

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application ) APPLICATION NO. B-1731  
of LBH d/b/a Archway )  
Transportation, seeking to )  
institute a new service as a )  
contract carrier over irregular ) DENIED  
routes by transportation of )  
clients of the Nebraska )  
Department of Health and Human )  
Services by van and wheelchair )  
van in open class service. ) ENTERED: SEPTEMBER 1, 2009

APPEARANCES:

For the Applicant:

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Berkshire & Burmeister  
1010 S. 120<sup>th</sup> St., Suite 220  
Omaha, NE 68154

For the Commission:

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Nebraska Public Service Commission  
Suite 300, 1200 N Street  
P.O. Box 94927  
Lincoln, NE 68509

For the Protestants:

Happy Cab d/b/a Happy Cab Co.,  
Yellow Cab, Checker Cab  
Company, and DonMark, Inc.  
d/b/a Cornhusker Cab Company:  
Michael F. Polk  
Adams & Sullivan P.C.  
1246 Golden Gate Dr., Suite 1  
Papillion, NE 68046

R & F Hobbies, Inc. d/b/a

Prince of the Road:

John M. Boehm  
Butler, Galter, O'Brien & Boehm  
811 S. 13<sup>th</sup> Street  
Lincoln, NE 68508

Servant Cab Company d/b/a

Yellow Cab Company and

Capital Cab Company:

Jack L. Shultz  
Harding & Shultz  
800 Lincoln Square  
121 S. 13<sup>th</sup> Street  
P.O. Box 82028  
Lincoln, NE 68501-2028

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BY THE COMMISSION:

By application filed August 20, 2008, LBH d/b/a Archway Transportation seeks authority as a contract carrier in open class services in the transportation of clients for the Department of Health and Human Services by van and wheelchair van between points in the State of Nebraska over irregular routes. Notice of the application was published in the **Daily Record**, Omaha, Nebraska, on October 24, 2008. Timely protests to the application were filed by R & F Hobbies, Inc. d/b/a Prince of the Road, Happy Cab d/b/a Happy Cab Co., Yellow Cab, Checker Cab Company, DonMark, Inc. d/b/a Cornhusker Cab Company, Transportation Plus, Golden Plains Services, and Servant Cab Company LLC d/b/a Yellow Cab Company and Capital Cab Company. A hearing on the application was held on March 4, 2009.

A P P L I C A N T ' S E V I D E N C E

Lisa Paradis ("Paradis") testified for the Applicant first. Paradis is a chemical use therapist at Boys Town who works with adolescents who have mental health and substance abuse concerns. Paradis testified that Boys Town does have problems with the time it takes Magellan and the Department of Health and Human Services ("HHS") to authorize transportation and coordinate the orders, and that there appears to be a disconnect between Magellan and the transportation companies. Paradis testified there are special concerns with the transportation of children that she believes are unique. Paradis testified that she had problems with transportation through the current providers on a weekly basis. The problems were not just transportation problems, but a service provider (i.e., HHS, Magellan and Medicaid) problem. Paradis testified she cannot call a transportation company directly for service and must request service through Magellan or HHS with whom the transportation carriers have contracts. Paradis testified that Boys Town had made efforts to resolve the problems with the current transportation providers, but the problems had not been resolved. Paradis testified that transportation provided to clients of Boys Town through Magellan and HHS would equate to approximately seven movements per week. Despite the alleged problems with transportation, Paradis had made no complaints to HHS about Magellan's carrier service. Paradis had no need for transportation between points in Lancaster County or from any point to or from Lancaster County.

Mary Fraser Meints ("Frazier Meints") next testified for the Applicant. Fraser Meints testified that she is the Chief Operating Officer of Uta Halee Girls Village in Omaha, Nebraska. She had worked for Uta Halee for seven and one-half years.

Fraser Meints testified that Uta Halee has issues with the transportation services it receives relating to children not being picked up on time, not returned on time, and situations where the children being transported were not comfortable with the drivers. Fraser Meints testified that Uta Halee has children with mental health issues and special needs which are not being met by current providers. Fraser Meints testified that Uta Halee's needs for its children were a special need that required specific training. Fraser Meints had made requests to Medicaid and Magellan that carriers be required to provide such training, but she received no response and Medicaid and Magellan made no requests of any transportation provider for such training. Fraser Meints was unable to provide any detail or specificity with regard to any carriers or any specific circumstances relating to what she characterized as problem service. Fraser Meints stated at one time carriers (unidentified) were transporting girls and boys at the same time which led to some problems, but it appeared the carriers presently had that under control. The transportation of the girls and boys in the same vehicle would have been arranged by either Medicaid or Magellan. Fraser Meints had made no request of any existing carriers to provide the services which she claims are necessary. Fraser Meints has no need for service between points in Lancaster County, but on some occasions would require service between Omaha and Lancaster County. Fraser Meints stated no objection to using Servant Cab Service and had never called them in the past. Fraser Meints stated Uta Halee Girls Village does not arrange for transportation directly, that Magellan or Medicaid is responsible for arranging the transportation.

Felizia Frezell, the applicant, then testified. Frezell is employed at Boys Town as the Business Manager where she has worked for seven years. Frezell testified one of the reasons she has applied for transportation authority is that she has seen the gap in transportation services being provided currently and wants to raise the bar of excellence for child passenger safety. Frezell testified that the Applicant's drivers would all be trained in child passenger safety and physical and verbal de-escalation. The Applicant's services would be specialized to the needs of children with mental health and other special needs. The Applicant's drivers will walk all children who are under the age of 19 from the vehicle to the destination, and all drivers would be trained to deal with mental health and behavioral issues of children. Frezell stated she had filed numerous complaints to Magellan and Medicaid about the transportation issues that Boys Town has had and that those issues complained about were specific to transportation providers currently available with the biggest issue being the

quality of care from the current transportation companies. Frezell testified that she had \$20,000 in cash set aside for initial startup. Frezell also testified Applicant already secured three vehicles and a location from which to operate the business.

On cross-examination Frezell was asked what rate she would charge for the proposed service, to which she responded that she was unsure. Frezell stated she had a line of credit but did not specify with whom or for how much. Frezell also stated she had an additional anonymous financial backer whom she did not identify or quantify the level of commitment. Although the financial statement submitted by Frezell purported to be a pro forma income statement for the period April to October, it was not. The Applicant developed a business plan which was submitted to some unidentified lender, but the business plan was not offered at the hearing. The business plan allegedly provided for a loss in the first three years of operation, and the Applicant testified she had the wherewithal to sustain losses until the business could be profitable. Applicant would not decline any transportation. For example, it would accept a Lincoln to Lincoln transport even if it meant sending an empty vehicle 50 miles each way to perform the service. The Applicant does not intend to offer its service to the general public but only to HHS.

#### P R O T E S T A N T S '   E V I D E N C E

James Laudenklos ("Laudenklos") testified for Protestant R & F Hobbies, Inc. d/b/a Prince of the Road Transportation ("Prince") of Ravenna, Nebraska. Laudenklos testified that he is the Chief Operations Officer and has only held that position a little over one year. Laudenklos testified that Prince provides an escort service if requested by HHS. Laudenklos testified that Prince was meeting the requirements that the Applicant said they would uniquely provide. Laudenklos testified about the training that Prince drivers undergo, which was similar to that the Applicant was proposing. Laudenklos did not deny that there were times when Prince could not meet the demands for service and that there are times when their transportation of children ran behind schedule. Laudenklos testified that in the month of January 2009, Prince received seven complaints while performing transportation for over 6,000 trips. Laudenklos acknowledged that serving children is quite a bit different than serving the general public, and the needs are unique in transporting children that have mental health and behavioral problems.

On cross-examination Laudenklos acknowledged that one of the Prince employees had been charged with sexually assaulting a 15 year old girl the employee assigned was to drive to a group home. On another occasion, Prince had trouble with a 14 year old boy who escaped from one of the vans while being transported.

Kirby Young ("Young") testified on behalf of Protestant Servant Cab Company LLC ("Servant"). Servant provides service between Lincoln and a twenty-five mile radius of Lincoln and service to and other points on the one hand and points within 25 miles of Lincoln on the other. Young testified that it was his opinion that public convenience and necessity did not require the entry of an additional carrier. He testified that Servant had excess capacity and was prepared to handle additional traffic if the need exists. Servant has made substantial investments in its fleet and is in a position to supplement that fleet if necessary. Servant provides service to HHS and Magellan under a contract. Servant drivers currently walk children under the age of 16 from the point of pickup to the vehicle and from the vehicle to the point of delivery at which point they obtain signed receipts from a responsible party. On cross-examination, Young acknowledged that his drivers were not trained to the extent that Applicant proposes, but that his drivers transport children with mental health and behavioral problems within his authorized territory on a daily basis. Young has not received any complaints from Magellan, HHS or either witness appearing in support of the application about the service provided by his company. Young stated his company stands ready to provide the transportation requested by any party.

Marlan Dooley ("Dooley") gave a brief statement on behalf of Golden Plains Services. Mr. Dooley noted that the only support for the application came from the Omaha/Lincoln part of the state and that where he provides service in western Nebraska, he felt the needs were being met. Dooley did not believe it was necessary to authorize another carrier since there was no evidence that the services he provides were not meeting the needs of the territory he serves.

Finally, Vicki Harding of Transport Plus made a general statement that she felt there were plenty of providers within the Lincoln area where she provides service and did not believe that there was a need for an additional carrier.

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

Applications for contract carrier authority are governed by NEB. REV. STAT. § 75-311(2), which provides:

(2) A permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application if it appears after notice and hearing from the application or from any hearing held on the application that (a) the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle and to conform to the provisions of such sections and the lawful requirements, rules, and regulations of the commission under such sections and (b) the proposed operation, to the extent authorized by the permit, will be consistent with the public interest by providing services designed to meet the distinct needs of each individual customer or a specifically designated class of customers as defined in subdivision (6) of section 75-302. Otherwise the application shall be denied.

The Commission's consideration of an applicant's request for authority is comprised of two tests. The first part of the test is whether the applicant is fit, willing and able properly to perform the service of a contract carrier by motor vehicle and to conform to the provisions of such sections and the lawful requirements, rules and regulations of the Commission under such sections.

Applicant stated that it is properly equipped and has the financial capability to perform the proposed contract services. Applicant stated it was aware of the insurance requirements of the Commission and was offered the opportunity to file a late filed exhibit regarding the nature of the coverage which it had priced. The late filed insurance exhibit was never filed. Applicant's pro forma income statement was confusing at best. Applicant acknowledged that the numbers were not for the timeframe of April through October and that no consideration had been given to the number of trips or the price to be charged when the income statement was developed. In fact, Applicant showed income of \$20,000, when reality the \$20,000 was an asset appearing on its balance sheet, not a revenue projection on its income statement. The fact that Applicant did not know what it would charge for its services is somewhat concerning. The fact that Applicant stated it had developed a business plan that projected incomes and losses, but declined to share that information with the Commission is also a concern. On the other

hand, Applicant stated it has obtained facilities from which to operate and has three vehicles with access to a potential fourth vehicle. Applicant also referenced some lines of credit, but with whom and for how much were never disclosed. The financial fitness of the Applicant to perform the proposed service is suspect at best. However, we need not rule on the Applicant's financial fitness because the application fails on other grounds.

The second part of the two part test is whether the proposed operation, to the extent authorized by the permit would be consistent with the public interest. In **Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp.**, 188 Neb. 584, 198 N.W.2d 195 (1972), the court established the following criteria to be considered in determining whether a proposed contract carrier operation will be consistent with the public interests:

In considering an application for a permit to operate a contract carrier the burden is upon the applicant to show that the proposed service is specialized and fits the need of the proposed contracting shippers, that the applicant is fit, willing and able to perform the service and that the proposed operation will be consistent with the public interest. **Samardik of Grand Island-Hastings, Inc. v. B.D.C. Corp.**, 183 Neb. 229, 159 N.W.2d 310 (1968). Where transportation of specified commodities can be performed as well by common carriers as by contract carriers a need for contract carriers is not established. **Samardik of Grand Island-Hastings, Inc. v. B.D.C. Corp., supra.** If competent proof is made by the applicant showing the proposed service to be specialized and needed and is protested by common carriers showing a willingness and ability to perform it, the applicant must then establish that he is better equipped and qualified to meet the special needs than the common carriers. **Samardik of Grand Island-Hastings, Inc. v. B.D.C. Corp., supra.** The adequacy of existing service to perform the normal needs of proposed contracting shipper is not conclusive where the new service is better designed to fit the special requirements of the proposed contracting shipper. **Samardik of Grand Island-Hastings, Inc. v. B.D.C. Corp., supra.**

In the application before us, the evidence is insufficient to establish that a specialized need of the proposed supporting shippers exists. The Applicant has proposed a specialized service, but not one designed to meet the specialized needs of its "proposed contracting shippers."

The **Samardik** case places the burden on the Applicant to demonstrate that the service which it proposes fits the need of the "proposed contracting shippers." The contracting shippers in this instance are Magellan, HHS, and Medicaid. No witness appeared on behalf of any of the three "proposed contracting shipper" entities to testify regarding any specialized need. Neither of the supporting witnesses indicated any intent to enter into a contract with the Applicant. Further, one of the supporting witnesses had gone so far as to request Magellan to implement training so that carriers could perform services similar to those proposed by the Applicant. The fact that Magellan declined to respond to such a request could indicate that it does not deem such training as necessary. Further, none of the Protestants had ever been asked by the contracting shippers to perform the specialized service proposed by the Applicant.

Both supporting witnesses made it clear they have no independence to contact and arrange for transportation services. All transportation arrangements must be made through Medicare, HHS or Magellan, who arrange, control and pay for the subject transportation. Neither of the supporting witnesses indicated any intent to contract with the applicant nor to pay for the subject transportation. Further, the Applicant itself indicated its intent was to contract only with HHS. Applicant did not present any evidence of any intent to contract with either Boys Town or Uta Halee Girls Village. No "proposed contracting shipper" for whom the specialized needs must be designed testified in support of the application. We cannot conclude that Medicaid, HHS or Magellan, the "proposed contracting shippers," have any specialized need for the proposed service. The record is silent on any such specialized need.

As the Commission has previously determined ***In re Application of Judy Mohler d/b/a Cruising With Care***, Application No. B-1609 (2004) (where an applicant was proposing specialized training for its drivers similar to that proposed here), the Commission concluded as follows:

The commission notes that testimony centered around a general desire for more specialized transportation for youth and foster care served by Region 3, the Department of Health and Human Services or office of juvenile services. While the applicant has a noble goal of trying to better serve children with special behavioral needs, the commission is not the proper body to determine the adequacy of training in working with children. Thus, the commission must apply the



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traditional analysis of whether an additional transportation provider is needed in the area the applicant seeks to serve.

It is not this Commission's charge to identify what specialized training is appropriate for drivers absent input from the "proposed contracting shippers" who arrange, control and pay for the service. We find no evidence that any of the "proposed contracting shippers" have need for the services proposed by the Applicant.

After consideration of the evidence and being fully advised in the premises, the Commission is of the opinion and finds the proposed contract carrier operation is not designed to meet the specialized needs of the "proposed contracting shippers" and the application must therefore be denied.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Application B-1731 is hereby denied.

MADE AND ENTERED at Lincoln, Nebraska, this 1st day of September, 2009.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

*David L. Cup*

*Paul J. Hrusa*

*Anne C. Boyle*

*Tim Schrom*

*Frank E. Landis*  
Chairman

ATTEST:

*Michelle S.*  
Executive Director

//s// Frank E. Landis