

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of Powerday Glory,) APPLICATION NO. B-1636
Inc., Omaha, seeking authority)
as a common carrier of)
passengers in open class service)
by vans and wheelchair)
accessible vans between points)
in Douglas and Sarpy counties) DENIED
and between points in said)
counties, on the one hand, and,)
on the other hand, points in)
Nebraska over irregular routes.)
To include the transportation of)
Health and Human Services)
clients and their subcontractors)
thereto. RESTRICTION: The)
transportation of railroad train) ENTERED: OCTOBER 26, 2004
crews and their baggage is not)
authorized.)

APPEARANCES:

For the Applicant:

Dennis Koley
PO Box 470
Fremont, Nebraska

And

Eugene Eckel
503 S. 36th Street
Omaha, Nebraska

For the Protestant:

R & F Hobbies, Inc. d/b/a Prince of the Road
John Boehm
811 S. 13th Street
Lincoln, Nebraska

For the Commission:

Shana Knutson
Mark Breiner
300 The Atrium Building
1200 N Street
Lincoln, Nebraska

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BY THE COMMISSION:

By application filed July 18, 2003, Powerday Glory, Inc. (Powerday) seeks authority as a common carrier of passengers in open class service by vans and wheelchair accessible vans between points in Douglas and Sarpy Counties and between points in said counties and points in Nebraska over irregular routes to include the transportation of Health and Human Services clientele and their subcontractors thereof. Notice of the application was published in The Daily Record, Omaha, Nebraska, on August 8, 2003.

Protests to the application were duly filed by MAVM Ventures, d/b/a A & B Shuttle through its attorney Marshall Becker, by Shared Mobility Coach, Inc., by R & F Hobbies, Inc. d/b/a Prince of the Road (Prince of the Road) through its attorney, John Boehm and by Servant Cab Company through its attorney, Jack Shultz. A hearing on the application was held on March 24, 2004. Restrictive amendments to the application were filed on February 27, 2003 and March 22, 2003. A & B Shuttle withdrew its protest conditional upon the Commission's acceptance of the restrictive amendment. Servant Cab also withdrew its protest prior to the hearing.

E V I D E N C E

Mr. Adedotun Moore testified first for the applicant. Mr. Moore is the vice president and treasurer of the applicant, Powerday. He and his wife are the only employees, stockholders and officers of Powerday. Mr. Moore is an Omaha resident who, through Powerday, seeks to provide intrastate motor carrier authority. Mr. Moore possesses a degree in Business Administration. Mr. Moore has worked as a driver and for Midlands Services Link, a transportation provider in Omaha. He also arranged transportation for clients. He left on good terms to begin his own transportation company. Mr. Moore acquired one vehicle, a 1999 GMC Safari seven-passenger van, in furtherance of his business plan. He plans to acquire a wheelchair accessible vehicle if the authority requested is granted. Mr. Moore obtained insurance quotes in preparation for the hearing.

Mr. Moore further testified he worked as a certified nursing assistant (CNA). As a CNA he did not arrange transportation for his clients. He readied his clients for their appointments.

Mr. Moore testified the demand for transportation services is very high. Mr. Moore opined that the current transportation providers lack adequate timing. Initially, his wife would drive the one vehicle for Powerday. However, he would hire more employees if the demand required it.

On cross-examination, Mr. Moore testified that when he worked for Midlands, they were late in picking up clients and returning them. This delay occurred under his supervision of the drivers at Midlands.

Mr. Moore testified that given his financial ability, he would be able to purchase a second vehicle. Mr. Moore testified he believed the binder for insurance was comprehensive and would include automobile liability coverage, even though the document refers to coverage on a building.

On cross-examination, Mr. Moore recalled a time where a woman he took care of as a nursing assistant was supposed to be picked up Thanksgiving Day, but no one showed up. This incident was in 2002. He did not arrange for the transportation and he did not know who the transportation provider was supposed to be.

Ms. Olabisi Moore testified next for the applicant. She is the wife of Adedotun Moore. Ms. Moore is also a certified nursing assistant. She is employed by Millard Good Samaritan Center. She and her spouse started Powerday because they noticed some delays in transportation pickups and return trips. Ms. Moore testified that she has observed patients waiting one to two hours for a transportation provider. Occasionally, they would have to reschedule appointments because of the delays. Most of the time, the transportation carriers she has observed at Good Samaritan Center are Omaha Ambulance, Rural Metro and Metro Area Transit. She is not responsible for arranging the transportation. Ms. Moore testified the waiting times are similar at the Nebraska Skilled Nursing Center and at Lutheran Homes. She observed Metro Area Transit was the provider for Lutheran Homes.

On cross-examination, Ms. Moore testified that the facilities she worked for referenced in her testimony have their own vans. She did not know why the facility did not purchase additional vans. As far as she knows, the Millard Good Samaritan Center contacts only Rural Metro, Omaha Ambulance and MAT. She does not know whether the facility has a written policy to use only those carriers. Ms. Moore testified that she thought there were around one hundred carriers in Omaha. She did not know why the health care facilities only contacted two or three carriers.

Mr. Bill Grayson testified next on behalf of the applicant. He is employed by the Department of Health and Human Services. He possesses the contracts for all the service carriers in the eastern service area. He handles the billing rejections, the complaints and the contacts. Mr. Grayson testified generally about a document prepared by his employer identified as the Nebraska Average Monthly Medicaid Eligibles. The document shows the types of transportation, the carriers, the amounts paid, the frequency of the trips and the number of people that were transported. It was prepared specifically for Douglas, Cass, Sarpy, Washington and Dodge counties. The document shows a steady increase in transportation from 1999. He has seen an average annual increase of about 10 percent a year. Generally, Mr. Grayson believes, there is going to be an increasing demand for transportation services through Health and Human Services.

Mr. Grayson receives about one transportation related complaint per month. He would have no objection to the Commission granting the application.

On cross-examination, Mr. Grayson estimated that there are several thousand transports per month for the agencies in the Omaha area. He estimated that he contracts with 11 carriers providing transportation in Omaha. There are other carriers that operate in the Omaha area that went to Lincoln to sign their contract.

Mr. Grayson testified that he is looking for the carriers with the lowest rates. Mr. Grayson testified that nursing homes would be responsible for their own transportation.

Ms. Hope Akwani testified next on behalf of the applicant. Ms. Akwani is a registered nurse. She is employed at the Millard Good Samaritan Home as a charge nurse. She contacts transportation providers on a regular basis. Millard Good Samaritan Home contacts Eastern Ambulance, Rural Metro and Omaha Ambulance. The administration sets the list of providers. If a provider wanted to contract services with Millard Samaritan Home, the provider would have to go to the administrator.

During her work as a charge nurse, she has observed transportation needs of the patients. She believes the needs are not being met. She testified that on one occasion the ambulance provider was a half hour or an hour late. Ms. Akwani testified about a specific patient who fell under her watch as a charge nurse. She called the doctor who instructed her to send the patient to the emergency room. She contacted the family and then contacted the ambulance. The ambulance came an hour to an

hour and fifteen minutes later. Based on this experience she testified that there is a need for an additional transportation provider.

Ms. Akwani has never heard of Prince of the Road. She did not know they were a transportation provider. She testified that the nursing home has only three providers on a list and they are supposed to contact those particular providers.

Upon cross-examination, she testified that Millard Good Samaritan Center has its own van. The Millard Good Samaritan Center also uses MOBY and MAT to transport its residents. The three providers on Millard Good Samaritan Center's list are all ambulance companies. She testified that based on her observations, given the fact that they are only authorized to call the ambulance companies there is a shortage of ambulance transportation. In terms of other types of transportation she has not observed a shortage for other types of transportation companies, only ambulance transportation.

Ms. Racheal Stewart testified next for the applicant. Ms. Stewart is a property manager, home health aide and a medical assistant. She has been most recently employed in Omaha as a certified nursing assistant. She is assigned work through an agency and thus travels around from place to place. Mostly, she escorts patients to and from doctors' offices, hospitals and other health care facilities. She has observed that patients wait too long for transportation. She does not arrange the transportation or call providers. She takes care of the patients while they wait. The transportation providers she has observed are Midlands, Rural and Omaha ambulance companies. She mentioned a specific incident where the ambulance company was late in taking a patient to a health care facility where the patient had a seizure.

On cross-examination, Ms. Stewart testified that most of the patients she routinely sees require wheelchair accessible vehicles. She testified regarding a specific incident where a patient suffered a seizure while waiting for transportation. That incident occurred over a year ago. She did not remember who the transportation provider was.

Mr. Ray Lane testified next on behalf of the applicant. Mr. Lane is an Omaha resident. He suffers from physical disabilities that require him to procure transportation to and from medical appointments on a frequent basis. He has to arrange approximately six to seven medical appointments per week. The transportation provider he uses is MOBY.

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On cross-examination, Mr. Lane testified that his HHS caseworker directs him to use MOBY. His caseworker is the one who told him he could not use an alternative provider because MOBY was cheaper. He has informed his caseworker of the delays he experiences with MOBY. The caseworker responded to him that MOBY needs more drivers.

Mr. Frank Schumacher testified on behalf of Shared Mobility, protesting this application. Mr. Schumacher testified that the applicants witnesses all addressed transportation at nursing homes. Mr. Schumacher testified that the transportation problems experienced by nursing homes are outside of the Commission's realm in that the Commission has no means to give the nursing homes guidelines. HHS pays nursing homes a certain amount for services for those patients. Then, it is the nursing home's responsibility to secure transportation for the persons residing at the home. Shared Mobility receives very few requests for transportation with any one nursing home in Omaha. Any transportation they have provided was at the request of a family member of the person residing in the nursing home. Mr. Schumacher pointed out that the applicant has shown the Commission no commitments from the nursing home that if the application were granted, the nursing home would utilize applicant's service. Mr. Schumacher further testified that a one percent impact on his clientele would force him to lay off drivers.

Upon further questioning, Mr. Schumacher testified that he has spoken with nursing homes to try to become their provider. He was told that the nursing home has been allotted only so much money per client per day.

Mr. Miller testified for Prince of the Road. He is a shareholder and the Chairman of the Board for the corporation. He is the manager of the Omaha operation. He primarily dispatches the transportation runs. He hires and trains drivers and operates the day-to-day activities in Omaha. Mr. Miller testified that Prince of the Road operates pickups in a timely fashion. The drivers maintain a log or record of the time they pick up and drop off clients. Mr. Miller reviews those records from time to time to monitor the timeliness of Prince of the Road's service. He testified that Prince of the Road is generally on time.

Prince of the Road has contacted nursing homes in the Omaha area seeking to provide service for them. They contacted all of the nursing homes in the area. He found most of the nursing homes have their own vehicles and most would prefer to use that vehicle as opposed to hiring another provider. They also prefer

to use the government subsidized transportation services such as MOBY.

Mr. Miller testified that his drivers have a sufficient amount of down time. Prince of the Road could take on more business. Prince of the Road is not turning down requests for transportation services.

On cross-examination, Mr. Miller testified that the independent contractors working for Prince of the Road are given an opportunity to accept transportation requests and reject them. Occasionally, a driver will reject a request. He has the opportunity to inspect the vehicles at the time the contractor's checks are handed out. Nursing home business constituted less than one percent of Prince of the Road's business.

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. The burden of proof rests with the applicant to show that all requirements of § 75-311 are met. Application of Greyhound Lines, Inc., 209 Neb. 431, N.W.2d 336, 339 (1981). First, the Commission must determine if an applicant is "fit, willing and able." Applicant presented testimony that it has obtained a vehicle to provide the service and has investigated costs of insurance. Applicant further presented evidence of experience in the transportation industry. Applicant's proposed business plan is designed to address perceived problems nursing homes are experiencing with transportation. Applicant draws upon his experience as a certified nursing assistant to show that he can provide adequate care of his clients while in route.

While the Commission supports applicant's proposal to ease the waiting time for nursing home clients, the Commission does not believe Applicant has met its burden of proof in two specific areas. First, applicant produced insufficient evidence relative to financial fitness. Second, applicant failed to show that there is a need that can be addressed by a grant of this application.

The Commission will address the issue of financial fitness first. To comply with the statute, "the applicant must prove, in part, that the applicant is fit financially." Overland Armored Express of Lincoln, Inc. v. Wells Fargo Armored Service, Inc., 428 N.W.2d 166, 229 Neb. 524, 528 (1988). While the information contained in the application, entered into the record as an exhibit, appears to show that the applicant has the financial means to begin the proposed business, the applicant has the burden of proving this pursuant to Overland Armored Express. The Commission does not believe the applicant presented sufficient evidence to meet its burden of proof in this regard.

We next 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 is as follows:

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 at 591, 578 N.W.2d 28 (1998).

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 demonstrated a general need as it relates to nursing home residents. However, applicant failed to demonstrate that the nursing homes would be amenable to using the applicant's transportation service if this application is granted. The testimony demonstrated that the administrators of

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the nursing homes generally make the decision regarding which transportation providers its facility will use. Generally, the providers are limited to ambulance services and MOBY, which is tied to the public transportation system in Omaha. The service MOBY provides is generally exempt from Commission regulation.

Moreover, the testimony indicated that the Protestants had, at least on one occasion, contacted many of the Omaha nursing home facilities in an effort to obtain a contract to provide the same or similar service, but were turned away. In sum, the applicant failed to show that there was a need it could meet by a grant of this application, which could not be met by the existing carriers.

The Commission finds further that the Protestants presented sufficient evidence that the Protestants can meet the existing transportation needs. 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 has not presented sufficient evidence of fitness, and further, 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 that application of Powerday Glory, Inc., in Application No. B-1636 be, and it is hereby denied.

MADE AND ENTERED at Lincoln, Nebraska, this 26th day of October 2004.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Lowell Johnson

Ann C. Boyle

Red Johnson

//s// Frank E. Landis
//s// Gerald L. Vap

Chairman

David L. Vap

ATTEST:

And J Pollak

Executive Director