

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Applica- )  
tion of APEX Transportation )  
Services, Omaha, seeking )  
authority as a common carrier )  
in Nebraska intrastate )  
commerce in the transporta- )  
tion of passengers, 19 years )  
of age and younger and their )  
caregiver or family members, )  
between points in Douglas and )  
Sarpy Counties, on the one )  
hand, and, on the other hand, )  
points in Nebraska over )  
irregular routes. Passengers )  
19 years of age or younger )  
must be Medicaid eligible or )  
require mental health services )  
or are either in or under )  
consideration for foster care.)

Application No. B-1508

APPLICATION DENIED

Entered: November 4, 1999

BY THE COMMISSION:

By application filed June 3, 1999, APEX Transportation Services ("Applicant"), Omaha, Nebraska, seeks authority as a common carrier in Nebraska intrastate commerce in the transportation of passengers 19 years of age or younger, and their caregiver or family members between points in Douglas and Sarpy Counties, on the one hand, and, on the other hand, points in Nebraska over irregular routes. A copy of notice of the application was published in the Daily Record, Omaha, Nebraska, on June 7, 1999, pursuant to Commission regulations. Protests to the Application were filed on June 11, 1999, by Prince of the Road through its attorney, John Boehm; and, on June 16, 1999, by Happy Cab Co. through its attorney, Angela Burmeister. The protest filed by Happy Cab was withdrawn on September 21, 1999.

A hearing was held September 22, 1999, in the Commission Library, Lincoln, Nebraska. The hearing was video-conferenced with a link to the State Office building, 1313 Farnam-on-the-Mall, Omaha, Nebraska. A notice of the hearing was sent by first class mail to all interested parties on July 27, 1999. The Applicant was represented by David Christensen, Omaha, Nebraska. John Boehm, Lincoln, Nebraska, appeared for the Protestant.

Robert Thompson, the owner and administrator of APEX Transportation testified in support of the application. The APEX Foster Care Treatment ("APEX Foster Care"), which he also operates,

takes children who are wards of the state, children who have behavior disorders and other mental health diagnoses. As treatment improves the behavior of these children, they are moved to a community-based setting. There exists a need to transport these children from place to place.

APEX Foster Treatment has four full-time employees, who would also be working for APEX Transportation. Currently APEX Transportation utilizes the personal vehicles of the employees; however, Mr. Thompson testified, a new vehicle would be purchased upon the granting of any authority. When asked if he had any problems arranging transportation, Mr. Thompson testified about an incident that he experienced in which there was a miscommunication with a driver employed by Prince of the Road.

On cross-examination, he testified that APEX Foster Care began placement of children in June of 1999. The children are all clients of the Nebraska Department of Health and Human Services ("HHS"). The children are currently transported from their schools to the office at no charge. He anticipated that, with a grant of authority, APEX Transportation would also transport biological parents, foster parents, and children in need of supervision. These would include rides to therapy sessions and meetings.

Mr. Thompson further testified that he currently does not have a contract with HHS for the transportation of children. APEX Foster Care has a contract with Options. He then described the backgrounds of the four employees who would also be employees of APEX Transportation. These included the clinical director, a nurse with 15 years' experience; a licensed mental health professional; and an in-home visitation specialist, who he anticipated might accompany the driver in a situation where the child or children needed someone with a "calming effect." Other drivers would be hired as needed by the expansion of the business. The drivers would receive aggressive control techniques' training.

Jeanette Speck, a partner in APEX Transportation, then testified in support of the application. She is also the executive director of APEX Treatment Foster Care. She is a registered nurse and has been working in psychiatry since 1983. She testified that there are currently nine children placed with APEX Foster Care. She described situations where APEX Foster Care would be called when a foster child acted up in school. APEX Foster Care then sends two persons to retrieve the children. She expressed a concern that she has should an untrained driver go to the school in this type of situation to retrieve a disruptive student. She had not had any foster parent complain to her regarding the

transportation of the children, although she did explain her understanding of the incident where the biological mother was not picked up timely by the driver employed by Prince of the Road.

She further explained that it was important that the driver who was picking up the children to have some information about the child and the types of interventions that had been used on the child being transported. She supports the application because of safety concerns regarding the transportation of the children.

Under cross-examination, she testified that APEX Foster Care is paid on a per diem basis for the care of the children. She also agreed that APEX Transportation might be used to transport staff of APEX Foster Care to visit children for interviews, for example. She also stated that all drivers would undergo TACT, a program of aggressive control techniques' training. The drivers would also undergo foster care training which is the same as that provided by APEX Foster Care to foster parents.

Sean Schroll, the owner of Prince of the Road, testified in opposition to the application. Prince of the Road is a certified statewide carrier which contracts vehicles. Currently there are over forty drivers and vehicles under contract with Prince of the Road. The majority of their business is to transport clients of HHS and Options. They also transport parents, caregivers, and foster children. He reports that they have not encountered any serious incidents in the transportation of foster children.

Options contacts Prince of the Road for transportation needs. Prince of the Road then contacts a driver. All drivers are equipped with cellular phones and generally call to the home office if they are going to be more than fifteen minutes late for a transportation appointment. The home office then notifies the destination of the call. Transportation is generally arranged by phone or fax. The dispatch is operated by six employees, and is manned 24 hours a day.

Prince of the Road has begun a training program for its drivers. The contract for this training is with a Mr. Henry Moss, who is with the National Detention Association; the training is certified by the Nebraska Law Enforcement. The training is known as Therapeutic Aggression Control Tactics (TACT). TACT training includes sensitivity training, deescalation, and stress management.

Mr. Schroll provided a list of the levels of training received by all of its drivers. Twenty-two drivers had received training as of the date of the hearing with all drivers scheduled to complete

training by October 6, 1999. All new drivers will also have to complete the training.

On cross-examination, Mr. Schroll testified that the drivers receive some background on the individual who is to be transported but that his drivers would not have all of the medical information or have any personal relationship with the child or children to be transported. They would be given information on whether a child might have a tendency "to run."

John Miller, Chairman of the Board of Prince of the Road, testified against the application. He stated that he has four vehicles leased to Prince of the Road who are all located in Omaha. He stated that there have only been a couple of times that his drivers in Omaha could not provide the requested service. He stated that Prince of the Road currently transports juveniles for Options and HHS. There are approximately 15 transportation runs with children per day. He also confirmed that Prince of the Road can currently meet the demand for transportation as well as additional business.

On cross-examination, he testified that the information given to a driver regarding a juvenile to be transported is limited and that the information does not include the medications that the juvenile might be taking.

John Schroll, the Public Relations representative from Prince of the Road, testified that he meets with representatives from HHS and Options regarding the services that Prince of the Road needs to provide. He testified as to the training curriculum that his drivers had to take. The training of a driver includes a criminal background check, a check with the Central Registry (HHS) and the training process. He also testified that Prince of the Road has been able to meet all requests for service as well as additional requests for service, if needed.

#### FINDINGS AND OPINION

The decision on to grant or deny this application centers around the question of whether the applicant has proved that the "proposed service, to the extent to be authorized by the certificate...is or will be required by the present or future public convenience and necessity." Neb. Rev. Stat. §75-311(1)(b)(Reissue 1996). The applicant bases its appeal on the argument that there is not currently adequate and satisfactory service for the transportation of Medicaid eligible juveniles or

for children under the age of 19 with mental illness.

To answer this query, we turn to the question of "whether this purpose can or will be served as well by existing carriers." *In re Application of Kilthau*, 236 Neb. 811, 815 (1991). If this question can be answered affirmatively, the application must be denied. Arguing that the existing service is unsatisfactory, the Applicant relies on an anecdotal account of a biological mother who waits for the driver from Prince of the Road who never arrives, presumably because the driver went to the wrong address. While the incident in question, to some degree did occur, alone, one anecdotal incident cannot serve as a demonstration that the proposed service cannot be served as well as the existing carriers, in this case, Prince of the Road.

The Protestant, on the other hand, testified that it is willing to meet the present demand for such services and, because it has potential drivers on its waiting list, any possible increase in demand for the immediate future.

Another argument advanced by the Applicant is that the service proposed is unique and being unmet because of special training and relationships that the Applicant argues it, alone, is in the position of providing. Protestant Prince of the Road demonstrated that it is requiring of its drivers the same time of aggressive de-escalation training that the Applicant requires of its drivers. In addition, the Protestant can point to criminal background checks and checks with the central Registry of HHS. As long as existing carriers continue with the type of training that the Applicant hopes to distinguish itself with, the Applicant cannot show, in this regard, that a grant of authority is necessary or meets the demand for these types of services. The result is that the Applicant cannot rely on its provisioning of special training to deal with juveniles as the basis for approving its application.

The Applicant further argues that its relationships with the juveniles transported provides a basis for the grant of its application. The Applicant, however, fails in its burden of proof to show that these relationships and the benefits arguably derived from these relationships constitute an existing or future need that is unmet by existing carriers.

Because the Applicant failed to prove a present or future need that is unmet or inadequately met by existing carriers, it does not demonstrate the "need and necessity" required for this Commission to grant an application for authority. The mere convenience that it can provide itself is insufficient to prove that it also serves

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the "public" necessity that state law requires.

For these reasons, the Commission finds that the Applicant fails to meet the "need and necessity" prong of state law which stands as a prerequisite to a grant of authority. Because the Applicant fails this test, we need not reach a conclusion on the issue of fitness.

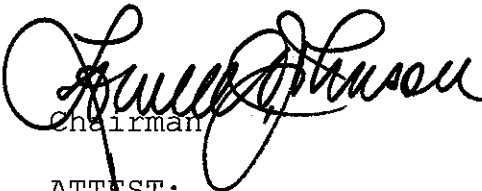
O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Application B-1508 be, and it is hereby, denied.

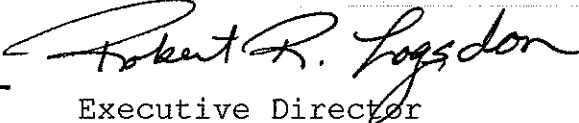
MADE AND ENTERED in Lincoln, Nebraska on this 4th day of November, 1999.

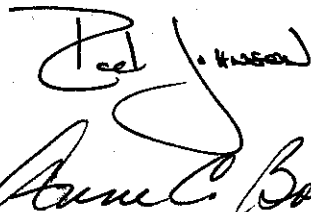
COMMISSIONERS CONCURRING:

NEBRASKA PUBLIC SERVICE COMMISSION

  
Chairman

ATTEST:

  
Executive Director

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