

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application)	APPLICATION NO. M-14205
of Tymar, LLC, d/b/a Second to)	
None Moving, LaVista, Nebraska,)	
seeking authority as Common)	
carrier in Nebraska Intrastate)	ORDER ON RECONSIDERATION:
commerce in the Transportation)	GRANTED
of household goods between)	
points in Cass, Sarpy, Douglas,)	
and Washington counties and)	
between points in said counties)	
over irregular routes.)	ENTERED: MARCH 27, 2012

APPEARANCES

For the Applicant:

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For the Commission Staff:

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BY THE COMMISSION:

B A C K G R O U N D

By application filed July 7, 2006, Tymar, LLC d/b/a Second to None Moving, LaVista, Nebraska, seeks to establish an authority as a common carrier of household goods in Nebraska intrastate commerce in service between points in Cass, Sarpy, Douglas, and Washington and between points in said counties over irregular routes. Notice of the application was published in The Daily Record, Omaha, Nebraska, on May 20, 2008. Timely protests to the application were filed by Two Men and a Truck, Jim's Moving and Delivery Company, Vaughn Moving, I-Go Van and Storage, vonRenzell Van and Storage, Earl vonRenzell, and Chieftain Van Lines.

During discovery in this application, the Applicant sent out a number of Requests for Admission to the Protestants. Included in the requests for Admission were the following:

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

APPLICATION NO. M-14205

PAGE 2

Request No. 8: Applicant is fit, willing, and able to provide services in the geographical areas set forth in the application.

Request No. 13: Granting the application will benefit the public interest and benefit present public convenience and necessity.

There were several other Requests for Admissions that inquired into other areas but those requests were not materially probative to a decision on the application.

Only one of the Protestants, Chieftain, answered the Requests for Admissions, and it neither objected to the Request nor denied it. Therefore, the Requests for Admissions were not objected to nor denied by any Protestant.

The Applicant submitted an affidavit to the Commission on the day before the hearing demonstrating the lack of responses to the Request for Admissions, and argued at the hearing that the lack of responses should result in the facts of the Application being found to be admitted by the Protestants and that the Commission should resolve the application in favor of the Applicant.

The Commission overruled the request that the testimony of the Protestants should be disregarded due to their failure to respond to the Requests for Admissions. The Commission allowed the Protestants to testify at the hearing.

On October 14, 2009, the Commission entered an order that denied the application. The Commission found that, although the Applicant was fit, willing, and able to perform the proposed service pursuant to §75-311 (a), the Applicant had not met its burden of proof under §75-311 (b).

Tymar appealed the order to the District Court of Lancaster County, Nebraska. The District Court upheld the order of the Commission on August 5, 2010. Tymar appealed that order to the Nebraska Supreme Court. On November 10, 2011, the Nebraska Supreme Court entered an order that reversed the decision of the district court and remanded the cause to the district court with directions to remand the action to the Commission with directions for the Commission to reconsider the application consistent with the opinion entered on November 10, 2011.

On December 20, 2011, the district court entered an order remanding the case to the Commission with directions that it reconsider the application of the Plaintiff seeking authority to operate as a common carrier of household goods consistent with the opinion of the Nebraska Supreme Court found at 282 Neb. 692.

OPINION AND FINDINGS

This matter is now before the Commission for it to reconsider its decision consistently with the opinion entered by the Nebraska Supreme Court in Tymar, LLC vs. Two Men and A Truck, 282 Neb. 692 (2011). The Supreme Court addressed the Requests for Admissions and the legal effect that those unanswered requests have on the proceedings before the Commission. The Supreme Court said that the Commission erred under Rule 36 when it did not give legal effect to the substance of the unanswered request Nos. 8 and 13.

The substance of unanswered requests 8 and 13 should have caused the Commission to find that the tests as set for the Applicant in §75-311 (a) and (b) were passed by the Applicant and that the application should have been approved.

Applications for common carrier authority are governed by Neb. Rev. Stat. § 75-311 (2011), 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.

The Commission must apply a two-part test. First, the Commission must determine if an applicant is "fit, willing, and able to properly perform the service proposed." In this matter, the Commission had previously found that the Applicant was fit, willing, and able to perform the service proposed. ." Based on the evidence before us and adduced from the record, we found

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

APPLICATION NO. M-14205

PAGE 4

that the applicant had met the fitness test of Neb. Rev. Stat. Section 75-311.

The second part of the test is whether the proposed service, to the extent to be authorized by the certificate, . . . is or will be required by the present or future public convenience and necessity. Pursuant to Rule 36, the Commission finds that the Request for Admission No. 13 was properly served by the Applicant, and that the failure of the protestants to answer or object to the Admission causes the subject matter of the request to be deemed admitted for the purposes of the action. As the Admission requested in No. 13 is directly on point regarding §75-311 (1) (b), the Commission finds that this Admission provides the legal effect of establishing that the Applicant has met its burden of proof on the second part of the test.

The Commission therefore finds, consistent with the Supreme Court order of November 11, 2011, that the Applicant's burden of proof has been legally met, and that the application should be granted.

Being fully informed in the premises, the Commission is of the opinion and finds that the application should be granted.

O R D E R

Being fully informed in the premises, the Commission hereby orders:

1. The applicant is fit, willing, and able properly to perform the service proposed and to conform with the provisions of Neb. Rev. Stat. § 75-301 to §75-322 and the requirements, rules, and regulations of the Commission thereunder.

2. The proposed intrastate service is or will be required by the present or future Public Convenience and Necessity to the following extent:

C E R T I F I C A T E A U T H O R I Z E D

SERVICE AND TERRITORY AUTHORIZED: Transportation of common carrier of household goods in Nebraska intrastate commerce in service between points in Cass, Sarpy, Douglas, and Washington and between points in said counties over irregular routes.

3. The application should be granted.

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

APPLICATION NO. M-14205

PAGE 5

ORDER

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Application M-14205, be, and it is hereby, granted; and that upon compliance with the terms and conditions as set forth in this Order, a Certificate of Public Convenience and Necessity shall be issued to Tymar, LLC, d/b/a Second to None Moving, authorizing the operations as set forth in the foregoing findings.

IT IS FURTHER ORDERED that the Applicant shall not be issued the Certificate of Public Convenience and Necessity authorized by the Commission unless and until Applicant has fully complied, within a reasonable time from the effective date of this Order, with Neb. Rev. Stat. §75-305 (fees), §75-307 (insurance), and §75-308 (rates), and with the rules and regulations of the Commission; and if upon expiration of such time Applicant has not complied with such terms and conditions, this Order shall, after reasonable notice to Applicant, be of no further force and effect.

IT IS FURTHER ORDERED that Applicant shall not conduct operations until a Certificate of Public Convenience and Necessity is issued.

IT IS FURTHER ORDERED that Applicant shall render reasonably continuous and adequate service to the public pursuant to the authority authorized.

IT IS FURTHER ORDERED that the Certificate of Public Convenience and Necessity authorized shall be subject to the terms, conditions, and limitations which have been, or may hereafter be, prescribed by the Commission.

MADE AND ENTERED at Lincoln, Nebraska, this 27th day of March, 2012.

COMMISSIONERS CONCURRING:

NEBRASKA PUBLIC SERVICE COMMISSION



//s// Rod Johnson
//s// Frank Landis

Chairman



ATTEST:



Executive Director

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION
