

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of Alpha Life) APPLICATION NO. B-1921
Improvement Services, Omaha,)
seeking authority as a common)
carrier of passengers and their)
baggage by passenger van and)
vans specially modified)
according to the Americans with) GRANTED
Disabilities Act between points)
in Douglas, Sarpy, Washington,)
and Cass Counties over)
irregular routes under contract)
with the Nebraska Department of)
Health and Human Services.) Entered: June 12, 2018

For Commission Staff:

Jamie Reyes
Ellie Rohr
300 The Atrium
1200 N St.
Lincoln, Nebraska 68508

For the Protestants:

Happy Cab Company, d/b/a
Checker Cab Company, Happy
Company, and Yellow Cab
Company; DonMark, Inc., d/b/a
Cornhusker Cab Company; and
Valor Transportation, d/b/a
Safeway Cabs:

Andy Pollock
Jaydon Pence
Rembolt Ludtke, LLP
3 Landmark Centre
1128 Lincoln Mall, Ste. 300
Lincoln, Nebraska 68508

BY THE COMMISSION:

B A C K G R O U N D

On October 15, 2015, Alpha Life Improvement Services ("Applicant"), Omaha, applied for a transfer of the authority held by Midlands Services, Inc. ("Midlands"). The Commission entered an order granting that application on January 12, 2016, and the Certificate of Public Convenience and Necessity was issued March 15, 2016. Midlands was in operation prior to the

Commission's requirement that carriers apply for and receive HHS designation, which would be noted on the carrier's Certificate of Public Convenience and Necessity.¹ Carriers who provided this service prior to the rule change were permitted to continue doing so without a separate application. When the transfer occurred, the HHS designation was not transferred with the authority. On June 6, 2016, Applicant applied to extend its authority to include HHS Designation. Timely protests were filed by Golden Plains Services, Inc. d/b/a GPS Transportation ("GPS"); Happy Cab Company, d/b/a Happy Cab Company, Checker Cab Company, and Yellow Cab Company; DonMark, Inc., d/b/a Cornhusker Cab Company; and Valor Transportation, d/b/a Safeway Cabs (Collectively, "Omaha Cab Companies"), and were granted on July 20, 2016.

Applicant notified the Transportation Department that Midlands had provided HHS services prior to the transfer of authority. Applicant provided the Department with copies of Midlands's HHS contracts, and the Department contacted HHS to verify the services provided by Midlands prior to the transfer. Upon review, the Department determined it would be necessary to move forward with a hearing. A planning conference was held December 20, 2017, to establish a procedural schedule. Protestant GPS withdrew its protest on February 12, 2018. On February 20, 2018, the Omaha Cab Companies filed a motion to compel discovery and continue the hearing. A telephonic hearing was held on March 1, 2018. Because of that hearing, the Hearing Officer entered an order granting the Omaha Cab Companies' motions and amending the procedural schedule.

A hearing on the application was held pursuant to the amended procedural schedule on April 13, 2018, in the Commission Hearing Room with appearances as shown above.

EVIDENCE

In support of its application, Applicant produced one witness, R. Justice Braimah. Dr. Braimah is the owner and

¹ Docket RR-148 *In the Matter of the Commission, on its own motion, seeking to amend Title 291, Chapter 3, Motor Carrier Rules and Regulations, Section 001, Definitions, and to harmonize existing rules. Order Issuing Amendments to the Rules; Order Setting Hearing.* (October 4, 2001). (Midlands Certificate was issued in 1999).

executive director of Alpha Life Improvement Services.² Applicant was unrepresented by counsel. Therefore, Dr. Braimah was permitted to make a statement on behalf of his company, but he was not permitted to cross-examine any witnesses.³ Dr. Braimah testified he was previously the director of operations of Midlands, which was a family business.⁴ He stated Midlands went out of business after the "privatization that occurred."⁵

Dr. Braimah is a clinical psychologist, and founded Alpha Life Improvement Services to provide services to individuals with developmental disabilities as well as severe and persistent mental illness. Alpha Life provides assessment, crisis intervention, residential group homes, in home residential services, and respite care.⁶ Dr. Braimah stated he originally entered this field because he operated a transitional living home where the residents consistently had trouble with transportation and could not consistently get rides, leading to staff often taking residents to appointments.⁷ Dr. Braimah stated Applicant is seeking to offer transportation services beyond the Developmental Disabilities Waiver services he already offers to help fill that gap.⁸

Dr. Braimah indicated he was aware of the HHS designation on the application. However, Midlands had previously provided those services, so he believed that ability would be transferred with the authority. He only became aware of the issue when he attempted to register to provide services with Intelliride, the current HHS Broker.⁹ Dr. Braimah stated he was unsure why the designation did not automatically transfer with the authority because Applicant is still in a position to provide those services. Applicant currently provides services to HHS clients pursuant to the Developmental Disabilities ("DD") Waiver.¹⁰

² Hrg. Transcr. 4:12-17 (April 13, 2018).

³ Id. At 4:22-25; see also UPL Rules

⁴ Id. at 6:6-8.

⁵ Id. At 6:8-9 (Mr. Braimah is referring to beginning of the brokering services that assign rides for HHS clients to the various providers.)

⁶ Id. At 6:9-13; 11:1-14

⁷ Id. At 12:24-13:5

⁸ 13:6-10

⁹ Id. At 6:14-22

¹⁰ Id. At 7:5-11

In response to questions by Commissioner Schram, Dr. Braimah further explained he met with Intelliride and learned he would not be permitted to provide HHS transportation because he had not checked the HHS designation box on his application.¹¹

Jaydon Pence questioned Dr. Braimah on behalf of the Omaha Cab Companies. Ms. Pence asked about the history of Midlands Services. Dr. Braimah indicated Midlands entered the market to provide transportation to HHS clients. Midlands had approximately forty employees. However, Dr. Braimah indicated privatizing the brokerage system caused costs for the business to increase.¹² Midlands attempted to continue providing HHS services for approximately one year after the brokerage system came into being.¹³

Ms. Pence also questioned Dr. Braimah on his revenue predictions. Dr. Braimah projects revenue of \$200,000 in the first year with expenses greater than fifty percent.¹⁴ Dr. Braimah testified these figures included insurance and personnel costs.¹⁵ Dr. Braimah further testified he did not contact other carriers because he did not believe it was necessary.¹⁶ Dr. Braimah stated he knows his community and saw the needs first hand when he was running for office, and this service would meet the needs of some of the highest need individuals.¹⁷ Alpha Life is seeking to continue the work previously handled by Midlands.¹⁸

Ms. Pence called John Davis on behalf of the Omaha Cab Companies. Mr. Davis testified the Happy Cab fleet currently has approximately 130 active drivers, which is a decrease over a number of years.¹⁹ Mr. Davis indicated this decrease is due, in part to the Transportation Network Companies, but also in part

¹¹ *Id.* At 9:19-22

¹² *Id.* at 14:20-15:16

¹³ *Id.* at 16:9-14

¹⁴ *Id.* at 21:17-23

¹⁵ *Id.* at 22:9-13

¹⁶ *Id.* at 22:14-23

¹⁷ *Id.* at 29:21- 30:7

¹⁸ *Id.* at 30:14-18

¹⁹ *Id.* at 35:3-4

due to the changes with HHS and entitlement programs.²⁰ Mr. Davis explained that previously, HHS trips made up over one third of all of Happy Cab's business. However, that has been reduced to approximately fifteen percent due to increased competition, as well as the introduction Intelliride's tablet system.²¹ Mr. Davis testified Happy Cab has the ability to expand its service to meet additional HHS needs.²²

Ms. Pence asked Mr. Davis why Happy Cab did not protest Alpha Life's original application. Mr. Davis indicated when the privatization was happening in 2011, he facilitated discussions and groups with other carriers providing HHS transportation, but Midlands was not a factor at that time.²³ Many of the smaller carriers began to drop out of the market because of these changes between 2006 and 2011, including Midlands.²⁴ Mr. Davis further stated when Alpha Life sought its HHS designation, Happy Cab became concerned at that time and chose to protest.²⁵ Mr. Davis also stated that Happy Cab consistently provides transportation services to the DD community on a regular basis.²⁶ Mr. Davis testified that prior to his work with Happy Cab, he worked extensively with the DD population.²⁷ Happy Cab routinely serves many populations with disabilities, and Mr. Davis believes the entry of new carrier would be harmful to Happy Cab's business.²⁸

In his closing statement, Dr. Braimah stated that denying this application would not be preventing a new carrier from entering, as Mr. Davis testified, but would be removing an existing carrier because Midlands provided this service.²⁹ Ms. Pence argued in closing that the gap in services beginning in at

²⁰ *Id.* at 35:11-20

²¹ *Id.* at 36:6-16.

²² *Id.* at 38:4-7

²³ 38:19-21; 39:17-40:2; 40:6-15

²⁴ *Id.* at 44:9-16

²⁵ *Id.* at 41:11-13.

²⁶ *Id.* at 43:17-23.

²⁷ *Id.* at 33:10-16

²⁸ *Id.* at 48:10-11; 48:23-49:6

²⁹ *Id.* at 54:12-22; see also Exhibit 5 (The DHHS records verifying Midlands services submitted by the applicant do not continue past 2002. However, DHHS staff was able to confirm to Department staff, in emails contained within exhibit 5, that Midlands provided HHS service until May of 2012.)

least 2012 is sufficient to indicate Midlands was no longer providing that service.³⁰ Ms. Pence argued this interrupted the need, and, as Mr. Davis' testimony indicates, there is no longer a need.³¹ Commissioner Landis asked whether this presented a dormancy issue. Mr. Pollock responded dormancy would apply to the whole certificate, but this issue only applies to the HHS portion. The gap in service was sufficient to show there was no longer a need for Alpha Life to provide these services.³²

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

In the present case, Applicant is seeking add HHS Designation to the authority held in certificate B-1921.

Applications for common carrier authority are governed by NEB. REV. STAT. § 75-311(1) (Cum. Supp. 2016), 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, 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.

The Commission must apply this two-part test in order to grant an application for common carrier authority.

For the first part of the test, an applicant must prove that it is fit, willing and able to provide the proposed service. Given that Dr. Braimah previously worked with Midlands Services and has since been approved to operate Alpha Life under the new certificate number, he has demonstrated fitness. Dr. Braimah currently provides transportation through the DD waiver program and has significant experience serving populations with disabilities as described above. No evidence was presented to counter Dr. Braimah's fitness to serve HHS clients.

³⁰ *Id.* at 56:11-20

³¹ *Id.* at 55:17-56:6

³² *Id.* at 57:16-58:5.

For the second part of the test, an applicant must prove that the service that it wishes to provide is required by public convenience and necessity. The Nebraska Supreme Court set forth the analysis for determining "public convenience and necessity," stating:

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.³³

The issue of whether an applicant has met its burden of demonstrating that the proposed service is required by public convenience and necessity is ordinarily a factual issue.³⁴

Although the above test is typically required to demonstrate need, it is reserved for carriers new to the market. Midlands Services began providing service to HHS clients in 1999.³⁵ When Midlands' certificate was issued, carriers were not required to specifically request HHS designation and certificates of authority did not note any restrictive language related to HHS transportation. The Commission opened a rule making proceeding in 2001, which resulted in the addition of the separate HHS designation to applications for authority moving forward. However, the Commission explicitly made an exception for carriers who had been legally providing HHS transportation prior to the enactment of the rule.³⁶ Specifically, the Commission found that carriers who had been legally providing this service would be permitted to continue providing this service subject to the geographical restrictions on the certificate.³⁷

³³ *In re Application of Nebraskaland Leasing & Assocs.*, 254 Neb. 583, 591 (1998).

³⁴ *Id.*

³⁵ Certificate of Public Convenience and Necessity B-1494, Midlands Services Link, Inc. issued August 18, 1999.

³⁶ Docket RR-148 *In the Matter of the Commission on its own motion seeking to amend title 291, chapter 3, Motor Carrier Rules and Regulations, Section 001, Definitions, and to harmonize existing rules. Order Issuing Amendments to the Rules; Order Setting Hearing.* (October 4, 2001).

³⁷ *Id.* at p. 5.

As shown in Exhibit 5, Midlands Services Link, Inc. provided HHS transportation until May of 2012. In November of 2013, Midlands sought suspension of its certificate. Alpha Life subsequently applied for the transfer of authority in February 2015 and was issued in March of 2016. Upon realizing the HHS designation had not been transferred with the certificate, Applicant filed an application for HHS designation in June of 2016. The Application was published and properly protested. Applicant then raised the issue that Midlands prior provision of HHS service should have transferred with the Application. The hearing officer reviewed this request and determined the matter should go to hearing. The gap in service was approximately eighteen months. This type of issue had not previously been raised before the Commission. As such, it was necessary for the evidence to be presented to the full Commission, to allow both the Applicant and Protestant ample opportunity to be heard regarding this issue.

The Parties each made arguments regarding the issue of the gap in service. Dr. Braimah discussed his experience in the field and the number of years he has served this population, both through Midlands and through his new company Alpha Life. John Davis, in his testimony for the Protestant, indicated Happy Cab had not protested the initial transfer because Midlands had not been a factor when privatization occurred. He indicated Midlands had already left the field and Happy Cab did not view them as competition when Dr. Braimah applied for the initial transfer. Mr. Davis also cited the fact that Happy Cab is able to and currently does serve the DD population, which is Dr. Braimah's primary client base. That argument is not persuasive as Dr. Braimah may provide transportation to his current clients through the DD Waiver program.

Ms. Pence, in closing, argued that the gap in service interrupted the presumption of need, and there is no longer a need. Although there was a gap in service from the time Midlands provided its last HHS trip to the time the certificate was suspended, the Commission disagrees that it was sufficient to interrupt the presumption of need. Midlands provided HHS service consistently for thirteen years with the certificate it held. Based on the evidence presented by each party, the Commission agrees with the Applicant. The Privatization of the HHS brokerage system created a great deal of confusion for a number of carriers. The Certificate held by Midlands was never ruled to be dormant by the Commission. Midlands properly provided service, and properly suspended its Certificate. Alpha

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Life should be permitted to continue this service because of the proper transfer of the authority from Midlands Services Link, Inc. in B-1494 to Alpha Life Improvement Services in B-1921.

From the evidence adduced and being fully informed in the premises, the Commission is of the opinion and finds that the proposed application of Alpha Life Improvement Services should be granted. A new Certificate of Public Convenience and Necessity should be issued for Alpha Life Improvement Services to include the HHS Designation.


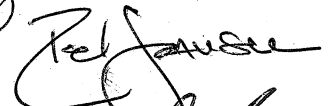

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Application No. B-1921 be, and is hereby, granted.

It IS FURTHER ORDERED that the Certificate of Public Convenience and Necessity issued to Alpha Life Improvement Services in B-1921 should be amended to include HHS Designation.

ENTERED AND MADE EFFECTIVE at Lincoln, Nebraska, this 12th day of June, 2018.

COMMISSIONERS CONCURRING:

//s//Frank E. Landis
//s//Mary Ridder

NEBRASKA PUBLIC SERVICE COMMISSION


Chair

ATTEST:


Executive Director