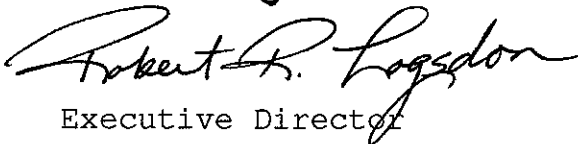
MADE AND ENTERED in Lincoln, Nebraska on this 4th day of November, 1999.

COMMISSIONERS CONCURRING:

NEBRASKA PUBLIC SERVICE COMMISSION


Chairman

ATTEST:


Executive Director

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

COMMISSIONERS DISSENTING:
//s//Daniel G. Urwiller