

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of Emerald) APPLICATION NO. B-1769
Limousine, Inc., Omaha, seeking) SUPPLEMENT 3
authority in Nebraska intrastate)
commerce in the transportation)
of passengers in limousine)
service by vans and SUVs over)
irregular routes within a 250)
mile radius of Omaha, Nebraska.)
RESTRICTION: The transportation)
of railroad train crews and) DENIED
their baggage is not authorized.)
The certificate holder shall)
maintain a listing of its)
services in the Yellow Pages of)
the telephone directory serving)
Dakota City.)
ENTERED: APRIL 16, 2013

APPEARANCES

For the Commission Staff:

For the Protestants

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

Jack Shultz
Harding and Shultz
P.O. Box 82028
Lincoln, NE 68508

BY THE COMMISSION:

BACKGROUND

On May 8, 2012, an application was filed by Emerald Limousine, Inc., Omaha, Nebraska, seeking authority in Nebraska intrastate commerce in the transportation of passengers in limousine service by vans and SUVs over irregular routes within a 250 mile radius of Omaha, Nebraska. RESTRICTION: The transportation of railroad train crews and their baggage is not authorized. The certificate holder shall maintain a listing of its services in the Yellow Pages of the telephone directory serving Dakota City.

Notice of the application was published in The Daily Record, Omaha, Nebraska, on September 10, 2012. Timely protests were filed by VIP Limousine, A-1 Limousine and Alford Oil.

A hearing on the application was held on January 23, 2013, with appearances listed above. Notice of the hearing was sent to all interested parties on December 18, 2012.

APPLICANT'S EVIDENCE

Jim Campin testified for the Applicant. He is the President of Emerald Limousine. Mr. Campin discussed that a number of people would have testified in support of the application but that they were not able to be present for the hearing. R. Campin offered printed testimony that was received into evidence as Exhibit 4. Mr. Shultz objected to parts of Exhibit 4 as hearsay. Exhibit 4 was received into evidence. He also discussed some population statistics in the Omaha/Lincoln area. He noted that there were approximately 1.2 million people in the Omaha/Lincoln area. He noted that his examination of the number of vans and SUVs serving the area in the limousine market totaled seven SUVs and four vans among five companies. He stated that the number of vans and SUVs in service were not enough to adequately serve a population of this size.

Mr. Campin also stated that his company received approximately 11 inquiries regarding SUV availability and seven inquiries for van availability every week. While he did not know whether or not these inquiries resulted in their finding service elsewhere, he did believe that a number of them did not find service. On examination by Commissioner Landis, Mr. Campin said that he used to keep a log of these requests, but that it became burdensome to do so and had not kept them lately. Mr. Campin also stated that he did refer these inquiries on to other carriers, but did not do any follow-up to determine if the person inquiring had found service.

Mr. Campin said that his companies have the ability to provide service in sedans and busses. He wants the ability to provide full service to his customers with the addition of vans and SUVs to his fleet.

Mr. Campin ended by citing 75-301(2)(b) and (c). The statutes cite that it is the policy of the Legislature to

promote adequate economical and efficient service by motor carriers and reasonable charges therefore without unjust discrimination, undue preferences, or advantages, and unfair destructive competitive practices. It is also to improve the relations between and coordinate transportation by and regulation of such motor carriers and other carriers.

On cross-examination by Mr. Shultz, Mr. Campin acknowledged that he would produce no witnesses other than himself regarding the need for the proposed expansion of his vehicle fleet. Mr. Shultz also questioned Mr. Campin's accuracy of available vans and SUVs in the Omaha/Lincoln area. Mr. Shultz asked if the information on VIP Limousine's number of available vehicles was accurate, and Mr. Campin admitted the information he gave was based upon his knowledge of the situation, which was around two years old and may not reflect the current number of vehicles actually deployed.

Mr. Campin stated that he intended to use one van and one SUV initially. He believed that there would be enough trips available to support these vehicles, and these would be economically viable.

An issue regarding the use of independent contractors was discussed, and a request for the contracts signed with these contractors was made by Mr. Shultz and granted by the hearing Officer. The Applicant did supply copies of the contacts it uses with its drivers pursuant to this request as Late Filed Exhibit 6.

An issue regarding the Applicant keeping an advertisement in the Dakota City Yellow Pages was also discussed. The Applicant filed Late Filed Exhibit 8 showing that it has contracted with the Dakota City Yellow Pages.

Mr. Shultz requested that the Commission's Motor Carrier Complaint against the Applicant docketed as MCC-3180 be received as an exhibit. This request was granted and MCC-3180 was received into evidence as Exhibit 5.

Upon questioning by Mr. Shultz, Mr. Campin admitted the Applicant operated as alleged in MCC-3180 without authority to operate SUVs. He also admitted that the vehicles were not properly registered with the Commission, did not have PSC plates as required and did not have the Commission identification card

as required. Mr. Campin believed that adequate insurance was in place at the time, but does not believe that to be the case now.

Mr. Campin admitted that Mr. Schmidt, who also is employed by the Applicant, panicked and lied to Commission staff regarding the use of the SUVs for that weekend. Mr. Campin said that they did not know what to do when promises made by the car rental company were broken and used the vehicles when they should not have.

On examination by Commissioner Schram, Mr. Campin said that they do have a business plan for the new vehicles but do not plan to provide it. Mr. Campin also said that they are planning to use independent contractors in these vehicles, and that they do a background check on all of the drivers prior to being retained as a driver.

Mr. Thomas Schmidt testified next for the Applicant. He is an employee of Emerald Limousine. On examination by Mr. Shultz, that he knew that Emerald Limousine did not have authority to operate SUVs during the Berkshire-Hathaway event in May of 2012. He further admitted to "making a mistake" when he lied to Commission staff regarding the use of these vehicles at that time.

Mr. Schmidt further informed the Commission that the free services that were stated by Mr. Campin to have been made by Emerald were in fact made by private individuals on their own time. He stated that he believed that their personal insurance would apply in these situations, and that Emerald Limousine's would not apply.

Mr. Schmidt said the independent contractors had signed contracts with Emerald limousine. He did not, however, have any specific knowledge as to the dates of the contracts and would have to defer to the contracts as submitted.

On examination by Commissioner Landis, it was emphasized that the Applicant must have proper insurance in place. He further expressed concern regarding the use of outside individuals in the "free services" that were offered and the potential for inapplicability of insurance in these types of situations.

An examination of Commission records shows that the Applicant does have the Form E on file with the Commission.

This places the Applicant in compliance with Commission rules and regulations. It does not necessarily apply, however, to some of the activity that is occurring with regard to some of the "free services" that are at issue.

On examination by Commissioner Schram, Mr. Schmidt did not know to what extent the drivers may have been "tipped" in providing the "free services" in question. He did not know whether or not any tips would make the transportation for hire.

At the conclusion of the evidence, Mr. Shultz made a Motion to Dismiss the application for failure of the Applicant to meet its statutory burden of proof. He cited that there were no public witnesses in support of the application and no financial statements or records being provided in order to determine the financial fitness of the Applicant. The Hearing Officer does not have the ability to grant a motion that is dispositive in the case and therefore declines to enter a ruling on the motion.

PROTESTANTS' EVIDENCE

Bill Alford testified on behalf of the Protestants. He is the owner and President of VIP Limousine, A-1 Limousine and Alford Oil. His companies offer services similar to those proposed by the Applicant to the full extent of their respective authorities. He has thirty-eight employees, mostly drivers but also a bookkeeper and two reservation specialists. There are people available to receive calls on a 24/7 basis, and the services offered are 24/7 as well. His companies currently have SUVs and vans in operation.

Mr. Alford stated that vans and SUVs provide more economical transportation for groups than a regular limousine can. He said that his companies currently have three SUVs in operation and can add more vehicles as needed. Mr. Alford stated that this is not a large part of his business currently but that it is one that grows at certain times of the year. His fleet is not usually operating at full capacity other than a few big events during the year. During these events, Mr. Alford testified, he can secure additional vans as needed to meet demands.

Mr. Alford testified that Emerald Limousine operated with SUVs during the Berkshire-Hathaway event in May of 2012. He had

secured several SUVs for service during this event under a contract with BDT Capital. He believes that he lost trips to Emerald Limousine during this event. He had not been made aware of any problems with his service by BDT. He estimates that he lost approximately \$7,000 in revenues during this event to Emerald Limousine.

Mr. Alford stated that his companies are desirous of additional business, and able to meet the demands of the market. He said that the present and future public convenience and necessity does not require the granting of this application.

OPINION AND FINDINGS

Applications for common carrier authority are governed by Neb. Rev. Stat. § 75-311 (2012), 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 is a current certificated carrier and has been found to be fit, willing and able to provide service in another proceeding. The Commission has entered an order in MCC-3180 wherein the Applicant was found to have violated Commission rules regarding the improper use of SUVs and other violations.

The Commission is concerned regarding the "free" services that the Applicant has stated that it has provided. It does appear that these "free" services were not performed in a manner that is consistent with public safety, especially in the potential of inapplicability of insurance. The Applicant must

be certain that any services provided will have proper insurance in effect in order to protect the passengers and their service in the case of any accident.

While the Applicant has operated in a manner inconsistent with Commission rules and regulations, we have dealt with that situation in the Motor Carrier Complaint set forth above. Due to findings set forth below, the Commission will not enter a finding regarding fitness of the Applicant in this application.

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 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, 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. Campin regarding the number of companies in the Omaha and Lincoln area that utilize vans and SUVs and the population that these companies serve. Mr. Campin also said that his company receives calls as to the availability of vans or SUVs.

However, there was no testimony offered regarding the specific levels of service issues or the severity of any problems due to a lack of vans or SUVs in the proposed

geographic area. 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. Mr. Campin said that he did not know whether the inquiries that were made were able to find other services. Mr. Alford stated that his company does not operate at full capacity most of the time, and can add to its fleet when necessary. There was an inadequate showing that service is unavailable 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-1769, Supplement 3, be, and it is hereby, denied.

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MADE AND ENTERED at Lincoln, Nebraska, this 16th day of April, 2013.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Mark Fuchs
Chair

Tim Schram

Red Johnson

Gerald W. King

//s// Frank E. Landis

ATTEST:

Steve Meradith
Executive Director

