

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application ) APPLICATION NO. B-1519  
Of Navigator Motor Coaches, Inc., ) SUPPLEMENT 1  
Norfolk, Nebraska, seeking to )  
Acquire, through transfer, the ) GRANTED  
Authority granted to I-80 Epply )  
Express, Kearney, Nebraska, in )  
Certificate B-1192. ) ENTERED: July 12, 2011

APPEARANCES

For the Applicant:

Jack W. Besse  
P.O. Box 10  
Kearney, Nebraska 68848

For the Protestant:

Jack L. Shultz  
P.O. Box 82028  
Lincoln, Nebraska 68501

For the Commission Staff:

Mark Breiner  
300 The Atrium, 1200 N Street  
Lincoln, Nebraska 68508

BY THE COMMISSION:

By application filed November 19, 2010, Navigator Motorcoaches, Inc., (hereinafter referred to as "Applicant") of Norfolk, Nebraska, seeks to acquire through transfer the authority granted to I-80 Eppley Express, Kearney, Nebraska. Notice of the application was published in The Daily Record, Omaha, Nebraska on November 24, 2010. Timely protests to the application were filed by Iron Horse Relays, LLC, and by Dashabout Roadrunner.

A hearing was scheduled on April 26, 2011, in the Commission hearing Room in Lincoln, Nebraska. Notice of the hearing was sent to all parties on March 22, 2011. A hearing on the application was held April 26, 2011, in the Commission Hearing Room with appearances as shown above.

EVIDENCE

The Applicant first called Donald Oberle to testify. Mr. Oberle is one of the owners of the Applicant. Navigator is currently operating under its authority held in Certificate B-1519.

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It currently transports around one million people per year.

Mr. Oberle plans to maintain I-80s presence in the Kearney area. His stated goal is to maintain many of the current employees and to maintain the services currently provided by I-80.

Mr. Oberle stated that it was his understanding that the protest was only on the irregular portion of the authority. He further stated that a restriction of the transferred authority would cause a readjustment or termination of the contract to purchase the authority from Larry Miller at I-80.

On cross-examination by Jack Shultz, Mr. Oberle stated that Navigator will overhaul and perhaps upgrade the fleet in the future. He further stated that Navigator may offer additional services in other areas if the demand warranted such provision.

Mr. Larry Miller was called to testify. Mr. Miller is the owner of I-80 Eppley Express. Mr. Miller testified that he operates I-80 Eppley Express. I-80 has operated under all sections of its authority, which include regular route transportation, irregular route transportation, and a trolley service in Kearney, Nebraska.

Mr. Miller stated that his irregular route service was operated on a demand basis between towns that are not on his regular route service such as McCook, Lexington or Holdrege. While there is not a specific published schedule for this service, he does receive calls and performs services as a result of these calls. Mr. Miller interpreted his trips that transported seven or more to be charter, and trips for less than that number to be irregular trips. The company maintains advertising in newspapers and the internet.

Mr. Miller stated that a transfer of his authority would not affect other transportation providers. He is requesting that the Commission grant a transfer of his authority to the Applicant as it is without any restrictions being placed upon it. He also stated that the Applicant was fit, willing and able to conduct the business.

On cross-examination by Jack Shultz, Mr. Miller stated that he considered, Ameristar Tours, First Holiday Tours and Arrow Stage

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Lines to be his competition in charter service, and listed Dashabout Roadrunner and Prince of the Road as competition in his irregular route service.

When asked by Mr. Shultz whether he had a rate for irregular route service, Mr. Miller stated that he charged the relevant charter rate for the use of the vehicle. Mr. Miller also stated that he used the word "charter" for bus and in reference to irregular service. Also on questioning by Mr. Shultz, Mr. Miller indicated that he did not advertise specifically for irregular route service in any of his advertising. Mr. Miller said again that he used the word "charter" to apply to both bus and irregular service, and that to the general public there was little or no difference between the services as far as terminology is applied.

Mr. Shultz inquired about the tariff and the applicability of the tariff to his services. Mr. Miller again stated that he charged the appropriate vehicle size for irregular route service.

#### OPINION AND FINDINGS

Applications for transfer of authority are governed by Neb. Rev. Stat. Sec. 75-318, which in pertinent part says:

It shall be lawful, only under the conditions specified in this section, for any motor carrier or nonmotor carrier, or two or more carriers to: (2) Purchase, . . . the . . . certificates, . . . of another motor carrier; or . . . . Whenever a . . . purchase . . . of the certificates. . . is proposed, the . . . person seeking authority therefor shall present an application to the commission, and thereupon the commission shall notify such carriers and other parties known to have an interest of the time and place for a public hearing in accordance with such rules as the commission shall adopt. If, after such hearing, the commission finds that the transaction proposed will be consistent with the public interest and does not unduly restrict competition and that the applicant is fit, willing and able to properly perform the proposed service, it may enter an order approving and authorizing such . . . purchase, . . . of (a) . . . certificate. . . upon such terms and conditions as it shall find to be just and reasonable; provided, that if any of the certificate or permit proposed to be . . . transferred . . . are dormant the commission may approve an

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application for . . . transfer . . . only upon proof of and a finding that such . . . transfer . . . is or will be required by the present and future public convenience and necessity, in the same manner as provided in section 75-311 . . . ."

In this matter, an application for the transfer of the authority held by I-80 Eppley Express was alleged to be dormant by the protestant Dashabout Roadrunner. The protestant, through its counsel, stated that the transfer of I-80 Eppley Express' certificate should not include the irregular route authority as it had not performed under that authority for a period of time no tariff was applicable to the irregular service and that therefore it should be found by the Commission to be dormant. As evidence, the protestant noted that I-80 did not specifically advertise for irregular route transportation but only for bus and charter service. The protestant further cited that the tariff held by I-80 did not have provisions for anything other than charter service and that there was no tariff applicable to irregular route service for individuals or for groups of less than seven.

In Canning v. McKay, 173 Neb. 103, 112 N.W. 2d 737, the Supreme Court said on the question of dormancy "Where the holder of a certificate of public convenience and necessity has complied with applicable statutes, regulations, and terms of his certificate, the question of dormancy becomes one of fact under all the circumstances shown."

The files and records of the Commission show that I-80 maintained its insurance in force and paid its annual fees. I-80 maintained a fleet of vehicles and drivers and held itself out to provide transportation. It maintained a tariff on file. It performed operations under its authority.

There was evidence that I-80 operated in a manner that was consistent with operating an irregular route service. In answers to interrogatories there was a list of trips that were performed with less than seven people and not operating in a charter situation. These trips provided evidence that irregular route services have been performed by I-80 and that the irregular route service is not dormant.

The protestant made an argument in examination that the tariff of I-80 did not have a provision for anything other than charter

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service. Larry Miller testified that he used the rates that were listed as charter and applied them to these trips. While there are not, on its face, any tariff provision that would appear to apply directly to irregular route traffic, the manner in which Mr. Miller applied the rates would be consistent with the provision of said service.

Mr. Miller also pointed out in his testimony that he used the word "charter" to include irregular route traffic. While acknowledging that the word "charter" has a specific meaning under Commission rules, he also stated that it is a common practice to use the term more loosely than is used in Commission rules and that individuals can "charter" a vehicle without it meeting the Commission rule regarding "charter" service. The tariff could have been more clear as to the application of the rates to irregular service, but the Commission finds that in the totality of the situation the application of rates by I-80 does not constitute a violation of Commission rules. While other aspects of Mr. Miller's testimony, such as the inconsistent application of a fuel surcharge are problematical, they lie outside the subject matter of this proceeding.

The Commission finds that, on the basis of the facts as presented in the case, that the irregular authority section of the certificate held by the transferor is not dormant. The Commission therefore will turn to the remaining parts of the test as set for in 75-118.

The record is silent on the issue of whether the transfer would be consistent with the public interest. There was no evidence presented by either side that the transfer would not be consistent with the public interest. The Commission finds that the transfer would not be contrary to the public policy of the state as expressed in the Motor Carrier Act.

All parties are in agreement that the transfer will not unduly restrict competition. There will not be less service available after the transfer than before. The Commission therefore finds that the transfer will not unduly restrict competition.

The remaining question the Commission is required to answer is whether the applicant is fit, willing and able properly to perform the service proposed to be transferred. The testimony in this matter shows that the transferee, Navigator Coaches, is fit, B-1519

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willing and able to properly perform the services in the its current certificate. Navigator is currently a certificated carrier in good standing with the Commission. The Commission therefore finds that the transferee is fit, willing and able to properly perform the service proposed to be transferred.

From the evidence adduced and being fully advised in the premises, the Commission is of the opinion and finds:

1. The Applicant is fit, willing and able properly to perform the service proposed and to conform to the provision of Sections 75-301 to 75-322.04, R.R.S. 2010, as amended, and the requirements, rules and regulations of the Commission thereunder.
2. The proposed intrastate service is or will be required by the present or future public convenience and necessity to the following extent:

COMMON: SUPP. 4: Passengers and their baggage over regular routes via the Interstate Highway System between Eppley Airfield near Omaha and Kearney serving intermediate points at Kearney, Grand Island, Hastings, York, Lincoln and Omaha interchanges.

RESTRICTION: No railroad train crews may be carried plus no passengers may be carried for revenue between points within the city limits of Omaha. Irregular Route: Passengers and their baggage between points in Nebraska over irregular routes.

RESTRICTION: No railroad train crews may be carried plus no passengers may be carried for revenue between points within the city limits of Omaha. SUPP. 5: Transportation of passengers and their baggage by trolley, bus, and passenger vans between points in Kearney over regular routes.

# O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Application B-1519, Supplement 1 be, and it is hereby, granted; and that upon compliance with the terms and conditions set forth in this Order, a Certificate of Compliance shall be issued to Navigator Motor Coaches, Inc., Norfolk, Nebraska, in Application B-1519, Supplement 1 authorizing the operations set forth in the foregoing findings.

IT IS FURTHER ORDERED that applicant shall not be issued the Certificate of Compliance authorized by the Commission unless and

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until applicant has fully complied, within ninety (90) days from B- the effective date of this Order, with Neb. Rev. Stat. sections 75- 305 (fees), 75-307 (insurance), and 75-308 (rates) (Reissue 1996), 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 Compliance is issued.

IT IS FURTHER ORDERED that the operations authorized herein shall be subject to the terms, conditions, and limitations which have been, or may hereafter be prescribed by the Commission.

MADE AND ENTERED at Lincoln, Nebraska, this 12th day of July, 2011.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

*Rad Janssen*  
*Anne Boyfe*  
*Gerald F. Upp*

//s//Frank E. Landis  
//s//Tim Schram

*Tim Schram*  
Chairman

ATTEST:

*Phil Rye*  
Executive Director

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