

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application ) APPLICATION NO. B-1699  
of Count Cook d/b/a/Confidential )  
Transportation, Omaha, Nebraska, )  
seeking authority as a common )  
carrier of passengers and their ) DENIED  
baggage in open class service )  
between points in Douglas County )  
and Sarpy County and between )  
points in said counties. ) ENTERED: MARCH 18, 2008

APPEARANCES:

For the Applicant:

Terri Crawford  
319 South 17<sup>th</sup> St. #710  
Omaha, NE 68102

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

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

For the Commission Staff:

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

Prince of the Road:

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

BY THE COMMISSION:

B A C K G R O U N D

By application filed April 3, 2007, Count Cook d/b/a Confidential Transportation, of Omaha, Nebraska, seeks authority to operate as a common carrier of passengers and their baggage in open class service between points in Douglas County and Sarpy County and between points in said counties. Notice of the application was published in The Daily Record, Omaha, Nebraska, on April 23, 2007. Protests to the application were filed by Shared Mobility Coach on May 3, 2007, Happy, Yellow and Checker Cabs on May 7, 2007, by DonMark, Inc., d/b/a Cornhusker Cabs on May 8, 2007, and by Prince of the Road on May 10, 2007.

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A hearing on the application was held on December 11, 2007, with appearances as listed above. Notice of the hearing was also published in The Daily Record.

E V I D E N C E

Connie Baker is a mental health practitioner who has had an office in Omaha for the past five years. She has used outside transportation providers for her clients, primarily relying on Prince of the Road. Ms. Baker testified that she has had transportation difficulties with Prince of the Road over the past year. She estimated that she had 15 occurrences of late pick ups, missed appointments and late in being picked up after a session.

She stated that she did attempt to work out her issues with Prince of the Road, but that those efforts were not successful. She no longer uses Prince of the Road for her transportation needs. She stated that she desires to get reliable transportation for her clients. She also stated that she currently is using Goodwill Transportation and is having good results with them.

Janelle Foxworth is a provisionally licensed mental health practitioner in Omaha. She has been providing transportation for her clients recently due to problems she is having with her current provider. She has been providing her own transportation since October of 2007.

The problems she has experienced include late pick ups and lost orders. These transportation issues can result in a disruption to her counseling schedule which can cascade into other appointment times.

Ms. Foxworth did attempt to resolve her issues with Prince of the Road, but was not able to work them out. She testified she feels that there is a need for another service due to these issues.

On cross-examination by Mr. Boehm, she said she does not know how the applicant will provide its services or if they will help in this situation. She has not complained to Magellan about any transportation issues.

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On cross-examination by Mr. Polk, she stated that she has no business contacts with the cab companies in Omaha and does not know if they could meet her needs. She has not done any market analysis or financial analysis of the applicant in determining her opinion as to the need for the service. She has also not filed any complaints regarding transportation issues with the Commission.

On cross-examination by Commissioner Boyle, she stated that of the four incidents she had with Prince of the Road in a two month period, three of them were for late pickups.

Ms. Foxworth stated on redirect by Ms. Crawford that she does not use the cab companies as she believes that a land line is necessary for the companies to provide service. The majority of her clients do not have land lines.

Kimberly McMorris is a mental health practitioner in Omaha. She provides a service that has many minors as clients. She has been using Magellan for transportation referrals since 2004.

Ms. McMorris testified that she has experienced problems with Prince of the Road throughout the time period of 2005 through 2007. The problems include late pickups thereby causing scheduling problems for her clients, as well as pick ups after appointments. She stated that children have been left outdoors four times in a 12 month period. She did attempt to discuss her concerns with Prince of the Road, but was not able to come to any satisfactory resolution. She stated that she recently has started using Goodwill Transportation

On cross-examination by John Boehm, Ms. McMorris stated that she had six instances of late drop offs in 2007. The usual pattern is to have too late of drop-offs Monday through Friday, and too early drop-offs on Saturday. She did not contact Prince of the Road, Magellan nor the Commission with any of her concerns.

On cross-examination by Mr. Polk, Ms. McMorris did state that she used the cab company one time and that the trip was satisfactory. She also stated that Goodwill

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Transportation is providing adequate service at this time and has no complaints about their service to her.

On examination by Commission staff, Ms. McMorris stated that she used Prince of the Road approximately ten times per week in 2007. It was this level of service that resulted in five problems with Prince of the Road during this period of time.

On redirect by Ms. Crawford, Ms. McMorris stated that she had experienced difficulties with Prince of the Road throughout the time period 2004 to 2007. The problems were not resolved to her satisfaction.

Sandra Hicks is a mental health practitioner in Douglas County. She described the process of arranging transportation through Magellan. She has used Prince of the Road in the past for transportation of her clients.

Ms. Hicks stated that she has used Prince of the Road but that she had had issues regarding late deliveries and pick ups and missed appointments. She has started to do some transportation of her clients on her own.

Ms. Hicks stated that she no longer uses Prince of the Road due to these issues. She expressed frustration due to the impact of these late/missed appointments on her schedule. She stated that she is currently using Goodwill Transportation. Ms. Hicks said that she does not use the cab service in Omaha as the vans are usually more convenient for her clients. She also referenced the land line issue as a problem for many of her clients.

On cross-examination by John Boehm, she stated that she had received a referral to Goodwill Transportation from another counselor. On cross-examination by Michael Polk, she stated that Goodwill Transportation is currently meeting her needs adequately.

Count Cook is a mental health practitioner who has been practicing in the Omaha area for eight years. He testified that he has ten clients that are in need of transportation.

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Mr. Cook testified to the amount of frustration that his service has experienced due to transportation issues that involve Prince of the Road, the cab companies and Goodwill Transportation. He set forth the same issues that the other witnesses have regarding late service, early drop offs and missed appointments. He testified as to the negative impact that these issues cause on his counseling services and his clientele.

Mr. Cook testified that over the past few months that his service has experienced one or two no shows, six to seven instances of late pick up and the same number of early drop offs. He also stated that he has made complaints to Magellan regarding these service issues.

Mr. Cook stated that the issues that he set forth also involve Goodwill Transportation. Goodwill also has the same issues that involve his clients, and are therefore not meeting his needs for reliable transportation.

Mr. Cook also cited a professional and ethical situation regarding the transportation of two different clients in the same vehicle.

It is Mr. Cook's testimony that these problems involve all providers and creates a quality of service issue for his counseling service. It is these issues that create the need for his proposed service in the Omaha Rea.

On cross-examination by Mr. Boehm, Mr. Cook stated that he plans to initially use four or five vans in his service. He also testified that he has filed complaints with Magellan on many occasions due to the issues with service that he has experienced.

On cross-examination by Mr. Polk, Mr. Cook stated that he did have a bad experience with the cab company service. He was not able to provide any details about the incident, and he did not complain to either the cab company or the Commission regarding the instance. He further stated that he has complaints with all providers discussed in the hearing.

Mr. Cook stated on cross that he has not run a transportation company before. He has not done a marketing

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study or a financial study to determine the viability of the proposed service.

On redirect by Ms. Crawford, Mr. Cook said that he does not know why the transportation system is not working for him, only that it is not working for him as well as he needs it to. He also said that other therapists that he has talked with have told him of similar problems with the current transportation situation.

John Miller testified on behalf of the protestant Prince of the Road. He is the manager of the dispatch office in Omaha.

He testified that the company currently has thirty-five drivers in the Omaha area. These drivers provide around 350 to 375 trips per day. These include many Magellan trips.

Mr. Miller stated that there can be issues regarding transportation provided by Prince of the Road that would involve situation such as those set out by the witnesses for the Applicant. There can be processing errors by Magellan as well as by dispatcher for his company or the drivers. All of these errors can result in some of the issues such as early drop offs or late pick ups. Lateness can be the result of delays at any point in the process, from parking to late arrival by the client. There are also a limit to the number of drivers that the company can employ and that can result in late performance at peak times. The peak times can require many more drivers than could economically be employed throughout the remainder of the day.

Mr. Miller stated that he was not aware of any complaints from Magellan regarding their services.

On cross-examination by Ms. Crawford, Mr. Miller stated that his company has a policy that children are not to be dropped off without adult supervision. The driver is to get the signature of a responsible adult when dropping of a child. However, Mr. Miller did state that this policy is difficult to verify, and is probably not followed in every circumstance. He did state that drivers are

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disciplined if they are found to be not following the policy.

Mr. Miller also admitted on cross by Ms. Crawford that he may not be aware of all complaints that could be filed with his company. Some complaints are worked out by the dispatcher, and others may not be forwarded on to him.

On examination by Commissioner Schram, Mr. Miller stated that his company does not have a policy of referring turn downs to other carrier if his company is not able to do the run.

On examination by Commissioner Boyle, Mr. Miller did answer that they do not have a policy that would allow for extra time to alleviate lateness situation, particularly in the situation involving school transportation. He also stated that there is usually not a problem with refusals as most days they have enough coverage.

Kurtis Dibert is the driver coordinator and safety director for Happy, Yellow, Checker and Cornhusker Cabs. They operate 190 vehicles and drivers in Douglas, Sarpy, Washington and Cass counties. These drivers provide approximately 1100 trips per day, including 150 to 350 Magellan trips on an average day.

Mr. Dibert testified that his driver staff has excess capacity during the day and would be able to provide all the needs of Magellan is requested. He stated that they do work with Magellan and stand prepared to do more for them if asked.

He also stated that his companies also have a policy of not dropping off children without adult supervision and was not aware of any policy regarding the need for a land line to make a reservation with them.

On cross-examination by Ms. Crawford, Mr. Dibert stated that his companies serve all of Omaha and do not exclude any area. Drivers are able to set themselves up for service in a particular area of the city, and can refuse to take trips, but that the entire city is covered as drivers will go to where the business is and that they do set themselves up in all areas of Omaha. He also stated

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that enough drivers agree to service all areas that the entire city receives adequate service.

On examination by Commission Schram, Mr. Dibert stated that his company would recommend another provider if they happened to not be able to service a particular call. He also stated that the companies have enough excess capacity that the situation of refusal has not arose is not likely to occur.

On examination by Commissioner Boyle, Mr. Dibert stated that they do not perform a formal study to determine service levels in different areas of Omaha. He did state that he does monitor the number of delinquent trips that would indicate inadequate service in an area. He stated that this monitoring has not shown any area of the city that is exhibiting this type of service level.

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 and Sarpy counties. Applications for common carrier authority are governed by Neb. Rev. Stat. § 75-311 (2006), 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 Applicant did not put forth a business plan or study that would show the feasibility of the proposed operation. There was also no specific showing that the Applicant has the requisite business experience to operate a transportation company. 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. 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.

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 by the witnesses, 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. Mr. Dibert on behalf of the cab companies testified that his companies have excess capacity that current demand does not fill. 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.

Finally, the evidence demonstrated that existing carriers are sufficiently able to meet the current demand for service. In particular, two of the Applicant's witnesses stated that an existing carrier, Goodwill Transportation, is currently meeting their needs. The testimony also shows that there are numerous other transportation alternatives to Prince of the Road that the witnesses for the Applicant are either unaware of or have chosen not to use. 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 County and Sarpy County 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.

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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 (2006).

O R D E R

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

MADE AND ENTERED at Lincoln, Nebraska, this 18th day of March, 2008.

COMMISSION

NEBRASKA PUBLIC SERVICE

COMMISSIONERS CONCURRING:

*Gerald L. Wyp*  
*Frank E. Landis*  
*Tim Schram*

*Anne C. Boyle*

Chair

ATTEST:

*Michelle H. H.*

Executive Director

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