

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application) APPLICATION NO. B-1720
of Phoenix Counseling, Inc.,)
dba Phoenix Transportation)
Services, Omaha, seeking)
authority as a common carrier in)
Nebraska intrastate commerce in)
the transportation of passengers)
and their baggage in open class) DENIED
service between points in)
Douglas, Cass, Sarpy and)
Washington Counties and between)
points in said counties. HHS)
Designation: Yes. RESTRICTION:)
The transportation of railroad)
train crews and their baggage) ENTERED: DECEMBER 22, 2009
is not authorized.)

For the Applicant:

Anthony Ike
Attorney at Law
1904 Farnam Street #301
Omaha, NE, NE 68102

Jackie Barfield
Attorney at Law
6651 Sorensen Pky
Omaha, NE 68152

For Commission Staff:

Mark Breiner
300 The Atrium
1200 N Street
P.O. Box 94927
Lincoln, NE 68509

BY THE COMMISSION:

For the Protestant:

John Boehm
Attorney at Law
811 South 13th Street
Lincoln, NE 68508

Michael Polk
Attorney at Law
1246 Golden Gate Dr #1
Papillion, NE 68046

B A C K G R O U N D

By application filed April 2, 2008, Phoenix Counseling, Inc., dba Phoenix Transportation Services, Omaha, Nebraska seeks authority as a common carrier of passengers in Nebraska intrastate commerce in the

APPLICATION NO. B-1720

PAGE 2

transportation of passengers and their baggage in open class service between points in Douglas, Cass, Sarpy, and Washington counties and between points in said counties. The authority would be restricted against the transportation of railroad train crews and their baggage and would allow the transportation of HHS clients. Notice of the application was published in The Daily Record, Omaha, Nebraska, on April 24, 2008. Timely protests were filed by Happy Cab Company, Yellow Cab Company, Checker Cab Company, and Cornhusker Cab Company thought their attorney, Michael Polk; R & F Hobbies, Inc., dba Prince of the Road through its attorney, John Boehm; VIP Limousine, VIP Limobus, Omaha Limousine, A-1 Limousine and Alford Oil; and by SMC.

A hearing on the application was held on July 2, 2009, with appearances listed above. Notice of the hearing was sent to all interested parties on May 12, 2009.

APPLICANT'S EVIDENCE

Peter Nganter testified first for the applicant. Mr. Nganter has lived in Omaha for the past 16 years and has a PhD in economics and several post-doctoral certificates. He also has been a transportation provider for the past eight years. He testified as to some of the different challenges that the industry faces.

Mr. Nganter stated he believed that there is a need for additional transportation providers. He said that more providers allowed more choice for the customer. Additional providers would also result in better competition and better service for the customers also.

On cross-examination by Mr. Polk, Mr. Nganter stated that his primary occupation is a consultant, but that he also is the driver for his transportation company. His company provides twenty to thirty trips per day in its one vehicle. He said that he has HHS authority to transport clients. All of his trips are HHS clients with no private pay clients.

Mr. Nganter said that he does not use the cab companies in Omaha for his overflow business because they do not have HHS authority. He also stated that he believed that there

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

APPLICATION NO. B-1720

PAGE 3

were approximately six HHS authorized carriers in the Omaha area. Mr. Nganter did admit on questioning by Mr. Polk that he does not know of the total capacity of all carriers in the Omaha market. Mr. Nganter stated that he did not have access to any statistics such as Shared Mobility Coach or Prince of the Road to know what their capacities might be.

On redirect by Mr. Ike, Mr. Nganter still maintained that there is a need for additional transportation providers in the Omaha area. The customers sometimes get frustrated with waiting time that they experience with certain providers and want to go with a different carrier. This is at least part of the reason that additional providers are necessary, according to Mr. Nganter.

Gregory Ucheagwu testified next for the applicant. He is a resident of Douglas County, Nebraska, and has been for the past 28 years. He currently has his own mental health business that he has run for the past nine years. The practice deals with individuals from age 6 to 80.

Mr. Ucheagwu related a specific problem that he had with a Prince of the Road driver. The driver, according to Mr. Ucheagwu, became irritated when he was told that the appointment would take the usual forty-five minutes even though it began late, thus delaying the driver. Mr. Ucheagwu stated that his training and talent in defusing tension allowed him to de-escalate the situation. It is this type of training and experience Mr. Ucheagwu says he can bring to transportation that would make his service different from other transportation providers.

Mr. Ucheagwu stated he plans to hire drivers, advertise for business, provide diversity training to his drivers, and do background checks. He stated that he has approximately \$11,000 in cash that is available to him for start-up costs. On further testimony, the \$11,000 that is available to him is \$3,325.50 of available credit on a Visa credit card, and a \$7,500 line of credit with American General Financial Services. Mr. Ucheagwu also testified that he had a tentative purchase agreement for the purchase of two vehicles for use in the proposed operation.

APPLICATION NO. B-1720

PAGE 4

Ms. Janet Starks was called next by the applicant. She is a provisionally licensed mental health therapist and provisionally licensed drug and alcohol counselor. Several of her clients have experienced transportation issues. One issue is that most her clientele are private pay without adequate resources to pay for transportation. She therefore either provides the transportation herself or goes to the client's house for counseling. Many providers will not contract with her because of the facts that many of her clients are not HHS clients and that she is an individual provider. She often uses the cab company, but says that the rates that must be paid are beyond the ability of many of her clients to pay.

Ms. Starks had discussed with the applicant how he could provide transportation for some of her clientele. The arrangement they discussed was that Ms. Starks would pay a sliding scale of payment based on the therapeutic rate that she charges the client, usually about ten percent. She would not be allowed to use the applicant's services for some of her clients as she refers many to the applicant's counseling services for treatments that they can better provide than she can.

On cross-examination by Mr. Polk, Ms. Starks stated that the clients at issue regarding transportation are the 75% of her clientele that are not HHS clients. The HHS clients have their own transportation provided. She stated that on many instances the clients are late enough to require that the counseling session be rescheduled. She also will travel to the client's house due to transportation issues.

Ms. Starks said that the 75% of her clientele she is referring to would be referred to Phoenix Transportation, as they would charge a rate that would be affordable. She admitted that she did not know what the applicant would pay his employees, what workers compensation costs are, insurance costs, or other maintenance costs. She therefore does not know if the rates that she makes reference to be reasonable rates for the operation of a transportation business or not.

APPLICATION NO. B-1720

PAGE 5

On cross-examination by Mr. Boehm, Ms. Starks said that the transportation costs would be billed to her and not the client, but that there may be an issue with the rates that the applicant would be contracted for with HHS and the much lower rates that she and the applicant discussed.

Mr. Zubi Amyeagbumam was called by the applicant. He is a licensed mental health therapist. Mr., Amyeagbumam testified that drop-offs and pick-ups are sometimes late. He has had to sit with a child for 45 minutes as the pick-up was late and the child would have been left alone if he did not stay with him. There also are problems with clients not being where they are supposed to be for pick up, although sometimes the transportation provider does not do enough searching for the pick up and can miss that they are in fact there.

PROTESTANT'S EVIDENCE

Mr. Sean Schroll was called by the protestant Prince of the Road ("Prince"). Mr. Schroll is the Chief Operating Officer for the protestant. He testified that Prince currently operates 33 vehicles in the Omaha area with 29 drivers. The company provides on average between 325 and 350 transports per day in the Omaha area. The company has handled as many as 450 trips per day. A change in dispatch methodology has resulted in increased efficiency, with an increase in the number of trips provided and a decrease in the number of no-shows and cancellations. Prince is also able to hire more drivers as demand calls.

Prince has a training program for its drivers that include safety and diversity training. Prince requests that orders for transportation be given 48 hours in advance but that they do take same day and 24 notice trips also. Prince has a policy of going to the door to greet that client and to attempt to ensure that the passenger is there. If the client refuses to go with the driver, the driver is to call dispatch that in turn calls the caseworker or the counselor. Prince provides transportation in all areas of Omaha.

On cross-examination by Mr. Ike, Mr. Schroll stated that drivers undergo a background check and drug screening. The

APPLICATION NO. B-1720

PAGE 6

48-hour request is for convenience and efficiency in scheduling, according to Mr. Schroll.

The protestant cab companies in Omaha called John Davis to testify. Mr. Davis is director of operations for the cab companies. He handles the day-to-day operations for them. The cab companies provide approximately 1,100 trips per day in the Omaha area. The cab companies do not require any advance notification for trips. He stated that the companies have the capacity to handle the approximate 20 trips per day that the applicant has said it thought it would provide.

Mr. Davis testified that the number of trips that his companies have provided has decreased in the past few months. He stated that it is his belief that there are an adequate number of providers in the Omaha area as evidenced by this decline.

Mr. Davis discussed the HHS system for transportation. He said that the system is fragmented, with some caseworkers making arrangements while other use third party payers such as Magellan to manage transportation. This can cause confusion in transportation communications which can result in lost or delayed requests for transportation. While the companies have some issues, there other factors that also contribute to the situation.

Mr. Davis noted that the cab companies must charge a set rate and do not have the ability to charge a sliding scale for transportation. To do otherwise would be a violation of Public Service Commission rules and regulations.

The cab companies do a through investigation of the background of its drivers, according to Mr. Davis. All drivers have a criminal background check, a motor vehicle record check, a check of the child abuse registry and the dependent adult abuse registry. Complaints are handled through the dispatch center to a manager who calls the complainant to get additional information and attempt to resolve the situation.

APPLICATION NO. B-1720

PAGE 7

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

Applications for common carrier authority are governed by Neb. Rev. Stat. § 75-311 (2008), 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 to properly 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 should be denied.

In other words, the Commission must apply a two-part test. First, the Commission must determine if an applicant is "fit, willing and able." In this matter, the Applicant did not sufficiently prove that it is fit, willing and able to perform the proposed service. The only evidence as to financial fitness is a reference to available cash of \$11,000. Further testimony showed that this amount was based upon \$3,325.00 credit availability on a credit card and the boilerplate offer from American General Financial Services for a personal loan in the amount of \$7,500.00. Neither of these sources are personal assets of the applicant and would result in the company start-up being accomplished by the incursion of debt. There was no other showing of assets owned by the applicant. Based on the evidence before us and adduced from the record in the instant case, we find that the applicant has not met the fitness test of Neb. Rev. Stat. Section 75-311.

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 "need and necessity" was set forth by the Supreme Court in its May 8, 1998, ruling,

In determining public convenience and

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

necessity, the deciding factors are (1)
APPLICATION NO. B-1720 PAGE 8

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 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 not presented sufficient evidence of need and necessity to support a grant of the application.

The first part of the test is whether the operation will serve a useful purpose responsive to a public demand or need. Testimony was adduced from Mr. Nganter, Ms. Starks and by the applicant that related some transportation difficulties, particularly in delays in service, cost of service and customer relations issues. However, there was no testimony regarding the specific levels of the service issues or the severity of the problems. There was no documentation regarding the number of delayed calls. There was no evidence brought to the Commission from anyone that was denied or delayed in service. There was no evidence from a witness that claimed they were not able to secure service from the current providers. There was not enough evidence put forward to the Commission that would allow a finding that the applicant passed the first part of the test. The Commission therefore finds that the application has failed the first part of this test.

The second part of the test is whether the purpose can or will be served as well by existing carriers. There was no direct evidence placed in the record that would show that the existing carriers are providing inadequate service in the territory sought by the applicant. In this matter there was an inadequate showing that service is unavailable

APPLICATION NO. B-1720

PAGE 9

or inadequate. Therefore, the Commission finds that the Application fails part two of the test.

The third part of the test is whether the public demand or need 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 Commission declines to enter a finding on this part of the test as it has found that the application failed other parts of the test and thus should be denied.

From the evidence adduced and being fully informed in the premises, the Commission is of the opinion and finds that the application should be denied.




O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Application B-1720, be, and it is hereby, denied.

MADE AND ENTERED at Lincoln, Nebraska, this 22nd day of December, 2009.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:


Chairman

ATTEST:


Executive Director

//s// Frank E. Landis