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TYMAR, LLC, DOING BUSINESS AS SECOND TO NONE MOVING, A NEBRASKA LIMITED LIABILITY COMPANY, APPELLANT AND CROSS-APPELLEE, V. TWO MEN AND A TRUCK ET AL., APPELLEES, AND NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE AND CROSS-APPELLANT.

805 N.W.2d 648

Filed November 10, 2011. No. S-10-861.

1. **Administrative Law: Judgments: Appeal and Error.** In an appeal under the Administrative Procedure Act, an appellate court may reverse, vacate, or modify the judgment of the district court for errors appearing on the record.
2. **Judgments: Appeal and Error.** An appellate court reviews questions of law independently of the lower court's conclusion.
3. **Pretrial Procedure: Evidence.** A party's failure to make a timely and appropriate response to a request for admission constitutes an admission of the subject matter of the request, which matter is conclusively established unless, on motion, the court permits withdrawal of the admission.
4. **Rules of the Supreme Court: Pretrial Procedure.** Neb. Ct. R. Disc. § 6-336 is self-enforcing, without the necessity of judicial action to effect an admission which results from a party's failure to answer or object to a request for admission.
5. **Rules of the Supreme Court: Pretrial Procedure: Evidence: Proof.** Neb. Ct. R. Disc. § 6-336 is not self-executing. Thus, a party that seeks to claim another party's admission, as a result of that party's failure to respond properly to a request for admission, must prove service of the request for admission and the served party's failure to answer or object to the request and must also offer the request for admission as evidence.
6. **Rules of the Supreme Court: Pretrial Procedure.** If the necessary foundational requirements are met and no motion is sustained to withdraw an admission, a trial court is obligated to give effect to the provisions of Neb. Ct. R. Disc. § 6-336 which require that the matter be deemed admitted.
7. **Pretrial Procedure: Courts: Appeal and Error.** Appellate courts look to other courts for guidance in applying Nebraska's rules of civil procedure which are based on the federal rules.
8. **Rules of the Supreme Court: Pretrial Procedure.** The language of Neb. Ct. R. Disc. § 6-336 contemplates that, if a request for admission seeks information that is permissible under Neb. Ct. R. Disc. § 6-326, the request can ask a party to admit facts in dispute, the ultimate facts in a case, or facts as they relate to the law applicable to the case.
9. **Pretrial Procedure: Rebuttal Evidence: Evidence.** An admission that is not withdrawn or amended cannot be rebutted by contrary testimony or ignored by the district court simply because it finds the evidence presented by the party against whom the admission operates more credible. This conclusive effect applies equally to those admissions made affirmatively and those established

by default, even if the matters admitted relate to material facts that defeat a party's claim.

10. **Motor Carriers.** The issue of public convenience and necessity is ordinarily one of fact.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed and remanded with directions.

David J. Skalka, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, L.L.C., for appellant.

Jon Bruning, Attorney General, and L. Jay Bartel for appellee Nebraska Public Service Commission.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF THE CASE

Appellant, Tymar, LLC, doing business as Second to None Moving (Tymar), filed an application with the Nebraska Public Service Commission (Commission) seeking authority to operate as a common carrier of household goods in intrastate commerce in service points in Cass, Sarpy, Douglas, and Washington Counties. Other common carriers in the area, including Two Men and a Truck; Jim's Moving & Delivery Co., Inc.; Vaughn Moving; I-Go Van & Storage; Earl D. vonRentzell; vonRentzell Van & Storage, Inc.; and Chieftain Van Lines, Inc. (Chieftain), filed protests to Tymar's application. The Commission conducted a hearing and determined that Tymar had failed to establish its prima facie case that it met the standards for approval of its application under the regulatory scheme imposed by Neb. Rev. Stat. § 75-301 et seq. (Reissue 2009). The Commission denied the application.

Tymar appealed to the district court for Lancaster County under Neb. Rev. Stat. § 75-136 (Reissue 2009) and the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008 & Supp. 2009), and the district court affirmed the decision of the Commission. Tymar appeals, and the Commission cross-appeals. Because certain rulings surrounding the evidentiary significance of the unanswered

requests for admissions tendered by Tymar amounted to errors of law, we reverse the order of the district court and remand the cause with directions to the district court to reverse the Commission's denial of the application and remand the action to the Commission with directions to reconsider Tymar's application consistent with this opinion.

STATEMENT OF FACTS

Tymar is owned and operated by Myron Tyrone Franklin. In 2008, Tymar filed an application with the Commission seeking authority to operate as a common carrier of household goods in intrastate commerce in service points in Cass, Sarpy, Douglas, and Washington Counties.

An application is subject to the rules and regulations of the Commission, as well as to statutory requirements. Under the Commission rules: "An application which is not protested may on applicant's motion, or on the Commission's own motion, be processed by use of affidavits and will be processed administratively. The affidavit will be signed by the applicant or counsel and sworn to before a notary." 291 Neb. Admin. Code, ch. 1, § 018.03 (2001). The Commission rules contain an affidavit form requesting information in addition to that provided in the application. The affidavit seeks information such as the vehicles the applicant proposes to use, the maintenance schedule of the vehicles, and the applicant's agreement to abide by safety standards, tariffs, Nebraska statutes governing motor carriers, and the Commission's rules and regulations. We understand such affidavit is necessary to the grant of an unopposed application and may be requested under other circumstances. The record does not contain an affidavit filed by Tymar.

In response to the application, various protests were filed by existing carriers, including Two Men and a Truck, Jim's Moving & Delivery Co., Vaughn Moving, I-Go Van & Storage, Earl D. vonRentzell, vonRentzell Van & Storage, and Chieftain. As a general matter, where protests are filed, a hearing is necessary. On March 19, 2009, the Commission sent a letter to Tymar inquiring whether it wished to pursue its application. Notwithstanding the protests, Tymar responded that it did wish

to pursue its application. There ensued correspondence regarding setting a hearing date.

In addition to the rules and regulations of the Commission, applications for common carrier authority are subject to § 75-311(1), 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 to conform to the provisions of sections 75-301 to 75-322 and the requirements, rules, and regulations of the commission under such sections 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 shall be denied.

We have stated that the issue of public convenience and necessity is ordinarily one of fact. *In re Application of Petroleum Transport Service, Inc.*, 210 Neb. 411, 315 N.W.2d 245 (1982). We have further explained that

> [i]n 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, 578 N.W.2d 28, 34 (1998).

On June 15, 2009, Tymar served requests for admissions pursuant to Neb. Ct. R. Disc. § 6-336 (Rule 36) on the protestants. The requests for admissions requested, inter alia, that the protestants admit the following:

Request No. 4: Applicant is minority owned.

Request No. 5: Applicant is minority operated.

Request No. 6: The public interest will be benefited by authorizing a minority-owned entity to provide services in the geographical area set forth in the application.

Request No. 7: The public interest will be benefited by authorizing a minority-operated entity to provide services in the geographical area set forth in the application.

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

Request No. 9: The present public convenience and necessity require provision of services by a minority-owned entity in the geographical area set forth in the application.

Request No. 10: The future public convenience and necessity will require provision of services by a minority-owned entity in the geographical area set forth in the application.

Request No. 11: The present public convenience and necessity require provision of services by a minority-operated entity in the geographical area set forth in the application.

Request No. 12: The future public convenience and necessity will require provision of services by a minority-operated entity in the geographical area set forth in the application.

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

With the exception of Chieftain, the protestants did not respond to Tymar's requests. Chieftain's response to the requests is not in the record. However, the record elsewhere shows that Chieftain's position was not to deny or object to the substance of the admissions, but, rather, implied that it was Tymar's burden to establish its entitlement to a certificate. As explained below, such response effectively admits the substance of the requests. Chieftain did not appear at the hearing on Tymar's application.

A hearing was scheduled before the Commission. The day before the hearing, counsel for Tymar submitted a letter to the Commission stating that the procedural requirements regarding proper service of the requests for admissions had been met. Tymar advised the Commission that the lack of response to the requests for admissions resulted in the facts therein being deemed admitted pursuant to Rule 36 and that, in Tymar's

view, such facts resolved the matter in favor of granting Tymar's application.

At the hearing, Tymar submitted the affidavit of its counsel showing proper service and the requests for admissions were offered into evidence. The Commission stated that it would admit the exhibit but reserved ruling on how it would treat the admissions "until a further time."

Tymar's position has consistently been that the unanswered requests for admissions which are deemed admitted resolved the matter in its favor. As counsel for Tymar explained before the district court, because the Commission would not state that it would treat the facts as conclusively established, Tymar was forced to go forward with the presentation of evidence. Accordingly, counsel for Tymar called Franklin and others to testify. Franklin testified regarding his experience and skill, and other witnesses testified about the unavailability of movers on certain occasions. Several representatives of the protestants testified in opposition to Tymar, generally stating that business had declined due to the national economic downturn.

On October 14, 2009, the Commission issued its order. In its order, the Commission declined Tymar's request to disregard the testimony of the testifying protestants due to their failure to respond to Tymar's requests for admissions and other discovery. Instead, the Commission's order stated: "The Commission hereby overrules the motion of the applicant and will allow the protestants['] testimony contained in the record and will give it the due weight that it deserves."

In its order, the Commission determined that Tymar was fit, willing, and able to provide the proposed service, and this determination has not been challenged in subsequent proceedings. Thus, we treat Tymar as fit, willing, and able under § 75-311(1)(a). However, upon review of the evidence, the Commission determined that Tymar had not presented sufficient evidence of the need for its proposed services to support a grant of its application. The Commission denied Tymar's application essentially as not having satisfied the convenience and necessity requirements in § 75-311(1)(b).

Tymar appealed to the district court for Lancaster County under § 75-136 and the Administrative Procedure Act. In an

order filed August 5, 2010, the district court affirmed the decision of the Commission to deny Tymar's application. The district court addressed the protestants' failure to respond to Tymar's requests for admissions. The district court determined that based on the protestants' failure to respond, certain facts must be deemed established, including request No. 13 to the effect that "granting Tymar's application will benefit the public interest and will benefit present public convenience and necessity." Despite the foregoing determination, the district court stated that the substance of this admission was merely an "additional" factor to be considered with other evidence and that the admissions did not in and of themselves determine whether Tymar's application should be granted. The district court also stated that several of the requests inserted an irrelevant factor, i.e., that Tymar is a minority-owned business, and that the existence of this irrelevant matter affected the weight the district court would give the admissions.

The district court's order describes the evidence presented at the Commission hearing and addresses whether Tymar's evidence met the statutory requirements for issuance of a certificate. The district court order assumed that Tymar was fit, willing, and able. Therefore, the district court indicated that the primary question it would consider was whether the evidence established that the service proposed by Tymar is or will be required by the present or future public convenience and necessity. The district court reviewed the evidence adduced before the Commission and determined that Tymar had failed to prove that public convenience and necessity would be served by its proposed service.

The standard of review before the district court is de novo on the record. § 84-917(5)(a). Although at one point in its order, the district court quoted a superseded standard of review, the district court applied the correct standard of review and affirmed the order of the Commission.

Tymar appeals the decision of the district court and the Commission cross-appeals.

ASSIGNMENTS OF ERROR

Tymar claims the district court erred when it did not recognize that the facts contained in Tymar's unanswered requests

for admissions were conclusively established and that such facts entitled Tymar to the certificate it sought. Tymar claims that the district court erred when it failed to correct the Commission's ruling regarding the treatment of the unanswered admissions and further erred when it did not reverse the order denying the application.

On cross-appeal, the Commission claims that, because the substance of the requests sought impermissible material including legal conclusions, the district court erred to the extent it determined that certain facts were deemed admitted as a result of the protestants' failure to respond to the requests.

Although the parties assign other errors, our resolution of these assignments of error results in a reversal and remand to the district court with directions to reverse and remand to the Commission with directions to reconsider Tymar's application consistent with this opinion. Accordingly, we do not directly discuss the remaining assignments of error.

STANDARDS OF REVIEW

[1] In an appeal under the Administrative Procedure Act, an appellate court may reverse, vacate, or modify the judgment of the district court for errors appearing on the record. *Nebraska Pub. Advocate v. Nebraska Pub. Serv. Comm.*, 279 Neb. 543, 779 N.W.2d 328 (2010).

[2] An appellate court reviews questions of law independently of the lower court's conclusion. *Id.*

ANALYSIS

Cross-Appeal: It Was Not Error for the District Court to Conclude That Certain Facts in the Unanswered Requests for Admissions Had Been Admitted by the Protestants.

We begin by addressing the Commission's assignment of error on cross-appeal in which it claims that the district court erred when it determined that the protestants' failure to respond to the requests for admissions tendered by Tymar established certain facts contained in the admissions. The Commission asserts that the substance of the requests was improper, because the requests sought admission of facts clearly in dispute and legal conclusions and these matters exceed the scope

of inquiries permitted under Rule 36. Thus, the Commission maintains, it was error to accord any weight to unanswered requests. We do not agree with the Commission's assertions regarding the proper scope of Rule 36 requests and reject this assignment of error.

As an initial matter, the district court indicated that along with the Commission, it would consider Tymar fit, willing, and able. Thus, it focused on whether Tymar's evidence showed that the proposed service would serve the public convenience and necessity.

In considering the issue of the protestants' failure to respond to the requests for admissions served by Tymar, the district court noted that the Commission's rules provide that the discovery proceedings in matters before the Commission are governed by the rules and regulations of the Nebraska Supreme Court. Regarding depositions and discovery, the Nebraska Administrative Code provides: "The use of depositions and discovery in proceedings before the Commission is governed by the rules and regulations of the Nebraska Supreme Court." 291 Neb. Admin. Code, ch. 1, § 016.11 (2001). The district court correctly noted that the Nebraska Supreme Court rules relating to discovery provide that a party may serve on another party written requests for admissions and that unless answered, objected to within 30 days after service, or requested to be withdrawn, the requests are deemed admitted. See Rule 36. We have treated protestants as "parties" in our prior cases. E.g., *In re Application of Northland Transp.*, 239 Neb. 918, 479 N.W.2d 764 (1992); *In re Application of George Farm Co.*, 233 Neb. 23, 443 N.W.2d 285 (1989); *In re Application of BIJK Enterprises*, 228 Neb. 804, 424 N.W.2d 356 (1988); *In re Application of Regency Limo*, 222 Neb. 684, 386 N.W.2d 444 (1986). Accordingly, service of requests on the protestants was permissible and the protestants were subject to Rule 36.

Admissions are governed by Rule 36, which states in relevant part:

> (a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of [Neb. Ct. R. Disc. § 6-326

> (Rule 26)] set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. . . .
>
> . . . The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his or her attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of forty-five days after service of the summons upon him or her.

Rule 26, to which reference is made in Rule 36, provides in part:

> (b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Based on Rule 36(a) and the case law of this court, the district court determined that Tymar had met the various procedural requirements surrounding the requests and had met the proper foundational requirements for the receipt into evidence of all of the requests for admissions. Because no motion was made to the Commission to have the admissions withdrawn, the district court determined that the Commission was obligated to deem the substance of the requests admitted by the protestants.

As stated in its order, based on this reasoning, and upon its de novo review, the district court considered,

> without limitation, the following to have been conclusively established by the failure of the protestors to have answered the requests for admissions:
>
> (1) Tymar is a minority-owned and operated business;
>
> (2) the public interest will be benefitted by authorizing a minority-owned and operated business to provide service in the geographical area set forth in Tymar's application;
>
> (3) the present and future public convenience and necessity requires and will require provision of services by a minority-owned and operated business in the geographical area set forth in Tymar's application; and
>
> (4) granting Tymar's application will benefit the public interest and will benefit present public convenience and necessity.

Despite having determined that the foregoing matters had been established, the district court nevertheless stated that these admitted facts did not in and of themselves establish the convenience and necessity necessary to grant the application. Instead, the district court stated that these facts were merely factors to be considered along with the evidence Tymar was forced to offer. The district court further stated that the requests inserted an irrelevant factor, i.e., that Tymar is a minority-owned business, and stated that this irrelevant material affected the weight the district court would give to the admissions.

[3-6] We have held that a party's failure to make a timely and appropriate response to a request for admission constitutes an admission by that party of the subject matter of the request, unless, on motion, the court permits withdrawal of the admission. See *City of Ashland v. Ashland Salvage*, 271 Neb. 362, 711 N.W.2d 861 (2006). See, also, *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009). We have recognized that Rule 36 is self-enforcing, without the necessity of judicial action to effect an admission which results from a party's failure to answer or object to a request for admission. *City of Ashland v. Ashland Salvage, supra*; *Mason State Bank v. Sekutera*, 236 Neb. 361, 461 N.W.2d 517 (1990). We have noted, however,

that Rule 36 is not self-executing. Thus, a party that seeks to claim another party's admission, as a result of that party's failure to respond properly to a request for admission, must prove service of the request for admission and the served party's failure to answer or object to the request and must also offer the request for admission as evidence. *City of Ashland v. Ashland Salvage, supra*. If the necessary foundational requirements are met and no motion is sustained to withdraw an admission, a trial court is obligated to give effect to the provisions of Rule 36 which require that the matter be deemed admitted. *City of Ashland v. Ashland Salvage, supra*; *Schwarz v. Platte Valley Exterminating*, 258 Neb. 841, 606 N.W.2d 85 (2000).

In this case, it is not disputed that Tymar followed the necessary foundational requirements for serving the requests for admissions and that the unanswered requests were received in evidence. With the exception of Chieftain, the protestants did not respond to the requests, and Chieftain's response was neither an objection nor a denial. The Commission asserts that this failure to respond is of no consequence. It argues in its cross-appeal that, because the requests sought impermissible admissions of facts in dispute and legal conclusions, the protestants were not obligated to answer the requests for admissions.

[7] This court has not previously addressed whether requests for admissions under Rule 36 surrounding the ultimate facts in the case or mixed questions of law and fact are proper. However, many federal and state courts and scholars have addressed this issue. We have indicated that we look to other courts for guidance in applying our rules of civil procedure which are based on the federal rules. See, *Ichtertz v. Orthopaedic Specialists of Neb.*, 273 Neb. 466, 730 N.W.2d 798 (2007); *Anderson v. Wells Fargo Fin. Accept.*, 269 Neb. 595, 694 N.W.2d 625 (2005); *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005).

Our research shows that the issue of the proper scope of requests under Fed. R. Civ. P. 36 (federal Rule 36) created a conflict among the courts that was addressed in amendments made to the Federal Rules of Civil Procedure in 1970. See 8B Charles Alan Wright et al., Federal Practice and Procedure § 2255 (3d ed. 2010). It has been observed that prior to 1970,

the rules allowed for admissions of only "'relevant matters of fact.'" *Jones v. Boyd Truck Lines*, 11 F.R.D. 67, 70 (W.D. Mo. 1951). Therefore, before 1970, a majority of decisions stated that only matters "of fact" were properly the subject of requests for admissions. 8B Wright et al., *supra*. The decisions sustained objections to requests that were regarded as involving opinions or conclusions or a mixture of law and fact. *Id*. However, this view was not unanimous. *Id*.

In the 1970 amendments to federal Rule 36(a), the reference to "relevant matters of fact" was deleted and the rule was rewritten and authorized requests to admit that sought the truth of "any matters within the scope of [federal] Rule 26(b)(1) relating to: (A) facts, the application of law to fact, or opinions about either." See, also, 8B Wright et al., *supra*. Notwithstanding the expanded scope of proper federal Rule 36 requests, the advisory committee's note to this amendment indicated that it was still improper to request the admission of an issue that is purely a matter of law. See Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487 (1970). Nebraska Rule 36 contains the language of the 1970 amendment.

Contrary to the suggestion urged by the Commission in its cross-appeal to the effect that the permissible scope of Rule 36 is narrow, the Wisconsin Supreme Court observed that the more recent federal decisions interpreting federal Rule 36 do not support the conclusion that a party cannot request another party to admit "ultimate facts" or facts that would be dispositive of the entire case. *Schmid v. Olsen*, 111 Wis. 2d 228, 330 N.W.2d 547 (1983) (citing *City of Rome v. United States*, 450 F. Supp. 378 (D.D.C. 1978), *affirmed* 446 U.S. 156, 100 S. Ct. 1548, 64 L. Ed. 2d 119 (1980), and *Campbell v. Spectrum Automation Co.*, 601 F.2d 246 (6th Cir. 1979)). In *Schmid,* the Wisconsin Supreme Court reversed the trial court's ruling to the effect that it was improper to request a party to admit that such party was 70 percent negligent. The Wisconsin Supreme Court stated: "We believe that there is no compelling reason why a request to admit seventy percent negligence should be considered a nullity. '[Federal Rule 36] is designed to expedite litigation, and it permits the party securing admissions to rely

on their binding effect.'" *Schmid v. Olsen*, 111 Wis. 2d at 236-37 n.4, 330 N.W.2d at 551 n.4 (quoting *Rainbolt v. Johnson*, 669 F.2d 767 (D.C. Cir. 1981)). See, also, advisory committee's note, Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, *supra*.

In discussing the amendments, one treatise noted that one of the 1970 amendments to federal Rule 36(a) resolved the conflict in the cases as to whether a party can request another party to admit facts in dispute. 8B Wright et al., *supra*, § 2256. The advisory committee's note to the 1970 amendment of federal Rule 36(a) states in part:

> The proper response in [cases where disputed facts are sought to be admitted] is an answer. The very purpose of the request is to ascertain whether the answering party is prepared to admit or regards the matter as presenting a genuine issue for trial. In his answer, the party may deny, or he may give as his reason for inability to admit or deny the existence of a genuine issue. The party runs no risk of sanctions if the matter is genuinely in issue, since Rule 37(c) [regarding discovery sanctions] provides a sanction of costs only when there are no good reasons for a failure to admit.

48 F.R.D. at 532.

As we have noted, Nebraska Rule 36(a) states that

> [t]he matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his or her attorney . . . .

Thus, Rule 36 provides an opportunity for the party on whom a request has been served to give an answer showing facts are in dispute or object to the propriety of the request. However, failure to answer will serve as an admission of the substance of a proper request.

[8] Based on the foregoing, we conclude that the language of Rule 36 contemplates that, if the request for admission seeks information that is permissible under Rule 26, the request can ask a party to admit facts in dispute, the ultimate facts in a case,

or facts as they relate to the law applicable to the case. Having made this determination, we now review Tymar's requests to determine the propriety of the requested admissions.

With respect to the statutory components of a case, the applicant must show that (1) it was fit, willing, and able to perform the proposed service and (2) the service is or will be required by the present or future public convenience and necessity. § 75-311(1). As noted, there seems to be no dispute that Tymar was fit, willing, and able.

The requests made by Tymar included:

Request No. 4: Applicant is minority owned.

Request No. 5: Applicant is minority operated.

Request No. 6: The public interest will be benefited by authorizing a minority-owned entity to provide services in the geographical area set forth in the application.

Request No. 7: The public interest will be benefited by authorizing a minority-operated entity to provide services in the geographical area set forth in the application.

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

Request No. 9: The present public convenience and necessity require provision of services by a minority-owned entity in the geographical area set forth in the application.

Request No. 10: The future public convenience and necessity will require provision of services by a minority-owned entity in the geographical area set forth in the application.

Request No. 11: The present public convenience and necessity require provision of services by a minority-operated entity in the geographical area set forth in the application.

Request No. 12: The future public convenience and necessity will require provision of services by a minority-operated entity in the geographical area set forth in the application.

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

In the instant case, the references in the requests to Tymar's being a minority owned and operated entity and the need for a minority-owned entity in the moving industry are not directly tied to the explicit statutory language under consideration. We

need not consider the propriety of these requests, because the unanswered requests Nos. 8 and 13, which are proper under Rule 26, are directly related to the statutory requirements under § 75-311(1)(a) and (b), and thus the "minority-owned" requests are unnecessary to Tymar's success. Request No. 8 to the effect that applicant Tymar is fit, willing, and able to provide services in the geographical area set forth in the application and request No. 13 to the effect that granting the application will benefit the public interest and benefit present public convenience and necessity go directly to the statutory elements Tymar needed to establish under § 75-311(1)(a) and (b). Further, contrary to the argument of the Commission in its cross-appeal, based on the current language of Rule 36, this requested material was not improper because these requests ask the protestants to apply the facts of this case to the legal issues presented under the statute.

By not responding to requests Nos. 8 and 13, the protestants have effectively admitted that (1) the applicant is fit, willing, and able to provide services in the geographical area set forth in the application and (2) granting the application will benefit the public interest and benefit present public convenience and necessity. If the protestants had objections to the requests because they contained facts which the protestants believe were in dispute, then the proper course of action would have been to deny the requests, object to the requests, or request that they be withdrawn at the hearing before the Commission, not to simply ignore the requests. By not responding and not requesting that requests for admissions Nos. 8 and 13 be withdrawn, the matters in requests Nos. 8 and 13 are deemed admitted by the protestants. Thus, to the extent the district court deemed the substance of requests Nos. 8 and 13 admitted by the protestants, it did not err.

Appeal: The District Court Erred by Not Giving Proper Effect to Requests for Admissions Nos. 8 and 13 and Not Correcting the Commission's Ruling Relative to These Requests.

Having determined that the foundational requirements for the requests were established, that requests for admissions

Nos. 8 and 13 were proper and relevant to the matter, that the substance of the requests was effectively admitted by the protestants due to their failure to deny, object to, or answer the requests or to request they be withdrawn, and noting that the unanswered requests were received in evidence, we now address the effect of requests Nos. 8 and 13 in this case. This discussion resolves Tymar's assignment of error to the effect that the district court erred when it failed to treat requests Nos. 8 and 13 as the protestants' admission of the elements of § 75-311(1). We agree with Tymar that the district court erred in its legal analysis; however, such error does not necessarily entitle Tymar to a certificate. A certificate may be granted where an applicant meets not only the statutory requirements under discussion but also the dictates of the Commission's rules and regulations. A protestant's admission of the elements of § 75-311 does not necessarily mean that the applicant has established the elements of § 75-311.

[9] As noted above, if the necessary foundational requirements are met for the requests for admissions and no motion is made and sustained to withdraw an admission, under Rule 36, the trial court is obligated to deem the facts admitted by the party on whom the requests were served. See *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009). Such admitted facts serve to limit the proof at trial. It has been observed that "[t]he salutary function of [federal] Rule 36 in limiting the proof would be defeated if the party were free to deny at the trial what he or she has admitted before trial." 8B Charles Alan Wright et al., Federal Practice and Procedure § 2264 at 382 (3d ed. 2010). In this regard, the Court of Appeals for the Fifth Circuit noted:

> An admission that is not withdrawn or amended cannot be rebutted by contrary testimony or ignored by the district court simply because it finds the evidence presented by the party against whom the admission operates more credible. This conclusive effect applies equally to those admissions made affirmatively and those established by default, even if the matters admitted relate to material facts that defeat a party's claim. Mere trial testimony did

> not constitute a motion by the Legal Clinic [defendant] to withdraw or amend its admissions.

American Auto. Ass'n v. AAA Legal Clinic, 930 F.2d 1117, 1120 (5th Cir. 1991). Similarly, "'[a]ffidavits and depositions entered in opposition to summary judgment that attempt to establish issues of fact cannot refute default admissions.'" *Praetorian Ins. Co. v. Site Inspection, LLC*, 604 F.3d 509, 514 (8th Cir. 2010) (quoting *U.S. v. Kasuboski*, 834 F.2d 1345 (7th Cir. 1987)). Thus, the evidence offered by the protestants after the requests were admitted, designed to refute the statutory matters in the defaulted admissions, was not properly received or considered by the lower tribunals.

This matter is before us on appeal from the district court sitting as an appellate court. We review questions of law independently of the lower court's rulings. See *Nebraska Pub. Advocate v. Nebraska Pub. Serv. Comm.*, 279 Neb. 543, 779 N.W.2d 328 (2010). In addressing whether the district court erred in its consideration of the admissions, we must review the rulings made by the Commission which were challenged in district court.

Prior to the hearing before the Commission, Tymar submitted a letter to the Commission, along with the requests for admissions, indicating it was Tymar's position that, because of the lack of response to the admissions, their substance was deemed admitted and such admitted facts resolved the matter before the Commission in favor of granting Tymar's application. At the hearing, Tymar offered the admissions into evidence and argued that their substance amounted to admitted facts. Although the Commission allowed the admissions into evidence, Tymar was informed by the Commission that, rather than treat the unanswered requests as admitted by the protestants, it would withhold its ruling on how to treat the unanswered admissions; permitting the protestants to testify further compounded this error. See, *American Auto. Ass'n v. AAA Legal Clinic, supra*; 8B Wright et al., *supra*.

It was error for the Commission at the outset of the hearing to not give the unanswered admissions the full legal weight they were due. Given the protestants' failure to respond to

the admissions or to request that they be withdrawn, the Commission was required to deem the facts contained in requests Nos. 8 and 13 admitted by the protestants pursuant to Rule 36. The Commission failed to give the admissions their full legal effect as they pertained to § 75-311(1), and such failure was an error of law which the district court on appeal should have corrected.

[10] In its order on appeal, the district court acknowledged request for admission No. 13 as conclusive as a matter of law but considered it as only one factor to be weighed in its determination which ultimately affirmed the order of the Commission denying the application. Request No. 13 provided that "[g]ranting the Application will benefit the public interest and benefit present public convenience and necessity." We have stated that "[t]he issue of public convenience and necessity is ordinarily one of fact." *In re Application of Petroleum Transport Service, Inc.*, 210 Neb. 411, 415, 315 N.W.2d 245, 248 (1982). Given the unanswered request for admission No. 13, Tymar's proposal that it will serve the public convenience and necessity stands as admitted by the protestants.

The lower tribunals were not free to ignore the controlling record or bolster the protests. When Tymar put on evidence of the unanswered requests for admissions Nos. 8 and 13, the facts under § 75-311(1) were deemed admitted by the protestants, although not necessarily established by Tymar. Further, the statutory component does not necessarily meet additional regulatory requirements which may exist under the rules and regulations of the Commission, and we make no comment regarding additional evidence such as that sought in the affidavit form referred to above which may be necessary on remand to the issuance of a certificate. The district court erred as a matter of law when it failed to correct the Commission's rulings which did not treat the unanswered requests Nos. 8 and 13 as deemed admitted by the protestants with respect to the statutory requirements. See § 75-311(1). We agree with Tymar that the district court erred when it did not reverse the Commission's rulings regarding the treatment of these requests for admissions and did not reverse the denial of Tymar's application and remand for further consideration.

CONCLUSION

Tymar served and offered unanswered requests for admissions, which were received in evidence. Under applicable law, the substance of the unanswered requests should be deemed admitted by the protestants. The Commission erred under Rule 36 when it did not give legal effect to the substance of unanswered requests Nos. 8 and 13 regarding, respectively, fitness and necessity under § 75-311(1). The district court erred as a matter of law when it failed to correct the Commission's rulings regarding these requests for admissions and affirmed the Commission's denial of Tymar's application. We reverse the decision of the district court and remand this cause to the district court with directions to remand the action to the Commission with directions to reconsider Tymar's application consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

KEVIN J. PETERSON AND PATTI J. PETERSON, APPELLEES, V. STACIA E. SANDERS, ALSO KNOWN AS STACIA E. WOODS, ET AL., APPELLANTS.

806 N.W.2d 566

Filed November 10, 2011. No. S-10-1170.

1. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Affirmed.

Rick L. Ediger, Katie S. Baltensperger, and John F. Simmons, of Simmons Olsen Law Firm, P.C., for appellants.

Pamela Epp Olsen, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellees.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and SIEVERS, Judge.