

BY THE COMMISSION:

B A C K G R O U N D

On August 18, 2017, Dignity Non-Emergency Medical Transportation, Inc. ("Applicant"), Omaha, filed an application seeking authority as a common carrier to provide transportation of passengers by van in open class between points in Antelope, Boone, Burt, Butler, Cass, Cedar, Clay, Colfax, Cuming, Dakota, Dixon, Dodge, Douglas, Fillmore, Gage, Hall, Hamilton, Jefferson, Johnson, Lancaster, Madison, Merrick, Nance, Nemaha, Otoe, Pawnee, Pierce, Platte, Polk, Richardson, Saline, Sarpy, Saunders, Seward, Stanton, Thayer, Thurston, Washington, Wayne, and York Counties. The transportation of railroad train crews and their luggage is not authorized, and Applicant applied for HHS Designation. Timely protests were filed by Golden Plains Services, Inc. d/b/a GPS Transportation ("GPS"), Action Cab, Camelot Transportation, Triumph Transportation, and MG Taxi (together, "Protestants") and were granted on November 6, 2017.

On November 14, 2018, a planning conference was held to set the procedural schedule. On January 9, 2018, Applicant filed a motion to compel discovery alleging no responses had been received from protestant, MG Taxi. Applicant's motion further alleged that incomplete responses were received from Protestants GPS, Action Cab, Camelot Transportation, and Triumph Transportation. MG Taxi withdrew its protest on January 12, 2018. A Hearing Officer Order was entered January 19, 2018 to grant Applicant's motion in part, deny the motion in part, and continue the hearing. Subsequent to Applicant's receipt of the ordered discovery responses, a Hearing Officer Order establishing the modified procedural schedule and setting the hearing was entered January 23, 2018.

A hearing on the application was held pursuant to the modified procedural schedule on February 20, 2018, in the Commission Hearing Room with appearances as shown above.

E V I D E N C E

In support of its application, Applicant produced one witness, M'Moupientila N'Kenon N'Da. Mr. N'Da is the owner of Dignity Non-Emergency Medical Transportation. He also owns

Dignity Home Care, Dignity Care Group, and Dignity Home Hospice.¹ Mr. N'Da testified that his businesses provide a variety of services to clients including skilled care and hospice.² Mr. N'Da has Master of Science Degrees in Clinical Psychology and Public Administration, as well as a PhD in Finance.³ He currently teaches psychology and math at the collegiate level in addition to operating the Dignity companies.⁴

Mr. N'Da testified that Dignity Home Care provides limited transportation to clients.⁵ He went on to explain that he believed his clients needed additional transportation services. However, he stated he would need additional clients in order to offer reasonable prices for transportation.⁶ Mr. N'Da indicated that he hired a research firm to conduct a market survey to assist in determining need. The results of this survey were offered as Exhibit 17.⁷ Mr. Pollock objected based on foundation and hearsay. Mr. Pollock argued that the report does not provide information as to how the calls were made, what questions were asked, and how the information was kept. Further, the information was received secondhand from the researcher and third-hand from the persons with whom the researcher spoke.⁸ Mr. Shultz joined in the objection.⁹ Mr. N'Da testified that he personally followed up with the facilities after receiving the report.¹⁰

Commissioner Schram questioned Mr. N'Da about his relationship with the entity that created this report. Mr. N'Da testified that the company, Twenty First Century, assists with market research and is well versed in Medicaid, HHS, and Medicare policies.¹¹ Commissioner Schram ruled the exhibit would be admitted but given the weight it deserves.¹² Mr. Pollock

¹ Hrg. Transcr. 6:5-7:13 (Feb. 20, 2018).

² *Id.*

³ *Id.* at 8:20-22.

⁴ *Id.* at 8-11.

⁵ *Id.* at 9:4-24.

⁶ *Id.* at 14:2-5.

⁷ *Id.* at 14:10-15:15.

⁸ *Id.* at 15:16-25

⁹ *Id.* at 16:2-3.

¹⁰ *Id.* at 17:7-9.

¹¹ *Id.* at 17:24-18:11.

¹² *Id.* at 18:12-14.

questioned Mr. N'Da about the issue of need as it related to the chart in Exhibit 17 and whether the document reflected need. Mr. N'Da indicated that he perceived a need from the document.¹³

Mr. N'Da testified that he met and/or spoke with some of the facilities and administrators at the facilities listed in Exhibit 17. The administrators indicated to Mr. N'Da that they have a need for transportation services.¹⁴ The specific facilities with whom Mr. N'Da spoke personally were not identified, and no outside testimony was offered to corroborate the needs of facilities. On cross-examination, Mr. Shultz asked Mr. N'Da if there were facilities in each of the counties where he is seeking authority which need his service. Mr. N'Da said he was not sure because he was not familiar with all of the counties off hand.¹⁵

Applicant offered Exhibits 15 and 16, which were copies of bank account information for Dignity Accounts. The exhibits show substantial balances in the accounts of Mr. N'Da's Dignity businesses. Additionally, Mr. N'Da testified that he has looked into potential vehicles and could purchase one to two cars without financing. He has also spoken with Wells Fargo and Navy Federal about possibly acquiring vehicles.¹⁶ Mr. N'Da further testified he has looked into the insurance costs for this type of business.¹⁷ On cross-examination, Mr. Shultz questioned why the accounts are not held by Dignity Non-Emergency Medical Transportation. Mr. N'Da testified that Dignity Home Care is the company that financed all of his companies and is the parent company.¹⁸

During cross-examination, Mr. Shultz questioned Mr. N'Da about transporting customers who are not affiliated with any of the Dignity businesses. There appeared to be some questions about the type of transportation business Mr. N'Da intended to conduct. Mr. N'Da indicated that he would provide transport to anyone who needed transportation and was a client of the

¹³ *Id.* at 70:4-10.

¹⁴ *Id.* at 19:4-9.

¹⁵ *Id.* at 48:6-16.

¹⁶ *Id.* at 25:13-18.

¹⁷ *Id.* at 36:16-19.

¹⁸ *Id.* at 50:16-23.

Nebraska Department of Health and Human Services ("HHS"). However, Mr. N'Da referenced the need for the clients to contact their coordinators, call the companies, and interview them.¹⁹ Upon further questioning, Mr. N'Da indicated he would provide transportation to the general public.²⁰

Mr. Pollock questioned Mr. N'Da about the type of transportation he currently provides. Mr. N'Da testified that he currently provides transportation pursuant to the AD Waiver Program.²¹ Mr. N'Da explained this transportation is arranged through the service coordinator for each client, not through Intelliride.²² Mr. N'Da further testified that if he were approved, he would provide transportation to any client sent to him through Intelliride.²³

Mr. Pollock further questioned Mr. N'Da whether Dignity would seek to market the other businesses operated by Dignity while transporting clients utilizing non-Dignity associated services. Mr. N'Da stated, "It depends how you define market."²⁴ Mr. Pollock asked if Mr. N'Da would solicit new business from Intelliride clients. Mr. N'Da stated he would not solicit new clients in this capacity.²⁵

Mr. N'Da testified he would offer service from 9-5. Mr. Pollock questioned why he would not provide 24-hour service. Mr. N'Da indicated he planned to start with a small number of vehicles and build from there as business indicated.²⁶ Commissioner Rhoades asked staff if non-emergency medical providers typically operated 24/7 for HHS transportation. Ms. Rohr indicated she was unaware of carriers who operated 24/7 for non-emergency medical transportation.²⁷ Finally, Mr. Pollock asked whether Mr. N'Da would send vehicles from Omaha to pick up

¹⁹ *Id.* at 55:11-16.

²⁰ *Id.* at 57:12-16.

²¹ *Id.* at 61:4-12. (Mr. N'Da testified it is the Adult Disabled Waiver, however it is called the Aged and Disabled Waiver).

²² *Id.* at 61:22-62:8.

²³ *Id.* at 69:6-12.

²⁴ *Id.* at 70:12-21.

²⁵ *Id.* at 70:22-71:1.

²⁶ *Id.* at 71:2-24.

²⁷ *Id.* at 78:5-12.

passengers in Henderson or Grand Island, and Mr. N'Da indicated he would.²⁸

Mr. Shultz called Kirby Young to testify on behalf of Protestant GPS Transportation. Mr. Young testified that GPS offers service to all of the counties described in the application and has the ability to provide more service than it currently receives requests to provide.²⁹ Mr. Young further testified that GPS would be in a position to supplement its fleet with additional drivers and vehicles if the need increased.³⁰ Mr. Young indicated that GPS offers service 24/7; however, there may not be a need every hour of the day.³¹ Mr. Young further testified that the hours of operation for Intelliride are 7 am to 7 pm.³² Mr. Young testified that his business would be reduced if an additional provider entered the market.³³

On cross-examination, Mr. Wray questioned Mr. Young regarding circumstances where Mr. Young would reject a trip. Mr. Young testified that GPS would reject a trip if taking it would be a danger to the public.³⁴ Commissioner Landis asked Mr. Young if GPS had rejected any rides based on driver availability, and Mr. Young indicated they had not.³⁵

Mr. Young testified as to the process of getting rides through Intelliride. Mr. Young indicated the clients contact Intelliride at least 3 days in advance, and then Intelliride schedules the ride with a provider.³⁶ Mr. Young noted that clients cannot select a particular transportation provider through Intelliride. However, clients receiving service through the AD Waiver program are able to choose providers.³⁷

²⁸ *Id.* at 73:5-22.

²⁹ *Id.* at 81:20-82:1, 86:23-87:1.

³⁰ *Id.* at 83:1-6.

³¹ *Id.* at 83:16-23, 87:21-88:9 (examples of cases occurring outside business hours).

³² *Id.* at 84:9-10.

³³ *Id.* at 93:16-25.

³⁴ *Id.* at 92:3-11.

³⁵ *Id.* at 94:22-25.

³⁶ *Id.* at 84:17-85:3.

³⁷ *Id.* at 85:4-14.

Mr. Pollock called John Bartu to testify on behalf of Comstock Company d/b/a Action Cab ("Action Cab"). Mr. Bartu is the vice-president of Action Cab.³⁸ Action Cab has the ability to operate statewide so long as the trip begins or ends in Grand Island, Hastings, or Columbus.³⁹ Mr. Bartu testified that the bulk of their vehicles are in Grand Island or Hastings.⁴⁰ Mr. Bartu testified that Action Cab would make a business decision to reject trips that are point to point in Columbus because it would not be cost effective to send a vehicle from Hastings or Grand Island up to Columbus.⁴¹ According to Mr. Bartu, Action Cab typically only accepts jobs outside of the Grand Island and Hastings areas if they are long distance "mileage runs," such as Hastings to Columbus, Columbus to Grand Island, or Grand Island to Omaha or Lincoln.⁴² Mr. Bartu stated neither HHS nor Intelliride has ever expressed concern over this practice.⁴³ On cross-examination, Mr. Bartu indicated that on a good week, Action Cab goes to Lincoln or Omaha twice per week.⁴⁴

Mr. Bartu further testified that Action Cab no longer operates a wheelchair van because it was not used often. He specifically indicated most individuals within his service area are able to get wheelchair transport from state and federally funded bus systems for a lower rate than he could charge.⁴⁵ Mr. Bartu further explained that Action Cab competes against bus systems, other taxis, and several open class providers to get business currently.⁴⁶ Additionally, Mr. Bartu stated a previous program allowed individuals to purchase reduced price cab vouchers and the cab companies would be reimbursed by the state or federal program through which customers purchased the vouchers. However, he stated this program has been discontinued and harmed his business.⁴⁷ Mr. Bartu testified that, due to the elimination of the voucher program, his business has reduced by twenty to twenty-five percent.

³⁸ *Id.* at 98:8-9.

³⁹ *Id.* at 99:7-11.

⁴⁰ *Id.* at 100:21-101:2.

⁴¹ *Id.* at 101:19-21.

⁴² *Id.* at 102:22-25.

⁴³ *Id.* at 102:14-18.

⁴⁴ *Id.* at 113:9-10.

⁴⁵ *Id.* at 102:19-103:5.

⁴⁶ *Id.* at 103:16-104:3.

⁴⁷ *Id.* at 104:7-24.

Mr. Bartu testified that an additional carrier would further reduce his business.⁴⁸ Mr. Bartu also stated that as a taxi provider, he is obligated to have 24/7 availability but does not provide trips for many hours in the day.⁴⁹ Therefore, the business relies upon heavier times to subsidize slow times.⁵⁰ Mr. Bartu stated that Action Cab has reduced the number of vehicles from 15 down to 10-12.⁵¹ However, if business were to increase, Action Cab would increase its fleet again.⁵²

Mr. Bartu stated that Action Cab accepts or rejects trips from Intelliride by a certain time. However, he also stated that Action Cab has received trip information on very short notice as well.⁵³ He indicated notice is typically 24 hours or less.⁵⁴ If a trip is very short notice, the company will receive a call and have to accept or reject the ride over the phone. Mr. Bartu indicated that Action Cab's office staff accepts those calls from 5:30 am to 8:00 pm.⁵⁵

The final witness was Alissa Kern, on behalf of Camelot Transportation ("Camelot") and Triumph Transportation ("Triumph"). Ms. Kern is the Managing director for Camelot and Triumph.⁵⁶ Ms. Kern indicated that Camelot and Triumph currently provide transportation statewide for HHS, private pay clients, and Probation. Triumph primarily handles wheelchair service.⁵⁷ Of the 46-47 drivers currently employed by the companies, no drivers are currently working full time.⁵⁸ Ms. Kern stated that Camelot and Triumph have the driver and equipment availability to double the number of trips they currently receive.⁵⁹ Ms. Kern further indicated the drivers would prefer to be full time and

⁴⁸ *Id.* at 105:4-20.

⁴⁹ *Id.* at 105:21-25.

⁵⁰ *Id.* at 106:6-9.

⁵¹ *Id.* at 109:4-11.

⁵² *Id.* at 109:12-14.

⁵³ *Id.* at 107:15-108:6.

⁵⁴ *Id.* at 108:8.

⁵⁵ *Id.* at 108:14-21.

⁵⁶ *Id.* at 117:6-7.

⁵⁷ *Id.* at 117:19-24.

⁵⁸ *Id.* at 117:25-118:1.

⁵⁹ *Id.* at 120:4-10.

often compete with each other for trips and hours.⁶⁰ She went on to note that the entry of GPS into the market drastically reduced business for Camelot and Triumph.⁶¹

Ms. Kern testified Camelot and Triumph do not typically reject trips based on lack of available drivers unless it is a point-to-point trip in a community far from any of their drivers.⁶² Additionally, Ms. Kern stated that the companies are available for service 24/7.⁶³ In response to questions from Commissioner Rhoades, Ms. Kern testified that Intelliride prioritizes trip assignments utilizing a tablet system. Providers may rent a tablet from Intelliride for \$200 per tablet per month and become a preferred provider. If a company does not rent the tablets, the company is placed into "overflow status," meaning they are manually assigned trips as tablet companies fill up.⁶⁴

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 authority to provide transportation of passengers by van in open class service between points in Antelope, Boone, Burt, Butler, Cass, Cedar, Clay, Colfax, Cuming, Dakota, Dixon, Dodge, Douglas, Fillmore, Gage, Hall, Hamilton, Jefferson, Johnson, Lancaster, Madison, Merrick, Nance, Nemaha, Otoe, Pawnee, Pierce, Platte, Polk, Richardson, Saline, Sarpy, Saunders, Seward, Stanton, Thayer, Thurston, Washington, Wayne, and York Counties. Applicant is also seeking HHS Designation.

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

⁶⁰ *Id.* at 122:7-15.

⁶¹ *Id.* at 122:16-21.

⁶² *Id.* at 123:4-10.

⁶³ *Id.* at 123:19-22.

⁶⁴ *Id.* at 134:25-135:16.

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. Mr. N'Da provided substantial evidence indicating he is fit to enter the market as a passenger carrier. Mr. N'Da has significant business experience operating three business under the Dignity brand.⁶⁵ Further, Mr. N'Da possesses several advanced degrees, including a PhD in finance.⁶⁶ Mr. N'Da has developed a plan to slowly enter the market and evaluate the reasonableness of the business before expanding.⁶⁷ Mr. N'Da is undoubtedly willing to enter the market. Protestants did testify they were providing services 24 hours per day, however this is not a requirement of open class carriers. He is also able to take the next steps, including purchasing vehicles as outlined in his testimony regarding the finances of the Dignity businesses. No evidence was presented to counter Mr. N'Da's fitness to enter the market as a passenger carrier.

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.⁶⁸

⁶⁵ *Id.* at 6:12-15, 7:2-8, 7:13-14.

⁶⁶ *Id.* at 8:20-22.

⁶⁷ *Id.* at 71:16-24.

⁶⁸ *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 required by public convenience and necessity is ordinarily a factual issue.⁶⁹

Utilizing the factors set forth by the Nebraska Supreme Court, the record does not present sufficient evidence of necessity to support a grant of the application. First, Applicant did not produce any witnesses other than himself in support of the application and presented virtually no evidence regarding need. Mr. N'Da testified he retained the services of a consulting firm to analyze the issue of need. However, the report received as Exhibit 17 merely indicated which facilities and rehab centers utilized local transportation providers. Nothing in the report indicated the current providers were unable to meet the needs of the facilities or their residents.⁷⁰ Mr. N'Da testified he followed up with the facilities and believed there was a need. However, no representatives from any of the facilities nor any clients offered any testimony in support of this assertion. While some of the facilities identified use local transportation according to the notes in the exhibit, none of the notes indicated whether the facilities have experienced any insufficient service.⁷¹

Additionally, Mr. N'Da's business currently offers limited transportation services to clients pursuant to the Aged and Disabled Waiver through Health and Human Services. Throughout Mr. N'Da's testimony, it appeared he primarily wished to serve clients for whom Dignity is already providing services. Mr. N'Da testified Dignity would provide service to anyone who requested service. However, he appeared to be unfamiliar with the methods by which rides were assigned. Mr. N'Da referenced passengers having the right to choose their provider with assistance from their coordinators.⁷² This is true within the waiver services for which many of Applicant's consumers qualify. However, transportation services coordinated through Intelliride are generally not provided utilizing client choice. If Applicant's primary goal is to provide additional transportation services for clients to whom services are already provided, there are certain exemptions that may apply. However, if Applicant were to provide service as an open class carrier, Mr. N'Da would receive trips from the tablet system with Intelliride or from their overflow pool as described in Ms. Kern's testimony. This may not

⁶⁹ *Id.*

⁷⁰ Hrg. Ex. 17 (Feb. 20, 2018).

⁷¹ *Id.*

⁷² Hrg. Transcr. 55:8-19 (Feb. 20, 2018).

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align with the current services offered by the other Dignity businesses.

Second, Applicant presented no evidence indicating the existing carriers are failing to meet the needs of consumers in the market Applicant seeks to enter. Mr. Bartu, Mr. Young, and Ms. Kern each testified that Protestants have the ability to take on more customers in the market. Without evidence to the contrary, the Commission cannot determine whether the current providers are insufficient to meet client needs.

Finally, Applicant did not offer any evidence showing such entry would be harmless to other carriers. Each of the Protestants testified that the approval of a new carrier would harm their businesses, but did not offer any market evidence in support of such assertions. However, Applicant has the burden of proof. Applicant did not offer any market research or testimony regarding the impact of entering the market on the operations of existing carriers. Therefore, the Commission cannot say that approving Applicant's application would be harmless to the existing providers.

From the evidence adduced and being fully informed in the premises, the Commission is of the opinion and finds that the proposed application of Dignity Non-Emergency Medical Transportation should be denied.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Application No. B-1953 be, and is hereby, denied.

ENTERED AND MADE EFFECTIVE at Lincoln, Nebraska, this 24th day of April, 2018.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:



Chair



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

ATTEST



Executive Director

COMMISSIONERS DISSENTING:

//s//Crystal Rhoades

Commissioner Crystal Rhoades dissenting:

Mr. N'da's application should be granted. He is currently serving clients through Dignity Home Healthcare. He transports those clients for errands and personal needs and wished to expand his services so that he could provide transportation to those clients for their medical appointments.

Mr. N'da demonstrated he met the fitness standard to become a common carrier. He further testified that there is a need in his community. So long as Intelliride continues to assign trips on the basis of who is paying for tablets there is no way for this Commission to ever make any reasonable conclusion about whether or not there are enough carriers in any market in Nebraska. The current dispatching system is pay to play, where by carriers are given more business in exchange for rental of Intelliride's tablet system. That means some carriers are given more trips while other carriers are idle regardless of capacity of the carrier. This makes it impossible to determine with data what the need is in the market.

Historically, applicants have asked Intelliride to testify at such hearings as witnesses to advise the Commission on whether or not there is "unmet need" in the market. Even if Mr. N'da had brought in witnesses from Intelliride their testimony would have been less compelling than his as a marker for need and necessity because they stand to profit so dramatically from allowing in carriers who agree to pay the tablet rental. As long as Intelliride engages in this system the best evidence will continue to be direct testimony from the parties. Finally, the Commission is well aware that there have been numerous complaints arising from Intelliride's dispatching and pay to play practices and those practices have resulted in numerous dockets with complaints including service and billing problems. Until such time these issues can be resolved the Commission should err on the side of market based competition. Mr. N'da is a successful businessman with a background in economics and it's his desire to enter the market. He has committed considerable resources and time to achieving that goal and should be given permission to enter the market. I was not persuaded that allowing one or two additional vehicles to transport medical clients in the Omaha area would have caused harm to existing carriers.



Crystal Rhoades