

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application) Application No. B-1567
of B-1567, Application of Tim)
Whitney d/b/a VIP Limousine)
Service 2119 ½ Central Avenue,)
Kearney, NE 68847; seeks) GRANTED AS AMENDED
authority as a common carrier of)
passengers in Nebraska)
intrastate commerce to provide)
limousine service in luxury or)
stretch limousines between)
points in Buffalo County and)
between points in said county on)
the one hand and on the other)
hands points in Nebraska over) Entered: April 9, 2002
irregular routes.)

APPEARANCES:

For the Applicant:
Jeffrey Knapp
15 W 22nd Street
P.O. Box 1434
Kearney, NE 68848

For the Protestant:
Thomas Tye II
1419 Central Avenue
P.O. Box 636
Kearney, NE 68848

For the Commission staff:
Shanicee Knutson
300 The Atrium
1200 N Street
Lincoln, Nebraska 68508

BY THE COMMISSION:

By application filed August 2, 2001, Tim Whitney d/b/a VIP Limousine Service seeks authority as a common carrier of passengers in Nebraska intrastate commerce to provide limousine service in luxury or stretch limousines between points in Buffalo County and between points in said county on the one hand and on the other hands points in Nebraska over irregular routes.

APPLICATION NO. B-1567

PAGE TWO

Notice of the application was published in The Daily Record, Omaha, Nebraska, on August 8, 2002. Notice of hearing was mailed to all interested parties on January 15, 2002 and was entered into the record as Exhibit No. 2. Protests were timely filed by Daniel and Susan Sindt d/b/a Kearney Cab Company and by O'Rourke & O'Rourke Buggy Rentals in Kearney, Nebraska and VIP Limo Service of Crofton, Nebraska. On February 14, 2002 a restrictive amendment was filed whereby the applicant sought to change his name to Tri-City Limousine Service. Therefore, the protest filed by VIP Limousine Service was withdrawn.

An objection to the name change of the applicant from VIP Limousine Service to Tri-City Limousine Service was filed by the Protestants on February 20, 2002.¹

E V I D E N C E

In support of the application, Applicant presented five witnesses who testified as follows:

Mr. Whitney, the applicant, testified that he is a resident of Kearney, Nebraska. He has lived in Kearney all his life. Presently, he is a host and front desk manager at Grandpa's Steakhouse. He has held that position for 11 years. Mr. Whitney testified that he was familiar with the transportation services offered near and around Kearney and has personal knowledge that there is a need for another limousine carrier in Kearney. Mr. Whitney testified that Grand Island has three limousine companies and Hastings also has three limousine companies to choose from. Kearney, he stated, has only one. He has seen "Special Moments" limousine service in Kearney from time to time. That operation is out of Clearwater which is approximately 143 miles away. Mr. Whitney testified that a number of people in the community have asked him to provide limousine service and he has turned them down. With respect to those individuals he stated that, "they more or less don't like the service in town so we send them to Grand Island services down there."² He further testified that the people he spoke with were aware that limousine service was available from the Protestant.

¹ This objection was renewed by the Protestant's attorney at the hearing. A copy of the written objection was received into evidence as Exhibit No. 4.

² Whitney, Tr. at 14:6-7.

APPLICATION NO. B-1567

PAGE THREE

In support of fitness, a copy of the application submitted by the applicant was offered and entered into the record as Exhibit No. 3. Mr. Whitney testified that he purchased a 1995 Lincoln Town Car stretch limousine and has been providing private not for hire services on certain occasions to his family and friends. A copy of the title to the vehicle was offered and received into evidence as Exhibit No. 6. Mr. Whitney testified that he has knowledge of the Commission's liability insurance requirements and has obtained means for general maintenance and repairs for his vehicle. Mr. Whitney stated that his financial statements in the record demonstrate his financial ability to operate a limousine service in the proposed territory.

Upon cross-examination, Mr. Whitney testified that the value of the limousine he owned was appraised at \$14,000.00. He testified that he received a loan three months ago so that he could carry out his business plan. Part of his assets included real estate owned jointly by four family members. He confirmed that he is only seeking authority in Buffalo County. The name Tri-City Limousine will be used only because Kearney is part of the "tri-city" area. He testified that his support witnesses from his application were not present at the hearing because one was having medical complications and the other had a conflict with the hearing time because of work. Mr. Whitney had not made any projections as to when he would turn a profit. However, he testified that he receives approximately one or two calls a week. Mr. Whitney admitted to receiving gratuities for his pro bono transportation. However, he did not seek a gratuity and it was not compensation or a trip fare.

Ms. Nancy Matzner, general manager at the First Inn Gold of Kearney, testified that she has known the applicant for about one year. She stated that he was a man of good character and good business sense. She further testified that she has heard a number of inquiries about Mr. Whitney providing limousine service. She further testified that she is familiar with the demand in the area. She testified that there is a need. She would recommend the applicant's service to her clients and guests.

APPLICATION NO. B-1567

PAGE FOUR

Upon cross-examination, Ms. Matzner testified that she does not arrange the limousine service; she makes the recommendations. The patrons arrange the service. Currently, she does recommend the use of Protestant's limousine service.

Ms. Wynne Adams testified that she was also familiar with the applicant. She has known him for 15 years. She testified that he was of good character. She is employed by a radio station and would have need for his proposed service for promotions, trade shows and weddings. She testified that she was familiar with the Protestants limousine service. She has not had a bad experience with the Protestant's limousine service; however, she testified that Kearney had a need for the applicant's proposed service. Upon cross-examination, she testified that she does set up limousine service directly for her clients.

Mr. Stan Haffman testified that he has known the applicant for 2-3 years. He testified that Mr. Whitney was a man of good character and fitness. He has not personally rented a limousine within the last two years. He has not experienced any problems with the Protestant's limousine service. However, he testified that Kearney is a growing community and could use an additional limousine provider.

Mr. Ed Sheen testified last for the applicant. He testified that he has authority to provide transportation service for hire by virtue of his certificate of public convenience and necessity granted in Application B-1459. He used to operate a limousine service in Minden. His operates are currently suspended due to mechanical problems with his vehicle. He testified that he had no opinion as to whether Kearney could use an additional limousine service.

Mr. O'Rourke testified for the Protestant. He testified that he has resided in Kearney for the last thirty-eight years. He currently holds authority as J & M Limousine. He has held that authority for seventeen years. He testified that he has statewide limousine service authority. He currently has five vehicles, however, one of which, is inactive. He testified that he has never turned down clients. He further testified that he has vehicles which sit idle many times in the year. He stated that he would acquire additional vehicles and/or drivers if the need arose. People can always contact him for services. He

APPLICATION NO. B-1567

PAGE FIVE

testified that there was no need for the applicant's proposed service because he was in the market meeting the need.

On cross-examination, Mr. O'Rourke testified that his drivers were not full-time. He could not afford to keep them on full-time as the need was not there. According to his rates, customers are charged a minimum of 3-5 hours for his service. He testified that even on busy days such as on Valentine's Day, he did not turn any customers down.

Mr. Daniel Sindt also testified for the Protestant. Mr. Sindt operates Kearny Cab Company. He testified that in 1993 or 1994 he had an occasion to use Mr. Whitney's limousine. He testified that he rented a limousine for approximately \$100.00. He testified that Mr. Whitney did not have authority to provide transportation service for hire at that time. He further testified that the money received was payment for the transportation service provided and not a gratuity.

O P I N I O N A N D F I N D I N G S

For a grant of authority, an applicant must prove that it is 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). In the present application, Mr. Whitney has demonstrated that Tri-City Limousine Service would be financially fit and able to provide the proposed limousine services in the defined territory. The Commission finds the evidence provided through the applicant and supporting documentation provides that applicant possesses the financial ability to operate the proposed service. We further find that the applicant's testimony provided sufficient evidence regarding his managerial skills to operate the proposed business. Mr. Whitney has had significant experience in working in an industry which caters to the public need and demand. His readiness is demonstrated by the fact that Mr. Whitney has obtained a vehicle to be used in the proposed service and has taken steps necessary to ensure that the public is safeguarded by confirming with the Commission that the vehicle will be properly maintained and insured. Upon review of the all the evidence adduced at

APPLICATION NO. B-1567

PAGE SIX

hearing, we find that the applicant has provided the requisite criteria as well as a meaningful business plan with which to base a finding that the applicant is fit, willing and able to provide the proposed limousine service.

We find that the evidence produced by the Protestant to demonstrate that Mr. Whitney is not fit to operate a limousine service because of a past incident whereby Mr. Whitney provided a trip for hire, unpersuasive. As a general matter, this Commission does not take unauthorized operations lightly. However, the testimony provides that this particular incident is an isolated event that occurred approximately nine years ago. We find, based upon the particular facts before us, that this incident is not enough to convince us that this applicant is unfit.

We therefore turn to the issue of whether the proposed service is or will be required by the present or future public convenience and necessity. The traditional analysis for determining "need and necessity" was set forth 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.

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

APPLICATION NO. B-1567

PAGE SEVEN

The issue of whether an applicant has met its burden of demonstrating that the proposed service is consistent with public convenience and necessity is ordinarily a factual issue. *Id.* The statute requires us to determine whether the proposed operation will serve a useful purpose that is responsive to the public demand or need. Neb. Rev. Stat. § 75-311 (Reissue 1996). Therefore, we must examine the evidence based upon what is responsive to the public need and demand.

From the evidence adduced at the hearing, we find that the applicant sufficiently demonstrated that a need for the proposed service existed. Kearney is a growing community and the transportation industry should grow with the community. Several witnesses voiced a need for additional limousine service. Several witnesses also testified that they would use or recommend the applicant's proposed service if the application is granted. Therefore, the Commission finds that the proposed operation will serve a useful purpose that is responsive to the public demand or need.

The Commission further finds that the purpose cannot be sufficiently met by existing carriers in the area. The Commission gives little weight to the testimony by the Protestant that he could at all times meet all demand of the growing community. The Commission further believes that if the Protestant's transportation service was at all times sufficient, then the applicant would not receive as many requests for transportation service as he currently does. The Commission further opines that the supporting witness testimony demonstrates that the need cannot be adequately met by the Protestant.

Finally, we turn to the issue of whether existing carriers would be endangered or impaired by the granting of this application. Primarily, no evidence of harm or endangerment was presented by the Protestants in the hearing. The Commission compared the city size of Kearney to those similarly sized to determine whether the population can support an additional limousine carrier. From this review, we believe that it can. Moreover, there is no indication that the applicant's part-time limousine operation will harm the Protestant's operation. Accordingly, Commission finds that a grant of this application would not endanger or impair the operations of existing carriers including the Protestant.

APPLICATION NO. B-1567

PAGE EIGHT

In sum, we find that the applicant has met the requirements of Neb. Rev. Stat. § 75-311, and therefore, the application should be granted as amended. From the evidence adduced and being fully informed in the premises, the Commission is of the opinion and finds:

1. Applicant is fit, willing, and able to properly perform the service of a common carrier by motor vehicle and to conform to the provisions of Neb. Rev. Stat. §§ 75-301 to 75-322 (Reissue 1996) 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:

CERTIFICATE AUTHORIZED

SERVICE TERRITORY AUTHORIZED:

COMMON: Transportation of passengers in Nebraska intrastate commerce to provide limousine service in luxury or stretch limousines between points in Buffalo County and between points in said county on the one hand and on the other hands points in Nebraska over irregular routes.

Finally, we address one other issue raised by the Protestant, the applicant's name change. The Commission's policy on name changes requires that the name change application be published in the Daily Record, so that other entities with the same or similar name can file a protest. The Commission disagrees with the Protestant that the name could be misleading. The Commission further finds that the name chosen by applicant probably would not have triggered further protest. Upon review of the authorities granted, the Commission found that no similar name was being used by another operator. The objection filed by the protestant is therefore overruled. Notwithstanding that, the Commission finds that the applicant should file a request to change its name so that the Commission can officially publish the notice of the name requested in the Daily Record. If a like-named carrier comes forward to protest the application, the

APPLICATION NO. B-1567

PAGE NINE

Commission will then resolve any outstanding name change issues in that proceeding. In the meantime, however, Applicant may use the name "Tri-City Limousine Service" until that request is either granted or denied by this Commission.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Application B-1517 be, and it is hereby, granted as amended above and that a certificate shall be issued to Tri-City Limousine Service, Kearney, Nebraska authorizing the services of a common carrier by motor vehicle as set forth above.

IT IS FURTHER ORDERED that applicant shall file an application requesting the Commission's approval of its name change to Tri-City Limousine Service within thirty days from the date of this Order.

IT IS FURTHER ORDERED that applicant shall not be issued the certificate authorized by the Commission unless and until the 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), (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 the applicant, be of no further force and effect.

IT IS FURTHER ORDERED that applicant shall not conduct operations until a Certificate is issued.

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

APPLICATION NO. B-1567

PAGE TEN

MADE AND ENTERED at Lincoln, Nebraska, this 9th day of April, 2002.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Frank E. Landis

Guadalupe

Red Johnson

//s//Anne C. Boyle
//s//Frank E. Landis

Anne Boyle

Chair

ATTEST:

Ad S. Pollack

Executive Director