

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of Spencer M.)	APPLICATION NO. B-1617
Fentress dba Fairbury Taxi,)	
Fairbury, seeking to acquire,)	
through transfer, the authority)	
granted to Murvel LeRoy Fentress)	
and Spencer M. Fentress, a)	
partnership, dba Fairbury Taxi)	GRANTED IN PART AS MODIFIED
in Certificate B-1499 and to)	AND DENIED IN PART AND
extend its authority to between)	CERTIFICATE B-1499 REVOKED
points in Jefferson County- and)	
between points in Jefferson)	
County and points in Nebraska.)	
All trips to originate or)	
terminate in Jefferson County.)	ENTERED: NOVEMBER 4, 2003

APPEARANCES:

For the Applicant:

Hal Hasselbalch, Esq.
7900 Portsche Lane
Lincoln, NE 68516

For the Commission:

Shana Knutson, Esq.
300 The Atrium
1200 N Street
Lincoln, NE 68508

For the Protestants:

Yellow Cab & Limo, Inc.,
and R & F Hobbies Inc.,
d/b/a Prince of the
Road:

John Boehm, Esq.
811 S. 13th Street
Lincoln, NE 68508

BY THE COMMISSION:

By application¹ filed February 21, 2003, Spencer M. Fentress seeks to acquire the authority granted to Murvel LeRoy Fentress

¹ The application form filed with the Commission was an older form no longer being used by the Commission. The Commission revised its application form in 2002 to incorporate policy and rule changes made through Rule and Regulation No. 148. The newer application form specifically asks whether the applicant seeks to transport clients of the Nebraska Department of Health and Human Services (HHS) and the Commission's publication reflects such a request. Because an older form was used, the applicant's desire to extend its ability to transport HHS clients was not listed on the application and not published to give such notice to potential Protestants. Rather than republishing,

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and Spencer M. Fentress, a Partnership, d/b/a Fairbury Taxi (hereinafter "Fairbury Taxi") in Application No. B-1499, and to extend its authority to between points in Jefferson County and between points in Jefferson County and points in Nebraska. All trips are to originate or terminate in Jefferson County. Notice of the application was published in The Daily Record, Omaha, Nebraska, on February 25, 2003. A protest to the application was filed on March 14, 2003 by R & F Hobbies Inc., d/b/a Prince of the Road (Prince of the Road) and on March 18, 2003 by Yellow Cab & Limo, Inc. (Yellow Cab). A hearing on the application was held in Fairbury, at Fairbury City Hall, on July 16, 2003 with appearances entered as shown above.

In support of the application, the applicant testified as follows:

Mr. Spencer M. Fentress testified that he was a part owner of Fairbury Taxi, which was a partnership comprised of Murvel Fentress, his father, and himself. Mr. Murvel Fentress passed away in April of 2002. The applicant seeks to change the composition of the business from a partnership into a sole proprietorship. The applicant also seeks to extend the authority to include Jefferson County and all points in Nebraska with trips originating and/or terminating in Jefferson County.

Mr. Fentress testified that he and his wife operate the business day to day. Taxi service is available 24 hours a day seven days a week. His wife answers the calls and drives the taxicab. Mr. Fentress would like to serve Nebraska Department of Health and Human Services (HHS) clients in all of Jefferson County and between points in Jefferson County and points in Nebraska. Currently, Fairbury Taxi's equipment consists of a 1991 Chevrolet Corsica. Mr. Fentress testified that he plans to add a second vehicle if the present application is granted.

To demonstrate financial fitness, Exhibit 4, a financial statement, was offered and received into evidence. Exhibit 5 was a profit and loss statement of Fairbury Taxi for 2002. It was also received into evidence. Exhibit 5 demonstrated that Fairbury Taxi operated at a profit.

however, the Commission decided to proceed to hearing on the evidence. The Commission believed that the two Protestants involved would not be prejudiced by such an approach as they would have the opportunity at the hearing to cross-examine any witness who testified on the need for additional HHS transportation providers.

Mr. Fentress further testified that to his knowledge, Yellow Cab does not generally serve Jefferson County. Mr. Fentress stated that Yellow Cab does provide transportation services to HHS clients in Jefferson County.

On cross-examination, Mr. Fentress stated that the real estate valuations listed in his financial statement were based on appraisals. However, for purposes of the hearing, he adjusted some of the previously appraised amounts on his property reflected in Exhibit 4 because of some work he performed on the property. He based the upward adjustments on conversations he had with an appraiser regarding the work he had performed on the properties. Exhibit 4 also reflects that Mr. Fentress values his business at \$15,000. Physical assets in his business include the 1991 Chevrolet Corsica and a Motorola telephone. Mr. Fentress did not have an appraisal of his business performed. Mr. Fentress also stated that he had been the petitioner in a Chapter 7 bankruptcy proceeding, which was discharged in June of 2003. The bankruptcy trustee did not sell any of the property listed in Exhibit 4. The values listed on the bankruptcy schedules for Mr. Fentress' real estate were amounts taken from the county assessor's office which were lower than the amounts listed on Exhibit 4.

The applicant also offered the testimony of thirteen supporting witnesses who testified as follows:

Mrs. Ronnie Fentress is Spencer Fentress' wife. She testified that she fields all of the calls for service and drives the taxicab. Two or three times per month, she is asked to transport persons outside the present authority held by Fairbury Taxi. She refers those calls to Yellow Cab. On cross-examination, Mrs. Fentress stated that she believed Fairbury Taxi's authority covered all of Jefferson County.

Mr. Frank Jordan, a police captain for the city of Fairbury, testified that he is asked to assist people who are stranded in Fairbury a couple times a week. Occasionally, he will transport them, but oftentimes, he cannot assist them. He attempts to find transportation for the stranded motorists. Upon cross-examination, Captain Jordan testified that he could not recall the last time someone needed a ride outside of Fairbury Taxi's area of service. He stated that the last instance was probably in June.

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Mr. Larry Taylor testified that on one occasion, last February, he wanted to go to a friend's house in Beatrice. Fairbury Taxi could not take him. When he contacted Yellow Cab, he discovered it was closed on Sundays. As a result, he could not get a ride to his friend's house.

Ms. Sandra Kinzie testified that her car broke down on the way to an appointment in Hebron. She contacted Fairbury Taxi who referred her to Yellow Cab. Yellow Cab told her it would be 45 minutes before it could pick her up in Fairbury. She would have been late for her appointment so, as a result, she was required to reschedule her appointment. If Fairbury could have taken her to her appointment she would have used Fairbury Taxi. Upon cross-examination, Ms. Kinzie testified that she has used Fairbury Taxi a couple of times around Fairbury. Other than that one occasion, she has never had a need to use Fairbury Taxi to go out of town.

Mr. Joseph Brommer testified that late one evening he needed a ride to Beatrice. He attempted to contact Yellow Cab three times without success because Yellow Cab was closed. On a separate occasion, in 2002, Mr. Brommer testified, he attempted to contact Yellow Cab for a ride to Tecumseh without success as the telephone was not answered. He could remember only the two instances when he needed taxi service outside of Fairbury.

Ms. Emily Krumme testified that on Sunday, May 24, 2003, after learning Fairbury Taxi could not take her, she attempted to contact Yellow Cab. No one answered the telephone. She received a ride from her friends who took an alternate route to pick her up. Ms. Krumme testified that she did not get an answering machine when she called Yellow Cab. She would have used Fairbury Taxi if it had the authority.

Ms. Tonya Schultz, a Fairbury resident, testified that last December she had an eye appointment she had to reschedule because Fairbury Taxi did not have the authority to take her to Beatrice. When she contacted Yellow Cab, she was told that it would be 45 minutes to an hour before she would be picked up. Upon cross-examination, Ms. Schultz testified that Fairbury Taxi may not have been available to pick her up either if its one car had been in use.

Ms. Wanda Rhodes, a Fairbury resident, testified that on one occasion last year, when she was a resident of Daykin, Nebraska, she needed to visit the Spine Center in Omaha. She contacted Fairbury Taxi who could not take her because of its authority limitation. She testified that she had a bad experience with Yellow Cab and therefore would not use Yellow Cab again for taxi service. Ms. Rhodes testified that the taxi driver would drop her off and leave her at her destination and take other calls in the area. Then, she had to wait for Yellow Cab to pick her up. She stated that when she had used Yellow Cab, the driver smoked in the vehicle and refused to stop or open a window when she requested him to. The driver was also speeding. She testified that the fares she paid for the taxi came out of her own pocket and were not paid for by HHS. Ms. Rhodes testified that she had a need to use a taxicab for service out of Fairbury on a regular basis. Ms. Rhodes testified that the driver for Fairbury Taxi smokes in the vehicle, but rolls down the window.

On cross-examination, Ms. Rhodes testified that it has been a couple of years since she used Yellow Cab. She further stated that the incident she referred to in her testimony regarding the driver being rude and smoking in the vehicle occurred in 1996 or 1997. She has not used Yellow Cab since. She testified that it was acceptable for Fairbury Taxi to take other calls after dropping her off at her destination but not for Yellow Cab to do so. Ronnie has taken other calls around Fairbury after dropping Ms. Rhodes off at her destination. Ms. Rhodes testified that she does not have to wait a long time for Fairbury Taxi to pick her up since they cannot leave the county.

Mr. Raymond Anthony, a resident of Fairbury, testified that he uses Fairbury Taxi frequently. On one occasion he wanted to use Fairbury Taxi to go to a friend's house in Hebron. Fairbury Taxi told him that the trip was beyond the scope of its authority. He contacted Yellow Cab, but he was told that Yellow Cab would not be able to pick him up because it was closed. He testified that he would use Fairbury Taxi at least once per month to take him out of Jefferson County, to Hebron or Lincoln, if it had authority. Mr. Anthony testified further that he did not qualify for HHS reimbursement. He was a private pay client. On cross-examination, Mr. Anthony testified that he has relied on his sister to take him out of Jefferson County in the past. He has not used the handi-van service to take him to Hebron.

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Mr. Richard Allen, a Fairbury resident, testified that he used Fairbury Taxi to take him to and from Fairbury Clinic. When his doctor referred him to a specialist in Lincoln, he was told to call Yellow Cab. Mr. Anthony used Yellow Cab's service but complained that the driver sped and smoked in the vehicle. He testified that he would use Fairbury Taxi if it had authority.

Mr. Troy Siems, a Fairbury resident, testified that on June 28, 2003, he attempted to contact Yellow Cab about 12:30 a.m. There was no answer. Since the call was long distance, he was charged over three dollars to place the call from the payphone. Because the trip would have been beyond the scope of Fairbury Taxi's authority, he could not hire Fairbury Taxi. Finally, he stayed with friends for the night.

Ms. Betty Frost, a Fairbury resident, testified that on one occasion she had a doctor appointment in Hebron. She was referred to Yellow Cab by Fairbury Taxi. However, she did not have the money to make a long distance telephone call. She then had to change her appointment. Her mother furnished the transportation for her doctor appointment. Ms. Frost testified that she will not use the handi-van service because she believes it should be reserved for the elderly.

Mr. Michael Fitzgerald, a Beatrice resident, testified that he was in Fairbury on one night two years ago when his motorcycle broke down at about 10 o'clock p.m. Because Yellow Cab was closed, he could not find a taxi that could take him to Beatrice. The only transportation service he could find was a limousine service with a two-hour minimum at seventy-five dollars per hour.

Yellow Cab presented one witness, Mr. Ron Hippen, who testified that he is the owner of Yellow Cab. Exhibit 6 was introduced and received and documents the scope of Yellow Cab's authority. Yellow Cab operates between the hours of seven o'clock in the morning to six o'clock in the evening on Mondays through Saturdays. In addition, Yellow Cab will transport HHS clients twenty-four hours per day. Between December 1, 2002 and June 1, 2003 Yellow Cab received approximately \$2,000 from the Fairbury HHS office. While it is a small amount of the HHS traffic, a loss of it would affect Yellow Cab adversely. Mr. Hippen has never turned down any requests for transportation from the Fairbury HHS office.

Mr. Hippen testified that the handi-van, a public transportation service, transports people to Lincoln, Omaha and a number of other communities by appointment. There are no restrictions on who can use the handi-van service.

Mr. Hippen further testified that Yellow Cab has an answering machine, which is on all of the time. Therefore, in his opinion, the witness who testified that there was no answering machine would be incorrect. Mr. Hippen also testified that Yellow Cab has an 800 number so it is not a long distance call from Fairbury. The 800 number is published in the local directories. Yellow Cab has a general no smoking policy. Drivers are not allowed to smoke when there is a client in the car. If a client wants to smoke then the driver can smoke in the vehicle too. Mr. Hippen stated that he employs only one driver who smokes. He has not received any complaints concerning her smoking in the vehicle.

Upon cross-examination, Mr. Hippen testified that he did not assume the applicant was asking for an HHS designation in the expansion request. The more recent publications explicitly state whether an applicant is requesting to transport for HHS.

Mr. Hippen testified that Yellow Cab does not protest the transfer of the authority of Fairbury Taxi from the partnership to the sole proprietorship. However, Yellow Cab does protest the extension of the authority. Specifically, Mr. Hippen stated, Yellow Cab is protesting any extension of HHS authority.

Prince of the Road presented one witness, Alvin Schroll, Chief Executive Officer of Prince of the Road, who testified that most of his company's business is comprised of transporting HHS clients. Prince of the Road operates statewide in Nebraska with the exception of Lancaster County. Mr. Schroll testified that Prince of the Road has drivers located at various points throughout the state. Prince of the Road provides transportation for clients of HHS and for private paying customers. Prince of the Road has approximately four drivers located within 25 miles of Fairbury. Prince of the Road is protesting any request for an extension of the applicant's ability to transport HHS clients. To Mr. Schroll's knowledge, Prince of the Road has never turned down a request for HHS transportation in the Fairbury area.

On cross-examination, Mr. Schroll stated that Prince of the Road does not have any vehicles stationed in the City of Fairbury or in Jefferson County. Mr. Schroll did not know how many private paying clients Prince of the Road has transported in Jefferson County within the last six months. It may be possible that Prince of the Road has not transported any private paying clients in Jefferson County within that time frame.

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

A. Application for Transfer of Authority

We first address the Applicant's request for a transfer of authority. The Applicant seeks authority to transfer the Certificate which was granted in Application No. B-1499 to Spencer and Murvel Fentress as a partnership to Spencer Fentress as a sole proprietorship. No Protestant at the hearing presented evidence in opposition to the request to transfer the Certificate. NEB. REV. STAT. § 75-318 governs transfer applications and provides generally that a transfer application should be granted by the Commission upon the finding that the Applicant is fit, willing and able to provide the proposed service and that the transfer would serve the public interest. The Commission finds that such requirements have been met; therefore, the transfer of authority from a partnership to a sole proprietorship operated by Spencer Fentress should be approved.

B. Request for Extension of Authority

For a grant of a new authority or an extension of an existing 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). To establish fitness, the applicant produced evidence of its current operational success with Fairbury Taxi. Fairbury Taxi was first granted authority to operate in 1999. The applicant testified and offered supporting evidence that in the most recent year, Fairbury Taxi operated at a profit. Mr. Fentress also presented a financial statement listing his assets and liabilities demonstrating that he could possibly expand the business if needed.

We note for the record that Mr. and Mrs. Fentress may not be aware that their current authority, as approved in Docket B-1499, permits Fairbury Taxi to operate only within a five-mile radius of Fairbury and does not extend to all Jefferson County. Their incorrect interpretation of Fairbury Taxi's authority raises some concerns about their fitness to properly conform their operations to the rules, regulations and orders of the Commission. The Commission speculates that Mr. and Mrs. Fentress may have been confused by a Commission's prior order, which initially granted Fairbury Taxi the authority to serve all of Jefferson County. However, such authorization was overturned by the Commission on appeal. While disconcerting, the Commission finds this should not prevent a finding that the applicant is fit in this case.

Upon review of all the evidence adduced at the hearing, we find that the applicant has provided the requisite criteria with which to base a finding that the applicant is fit, willing and able to provide the proposed transportation service.

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).

The issue of whether an applicant has met its burden demonstrating that the proposed service is consistent with public convenience and necessity is ordinarily a factual issue.

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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. Several witnesses testified in support of the extension of authority. Although many of the problems experienced by the witnesses in obtaining a taxicab were based on one-time or rare occurrences only such as the break-down of a vehicle, the Commission finds that enough evidence was presented to extend the authority in part to provide the Fairbury community with the ability to obtain transportation in the evenings or upon short notice to other nearby communities of need. Mr. Taylor, Mr. Brommer and Ms. Schulz testified that on certain occasions they could not obtain transportation, on short notice, to Beatrice. Ms. Kinzie, Ms. Frost and Mr. Anthony needed transportation to and from Hebron, which could not be timely provided by Yellow Cab. The testimony presented by these witnesses demonstrates that there is a need for transportation from Fairbury to Hebron and from Fairbury to Beatrice. This evidence was not refuted by Yellow Cab. Rather, it was admitted that Yellow Cab does not operate after six o'clock in the evening with the exception that Mr. Hippen will pick up and drop off HHS clients at any time.

From the evidence adduced at the hearing the Commission finds that, in part, a grant of the proposed extension sought will serve a useful purpose responsive to a public demand and need, is not served as well by existing carriers, and can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to the public interest. The applicant demonstrated that there are private fare customers who may have a need for transportation into and out of Fairbury in the evenings when Yellow Cab is not accepting fares.

The Commission finds however, that the applicant has not produced evidence necessary to support a finding that HHS designation should be granted for an extended area beyond the territory currently authorized by the Commission for Fairbury Taxi in its Certificate. As the Commission found in its orders entered in Rule and Regulation No. 148, separate evidence specific to need and necessity for Health and Human Services clients must be provided to support the granting of the HHS designation. Specifically, by Commission order adopting changes

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to the motor carrier rules and regulations, rule 010.02C provides,

No carrier shall transport passengers under contract with the Nebraska Department of Health and Human Services (HHS) or any contractors of HHS absent some specific authorization from the Commission. In order to receive such authorization, the applying carrier must demonstrate that such authorization is or will be required by the present or future convenience and necessity separate and apart from the present or future convenience and necessity demonstrated on the underlying certificate of authority...

In the Matter of the Commission, on its own motion, seeking to amend Title 291, Chapter 3, Motor Carrier Rules and Regulations, Section 001, Definitions, and to harmonize existing rules. Rule and Regulation No. 148, ORDER ISSUING A CERTIFICATE OF ADOPTION OF THE AMENDMENTS TO EXISTING COMMISSION RULES (entered: February 5, 2002) at 4.

This requirement applies to new authorities and proposed authority extensions. In practice, the Commission typically requires that evidence be brought forth by a witness from HHS or through other personal accounts, of an ongoing need for HHS transportation which is not being met on a satisfactory basis by the other protesting carriers.

In this instance, the applicant did not present any witness from HHS to testify concerning a need for an additional HHS provider in the proposed territory. The applicant presented only one HHS client who testified that he was unhappy with one of the Protestants, Yellow Cab, because the driver was speeding and because the driver smoked cigarettes. However, that witness also testified that he smoked and that the applicant's driver smoked. Although the applicant's driver smoked in the vehicle, he testified that Yellow Cab driver's smoking bothered him.² The

² We note that according to the Commission's rules at 291 Neb. Admin. Code Chapter 3, Section 01.01E2, taxicab drivers are prohibited from smoking in the vehicle unless permission is first received by the passenger. It does

witness further testified that although the smoke bothered him, he did not say anything to the driver about it. He did not report this incident either to Yellow Cab or to the Commission. The witness also testified he had no immediate need for transportation to Lincoln in the future other than for a possible surgery should he elect to have it. Finally, and most importantly, the witness testified that the transportation was arranged by the HHS caseworker and his wife. He did not arrange the transportation nor did he talk to the HHS representative about other carriers able to provide him with the transportation, such as the other Protestant, or the handi-van, which provides transportation to and from Lincoln from Fairbury. In sum, we find the testimony from this one witness to be insufficient to grant an HHS designation for any extended territory sought.

The Protestants, on the other hand, produced sufficient evidence that they can and do serve the HHS client population in an adequate and satisfactory manner and that another HHS carrier in this area will endanger their current operations by diverting this traffic away. There was no testimony evidencing a lack of HHS transportation out of Fairbury to other locations in Nebraska. Nor do we find testimony from the one HHS client presented by the applicant sufficient to indicate that the transportation services by the certificated providers, is inadequate.

In sum, we find that the applicant has met the requirements of NEB. REV. STAT. § 75-311 in part, and therefore, the application should be granted as modified below. 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

not appear from the record that the Yellow Cab driver or the Applicant's driver requested and received permission to smoke in the vehicle.

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Convenience and Necessity to the following extent:

CERTIFICATE AUTHORIZED

SERVICE TERRITORY AUTHORIZED:

COMMON: Transportation of passengers in Nebraska intrastate commerce to provide taxicab service by sedan between points in Jefferson counties and between points in Jefferson County on the one hand and on the other hand points in Gage and Thayer counties over irregular routes. All trips to originate or terminate in Jefferson County. RESTRICTIONS: The transportation of clients of the Nebraska Department of Health and Human Services or of any subcontractors thereof beyond a five-mile radius of Fairbury shall not be permitted.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Application B-1617 be, and it is hereby, granted as modified above and that a certificate shall be issued to Spencer M. Fentress d/b/a Fairbury Taxi authorizing the services of a common carrier by motor vehicle as set forth above; and that to avoid a lapse of authority, the Certificate of Public Convenience and Necessity issued in Application B-1499, shall be revoked and cancelled simultaneously with the issuance of a Certificate of Public Convenience and Necessity in Application B-1617.

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 90 days 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.

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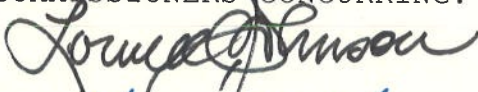

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IT IS FURTHER ORDERED that the Certificate authorized shall be subject to the terms, conditions, and limitations which have been, or may hereafter be, prescribed by the Commission.

MADE AND ENTERED at Lincoln, Nebraska, this 4th day of November 2003.


NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:



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


Chair

ATTEST:


Executive Director