

**BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION**

In the Matter of the Commission, on its own motion, seeking to amend Title 291, Chapter 1, Rules of Commission Procedure, to update the chapter in its entirety. ) Rule and Regulation No. 192  
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**COMMENTS**

Checker Cab Company, dba Checker Cab Company, Happy Cab Company, and Yellow Cab Company; DonMark, Inc., dba Cornhusker Cab Company; Valor Transportation Company, dba Safeway Cab Company; Airport Transportation Co.; Camelot Transportation, Inc.; and Triumph Transportation, Inc. (collectively, “**Happy Cab and Camelot**”) by and through their attorneys of record, hereby respectfully submit these comments to the Nebraska Public Service Commission (“**Commission**”) in response to the Commission’s September 30, 2014, *Order Opening Docket, Releasing First Set of Proposed Rules and Seeking Comment* (“**Order**”).

**Introduction**

On September 30, 2014, the Commission, in its Order, released a revised set of rules or procedure (“**Proposed Rules**”) in the above-captioned matter with the goal of comporting with the Nebraska Model Rules of Agency Procedure. In the Order, the Commission also sought comments on the Proposed Rules.

Happy Cab and Camelot hereby submit the following comments in response to Order and addressing the Proposed Rules.

Generally, Happy Cab and Camelot believe the Proposed Rules present a relatively simple and straightforward set of procedures for the Commission to administer matters

relating to any of the several industries the Commission regulates. The Commission is to be commended for undertaking this proceeding.

Certain practices authorized and required under the current Rules of Commission Procedure, such as the filing of Applications, Petitions for Formal Intervention, and Protests, remain applicable and necessary for the orderly and efficient administration of matters before the Commission. For reasons explained further below, it would be impracticable to not include such pleadings and related processes in the Proposed Rules. *See* NEB. REV. STAT. § 84-909.01.

### **Applications Should Be Allowed**

The Proposed Rules do not define or affirmatively recognize Applications. An Application, rather than petitions or other pleadings, is the pleading most commonly utilized to commence an action before the Commission. Applications, for instance, are filed by telecommunications carriers to seek approval of interconnection agreements, by natural gas companies for approval of rate changes, by transportation carriers for approval of service territory expansions, and by carriers and utilities in all industries for approval of action such as changes of ownership or new operating authority. It would impracticable under these circumstances to eliminate Applications as a means for initiating an action before the Commission. *See* NEB. REV. STAT. § 84-909.01. Continuing to allow the filing of applications would cause no harm to the Commission, industries regulated by the Commission, or the general public and consumers.

The omission of a definition or affirmative recognition of Applications in the Proposed Rules does not appear intentional. In fact, several rules reference applications, indicating that the Proposed Rules contemplate their existence:

- **Rule 001.24** defines Protest as “any pleading filed in opposition to *an application* for motor carrier authority” (emphasis added).

- **Rule 001.25** similarly defines Protestant as a person filing a protest to “an application” for motor carrier authority.
- **Rule 004.03K** recognizes the Commission’s authority to dismiss an “application” for want of prosecution.
- **Rule 004.09** allows for informal disposition of an “application which is not opposed.”
- **Rule 004.14E** prohibits the filing of a “subsequent application covering substantially the same subject matter” within 90 days after Commission denial of the “previous application.”
- **Rule 010.04** sets forth the requirements for published notice of “applications.”

All of these rules reference Applications, giving a clear indication that the Proposed Rules envision the filing of Applications by various carriers and utilities.

Happy Cab and Camelot recommend including in the Proposed Rules a definition of Application, such as the following:

“Application shall mean an initial pleading filed with the Commission that seeks Commission action.”

This broad definition closely resembles the definition for Petition in the Proposed Rules. The similarity is intentional. Both are pleadings that are, and will be, commonly used initial pleadings. The rules listed above are incomplete and confusing if the Proposed Rules do not create the pleading – an Application – to which they reference.

A related addition would be the definition of Applicant. Happy Cab and Camelot recommend the following:

“Applicant(s) shall mean a party or parties who have filed an application with the Commission seeking Commission action.”

This definition also resembles the definition of Petitioner in the Proposed Rules.

Only minor modifications will be needed to accommodate the newly defined term Application:

To clarify that the Commission envisions other pleadings, such as Applications, to be appropriate means of initiating proceedings, **rule 001.21** should be modified as follows:

Petition means ~~the~~ an initial document filed by or with the Commission that sets forth a claim and request for Commission action or initiates a proceeding.

**Rule 001.23** should be modified as follows:

Pleading shall mean any written petition, application, formal complaint, protest, answer, or motion used in any proceeding before the Commission as set forth in this chapter.

In this rule and others below, references to Formal Complaint and Protest, both of which are defined in Section 1 of the Proposed Rules, and related terms appear to be needed and appropriate.

**Rule 004.03A** should be modified as follows:

The contested case begins with the filing of a petition, application, or formal complaint and request for hearing, if applicable, with the Commission, upon the filing of a departmental complaint, or upon the Commission's own motion. The petition, application, or complaint is the initial document filed by or with an agency that sets forth a claim and request for agency action.

**Rule 004.03B** should be modified as follows:

The parties to a contested case shall be the petitioner, applicant, complainant, or person by whom a contested case is brought and the respondent, intervenor, protestant, or person against whom a contested case is brought and includes any intervenors.

**Rule 004.03D** should be modified as follows:

The pleadings in a contested case may include a petition, application, formal complaint, intervention, protest, answer, reply, notice, motion, stipulation, objection or order or other formal written document filed in a proceeding before the Commission. Any pleading filed in a contested case shall meet the following requirements:

**004.03D1** The pleading shall contain a caption specifying the title or nature of the pleading, shall state material factual allegations and state concisely the action the Commission is being requested to take, shall contain the name and address of the petitioner, applicant, or complainant, and shall be signed by the

party filing the pleading, or when represented by an attorney, the signature of that attorney.

**004.03D1a** Attorneys shall also include their address, telephone number and bar number.

**004.03D1b** The initial petition or formal complaint shall also contain the name and address of the respondent.

**004.03D2** All pleadings shall be made on white, letter-sized (8½ x 11) paper and shall be legibly typewritten, photostatically reproduced, printed or handwritten. If handwritten, a pleading must be written in ink.

By its nature, an Application is not likely to reference a “respondent”; hence, reference to “application” in **004.03D1b** is not necessary. Reference to “formal complaint” is necessary and appropriate.

**Rule 004.03F** should be modified as follows:

The petitioner or complainant shall serve a copy of the petition or formal complaint on each respondent listed in the petition personally or by first-class or certified mail. Written proof of such service shall be filed with the Commission. Each respondent who chooses to file a responsive pleading must do so within 20 days from the date of personal service or the date of agency mailing of the petition or formal complaint.

See comment regarding rule **004.03D1b** above.

**Rule 004.03G** should be modified as follows:

All pleadings subsequent to the initial petition, application, or formal complaint shall be served by the party filing such pleading upon all attorneys of record or other representatives of record and upon all unrepresented parties. Service shall be made personally or by first-class or certified mail. Written proof of such service shall be filed with the Commission.

For consistency’s sake, **rule 004.03K** should be modified as follows:

Any petitioner, applicant, or complainant failing to prosecute his or her application within ninety (90) days may be subject to an order to show cause as to why the petition, application, or complaint should not be dismissed.

## Process for Protests and Formal Interventions

Like Applications, the Proposed Rules appear to contemplate the filing of Protests and Petitions for Formal Intervention. Unlike the term Application, Protests and Formal Intervenor are defined terms. Proposed Rules 001.24 and 001.25 define Protest and Protester; Proposed Rule 001.11 defines Formal Intervenor. Another reference, indicating contemplation of these terms, appears in Proposed Rule 004.09, which allows for informal disposition of an “application which is not opposed through a protest or formal intervention.”

Most notably, two rules specifically address, albeit incompletely, how and under what circumstances a Formal Intervention should be made:

- **Rule 001.14** defines Informal Intervenor to mean “an intervenor who does not satisfy the requirements of formal intervention.” Nowhere in the Proposed Rules, however, are the “requirements of formal intervention” set forth or even mentioned.
- **Rule 004.02A4**, which appears under the primary section addressing interventions in contested cases, requires that the Petition for Intervention “state whether petitioner is seeking formal or informal intervention.”

Despite all of the foregoing references to Protests and Formal Interventions, the Proposed Rules do not adequately establish the process for filing such pleadings or their requisite contents. Preserving the ability of prospective parties to file Protests and to Formally Intervene is necessary, given the unique nature of the Commission as a Constitutional body with a quasi-judicial role. It would be impracticable not to preserve Protests and Formal Interventions as vehicles by which persons become parties to proceedings before the Commission. *See* NEB. REV. STAT. § 84-909.01. For example, in telecommunications proceedings involving Applications for grants from the Nebraska Broadband Program, it has been common in recent years for a carrier that believes it already provides broadband service in a territory for which new service is proposed to file a Protest or Petition for Formal Intervention in order to protect its interests and seek to

ensure that grant funding is not provided for broadband in areas where it is already provided. In motor carrier proceedings dating back for years, if one carrier currently provides service that satisfies the public convenience and necessity in a particular territory, that carrier will file a Protest to an Application seeking authority to provide service in the same territory. Protests and Formal Intervention are important vehicles not only to ensuring the rights and interests of parties are protected, but also to ensuring the orderly administration of state law and the rules and regulations enforced by the Commission.

Happy Cab and Camelot strongly urge the Commission to retain the current rules governing the filing of Protests and Petitions for Interventions in Commission proceedings. Current rule 014 and its subparts, relating to Protests, should be retained. Current rule 015 and its subparts, relating to Interventions, both Formal and Informal, should also be retained. Once the Commission has reviewed Comments and considered hearing testimony on the Proposed Rules, the Commission should harmonize current rules 014 and 015 with the Proposed Rules. Happy Cab and Camelot will be glad to work with the Commission and other parties in this endeavor.

For the time being, Happy Cab and Camelot will address specific Proposed Rules pertaining to Protests and Formal Interventions that cause particular concern.

#### Protest Should Be Defined to Apply to All Industries

As drafted, under the Proposed Rules, protests would be allowed only in motor transportation matters. Given that protests are not uncommon in other matters before the Commission, and there is no reason to assume that will change as a matter of practice, Happy Cab and Camelot recommend dropping the specific reference to motor carrier authority in two rules.

**Rule 001.24** should be modified as follows:

Protest shall mean any pleading filed in opposition to an application ~~for motor carrier authority~~.

**Rule 001.25** should be modified as follows:

Protestant shall mean a person filing a protest to the granting of an application ~~for motor carrier authority~~.

This simple change will allow the common practice of filing protests in other types of proceedings to continue.

#### Timing for Filing of Protests and Interventions

The Proposed Rules are internally inconsistent in the deadlines they appear to establish for filing of Protests and Interventions. **Rule 004.02A** states that a Petition for Intervention must be submitted *at least five days before the Hearing*. **Rule 004.09**, however, allows for informal disposition (commonly referred to in current practice as “modified procedure”) of contested cases if not opposed by Protest of Formal Intervention *within 30 days of the date notice of the application is published*. These two deadlines cannot be reconciled. They are inconsistent. Under current rule 014.02, a Protest must be filed within 30 days from the date of publication of notice of the application. Petitions for Formal Intervention must be filed during the same period, according to current rule 015.01B. Petitions for Informal Intervention, on the other hand, may be filed later. See current Rule 015.02A.

Again, the current rules as they pertain to the filing of Protests and Interventions create an orderly process for administering contested cases before the Commission. The Proposed Rules, due to their inconsistency and inapplicability to the types of matters commonly before the Commission, are impracticable. *See* NEB. REV. STAT. § 84-909.01. For instance, in a proceeding on an Application for motor carrier authority, it would be impracticable, if not a denial of due process, to allow a competing carrier to become a party

to the proceeding *just 6 days prior to the Hearing*, as would be allowed under Proposed **Rule 004.02A**. The timing of such filing would not allow for proper discovery or preparation for the hearing by the Applicant who in all likelihood has a substantial business interest awaiting Commission consideration.

In summary, the Proposed Rules relating to Protests and Interventions would mark a dramatic departure from current practices that lend to the efficient and orderly administration of matters before the Commission.

### **Planning Conferences**

Proposed **Rule 004.05A** and its subsections establish procedures for conducting *prehearing conferences*. In motor carrier proceedings before the Commission, *planning conferences* have proved to be effective means to establish progression schedules for cases, including discovery deadlines and hearing dates. Planning conferences increase efficiency and certainty in the conduct of proceedings. They are valuable tools the Commission uses effectively.

Planning conferences are different from prehearing conferences. Planning conferences typically take place relatively early in the proceeding – after the protest deadline has passed, but before parties have engaged in discovery. The prehearing conferences set forth in rule 004.05A, on the other hand, would occur after discovery and closer to the hearing date. The Commission in its Proposed Rules should recognize the importance of planning conferences, as well as the distinction between planning conferences and prehearing conference, by adopting a rule that establishes in very general and non-prescriptive terms the guidelines for planning conferences. Happy Cab and Camelot recommend the following:

A Hearing Officer designated to conduct a hearing may determine, subject to the Commission's rules and regulations, whether a planning conference will

be conducted. If a planning conference is not held, a Hearing Officer for the hearing may issue a planning conference order and progression schedule, based on the pleadings, to regulate the conduct of the proceedings, including discovery and the filing and exchange of witness and exhibit lists.

If a planning conference is conducted, the Hearing Officer shall set the time and place of the conference and give reasonable notice to all parties and other persons entitled to notice.

The Hearing Officer shall conduct a planning conference, as may be appropriate, to deal with such matters as exploration of settlement possibilities, discovery and depositions, scheduling of deadlines and the hearing, filing and exchange of exhibit and witness lists, and such other matters as will promote the orderly and prompt conduct of the hearing. The Hearing Officer shall issue a planning conference order incorporating the matters determined at the planning conference and any progression schedule that may have been established.

The Hearing Officer may conduct all or part of the planning conference by telephone, television, or other electronic means if each participant in the conference has an opportunity to participate in the entire proceeding while it is taking place.

**Dated:** November 20, 2014

**CHECKER CAB COMPANY DBA CHECKER CAB COMPANY, HAPPY CAB COMPANY, AND YELLOW CAB COMPANY; DONMARK, INC., DBA CORNHUSKER CAB COMPANY; VALOR TRANSPORTATION DBA SAFEWAY CAB COMPANY; AIRPORT TRANSPORTATION CO.; CAMELOT TRANSPORTATION, INC. and TRIUMPH TRANSPORTATION, INC.**

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