

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application ) APPLICATION NO. B-1650  
of Eastern Horizon Transpor- )  
tation, Inc., Omaha, Nebraska, )  
seeking authority as a common ) DENIED  
carrier of passengers and their )  
baggage between points in )  
Douglas, Sarpy, Cass and ) ENTERED: SEPTEMBER 29, 2009  
Washington counties, on the one )  
hand, and, on the other hand, )  
points between said counties. )  
RESTRICTION: The transportation )  
of railroad train crews and )  
their baggage is not authorized. )  
HHS Designation: Yes. )

APPEARANCES:

For the Applicant:

Jackie Barfield  
6651 Sorensen Pky  
Omaha, NE 68102

For the Commission Staff:

Mark Breiner  
300 The Atrium  
1200 N Street  
PO Box 94927  
Lincoln, NE 68509

For the Protestants:  
Happy, Yellow, Checker,  
DonMark, Inc.:

Michael Polk  
1246 Golden Gate Dr.  
Suite 1  
Papillion, NE 68046

Prince of the Road:

John Boehm  
811 South 13<sup>th</sup> St.  
Lincoln, NE 68508

A&B Shuttle:

Marshall Becker  
9907 Ontario Street  
Omaha, NE

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BY THE COMMISSION:

B A C K G R O U N D

By application filed June 7, 2004, Eastern Horizon Transportation, Inc., of Omaha, Nebraska, seeks authority to operate as a common carrier of passengers and their baggage in open class service between points in Douglas Sarpy, Cass and Washington counties between points in said counties. Notice of the application was published in The Daily Record, Omaha, Nebraska, on December 13, 2004. Protests to the application were timely filed by Happy, Yellow and Checker Cabs by DonMark, Inc., d/b/a Cornhusker Cabs, Prince of the Road, A&B Shuttle and by Shared Mobility Coach.

A hearing on the application was held on March 25, 2009. Notice of the hearing was sent to all parties on February 24, 2009.

E V I D E N C E

Dr. Christopher Aja testified first for the applicant. Dr. Aja is a clinical psychologist and has operated his own private practice for eight years. He has resided in the Omaha area for over ten years.

In addition to his practice, Dr. Aja also managed Goodwill Transportation for a one month period of time. He was responsible for dispatching and organizing Goodwill during that time. He also drove for Holiday Inn in Omaha for a period of around three months.

Dr. Aja also owned an operated a child care business in Iowa. At that business he was responsible for managing the staff and providing training for the employees.

Dr. Aja testified that in his own practice that he experienced transportation problems. He said that on some occasions that he had to go to the clients house for counseling sessions as the clients could not get transportation to his office. He stated that lateness was also an issue. Clients being late for appointments

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impacted not only the clients, who had to experience being late for the appointment as well as possibly a shorter session, but the provider also experienced issues as its schedule would be interrupted and other clients would be inconvenienced.

Dr. Aja stated that he has experienced these issues in all four counties that he has applied for. He has clientele in all four counties and his practice has experienced the same issues in all four counties.

Dr. Aja informed the Commission that he has stated that he has the financial ability to operate the business as he has around \$5,000 in cash as well as financial backing from his brother. He also owns various properties around Omaha including his primary residence and several vacant lots.

Dr. Aja will provide transportation for youths as well as other clients of the Department of Health and Human Services. He plans to provide an experienced driver with a good background, will perhaps perform drug tests, and will train the driver in interpersonal skills. Initially, Dr. Aja plans to do the driving, but hopes that the business will grow so that additional drivers can be employed. Dr. Aja plans to advertise his business to increase ridership.

Dr. Aja did testify that his license to practice was suspended for two years, and that the child care center in Iowa was no longer in operation due to financial factors. He was not clear as to why the Department suspended his license, but did state that he felt he did nothing wrong to deserve the suspension.

Dr. Aja said that current providers would not be injured. He believes that the population of Omaha is growing and that this requires additional carriers. He is applying to fill the gap caused by this increase in population. Dr. Aja stated that he does not believe that the market for transportation providers is currently saturated.

On cross-examination by John Boehm, Dr. Aja stated that the child care center in Iowa closed due to income problems.

On cross-examination by Mr. Polk, Dr. Aja admitted that Eastern Horizon Transportation, Inc., was not in good standing with the Nebraska Secretary of State- Corporate Division as of the time of the hearing. He would pay the fees as required to have it reinstated, Dr. Aja said.

Mr. Polk also raised issues regarding the financial statements provided by Dr. Aja. He noted that the profit and loss statement listed around \$52,000, but that this figure was overestimated due to a failure to list taxes owed on this amount. Mr. Polk also showed a filing from the Douglas County Assessor's Office that showed that one particular piece of property that Dr. Aja had valued at \$10,000 was listed on the tax rolls as being valued at \$300. Dr. Aja also stated that he had developed a business plan but that he has not re-sent it to the Commission.

Pamela Helem was next called by the applicant. She is a mental health therapist at Helem's Counseling and Consulting Services in Omaha. She stated that she has seen clients wait in the lobby of the service for up to 30 minutes for a return trip home four to five times a week. She stated that Prince of the Road did most of the transportation. Delays at the beginning and at the end of sessions cause difficulties for both the client and the provider. It causes frustration for the clients as well as interruptions in the provider's day.

Ms. Helem stated that the only provider that the service currently uses is Prince of the Road. She was given a list by Magellan that included Prince, Midwest Special Services, the cab companies and others. She believes that overbooking by providers can be an issue in the delays and other problems with transportation.

She stated that granting another authority would be helpful with the lateness issues. She said that she would commit 30 to 40 percent of her business to the applicant.

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On cross-examination by John Boehm, Ms. Helem stated that she know of about twenty-one individuals that would need transportation on a weekly basis. She also admitted that some delays are not caused by the driver or the transportation provider, and can be the fault of the client or Magellan or have no fault to be placed.

On cross-examination by Marshall Becker, Ms. Helem admitted that she was not aware of the service provided by A&B Shuttle. She did say that she would use them if they were available.

Richard Macklin testified next for the applicant. He has been employed by various companies as a driver for around eighteen years. He detailed some practices done by past employers. He also stated that some delays are avoidable while others are not.

Jim Laudenklos testified for the protestant Prince of the Road. He said that there are thirty-five drivers and vans in the Omaha area and that they provide approximately 6,000 trips per month. He stated that Prince has made several changes in its operation in the past few months, including management changes as well as dispatch changes. These changes have resulted in a twenty percent increase in business in the last few months.

Mr. Laudenklos stated that he had fielded around five complaints for lateness the previous month. He further stated that the company provided 5,300 trips that month.

Mr. Laudenklos said that he believed that Prince and other carriers were meeting the demands of the market and of the Department of Health and Human Services. He also said that he can add drivers and vans as necessary.

On cross-examination by Jackie Barfield, Mr. Laudenklos stated that he had hired four drivers and had fired one in the past ninety days. He also said that the drivers are trained to handle special situations.

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John Davis was called by the protestant cab companies. He is the Director of Operations for Happy, Yellow, Checker and Cornhusker. He testified that the protestants have 200 vehicles and around 170 drivers employed. They provide nearly 40,000 trips per month. HHS makes up forty-five percent of there business. He believes that his companies are meeting all requests of the general public as well as HHS, but that they could expand when necessary.

On cross-examination by Jackie Barfield, Mr. Davis said that he has received complaints regarding lateness but the companies try to address any issues quickly. He also stated that the company does provide safety and sensitivity training.

On examination by Commissioner Schram, Mr. Davis said that his companies had received three complaints in the previous month.

Mike Van Meter testified for the protestant A&B Shuttle. He stated that HHS comprises sixty percent of his business. He said that he had the ability to handle Helem's business if requested.

On cross-examination by Ms. Barfield, Mr. Van Meter did state that there can be difficulties with scheduling and being on time. These difficulties can be caused by the driver, the company, Magellan or the client.

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

In this particular case, Applicant is seeking to obtain authority so that it may provide transportation that originates in Douglas, Sarpy, Cass and Washington counties. Applications for common carrier authority are governed by Neb. Rev. Stat. § 75-311 (2006), which provides,

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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 Applicant did not put forth a business plan or study that would show the feasibility of the proposed operation. There was no discussion as to the amount of rates that were necessary to operate nor any details of a business plan for its operation. The applicant did put forth evidence that it had some experience in transportation, but this consisted of one month as a manager of Goodwill Medical Transportation as well as a driver for Holiday Inn. The Commission is further bothered by the failure of the day care center in Iowa as well as the suspension of his license to practice in Nebraska for a period of two years. There is simply not enough evidence before the Commission for it to reach a determination regarding the Applicant's fitness. The Commission will therefore not reach a finding on the fitness of the Applicant as the application must be denied on other criteria as set forth below.

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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 2007).

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 quantifiable need. There was some evidence of occasional difficulties experienced in his practice as well as in Helem's Counseling, but the level of the difficulties does not appear to be significant or extraordinary. 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. While some of the evidence indicated that there might be issues regarding service, particularly during peak hours, there was no evidence to suggest that these issues are out of the ordinary.



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Finally, the evidence demonstrated that existing carriers are sufficiently able to meet the current demand for service. Other than the testimony of the applicant and Helem's Counseling, there was no further evidence provided. It is further unclear as to the number of late trips provided. In Helem's Counseling case, they were not even aware of the ability of A&B Shuttle to assist them in their transportation needs. 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.

**Territory Requested:**

Common: Transportation of passengers in Nebraska intrastate commerce as a common carrier of passengers by common carrier of passengers and their baggage in open class service between points in Douglas, Sarpy, Cass and Washington counties and between points in said counties.

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.

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 (2006).

**O R D E R**

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the above-captioned application filed by Eastern Horizon Transportation, Inc., should be denied as provided herein.

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MADE AND ENTERED at Lincoln, Nebraska, this 29th day  
of September, 2009.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

//s// Frank E. Landis

Chairman

ATTEST:

Executive Director