

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application ) APPLICATION NO. B-1621  
of Phoenix Counseling, Inc., )  
d/b/a Phoenix Transportation )  
Services, Omaha, Nebraska. ) DENIED  
)  
)  
) ENTERED: OCTOBER 30, 2007

APPEARANCES:

For the Applicant:

Mr. Anthony Ike  
Attorney-at-Law  
7701 Pacific Street, Ste 220  
Omaha, NE 68114

For the Protestant:

Mr. Jerry Sena  
Attorney-at-Law  
1246 Golden Gate Drive Ste 1  
Papillion, NE 68046

For Commission Staff:

Mark Breiner  
1200 N Street, Suite 300  
Lincoln, NE 68508

BY THE COMMISSION:

On March 19, 2003, an application was filed by Phoenix Counseling, Inc. d/b/a Phoenix Transportation Services ("Applicant") seeking authority as a passenger carrier pursuant to Neb. Rev. Stat. Section 75-310. Protests were timely filed by Happy Cab, Yellow Cab, Checker Cab, Cornhusker Cab, Prince of the Road, and Shared Mobility Coach, Inc. (collectively "the Protestants"). Prince of the Road subsequently withdrew its protest on or about June 29, 2004.

A hearing on the above-captioned application was originally scheduled by hearing officer order for June 30, 2004. However, the hearing was rescheduled for September 7, 2004, pursuant to Applicant's June 29, 2004, Motion to Continue. Happy Cab, Yellow Cab, Checker Cab, Cornhusker Cab subsequently filed a Motion to Continue and the hearing was rescheduled to take place on September 7, 2004 at 10 a.m. in the Commission Hearing Room/Library, 300 The Atrium, 1200 N Street, Lincoln, Nebraska and via video conference at 1313 Farnam on the Mall, Room 207, Omaha, Nebraska. The September 7 was continued to May 18, 2005, so as to receive testimony from the Protestant Happy Cab.

## PRELIMINARY MATTERS

There were two preliminary matters that were addressed at hearing. The first was a Motion-in-Limine filed by the Protestant Happy Cab regarding the receipt of testimony from the Applicant that was not filed with answers to discovery that did not meet established discovery deadlines. That Motion was overruled by the Hearing Officer Commissioner Boyle.

The second matter was a Motion to Continue filed by the Protestant Happy Cab. The owner of the Protestant, Mark Mitchell, was not able to be present to testify due to a family illness. The Motion was overruled by the Hearing Officer, but it was also ordered that the record would be kept open to receive evidence from the Protestant at a future hearing.

## APPLICANT'S EVIDENCE

The first witness called by the Applicant was Gregory Ucheagwu. Mr. Ucheagwu is a 25 year resident of Omaha who is a therapist and has operated his own home based counseling service for the last six years. His service treats individuals with mental disorders.

Mr. Ucheagwu submitted a financial statement that showed a gross income to his business of \$41,845 for 2003. Mr. Ucheagwu also indicated that he had approximately \$10,00 available for start-ups costs such as vans and dispatch.

Mr. Ucheagwu testified as to current transportation providers having a condescending and patronizing attitudes toward people in North Omaha. He stated that the current providers will not go into North Omaha at times and cut off the services provided at 9:00 p.m. He stated that the local people would prefer to use his proposed service over that of current providers.

Mr. Ucheagwu also stated that he is "not saying that they (current providers) are not doing their job", but that there are delays in the services provided by them. He did not have specific information on times and dates.

Mr. Ucheagwu said that he would serve the entire city and will go "anywhere to help anyone" in Omaha. He also stated that he is sensitive to the special needs of his clients and can provide services to them that current providers cannot.

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Mr. Ucheagwu said that he has talked about insurance with some providers and believes that he can afford to pay what is required.

On cross-examination by Jerry Sena, Mr. Ucheagwu stated that it is his intention to provide transportation to all people in the areas requested. He also stated that he has not to date purchased a vehicle but if granted a certificate that one will be purchased.

When asked, it was discussed that his business has a net earnings of \$7,000. The Protestant's attorney stated that he believed that this was not enough money to start up and run the proposed service.

Mr. Ucheagwu was asked about the drivers that the service would employ. He stated that sometimes he would drive himself, and other times there would be other drivers. These drivers would in all likelihood not be licensed therapists.

Mr. Ucheagwu stated that two vehicles would meet his needs at present but that if he fielded more clients he would make thenecessary adjustments in hid fleet. He did admit on cross that tow vehicles could be stretched thin in light of the territory that was is seeking.

Mr. Ucheagwu also stated on cross by Mr. Sena that he has not done a statistical study of the number of trips that he would perform in the Omaha area. He also admitted that he does not know at this time what the cost of insurance will be.

On cross examination by Commission staff, Mr. Ucheagwu stated that he intended to be open from seven a.m. until midnight Monday through Saturday. He planned to use a dispatch system but he had not decided upon one as of the hearing. He planned to advertise in the Yellow pages as well as build his business by word of mouth advertising.

He also stated that he did not have a business plan, had not picked out vehicles but had some figures in mind for their purchase, and that at least one of the vehicles would be wheelchair-capable. He also stated that the majority of his clients would be Health and Human Services clients.

Mr. Ucheagwu stated that he intended to do background screening to include drug and physical testing. His goal is to have three drivers in addition to himself. After further questioning and reviewing laws and regulations regarding drivers hours by staff, he admitted that he would have to hire more

drivers than three in order to stay in compliance with those provisions.

Mr. Ucheagwu stated that he had \$10,000 in start-up money and that he believed that his amount was sufficient to begin his operations.

On cross examination by Commissioner Boyle, he did state that his background checks would also include criminal background checks as well as the drug and physical background checks.

On redirect, Mr. Ucheagwu reiterated that he did not intend to finance the purchase of vehicles, but that he could do that if it was necessary.

The next witness called by the Applicant was Roxanne Miller-Jackson. She is a Protection and Safety Case Manager for the Nebraska Department of Health and Human Services. She sets up transportation for children with special needs. She stated that some providers have a 48 hour notice for such transportation and that in many instances the transportation service needs to be provided immediately. She stated that Mr. Ucheagwu would be a good provider due to his background and experience in working with these types of individuals. She does also use Visinet to arrange for transportation, but believes that a bigger pool of providers would be helpful to help her address crises situations.

Janet Starks was called next by the Applicant. She is a Program Coordinator with the Pacesetter Academy. She testified regarding difficulties that she has experienced with current providers. She stated that she had difficulty arranging services at times due to the providers not coming to pick up her clientele due to fears of the individuals behaviors. She stated that the problem was especially difficult after dark.

On cross examination by Commission staff, she stated that she estimated that she has difficulty 75 percent of the time that she calls for service. There are some declinations as well as late service after the time that the service is needed. She also stated that many providers require 24 hour notice and that her program had situations where she could not provide this notice due to the emergency of the situation.

On redirect, Ms. Starks state that the training that Mr. Ucheagwu has would be helpful in dealing with her clients. She stated that his service would be helpful in meeting her transportation needs.

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## PROTESTANT'S EVIDENCE

The first witness called by the Protestant was James Tesmer. Mr. Tesmer is an employee of Happy Cab and has worked in various capacities for them for 28 years. He estimates that forty to fifty percent of his business is in North Omaha. He stated that he has not experienced or witnessed any business being turned down anywhere in Omaha.

Mr. Tesmer did state the there are problems in Omaha, and that these problems are addressed. Addresses where problems are experienced are noted and cash can be demanded upfront, but service is not refused to these addresses. He also stated that service has not been refused to the academy as was alleged in the Protestant's evidence.

Testimony was given that Happy Cab will send drivers with special experience if the special services are requested. It was also stated that the company is usually not notified of any special situations or if it is an emergency situation by the people calling for the transportation.

Mr. Tesmer testified that no one is told that a 24 or 48 hour notice is required. Usually trip wait times are between 15 and 20 minutes, although there are times when the wait is longer. Computer problems have arisen that cause a slowdown in the dispatch of calls, but that this is a rare occurrence.

Mr. Tesmer stated that business is down since 9/11. He detailed that a number of drivers have quit in the 1st few years, primarily due to the decrease in business making it hard to make enough money to continue. He also testified that the company would be hurt if another authority was granted in Omaha. He believes that Happy Cab is handling and are prepared to handle the situations as described by the Protestant in the future.

On cross-examination by Mr. Ike, Mr. Tesmer testified that he was only speaking for his situation and not for anyone else or any other provider. He also admitted that he did not know for certain why drivers were quitting, and that it may be for other reasons than low compensation.

The next witness called was Steven Quirk. Mr. Quirk works for Happy Cab as a driver and has done so for over three years. He testified that he goes to North Omaha at all times of day or night. He also testified that two years ago wait times would usually run around 45 minutes, but that now the wait times run

less than 10 minutes and that often times drivers were waiting 20 to 30 minutes between calls.

Mr. Quirk stated that business is such that the granting of a new authority would hurt his business by taking away another piece of the pie.

On cross-examination, Mr. Quirk stated he knew of no reluctance to service the academy that was detailed in the Protestant's evidence. He also agreed with previous testimony that problem addresses are tracked, but that service is not refused.

Frank Schumacher from Shared Mobility Coach sent in a letter for consideration by the Commission. After argument the Hearing Officer did not admit the letter into evidence.

The hearing was adjourned and reconvened on May 18, 2007. The witness called at this time by the Protestant was Dan Daveney. Mr. Daveney is the operations manager for Happy Cab. Mr. Daveney testified that the various Protestants that he had knowledge of had around 170 cabs available in their fleets.

Mr. Daveney stated that the companies had excess capacity at the time of the hearing. He had several cabs that were not on the street due to different issues such as maintenance problems. He also listed a lack of business and need to use those vehicles as another reason for the cabs not being used currently.

Mr. Daveney testified that the companies do many time calls in which a cab is dispatched prior to the pick-up time so as to eliminate waiting for the customer. He estimated that 90 percent of the time the driver was waiting for the passenger. He also stated that to his knowledge the company has never been booked to the extent that customers were turned away other than occasions such as a snow storm or other emergency.

Mr. Daveney testified that the Protestant's provide a training program for the independent contractors that operate their vehicles that include a review of Public Service Commission rules and regulations, Omaha Airport Authority procedures, driver safety training and Omaha street orientation. They also do pre-employment drug testing as well as a criminal background check.

Mr. Daveney finished by stating that he believed that the Protestant's have sufficient capacity to meet demand and the ability to increase the fleet when necessary. He stated that

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there was no need for another certificated carrier, and that the granting of another certificate would harm the Protestants economically.

On cross-examination by Mr. Ike, Mr. Daveney stated that he was not aware of any complaints involving Health and Human Services in the past six months. He also admitted that the Protestants did not provide any specialized training for special needs individuals.

Mr. Daveney stated on cross that the Protestants have not refused service in North Omaha. Mr. Daveney said that some drivers have stated that they will not work in the North Omaha area. He also stated that the Protestants have cancelled some contractors in the immediate past due to complaints such as lateness in providing service.

On redirect by Mr. Sena, Mr. Daveney said that drivers do not single out North Omaha but will also prefer not to provide services in south or east Omaha or Bellevue for different reasons.

#### OPINION AND FINDINGS

Applications for common carrier authority are governed by Neb. Rev. Stat. § 75-311 (2000), which provides,

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 is to the extent to be authorized by the certificate, whether regular, or irregular, passenger or household goods, is or will be required by the present or future public convenience and necessity. Otherwise the application shall be denied.

In order to be successful, an applicant must provide that it is fit, willing and able to provide the proposed service and that the proposed service "is or will be required by the present or future public convenience and necessity." The Commission will begin with the fitness of the Applicant.

Fitness evaluation requires that the Commission look at the personal, financial and business acumen of the Applicant. In

this matter, the Commission finds that the Applicant has not shown fitness in regards to business plan and financial ability to operate the proposed service.

The Applicant stated that he does not have a business plan developed. While the evidence shows that Mr. Ucheagwu has given some thought and planning to his proposed service, there are many significant issues that are not well planned. He stated to the Commission that he had contacted insurance companies regarding insurance requirements, but he does not know what the cost of the insurance will be. This is a major factor in the operation of transportation services, and the Commission does not see how the viability of a proposed service can be evaluated when a major cost such as insurance is not known. Mr. Ucheagwu also stated that he will use a dispatch system but has not chosen one yet. This is another significant cost that does not appear to have been adequately addressed by the Applicant.

The Applicant also has issues in personnel matters. He stated initially that he would use three drivers in the service, but on cross-examination admitted that he did not fully consider hours of service requirements in determining the number of drivers and would probably have to hire more. Mr. Ucheagwu also presented to the Commission that he intended to do drug screening and have his drivers undergo physicals, but then agreed later under examination by Commissioner Boyle that a criminal background check would also be done.

Mr. Ucheagwu stated that he intended to operate two vehicles in the proposed service, but that he had not picked them out yet. While he did state that he could finance the purchase of the vehicles if he had to, the Commission is concerned that the amount of money available for start-up is not sufficient to purchase the vehicles the Applicant appears to have in mind for the proposed service.

From the evidence presented on this matter, we find that Applicant has not sufficiently proven it is fit, willing and able properly to perform the proposed service and able to conform to Neb. Rev. Stat. § 75-301 et seq.

The traditional analysis for determining "need and necessity" was set forth by the Supreme Court in the case of In re Application of Nebraskaland Leasing & Assocs., 254 Neb. 583, 591 (1998), wherein the Court stated:

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.

The issue of whether an applicant has met its burden of demonstrating that the proposed service is required 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 public purpose that is responsive to the public demand or need. Neb. Rev. Stat. § 75-311 (Reissue 1996).

From the evidence adduced at the hearing, we find that the Applicant has not sufficiently demonstrated an existing need for the proposed service, which would permit Applicant to provide point-to-point transportation services within the above referenced counties. First, the Applicant failed to present evidence that demonstrated a need. The witnesses that were produced were unpersuasive in this capacity. Secondly, the testimony that was introduced did not support a conclusion that there was a public need for an additional carrier. The Protestant testified that current demand does not even support putting all of his vehicles into service. While some of the evidence indicated that there might be a wait time for service, particularly during peak hours, there was no evidence to suggest that usual wait times are unreasonable or out of the ordinary. Finally, the evidence demonstrated that existing carriers are sufficiently able to meet the current demand for service. Therefore, the Commission finds that Applicant has not demonstrated adequate public demand or need for the proposed service to provide point-to-point transportation within the above referenced counties.

Next, we turn to the issue of whether existing carriers would be endangered or impaired by the granting of this application. The Protestant testified that the addition of another carrier would harm his business. The testimony showed that a number of the Protestant's vehicles were in reserve and could be brought into service if demand was present. The evidence indicates that the Protestant is able to handle additional traffic if it occurs. Based on all of the foregoing, we conclude that it is necessary to deny the Application.

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

1. The application should be denied.

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Operations in violation of this or any other order of the Commission or operations outside the scope of Applicant's certificated area will result in civil penalties of up to ten thousand dollars per day as provided in Neb. Rev. Stat. § 75-156 (Reissue 2003), or in a suspension or revocation of Applicant's certificate.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the above-captioned application filed by Phoenix Counseling, Inc., d/b/a Phoenix Transportation Services should be denied as provided herein.

MADE AND ENTERED at Lincoln, Nebraska, this 30<sup>th</sup> day Of October, 2007.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

*Gerald J. Up*  
*Anne C. Boyle*  
*Frank E. Landis*

Chairman

*Rod Johnson*

ATTEST:

Executive Director

*Michael G. Hall*

//s// Rod Johnson  
 //s// Frank E. Landis