

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application) APPLICATION NO. B-1609
of Judy Mohler dba Cruising with)
"Care" of 2202 West 5th Street,)
Hastings, Nebraska, seeking)
authority as a common carrier in)
Nebraska intrastate commerce in)
the transportation of passengers) DENIED
and their baggage over irregular)
routes between points within a)
100-mile radius of Hastings)
Nebraska by Van and PT Cruiser.)
RESTRICTION: The transportation)
of railroad train crews and) ENTERED: FEBRUARY 18, 2004
their baggage is not authorized.)

BY THE HEARING OFFICER:

On November 12, 2002, an application was filed by Judy Mohler dba Cruising with "Care" (Cruising with Care or Applicant), seeking authority as a passenger carrier pursuant to Neb. Rev. Stat. Section 75-310. Protests were timely filed by Comstock Corporation dba Action Cab, Prince of the Road, Servant Cab Company and A-1 Ambassador Limousine, Inc., dba Special Services.

A hearing was held in this matter on October 23, 2003, at the City Council Chambers, City Hall, 220 North Hastings Avenue, Hastings, Nebraska. Post-hearing written oral arguments were thereafter submitted by the parties.

E V I D E N C E

Three witnesses testified on behalf of the applicant.

Mr. Bernard Hascall testified that he is a Program Manager for Region 3 Behavioral Health Services. His duties include managing a budget and other data, as well as overseeing services to families and children, such as home services, foster care services, and transportation services. He stated that Region 3 covers 22 counties, including Buffalo County and the city of Grand Island. The region serves approximately 230 youth per month.

Mr. Hascall testified that many of the youths require transportation to therapy, which is covered by health insurance carrier Magellan, as well as transportation for visits, to job interviews, and other destinations. He further testified that if a family or caretaker cannot transport a child, then Region 3 would turn to commercial transportation.

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Mr. Hascall stated that to his knowledge, Region 3 has not been faced with a situation where no commercial transportation was available. He indicated that there are at least two, possibly three, companies that Region 3 staff contacts. He further testified that to his knowledge, none of the current commercial transport providers specialize in meeting the needs of children in agency-based foster care. Regarding expenditures for commercial transportation, Mr. Hascall testified that Region 3 paid \$164,882.81 for fiscal year 2003 (July 1 to June 30).

Mr. Hascall stated that he is concerned about children who have had a difficult visit with their parents or rough therapy session being transported by someone who they do not know. Some trips are long distances, taking as long as 50 minutes, which he testified is a long time to have so much emotion built up with no way to release it.

Upon cross-examination, Mr. Hascall testified that he believes drivers should have training in therapeutic interventions or other techniques for dealing with kids who are upset. He stated that he did not know whether any of the commercial transportation companies had employees who have received such training. He further testified that he would not see a problem with using a taxi company to meet a child's transportation needs, provided that the individuals who make up a child's team of support were comfortable with such transportation. He further stated that Region 3 has used Midwest, Prince of the Road and A-1 to provide commercial transportation.

Upon redirect examination, Mr. Hascall testified there is not a significant difference in the rates charged by commercial carriers.

Ms. Micaela Swigle testified next on behalf of the applicant. Ms. Swigle is a protection and safety worker with the Department of Health and Human Services. She has also been employed with the Office of Juvenile Services. As a protection and safety worker, she assists children who have been abused or neglected, ranging from age zero to 19. Children served by the Office of Juvenile Services are aged ten to 19, and the majority of them have committed law violations or are listed as status offenders.

Ms. Swigle testified that she makes arrangements for the transportation of children, generally for visits between the youth and their parents, therapy sessions and appearances in court. She stated that she has identified problems with commercial transportation providers, including one that occurred

in the last four to six weeks, where due to a communication error, a youth was not picked up for his visit. She explained that there were two youths in the same family by the same name, both of whom had been scheduled for transportation. One youth's trip was to be cancelled, but instead the company cancelled both youths' trips. She further testified that there have been some problems with timeliness of pickups and getting youth to their appointments on time. She stated that approximately 2 and one-half years ago, there was an allegation that a driver inappropriately touched a youth. She had to find another driver that the youth would be comfortable with for rides to visitations. Upon questioning by Commissioner Landis, Ms. Swigle stated that the incident was not reported to the Public Service Commission, but was investigated by law enforcement and the Department of Health and Human Services.

Ms. Swigle testified that children in agency-based foster care have more individualized needs than those in traditional, home-based foster care. She stated that she was not aware of any commercial providers that differentiate themselves to care for children with specialized needs.

Ms. Swigle testified that she is familiar with Judy and Dennis Mohler, because they are licensed foster care parents.

Upon cross-examination, Ms. Swigle testified that she uses A-1, Midwest and Prince of the Road to transport the children she serves. She testified that she might require commercial services at least eight times per month, and possibly more, between the tri-city area of Kearney, Hastings and Grand Island, as well as Aurora. She further testified that she only uses carriers that have contracted with the Department of Health and Human Services. She stated that on one or two occasions, she has used a taxicab to transport children, but that she does not use it frequently.

Upon further cross-examination, she testified that the majority of the youth that she works with have special behavioral health needs, including conduct disorder, oppositional defiant disorder, post-traumatic stress disorder, and depression. She testified that area agencies provide training for interacting with children who have behavioral disorders. The training is very in depth and takes approximately two to four days.

Ms. Judy Mohler testified last on behalf of the applicant. Ms. Mohler and her husband have been active as foster parents for approximately ten years total. They had 27 foster children live with them, and have provided both a traditional foster care

home and agency-based foster care. Exhibit 5 is a list of training requirements to be an agency-based foster care home. Ms. Mohler testified that she and her husband have significant training in dealing with children with behavioral disorders, as well as CPR training.

Ms. Mohler testified that one of her foster children would complain that the driver of the commercial transportation service used did not speak English, and also experience communication problems in arranging for transportation. This made her aware that there might be a need for other transportation options.

She testified to the experience of another child who used commercial transportation, and the driver did not speak to the child during a whole hour trip. That driver also smelled of smoke and had tattoos showing, and Ms. Mohler state that she did not feel the child needed such exposure because of his behavior problems. She stated that the child would come home and say he would never get into the vehicle again. The same child also had a negative experience with another passenger, a 14-year old boy who refused to wear a seat belt and caused problems for the driver. The same child also rode with another adult passenger, who was given permission by the driver to smoke in the vehicle. The child also experienced a two-hour wait for one trip to visit his father, which was very upsetting to the child.

Ms. Mohler further testified that concerns regarding transportation are consistently a discussion topic at training sessions through South Central Behavioral Services.

Exhibit 6 is the financial statement of Ms. Mohler and her husband. Ms. Mohler testified that she has adequate resources to apply to the business if the application is approved.

She and her husband also have a construction business. She has experience in bookkeeping and office management. Ms. Mohler presented Exhibit 4, a letter of recommendation from her former employer Dr. John Waddell.

Mr. Sean Schroll testified on behalf of protestant Prince of the Road. Mr. Schroll is the chief operating officer for Prince of the Road, which is a statewide passenger transportation provider. Prince of the Road is restricted from providing transportation point-to-point in Lancaster County or originating in Lancaster County. Mr. Schroll testified that Prince of the Road has 69 vehicles, and that the company operates 24 hours per day, seven days per week. Prince of the Road has drivers and vehicles located in the Hastings, Nebraska

area, according to Mr. Schroll. He testified that the majority of Prince of the Road's passengers are clients of Health and Human Services, including subcontractors thereof, such as Magellan.

Mr. Schroll testified that most of the children that Prince of the Road transports for Health and Human Services have some sort of behavioral disorder or other behavior problem, and that most of the adults have some sort of a special need. Mr. Schroll further testified that Prince of the Road's drivers receive training in the principles of a program known as "TACT," which includes de-escalation techniques. He stated that the clients should be treated like the drive wants to be treated, and the drivers are instructed not to counsel the passengers. Mr. Schroll stated that counseling passengers could interfere with therapy. They are also instructed to avoid discussing certain topics, like politics, sex and drugs. Under HIPPA (Health Insurance Privacy Protection Act) regulations, Mr. Schroll said, the drivers are not to discuss medical needs or behavioral problems with the social workers who are arranging transportation.

Mr. Schroll further testified that if one of the passengers was acting up, the driver is to contact the dispatcher, who would then contact the caseworker responsible for that passenger. Drivers are not authorized to physically intervene.

Mr. Schroll stated that Prince of the Road performs less than two trips in the Hastings area per day, and has three drivers in Hastings. He said that they transport juveniles individually, unless the caseworker gave permission to transport juveniles together.

He further testified that the Department of Health and Human Services does not require drivers to have any special training or knowledge in dealing with children with behavioral disorders.

He testified that having another provider enter the market would have an adverse affect on Prince of the Road and other providers. Mr. Schroll stated that Prince of the Road was able to reduce rates it charges Health and Human Services in the most recent contract it entered.

Upon cross-examination, Mr. Schroll testified that Prince of the Road conducts background checks on its drivers.

Ms. Donna Corey testified on behalf of protestant Servant Cab. She is an owner of the company, which employs 60 drivers.

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All of the drivers meet the requirements of Servant Cab's contracts with Health and Human Services. Servant Cab offers service between Lincoln and Hastings, and the proposed service would conflict with Servant Cab's operations. She testified that approximately 40% of the Servant Cab's gross revenues could be attributed to Health and Human Services traffic, and that if the application was granted, all of such traffic would be subject to diversion.

Upon questioning by Commissioner Landis, Ms. Corey testified that Servant Cab originates trips in Lincoln and a 30-mile radius, and would not go to Hastings to originate a trip.

Dr. John Bartu testified on behalf of Action Cab. Dr. Bartu owns Comstock Corporation dba Action Cab in Grand Island and Hastings. Action Cab has contracts with Health and Human Services to transport people out of Hastings and Grand Island. Trips performed for Health and Human Services clients include medical appointments and essential shopping for both youth and adults. Dr. Bartu testified that well over 50% of Action Cab's business is for Health and Human Services, and around 50% of the business conducted in Hastings and Grand Island is for Health and Human Services. Losing Health and Human Services traffic would have an adverse effect on Action Cab, Dr. Bartu testified. He has not received complaints from Health and Human Services or clients regarding the service provided.

Dr. Bartu testified that Action Cab's drivers are subject to screening by its liability insurance company, including screening of drivers' licenses for various violations.

Upon cross-examination, Dr. Bartu testified that Action Cab does not train its drivers in de-escalation techniques or any other specialized techniques for dealing with clients.

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

The granting of a certificate of public convenience and necessity is governed by Neb. Rev. Stat. § 75-311 (Reissue 1996), which states,

A certificate shall be issued to any qualified applicant authorizing the whole or any part of the operations covered by the application if it is found after notice and hearing that (a) the applicant is fit, willing, and able properly to perform the service proposed...and (b) the proposed service, to the extent to be authorized by the certificate, whether regular or irregular, is or will be required by present or

future public convenience and necessity. Otherwise the application shall be denied.

In other words, the Commission must apply a two-part test. First, the Commission must determine if an applicant is "fit, willing and able." Upon consideration of the evidence adduced at the hearing, we find that the applicant has met the fitness test of § 75-311. The applicant presented credible evidence as to the fitness of her character, financial fitness and fitness of her business acumen. She presented knowledge of the area, the industry, and Commission requirements.

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 public convenience and necessity was set forth by the Nebraska 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).

The Commission notes that testimony centered around a general desire for more specialized transportation for youth in foster care and served by Region 3, the Department of Health and Human Services or Office of Juvenile Services. While the applicant has a noble goal of trying to better serve children with special behavioral needs, the Commission is not the proper body to determine the adequacy of training in working with children. Thus, the Commission must apply the traditional analysis for whether an additional transportation provider is needed in the area the applicant seeks to serve.

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. Given the record before us, we find that the applicant has failed to demonstrate that the proposed operation would serve a public demand or need which could not be served as well by existing carriers. The applicant did not present sufficient evidence to support the claim that there was a need for

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transportation service that was currently unmet by other carriers.

The Commission finds further that the protestants presented sufficient evidence that the protestants can meet the transportation needs that the applicant asserted exists. We find that the applicant's service will endanger or impair the operations of existing carriers including the protestants.

Accordingly, we must find that the applicant is fit, willing, and able, but has not met the public convenience and necessity test of Nebraska law. The Commission, therefore, finds that the application should be denied.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Application B-1609 be, and is hereby, denied.

MADE AND ENTERED at Lincoln, Nebraska, this 18th day of February, 2004.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Frank E. Landis

Chairman

Gerald L. Vap

Anne C. Boyle

ATTEST:

Ad J Pollack

Executive Director

Rock Johnson

//s//Frank E. Landis

//s//Gerald L. Vap