

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Appli-)
cation of Abbott Transport-)
ation, Inc. seeking authority)
as a common carrier in)
Nebraska intrastate commerce)
in the transportation)
of passengers and their)
baggage by bus (15 passengers)
or less) (a) between Eppley)
Airfield and hotels and motels))
in Douglas and Sarpy Counties)
over irregular routes; and)
(b) in special party opera-)
tions between points in)
Douglas and Sarpy Counties)
over irregular routes.)
RESTRICTION: The transporta-)
tion of railroad train crews)
and their baggage is not)
authorized.)

Application No. B-1505

GRANTED AS AMENDED

Entered: November 4, 1999

APPEARANCES:

For the Applicant:

Bradford E. Kistler
P.O. Box 85778
Lincoln, NE 68501

For the Protestant:

Angela L. Burmeister
Richard N. Berkshire
8805 Indian Hills Drive #200
Omaha, NE 68114

For the Commission:

Michael T. Loeffler
1200 N Street
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BY THE COMMISSION:

By application filed May 3, 1999, Abbott Transportation, Inc.,

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("Abbott" or "Applicant") Omaha, Nebraska, seeks authority as a common carrier in Nebraska intrastate commerce in the transportation of passengers and their baggage by bus (15 persons or less) (a) between Eppley Airfield, Omaha, Nebraska, and hotels and motels in Douglas and Sarpy Counties over irregular routes; and (b) in special party operations between points in Douglas and Sarpy Counties over irregular routes.

Notice of the application was published in The Daily Record, Omaha, Nebraska, on May 5, 1999 pursuant to Commission rules. A protest was filed to the application by Happy Cab Company ("Happy Cab" or "Protestant") and by R&F Hobbies dba Prince of the Road. The protest by Prince of the Road was withdrawn upon amendment to the application by the Applicant further restricting the proposed service as follows: "Governmentally financed transportation of clients of the Nebraska Department of Health and Human Services and/or private contractors of the Nebraska Department of Health and Human Services such as, but not limited to, FHC Options and Partners, and/or of persons in the custody of the Department of Corrections (sic read: Department of Correctional Services), in their capacity as such clients and/or persons in custody, is not authorized." Such amendment is adopted and incorporated into this grant of authority.

A hearing was held at the Nebraska State Office Building, 1313 Farnam-on-the-Mall, Omaha, Nebraska, on August 26, 1999. Notice of the hearing was sent to interested parties on August 10, 1999. The Applicant produced nine witnesses who testified as follows:

Jeanne Taylor, a resident of Gulf Breeze, Florida, testified that she had occasion to attempt to make transportation plans for her son, a paraplegic, who was planning to fly into Omaha for a wedding. He required transportation with a wheelchair lift. She first called A&B Shuttle who informed her that they did not have a wheelchair lift equipped vehicle. When she called Eppley Airfield for information, she was told to contact a taxicab service. She did not call a cab service for transportation because of past experiences with cabs where she felt that she and her son were ignored because of the extra effort to transport a person with a wheelchair. She also preferred using a vehicle with a wheelchair lift. After a fruitless contact with another provider, she contacted Abbott Airport Parking. Abbott Airport Parking provided transportation with a wheelchair lift free of charge. On cross-examination, she testified that she did not contact other companies whose names were provided by counsel for the Protestant.

Len Friedenbach, general manager of Sleep Inn and Comfort Inn,

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testified that he has personal experience with customers of his hotels who require transportation to Eppley and who often arrive the day prior to their scheduled flight. He testified that Sleep Inn customers can obtain transportation to the airport by parking at the Abbott Airport Parking facilities. Transportation to the airport is then provided free of charge and is part of the service of renting a space for a vehicle to park. Clients of Sleep Inn who do not take advantage of the service provided by Abbott Airport Parking must use a taxicab for transportation to the airport. He described problems with timeliness which he has had in the past when his customers have called for cab service for transportation to the airport. He also testified that Abbott Parking generally operates 6-7 runs between Sleep Inn and the Airport daily.

Mr. Freidenbach testified further that he has been involved with the hospitality industry for over five years. This experience has given him broad knowledge of the ground transportation services in Omaha. He is a member of the Greater Omaha Lodging Association and attends meetings of the Association. He believes that a shuttle service such as offered by the applicant would be beneficial and believes that the options provided by such a service would serve a demand for shuttle services. Shuttle services offer benefits that, he believes, cab transportation cannot offer including fast response time, scheduled arrivals and departures, and the ability to provide service to unrelated persons who could share the same trip. Despite his involvement with the Association, he has never heard of A&B Shuttle and has never been approached by them to fulfill the transportation needs of his guests.

Michael Schmid, president of Abbot Transportation and Abbott Airport Parking ("Abbott Parking"), testified on behalf of the application. He testified that Abbott Parking owns two lots and runs shuttle service between the lots and Eppley for the price of a parking space. The shuttle uses a bus that is equipped with a wheelchair lift. Upon receiving a grant of authority, he would add five more shuttle buses, one of which will be equipped with a wheel chair lift. Abbott Parking also rents 400 spaces to the Omaha World-Herald and, by contract, shuttles the employees to their downtown employment at the paper.

He described his proposed service. The shuttle service will go from hotel to hotel and will be dispatched via cellular phones or two-way radio. Drivers will be uniformed. He will seek permission to position one bus at a west Omaha hotel, one in midtown Omaha, one downtown and another at the airport. He also intends to provide special party service where reservations will have to be made in advance. Destinations could include places of

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special interest such as Boys Town or the Civic Auditorium. This would allow the riders to avoid parking problems and fees. Vehicles will be regularly maintained and inspected. Drivers will undergo a background check and driving tests. Upon approval of authority, he will transfer the vehicles now used by Abbott Parking to Abbott Transportation. He also presented income statements and balances of his banking accounts.

Mr. Schmid testified that he has heard of A&B Shuttle but is not aware that they provide the type of service which he intends to offer.

Testifying in support of the application, Mary Lou Koterzina, manager of Visitor Services for Father Flanagan's Boys Home for the past 18 years, stated that she supports the idea of special party shuttle transportation to Boys Town. She believes that such a program would give the Home visibility and be good for tourism. Currently, the only way for potential visitors to visit Boys Town is via cab or personal car. She stated that the cost of a cab could be prohibitive. Once on the campus, visitors need transportation to drive them around - a service impractical for taxi services. Ms. Koterzina also testified that MAT bus service does not extend as far west as Boys Town and that the vans owned and used by Boys Town are not available for public use. She further stated that she is not familiar with A&B Shuttle and that they have never contacted her. She also testified that she has had problems with timeliness for visitors who have called cab services.

Jerry Dann, an owner-operator of two hotels, testified in support of the application. Neither of his hotels accommodates its guests with a courtesy car. A shuttle service, he contended, would be of benefit to the guests at his hotels. He testified that he has called A&B Shuttle on occasion. He has experienced many problems with timely arrivals of cabs as compared with their time they are called and are scheduled to arrive. He thought that his guests would use a shuttle service one or two times per week.

Mark Jeffrey spent 13 months as an employee of Marriott at his present location. Like the previous testifier, his hotel does not offer the use of a courtesy car. He presented documentary evidence regarding customer complaints with regard to guests requesting cab service for transportation. His company has been tracking complaints with cab services since about February. Since that time he and his staff have logged numerous complaints on taxi service providers in the Omaha area. Most complaints are for lack of promptness, but there have been others including non-arrival, abusive behavior, and other service complaints. As a member of the

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Omaha Lodging Association, he had the opportunity to visit with taxi company representatives in an effort to address his customers' complaints. Since a meeting with some of these representatives last June, however, he and his staff have still recorded an additional 21 complaints regarding poor taxi service. His clientele includes a significant number of repeat customers and the inability of them to obtain satisfactory and reliable transportation services from cab companies, he believes, reflects poorly on his company. He testified that he has made complaint with the Commission recently regarding the poor service record of cabs to his hotels.

Mr. Jeffrey further testified that he believed that the shuttle proposal offered by the Applicant would be beneficial to him and to his customers. He had been approached by A&B Shuttle some time ago and hoped to establish some type of shuttle service but it has yet to materialize. He indicated that he did not care who operated the shuttle service, but thought it was needed.

Tania Moore also testified in support of the application. She is the Tourism Manager for the Greater Omaha Convention and Visitors' Bureau, working primarily with the leisure market and with group tours. She affirmed that a shuttle service would be beneficial to the city. She has worked with persons who wish to travel in groups. She felt that the proposed service would fill a gap for transportation services that currently exists. She stated that she gets about one call per week from small groups who require transportation. She testified that she would make referrals to the Applicant if he received the authority. She has had no discussion with A&B Shuttle and they have never contacted her about the services that they could provide.

Dick Moser, manager of the Best Western White House Inn, testifying in support of the application, told the Commission that he has many guests that inquire as to whether his hotel provides shuttle service to the airport. He has experienced problems with obtaining cab transportation for his guests. There are problems with no-shows as well as cabs arriving late. He supported the concept of a shuttle and thought its addition would be beneficial. He testified further that, prior to the hearing, he had not heard of A&B Shuttle.

Dan Koenig, executive director of the Bellevue Chamber of Commerce, testified that a shuttle service would be beneficial to the area that he represents. He supported the idea of greater options for the enlisted men residing at Offutt in Bellevue. He testified that the Bellevue area is growing and that he saw a

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growing need for transportation services. He has never been approached by A&B Shuttle and had never been approached by the company for their transportation services. He testified further that he has had hotel and motel operators approach him on the need for a shuttle service.

Three persons testified in opposition to the application. The first was Vince Lalomia, president of Happy Cab, Yellow Cab, Checker Cab and Airport Transportation. He testified that he was aware of eight different transportation providers who could provide service to the handicapped. Mr. Lalomia testified that the granting of an application would harm his company. He produced documentation of trips made to various hotels and motels in the Omaha area in support of his contention that arrival times of the cabs to their destination were responsive. He stated that he has not personally received any complaints on timeliness regarding Happy Cab taxis. The report summarized average times and showed that the time from the time a call was received and a taxi arriving at the hotel ranged anywhere from about 8 to 13 minutes. A report presented demonstrated that, based on a survey of riders, cab riders are satisfied with the service being provided by Happy Cab.

He disputed evidence brought by the Applicant regarding specific instances of dissatisfaction with cabs and denied that his company failed to answer phones as suggested by the complaint logged entered into evidence. He stated that, at Happy Cab, the phones are manned 24 hours a day.

Mr. Lalomia told the Commission that his operation employs 83 drivers, who are all independent contractors, and operates 110 vehicles. Drivers work under a lease arrangement and are not restricted to serve any particular area. He was not at the June meeting of the Greater Omaha Lodging Association but his company was represented by another employee. He further stated that, as a result of the complaints that he heard about at the June meeting, Happy Cab has since changed their answering machine message to reduce misunderstandings when persons called the company for taxi service. Mr. Lalomia further testified that he was aware of A&B Shuttle and that it was his understanding that A&B Shuttle provided demand-responsive shuttle service.

Dominic Manzelli also testified for the Protestant and in opposition to the application. Mr. Manzelli is the director of fleet management for cabs operated by the Protestant. He noted that, while he does receive complaints from the hotels and motels occasionally, he responds to these complaints. His company, in response, has made amends to the customer, provided free rides and

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offered apologies. He also testified that the granting of the application would harm the cab companies by providing direct competition.

Bill Cain testified for the Protestant. He is the project manager for Happy Cab. He testified that he was at the June meeting of the Greater Omaha Lodging Association and that he was approached by some representatives of the lodging industry regarding concerns, but was told that he should not consider them as criticism against Happy Cab. In response to complaints he received regarding the voice message indicating arrival time when persons called requesting service, his company changed the voice mail greeting to indicate a more accurate time for customers to expect the arrival of a taxi cab. He further testified that the granting of the application would harm the cab business. He was also, he said, aware of studies into the feasibility of shuttle service in the Omaha area, the latest being conducted in 1993. According to the criteria used by the study, it was his opinion that the Omaha market could not support a shuttle service because of inadequate factors causing demand for such service. He could not provide information regarding the development of the criteria used by the study.

For the record, the Commission should note that it did not allow the testimony of Mark Hamilton of A&B Shuttle. A&B Shuttle, a holder of a certificate of authority for the Commission, did not file a protest of the application. Counsel for the Protestant provided an Offer of Proof at the hearing. After several minutes of reading this proof into the record, she was advised that she should finish up. After noting her objection, the Commission offered, and counsel accepted, that a written offer of proof be entered into the record. That offer of proof was received by this Commission October 6, 1999, and was made part of the record of this application.

FINDINGS AND OPINION

Before the Commission turns its attention to the merits of this application, we first address some procedural and peripheral issues. Protestant offered objection to having its offer of proof being read into the record limited at the time of the hearing. At the time, the objection was sustained to the effect that counsel was directed to finish the reading and to sum up her offer. Counsel indicated that she thought that she could do so in a few minutes and read additional offer of proof into the record. In addition, she sent a written offer of proof which has since been made part of the record. While an Offer of Proof is specifically

provided for in Commission rules, there is no requirement that the entire offer must, on demand, be read into the record at the time of the hearing. See *Title 291, Rules of Commission Procedure, Ch.1, Rule 016.12 (1992)*. The Commission has accepted the full written Offer of Proof into the record of this proceeding and has given the Offer the appropriate weight in its consideration. We find that the Protestant's objection regarding reading the Offer of Proof into the record at the time of the hearing overruled in part and sustained in part. As it is now a part of the official record in this proceeding, the Protestant has suffered no harm.

Second, regarding the refusal of the Commission to allow the testimony of Mark Hamilton of A&B Shuttle, the Commission notes that its rules and procedures provide ample, full, and predictable directives for a certificate holder to take when that holder objects to an application. The party objecting to the application may file as a protestant or an intervenor. These rules were properly promulgated and allow an applicant to have fair and full notice of the objections to the application. By placing the applicant on notice, the applicant may employ all of the tools of discovery in order to build his or her case for the application.

In fact, our rules requires such a protest to be filed. The Commission Rules and Procedures specifically provide,

"Failure to timely file a protest shall be construed as a waiver of opposition and participation in the proceeding." *Title 291, Rules of Commission Procedure, Ch. 1, Rule 014.01 (1992)*.

When a party has a certificate of authority, as Mr. Hamilton does here, they are constructively charged with full knowledge of the rules and regulations of the Commission. Mr. Hamilton chose not to take advantage of the procedures for intervention and protest. Having failed to do that, he cannot then be called by another Protestant to present his case against the application. Such a procedure allows circumvention of Commission rules and places the applicant in an unfair and disadvantaged position regarding the presenting of his or her case. Our system of justice is built on rules that provide for proper notice, adequate opportunity for discovery, and a fair presentation of facts so that the fact-finder, here, the Commission, may reach a decision based upon the law and its system of fairness.

Protestant's objection that Mr. Hamilton was prevented from testifying are without merit. To rule otherwise would be to place potential applicants for authority at an unfair disadvantage in

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future proceedings.

Nonetheless, our findings will address, in relevant part, the role of A&B Shuttle to the extent that such information was received as a result of the testimony at the hearing.

Turning our attention to the application, this Commission finds that the application should be granted. We find the Applicant fit, willing and able to provide the proposed services in the application. Fitness of the Applicant was not an issue of contention during the hearing. Rather, the protest to the application centered around the issue of "public convenience and necessity" as provided in Neb. Rev. Stat. §75-311.

Nebraska law dictates that this Commission examine three factors in determining whether an Applicant has met the state requirement for "need and necessity" as explained 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 without endangering or impairing the operations of existing carriers contrary to the public interest,"

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

The Court also instructs that the second factor listed above is the threshold question for determining "need and necessity" so we address that factor first. *Id.*

Applicant proposes a shuttle service between hotels and motels in Douglas and Sarpy Counties and Eppley Airfield and also for special transportation upon reservation by the parties. Protestant Happy Cab et al. asked most witnesses for the Applicant if they had ever used or considered A&B Shuttle for the purposes of providing shuttle service. Their answers are instructive. Long-standing experts in Omaha ground transportation testified one after another that they either had never heard of A&B Shuttle, had never been approached by A&B Shuttle in their official capacities as tourism points of contact, or that A&B Shuttle had not followed through on discussions about providing transportation. This speaks to the adequacy of A&B Shuttle as it relates to the promotion of its

services. Further, A&B Shuttle was described as a demand-responsive shuttle system involving mainly shuttle from Omaha residences to other places. A&B Shuttle does not provide the type of continuous and regular hotel-to-airport shuttle service proposed by the Applicant. There was no evidence, nor has A&B Shuttle ever approached anyone, including this Commission, regarding a regular and continuous hotel-to-airport shuttle operation as proposed. The fact that A&B Shuttle exists is not in and of itself sufficient to defeat the application. As the Court notes,

"[T]he 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." *Id.*

There is nothing in the record that A&B Shuttle stands ready to provide the proposed service. In fact, several representatives from hotels and motels in Omaha and Bellevue indicated that they thought such a service should exist. These representatives demonstrated their lack of bias when they testified that they did not even care who offered such a service; they only understood that one did not exist. Logically, if a hotel-to-shuttle system did exist, it stands to reason that these representatives would have knowledge of a system if it were satisfactorily and adequately operated.

The next question is whether taxi services can stand up and claim to be willing to provide the service. We conclude that they cannot. Taxi services, according to the evidence adduced, cannot timely fill the need for immediate service; cannot, by Commission rule serve in place of a shuttle that takes on numerous parties without the consent of the others; and, have serious problems of providing adequate and satisfactory service to hotels.

A shuttle service, as proposed, may take numerous parties without requiring the consent of the other passengers. Taxis are prevented by Commission rule of doing this. See *Title 291, Motor Carriers, Ch. 3, Rule 011.01 (1989)*.

Further, the Commission received sufficient evidence to indicate that persons who would most rely on this type of service, that is, tourists and travelers in need of reliable and timely transportation to the airport, are those most ill-served by taxi cab service operators. Cab operators lease their vehicles from the cab companies. They are, by the testimony presented by the Protestant, not restricted to any area and need not take a call dispatched.

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Finally, their record of service to hotels is inadequate as evidenced by the many pages of the log of customer complaints against the taxi companies presented by the hotel manager. Protestant cab companies presented evidence which they claimed showed short response times to hotels in the Omaha area. This evidence was skewed by the fact that, when a cab arrived early, a negative response time was assigned to the call. Further, there were dozens of instances in the logs supplied by the cab company that showed response times of twenty minutes or longer, some even over thirty minutes. This is not an adequate response to that population most interested in a hotel-to-airport shuttle service.

The next factor to consider is whether the proposed operation will serve a useful purpose. The Applicant met his burden of showing that this service is needed and desired. The Applicant presented testimony from hotel operators in Omaha and Bellevue, from representatives in the tourism industry and from tourist attractions that more than indicated that this type of service is one that is useful, needed, and will be utilized.

Protestants made reference to a 1993 study which indicated that Omaha lacked the prerequisite criteria for a super shuttle. Not only does the dating of this material of dubious relevance to this proceeding, the Protestant failed to produce the actual study and could not answer as to the development of the criteria used. Overall, the Commission finds that the Applicant has met his burden in demonstrating that his proposed service is responsive to a public demand.

The last factor to be considered is whether the proposed service would endanger or impair the operations of an existing carrier. The Protestant introduced evidence from employees of the Protestant testifying that the service would endanger the cab companies. While assertions from those financially involved with the protest are not automatically dismissed, they are given their proper weight. The fact is that the population to be served by the Applicant is a different one than that served by taxi providers. The testimony demonstrated that persons who would be most apt to utilize a shuttle service are those who want regular and reliable transportation, a demand that taxis cannot consistently meet.

The Commission is not making a finding that the taxi companies represented are inadequate, merely, that in the type of service that is proposed here, there are degrees of timeliness and that customers most likely to use a shuttle service would have higher expectations and needs for promptness and regularity.

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Because the Applicant has been found to be fit, willing and able to provide the service proposed, and because the Applicant has met the burden of proving a present public convenience and necessity, we find that the application should be granted.

CERTIFICATE AUTHORIZED

COMMON: Transportation of passengers and their baggage by bus (15 passengers or less) (a) between Eppley Airfield and hotels and motels in Douglas and Sarpy Counties over irregular routes; and (b) in special party operations between points in Douglas and Sarpy Counties over irregular routes. RESTRICTION: The transportation of railroad train crews and their baggage is not authorized. Further restricted as follows: Governmentally financed transportation of clients of the Nebraska Department of Health and Human Services and/or private contractors of the Nebraska Department of Health and Human Services such as, but not limited to, FHC Options and Partners, and/or of persons in the custody of the Department of Correctional Services, in their capacity as such clients and/or persons in custody, is not authorized.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the application for authority in Application B-1505 be, and it is hereby, granted as amended.

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,

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conditions, and limitations which have been, or may hereafter be, prescribed by the Commission.

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

COMMISSIONERS CONCURRING:

NEBRASKA PUBLIC SERVICE COMMISSION

Lowell C. Johnson

Lowell C. Johnson
Chairman

ATTEST:

Frank E. Landis

Robert R. Logsdon
Executive Director

//s//Lowell C. Johnson
//s//Frank E. Landis
//s//Daniel G. Urwiller

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION
