SECTION 8

OPERATIONAL LIMITATIONS

INTRODUCTION

Congress has enacted legislation designed to protect private enterprise from federally subsidized competition. Congress was concerned that federal funding not be used without consideration of the interests of private carriers that compete with federally funded transit providers for patronage. This concern resulted in the creation of certain protections for private carriers, including restricting certain operations by recipients and subrecipients of federal funds.[1] Such legislation seeks to protect two categories of competitors from federally-funded transit operations—private charter bus operators[2] and private school bus operators.[3]

I. STATUTORY AND REGULATORY BACKGROUND

In the early 1970s, Congress became increasingly concerned that federally-funded mass transportation facilities and equipment not be used in unfair competition against private carriers. This concern resulted in restrictions on the use of FTA-assisted equipment and facilities for charter service that first appeared in Section 164(a) of the Federal Aid Highway Act of 1973.[4] Section 164(a), which prohibited all charter service outside an FTA recipient's urban area, read as follows:

> No Federal financial assistance shall be provided under (1) subsection (a) or (c) of section 142, title 23, United States Code, (2) paragraph (4) of subsection (e) of section 103, title 23, United States Code, or (3) the Urban Mass Transportation Act of 1964, for the purchase of buses to any applicant for such assistance unless such applicant and the Secretary of Transportation shall have first entered into an agreement that such applicant will not engage in charter bus operations in competition with private bus operators outside of the area within which such applicant provides regularly scheduled mass transportation service. A violation of such agreement shall bar such applicant from receiving any other Federal financial assistance under those provisions of law referred to in clauses (1), (20), and (30) of this subsection.

Section 164(a) was amended by Section 813(b) of the Housing and Community Development Act of 1974[5], and reflected in Section 3(f) of the Urban Mass Transportation Act of 1964, as amended, as follows:

> No Federal financial assistance under this Act may be provided for the purchase or operation of buses unless the applicant or any public body receiving such assistance for the purchase or operation of buses or any publicly owned operator receiving assistance, shall as a condition of such assistance enter into an agreement with the Secretary that such public body, or any operator of mass transportation for such public body, will not engage in charter bus operations outside the urban area within which it provides regularly scheduled mass transportation service, except as provided in the agreement authorized by this subsection. Such agreement shall provide for *fair and equitable arrangements*, appropriate in the judgment of the Secretary, to assure that the financial assistance granted under this Act will not enable public bodies and publicly owned operators to foreclose private operators from the intercity charter bus industry where such private operators are willing and able to provide such service…(emphasis added).

Since the 1974 amendments, Congress has made no substantive changes to the charter bus restrictions set forth above.[6]

The Urban Mass Transportation Administration (hereafter FTA) published its first rule regulating charter bus activities by FTA recipients on April 1, 1976.[7] The rule prohibited public transit operators from providing charter bus service outside their urban operating areas unless "fair and equitable arrangements" had been made to protect "willing and able" private intercity charter bus operators. The rule was quite broad, and allowed FTA recipients to compete, within their existing operating areas, against private carriers. FTA recipients were required to certify that their charter service was "incidental," and that revenues generated by such service were equal to or greater than the cost of providing the service. Finally, the regulation required that charter certifications be made available for review and comment by private carriers.

Early charter bus decisions revolved around the definitions of "urban area" and "incidental service," cost certification, and cost allocation plans. Many FTA grantees complained that the rule created undue administrative burdens on them, while private operators voiced concern that publicly funded operators were forcing them out of business with federally-funded equipment. Even the FTA found the rule cumbersome, and on January 19, 1981, issued an advance notice of proposed rulemaking (ANPRM) to revise the rule.[8]

After an especially long period of comment and review, FTA issued a complete revision of its charter regulations on April 13, 1987. The revised regulations established a general prohibition on the use of FTA-funded equipment and facilities for charter service.[9] Incidental use was allowed only where there were no willing and able private operators, or where private operators lacked equipment accessible to the elderly or disabled. Two other exemptions, for hardship situations in non-urbanized areas and for special events, could be obtained with FTA approval. On November 3, 1987,

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[1] *See, e.g.*, 49 U.S.C. §§ 5323(1), 5323(d), and 5323(f) (2000).

[2] 49 C.F.R. pt. 604.

[3] However, on demand taxicab service is not within the protected category. PAUL DEMPSEY & WILLIAM THOMS, LAW & ECONOMIC REGULATION IN TRANSPORTATION 327 (Quorum 1986). Westport Taxi Service, Inc. v. Adams, 571 F.2d 697 (2d Cir. 1978).

[4] Pub. L. 93-87, 87 Stat. 280 (Aug. 13, 1973).

[5] Pub. L. 93-383, 88 Stat. 633 (Aug. 22, 1974).

[6] 49 U.S.C. §§ 5323(d), 5323(f) (2000).

[7] 41 Fed. Reg. 14123 (Apr. 1, 1976).

[8] 46 Fed. Reg. 5394 (Jan. 19, 1981).

[9] 52 Fed. Reg. 11916 (Apr. 13, 1987).

FTA issued charter service questions and answers to its April 13, 1987, rulemaking.[10]

FTA amended its charter rule on December 30, 1988, to add three additional exceptions to the general prohibitions described above.[11] The amendment allowed the incidental use of FTA-funded equipment and facilities under certain conditions for: 1) direct charter service with nonprofit social services agencies,[12] 2) provision of service to the elderly by social services agencies in nonurbanized areas, [13] and 3) service agreed upon between FTA recipients and local private operators pursuant to a willing and able determination allowing such service.[14] FTA has not made changes to its charter regulations since the December 1988 amendments.

A. Charter Service

Charter service is defined as:

> Transportation using buses or vans, or facilities funded under the Acts of a group of persons who pursuant to a common purpose, under a single contract, at a fixed charge (in accordance with the carrier's tariff) for the vehicle or service, have acquired the exclusive use of the vehicle or service to travel together under an itinerary either specified in advance or modified after having left the place of origin. This definition includes the incidental use of FTA funded equipment for the exclusive transportation of school students, personnel, and equipment.[15]

Every applicant for FTA assistance must submit with its grant application an agreement that the recipient will not operate prohibited charter service.[16] This agreement should not be confused with the so-called charter agreement executed between the recipient and all willing and able charter providers in the recipient's service area; the charter agreement specifies which types of charter service the recipient may operate directly. The foregoing rules apply to both recipients and subrecipients.[17] The rules also apply to FTA-funded vans and buses, but not to FTA-funded facilities and equipment such as rail vehicles and ferry boat vehicles.[18]

Incidental charter service is defined as charter service that does not "interfere with or detract from" the provision of mass transportation service, or does not "shorten the mass transportation life of the equipment or facilities" being used.[19] The purpose of the rules is to ensure that FTA-funded equipment and facilities are available for mass transportation. Though the issue of what is "incidental" is determined by FTA on a case-by-case basis, among charter services the FTA explicitly does *not* consider "incidental" are the following:

- Service performed during peak hours;[20]
- Service that does not meet its fully allocated cost;
- Service used to count toward meeting the useful life of any facilities or equipment; and
- Service provided in equipment that is excess of an FTA-approved spare ratio.[21]

Generally speaking, recipients of FTA funds are prohibited from providing charter services where private companies are available and willing to provide such services (known as "willing and able" providers).[22] A "willing and able" provider is one who has the desire, the physical capability,[23] and the legal authority to provide charter service in the area in which it is proposed.[24] The purpose of the prohibition is to ensure that federal-funded equipment and facilities do not compete unfairly with private charter carriers.[25] All operators—public or private—receiving FTA assistance through the recipi-

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[10] 52 Fed. Reg. 42248 (Nov. 3, 1987).

[11] 53 Fed. Reg. 53348 (Dec. 30, 1988).

[12] 49 C.F.R. § 604.9(b)(5) (2003).

[13] 49 C.F.R. § 604.9(b)(6) (2003).

[14] 49 C.F.R. § 604.9(b)(7) (2003).

[15] 49 C.F.R. 604.5(e) (2003).

[16] For state administered programs, the state must submit the charter agreement and obtain and retain written certification of compliance by its subrecipients. 49 C.F.R. 604.7(a) (2003).

[17] As the FTA noted,

> a private operator that receives [FTA] assistance through a recipient, whether under contract to provide specific service or by means of an allocation plan as in New Jersey, was subject to the regulation to the extent that the assisted equipment or facilities were used to provide charter service…. Consequently, all operators for a recipient, whether public or private, under contract or receiving assistance through a recipient, are subject to the charter rule but only to the extent that the operator uses [FTA] funded equipment or facilities to provide charter service…. Therefore, in shorthand, the rule treats all operators for a recipient as a recipient to the extent that they stand in a recipient's shoes.

52 Fed. Reg. 11918-9 (Apr. 13, 1987).

[18] According to FTA, "Since there are so few private rail or ferry boat operators, we believe that not including charter rail and charter ferry boat service within this rule will have little if any adverse effect on operators." 52 Fed. Reg. 11916 (Apr. 13, 1987). However, charter service provided with FTA-funded rail or ferry boat equipment must be incidental to the provision of mass transportation. 52 Fed. Reg. 11920 (Apr. 13, 1987).

[19] 49 C.F.R. 604.5(i) (2003).

[20] FTA has defined peak hours as generally running from 6:00-9:00 a.m., and from 4:00-7:00 p.m. 52 Fed. Reg. 11926 (Apr. 13, 1987).

[21] 52 Fed. Reg. *Id*. at 11926 (Apr. 13, 1987).

[22] 49 C.F.R. 604.9(b)(1) (2003).

[23] A charter operator need not demonstrate that it has any particular capacity level. It may be deemed willing and able even if it has only one bus, and that bus may be an intercity bus, a transit bus, a school bus, or a trolley bus. However, an operator must have at least one bus or van to be considered "willing and able." Transportation brokers are ineligible for such designation. 52 Fed. Reg. 11922 (April 13, 1987). FTA recognized that "it is possible where there is only one willing and able private operator that has precluded the recipient from providing any charter service that the private operator could refuse to provide requested charter service and leave the customer without transportation." However, the agency considered such circumstances unlikely, and concluded "that the market will take care of the situation." 52 Fed. Reg. 11922 (Apr. 13, 1987).

[24] 49 C.F.R. § 604.5(p) (2003).

[25] 52 Fed. Reg. 11916-17 (Apr. 13, 1987).

ent stand in the shoes of the recipient for purposes of the charter prohibition.

B. Exceptions

1. The No "Willing and Able" Private Carriers Exception

An applicant seeking FTA financial assistance to acquire or operate transportation equipment or facilities must submit to FTA a formal written agreement that it will provide charter service only to the extent that there are no private charter service operators willing and able to provide the charter service.[26]

In order to determine whether such private operators exist, a transit operator must publish a notice in a local newspaper and send a copy to all local private charter operators and any operator that requests it, as well as to the American Bus Association and the United Bus Owners of America.[27] The notice must describe the charter service sought to be directly provided by the recipient,[28] and give the private operators not less than 30 days to submit written evidence that they are "willing and able" to provide the service.[29] The FTA prohibits a recipient requiring detailed proof of the private charter operator's ability to provide charter service.[30] The transit operator may, but need not, hold an oral hearing.[31] If there are no private operators willing and able to provide the proposed charter service, the FTA recipient may directly provide incidental charter service.[32] However, if there is at least one private charter operator willing and able to provide the charter service the FTA recipient seeks to provide directly to the public, the recipient is prohibited from providing such charter service using FTA-funded equipment or facilities.[33]

For example, if the public transit provider announces its desire to provide charter bus and van service, and there are private bus companies that state that they are "willing and able" but do not have at least one van, the public operator may directly provide incidental charter service in FTA-funded vans, but not buses.[34] The rationale is that the private bus companies, while "willing," are not "able" to operate van service because of the absence of at least a single van.

2. The Contract Exception

As noted above, to the extent that there is at least one such private "willing and able" private charter operator, an FTA recipient may not directly provide charter service. It may, however, provide charter service or vehicles under contract or lease to a private charter operator.[35] Typically, this would be under circumstances where the private operator does not have sufficient equipment to satisfy the capacity demands of the charterer,[36] or when the private operator is unable to provide "equipment accessible to elderly and disabled persons."[37] In both circumstances, the FTA recipient is under contract with the private operator and not with the passengers.[38] During the contract or lease term, the private charter operator must be responsible for the direction and control of the public transit provider's equipment.[39] However, the regulations do not require the recipient to lease its FTA-funded vehicles to the private charter operator. Moreover, the private charter

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[26] 49 U.S.C. § 5323(d) (2000), C.F.R. 604.7 (2003).

[27] Notice should be published not less than 60 days prior to the date that the recipient proposes to commence directly providing the charter service. The notice must be published in a general circulation newspaper in the geographic region in which the recipient seeks to provide charter service. If the region is large enough, it may have to be published in more than one newspaper to cover the entire area. A state is free to publish one newspaper notice to cover all its subrecipients, or publish a notice for each subrecipient tailoring the publication to cover only the region in which the subrecipient operates, or it can publish regional notices to cover several subrecipients. 52 Fed. Reg. 11926-27 (Apr. 13, 1987).

[28] The notice must describe the days, times of day, geographic region, and vehicles. 49 C.F.R. § 604.11(c)(2) (1999). FTA encourages, but does not require, that the notice indicate the purpose of the charter, or the groups to be transported. 52 Fed. Reg. 42248 (Nov. 3, 1987). The notice should describe the proposed charter service and request that private charter operators respond with evidence to prove they are willing and able to provide it. 52 Fed. Reg. 11926-27 (Apr. 13, 1987).

[29] If the FTA recipient believes that a private charter operator has falsified its "willing and able" filing, it may file a complaint with the FTA Chief Counsel, who shall direct the parties to informally resolve the dispute; failing that, he or she shall rule on the complaint within approximately 90 days. 52 Fed. Reg. 42250 (Nov. 3, 1987). The FTA recipient may look behind the evidence where it has reasonable cause to believe that some or all of the evidence submitted has been falsified. According to FTA, "we have no intention of permitting an unscrupulous private operator from affecting the services that a recipient may provide to the ultimate detriment of the customer." Once the recipient determines that an eligible willing and able private operator exists, it may cease reviewing the evidence submitted. According to FTA, "if a private operator satisfies the definitional requirements of desire, ability to obtain the vehicles, and legal authority, the private charter operator is automatically willing and able." Within 60 days of the deadline for filing a "willing and able" statement, the recipient must inform all the private operators that submitted evidence of its decision. 52 Fed. Reg. 11916 (Apr. 13, 1987).

[30] "The notice must not require anything beyond: (1) A statement that the private operator has the desire to provide the service described and the physical capability to do so, and (2) submission of documents showing that it possesses the requisite legal authority." 52 Fed. Reg. 42248 (Nov. 3, 1987).

[31] If it holds an oral hearing, it is advised to make a copy of the transcript available to any party who requests one. 52 Fed. Reg. 42250 (Nov. 3, 1987).

[32] 49 C.F.R. 604.9(b)(2003).

[33] The rule applies to recipients and subrecipients. 49 C.F.R. 604.9(a) (2003).

[34] 52 Fed. Reg. 11920 (Apr. 13, 1987).

[35] 49 C.F.R. § 604.9(b)(2) (2003).

[36] 52 Fed. Reg. 11921 (Apr. 13, 1987).

[37] 49 C.F.R. § 604.9(b)(2)(ii).

[38] 52 Fed. Reg. 11916 (Apr. 13, 1987).

[39] 52 Fed. Reg. 42248 (Nov. 3, 1987).

operator's drivers may operate the recipient's vehicles. Nor do the regulations require that the recipient forego its safety rules, operating procedures, and accident reporting requirements. In effect, the private charter operator becomes a broker for the charter operations of the federally-funded FTA recipient.

3. The Hardship Exception

FTA recipients in non-urbanized areas may petition the agency for a "hardship exception" that allows the recipient to provide charter service directly to the customer if willing and able private operators impose minimum trip durations that exceed the proposed charter trip, or willing and able private operators are located so far from the origin of the charter service that the costs of the service would be onerous.[40] In either situation, the process for seeking a hardship exception is the same.

First, after determining that there is one or more willing and able private charter operators, the recipient must provide those operators with 1) a written explanation why FTA should grant a hardship exception in that particular case, and 2) a 30-day comment period within which the private operators may respond. Second, after the comment period closes, the recipient must send the FTA's Chief Counsel[41] a copy of the notice it sent to the willing and able operators, and copies of all comments received. The Chief Counsel reviews the materials submitted and grants or denies the request in whole or in part. Because hardship exceptions are effective for only 12 months, such exceptions, where warranted, must be resubmitted on a yearly basis.[42]

4. The Special Events Exception

Upon petition,[43] a waiver may also be granted to an FTA-funded public transit operator, allowing it to provide charter service for special events to the extent that private charter operators are incapable of providing the service.[44] The rules do not define "special events," but FTA has expressed its intention that they "include only events of an extraordinary, special and singular nature such as the Pan American Games and the visits of foreign dignitaries."[45] Though no public notice is required, FTA expects recipients applying for such an exemption to have contacted private carriers in the area to determine whether they are unable to provide such service.[46] In other words, the recipient has the option of providing broad public notice or notifying the local private carriers individually. FTA has made it clear that special events waivers will be sparingly granted and that the recipient applying for such a waiver will have a heavy burden to prove that the requested charter service cannot be provided by private charter operators. Generally, such exceptions are limited to events of national or international importance where private operators would be unable to provide the necessary level of service.[47]

5. The Nonprofit and Government Agencies Exception

The legislative history of the Department of Transportation and Related Agencies Appropriations Act of 1988[48] indicates that in response to complaints of transit agencies that the charter bus regulations restricted charter service too greatly, Congress asked that a rulemaking be undertaken to amend the charter regulations to "permit non-profit social service agencies with clear needs for affordable and/or handicapped-accessible equipment to seek bids for charter services from publicly funded operators."[49] The Congress expressed its concerns that the charter regulations may have been adversely affecting the "transportation disadvantaged"—those people of limited physical or financial means who depend on transit to meet their mobility needs.[50] It suggested that "these non-profit agencies…be limited to government entities and those entities subject to section 501(c) 1, 3, [4] and 19 of the Internal Revenue Code."[51]

In response, FTA promulgated regulations allowing recipients to contract directly for charter services with social service agencies that serve elderly and disabled patrons or receive funding from U.S. Department of

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[40] 49 C.F.R. § 604.9(3) (2003).

[41] As a practical matter, hardship requests are processed through FTA's regional counsel in the particular region where the request arises.

[42] 52 Fed. Reg. 11925 (Apr. 13, 1987).

[43] Petitions must be filed at least 90 days prior to the proposed service. They must describe the event, and explain how it is special, and why private charter operators are incapable of providing it. *Id*.

[44] 49 C.F.R. § 604.9(b)(4) (2003). The incapability of private operators to meet the needs of the special event is the central issue in determining whether the exception will be granted. FTA has indicated that "private charter operators would not be capable of providing charter service if, for example, their fleets, even when pooled together, would not equal or even approximate the level of service required by the event." 52 Fed. Reg. 11925 (Apr. 13, 1987).

[45] 52 Fed. Reg. 11916 (Apr. 13, 1987).

[46] 52 Fed. Reg. 42248 (Nov. 3, 1987).

[47] 52 Fed. Reg. 11925 (Apr. 13, 1987).

[48] Pub. L. 100-202, 101 Stat. 1329 (Dec. 22, 1987).

[49] H.R. REP. NO. 100-498, CONG. REC. H12787 (Dec. 21, 1987). FTA interpreted this as limited to two types of circumstances: (1) where the government entities and tax-exempt organizations need charter service that may be difficult for them, or their constituents, to afford; and (2) where the government entities and tax-exempt organizations need transportation equipment accessible to elderly or disabled patrons. 53 Fed. Reg. 18964 (May 25, 1988).

[50] H.R. REP. NO. 100-498, CONG. REC. H12787 (Dec. 21, 1987).

[51] 53 Fed. Reg. 53348 (Dec. 30, 1988). Congress also recommended that an exemption be provided to "those public transit authorities which purchased charter rights entirely with non-federal funds prior to the enactment of the Urban Mass Transportation Act of 1966." The agency declined to adopt the latter recommendation, believing that it would be contrary to the governing statutory requirements. *Id*.

Health and Human Services (HHS) programs,[52] provided that the social service agency with which the FTA recipient contracts is either a governmental institution, or an organization exempt from taxation under Sections 501(c) 1, 3, 4, or 19 of the Internal Revenue Code.[53]

Though a major catalyst for these regulations was the mobility needs of the disabled, one must recognize that FTA takes the position that exclusive service for elderly disabled riders is considered to be "mass transportation" service under the Federal Transit Act, and not charter service, even if provided only on an incidental basis, so long as it is open to all elderly and disabled persons in a geographic service area, and not restricted to a particular group.[54]

6. The Non-Urbanized Area Exception

Similar to the nonprofit and government agencies exception, the non-urbanized area exception[55] allows FTA recipients to contract directly with eligible entities for charter services where more than 50 percent of the passengers on a trip will be elderly. As its name implies, this exception applies only in non-urbanized areas of less than 50,000.

7. The Agreement with Private Operators Exception

An FTA-funded transit provider may directly provide charter service where it has reached a written agreement allowing it to do so with all "willing and able" private carriers.[56] To qualify, the recipient must provide for such an agreement in its annual charter notice, and complete the review process on all the replies it receives in response to the notice.[57] The agreement may define the exempted charter service in any terms to which the parties agree. FTA's approval or concurrence is not required, but notice of the agreement must be published.[58]

8. Charter Service with Locally Funded Equipment and Facilities

The charter prohibition applies only to FTA-funded equipment and facilities. FTA takes the position that where a recipient establishes a separate company using equipment and facilities purchased, maintained, and operated exclusively with local funds, any charter operations by that company are exempt from the FTA's charter bus prohibitions. Alternatively, a recipient can establish a separate charter division that receives no federal funds, does not use federally-funded equipment, and does not use federally-funded facilities.[59] Note, however, that the operator must do more than simply identify certain equipment in its fleet as locally funded.

However, in a case involving the Manchester, New Hampshire, transit authority, FTA took the position that, if there is a "willing and able" charter provider, a transit authority may not allow its separate charter operator to use an FTA-funded garage in connection with charter operations even on an incidental basis. FTA-funded facilities also include offices and other administrative locales. However, a transit provider could lease space in an FTA-funded garage to a private carrier on an incidental basis. FTA also recommends that, where a transit operator establishes a charter subsidiary, affiliate, or division, that the maintenance work be contracted out rather than performed in-house in an FTA-funded garage.[60] This reflects FTA's view that charter service should be provided by private charter operators to the maximum extent practicable. FTA, in furtherance of its policy, strictly construes the charter regulations and will find that any nexus to FTA funds (e.g., an FTA-funded garage) will prohibit the recipient's proposed charter operation.

A person who believes that an FTA recipient is in violation of the regulations may submit a written complaint to the FTA Regional Administrator (in the case of charter operations), who shall first attempt to conciliate the dispute. The Regional Administrator shall send a copy of the complaint to the respondent, and allow it 30 days to file written evidence that no violation has occurred. The complainant has 30 days to rebut the response in writing. The Regional Administrator has the discretion to engage in further investigation and/or grant a party's request for oral hearing. The Regional Administrator shall attempt to issue a written decision within 30 days of receiving all the evidence.[61] Should the Regional Administrator determine, on complaint or *sua sponte,* that a violation has occurred, he or she may order such remedies as are appropriate.[62] If the Regional Administrator determines that there has been a continuing pattern of violation, he or she may bar the respondent from the receipt of further financial assistance for mass transportation facilities and equip-

[52] It should be emphasized that the exemption is limited to the very narrow category of HHS-funded agencies. Recipients may not provide charter service to the Girl Scouts, to a University, or to the Junior League. Transit systems fought hard for this right in the rulemaking process; FTA rejected these arguments and limited the exemption to HHS-funded organizations. Thus, being a Section 501(c)(1) or a 501(c)(3) organization is not enough.

[53] 53 Fed. Reg. 18964 (May 25, 1988).

[54] 52 Fed. Reg. 42248 (Nov. 3, 1987).

[55] 49 C.F.R. § 604.9(b)(6) (2003).

[56] A recipient of FTA funds may provide charter service directly to the customer where a formal agreement has been executed between the recipient and all willing and able private charter operators. 49 C.F.R. § 604.9(b)(7) (1999).

[57] 52 Fed. Reg. 42248 (Nov. 3, 1987).

[58] 49 C.F.R. § 604.9(b)(4) (2003).

[59] If a recipient sets up a separate company that has only locally funded equipment and facilities and operates with only local funds, or the recipient is able to maintain separate accounts for its charter operators to show that the charter service is truly a separate division that receives no benefits from the mass transportation division, then the charter rule would not apply.

52 Fed. Reg. 42248 (Nov. 3, 1987).

[60] 52 Fed. Reg. 42252 (Nov. 3, 1987).

[61] 49 C.F.R. § 604.15 (2003).

[62] 49 C.F.R. § 604.17(a) (2003).

ment.[63] The losing party may appeal the Regional Administrator's decision to the FTA Administrator within 10 days of receipt.[64] FTA's final decision on a charter bus appeal is subject to judicial review.[65]

II. SCHOOL BUS OPERATIONS

A. The General Prohibition

Similar to the charter bus prohibitions, federal law limits federal funding to those recipients that agree not to provide school bus transportation in competition with private school bus operators.[66] This section protects private school bus operators from competition by federally-funded mass transportation providers.[67] Neither an FTA recipient nor any transit operator performing work in connection with such a recipient may engage in school transportation operations in competition with private school transportation operators, except as permitted under the Federal Transit Act.[68]

Section 3(g) of the Urban Mass Transportation Act of 1964 prohibited federal financial assistance for transit operations unless the recipient entered into an agreement with DOT that it would not engage in school bus operations "exclusively for the transportation of students and school personnel, in competition with private school bus operators."[69] Several subsequent pieces of legislation affirmed this prohibition, and expanded it from applicability to the purchase of buses to all grants for the construction or operation of transit facilities and equipment.[70] The purpose of the legislation was to prevent competition with private school bus operators, competition that Congress perceived to be unfair.[71] But only exclusive school bus operations were prohibited, for Congress did not intend to prohibit use of public transit for school-related purposes, or prohibit school-bound riders from boarding transit vehicles.[72]

An applicant seeking FTA financial assistance to acquire or operate transportation facilities and equipment must certify that it will: (1) engage in school transportation operations in competition with private school transportation operators only to the extent permitted by the Federal Transit Act; and (2) comply with the requirements of the applicable regulations before providing any school transportation.[73] The Federal Transit Act permits federal financial assistance for the use of mass transit equipment to provide school bus service so long as "the applicant agrees not to provide school bus transportation that exclusively transports students and school personnel in competition with a private school bus operator."[74] The FTA MA contractually obligates the recipient to comply with these provisions.[75]

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[63] 49 C.F.R. § 604.17(b) (2003).

[64] 49 C.F.R. § 604.19(a) (2003).

[65] 5 U.S.C. §§ 701–706 (2000). 49 C.F.R. 604.21 (2003).

[66] 49 U.S.C. § 5323(f) (2000).

[67] Area Transportation v. Ettinger, 1999 U.S. Dist. LEXIS 18503 (1999).

[68] 49 U.S.C. § 5323(f) (2000); FTA regulations, "School Bus Operations," 49 C.F.R. pt. 605 (2003).

[69] 49 U.S.C. § 1602(g) (1964).

[70] A similar provision was included in Section 164(b) of the Federal-Aid Highway Act of 1973, though the "grandfather" provisions authorizing continuation of preexisting school bus operations differ. The Urban Mass Transportation Act set a November 26, 1974, cut-off date, while the Federal-Aid Highway Act of 1973 set an August 13, 1973, date. Section 109(a) of the National Mass Transportation Assistance Act of 1974 (Pub. L. 93-503; Nov. 26, 1974; 88 Stat. 1565) added a new Section 3(g) to the Urban Mass Transportation Act of 1964 (49 U.S.C. § 1602(g)) and applies to all grants for the construction or operation of mass transportation facilities and equipment under the Federal Transit Laws, as amended. No federal financial assistance may be provided for the construction or operation of facilities and equipment for use in providing public mass transportation service unless the applicant and the Administrator enter into an agreement that the applicant will not engage in school bus operations exclusively for the transportation of students and school personnel, in competition with private school operators. 49 C.F.R. § 605.1 (2003); 41 Fed. Reg. 14128 (Apr. 1, 1976); Federal Mass Transit Act of 1964, as amended (49 U.S.C. § 1601 *et seq.*); 23 U.S.C. § 103(e)(4) (2000); 23 U.S.C. § 142(a) and (c) (2000); and 49 C.F.R. 1.51 (2003).

[71] Chicago Transit Auth. v. Adams, 607 F.2d 1284, 1291 (7th Cir. 1979).

[72] Lamers v. City of Green Bay, 998 F. Supp. 971, 989 (E.D. Wis. 1998), quoting the legislative history as saying,

> [T]he intent and legal effect of this section will not prevent those cities which have their own mass transit buses to allow them to be used by riders of school age to travel at reduced fares, nor to prohibit the routing of a public transit bus adjacent to school facilities, as a part of the regularly scheduled bus system service for any passenger. 119 Cong. Rec. 28102 (1973) (statement of Rep. Kluczynski, Chairman of the Transportation Subsommittee).

[73] 49 U.S.C. § 5323(f) (2000), and FTA regulations, "School Bus Operations," at 49 C.F.R. § 605.14 (2003). As required by 49 U.S.C. § 5323(f) (2000) and FTA regulations, "School Bus Operations," at 49 C.F.R. § 605.14 (2003), the applicant for FTA funding must agree that it and all its recipients will: (1) engage in school transportation operations in competition with private school transportation operators only to the extent permitted by 49 U.S.C. § 5323(f), and implementing regulations; and (2) comply with the requirements of 49 C.F.R. pt. 605 before providing any school transportation using equipment or facilities acquired with federal assistance awarded by FTA and authorized by 49 U.S.C. ch. 53 or tit. 23 U.S.C. for transportation projects.

[74] 49 U.S.C. § 5323(f) (2000). 49 C.F.R. pt. 605 (2003). The transit provider must enter into a written agreement with the FTA providing that "the applicant will not engage in school bus operations exclusively for the transportation of students and school personnel in competition with private school bus operators." 49 C.F.R. § 605.14 (2003). The contents of the agreement are set forth in 49 C.F.R. § 605.15 (2003).

[75] Master Agreement § 29, available for review at http://navigation.helper.realnames.com/framer/1/113/default.asp?realname=Federal+Transit+Administration&url=http%eA%2F%2Fwww%Efta%2Edot%2Egov%2F&frameid=1&providerid=113&uid=30021314 (visited Mar. 23, 2002).

B. Exceptions

A federally-funded transit provider seeking to engage in school bus operations must hold public hearings assessing the economic, social, and environmental consequences of such service, and notify private school bus operators of its intentions.[76] It must also demonstrate to FTA that: (1) it operates an urban school system and a separate and exclusive bus program for that school system; (2) the private school bus operators are unable to provide service safely, and at a reasonable rate; or (3) that it or its predecessor was engaged in providing school bus operations in the year preceding August 13, 1973, (in the case of a grant involving the purchase of buses), or November 26, 1974, (in the case of an FTA grant involving facilities and equipment).[77]

C. Tripper Service

In 1982, FTA amended its regulations to authorize tripper service as an extension of the statutory prohibition of only "exclusive" school bus operations.[78] Tripper service is defined as "regularly scheduled mass transportation service which is open to the public, and which is designed or modified to accommodate the needs of school students and personnel, using various fare collections or subsidy systems."[79] Buses used in such service must be clearly marked as open to the public and not carry the designation "school bus" or "school special." They may stop only at a regular transit stop. The routes must be in regular route service in its published route schedule.[80] However, the routes need not be extensions of preexisting routes, and the transit provider may design separate routes to accommodate students. Trippers are routes that start and stop based on the school year calendar and do not operate over the summer. Some transit operators have a number of student pass programs that give students significant discounts. In some instances, transit providers have agreements with school districts that fund pass programs for their students, which allow the district to reduce its own yellow bus service significantly, though this works only for schools in more urban areas. According to one court, "From the perspective of private school bus operators, this is a loophole you can drive a bus through."[81] One might also argue that transit bus service provides enhanced safety and service, and better trained operators.

D. Distinguishing School Bus from Charter Operations

In *Chicago Transit Authority v. Adams,*[82] the Seventh Circuit addressed the differences between school bus and charter operations. At issue was whether the Chicago Transit Authority could provide daily bus service in vehicles purchased with federal funds from a common departure point at a neighborhood school each morning and back to the school at the end of the school day. The service was used to transfer students to less crowded schools and to schools offering special facilities or programs, and to facilitate racial desegregation. FTA took the position that such service was not forbidden school bus operations, but instead constituted permissible incidental charter service.[83] The U.S. Court of Appeals for the Seventh Circuit disagreed:

> Since the transportation here is daily service to and from school at the beginning and end of the school day, it is indistinguishable from undisputed school bus operations except for the common point of pick-up and delivery….[w]e believe that the language of the charter regulation describes a single trip or series of trips for school students rather than daily transportation at the beginning and end of each school day when it speaks of groups traveling under a "single contract" and "under an itinerary, either agreed on in advance or modified after having left the place of origin. The school bus operations regulation, on the other hand, speaks of transportation "to and from school," language which we have concluded describes the daily transportation of students to and from their schools of regular attendance at the beginning and end of the school day.[84]

The court also noted that the regulations limited charter bus operations for school students to "incidental use."[85] The court agreed with FTA that the legislation restricted the use of federally-funded buses in school bus or charter operations to nonpeak hours when those vehicles are least likely to be needed for regularly scheduled mass transportation service to the public. Though federal funds may not be used to finance the purchase of buses used primarily in charter service, a transit provider is not prohibited from using such buses for charter service during idle or off-peak periods when

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[76] 49 C.F.R. § 605.4 (2003). The notice requirements to the public and to private school bus operators are set forth in 49 C.F.R. § 605.16 (2003). The private school bus operators may file written comments at the time of the public hearing, and the transit provider shall submit the comments and a transcript of the public hearing to the FTA. 49 C.F.R. § 605.18 (2003). The filing requirements are elaborated in 49 C.F.R. § 605.19 (2003). If there are no private school bus operators in the area, the transit provider may so certify to FTA, in lieu of meeting the notice requirements of § 605.16. 49 C.F.R. § 605.17 (2003).

[77] 49 C.F.R. § 605.11 (2003).

[78] 47 Fed. Reg. 44795, 44803 (2003).

[79] 49 C.F.R. § 605.3 (2003).

[80] *Id*.

[81] Lamers v. City of Green Bay, 998 F. Supp. 971, 991.u.10 (E.D. Wis. 1998).

[82] Chicago Transit Auth. v. Adams, 607 F.2d 1284 (7th Cir. 1979).

[83] *Id*. The charter regulations authorized "the incidental use of buses for the exclusive transportation of school children." 607 F.2d at 1291. (The provision now reads, "the incidental use of FTA funded equipment for the exclusive transportation of school students, personnel, and equipment." 49 C.F.R. § 604.5(e) (2003)).

[84] *Id*. at 1292 [citation omitted].

[85] *Id*. at 1294.

the buses are not needed for scheduled runs.[86] Only buses not purchased with federal funds can be used for more than incidental charter operations for school service.[87] Under FTA's regulations, incidental charter service is defined as charter service that does not "(1) interfere with or detract from the provision of the mass transportation service for which the equipment or facilities were funded under the Acts; or (2) does not shorten the mass transportation life of the equipment or facilities."[88] However, this prohibition on the use of federally-funded equipment does not apply to tripper service, described above.[89]

E. Complaints, Remedies, and Appeals

In the case of alleged school bus violations, the complaint procedures are similar to those for alleged charter bus violations, but involve the filing of a written complaint directly to the FTA Administrator.[90] The Administrator allows the respondent 30 days to show cause, in writing, why a hearing should not be held, and may hold one or more evidentiary hearings.[91] The Administrator makes a written determination of whether a violation has occurred, and if it has, he or she may impose such remedial measures as he or she may deem appropriate, including barring a grantee from receipt of further FTA financial assistance.[92] Parties have the right to judicial review under the APA[93] once these administrative procedures have been exhausted.[94]

Several courts have noted that where a statute clearly reflects an intent to protect a competitive interest, the protected party has standing to bring suit to require compliance.[95] But standing can be a problem for a private carrier alleging that a public transit provider is engaging in unlawful operations. For example, in *Area Transportation, Inc. v. Ettinger,*[96] a school bus operator in Flint, Michigan, filed a complaint with FTA alleging that a competitor was providing prohibited, exclusive school bus service in violation of federal law. FTA agreed, and ordered the public transit provider to "cease and desist any such further service," but imposed no requirement that prior federal grants be returned, or that future federal funds be withheld. The private carrier sought a declaratory order that: (1) FTA lacks discretion to determine the appropriate sanction for a statutory violation; (2) FTA must declare the public transit provider ineligible for future federal transit assistance grants; and (3) FTA must require the recipient to repay the grants it received for each year it was in violation.

In *Ettinger,* the court noted that to establish standing under the APA, a plaintiff must prove (1) an "injury in fact," as required by the case or controversy requirement under Article III of the Constitution, and (2) that he or she falls within the "zone of interests" contemplated by the relevant statute. The court found the latter requirement met, and proceeded to evaluate whether the plaintiff had suffered an "injury in fact" for Article III purposes. The court noted that Article III standing requires a plaintiff to prove: (1) he or she suffered an "injury in fact"—an invasion of a concrete and particularized legally recognized interest; (2) there was a causal connection between defendant's action and plaintiff's injury, such that the injury is fairly traceable to defendant's action and not caused by some third party not before the court; and (3) a favorable decision will likely redress the injury. The court found that the private carrier alleged an injury in fact (that the public transit provider enjoyed a competitive advantage because of the federal grant), but that it failed to prove its injury was fairly traceable to the FTA's decision (the injury instead was caused by illegal school bus service performed by a third party not before the court). The court also held the remedy sought (the repayment of federal grants to FTA) would not redress its injury, but would instead injure the public transit provider. Therefore, plaintiff lacked Article III standing. The FTA had not cut off the private carrier's future funding, nor required repayment of earlier sums collected unlawfully; it merely ordered the private carrier to cease and desist from the unlawful activity.[97] The court also observed that the Federal Transit Act does not explicitly require payment of federal funds where recipients are found to have engaged in unlawful activities; in effect, leaving wide discretion to the FTA as to remedies.[98]

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[86] 49 C.F.R. pt. 605, App. A (2003).

[87] *Id*. at 1293–94. 49 C.F.R. § 605.12 (2003).

[88] 49 C.F.R. § 604.5(i) (2003).

[89] 49 C.F.R. § 605.13 (2003).

[90] 49 C.F.R. § 605.30 (2003).

[91] 49 C.F.R. § 605.32 (2003).

[92] 49 C.F.R. §§ 605.33, 605.34 (2003).

[93] 5 U.S.C. §§ 701–706 (2000); 49 C.F.R. § 605.35 (2003).

[94] Suburban Trails, Inc. v. N.J. Transit Corp., 800 F.2d 361 (3d Cir. 1986); Bradford School Bus Transit, Inc. v. Chicago Transit Auth., 537 F.2d 943 (7th Cir. 1976); TPI Construction Servs. v. City of Chicago, 1980 U.S. Dist. Lexis 17135 (N.D. Ill. 1980).

[95] City of Evanston v. Regional Transp. Auth., 825 F.2d 1121, 1123 (7th Cir. 1987); South Suburban Safeway Lines, Inc. v. City of Chicago, 416 F.2d 535, 539 (7th Cir. 1969); Bradford School Bus Transit, Inc. v. Chicago Transit Auth., 537 F.2d 943 (7th Cir. 1976), *cert. denied*, 429 U.S. 1066 (1977). However, some courts have found that the Federal Transit Act was intended to benefit the public at large and not create special benefits for particular classes of persons. *See, e.g.,* A.B.C. Bus Lines, Inc. v. Urban Mass Transp. Admin., 831 F.2d 360 (1st Cir. 1987), and Dopico v. Goldschmidt, 687 F.2d 644 (2d Cir. 1982).

[96] 75 F. Supp. 3d 862 (N.D. Ill. 1999), 1999 U.S. Dist. Lexis 18503 (N.D. Ill. 1999); *aff'd*, Area Transp., Inc. v. Ettinger, 219 F.2d 671 (7th Cir. 2000).

[97] *Id*. at 864.

[98] 1999 U.S. Dist. Lexis 18503 (1999).