Transit Cooperative Research Program

Selected Studies in Transportation Law

Volume 7

Transit Charter Bus Service

Decisions and Documents

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OF THE NATIONAL ACADEMIES

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in
Transportation Law

Volume 7

TRANSIT CHARTER BUS SERVICE DECISIONS AND DOCUMENTS

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TRANSIT CHARTER BUS SERVICE DECISIONS AND DOCUMENTS

This report was prepared by Shelly Brown, Shelly Brown Associates.

James B. McDaniel, The Transportation Research Board, Counsel for Legal Research Projects, coordinated this research report and served as content editor.

Transit Cooperative Research Program

Transportation Research Board
The National Academies
Washington, DC

2005

NOTICE

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The members of the Project Committee selected to monitor this project and to review this report were chosen for recognized scholarly competence and with due consideration for the balance of disciplines appropriate to the project. The opinions and conclusions expressed or implied are those of the researchers, and, while they have been accepted as appropriate by the Project Committee, they are not necessarily those of the Transportation Research Board, the National Research Council, The National Academies, or the program sponsors.

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Transit Cooperative Research Program

Project Committee J-5

Cooperative Research Programs Staff

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Foreword

These documents, comprised of decisions, Dear Colleague letters, and memoranda, relate to the Federal Transit Administration interpretation of its regulations pertaining to charter bus service requirements, 49 C.F.R. § 604.9 *et seq*. These materials are dated June 11, 1976, through April 22, 2004, and total 221 documents.

The charter bus statutory requirements can be found at 49 U.S.C. § 5323(d) as amended (2004), Pub. L. 93-383, 88 Stat. 633 (Aug. 22, 1974);

> d) Condition on Charter Bus Transportation Service.
>
> (1) Financial assistance under this chapter [49 USCS 65 §§ 5301 *et seq*.], may be used to buy or operate a bus only if the applicant, governmental authority, or publicly owned operator that receives the assistance agrees that, except as provided in the agreement, the governmental authority or an operator of mass transportation for the governmental authority will not provide charter bus transportation service outside the urban area in which it provides regularly scheduled mass transportation service. An agreement shall provide for a fair arrangement the Secretary of Transportation considers appropriate to ensure that the assistance will not enable a governmental authority or an operator for a governmental authority to foreclose a private operator from providing intercity charter bus service if the private operator can provide the service.
>
> (2) On receiving a complaint about a violation of an agreement, the Secretary of Transportation shall investigate and decide whether a violation has occurred. If the Secretary decides that a violation has occurred, the Secretary shall correct the violation under terms of the agreement. In addition to a remedy specified in the agreement, the Secretary may bar a recipient under this subsection or an operator from receiving further assistance when the Secretary finds a continuing pattern of violations of the agreement.

When using the indexes, you should be mindful that the regulations were first promulgated in 1976, but drastically revised in 1987. The pre 1987 amendment decisions are included mainly for historical purposes. For a more extensive discussion of Charter Bus Service requirements, see Section 8, Volume 5, Transit Law, TRB's *Selected Studies in Transportation Law* (Dec. 2004). The regulations are much more extensive and can be found at 49 C.F.R. § 604.9 *et seq*.

There are three indexes: 1) an alphabetical listing of the 221 documents; 2) Charter Document by Federal Transit Administration Regions; and 3) a Subject and Issue Index.

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49 USC 1602(4)
Reading

DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION
WASHINGTON, D.C. 20590

11 JUN 1976

Mr. Roger M. DeBaise
Chairman Transit District
Town of Wallingford
Municipal Building
Wallingford, Connecticut 06492

Dear Mr. DeBaise:

This is in response to your letter and affidavits of May 26, 1976 regarding the charter and school bus operations of the Wallingford Transit District (WTD).

We are informed by your letter and affidavit, and also the affidavit of Mr. John J. Wall of Wall's Transportation Service, that the buses purchased by the Wallingford Transit District under Project No. CT-03-0012 will be used exclusively in "mass transportation service" as defined under the Urban Mass Transportation Act of 1964, as amended (the UMT Act), and also under Urban Mass Transportation Administration (UMTA) regulations. For this reason, and also because your operation is so small, you have requested under Section 604.14 of UMTA regulations on charter bus operations that WTD be granted a waiver of Sections 604.12, 604.13 and 604.15, and of any financial reporting requirements for charter bus operations.

Based on the information in your letter and affidavits UMTA hereby accepts your request for a waiver of the above Sections of the UMTA regulations under section 604.14 of the charter bus regulations. This approval shall constitute an agreement between WTD and UMTA under Section 3(f) of the UMT Act and shall be incorporated in to the grant contract for Project No. CT-03-0012.

Since under the terms of this agreement buses for Project No. CT-03-0012 will be used exclusively for mass transportation services, the Wall's Transportation service may continue to engage in school bus operations but with the understanding that Project buses will not be used in those operations.

If I can be of further assistance to you in this matter please feel free to call on me.

Sincerely,

/s/ Theodore A. Munter

Theodore A. Munter
Acting Chief Counsel

cc: Chron
Reading
UCC-15 File
UCC-30 File
Project File
COOK:CM:6/9/76

MEMORANDUM IN RE

THE COMPLAINT OF WALTER K. ZINSMEISTER AGAINST THE CENTRAL NEW YORK REGIONAL TRANSPORTATION AUTHORITY

FINDINGS AND CONCLUSIONS

The Urban Mass Transportation Administration received a complaint dated October 24, 1975, from Mr. Walter K. Zinmeister, President of the Syracuse and Oswego Motor Lines, Inc., Syracuse, N.Y., alleging that the Central New York Regional Transportation Authority (CNYRTA) was engaging in charter bus operations outside of its urban area; engaging in destructive pricing; and engaging in non-incidental charter bus operations with UMTA-assisted equipment in violation of the Urban Mass Transportation Act of 1964, as amended (the Act). CNYRTA was notified of Mr. Zinmeister's complaint by letter dated December 9, 1975, and afforded 30 days to reply to those allegations. CNYRTA responded both in writing and orally at an informal proceeding held on January 20, 1976, at the Department of Transportation in Washington, D.C. We have reviewed the information supplied to us by Mr. Zinsmeister and his attorney, Mr. L. Lawrence Tully, and also the information supplied by CNYRTA and its attorney, Mr. Barry Shulman. On the basis of that information we make the following findings:

1. The CNYRTA engaged in unauthorized charter bus operations outside of its urban area from June 4, 1975 to October 22, 1975, because of its failure to obtain an agreement under section 3(f) of the Act during that time period;

2. That CNYRTA is prohibited from using UMTA-assisted buses in charter bus operations outside of its urban area under its authorizing legislation, (Public Authorities Law 1325 et seq.);

3. That allegations of destructive pricing were not substantiated; and

4. That the allegations of non-incidental use of buses were also not substantiated.

In respect to our first finding, UMTA grantees are prohibited by section 3(f) of the Act from engaging in charter bus operations outside of the urban area within which they provide mass transportation service unless they enter into an agreement which, in the opinion of the Secretary of Transportation, contains a "fair and equitable arrangement" to prevent the foreclosing of charter operations by local private intercity carriers who are willing and able to provide such service. On June 4, 1975, in connection with Project No. NY-03-0058, CNYRTA signed a certification providing that it would not engage in charter bus operations outside of its

urban area. On June 13, 1975, UMTA issued a notice in the Federal Register which provided that UMTA grantees could engage in charter bus operations outside of their urban area if they entered into an "interim" agreement pursuant to which they would be required to certify that revenues generated by charter service are equal to or greater than the cost of providing the service. (See Notice 1, 40 Fed.Reg. 25315 (June 13, 1975)). CNYRTA did not receive approval of an interim agreement until October 22, 1975.

CNYRTA engaged in charter bus operations from the time of its June 4, 1975, certification until the approval of its interim agreement; such operations during that time period were in violation of the Act. CNYRTA contends that it believed itself to be in compliance with the regulations because of a letter sent to UMTA on April 9, 1975, to which it received no response. The letter in question asked for guidance in how to proceed in obtaining a section 3(f) agreement. The answer to this question was provided to CNYRTA and all other affected transit operators through publication in the Federal Register. Therefore CNYRTA cannot rely on its failure to receive actual notice to relieve it of the requirements of that Notice or of section 3(f) of the Act.

In respect to the second finding, CNYRTA is a public benefit corporation formed under Public Authorities Law, Section 1332, et seq. to operate in three counties:

Onondaga, Oswego and Cayuga. Nowhere in this enabling legislation has CNYRTA been granted authority to conduct either charter or mass transportation activities outside of this three-county area. In August of 1974 the New York Attorney General issued an opinion with respect to CNYRTA's authority to engage in charter bus operations outside of their three-county area. The Attorney General's opinion reads in part as follows:

> "In conclusion, therefore, it is my opinion that the Authority may, or in its administrative discretion forego, bidding on intra-district charter runs; however, it should abstain from bidding on such private charters which operate beyond the limits of the Authority."

Under Section 604.15(b)(1) of UMTA's final regulations on charter bus operations, 41 Fed.Reg. 1142 (April 1, 1976), grantees are required to provide a description of the area within which they are authorized by appropriate State law to conduct charter bus operations. Given the opinion of the Attorney General quoted above and other information in the file on this matter, it is clear that CNYRTA is unable to demonstrate its compliance with section 604.15(b)(1) of the charter bus regulations. CNYRTA should therefore refrain from using UMTA-assisted buses in charter bus operations outside of the three-county area described above.

In respect to our third finding, the allegation that CNYRTA's prices were designed to eliminate competition was not substantiated. Under the UMTA notice of June 13,

1975, and under the final regulations on charter bus operations, a grantee is required to certify and establish to the satisfaction of UMTA that revenues generated from charter operations are equal to or greater than the cost of providing the service. Where the grantee makes such a showing it may engage in charter bus operations outside of its urban area in competition with private carriers (where the grantee is otherwise allowed by local or State law to engage in such operations). UMTA does not consider private carriers to be foreclosed from charter bus operations when grantees satisfy the UMTA requirements for certification. CNYRTA's certification submitted under the June 13, 1975 Notice was reviewed and approved by UMTA on October 22, 1975.

In respect to our last finding, the allegation that CNYRTA is in violation of the requirement that UMTA-assisted buses be used only in incidental charter bus operations was also not substantiated by the complaint or subsequent proceedings. UMTA does not provide assistance for charter bus operations. Buses purchased with assistance under the Act are to be used in "mass transportation" service which has been defined, under section 12(c)(5) of the Act, to exclude charter bus operations. However, pursuant to an opinion of the Comptroller General of the United States, B-160204, Dated December 7, 1976, UMTA may allow buses funded

under the Act to be used in incidental charter bus operations. Incidental means operations which do not interfere with a grantee's regular route service. CNYRTA has alleged, and it has not been established otherwise, that their charter bus operations have not interferred with regular route service. In section 604.11 of UMTA's final charter bus regulations a more clearly defined standard is applied for what is or is not incidental charter bus operations. Section 604.11 was not in effect, however, at the time of this alleged violation and may not be used as a standard to determine compliance in this matter.

CONCLUSION

With regard to sanctions for violations section 3(f) of the Act reads, in part, as follows:

> "...In addition to any other remedies specified in the agreement, the Secretary shall have authority to bar a grantee or operator from the receipt of further financial assistance for mass transportation facilities and equipment where he determines that there has been a continuing pattern of violations of the terms of agreement. Upon receiving a complaint regarding an alleged violation, the Secretary shall investigate and shall determine whether a violation has occurred. Upon determination that a violation has occurred, he shall take appropriate action to correct the violation under the terms and conditions of the agreement."

While UMTA's investigation in this matter has determined that CNYRTA engaged in unauthorized charter bus operations from June 4, 1975 to October 22, 1975, we have concluded

that this violation is not sufficient to establish a continuing pattern of violations under the Act. UMTA therefore will not consider barring CNYRTA from further Federal financial assistance at this time. However, CNYRTA may not engage in any charter bus operations outside of its regular service area (the three-county area described above) until it has established to UMTA's satisfaction that it is allowed to do so under appropriate law and that any such service would be in compliance with our regulations. The interim agreement submitted by CNYRTA and approved by UMTA on October 22, 1975, is hereby cancelled.

Charter bus operations by CNYRTA which are inconsistent with this memorandum will be a violation of section 3(f) of the Act, and shall result in the barring of further financial assistance to that Authority.

/s/ Theodore A. Munter

Theodore A. Munter

49 USC 1602(f)

DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION
WASHINGTON, D.C. 20590

THE ADMINISTRATOR

30 JUN 1976

Mr. William J. Leidinger
President
Greater Richmond Transit Company
900 East Broad Street
Richmond, Virginia 23219

Dear Mr. Leidinger:

This is in response to your letter of June 7, 1976 concerning the Urban Mass Transportation Administration's (UMTA) recently issued rules on charter bus operations, 41 Fed.Reg. 14122 (April 1, 1976).

You object to the fact that UMTA did not incorporate your August 5, 1975 comments on the proposed charter regulations with respect to requiring the "notice" procedures in section 604.15 "only for the first application submitted after the effective date of the charter regulations." We appreciate your comments on the proposed regulations. Many of your comments were incorporated into the final regulations, and I can assure you that the remaining comments received our careful consideration. However we did not feel that your comments on the noted procedure were appropriate for incorporation into the final regulations.

You are also concerned that UMTA has in your opinion attempted to broaden the scope of section 3(f) of the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1602) (the Act) to apply to charter bus operations inside a grantee's service area. This is not the case. Section 604.12 of the charter bus regulations provide as follows:

> "Every grantee shall as a condition of assistance, enter into a written agreement, that neither it nor any operator of mass transportation equipment on its behalf, will engage in any charter bus operations where points of origin or destination will be outside of its urban area except as permitted under that agreement. The agreement shall become a part of the grant contract between the Government and the grantee.

The cause of your concern is apparently section 604.15(a) of the regulations which provides as follows:

> "Each applicant who engages or wishes to engage in charter bus operations shall include the following in its application. ..."

We agree that this section is ambiguous. We therefore propose to modify it as follows:

> "Each applicant who engages or wishes to engage in charter bus operations outside of its urban area shall include the following in its application. ..."

Thank you for bringing this matter to our attention. We will take appropriate corrective actions.

If I can be of further assistance to you please do not fail to contact me.

Sincerely,

Robert E. Patricelli

3(f) Leading

DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION
WASHINGTON, D.C. 20590

9 JUL 1976

Mr. Wayne J. Smith
United Bus Owners of America
500 12th Street S.W.
Washington, D.C. 20024

Dear Mr. Smith:

This is in response to your letter of June 13, 1976, requesting clarification of the procedures involved in reporting apparent charter violations by UMTA grantees, and inquiring about the availability of information with respect to grantees' charter rates.

We appreciate your concern in this matter and we will respond in length to your inquiry.

Under section 604.40 of the Urban Mass Transportation Administration's regulations on charter bus operations, 41 F.R. 14122 (April 1, 1976), an interested party may file a complaint alleging a violation of an "agreement" by an UMTA grantee entered into under section 3(f) of the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1601 et seq.) (the Act). Such complaint "... must be in writing and must specify in detail the action claimed to violate the agreement, and must be accompanied by evidence sufficient to enable the Administrator to make a preliminary determination as to whether probable cause exists to believe that a violation of the agreement has taken place." (Emphasis supplied). Under sections 604.15 and 604.20 of those regulations private carriers within a grantee's "urban area" will have the information available to them which constitutes an agreement with UMTA. This information will be supplied either through a public hearing or through notices of modification of a prior agreement under section 604.20.

Since the publication of the charter regulations several grantees have requested and have been granted an extension of time for compliance. Grantees are using this time to give notices of public hearings, where appropriate, or to notify private carriers of their proposed or existing charter operations and receive comments thereon. After final submission of this information to UMTA, we will be better prepared to determine what is or is not a violation

of an agreement since no agreements have been finalized.

Once agreements have been finalized, private carriers who complain under Section 604.40 will make a better case of their allegations if they are familiar with the final agreement of the grantee in question. It would therefore not be sufficient to allege merely that an UMTA-assisted bus is being used on charter operations during the rush hours or that it was used more than fifty miles outside of a grantee service area. Although the above uses of UMTA-assisted buses are presumed to be non-incidental, these presumptions will not apply where a grantee has established to our satisfaction, prior to finalizing its agreement, that such use of buses will not interfere with its mass transportation services to the public. We expect that this information will be supplied to both UMTA and private operators under Section 604.15(b)(1) and (2) of the regulations which requires the following information with respect to charters:

> "... (1) A description of the area within which the applicant is authorized by local, State and Federal law to conduct charter bus operations. Copies of the document granting such authority should be attached. Where there are disputes over jurisdiction pending that would affect charter bus operations this information should be included in that notice.
>
> (2) An estimation of the number of each type of bus which will be employed on the proposed charter bus operations, and the number of weekdays or weekends those buses operate. The applicant shall also include a statement that the proposed use of these buses will not interfere with regularly scheduled mass transportation services. ..."

With this information available, private carriers will know what is or is not a violation of the regulations, not only with respect to the incidental use of equipment, but also with respect to allegation of rate violations.

Finally, regarding the extent to which grantees are required to provide charter rate information to private operators, the charter regulations do not require that this information be

available. The regulations require certification of charter costs for a grantee's entire system and not for any particular route. Private operators who are interested in a particular charter rate charged by a grantee should inquire to the appropriate state agency.

Thank you for your concern in this matter.

Sincerely,

/s/ Theodore A. Munter

Theodore A. Munter
Acting Chief Counsel

#12095
PCook:vs:7-9-76
cc: UCC-1 Reading
UCC-1 Chron
UCC-10 File
UCC-15 Cook
UOA-10 (2)

3 f
49 USC 1609(f) Reading

DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION
WASHINGTON, D.C. 20590

27 JUL 1976

Mr. J. F. Hutchinson
Director of Transportation
City of Santa Monica
1620 Sixth Street
Santa Monica, California 90401

Dear Mr. Hutchinson:

This is in response to your letter of July 6, 1976 concerning charter operations for the City of Santa Monica.

We are informed by your letter that the City is authorized under State law "... to operate service any place in the State, except where another municipality runs similar service and has not agreed to allow Santa Monica to operate... ." (Article 11, Section 9 of the California Constitution.) You have requested an opinion describing the urban area within which the City provides regular mass transportation services for the purposes of section 3(f) of the Urban Mass Transportation Act of 1964, as amended (the Act).

Section 3(f) of the Act provides in part 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 such 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 ..." (Emphasis added).

Under Section 604.3 of UMTA regulations implementing Section 3(f): "Urban area" means the entire area in

which a local public body is authorized by appropriate local, State and Federal law to provide regularly scheduled mass transportation service ... ."

Based on the above, it is our opinion that the City may engage in charter operations within the areas described in Article 11, Section 9 of the State Constitution without an agreement under Section 3(f) of the Act.

If I can be of further assistance to you please feel free to call on me.

Sincerely,

/s/ Theodore A. Munter

Theodore A. Munter
Acting Chief Counsel

cc:
File
Chron
Reading
UCC-10 Chron
UCC-15 Chron

PCook:pam 7/21/76

Retype CM: 7/26/76

49 USC 1602(f)

DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION
WASHINGTON, D.C. 20590

UCC-1
Reading

Mr. James F. Bender
American Transit Corporation
120 South Central Avenue
St. Louis, Missouri 63105

17 NOV 1976

Dear Mr. Bender:

This is in response to your letter of September 20, 1976 to Mr. Joseph Blundon, formerly of this office, concerning the Urban Mass Transportation Administration's (UMTA) charter bus regulations. In your letter you made some assertions regarding those regulations and requested our confirmation of your interpretations.

You are correct in your interpretation that a grantee who limits its charter operations to the area within which it provides regularly scheduled mass transportation services is not required to prepare or submit a cost allocation plan or notice to private charter operators. Such grantees are also not required to conduct public hearings on their charter operations, although they are still subject to the incidental restrictions set forth in section 604.11 of those regulations.

Finally, buses which are not purchased with UMTA assistance are not subject to the incidental restrictions, but are subject to the cost requirements of the regulations.

I am enclosing a copy of the charter regulation for your convenience.

Sincerely,

/s/ James M. Christian

James M. Christian
Chief Counsel

Enclosure

UMTA
PCOOK:psm:11/16/76
cc:
UCC-1 Reading
UCC-1 Chron
UCC-15 Cook
UCC-10 File

49USC 1602(f)
UCC-1
Reading

DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION
WASHINGTON, D.C. 20590

Mr. Yoshio Kosai
Acting Director of Transportation
City of Tacoma
Tacoma Transit System
1235 South Sprague Avenue
Tacoma, Washington 98405

17 NOV 1976

Dear Mr. Kosai:

This is in response to your letter of November 5, 1976 concerning the proposed leasing of buses by Tacoma Transit System (TTS) to a private operator for weekend charter operations. Specifically you have asked whether TTS can lease from 10 to 24 of its buses to a private carrier for weekend charters outside of TTS's regular service area for a period of approximately 10 to 12 weeks without obtaining a charter agreement under UMTA charter regulations.

Under section 3(f) of the Urban Mass Transportation Act of 1964, as amended, and UMTA regulations issued thereunder, 41 F.R. 14122 (April 1, 1976), UMTA is required to ensure that equipment purchased with UMTA assistance is not used unfairly in competition with private operators who are willing and able to provide charter service.

The leasing arrangement which you propose is in cooperation rather than in competition with private carriers. For this reason we find no objections to your leasing UMTA-assisted buses in the manner you have described if such use of those buses will not interfere with TTS's regularly scheduled service.

Finally, our approval of the proposed leasing arrangement is based on the assumption that it is a one time arrangement. If TTS is desirous of continuing similar arrangements with the current private operator, or other private operators, compliance with UMTA regulations will be necessary.

If I can be of further assistance to you please feel free to call on me.

Sincerely,

/s/ James M. Christian

James M. Christian
Chief Counsel

UMTA
PCOOK:psm:11/17/76
cc:
UCC-1 Reading
UCC-1 Chron
UCC-15 Cook
UCC-10 File

DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION
WASHINGTON, D.C. 20590

NOV 22 1976

Mr. Ellis H. Watkins
Dallas Transit System
101 North Peak Street
Dallas, Texas 75226

Dear Mr. Watkins:

This is in response to your letter of October 5, 1976, requesting approval of a charter agreement under the Urban Mass Transportation Administration's (UMTA) charter regulations.

In your letter you made the following declaration: "...the Dallas Transit System will not engage in charter service, using equipment purchased with federal funds, outside of the urban area within which it provides regular scheduled mass transportation service, except in 'incidental' charter operations as determined by the Comptroller General." Along with your letter you submitted a "cost allocation certification."

We have reviewed your submissions and have determined that they do not form an acceptable basis for a charter agreement under section 3(f) of the Urban Mass Transportation Act of 1964, as amended.

Section 604.20 of the charter regulations provides a procedure for amending prior charter agreements. It provides that any grantee wishing to modify its charter agreement to allow for charter service outside of a grantee's regular service area must do the following:

1. Develop a certified statement of costs showing revenues and expenses, a cost allocation plan and a statement of proposed or existing charter operations;

2. Send the items listed in paragraph (1) to all private carriers who originates service in the grantee's urban area;

3. Allow 30 days for private carriers to submit their comments; and

4. Submit comments along with documents referred to in paragraphs (1) and (2) to UMTA for approval.

The information you submitted did not contain a properly certified statement of costs showing revenues and expenses, a cost allocation plan, a statement of proposed or existing charter service, or a notice to private carriers. We must have these items before we approve your charter agreement.

Finally, if Dallas Transit decides to limit all of its charter service to within its regular service area, none of the documents called for above will be necessary. In that case you need only certify that no charter service will be conducted outside of your regular service area.

I am enclosing a copy of an approved agreement which might serve as a model in the preparation of your agreement.

Sincerely,

James M. Christian
Chief Counsel

Enclosure

UMTA
PCOOK:psm:11/16/76
cc:
UCC-1 Reading
UCC-1 Chron
UCC-15 Cook
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Mr. Benjamin B. Baker
Administrator
Southeastern Regional Transit
Authority (SRTA)
1213 Purchase Street
New Bedford, Massachusetts 02740

Dear Mr. Baker:

This is in response to your letter of January 7, 1977 requesting approval of a charter agreement under the Urban Mass Transportation Administration's (UMTA) charter regulations.

In your proposed agreement you made the following declaration: "...The Grantee agrees that neither it, nor any operator of project equipment, will engage in charter bus operations outside the urban area within which it provides regularly scheduled mass transportation services except as provided within Section 604.11 cited in the Federal Register Volume 41 No. 64 dated Thursday, April 1, 1976 on Page 14124. (Emphasis supplied).

We have reviewed your submissions and have determined that they do not form an acceptable basis for a charter agreement under section 3(f) of the Urban Mass Transportation Act of 1964, as amended since SRTA proposes to provide charter service outside of its regular service area.

Section 604.20 of the charter regulations provides a procedure for amending prior charter agreements. It provides that any grantee wishing to modify its charter agreement to allow for charter service outside of a grantee's regular service area must do the following:

1. Develop a certified statement of costs showing revenues and expenses, a cost allocation plan and a statement of proposed or existing charter operations;

2. Send the items listed in paragraph (1) to all private carriers who originates service in the grantee's urban area;

3. Allow 30 days for private carriers to submit their comments; and

4. Submit comments along with documents referred to in paragraphs (1) and (2) to UMTA for approval.

The information you submitted did not contain a properly certified statement of costs showing revenues and expenses, a cost allocation plan, a statement of proposed or existing charter service, or a notice to private carriers. We must have these items before we approve your charter agreement.

Finally, if Southeastern Regional Transit Authority decides to limit all of its charter service to within its regular service area, none of the documents called for above will be necessary. In that case you need only certify that no charter service will be conducted outside of your regular service area.

I am enclosing a copy of an approved agreement which might serve as a model in the preparation of your agreement.

Sincerely,

/s/ James M. Christian

James M. Christian
Chief Counsel

Enclosure

UCC-1 Reading

49 USC 1612(f)

SEP 19 1977

Mr. B. L. Peyton
Regional Vice President
Greyhound Lines, Inc.
Clark and Randolph Streets
Chicago, Illinois 60601

Dear Mr. Peyton:

Thank you for your letter of July 27, 1977, concerning the charter bus operations of the Greater Cleveland Regional Transit Authority (GCRTA). You have expressed your displeasure with GCRTA charter operations which you consider to be in violation of section 604.11 of the Urban Mass Transportation's regulations on charter bus operation.

Section 604.11 establishes the presumption that UMTA-assisted buses which are used in charter service during rush hours, more than six (6) hours a day, or more than fifty (50) miles outside of a grantee's urban area, are being used primarily in charter as opposed to mass transportation service, in violation of the UMTA grant contract and the Urban Mass Transportation Act of 1964, as amended (the UMT Act). This presumption may be rebutted by a grantee's showing that its use of UMTA-assisted buses is "incidental" as defined by the Comptroller General in B-160204, December 7, 1966. (Page 14125 of the enclosed regulations). Such a showing may be made in an agreement between UMTA and a grantee pursuant to section 3(f) of the UMT Act.

GCRTA has obtained such an agreement from UMTA. This agreement expressly provides that GCRTA may engage in incidental charter service which does not interfere with regularly scheduled mass transit service. The agreement anticipates that GCRTA will make occasional use of approximately six (6) buses for charter use during rush hours and outside of its urban area.

Section 604.40 of the UMTA charter regulations requires that "... a complaint must be in writing and must specify in detail the action claimed to violate the agreement, and must be accompanied by evidence sufficient to enable the Administrator to make a preliminary determination as to whether probable cause exists to believe that a violation of the agreement has taken place." We do not believe that facts you have brought to our attention to date establish probable cause that GCRTA has violated its agreement. We therefore will not direct an investigation of this matter. However, in the event you believe that GCRTA is in violation of other provisions of the UMTA charter regulations, please bring those matters to our attention.

If I can be of further assistance to you, please feel free to call on me.

Sincerely,

Original signed by
Charles F. Bingman
Richard S. Page

Enclosure

UMTA:PCOOK:dlc:9/6/77
cc: UCC-1 Reading
UCC-1 Chron
UCC-1 File
UCC-15 Cook
UOA-10 (2)

UCC-1
Reading
File

Benjamin L. Bendit, Esquire
Bendit, Weinstock & Sharbaugh
A Professional Corporation
Counsellors at Law
744 Broad Street
Newark, New Jersey 07102

SEP 20 1977

Dear Mr. Bendit:

Thank you for your letter of August 2, 1977, to Mr. James Christian, former Chief Counsel, concerning the use of Urban Mass Transportation Administration (UMTA)-assisted buses in charter service in the State of New Jersey. Please accept my apology for this delay in responding to you.

We are informed by your letter that you represent a number of private bus operators who have received UMTA-assisted buses under the allocation plan developed by the State for the distribution of those buses. These private operators, we are informed, are prepared to comply with UMTA's charter bus regulations, but they have been waiting for either UMTA or the New Jersey Department of Transportation (NJDOT) to call for the appropriate submissions. You also state that there has been no indication that UMTA or NJDOT will ever require appropriate filings from New Jersey operators. In view of the foregoing, you have inquired as to what fashion and by whom will the UMTA charter bus regulations be enforced.

By publication of its charter regulations in the Federal Register on April 1, 1976, UMTA made public its requirements with respect to charter operations by UMTA-assisted operators. Your statement that you have not heard from Washington whether certifications are required is therefore incorrect since the UMTA charter regulations expressly state that requirement.

Under the charter regulations, grantees or operators on the grantees' behalf who derive more than $15,000 annually from charter service and who operate charter service outside of the grantee's urban area, are required to file a charter agreement. It appears from your letter that NJDOT has not developed an adequate procedure for obtaining these agreements from private operators throughout the State. The requirements of UMTA's charter regulations nevertheless remain and any grantee or operator that uses UMTA-assisted buses in violation of the charter regulations are subject a forfeiture of that equipment.

In view of the foregoing, we suggest that you have your clients comply with the charter regulations immediately by forwarding the required documents to NJDOT. You may also send a copy to UMTA.

It is NJDOT's responsibility to collect the required documentation and forward it to UMTA. We will conduct a review of NJDOT to determine if the charter bus requirements are being met.

Thank you for your concern in this matter. If I can be of further assistance to you in this matter, feel free to call on me.

Sincerely,

/s/ Margaret M. Ayres
Chief Counsel
Margaret M. Ayres
Chief Counsel

UMTA:PCOOK:dlc:9/14/77
cc: UCC-1 Reading
UCC-1 Chron
UCC-1 File -- Buses, Charter
UCC-15 PCook

DEC 23 1977

Honorable Robin Beard
House of Representatives
Washington, D.C. 20515

Dear Mr. Beard:

Thank you for your letter of November 16, 1977, on behalf of Mr. Fran Bass, Jr., concerning the use of buses owned by transit authorities in sightseeing operations.

Since 1964, the Urban Mass Transportation Administration (UMTA) has been charged with approving capital grants for the purchase of transit buses and related mass transportation equipment. The term "mass transportation" is defined in section 12(c)(5) of the Urban Mass Transportation Act of 1964, as amended (the Act) to mean "... transportation by bus, or rail or other conveyance, either publicly or privately owned, which provides to the public general or special service (but not including school buses or charter or sightseeing service) on a regular and continuing basis." (Emphasis supplied). Under this definition of mass transportation, and under section 3(f) of the Act, UMTA is prohibited from assisting in the purchase of equipment which would be used primarily in charter bus or sightseeing operations. Such use of UMTA-assisted buses would have the effect of diverting these buses from the purpose for which grant funds were given, i.e., to improve mass transportation service in designated urban areas.

While UMTA-assisted buses may not be used primarily to provide sightseeing or charter bus service, these buses may be used to provide "incidental" services, including sightseeing or charter service, if such service does not interfere with regularly scheduled service to the public. (See the Opinion of the Comptroller General, B-160204, 41 F.R. 14123, Appendix A, April 1, 1976, copy enclosed).

I appreciate your interest in this matter. If I can be of further service to you, please feel free to call on me.

Sincerely,

Richard S. Page

Enclosure

DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION
WASHINGTON, D.C. 20590

APR 7 1978

Mr. B. L. Peyton
Regional Vice President
Greyhound Lines, Inc.
Clark & Randolph Streets
Chicago, Illinois 60601

Dear Mr. Peyton:

The Administrator has asked me to respond to your letter of January 24, 1978, responding to his earlier letter to you concerning the charter bus operations of the Greater Cleveland Regional Transit Authority (GCRTA).

You have raised several concerns in your current letter about the nature and extent of the existing charter bus agreement between this agency and GCRTA under the Urban Mass Transportation Administration's (UMTA) charter bus regulations, 41 F.R. 14122 (April 1, 1976). Such concerns include whether the comments made by private carriers at public hearings are given consideration by UMTA; and, the origin of the UMTA-GCRTA charter agreement. I believe the following review of the development of our charter requirements will be helpful in addressing your concerns.

The first restriction on the use of UMTA-assisted buses in charter service appeared in section 164(a) of the Federal Aid Highway Act of 1973 which reads 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), (2), and (3) of this subsection."

Under section 164(a), all charter service by UMTA grantees outside of the grantee's urban area was prohibited.

Section 164(a) was amended by section 813(b) of the Housing and Community Development Act of 1974, August 22, 1974 (P. L. 93-383, 88 Stat. 633). That amendment is currently reflected in section 3(f) of the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1602) (the UMT Act), and reads 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 and privately owned operators for public bodies to foreclose private operators from the intercity charter bus industry where such private operators are willing and able to provide such service. ..." (emphasis supplied).

Section 3(f) of the UMT Act differs from section 164(a) of the Highway Act in that section 3(f) expressly allows UMTA grantees to engage in charter bus operations outside the grantee's urban area in competition with private carriers so long as such charter operations are carried out under conditions which the Secretary of Transportation finds to be fair and equitable.

The April 1, 1976 UMTA charter bus regulations implement section 3(f) of the UMT Act by setting forth the terms which are fair and equitable in the opinion of the Secretary to protect the economic interests of private charter operators. At the same time, the regulations are designed to establish minimum conditions under which all public operators may engage in charter bus operations in competition with private carriers and yet not foreclose the latter from the charter bus industry.

The basic thrust of the regulations is twofold: (1) they require grantees who engage in charter bus operations outside of their regular service area to certify that revenues generated from those operations are equal to, or greater than the cost of providing that service; and (2) they codify the "incidental" charter restrictions on the use of Federally-assisted equipment which the Comptroller General set forth in his Opinion of 1966. (Comptroller General of the United States, B-160204 (December 7, 1966)). (See Appendix A, charter regulations, copy enclosed).

With respect to the economic thrust of the charter regulations, grantees are required to certify that they have taken into account those expenses outlined in Appendix B of the charter regulations in developing their charter rates. In addition to the expenses outlined in Appendix B, grantees are also required to add depreciation on all federally-assisted buses as an expense.

The certifications made by grantees are made available to private carriers under section 604.18 of the charter regulations prior to UMTA approval of a charter agreement. Private carriers have the opportunity to comment on these certifications either at a public hearing or through written comments which are forwarded to UMTA by the grantee. In addition to commenting on the grantee's certifications, private carriers are also allowed to state their objections to a grantee's charter operations. If such objections state a legally sufficient basis for UMTA limiting or prohibiting a grantee's charter operations, we will take appropriate action.

In the particular case of GCRTA, we have reviewed the information submitted by that authority as required by the enclosed charter regulations. We have also reviewed the comments submitted by private carriers who have objected to GCRTA's charter operations, including those comments submitted by Greyhound, and we find no legally sufficient basis to limit or prohibit GCRTA charter operations either under the UMTA charter regulations or under section 3(f) of the UMT Act. You will note that under the regulations legally sufficient reasons to limit or deny a proposed charter agreement include, but, are not limited to the following determinations: 1) that a grantee is not allowed to carry out proposed charters under State law under section 604.15(4)(b)(1); 2) that a grantee has failed to follow the procedures prescribed by the regulations with respect to certification of costs, the preparation of a cost allocation plan or notice to private carriers; or, 3) that a proposed agreement violates the incidental requirement of section 604.11 of the regulations.

I am enclosing for your information the comments made by Don Bianchi, General Manager for Greyhound in Cleveland, Ohio. The comments were forwarded to UMTA under the charter regulations in conjunction with GCRTA's application for operating assistance. As you can see, the general tone of Mr. Bianchi's comments is to complain about competition from GCRTA which results in a loss of business for Greyhound. His comments allege no violation of UMTA requirements.

With respect to the use of UMTA-assisted buses in incidental charter service the Comptroller General's decision to allow incidental use of UMTA-assisted buses in charter operations was based on the theory that the buses would not be needed for mass transportation purposes at the time of their use in charter service. The following is taken from that decision (page 14131 of the April 1, 1976 regulations):

> "...HUD further advises that:
>
> 'One of the basic facts of urban transportation operations is that the need for rolling stock is far greater during the morning and evening rush hours on weekdays than at any other time. For that reason, any system which has sufficient rolling stock to meet the weekday rush-hour needs of its customers must have a substantial amount

> of equipment standing idle at other times, as well as drivers and other personnel being paid when there is little for them to do. To relieve this inefficient and uneconomical situation, quite a number of cities have offered incidental charter service using this idle equipment and personnel during the rush hours when the same are not needed for regularly scheduled runs. Among the cities so doing are Cleveland, Pittsburgh, Alameda, Tacoma, Detroit and Dallas. ...'"

Based on the Comptroller General's decision, section 604.11 states what is presumed not to be incidental charter service. These presumptions can be rebutted by an appropriate showing by a grantee that use of UMTA-assisted buses in charter service does not interfere with regular mass transit service. UMTA will agree to a grantee's incidental use of UMTA-assisted buses in charter bus operations where sufficient justification is shown. If, for example, a grantee keeps a small number of its buses as reserves to its regular mass transportation fleet, and proposes to use a portion of this reserve fleet in charter bus operations, UMTA would approve such use of UMTA-assisted buses since it would not interfere with the grantee's regular route service.

I hope this review of UMTA's statutory and regulatory requirements is helpful to your understanding of our policy with respect to charter bus operations by our grantees. It is not our policy to prohibit charter operations which are within the scope of our charter bus requirements.

Thank you for your interest in this matter.

Sincerely,

/s/ Margaret M. Ayres
Chief Counsel

Margaret M. Ayres

Enclosure

UMTA:PCOOK:dlc:2/28/78
cc: UCC-1 Reading
UCC-1 Chron
UCC-File--
UCC-15 PCook
UOA-10(2)
Control No. 114 L

DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION
WASHINGTON, D.C. 20590

JUL 3 1978

Honorable Robin Beard, M.C.
House of Representatives
Washington, D.C. 20515

Dear Mr. Beard:

Thank you for your letter of May 11, 1978, concerning the sightseeing services regulated by the Metropolitan Transit Authority (MTA). Forwarded with your letter was a letter dated May 11, 1978, from Mr. Fran M. Bass, Chief Executive Officer of Music City Services, Inc. Mr. Bass is concerned about attempts by MTA to regulate the sightseeing services offered by Music City Services, Inc.

In our previous correspondence to you of December 23, 1977, on this matter (copy enclosed), we indicated that UMTA-assisted buses may be used in sightseeing service if such service does not interfere with regularly scheduled service to the public.

However, from the documents we have received it would appear that no UMTA-assisted buses are involved in this matter, as it is concerned solely with whether Music City Services, Inc. should come under MTA jurisdiction because of alleged charter activity. This issue is properly pending before the courts in Tennessee, and does not involve any UMTA regulations or requirements.

I trust that this letter is responsive to your request and look forward to being of assistance to you in the future.

Sincerely,

Margaret M. Ayres

Margaret M. Ayres
Chief Counsel

Enclosure

UMTA/PCOOK:6/28/78:cp
cc: UCC-1 Chron
UCC-1 Reading
UCC-30/File
UCC-31/Cook

UCC-1
READING

DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION
WASHINGTON, D.C. 20590

SEP 20 1978

Mr. Len Engel
General Manager
Boise Urban Stages
P.O. Box 9016
Boise, Idaho 83707

Dear Mr. Engel:

This is in response to your letter of September 13, 1978, requesting our opinion as to whether Boise Urban Stages (BUS) may engage in charter bus operations within its service area without a charter bus agreement.

BUS may engage in charter bus operations within its urban area without a charter bus agreement. Charter bus agreements are required only when a grantee has derived more than $15,000 in its most recently completed fiscal year, and engages in charter bus operations outside of the urban area wherein such grantee conducts regularly scheduled mass transportation services.

If I can be of further assistance to you, please feel free to call on me.

Sincerely,

Theodore A. Munter
Assistant Chief Counsel,
Programs

UMTA:PCOOK:dlc:9/20/78
cc: UCC-1 Reading
UCC-1 Chron
UCC-File--BUSES (Charter)
UCC-31 PCook
UCC-30 TMunter

UCC-1
READING

DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION
WASHINGTON, D.C. 20590

SEP 22 1978

Mr. Stephen J. Bochenek
Giffin, Winning, Lindner, Newkirk,
Cohen & Bodewes
525 West Jefferson Street
Building One
P.O. Box 2117
Springfield, Illinois 62705

Dear Mr. Bochenek:

This is in response to your letter of September 12, 1978, to the Urban Mass Transportation Administration (UMTA) Administrator concerning the charter bus operations of the Springfield Mass Transit District ("SMTD").

We are informed by your letter that SMTD will come within the scope of UMTA's charter bus regulations, 41 F.R. 14122 (April 1, 1976) (copy enclosed), because its charter revenues will exceed $15,000 during its 1978 fiscal year. You have therefore inquired as to the procedure to be followed in obtaining a charter agreement under UMTA charter regulations.

We suggest that SMTD proceed as follows under section 604.20 of the UMTA charter regulations in its quest for a charter agreement:

1. SMTD should develop a notice setting forth the type of charter service it proposes; the areas such service will cover; and, the times such services will be available;

2. develop a certified statement of costs taking into account those expense items listed in Appendix B of the charter bus regulations, page 14126; and, a cost allocation plan;

3. send the information contained in paragraphs 1 and 2 above to private carriers who originate charter service on SMTD's urban area and allow them 30 days for written comment; and

4. after 30 days send the notice, certified statement of costs, cost allocation plan and comments of the private carriers to this office for approval.

If you have any further questions on this matter, please feel free to call on me.

Sincerely,

/s/ Theodore A. Munter

Theodore A. Munter
Assistant Chief Counsel,
Programs

Enclosure

UMTA:PCOOK:dlc:9/21/78
cc: UCC-1 Reading
UCC-1 Chron
UCC-File—BUSES (Charter)
UCC-31 PCook
UCC-30 TMunter
UOA-10(2)
Control No. 001208 L

MEMORANDUM REGARDING THE COMPLAINT OF

HUDSON BUS TRANSPORTATION CO., INC., et al.

AGAINST

THE STATE OF NEW JERSEY AND THE

URBAN MASS TRANSPORTATION ADMINISTRATION

I. Background

On June 26, 1978, a complaint was filed with the Administrator of the United States Urban Mass Transportation Administration ("UMTA") on behalf of five private bus companies which operate in the State of New Jersey, principally serving routes between points within northern New Jersey and New York City. 1/ The complaint alleges, in brief, that the mass transportation program being carried out by the State of New Jersey with UMTA financial assistance does not encourage participation of private enterprise to the maximum extent feasible, as required by Sections 4(a) and 3(e) of the Urban Mass Transportation Act of 1964, as amended, ("the Act"). 2/ The Complainants request that UMTA not grant any financial assistance, capital or operating, to the State of New Jersey until the alleged statutory violations are corrected.

Procedurally, the complaint has been handled in accordance with procedures used previously by UMTA in similar matters. The complaint was forwarded to the State of New Jersey for reply (The complaint letter, dated June 26, 1978, is appended hereto as Attachment 1). Pursuant to a request by the Complainants, it was agreed that, in order to complete the record, a conference would be held following the submission to UMTA of written material. On August 30, 1978, Complainants submitted a document in support of the complaint. (The complaint document is appended hereto as Attachment 2). On October 5, 1978, the State submitted its response. (Appended hereto as Attachment 3). Both sides submitted supporting material. On November 17, 1978, a conference was held in Federal offices in New York City. In addition to the attorneys representing the two sides, six individuals--either owners or officers of each of the Complainants--were in attendance. All were given an opportunity to speak. The UMTA Assistant Chief Counsel and Regional Counsel presided at the conference. A court reporter transcribed the proceeding, and copies of the transcript were made available to each of the parties. (A copy of the transcript is appended hereto as Attachment 4).

1/ The Complainants are Hudson Bus Transportation Co., Inc., Hudson Transit Lines, Inc., Lakeland Bus Lines, Inc., Manhattan Transit Co., Rockland Coaches, Inc., and Suburban Transit Corp.

2/ The relevant provisions of the UMT Act are Sections 3(e)(2) and former Section 4(a). That portion of Section 4(a) relied upon by the Complainants has been repealed by the Federal Public Transportation Act of 1978. However, the substance of the repealed portion of Section 4(a) now appears in Section 8(e) of the Act, as amended.

While in no sense a formal evidentiary hearing, the November 17, 1978 conference provided the parties with an opportunity to supplement the written submissions, and to provide a complete record upon which the Administrator could base his determination whether all statutory requirements have been met. 3/ Complainants have requested that a formal hearing be held in order for their counsel to examine witnesses under oath and, presumably, to provide additional evidence for the record. We find, however, that the existing record is sufficient upon which to base a determination.

II. The Statutory Requirement

The purpose of the UMT Act is to provide federal financial assistance to States and local public bodies to develop and operate efficient and coordinated mass transportation systems. The goal of the Act is to secure the welfare and vitality of urban areas, the satisfactory movement of people and goods within such areas, and the effectiveness of housing, urban renewal, highway and other federally aided programs, which are jeopardized by the deterioration or inadequate provision of urban transportation facilities and services, the intensification of traffic congestion, and the lack of coordinated transportation and other development planning on a comprehensive and continuing basis. 49 U.S.C. 1601(a)(2). Therefore, under the Act, Congress has made available matching funds for the purposes of capital acquisition and construction, operating assistance, and planning activities in connection with mass transportation projects.

In so doing, Congress has expressed its concern that such federal assistance not be used without regard for the interests of existing private mass transportation companies. At the same time, however, Congress has made clear that decisions regarding mass transportation services to be provided with federal assistance must be made locally, as required by local needs. Hence, Section 2(b) of the Act states that one of the purposes of the Act is--

> "(3) to provide assistance to State and local governments and their instrumentalities in financing (mass transportation)

3/ The authority to exercise the functions vested in the Secretary of Transportation by the Act has been delegated to the UMTA Administrator, 49 CFR 1.51. The Administrator has delegated the authority to accomplish project approvals and to make such findings and determinations as appropriate to the Regional Directors of UMTA. UMTA Order 1100.18 (July 7, 1978). The State of New Jersey, for purposes of this complaint, falls within the jurisdiction of UMTA Region II.

> systems, to be operated by public or private mass transportation companies as determined by local need." 4/

Reliance on local decision making is central to the entire program of federal financial assistance for mass transportation systems. Section 1 of the Urban Mass Transportation Assistance Act of 1970, for example, provides that the purpose of the Act is--

> ". . . to create a partnership which permits the local community, through federal financial assistance, to exercise the initiative necessary to satisfy its urban mass transportation requirements." 49 U.S.C. 1601a.

The emphasis on local decision making in determining how best to serve the transportation needs of the local area was recognized in Pullman, Inc. v. Volpe, where the court stated:

> "The statutory scheme of UMTA emphasizes the large role to be played by the local bodies responsible for urban mass transit . . .. This reliance on the local or state group is consistent with the statute's encouragement of local responsibility in urban mass transportation. The statute does not promote a centralized procedure which leaves all decisions with the Secretary (of Transportation), but rather, emphasizes local solutions to problems." 337 F.Supp. 432, 438-439 (E.D. Pa. 1970).

Within this framework, Congress has consistently expressed its desire that private enterprise be afforded the opportunity to participate "to the maximum extent feasible" in the locally determined, federally funded program of mass transportation services. The 1964 Act contained two provisions, Section 3(e) and the first two sentences of Section 4(a), which expressed

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4/ 49 U.S.C. 1601(b)(3). Similarly, Sections 2(b)(1) and 2(b)(2) each state a purpose of the Act that calls for the cooperation of mass transportation companies, "both public and private."

this intent. Section 4(a) provided as follows:

> "No federal financial assistance shall be provided pursuant to subsection (a) of Section 3 unless the Secretary determines that the facilities and equipment for which the assistance is sought are needed for carrying out a program, meeting criteria established by him, for a unified or officially coordinated urban transportation system as a part of the comprehensively planned development of the urban area, and are necessary for the sound, economic and desirable development of such area. Such program shall encourage to the maximum extent feasible the participation of private enterprise." (Emphasis added).

The Federal Public Transportation Act of 1978 deleted that provision, but added a new section, Section 8, that contains this requirement. In part, the new section provides as follows:

> "(a) It is declared to be in the national interest to encourage and promote the development of transportation systems embracing various modes of transportation in a manner which will serve the States and local communities efficiently and effectively. To accomplish this objective, the Secretary shall cooperate with the State and local officials in the development of transportation plans and programs which are formulated on the basis of transportation needs with due consideration to comprehensive long-range land use plans, development objectives, and overall social, economic, environmental, system performance, and energy conservation goals and objectives, and with due consideration to their probable effect on the future development of urban areas of more than 50,000 population. . ..
>
> * * *
>
> (e) The plans and programs required by this section shall encourage to the maximum extent feasible the participation of private enterprise." 49 U.S.C. 1607 (Emphasis added).

Section 3(e), as revised by the 1978 Act, provides as follows:

> "No financial assistance shall be provided under this Act to any State or local public body or agency thereof for the purpose, directly or indirectly, of acquiring any interest

> in, or purchasing any facilities or other property of a private mass transportation company, or for the purpose of constructing, improving, or reconstructing any facilities or other property acquired . . . from any such company, or for the purpose of providing by contract or otherwise for the operation of mass transportation facilities or equipment in competition with or supplementary to, the service provided by an existing mass transportation company, unless (1) the Secretary finds that such assistance is essential to the program of projects required by section 8 of this Act, (2) the Secretary finds that such program, to the maximum extent feasible, provides for the participation of private mass transportation companies, (3) just and adequate compensation will be paid to such companies for acquisition of their franchises or property to the extent required by applicable State or local laws, and (4) the Secretary of Labor certifies that such assistance complies with the requirements of section 13(c) of this Act." 49 U.S.C. 1602(e) (Emphasis added). 5/

III. Congressional Intent

The United States Court of Appeals for the Seventh Circuit, in South Suburban Safeway Lines, Inc. v. City of Chicago, was the first appellate court to review UMTA's compliance with Section 3(e). The Court observed the following with respect to the intent of Congress in enacting this provision:

> "In section 1602, Congress seems to have been primarily concerned over the possibility of public acquisition of private facilities (a subject not involved in this action) although competition with and supplementation of existing facilities were also dealt with." 416 F.2d 535, 539 (7th Cir., 1969).

The legislative history of Section 3(e) bears this out. In brief, Section 3(e) originated in Senate Bill S.6, (88th Cong., 1st Sess.), one of the bills which resulted in the Urban Mass Transportation Act of 1964.

5/ Thus, the Act specifically permits grants to be made for competitive and supplementary services, as long as the requisite findings are made. This is consistent with the principle that there is no Constitutional right to be free from governmental competition. See: Tennessee Electric Power Co. v. T.V.A., 306 U.S. 118, 138-139 (1939); Westport Taxi Service, Inc. v. Adams, Civil No. B-76-369 (D.Conn., April 13, 1977), slip opinion at 12; aff'd in part, rev'd in part, 571 F.2d 697 (2d Cir., 1978).

The principal sponsor of the bill, Senator Harrison Williams of New Jersey, indicated that this provision intended to further a neutral Federal posture on the question of whether public or private companies should operate federally assisted mass transportation services. In discussing the provisions of the bill, Senator Williams said:

> ". . . the public body would not have to operate the transit facilities and equipment itself. It could provide for their operation by lease or other arrangement. Thus, every locality would remain free to choose public or private operation of its transportation system or any combination of the two." 109 Cong. Rec. 198 (Daily ed., January 14, 1963) (Emphasis added).

Senator Williams' version of Section 3(e) differed in one respect from the provision which was ultimately enacted. As originally introduced, the bill permitted the applicant for assistance to certify to the Administrator that, among other things, the program, to the maximum extent feasible, provides for the participation of private mass transportation companies. As amended, the Administrator was required to find that the federally assisted program includes, to the maximum extent feasible, the participation of such companies.

In the House of Representatives, an amendment to H.R. 3881 (88th Conc., 1st Sess.) contained language substantially similar to that which the Senate had passed. Subsequently, the Senate adopted the House language, and the provision was signed into law. The debate in the House revealed that the intent of Section 3(e) was to provide fair and equitable treatment of private operators, and to require the Administrator to use his judgment in making the required findings. 6/

Clearly, the statutory requirement of private participation "to the maximum extent feasible," was not intended by Congress to prohibit the use of federal assistance to fund services which might compete with or supplement

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6/ In the South Suburban Safeway Lines, Inc. decision, the Seventh Circuit said the following:

> ' The elements of the findings to be made are discretionary, essentially more quasi legislative than quasi judicial. Surely Congress intended no trial de novo. The procedure which was followed shows that the administrative agency did address itself to the questions posed by section 1602(c), in a rational manner, and resolve them by findings which met the statutes.' 416 F.2d at p. 540.

existing services. In fact, the statute expressly permits competitive or supplementary services as long as the findings can be made. It is also noteworthy that the statute's history provides no guidance on the question of how the required findings are to be made in cases involving competition among two or more private mass transportation companies. Nor is the statute intended to foster private operations over publicly owned operations. The overriding concern of the sponsors of the provisions in the 1964 Act was to guard against unnecessary or coerced public takeovers of existing private operators. 7/ As the District Court in Westport Taxi Service, Inc. v. Adams said:

> "If there is a federal statutory right to protection from governmental competition, . . . , it derives from the Congressional intent expressed in 49 U.S.C. sections 1602(e) and 1603 to provide for and encourage 'to the maximum extent feasible' the participation of private enterprise and to compensate private mass transportation companies 'for acquisition of their franchises or property to the extent required by applicable State or local laws.' . . . All the statute requires is encouragement of private participation to the maximum extent feasible.' It does not allow private transit operators to write their own ticket. 8/

The statutory scheme viewed as a whole thus juxtaposes two potentially conflicting interests: private participation and local determination. By authorizing the Administrator to use his discretion in making the required findings, Congress has placed the responsibility for resolving such conflict, where it exists, in the hands of the Federal agency. Moreover, by using language as general as "to the maximum extent feasible," without any additional guidance as to the standard to be used, Congress has given the agency extremely broad discretion in carrying out this responsibility.

7/ See statement of Congressman Rains, 110 Cong. Rec. 14464 (Daily ed., June 25, 1964):

> ". . .this amendment would prevent any force on the part of the municipal body to just taking over the authority whether or not private enterprise wanted it done."

8/ Civil No. B-76-369 (D.Conn., April 13, 1977), slip opinion at 12; aff'd in part, rev'd in part, 571 F.2d 697 (2d Cir. 1978). The requirement of Section 3(e)(3) that "just and adequate compensation will be paid to such companies for acquisition of their franchises or property" is further evidence that the congressional concern was over unnecessary public takeovers of private companies.

IV. New Jersey's Mass Transportation Program

The State of New Jersey, and especially the northeastern portion of the State which makes up part of the New York metropolitan area, constitutes one of the most densely populated areas of the nation. Consequently, mass transportation plays an inordinately important role in maintaining the vitality of the area.

Since the early 1800's, railroads have played a major part in providing transportation service to the State. 9/ Today's commuter railroad network has its roots in the mid-nineteenth century. (The system's history is described in detail in the Application of the New Jersey Department of Transportation, which is appended hereto as Attachment 5). Presently, all commuter rail service in the area is provided by Conrail, which includes the services formerly provided by the Erie Lackawanna, Penn Central, Central Railroad of New Jersey and the New York & Long Branch Railroads. In 1978, the combined ridership of these lines was approximately 34.7 million.

New Jersey's bus system is also one of the most extensive in the nation. While consolidation and abandonment of bus operations has reduced the number of companies providing bus service in New Jersey over the years, the State is presently served by approximately 245 operators, carrying an estimated annual ridership of over 210 million passengers. By far the largest bus company in the State, Transport of New Jersey (TNJ) carries almost 90 million passengers annually in its fleet of almost 1200 buses.

What is significant is that with two minor exceptions, all bus and commuter rail operations in the State are privately owned. 10/

The Tri-State Regional Planning Commission, the Metropolitan Planning Organization (MPO) designated by the Governor, is responsible for the transportation planning process, which includes the development of planning programs, a transportation plan and transportation improvement programs (TIP)

9/ The description of mass transportation services which follows in the text is taken from the Application of the New Jersey Department of Transportation for an Operating Assistance Grant for the 1978 fiscal year, (NJ-05-0015).

10/ The two public carriers are Mercer Metro and the Salem County Improvement Authority. TNJ is a wholly owned subsidiary of Public Service Electric and Gas Company, a privately owned utility company. Maplewood Equipment Company is a subsidiary of TNJ. Conrail, pursuant to its authorizing legislation, (45 USC 701 et seq.), was specifically precluded from being established as an agency or instrumentality of the Government, and was specifically authorized to be established as a "for profit corporation." It is therefore clear that TNJ, Maplewood, and Conrail are private mass transportation companies.

for the northeastern New Jersey area. 11/ The Regional Transportation Plan developed by Tri-State includes among its stated public transit objectives the following: Preserve and stabilize all vital existing operations; Attain fastest feasible travel time to central business districts; Provide rail, bus, and paratransit services to all areas of sufficient density; Coordinate, integrate and promote all public transportation operations. ("Maintaining Mobility," submitted as Exhibit C to State's Response to Complaint, p. 10). These, as well as other objectives, have guided the continuing and comprehensive planning process for the northeastern New Jersey area, and have resulted in a series of UMTA-funded projects, including both capital and operating assistance, to meet these locally determined goals.

Under the program of operating assistance authorized by Section 5 of the UMT Act, the State of New Jersey, through the Commuter Operating Agency (COA) of the New Jersey DOT, has received grants for eligible operating assistance for each fiscal year since 1975. Under the program of capital assistance authorized by Section 3 of the UMT Act, UMTA has made a number of grants to NJDOT, benefitting both rail and bus services. Under the provisions of Section 17 of the UMT Act, emergency operating assistance for Conrail has also been made available.

Independent of the federal program of assistance is New Jersey's own statutory program of operating assistance to motor bus carriers within the State. There are two such programs authorized by State law, whereby contracts are entered into between the COA and motor bus carriers. N.J.S.A. 27:1A-19 provides the following:

> "The agency may enter into contracts with any motor bus carrier or carriers to operate passenger service which the agency shall determine (a) to be necessary to provide or encourage adequate commuter or intercity bus service and (b) would not otherwise be provided or made available without State assistance. Payment by the agency for such passenger service shall be based on the actual cost of such service to the motor bus carrier plus a 6% return on investment."

N.J.S.A. 27:1A-28.7 further provides as follows:

> "The Department of Transportation is hereby authorized to contract with any motor bus carrier operating bus or rail transit service in the state which is in imminent danger of terminating all bus services or all rail transit services provided by said motor bus companies to insure the continuance of that portion of the bus and rail transit services which is essential. Payment by the Department under such a contract shall not exceed the actual cost to the motor bus carrier for providing such services and shall not include any return on investment."

11/ The requirements for the transportation planning process are contained in the regulations jointly issued by UMTA and the Federal Highway Administration, 40 Fed. Reg. 42976 et seq. (September 7, 1975); 23 CFR Part 450 and 49 CFR Part 613.

Since the State operating assistance program was initiated in 1970, 34 private bus companies have received more than $126 million in State subsidies. In Fiscal Year 1977 alone, over $42 million was distributed to 24 private companies. 12/ It must be emphasized, however, that such funds are authorized to be made available only under certain conditions. Payments under N.J.S.A. 27:1A-28.7 are restricted to bus companies which are in "imminent danger of terminating all bus services," and for services which are "essential." These are limitations imposed by the New Jersey State Legislature, and express the locally determined needs of the State.

The apportionment of State funds to private operators meeting the statutory criteria is affected by the availability of Federal financial assistance under Section 5 of the UMT Act. The application submitted to UMTA for Section 5 operating assistance (Attachment 5 hereto) specifies that the purpose of such assistance is to provide funds to Conrail and TNJ for operating expenses in Fiscal Year 1978. Counsel for the State explained in the November 17, 1978 conference that the reason that these two carriers alone are specified in the application is that the total amount of UMTA assistance available under the Section 5 formula is far less than the amount needed to provide assistance to all eligible carriers in the State. The difference is made up with State funds. (Attachment 4, p. 123). Therefore, the State's operating assistance program must be considered to include both State funds under the aforedescribed statute and UMTA funds made available under Section 5 of the UMT Act.

In addition to the program of operating assistance to bus companies, the State has purchased a large number of buses, with UMTA assistance. All such buses have been leased to private bus companies. 13/ Finally, the State provides operating assistance and, through UMTA grants, capital assistance, to the commuter railroads serving the State. (See attachment 5, p. 37).

12/ See Attachment 5, pp. 39-40. It is of interest to note that assistance payments were made to two of the Complainants, Hudson Bus Transportation Co. and Manhattan Transit Co. at various times during the 1970-77 period. While it is undeniable that one company, TNJ, has received the largest amount of such payments, e.g., over 70 percent of the total in FY 1977, assistance is available to any operator meeting the statutory criteria.

13/ See Attachment 5, p. 35. Again, it is noteworthy that each of the Complainants operates some number of State owned buses. Attachment 3, p. 12.

14

It is this program which the Complainants allege is violative of the "private enterprise" provisions of the UMT Act. Specifically, the Complainants claim that "the various programs are not designed or intended to encourage participation of private enterprise 'to the maximum extent feasible' but rather are designed and intended to cause the demise of private enterprise." (Attachment 1, p. 3). This is the essence of the complaint; and the discussion which follows will address those portions of Complainants' argument which we believe are relevant to a claim under the statutes at issue.

V. Discussion

The complaint is based upon a theory that the "private enterprise" provisions of the UMT Act prohibit competition between services which receive Federal assistance and those which operate without the benefit of such assistance. The Complainants claim that competition exists in their service areas, and has resulted in a situation whereby their federally assisted competitors can maintain fares at artificially depressed levels, thus gaining a competitive advantage. They claim that they cannot participate in the State's subsidy program, and thus maintain fares at comparable levels, because of the State's utilization of the subsidy program authorized by N.J.S.A. 27:1A-28.7, which does not permit recipients to earn a return on investments. They, therefore, conclude that the State's program discriminates against them, does not meet the requirements of the UMT Act, and should not receive any further UMTA assistance until the alleged statutory violations are corrected. (See Attachment 2, p. 5).

As will be further discussed below, we do not agree that the State's program violates either the letter or the spirit of the "private enterprise" provisions of the UMT Act. While we are aware of the need for NJDOT to reexamine many of its present policies and practices in order to further improve mass transportation services for the public and to execute a more efficient use of Federal mass transportation assistance funds, we reject Complainants' request that the State be precluded from receiving any further UMTA assistance.

A. The State Subsidy Program Is Not Inconsistent With the UMT Act.

Central to the complaint is the question whether the State subsidy program authorized by N.J.S.A. 27:1A-28.7 is consistent with Federal requirements. The purpose of the State program, as revealed by the very words of the statute, is to provide public funds to bus operators which are in "imminent danger of terminating all bus services. . . to insure the continuance of essential services." Such purpose is clearly consistent with the underlying purpose of the UMT Act, which is to alleviate the societal problems caused by "the deterioration or inadequate provision of urban transportation services." 49 U.S.C. 1601(a)(2).

Moreover, a basic fact which cannot be overemphasized is that virtually all of the recipients of such assistance are private mass transportation companies. In fact, the State subsidy program exists for the purpose of assisting such companies to continue their operations. 14/

The debate in Congress regarding the "private enterprise" provisions reveals that an overriding concern was the potential use of Federal funds to convert, unnecessarily, private operations to public ownership. The State of New Jersey has not used UMTA funds to convert private bus companies to public ownership. 15/ Rather, the State has decided to distribute available Federal funds and independently authorized State funds solely to private mass transportation companies. This, by itself, is persuasive in determining whether the State's program meets the requirements of the relevant statutes.

Complainants, however, raise the question of whether the implementation of a program which restricts itself to private companies in jeopardy of going out of business, and which provides payments not to exceed the actual cost of providing essential services without any return on investment, satisfies the requirement that the program "encourage to the maximum extent feasible the participation of private enterprise." There is no basis in the UMT Act for a finding that the preclusion of a return on investment as a condition to the receipt of operating assistance is inconsistent with the "private enterprise" provisions or that Congress intended UMTA to declare State statutory assistance programs, such as New Jersey's, improper. Rather, Congress made clear that local mass transportation programs are to be developed and operated according to local needs. As one court has noted, the UMT Act "emphasizes local solutions to problems." Pullman, Inc. v. Volpe, supra, 337 F.Supp. 439.

The legislature of the State of New Jersey, through the enactment of the State subsidy program statutes, has provided a local solution to the problem of private bus companies in jeopardy of going out of business. The Governor, through the State Department of Transportation, has further provided a local solution to the problem of carrying out the intent of the legislature in the absence of unlimited financial resources. That is, the State has chosen to operate under the program which does not permit a return on investment, although a 6 percent return would be permitted under the other State subsidy program statute. Such local determinations are well within the discretion of the local decision making bodies.

14/ Certainly, New Jersey is not unique in this respect. As complainants' counsel correctly indicated, several areas within UMTA Region II are presently served by private bus operators. See Attachment 4, p. 156.

15/ Yet, such use of UMTA funds is by no means prohibited. Section 2b of the Act specifically permits operation by "public or private mass transportation companies as determined by local needs." 49 U.S.C. 1601(b)(3). Section 3(e) permits, so long as "adequate compensation" is paid to such private companies, the acquisition of private companies by UMTA grantees. 49 U.S.C. 1602(e)(3).

B. The Provision of Assistance to Conrail Does Not Violate The UMT Act.

Complainants claim that New Jersey's program of mass transportation assistance discriminates against them in that a disproportionate amount of Federal assistance is made available to commuter rail operations. It is undisputed that while more passengers are carried by bus than by rail in New Jersey, more Federal assistance has been made available to the railroads than to the bus operators. Nevertheless, there is no basis for a finding that such funding is inconsistent with the "private enterprise" provisions, or any other provisions of the UMT Act.

Section 8 of the UMT Act declares that it is in the national interest "to encourage and promote the development of transportation systems embracing various modes of transportation in a manner that will serve the States and local communities efficiently and effectively." With respect to the rail transit mode, UMTA has issued a policy statement on Rail Transit which sets forth at length the rationale for Federal support of rail transit projects. 16/

More importantly, the local transportation planning process has identified the continuation and upgrading of rail services as a priority need for northern New Jersey. (See Transportation Improvement Program. Attachment 3, Exhibit D). This is consistent with the following statement from the area's Transportation Plan, "Maintaining Mobility":

> "The backbone of the public transport system is the rail network--subways and commuter railroads--capable of carrying large amounts of people at high speeds along fixed routes. Express buses provide high-quality service to areas lacking rail service. Local buses offer still wider coverage at slow speeds. Taxi and paratransit services meet special needs." (Attachment 3, Exhibit C, p. 3).

What is clear from the foregoing is that it has been recognized by both Federal and local decision makers that the various transportation modes serve different transportation requirements, and each mode should be considered on its own merits in deciding an area's particular mix of modes. Such consideration is properly the responsibility of local decisionmakers. We do not believe that it was the intention of the drafters of the "private enterprise" provisions to interfere with this process. Hence, we cannot agree with the complainants that "disproportionate" levels of assistance to the area's rail carriers violates the provisions of the UMT Act, so long as the program demonstrates that private mass transportation companies participate "to the maximum extent feasible."

16/ 43 Fed. Reg. 9428-30 (March 7, 1978). While UMTA's Policy Statement is intended to guide decisions on the design and construction of new rail transit facilities, it is nevertheless instructive for purposes of describing the national commitment to financing rail transit systems.

C. The "Private Enterprise" Provisions Do Not Prohibit Competition Between Federally Assisted Carriers and Carriers Which Do Not Receive Assistance.

The complainants emphasize that they are at a disadvantage because they must compete for passengers with TNJ and Conrail, both of which are recipients of assistance from the State and UMTA. The disadvantage results from fare differentials made possible, it is claimed, by their competitors receiving assistance. Complainants claim that this situation violates the "private enterprise" provisions to the extent that the State does not provide for a formula-based assistance program by which all operators would receive assistance based on passengers and passenger miles. 17/

T o state that the "private enterprise" provisions prohibit competition between assisted and unassisted private mass transportation companies is to misconstrue the requirements of those provisions. Section 3(e) of the Act states that in order to provide financial assistance for the purpose of operating mass transportation services in competition with services provided by an existing private mass transportation company, the UMTA Administrator must make certain findings, including that the assisted program, "to the maximum extent feasible, provides for the participation of private mass transportation companies." Therefore, when the Administrator makes such findings, competition may exist, as is expressly recognized by the statute.

It is nevertheless disturbing to recognize that the existing route structure in northern New Jersey may result in duplication of services and inefficiencies which may deleteriously affect not only the profitability of bus operations, but also the level of services being provided to the public, and the fares being charged for such services. The issue of the efficiency of New Jersey's bus program, in fact, has been addressed by UMTA, and there is a continuing effort underway to alleviate many of the problems identified by the Complainants. 18/ This is not to say, however, that a basis does not exist upon which the Administrator may make the findings required by the Act.

With respect to Complainants' contention that the relevant statutes require "parity" for all passengers in the area, (i.e., an assistance formula based on passengers and passenger miles), there is simply no basis whatever for such a requirement. To impose such a formula on the State would be allowing these operators "to write their own ticket." Westport Taxi Service, Inc. v. Adams, supra, p. 12.

17/ See, e.g., Attachment 2, pp. 13, 18, 24, 38; Attachment 4, pp. 5, 8, 17, 20, 28, 31, 60, 66, 69, 86, 93, 102, 156.

18/ Letter of November 16, 1978 from Hiram J. Walker to Robert A. Keith, Attachment 6. UMTA's concern regarding the State's bus program is discussed further, below.

13

D. There Is Ample Basis For A Finding That New Jersey's Program, To The Maximum Extent Feasible, Provides For The Participation Of Private Mass Transportation Companies.

Congress provided little guidance as to the meaning of the "private enterprise" provisions. By the use of general language, however, the statute gives the Administrator broad discretion in implementing the requirement. This discretion has been exercized on a case-by-case basis in determining whether the required findings can be made.

In the case of New Jersey's program, the record discloses ample evidence that private mass transportation companies participate to the maximum extent feasible. The program is premised upon an existing system of bus and rail services, all of which are operated by private companies. Through a combination of State and Federal programs, assistance is made available to continue essential services and to upgrade capital facilities and purchase new equipment. Any private operator may apply to the State for assistance, and any operator meeting the State's criteria may receive such assistance. While competition may exist between assisted and unassisted carriers, such competition is expressly authorized by the UMT Act as long as the required findings can be made.

However, the Complainants emphasize the effect which competition has on the fares which unsubsidized carriers can charge. Complainants state that they would apply for fare increases, but must maintain fares at depressed levels in order to remain competitive with subsidized carriers operating on the same or similar routes. The rail services offered by Conrail differ in kind from the services offered by the Complainants, and we therefore do not consider such services competitive. Competition among bus operators, while expressly authorized by the UMT Act, may indeed have an effect on the services provided to the public. This is an area which the State should examine to determine whether the mass transportation system is serving the public efficiently and effectively. 19/

In order to increase the efficiency and effectiveness of service, the State should examine existing routes, schedules, and fares to determine whether changes should be made to avoid unnecessary duplication of service. A State Reorganization plan, effective January 1, 1979, provides the State with this opportunity, and should help maximize efficiency in the provision

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19/ UMTA is prohibited from regulating in any manner the mode of operation of any mass transportation system receiving assistance under the Act. 49 U.S.C. 1608(d). This prohibition specifically includes the regulation of fares. Yet, the Act declares that mass transportation systems should serve the public "efficiently and effectively." 49 U.S.C. 1607(a).

of mass transportation services. 20/ The State is presently developing a program of capital projects for which UMTA assistance will be sought. As many as 1,000 buses are anticipated to be purchased, and bus related facilities may be constructed. This program provides the State with an additional opportunity to examine the needs of New Jersey's bus operators as well as the needs of the public. It is anticipated that the program may also include the construction of bus maintenance facilities and garages, park and ride lots and other supportive facilities, and that the buses purchased will be allocated among the State's many private bus operators in a rational and efficient manner.

The issues raised by the Complainants do not preclude the Administrator from making the required findings. It is not the purpose of this memorandum to provide a general statement on the issue of private participation in UMTA-assisted programs. Rather, we have been asked to examine the situation in New Jersey. That examination has revealed that certain problems exist, but that steps are being taken to resolve them. Our review of the State's program has not, however, revealed any substantive reason for withholding funds from New Jersey.

VI. Conclusion

The complaint of Hudson Bus Transportation Co. and the other private bus companies has been thoroughly considered. Complainants have had the opportunity to present their case to the Administrator through written submissions and at a conference with UMTA attorneys. The State has responded to the allegations contained in the Complaint.

The record developed in this proceeding is voluminous. As described herein, the record provides a basis for a finding that New Jersey's program, while requiring a thorough examination to correct certain problems, satisfies the requirements of the "private enterprise" provisions. Private mass transportation companies are provided, to the maximum extent feasible, opportunity to participate in New Jersey's program.

Complainants' request that UMTA not approve financial assistance to New Jersey should be denied.

20/ In the past, a number of agencies have had jurisdiction over the operations of New Jersey's bus operators. The Commuter Operating Agency of the Department of Transportation has had contractual control over the fares, routes and schedules of all subsidized mass transportation operators. The Board of Public Utilities has had jurisdiction over routes, fares and schedules of the nonsubsidized carriers. The Interstate Commerce Commission has had jurisdiction over the operations of interstate, trans-Hudson, operators. As stated by Governor Byrne, the former split in jurisdiction was "confusing, inefficient and duplicative and has hindered the development of a rational public transportation system in the State." On January 1, 1979, pursuant to a State Reorganization plan, the functions of the Board of Public Utilities as they apply to bus and rail operations, will be transferred to the Department of Transportation. (Governor's Message and Reorganization Plan appended hereto as Attachment 7).

File Charter 1602 (f)
UCC-1
Rendi

DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION
WASHINGTON, D.C. 20590

APR 5 1979

Mr. Dean A. Hetrick
General Manager
Greater Portland Transit
District (GPTD)
P.O. Box 1097
Portland, Maine 04104

Dear Mr. Hetrick:

The Urban Mass Transportation Administration (UMTA) has completed a review of the Greater Portland Transit District's (GPTD) charter operations. It is our determination that GPTD has engaged in charter operations outside of the urban area in which it provides regularly scheduled mass transportation services, without an agreement under section 3(f) of the Urban Mass Transportation Act of 1964, as amended, (49 U.S.C. § 1601, et seq.) (the UMT Act) and UMTA charter regulations, as amended, 41 F.R. 14122 (April 1, 1976). GPTD is therefore ordered to cease and desist from any charter operations outside of the urban area in which it provides regularly scheduled mass transportation services, as defined by the laws of the State of Maine. For the purposes of this order GPTD's urban area is defined to include the Cities of Portland, South Portland, and Westbrook. This order shall remain in effect for a period of three (3) years from the date of its issuance. During that time, and until such time as GPTD is eligible and applies for a charter agreement under section 3(f) of the UMT Act, GPTD shall submit annually to this office effective 30 days from the date of this order:

1. A complete description of all proposed charter operations within its urban area during the impending year;

2. An estimate of the number and type of buses which will be employed in the proposed service and a statement of their availability;

3. A certification of costs for the proposed charter operations. Such certification shall include all relevant expenses specified in Appendix B of UMTA charter regulations, 41 F.R. 14122 (April 1, 1976); and

4. A cost allocation plan.

GPTD is required to submit charter cost data to UMTA for a period of three (3) years from the date of this order although its charter activity during that period will be limited to the urban area in which it provides regularly scheduled mass transportation service. UMTA's decision to require this submittal was prompted by GPTD's charter activity outside of its urban area since the issuance of UMTA charter regulations on April 1, 1976. Because GPTD has not complied with UMTA's cost reporting requirements contained in the April 1, 1976 regulations, UMTA has been denied the opportunity to review the adequacy of GPTD's current charter rates. UMTA will therefore conduct such a review over the next three (3) years to insure that GPTD's charter rates are not designed to foreclose private carriers from the charter industry.

UMTA received a complaint from Brunswick Transportation Co., Inc. (Brunswick) dated May 19, 1978, and a subsequent complaint from Hudson Lines, Inc., (Hudson) both private carriers in Maine, alleging certain violations by GPTD of the UMT Act and UMTA charter regulations. On June 26, 1978, UMTA issued a Notice of Probable Violation (Notice) to GPTD citing possible violations of its charter bus regulations and the UMT Act. GPTD responded to the UMTA Notice by letter and supporting documents dated on July 28, 1978, setting forth why it believed it had not violated UMTA requirements. Brunswick submitted a rebuttal to the GPTD response on October 13, 1978. Hudson's response was submitted on October 12, 1978.

With respect to charter service outside of its urban area, GPTD has admitted in its response that it regularly contracts such charter without an appropriate agreement, in violation of UMTA regulations. GPTD alleges, however, that the amount of charter work done outside its urban area is not significant since such charters amounted to only 5 percent of its total charter work during the first six (6) months of 1978. GPTD further explains its lack of a charter agreement with UMTA as follows:

> "On March 25, 1975, a request for an Agreement with the Secretary of Transportation on charter rights was submitted to UMTA (copy enclosed). Subsequently the District was notified, verbally, to hold the request until final regulations were published in April, 1976, the District has filed one additional Section 5 grant application under the old application procedures. The old procedures were used for the calendar year (our fiscal year) 1977 because the application was nearly complete when UMTA Circular C 9050.1 was issued June 10, 1977 and received by us in July, 1977. Page two, paragraph two of C 9050.1 indicated that the old procedures were acceptable until January 1, 1978. The District is preparing the calendar year 1978, Section 5 application under the new procedures including Exhibit E: Charter and School Bus Operations.

> Section 604.20, Modifications of Agreements and Amendments of Application; and Section 604.21, Amendment of Application for Assistance, require the District to develop a certification of costs for its charter bus operations and send it with its proposed or existing charter bus operations and cost allocation plan to private charter bus operators whose service originates in the grant's urban area. The District had neglected to do this, but a certification of costs and a description of charter bus operations have been sent to Brunswick Transportation Co., Inc., the carrier whose service originates in South Portland, a city in our urbanized area. A copy of that certification is enclosed." (Attachment No. 1)*

The record indicates that GPTD did not send the certification mentioned above to Brunswick until July 27, 1978, one day before GPTD responded to the UMTA Notice. There is no indication in our records that GPTD ever sought final approval of Attachment No. 1 as a formal charter agreement.

We disagree with GPTD's position that the amount of charter work done outside of its urban area was not significant. Section 3(f) of the UMT Act provides in part as follows:

> "No Federal financial assistance under this Act may be provided for the purchase 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 such 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 . . . ." (emphasis added)

Under section 3(f) and UMTA regulations implementing it, any charter operations by a grantee outside its urban area subject that grantee to the charter regulations if that grantee grosses more than $15,000 annually (section 604.2) from its total charter operations.

In conclusion we find that GPTD operated charter service outside of its urban area without an agreement in violation of section 3(f) of the UMT Act and UMTA regulations issued thereunder. GPTD therefore

should not engage in any charter service outside of its urban area as defined herein. Such charters may not be originated or terminated outside of the urban area. Any violation of this order may be considered grounds to establish a pattern of continuing violations and may result in GPTD being barred from further assistance under the UMT Act.

Sincerely,
/s/ Margaret M. Ayres
Chief Counsel

Margaret M. Ayres
Chief Counsel

Enclosures

* To the extent that Attachment No. 1 complies with this order, it may be used as GPTD's initial filing under this order.

UMTA:PCOOK:dlc:2/9/79
cc: UCC-1 Reading
UCC-1 Chron
UCC-File--CHARTER COMPLAINT AGAINST GPTD
UCC-31 PCook

DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION
WASHINGTON, D.C. 20590

Mr. James C. Riffe
President
Chesapeake & Northern Transportation
Corporation
5604 Capelle Road
Portsmouth, Virginia 23703

JUL 12 1979

Dear Mr. Riffe:

Thank you for your letter of June 20, 1979, concerning the use of transit buses owned by the Tidewater Transportation District Commission (TTDC) in employee hauling (charter service). We are informed by your letter that TTDC has leased transit buses to the Betsy Corporation, and that the latter is using those buses in competition with your company in providing charter services. You have requested that we review that matter to determine if such actions violate section 3(f) of the Urban Mass Transportation Act, as amended (49 U.S.C. 1602(f)) (the UMT Act).

The Urban Mass Transportation Administration (UMTA) does not permit its grantees to use or allow the use of UMTA-assisted buses in any charter service which interferes with regularly scheduled mass transportation service. In this respect, any charter service offered by UMTA grantees or operators for such grantees must be incidental to the provision of mass transit service. No UMTA-assisted buses can be assigned primarily to charter service. Any such assignment would violate section 604.11 of UMTA's charter bus regulations, 41 F.R. 14122 (April 1, 1976) (copy enclosed), which were promulgated under section 3(f) of the UMT Act.

We have requested the UMTA Regional Office in Philadelphia to review this matter and determine whether TTDC is in compliance with our charter regulations, specifically with respect to its leasing of equipment to the Betsy Corporation.

We appreciate your bringing this matter to our attention. We will inform you of our findings and of any action we may take.

You may direct any further inquiry on this matter to our Regional Office Counsel, Ms. Nancy Greene, at 215/597-8098.

Sincerely,
/s/ Margaret M. Ayres
Chief Counsel

Margaret M. Ayres
Chief Counsel

Enclosure

UMTA:PCOOK:dla:7/10/79
cc: UCC-1 Reading
UCC-1 Chron
UCC-File--
UCC-31 PCook
Region III - N. Greene
UOA-10(2)
Control No. 004435 L

Charter

AUG 31 1979

Mr. Irwin J. Borof
Attorney At Law
125 Twelfth Street
Suite 105
Oakland, California 94607

Dear Mr. Borof:

I have received your letter, dated August 21, 1979, regarding A.C. Transit's charter operations. You have requested that A.C. be required to prescribe the specific boundaries of its service; your suggestion is that, since A.C. Transit's San Francisco service is limited to Treasure Island and the bus terminal, it should not be permitted to operate charter service throughout the city.

The UMTA regulations governing charter operations (49 C.F.R. Part 604) require that a grant recipient engaging in charter operations outside the urban area within whichiit provides regularly scheduled mass transportation service and from which it derives more than $15,000 in revenue, must enter into a charter agreement with UMTA to ensure that UMTA assistance is not used in support of charter operations. "Urban area" is defined as "the entire area in which a local public body is authorized by appropriate local, State, and Federal law to provide regularly scheduled mass transportation service", which includes all areas within the urbanized area served by the operator.

A.C. Transit provides regularly scheduled service within the San Francisco-Oakland urbanized area and is, therefore, not required to enter into a charter agreement, as long as its charter service remains within that area. Any other interpretation of the regulation would result in the limitation of charter operations to only these areas which are served by A.C. routes.

Sincerely,

MJM

Melanie J. Morgan
Regional Counsel

cc: Mr. Nisbet, A.C. Transit

MORGAN/ddb 083079

charter

DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION
WASHINGTON, D.C. 20590

DEC 27 1979

Donald J. Ellis, Esquire
Troutman, Sanders, Lockerman
and Ashmore
Attorneys at Law
Candler Building
Atlanta, Georgia 30303

Dear Mr. Ellis:

The Urban Mass Transportation Administration (UMTA) has completed a review of the charter bus operations of the Metropolitan Atlanta Rapid Transit Authority (MARTA) as a result of an April 7, 1978, complaint filed by Tamiami Tours, Inc., and Continental Tennessee Lines, Inc., both doing business as Trailways (Trailways). It is our determination that MARTA has not engaged in charter bus operations in violation of either section 3(f) of the Urban Mass Transportation Act of 1964, as amended (the UMT Act), UMTA Charter Bus Regulations, 49 CFR Part 604, or MARTA's charter bus agreement with UMTA submitted under the preceding requirements.

UMTA received a complaint from Trailways dated April 7, 1978, alleging certain violations by MARTA of the UMT Act and UMTA charter regulations. Specifically, Trailways made the following allegations which will be addressed individually herein.

1. MARTA's charter operations violate Federal laws and regulations;

2. MARTA has violated its agreement with UMTA concerning the operations of charter bus service;

3. MARTA's federally subsidized low charter rates are foreclosing private enterprise;

4. MARTA's charter bus rates are not producing income equal to or greater than the costs of providing such service, thus converting Federal assistance to a subsidy for charter operations;

5. MARTA's charter bus operations have interfered with MARTA's primary urban mass transit functions;

   (a) MARTA has provided charter bus service during weekday morning and evening rush hours;

   (b) MARTA has provided weekday charter bus service requiring the use of a particular bus for longer than six hours in any one day;

   (c) MARTA has provided charter bus service beyond its urban area as if it is a private interstate charter bus operation;

6. MARTA has engaged in certain practices in an effort to avoid the limitations on the use of federally financed equipment and facilities in charter bus operations; and

7. MARTA's illegal acts and practices compel remedial action by UMTA.

On April 21, 1978, UMTA issued a Notice of Probable Violation (Notice) to MARTA citing possible violation of its charter bus regulations and the UMT Act. MARTA responded to the UMTA Notice by letter and supporting documents dated June 1, 1978, setting forth why it believed it had not violated UMTA's requirements.

On June 15, 1978, a hearing was held on the Trailways complaint at the UMTA Region IV office in Atlanta, Georgia. Both Trailways and MARTA were represented by counsel at this hearing. Both presented witnesses and documentary evidence, which along with the official transcript of this matter, and all documents received in evidence up to and including those filed by MARTA dated August 9, 1978, constitute the official record.

At the June 15 hearing, counsel for Trailways moved to strike MARTA's reply to the Trailways complaint. In that reply, MARTA alleges that charter bus operations are permitted by both state and Federal law. Trailways alleges that charter service is not permitted under MARTA's enabling legislation or under any Federal statute. MARTA opposed the Trailways motion to strike on the grounds that Trailways was raising a new issue at the hearing which was not previously raised in its complaint, i.e., whether MARTA was authorized to engage in charter operations by its enabling legislation. The hearing officer agreed that the issue raised by Trailways was a new one which had not been previously raised by the Trailways complaint. However, since the issue was relevant, the hearing officer agreed to allow Trailways to submit evidence in support of its position that MARTA's enabling legislation does not allow MARTA to engage in charter service. Such

evidence was to be submitted along with Trailways' response to MARTA's reply of June 1, 1978, which was due approximately thirty (30) days subsequent to the filing of the reply by MARTA. MARTA was allowed twenty (20) days after the filing of the Trailways' response to rebut the new issue raised by Trailways. The hearing officer stated that upon the filing of the rebuttal by MARTA, the record in this matter would be closed to further submittals. (See Transcript pages 127-135). The disposition on all preliminary motions was to be addressed in the decision by UMTA on the Trailways complaint.

The Trailways motion to strike portions of MARTA's reply of June 1, 1978, concerning its authority to engage in charter service is denied. The Attorney General of Georgia in Opinion 73-60, May 4, 1973, has expressly ruled on MARTA's authority to provide charter service inside of its urban area by the following statement:

> "MARTA is a public body corporate created as a joint instrumentality of the participating governments existing for the purpose of establishing and administering '... a rapid transit system within the metropolitan area ...' Ga. Laws 1965, pp. 2243, 2252, Sections 3, 7. The responsibility of MARTA with respect to a 'rapid transit system' includes the 'right to provide group and party service'. Id. Sections 2(g), and 2(i) ... it is clear, therefore, that MARTA does have the authority to provide charter service ...."

The Attorney General also answered in the affirmative the question of whether MARTA could, under State law, provide charter service outside the metropolitan Atlanta area by the following statement:

> "... it follows that MARTA may provide charter service for trips originating within the metropolitan area, but extending beyond those borders where it concludes that such charters are reasonably necessary to serve its statutorily mandated objective within the metropolitan area."

The above portions of the opinion of the Georgia Attorney General provides a sufficient basis for UMTA to find that MARTA is authorized under State law both to engage in charter service and to engage in charter service outside of its urban area. In this respect, UMTA is not persuaded by Trailways arguments that the decision of the Attorney General of Georgia should not control this issue because such opinion is not binding as law. As authority for its position that the Attorney General's decision should not be followed, Trailways cites Gable Industries, Inc. v. Blackman, 233 Ga. 542 (1975). That opinion, however, merely states that the Attorney General's opinion is not binding on the courts. In this matter, where no court opinion is available to aid UMTA in

deciding the issue presented here, our view is that the opinion of the Attorney General should be given great weight, particularly since the issue to be decided involves an interpretation of a local statute. Therefore, it is our opinion that MARTA is permitted by its enabling legislation to engage in charter bus operations both inside and outside of its urbanized area.

Counsel for Trailways also moved to strike Exhibits 1 and 4 of MARTA's reply of June 1, 1978. Trailways contends that the letters in Exhibit 1 complimenting MARTA for the quality of its charter service cannot be used as a basis to establish the lawfulness of that service. We agree that public support for charter service does not affect the legality of that service under UMTA requirements. The Trailways motion is granted on the grounds that Exhibit 1 is not relevant to the purpose of this review which is to determine the legality of MARTA's charter service. However, Trailways' motion to strike Exhibit 4 which describes the scope of MARTA's charter service is denied on the grounds that Exhibit 4 is relevant in establishing the magnitude of MARTA's charter operations.

Counsel for Trailways also moved to strike paragraph 1 of page (6) of MARTA's June 1, 1978, response which provides as follows:

> "In summary, the Authority's charter service has historically been an incidental but essential service that addresses a specific transportation need, recognized by Congress in the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. § 1602(f)) (hereinafter referred to as the "UMT Act").

Trailways' grounds for objection is that MARTA "... is basically saying that the provision of charter service addresses a specific transportation need recognized by Congress in the Urban Mass Transportation Act of 1964, as amended. This is clearly not so and should be deleted and not considered for the purpose offered." The Trailways motion is denied on the grounds that the statement by MARTA is supported by the existence of section 3(f) of the UMT Act and the December 7, 1966 decision of the Comptroller General of the United States (supra) which indicate that Congress recognized that transit operators would carry out charter service and that such services do in fact address a specific transportation need.

Finally, Trailways moved to strike the questions posed by William C. Nix, Director of Transportation, Engineering and Evaluation for MARTA, to John Spellings of Trailways on cross examination concerning the convenience of arranging service among private carriers. The grounds for objection is that MARTA cannot justify its charter service on the basis of the need for that service. Trailways further states that Mr. Nix's questions imply that because no one carrier can provide

sufficient buses to provide charter service to the metropolitan area, some people will go without service. [Page 98-99, Hearing Transcript, June 15, 1978]. The Trailways motion is denied. We agree that need alone does not justify MARTA providing charter service. However, as we have determined earlier, we find that such service is permitted under section 3 of the UMT Act.

We now address specifically the allegations of the Trailways complaint of April 7, 1978. Trailways first alleges that MARTA's charter bus operations violate Federal laws and regulations. The UMT Act authorizes Federal funds to finance the acquisition, construction, reconstruction, and improvement of facilities and equipment for use in mass transportation. The term "mass transportation" is defined in section 12(c)(6) of the UMT Act to mean "...transportation by bus, or rail, or other conveyance, either publicly or privately owned, which provides to the public general or special service (but not including school buses or charter or sightseeing service) on a regular and continuing basis." (emphasis added). UMTA is prohibited from assisting in the purchase or operation of equipment which would be used primarily 1/ in charter bus operations under this definition and under section 3(f) of the UMT Act which in its entirety provides 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 such 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 financial assistance granted under this chapter will not enable public bodies and publicly and privately owned operators for public bodies to foreclose private operators from the intercity charter bus industry where such private operators are willing and able to provide such service. (emphasis added).

1/ While section 12(c)(6) of the UMT Act prohibits the agency from making a bus grant expressly for the purpose of providing charter service, the Comptroller General of the United States in opinion B-160204, December 7, 1966, has ruled that buses purchased with UMTA funds may be used in incidental charter service. In that opinion, the Comptroller General stated "...we are of the opinion that any lawful use of project equipment which does not detract from or interfere with the urban mass transportation service for which the equipment is needed would be deemed an incidental use of project equipment, and that such use of project equipment is entirely permissible under our legislation."

Section 3(f) of the UMT Act reflects amendments to that section by section 813(b) of the Housing and Community Development Act of 1974, August 22, 1974 (P.L. 93-383, 88 Stat. 633). Before those amendments all charter service by UMTA grantees outside of the grantee's service area was prohibited by section 164(a) of the Federal Aid Highway Act of 1973 which, prior to its repeal 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), (2), and (3) of this subsection."

Section 3(f) of the UMT Act differs from section 164(a) of the Highway Act in that section 3(f) expressly allows UMTA grantees to engage in charter bus operations outside the grantee's urban area in competition with private carriers so long as such charter operations are carried out pursuant to an agreement which the Secretary of Transportation finds to contain fair and equitable arrangements for protection of the economic interest of competing private carriers.

The April 1, 1976 UMTA charter bus regulations implement section 3(f) of the UMT Act by setting forth the terms which are "fair and equitable" in the opinion of the Secretary to protect the economic interests of private charter operators. At the same time, the regulations are designed to establish minimum conditions under which all public operators may engage in charter bus operations in competition with private carriers and yet not foreclose the latter from the intercity charter bus industry.

The basic thrust of the regulations is twofold: (1) they require grantees who engage in charter bus operations outside of their urban area to assure that Federal assistance is not used to subsidize charter operations by certifying that revenues generated from those operations are equal to, or greater than the cost of providing that service; and (2) they codify the "incidental" charter restrictions on the use of Federally-assisted equipment which the Comptroller General set forth in his opinion of 1966. (Comptroller General of the United States, B-160204 (December 7, 1966)). (See Appendix B, UMTA Charter Bus Regulations, 41 F.R. 14122, April 1, 1976).

With respect to the economic thrust of the charter regulations, grantees are required to certify that they have taken into account those expenses outlined in Appendix B of the charter regulations in developing their charter rates. In addition to the expenses outlined in Appendix B, grantees are also required to add depreciation on all Federally-assisted buses and taxes as expenses.

The certifications made by grantees are made available to private carriers under section 604.18 of the charter regulations prior to UMTA approval of a charter agreement. Private carriers have the opportunity to comment on these certifications either at a public hearing or through written comments which are forwarded to UMTA by the grantee. In addition to commenting on the grantee's certification, private carriers are also allowed to state their objections to a grantee's charter operations.

If such objections state a legally sufficient basis for UMTA to limit or prohibit a grantee's charter operations under the UMTA charter regulations, appropriate action will be taken by UMTA.

MARTA's first request for a charter agreement under UMTA charter bus regulations was made in September 1976. Upon approval of documentation submitted by MARTA on September 10, 1976, UMTA approved an interim charter agreement which allowed MARTA to conduct charter service outside of its urban area for a period of sixty (60) days pending approval of a final charter bus agreement. [See MARTA Exhibit 3 in its April 7, 1978 reply to the Trailways Complaint].

On November 2, 1976, UMTA gave unconditional approval of MARTA's request for a charter agreement. An approved charter agreement remains in effect for twelve months unless an UMTA grantee makes major changes in its charter operations within that time period. Upon the expiration of its November 2, 1976, charter agreement, MARTA requested a new agreement by letter and supporting documents dated October 7, 1977. 2/ In response to MARTA's October 7 request, UMTA approved its charter agreement on December 5, 1977. The December 5 charter agreement was in effect at the time the Trailways complaint was filed. Therefore, to the extent that section 3(f) of the UMT Act and UMTA charter regulations require a charter agreement as a condition of operating charter service outside of a grantee's service area, it is our finding that MARTA has met those requirements as evidenced by the referenced approved charter agreements with UMTA. We therefore find that MARTA's operations are not in violation of Federal laws and regulations. The extent to which MARTA has fulfilled the commitments made in its agreements will be discussed further herein.

2/ The Transcript of the public hearing conducted by MARTA on its proposed charter operations indicate that Trailways representatives appeared at the hearing. That testimony opposing MARTA's charter services is a part of that record. However, the objections put forth by Trailways at the hearing did not establish a legal basis for denying approval of MARTA's charter agreement under the UMTA charter regulations.

The following allegations by Trailways will be discussed together because of their general relationship: MARTA has violated its agreement concerning the operation of charter services; MARTA's Federally subsidized low charter rates are foreclosing private enterprise; and MARTA's charter bus rates are not producing income equal to or greater than the costs of providing such service, thus converting Federal assistance into a subsidy for charter operations. The extent to which MARTA has complied with its charter agreement with UMTA can be clarified by a discussion of the regulations which require that agreement. Section 604.15 of UMTA charter regulations as amended, 41 F.R. 56651 (December 29, 1976) provides that "each applicant who engages or wishes to engage in charter bus operations outside of its urban area shall include the following in its application...a certification of costs and ...a cost allocation plan... ." Under section 604.3 of the charter regulations, "Certification of costs" and "cost allocation plan" are defined, respectively, as follows:

> "Certification of costs" means a statement prepared using generally accepted accounting principles, consistent with a grantee's regular accounting methods, and certified to be true and accurate by a grantee's chief financial officer. This statement indicates the elements of cost that are attributable to a grantee's charter bus operations. A grantee's statement must include depreciation expense on federally-assisted buses, facilities and equipment as an element of cost, and State and Federal taxes, whether or not the grantee is required to pay such taxes. This statement shall also give assurance that the revenues generated by charter bus operations are, and shall remain, equal to or greater than the cost of providing the service. ..."
>
> "Cost allocation plan" means the documentation identifying, accumulating, and distributing costs attributable to charter bus operations together with the allocation methods used."
>
> [See 604.3, 41 F.R. 14123, April 1, 1976].

MARTA's charter agreement for fiscal year 1977, approved December 5, 1977, complies with the above requirements. MARTA's certified cost statement indicates that MARTA charter revenues exceeded its charter expense by $35,738 during that period after appropriate treatment of: (a) relevant expenses listed in Appendix B of the regulations, (b) $70,407 for depreciation of Federally-assisted equipment, and (c) $12,323 for State and Federal taxes. (The latter items, depreciation and taxes, are not actual expense items, but are required by the charter regulations in order to ensure that grantee charter rates are not so artificially low in comparison to those of private carriers by virtue of Federal subsidy or tax exempt status as to foreclose private carriers from the charter industry).

MARTA's cost allocation plan indicates that charter costs were determined by the ratio of total charter miles to total miles traveled by MARTA. The rate derived by that comparison provides a basis for determining charter costs as a percentage of total cost which are uniformally applied on a system-wide basis. UMTA's review of MARTA's certification of cost and cost allocation plan indicated that it was prepared using generally accepted principles of accounting and was consistent with MARTA's regular accounting methods. It also indicated that costs were less than revenues.

Trailways has not challenged specifically any element of expense in MARTA's certified cost statement, nor has Trailways challenged MARTA's method of cost allocation. The following dialogue from the June 15, 1978 hearing illustrates this point:

> MR. COOK: (Hearing Officer) Do you challenge any specific element of expense which they have listed?
>
> MR. ELLIS: (Trailways) We challenge the document, and our accountants have analyzed this document. And due to the lack of information system-wide for the MARTA System, they have told us that they're unable to make a judgment on that that they would rely on without knowing all the System's figures. However, they did state to us that there were several factors in the cost allocation plan which they questioned, and we have reserved that issue for our supplemental brief or our response. And at that time, we will make such response as we deem appropriate.
>
> [Pages 193-194, transcript, June 15 hearing].

Trailways' supplemental brief of July 11, 1978, did not specifically challenge MARTA's certification of cost or cost allocation plan, or any element thereof. That brief did, however, discuss the issue of whether MARTA's charter rate is foreclosing Trailways from the charter industry because its charter rate is lower. [Pages 26-37, Trailways response of July 11, 1978]. UMTA's regulation does not provide for the setting of rates by comparison to those of private carriers. The adequacy of a grantee's charter rate should be determined by the expenses incurred by the grantee as reflected in Appendix B of the charter regulations, plus taxes and depreciation on Federally-assisted equipment and must be reasonable by comparison to such documented costs. Private carriers determine their charter rates based on their expenses plus a desired rate of profit. Both expenses and profit margins vary significantly among carriers. UMTA charter regulations attempt to establish a basis for a reasonable charter rate for grantees notwithstanding these variables in determining rates among competing carriers. As a result of the expenses which grantees are required to take into account in determining their charter rates, grantees are placed on an equal footing with private carriers with respect to expenses relating to charter service. Other factors such as the type of equipment offered, the level of service

provided and the availability of such service provide additional subjective criteria which go into the setting of a charter rate, and also provide additional reasons why UMTA grantees should be allowed to establish charter rates within the general parameters of the regulations.

On the issue of foreclosure, Trailways states that "...if the intent is to foreclose competition from private carriers by gaining an unfair competitive advantage through a lower price, then the charter rate is illegal." [Page 28, Trailways July 11, 1978 response]. It is within this context that Trailways has specifically challenged MARTA's "charitable" rate under which certain non-profit organizations are provided charter service at a reduced rate. Section 604.13 of the charter regulations incorporates by reference the following provisions in each approved charter agreement:

> The grantee, or any operator of project equipment, agrees that it will not establish any charter rate which is designed to foreclose competition by private charter bus operators.
>
> The grantee agrees that it will not engage in any practice which constitutes a means of avoiding the requirements of this agreement or part 604 of the Urban Mass Transportation regulations.

MARTA offers the following justification for the existence of its charitable rate:

> Prior to July 1, 1974, the MARTA charter tariff made no distinction in its rate structure with respect to the status of the chartering party. All groups were quoted the same rate and all groups were subject to a three-hour minimum charge. Under urging by the private sector, however, the Board considered and approved a five-hour minimum charge, along with various other increases in rates for charter service. Currently, the regular rate represents a five-hour minimum time charge, and the special rate represents a three-hour minimum time charge. The Authority's current charter tariff is attached as Exhibit 18, and the Authority's proposed tariff charter is attached as Exhibit 19.
>
> The special rate was established to assist non-profit institutions with limited funds, which have need for charter services of short duration, and who should not, in the opinion of MARTA's Board of Directors, pay excessive charges for time not needed or used. Thus, elimination of the requirement to pay for time not

> needed or used is the thrust of the non-profit rates, as opposed to any discount or bargain rate. For the first three hours, the charge per hour for charter services is the same under the regular rate as it is under the special rate. Although the current charge for each additional hour under the special rate is somewhat less than the charge for each additional hour under the regular rate ($15.00 as opposed to $16.00), the purpose of the special rate has always been to make charter services available to groups and organizations with limited funds, and for short durations--institutions which might otherwise be foreclosed from the use of charter service altogether.
>
> [Page 20, MARTA response of April 7, 1978].

It is our finding that the above offers an adequate explanation for the existence of MARTA's special rate and that because MARTA's overall charter revenues exceeded costs as required by the regulation, the special rate does not foreclose competition by private carriers. Notwithstanding this finding, however, UMTA will require that all future special rates be submitted with MARTA's request for a charter agreement and that such rates be specifically approved by UMTA.

Finally, Trailways raises the following related issues regarding MARTA's charter operations: MARTA's charter bus operations have interfered with MARTA's primary urban mass transit functions; MARTA has provided charter bus service during weekday morning and evening rush hours; MARTA has provided weekday charter bus service requiring the use of a particular bus longer than six hours in one day; and, MARTA has provided charter bus service beyond its urban area as if it is a private interstate charter bus operation. Section 604.11 of UMTA charter bus regulations regulates the use of equipment purchased under an UMTA grant as follows:

> (a) No grantee or operator of mass transportation equipment shall engage in charter bus operations using buses, facilities, or equipment funded under the Act except on an incidental basis in strict compliance with the Opinion of the Comptroller General of the United States, B-160204, December 7, 1966, in Appendix A of this part.
>
> (b) Any of the following uses of mass transportation buses in charter bus operations will be presumed not to be incidental:

(1) Weekday charters which occur during peak morning and evening rush hours;

(2) Weekday charters which require buses to travel more than fifty miles beyond the grantee's urban area; or

(3) Weekday charters which require the use of a particular bus for more than a total of six hours in any one day.

To rebut these presumptions a grantee must establish in its agreement to UMTA's satisfaction that its proposed use of a bus in charter service during weekday rush hours, during weekdays more than fifty miles outside of its service area or during weekdays for more than six hours in a single day, will not interfere with its obligation to provide regular transit service. MARTA's approved charter agreement of December 5, 1977 indicates the peak AM and PM requirements for MARTA buses. These requirements are further established by MARTA Exhibit 11 in its April 7, 1978 reply. By those documents, MARTA has shown the times during which buses are in service and the times during which those buses are idle. By its submittal, MARTA has established that, because of the variations of routes serviced by its buses and the differing times during which those routes are served, MARTA has as many as 18 buses available for charter service during the AM peak period and 32 during the PM peak period during weekdays. The evidence presented in this matter does not establish that MARTA has booked any charters in excess of those available buses or that those buses are not available for transit needs or that MARTA has too many transit buses to meet its peak hour need. In this regard, MARTA has established that the peak period must be defined in terms of the use of the particular bus in question and has therefore overcome the presumption established in section 604.11 of the charter regulations that charter service performed during the peak period is a violation of the regulations. MARTA has shown that not all buses are used throughout the peak rush hour period for the City of Atlanta. Some buses operate on as few as one route during the day and therefore are idle during the greater part of the day. This is a natural consequence of UMTA's policy of funding a grantee's peak period requirements. The Comptroller General made the following observation of that practice by this agency:

> "One of the basic facts of urban mass transportation operations is that the need for rolling stock is far greater during the morning and evening rush hours on weekdays than at any other time. For that reason, any system which has sufficient rolling stock to meet the weekday rush-hour needs of its customers must have

> a substantial amount of equipment standing idle at other times, as well as drivers and other personnel being paid when there is little for them to do. To resolve this inefficient and uneconomical situation, quite a number of cities have offered incidental charter service using this idle equipment and personnel during the hours when the same are not needed for regularly scheduled runs. Among the cities so doing are Cleveland, Pittsburgh, Alameda, Tacoma, Detroit and Dallas.
>
> "Such service contributes to the success of urban mass transportation operations by bringing in additional revenues and providing full employment to drivers and other employees. It may in some cases even reduce the need for Federal capital grant assistance.
>
> [Appendix A, 41 F.R. 14126, April 1, 1976].

If a bus has served its primary function, the provision of mass transit service, UMTA has no objections to that bus engaging in the charter operations mentioned in section 604.11(b)1-3. It is therefore our finding that MARTA's charter service does not interfere with its provision of mass transit service and that such charter service does not violate UMTA charter regulations.

Trailways also alleges that MARTA's recordkeeping process does not disclose the number of miles away from the urban area which a bus travels nor do the records show the total number of hours that buses are actually used on weekdays. According to Trailways, the records either show an estimated duration of the charter trip or no estimation at all. [Page 17, Trailways' complaint, April 7, 1978]. This practice by MARTA is alleged to violate section 604.13 of the charter regulations which incorporated by reference the requirement that:

> The grantee agrees that it will not engage in any practice which constitutes a means of avoiding the requirements of this agreement or part 604 of the Urban Mass Transportation regulations.

MARTA offers the following response to the Trailways allegation:

> MARTA is not in violation of its Agreement with UMTA, since it keeps and has kept complete records of its charter service activities. The two items of information which both Mr. Spellings and Mr. Bach allege were not recorded, were readily available on both occasions when those two representatives visited

> the MARTA Operating Facility at 125 Pine Street, N.E., in Atlanta. Those gentlemen examined only the file copies of charter order forms for the period in question. However, if these gentlemen had made known the information which they were seeking, they would have been directed to the operating copy of the same charter form. On that final copy, actual duration and actual distance outside the urban area are recorded, but only after the trip is completed, a practice which is only to be expected. Moreover, as the affidavit of Mr. H. R. Kilgo, Chief of Charter Services for MARTA, shows, (Exhibit 25), the Trailways representatives asked for operator pay tickets and additional specific information which was not kept at the location of Mr. Kilgo's office. They were advised as to where the information was located, but apparently were unwilling to travel to the location where that information was kept.
>
> [Page 26-27, MARTA reply, June 1, 1977].

Based on the above response by MARTA it is our view that MARTA has not engaged in a practice which constitutes a means of avoiding requirements with respect to its charter recordkeeping process.

Therefore, for the reasons stated herein, it is our finding that MARTA is not in violation of section 3(f) of the UMT Act, UMTA charter regulations or MARTA's charter bus agreement with UMTA.

Sincerely,

Prentis Cook, Jr.

Prentis Cook, Jr.
Attorney-Advisor

Charter + School Bus Operations

DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION
WASHINGTON, D.C. 20590

DECISION
Charter and Sightseeing Operations

San Antonio Sightseeing, Inc.
Complainant

V.

San Antonio Metropolitan Transit Authority
Respondent

I. Summary

This decision is the result of an investigation into the sightseeing and charter bus operations of the San Antonio Metropolitan Transit Authority (SAMTA). The investigation disclosed that SAMTA has substantially complied with restrictions imposed on charter and sightseeing activities of UMTA grantees by the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. §1601 et seq.), and the Act's implementing regulations. (49 CFR Part 604) Some isolated violations were found and are ordered corrected by this decision; however, no pattern or practice of violations was disclosed by the investigation into the respondent's operations.

II. Background

UMTA received a complaint filed against SAMTA on August 2, 1979, by San Antonio Sightseeing, Inc., (D/B/A B&T Fuller Double-Decker Bus Co.) through its President, Thomas M. Fuller. The complainant alleged that SAMTA is engaging in charter and sightseeing operations in violation of 49 U.S.C. 1602(f)(Section 3(f) of the Urban Mass Transportation Act of 1964, as amended (the "UMT Act")), and UMTA's implementing regulations set out in 49 C.F.R. 604 et seq. Specifically, the complainant alleged that SAMTA "has pursued and is continuing to pursue acts which are in controvention of the express policy of the Administration, in that said acts are designed to foreclose willing and able private operators."1/

These acts are alleged to include: the payment of charter and sightseeing tour discounts, commissions, and tips; the use of Federally funded equipment in SAMTA's sightseeing operations; the use of excess buses in charter operations; and the use of UMTA assisted buses for sightseeing and charter operations during peak mass transit hours.

1/ Complaint, page 2

These practices are alleged to be in violation of 49 C.F.R. 604.13(5). The Complainant requests that UMTA order the Respondent, SAMTA, to cease and desist from engaging in the practices complained of, and require SAMTA to dispose of 58 transit buses alleged to to be in excess of its needs. 2/

Supporting the complaint are various exhibits. 3/

III. Responses to the Complaint

The Respondent, SAMTA, has asserted as its defense that:

A. 49 C.F.R. Sections 604.13-604.18 do not apply to its charter and sightseeing operations since SAMTA conducts no charter or sightseeing operations outside the urban area within which it provides regularly scheduled mass transportation services.

B. None of the buses used for sightseeing service are Federally funded. Thus, the presumptions concerning prohibited uses in Section 604.11 do not apply; and the remainder of Part 604 does not apply to sightseeing services since the activities are conducted within the recipient's urban area.

C. SAMTA maximizes the use of non-Federally funded buses in its charter bus operations, with Federally funded buses and equipment used only "incidentally." Such use is in substantial compliance with the Opinion of the Comptroller General of the United States, B-160204, December 7, 1966.

D. All expenses incurred in providing charter and sightseeing services are fully allocated and covered by revenue from such operations, in accordance with an UMTA approved cost allocation plan, and are assumed entirely by SAMTA with no Federal financial participation.

E. Sightseeing services provided with non-Federally funded buses are specifically excluded from the definition of "charter bus operations."

2/ Complaint, pages 4 and 5.

3/ Those exhibits include Exhibit 1, an Ordiance, which grants a franchise to San Antonio Sightseeing, Inc., to operate sightseeing services in the City of San Antonio; Exhibit 2, a "special notice" promoting the 50% discount coupons by SAMTA; Exhibit 3, a VIA Metropolitan Transit Budget Performance Report dated June 1979; Exhibit 4, an advertisement promoting sightseeing "via Gray Line"; and Exhibit 5, which includes a newspaper article published in the San Antonio Express/News, Sunday, March 18, 1979, a "roster of equipment."

Supporting the response are various exhibits. 4/

Supplementary correspondence was submitted by the parties in further support of the positions taken by each party on the issues in this case.

IV. Findings and Determinations

A. Sightseeing Operations

To determine whether the complainant's allegations are substantiated, the initial point of review must begin with a determination of: (1) whether sightseeing operations are eligible for UMTA assistance and (2) whether UMTA assistance is being used to support the sightseeing operations. This question initially leads us first to examine Section 12(c)(6) of the UMT Act (49 U.S.C. §1608(c)(6) which defines "mass transportation" for purposes of determining the eligibility of projects for Federal financial assistance. That section states:

> The term "mass transportation" means transportation by bus, or rail, or other conveyance, either publicly or privately owned which provides to the public general or special service (but not including school buses or charter or sightseeing service) on regular and continuing basis.

Section 12(c)(6) thus plainly distinguishes three separate categories of bus service from "mass transportation" that are not eligible for UMTA assistance: school bus and charter and sightseeing service. However, the UMT Act does not define the three ineligible bus services. UMTA has administratively defined charter and school bus services in its implementing regulations. See 49 C.F.R. 604.3 and 605.3. Sightseeing service has not been defined in either set of regulations. Also UMTA has not issued any regulations specifically on sightseeing services. As a consequence sightseeing service remains undefined.

4/ Those exhibits are: Exhibit A, a map of the San Antonio urbanized area; Exhibit B, a roster of SAMTA equipment; Exhibit C, a map of metropolitan San Antonio; Exhibit D, a schedule of service dated September 4, 1979; Exhibit E, San Antonio MTA cost allocation plan and audit findings; Exhibit F, a schedule of sightseeing services offered by SAMTA: Exhibit G, a advertisement promoting San Antonio sightseeing service; Exhibit H, an expense and revenue statement for SAMTA charter and sightseeing services; Exhibit I, tariffs for San Antonio's sightseeing services from 1961 through 1979; Exhibit J, portions of an UMTA grant application for the amendment of UMTA grant TX-03-0005 proposing the retention of 100 GMC vehicles; Exhibit K, a letter signed by Glen Ford, Regional Director, UMTA, approving the amendment; Exhibit L, a "recap" or revenue miles and hours operated; Exhibit M, a final audit report for operating assistance grant TX-05-4032; Exhibit N, a response from C. L. Williamson, Comptroller and Treasurer, VIA Metropolitan Transit, to the final audit report and closeout to operating assistance grant TX-05-4032; and Exhibit P, a statement by SAMTA regarding the use of federally funded buses in school and charter bus operations.

Although the complainant claims that the charter bus regulations apply to sightseeing operations, it is our interpretation of the pertinent statutes and regulations that sightseeing service is a distinguishable albiet ineligible, activity from charter bus operations. Consequently, we conclude that the complainant's assertion that UMTA's charter bus regulations, 49 C.F.R. 604 et seq., regulate SAMTA's provision of sightseeing service is incorrect. This conclusion is supported by comparison of the UMTA definition of charter bus operations (see 49 C.F.R. 604.3) with the sightseeing operations actually conducted by the respondent.

Section 604.3 states:

> "Charter bus operations" means transportation by bus of a group of persons who, pursuant to a common purpose, and under a single contract, at a fixed charge for the vehicles or service, in accordance with the carrier's tariff, have acquired the exclusive use of a bus to travel together under an itinerary, either agreed on in advance, or modified after having left the place or origin. (This includes the incidental use of buses for the exclusive transportation of school students. personnel and equipment.)

The respondent's sightseeing operations have fixed itineraries, which users must accept or decline as is (see Respondent's response, Exhibit F); the respondent's sightseeing activities are not operated under a single contract, but under a fare per-person structure (see Respondent's response, Exhibit G); and the respondent's sightseeing operations do not restrict service or a bus to one group of persons, but accepts customers for the tours by any combination of unrelated individuals or groups (see Respondent's response, Exhibit G). Thus, SAMTA's sightseeing activities do not meet UMTA's definition of charter bus operations.

For the forgoing reasons we hold that UMTA's charter bus regulations, 49 C.F.R. 604 et seq., do not regulate or restrict in any manner SAMTA sightseeing operations and that for the same reasons section 3(f) of the UMT Act does not apply.

However, as previously shown UMTA cannot provide assistance for sightseeing operations (see above regarding §12(c)(6) of the UMT Act that shows sightseeing service ineligible for UMTA assistance). For this reason it is our determination that UMTA recipients must not use UMTA assisted equipment for sightseeing operatio when needed for mass transportation purposes. But a question that remains is what uses may the equipment be put to when not needed for mass transportation service.

We find that when SAMTA's sightseeing activities are considered in light of this question that SAMTA's sightseeing activities using UMTA assisted buses, facilities or equipment are governed by analogy by the same principles that govern recipient's charter bus operations. That is, the buses, facilities or equipment may be used for any other lawful purpose so long as the other use is not in derogation of mass transportation services provided by the recipient or against any UMTA regulation or statutory requirement. Thus, we hold that recipients may use the UMTA-assisted buses, facilities and equipment for sightseeing service so long as the use is in strict compliance with the December, 1966 decision of the Comptroller-General of the United States. 5/

The underlying principle by which UMTA defines "incidental use" was set out in the Comptroller's-General Decision cited earlier. That principle is:

> "...any lawful use of project equipment which does not detract from or interfere with the urban mass transportation service for which the equipment is needed would be deemed an incidental use of such equipment, and that such use of project equipment is entirely permissible under [the] legislation. What uses are in fact incidental, under this test, can be determined only on a case-by-case basis." 6/

Therefore, whether UMTA-assisted buses, facilities or equipment have been used for sightseeing service is not the crucial question. What is crucial is whether such use has detracted from the purpose for which UMTA provided the assistance, i.e., provision of mass transportation. If the sightseeing activities have not been in derogation of that purpose the use is then incidental, and thus permissible.

The record shows that most of the Respondent's sightseeing operations do not involve UMTA assistance. 7/ However, the Respondent did admit that it uses UMTA-assisted patrol cars in sightseeing operations. The complainant has also claimed that UMTA-assisted facilities support sightseeing operations.

5/ Op. Com. Gen. No. B-160204, December 7, 1966. See 49 C.F.R. Part 604, Appendix A (1976). Also it does not follow that the UMTA charter bus regulation (49 C.F.R. Part 604) would apply to the Respondent's sightseeing operation, especially since (i) Congress distinguished between charter and sightseeing service in section 12(c)(6) of the UMT Act; (ii) section 3(f) of the Act refers only to "charter bus operations" and the "intercity charter bus industry," without any reference to sightseeing service; and (iii) the regulations in their entirety refer only to "charter bus operations."

6/ See Appendix A of 49 C.F.R. Part 604.

7/ See Respondent's response, Exhibit E, that contains a cost allocation plan for SAMTA operations including charter and sightseeing service, plus a letter from UMTA's regional office approving the plan

The Respondent states that UMTA assisted patrol cars were used for sightseeing operations only when the cars would otherwise be idle; i.e., not needed in support of mass transportation service (Respondent's response, p. 15). We find nothing in the record that contradicts the respondent's assertion. As a consequence, we conclude that the complainant's allegation of the wrongful use of patrol cars is not substantiated.

With regard to the use of other equipment or of facilities involving UMTA assistance, no evidence has shown a use for sightseeing operations that detracted from mass transportation service. Thus, we conclude that these allegations of misuse of UMTA-assisted support facilities are also not substantiated.

B. Promotional Devices

The complainant also alleges that the respondent uses promotional devices such as tipping, discounts, and commissions to encourage patronage of sightseeing and charter operations and that such devices violate UMTA's requirements. The record shows that the costs for such devices are fully and properly allocated to non-Federal sources, and separated from mass transportation operations of the Respondent. This is apparent from UMTA's review of the Respondent's applications for assistance which shows that UMTA has granted a level of funding appropriate only for the Respondent's needs to fulfill its mass transportation obligation.

In addition, the Respondent in an effort to ensure that it would not use UMTA assistance to support non-eligible activities, formulated and submitted to UMTA a cost allocation plan showing that both its sightseeing and charter bus operations are not supported by UMTA assistance. That plan was reviewed and approved by UMTA auditors. (Respondent's response, Exhibit E).

Since the promotional devices have been shown not to involve programs or activities that are supported with UMTA assistance, those devices clearly do not violate any UMTA sightseeing or charter operation statute or regulation.

C. Charter Bus Operations

The Complainant alleges that respondent's charter bus operations violate UMTA's charter bus regulation including sections 604.13 through 604.18.

The Respondent disagrees; respondent states that section 604.13 through 604.18 do not apply to its operation since the respondent conducts all its operations within its urban area, and that in addition, section 604.11 allows the charter bus uses conducted with UMTA-assisted buses, facilities and equipment on an incidental basis. We agree with the respondent that since it conducts all its activities (charter, sightseeing, and urban mass transportation) within its urban area, the principle by which its charter operations are regulated is found in 49 C.F.R. 604.11 relating to "incidental use."

However, SAMTA has admitted that it has either inadvertently or due to exceptional circumstances used UMTA-assisted buses for charter bus service within its urban area during peak hours in "isolated instances." These uses trigger the presumption in 49 C.F.R. 604.11(b)(1). 8/

Subparagraph (a) of that provision demands "strict compliance" with the Comptroller's-General decision, cited earlier (not approximate compliance or substantial compliance). 9/ However, nothing in the record counters the respondent's characterization that the uses were other than "isolated." As a consequence, we conclude that the uses were violations, but violations that were not part of a continuing pattern that indicated disregard of the restrictions imposed on the Respondent's charter operations. 10/ On the contrary, the respondent's overall efforts with regard to its administration and management of non-mass transportation operations show that the respondent seeks to assure that those operations stand on their own, apart from urban mass transportation operations, without use of UMTA assistance. 11/

Under these circumstances the Respondent must institute such additional measures that will prevent future violations.

Conclusion

The Respondent's sightseeing and charter bus operations are conducted substantially in compliance with UMTA's restrictions and limitations. However, the Respondent has admitted isolated uses of UMTA-assisted mass transportation vehicles during peak hours in non-mass transportation related operations. Since the uses were not explained so to overcome the presumption of 49 C.F.R. 604.11(b)(1), we find that the uses violated the charter bus regulations, 49 C.F.R. 604.11(a).

8/ 49 C.F.R. 604.11(b)(1) states: "Any of the following uses of mass transportation buses in charter bus operations will be presumed not to be incidental: (1) Weekday charters which occur during peak morning and evening rush hours; ..."

9/ 49 C.F.R. 604.11(a)

10/ 49 C.F.R. 604.43(c) requires: "If the Administrator should determine that a violation has occurred, he will include a statement as to whether there has been a continuing pattern of violations."

11/ See footnote 7.

The Respondent is hereby ordered to submit a plan to UMTA for approval that will provide additional safeguards so that isolated or inadvertent violations do not re-occur. Such plan shall be submitted within 30 days of receipt of this decision.

Finally, we conclude that all other alleged violations are not substantiated.

Submitted by: Paul Jensen — May 19, 1980
Paul Jensen, Regional Counsel — date

Approved by: Margaret M. Ayres — July 7, 1980
Margaret M. Ayres, Chief Counsel — date

DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION
300 SOUTH WACKER DRIVE—SUITE 1740
CHICAGO, ILLINOIS 60606

REGION V

JUL 11 1980

Mr. Adam J. Milewski
President
Valley Transit Corp.
9001 West 79th Place
Justice, Illinois 60458

Dear Mr. Milewski:

Your letter of May 2, 1980 addressed to our Chief Counsel, Margaret M. Ayres, regarding charter business of the Chicago Transit Authority has been forwarded to this office for disposition. Your allegations will be investigated shortly and the results of our examination will be communicated to you as soon as possible.

I have completed an investigation of the complaint communicated to me in a telephone conversation with you held on May 28, 1980. You informed me at that time that the C.T.A. had successfully bid on a contract to furnish bus service to a Rotary convention that was held in Chicago early in June. Due to the number of buses required to provide the needed service you were concerned that the C.T.A. would have to divert a large number of buses from scheduled service, an action that would be contrary to regulations issued by the Urban Mass Transportation Administration.

Ronald F. Bartkowicz, C.T.A. First Deputy General Attorney, informed me that the C.T.A. subcontracted a portion of the subject charter service to the Willett Bus Company. Even with the subcontracted service it was necessary for the C.T.A. to use as many as fifteen buses at any one time during the contract period (May 31 - June 5, 1980). The C.T.A. informed us that none of the buses dedicated to the charter operation were removed from scheduled service and that all charter vehicles were available from a pool of extra buses that are usually available during peak hours. In such circumstances it is permissible for UMTA grantees to engage in charter work provided such operations otherwise comport with the terms of our regulations.

Mr. Bartkowicz also informed me that Valley Transit was accorded an opportunity to bid on the Rotary subcontract but chose not to do so.

If you have additional information or any evidence that would be contrary to the representations made by C.T.A. I would appreciate your forwarding such information to me.

Very truly yours,

Sanford E. Balick
Regional Counsel

Chron

DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION
WASHINGTON, D.C. 20590

JUL 17 1980

Mr. Wayne Smith, President
United Bus Owners of America
Suite 201
600 Water Street, S.W.
Washington, D.C. 20024

Dear Mr. Smith:

Thank you for the explanation and comments on the United Bus Owner's proposals to modify the UMTA charter bus regulation, 49 CFR Part 604, that you and Paul Nagle provided us at our recent meeting on June 30, 1980. I wish to confirm the points of discussion we arrived at in the meeting about the UBOA proposals and on other matters that have come up about the operation and enforcement of the present UMTA charter regulation.

As we noted in the meeting modification of sections 604.11 and 604.15 as UBOA suggested in its April 16, 1980 position paper to the Administrator, is not authorized by the Urban Mass Transportation Act of 1964, as amended, 49 USC 1601 et seq. (the UMT Act). The proposed standards for protection of private charter bus operators of "adverse effect" proposed for inclusion in sections 604.11 and 604.15 and of "affirmative action" proposed for inclusion in section 604.15 of the regulation appear to be a departure from sections 3(e), 3(f), 12(c)(6), or any other provisions of the UMT Act.

As we also discussed, our current regulation does not require that private operators alleging violations of UMTA charter bus provisions be represented by legal counsel when filing and pursuing administrative complaints with UMTA. We feel the process is an informal one which does not require formal procedures like those of the Federal district courts. Also, UMTA cannot comment on the other UBOA proposals since federal rulemaking procedures require that UMTA obtain the comments and proposals of all interested parties to the regulation before UMTA takes any position on possible revision of the regulation. However, we will include a summary of the UBOA proposals in our notice proposing revision to the charter bus regulation that UMTA plans to publish in the Federal Register at the end of August, 1980 and request the public's comments on the proposals.

UMTA may hold a hearing in connection with any revision of the regulation. If we do, UBOA along with other interested parties would be invited to testify.

With regard to your request that UBOA staff members be allowed to assist UMTA staff in rewriting the regulation, I am unable to accept your offer of assistance. The federal rulemaking process requires us to follow prescribed procedures that do not permit actions that might give the appearance that UMTA is giving an advantage to any one interested party. To accept UBOA's assistance might give that appearance.

I wish to thank you for the invitation for members of UMTA's legal staff to attend the UBOA regional conferences in September to explain the operation of the proposed revision. Mr. Ernesto Fuentes will attend the Washington, D.C. conference. We have tenatively scheduled Mr. Sanford Balick, the UMTA Region V Counsel for the Chicago conference and Ms. Melanie Morgan, the UMTA Region IX Counsel for the San Francisco conference. Mr. Balick and Ms. Morgan's schedules must be confirmed. Mr. Fuentes will call you within the next two weeks to confirm the schedules or give you the names of the persons who will be attending in their places.

Finally, as you may know, Mr. Munter and Mr. Fuentes have been working with Paul Nagle to keep UBOA informed about the status of several complaints that have been pending with UMTA for some time. Please feel free to continue to work with them on these matters.

I thank you for pointing out areas where the UMTA charter bus regulation may merit revision. The UBOA position paper and comments you made during our April and June meetings with UMTA's Administrator will be fully considered when we draft the proposed revisions to the charter regulation. I also will look forward to UBOA's additional comments during the rulemaking process that will follow.

Sincerely,

Theodore A. Munter acting for

Margaret M. Ayres
Chief Counsel

Chron

DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION
WASHINGTON, D.C. 20590

JUL 24 1980

Mr. Irwin J. Borof
Attorney at Law
125 Twelfth Street
Suite 105
Oakland, California 94607

Subject: Definition of "Urban Area"
- UMTA Charter Bus Regulations

Dear Mr. Borof:

This is in response to your letter, dated September 13, 1979 to Ms. Melanie Morgan UMTA's Region IX Counsel, and your letter of March 24, 1980 to UMTA's Region IX Office concerning the charter bus operations of Alameda-Contra Costa County Transit District (AC Transit).

Your September 13, 1979 letter objects to the interpretation of "urban area" for AC Transit advanced in an August 31, 1979 letter to you from Ms. Melanie Morgan. The regional counsel described the urban area, for purposes of the UMTA charter bus regulation, within which AC Transit provides regularly scheduled mass transportation service as the San Francisco-Oakland urbanized area.

As you correctly pointed out in your letter, the Urban Mass Transportation Act of 1964, as amended, 49 USC 1602(f), requires imposition of certain arrangements on UMTA recipients through a special agreement with UMTA to prevent foreclosure of privately owned operators by a grantees who engage in intercity charter bus operations. The standard that triggers imposition of such arrangements is found in Section 3(f) of the UMT Act, 49 USC §1602(f); it states:

> ...the applicant or any public body receiving...assistance for the purchase or operation of buses...shall as a condition of such assistance enter into an agreement with the Secretary that 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.

The UMTA regulation promulgated to implement that provision, defines urban area in section 49 CFR §604.3, as follows:

> "Urban area" means the entire area in which a local public body is authorized by appropriate local, State and Federal law to provide regularly scheduled mass transportation service. This includes all areas which are either: (a) within an "urbanized area" as defined and fixed in accordance with 23 CFR Part 470, subpart B; or (b) within an "urban area" or other build-up place as determined by the Secretary under section 12(c)(4) of the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1608(c)(4)).

The statute and the regulation together then provide a two-part standard that triggers imposition of the additional "fair and equitable arrangements over grantees who engage in intercity charter bus operations. That is, the recipient must engage in charter bus operations outside the area in which it is both (a) providing mass transportation service, and (b) authorized to provide the mass transportation service. Since the urbanized area in which AC Transit's district is located is the Oakland-San Francisco urbanized area as defined by the U.S. Bureau of the Census (See 49 USC 12(c)(11), the UMTA charter regulation allows AC Transit to conduct charter bus operations in San Francisco without the additional arrangements required of grantees who conduct intercity charter bus operations so long as the other portions of AC Transit's charter operations do not go outside its urban area.

Further, we have reviewed the enabling statute of AC Transit (found in California Public Utilities Code (CPU) §24501 et seq.) to determine the area in which AC Transit is authorized to operate mass transit service. Section 24561, which you cited to support your position, only refers to the geographic area that may be part of the AC Transit district; we do not find in that section any indication of the area where AC Transit may provide mass transportation service. However, Section 25801 does address that question. It states:

> A district may acquire, construct, own, operate, control or use rights of way, rail lines, bus lines, stations, platforms, switches, yards, terminals, and any and all other facilities necessary or convenient for transit service within or partly without the district...

Although, §25801 does not deliniate the extent of the permissible operations it may conduct outside its district, it is clear that service for its district can entail operations "partly without the district."

While this interpretation that may seem, on the surface, incongruous, the interpretation is consistent with other California transit districts enabling statutes. For instance, the San Francisco Bay Area Transit District (BART) is empowered to operate "in the eighty-four (84) individual units of county, city-and-county, and city governments located in the area...although its service must be coordinated with that of other transit facilities in areas to be served." CPU §28501. This area includes among others the AC Transit District. CPU Code §28504.

In connection with this you have cited a prior UMTA decision involving the Chicago Transit Authority (CTA) in support of your position that AC Transit's urban area should be defined as the AC Transit district. In that February 11, 1977 decision, UMTA found, as you correctly pointed out, that CTA was limited to conducting charter operations without the additional arrangements imposed by 49 CFR §604.13, to the area where it was providing authorized mass transportation services. However, on pages 2 and 3 of the decision, we found against CTA because it did not have state or local authority to provide transportation service in the area where the disputed CTA charter operations were occurring. CTA was required by state statute to obtain local agreements to conduct the transportation services into these areas. CTA did not show it obtained the agreements. AC Transit, on the other hand, is authorized to conduct mass transportation service into San Francisco without agreements like those in CTA. As a consequence, we find that the CTA decision does not support your position.

You have also raised the question of whether Ms. Morgan's interpretation of the charter regulation would allow AC Transit to run freely within the five-county San Francisco bay area. Construction of the state statute is ultimately the prerogative of the California state government and state courts; however, our review indicates that the state statute places no specific limits on AC Transit's operations outside its district. In fact, CPU §25801, cited earlier, appears to allow AC Transit's mass transit operations to extend to any place in the state of California so long as the transit operations are "necessary and convenient" for the AC Transit district and only "partly without the district." Thus, in considering whether AC Transit's charter operations in a particular case are conducted within its urban area, we would primarily consider whether AC Transit was actually providing mass transportation services to an area where it is authorized to provide service. If an affirmative answer is obtained to this question, AC Transit is within its urban area for charter bus purposes, and may operate charter bus services without the additional arrangements imposed on intercity charter operators by section 3(f) of the UMT Act.

A closely related question you have raised is whether only two mass transportation lines run from AC Transit's district to two points in San Francisco are sufficient to allow AC Transit to consider the entire city of San Francisco part of its urban area. Since San Francisco is part of AC Transit's urbanized area the amount of service provided is not relevant. However, the question is relevant to situations in which AC Transit might provide charter service to an area not part of the Oakland-San Francisco urbanized but where AC Transit provides authorized mass transportation services. Of particular relevance to this question is the fact that neither section 3(f) of the UMT Act nor the definition of urban area in the UMTA charter bus regulation, 49 CFR 604.3, place a quantative minimum of mass transportation service that must be provided to an area before it satisfies the "providing mass transportation service" standard of the statute or regulation.

For the foregoing reasons, we find that San Francisco is for charter bus purposes part of AC Transit's urban area. Further we find that to the extent that AC Transit extends its regularly scheduled mass transportation service to other cities, AC Transit's urban area, for charter bus purposes will expand to include those additional areas. Finally, we find that the Oakland/San Francisco urbanized area constitutes AC Transit's urban area for charter purposes.

In your March 24, 1980 letter you oppose the award of UMTA assistance to AC Transit. You raise as the bases for that opposition similar questions raised in your September 13, 1979 letter about AC Transit's charter bus operations.

The March letter claims that AC Transit has falsely stated that it conducts all its charter operations with its urban area. In support of that allegation you claim AC Transit performs contracts with BART and others that take AC Transit out of its service area and that the contracts are in the nature of charter bus services. You also claim that you have a right to a hearing on these matters before UMTA. Finally, you state that you have been unable to get AC Transit to define its service area for you for charter bus purposes.

We are aware that AC Transit is conducting some feeder line service for BART. However, the nature of those feeder lines serve the mass transportation needs of BART's patrons who disembark at BART stations in Alameda and Contra Costa Counties and continue to points within and without the AC Transit district. Your challenge to these BART contracts raises the question of whether such service is "mass transportation service," as defined in the UMT Act, 49 USC 1608(c)(6) or "charter bus operations," as defined in the UMTA charter bus regulation, 49 CFR 604.3. The distinction is obviously crucial, since if the contracts are mass transportation services the charter regulation does not apply.

On the other hand, if you believe the services are charter operations conducted in violation of UMTA's restrictions, you may file a complaint with us under the procedures of 49 CFR 604.42 and we will investigate the matter. Before we can do so, we need the information specified by 49 CFR 604.40; that is, we need a detailed description of the services AC Transit conducts for BART that are objectionable to you, the same type of information about the "other" contract work you referred to. The descriptions must be sufficient to enable the Administrator to make

a preliminary determination as to whether probable cause exists to believe that a violation has taken place. See 49 CFR §604.40.

Closely related to this is your request for a hearing to determine the urban area of AC Transit cited in both your September and March letters. The UMTA charter bus regulation provides two different possible opportunities to you for participation in a hearing.

Section 604.17 of the charter regulation provides an opportunity for private operators to comment in a hearing on a grant applicant's charter operations at the time a grant application is made to UMTA. However, those comments must be submitted to the applicant, not to UMTA. 49 CFR 604.17. Also, the charter regulation provides that the Administrator of UMTA may hold, if he deems it necessary, an evidentiary hearing pursuant to a charter bus complaint investigation. Such a hearing is not a right to the parties but is discretionary for the Administrator, to enable him to gather the necessary evidence to make a decision on a complaint. 49 CFR 604.42. Since there is no complaint involved at this time a hearing is not appropriate under this provision. Further, even if a complaint were involved, a hearing may not be held if it were deemed by UMTA as unnecessary, 49 CFR 604.42.

Thank you for your patience in this matter. If you have any questions you may continue to direct them to UMTA's Region IX office. If you wish to file a complaint you may send it to me and after docketing in this office we will transmit it to the Region IX office for investigation.

Sincerely,

Theodore A. Munter, for

Margaret M. Ayres
Chief Counsel

AUG 18 1980

Paul Nagle, Esq.
United Bus Owners of America
Suite 201
500 Water Street
Washington, DC 20024

Dear Mr. Nagle:

This is in response to UBOA's question asking whether it is proper for the Des Moines Metropolitan Transit Authority (MTA) to use UMTA assistance for express commuter service between Altoona, Iowa, a town that is outside of MTA's urban area, and downtown Des Moines.

The fact that the service goes outside the MTA urban area is significant if the Altoona express may be characterized as a "charter bus operation," as defined in UMTA's charter bus regulations, 49 C.F.R. Part 604. This is crucial since charter bus operations that go outside of a grantee's urban area trigger the provisions of Section 3(f) of the Urban Mass Transportation Act of 1964 (UMT Act), as amended, 49 USC 1601 et seq., and the UMTA charter regulations, 49 C.F.R. Part 604. These statutory and regulatory provisions impose certain restrictions on UMTA grantee intercity charter operations. Charter operations are defined as:

> ...(T)ransportation by bus of a group of person who, pursuant to a common purpose, and under a single contract, at a fixed charge for the vehicles or service, in accordance with the carrier's tariff have acquired the exclusive use of a bus to travel together under an itinerary, either agreed on in advance, or modified after having left the place of origin. (This includes the incidental use of buses for the exclusive transportation of school students, personnel and equipment.)

49 C.F.R. 604.3(b).

Information obtained from the MTA indicates that the Altoona express does not meet that definition. It is a fixed route service that runs at prescribed times during the weekdays, charging passengers on a fare per person basis. The service is open to all members of the general public, with no restriction based any group membership.

Since the Altoona express does not meet that definition, the statutory and regulatory provisions relating to charter bus operations do not apply.

Also, comparision of the service to the definition of "mass transportation" found in the UMT Act leads us to believe that the service is mass transportation and thus the proper subject of UMTA assistance. Section 12(c)(6) of the UMT Act provides:

> The term mass transportation means transportation by by bus ... either publicly or privately owned, which provides to the public either general or special service (but not including school buses or charter or sightseeing service) on a regular and continuing basis.

Since, as shown above, the Altoona express provides service to the general public on a regular and continuing basis and does not meet the definition of charter bus operations, it appears that it is not improper to support the service with UMTA financial assistance.

It may be, however, that the service is in conflict with Section 3(e) of the UMT Act, 49 USC 1602(e). That section provides:

> No Financial assistance shall be provided under this Act to any state or local public body or agency thereof for the purpose, directly or indirectly, ... of providing by contract or otherwise for the operation of mass transportation facilities or equipment in competition with, or supplementary to, the service provided by an existing mass transportation company, unless the Secretary finds that such program to the maximum extent feasible, provides for the participation of private mass transportation companies

The information provided to us by the MTA indicates that establishment of the service was made after public notice was given of MTA's intention to initiate the Altoona express. No objection to or request for participation in provision of the service was filed by a private transportation company. As a consequence it does not appear that any private operator has been harmed by this MTA operation, and thus the service does not appear to conflict with Section 3(e). However, if UBOA has additional information relating to compliance with this provision, it should be submitted to this office so that we can thoroughly consider the matter.

I hope this answers UBOA's question. If any other questions come to mind please feel free to call me.

Sincerely,

Ernesto V. Fuentes

cc: Reg. Counsel

D. Charter Bus

U.S. Department of Transportation
Urban Mass Transportation Administration

Region 2
Connecticut,
New York, New Jersey,
Puerto Rico, Virgin Islands

26 Federal Plaza
Suite 14-110
New York, New York 10278

JAN 16 1981

Anthony R. Ameruso, P.E.
Commissioner
New York City Department of
Transportation
40 Worth Street
New York, New York 10013

Dear Commissioner Ameruso:

This is in response to your letter of November 3, 1980, which requested guidance on several issues relating to the charter bus provisions of the Urban Mass Transportation Act of 1964, as amended ("the UMT Act"), 49 U.S.C. 1602(f) and 1608(c)(6), and the UMTA charter bus regulation, 49 CFR Part 604. I am providing specific answers to your enumerated questions, below. However, it is important to first explain the basis for UMTA's requirements and summarize what the requirements actually are.

UMTA's charter bus regulation is designed to implement two provisions of the UMT Act. The first provision, section 12(c)(6), states that "mass transportation" service, which is eligible for UMTA funding, does not include " . . . charter or sightseeing service". 49 U.S.C. 1608(c)(6). The Comptroller General of the United States has interpreted this provision to disallow the use of financial assistance provided under the UMT Act for the purchase of buses intended for use in charter service, but to allow, even encourage, the "incidental" use of such buses for charter service so long as such service "does not detract from or interfere with urban mass transportation service for which the equipment is needed." Opinion of the Comp. Gen., B-160204 (December 7, 1966). This "incidental use" restriction applies to all UMTA grantees, and is set forth in the charter regulation at 49 CFR 604.11.

The second provision of the UMT Act on which the regulation is based is section 3(f), which is a special provision enacted to protect private operators in the intercity charter bus industry from being foreclosed from intercity charter bus business by competition from federally assisted public bodies and those private carriers who operate urban mass transportation services on their behalf. 49 U.S.C. 1602(f). Under this provision, all grantees who receive funds under the UMT Act or the Federal-Aid Highway Act for "the purchase or operation of buses," must enter into a charter bus agreement with the Secretary of Transportation to protect private intercity charter bus operators. The terms of this "agreement" are set forth in 49 CFR 604.13, and become operative if a recipient of capital or operating assistance, or an operator on its behalf, engages in charter bus operations outside its urban area, and derives $15,000 or more annually from such operations.

In the event that a grantee or an operator on its behalf engages in incidental charter bus operations outside its urban area, and derives $15,000 or more annually from such operations, the regulation requires that the grantee submit to UMTA the following: (1) a statement with respect to notice to private charter bus operators regarding the proposed or existing incidental charter operations (49 CFR 604.15); (2) a certification of costs (49 CFR 604.3, 604.15(a)(3)); and (3) a cost allocation plan (49 CFR 604.3, 604.15(a)(4)).

The answers to your enumerated questions are as follows:

1. What is the definition of "mass transportation service?"

The term "mass transportation" is defined in section 12(c)(6) of the UMT Act as follows:

> " . . . transportation by bus, or rail, or other conveyance, either publicly or privately owned, which provides to the public general or special service (but not including school buses or charter or sightseeing service) on a regular and continuing basis." 49 U.S.C. 1608(c)(6).

While the statutory definition of "mass transportation" is silent on the matter, it is important to note that UMTA is authorized to assist mass transportation services only within urban areas, and not between cities. This is evident from the congressional statement of Findings and Purposes contained in section 2 of the UMT Act (49 U.S.C. 1601) and from the inclusion in the Act of a separate program of assistance for intercity bus service in section 22 (49 U.S.C. 1618).

2. What is the definition of "incidental charter use?"

The UMTA charter bus regulation defines "incidental" as charter bus operations which do not interfere with regularly scheduled service (49 CFR 604.3), and lists three charter uses that are presumed not to be incidental:

(1) Weekday charters which occur during peak morning and evening rush hours;

(2) Weekday charters which require buses to travel more than fifty miles beyond the grantee's urban area; and

(3) Weekday charters which require the use of a particular bus for more than a total of six hours in any one day. 49 CFR 604.11(b).

Any other charter use would be considered an "incidental use," and is allowed, so long as the other requirements of the regulation are met.

3. What geographical entity comprises the "urban area" for purposes of operators assisted by the New York City Department of Transportation?

The definition of "urban area" for purposes of the UMT Act is left to UMTA's discretion, 49 U.S.C. 1608(c)(10). The charter bus regulation defines "urban area" as follows:

> " . . . the entire area in which a local public body is authorized by appropriate local, State and Federal law to provide regularly scheduled mass transportation service. This includes all areas which are either (a) within an 'urbanized area' as defined and fixed in accordance with 23 CFR Part 470, subpart B; or (b) within an 'urban area' or other built-up place as determined by the Secretary under (section 12 of the UMT Act)." 49 CFR 604.3.

Section 12(c)(10) of the UMT Act defines "urban area" as follows:

> ". . . any area . . . which is appropriate, in the judgment of the Secretary, for a public transportation system to serve commuters or others in the locality taking into consideration the local patterns and trends of urban growth." 49 U.S.C. 1608(c)(10).

In considering the applicability of these definitions to the New York City area, we have determined that for purposes of the charter regulation and the "incidental use" presumption, the urban area for New York City Department of Transportation should coincide with the Tri-State New York-Northeast New Jersey-Connecticut urbanized area. This is conditioned, however, on the operators' authority to provide service within the entire area. However, our definition of "urban area" also includes those areas where an operator actually provides mass transportation services, even though it hs no explicit authority to do so, so long as it is not prohibited from doing so.

4. What are the UMTA regulations on the scheduled use of UMTA-funded buses as opposed to charter use? While there are no regulations that bear on this specific question, the definition of "mass transportation" service provides guidance on the allowed uses of UMTA-funded buses. That is, UMTA-funded buses can only be used for scheduled services that fall within our definition of "mass transportation." By analogy with the "incidental use" restrictions, however, such buses may be used for other purposes when not needed for mass transportation. That is, an operator who is authorized to provide regularly scheduled intercity service on weekends, for example, could do so with UMTA-assisted buses. However, it would have to be demonstrated that no UMTA operating assistance is attributed to the provision of such non-mass transportation service. In addition, where such service competes with or supplements

the services provided by other private, non-subsidized mass transportation companies, the requirements of section 3(e) of the UMT Act apply (49 U.S.C. 1602(e)). UMTA will shortly issue a Notice of Proposed Rule-making implementing section 3(e), and we anticipate that the proposed regulation will provide guidance in this area.

5. What restrictions apply under the following circumstances:

(a) Private company receives operating assistance but does not have UMTA-funded buses: The charter bus restrictions apply to any bus company that receives either capital or operating assistance. Likewise, operating assistance is available only for eligible "mass transportation" services.

(b) Private company has UMTA-funded buses and non-UMTA funded buses, and (1) does not receive operating assistance: The charter bus restrictions and mass transportation use requirements apply only to UMTA-funded operations. Thus, a private company which owns its own buses and receives no operating assistance is free to operate those buses without restriction. The company's UMTA-funded buses, however, are subject to all applicable UMTA requirements.

(b)(2) Same as (b)(1), but company does receive operating assistance: Operating assistance is available only for eligible "mass transportation" service. Therefore, in order for the company to use its own buses without restriction, all operating assistance must be attributable to the mass transportation portion of its operations. That is, the company may use its own buses in non-incidental charter service only if its cost allocation plan demonstrates that charter revenues from these buses exceed charter expenses. The company's UMTA-funded buses are restricted to incidental charter use only.

(c) and (d) Private company has an equity interest in UMTA-funded buses: UMTA agreed to allow the private bus companies in New York City to receive an undivided proportional share of the ownership of buses for which they put up the local share on the condition that the buses would be subject to all the terms and conditions of the grant agreement between UMTA and NYCDOT. Thus, the fact that a company has an equity interest in UMTA-funded buses does not limit any otherwise applicable UMTA requirements or restrictions.

(e) If a company does charter or scheduled work within and/or outside the urban area, must it use separate buses for this service with separate financial accounts or may it use the same buses with separate financial accounts: This question is too broad for a specific response. As noted above, the charter restrictions apply to companies receiving operating or capital assistance. UMTA-funded buses, whether they receive operating assistance or not, can be used for charter service only on an incidental basis. By analogy, UMTA-funded buses may be used for other non-mass transportation uses (i.e., regularly scheduled intercity service) only on an incidental basis. Under no circumstances may operating assistance be used to offset non-mass transportation operating expenses. Inasmuch as operating expenses will involve such activities as maintenance and storage, which apply to an entire fleet, the company will

have to be able to separately allocate its mass transportation expenses and non-mass transportation expenses. Thus, if a company has its own buses, and wishes to use them in non-incidental charter or other non-mass transportation operations, it may either physically segregate these buses from its UMTA-assisted buses, or demonstrate, in its cost allocation plan, that UMTA operating assistance is not used to subsidize the non-mass transportation services.

(f) Do UMTA regulations apply only during the period of an operating assistance grant: Assuming that a company has no buses that were purchased with UMTA funds, the charter and mass transportation use restrictions would apply only for the period of an operating assistance grant. UMTA requirements apply to UMTA-funded buses for as long as they are used in mass transportation. In the event a bus is withdrawn from mass transportation service, section 4 of the grant agreement and OMB Circular A-102, Attachment N, govern the disposition of the equipment.

I have attempted to provide you with workable interpretations of the applicable rules, in response to your questions. Enclosed are copies of pertinent documents. In preparing project applications and budgets, you should work closely with the UMTA regional Transit Assistance office to ensure that UMTA assistance is being used for eligible expenses. I hope that this letter has clarified UMTA's requirements. If you have any further questions, please feel free to contact me again.

Sincerely,

Glenn Wasserman

Glenn F. Wasserman
Regional Counsel

Enclosures

U.S. Department of Transportation
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TALMAGE TOURS, INC.)
)
vs.) MEMORANDUM OF DECISION
)
NEW JERSEY TRANSIT CORPORATION)

I. Summary of Decision

This decision is the result of an investigation into the charter bus operations of the New Jersey Transit Corporation ("NJTC"). On the basis of this investigation, we have determined that NJTC's temporary operation of charter bus tours pending the implementation of a plan to restructure its mass transportation routes and service levels does not constitute a violation of the applicable statutory and regulatory requirements pertaining to charter bus operations and therefore does not require any remedial action beyond NJTC's own present plans to discontinue its charter bus operations by November 25, 1981.

II. The Complaint and NJTC's Response

The complaint, dated July 15, 1981, alleges that NJTC is "selling motorcoach tours under the auspices of the State of New Jersey, Brendan Byrne, Gov." (Letter from George C. Guenther to Honorable Andrew L. Lewis, Secretary, July 15, 1981). Enclosed with the complaint is a copy of an advertisement which appeared in the Philadelphia Inquirer on June 14, 1981, promoting NJTC bus tours to various locations beyond NJTC's service area which range from three to fourteen days in duration.

We forwarded the complaint to NJTC on August 12, 1981, and afforded the respondant an opportunity to demonstrate that it is not in violation of Section 3(f) of the Urban Mass Transportation Act of 1964, as amended, ("the UMT Act"), 49 U.S.C. 1602(f), and why the Urban Mass Transportation Administration ("UMTA") should not issue an appropriate order under that section or take other appropriate action. (Letter from Glenn F. Wasserman to Jerome C. Premo, August 12, 1981). NJTC responded by letter dated September 16, 1981.

The NJTC's response, (letter from Kenneth S. Levy to Glenn F. Wasserman, September 16, 1981), which includes several exhibits, does not dispute the allegation that NJTC is operating charter bus tours but contends that those operations do not constitute a violation of applicable UMTA rules. The NJTC response states that NJTC had acquired the private bus company Transport of New Jersey ("TNJ") with UMTA grant assistance, and that UMTA had concurred in the interim continuation of TNJ charter operations until NJTC develops and implements a plan for restructuring routes and service levels subsequent to the acquisition of TNJ, and that NJTC has developed a plan to totally segregate its mass transportation and non-incidental charter operations by November 25, 1981. NJTC further asserts that the interim continuation of TNJ charter operations does not constitute a violation of law in that (1) its charter operations are based on fair and equitable arrangements to assure that UMTA financial assistance does not allow NJTC to foreclose private operators from the intercity charter market, and (2) the use of UMTA-funded buses by NJTC in charter service is "incidental" to and will not interfere with NJTC's ability to provide regular mass transportation service. By letter dated October 15, 1981, the law firm Fry, Hibschman, Golden, Welz & Yatron, on behalf of the complainant, replied to NJTC's response. (Letter from Howard M. Fry to Glenn F. Wasserman, October 15, 1981). The reply contends that while UMTA instructed NJTC to adopt a plan to restructure routes and service levels on November 25, 1981, NJTC has only recently begin to do so. Moreover, the reply questions NJTC's statement that its charter operations are incidental to its mass transportation service and that such operations are being run on a fair and equitable basis with respect to other private charter operators. The reply further contends that some of the financial data supplied by NJTC in its response are "suspect" and that TNJ's continued charter operations preclude effective competition by non-subsidized carriers.

III. Findings of Fact

The following facts are undisputed:

1. On November 25, 1980, UMTA approved a capital grant in the amount of $32,111,000 to assist NJTC in the purchase of stock representing the tangible assets of TNJ and its wholly-owned subsidiary, the Maplewood Equipment Company.

2. The UMTA grant was made with the express understanding that TNJ was operating extensive charter bus services and on the condition that if buses which were then being used by TNJ primarily or exclusively for charter service were not assimilated mass transportation service, NJTC would sell those buses and offset the UMTA grant with the proceeds of such sale. UMTA instructed NJTC that "(T)he retention or disposition of the acquired equipment will depend on the adoption by NJTC of a final plan for the restructuring of routes and service levels." (Letter from Hiram J. Walker to Louis J. Gambaccini, November 25, 1980).

3. On July 17, 1981, NJTC informed UMTA that the NJTC Board of Directors on July 14, 1981 approved a plan to restructure TNJ's charter operations, including assimilating into mass transportation service all vehicles previously purchased with federal funds. NJTC anticipated that "all buses acquired under the UMTA grant will be placed in regular service no later than November 25, 1981 (the first anniversary of the grant approval)." (Letter from Jerome C. Premo to Hiram J. Walker, July 17, 1981).

4. At the time the complaint was filed and at the present time, NJTC offers to operate or operates charter bus tours with UMTA-funded buses, substantially as described in the June 14, 1981 newspaper advertisement submitted with the complaint.

IV. The Legal Framework

At issue is whether or not the continued charter operations by NJTC violate UMTA's regulation on Charter Bus Operations, 49 C.F.R. Part 604.

UMTA's charter bus regulation is designed to implement two provisions of the UMT Act. The first provision, section 12(c)(6), states that "mass transportation" service, which is eligible for UMTA funding, does not include "... charter or sightseeing service". 49 U.S.C. 1608(c)(6). The Comptroller General of the United States has interpreted this provision to disallow the use of financial assistance provided under the UMT Act for the purchase of buses intended for use in charter service, but to allow, even encourage, the "incidental" use of such buses for charter service so long as such service "does not detract from or interfere with urban mass transportation service for which the equipment is needed." Opinion of the Comp. Gen., B-160204 (December 7, 1966). This "incidental use" restriction applies to all UMTA grantees, and is set forth in the charter regulation at 49 CFR 604.11. The regulation lists three charter uses that are presumed not to be incidental:

(1) Weekday charters which occur during peak morning and evening rush hours;
(2) Weekday charters which require buses to travel more than fifty miles beyond the grantee's urban area; and
(3) Weekday charters which require the use of a particular bus for more than a total of six hours in any one day. 49 CFR 604.11(b).

The second provision of the UMT Act on which the regulation is based is section 3(f), which is a special provision enacted to protect private operators in the intercity charter bus industry from being foreclosed from intercity charter bus business by competition from federally assisted public bodies and those private carriers who operate urban mass transportation services on their behalf, 49 U.S.C. 1602(f). Under this provision, all grantees who receive funds under the UMT Act or the Federal-Aid Highway Act for "the purchase or operation of

buses," must enter into a charter bus agreement with the Secretary of Transportation to protect private intercity charter bus operators. The terms of this "agreement" are set forth in 49 CFR 604.13, and become operative if a recipient of capital or operating assistance, or an operator on its behalf, engages in charter bus operations outside its urban area, and derives $15,000 or more annually from such operations.

In the event that a grantee or an operator on its behalf engages in incidental charter bus operations outside its urban area, and derives $15,000 or more annually from such operations, the regulation requires that the grantee submit to UMTA the following: (1) a statement with respect to notice to private charter bus operators regarding the proposed or existing incidental charter operations (49 CFR 604.15); (2) a certification of costs (49 CFR 604.3, 604.15(a)(3)); and (3) a cost allocation plan (49 CFR 604.3, 604.15(a)(4)).

V. Analysis

The first issue which must be resolved is whether the interim continuation of TNJ's charter operations, following that company's acquisition by NJTC with UMTA assistance, may be considered to be incidental to NJTC's regular mass transportation operations. This is because the procedures set forth in UMTA's regulation presuppose that a grantee's charter operations will only be incidental to and not interfere with the grantee's regular mass transportation services.

The UMTA regulation codifies the incidental charter restriction which the Comptroller General set forth in his 1966 opinion. See Appendix A, 49 C.F.R. Part 604, and 49 C.F.R. 604.11(b). To rebut the three presumptions stated in the Comptroller General's opinion, a grantee must establish to UMTA's satisfaction that a proposed use of a bus in charter service during weekday peak hours, or during weekdays more than fifty miles outside of the grantee's service area, or during weekdays for more than six hours in a single day, will not interfere with its ability to provide regular mass transportation service. It is undisputed that NJTC operates charter service requiring the use of federally assisted buses during weekdays in one or more of the above circumstances. In its response, NJTC states that it uses 80 of its 1,510 buses for charter operations. At the present time, peak hour demand requires that TNJ have 1,219 buses in regular mass transportation service. See letter from Kenneth S. Levy to Glenn F. Wasserman, October 27, 1981. Thus, the use of 80 buses in charter service would not interfere with NJTC's ability to provide regular mass transportation service. That the TNJ fleet contains a number of buses far in excess of its peak hour needs is a matter of some concern to UMTA. Consequently, the grant to NJTC for the acquisition of TNJ was conditioned upon NJTC's developing a plan to restructure TNJ's route and service levels and to dispose of buses not needed for regular mass transportation service. As previously noted, NJTC

intends to implement such a plan by November 25, 1981. During the interim, the use of excess buses in charter service is consistent with the Comptroller General's opinion:

> "Such service contributes to the success of urban mass transportation operations by bringing in additional revenues and providing full employment to drivers and other employees. It may in some cases even reduce the need for Federal capital assistance." (Appendix A, 49 C.F.R. Part 604).

We have therefore concluded that the interim use of 80 buses by NJTC for charter service pending the implementation of a plan for TNJ's routes and service levels is an incidental use that does not violate the Comptroller General's opinion or the UMTA regulation.

The next issue is whether NJTC has complied with the procedures set forth in the UMTA regulation. The three requirements that apply to a grantee who engages in incidental charter bus operations outside its urban area and derives $15,000 or more annually from such operations are as follows: (1) the grantee must submit documentation regarding notice to private charter operators; (2) the grantee must provide a certification of costs; and (3) the grantee must prepare and submit a cost allocation plan. 49 C.F.R. 604.3, 604.15.

For purposes of investigating the complaint, we reviewed NJTC's most recently approved operating assistance grant. On December 15, 1980, NJTC submitted the required information in support of its application for an operating assistance grant for the year ending June 30, 1981 (UMTA project No. NJ-05-4032). A notice of public hearing was advertised in 11 newspapers throughout the State and was also sent to 157 bus carriers in New Jersey and all charter bus carriers in the Bronx and Manhattan, New York (33 carriers). The notice clearly states that TNJ "engages in and intends to continue to engage in" charter operations in accordance with its tariffs filed with the State DOT and the Interstate Commerce Commission, and that "the required documentation relating to the charter bus operations of the (subsidized) carriers will be available for inspection" prior to and at the time of the scheduled public hearing. Our review of the verbatim transcript of the September 25, 1980 hearing shows that not one charter operator, including the complainant, appeared at the hearing to oppose the application or otherwise comment on it.

In addition to the information concerning the public hearing and notice to charter operators, NJTC submitted comprehensive financial information from TNJ including a statement of revenues and expenses showing that charter revenues are equal to or greater than charter-related expenses, a certification by NJTC's Comptroller concerning the financial statement, and copies of all applicable tariffs. Following a review of this material, the UMTA Regional Administrator accepted the certification of costs and otherwise approved NJTC's charter operations by approving the grant. See 49 C.F.R. 604.18(b).

This approval was based on UMTA's determination that the figures set forth in the certified statement of revenues and expenses appeared reasonable, and that no private charter bus operator had testified at the hearing or otherwise challenged those figures.

Now, however, the complainant challenges the estimated revenues and costs certified by TNJ's Comptroller for the year which will end June 30, 1982, which is attached to NJTC's response. In its reply to the NJTC response, counsel for the complainant suggest an inconsistency between this certification and a staff review of TNJ's estimated charter and tour business, which is also attached to the response. The certification apparently does not take into account any charges for equipment leases, while the staff review does. This apparent inconsistency does not indicate a violation of the applicable rules. Indeed, the staff review of TNJ's charter operations is premised upon a total separation of charter operations from TNJ's mass transportation service, which would resolve any question of compliance with the UMT Act and charter regulations. Moreover, the certification of actual revenues and costs for the year ending June 30, 1980, which was the subject of the September 25, 1980 public hearing, has not been challenged by the complainant or any other private charter bus operator.

The complainant further questions the reasonableness of TNJ's charter rates, based on the assumption that TNJ's recent 30 percent rate increase in a period of less than seven months shows that the rate prior to the rate increase was "extremely low and that it can be assumed that such a low rate would preclude effective competition from non-subsidized carriers." We cannot, on the basis of complainant's speculation, determine that TNJ's charter rates are "designed to foreclose competition by private charter bus operators," as prohibited by the regulation. 49 C.F.R. 604.13(3). Furthermore, complainant and all other private charter bus operators have had the opportunity to comment on previous charter rates at the public hearings held by NJTC for its operating assistance grant applications. As noted above, no private charter bus operator testified at the September 25, 1980 hearing. We will not, therefore, review TNJ's past charter rates, especially in light of the recent increases in those rates which are not being challenged by the complainant as violative of the applicable rules.

VI. Conclusion

Based on the foregoing, we do not find that NJTC has violated the applicable statutory and regulatory requirements by continuing to operate TNJ's charter and tour services pending the implementation of a reorganization plan. This decision is founded upon the reasonableness of UMTA's condition in the November 25, 1980 grant approval that NJTC will either assimilate its charter buses into mass transportation service or sell its charter buses and offset the grant with the proceeds of such sale, depending upon "the adoption by NJTC of a final plan

for the restructuring of routes and service levels." NJTC has stated that it will implement such a plan by November 25, 1981, and we have determinated that implementation by that date will be reasonable. We therefore conclude that the charter operations complained of do not constitute a violation of the UMT Act or UMTA's charter bus regulations, 49 C.F.R. Part 604.

Glenn F. Wasserman
Regional Counsel

G. Kent Woodman
Chief Counsel

NOV 24 1981

DECISION

Greyhound Lines, Inc. and Hopkins Limousine Service, Inc.

Complainants

v.

Greater Cleveland Regional Transit Authority

Respondent

I. Summary

This decision is the result of an investigation into the charter bus operations of the Greater Cleveland Regional Transit Authority (GCRTA). The investigation disclosed that while GCRTA, in good faith, believed that it has substantially complied with restrictions imposed on charter activities of UMTA grantees by the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1601 et seq.), and the Act's implementing regulations (49 CFR Part 604), that, in fact, certain remedial actions are required to bring GCRTA into full compliance with the regulations. No pattern or practice of violations was disclosed by the investigation into the Respondent's operations.

II. Background

UMTA received a complaint from Hopkins Limousine Service Inc. (Hopkins) on April 12, 1981, through Senator Glenn's office, charging that GCRTA was conducting illegal charter activities. A similar but more detailed complaint was received from Greyhound Lines, Inc. on April 13, 1981. Given the similarity of the complaints, they have been combined for purposes of this decision. Reference is primarily to Greyhound's complaint since that was more detailed.

Specifically, the Complainants alleged that: GCRTA operated charter service during prohibited times and in prohibited areas at costs which foreclosed private operators from the intercity charter bus industry; that GCRTA's charter agreement with UMTA is in violation of the statute and implementing regulations; and that if such charter service is incidental it is only because GCRTA maintains an excessive spare ratio which allows them to violate the intent of the regulations with impunity.

The Complainants request that UMTA order the Respondent to cease and desist from engaging in the practices complained of and to withhold all future funding until it does cease such practices.

Supporting the complaint are various exhibits, including a typical Greyhound statement at public hearings, typical notice of application by GCRTA, Greyhound internal memo from a meeting with GCRTA on February 20, 1981, GCRTA's letter on peak requirements and charter fleet, and UMTA's 1979 response to Greyhound concering GCRTA's charter activities. Greyhound filed additional information on June 17 and August 6, 1981, including a statement of "Agreed Facts".

It should be noted that five to seven private operators have complained about GCRTA's charter operations at every public hearing held over the last several years and that Greyhound filed a similar complaint with UMTA, which was decided in favor of GCRTA in May of 1979. Nonetheless Greyhound continues to assert that UMTA's charter regulations are being violated. UMTA docketed the complaint for review having determined that Complainants had provided sufficient evidence to justify a preliminary determination of probable cause with regard to the alleged violations.

III. Response to the Complaint

GCRTA responded to the complaints on May 1, May 20, June 3, and September 4, 1981, and denied any wrongdoing. In support of its defense, GCRTA provided the following information: a copy of its charter agreement with UMTA; a certification of costs for the year ending December 31, 1979; a listing of its fleet requirements; a listing of its charter operations from April 1, 1980 through March 31, 1981; a copy of its advertisement in the Yellow Pages; a copy of a state court decision, Schwenk v. Miami Valley Regional Transit Authority,4 003d 145 (1975), to support its position that the RTA can operate charters outside its urban area; and Daily Vehicle Reports and Vehicle Control Charts for the days on which charters were operated more than 50 miles outside their urban area to substantiate that they were able to meet their peak hour requirements, scheduled maintenance and road calls.

Respondent asserts that all charter operations are incidental to regularly scheduled mass transportation, that they are operating all charter service in compliance with their agreement with UMTA, that their revenues exceed their costs and that the alleged excess spare ratio is unfounded and irrelevent to the issue at hand.

IV. Findings and Determinations

The complaint raises several distinct issues which, although interrelated, are addressed separately:

1. Does GCRTA have a valid charter agreement with UMTA and has it been adhering to the terms of that agreement?

2. Do GCRTA's charter operations qualify as incidental service?

3. Has GCRTA foreclosed private operators from intercity charter bus activity where such private operators are willing and able to provide such service?

1. Does GCRTA have a valid charter agreement with UMTA?

Every grantee who conducts charter service outside its urban area must first enter into a written agreement with UMTA (49 CFR 604.12). GCRTA has provided a copy of an undated charter agreement signed by Mr. Leonard Ronis, then General Manager of GCRTA, which it purports is its charter agreement with UMTA. This agreement contains terms and conditions other than the standard terms and conditions in 49 CFR 604.13 and therefore, constitutes a special agreement under 49 CFR 604.14. Specifically, it provides that GCRTA may conduct charter service during peak morning and evening rush hours, weekday charters which require the use of a coach for more than a total of six hours in any one day, and charter service outside of its urban area provided that its equipment requirements permit it to operate such charters without interfering with regularly scheduled service.

GCRTA did not provide, and our records did not contain, any indisputable evidence that UMTA concurred in this specific charter agreement. Our files do contain, however, a letter dated September 19, 1977 from Richard S. Page, then UMTA Administrator, to Mr. B. L. Peyton, Regional Vice President of Greyhound Lines, Inc., stating that the presumptions of incidental service in 49 CFR 604.11 can be overcome in an agreement between UMTA and a grantee. The letter further states that GCRTA has obtained such an agreement from UMTA and that this agreement expressly provides that GCRTA may engage in incidental charter service which does not interfere with regularly scheduled mass transit service. Thus, we conclude that the charter agreement provided by GCRTA was approved by UMTA.

However, whether this constitutes a valid agreement is another question. A letter dated April 7, 1978, from the previous Chief Counsel, Margaret M. Ayres, to Mr. Peyton, identified the criteria to be used by UMTA in determining if there is a legally sufficient basis to limit or deny a proposed charter agreement. These "include, but are not limited to the following determinations: (1) that a grantee is not allowed to carry out proposed charters under State law under section 604.15(4)(b)(1); (2) that a grantee has failed to follow the procedures prescribed by the regulations with respect to certification of costs, the preparation of a cost allocation plan or notice to private carriers; or, (3) that a proposed agreement violates the incidental requirement of section 604.11 of the regulations." Using these same criteria, there is an adequate basis for reconsidering our acceptance of the agreement. Furthermore, given the lapse of time since our concurrence in the agreement, and the issues raised in the complaint, there is ample legal basis for requiring UMTA and GCRTA to either enter into a standard agreement as provided in 49 CFR 604.13 or another special agreement under 49 CFR 604.14, if justified per 1.C. of this decision.

A. Authority to Operate Charters Under State Law

There is incomplete documentation to support a conclusion that GCRTA has authority to conduct charters on a statewide basis. The documentation supplied by GCRTA provides two contradictory arguments as to why it has authority to conduct charters on a statewide basis.

The first is that GCRTA has authority to operate transit service anywhere in the state. It bases this conclusion on both statutory and case law. Section 306.35(g) of Ohio Revised Code states that an RTA may ". . . acquire, construct, improve, extend, repair, lease, operate, mantain or manage transit facilities within or without its territorial boundaries deemed necessary to accomplish the purpose of its organization. . ." In Schwenk v. MVRTA, supra, the Ohio Court held that an RTA is not subject to the jurisdiction of the Public Utility Commission and may extend its transit services to non-contiguous areas outside the territorial boundaries of the RTA.

While these sources may provide conclusive evidence that GCRTA has the authority to provide transit service on a statewide basis, neither source specifically provides that charter service is transit service. In fact, section 306.30(A) of Ohio Revised Code defines a transit facility as one ". . .having as its primary purpose the regularly scheduled mass movement of passengers between locations within the territorial boundaries of a regional transit authority. . ."

If GCRTA believed that this were a proper legal basis for GCRTA to provide transit service, including charter service, on a statewide basis, no charter agreement would have been necessary, as section 3(f) of the Act only requires an agreement for charter bus operations outside the urban area within which the operator provides regularly scheduled mass transportation service. Under 49 CFR 604.3(b), the urban area is defined as the entire area in which a local public body is authorized by law to provide regularly scheduled mass transportation service. This is further defined to include all areas which are either within an "urbanized area" as fixed in accordance with 23 CFR Part 470, or within an "urban area" as determined by the Secretary under 49 USC 1608(c)(4)).

GCRTA also argues that it has authority to conduct statewide charters because its predecessor, the Cleveland Transit System, provided charter service throughout Ohio for over thirty years under Article XVIII, Section 6 of the Ohio Constitution which allows a municipality to sell and deliver to others any transportation service in an amount not exceeding fifty percent of the total service. However, GCRTA has not established that it is a municipality which would be covered by this section of the constitution. Conversely, it has not established that it is entitled to this constitutional protection as a successor of Cleveland Transit System.

While Ohio law may provide a basis for finding that GCRTA has the authority to conduct charters on a statewide basis, neither source relied upon by GCRTA to date is sufficient to justify that conclusion. Therefore, prior to UMTA approving a new charter agreement with GCRTA it must provide sufficient documentation to establish that it has authority to conduct charters under State law.

As part of this process, GCRTA must specifically document the urban area within which it is authorized to operate mass transit service. In developing this documentation, GCRTA is hereby notified that UMTA will not recognize a grantee's authority to provide mass transportation service which extends beyond an area within which the grantee can reasonably provide mass transportation service, in morning and evening peak periods, to and from a central city. The fact that state law may authorize a grantee to provide service on a statewide basis, does not preclude UMTA from limiting its definition of the urban area for Federal purposes to the area in which it is reasonable for the grantee to provide regularly scheduled mass transportation service. In determining reasonableness, the fact that a grantee actually provides service to such an area will be considered conclusive. Thus, until GCRTA establishes a broader urban area, consistent with the above guidelines, UMTA will only recognize as GCRTA's urban area the territorial limits of the four counties to which GCRTA presently provides service. This includes Cuyahoga County which is a member of the RTA, and Lake, Lorain, and Medina Counties, since GCRTA has four routes which serve surburban commuters in these counties.

B. Compliance with the Procedures in 49 CFR Part 604

The regulation establishes certain procedures which must be followed by grantees. Certain of these procedures deal with "certification of costs" (49 CFR 604.15, 30 and 51). GCRTA has failed to follow these procedures prescribed by the regulations with respect to certification of costs in that the most recent certification of cost provided by the GCRTA during this investigation was for the year ending December 31, 1979. It should be noted that on February 17, 1982 we received a certification of cost for the year ending December 30, 1980 as part of GCRTA's 1982 operating grant application (OH-05-4131). However, 49 CFR 604.3(b) provides that the period covered by the grantee's certification of costs shall not be less than two or greater than four of its most recently completed fiscal quarters. Also, 49 CFR 604.15 requires that a certification of costs be included in each application. All future applications must include a current certification of costs. This will allow private operators a chance to comment in a timely manner, at the public hearing, on this data.

C. Compliance with the Incidental Requirements of 49 CFR 604.11

Three examples of activities which will be presumed not to be incidental are provided in 49 CFR 604.11. While UMTA has previously voiced the opinion that the presumptions of incidental service can be overcome in an agreement, it is now time to restate that position.

It is UMTA's intention that the presumptions of non-incidental service apply in all instances. However, these are not conclusive presumptions and can be rebutted after the fact, on a case by case basis, if the grantee presents evidence or documentation, which in UMTA's determination sufficiently shows that the questioned charter service indeed did not interfere with regularly scheduled service, including regularly scheduled

maintenance and road calls, on the day and time in question. In other words, the grantee must have sufficient daily records to show that all service requirements were met. In exceptional cases, UMTA will also consider allowing the grantee to overcome the regulatory presumptions in the negotiation of an agreement, but such a rebuttal must be fully documented, must rely on unique situations, such as topography, unusual peak hours or special events, and must clearly show that regularly scheduled mass transportation service will not be interfered with under any circumstances. The grantee, of course, would still be subject to challenge if it used the UMTA equipment in non-incidental service which had not been approved by UMTA as part of a special agreement.

In summary, while GCRTA did have a charter agreement and may have been performing in conformance with that agreement, the issues raised by this complaint suggest that the agreement must be renegotiated along the guidelines listed above. Until a new agreement is entered into, in conformance with the procedures in 49 CFR Part 604, GCRTA will not be permitted to perform charter service outside the urban area in which it provides regularly scheduled mass transportation service. Furthermore, GCRTA must comply with the incidental restrictions (not during peak hour or more than 6 hours in one day) contained in 49 CFR 604.11.

2. Do GCRTA's charter operations qualify as incidental service?

As discussed above, the regulation contains three examples of bus uses which are considered non-incidental yet the GCRTA agreement allows them to use the buses in these ways as long as their equipment requirements so permit. With respect to one of these examples, GCRTA provided evidence that between April 1, 1980 and March 31, 1981, it conducted 65 charters more than 50 miles outside its urban area. It also provided evidence in the form of Daily Vehicle Reports and Vehicle Control Charts that, on the days in question, it was able to meet all peak hour requirements, scheduled maintenance and road calls. However, a key element of Greyhound's complaint is that GCRTA has been able to conduct these types of charters without interfering with regularly scheduled mass transportation service because it has an inordinately high spare ratio. The documentation supplied by GCRTA, taking into account both the number of buses scheduled for routine maintenance (94) and the number of buses inactive and held as spares (80), shows that as of April 1981 this ratio was around 21%. This is higher than UMTA's general rule of thumb of 10%-15% but is justified on the basis that 41% of GCRTA's fleet is over 12 years old and the high breakdown rate of its newer buses. However, there is documentation, in terms of recent press clippings, that GCRTA has had to lease 50 buses from MARTA in order to meet its regularly scheduled service because of the poor condition of its buses. (These extra 50 buses are not included in GCRTA's figures and would increase the spare ratio.) Furthermore, GCRTA admitted in a October 21, 1981 letter requesting our concurrence in a grant to rehabilitate 100 buses (OH-05-0058) that they have been experiencing severe equipment shortages and "it has not been possible to make schedule since January 1981." In light of these facts, GCRTA will not be allowed to use its high spare ratio to conduct, or to justify conducting, charter operations in excess of those allowed in the regulation. This means that the number of buses used for charter and peak hour service, including scheduled maintenance and road calls, shall not exceed 110% of GCRTA's peak hour requirements.

In this regard, continued use of the excess spare ratio to justify charter operations may constitute engaging in a practice which is a means of avoiding the requirements of the charter agreement. If so, such action will clearly be prohibited by the terms of any agreement under 49 CFR 604.13.

As a corollary matter, Hopkins has objected to the size and content of the GCRTA ad in the "Yellow Pages" under "Charter and Rental Buses". This ad states "pick the bus that meets your need from the largest charter bus fleet in Ohio." GCRTA has countered that this ad only refers to their two "Charter Chiefs" which were bought without UMTA assistance. However, it seems unlikely that two buses give GCRTA the largest charter bus fleet in Ohio. While such an advertisement itself would not result in a violation of the incidental provision, since GCRTA would presumably turn down any charter requests that interfered with regularly scheduled service, the tone does imply that GCRTA is ready and able to provide charters at any time. Therefore, in the future, GCRTA may not advertise service which is impermissable under the charter regulation.

In summary, while GCRTA may have been able to conduct non-incidental charters without in fact interfering with regularly scheduled service, such operations were partially possible only as a result of its high spare ratio. In the future, GCRTA may not conduct non-incidental charters, without finding itself subject to a complaint and having to justify such charters after the fact, and may not use its spares as a means of justifying its charter operations.

3. Has GCRTA foreclosed private operators from intercity charter bus activity where such private operators are willing and able to provide such service?

GCRTA's existing agreement, like the standard agreement, provides that a grantee will generate enough revenue from its charter operations to equal or exceed the costs of providing such service consistent with a cost allocation plan required by the regulation which includes dummy charges for taxes and depreciation. While GCRTA has not provided a recent certification of costs, its certification for the year ending 1980 shows that it was able to meet this criteria. Without evidence to the contrary, we will assume that GCRTA is charging overall a high enough rate to cover all of its costs.

However, the agreement also provides that a grantee will not establish a charter rate which is designed to foreclose competition by private bus operators. Greyhound has provided an analysis, using GCRTA's own figures, which shows that on certain trips GCRTA's bus revenue for that trip would be less than the fully allocated cost for that charter trip. GCRTA has stated that its cost of charter operations is $4.12 per mile, yet for an overnight trip from Cleveland to Kings Island Amusement Park, 480 round trip miles, it would only charge $965.00 or $2.01 per mile. Furthermore, this charge is $155.00 less than Greyhound would charge for a similar trip.

The issue raised by this analysis is whether a grantee can undercharge on certain routes as long as its overall revenue exceeds its costs. The regulation itself is silent on this issue and only requires that revenues generated by operations are equal to or greater than the cost of providing such charter operations.

However, in the interest of fairness, UMTA will establish the following guidelines for determining whether rates exceed costs and whether a private operator is being foreclosed: (i) the general cost test is whether overall charter revenues equal or exceed overall costs; (ii) even if a grantee meets this test, the grantee can still be found to be in violation of the regulation if it engages in predatory pricing on a single route, that is pricing which is designed to foreclose competition.

In summary, while GCRTA has shown that at least through 1980, it was able to cover its costs on an overall basis, it must continue to provide this certification of cost information with each application and cannot establish predatory pricing on individual routes.

V. Conclusion

Based on the foregoing, we find that GCRTA has violated the applicable statutory and regulatory requirements by operating certain non-incidental charters and by not filing a current certification of costs. However, these findings are based, in part, upon an interpretation of the regulation which has not previously been communicated to GCRTA. As a consequence, we conclude that although a violation occurred, it was not part of a continuing pattern that indicated disregard of the restrictions imposed on grantees under 49 CFR Part 604. Thus, we are recommending that the following corrective actions be taken:

1. Within sixty (60) days of receipt of this order, GCRTA will cease and desist all charter operations outside its urban area until all of the requirements of this order have been complied with. For purposes of this order, urban area will be defined as the territorial limits of those counties actually served by GCRTA. Charter service conducted in the urban area must be incidental. For any charter contracts in existence on the date of this order, for service to occur after the 60-day period, GCRTA will immediately contact UMTA Region V for instructions on how to handle these contracts.

2. GCRTA will provide evidence that it has authority under state law to conduct charters and will document the urban area within which it is authorized to operate mass transportation service.

3. If GCRTA is able to establish that it has authority to provide charters outside its urban area, GCRTA and UMTA will enter into a new agreement using the standard provisions contained in 49 CFR 604.13. GCRTA will follow all of the applicable steps for obtaining a modified charter agreement contained in 49 CFR 604.20(b)-(d).

4. If GCRTA and UMTA enter into an agreement allowing GCRTA to conduct charters outside its urban area, GCRTA will keep its certification of costs current as required by the regulation in all of its future grant applications.

5. GCRTA will not use its high spare ratio to justify providing non-incidental charter service.

6. Rates charged for individual charter operations must not be predatory.

Failure of GCRTA to comply with the terms of this order may result in a finding of a continuing pattern of violations and the discontinuance of Federal funds for mass transit until compliance is assured.

Brigid Hynes-Cherin, Regional Counsel, UMTA Region V — 8/23/82 Date

CONCUR:

J Mentz, acting for
G. Kent Woodman, Chief Counsel — 8/26/82 Date

Filed Clerk's Office

U.S. Department of Transportation
Urban Mass Transportation Administration

Headquarters

400 7th Street S.W.
Washington, D.C. 20590

JAN 14 1983

Michael L. Ritz, Esquire
Assistant Chief Counsel
The Greater Cleveland Regional
Transportation Authority (GCRTA)
615 Superior Avenue, N.W.
Cleveland, Ohio 44113

Dear Mr. Ritz:

By letter dated November 4, 1982, you requested that GCRTA be permitted to extend charter operations to include service to the Cleveland Coliseum located approximately 1 1/2 miles accross the Cuyahoga County border in Richfield, Ohio, and that the two "Charter Chiefs" owned by GCRTA be permitted to operate exempt from UMTA regulations (49 CFR Part 604).

As noted in your letter, these requests were prompted by restrictions having been placed on RTA charter operations by UMTA in its decision of August 26, 1982, (hereafter refered to as the "Decision") resulting from an UMTA investigation of complaints by Greyhound Lines, Inc., and Hopkins Limousine Service Inc., into the charter operations of the GCRTA. Because your requests stem directly from our Decision, we have chosen to treat your letter as a formal request for reconsideration of that Decision as it effects the issues raised in your letter.

Service to the Coliseum

The evidentiary material accumulated during the UMTA investigation (in accordance with §604.42) did not support GCRTA's claim of legal authority to provide regularly scheduled mass transportation service on a statewide basis. Therefore, in the Decision UMTA exercised its authority to redefine RTA's "urban area" according to §12(c)(10) of the UMT Act and §604.3(b) of the regulation as that area actually served by GCRTA's mass transit operations, namely the territorial boundaries of the four county area containing Cuyahoga, Lake, Lorain and Medina counties. §12(c)(10) states:

> [T]he term 'urban area' means any area that includes a municipality or other built-up place which is appropriate, in the judgment of the Secretary, for a public transportation system to serve commuters or others in the locality taking into consideration the local patterns and trends of urban growth;

The information you provide in support of this request that RTA be permitted to operate charter service to the Cleveland Coliseum does evidence local patterns and trends of urban growth as would permit UMTA to include the Coliseum within the defined GCRTA urban area. Specifically we are informed by your staff that:

1. Prior to 1975, the Cleveland Transit System (CTS) provided both regular transit and charter service to the Cleveland Arena located in downtown Cleveland.

2. In 1975, GCRTA took over the CTS operations in Cleveland.

3. In 1978, the Cleveland Coliseum was built in its current location as a replacement for the Cleveland Arena.

4. The Coliseum is the home of the Cleveland Cavaliers basketball team and RTA is requested to provide charter service for basketball games and special performances.

5. There is insufficient traffic to warrent establishment of regular transit service to the Coliseum and therefore only charter service is provided.

6. For approximately nine months of the year (March through November) there is insufficient private capacity willing and able to meet identified needs.

7. That the provision of charter service would primarily aid persons in the urban area as defined in the Decision.

Taking into consideration the facts as we understand them, it would appear that the relocation of the Cleveland Cavaliers from the Arena to a new Coliseum sports complex is a natural development of urban growth in the Cleveland metropolitan area. Further, we find that charter service to the Coliseum by GCRTA from the areas presently served by the GCRTA (namely the counties of Cuyahoga, Medina, Lake and Lorain) is appropriate for a public transportation system to serve commuters and others within the locality. Lastly, we take specific note of GCRTA's recent efforts to enter into a new Charter Agreement with UMTA as required by the Decision, which we anticipate will be completed within the next 120 days.

Therefore, in conformance with §12(c)(10) of the UMT Act, the "urban area" of the GCRTA is hereby defined as including the territorial boundaries of the four above named counties, and that area of approximately 1 and 1/2 miles from the Cuyahoga county border to the Cleveland Coliseum in Richfield, Ohio.

The Cleveland Coliseum is located in Summit County. We take specific note of the fact that the city of Akron, Ohio operates its own mass transit system within that county. Nothing in this decision is to be regarded as evidencing the existence of any right of GCRTA to operate within the boundaries of Summit County which did not previously exist under Ohio law.

Operation of GCRTA's Charter Chiefs

In considering GCRTA's request that the two "Charter Chiefs" be permitted to operate exempt from the UMTA regulations, consideration has been given to balancing the need for vigorous enforcement of the charter regulations for the protection of private enterprise on the one hand, and the degree of harm which GCRTA may be expected to suffer if the requested relief were not granted from the Decision. On that basis, UMTA finds no justification for exemption of the GCRTA Charter Chiefs from operation subject to the regulations. First, expansion of the GCRTA urban area as to include the Coliseum would permit GCRTA to provide charter service to that location even without a charter agreement in force between GCRTA and UMTA, subject only to the incidental use provisions and cost certification provisions of the UMTA regulations as they relate to vehicles, equipment and facilities funded under Urban Mass Transportation Act of 1964, as amended. As the "Charter Chiefs" were purchased without UMTA participation, those vehicles are already exempt from the incidental use provisions and thus can be used within the defined GCRTA urban area for charter service subject only to the cost certification provisions. Second, a review of the list of GCRTA charter contracts requiring operation beyond the defined "urban area" which were in existence prior to the Decision, which list was included along with your request, reflects only three contracts which are affected. On balance, it would appear that any damage to GCRTA which might be occasioned by a potential breach of contract can be avoided through a waiver of the regulation with respect to operation outside the urban area for those contracts without a blanket exemption. Therefore, your request that the "Charter Chiefs" be permitted to operate exempt from the UMTA regulations is hereby denied. A waiver is hereby granted, however, permitting GCRTA to provide contract charter service beyond its urban area for the three outstanding contracts existing as of the August 26, 1982, Decision on the dates specified in your submission.

Finally, contrary to the statement in your letter, the Decision did not cancel the charter agreement under which RTA has been operating. Rather, the UMTA Administrator is permitted by §604.14 of the charter regulations to authorize the use of provisions other than the standard ones contained in §604.13 where the Administrator determines that the requirements of §3(f) of the UMT Act and §164b of the Highway Act can be met by such provisions. As discussed on pages three through five of the decision (copy enclosed), RTA did not provide, and UMTA records did not contain any indisputable evidence that UMTA had originally or thereafter concurred in the specific charter agreement under which RTA has been operating. While it was found that RTA may have a charter

agreement and may have been performing in conformance with that agreement, the issues raised by the complaint suggest that the agreement must be renegotiated. Thus, under authority of §604.14, the Agreement under which GCRTA had been operating, as limited by the Decision and this Decision on Request for Reconsideration is hereby approved and shall continue in effect until a new agreement is consummated. This agreement continues to be approved subject to examination or audit of charter bus manifests, and other accounts by UMTA representatives in the event of a complaint by an interested party alleging that the charter rates charged by GCRTA are not in compliance with the terms of this agreement.

Sincerely,

G. Kent Woodman
Chief Counsel

Enclosure

Urban Mass Transportation Administration
UCC-31:DURKEE:dd::x61936
Retyped:DURKEE:kly:12-1-82:61936
cc: UCC-Chron/UCC-31/UCC-30/UCC-1/URO-5

Charles Reps

U.S. Department of Transportation
Urban Mass Transportation Administration

Headquarters

400 7th Street S.W.
Washington, D.C. 20590

JAN 27 1984

Mr. Charles A. Webb
Attorney at Law
606 London House
1001 Wilson Boulevard
Arlington, Virginia 22209

Dear Mr. Webb:

This responds to your recent letter informing the Urban Mass Transportation Administration (UMTA) of the American Bus Association's (ABA) continuing interest in a charter bus complaint filed against the Greater Cleveland Regional Transit Authority (GCRTA). You specifically request information concerning any proposed agreements between UMTA and the GCRTA which would allow the GCRTA to conduct charter service outside its urban area.

As you know, UMTA issued a decision on August 26, 1982, that found the GCRTA in violation of UMTA's regulation on Charter Bus Operations (49 CFR Part 604). As a result, UMTA ordered the GCRTA to cease and desist all charter operations outside its urban area. The order permitted the GCRTA to enter into a new charter bus agreement with UMTA to provide service outside its urban area if it could establish that it had the legal authority under State law to do so. Under the terms of the decision, "urban area" is defined as "the territorial limits of those counties served by GCRTA."

By letter dated November 4, 1982, the GCRTA requested that it be permitted to extend charter operations to include service to the Cleveland Coliseum located approximately one and one-half miles across the boundary of its "urban area" as defined by the decision. UMTA concurred in this request on January 14, 1983.

On October 3, 1983, UMTA entered into a charter agreement with the GCRTA. A copy is enclosed. Under the terms of this agreement, the GCRTA is not permitted to engage in charter operations with UMTA funded equipment and facilities outside its urban area. The agreement defines "urban area" as

"the area within the territorial boundaries of counties in which GCRTA provides regularly scheduled mass transportation service." The agreement does permit the GCRTA to use its Charter Chiefs to provide charter service anywhere in the State of Ohio since these vehicles were not federally funded. The GCRTA, however, may not use any Federal operating assistance to subsidize the charter services provided with these buses.

I hope that this information has been helpful. If you have any additional questions, please do not hesitate to contact me.

Sincerely,

G. Kent Woodman
Chief Counsel

cc: Rick Bacigalupo, URO V

Enclosure

URBAN MASS TRANSPORTATION ADMINISTRATION
UCC-32:DGOLD:~~cm:Ext. 61936:~~ 1-19-84
Copies to: UCC-32/Gold/ UCC-Chron/ UCC-30/Munter/ UCC-1/Woodman

AGREEMENT
BETWEEN
GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY
AND
THE DEPARTMENT OF TRANSPORTATION

THIS AGREEMENT, entered into this 3rd day of October, 1983, between the Greater Cleveland Regional Transit Authority, hereinafter referred to as "GCRTA" and the Secretary of Transportation of the Department of Transportation, of the United States of America.

WHEREAS, the GCRTA desires to operate charter service outside its urban area; and

WHEREAS, 49 CFR, Part 604, provides that a charter bus agreement must be entered into with the Secretary of Transportation before charter services can be operated outside GCRTA's urban area.

NOW, THEREFORE, GCRTA agrees as follows:

(1) That neither it, nor any operator of mass transportation equipment and facilities on GCRTA's behalf, will engage in charter bus operations outside the GCRTA urban area, which is defined as the area within the territorial boundaries of counties in which GCRTA provides regularly scheduled mass transportation service, except as provided for herein;

(2) That revenues generated by its charter bus operations are equal to or greater than the costs of providing charter bus operations consistent with its cost allocation plan and that GCRTA shall keep its certification of said costs current as required by regulation;

(3) That it will not establish any charter rate which is designed to foreclose competition by private bus operators;

(4) That any use of project facilities and equipment in charter service will be incidental, as described in the Opinion of the Comptroller General of the United States, B-100204, December 7, 1966, and shall not interfere with the use of such facilities and equipment in regularly scheduled mass transportation services to the public;

(5) That the two (2) buses known as the "Charter Chiefs," which were purchased by the Cleveland Transit System (predecessor of the GCRTA) with non-federal funds and which are not used in providing regularly scheduled mass transportation services, shall only be used to provide charter bus services within the State of Ohio to the extent permitted under this Agreement;

(6) That it has notified the private operators licensed by the State of Ohio to render service in its urban area of the terms and conditions of the herein Agreement.

The Secretary of Transportation of the Department of Transportation of the United States of America agrees to permit GCRTA to operate charter service pursuant to the conditions set forth in 49 CFR Part 604, which is hereby incorporated into this Agreement, including the requirement that it provide the Urban Mass Transportation Administration (hereinafter referred to as "UMTA") with its cost allocation plan;

Further, the Secretary of Transportation finds that these provisions constitute fair and equitable arrangements within the meaning of the Urban Mass Transportation Act of 1964, as amended, to assure that the financial

assistance granted by the United States Government under any mass transportation grant project will not enable GCRTA or any contracted operator of project equipment and facilities to foreclose private operators, from the intercity charter bus industry, where such private operators are willing and able to provide such service.

IN WITNESS WHEREOF the parties hereunto have set their hands and seals the day and year first written.

Witnesses:

GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY

By: _____

Its: Acting General Manager

DEPARTMENT OF TRANSPORTATION

By: _____

Its: Acting Deputy Administrator

The legal form and correctness of the within instrument are hereby approved.

_____

Acting General Counsel

Tower Bus, Inc.,
Complainant

v.

Southeastern Michigan
Transportation Administration,
Respondent

I. Summary

This decision of the Urban Mass Transportation Administration (UMTA) is in response to a complaint filed by Tower Bus, Inc. (Tower) alleging that the Southeastern Michigan Transportation Administration (SEMTA) violated Federal and State statutes, Federal regulations, and an UMTA Order. UMTA's review is limited to the alleged violations of the UMTA statute, regulations and Order. UMTA has concluded that: (1) SEMTA's charter operations are in compliance with UMTA's requirements; and (2) SEMTA has not engaged in illegal anticompetitive conduct.

II. Background

Tower filed a complaint with UMTA dated September 30, 1981, alleging, inter alia, that SEMTA is engaging in illegal charter operations and anticompetitive conduct.

Specifically, Tower alleges that SEMTA violated the following:

49 U.S.C. § 1602
5 U.S.C. § 552
49 U.S.C. Chapter 8
49 C.F.R. Part 604
49 C.F.R. Part 605
49 C.F.R. Chapter 3, Subpart B
49 C.F.R. Chapter 10
UMTA Order dated July 13, 1978
State of Michigan Statutes, Act 254, P.A. 1935
State of Michigan Statutes, Act 204, P.A. 1976, as amended
State of Michigan Statutes, Act 442, P.A. 1976, as amended

Tower seeks: (1) an order prohibiting SEMTA from continuing its violations; (2) all funding of SEMTA by UMTA to be stopped; (3) monetary damages; and (4) an on-site investigation of SEMTA's operations.

By letter to UMTA, dated December 18, 1981, SEMTA responded to Tower's allegations. SEMTA admitted that it had violated UMTA's July 13, 1978 Order, but indicated that the violations had ceased. SEMTA denied Tower's other allegations. Tower filed a rebuttal to SEMTA's response on January 29, 1982, and SEMTA filed a surrebuttal on February 19, 1982.

The parties met with UMTA on May 10, 1982, and discussed the possibility of reaching a settlement in regard to the complaint. Negotiations took place between June and September 1982, but no settlement was agreed upon. On September 2, 1982, Tower advised UMTA that it was renewing its complaint, and alleged that SEMTA had continued to violate UMTA's charter bus regulations after Tower's September 1981 complaint was filed. Tower submitted information to suport its claim on September 30, 1982. By letters dated October 15 and November 15, 1982, SEMTA denied Tower's allegation and submitted information to support its position.

III. Jurisdiction

UMTA's jurisdiction is limited to the claims made with respect to 49 U.S.C. § 1602, 49 C.F.R. Parts 604 and 605, and UMTA's Order. UMTA will not, therefore, make any determinations concerning Tower's claim that SEMTA violated the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Tower's allegations of harrassment, or Tower's assertion that SEMTA violated ICC regulations, 49 C.F.R. Chapters 3 and 10, and 49 U.S.C. Chapter 8. UMTA also has no authority to award monetary damages as requested.

IV. Findings and Determinations

UMTA's findings are directed to each of the following allegations by Tower: that SEMTA (1) operates intercity charters in violation of 49 U.S.C. § 1602(f), 49 C.F.R. § 604 and UMTA's July 13, 1978 Order; (2) operates peak and extended hour charters in violation of 49 C.F.R. § 604; (3) operates school bus service in violation of 49 U.S.C. § 1602(g) and 49 C.F.R. § 605; (4) charges anticompetitive charter rates in violation of 49 U.S.C. § 1602(e) and (f) and 49 C.F.R. § 604; and (5) operates routes, schedules, and services in an anticompetitive manner in violation of 49 U.S.C. § 1602(e).

A. Charter Bus Operations

(1) Intercity Charters

By UMTA Order dated July 13, 1978, SEMTA was ordered to cease and desist for a period of three years from any charter operations outside that urban area in

which it provides regularly scheduled mass transportation services, as defined by State of Michigan Statute, Act 204, P.A. 1976, as amended. The Order was issued following a determination by UMTA that SEMTA had engaged in charter operations outside of its urban area without an agreement as required under 49 U.S.C. § 1602(f) and 49 C.F.R. § 604.12. Upon termination of the UMTA Order on July 13, 1981, SEMTA was permitted to engage in intercity charter operations according to the provisions of 49 C.F.R. § 604.13, absent a special agreement under 49 C.F.R. § 604.14. Although SEMTA has not entered into a written agreement under 49 C.F.R. § 604.12, SEMTA is bound to comply with the provisions of 49 CFR § 604.13 by the terms of Part II of the UMTA grant agreement.

Tower alleges that SEMTA conducted 317 charters outside its urban area in violation of 49 U.S.C. § 1602(f), 49 C.F.R. § 604.13 and the July 13, 1978 Order. SEMTA admits that it engaged in some charter operations outside its urban area as Tower alleges, but SEMTA also states that the number of alleged violations was exaggerated and that under current SEMTA practice, no extraterritorial charters are accepted. In addition, SEMTA states that those individuals who were primarly responsible for the violations are no longer employed by SEMTA.

In view of the unrefuted evidence that after the July 13, 1978 Order expired, SEMTA voluntarily ceased operation of all charters outside of its urban area, UMTA does not find it necessary to take any remedial action to prohibit SEMTA from engaging in such operations. Irrespective of whether there were 317 violations or fewer violations between July 13, 1978 and July 13, 1981 (when the Order was in effect), and between July 13, 1981 and December 18, 1981 (after the Order expired), we find no violations since December 18, 1981 (when SEMTA responded to Tower's complaint). SEMTA states that its voluntary extention of its three year probationary penalty will remain in effect until UMTA is satisfied that SEMTA has fully complied with all appropriate procedures. Future violations do not, therefore, appear likely. If violations do recur, UMTA will take appropriate measures at that time.

(2) Peak and Extended Hour Charters

Tower alleges that SEMTA violated 49 C.F.R. § 604.11 by operating non-incidental charters. Under Section 604.11(b), the following uses of mass transportation buses in charter bus operations are presumed not to be incidental:

(1) Weekday charters which occur during peak morning and evening rush hours;

(2) Weekday charters which require buses to travel more than fifty miles beyond the grantee's urban area; or

(3) Weekday charters which require the use of a particular bus for more than a total of six hours in any one day.

Tower charges that SEMTA operated weekday charters during peak morning and evening rush hours, and operated weekday charters which require the use of a bus for more than six hours in one day. Tower submitted data in support of its position with its initial complaint on September 30, 1981, and submitted supplemental data, indicating continued violations, on September 30, 1982. The data is presented in a computerized analysis by Tower of SEMTA's records of its charter bus operations.

SEMTA responded to Tower's allegations both by pointing out the inaccuracies in Tower's data and analysis, and by showing that those peak and extended hour charters which did occur were incidental. SEMTA submitted its own analysis of the same charter runs that were analyzed in Tower's computer printout.

Tower defines SEMTA's peak hours as 6:00 - 9:00 a.m. and 3:00 - 6:00 p.m. SEMTA submits that its operational definition of peak hours is 7:10 - 8:10 a.m. and 4:40 - 5:40 p.m. Under this definition, far fewer peak hour charters occurred. In addition, SEMTA asserts that some trips labeled by Tower as peak hour violations were cancelled and, therefore, never took place. SEMTA also states that other charters labelled by Tower as peak hour volations did not actually operate during peak hours, but were merely billed at the minimum two-hour charge.

SEMTA asserts that some of the charters designated by Tower as requiring the use of a particular bus for more than six hours actually involved the use of more than one bus for less than six hours per bus. The total time billed for each charter exceeded six hours, but each individual bus was used for less than six hours.

SEMTA also disputes Tower's designation of some runs as charter runs at all. These runs involve small buses operated under SEMTA's municipal credit program (discussed in Section B(1) below). Some of the runs were actually new regular transit routes that were billed as charters during a trial period to fascilitate billing and review of the cost of running the routes.

In addition to presenting evidence refuting Tower's designation of runs as peak and extended hour charters, SEMTA rebutted the presumption that any peak or extended hour charters which took place were non-incidental. SEMTA submitted terminal dispatch logs, and dispatch office daily assignment sheets indicating that there was no disruption of or interference with regularly scheduled mass transportation service. Regardless of whether peak or extended hour charter operations took place SEMTA had idle buses to operate those charters. Given that the charters did not interfere with regularly scheduled service, the charters were incidental and not in violation of 49 C.F.R. § 604.11.

(3) School Services

Tower alleges that SEMTA operated school runs in violation of 49 U.S.C. § 1602(g) and 49 C.F.R. Part 605, by assigning charter numbers to those runs as a subterfuge. According to Tower, the runs are actually regular school runs operated to the exclusion of anyone but school children. In support of its allegations, Tower designated certain charter runs, on the computer print out of SEMTA's charter operations, as school runs.

SEMTA responds that its school services include the operation of tripper service and charter service, but denies the allegation that these operations are in violation of the regulation. SEMTA contends that its tripper service is permitted under 49 C.F.R. § 605.13 and that this service has never been disguised as charter service. Furthermore, SEMTA argues that the charter service it provides for school children is not a device to avoid any of the requirements of 49 C.F.R. Part 605, and that the service is incidental charter service under 49 C.F.R. § 605.12.

After reviewing the evidence and the arguments of both parties, UMTA finds that Tower has not presented sufficient evidence to establish that SEMTA violated the requirements of 49 U.S.C. § 1602(g) or C.F.R. Part 605.

B. Competition with Tower's Services

(1) Charter Rates

Tower alleges that SEMTA's charter rates are anticompetitive in violation of 49 U.S.C. § 1602(e) and (f) and 49 C.F.R. § 604.13. Tower's major concern appears to be that under Michigan's municipal credit program, SEMTA essentially provides "free" charter trips.

It is not necessary for UMTA to decide whether, as a general matter, the municipal credit program results in anticompetitive charter service. UMTA's review is limited to considering whether SEMTA offers its charter service, including charters provided under the municipal credit program, in violation of the statutory and regulatory requirements with respect to charter rates. It is UMTA's position that no violation has occurred.

Under 49 U.S.C. § 1602(e), UMTA may not provide financial assistance for the purposes of providing for mass transportation, unless the recipient's program, to the maximum extent feasible, provides for the participation of private mass transportation companies. This provision does not apply to SEMTA's charter services, because charter services are specifically excluded from the definition of "mass transportation" under 49 U.S.C. § 1608(c)(6). SEMTA's charter rates cannot, therefore, be in violation of 49 U.S.C. § 1602(e).

According to 49 C.F.R. § 604.13, grantees are prohibited from charging anticompetitive rates for any charter operations if the grantee provides intercity charter service. As discussed in Section A(1) above, the facts in the record establish that SEMTA no longer operates any charters outside its urban area. Therefore, SEMTA's charter rates are not subject to the requirements of these sections, and no violations have occurred.

(2) Routes, Schedules, and Services

Tower presented evidence, not refuted by SEMTA, indicating that SEMTA operates some routes and schedules that overlap with Tower's services. Tower also asserts that SEMTA does not, to the maximum extent feasible, provide for the participation of private mass transportation companies as required under 49 U.S.C. § 1602(e).

In response, SEMTA contends that nearly all SEMTA and Tower routes differ by times, organization and destination, type and frequency of service. SEMTA recognizes that there are minor overlaps, but argues that the overlaps are an unavoidable result of fulfilling the public's needs for convenient and economical transportation that cannot be reasonably met by private companies alone. Moreover, SEMTA argues that the mere overlapping of routes, schedules or services does not significantly affect Tower's operations or reduce Tower's business. SEMTA also argues that, taking into account both financial and practical considerations, it has used the services of private mass transportation companies to the maximum extent feasible.

The UMT Act does not completely prohibit recipients from providing mass transportation services in competition with private companies. Section 1602(e) states that UMTA's financial assistance is not to be provided:

> "for the purpose of providing ... for the operation of mass transportation facilities or equipment in competition with, or supplementary to, the service provided by an existing mass transportation company, unless (1) the Secretary finds that such assistance is essential to the program or projects required by section 8 of [the] Act, [and] (2) the Secretary finds that such program, to the maximum extent feasible, provides for the participation of private mass transportation companies..."

UMTA set forth the rules by which it determines whether a grantee has met its responsibilities to private mass transportation companies under this Section in a memorandum concerning Hudson Bus Lines, Inc.:

a. A grantee must be able to establish that it adhered to a process that assures:

(1) Private mass transportation companies have been or will be afforded an opportunity to be heard.

(2) Private mass transportation companies have been or will be given meaningful considertion as potential participants in the provision of mass transportation service.

b. A grantee may then determine whether and to what extent it is feasible to involve private mass transportation companies in the federally assisted transportation program in the area but the grantee must be able to justify its rationale for that determination.

c. Upon receiving a complaint, UMTA will review the grantee's decision and rationale therefore to assure that the grantee's decision is neither arbitrary nor capricious, nor an unwarranted abuse of discretion.

UMTA also stresses the importance of documentation by the grantee to demonstrate what opportunities to participate were actually afforded to the complainant.

SEMTA contends that it has never operated any buses, schedules or services for the purpose of competing with Tower or other private companies. Furthermore, SEMTA states that overlaps are the unavoidable result of fulfilling the public's mass transportation needs in the southeastern Michigan area. In determining the feasibility of entering into contracts with private carriers, SEMTA asserts that it takes into account both economical and practical considerations. SEMTA has submitted evidence demonstrating its willingness to accomodate and/or compensate private companies. The evidence includes documentation of agreements and proposals between SEMTA and Tower.

UMTA therefore finds that SEMTA's determination that it provides for participation by private mass transportation companies to the maximum extent feasible is neither arbitrary and capricious nor an abuse of discretion. Accordingly. UMTA does not find that SEMTA violated 49 U.S.C. § 1602(e) as alleged.

V. Conclusions and Order

In view of the foregoing, UMTA concludes that SEMTA's charter operations comport with UMTA's statute, regulations, and July 13, 1978 Order. UMTA also finds that SEMTA's charter rates, routes, schedules and services are also in compliance with UMTA's requirements. Therefore, no action will be taken by UMTA.

Susan J. Blum
Staff Attorney

10/24/84
Date

Edward J. Gill, Jr.
Acting Chief Counsel

November 5, 1984
Date

DECISION

Raleigh Transportation Services

Complainant

v.

City of Raleigh, North Carolina

and

Capital Area Transit System

Respondents

I. Summary

This decision is the conclusion of an investigation begun in response to a complaint received by the Urban Mass Transportation Administration (UMTA) Regional Office in Atlanta, Georgia, from Raleigh Transportation Services (RTS). In its complaint, RTS alleges that the City of Raleigh (the City) and the Capital Area Transit System (CATS) are in violation of the charter bus or school bus provisions in Sections 3(f) and 3(g) of the Urban Mass Transportation Act of 1964, as amended, (49 U.S.C. 1602(f) and (g)) (UMT Act) and the implementing regulations (49 CFR Parts 604 and 605). UMTA concludes that the City and CATS are not in violation of either Section 3(f) or 3(g) of the UMT Act or the implementing regulations.

II. Background

A. The Complaint.

RTS filed a complaint with the Regional Administrator on October 11, 1982. In this complaint RTS alleges that the City and CATS, the operator of the local public transit system which receives UMTA funds from the City, are violating the school bus provisions in Section 3(g) of the UMT Act since CATS is providing exclusive transportation for students and school personnel in competition with private operators. RTS also alleges that it had contacted the City which considers the service in question to be charter bus service, not school bus service. If true, RTS alleges that the City and CATS are

violating the charter bus provisions in Section 3(f) of the UMT Act and the implementing regulations at 49 CFR 604.11 since the service in question is provided during peak hours and the trips use a vehicle for more than 6 hours per day.

Specifically, RTS alleges that CATS is providing transportation service for students to and from North Carolina State University in Raleigh. The origin of the service is the Wakefield Apartments in Raleigh. The service is alleged to be provided by one bus in continuous circulation from 7:00 a.m. to 6:00 p.m. Monday through Friday on 30 minute headways. During peak hours, from 7:00 a.m. to 10:30 a.m. and from 2:30 p.m. to 5:00 p.m., an additional bus is alleged to provide service. The service is alleged to be paid for by the real estate management firm at the apartment complex and is for the exclusive use of the students living at the apartment complex. RTS alleges that the service operates closed door between the apartment complex and North Carolina State University. This service is alleged to be provided with the same equipment that CATS uses for its regular route service.

On October 18, 1982, UMTA responded to RTS and acknowledged the receipt of the complaint. In addition, UMTA requested that RTS provide additional information regarding the alleged charter bus violations if such information were available. No information was received and on November 11, 1982, UMTA sent a copy of the complaint to the City, UMTA's recipient, for investigation and reply.

B. Response to the Complaint.

On November 15, 1982, the City acknowledged its receipt of UMTA's October 18, 1982, letter and stated that it was preparing a response. In its response, dated December 3, 1982, the City states it understands Section 3(g) of the UMT Act and the implementing regulations to apply only to primary and secondary school bus transportation and not to the transportation of university students. Second, the City claims that it is not providing "school bus operations" as defined in 49 CFR 605.3 since it does not provide the service in question with either a Type I or Type II school vehicle as defined in the Highway Safety Program Standard No. 17 (23 CFR 1204.4). Third, the City states that the party contracting for the service is not a school or a school system, but is a businessman who operates the apartment complex. From these three premises the City concludes that the service in question is charter service.

The City further states that the intent of the Section 3(f) of the UMT Act is to protect private intercity charter bus operators. The City states that the service in question is intracity since it begins and ends within the city

limits of Raleigh. Second, the City states that it has done nothing to forclose private operators since it changes full charter rates which cover operating expenses and which include a factor for profit.

The City states that it considers the service incidental charter service. Although the City admits that it does operate the service during peak hours and uses a bus for longer than 6 hours in any one day, it states that the service is incidental since it does not detract from or interfere with the regular service it provides.

C. Rebuttal

On January 6, 1983, UMTA sent a copy of the City's response to the RTS. The RTS rebutted the City's assertions on January 26, 1983. First, the RTS argues that the City's belief that the school bus provisions in Section 3(g) of the UMT Act apply only to primary and secondary students is difficult to understand. The RTS refers to a meeting in September 1982 attended by then UMTA Regional Administrator Carl Richardson, Ms. Collen Weule, an UMTA Attorney, and representatives of the RTS and the City. At that meeting, the RTS alleges that Mr. Richardson and Ms. Weule explained that the term "student" in Section 3(g) applies to any student including those attending colleges and universities.

Second, the RTS asserts that the City's arguments that the type of bus that CATS uses to provide the service is not a Type I or Type II schoolbus and the fact that a businessman, and not a school or school system, pays for the service are irrelevant. Third, the RTS alleges that the service is not incidental since it operates 11 hours each day, with 30 minute headways for 150 days each year.

D. UMTA Request for Additional Information.

On October 23, 1984, UMTA requested that the City provide it with additional information concerning its charter bus operations. Specifically, UMTA requested that the City provide evidence to show that the service in question does not detract from the provision of regularly scheduled mass transportation service. Although the City asserted in its December 3, 1982, response that the service is incidental even though it operates doing peak hours and uses a bus for more than 6 hours a day, it provided no factual data in that letter to support its conclusion.

In addition, UMTA requested that the City provide financial data to support its claim that the costs for providing the service in question are covered by revenues. UMTA stated that the regulation's requirement that annual charter costs be covered by annual charter revenues only applies if a recipient provides intercity charter service. If a recipient provides only intracity

charter service, the regulations do not impose any requirements on the rates for this service. Since the City had never stated that it provides intercity service, UMTA advised it that it needs only provide the requested information if it provides intercity service.

E. Response.

The City responded by letter dated December 17, 1984. The City states that it has an active fleet of 46 buses, and a peak requirement of 41 buses (this is for the A.M. peak, the P.M. peak requires only 40 buses) which includes the buses used for the service in question. The City's off peak requirement is only 20 buses. In addition, the City provides an analysis of road calls during its fiscal year ending June 30, 1984. According to this analysis, the City experienced, on the average, less than one roadcall per day. From this, the City concludes that the service in question does not interfere with its mass transportation service.

In addition, the City also provides a schedule of its charter rates. According to this material, the City's charter costs per hour are $28.62 and the rate it charges for charter service is $29.63. The City states that this information shows that its charter revenues do cover its charter costs.

The letter, however, does not state specifically that the City provides intercity charter service. By telephone conversation on December 21, 1984, Mr. Bart Barham, the City's Transportation Services Engineer, confirmed that it does provide such service.

III. Findings and Determinations

In order to determine whether the service in question is impermissible, it is necessary to compare the current operations with both school bus service and charter bus service as these types of service are defined in the UMT Act and the implementing regulations

A. School Bus Service

Section 3(g) of the UMT Act provides that:

> No Federal financial assistance shall be provided under this Act for the construction or operation of faciities and equipment for use in providing public mass transportation service to any applicant for such assistance unless such applicant and the Secretary shall have first entered into an agreement that such applicant will not engage in schoolbus operations, exclusively for the transportation of students and school personnel, in competition with private schoolbus operators.

The regulations implementing this provision define "school bus operations" as "transportation by bus exclusively for school students, personnel and equipment in Type I and Type II school vehicles as defined in Highway Safety Program Standards No. 17" 49 CFR 605.3. Thus, it is necessary to review the service provided by CATS to determine if it: 1) is by bus; 2) transports students, personnel or equipment; 3) is exclusive transportation; and 4) is provided in a Type I or Type II school vehicle.

There is no dispute that the service in question is provided by bus. In addition, the City does not deny that the service is provided exclusively for the residents of the Wakefield Apartements who attened North Carolina State University.

The City, however, does dispute that the patrons of the service are students. The City argues in its December 3, 1982, letter, that "students" only includes people attending primary and secondary schools. The RTS rebuts this argument by stating that UMTA staff have said that the term "students" does include people attending colleges and universities.

UMTA has not previously formally adressed the question of whether a college student is a "student" in terms of Section 3(g) of the UMT Act and the school bus regulations. After a thorough review of this question, UMTA concludes that the term "student" in Section 3(g) and the school bus regulation does not include college students. Neither the UMT Act nor the school bus regulations define "student". Similarily, neither the legislative history nor the regulatory history discuss who is considered to be within the class of "students". In such cases, it is a well-settled canon of statutory construction that "words used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary." Burns v. Aleala, 420 U.S. 575, 580-81 (1975).

While the ordinary meaning of "students" may be broad enough to include a person of any age who studies, the meaning of this term in Section 3(g) cannot be read without looking at this provision as a whole. In addition to setting out the general prohibition against UMTA recipients providing exclusive service to students, Section 3(g) provides specific exceptions to this prohibition. The last of the three exceptions states:

> this subsection shall not apply with respect to any State or local public body or agency thereof, if it (or a direct predecessor in interest from which it acquired the function of so transporting school-children and personnel along with facilities to be used therefore was so engaged in schoolbus operations any time during the twelve-month period immediately prior to the date of the enactment of this subsection. (Emphasis added.)

The word "school-children" in this exception appears to function as a synonym for "students" in the first sentence of Section 3(g). The ordinary meaning of "school-children" is, in UMTA's opinion, limited to primary, pre-primary, and secondary school students. Consequently, it is UMTA's opinion that "students" in Section 3(g), since it is a synonym for "school-children", does not include college students.

This conclusion is supported by the legislative history for Section 3(g) and a related bill passed during the same Congressional session which added Section 3(g) to the UMT Act. Congress first enacted a school bus provision in the Federal-Aid Highway Act of 1973 (Pub. L. No. 93-87). Section 164(b) of this Act requires any applicant for financial assistance to purchase buses under Sections 103(e) and 142 of 23 U.S.C. or under the UMT Act to enter into an agreement that it would not engage in exclusive school bus operations for students and school personnel in competition with private operators. Congress added the school bus provision to the UMT Act in the National Mass Transportation Assistance Act of 1974 (Pub. L. 93-503). The language added as Section 3(g) is identical to that in Section 164(b) of the 1973 Act except that it expends the agreement requirement to include applications for grants for construction or operation of any facilities and equipment.

Both of these provisions had their origins in House-passed bills. The Senate passed bills did not contain any school bus provisions and, thus, the language was included by the Conference Committees. In both House-passed bills, Section 142(h) of S. 502 and Section 9 of H.R. 6452, the word "schoolchildren" is used exclusively. The word "student" was added in conference for both bills. This evidences a clear intent on the part of Congress that the two terms are synonyms and that the persons UMTA recipients are prohibited from transporting are persons attending primary, pre-primary, and secondary schools and not those attending colleges or universities.

In addition, the same Congress which added Section 3(g) to the UMT Act also enacted the Motor Vehicle and School Bus Safety Amendment of 1974 (Pub. L. No. 93-492). This Act amends the National Traffic and Motor Vehicle Safety Act of 1966 (Pub L. No. 89-563). In addition to authorizing appropriations for another of the Department of Transportation's operating administrations, the National Highway and Traffic Safety Administration (NHTSA) for FY 1975 and 1976, these amendments require NHTSA to issue Motor Vehicle Safety Standards for schoolbuses and defines "schoolbus" to mean,

> a passenger motor vehicle which is designed to carry more than 10 passengers in addition to the driver, and which the Secretary determines is likely to be significantly used for the purpose of transporting primary, pre-primary, or secondary school students to or from such schools or events related to such schools. (15 U.S.C. §1391 (14))

Thus, for the purposes of NHTSA's safety program, Congress excluded college students from the riders of schoolbuses.

Canons of statutory construction state that statutes relating to the same subject and passed at the same legislative session are to be construed harmoniously. 82 C.J.S. § 367. Since Congress added the schoolbus provision to the UMT Act and to the Motor Vehicles Safety Act of 1966 in the same sessions, catagories of person transported by a schoolbus should be interpreted consistently. Consequently, UMTA finds it necessary to exclude college students from the Section 3(g) definition of "students" since they are excluded in the Motor Vehicle and Schoolbus Safety Amendments of 1974.

Therefore, since UMTA has determine that college students are not students within the terms of Section 3(g) of the UMT Act and the implementing regulations, we conclude that the City is not in violation of the prohibitions on providing exclusive school bus service with UMTA-funded vehicles and equipment.

B. Charter bus Service.

The limitations on the charter bus service which UMTA recipients may provide with UMTA-funded vehicles and equipment are contained in two provisions in the UMT Act. Section 12(c)(6) defines "mass transportation" to specifically exclude charter service. Based on a Comptroller General's Opinion, however, UMTA recipients are permitted to provide charter bus service as long as it is incidental to the provision of mass transportation service. Section 3(f) prohibits the Secretary of Transportation from providing financial assistance under the UMT Act unless the applicant enters into an agreement that as a condition of such assistance the public body will not engage in charter bus operations outside the urban area within which it provides regularly scheduled mass transportation service so as to foreclose private operators from intercity charter service.

UMTA's regulation on Charter Bus Operations (49 CFR Part 604) define charter bus operations as:

> transportation by bus of a group of persons who, pursuant to a common purpose, and under a single contract, at a fixed charge for the vehicles or service, in accordance with the carrier's tariff, have acquired the exclusive use of a bus to travel together under an itinerary, either agreed on in advance, or modified after having left the place of origin.

A comparison of the service in question with this definition indicates that it is charter service. The service is by bus and transports a group of people, for a single purpose, under a contract, at a fixed charge, under an itinerary. Although charter service is generally thought of as a one time trip, e.g., a field trip, the UMTA definition is broad enough to include the recurring type of service provided here by the City through CATS.

The regulation implements the statutory provisions referred to above in distinct ways. Section 604.11 states that charter service is presumed to be not incidental if it is during the weekday and it occurs during peak hours, requires a bus to travel more than 50 miles outside a recipient's urban area, or requires the use of a particular bus for more than a total of 6 hours in any one day. These restrictions apply to any charter service, whether intracity or intercity, which a recipient provides.

Section 604.12 implements the protections for private intercity charter bus operators by requiring a recipient that does any intercity charter service to cover total charter costs (both intercity and intracity) with total charter revenues and by prohibiting a recipient from charging a predatory rate.

The RTS alleges that the service is not incidental since it is provided during peak hours and requires the use of a particular vehicle for more than 6 hours in a day. The City responds that the service is incidental, intracity service which does not foreclose private operators since the rate charged covers all operating expenses and includes a profit factor.

After a review of the evidence submitted, UMTA concludes that the charter services is incidental. The City has an active fleet of 46 buses and has an A.M. peak requirement of 41 buses and a P.M. peak requirement of 40 bus including the buses needed for the service in question. Its off-peak requirement is 20 buses. In addition, the City's data on roadcalls, i.e. service disruptions indicating the breakdown of a bus during scheduled service, during its fiscal year 1984 show on the average less than 1 roadcall per day. Since the City has 5, 6, and 26 spare buses available during its A.M. peak period, P.M. peak period, and off peak period, respectively, it can meet roadcall needs with the available spare buses. UMTA concludes, therefore, that the City has rebutted the incidental use presumptions and that the charter service is permissible.

In addition, the City submitted a cost allocation plan showing its per hour charter costs for the twelve month period ending June 30, 1984. According to this data which accounts for the costs listed in Appendix B to the charter bus regulation, the City's per hour charter costs are $28.62. The City's per hour charter revenues are $29.65. The regulation only requires that the City's charter revenues equal or exceed its charter costs if it provides intercity charter service. If such service is provided, however, the recipient must ensure that its total charter revenues equal or exceed its total charter costs. Since the City does operate intercity charter service, the above

described cost and revenue requirements apply. The data provide by the City, however, shows that it is meeting these requirements. Therefore, UMTA finds the City incompliance with this provision of the charter bus regulations.

IV. Conclusion

The RTS alleges that the service provided by the City through CATS from the Wakefield Apartments to the North Carolina State University violates Sections 3(f) or 3(g) of the UMT Act and the corresponding implementing regulations. As discussed above, UMTA finds the City and CATS are not in violation of these provisions or the regulations. The service in question is not prohibited school bus service since college students are not "students" within the terms of Section 3(g) or its implementing regulations. Furthermore, although the service is charter service, the evidence provided by the City shows that it is incidental to the provision of mass transportation and that, as a provider of intercity charter service, the City's annual charter revenues equal or exceed its annual charter costs.

Submitted by: Douglas G. Gold — Date: 24 January 1985
Douglas G. Gold
Attorney-Advisor

Approved by: Edward J. Gill — Date: Jan 28, 1985
Edward J. Gill
Acting Chief Counsel

U.S. Department of Transportation
Urban Mass Transportation Administration

Headquarters

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FEB 8 1985

Mr. John F. Fryer
Counsel for Transportation Regulation
U. S. House of Representative
Committee on Public Works and
Transportation
2165 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Fryer:

Enclosed is the information that you requested from the Urban Mass Transportation Administration (UMTA) during a meeting on January 29, 1985, which you had with Douglas Gold, of my staff, and Daniel Harrant, Office of Budget and Policy. I hope that the information will assist in your review of various charter bus issues.

The first enclosure is a copy of UMTA's regulations on Charter Bus Operations (49 CFR Part 604). The second enclosure is a list of those UMTA recipients, according to the fiscal year 1983 submissions for the Section 15 Report, that provide charter bus service. The list indicates the charter revenues, hours, and miles provided.

In addition, you requested UMTA's comments on a document prepared by the American Bus Association (ABA) entitled, "The Fight Against Subsidized Charter Bus Operations -- The Role of the American Bus Association." The document discusses, among other things, UMTA's charter bus regulation, the ABA's suggested revisions, both regulatory and statutory, and recent Interstate Commerce Commission actions granting expanded charter authority under the Bus Regulatory Reform Act of 1982. Since UMTA is in the process of rulemaking to revise the existing charter bus regulation, it would, in our opinion, not be appropriate to comment on the ABA's document.

Finally, Mr. Clyde Woodle asked what annual costs a private charter bus operator incurs to cover the acquisition and operations of a charter bus. A quick check with Mr. Harold Morgan, the ABA's Director of Statistical Research, estimates that based on a purchase price of $180,000, financed at a 15 percent interest rate, a private operator spends at most $25,000 per

year over the 10 year life of the bus in capital costs. Mr. Morgan also estimates an operating cost of $1.80 per mile. Since buses travel on the average of 75,000 miles per year, the annual operating cost is $135,000. If Mr. Woodle would like these figures fleshed out, we would be happy to try to do so.

If there is any additional information that UMTA can provide, please do not hesitate to conact me.

Sincerely,

Edward J. Gill, Jr.
Acting Chief Counsel

Enclosures

U.S. Department
of Transportation

**Urban Mass
Transportation
Administration**

Headquarters

400 7th Street S.W.
Washington, D.C. 20590

FEB 11 1985

Mr. Thomas W. Fisher
President
Tower Bus, Inc.
363 North Gratiot
Mount Clemens, Michigan 48043

Dear Mr. Fisher:

This responds to your letter concerning the decision rendered by the Urban Mass Transportation Administration (UMTA) on the complaint filed by you on behalf of Tower Bus, Inc., against the Southeastern Michigan Transportation Administration (SEMTA). In the complaint, you alleged that SEMTA, a recipient of Federal financial assistance from UMTA, violated the restrictions imposed on charter bus service and school bus service by the Urban Mass Transportation Act of 1964, as amended (UMT Act), and UMTA's implementing regulations, and the terms of a July 13, 1978, UMTA Order further restricting SEMTA's charter bus operations. UMTA's decision found that SEMTA was not in violation of either the statutory or regulatory provisions and that, although SEMTA had violated the Order, no remedial actions were necessary since the violations had ceased.

Your letter addresses several points. Let me respond to them in order. First, you state that UMTA has never conducted an on-site investigation of SEMTA. In October 1984, UMTA's regional staff in Chicago conducted an on-site visit of SEMTA. This was done as part of the Triennial Review which is required by Section 9(g)(2) of the UMT Act. The purpose of the Triennial Review is to ensure that UMTA's grantees are complying with statutory and administrative requirements. The regional staff examined SEMTA's charter records and noted several potential violations of the charter bus regulation's incidental use presumptions. These problems will be presented to SEMTA in the Triennial Review Report and SEMTA will be given the opportunity to respond. If SEMTA is unable to prove that the service in question did not violate the regulations, we will take appropriate actions.

In your second point, you state that UMTA's decision accepts SEMTA's admission that it violated the July 13, 1978, UMTA Order, but does not find SEMTA guilty since SEMTA has ceased providing the prohibited service. This is not a correct reading of the decision. While the decision does state that UMTA accepts SEMTA's admission of violation, it does not state that SEMTA is not guilty. Rather, the decision states that UMTA is not imposing any remedial actions for the violations. The absence of any penalty is not equivalent to a finding of not guilty.

In this case, the decision clearly states why UMTA felt no remedial actions were necessary. First, there was no evidence of any violations after December 18, 1981. Second, SEMTA states that its voluntary extension of the prohibition on intercity charter service will remain in effect until it has satifactorily complied with UMTA's regulation. Based on these points, UMTA did not feel further violations were likly to ocurr and that remedial action was unnecessary.

Your third point criticizes UMTA for permitting SEMTA to provide charter bus service without entering into a charter bus agreement as required by Section 3(f) of the UMT Act. This is not correct. SEMTA has entered into a charter bus agreement with UMTA. The decision states, "Although SEMTA has not entered into a written agreement under 49 C.F.R. §604.12, SEMTA is bound to comply with the provisions of 49 CFR §604.13 by the terms of Part II of the UMTA grant agreement." The provisions of 49 CFR §604.13 contain the terms of the standard charter bus agreement. As a result, UMTA considers that SEMTA is bound by the terms of the standard agreement and has, in effect, entered into the statutorily required agreement.

I believe that this information responds to the points your raised in your letter. If you would like to discuss the decision or this response, I would be happy to meet with or your representatives personally.

Sincerely,

Edward J. Gill, Jr.
Acting Chief Counsel

U.S.Department
of Transportation

**Urban Mass
Transportation
Administration**

The Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

JUN 24 1985

Mr. John Shoup
President, Tri-State Coach
Lines, Inc.
2101 West 37th Avenue
Gary, Indiana 46408

Dear Mr. Shoup:

This responds to your recent letter regarding the Northwest Indiana Regional Planning Commission's (NIRPC) transportation improvement plan. You are concerned that the grant funds that the NIRPC might receive from the Urban Mass Transportation Administration (UMTA) and pass through to private transportation providers would give those private operators an unfair competitive advantage in the charter bus market over operators such as Tri-State Coach Lines, Inc., which receive no UMTA subsidies. Let me assure you that your comments have been transmitted to UMTA's Regional Office in Chicago and will be taken into consideration when determining whether NIRPC's applications will be granted.

Since your concerns revolve mainly around the potential advantage which the subsidized private operators may enjoy in the charter market, I feel it is important to give you some background on the restrictions on charter bus service which UMTA imposes on its grant recipients. UMTA's regulations on Charter Bus Operations (49 CFR Part 604, copy enclosed) implement two provisions in the Urban Mass Transportation Act of 1964, as amended. Section 12(c)(6) of the Act defines "mass transportation" to exclude charter bus operations. A 1966 Comptroller General's Opinion, set forth in Appendix A to the regulation, however, states that UMTA has the discretion to permit recipients to use UMTA-funded equipment on an incidental basis to provide charter bus service so long as it does not detract from the provision of mass transportation service. The regulation, in Section 604.11, implements these restrictions by prohibiting a recipient from providing certain charter bus service on weekdays such as during peak periods. The regulation presumes that such service is not incidental. If a complaint were filed, a recipient could rebut these presumptions with factual evidence to show that the service in question does not detract from the provision of mass transportation.

The other provision in the UMT Act that concerns charter bus service is Section 3(f). This provision was added by Congress in 1974 to protect private providers of intercity charter bus service from unfair competition by UMTA recipients. According to this provision, all applicants for UMTA assistance must enter into an agreement with UMTA. The regulation, in Section 604.13, sets forth the standard terms of this agreement. The two key provisions of this agreement require a recipient that provides any intercity charter service to cover its total annual charter costs (both intercity and intracity) with its charter revenues and prohibit a recipient

from charging a predatory rate on any charter route. The list of costs that must be included in this calculation is set forth in Appendix B to the regulation. The theory behind this approach is that, by requiring a recipient to fully allocate its charter costs and to cover its charter costs with revenues, the benefit of any UMTA assistance is neutralized and the recipient and any private intercity charter bus operators will be on an equal economic plane.

From your perspective, it is important to note that Section 604.12 clearly states that the regulation applies not just to UMTA recipients, but also to any operators for a recipient. In the situation you describe, the private operators to which the NIRPC would pass UMTA assistance would be bound to comply with the regulation. Therefore, by fully allocating costs according to the required cost allocation plan and ensuring that annual charter revenues equal or exceed charter costs, any advantage provided by UMTA subsidies should be neutralized.

I must stress, however, that these economic restrictions only apply if the recipient, or operator for the recipient, operates intercity charter bus service. The regulation defines "intercity charter bus service" generally as charter service outside the recipient's urbanized area. If a recipient, or operator for the recipient, operates charter service solely within the urbanized area, the only restrictions which the regulation imposes are those to ensure that the charter service is incidental to the provision of mass transportation. The regulation does not speak to the costs which must be charged for such service.

Since UMTA issued this regulation in 1976, both recipients and private intercity operators have complained. UMTA's recipients complain that the regulation is too burdensome and unduly restricts their ability to provide charter service which generates revenues to offset operating deficits. Private intercity charter operators argue that the regulations do not offer enough protections and that the cost data is too complex to be able to effectively review to determine if costs are being covered by revenues. Consequently, UMTA is in the process of revising the regulation. We published an advance notice of proposed rulemaking in October 1982 and are presently drafting a notice of proposed rulemaking. Although I admit that this represents a considerable time delay, let me assure you that this does not evidence any lack of desire on UMTA's part to issue an effective rule. Instead, rulemaking is, by its very nature, a complex process and when the issues involved, as they are here, are so multifaceted, the complexity escalates. We are diligently working on this revision and hope to publish it soon.

I hope that this has provided some useful information for you. If you have any additional questions, please do not hesitate to contact me.

Sincerely,

Ralph L. Stanley

Enclosure

Urban Mass Transportation Administration
UCC-32:DGOLD:KLY:6/4/85:426-1936
Control No. 003647:Due Date: 85-6-11
cc: UOA-1/UOA-2/UOA-3/UES-1/UES-10(2)/UBP/UGM/UGM-30
URU-5/Nancy Greene/URU-5/Rick Bacigalupo/
UCC-Chron/UCC-32/Gold/UCC-30/Munter
UCC-1/LaSala

File: IN: NIRPC §3(f) Inquiry

DECISION ON REQUEST FOR RECONSIDERATION

Raleigh Transportation Services

Complainant

v.

City of Raleigh, North Carolina

and

Capital Area Transit System

Respondents

I. SUMMARY

The Urban Mass Transportation Administration (UMTA) has reconisdered its decision in Raleigh Transportation Services v. City of Raleigh, North Carolina and Capital Area Transit System (January 28, 1985). On reconsideration, we still find no violation of the Urban Mass Transportation Act of 1964, as amended, or the implementing regulations, but base our finding instead on the conclusion that the service at issue is not charter service, but a form of mass transportation service.

II. Background

On January 28, 1985, UMTA issued its decision in response to the complaint filed by Raleigh Transportation Services (RTS) against the City of Raleigh, North Carolina (the City) and the Capital Area Transit System (CATS). In its complaint, the RTS alleged that the City and CATS violated the charter bus or school bus provisions in Section 3(f) and 3(g) of the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1602(f) and (g)) (UMT Act) and the implementing regulations (49 CFR Parts 604 and 605). UMTA concluded that the City and CATS were not in violation of either Section 3(f) or 3(g) of the UMT Act or the implementing regulations.

The service complained of is provided by the RTS through CATS to students to and from North Carolina State University in Raleigh. The origin of the service is the Wakefield Apartments in Raleigh. The service is alleged to be provided by one bus in continuous circulation from 7:00 a.m. to 6:00 p.m. Monday through Friday on 30 minute headways. During peak hours, from 7:00 a.m. to 10:30 a.m. and from 2:30 p.m. to 5:00 p.m., an additional bus is

alleged to provide service. The service is alleged to be paid for by the real estate management firm at the apartment complex and is for the exclusive use of the students living at the apartment complex. RTS alleges that the service operates closed door between the apartment complex and North Carolina State University.

UMTA held in its January 28, 1985, decision that the service does not violate the school bus restrictions in Section 3(g) of the UMT Act or its implementing regulations in 49 CFR Part 605 since college students are not "students" within the terms of these provisions. Furthermore, although UMTA concluded that the service is charter service, the evidence provided by the City showed that it is incidental to the provision of mass transportation and that, as a provider of intercity charter service, the City's annual charter revenues equal or exceed its annual charter costs.

III. Reconsideration

UMTA has decided to reconsider this decision since it is arguable that the service in question is a form of permissible mass transportation called subscription bus service and, therefore, UMTA did not have to reach the conclusion whether the service is school bus service or charter bus service.

IV. Discussion

UMTA's regulation on Charter Bus Operations (49 CFR Part 604) defines charter bus operations as:

> transportation by bus of a group of persons who, pursuant to a common purpose, and under a single contract, at a fixed charge for the vehicles or service, in accordance with the carrier's tariff, have acquired the exclusive use of a bus to travel together under an itinerary, either agreed on in advance, or modified after having left the place of origin.

The initial decision compared this definition with the service in question and concluded that it is charter service. The decision states,

> The service is by bus and transports a group of people, for a single purpose, under a contract, at a fixed charge, under an itinerary. Although charter service is generally thought of as a one time trip, e.g., a field trip, the UMTA definition is broad enough to include the recurring type of service provided here by the City through CATS.

This was an erroneous conclusion. When Congress enacted the Urban Mass Transporation Act of 1964, it defined "mass transporation" as "transportation by bus, or rail, or other conveyance, either publicly or privately owned, serving the general public (but not including school buses or charter or sightseeing service) and moving over prescribed routes." (Section 9(c)(5)). Congress amended this definitation in 1968 to insert "which provides to the public general or special service" in lieu of "serving the general public" and inserting "on a regular and continuing basis" in lieu of "and moving over prescribed routes." This was accomplished by Section 702 of the Housing and Urban Development Act of 1968 (Pub. L. No. 90-448).

The legislative history explains why the revision was made. The language which was eventually enacted was proposed in Section 602 of H. R. 17989. The House Report prepared by the Banking and Currency Committee accompanying this bill states that the purpose of the proposed revision was to broaden the definition of mass transportation "to allow greater flexibility in developing and applying new concepts and systems in urban mass transportation programs." (H. R. Rep. No. 1785, 90th Cong., 2d Sess., reprinted in 1968 U.S. Code Cong. Ad. & News, 2941.) Under other provisions in the UMT Act, the Committee found that grants were funding research which was developing new concepts and innovations that had a great potential for the eventual improvement of urban mass transportation. These concepts and innovations, however, were not able to be funded for implementation since they did not fall within the definition of mass transportation. One example cited in the report is demand-responsive door-to-door service. Under the 1964 definition, demand-responsive door-to-door service would not qualify as mass transportation because it does not operate over a prescribed route.

The report also cites another instance of service that the Committee believed would benefit from Federal assistance but was not included in the term mass transportation. This service would serve "only a specific portion of the public rather than the 'general' public" such as "service from ghettos to specific places of employment, limited to those riders who work there." (Id. at 2941). Absent the 1968 revision, this would not be mass transportation since the service would not be offered to the public generally, but only to a specially defined segment of the public.

A review of the service in question in this complaint indicates that it is mass transportation service. The service is provided by publicly owned buses, offered to a special segment of the public, and operated on a regular and continuing basis. Our initial decision concluded that the definition of charter bus service, while generally thought of as a one-time trip, was broad enough to include the regularly and continually run service in question. While some frequently provided service may qualify as charter service, the service in question does not. It is provided five days per week, 11 hours per day, at 30 minute headways. This is clearly mass transportation operated to the public as special service.

V. Conclusion

On reconsideration, UMTA finds that it mischaracterized the service provided by the City through CATS in its January 28, 1985, decision. The service is not charter service, but mass transportation. Therefore, the January 28, 1985, decision is hereby revised to reflect this reasoning. Since UMTA finds the service to be permissible, we still do not find the City or CATS in violation of any provision of the UMT Act or the implementing regulations.

Submitted by: Douglas G. Gold Date: JUN 24 1985

Douglas G. Gold

Approved by: Joseph A. LaSala, Jr. Date: JUN 26 1985

Joseph A. LaSala, Jr.

U.S. Department
of Transportation

**Urban Mass
Transportation
Administration**

The Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

JUL 31 1985

Mr. Robert A. Swanson
Roamin' Coaches
1204 Turner McCall Boulevard
Rome, Georgia 30161

Dear Mr. Swanson:

Secretary Dole has asked me to respond to your letter to her concerning Federal grants to the Rome Transit Department (RTD). You state that these grant monies enable the RTD to compete at lower prices with the charter service that Roamin' Coaches and other private operators provide. You request, therefore, application information for Federal grants to enable you to compete on a fair and equal basis.

Let me state at the outset that this Administration strongly supports the role of the private transportation company in the provision of transportation services to this Nation. The Urban Mass Transportation Administration (UMTA) believes that recipients of our grant funds, such as the RTD, should not be able to compete unfairly with private providers of mass transportation services. Our views of this subject are more fully expressed in the enclosed policy "Private Enterprise Participation in the Urban Mass Transportation Program."

In addition to prohibiting unfair competition in the provision of mass transportation services, UMTA restricts the charter bus services which our recipients provide. UMTA's regulations on Charter Bus Operations (49 CFR Part 604, copy enclosed) implement two provisions in the Urban Mass Transportation Act of 1964, as amended. Section 12(c)(6) of the Act defines "mass transportation" to exclude charter bus operations. A 1966 Comptroller General's Opinion, set forth in Appendix A to the regulation, however, states that UMTA has the discretion to permit recipients to use UMTA funded equipment on an incidental basis to provide charter bus service so long as it does not detract from the provision of mass transportation service. The regulation, in Section 604.11, implements these restrictions by prohibiting a recipient from providing certain charter bus service on weekdays such as during peak periods. The regulation presumes that such service is not incidental. If a complaint were filed, a recipient could rebut these presumptions with factual evidence to show that the service in question does not detract from the provision of mass transportation.

The other provision in the UMT Act that concerns charter bus service is Section 3(f). This provision was added by Congress in 1974 to protect private providers of intercity charter bus service from unfair competition by UMTA recipients. According to this provision, all applicants for UMTA assistance must enter into an agreement with UMTA. The regulation, in

Section 604.13, sets forth the standard terms of this agreement. The two key provisions of this agreement require a recipient that provides any intercity charter service to cover its total annual charter costs (both intercity and intracity) with its charter revenues and prohibit a recipient from charging a predatory rate on any charter route. The list of costs that must be included in this calculation is set forth in Appendix B to the regulation. The theory behind this approach is that, by requiring a recipient to fully allocate its charter costs and to cover its charter costs with revenues, the benefit of any UMTA assistance is neutralized and the recipient and any private intercity charter bus operators will be on an equal economic plane.

I must stress, however, that these economic restrictions only apply if the recipient, or operator for the recipient, operates intercity charter bus service. The regulation defines "intercity charter bus service" generally as charter service outside the recipient's urbanized area. If a recipient, or operator for the recipient, operates charter service solely within the urbanized area, the only restrictions which the regulation imposes are those to ensure that the charter service is incidental to the provision of mass transportation. The regulation does not speak to the costs which must be charged for such service.

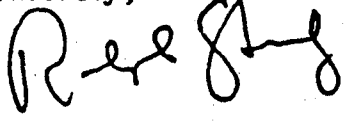
Since UMTA issued this regulation in 1976, both recipients and private intercity operators have complained. UMTA's recipients complain that the regulation is too burdensome and unduly restricts their ability to provide charter service which generates revenues to offset operating deficits. Private intercity charter operators argue that the regulations do not offer enough protections and that the cost data is too complex to be able to effectively review to determine if costs are being covered by revenues. Consequently, UMTA is in the process of revising the regulation. We published an advance notice of proposed rulemaking in October 1982 and are presently drafting a notice of proposed rulemaking. Although I admit that this represents a considerable time delay, let me assure you that this does not evidence any lack of desire on UMTA's part to issue an effective rule. Instead, rulemaking is, by its very nature, a complex process and when the issues involved, as they are here, are so multifaceted, the complexity escalates. We are diligently working on this revision and hope to publish it soon.

I would point out, however, that the §604.40 of the existing charter bus regulation provides that an interested party may file a written complaint alleging a violation of the terms on a charter bus agreement. If you believe evidence of a violation exists, you may wish to file a formal complaint consistent with the regulations.

You request application information so that Roamin' Coaches can receive UMTA assistance like the RTD. Unfortunately, the UMT Act does not enable UMTA to make capital or operating grants directly to private providers of mass transportation service. The UMT Act does permit a recipient to pass the grant funds through to a private company. This mechanism, however, comes into play if the private operator provides mass transportation services for the recipient. If so, the private operator can then use the equipment for charter services, but the private operator steps into the shoes of the recipient and the above-described regulation would apply to restrict that service. If the private provider would only provide charter service, no UMTA funds could be passed through by the recipient.

I want to assure you that your comments will be considered when reviewing any future bus applications submitted by the RTD. Although our records do not indicate any currently under review, we will keep your comments on file. In addition, if after reviewing the enclosed regulation you believe the RTD's charter bus service is not in compliance, you may file a formal complaint with UMTA.

Sincerely,



Ralph L. Stanley

2 Enclosures

Urban Mass Transporation Administration
UCC-32:DGOLD:KLY:6/25/85:426-1936
Control No. 8506100061: Due Date: 85/7/02
cc: P/C/UOA-1/UOA-2/UOA-3/UES/UES-10(2)/UGM/UGM-30/UBP/URO-4/
UCC-Chron/UCC-32/Gold/UCC-30/Munter/UCC-1/LaSala

U.S. Department
of Transportation

**Urban Mass
Transportation
Administration**

The Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

AUG 15 1985

Mr. John Shoup
President
Cardinal Charter and Tours
P. O. Box 271
Middlebury, Indiana 46540

Dear Mr. Shoup:

Thank you for commenting on my letter of June 24, 1985, in which I advised you of the Urban Mass Transportation Administration (UMTA) rules applicable to charter operations and addressed your concerns regarding the lease of subsidized equipment by a private operator. As I understand your current question, you are concerned that a private operator providing mass transportation by leasing equipment from a public body for a fee is in a favored position with respect to competition with other charter operators if it also provides charter service, in that the competition does not have equipment available for charter operations at this subsidized rate. This is true; however, under the UMTA charter regulations the lessee must account for such equipment as if it had purchased it, rather than at the actual lease rate in computing its cost, if it is engaged in intercity charter bus operations. If the lessee is only engaged in intracity operations, this requirement would not be applicable under the charter regulation. However, the transit operator in leasing UMTA financed equipment to private companies for mass transit operations should compete that transaction so as to obtain the best and most economical contract possible. This would mean that the lease rate should take into consideration revenues or income (including charter revenues) that the operator would realize in operating the equipment.

As with your initial inquiry, I have forwarded your June 28, 1985, letter and my reply to the Regional Office for consideration in processing grants for the Northwest Indiana Regional Planning Commission. I am also providing you with a copy of our policy on "Private Enterprise Participation in the Urban Mass Transportation Program." This policy provides that the local planning and programming process establish procedures for the most feasible participation of private mass transportation providers in the UMTA programs.

I hope I have satisfactorily answered your question. If you have any additional questions, do not hesitate to contact me.

Sincerely,

Ralph L. Stanley

Enclosure

U.S. Department
of Transportation

**Urban Mass
Transportation
Administration**

The Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

SEP 18 1985

The Honorable Virginia Smith
House of Representatives
Washington, D.C. 20515

Dear Virginia:

Secretary Dole has asked me to respond to your letter forwarding the concerns of such constituents as Ms. Florence Engelhaupt of Spencer, Nebraska. Ms. Engelhaupt complains that the restrictions imposed by the Urban Mass Transportation Administration (UMTA) on the charter service that the UMTA recipient in Boyd County, Nebraska, provides are too burdensome.

UMTA's regulations concerning the charter bus service which our recipients can provide with UMTA assistance are based on the provisions in Sections 3(f) and 12(c)(6) of the Urban Mass Transportation Act of 1964, as amended. Section 12(c)(6), the first enacted provision, defines "mass transportation" to specifically exclude charter bus service. A 1966 Comptroller General's Opinion holds, however, that UMTA funded equipment can be used to provide charter bus service on an incidental basis, i.e., so it does not interfere with or detract from the provision of mass transportation service. Section 3(f), which Congress added to the UMT Act in 1974, prohibits UMTA recipients from competing unfairly with those private intercity charter bus operators that are willing and able to provide such service.

UMTA issued the charter bus regulation in 1976. It is found at 49 CFR Part 604. The regulation implements Section 12(c)(6) by presuming that any charter service provided with UMTA assistance on weekdays during peak periods, extending 50 miles beyond the urban area, or requiring the use of a bus for more than 6 hours in one day is not incidental. A recipient is permitted, however, to rebut these presumptions to show that the charter service in question did not interfere with the provision of mass transportation. There are no restrictions on weekend charter service.

The regulation implements the protections in Section 3(f) by requiring a recipient that provides intercity charter service to cover its total annual charter costs with charter revenues. In addition, the regulation prohibits such recipients from charging a predatory rate for any charter service.

The regulation applies to recipients of funds under Section 18 of the UMT Act such as the provider of the handi-bus service Ms. Engelhaupt describes. For these recipients, which are generally small operators in rural areas, it is important to note that the regulation's provisions implementing Section 3(f) do not apply unless the recipient earned more than $15,000 in charter revenues during its most recently completed fiscal year. Since few Section 18 recipients earn such charter revenues, the cost and revenue provisions in the regulation are usually inapplicable.

Based on discussions with the Nebraska Department of Roads, it is UMTA's understanding that the Section 18 recipient Ms. Engelhaupt refers to earned $15,000 or less from charter services during its most recently completed fiscal year. Therefore, the recipient can do any and all charter service with UMTA assistance so long as the service is incidental as described above. In that regard, charter service could go beyond the 50-mile limit as Ms. Engelhaupt desires, but if it does so on weekdays, the recipient would have to be able to prove, if requested, that the charter service did not interfere with the provision of mass transportation. For Section 18 recipients, UMTA measures the 50-mile limit from the perimeter of the recipient's service area since the service is not provided in an urban area.

I hope that this information has been helpful. If you need any additional assistance, please contact UMTA's Regional Administrator, Mr. Lee O. Waddleton, 6301 Rockhill Road, Suite 100, Kansas City, Missouri, 64131, (816) 926-5053.

Sincerely,

Ralph L. Stanley

URBAN MASS TRANSPORTATION ADMINISTRATION
UCC-32:DGOLD:KLY:9/9/85:426-1936
Control No. 850830-033:Due Date: 9/9/85
cc: I/C-1/P-1/B-1/S-1/S-10/J-1/UOA-1/UOA-2/UOA-3/UES-1/UES-10(2)
UGM/UGM-30/UBP/URO-7/UCC-Chron/UCC-32/Gold/UCC-30/Munter/UCC-1/LaSala

U.S. Department of Transportation
Urban Mass Transportation Administration

The Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

JUL 27 1986

Mr. Sherman P. Flogstad
General Manager
Rogue Valley Transportation District
3200 Crater Lake Avenue
Medford, Oregon 97501

Dear Mr. Flogstad:

This responds to your letter requesting that the Urban Mass Transportation Administration (UMTA) reconsider its decision to not enter into a charter bus agreement with the Rogue Valley Transportation District (RVTD). Your letter also provides information in response to allegations of two violations of UMTA's cease and desist order of January 28, 1986.

You argue that Section 604.18 of the charter bus regulation, upon which UMTA relied to deny signing an agreement, is not appropriate. You state that the language in this provision authorizes UMTA to consider various materials submitted by the recipient when deciding whether to enter into an agreement, but not the existence of private operators willing and able to provide the proposed service.

UMTA disagrees. Section 604.18 states,

> The Administrator will consider the comments filed by private charter bus operators prior to making any findings regarding either the application's certification of costs, cost allocation plan, or other aspects of its proposed charter bus operations. (Emphasis added.)

The regulatory language "other aspects of its proposed charter bus operations" is broad enough to include any facet of the proposed charter service and the context in which it would be provided. The context certainly includes the existence of private operators and comments that they are willing and able to meet current demands and provide that service which the recipient proposes. Your letter includes no new information that would call into question the conclusions that we drew from the previous material which you submitted. Therefore, we continue to decline to enter into a charter bus agreement with the RVTD.

Your letter provides several other objections to our decision. These objections are presented in the form of citations to the regulation with an explanation of the provisions cited and, in some cases, an explanation of how the provision is not applicable to the RVTD.

The sections you cite relate to general provisions in the regulation such as purpose and scope, or to the incidental use presumptions. A charter bus agreement is required by UMTA when the recipient desires to provide charter bus service outside of its urban area. The regulation provides procedural steps that must be followed and the documentation that must be submitted before the agreement can be entered into. Since these procedures and documents concern notice, costs and private sector comments, statements concerning purpose, scope and incidental use, presumptions are not relevant or germane to granting a charter bus agreement.

It is important to understand the type and extent of charter bus service that the RVTD may provide consistent with UMTA's regulation and the limitations imposed by the cease and desist order of January 28, 1986. Since UMTA's regulation only applies to charter service that in some way uses UMTA assistance, a recipient may provide any and all charter bus service, regardless of time or destination, that uses only local funds.

In addition, under UMTA's regulations, a recipient may provide any and all charter bus service using UMTA funded equipment and facilities within its urban area so long as the service is incidental to the provision of mass transportation service. UMTA's cease and desist order does not in any way affect the RVTD's ability to provide incidental intracity service using UMTA funded equipment and facilities.

UMTA has sent a copy of your response concerning the alleged violations of the cease and desist order to the complainant, York Tours, Inc. (York), and provided it with 30 days to rebut the response. A copy of this letter is enclosed. UMTA will endeavor to issue a written determination of compliance with the order within 30 days of receipt of York's rebuttal.

If you have any additional questions concerning these matters, please contact Mr. Douglas G. Gold, the attorney assigned to this complaint, at (202) 426-1936.

Sincerely,

Ralph L. Stanley

Enclosure

U.S. Department
of Transportation

**Urban Mass
Transportation
Administration**

Headquarters

400 Seventh St., S.W.
Washington, D.C. 20590

FEB 6 1987

Mr. Dean P. Bell
Executive Director
Chief General Manager
Regional Transit Authority
Suite 1600
Ten-O-One Howard Building
New Orleans, Louisiana 70113

Dear Mr. Bell:

This responds to your letter in which you seek the Urban Mass Transportation Administration's (UMTA) approval of the augmented fixed route service which the Regional Transit Authority (RTA) provides for conventions and special events. You state that this service is not charter service.

You describe the service as existing fixed route service that uses two shuttles in the French Quarter. The RTA augments this service with additional vehicles and service hours to meet the special needs of conventions or special events. You state that this service had not, at the time you wrote been fully implemented and that it is designed to incorporate a private/public sector partnership.

Let me state clearly that it is not possible to give you a definitive response to your question. It appears from the facts that you have provided that the service would probably be mass transportation and not charter service. This assumes that the service is open to the public, that the RTA makes all of the service decisions including setting fares and schedules pursuant to the same process it follows to make all other mass transportation service decisions, and that the service is designed for the general public and not a special group such as a private club. Since the answers to some of these questions are not contained in your letter, UMTA can only state that the service appears to be permissible.

I am very glad to learn that you are developing this service in concert with the private sector. The involvement of private mass transportation entities is very important for UMTA and your initiatives in this area for the convention service reflects your understanding our goals. Please note that to the extent that the service is restructured to meet the needs of each convention, you should consider putting this extra service to bid to maximize the involvement of the private sector.

If you have any further questions regarding this service, please do not hesitate to contact me.

Sincerely,

Joseph A. LaSala, Jr.
Chief Counsel

Exhibit A

Durango Transportation, Inc.)
Complainant)
)
)
v.)
) Re: CO-09/85-01
)
City of Durango, Colorado)
Respondent)

INTRODUCTION

On September 26, 1985, Durango Transportation, Inc. (DTI), by its attorney Nancy P. Bigbee, Esq., filed a complaint with the Urban Mass Transportation Administration (UMTA) alleging that the City of Durango, Colorado (Durango), a recipient of financial assistance from UMTA, violated Section 3(e) of the Urban Mass Transportation Act of 1964, as amended (UMT Act), and does not have the legal capacity under Section 3(a)(2)(A)(i) of the UMT Act to carry out the financed projects. After a thorough review of the materials submitted by the parties and UMTA's own records, UMTA finds that Durango complied with Sections 3(e) of the UMT Act. Further, we find that given the evidence submitted we must accept Durango's assertion of legal capacity under Colorado law unless or until a Colorado administrative body or court of competent jurisdiction decides to the contrary.

COMPLAINT

On September 26, 1985, DTI filed its complaint with UMTA. In its complaint, DTI alleges that Durango violated Section 3(e) of the UMT Act since it did not consider private transportation providers to the maximum extent feasible in the provision of transportation services funded by UMTA. The service in question includes the Opportunity Bus service provided to elderly and handicapped persons funded under Section 18 of the UMT Act, which provides formula grants to non-urbanized areas, and the general mass transit service to and from the La Plata County Airport and the Purgatory Ski Area funded under Section 3 of the UMT Act, which provides discretionary capital grants.

Second, the complaint alleges that Durango has not compensated DTI for the competing service which it provides from the airport to the ski area. The complaint alleges that such compensation is required by Section 3(e)(4) of the UMT Act.

Third, the complaint alleges that Durango does not have the legal capacity to operate the mass transportation service for which it has received UMTA assistance. This legal capacity is required by Section 3(a)(2)(A)(i) of the UMT Act. The complaint states that Durango selected as the provider of the Opportunity Bus service the Club Esfuerzo which did not have operating authority from the Colorado Public Utilities Commission (PUC).

The complaint provides a lengthy discussion of the negotiations between DTI and Durango for the purchase by Durango of some or all of DTI's PUC operating authority which DTI claims was needed to enable Durango to provide the airport to ski area service. The complaint states that the sale was never consummated and as a result, Durango entered into an intergovernmental agreement with La Plata County as an alternative means to enable it to provide this service. The complaint alleges that this agreement attempts to substitute the intergovernmental agreement for the necessary PUC authority and, thus, renders the service illegal. DTI states that it has challenged the validity of this agreement before the PUC and that a PUC Interim Order of September 20, 1985, supports its position.

The complaint asks that UMTA deny Durango additional funding and that Durango refund UMTA for past funding of illegal services.

RESPONSE

UMTA sent a copy of DTI's complaint to Durango on December 4, 1985, and provided it with 30 days, from the date of receipt, to respond to DTI's allegations. Durango received this material on December 16, 1985, and by letter dated January 3, 1986, it requested an extension of 30 days to respond. UMTA responded by letter dated January 13, 1986, granting the request in part by extending the deadline for 15 days until January 29, 1986. UMTA received Durango's response on January 29, 1986.

Durango's response describes the activities it has done to involve the private sector in the provision of mass transportation services since 1976. The response describes the specific actions Durango took in 1983, 1984, and 1985 in relation to its applications for operating and administrative assistance under Section 18. Specifically, the materials include copies of the public notices and individual notices to DTI of various hearings on the applications, copies of requests for proposals to provide the service for which UMTA assistance was received, evaluations of the various bids received, and explanations of why a particular bid was accepted.

The materials also describe what Durango did in 1983 to involve the private sector in the provision of the service to and from the airport and the ski area. This service is assisted by the only UMTA section 3 capital assistance which Durango has received. In connection with this grant application, Durango describes the negotiations between it and DTI for the purchase and sale of some or all of DTI's PUC authority.

Durango also includes evidence of its legal authority to provide the services for which it has received UMTA assistance. Durango believes that the intergovernmental agreement between it and La Plata County is legal and is sufficient to enable it to provide the airport and ski area service. Durango asserts that the Interim Order issued by the PUC on September 20, 1985, does not address the merits of the validity of the intergovernmental agreement and that the matter is pending before the PUC. Durango recognizes UMTA's concern over the validity of this agreement, yet asserts that UMTA has no jurisdiction over the issue.

Finally, Durango states that DTI is not a private provider of mass transportation service and, therefore, not entitled to the protections afforded by Section 3(e) of the UMT Act. Durango's argument is based on a letter sent by UMTA's Regional Office in Denver to DTI on March 6, 1984. This letter states that, based on the information to date, it does not appear that DTI provides mass transportation as defined in the UMT Act since most, if not all, of the service DTI provides is closed-door and seasonal. Furthermore, the letter states that even if DTI does provide mass transportation the service which Durango operates does not compete with or supplement that service and, therefore, the protections in Section 3(e) would not apply to DTI.

REBUTTAL

UMTA sent a copy of Durango's response to DTI on February 24, 1986, and provided it with 15 days from receipt to rebut the response. On March 12, 1986, DTI requested a two week extension due, among other reasons, to the volume of Durango's response. UMTA agreed to the extension and set the deadline at March 28, 1986. UMTA received the rebuttal on March 28, 1986.

DTI states in its rebuttal that Durango's response supports its position that the planning and programming process it followed was intended to and did operate to prevent the meaningful

participation of DTI in the proposed transportation system. DTI states that Mr. Olson, the current owner, had purchased DTI in 1982 when the services at issue were first being planned. Since DTI had been at that time an unsuccessful company, the complainant asserts that it was not considered seriously as a potential provider.

DTI states that the surveys that Durango relied on to support the provision of a mass transportation system are flawed since a small sample was used and because they do not actually show the wide-spread support that Durango alleges.

DTI states that Durango did not properly understand the bid it submitted in response to the 1983 RFP. DTI submitted a bid for the mass transportation shuttle service and not the demand-responsive service. DTI did, however, offer to cooperate with the provider that Durango selected for the demand-responsive service. DTI states that Durango ignored its offer to cooperate. Moreover, DTI states that its bid for the shuttle service was lower than the bidder that Durango selected and that a consideration of the fully allocated costs was not made.

Finally, DTI states that Durango totally ignored the issue of whether the other bidder had the allegedly requisite PUC authority.

DTI states that the bidding for the 1984 Section 18 service was made difficult because at the time, DTI was under contract to sell its PUC authority to Durango. Also, DTI states that Durango requested more detailed information in 1984 and less time was provided to furnish it. Since DTI had had little success in 1983 and 1984, there was nothing to indicate that it should attempt to participate in 1985.

The rebuttal also provides a detailed response to the points Durango had made concerning the unsuccessful transfer of DTI's PUC authority.

DISCUSSION

Before this decision examines Durango's actual compliance with the private sector provisions, it is important to address several basic issues raised by the parties.[1]

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[1] UMTA notes that on May 2, 1986, complainant contacted UMTA to inform UMTA that it was attempting to settle the complaint. UMTA verbally agreed to suspend further action until word was received that settlement attempts were unsuccessful. UMTA sent a letter to the parties dated June 25, 1986, setting forth this position. Complainant informed UMTA by letter dated July 17, 1986, that the settlement negotiations proved fruitless and requested that UMTA resume its deliberations on the complaint.

Is DTI Entitled to the UMT Act's Protections?

In its response, Durango asserts that DTI is not a private provider of mass transportation and, therefore, not entitled to the protections afforded by Section 3(e) of the UMT Act. Durango supports this position with a letter sent by UMTA's Regional Counsel in Denver, Colorado, which states that it appears that DTI is not an existing provider of mass transportation. The letter reaches this conclusion because the facts show that the service that DTI provides within the City of Durango can be exclusive if the patron so desires and is seasonal. This is not consistent, the letter states, with the definition of "mass transportation" in Section 12(c)(6) of the UMT Act which requires such service to be open to the public and to be operated on a regular and continuing basis.

We do not disagree with this conclusion. The letter, however, is written in terms only of the service which DTI provides within the City of Durango. The letter clearly states that the service that UMTA has not found to be mass transportation is the service which DTI provides "in-town", not all of the service which DTI provides.

A significant portion of the service which UMTA funds in this complaint is in La Plata County, outside of the City of Durango. The determination made by UMTA's Regional Counsel does not address this service. Since the allegation may be construed to include this service too, and is unrebutted by the complainant, the record before UMTA is inconclusive on this issue. Therefore, for the purposes of this complaint, UMTA will assume that DTI is a private provider of mass transportation and is protected by Section 3(e) of the UMT Act for at least the service that Durango provided with UMTA funds outside of the City of Durango.

Compensation Under Section 3(e)(3) of the UMT Act

DTI claims that Durango has violated Section 3(e)(3) of the UMT Act since it has not compensated DTI for the competitive and supplemental service which Durango is providing between the airport and ski area. Section 3(e)(3) requires that a recipient pay a private operator "just and adequate compensation...for acquisition of...franchises or property to the extent required by applicable State or local law." (Emphasis added.)

In this case, there has been no determination by a competent body at the State or local level that compensation is due by Durango to DTI. Until such time, there is no requirement under the UMT Act that Durango pay DTI. If a determination is made by a competent body at the State or local level, UMTA will review any request by Durango for funding the payment and make a determination whether payment is permitted under the UMT Act.

Legal Authority

A continuing thread that runs through this complaint is that Durango has not had and still does not have the required legal authority to operate the service which UMTA has or is funding. DTI argues that the Club Esfuerzo, Durango's contractor, did not have the proper PUC authority to operate the "Opportunity Bus" and that Durango failed to take proper notice of this when it reviewed the bids for this service and awarded the service. Similarly, DTI argues that the current intergovernmental agreement between Durango and La Plata County does not give Durango the authority to operate the airport to ski area service. UMTA notes that this latter issue is currently before that body.

At this time, UMTA is convinced, based on the evidence presented, that Durango does have the required legal capacity to carry out the projects which UMTA has funded consistent with Section 3(a)(2)(A)(i) of the UMT Act. Under Section 3(a)(2)(A)(i) of the UMT Act, the Secretary may not make a grant unless the Secretary determines that the applicant has or will have the legal capacity to carry out the proposed project.[2] This determination is based on assurances submitted by the applicant, usually in the form of an opinion of counsel which stating that the applicant has the legal authority under the applicable State or local law. In this case, UMTA has in its files the necessary State assurances and the opinions of counsel which enabled UMTA to make the findings of legal capacity.[3]

UMTA is aware that the PUC did provide its opinion in a December 30, 1983, letter to DTI that the Club Esfuerzo did not have the necessary PUC authority to operate the in-town UMTA funded service. The PUC stated that Durango could only operate bus service within the city without PUC authority if the employees are City of Durango employees. As noted in the complaint, Durango

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[2] This authority has been delegated to the Administrator of UMTA in 49 CFR Sections 1.45 and 1.51.

[3] Two district courts have upheld this procedure as not arbitrary, capricious, or an abuse of discretion. Parker v. Adams, Civil No. 78-652 (W.D.N.Y. memorandum opinion filed Nov. 15, 1987); Philadelphia Council of Neighborhood Organizations v. Coleman, 437 F. Supp. 1341 (E.D. Pa. 1977). aff'd without opinion 578 F. 2d. 1375 (3rd Cir. 1978).

remedied this problem immediately and on January 1, 1984, began operating this service using city employees.

To date, there has been no other determination to put UMTA's findings into question. Therefore, unless an adverse finding is made, UMTA must rely upon Durango's assurance that it has the required legal capacity under Colorado to carry out the UMTA funded projects.

Having dispensed with these basic issues, we will now turn to an examination of Durango's actions to involve the private sector in the planning and programs for which it has received UMTA funds.

The standard which guides UMTA in reviewing any private sector complaint is the policy statement that UMTA issued on October 22, 1984, 49 Fed. Reg. 41310. In this notice, UMTA stated that we will only entertain complaints from private enterprise organizations on procedural grounds. The policy lists three such procedural grounds. First, that the local recipient had not established procedures for the maximum feasible participation of private transportation providers consistent with Section 8(e) of the UMT Act and the spirit of the policy. Second, that the local procedures were not followed. Third, that the local process does not provide for the fair resolution of disputes. By limiting our scope of review, UMTA states in the policy that we will not review disputes when the compliant is with the substance of local decisions concerning the service provided or the service provider. 49 Fed. Reg. 41312. Thus, UMTA will not substitute its own judgment for that of the recipient.

On January 10, 1983, the State of Colorado Department of Highways (CDOH), the UMTA recipient for the Section 18 program, issued a notice to inform applicants of its new application procedures.[4] The notice state that the following three elements are added to the application procedure:

> 1. Applicants must hold a planning meeting inviting all the service providers in their area along with Colorado Department of Highway staff members.
>
> 2. Applicants must prepare, and publish public notices of, specific requests. They must also notify non-applicant

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[4] Section 18 of the UMT Act authorizes the Secretary of Transportation to apportion funds to the Governor of each Stte for public transportation projects in non-urbanized areas. The funds, apportioned annually, are made available on a population-based formula and may be used for capital, operating, and administrative projects. UMTA makes the grant of these funds directly to the State which in turn distributes them to eligible subrecipients.

providers individually. In this way, commercial service operators will have a maximum opportunity to participate in the programs.

3. An appeals process must be in place for service providers whose proposals were requested by the applicant.

Durango states that it adopted this process and followed it in its application process for the grants in question.

UMTA finds that this process is the type that the October 22, 1984 calls for. While this process was adopted and put into practice before UMTA published that policy, it covers the elements that UMTA indicated are important for the meaningful participation of and consideration of the private sector in the provision of transportation services.

A review of the factual record shows that Durango followed this process during the application process for each of the grants in question. First, Durango applied for Section 18 assistance in 1983. The record shows that Durango held a planning meeting on March 3, 1983, to discuss the City's transportation needs in light of the City's interest in applying for UMTA Section 18 funds. The minutes state that DTI attended the meeting. Durango provided notice that this meeting would be held by publishing a notice in the local newspaper on 27, 1983, and by sending an announcement personally to DTI on February 18, 1983.

Pursuant to the private sector participation process, Durango also published a notice inviting bids from interested parties to provide the service that would be funded by the UMTA grant on April 8, 1983. The record shows that a copy was sent by certified mail to DTI. DTI responded and submitted a bid for the service. It appears that only one other operator submitted a bid.

After an examination of the bids, Durango informed DTI on June 3, 1983, that it had decided to award the contract to the other bidder. In its rebuttal, DTI takes issue with several aspects of the bid evaluation process. In particular, DTI focuses on the issue whether the successful bidder had the appropriate legal authority to provide the service and whether Durango reviewed the bids based on the fully allocated costs of the two bidders.

In the October 22, 1984 private enterprise policy, UMTA states that we will not review the substance of local decisions. We note here, however, that the record does explain Durango's decision not to award to DTI. It appears that Durango accepted the successful bidder's statement that it had the proper operating authority. DTI's mere challenge of that, without a definitive statement by a local body with jurisdiction to decide that question, provides no reason to doubt the veracity of the bidder's assertion.

It appears that DTI claims that Durango did not review the bids based on fully allocated costs because its bid was $500.00 lower that the successful bidder's bid and because Durango did not deduct from DTI's bid price the expected revenues, as estimated by the successful bidder, as DTI had indicated in its bid.

At the outset, it is critical to understand that UMTA has never stated that our guidance in the private sector policy to evaluate bids based on fully allocated costs requires the service contract to be awarded to the lowest bidder. There are always other factors that may be more important than cost that weigh in favor of one bidder.

In this case, it is true that DTI's bid was lower that the successful bidder's costs by $500.00. If Durango had deducted the estimated revenues from the bid, the difference would have been greater. The successful bidder, however, deducted this same amount in its expense/revenue statement and thus it appears that the difference in the two bids would have remained $500.00. UMTA concludes that the arguments that DTI has made do not show that Durango did not evaluate the bids on a fully allocated cost basis.

The private sector participation process required by the CDOH and adopted by Durango includes an appeals process. The letter informing DTI that it had not been selected as the provider also informed DTI of the procedure that was available to it to appeal Durango's decision.

DTI took advantage of this appeals process and filed an appeal with the City Council on June 14, 1983. The City Council considered the appeal on June 21, 1983 and upheld Durango's decision. DTI appealed this decision to the CDOH which upheld Durango's decision on September 8, 1983.

UMTA notes that DTI also could have filed a protest with UMTA under our bid protest procedures as set forth in UMTA Circular 4220.1A. Under these procedures, however, a protest now would not be timely.

The process that Durango followed in 1984 for the next Section 18 application is nearly identical to that which it followed in 1983. Durango published a notice and sent a copy of the notice directly to DTI on February 17, 1984, announcing a February 24, 1984, planning meeting to discuss "possible coordination and mutual assistance between transit service providers and sponsoring organizations." DTI attended the meeting. On February 27, 1984, Durango sent a notice inviting the submission of bids to provide the assisted service. DTI did not actually submit a bid to provide the service, but stated in a letter to Durango dated April 3, 1984, one day after bids were due, that it disputed the specifications.

The request for bids, however, did contain a provision to explain how a potential bidder could protest the specifications to seek clarification. On April 25, 1984, the Durango City Attorney informed DTI that since it had failed to follow these procedures and that since no bid was received, Durango considered that DTI did not respond to the bid solicitation.

In 1985, Durango followed this same process. On January 21, 1985, Durango sent a notice to DTI informing it of the meeting that would be held to discuss transportation service. The record shows that DTI did attend. Durango, pursuant to its process, published a notice on January 28, 1985, inviting bids to provide the assisted service. DTI did not respond and participated no further in the process for 1985.

Based on these facts, therefore, UMTA finds for the 1983, 1984 and 1985 Section 18 applications that Durango did follow a process for the consideration of private enterprise and that the process did provide for the fair resolution of disputes. The fact that DTI choose to participate in some, but not all of these application processes is not relevant. Since Durango followed a process that is consistent with UMTA's policy, we find no violations with the UMT Act.

In 1983, Durango also applied to UMTA for Section 3 funding to purchase vehicles and related equipment to provide mass transportation including service from the airport to the ski area. The planning process for this service began in early 1983 and included several meetings with private operators, including DTI on February 25, March 11, and March 25, 1983. Durango published notice of a public meeting to discuss the Section 3 grant application and sent a copy to DTI on March 24, 1983.

On this same date, Durango informed DTI that it was considering several alternatives involving DTI to provide the service using UMTA funded equipment. These alternatives included leasing the equipment to DTI to perform the service, and the purchase by Durango of some or all of DTI's operating authority.

The course that Durango opted for was to purchase some or all of DTI's authority since it appears that DTI was not interested in a leasing arrangement. These two parties then entered into protracted negotiations for the sale of this authority, a process which UMTA notes is not finished and is the subject of pending litigation. While this process has been going on for several years, this is not in any way an indication of Durango's lack of compliance with Section 3(e) or UMTA's policy on the involvement of the private sector. Rather, the facts show that for the Section 3 grant, Durango followed the same process of notice and involvement that it followed for the Section 18 grant applications and that due to difficulties between the parties, communications broke down. While this is a regrettable situation, it is not a violation of either the UMT Act or the implementing policies.

CONCLUSION

After a thorough review of the evidence presented, UMTA finds that Durango did comply with Section 3(e) of the UMT Act and the implementing policies in its grant applications for Section 18 grants in 1983, 1984 and 1985, and for a Section 3 grant in 1983. Durango adopted a process for the consideration and involvement of the private sector as specified by the CDOH and followed that process in the grant applications at issue. UMTA finds that this satisfies UMTA's requirements and that Durango is in compliance with those requirements.

Douglas G. Gold
Attorney-Advisor

FEB 24 1987
Date

Joseph A. La$ala, Jr.
Chief Counsel

FEB 24 1987
Date

U.S. Department
of Transportation

**Urban Mass
Transportation
Administration**

The Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

MAY - 1 1987

Dear Colleague:

Enclosed you will find a page change for the Urban Mass Transportation Administration (UMTA) Section 9 Circular developed to reflect an important change in UMTA's treatment of income received pursuant to a contract for the nonexclusive transportation of school children in mass transportation service.

In response to an audit by the Department of Transportation's Inspector General (IG), UMTA reevaluated current policy on the treatment of contract revenue received for such service. UMTA concurred with the IG's finding that contract revenue earned by providing such service is revenue from the operation of mass transportation service and, as such, should be treated as farebox revenue.

Therefore, contract revenue received from the nonexclusive transportation of school children must be deducted from operating expenses before calculating net project cost for operating assistance projects under all UMTA programs. Correspondingly, these revenues may no longer be counted toward the local match under any UMTA program, except as otherwise provided for in the statute.

I am confident that you will agree that the new treatment of these contract revenues is more reflective of the nature of the service from which such revenues are derived. This revised treatment of contract revenue from the nonexclusive transportation of school children is effective for all applications filed after the date of this letter.

Sincerely,

Ralph L. Stanley

Enclosure

U.S. Department
of Transportation

**Urban Mass
Transportation
Administration**

The Deputy Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

JUN 22 1987

Dear Colleague:

This is to remind you that UMTA's new charter service regulations, 49 C.F.R. Part 604, have been in effect since May 13, 1987.

For those recipients that have been providing charter service with UMTA-assisted facilities and equipment and would like to continue to do so, the public notification process set forth at 49 C.F.R. § 604.11 must be completed by August 11, 1987. Because of the time requirements outlined in the regulation, to meet this August 11, 1987, deadline, the recipient's notice must be published no later than July 11, 1987. Promptly after publication of notice by those grantees planning to provide charter service, it is requested that the recipient send a copy of its public notice to the appropriate Regional Office.

After August 11, 1987, the recipient may provide charter service only if the recipient has determined that there are no private operators that are willing and able to provide the service in question. If the recipient does not complete its public participation process and decisionmaking by August 11, 1987, UMTA will assume that the recipient has elected to withdraw from the operation of charter service except for those instances where service is provided under one of the exceptions outlined in the rule.

For those recipients that have not been providing charter service with UMTA-assisted facilities and equipment and for those recipients that have withdrawn from charter service but would like to resume offering charter service, the recipient must first fulfill the public notification and decision process of 49 C.F.R. §§ 604.11 and 604.13.

If a recipient operates charter service after August 11, 1987, without engaging in an adequate public participation process designed to notify willing and able private operators of its desire to operate charter service, the recipient will be in violation of the regulation and may be operating in violation of its grant agreement. In order that your Federal assistance not be jeopardized, recipients are also reminded that the procedures for exceptions must be followed when service is proposed under one of the exceptions contained in 49 C.F.R. § 604.9.

In addition, grant applications submitted after May 13, 1987, must be accompanied by a charter agreement as set forth in 49 C.F.R. § 604.7(b). If a recipient does not intend to submit a grant application to UMTA during fiscal year 1987, the recipient must still submit a copy of its charter agreement to the appropriate Regional Office, as set forth at 49 C.F.R. § 604.7(b), by July 12, 1987.

Sincerely,

Alfred A. DelliBovi

Alfred A. DelliBovi

Department
Transportation
Urban Mass
Transportation
Administration

Headquarters

400 Seventh St. S.W.
Washington, D.C. 20590

JUL 7 1987

Ms. Carol L. Bertran
Privatization Coordinator
Service Development Department
Beaver and Island Avenues
Pittsburgh, Pennsylvania 15233

Dear Ms. Bertran:

This is in response to your request of May 14, 1987, for a determination of the category of the commuter club service operated by the Port Authority of Allegheny County.

In your letter, you described this service as follows:

1. The service is by bus.

2. Buses serve commuters working from 8:00 a.m. to 5:00 p.m. in Downtown Pittsburgh.

3. The charge for the bus is predetermined by the Port Authority at a set rate per day.

4. No contract exists between the Port Authority and the riders.

5. The service is part of the Port Authority's scheduled pick service and operates on a regular and continuing basis.

6. The routing, including origin, destination, and stops, is predetermined and part of the Port Authority's picked scheduled work. The routing may only be changed by the driver notifying Port Authority's Traffic Control if deviation of routing is requested due to congestion, road conditions, etc. This is a standard operating procedure.

7. The service is designed to benefit the public at large and is not limited to employees of certain companies. Anyone wishing to ride on the service is invited to do so by contacting the club bus officer.

8. Riders are guaranteed a seat and receive a monthly Port Authority pass which entitles them to ride the commuter bus and also offers them transportation on certain other regularly-scheduled routes.

The new charter regulation, which went into effect on May 13, 1987, defines "charter service" and distinguishes it from "mass transportation".

Under 49 CFR 604.5, "charter service" means transportation using buses vans, of a group of persons, who, pursuant to a common purpose, under a single contract and at a fixed charge, have acquired the exclusive use of the vehicle to travel together under an itinerary either specified in advance or modified after having left the place of origin. The preamble to the regulation moreover explains that "charter service" is usually thought of as the one-time provision of service, and that the user, not the recipient, has control of the service.

On the other hand, "mass transportation" is defined in section 12(c)(6) of the UMT Act as service to the public, either general service or special service, on a regular and continuing basis. In the preamble to the new regulation, UMTA offers additional guidance on the nature of mass transportation, by providing three characteristics which distinguish it from "charter service".

First, the preamble explains, mass transportation is under the control of the recipient. This means that the recipient is responsible for setting the route, rate, and schedule. Second, the service is designed to benefit the public at large, and not some special organization. Third, mass transportation is open to the public. Anyone wishing to ride on the service must be allowed to do so.

Applying these definitions and guidelines to the commuter club service described in your letter, the service is clearly "mass transportation" and not "charter service". First, you state that Port Authority sets the rate, schedule, and subject to slight deviations for traffic and road conditions, the destination for the service. Second, the service is apparently designed to benefit the public, in this case commuters working in downtown Pittsburgh. Third, you describe the service as open to the public, and that anyone wishing to ride it is entitled to do so. Fourth, there is no contract between Port Authority and the riders: the latter receive a monthly pass which entitles them to ride the commuter bus. Finally, the service as you describe it is regular and continuous, and is not the type of one-time provision of service envisaged in the charter regulation.

Accordingly, UMTA considers the Port Authority of Allegheny County to be mass transportation rather than charter service, in keeping with the definition of 49 CFR Port 604 and its interpretative guidelines.

Sincerely,

Joseph A. LaSala, Jr.
Chief Counsel

U.S. Department
of Transportation

**Urban Mass
Transportation
Administration**

The Deputy Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

AUG 12 1987

Mr. Jack R. Gilstrap
Executive Vice President
American Public Transit Association
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dear Jack:

In light of a number of questions both the American Public Transit Association (APTA) and the Urban Mass Transportation Administration (UMTA) have received about the effective date of UMTA's charter bus regulation, we are pleased to take you up on your offer to print a concise statement on this matter in Passenger Transport.

If an UMTA grantee was providing charter bus service on May 13, 1987, and desires to continue to provide such service, section 604.11(a)(2) of the regulation (52 Federal Register 11935) provides that the grantee must complete a public participation process not more than 90 days after May 13, 1987. In other words, a recipient of UMTA funds may not provide charter bus service using UMTA facilities or equipment after August 11, 1987, unless it has completed its public participation process, and no private charter operator is willing and able to provide the service. Of course, a grantee may provide charter service on an incidental basis if it has been granted one of the exceptions by UMTA which are outlined in the rule. If a recipient was not providing charter service on May 13, 1987, but desires to do so, it must first complete a public participation process at least 60 days before initiating charter service.

The regulation provides that if UMTA determines that a violation has occurred, the Chief Counsel may order such remedies he determines are appropriate given the facts and circumstances of each case. The regulation further provides that the Chief Counsel may bar the recipient from the receipt of UMTA funding if he determines that there has been a continuing pattern of violation of the regulation.

As you know, this regulation, which is a priority of this Administration, was developed over a period of years, including a lengthy notice and comment period. The regulation is now in place and our enforcement efforts are underway.

Our regional offices and headquarters staff are available to provide any additional information or guidance that our recipients or APTA may need regarding the regulation.

Sincerely,

Alfred A. DelliBovi

URBAN MASS TRANSPORTATION ADMINISTRATION
UCC-10:DDUFF:hb:366-4011:AUGUST 11, 1987
KEY WORD: Charter Bus Regulations
FILE NAME: Gilstrap
COPIES TO: UCC-10
UCC-1
UCC-30
UCC-CHRON

UOA-2
UES-10(2)

U.S. Department
of Transportation

**Urban Mass
Transportation
Administration**

REGION VIII
Colorado, North Dakota,
Montana, South Dakota,
Utah, Wyoming

1050 17th Street
Prudential Plaza
Suite 1822
Denver, Colorado 80265

August 12, 1987

Mr. Chester Colby, General Manager
RTD
1600 Blake Street
Denver, CO 80202-1399

Dear Ed:

This is to notify you that UMTA has approved RTD's arrangement for leasing charter buses to private operators as being in compliance with current charter regulations.

An additional question has also been posed to Headquarters concerning the possible treatment of lessees as "recipients" under the new regulations. If lessees were to be considered recipients for the purposes of the regulations, they would be subject to the same public notice requirements and charter service restrictions as grantees.

We have recommended that occasional lessees of charter equipment not be treated like recipients, since such treatment would likely preclude the types of leasing arrangements specifically permitted by the regulations, i.e., leasing to a private operator who lacks either the required capacity or handicapped accesssible equipment.

We will inform you if we receive any further guidance on this point. Thank you for your cooperation.

Sincerely yours,

Helen M. Knoll
Regional Counsel

cc: James Rea, Colorado Western Stages, Inc.
Jack Brooks, RTD

DECISION

KRAFTOURS CORPORATION, Complainant,	}	
vs.	}	OK-02/86-01
HARRIS COUNTY METROPOLITAN TRANSPORTATION AUTHORITY, Respondent/Grantee	}	

I. SUMMARY OF DECISION

This decision is in response to a complaint filed on February 24, 1986, with the Urban Mass Transportation Administration (UMTA) by Kraftours Corporation (Kraftours). In its complaint, Kraftours claimed that National Transit Services (NTS), a privately-owned bus company, was operating charter bus service without UMTA authority while under contract with the Harris County Metropolitan Transportation Authority (MTA), the Houston, Texas grantee of UMTA. UMTA's subsequent examination of the facts and materials submitted by the parties revealed that, with the exception of route cards displayed on NTS vehicles, the charter service in question was not performed using UMTA-funded equipment or operating assistance. Consequently, UMTA concludes that there has been no substantial violation of the charter restrictions in the UMT Act of 1964 on the part of either NTS or MTA.

II. BACKGROUND

A. Complaint

Kraftours' complaint of February 24, 1986, claimed that NTS had, for the previous two months, been engaged in operating charter service in interstate commerce. It specifically alleged that NTS had used publicly-funded buses to provide charter service from Houston, Texas, to Red Rock, Oklahoma, for the purpose of transporting passengers to participate in bingo games on Indian reservations.

By letter of April 3, 1986, UMTA informed MTA of the complaint filed by Kraftours. The letter stated that Kraftours' allegations, if true, could constitute a violation of the charter bus restrictions in Section 3(f) of the Urban Mass Transportation Act of 1964, as amended, and the implementing regulations, 49

C.F.R. 604.[1] The letter also pointed out that if MTA contracts with NTS, the charter bus restrictions apply to NTS to the extent that it operates charter service using UMTA-funded equipment. Since the service in question appears to have been operated outside of the MTA service area, and if MTA had earned more than $15,000 in charter revenues during the past fiscal year, the letter stated, MTA would have to have entered into a charter bus agreement and submitted a cost allocation plan to UMTA before MTA or NTS could provide charter services. UMTA noted that MTA had not entered into any such agreement. UMTA therefore stated that it was treating Kraftours' letter as a formal complaint, and provided MTA with 30 days from the receipt of UMTA's letter to respond to the complaint.

B. Response to Complaint

MTA responded to the complaint by letter dated April 9, 1986. In this letter, MTA stated that NTS operated commuter bus services for MTA under contract with compensation based on the number of revenue hours provided. MTA explained that no UMTA grant-funded equipment or operating assistance was utilized in this service, and that NTS owned its vehicles and provided all operators, fuel, and other supplies necessary to operate the services. MTA stated that NTS performed no charter services for or under contract to MTA, and that consequently, it was of the opinion that NTS' charter operations did not fall within the purview of the Federal statute or regulations.

C. Rebuttal

UMTA sent a copy of MTA's initial response to Kraftours on April 26, 1986, and provided it with 30 days from the date of receipt to rebut MTA's response. By letter dated May 20, 1986, Kraftours took exception to the notion that NTS was exempt from the UMTA charter bus regulations by virtue of the fact that it operated without direct funding from MTA. Kraftours alleged that the vehicles NTS used in providing charter service had been purchased pursuant to the contract with MTA. According to Kraftours, "...National Transit certainly would not own these numerous, new vehicles ... were it not for the contract to the Grantee to provide regular route services...". Consequently, Kraftours stated, NTS had been placed in a position to compete

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[1]The charter service regulation in effect as the time of this complaint has been replaced by a new rule which became effective on May 13, 1987. Under this new rule, recipients and subrecipients UMTA funds may not engage in charter operations if there is a private operator "willing and able" to perform the service. Therefore, had this complaint been decided under the new regulation, and assuming that Kraftours could be considered a "willing and able" private operator, NTS would be prohibited from performing the charter service cited herein.

unfairly with the private sector, in violation of the UMT Act of 1964.

Kraftours claimed that NTS not only used these vehicles purchased pursuant to the contract with MTA, to unlawfully and flagrantly conduct charter bus operations, but it also attempted to mislead the public into believing that it was providing charter service under MTA authority. Kraftours alleged that the NTS vehicles involved in these activities displayed MTA advertisement, MTA vehicle numbers, and MTA license plates, thereby holding themselves out in the eyes of the public as operating under the auspices of MTA.

To illustrate its claims, Kraftours cited an incident which occurred on April 19, 1986 involving an NTS vehicle. On that occasion, Kraftours alleged, an NTS bus "in Houston Metro livery" was seen by an employee of Kraftours in a service station at the intersection of the Oklahoma Cimmarron Turnpike and state road #77. This vehicle, it was claimed, displayed MTA advertising on the outside and inside, and also bore an Indian reservation bingo parking sticker. Claiming that a violation of the UMTA regulations had thus occurred, Kraftours requested that UMTA take action to prevent a recurrence of such alleged unfair trade practices.

D. Supplementary Response

UMTA forwarded a copy of Kraftours' rebuttal to MTA on July 7, 1986, and requested that MTA respond to it within 15 days. By letter of July 23, 1986, MTA filed a supplementary response, in which it stated that Kraftours rebuttal contained a number of misstatements of fact or incorrect conclusions from accurate facts.

MTA first of all denied that NTS operated in MTA livery. MTA pointed out that its own red, white and blue graphics scheme was substantially different from the red stripe on white bus paint scheme used by most NTS buses. MTA enclosed color photos of both an MTA and an NTS bus, to illustrate the difference in color schemes. Second, as concerns Kraftours' allegation that NTS buses carried MTA advertisement, MTA noted that when NTS buses were operated in contract service, they carried a car card in the rear and a dash sign indicating the particular route they are serving. According to MTA, these signs were to be used by NTS only when it was providing service for MTA, and were to be removed when the buses were not providing such service. Third, MTA denied that NTS buses carried MTA license plates, and stated that they instead carried commercial license plates.

MTA stated that it did not have sufficient information about NTS' business affairs to respond to Kraftours' assertion that the vehicles in question had been purchased specifically by NTS for

the purpose of fulfilling its obligations under the contract with MTA. MTA pointed out that it had a service contract with NTS, and that it considered the fact of whether NTS used its existing fleet or purchased new vehicles, to be of no bearing or relevance. In support of its assertions concerning the nature of the agreement between itself and NTS, MTA attached to its supplementary response a copy of the contract.

On August 12, 1986, UMTA sent to Kraftours a copy of MTA's supplementary response and the attached documents, and stated that it would endeavor to issue a decision as soon as its current work load permitted. Kraftours acknowledged receipt of MTA's supplementary response by letter to UMTA dated August 25, 1986. However, Kraftours stated that the supplementary response had not addressed the issues raised in its rebuttal, and indicated that it maintained all of the allegations made in its letter of May 20, 1986.

III. DISCUSSION

The issue in this case is whether the charter restrictions in the Urban Mass Transportation Act of 1964, as amended, and the implementing regulations in effect at the time of the complaint, 49 C.F.R. 604, applied to the interstate charter service provided by NTS. If they did not, neither MTA, as a direct UMTA grantee, nor NTS, as a contractor operating under its authority, can be cited for a failure to comply.

One of the principal goals of the above-cited charter restrictions was to protect private charter operators from unfair competition on the part of recipients of UMTA assistance. 49 C.F.R. 604.13 indeed provided that in order to engage in charter bus operations outside its urban area, the recipient must enter into a special agreement, aimed at assuring "...that the financial assistance granted under this mass transportation grant project will not enable the grantee, or any operator of project equipment for the grantee, to foreclose private operators form the intercity charter bus industry...".

These restrictions on charter bus services were applicable, under 49 C.F.R. 604.2, only to recipients of UMTA financial assistance for the purchase or operation of buses. NTS was thus subject to requirements of 49 C.F.R. 604 only to the extent that it used UMTA-funded buses or operating assistance in performing its charter services. In order to determine whether these provisions applied, then, it must first be established that NTS was indeed such an "operator of project equipment" for UMTA's grantee, MTA.

Kraftours alleged this fact in its letter of May 20, 1986, in which it stated that the vehicles used by NTS in its charter operations were purchased pursuant to the contract between NTS and MTA. Kraftours based this assertion on "outward appearances" and its observation that "...National Transit would not own these

numerous, new vehicles ... were it not for the contract with the Grantee...". In order to make a determination on this point, however, it is necessary to go beyond outward appearances and observations, to examine the facts presented by the parties, and the provisions of the contract between NTS and MTA.

In its initial response to Kraftours' complaint, MTA stated that NTS used no UMTA-funded equipment or operating assistance in its charter operations. MTA maintained that NTS owned its vehicles, and provided all operators, fuel, and other supplies necessary to perform such services. MTA also stated that NTS performed no charter services for or under contract to MTA.

An examination of the contract between NTS and MTA bear out the latter's affirmations on these points. Article 3 of the contract describes the services to be performed by NTS as the providing of commuter bus service over six MTA bus routes. There is no provision for charter, or any other than regularly scheduled route service. It is also provided that NTS shall furnish all personnel, passenger buses, equipment, and maintenance facilities necessary for the performance of these services.

Under Article 11 of the contract, the only property to be furnished by MTA to NTS are transit fareboxes, farebox cards, signage and sign holders. It is moreover specifically provided that such property shall only be used in the performance of the contract. There is no provision for the supplying of vehicles or other capital equipment by MTA to NTS.

Article 7 states that NTS shall be paid on the basis of the number of service hours scheduled by MTA. Under the terms of this provision, NTS is compensated only for services actually performed, and in accordance with a variable rate based on the level of performance provided to MTA for each scheduled trip.

This examination of the contract does not, then, support Kraftours' assertion that NTS was using publicly funded buses for charter operations, in violation of the UMTA charter bus regulations. NTS merely provides services for MTA, and in so doing, uses its own equipment, personnel and facilities. NTS is neither the recipient of direct UMTA grants, nor an operator of project equipment for the grantee.

Since it has been established that the buses used by NTS in its charter operations were not UMTA-funded, it is not necessary to reach the subsidiary allegation raised in Kraftours' letter of May 20, 1986, namely that NTS was "holding itself out in the minds of the public as operating under the auspices" of MTA. Even admitting, arguendo, that NTS was attempting to create the impression that it was operating charter service under the authority of MTA, its activities could be prohibited under the charter bus regulations only if they were performed using UMTA-funded equipment or operating assistance. As a private operator,

using its own vehicles to perform services outside the scope of its contract with UMTA's grantee, MTA, NTS was not subject to the restrictions of the then existing charter regulations, 49 C.F.R. Part 604. The trade practices it used in its charter operations, no matter how unfair they may have seemed to Complainant, were of no concern to UMTA.

Moreover, there is no clear indication that NTS was indeed trying to associate itself with MTA in the minds of the public. The photos submitted by MTA do show certain similarities in the appearance of NTS and MTA buses, but there were also substantial differences. While MTA buses used a red, white and blue graphics scheme and bear the word "METRO" in large letters, the NTS buses had a red on white bus color scheme and no lettering.

Kraftours letter of May 20, 1986, also alleged that NTS buses carried "Metro advertising" while performing charter services. According to MTA's response of July 23, 1986, the "advertisement" referred to were probably the route cards which NTS buses carried in the dash and rear while performing regular contract service. Under Article 11 of the MTA/NTS contract, these signs were to be used by NTS only when performing contract services. NTS' failure to remove them during charter operations would constitute a violation of the contract. Moreover, since this signage was supplied to NTS by MTA under Article 11 of the above-mentioned contract, it was UMTA-funded equipment, and, in keeping with the provisions of 49 C.F.R. Part 604, should not have been used in the performance of charter services. However, since a new charter regulation has gone into effect since the time of this complaint which presumably precludes NTS from performing charter operations, UMTA feels that it is not necessary to issue an order enjoining NTS from using the signage while engaged in "private" service. NTS' use of the signage constituted a relatively minor violation of the then existing charter rule, so that no sanction against NTS or MTA would have been warranted on that basis alone.

IV. CONCLUSION

UMTA's examination of the evidence presented reveals that the charter operations performed by NTS were outside the scope of its contract with UMTA's grantee, MTA, and, with the exception of signage displayed on NTS vehicles, did not involve the use of UMTA-funded equipment or operating assistance. As such, they did not fall within the ambit of the charter restrictions in the UMT Act and implementing regulations in effect as the time of the

complaint, 49 C.F.R. 604. UMTA therefore finds that there was no violation warranting sanction against MTA or NTS.

Rita Daguillard
Attorney-Advisor

8/12/87
Date

Joseph A. LaSala, Jr.
Chief Counsel

8/13/87
Date

U.S. Department
of Transportation

**Urban Mass
Transportation
Administration**

Headquarters

400 Seventh St., S.W.
Washington, D.C. 20590

AUG 26 1987

Mr. David Ryan
General Counsel
Topeka Metropolitan Transit Authority
201 North Kansas
Topeka, Kansas 66603

Dear Mr. Ryan:

Enclosed is a copy of a letter from Mr. Craig D. Busskohl of Arrow Stage Lines pertaining to the decision of the Topeka Metropolitan Transit Authority (TMTA) that Arrow Stage Lines is not a willing and able private operator pursuant to the Urban Mass Transportation Administration's (UMTA) charter service regulations, 49 C.F.R. section 604.13.

UMTA questions your rejection of Arrow Stage Lines on the grounds that it has not submitted evidence of its authority to provide charter service in the City of Topeka, Kansas. Please submit a detailed legal opinion stating the specific requirements that must be met to provide service within the city, with all pertinent citations and references to the organization that regulates charter operations within the city. Absent valid State law to the contrary, UMTA presumes that a charter operator licensed to provide service in any part of a State is authorized to provide service within any city of that State.

UMTA finds TMTA's notice that it intends to provide charter service in trolley buses to be unreasonably restrictive pursuant to the provisions of 49 C.F.R. section 604.11(c)(2). Pursuant to the definition of categories of revenue vehicles at 49 C.F.R. section 604.5(d), the only categories of revenue vehicles that may be specified are buses and vans. By offering to provide charter service in trolleys, TMTA's notice discourages private operators whose capabilities are different from informing TMTA that they are willing and able to provide charter service. Moreover, it is contrary to the provisions of UMTA's regulations to find a private operator not willing and able because it does not offer to provide charter service in trolleys.

Therefore, if TMTA did publish such a notice and no private operator is found by TMTA to be willing and able to provide charter service, then TMTA must publish a notice which comports properly with the requirements of the regulations. The new

VRO-7

notice must provide at least 30 days in which a private operator may offer charter service. TMTA may not undertake charter service directly after August 11, 1987, until TMTA finds that no willing and able private operator has responded to a new notice that meets the requirements of 49 C.F.R. section 604.11(c).

Sincerely,

Joseph A. LaSala, Jr.
Chief Counsel

Enclosure

U.S. Department of Transportation
Urban Mass Transportation Administration

Headquarters

400 Seventh St., S.W.
Washington, D.C. 20590

AUG 2 6 1987

Mr. Wayne J. Smith
Executive Director
United Bus Owners of America
1275 K Street, N.W.
Washington, D.C. 20005-4006

Dear Mr. Smith:

This is in response to your letter of August 3, 1987, on behalf of Crescent Tour and Charter of Topeka, Kansas (Crescent Tour).

The Urban Mass Transportation Administration (UMTA) agrees with you that the Topeka Metropolitan Transit Authority's (TMTA) requirements for trolleys set forth in their notice is overly restrictive.

Moreover, the TMTA's requirements pertaining to Crescent Tour's legal authority may be too restrictive. Therefore, UMTA has written a letter to TMTA, informing them of our view and asking for further information about their legal requirements (copy enclosed).

In response to your questions about trolley buses, UMTA has not maintained a list of buses for which UMTA has provided assistance and is thus uncertain how many trolley buses have been acquired with UMTA assistance. UMTA affords its grantees much discretion in determining what type of vehicle best meets their mass transit needs. It is my impression that some of the trolleys acquired with UMTA assistance have been used to meet downtown circulation needs. I would emphasize that UMTA assistance is granted only for mass transportation purposes.

Sincerely,

Joseph A. LaSala, Jr.
Chief Counsel

Enclosure

UPO-27

U.S. Department of Transportation
Urban Mass Transportation Administration

The Deputy Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

SEP -3 1987

The Honorable Loren Callendar
Mayor of Sioux City
City Hall
Sioux City, Iowa 51102-0447

Dear Mayor Callendar:

This is in response to your letter to Secretary Dole pertaining to the effect on the Sioux City Transit System of the Urban Mass Transportation Administration's (UMTA) rulemaking on "Charter Service" and the difficulties in obtaining affordable charter service from private operators.

On April 13, 1987, UMTA published its revised regulations regarding the charter service which UMTA recipients may provide using UMTA-funded equipment and facilities. A copy of these regulations is enclosed.

UMTA's charter service regulations prohibit the Sioux City Transit System, an UMTA recipient, from providing directly any charter bus or van service which uses UMTA-funded equipment or facilities if there is at least one willing and able private charter operator. The Sioux City Transit System may supplement the capability of the private operator as set forth in the exception at 49 C.F.R. section 604.9(b)(2). In essence, this exception permits the Sioux City Transit System to lease its vehicles on an incidental basis to a private operator to meet the needs of a particular charter trip. If the Sioux City Transit System makes its buses, including its trolley bus, available to a private operator, such service must be incidental to its provision of mass transportation service.

UMTA took care in drafting these regulations to establish broad categories of revenue vehicles to preclude recipients from finding that a charter operator is not willing and able. For that reason, UMTA recognizes only buses and vans as appropriate categories of vehicles. Thus UMTA classifies a trolley bus as a bus for purposes of compliance with the regulations. 49 C.F.R. section 604.5(d). Although UMTA understands that considerable interest has been shown in chartering trolley buses, UMTA believes it is not essential to the public interest to accommodate this preference at the expense of private charter operators that may lack trolley buses. Therefore, UMTA believes an exception for trolley buses is inappropriate.

In drafting these regulations, UMTA determined that our statutory mandates to protect private charter bus operators from unfair competition from UMTA recipients, by virtue of their having obtained substantial Federal financial assistance, and to ensure that UMTA-funded equipment is used for mass transportation require that the regulations be as restrictive as they are. UMTA believes that the private charter industry is able to serve the Nation's essential charter needs. I believe the exceptions in the regulations assure that the actual transportation needs of the public can be met adequately.

Sincerely,

Alfred A. DelliBovi

Enclosure

U.S. Department
of Transportation

**Urban Mass
Transportation
Administration**

The Deputy Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

SEP 8 1987

The Honorable William Lehman
Chairman, Subcommittee on Transportation
Committee on Appropriations
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The House Report accompanying the Fiscal Year 1988 Department of Transportation and Related Agencies appropriation bill contains a number of directives to the Urban Mass Transportation Administration (UMTA) regarding the charter bus regulation UMTA recently issued. Included among those directives is a request that we survey our grantees to determine if any of them have purchased charter rights without Federal funds. While we are not providing this specific information, we think that the information discussed below responds to the thrust of this question.

The purchase of private charter rights by a public transit operator is not eligible for Federal funding. While we do not know how many transit operators have purchased private charter rights, or whether such purchases were before or after enactment of the UMT Act, we can assure you that no private charter rights were purchased with UMTA funds. As a general policy matter, UMTA provides Federal assistance only for mass transportation activities. Charter bus activities are not mass transportation; the purchase of private charter rights by a transit operator are not eligible for Federal funding and have not been eligible for such funding at any time during the history of the UMTA program.

UMTA's charter bus regulation does not apply to non-federally funded equipment and facilities. The Committee's request for information appears to suggest that an exception should be created that would permit UMTA grantees to engage in charter bus activities so long as Federal funds are not involved. In fact, such an exception already exists. The charter bus regulation is inapplicable to any charter bus activities of an UMTA grantee that are carried out without federally funded equipment or facilities. In such a case, if a grantee can establish that Federal funds are not in any manner being used to support its charter bus activities, it may provide charter bus activities without restriction by UMTA.

The requirements of the charter bus regulation are triggered by the use of UMTA funded facilities and equipment. The question of whether a grantee has purchased private charter rights with non-Federal funds is irrelevant to the requirements of the charter bus regulation. As a matter of law, the charter bus requirement applies to "...any public body receiving such [Federal transit] assistance for the purchase or operation of buses...". (Section 3(f) of the UMT Act). Private charter rights purchased by an UMTA grantee should have been so purchased without Federal funds. Once any such grantee receives UMTA funding for the purchase or operation of buses, however, that grantee as a matter of law must, in using federally funded equipment or facilities, comply with the statutory and regulatory charter bus requirements.

I trust this is responsive to the Committee's request. If we can provide any further information regarding this matter, please contact me.

Sincerely,

Alfred A. DelliBovi

DECISION

ERIN TOURS, Complainant,	}	
vs.	}	NY-02/86-01
COMMAND BUS COMPANY, Respondent	}	

I. SUMMARY OF DECISION

This decision is in response to a complaint filed with the Urban Mass Transportation Administration (UMTA) on February 11, 1986, by Erin Tours (Erin). The complainant alleged that Command Bus Company (Command) had operated charter service using UMTA-funded equipment which had been deleted from regular service.

UMTA's investigation of the complaint leads it to conclude that Erin's allegations are founded. Consequently, UMTA holds that Command has engaged in charter activities in violation of Sections 3(f) and 12(c)(6) of the Urban Mass Transportation Act of 1964, as amended (UMT Act), and the implementing regulations in 49 C.F.R. Part 604.[1]

II. COMPLAINT

On February 11, 1986, Erin Tours filed a complaint with UMTA in which it alleged that Command Bus Company had operated charter service using UMTA-funded vehicles which had been deleted from regularly scheduled service. The complaint specifically cited two incidents involving Command buses. In the first incident, alleged to have occurred on February 7, 1986, Erin stated that Command used four of its buses to run charter service to the airport during the morning rush hour. On a second occasion which, according to Erin's letter, took place on February 10, 1986, two Command buses were seen unloading passengers at the Pan Am terminal at J.F.K. Airport during the afternoon peak period.

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[1]The regulation in effect at the time of this complaint has been replaced by a new charter service rule, which became effective on May 13, 1987. Under the new rule, recipients and subrecipients of UMTA funding may not engage in charter operations if there is a private operator "willing and able" to perform the charter service the recipient seeks to provide. Had this complaint been decided under the new regulation, and assuming that Erin could be considered a "willing and able" private operator, Command, a subrecipient of funds through UMTA's grantee, NYCDOT, would be prohibited from providing the charter service cited therein.

III. RESPONSE

By letter of March 14, 1986, UMTA informed Command of the complaint filed against it. The letter stated that Erin's allegations provided sufficient detail to enable UMTA to determine that a violation of Section 3(f) and 12(c)(6) of the UMT Act had occurred. The implementing regulations, the letter said, permitted only charter service that was incidental to the provision of mass transportation. The regulations presumed that weekday peak hour charters were not incidental, but permitted a recipient to rebut the presumption. Accordingly, UMTA gave Command 30 days from receipt of the letter to respond to the allegations. Since Command receives UMTA assistance solely through the New York City Department of Transportation (NYCDOT) and not directly from UMTA, UMTA asked Command to work with NYCDOT in preparing its response.

On March 14, 1986, UMTA sent to NYCDOT a similar letter, in which it stated that NYCDOT was also considered a respondent in this proceeding, and that it should respond within 30 days from receipt of the letter. UMTA received no response from NYCDOT. On May 26, 1986, UMTA sent a second copy of the complaint to NYCDOT, along with a letter which stated that the first copy of the correspondence had been forwarded to NYCDOT through DHL World Express Courier, whose records showed that it had been received. NYCDOT was given 30 days to respond, and was asked to work closely with Command in preparing its response. NYCDOT failed to respond to this second letter. In a telephone conversation of June 13, 1986, NYCDOT indicated to UMTA that it was preparing a response, and would forward it shortly. Despite this assurance, however, UMTA has never received a response from NYCDOT.

In a letter dated April 21, 1986, Command informed UMTA that Erin's letter of complaint had not been included in UMTA's correspondence of March 14, 1986. Command thus requested, since it did not have knowledge of the specific allegations brought against it, that UMTA grant it an extension of time in which to respond.

By letter of May 6, 1986, UMTA acknowledged the administrative oversight, and granted Command an extension of 30 days to respond to Erin's complaint.

Command responded to the complaint by letter dated May 29, 1986. In that letter, Command stated that the buses mentioned in the complaint had been part of the Mass Transportation Service Contract of March 2, 1979 between New York City and Pioneer Bus Corp., and subsequently transferred in the October 3, 1979 Assignment Assumption Agreement between Pioneer and Command. Command said that it had operated and maintained these vehicles since the date of the said transfer, and that they had been used principally for express bus service between Brooklyn and Manhattan.

Command further stated that it used these buses for charter service in compliance with the provisions of the above-cited Mass Transportation Service Contract. It quoted Article 24 of the said contract, which provides that the carrier may perform charter operations, as long as the buses used in such charter operations do not exceed 8.64% of the mileage accrued annually during the term of the contract.

As concerns the first incident cited in Erin's complaint, Command stated that it did not involve service to the airport during rush hour, but was rather a charter trip between and mid-Manhattan hotel and the Brooklyn Academy of Music, and began with a noon pickup. Command said that all morning trips on February 7, 1986, had been covered, and that spare buses were available.

As for the second incident, Command admitted that it did occur at the date and place indicated, but said that the buses used therein had not been deleted from service on its regular, franchised routes. All regular express and local bus runs, Command stated, had been covered on that date of February 11, 1986.

IV. REBUTTAL

UMTA forwarded to Erin a copy of Command's response on June 25, 1986. UMTA's letter noted that although a copy of the complaint had been sent to NYCDOT, no response had been received. UMTA stated that since the 30-day period for NYCDOT to respond had lapsed, UMTA would not consider any material subsequently received from NYCDOT as part of the administrative record on which it would base its decision. Erin was again given 30 days from receipt of the letter to rebut Command's response. UMTA stated that it would endeavor to issue a decision within 30 days of Erin's rebuttal.

UMTA received Erin's rebuttal on July 28, 1986. Erin therein stated that the incidents cited in its complaints were only two examples of what it considered to be a continuing, blatant disregard for UMTA regulations. Erin said that Command had openly advertised its intent to compete in the charter market, and had in fact recently made several local and interstate charter trips.

Erin moreover stated that given the overcrowding and insufficient number of Command buses, Command's claim that the charter buses had not been deleted from regular service, was implausible. Command's assertion that it "operates its franchised routes with the highest performance levels of service possible" was contradicted, Erin said, by the level of service Command provides.

V. UMTA'S REQUEST FOR ADDITIONAL INFORMATION

By letter of February 13, 1987, UMTA requested from Command additional information needed to clarify points made in Command's

response of May 29, 1986. UMTA first of all asked that Command provide it with information which could help establish that the buses in question had been purchased with UMTA funds, so that it could be determined whether they are subject to the UMTA charter bus regulations.

Secondly, UMTA noted that in its response, Command admitted that it did make a charter trip to the airport on February 10, 1986, but stated that the two buses used had not been deleted from regular service. UMTA stated that in order to accept Command's assertion, it must have specific information that its franchised routes had not been deprived of regular service during the rush period on that date. Accordingly, UMTA asked Command to send any supporting documents which could help establish this fact.

UMTA gave Command 30 days from receipt of its letter to provide the requested information, and stated that it would endeavor to issue a decision within 30 days of its receipt thereof. Command informed UMTA by telephone on March 22, 1987, that it had received the letter of February 26, 1987, and planned to respond within 30 days of that date. Since Command failed to do so, however, UMTA proceeded to issue this decision.

VI. DISCUSSION

Under Section 12(c)(6) of the UMT Act, "mass transportation", which is eligible for UMTA funding, does not include "...charter or sightseeing service". 49 C.F.R. 604.11(a) of the implementing charter regulation then in effect stated that no grantee or operator of UMTA-funded buses or equipment may engage in charter bus operations, except on an incidental basis, in compliance with the Opinion of the Comptroller General of the United States, B-160204 (December 7, 1966).[2] Among the charter uses presumed by the regulation not to be incidental, were the following:

> (1) Weekday charters which occur during peak morning and evening rush hours;
>
> (2) Weekday charters which require buses to travel more than fifty miles beyond a grantee's urban area;
>
> (3) Weekday charters which require the use of a particular bus for more than a total of six hours in any one day.

In its complaint, Erin alleged that Command, an operator of transportation services for UMTA's grantee, NYCDOT, had violated 49 C.F.R. 604.11(b)(1), by operating weekday charters during peak

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[2] Incidental use, as defined by the Opinion of the Comptroller General, is that which "...does not detract or interfere with urban mass transportation service."

rush hours, using vehicles deleted from regular service. The complaint cited two alleged examples of such charter operations, one occurring during the February 7, 1986, morning rush hour, and the other during the February 10, 1986, peak period.

In its response, Command denied that it operated charter service to the airport on February 7, 1986. The charter run it made on that date, Command claims, was between a midtown Manhattan hotel and the Brooklyn Academy of Music. Command moreover stated that the trip did not take place during the morning rush hour, but rather began with a pickup at noon.

In its rebuttal, Erin offered no evidence to contradict Command's claim that the February 7 charter trip did not take place during the morning rush hours. Erin merely contented itself with making general assertions that Command's response is simply "perfunctory lip service" and "biased statements", without going to the heart of the very precise contention Command made with regard to this trip.

Given this lack of evidence to the contrary, then, Command's assertion that the February 7 charter was not weekday, peak hour service, must be accepted. This being the case, the incidental service provision of 49 C.F.R. 604.11(b)(1) does not apply, since the charter in question is clearly not the type prohibited by the regulation.

Such is not the case, however, with the February 10, 1986, charter trip, which Command acknowledges to have occurred at the time and place alleged in the complaint. Since this charter took place on a weekday and during peak rush hours, the presumption of 49 C.F.R. 604.11 that it was non incidental service which interfered with regularly scheduled service is triggered.

This presumption is not conclusive, however, and the respondent may overcome it by offering evidence or documentation sufficient to establish that all regular service requirements had been met on the day and time in question. Greyhound Lines, Inc. and Hopkins Limousine Service, Inc. v. Greater Cleveland Regional Transit Authority (August 26, 1982); Tower Bus, Inc. v. Southeastern Michigan Transportation Administration (November 5, 1984). While Command asserted in its response that the vehicles used in the February 10 charter operation had not been deleted from regular service, it offered no documentary evidence of this fact. UMTA's letter of February 13, 1987, to Command requested that Command furnish such information within 30 days of its receipt of the letter. Since Command did not respond to this request within the time allotted, UMTA holds that it has failed to rebut the presumption of 49 C.F.R. 604.11. Consequently, Command's charter operation of February 10, 1986, is held to be a violation of the incidental service provisions of the charter bus regulations in effect at the time of the complaint.

It should be noted that the above-cited charter regulation applied only to charter operations using UMTA-funded vehicles. While Command performs urban mass transportation service for UMTA's grantee, NYCDOT, neither party has presented any specific evidence that the buses used by Command in performing its charter services, were not purchased or operated with UMTA funds. Command's response of May 29, 1986, states that the buses in question had been part of a Mass Transportation Service Contract between New York City and Pioneer Bus Corporation, and subsequently transferred to Command by an Assignment Assumption Agreement. It provided no details, however, on whether the original purchase of the buses, or their assignment, had been made with UMTA funds. UMTA therefore requested, in its letter of February 13, 1987, that Command provide such information so that it could make a preliminary determination of whether the charter regulations were applicable. Since Command failed to respond to this request within the time allotted, UMTA must therefore assume that the vehicles in question were UMTA-funded, and consequently that the UMTA charter regulations then in effect did indeed apply to Command's operations.

VII. CONCLUSION

Based on the foregoing, UMTA holds that Command has, at least on one occasion, used UMTA-funded vehicles during a weekday rush hour in non-mass transportation related operations. Since Command has offered no evidence to overcome the presumption of 49 C.F.R. 604.11(b)(1), we find that this use violated the charter bus regulation in effect as the time of the complaint, 49 C.F.R. 604.11(a).

However, the new charter regulations prohibit subrecipients of federal funds from providing charter service when there is a willing and able private operator. Assuming that Erin is such a willing and able private operator, Command is presumably no longer able to provide the type of service cited in the complaint. Consequently, UMTA finds that it is not necessary to impose sanctions upon Command for its violations of the former charter regulations.

Rita Daguillard
Attorney Advisor

9/9/87
Date

Joseph A. LaSala, Jr.
Chief Counsel

9/25/87
Date

Syracuse & Oswego Motor Lines, Inc. Central NY Coach Lines, Inc. and Onondaga Coach Corporation,	)	
Complainants	)	
v.	)	NY-11/85-01
Central New York Regional Transportation Authority, CNY CENTRO, Inc., CENTRO of Cayuga, Inc., and CENTRO of Oswego, Inc.,	)	
Respondents	)	

I. SUMMARY

On November 1, 1985, Syracuse & Oswego Motor Lines, Inc., Central NY Coach Lines, Inc., and Onondaga Coach Corporation (Complainants), filed a complaint with the Urban Mass Transportation Administration (UMTA) alleging that the Central New York Regional Transportation Authority (CNYRTA), CNY Centro, Inc., Centro of Cayuga, Inc., and Centro of Oswego, Inc. violated the charter bus restrictions in the Urban Mass Transportation Act of 1964, as amended (UMT ACT), and the implementing regulations, 49 CFR Part 604.1

After a thorough review of the materials submitted, UMTA finds that CNYRTA did not violate the regulations with respect to the incidental use provision, operating beyond its urban area, and predatory pricing.2 However, at this time, UMTA finds that CNYRTA has not supported its contention that all expenses were properly allocated for charter service and charter revenues did not exceed charter costs for the years in question.

Since CNYRTA has, however, ceased providing charter service following the implementation of the new charter regulations on May 13, 1987, the issue of its nonconformity the with former regulations has become moot. UMTA consequently finds that it is not in the public interest to issue any directive of guidance to CNYRTA with respect to charter operations pre-dating the current regulations.

1 The regulations that CNYRTA is alleged to have violated have been superseded by the revised regulations that UMTA published on April 13, 1987, 52 Federal Register 11916. This decision, for ease of drafting and to eliminate cumbersome writing, speaks in terms of the old regulation, published on April 1, 1976, as if it were still in effect.

2 CNYRTA is the parent corporation and CNY Centro, Inc., Centro of Cayuga, Inc., and Centro of Oswego, Inc. are subsidiaries of CNYRTA. Since all of the allegations concern the charter operations of the CNY Centro, Inc. subsidiary, this decision uses CNYRTA and CNY Centro, Inc. synonymously.

II. COMPLAINT

On November 1, 1985, complainants filed this complaint with UMTA pursuant to 49 CFR 604.40. The complainants allege that the Central New York Regional Transportation Authority, CNY Centro, Inc., Centro of Cayuga, Inc., and Centro of Oswego, Inc. breached its agreement with UMTA through a continuing pattern of operating charters: (1) on a non-incidental basis; (2) beyond its urban area; (3) at charter rates which do not equal or exceed the actual cost of providing the service; and (4) at charter rates designed to foreclose competition by the private carriers.

The first allegation is that CNYRTA violated the non-incidental use restrictions of mass transportation buses contained in 49 CFR 604.11, by operating charter bus service during peak periods and for over six hours.3 To support their claim of non-incidental operations, the complainants made a request under New York's Freedom of Information Law to examine CNYRTA's charter bus records for the preceding three years. Copies of charter bus trip sheets for some 6000 charters operated by CNY Centro over these three years were obtained as a result of the request, analyzed by the complainants and provided to UMTA. Based on that analysis, the complainants, allege that they identified 1560 instances where charters were run during either the morning or evening peak rush hours or during both peaks. The complainants define CYNRTA's peak rush periods as 7:00 a.m. to 9:00 a.m. and 4:00 p.m. to 6:00 p.m.

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3 Section 604.11(b) of the regulation states that uses of mass transit buses in charter operations are presumed to be non-incidental for weekday charters occurring during peak morning and evening rush hours, weekday charters which require buses to travel more than 50 miles beyond the grantee's urban area, and weekday charters which require the use of a particular bus for more than a total of six hours in any one day.

4 Charter orders 9874 and 9875 were identified as a two-bus charter alleged to have operated during both peaks on Wednesday, March 13, 1985. The complaint alleges that the trip left in the morning peak at 8:30 a.m. and ran all day, returning in the evening peak at 5:20. Each bus was alleged to have been in service for nine hours.

which required buses to be in charter service for more than a total of six hours in one day, in violation to 49 CFR 604.11(b)(3). Of the 1560 charters alleged to have operated during peak periods, 105 are alleged to have also been instances where buses were used in charter operations for more than six hours.

As representative of the six hour violations, the complainants described the four specific examples discussed in regard to the alleged peak period violations. Charter order 09874 and 09875 were alleged to have required the use of a bus for 9 hours each, while charter orders 09834 and 09906 were alleged to have operated for 8 hours and 7.8 hours, respectively.

The second allegation is that the respondent is engaged in and attempting to engage in charter business outside of its transportation district using "joint service arrangements" and "special services contracts," in violation of its present agreement with UMTA. The "out of district" charters are alleged to include runs to ski areas in Madison County and a released time school contract in Cortland County. The "special service contracts" are alleged to be operated on a daily basis through the morning and evening peak periods, but are reportedly not being treated as charters by CNYRTA. The complainants state that they have commenced an action in the Supreme Court of Onondaga County to end these charters.

Included in the complaint are copies of joint service agreements purported to exist between CNYRTA and Cortland and Madison counties. These agreements show that the legislatures of these two counties have entered into an agreement for the provision of charter and transportation services to be provided by CNYRTA. Also included as an attachment to the complaint is a copy of an advertisement describing a service which Centro provides to a ski area with stops in Cazenovia. The complainants allege that this is located in Madison County, outside of the CNYRTA transportation district.

Charter order 09834 was identified as a charter which operated as what CNY Centro calls a "shuttle" on Thursday, February 21, 1985. The initial pullout was alleged to be a t 7:00 a.m., with the bus being used at different times of hte day including 4:45 p.m. The complainants allege that this charter worked 8.03 hours, and cite it as another example of a charter which was run during both peak periods.

Charter order 09906 represents a charter which operated on Wednesday, April 24, 1985. The trip is alleged to have started at 8:45 a.m. and returned to the garage at 12?35 p.m. Then the trip continued and pulled out at 4:55 p.m., according to the complainants, and returned at 8:28 p.m., for a total of 7.8 hours of operation.

The third allegation is that CNYRTA provides intercity charter bus service, and that its total annual charter revenues do not equal or exceed its fully allocated annual charter operation costs.5 Through a comparison of CNYRTA's certification of costs of charter service for CYN Centro, Inc., for the fiscal year ended March 31, 1984, and copies of the CNYRTA's consolidated operating statements for the years 1983, 1984, and 1985, the complainants allege that the certification of costs for charter bus miles is inaccurate. The complainants further allege that had CNYRTA used a proper allocation of full costs to the charter operations CNYRTA's charter operations would have operated at a loss.

The complainants allege that the cost allocation plan for the fiscal year ending March 31, 1984, for CNY Centro does not properly include all the expenses in Appendix B of 49 CFR 604. They cite a number of items which they believe were either excluded or not properly accounted for including: (1) driver's wages for backup service or service on short notice; (2) wages for reserve drivers; (3) expenses for fringe benefits, including sick leave, holiday, and vacation pay; (4) cost for guaranteed pay for drivers; (5) claims costs; (6) attorney's fees; (7) sales tax; (8) expenses for vandalism; and (9) expenses for interest paid on borrowed funds.

The complainants allege that they compared the total reported direct, indirect, and dummy costs reported on the certification of costs for CNY Centro, for the fiscal year ending March 31, 1984 ($8,783,627), with the operating expenses for CNY Centro, for this same period, as reported on CNYRTA's Consolidated Statement of Operations ($14,510,734). As a result of this comparison, they assert that the cost allocation plan and certification of costs submitted for CNY Centro are inaccurate, because many operating costs were not properly included in the charter allocation plan.

Based on what the complainants believe to be the fully allocated operating costs of charter services, they report that CNY Centro charter operations would have operated at losses of $41,913 in fiscal year 1983; $75,158 in 1984; and $95,146 in 1985. They submit that the information provided in the complaint shows that CNYRTA is operating its charter services at a loss, and is using Federal assistance from its line operations to subsidize its charter work.

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5 The regulations specify in 49 CFR 604.13, that if a recipient desires to provide intercity charter service with UMTA-funded equipment or facilities and it earns more than $15,000 in annual charter revenues, it must agree that annual revenues generated by all of its charter bus operations (both intercity and intracity) are equal to or greater than the cost of providing charter operations consistent with its cost allocation plan.

The fourth and final allegation is that CNYRTA operated charters at rates designed to foreclose competition by the private carriers, and that on some charters CNYRTA charged predatory rates.6

The complainants allege that based on a comparison of the CNY Centro's published tariff rates, the prices CNY Centro actually charged for the charters, and the cost under the allocation of full costs, CNY Centro has consistently priced charters below not only its published tariff rates, but also below true costs. This practice, the complainants allege, is clearly designed to foreclose and has foreclosed competition from the private carriers.

Using what the complainants allege are CNY Centro's full operating costs based on maintenance and insurance allocated by miles and all other costs allocated by hour, costs per mile and per hour were computed for fiscal years 1983 through 1985. These costs per mile and per hour figures were applied to the associated miles and hours for each CNY Centro charter trip order which allegedly showed a peak time violation. The resulting figure represented what the complainants allege is the "actual cost" of each trip.

Summary sheets were prepared which compared the complainant's "actual costs" to the CNY Centro pricing tariff as approved by its Board of Directors, and the price charged by CNYRTA for a particular charter trip. These summary sheets, the complainants state, illustrate the consistent pattern of CNYRTA's practice of pricing well below CNYRTA's actual cost and below its own price listing, in a manner designed to foreclose competition by private charter bus operators in violation of 49 CFR 604.13. Three examples of these alleged improper pricing practices are discussed in the complaint.7

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6 According to 49 CFR 604.13, every grantee who provides intercity charter service and earns more than $15,000 in charter revenues is obligated to enter into an agreement with UMTA which states that it will not establish any charter rate which is designed to foreclose competition by private charter bus operators.

7 For CNY CENTRO charter order 9875, the complainants state that the "actual cost" per bus is $313.31, while the tariff price calls for $263.00 per bus, and CNY Centro only charged $192.50. For charter order 09834, the complainants state that CNYRTA charged the customer only $160, while the tarifff price calls for $240, and the "actual cost" was $243.36. On charter order 09906, the complainants state that the customer was charged only $206.60, while the tariff price calls for $422, and the "actual cost" is $437.52. Other alleged pricing violations were summarized in the complaint.

III. RESPONSE

UMTA sent a copy of the complaint to CNYRTA on January 21, 1986. Because the complaint contained a voluminous set of backup material alleged to support the four principal allegations, CNYRTA requested, and UMTA granted a 60-day extension for a total of 90 days to respond to the complaint. CNYRTA's response was received by UMTA on April 18, 1986.

In general, CNYRTA denies the complainants' allegations. Moreover, CNYRTA states that the filing of the complaint merely represents another effort by the complainants to harass CNYRTA and reduce, if not eliminate, the provision of charter services by CNYRTA.

Regarding the specific allegations, CNYRTA provided affidavits and supporting materials which it believes rebuts each allegation raised by the complainants. CNYRTA states that these materials provide proof of CNYRTA's assurances to UMTA that all charters were incidental and priced properly, that there was no predatory pricing, and that cost allocation plans and tariffs were complied with.

First, CNYRTA addresses the allegations regarding peak hour non-incidental use of mass transit buses in charter operations, and six hour violations. CNYRTA states that it does not use its federally funded buses in peak rush times except where it can be proved that these buses were incidental at the time, thus rebutting the presumption of non-incidental charters. CNYRTA's subsidiaries use th following definition to describe peak hour periods:

> For the entire system, the peak time is that time at which the maximum number of buses is required for mass transportation. Any available bus could be used for charter service at other times.

This definition, CNYRTA states, assures that a federally funded bus would not be used in charter service if it would be needed as a spare, for regular route service, or maintenance.

CNYRTA states that its operating subsidiaries have different peak and maximum vehicle requirements at different times of the year, primarily as a result of ridership from students at Syracuse University, high schools, and community colleges. As a result, CNYRTA states that CNY Centro's morning peak period is from 7:45 a.m. to 8:15 a.m. during the fall, winter, and spring schedule when the universities and parochial schools are in session.

CNY Centro's afternoon peak period is reported to be from 5:00 p.m. to 5:15 p.m. Moreover, because the heavy demand by students peaks at 2:30 p.m., whereas the demand for space by adult commuters is greatest at 5:00 to 5:15 p.m., CNYRTA states that it operates 25 fewer buses during the afternoon peak than in the morning.

Therefore, CNYRTA states that during the summer or times during the fall, winter, and spring months when the university and/or the schools are closed, it will utilize federally funded buses for charter service during the morning peak period when there is no potential that these buses will be needed for regularly scheduled mass transit, or as a spare, or for maintenance. However, CNYRTA states that as a policy it will not operate a charter between 7:45 and 8:15 a.m. during the fall, winter, or spring when the universities and/or parochial schools are in session.

During the evening rush period at any time of the year, CNYRTA states that it will operate charter service because this period, as stated above, requires 25 fewer buses than the morning peak. CNYRTA states chartering up to 25 buses during the evening peak period is "incidental" use because these buses would otherwise be idle.

CNYRTA provides summary charts which show each of the 1560 alleged morning and evening peak hour violations, the day it operated, the seasonal schedule effective at that time, the alleged peak period, and comments that state why it believes that the presumption of non-incidental use is rebutted for a particular trip. The schedules must be analyzed in conjunction with a series of graphs, which are said to show the number of buses required to operate CNY Centro regular route service during the corresponding time period.

CNYRTA's response addresses what it states are 793 charter trips that the complainants allege occurred during the morning peak.8 Further, CNYRTA states that of these 793 alleged morning peak trips, only 24 charters actually occurred during seasons when the CNY Centro system operated at peak requirements as defined by CNYRTA. A detailed description of these 24 charters is provided by CNYRTA in an effort to rebut allegations of non-incidental use of mass transit buses during peak periods.

Of the 24 charters which CNYRTA admits CNY Centro operated during the 7:45 to 8:15 a.m. morning peak period, it reports that 13 were not charters by Federal definition, because they were used solely to augment their regular route service to Manley Field at Syracuse University or used in special shuttle operations at the university and that one was a non-charter marketing promotion. CNYRTA admits that the remaining 10 trips operated during the peak were charters within the Federal definition. However, CNYRTA states that regular route passengers were never inconvenienced or deprived of service, because spare buses were available.

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8 It appears that CNYRTA presumes that the 777 charter trips alleged to have occurred during the evening peak do not violate the incidental use restrictions because CNY Centro has 25 idle buses available during the evening peak.

CNYRTA also provided certificates from the Director of Operations and Director of Maintenance which certify that all regularly scheduled trips were completed and that all regularly scheduled maintenance necessary to operate all line operations was conducted.

Next, CNYRTA provides a detailed discussion aimed at rebutting the complainants' allegation that it violated UMTA regulations by operating 105 weekday charters requiring the use of a bus for more than six hours in one day. It states that a careful review of the actual charter sheets included in the complaint prove that only 56 instances of six hour charters occurred. Moreover, CNYRTA states that all of these charters took place when it has been proven that CNY Centro had sufficient excess buses to operate a particular charter without any interference to its regular route customers.

Specifically, of these 56 charters, CNYRTA states that 33 were operated during the period between its morning and evening peak periods, or after the 5:15 p.m. peak period. Of the remaining 23 charters, CNYRTA states that 19 operated during the evening peak, when it has at least 20 available buses (CNYRTA stated earlier that it always has 25 buses available) and 4 violated the morning peak, but at a time when the University and/or schools were closed.

Second, Barry M. Shulman, Counsel to CNYRTA, addressed the allegations that CNYRTA operated charter service beyond its urban area. In an affidavit accompanying the response, Mr. Shulman states that CNYRTA discontinued all operations beyond its urban area (except service provided to stranded airline passengers) in approximately April of 1985, after the complainants filed suit in the State of New York seeking to have such service discontinued.

However, the use of interline and joint service agreements, under which the charter trips out of Centro's urban area were previously operated, had been specifically approved by the Attorney General of the State of New York on December 31, 1981, according to Mr. Shulman. Mr. Shulman also states that the use of these agreements was filed with UMTA, and approved by UMTA Chief Counsel G. Kent Woodman, on July 15, 1982.9

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9 In this letter, UMTA states that in light of the New York Attorney General's opinion dated December 31, 1981, it has no objection to CNYRTA's provision of intercity charters based on joint service agreements. Prior to the December 31, 1981, interpretation, UMTA had held, based on UMTA's understanding of the Attorney General's opinion of August 20, 1974, that CNYRTA could only provide intercity charter service based on joint service agreements if the agreement were with a carrier. As a result of the changed interpretation by the State, CNYRTA could provide intercity charter if the agreement were with a carrier, county government, or any of several other entities.

After discontinuing the intercity charters, provided through joint service agreements, Mr. Shulman states that CNYRTA applied to UMTA Administrator Stanley to amend its charter bus agreement to permit expanded intercity charter operations. However, on November 25, 1985, UMTA Administrator Stanley denied the requested amendment.

At that point, according to Mr. Shulman, all charter service out of CNY Centro's urban area had been discontinued, except for the above referenced service to stranded airline passengers.

Although the private carriers were said to have never raised any objection to the service to airline passengers, CNYRTA's Board was said to have decided to discontinue all charter service out of Centro's urban area, by a resolution adopted February 21, 1986, which is attached to the affidavit. Additionally, Mr. Shulman states that CNYRTA sent a written notice to the three counties with whom it had interline or joint service agreements, that such agreements were terminated. Finally, Mr. Shulman states that CNYRTA's fiscal year commences on April 1, and that during the current fiscal year there have been no charters operated outside of CNYRTA's urban area.

Third, CNYRTA addressed the allegation that it used an improper method of allocating the costs of its charter operations which, if properly allocated, would mean that the charter service has been operated at a loss. CNYRTA states that the complainants used an improper method of allocating the costs of its charter operations, which in nearly every instance, overstates the true cost of each charter. Also, they state that Mr. Russell Ferdinand, President of Syracuse & Oswego Motor Lines, one of the complainants, and CNYRTA's former Chief Financial Officer, certified and calculated CNY Centro's cost allocation plans for nearly all of the period mentioned in the complaint.

CNYRTA compiled summary sheets that show that for the 1560 charters that are the principal focus of this complaint, it experienced a loss of $4,234, comparing CNY Centro cost to actual price. CNYRTA cautions, however, that this loss must be viewed in light of several factors including: (1) the fact that CNY Centro made a profit from charter operations in each of the three years in question; (2) the fact that these 1560 charters were selectively chosen from more than 6000 available to the complainants; and (3) the fact that these 1560 charters represent only $71,000 out of over $1 million in charter revenues over the three years.

CNYRTA's accountant provided an affidavit which states that CNYRTA's certification of costs are prepared using generally accepted accounting principles consistent with CNYRTA's regular accounting methods. In addition, the affidavit states that the certification of cost and cost allocation plans are not a required part of the basic financial statements. However, the affidavit states that the cost and plans were subjected to the auditing procedures applied in the examination of the basic financial statements, and were fairly stated in all material respects in relation to the financial statements taken as a whole.

CNYRTA also included an affidavit from its Chief Financial Officer, Mr. Steven M. Share. Mr. Share states that the charter revenues for CNYRTA's subsidiaries exceeded their charter costs for fiscal years 1982/83, 1983/84, and 1984/85. The revenues exceed the costs in each of these years even after "dummy" costs are included. As an example, the charter profits for CNY Centro were $57,379, $40,014, and $20,911 for the three fiscal years, respectively.

Fourth, CNYRTA addressed the allegation that it operated charters at rates designed to foreclose competition by the private operators and that on some charters, CNYRTA charged predatory rates. CNYRTA states that it has priced its charters in accordance with the tariff approved by the CNYRTA Board, and its cost allocation methodology demonstrates conclusively that charter revenues exceed the cost of charters from 1983 through 1985.

In addition, CNYRTA states that although there are isolated instances where CNY Centro has lost money on specific charters, this was not done with the intent of foreclosing competition. Moreover, CNYRTA states that the private operators have not presented any evidence that they have been foreclosed from competition because of CNYRTA's pricing policy.

Regarding the pricing procedures it used, CNY Centro gives three reasons why the private operators incorrectly priced its charter trips: (1) they had the incorrect tariff at the time; (2) they were unaware of the senior citizen discount which has historically been part of the tariff; and (3) they incorrectly interpreted the charter sheet.

CNYRTA prepared charts showing how CNY Centro calculated the price for each of the 1560 charters identified by the private operators. The methodology used to calculate the price is shown, and the final recalculated price is compared to the price actually charged. In the explanation section, CNYRTA describes how the private operators may have calculated the incorrect price.

In a few instances CNYRTA admits that it did price a charter below its tariff. However, it states that this was done unintentionally as a result of underestimating the exact number of miles or hours that a given charter would take where the customer was given a firm price.

CNYRTA states that a large number of the charters which the private operators allege were priced below cost, in a predatory manner, are what CNY Centro calls "weekly shopper buses." CNYRTA states these weekly shopper buses are not charters according to the Federal definition. CNYRTA states that while the buses are paid for by the grocery stores, the service now operates on published schedules open to the general public, and passengers ride the bus to and from the primary sponsor, but they also shop at other businesses around the sponsor's store.

CNYRTA states that it initiated the weekly shopper service early in the 1970s, as a response to the closing of a number of grocery stores throughout the inner city. A number of senior citizens were reported to have requested CNY Centro's "Call-A-Bus" service to the relocated grocery stores. CNYRTA states that the calls to the Call-A-Bus service requesting trips to grocery stores led them to institute the weekly shopper buses, so that CNY Centro would not have to commit all of its Call-A-Bus resources to serve shopper trips. The buses are billed as charters, according to CNYRTA, to avoid the overtime provisions necessary if it operated the shopper buses as Call-A-Bus service.

If the cost allocation methodology were applied to the weekly shopper buses, CNYRTA admits that it did not cover all of the costs, including the dummy costs. However, CNYRTA states that it increased the price of the service in April 1985, and again in April 1986, in an effort to eliminate all losses shown through the cost allocation methodology. In support of that claim, CNYRTA provides summary charts which show that the cost of the weekly shopper service exceeded revenues by $235 in 1983, and increased to $320 in 1984, but in 1985 the figure dropped to $38.

IV. REBUTTAL

UMTA sent the complainants a copy of CNYRTA's response on May 1, 1986. The complainants sent their rebuttal to UMTA on July 7, 1986, after being given additional time to respond to the allegations.

The rebuttal addresses peak hour non-incidental use, charter service beyond CNYRTA's urban area, inadequacy of CNYRTA's cost allocation plans, and improper pricing aimed at foreclosing competition. It also includes a footnote that repeats the claim of extended hour charters and states that the respondents admitted to 56 such instances.

In addition, the complainants state three additional allegations in their rebuttal that were either not mentioned at all in the initial complaint, or if they were, were discussed in conjunction with one of the above allegations. These additional allegations include claims that CNYRTA: (1) maintains a fleet which is larger than necessary to meet the needs of its line service; (2) improperly manipulates its peak service requirements so as to expand its available charter fleet; and (3) inflates peak requirements by improperly operating special school bus services and routes.

Allegations (1) and (2) will be discussed in conjunction with peak hour non-incidental use since these allegations were mentioned in the complaint in conjunction with the non-incidental use claim. However, since the complaint was not filed under 49 CFR Part 605, which is the applicable school bus regulation, the complainants' third claim will not be discussed. If complainants wish to file a separate school bus complaint, they may do so following the procedures set forth in 49 CFR Part 605.

First, the complainants state that CNYRTA's definition of peak periods contravenes the intent of the regulations, since UMTA regulations in 49 CFR 604 define peak periods as "rush hours." Additionally, they restate their claim that CNYRTA's peak periods are from 7:00 to 9:00 a.m., in the morning, and from 4:00 to 6:00 p.m. in the evening. These peak periods, the complainants state, are accurate, reasonable, and meet UMTA's definition of peak periods.

Also, the complainants state that CNYRTA's claim that any charter sevice they provided during peak periods was incidental because the charters were operated without interfering with regularly scheduled line operations, was not substantiated with any documentation.

Moreover, the complainants allege that it is only because CNYRTA has a bus fleet far in excess of that which is required for regularly scheduled operations, cutbacks and maintenance, that they are able to operate charter service during peak periods without interrupting line service. Similarly, the complainants attack CNYRTA's use of a 20 percent spare ratio as an effort to justify its excess fleet size.

Second, the complainants dispute CNYRTA's counsel's claim that CNYRTA "immediately" discontinued extraterritorial charter service when the complainants filed suit in New York in January 1985. To the contrary, they state that CNYRTA made no attempt to cancel the joint service agreements with Cortland or Madison counties or withdraw from out of district work until the resolution of the Board of Directors on February 27, 1986. This resolution, according to the complainants, was passed only after the private carriers had initiated its complair with UMTA and the Administrator had issued its decision of "probable cause" on January 14, 1986.

Moreover, the complainants point to the fact that the joint service agreements were not cancelled until March 25, 1986, and, not coincidental, while CNYRTA's answer to the complaint was being prepared. This, the complainants allege, provides a clear indication that CNYRTA's limitations on its out of district work was only motivated by an attempt to moot the charges raised by the complaint and avoid a remedy.

Third, regarding the claim of improper cost allocation, the complainants question the content of the affidavit of CNYRTA's accountant. They state that the affidavit makes no conclusion and states no opinion that the certification of costs is in compliance with UMTA regulations. The complainants state that the affidavit also fails to challenge their contention that not all costs have been allocated in compliance with the regulations.

In addition, the complainants include an affidavit from a certified public accountant in support of their claim that CNY Centro used an improper cost allocation. The affidavit states that the accountant reviewed CNY Centro's cost allocation plan and certification of costs

for the fiscal year ended March 1, 1985, along with the charts of accounts, which revealed that several material expense items had not been allocated against charter revenues as required by UMTA regulations.

Furthermore, the accountant states that his analysis revealed an inconsistency in CNYRTA's overall allocation of costs. With respect to certain categories of cost, he states that items related to CNY Centro's Cortran operations were accounted for in separate accounts. However, he states that the allocation percentage originally used on all costs included the Cortran miles and hours. He reasoned that if CNY Centro eliminated the Cortran costs from consideration, then the related Cortran miles and hours should have also been excluded in allocating the remaining costs between line and charter activities.

Instead of the $21,911 profit reported by Centro in fiscal year 1985, the complainants' accountant states that this profit would have been reduced to $9,692 after the "Cortran adjustment." Furthermore, the accountant makes a calculation that he states shows that if additional expenses which CNY Centro omitted were also included, then the charter operations would show a net loss of $36,494 for fiscal year 1985 (compared to a loss of $95,146, estimated in the original complaint).

Fourth, the complainants addressed CNYRTA's response to their allegation that CNYRTA engaged in a practice of predatory pricing, and used this practice to foreclose competition by the private charter operators. The complainants state that CNYRTA's tariff was not established based on cost, but instead was set below cost so as to undercut the private carriers and dominate the charter market.

To support that allegation, they supplied an affidavit from Russell Ferdinand, President of Syracuse & Oswego Motor Lines and formerly Chief Financial Officer of CNYRTA. The affidavit states that CNYRTA established its charter tariff, not based on costs, but based on a comparison with the prices of local private charter operators. They also provided affidavits from other present and former Syracuse & Oswego employees, which are alleged to show a specific example of predatory pricing on a charter contract with a grocery chain.

The complainants requested that UMTA pay particular attention to CNYRTA's analysis of cost versus the price of the twelve subgroups of the 1560 charters in question, since CNYRTA admits that it suffered a loss on these charters in excess of $4000. In addition, they state that CNYRTA gave no reason why these charters would not be representative of their charter operations.

V. DISCUSSION

The four principal allegations are that CNYRTA breached its agreement with UMTA through a continuing pattern of operating charters: (A) on a non-incidental basis; (B) beyond its urban area; (C) at charter rates which do not equal or exceed the actual cost of providing the service; and (D) at charter rates designed to foreclose competition by

the private carriers. Each of these allegations is discussed below, along with any other factual or legal issues that relate to them.

The charter regulations that were in effect when the complainants filed this complaint have changed. UMTA published final regulations revising the previous regulations on April 13, 1987. In this decision, UMTA is comparing CNYRTA's charter service with the old regulations, not the revised regulations.

A. Non-Incidental Use of Transit Vehicles

The complainants allege that CNYRTA violated 49 CFR 604.11 by operating non-incidental charters. Under 604.11(b), the uses of mass transportation buses in charter operations in the following ways are presumed not to be incidental:

(1) weekday charters which occur during peak morning and evening rush hours;

(2) weekday charters which require buses to travel more than fifty miles beyond the grantee's urban area; or

(3) weekday charters which require the use of a particular bus for more than a total of six hours in any one day.

The definition of "incidental" is set forth in the regulation. Section 604.3 states, " 'incidental' means charter bus operations which do not interfere with regularly scheduled service to the public (as defined in the Opinion of the Comptroller General of the United States, B-160204, December 7, 1966...)" Therefore, non-mass transit service is incidental only if it does not interfere with the provision of mass transportation service. The complainants charge that CNYRTA operated weekday charters during peak morning and evening rush hours, and operated weekday charters which require the use of a bus for more than six hours in one day.

The data presented to support that claim includes copies of CNY Centro charter orders, and an analysis of what is alleged to be 1560 violations of the peak hour incidental use restrictions, 105 of which are alleged to also show extended hour violations. In addition, the complainants included copies of CNYRTA's Section 15 submissions, in an effort to support their view of CNYRTA's peak periods.

CNYRTA responded to the allegations by pointing out inaccuracies in the complainants' analysis, and by showing that those peak and extended hour charters which did occur were incidental. CNYRTA submitted its own analysis of the same 1560 charter runs. CNYRTA's analysis shows based on its more limited definition of peak hours that only 56 instances of peak hour incidental use violations occurred. In each instance, they show that they had idle buses available to operate those charters. CNYRTA's analysis also shows that very few extended hour violations occurred, and in each instance they provide data to rebut the presumption of non-incidental use.

Furthermore, CNYRTA states that its evening rush period requires fewer buses, and therefore it always has 25 buses that can be used in charter operations with no adverse affect on line operations. Based on that operational factor, CNYRTA states that no evening peak hour violations occurred. In addition, CNYRTA asserts that "many of the charters labelled by the complainants as peak hour violations were not actually charters, but were buses used to augment regular service, and billed as charters to facilitate billing."

Regarding the extended hour charters, CNYRTA asserts that some of the charters designated by the complainants as requiring the use of a particular bus for more than six hours actually involved the use of more than one bus for less than six hours per bus. CNYRTA shows that in nearly every instance, the total time billed for each charter exceeded six hours, although each individual bus was used for less than six hours.

In addition to presenting evidence to refute the complainants' designation of runs as peak and extended hour charters, CNYRTA provided evidence to rebut the presumption that any peak or extended hour charters which took place were non-incidental. CNYRTA submitted calendars showing its schedule by season, an analysis of turn backs and extra trips, a peak vehicle repair study, and computer-generated vehicle requirement graphs for each year from 1983 through 1985, by season and by peak time period.

The graphs show the scheduled vehicles on the road during a particular peak, the number of operational spares used, the number of vehicles under repair at each time during the peaks, a 20 percent spare ratio, and the total number of buses owned at each point in time from 1983 to 1985. From these graphs the reader is able to determine whether CNYRTA had adequate vehicles available to operate regular service, during those periods when they admit to operating charters during peak periods.

CNYRTA also provided certificates from the Director of Operations and Director of Maintenance, which certify that all regularly scheduled trips were completed, and all regularly scheduled maintenance necessary to operate all line operations was conducted.

After an exhaustive review of the materials submitted by the parties, UMTA finds that the charter trips in question were incidental to the provision of mass transportation and thus, CNYRTA has rebutted the regulation's presumption. UMTA bases this finding principally on the certification submitted by CNYRTA's employees that all regularly scheduled trips and maintenance were performed. This is consistent with previous UMTA decisions and is sufficient to satisfy UMTA that the service was incidental. 2 Can Caravan, Inc. d/b/a/ San Antonio Trolley System v. San Antonio Metropolitan Transit Authority, d/b/a VIA Metropolitan Transit, 1987; Tower Bus, Inc. v. Southeastern Michigan Transportation Administration, November 5, 1984; Greyhound Lines, Inc. and Hopkins Limousine Service, Inc. v. Greater Cleveland Regional Transit Authority, August 26, 1983.

In addition, UMTA finds that the other evidence submitted by CNYRTA confirms this finding. For example, and of particular note, are the calendars and graphs that CNYRTA provided. These show visually that it had enough buses available on the days and times in question to provide the charter service at issue without disrupting any regularly scheduled mass transportation and related maintenance.

Another issue relating to non-incidental service is the allegation that the peak periods CNYRTA identified in its response were not consistent with the peak periods identified in other UMTA submissions. In their rebuttal, the complainants allege that the peak hours which CNYRTA designated in its Section 15 reports are the peak periods that the complainants used, and are the ones which should be used in determining whether CNYRTA violated the charter bus regulations. According to this UMTA reporting program, peak periods in the morning and afternoon occur when the system operates headways closer than during the midday base. Using this definition, CNYRTA's peak periods would be much longer than it states they are.

The complainants define CNYRTA's peak hours as 6:00 to 8:00 a.m. and 4:00 to 6:00 p.m. CNYRTA submits that its operational definition of peak hours is 7:45 - 8:15 a.m. and 5:00 to 5:15 p.m., during the spring, fall, and winter when the universities and schools are open. During the summer, and when the universities and schools are closed, CNYRTA states that its operational policy allows buses to be used for charter operations during the designated peak periods because they have idle buses available. Under CNYRTA's definition, far fewer peak hour charters occurred.

It is not necessary for UMTA to decide whether the peak periods in CNYRTA's Section 15 reports are the peak periods which should be used for the incidental use presumptions. Regardless of what time period is used for the peaks, it is clear that CNYRTA had a sufficient number of idle buses available for charter operations to rebut the presumption that it operated non-incidental peak hour charters. Therefore, UMTA finds it unnecessary to discuss this issue further.

The final issue raised by the complainants which relates to the allegations of non-incidental use is the claim that CNYRTA's use of a 20 percent spare ratio is excessive, and stimulates and encourages the sort of aggressive approach to charter operations which have been followed by CNYRTA. The complainants state that a 10 percent spare ratio was in effect throughout the period covered in the complaint and that such a ratio is reasonable.

UMTA agrees with the complainants that a recipient may be able to operate extensive charter service if the recipient has a large spare ratio. In Greyhound, UMTA restricted the recipient's use of buses for charter operations because of the recipient's large spare ratio. Also mentioned in Greyhound was UMTA's general rule of thumb at that time that a spare ratio of 10 percent to 15 percent was acceptable. Id at 6.

The current guidelines, found in UMTA Circular 9030.1, dated June 17, 1985, state, "[t]he number of spare buses in the active fleet for grantees owning fifty of [sic] revenue vehicles should normally not exceed 20% of the vehicles operated in maximum service." UMTA has reviewed CNYRTA's spare ratio and according to the record it was 15 percent for the time period covered by the complaint. This is less than the 20 percent figure that UMTA uses now and we do not find that CNYRTA's spare ratio is excessive or require that the authority limit the number of spares that may be used for incidental charter service.

B. Charter Bus Operations Outside of the Urban Area

The complainants allege that CNYRTA operated charters outside of its urban area in violation of its charter agreement with UMTA. As part of their evidence, they submitted copies of joint service agreements alleged to exist between CNYRTA and Cortland and Madison counties, both of which are outside of CNYRTA's transportation district. In addition, the complainants provided a copy of an advertisement alleged to show a service CNY Centro operates to a ski area which makes stops in Cazenovia, New York, which is in Madison County.

Section 604.12 of the charter bus regulations specifies that a recipient of financial assistance from UMTA must enter into a charter bus agreement with UMTA if it desires to provide intercity charter bus service, i.e., charter service using UMTA equipment outside of its mass transportation service area, and if it earns more than $15,000 annually in charter revenues.

The procedures which a recipient must follow to enter into or amend its charter agreements are set forth in 49 CFR 604.15. These procedures include giving public notice, holding a hearing, and submitting specific documents to UMTA so that UMTA may decide whether to agree to enter into an agreement or amend an existing agreement.

In a November 25, 1985, letter in response to a request by CNYRTA to amend its charter agreement to expand its intercity charter service, the UMTA Administrator discussed CNYRTA's current agreement with UMTA:

> Currently, the charter bus agreement that CNYRTA operates under, and which UMTA approved on February 23, 1977, permits CNYRTA to operate intercity charter service outside of its three county area by way of joint service agreements with certain aviation facilities within New York State.

Letter from UMTA Administrator Ralph Stanley to Mr. Warren H. Frank, Executive Director, CNYRTA (Nov. 25, 1985).10

In its response, CNYRTA states that the interline or joint service agreement under which it operated service to counties adjoining its urban area was specifically approved by the Attorney General of the State of New York, filed with UMTA, and was approved by UMTA Chief Counsel, G. Kent Woodman, on July 15, 1982. The July 15, 1982, letter stated,

> In light of the New York Attorney General's opinion dated December 31, 1981, explaining the informal opinion of August 20, 1974, UMTA no longer has any objection to CNYRTA entering into charter bus arrangements that are, "...joint service arrangements under which bus service is provided to a location outside,..."CNYRTA's district.

Letter from UMTA Chief Counsel G. Kent Woodman to Edward J. Moses, Esq., Mackenzie, Smith, Lewis, Mitchell & Hughes (July 15, 1982).

The evidence shows that UMTA approved of CNYRTA entering into joint service arrangements to provide charter service outside of CNYRTA's district. UMTA finds that CNYRTA did not violate the charter regulation with respect to charter trips outside its urban area which were conducted prior to the letter from UMTA Administrator Ralph Stanley, on November 25, 1985.

While the November 25, 1985, letter prohibited joint services agreements other than those to stranded airline passengers, CNYRTA's response makes it clear that it has stopped providing even this intercity charter service. UMTA finds that there is no evidence of violations of this permissible intercity charter service after November 25, 1985. Therefore, UMTA finds that CNYRTA has not violated its charter agreement with UMTA. We caution CNYRTA, however, that in the future if it were to resume intercity charter service that it must refrain from using UMTA funded buses in charter bus operations outside of the three county area of Oswego, Cayuga, and Onondaga counties, except for the service to aviation facilities.

C. Charter Rates

The complainants allege that CNYRTA's total annual charter revenues do not equal or exceed the fully allocated annual charter costs, in

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10 CNYRTA was seeking to expand that authority to operate by way of joint service arrangements throughout New York State. However, the Administrator denied the request, finding a clear showing that the private charter operators were capable of providing all the necessary intercity charter service in the area CNYRTA proposed to serve.

violation of 49 CFR 604.13. Under that section of the regulation, an UMTA recipient that provides intercity provides charter service with UMTA funded equipment or facilities and earns more than $15,000 in annual charter revenues, must agree that annual revenues generated by all of its charter bus operations (both intercity and intracity) are equal to or greater than the cost of providing charter bus operations consistent with its cost allocation plan.

The complainants allege that because CNYRTA did not use a proper allocation of full costs to the charter operations, CNYRTA's charter operations operated at a loss. They cite a number of items which they believe were either excluded or not properly accounted for in CNYRTA's cost allocation plan according to Appendix B of 49 CFR 604. In their complaint, the complainants alleged that had CNYRTA used a proper allocation of costs, CNY Centro charter operations would have operated at losses of $41,913 in fiscal year 1983, $75,158 in 1984, and $95,146 in 1985. These losses were based on a comparison of items on CNY Centro's Consolidated Statements of Operations, with the cost allocation plans for each year in question.

In their rebuttal the complainants provided an analysis of CNY Centro's fiscal year 1985 cost allocation plan conducted by a certified public accountant familiar with charter operations. Instead of the original comparison of items in CNYRTA's Consolidated Statements of Operations with the cost allocation plans, the accountant focused on: (1) an alleged inconsistency in how CNYRTA accounted for the costs and mileage from its Cortran operations; and (2) an analysis of CNY Centro's chart of accounts.

Based on the alleged inconsistency, the accountant estimated that once a Cortran mileage adjustment was made, CNY Centro would have realized a profit of only $9,692 for fiscal year 1985, instead of the $20,911 it reported. The accountant's analysis of CNY Centro's chart of accounts alleges that after the items that were not properly accounted for are included, CNY Centro would have operated at a loss of $36,494 in 1985.

The complainants demonstrate through their use of different approaches to allocating CNYRTA's charter cost, how difficult it is to reach a consensus on how such costs should be properly allocated. Their estimate of CNY Centro's charter losses for 1985 is $95,146 in the initial complaint, and in the reply brief this same loss is estimated at $36,494.

Regardless of this problem, UMTA is unable to conclude that CNYRTA's charter costs were accounted for properly in accordance with Appendix B of the rule. While CNYRTA asserts that even after the inclusion of dummy costs that it would have made a charter profit, there is no explanation of what the dummy costs are.

Complainants have listed several costs that Appendix B specifically states must be included. These include sick pay and holiday pay.

CNYRTA does not show that these costs have been included either in its usual course or in the adjustments as dummy costs.

Therefore, UMTA finds that CNYRTA did not comply with the regulation and that its costs for charter service were not fully allocated and we can not conclude that it earned charter revenues in excess of charter profits for the three years in question.

D. Predatory Pricing

The complainants allege that CNYRTA operated charters at rates designed to foreclose competition by the private carriers, and that on some charters CNYRTA charged predatory rates. Section 604.13 of the regulation requires each grantee to enter into an agreement with UMTA which states that it will not establish any charter rate which is designed to foreclose competition by private charter operators.

The question that UMTA must answer is whether the complainants produced sufficient evidence to support a claim of predatory pricing. We do not believe they have. Whether CNYRTA charged predatory rates can only be determined by making a comparison of the rate CNYRTA charged for a particular trip with the rate charged by the private operator for that same trip. However, the complainants did not provide sufficient evidence to enable UMTA to make such a comparison. Therefore, UMTA holds that because the complainants did not provide sufficient evidence to support a finding in their favor, the allegation of predatory pricing was not substantiated.

The complainants also made one specific allegation of predatory pricing regarding former business they had with the Price Chopper grocery chain. They allege that CNYRTA took their contract through predatory undercutting of pricing. Again, the complainants did not provide any evidence of their rate compared with the one charged by CNYRTA. However, CNYRTA admits that it "went to one of the most popular stores to see if they would be interested in sponsoring the direct cost of a bus." Response at Exhibit L.

While the evidence does show that the private operators once had a charter contract with the grocery chain, CNYRTA has presented sufficient evidence to support a finding that the service is no longer operated as a charter, but instead, is a service which operates on published schedules open to the general public. CNYRTA stated that it only characterized the buses as charters to avoid the overtime provisions necessary if it operated the service as part of its Call-A-Bus service. Therefore, UMTA finds that the claim of predatory pricing regarding the grocery contract is not substantiated because there is no evidence that CNYRTA established a charter rate which was designed to foreclose competition.

VI. Conclusions and Order

In view of the foregoing, UMTA finds that the alleged violations regarding the incidental use provisions, operating beyond the urban are and predatory pricing are not substantiated. However, at this

time, UMTA finds that CNYRTA has not supported its contention that all expenses were properly allocated for charter service and we cannot conclude that charter revenues did exceed charter costs for the years in question.

Since the date of this complaint, however, UMTA has implemented new charter service regulations, 49 C.F.R. 604, which provide that a recipient of Federal transportation assistance may not perform charter operations within its service area when there is a private operator willing and able to provide the service. UMTA has been informed that more than one private operator in CNYRTA's service area has been determined willing and able since May 13, 1987, the effective date of the new rule. Consequently, CNYRTA may no longer provide charter service. The issue of its nonconformity with the charter regulations has thus become moot, and does not require the issuance of any sanction or order on the part of UMTA.

Rita Daguillard
Attorney-Advisor

10/1/87
Date

Joseph A. LaSala, Jr.
Chief Counsel

10/2/87
Date

UR08

U.S. Department of Transportation

Urban Mass Transportation Administration

The Deputy Administrator

400 Seventh St. S.W.
Washington, D.C. 20590

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OCT 26 1987

Mr. Charles E. Colby
General Manager
Regional Transportation District
1600 Blake Street
Denver, Colorado 80202-1399

Dear Mr. Colby:

This is in response to your recent request for an exception under 49 C.F.R. 604.9(b)(4) which would allow the Denver Regional Transportation District (RTD) to provide charter service on the occasion of the 1988 Convention of the International Association of Lions Clubs, to take place from June 27 to July 2, 1988.

The preamble to the regulations, at page 11925, explains that the Urban Mass Transportation Administration (UMTA) will grant an exception under Section 604.9(b)(4) only for events of an extraordinary, special and singular nature. Your letter and enclosures indicate that this is to be the largest convention in Denver's history, with 35,000 persons expected to attend. Given the international importance of the convention, the fact that it constitutes a unique occasion for the city of Denver, and the large number of attendees expected, UMTA recognizes it as an event of a special and singular nature. Moreover, we understand from your letter that the combined resources of private charter operators in your area are insufficient to meet the service needs for this convention. Also, the American Bus Association has advised us that the City and the local private operator have been working together to coordinate the capabilities for this event. For these reasons, I hereby authorize the RTD to make available as many as 160 buses to accommodate the need for charter service for attendees at the International Association of Lions Clubs Convention, June 27 to July 2, 1988. This exception is valid only for shuttle service between hotels and the convention sites. Should RTD require additional buses or wish to perform operations other than shuttle service, you must request an additional exception under the procedures of 49 C.F.R. 604.9(d). Moreover, before undertaking charter operations using UMTA funded facilities and equipment, RTD should attempt to broker as much service as possible to private providers.

HK LM DD
RV LL JK
DC PVC
TRA H CD

You are reminded that, in accordance with 49 C.F.R. § 604.9(3), "Any charter service that a recipient provides under any of the exceptions of this part must be incidental charter service." The regulations define "Incidental Charter Service" as "charter service which 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." 49 C.F.R. 604.5(i). The preamble to the regulations provides further guidance on determining what constitutes charter service. 52 Fed. Reg. 11926, April 13, 1987.

Sincerely,

Alfred A. DelliBovi

3(e)

Hudson Bus Lines, Inc. Complainant v. Massachusetts Bay Transportation Authority Respondent	)	MA-03/86-01

SUMMARY

Hudson Bus Lines, Inc., (Hudson) filed this complaint with the Urban Mass Transportation Administration (UMTA) alleging that the Massachusetts Bay Transportation Authority (MBTA) had violated Section 3(e) of the Urban Mass Transportation Act of 1964, as amended (UMT Act) in its operation of Route 326. After a thorough investigation, UMTA finds that Hudson was adequately involved in the plan to transfer operating responsibilities along Route 326, and thus concludes that there was no violation of Section 3(e) with respect to Hudson. UMTA concludes, however, that the MBTA violated section 3(e) by failing to involve other private operators in the proposed transfer. UMTA therefore orders the MBTA to follow the procedures set forth in paragraph A of its policy dated July 23, 1986, in any future plans to involve the private sector when planning or implementing any new or restructured service.

COMPLAINT

On March 5, 1986, Hudson filed this complaint with UMTA's Regional Office in Boston, Massachusetts. The Regional Office transmitted it to the Chief Counsel's Office for investigation and resolution on March 10, 1986.

In this complaint, Hudson alleges that the MBTA violates Section 3(e) of the UMT Act by operating bus service on Route 326 in competition with Hudson. The service allegedly operates from Medford and Medford Square to Boston. Hudson states that it has provided service to the City of Medford since 1938 and that it provides express service over the same route as the MBTA's Route 326. Hudson states that it provides 14 trips daily, Monday through Friday, from Medford and 12 trips daily, Monday through Friday, from Medford Square. Hudson included a map to show that its service and Route 326 are identical.

Hudson states that the MBTA has not complied with Section 3(e) of the UMT Act in providing this service. Indeed, the MBTA's noncompliance was exacerbated when it decreased the headways on this service on December 28, 1985. As a result of this action, Hudson alleges that the number of MBTA trips has increased to the point where its buses operate at times only several minutes prior to Hudson's buses.

Hudson further alleges that the MBTA violated a Massachusetts State law which allegedly gives preference to existing private carriers if a public authority wishes to introduce service over the same route. Mass. Gen. Laws Ann. ch. 161A, Section 5(k) (West 1976).

Hudson states that it attempted to resolve its problems with the MBTA by negotiating with the MBTA. Pursuant to an agreement that was negotiated between the parties, Hudson would release the MBTA from any claims against it for competitive service and the MBTA would drop half of its service on Route 326 as of January 1, 1986, and completely discontinue its service on Route 326 as of March 1986.

The agreement was, however, never put into effect. Since Hudson has never been able to learn the reasons for this failure, it filed this complaint with MBTA.

RESPONSE

UMTA sent a copy of the complaint to the MBTA on March 24, 1986, and provided it with 30 days from receipt to respond to the allegations. The MBTA's response is dated April 24, 1986.

The MBTA asserts that the service on Route 326 is not in competition with Hudson's service. The MBTA states that it began this service on June 26, 1973, and that it obtained the operating rights to provide the service by acquiring them from another company in 1968 and its assumption of the operations of a second company.

The MBTA states that Hudson filed a claim for $3 million in damages against the MBTA for the operation of Route 326 in 1981. The claim was based on a violation of Mass. Gen. Laws Ann. ch. 161A, Section 5(k) (West 1976). The MBTA states that it denied the claim since it was not filed within 6 months of the commencement of the service as required by Mass. Gen. Laws Ann. ch. 161A, Section 14(a) (West 1976). The MBTA includes a copy of the relevant portions of the statute.

On January 27, 1981, the MBTA states that Hudson filed an administrative complaint with UMTA making many of the same allegations made in this complaint. The MBTA states that UMTA never formally disposed of the complaint.

The MBTA states that Hudson did not raise the issue again until April 29, 1985, when it approached the MBTA to negotiate for the operation of the service along Route 326 under contract with the MBTA. In exchange, Hudson would release the MBTA from any and all outstanding competition claims.

The MBTA states that it presented this proposal to its Board of Directors on December 18, 1985. The Board rejected the proposed transfer of the operations of Route 326 pending further analysis of revenue gains and losses. The MBTA claims that negotiation continued and that a possible transfer was contemplated. The tranfer did not occur, however, because the MBTA had found that: 1) the public of the city of Medford opposed the transfer; 2) Hudson had no equipment accessible to handicapped persons; 3) Hudson had no adequate means to monitor the accuracy of the number of MBTA pass users that Hudson would carry; and 4) there would be no cost savings to the city of Medford.

The MBTA claims that it had to increase its service along Route 326 because of increased patronage, not to increase its competition with Hudson.

Finally, the MBTA notes that consistent with UMTA's guidance on the involvement of the private sector, it has a local mechanism for the resolution of complaints. This is the procedure in Mass. Gen. Laws Ann. ch. 161A, Section 14(a). This requires the filing of a complaint within 6 months of the commencement of the MBTA's complained of service. The MBTA states that since Hudson did not do so within 6 months of June 26, 1973, when it began Route 326, that Hudson is barred from making this complaint.

REBUTTAL

UMTA sent a copy of the MBTA's response to Hudson on May 7, 1986. Hudson states that it received the letter on May 13, 1986, and its rebuttal is dated June 10, 1986.

In its rebuttal, Hudson discusses how the MBTA did not comply with Mass. Gen. Laws Ann. ch. 161A, Section 5(k) (West 1976) when Route 326 was begun in 1973 and that the MBTA has not even atttempted to justify its compliance with this State law. Hudson also claims that the MBTA has not complied with the requirements of this law in the provision of other bus service.

Hudson states it appeared that the agreement to transfer the operations on Route 326 was in place for the January 1, 1986, transfer, but that it never happened. Hudson states that it was informed on March 12, 1986, that the MBTA's Board disapproved the action. Hudson notes that further negotiations proved unsuccessful.

Hudson claims that its remedy under Mass. Gen. Laws Ann. ch. 161A, Section 14(a) (West 1976) is not its sole remedy and that it may complain under Section 3(e) of the UMT Act. Hudson states that

the MBTA did not comply with this requirement in the establishment of the service in 1973 and did not do so when it supplemented the service in December 1985.

Hudson states that while the MBTA does not believe that its decreased headways on Route 326 compete against Hudson, the result is, nonetheless, increased competition.

Hudson responds to the four reasons given by the MBTA for not putting the transfer into effect. Hudson states that the first reason given, that the public does not like Hudson's service, is incorrect and unfair. Hudson provides a discussion of the history of its operations and concludes that the quality of its service cannot be validly raised as a reason not to transfer the service.

Second, Hudson states that it was going to keep the fares the same as the MBTA charged on Route 326. Third, Hudson says that it cannot afford to purchase accessible equipment since it is not a subsidized carrier. Fourth, Hudson states that it could have activated its fare collection machinery to monitor the accuracy of the number of MBTA passes used on the service.

Hudson concludes by stating that it wants UMTA to order MBTA to cease its operations on Route 326 so that Hudson will have the "opportunity to provide bus service over Route 326 free from competition with MBTA."

DISCUSSION

The first issue that Hudson raises concerns an alleged violation of Massachusetts State law. Mass. Gen. Laws Ann. ch. 161A sec. 5(k) (West 1976). The statutory provision cited by the parties relates to the provision of service by the MBTA in competition with private operators. To the extent that the issue raises requires UMTA to review the MBTA's compliance with this provision, UMTA does not have the competence to interpret Massachusetts law nor the jurisdiction to determine compliance with it.

The alleged violation could also be construed as raising a section 3(e) issue concerning the MBTA's compliance with its private sector dispute resolution process. UMTA does review disputes concerning compliance with local procedures for resolution of disputes. 49 Fed. Reg. 41,310, 41,312 (Oct. 22, 1984). The issue raised here, however, concerns the MBTA's compliance with the state provision in instituting the service in 1973. As the complaint is raised thirteen years after the alleged violation occurred, UMTA will not review this claim as Hudson raises the issue in an untimely manner.

Second, Hudson alleges noncompliance with section 3(e) and Massachusetts law when the MBTA decreased headways on Route 326 in December 1985. Hudson claims that it provides 14 daily trips, Monday through Friday, from Medford and 12 daily trips, Monday through Friday, from Medford Square. Hudson provides copies of two MBTA schedules for Route 326, both dated December 28, 1985. The first reflects the schedule for the service if the transfer of service to Hudson was completed and the second reflects the service without the transfer to Hudson. Neither, however, indicates how much additional service the MBTA began to provide by reducing headways in comparison to the previous level of service. UMTA is unable to determine if the decrease of headways constituted "new or restructured service" and therefore will not apply UMTA requirements for private sector involvement in planning and implementing new or restructured service to the decrease of headways on Route 326.

Hudson's third allegation concerns the proposed transfer of service operation to a private operator. UMTA finds that this plan to transfer service constitutes "new or restructured service" as contemplated by UMTA Circular 7005.1, "Documentation of Private Enterprise Participation Required for Sections 3 and 9 Programs" (Dec. 5, 1986). Paragraph 4 defines "new or restructured services" as a significant service change. This may involve any of the following:

> establishment of a new mass transportation service; addition of a new route or routes to a grantee's mass transportation system; a significant increase or decrease in service on an existing route in a grantee's mass transportation system; a significant realignment of an existing route in a grantee's mass transportation system; or a change in the type or mode of service provided on a specific regularly scheduled route in a grantee's mass transportation system.

Here, the transfer of operations to another entity, i.e. Hudson, clearly is a significant service change as it changes the type of service on a specific regularly scheduled route. The MBTA therefore must comply with the guidelines of Circular 7005.1 for new or restructured service.

Circular 7005.1, as well as predecessor guidance documents, do not set forth the steps that a grantee must take to involve and consider private enterprise in planning and implementing new or restructured service. The Circular instead leaves this to the local process as developed in the required grantee private enterprise consideration policy statement. Circular 7005.1 at paragraph 5.

Consistent with this requirement, the MBTA developed a process and submitted it to UMTA on August 7, 1986. The copy sent to UMTA states that the policy "will be incorporated into the daily operations of the Authority." The MBTA's process sets forth three policies regarding the planning of new or restructured service: 1. notify private carriers when new or restructured service is considered; 2. notify private carriers of the initiation and progress of all studies on transit service; and 3. notify private carriers of all public meetings regarding transit service. The policy statement also sets forth the implementation details for these policies.

Since the controversy in this complaint arose before the MBTA submitted this policy to UMTA, the MBTA may not have followed its specific steps. Nonetheless, because UMTA's guidance has stated since October 22, 1984, that such a local process for the involvement of the private sector is needed before instituting new or restructured service, UMTA examines the steps that the MBTA went through in its attempts to transfer the operations of Route 326.

UMTA finds that the MBTA did not follow an adequate process to consider the private sector. Although the MBTA clearly did consider and negotiate with one private provider, i.e. Hudson, in the transfer of this service, such action is not consistent with UMTA's policy, which stresses competition and the ability of all private operators to participate in the planning and provision of service.

The complainant here must realize that it is not entitled to special treatment simply because it already provides service along the corridor in which it seeks to expand operations. It must compete fairly with other interested private operators. UMTA recipients are required to provide a forum for such fair competition and to fairly evaluate all competitors.

In fact, UMTA's Third Party Contracting Guidelines, Circular 4220.1A provides contracting guidelines that require, in most instances, that recipients follow a competitive process in contracting out for goods or services. On January 21, 1987, then UMTA Administrator Ralph Stanley sent a letter to UMTA recipients reiterating that "[a]ll transit management, planning, route or other contracts, whether new or extending existing contracts, must be awarded in accordance with" Circular 4220.1A. Thus, unless one of the very limited sole source procurement exceptions applies, the MBTA could only contract the Route 326 service out to a private operators through a competitive process.

CONCLUSION

UMTA concludes that the MBTA did not follow UMTA section 3(e) requirements for the involvement of the private sector in planning to transfer Route 326 to a private operator, which is a restructuring of service. As the MBTA apparently is no longer contemplating such a transfer, there is no need for it to undertake such a process at this time. If at some later date the MBTA again contemplates the transfer of this route or any other route to a private operator, the MBTA must comply with UMTA Circular 7005.1 and the MBTA's policy statement adopted July 23, 1986. Further, in contracting with private operators to provide service, the MBTA must comply with the contracting guidelines of Circular 4220.1A.

Rita Daguillard
Attorney-Advisor

11/6/87
Date

Theodore A. Munter
Acting Chief Counsel

11/6/87
Date

U.S. Department
of Transportation

Urban Mass
Transportation
Administration

The Deputy Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

NOV 10 1987

The Honorable Charles E. Grassley
United States Senate
Washington, D. C. 20510

Dear Senator Grassley:

This is in response to your letter enclosing a letter from Mr. Stewart Huff, Chairman of the Board of Trustees of the Sioux City Transit System (SCTS), regarding the effect of the Urban Mass Transportation Administration's (UMTA), rulemaking on "Charter Service." Each of the many issues raised in Mr. Huff's letter will be addressed.

On April 13, 1987, UMTA published its revised regulations regarding the charter service which UMTA recipients may provide using UMTA-funded equipment and facilities. A copy of these regulations is enclosed.

Issue No. 1

"The regulation places unreasonable restrictions on our [SCTS's] efforts to respond to specific public service transportation needs, ..."

UMTA's Response to Issue No. 1

UMTA's charter service regulations only address how an UMTA recipient may use its UMTA-assisted equipment and facilities. Because UMTA is not authorized to provide Federal assistance for charter service and because only incidental charter service may be performed with UMTA-assisted equipment and facilities, UMTA must take the necessary steps to assure that the equipment and facilities UMTA finances are not misused for purposes unauthorized by Federal statute. Federal assistance is not available for every type of service an UMTA recipient may be requested to supply.

Issue No. 2

"The regulation ... forces the underutilization of our public transit equipment and facilities in which taxpayers have invested, ..."

UMTA's Response to Issue No. 2

UMTA makes capital assistance available on the understanding that a recipient needs the equipment or facilities for mass transportation purposes. UMTA would note that if a recipient's UMTA-assisted equipment and facilities are underutilized, the recipient may have excess property that must be disposed of in accordance with the terms of OMB Circular A-102, Attachment N.

Issue No. 3

"The regulation ... eliminates a source of needed revenue for our financially strapped transit system."

UMTA's Response to Issue No. 3

Overall, UMTA believes that the provision of charter service to its recipients is more costly than the revenues that may be collected. This issue is more fully discussed in the preamble to the regulations at 52 Fed. Reg. 11932, April 13, 1987:

> UMTA does not doubt that some recipients earn profits from their charter services. Many of the commenters stated that these revenues equal 1, 2, or 3 percent of their total revenues. While UMTA cannot deny that these amounts of revenues may be important to these recipients, they do not appear to be so enormous that their loss will seriously affect these recipients.
>
> Furthermore, it is still UMTA's position that mass transportation is a local concern. Thus, while a loss of charter revenues may have an adverse impact on the services that these recipients are able to provide, we believe that such losses are the responsibility of the State and local government to correct.

Issue No. 4

The regulation is, "anti-competitive."

UMTA's Response to Issue No. 4

In drafting the regulations, UMTA determined that its statutory mandates to protect private charter operators from unfair competition from UMTA recipients and to ensure that UMTA-funded equipment is used for mass transportation require that the charter service regulations be as restrictive as they are. UMTA does not have the legal authority to provide Federal assistance for charter service. UMTA, therefore, does not have the legal authority to support its recipients' efforts to increase competition in charter

service. UMTA believes fair competition is best assured by providing a level playing field for all operators. To do this, UMTA removed the advantages enjoyed by recipients of UMTA assistance when they compete with entities that do not receive Federal assistance.

Issue No. 5

The regulation is, "federally intrusive."

UMTA's Response to Issue No. 5

Because UMTA's new charter service regulations impose fewer administrative burdens than were imposed by UMTA's previous charter bus regulations, UMTA believes the new regulations are far less intrusive than either the former charter bus regulations or the proposed charter bus regulations set forth in the notice of proposed rulemaking. For example, the preamble to the new regulations states at 52 Fed. Reg. 11918, April 13, 1987, "We have taken special pains to minimize the administrative and paperwork burdens imposed by the rule to ensure that all recipients will be capable of complying without hardship." In addition, the preamble notes that "UMTA has decreased the administrative burden on recipients in the public participation process by eliminating the hearing requirement," that was included in the notice of proposed rulemaking. 52 Fed. Reg. 11926, April 13, 1987.

Issue No. 6

The regulation is, "inconsistent with UMTA's privatization initiative since it will force private companies to choose between charter service or seeking line-haul service contracts with [a] public transit system."

UMTA's Response to Issue No. 6

Section 3(f) of the Urban Mass Transportation Act of 1964, as amended (UMT Act), states that its restrictions apply to the recipient, "or any operator of mass transportation," for the recipient. Therefore, substantially similar restrictions must be imposed on charter service by private operators who provide mass transportation service for recipients and on charter service by recipients. 52 Fed. Reg. 11918, April 13, 1987. Although UMTA is aware of a possible conflict between UMTA's private sector policies that encourage private operators to engage in mass transportation operations for recipients and the restrictions imposed by the charter service regulations on those private operators that provide mass transportation service for recipients, UMTA is bound by the terms of its legislation, which requires consistent treatment for both recipients and those private operators that provide mass transportation service for recipients. 52 Fed. Reg. 11919, April 13, 1987.

Issue No. 7

"The regulation is not authorized by statute: it is based on a regulatory approach specifically rejected by Congress in 1974 and exceeds UMTA's authority under section 3(f) and 12(c)(6) of the Urban Mass Transportation Act."

UMTA's Response to Issue No. 7

The statutory basis for the regulations is section 12(c)(6) and section 3(f) of the UMT Act. The regulations implement those two provisions of the UMT Act. The first provision, section 12(c)(6), has been part of the UMT Act since its enactment, and defines "mass transportation" specifically to exclude charter service, sightseeing service, or school bus service. The second provision, section 3(f), was enacted by Congress in the early 1970's and is more specific. Section 3(f) requires all applicants for UMTA assistance for the purchase or operation of buses to enter into an agreement with UMTA to ensure that the private intercity charter bus industry is not foreclosed from the charter business by public operators using publicly funded equipment.

I should also point out that Congress recently has passed legislation in a related area. As you know, the Surface Transportation and Uniform Relocation Assistance Act of 1987, enacted on April 2, 1987, reauthorized both the transit and highway programs for five years. Section 339 of that Act amended the laws governing the Interstate Commerce Commission. This provision precludes a public transit authority that has received Federal assistance from acquiring interstate charter rights beyond the area in which it provides regularly scheduled mass transportation services if any private operator is providing the service or is willing and able to provide the proposed service. This is noteworthy because UMTA has taken a parallel approach in its charter service regulations, which apply within a transit operator's service area.

A more detailed legal analysis is set forth in the preamble to the regulations at 52 Fed. Reg. 11930 and 11931, April 13, 1987. UMTA believes the charter service regulations are fully within UMTA's legal authority to administer UMTA's mass transportation program.

Issue No. 8

"Congress should act immediately to withdraw this regulation."

UMTA's Response to Issue No. 8

UMTA is aware of the congressional guidance set forth in the House report language accompanying the FY 1988 Department of Transportation and Related Agencies Appropriations Bill (H.R. 2890) pertaining to the impact of UMTA's new regulations on

non-profit entities that in the past have relied on charter service provided by UMTA recipients. That report language directs UMTA to undertake a rulemaking on a proposed amendment to the regulations that would permit certain entities to seek bids from public transit operators, notwithstanding the requirements of the regulations. That report language also directs UMTA to provide transit operators interim guidance that such a rule change is under consideration.

UMTA is now in the process of developing an appropriate notice of proposed rulemaking. In so doing, UMTA will be seeking to discern what segments of the public are actually unable to obtain charter service on a reasonable basis from the private sector, and thus must rely on UMTA recipients for service to meet their needs.

Issue No. 9

"We believe an investigation is in order as to why section 604.11(b)(3) came to be included in a federal regulation administered by the Department of Transportation."

UMTA's Response to Issue No. 9

UMTA's charter service regulations at 49 C.F.R. § 604.11(b)(3) require, as part of the public participation process, that the recipient send a copy of its notice of intent to provide charter service to the United Bus Owners of America (UBOA) and the American Bus Association (ABA). In proposing this requirement, UMTA has explained in its notice of proposed rulemaking set forth at 51 Fed. Reg. 7898, March 6, 1986, that:

> It is UMTA's opinion that notice to these organizations would be helpful. UBOA and the ABA are the trade associations representing virtually all private charter bus companies. Consequently, notice to them would be another way to ensure that notice is received by the potential willing and able private charter operators in the proposed service area. This could be effectively done by UBOA and the ABA through their newsletters.

The preamble to the new charter service regulations states simply at 52 Fed. Reg. 11927, April 13, 1987, that:

> UMTA believes that actual notice to these two trade associations is important to ensure that there is as wide a distribution as possible in order to get as large a response as possible.

Issue No. 10

"SCTS is effectively prohibited from satisfying the special travel interests of our citizens," because the nearest charter operator is located in another State.

UMTA's Response to Issue No. 10

Among the approaches UMTA considered in establishing a proper balance between the provision of charter service by the private sector and UMTA recipients was a plan in which a recipient would be authorized to provide charter service if a customer had made a reasonable attempt to secure service from private operators. Having concluded an extensive rulemaking process in which more than 300 comments were received and analyzed, UMTA made a decision not to adopt regulations that would permit a grantee to be a "charter provider of last resort." One problem with the "charter provider of last resort" approach is that UMTA lacks the means to impose a penalty on a charter customer that misleads a recipient to believe that the customer genuinely made an adequate effort to secure service from private operators. In addition, by permitting charter service customers to continue their habitual practice of meeting their charter needs by securing the services of UMTA recipients, UMTA would be undermining the efforts of private operators to serve the public by making proper investments and other improvements. While UMTA recognizes that there might be, in a few instances, some minimal inconvenience to the public resulting from the transfer of charter relationships from UMTA recipients to private operators, UMTA's regulations were drafted to include exceptions that would preclude the imposition of actual hardship on the public. In drafting the regulations, UMTA determined that its statutory mandates to protect private charter operators from unfair competition from UMTA recipients and to ensure that UMTA-funded equipment is used for mass transportation require that the charter service regulations be as restrictive as they are.

In summary, UMTA believes its charter service regulations are fair and reasonable.

Sincerely,

Al DelliBa

Alfred A. DelliBovi

Enclosures

UR07

US Department
of Transportation

Urban Mass
Transportation
Administration

The Deputy Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

NOV 12 1987

Mr. Kevin L. Doyle
Assistant Transportation Planner
Johnson County Council of Governments
410 E. Washington Street
Iowa City, Iowa 52240

Dear Mr. Doyle:

This is in response to your recent request for an exception under 49 CFR 604.9(b)(4) which would allow Iowa City Transit, Coraville Transit, and University of Iowa CAMBUS to operate charter service on the occasion of the 1988 World Ag Expo, which will be held in the Amana Colonies, Iowa, from September 7 through 10, 1988.

The preamble to the regulation, at page 11925, explains that the Urban Mass Transportation Administration (UMTA) will grant an exception under section 604.9(b)(4) only for events of an extraordinary, special and singular nature. Your letter indicates that this international agricultural exposition, which has been held in the United States only twice in the past twenty years, is expected to draw between 200,000 and 300,000 visitors. Given the international importance of the exposition and the large number of attendees expected, UMTA recognizes it as being the type of event envisaged by section 604.9(b)(4). Moreover, we understand from your letter that the resources of the one private operator in your area which has been determined "willing and able," are insufficient to meet the service needs for this exposition. Also, the American Bus Association has advised us that the local private operators have agreed that the three UMTA recipients in question should be allowed to provide charter service for this event.

For these reasons, I hereby authorize Iowa City Transit, Coraville Transit, and University of Iowa CAMBUS to make available buses to assist in accommodating the need for charter service during the World Ag Expo, from September 7 through 10, 1988. This exception is valid only for shuttle service between the parking lots and the exposition site. Should any of the three recipients to whom this

exception is granted, wish to perform operations other than shuttle service, they must request an additional exception under the procedures of 49 CFR 604.9(d).

You are reminded that in accordance with section 604.9(e) of the regulation, "Any charter service that a recipient provides under any of the exceptions of this part must be incidental charter service." The preamble to the regulation cites as an example of "incidental service" service using vehicles which do not exceed the recipient's spare ratio by more than 20 percent. Your letter indicates that the 20 percent ratio for Iowa City Transit would be 4 vehicles; for Coraville Transit, 1 vehicle; and for University of Iowa CAMBUS, 2 vehicles. Consequently, the number of vehicles used in charter service by these recipients during the exposition should not exceed these figures. Further guidance on determining what constitutes "incidental service" is provided in the preamble. 52 Fed. Reg. 11926, April 13, 1987.

Sincerely,

Alfred A. DelliBovi

decisions etc UKU 1

U.S Department of Transportation

Urban Mass Transportation Administration

The Deputy Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

NOV 23 1987

The Honorable Dave Nagle
House of Representatives
Washington, D.C. 20590

Dear Mr. Nagle:

This is in response to your letter enclosing a letter from your constituent, Mr. John Lundell, pertaining to the effect on the public of the Urban Mass Transportation Administration's (UMTA) rulemaking on "Charter Service."

On April, 13, 1987, UMTA published its revised regulations regarding the charter service which UMTA recipients may provide using UMTA-funded equipment and facilities. A copy of these regulations is enclosed.

In particular, Mr. Lundell and you are concerned about the impact of the lack of charter service available to some communities alleged to be caused by the regulations' prohibition on UMTA recipients from providing any charter service if a private charter company responds to the recipient's public notice expressing interest in being the provider. In drafting the charter service regulations, UMTA determined that its statutory mandates to protect private charter operators from unfair competition from UMTA recipients and to ensure that UMTA-funded equipment is used for mass transportation require that the charter service regulations be as restrictive as they are.

In your letter, you also requested UMTA to, "...comment on the possibility of exemptions being made for UMTA recipients providing the service if the private company will not."

In general, UMTA believes that the private charter industry is able to serve the Nation's charter needs on reasonable terms, as explained in the preamble to the regulations set forth at 52 Fed. Reg. 11924, April 13, 1987. UMTA, however, has recognized that for a variety of reasons, a private operator may be unwilling or unable to perform certain charter trips. UMTA believes that a recipient may make the "willing and able" process more effective by expanding the content of its charter notice to include information which would be helpful to the private operator in deciding whether to respond. Thus, in addition to the

information required by 49 C.F.R. § 604.11(c), i.e., days, times of day, geographic area, and category of revenue vehicle to be used, a recipient may include in its notice descriptions of destination, trip purpose, or clientele to be served. As long as the notice does not discourage a response from a person who meets the criteria for a "willing and able" operator, a recipient has flexibility in using descriptions which allow private operators to decide whether they desire to perform a particular charter trip.

In addition to this formal notice process, recipients are encouraged to engage private operators in a dialogue through other means as well, such as written communications, conferences, or informal meetings. A recipient may also provide in its notice a telephone number that a private operator may call to obtain further information on the proposed service.

Furthermore, a recipient may perform a certain charter trip, even though it has been determined that there are "willing and able" private operators in its service area, when there is an agreement to this effect between the recipient and the private operator. The recipient's charter notice must, however, have provided for this type of agreement. If it did not, the recipient must, before undertaking the charter trip in question, amend its notice to refer specifically to such an agreement.

Such measures are in keeping with the spirit of the charter service regulations, which is to encourage cooperation between UMTA recipients and the private sector. Through their judicious use, recipients and private operators should be able to work together to ensure that critical consumer needs for charter service will be met.

I hope that this will helpful.

Sincerely,

Al DelliBovi

Alfred A. DelliBovi

Enclosure

U.S. Department of Transportation
Urban Mass Transportation Administration

The Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

NOV 23 1987

Barry M. Shulman, Esq.
Scolaro, Shulman, Cohen,
Lawler & Burstein, P.C.
90 Presidential Plaza
Syracuse, New York 13202

Re: Syracuse & Oswego Motor Lines, Inc. v. Central New York Regional Transportation Authority, NY-05/86-01

Dear Mr. Shulman:

This responds to your request on behalf of the Central New York Regional Transportation Authority (CENTRO) for reconsideration of the decision of the Chief Counsel in the above-referenced matter. In his decision, the Chief Counsel found that CENTRO was impermissibly providing charter service between Manley Field House and Crouse-Irving Memorial Hospital (Hospital). You dispute the Chief Counsel's findings and state that the Urban Mass Transportation Administration (UMTA) should determine that the service is mass transportation as defined in UMTA's charter regulation, 49 CFR part 604.

You base your request on evidence which was not available at the time this complaint was filed in 1986, but which you feel should be taken into consideration in order to properly characterize the service in question.

First, in support of your contention, you state that the service in question is open door, since it is published in CENTRO's regularly published schedules which have been in print for over two years. While the Crouse-Irving Memorial shuttle timetable is different in format from other CENTRO schedules (e.g., undated, small card, restricted hours, etc.), CENTRO's Director of Operations argues that such differences are only due to the nature and extent of a particular service. UMTA has similarly determined that while CENTRO does publish a variety of different types of schedules (which have been submitted as evidence), these differences are due to the nature of a particular service and do not automatically categorize it as impermissible charter service.

Second, overlapping with the issue of open door, is the issue of exclusive use. You have submitted a form, devised by CENTRO's General Manager, which allowed staff to take a sampling, over a seven day period, of the bus ridership on the route in question. The sampling clearly illustrates that this shuttle is not for the exclusive use of employees of the Hospital and that members of the public board and disembark at points along its route.

Also, the General Manager of CENTRO has submitted bus driver procedure forms which clearly state that "[t]his is regular route service, and anyone can ride." Additionally, several bus drivers on the Crouse-Irving Memorial shuttle route have submitted Incident Reports in their own words and handwriting. The bus drivers indicated that they are instructed to pick up all members of the public at all stops along the scheduled route.

Moreover, after reviewing information submitted by CENTRO, UMTA has determined that the lot can be accessed by cars with Syracuse University permits, certain construction workers on building projects at the University, University faculty members, some University students as well as by those in possession of visitor permits. Also, the bus stop can be accessed by walking into the parking lot, as there is no restriction placed on physically entering the lot.[1]

Therefore, while the Chief Counsel held in the original decision that it was highly unlikely that the Hospital's aim was to open the service up to the general public, we now find, based on all new information in the record, that there is an open door policy. The Crouse-Irving Memorial shuttle is not restricted to a particular group (i.e., hospital employees).

Third, in support of your contention, you argue that the shuttle service is under CENTRO's control. By your own admission, it is the Hospital which both solicited the service and pays for it. However, according to the contract between CENTRO and the Hospital (which you submitted as evidence), it is CENTRO that has exclusively determined the passenger stops for the shuttle as well as the deployment of vehicles for the route.

---

1 It is important to note that the complainant, Syracuse & Oswego Motor Lines, Inc., had submitted a video cassette recorded by its President, Russell Ferdinand, on October 17, 1988. This tape depicted the layout of the Manley Field House parking lot as well as footage of alleged shuttle buses passing by riders waiting at designated bus stops. However, in a letter to UMTA dated November 1, 1988, Mr. Ferdinand has requested that this video cassette be withdrawn from evidence in determining CENTRO's appeal. UMTA granted Mr. Ferdinand's request, and has not considered the said video cassette as evidence in rendering this decision. Moreover, by letter dated November 8, 1988, counsel for CENTRO, which had been advised of Mr. Ferdinand's request to withdraw the cassette, indicated that CENTRO agreed to the withdrawal.

UMTA now finds that there is enough new information to determine that the shuttle service is under the control of the grantee, thus, bringing it within the definition of permissible mass transportation.

UMTA recognizes that there is a sometimes overlapping nature to mass transportation and charter service. However, UMTA concludes, based on the new information submitted by complainant and respondent in response to previous findings, that the service being provided by CENTRO is permissible mass transportation as per the definition in the preamble to the regulation.[2]

Sincerely,

Alfred A. DelliBovi

cc: Russell Ferdinand, President,
Syracuse & Oswego Motor Lines, Inc.

2 The definition of mass transit is summarized in the preamble to the regulation, as follows: (1) it is under the control of the grantee; (2) it is designed to benefit the public at large; and (3) it is open door. 52 Federal Register 11920, April 13, 1987.

UR07

U.S. Department of Transportation
Urban Mass Transportation Administration

Headquarters

400 Seventh St., S.W.
Washington, D.C. 20590

DEC 10 1987

Mr. Rex C. McCall
Assistant General Counsel
City Utilities of Springfield
301 E. Central
P.O. Box 551
Springfield, Missouri 65801

Dear Mr. McCall:

Your recent letter to Mr. Lee Waddleton, Regional Administrator of the Urban Mass Transportation Administration (UMTA) has been referred to us for comment. We are concerned that your letter indicates that you have misinterpreted UMTA's charter regulation. We would like to clarify the issue raised in your letter in order to avoid any violation of the regulation by City Utilities of Springfield (CUS).

Your letter states that CUS is operated by the City of Springfield. You explain that CUS provides bus service for another City entity, the Convention and Visitors Advisory Board (CVAB). You indicate that it is your belief that this service is not charter service, since the same legal entity is both the provider and the beneficiary of the service. It is your opinion that the service does not conform to the charter criteria of being to a distinct group of people and pursuant to a contract between two parties.

UMTA does not share your view that separate divisions of a city government are one and the same entity. UMTA considers a municipal department which receives UMTA funds for mass transit purposes, as distinct from another department which is engaged in different activities and performs different functions. It would indeed undermine UMTA's mission of providing funding for mass transit purposes, if such funding could be utilized for other purposes on the pretext that the recipient is part of a larger entity that is free to use it as it chooses.

The issue of the provision of service by a transit division of a city government to another municipal department has been dealt with in UMTA's recently published Charter Questions and Answers, 52 Federal Register 42248 (November 3, 1987). The answer to question 33 clearly affirms that UMTA considers such movements to be charters within the definition of the charter regulation. UMTA states that a transit authority that wishes to provide service of this type must comply with the requirements of the regulation. A copy of these Questions and Answers is enclosed for your information.

Therefore, if CUS is now providing such bus service to the CVAB, it should discontinue doing so immediately. Any continuation of such practices could jeopardize CUS' Federal transportation assistance.

Please feel free to contact this office if you have any questions or need further guidance in the interpretation of UMTA's charter regulation.

Sincerely,

Theodore A. Munter

Theodore A. Munter
Acting Chief Counsel

Enclosure

cc: Jeanmarie Homan, URO-7

File charter UR0-3

U.S. Department of Transportation
Urban Mass Transportation Administration

The Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

DEC 10 1987

Mr. David I. L. Sunstein
Sun Coach Lines
1721 Busch Street
McKeesport, Pennsylvania 15132

Dear Mr. Sunstein:

This is in response to your letter pertaining to the Port Authority of Allegheny County's (Port Authority) annual charter permit charge of $1,000.

At the outset, we would like you to know that the Urban Mass Transportation Administration (UMTA) does not provide Federal assistance to its recipients to purchase certificates to operate charter service. We are unaware of any records in our possession which would support your belief that UMTA did, in fact, provide Federal assistance in 1964 to the Port Authority to purchase all Pennsylvania Public Utility Commission Charter and Special Operations certificates to operate within Allegheny County.

Although UMTA is not empowered by law to regulate Port Authority's administrative charges in connection with issuing charter permits, UMTA has expressed its concern to the Port Authority about its annual charter permit fees. Enclosed is a copy of the Port Authority's response and an opinion of its counsel setting forth the basis in Pennsylvania law for the Port Authority's charter permit fees. In its letter, Port Authority claims its fees to cover the expenses of administering its charter permit program are reasonable. The Port Authority also states that the fees will be adjusted to reflect their experience.

For these reasons, UMTA will not take further action in this matter.

Sincerely,

Alfred A. DelliBovi

Alfred A. DelliBovi

Enclosure

EAGLE BUS, INC. Complainant	)	
v.	)	
	)	NY-02/86-02
NEW YORK CITY TRANSIT AUTHORITY, Respondent	)	

SUMMARY

Eagle Bus, Inc. (Eagle) filed this complaint with the Urban Mass Transportation Administration (UMTA) alleging that the New York City Transit Authority (NYCTA) had violated the provisions of the Urban Mass Transportation Act of 1964, as amended (UMT Act), and the implementing policy in its planning and provision of mass transportation service from Staten Island to Manhattan. After a thorough review of the materials submitted by the parties, UMTA finds that the NYCTA violated Sections 3(e), 8(e), and 9(f) of the UMT Act and the implementing policy by failing to involve the private sector in plans to implement new or restructured service. However, given the modest level of the service actually implemented and thus the de minimis nature of the NYCTA's violation, UMTA will not require the NYCTA to follow a public participation process with respect to this service. The NYCTA should nonetheless follow the guidelines set by its own private sector policy in any future planning or provision of new or restructured service.

COMPLAINT

On February 27, 1986, Eagle filed a complaint with UMTA regarding NYCTA's proposed service from Staten Island to Manhattan via New Jersey.(1) Eagle alleged that it would be adversely affected by this service if it were actually provided. Eagle furnished several attachments with its letter, including a copy of its correspondence with the NYCTA concerning the service, a copy of the information that the NYCTA had filed with the New York City Board of Estimate to obtain approval for the service, and a letter to Eagle from the Interstate Commerce Commission (ICC) concerning the operating authority needed to provide this service.

UMTA responded by letter dated March 28, 1986, acknowledging that the information presented indicated possible violations of the UMT Act and the policy guidance on the involvement of the private sector in the provision of mass transportation services that UMTA funds. Pursuant to UMTA's procedures for the resolution of such

(1) The service in question is referred to in this decision as "express service." It is in fact only partial express service, since both under the existing and the proposed plan, pick-ups are scheduled on Staten Island and in Brooklyn.

complaints, UMTA ordered Eagle to attempt to settle its dispute with the NYCTA at the local level for at least 30 days. If after that time no resolution was reached, Eagle was asked to request in writing that UMTA initiate a formal investigation of the complaint.

On May 1, 1986, Eagle did write to UMTA to state that it had attempted to resolve its problems and described the conversations that it had had with the NYCTA. Since, however, no resolution had been reached, Eagle asked UMTA to treat its letters as a formal complaint. The focus of Eagle's complaint was that the NYCTA was in the process of planning service over the same routes served by Eagle, and that Eagle had not been given the opportunity to participate in the planning and provision of the service. Eagle noted that as of the writing of this letter, the new service was not yet operational.

RESPONSE

UMTA reviewed the materials submitted by Eagle and determined that they did constitute a private sector complaint. UMTA sent a copy of both of Eagle's letters to the NYCTA on May 13, 1986, and provided it with 30 days from receipt to respond to the complaint. The NYCTA's response is dated June 10, 1986.

In its response, the NYCTA asserts that Eagle's complaint is without merit and that the portions of the UMT Act that Eagle cited are not applicable to the service at issue. NYCTA argues that the service does not involve new routes or new routing in the boarding and alighting areas. The NYCTA states that the same number of express lines will be operated to Manhattan as before and that the only change is that the express portion of NYCTA's existing service would be through New Jersey instead of through Brooklyn.

The NYCTA states that the reason for this change is to make the service faster and to save time for the patron. If improvements in the quality of service result in violations of the UMT Act, then the NYCTA argues that other improvements such as using new buses or air conditioned buses would also be violations.

The NYCTA argues that the changes will not introduce any additional levels of competition that have not existed since it began to provide service from Staten Island several years ago. In fact, the NYCTA states that Eagle had filed under Chapter 11 of the Federal bankruptcy laws and is, therefore, hardly able to adequately handle all of the transportation needs of Staten Island.

The NYCTA states that it has followed the required steps in order to operate this service and that it has the appropriate legal operating authority. It argues that its re-routing of service through New Jersey is not subject to the jurisdiction of the ICC, but rather to that of the New York City Board of Estimate, from which it has received proper authority. The NYCTA maintains that the Board of Estimate's authorization process included a public hearing held on December 19, 1985, at which Eagle could have presented its opposition.

The NYCTA provides a description of the service and indicated how it is different from the service provided by Eagle. First, the two operations have different pick-up and delivery points.

Second, the NYCTA explains that its service, unlike Eagle's, operates non-stop in New Jersey, i.e., it makes no pick ups or drop offs there. The NYCTA also stated that it had not begun to provide the service on routes x12 and x13.

Based on these facts, the NYCTA concludes by urging UMTA to reject Eagle's complaint.

REBUTTAL

UMTA sent a copy of the NYCTA's response to Eagle on July 7, 1986, and provided it with 15 days to rebut the evidence. Eagle's rebuttal is dated July 21, 1986.

Eagle's rebuttal makes three main points. First, Eagle takes issue with the NYCTA's argument that the service is not new and creates no new level of competition. Eagle describes the routing of the new service, emphasizing that it will operate from Staten Island to Manhattan over a route different from that now used by the NYCTA. Eagle provides maps of the service, which is to involve four bus lines described as x10, x12, x13 and x17. It also attaches copies of NYCTA's maps, showing how Eagle's service parallels or is identical to that which the NYCTA plans to provide. Eagle states that the change in route will create service to midtown Manhattan while the previous service was to downtown Manhattan. Since Eagle's service is to midtown Manhattan, it argues that the service is new and will increase competition.

Eagle responds to the NYCTA's statement that Eagle's service is not non-stop through New Jersey. Eagle states that its buses leave Staten Island, New York, and operate non-stop via New Jersey to New York, New York.

Eagle states that while it and the NYCTA may have different stops on Staten Island and New York, this is a difference without a distinction. According to Eagle, in the area served by both Eagle and the NYCTA in Manhattan, "different stops a few blocks apart in peak hours do not decrease competition and reduce the business available" to private operators.

Eagle asserts that the NYCTA'S proposed route will serve a different destination within Manhattan, and that the altered service will not reduce travel time. Instead, it will serve a completely different patron group, i.e., interstate and midtown commuters, the same group served by Eagle.

Eagle acknowledges that it did file under Federal bankruptcy laws, but stated that it is attempting to terminate its bankruptcy.

Eagle maintains that even conceding, arguendo, that the service is not new, the NYCTA must comply with UMTA's private sector policies since the service is significantly restructured. Eagle states that the NYCTA has no procedures to involve the private sector in the provision of such service.

In its second point, Eagle disputes the NYCTA's arguments that the NYCTA has the proper legal authority to operate the service. Eagle states that it did not present its case at the Board of Estimate's Hearing since that body was not the proper forum. Eagle states that since the proposed service involves interstate transportation, the matter is subject to the jurisdiction of the ICC.

In its third point, Eagle rebuts the NYCTA's arguments that the service does not constitute a violation of the UMT Act. Eagle contends that the NYCTA failed to involve Eagle in its plans to implement the new service, thereby violating Sections 3(e), 8(e), and 9(f) of the UMT Act, which require involvement of the private sector to the maximum extent feasible in the provision of service.

Eagle concludes by stating that the service is new and creates new competition, that it violates the ICC requirements, and that it violates the UMT Act. Eagle asks that UMTA grant appropriate relief.

REQUEST FOR ADDITIONAL INFORMATION

By letter dated March 5, 1987, UMTA requested additional information from the respondent. UMTA's letter stated that the materials submitted provide a description of routes x10, x12, x13, and x17 as they would be operated non-stop through New Jersey, but not as they were operated non-stop through Brooklyn. UMTA asked that this information be provided within 15 days.

The NYCTA's response is dated April 8, 1987. In its letter, the NYCTA states that only service along route x17 is in operation, since plans to operate service on the other three routes had not been implemented. NYCTA states that there were currently only two morning and two evening trips along the x17 line. NYCTA said that before operations through New Jersey began, the x17 route followed three service patterns in Manhattan, which it describes as follows:

A trips) serving lower Manhattan;

B trips) serving midtown Manhattan to 57th Street at 3rd Avenue;

C trips) operating as a combination of A and B trips, serving lower and midtown Manhattan to 57th Street at 3rd Avenue.

NYCTA explains that it has chosen two of the four morning B trips and two of the five evening B trips to operate from Staten Island through New Jersey to midtown Manhattan via the Lincoln Tunnel. Morning trips proceed to 57th Street at 3rd Avenue, making no stops between the Lincoln Tunnel and Madison Avenue at 34th Street. Evening operations begin from 57th Street at 3rd Avenue. As in the morning, no stops are made between from 34th Street to the Lincoln Tunnel. These trips are identified as BJ trips.

NYCTA says that no change had been made in the local route path on Staten Island for these BJ x17 trips. The Manhattan route path did change, however, since entering Manhattan from the Lincoln Tunnel had made service below 34th Street impossible.

NYCTA maintains that the two remaining morning and three remaining evening B trips still operate non-stop through Brooklyn, with no change in their operating schedule. Likewise, according to NYCTA, all other A and C trips remain unchanged, and continue to operate express through Brooklyn.

Enclosed with NYCTA's letter were operating schedules, a public timetable, and a passenger information handout describing the revised x17 routing through New Jersey.

COMMENTS ON ADDITIONAL INFORMATION

On April 17, 1987, UMTA forwarded to Eagle a copy of NYCTA's response to UMTA's request for additional information. Eagle was given 15 days from receipt to provide comments.

Eagle's response is dated May 1, 1987. Eagle's first comment concerns the NYCTA's statement that permission to operate the proposed express routes through New Jersey has been granted. Eagle contends that the NYCTA's service through New Jersey constitutes interstate transportation, and is thus subject to the jurisdiction of the ICC. Since the NYCTA has not obtained authorization from the ICC, Eagle contends, its provision of the service is invalid. Eagle states that it has filed a complaint against NYCTA with the ICC, and that a decision is expected.

Secondly, Eagle notes that Carol Coaches, Inc., a company owned and operated by Eagle, has begun servicing some of Eagle's routes, including the Staten Island to Manhattan via New Jersey route. Since Carol Coaches is now providing the service which is the subject of this complaint, Eagle asks that Carol Coaches be added or substituted as a complainant.

Third, Eagle states that NYCTA's BJ x17 buses operate along Richmond Avenue on Staten island. Eagle states that ten of Carol Coaches' schedules operate along Richmond Avenue, and that Richmond Avenue is a key traffic source for Carol, involving fifty percent of its traffic.

Eagle contends that since NYCTA began the service in question without consideration of the private sector, NYCTA should be considered in violation of the Sections 3(e), 8(e), and 9(f) of the UMT Act and implementing policy guidelines. Eagle concludes that UMTA should prohibit NYCTA's proposed service and grant relief as is appropriate under its applicable law and policy.

DISCUSSION

Before reaching the main issues raised by this complaint, UMTA believes that it is appropriate to address a subsidiary matter, namely Eagle's request that its affiliate, Carol Coaches, be added

as a complainant. Eagle states that Carol Coaches has assumed operation, under proper authority, of several of Eagle's routes, including the Staten Island to Manhattan through New Jersey route. Since Carol Coaches is a private operator entitled to the same protections under the UMT Act as Eagle, and since it is now performing the services on which this complaint is based, UMTA feels that its participation in this proceeding will not change or affect the issues raised. UMTA therefore accedes to Eagle's request that Carol Coaches be added as a complainant.

Having dispensed with this question, we will now proceed to examine the three main issues raised in this complaint, and which are as follows:

1) Whether the NYCTA was required to obtain ICC approval prior to implementation of its new express service

In its complaint, Eagle claims that since the NYCTA's planned Staten Island to Manhattan via New Jersey service is interstate, the NYCTA should have obtained prior authorization from the ICC. Eagle contends that since the NYCTA failed to obtain ICC authorization, its provision of the service is unlawful. Eagle states that it has filed a formal complaint with the ICC, and that the matter is now pending.

The NYCTA refutes Eagle's assertion that its new express service is subject to the jurisdiction of the ICC. It states that the service in question is exempted from the jurisdiction of the ICC by reason of the commercial zone exemption specified at 49 USC Section 1052(b) - i.e., authorizations received from the New York City Board of Estimate's and the New Jersey Department of Transportation lawfully enable the Authority to engage in the intrastate transportation of passengers over the length of the interstate routes involved.

Whatever the merits of these respective positions, UMTA feels that it has no authority to determine the jurisdiction of another body. Such a determination by UMTA is especially inappropriate in this case, where the matter has been formally raised before the ICC, which is expected to issue a decision on it. UMTA therefore declines to make a determination on the question.

UMTA's failure to decide the jurisdictional issue will have no effect on its funding of the NYCTA's mass transit projects. Under Section 3(a)(2)(A)(i) of the UMT Act, the Secretary may not make a grant unless the Secretary determines that the applicant has or

will have the legal capacity to carry out the proposed project.(2) This determination is based on assurances submitted by the applicant. In this case, the NYCTA has submitted evidence that it has obtained authorization from the New York City Board of Estimate, and has made assurances to UMTA that such authorization is valid. Therefore, unless an adverse finding is made by the ICC, UMTA must rely on the NYCTA's assurances that it has the requisite legal capacity to carry out the UMTA-funded projects. See Durango Transportation, Inc. v. City of Durango, Colorado, at page 7, CO-09/85-01 (February 24, 1987).

2) Whether the NYCTA's new express service constitutes "new or restructured service," requiring involvement of the private sector

Eagle's complaint alleges that in proposing to operate express bus service from Staten Island to Manhattan via New Jersey without consulting private operators, the NYCTA is in violation of the provisions of the UMT Act and UMTA's policy requiring maximum participation of the private sector.

UMTA's Circular 7005.1, "Documentation of Private Enterprise Participation Required for Sections 3 and 9 Programs," (December 5, 1986), provides guidance with respect to private sector involvement, and defines the type of "new or restructured service" which triggers such involvement.(3) The Circular states that "new or restructured service" may include any of the following:

> establishment of a new mass transportation service; addition of a new route or routes to a grantee's mass transportation system; a significant increase or decrease in service on an existing route in a grantee's mass transportation system; a significant relaignment of an existing route in a grantee's mass transportation system;

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(2) This authority has been delegated to the Administrator of UMTA in 49 CFR Sections 1.45 and 1.51.

(3) While Circular 7005.1 was not in effect at the time that the new service was proposed by NYCTA, involvement of the private sector has been a longstanding policy of UMTA, and is required by Sections 3(e) and 8(e) of the UMT Act. Moreover, UMTA's notice of policy, "Private Enterprise Participation in the Urban Mass Transportation Programs," 49 FR 41310 (October 22, 1984) stated that "...when new service needs are developed, or services significantly restructured, consideration should be given to whether private carriers could provide such service." The guidelines for determining what constitutes new or restructured service, and the private sector consultation process grantees must follow, have simply been definitized in Circular 7005.1. Since the Circular sets the standards currently in effect, these standards are the ones against which the NYCTA's compliance with UMTA's private sector policy should be measured.

The NYCTA's proposed new bus service involves, if not the establishment of new routes, at least a significant realignment of an existing route. While in its letter of November 7, 1985, to the New York City Board of Estimate, the NYCTA describes its proposed express service as "the establishment of four new omnibus routes," it states in its response to Eagle's complaint that the bus lines in question have simply been rerouted through New Jersey in an effort to provide faster service.

Whatever the intent of the NYCTA in proposing the new service, it is clear from a comparison of the proposed routes with a general map of the area, that the proposed bus lines would operate along very different corridors from the existing ones. Even though the destination points of the new routes are apparently the same as those of the NYCTA's existing routes, and even though the express buses would operate non-stop through most of the revised portion of the routes, the fact that they enter Manhattan at different points necessarily means that at least some of their stops and pick ups would be different. The NYCTA concedes as much when, in describing its new BJ x17 route, it states that these trips no longer stop below 34th Street, since "(e)ntering Manhattan directly into the Midtown area from the Lincoln Tunnel made service between Worth Street and 34th Street impossible." This type of significantly altered service clearly constitutes "new or restructured service" as contemplated by UMTA Circular 7005.1.

It should be noted, however, that the NYCTA did not implement all of its proposed express service. Instead of full service on four routes, the NYCTA instituted partial service on only one route, the x17. Thus, only four of the x17's nine daily trips follow the new express routing. Because of the modest level of the service change involved, UMTA will not require compliance with the private sector policy with respect to the service as implemented. However, since the express routes as proposed, both in terms of scope and in terms of the degree of alteration involved, constitute "new or restructured service," UMTA will examine whether the NYCTA's compliance with the private sector guidelines was adequate with respect to them.

3) Whether the NYCTA provided sufficient consideration for the private sector in proposing its new express bus service

Eagle contends that the NYCTA's planning and programming process has not provided for the maximum feasible participation of private transportation providers, consistent with the UMT Act and its implementing policy. It states that in planning the new service, the NYCTA failed to establish local procedures for involvement of the private sector or for a fair resolution of disputes.

The NYCTA, on the other hand, argues that an adequate forum for private operators was provided by the New York City Board of Estimate hearing on the new service. The NYCTA maintains that Eagle could have attended the hearing and voiced its opposition to the new service proposal.

UMTA's 1984 private enterprise policy notice, 49 FR 41310, which was in effect at the time of the NYCTA's proposed service plan, stated that:

> It is UMTA's policy that a fair appraisal of private sector views and capabilities be assured by affording private sector providers an early opportunity to participate in the development of projects that involve new or restructured mass transit services. Private providers should be given an opportunity to present their views concerning the development of local transportation plans and programs and to offer their own service proposals for consideration.

Circular 7005.1 sets out the minimum elements an UMTA grantee's private sector consultation process must contain. These include:

a) Notice to and early consultation with private providers in plans involving new or restructured service as well as the periodic re-examination of existing service

b) Periodic examination, at least every three years, of each route to determine if it could be more efficiently operated by a private enterprise.

c) Description of how new and restructured services will be evaluated to determine if they could be more effectively provided by a private sector operation pursuant to a competitive bid process.

d) The use of costs as a factor in the private/public decision.

e) A dispute resolution process which affords all interested parties an opportunity to object to the initial decision.

UMTA believes that the possibility for a private operator to appear at a hearing convened by a body empowered to authorize a new service plan, does not meet the criteria set forth above. There is no evidence that the hearing provided any effective consultation with private operators, or that any of the

competitive bid or cost factors required by UMTA were considered. Moreover, the hearing was held and organized by a third party pursuant to its own mandate and procedures, and not by the grantee specifically in keeping with UMTA's private sector guidelines. As such, the Board of Estimate hearing cannot be considered an adequate substitute for the type of local consultation process described in UMTA's 1984 policy statement and in Circular 7005.1.

CONCLUSION

After a thorough investigation, UMTA concludes that the NYCTA failed to provide adequate consideration for the private sector in its proposal to institute four new express bus routes between Staten Island and Manhattan via New Jersey. UMTA finds that the service plan proposed by the NYCTA constitutes new or restructured service as contemplated by UMTA's 1984 policy notice and by UMTA Circular 7005.1. UMTA notes, however, that in September 1987, the Metropolitan Transit Authority, the NYCTA's parent organization, did submit to UMTA a private sector policy which essentially conforms to the requirements of Circular 7005.1. Since this policy was not in effect at the time the NYCTA established the service in question, the NYCTA violated UMTA's private sector policy by failing to adequately involve the private sector in its planning and provision of the service. Given, however, the modest scope of the service instituted and therefore the de minimis nature of the NYCTA's violation, UMTA will not require the NYCTA to follow a private sector consultation process with respect to this service. The NYCTA should nonetheless follow the guidelines of its own private sector policy in any future plans to establish new or restructured service.

Rita Daguillard
Attorney-Advisor

12/28/87
(Date)

Theodore A. Munter
Acting Chief Counsel

12/28/87
(Date)

U.S. Department
of Transportation

**Urban Mass
Transportation
Administration**

Midwestern Area Office

6301 Rock Hill Road
Suite 100
Kansas City, Missouri 64131

Kenneth R. LaRue
Manager, Transit Planning
Department of Transportation
200 N.E. 21st Street
Oklahoma City, Ok 73105-3204

Re: Charter Service

Dear Mr. LaRue:

As promised during our recent meeting, here are the copies of sample notices and agreements used in the exception processes under the Charter Service Regulation.

Attachment 1 illustrates the notice seeking willing and able private operators. This notice is the key process in operating charter services under the first exception set forth in the regulations. It is also an important step in the procedures required to operate charter under the fourth and the seventh exceptions (the "hardship" and the formal agreement exceptions). The exception requires that a notice seeking willing and able operators must be publish annually and that a copy of each notice must be sent to the private operators' national associations. Instructions and addresses are set forth in the regulation at Section 604.11.

Attachment 2 is a sample lease agreement under which an UMTA grantee may lease equipment to a private charter operator under the second exception set forth in the regulations. Under the terms and conditions of UMTA grant agreements, UMTA must approve leases of UMTA-funded equipment. To facilitate the approval process for these short term leases, each region has implemented its own expedited process. Accordingly, I would suggest that you contact Region VI for further guidance on their process.

Attachment 3 is a copy of a formal agreement which was executed between an UMTA grantee and the private operators which were determined willing and able in response to the grantee's public notice. The formal agreement exception is set forth as exception seven in the regulation. It is important to note that the formal agreement process requires the grantee to give public notice of its intent and desire to enter into an agreement with the private operators. It may do this in its annual public notice or the grantee can do a three step process: 1) issue a public notice to determine the willing and able private operators (See, Attachment 1); 2) negotiate an agreement which includes each and every private operator determined to be willing and able; and, 3) publish notice of the proposed agreement.

As I indicated to you at our meeting, we do not have a copy in our office of documentation relating to exception four, the "hardship" exception. Basically, the process is threefold: 1) publish a notice to determine all willing and able private operators (See, Attachment 1); 2) give all willing and able operators written notice that the grantee is going to petition UMTA for a "hardship" exception (The letter should explain why the grantee is seeking the exception and advise the private operators that they have at least 30 days to comment.); and, 3) send a written request for a "hardship" exception to the agency's Chief Counsel, submitting copies of the notice and the private operators comments along with the request. This is not expected to be a trip-by-trip process. Rather, the regulation permits the Chief Counsel to grant exceptions for a time period deemed appropriate, up to 12 months.

To operate charter services under exceptions five and six of the regulation requires neither a notice process nor a negotiated agreement. I believe we did clarify this point during our discussion. It does, however, require the grantee to obtain a signed certification for each charter trip from the agency contracting for the service. The language of each certification is set forth in the regulation, as amended in December of 1988. In exceptions five and six, there are a total of four different certifications to choose from depending upon the circumstances of the contracting agency and the passengers taking the trip. The variable features of each of the certifications can be summarized as follows: 5(i) targets trips for handicapped; 5(ii) targets trips for agencies receiving funds from the U.S. Department of Health and Human Services; 5(iii) is for trips for state certified agencies; and, 6 is for non-urbanized areas only and targets trips for the elderly.

As we discussed, I fully support your emphasizing to your transit operators the importance of reviewing the regulation, including the published amendment, before proceeding with any of the exception processes. The preambles to the regulation and the amendment also provide helpful information concerning the exception processes. The processes are not difficult but must be followed carefully to assure compliance with the regulation and the protection of the interests of private operators.

Please feel free to contact me at (816-926-5053) or your Region VI Office should you have any questions. Thank you again for the warm welcome I received from you, your staff and all the conference participants. I truly enjoyed my visit to Oklahoma.

Sincerely,

Jeanmarie Homan

Jeanmarie Homan
Regional Counsel, Region VII

Attachments

PUBLIC NOTICE
PROVISION OF CHARTER TRANSIT SERVICES
CITY OF CEDAR RAPIDS, IOWA

The City of Cedar Rapids, Iowa proposes to provide the following charter services by the Cedar Rapids Bus Department, 427 8th Street N.W., Cedar Rapids, Iowa, 52405:

1. Bus transportation for elderly citizens to congregate meals and social events, Monday - Friday year-round, late morning and early afternoon, in Cedar Rapids;

2. Bus transportation for developmentally disabled citizens of Cedar Rapids and Marion to special schooling, Monday - Friday during June, July, and August, 8:00 - 10:00 AM and 3:00 - 5:00 PM, in Cedar Rapids, Marion;

3. Bus transportatin for low income children from the Jane Boyde Community Center to various holiday, social, and nutritional events, days varied, usually late AM and early PM, in Cedar Rapids and Marion.

Any private operator desiring to provide this service must demonstrate willingness and ability in writing within 30 days of publication of this notice in the Cedar Rapids Gazette. Such evidence shall be forwarded to the following:

City of Cedar Rapids Bus Department
427 8th Street N.W.
Cedar Rapids, Iowa 52405
Attention: William Hoekstra, Transit Director

Evidence necessary to demonstrate willingness and ability of the operator to provide service includes only the following:

1. A statement that the private operator has the desire and the physical capability to actually provide the category of revenue vehicle specified above (bus), and

2. A copy of documents showing that the private operator has the requisite legal authority to provide the proposed service, and that it meets all necessary safety certification, licensing, and other legal requirements to provide the proposed service.

The recipient (Cedar Rapids Bus Department) will review only the evidence submitted prior to the deadline and will complete said review within 30 days of the deadline. Any private operators proposing service in accord with this notice will be notified of the results of said review within 60 days of the deadline.

The City of Cedar Rapids will not provide any charter service using equipment or facilities funded under the Urban Mass Transportation Act of 1964, as amended, 49 USC 1601 et sequence, to the extent that there is at least one willing and able private charter operator, unless one or more exceptions listed in 49 CFR Section 604.9(b) applies.

Dated this _____, 1988.

Lyle Hanson
City Clerk

Published in the Cedar Rapids Gazette _____,1988.

STANDARD FORM AGREEMENT
BETWEEN
THE TRANSIT AUTHORITY OF THE CITY OF OMAHA
dba METRO AREA TRANSIT
AND A PRIVATE CHARTER OPERATOR
FOR THE PROVISION OF CHARTER EQUIPMENT

THIS AGREEMENT is entered into on the _____ day of _____, 198___, between the Transit Authority of the City of Omaha, dba Metro Area Transit, hereinafter referred to as "MAT", and _____, hereinafter referred to as "Private Charter Operator".

WHEREAS, Private Charter Operator has been requested to provide charter service that exceeds its capacity; and

WHEREAS, MAT is agreeable to providing Private Charter Operator bus equipment and operator(s) from the MAT fleet for use as charter equipment on the terms and conditions as hereinafter specified.

NOW, THEREFORE, in consideration of the mutual covenants and conditions contained herein, the parties do agree as follows:

1. Provision of Equipment; Bus Operators. MAT agrees to provide to Private Charter Operator from time to time (subject to availability) equipment from the MAT fleet for use as charter equipment, along with qualified operator(s), to satisfy the needs of the charter. All requests for charter equipment shall be made in writing by a duly authorized representative of the private operator. Equipment will be provided in good operating condition and shall be cleaned prior to providing the same for Private Charter Operator. Said equipment is being provided to Private Charter Operator for such periods as may be requested on the charter order form, it being understood that, regardless of the length of time of usage, Private Charter Operator shall be charged at a minimum of four (4) hours usage for each piece of equipment provided.

2. Payment to MAT. Private Charter Operator shall pay the rates currently approved by the MAT Board of Directors (see Attachment "A") for charter service for each bus hour operated from the time the charter leaves the garage, until the charter returns, with a four (4) hour minimum as aforesaid. Private Charter Operator shall make payment in full within thirty (30) days after receipt of a billing statemen from MAT. Payment shall be made to Metro Area Transit, 2222 Cuming Street, Omaha, Nebraska 68102. In the event that the amount provided in the statement is not paid within thirty (30) days from the date of billing, the unpaid balance shall bear interest at the rate of twelve percent (12%) per annum until the same is paid in full. No additional charter orders will be honored during such time as payments to MAT are not current.

3. Restrictions. The following restrictions shall apply in the use of the equipment provided hereunder:

(a) No charter shall be operated to any point more than five (5) miles outside of the corporate limits of the City of Omaha.

(b) At no time shall alcoholic liquors be consumed or open containers of alcoholic liquor be permitted on or in the equipment at any time that the same is being operated or is located upon any street, highway, or alley.

(c) No charter will be operated which conflicts in any way with UMTA Regulation 49 CFR, Part 604 to which MAT is obligated.

(d) This contract in no way shall be construed as an obligation on the part of MAT to operate the service requested by the Private Operator. MAT shall retain sole right of refusal of service requested.

(e) No member of or delegate to the Congress of the United States shall be admitted to any share or part of this contract or to any benefit arising therefrom.

No member, officer, or employee of the Authority or a local public body, during his tenure, or for one year thereafter, shall have any interest, direct or indirect, in this contract or the proceeds thereof.

4. Hold Harmless. Private Charter Operator agrees to save and hold MAT harmless from any and all claims, demands, liabilities, or suits of any nature whatsoever, arising out of, because of, or due to any acts on the part of the Private Charter Operator, its agents or employees, which result in bodily injury or property damage to riders, personnel of the Private Charter Operator, or any other persons.

5. Equal Employment Opportunity. In connection with the chartering of equipment provided hereunder, Private Charter Operator agrees that it shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, disability, national origin, or marital status. In the employment of persons, Private Charter Operator shall comply with any and all applicable federal equal employment opportunity provisions as required by the Urban Mass Transportation Act and regulatons promulgated thereunder.

6. Amendment. This Agreement may be amended only by written amendment signed by all parties hereto.

7. Term and Termination. This Agreement shall remain in full force and effect from the date of execution by all parties hereto until terminated by either party giving to the other party no less than thirty (30) days written notice of termination.

IN WITNESS WHEREOF, the parties have executed this Agreement on the day and year first written above.

ATTEST:

THE TRANSIT AUTHORITY
OF THE CITY OF OMAHA

PRIVATE PROVIDER	EXECUTIVE DIRECTOR
WITNESS	WITNESS
Title	Title

CHARTER AGREEMENT
GREENVILLE TRANSIT AUTHORITY

Greenville Transit Authority (GTA) proposes the following charter agreement for the period January 1, 1988 through June 30, 1988, at which time these items or a new proposal based on existing conditions will be published.

1. Greenville Transit Authority will provide charter service with trolleys for the following:

   A. Weddings;
   B. City and County government or agencies thereof; and
   C. College athletic teams.

2. Charter service shall be limited to Greenville County and shall not exceed three (3) hours of use.

3. Charter rates shall be at a competitive rate with local private operators.

4. GTA will subcontract to/with a private operator, who, by the conditions stipulated in the UMTA charter regulations does not have sufficient capacity to meet a charter request or is in need of handicapped equipped vehicles to meet a charter request. The rate for these subcontracts will be the same as in item 3 above. Such subcontracts shall be limited to off-peak periods of GTA service, within the state of South Carolina, insured by the private operator and subject to equipment availability.

5. Special events wherein passengers pay a fare for transportation and the service is open to the public is not considered charter as may be operated by GTA or other providers.

Date: December 11, 1987

TO: All Concerned

The undersigned agrees to the provisions of the GTA Charter Agreement dated December 11, 1987, effective for the period January 1, 1988 through June 30, 1988.

WAYNE J. SMITH
Printed or Typed Name

Wayne J. Smith
Signature

United Bus Owners of America
Company Name

1/19/88
Date

FILE COPY

U.S. Department of Transportation
Urban Mass Transportation Administration

Region III

841 Chestnut Street
Suite 714
Philadelphia, PA 19107

FEB 10 1988

RE: Leasing of UMTA-funded facilities and equipment for charter operations by private providers

Dear Grantee:

As you know, Section 109 (Encumbrance of Project Property) of Part II (Terms and Conditions) of UMTA's standard Urban Mass Transportation Agreement prohibits a grantee from leasing UMTA-funded facilities and equipment for any purpose without prior written concurrence from UMTA.

However, as you may also be aware, UMTA's charter regulations specifically permit UMTA grantees to lease UMTA-funded facilities and equipment for charter operations in instances where a private operator has been asked to provide charter service that exceeds its capacity, or where the private operator is itself unable to provide equipment accessible to elderly and handicapped persons. See, 49 C.F.R. subsection 604.9(b)(2)

A number of grantees have asked whether pursuant to Section 109 of the Grant Agreement they are still required to seek UMTA'S written concurrence when they want to lease UMTA-funded facilities and equipment for charter purposes in accordance with UMTA's charter service regulation. They are not. Grantees should be mindful, however, that this and all other uses of UMTA-funded facilities and equipment are governed specifically by Section 108 (Use of Project Facilities or Equipment) of Part II of the standard Urban Mass Transportation Agreement, the property management standards set forth in OMB Circular A-102, Attachment N and OMB Circular A-110, Attachment N, as appropriate; and UMTA Circular 4220.1A (Third Party Contracting Guidelines).

UMTA recommends, further, that in each and every instance where a grantee wishes to lease UMTA-funded facilities and equipment to a private charter operator for use in accordance with UMTA's charter service regulation, the grantee execute a written lease agreement with the private operator that includes the following provisions:

Federal interest in facilities and equipment. This lease agreement provides for the use of mass transportation facilities and equipment that have been financed in part by the Urban Mass Transportation Administration (UMTA). The lessor (UMTA grantee) and lessee (private charter operator) warrant that the use of these UMTA-funded facilities and equipment will comply with the UMTA charter service rule at 49 C.F.R. Part 604. The use of these UMTA-funded facilities and equipment is governed by the lessor's Urban Mass Transportation Agreement with UMTA; by UMTA Circular 4220.1A; and by the Office of Management and Budget Circulars A-102, Attachment N, and/or A-110, Attachment N.

Lessor's Right to Terminate. Upon notice to the lessee, the lessor may suspend or terminate this lease agreement for cause or convenience. Such suspension or termination is effective immediately upon notice.

Prohibition on Conflicts of Interest. The lessor and lessee warrant that no employee, officer, or agent of the lessor, nor any partner of such a person, nor any member of the immediate family of such a person, nor any organization which employs, or is about to employ, such a person, has a financial or other interest in the lessee or will otherwise benefit from the execution or performance of this lease agreement.

In addition to the provisions above, UMTA suggests that the written lease agreement between the grantee and the private charter operator include such legal and commercial clauses as are desirable from the grantee's vantage and appropriate under the State law that governs the lease agreement.

Should you have any questions about these suggested provisions, please feel free to contact my office. Please note, also, that in the November 3, 1987 Federal Register notice we previously provided you, UMTA has answered a number of recurring questions from grantees regarding UMTA's position on permissible leasing of UMTA-funded facilities and equipment for charter service.

Finally, you are reminded that UMTA's advance written concurrence is needed in all other (non-charter related) instances where leasing or other encumbrance of federally-funded property is contemplated.

Sincerely,

Peter N. Stowell
Regional Administrator

TNG:tc 2/9/88

2/9/88

DECISION

WASHINGTON MOTOR COACH ASSOCIATION, Complainant	}	
v.	}	WA-09/87-01
MUNICIPALITY OF METROPOLITAN SEATTLE, Respondent	}	

SUMMARY

The Washington Motor Coach Association (WMCA)(1) filed a complaint with the Urban Mass Transportation Administration (UMTA) on September 21, 1987, alleging that the Municipality of Metropolitan Seattle (METRO) was providing charter service in violation of the UMTA charter regulation, 49 CFR Part 604. The service specifically complained of was METRO's "park and ride" service to the University of Washington (the University) stadium during the football season. After a thorough investigation, UMTA finds that the service was mass transportation, and therefore not in violation of the charter service regulation. However, METRO initiated this service without sufficient consideration and involvement of the private sector, as required by Sections 3(e) and 8(e) of the Urban Mass Transportation Act of 1964, as amended (UMT Act), and the implementing policy guidelines. These guidelines are set forth in UMTA's policy statement, "Private Enterprise Participation in the Urban Mass Transportation Program," 49 Fed. Reg. 41310, (October 22, 1984), and are further defined in UMTA Circular 7005.1, "Documentation of Private Enterprise Participation Required for Sections 3 and 9 Programs," (December 5, 1986). UMTA orders METRO to follow these guidelines prior to recommencing such service.

COMPLAINT

On September 21, 1987, WMCA filed this complaint with UMTA. The complaint alleges that METRO is engaging in service which is in violation of UMTA's charter rules. The complaint specifically focuses on charter service rendered by METRO for the University, and states that METRO began this service without determining if there were willing and able private operators, as required by 49 CFR 604.11.(2) WMCA seeks relief from this and any other illegal charter service in which METRO might be engaged.

(1) WMCA describes itself as "an association of motor passenger carriers whose members operate more than 90% of the privately owned intercity charter coaches domiciled in the State."

(2) This section requires UMTA grantees desiring to provide direct charter service, to undertake a public notice process aimed at determining if there are willing and able private operators. If there are such willing and able private providers, grantees may perform charter service only under one of the exceptions to the regulation.

WMCA states that the regulation applies to charter service, as defined in Section 604.5(e).(3) WMCA points out that UMTA has acknowledged in the preamble to the regulation that this definition is not the most comprehensive possible, and has in fact stated that there remain "many difficulties in determining in a given case which category the service fits into most appropriately." (52 Fed. Reg. 11919) Nonetheless, WMCA notes, UMTA has relied on years of Interstate Commerce Commission (ICC) decisions in arriving at this definition, which can therefore serve as guidance. Moreover, WMCA explains, UMTA has distinguished charter service from mass transit, which is characterized as : 1) being under the control of the grantee, 2) being designed to benefit the public at large, and 3) being open to the public and not closed door. (52 Fed. Reg. 11920) WMCA indicates that these characteristics can be used in a process of elimination test to determine what is not mass transportation and is therefore charter service. Based on these guidelines, WMCA maintains that the service performed by METRO for the University is charter service, in violation of UMTA's charter rule.

The service in question is described, WMCA states, in a document entitled "University of Washington Stadium Expansion Parking Plan and Transportation Management Program" (the Transportation Plan), prepared by the University of Washington Transportation Office and dated February 2, 1986. WMCA notes that the Plan describes a "transit scrip" program, designed to encourage passengers to ride public transportation to the stadium. Under the program, WMCA explains, a transit pass or "scrip" is provided by the University to each football ticket purchaser. The scrip allows the rider a free ride to and from football games on regular METRO service, on "Husky Special" routes (which, according to WMCA, are extra schedules on four existing routes), and on a park and ride service. It is the park and ride service that is the subject of this complaint.

Using the process of elimination test, WMCA maintains that the park and ride service lacks the first essential element of mass transit since it is under the control of a party other than the recipient. First, WMCA states, the University designates the number of buses that will be needed. Second, WMCA contends, the University has established the locations at which passengers will be picked up, as well as a primary and secondary route between each park and ride lot and the stadium. Third, WMCA notes, the University provides scrip for payment and pays to have the scrip printed. According to WMCA, it is clear from this description that the University and not METRO controls the service.

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(3) Section 604.5(e) defines "charter service" as: "Transportation using buses or vans...of a group of persons who pursuant to a common purpose, under a single contract, at a fixed charge..., have acquired the exclusive use of the vehicle...under an itinerary...specified in advance...".

Again, applying the process of elimination test, WMCA states that the "park and ride" service is charter and not mass transit, since it is designed to benefit a specific group, and not the public at large. This group, WMCA argues, is composed of football ticket holders, since only they are provided with scrip, and only they are permitted to board the buses. According to WMCA, there are no other members of the public who might benefit.

WMCA also contends that the service fails to meet the mass transit criterion of being "open door," since, though theoretically, someone other than a football ticket holder could ride the bus, this is a logical impossibility. WMCA bases this assertion on the "virtual certainty that those using this park and ride transportation will be travelling to the football game," since there are no intermediate points between the park and ride lots and the stadium.

Consequently, WMCA argues, the park and ride service conforms to the definition of charter service set forth in Section 604.5(e), since it is provided to a specific group of persons (football game attendees), under a single contract (with the University), at a fixed charge for the exclusive use of the vehicle under an itinerary set in advance (by the University). Moreover, WMCA contends, the Plan shows that the service is under the control of the University.

For the reasons set forth above, WMCA asks that UMTA find METRO in violation of the charter regulation in the provision of its park and ride service, direct METRO to cease and desist from such activities, and direct METRO in the future to submit service proposals to UMTA in advance of their operation.

In support of its complaint, WMCA attaches excerpts from the Transportation Plan, copies of correspondence between METRO and a WMCA member concerning provision of the service, and a copy of METRO's private service proposal analysis.

RESPONSE

UMTA sent a copy of the complaint to METRO on October 19, 1987, and provided it with 30 days from receipt to respond. METRO's response is dated November 20, 1987.

In its response, METRO states that it is a municipal corporation organized under Washington State law. METRO explains that its statutory function includes the transportation of fare-paying passengers, "by means other than by chartered bus."

METRO explains that it has traditionally offered transportation to the University stadium on game days. It claims that this service is open door, since nothing prevents members of the general public from boarding, stopping at stops along the way, and paying a regular fare rather than transit scrip. METRO maintains that there is still much private charter service to the University football games, and these private charters have not been supplanted by METRO service.

METRO states that in 1983, in anticipation of an expansion of the football stadium and other University facilities, the city of Seattle and the University executed an agreement to create a "workable parking plan and traffic management program for the facility." The Transportation Plan was therefore developed and adopted by the Seattle City Council. It was pursuant to the Transportation Plan, METRO explains, that the transit scrip program was instituted in 1986. Under this program, METRO states, the University mails scrip along with game tickets for use on regular transit, Husky Special service, and park and ride service. METRO says that the University reimburses METRO for each individual piece of scrip collected. Each person pays individually on boarding, METRO states, and riders who have no scrip pay the regular fare.

METRO explains that it was also in 1986 and pursuant to the Transportation Plan that the park and ride service to the University stadium began. The service, METRO states, was a response to increased ridership due to an expansion of the stadium capacity from 58,500 to 72,200 seats. METRO remarks that use of the service has exceeded expectations: approximately 7,077 riders use the service each game day, and eighty-two buses and drivers, eleven supervisors, and nine administrative and support personnel are required to operate it.

METRO maintains that the park and ride service does not meet UMTA's definition of charter since it lacks two key elements: 1) "a single contract for a fixed charge...for the vehicle or service," and 2) "exclusive use of the vehicle."

As to the first element, METRO states that the Transportation Plan is not a contract between the University and METRO, but merely a blueprint of the University's response to the city of Seattle's requirement of a "workable transportation plan for the University stadium." METRO says that the only arguably applicable contract between METRO and the University is an "Interlocal Cooperation Agreement." However, METRO states, the terms of this Agreement do not establish a "single contract for a fixed charge," but rather an arrangement whereby the University reimburses METRO for individual fares.

METRO argues that its park and ride service also lacks the element of exclusivity. METRO refutes WMCA's contention that it is a "logical impossibility" that someone other than a football game attendee would use the service. While most riders will no doubt be heading for the game, METRO says, this is not necessarily the case for all, since the University hospital, shopping complex, and other facilities are in the vicinity. In short, METRO maintains, the service is clearly open door, and therefore not charter.

Moreover, METRO claims, UMTA's own interpretation of the charter regulation supports METRO in this dispute. METRO cites UMTA's recently issued "Charter Service Questions and Answers," in which "service to regularly scheduled but relatively infrequent events...that is open door, with fares collected from individuals" is held to be mass transportation and not charter.(See, Q&A 27c, 52 Fed. Reg. 44248-44255, November 3, 1987).

Furthermore, METRO maintains, even if the park and ride service were charter service, there is no private carrier able to adequately provide it. METRO cites 49 CFR 604.5(p), which states that a private carrier is willing and able to provide charter service if it has the desire and the "physical capability of providing the categories of revenue vehicles requested." While METRO acknowledges that there are private operators "willing" to provide the park and ride service, it states that none is "able" to do so. METRO explains that the park and ride service required the use of eighty-two buses each game day in 1987. METRO states that no private operator in the Seattle metropolitan area possesses the vehicle capacity to provide the park and ride service, and in order to perform it, would be obliged to lease vehicles from METRO. Moreover, METRO contends, the service requires not only equipment but expertise in radio communication, scheduling, route designation, and other types of supervision and coordination. According to METRO, WMCA has produced no evidence that any of its member carriers are "able" to provide these aspects of the service. Consequently, METRO argues, there is no showing that any private carrier is "willing and able" to perform the service.

METRO also presents three subsidiary arguments. First, METRO states, UMTA's charter rules exceed the scope of UMTA'S statutory authority, since they are based in part on section 3(f) of the UMT Act, which prohibits unfair competition by UMTA recipients with intercity operators. METRO claims that there is no statutory basis for extending this prohibition to intracity service. This being the case, METRO argues, even if the park and ride service were charter, UMTA would have no authority to prohibit it. Second, METRO states that there are public policy reasons which

require that WMCA's complaint be dismissed. METRO states that in providing the park and ride service, it is fulfilling its mission of providing economical mass transportation. Since no private carrier in the Seattle area has shown that it can provide service of similar cost and quality, the public interest requires that METRO be supported in its role. Third, METRO argues, the complaint is moot, since the park and ride service is designed to operated only during football season. Since 49 CFR 604.15 sets a time frame of 120 days for the resolution of complaints, a decision could not be issued before the end of the season. Accordingly, METRO maintains, the complaint should be dismissed.

Among the attachments submitted by METRO were copies of the April 1983 Agreement between the city of Seattle and the University, Transportation Plan, the Interlocal Cooperation Agreement, the 1987 Park and Ride Service Operation Plan, and affidavits by Michael E. Williams, Transportation Engineer in the University's Transportation Office, and by Rick Walsh, Manager of Service Planning and Market Development for METRO.

REBUTTAL

METRO forwarded a copy of METRO's response to WMCA on December 2, 1987, and provided it with 30 days from receipt to submit a rebuttal. WMCA'S rebuttal is dated December 21, 1987.

First, WMCA rejects METRO's argument that UMTA acted without legal authority in promulgating the charter regulation. WMCA maintains that the legal basis for the rule is adequately described in the preamble, at 52 Fed. Reg. 11930-1. Moreover, WMCA states, since the rule was adopted following appropriate rulemaking procedure, it can only properly be challenged before a court of competent jurisdiction, and not in this proceeding. WMCA also refutes METRO's contention that public policy reasons require dismissal of the complaint. The public policy reasons to be considered in this matter, WMCA asserts, are those underlying the regulation, namely the provision of mass transit services by UMTA recipients, and the protection of charter operators.

Second, WMCA takes issue with METRO's statement that there are no willing and able private operators. Noting that METRO has not undertaken a public notice process aimed at determining if there are willing and able operators, WMCA remarks "You don't know if you don't ask." Since METRO never requested public participation, WMCA points out, it is a legal possibility for it to now argue that there are no willing and able private operators. WMCA also challenges METRO's definition of willing and able, stating that vehicle capacity and the ability to supervise and coordinate bus

movements should not be included in the definition. WMCA states that to be found willing and able under the charter regulation, a private operator need only possess at least one bus or van.

Third, WMCA maintains that the park and ride service is charter service. WMCA states that the fares of most the riders are paid by the University under its transit scrip agreement with METRO, and persons paying cash are a de minimis proportion of all riders. According to WMCA, this demonstrates that the service is not open door. Moreover, WMCA contends, the Transportation Plan shows that the University designates routes from the parking lots, and the pick-up points of the buses. WMCA states that the service is thus not under the control of METRO, but rather under that of the University. These facts show, WMCA states, that the service meets UMTA's definition of charter. METRO argues that instead of Question 27c of UMTA's "Charter Service Questions and Answers," reference should be made to Question 27a, which describes service similar to the park and ride service as charter service.

Finally, WMCA states that its complaint is not moot, since the service will surely be run during the next football season unless METRO is directed to discontinue it. WMCA, moreover, maintains that the larger issues of what constitutes charter service, the definition of willing and able, and the application of the charter rule to services provided in Seattle, will survive the 1987 football season. WMCA also argues that dismissal would mean a re-filing of the complaint in 1988. Again, given the regulatory time frame, this complaint could not be dealt with on a timely basis. Accordingly, WMCA asks that UMTA entertain its complaint, and provide the relief requested therein.

DISCUSSION

Before reaching the main issues of this complaint, UMTA believes that it is appropriate to address the subsidiary questions raised by the respondent.

One threshold matter is the issue of mootness. Given the present capacity of the University stadium and the dictates of the Transportation Plan, UMTA considers it very likely that the service will be operated again in 1988. In view of the recurring nature of this service, the issue of its proper characterization is not moot, since it will probably arise during the forthcoming football season. UMTA therefore finds that it is appropriate to entertain the complaint at this time.

Moreover, UMTA agrees that there are substantial public policy grounds supporting METRO's position that it should be encouraged to provide mass transit services. However, these policies are not inconsistent with that underlying the charter regulation, namely that UMTA funds should be used for mass transit purposes only, and

not to compete unfairly with private charter operators. METRO's compliance with the charter regulation can only assist it in better fulfilling its mission by channelling its services and resources toward mass transit use. For this reason, dismissal of the complaint on the public policy grounds advanced by METRO is unwarranted.

UMTA also believes that it is appropriate to clarify the definition of "willing and able." The respondent's comments indicate a serious misinterpretation of this term as it is used in the charter regulation. 49 CFR 604.11 sets forth the procedures that a recipient must follow in determining whether there are willing and able private operators. This section limits the recipient to two factors in making its determination: 1) possession of legal authority, and 2) ability to provide the required category of vehicle. The preamble to the regulation, at page 11921, states that the definition should not include any notion of capacity, and that a private operator with one bus is just as willing and able as a private operator with 100 buses. METRO is thus incorrect in asserting that there are no willing and able private operators in the Seattle area, since none possesses the 82-vehicle capacity or supervisory expertise needed. The willingness and ability of private operators can only be determined after a recipient has completed the public participation process of 49 CFR 604.11. Moreover, in making its determination, a recipient may consider only the two above-mentioned factors, and no extraneous ones.

As concerns the respondent's contention that the charter regulation exceeds UMTA's statutory authority, UMTA believes that its position on this issue is clearly and comprehensively set forth on pages 11930-1 of the preamble to the rule. Moreover, since under the terms of the regulation, UMTA is limited in these proceedings to a consideration of the merits of the complaint, this is not the proper forum to raise a challenge to the legality of the regulation.

Having dispensed with these questions, we will proceed to an examination of the main issues of this complaint, and which are as follows:

1. Whether METRO's park and ride service is mass transportation or charter service

In its complaint, WMCA uses a process of elimination test to establish that the park and ride service provided by METRO is charter service. This test is based on UMTA's definition of mass transportation, which is set forth at page 11920 of the preamble

to charter regulation, and which is characterized as being service:

1) under the control of the grantee;
2) designed to benefit the public at large;
3) open to the public and not closed door.

WMCA argues that since the park and ride service does not contain these three elements, it is not mass transportation, but rather charter service.

WMCA contends that the first element is lacking, since the service is not under the control of METRO, but rather under that of another party, the University. According to WMCA, the University designates the number of buses that will be used, establishes pick-up points and routes, and pays the cost of the service.

The materials submitted by the respondent, however, fail to bear out WMCA's contentions on this point. The April 1983 Agreement between the city of Seattle and the University outlines the transportation objectives to be met as a result of the expansion of the University's facilities. The Agreement provides that "The City will assist the University in meeting these objectives and will reduce non-University generated traffic and transportation volumes by implementing additional programs."(4) The Agreement further stipulates that the University's role in this transportation scheme will be the formulation of a "Master Plan," to include a description of existing University facilities, and their projected expansion and use.(5) These provisions indicate that the intent of the Agreement is that METRO, using data and information supplied by the University as guidelines, should establish supplementary service to meet the needs of members of the general public travelling to the University.

METRO's primary responsibility for the service is confirmed by the statement of Rick Walsh, Manager of Service Planning and Market Development for METRO, that "METRO is responsible for determining the appropriate route for each park and ride lot to Husky Stadium." According to Mr. Walsh, "METRO also determines the scheduling of the buses, and fixes the amount of fare to be paid by each rider."(6) Both according to the terms of the Agreement then, and to the statements of its operations manager, the service is managed, supervised, and operated by METRO, with the University playing mainly an informational role. Accordingly, it meets the first mass transit criteria of being under the control of the grantee.

(4) "Agreement between the city of Seattle and the University of Washington," April 1983, page 15.
(5) Id, at page 2.
(6) Affidavit of Rick Walsh, p 4.

Referring to the second element of UMTA's definition, WMCA also maintains that the park and ride service is charter rather than mass transit, since it is not designed to benefit the public at large, but a particular group, namely football game attendees.

In this connection, it should be pointed out that on page 11920 of the preamble to the regulation, UMTA states that service is designed to benefit the public at large when it serves the needs of the general public, "and not some special organization such as a private club." It is questionable whether football game attendees form a well-defined and cohesive enough group to be considered a "special organization." Even admitting, arguendo, that such is the case, it is clear from the above description that METRO's park and ride service is not intended for the exclusive use of such riders, but is available to anyone wishing to board it. As such, it can be said to benefit the public at large, in keeping with UMTA's second criterion of mass transportation.

This second element overlaps with UMTA's third requirement for mass transportation, namely that the service be "open door." WMCA maintains that though theoretically, anyone could board the service, only football game goers are likely to do so, since there are no intermediate points between the park and ride lots and the football stadium.

METRO states, on the other hand, that the service is open door, since not only scrip holders, but also regular fare-paying passengers can ride it. METRO further argues that many members of the general public do in fact use the service, since the University museum, hospital, shopping center, and other facilities are located near the terminus.

In determining whether service is truly open door, UMTA looks not only at the level of ridership by the general public as opposed to a particular group, but also the intent of the recipient which offers it. The intent to make service open door can be discerned in the attempts that a recipient has made to make to service known and available to the public. UMTA thus takes into consideration the efforts a recipient has made to market the service. Generally, UMTA considers that this marketing effort is best accomplished by publishing the service in the grantee's preprinted schedules. UMTA notes that METRO has failed to submit copies of any such preprinted schedules, and assumes that none exist. However, UMTA notes that the Transportation Plan calls for active marketing of the service to the public by means of promotional mailings, billboard advertising, and radio and television public service announcements.(7) Assuming that METRO has followed

(7)"University of Washington Stadium Expansion Parking Plan and Transportation Management Program," page 9.

this strategy, UMTA concludes that METRO has adequately marketed the service during the 1987 football season. However, in order to strictly conform to UMTA's requirements for open door service, METRO should, before offering the service in the future, publish it in its preprinted schedules.

Based on the foregoing, UMTA concludes that METRO's park and ride service to the University stadium is mass transportation. This decision should not be taken as a ruling that all service provided by a recipient to regularly scheduled periodic events is mass transportation. Presented with a complaint, UMTA will look carefully at each individual case to determine whether the service provided contains the required elements of mass transportation. In short, UMTA cautions transit providers against reading this decision too widely, and reminds them that there are many cases which fall in between the two categories, and which should be examined on an individual basis.

2. Whether METRO should have undertaken a private sector involvement process before instituting the park and ride service.

In its response, METRO correctly argues that its park and ride service is mass transportation, since it conforms to the service described in Q&A 27c of UMTA's "Charter Service Questions and Answers," i.e., service to regularly scheduled but infrequent events, that is under the control of the grantee, with fares collected from individuals. For the reasons stated above, UMTA agrees that the example cited in Q&A 27c is applicable to this case. However, the following language from this same Q&A is equally applicable:

> ...such services would appear to be excellent candidates for privatization, since they may very well be self-supporting without the need for public subsidies. In accordance with UMTA's private enterprise policy, grantees should examine the interest and capability of the private sector in providing the service.

This statement is in conformity with the requirements of Section 3(e) of the Urban Mass Transportation Act of 1964, as amended (UMT Act), and UMTA's implementing policy guidelines, which require maximum participation of the private sector.

These guidelines are set forth in UMTA's notice of policy, "Private Enterprise Participation in the Urban Mass Transportation Programs," 49 Fed. Reg. 41310 (October 22, 1984). UMTA's Circular 7005.1, "Documentation of Private Enterprise Required for Sections 3 and 9 Programs," (December 5, 1986), provides further guidance with respect to private sector involvement, and defines the type of "new or restructured service" which triggers such involvement. The Circular states that "new or

restructured service" may include any of the following:

> establishment of a new mass transportation service; addition of a new route or routes to a grantee's mass transportation system; a significant increase or decrease in service on an existing route in a grantee's mass transportation system; a significant realignment of an existing route in a grantee's mass transportation system;

Clearly, METRO's park and ride service is of sufficient magnitude to be charactertized as the establishment of a new mass transportation service. According to information supplied by METRO, it requires the use of 82 buses and drivers on each game day, transports about 7,000 riders, and is coordinated by 11 supervisors and nine support personnel. As such, it constitutes "new or restructured service" as contemplated by Circular 7005.1.

The same Circular sets out the minimum procedures which a grantee must follow in seeking to involve the private sector. These include:

a) Notice to and early consultation with private providers in plans involving new or restructured service as well as the periodic re-examination of existing service.

b) Periodic examination, at least every three years, of each route to determine if it could be more effectively operated by private enterprise.

c) Description of how new or restructured services will be evaluated to determine if they could be more effectively provided by a private sector operation pursuant to a competitive bid process.

d) The use of costs as a factor in the private/public decision.

e) A dispute resolution process which affords all interested parties an opportunity to object to the initial decision.

There is no indication in the submissions from the parties that METRO attempted to notify or involve private operators during the early stages of its planning of the service. METRO has shown that it did perform a private/public cost analysis. This analysis, however, appears to have been performed on the basis of limited information which was offered by, rather than solicited from, a single carrier. It also appears that METRO provided private operators with no dispute resolution process or opportunity to appeal its initial negative decision. Consequently, METRO's limited consideration of private sector alternatives appears to fail to meet the requirements of Circular 7005.1.

CONCLUSION

After a thorough investigation, UMTA concludes that METRO's park and ride service is mass transportation, since it substantially conforms to the following criteria: 1) it is under the control of the grantee; 2) it is designed to benefit the public at large; and 3) it is open door. With regard to the latter element, however, UMTA finds that the service fails to conform to one requirement, namely that it be published in the grantee's regularly published schedules. UMTA therefore orders METRO to publish the service in its preprinted schedules prior to re-instituting it. UMTA also finds that the park and ride service constitutes new or restructured service as contemplated by UMTA Circular 7005.1, thereby triggering UMTA's private sector involvement requirements. UMTA finds that the measures METRO took to involve the private sector did not fully meet the minimum requirements set out in the Circular. Therefore, prior to recommencing the service, METRO should undertake a public participation process which follows the guidelines set forth in UMTA Circular 7005.1.

Rita Daguillard
Attorney-Advisor

3/17/88
(Date)

Edward J. Babbitt
Chief Counsel

3/21/88
(Date)

SEQUIM TAXI)
vs) WA-09/85-01
CLALLAM TRANSIT SYSTEM)

DECISION

I. SUMMARY OF DECISION

This decision is the result of an investigation begun in response to a complaint received by the Urban Mass Transportation Administration (UMTA) on November 5, 1985, from Larry G. Ennen, President of Sequim Taxi. The complaint alleges that the local planning and programming process employed by Clallam Transit Service (CTS) did not include procedures for the maximum feasible participation of private transportation providers consistent with Section 3(e) of the Urban Mass Transportation Act of 1964, as amended (UMT Act). UMTA finds that the vehicles used to provide the service which is the subject of this complaint were not UMTA-funded, and CTS is therefore not required to follow the procedures of Section 3(e) in implementing this service.

II. BACKGROUND

A. Exhaustion of Local Remedies

Mr. Ennen originally complained to UMTA in September, 1985, claiming that CTS was detrimentally affecting his business. UMTA acknowledged the letter on September 24, indicating that a potential violation of UMTA requirements had been shown, but that Sequim Taxi must first make an attempt to resolve the problem locally before UMTA could entertain a protest. Because CTS is not a direct recipient of UMTA funding, but a subrecipient under the state-administered Section 18 program, UMTA notified the State of the complaint and requested that the State attempt to resolve the matter locally. By letter dated October 23, 1985, the State notified UMTA that local efforts to resolve the dispute had been completed. According to the State's letter, Mr. Ennen had sought to increase his company's participation in the provision of dial-a-ride services, and specifically that he be allowed to lease or operate CTS vehicles used to provide such service. The contract between Sequim Taxi and CTS was to expire on December 31, 1985, and CTS was planning to solicit proposals for operation of dial-a-ride services that would include the opportunity to use CTS equipment. It, therefore, appeared that Sequim Taxi's concerns had been satisfactorily addressed.

B. The Complaint

However, by letter dated November 1, 1985, Mr. Ennen notified UMTA that he did not consider the complaint adequately resolved, and formally requested UMTA's assistance. For purposes of this complaint, we have indicated Sequim Taxi as the complainant. It is somewhat unclear from the correspondence whether Sequim Taxi is also doing business as Sequim Transportation, Inc. and we use the names interchangeably. The letter alleged that the local planning and programming process had not established procedures for the maximum feasible participation of private transportation providers. Although the letter alleges that the contract terms are drafted in a manner that precludes Sequim Taxi from bidding, it does not elaborate. It also states that the "preliminary process for establishing ways to work out disputes and resolutions was not followed by CTS", but again it does not explain the reasons for this conclusion.

C. The Response

The State of Washington responded by letter dated December 17, 1985, indicating that contrary to Sequim Taxi's allegation, CTS did favorably consider its request to permit potential contractors the ability to lease or otherwise operate CTS-owned equipment under the contract. The response indicates that the solicitation process used by CTS allowed for input and modification, and provided a forum for resolution of complaints through its regular Board meeting process. The real problems, according to the State, result from on-going contract administration disputes arising out of an existing contract between CTS and Sequim Taxi. The response concludes that, while CTS did not have a formal private enterprise participation policy or process at the time the complaint was filed, that in practice it complies with the spirit of the 3(e) requirements by considering the complaint and making changes to address the concerns raised.

D. The Rebuttal

Although the complainant was given the opportunity to rebut the State's response, no rebuttal was offered.

E. Request for Additional Information

By letter dated January 23, UMTA requested that the State provide additional information relative to the planning process following by CTS, in particular with

respect to its decision to expand the special transportation business during the term of Sequim Taxi's contract.

F. Supplementary Response by State

By letter dated February 3, 1986, the State responded to UMTA's request for additional information. The response makes the following points:

1. Two changes were made to the program in June of 1984: a) the hours of operation were expanded to match fixed route service, and b) lift-equipped vehicles were made available to ambulatory passengers.

2. Mr. Ennen's contract was amended to allow for the increased hours of operation. (It is unclear whether the expanded use of CTS lift-equipped vehicles by ambulatory passengers was consistent with the contract.)

3. The State disagrees with Mr. Ennen's assertion that these changes resulted in a loss of business. In support of its position the State notes that payments to Mr. Ennen under the contract increased dramatically after July 1984 over previous payments. Furthermore, the contract with Sequim Taxi was intended to be a supplementary service and not a guarantee of an exclusive right to provide transportation.

4. CTS did meet with the complainant to discuss Mr. Ennen's concerns. However, CTS indicated at that meeting that it would not consider Mr. Ennen's proposal to use CTS vehicles until certain existing billing problems could be corrected. CTS maintained that Sequim Taxi was not following proper billing procedures in accordance with its contract. According to the State, it is this contract dispute which really forms the basis for the instant complaint, rather than a failure to fulfill private enterprise requirements. In any case, the CTS Board decision to provide the service through a competitive process is considered by the State to have cured any such failure.

G. Rebuttal to Supplemental Response

Mr. Ennen submitted a rebuttal to the State's supplemental response by letter received on March 4, 1986. This rebuttal included numerous attachments. Briefly, the rebuttal makes the following points:

1. The June 1984 changes by CTS, increasing use of lift-equipped vehicles, were unilateral. There was no prior consultation. Further, the subsequently negotiated contract, which supposedly provided for these changes, was ignored by CTS.

2. A chart was provided showing weekly earnings over a 4-year period to demonstrate that CTS, through its Dial-A-Ride program, has taken over the taxi business. Further, although the complainant's gross income has risen, net income has actually declined.

3. With respect to the meeting between CTS and the complainant, the meeting was not consultative in nature and did not address the issue of use of CTS vehicles by the complainant.

4. Complainant disputes allegations relative to improper billings under the contract.

5. The competitive solicitation was too big, and the financial and paperwork requirements were too onerous, to permit complainant to submit a responsive bid.

H. Additional Supplemental Response by State

By letter dated March 31, 1986, the State made the argument that neither UMTA nor the State has jurisdiction because no UMTA funding is directly involved in the elderly and handicapped services contracted out by CTS.

III. Discussion

CTS and Sequim Taxi were parties to a contract under which Sequim Taxi provided special transportation to the elderly and handicapped in the Sequim area. The contract was renewed in August 1984. During the course of the contract, Sequim Taxi raised concern about the level of competition from CTS vehicles which were allegedly diverting customers from Sequim Taxi.

In June of 1984, CTS unilaterally expanded service with its lift-equipped vans. Although no prior consultation occurred, CTS and Sequim Taxi did conduct subsequent discussions concerning the use of the vans.

During these discussions, Sequim Taxi proposed that CTS make its vans available to Sequim Taxi in return for a mutual guarantee of service on Sequim's part, and restricted operation on CTS' part. CTS declined, based on questioned billing practices by Sequim arising out of the existing contract.

CTS eventually issued a new solicitation for special transportation service, which permitted the successful contractor to utilize CTS equipment to provide the service. The complainant did not submit a bid, and another provider was awarded the contract. Sequim Taxi complains that CTS did not follow the procedures set forth by Section 3(e) of the UMT Act in the awarding of this contract.

Before UMTA will deal with a complaint pertaining to a violation of the terms of Section 3(e), it must be established that the type of assistance which the grantee receives falls within the perimeters of this provision.

Section 3(e) provides, in pertinent part:

> No financial assistance shall be provided under this Act to any State or local public body or agency thereof for the purpose, directly or indirectly ... of providing by contract or otherwise for the operation of mass transportation facilities or equipment in competition with, or supplementary to, the service provided by an existing mass transportation company ... unless the Secretary finds that such program, to the maximum extent feasible, provides for the participation of private mass transportation companies.

CTS is a subrecipient of UMTA funds under the State-administered Section 18 program. Materials submitted by the parties, however, show that this assistance has been provided exclusively for capital purposes, and has not been utilized to acquire or operate the vehicles involved in the instant complaint.

Consequently, CTS is not subject to the requirements of Section 3(e) in its provision of this service. Therefore, though Sequim Taxi's allegations are not without merit, and though UMTA notes that at the time this complaint was filed, CTS lacked a private sector participation process as required by Section 3(e), UMTA lacks jurisdiction to make a decision or ruling on this matter.

IV. Conclusion

Before UMTA will rule on a complaint pertaining to a violation of the terms of a grant agreement, it is essential that jurisdiction be established. In this case, CTS does not receive operating assistance from UMTA. If it did, UMTA would assert jurisdiction on the ground that any operating assistance would be indirectly, if not directly, involved in the provision of transit service by CTS. CTS has utilized UMTA assistance solely for capital purposes, and no UMTA funds were used to operate the vans which are the subject of this complaint. For this reason, UMTA concludes that the provisions of Section 3(e) are inapplicable to the service which CTS provides using the vans in question, and that UMTA therefore lacks jurisdiction to make a ruling on this matter.

Rita Daguillard
Attorney-Advisor

4/26/88
Date

Edward J. Babbitt
Chief Counsel

5/3/88
Date

BEFORE THE URBAN MASS TRANSPORTATION ADMINISTRATION

In the matter of		
BLUE GRASS TOURS AND CHARTER Complainant	:	CHARTER COMPLAINT
		(49 U.S.C. 1602(f))
versus	:	
		URO-III - 1987
LEXINGTON TRANSIT AUTHORITY Respondent	:	

MEMORANDUM OF DECISION

Question Presented

Whether the transportation provided to the University of Kentucky principally for its faculty, staff and students by the Lexington Transit Authority, Lexington, Kentucky (hereinafter referred to as "LexTran") constitutes impermissible charter service in violation of 49 CFR Part 604, which implements Section 3(f) of the Urban Mass Transportation Act of 1964 as amended, 49 U.S.C. 1602(f) (the "UMT Act")?

Facts

The facts as presented by complainant, Blue Grass Tours and Charter, a privately-owned transportation company located in Lexington, Kentucky, and by respondent, LexTran, are as follows:

The University asked the complainant to bid on a contract (referred to as "annual subsidy" by LexTran) to provide a certain number of hours in the course of the year according to a set route and schedule. The University asked complainant to give a rate per hour based on that information. Then, before complainant had replied, it was told by the University that LexTran had lowered its price and that the University would continue to have the needed transportation provided by LexTran.

The service at issue is apparently around the University campus, from building to building. It is open and free to anyone going on the route. The service is only provided when the University is open. It is in addition to the regularly scheduled LexTran routes that exist in Lexington, some of which travel to and through the campus.

Neither complainant nor respondent has provided for the record a copy of a written agreement setting forth the terms of the service in question. The schedule for the service is apparently set by an oral or informal agreement between the University and LexTran and runs when the University needs it. (There may have been in the past a written contract establishing the terms of the agreement but apparently the agreement is currently not in writing.)

Instead of collecting fares from each passenger, as LexTran does with its regular routes, LexTran receives an annual subsidy from the University for the service. The agreement to provide the service appears to be renewed annually in July.

Complainant's Position

It is the complainant's contention that the service in question is actually a form of prohibited charter service. The definition of charter found in Urban Mass Transportation Administration (UMTA) regulations at 49 CFR Subsection 604.5(e) is as follows:

> transportation using buses or vans, or facilities funded under the Acts [49 U.S.C. 1601 et seq. and 23 U.S.C. 103(e)(4) and 142] 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 UMTA funded equipment for the exclusive transportation of school students, personnel, and equipment.

The service complained of runs at the behest of the University which dictates locations and schedules. According to the complainant, LexTran has input in developing the routes from a logistical point of view as any operator would but the University determines the starting points and destinations and which areas of campus and specific buildings are to be included in the service.

The service fluctuates according to when school is in session. It is reduced during the summer and it does not exist when school is out of session and during holidays such as Christmas.

The complainant contends that the service may be open to the public but it is not advertised or promoted to make the public aware of its availability (except on the campus). Anyone wishing to use LexTran's regular service to points off campus must take LexTran's regular (published) routes and pay a fare.

Respondent's Position

LexTran's position is that its campus service fits the definition of "mass transportation" found in Section 12(c)(6) of the UMT Act of 1964, as amended. According to that definition, mass transportation means:

> transportation by bus, or rail, or other conveyance, either publicly or privately owned, which provides to the public general or special service (but not including school buses or charter or sightseeing service) on a regular and continuing basis.

To support that contention, LexTran states that the service operates on a regular and continuing basis throughout the year, Monday through Friday, between the hours of 7:10 a.m. and 6:20 p.m., but that service levels naturally vary during the year, based upon demand.

Furthermore, the service is open to the general public and the vehicles are not for the use of any particular group. The riders have no control of the route or destination of the vehicle.

LexTran sets the routes and schedules based on LexTran's knowledge of transit operations and the area's geography with input from the University on class schedules, working hours, and peak hours of the hospital.

There is no fare charged for the service. The University pays LexTran an annual subsidy, established by mutual agreement. There is no subsidy contract in effect.

The service is promoted in conjunction with all of LexTran's services.

LexTran has signed an agreement with UMTA pursuant to 49 CFR Subsection 604.7 in which LexTran has agreed not to provide charter service with UMTA funded facilities and equipment unless there is no able and willing private operator or unless one of the exceptions in 49 CFR Section 604.9 applies.

Conclusion

The issue is not a simple one. Frequently, transportation service around a university complex is considered "mass transportation." (Please see in this regard Question number 27.d. of the Charter Questions and Answers published on November 3, 1987, 52 Fed. Reg. 442252.) In this case, however, even though LexTran has argued that this service fits the definition of mass transportation, the facts would indicate that the service more closely resembles charter service.

Discussion

The service in question more closely fits the definition of "charter" found in the UMTA regulations than the definition of "mass transportation" found in the UMT Act. However, there is no contention that LexTran is providing permissible charter service as an exception under UMTA charter regulations, 49 C.F.R. Section 604.9.

Notwithstanding the fact, as LexTran contends, that the service on the campus is "regular and continuing," it appears that that service has been set up "under a single contract" to regularly benefit a group of persons who have specified where and when they want the service to exist and who annually pay a special price to have it available only when they are there to use it.

Notwithstanding the fact, as LexTran contends, that there may be no written contract in effect, the service is provided for the University only at the times and locations specified by the University and agreed to by LexTran. (Although not clearly stated by either complainant or respondent, I infer from their letters that the annual subsidy only covers service required by the University except as altered for operational reasons by LexTran.)

Notwithstanding the fact, as Lextran contends, that none of the individual riders has the ability to direct the vehicle to take a different course, the University, on behalf of those individuals, does have the prerogative of altering routes and schedules.

Indeed, the campus service is, in some respects, quite dissimilar to LexTran's other routes. For example, it is free to individual riders (while on Lextran's other routes individual riders pay a fare) and there are no published schedules (while published schedules exist for LexTran's other routes). Moreover, while those two characteristics of the service are not in themselves determinative of whether it is either charter or mass transportation - See in this connection Question 27.a. of the Questions and Answers Published November 3, 1987. 52 Fed. Reg. 42252. - the conclusion one would have to draw is that the service to the University is a special type of service which is set up, advertised and operated differently than LexTran's regular service. and notwithstanding the absence of a written contract, one that appears to be operating pursuant to a special agreement to accommodate the special needs of the University.

This conclusion is reinforced by application of part of the discussion in the preamble to the charter regulation published on April 13, 1987 to the present situation. In the preamble UMTA explained that three characteristics of mass transportation differentiate it from charter service.

> First, mass transportation is under the control of the recipient. Generally the recipient is responsible for setting the route, rate, and schedule, and deciding what equipment is used. Second, the service is designed to benefit the public at large and not some special organization such as a private club. Third, mass transportation is open to the public and is not closed door. Thus, anyone who wishes to ride on the service must be permitted to do so. [49 CFR Part 604, 52 Fed. Reg. 11916, at 11920]

Although LexTran would argue that it is in control of the service with respect to setting routes, rate, schedule and equipment, it appears that the University has requested service generally - if not specifically - according to certain routes and schedules. LexTran has proposed to charge a certain rate and has decided what equipment to use in order to meet the needs of the University.

Secondly, although LexTran would argue that the service provided to the University benefits the public at large, and is not exclusive as for a private club, it appears that it is designed to fulfill the transportation needs of the University students and personnel. It is not set up to benefit the general public except as the general public might coincidentally need to travel around the campus.

Thirdly, although the service is "open door" in the sense that anyone wanting to ride on it is not excluded from doing so, UMTA has interpreted "open door" to mean involving a substantial public ridership and/or an attempt by the transit authority to widely market the service. That does not appear to be the situation here. Moreover, the service does not operate in the general urban area of Lexington, but only on campus.

Finally, although the definition of "mass transportation" in the UMT Act does include the concept of "special" service, the type of service complained of in this case is not one of the two types of "special" service that legally fit the definition of "mass transportation." They are: service exclusively for elderly and handicapped and service provided for the workers who live in the innercity, but work in a factory in the suburbs. These historically are the only two "special" types of service still considered to be mass transportation. [52 Fed. Reg. 11916 at 11920]

Decision

Because the service provided by LexTran to the University of Kentucky is in reality charter service rather that mass transportation, unless LexTran has gone through the public process described in the charter regulations at 49 C.F.R. 604.11 and found there to be no legally "able and willing" private charter operator in its service area (and thus is operating the service pursuant to a legitimate exception to the regulation pursuant to 49 C.F.R. section 604.9,) I conclude that it is an impermissible use of UMTA funded facilities and equipment to continue to provide the transportation which has been the subject of this discussion.

Accordingly, unless LexTran can show that it has gone through the abovementioned public process and found there to be no legally "able and willing" private charter operator, LexTran is ordered to cease and desist immediately this special service to the University.

5/9/88
DATE

NANCY A. GREENE
Regional Counsel

5/17/88
DATE

EDWARD J. BABBITT
Chief Counsel

BEFORE THE URBAN MASS TRANSPORTATION ADMINISTRATION
OFFICE OF CHIEF COUNSEL

In the matter of:

SEYMOUR CHARTER BUS LINES, Complainant	}	
v.	}	TN-09/88-01
KNOXVILLE TRANSIT AUTHORITY, Respondent	}	

DECISION

SUMMARY

Seymour Charter Bus Lines (Seymour) filed this complaint with the Urban Mass Transportation Administration (UMTA), alleging that the Knoxville Transit Authority (K-TRANS) was providing charter service in violation of the Urban Mass Transportation Administration's (UMTA) charter regulation, 49 CFR Part 604. The complaint specifically alleged that Seymour had contracted to provide charter service for the University of Tennessee (the University). Applying a balancing test to the service in question, UMTA concludes that it is charter service as defined by 49 CFR 604.5(e). UMTA orders K-TRANS to cease and desist from providing the service as it is currently configured. K-TRANS must report to UMTA within 90 days on the measures it has taken to comply with the terms of this order.

COMPLAINT

Seymour filed this complaint with UMTA on August 19, 1988. The complaint alleged that K-TRANS was providing charter service in violation of UMTA's charter regulation, 49 CFR Part 604. The complaint specifically alleged three violations. According to the first two allegations, set forth in paragraphs 5 and 6 of the complaint, K-TRANS had established brokering arrangements with Loy Bus Lines and Mays Bus Lines. In paragraph 7 of the complaint, Seymour alleged that K-TRANS had successfully bid on a contract for charter service to the University, at a charge that was less than its fully allocated cost of providing the service.

By letter of September 23, 1988, UMTA advised Seymour that its allegations stated a complaint under 49 CFR 605.15. The letter directed Seymour to attempt local conciliation for thirty days. If no resolution were reached at the end of this period, the

letter stated, either party could write to UMTA to request a formal investigation.

On October 27, 1988, Seymour wrote to UMTA to state that it had met with K-TRANS on the previous day. As a result of discussions which took place, Seymour stated, it was withdrawing its allegations that K-TRANS had established brokering arrangements with Loy Bus Lines and May Bus Lines. Seymour stated, however, that the parties had been unable to reach an agreement on the nature of K-TRANS' service to the University. Seymour maintained that the service was charter service, and therefore prohibited by UMTA's charter regulation.

RESPONSE

By letter of November 21, 1988, UMTA advised Seymour and K-TRANS that it would proceed with a formal investigation of the remaining allegations concerning K-TRANS charter service for the University. UMTA gave K-TRANS 30 days to respond to the complaint.

K-TRANS' response was dated December 21, 1988. K-TRANS noted that it was making no response to the allegations of paragraphs 5 and 6 of the complaint concerning K-TRANS' brokering arrangements with Loy Bus Lines and Mays Bus Lines, since those allegations had been withdrawn by Seymour.

Responding to the allegations in paragraph 7, K-TRANS stated that it has been providing service to the University of Tennessee campus and to certain student apartments operated by the University. K-TRANS explained that it had been operating, as part of the mass transit system of the city for many years, service to and from the campus and to and from 5 off-campus apartments occupied by married and graduate students.

In June 1988, stated K-TRANS, the University issued a request for quotations. K-TRANS indicated that it was providing service to the University not under a separate contract, but "pursuant to the request for quotations issued by the University and the response of K-TRANS." K-TRANS denied that the service was charter service, or that service was being provided in violation of the UMTA charter regulation.

K-TRANS stated that the schedule for the Route 22 service, a copy of which was attached to its response, showed that the service provided for the University community was divided into two parts. The first part, explained K-TRANS, was known as the Campus Route, and connected the main campus with the University Agricultural Campus along Weyland Drive, a main thoroughfare of the City. K-TRANS stated that no fare was charged for this intercampus service.

The second part of the service, according to K-TRANS, was provided to five (5) separate apartment complexes which housed married and graduate students. K-TRANS explained that the service to the

married student apartments ran along a principal thoroughfare, through residential and commercial areas. K-TRANS maintained that the buses stopped and picked up at any K-TRANS stop along the way. Each rider, stated K-TRANS, paid a fare for this service.

K-TRANS stated that in its request for quotations, the University requested the use of 45-passenger buses, set the departure times from the campus and the apartments and the times during which the service would operate, and set the fare to be charged for students. Otherwise, K-TRANS maintained, the service was totally under the control of K-TRANS.

K-TRANS explained, notably, that it set the number of vehicles used to provide the service, handled all operational details, and determined the routes to be followed. K-TRANS stated that for the most part, the buses operated along publicly dedicated and maintained streets, were open to the public at regular fares, and stopped at all of K-TRANS' regular stops. Moreover, stated K-TRANS, the service appeared in K-TRANS' regularly published schedules, which were distributed to the general public. K-TRANS acknowledged that the service was geared to meet the needs of the University community, but stated that it was not tied exclusively to University class schedules, and had operated on a modified schedule during vacation periods. These factors, K-TRANS maintained, confirmed that the service was "mass transportation" as defined on page 11920 of the preamble to UMTA's charter regulation (52 Fed. Reg. 11916 et seq., April 13, 1987).1

K-TRANS further contended that the service was for the benefit of the public-at-large, since University students were members of the public as was any group which lives in a particular sub-division or series of apartment complexes. College students were not, maintained K-TRANS, a restricted, nurtured group as would be secondary students served by a school bus, but were members of the local community.

On the other hand, K-TRANS submitted, the service was not "charter service," because, among other things, the patrons did not have a common purpose or constitute a defined group, they had not acquired exclusive use of the bus, they did not travel under an itinerary specified in advance or have authority to set the desination, and each rider paid an individual fare.

Responding to the allegation of paragraph 9 of the complaint concerning K-TRANS' failure to bid fully allocated costs for the University contract, K-TRANS acknowledged that the successful bid price was $22.75 per hour, but stated that determination as to

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1) "Mass transportation" is herein defined as having the following three basic characteristics: 1) it is under the control of the grantee (i.e., the grantee sets the rate, route, fares and schedules); 2) it is designed to meet the needs of the general public as opposed to those of a particular group; 3) it is open to the public.

whether the charge was compensatory was not appropriate. If it were determined that the service was charter service and should not be provided, argued K-TRANS, the amount of the charge would become a moot question. If, stated K-TRANS, the ultimate decision were that the service is mass transportation, then the matter complained of in paragraph 9 should not be an issue.

Further responding to the complaint generally, K-TRANS asserted that the regulations promulgated at 49 CFR Part 604 were not within the legal authority granted to UMTA under the Urban Mass Transportation Act of 1964, as amended (UMT Act), since the service complained of was not being operated outside the urban area in which K-TRANS provided regularly scheduled mass transportation service.2

For the above reasons, K-TRANS concluded that the complaint should be dismissed.

REBUTTAL

By letter of December 29, 1988, UMTA wrote to Seymour to state that it had received the response of K-TRANS on December 21, 1988, and that K-TRANS had indicated that it had forwarded a copy of its response to Seymour. UMTA stated that Seymour would have 30 days to file a rebuttal.

Seymour's rebuttal is dated January 17, 1989. Seymour therein stated that the issue presented in this proceeding was whether transportation provided to the University exclusively, or on a substantially exclusive basis, for its faculty, staff and students by K-TRANS, consituted impermissible charter service in violation of 49 CFR Part 604.

Seymour pointed out that in consideration of the payment of $22.75 per hour per bus, K-TRANS agreed to provide service to the University campus, operating in an area and at times specified by the University. Seymour noted that in meeting this general transportation requirement, the University had imposed specfic requirements on K-TRANS, including the number and seating capacity of buses used, detailed insurance specifications, maintenance of a cash collection system acceptable to the University, and frequency of service and points of origin and destination.

Seymour asserted that the service provided by K-TRANS to the University was not mass transit. Seymour pointed out that mass transit is described in the preamble to UMTA's charter regulaion

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2) UMTA will not discuss this issue, since it has already dealt with it extensively in two previous decisions, Washington Motor Coach Association v. Municipality of Metropolitan Seattle, WA-09/87-01, March 21, 1988, and B&T Fuller Double Decker Bus Company v. VIA Metropolitan Transit, TX-02/88-01, November 14, 1988.

as being: 1) under the control of the grantee; 2) designed to benefit the public at large; 3) open door. 49 Fed. Reg. 11920, (April 13, 1987). Seymour maintained that K-TRANS' service had none of those characteristics of mass transit.

First, stated Seymour, K-TRANS' service to the University was not under its control, but operated according to routes, minimum rates, and schedules set by the University, which also specified what equipment is used.

Second, Seymour argued, K-TRANS maintained that the service was designed to benefit "members of the public," since students were part of the public at large. That argument, Seymour pointed out, was rejected by the UMTA Chief Counsel in Blue Grass Tours and Charter v. Lexington Transit Authority (Memorandum of Decision dated May 17, 1988). In that decision, Seymour noted, the Chief Counsel ruled that the service was not set up to benefit the general public, except as the general public might coincidentally need to travel around the campus.3

Third, Seymour acknowledged that K-TRANS' service could be described as "open door" in the sense that no one wanting to use it was prevented from doing so, but denied that it was true "open door" mass transit. Seymour quoted the finding in an opinion letter of UMTA's Chief Counsel dated December 28, 1988, that certain service provided by the Ithaca Transit Authority was impermissible charter service since it was apparent that the purpose of the trip was to provide service for a particular group of senior citizens and not for the public-at-large. Seymour cited K-TRANS' failure to furnish the University with documentation of fares collected or passengers carried as evidence that there was no significant public ridership or routes serving the married students' apartments.

Seymour maintained that K-TRANS' campus service conformed to the following seven criteria for charter service set forth in 49 CFR 604.5(e):

1) The patrons had a common purpose, namely to travel to or from points on the University campus.

2) The service was provided exclusively for University students and personnel. Moreover, Seymour stated, no transportation was provided when school was not in session.

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3) The Lexington Transit Authority, the respondent in the proceeding cited, eventually modified this element of the service by publishing schedules for its campus service, advertising them to the public, and marking campus stops with its logo, thereby evidencing an attempt to invite public ridership. By letter of December 27, 1988, to the Lexington Transit Authority, UMTA recognized that these and other changes had converted what it believed was charter service to mass transit.

3) While the passengers did not board as a group at a common place, it was not uncommon for motor carriers to pick up at various locations (ex., pick-ups at various hotels in the case of convention charters).

4) The University had acquired exclusive use of the bus for its students and personnel.

5) The passengers travelled together under an itinerary specified in advance by the chartering party, the University.

6) The University, the chartering party, set the destinations.

7) The buses were chartered for the purpose of providing transportation on an individual basis; hence, each person paid an individual fare.

Seymour argued that like the service in Blue Grass, the service provided by K-TRANS to the University was set up, advertised, and operated differently than K-TRANS' regular service and was geared to accomodate the special needs of the University when school was in session.

Seymour responded to K-TRANS' argument that UMTA lacked legal authority to promulgate the charter regulation by stating that 12(c)(6) of the UMT Act, by restricting UMTA funds to use for mass transit purposes, invested UMTA with the necessary authority to prohibit use of funds for other purposes. Section 12(c)(6), maintained Seymour, was a fairly typical example of a delegation of authority to frame major governmental policy without significant statutory guidance.

Seymour asked that for the reasons set forth above, K-TRANS should be barred from receipt of further financial assistance for mass transit facilities and equipment.

REQUEST FOR ADDITIONAL INFORMATION

By letter of January 26, 1989, UMTA requested additional information from K-TRANS. The information requested, and K-TRANS' response of March 10, 1989, are summarized as follows:

QUESTION: Why, after providing service to the University of Tennessee for many years as part of its mass transit system, is K-TRANS now providing it pursuant to the request for quotation from the University?

ANSWER: Prior to 1988, the basis for subsidy by the University to K-TRANS had been by negotiated agreement. Last year, however, following an informal proposal from a private operator, the University determined that it should be satisfied as to the appropriate payment, and decided to solicit proposals.

QUESTION: Please submit a copy of Requirements Contract UC #0505-990.

ANSWER: Document requested, dated June 23 1988, is attached.

QUESTION: Has there been a change in fares, routes or schedules since the K-TRANS began operating the service pursuant to the University's request for quotation?

ANSWER: No change has been made in fares, routes or schedules, though it has been determined to operate the service when the University is not in session.

In a supplemental response, K-TRANS commented on two matters contained in complainant's rebuttal, and provided other additional information.

First, K-TRANS stated, with regard to the assertion that all patrons had the common purpose to travel to and from points on the University campus, it should be pointed out that students may transfer to another K-TRANS route with the purchase of a transfer at the regular charge.

Second, K-TRANS noted that complainant's rebuttal contained a footnote to the effect that no transportation was provided when the University was not in session. K-TRANS referred to Exhibit "C" of its response showing the schedule for the Christmas Holiday period between December 15, 1988, and January 10, 1989.

K-TRANS further stated that bus stops signs were, and historically had been, posted and maintained on the regular campus. K-TRANS moreover maintained that while the University's request for proposals contained a schedule of desired departure times, this schedule had originally been developed by K-TRANS in consultation with the University. Finally, K-TRANS stated that in order to further illustrate the urban nature of the service in question, it was attaching a city street map showing the routes followed over the campus area.

COMMENT ON SUPPLEMENTAL RESPONSE

On March 20, 1989, Seymour provided the following comments on the supplemental information furnished by the complainant.

First, argued Seymour, the students' alleged ability to transfer to other routes did not make the campus routes part of an integrated mass transit system.

Second, stated Seymour, the operation of the service during the Christmas season did not negate the fact that the service was not mass transportation, but was dedicated exclusively to the needs of University students and personnel.

Third, Seymour contended that the posting of stop signs was irrelevant if the general public did not use the service in question.

Fourth, Seymour stated that it would be reasonable to assume that service for the University, whether mass transit or charter, would be discussed by officials of K-TRANS and the University to determine the most convenient departure times.

Fifth, Seymour conceded that the service provided by K-TRANS under contract to the University was over routes depicted on the city map supplied by K-TRANS. Finally, Seymour maintained that K-TRANS had failed to establish that it had transported even one member of the general public.

K-TRANS was required under the terms of its contract with the University, stated Seymour, to furnish documentation of fares collected and passengers carried, but had thus far failed to do so.

DISCUSSION

The essential issue in this case is whether the service provided by K-TRANS to the University is impermissible charter service or permissible mass transportation.

The complainant's argument that the service provided by K-TRANS to the University is charter service is based in large part on the definition of charter service set out at 49 CFR 604.5(e), and on the Chief Counsel's determination in Blue Grass (supra) concerning similar university campus service.

In Blue Grass, the Chief Counsel determined that the service provided by the Lexington Transit Authority (Lextran) essentially corresponded to the criteria of section 604.5(e). First, the Chief Counsel found, the service was charter service, since it was provided "under a single contract." The Chief Counsel's investigation revealed that although no written contract had been concluded between the parties, the service was operated by the grantee on terms set by the University, and the grantee was conpensated on the basis of hours of service.

Second, the Chief Counsel found that the service was operated and managed differently from the grantee's other routes, since there were no published schedules for the campus routes, and it was provided for free.

Third, the Chief Counsel found that the service had been designed to meet the transportation needs of university students and personnel, and that that though it was operated open door, only coincidentally served the needs of the needs of the general public. Balancing these factors, the Chief Counsel determined that the service was charter service.

The same type of balancing test must be applied in determining the nature of service involved in any complaint filed with UMTA, since, as the preamble to the charter regulation points out at page 11926, there is no fixed definition of charter service, and the characteristics cited by UMTA are given as examples only.

While the service provided by K-TRANS is similar to that provided by Lextran at the time of the complaint cited in Blue Grass, it has other characteristics which more easily fit the definition of mass transportation.

In contrast to Lextran, K-TRANS does publish the campus routes in its regular schedules. Moreover, K-TRANS' service to and from the married student apartments is not provided for free, but each passenger pays an individual fare. In these respects, the service conforms to the criteria for mass transportation.

At the same time, K-TRANS' service and Lextran's service as it was reconfigured following the Chief Counsel's decision in Blue Grass, share similarities which also meet UMTA's mass transit criteria. While in both cases the routes serve mainly university students and personnel, both offer at least a significant opportunity for public ridership. In Lextran's case, following the issuance of the Chief Counsel's decision, the campus service was modified to invite public ridership through the publication of regular schedules and the marking of campus stops with the Lextran logo.

The K-TRANS service affords an opportunity for public ridership through the publication of regular schedules and the posting of bus stop signs throughout the campus. Morever, as K-TRANS points out, since the University campus is located in a central part of the urban area, some of the campus route buses follow major thoroughfares and passengers using them may connect with other K-TRANS routes. Further, contrary to Seymour's assertion that the campus service does not operate during school vacation periods, K-TRANS has demonstrated that the service does operate on a modified schedule at least during the Christmas holiday season. Thus, the service does appear to be open and available to the general public.

Seymour, while not denying that the service is open door, cites K-TRANS' failure to furnish the University with documentation of fares collected or passengers carried as evidence that there is no significant public ridership on the campus routes. Although K-TRANS has not made this information available to UMTA, UMTA disagrees with Seymour that this is conclusive evidence that no member of the general public has been transported by the campus service. The agreement between K-TRANS and the University does not require that K-TRANS provide separate data on student and nonstudent riders. Thus, even though K-TRANS may be able to provide information on fares collected and passengers using this service, it does not appear that this information would be in any way helpful in determining the number of student riders versus the

number of members of the general public being transported on the campus routes.

On the other hand, both the university service originally operated by Lextran and K-TRANS' campus service meet UMTA's criteria for charter service in that they are provided under an agreement which links the cost of the service to the number of hours operated. This agreement, by allowing the University to set fares and schedules, places control of the service with a party other than the grantee. Although K-TRANS maintains that it handles other aspects of the service, such as the number of vehicles used and the routes to be followed, UMTA notes that these are merely operational details and not determinative of actual control of the service. As UMTA has stated in its "Charter Service Questions and Answers," 52 Fed. Reg. 42248, 42252 (November 3, 1987), such control of fares and schedules is the critical element in distinguishing charter service from mass transportation in the case of service to a university complex. Question 27(d) indeed states:

> "If the service is for the exclusive use of students and the university sets the fares and schedules, the service would be charter. However, such service operated by a recipient which sets fares and schedules and is open door, though it serves mainly university students, would be mass transportation."

Thus, by operating under an agreement which allows the University to control the service, K-TRANS fails to meet the criterion set in the most important part of the balancing test which UMTA uses to distinguish charter service from mass transportation in the case of campus route service.

It should be noted that following the Chief Counsel's decision in Blue Grass, Lextran modified this aspect of its service by ceasing to provide it under an agreement linking payment to hours of service, instead receiving an annual grant from the University. In a letter to Lextran dated December 27, 1988, UMTA recognized that by thereby assuming control of the campus service and by making it open to the general public, Lextran had successfully converted the service to mass transportation. UMTA noted that in so transforming the service, Lextran had provided an example for similarly situated grantees.

Should K-TRANS wish to continue providing service to the University, it must reconfigure the service to conform to UMTA's mass transportation guidelines. It should be pointed out, however, that even if K-TRANS were to operate the campus service as mass transportation it should, in accordance with UMTA's private sector policy, examine the interest and capability of the private sector in providing this service. This is especially the case since, according to the information furnished by K-TRANS, this service has been operated for several years. Under the guidelines set forth in Circular 7005.1, "Documentation of Private

Enterprise Participation Required for Sections 3 and 9 Programs" (December 5, 1986), UMTA grantees should examine each route at least every three years to determine if it could be more efficiently operated by private enterprise.

CONCLUSION AND ORDER

UMTA finds that the service provided by K-TRANS to the University service is charter service, since it is provided under an agreement with the University, which controls rates and schedules. In order to come into compliance with UMTA requirements, K-TRANS must either cease and desist from providing the service, or it must provide it in conformance with UMTA's mass transportation guidelines. K-TRANS must report to UMTA within 90 calendar days of receipt of this decision on the measures that it has taken to comply with this order.

Dated: November 29, 1989

Rita Daguillard
Attorney-Advisor

APPROVED:

Steven A. Diaz
Chief Counsel

LaFayette + Greenville Bus Owners Association Complainant	)	
v.	)	NJ-07/86-01
New Jersey Transit Corporation Respondent	)	

SUMMARY

The LaFayette + Greenville Bus Owners Association (L + G) filed this complaint with the Urban Mass Transportation Administration (UMTA) alleging that the New Jersey Transit Corporation (NJT) was unfairly treating small private bus operators in violation of Section 3(e) of the Urban Mass Transportation Act of 1964, as amended (UMT Act), with regard to the provision of mass transportation service for the Liberty Weekend Celebration. After a thorough review, UMTA finds that NJT did violate UMTA's policies concerning the involvement of the private sector in the provision of this service and we order NJT to comply with these policies in the future when similar special service is planned and provided.

COMPLAINT

On June 17, 1986, L + G wrote to UMTA complaining about the service that NJT was planning to provide for the Liberty Weekend Celebration to be held from July 3 -7, 1986. L + G complained that NJT'S treatment of small private operators in relation to their participation in the transit service for this celebration was unfair. L + G included a copy of a newspaper article that described the additional services that NJT planned to provide for the celebration.

L + G sent another letter to UMTA dated July 1, 1986, on this same issue. The letters included several pieces of correspondence between L + G and NJT. In a June 16, 1986, letter to NJT, L + G complained about the service that NJT would provide from Journal Square, the Grove Street PATH Station, and the Exchange Place PATH Station to Liberty Park. L + G states that it provides this service 365 days each year and that any such service NJT would provide will be an infringement on its rights and "unjustly deprive us of windfall profits." L + G claimed that NJT never took its capabilities into consideration and that it wants to resolve the issue before the celebration begins.

L + G included a copy of NJT's response which stated that it understands that L + G does not have the operating authority needed to provide regular route service between Journal Square and Liberty Park. Furthermore, NJT stated that it had contacted the Central Avenue IBOA which does have the needed authority, but that it was awaiting a response.

L + G responded and complained that NJT's response was sent too late to permit a resolution of the problem. L + G also reiterated its basic complaint.

RESPONSE

UMTA reviewed the materials that L + G sent and concluded that it could be viewed as a complaint that NJT had not complied with Section 3(e), 8(e) or (f) of the UMT Act and the implementing policies in the planning and prospective provision of the special service for the celebration. Since it a appeared that L + G had attempted to resolve this problem at the local level and failed, UMTA sent NJT a copy of the materials submitted by L + G on July 31, 1986, for a response due no later than 30 days from receipt.

NJT's response dated August 26, 1986, states that it did not violate the UMT Act or any other federal law, regulation or policy in its planning or provision of this service. NJT enclosed several attachments with its response that include descriptions of the planning of the service, press releases about the service and schedules of the service. NJT states that it decided to provide the service in conjunction with the New Jersey Liberty Weekend Executive Committee since the current services would be unable to meet the anticipated unprecedented level of service that would be needed.

NJT admits that L + G provides service to within 1.25 miles of Liberty Park and that the Central Avenue IBOA provides regular service directly to the Park. NJT states that it offered a portion of the special service to Central if it could provide guaranteed operable air conditioned buses. Since Central could not make this guarantee, NJT did not use Central in the provision of the service. Furthermore, NJT states that while it discussed the option of hiring private operators to provide the service that due to concerns about the quantity and quality of equipment, the decision was made not to use them.

NJT states that the planning process for this service is not part of the regular planning process in Section 8(e) or 9(f) of the UMT Act and that L + G lacks standing to file this complaint since it does not have authority to operate to the Park.

NJT states that it did use UMTA funded buses to provide the service, but that the operating costs were borne by the farebox revenues and that the workers volunteered their time. Thus, NJT views this service as a local operation except for the buses.

NJT concludes that L + G's only complaint is that NJT did not lease or hire it. NJT states that the decision which private operators should or should not be included in the provision of special service such as here should be left up to the sound discretion of the local officials. As a result, NJT finds L + G's complaint frivolous.

REBUTTAL

UMTA sent a copy of NJT's response to L + G on September 11, 1986, and provided it with 30 days from receipt to rebut the response. L + G's rebuttal is dated October 6, 1986.

In its rebuttal, L + G states that NJT's actions in regard to this service are just another example of how it bullies the private, independent carriers in Hudson County, New Jersey. L + G states that as late as July 1, 1986, it was told by an NJT employee that L + G was to be included in the provision of this service.

L + G provides a description of the service it provides and states that it serves Liberty Park, passing within 2 blocks on one route and 3 blocks on another, of the entrances. L + G states that NJT provides hardly any service during the year to the park.

The rest of L + G's rebuttal reiterates problems that it has had with NJT over the years. These issues are not relevant to the complaint at hand.

DISCUSSION

A central issue in this complaint is whether the special service that NJT planned and provided for Liberty Weekend is the type of service for which a recipient needs to follow UMTA's policies on the involvement of the private sector. NJT claims that it is not and, as a result, the complaint is frivolous.

In UMTA's October 22, 1984, "Private Enterprise Participation in the Urban Mass Transportation Program" we state that recipients should consult with the private sector by affording them the opportunity as early as possible to participate in the development of new and restructured mass transit service. In the January 24, 1986, "Guidance on Documentation of Private Enterprise Participation in Urban Mass Transportation Programs," UMTA stated that "new or restructured services" may include any or all of the following,

> establishment of a new mass transportation service; addition of a new route or routes to an applicant's or grantee's mass transportation system; a significant increase in service on an existing route in an applicant's or grantee's mass transportation system; or a change in the type or mode of service provided on a specific, regularly scheduled route in an applicant's or grantee's mass transportation system. 51 Fed. Reg. 3307

It is arguable that the special service that NJT provided for Liberty Weekend does not fit with in this definition. It was service for a limited time, designed to serve one event, and would not continue beyond the scheduled activities. Since the definition that UMTA provided appears to contemplate service of a permanent nature, the service in question would not be subject to the guidance in the policy statements.

UMTA disagrees. The service here involved the establishment of new routes and services. Although the services were offered for a limited time and for a limited purpose, the service was provided to meet an unprecedented level of need. Such service requires

advance planning and it is clear that planning did occur at least two months prior to provision based on the documents that NJT provided. NJT included a copy of the "Transportation/Traffic Control Plan Liberty Week Celebration 3 - 6 July, 1986" with its response. This report is dated May 21, 1986, and the date on some of the pages is May 12, 1986. Thus, the service was not designed in response to an immediate emergency or an unanticipated need that would have made the involvement of the private sector impossible. Therefore, UMTA concludes that this was "new or restructured service" and that NJT should have followed UMTA's policy guidance before instituting the service.

This is not to say that all service of a limited duration or purpose will automatically be "new or restructured service." UMTA will make such decisions on a case-by-case basis. In situations like this one, however, where there was time to involve the private sector, the recipient should treat the limited service as "new or restructured service."

In the October 22, 1984, policy guidance, UMTA states that a recipient should have a process in to place provide for the participation of the private sector to the maximum extent feasible. UMTA limits its review of complaints to only those that allege a procedural violation that there is no such process, that the process was not followed, or that the process does not provide for the fair resolution of complaints.

NJT has not submitted a formal private sector participation process to UMTA. UMTA has, however, accepted NJT's Private Carrier Advisory Committee (PCAC) as NJT's good faith efforts to comply with UMTA's private sector policies. The PCAC includes a process for resolving disputes between NJT and private operators.

NJT has presented no evidence that it used the PCAC in the planning or provision of the special service for Liberty Weekend or for resolving the complaint which L + G filed with NJT. While UMTA admits that NJT did consider the use of Central in the provision of this service, that consideration appears to have been done on an ad hoc basis and not the formal process that UMTA's policies envision.

UMTA acknowledges that NJT claims that L + G has no standing to complain under Section 3(e) since it does not have authority to provide service into Liberty Park. At this point, UMTA does not find that this is an important issue. That fact may be a valid reason for deciding not to include a private operator in the provision of service, but it does not absolve a recipient from the basic and preliminary steps of following its private sector process before a conclusion as to the capability of a particular provider is made.

CONCLUSION

After a thorough review of the materials submitted by the parties, UMTA concludes that NJT did not comply with UMTA's policy guidance provision of service for Liberty Weekend. Therefore, UMTA orders NJT to comply with these policies in the future and to follow its own locally developed policies and procedures whenever similar special service is planned and provided. Failure to do so may result in finding a pattern of violations that jeopardizes continued Federal funding.

Rita Daguillard
Attorney-Advisor

5/26/88

Edward J. Babbitt
Chief Counsel

5/27/88

LAFAYETTE + GREENVILLE BUS OWNERS ASSOCIATION Complainant	)	
v.	)	NJ-11/85-01
NEW JERSEY TRANSIT CORPORATION Respondent	)	

SUMMARY

In this complaint, the LaFayette + Greenville Bus Owners Association (complainant) alleges that the New Jersey Transit Corporation (respondent) is in violation of the private sector provisions in the Urban Mass Transportation Act of 1964, as amended (UMT Act), and the implementing policies. After a thorough investigation, the Urban Mass Transportation Administration (UMTA) finds that the allegations are not substantiated.

COMPLAINT

On November 13, 1985, Mr. J. Kevin Moran, complainant's president, wrote to UMTA to complain about the competition that it faces from the respondent. Complainant makes the following specific allegations. First, complainant alleges that respondent competes unfairly against it because respondent receives monies, operating subsidies, and equipment from the Federal Government, the State of New Jersey and the New York-New Jersey Port Authority.

Second, complainant alleges that there is a conflict of interest since respondent's Chairman is also the Director of the New Jersey Department of Transportation (NJDOT). As a result, complainant alleges that respondent in reality regulates the bus fare structure in New Jersey.

Third, complainant alleges that respondent has not provided it with equipment for its bus operations under the 1983 and 1984 bus allocation plans. Complainant alleges that it is due $125,000 for 1983 and $300,000 for 1984.

Fourth, complainant alleges that respondent unfairly competes with it on its bus service in the Jersey City - Bayonne corridor because respondent uses advance design buses (ADB) on this route. These are relatively new buses and complainant states that it must use buses that are at least 10 years old. Complainant argues that out of fairness respondent ought to use the same type of equipment. Complainant states that it has written to respondent on this matter. Complainant states that respondent has replied that it may use the ADB's and that complainant cannot dictate the type of buses it uses. Complainant states that it does not object to respondent's use of the ADB's elsewhere.

Fifth, complainant alleges that when it complains or makes an inquiry of respondent, NJDOT conducts an inspection of its equipment. Complainant alleges that these inspections cause a hardship. Complainant states that taking buses out of service for minor repairs inconveniences the customer because it has no spares and, thus, there are fewer buses on the line.

Sixth, complainant concludes by stating that it has asked respondent to buy it out because it can no longer compete with it. To date complainant states that no answer has been forthcoming.

RESPONSE

UMTA reviewed complainant's letter and decided to treat it as a private sector complaint. Pursuant to UMTA's complaint procedures, we forwarded a copy of complainant's letter to respondent on February 28, 1986, and provided it with 30 days from receipt to respond to the allegations. Due to administrative oversight, UMTA neglected to enclose a copy of complainant's letter and corrected the error on March 24, 1986. UMTA extended respondent's time for response to 30 days from receipt of the second letter.

Respondent replied on April 25, 1986. In general, respondent states that it has reviewed the applicable provisions in the UMT Act and the implementing policy statements and finds that it has violated no Federal law or regulation. Respondent concludes that there is no reason for UMTA to take further action on the matter.

Respondent also responds to the specific allegations that complainant makes. In response to complainant's second allegations, respondent states that its Chairman is also the Commissioner of Transportation in New Jersey because of New Jersey State Law. Respondent states that the office that sets intrastate fares for private bus carriers is the Office of Regulatory Affairs. Respondent states that while the Director of this office does report to the Commissioner, the Director is completely independent of respondent.

In response to complainant's third allegation respondent provides a summary of the equipment that complainant was told that it would receive under the allocation plans. Respondent states that complainant informed respondent on August 4, 1985, that it no longer wished that equipment. Respondent states that it is waiting for a request from complainant for replacement items.

In response to the fourth allegation, respondent provides copies of the correspondence between the parties on this issue. Respondent notes that it had offered ADBs to complainant in 1981, but that complainant refused them since it would not be able to maintain such complicated buses.

In response to the fifth allegation, respondent states that the safety inspection of buses in New Jersey is a responsibility of the Office of Regulatory Affairs within NJDOT and that its buses are subject to the same inspection as complainant's buses. Respondent provides the name of the director of this office and suggests that complainant contact him.

REBUTTAL

UMTA sent a copy of respondent's letter to complainant on May 7, 1986, and provided it with 15 days from receipt to rebut the evidence. Complainant's rebuttal is dated June 16, 1986. Since this is dated after the expiration of the 15-day rebuttal period, UMTA does not regard the letter as part of the administrative record for this complaint and has not considered the material in rendering this decision.

DISCUSSION

In "Private Enterprise Participation in the Urban Mass Transportation Program," 49 Fed. Reg. 41310, October 22, 1984, UMTA describes its private sector complaint process. This notice states that UMTA will entertain complaints,

> Only upon procedural grounds that the local planning and programming process has not established procedures for the maximum feasible participation of private providers consistent with section 8(e) and the spirit of this policy; or that local procedures were not followed; or that the local process does not provide for fair resolution of disputes.

In addition, UMTA states that we will not entertain any complaints until the complainant has attempted to resolve its problems at the local level. Therefore, UMTA has created a narrow range of issues that we will entertain as formal private sector complaints. Although there maybe many other problems that a private operator may have with an UMTA recipient, such problems will not form the basis of a complaint that UMTA will adjudicate.

In this complaint, several allegations do not fall within the three categories listed in the policy statement. These are the first, second, and sixth allegations. The first allegation is a complaint about the structure of Federal, State and local funding mechanisms for mass transportation. The second is a complaint about the structure of State law. The sixth is a complaint that respondent appears to show no interest in purchasing complainant. Since none of these are allegations that fall with the three categories listed above, UMTA will not address them in this decision. The allegations that UMTA will discuss further are, therefore, the third, fourth, and fifth.

In the third allegation, complainant alleges that it has not received equipment under respondent's bus allocation plan. Read in a light most favorable to the complainant, the third allegation can be viewed as an allegation that respondent's planning and programming process does not provide for the maximum feasible participation of the private sector because the program does not provide the equipment promised under it.

Respondent does not deny that complainant has not received the equipment that was to be provided in 1983 and 1984. Respondent, however, explains that complainant has not received any equipment because it wrote to say that it did not want the equipment originally sought and has not indicated any substitute equipment. It appears that there is not a problem with respondent's program, but rather that complainant has not followed the process involved with obtaining equipment under it. It appears that all complainant must do is contact the respondent to resolve this matter.

In the fourth allegation complainant alleges that respondent unfairly competes with it because it uses ADBs on a route they both serve. Complainant does not allege that it is unfair competition that respondent serves this route. The complaint is limited to the use of newer buses on the route. Complainant alleges that it has written respondent numerous times in an attempt to resolve this problem, but that it has had no success.

In the fifth allegation, complainant alleges that the respondent initiates retaliatory inspections of complainant's equipment whenever it complains to respondent. Read in a light most favorable to complainant, these two allegations appear to be that respondent's local process does not provide for the fair resolution of disputes.

It is important to note that the dispute that a party complains of must be something that the UMT Act or the implementing policies require or address. UMTA cannot reach beyond the limits of our authorizing legislation or implementing documents in order to control the relationships of our recipients and private enterprise. In the case of the fourth allegation, UMTA recognizes that complainant is not satisfied with the fact that respondent uses newer buses and that it must use older buses to serve basically the same pool of riders.

The use of newer equipment may attract more riders and result in higher revenues. This, however, is not a practice that the UMT Act or the implementing policies prohibit or even address. Thus, UMTA will not reach beyond these limits to address the merits of the disagreement. UMTA does note, however, that complainant did have the opportunity to obtain the same buses that respondent uses, but declined. That is a decision complainant made several years ago and with which it must live.

Complainant states that the respondent initiates retaliatory inspections of its equipment whenever it complains to respondent. The evidence presented by respondent shows, however, that respondent has no part in deciding if and when bus inspections are done. Rather, this duty lies within NJDOT's Office of Regulatory Affairs which is completely independent from respondent. Furthermore, this office inspects respondent's buses as well as complainant's buses. Therefore, UMTA finds that respondent cannot be guilty of violating the private sector protection provisions in the UMT Act or the policy statements with regard to any inspections since it has no responsibility for instituting or conducting them.

CONCLUSION

After a thorough review of the materials submitted, UMTA finds that complainant has not substantiated any violations by respondent of the private sector provisions in the UMT Act or the implementing policies. Therefore, the complaint is dismissed.

Rita Daguillard
Attorney-Advisor

4/21/88
Date

Edward J. Babbitt
Chief Counsel

6/6/88
Date

U.S. Department of Transportation
Urban Mass Transportation Administration

Headquarters

400 Seventh St., S.W.
Washington, D.C. 20590

File Copy

JUN 23 1988

Mr. Troy L. Nelson
Charter Department
Mass Transportation Authority
1401-03 South Dort Highway
Flint, Michigan 48503

Dear Mr. Nelson:

Enclosed is a letter to me from Mr. Charles A. Webb, General Counsel of the American Bus Association, accompanied by a letter to you from Mr. Thomas W. Fisher, President of Tower Bus.

The Urban Mass Transportation Administration (UMTA) is aware that, for a variety of reasons, a private operator might be unwilling or unable to perform certain charter trips. While UMTA has taken the position that an UMTA recipient, such as the Mass Transportation Authority (MTA), may perform a particular charter trip, even though the recipient has determined that there are "willing and able" private operators in its service area, there first must be an agreement to this effect between the recipient and all the private operators in the recipient's geographical area and any service provided must conform to the limitations of that agreement. In addition, the recipient's annual charter notice must have provided for this type of agreement. If it did not, the recipient must, before undertaking the charter trip in question, amend its notice to specifically refer to such an agreement. Moreover, recipients are encouraged to engage private operators in a dialogue through other means as well, such as written communications, conferences, or informal meetings.

From my review of Mr. Fisher's letter to you, it appears that there is a misunderstanding between you and Mr. Fisher about the conditions under which MTA may provide charter service. Indeed, unless the other private operators have concurred in the "agreement" MTA believes it has made with Tower Bus, MTA may not operate any charter service in its geographical area, since there is apparently at least one willing and able operator (Tower Bus) has been identified.

In summary, UMTA requests that MTA honor all the requirements of the charter service regulations, 49 C.F.R. Part 604.

Sincerely,

Edward J. Babbitt
Chief Counsel

Enclosures

cc: Charles Webb

In the matter of:

BEFORE THE URBAN MASS TRANSPORTATION ADMINISTRATION

Yellow Cab Co.
Complainant

v.

VA-03/86-01

JAUNT, Inc.
Respondent

DECISION

SUMMARY

Yellow Cab, Co. (Yellow) filed this complaint with the Urban Mass Transportation Administration (UMTA) alleging that JAUNT, Inc. (JAUNT) had not complied with the provisions in the Urban Mass Transportation Act of 1964, as amended (UMT Act) and the implementing guidance concerning the participation of private enterprise in the provision of UMTA assisted mass transportation. After a thorough review of the administrative record, UMTA finds that the local decision-maker erred in its interpretation and application of UMTA's guidance. Therefore, UMTA remands this matter to the local level for further action consistent with this decision.

COMPLAINT

Yellow's private sector complaint with JAUNT came to UMTA's attention in 1985.[1] By letter dated August 9, 1985, UMTA informed Yellow that it needed to attempt to resolve its problems with JAUNT at the local level before UMTA would become involved. Yellow's formal complaint dated March 21, 1986, acknowledges that local attempts were made but that the local process did not provide for the fair resolution of its dispute with JAUNT.

In the first part of its complaint, Yellow sets forth the chronology of events. On June 18, 1985, the University of

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1 Yellow states in various exhibits attached to its complaint that the service which is the subject of this complaint could be charter service. UMTA, however, has treated this as a complaint of non-compliance with UMTA's requirements for the participation of the private sector in the provision of mass transportation since that is how Yellow characterized its problems in the actual complaint letter. UMTA believes that the service is mass transportation since while it is provided under contract, JAUNT appears to control the service and it is not exclusive to the employees of the University The contract, Exhibit 1 to the complaint, makes this clear

Virginia (University) issued a request to bid on bus service to shuttle its employees between two branches of its hospitals. JAUNT had been providing this service since 1977, but at Yellow's request, the University agreed to put it out to bid.

Both Yellow and JAUNT responded. Yellow alleges that it bid $18.25/hour and that JAUNT bid $10.50/hour. The University selected JAUNT and Yellow appealed the decision to the Charlottesville-Albemarle Metropolitan Planning Organization (MPO) alleging non-compliance with UMTA's guidelines on the participation of the private sector in the provision of mass transportation service.

The MPO did not have a process for resolving private sector disputes, but Yellow states that it agreed with JAUNT to a three member arbitration panel that would issue a non-binding decision. The panel met and issued a decision on December 2, 1985, finding that JAUNT had not violated UMTA's guidelines. The MPO adopted a resolution approving this decision on December 12, 1985. Yellow states that there was no appeals process for this decision, but it requested the MPO to reconsider the decision on January 17, 1986. Yellow states that on January 30, 1986, it appeared before the MPO's technical committee requesting that it recommend to the MPO that the MPO should reconsider approval of the decision. The request was denied. Yellow asked the MPO to reconsider the decision on March 19, 1986, and this request was also denied.

Yellow states that it must now seek UMTA involvement. Yellow states that it understands that UMTA will not review the substance of the local decision, but that it needs UMTA's assistance to establish a local procedure that protects private operators when disputes arise as a result of the application of UMTA's guidance.

Yellow states that there are several bases for its appeal to UMTA. First, Yellow states that an appeals process is necessary due to various factors including the fact that the arbitration was non-binding, that the panel took a narrow approach in its analysis of whether it is appropriate for JAUNT to provide the shuttle service, and the panel's failure to address several issues raised by Yellow.

Second, Yellow states that regardless of whether it is appropriate for JAUNT to provide the service, the panel erred in its failure to adequately consider the issue of true comparison of costs. Yellow raised this issue in the documents it presented to the panel arguing that JAUNT's bid of $10.50/hour does not represent its true cost for providing the service.

Yellow quotes from the decision to support its position. The decision states that the concept of true comparison of costs is difficult to analyze and such a comparison would be difficult to do particularly since it did not know how Yellow calculated its costs. Yellow states that the panel never asked for this information and that Yellow did not furnish this information

itself since the UMTA guidance is directed to determining the true cost of recipients' service. Moreover, Yellow states that it believes that it introduced enough evidence to show that its cost was lower than JAUNT's subsidized cost and therefore established that it could provide the service more efficiently than JAUNT.

Third, Yellow argues that the panel erred by stating that in fact the issue of true comparison of costs is "somewhat moot" since Yellow failed to establish that the shuttle service is not "new or significantly restructured." Yellow argues that the service does meet this threshold test under UMTA guidance since the service described in the request for bids completely changed the route and doubled the distance.

Yellow states that regardless of whether the service is new or restructured, the UMTA guidance makes clear that true comparison of costs must be calculated when the private sector maintains that it can provide service more efficiently. Yellow refers to 49 Fed. Reg. 41312 to support this position and to 51 Fed. Reg. 3306 - 3308 to confirm this contention.

Yellow states that JAUNT admitted to the panel that its bid of $10.50/hour had nothing to do with the cost of the service. It is alleged that JAUNT maintains that this figure represents the fare. Yellow quotes from the testimony by Linda Wilson, JAUNT's Executive Director, to the panel to support this argument.

Yellow also quotes from JAUNT's pamphlet, Advantages to Human Service Agencies of Using the Consolidated JAUNT System For Transportation Needs (May 1985). This document states that one of the cost savings that social service agencies realize by contracting with JAUNT is that the "Users pay only half of the cost of transportation" since half of JAUNT's operating costs are subsidized by State, local and Federal assistance. Yellow infers from this that JAUNT's real costs are approximately $20.00/hour. Yellow states that this inference is supported by JAUNT's statement of monthly performance indicators for the first 10 months of fiscal year 84-85 which shows JAUNT's total costs to be $19.31/hour.

Yellow states that JAUNT disputed this $19.31 figure and stated to the panel that JAUNT had never figured what its indirect costs would be. Yellow refers to Ms. Wilson's testimony when she states that she would guess that the adding of the indirect costs of operating its shuttle service would bring the cost to $15.00 or $16.00/hour.

Yellow states that it was distressed to learn this since on April 18, 1984, JAUNT had prepared a cost analysis of the shuttle for the University and included indirect costs for this service. Yellow states that when the indirect costs listed in this analysis are added to the FY 84-85 direct costs the total cost would be $26.08/hour which is higher than Yellow's bid of $18.25/hour. Yellow states that JAUNT's failure to disclose this information to

the panel and its misrepresentation that no analysis had been made, prevented the panel from reaching a decision on the true facts.

Yellow also states that the $26.08/hour figure is significant since the service described in the request for bids was twice as long as that operated in FY 84-85. Yellow presumes that if JAUNT's bid had remotely reflected its true costs that it would have to have been increased from this figure. Instead, JAUNT bid the same price for FY 85-86 as it had in FY 84-85.

Yellow describes in detail what it considers to be irregularities in the bidding process. Yellow states that there were discussions between JAUNT and the University during the biding process and that the service which JAUNT provides under the resulting contract does not reflect the service that was described in the request for bids.

Yellow concludes by stating that part of the problem involved with this action is the MPO's uncertainty in how to implement UMTA's guidance. In addition, Yellow states that the MPO is predisposed to favor JAUNT due to its length in providing service in the Charlottesville area. Yellow states that this position makes it difficult for private carriers to become involved.

RESPONSE

UMTA reviewed Yellow's letter and determined that the service appears to be mass transportation, but that there was no evidence of how JAUNT attempted to provide for the participation of the private sector to the maximum extent feasible. Since there appeared to have been an attempt to resolve the matter at the local level, UMTA stated that it was now the appropriate time for us to investigate the complaint. On April 23, 1986, UMTA sent JAUNT a copy of the materials that Yellow submitted and provided JAUNT with 30 days from recipient to respond.

JAUNT's response is dated May 2, 1986. JAUNT argues that there is a local process for resolving disputes and the process used in this complaint was in fact suggested by Yellow's attorney. JAUNT states that the MPO formally adopted this process to handle all future disputes on April 3, 1986. JAUNT questions whether Yellow accepts this process only when it decides in favor of the private operator.

JAUNT states that it has been providing the hospital shuttle service since 1977 and that it is part of a consolidated human service/public specialized transportation system. JAUNT states that the fee charged for this service is based on recovering all direct operating costs and that indirect costs are funded by local, State and UMTA funds.

JAUNT states that none of the participants in the coordinated system bid for services. They are, instead, public agencies being served by another public agency. JAUNT states that if private operators wished to participate they would have difficulties. As an example, JAUNT states that since it only receives subsidies to operate and administer its service, that these are the only funds it could pass along to a private operator through a subcontract. JAUNT states, however, that it would need to retain these monies since it would still have administrative costs with the subcontract.

JAUNT describes the series of events that have led up to this controversy. First, JAUNT states that in FY 85 no private operator expressed any desire to provide the shuttle service even though one of Yellow's employees was serving on JAUNT's board and on the MPO's technical committee.

Second, JAUNT states that Yellow went to the University and told it that it had to bid out the shuttle service. The University complied, but that the bid requests only the fee charged for the service. JAUNT states that as part of its transportation improvement process (TIP), it determined that the University qualified for JAUNT's subsidized fee. JAUNT states that if the University had not qualified for this rate, it would not have bid on the service since JAUNT only serves approved agencies.

Third, JAUNT states that it would investigate subcontracting to Yellow, but that it understands that Yellow is not interested in subcontracting for the shuttle.

Fourth, JAUNT is unclear what remedy Yellow seeks. JAUNT states that a remedy could include the opportunity to subcontract or require JAUNT to bid its full costs for the shuttle service.

Finally, JAUNT describes the activities it is doing to involve the private sector. First, JAUNT has developed an agreement to begin subcontracting demand-responsive urban public transportation to taxicabs. There are problems with insurance coverage in this effort that it is attempting to resolve. These same problems inhibit JAUNT's ability to subcontract out the shuttle service. Second, JAUNT has private sector representation on its board. Third, JAUNT will engage a consultant to design a complete cost allocation plan prior to the approval of the 1988 TIP. Fourth, JAUNT had private sector participation in its recent revision of its policies, procedures and long range plans .

REBUTTAL

UMTA sent a copy of JAUNT's response to Yellow on May 7, 1986, and provided it with 30 days from receipt to rebut JAUNT's response. On June 4, 1986, Yellow wrote to UMTA to request a copy of UMTA's decision in Raleigh Transportation Services v. City of Raleigh,

North Carolina and Capital Area Transit System, and an extension until June 23, 1986.[2] UMTA sent the requested materials and granted the extension by letter dated June 10, 1986. Yellow's rebuttal is dated June 19, 1986.

Yellow states that it had expressed an interest in and questioned JAUNT's role in providing the shuttle service since 1982. Yellow states that it never had the opportunity to become involved in this service until the University put the service out to bid in June 1985. Before Yellow responded to this request, it sent a copy of UMTA's guidelines to JAUNT so that it could bid its fully allocated costs for the service.

Yellow reiterates its allegations concerning the panel's failure to adequately address the issue of true comparison of costs. Yellow also reiterates JAUNT's failure to inform the panel of the analysis of indirect costs that it had done in 1984.

Yellow states that this failure to disclose information and other actions taken by JAUNT evidence its lack of good faith in this controversy. Yellow states that this attitude is evident in a newspaper article written by Ms. Wilson.

Yellow closes by requesting that UMTA impose all available sanctions against JAUNT including the withholding of future funding until JAUNT complies with UMTA's private sector guidance and redresses the loss sustained by Yellow as a consequence of JAUNT's failure to comply with those guidelines in this matter.

DISCUSSION

In its complaint, Yellow raises several issues, some of which are peripheral to the central issue. We will dispose of the peripheral issues first.

First, Yellow describes irregularities with the bidding process. Yellow points to discussions between JAUNT and the University and differences between the service as described in the request for bids and the actual service. While UMTA is concerned with possible problems in the bidding procedures, our concerns are limited to situations where an UMTA recipient is conducting the procurement, and not where the recipient is bidding on service sought by a third party. It is UMTA's position that the third party, in this case the University, is in the best position to determine compliance with the procurement procedures that it must follow and that any disputes arising from procurement procedures should be resolved in a local forum. Therefore, UMTA is

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2 UMTA's letter of April 23, 1986, to JAUNT cited this decision as the basis for initially determining that the shuttle service is mass transportation.

dismissing the allegations with respect to JAUNT's bidding irregularities.

Second, Yellow states that its main concern with the local resolution process that was involved in this matter is that it did not provide for an appeals process. Since Yellow finds that the panel took a narrow approach in its analysis of whether it is appropriate for JAUNT to provide the shuttle service and did not properly apply the guidance on fully allocated costs that an appeals process is critical.

UMTA disagrees. The guidance which UMTA has issued on private sector participation has never required a local appeals process to be part of the local dispute resolution process. Indeed, the most recent guidance provided in UMTA Circular 7005.1, "Documentation of Private Enterprise Participation Required for Sections 3 and 9 Programs" (December 5, 1986), states, "Once a Complainant has exhausted his local dispute resolution process, he should send his complaint to: [the UMTA] Chief Counsel."

The implication of this language is that a local appeals process is not required since UMTA sees its role as the party to whom appeals of that local process are made. While a local dispute resolution process many provide for local avenues of appeal, UMTA does not require one. See, e.g. Durango Transportation, Inc. v. City of Durango, CO-09/85-01, February 24, 1987 (the local process provided for several levels of appeal). As result, the absence of such a component does not invalidate the local process nor is it the basis for UMTA to entertain a complaint.

UMTA now turns to the central issue in this complaint. Yellow correctly states UMTA's position that we will not review the substance of local decisions regarding service or the appropriate service provider. UMTA articulated this position in the October 22, 1984, guidance on "Private Enterprise Participation in the Urban Mass Transportation Program," [49 Fed. Reg. 41310] and restated it in Circular 7005.1. This statement should not be interpreted to mean that UMTA will never review the substance of a local decision. Rather, UMTA's position is that we will not review the substance of a local decision when the decision is reasonable and correctly applies our guidance. If UMTA were to accept every local decision simply because a local process was followed, but not ensure that our guidance were correctly articulated and applied, we would license arbitrary, unreasonable, and capricious decisions.

In this case, UMTA finds that the decision which the panel issued and which the MPO adopted does not correctly reflect UMTA's guidance and is, therefore, not acceptable to UMTA. There are several reasons for this, but before these are stated, UMTA will summarize the decision.

The decision, dated November 25, 1985, first thanks the parties for their participation and the opportunity to consider the

issues. The decision then turns to the specific two questions that Yellow raised in the materials that it submitted to the panel. First, the decision finds that JAUNT may provide service like the hospital shuttle service since there is nothing in the record to show that it is inappropriate for JAUNT to provide the service.

Second, the decision addresses the issue of the full allocation of costs as stated in UMTA's 1984 guidance. The decision states that JAUNT's bid does not take into consideration all of its costs since it does not include indirect costs. The decision, however, states that the concept of true allocation of costs is a difficult concept to deal with for several reasons including the absence of a profit factor for the UMTA recipient and the lack of knowledge of how Yellow arrived at its bid of $18.25/hour.

The decision addresses this quandary and finds that JAUNT's true cost is higher that the $10.50 it bid, but that the panel could not provide a definitive answer to Yellow's question "since the manner in which the Yellow Cab bid was calculated was unknown to the panel." p. 3.

The decision, however, states that the matter of comparing costs was "somewhat moot" since the panel did not conclude that the service was "new or significantly restructured." The decision states that this is the threshold that service must meet, under UMTA's guidance, to require a comparison of the full allocation of costs. While the decision states that the panel reached this conclusion because the service as provided by JAUNT under the contract is the same as it was providing previously for the University, it states that the panel would have reached the same conclusion if the route had been changed in accordance with the request for bids.

Next, the decision states that the UMTA guidance and policies involved in this matter apply to UMTA recipients and not to third parties like the University. The panel did not permit "such technicalities" to prevent it from responding to Yellow's question.

The panel concludes by stating that the MPO should give serious consideration to the involvement of the private sector in the provision of mass transportation in the area, but that the lack of clarity and nebulous concepts in UMTA's guidance do not provide a useful service. The decision closes with the request that the parties bring these views to UMTA's attention.

UMTA finds that this decision is unacceptable for several reasons. First, the panel finds that the service is not new or significantly restructured so as to trigger the comparison of fully allocated costs between the various proposers. The decision states that the panel reached this conclusion because the service JAUNT provides under the contract is the same as it provided before. In addition, the panel finds that even if the service

were provided as described in the request for bids that it would not be new or significantly restructured.

UMTA disagrees. First, it is the service as described in the request for bids that must be compared with existing service in order to make a decision whether it is new or restructured. The panel erred in using the service as provided by JAUNT under the contract as the benchmark. The service described in the request for bids would follow a different route than that which JAUNT was providing and would have doubled the length of the route. This change is clearly a significant restructuring of an existing route and requires the comparison of fully allocated costs when making decisions between competing service providers.

UMTA would have reached this same conclusion even if the service described in the request for bids had been the same as JAUNT was providing. In a contract situation, as here, UMTA believes that any rebidding for existing service is new or restructured service.

The second error that UMTA finds the panel made is to not compare the fully allocated costs of JAUNT with the bid made by Yellow. While UMTA does not dispute the panel's conclusion that the UMTA guidance is directed at the recipients and not third parties, UMTA holds that when a recipient bids on service requested by third parties, the recipient must bid its fully allocated costs if the provision of that service will involve the use of UMTA assistance.

In this case, JAUNT only bid its fare excluding any allocation of the indirect administrative costs associated with performing under the contract. The panel recognized that it could make a guess, based on JAUNT's testimony, that adding the indirect costs would increase the cost to more than the $10.50/hour which JAUNT had bid. The panel concludes that despite this, it could not provide a definitive answer since it did not have Yellow's calculations.

UMTA's guidance does not require that all parties to a bid submit their fully allocated costs. It is only the public agencies and non-profit agencies whose bids must reflect their fully allocated costs. UMTA's guidance states that in such circumstances, "Subsidies provided to public carriers, including operating subsidies, capital grants and the use of public facilities should be reflected in the cost comparisons." 49 Fed. Reg. at 41312. Thus, UMTA does not intend that a private operator fully allocate it costs or bid this figure in a procurement. UMTA intends that the price bid by the private operator is the figure against which a recipient's or a non-profit agency's fully allocated cost is compared. In this case, the panel did not follow this approach and UMTA cannot permit this error to stand.

It is important to note that UMTA does not require that the service be performed by the low bidder. UMTA has always maintained that cost is one of the factors that a decision maker should consider, but we have never stated nor do we support the

position that it is the only factor to consider. UMTA Circular 7005.1 makes this clear when it states in Paragraph 5.d. that the local process for the consideration of the private sector must include, "The use of costs [defined in the circular as fully allocated costs] as a factor in the private/public decision." [Emphasis added.] Thus, price is one of many factors that should be considered before any decision is made on the appropriate service provider.

CONCLUSION

After a thorough investigation of the record, UMTA finds that the decision recommended by the arbitration panel and adopted by the MPO is not consistent with UMTA's guidance and cannot be accepted by UMTA as the end product of a local resolution process. Therefore, UMTA remands this matter to the MPO for further action consistent with it process adopted April 3, 1986, this decision, and UMTA's guidance. UMTA expects that the parties will act as expeditiously as possible to comply with this order.

UMTA reminds the parties that if the local decision is that JAUNT should not provide the service, but the University decides that it wants JAUNT as the provider and JAUNT actually provides the service, then the service will not be eligible for any UMTA assistance and must be provided using only locally funded equipment, facilities and operating assistance. Any further UMTA action in this complaint will be based on appeals, if any, of the decision on remand.

Rita Daguillard
Attorney-Advisor

Date

Edward J. Babbitt
Chief Counsel

6/30/88
Date

U.S. Department of Transportation
Urban Mass Transportation Administration

The Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

JUL 6 1988

Dear Colleague:

The anniversary of the effective date of the Urban Mass Transportation Administration's (UMTA) charter service regulation, 49 C.F.R. Part 604, has recently passed. UMTA has been pleased with the cooperation of the many UMTA recipients that have implemented this regulation appropriately, and that have responded in a positive manner with the private charter bus industry.

Because the time is near when many recipients that wish to provide charter service to accommodate community needs must publish new annual notices, UMTA would like to direct your attention to the following matters:

Defective Notices

Problems with notices have frequently arisen when recipients have described the types of equipment they intend to use, and suggested that a private provider must offer similar equipment to be considered willing and able. A recipient's 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, by virtue of the possession of at least one bus or van, to do so, and (2) submission of documents showing that the private operator possesses the requisite legal authority. Regardless of how the recipient describes its own service, the recipient must make it clear in the notice that private operators are not required to respond in similar detail.

UMTA is aware that for a variety of reasons a private operator might be unwilling or unable to perform certain charter trips. UMTA believes that a recipient may make the "willing and able" process more effective by expanding the content of its charter notice to include information which would be helpful to the private operator in deciding whether to respond. Thus, in addition to the information required by 49 C.F.R. § 604.11(c), i.e., days, times of day, geographic area, and category of revenue vehicle to be used, a recipient may include in its notice descriptions of destination, trip purpose, or clientele to be served. As long as the notice does not discourage a response from a person who meets the minimum criteria for a "willing and able" operator, a recipient has flexibility in using descriptions which allow private operators to decide whether they desire to perform a particular trip.

In addition, if the recipient's annual charter notice has provided for such an agreement, an UMTA recipient may perform a particular charter trip, even though it has been determined that there are "willing and able" private operators in its service area, when there is an agreement to this effect between the recipient and the private operators.

In addition to this formal notice process, recipients are encouraged to engage private operators in a dialogue through other means as well, such as written communications, conferences, or informal meetings. A recipient may also provide in its notice a telephone number which a private operator may call to obtain further information on the proposed service.

For further information pertaining to requirements for charter notices, your attention is directed to Questions and Answers Numbers 2 through 18 of UMTA's Charter Service Questions and Answers, 52 Fed. Reg. 42242 et seq., November 3, 1987.

Special Service

UMTA considers "special service" to be a type of "mass transportation," rather than "charter service." Among the types of service that qualify as "special service" are service exclusively for elderly and handicapped persons and service provided for workers who live in the inner city, but work in the suburbs. However, these types of special service should not be confused with charter service for non-profit or other similar groups. See preamble to the Charter Service Regulation, 52 Fed. Reg. 11920, April 13, 1987, and Question and Answer Number 44 of UMTA's Charter Service Questions and Answers, 52 Fed. Reg. 42242 et seq., November 3, 1987, for further discussion. If you have any questions about whether the special service you intend to offer qualifies as mass transportation, please contact the appropriate UMTA Regional Manager.

Special Events

A recipient need not announce in the notice its intention to seek a special events exception; nevertheless, it may be useful for recipients to use the notice as a means to determine to what extent private operators are able to provide service to accommodate a particular special event. See Question and Answer Number 23 of UMTA's Charter Service Questions and Answers, 52 Fed. Reg. 42242 et seq., November 3, 1987, for further discussion.

Proposed Amendment To The Regulation

I also call your attention to UMTA's recent issuance of a notice of proposed rulemaking (NPRM) containing proposed amendments to the charter service regulation, 53 Fed. Reg. 18964 et seq., May 25, 1988. In response to congressional guidance, UMTA is undertaking a rulemaking to consider an amendment to its charter regulation that would allow nonprofit social service agencies with a need for affordable or handicapped-accessible equipment to seek bids from public transit authorities. The NPRM also addresses whether an exemption to those public transit authorities which purchased charter rights entirely with non-Federal funds prior to enactment of the Urban Mass Transportation Act of 1964, as amended, should be permitted. UMTA held a hearing on this proposed amendment on June 20, 1988, in Washington, D.C., and will hold further hearings on June 29, 1988, in Kansas City, Missouri; on July 15, 1988, in Cincinnati, Ohio; and on July 20, 1988, in San Francisco, California. Please see the UMTA notice at 53 Fed. Reg. 20660 et seq., June 6, 1988, for more information on these hearings. UMTA welcomes your participation in this rulemaking.

Again, UMTA wishes to express its appreciation for the fine cooperation of many recipients in adhering to the requirements of the charter service regulation.

Sincerely,

Alfred A. DelliBovi

Alfred A. DelliBovi

SYRACUSE & OSWEGO MOTOR LINES, INC.
Complainant
v.
CENTRAL NEW YORK REGIONAL TRANSPORTATION AUTHORITY,
Respondent

NY-05/86-01

SUMMARY

Syracuse & Oswego Motor Lines, Inc. (S&O), filed this complaint with the Urban Mass Transportation Administration (UMTA), alleging that the Central New York Regional Transportation Authority (Centro) had failed to comply with the provisions of the Urban Mass Transportation Act of 1964, as amended (UMT Act), and the implementing guidance concerning private enterprise involvement in the provision of mass transportation. The complaint specifically alleged that Centro was improperly providing shuttle service between Manley Field House and Crouse-Irving Memorial Hospital (the Hospital). After a thorough investigation of the materials submitted by the parties, UMTA finds that the service in question is charter service, and is therefore not subject to UMTA's private sector guidelines. However, UMTA's charter service regulation, 49 CFR Part 604, prohibits grantees from providing charter service when there is a willing and able private operator. Centro has determined that there is at least one willing and able private operator in its service area. Therefore, assuming that the service is being operated in essentially the same manner described in the parties' original submissions, Centro should therefore cease and desist providing this service immediately.

COMPLAINT

S&O filed this complaint with UMTA on April 17, 1986. In its complaint, S&O stated that it had been negotiating with the Hospital to operate their shuttle service between Manley Field House and the Hospital. According to S&O, Centro had operated this service for the price of $450.00 per day during the previous year. S&O claimed that Centro, upon finding that S&O was to receive this contract based on a lower price, cut its price by 25 percent to $342.00 in order to keep the contract. S&O indicated that Centro was providing the service for a price that was below its operating cost, thereby using its Federal transportation assistance to compete unfairly with a private operator.

S&O stated that the local municipal planning organization (MPO) had no procedures for 1) judging private sector complaints or, 2) making public/private cost analyses. It therefore requested that UMTA take the necessary steps to have the local MPO conform to UMTA's private sector policy.

RESPONSE

UMTA reviewed S&O's letter and determined that it should be treated as a formal complaint under Sections 3e/8e of the UMT Act. On June 19, 1986, UMTA forwarded a copy of the complaint to Centro and provided Centro with 30 days to respond.

Centro's response is dated June 8, 1986. Centro states that the service it provides to the Hospital is not subject to UMTA's private sector guidelines. First, Centro explains, the service is described in two annual agreements between Centro and the Hospital. These agreements, states Centro, show that the service provided during the second annual term was identical to that provided during the first annual term. Consequently, Centro contends, there is no "new or restructured service" which would trigger UMTA's private sector guidelines.

Second, Centro maintains, the service was solicited by the Hospital, which accepted Centro's bid, even though it was higher than S&O's. Thus, Centro implies, when an outside party selects the service provided, the public operator has no control over the selection process, and cannot be held responsible for following the private sector guidelines.

Centro suggests that UMTA make a preliminary determination on the issue of whether service provided on an identical basis during successive terms to a private party which has solicited it, should be governed by UMTA's private sector guidelines. Centro states that it considers the guidelines inapplicable to such service, and urges UMTA to dismiss the complaint.

REBUTTAL

UMTA forwarded a copy of Centro's response to S&O on March 22, 1988, and provided S&O with 30 days to submit a rebuttal. S&O's rebuttal, dated March 31, 1988, contests the two main points raised by Centro. First, S&O denies that Centro's shuttle service during the second annual term of the agreement was not the type of service which triggers UMTA's private sector guidelines. S&O states that under these guidelines, existing service must be periodically reviewed to determine if it can be provided more efficiently without public involvement. According to S&O, a contract renewal is the ideal time to perform such a review. S&O moreover maintains that a true comparison of costs cannot be made between service providers without the privatization guidelines. Thus, S&O indicates, the guidelines should apply whenever service is put out for bid.

Second, S&O refutes Centro's argument that because the service was solicited by a private party, it falls outside the privatization guidelines. A major policy objective of these guidelines, states S&O, is to promote greater reliance on the private sector in the provision of mass transit services. Allowing a third party to

select a service provider while not requiring the public agency involved to follow the privatization guidelines, S&O argues, permits such public agency to circumvent UMTA's private sector requirements. Accordingly, says S&O, the private sector guidelines should apply to Centro's shuttle service for the Hospital.

S&O also raises the argument that the shuttle service is charter service, since it meets all of definitional requirements of Section 604.5(e) of UMTA's charter regulation. S&O claims that the service is provided to a group of persons pursuant to a common purpose, since it is used to transport Hospital employees from the parking lot to the Hospital. These employees moreover have exclusive use of the vehicle, according to S&O, since the general public has no need for this service. S&O moreover states that the service is under a single contract, to the Hospital, at a fixed price, which changes on the basis of the level of service provided. Finally, S&O says, the itinerary for the service is specified in advance by the Hospital, which has complete policy control over this service.

The crux of Centro's counter argument, S&O states, is that the service is not charter since it is "open to the public." S&O contends that even if the service were run on a route that could be used by the general public, there are no published schedules, maps, or any other means by which the public could learn about the service. S&O consequently states that it is filing a charter complaint in reference to this service.

DISCUSSION

On the basis of the allegations originally made by the Complainant, UMTA decided to treat the matter as a formal complaint under Sections 3e/8e of the UMT Act, and UMTA's private sector policy. However, later allegations and the Respondent's reply to them, raise the more essential issue of whether the service in question is mass transit or charter service. [1]

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1 (UMTA is aware that nearly two years have elapsed between the filing of the original complaint and the submission of the complainant's rebuttal. Therefore, UMTA bases its characterization of the Hospital shuttle service on the assumption that the service is operated in essentially the same manner described in the original complaint and response, and has undergone no significant modification in the intervening period.)

Since, as the Complainant points out, the goal of UMTA's private sector policy is to "promote greater reliance on the private sector in the provision of mass transportation services," [2] above-cited provisions apply only to a grantee's mass transit services. Charter service, on the other hand, must be examined in the context of UMTA's charter regulation, 49 CFR Part 604. [3]

49 CFR 604.5(e) describes charter service as:

> transportation using buses or vans, or facilities funded under the Acts, of a group of persons who pursuant to a common purpose, under single contract, at a fixed charge ... for the vehicle or service, have acquired use of the vehicle or service to travel together under an itinerary specified in advance or modified after having left the place of origin.

The definition of mass transit is summarized in the preamble to the regulation, as follows:

> 1 - it is under the control of the grantee;
> 2 - it is designed to benefit the public at large;
> 3 - it is open door. [4]

These characteristics can be measured against Centro's shuttle service to determine whether it is mass transit or charter.

First, when determining whether a particular service is under the control of the grantee, UMTA looks at whether he grantee sets the rates, fares, and schedules. In this case, it appears to be the Hospital, and not the Respondent, which is responsible for determining how the service operates. According to the Respondent's own statement, "In this case a private hospital and not the Respondent solicited service for which it, the hospital paid for." Since the hospital requested the service, and apparently sets the fare at which it operates, it presumably

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2 {"Private Enterprise Participation in the Urban Mass Transportation Program," 49 Fed. Reg. 41311, October 22, 1984.}

3 {The charter regulation in effect at the time of this complaint was superseded by a new regulation, which went into effect on May 13, 1987. The former regulation allowed grantees to provide charter which was "incidental" to, i.e., did not detract from or interfere with, a grantee's regular mass transit services. Under the new regulation, recipients of UMTA funds may not provide charter service if there is a private operator willing and able to provide the service.}

4 {52 Federal Register 11920, April 13, 1987.}

controls the other aspects of the service as well. As such, the service cannot be said to be under the control of the grantee.

Second, the service is obviously not designed to benefit the public at large, but rather to serve the needs of a particular segment, namely employees travelling between a private parking lot and their jobs at the Hospital. It is therefore intended to meet the needs of a small, specific group, and not the general community.

Third, while neither the Complainant nor the Respondent gives a detailed description of how the service operates, both state that it is provided under contract to the Hospital. Considering the fact that the Hospital commissioned and pays for the service, it is highly unlikely that its aim was to open it up to the general public. Since the shuttle is restricted to a particular group, then, and anyone wishing to board it is not allowed to do so, it does not qualify as open door service.

Therefore, assuming that the Hospital shuttle service is being operated in essentially the same manner described in the original complaint and response, UMTA concludes that it is not mass transit, but rather charter service. Thus, though S&O originally filed this complaint under Sections 3e/8e of the UMT Act, and the implementing guidelines, these provisions are inapplicable in this instance, since they apply only to a grantee's mass transportation services. The provision applicable to this matter is Section 604.9 of UMTA's charter regulation, which states that a recipient of UMTA funds may not provide charter service if it has determined that there is a willing and able private operator in its service area. It is UMTA's understanding that Centro has made this determination. Centro's provision of service between Manley Field House and Crouse-Irving Memorial Hospital is therefore in violation of UMTA's charter regulation.

CONCLUSION

Assuming that the shuttle service is being operated in essentially the same manner described in the original complaint and response, UMTA concludes that it is charter service, as defined by UMTA's charter regulation, 49 CFR Part 604. Therefore, it is not subject to UMTA's private sector guidelines, which apply to a grantee's

mass transit services. Centro's provision of the service is, however, in violation of Section 604.9 of the charter regulation, which prohibits grantees from providing charter service when there is a willing and able private operator, except under one of the exceptions to the regulation. Centro should therefore cease and desist providing this service immediately.

Rita Daguillard
Attorney-Advisor

6/30/88
Date

Edward J. Babbitt
Chief Counsel

7/6/88
Date

File Chron VCC-30
Chron

U.S. Department of Transportation
Urban Mass Transportation Administration

Headquarters

400 Seventh St., S.W.
Washington, D.C. 20590

AUG 17 1988

Barry M. Shulman, Esq.
Scolaro, Shulman, Cohen,
Lawler & Burstein, P.C.
90 Presidential Plaza
Syracuse, New York 13202

Re: NY/CENTRO 88-05-02

Dear Mr. Shulman:

This is in response to your letter of July 11, 1988, in which you inquired about the reference to printed schedules as being critical to the determination of whether service is classified as mass transit or charter.

The definition of "mass transportation" set forth at section 12(c)(6) of the Urban Mass Transportation Act of 1964, as amended (UMT Act), 49 U.S.C. Section 1608(c)(6) provides as follows:

> the term 'mass transportation' means transportation by bus, rail, or other conveyance, either publicly or privately owned, which provides to the public general or special service (but not including school buses or charter or sightseeing service) on a regular and continuing basis. [emphasis supplied]

It is the view of the Urban Mass Transportation Administration (UMTA) that, in general, a grantee best demonstrates that a service will be performed on a regular and continuing basis by including that service on its regular printed schedules.

UMTA recognizes that the Charter Service Regulation itself did not stress the importance of regularly-printed schedules as a criteria for establishing that service constitutes mass transportation. Since the UMT Act defines "mass transportation," UMTA did not create a new definition of "mass transportation" for its Charter Service Regulation. However, the preamble to the regulation does state, in several places, the necessity that service to be "regular and continuing" before it may qualify as mass transportation. See preamble to the Charter Service Regulation, 52 Fed. Reg. 11919 and 11920, April 13, 1987. In addition, the preamble emphasizes that, for service to qualify as mass transportation, the recipient (rather than the customer) must

establish the routes and schedules to be followed. A recipient best demonstrates that it (rather than the customer) has established a particular route and schedule by including the route and schedule in its regularly-printed schedules. Provision of service that deviates from the recipient's printed routes and schedules does not, in all cases, disqualify such service as "mass transportation." Nevertheless, a recipient might easily circumvent the restrictions of the Charter Service Regulation, if the recipient could merely adopt those routes and schedules desired by particular customers without first printing those routes and schedules, particularly if the desired service were sporadic or infrequent.

Although UMTA's Charter Service Questions and Answers, 52 Fed. Reg. 42248 et seq., November 3, 1988, do not expressly mandate regularly-printed routes and schedules, the importance of regularly-printed routes and schedules is alluded to in the reference to "regularly scheduled" service in Question 27.c. Moreover, the Answer to Question 39 states that, "UMTA would be suspicious or concerned about incidents in which recipients operate service which, though it conforms to the above criteria [for sightseeing service], is without pre-arranged schedules and is specifically designed to accommodate the desires or a particular group."

Therefore, UMTA is pleased that Centro will include its shuttle service for the New York State Fair in its printed schedules of service. In addition, UMTA appreciates the efforts Centro is making to privitize this and other service.

Sincerely,

Edward J. Babbitt

Edward J. Babbitt
Chief Counsel

cc: Mr. Russell Ferdinand

UCC-30
Chron

U.S. Department of Transportation
Urban Mass Transportation Administration

The Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

AUG 18 1988

Mr. Patrick L. Hamric
General Manager
Lexington Transit Authority
109 Loudon Avenue
Lexington, Kentucky 40508

Re: Blue Grass Tours & Charter v. Lexington Transit, KY-08-08/01

Dear Mr. Hamric:

I am writing in reference to your appeal of the decision of the Urban Mass Transportation Administration's (UMTA) Chief Counsel in the above-referenced matter. In his decision, the Chief Counsel found that the service provided by the Lexington Transit Authority (Lextran) to the University of Kentucky was impermissible charter service, in violation of UMTA's charter regulation, 49 CFR Part 604. You state that Lextran is in compliance with the charter regulation, and list a number of areas you feel that UMTA should take into account in reconsidering its decision.

First, you dispute the Chief Counsel's finding that "the service complained of runs at the behest of the University, which dictates locations and schedules." You state that the University and Lextran mutually agree on the routes and schedules. This practice, you point out, is used throughout the country with major employers, schools of all types, hospitals, and retail centers. Moreover, you maintain, while schedules for the service may change according to need, the routes have remained virtually the same for several years.

UMTA agrees that the provision of service by a grantee to a university complex may be mass transit. See Q&A 27(d) of UMTA's "Charter Service Questions and Answers," 52 Fed. Reg. 42248, 42252, November 3, 1987. However, one requirement for being categorized as such is that the service in question be under the control of the UMTA recipient. While you maintain that this is the case with the campus service provided by Lextran, the Chief Counsel's investigation revealed that the University essentially dictates the routes and schedules. A copy of the University's bid proposal for the forthcoming school year confirms the Chief Counsel's finding. In this document, the University solicits bids from providers for "intra-campus transportation for the University of Kentucky Department Of Parking and Transportation." The University specifies in the bid proposal the type of vehicles required, and states that the service will follow routes and schedules determined by the University. Moreover, the proposal

states that the bus stops will be designated by the University, and that "these University designated bus stops shall be the only stops recognized by the Provider's operators." A copy of the bid proposal is enclosed for your information.

It is clear from this description that the service is under the control of the University, and not of Lextran. As such, it lacks a major characteristic of mass transportation.

Second, you take issue with the Chief Counsel's conclusion that the service is "not advertised or promoted to make the public aware of its availability (except on campus)." You state that the service is indeed open to the public, and enclose a Lextran route map indicating the University service.

UMTA notes, however, that the Lextran route map for the campus service is not current, but is dated January 1, 1982. Moreover, though Lextran states that it provides information on the service to telephone callers, there is, as the Chief Counsel's decision pointed out, no indication of an attempt on the part of Lextran to market the service to the general public. Consequently, UMTA considers that the campus bus service is not open to the public, but is designed for the exclusive use of students and campus personnel.

Finally, you explain that the University campus is located in the heart of the general urban area of Lexington, and that the route serves a number of residential areas and businesses close to the University.

The fact that the campus bus service concomitantly serves immediately adjacent off-campus areas is not enough to transform its essential character. As the Chief Counsel's investigation found, and the University's bid proposal confirms, the service is provided by Lextran under contract with the University for the purpose of transporting students. Even admitting that members of the public may and occasionally do board the campus buses, such use of the service by the general population of Lexington is clearly secondary to its main purpose.

I therefore conclude that the Chief Counsel correctly ruled on the record provided by the parties, and that the service provided by Lextran to the University of Kentucky meets the UMTA's criteria for charter service since it is under a single contract, under the control of a party other than the grantee, and for the exclusive use of a particular group. Therefore, I find no basis for overturning his decision.

Accordingly, I hereby deny your appeal of the Chief Counsel's decision in the above-cited matter.

Sincerely,

Alfred A. DelliBovi

cc: Wallace C. Jones, Jr.
Blue Grass Tours & Charter

Enclosure

U.S. Department
of Transportation

**Urban Mass
Transportation
Administration**

REGION VIII
Colorado, North Dakota,
Montana, South Dakota,
Utah, Wyoming

1050 17th Street
Prudential Plaza
Suite 1822
Denver, Colorado 80265

August 25, 1988

Richard C. Thomas, Public Transit Director
City of Phoenix
101 South Central Avenue, Suite 600
Phoenix, AZ 85004

Subject: Charter Service Public Notice

Dear Mr. ~~Thomas~~ Dick:

Pursuant to our phone conversation regarding charter service public notice requirements, please note the answer to question number 13, page 42250, in the enclosed Federal Register notice. The answer indicates that a grantee does not to have to publish a notice if the grantee already knows that at least one willing and able private charter operator exists in the area, but the grantee intends to provide charter service only through subcontracting arrangements with the private sector. The answer also states that a grantee will not be precluded from obtaining a special events exception solely on the grounds that it failed to publish a notice of general willingness to provide charter. The latter provision appears to be designed for the grantee that does not originally intend to provide charter service at all, but is suddenly faced with a need for special events service and has no time for the usual notice process.

As I understand the facts, Phoenix intends to provide charter service only through subcontracting arrangements or for special events. The City also already knows that private operators exist in the area. Therefore, there is no absolute requirement for the City to publish an annual charter notice.

When requesting a special events exception from UMTA, however, a grantee is first required to notify all willing and able private operators of its intent to provide the charter service and give them an opportunity to comment. The annual charter notice is the usual means for determining which operators are willing and able to provide service and thus must be notified in such circumstances.

Since Phoenix is already aware that it may want to provide special events service and would have time to go through the usual notice process, the City may wish to issue the public notice so that it can establish a list of operators to contact when special events do occur. If the City has some other reasonable means of identifying private charter operators, however, it appears that the annual public notice would not be an absolute prerequisite to obtaining a special events exception.

I hope this information will be helpful.

Sincerely yours,

Helen M. Knoll
Regional Counsel

Subject
INNER CITY

U.S. Department
of Transportation

**Urban Mass
Transportation
Administration**

REGION I
Connecticut, Maine
Massachusetts,
New Hampshire,
Rhode Island, Vermont

Transportation System Center
Kendall Square,
55 Broadway,
Suite 904
Cambridge, Massachusetts 02142

August 31, 1988

Arthur L. Handman
Executive Director
Greater Hartford Transit District
One Union Place
Hartford, Connecticut 06103

Dear Mr. Handman:

I am responding to your letter of August 24, 1988 regarding the interpretation of "special services" relating to the transportation of workers from the inner city to suburban job sites. You ask whether such service could be expanded to include carrying the children of the workers to day care centers at or near the suburban job sites and to include transporting the inner city workers to remedial training sessions either prior to or after their employment periods.

The definition of mass transportation, UMT Act section 12(c)(6), includes "special service". The legislative history states that special service includes transportation of workers who live in the inner city, but work in a factory in the suburbs. See H.R. Rep. No. 1785, 90th Cong., 2d Sess., rep. in 1968 U.S. Code Cong. Ad. & News 2941. Thus, your description of the service that transports the workers to their job sites is special service and therefore can be operated closed door. (Please note that in order that the service not constitute charter service it must meet other characteristics of mass transportation. See Charter Rule Preamble, 52 Fed. Reg. 11,916, 11920, col. 1 (Apr. 13, 1987).)

Although the additional service to transport the workers' children for day care and to transport the workers to training sessions is not specifically contemplated by the legislative history, this service as described is ancillary to the main objective of transporting workers from the inner city to suburban job sites. As such, the transportation of such workers to the suburbs, with the ancillary transportation of their children to day care and the workers to job training, would still constitute special service as contemplated in the legislative history

underlying UMT Act section 12(c)(6). Please note that this interpretation is based on the close linkage of the ancillary transportation to the main thrust of the service: transporting workers from the inner city to suburban job sites. Any alteration in the structure of the described service might well result in recasting such service outside the narrow statutory definition of special service. Please contact me if any changes to the proposed service might alter this legal opinion.

If you have any questions on this matter, please feel free to contact me.

Sincerely,

ORIGINAL SIGNED BY

Paul C. Bauer
Regional Counsel

BEFORE THE URBAN MASS TRANSPORTATION ADMINISTRATION

In the matter of:

SANTA BARBARA TRANSPORTATION, INC.	}	
	}	
v.	}	CA-03/87-01
	}	
SANTA BARBARA METROPOLITAN TRANSIT DISTRICT	}	

DECISION

SUMMARY

Santa Barbara Transportation, Inc. ("SBT") filed this complaint with the Urban Mass Transportation Administration ("UMTA") alleging that the Santa Barbara Metropolitan Transit District ("the District") had failed to comply with the provisions of the Urban Mass Transportation Act of 1964, as amended ("UMT Act") and the implementing guidance concerning participation of private enterprise in the provision of mass transportation. After a thorough review of the administrative record, UMTA finds that the local metropolitan planning organization ("MPO") lacks a process for the fair resolution of disputes. UMTA considers that this failure to develop a dispute resolution process is contrary to UMTA policy, and encourages the MPO to develop such a process as soon as possible. UMTA also finds that the District did not follow its own private sector policy in bidding part of its mass transit services, and orders the District to rebid the service by January 1, 1989.

COMPLAINT

SBT filed this complaint with UMTA on January 28, 1988. The complaint alleges that SBT has been unfairly denied the opportunity to bid on service with Metran during the past four years.

SBT states that in 1984, the District ignored SBT's offer to provide paratransit service at 50% of the cost the District offered to the "nonprofit" it had helped to establish.

SBT claims that in 1985, it again offered the District to provide paratransit service at 50% of the District's cost, and to provide regularly scheduled service. According to SBT, both offers were refused by the District's General Manager.

SBT states that in 1986, it again approached the District with an offer to provide paratransit service at 50% of the District's cost and to provide regularly scheduled service. SBT alleges that in an attempt to punish SBT, the District underbid SBT on a contract for shuttle service that SBT was operating for the City of Santa Barbara. SBT states that the District's bid was far below its fully allocated cost to provide the service.

SBT states that in 1986, it requested to be considered by the District to provide scheduled bus service. SBT indicates that the District invited bids to provide 20% of its regularly scheduled service. SBT claims that it submitted a bid within the five working days allowed by the District for response, but that the District's General Manager termed its bid "non-responsive." SBT asserts that its bid was for $722,000, and that the District had stated that its own fully allocated cost to provide the service was $1,135,000.

The District's General Manager, claims SBT, had advised the District's Board of Directors not to contract with SBT, as only $380,000 could be saved from the District's $6,000,000 budget by doing so. A month later, states SBT, at an UMTA-sponsored meeting, the General Manager passed out a handout showing that $635,000 could be saved by contracting with a private company.

SBT alleges that in bidding out this service, the District violated every part of its own dispute resolution process which, according to SBT, was written after the bid. SBT asks UMTA to investigate these alleged violations of UMTA's private sector policy.

RESPONSE

UMTA reviewed SBT's complaint and determined that the allegations, if substantiated, constituted violations of the private sector provisions of the UMT Act and the implementing policy. UMTA forwarded SBT's complaint to the District on March 21, 1988, and provided it with 30 days to respond.

The District's response is dated March 30, 1988. In its response, the District characterizes SBT's allegations as "unsupportable, simply false, or a fabrication."

In response to SBT's allegation that the District had unfairly rejected its offer to operate paratransit service, the District states that it does not have a paratransit service to subcontract. the District denies that it had helped to establish a nonprofit organization. The District explains that in 1977, it had operated a paratransit service. In 1979, the District states, the Easter Seals Society of Santa Barbara purchased lift-equipped vans through UMTA's 16(b)(2) program,[1] and started Easy Lift, its own independent transit operation. The District notes that it ceased its own paratransit operation, and began allocating a portion of its California Development Act funds to Easter Seals as a partial operating support.

The District further denies that it "punished" SBT by attempting to underbid SBT on a contract SBT had with the City of Santa Barbara. The District states that it had never obtained a contract to operate such service, but merely designed the service for the City and suggested that the City bid it out.

The District moreover disputes SBT's allegation concerning the District's consideration of its bid for regularly scheduled service. The District states that it solicited bids for about 15% of its scheduled service during the preceding summer. According to the District, the bid solicitation was issued immediately upon completion of the proposed public schedule, and bidders were given far more than five days to respond. f[2] Not only was SBT's bid non-responsive, the District maintains, but it was also for $980,066, and not for $722,000, as stated in SBT's complaint.

The District states that § 13(c) of the UMT Act precludes transit operators from laying off workers without compensation.[3] Since its labor contract mandates lay-offs on the basis of seniority, the District maintains, it would, if it subcontracted, be obliged to lay off most of its low-wage, part-time employees. The cost of compensating these workers, the District states, as well as increased overall labor costs resulting from the lay-off of its low-wage employees, would result in savings of only $380,000.

1Section 16(b)(2) of the UMT Act authorizes UMTA to make grants to private nonprofit corporations for the purpose of assisting them in providing transportation services for the elderly and handicapped.

2The District fails to specify, however, exactly how many days the bidders were given.

3This statement is technically incorrect, since §13(c) contains no provision mandating compensation for laid-off workers. However, this section does direct grantees to protect the interests of their employees, and to undertake such measures as may be necessary to protect their rights, privileges, and benefits.

As for SBT's claim that the District's General Manager had stated that $635,000 could be saved by contracting 20% of the District's service, the District indicates that these figures have no relationship to its subcontract bid. The District states that its subcontract bid was for 15% of its service. The 20% figure was mentioned in a speech by its General Manager, the District notes, to demonstrate that as greater levels of service are subcontracted, more real savings may occur. The 20% was offered only for explanatory purposes, MTD contends, and was not the level it requested proposals for.

With regard to the $1,135,000 that SBT claims is the District's cost for providing the service in question, the District states that SBT "made up that figure." The District maintains that its fully allocated costs for providing the service are nowhere near that amount.

Finally, the District asserts that SBT had been given ample opportunity to have its case heard. The District Board of Directors, states the District, had given SBT several months to explain its case. The case was heard by the Board and rejected, the District maintains. SBT then appealed to the local MPO for relief, explains the District, and was denied a hearing. According to the District, every effort had been made to hear SBT's appeal.

The District concludes by affirming that UMTA's investigation will show that SBT's allegations are full of inaccuracies.

REBUTTAL

UMTA forwarded the District's response to SBT on April 7, 1988, and provided SBT with 30 days to submit a rebuttal. SBT's rebuttal is dated May 12, 1988.

In its rebuttal, SBT first of all disputes the District's claims that Easy Lift, the local nonprofit organization which provides paratransit service, is not funded by the District. SBT states that the District supplies most of Easy Lift's operating budget and has provided that organization with two lift-equipped vans.

SBT indicates that for four consecutive years, from 1984 to 1987, it had requested to be considered to provide paratransit service. According to SBT, it had not been allowed to make a presentation to the the District Board, despite repeated requests to the District's General Manager. The paratransit service was awarded to Easy Lift, states SBT, for each of the years in question.

SBT states that it bid on the service again in late 1987, when the Area Planning Council, the local MPO, required the District to put the service out for bid. Information available at the time, claims SBT, indicated that 55% of the users of the paratransit service were ambulatory and did not require lift-equipped vehicles. SBT states that the MPO drafted the bid specifications to reflect this fact, but that the District's General Manager changed the specifications to require lift-equipped vehicles only. SBT explains that only two transit providers bid on the contract, namely SBT and Easy Lift. Since all of Easy Lift's vehicles are lift-equipped, SBT indicates, Easy Lift won the contract, despite the fact that its cost per trip is substantially higher than SBT's.

SBT complains that the District's decision was almost totally based on subjective criteria, and not on the normal bid criteria of cost, company experience, financial strength, and qualifications of the management team. SBT states that there was no pre-bid conference, and it was not allowed to be interviewed by the Board of Directors. As a result, claims SBT, it was again unfairly excluded from providing the paratransit service.

Second, SBT states that while it is correct that the District has never operated a shuttle service for the City of Santa Barbara, "it is not from lack of trying." SBT claims that in 1985 and 1986, the District attempted to undercut SBT's cost for operating the service by offering to provide it at less than its allocated cost.

In 1987, SBT states, it won a two-year contract to provide the service. SBT indicates that since then, the District has been making renewed attempts to acquire the contract. Recently, SBT maintains, the District's General Manager placed the District employees on SBT's shuttle buses in order to monitor operations and passenger counts. SBT states that it expects the District to present a new cost undercutting proposal to the City before the present shuttle service contract expires on July 1, 1989.

Third, SBT states that the District did not follow UMTA guidelines when it put its transit service out for bid in July 1987. SBT claims that it was given only five working days to respond to a $1 million bid. Moreover, SBT maintains, "...it has been shown by the experts that the District's fully allocated cost to provide the service is $1,135,000." SBT states that its own bid was about $980,000, but that it offered to reduce its price to $722,276 if it could buy or lease the District buses at market value and use UMTA-funded fareboxes. The bid was rejected by the District, SBT indicates, on the advice of the General Manager, who told the District Board not to grant the bid to SBT as the District's partial incremental costs to provide the service were only $380,000.

Stating that the District had unfairly thwarted all privatization opportunities and the accompanying cost savings during the past five years, SBT asks that UMTA end such alleged abuses and require the District to give fair consideration to bids from private companies.

DISCUSSION

UMTA developed its private enterprise policy in conformance with three provisions of the UMT Act, namely Sections 3(e), 8(e), and 9(f). Under Section 3(e) UMTA must, before approving a program of projects, find that such program provides for the maximum feasible participation of private enterprise. Section 8(e) directs UMTA recipients to encourage private sector participation in the plans and programs funded under the Act. Finally, as a precondition to funding under Section 9, recipients must develop a private enterprise program in accordance with the procedures set out in Section 9(f).

In order to provide guidance in achieving compliance with these statutory requirements, UMTA issued its policy statement, "Private Enterprise Participation in the Urban Mass Transportation Program," 49 Federal Register 41310, October 22, 1984. This policy statement sets forth the factors UMTA will consider in determining whether a recipient's planning process conforms to the private enterprise requirements of the UMT Act. These factors include consultation with private providers in the local planning process, consideration of private enterprise in the development of the mass transportation program, and the existence of records documenting the participatory nature of the local planning process and the rationale used in making public/private service decisions.

UMTA's private sector requirements are further detailed in Circular 7005.1, "Documentation of Private Enterprise Participation Required for Sections 3 and 9 Programs," December 5, 1986. The Circular outlines the minimum elements which a grantee's private sector consultation process must contain, and describes the documentation required to demonstrate that the process has been followed.

The Circular states that a grantee's private sector process must include the following elements:

a. Notice to an early consultation with private providers in plans involving new or restructured service as well as the periodic re-examination of existing service.

b. Periodic examination, at least every three years, of each route to determine if it could be more efficiently operated by a private enterprise.

c. Description of how new and restructured services will be evaluated to determine if they could be more efficiently provided by private sector operation pursuant to a competitive bid process.

d. The use of costs as a factor in the public/private decision.

e. A dispute resolution process which affords all interested parties an opportunity to object to the initial decision. UMTA's complaint process is designed to accept appeals of this local dispute resolution process.

The Circular also describes the complaint procedure which private operators may follow when they believe that a grantee's private sector policy is inadequate or has been improperly applied. Under this procedure, disputes should be resolved at the local level. The procedure ideally envisages a first stage of dispute resolution between the grantee and the private operator and, failing settlement at this level, a review of the grantee's decision by the local MPO. The Circular states that the MPO should develop its own dispute resolution process, and that complaints to UMTA will be referred to the MPO for an attempt at local settlement. Under the terms of the Circular, UMTA will entertain complaints only when a complainant has exhausted its local dispute resolution process.

In its complaint, SBT asks UMTA to resolve its dispute with the District, since it has exhausted local review. The District's response explains that SBT had asked the District's Board of Directors to reconsider its bid to provide transit service, and that this request had been denied. The District indicates that SBT then appealed to the Area Planning Council (APC), the local MPO, which refused to hear its appeal.

In a letter dated January 12, 1987, to the California Bus Association (CBA), which sought to bring the appeal on behalf of SBT, the APC states:

> The APC staff is aware that the Santa Barbara Metropolitan Transit District had previously adopted a privatization policy which includes a dispute resolution process involving

> the Area Planning Council. However, the policy was never presented to the Council for approval or acceptance. Furthermore, the APC has never indicated a desire to accept such a role since it has no authority to effect a resolution of disputes involving the SBMTD and private contractors.

The APC's position in this matter is contrary to UMTA's dispute resolution process, as outlined in Circular 7005.1. Under this process, MPOs are expected to constitute an independent level of review of grantees' decisions. UMTA recognizes that an MPOs staffing and resources may not allow it to perform a thorough, substantive investigation of private sector complaints in all cases, but expects that MPOs will at the very least review the grantee's decision and indicate its concurrence or nonconcurrence before referring the complaint to UMTA.

UMTA's policy requiring local dispute resolution is in accordance with the underlying spirit of the UMT Act, which is to afford communities maximum discretion in local decision-making. The policy also recognizes the fact that the local decision-maker is most knowledgeable about the facts and events surrounding a local dispute, and best situated to make a determination with regard to them.

UMTA views unfavorably the APC's decision not to accept a role in the resolution of local disputes. This is especially the case, since the APC justifies its refusal on the ground that such a role was never presented to the APC for approval or acceptance. Under the terms of the UMTA Circular, the MPO is expected to develop a dispute resolution process on its own and independently, and not subsequent to referral by the grantee. UMTA believes that the APC's rejection of a dispute resolution role in this instance is a clear abnegation of its responsibilities in the private sector complaint process.

This refusal is all the more regrettable in the present instance, since the parties make sharply contradictory statements which are difficult for UMTA, with its removal from the local situation, to reconcile. For instance, the parties make conflicting claims with regard to the establishment and funding of Easy Lift and the awarding of the paratransit service contract to that organization. According to SBT, Easy Lift was created and is funded by the District, while the District maintains that it is a totally independent organization to which the District merely passes along state development funds. SBT further alleges that Easy Lift won the local contract to provide paratransit service because the

District changed the contract specifications to correspond to Easy Lift's equipment capacity. The District, on the other hand, indicates that the contract was awarded to Easy Lift because of the quality of its service. Since, according to the statements of both parties, the APC determines the level of funds the District allocates to Easy Lift and participated in the bid solicitation process, it is clearly in a better position than UMTA to decide the accuracy of the parties' claims.

Likewise, the parties differ significantly in their claims concerning the shuttle service SBT provides to the City of Santa Barbara. SBT insists that the District is using cost undercutting tactics to win its shuttle contract, while the District denies the allegation, and maintains that it merely suggested that the City bid the service out. As the body which has direct control of federal funding to the District and general involvement in local transportation matters, the APC has a distinct advantage over UMTA in determining the merits of these contradictory statements.

Furthermore, at the heart of SBT's complaint with regard to its bid on the District's transit service, is its criticism of the cost allocation method used by the District. SBT alleges that the District used arbitrary cost comparison methods in rejecting its competitive service bid, while the District states that its analysis was based on standard, UMTA-approved cost allocation guidelines. Since, under Circular 7005.1, MPOs are responsible for providing UMTA with a description of proposals submitted to grantees by private operators and how they are evaluated, UMTA presumes that the APC has direct knowledge of the cost allocation method used by the District. Again, therefore, UMTA believes that this is a question which could best be decided by the APC.

UMTA recognizes, however, that by its own admission, the APC currently has no dispute resolution process in place, and that it might be several months before the APC can develop such a process. UMTA further recognizes that the complainant may be prejudiced by this delay in the hearing of its appeal. UMTA therefore believes that fairness to the complainant requires that UMTA decide these issues on the merits.

As concerns the first issue raised by SBT, UMTA's review of the administrative record shows that, for the current year at least,

the District did adhere to the requirements of the private sector policy in the awarding of the paratransit contract. Materials submitted by the parties show that the District issued a request for proposals for the paratransit service on March 29, 1988. Bidders were given until April 19, 1988, to respond, and service was scheduled to begin on July 1, 1988. The record further indicates that the District received proposals from two transportation providers, namely SBT and Easy Lift, and that these proposals were thoroughly reviewed by an Evaulation Committee. This review, the records shows, was followed by a detailed recommendation to the the District Board, which included an item-by-item comparison of the two proposals. The Committee recommended in favor of awarding the contract to Easy Lift for various qualitative reasons, including the fact that SBT, unlike Easy Lift, had failed to submit a detailed budget and operating plan for the service.

UMTA's investigation also failed to corroborate SBT's claim that Easy Lift is an organization established and funded by the District. Not only has SBT failed to show that Easy Lift was created or is controlled by the District, but it has also presented no clear evidence that the District provides funding to Easy Lift in addition to the funds which it is authorized under the California Transportation Development Act (TDA) to pass along to that organization. It indeed apparent from the administrative record that Easy Lift is an independent organization which receives funding from several sources, including the TDA funds distributed by the District.

On the basis of these findings, UMTA concludes that there is no merit to SBT's allegations with regard to the paratransit service contract. UMTA finds that by providing adequate notice to private providers and by using objective criteria to evaluate their proposals, the District conducted its bid process for the paratransit service in accordance with the private policy guidelines.

The second issue raised by SBT concerns bidding by the District on a contract for shuttle service which SBT has with the City of Santa Barbara. While the District denies in one part of its response that it has any interest in the shuttle contract, it states elsewhere that "there is the possibility that Mertran may be forced by the City of Santa Barbara to expand its services in that area."

Although the requirements of Circular 7005.1 apply only to a grantee's contracting of its own mass transit services, a grantee is nonetheless bound by the provisions of Section 3(e) of the UMT Act when engaged in competitive bidding against a private operator. This Section requires that recipients of UMTA assistance must provide for the maximum feasible participation of private operators in the provision of mass transit services. UMTA would view actions such as those allegedly taken by the District

in attempting to win the shuttle contract from SBT, as a violation of this provision.

However, UMTA notes that the District strongly denies using cost undercutting tactics or harassment to win the shuttle contract from SBT. It should moreover be noted that SBT has not yet suffered any actual injury in this regard, since it is still operating the service under the existing contract, which is set to expire on July 1, 1989. UMTA therefore believes that no corrective measures are called for in the matter of the shuttle contract, beyond an admonition to the District that as an UMTA recpient, it must refrain from any action which would be deliberately detrimental to the interests of private providers, and must adhere to the requirements of Section 3(e) when competing with a private operator.

The third aspect of SBT's complaint deals with its bid on part of the District's mass transit service. SBT in essence claims that the District failed to follow its own private sector guidelines by allowing bidders only 5 days to submit proposals, and by using improper cost allocation methods.

The District denies that bidders were given an inadequate amount of time to submit proposals, but fails to specify how much time they were allotted. Moreover, while the District maintains that it used an UMTA approved cost allocation method, the brief submitted to the MPO by the California Bus Association (CBA) on behalf of SBT questions this assertion. The CBA found that the cost allocation practices uesd by the District in this instance were inconsistent with UMTA's cost analysis guidelines in several important respects. These include the deletion by the District of approximately $211,493 in operating costs from its fully allocated model for the service. The CBA appropriately points out that "If all fixed and variable resources are included in a fully allocated cost estimate, the model is not in conformance with the guidelines." The CBA also notes that the District used two different figures to represent its "marginal cost" to operate the service, citing the sum of $461,212 in a letter to the the District Board, and $380,508 at the Board hearing on the matter. The District Board correctly describes these procedures as irregularities in the area of cost allocation.

Since the District has failed to refute SBT's allegations concerning its bid solicitation deadline and its cost allocation practices, UMTA must assume that they are true. UMTA therefore concludes that the procedures which the District used in contracting out part of its transportation services are not in compliance with its own private sector participation process.

Since UMTA finds that the process used by the District in this instance unnecessarily excluded the private sector from competitive contracting of mass transit services, it orders the District to rebid, by January 1, 1989, the portion of that service which is the subject of this complaint. In so doing, the District should follow the guidelines for private enterprise involvement set out in Circular 7005.1, and its own private sector policy.

CONCLUSION

UMTA concludes that the Area Planning Council, the local MPO, failed to follow UMTA guidelines with respect to the development of a local dispute resolution process. UMTA encourages the MPO to develop a procedure for the review of grantees' decision, in conformance with the private sector guidelines set out in Circular 7005.1. UMTA also finds that the District did not follow its own private enterprise policy in bidding out part of its mass transit services, and orders the District to rebid the service by January 1, 1989.

Rita Daguillard
Attorney Advisor

9/15/88
Date

Edward J. Babbitt
Chief Counsel

9/21/88
Date

BEFORE THE URBAN MASS TRANSPORTATION ADMINISTRATION

In the matter of:

B&T FULLER DOUBLE DECKER BUS COMPANY, et al. Complainants	}	
v.	}	TX-02/88-01
VIA METROPOLITAN TRANSIT AUTHORITY, Respondent	}	

DECISION

SUMMARY

This complaint was filed with the Urban Mass Transportation Administration ("UMTA") on February 2, 1988, by the American Bus Association ("ABA") on behalf of three private bus operators, B&T Fuller Double Decker Bus Company ("Fuller"), Greyhound Lines, Inc. ("Greyhound"), and River City Coaches ("River City"). The complaint alleged that the San Antonio Metropolitan Transit Authority, also known as VIA Metropolitan Transit Authority ("VIA"), had violated UMTA's charter regulation, 49 CFR Part 604. UMTA's investigation finds that VIA has violated the regulation by leasing vehicles to entities which are not "private charter operators" within the meaning of the charter regulation. UMTA orders VIA to cease and desist from such practices immediately. UMTA's investigation also leads it to believe that VIA may be providing charter service using surplus assets. In order to make a clear determination on this matter, UMTA will conduct an independent study of VIA's charter and mass transit operations.

COMPLAINT

The ABA, a national trade association of private bus operators, filed this complaint on February 2, 1988, on behalf of three of its members which provide charter service in the San Antonio, Texas area. The complaint alleges that VIA has violated UMTA's charter regulation, 49 CFR Part 604. The ABA specifically describes its complaint as follows:

The ABA states that on August 11, 1987, VIA published a public charter notice pursuant to 49 CFR 604.11.[1] The notice indicated, explains the ABA, that VIA would complete its willing and able determination process by November 9, 1987.

The complainants and other private operators submitted the evidence required by the notice, indicates the ABA, and were determined by VIA to be willing and able to provide charter service. The ABA maintains that VIA nonetheless made known its intent not to comply with the charter regulation by soliciting proposals from private charter providers or brokers to provide charter service for VIA under an exclusive arrangement with VIA. The ABA attaches to its complaint a copy of VIA's request for proposals (RFP).

The ABA states that on October 24, 1987, it protested VIA's RFP on behalf of its members likely to be adversely affected by it. The ABA indicates that VIA did not implement the proposal.

The ABA maintains that VIA nevertheless failed to comply with the charter regulation by failing to complete its public participation process by August 11, 1987, as required by 49 CFR 604.11(a)(2), and continued to provide charter service subsequent to that date using UMTA funded facilities and equipment.

Moreover, states the ABA, by memo dated October 13, 1987, school department heads were advised by Antonio G. Alvarez, Assistant Superintendent of the San Antonio School District, that they had the option of calling either Convention Coordinators or Lance Livingston Productions for charter service to be performed through October 27, 1987. The ABA attaches a copy of this memo.[2]

1Under 49 CFR 604.11, recipients of UMTA funds desiring to provide charter service, must complete a public participation process in order to determine if there are willing and able private operators. This process, which must be followed annually, includes publishing in a newspaper a notice describing the proposed service, with a copy to all private operators in the area, as well as to the ABA and the United Bus Owners of America. If a recipient determines that there is at least one willing and able private operator, it may provide charter service only under one of the exceptions to the regulation.

2The charter regulation became effective on May 13, 1987. UMTA recipients which were providing charter service on that date and desired to continue doing so, were required to publish their charter notice not more than 90 days thereafter. Recipients were expected to suspend charter operations after August 11, 1987, until they had established through the notice process that there were no willing and able operators in their service area.

According to the ABA, although VIA may occasionally refer charter customers to private bus operators, it attempts to channel most of its business to brokers or bus operators who are chronically short of equipment, and who must necessarily use VIA's equipment. The ABA maintains that VIA provides charter service unlawfully under sham arrangements with one or more brokers, but principally with Convention Coordinators and Lance Livingston Productions. The ABA describes VIA's establishment of subcontracting and brokerage relationships and the steering of customers to firms having no equipment or chronically short of equipment, as a prohibited practice.

The ABA requests that the UMTA Chief Counsel direct VIA to advise the complainants and UMTA whether it has provided charter service directly to customers or under sham arrangements with private firms; withhold UMTA funds or use other appropriate remedies; and, order VIA to cease and desist from providing illegal charter service.

RESPONSE

By letter of February 26, 1988, UMTA advised the ABA that the allegations contained in its letter, if substantiated, might constitute violations of the charter regulation. UMTA stated that under 49 CFR 604.15, parties should attempt conciliation at the local level before filing a complaint with UMTA. UMTA stated that if this attempt were not successful, the parties should notify UMTA in writing so that it could proceed with an investigation of the complaint.

On April 8, 1988, the ABA wrote to UMTA to state that it had attempted to resolve the dispute with VIA but had failed. The ABA stated that the complainants had met with representatives of VIA on March 28, 1988. A summary of the meeting, attached to the ABA's letter, showed that its results had been inconclusive.

UMTA wrote to VIA on April 19, 1988, to state that it had been advised by the complainants that they had been unsuccessful in resolving their dispute with VIA. UMTA informed VIA that it was consequently undertaking a formal investigation of the complaint, in conformance with 49 CFR 604.15(c). UMTA asked for VIA's response within 30 days. VIA's response is dated May 20, 1988.

In its response, VIA denies that it has violated the charter regulation. VIA states that it has taken all the required steps to determine that private charter operators are willing and able to provide charter service. VIA maintains that after the publication of the regulation, it went through the public notice process prescribed by 49 CFR 604.9(a) and 604.11. In support of its assertions, VIA attaches copies of its published notice, of evidence received from private operators, and of VIA's letters to private operators informing them of the willing and able determination.

VIA further denies that it has provided direct service to charter customers. VIA states that it has provided no unauthorized service directly to customers after the determination was made, and has no intention of doing so. VIA attaches a copy of its current policy stating that it no longer provides direct charter service.

VIA states that since the implementation of the regulation, it has provided charter equipment and service under contract only to bona fide private charter operators, and not to brokers. VIA notes that under 49 CFR 604.9(b)(2), an UMTA recipient may lease equipment to private operators which lack handicapped accessible buses or the vehicle capacity required to provide a particular charter trip. VIA points out that under this exception to the regulation, a grantee may contract with all private operators, and not just those determined willing and able. Section 604.5(p) of the regulation, explains VIA, states that an operator is willing and able if it desires to provide service, and possesses the required vehicles and legal authority. VIA states that since it takes so little to be determined willing and able, it is difficult to imagine what private charter operators are not willing and able. One explanation, states VIA, is that a broker is a private charter operator, though not a willing and able one.

VIA claims that despite this uncertainty as to whether a grantee may contract with a broker, it has not entered into subcontracts with brokers, but only with bona fide charter operators. VIA states that it has verified that each operator owns at least one bus or one van. VIA attaches a list of the operators with which it has contracted, as well as representations from each operator showing that it has one bus or one van.

According to VIA, the complainant's claim that VIA subcontracts to charter operators which are "chronically short of equipment" denotes a misunderstanding of the charter regulation, which treats all operators alike, whether they have one bus or 100 buses. Moreover, states VIA, Texas law prohibits discrimination against small operators. Furthermore, VIA notes, UMTA encourages grantees to contract with small businesses. VIA also adds that a refusal to do business with small operators could have serious antitrust implications.

VIA disputes the complainants' claim that it has had an exclusive contract with a private charter operator. VIA maintains that its policy has been to contract with all private operators which request such service. VIA attaches a list of the private operators with which it has contracted.

VIA affirms that although it will continue to comply with the charter regulation, it considers the regulation invalid. VIA contends that UMTA has exceeded its authority in implementing the regulation. Section 12(c)(6) of the Urban Mass Transportation Act of 1964, as amended (UMT Act), notes VIA, defines "mass transportation," and prohibits funding solely or primarily for charter service. However, VIA states, nothing in this section justifies a total ban on charter service. On the contrary, VIA maintains, Section 3(f) reveals that the Congressional intent was to protect intercity, and not intracity, operators from unfair, not from all, competition by public operators. In support of its point, VIA presents a legislative and regulatory history of the UMT Act, as well as excerpts from the Comptroller General's opinion of December 7, 1966 (B-160204), which states that grantees may use UMTA-funded equipment to provide incidental charter service.[3]

According to VIA, the new charter regulation should in no event be applied to the use of equipment and facilities funded by Federal grants before the effective date of the regulation. VIA contends that principles of equity require that new regulations should not be applied retroactively. VIA moreover states that when the Federal government disburses money under its spending power, its relationship with the grantee is in the nature of a contract. When the Federal government tries to impose new, damaging restrictions on the recipient after the funding of the grant, maintains VIA, it changes the nature of the contract with the recipient and impairs the bargain.

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3 UMTA has chosen to define "incidental charter service" as service which does not interfere with or detract from a grantee's mass transit services. Several examples of what UMTA considers to be "incidental charter service" are cited on page 11926 of the preamble to the charter regulation (52 Fed. Reg. 11916, April 13, 1987).

VIA moreover explains that it has expended funds in reliance on the former charter regulation. UMTA's retroactive implementation of the new regulation, contends VIA, prohibits the generation of revenue from the equipment and facilities upon which VIA had relied in good faith. UMTA's change in long-standing Federal policy, argues VIA, deprives VIA of a valuable stream of incidental income from assets purchased under the prior regulation and should be applied, if at all, only to assets funded with Federal funds after the effective date of the new regulation.

VIA further argues that it is not a violation of the regulation for VIA to give out the names of one or more private charter operators. VIA states that it has distributed a list of private charter operators, and to its knowledge, all the operators listed have one bus or one van. According to VIA, there are four reasons why the complainant's allegations of "steering" are meritless. First, says VIA, the charter regulation gives the grantee discretion in recommending charter operators. VIA states that the complainants' objections appear to be based on the philosophy that all charters should be provided with private equipment, and that private operators must subcontract vehicles from private operators. VIA points out that UMTA rejected this position in its final charter rule.

Second, VIA maintains that giving out the names of one or more operators is not "steering." VIA states that the complainants base their complaint on Q&A 19 of UMTA's "Charter Service Questions and Answers," 52 Fed. Reg. 42248, 42251, November 3, 1987. However, VIA states, the Q&A does not define "steering," or cite any part of the regulation which prohibits it. Nonetheless, contends VIA, it has neither steered nor actively promoted any one private operator, but has merely recommended certain operators.

Third, argues VIA, even if it had engaged in "steering," this practice is not prohibited by the charter regulation. VIA states that the regulation does not mention, much less prohibit steering. VIA maintains that UMTA can mandate such a prohibition only through the rulemaking process, which it has thusfar failed to do.

Fourth, states VIA, the complainants allege that VIA's policy of recommending charter operators is contrary to the "intent" of the charter regulation. VIA argues that the "intent" of a regulation should not be an issue, unless there is some ambiguity in the regulation itself or in its enabling statute. According to VIA, 49 CFR 604.9(b)(2) needs no clarification.

VIA maintains that even if Q&A 19, which characterizes "steering" as inappropriate, were to be defended as an agency interpretation of its regulation, such an interpretation would be invalid. VIA states that a Federal agency may not by interpretation read a requirement into a regulation which is not there. An interpretation of a regulation may not, argues VIA, enlarge the scope of the regulation beyond the enabling statute under which it was promulgated. VIA contends that an interpretation of the charter regulation which would allow UMTA to regulate the private charter market is plainly outside the scope of the UMT Act.

VIA states that its actions have been completely consistent with Congressional intention. VIA asserts that its federally funded buses are not primarily used in charter service, and not at all in intercity operations. VIA moreover states that it does not subsidize charter operations. In fact, says VIA, it has made a profit on its charter service. VIA attaches, in support of its assertion, a copy of its most recent auditor's report.

VIA concludes by recapitulating the main points raised in its response, and requests that the UMTA Chief Counsel find that VIA has not violated Federal law or regulations as complained of in Complaint TX-02/88-01.

REBUTTAL

By letter of May 27, 1988, to the ABA, UMTA stated that it understood that a copy of VIA's response had been sent to the ABA. UMTA advised the ABA that it could submit a rebuttal within 30 days of receipt of the letter.

The ABA's rebuttal is dated July 1, 1988. The ABA states that VIA has violated UMTA's charter regulation, and accordingly disputes each of the main points raised in VIA's response.

The ABA states that VIA has complied with the "willing and able" determination process as required by 49 CFR 604.9(a) and 604.11, with the one exception that the process was not completed by August 11, 1987, as required by 49 CFR 604.11(a)(2). On October 6, 1987, the ABA maintains, VIA had found at least one private operator willing and able. Consequently, states the ABA, VIA was precluded from providing direct charter service after that date.

The ABA states that it does not allege that VIA has provided direct charter service after October 8, 1987. Rather, affirms the ABA, the gist of its complaint is that VIA has circumvented the prohibition against direct charter service, by referring its charter customers to brokers. The result of these actions has been, maintains the ABA, that VIA has been providing the same amount of charter service since the implementation of the current charter regulation as before.

VIA denies, the ABA indicates, that it has provided direct charter service to brokers. However, states the ABA, this denial is premised on the position that an entity which transports passengers in a bus or van cannot be a broker. The ABA points to the statement in VIA's response that a broker can be a "private charter operator," though not a "willing and able" one. VIA's position, states the ABA, is that it can subcontract with all "private charter operators," and not just with those that are "willing and able." Thus, maintains the ABA, VIA is operating on the principle that it can subcontract with brokers, since it considers them to be to be "private charter operators" to the extent that they operate a bus or a van.

The ABA indicates that VIA's standard is overly broad, since in order to subcontract with an UMTA recipient, a one-bus or one-van operator must be acting as a motor carrier, and not engaged in service as a broker. VIA fails to recognize, states the ABA, that an entity which owns or operates one bus or one van under appropriate legal authority may nevertheless be operating predominantly as a broker. The ABA cites Section 10102(1) of the revised Interstate Commerce Act, 49 U.S.C.A. 10102(1)(West Supp. 1988), which defines "broker" as a person, other than a motor carrier, which sells or offers to sell transportation by motor carrier. Consequently, affirms the ABA, even though a person may own and operate motor vehicles and may be certificated by the Interstate Commerce Commission ("ICC"), it may nevertheless be found to be operating as a broker rather than as a private charter operator in a particular instance.

The ABA notes that VIA has attached to its response a list of the entities to which it has provided charter service under contract and their qualifications to engage in a direct contractual relationship with charter customers. The ABA contends that VIA's service to ten of the entities listed was unlawful because these entities did not hold appropriate operating authority and, even if they possessed such authority, they dealt with VIA as brokers and not as carriers. The ABA provides a list of the ten entities in question, as well as of the number of passenger vehicles which they own and operate and of their motor carrier operating authority.

The ABA states that VIA's financial statements for the year ended February 29, 1988, show charter and contract service revenues of $2,597,761. The ABA expressed its belief that VIA has derived similar monthly revenue since February 29, 1988, despite the limitations imposed on its charter service by UMTA's charter regulations. This volume of contract charter business could not have been generated, argues the ABA, unless one or more of the entities listed above acted as a broker in arranging for charter

transportation in VIA's buses.

In fact, the ABA alleges, VIA has established sham arrangements with pseudo brokers in order to circumvent the charter regulation. Under these subterfuge arrangements, the ABA claims, VIA generates most of the charter business and channels it to an ostensible provider of charter transportation with the understanding that this provider will call upon VIA to provide the service under contract in UMTA-funded buses.

Moreover, states the ABA, VIA's argument that a refusal to deal with small operators could raise antitrust implications, is disingenuous. By conspiring with certain entities to circumvent UMTA's charter regulation, claims the ABA, VIA and its co-conspirators have restrained competition in the San Antonio charter bus market and have attempted to monopolize that market to the detriment of their competitors.

The ABA disputes VIA's claim that UMTA's charter regulation is not authorized by the UMT Act. The ABA argues that nothing in the statute or legislative history supports this assertion. Congress has, the ABA states, empowered UMTA to determine to what extent UMTA-funded equipment may be used for charter service.

As concerns the interpretation of section 12(c)(6) by the Comptroller General, the ABA states that this opinion is an advisory one, issued without public notice and comment, and has no legal force or effect. UMTA has, argues the ABA, modified in its 1976 charter regulation and in the current charter regulation, the "incidental use" concept enunciated by the Comptroller General.

The ABA further disputes VIA's contention that the charter regulation is "...directly contrary to the expressed intention of Congress." Conference Report language accompanying the 1988 Department of Transportation Appropriations Act, the ABA points out, does not direct that the regulation be rescinded, but rather that UMTA recipients be permitted to provide charter service under certain circumstances.

VIA attacks, notes the ABA, UMTA's legal authority to implement the charter regulation by contending that if Section 12(c)(6) contained an absolute prohibition on the provision of charter service, UMTA would not need to also rely on Section 3(f). The ABA counters this view by stating that Section 3(f)is not superfluous, although it does overlap to some extent with Section 12(c)(6). Section 3(f), states the ABA, unlike Section 12(c)(6), authorizes UMTA to regulate charter service by its recipients irrespective of whether that service is provided with buses funded under the UMT Act, or funded by non-Federal sources.

The ABA agrees with VIA that the current charter regulation

differs markedly from UMTA's previous charter regulations. However, the ABA cites three court decisions which have held that an administrative agency may depart from its established precedents when the decision to do so is supported by sufficient analysis.[4]

The ABA rebuts VIA's argument that the charter service regulation applies retroactively to the use of UMTA-funded equipment and facilities. The regulation, argues the ABA, does not apply to UMTA-funded assets prior to the effective date of the regulation, but rather to the use of those assets after May 13, 1987. Accordingly, states the ABA, the regulation has no more retroactive impact than a prospective property tax increase applied to buildings constructed before the effective date of the tax increase.

Finally, the ABA states that it is unlawful for VIA to generate charter business and channel it to brokers for the purpose of circumventing the regulation. The ABA maintains that it would not object to a policy under which VIA recommended charter customers to all, some, or only one bona fide charter bus operators in the San Antonio area. However, claims the ABA, VIA generates a large volume of charter business, which it refers to paper intermediaries with the understanding that VIA will be retained to provide the physical service under the contract. These sham arrangements, states the ABA, which serve no economic purpose other than regulatory evasion, constitute the gravamen of its complaint.

The ABA maintains that if the complaint were groundless, the truth of the matter could easily have been demonstrated by financial and traffic data in VIA's files. The ABA notes that no such refutation appears in VIA's response. The ABA points out that Exhibit H of the response shows that VIA derived $2,597,761 in charter and contract revenues for the year ended February 29, 1988. The ABA states that it believes that VIA continues to derive revenues in the same approximate amount from its charter service. The ABA states that the Chief Counsel should obtain information from VIA's files which would establish this fact.

4The decisions cited by the ABA are: Columbia Broadcasting System, Inc. v. F.C.C., 454 F. 2d 1018 (D.C. Cir. 1971); Public Interest Research Group v. F.C.C., 522 F. 2d 1060, 1065, (1st Cir. 1975); and, Greyhound Corp. v. I.C.C., 551 F. 2d 414, 416 (D.C. Cir. 1977).

The ABA concludes by stating that VIA has not complied with 49 CFR Part 604 but, on the contrary, has circumvented it by sham arrangements with brokers and carriers. The ABA requests that the Chief Counsel find that there has been a continuing pattern of violation of the regulation by VIA and, as provided in 49 CFR 604.17(b), bar VIA from the receipt of further financial assistance for mass transportation facilities and equipment.

DISCUSSION

This complaint raises a myriad a factual and legal issues. For the sake of clarity and logical progression, UMTA has divided these into four subsidiary issues and two central issues. The subsidiary issues mainly concern the legality and applicability of the charter regulation. Although these issues are not vital to a determination on this matter, UMTA believes that it is appropriate to deal, at least succinctly, with the questions that they raise.

The first subsidiary issue is whether UMTA's current charter regulation is authorized by the UMT Act. VIA maintains that UMTA has exceeded its statutory authority in promulgating the regulation, since Section 12(c)(6)'s basic definition of "mass transportation" defined the projects eligible for Federal aid, but was not intended as a broad grant of authority for UMTA to become a charter marketing and regulatory agency. Moreover, states VIA, Section 3(f) gives UMTA the authority to regulate, to a limited extent, the intercity, and not the intracity, activities of a grantee. VIA therefore concludes that UMTA has gone beyond its statutory mandate in implementing a regulation which prohibits a grantee from providing any charter service, except under one of the narrow exceptions to the regulation.

UMTA has addressed the question of statutory authority on pages 11930-1 of the preamble to the charter regulation. UMTA therein explains that comments from recipients and trade associations representing them argued, in basically the same terms that VIA is now arguing, that UMTA had exceeded its statutory authority in implementing the regulation. UMTA's extensive discussion in the preamble refutes these arguments, and explains the legal basis for the rule. UMTA therefore believes that its position on this matter has been clearly and comprehensively set forth. Moreover, UMTA has ruled that since, under the terms of the charter regulation, UMTA is limited in these proceedings to an examination of the merits of the complaint, it does not consider this the proper forum for raising a challenge to the legality of the rule. Washington Motor Coach Association v. Municipality of Metropolitan Seattle, WA-09/87-01, March 21, 1988.

The second subsidiary issue raises the question of the retroactive

application of the charter regulation. VIA contends that the current regulation should be applied, if at all, only to assets funded with federal moneys after its effective date, since a retroactive application of the rule would create an undue burden on VIA. As the ABA correctly points out, however, the charter regulation does not apply to facilities and equipment funded by UMTA before the effective date of the rule, but rather to the use of these capital assests after that date. As such, the charter regulation is not retroactive, but rather prospective in its application.

Directly linked to the question of retroactivity is the third subsidiary issue, namely whether the charter regulation has imposed new and damaging restrictions on VIA which impair its contractual agreement with UMTA. VIA contends that it had relied on UMTA's prior charter regulation when making decisions regarding acquisitions and projects. For example, states VIA, when constructing some of its federally funded buildings, VIA relied on the fact that it would be able to use them incidentally in charter service to produce a stream of income. VIA argues that UMTA's charter regulation marks an abrupt change in long-standing Federal policy which, if applied to assets funded before the effective date of the new rule, would deprive VIA of a valuable stream of income on assets purchased under the prior regulation.

UMTA's current charter regulation is a departure from the prior rule only in the sense that it establishes more restrictive conditions under which a recipient may provide charter service. As is stated in the preamble, this regulation does not preclude the provision of incidental charter service with UMTA-funded assets, but simply creates a new and tighter definition of incidental service. The current regulation, like the one which preceded it, is designed to ensure that UMTA assistance is used for mass transit purposes only, and not in support of charter operations.[5]

VIA was, therefore, misguided in relying on the 1976 charter regulation to acquire assets which would produce a stream of income. That regulation established strict conditions under which a recipient could provide charter service. It presumed that charter service during peak hours, beyond 50 miles of a recipient's service area, and which required the use of a bus for more than six hours, was non-incidental and therefore prohibited. UMTA fails to understand how these restrictive conditions could be construed as a mandate to invest extensively in equipment and facilities to be used for charter service. On the contrary, UMTA has never sanctioned the acquisition and use of assets for charter

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5See, 41 Fed. Reg. 14122, 14123 (April 1, 1976); and, 52 Fed. Reg. 11916, 11930 (April 13, 1987).

purposes. UMTA's participation in these assets was on the condition that they be used for mass transit purposes only. VIA's reliance on the prior charter regulation to purchase such assets with UMTA funds was despite the rule and not because of it. Clearly, then, the current charter regulation has not impaired VIA's contractual agreement with UMTA, since, through implementation of both it and of the 1976 regulation, UMTA has sought to limit the use of UMTA-funded facilities and equipment for purposes other than mass transit.

The final subsidiary issue is whether UMTA is empowered to prohibit VIA's "steering" of charter customers. VIA maintains that the charter regulation neither defines nor prohibits "steering." VIA states that even if characterized as "steering," VIA's practice does not contravene the intentions of the regulation or the Act.

UMTA states in Q&A 19 of its "Charter Service Questions and Answers," that under the charter regulation, recipients may use their discretion in determining which names of charter operators they may give out to the public. However, UMTA notes, it will view any attempt on the part of a recipient to establish an exclusive brokering or subcontracting relationship as a contravention of the regulation. UMTA's position on this issue is based on its perception that a recipient could easily circumvent the regulation by systematically channelling all charter business to operators with which it has established a brokering agreement. Such an arrangement would allow the recipient to do indirectly what the regulation prohibits it from doing directly, namely to provide an unlimited amount of charter service in competition with private operators. It would moreover undermine one of the main purposes of the regulation, which is to promote the health and vitality of the private charter industry by fostering free and open competition among charter operators. UMTA believes that it is empowered to take any measure necessary to safeguard the effectiveness and integrity of the charter regulation, including imposing a prohibition on "steering" arrangements which would render it meaningless.

Having dispensed with these questions, we will turn to the central issues raised by this complaint, and which are as follows:

1) Whether VIA has leased vehicles to charter operators in violation of 49 CFR 604(b)(2)

The crux of the ABA's complaint is that VIA has provided charter service under sham arrangements with private operators. The ABA claims that VIA channels business to brokers who lack equipment, or to private charter operators who are chronically short of equipment, and who must necessarily use VIA's equipment. These brokering arrangements, states the ABA, are invalid under the charter regulation.

VIA responds by stating that while it disagrees with UMTA's position that subleasing to brokers is prohibited under the charter regulation, it has not contracted with brokers, since all of the operators with which it has contracted own at least one bus or one van. Moreover, states VIA, the charter regulation allows recipients to lease vehicles to any operator it chooses, regardless of the size of that operator's vehicle fleet.

In order to resolve this question, it is necessary to examine the basic intent of the regulation, which is to protect private charter operators from unfair competition by UMTA recipients. This competition may come directly from the recipient's provision of service to charter customers, or indirectly from the conclusion of arrangements which allow the recipient to provide service through an intermediary.

Under the exception of 49 CFR 604.9(b)(2), a recipient may lease vehicles to "private charter operators" which lack the capacity or handicapped-accessible vehicles required to provide a particular charter trip. Although the charter regulation does not define the term "private charter operator," it is clearly the intent of the regulation that such an operator be the owner of at least one bus or one van which it is licensed to operate as a provider of charter transportation. The intent of the rule that leasing by grantees be restricted to owners of vehicles can be gathered, first of all, from the goal of the regulation as stated above. Secondly, the regulation requires that to lease buses from a grantee, an operator must have exhausted it capacity or have no accessible equipment. This requirement would be meaningless if the operator were a broker, who has no equipment of any type to begin with. For this reason, UMTA disagrees with VIA's conclusion that a broker may be a private charter operator.

UMTA also disagrees with VIA's position that VIA meets the requirements of the charter regulation when it subleases vehicles to any entity which owns a bus or a van, regardless of whether that entity is licensed to operate such vehicle in charter service. VIA's interpretation of the regulation could lead to substantial abuse. It is common for organizations such as schools, nursing homes, social or recreational clubs, or even business whose mission is unrelated to transportation, to own a bus or a van. VIA has, for instance, submitted evidence showing that one of the "private charter operators" to whom it has leased vehicles is a catering service, most of whose vehicles are cargo vans. Mere ownership of a vehicle does not transform such an organization into a "private charter operator" for the sake of the regulation. If the regulation is to fulfill the purpose for which it was intended, it is essential that recipients be allowed to lease vehicles only to legitimate operators of at least one vehicle which they are licensed to operate in charter service, and which is not merely a tool for use in an unrelated activity.

There is no evidence in the administrative record that VIA has concluded a written or verbal agreement to channel business to any particular entity. It is, however, apparent that VIA has subleased vehicles to entities which are not "private charter operators" under the criteria set forth above. These include the above-mentioned catering service, as well as travel agencies, convention organizers, and one entity, identified as "J&P Enterprises," whose business activity is not specified. UMTA finds that such practices, even if they are not a deliberate attempt to circumvent the regulation, are at least contrary to its intent and purpose, and should be prohibited.

In order to ensure that VIA is subleasing UMTA-funded equipment only to bona fide private charter operators, UMTA order VIA to provide, within 3 months and 6 months successively, of the date of receipt of this decision, a list of the private charter operators with which it has contracted, describing the number and type of vehicles which they operate, and their operating authority.

2. Whether VIA has provided service which is not incidental to the provision of mass transportation

The second major aspect of the ABA's complaint concerns the level of charter service which VIA is providing. The ABA claims that VIA is operating as much charter service under the current regulation as it did under the prior one, and points to the figures provided by VIA which show that for the fiscal year ended February 29, 1988, VIA derived $2,597,761 in charter and contract revenues. VIA, on the other hand, states that this service was provided under the capacity exception to the charter regulation, and moreover meets UMTA's definition of incidental charter service.

UMTA states in the preamble to the charter regulation that in order to ensure maximum flexibility, it has chosen to define "incidental" in broad terms. Under this definition, charter service is incidental when it does not interfere with or detract from the provision of mass transit, or shorten the mass transit life of vehicles and facilities. UMTA provides in the preamble three examples of non-incidental service, including peak hour service, service which does not meet its fully allocated cost, and service using buses in excess of a 20% spare ratio. UMTA specifically points out, however, that this list is not exhaustive, and that there are many other possible examples of non-incidental service.

UMTA believes that one of these examples is charter service which generates a disproportionately large percentage of the grantee's transit revenues. VIA's charter revenues for the most recent fiscal year, which ended more than nine months after the implementation of the regulation, represent, according to VIA's own financial statement, nearly one-third of its regular line service revenues. The sheer magnitude of VIA's charter revenues leads UMTA to suspect that the charter service VIA is providing fails to conform to UMTA's incidental service guidelines.

Moreover, UMTA is also led to conclude that in order to generate such large revenues, VIA may have a substantial amount of excess resources which it is using to provide charter service. UMTA will therefore conduct an independent study of VIA's charter and mass transit operations to determine whether this substantial amount of charter revenue is due to the use of surplus equipment and facilities. If such is the case, UMTA may determine that VIA should sell or dispose of these surplus assets in accordance with UMTA and Office of Management and Budget (OMB) guidelines.

CONCLUSION

UMTA's examination of the administrative record shows that VIA has leased vehicles to entities which are not "private charter operators" within the meaning of the charter regulation. UMTA orders VIA to cease and desist from these practices immediately. UMTA also orders VIA to provide, within 3 months and 6 months successively from the date of receipt of this decision, information which would enable it to determine VIA's compliance with the terms of this order. UMTA reminds VIA that failure to comply with the charter regulation may jeopardize VIA's Federal transportation assistance. UMTA also finds that VIA may be providing service which is not incidental to the provision of mass transit, and which is operated using surplus equipment and facilities. In order to make a determination on this matter, UMTA will conduct an independent study of VIA's charter and mass transit facilities.

Rita Daguillard
Attorney Advisor

NOV 14 1988
Date

Theodore A. Munter
Deputy Chief Counsel

NOV 14 1988
Date

Union
File charter

U.S. Department of Transportation
Urban Mass Transportation Administration

Headquarters

400 Seventh St., S.W.
Washington, D.C. 20590

DEC 5 1988

Russell Ferdinand
President
Syracuse & Oswego Motor Lines, Inc.
105 Terminal Road
P.O. Box 2667
Syracuse, New York 13220

Re: Use of UMTA Buses for Charter

Dear Mr. Ferdinand:

This responds to your recent letter dated November 17, 1988, wherein you query whether S&O Tours, Inc. would be in conformance with the Urban Mass Transportation Administration's (UMTA) charter regulation under various conditions. UMTA will enumerate each condition, followed by our analysis of the regulation.

1. At no time can line service be compromised in any manner to operate a charter. It should be noted this policy originated in the 1930's when the company first received ICC authority.

True. As stated in 52 Federal Register 42251, Question Number 24, even when an UMTA recipient falls within one of the exceptions which would permit it to provide charter service with UMTA funded equipment and facilities, such service must be "incidental." "Incidental" is described as charter service which does not "interfere with or detract from" providing mass transportation service or does not "shorten the mass transportation life of the equipment or facilities" being used.

2. The company would be requested to operate charters that exceed charter capacity (sp).

Initially, it is important to note that the regulations apply to subrecipients of UMTA funds which use UMTA-funded equipment just as it does to recipients. Thus, a recipient, or in this case a subrecipient, can enter into a contract to sublease charter equipment to a private operator when the operator needs equipment in excess of its capacity. This is an exception, which permits a recipient to provide charter service with UMTA funded equipment and facilities.

3. The company has a separate set of accounts for its charter business. The separation is audited by a CPA firm.

To the extent that S&O Tours, Inc. is truly an independent company, it is like any other private company and can lease to anyone they please without being subject to the regulation. However, if this independent company is determined to be a sham, UMTA will pierce the corporate veil.

4. The company swaps miles to insure that the UMTA funded equipment does not operate in excess of total line miles. Thus, if an UMTA funded bus travels 100 miles on a charter a company charter bus will operate 100 miles of line service. This insures that UMTA capital value is not misused.

UMTA is unclear as to the purpose of this question and needs more information in order to respond.

5. The company charters buses to other willing and able private companies when their capacity is exceeded. Points #1 & #4 would still apply in this circumstance.

The preamble to UMTA's charter regulation, 52 Federal Register 11916, 11918 (April 13, 1987), states that the regulation only applies to charter service using UMTA-funded equipment and facilities. If a recipient or subrecipient sets up a separate company that has only locally funded equipment, or is able to maintain separate accounts for its charter operation that show the charter service is truly a separate division, then the charter regulation would not apply. Moreover, such a separate entity could even lease buses or garage space from an UMTA recipient or subrecipient on an incidental basis. In short, there are no restrictions on the charter activities of an UMTA subrecipient's separate charter entity which uses only non-UMTA funded vehicles and facilities.

I trust that this provides you with the necessary clarifications.

Sincerely,

Theodore A. Munter
Deputy Chief Counsel

UCC-2

U.S. Department of Transportation
Urban Mass Transportation Administration

Headquarters

400 Seventh St., S.W.
Washington, D.C. 20590

December 28, 1988

Mr. Patrick L. Hamric
General Manager
LEXTRAN
109 Loudon Avenue
Lexington, Kentucky 40508

Re: Blue Grass Tours and Charter v. Lexington Transit, KY-88/08-01

Dear Mr. Hamric:

I am writing to close the investigation of the above-cited complaint, which was filed by Blue Grass Tours and Charter a year ago. Based on the information you have provided, we can conclude that the service Lexington Transit (Lextran) provides in the area around the University of Kentucky is mass transit as opposed to charter.

In the course of her visit with you on December 14, 1988, Nancy Greene, Regional Counsel, Urban Mass Transportation Administration (UMTA) Region III, learned that while the service is still provided to the University, it is no longer provided pursuant to a contract which links payment to hours of service. Instead, Lextran receives an annual grant from the University. Schedules have been published for the two routes that circulate in the University area. Students have the privilege of riding free upon showing a student ID, while the general public pays the regular fare. Bus stops are marked with signs showing the Lextran logo and route number and transfers to the other routes in the Lextran system are indicated.

In short, it appears that you have successfully converted what we believe was charter service to mass transit. In fact, you have provided an example for other grantees who are similarly situated to follow.

I would like to point out, however, that in accordance with UMTA's private sector policy, Lextran should examine the interest and capability of the private sector in providing this service. This is especially the case since, according to the information you have furnished, this service has been operated by Lextran since

1982. Under the guidelines set forth in Circular 7005.1, "Documentation of Private Enterprise Participation Required for Section 3 and 9 Programs" (December 5, 1986), UMTA grantees should examine each route at least every three years to determine if it could be more efficiently operated by private enterprise.

Sincerely,

Theodore A. Munter
Deputy Chief Counsel

cc: Wallace Jones

Nancy Greene, URO-III

BEFORE THE URBAN MASS TRANSPORTATION ADMINISTRATION

In the matter of:

MARTUCCI BUS COMPANY AND E. VANDERHOOF AND SONS, INC.	}	
v.	}	NJ-02/87-01
NEW JERSEY TRANSIT CORPORATION	}	

DECISION

SUMMARY

Martucci Bus Company and E. Vanderhoof and Sons, Inc. ("Martucci") jointly filed this complaint with the Urban Mass Transportation Administration ("UMTA") alleging that New Jersey Transit Corporation ("NJT") had failed to comply with the provisions of the Urban Mass Transportation Act of 1964, as amended ("UMT Act") and the implementing guidance concerning participation of private enterprise in the provision of mass transportation. After a thorough review of the administrative record, UMTA finds that the violations alleged by the complainant do not fall within the scope of the private sector provisions of the UMT Act and the implementing policy.

COMPLAINT

Martucci filed this complaint with UMTA on January 10, 1987. The complaint alleges that NJT had violated the private sector provisions of the UMT Act by improperly transferring operations of the Number 24 bus route to Orange, Newark and Elizabeth Bus, Inc. (ONE Company), a privately owned company. According to Martucci, NJT had decided to pursue an option under which it would exchange its operating rights on its Number 24 line for the operating rights of a number of single bus operators servicing a number of routes in direct competition with NJT. However, Martucci claims that a private agreement was made between ONE Company and NJT for ONE Company to purchase the operating certificates of these sixteen operators (excluding Martucci), in exchange for a certificate to allow ONE Company to operate the Number 24 route. Martucci alleges that these negotiations were conducted under a veil of secrecy. Furthermore, Martucci states that there has been a lack of interest on NJT's part in having Martucci acquire full operation of the Number 24 route because of the secret agreement between ONE Company and NJT. Martucci further claims that this foreclosed an opportunity for it to engage in meaningful negotiations for the Number 24 route. In other words, they have been foreclosed from any meaningful competition.

Second, Martucci alleges that the operating certificates belonging to the independent bus companies were bought by ONE

Company at way below fair market value. Martucci states this also resulted in destructive competition.

RESPONSE

UMTA reviewed Martucci's complaint and determined that the allegations could possibly constitute violations of the private sector provisions of the UMT Act and the implementing policy. UMTA forwarded Martucci's complaint to NJT on April 16, 1987, and provided it with thirty days to respond.

NJT's response is dated May 15, 1987. In its response, NJT states that Martucci has not alleged any violations of either the UMT Act or UMTA policy. "The real complaint," states NJT "is that they were unable to negotiate a favorable business deal like the business deal negotiated by the ONE Company."

In response to Martucci's allegation that NJT had unfairly rejected the offer to have complainant acquire the number 24 route, NJT states that Martucci's real complaint was that a deal was made with the ONE Company and not with complainant. NJT explains that by agreeing to a trade of routes between it and the newly created ONE Company, the number of buses operated by private carriers in the affected area has increased from 25 to 36 buses, thus effectuating UMTA's private enterprise policy.

NJT further does not deny that negotiations between ONE and NJT (to have ONE purchase the operating rights of the small private carriers in exchange for the number 24 route) were kept confidential until all purchases were consummated. The Assistant Executive Director, in a supporting affidavit, states that a year prior to these negotiations, in the summer of 1984, NJT began to meet with private carriers to determine if they might be interested in transferring to another route or in being bought out. NJT concluded that these small independent carriers were being unreasonable and that they believed that NJT would be willing to pay whatever price was necessary to accomplish its goals; NJT subsequently terminated said negotiations. Thus, in September 1986, while the agreement between ONE Company and NJT was being finalized in secrecy, ONE succeeded in purchasing almost all the operating rights of the independents (except for Martucci). NJT states that this arrangement saves them approximately $600,000 annually in operating losses, it eliminates inefficient, duplicative service and it is in accordance with UMTA's private enterprise policy.

NJT moreover contends that Martucci never attempted to locally resolve its claim of destructive competition. NJT states that it has adopted detailed procedures to resolve destructive competition complaints and Martucci has not exhausted this local administrative remedy. Lastly, NJT claims that Martucci has

offered no evidence that NJT has actually engaged in destructive competition.[1]

NJT concludes by stating that the complainant is unable to allege any violations of either the UMT Act or UMTA policy.

REBUTTAL

UMTA forwarded NJT's response to Martucci. On April 28, 1988, UMTA advised Martucci that it had not received its rebuttal statement. By letter of May 2, 1988, Martucci filed a photocopy of its rebuttal, which is dated June 9, 1987.

In its rebuttal, Martucci initially states that the basis of its complaint is that NJT "has improperly benefitted members of the private sector at the expense of the taxpayers of the State of New Jersey, the taxpayers of the United States ... and the members of the private sector that we are representing in this action."

Specifically, Martucci alleges that the agreement between ONE Company and NJT has virtually forced it out of business and negated its profitability margin. ONE Company, states Martucci, was able to purchase the independent bus companies at 'bargain basement' prices and exchange those operating certificates for the right to operate the Number 24 route. Martucci complains that while NJT broke off negotiations with the independents because they were demanding prices in excess of fair market value, NJT was then willing to make a deal with the ONE Company, which was finalized in September 1986, to trade NJT's operating rights for far below fair market value. It is alleged that ONE Company purchased the independents with a very small amount of cash, the balance in long term notes.

Second, Martucci complains that prior to the transfer of operations to the ONE Company, NJT had conducted coordinated operations on the Number 24 route with Martucci as well as with Wohlgemuth Bus Company, which is operated by Robert White, who is also the President of ONE Company. (White also represents the independent carriers in the Newark-Elizabeth area on the Private Carrier Advisory Committee).[2] These private companies, including Martucci, were given first choice in the selection of runs which permitted them to operate profitably without the need to seek state subsidies. However, subsequent to the transfer, Martuccci was assigned runs by NJT which were less favorable, resulting in both reduced revenue and income.

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1 NJT's regulation for destructive competition provides for an impartial administrative law judge to conduct a hearing and make recommendations to the NJT Board. See, New Jersey Administrative Code 16:74-1, et seq.

2 The NJT Board created the Private Carrier Advisory Committee (PCAC) to advise the Board concerning policy matters affecting all private carriers. Mr. White is one of its members and Frank Gallagher, President of ONE Company, chairs the PCAC.

Third, Martucci states that the ONE Company did not exist prior to the agreement between NJT and ONE. Therefore, claims Martucci, "to all appearances [ONE] is undercapitalized in the sense that its first action was to go out and purchase a number of bus routes by means of using promissory notes."

Fourth, Martucci alleges that the ONE Company has been provided with new buses to conduct its operations while NJT has refused to replace the older buses presently leased to Martucci. Also, NJT has redetermined its standard formula for making payments under its Bus Card Program which has resulted in substantially reduced payments to Martucci.

Fifth, states Martucci, "as a result of the transfer of operation from the private companies to NJT and NJT's decision to hold off on a formal conclusion of the ONE Company, the ONE Company has fallen under the direction of NJT rather than the the New Jersey Department of Transportation and has been able to make changes in its route structure without going through the long administrative process required by the Department of Transportation." In sum, claims Martucci, ONE Company has been able to circumvent a process that Martucci is bound to follow; that is, Martucci must receive approval from the New Jersey Department of Transportation to conform its routes to that of ONE Company.

Sixth, Martucci alleges that ONE Company has been privy to inside information in negotiating its agreement with NJT. ONE Company is composed of Frank Gallagher and Robert White. As stated above, Mr. Gallagher chairs the PCAC and Mr. White represents the independent carriers in the Newark-Elizabeth area on the PCAC. Martucci states that Mssrs. Gallagher and White used information obtained in their capacity as members of the PCAC in order to negotiate favorable business deals to their personal benefit.

Finally, Martucci states that UMTA is neither governed nor bound by state law in deciding this case. Thus, the New Jersey regulations concerning destructive competition can be overridden by the intervention of a Federal agency.

DISCUSSION

UMTA developed its private enterprise policy in conformance with three provisions of the UMT Act, namely Sections 3(e), 8(e), and 9(f). Under Section 3(e) UMTA must, before approving a program of projects, find that such program provides for the maximum feasible participation of private enterprise. Section 8(e) directs UMTA recipients to encourage private sector participation in the plans and programs funded under the Act. Finally, as a precondition to funding under Section 9, recipients must develop a private enterprise program in accordance with the requirements set out in Section 9(f).

In order to provide guidance in achieving compliance with these statutory requirements, UMTA issued its policy statement, "Private Enterprise Participation in the Urban Mass Transportation Program." 49 Federal Register 41310, October 22, 1984. UMTA's private sector requirements are further detailed in Circular 7005.1, "Documentation of Private Enterprise Participation Required for Sections 3 and 9 Programs," December 5, 1986.

However, before a private enterprise complaint is entertained by UMTA, there must be an initial determination that UMTA has jurisdiction over the issues raised therein. UMTA will not examine the substantive issues before making this initial determination. After reviewing all evidence contained in the administrative record, UMTA has concluded that none of the issues raised by Martucci falls within the scope of UMTA's private sector policy. Thus, UMTA has no jurisdiction over Martucci's complaint, and specifically over the six allegations outlined in its rebuttal.

The first allegation in Martucci's rebuttal states that Martucci was virtually forced out of business when NJT traded its operating rights to the ONE Company at far below market value, thus enabling the ONE Company to purchase the independent bus companies at 'bargain basement' prices, The ONE Company in turn, states Martucci, traded these operating rights to NJT in exchange for the right to operate the Number 24 route, in competition with Martucci.

While UMTA agrees that the above mentioned arrangement may have provided the ONE Company with a distinct advantage over its competitor, Martucci, such matters do not fall within the scope of UMTA's private sector policy. UMTA's private sector policy in no way dictates, or even addresses, the substance or conduct of a grantees' business transactions, or the manner in which these transactions are financed.

Moreover, Martucci's complaint is not that it was not consulted in connection with the plan to exchange operating rights on the Number 24 route, but rather, that it was later excluded from these negotiations, which were then continued with the ONE Company. At the time that these negotiations were being conducted, late in 1985 through September 1986, UMTA's private sector policy was contained in 49 Federal Register 41310 (October 22, 1984). The Federal Register Notice simply required that "when ... services are significantly restructured, consideration should be given to whether private carriers could provide such service." NJT met this requirement when it undertook negotiations with Martucci. Although the policy guidelines now in effect in Circular 7005.1 (December 5, 1986) contain more stringent requirements, including a competitive bid process and cost factoring, NJT could not be held to these requirements in the case of route planning or negotiations which predate the Circular. Consequently, both because NJT met its private sector obligations to Martucci under the guidelines in effect at the time, and because Martucci's

allegations with respect to the structuring and financing of route trade with the ONE Company falls outside of the scope of UMTA's private sector policy, UMTA will not entertain the first issue raised in Martucci's rebuttal.

In its second allegation, Martucci states that subsequent to the transfer of operations to the ONE Company, Martucci was assigned runs which were less favorable, resulting in both reduced revenue and income. Martucci's second allegation stems directly from the first one since the re-assignment of runs is a direct consequence of the route trade between NJT and the ONE Company. Since UMTA has determined that Martucci's first allegation is outside of UMTA's jurisdictional boundaries and moreover would not constitute a violation of the guidelines in effect at the time of the events in question, this second allegation similarly cannot be entertained.

In its third allegation, Martucci states that the ONE Company is undercapitalized and was formed mainly to carry out the transaction between ONE Company and NJT. UMTA's private sector policy addresses only the measures that a grantee has taken to involve the private sector in its provision of service. However, it does not address issues pertaining to financial structure. Thus, UMTA does not have jurisdiction to decide this issue. Rather, complainant should address this issue to a proper state judicial and/or administrative forum.

In its fourth allegation, Martucci states that the ONE Company has been provided with new buses while Martucci's request for newer equipment has been denied. Initially, it should be noted that NJT has developed a complex formula for bus allocation including a bus allocation plan dispute resolution process. Martucci has not sought redress under this state procedure. However, even if this procedure had been followed, UMTA has determined that Martucci has not alleged facts sufficient to make a determination that there has been a violation of UMTA's private sector policy.

In its fifth allegation, Martucci states that NJT is holding off on formally transferring ONE Company's operation of routes so that it does not fall under the jurisdiction of the New Jersey Department of Transportation (NJ DOT). This is not a matter that is within UMTA's jurisdiction. Any complaint wherein a party has not followed proper NJ DOT procedures must be addressed to the NJ DOT.

In its sixth allegation, Martucci states that ONE Company has had access to inside information. Similarly, this is not a matter that is within UMTA's jurisdiction; Martucci may address this issue to an appropriate state forum.

Finally, Martucci states that UMTA is neither bound nor governed by New Jersey law. As a general rule, Federal law preempts state law. However, the legislative intent as expressed through UMTA's private sector guidelines, clearly mandates the development or

adoption of a local process. Both the Federal Register notice and Circular 7005.1 expressly state that disputes should be resolved on the local level, and that UMTA will entertain a complaint only when local remedies have been exhausted. Thus, in the case of private enterprise dispute resolution, UMTA has consented to decision-making by local jurisdiction.

CONCLUSION

UMTA concludes that the violations alleged by Martucci do not fall within the scope of the private sector provisions of the UMT Act and the implementing policy. Moreover, while two of Martucci's allegations might conceivably fall within the scope of the private sector policy now in effect, the conduct at issue predated the enactment of more stringent private sector guidelines. Therefore, UMTA has no jurisdiction to entertain this complaint. Accordingly, UMTA dismisses Martucci's complaint.

Rita Daguilland
Rita Daguilland
Attorney Advisor

December 30, 1988
Date

T Munter
Theodore A. Munter
Deputy Chief Counsel

Dec. 30 1988
Date

UCC-31
Chron

U.S. Department of Transportation
Urban Mass Transportation Administration

The Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

JAN - 5 1989

The Honorable Silvio O. Conte
House of Representatives
Washington, D.C. 20515

Dear ~~Mr. Conte~~ Sil:

Thank you for your letter concerning the Urban Mass Transportation Administration's (UMTA) amendment to its charter service regulation, which was recently published in the Federal Register. Your letter commends UMTA on its amendment which, you state, clearly reflects an intent to help persons with disabilities. However, you suggest certain changes to the amendment which you believe will assure that UMTA's charter regulation does not inadvertently burden people with disabilities.

First, you state, the definition of "transportation disadvantaged" appears to be limited to "persons of limited fiscal or financial means." You suggest that the definition be expanded so that it is clear that "transportation disadvantaged" also includes the mentally impaired.

In response to comments on its notice of proposed rulemaking (NPRM) on the amendment, UMTA considered the possibility of including mental impairment in the definition of "transportation disadvantaged." However, UMTA determined that the inclusion of this category of persons was not feasible because of the difficulty of establishing criteria or guidelines for defining eligibility. The rule does not limit and in fact UMTA encourages its recipients to provide the broadest possible coverage in defining handicaps eligible for the exception, including mental impairment.

Second, you ask that UMTA carefully review the rule and modify it where necessary to ensure that the chartering process is as simple and direct as possible. You suggest that UMTA adopt two suggestions made by the Consortium for Citizens with Developmental Disabilities (the Consortium) in its comments of July 22, 1988, on the NPRM.

The Consortium's first suggestion is that contracting agencies be able to obtain a single certification for charter services for multiple groups. UMTA agrees that a single certification may be

appropriate under some circumstances, and has allowed for it in the final rulemaking. The amendment as now drafted recognizes situations where one contract may cover more than one trip for the same passengers and the same purposes, such as a week-long day camp program for handicapped children. Under these situations, a single certification would be acceptable.

The Consortium's second comment addresses the question of allowing non-disabled persons to benefit from the exception as long as the purpose of their trip is directly related to assisting disabled persons. UMTA again believes that the inclusion in the amendment of such a broad category of persons would be impractical and unworkable and generate complaints of abuse. At the same time, UMTA is mindful of the fact that organizers or sponsors of activities for the disabled may in some cases have a valid need to contract charter services from UMTA recipients. UMTA believes, however, that the needs of these groups will in large part be met through use of the formal agreement process, which UMTA has included in the final rulemaking. This process allows a recipient to provide certain charter services when it has concluded a formal agreement with the willing and able private operators in its service area. The only procedural requirement, in addition to the conclusion of a formal agreement, is that the recipient's published notice provide for this type of agreement or be subsequently amended to specifically refer to the agreement. UMTA believes that this procedure will provide the most flexible and least burdensome mechanism for meeting the charter needs of sponsors of events for disabled persons.

Finally, you state that one exemption under the final rule would be limited to those groups receiving funds only from the U.S. Department of Health and Human Services (USDHHS). You ask that the exemption be expanded to cover low income people receiving funds from Federal agencies other than USDHHS.

Several organizations provided UMTA with similar comments on the NPRM. In response to these comments, UMTA has expanded the exception to include organizations which receive or are eligible to receive, from a State or local body, funding comparable to that provided by certain USDHHS programs. In order to be eligible for the exception, these groups must be certified by the State under a procedure set out in the final rule. It should moreover be noted that the charter needs of groups receiving funds from Federal agencies other than USDHHS or from State sources may be met through use of the formal agreement process outlined above.

UMTA believes that its final rulemaking on the amendment reflects the intent of Congress as expressed in the Conference Report 100-498, as well as the many comments received on the NPRM. I share your confidence that the amendment will allow our recipients to serve the disabled, while fulfilling UMTA's statutory goal of limiting the use of federally funded equipment for purposes other than mass transit.

Sincerely,

Alfred A. DelliBovi

US Department
of Transportation

**Urban Mass
Transportation
Administration**

Mr. Bryon Baxter
Director of Transportation
City of Davenport
2929 Fifth Avenue
Rock Island, Illinois 61202

Re: IL/RICMMTD/87-12-01

Dear Mr. Baxter:

Thank you for your recent letter concerning transit service in the city of Davenport, Iowa.

The first issue concerns the discontinuance of transit service on Route 11. The Urban Mass Transportation Administration (UMTA) acknowledges the city of Davenport's contention that it has followed the guidelines as established by the UMTA charter service regulation, and specifically, the public comment process, as required by 49 U.S.C. § 1607 (e)(3)(H), which provides for a locally developed process to solicit and consider public comment prior to raising fares or implementing a major reduction of transit service. UMTA considers the discontinuance of charter service on Route 11 to be in accordance with the charter service regulations.

The second matter involves transit service to the Quad City Thunder basketball games, alleged to be referred to as "chartered buses." The city of Davenport states that this service is scheduled service which is open to the public. UMTA recognizes that special service is not necessarily charter service, as defined at 49 CFR section 604.5(e) of UMTA's charter service regulations. In this instance, UMTA has determined that this service is not charter service.

Based on our investigation of facts involved in certain aspects of transit service conducted in the Quad Cities, UMTA has determined that there is no violation of the charter service regulation, or 49 U.S.C § 1607 (e)(3)(H), with respect to the discontinuance of service on Route 11 and service to accommodate Quad City basketball games.

UMTA, therefore, will not be taking any further action with respect to these matters.

Sincerely,

Edward J. Babbitt

Edward J. Babbitt
Chief Counsel

BEFORE THE URBAN MASS TRANSPORTATION ADMINISTRATION

In the matter of:	:	
SUMMIT COACHES,	:	
Complainant,	:	
v.	:	IN-Ft. Wayne/88-06-01
FORT WAYNE PUBLIC TRANSPORTATION CORPORATION,	:	
Respondent/Recipient	:	

DECISION

SUMMARY

Summit Coaches ("Summit") filed an informal complaint with the Urban Mass Transportation Administration ("UMTA") on June 8, 1988, alleging that Fort Wayne Public Transportation Corporation ("FWPTC") has provided charter service in violation of the UMTA charter regulation, 49 CFR Part 604. UMTA's investigation finds that FWPTC has violated UMTA's charter regulation by using UMTA funded equipment in "charter" service, as that term is defined in the charter regulation, although FWPTC has labelled that service as "group demand service". UMTA does find, however, that two of the services offered by FWPTC come within UMTA's definition of mass transportation: the Lincoln Life service and the Target Store service. In addition, the attempted separation of the operations of FWPTC Charter Division from its Public Transit Division does not meet UMTA requirements. Neither may FWPTC use UMTA funded equipment and personnel whose salary is partially paid with UMTA funds to upgrade non-UMTA funded buses which later may be used for charter operations. UMTA orders FWPTC to cease and desist from such practices immediately.

COMPLAINT

Loser & Loser, Inc., d/b/a Summit Coaches, is a private bus operator located in Ft. Wayne, Indiana. On June 8, 1988, Summit's informal complaint referencing 24 possible violations of the charter regulation, 49 CFR Part 604, was forwarded to UMTA. Summit contends that certain of the transportation services provided by FWPTC are not "mass transportation" as defined in the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. app. § 1608 § 12 (c)(6) (UMT Act), but prohibited "charter bus operation", as defined in 49 U.S.C. § 1602, § 3(f). The other significant aspect of the complaint is the allegation that FWPTC is using UMTA funded equipment and facilities to assist in its charter service and does not have an entirely separate charter service division that uses no federally assisted resources. Summit specifically describes its complaint as follows:

On May 4th and 5th, 1988, three FWPTC chartered buses, which Summit believed to be funded by UMTA, transported passengers from the Marriott Hotel to the Magnavox and ITT plants.

On May 14, 1988, FWPTC chartered two buses to religious organizations, one bus to Bethel United Methodist Church and one to St. John's Lutheran Church.

On or about March 1, 1988, FWPTC chartered two UMTA funded trolleys to transport a movie actress, Lori David, and her friends to the Hollywood II Cinema.

On November 4, 1987, three FWPTC buses, marked "charter", two of them believed to be UMTA funded, were chartered by Fort Wayne National Bank to the Embassy Theatre. The next morning, the same three buses were intermingled among the rest of the fleet on FWPTC property. In a meeting on the morning of November 5, 1987, John J. Murphy, General Manager of FWPTC, admitted that two of the buses were UMTA funded and had been used for charter purposes in response to this complaint.

On April 27, 1988, four FWPTC buses, two of them believed to be UMTA funded, were chartered by A.R.M. Services to move passengers from a parked airplane to the terminal at Baer Field Airport.

On May 16, 1988, Foster Grandparents chartered one FWPTC UMTA-funded bus from the Senior Citizens Center to Hall's Guesthouse.

FWPTC non-UMTA funded buses are not headquartered or maintained off property by a private contractor, as claimed by FWPTC, but are repaired and maintained at the UMTA funded facility by UMTA funded employees. Additionally, the drivers for charters are dispatched from and the charter records are maintained at an UMTA funded facility.

Two UMTA funded employees, John Murphy and Mike Bill, respectively, manage and are in charge of the charter operations. Another UMTA funded employee answers the telephone for both the "charter division" and the "mass transportation division".

FWPTC advertises under "Buses-Charter and Rental" in the Yellow Pages of the Fort Wayne telephone directory using the same address and telephone number for the "charter division" as is used for its "mass transportation division".

On April 29, 1988, a FWPTC bus ran charter service from Hall's Guesthouse to the General Motors plant.

On May 13, 1988, a non-UMTA funded FWPTC bus ran charter service from Hanna Street to Calvary Temple Park.

On May 14, 1988, a non-UMTA funded FWPTC bus ran charter service to the Indianapolis Time Trials for the Fort Wayne Board of Realtors.

On May 17, 1988, a FWPTC bus ran charter service for a union group from the Holiday Inn to the B.F. Goodrich plant.

On May 21, 1988, a FWPTC bus ran charter service from American Plaza to the Foellinger Botanical Conservatory.

In December 1987, FWPTC ran charter service to Target Stores from various senior complexes.

At the time of the complaint, FWPTC was providing daily shuttle service for Lincoln Life's employees that was funded by Lincoln Life at $19.50 per hour.

RESPONSE

By letter of July 13, 1988, UMTA advised FWPTC that the allegations contained in Summit's complaint would constitute violations of UMTA's charter service regulations and requested FWPTC to provide comprehensive data on the nature and scope of its charter bus operations. On August 5, 1988, FWPTC provided some of the requested material, but did not submit substantiating documentation until September 29, 1988.

The documentation submitted by FWPTC shows that the trips alleged by Summit to have been chartered with UMTA-funded vehicles were in fact provided with such vehicles. The documentation also shows that non-UMTA funded vehicles used for

charter operations were supported by UMTA-funded employees and facilities since FWPTC did not enter into the lease with JRR Corporation for separate storage and maintenance facilities for its non-UMTA funded equipment until August 2, 1988. FWPTC also acknowledges that UMTA funded employees are engaged in charter activities. FWPTC acknowledges that the Yellow Pages list FWPTC under the "charter" category for buses.

In its defense FWPTC claims that the services provided were not "charter" but "group demand response". FWPTC states that group demand response service differs from charter service since FWPTC "retains the right to remove the bus from its destination and to utilize it in normal mass transportation service....(and that) [i]n some instances, FWPTC has charged a fare to each individual user of demand response service."

FWPTC states that the provision of trolley service on or about March 1, 1988, was provided at the request of the county sheriff's department without cost as a community service.

In the case of the December 8, 1988, service to Target Store, FWPTC states that the service was made available by the store to provide transportation to senior citizens for special Christmas shopping and that such service is "mass transportation" as defined by UMTA in 52 Fed. Reg. 11920, April 13, 1987.

In the case of the daily shuttle to Lincoln Life for its employees, FWPTC claims that the service is "[r]egularly [s]cheduled [d]owntown [s]huttle service open to the general public at 25 cents fare. It is subsidized at $19.50 per hour by Lincoln Life. Lincoln Life employees show their passes but do not pay a fare." In support of this claim FWPTC provided a published schedule for the service.

John J. Murphy, General Manager of FWPTC, stated in a meeting with Summit that "buses the FWPTC owned without federal involvement were being maintained in FWPTC's facility awaiting an agreement with JRR Corporation for storage and maintenance on its lot." FWPTC states that this situation continued until August 1, 1988, when the FWPTC Board approved the terms and authorized the execution of a contract with JRR Corporation. In support of this statement, FWPTC later provided an executed copy of the contract between FWPTC and JRR Corporation dated, August 2, 1988, which provides for both the storage and maintenance and repair of five non-federally funded buses.

Until the contract with JRR Corporation was executed, FWPTC states it attempted to separate out costs related to charters from the total costs incurred by means of a percentage based on relative monthly mileage. FWPTC acknowledges that this is not acceptable.

FWPTC also claims that it separates out the charter activities of employees whose salary is UMTA funded and provides documentation showing how this accounting is accomplished. The documentation indicates that the allocation is again made on a percentage basis of total time worked to time spent on "special division" work, and that percentage is applied to the following fringe benefits: insurance premiums, pensions and F.I.C.A. FWPTC states that it does not allocate the costs of the building in this calculation.

FWPTC claims that the 1987 Yellow Pages advertisement was inserted without its knowledge and states that no Yellow Pages advertising of charter operations was done in 1988. The copies of the pertinent Yellow Pages provided by FWPTC, however, shows a line listing for FWPTC under "buses-charter & rental" for 1988 with the same telephone number listing shown for regular bus service.

Summit reviewed the information provided by FWPTC in its September 29, 1988, letter to UMTA and stated that it believed that FWPTC has provided, and is continuing to provide charter service in violation of the 49 C.F.R. Part 604 regulations. Summit requested UMTA to direct it and FWPTC to attempt conciliation of this charter service complaint in accordance with the procedure described in § 604.15 (b) of the regulations.

On October 28, 1988, UMTA advised FWPTC that Summit's allegations would be treated as a formal complaint under 49 CFR 604.15 and directed the parties to attempt conciliation of the dispute for a period of 30 days. At the end of the 30-day period no settlement had been reached, but UMTA was advised by Summit that the issues between the parties were narrowed to four: (1) has FWPTC's use of UMTA funded equipment in what it now acknowledges to be "charter" operations, violated any UMTA regulations; (2) has FWPTC used UMTA funded equipment in "charter" service, as that term is defined in Federal regulations, although FWPTC has labeled that service as "regularly scheduled service" or "group demand response"; (3) are the operations of the FWPTC Charter Division sufficiently separated from its Public Transportation Division to meet UMTA requirements; and (4) may UMTA funded equipment and personnel whose salary is partially paid with UMTA funds be used to upgrade non-UMTA funded buses which later may be used for charter operations.

On November 30, 1988, UMTA notified FWPTC that it must respond to Summit's complaint within 30 days of receipt of the notice. On December 28, 1988, FWPTC submitted a request for a 10-day extension of time to file its response. UMTA granted FWPTC until no later than January 13, 1989 to submit its response. The FWPTC's response is postmarked January 13, 1989, but was not received by UMTA until January 18, 1989.

In its response, FWPTC maintains that their "demand response service" does not come within the definition of "charter service" as contained in the regulations. FWPTC relies on Federal Register Vol. 52, No. 70, 11919 for a definition of "charter service": "the service was to a defined group of people; there was a single contract between the recipient and the riders, not individual contracts between the recipient and each rider; the patrons had the exclusive use of the bus." FWPTC claims that their "group response service" is available to members of more than one group since the bus does not wait at the destination of any group but is available for such other service as it may be able to provide until it is time to pick up passengers for the return trip. It then returns to pick up the members of the different groups at whatever times they desire. FWPTC states, hypothetically, that "there could be separate contracts between each group on the bus and the PTC; no group had the exclusive use of the bus and there was not necessarily service to a defined group of people because there could have been service to several such groups."

FWPTC states that it also provides individual demand response service which is primarily designed for the handicapped, who pay $2.00 for the service. The service is also available to non-handicapped individuals for $4.00.

FWPTC states that if charter trips were equipped with UMTA funded vehicles, it was because it failed to comprehend the importance of using only non-UMTA funded vehicles for that purpose. FWPTC believes it has corrected the problem by the creation of the "special services division" and fully informing all employees of the necessity of using only non-UMTA funded vehicles for charter purposes.

FWPTC states in its response that it has been working to segregate the costs of charter bus operations to ensure that UMTA funds are not expended. Since August 1988, FWPTC claims, all buses used in the charter operation are non-UMTA funded and have been stored and maintained at JRR Corporation's property.

FWPTC maintains that it has allocated all costs of the charter service to the Special Services Division, including employee payroll and expenses, utilities and building maintenance. FWPTC requests UMTA's opinion as to whether its cost allocations are adequate.

FWPTC states that its downtown shuttle service is partially funded by Lincoln Life Insurance Company and that Lincoln's employees ride without charge. But, FWPTC maintains, the service is available to anyone in the downtown area who pays the normal fare. Lincoln's payment, says FWPTC, is offset by any revenue collected from paying customers. FWPTC states that this shuttle service falls clearly within the definition of "mass transportation" contained in 52 Fed. Reg. 11919, April 13, 1987.

In concluding its response, FWPTC denied Summit's allegation that it is upgrading non-UMTA funded buses, using UMTA funded facilities, for use in charter service. Instead, the FWPTC claims that it plans to buy 13 more buses, using non-UMTA funds, and place them in its Special Services Division.

REBUTTAL

The response was forwarded by UMTA to Summit. Summit then had 30 days to submit a rebuttal. Summit requested and received a 10-working-day extension of time, until March 10, 1989, to submit its rebuttal. Summit's rebuttal is dated March 10, 1989.

Summit challenges the response of FWPTC and maintains that the service which FWPTC calls "demand response" is in fact charter service; that the shuttle service for Lincoln Life is charter service rather than "mass transportation"; that FWPTC's violations of UMTA's charter regulations are persistent and continuing; that FWPTC uses UMTA funded facilities and employees in support of its charter services; that FWPTC's method of allocating costs of charter services is unsound; and that FWPTC's charter service is not "incidental" to its mass transportation service.

Summit claims that FWPTC's argument that its service is "demand response" rather than charter service is disingenuous. First, Summit points to FWPTC's own definition of "demand response service". The distinguishing characteristic of "demand response service", as defined by FWPTC, is that the buses are available for other service. Summit analyzed the "demand response" data provided by FWPTC on September 29, 1988, in response to UMTA's request. Summit concluded that the definition is more theory than fact since for numerous trips the data showed that there could not have been any other service provided either because of time constraints or because FWPTC is not permitted to originate traffic outside FWPTC's service area.

Summit contends that if FWPTC's definition of "demand response service" was accepted, "all the buses parked outside of stadiums, sports arenas, racetracks, theaters, theme parks, and historical sites for a period of three hours or more would be engaged in group response if they were available for hire during that period by other groups." While Summit agrees that UMTA's definition of charter service includes the concept of exclusive use, Summit claims that FWPTC has contrived its definition of demand response service to circumvent the charter regulation.

Further, Summit asserts that FWPTC's actual "demand response service" does not coincide with its own definition. Because FWPTC does not inform its "demand response" clients that they might have to share a bus, and because buses used in "demand response" are so rarely shared, in most cases the "demand response" client has the exclusive right to the bus.

Summit contends that other facts which lead to the conclusion that FWPTC's "demand response service" is really "charter service" are that the buses carry no destination designation, the schedule is established to accommodate the "demand response party", and no schedules or fare information are published for the information of the general public.

Summit challenges the claim of FWPTC that the service provided to Lincoln Life employees is "mass transportation". As authority, Summit relies on UMTA's definition of "mass transportation" contained in the preamble to the charter service regulation. Mass transportation "(1) is under the control of the grantee; (2) designed to benefit the public at large; and (3) is open door. 49 Fed. Reg. 11920 (April 13, 1987)."

Summit states that the Lincoln Life shuttle service is operated by FWPTC in accordance with Lincoln Life's contract and the service is only operated when Lincoln Life's employees are going to or returning from work. Lincoln Life employees pay no fare, Summit claims, and any revenue generated reduces the amount paid by Lincoln Life. Summit states that only a very few members of the general public ride the buses.

Summit compares the Lincoln Life service to service provided by the Utica Transit Authority which was determined by UMTA to be impermissible charter service.1/ While the Utica service was provided "on an open-door basis in that any member of the public

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1/ UMTA made this determination in a letter to Barry Shulman dated December 28, 1988.

could board, including senior citizens, it appears that the true purpose of the trip was to provide charter service for the senior citizens, and not for the public-at-large. UMTA believes that under the circumstances, there was probably little public ridership during the trip in question."

Summit claims that FWPTC's violations of the charter service regulations are persistent and continuing. Summit infers that Summit's use of non-UMTA funded equipment for its charter services for some 13 months after UMTA's charter regulation became effective was not the result of ignorance and inadvertence. Summit reports that even after the submission of FWPTC's response in which it declared that it had taken measures to inform all its employees of the necessity of using only non-UMTA funded equipment for charter trips, FWPTC, in February 1989, used an UMTA funded minibus in its charter service for the Fort Wayne Home and Garden Show. Summit also casts doubt on whether in December 1988, FWPTC could have transported a reported "650 youth and 10 local celebrities all over the city on PTC buses . . . " solely in the five non-UMTA funded buses owned by FWPTC. As another aspect of FWPTC's continuing violation of the charter service regulation, Summit points to FWPTC's current advertisement in the Yellow Pages under "Buses-Charter and Rental".

Summit contends that FWPTC uses UMTA funded facilities and employees to support its charter operations. To illustrate FWPTC's lack of credibility on this issue, Summit points out several contradictions between the facts FWPTC has represented to UMTA and the facts as known to Summit. Summit states that in an October 5, 1987 letter from FWPTC to UMTA, FWPTC claimed to have purchased the Federal interest in 15 buses, while UMTA's files only reflect purchase of the Federal interest in three buses. In particular, FWPTC claims to have purchased the Federal interest in bus number 192, but according to Summit that bus remains federally funded and is consistently used for charter service.

Additionally, the same FWPTC letter states that the buses used for charter operations are maintained off FWPTC's property by a private contractor. Summit points out that this is patently false since FWPTC did not enter into the contract with JRR Corporation until August 2, 1988. Summit also claims that FWPTC engaged in a subterfuge to remove the buses used for charter operations from FWPTC property just prior to UMTA officials arrival on site to conduct an audit on July 23, 1988; that FWPTC allowed an UMTA funded bus which is regularly used in charter operations to receive an extensive engine overhaul at the FWPTC facility; that as of March 10, 1989, buses identified by FWPTC to have been purchased for FWPTC's charter operation are stored on FWPTC property. Summit acknowledges that in FWPTC's response, FWPTC states that the identified buses are not the buses which FWPTC intends to upgrade for charter use, but Summit claims that FWPTC's statement is at variance with its earlier statement.

In its Rebuttal, Summit points out that FWPTC's claim that it is no longer engaged in advertising its charter services alongside its regular mass transportation services is belied by FWPTC's current advertisement contained in the Yellow Pages.

Summit notes a new development with regard to FWPTC's bus operators. According to Summit, while FWPTC stated in its response that all demand response and charter service has been performed by private contract operators, in January 1989, an arbitrator interpreting the Collective Bargaining Agreement between FWPTC and its union ruled that all such service must be performed by union operators in the future.

Summit relies on a previously issued UMTA opinion as authority for the proposition that mere bookkeeping separation between charter accounts and mass transportation accounts is not sufficient to comply with the UMTA charter regulation.2/ Further, Summit contends that FWPTC's cost allocation between its Special Services Division and its Mass Transportation Division inequitably transfers losses from its charter service to its UMTA subsidized mass transportation service. As evidence of this allegation, Summit directs attention to FWPTC's audit report dated December 31, 1987. The audit report shows that the Special Services Division's operating loss was reduced by $135,567.00 revenue from receipts at the Fort Wayne Municipal Garage.

Summit alleges that FWPTC's alleged "break-even" rate of $19.50 per hour for its Special Services Division is in fact subsidized by UMTA since $19.50 per hour is substantially below Summit's "break-even" rate and since FWPTC's Special Services Division has experienced a substantial actual loss.

Summit contends that because FWPTC uses the same telephone number for both its Special Services Division and its Mass Transportation Division it probably uses the same UMTA funded personnel to perform both functions.

Finally, Summit submits that FWPTC's substantial charter and "demand response" service in no way meets the basic UMTA requirement that any charter service allowed pursuant to the exceptions to the charter regulation must be "incidental".

2/ Memorandum Opinion Re: Manchester Transit Authority Charter Operations, dated July 14, 1987.

DISCUSSION

The first question to be determined, among the four issues agreed to by the parties and UMTA on October 28, 1988, as stated above, is whether FWPTC's use of UMTA funded equipment in what it now acknowledges to be "charter" operations, violated any UMTA regulations. The answer is in the affirmative. UMTA's charter regulation, 49 C.F.R. Part 604 (April 13, 1987), provides that a recipient may provide charter service that uses equipment or facilities provided under the UMT Act or under 23 U.S.C. 103 (e)(4), 142(a), or 142(c) only to the extent that there are no private charter service operators willing and able to provide the charter service, unless one or more of the exceptions in 49 C.F.R. 604.9 applies. Prior to providing its charter service there is no indication that FWPTC utilized any of the necessary procedures to determine whether there were any willing and able operators (although Summit's complaint is evidence that there is at least one potential willing and able operator). Neither does FWPTC make a case that any of the recognized exceptions contained in the charter regulation apply.

The second question which requires determination is whether FWPTC used UMTA funded equipment in "charter" service, as that term is defined in Federal regulations, although FWPTC has labelled that service as "regularly scheduled service" or "group demand response". It is apparent from the evidence submitted by Summit, and FWPTC acknowledges, that FWPTC regularly provides bus service to private groups at their request. Summit claims that the service provided is prohibited charter service within the meaning of the UMTA regulation, while FWPTC maintains that the service, which FWPTC labels "demand response", is mass transportation.

Further, Summit claims, and FWPTC acknowledges, that some of this service was rendered with the use of UMTA funded equipment. FWPTC submits, however, that it has remedied the lack of instruction to FWPTC employees which resulted in the inappropriate use of UMTA funded equipment in its "demand response" service. Summit maintains that despite FWPTC's claim that it no longer uses UMTA funded equipment to provide its "demand response" service, FWPTC continues to use UMTA funded equipment for such service.

The parties are also in dispute as to the nature of FWPTC's provision of service on behalf of Target Stores, Inc. and Lincoln Life. FWPTC claims that these services are not charter service or "demand response", but fall squarely within the definition of mass transportation.

In these contexts, therefore, it is necessary to compare charter service, "demand response" service and mass transportation. UMTA defines mass transportation as being provided to the public on a regular and continuing basis. In addition, UMTA has expressed three other characteristics by way of illustration. "First, mass transportation is under the control of the recipient. . . .[s]econd, the service is designed to benefit the public at large and not some special organization such as a private club. . . .[t]hird, mass transportation is open to the public and is not closed door." 52 Fed. Reg. 11920 (1987).

FWPTC adds no new facts to the information submitted by Summit relating to the Target Store service. According to the newspaper article submitted by Summit, Target Store chartered FWPTC buses "to shuttle shoppers to and from nursing homes, apartments and senior citizens' centers" on December 8, 1987, in accordance with schedules published therein. The service was instituted to provide senior citizens, disabled people and their companions with "hassle-free" shopping at the store. The store would be closed to other shoppers when this occurred.

FWPTC claims that the "Lincoln Life" service it provides is regularly scheduled downtown service. It is open to the public at twenty-five cents fare and there is a published schedule of its operations. Lincoln Life employees do not pay a fare, but their employer subsidizes the operation of the service with payment of $19.50 per hour to FWPTC. Summit claims that the service is really charter service since it operates only when Lincoln Life is open for business, is used almost exclusively by Lincoln Life employees who do not pay any fare and the fee Lincoln Life pays to FWPTC is reduced by the amount of any extraneous fares received from non-Lincoln Life employees.

In comparing FWPTC's Target Store service and Lincoln Life service with UMTA's definitions of prohibited charter service and mass transportation it is apparent that the two services for different reasons come within UMTA's definition of mass transportation.

The Target Store service was specially rather than regularly scheduled since it was a once a year event and there was no schedule promulgated by the FWPTC. Target Store specified the time and route for the service and Target Store itself paid FWPTC for the use of the buses rather than the individuals who took advantage of the service. Thus Target Store rather than FWPTC was in control of the service. The service was limited to the elderly, handicapped and disabled and their companions and its destination was to Target Store which would only be open to this specific group. Even though this service meets the definition of charter service, since it constituted exclusive service for the elderly and handicapped, it is considered to be "mass transportation" under the UMT Act. 52 Fed. Reg. 42252, November 3, 1987.

The Lincoln Life service, for different reasons, comes within UMTA's definition of mass transportation. The service operates regularly and FWPTC has and provided to UMTA a published schedule of the service offered. FWPTC lists revenue from this service in its regular operations, not in either its "demand response" or charter service, evidencing the control FWPTC assumes over this service. Although Lincoln Life pays for the cost of the service on behalf of its employees, the service is not restricted to them and a member of the general public can use the service for twenty-five cents. Thus UMTA considers the service regularly scheduled service, in the control of FWPTC, beneficial to the public at large and open-door.

FWPTC does not take a position as to whether the Lori David trolley service was charter service or mass transportation, but relies on its statement that the trolley service was provided free of cost as a public service to the community at the request of the county sheriff's department. UMTA has ruled that cost is irrelevant in distinguishing mass transportation from charter service. See Question and Answer 27(a) of UMTA's "Charter Service Questions and Answers," 52 Fed. Reg. 42248, 42252, November 3, 1987. The service was provided for a singular occasion at the request of the sheriff's department. The transportation service did not benefit the public at large, but was limited to Lori David and her coterie of friends. Therefore the service was neither regular nor under FWPTC's control, and neither beneficial nor open to the public.

The largest number of specific complaints regarding the provision by FWPTC of charter service have been distinguished by FWPTC as "group demand response". In answering the question whether FWPTC has used UMTA funded equipment in "charter" service, as that term is defined in federal regulations, in providing such service, it is again useful to compare UMTA's definitions of mass transportation and charter service with the service FWPTC calls "group demand response".

FWPTC makes several distinctions between "group demand response" service and charter service. In contrast to FWPTC's understanding of the term charter service, in which all passengers are members of the same group and the bus is used exclusively for the group, in "group demand response" service the bus is available to members of more than one group, FWPTC retains the right to remove the bus from its destination and to utilize it in regular mass transportation. For the greatest part, fares are not collected from individual passengers. FWPTC bases its position on a narrow reading of the definition of charter service contained in

the regulation. FWPTC focuses only on one aspect of the regulation; "that the service was to a defined group of people . . there was a single contract between the recipient and the riders, not individual contracts between the recipient and each rider . . the patrons had the exclusive use of the bus." 52 Fed. Reg. 11919 (April 13, 1988). FWPTC overlooks the rest of the definition of charter service as well as the definition of mass transportation. FWPTC's position is not supportable when the so-called "demand response service" is examined against the complete definition and intent of the regulation as well as the system in actual operation instead of mere theory.

FWPTC's "demand response" service is not regularly scheduled and continuing service within the FWPTC's control, rather it is provided to singular events at the request of outsiders. The possibility that the bus could be used for more than one group at the same time does not bring the service outside the definition of charter service. The services do not benefit the public at large but are for the use of private organizations. Also, because there are no published schedules or any marking on the buses indicating their designations, the service is essentially closed door. Further, an examination of the "Daily Charter/Demand Response Records submitted by FWPTC shows that in fact the services are rendered exclusively to only one group per bus and that many of the trips are of insufficient duration for the FWPTC to be providing regularly scheduled service using the same equipment during the "demand response" party's excursion, contrary to FWPTC's hypothesis.

In determining whether the operations of the FWPTC Special Services Division are sufficiently separated from its Public Transportation Division to meet UMTA requirements, UMTA is particularly mindful of the prohibition against using UMTA funded equipment or facilities to provide charter service unless one or more of the exceptions applies, 49 C.F.R. § 604.9 (a). "Facilities" in the context of the charter regulation applies to offices and other administrative locales. Any expense for items such as depreciation, utilities, labor, etc., incurred by the entity providing charter service must be accounted for separately and not charged to any UMTA grant, 52 Fed. Reg. 42252 (November 3, 1987).

Clearly, prior to the time any costs were allocated to the Charter Division, UMTA funded equipment and facilities were being used to support FWPTC's charter service. FWPTC does not rely on any of the recognized exceptions to the provision of charter service with UMTA equipment to justify its charter operations. Instead, FWPTC

has recently instituted a system of allocating certain selected employee salaries and expenses to its Charter Division. From an examination of FWPTC's Attachment # 5, describing the method for allocating administrative costs and the December 31, 1987 Audit Report, it appears that FWPTC has not fully allocated the costs of its charter services. For example, FWPTC allocates the costs of medical insurance, pension plan and FICA, but does not allocate all employee fringe benefits, including but not limited to, sick leave, holiday pay, vacation pay, unemployment taxes and worker's compensation.

Additionally, FWPTC indicated in its Response that it had not yet discovered a satisfactory method of allocating the operation and maintenance of its building. This is also evidenced by Summit's allegations that FWPTC uses the same telephone number, office and responsive personnel to operate its charter service as its mass transportation service.

In Question and Answer 26 of UMTA's Charter Service "Questions and Answers," 52 Fed. Reg. 42248, 42252, November 3, 1987, UMTA concluded that, ". . . if there is a willing and able private provider, a transit authority may not allow its separate charter entity to use, on an incidental basis, the UMTA-funded garage in connection with its charter operations, even if the separate charter entity were to pay the transit authority rent and fees for such incidental use." (Emphasis originial). The opinion is based on 49 C.F.R. 604.9 (a), which prohibits the recipient "from providing charter service with UMTA-funded equipment or facilities," and UMTA notes that the term "facilities" applies to offices and other administrative locales. Therefore, FWPTC may not continue its charter service using a system of cost allocation.

Summit also pointed out that according to the December 31, 1987 Audit Report, FWPTC had subsidized its Special Services Division with the receipts from the Municipal Garage. This practice is entirely inconsistent with the charter regulation and UMTA directs that the Audit Report be revised so that the UMTA funded revenues do not in any way offset the expenses of the Special Services Division and that no such accounting practices be followed in any future financial statements.

For the reasons set forth above it would also be inconsistent with the charter regulation for UMTA funded equipment and personnel whose salary is partially paid with UMTA funds be used to upgrade non-UMTA funded buses which later may be used for charter operations.

CONCLUSION

UMTA's examination of the administrative record shows that FWPTC has engaged in charter operations within the meaning of the charter regulation; has used UMTA funded equipment in "charter service", as that term is defined in federal regulations. UMTA finds that the Lori David trolley service was prohibited charter service. Additionally, the "group demand response" service which FWPTC regularly provides does not meet UMTA's definition of mass transportation, and is also prohibited charter service. UMTA does find, however, that the Target Store service and the Lincoln Life service meet the criteria for mass transportation. UMTA directs FWPTC to cease and desist from all prohibited charter service immediately.

UMTA further finds that FWPTC's system of cost allocation between its Special Services Division and its Mass Transportation Division has been both incompletely and improperly executed. FWPTC has failed to fully allocate personnel and building operating expenses. But UMTA notes that the entire cost allocation concept is not proper in these circumstances since it allows FWPTC to participate in charter operations through its Special Services Division to a greater extent than a private charter operator operating under contract to the FWPTC. UMTA also specifically directs FWPTC to revise any financial statements which transfer revenues from the Mass Transportation Division to the Special Services Division to offset losses incurred by the Special Services Division.

FWPTC is further advised that it would be improper under the charter regulation to use UMTA funded equipment and personnel whose salary is partially paid with UMTA funds to upgrade non-UMTA funded buses which later may be used for charter operations.

In reviewing the December 31, 1987, Audit Report UMTA noted that the FWPTC is also providing school service. By way of information and proscription, UMTA takes this opportunity to advise FWPTC that if this service is exclusive school bus service, it is prohibited, 49 U.S.C. app. § 1602 § 3(g), and is further regulated by the provisions of 49 C.F.R. Part 605. Should FWPTC be providing exclusive school service in violation of UMTA's statutory and regulatory requirements, it should cease and desist immediately.

UMTA received a letter dated June 7, 1989, from FWPTC stating that as a result of an arbitration decision, FWPTC had ceased all charter operations. To the extent the issues raised by Summit's complaint are not resolved, however, UMTA issues this decision.

Elizabeth A. Snyder
Attorney Advisor

Date July 6, 1989

Theodore A. Munter
Deputy Chief Counsel

Date July 3, 1989

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Chron

U.S. Department
of Transportation

**Urban Mass
Transportation
Administration**

Headquarters

400 Seventh St., S.W.
Washington, D.C. 20590

JUL 14 1989

Mr. Richard Rohde, General Manager
South Bend Public Transportation Corporation
901 East Northside Boulevard
Post Office Box 1437
South Bend, Indiana 46624

Dear Mr. Rohde:

It has been brought to my attention that the South Bend Public Transportation Corporation (SBPTC) published a charter service notice on June 23, 1989, that is defective.

The notice states that in order for a private bus operator to be considered "willing and able" it must submit written evidence that the private operator has the "desire and physical capability to actually provide the categories of revenue vehicle specified." The categories of vehicles specified in the notice are "35-foot advanced design air-conditioned buses" and "the 'Transpo Trolley,' a specialty vehicle".

The Urban Mass Transportation Administration (UMTA) stated in Question and Answer number three of "Charter Service Questions and Answers" 52 Fed. Reg. 42248, 42249, November 3, 1987, that in its notice a grantee may describe its own service in any way, but that it "must make it clear in the notice that private operators are not required to respond in similar detail. Instead, private operators are required to show only that they have . . . the desire to perform the service plus at least one bus or van." And in Question and Answer number six, supra at 42249, UMTA stated that "[i]n order to prove that it is 'able' to provide the service, the charter operator does not have to demonstrate that it has any particular capacity level; in other words, a charter operator is as willing and able if it has one bus as it would be if it had one hundred buses." Enclosed for your information is a copy of the "Charter Service Questions and Answers".

Therefore it appears that SBPTC's notice is not in conformance with UMTA's charter regulation, 49 C.F.R. 604.9, since it could inhibit an operator, who otherwise would be considered willing and able, from responding to the notice. Please revise the charter service notice as indicated to conform to UMTA's regulation and republish it.

Sincerely,

Theodore A. Munter
Deputy Chief Counsel

Enclosure

cc: Charles A. Webb, Esq.

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U.S. Department of Transportation

Urban Mass Transportation Administration

Headquarters

400 Seventh St., S.W
Washington, D.C. 20590

JUL 17 1989

Mr. John L. Carter
Director of TALTRAN
555 Appleyard Drive
Tallahassee, Florida 32304

Dear Mr. Carter:

Please find enclosed a copy of a letter from Charles A. Webb, Esq., informing the Urban Mass Transportation Administration (UMTA) that the City of Tallahassee (TALTRAN) has apparently published a notice expressing its willingness to provide charter service in a manner that violates UMTA's charter service regulations, by specifying that TALTRAN would be employing handicapped accessible as well as non-accessible buses or vans.

UMTA's charter service regulations limit the description of charter service a recipient may include in its notice, "... to the days, times of day, geographic area, and categories of revenue vehicle, but not the capacity or duration of the charter service." UMTA specifically defined categories of revenue vehicles in the regulations to mean, "bus or van," 49 CFR 604.5(d), in order to preclude other subcategories of vehicles, such as accessible or non-accessible vehicles, from influencing the determination of which private operators would be found willing and able.

It is UMTA's view that by offering to provide service in coaches or vans described as handicapped accessible and non-accessible and asking private providers to submit a statement that they have the "desire and the physical capability to actually provide the categories of revenue vehicle specified...," TALTRAN has implied that private operators will not be found "willing and able" if their buses or vans differ from those specified in the notice.

This practice violates the requirements of 49 CFR 604.11(c)(5)(i)and (ii), which provide that the recipient's public notice must state that the evidence to determine whether a private charter operator is willing and able should include only a statement that the private operator has the desire and physical capability to provide one or both "categories of revenue vehicle" specified in 49 CFR 604.5(d), i.e., buses or vans, and that the

private operator has the requisite legal authority to provide the service.

The notice TALTRAN published is unduly restrictive because it discourages private operators with different capabilities from informing TALTRAN that they are willing and able to provide charter service. Therefore, TALTRAN should immediately publish a nonrestrictive notice in strict accordance with UMTA regulations in order to determine which private operators are willing and able.

Should you have any questions concerning this requirement, please contact Rita Daguillard of my staff at 202/366-1936.

Sincerely,

Theodore A. Munter
Deputy Chief Counsel

Enclosure

cc: Charles A. Webb, Esq.

George T. Snyder, Jr.
Executive Vice President, ABA

BEFORE THE URBAN MASS TRANSPORTATION ADMINISTRATION

In the Matter of:

BLUE BIRD COACH LINES, Complainant	}	
v.	}	NY-09/88-01
JAMESTOWN AREA TRANSIT SYSTEM, Respondent	}	

DECISION

SUMMARY

Blue Bird Coach Lines, Inc. (Blue Bird) filed this complaint with the Urban Mass Transportation Administration (UMTA) on September 19, 1988. The complaint alleged that the Jamestown Area Transit System (JARTS) had provided service in violation of UMTA's charter regulation, 49 CFR Part 604. The complaint specifically alleged that JARTS was using both its own buses and buses owned by the Jamestown City School District (the District) in charter service under contract with the District. After a thorough investigation, UMTA has determined that JARTS has serviced and maintained in an UMTA-funded garage vehicles used for charter and school service, in violation of 49 CFR Part 604 and 49 CFR Part 605. UMTA orders JARTS to correct these violations within three months of receipt of this order.

COMPLAINT

Blue Bird filed this complaint on September 19, 1988, against JARTS, alleging that JARTS is in violation of UMTA's charter regulation. The complaint specifically alleges that JARTS had been the successful bidder on a contract calling for the use by JARTS of "substitute buses"[1] in transporting students in charter

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[1]According to the specifications of the contract, a copy of which is attached to the complaint, "substitute buses" are vehicles provided by the contractor which are to be furnished on days when buses owned by the District are undergoing maintenance or are out of service for any reason.

service to and from school, and for the use of JARTS-owned buses in transporting students in charter service to destinations beyond the District. Even if some of the buses operated by JARTS under the contract are not UMTA-funded, the complaint alleges, they are serviced, garaged, and maintained in a facility funded by UMTA, in violation of 49 CFR Part 604.[2]

The complaint moreover states that JARTS has used UMTA funds to purchase transit buses to be used in school service. UMTA funds, the complaint points out, may lawfully be used by JARTS only for "mass transportation...," which, as defined in Section 12(c)(6) of the Urban Mass Transportation Act of 1964, as amended (UMT Act), specifically excludes both school bus and charter service.

Blue Bird attaches to its complaint copies of the bid proposal and specifications for the service in question, as well as a copy of the school transportation contract between JARTS and the District.

Blue Bird requests that the Chief Counsel withdraw funds for equipment and facilities from JARTS, order such other remedies as may be appropriate, and direct JARTS to cease and desist from providing charter service in violation of 49 CFR Part 604.

RESPONSE

By letter dated September 14, 1988, UMTA advised Blue Bird that the allegations in its complaint, if substantiated, might constitute violations of UMTA's school bus regulation, 49 CFR Part 605, and UMTA's charter regulation, 49 CFR Part 604. UMTA stated that under the procedure set out in these regulations, the parties should attempt local conciliation for thirty (30) days. UMTA indicated that it would begin an investigation if no resolution were reached within this period.

On October 21, 1988, Blue Bird wrote to inform UMTA that it had met with JARTS to attempt local conciliation of the dispute. As a result of the discussion, stated Blue Bird, only one issue remained in dispute, namely whether certain buses, not funded by UMTA, have been engaged in charter service using UMTA-funded facilities.

2There is no specific provision of 49 CFR Part 604 which prohibits grantees from servicing and maintaining their non UMTA-funded charter vehicles in an UMTA-funded facility. However, UMTA has interpreted the language of the regulation as imposing this prohibition. See Q&A 26 of UMTA's "Charter Service Questions and Answers," 52 Federal Register 42248, November 3, 1987.

By letter of November 3, 1988, UMTA informed the parties that it would focus its investigation of the complaint on this issue.

JARTS response is dated January 3, 1989. In its response, JARTS states that the gravamen of the complaint, as contained in paragraphs 7, 8 and 9, is that JARTS has violated the charter regulation by successfully bidding on a contract to transport students "to and from school" and to "destinations beyond the Jamestown City School District." Although it was initially alleged, JARTS states, that "the buses used in such charter operations were UMTA-funded," it is now conceded that JARTS "had not used UMTA funds to purchase buses which were used in school services."

JARTS indicates that it is difficult to respond to the complaint, since the essence of the allegation has been removed. The complainant has, says JARTS, taken a shotgun approach with the hope that one pellet would strike. JARTS indicates that it will focus its response on the school bus complaint.

JARTS explains that the transition from private to public ownership of transit operations occurred in June 1962, when the Jamestown City Council authorized the acquisition of the Jamestown Motor Bus Transportation Company, Inc. (JMBTC). For the years ending December 30, 1972, and December 30, 1973, states JARTS, the audited financial statements of the JMBTC clearly reflect the existence of a school bus contract for both these years. Accordingly, JARTS maintains, there is clear evidence of the provision of school bus service prior to the enactment of Section 3(g) of the Urban Mass Transportation Act of 1964, as amended (UMT Act).

In 1973 and 1974, JARTS explains, Congress enacted Section 3(g) of the UMT Act, which provides that if a public transit authority or its predecessor operated school bus service during the twelve months immediately prior to the date of enactment, said operator could continue to provide said school bus service. Moreover, JARTS points out, counsel for Blue Bird has conceded that JARTS uses no federally funded vehicles in providing this service.[3]

3The preamble to UMTA's school bus regulation explains that even if a federally assisted operator is allowed to engage in school bus operations under one of the exemptions listed in Section 3(g) of the UMT Act, the operator cannot use federally funded buses, facilities or equipment in those operations. 41 Federal Register 14127, April 1, 1976.

Accordingly, states JARTS, it is a "grandfathered" recipient and can lawfully engage in school bus operations.

Moreover, JARTS asserts, the complainant has not shown that it is an interested party as defined by Part 604.5(j). The UMT Act, JARTS states, was carefully crafted to make a distinction between charter bus operations and school bus operations. The complainant, JARTS points out, has failed to allege that it engages in school bus operations, or that it can comply with the "Transportation Specifications" developed by the City. JARTS also states that there is no allegation that the complainant and the respondent are in competition. Thus, argues JARTS, the complainant has no standing to challenge the awarding of the school district's transportation contract to JARTS.

Furthermore, states JARTS, it has serious concerns regarding the motivation for the filing of the present complaint. On June 1, 1988, JARTS states, the complainant submitted a proposal to be the management firm for JARTS. Instead of selecting the complainant, JARTS explains, the City selected another management company to manage and operate the system effective July 1, 1988. It appears, contends JARTS, that in retaliation for that decision, the complainant filed the instant complaint on or about August 11, 1988. Undoubtedly, JARTS asserts, if the complainant had been selected as the new management firm, the present complaint would not have been filed.

JARTS describes itself as a "non-urbanized area," i.e., an area with a population of less than 50,000. Assuming arguendo, states JARTS, that the charter regulation applies in this case to the school buses owned by the school district, the requirements for an exception would be met since there would be a clear hardship for the "customer" - the City School District - in that the complainant is "located too far" from the region of the service.[4] JARTS points out that the complainant has no garage facility in Jamestown, and has its home office some fifty (50) miles from Jamestown. The complainant's garage and maintenance facility, states JARTS, is located some 30 miles away in Fredonia, New York. Accordingly, JARTS argues, the spirit and the letter of the charter regulation mandate this exception.

4Subsection 604.9(b)(3)(ii) of the charter regulation provides that a recipient in a non-urbanized area may petition UMTA for an exception to provide charter service if the charter service provided by the willing and able private charter operator would create a hardship on the customer because the willing and able private operator is located too far from the origin of the charter service.

Further assuming arguendo, states JARTS, that the school bus operations of Jamestown are charter service, the plain language of Section 3(f) of the UMT Act restricts only "intercity" charter service using federally financed buses. JARTS maintains that its school bus operations are essentially within the Jamestown area, and it is clear that intra-city or intra-urban service is not affected by the UMT Act.

JARTS concludes by stating that the complainant has failed to meet the standing requirements by showing that it is an interested party because it has not alleged or shown any financial interest which is adversely affected by the school bus contract awarded to JARTS. Moreover, contends JARTS, there has been no showing by the complainant that it is willing or able to perform the school bus contract as evidenced by the fact that for over a quarter of a century, it has neither bid upon or responded to the school district's announcements. It is clear, states JARTS, that the respondent has complied with all applicable requirements and is not in violation of the charter regulation.

REBUTTAL

By letter of January 11, 1989, UMTA forwarded a copy of the response to the complainant, and provided it with 30 days to submit a rebuttal. The complainant's rebuttal is dated February 2, 1989, and addresses JARTS' arguments in the order in which they appear in the response.

First, Blue Bird states that JARTS' claim that it is qualified under the "grandfather" clause of Section 3(g) of the UMT Act is irrelevant to the issues raised in the complaint. Blue Bird states that it has not alleged that JARTS may not lawfully engage in school bus operations within the meaning of 49 CFR Part 605. Its complaint, states Blue Bird, is not concerned with the transportation of school children in "school bus operations" as defined in 49 CFR 605.3, except to the extent that such operations involve the transportation of school children in charter service using UMTA-funded facilities. Blue Bird states that service provided by JARTS to the City of Jamestown pursuant to the Invitation to Bid is charter service as defined in 49 CFR 604.5(e).[5]

5Under 49 CFR 604.5(e), 'Charter Service' means 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. <u>This definition includes the use of UMTA funded equipment for the exclusive transportation of school students, personnel, and equipment</u>. (Emphasis added).

Second, Blue Bird maintains that it is an interested party within the meaning of 49 CFR 604.5(j). Blue Bird states that it has a financial interest which is adversely affected by the provision of charter service for school children in UMTA-funded coaches, and by the provision of service for school children in non-UMTA funded coaches which are maintained in an UMTA-funded facility. Blue Bird states that if such operations were not conducted, it would be willing and able to handle the traffic.

Third, Blue Bird denies that it challenges the awarding of the school district's transportation contract to JARTS. If the contract service were performed without the use of UMTA-funded equipment or facilities, Blue Bird states, it would not object and would indeed have no standing to challenge of provision of the contract service.

Fourth, Blue Bird maintains that the complaint was filed in good faith. Blue Bird acknowledges that it made an offer to serve as the management firm for JARTS. However, states Blue Bird, to suggest that the filing of the complaint was motivated by some improper and unspecified purpose is both snide and ludicrous. Blue Bird indicates that if it had been selected, there would have been no need to file the complaint, since it would not have provided charter service using UMTA-funded equipment or facilities.

Fifth, Blue Bird rebuts JARTS' argument that the challenged service is inapplicable under the hardship exception of 49 CFR 604.9(b)(3). The hardship exception, Blue Bird points out, is not self-executing, but must be specifically requested and granted by UMTA in accordance with the procedure specified in the regulation. Blue Bird states that to the best of its knowledge, no such request has been made.

Sixth, Blue Bird challenges JARTS' argument that the Jamestown school operations, even if they can be considered charter service, are not prohibited by UMTA's charter regulation, since the regulation restricts only intercity charter service. JARTS' argument, states Blue Bird, is based on the erroneous assumption that Section 3(f) of the UMT Act is the only basis for the charter regulation. Blue Bird recognizes that Section 3(f) addresses only charter service performed outside a grantee's urban area. The regulation, however, states Blue Bird, is also based on Section 12(c)(6) of the UMT Act, which is not limited to the charter operations of UMTA grantees which are conducted outside their urban areas. Blue Bird lists various adverse conditions in the private charter industry which UMTA, according to the preamble to the current charter regulation, prompted UMTA to implement the new rule in order to protect the industry.

Finally, Blue Bird maintains that contrary to JARTS' apparent belief, it is not required to show that it is willing and able to perform the school bus contract awarded to JARTS. It was the responsibility of JARTS, states Blue Bird, in accordance with the procedure set forth in the charter regulation, to determine whether any private bus operators in the area are willing to handle any of the charter service within the purview of 49 CFR Part 604.

Blue Bird states that for the above reasons, the Chief Counsel should find that there has been a continuing pattern of violation of 49 CFR Part 604 by the respondent, and that the respondent should consequently be barred from receipt of further Federal transportation assistance.

ADDITIONAL RESPONSE OF JARTS

By letter of February 7, 1989, JARTS stated that the complainant's rebuttal had narrowed the issues, and that it would therefore be appropriate to file an additional response. Accordingly, JARTS requested leave to file such additional response within fifteen (15) days. UMTA granted JARTS' request by letter dated February 16, 1989.

JARTS' additional response is dated March 8, 1989. JARTS therein maintains that it has not in the past, and does not now use UMTA funded buses to satisfy the requirements of the school district contract. The contract, states JARTS, is serviced by "District-owned vehicles," and it is only in the event that District-owned vehicles are unavailable that JARTS vehicles may be used. In practice, says JARTS, this has never happened.

JARTS moreover maintains that its incidental service under the school contract is authorized by 49 CFR 605.12.[6] JARTS argues that the complainant would transform a traditional school bus contract into charter bus service. This, states JARTS, would be contrary to both the regulations and the clear intent of Congress. JARTS states that in satisfying the provision of the school bus contract, it utilizes only District-owned equipment, whether it be for regular school transportation or for incidental service. These vehicles, JARTS indicates, are serviced and maintained in an UMTA funded garage in conformance with the charter regulation.

6Subsection 49 CFR 605.3(b) defines "incidental" as "the transportation of school students, personnel and equipment in charter bus operations during off peak hours which does not interfere with regularly scheduled service to the public."

With regard to the issue of good faith, JARTS maintains that Blue Bird's failure to specifically address the issue in its response raises a serious question as to motivation and whether it has "clean hands." JARTS moreover argues that if the complainant had been selected as the management company, it would have used the same school district buses serviced by the same garage facilities to satisfy the school district's requirements.

Responding to the question of its failure to request a hardship exception, JARTS maintains that no such request was required, since its operations are clearly school bus operations well within the regulatory definition. However, states JARTS, assuming such a request was required, it would have been entitled to the exception.

JARTS concludes by stating that at all times from 1962 to the present, JARTS has operated the school transportation services in Jamestown, which includes the recognized incidental service transporting school students, personnel and equipment to extracurricular activities. During the current contract period, states JARTS, it has never used UMTA funded buses for this purpose.

BLUE BIRD'S COMMENT ON JARTS' ADDITIONAL RESPONSE

By letter of March 20, 1989, Blue Bird provided a brief comment on JARTS' additional response. JARTS contends, Blue Bird states, that UMTA funded facilities lawfully may be used to service and maintain non-UMTA funded equipment where such equipment is used in providing "incidental service" for extracurricular activities beyond the school district. Contrary to JARTS' impression, Blue Bird states, "school bus operations" are limited to the transportation of school children from home to school and do not extend to extracurricular activities far beyond the boundaries of the school district. Blue Bird cites the Federal Motor Carrier Safety Regulations (49 CFR Part 305) and the Federal Highway Administration Regulations (49 CFR Part 390) in support of its position.

Even assuming, states Blue Bird, that the challenged charter bus operations of JARTS are "incidental" in nature, such incidental charter operations violate the 49 CFR Part 604 regulations.

DISCUSSION

In its letter of November 3, 1988, UMTA agreed to focus its investigation of this complaint on the issue of whether non UMTA-funded vehicles allegedly used in charter service are being serviced and maintained in an UMTA-funded garage. However, subsequent submittals by the parties also raise other issues which UMTA believes it is necessary and appropriate to address.

1. Standing

The first question to be addressed is that of standing. JARTS contends that Blue Bird lacks standing to file this complaint, since it is not a school bus operator and does not have a financial interest which is affected by the school service contract being performed by JARTS, and is therefore not an "interested party."

This contention, however, overlooks the fact that the Blue Bird's complaint was filed under the charter regulation, 49 CFR Part 604. The complaint as originally submitted essentially alleged that the service being provided by JARTS was charter service, since it involved the use of UMTA-funded facilities and equipment in transporting students for non school-related activities. Such operations are indeed charter service as defined by 49 CFR 604.5(e). Since Blue Bird identifies itself in the complaint as a private charter operator which would be able to perform these operations if JARTS were not performing them, it has a financial interest which may be adversely affected by the actions of JARTS, and thus may properly be determined an "interested party" under 49 CFR 604.5(j).

2. Good faith of the complainant

The next question to be dealt with is that of Blue Bird's motivation in bringing this complaint. JARTS asserts that the complaint is not brought in good faith, and states that it was filed in retaliation against the awarding by JARTS of its management service contract to another firm.

UMTA cannot be certain of the underlying motivations of Blue Bird in filing this complaint, nor should such an inquiry be necessary. Subsection 604.15(b) of the charter regulation merely requires that a complaint be "not without obvious merit" and "state grounds upon which relief should be granted." The regulation does not require that the complainant be of any particular mental disposition or attitude. As long as the complaint meets the threshold requirements cited above, it can be properly entertained by UMTA, despite the state of mind of the complainant at the time that it was filed.

3. Applicability of the hardship exception

JARTS argues that even if its school operations are charter service, they are permissible under the "hardship" exception of 49 CFR 604.9(b)(3). JARTS states that it meets all the requirements of this subsection, and would have been entitled to a hardship exception had it requested one. The charter regulation mandates the granting of this exception, states JARTS, since Blue Bird is located "too far" from the origin of the service, thereby creating a hardship on the customer, the school district.

UMTA disagrees. The regulation in no instance mandates the granting of a hardship exception; the regulation allows the UMTA Administrator to grant such an exception when he determines, on the basis of the information provided, that there are reasonable grounds to do so. Moreover, JARTS cannot assume an automatic finding that the private provider is located "too far" from the origin of the service. Q&A 38 of UMTA's "Charter Service Questions and Answers," 52 Federal Register 42248, November 3, 1987, points out that UMTA has no fixed guidelines for determining what is "too far," but will examine the information submitted by a recipient on an individual basis.

Until JARTS has submitted its request and information and has received notification of the Administrator's decision, it should not assume that it should or will receive a hardship exemption, nor should it perform charter operations in accordance with this assumption.

4. UMTA's authority to regulate intra-city charter operations

JARTS argues that even if its school bus operations are charter service, they are permissible, since Section 3(f) of the UMT Act restricts only "intercity" charter service. JARTS maintains that its school bus operations take place within the Jamestown area, and are thus intracity service, not affected by the UMT Act.

The crux of JARTS' argument is that UMTA has exceeded its statutory authority in promulgating the charter regulation, which prohibits both intercity and intracity charter operations.

It should be pointed out that JARTS' argument with respect to this issue is disingenuous, since Exhibit E of the "Transportation Specifications" clearly indicates that JARTS is to provide service for extracurricular activities outside its urban area. Thus, even under the restrictive interpretation of UMTA's authority proposed by JARTS, the service in question would be prohibited to the extent that it involves the use of UMTA-funded equipment or facilities.

Even admitting, however, that JARTS is providing no intercity charter service, its argument was raised and rejected in two

previous administrative proceedings.[7] UMTA's response is the same in this case as it was in those two instances. First, UMTA has addressed the question of statutory authority on pages 11930-1 of the preamble to the charter regulation (52 Fed. Reg. 11916 et seq., April 13, 1987). UMTA's extensive discussion refutes the argument of lack of statutory authority, and explains the legal basis for the rule. Second, since, under the terms of the charter regulation, UMTA is limited in these proceedings to an examination of the merits of the complaint, it does not consider this a proper forum for considering a challenge to the legality of the rule.

5. JARTS' service for extracurricular school activities

The preamble to UMTA's school bus regulation, at page 14128, explains that "school bus operations" generally take place during peak morning and evening hours. The transportation of students and personnel during off-peak hours is said to be charter service, governed by 49 CFR Part 604. The trips provided by JARTS for extracurricular school activities, some of which involve overnight service outside the school district, are clearly not "school bus operations" providing peak hour transportation to and from school, but rather charter service as defined by 49 CFR 604.5(e).

JARTS states, and Blue Bird concedes, that no UMTA-funded vehicles are used to provide this service. In its additional response, however, JARTS affirms that the locally funded vehicles utilized for these trips are serviced and maintained in an UMTA-funded garage. JARTS indicates that it considers such use of an UMTA-funded facility to be in conformance with UMTA regulations.

JARTS' position is in direct contradiction with an UMTA ruling set forth in Q&A 26 of the above-cited "Charter Service Questions and Answers." Q&A 26 explains that even when a grantee provides charter service with locally funded vehicles, such vehicles may not be stored or maintained in an UMTA-funded facility, even if the separate charter operation were to pay rent and fees for such use. Accordingly, even though UMTA concludes that JARTS has used no UMTA-funded vehicles in providing extracurricular charter service under the school contract, JARTS is nonetheless in

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7Washington Motor Coach Association v. Municipality of Metropolitan Seattle, WA-09/87-01, March 21, 1988; and, B&T Fuller Double Decker Bus Company v. VIA Metropolitan Transit, TX-02/88-01, November 14, 1988.

violation of the charter regulation to the extent that it services and maintains its charter vehicles in an UMTA-funded garage. In order to come into compliance with the charter regulation, JARTS must either store and maintain its charter buses in a separate facility which was not purchased with UMTA funds, or it must reimburse UMTA for the part of the UMTA-funded garage which is used for charter operations.

6. JARTS' use of an UMTA-funded garage in school bus operations

Information provided by JARTS, and uncontradicted by Blue Bird, indicates that JARTS may lawfully provide school bus service, since it was doing so more than twelve months prior to the enactment of Section 3(g), and thus falls under the "grandfather" exception. Moreover, both JARTS and Blue Bird appear to agree that JARTS uses only locally funded vehicles in providing the service.

However, as is indicated in its additional response, JARTS apparently believes that vehicles used in school bus operations, like those used in charter service, may be stored and maintained in an UMTA-funded garage. Again, JARTS has erred with regard to this question. Subsection 605.12 of UMTA's school bus regulation clearly provides that a grantee may not engage in school bus operations using UMTA-funded facilities or equipment. The preamble to the regulation, at page 14127, specifically states:

> Even if a federally assisted operator is allowed to engage in school bus operations under one of the exceptions listed in sections 3(g) and 164(b), the operator cannot use federally assisted buses, facilities and equipment in those operations.

JARTS' use of an UMTA garage to service and maintain vehicles used in school operations is thus in direct violation of UMTA's school bus regulation. In order to come into compliance with the school bus regulation, JARTS must either service and maintain its school buses in a separate facility which was not purchased with UMTA funds, or it must reimburse UMTA for the part of the UMTA-funded garage which is used for school operations.

CONCLUSION

On the basis of its investigation, UMTA concludes that JARTS is providing charter service under its contract with the school district. Although JARTS uses locally funded vehicles in these charter operations, it services and maintains them in an UMTA-funded garage, in violation of 49 CFR Part 604. Similarly, JARTS' school bus operations are performed using locally funded vehicles which are also serviced and maintained in an UMTA-funded garage, in violation of 49 CFR Part 605. In order to come into compliance with UMTA requirements, JARTS must either service and maintain its charter and school buses in a facility which was not purchased with UMTA funds, or it must reimburse UMTA for the part of the UMTA-funded garage which it uses for charter and school operations. JARTS should report to UMTA within 90 calendar days of receipt of this decision on the measures that it has taken to comply with this order.

Rita Daguillard
Attorney-Advisor

AUG 08 1989
(Date)

Steven A. Diaz
Chief Counsel

AUG 08 1989
(Date)

file charter

US Department
of Transportation

Urban Mass
Transportation
Administration

Headquarters

400 Seventh St. S.W.
Washington D.C. 20590

AUG 21 1989

Mr. Jeffrey Nelson
Rock Island County Metropolitan
Mass Transit District
2929 5th Avenue
Rock Island, Illinois 61201

Re: IL-Metro/89-06-01

Dear Mr. Nelson:

Thank you for your recent response to the above-cited complaint. Your letter states that the service cited in the complaint is mass transportation. You maintain that it is provided by the Rock Island Metropolitan Mass Transit District (RICMMTD) on a regularly scheduled basis to homes currently on the market, and that RICMMTD has received no complaint that persons have been denied access to this route.

Your letter fails, however, to provide information sufficient to allow the Urban Mass Transportation Administration (UMTA) to determine the nature of the service in question. In this connection, I draw your attention to the preamble to UMTA's charter regulation, 52. Fed. Reg. 11916, 11920 (April 13, 1987), which describes "mass transportation" as having the following three characteristics:

1) the service is under the control of the grantee;
2) it is designed to benefit the public at large;
3) it is open to the public.

UMTA views service as being under the control of the grantee when the grantee, and not a third party, sets the route, rate and schedule, and decides what equipment is used. UMTA considers that service is in conformance with the second element of the definition when it is intended to meet the needs of the general public as opposed to those of a particular organization or specified group of users. Finally, in determining whether service is open door, UMTA considers whether it stops at the grantee's regularly scheduled stops, appears in the grantee's printed schedules, and has a substantial level of public ridership.

Service which does not have these characteristics is charter service, and is impermissible under UMTA's charter regulation, 49 CFR Part 604.

Please provide, within fifteen (15) days of receipt of this letter, information, including supporting documentation, which will allow UMTA to determine to which category RICMMTD's homes tour service belongs. Should you have any questions in the meantime, you may address them to Rita Daguillard of my staff at 202/366-1936.

Sincerely,

Steven A. Diaz
Chief Counsel

cc: Charles A. Webb, Esq.

US Department
of Transportation

**Urban Mass
Transportation
Administration**

The Deputy Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

AUG 25 1989

Mr. Ronald P. Spall
Vice President
Grant County Convention and
Visitors Bureau
215 South Adams Street
Marion, Indiana 46952

Dear Mr. Spall:

This responds to your recent letter concerning the use by the Grant County Convention and Visitors Bureau ("Grant County") of buses owned by the City of Marion ("the City"), a recipient of Urban Mass Transportation Administration ("UMTA") funds, to transport conventioneers within the county. You indicate that Grant County and the City have recently been advised by a consultant to the State of Indiana Department of Commerce that such use of UMTA-funded equipment may jeopardize the City's Federal transportation assistance.

You maintain that Grant County's use of the vehicles in question should be permitted for two reasons. First, you state, Grant County does not "charter" the UMTA-funded buses, but uses them to provide a free community service. Second, you explain that there is no private provider of charter service within the area, since the closest one is located 35 miles away.

Neither of these reasons, however, exempts Grant County or the City from the prohibition on the use of UMTA-funded equipment for charter service. In connection with your first point, I draw your attention to Q&A #27(a) of UMTA's "Charter Service Questions and Answers," 52 Fed. Reg. 42248, 42252 (November 3, 1987), which states:

> Cost is irrelevant in determining whether service is mass transportation or charter service. Thus, service which meets criteria set by UMTA, i.e., service controlled by the user, not designed to benefit the public at large, and which is provided under a single contract, will be charter regardless of the fact that it is provided for free.

Grant County's use of UMTA-funded buses to transport groups of conventioneers indeed meets the criteria of "charter service" provided on page 11919 of the preamble to UMTA's charter regulation, 49 CFR Part 604 (49 Fed. Reg. 11918 et seq., April 13, 1987), since it is: (1) by bus; (2) to a defined group of people; (3) there are no single contracts between the recipient and individual riders; (4) the patrons have exclusive use of the bus; (5) the riders have sole authority to set the destination. Accordingly, though the service is provided for free, it falls under the prohibition of the charter regulation.

With regard to your second argument, I would like to point out that distance from the service area is not a factor that UMTA recipients may take into consideration in determining that a private operator is willing and able to provide charter service. Section 604.11 of the charter regulation provides that to be determined willing and able, a private operator need only demonstrate that it has the capability to provide the required categories of revenue vehicles, and the legal authority to operate charter service in the area where it desires to provide such service. To the extent that there is such a willing and able private operator in the City's service area, the City may make UMTA-funded vehicles available for charter service only under one of the exceptions to the regulation.

One exception which may be applicable to the situation you describe is that of section 604.9(b)(7) of the regulation, which permits a recipient to provide particular types of charter service when there is an agreement to this effect between the recipient and all the private charter operators it has found willing and able. Under the procedure set forth in this section, the recipient's annual public charter notice must have provided for this type of agreement. If it did not, the recipient must, before undertaking the charter trip(s) in question, amend its charter notice to specifically refer to such agreement.

Moreover, under section 604.9(b)(3), a recipient in a non-urbanized area (i.e., an area with a population of less than 50,000) may petition UMTA to provide charter service directly when charter service provided by willing and able charter operators would create a hardship on the customer because the private operators are located too far from the origin of the charter service. Before any such exception is granted, however, the recipient must petition the UMTA Chief Counsel to grant such an exception, and give notice of its request to any private operator it has determined willing and able. The private operators will then have 30 days to submit written comments to the recipient on

request. The question of what is "too far" from the charter point of origin will be decided by UMTA's Chief Counsel on a case-by-case basis.

I trust that this responds to your inquiry and clarifies the points raised in your letter.

Sincerely,

Roland J. Mross

U.S. Department
of Transportation

Urban Mass
Transportation
Administration

The Deputy Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

SEP 12 1989

The Honorable Cass Ballenger
House of Representatives
Washington, D.C. 20515

Dear Mr. Ballenger:

This is in response to your letter requesting information regarding the concerns of your constituent, Christopher D. Turner, of Boone, North Carolina, about the federal regulations governing charter service by public transportation agencies. Mr. Turner describes a problem experienced by AppalCART, the local transportation authority. He states that there should be an exception to the charter service regulation for rural and low income areas and that a private operator should have at least three buses in order to be considered a "willing and able" carrier.

Five limited exceptions to the basic prohibition of the charter service regulation are set out in 49 C.F.R. 604.9(b). Two of these exceptions may be applicable to AppalCART's situation. The regulation provides that

> (2) A recipient may enter into a contract with a private charter operator to provide charter equipment to or service from the private charter operator if: (i) The private charter operator is requested to provide charter service that exceeds its capacity; . . . .
> (3) A recipient in a non-urbanized area may petition UMTA [Urban Mass Transportation Administration] for an exception to provide charter service directly to the customer if the charter service provided by the willing and able private charter operator or operators would create a hardship on the customer because: . . . The willing and able private operator or operators are located too far from the origin of the charter service.

These aspects of the regulation are further explained in question twenty of "Charter Service Questions and Answers" 52 Fed. Reg. 42248, 42251, November 3, 1987, several reprints of which are enclosed for your convenience.

The regulation also specifies that a "willing and able" private charter operator need only express in writing its desire to perform, have the physical capability of providing the categories of revenue vehicles specified in the notice and possess the required legal authority to operate charter service in the area where it desires to provide such service. Questions five and six of the enclosed reprints address this point.

I trust that this responds to your questions and concerns.

Sincerely,

Roland J. Mross

Enclosure

file Charter

U.S. Department of Transportation
Urban Mass Transportation Administration

The Deputy Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

OCT - 6 1989

The Honorable Phil Gramm
United States Senator
712 Main Street, Suite 2400
Houston, Texas 77002

Dear Senator Gramm:

This responds to your recent letter enclosing correspondence from your constituent, Jack Ussery of the Texas Department of Mental Health and Mental Retardation in Corpus Christi. Mr. Ussery expresses disappointment that a Federal agency would prohibit a transit authority from transporting retarded citizens in the event of a destructive hurricane. An attachment to Mr. Ussery's letter indicates that he was advised by VIA Metropolitan Transit (VIA) of San Antonio, Texas that the Urban Mass Transportation Administration's (UMTA) charter regulation prohibits VIA from operating outside its service area, even in emergency situations.

The information which VIA provided to Mr. Ussery is inaccurate in two respects. First, UMTA's charter regulation, 49 CFR Part 604, prohibits an UMTA grant recipient from providing charter service when there is a private operator willing and able to provide the service. If there is no such willing and able private operator, the UMTA recipient may provide any charter service it chooses, as long as such service is "incidental," i.e., it does not interfere with or detract from the recipient's mass transit service. The regulation does not contain any geographic restriction: any limits on charter operations outside the recipient's service area are not mandated by UMTA. Bona fide emergency operations are, similarly, not limited by this UMTA regulation.

Second, even if there is a willing and able private operator, UMTA has provided a special exception which allows recipients to perform charter operations in emergency situations. Q&A #45 of UMTA's "Charter Service Questions and Answers," 52 Fed. Reg. 42248, 42255, states:

> "UMTA will allow recipients to perform otherwise prohibited charter service in the case of a serious emergency, in which time is of the essence in transporting victims or rescue workers. The types of emergency situations contemplated under this exception are man-made and natural disasters, such as fire, chemical spills, floods or hurricane."

Accordingly, UMTA's charter regulation would not prohibit VIA from providing the type of emergency service requested by Mr. Ussery.

I trust that this responds to your inquiry.

Sincerely,

Roland J. Mross

Enclosure:
Transmittal Correspondence

cc: Washington Office

Chron

U.S. Department of Transportation
Urban Mass Transportation Administration

Headquarters

400 Seventh St., S.W.
Washington, D.C. 20590

NOV 22 1989

Brent A. Sheffer, Manager,
Financial Planning Budget
Central Ohio Transit Authority
1600 McKinley Avenue
Columbus, Ohio 43222

Dear Mr. Sheffer:

Please find enclosed a copy of a letter from Charles A. Webb, Esq., which requests that the Urban Mass Transportation Administration (UMTA) inquire as to the legality of a service being provided by the Central Ohio Transit Authority (COTA) for Seniors on the Town.

You are reminded that under UMTA's charter regulation, 49 CFR Part 604, recipients of UMTA funds may not provide charter service if there is a willing and able private operator, except under one of the exceptions to the rule. However, it should be noted that exclusive service for the elderly and handicapped is "mass transportation" under the definition of the Urban Mass Transportation Act of 1964, as amended (UMT Act), and is not considered to be charter. UMTA has ruled that in order to qualify as "exclusive," the service in question must be open to all elderly and handicapped in a particular service area, and not restricted to a particular group of elderly and handicapped persons. See, Q&A #27(b) of UMTA's "Charter Service Questions and Answers," 53 Fed. Reg. 42248, 42252 (November 3, 1989).

Please provide, within thirty (30) days of receipt of this letter, specific information concerning the nature of COTA's service to Seniors on the Town. Your response should explain who controls the service (i.e., sets the rates, routes and schedules), whether it was designed to accommodate the needs of a particular group as opposed to those of the general public or a specific segment thereof, and whether it is open, if not to the general public, at least to all the elderly and handicapped in COTA's service area.

When UMTA has received this information, it will make a determination in this matter.

Sincerely,

Steven A. Diaz
Chief Counsel

Enclosures

cc: Charles A. Webb, Esq.

BEFORE THE URBAN MASS TRANSPORTATION ADMINISTRATION
OFFICE OF CHIEF COUNSEL

In the matter of:

SEYMOUR CHARTER BUS LINES, Complainant	}	
v.	}	TN-09/88-01
KNOXVILLE TRANSIT AUTHORITY, Respondent	}	

DECISION

SUMMARY

Seymour Charter Bus Lines (Seymour) filed this complaint with the Urban Mass Transportation Administration (UMTA), alleging that the Knoxville Transit Authority (K-TRANS) was providing charter service in violation of the Urban Mass Transportation Administration's (UMTA) charter regulation, 49 CFR Part 604. The complaint specifically alleged that Seymour had contracted to provide charter service for the University of Tennessee (the University). Applying a balancing test to the service in question, UMTA concludes that it is charter service as defined by 49 CFR 604.5(e). UMTA orders K-TRANS to cease and desist from providing the service as it is currently configured. K-TRANS must report to UMTA within 90 days on the measures it has taken to comply with the terms of this order.

COMPLAINT

Seymour filed this complaint with UMTA on August 19, 1988. The complaint alleged that K-TRANS was providing charter service in violation of UMTA's charter regulation, 49 CFR Part 604. The complaint specifically alleged three violations. According to the first two allegations, set forth in paragraphs 5 and 6 of the complaint, K-TRANS had established brokering arrangements with Loy Bus Lines and Mays Bus Lines. In paragraph 7 of the complaint, Seymour alleged that K-TRANS had successfully bid on a contract for charter service to the University, at a charge that was less than its fully allocated cost of providing the service.

By letter of September 23, 1988, UMTA advised Seymour that its allegations stated a complaint under 49 CFR 605.15. The letter directed Seymour to attempt local conciliation for thirty days. If no resolution were reached at the end of this period, the

letter stated, either party could write to UMTA to request a formal investigation.

On October 27, 1988, Seymour wrote to UMTA to state that it had met with K-TRANS on the previous day. As a result of discussions which took place, Seymour stated, it was withdrawing its allegations that K-TRANS had established brokering arrangements with Loy Bus Lines and May Bus Lines. Seymour stated, however, that the parties had been unable to reach an agreement on the nature of K-TRANS' service to the University. Seymour maintained that the service was charter service, and therefore prohibited by UMTA's charter regulation.

RESPONSE

By letter of November 21, 1988, UMTA advised Seymour and K-TRANS that it would proceed with a formal investigation of the remaining allegations concerning K-TRANS charter service for the University. UMTA gave K-TRANS 30 days to respond to the complaint.

K-TRANS' response was dated December 21, 1988. K-TRANS noted that it was making no response to the allegations of paragraphs 5 and 6 of the complaint concerning K-TRANS' brokering arrangements with Loy Bus Lines and Mays Bus Lines, since those allegations had been withdrawn by Seymour.

Responding to the allegations in paragraph 7, K-TRANS stated that it has been providing service to the University of Tennessee campus and to certain student apartments operated by the University. K-TRANS explained that it had been operating, as part of the mass transit system of the city for many years, service to and from the campus and to and from 5 off-campus apartments occupied by married and graduate students.

In June 1988, stated K-TRANS, the University issued a request for quotations. K-TRANS indicated that it was providing service to the University not under a separate contract, but "pursuant to the request for quotations issued by the University and the response of K-TRANS." K-TRANS denied that the service was charter service, or that service was being provided in violation of the UMTA charter regulation.

K-TRANS stated that the schedule for the Route 22 service, a copy of which was attached to its response, showed that the service provided for the University community was divided into two parts. The first part, explained K-TRANS, was known as the Campus Route, and connected the main campus with the University Agricultural Campus along Weyland Drive, a main thoroughfare of the City. K-TRANS stated that no fare was charged for this intercampus service.

The second part of the service, according to K-TRANS, was provided to five (5) separate apartment complexes which housed married and graduate students. K-TRANS explained that the service to the

married student apartments ran along a principal thoroughfare, through residential and commercial areas. K-TRANS maintained that the buses stopped and picked up at any K-TRANS stop along the way. Each rider, stated K-TRANS, paid a fare for this service.

K-TRANS stated that in its request for quotations, the University requested the use of 45-passenger buses, set the departure times from the campus and the apartments and the times during which the service would operate, and set the fare to be charged for students. Otherwise, K-TRANS maintained, the service was totally under the control of K-TRANS.

K-TRANS explained, notably, that it set the number of vehicles used to provide the service, handled all operational details, and determined the routes to be followed. K-TRANS stated that for the most part, the buses operated along publicly dedicated and maintained streets, were open to the public at regular fares, and stopped at all of K-TRANS' regular stops. Moreover, stated K-TRANS, the service appeared in K-TRANS' regularly published schedules, which were distributed to the general public. K-TRANS acknowledged that the service was geared to meet the needs of the University community, but stated that it was not tied exclusively to University class schedules, and had operated on a modified schedule during vacation periods. These factors, K-TRANS maintained, confirmed that the service was "mass transportation" as defined on page 11920 of the preamble to UMTA's charter regulation (52 Fed. Reg. 11916 et seq., April 13, 1987).1

K-TRANS further contended that the service was for the benefit of the public-at-large, since University students were members of the public as was any group which lives in a particular sub-division or series of apartment complexes. College students were not, maintained K-TRANS, a restricted, nurtured group as would be secondary students served by a school bus, but were members of the local community.

On the other hand, K-TRANS submitted, the service was not "charter service," because, among other things, the patrons did not have a common purpose or constitute a defined group, they had not acquired exclusive use of the bus, they did not travel under an itinerary specified in advance or have authority to set the desination, and each rider paid an individual fare.

Responding to the allegation of paragraph 9 of the complaint concerning K-TRANS' failure to bid fully allocated costs for the University contract, K-TRANS acknowledged that the successful bid price was $22.75 per hour, but stated that determination as to

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1) "Mass transportation" is herein defined as having the following three basic characteristics: 1) it is under the control of the grantee (i.e., the grantee sets the rate, route, fares and schedules); 2) it is designed to meet the needs of the general public as opposed to those of a particular group; 3) it is open to the public.

whether the charge was compensatory was not appropriate. If it were determined that the service was charter service and should not be provided, argued K-TRANS, the amount of the charge would become a moot question. If, stated K-TRANS, the ultimate decision were that the service is mass transportation, then the matter complained of in paragraph 9 should not be an issue.

Further responding to the complaint generally, K-TRANS asserted that the regulations promulgated at 49 CFR Part 604 were not within the legal authority granted to UMTA under the Urban Mass Transportation Act of 1964, as amended (UMT Act), since the service complained of was not being operated outside the urban area in which K-TRANS provided regularly scheduled mass transportation service.2

For the above reasons, K-TRANS concluded that the complaint should be dismissed.

REBUTTAL

By letter of December 29, 1988, UMTA wrote to Seymour to state that it had received the response of K-TRANS on December 21, 1988, and that K-TRANS had indicated that it had forwarded a copy of its response to Seymour. UMTA stated that Seymour would have 30 days to file a rebuttal.

Seymour's rebuttal is dated January 17, 1989. Seymour therein stated that the issue presented in this proceeding was whether transportation provided to the University exclusively, or on a substantially exclusive basis, for its faculty, staff and students by K-TRANS, consituted impermissible charter service in violation of 49 CFR Part 604.

Seymour pointed out that in consideration of the payment of $22.75 per hour per bus, K-TRANS agreed to provide service to the University campus, operating in an area and at times specified by the University. Seymour noted that in meeting this general transportation requirement, the University had imposed specfic requirements on K-TRANS, including the number and seating capacity of buses used, detailed insurance specifications, maintenance of a cash collection system acceptable to the University, and frequency of service and points of origin and destination.

Seymour asserted that the service provided by K-TRANS to the University was not mass transit. Seymour pointed out that mass transit is described in the preamble to UMTA's charter regulaion

2) UMTA will not discuss this issue, since it has already dealt with it extensively in two previous decisions, Washington Motor Coach Association v. Municipality of Metropolitan Seattle, WA-09/87-01, March 21, 1988, and B&T Fuller Double Decker Bus Company v. VIA Metropolitan Transit, TX-02/88-01, November 14, 1988.

as being: 1) under the control of the grantee; 2) designed to benefit the public at large; 3) open door. 49 Fed. Reg. 11920, (April 13, 1987). Seymour maintained that K-TRANS' service had none of those characteristics of mass transit.

First, stated Seymour, K-TRANS' service to the University was not under its control, but operated according to routes, minimum rates, and schedules set by the University, which also specified what equipment is used.

Second, Seymour argued, K-TRANS maintained that the service was designed to benefit "members of the public," since students were part of the public at large. That argument, Seymour pointed out, was rejected by the UMTA Chief Counsel in Blue Grass Tours and Charter v. Lexington Transit Authority (Memorandum of Decision dated May 17, 1988). In that decision, Seymour noted, the Chief Counsel ruled that the service was not set up to benefit the general public, except as the general public might coincidentally need to travel around the campus.3

Third, Seymour acknowledged that K-TRANS' service could be described as "open door" in the sense that no one wanting to use it was prevented from doing so, but denied that it was true "open door" mass transit. Seymour quoted the finding in an opinion letter of UMTA's Chief Counsel dated December 28, 1988, that certain service provided by the Ithaca Transit Authority was impermissible charter service since it was apparent that the purpose of the trip was to provide service for a particular group of senior citizens and not for the public-at-large. Seymour cited K-TRANS' failure to furnish the University with documentation of fares collected or passengers carried as evidence that there was no significant public ridership or routes serving the married students' apartments.

Seymour maintained that K-TRANS' campus service conformed to the following seven criteria for charter service set forth in 49 CFR 604.5(e):

1) The patrons had a common purpose, namely to travel to or from points on the University campus.

2) The service was provided exclusively for University students and personnel. Moreover, Seymour stated, no transportation was provided when school was not in session.

---

3) The Lexington Transit Authority, the respondent in the proceeding cited, eventually modified this element of the service by publishing schedules for its campus service, advertising them to the public, and marking campus stops with its logo, thereby evidencing an attempt to invite public ridership. By letter of December 27, 1988, to the Lexington Transit Authority, UMTA recognized that these and other changes had converted what it believed was charter service to mass transit.

3) While the passengers did not board as a group at a common place, it was not uncommon for motor carriers to pick up at various locations (ex., pick-ups at various hotels in the case of convention charters).

4) The University had acquired exclusive use of the bus for its students and personnel.

5) The passengers travelled together under an itinerary specified in advance by the chartering party, the University.

6) The University, the chartering party, set the destinations.

7) The buses were chartered for the purpose of providing transportation on an individual basis; hence, each person paid an individual fare.

Seymour argued that like the service in Blue Grass, the service provided by K-TRANS to the University was set up, advertised, and operated differently than K-TRANS' regular service and was geared to accomodate the special needs of the University when school was in session.

Seymour responded to K-TRANS' argument that UMTA lacked legal authority to promulgate the charter regulation by stating that 12(c)(6) of the UMT Act, by restricting UMTA funds to use for mass transit purposes, invested UMTA with the necessary authority to prohibit use of funds for other purposes. Section 12(c)(6), maintained Seymour, was a fairly typical example of a delegation of authority to frame major governmental policy without significant statutory guidance.

Seymour asked that for the reasons set forth above, K-TRANS should be barred from receipt of further financial assistance for mass transit facilities and equipment.

REQUEST FOR ADDITIONAL INFORMATION

By letter of January 26, 1989, UMTA requested additional information from K-TRANS. The information requested, and K-TRANS' response of March 10, 1989, are summarized as follows:

QUESTION: Why, after providing service to the University of Tennessee for many years as part of its mass transit system, is K-TRANS now providing it pursuant to the request for quotation from the University?

ANSWER: Prior to 1988, the basis for subsidy by the University to K-TRANS had been by negotiated agreement. Last year, however, following an informal proposal from a private operator, the University determined that it should be satisfied as to the appropriate payment, and decided to solicit proposals.

QUESTION: Please submit a copy of Requirements Contract UC #0505-990.

ANSWER: Document requested, dated June 23 1988, is attached.

QUESTION: Has there been a change in fares, routes or schedules since the K-TRANS began operating the service pursuant to the University's request for quotation?

ANSWER: No change has been made in fares, routes or schedules, though it has been determined to operate the service when the University is not in session.

In a supplemental response, K-TRANS commented on two matters contained in complainant's rebuttal, and provided other additional information.

First, K-TRANS stated, with regard to the assertion that all patrons had the common purpose to travel to and from points on the University campus, it should be pointed out that students may transfer to another K-TRANS route with the purchase of a transfer at the regular charge.

Second, K-TRANS noted that complainant's rebuttal contained a footnote to the effect that no transportation was provided when the University was not in session. K-TRANS referred to Exhibit "C" of its response showing the schedule for the Christmas Holiday period between December 15, 1988, and January 10, 1989.

K-TRANS further stated that bus stops signs were, and historically had been, posted and maintained on the regular campus. K-TRANS moreover maintained that while the University's request for proposals contained a schedule of desired departure times, this schedule had originally been developed by K-TRANS in consultation with the University. Finally, K-TRANS stated that in order to further illustrate the urban nature of the service in question, it was attaching a city street map showing the routes followed over the campus area.

COMMENT ON SUPPLEMENTAL RESPONSE

On March 20, 1989, Seymour provided the following comments on the supplemental information furnished by the complainant.

First, argued Seymour, the students' alleged ability to transfer to other routes did not make the campus routes part of an integrated mass transit system.

Second, stated Seymour, the operation of the service during the Christmas season did not negate the fact that the service was not mass transportation, but was dedicated exclusively to the needs of University students and personnel.

Third, Seymour contended that the posting of stop signs was irrelevant if the general public did not use the service in question.

Fourth, Seymour stated that it would be reasonable to assume that service for the University, whether mass transit or charter, would be discussed by officials of K-TRANS and the University to determine the most convenient departure times.

Fifth, Seymour conceded that the service provided by K-TRANS under contract to the University was over routes depicted on the city map supplied by K-TRANS. Finally, Seymour maintained that K-TRANS had failed to establish that it had transported even one member of the general public.

K-TRANS was required under the terms of its contract with the University, stated Seymour, to furnish documentation of fares collected and passengers carried, but had thus far failed to do so.

DISCUSSION

The essential issue in this case is whether the service provided by K-TRANS to the University is impermissible charter service or permissible mass transportation.

The complainant's argument that the service provided by K-TRANS to the University is charter service is based in large part on the definition of charter service set out at 49 CFR 604.5(e), and on the Chief Counsel's determination in Blue Grass (supra) concerning similar university campus service.

In Blue Grass, the Chief Counsel determined that the service provided by the Lexington Transit Authority (Lextran) essentially corresponded to the criteria of section 604.5(e). First, the Chief Counsel found, the service was charter service, since it was provided "under a single contract." The Chief Counsel's investigation revealed that although no written contract had been concluded between the parties, the service was operated by the grantee on terms set by the University, and the grantee was conpensated on the basis of hours of service.

Second, the Chief Counsel found that the service was operated and managed differently from the grantee's other routes, since there were no published schedules for the campus routes, and it was provided for free.

Third, the Chief Counsel found that the service had been designed to meet the transportation needs of university students and personnel, and that that though it was operated open door, only coincidentally served the needs of the needs of the general public. Balancing these factors, the Chief Counsel determined that the service was charter service.

The same type of balancing test must be applied in determining the nature of service involved in any complaint filed with UMTA, since, as the preamble to the charter regulation points out at page 11926, there is no fixed definition of charter service, and the characteristics cited by UMTA are given as examples only.

While the service provided by K-TRANS is similar to that provided by Lextran at the time of the complaint cited in Blue Grass, it has other characteristics which more easily fit the definition of mass transportation.

In contrast to Lextran, K-TRANS does publish the campus routes in its regular schedules. Moreover, K-TRANS' service to and from the married student apartments is not provided for free, but each passenger pays an individual fare. In these respects, the service conforms to the criteria for mass transportation.

At the same time, K-TRANS' service and Lextran's service as it was reconfigured following the Chief Counsel's decision in Blue Grass, share similarities which also meet UMTA's mass transit criteria. While in both cases the routes serve mainly university students and personnel, both offer at least a significant opportunity for public ridership. In Lextran's case, following the issuance of the Chief Counsel's decision, the campus service was modified to invite public ridership through the publication of regular schedules and the marking of campus stops with the Lextran logo.

The K-TRANS service affords an opportunity for public ridership through the publication of regular schedules and the posting of bus stop signs throughout the campus. Morever, as K-TRANS points out, since the University campus is located in a central part of the urban area, some of the campus route buses follow major thoroughfares and passengers using them may connect with other K-TRANS routes. Further, contrary to Seymour's assertion that the campus service does not operate during school vacation periods, K-TRANS has demonstrated that the service does operate on a modified schedule at least during the Christmas holiday season. Thus, the service does appear to be open and available to the general public.

Seymour, while not denying that the service is open door, cites K-TRANS' failure to furnish the University with documentation of fares collected or passengers carried as evidence that there is no significant public ridership on the campus routes. Although K-TRANS has not made this information available to UMTA, UMTA disagrees with Seymour that this is conclusive evidence that no member of the general public has been transported by the campus service. The agreement between K-TRANS and the University does not require that K-TRANS provide separate data on student and nonstudent riders. Thus, even though K-TRANS may be able to provide information on fares collected and passengers using this service, it does not appear that this information would be in any way helpful in determining the number of student riders versus the

number of members of the general public being transported on the campus routes.

On the other hand, both the university service originally operated by Lextran and K-TRANS' campus service meet UMTA's criteria for charter service in that they are provided under an agreement which links the cost of the service to the number of hours operated. This agreement, by allowing the University to set fares and schedules, places control of the service with a party other than the grantee. Although K-TRANS maintains that it handles other aspects of the service, such as the number of vehicles used and the routes to be followed, UMTA notes that these are merely operational details and not determinative of actual control of the service. As UMTA has stated in its "Charter Service Questions and Answers," 52 Fed. Reg. 42248, 42252 (November 3, 1987), such control of fares and schedules is the critical element in distinguishing charter service from mass transportation in the case of service to a university complex. Question 27(d) indeed states:

> "If the service is for the exclusive use of students and the university sets the fares and schedules, the service would be charter. However, such service operated by a recipient which sets fares and schedules and is open door, though it serves mainly university students, would be mass transportation."

Thus, by operating under an agreement which allows the University to control the service, K-TRANS fails to meet the criterion set in the most important part of the balancing test which UMTA uses to distinguish charter service from mass transportation in the case of campus route service.

It should be noted that following the Chief Counsel's decision in Blue Grass, Lextran modified this aspect of its service by ceasing to provide it under an agreement linking payment to hours of service, instead receiving an annual grant from the University. In a letter to Lextran dated December 27, 1988, UMTA recognized that by thereby assuming control of the campus service and by making it open to the general public, Lextran had successfully converted the service to mass transportation. UMTA noted that in so transforming the service, Lextran had provided an example for similarly situated grantees.

Should K-TRANS wish to continue providing service to the University, it must reconfigure the service to conform to UMTA's mass transportation guidelines. It should be pointed out, however, that even if K-TRANS were to operate the campus service as mass transportation it should, in accordance with UMTA's private sector policy, examine the interest and capability of the private sector in providing this service. This is especially the case since, according to the information furnished by K-TRANS, this service has been operated for several years. Under the guidelines set forth in Circular 7005.1, "Documentation of Private

Enterprise Participation Required for Sections 3 and 9 Programs" (December 5, 1986), UMTA grantees should examine each route at least every three years to determine if it could be more efficiently operated by private enterprise.

CONCLUSION AND ORDER

UMTA finds that the service provided by K-TRANS to the University service is charter service, since it is provided under an agreement with the University, which controls rates and schedules. In order to come into compliance with UMTA requirements, K-TRANS must either cease and desist from providing the service, or it must provide it in conformance with UMTA's mass transportation guidelines. K-TRANS must report to UMTA within 90 calendar days of receipt of this decision on the measures that it has taken to comply with this order.

Dated: November 29, 1989

Rita Daguillard
Attorney-Advisor

APPROVED:

Steven A. Diaz
Chief Counsel

Chron

U.S. Department of Transportation
Urban Mass Transportation Administration

Headquarters

400 Seventh St., S.W.
Washington, D.C. 20590

DEC 13 1989

Darryl A. Mayers, Esq.
Assistant Chief Counsel
Law Division
Massachusetts Bay Transit Authority
10 Park Plaza
Boston, Massachusetts 02116

Dear Mr. Mayers:

This is in response to your November 3, 1989, letter requesting clarification of certain provisions of the Urban Mass Transportation Administration's (UMTA) charter bus regulations, 49 C.F.R. Part 604.

You ask for clarification as to whether the Massachusetts Bay Transit Authority (MBTA) must take passenger costs into consideration when determining whether a private charter operator is "willing and able." To the contrary, cost should not be a consideration in this determination. Section 604.5(p) clearly defines "willing and able" and section 604.11(b)(5) clearly establishes what a private operator must do to obtain a designation that it is "willing and able." The only permissible criteria are (1) a statement from the private operator to the recipient that it has the desire and the physical capability to actually provide the categories of revenue vehicle specified in the recipient's published notice, e.g., buses or vans, and (2) a copy of the documents showing that the private operator has the requisite legal authority to provide the proposed charter service and that it meets all necessary safety certification, licensing and other requirements to provide the proposed charter service. No other factors are to be considered in determining whether a private operator is "willing and able," even when the service falls within the parameters of section 604.9(b)'s exceptions.

Regarding the procedural steps you outline for determining when MBTA may contract directly to provide charter service under section 604.9(b)(5) and (6), the first three points are essentially correct as regards Part 604 as a whole. The remaining two points, however, require some amplification.

First, under sections 604.9(b)(5) and (6), before MBTA can enter into a direct contract with a requesting entity it must obtain a letter from the requesting entity which certifies, inter alia, that (1) the organization is a governmental entity or a private,

non-profit organization which is tax-exempt under subsections 501(c)(1),(3),(4), or (19) of the Internal Revenue Code; (2) the proposed charter is consistent with the requesting organization's function or purpose; and (3) the proposed charter complies with Title VI of the Civil Rights Act of 1964, as amended.

In addition, under subsection 604.9(b)(5), which applies to all recipients, the requesting organization's certification must indicate that the proposed charter (1) involves carrying a significant number of handicapped persons; or (2) is operated by a qualified social service agency under Appendix A of Part 604; or (3) is operated by an entity which, at the request of a state, has been certified in writing by UMTA as receiving or being eligible to receive public assistance funds from a State or local governmental agency for purposes which may involve the transportation of transit-disadvantaged or transit-dependent persons.

Subsection 604.9(b)(6), on the other hand, is limited to recipients in nonurbanized areas. Such areas have a population under 50,000 persons. Under this subsection, the recipient may contract directly with an entity which also certifies that more than 50 percent of the passengers on a charter trip will be elderly.

We also direct your attention to the preamble to the amendment to the Charter Service regulations, which appeared in the December 30, 1988 Federal Register, 53 Fed. Reg. 53348. Pages 53353-4 contain a detailed analysis of subsections 604.9(b)(5),(6), and (7). A copy of the Federal Register notice is enclosed.

Sincerely,

Steven A. Diaz
Chief Counsel

Enclosure

FOR - Chron

U.S.Department
of Transportation

**Urban Mass
Transportation
Administration**

Headquarters

400 Seventh St., S.W
Washington, D.C. 20590

DEC 13 1989

Paul T. Coulis, General Manager
Hammond Yellow Coach Lines
920 - 150th Street
Hammond, Indiana 46327

Dear Mr. Coulis:

Thank you for your recent response to our letter of September 21, 1989, forwarding correspondence from Senators Richard Lugar and Dan Coats, which enclosed a complaint from Ms. Barbara L. DuBroff against Hammond Yellow Coach Lines (Hammond). Ms. DuBroff alleged that Hammond had been providing scanty and poor service on its commuter runs, while concentrating its better resources and personnel on its charter operations. Our letter to you requested a detailed response to Ms. DuBroff's allegations as well as answers to specific questions concerning Hammond's charter operations.

You state that Hammond runs a mass transit and a charter service from the same facility using 7 buses funded by the Urban Mass Transportation Administration (UMTA) and 18 non-federally funded buses. You indicate that Hammond uses UMTA-funded buses in charter service in conformity with UMTA's charter regulation, 49 CFR Part 604.

The charter regulation, you maintain, allows the "incidental" use of UMTA-funded equipment in charter service. You state that Section 604.11(a) of the rule presumes that a recipient is using its equipment and facilities incidentally if it does not conduct weekday charters: 1) during peak morning and evening hours; 2) requiring a bus to travel more than 50 miles beyond the recipient's urban area; and, 3) requiring the use of a particular bus for more than 6 hours in any one day.

The provision which you cite was found in the regulation which was superseded by the current charter rule on May 13, 1987. 52 Fed. Reg. 11916 et seq. (April 13, 1987). The regulation now in effect prohibits UMTA recipients from providing charter service using UMTA-funded equipment when there is a private operator "willing and able" to provide the service, unless one of the exceptions to the regulation applies. If Hammond is providing charter service which does not fall under one of these exceptions, it is in violation of the charter regulation.

It should be emphasized that this prohibition applies only to charter service using UMTA-funded equipment and facilities. If Hammond sets up a separate company that has only locally funded equipment and operates it with only local funds, or is able to maintain accounts for its charter operations that show that the service is truly a separate division which receives no benefits from the mass transit division, then the charter rule will not apply.

Please note that even if Hammond were to set up a separate charter division, it should not service and maintain its locally funded vehicles in an UMTA-funded facility. Furthermore, any maintenance expenses incurred by Hammond's separate charter entity must be paid for exclusively with local funds and not charged to any UMTA grant. In this connection, please see Q&A #26 of UMTA's "Charter Service Questions and Answers," 52 Fed. Reg. 42248, 42252 (November 7, 1987).

Please advise me, within thirty (30) days of receipt of this letter, of the measures that Hammond has taken to conform to the requirements of UMTA's charter regulation as outlined above. Should you have any questions in the meantime, you may contact Rita Daguillard of my staff at 202/366-1936.

Sincerely,

Steven A. Diaz
Chief Counsel

complaint RC-8

U.S. Department of Transportation
Urban Mass Transportation Administration

Headquarters

400 7th Street S.W.
Washington, D.C. 20590

FEB 8 1990

Richard C. Thomas
Public Transit Director
City of Phoenix
Public Transit Department
101 South Central Avenue, Suite 600
Phoenix, Arizona 85004-0000

Re: Charter Bus Complaint
AZ-PHX/89-10-01

Dear Mr. Thomas:

This is a further inquiry with respect to the charter service complaint brought by Greyhound Travel Services, Inc. dated September 29, 1989, alleging that the City of Phoenix, Public Transit Department (Phoenix Transit) may have engaged in impermissible charter service by providing transportation on August 11, 1989, to the Phoenix Cardinal game, and handling charters for Realty Executives, Russ Lyon Realty and Paradise Valley Multiple Leasing.

On November 3, 1989, Phoenix Transit responded to the Urban Mass Transportation Administration's (UMTA) initial inquiry regarding the complaint by advising UMTA that none of the nine Phoenix Transit buses used for the August 11, 1989, Cardinal football game were direct charters, but were for a "variety of clients" and that the service provided to Realty Executives was subcontracted through Valley Coach, a private operator. Phoenix Transit further stated that charter service was provided to Russ Lyon Realty and Paradise Valley Multiple Leasing only prior to the change in UMTA's regulation.

The information UMTA has received so far is insufficient for it to make a complete analysis of whether the services at issue were impermissible charter service. The charter service regulation provides two exceptions to the basic prohibition against charter service which may be applicable to Phoenix Transit's circumstances. The regulation provides that a recipient may enter into a contract with a private charter operator to provide charter equipment to or service for the private charter operator if: "(i) the private charter operator is requested to provide charter service that exceeds its capacity; or (ii) the private charter operator is unable to provide equipment accessible to elderly and handicapped persons itself." 49 C.F.R. Part 604.9(b)(2).

From the explanation Phoenix Transit submitted UMTA is unable to determine whether either of these two exceptions to the prohibition against charter service is applicable. Please submit any documentation Phoenix Transit may have concerning either of the applicable exceptions to the charter service prohibition, specifically:

(1) documentation establishing the nature of the contractual relationship between Phoenix Transit and the "variety of clients" for whom service was provided on August 11, 1989, to the Cardinal's football game;

(2) documentation establishing the nature of the contractual relationship between Phoenix Transit and Valley Coach concerning the service provided to Realty Executives;

(3) copies of the private operator licenses of Phoenix Transit's "variety of clients" and Valley Coach;

(4) how many buses and or vans each of these "variety of clients" and Valley Coach has in its inventory;

(5) what information these "variety of clients" and Valley Coach provided Phoenix Transit concerning their equipment before entering into the contractual relationships with Phoenix Transit; and

(6) all documentation concerning any transit services provided by Phoenix Transit to Russ Lyon Realty and Paradise Valley Multiple Leasing since May 13, 1987, the effective date of UMTA's current charter service regulation.

Thank you for your cooperation in the enforcement of UMTA's charter service regulation.

Sincerely,

Steven A. Diaz
Chief Counsel

cc: Mr. J. W. Haugsland
~~URO-IX~~
URO-VII

RECEIVED
90 FEB 15 AM 10:29

Dale Charter

Chron

U.S. Department of Transportation

Urban Mass Transportation Administration

Headquarters

400 7th Street S.W.
Washington, D.C. 20590

MAR 16 1990

Ms. Debra Ruggles, General Manager
Abilene Transit
1189 S. 2nd Street
Abilene, Texas 79602

Dear Ms. Ruggles:

This responds to your recent letter to Wilbur Hare, Regional Manager, Urban Mass Transportation Administration (UMTA) Region VI. You explain that the Abilene Transit System (ATS) receives occasional requests from Taylor County Courthouse officials to provide short trips for jurors. You state that because of the small number of passengers to be transported and the short duration of the trips, the services of the two local willing and able private operators are not suitable to meet this need. Moreover, you indicate that ATS does not wish to use local funds to purchase a van which would be used only sporadically. You therefore request that UMTA grant an exemption which would allow ATS to provide this service.

UMTA's charter regulation, 49 CFR Part 604, prohibits UMTA recipients from providing charter service using UMTA-funded facilities and equipment if there is at least one private operator willing and able to provide the service. The regulation, however, provides eight exceptions to this general prohibition.

The exception which appears appropriate for the situation you describe is that of 49 CFR 604.9(b)(7). Under this exception, a recipient may operate particular charter trips contracting directly with the customer where there is a formal agreement to this effect between the recipient and all the private operators responding to the recipient's notice and determined to be willing and able.

To take advantage of this exception, the recipient must complete the review process on all replies to its annual charter notice. Except for the limitations of incidental use, the recipient and the private charter operators may define the excepted charter service in any terms and conditions agreed to.

UMTA is not a party to these agreements, nor is UMTA's concurrence or approval required. The only procedural requirement, in addition to conclusion of a formal agreement, is that notice of the agreement be published. The recipient's annual published notice must provide for this type of agreement or be subsequently amended to specifically refer to the agreement, before the recipient undertakes the charter trips described in the agreement.

My staff would be happy to provide you with any further information or guidance you require with regard to this exception.

Sincerely,

D Mauldin, Deputy for

Steven A. Diaz
Chief Counsel

U.S. Department
of Transportation

**Urban Mass
Transportation
Administration**

REGION VIII
Arizona, Colorado, Montana
Nevada, North Dakota,
South Dakota, Utah, Wyoming

Federal Office Building
1961 Stout Street
Room 520
Denver, Colorado 80294

March 27, 1990

Requests for
Information
& Guidance

Mr. Richard D. Bauman
General Manager
Regional Transportation District
1600 Blake Street
Denver, Colorado 80202

Dear Mr. Bauman:

We have been notified of RTD's intent to provide charter service for major conventions to the extent that private operators are unable to meet the demand for such service. It is our understanding that RTD will issue the required public notice of its intent to provide the service. The draft notice provided to UMTA states that RTD will attempt to execute an agreement with all willing and able private charter operators who respond to the notice in accordance with 49 CFR Section 604.9(b)(7). The agreement would allow RTD to provide the service directly with maximum participation by private operators.

We appreciate RTD's expressed intent to comply with all aspects of UMTA's charter regulations. We are concerned, however, that providing charter service for major conventions could interfere with RTD's provision of mass transportation.

As you are aware, charter service may be undertaken by UMTA grantees only if it is "incidental" to and does not interfere with regular mass transportation operations. We would appreciate receiving information about RTD's plans to insure that charter service for conventions will not interfere with mass transit, particularly during peak hours. Because of the possibility that RTD could provide a substantial amount of this type of charter service, we would prefer a written response.

Again, RTD's coordination with UMTA on this issue and RTD's concern for compliance with UMTA requirements are much appreciated. Questions concerning this issue should be addressed to Helen Knoll of this office at 844-3242.

Sincerely,

Leonard J. Lacour for

Louis F. Mraz, Jr.
Regional Manager

cc: Frank Sharpless

BEFORE THE URBAN MASS TRANSPORTATION ADMINISTRATION

In the matter of:	:	
	:	
AMERICAN BUS ASSOCIATION, et al.,	:	
	:	
Complainants	:	
	:	
v.	:	DC-04/89-01
	:	
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,	:	
	:	
Respondent	:	

DECISION

SUMMARY

The American Bus Association (ABA) filed a complaint with the Urban Mass Transportation Administration (UMTA) on April 14, 1989, alleging that the Washington Metropolitan Area Transit Authority (WMATA) was brokering charter service in violation of the UMTA charter service regulation, 49 CFR Part 604. UMTA's investigation finds that it is beyond the scope of its jurisdiction to consider an issue related to the operating authority of companies with which WMATA subcontracts UMTA vehicles for charter service; UMTA does not require WMATA to look behind a request for the use of their buses by a private operator in the absence of fraud or falsified statement; that the charter service provided by WMATA through its subcontracting arrangements with Lakeland and International does not constitute "brokering" and is within UMTA's definition of allowable subcontract service described in the charter service regulation; that Complainants offered no proof that either Lakeland or International were brokers "in fact;" and that the evidence established that both Lakeland and International entered into valid subcontracting arrangements with WMATA.

COMPLAINT

The ABA is the national trade association for the intercity bus industry and is headquartered in Washington, D.C.; American Coach Lines, Inc., East Coast Parlor Car Tours, Eyre Bus Service, Inc., Gold Line, Inc. and Greyhound Lines, Inc. are members of the ABA (collectively referred to as Complainants) and are engaged in transporting passengers in charter bus operations in the Washington, D. C. metropolitan area.

On April 14, 1989, Complainants submitted a formal complaint to UMTA alleging that WMATA used the services of Lakeland Tours, Inc. (Lakeland), of Charlottesville, Virginia, and the services of several other carriers as brokers of transportation. Complainants alleged that WMATA has transported passengers in charter trips which begin and end at points within the Washington Metropolitan Area Transit District (District) in violation of 49 C.F.R. Part 604. Furthermore, Complainants alleged that the companies with which WMATA does business are themselves not authorized to transport passengers between points within the District. As evidence of these allegations Complainants provided copies of eight of WMATA's service orders and manifests showing charter service in and around the Washington metropolitan area.

Secondly, Complainants alleged that WMATA provided charter transportation pursuant to contracts entered into with International Limousine, Inc. (International), of Washington, D. C., despite the fact that International does not own or operate buses. Complainants alleged that WMATA's contractual arrangement with International is a sham arrangement contrived for the purpose of enabling WMATA to provide charter services directly to customers using UMTA-funded equipment and services.

Complainants requested UMTA to direct WMATA to immediately cease and desist from providing charter service in violation of 49 C.F.R. Part 604 and to withhold from WMATA funds for equipment and facilities.

RESPONSE

Under the procedure set out in the regulation, a complainant must seek conciliation at the local level before filing a complaint with UMTA. Because Complainants advised UMTA that WMATA previously had declined to participate in informal efforts to resolve the Complaint, UMTA directed WMATA to respond to the Complaint within thirty (30) days.

By letter dated May 1, 1989, UMTA forwarded to WMATA a copy of the Complaint. UMTA advised WMATA that the allegation that charter service was rendered within the District without authority was outside the scope of UMTA's review since UMTA has no jurisdiction over operating authority. But, UMTA also advised WMATA that the allegation that WMATA was leasing equipment to a broker which had no buses of its own would constitute, if substantiated, a valid complaint under UMTA's charter regulation. By letter dated May 30, 1989, WMATA submitted its response to the Complaint.

WMATA stated that based on the information available to it, the allegations contained in the Complaint were without merit. WMATA stated that it required each subcontract carrier to certify that it had at least one bus or van. This certification, WMATA stated, met the requirements of 49 C.F.R. Part 604 as amplified in 52 Fed. Reg. 42248 at 42249, November 3, 1987. Furthermore, WMATA cited 49 C.F.R. Part 604.13(e) as authority for its contention that it was not allowed to look behind a subcontract carrier's statements absent evidence of fraud.

WMATA stated that it required all subcontract carriers to possess operating authority from either the Washington Metropolitan Area Transit Commission (Commission) or the Interstate Commerce Commission (ICC).

Finally, WMATA stated that its Office of Marketing was provided with information from International stating that it currently owned twenty-four twenty-seat vans and one twenty-nine seat passenger bus. WMATA stated that according to the terms of 52 Fed. Reg. 42248 at 42249, November 3, 1989, International would not be a broker.

REBUTTAL

The response was forwarded by UMTA to Complainants on June 15, 1989. Complainants then had thirty (30) days to submit a rebuttal. Complainants' rebuttal is dated July 13, 1989.

Complainants stated that WMATA did not deny that it used the services of Lakeland in providing charter bus service between points in the District despite the fact that Lakeland holds no authority from the Commission. Complainants conceded that International now owns one bus capable of seating twenty-nine passengers. Complainants stated that WMATA did not specifically deny the allegation that WMATA's contractual arrangement with International was a sham operation.

First, Complainants argued that WMATA is required to exercise reasonable judgment to determine whether its subcontract carriers possess the requisite authority to provide the contracted service and that WMATA's reliance on 49 C.F.R. Part 604.13(e) is misplaced. Complainants stated that that provision only relates to the review of evidence submitted by a private bus operator in response to a charter service notice published pursuant to 49 C.F.R. Part 604.11. Complainants noted that in the "Charter Service Questions and Answers," 52 Fed. Reg. 42248 at 42253 (November 3, 1987), in the answer to a question regarding the grantee's responsibility to assure the circumstances fit the limited exceptions set forth in §604.9(b)(2), UMTA stated that it "will allow its grantees to use their reasonable, good faith judgment as to whether the requirements of the regulations have been met." Complainants stated that it is reasonable to require WMATA to check the District Annual Report to ascertain whether a private operator can lawfully use buses between points in the District.

Secondly, Complainants argued that WMATA cannot lawfully use subcontract carriers which are not authorized to provide the involved charter service. In support of this argument, Complainants referred to the Washington Metropolitan Area Transportation Regulatory Compact, Pub. L. No. 86-794, 74 Stat. 1031 (1960). The compact is applicable

> to the transportation for hire by any carrier of persons between any points in the Metropolitan District and to the persons engaged in rendering or performing such transportation service . . .

supra, Article XII, Section 1(a). Section 4(a) of Article XII provides that no person shall engage in transportation subject to the Act unless there is in force a certificate issued by the Commission.

Lakeland Tours, Inc., Complainants argued, may have been authorized by the ICC, but the ICC has no jurisdiction over transportation between points in the District. Thus, Complainants imply that WMATA has not made a reasonable determination of the operating authority of its lessee.

Thirdly, Complainants argued that WMATA was not providing lawful charter service as a subcontractor because its arrangements with other entities were merely brokerages or shams. Complainants claimed that WMATA circumvented the prohibitions against direct chartering by promoting charter business and referring it to entities with the understanding that they would arrange for WMATA to provide the physical transportation as a carrier. Complainants cite the case of Golbal Van Lines, Inc. v. I.C.C., 691 F.2d 773 (5th Cir. 1982), for the proposition that even though an activity may not be labeled "brokering," it may be so in fact. Complainants argued that UMTA's charter service regulations would be meaningless if the prohibitions against contracting with persons acting as brokers could be nullified by the broker's purchase of a second-hand bus for five thousand dollars.

Finally, Complainants requested UMTA to obtain from WMATA full information on the charter bus service provided by WMATA as a subcontractor for Lakeland and International including dates on which such service was provided, number of buses used on each trip and names of the groups for which the charter service was performed. Complainants also requested UMTA to seek further information from WMATA regarding the charter service provided by WMATA between points in the District.

On July 27, 1989, as a supplement to its Rebuttal statement, Complainants provided UMTA with a copy of the Certificate of Public Convenience and Necessity issued by the Commission granting authority to International to engage in charter operations restricted to a vehicle capacity of thirty passengers or less, and against transportation to and from Washington National Airport, Dulles International Airport and operations solely between points in Virginia.

DISCUSSION

Complainants confuse the legal authority aspect of the "willing and able" requirement with the requirement that in order for an UMTA recipient to subcontract with a private operator, the private operator must either lack capacity or not have equipment accessible to elderly and handicapped persons. UMTA advised the parties in its May 1, 1989, letter to WMATA that the allegation that WMATA rendered charter service within the District without authority was outside the scope of UMTA's review since UMTA has no jurisdiction over operating authority. This aspect of the complaint may, however, be cognizable by either the District or the Commission. Thus, Complainants allegation that Lakeland does not have authority from the Commission to perform charter service in the District will not be discussed further.

WMATA asserted that International met the "willing and able" requirement for private operators by owning twenty-four twenty seat vans and one twenty-nine seat passenger bus. UMTA only requires that a private operator have at least one bus or van to be determined "willing and able." Complainants conceded that International had one twenty-nine seat passenger bus, but continued to assert, with no further evidence, that WMATA's subcontracts with International were merely shams for a brokered arrangement.

While conceding the central point, Complainants advocated an increased level of scrutiny by grantees of private operators with whom grantees may contract for charter service. Complainants suggested that language contained in "Charter Service Questions and Answers" 52 Fed. Reg. 42248, 42253 (November 3, 1987), required a grantee to use "reasonable, good faith judgment as to whether the requirements of the regulation have been met." The context in which the use of the term "reasonable, good faith judgment" is used, however, is critical. UMTA's direction is that it will "allow" its grantees to use "reasonable, good faith judgment," but not "require" them to look behind a request for the use of their buses by a private operator in the absence of apparent fraud or falsified statement. Complainants showed no evidence of falsification or fraud which would put WMATA on notice to look behind the certifications provided by private charter operators. Complainants' allegation that WMATA's subcontract arrangements with International are "brokered" is not justified since International more than meets UMTA's minimum vehicle requirements and Complainants showed no evidence of fraud.

Lastly, Complainants argued that even if neither Lakeland nor International were "brokers" within the strict definition of the term by UMTA, they should be considered as brokers because they are so "in fact." Complainants offered no evidence that either Lakeland or International were brokers "in fact." The evidence established that both Lakeland and International entered into valid subcontracting arrangements with WMATA.

CONCLUSION

UMTA finds that it is beyond the scope of its jurisdiction to consider an issue related to the operating authority of companies with which WMATA subcontracts UMTA vehicles for charter service.

UMTA does not require WMATA to look behind a request for the use of their buses by a private operator in the absence of fraud or falsified statement. The charter service provided by WMATA through its subcontracting arrangements with Lakeland and International does not constitute "brokering" and is within UMTA's definition of allowable subcontract service described in the charter service regulation, 49 CFR Part 604.

Complainants offered no proof that either Lakeland or International were brokers "in fact." The evidence established that both Lakeland and International entered into valid subcontracting arrangements with WMATA.

Elizabeth A. Snyder
Attorney Advisor

April 20, 1990
Date

Steven A. Diaz
Chief Counsel

April 20, 1990
Date

URBAN MASS TRANSPORTATION
ADMINISTRATION

In the Matter of:

MEDICINE LAKE BUS COMPANY, Complainant	)	
v.	)	MN/01-01-90
	)	DECISION
METROPOLITAN TRANSIT COMMISSION Respondent	)	

I. Background

On January 12, 1990, a complaint was filed with the Urban Mass Transportation Administration ("UMTA") on behalf of Medicine Lake Bus Company ("Medicine Lake"), which operates in the Minneapolis, Minnesota area. The complaint alleges, in brief, that the Metropolitan Transit Commission ("MTC"), a recipient of UMTA funds, violated the private sector provisions of the Urban Mass Transportation Act of 1964, as amended ("UMT Act"), and the implementing guidance. The complaint specifically alleges that the MTC bid both its marginal and its fully allocated cost on a potential contract to provide service for the Southwest Transit Commission ("Southwest"), and that the MTC was awarded the contract on a marginal cost basis.

According to the facts as presented by the parties, the dispute arose following the issuance of a request for proposals for the Route 53 service by Southwest in April 1989. Both Medicine Lake and the MTC submitted proposals. As required by UMTA guidance, the MTC proposal listed fully allocated costs. However, the MTC proposal also listed marginal costs. On August 17, 1989, the MTC was awarded the contract, which was executed on a marginal cost basis. Medicine Lake's protest was then heard and denied by Southwest, the Transit Dispute Resolution Board ("TDRB"), and the Regional Transit Board ("RTB"), in accordance with the

UMTA-approved local dispute resolution process.[1]

This complaint has been handled in accordance with the procedure used by UMTA in similar matters. The complaint was forwarded to the MTC for reply. The MTC then moved for dismissal of the complaint on the ground that Medicine Lake had raised no issues within UMTA's jurisdiction. UMTA denied the MTC's motion, stating that the issues raised in Medicine Lake's complaint were within UMTA's jurisdiction to interpret and apply the private sector policy. The MTC subsequently submitted its reply on March 13, 1990. On March 23, 1990, Medicine Lake filed its rebuttal. Southwest filed two documents with UMTA. The first, dated March 13, 1990, was a brief in opposition to Medicine Lake's appeal. The second, dated April 4, 1990, was a request for dismissal of Medicine Lake's appeal. By letter of April 25, 1990, UMTA advised Southwest that Southwest had not been joined as a party to these proceedings, and Southwest's submittals would therefore not be considered part of the administrative record. On April 24, 1990, UMTA requested from the MTC additional data on its cost for providing the Southwest service. This information was received on May 16, 1990.

II. The Statutory Requirement

The purpose of the UMT Act is to provide assistance for the development of mass transportation systems in metropolitan and other urban areas. 49 U.S.C. 1601. To this end, Congress has made available to state and local public bodies matching funds for the purposes of capital acquisition and construction, operating assistance, and planning activities in connection with mass transportation projects.

In so doing, Congress has expressed its concern that such Federal assistance not be used without regard for the interests of existing mass transportation companies. At the same time,

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[1]UMTA Circular 7005.1, "Documentation of Private Enterprise Participation Required for Sections 3 and 9 Programs," December 5, 1986, describes the complaint procedure which private operators may follow when they believe that a grantee's private sector policy is inadequate or has been improperly applied. Under this procedure, disputes should be resolved at the local level. The procedure ideally envisages a first stage of dispute resolution between the grantee and the private operator and, failing settlement at this level, a review of the grantee's decision by the metropolitan planning organization (MPO). Under the terms of the Circular, UMTA will entertain complaints only when a complainant has exhausted its local dispute resolution process.

however, Congress has made it clear that decisions regarding mass transportation services to be provided with Federal assistance must be made locally, as required by local needs. Hence, Section 2(b) of the UMT Act states that one of the purposes of the Act is

> "(3) to provide assistance to State and local governments and their instrumentalities in financing such systems, to be operated by public or private mass transportation companies as determined by local needs." 49 U.S.C. 1601(b)(3). (Emphasis added).

This emphasis on local decision-making in determining how best to serve the transportation needs of the local area was recognized in Pullman v. Volpe, where the court stated:

> "The statutory scheme of UMTA emphasizes the large role to be played by local bodies responsible for urban mass transit.... This reliance on the local or state group is consistent with the statute's encouragement of local responsibility in urban mass transportation. The statute does not promote a procedure which leaves all decisions with the Secretary (of Transportation), but rather, emphasizes local solutions to problems." 337 F.Supp. 432, 438-439 (E.D.Pa. 1970).

Within this framework, Congress has expressed its desire that private enterprise be afforded the opportunity to participate "to the maximum extent feasible" in the locally funded mass transportation program. Under Section 3(e) UMTA must, before approving a program of projects, find that such program provides for the maximum feasible participation of private enterprise. Section 8(e) directs UMTA to encourage private sector participation in the plans and programs funded under the UMT Act. Finally, as a precondition to funding under Section 9 recipients must develop a private enterprise program in accordance with the procedures set out in Section 9(f).

It is clear from this reading of the UMT Act that both local decision-making and private sector participation are essential to the statutory scheme, and that in any program of projects funded under the UMT Act, there must be a balancing of these two elements.

III. UMTA and Congressional Guidance concerning Private Sector Involvement

The above-cited provisions of the UMT Act mandate private sector participation as a condition for the granting of Federal mass transportation assistance. The statute does not, however, outline the precise standards which a grantee's private sector program must meet, but rather leaves these to be defined by the agency Particularly with respect to the findings to be made under Section 3(e), the statute allows UMTA wide discretion.[2]

In order to provide guidance for achieving compliance with the requirements of these provisions, UMTA issued its policy statement, "Private Enterprise Participation in the Urban Mass Transportation Program," 49 Federal Register 41310, October 22, 1984. The policy statement sets forth the factors UMTA will consider in determining whether a recipient's planning process conforms to the private enterprise requirements of the UMT Act. These factors include consultation with private providers in the local planning process, consideration of private enterprise in the development of the mass transportation program, and the existence of records documenting the participatory nature of the local planning process and the rationale used in making public/private service decisions.

However, in the Conference Report Accompanying the FY 1987 Department of Transportation and Related Agencies Appropriations Bill (99th Congress, H.R. 5205) ("the 1987 Conference Report"), Congress expressed concern that UMTA had overstepped the boundaries of its discretion by conditioning certain Section 9 grants on private sector involvement. Congress therefore inserted in the bill Section 327, which states that such a conditioning of formula grants cannot occur. At the same time, however, the conferees made it clear that the basic private sector provisions of the UMT Act were to remain unaltered.

> "Section 327 emphasizes that it is not the intent to supersede or override the existing statutory provisions relating to the private sector sections 3(e), 8(e) and 9(f) of the Urban Mass Transportation Act of 1964, as amended. Nor is it the intent of the section to affect or limit the (UMTA) administrator's authority to allocate funds under the section 3 discretionary program." 1987 Conference Report at 29.

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[2]In South Suburban Safeway Lines, Inc. v. City of Chicago, 416 F.2d 535, 539 (1969), the Court noted with respect to the four standards to be met by applicants for assistance under Section 3(e), that "(e)ach standard...calls for an administrative decision which is essentially an exercise of discretion."

UMTA interpreted and implemented the congressional guidance in Circular 7005.1, "Documentation of Private Enterprise Participation in Sections 3 and 9 Programs," December 5, 1986 ("the Circular"). In the preamble to the Circular, at page 2 UMTA notes with respect to Section 327:

> "The provision...imposes limitations on UMTA, but also recognizes UMTA's ongoing statutory responsibilities under Section 3(e), 8(e) and 9(f) of the UMT Act. After review of the provision and its legislative history, UMTA interprets Section 327 to mean that UMTA may not:
>
> a. Condition a Section 9 grant on a specific level of private sector involvement;
>
> b. Establish quotas for private sector involvement; or
>
> c. Mandate the local decision regarding private sector involvement.
>
> This Circular imposes no such requirements."

Instead, the Circular outlines the minimum elements that a grantee's private sector consultation process must contain, and describes the documentation required to demonstrate that the process has been followed. Among these elements is the use of costs in the public/private decision. See, Circular at page 5. The Circular explains that "'costs' means fully allocated costs which are attributable to the provision of the service." Id. at page 3.

Finally, UMTA has enforced its private enterprise requirements and has clarified and corrected problems of interpretation of private sector guidance through administrative decisions which are issued following the adjudication of disputes under the complaint process described at page 5 of the Circular.

IV. Discussion

The central issue in this matter is whether the MTC has violated the private sector provisions of the UMT Act and the implementing guidance by bidding on and entering into a contract to provide service for Southwest on a marginal cost basis. The complainant points out that UMTA's decision in In the Matter of Yellow Cab Co. v. JAUNT, Inc., dated June 30, 1988, specifically states that when an UMTA recipient bids on service requested by third parties, the recipient must bid its fully allocated cost if the provision

of the service will involve the use of UMTA assistance. See, complaint at 10. The complainant argues that the requirement that the MTC bid only its fully allocated cost necessarily implies that the MTC also be required to contract on a fully allocated cost basis. Id. at 11. The complainant requests that UMTA find that according to UMTA policy, the MTC can contract for the Southwest service only on a fully allocated cost basis. Id. at 2.

In opposition to Medicine Lake's appeal, the respondent raises two main arguments. First, the respondent argues that UMTA should uphold the decision to award the Route 53 contract to the MTC, since it comports with UMTA policies. See, Response at 3. Second, the respondent argues that Medicine Lake's appeal seeks an exercise of power outside UMTA's authority. Id. at 26.

UMTA will deal with these two arguments in reverse order, since the second one raises the threshold question of UMTA's authority to decide this matter.

A. UMTA's Review of This Matter is within the Scope of its Authority under the UMT Act

The MTC argues that Medicine Lake, in seeking to impose the private sector provisions of the UMT Act and the implementing guidelines in the case of the Southwest Route 53 service, is stretching UMTA's mandate beyond congressional intent.

The MTC contends that by defining the precise cost terms guiding each local process, UMTA seeks to exercise extra-statutory powers. This, states the MTC, would place UMTA in a position similar to that which it occupied in Amalgamated Transit Union v. Skinner, __F.2d.____, DK No. 89-5321 (D.C. Cir. 1990). In that case, the MTC notes, the court found that UMTA had exceeded express limitations by imposing its will upon local entities and by conditioning Federal assistance on their compliance with its drug testing policies.

The MTC also disputes the applicability of UMTA's decision in Yellow Cab v. JAUNT, VA-03/86-01 (1988) to the instant case on several grounds, the principal one being that in using JAUNT to announce a rule on fully allocated cost, UMTA has circumvented the rulemaking requirement of the Administrative Procedures Act, 5 U.S.C. §553 (APA). The MTC states that an agency's discretion to adopt rules through the adjudication process has been expressly limited by the courts, and agencies may not use adjudication as a means of avoiding the APA's rulemaking requirements.

UMTA believes that this proceeding is not the proper forum for raising issues concerning its authority or the means used to formulate its private sector guidance. Under the terms of Circular 7005.1, UMTA is limited in these proceedings to an examination of whether its guidance was correctly applied. UMTA notes, however, that it has been given wide discretion under the private sector provisions of the UMT Act to issue and implement this guidance. UMTA believes that it has properly exercised its discretion in formulating the requirement that when a recipient bids on service requested by third parties, the recipient must bid its fully allocated cost if the provision of that service will involve the use of UMTA assistance.

Moreover, UMTA notes that the imposition of this and other private sector requirements is not, as the MTC indicates, tantamount to an examination by UMTA of the level of private sector involvement in each local project. As indicated above, UMTA will not mandate any local decision regarding private sector involvement. UMTA requires that recipients establish and implement a private sector involvement process, and examines the application of this process to a particular project only when there is an indication that it may have been improperly applied. Even in such cases, UMTA limits itself to determining whether a recipient's process comports with the privatization guidelines, and leaves decisions concerning the level of private sector involvement in a particular project to the grantee. UMTA thus believes that in issuing its private sector guidance, it has ensured the balancing of private enterprise participation and local decision-making required under the UMT Act.

UMTA accordingly concludes that it is acting within the scope of its authority under the private sector provisions of the UMT Act in reviewing the MTC's compliance with these requirements in its bid on the Southwest Route 53 service.

B. <u>The MTC's Bid on the Southwest Route 53 Service Does Not Comport with UMTA's Private Sector Guidelines</u>

The MTC states, at page 17 of its Response, that this dispute is one of semantics, since its so-called "marginal cost" bid on the Southwest Route 53 service meets UMTA's fully allocated cost requirements. Based on UMTA's accounting principles, the MTC maintains, its "marginal cost" proposal actually bids fully allocated costs attributable to the service, within the meaning of UMTA Circular 7005.1.

However, a verification by UMTA of cost figures for the Southwest service provided by the MTC, shows that this is not the case. Paragraph 4 of Circular 7005.1 explains that UMTA's costing principles are described in its "Guidelines for Fully Allocated Costs in Transit Service." This publication clearly states that fully allocated costs must include all costs associated with the provision of the specified service, including fixed and variable costs, as well as direct and shared costs.

The MTC, on the other hand, indicates that it had excluded from its marginal cost bid certain fixed costs, since the Southwest service would account for only a small portion of the MTC's total operation, and thus would require no administrative, personnel, or operational charges to accommodate it. Accordingly, the MTC explains, its marginal cost bid includes only costs which would be additionally incurred as a result of the Southwest service.

This cost presentation fails to meet UMTA's fully allocated cost guidelines. The first fully allocated cost component, listed on page 4 of the above-cited publication, is "Fixed Costs," which are constant over very large increments of service and therefore do not vary with small changes in the level of transit service. Examples of fixed costs include most administrative labor costs, facility related capital costs, and materials and supplies costs incurred directly to support revenue services.

The need to include costs that will be incurred whether or not the MTC provides the Southwest service is further underscored on page 5 of this publication.

> "Some costs can be directly attributed to the specific service segment of transit service. ... Other costs, however, cannot be directly and exclusively attributed to the specific segment of service but instead are costs which support and are shared by the range of services provided by the transit operator. These costs are normally the fixed costs of the overall transit system. A fully allocated costing analysis takes both of these types of costs into account."

UMTA consequently finds that the MTC's marginal cost bid for the Southwest Route 53 service did not represent "fully allocated costs attributable to the service" within the meaning of Circular 7005.1

The MTC further defends its position by stating that UMTA has never adopted any rule or policy outlawing proposals which reflect both fully allocated and marginal costs. This position reiterates the one taken by the TDRB, which, in its decision on this dispute, stated that UMTA's policies were vague in this regard, and that UMTA had never clarified its guidelines on this issue. In its analysis of the matter, the TDRB found that Southwest's awarding of the contract to the MTC on a marginal cost basis was proper, so long as the MTC's fully allocated costs were disclosed and considered in the bid process. According to the TDRB, a fully allocated cost bid is an analytical tool that enables third-party providers to make policy determinations as to whether the "magnitude and the application of the public subsidy involved is appropriate under the circumstances." In the TDRB's view, the comparative process does not require that service contracts between a subsidized operator and third-party providers be pegged at fully allocated costs.

UMTA strongly takes issue with this position. In elaborating its fully allocated cost guidelines, UMTA intended that they be used as a practical tool for making service decisions, and not simply as an analytical tool for making policy determinations. UMTA's purpose in establishing these guidelines was to ensure that public and non-profit entities fairly account for all direct and shared costs of capital, operations, and administration attributable to the services under consideration for competition, thereby removing any unfair advantage accruing from their Federal subsidy. The guidelines treat "public and non-profit agencies as if they were required to recover their cost of production, like a private firm, in a competitive environment."

It is UMTA's intent that these guidelines form the basis for the evaluation of the public entities' cost bids in all public/private competitive bid situations, and not be used on an optional or selective basis. In UMTA's view, the bidding of both fully allocated and marginal costs provides the decision maker with the option of which cost bid to choose. The possibility of such a selection would clearly undermine the effect of the fully allocated cost requirement, since decision makers could simply overlook a recipient's fully allocated cost bid whenever they found it advantageous or desirable. The requirement would be similarly undermined if recipients could contract for third-party service at a cost which did not take their Federal subsidy into account. UMTA believes that this would be contrary to its policy of ensuring the maximum feasible participation of private enterprise, and to the congressional directive underlying it.

UMTA fully agrees with the MTC that cost is only one factor to be considered in the selection of a service provider, and has in fact consistently stated this position.[3] However, costs are undeniably an important factor, and weigh heavily in a particular service decision. UMTA believes that compliance with its fully allocated cost guidelines will ensure that costs do not outweigh the other evaluation factors.

UMTA therefore concludes that in bidding both its fully allocated costs and its marginal costs for the Southwest Route 53 service, and in contracting to provide the service on a marginal cost basis, the MTC acted in contravention of UMTA's private sector guidelines.

However, UMTA recognizes that it had not, as the TRDB points out, clarified its position on the issue of fully allocated and marginal cost bids, and that its failure to do so may be responsible for the apparent confusion on this issue which has resulted. Therefore, while UMTA finds that the MTC's marginal cost bid for the Southwest service was contrary to UMTA's guidelines, it will not require the MTC to cease and desist from providing this service. However, UMTA expects that in the future bids on third-party service contracts, the MTC will conform to UMTA's fully allocated cost guidelines as articulated in this decision. UMTA will expect to receive from the MTC within thirty (30) days of receipt of this decision a written confirmation that it will adhere to these guidelines. UMTA will approve no further grants for the MTC prior to receipt of this written confirmation.

V. Conclusion

UMTA's investigation of this matter reveals that the MTC failed to conform to UMTA's private sector guidelines by bidding both fully allocated and marginal costs in a bid on the Southwest Route 53 service, and by entering into a contract to provide this service on a marginal cost basis. However, UMTA recognizes that it had not clarified its position on this issue, and that its failure to do so may be responsible for the apparent confusion on this issue which has resulted. Accordingly, UMTA will not require that the MTC cease and desist from providing this service. However, in order to ensure future compliance with its fully allocated cost guidelines, UMTA will expect to receive from the MTC, within thirty (30) days from receipt of this decision, a written confirmation that it will adhere to these guidelines. UMTA will approve no further grants for the MTC prior to receipt of this written confirmation.

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[3] See, discussion of UMTA's position on this issue in JAUNT at page 9.

Rita Daguillard
Attorney-Advisor

12/31/90
(Date)

UCC-50 [illegible]
[illegible]

U.S. Department of Transportation
Urban Mass Transportation Administration

Headquarters

400 7th Street S.W.
Washington, D.C. 20590

30 JANUARY 1991

CERTIFIED MAIL--RETURN RECEIPT REQUESTED

Russell Ferdinand, President
Syracuse & Oswego Motor Lines, Inc.
105 Terminal Road
P.O. Box 2667
Syracuse, New York 13220

Re: Charter Service

Dear Mr. Ferdinand:

This is in response to your inquiries regarding the parameters of the Urban Mass Transportation Administration's (UMTA) charter service regulation. You stated that your company, Syracuse & Oswego Motor Lines, Inc. (S & O), operates a number of UMTA funded buses in regular line service under contract with Onondaga County. S & O occasionally charters buses from Onandaga County and the Regional Transit Authority

You noted that UMTA's charter service regulation does not appear to restrict the distance UMTA funded buses can travel while in incidental charter service. For example, you stated that it would seem that an UMTA funded bus could travel approximately 325 miles round trip from Syracuse to Buffalo on a Sunday when there are excess buses.

In response to the questions you posed UMTA provides the following guidance:

(1) Can UMTA funded buses travel outside the Metropolitan area if they are in incidental charter service?
Answer: Yes, however, the service must be restricted to incidental charter service. The regulation defines "incidental charter service" as charter service which 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 useful life of the equipment or facilities. UMTA has published further guidance giving examples of non-incidental service including: "service performed during peak hours; service which does not meet its fully allocated cost; service being used to count toward the useful life of any facilities or equipment; and service provided in equipment that is in excess of an UMTA-approved spare ratio." 52 Fed. Reg. 42248 at 42252, "Charter Service Questions and Answers," November 3, 1987.

(2) If the answer to the above is yes, would there be any other distance restrictions, assuming the trip meets all other regulations?
Answer: No other specific distance restrictions are applicable. UMTA will evaluate inquiries based on the above quoted criteria on a case by case basis.

(3) Would there be any difference in regulation, as it regards this issue, between this Company operating an out of area trip and the Regional Transportation Authority operating a similar trip?
Answer: As noted above, distance is not a criteria for determining whether a charter trip meets UMTA's definition of "incidental charter service." The Regional Transit Authority must comply with the regulations to the same extent as any other UMTA recipient. It is important to note, however, that from your description S & O is operating in two different roles: first, under its contract with Onondaga County, S & O is acting for and on behalf of an UMTA recipient; second, S & O is a private charter operator. When S & O desires to operate a charter trip using UMTA funded equipment from Onondaga County, S & O must distinguish between these two roles to meet the requirements of the regulation.

For example, as operator of the Onondaga County line S & O may not operate charter service unless (1) there are no willing and able private charter operators; (2) it has obtained a "hardship" exception from UMTA; (3) it has obtained a "special exception" exception from UMTA; or (4) it contracts with a government entity or private non-profit organization exempt from taxation under subsection 501(c) of the Internal Revenue Code, under certain conditions. In order for S & O, in its role as private charter operator, to lease equipment from Onondaga County, S & O must have exceeded its capacity or be unable to provide equipment accessible to handicapped and elderly persons itself.

I trust that this responds to your questions and concerns. If you have further questions please contact me or Rita Daguillard, the attorney assigned to this matter, at (202) 366-1936.

Sincerely,

Steven A. Diaz
Chief Counsel

cc: Leslie Rogers, Regional Counsel
URO-II

U.S. Department
of Transportation

**Urban Mass
Transportation
Administration**

Headquarters

400 7th Street S.W.
Washington, D.C. 20590

7 FEBRUARY 1991

Jeff Hamm, General Manager
Jefferson Transit
1615 W. Sims Way
Port Townsend, Washington 98368

Dear Mr. Hamm:

This responds to your request on behalf of Jefferson Transit Authority (JTA) for a "hardship" exception under 49 CFR 604.9(b)(3) which would allow JTA to provided charter services within Jefferson County and the Olympic Peninsula, Washington.

According to the information contained in your letters and from your conversations with Elizabeth Martineau of my staff, two companies, Janssen's Charters & Tours (Janssen) and Grayline of Seattle (Grayline), responded to JTA's public notice requesting willing and able private operators. JTA notified the two willing and able private operators in writing on March 14, 1990, of its intention to seek a "hardship" exception. JTA stated that neither of the operators responded to JTA's request to meet on April 24, 1990, to discuss the exception request further.

Both operators who responded are based outside of Jefferson County: Janssen is located one and one-half hours away and has a $75.00 deadhead fee with a minimum charge of $195.00 up to the first 5 hours and then $35.00 for each additional hour; Grayline is located two and one-half hours away, has a deadhead charge of $1.50 per mile and a minimum charge of $155.00 for two hours. These charges amount to extraordinary deadhead costs and create hardships for local customers.

In light of this information, it appears that granting a "hardship" exception is justified. Accordingly, I hereby grant JTA an exception under 49 CFR 604.9(b)(3) to provide charter service within Jefferson County using buses and vans for twelve consecutive months from the date of this letter. If, at the end of this period, JTA wishes to continue providing charter service, it must submit another exception request.

Sincerely,

Steven A. Diaz
Chief Counsel

APR - 5 1991

Previous Concurrences Valid

CONCURR	
RTG. SYM	UCA-32
INITIALS/SIG.	RD
DATE	4/1/91
RTG. SYMBOL	UCA-1
INITIALS/SIG.	
DATE	4/3/91
RTG. SYMBOL	UES-2
INITIALS/SIG.	
DATE	4/3/91
RTG. SYMBOL	UOA-2
INITIALS/SIG.	
DATE	4/4/91
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The Honorable Newt Gingrich
House of Representatives
Washington, D.C. 20515

Dear Mr. Gingrich:

Please find enclosed, a copy of the response of Elton W. Gogolin, Jr., Managing Attorney for the Metropolitan Atlanta Rapid Transit Authority (MARTA), to the recent allegation by your constituent, Mr. William H. Bodenhamer, that MARTA had violated the Urban Mass Transportation Administration's (UMTA) charter service regulation, 49 CFR Part 604. In my letter of March 5, 1991, I stated that I would advise you of the results of UMTA's inquiry into this matter.

Mr. Gogolin's response indicates that on the occasion in question, the Home Builders Convention from January 18, 1991, through January 21, 1991, MARTA was providing vehicles to a private operator which lacked the capacity, pursuant to 49 CFR Part 604.9(b)(2)(i). This exception allows that a recipient may enter into a contract with a private operator to provide charter equipment to or service for the private operator, if the private charter operator is requested to provide charter service that exceeds its capacity. It should be noted that this provision does not require a private operator to seek vehicles from another private operator before requesting them from an UMTA grantee. Moreover, the leasing of the vehicles appears to have been incidental service, since it did not interfere with or detract from MARTA's provision of mass transit service, as the lease involved only 5% of MARTA's total active bus fleet.

In view of the information provided by Mr. Gogolin, UMTA dismissed Mr. Bodenhamer's complaint on March 12, 1991. A copy of UMTA's letter to Mr. Bodenhamer is enclosed.

I hope that this responds to your concerns with regard to this matter.

Sincerely,

/S/

Brian W. Clymer

UCA-3 4/4 Per UCA-1

Enclosures

PCV

JUN 12 1991

CONCURRENCES	
RTG. SYMBOL	UCG
INITIALS/SIG.	
DATE	6/11/91
RTG. SYMBOL	UES-2
INITIALS/SIG.	
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RTG. SYMBOL	UGA-2
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The Honorable Victor Ashe
Mayor
City of Knoxville
Knoxville, Tennessee 37901

Dear Mayor Ashe:

Secretary Skinner has asked me to respond to your letter concerning the Urban Mass Transportation Administration's (UMTA) charter regulation, 49 CFR Part 604. Specifically, you state that under UMTA's interpretation of the regulation, a grantee may not offer charter service to city departments in connection with government service, even if the service is provided free of charge. You ask if the administration would object to the adoption of amendments to Sections 3(f) and 12(c)(6) of the Urban Mass Transportation Act of 1964, as amended (UMT Act), which would provide that mass transit equipment funded in part by Federal grants could be used for and on behalf of any level of government which contributed to its cost of acquisition, in fare-free charter service, without violating the charter rule.

UMTA understands and appreciates the concerns expressed in your letter. However, UMTA is bound by its statutory mandate to protect the private charter industry, and to ensure that UMTA funded equipment is used solely for mass transit purposes. Since the type of trip described in your letter meets UMTA's definition of charter service, it is inconsistent with these statutory requirements. In order to accommodate users of charter service, however, UMTA has allowed grantees to use both the charter notice process and the eight exceptions to the regulation in a manner which maximizes the service they may provide.

Therefore, UMTA sees no need to change the current regulation, since it believes that the rule achieves the statutory goals while being flexible enough to ensure that community needs for charter service are met. For example, UMTA has recognized that for a variety of reasons, a private operator may be unwilling or unable to perform certain charter trips. UMTA believes that a recipient may make the "willing and able" process more effective by expanding the content of its charter notice to include information about the types of charter trips it desires to provide [illegible] be helpful to the private operator in deciding wheth[illegible]

Thus, in addition to the information required by 49 CFR 604.11, i.e., days, times of day, geographic area, and category of revenue vehicle, a recipient may include in its charter notice descriptions of trip purpose, destination, or clientele to be served. As long as the notice does not discourage a response from a person who meets the criteria for a "willing and able" operator, a recipient has flexibility in using descriptions which allow private operators to decide whether they desire to perform a particular type of charter trip.

In addition to this formal notice process, recipients are encouraged to engage private operators in a dialogue through other means as well, such as written communications, conferences, or informal meetings. A recipient may also provide in its notice a telephone number that a private operator may call to obtain further information on the proposed service.

Furthermore, as indicated above, a recipient may perform certain charter trips, even though it has been determined that there are "willing and able" operators, when it qualifies for one of the exceptions of 49 CFR 604.9. For example, under 49 CFR 604.9(b)(7), a recipient may provide direct charter service when there is a formal agreement to this effect between the recipient and the private operator. The recipient's annual public charter notice must have provided for this type of agreement. If it did not, the recipient must, before undertaking the charter trip in question, amend its notice to refer specifically to such an agreement.

UMTA believes that the charter needs of local communities can be met through judicious use of the measures outlined above. Our legal staff is willing to assist grantees in meeting these needs within the confines of the current law and regulation. Although, as we have indicated above, UMTA sees no need to change the current charter law or regulation, we would be happy to review any legislative proposal addressing this matter.

Sincerely,

Brian W. Clymer

DEC 30 1991

CONCURRENCES	
RTG. SYMBOL	UCC-32
INITIALS/SIG.	
DATE	12/19/91
RTG. SYMBOL	
INITIALS/SIG.	
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DATE	
RTG. SYMBOL	UCC-30
INITIALS/SIG.	
DATE	12-19-9

Wayne Cook
General Manager
VIA Metropolitan Transit
800 West Myrtle Street
P.O. Box 12489
San Antonio, Texas 78212

Dear Mr. Cook:

Please find enclosed copies of letters from Senators Lloyd Bentsen and Phil Gramm, enclosing correspondence from their constituent, Johnny Keith, of San Antonio, Texas. Mr. Keith, an employee of Kerrville Bus Company, a private transportation provider, asks for an investigation into what he terms the "illegal operations" of VIA Metropolitan Transit (VIA).

I would appreciate your providing me with a specific and detailed response to the issues raised by Mr. Keith, including the following:

- Mr. Keith states that VIA, a federally funded system, has been placed in charge of a new sports dome and allows only VIA buses access to the facility. He indicates that this places private operators at a competitive disadvantage. Please explain the arrangement under which VIA is allowed to manage and control the sports dome, whether it restricts access to the facility by private providers, and if so, for what reason.

- Mr. Keith states that VIA has proposed to the City Council a ground transportation ordinance which would impose fees and training requirements on local charter operators, and also mandate inspections of their buses and maintenance facilities. Please indicate whether VIA has proposed such an ordinance and if so, how this proposal encourages private enterprise participation to the maximum extent feasible, in keeping with the requirements of Section 8(o) of the Federal Transit Act of 1991.

- Mr. Keith complains that VIA, the local city bus system, is performing charter operations outside of its local service area. If VIA is performing such charter service, please explain how it is able to do so, in light of the requirement of 49 CFR Part 604 that recipients may provide charter service only under one the exceptions to the regulation, and on an incidental basis.

I look forward to receiving your response within thirty (30) days of receipt of this letter.

Sincerely,

/s/ Munter

Steven A. Diaz
Chief Counsel

Enclosure

URBAN MASS TRANSPORTATION ADMINISTRATION
UCC:32:R.DAGUILLARD:LD:366-1936:12-18-91
CC:UCC-1,2,32,CHRON
NETWORK:VIACOOK

U.S. Department
of Transportation
**Federal Transit
Administration**

400 Seventh St., S.W.
Washington, D.C. 20590

MARCH 12, 1992

Vincent H. Savill, President
Park Trans
100 Wales Avenue
Avon, Massachusetts 02322

Re: MA-BATA/91-10-01

Dear Mr. Savill:

Please find enclosed a copy of the response of Charles C. Stevenson, Administrator of the Brockton Area Transit Authority (BAT), to your allegation that BAT has engaged in impermissible charter service. Specifically, you allege that BAT has been providing transportation services to the developmentally disabled clients of the Massachusetts Department of Mental Retardation (DMR), in violation if the Federal Transit Administration's (FTA) charter service regulation, 49 CFR Part 604.

Based on the information in Mr. Stevenson's letter, it appears that the BAT is providing special charter service exclusively for the elderly and handicapped. The Federal Transit Administration has determined that this type of exclusive service, even when provided on a demand responsive basis, is "mass transportation" and is not considered to be charter. See, 52 Fed. Reg. 42252 (November 3, 1987). Therefore, it would appear that the service being provided by the BAT, in this instance, does not violate FTA's charter service regulation.

Please do not hesitate to contact us if the FTA may be of further assistance.

Sincerely,

Steven A. Diaz
Chief Counsel

Enclosure

cc: Charles C. Stevenson
Brockton Area Transit Authority

Previous Concurrence brought forward by Leonora Drake

CONCURRENCES	
RTG. SY	TO
INITIALS/SIG.	N. B.
DATE	3-19-92
RTG. SYMBOL	TOA-2
INITIALS/SIG.	
DATE	3/23/92
RTG. SYMBOL	
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MAR 26 1992

The Honorable Phil Gramm
United States Senator
2323 Bryan Street, #1500
Dallas, Texas 75201

Dear Senator Gramm:

Please find enclosed the response of Wayne M. Cook, former General Manager of VIA Metropolitan Transit, to allegations by your constituent, Johnny Keith, that VIA has engaged in "illegal operations." Specifically, Mr. Keith, an employee of Kerrville Bus Company (Kerrville), has alleged that VIA has restricted access by private operators to a local sports dome, has proposed a local ordinance which would place onerous conditions on private charter operators, and has performed charter operations outside its service area. The Federal Transit Administration (FTA) has reviewed Mr. Keith's allegations and VIA's response, and concludes that none of the actions of which Mr. Keith complains constitutes a violation of FTA requirements.

With respect to Mr. Keith's allegations concerning the sports dome, VIA states that it has contracted with the City of San Antonio to develop and operate the facility, which was built entirely with local funds. This information has been confirmed by our Fort Worth Regional Office. VIA maintains that it has encouraged the City to set aside space for charter bus parking, and has recommended to the City that Kerrville be represented on the task force reviewing the issue of charter bus parking. Since no Federal funds have been used to build or operate the sports dome, the issue of charter bus parking at the facility is a local one, which apparently is being appropriately handled by the local task force.

VIA denies that its has proposed the ground transportation ordinance referred to by Mr. Keith. Unless Mr. Keith can provide additional facts to support his allegation, the FTA will take no further action on this matter.

Finally, VIA states that any charter operations conducted outside its service area have been performed under one of the exceptions to the FTA's charter regulation, 49 CFR Part 604, and have been provided on an incidental basis. Since the charter regulation does not impose geographic restrictions on charter operations which are being otherwise lawfully provided, the provision of service by a grantee outside its service area does not constitute a violation of the regulation. Accordingly, the FTA can take no action against VIA on the basis of this allegation.

I trust that this responds to your inquiry.

Sincerely,

Brian W. Clymer

Enclosure

cc: Washington Office

FEDERAL TRANSIT ADMINISTRATION
TCC:32:R.DAGUILLARD:LD:366-1936:3-5-92
CC:TCC-1,2,32,CHRON, TES
NETWORK:PHIL

TCC-32

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

In the Matter of

ANNETT BUS LINES, Complainant	: :	
versus	:	No. FL-TALTRAN/90-02-01
CITY OF TALLAHASSEE, Respondent	: :	

SUMMARY

Annett Bus Lines (Annett), a private bus operator, complains to the Federal Transit Administration (FTA) alleging that the City of Tallahassee, Florida (TALTRAN) provides impermissible charter service to the campus of Florida State University (FSU) using FTA-funded equipment and facilities. FTA concludes that the service being provided on the FSU campus is mass transportation, and that TALTRAN has not violated the Charter Service Regulation, 49 C.F.R. 604 (Regulation).

BACKGROUND

Annett alleges that TALTRAN, a public transit provider and recipient of FTA financial assistance, provides charter bus service to the FSU campus despite an awareness that Annett was willing and able to provide such service. Under the Regulation a recipient is prohibited from providing charter service using FTA-funded facilities and equipment when there is a private operator willing and able to provide the service unless it comes under one of the express exceptions to the rule. TALTRAN claims that the service it provides to the FSU campus constitutes mass transportation, and not impermissible charter service, under the Regulation. [1]

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[1] After Annett filed its rebuttal statement, TALTRAN submitted a response to the rebuttal. Annett, in turn, submitted a response to TALTRAN's response. Because the complaint procedure defined in the Regulation (49 C.F.R. 604.15) does not provide for the filing of documents beyond the rebuttal statement, neither response has been considered.

TALTRAN has provided bus service on the FSU campus since August 16, 1989. But, on August 15, 1990, TALTRAN began providing service to FSU under a new Service Agreement (the Agreement) which gave TALTRAN control over routes, schedules, and publicity for the service. The issue presented is whether service under the new Agreement constitutes mass transportation or charter service.

DISCUSSION

Annett alleges that the bus service provided to the FSU campus under the Agreement is charter service and therefore in violation of 49 C.F.R. 604.9(a). The rule defines "charter service" as "bus or van transportation of a group of persons traveling pursuant to a single purpose, under a single contract, at a fixed charge for the service or vehicle. Charter passengers acquire exclusive use of the vehicle or service and control the itinerary." 49 C.F.R. 604.5(e).

TALTRAN contends that the service it provides under the Agreement is mass transportation. As described in the preamble to the Regulation, 52 Fed. Reg. 11916 (1987), (Preamble), "mass transportation" is "service which is under the control of the FTA grant recipient; it also benefits the public at large and is open to the public - anyone wishing to use the service is permitted to do so."

TALTRAN asserts that it is in control of the FSU service. Under the Agreement between TALTRAN and FSU, TALTRAN alone has the right to schedule service. Service level and route adjustments are within the sole discretion of TALTRAN, including the reduction, addition, or complete curtailment of service. In addition, the FSU service benefits the public at large: the service is available to the public, there are several transfer points on the routes in question to other routes on the TALTRAN system; and the routes are advertised on the generally published schedule. [2] While FSU students, faculty, and staff benefit most from the service, it is not provided for their exclusive use. Anyone wishing to travel on the FSU campus or to any of its facilities may use these bus routes. Finally, although the service is reduced during the summer months, it is operated on a regular, continuous basis in a manner similar to TALTRAN's other service.

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[2] Although the routes in question are not depicted on the published generally schedule or on TALTRAN route maps, route numbers are noted prominently as are instructions on how to obtain additional information about the routes.

Annett does not dispute TALTRAN's claims of control over the service; it states: "where the contract places the ultimate right and responsibility (for controlling routes and schedules, pick up points, and frequency of service) is not decisive."[3] Instead, Annett contends that "...the crucial factual issue in dispute is whether patrons of the service represented by FSU -- the students, faculty, and staff of FSU -- have the exclusive use of the buses involved or whether the service is open to the general public and used by the public at large to an extent that is not de minimis."[4]

Annett argues that TALTRAN's service is not mass transportation because it is not "open door," that is, it is not used to a significant extent by the general public. Annett claims, based on its observations, that it believes TALTRAN's service has never been used by riders other than FSU students, faculty, and staff.[5]

We do not agree with Annett's narrow definition of "open door" service. As described in the preamble, an open door service is one which does not exclude anyone wanting to use the service. The description in the preamble does not require the service actually to carry riders outside its target group, but merely requires that riders outside the target group be eligible to use the service. Annett alleges not that the general public is excluded from the service, but merely that the general public does not use the service, except on an incidental basis. The fact that the general public's use of the service is incidental or de minimis is not determinative. It is the general public's opportunity to use the service which is dispositive of the issue.

FTA has previously held that one of the indicia of open door service is that the transit authority has marketed it widely. Blue Grass Tours and Charter v. Lexington Transit Authority, Memorandum of Decision dated May 17, 1988. TALTRAN notes the existence of the routes in question in a conspicuous place in its general routes and schedules brochure. While these routes do not appear on the route map, they are not the only TALTRAN routes which are not depicted. [6] Readers of the brochure requiring additional information about campus routes are provided with a telephone number and an address where additional

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[3] Rebuttal Statement at 5.
[4] Rebuttal Statement at 4.
[5] TALTRAN'S complaint of May 16, 1991, at page 5.
[6] Op. cit.

information, including a printed schedule, may be obtained. The telephone number and address to which riders are referred for additional information about the campus routes belong to TALTRAN: they are the same address and phone number to which the public is referred for information on all routes on the general schedule.[7] Thus, FTA finds that TALTRAN clearly has notified the general public that it is providing service on the FSU campus and that it is available to anyone wanting to use it.

Moreover, the service provided by TALTRAN is similar to examples of mass transportation service which appear in the preamble. In one example, a human services agency contracts with an FTA recipient for weekly service to a shopping center for the agency's clients. According to the preamble, as long as the FTA recipient is free to accept riders who are not clients of the agency, the service would be mass transportation.[8] This example is analagous to the instant case. FSU has contracted for service on its campus and TALTRAN serves any rider on these routes, even if the rider is not affiliated with FSU.

CONCLUSION

It is FTA's view that the bus service provided by TALTRAN on the FSU campus is mass transportation within the meaning of the Regulation. The Service Agreement which became effective in August, 1990 has placed control over the service with TALTRAN, and TALTRAN is operating the service on an open door basis, not restricting passengers to FSU students and staff, and publicizing the routes to the general public. The fact that members of the general public only use this service infrequently or on an incidental basis does not convert it to charter service. Accordingly, FTA finds that TALTRAN is not in violation of the Charter Service Regulation.

April 28, 1992
Date

Rita Daguillard

Approved:

Steven A. Diaz
Chief Counsel

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[7] TALTRAN's routes and schedules brochure dated August 1990.
[8] 52 Fed. Reg. 11920

U.S. Department
of Transportation

**Federal Transit
Administration**

Headquarters

400 Seventh St., S.W.
Washington, D.C. 20590

MAY 4, 1992

Carl F. Kiessling III, President
Kiessling School Transportation, Inc.
P.O. Box 153
South Walpole, Massachusetts 02071

Re: MA-PVTA/91-10-01

Dear Mr. Kiessling:

Please find enclosed a copy of the response of Marlene B. Connor, Director of Programs and Planning of the Pioneer Valley Transit Authority (PVTA), to your allegation that PVTA has engaged in impermissible charter service. Specifically, you allege that PVTA has been providing transportation services to the developmentally disabled clients of the Massachusetts Department of Mental Retardation (DMR), in violation of the Federal Transit Administration's (FTA) charter service regulation, 49 CFR Part 604.

Based on the information in Ms. Connor's letter, it appears that the service provided by the PVTA falls within the bounds of permissible charter service, as the PVTA provides direct charter service for state-certified human service agencies, pursuant to 49 CFR 604.9(b)(5), which states that a "recipient may execute a contract with a government entity or a private, non-profit exempt from taxation under subsection 501(c)(1), 501(c)(3), 501(c)(4), 501(c)(19) of the Internal Revenue Code to provide charter service upon obtaining a certification from that entity or organization." Therefore, it would appear that the service being provided by the PVTA, in this instance, does not violate FTA's charter service regulation.

Please do not hesitate to contact us if the FTA can provide you with further assistance.

Sincerely,

Steven A. Diaz
Chief Counsel

Enclosure

U.S. Department
of Transportation
**Federal Transit
Administration**

Headquarters

400 Seventh St., S.W.
Washington, D.C. 20590

MAY 4, 1992

John J. Belli, President & CEO
Travel Time
277 Newbury Street
West Peabody, Massachusetts 01960

Re: MA-WRTA/91-10-01

Dear Mr. Belli:

Please find enclosed a copy of the response of Robert E. Ojala, Administrator of the Worcester Regional Transit Authority (WRTA), to your allegation that WRTA has engaged in impermissible charter service. Specifically, you allege that WRTA has been providing transportation services to the developmentally disabled clients of the Massachusetts Department of Mental Retardation (DMR), in violation of the Federal Transit Administration's (FTA) charter service regulation, 49 CFR Part 604.

Based on the information in Mr. Ojala's letter, it appears that the WRTA is providing special service exclusively for the elderly and handicapped. The Federal Transit Administration has determined that this type of exclusive service, even when provided on a demand responsive basis, is "mass transportation" and is not considered to be charter. See 52 Fed. Reg. 42252 (November 3, 1987). Therefore, it would appear that the service being provided by the WRTA, in this instance, does not violate FTA's charter service regulation.

Please do not hesitate to contact us if the FTA can be of further assistance.

Sincerely,

Steven A. Diaz
Chief Counsel

Enclosure

Chron

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

In the Matter of:

THE AMERICA BUS ASSOCIATION, Complainant,	}	
versus	}	TX-08/89-01
VIA METROPOLITAN TRANSIT, Respondent	}	

DECISION

SUMMARY

The American Bus Association (ABA) complains on behalf of private bus operators in San Antonio, Texas, alleging that the San Antonio Metropolitan Transit Authority (VIA) provides charter service in violation of the Federal Transit Administration's (FTA)[1] Charter Service Regulation, 49 CFR Part 604, (Charter Regulation or Regulation).[2] The complaint specifically alleges that VIA circumvents the Charter Regulation by steering charter business to an entity whose relationship with VIA is essentially

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[1]On December 18, 1991, the President signed the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA). Title III, Section 3004 of ISTEA, the Federal Transit Act, redesignates the Urban Mass Transportation Administration the "Federal Transit Administration." Under Section 3003 of Title III, the name of the agency's enabling statute is changed from the "Urban Mass Transportation Act of 1964" ("the UMT Act") to the "Federal Transit Act of 1991" ("the FT Act"). Consequently, all references in this decision to "UMTA" and the "UMT Act" mean "FTA" and the "FT Act."

[2]Under the charter regulation, recipients of FTA assistance may not provide charter service when there is a private operator willing and able to provide the service, unless one of the exceptions to the regulation applies.

that of a broker.[3] The FTA finds that VIA does channel most of its charter business to one private operator, in violation of the Charter Regulation. The FTA orders VIA to cease and desist from this practice immediately.

BACKGROUND

On February 2, 1988, the ABA complained alleging that VIA leased vehicles to entities which were not "private charter operators" within the meaning of the Charter Regulation. On November 14, 1988, the FTA issued a cease and desist order against such practices ("the Prior Decision").[4] The ABA now complains that VIA is not in compliance with the Prior Decision.

DISCUSSION

The ABA contends that VIA circumvents the Charter Regulation by steering a large volume of business to Convention Coordinators, which owns only one or two buses and whose relationship with VIA is essentially that of a broker rather than that of a carrier.[5] Moreover, the ABA states that VIA engages in price discrimination because it gives Convention Coordinators a substantial discount on vehicle leases which is not available to other private operators. The ABA points out that this discount, based on the volume of buses that a subcontractor leases from VIA, ostensibly available to all. As a practical matter, however, it is granted only to Convention Coordinators, VIA's preferred provider.[6]

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[3] 49 U.S.C.A. § 10102(1) (West Supp. 1988), defines "broker" as follows:

> (1) 'broker' means a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out for solicitation, advertisement or otherwise as selling, providing, or arranging for transportation by motor carrier for compensation.

[4] Under 49 CFR 604.9(b)(2), a recipient may lease vehicles to a private charter operator which lacks the capacity to perform a particular charter trip. The FTA's decision found that several of the entities to which VIA was leasing equipment did not meet the definition of "private charter operator," since they owned no vehicles, and were not providers of transportation services.

[5] Complaint, p. 6.

[6] Complaint, p. 10.

VIA argues that the present complaint should be dismissed on res judicata principles, claiming that the issues presented were decided in the Prior Decision.[7]

VIA argues that the Charter Regulation is not authorized by the FT Act, and should in no event be applied to the use of federally funded equipment or facilities authorized before the effective date of the regulation.[8] In the Prior Decision, the FTA affirmed that it is acting within its statutory authority, and that the Charter Regulation it not retroactive in its application.[9] The FTA sees no need to elaborate on these points.

The doctrine of res judicata does not preclude FTA review since both the central legal question and the factual circumstances in this case are clearly distinguishable from those presented in the ABA's Prior Complaint. The main issue in that complaint was the leasing of vehicles to entities which owned no vehicles, and which were not transportation providers. To comply with the Prior Decision VIA has changed its leasing practices, and now leases only to private transportation providers which own at least one bus or one van.[10] The issue now before the FTA is that VIA circumvents the Charter Regulation by steering charter business to an entity whose relationship with VIA is essentially that of a broker.

Moreover, under VIA's current leasing policy as revised on April 1, 1990, VIA now contracts with three private operators on a rotating basis.[11] However, documentation provided by VIA in response to the FTA's request indicates that one private operator, Convention Coordinators, was responsible for 96.6 percent of all VIA's charter invoicing in the period from April 1, 1990, to January 31, 1991.[12] VIA's quasi-exclusive relationship with this private operator, and not VIA's former practice of contracting with non-transportation providers, is the subject of the present complaint. Accordingly, the doctrine of res judicata is not applicable to this matter.

While VIA acknowledges that it subcontracts mainly with Convention Coordinators, it maintains that the charter regulation allows it to do so. VIA points out that the charter regulation does not regulate the relationship between a grantee and a private charter

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[7]Response, p. 3.
[8]Response, pp. 9-10.
[9]Prior Decision, pp. 11-13.
[10]Response, p. 7.
[11]Response, Exhibit 18.
[12]Response, Exhibit 14.

operator.[13] Under 49 CFR 604.9(b)(2), a grantee has the right to contract or refuse to contract with all, some, or none of the private operators seeking to lease vehicles.[14]

VIA corectly notes that in the charter regulation the FTA intentionally does not interject itself in the relationship between a recipient and private charter subcontractors. In allowing recipients wide discretion in their subcontracting arrangements, the FTA relies on the recipients' good faith and sound business judgment.[15] The FTA has nonetheless specifically stated that it will not allow this exception to be abused:

> Grantees who have a roster of several private operators may use their discretion in determining which names to give to a member of the public who calls. They may give out all, some, or any one of the names of "willing and able" operators. However, the FTA will view any attempt on the part of a recipient to establish an exclusive subcontracting or brokering relationship with or steer customers to one particular operator, as a contravention of the regulation, and will, in such cases, take appropriate action.[16]

In the Prior Decision, the FTA explained that a prohibition of exclusive subcontracting arrangements ensures the effectiveness of the charter regulation:

> UMTA's position on this issue is based on its perception that a recipient could easily circumvent the regulation by systematically channelling all charter business to operators with which it has established a brokering arrangement. Such an arrangement would allow the recipient to do indirectly what the regulation prohibits it from doing directly, namely to provide an unlimited amount of charter service in competition with private operators.

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[13]Response, p. 27.
[14]Ibid.
[15]52 Federal Register 11916, 19925 (April 13, 1987).
[16]52 Federal Register 42248, 42250 (November 3, 1987).

> It would moreover undermine one of the main purposes of the regulation, which is to promote the health and vitality of the private charter industry by fostering free and open competition among charter operators. UMTA believes that it is empowered to take any measure necessary to safeguard the effectiveness and integrity of the charter regulation, including imposing a prohibition on "steering" arrangements which would render it meaningless.[17]

As indicated above, despite VIA's purported policy of rotating charter referrals among three private operators, Convention Coordinators accounted for 96.6 percent of all VIA's charter invoicing during the period studied indicating that VIA has a quasi-exclusive subcontracting arrangement with Convention Coordinators, in violation of the charter regulation, and in contravention of specific FTA guidance.

The FTA orders VIA to cease and desist immediately from violating the charter regulation by either: 1) discontinuing all charter service; or, 2) subcontracting on an equal basis with all willing and able private charter operators in its service area. To ensure compliance with the terms of this order, the FTA orders VIA to provide a report covering the period from June 1, 1992, to November 30, 1992, that includes a list of the private operators to which it has leased charter vehicles, the number of vehicles leased to each operator, and the amounts charged by VIA to each operator for lease of these vehicles. VIA should submit this report to the FTA by December 15, 1992. If, upon review of this report, the FTA concludes that VIA has failed to comply with the terms of this order, it will suspend immediately all FTA assistance to VIA.

CONCLUSION

The FTA finds that VIA has violated the charter regulation by establishing an exclusive subcontracting arrangement with one private operator. The FTA orders VIA to cease and desist from this practice immediately. The FTA will monitor VIA's compliance with this order by reviewing VIA's charter subcontracting over a

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[17]Prior Decision, p. 13.

6-month period. If, at the end of this period, the FTA finds that VIA has failed to comply with this order, it will suspend immediately all FTA assistance to VIA.

Dated: May 6, 1992

Rita Daguillard
Attorney Advisor

Approved:

Steven A. Diaz
Chief Counsel

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION I
Connecticut, Maine,
Massachusetts,
New Hampshire,
Rhode Island, Vermont

Transporation System Center
Kendall Square,
55 Broadway
Suite 904
Cambridge, Massachusetts 02142

JUN 8 1992

Darlene A. Reipold, President
F. M. Kuzmeskus, Inc.
P. O. Box 484
Turners Falls, MA 01376

Dear Ms. Reipold:

Please find enclosed a copy of the response of Thomas Chilik, General Manager of the Greenfield Montague Transportation Area (GMTA), to your allegation that GMTA has engaged in impermissive school bus service. Specifically, you allege that GMTA has been providing transportation services to children enrolled in Headstart in violation of the Federal Transit Administration's (FTA) school bus regulation, 49 CFR Part 605.

Based on the information in Mr. Chilik's letter, it appears that GMTA is providing charter service for pre-school children who are enrolled in the local Headstart program which is operated by the Parent Child Development Center, Greenfield, Massachusetts. This type of charter service falls within an exception to the charter service regulation at 49 CFR Section 604.9(b)(5)(ii). Therefore, the service provided by GMTA, in this instance, is not in violation of federal regulations.

If you have any further questions, please contact Margaret Foley, Regional Counsel, at (617) 494-2055.

Sincerely,

Richard H. Doyle
Regional Administrator

Enclosures: 49 CFR Part 604
Mr. Chilik's letter of May 20, 1992

cc: Thomas Chilik, General Manager
GMTA

U.S. Department of Transportation
Federal Transit Administration

Headquarters

400 Seventh St., S.W.
Washington, D.C. 20590

NOVEMBER 2, 1992

John J. Belli, President & CEO
Travel Time
277 Newbury Street
West Peabody, Massachusetts 01960

Dear Mr. Belli:

Re: MA-GATRTA/91-10-01

This responds to your complaint alleging that Greater Attleboro-Taunton Regional Transit Authority (GATRTA) has engaged in impermissible charter service. Specifically, you allege that GATRTA has been providing transportation services to the developmentally disabled clients of the Massachusetts Department of Mental Retardation (DMR) in violation of the Federal Transit Administration's (FTA) charter service regulation, 49 CFR Part 604.

Based on the information provided regarding GATRTA's operations, I find that GATRTA provides special charter service exclusively for the elderly and persons with disabilities. Previously, the FTA has determined that this type of exclusive service, even when provided on a demand responsive basis, constitutes "mass transportation"; it is not charter. See, "Charter Service Questions and Answers," 52 Fed. Reg. 42248, 42252 (November 3, 1987). Moreover, pursuant to 49 CFR 604.9(b)(5), an FTA "recipient may execute a contract with a government entity or a private, non-profit organization exempt from taxation under subsection 501(c)(1), 501(c)(3), 501(c)(4), or 501(c)(19) of the Internal Revenue Code to provide charter service upon obtaining a certification from the entity or organization." Thus, in this instance, I find that the service that GATRTA is providing is not in violation of the FTA's charter service regulation.

Please do not hesitate to contact us if the FTA can provide you with further assistance.

Sincerely,

for Steven A. Diaz
Chief Counsel

cc: Mr. Francis J. Gay
Administrator, GATRTA

MVRTA

U.S. Department of Transportation
Federal Transit Administration

Central Area Office
Region 5

55 East Monroe Street
Suite 1415
Chicago, Illinois 60603

NOV 2 1992

Ms. Lynette Wagner
Operations Management Assistant
Miami Valley Transit Authority
600 Longworth Street
P.O. Box 1301
Dayton, Ohio 45401-1301

Dear Ms. Wagner:

I am writing you to respond to the questions raised in your October 15, 1992 letter regarding the Federal Transit Administration (FTA) Charter Service Regulation. Your letter indicates that Miami Valley Transit Authority (MVRTA) wishes to engage in a limited amount of charter service involving its electric trolley buses and simulated streetcars. MVRTA, in accordance with 49 CFR part 604.11, has placed a notice in a local newspaper indicating its desire to provide charter service and requesting comment from the private charter operators. Your letter indicates that at the conclusion of the public notice process there is only one private operator who has requested that MVRTA not provide the service because they do not see where they will receive a benefit. According to your letter none of the private operators responding to the notice have either electric trolley buses or streetcars.

As a general rule a recipient of FTA funding may not provide charter service unless certain exceptions as stated in 49 CFR part 604.9 are applicable. One of these exceptions is a determination that there are no "willing or able" private charter operators capable of providing charter service. The rational behind the requirement to publicly advertise a grantees desire to provide charter service is to determine if there is any private charter operator who is "willing and able" to provide charter service. FTA defines "willing and able" in its Charter Regulation which states:

> Willing and Able means having the desire, having the physical capability of providing the categories of revenue vehicles requested, and possessing the legal authority... to provide the service in the area in which it is proposed to be provided. (emphasis added)

Based on the information that you have given me I believe that MVRTA has complied with the requirements of FTA's regulation. You may proceed to provide incidental charter service over the objection of the single private operator because it is unable to qualify as a willing and able provider due to the fact that it does not own or operate electric trolley buses or railcars. I would caution you on the fact that the only type of charter service that

streetcar is requested . If any other type of vehicle is requested MVRTA would be required under FTA's regulations to refer the requestor to a private operator.

I hope this information answers the questions that you had about the charter regulation. If you have any additional questions, please feel free to contact me.

Sincerely,

Dorval R. Carter Jr.
Regional Counsel

TCC-32

U.S. Department
of Transportation
**Federal Transit
Administration**

Headquarters

400 Seventh St., S.W.
Washington, D.C. 20590

NOVEMBER 2, 1992

Alan F. Kiepper, President
New York City Transit Authority
370 Jay Street
Brooklyn, New York 11201

Dear Mr. Kiepper:

The United Bus Owners of America (UBOA) has forwarded to me a copy of a charter service notice dated September 15, 1992, issued by the New York City Transit Authority (NYCTA). The notice states that the NYCTA will not provide any of the categories of charter service listed therein if a private operator indicates willingness to provide the service, with four exceptions:

1. Transportation of employees for the purpose of attending funeral services of employees who die during period of active employment.

2. Transportation required in the interest of public safety, as in the case of police or other public safety emergency needs.

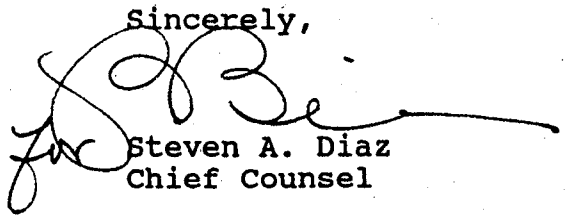
3. Transportation of juries on an on-demand basis through contractual arrangements with the Federal and/or other courts.

4. Transportation for groups attending NYCTA sponsored forums and ceremonies.

Please note that each of the above categories meets the definition of "charter service" set out in the FTA charter service regulation, at 49 CFR 604.5. Specifically, the service is by bus; to a defined group of people; there are no single contracts between the recipient and individual riders; the patrons have the exclusive use of the bus. Moreover, these categories are specifically described as charter service in the FTA's "Charter Service Questions and Answers," 52 Federal Register 42253 (November 3, 1987). However, as indicated in this same document, the FTA will allow recipients to provide the type of service described in Category 2 in the case of a serious emergency, in which time is of the essence for transporting victims, police officers, or rescue workers.

Accordingly, the NYCTA should amend its charter service notice to allow private operators to indicate willingness to provide the four types of service referenced above, with the exception of Category 2 in case of serious emergency. The NYCTA should submit a copy of the amended notice to this office within thirty (30) days of receipt of this letter.

Sincerely,



Steven A. Diaz
Chief Counsel

cc: Wayne Smith
UBOA

U.S. Department of Transportation
Federal Transit Administration

Headquarters

400 Seventh St., S.W.
Washington, D.C. 20590

NOVEMBER 13, 1992

Richard Armour, President
Y.C.N. Transportation
19 Vernon Street
Norwood, Massachusetts 02062

Re: MA-BATA/91-10-01

Dear Mr. Armour:

This responds to your request for reconsideration of the above-cited decision, which held that the service being provided by the Brockton Regional Transit Authority (BATA) to the Massachusetts Department of Mental Retardation (DMR) is not impermissible charter service. The ruling indicated that the service falls within the definition of "mass transportation" at Section 12(c)(6) of the Federal Transit Act, as amended (FT Act), which Congress extended in 1968 to include special service in addition to general service. The two examples of special service that Congress provided are service exclusively for the elderly and persons with disabilities, and service for workers who live in the innercity, but commute to a factory in the suburbs. See, H.R. Rep. No. 1785, 90th Cong., 2d. Sess., reprinted in 1968 U.S. Code Cong. Ad. & News, 2941.

I understand from your letter of November 6, 1992, and your conversation of that date with Rita Daguillard of my staff, that you request reconsideration of this decision on the grounds outlined in a letter of June 26, 1992, submitted on your behalf by Mr. Jonathan Haverly. In his letter, Mr. Haverly maintains that documents obtained from the Massachusetts Comptroller through the Freedom of Information Act contradict BATA's characterization of the service as exclusively for the elderly and persons with disabilities. These documents, which are attached to his letter, include portions of BATA's service contract with the DMR describing the clientele eligible to be served under the contract. According to Mr. Haverly, this description indicates that the service is not mass transportation since it is restricted to clients of the DMR and is not available to all elderly and persons with disabilities in BATA's service area. Mr. Haverly points out that under Federal Transit Administration (FTA) guidance, to qualify as "exclusive," service must be open to all elderly and persons with disabilities in a particular geographic area and not restricted to a particular group of elderly and persons with disabilities. See, 52 Federal Register 42252, November 3, 1987. Mr. Haverly therefore concludes that the service is charter, and is being provided by BATA in violation of the FTA's charter regulation, 49 CFR Part 604.

The FTA finds that Mr. Haverly's conclusion is erroneous for two reasons. First, the FTA considers that service is restricted to a particular group when it is "designed to benefit some special organization such as a private club." See, 52 Federal Register 11920, April 13, 1987. The designation by a statewide human services agency of individuals as disabled and therefore eligible for specialized mass transportation, does not meet this criterion. In fact, the FTA recognizes that recipients may delegate the responsibility for certifying individuals as disabled to other agencies, provided that such agencies administer the certification in an acceptable manner and allow reasonable access to the elderly and disabled. See, FTA Circular 9060.1, pp. IX-2,3 (April 20, 1978). The FTA notes that many recipients make extensive use of both public and private social service agencies to identify individuals eligible for special mass transit benefits. Id.

Second, the "DMR Service Description" dated December 26, 1991, submitted by Mr. Haverly, states that the "DMR service is not exclusive and non-DMR clients are transported with DMR clients." Under FTA guidelines, the fact that service designed for the elderly and disabled is also open to the general public, is an indication that such service is mass transportation:

> [A]ssume a human services agency contracts with a recipient to...provide service for the agency's clients. If the service is open-door and the recipient can put any rider on the vehicle in addition to the agency's clients, the service would probably be mass transportation. 52 Federal Register 11920, April 13, 1987.

Therefore, consistent with this guidance, the FTA maintains that the service provided by BATA to the DMR is mass transportation, and denies your request for reversal of its decision in MA-BATA/91-10-01.

Sincerely,

Steven A. Diaz
Chief Counsel

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

In the matter of:

LAS VEGAS TRANSIT SYSTEM, INC. v. REGIONAL TRANSPORTATION COMMISSION OF CLARK COUNTY, NEVADA	NV06/92-2104

DECISION

SUMMARY

Las Vegas Transit System, Inc., (LVTS) filed this complaint with the Federal Transit Administration (FTA) alleging that the Regional Transportation Commission of Clark County, Nevada (RTC) had failed to comply with the provisions of the Federal Transit Act, as amended (FT Act), and the implementing guidance concerning participation of private enterprise in the provision of mass transportation. LVTS asked that the FTA withhold RTC's grant funds for restructured mass transit service in the Las Vegas area.

After a thorough review of the administrative record, the FTA finds that the RTC, which is also the local metropolitan planning organization (MPO), does not have a process for the review of local decisions that includes a second level of review. Under these circumstances, the lack of a two-tiered review process does not, however, affect the substantive rights of the parties and does not constitute a fatal flaw in RTC's disposition of this matter. The FTA finds that the RTC provided for the participation of private mass transportation companies in its proposal for fixed route service to the maximum extent feasible. Accordingly, the FTA finds that the RTC did not violate the

private sector provision of section 3(e) of the FT Act and the implementing policy.[1]

COMPLAINT

LVTS filed this complaint with FTA on June 12, 1992. The complaint alleges that RTC failed to provide for the participation of the private sector to the maximum extent feasible in its proposal for restructuring the Las Vegas Valley transit system. LVTS states that RTC issued a "Request for Proposals" (RFP) that precluded LVTS from having an equal opportunity to submit a bid for fixed route service. LVTS states that "the [RFP] evaluation criteria imposed unreasonable restrictions that neither...LVTS nor any other local company could meet."[2] LVTS further claims that it objected to the RFP during the drafting stage, but its comments were ignored.

According to LVTS, the RFP imposed a mandatory requirement that was exclusionary and discriminatory. LVTS claims that the requirement called for each offeror to submit five references from cities where the company had previously provided mass transit service. LVTS claims that this requirement precluded consideration of companies like itself that have not provided services to other cities.

Nevertheless, LVTS states that it submitted a proposal, entitled "Segmentation Plan," but the proposal was denied on three separate occasions. LVTS claims that RTC's stated reason for the denials was that "[it] could not make a determination on the

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[1] LVTS raised several other claims against RTC in its complaint to the FTA. Those claims involve alleged violations of sections 9 and 13(c) of the FT Act, and of the Common Grant Rule, 49 CFR Part 18, the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), and the President's Executive Order for Privatization of the Country's Infrastructure (Executive Order). The FTA finds that it does not have jurisdiction over LVTS' claims under section 9 and 13(c) of the FT Act. FTA Circular 4220.1B, "Third Party Contracting Guidelines," limits FTA's review of section 9 bid protests to claims that a grantee failed to have written protest procedures. Furthermore, alleged violations of section 13(c) should be directed to the Secretary of Labor. Finally, the FTA finds that LVTS has not articulated its claims under ISTEA and the Executive Order. Therefore, this decision is limited to an examination of the RTC's alleged violation of section 3(e) of the FT Act.

[2] LVTS has been the sole provider of fixed route service in Clark County, Nevada for approximately 45 years. LVTS asserts that RTC is restructuring the mass transit system primarily to eliminate LVTS from the business.

ability of [LVTS] to provide [the] service...."

Finally, LVTS claims that RTC did not attempt to resolve the dispute at the local level as called for by FTA's policy guidelines. LVTS claims that the FTA's guidelines required RTC at least to establish an independent internal body (i.e., a group separate from that which reviewed the proposals) to handle this dispute.

RESPONSE

The FTA reviewed LVTS' complaint and determined that the allegations, if substantiated, constituted violations of the private sector provision of the FT Act and the implementing policy. The FTA forwarded LVTS' complaint to the RTC on July 7, 1992, with 30 days to respond.

RTC's response is dated August 17, 1992. RTC claims that LVTS' complaint is totally without merit and states that the complaint is an attempt by LVTS to hold on to its "near monopoly position" in the Las Vegas Valley. RTC claims that its decision to restructure the mass transit service in Las Vegas Valley was based on the results of a local referendum. RTC states that the results of the referendum indicate that most transit passengers in the area were unsatisfied with the condition of mass transit service in the Las Vegas Valley.

In response to LVTS' claim under section 3(e) that RTC did not provide for the maximum feasible participation of the private sector in its proposed restructured service, RTC claims that LVTS lacks standing. RTC asserts that LVTS is not a private provider but instead a "publicly subsidized carrier...that has been the beneficiary of two types of Federal subsidies."[3]

Moreover, RTC states that even if LVTS has standing under 3(e), its claim against RTC is not valid. RTC asserts that it has complied with both sections 3(e) and 8(o) of the FT Act by attempting competitively to procure the services of the private sector to operate its new fixed route system.

According to RTC, the planning committee that drafted the RFP for the new fixed route services included an LVTS representative.

REBUTTAL

The FTA forwarded RTC's response to LVTS on August 21, 1992, and

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[3] LVTS operates 58 vehicles, 30 of which it has acquired through leases with the City of Las Vegas and the RTC. These leases permit LVTS to use federally-funded buses in exchange for LVTS contributing a local matching share.

provided LVTS with 30 days to submit a rebuttal. LVTS's rebuttal is dated October 6, 1992.

In its rebuttal, LVTS reasserts its position that "RTC has seriously and substantially violated the [FT Act]" by failing to provide for the meaningful involvement of the private sector in its new route services. LVTS admits that it participated in the RTC's planning committees; however, it claims that the subcommittees had no impact on the actual planning process.

Moreover, LVTS claims that the real problem lies in the fact that the RTC is the MPO. LVTS asserts that it is unreasonable to ask a private operator to appeal its 3(e) complaint to the same entity that initially dismissed its complaint. LVTS urges the FTA to demand RTC develop an independent dispute mechanism to review initial decisions on private sector complaints.

ANALYSIS

The FTA developed its private enterprise policy under the provisions of three sections of the FT Act, namely sections 3(e), 8(o), and 9(f). Under section 3(e) the FTA must, before approving a program of projects, find that such program provides for the maximum feasible participation of private enterprise. Section 8(o) directs FTA recipients to encourage private sector participation in the plans and programs funded under the Act. Finally, as a prerequisite to funding under section 9, recipients must develop a private enterprise program in accordance with the procedures set out in section 9(f).

In order to provide guidance in achieving compliance with these statutory requirements, the FTA issued its policy statement, "Private Enterprise Participation in the [Federal Transit] Program," 49 FR 41310, October 22, 1984. This policy statement sets forth the factors the FTA will consider in determining whether a recipient's planning process conforms to the private enterprise requirements of the FT Act. These factors include consultation with private providers in the local planning process, consideration of private enterprise in the development of the mass transportation program, the existence of records documenting the participatory nature of the local planning process and the rationale used in making public/private service decisions.

The FTA's private sector requirements are further detailed in Circular 7005.1, "Documentation of Private Enterprise Participation Required for Sections 3 and 9 Programs," December 5, 1986. The Circular outlines the minimum elements a grantee's private sector consultation process must contain, and describes the documentation required to demonstrate that the process has been followed.

The Circular states that a grantee's private sector process must include the following elements:

a. Notice to and early consultation with private providers in plans involving new or restructured service as well as the periodic re-examination of existing service.

b. Periodic examination, at least every three years, of each route to determine if it could be more efficiently operated by a private enterprise.

c. Description of how new and restructured services will be evaluated to determine whether they could be more efficiently provided by private sector operation pursuant to a competitive bid process.

d. The use of costs as a factor in the public/private decision.

e. A dispute resolution process which affords all interested parties an opportunity to object to the initial decision. FTA's complaint process is designed to accept appeals of this local dispute resolution process.

The Circular also describes the complaint procedure which private operators may follow when they believe that a grantee's private sector policy is inadequate or has been improperly applied. Under this procedure, disputes should be resolved at the local level. The procedure requires dispute resolution between the grantee and the private operator and, failing settlement at this level, a review of the grantee's decision by either a local MPO or the FTA. Under the terms of the Circular, the FTA will entertain complaints only when a complainant has exhausted its local dispute resolution process.

FTA's review of the administrative record indicates that LVTS' complaint was originally submitted to the RTC as a bid protest, and that while the RTC reviewed and adjudicated the protest in accordance with its bid protest procedures, it did address the merits of the 3(e) complaint. In a memorandum dated January 2, 1992, counsel for RTC notes that LVTS included in its bid protest an allegation that RTC "failed to satisfy its obligation under 3(e) to provide for private sector participation in the project to the maximum extent feasible by not allowing LVTS to continue its existing operations."[4] The memorandum dismisses the allegation on the ground that RTC's new fixed route service will be provided only by private operators, and that RTC therefore involved the private sector to the maximum extent feasible in the planning and provision of this service.

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[4] See Memorandum of Clark County Regional Transportation Commission, August 17, 1992 at Attachment J-1.

Therefore, FTA concludes that RTC did in fact render an initial decision rejecting LVTS' 3(e) complaint. Based upon the stipulation of the parties, we find that the parties have exhausted the local process.[5] Thus, we reach the merits of this case.

The FTA recognizes that Nevada law delegates to the RTC, among other duties, the authority to act as the MPO. Specifically, section 373.1161 of the Nevada Revised Statutes gives the RTC the power to conduct studies, develop plans and conduct public hearings to establish short-range and regional plans for transportation. RTC has not submitted, however, a copy of its format process for the resolution of private sector complaints.[6] Circular 7005.1 requires all recipients to develop a local dispute resolution process.

The FTA's policy requiring local dispute resolution is in accordance with the intent of the FT Act, which is to afford communities maximum discretion in local decision-making.[7] The policy also recognizes the fact that the local decision-maker is most knowledgeable about the facts and events surrounding a local dispute, and best situated to make a determination with regard to them.

Therefore, in view of the fact that RTC has not established that it currently has a process for review of local decisions, but is willing to stipulate for the purpose of this complaint that the local 3(e) dispute process has been exhausted, and that a delay in hearing this appeal might prejudice both parties, the FTA will decide the section 3(e) complaint on the merits

The primary issue LVTS raises is that RTC did not provide for the participation of the private sector to the maximum extent feasible. The FTA's review of the administrative record shows

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[5]In Santa Barbara Transportation, Inc. v. Santa Barbara Metropolitan Transit District, CA-03/87-01, the FTA directed its grantee to refer requests for reconsideration of private sector decisions to the local MPO before referral to the FTA. However, in this case, the grantee and the MPO are the same entity. It is therefore not feasible to expect an independent level of review of private sector decisions under this structure, and none is required.

[6] Although the RTC states it adopted a grievance and complaint procedure for dealing with transit issues, the FTA finds that RTC did not submit any document that substantively supports that contention.

[7] See sections 2(b) and 3(a)(1) of the FT Act.

that this argument is without merit. RTC involved private operators in the project's planning stage from as early as March 1989.

Both RTC and LVTS submitted materials that show that RTC set up a Transit Technical Study Committee to provide assistance in the restructuring of Las Vegas Valley's mass transit system. This committee included members of both the private and public sectors. The record also indicates that on June 14, 1990, RTC adopted the Transit Technical Study's Interim Report which specifically encouraged the RTC to competitively procure private sector services.[8]

Moreover, the record details a June 13, 1991, notice of intent to issue a request for proposal for transit service, in addition to an advertisement in Passenger Transport that noted RTC's proposed new service.[9] In total, RTC received six proposals from the private sector based on these efforts.

Based on the record, the FTA finds that the RTC did not violate the provision of section 3(e) requiring private sector involvement. RTC fully provided for private sector involvement through early notice and consultation with those private providers.

A secondary issue raised by LVTS concerns RTC's failure to afford it "just and adequate compensation" under the provisions of section 3(e). Section 3(e) provides in pertinent part:

> No financial assistance shall be provided under this Act to any State or local public body...for the purpose...of providing by contract or otherwise for the operation of mass transportation facilities and equipment in competition with or supplementary to, the service provided by an existing mass transportation company, unless...(3) just and adequate compensation will be paid to such companies for acquisition of their franchises or property to the extent required by applicable State or local laws....

As earlier noted in FTA's letter to LVTS, dated August 20, 1991, section 3(e) is intended to ensure that the rights of existing private transit operators are protected in the event of an acquisition by an FTA-funded public entity. The determination, however, of whether an acquisition has taken place, and what compensation is due to affected private providers as a result of such acquisition, is properly made under applicable State or

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[8] See RTC Memorandum, Attachment A at 5.

[9] See RTC Memorandum, Attachment A at 10.

local law.[10] Therefore, FTA will not make any findings based on this claim, which falls outside its jurisdiction.

CONCLUSION

The FTA requires that the RTC submit a copy of its local dispute resolution process, as required by Circular 7005.1, within 60 days of the date of this decision. FTA also finds that RTC complied with the requirements of section 3(e) by providing for the participation of the private sector to the maximum extent feasible in its proposal for restructured mass transit service in the Las Vegas Valley. LVTS should refer its claim for compensation for acquisition of its property by the RTC to the appropriate State or local forum.

November 25, 1992
Date

Rita Daguillard
Attorney Advisor

Steven A. Diaz
Chief Counsel

[10] See, South Suburban Safeway Lines, Inc. v. City of Chicago et al., 416 F.2d 535 (7th Cir. 1968), and Rose City Transit Co. v. City of Portland, Or. Ct. App. 525 P.2d 1325 (1974).

U.S. Department of Transportation
Urban Mass Transportation Administration

Headquarters

400 7th Street S.W.
Washington, D.C. 20590

DECEMBER 2, 1992

Richard Armour, President
Y.C.N. Transportation
19 Vernon Street
Norwood, Massachusetts 02062

Re: MA-BATA/91-10-01

Dear Mr. Armour:

This responds to your second request for reconsideration of the above-cited decision, which held that the service being provided by the Brockton Regional Transit Authority (BATA) to the Massachusetts Department of Mental Retardation (DMR) is not impermissible charter service. My ruling of November 13, 1992, on your first request for reconsideration stated that the service in question falls within the Federal Transit Administration (FTA) definition of special service for the elderly and persons with disabilities, and is therefore permissible mass transit. My ruling was based on two findings: 1) the service is not restricted to a particular group but is open to all persons designated by the DMR as elderly and disabled; and 2) the service is open door, and BATA can put any rider on the vehicles in addition to the agency's clients. The FTA has determined that service having these characteristics meets the criteria for mass transit set out in FTA guidance. See, 52 Federal Register 11920, April 13, 1987.

I understand that the arguments supporting your second request are presented in a letter dated November 17, 1992, submitted on your behalf by Jonathan Haverly. Mr. Haverly terms my first finding "unjustifiable" and states that "should you wish to persist in promoting this first argument, we are fully prepared to respond." Mr. Haverly notes that my second finding is based on the "DMR Service Description" dated December 26, 1991. He denies that he submitted this document to the FTA, and claims that it was submitted by BATA. In this connection, please find enclosed a copy of Mr. Haverly's letter to me of June 26, 1992, which, at page 2, references the document in question as "Attachment 3" and quotes from it extensively.

Neither of the points raised by Mr. Haverly meets the standard for review of initial decisions set out in the FTA's charter regulation, 49 CFR Part 604. Under 49 CFR 604.19(b), the FTA will take action on an appeal only if the appellant presents evidence

that there are new matters of fact or points of law that were not available or known during the investigation of the complaint. Moreover, the regulation provides for only one appeal of decisions. Under 49 CFR 604.21, a decision on appeal is final and conclusive, but is subject to judicial review pursuant to sections 701-706 of Title 5 of the U.S. Code.

In view of the foregoing, the FTA will entertain neither this nor any other request for reconsideration of its decision in MA-BATA/91-10-01.

Sincerely,

for Steven A. Diaz
Chief Counsel

Enclosure

cne II
file 3 f
Chron

U.S. Department of Transportation
Federal Transit Administration

Headquarters

400 Seventh St., S.W.
Washington, D.C. 20590

JANUARY 8, 1993

Debra Swetnam
Assistant Transit Manager
Blacksburg Transit
300 South Main Street
Blacksburg, Virginia 24060

Dear Ms. Swetnam:

This is in response to your request, on behalf of Blacksburg Transit, for a hardship exemption to provide charter bus service authorized under the Federal Transit Administration's (FTA) charter service regulations, 49 CFR 604.9(b)(3)(ii). Blacksburg Transit claims that Abbott Bus Lines, Inc. (Abbott), the only willing and able private operator in the service area, is located too far from the town of Blacksburg. FTA has granted exemptions from this regulation to Blacksburg Transit for calendar years 1988, 1989, 1990, 1991, and 1992.

FTA has reviewed the materials submitted in your letter of December 8, 1992, as well as that provided in your telephone conversation with Rita Daguillard of my staff. Under 49 CFR 604.9(b)(ii), one of the factors that FTA may take into consideration in deciding whether to grant a hardship exemptions is the private operator's distance from the origin of the charter service, and the effect this distance may have on the price and other aspects of the service. The information you have provided indicates that Abbott is located 41 miles from the town of Blacksburg, most charter trips in Blacksburg's service are relatively short, and Abbott's minimum base rate and deadhead mileage adds approximately $200.00 to the cost of a charter trip. The cost of Blacksburg Transit's average charter trip is about $280.00.

FTA notes that Blacksburg Transit has provided written notice to Abbott, as required by the charter service regulation at 49 CFR 604.9(c)(1). FTA has received, both as part of Blacksburg Transit's submittals and directly from Abbott, notice of Abbott's objection to the granting of this hardship exemption. However, given the above-mentioned price difference between Blacksburg Transit and Abbott, and the fact that most of Blacksburg Transit's charter customers are nonprofit groups for whom this price difference would constitute a hardship, FTA believes that the exemption is nonetheless justified.

Based on the information provided in your petition, FTA has determined that Blacksburg Transit does qualify for an exemption under 49 CFR 604.9(b)(3)(ii). I am therefore granting your request for an exemption. Your exemption becomes effective on the date of this letter, and permits Blacksburg Transit to provide charter service throughout its service area for up to twelve months.

Sincerely,

Steven A. Diaz
Chief Counsel

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

In the Matter of:

ACADEMY BUS TOURS, INC. Complainant	)	
v.	)	No. NJ-05/92-2101
NEW JERSEY TRANSIT CORPORATION Respondent	)	

Decision of the Office of Chief Counsel

SUMMARY

Academy Bus Tours, Inc. (Academy), a private carrier, filed this complaint, dated May 15, 1992, with a supplement to the complaint, dated May 26, 1992, (docketed May 27, 1992) with the Federal Transit Administration (FTA). The complaint alleges that New Jersey Transit Corporation (NJT) failed to comply with the private sector provisions of the Federal Transit Act, as amended (FT Act), 49 U.S.C. app. section 1602(e) and section 1607(e), and the implementing guidance concerning participation of private enterprise in the provision of mass transportation. Specifically, Academy alleges that NJT improperly used its own "avoidable cost" methodology[1] instead of FTA's prescribed "fully allocated cost" methodology[2] to compare the costs of Academy's

[1] The avoidable cost methodology employed by NJT uses direct costs (e.g., fuel, parts, insurance), plus shared semi-fixed costs (e.g., garage costs, personnel and management costs) if they are significant, in the cost evaluation of a particular service. (New Jersey Transit Corporation Answer to Academy Bus Tours Complaint, August 6, 1992, at 19, note 11.)

[2] FTA's fully allocated cost methodology, as described in the FTA's "Fully Allocated Cost Analysis: Guidelines for Public Transit Providers," prepared by Price Waterhouse, April 1987, uses direct costs, shared semi-fixed costs, and shared fixed costs. Fixed costs are costs that cannot be eliminated (e.g., top management salaries, office building costs). The purpose of the fully allocated cost method is to provide an accurate and equitable accounting of both fixed and variable costs, so that FTA recipients may not derive an unfair advantage from their Federal subsidies.

proposal for bus service against the costs presented in the proposal of New Jersey Transit Bus Operations (NJT Bus). Based on this comparison, NJT awarded the contract to its own subsidiary, NJT Bus. The date of NJT's decision does not appear in the record before the FTA. Academy has asked the FTA to decide whether NJT is in violation of the provisions of FTA Circular 7005.1 for failing to use a "fully allocated cost" methodology to compare the costs of public and private proposals.

A threshold issue is whether the complainant exhausted local administrative remedies before appealing to the FTA.[3] NJT, in its response, dated August 6, 1992, contends that Academy did not file a pre-award complaint with NJT's Board, nor did it later avail itself of other available administrative mechanisms. Academy, in its rebuttal, dated October 2, 1992, argues that NJT does not have a local process. The FTA finds that NJT has no written process for the local resolution of private sector disputes, as required by FTA Circular 7005.1. Academy was therefore unable to exhaust local remedies, and the FTA takes jurisdiction of this matter. The FTA directs NJT to develop a local resolution process, and to forward it to the FTA within sixty (60) days. The FTA also finds that NJT's avoidable cost methodology is inconsistent with the FTA's fully allocated cost guidelines. The FTA directs NJT to develop, before submitting bids to provide service in competition with private operators, a methodology which provides an accurate accounting of both fixed and variable costs, in keeping with the FTA's fully allocated cost methodology.

BACKGROUND

This dispute originated when NJT Bus and Academy competed for the Airlink bus route contract[4]. New Jersey Transit Bus Operations ultimately won the contract award, but Academy claims that New Jersey Transit Bus Operations' successful bid was predicated

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[3] According to NJT, in its response at p 2.n1, the parties are litigating the issue of whether NJT violated FTA's requirement by permitting the use of avoidable cost financing techniques for other routes in a New Jersey appeals court. Academy Bus Tours Inc., v. New Jersey Transit Corporation, Superior Court of New Jersey, Appellate Division, Nos. A-2195-90-K. Under FTA Circular 7005.1 entitled "Documentation of Private Enterprise Participation Required for Sections 3 and 9 Programs," December 5, 1986, complainants must exhaust local administrative remedies for resolving private sector complaints before appealing to the FTA.

[4] The Airlink bus route runs daily between Broad Street and Pennsylvania Train Station in and the Newark International Airport.

upon its use of an avoidable cost methodology.[5] Academy maintains that the use of the avoidable cost methodology is not only unfair, but a violation of the FTA Circular 7005.1, which prescribes the use of a fully allocated cost methodology. It is on these grounds that Academy filed its Section 3(e) complaint. Academy alleges it exhausted all local remedies.

According to NJT, Academy never exhausted its local remedies as outlined in the FTA Circular 7005.1. Thus, FTA should dismiss the matter.

In its rebuttal, Academy asserts that no local administrative mechanism exists to address its 3(e) complaint, therefore its complaint is properly before the FTA. Further, Academy claims that NJT has misread the provisions of the ISTEA concerning the amount of discretion that should be afforded to a local transit agency. Academy submits that "the FTA is free to demand that certain minimum criteria be employed by the grantee to determine exactly what satisfies 'local needs'."[6] Finally, Academy reasserts its position that NJT is in violation of FTA Circular 7005.1 based on NJT's failure to consider the fully allocated costs in its cost comparison of private and public proposals.

DISCUSSION

In its complaint, Academy raises one primary issue, whether or not FTA Circular 7005.1 mandates that a grantee use a fully allocated cost methodology when it compares the costs of private and public proposals. The NJT, however, raises an issue in its response that must be decided before the FTA can make any findings on Academy's complaint, namely whether or not Academy exhausted the local review process.

The Circular describes the complaint procedure which private operators should follow when they believe that a grantee's

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[5] According to Academy, NJT has allowed NJT Bus to submit bid proposals based on an avoidable cost methodology since November 1990. Academy claims that this practice permits New Jersey Transit Bus Operations to exclude from its proposals "the shared costs of labor and overhead of its operation . . . when competing with private carriers pursuant to the grantee's private sector initiative." See, Academy Bus Tours Complaint, May 15, 1992, at 2. It is Academy's position that New Jersey Transit Bus Operations receives an unfair advantage over private carriers who include fully allocated cost in their proposals.

[6] See, Academy Bus Tours Rebuttal to NJT's Response, October 2, 1992, at 8.

private sector policy is inadequate or has been improperly applied. Under this procedure, disputes should be resolved at the local level. The Circular requires a process for the resolution of disputes at the local level between the grantee and the private operator and, failing settlement at this level, a review of the grantee's decision by either a local Metropolitan Planning Organization or the FTA. Under the terms of the Circular, the FTA will entertain complaints only when a complainant has exhausted its local remedies.

Academy contends that NJT has no local administrative process to hear Section 3(e) complaints. While NJT states that Academy has failed to exhaust local remedies, it fails to identify a specific dispute resolution process. The FTA has reviewed NJT's private sector involvement process, and finds that it contains no written procedures for the local resolution of disputes, as required by Paragraph 5(e) of Circular 7005.1. The FTA therefore finds that Academy could not avail itself of local administrative remedies, and takes jurisdiction of this matter.

The FTA fully allocated cost guidelines are stated and described in three documents. The Private Enterprise Participation in the Federal Transit Program (Federal Register, Volume 49, Number 205, October 22, 1984) is a policy statement regarding private enterprise participation in programs funded by FTA. As one of its provisions, this guidance states that:

> When comparing the service proposals made by public and private entities, all the fully allocated costs of public and non-profit agencies should be counted. Subsidies provided to public carriers, including operating subsidies, capital grants and the use of public facilities should be reflected in the cost comparisons.

FTA Circular 7005.1 provides guidelines for the development and documentation of a local process for the consideration of private enterprise participation and private operation of mass transportation. The Circular states that one of the factors to be included in the process is:

> d. The use of costs as a factor in the private/public decision.
>
> Costs are defined in the Circular as follows:
>
> "Costs" means fully allocated costs which are attributable to the provision of the service. The application of these costing principles which reflect generally accepted accounting principals [sic] are more fully described in "Guidelines for Fully Allocated Costs in Transit Service," available from FTA.

The guidelines, entitled "Fully Allocated Cost Analysis: Guidelines for Public Providers" (April 1987), describe generally accepted approaches to fully allocated costing that are consistent with the guidance. The report defines fully allocated costing to include both fixed and variable costs (page 4):

> Fixed Costs, which are constant over very large increments of service and therefore do not vary with small changes in the level of transit service. Examples of fixed costs include most administrative labor costs incurred directly to support revenue service.
>
> Variable Costs, which normally vary with the level of transit service provided. Variable costs include driver wages and vehicle fuel costs which vary directly with the level of service.

The report also states that fully allocated costing requires the estimation of direct and shared costs (page 5):

> Direct Costs of a segment of transit service - These are the costs which can be associated on a one-to-one basis with a segment of transit services. At the route or vehicle level, for example, direct costs generally consist of operator, mechanic and servicer wages, associated fringe benefits, fuel and lubricants, tires and tubes, and the depreciation costs associated with the vehicles used to operate that service, including spare vehicles.
>
> Shared Costs of a segment of transit service - These are costs which cannot be associated on a one-to-one basis with a specific segment of transit services. The shared costs relevant to a single bus route or vehicle, for example, consists at a minimum of the costs to operate the facility from which the route or vehicle is dispatched. Shared costs must be allocated to specific segment of transit service in a logical manner which reflects the rate at which the cost is incurred to support the specific segment of service. [Emphasis in original.]

NJT's avoidable costing approach is not consistent with the FTA's costing guidelines. In its Response, NJT describes the NJT avoidable costing approach to include: 1) all direct costs; and 2) shared semi-fixed costs only if they are of significant scale to result in significant savings (footnote 11, page 19). By contrast, NJT states that the fully allocated method advocated by Academy requires that all direct and shared costs should be included in the costs for evaluation.

In its Response, NJT goes on to state that the NJT Board concluded that the fully allocated approach recommended by FTA was inappropriate in New Jersey. The Board recommended that the avoidable cost approach be used (page 20).

Later the NJT describes its use of the avoidable cost approach. It states that (page 25):

> ...only the costs which will actually change as a result of the contracting out of the service must enter into the financial evaluation. In the Airlink RFP, it would be irresponsible and illogical for NJ Transit to assess NJ Transit's fixed and unavoidable costs to a small and minute bus service which utilizes only a tiny fraction -- four (4) buses -- of NJ Transit's fleet of nearly 1,880 buses.

These statements indicate that NJT is familiar with the concepts involved in fully allocated and avoidable costing approaches. They also indicate that NJT's avoidable costing approach is not consistent with the FTA costing guidelines, since it takes into account only the variable and not the fixed costs of providing a particular service.

The FTA directs NJT to develop, before submitting further bids to provide service in competition with private operators, a methodology that takes into account both variable and fixed costs, consistent with the FTA's fully allocated cost methodology.

CONCLUSION

The FTA determines that NJT does not have a local process for resolving Section 3(e) disputes, and that Academy was unable to avail itself of a local process. The FTA directs NJT to develop a local dispute resolution process, and to submit it to the FTA within sixty (60) days of receipt of this decision. NJT should also develop, before submitting further bids on transit service in competition with private operators, a costing methodology that is consistent with the FTA's fully allocated cost principles.

The FTA intends to monitor NJT's compliance with this decision before approving future grants to NJT.

January 19, 1993
Date

Rita Daguillard
Attorney Advisor

Steven A. Diaz
Chief Counsel

Chron alc 3F

U.S. Department of Transportation
Federal Transit Administration

Headquarters

400 Seventh St., S.W.
Washington, D.C. 20590

January 25, 1993

Mr. Alan F. Kiepper
President
New York City Transit Authority
370 Jay Street
Brooklyn, New York 11201

Dear Mr. Kiepper:

This responds to your letter of December 24, 1992, concerning the annual notice of charter service recently published by the New York City Transit Authority (NYCTA). Your letter states that NYCTA is willing to amend its charter notice to remove three of the exceptions enumerated in an earlier letter from the Federal Transit Administration (FTA). You state, however, that NYCTA believes that the fourth exception mentioned therein, i.e., transportation of service to NYCTA-sponsored ceremonies, does not fall within the definition of charter service. You seek clarification from the FTA concerning this category of service.

Your letter indicates that NYCTA believes that this service is mass transportation, since NYCTA will set the routes and schedules and decide which type of equipment will be used. The service therefore appears to have some of the characteristics of mass transportation as defined by the FTA at 52 Federal Register 11920 (April 13, 1987). However, this service, as described in your letter, lacks other characteristics set out in this definition, namely that the service be designed to benefit the public at large, and be provided on an open door basis. Moreover, the service meets the FTA's definition of charter service, set out at 49 CFR 604.5, since it is to a defined group of people, on a one-time basis, with no individual contracts between the users and the recipient. Accordingly, the FTA finds that this fourth category of service is charter service, and should not be cited as an exception in NYCTA's annual charter notice.

I trust that this provides the clarification you requested.

Sincerely,

Gregory B. McBride
Deputy Chief Counsel

March 5, 1993

Stephen Anzuoni, Executive Secretary
New England Bus Transportation Association
464 Statler Office Building
20 Park Plaza
Boston, MA 02116

Dear Mr. Anzuoni:

The enclosed correspondence from John Powell, General Manager of the Worcester Area Transportation Co., Inc. (WATC), responds to your allegation that the Worcester Regional Transit Authority (WRTA) intends to engage in impermissible charter service. Specifically, you claim that on March 11, 1993, the WRTA plans to use federally-funded buses to perform tours in connection with a conference sponsored by the NorthEast Transit Association (NETA).

According to Mr. Powell, NETA asked ElderBus, a WRTA para-transit service operator, to provide a vehicle on March 11 to transport attendees of the "Sections 16 and 18 Rural Transit Operations Seminar" from the Host Hotel in Sturbridge to the ElderBus operation in Southbridge and then on to the Worcester Area Van Express (WAVE) operation in Worcester. Essentially, the ElderBus will be used to transport the public transit operators on a "tour" of the public transit facilities.

Based on the information contained in Mr. Powell's memorandum, the Federal Transit Administration (FTA) has determined that the tours scheduled for March 11 are promotional in nature and will serve to educate the conference attendees in the area of public transit. Therefore, NETA's use of the ElderBus for the limited purpose of

touring the public transit operations will not violate the Charter Regulation, 49 CFR Part 604.

If you have any questions, please call Margaret Foley, Regional Counsel, at (617) 494-2055.

Sincerely,

Richard H. Doyle
Regional Administrator

Enclosure

cc: Mr. Robert E. Ojala
Administrator, WRTA

Mr. John Powell
General Manager, WATC

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION I
Connecticut, Maine,
Massachusetts,
New Hampshire,
Rhode Island, Vermont

Transporation System Center
Kendall Square,
55 Broadway
Suite 904
Cambridge, Massachusetts 02142

APR 7 1993

Ray Penfold, General Manager
V.I.P. Tour & Charter Bus Company
129-137 Fox Street
Portland, ME 04101

Dear Mr. Penfold:

The enclosed correspondence from Kenneth W. McNeill of the Maine Department of Transportation (MDOT), responds to your allegation concerning the Western Maine Transportation Services, Inc. (WMTS), also known as Pine Tree Transit. Specifically, you allege that WMTS, a private nonprofit organization which receives federal funds through MDOT, has engaged in impermissible charter service between The Bethel Inn, Bethel, Maine, and the Sunday River Ski Resort, Newry, Maine.

Under Section 12(c)(6) of the Federal Transit Act (Act), "mass transportation" is defined as service to the public on a regular and continuing basis. By contrast, "charter service" usually involves a one-time provision of service and the user, not the recipient of federal funds, has control of the service. See 52 Federal Register 11919-20 (April 13, 1987).

Based upon the information contained in MDOT's response, the service in question appears to fall within the definition of "mass transportation." First, WMTS exercised control over the service by setting the route and schedule and deciding what type of equipment to use. Second, the service was not restricted to guests of The Bethel Inn but was provided to benefit the public-at-large and was adverstised as "open to the public" in a local newspaper. Third, WMTS provided the service on a regular and continuing basis during weekends and holidays.

Although you have styled your letter as a complaint under the FTA's charter service regulation, I note that your allegation is also in the nature of a private sector complaint under Section

3(e) of the Act. Under FTA's private sector participation guidelines, recipients of federal funds should consider the views of private providers when using FTA-funded vehicles to provide new or restructured transportation services. Moreover, when bidding in response to a request for service, the fully allocated costs of public and nonprofit agencies receiving federal funds should be disclosed. Subsidies provided to public and private nonprofit carriers, including operating subsidies, capital grants, and the use of public facilities should be reflected in the cost comparisons. According to Mr. McNeill, WMTS bid its fully allocated costs in response to The Bethel Inn's request for service betweeen the Inn and the Sunday River Ski Resort.

In conclusion, please note that questions dealing with the fairness of local procedures and decisions involving private sector complaints should be addressed at the local level. Complaints which cannot be resolved at the local level should be resolved at the state level. If you have further questions involving private sector involvement in the provision of transit service, I recommend that you call or write to Kenneth W. McNeill, Director, Highway Mass Transportation Division, MDOT, State House Station 16, Augusta, ME 04333, (207) 287-3318.

Sincerely,

Richard H. Doyle
Regional Administrator

Enclosures: MDOT ltr dtd 2/19/93
MDOT ltr dtd 3/9/93

cc: Kenneth W. McNeill, MDOT

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION I
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Massachusetts,
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Rhode Island, Vermont

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Cambridge, Massachusetts 02142

APR 7 1993

James M. Jalbert, President
C & J Trailways
P. O. Box 190
Dover, NH 03820

Dear Mr. Jalbert:

The enclosed correspondence from Joe R. Follansbee, Executive Director of the Cooperative Alliance For Seacoast Transportation (COAST), responds to your allegation that COAST may have engaged in impermissible charter service. Specifically, you allege that COAST provided transportation services to Pro Portsmouth for their Market Square Day event on June 8, 1992, and to the Prescott Park Arts Festival on August 23, 1992. You also claim that COAST has bid on and performed charter service for the University of New Hampshire (UNH) Alumni Center and for other organizations throughout the campus.

Based upon the information contained in Mr. Follansbee's letter, it appears that the transportation services provided on June 8 and August 23, 1992, did not meet the charter criteria of being provided under a single contract for the exclusive use of a defined group of people who have authority to decide the itinerary. According to Mr. Follansbee, COAST donated its services during the community events for traffic mitigation purposes. He states that COAST exercised control over the service by setting the route, rate and schedule and deciding what type of equipment to use. Moreover, the service was open to the public and was not restricted to a private group. The FTA has previously determined that this type of service is mass transportation and not charter. See 52 Federal Register 11919-20 (April 13, 1987).

With reference to transportation services conducted at UNH, Mr. Follansbee notes that the charter operator on campus is UNH Kari-Van. He maintains that COAST has absolutely no interface with UNH Kari-Van charters and emphatically denies that COAST conducts charter service on campus grounds. Accordingly, it does not appear that COAST is in violation of the FTA's Charter Service Regulation at 49 CFR Part 604.

In closing, I would like to take this opportunity to encourage both you and Mr. Follansbee to remain in close contact in order to enhance your opportunities, as a private operator, to participate in the development of new transportation services in and around the Portsmouth area.

I hope this information has been helpful. If you need any additional clarification or assistance, please call Margaret Foley, Regional Counsel (617) 494-2055.

Sincerely,

Richard H. Doyle
Regional Administrator

Enclosure

cc: Mr. Joe R. Follansbee
Executive Director, COAST

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION I
Connecticut, Maine,
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Rhode Island, Vermont

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Kendall Square,
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JUL 16 1993

G. Stephen Anzuoni, Esq.
Statler Office Building
20 Park Plaza, Suite 464
Boston, MA 02116

Dear Mr. Anzuoni:

This responds to your letters dated May 6 and July 6, 1993, written on behalf of Gulbankian Bus Lines (GBL) alleging that AVCOA, a private, nonprofit organization which receives Section 9 funds through the Worcester Regional Transit Authority (WRTA), is providing impermissible charter service by transporting senior citizens to various shopping centers.

In response to your complaint, the WRTA forwarded a letter from Ms. Gail Heald, AVCOA's Planner for Elderly and Disabled Transportation. According to Ms. Heald, AVCOA provides coordinated regional transportation for the elderly/disabled residents of Southboro and five other WRTA member municipalities for any trip purpose, including shopping. Ms. Heald further maintains that each rider pays an individual fare to receive the demand responsive/shared ride service. In your July 6, 1993 rebuttal to AVCOA's response, you claim that the senior citizens do not pay individual fares but rather, the Town of Southboro pays a single charge for the transportation service. You further argue that AVCOA is "providing shopping trips, every Thursday, for prearranged groups of senior citizens."

Based upon the information provided regarding AVCOA's operations, the Federal Transit Administration (FTA) has determined that AVCOA is providing special service exclusively for the elderly and persons with disabilities. Previously, the FTA has determined that this type of exclusive service, even when provided on a demand responsive basis, is "mass transportaton" not charter service. See, "Charter Service Questions and Answers," 52 Fed. Reg. 42248, 42252 (Nov. 3, 1987). To qualify as "exclusive" the service in question must be open to all elderly or disabled persons in a particular geographic service area and not restricted to a particular group of elderly or disabled persons. The FTA considers that service is restricted to a particular group when it is designed to benefit "some special organization such as a private club." See, 52 Fed. Reg. 11916, 11920 (Apr. 13, 1987). Scheduling shopping trips for senior citizens does not meet this criterion merely because the trips are "prearranged."

Several other characteristics of the service provided by AVCOA indicate that it is mass transportation rather than charter. According to Ms. Heald, AVCOA is in charge of the regional transportation services in question. Ms.Heald states that the riders do not exercise control over

the service; in fact, trips are clustered whenever possible in order to achieve greater operating/cost efficiencies. Furthermore, the fact that AVCOA provides the service every Thursday is consistent with the language at Section 12(c)(6) of the Federal Transit Act which defines "mass transportation" as service provided on a regular and continuing basis. Although a dispute exists regarding the question of whether the riders pay their fares individually or whether the Town of Southboro pays a single charge, the method of payment, by itself, is not dispositive of whether a service is charter or mass transportation. Rather, in any complaint situation, FTA must review the service in question and determine to which category it most properly belongs. See, 52 Fed. Reg. at 11920. Accordingly, based upon a review of all the information submitted, the FTA has determined that the service provided by AVCOA is mass transportation.

Since the FTA has determined that AVCOA is not in violation of FTA's Charter Regulation, 49 CFR 604, your request for damages and other appropriate relief is moot. However, I will take this opportunity to advise you that the FTA is a grant-making agency, not a regulatory or enforcement agency. As such, the FTA is not empowered to award damages or assess fines.

I trust this information has been helpful. If you need any additional clarification or assistance, please call Margaret E. Foley, Regional Counsel (617) 494-2055.

Sincerely,

Richard H. Doyle
Regional Administrator

cc: Gail Heald, Planner
Elderly and Disabled Transportation

Robert E. Ojala
Administrator, WRTA

Chron

U.S. Department of Transportation
Federal Transit Administration

REGION I
Connecticut, Maine,
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AUG 13 1993

G. Stephen Anzuoni, Esq.
Statler Office Building
20 Park Plaza, Suite 464
Boston, MA 02116

Dear Mr. Anzuoni:

This responds to your request for reconsideration of my July 16, 1993, decision which held that AVCOA, a subrecipient of the Worcester Regional Transit Authority (WRTA), is not providing impermissible charter service to elderly citizens of Southboro, Massachusetts. The ruling indicated that the service falls within the definition of "mass transportation" at Section 12(c)(6) of the Federal Transit Act, as amended (FT Act), which Congress extended in 1968 to include special service in addition to general service. The two examples of special service that Congress provided are service exclusively for the elderly and persons with disabilities, and service for workers who live in the intercity, but commute to a factory in the suburbs. See, H.R. Rep. No. 1585, 90th Cong., 2d. Sess., reprinted in 1968 U.S. Code Cong. Ad. & News, 2941, and 52 Fed. Reg. 11920, April 13, 1987.

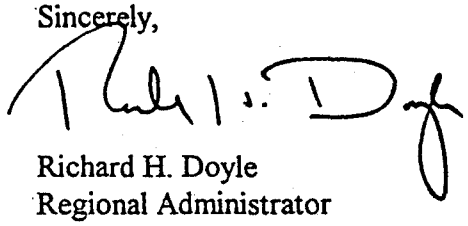
In requesting reconsideration you raise several issues. First, you allege that, if the service in question is mass transportation, AVCOA and the WRTA are in violation of Section 3(e) of the FT Act "for providing a mass transportation service that is competing with an existing private mass transportation company." You further claim that the WRTA did not put the service out to competitive bid. In response to this allegation, please note that Section 3(e) does not prohibit grantees from competing with private transportation providers, but rather, requires that grantees provide for the maximum feasible participation of private enterprise. The FTA's private sector requirements are further detailed in "Private Enterprise Participation in the Urban Mass Transportation Program," 49 Fed. Reg. 41310, October 22, 1984, and FTA Circular 7005.1, "Documentation of Private Enterprise Participation Required for Sections 3 and 9 Programs," December 5, 1986 (copies attached). These documents state that interested parties may appeal to the FTA only after exhaustion of the local dispute resolution process, and only on procedural grounds. Accordingly, if you intend to pursue a private sector complaint, you must first attempt to resolve the problem at the local level.

Next, you maintain that, if the service in question is special service, AVCOA is operating in violation of state law because the Massachusetts Department of Public Utilities (DPU), and not the WRTA, has jurisdiction over special service operating rights. In support of this contention,

you submitted a decision rendered by the DPU granting petitions filed by the Cape Cod & Hyannis Railroad, Inc., for a license and certificate to operate a shuttle bus service which would be restricted to passengers of the Railroad. According to the DPU, "when such restrictions exist, the resulting service is not within the meaning of mass transportation service providing public general or special service on a regular and continuing basis "as defined by the FT Act. (See DPU 1601/1602 at pages 10, 14-15.) Thus, the DPU's decision does not appear to be inconsistent with the FTA's ruling in this matter. Nevertheless, whether or not AVCOA and the WRTA are violating Massachusetts law is not an issue for the FTA to decide. Allegations regarding violations of state law should be referred to appropriate state authorities.

Finally, you contend that material issues of fact need to be explored and request an evidentiary hearing with an adequate procedure for full discovery of all relevant material. The FTA's determination in this matter was based upon the documents submitted by AVCOA, the WRTA and your client, Gulbankian Bus Lines. Your July 19, 1993, request for reconsideration does not contain new matters of fact or relevant points of law that were not available or not known during the investigation of the complaint. Therefore, consistent with the July 16, 1993, decision, the FTA maintains that the service provided by AVCOA to the elderly residents of Southboro is mass transportation, and denies your request for reconsideration. If you need any additional clarification or assistance, please contact Margaret E. Foley, Regional Counsel (617) 494-2055.

Sincerely,



Richard H. Doyle
Regional Administrator

Enclosures: 49 Fed. Reg. 41310, October. 22, 1984
FTA Circular 7005.1, December 5, 1986

cc: Gail Heald, Planner
Elderly and Disabled Transportation, AVCOA

Robert E. Ojala, Administrator
WRTA

U.S. Department
of Transportation
Federal Transit
Administration

400 Seventh St., S.W.
Washington, D.C. 20590

SEP 15 1993

Mr. Russell J. Olvera
Director
Regional Transit System
100 S.E. 10th Avenue
Gainesville, Florida 32602

Dear Mr. Olvera:

This responds to your request for a temporary waiver of the Federal Transit Administration's (FTA) charter regulation, 49 CFR Part 604. You indicate that this request by the Regional Transit System (RTS) is prompted by the failure of Breakaway Tours, Inc. (Breakaway), a private carrier that has been subcontracting RTS buses for charter service, to pay $14,478.00 in arrears of leasing charges. You seek a waiver which would allow the RTS to provide charter service for the University of Gainesville and other local customers until Breakaway has settled its past due account.

Enclosed with your letter is a copy of the RTS' annual charter notice. Under 49 CFR 604.11, a private operator will only be determined willing and able if it responds to a recipient's notice in writing by the stated deadline. Therefore, if no private operator responds to the RTS' notice in writing by its deadline of September 30, 1993, none may be determined "willing and able." Thus, pursuant to 49 CFR 604.9, the RTS may begin providing direct charter service on that date.

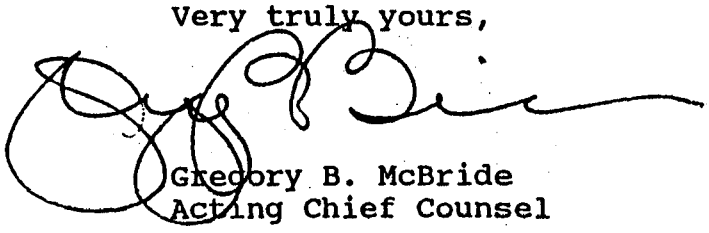
In the meantime, assuming that the RTS is barred from providing direct charter service because there is currently a willing and able local provider, the RTS may provide charter service through subcontracting arrangements with a private operator that lacks the capacity to perform a particular charter trip. The RTS may subcontract with any legitimate private charter operator, not only with an operator that has been determined willing and able under the procedures of 49 CFR 604.11. FTA has defined "legitimate private charter operator" as the owner of at least one vehicle which it is licensed to operate in charter service. See, B&T Fuller, et al. v. VIA Metropolitan Transit Authority, TX-02/88-01, November 18, 1988.

If, as you say, Breakaway Tours owns no buses with which to perform local charter work, it is not a legitimate private charter operator, and thus does not qualify either to lease vehicles from the RTS, or to be determined willing and able. It appears from your letter that the RTS may be able to provide direct charter service by September 30, 1993, or, in the

meantime, through subcontracting arrangements with operators other than Breakaway.

If you have further questions concerning the FTA's charter requirements, please contact Rita Daguillard at 202/366-1936.

Very truly yours,



Gregory B. McBride
Acting Chief Counsel

PCV

U.S. Department
of Transportation
**Federal Transit
Administration**

400 Seventh St., S.W.
Washington, D.C. 20590

CONCURRENCES

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SEP 27, 1993

Mr. Sonny Hall
President
Transport Workers Union of
Greater New York
80 West End Avenue
New York, New York 10023

Dear Mr. Hall:

This responds to your letter concerning a ruling of November 2, 1993, by then-Chief Counsel Steven A. Diaz. In this ruling, Mr. Diaz stated that certain categories of service listed in the New York City Transit Authority's (NYCTA) annual charter notice, including transportation for groups attending NYCTA-sponsored forums and ceremonies, constituted charter service. Under the Federal Transit Administration (FTA) charter regulation, 49 CFR Part 604, an FTA recipient may not provide charter service if there is a willing and able private operator.

You ask that FTA confirm your understanding that Mr. Diaz' ruling does not apply to service for the Annual Retiree Picnic for NYCTA employees. You state that NYCTA has sponsored and provided service for this event for the past fifteen years, but has recently indicated that it must discontinue doing so because the service falls within one of the categories of "charter service" mentioned in Mr. Diaz' ruling.

"Charter service" is defined at 49 CFR 604.5 as transportation, using buses or vans, of a group of persons who, pursuant to a common purpose and under a single contract, have acquired exclusive use of the vehicle to travel together under an itinerary specified in advance. Bus service exclusively for the transportation of NYCTA employees to the Annual Retiree Picnic appears to meet this definition. Accordingly, if there is a willing and able private operator, NYCTA may provide this service only under one of the exceptions to the regulation.

One of these exceptions, 49 CFR 604.9(b)(7), allows a recipient to provide particular types of charter service where a formal agreement has been executed between the recipient and willing and able local operators. The recipient must have referenced the services in question in its annual charter notice.

It is my understanding that NYCTA has referenced service to transport NYCTA employee to NYCTA-sponsored events in its annual charter notice. NYCTA is therefore eligible for this exception.

Please do not hesitate to contact me if I can be of further assistance.

Very truly yours,

Gregory B. McBride
Deputy Chief Counsel

Gregory B. McBride
Acting Chief Counsel

cc: Alan F. Kiepper
President, NYCTA

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION VIII
Arizona, Colorado, Montana
Nevada, North Dakota,
South Dakota, Utah, Wyoming

Columbine Place
216 Sixteenth Street
Suite 650
Denver, Colorado 80202

October 12, 1993

Richard C. Thomas, Public Transit Director
City of Phoenix
302 N. First Avenue, Suite 700
Phoenix, AZ 85003

Subject: Exception to Provide Direct Charter Service

Dear Mr. Thomas:

The City of Phoenix has requested an exception under 49 CFR Section 604.9(b)(4) to allow Phoenix Transit System (PTS) to be the primary provider and organizer of charter service for the Lions Club International annual convention to be held in Phoenix during July 1994. PTS has been asked by the Lions to coordinate the service, based on PTS' experience and type of equipment and operations.

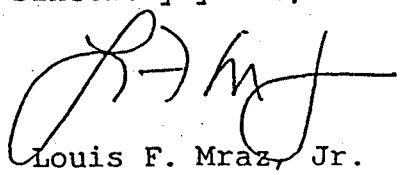
A petition for a special events exception must describe the event, explain how it is special, and explain the amount of charter service which private charter operators are not capable of providing. 49 CFR Section 604.9 (d)(2). The service to be provided must be incidental charter service in accordance with 49 CFR Sections 604.5(i) and 604.9(e), that is, it must not interfere with or detract from mass transit operations.

The City of Phoenix has described the extraordinary size of the Lions' convention and the number of buses that will be needed to serve the organizations' needs. Further, Phoneix has stated that a combination of public and private contractors will be needed to provide the service. Phoenix has assured FTA that any charter service provided by PTS will will not interfere with scheduled, fixed-route service. Therefore, Phoenix has met the criteria for a special events exception.

Accordingly, FTA hereby grants an exception to provide charter service during the Lions' convention to the extent that private operators are not capable of providing the service. 49 CFR 604.9(b)(4). The City shall assure that private operators are notified of their opportunity to participate in the service and are permitted to participate to the maximum extent feasible.

Thank you for submitting the request for an exception in such a timely fashion. Best wishes to both the Lions and the City for a successful convention in 1994.

Sincerely yours,



Louis F. Mraz, Jr.
Regional Administrator

U.S. Department of Transportation
Federal Transit Administration

Headquarters

400 Seventh St., S.W
Washington, D.C. 20590

November 24, 1993

Mr. R. Jeffrey Henning
President
VPSI, Inc.
1220 Rankin Street
Troy, MI 48083-6004

Dear Mr. Henning:

VPSI, Inc. filed this complaint with the Federal Transit Administration (FTA) alleging that the Suburban Bus Division of the Regional Transportation Authority (PACE) had failed to comply with provisions of the Federal Transit Act, as amended (FT Act), and implementing guidance concerning the participation of private enterprise in the provision of mass transportation. Specifically, VPSI alleges that PACE initiated a vanpooling service, PACE VIP Vanpool Program, without determining that such service is essential to its program of projects. Further, VPSI contends that PACE has not allowed VPSI to avail itself of the local dispute resolution process. VPSI asserts that its complaint is "against the use of federal funds to unfairly compete with the private sector."

FTA concludes that PACE did undertake a process to determine that it was essential to provide subsidized vanpool services and provided opportunities for private carriers to participate in that program. FTA's review of this matter also indicates that PACE has a local dispute resolution process, and has followed this process in its handling of VPSI's complaint. FTA further finds that PACE's process afforded VPSI a fair opportunity to resolve this dispute. Accordingly, FTA finds that PACE has met the applicable procedural requirements. Since under FTA's private enterprise policy statement FTA may entertain private enterprise complaints only on the grounds that a recipient has not established or has not followed fair and equitable procedures for considering private sector participation in federally assisted programs and resolving disputes, FTA will not further consider this matter.

Complaint/Supplemental Information

VPSI filed its complaint with FTA on August 7, 1992. By letter dated October 7, 1992, FTA requested that VPSI submit additional information and documentation in order to clarify the complaint for continued processing under FTA Circular 7005.1. When VPSI failed to respond, FTA sent a second request, dated February 19, 1993, seeking the supplemental information. VPSI forwarded the information on March 8, 1993. On April 15, 1993, FTA requested that PACE respond to the VPSI supplemental information. FTA received the PACE response, dated May 18, 1993,

Background

FTA developed its private enterprise policy under sections 3(e), 8(o), and 9(f) of the FT Act. Under section 3(e) FTA must, before approving a program of projects, find that such program provides for the maximum feasible participation of private enterprise. Section 8(o) directs FTA recipients to encourage private sector participation in the plans and programs funded under the FT Act. Finally, as a prerequisite to funding under section 9, recipients must develop a private enterprise program in accordance with the procedures set out in section 9(f).

To provide guidance under these statutory requirements, FTA issued its policy statement, "Private Enterprise Participation in the [Federal Transit] Program," 49 FR 41310, October 22, 1984. This policy statement sets forth the factors FTA considers in determining whether a recipient's planning process conforms to the private enterprise requirements of the FT Act. These factors include consultation with private providers in the local planning process, consideration of private enterprise in the development of the mass transportation program, the existence of records documenting the participatory nature of the local planning process, and the rationale used in making public/private service decisions.

FTA Circular 7005.1 outlines the minimum elements to be included in a grantee's private sector consultation process:

a. Notice to and early consultation with private providers in plans involving new or restructured service as well as the periodic re-examination of existing service.

b. Periodic examination, at least every three years, of each route to determine if it could be more efficiently operated by a private enterprise.

c. Description of how new and restructured services will be evaluated to determine whether they could be more effectively provided by private sector operation pursuant to a competitive bid process.

d. The use of costs as a factor in the public/private decision.

e. A dispute resolution process that affords all interested parties an opportunity to object to the initial decision. FTA's complaint process is designed to accept appeals of this local dispute resolution process.

The Circular also describes the complaint procedure private operators should follow when they believe that a grantee's private sector policy is inadequate or has been improperly applied. Under this procedure disputes should be resolved at the local level. The procedure requires a dispute resolution process

between the grantee and the private operator and, failing settlement at this level, a review of the grantee's decision by either a local MPO or FTA. Under the terms of the Circular, FTA will entertain complaints only when a complainant has completed its local dispute resolution process.

Discussion

The policy statement provides that FTA will entertain complaints from private enterprise organizations only on grounds that (1) the recipient does not have a local private enterprise process that includes dispute resolution procedures, (2) the local process was not followed, or (3) the local process does not provide for the fair resolution of disputes. The policy statement also provides that FTA will not review disputes concerning the substance of local decisions regarding service or the appropriate service provider. The threshold issue in this matter is therefore whether PACE has met the three aforementioned procedural requirements.

First, PACE clearly has a private enterprise process that includes dispute resolution procedures, as is evidenced by a copy of these procedures submitted to FTA by VPSI on June 4, 1993.

Second, we conclude that in processing VPSI's complaint, PACE followed its written local procedures. The record indicates that on November 13, 1991, VPSI filed with PACE a complaint that PACE is providing subsidized vanpooling service in competition with similar service provided by VPSI. PACE issued an initial decision on December 29, 1991. On January 22, 1992, VPSI requested reconsideration. PACE denied the request on February 10, 1992. VPSI then appealed to the Chicago Metropolitan Planning Organization (MPO), which on July 17, 1992, refused to entertain the appeal on the ground that it did not fall within the MPO's subject matter jurisdiction. Under the local dispute resolution process, the MPO will only entertain complaints dealing with planning issues or the participation of the private sector in the planning and programming process.

VPSI cites the failure of the MPO to hear its appeal as evidence that the local dispute resolution is flawed since it does not provide complainants with adequate recourse against adverse decisions.

FTA guidance has never required that a local appeals process be part of the local dispute resolution process. While a local dispute resolution process may provide for local avenues of appeal, FTA does not require one. See, e.g., Durango Transportation, Inc. v. City of Durango, CO-09/85-01, February 24, 1987. Consequently, the absence of such a component does not invalidate the local process, nor is it a basis upon which FTA would entertain an appeal.

Third, FTA finds that PACE's process afforded VPSI a full and fair opportunity to settle its dispute. Indeed, in attempting to resolve this matter, PACE exceeded the requirements of its local written process. VPSI's own submittals indicate that between January 1992 and July 1992, VPSI participated in numerous meetings and telephone conferences with PACE officials to discuss and resolve issues related to its complaint.

Moreover, in ruling on VPSI's complaint, PACE responded specifically and in detail to all of VPSI's allegations concerning the establishment of its vanpool service. PACE noted that the service had been competitively bid, and that VPSI not only was invited to submit a proposal, but also appeared at the pre-bid meeting. For reasons it has failed to explain, VPSI chose not to bid on the service. The bid was won and the service is now being provided by another private operator.

PACE further noted that prior to establishing its program, PACE had met with representatives of VPSI to discuss PACE's interest in vanpooling and possible VPSI involvement. PACE also met with representatives of other vanpool programs across the nation to discuss the operational, legal and market impacts of its involvement. In response to VPSI's allegation that PACE's program duplicates VPSI's service, PACE cites several studies--including one by the local MPO--indicating that the Chicago metropolitan area could support between 1,200 and 2,000 vanpools, only a fraction of which are currently operating in the region.

Conclusion

FTA finds that PACE has established and followed local dispute resolution procedures and that these procedures afforded VPSI an equitable opportunity to resolve this dispute. Since under the policy statement FTA will not review the substance of a local decision, FTA hereby dismisses VPSI's appeal. This decision constitutes FTA's final agency action in this matter.

Very truly yours,

Gregory B. McBride
Acting Chief Counsel

cc: Mr. Joseph DiJohn
Executive Director, PACE

U.S. Department
of Transportation
**Federal Transit
Administration**

Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

DEC 1 1993

G. Stephen Anzuoni, Esq.
Statler Office Building
2 Park Plaza, Suite 464
Boston, Massachusetts 02116

Dear Mr. Anzuoni:

This responds to your appeal on behalf of Gulbankian Bus Lines (GBL) of a decision by Richard H. Doyle, Regional Administrator, Federal Transit Administration (FTA) Region I, which held that the Assabet Valley Council on Aging (AVCOA), a subsidiary of the Worcester Regional Transit Authority (WRTA), is not providing impermissible charter service to elderly citizens of Southboro, Massachusetts. The ruling indicated that the service falls within the definition of "mass transportation" at section 12(c)(6) of the Federal Transit Act, as amended (FT Act), which Congress extended in 1968 to include special service such as transportation of the elderly, in addition to general service.

Under FTA's charter regulation, at 49 CFR 604.19, a losing party may appeal a decision to the FTA Administrator if it presents evidence that there are new facts or points of law that were not available or known during the investigation of the complaint. You indicate that there are several facts or points of law that were not available or known to GBL during the investigation of this matter.

First, you state that FTA recently changed its procedural rules for the processing of charter complaints, and that GBL was unaware of these rules at the time it filed its complaint.

There has been no substantive change in FTA's procedural rules for the processing of charter complaints. On December 1, 1992, under Order 1100.50, Change 2 ("FTA Delegations of Authority"), responsibility for deciding complaints under 49 CFR Part 604 was delegated to the FTA Regional Administrators. FTA has issued a Federal Register notice advising of this delegation (58 FR 52684, October 12, 1993). The Region I Office has informed me that you were notified of this delegation at the time you filed your complaint. Indeed, your submittals in this matter are addressed to the Regional Administrator, and not to the FTA Chief Counsel. It is apparent from this documentation that you had requisite knowledge of FTA procedures during the investigation of your complaint, and that these procedures were available and known to you at that time.

Second, you state that GBL was unaware of the definition of "special service," since this term does not appear in 49 CFR Part 604 or the FT Act.

In the preamble to its charter regulation (52 FR 11920, April 13, 1987), FTA discussed the definition of "special service." FTA noted that in 1968, Congress amended the definition of "mass transportation" to permit special service in addition to general service. One example of special service provided by Congress was service exclusively for elderly and handicapped persons. FTA stated that henceforth it would consider any exclusive service meeting this definition to be mass transportation. Since FTA published this information in the Federal Register on April 13, 1987, it was available to GBL at the time of the investigation of this complaint.

Third, you claim that GBL was unaware of the exact nature of AVCOA's service at the time it filed its complaint. You state that the Central Massachusetts Regional Planning Commission, which responded to the complaint on behalf of AVCOA, described it in general terms, and that GBL therefore lacks essential information concerning AVCOA's service. You request that AVCOA provide detailed responses to an extensive list of questions concerning this service.

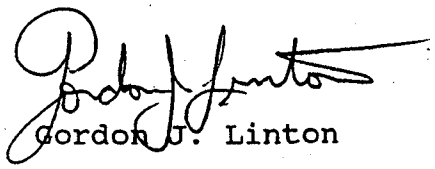
My review of the record indicates that GBL filed submittals in this matter on June 14, July 6 and July 19, 1993. In none of these submittals did GBL request the type of detailed information concerning AVCOA's service that it is now seeking. Having failed to solicit this information during the investigation of the complaint, GBL may not now claim that it was unavailable at that time.

Finally, you state that coincidentally, in an envelope postmarked August 17, 1993, you received unsolicited correspondence relating to a complaint against the Massachusetts Bay Transportation Authority (MBTA) alleging violations of the private sector provisions of the FT Act. This correspondence indicates that the Regional Administrator had referred the complaint to the MBTA with a request that the MBTA respond directly to the complainant's allegations. You state that this correspondence presents evidence relating directly to the Regional Administrator's past practice regarding the resolution of private sector complaints, and constitutes a new matter of fact not available or known during the investigation of this matter.

FTA finds that the availability of information concerning the processing of private sector complaints is not germane to this matter, which alleges a violation of FTA's charter service regulation. The Regional Administrator's practice in handling private sector complaints is therefore not a new matter of fact that justifies an appeal under 49 CFR Part 604.

In view of the foregoing, I deny your request for an appeal of the Regional Administrator's decision in this matter.

Sincerely,



Gordon J. Linton

U.S. Department
of Transportation
Federal Transit
Administration

December 8, 1993

400 Seventh St., S.W.
Washington, D.C. 20590

G. Stephen Anzuoni, Esq.
Statler Office Building
2 Park Plaza, Suite 464
Boston, Massachusetts 02116

Dear Mr. Anzuoni:

In response to your correspondence of December 3, 993, concerning the appeal of Gulbankian Bus Line (GBL) of a decision by Richard H. Doyle, Regional Administrator, Federal Transit Administration (FTA) Region I, concerning alleged charter violations by the Assabet Valley Council on Aging (AVCOA), I am enclosing a copy of FTA's denial of this appeal.

After reviewing the record in this matter, Gordon H. Linton, FTA Administration, concluded that GBL had presented no new facts of points of law that were not known of available during the investigation of this complaint. Mr. Doyle's decision that AVCOA's service for the elderly is permissible mass transit therefore stands.

Your letter states that "in the nature of an alternative argument, GBL, on October 19, 1993, took Mr. Doyle at his word" and filed a complaint with the Worcester Regional Transit Authority (WRTA), AVCOA's parent organization, alleging that AVCOA and WRTA had failed to follow FTA's private enterprise guidance. You state that GBL has received no response to this complaint.

FTA's private enterprise policy guidance (FTA Circular 7005.1) provides that complaints should be resolved locally, and that FTA will entertain complaints from private operators only after the complainant has exhausted the local dispute resolution process.

Accordingly, I am forwarding a copy of this complaint to WRTA for resolution at the local level.

I trust that this responds to your concerns.

Very truly yours,

Gregory B. McBride
Acting Chief Counsel

Enclosure

cc: Richard H. Doyle, TRO-1

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION VIII
Arizona, Colorado, Montana
Nevada, North Dakota,
South Dakota, Utah, Wyoming

Columbine Place
216 Sixteenth Street
Suite 650
Denver, Colorado 80202

December 29, 1993

Craig D. Busskohl, President
Arrow Stage Lines, Inc. 4001
4001 S. 34th Street
Phoenix, AZ 85040

Subject: City of Phoenix Charter Service

Dear Mr. Busskohl:

Your letter of December 13, 1993, expresses your concerns about the exception given to the City of Phoenix by FTA so that Phoenix Transit System (PTS) may provide charter service for the Lions Club International convention to be held in Phoenix during July 1994. This special events exception was granted through an exercise of FTA discretion under 49 CFR Section 604.9(b)(4). A copy of the application for the exception, including supporting documentation, and a copy of FTA's determination, dated October 12, 1993, are enclosed.

As the determination points out, the application for the exception included information that is sufficient to meet the requirements of 49 CFR Section 604.9(d)(2), 604.9(e) and 604.5(i). Therefore, the exception was approved.

In addition, Phoenix has demonstrated that private operators will be relied upon to help provide the charter service. In accordance with Sections 3(e) and 8(o) of the Federal Transit Act, FTA is requiring that Phoenix include private operators in the charter service to the maximum extent feasible.

Never given the opportun

The special events exception in FTA's charter regulations is designed for just such large-scale gatherings as the Lions convention, where it appears that local private operators may be unable to provide the amount and type of service that is needed without significant involvement or leadership by FTA grantees. Although your letter indicates that you feel capable of brokering charter service for the Lions, the Lions and others have indicated that PTS services and equipment are essential.

As a matter of precedent, FTA has previously granted special events exceptions for other Lions Club conventions, as well as papal visits, Olympics, etc. Currently, FTA is also working with

a number of other grantees and large organizations to ensure the provision of service for extraordinary events.

I hope that you will work with the City and PTS so that Arrow Stage Lines will have an opportunity to participate with other private operators in providing charter service for the Lions convention in Phoenix.

Sincerely yours,

Louis F. Mraz, Jr.

Enclosures

cc: Richard Thomas

U.S. Department
of Transportation

**Urban Mass
Transportation
Administration**

Headquarters

400 7th Street S.W.
Washington, D.C. 20590

FEB 17 1994

Mr. Lawrence J. Hanley
President and Business Agent
Amalgamated Transit Union, Division 726
40 Yukon Avenue
Staten Island, New York 10314

Dear Mr. Hanley:

This responds to your letter asking what regulations govern the ability of a federally funded transit agency, specifically the New York City Transit Authority (NYCTA), to provide service for events such as employee funerals.

Under the Federal Transit Administration (FTA) charter regulation, 49 CFR Part 604, an FTA recipient may not provide charter service if there is a willing and able private operator. "Charter service" is defined at 49 CFR 604.5 as transportation, using buses or vans, of a group of persons who, pursuant to a common purpose and under a single contract, have acquired exclusive use of the vehicle to travel together under an itinerary specified in advance. Bus service exclusively for the transportation of NYCTA employees to employee funerals would appear to meet this definition. Accordingly, if there is a willing and able private operator, NYCTA may provide this service only under one of the exceptions to the rule.

I am enclosing a copy of the charter regulation for your information. Should you have further questions concerning the provision of charter service by FTA recipients, please contact Rita Daguillard at 202/366-1936.

Very truly yours,

Gregory B. McBride
Acting Chief Counsel

Enclosure

U.S. Department
of Transportation
**Federal Transit
Administration**

Headquarters

400 Seventh St., S.W.
Washington, D.C. 20590

MAR 24 1994

The Honorable Leonard Stavisky
New York State Senate
10-17 147th Street
Flushing, New York 11357

Dear Senator Stavisky:

This responds to your request for clarification of the procedural requirements for obtaining an exception to the Federal Transit Administration (FTA) charter regulation that would allow Queens Surface, a private subrecipient of funds from FTA, to provide charter service for the North Flushing Senior Center (Flushing). You indicate that Flushing is a tax-exempt, non-profit social service center.

The FTA charter regulation, 49 CFR Part 604, prohibits the provision of charter service using FTA-funded facilities or equipment, unless one of the exceptions to the regulation applies.

One of these exceptions, at subsection 604.9(b)(5)(i), provides that a recipient or subrecipient of FTA funds may use FTA-funded vehicles to provide charter service for certain tax-exempt, non-profit social service agencies that receive funds either directly or indirectly under one of the U.S. Department of Health and Human Services (USDHHS) programs listed in Appendix A of the regulation. These programs include Administration on Aging (ADA) grants for supportive services and senior centers, and ADA social service block grants. If Flushing is receiving funding under one of these programs, it should submit to Queens Surface a certification in accordance with subsection 604.9(b)(5)(i). Queens Surface may then provide direct charter service to Flushing without seeking or obtaining a waiver from FTA.

If Flushing does not receive USDHHS funds, it may also be eligible for an exception to the charter regulation if it receives assistance from a State or local government comparable to the assistance provided by USDHHS under the programs listed in Appendix A. In subsection 604.9(b)(5)(iii), FTA has established a mechanism by which a State may petition FTA for inclusion in Appendix A of such an organization.

The State must petition FTA on behalf of the requesting organization, including in its petition the following information: (1) the name of the organization, a description of its membership, and the type of public welfare activities it performs; (2) evidence that the organization is exempt from taxation under section 501(c)(1), (3), (4), or (19) of the

Internal Revenue Code; and (3) a certification by the organization that: (a) it is tax-exempt; (b) it receives or is eligible to receive from a State or local government assistance comparable to that provided by USDHHS to the programs listed in Appendix A; and (c) that in the course of carrying out its activities, it arranges for travel of groups who are transit-disadvantaged or transit-dependent.

If FTA approves the petition, it will provide the State and the organization in question with a written statement to the effect that an FTA recipient or subrecipient may provide direct charter service to the organization.

Rita Daguillard of my staff would be happy to provide any assistance you may need in submitting on behalf of Flushing either a certification to Queens Surface under subsection 604.9(b)(5)(i) or a petition to FTA under subsection 604.9(b)(5)(iii). You may contact her at 202/366-1936.

I hope that this provides the necessary clarification.

Very truly yours,

Gregory B. McBride
Acting Chief Counsel

JUN 13 1994

Mr. Charles D. Busskohl
Chief Executive Officer
Arrow Stage Lines
4001 South 34th Street
Phoenix, Arizona 85040

Dear Mr. Busskohl:

Your letter to Senator John McCain has been forwarded to me for response. You express concern that your company, Arrow Stage Lines, will be adversely affected by the Federal Transit Administration's (FTA) recent recision of its private enterprise policy.

In rescinding this guidance, FTA followed the requirements of section 12(i) of the Federal Transit Act, as amended (FT Act), which prescribes prior notice and a 60-day public comment period for all significant changes in agency law or policy. In its final Notice of Recision of Private Enterprise Participation Guidance (59 Federal Register 21890, April 26, 1994), FTA noted that commenters opposed to the recision failed to provide substantive evidence that the previous policy had resulted in a significant increase in private sector involvement in the provision of mass transit services or assisted in the improvement of mass transit systems. Accordingly, FTA cannot agree that the recision will cause financial harm to private operators.

FTA's action was also based on its judgment that the requirements imposed by the previous guidance, while ineffective, have unduly infringed on the decisionmaking authority that local officials are entitled to exercise under the FT Act. FTA believes that this recision is within the broad limits of its authority under the FT Act, represents a policy choice that is reasonable and valid in light of the agency's experience in administering the provisions over the past ten years, and is fully within the limits of its policymaking discretion.

I wish to emphasize that in rescinding these requirements, the agency continues to support the participation of private enterprise in the FTA program. Indeed, the section 8 planning process and the section 9(f) consultation process, during which key decisions concerning private enterprise participation are

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made, represent a thorough and comprehensive approach to the consideration of private enterprise at the local level, consistent with the requirements of the FT Act. FTA is confident that these processes will provide local officials with the flexibility to decide whether service is to be operated by public or private mass transportation companies, as determined by local needs.

Sincerely,

/s/ original signed by

Gordon J. Linton

cc: Senator John McCain

U.S. Department
of Transportation
**Federal Transit
Administration**

400 Seventh St., S.W.
Washington, D.C. 20590

JUL 11 1994

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G. Steven Anzuoni, Esq.
Statler Office Building
20 Park Plaza, Suite 464
Boston, Massachusetts 02116

Dear Mr. Anzuoni:

This responds to your letter of May 19, 1994, alleging that the Massachusetts Bay Transportation Authority (MBTA) made material misrepresentations of fact to the Federal Transit Administration (FTA). You state that in response to the FTA's inquiry concerning a private enterprise complaint filed by your former client, Hudson Lines, Inc. (Hudson), the MBTA made knowing and willful false statements that "constitute fraud on a tribunal."

Specifically, you allege that in its letter of December 27, 1993, the MBTA sought to convey to FTA the impression that it was working diligently to resolve the complaint by conducting and evaluating various surveys, studies, etc. The truth of the matter, you state, is that since receiving Hudson's complaint of June 30, 1993, the MBTA neither conducted nor evaluated anything at all as regards the service or routes concerned. Hence, you conclude that the MBTA's letter of December 27, 1993, contained material misrepresentations of fact and constituted willful misconduct.

Please find enclosed a copy of a letter dated June 24, 1994, from Peter B. Morin, General Counsel of the MBTA, which emphatically denies your charge that the MBTA sought to deceive FTA. Mr. Morin explains that the resolution of Hudson's private enterprise complaint was directly related to the resolution of more global issues regarding transportation for all commuters in and around the town of Stoneham. He states that the MBTA did, in fact, conduct studies and did evaluate these studies and related data in arriving at its decision concerning transportation options for that area. I understand that Mr. Morin forwarded copies of these studies to you on May 6, 1994.

In view of Mr. Morin's explanations and submission of the reports in question, as well as of the fact that you have presented no substantive evidence that the MBTA knowingly and willfully intended to deceive or mislead FTA, I find further inquiry into your complaint unwarranted. Accordingly, FTA closes its file on this matter.

Very truly yours,

Rita Daguillard
Deputy Assistant Chief Counsel
for General Law

Enclosure

cc: Peter B. Morin, Esq.

Chron File Charter

U.S. Department
of Transportation
Federal Transit
Administration

400 Seventh St., S.W.
Washington, D.C. 20590

JUL 15 1994

Mr. Craig D. Busskohl
Arrow Stage Lines
4001 South 34th Street
Phoenix, Arizona 85040

Dear Mr. Busskohl:

Thank you for your letter concerning charter operations by recipients of funds from the Federal Transit Administration (FTA). You ask for stricter enforcement of FTA's charter regulation, and request a commitment that FTA-funded equipment will no longer be leased for charter purposes.

Your concern appears to stem from FTA's granting of a special events exception to permit Phoenix Transit System (PTS), a subrecipient of FTA funds, to provide charter service for the Lions Convention. In a recent letter to Mr. James L. Schmidt of Arrow Stage Lines, FTA Administrator Gordon Linton explained that the granting of this waiver by Mr. Louis F. Mraz, Regional Administrator, FTA Region VIII, was both appropriate under the circumstances and consistent with the requirements of FTA's charter regulation, 49 CFR Part 604.

Under 49 CFR 604.9(b)(4), a recipient of FTA funds may obtain a waiver to provide charter service for special events to the extent that private charter operators are not capable of providing the service. FTA chose not to define "capable" to provide for a maximum degree of flexibility. Nevertheless, FTA stated that it would consider 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 for this event. FTA noted that it added this exception to cover the situation where a city is hosting an event of national or international importance and private charter operators simply would not be capable of delivering the service needed. 52 Federal Register 11925 (April 13, 1987).

According to information FTA received, the Lions Club International meeting is expected to draw more than 20,000 attendees and to contribute over $20 million to the local economy. The Lions Club and the Phoenix and Valley of the Sun Convention and Visitors Bureau requested in writing that PTS, the principal contractor for the city of Phoenix (the City), coordinate transportation for the event, based on their perception that its experience, personnel and equipment best qualified it to provide the service required. The City stated

that in requesting that PTS coordinate the arrangements, the Lions Club specified that because of the large amount of hotel-to-convention shuttle service involved, it would prefer to use as many urban style, two-door buses as possible, and to contract with an operator specializing in the delivery of urban service on a day-to-day basis.

FTA granted the City's petition for a special events exception based on these factors and on the condition that private operators would be given an opportunity to participate in this service to the maximum extent feasible. Moreover, the City assured FTA that, in accordance with 49 CFR 604.9(e), any charter service provided by PTS will be "incidental," i.e., will not interfere with or detract from scheduled, fixed route service. FTA's charter regulation allows the use of FTA-funded equipment for charter service for special events and in other situations where private operators are unable to meet the anticipated need. Any commitment by FTA that FTA-funded equipment will no longer be used in charter service would therefore be inconsistent with the regulation and contrary to the interest of the transit-riding public.

I assure you, however, that FTA actively enforces the charter regulation. For this reason, FTA carefully examines every request for exceptions to the charter regulation, and grants them only when it is clear that the factors presented meet the regulatory criteria. Moreover, FTA monitors its grantees' compliance with the charter regulation through triennial reviews and periodic audits and through the investigation of complaints by private operators. These measures meet the regulatory goal of protecting private charter operators from federally subsidized competition with public agencies, while providing these agencies with the flexibility to meet charter needs that otherwise would not be served.

Very truly yours,

Rita Daguillard

Rita Daguillard
Deputy Assistant Chief Counsel
for General Law

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

In the matter of:	}	
	}	
Ark Transportation, Inc.	}	CHARTER COMPLAINT
Complainant	}	
	}	49 U.S.C. § 5323(d)
v.	}	
	}	TRO-1/VT-12/94-01
Marble Valley Regional Transit District,	}	
Respondent	}	

DECISION

SUMMARY

Ark Transportation, Inc. (Ark), filed this complaint with the Federal Transit Administration (FTA), alleging that the Bus Company, Inc., a/k/a/ Marble Valley Regional Transit District (MVRTD) is providing charter service in violation of the FTA charter regulation, 49 CFR Part 604. The complaint specifically alleged that MVRTD had executed an "Operating Agreement for Transportation Services" (Operating Agreement) to provide charter service for Killington, Ltd. (Killington), a Vermont corporation. Applying a balancing test to the service in question, FTA finds that the service is in fact mass transportation, and therefore, not in violation of the charter service regulation. However, some terms of the Operating Agreement interfere with the MVRTD's prerogative to control the service in the public interest. In order to correct that deficiency, the Operating Agreement must be changed to make clear that MVRTD will exercise sufficient control over the transportation services in accordance with FTA's definition of mass transportation. MVRTD must report to FTA within thirty days on the measures it has taken to comply with the terms of this order.

MVRTD and Killington entered into the Operating Agreement on September 29, 1994. which commenced upon execution and is to terminate on March 30, 1997, unless ended sooner by mutual agreement of the parties in writing. On November 21, 1994, MVRTD and Killington executed an Addendum to the Operating Agreement which provides that provisions therein shall prevail over the September 29 agreement. The Addendum deleted Paragraph D of Section III concerning MVRTD obligation to supply Killington with four 6-passenger waiting shelters.

COMPLAINT

Ark, which operates the Killington Shuttle Bus, is a private bus operator located in Killington, Vermont. By letter dated October 7, 1994, Ark filed this complaint with the FTA alleging that the service in question is actually a form of prohibited charter service. Ark attached a copy of the Operating Agreement to the complaint. The definition of charter service found in FTA's regulations at 49 CFR § 604.5(e) is as follows:

> ...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...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....

Specifically, Ark complains that MVRTD contracted with Killington to provide charter service operations along the Killington Access Road. According to its complaint, Ark had previously performed these services pursuant to contracts with Killington and with restaurants, lodges and nightclubs in the area. In addition, Ark states that MVRTD intends to provide services from Rutland to Sherburne, Vermont, for employees of Killington and the general public. Ark bases its complaint upon eleven allegations.

In Allegation #1, Ark contends that the service in question is a classic charter operation and not mass transit. First Ark states that MVRTD will pick up employees of Killington, along with members of the public, at 6:30 a.m. each morning during the ski season. Moreover, Ark asserts that the fact Killington is paying MVRTD to transport its employees roundtrip from Rutland to Killington, Vermont, each day is further evidence that the service in question is charter. Finally, Ark claims that MVRTD is running the same shuttle service that Ark performed previously under contract with Killington whereby the scheduled times and pick up points were set by Killington.

In Allegation #3, Ark maintains that the service is charter because riders will pay a set fare of $1.00 or more which will be turned over to Killington. Ark further claims that Killington and local businesses will set the schedule for the service. In addition, Ark contends that MVRTD has no authority to operate on the Killington Access Road or to operate at night.

In Allegation #4, Ark claims that the local businesses have been pressured to accept the terms of the transportation services.

Under Allegation #5, Ark maintains that MVRTD and Killington had already decided to enter into a contract well before the bidding process and that the terms and conditions contained in the bid documents do not correspond to the contract executed between MVRTD and Killington.

Ark further alleges in Allegation #6 that MVRTD did not fully allocate its costs and is unable to separate its federally funded and private-for-profit operations.

In Allegation #10, Ark claims that in effect the contract between MVRTD and Killington will put Ark out of business. Ark further states that its buses will be taken back by their manufacturer and resold to MVRTD which currently does not have sufficient equipment to meet its contractual obligations with Killington.

Allegation #11 states that Ark is a willing and able provider of charter service and has the authority to provide this service.

Finally, Ark claims that MVRTD failed to comply with FTA's charter regulation for the following additional reasons: MVRTD did not publish a notice of its intent to provide charter service (Allegation #2); MVRTD did not send a notice of its intent to provide charter service to the American Bus Association or the United Bus Owners of America (Allegation #7); the service in question does not fall within an exception to the charter regulation (Allegation #8); and MVRTD is using federally funded equipment and facilities to compete unfairly with private charter operators (Allegation #9).

RESPONSE

By letter dated October 18, 1994, FTA informed MVRTD of the complaint filed against it. The letter stated that pursuant to the implementing regulation, a recipient of FTA funding may not provide charter service using FTA funded facilities or equipment if there is a private operator in its geographic area willing and able to provide that charter service, unless one or more of the exceptions listed at 49 CFR § 604.9(b) apply. Furthermore, MVRTD was advised that any charter service provided by a recipient under an exception must be incidental. The letter further stated that if MVRTD was providing charter service that is impermissible under the regulation, it should discontinue doing so immediately. In order to expedite the matter, FTA gave MVRTD until November 4, 1994, to respond to the complaint.

In its response dated November 3, 1994, MVRTD argues that the service being provided under the Operating Agreement with Killington is "mass transportation." In answer to Allegation #1, MVRTD contends that the fact that Killington is paying for the fares of its guests and employees does not defeat a finding that the service in question is mass transportation. Moreover, MVRTD claims that the issue of whether the service is provided under a single contract, or under separate contracts with each individual patron, is not the touchstone of a charter service. Instead, MVRTD notes that according to the Operating Agreement, it will provide "open door" service which is not limited to Killington employees and guests. MVRTD maintains that approximately 30 to 40 Killington employees will use the service and that members of the general public will take the remaining 80 to 90 seats on a first-come, first-served basis. With reference to the shuttle service from downtown Rutland to Sherburne which will transport Killington employees, MVRTD likewise argues that this service is mass transportation because access is extended to

anyone who wishes to ride on the buses. Furthermore, MVRTD contends that the mere fact that employees and guests of Killington may take greater advantage of the Rutland-Sherburne shuttle does not make this a charter service.1/ In support of this contention, MVRTD cites the preamble of FTA's charter regulation which states that under all FTA programs, "recipients provide subscription service, parking lot shuttles and other services that while open to the public may be of limited utility due to destination, hours of service or need." (52 Fed. Reg. 11919, Apr. 13, 1987) As further evidence that the service is public in nature, MVRTD notes that the schedules prepared by MVRTD and Killington will be advertised by MVRTD in the local papers and posted by Killington at its ski area in accordance with the terms of the Operating Agreement. In sum, MVRTD claims that the "open door" character of the service in question is central to the conclusion that the service constitutes mass transportation, not charter service.

In the second part of its response to Allegation #1, MVRTD addresses the issue of its control over setting the routes and schedules identified under the Operating Agreement. MVRTD explains that the routes and schedules were developed by MVRTD, in conjunction with its transportation consultant, Multi-Systems, Inc., as part of MVRTD's Short Range Transit Plan. While MVRTD acknowledged that Killington served in an advisory capacity by identifying areas and times of peak traffic flow and supplying information regarding routes and schedules which had proven satisfactory in the past, MVRTD states that Killington did not have "control" over the routes and schedules. MVRTD asserts that it is clearly responsible for setting the routes because under the Operating Agreement it is obligated to provide regularly scheduled service and to mutually coordinate any changes in the routes with Killington.

In response to Allegation #3, MVRTD submits that the night service does not qualify as charter merely because the fares collected from patrons will be forwarded to Killington. As stated previously, MVRTD claims that the issue of whether the service is provided under a single contract, or under separate contracts with each rider, does not establish the service as charter. Rather, MVRTD contends the service is clearly mass transportation because it is open to the general public and the routes and schedules are established by the recipient. In reply to Ark's contention that it has no authority to perform the service herein, MVRTD submits that it has been granted authority under 24 Vermont Statutes Annoted Section 5121, *et seq.* to deliver transportation services to all points within Rutland County. MVRTD further states that it is not constrained by the limits of the Certificate of Public Good issued to "The Bus" in 1981.

With reference to Allegation #4, MVRTD argues that Ark's claim that local businesses have been pressured to accept the terms of the transportation services is irrelevant in determining whether the service in question is charter. Nevertheless, MVRTD responds that there is nothing in the

1/ MVRTD attached copies of schedules for the Killington Shuttle Bus mid-day service and the Rutland/Mendon/Sherburne commuter service which indicates the first bus will depart Rutland at 6:15 a.m. and arrive at Killington at 7:30 a.m.

Operating Agreement that requires local businesses to take advantage of the transportation services and claims they are free to obtain services elsewhere. Moreover, the bus stop structures being provided to Killington under separate contract will be placed at high-traffic stops on public roads along MVRTD-designated bus routes.

Responding to Allegation #5, MVRTD again notes that the issue of whether MVRTD and Killington had already decided to enter into a contract before the bidding process began is irrelevant to a determination of charter service herein. However, MVRTD responds that Killington contacted Ark on about May 9, 1994, requesting submission of a bid for the services in issue for the 1994-95 ski season. Ark submitted its bid to Killington on June 14, 1994. The transportation service contract was awarded to MVRTD on July 19, 1994. Thus, MVRTD contends that Ark's allegation that the contract bid was somehow a "done deal" before Ark had a chance to bid on the contract is simply untrue.

Furthermore, MVRTD maintains that the issues raised in Allegation #6 concerning full cost allocation are totally irrelevant to Ark's contention that MVRTD is providing charter service. Moreover, MVRTD contends that since the service in question is mass transportation, and not charter service, this allegation is moot. Nevertheless, MVRTD responds that it has fully complied with the applicable regulations governing full cost allocation.

In Allegation #10, Ark claims that the contract between MVRTD and Killington will put Ark out of business. MVRTD again responds that this issue is wholly irrelevant in determining whether the service herein is charter and states that Ark's financial woes are in no way attributable to the Operating Agreement.

With reference to Ark's claim under Allegation #11, MVRTD claims that Ark is not a willing and able provider of charter service as defined at 49 CFR § 604.5(p) because Ark's equipment has been repossessed by Commonwealth Thomas and thus, Ark is currently unable to provide charter services.

In conclusion, MVRTD responds that since the service in question is mass transportation and not charter: it was not required to solicit responses from willing and able charter service operators through a newspaper notice (Allegation #2), it was not required to send a notice to American Bus Association or the United Bus Owners of America (Allegation #7), the charter exceptions provided under 49 CFR § 604.9(b) are not applicable (Allegation #8), and the transportation services to be provided under the Operating Agreement are mass transit which is fully consistent with federal and state law (Allegation #9).

REBUTTAL

By letter dated October 18, 1994, FTA notified Ark to submit any comments on MVRTD's response not later than 15 days after receipt thereof. In its rebuttal, dated November 15, 1994,

Ark argues that the FTA decisions of Seymour Charter Bus Lines v. Knoxville Transit Authority, TN-09/88/01, and Blue Grass Tours and Charter v. Lexington Transit Authority, URO-III-1987 support the complainant's position that the service in question is charter and not mass transportation. These cases involved service in and around university campuses which the FTA determined was charter and not mass transportation.

Specifically, Ark contends that the Operating Agreement is actually an agreement under a single contract for two defined groups of people, employees of Killington and skiers who come to the Killington region. Ark claims that Killington's employees and the skiers essentially have exclusive use of the buses. In support of this contention, Ark cites the Bluegrass case which stated that "[a]lthough the service is 'open-door' in the sense that anyone wanting to ride on it is not excluded from doing so, [FTA] has interpreted 'open-door' to mean involving a substantial public ridership and/or an attempt by the transit authority to widely market the service." As to exclusive use by the employees, Ark argues that the first buses will arrive at the ski area more than one hour prior to the operation of the lifts and therefore, the statement that the early buses are open door is fallacy. Ark explains that skiers and other members of the public would not be interested in arriving at the ski area at such an early hour. With reference to exclusive use by the skiers, Ark claims that the bus schedules indicate they were drawn up for the convenience of the skiers and notes that transportation between Rutland and Killington for individuals interested in shopping is extremely limited. In addition, Ark notes that the shuttle bus does not stop at all restaurants and hotels on the Killington Access Road but only at those particular businesses who are paying for the service.

Furthermore, Ark argues that under the Bluegrass case, it is clear that the service in question is charter becaue it is being provided based upon an hourly rate. Moreover, according to the midday public transit schedule, the bus stops and bus shelters are located on private property and not along public roads. In addition, Ark claims that it has sole authority to make stops along the Killington Access Road. Ark contends that these facts clearly place the Operating Agreement within the ambit of the Seymour case because although there supposedly is an "open door" policy and regular schedules, there is no posting of bus stop signs on public right-of-ways and the service only operates during the ski season from mid-November through April.

On the issue of control, Ark asserts that the Operating Agreement is actually for service provided under a single contract whereby Killington determines the route, rate and schedule. Moreover, Ark claims that MVRTD cannot be setting the scheduling for the Village Shuttle because the scope of the service is exactly the same as that provided by Ark in the past during which time Killington set the schedule. Ark also points out that under the terms of the Operating Agreement, Killington is required to supply MVRTD with two-way radio communication equipment in order to interface with Killington which indicates that Killington has control over the service. In further support of its contention that Killington has control over the service, Ark notes that Killington will retain ownership of the ski racks/holders which it is obligated to install on the buses pursuant to the Operating Agreement and will have exclusive advertising rights on all buses.

In response to MVRTD's statement that Ark is not a willing and able provider of charter service, Ark claims that it was a willing and able provider at the time of the contract bids and is presently capable of providing the service to Killington. Ark further claims that it was not given the opportunity to bid on all of the services now being provided by MVRTD.

FTA'S REQUEST FOR ADDITIONAL INFORMATION

By letter of November 22, 1994, FTA requested from MVRTD additional information needed to clarify points concerning the extent of control which the MVRTD will exercise in carrying out the provisions set forth in the Operating Agreement. The information requested and MVRTD's response of November 29, 1994, are summarized as follows:

QUESTION: Paragraph III.A: Please clarify the terms stating that the service may vary upon reasonable notice from Killington and whether MVRTD has the prerogative of honoring the questions or not.

ANSWER: The District may increase or decrease routes and scheduling based upon demand and volume. Hours and service have been designed and coordinated by the District's consultant, Multi-system Inc., in cooperation with Killington. The District has the final say in setting schedules and hours. For confirmation of this, see paragraph III. F. 2. and 3. of the Operating Agreement which provides that it is the District's obligation or responsibility to alter frequency of pick-ups or days or hours of operation.

QUESTION: Paragraphs III.C and F: Please clarify MVRTD's obligation to provide additional vehicles and services and explain what flexibility MVRTD has in this regard.

ANSWER: The District has no contracted obligation to provide any specific number of buses or size of buses. It is the District's responsibility to provide "fixed-route, open door service" but, beyond that, Killington has only the ability just as any resident would to suggest additional routes or stops.

QUESTION: Paragraph III.F: Please clarify the provision that at Killington's election, members of the public using the services may be charged $1.00 per ride which will be turned over to Killington. This fact indicates that Killington will be setting and retaining fares for services provided by MVRTD. Please explain this issue more fully.

ANSWER: It is true that a $1.00 fare will be refunded to Killington for Evening Route users as a partial return of the Killington subsidy. However, the District still retains the right to charge more than $1.00. The District intends to charge a $1.00 fare one-way to the general public between Rutland and Sherburne. This is the same fare charged by the District on its other routes. These dollars will not be refunded to Killington. The suggested $1.00 fee was set by the District and its consultant Multi-system, Inc., with input from Killington. The fare was conceived to offset the

cost of service elements that could have hindered system delivery and thus make some service unavailable to or for the public. The City of Rutland, Town of Proctor and other communities subsidize the District's existing mass transit system in a similar fashion as Killington will do in this case.

QUESTION: Paragraphs VI.A and XI: Please clarify these paragraphs in terms of restrictions on MVRTD control.

ANSWER: Paragraph VI.A, "Employees and Use of Sub-Contractors" was intended to require that the District supply the mass transit services contemplated in the Operating Agreement and not a third party hired by the District. Killington wanted a mass transit system in place and is willing to subsidize it to make it happen. Killington did not want the District to be able to hire a subcontractor to perform any of the routes.

Paragraph XI is a standard arbitration clause. The parties desired to work collaberatively to bring mass transit to Sherburne and wanted to underscore the need to meet in person and resolve any differences.

Along with its November 29, 1994, response to FTA's questions, MVRTD submitted a responsive memorandum to Ark's rebuttal.2/ MVRTD argues that there are substantial factual differences between the Seymour and Blue Grass cases and the instant case. First, both of the cited cases involved service to a university campus where the university was found to have set the schedules and fares which MVRTD claims is not true in this case. Also in Blue Grass, there was a finding that while service to the campus was open to all, it was not advertised sufficiently to make the public aware of its availability. In MVRTD's case, the service will be advertised in several local papers, on the buses, and by Killington and other eating and sleeping establishments in the area. Moreover, MVRTD explains that it allows riders who take the evening bus to Rutland to transfer and utilize other MVRTD routes, unlike the service at issue in the Blue Grass or Seymour cases. Secondly, MVRTD argues that Blue Grass and Seymour involved services to an identifiable group of people attending a university which is distinct from MVRTD's situation which is not geared toward any defined group but to the public at large. MVRTD explains that the service will provide public transportation to the thousands of people living, shopping and working along U.S. Route 4, in Rutland, Mendon and Sherburne and not only to employees of Killington or skiers. MVRTD notes that Killington's competitor, Pico Ski Area, will no doubt benefit from the same service.

2/ MVRTD' attached its cost breakdown which indicates the following: Killington will be charged an annual rate of $101,949.76 (3,872 hours at $26.33 per hour) for the Daytime Shuttlebus; $9,242 (351 hours at $26.33 per hour) for the Commuter Route; and $33,518 (1,273 hours at $26.33 per hour) for the Evening Route.

MVRTD explained that the public demand for transportation services that exist in the Rutland-Sherburne region is due to the fact that two large ski areas are located in the Rutland area . MVRTD argues that "[s]kiers, in this factual background, are not a 'defined group,' they are the 'transportation public.'" MVRTD claims that its mass transportation services between Rutland and Sherburne further the goals of FTA's program of transit assistance for nonurbanized areas as set forth in FTA Circular 9040.1C, dated November 3, 1992.

In response to Ark's contention that the early morning service will be for the exclusive use of Killington's employees, MVRTD states that there is no evidence that skiers will not use the morning shuttle run and claims that the service is timed to get most skiers to the ski area in time for lifts to open. MVRTD states that under the present schedule buses depart Rutland for Killington at 7:00 a.m., lifts at Killington open at 8:00 a.m. on weekends and 9:00 a.m. during the week, and lifts at Pico open daily at 8:30 a.m. Furthermore, MVRTD anticipates that the service will take extra time in order to facilitate pick-ups and drop-offs throughout the service area. As to Ark's position that the service is for the exclusive use of the skiers, MVRTD states that the general public is already making use of the service going up and down the mountain and several businesses along the route have asked to be included in the service.

Referring to Ark's argument that under Blue Grass the service is charter because it is being provided on an hourly basis, MVRTD points out that some base had to be established with regard to subsidy. Furthermore, MVRTD's CPA and business manager configured service cost with full cost allocation. In reply to Ark's assertion that the bus stops are not located along public roads, MVRTD states that bus stop signs are located along the Killington Road and MVRTD buses will stop when they are flagged by the public, in safe areas. Further, MVRTD claims that there is no authority or documentation to substantiate the contention that Ark has sole authority to operate along the Killington Road. MVRTD states that the Killington Road is a public road and MVRTD buses are entitled to use it. Although the service only operates during the ski season, MVRTD explains that year-round service might be offered if demand necessitates.

With regard to the issue of control, MVRTD responds that although it coordinates with Killington, under the Operating Agreement MVRTD has the final say in choosing the rates, routes and schedules for the service. MVRTD notes that in reaching its decision in the Blue Grass case, the FTA considered the fact that the university had the prerogative to alter routes and schedules. Here, while Killington will be consulted, MVRTD claims it has the final say over schedules and routes and relied heavily on its consultant to design the system. MVRTD further contends that the Operating Agreement herein does not dictate what equipment is to be used as was the case in Blue Grass.

In response to Ark's allegation that there is a single contract between MVRTD and Killington, MVRTD contends that the Operating Agreement is essentially a subsidy agreement for public mass transportation. Furthermore, MVRTD argues that although Ark served the same general area previously, the service is open to the public this year as opposed to past years. MVRTD notes that it asked Killington to supply two-way radio communications as an extra precaution to

allow MVRTD to patch into town highway departments to facilitate help if needed with respect to road conditions. MVRTD claims it will use its own two-way communications equipment for dispatch and other everyday functions of service delivery. In regard to Killington's exclusive advertising rights on the buses, MVRTD asserts that all advertising is subject to appoval in advance by MVRTD and claims that Killington in coordination with MVRTD will use advertising space to display route schedules and configurations.

As to Art's claim that it is a willing and able provider of charter service, MVRTD responds that it was informed by Commonwealth Thomas that Ark vehicles were taken back by Commonwealth, are on Commonwealth's floor, and could be purchased by the MVRTD. Moreover, MVRTD claims that none of Ark's vehicles are ADA equipped and therefore, are unsuitable for public transportation.

COMMENT ON SUPPLEMENTAL RESPONSE

On December 6, 1994, Ark provided the following comments on the supplemental information furnished by the respondent. The FTA will consider those comments which concern issues previously raised in this proceeding and which are relative to the determination of whether the service herein is charter or mass transportation.

Ark takes issue with MVRTD's claim that "[t]he District has no contracted obligation to provide any specific number of buses or size of buses." Ark points out that Paragraph III.C specifically provides that MVRTD is obligated to provide up to four 32-passenger buses and one back-up bus.

In addition, Ark contends that the buses used in the night shuttle and mid-day shuttle will be used exclusively by Killington because Killington has contracted with MVRTD for their use. Ark takes issue with MVRTD's response that the service is open to the public this year as opposed to past years because the buses stop at condominiums located on private property that are connected to a ski area via a shuttle service just as apartments were connected to a university in the Seymour case. Furthermore, Ark claims that the fact that MVRTD is advertising the service in the "Mountain Times" underscores the fact that the service caters to vacation visitors as the paper's greatest circulation is in Sherburne at local eating, dining and lodging facilities.

Ark further contends that according to MVRTD schedules, it does not appear that riders may transfer to and from the Rutland/Sherburne route. With reference to the bus stop signs along the Killington Road, Ark claims that the signs, and posts they are attached to, are owned by Ark, not MVRTD.

Finally, Ark denies that its vehicles were taken back by Commonwealth Thomas. Instead, Ark explains that it asked Commonwealth to floor plan the vehicles which Ark can have back at any time.

DISCUSSION

The essential issue in this matter is whether the service provided by MVRTD is impermissible charter service or permissible mass transportation.

In its complaint, Ark claims that the service provided under the terms of the Operating Agreement is clearly charter service and is merely "cloaked" in mass transportation. Ark's argument that the service provided by MVRTD is charter service is based in large part on the Chief Counsel's determinations in the Blue Grass and Seymour cases and the definition of charter service set out at 49 CFR 604.5(e).

In Blue Grass, the Chief Counsel determined that the service provided by the Lexington Transit Authority (LexTran) basically corresponded to the definition of charter for the following reasons. First, the service was provided under a single contract, was operated on terms set by the university, and the recipient was compensated on an hourly rate. Second, the service was operated and managed differently from the recipient's other routes because there were no published schedules for the campus routes and the service was provided free to individual riders. Third, the service had been designed to meet the transportation needs of the university students and personnel, and, though it was operated open door, only coincidentially served the needs of the general public.

It should be noted that following the Chief Counsel's decision in Blue Grass, LexTran modified the service by ceasing to provide it under an agreement linking payment to hours of service, instead receiving an annual grant from the university. In addition, LexTran modified the service by publishing schedules for its campus service, advertising them to the public, and marking campus stops with its logo, thereby evidencing an attempt to invite public ridership. Subsequently, in a letter to the recipient, FTA recognized that by assuming control of the campus service and by making it open to the general public, the service had been converted to mass transportation.

In Seymour, the Chief Counsel found the campus service met FTA's criteria for charter service because it was provided under an agreement with the university which linked the cost of the service to the number of hours operated. Furthermore, pursuant to the agreement, the university was allowed to set fares and schedules which placed control of the service with a party other than the recipient. The Chief Counsel concluded that in order to come into compliance with FTA requirements, the recipient would be required to reconfigure the service to conform to FTA's mass transportation guidelines.

In the preamble to the charter regulations, FTA states that the main features of charter are: 1) the service is by bus or van; 2) the service is to a defined group of people; 3) there is a single contract between the recipient and the riders, not individual contracts between the recipient and each

rider; 4) the patrons have the exclusive use of the bus; 5) the charge for the bus is a set rate; and 6) the riders have the sole authority to set the destination. (52 Fed. Reg. 11919, Apr. 13, 1987)

In the instant case, Ark first argues that the service is charter because it is provided to two "defined groups" of people, skiers and Killington's employees, who essentially have exclusive use of the buses. Second, Ark maintains that the Operating Agreement is, in reality, an agreement under a single contract, whereby the service is being provided on a hourly rate. Third, Ark claims that Killington actually determines the route, rate and schedule, and Killington, and the riders via their rental contract with Killington, set the destination.

As stated by the Chief Counsel in Seymour, a balancing test must be applied to determine the nature of the service involved in any complaint filed with FTA, since, as the preamble to the charter regulation points out at pages 11919-20, there is no fixed definition of charter service, and the characteristics cited by FTA are given as examples only.

In applying the balancing test to the instant case, FTA notes that the service provided by MVRTD has similarities to that provided in Blue Grass and Seymour in that it is provided pursuant to an agreement and paid for on a hourly basis.

Moreover, certain provisions in the Operating Agreement appear to diminish MVRTD's control over the service. Specifically, although in its November 22, 1994, response to questions posed by the FTA, MVRTD stated that "it is the District's obligation or responsibility to alter frequency of pick-ups or days or hours of operation," a reading of Section III.F indicates that MVRTD will, in fact, be obligated to provide additional services at Killington's request. Furthermore, Section VI, "Employees and Use of Sub-Contractors," appears to lessen MVRTD's control over the service by providing that MVRTD will not be discharged from any obligation or liability by subcontracting or delegating any services except as specifically set forth in writing in advance of such delegation. In addition, while the FTA would encourage resolution of any differences which might arise between Killington and MVRTD, Section XI, "Dispute Resolution and Arbitration," puts both parties on an equal footing and therefore, appears to diminish MVRTD's control over the service. Further, although MVRTD responded that it has no contracted obligation to provide any specific number of buses or size of buses, the Operating Agreement states that MVRTD is obligated to provide up to four 32-passenger buses and one back up bus. On this point, FTA notes that determining the number of vehicles used is merely an operational detail; however, the type of equipment used should be decided by the recipient. Finally, Section III.F provides that "[a]t Killington's election" members of the public may be charged $1.00 per ride which will be turned over to Killington to defray the cost of providing services. On this issue, the decision to charge fares should be MVRTD's not Killington's. Moreover, the fares received should not be transmitted directly to Killington, but instead, Killington's subsidy fee for the service should be reduced by the amount of any extraneous fares received from members of the general public.

In consideration of the foregoing, FTA has determined that the language in Operating Agreement should be changed to make clear that MVRTD has primary responsibility for the service and that Killington merely makes suggestions concerning the service and otherwise serves only in an informational capacity.

Although the service provided by MVRTD is somewhat similar to that provided in Blue Grass and Seymour, it has other characteristics which more easily fit the definition of mass transportation. While the Federal Transit Laws, as codified, at 49 U.S.C. § 5302(a)(7) define mass transportation as service provided to the public and operating on a regular and continuing basis, the FTA has further distinguished charter service from mass transportation by characterizing it as: 1) being under the control of the grantee, who generally is responsible for setting the route, rate, and schedule and deciding what equipment is used, 2) being designed to benefit the public at large and not some special organization such as a private club, and 3) being open to the public and not closed door so that anyone who wishes to ride on the service must be permitted to do so. (52 Fed. Reg. 11920, Apr. 13, 1987)

Ark argues that because the service provided by MVRTD does not contain these three elements, it is not mass transportation, but rather charter service. Ark claims that the first element is lacking because Killington sets the route, rate and schedule. In addition, Ark asserts that Killington has control over the service because it will supply MVRTD with two-way radio communication equipment which will be used to interface with Killington. As further confirmation of Killington's control over the service, Ark notes that Killington will have exclusive advertising rights on the buses and will retain ownership of the ski racks/holders attached to the vehicles.

The documentation submitted by MVRTD refutes this contention. MVRTD's maintains that the routes and schedules identified under the Operating Agreement were developed by MVRTD in conjunction with its transportation consultant, Multi-Systems, Inc., as part of MVRTD's Short Range Transit Plan (Plan). The MVRTD submitted a draft copy of a portion of the Plan which outlines the transportation objectives to be met as a result of bus service between Rutland and Killington. Section 8.2.2 of the Plan indicates that the purpose behind the service design is to combine ski-mountain shuttle bus service with regularly scheduled public bus service between Rutland and Killington Village. The Plan further provides that the service would be for (1) employees from Rutland and Castleton State College traveling to work on the ski mountain; (2) day skiers from Rutland and possibly from Castleton State College; and (3) Killington Village visitors who might be interested in day-time shopping opportunities in Rutland. According to the Plan, the immediate objective is to develop a service design for an operation that will be cost-efficient, convenient, and well-used. These provisions indicate that it is MVRTD's intent to use information supplied by Killington to assist in designing service to meet the needs of members of the general public travelling between Rutland and Killington.

Moreover, MVRTD's control over the service is evidenced by its response that MVRTD has the final say in setting schedules and may increase or decrease routes and scheduling based upon demand and volume. According to MVRTD, Killington merely has the ability to suggest

additional routes or stops. MVRTD further states that it intends to charge $1.00 to the public between Rutland and Sherburne and retains the right to charge more than that amount for the evening service. Furthermore, it appears that the radio equipment supplied by Killington does not necessarily diminish MVRTD's control, but instead will likely facilitate MVRTD's operations. In addition, although Killington will have exclusive advertising rights on the buses, according to the terms of the Operating Agreement the advertisements must be approved by MVRTD in writing in advance and thus this provision does not seem to lessen MVRTD's control. Finally, as to the ski racks/holders which Killington will attach to the buses and retain ownership of, the Operating Agreement provides that MVRTD must give approval prior to installation, and therefore, this factor does not appear to decrease MVRTD's control over the service.

Therefore, assuming that MVRTD will change the language in the Operating Agreement to strictly conform to FTA's definition of control, the FTA finds that the service meets the first mass transportation criterion of being under the control of the grantee. This corrective action is consistent with the FTA's decision in Washington Motor Coach Association v. Municipality of Metroplitan Seattle, WA-09/87-01, where the Chief Counsel found that service was mass transportation although it failed to conform in one aspect, namely that the service be published in the grantee's schedules. In that case, before reinstituting the service, the grantee was ordered to publish the service in its preprinted schedules.

With reference to the second element of FTA's definition of mass transportation, Ark maintains that the service is charter because it is not designed to meet the needs of the public at large, but rather two defined groups, namely skiers and employees of Killington.

In this regard, it should be noted that in the preamble to the charter regulation, FTA states that service is designed to benefit the public at large when it serves the needs of the general public and not some special organization such as a private club. (52 Fed. Reg. 11920, April 13, 1987) MVRTD claims that the service will provide mass transportation to thousands of people living, shopping and working in Rutland, Mendon and Sherburne and not only to skiers or Killinton's employees. In addition, MVRTD notes that it is likely that Killington's competitor, Pico Ski Area, will benefit from the service. Assuming arguendo that the skiers and employees of Killington formed two "defined groups," it is clear from MVRTD's submission that MVRTD's service is not intended for the exclusive use of such riders, but is available to anyone wishing to board it. As such, it is being provided to benefit the public at large and is consistent with the second criterion of mass transportation.

This second element of mass transportation extends over to FTA's third requirement for mass transporation, namely that the service be "open door." Ark claims that the skiers and employees of Killington essentially have exclusive use of the buses. In this connection, Ark states that members of the public will not avail themselves of the early morning service and that transportation services for shoppers is extremely limited.

On the other hand, MVRTD states that the service is open door because access is extended to anyone who wishes to ride on the buses. MVRTD points out that skiers in the Rutland area do not fit into a "defined group" but actually are the transportation public. In addition, MVRTD claims that the general public is already using the service and states that several businesses along the route have asked to be included in the service.

In determining whether service is open door, FTA looks not only to the level of ridership by the general public as opposed to a defined group, but also to the intent of the recipient who provides the service. The intent to provide service that is open door can be discerned by the efforts that a recipient has made to make the service known and available to the public. FTA thus takes into consideration the efforts a recipient has made to market the service. Generally, FTA considers that this marketing effort is best accomplished by publishing the service in the recipient's preprinted schedules. FTA notes that MVRTD has submitted copies of its schedules for the Killington mid-day and evening shuttle bus, and the Rutland/Mendon/Sherburn daytime and late afternoon/evening commuter service. Moreover, MVRTD claims that its service schedules will be advertised in several local papers and on the buses, and posted at local restaurants, lodging facilities, and the ski area. Accordingly, the FTA finds that the service conforms to the third criterion of mass transportation in that it is open to the public and not closed door.

CONCLUSION

After a thorough investigation, FTA concludes that the service provided by MVRTD is mass transportation because it substantially conforms to the following criteria: 1) it is under the control of the grantee; 2) it is designed to benefit the public at large; and 3) it is open door. With regard to the first element, however, FTA finds that certain provisions in the Operating Agreement interfere with the MVRTD's prerogative to control the service in the public interest. FTA, therefore, orders MVRTD to change the language of the Operating Agreement to make clear that MVRTD is responsible for setting the route, rate and schedules and deciding what equipment is used, with Killington playing mainly an informational role. MVRTD must report to FTA within thirty days on the measures it has taken to comply with the terms of this order.

Margaret E. Foley

Margaret E. Foley
Regional Counsel

December 16, 1994
(Date)

Richard H. Doyle
Regional Administrator

December 16, 1994
(Date)

FEB 16 1995

Mr. H. Edward Dowling, Jr.
Owner/Operator
Florida Stage Lines, Inc.
3016 W. 38th Street
Orlando, Florida 32839

Dear Mr. Dowling:

Thank you for your correspondence of January 30, 1995, alleging that the Regional Transit System (RTS) of Gainesville, Florida is in violation of the Federal Transit Administration's (FTA) charter regulation, 49 CFR Part 604. Specifically, you allege that RTS continues to lease vehicles to Breakaway Tours, which is not a legitimate private operator.

Under the charter regulation, FTA recipients are barred from providing direct charter service if there is a willing and able private local provider. Recipients may, however, provide charter service through subcontracting arrangements with a legitimate private operator that lacks the capacity to perform a particular charter trip. FTA has defined "legitimate private charter operator" as the owner of at least one vehicle which it is licensed to operate in charter service. See, B&T Fuller, et al. v. VIA Metropolitan Transit Authority, TX-02/88-01, November 18, 1988.

Complaints that recipients are in violation of the charter regulation are investigated by the appropriate FTA Regional Office. Accordingly, by copy of this letter, I am forwarding your correspondence to Paul T. Jensen, Regional Counsel, FTA Region IV. You may contact him at 404/347-3948.

Very truly yours,

/s/
Berle M. Schiller
Chief Counsel

cc: Paul Jensen, TRO-4
Russell J. Olvera

CONCURRENCES

RTG SYMBOL	TCC-32
INITIALS/SIG	
DATE	2/15/9
RTG SYMBOL	TCC-10
INITIALS/SIG	
DATE	2/16/95
RTG SYMBOL	TCC-1
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DATE	2-16
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TCC950125

GRID

U.S. Department
of Transportation
Federal Transit
Administration

400 Seventh St., S.W.
Washington, D.C. 20590

FEB 28 1995

Mr. Russell J. Olvera
Director
Regional Transit System
100 S.E. 10th Avenue
Gainesville, Florida 32602

Dear Mr. Olvera:

This responds to your request for an interpretation of the Federal Transit Administration's (FTA) charter regulation, 49 CFR Part 604, as it applies to the provision of charter service by the Regional Transit System (RTS) of Gainesville, Florida.

You state that on June 18, 1994, RTS published a notice of intent to provide charter service, requesting a response from private operators by July 31, 1994. No private operator responded to RTS' notice within the deadline. On October 26, 1994, Florida Stage Lines of Orlando/Ocala contacted RTS to request that it be determined "willing and able." You ask whether Florida Stage Lines is eligible to be determined "willing and able," since it failed to respond to RTS' notice by the stated deadline, and also since it lacks a valid occupational license as required by municipal ordinance. You moreover point out that Florida Stage Lines' principal place of business is in Orlando, which is approximately 125 miles from Gainesville.

Under 49 CFR 604.11, a private operator will only be determined "willing and able" if it responds to a recipient's notice in writing by the required deadline. Therefore, if Florida Stage Lines did not respond to RTS' notice by July 18, 1994, it may not be determined "willing and able" for the period covered by that notice.

Florida Stage Lines may be determined "willing and able" in response to a subsequent charter notice if it meets the criteria of 49 CFR 604.5(p), i.e., if it possesses the categories of revenue vehicles required and the legal authority to provide charter service in the affected area. An operator's distance from the service area may not be considered in making a "willing and able" determination. I understand from your letter that Florida Stage Lines does not have a valid permit to provide charter service in the Gainesville area. If such is indeed the case, Florida Stage Lines does not meet one of the required criteria and therefore may not be determined "willing and able."

CONCURRENCE
RTG SYMBOL TRO-1V
INITIALS/SIG RD
DATE 2/23/95
RTG SYMBOL TCC-32
INITIALS/SIG RD
DATE 2/24/95
RTG SYMBOL TCC-10
INITIALS/SIG [illegible]
DATE 2/24/95
RTG SYMBOL TCC-2
INITIALS/SIG [illegible]
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GRID

Form DOT F 1320.65 (Rev. 6/83)
Supersedes previous edition

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You also ask if, in the absence of a legitimate private charter operator in the Gainesville area, RTS may lease vehicles to Breakaway Tours, a local travel agency.

As FTA stated in its letter of September 15, 1993, RTS may subcontract only with a legitimate charter operator. FTA has defined "legitimate charter operator" as the owner of at least one vehicle which it is licensed to operate in charter service. See, B&T Fuller, et al. v. VIA Metropolitan Transit Authority, TX-02/88-01, November 18, 1988. If Breakaway Tours owns no vehicles with which it may provide charter service, it is not a legitimate private charter operator and thus does not qualify to lease vehicles from RTS.

However, in the absence of a "willing and able" charter operator in its service area, RTS may provide any type of incidental charter service, including direct service to clients of Breakaway Tours. FTA defines "incidental" as service that does not detract from or interfere with a grantee's regular mass transit operations.

Please contact Rita Daguillard at 202/366-1936 if you need further information concerning FTA's charter service requirements.

Very truly yours,

/s/

Merle M. Schiller
Chief Counsel

cc: Charles Webb, Esq.
H. Edward Dowling, Esq.
Paul Jensen, TRO-6

U.S. Department
of Transportation
Federal Transit
Administration

REGION V
Illinois, Indiana,
Michigan, Minnesota,
Ohio, Wisconsin

55 East Monroe Street
Suite 1415
Chicago, IL 60603
312-353-2789
312-886-0351 (fax)

Mr. Thomas P. Kujawa
Managing Director
Milwaukee County Transit System
1942 North 17th Street
Milwaukee, Wisconsin 53205-0016

MAR 1 3 1995

Dear Mr. Kujawa:

This letter is in response to your request dated March 8, 1995 for guidance as to whether the Milwaukee County Transit System (Milwaukee) may provide charter service to Lambeau Field in Green Bay, Wisconsin. I understand that Milwaukee has been providing service to various sporting events at Milwaukee County Stadium since 1976, but that effective in 1995 the Green Bay Packers will play all of their home games at Lambeau Field. Season ticket holders have been offered tickets to attend the football games in Green Bay and Milwaukee would like to provide charter service to those season ticket holders.

As you know, the Federal Transit Administration (FTA) charter regulations (49 CFR Part 604) do not allow a recipient of federal funds to use FTA funded vehicles for the provision of charter service except under certain limited situations. It is my opinion that the facts presented in your letter would not qualify for any of the exceptions contained in the regulations. Unless Milwaukee can determine that there are no willing and able private charter operators in the Milwaukee area capable of fulfilling this need for charter service, Milwaukee may not provide charter service for the purpose described in your letter.

Please be advised that this opinion is not intended to preclude Milwaukee from providing charter service under a subcontract arrangement with a private charter operator pursuant to 49 CFR Part 604.9(b)(2) as long as such service is considered incidental and does not impact Milwaukee's ability to meet its regular fixed route demand. I hope that this letter answers your questions regarding this matter, if you have any additional questions or need additional information please feel free to call me at 312-664-7200.

Sincerely,

Dorval R. Carter Jr.
Regional Counsel

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION I
Connecticut, Maine,
Massachusetts,
New Hampshire,
Rhode Island, Vermont

Transporation System Center
Kendall Square,
55 Broadway
Suite 904
Cambridge, Massachusetts 02142

MAR 13 1995

Mr. Robert E. Ojala
Administrator
Worcester Regional Transit Authority
287 Grove Street
Worcester, MA 01605

Dear Mr. Ojala:

This responds to your letter of February 24, 1995, concerning the FY 1994 Triennial Review of the Worcester Regional Transit Authority (WRTA). Specifically, you dispute the finding of non-compliance with the Federal Transit Administration's (FTA) charter regulation and maintain that the services WRTA provides in addition to its regularly scheduled routes do not constitute charter service. These additional services involve the use of FTA-funded buses by advertisers and the City of Worcester. According to the Triennial Review report, these services are provided on an incidental basis approximately two to three times per year on Saturdays.

You submit the following reasons to support your contention. First, you state that the WRTA has five painted buses in its fleet. You explain that the entire exterior of each of these buses has been painted with an advertisement by one advertiser who pays the painting cost and a monthly fee. The WRTA allows the advertisers to use the painted buses at various promotional events where, in most cases, the buses are merely on display. Under WRTA's current policy, the buses are provided either free of charge without a driver or for $30 per hour with a driver. Next, you cite two examples where the WRTA provided transportation services to accommodate the City of Worcester in conjunction with official events. In the first instance, a van accompanied the Mayor and other city officials during the "Mayor's Walk," and in the second instance, the WRTA provided a van to transport visiting dignitaries on a tour of the city and various revitalization sites.

Based on the information contained in your letter and the Triennial Review report, the FTA makes the following findings. The incidental use of the painted buses by advertisers is not in violation of FTA's charter regulation so long as the vehicles are used for demonstration purposes only. However, if the advertisers use the vehicles to transport passengers, the services will be considered charter.

In response to the issue concerning the use of FTA-funded buses to accommodate the City of Worcester, the FTA has determined that these services are charter because the city officials had exclusive use of the vehicles and sole authority to set the itinerary. Moreover, the services were designed to benefit a defined group of people and not the public at large. Furthermore, from the

facts submitted it appears the services were operated closed door and were not open to the public. Indeed, the transportation services WRTA provided to the City of Worcester are analogous to the charter services described in Question and Answer No. 33 contained in "Charter Service Questions and Answers," 52 Fed. Reg. 42253, Nov. 3. 1987 (copy enclosed). However, it is important to note that the enclosed final rule published in the Federal Register on October 7, 1994 (59 FR 51133) extended through October 31, 1995, a charter services demonstration program to permit transit operators to meet the transit needs of government, civic, charitable and other community activities, as directed by Section 3040 of the Intermodal Surface Transportation Efficiency Act (ISTEA). Thus, while the services WRTA is providing to the City of Worcester are presently prohibited by the charter regulation, the FTA is currently evaluating this type of service and depending on the data collected during the demonstration program, the FTA may revise the charter regulation to permit this type of service in the future.

Please be reminded that the FTA charter service regulation prohibits a recipient of FTA assistance from providing charter service which uses FTA-funded facilities or equipment when there is at least one willing and able private charter bus operator. A recipient wishing to provide direct charter service must engage in the public notice process set forth at 49 CFR Part 604.11. If, as a result of the public notice process, a recipient determines that there is no willing and able private operator, it may provide charter service. Even if a recipient determines that there is a willing and able private operator, it may qualify for one of the exceptions set out at 49 CFR 604.9.

If WRTA wishes to continue providing the charter service described above it must take the following action immediately, as the 90-day period allowed to come into compliance with the Triennial Review has passed. As stated in the Triennial Review Report and in compliance with 49 CFR 604.11, the WRTA must annually publish a notice that decribes the charter service that it proposes to provide in order to determine if there is a willing and able private provider of charter service. The notice must also be sent to all private charter service operators in the proposed geographic charter service area and to any private charter service operator that requests notice. In addition, a copy of the notice must be sent to the United Bus Owners of America, 1100 New York Avenue, N.W., Suite 1050, Washington, DC 20005-3934 and the American Bus Association, 1015 15th Street, N.W., Suite 250, Washington, DC 20006.

With reference to the service WRTA provided during the NCAA Championships in 1992, the FTA notes that the WRTA certifies that it will follow the proper procedures to obtain a "Special Events" exception in the future. For guidance regarding services which fall within this exception, see the information in Question and Answer No. 21 and the paragraph beginning "Exception 5" at 52 Fed. Reg. 42251, Nov. 3, 1987.

I hope this information is helpful. If you have any questions, please call Carol Morrissey at (617) 494-2396 or Margaret Foley at (617) 494-2409.

Sincerely,

Richard H. Doyle
Regional Administrator

Enclosures: Federal Register, Vol. 52, No. 212, Nov. 3, 1987
Federal Register, Vol. 59, No. 194, Oct. 7, 1994

File Certified Decision

Chron

US Department
of Transportation
Federal Transit
Administration

Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

APR 4 1995

Melvin B. Neisner, Jr., Esq.
Killington Road, P.O. Box 186
Killington, VT 05751

Dear Mr. Neisner:

By your letters dated December 21, 1994, and January 25, 1995, Ark Transportation, Inc. (Ark) appeals the December 16, 1994, decision of Regional Administrator Richard H. Doyle that service being provided by the Marble Valley Regional Transit District (MVRTD) in the Killington, Vermont, ski area is "mass transportation" for the purposes of the Federal transit laws. For the reasons discussed below, I affirm Mr. Doyle's decision.

History of the Complaint

On October 7, 1994, Ark filed a complaint with the Federal Transit Administration (FTA), alleging that MVRTD was providing charter service in violation of 49 CFR Part 604. Under Part 604, a recipient of FTA financial assistance may not provide charter service if a private operator is willing and able to do so. Ark alleged that MVRTD had executed an "Operating Agreement for Transportation Services" to provide charter service for Killington, Ltd. (Killington), a Vermont corporation.

Mr. Doyle found that the service met most of FTA's criteria for mass transportation and, therefore, was not in violation of the charter service regulation. However, since some terms of the Operating Agreement interfered with MVRTD's control of the service, FTA ordered amendment of the Operating Agreement. On January 13, 1995, MVRTD submitted a new version of the Operating Agreement, a "Subsidy Agreement," which addressed the control issues raised in the FTA decision. Ark has appealed pursuant to 49 CFR § 604.19.

Discussion

Each party raises a threshold matter. First, Ark alleges that MVRTD's submission of the Subsidy Agreement was not timely because it was received after business hours on January 13, 1995, and thus beyond the 30-day period allowed by the FTA Decision. Under section 604.5(g), however, in this complaint process, "*[d]ays . . .* means Federal working days." Accordingly, the submission was timely because FTA received it on January 16, 1995, well within the deadline of February 1, 1995.

Second, in its response dated February 22, 1995, MVRTD alleges that Ark's appeal fails to raise new matters of fact or points of law that were not available or not known to Ark during the

investigation of the October 6, 1994 Complaint filed by Ark, as required by section 604.15. As discussed below, I find that Ark's appeal does in fact meet that standard.

I turn now to the principal issue of this case, whether the service in question is impermissible charter service or mass transportation. The Federal transit laws define "mass transportation" as "transportation by a conveyance that provides regular and continuing general or special transportation to the public, but does not include schoolbus, charter, or sightseeing transportation." 49 U.S.C. § 5302(a)(7). From this provision, FTA has identified three salient characteristics of mass transportation:

> First, mass transportation is under the control of the recipient. Generally, the recipient is responsible for setting the route, rate, and schedule, and deciding what equipment is used. Second, the service is designed to benefit the public at large and not some special organization such as a private club. Third, mass transportation is open to the public and not closed door.

52 Fed. Reg. 11919-20 (April 13, 1987)

1. Under the control of the recipient. Ark makes several allegations related to the control criterion. First, Ark suggests that the schedule and routes of the village shuttle are controlled by Killington, noting that the routes and times have not changed since Ark ran the village shuttle. However, section III(k) of the Subsidy Agreement vests MVRTD with sole responsibility and authority for the setting and modification of routes and schedules. Ark presents no evidence that this provision has in fact been violated.

Second, Ark suggests that MVRTD lacks control over the service because it is limited to charging one dollar for its evening service. Again, the Subsidy Agreement provides that "MVRTD shall have the option, at its discretion, to charge an appropriate fee to the general public utilizing public transportation services" provided under the Agreement (§III (G)).

Third, Ark alleges that the use of two-way radios between Killington and MVRTD demonstrates Killington's control over MVRTD's routes and schedules. Ark argues that since local ordinances proscribe the use of radios to contact local police, the radios cannot be used for safety purposes. However, MVRTD has provided evidence that the radios are used for safety purposes, not as a means for Killington's control. Ark has not rebutted this evidence, nor has it explained how such radios have been used to control MVRTD's routes and schedules.

Fourth, Ark questions the section of the Subsidy Agreement requiring MVRTD to provide additional services at Killington's request. According to Ark, the only time MVRTD need not comply with the request is if MVRTD does not have sufficient equipment. Ark believes that MVRTD will always have sufficient equipment, so it has no effective right to refuse Killington's request for additional services. However, Ark has provided little evidence of MVRTD's excess capacity. In the absence of such evidence, the Subsidy Agreement adequately addresses this concern: section III(F) provides that additional public transportation services may be requested by Killington in exchange for a mutually agreed-upon extra subsidy. MVRTD will not be required

to provide the extra services if it does not have vehicles available, if the scope and extent of the additional services would significantly or materially alter the Agreement, or if agreement cannot be reached on price. In addition, section III(K) gives final responsibility and authority to MVRTD for any setting and modification of routes and schedules. Hence, ultimate control rests with MVRTD.

Fifth, Ark objects to sections VI and XI of the Subsidy Agreement, which deal respectively with assignment of contract and dispute resolution. Ark claims that both interfere with MVRTD's control over service. Again, Ark has failed to show how these provisions interfere with MVRTD's control over the routes, rates, and the equipment to be used. We find, on the contrary, that the assignment of contract provision increases MVRTD's control over its liability. Moreover, the dispute resolution provision does not interfere with MVRTD's control over rates, routes, and equipment; rather, it sets the ground rules for dispute resolution, which makes the agreement more predictable for both parties.

Finally, Ark contends that a letter sent by Killington requesting contributions from local businesses for bus service shows that Killington, not MVRTD, is in control of the service. Ark contends that the letter was sent only to businesses that previously supported Ark's charter service. This request for contribution does not give local businesses control over the service because payment is not obligatory. Nothing in the letter indicates that service will be cut off if the contribution is not sent.

Ark argues that Killington's request for contribution is analogous to Killington's collecting fares for the night shuttle, which FTA found in its December 16, 1994, decision to diminish MVRTD's control over the service (Decision, at 12). However, requesting contributions from businesses is distinguishable from collecting fares for the night shuttle. The passengers on the night shuttle are obligated to pay the fare in order to ride the bus. The businesses in the present scenario are not obligated to subsidize the service in order to benefit from it. Nothing prevents Killington from asking local businesses to contribute in order to reduce its subsidy to MVRTD. In any future letters, however, we recommend that Killington clarify that it is collecting to reduce its own subsidy, rather than to provide transportation services at the demand of the contributors. In addition, the letter stated that the contribution could be made either to MVRTD or Killington. As discussed above, Killington may attempt to solicit contributions to reduce its own subsidy. As for checks written to MVRTD, the Subsidy Agreement provides that fees charged to the general public by MVRTD will be applied as a credit toward Killington's annual subsidy. (See Agreement, §III(G).)

2. <u>The service is designed to benefit the public at large</u>. FTA has noted in prior decisions that service is designed to benefit the public at large when it serves the needs of the general public, instead of those of "some special organization such as a private club." 52 Fed. Reg. 11920 (April 13, 1987). Ark alleges that MVRTD's village shuttle is not open to the public because the routes accommodate only those traveling among condominium developments, and not persons traveling to Rutland or throughout Sherburne during most of the day. In FTA's view, persons renting condominiums and their guests are not a sufficiently defined group to be considered a "private club." Moreover, while the service accommodates them primarily, it is not restricted to their

exclusive use. FTA has found that service provided in this manner is designed to benefit the public at large. Las Vegas Transit System, Inc. v. Regional Transportation Commission of Clark County, Nevada, NVO6/92-2104 (November 25, 1992); Washington Motor Coach Association v. Municipality of Metropolitan Seattle, WA-09/97-01 (March 21, 1988).

3. Mass transportation is open to the public and not closed door. In determining whether service is truly "open door," FTA looks both at the level of ridership by the general public as opposed to a particular group and at the intent of the recipient in offering the service. The intent to make service open door can be discerned in the attempts to make service known and available to the public. FTA thus takes into account the efforts a recipient has made to market the service.

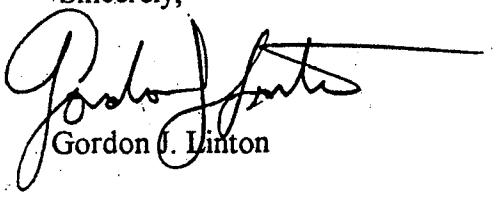
Generally, this marketing effort is best evidenced by publication of the service in the grantee's preprinted schedules (Washington Motor Coach, at 10). According to Blue Grass Tours and Charter v. Lexington Transit Authority, URO-III-1987 (May 17, 1988), FTA has interpreted "open door" to mean a substantial public ridership and/or an attempt by the transit authority to widely market the service (Blue Grass, at 5). The posting of bus stop signs and the connections to other transportation routes were also considered indicators of "opportunity for public ridership" in Seymour Charter Bus Lines v. Knoxville Transit Authority, TN-09/99-01 (November 29, 1989) at 9. These are simply examples of how recipients may manifest their intent to make service open door. A recipient is not required to make all of these efforts in order to have manifested the intent to make service open door.

I find that MVRTD has made adequate efforts to demonstrate its intent to make service open door. MVRTD has a preprinted schedule that is made available on request and has published the schedule several times in local newspapers. In addition, MVRTD has stated its intention to place signs along the route. In the meantime, MVRTD has stated in its schedule that it will pick up anyone who flags its buses so long as safety allows. The level of public ridership (which includes skiers using the village shuttle) is also significant. Ark makes a series of allegations regarding lack of MVRTD signage along the route, MVRTD's failure to advertise routes in certain local newspapers, lack of "public" ridership, and lack of connections with other local routes. However, as noted, a recipient is not required to make all the efforts outlined in earlier FTA decisions, only enough effort to manifest an intent that the service is open door. That level of effort has been reached in this case.

Conclusion

In summary, the service provided by MVRTD to the Killington, Vermont, ski area meets FTA's criteria for mass transportation. I therefore affirm the December 16, 1994, decision of the Administrator of FTA Region I that the service is not in violation of FTA's charter regulations.

Sincerely,



Gordon J. Linton

cc: John A. Facey, III, Esq.
Reiber, Kenlan, Schwiebert, Hall & Facey, P.C.

Read file

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION I
Connecticut, Maine,
Massachusetts,
New Hampshire,
Rhode Island, Vermont

Transporation System Center
Kendall Square,
55 Broadway
Suite 904
Cambridge, Massachusetts 02142

April, 27, 1995

TRO-1
Charter

Melvin B. Neisner, Jr., Esq.
Killington Road, P.O. Box 186
Killington, VT 05751

Dear Mr. Neisner:

This responds to your letters dated February 1 and March 3, 1995, written on behalf of Ark Transportation, Inc. (Ark) alleging that the Bus Company, Inc., a/k/a Marble Valley Regional Transit District (MVRTD) is providing charter service in violation of the Federal Transit Administration's (FTA) charter regulation, 49 CFR Part 604. Specifically, Ark alleges that MVRTD executed a "Grant Agreement" to provide charter service for the Mountain Green Condominium Owners Association (Mountain Green) located in Sherburne, Vermont.

In its response dated February 16, 1995, MVRTD argues that the service in question is mass transportation and notes that the purpose of the Grant Agreement is to provide funds for public mass transit service in the Mendon-Sherburne area. According to MVRTD, the funds provided under the Grant Agreement were used to expand Sherburne's present public transportation system by adding a bus to the fleet being operated on the Sherburne-Mendon routes. Furthermore, MVRTD points out that prior to the execution date of the Grant Agreement, MVRTD was providing what has already been found by FTA to be mass transit service1/ to Mountain Green and actually had a scheduled stop at Mountain Green. Moreover, MVRTD states that it could not ignore Mountain Green on its bus route because it is the largest condominium complex in Sherburne with 214 units and a commercial center. Finally, MVRTD asserts that the stop at Mountain Green connects with its other routes and does have an open door policy.

1/ *See* Ark Transportation, Inc. v. Marble Valley Regional Transit District, TRO-1/VT-12/94-01 (December 16, 1994) , *aff'd* by Gordon J. Linton, Administrator, on April 4, 1995.

The essential issue in this case is whether the service in question is impermissible charter service or mass transportation. The Federal Transit Laws define "mass transportation" as service provided to the public and operating on a regular and continuing basis. 49 U.S.C. § 5302(a)(7). The FTA has articulated other features which logically follow from this definition:

> First, mass transportation is under the control of the recipient. Generally, the recipient is responsible for setting the route, rate, and schedule, and deciding what equipment is used. Second, the service is designed to benefit the public at large and not some special organization such as a private club. Third, mass transportation is open to the public and not closed door. Thus, anyone who wishes to ride on the service must be permitted to do so.

52 Fed. Reg. 11919-20 (April 13, 1987).

First, Ark makes several allegations concerning the control criterion. Ark argues that the service is under the control of Killington, through its original underlying contract, and Mountain Green. As noted above, the FTA has already determined that the service being provided by MVRTD pursuant to the Subsidy Agreement with Killington is mass transportation. Next, Ark argues that there has not really been an increase in service on the evening shuttle route because MVRTD has added only one additional stop since executing the Grant Agreement, and contends that there is actually less frequency of service because the 10:00 p.m. run has been dropped from the evening schedule. Moreover, Ark claims that MVRTD does not stop at each of the locations listed on the Killington Road Rapid Transit Schedule. In FTA's view, the decision to increase or decrease service and setting routes and schedules is a proper exercise of MVRTD's control within the meaning of mass transportation and is a critical element in distinguishing it from charter service. Moreover, section IV of the Grant Agreement between MVRTD and Mountain Green states that "delivery of service, scheduling, and type and number of vehicles will be totally under the control of the [MVRTD]." Ark presents no evidence that this provision has been violated.

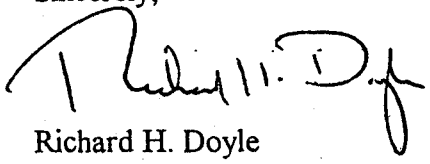
With reference to the second element of mass transportation, the FTA has determined that service is designed to benefit the public at large when it serves the needs of the general public and not some "special organization such as a private club." 52 Fed. Reg. 11920 (April 13, 1987). Ark maintains that the service is not designed to benefit the public at large, only skiers staying at Mountain Green's condominium hotel during the ski season. Moreover, Ark claims that the Upper Basin Service only transports skiers traveling through the condominium developments and not persons making connections to other routes. In the April 4, 1995, decision on appeal, FTA found that "persons renting condominiums and their guests are not a sufficiently defined group to be considered a private club. Moreover, while the service accommodates them primarily, it is not restricted to their exclusive use." Accordingly , it is being provided to benefit the public at large and is consistent with the second criterion of mass transportation.

Turning now to the third characteristic of mass transportation, the FTA notes that deciding whether service is open door, involves a two-part test. FTA looks both at the level of ridership by the general public as opposed to a defined group and at the intent of the recipient in offering the service. The intent to make service open door can be ascertained from the attempts to make the service known and available to the public. While FTA considers that this marketing effort is best evidenced by publishing the service in the recipient's preprinted schedules, other examples include displaying destination signs on buses, a substantial public ridership and/or attempts to widely market the service, and posting bus stop signs and connections to other transportation routes.

In its decisions of December 16, 1994, and April 4, 1995, the FTA determined that MVRTD made adequate efforts to demonstrate its intent to make the service in question open door. In this case, Ark alleges that MVRTD failed to advertise the schedule which included the Mountain Green stop in certain local newspapers during the weeks of December 15 and 22, 1994. The FTA notes, however, that the Grant Agreement between MVRTD and Green Mountain did not go into effect until December 23, 1994. Moreover, based upon the February 16, 1995, edition of "The Mountain Times" it is apparent that MVRTD has been publishing the updated schedule. FTA has previously found that a recipient is not required to exhaust all efforts to make the service known and available to the public, only enough effort to indicate an intent that the service is open door. That level of effort has been reached in this case.

In conclusion, the service provided by MVRTD to the Mountain Green Condominium Association meets FTA's criteria for mass transportation. If you have any questions, please contact Margaret E. Foley, Regional Counsel, at (617) 494-2409.

Sincerely,



Richard H. Doyle
Regional Administrator

cc: John A. Facey, III, Esq.
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Rutland, VT 05702-0578

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Marble Valley Regional Transit District
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Rutland, VT 05701

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Vermont Agency of Transportation
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Montpelier, VT 05633-5001

Mr. Schulyer Jackson
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Frank P. Urso, Esq.
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Senator James M. Jeffords
2 South Main Street
Rutland, VT 05701

Representative Betty Ferraro
111 State Street
Montpelier, VT 05633

Mr. Fred Bever
The Rutland Herald
27 Wales Street
Rutland, VT 05701

Mr. Tim Crossman
The Rutland Tribune
98 Allen Street
Rutland, VT 05701

Senator Patrick J. Leahy
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Montpelier, VT 05601-0933

Representative John Kasick
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U.S. Department
of Transportation
**Federal Transit
Administration**

REGION I
Connecticut, Maine,
Massachusetts,
New Hampshire,
Rhode Island, Vermont

Transporation System Center
Kendall Square,
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Suite 904
Cambridge, Massachusetts 02142

June 8, 1995

Mr. Joe R. Follansbee
Executive Director
Cooperative Alliance for Seacoast Transportation
213 Main Street
Durham, NH 03824

Dear Mr. Follansbee:

This responds to your request of May 30, 1995, concerning COAST's plans to provide transportation for three upcoming events which are being run by independent non-profit organizations. Specifically, the events are Market Square Day (Portsmouth, 80,000 people, 2-3 buses), First Night (Portsmouth, 60,000 people, 2 buses), and the International Children's Festival (Somersworth, 10,000 people). You state that you will perform the service, at the request of the communities and organizations holding the events, solely to ease traffic congestion through creation of park-and-ride type shuttle service. According to your letter, the directors of these events have told you that without donated transportation services they would be unable to fund traffic mitigating shuttles of any type. The service will be completely open to the public, with publicly announced or advertised stops and schedules, at a 25-cent fare.

The essential issue in this matter is whether the service in question is mass transportation or impermissible charter service. Based upon the information contained in your letter, the service in question does not meet the charter criteria of being provided under a single contract for the exclusive use of a defined group of people who have authority to decide the itimerary. Instead, the service falls more closely within the definition of mass transportation which is defined under the Federal Transit Laws as service provided to the public and operating on a regular and continuing basis. 49 U.S.C. § 5302(a)(7). The FTA has articulated other features which logically follow from this definition:

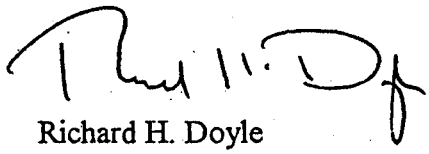
> First, mass transportation is under the control of the recipient. Generally, the recipient is responsible for setting the route, rate, and schedule, and deciding what equipment is used. Second, the service is designed to benefit the public at large and not some special organization such as a private club. Third, mass transportation is open to the public and is not closed door. Thus, anyone who wishes to ride on the service must be permitted to do so.

52 Fed. Reg. 11920 (Apr. 13, 1987).

During a June 8, 1995, conversation with Margaret Foley, Regional Counsel, you stated that COAST would set the route, rate and schedule and decide what equipment is used in providing the service. Therefore, the FTA finds that COAST will exercise sufficient control over the service within the meaning of mass transportation . Next, you state in your letter that the service will be provided "completely open to the public." Accordingly the FTA has determined that the service is being provided to benefit the public at large and is consistent with the second criterion of mass transportation. Turning now to the third characteristic of mass transportation, the FTA notes that deciding whether service is open door, involves a two-part test. FTA looks both at the level of ridership by the general public as opposed to a defined group and at the intent of the recipient in offering the service. The intent to make service open door can be ascertained from the attempts to make the service known and available to the public. While FTA considers that this marketing effort is best evidenced by publishing the service in the recipient's preprinted schedules, other examples include displaying destination signs on buses, a substantial public ridership and/or attempts to widely market the service, and posting bus stop signs and connections to other transportation routes. According to your letter, the stops and schedules will be publicly announced or advertised. The FTA has previously found that a recipient is not required to exhaust all efforts to make the service known and available to the public, only enough effort to indicate an intent that the service is open door. That level of effort has been reached in this case.

In conclusion, the service in question meets FTA's criteria for mass transportation. If you have any questions, please contact Margaret Foley at (617) 494-2409.

Sincerely,



Richard H. Doyle
Regional Administrator

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION I
Connecticut, Maine,
Massachusetts,
New Hampshire,
Rhode Island, Vermont

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Cambridge, Massachusetts 02142

JUN 8 1995

Ms. Rosemary Doyle
President
Cape Ann Travel Company, Inc.
d/b/a Cape Ann Tours
5 Whistlestop Mall
Rockport, MA 01966

Dear Ms. Doyle:

This responds to your recent undated letters of complaint addressed to President Clinton alleging that a subrecipient of the Cape Ann Transportation Authority (CATA) performed impermissible trolley service during 1994 and intends to resume the service during the summer of 1995. Specifically, you claim that the Cape Ann Transportation Operating Company (CATOC), a private nonprofit organization which receives federal funds through CATA, conducted narrated trolley tours last year outside CATA's fixed-route service and that CATOC plans to apply for a State license to conduct sightseeing and charter service this year.

In its response dated April 6, 1995, CATA argues that the service in question is mass transportation and not sightseeing or charter service. CATA maintains that its drivers did not give narrated tours on the trolley system last year and claims that the service was open to the public at an established fare with a fixed schedule. In response to your contention that CATA intends to perform sightseeing and/or charter service this year, CATA submitted a March 14, 1995, letter addressed to you from the Massachusetts Department of Public Utilities (DPU) advising you that CATA has not petitioned for authority to operate either trolley sightseeing service or charter service. Further, CATA notes that, as a private nonprofit company, CATOC may petition the DPU for a license to provide sightseeing or charter service as long as CATOC does not use publicly funded equipment or receive public funds to operate the service. According to CATA there will be no route deviation because the trolley will travel along its regular fixed-route system. Moreover, CATA points out that its route system has been in effect since the early 1970's and states that Cape Ann Tours operates as a private for-profit sightseeing/charter business over existing previously approved CATA routes.

Before reaching the main issue of this complaint, it is appropriate to address several subsidiary questions you raised. First, in regard to your concerns that CATA has selected CATOC to operate its transportation service, please be advised that FTA's private enterprise participation policy (copy enclosed) emphasizes local decision-making. Thus, the public/private operator choice is to be made at the local level. Furthermore, although Cape Ann Travel was not selected to provide the service, CATA did contract with a private nonprofit organization to operate its system. Next, you complain that it is difficult for you to compete with CATA's fare structure. Under 49 U.S.C. § 5307(d)(1)(I), FTA's jurisdiction over fares is limited to assuring that its recipients have a locally developed process to solicit and consider public comment before raising a fare. Therefore, CATA's fare structure is strictly a local matter and as long as CATA follows its public participation process to ensure consideration of public comment in final plans for fare increases, it will be in compliance with FTA regulations concerning fare structure. Having dispensed with these questions, we will proceed to an examination of the main concerns of your complaint.

The essential issue in this case is whether the service in question is mass transportation or impermissible charter or sightseeing service. The Federal Transit Laws define "mass transportation" as service provided to the public and operating on a regular and continuing basis. 49 U.S.C. § 5302(a)(7). The FTA has articulated other features which logically follow from this definition:

> First, mass transportation is under the control of the recipient. Generally, the recipient is responsible for setting the route, rate, and schedule, and deciding what equipment is used. Second, the service is designed to benefit the public at large and not some special organization such as a private club. Third, mass transportation is open to the public and is not closed door. Thus, anyone who wishes to ride on the service must be permitted to do so.

52 Fed. Reg. 11920, Apr. 13, 1987 (copy enclosed).

You allege that CATA performed impermissible charter service, sightseeing service and school bus service as described below.

Charter Service. Under Section 5323(d) of the Federal Transit Laws, as codified, 49 U.S.C. § 5301, *et seq.*, and the FTA's implementing regulation, 49 CFR Part 604, a recipient of FTA financial assistance may not provide charter service if a private operator in its geographic area is willing and able to do so unless one or more of the exceptions listed at 49 CFR 604.9 apply.

First, you claim that CATA ran buses during the Travel Writers Weekend for the Cape Ann Chamber of Commerce (COC). In its supplemental response dated May 16, 1995, CATA maintains that it advised the COC to "always contact private-for-profit companies" to provide these services. CATA acknowledges that on one occasion it did provide transportation for the COC during the Travel Writers Weekend but only after you gave CATA permission to do so after

withdrawing your offer to provide the service at the last moment which left the COC with no other transportation provider.1/ Second, you claim that CATA provided charter service during St. Peter's Festival and submitted a copy of the "1994 Fiesta schedule" which states that the Fiesta shuttle would run directly between State Fort Park and St. Peter's Square from 6:00 p.m. to 10 p.m. on Friday and from 7:30 p.m. to 10 p.m. on Saturday and Sunday. In answer to this allegation, CATA points out that this schedule was advertised in a newspaper as open to the public. Moreover, it is apparent from the schedule that this service was designed to benefit the public at large and not some special group or organization. Third, you allege that CATA violated the charter regulation because they used a vehicle for a parade in Salem, Massachusetts. CATA responded that the vehicle was used for advertising only, with no ridership. The FTA has previously determined that the incidental use of buses for advertising purposes is not in violation of FTA's charter regulation so long as the vehicles are used for demonstraton purposes only. However, if the advertisers use the vehicles to transport passengers, the services will be considered charter. Fourth, you ask why CATA has an office in Peabody. In its response CATA properly notes that this is not a matter of concern to the FTA and explains that the Peabody office represents CATA's Medicaid Dispatch Office for the Department of Public Welfare for the cities of Salem and Lynn. Indeed, CATA notes that your company, Cape Ann Tours, is a transportation provider for CATA's Medicaid Program. Fifth, you complain that CATA ran buses to the Peabody Shopping Mall. According to CATA, this service was instituted pursuant to a request made by citizens of Gloucester to the Mayor, is open to the public and is outlined in its fare schedule. Accordingly, based on the facts stated above, the FTA concludes that the services provided by CATA do not constitute impermissible charter service.

Sightseeing Service. Under the Federal Transit Laws, as codified, 49 U.S.C. § 5302(a)(7), a recipient of FTA funding may not provide sightseeing service. However, as noted in Question and Answer No. 39 contained in :"Charter Service Questions and Answers," 52 Fed. Reg. 42254, Nov. 3, 1987 (copy enclosed), sightseeing service is not subject to the restrictions placed on charter service, and may be provided by a recipient if it is incidental to the provision of mass transportation.

In support of your contention that CATA performed impermissible sightseeing service, you submitted a video cassette which was taped during a trolley ride in which the driver pointed out places of interest and stated that he was given information to memorize about the area. In

1/ The May 16 letter states that CATA provided this service in the Spring of 1994; however, on May 18, Mr. Wallace called Margaret Foley, Regional Counsel, to clarify this information. Mr. Wallace stated that while CATA had performed the service once in the past, last year the COC hired a school bus operator to provide the service. Mr. Wallace further stated that he believes that this year Cape Ann Tours will be providing these transportation services.

addition, you claim that you saw books describing the Cape Ann area on the desk of Kay Nordstrom, CATA's operator, and contend that is further evidence that CATA performed sightseeing service. In deciding whether service is mass transportation or sightseeing, the FTA reviews the characteristics of the service to determine to which category it most properly belongs. As indicated in copies of CATA's schedules for its fixed-route and trolley system, the provision of trolley service will not result in a deviation of CATA's regular fixed-route service. CATA points out that years ago it attempted to run fixed-route service through Essex but due to low ridership the service was terminated. Although CATA's regular fixed-route service only goes as far as the Essex line while the trolley service runs through Essex, under FTA guidelines, recipients have discretion to reopen or extend a route and are required to conduct a public participation process only in those cases involving major service reductions. See 49 U.S.C. § 5307(d)(I). Accordingly, the FTA finds that CATA's trolley service is mass transportation and not in violation of federal law.

School Bus Service. Section 5323(f) of the Federal Transit Laws, as codified, 49 U.S.C. § 5301, *et seq.*, prohibits the use of FTA-funded equipment or operations to provide service exclusively for the transportation of students and school personnel in competition with private schoolbus operators. However, under FTA's implementing regulation, 49 CFR Part 605, grantees may provide "tripper service," which is regularly scheduled mass transportation service which is open to the public and which is designed to accommodate school students and personnel, using various fare collections or subsidy systems. Section 605.3 of the regulation states that buses used in tripper service must be clearly marked as open to the public and may not carry designations such as "school bus." These buses may stop only at a grantee's regular service stop and must travel within a grantee's regular route service as indicated in the published route schedules.

In your letters of complaint, you allege that CATA is performing school bus service for Gloucester High School. In support of this allegation, you state that normally CATA buses can be waved down, but not the buses coming from the high school. In addition, you claim that your son had to travel 1/4 of a mile from the high school in order to board a CATA bus.

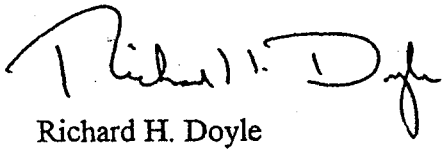
In Lamers Bus Lines, Inc. v. Green Bay Transit System, dated May 10, 1982, the FTA found that loading and unloading passengers in a school yard was not a regular service stop because it was uncertain whether the public would be allowed to use the stop on school property or whether the stop would be visible and known to the public. In Lamers, the FTA stated that both of these criteria must be met in order to find that a stop on school property is a regular stop. With regard to the first criterion, CATA maintains that the service stop located at the high school is open to the public. Moreover, the FTA notes that the bus stop was relocated at the high school after William J. Leary, Superintendent of the Gloucester Public Schools, wrote to Mr. Wallace on September 30, 1992, asking that CATA use the circle at the main school entrance in front of the high school as its bus stop because that area offers the maximum safety for the students who, at that time, were required to cross a heavily trafficked street when entering and exiting the CATA

buses (copy of letter enclosed). Mr. Leary stated that "for safety reasons, CATA has our permission to enter school property and to use the circle as its bus stop." Based on these facts, the FTA finds that CATA's bus stop located at Gloucester High School is publicly accessible. Turning now to the second characteristic of a regular bus stop, the FTA is unable to find that the high school stop is known and visible to the general public. Although Gloucester High School is listed on CATA's published bus schedule, it is unclear whether the public has been sufficiently notified of its location and use as a regular service stop. FTA, therefore, orders CATA to submit documentation that appropriate signs have been placed on the street, indicating to the public where on the school premises the bus stop may be found.

In conclusion, the FTA finds that CATA is not performing charter service or sightseeing service in violation of federal law. With regard to the provision of school bus service, CATA is ordered to report to the FTA within thirty days on the measures it has taken to comply with the terms of this order.

In accordance with 49 CFR 604.19 (copy enclosed), you may appeal this decision within ten days to Gordon J. Linton, Administrator, Federal Transit Administration, 400 Seventh Street, S.W., Room 9328, Washington, DC 20590.

Sincerely yours,



Richard H. Doyle
Regional Administrator

Enclosures: Private Enterprise Participation Notice, 59 Fed. Reg. 21890 (Apr. 26, 1994)
Charter Service, Final Rule, 52 Fed. Reg. 11916 (Apr. 13, 1987)
Charter Service Questions and Answers, 52 Fed. Reg. 42248 (Nov. 3, 1987)
Letter from William J. Leary to CATA, dated 9/30/92
FTA's Charter Regulation, 49 CFR Part 604

cc: Eugene Wallace, CATA

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION VIII
Arizona, Colorado, Montana,
Nevada, North Dakota,
South Dakota, Utah, Wyoming

Columbine Place
216 Sixteenth Street
Suite 650
Denver, Colorado 80202-5120
303-844-3242
303-844-4217 (FAX)

June 12, 1995

Richard C. Thomas, Public Transit Director
City of Phoenix
302 N. First Avenue, Suite 700
Phoenix, AZ 85003

Subject: Charter Service for Super Bowl XXX

Dear Mr. Thomas:

The City of Phoenix has requested an exception under 49 CFR Section 604.9(b)(4) to allow the City to participate directly in charter service for Super Bowl XXX to be held in Phoenix on January 28, 1996. The City has been asked by the Super Bowl XXX Host Committee to provide buses, which will complement the 500 to 700 buses coming from out of State.

A petition for a special events exception must describe the event, explain how it is special and explain the amount of charter service which private charter operators are not capable of providing (49 CFR Section 604.9(d)(2)). The service to be provided must be incidental charter service in accordance with 49 CFR Sections 604.5(i) and 604.9(e), that is , it must not interfere with or detract from mass transit operations.

The City of Phoenix has described the extraordinary size of the Super Bowl and the number of buses that will be needed to serve the event. Further, Phoenix has stated that a combination of public and private contractors will be needed to provide the service . Phoenix has assured FTA that any charter service provided by the City will not interfere with scheduled, fixed-route service. Therefore, Phoenix has met the criteria for a special events exception.

Accordingly, FTA hereby grants an exception to provide charter service during Super Bowl XXX to the extent that private operators are not capable of providing the service (49 CFR Section 604.9(b)(4)). The City shall assure that private operators are notified of their opportunity to participate in the service and are permitted to participate to the maximum extent feasible.

Thank you for submitting the request for an exception in such a timely fashion. Best wishes to the Host Committee and the City for a successful Super Bowl XXX.

Sincerely yours,

Louis F. Mraz, Jr.
Regional Administrator

OPTIONAL FORM 99 (7-90)

FAX TRANSMITTAL # of pages ►

To Al Villaverde	From Fta - Region 8
Dept./Agency	Phone # Denver
Fax #	Fax #

NSN 7540-01-317-7368 5099-101 GENERAL SERVICES ADMINISTRATION

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION I
Connecticut, Maine,
Massachusetts,
New Hampshire,
Rhode Island, Vermont

Transporation System Center
Kendall Square,
55 Broadway
Suite 904
Cambridge, Massachusetts 02142

June 13, 1995

Robert B. Kennedy, Administrator
Lowell Regional Transit Authority
145 Thorndike Street
Lowell, MA 01852

Dear Mr. Kennedy:

Reference is made to your May 19, 1995, response to the complaint filed by Rosemary Doyle of Cape Ann Travel Company, Inc., d/b/a Cape Ann Tours, alleging that Lowell Regional Transit Authority (LRTA) was "doing airport service." You acknowledge that, during the first week of May 1995, LRTA provided airport service to the Lowell Sun Charities for the National Golden Gloves Boxing Tournament, but contend that the service was within the "incidental basis exception of 49 CFR 604.9(b)." According to your letter, the Lowell Sun Charities was unable to make a satisfactory arrangement with a private carrier to transport tournament participants to and from Logan Airport. You further state that LRTA does not anticipate providing this service to any group in the future.

Based upon the information contained in your letter, the service provided did not fall within one or more of the exceptions set forth in the Federal Transit Administration's (FTA) charter service regulation, 49 CFR Part 604. Moreover, there is no "incidental basis exception;" instead, the regulation states that any charter service that a recipient provides under any of the exceptions must be incidental charter service. Furthermore, it appears that LRTA did not complete the public participation process as required by 49 CFR 604.11 when FTA-funded equipment is used to provide charter service. Accordingly, the FTA has determined that LRTA was in violation of the charter regulation in May 1995. The LRTA must cease this practice in the future or jeopardize its federal transportation assistance.

I hope this information is helpful. If you have any questions, please contact Margaret Foley, Regional Counsel, at 494-2409.

Sincerely,

Richard H. Doyle
Regional Administrator

cc: Ms. Rosemary Doyle
(w/copy of LRTA's 5/19/95 letter)

U.S Department
of Transportation

**Federal Transit
Administration**

Administrator

400 Seventh St. S.W.
Washington, D.C. 20590

JUL 27 1995

Mr. Richard J. Simonetta
General Manager
Metropolitan Atlanta Rapid Transit Authority
2424 Piedmont Road
Atlanta, Georgia 30324-3330

Dear Mr. Simonetta:

In response to your letter dated July 14, 1995, I grant your request for an exception to the Federal Transit Administration's (FTA) charter service regulation, 49 CFR Part 604, for charter bus service in support of the 1996 Olympic Games in the Atlanta area from June 1, to August 10, 1996. I understand that this service will require a maximum of six hundred (600) transit buses, as circumstances dictate, for the sole purpose of transporting certain members of the Olympic Family, consisting of athletes and accompanying officials, and media personnel (Rightsholding Broadcasters and Accredited Press) to and from security-restricted competition and non-competition venues. The number of buses required for the Olympic Family System may rise to a maximum of eight hundred (800) for extraordinary situations, such as on July 17, 1996, for Opening Ceremonies when all athletes and accompanying officials and media personnel need to be transported to the Olympic Stadium during a limited time period. This increase will be utilized only when the needs of the Olympic Spectator System are sufficiently diminished. This charter service will operate solely to support the transportation of approximately 50,000 of the members of the Olympic Family as defined above on a fixed, predetermined schedule. Transit buses used in both the Olympic Family System and the Olympic Spectator System will come from transit providers from around the country.

I grant this exception under the special event provision of the regulation, which permits such service where private charter operators are not capable of providing the needed service. 49 CFR 604.9(b)(4). As you indicate, over the last year and a half, the Atlanta Committee for the Olympic Games (ACOG), the coordinating entity for the Olympics, has met with private operators in the Atlanta area regarding service requirements, equipment inventories and estimated market demand for charter service during the 1996 Olympic Games. ACOG has also met with senior officials from national and State organizations that represent private operators in the Atlanta area including the Georgia Motor Coach Association (GMCA), the American Bus Association (ABA), and United Bus Owners of America (UBOA). As a result of these discussions, ACOG determined that private operators in the Atlanta area do not have enough transit buses to meet its needs.

ACOG has determined that only transit buses can satisfy its needs for a variety of reasons. Of special note, the unique security concerns presented by the Olympic Games make imperative the use of transit buses because they (1) afford ease of surveillance and inspection, (2) do not include

restrooms, underbelly storage, or overhead storage that pose additional security risks and impose additional inspection requirements, (3) have seating that is smooth and easy to inspect, (4) have large windows that provide good lighting, and (5) have large wheel wells that are easy to inspect. I believe that this security factor alone justifies your requirement to use transit buses.

As you note, other factors support the use of transit buses. Transit buses provide wide aisles for transportation of equipment, two-doors for access/egress, and interior system information displays that will make an important contribution to accommodating the multilingual Olympic Family. In addition, I certainly support your desire to use new or nearly new buses for the Olympics. This desire, however, is not a factor I have considered in granting the exception.

In a similar context, Congress has clearly signaled its intent that exceptions from our charter regulation be granted when extraordinary circumstances are present, noting the 1987 Pan American Games as an example of a situation that supported the use of "the services of the Indianapolis Public Transportation Corporation in meeting the extraordinary transit needs of the international competition." S. Rep. No. 423, 99th Cong., 2d Sess. 66 (1986). Of course, the 1996 Centennial Olympic Games is an extraordinary event for which transit needs will far exceed those of the 1987 Pan American Games. The Olympic Games in Atlanta will be the largest Olympic Games in history; twice as large as the 1984 Olympic Games in Los Angeles. Moreover, Congress has recognized the extraordinary transit needs of the 1996 Olympic Games and the Paralympics by specially appropriating $16 million dollars for the costs of planning, delivery and temporary use of transit vehicles. Department of Transportation and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-331, 108 Stat. 2471 (1994).

I note also that private operators will provide service during the Olympic Games for transportation demand commensurate with their service capabilities. On June 5, 1995, AGOG issued a Request For Quotations from private providers to provide transportation service to Olympic sponsors and to ACOG itself. ACOG estimates that approximately 750 over-the-road coaches will be used by Olympic sponsors and that a smaller number will be used by ACOG to provide Olympic Family services not requiring the special transportation requirements of the Olympic Family System fleet. In addition, of course, the Olympics will generate very substantial independent demand for transit services on the part of spectators, vendors, and local residents. Please advise Susan E. Schruth, Regional Administrator in Atlanta, on a monthly basis, of your efforts to coordinate the use of private operators for these charter opportunities.

Sincerely,

Gordon J. Linton

JUL 3 1 1995

The Honorable Jon Kyl
United States Senate
Washington, D.C. 20510-0304

Dear Senator Kyl:

This responds to your letter enclosing correspondence from your constituent, Mr. R.K. Vollmer, President of Nava-Hopi Tours, Inc. Mr. Vollmer expresses concern that the use of subsidized transit buses during the 1996 Olympic Games in Atlanta will preclude private operators from providing service for that event. You request an explanation and pertinent written information concerning this matter.

The 1996 Olympic Games in Atlanta are expected to be the largest in history - according to projections, attendance will be twice that of the 1984 Olympic Games in Los Angeles. Recognizing this extraordinary need, Congress provided that in Fiscal Year 1995 "$16,000,000 shall be available for grants for the costs of planning, delivery, and temporary use of transit vehicles for the special transit needs of the XXVIth Summer Olympics and the Xth Paralympiad." Public Law 103-33 (September 30, 1994).

The transit buses to be used for the members of the Olympic Family, defined as athletes, accompanying officials, and media personnel, will also operate on a fixed, predetermined schedule. These transit vehicles will not be open to the general public, and will therefore be providing charter service as defined in FTA's charter service regulation, 49 CFR Part 604. Since the regulation prohibits FTA recipients from providing charter service if there is a willing and able private operator, the Metropolitan Atlanta Rapid Transit Authority (MARTA), on behalf of the other transit agencies lending vehicles for this event, requested an exception under 49 CFR 604.9(b)(4) to provide service for the Olympic Family (see enclosed copy of letter from Richard J. Simonetta, General Manager of MARTA).

Under that provision, recipients may petition FTA to provide charter service for an event of an extraordinary or singular nature. One of the factors FTA considers in reviewing such requests is the recipient's attempts to determine whether private operators are able to provide the service. Attached to MARTA's request is a chronology of contacts that ACOG has had with private operators during the past year and a half. According to MARTA, these discussions indicate that local private operators do not have a sufficient quantity of transit buses to meet the needs of the Olympics. MARTA states that for various security reasons, transit buses, rather than over-the-road coaches are needed to provide this service.

ACOG will nonetheless use private operators to support other transportation needs for official Olympic sponsors and the Olympic Family that are appropriate to their service capabilities. Please

CONCUR
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find enclosed a copy of ACOG's request for quotations for charter service for the Olympic sponsors.

FTA granted MARTA's request after considering all of the factors outlined above.

Mr. Vollmer states that the use of publicly subsidized buses during the Olympics will not affect hi company, but that it may be affected by the granting of waivers for events such as the Phoenix Super Bowl. Please note that upon receipt of such requests, FTA applies the criteria of 49 CFR 604.9(b)(4) on a case-by-case basis.

I trust that you find this information helpful. Please do not hesitate to contact me if you need further information concerning this matter.

Sincerely,

/s/ original signed by

Gordon J. Linton

Enclosures

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

In the matter of:	)	
Great American Trolley Co., Inc.	)	
Complainant	)	CHARTER COMPLAINT
	)	49 U.S.C. § 5323(d)
Coastal Rapid Public Transit Authority	)	TRO-1V/SC-9/95-01
Respondent	)	

DECISION

SUMMARY

Great American Trolley Co., Inc. (GAT), filed this complaint with the Federal Transit Administration (FTA), alleging that Coastal Rapid Transit Authority (CRPTA) is providing charter service in violation of the FTA charter regulation, 49 CFR Part 604. The complaint specifically alleged that CRPTA had entered into an agreement to provide charter service for Myrtle Beach Farms Co., Inc., d/b/a Broadway at the Beach (BATB), a commercial resort development. Applying a balancing test to the service in question, FTA finds that the service is in fact mass transportation, and therefore, not in violation of the charter service regulations. However, CRPTA has failed to modify existing schedules or publish supplementary or amendatory schedules reflecting the availability of the BATB service including routing, scheduling or fare information. In order to correct this deficiency, such action must be taken to properly advertise this service. CRPTA must report to FTA within thirty days on the measures it has taken to comply with the terms of this order.

CRPTA and BATB entered into a "Trolley Operations Contract" on May 12, 1995 with transportation services commencing May 25, 1995, and terminating January 3, 1996; BATB having the option to extend the contract until May 1, 1996.

COMPLAINT

GAT is a private transit company operating trackless trolleys (buses) in South Carolina. By letters dated April 27, 1995, May 1, 1995, and May 21, 1995, GAT filed this complaint with the FTA alleging that the service in question is actually a form of prohibited charter service. A copy of the "Trolley Operations Contract" was forwarded by the respondent with its response. The definition of charter service found in FTA's regulations at 49 CFR § 604.5(e) is as follows:

> ...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...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....

Specifically, GAT complains that CRPTA contracted with BATB to provide charter services within BATB, a commercial resort development consisting of restaurants, retail shops, entertainment and other business establishments along the 21st through 29th Avenue North area in Myrtle Beach, South Carolina. According to the complaint, GAT has several trackless trolleys which it operates in and around Myrtle Beach; was ready, willing and able to contract with BATB to provide the desired service; but was underbid by CRPTA resulting in the contract being awarded to CRPTA by BATB. GAT bases its complaint upon nine allegations.

Allegation #1: The project in question is a privately owned amusement park called BATB located in the City of Myrtle Beach, South Carolina. BATB is located at 21st & Bypass #17.

Allegation #2: GAT has the only approved service to BATB.

Allegation #3: CRPTA has equipment which is totally funded by the Federal government. CRPTA has no approved route to BATB.

Allegation #4: BATB went out for bids to provide transportation for its employees and customers. This transportation requested would be confined totally to within the amusement park.

Allegation #5: CRPTA submitted a bid to the request for proposal using a trolley funded by FTA. CRPTA was awarded the contract.

Allegation #5A: GAT asserts that it is a gross abuse of the public trust to use Federally funded equipment to provide service to a private amusement park and take business from a private provider (GAT).

Allegation #6: GAT has several trackless trolleys which it operates in and around Myrtle Beach. GAT was ready, willing and able to provide the service. GAT bid on the contract but was underbid by CRPTA.

Allegation #7: The contracting entity in this case, BATB, has contracts with the tenants in the amusement park wherein BATB is committed to providing transportation service to the employees of the tenants albeit totally within the park. That is, the employees will park their cars within the park and take contracted for transportation to the tenant properties.

Allegation #8: The fare, the route, the hours of service and the frequency of service will all be set by BATB. Moreover, BATB has required that the vehicle to be used will be a trackless trolley. BATB will pay the transportation provider an hourly contract rate and the fare to passengers in the park will be free.

Allegation #9: The service constitutes charter service and not mass transit. GAT has the only approved service to the park. CRPTA will not be setting rates, schedules, or selecting equipment to be used. Moreover, this service is for the benefit of a private organization, namely BATB. Only employees and patrons of BATB can use this service.

RESPONSE

GAT's complaint was forwarded to CRPTA for response and by letter dated June 27, 1995, its response was provided. CRPTA asserts that it is a private, non-profit corporation which provides mass-transportation services in Horry and Georgetown Counties, South Carolina. CRPTA admits that it utilizes Federal as well as state and local funds in the provision of these services. Moreover, CRPTA asserts that services it provides at BATB, which is located in Horry County, constitute mass transportation allowable under the decisions of the FTA and Federal law and regulation.

In response to allegation #1, CRPTA asserts that GAT's characterization of BATB as a "privately owned amusement park" is misleading. CRPTA describes the project as a development consisting of commercial retail space, theaters, restaurants and retail shops which are leased to individuals and are open to the public. It maintains that BATB is a major development open to and frequented by the public through the use, in part, of connecting mass transit service provided by CRPTA.

CRPTA denies GAT's second allegation that GAT has the only approved service to BATB. CRPTA asserts that it has continuously operated routes in the area of BATB for years and will have the capacity to provide connecting service to the area. CRPTA states that it has been designated by the City of Myrtle Beach as the designated recipient of funds and that no further authorization is needed for transporting passengers within the limits of a municipality.

In response to allegation #3, CRPTA admits to purchasing certain equipment (including trolleys which it anticipates using at Broadway at the Beach) but asserts that it has continuously serviced the surrounding area..

CRPTA contends that with regard to allegation #4, it submitted a proposal to BATB to provide public transportation for employees and members of the public which frequent the theaters, restaurants, and retail shops. CRPTA asserts that although the service which it has contracted for will take place within the BATB area, CRPTA will be able to provide connecting service outside the area.

With regard to allegation #5, CRPTA asserts that it submitted a proposal using Federally funded equipment which was accepted by BATB.

CRPTA asserts in response to allegation #5A that its proposal to provide service is a lawful use allowed by Federal law and regulation. Furthermore, CRPTA contends that BATB is a major commercial facility open to the public and not a private amusement park.

With regard to allegation #6, CRPTA states that it is without knowledge as to GAT's ability to provide service to BATB and therefore denies same. It also states that it lacks sufficient information to form an opinion as to whether GAT provided a bid to perform the service in question but admits that GAT provides very limited service within the Myrtle Beach area.

In response to allegation #7, CRPTA asserts that it will have an open-door policy making its services available not only to employees but to the public as well.

CRPTA asserts that with regard to allegation #8, CRPTA will establish fares, routes, hours of service and frequency of service; not BATB. CRPTA also maintains that it retains control over the service to be provided.

Finally, with regard to allegation #9, CRPTA denies that its agreement with BATB constitutes charter service since CRPTA sets its own rates and schedules and maintains control over the equipment it will use. CRPTA maintains the service is designed to benefit the public at large and that it is open door.

REBUTTAL

By letter dated June 27, 1995, FTA forwarded a copy of CRPTA's response and notified GAT that it would be provided 30 days from receipt to rebut that response. FTA advised GAT that upon review of the rebuttal, a review of the evidence would be conducted and a decision rendered. GAT submitted its rebuttal to FTA by letter dated August 21, 1995.

In its rebuttal, GAT asserts that at the time CRPTA submitted its bid for the service, CRPTA had no connecting service to BATB nor does it provide connecting service at the present time. GAT

alleges that CRPTA has applied to the South Carolina Service Commission for authority to operate connecting service but that it has not yet received approval.

GAT alleges that only it has been authorized by the City of Myrtle Beach to service BATB and included a letter from the City Manager modifying GAT's route to include service to BATB. GAT maintains that the vehicle in question was funded by FTA to service specific routes but that the vehicle is used instead as an amusement park trolley, not in mass transportation as intended. GAT encloses pictures which depict a trolley with BATB signage. GAT argues that the vehicle is only used at the amusement park and because of the signage, can only be used at the park. GAT furthermore argues that BATB controls the usage of the vehicle and points to requirements BATB imposes upon said use such as the location of the route or routes and the times that such service must be provided. GAT acknowledges that CRPTA's contract with BATB contains provisions which reserves to CRPTA the sole responsibility and authority for reducing, setting, and modifying routes, schedules and services but alleges that BATB in fact controls said operations since it is given the right to terminate should CRPTA materially change its rates, routes, and schedules.

Finally, GAT alleges that it is a willing and able private provider and, that under FTA's charter regulations, CRPTA should be prohibited from providing the service in question.

DISCUSSION

The essential issue in this matter is whether the service provided by CRPTA is charter or permissible mass transportation.

The FTA has rendered several decisions regarding what constitutes charter service. Those decisions include Seymour Charter Bus Lines v. Knoxville Transit Authority, TN-09/88/01; Blue Grass Tours and Charter v. Lexington Transit Authority, URO-III-1987; and most recently, Ark Transportation, Inc. v. Marble Valley Regional Transit District, TRO-1/VT-12/94-01. Although GAT does not cite prior FTA decisions in support of its claims, it raises issues similar to those raised in the above cited decisions. Seymour and Bluegrass were cases involving service in and around university campuses which the FTA determined was charter and not mass transportation. Ark involved service in Killington, Vermont which parallels in numerous respects the service CRPTA intends to provide to Broadway at the Beach.

The Federal transit laws, as codified at 49 U.S.C. §5302(a)(7) define mass transportation as service provided to the public and operating on a regular and continuing basis. The FTA has further distinguished charter service from mass transportation by characterizing it as: 1) being under control of the grantee, who generally is responsible for setting the route, rate, and schedule and deciding what equipment is used, 2) being designed to benefit the public at large and not some special organization such as a private club, and 3) being open to the public and not closed door so that anyone who wishes to ride on the service must be permitted to do so. (52 Fed. Reg. 11920, April 13, 1987) On the other hand, FTA has defined the main features of charter as: 1)

the service is by bus or van; 2) the service is to a defined group of people; 3) there is a single contract between the recipient and the riders, not individual contracts between the recipient and each rider; 4) the patrons have the exclusive use of the bus; 5) the charge for the bus is a set rate; and 6) the riders have the sole authority to set the destination. (52 Fed. Reg. 11919, April 13, 1987) GAT argues that because the service provided by CRPTA does not contain the elements characteristic of mass transportation, that it is therefore charter service. GAT claims that because of a cancellation clause included in CRPTA's contract with BATB, BATB has control over the service rendered thus effectively placing it in the position of establishing the route, rates, schedule, and decision of what equipment is to be used. GAT further argues that permanent advertising by BATB upon the trolley dictates that there can be no discretion as to which vehicle can be used, thus placing the operation of the vehicle in the control of BATB.

The Issue of Control

The operative clauses in question invoked by GAT in asserting that BATB controls the operation of the service are found in paragraphs 2 and 8 of CRPTA's Operations Contract. Paragraph 2 reads in part:

> " ...Notwithstanding any provision to the contrary, CRPTA reserves the sole responsibility and authority for reducing, setting, and modification of routes, schedules and services provided under this agreement, provided, however, that any material change by CRPTA in the rates, routes and schedules provided under this agreement shall give BATB the right to terminate this agreement...."

Paragraph 8 provides in part:

> "...In the event a CRPTA trolley is out of service for one (1) hour, CRPTA shall provide a replacement trolley....Replacement trolley will carry no advertising. If a CRPTA mini-bus (Goshen) is substituted at the discretion of CRPTA for trolley during extended service hours, additional BATB signage identification will be applied."

CRPTA maintains that it alone establishes the fares, routes, hours of service and frequency of service based on its proposal to BATB. FTA finds CRPTA's argument persuasive. The terms of the Operations Contract clearly reserve the sole responsibility and authority to CRPTA for reducing, setting, and modification of routes, schedules and services. It clearly authorizes CRPTA to substitute at its discretion a mini-bus for the trolley during extended hours of service. It allows CRPTA the discretion of picking up and dropping off passengers anywhere along the route as determined by CRPTA. It provides that CRPTA shall furnish the operators, fuel, and supplies at its own expense and that the operators and other persons employed by CRPTA in or about the performance of this service shall be and remain the employees of CRPTA and not BATB. And finally, it reserves to CRPTA the authority to approve any requested advertising or vehicle markings in advance. FTA believes these facts outweigh any influence BATB could bring

to bear due to its right to terminate since clearly the contract must be mutually beneficial to each party with each having demands, necessitities, and legal obligations which dictate the nature and manner of service to be provided.

Many of these same factors existed in Ark wherein FTA determined that the provider in question, Marble Valley Regional Transit District (MVRTD), developed the routes and schedules identified in its Operating Agreement and that it had the final say in setting schedules and increasing or decreasing routes and scheduling based on demand and volume. In addition, MVRTD had final approval authority over all advertising placed on the bus, even though BATB's counterpart in Ark, Killington, had exclusive advertising rights on the buses. FTA determined that this provision did not diminish MVRTD's control or operation of the service. Ark and the instant case are distinguishable from Seymour and Blue Grass, cases involving service to university campuses wherein the universities were found to have set the schedules and fares rather than the transit operator and had the prerogative to alter routes and schedules. Such is not the case in the matter before us here.

The Issue of Whether Service is Designed to Benefit the Public at Large

GAT maintains that the service provided by CRPTA is confined to the employees and customers of a private amusement park and therefore not designed to benefit the public at large It furthermore asserts that CRPTA has no connecting service to BATB and that GAT has the only approved service to the park.

In this regard, it should be noted that in the preamble to the charter regulation, FTA states that service is designed to benefit the public at large when it serves the needs of the general public and not some special organization such as a private club. (52 Fed. Reg. 11920, April 13, 1987) CRPTA argues that BATB is a development of commercial retail space frequented by the public and that members of the public as well as employees will be provided transportation. CRPTA furthermore adds that it anticipates providing connecting service to the park at some point in the future although none is currently provided.

It is clear that service is not intended for an exclusive group of riders, as appeared to be the case in Bluegrass and Seymour, i.e. college students, but that it is available to anyone wishing to board it. In addition, although FTA recognizes connecting service would enhance the availability of the service to the public, it is not essential that it be provided in order to cause the service in question to be determined to be mass transportation; that is, under the control of the grantee, of benefit to the public at large, and open door. Finally, for purposes of the Federal government, CRPTA has submitted a legal opinion stating that it has the legal authority and capacity to provide mass transit service and to receive and disburse Federal funds for that purpose. It has entered into contractual agreements with FTA agreeing to provide mass transit services in accordance with applicable Federal rules and regulations. In this regard, no further authorization is needed for purposes of complying with FTA mandates. Should additional local

authorization be deemed necessary by the State of South Carolina, that is an issue of purely local concern.

The Issue of Whether Service is Open Door

GAT maintains that the service provided by CRPTA is for the benefit of a private organization, i.e. BATB, and that only employees and patrons of BATB can use this service. Once again, CRPTA argues that its service is open to all employees and members of the public seeking transportation in the area.

In determining whether service is open door, FTA looks not only to the level of ridership by the general public as opposed to a defined group, but also to the intent of the recipient who provides the service. The intent to provide service that is open door can be discerned by the efforts that a recipient has made to make the service known and available to the public. FTA thus takes into consideration the efforts a recipient has made to market the service. Generally, FTA considers that this marketing effort is best accomplished by publishing the service in the recipient's pre-printed schedules.

CRPTA states that schedules will be posted not only on the CRPTA vehicles but also throughout the restaurants, retail shops and theaters of the development as well as throughout Horry and Georgetown Counties. CRPTA provided no schedules as evidence of this assertion however, and, in fact, the only schedule provided was provided by GAT as exhibit 5 to its rebuttal. That schedule is entitled, "System-Wide Route Map/Year Round Schedule/CRPTA/Effective February 1995." It lists various route information, maps, and fares for services provided by CRPTA. Nowhere does it list service or route information relative to the BATB service. Since the Operating Agreement is dated May 12, 1995, the schedule obviously would not reference the BATB service. No evidence was presented, however, which indicates that the schedule was updated or that other commonly distributed schedules to the general public are now in existence which advise the public of the availability of service at BATB. It therefore is not apparent that CRPTA has taken efforts to market the service and make the service known and available to the public, the second test in determining whether the service is, in fact, open door. In consideration of the forgoing, FTA has determined that although the service does not appear to be provided to an exclusively defined group, and is thus, "open door", CRPTA has failed to adequately make the availability of the service known to the general public. Assuming, however, that CRPTA reprints its existing schedules or provides supplementary schedules which depict and describe availability of the BATB service, FTA finds that the service meets the third mass transportation criterion of "open door".

CONCLUSION

After a thorough investigation, FTA concludes that the service provided by CRPTA is mass transportation because it substantially conforms to the following criteria: 1) it is under the control

of the grantee; 2) it is designed to benefit the public at large; and 3) it is open door. With regard to the third element, however, FTA finds that CRPTA has failed to adequately inform the public of availability of service at BATB. FTA accordingly orders CRPTA to reprint existing schedules or publish amendatory schedules which clearly notifie the public of the availability of service at BATB including routing, scheduling, and fare information. CRPTA must report to FTA within thirty days on the measures it has taken to comply with the terms of this order.

Paul T. Jensen
Regional Counsel

October 2, 1995
Date

Susan E. Schruth
Regional Administrator

October 2, 1995
Date

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION I
Connecticut, Maine,
Massachusetts,
New Hampshire,
Rhode Island, Vermont

Transporation System Center
Kendall Square,
55 Broadway
Suite 904
Cambridge, Massachusetts 02142

OCT 2 3 1995

Ms. Rosemary Doyle
President
Cape Ann Travel Company, Inc.
d/b/a Cape Ann Tours
5 Whistlestop Mall
Rockport, MA 01966

Dear Ms. Doyle:

This responds to your letters of complaint dated September 6 and 16, 1995, alleging that the Cape Ann Transportation Authority (CATA) performed impermissible charter service during Schooner Festival weekend on September 2, 1995. In addition, your September 6 letter suggests that CATA is violating charter regulations by transporting students to after-school events.

Before addressing the essential issue of your complaint, it is appropriate to address a subsidiary question you raised. You complain that it is difficult for you to compete with CATA's fare structure. Under 49 U.S.C. § 5307(d)(1)(I), the FTA's jurisdiction over fares is limited to assuring that its recipients have a locally developed process to solicit and consider public comment before raising a fare. Therefore, CATA's fare structure is strictly a local matter and as long as CATA follows its public participation process to ensure consideration of public comments in final plans for fare increases, it will be in compliance with FTA regulations concerning fare structure. Having dispensed with this question, we will proceed to the main concern of your complaint.

Based upon the information contained in CATA's September 18, 1995, response, the service in question does not meet the charter criteria of being provided under a single contract for the exclusive use of a defined group of people who have authority to decide the itinerary. 49 CFR § 604.5(e). Instead, the service falls more closely within the definition of mass transportation which

is defined under the Federal Transit Laws as service provided to the public and operating on a regular and continuing basis. 49 U.S.C. § 5302(a)(7). From this provision, the FTA has identified several salient characteristics of mass transportation: service that is under the control of the provider, designed to benefit the public at large, and open to the public and not closed door. 52 Fed. Reg. 11919-20 (April 13, 1987).

In his September 18 response, Eugene Wallace, Administrator of CATA, maintained that the service in question operates over CATA's regular fixed-route system. Moreover, during an October 19, 1995, conversation with Margaret Foley, FTA Regional Counsel, Mr. Wallace stated that CATA sets the route, rate and schedule and decides what equipment is used in providing the service. Therefore, the FTA finds that CATA exercises sufficient control over the service within the meaning of mass transportation.

Next, CATA claims that the service is not for the exclusive use of any group or organization. Accordingly, the FTA has determined that the service is being provided to benefit the public at large and is consistent with the second criterion of mass transportation. This second element of mass transportation overlaps with FTA's third requirement for mass transportation, namely that the service be "open door." In determining whether service is open door, FTA looks not only to the level of ridership by the general public as opposed to a defined group, but also to the intent of the recipient who provides the service. The intent to provide service that is open door can be discerned by the attempts that a recipient has made to make the service known and available to the public. FTA thus takes into consideration the efforts a recipient has made to market the service. Generally, FTA considers that this marketing effort is best evidenced by publishing the service in the recipient's preprinted schedules, however, other examples include displaying destination signs on buses, a substantial public ridership, public advertisements, and posting bus stop signs and connnections to other transportation routes. A recipient is not required to exhaust all these efforts to make the service known and available to the public, only enough effort to indicate an intent that the service is open door. In this regard, FTA notes that CATA's transportation schedule for Schooner Festival weekend was advertised in a local newspaper which stated that the service was being provided to ease traffic congestion. Moreover, CATA submitted a copy of its regular route schedule which lists service to and from Gloucester High School as well as several other schools. Mr. Wallace maintains that the buses that stop at the schools are open to the public and do not carry school bus designations. Thus, it appears that the transportation CATA provides to students for after-school events is "tripper service" which is defined at 49 CFR § 605.3 as regularly scheduled mass transportation service which is open to the public and designed to accommodate school students. Accordingly, the FTA finds that the service in question conforms to the third criterion of mass transportation in that it is open to the public and not closed door.

In conclusion, the FTA finds that CATA is not performing charter service in violation of federal regulations. In accordance with 49 CFR § 604..19, you may appeal this decision within ten days to Gordon J. Linton, Administrator, Federal Transit Administration 400 Seventh Street, S.W., Room 9328, Washington, D.C. 20590.

We hope this information is helpful. If you have any questions, please contact Margaret Foley at (617) 494-2409.

Sincerely,

Richard H. Doyle
Regional Administrator

Enclosures: 49 CFR Part 604 - Charter Services

cc: Mr. Eugene Wallace, CATA

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION I
Connecticut, Maine,
Massachusetts,
New Hampshire,
Rhode Island, Vermont

Transporation System Center
Kendall Square,
55 Broadway
Suite 904
Cambridge, Massachusetts 0214-

October 10, 1996

Rosemary Doyle, President
Cape Ann Travel Company, Inc.
d/b/a Cape Ann Tours
5 Whistlestop Mall
Rockport, MA 01966

Dear Ms. Doyle:

This responds to your letters of complaint alleging that the Cape Ann Transportation Authority (CATA) is performing impermissible charter service. Specifically, in your undated letter received in this office July 3, 1996, you claim that CATA is performing charter service for the joint Chambers of Commerce (COC) and is providing trolley service along the same route that Cape Ann Tours has operated over for the past eight years. In your letter of July 5, 1996, you contend that CATA violated charter regulations in connection with transportation service for the Boston Consulting Group (BCG); and you also complain because CATA selected the Cape Ann Transportation Operating Company (CATOC) as their operator instead of your company. CATA submitted responses to your complaint on July 11 and 12, 1996; however, you did not submit a rebuttal.

With regard to your allegation that CATA is providing impermissible charter service for the COC, CATA maintains that Federal funds and Federally funded equipment are not used to provide the "Rockport Shuttle" service. Furthermore, in support of its statement that the service is open to the public and operates as regularly scheduled service on a fixed-route system, CATA submitted a copy of the printed route schedule for the "Rockport Shuttle." Moreover, CATA claims that it does not provide transportation service solely for the use of any organization or group. In response to your claim that CATA operates trolley service over the same route you have used for the past eight years, CATA points out that its operations predate those of Cape Ann Tours; and while your company operates as a private for-profit charter and sightseeing business, CATA operates as a public transit provider.

Pursuant to FTA's charter service regulation, 49 CFR Part 604, a recipient of FTA funding may not provide charter service using FTA-funded equipment or facilities if there is a private operator in its geographic area willing and able to provide that charter service, unless one or more of the exceptions listed at 49 CFR 604.9(b) apply. Recipients are subject to the charter regulation but only to the extent that they use FTA-funded equipment or facilities to provide charter service. If

a recipient sets up a separate company that uses only locally funded equipment and facilities and operates the service solely with 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 FTA's charter rule does not apply. 52 *Federal Register* 42248 (November 3, 1987) According to CATA, no Federal funds or Federally funded equipment are being used to provide the "Rockport Shuttle" service. However, even if Federally funded equipment and facilities were used to provide the service in question, based upon CATA's July 11 response and the "Rockport Shuttle" route schedule submitted therewith, the service in question does not meet the charter criteria of being provided under a single contract for the exclusive use of a defined group of people who have authority to decide the itinerary. 49 CFR § 604.5(e). Rather, the service falls more closely within the definition of permissible mass transportation which is defined under the Federal Transit Laws as service provided to the public and operating on a regular and continuing basis. 49 U.S.C. § 5307(a)(7).

Next, you assert that CATA "compounded" the alleged charter violations by notifying you of an opportunity to perform charter service for the BCG. To substantiate your claim, you submitted a copy of CATA's April 25, 1996, letter to you which states that, "[i]f you are interested and are able to provide transportation for the enclosed [BCG] schedules, please call...with a price quote as soon as possible." In his July 12, response Mr. Wallace explains that CATA only assisted the BCG in locating private operators to perform charter service, but did not supply any vehicles or equipment, Federally funded or otherwise, and did not contract with any operators to provide the service in question. In addition, you complain that CATA selected CATOC, a private nonprofit organization, as its operator instead of Cape Ann Tours. In this regard, FTA's jurisdiction is limited to requiring its grantees to follow the procurement standards set forth at 49 CFR § 18.36 and FTA Circular 4220.1D, "Third Party Contracting Requirements" in order to assure full and open competition. Otherwise, the choice of operator is to be made at the local level.

In conclusion, the FTA finds that CATA did not perform charter service in violation of Federal regulations. In accordance with 49 CFR § 604.19, you may appeal this decision within ten days of receipt to Gordon J. Linton, Administrator, Federal Transit Administration, 400 Seventh Street, S.W., Room 9328, Washington, D.C. 20590. You must include in your appeal the basis for the appeal and evidence to support your position and provide a copy of the appeal to CATA. I hope this information is helpful. If you have any questions, please contact me at (617) 494-2409.

Sincerely,

Margaret E. Foley

Margaret E. Foley
Regional Counsel

cc: CATA

U.S. Department of Transportation
Federal Transit Administration

REGION I
Connecticut, Maine,
Massachusetts,
New Hampshire,
Rhode Island, Vermont

Transporation System Center
Kendall Square,
55 Broadway
Suite 904
Cambridge, Massachusetts 02142

November 7, 1996

Rosemary Doyle, President
Cape Ann Tours and Trolley
P. O. Box 278
Rockport, MA 01966-0378

Dear Ms. Doyle:

This is to advise you that we are not considering your letter of October 24, 1996, an appeal of the Federal Transit Administration's (FTA) October 10, 1996, decision because your letter does not meet the standard set forth at 49 CFR § 604.19 (copy enclosed) which requires that an appeal present evidence that there are new matters of fact or points of law that were not available or not known during the investigation of the complaint. The October 10 ruling held that the service being provided by the Cape Ann Transportation Authority (CATA) is not impermissible charter service. In the preamble to the charter regulations, FTA states that the main features of charter are: 1) the service is by bus or van; 2) the service is to a defined group of people; 3) there is a single contract between the recipient and the riders, not individual contracts between the recipient and each rider; 4) the patrons have the exclusive use of the bus; 5) the charge for the bus is a set rate; and 6) the riders have the sole authority to set the destination. (52 *Fed. Reg.* 11919, April 13, 1987) (copy enclosed). Charter service is usually thought of as a one-time provision of service and the user, not the recipient, has the control of the service. *Id.*

In contrast, the Federal transit laws define "mass transportation" as service provided to the public and operating on a regular and continuing basis. 49 U.S.C. § 5302(a)(7) (copy enclosed). From this provision, FTA has identified three salient characteristics of mass transportation:

> First, mass transportation is under the control of the recipient. Generally the recipient is responsible for setting the route, rate, and schedule, and deciding what equipment is used. Second, the service is designed to benefit the public at large and not some special organization such as a private club. Third, mass transportation is open to the public and is not closed door.

52 *Fed. Reg.* 11919-20.

As stated in FTA's October 10 decision, even if Federally funded equipment and facilities were used to provide the transportation in question, based upon CATA's July 11, 1996, response and the Rockport Shuttle route schedule submitted therewith, the service in question does not meet

the charter criteria of being provided under a single contract for the exclusive use of a defined group of people who have authority to decide the itinerary. 49 CFR § 604.5(e). Rather, the service falls more closely within the definition of permissible mass transportation because it is open to the public and operates on a regular and continuing basis.

Furthermore, the FTA found that CATA did not violate the charter regulations by notifying you of an opportunity to perform charter service for the Boston Consulting Group (BCG). You note in your October 24 letter that you were asked to submit a bid directly to CATA instead of to the BCG and although this request may have given the appearance that CATA was involved in providing the service, CATA explained in its July 12 response that it only assisted the BCG in locating private operators to perform charter service, but did not provide any vehicles or equipment and did not contract with any operators to provide the service. While FTA does not require grantees to give members of the public who request it the name of a "willing and able" private provider, we recognize that this information may be beneficial to the public and encourage grantees to provide it. 52 *Fed. Reg.* 42250 (November 3, 1987) (copy enclosed). Grantees who have a roster of several private providers may use their discretion in determining which names to give to a member of the public who calls. *Id.* In this case CATA went further and notified you of the opportunity to provide charter service and asked you to submit a price quote. The FTA recommends that in the future, if a member of the public calls CATA for charter services, CATA should only provide the names of willing and able private providers so as not to create the appearance that the charter regulations are being circumvented.

In your October 24 letter, you state that you have not been at the Whistlestop Mall address since July 1995. You complain because FTA forwarded CATA's responses to your complaint to that address, but also state that you did not see any sense in submitting a rebuttal thereto. Unfortunately, you do not usually put a return address on your correspondence, and it was not until the Post Office returned the October 10 decision that FTA first realized mail is no longer delivered to the old address. Please be assured that we will keep a record of your new address in our files. In order that our records remain accurate, we ask that you include your address on future correspondence so we will know whether you are still at the same location.

Sincerely,

Margaret E. Foley

Margaret E. Foley
Regional Counsel

cc: Joseph Randazza, Acting Administrator, CATA

Enclosures: 49 CFR Part 604
49 U.S.C. 5301, et seq.
52 *Fed. Reg.* 11916 (April 13, 1987)
52 *Fed. Reg.* 42250 (November 3, 1987)

Chron

US Department
of Transportation
**Federal Transit
Administration**

Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

DEC 31 1996

Mr. Richard A. White
General Manager
Washington Metropolitan Area Transit Authority
500 Fifth Street, N.W.
Washington, D.C. 20001

Dear Mr. White:

This responds to your request for an exception under 49 CFR 604.9(b)(4) that would permit the Washington Metropolitan Area Transit Authority (WMATA) to provide charter service to any governmental or political agency affiliated with the inaugural of the President and Vice President of the United States, from January 15, 1997, through January 22, 1997.

The Federal Transit Administration's (FTA) charter regulation, 49 CFR Part 604, prohibits recipients from providing charter service if there is a willing and able private operator. Under section 604.9(b)(4), a recipient may petition FTA to provide charter service for special events of national importance to the extent that private charter operators are not capable of providing the service. The key determinant in this exception is the extent to which private charter operators are not capable of providing service for the event. See, 52 *Federal Register* 11925, April 13, 1987.

FTA has consulted organizations representing local private operators in connection with your request. These organizations have indicated that they have no objection to FTA's granting of this exception, on the condition that all charter trips provided thereunder originate and terminate within WMATA's service area, and that WMATA provide only those services that private operators are unable to provide.

Accordingly, I hereby grant an exemption under 49 CFR 604.9(b)(4) permitting WMATA to provide charter service during the inaugural of the President and Vice President of the United States, from January 15, 1997, through January 22, 1997. This exception allows WMATA to provide only charter trips originating and terminating within its service area, and only those services that private operators are unable to provide.

Sincerely,

Gordon J. Linton

Clinton

U.S. Department
of Transportation
**Federal Transit
Administration**

400 Seventh St., S.W.
Washington, D.C. 20590

DEC 16 1996

Mr. William J. Evans
Director of Evaluation and Development
Rochester-Genesee Regional
Transportation Authority
1372 East Main Street
P.O. Box 90629
Rochester, New York 14609

Dear Mr. Evans:

This responds to your letter to our Region II Office requesting an extension of a waiver allowing the Rochester-Genesee Regional Transportation Authority (RGRTA) to provide specific charter services using vehicles funded by the Federal Transit Administration (FTA).

Under FTA's charter regulation, 49 CFR Part 604, recipients may not provide charter service using FTA-funded equipment if there is a willing and able private operator. I understand that FTA's Region II Office granted RGRTA a 12-month waiver on October 11, 1995, since no private operators responding to RGRTA's 1995 annual charter notice could provide "transit-type lift and front-end and kneeling-equipped" vehicles. You indicate that in response to its 1996 charter notice, RGRTA again received no responses from operators having the specified type of vehicles. You therefore seek an extension of the waiver to provide charter service.

The granting of such a waiver is contrary to 49 CFR 604.3(p), which provides that a private operator is willing and able if it has the required category of vehicles and the legal authority to provide charter service. In implementing guidance, FTA has explained that there are only two categories of revenue vehicle, namely buses and vans. Under the charter regulation, a bus is a bus whether it is an intercity bus, a transit bus, a school bus, or a trolley bus. A private operator does not have to demonstrate that it has any particular type of bus in order to be considered "able." 52 *Federal Register* 42248, November 3, 1987.

Consequently, any private operator responding to RGRTA's annual charter notice and having at least one bus or one van that it is licensed to use in charter service, must be determined willing and able. RGRTA may therefore provide charter service using FTA-funded equipment only under one of the exceptions to the regulation. One of these exceptions, at section 604.9(b)(2)(ii), allows a recipient to provide charter equipment to or service for a private operator that lacks accessible vehicles. Further, under section 604.9(b)(5)(ii), a recipient may provide direct charter service to certain tax-exempt entities requesting service for persons with disabilities. Also, under section 604.9(b)(7), a recipient may provide specific types of charter service under a formal agreement with all the willing and able private operators in its service area. Before concluding a formal agreement under this section, recipients must complete the review process to ensure that all willing

and able private operators are valid parties to the agreement. Recipients are not required to seek approval or concurrence from FTA in order to provide service under these exceptions.

I regret any confusion caused by FTA's erroneous decision to grant RGRTA's 1995 waiver request, and trust that this provides you with the necessary clarification and guidance concerning FTA's charter requirements.

Very truly yours,

Patrick W. Reilly
Chief Counsel

cc: L. Penner, TRO-2
Scott Biehl, TCC-30

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

California Bus Association,
Complainant

v.

SunLine Transit Agency,
Respondent :

Charter Complaint

49 U.S.C. § 5323(d)

DECISION

Introduction

The California Bus Association (CBA) filed this complaint with the Federal Transit Administration (FTA) alleging that the SunLine Transit Agency (SunLine) is providing service in violation of FTA's charter regulation, 49 CFR Part 604. Specifically, CBA claims that SunLine's group trip policy and procedures are designed to promote charter service for school groups and that this practice excludes fixed-route riders. Applying a balancing test to the service in question, FTA finds that SunLine's group trip service is charter service in violation of 49 CFR Part 604 which implements Section 5323(d) of the Federal Transit Laws, as codified, 49 U.S.C. § 5301, et seq. Therefore, SunLine is ordered by this decision to correct the practices that do not comply with FTA's requirements.

Complaint

CBA filed this complaint with the FTA on June 24, 1996, and also provided photographic, video and documentary evidence. Specifically, CBA alleges that SunLine buses (aka "SunBuses") fail to stop for passengers waiting at designated bus stops, display unclear and misleading head-signs, and make off-route stops including loading and unloading passengers on school property. CBA's complaint and rebuttal describe incidents occurring on nine separate days between May 1993 and September 1996 all of which involved service to school groups.

Response to Complaint

CBA's complaint was forwarded to SunLine and by letters dated August 23 and September 3, 1996, SunLine provided its response. SunLine submitted additional documentation including its preprinted schedule, "SunBus Group Trip Policy Summary," and "Planning Group Trips" brochure. The brochure describes the service in question as trips made by a group of ten or more people from one mutual origin to one mutual destination. In addition, the brochure advertises that groups can go on field trips within a one-mile radius of the fixed route. To qualify for the group fare discount of fifty cents per rider, trips must be requested at least five working days prior to but no more than three months in advance of the trip. The brochure goes on to state that SunLine is

not a charter service; all SunBus services are open to the general public and operate on published fixed routes; all buses will make any stop on the route where passengers need to board or alight; additional buses may be placed in service for groups of forty or more at SunLine's discretion; and SunLine may limit the number of buses accommodating group trips, particularly during peak hours. According to the policy summary, SunLine reserves the right to cancel confirmed group trips because its first commitment is to meet regular fixed-route needs. The summary also contains procedures for groups to follow when cancelling trips.

In a July 12, 1996, memorandum, SunLine's Senior Trainer explains that new coach operators are advised that after picking up group trip riders, SunBuses must proceed along the regular fixed route, street by street, picking up regular passengers along the way until they reach their destination. At no time are SunBuses allowed to enter school grounds or private property. After the group has alighted the coach, the operators must remain in service until the end of the line unless a "follower" has caught up to them at which time they may transfer the remaining passengers. In addition, all "moneys" for the trips go through the farebox and the operators must log in the number of passengers in the group.

SunLine states that it sends the group trip brochure to schools annually and submitted a mailing list containing names and addresses of more than ninety schools and organizations. According to SunLine, the brochure is also included with a letter confirming group trip arrangements scheduled by a group leader using the service for the first time. Furthermore, SunLine acknowledged that it has performed over 4,000 group trips including most of the trips documented in CBA's complaint, for example, group service for Della Lindley Elementary School, Vista Del Monte Elementary School, Cahuilla Elementary School, Desert Springs Middle School, and Bubbling Wells Elementary School. SunLine maintains that it has instructed its operators not to enter school property to load and unload riders, and to pick up passengers along fixed routes.

With regard to CBA's allegations that SunBuses display clear and misleading head-signs, SunLine claims in its September 3 response that "Going into Service" is the correct head-sign to display while a group is boarding a bus, and that once the group has finished boarding, the sign should be changed to "Supplemental Service." SunLine's Senior Trainer states, however, that new coach operators are instructed to use headsigns reading "Supplemental, Limited Service" during group trips. Finally, SunLine maintains that it is intensifying its driver training and will discuss these issues in upcoming Operator Safety Meetings.

Rebuttal

In its rebuttal dated September 17, 1996, CBA challenges the legality of the group trip policy because the policy provides that SunBuses can deviate from estabished routes at the charter party's request and that the policy excludes fixed-route riders. Furthermore, CBA contends that when it became aware SunLine intended to provide the group trips in question, it monitored SunLine's activities and observed that SunBuses did not just occasionally pass up passengers

but rather, "never" stopped for passengers waiting at SunLine bus stops no matter how persistent the people were to board the SunBuses.

Moreover, CBA claims that SunLine has continued to perform closed-door charter service in spite of this complaint and SunLine's subsequent response thereto. Specifically, CBA alleges that on September 13, 1996, SunLine transported the Cathedral City High School band to the College of the Desert in two SunBuses displaying "Supplemental Service" and "Going into Service" head-signs. In support of this claim, CBA provided additional photographs. According to CBA, when one of the drivers observed someone taking pictures, the head-sign was changed to "Out of Service" for the duration of the trip. In addition, CBA claims that two female passengers were refused entry into one of the buses and that the SunBuses passed up fixed-route passengers along Highway 111 and travelled off-route.

Finally, CBA submitted correspondence regarding a November 10, 1992, complaint filed with FTA alleging that SunLine was operating exclusive school bus service in violation of FTA's school bus regulation, 49 CFR Part 605. In a December 2, 1992, response to CBA, SunLine represented that the service complained of was supplemental tripper service along fixed routes and that SunBuses did not enter school grounds or make off-route stops. CBA claims that SunLine's letter is a "local agreement" under 49 CFR 604.9(b)(7) and that SunLine is in violation thereof. CBA argues that despite FTA involvement and the subsequent "local agreement," SunLine has continued to operate closed-door service and that CBA's repeated efforts to resolve the matter over the course of three years have been unsuccessful.

Discussion

Before reaching the main issue of this complaint, it is appropriate to address a subsidiary question raised. CBA chracterizes SunLine's December 2, 1992, correspondence as a"local agreement" within an exception to the charter regulation, and maintains that SunLine is in violation thereof. SunLine's correspondence, however, pertains to supplemental tripper service under FTA's school bus regulations, 49 CFR 605.3 and therefore, does not constitute a "formal agreement" as defined at 49 CFR 604.9(b)(7) of the charter regulation.

The FTA points out, however, that CBA properly brought this complaint under the charter regulation, not the school bus regulation. The preamble to FTA's school bus regulation explains that "school bus operations" generally take place during peak morning and evening hours. 41 Fed. Reg. 14127, 14128 (April 1, 1976). The transportation of students and personnel exclusively during off-peak hours would be charter service governed by 49 CFR Part 604. The group trips provided by SunLine for extracurricular school activities are clearly not "school bus operations" providing peak hour transportation to and from school; however, the service does warrant scrutiny under the charter regulation. We turn now to an examination of the main concerns of CBA's complaint.

The essential issue in this matter is whether the service provided by SunLine is impermissible charter service or permissible mass transportation. The definition of charter service found in FTA's regulations at 49 CFR 604.5(e) is as follows:

> ...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...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.

Charter service is usually thought of as a one-time provision of service and the user, not the recipient, has the control of the service. 52 Fed. Reg. 11916, 11919 (April 13, 1987).

In contrast, the Federal Transit Laws define "mass transportation" as transportation that provides regular and continuing general or special transportation to the public. 49 U.S.C. § 5302(a)(7). The FTA has articulated other features which logically flow from this definition:

> First, mass transportation is under the control of the recipient. Generally, the recipient is responsible for setting the route, rate, and schedule, and deciding what equipment is used. Second, the service is designed to benefit the public at large and not some special organization such as a private club. Third, mass transportation is open to the public and is not closed door. Thus, anyone who wishes to ride on the service must be permitted to do so.

52 Fed. Reg. 11920.

FTA has previously stated that a balancing test must be applied to determine the nature of the service involved in any complaint filed with FTA because, as the preamble to the charter regulation points out at pages 11919-20, there is no fixed definition of charter service, and the characteristics cited by FTA are not exhaustive, but merely illustrative. Seymour Charter Bus Lines v. Knoxville Transit Authority, TN-09/88-01 (November 29, 1989). We have established the following findings and determinations on the basis of such an analysis.

1. Under the control of the recipient.

The record establishes that SunBuses deviate up to one mile from the published fixed routes to accommodate groups of ten or more. According to SunLine, the vehicles return to and continue along the regular route and stop at any bus stop where passengers need to board or alight. In addition, SunLine has discretion to increase or decrease the number of SunBuses used for group trips based on demand and volume. Next, SunLine has set a group-rate fare of fifty cents per rider, decides whether an additional fare will be required if transfers are involved, and advertises the fare in the preprinted fixed-route schedule and group trip brochure. Finally, according to the group trip brochure, the group representative must contact SunLine to schedule the trip and

supply the following information: date of trip, time of outbound trip, time of inbound trip, origin, destination, and group size. SunLine then confirms the reservations with a follow-up letter.

SunLine submits that the one-mile route deviations do not violate the charter regulation because SunBuses travel along the prepublished fixed routes during part of the group trips and stop to pick up regular route passengers. On the other hand, CBA contends that the group trip policy itself is irreversibly flawed both in theory and in practice because the policy provides that SunBuses can deviate up to one mile from established routes to perform services that are not regularly scheduled.

FTA finds that SunLine's group trip service does not operate on a regular and continuing basis within SunLine's control; rather, it is provided regularly to singular events at the behest of the group participants. The groups travel pursuant to a common purpose under an itinerary specified in advance in accordance with the group's selection of pick-up and drop-off points. Although SunLine decides the number of vehicles to be used for group trips and may determine the route to follow during the deviations, FTA has previously found that these are merely operational details and not determinative of actual control of the service (Seymour, at 10). As FTA has stated in Question 27(d) of its "Charter Service Questions and Answers," 52 Fed. Reg. 42248, 42252 (November 3, 1987), control of fares and schedules is the critical element in distinguishing charter service from mass transportation.

The FTA has previously determined that compensation on the basis of hours of service is evidence of charter operations, whereas individual fares paid by each rider indicates the service is mass transportation (Seymour at 9). Under the group trip policy, each rider pays an individual fare set by SunLine, and the money collected goes through the fare box. In this respect, the service conforms to mass transportation. FTA finds, however, that SunLine does not set the schedules for the group trips which is supported by the fact that there are no published schedules for the service. SunLine may have input in developing the group trip service schedules as any operator would, but the group representatives specify arrival and departure times and trip origins and destinations and thus, have the prerogative of altering schedules. Blue Grass Tours and Charter v. Lexington Transit Authority, URO-III (May 17, 1988).

In applying a balancing test to the foregoing factors, FTA finds that SunLine's group trip service does not meet the first criterion of mass transportation.

2. Designed to benefit the public at large.

CBA argues that SunLine's group trip policy is designed to promote group trip charters and to exclude fixed-route riders in violation of 49 CFR Part 604. In response, SunLine submits that SunBuses make one-mile deviations from the fixed route for the convenience of the groups as

long as SunBuses make all stops along the fixed route and the deviations do not inconvenience regular passengers.

The FTA has previously noted that service is designed to benefit the public at large when it serves the needs of the general public, instead of those of "some special organization such as a private club." 52 Fed. Reg. 11920 (April 13, 1987). The charter regulation requires that riders outside a target group of customers be eligible to use the service. See Annett Bus Lines v. City of Tallahassee, FL-TALTRAN/90-02-01 (April 28, 1992). SunLine's group trip policy targets groups of ten or more people and any members of the public who are unable or unwilling to form a group of at least ten riders are not eligible to use the service. Thus, the group trip service is not designed to benefit the public at large and in practice, is basically designed to meet the transportation needs of defined groups of students and school personnel as well as other organizations.

Indeed, the group trip service may cause inconvenience to members of the public. According to SunLine, the buses used for group trips stop at all stops along the fixed-route to pick up regular passengers. At SunLine's discretion, additional buses are added for groups of forty or more riders. These facts lead FTA to conclude that regular route passengers may be disadvantaged in either of the following ways. First, fixed-route riders, without prior notice, may be required to travel up to two miles roundtrip along route deviations made for group trips in SunBuses that do not keep within the fixed-route schedule; or second, supplementary SunBuses may be put into service solely to accommodate group trips with the result that regular passengers are excluded.

SunLine's group trip service is designed differently from SunLine's regular fixed-route service in other respects as well. For example, SunLine allows group participants to call from five days to three months in advance to schedule trips. Next, SunBuses deviate up to one mile from the fixed route to accommodate group trip passengers. Moreover, the photographic and video evidence show that there are no designated bus stop signs at the origin and destination points of the group trips. In addition, the group trip fare is fifty cents while SunLine's regular fare is seventy-five cents. Further, published schedules exist for SunLine's other routes but there are no published schedules for group trip service. Finally, group trip buses display restrictive headsigns. The reasonable conclusion adduced from these facts is that the group trip service is a special type of service which is set up, advertised and operated differently from SunLine's regular service, pursuant to a written agreement, to accommodate the special needs of the group participants' (Blue Grass, at 4). Although the definition of "mass transportation" in the Federal Transit Laws, 49 U.S.C. § 5302(a)(7), does include the concept of "special" transportation, the type of service complained of in this case is not one of the two types of "special" service that legally fit the definition of "mass transporation." They are service exclusively for elderly and disabled persons and service provided for workers who live in the innercity but work in a factory in the suburbs. 52 Fed. Reg. 11920.

Thus, the group trip service is not designed to benefit the public at large and in practice, is designed to meet the transportation needs of school groups and organizations.

3. Open to the public and not closed door.

In determining whether service is truly "open door," FTA looks both at the level of ridership by the general public as opposed to a particular group and at the intent of the recipient in offering the service. The intent to make service open door can be discerned in the attempts to make the service known and available to the public. FTA thus takes into account the efforts a recipient has made to market the service. Generally, this marketing effort is best evidenced by publication of the service in the recipient's preprinted schedules. Washington Motor Coach Association v. Municipality of Metropolitan Seattle, WA-09/87-01 (March 21, 1988). FTA has also interpreted "open door" to mean a substantial public ridership and/or an attempt by the transit authority to widely market the service (Blue Grass, at 5). The posting of bus stop signs and the connections to other transportation routes are also considered indicators of "opportunity for public ridership" (Seymour, at 9). A recipient is not required to make all of these efforts in order to have manifested the intent to make service open door.

Although SunLine asserts that its buses are open to the general public at all times, SunLine's position is not supportable when the group trip service is examined against the complete definition and intent of the charter regulation as well as the system in actual operation. The opportunity to arrange group trips is briefly described on page 7 of the published fixed-route schedule along with a number to call for additional information. The "Planning Group Trips" brochure is printed separately and SunLine's submission indicates that it is mailed to at least ninety schools and organizations. In other respects, however, SunLine's group trip service is essentially closed door.

CBA argues that the group trip service is not available to the general public because SunBuses display unclear and misleading head-signs, and fail to stop for passengers waiting at SunLine bus stops. The photographs submitted by CBA corroborate these claims. In response, SunLine claims that "Going into Service," "Supplemental Service," and "Supplemental, Limited Service" are the correct destination signs to use on SunBuses performing group trips. These facts clearly contradict SunLine's assertion that all SunBuses are open to the public. Moreover, such practices are inconsistent with the instructions given to the general public on page 2 of the preprinted schedule which direct passengers to "[c]heck the destination sign at the front of the bus to be sure you are boarding the correct bus."

In order for service to be considered open to the public, head-signs on buses must display route numbers and destinations, and must operate according to the published schedule. Destination signs on buses such as those used by SunLine are not permitted under 49 U.S.C. 5323(d). FTA finds that SunLine has employed signing procedures of obvious impropriety. Furthermore, using a terminus where there is no bus stop sign and refusing entry to passengers render SunLine's claims that the service is open to the public unpersuasive. Therefore, FTA finds that the service in question is not "open door" and does not meet the third criterion of mass transportation.

Conclusion and Order

After applying a balancing test to the service in question, FTA concludes that SunLine's group trip operations are charter service in violation of 49 CFR Part 604. Therefore, SunLine shall immediately discontinue operating the service as it is presently configured. Should SunLine wish to reinstitute group trip operations, it must reconfigure the service to conform to FTA's mass transportation guidelines, and submit its plan to FTA for review and approval prior to implementation.

Within thirty days, SunLine must provide a written report to the FTA on the measures it has taken to ensure compliance with the terms of this order.

Margaret E Foley — February 6, 1997

Margaret E. Foley
Regional Counsel (Date)

Leslie Rogers — FEB 10 1997

Leslie Rogers
Regional Administrator (Date)

U.S. Department
of Transportation
Federal Transit Administration

REGION VII
Iowa, Kansas
Missouri, Nebraska

6301 Rockhill Road
Suite 303
Kansas City, Missouri 64131

April 25, 1997

Mr. Loren L. Jones, President
Northwest Iowa Transportation, Inc.
Northwest Iowa Tours
P. O. Box 911
Old Highway 20 E
Fort Dodge, IA 50501-0911

Re: Charter and Intercity Service Inquiry
of April 21, 1997

Dear Mr. Jones:

This letter is the response to your inquiry of April 21, 1997 regarding whether federally-funded coaches (buses) if leased by the Heart of Iowa Regional Transit Authority (HIRTA) to Five Oaks Charter, Inc. of Des Moines, Iowa, for the purpose of providing intercity bus service may be used to compete with privately funded vehicles owned by your company and other private charter providers.

The general answer to your inquiry is no: FTA regulations found at 49 C.F.R. 604.9(a) prohibit recipients of federal funds from providing charter service if there are any private charter operators willing and able to do so. Furthermore, FTA funded equipment may not be used to provide charter service unless at least one of the exceptions in 49 C.F.R 604.9(b) applies.

Given the facts of your letter, exception (2)(ii) appears to be the only exception that could apply. This exception allows FTA funded equipment to be used when the recipient (HIRTA) enters into a contract with a private charter operator , such as Five Oaks Charter, Inc., to provide charter equipment to the operator because the operator itself is unable to provide equipment accessible to elderly and handicapped persons. However, any charter service provided under any of the exceptions must be incidental charter service as required by 49 C.F.R. 604.9(e).

If you have additional questions or concerns, please contact Ms. Paula L. Schwach, Regional Counsel at 816.274.5203.

Sincerely,

Lee O. Waddleton
Regional Administrator

cc: Heart of Iowa Regional Transit Authority

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION I
Connecticut, Maine,
Massachusetts,
New Hampshire,
Rhode Island, Vermont

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55 Broadway Suite 904
Cambridge, MA 02142
617-494-2055
617-494-2865 (fax)

MAY 12 1997

Mr. Kenneth A. Hazeltine
Public Transportation Administrator
New Hampshire Department of Transportation
P.O. Box 483
Concord, NH 03302-0483

Dear Mr. Hazeltine:

This responds to your April 22, 1997, request for an exception under 49 CFR § 604.9(b)(4) which would allow the New Hampshire Department of Transportation (NHDOT) to operate charter service for the 13th Rural Public and Intercity Bus Transportation Conference to be held September 13-17, 1997, in North Conway.

The preamble to the charter regulation explains that the Federal Transit Administration (FTA) will grant an exception under § 604.9(b)(4) only for events of an extraordinary, special and singular nature such as the Pan American Games and the visits of foreign dignitaries. 52 Fed. Reg. 11925 (April 13, 1987) Regularly scheduled yearly or periodic events would not qualify for the exception. "Charter Service Questions and Answers," 52 Fed. Reg. 42251 (November 3, 1987) With reference to our telephone conversation last week, the FTA did grant a "special event" exception to several transit authorities in Iowa for the 1988 World Ag Expo, an international agricultural exposition which had been held in the United States only twice in twenty years and which was expected to draw between 200,000 and 300,000 visitors. However, your letter indicates that the transportation conference, which is held periodically, is not the type of activity intended by the regulation's "special event" exception.

For these reasons, the FTA has determined that NHDOT must follow the public participation process set forth at § 604.11 to determine if there is a willing and able private provider of charter service. If no willing and able operator exists, NHDOT can provide charter service for the

conference as long as it is incidental charter service which is defined at § 604.5(i) as charter service that does not interfere with or detract from providing mass transportation service or does not shorten the mass transportation life of the equipment being used. *See also* 52 Fed. Reg. 42251-42252.

We hope this information is helpful. If you have any questions, please call Margaret E. Foley, Regional Counsel, at (617) 494-2409.

Sincerely,

Richard H. Doyle
Regional Administrator

Enclosures: 49 CFR Part 604, "Charter Service"
52 Fed. Reg. 11916 (April 13, 1987)
52 Fed. Reg. 42248 (November 3, 1987)

LOU- FYI

U.S. Department
of Transportation
Federal Transit
Administration

REGION VIII
Arizona, Colorado, Montana,
Nevada, North Dakota,
South Dakota, Utah,
Wyoming

Columbine Place
216 Sixteenth Street, Suite 650
Denver, Colorado 80202-5120
303/844-3242
303/844-4217 (fax)

John Barberis
Superintendent of Transportation
Regional Transportation District
1900 31st Street
Denver, CO 80216

June 6, 1997

Dear Mr. Barberis:

You asked whether RTD may enter into a contract with Colorado Charter Lines whereby RTD will provide buses and drivers for service during Denver's Summit of the Eight.

Under 49 CFR section 604.9(b)(2), a recipient may enter into a contract with a private charter operator to provide charter equipment to or service for the private charter operator if the private charter operator is requested to provide charter service that exceeds its capacity. Colorado Charter Lines, via its advertisement for additional coaches, has indicated that the charter service required by the Denver Summit of the Eight exceeds its capacity. Therefore, the contract RTD proposes to enter into with Colorado Charter Lines is permissible under FTA's charter service regulations.

If you have any further questions, please contact Kristin O'Grady, Regional Counsel, of my staff.

Sincerely,

Louis F. Mraz
Regional Administrator

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION I
Connecticut, Maine,
Massachusetts,
New Hampshire,
Rhode Island, Vermont

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NOV 14 1997

Thomas Chilik, General Manager
Greenfield Montague Transportation Area
382 Deerfield Street
Greenfield, MA 01301

Dear Mr. Chilik:

Reference is made to your October 23, 1997, response to the charter complaint filed by Mr. Donald Sadler of Chapin & Sadler, Inc. Specifically, Mr. Sadler alleged that the Greenfield Montague Transportation Area (GMTA) performed impermissible charter service for a trip that was originally booked with Chapin & Sadler. In addition, he submitted evidence that GMTA advertises itself as a charter company in the local telephone directory.

According to your response, GMTA did provide the charter service in question by transporting a group of passengers from the Blessed Sacrament Church to the Marian Fathers Shrine in Stockbridge. You explain that the violation occurred because your staff did not understand that this was a charter trip that should have been referred to a private operator, and maintain that you have taken corrective measures to avoid making such errors in the future. You also state that the reference to charter service will be deleted from the November 1997 issue of the telephone directory.

As you know, 49 U.S.C. 5323(d) and the Federal Transit Administration's (FTA) implementing regulation, 49 CFR Part 604, prohibit an FTA recipient from providing charter service using FTA-funded equipment or facilities if a private operator in its geographic area is willing and able to perform the service, unless one or more of the exceptions listed at 49 CFR § 604.9 apply. You are also reminded that applicants seeking FTA assistance must certify annually that they understand these requirements and that violation thereof may require corrective measures and the imposition of penalties, including debarment from the receipt of further Federal assistance for transportation.

In light of the foregoing, FTA deems it incumbent upon GMTA to properly train its employees to ensure that violations of this sort do not occur in the future. Finally, we request that you forward a copy of GMTA's listing from the November 1997 issue of your telephone directory for our records.

We trust this information is helpful. If you have any questions, please call Margaret Foley at (617) 494-2409.

Sincerely,

Richard H. Doyle
Regional Administrator

cc: Mr. Sadler

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION VII
Iowa, Kansas
Missouri, Nebraska

6301 Rockhill Road
Suite 303
Kansas City, Missouri 64131

August 18, 1998

Mr. Robert Roundtree
General Manager
City Utilities
P.O. Box 511
301 E. Central
Springfield, MO. 65801

Attn: Diane Hogan

Re: Charter Service

Dear Mr. Roundtree:

The Federal Transit Administration (FTA) has reviewed your letter dated July 13, 1998 requesting permission to use three, fully depreciated, 1979 fixed route buses which have been retired from service for charter services.

Vehicles purchased with FTA assistance in which there is a continuing Federal interest may not be used for charter services, and no federal operating subsidy can be used for maintenance or operating (including labor) costs of charter service unless an exception as outlined in 49 CFR Part 604 (a)(b) applies. However, pursuant to FTA Circular 5010.1B, Section 7 (g) and 49 CFR Part 18.32(e), federally-funded equipment which is no longer needed for transit purposes may be retained by the grantee. When, as represented by your staff in the teleconference with Regional Counsel, advertisement of the property has yielded no buyers or no buyers offering even $5,000 per bus, the grantee (pursuant to 49 CFR Part 18.32(e)(1)) has no further obligation to FTA. What City Utilities does with this equipment now that it has extinguished the Federal interest is outside the scope of FTA's purview.

You are reminded that buses used for charter service may not be housed in an FTA-funded facility or maintained with FTA operating assistance.

If you have further questions or need additional information, you may contact Shannon Graves, Program Manager at (816) 523-0204.

Sincerely,

Paula L. Schwach

for Lee Waddleton
Regional Administrator

U.S. Department
of Transportation
Federal Transit
Administration

400 Seventh St., S.W.
Washington, D.C. 20590

SEP 18 1998

Ms. Edith L. Lowery
Director/Grant Programs
Metropolitan Transit Authority
1201 Louisiana
Houston, Texas 61429

Dear Ms. Lowery:

This responds to your letter of July 24, 1998, commenting on the Federal Transit Administration's (FTA) July 1, 1998, Federal Register notice seeking to extend the information collection requirements for charter service operations. You ask why recipients should be burdened with annual publication and reporting requirements if they do not intend to operate charters, or if they are aware of the existence of private providers.

FTA's charter regulation, 49 CFR Part 604, requires recipients to complete a process for determining if there are willing and able private operators only if they wish to provide charter service. A recipient not wishing to engage in charter operations is not required to follow this process. Similarly, a recipient need not publish a notice of its willingness to provide charter service if it is aware of at least one willing and able private operator within its geographic area. FTA's July 1 Federal Register merely announces the agency's intent to reinstate its information collection requirements for charter service operations, and does not propose any amendment to FTA's charter regulation.

I thank you for your comments, and hope that you find this information helpful.

Please contact Rita Daguillard at (202)366-1936 if you need further information.

Very truly yours,

Patrick W. Reilly
Chief Counsel

cc: Sylvia Barney, TAD

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION I
Connecticut, Maine,
Massachusetts,
New Hampshire,
Rhode Island, Vermont

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Cambridge, MA 02142
617-494-2055
617-494-2865 (fax)

October 8, 1998

Ms. Pamela Pottle
Manager, Program Management
Maine Department of Transportation
Transportation Building
Station 15, Child Street
Augusta, ME 04330

Dear Ms. Pottle:

Reference is made to the enclosed letter from Theresa Samson, Vice President and General Manager of Hudson Bus Lines (Hudson), a private for-profit operator, regarding two issues involving the Western Maine Transportation Services a/k/a Pine Tree Transit (Pine Tree), a subrecipient of the Maine Department of Transportation (MDOT).

First, Ms. Samson complains that because Pine Tree is a private non-profit operator it was able to underbid Hudson and take over fixed-route services that her company had operated since 1959. As you know, the Federal Transit Administration's (FTA) "Notice of Recision of Private Enterprise Participation Guidance" was published in 59 Federal Register 21890 on April 26, 1994. FTA's new policy still requires consideration of private sector involvement consistent with statutory provisions, but allows local officials greater flexbility in making local transportation decisions. Under the new guidance, FTA specifically stated that it was eliminating the private sector appeal process and would instead monitor grantees' compliance through the transportation planning process, annual audits and trienniel reviews. Therefore, FTA will not entertain the private sector issue raised by Ms. Samson.

Next, Ms. Samson claims that her company will be adversely affected if Pine Tree is allowed to perform charter trips with FTA-funded assets as proposed in Pine Tree's legal notice of August 31, 1998. The notice states that Pine Tree is available to perform charter service "Mondays through Sundays from 12:01 a.m. to 12:00 midnight year round." Under FTA's charter service regulation, 49 CFR Part 604, a recipient who desires to provide any charter service using FTA-funded equipment or facilities must first determine if there are any private charter operators willing and able to provide the service. To the extent that there is at least one such private operator, the recipient is prohibited from providing charter service with FTA-funded assets, unless one or more of the exceptions in § 604.9(b) apply. Furthermore, any charter service provided by a recipient under an exception must be incidental. 49 CFR § 604.9(e). "Incidental charter service" is defined as service which 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.

49 CFR § 604.5(i). Thus, service performed during peak hours is not considered incidental. See Question and Answer 24, 52 Federal Register 42248, 42251 (November 3, 1987).

According to Ms. Samson, Hudson is a willing and able private operator. Therefore, Pine Tree will be prohibited from performing the proposed charter service with FTA-funded assets unless it is provided on an incidental basis under one or more of the limited exceptions. In this regard, please note that Pine Tree's legal notice states it will be available on a 24-hour basis, which would include prohibited service performed during peak hours.

Please look into the above matter and submit a written response to the FTA within thirty days of receipt of this notice and send a copy of your response to Hudson. By copy of this letter, Hudson is notified that it has thirty days from receipt of MDOT's answer to submit a rebuttal to the FTA with a copy to MDOT. If you have any questions, please call Margaret Foley, Regional Counsel, at (617) 494-2409.

Sincerely,

Mary Beth Mello

for Richard H. Doyle
Regional Administrator

Enclosure: 52 Federal Register 42248 (Nov. 3, 1987)
59 Federal Register 21890 (Apr. 26, 1994)

cc: Ms. Theresa S. Samson
Hudson Bus Lines

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION VII
Iowa, Kansas
Missouri, Nebraska

6301 Rockhill Road
Suite 303
Kansas City, Missouri 64131

November 10, 1998

Mr. Peter Hallock, Transportation Coordinator
Iowa Department of Transportation
100 E. Euclid Ave., Suite 7
Park Fair Mall
Des Moines, IA 50313

Re: NHTSA Safety Standards and
Definition of School Bus

Dear ~~Mr. Hallock~~ Peter:

This letter is FTA's response to your correspondence of November 4, 1998. In that correspondence you requested a letter clarifying that vehicles purchased for coordinated public transit services are not considered school buses (despite NHTSA's regulations or guidance letters to state motor vehicle dealers' associations), even if the vehicles are used in part to provide non-exclusive transportation for children to and from Head Start and some transportation to and from public and parochial schools. You indicated that Iowa Department of Transportation's (IDOT's) subrecipients funded under the Section 5310 and Section 5311 Programs are having difficulty obtaining delivery of vehicles because they are unwilling to certify that such vehicles will never be used to transport students to or from schools or school events.

FTA encourages the coordination of public transportation services. Our regulations have long recognized the tripper service exception for non-exclusive transportation of school-age children by transit systems with fixed route service. (See 49 CFR 605.13, tripper service exclusion to prohibition of offering school bus services.) Similarly, for rural systems operating general public transportation as a demand response service, coordinated human services transportation like Head Start are allowable. While such coordinated human services transportation primarily serves elderly, persons with disabilities and generally transportation disadvantaged persons, it is not restricted from carrying other members of the general public, if the service is marketed as public transit service. (See Cir. 9040.1E, Chapter III, Eligibility. Also see Cir. 9070.1D, Chapter V, Vehicle Use.) 53 USC 5323(f) prohibits the use of FTA funds for exclusive school bus transportation for school students and school personnel. However, the implementing regulation (49 CFR Part 605) does permit regular service to be modified to accommodate school students along with the general public.

FTA hopes that this clarification assists IDOT and its subrecipients in taking delivery of FTA-funded equipment in a timely manner so that you may continue to meet established milestones in the applicable grant(s).

Sincerely,

Mokhtee Ahmad

Mokhtee Ahmad
Regional Administrator

Pls:MA

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION I
Connecticut, Maine,
Massachusetts,
New Hampshire,
Rhode Island, Vermont

Volpe Center
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Cambridge, MA 02142-1093
617-494-2055
617-494-2865 (fax)

NOV 25 1998

Ms. Theresa S. Samson
Vice-President & General Manager
Hudson Bus Lines
280 Bartlett Street
Lewiston, ME 04240

Dear Ms. Samson:

This letter responds to your August 31, 1998, complaint addressed to Gordon J. Linton, Administrator of the Federal Transit Administration (FTA), regarding a private non-profit operator working under contract for the Maine Department of Transportation (MDOT). Specifically, you complain that Western Maine Transportation Services, Inc., a/k/a Pine Tree Transit (Pine Tree), took over fixed-route service in the Lewiston-Auburn area previously operated by Hudson Bus Lines (Hudson). Furthermore, you infer that Pine Tree intends to perform charter service in violation of FTA's charter regulation, 49 CFR Part 604.

In its October 19, 1998, answer to the complaint, MDOT explained that both the Lewiston-Auburn Transit Committee (LATC) and MDOT reviewed the bidding process used in procuring the fixed-route service in question and determined that it was in total compliance with FTA's third party contracting criteria. As noted in our previous correspondence to you dated October 8 and November 5, 1998, FTA's new private sector policy allows local officials greater flexibility in making local transportation decisions and eliminates the private sector appeal process. Please be assured, however, that FTA will continue to monitor MDOT's procurement practices through the transportation planning process, annual audits and triennial reviews.

With regard to the charter service allegation, we note that Pine Tree sent you a letter on October 5, 1998 (copy enclosed), stating that it has determined there is at least one private operator willing and able to provide charter service in Pine Tree's service area; and therefore, it will only perform charter trips if one or more of the exceptions listed in 49 CFR § 604.9(b) applies. Moreover, MDOT has asserted that it will contact Pine Tree to insure that any charter service provided under an exception must be incidental as required by 49 CFR § 604.9(e). By copy of our letter of October 8, 1998, Hudson was provided thirty days from receipt of MDOT's answer to submit a rebuttal to the FTA. To date, we have not received your response. Accordingly, the FTA finds that this issue has been resolved.

In accordance with 49 CFR § 604.19, you may appeal this charter service decision within ten days of receipt to Gordon J. Linton, Administrator, Federal Transit Administration, 400 Seventh Street, S.W., Room 9328, Washington, DC 20590.

Sincerely,

Richard H. Doyle
Regional Administrator

Enclosure: 49 CFR Part 604
Pine Tree ltr to Hudson dtd 10/5/98

Cc: Pamela S. Pottle, Manager
MDOT Transportation Programs Unit

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION V
Illinois Indiana,
Michigan, Minnesota,
Ohio, Wisconsin

200 West Adams Street
Suite 2410
Chicago, IL 60606-53232
312-353-2789
312-886-0351 (fax)

December 2, 1999

Richard N. Winston
Executive Vice President
For Transit Operations
Chicago Transit Authority
120 North Racine Avenue
Chicago, IL 60607

Dear Mr. Winston:

This letter responds to the Chicago Transit Authority's (CTA's) request for a special events charter exception under 49 CFR Section 604(b)(4) dated December 1, 1999, addressed to the Federal Transit Administration (FTA). The exception would allow the CTA to operate charter service for the "Aviation in the 21st Century – Beyond Open Skies Conference" to be held December 5-7, 1999, in Chicago.

The preamble to the charter regulation explains that the FTA will grant an exception under § 604.9(b)(4) only for events of an extraordinary, special and singular nature such as the Pan American Games and visits of foreign dignitaries, 52 Fed. Reg. 11925 (April 13, 1987). This event is an international aviation conference. Attendees will include fourteen Transportation Ministers and eight other heads of delegations. FTA understands that the City of Chicago has special concerns for the attendees' safety and seeks a higher level of security for these people. As a result, the City of Chicago has requested that the CTA provide mass transit buses, which have the necessary capacity and which do not contain undercarriage storage. Due to issues of security related to the attendees, as well as the unusual and unique nature of this event, the FTA recognizes the "Aviation in the 21st Century – Beyond Open Skies Conference" as the type of event envisaged by § 604.9(b)(4). CTA has also indicated that the use of the buses at the conference will not affect the CTA's ability to provide service to its passengers at all times of day, including rush hour periods.

For these reasons, I hereby authorize CTA to make FTA funded buses available to accommodate the need for a secure charter service during the "Aviation in the 21st Century – Beyond Open Skies Conference." CTA may, in accordance with the information provided to the FTA, utilize up to nine buses for the conference in the provision of this charter service.

CTA is reminded that, in accordance with 49 C.F.R. § 604.9(e), "Any charter service that a recipient provides must be incidental charter service." The regulations define "incidental charter

service" as service that does not interfere with or detract from mass transit use or shorten the mass transportation life of FTA funded facilities or equipment.

Sincerely,

Joel P. Ettinger
Regional Administrator

cc: Frank Kruesi
Duncan Harris

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION VII
Iowa, Kansas,
Missouri, Nebraska

901 Locust Street
Room 404
Kansas City, MO 64106
816-329-3920
816-329-3921 (fax)

April 18, 2000

By Facsimile: 515-683-8671

Ms. Pam Ward, Administrator
Ottumwa Transit Authority
Ten Fifteen Regional Transit
105 E. Third Street
Ottumwa, Iowa 52501

Re: Charter and School Bus Complaint –
Unfair Competition

Dear Ms. Ward:

I have enclosed herewith a copy of a complaint dated February 15, 2000 from Mr. Jerry Kjer, General Manager of Southern Iowa Transit, Inc. ("SIT"). This complaint alleges that Ottumwa Transit Authority ("OTA") and Ten Fifteen Regional Transit ("10-15 Transit") performed impermissible charter service on a number of occasions listed in the written complaint from April 1998 to April 2000. In addition, Mr. Kjer claims that OTA is transporting student to school-sponsored sports activities.

Under 49 USC 5323(d) of the Federal Transit Laws and under 49 CFR Part 604, FTA's implementing regulations, a recipient of FTA financial assistance may not provide charter service using FTA-funded facilities or equipment if a private operator in the recipient's geographic area of operations is willing and able to provide the service, unless one or more of the exceptions listed at 49 CFR 604.9 apply.

Furthermore, 49 USC 4323(f) of the Federal Transit Laws prohibits the use of FTA-funded equipment or operations in the provision of service exclusively for the transportation of school students and school personnel in competition with private school bus operators. However, under FTA's implementing regulations, 49 CFR Part 605, grantees may provide "tripper service." Tripper service is regularly scheduled mass transportation service which is open to the public and which is designed to accommodate school students and personnel using various rare collections or subsidy systems. 49 CFR 605.3 states that buses used in tripper service must be clearly marked as open to the public and may not carry designations such as "school bus." These buses may stop only at a grantee's regular service stop and must travel within a grantee's regular route of service as indicated in published route schedules.

Please note that with regard to the charter complaint, FTA's regulations define a process. More particularly, 49 CFR 604.15 provides that the Regional Administrator shall advise the complainant and respondent to attempt to conciliate the dispute informally. However, it is apparent from correspondence between the parties, that such a process would only result in delay and not in resolution satisfactory to the parties.

Accordingly, FTA requests that OTA and 10-15 Regional Transit submit a written response to the complaint to the Regional Office within 30 days of the date of this letter and send a copy of the same to SIT. OTA and 10-15 Regional Transit should also submit copies of any relevant published route schedules to this office. SIT, by copy of this letter, is advised of its right to rebut the OTA and 10-15 Regional Transit response within 30 days.

In addition, FTA Regional staff will conduct a site visit to assist it in fact-finding. This visit will occur on Monday, April 24, 2000. Staff will contact you regarding estimated time of arrival. Please be available and plan on making certain records available for this site visit.

If either party has any questions, please contact Ms. Paula L. Schwach, Regional Counsel, at 816-329-3935.

Sincerely,

Cindy E. Terwilliger
for

Mokhtee Ahmad
Regional Administrator

Enclosure

cc: Mr. Jerry Kjer, IDOT

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION VII
Iowa, Kansas,
Missouri, Nebraska

901 Locust Street
Room 404
Kansas City, MO 64106
816-329-3920
816-329-3921 (fax)

May 18, 2000

By Facsimile: 515-683-8671

Ms. Pam Ward, Administrator
Ottumwa Transit Authority
Ten Fifteen Regional Transit
105 E. Third Street
Ottumwa, Iowa 52501

Re: Charter and School Bus Complaint –
Unfair Competition

Dear Ms. Ward:

On February 15, 2000, Mr. Jerry Kjer, General Manager of Southern Iowa Transit, Inc. ("SIT"), filed a complaint alleging that Ottumwa Transit Authority ("OTA") and Ten Fifteen Regional Transit ("10-15 Transit") performed illegal charter service on a number of occasions listed in the written complaint from April 1998 to April 2000. In addition, Mr. Kjer claimed that OTA transported students to school-sponsored sports activities.

Following receipt of the complaint, OTA and 10-15 Transit were invited to submit a written rebuttal of the complaint. You have chosen not to do so.

On April 24, 2000, Leah Russell, Director of Operations, and Paula Schwach, Regional Counsel, made a site visit to Ottumwa to ascertain what the routes in question were like, what services were being provided, and what was the rationale of OTA and 10-15 Transit for the services in question.

FTA's conclusions are as follows:

1. 10-15 Transit has on two occasions as described in the complaint provided bus service to school age children for trips to Pioneer Ridge(a nature center) from and to a public school site using FTA-funded equipment/rolling stock. This service was provided without charge and in order to prevent a deadhead bus. The service was under a verbal contract with the school district. This service was previously provided by SIT. We find that such service constitutes charter service and competes with the private sector. This is a violation of 49 USC 5323(d) of the Federal Transit Laws and under 49 CFR Part 604, FTA's implementing regulations, because a private operator, SIT, in 10-15 Transit's geographic area of operations is willing and able to provide the service, and none of the exceptions listed at 49 CFR 604.9 apply.

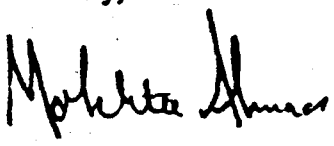
2. OTA operates a bus referred to as the Mid-Day Circulator. The destination of the Mid-Day Circulator is a water recreational/teaching facility called "the Beach." The riders are school age children and or school staff going to a common destination (the Beach) from a single point of pick up (the school) for a common purpose (swimming lessons offered by the school district) under a single contract between the school district and OTA. This description contains all of the elements of the very definition of charter service save one: clientele.

The only item in issue is whether this clientele has the exclusive use of the vehicle. Practically speaking, while the service is advertised as open to the public on the public access television channel, the route changes so frequently depending on which school is currently participating in the swim program offered by the local school district that the schedule is not reliable. The public access channel is arguably a niche market and not a medium designed for broad, general audiences. No schedule is available in paper format as are the fixed route and tripper service schedules. While drivers have been advised to allow members of the general public access to the Mid-day Circulator and have done so on at least one occasion, such ridership is so rare as to be merely incidental if not co-incidental. This appears to violate the spirit of the charter regulations. This is not to say that a Mid-day Circulator could not be designed which would accommodate some school children as well as the general public. However, we find that as currently designed, the service is charter service.

Accordingly, FTA requests that OTA and 10-15 Regional Transit cease providing service to Pioneer Ridge immediately. The Mid-Day Circulator is more problematic because of the potential ramifications of breach of contract with the school district. Therefore, FTA requests that OTA present this office with an exit plan or otherwise advise us as to how the service will be modified to meet the requirements of the Federal Transit Laws within 30 days. Any such plan must be implemented with all due speed but not later than 60 days from the date of this letter. Please provide the complainant, SIT, with a copy of any response to FTA.

If either party has any questions, please contact Ms. Paula L. Schwach, Regional Counsel, at 816-329-3935.

Sincerely,



Mokhtee Ahmad
Regional Administrator

Enclosure

cc: Mr. Jerry Kjer, SIT
Mr. Samil Sermet, IDOT

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

United Limo, Inc.,
Complainant

v.

Charter Complaint
49 U.S.C. Section 5323(d)

South Bend Public Transportation Corporation,
Respondent.

DECISION

Summary

On September 13, 1999, United Limo, Inc. ("Complainant") filed a complaint dated August 31, 1999, with the Federal Transit Administration ("FTA") alleging that South Bend Public Transportation Corporation ("Respondent") is providing a service in violation of FTA's charter regulation, 49 Code of Federal Regulations (C.F.R.) Part 604. The service specifically complained of pertains to Respondent's bus service to the Notre Dame/St. Mary's Complex located in South Bend, Indiana. Respondent filed an answer dated December 22, 1999. Complainant filed a response on February 4, 2000. Respondent filed additional information on March 13, 2000, and Complainant responded on April 18, 2000. Upon reviewing the allegations in the complaint and the subsequent filings of both the Complainant and the Respondent, FTA has concluded that the service in question does violate FTA's regulations regarding charter service. Respondent is hereby ordered to cease and desist in providing such illegal service.

Complaint History

Complainant filed its complaint with the FTA on September 13, 1999.[1] The complaint alleges that the Respondent is providing illegal charter service[2] by providing private charter service for the University of Notre Dame Du Lac and St. Mary's (collectively referred to as the "schools")[3] beginning on August 23, 1999. Specifically, Complainant alleges that this service is not open to the public because: (1) the service is to provide shuttle service among the schools; (2) the service is pursuant to a contract between the schools and the Respondent; (3) the service is on private property that is gated and secured; (4) the schools are billed for the service on a monthly basis; (5) hours of operation are prescribed by the schools; (5) the schedule for the service is to be

[1] Complainant filed its original complaint on August 31, 1999, with the Michiana Area Council of Governments ("MACOG"). On September 29, 1999, MACOG filed a Motion to Dismiss with the FTA. MACOG contends they should not be a party to this action because they do not handle federal funds for the Respondent as the Complainant alleges in their complaint. MACOG in their Motion to Dismiss correctly points out that Respondent is a direct recipient of federal funds from the FTA; the funds do not pass through MACOG. FTA agrees with this factual assertion and dismisses MACOG as a party to this complaint.

[2] Respondent receives Section 5307 and 5309 funds from FTA; therefore, they must comply with the charter regulations.

[3] The Respondent is also providing service to Holy Cross College, but it is not a signatory to the agreement.

distributed by the schools (and the drivers); (6) collection of fares is at the discretion of the schools; and (7) Respondent agrees not to allow any advertising on the buses inconsistent with the missions of the schools. Complainant also asserts that Respondent entered into its agreement for charter service with the schools without giving the Complainant proper notice and an opportunity to offer its service. Complainant requested a cease and desist order or in the alternative a loss of federal funds.[4]

Respondent filed its answer on December 22, 1999. In it, Respondent denied that it was providing illegal charter service, and attached as an exhibit a copy of the agreement between itself and the schools dated November 22, 1999. Respondent asserts that its service is not illegal because it is offered to the general public. Respondent also claims their legal notice was posted prior to their entering negotiations with the schools. Respondent alleges that it consulted with FTA staff before providing the service.

Complainant responded on February 4, 2000. This reply reiterated the assertion that Respondent's service is an illegal charter operation and that Complainant was not provided proper notice for an opportunity to offer its own charter service. Complainant again requested a cease and desist order.

Respondent requested leave to file a further response on February 23, 2000, and subsequently filed a response on March 13, 2000. Respondent again claimed that the service is open to the public and attached a map of the service as an exhibit.

Complainant filed an additional reply on April 18, 2000. Complainant reasserted its prior position in its reply. It also addresses the references the Respondent makes to conversations with FTA employees as to the legality of the service being provided. Complainant asserts any opinions offered by FTA would be advisory not controlling.[5]

Discussion

As Complainant has accurately stated, recipients of federal financial assistance can provide charter service in very limited circumstances. In the absence of one of the limited exceptions, the recipients are prohibited from providing the service. 49 C.F.R. Section 604.9(a). Complainant is not asserting that any of the charter exceptions apply, but rather that the service they are providing is not charter service.

The regulations define charter service as the following:

> transportation using buses or vans, funded under the Acts of a group of persons who pursuant to a common purpose, under a single contract, for a fixed charge for the vehicle

[4] The Complainant has requested that MACOG withhold federal funds, but as previously indicated the Respondent is a direct recipient of federal funds from the FTA.

[5] Although Respondent makes assertions that it consulted with FTA staff regarding the legality of the service, Respondent provided no written documentation that it sought a formal legal opinion from the FTA. Any conversations with FTA staff would have been of a general nature, since it would be difficult to determine the type of service being provided without viewing the contract between the Respondent and the schools. Respondent did not provide a copy of the contract for FTA legal review until after the complaint had been filed.

> or service, who have acquired the exclusive use of the vehicle or service in order to travel together under an itinerary either specified in advance or modified after leaving the place of origin. Includes incidental use of FTA funded equipment for the exclusive transportation of school students, personnel, and equipment. 49 C.F.R. § 605.5(e).

Thus, a determination needs to be made as to whether Respondent's service meets the definition of charter by examining the elements required for charter service. In order to qualify as charter service, the following questions need to be answered:

a) Is this transportation service using buses funded with FTA money?
b) Is the service for a common purpose?
c) Is it under a single contract?
d) Is it for a fixed charge for the vehicle or service?
e) Is the exclusive use of the vehicles to travel together under an itinerary either specified in advance or modified after leaving the place of origin?

Each of these elements is discussed below. If Respondent's service includes each of these elements, then it is charter service. If it is charter service, a determination needs to be made as to whether it is permissible charter service.

A. Is this transportation service using buses funded with FTA money?

The Respondent receives federal money for its buses and its capital maintenance expenses. It is a publicly funded transportation service. Its primary source of funding is dollars it receives from the FTA. Respondent's purpose is to provide public transportation through a bus system. The buses it uses are purchased with federal money.

B. Is the service for a common purpose?

The Agreement dated November 22, 1999 (the "Agreement"), between Respondent and the schools[6] includes several relevant provisions, which relate to the question as to whether the service provided is charter service. The Agreement discusses that its purpose is to provide a public shuttle bus service between the University of Notre Dame campus, the Saint Mary's College campus, and the Holy Cross College campus. The service runs between the schools on private property owned by the schools, since the Agreement states that the schools grant Respondent the right to use their roads and highways for the shuttle service. The Agreement also states that the University of Notre Dame du Lac agrees to keep its key card controlled gate operational during the shuttle service. Since the campus is gated and the service runs on private property, the shuttle service is not open to the public.

C. Is it under a single contract?

The Agreement serves as the single contract for the shuttle service.

[6] The Agreement as previously indicated is between the Respondent and the University of Notre Dame du Lac and the Corporation of Saint Mary's College Notre Dame.

D. Is it for a fixed charge for the vehicle or service?

The Agreement states that Respondent will provide at least two buses on a daily basis to run the shuttle service between the schools during the hours of operation prescribed by the schools. The schools will determine the actual number of buses used and the days and hours of service. The schools will pay $32 per hour per vehicle during the hours the shuttle operates. The hours will include fifteen minutes in each direction for deadheading each bus between the Respondent's garage and the school campuses. Therefore, there is a fixed charge for the vehicle for which the schools will be charged.

E. Is the exclusive use of the vehicles to travel together under an itinerary either specified in advance or modified after leaving the place of origin?

Under the Agreement, the Respondent shall set the schedule for the shuttle service during the hours set by the schools. The Respondent shall also set the routing. The schools and the drivers will distribute the schedule. The schools can decide to levy a fare at a later date, and then their billing for the shuttle service will be reduced accordingly.

Other provisions of the Agreement include the restriction on advertising on the shuttle buses. In the Agreement it states that the Respondent agrees to no advertising inconsistent with the schools' mission. The Agreement does state that the Respondent assumes responsibility and liability for the service. It also states that the Respondent is not an agent of schools, but it is a public carrier.

Examining all the indicators of the service, it is clear that the service being provided by the Respondent is a charter service. Respondent's own reply dated December 22, 1999, states, "We were informed that the cost of the service for a year must be provide...so that comparisons could be made with other providers who might also be interested in the service." Respondent must have known at the time this was charter service or why would other providers be interested. In fact, Respondent indicates in their reply dated March 13, 2000, that they provided their annual notice to provide charter service and received no responses from private providers, so they clearly knew this service was a charter service.

Respondent fails to provide evidence to back up its assertion that it is providing a public shuttle service. In its reply dates March 13, 2000, it states, "We [Respondent] carry the public on the shuttle trips, including students, non-students, parents of students, visitors to our area, sports fans, and other persons from the community." However, the Agreement indicates that the route starts and ends at the gates to the Schools and payment for service is hourly by the schools. Included in the hourly calculations is the time spent deadheading the vehicles.

The two cases Complainant cites, Greyhound Lines, Inc. v. City of New Orleans, 29 F. Supp. 2d 339 (E.D. LA. 1998) and Blue Bird Coach Lines, Inc. v. Linton, 48 F. Supp. 2d 47 (D.D.C. 1999), expand on the interpretation of charter service. The Greyhound case involved Greyhound buses being used for transporting passengers from their hotels to the Convention Center. The Court in making its determination that this was charter service stated that the service Greyhound provided was only available to clients of The Convention Store, not to the general public.

Payment came through a contract not individual paying passengers. Both these criteria were used to define charter service. In the Blue Bird case, the Court determined the service being provided by the Rochester-Genessee Regional Transit Authority of roundtrip transportation from Rochester to Buffalo and Syracuse for football and basketball games was not charter service. The service was widely advertised and open to the public. Individuals paid their own fare; it was not under a fixed contract. A finding that the service provided by the Respondent is charter service is consistent with both these cases.

In addition to the facts listed above, in the questions and answers section of the implementing charter regulations in the federal register, an on-point question was posed. The question asked whether service within a university complex according to routes and schedules requested by the university would constitute charter service. The answer indicated that "if the service is for the exclusive use of students and the university sets fares and schedules, the service would be charter. However, such service operated by a recipient which sets fares and schedules and is open door, though it serves mainly university students, would be mass transportation [Question 27(d)]." 52 FR 42248 (November 3, 1987) (DOT Charter Service Questions and Answers) The description of the service as set forth in the answer indicates that factually the Respondent's service is more like the former rather than the latter type of service.

Finally, it is interesting to note that from 1996 through 1999, the Complainant provided charter service to the schools. The description of the service in Complainant's complaint is identical to the service at issue here. Complainant states, "On July 26, 1996, [Complainant] United entered into a written charter service agreement with the University of Notre Dame Du Lac and Saint Mary's College, to provide specified charter motor carrier transportation services on a scheduled per vehicle per hour basis, invoiced monthly, with payment due within thirty (30) days." The service being provided by the Respondent is the same service and the terms of the Agreement are the same.

The Respondent has entered into a contract with two universities to provide shuttle service among three schools. The buses, which were purchased with federal dollars, are for the exclusive use of the shuttle service. The two schools are being billed for the use of the buses. The schools and the drivers are providing the schedules; the schedules are not available to the public with the other regular route information. The shuttle service is conducted on private roads and on a gated campus. The schools monitor the advertisements on the shuttles and they decide the hours of operation. The Respondent is clearly providing a private charter service.

Acceptable Charter Service

If a recipient of federal funds, like the Respondent wishes to provide charter service, then it must comply with the procedural requirements. The regulation states the following:

> If a recipient desires to provide any charter service using FTA equipment or facilities the recipient must first determine if there are any private charter operators willing and able to provide the charter service ... To the extent that there is at least one such operator, the recipient is prohibited from providing charter service with FTA funded equipment or facilities unless one or more of the exceptions applies, 49 C.F.R. Section 604.9(a).

There are a number of exceptions listed for providing charter service. However, the Respondent has not contended that one of the exceptions to the charter regulations applies in this case. Instead, the Respondent claims that even if this is a charter service, the Complainant failed to respond as a willing and able charter service to the solicitation for service. Respondent alleges they were not provided the opportunity to respond.

The regulations clearly state that before a recipient provides charter service it must determine if there is any willing and able charter operator. 49 C.F.R. § 604.9(a). In order to determine if there is at least one private charter operator willing and able to provide the service, the recipient must complete a public participation process. 49 C.F.R. § 604.11(a). The regulations under 49 C.F.R. § 604.11(a) require that the recipient complete the following:

(1) At least 60 days before it desires to begin to provide charter service...

(b) The public participation process must at a minimum include:
(1) Placing a notice in a newspaper, or newspapers, of general circulation within the proposed geographic charter service area;
(2) Send a copy of the notice to all private charter service operators in the proposed geographic service and to any private charter service operator that requests notice;
(3) Send a copy of the notice to the United Bus Owners of America, 1300 L Street, NW., Suite 1050, Washington, DC 2005 and the American Bus Association, 1100 New York Avenue, SW, Suite 1050, Washington, DC 20005-3934.

(c) The notice must:
(1) State the recipients name;
(2) Describe the charter service that the recipient proposes to provide limited to days, times of day, geographic area, and categories of revenue vehicle, but not the capacity or the duration of the charter service;
(3) Include a statement providing any private charter operator...at least 30 days... to submit written evidence...
(4) State the address to which the evidence must be sent;
(5) Include a statement that the evidence necessary for the recipient to determine if a private charter operator is willing and able includes the following:
(i) A statement that the private operator has the desire and the physical capacity to actually provide the categories of revenue vehicle specified, and
(ii) A copy of the documents to show that the private charter operator has the requisite legal authority to provide the proposed charter service and that it meets all necessary safety certification, licensing and other legal requirements to provide the proposed charter service.
(6) Include a statement that the recipient shall review only that evidence submitted by the deadline, shall complete its review within 30 days of the deadline, and within 60 days of the deadline shall inform each private operator that submitted evidence what the results of the review are.
(7) Include a statement that the recipient shall not provide any charter service using equipment or facilities funded under the Acts to the extent that there is at least one willing and able private charter operator unless the recipient qualifies for one or more of

the exceptions in 49 C.F.R. § 604.9(b).

Procedural Determination Discussion

The regulation under 49 C.F.R. § 604.11 clearly sets forth the procedures for determining if any willing or able private charter operators exist. The onus is upon the recipient to provide a "public participation process." At a minimum, the recipient is required to provide any private charter operator with at least 30 days to submit written evidence to prove that it is willing and able, and then it must inform each private operator what the results are at least 60 days before the deadline.

The Complainant has indicated that it is a "willing and able" charter service within the geographic area in question. It provided the charter service to the schools the three prior years. The Respondent does not challenge this assertion. In a letter dated August 16, 1999, written by the Complainant to the Respondent, the Complainant clearly notifies the Respondent of its desire and willingness to provide charter service to Notre Dame University. The letter further reminds Respondent of the requirements contained in 49 C.F.R. § 604 to publish a notice in the newspaper and to send a copy of the notice to the United Bus Owners Association and the American Bus Association. However, 49 C.F.R. § 604.11(b)(2) also requires the Respondent to send a "copy of the notice to all private charter service operators in the proposed geographic charter service area and to any private charter service operator that requests notice." Respondent admits in their reply dated March 13, 2000, that they failed to send a notice to the Complainant. They state they received no responses to their annual notice. However, they do not attach a copy of their notice, so it is not clear what their "annual notice" referred to or where it was published.

Respondent seems not to understand the procedural requirements of the charter regulations. In its reply briefs, it discusses that the schools indicated that no private charter operators had replied to their request for a proposal. The Respondent indicates that this is one of the reasons it did not send a notice directly to the Complainant. However, the regulations are clear, the procedural notice requirement applies to the Respondent not the schools. 49 C.F.R. § 604.11(a). Respondent was required to send Complainant a copy of the notice, as a private charter operator in the geographic area, and because they had indicated an interest in providing the service. 49 C.F.R. § 604.11(b)(2).

Respondent appears not to have complied with additional procedural requirements regarding published notice. In Respondent's reply dated December 22, 1999, it states, "This year, our legal notice was posted shortly before the negotiations were undertaken with the University of Notre Dame for the public shuttle service about which the complaint stemmed. A copy of the notice was not mailed directly to [Complainant] United Limo, Inc. at that time, because [Respondent] TRANSPO took their owner's telephone call to us inquiring into charter provisions as an indication of their availability for charter service." The regulations require that notice be published at least 60 days before recipient desires to begin providing the service. 49 C.F.R. § 604.11(a)(1).

Respondent failed to properly determine whether there were any willing any private charter operators willing and able to provide the service to the schools. Therefore, since Respondent has not raised any of the exceptions that would apply to providing charter service, it is prohibited

from providing charter service with FTA funded equipment or services under 49 C.F.R. § 604.9(a).

Remedy

Complainant has requested that Respondent immediately cease the charter operations at issue and begin the notice and review procedures as required under 49 C.F.R. Part 604. Complainant has requested in the alternative that there be a loss of federal funds. FTA does not need to address this question since it will be granting the cease and desist order. FTA grants Complainant's request for the cease and desist order and orders Respondent to cease providing charter service to the schools, and if they desire to provide charter service, they must follow the notice and review procedures for determining if there are any willing and able private charter operators.

Conclusion and Order

FTA finds that Respondent has been providing impermissible charter service and orders it to cease and desist any such further service. Refusal to cease and desist in the provision of this service could lead to additional penalties on the part of FTA.

In accordance with 49 C.F.R. § 604.19, the losing party may appeal this decision within ten days of receipt of the decision. The appeal should be sent to Nuria Fernandez, Acting Administrator, FTA, 400 Seventh Street, S.W., Room 9328, Washington, D.C. 20590.

Joel P. Ettinger
Regional Administrator

5-24-00
Date

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION V
Illinois Indiana,
Michigan, Minnesota,
Ohio, Wisconsin

200 West Adams Street
Suite 2410
Chicago, IL 60606-53232
312-353-2789
312-886-0351 (fax)

August 3, 2000

Thomas P. Kujawa
Managing Director
Milwaukee County Transit System
1942 North 17th Street
Milwaukee, WI 53205-1697

Dear Mr. Kujawa:

This letter serves as the Federal Transit Administration's (FTA) response to your request dated June 28, 2000, for a waiver of the charter regulations for the trolley replica buses. Unfortunately, the FTA charter regulations, which can be found at 49 Code of Federal Regulations Part 604, do not distinguish between trolley replica buses and regular buses. Unless one of the charter exceptions applies, you cannot provide charter service with the trolley replica buses. FTA would be happy to review any request to provide charter service under one of the charter exceptions. However, since you are not applying for consideration under one of the charter exceptions, your request for a waiver from the charter regulations is denied. Should you have any questions, please contact our office.

Sincerely,

Joel P. Ettinger
Regional Administrator

U.S. Department
of Transportation
Federal Transit Administration

REGION V
Illinois, Indiana,
Michigan, Minnesota,
Ohio, Wisconsin

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312-353-2789
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September 20, 2000

Mr. W. James Chamberlain
President
Mackinaw Trolley Company
PO Box 358
101B East Central
Mackinaw City, MI 49701

RE: Use of Public Funds for Private Charters

Dear Mr. Chamberlain:

This letter serves as the Federal Transit Administration's (FTA) response to your letter dated August 26, 2000, concerning charter operations by recipients of federal funds. In your letter, you indicated that Charlevoix County Public Transportation in Boyne City, Michigan has been using a federally funded vehicle for private charter operations and you asked that the FTA investigate this situation. You should also have provided a copy of your complaint to Charlevoix County. However, FTA will be sending them a copy along with this letter.

Under 49 CFR § 604.15(b), parties to charter disputes shall first attempt to resolve the dispute informally through discussions between the recipient and complainant. A period of informal conciliation shall last for up to 30 days from the date of receipt of this letter, unless an extension is mutually agreed upon by both parties. If you are unable to reconcile this matter between both parties, either party may send notification to this office. The FTA will send a copy of the notification to the other party and the respondent shall have 30 days from the receipt of notification in which to provide written evidence which responds to the complaint. The complaining party will then have 30 days from receipt of the Respondent's response to respond to the Respondent's evidence. The FTA will then review the evidence and prepare a written decision.

If it is determined that further investigation is necessary or an informal evidentiary hearing is necessary, you will be informed in writing. Either party may request an informal evidentiary hearing prior to the Regional Administrator's decision. The Regional Administrator may grant or deny the request. If such a hearing is determined to be necessary, the date and location will be prearranged by consultation with both parties. Any new evidence presented at the informal evidentiary hearing shall be submitted to the Regional Administrator within 10 days after the hearing. Deadlines may be extended in writing by the Regional Administrator.

The regulations regarding filing complaints for charter violations can be found at 49 CFR Section 604.15. Should you have any questions, please contact Nancy-Ellen Zusman of my staff at (312)353-2789.

Sincerely,

Joel Ettinger
Regional Administrator

cc: Charlevoix County Public Transportation w/enclosure
Mr. Paul France, Air Bear Transportation Company

U.S. Department of Transportation
Federal Transit Administration

The Deputy Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

OCT 5 2000

Mr. Richard A. White
General Manager
Washington Metropolitan Area Transportation Authority
600 Fifth Street, N.W.
Washington, DC 20001

Dear Mr. White:

This letter responds to the Washington Metropolitan Area Transportation Authority's (WMATA) October 5, 2000 request for a special events charter exception under 49 CFR Section 609.4(b)(4).

WMATA seeks to operate charter service for attendees of the International Transportation Symposium scheduled for October 9-12, 2000 in Washington, D.C. (the "Symposium"). The Symposium is being sponsored by the United States Department of Transportation, the Government of the District of Columbia, and the Greater Washington Board of Trade.

WMATA bases its application on safety and security concerns for the Symposium's attendees, whom will include Secretary of Transportation Rodney E. Slater, foreign transportation ministers, Members of Congress, governors, mayors, Members of Parliaments, international transportation, manufacturing and shipping industry executives, trade association experts, and labor leaders. Your application points out that, "WMATA has its own Metro Transit Police Department, which has extensive experience with special events with heightened security issues." Also as part of WMATA's application, you included a letter from the Government of the District of Columbia, addressed to you, requesting that WMATA obtain a charter exception in connection with the Symposium. That letter points out that, "public transit buses should be used to respond to [the safety] concerns" surrounding the Symposium. The FTA notes that public transit buses do not contain undercarriage storage compartments.

The preamble to the FTA's charter regulation explains that the FTA will grant an exception under Section 604.9(b)(4) for events of an extraordinary, special and singular nature such as the Pan American Games and visits of foreign dignitaries. 52 Fed.Reg. 11925 (April 13, 1987). Based on a review of the safety and security considerations in connection with the Symposium, the FTA grants WMATA an exception to operate charter service in connection with this special event.

The FTA reminds WMATA that, "Any charter service that a recipient provides must be incidental charter service." 49 CFR Section 604.9(e). The regulations define "incidental charter service" as service that does not interfere with or detract from mass transit use, and which does not shorten the mass transportation life of FTA funded facilities or equipment.

Sincerely,

Nuria I. Fernandez
Acting Administrator

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION VIII
Colorado, Montana,
North Dakota,
South Dakota,
Utah, Wyoming

Columbine Place
216 Sixteenth Street Suite 650
Denver, CO 80202-5120
303-844-3242
303-844-4217 (fax)

November 9, 2000

Mr. Todd A. Holland, President
Ramblin' Express, Inc.
4360 Buckingham Drive, Suite 100
Colorado Springs, Colorado 80907

Decisions

RE: Alleged Charter Service, City of Colorado Springs

Dear Mr. Holland:

We are in receipt of your letter of October 24, 2000 in which you have essentially alleged that the City of Colorado Springs is providing charter service by running federally funded buses from Colorado Springs to/from Mile High Stadium in Denver for Denver Broncos football games.

Charter Service means 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. (49 CFR §604.5(e).

What the City of Colorado Springs appears to be running is a route that goes to Mile High Stadium. This is similar to the Bronco Bus and Rockies Bus that RTD runs. The key is that this is not exclusive use under one contract. The service is available to anyone who wants to buy a ticket and ride the bus. Therefore, based on the information which you have provided it does not appear that the service which you have described falls within the definition of charter service.

Should you have further questions or comments, please feel free to contact us.

Yours truly,

Lee O. Waddleton
Regional Administrator

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION V
Illinois, Indiana,
Michigan, Minnesota,
Ohio, Wisconsin

200 West Adams Street
Suite 2410
Chicago, IL 60606-5253
312-353-2789
312-886-0351 (fax)

December 7, 2000

Barry S. Bland
President/CEO
Indianapolis Public Transportation Corporation
1501 West Washington Street
Indianapolis, IN 46222

RE: Request for Waiver of Charter Regulations

Dear Mr. Bland:

This letter serves as the Federal Transit Administration's (FTA) response to your request dated November 16, 2000, for an exception to the charter regulations. Specifically, the Indianapolis Public Transportation Corporation (IndyGo) wants a waiver of the charter regulations so that it may provide charter service for the World Police & Fire Games in Indianapolis this summer. IndyGo requested the waiver under 49 C.F.R. § 604.9(b)(4), the special events exception. Unfortunately, FTA can only grant this exception to the extent that private charter operators are not capable of providing the service. You indicated in your letter that 10,000 individuals would be coming in for the event. Nancy-Ellen Zusman of my staff confirmed with Elizabeth Johnson of your staff by telephone on December 5, 2000, that this is not a private capacity issue. Additionally, two private charter operators submitted negative comments in response to IndyGo's public notice proposing to provide the charter service for the event. Based on the information FTA has received to date, the Agency cannot grant your request for an exception, due to the fact there is no evidence private charter operators are not capable of providing the service. Therefore, FTA is denying your request for an exception, because it does not meet the requirements of 49 C.F.R. § 604.9(b)(4). Should you have any questions regarding this matter, please feel free to contact Ms. Zusman. She can be reached at (312) 353-2789.

Sincerely,

Joel P. Ettinger
Regional Administrator

U.S. Department
of Transportation
Federal Transit Administration

REGION V
Illinois, Indiana,
Michigan, Minnesota,
Ohio, Wisconsin

200 West Adams Street
Suite 2410
Chicago, IL 60606-5253
312-353-2789
312-886-0351 (fax)

December 20, 2000

Hank Sokolnicki
Planning/Grants Administrator
Miami Valley Regional Transit Authority
600 Longworth Street
P.O. Box 1301
Dayton, OH 45401

Re: Response to Request to Provide Incidental Charter Service Limited to Special Categories of Revenue Vehicles

Dear Mr. Sokolnicki:

This letter serves as the Federal Transit Administration's (FTA) response to Miami Valley Regional Transit Authority's (MVRTA) inquiry dated November 22, 2000, regarding a request to provide incidental charter service limited to special categories of revenue vehicles. It is also a follow-up to our subsequent telephone conversation on the same topic on November 30, 2000. Thank you for providing me with a copy of an FTA letter on this topic from November of 1992.

Since we spoke, I have researched the question and have been able to confirm, as I indicated to you on the telephone, that the charter regulations only distinguish between two types of vehicles, buses and vans, see 49 C.F.R. Section 604.3(e). If a grantee wishes to provide charter service, they must first determine whether there are any private willing and able charter providers, otherwise one of the exceptions listed under 49 C.F.R. Section 604.9(b) must apply. FTA is aware that the advice it provided to MVRTA in 1992 indicated differently. However, the interpretation contained in our letter to you today is the correct statement of the regulation. Grantees in their public notice soliciting private willing and able charter providers can only specify bus or van with regard to the type of vehicle.

FTA's Triennial Review Guide dated October 2000, states this interpretation also. Under the explanation of the charter annual service notice, the Guide states, "The grantee's notice must be limited to a description of the ... categories of revenue vehicles for service. Only two categories of vehicles can be specified: buses and vans. A bus is a bus whether it is an intercity bus, a transit bus, or a trolley. A private operator does not have to demonstrate that it has any particular type of bus to be considered 'able.'" (Guide at 16-2)

This specific question was also addressed approximately seven months after the final charter regulation was published. UMTA (the precursor agency to FTA) published a number of questions and answers regarding the charter regulations. One of the question and answers were as follows:

25. *Question*: If the customer insists on a particular type of equipment that the willing and able to [sic] private operator does not have, for example, a trolley lookalike, articulated or double-decker bus, may the grantee provide the service?

Answer: The regulation recognizes only two categories of vehicles, i.e., buses or vans. Trolleys, artics, doubledeckers and other types of specifically modified equipment are placed in one of these categories and are subject to the same rules as all other equipment. Therefore, the grantee would be able to provide the service only if one of the regulatory exceptions applies. (Federal Register, Vol. 52, No. 212, pg. 42252, November 3, 1987)

MVRTA if it wishes to provide charter service will need to reissue its public notice to determine if there are any private willing and able charter providers for the type of service (bus or van) it wishes to provide. FTA apologizes for any confusion its prior advice may have caused. Should you have any further questions regarding this matter, please feel free to contact me. I can be reached at (312) 353-2789.

Sincerely,

Nancy-Ellen Zusman

Nancy-Ellen Zusman
Regional Counsel

U.S. Department
of Transportation
Federal Transit Administration

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Michigan, Minnesota,
Ohio, Wisconsin

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312-353-2789
312-886-0351 (fax)

February 8, 2001

Ty E. Livingston
Director of Planning & Marketing
Greater Peoria Mass Transit District
2105 N.E. Jefferson Ave.
Peoria, IL 61603

Re: Review of Agreement for Direct Charter Service

Dear Mr. Livingston:

This letter serves as the Federal Transit Administration's (FTA) response to Greater Peoria Mass Transit District's (CityLink) request dated September 15, 2000, regarding review of its Agreement for Direct Charter Service. It is also a follow-up to our subsequent telephone conversations on the same topic on February 7, and 8, 2001

The issue CityLink raised is whether it could specify in its agreement with commercial charter operators that it would be using replica trolleys, as opposed to buses or vans, as indicated in its annual notice. I have researched the question and have been able to confirm, as I indicated to you on the telephone, that the charter regulations only distinguish between two types of vehicles, buses and vans, see 49 C.F.R. Section 604.3(e). If a grantee wishes to provide charter service, they must first determine whether there are any private willing and able charter providers, otherwise one of the exceptions listed under 49 C.F.R. Section 604.9(b) must apply. Grantees in their public notice soliciting private willing and able charter providers can only specify bus or van with regard to the type of vehicle. The agreement utilized under Section 604.9(b)(7) must be consistent with a Grantee's annual notice. In other words, the agreements should only list buses or vans when discussing the type of charter service the Grantee is intending to provide.

FTA's Triennial Review Guide dated October 2000, states this interpretation also. Under the explanation of the charter annual service notice, the Guide states, "The grantee's notice must be limited to a description of the ... categories of revenue vehicles for service. **Only two categories of vehicles can be specified: buses and vans.** A bus is a bus whether it is an intercity bus, a transit bus, or a trolley. A private operator does not have to demonstrate that it has any particular type of bus to be considered 'able.'" (Guide at 16-2)

This specific question was also addressed approximately seven months after the final charter regulation was published. UMTA (the precursor agency to FTA) published a number of questions and answers regarding the charter regulations. One of the question and answers were as follows:

25. *Question*: If the customer insists on a particular type of equipment that the willing and able to [sic] private operator does not have, for example, a trolley lookalike, articulated or double-decker bus, may the grantee provide the service?

Answer: The regulation recognizes only two categories of vehicles, i.e., buses or vans. Trolleys, artics, doubledeckers and other types of specifically modified equipment are placed in one of these categories and are subject to the same rules as all other equipment. Therefore, the grantee would be able to provide the service only if one of the regulatory exceptions applies. (Federal Register, Vol. 52, No. 212, pg. 42252, November 3, 1987)

CityLink if it wishes to provide charter service will need to renegotiate its agreement with the private charter operators to determine if there are any private willing and able charter providers for the type of service (bus or van) it wishes to provide. FTA apologizes for any confusion its prior advice may have caused. Finally, you may want to clarify in your agreement that CityLink is offering to provide charter service pursuant to 49 C.F.R. Section 604.9(b)(7). This provision is a regulation, not a circular as referenced in your agreement. Should you have any further questions regarding this matter, please feel free to contact me. I can be reached at (312) 353-2789.

Sincerely,

Nancy-Ellen Zusman

Nancy-Ellen Zusman
Regional Counsel

cc: Derek Davis

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION VII
Iowa, Kansas,
Missouri, Nebraska

901 Locust Street
Suite 404
Kansas City, MO 64106
816-329-3920
816-329-3921 (fax)

July 19, 2001

Ms. Gloria J. Young
Manager of Safety & Instruction
1200 East 18th Street
Kansas City, MO 64108

Re: Charter Service for American Dental Assoc.

Dear Ms. Young:

The Federal Transit Administration (FTA) has received your letter dated June 7, 2001 regarding charter service. It is our understanding that Kansas City Area Transportation Authority (KCATA) wishes to provide transportation for attendees to the American Dental Association Convention being held October 12-15, 2001 in the Kansas City area. Specifically, KCATA wishes to provide a shuttle service to transport convention attendees to restaurants and entertainment areas throughout the city.

The preamble to the charter regulation explains that the FTA will grant an exception under Section 604.9(b)(4), the exception which you have requested, only for events of an extraordinary, special and singular nature such as the Pan American Games and the visits of foreign dignitaries. (See 52 Fed. Reg. 11925, April 13, 1987.) Regularly scheduled yearly or periodic events would not qualify for the exception. (See "Charter Service Questions and Answers," 52 Fed. Reg. 42251, November 3, 1987.) While the FTA did grant a "special event" exception to several transit authorities in Iowa for the 1988 World Ag Expo, an international agricultural exposition which had been held in the United States only twice in twenty years and which was expected to draw between 200,000 and 300,000 visitors, the American Dental Association Convention does not appear to be an event of a singular nature. This convention is held periodically and only the location within the United States changes. Your letter provides no support for the proposition that the convention is the type of activity intended by the regulation's "special event" exception.

For these reasons, FTA has determined that KCATA must follow the public participation process set forth at 49 CFR 604.11 and thereby determine if there is a willing and able private provider of charter service. If no willing and able operator exists, KCATA can provide charter service for the convention so long as this service is incidental charter service. Your telephone conversation with Regional Counsel, Paula L. Schwach, indicated that the service would be provided outside of peak service hours and from 6:30PM to 11:00PM. Incidental charter service may not interfere with or detract from providing mass transportation service or shorten the mass transportation life of the equipment being used. (See also, 52 Fed. Reg. 42251-42252.)

For a copy of the FTA Charter Service Regulations, go to http://www.access.gpo.gov/nara/cfr/waisidx_99/49cfr604_99.html. If you have questions, please contact Shannon Graves at (816) 329-3926 or Paula L. Schwach, Regional Counsel at (816) 329-3935.

Sincerely,

Mokhtee Ahmad
Regional Administrator

Cc: Elizabeth Martineau, TCC

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION VII
Iowa, Kansas,
Missouri, Nebraska

901 Locust Street
Suite 404
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816-329-3920
816-329-3921 (fax)

October 3, 2001

Ms. Gloria J. Young
Manager of Safety & Instruction
1200 East 18th Street
Kansas City, MO 64108

Re: Charter Service for American Dental Assoc.

Dear Ms. Young:

On October 1, 2001, this office received your request for a waiver of the charter regulations pursuant to 49 CFR 604.9(b)(1). Attached to your letter was documentation of your efforts to comply with the public participation process set forth at 49 CFR 604.11 and your resulting determination that there is no willing and able private provider of charter service for transportation for attendees to the American Dental Association Convention being held October 12-15, 2001 in the Kansas City area. Specifically, KCATA notified private charter operators and the American Bus Association of the opportunity to provide a shuttle service to transport convention attendees to restaurants and entertainment areas throughout the city. No provider indicated either the willingness or the ability to participate in this service; many private providers are providing other service related to the convention.

FTA finds based on your letters dated August 1, and the attachments thereto, and September 18, 2001 that no willing and able operator exists, and therefore, KCATA is granted a waiver pursuant to 49 CFR 604.9(b)(1) and may provide charter service for the convention so long as this service is incidental charter service.

If you have any questions related to this waiver, please contact Paula L. Schwach, Regional Counsel at (816) 329-3935.

Sincerely,

Cindy E. Terwilliger.

Mokhtee Ahmad
Regional Administrator

Cc: Elizabeth Martineau, TCC

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION V
Illinois, Indiana,
Michigan, Minnesota,
Ohio, Wisconsin

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Chicago, IL 60606-5253
312-353-2789
312-886-0351 (fax)

OCT 11 2001

Joseph A. Calabrese, CEO
General Manager/Secretary-Treasurer
Greater Cleveland Regional Transit Authority
1240 W. Sixth Street
Cleveland, OH 44113

RE: Charter Service

Dear Mr. Calabrese:

The Federal Transit Administration (FTA) is aware that on August 5, 2001, the Greater Cleveland Regional Transit Authority (GCRTA) transported a group of American Public Transportation Association (APTA) participants from Cleveland, OH to Pittsburgh, PA. The purpose of the trip was to view Pittsburgh's various transportation facilities. The trip was in conjunction with APTA's 2001 Intermodal Operations Planning Workshop which was in Cleveland, OH from August 6-August 8, 2001. GCRTA has indicated that it did not charge the participants for the trip, and no regular GCRTA service was impacted by the use of the buses.

The question of what type of service was provided turns on whether the service provided qualifies as charter service or mass transportation. The definition of charter service under 49 C.F.R. § 604.5(e) is "transportation using buses... funded under the [FTA Act and those parts of 23 U.S.C. 103 and 142 that provide for assistance to public bodies for purchasing buses] Acts of a group of persons who pursuant to a common purpose, under a single contract, at a fixed charge... for the vehicle or service, have acquired the exclusive use of the vehicle or service to travel together under an itinerary..." The service provided by GCRTA was not open to the public. GCRTA used federally funded equipment to provide transportation for a specific group of individuals to travel from Cleveland to Pittsburgh.

Although GCRTA did not charge for this service, FTA has interpreted cost as being irrelevant. In 1987, UMTA (FTA's precursor agency the Urban Mass Transportation Administration) issued a series of charter questions and answers. Question 27(a) was whether service provided for free, but otherwise meets the criteria in the definition of charter would fall within the definition of charter. The answer was as follows:

> "Cost is irrelevant in determining whether service is mass transportation or charter service. Thus, service which meets the criteria set by UMTA, i.e., service controlled by the user, not designed to benefit the public at large, and which is provided under a single contract, will be charter regardless of the fact that it is provided for free.
>
> As a general rule, free charter service would be "non-incidental" since it does not recover its fully allocated cost, and could not be performed by an UMTA recipient, even under one of the exceptions to the charter regulations." (52 Fed. Reg. 42252 (Nov. 3, 1987))

Based on the information GCRTA has provided regarding this trip, FTA views this trip as unauthorized charter service. GCRTA controlled the service, and it was not for the benefit of the public at large. It was provided on a one time basis for transportation between two destinations.

Since GCRTA provided unauthorized charter service, it should extend the useful life of the vehicles in question by the amount of mileage that was used for the trip from Cleveland to Pittsburgh. In future, GCRTA should cease and desist from the practice of providing unauthorized charter service.

Should you have any questions regarding this matter, please feel free to contact me. I can be reached at (312) 353-2789.

Sincerely,

Louise Carter, Director
Office of Operations and Program Management

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION V
Illinois Indiana,
Michigan, Minnesota,
Ohio, Wisconsin

200 West Adams Street
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312-353-2789
312-886-0351 (fax)

OCT 23 2001

T. J. Ross
Executive Director
PACE
550 West Algonquin Road
Arlington Heights, IL 60005

RE: Charter Regulation Requirements

Dear Mr. Ross:

The Federal Transit Administration (FTA) is aware that on September 27, 2001, PACE provided thirty-five (35) buses based on a request from the White House. The buses were used to transport approximately 4,000 airline employees from sites beyond O'Hare Airport to a White House event with the Secretary of Transportation. The buses were used over a two-hour time period. PACE was reimbursed for the use of the buses. FTA does not know whether regular PACE service was impacted by the use of the buses.

FTA is aware that the White House indicated that for specific security reasons it wished to utilize PACE buses. A one-time event of this type would probably have qualified as an exception to the charter regulations under the special events exception. FTA is aware that this was a special request from the White House with a very narrow timeframe. FTA would have responded extremely quickly to either a written or verbal request (followed up later with a written request) for an exception. However, PACE did not seek the Administrator's approval for an exception. This letter is being sent as a reminder that PACE is required to follow the charter regulations, including the procedural requirements.

The charter regulations prohibit recipients from providing charter service with FTA funded equipment unless one of the specific charter exceptions applies. 49 Code of Federal Regulations (CFR) § 604.9(a). Under the regulations, there is a charter exception that applies for special events to the extent that private charter operators are not capable of providing the service. 49 CFR § 604.9(b)(4). However, in order to utilize the exception the recipient needs to petition the Administrator for an exception. *Id.* The petition should describe the event, explain how it is special, and explain the amount of charter service the private operators are not capable of providing. 49 CFR § 604.9(d). Additionally, the service provided can only be incidental. 49 CFR § 604.9(e). Incidental service means that the service does not interfere with or detract from the provision of mass transportation service. 49 CFR § 604.5.

As you well know, the service provided by PACE was not open to the public. PACE used federally funded equipment to provide transportation for a specific group of individuals for a specific purpose. The service provided clearly falls within the definition of charter. PACE did not petition for an exception to the charter regulations. FTA is bringing this matter to your attention so that should a similar situation occur, you will contact FTA immediately. Should you have any questions regarding this matter, please feel free to contact me.

Sincerely,

Joel Ettinger
Regional Administrator

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION I
Connecticut, Maine,
Massachusetts,
New Hampshire,
Rhode Island, Vermont

Volpe Center
55 Broadway, Suite 920
Cambridge, MA 02142-1093
617-494-2055
617-494-2865 (fax)

DEC 13 2001

Mr. Robert B. Kennedy
Lowell Regional Transit Authority
Gallagher Intermodal Transportation Center
145 Thorndike Street
Lowell, MA 01852

Dear Mr. Kennedy:

This letter will confirm that the Federal Transit Administration (FTA) authorized the Lowell Regional Transit Authority (LRTA) to provide charter service under a special events charter exception pursuant to 49 CFR Section 609.4(b)(4). Specifically, the office of U. S. Senator Robert Smith requested LRTA to provide a 25-passenger, or larger, CNG-powered bus to transport staff and press to various events in Western New Hampshire during a two-day tour which was officially called "The Bob Smith Environmental Bus Tour."

LRTA based its application on the nature of the service which was to inform the public about the need for an expanded natural gas infrastructure and for CNG filling stations in the State of New Hampshire and across the country. Your application pointed out that LRTA notified three private charter bus operators to determine whether these companies would be able to perform the service. None of the private operators had the capacity to provide the necessary service.

The FTA has not defined "special events," but intends that they cover only events of an extraordinary and singular nature. 52 Fed. Reg. 42251 (November 3, 1987). Based on a review of the considerations in connection with the Environmental Bus Tour, the FTA granted LRTA an exception to operate charter service in connection with this special event.

The FTA reminds LRTA that a request for a special events exception must follow the process set forth at Section 604.9(d). This process provides, in part, that a recipient must submit its petition for an exception to FTA at least 90 days prior to the date of the charter service and that any exception granted is only good for the particular special event specified. Moreover, any charter

service that a recipient provides must be incidental. 49 CFR Section 604.9(e). The regulations define "incidental charter service" as service which does not interfere with or detract from the provision of mass transit use, or which does not shorten the mass transportation life of FTA funded facilities or equipment.

I hope this information is helpful. If you have any questions, please feel free to call me at (617) 4949-2409.

Sincerely,

Margaret E. Foley

Margaret E. Foley
Regional Counsel

U.S. Department
of Transportation
**Federal Transit
Administration**

Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

C-16-01

DEC 27 2001

Dear Transportation Colleague:

The events of September 11 have introduced significant challenges for America's transportation network. Long recognized as the world's finest system for transporting passengers and goods, this network is the foundation of the world's strongest economy and most open society. We are now challenged to maintain that vigor and effectiveness in the face of a new and menacing threat.

Many of the private sector components of our transportation infrastructure were dealt a considerable economic blow by the September 11 attack. The airline industry was severely impacted, but so, too, was the private over-the-road bus industry. The bus industry reports that members experienced cancellation rates in charter and tourism business of up to eighty percent. Revenues from these services are considered crucial to maintaining intercity bus transportation networks, which serve over 4,000 communities.

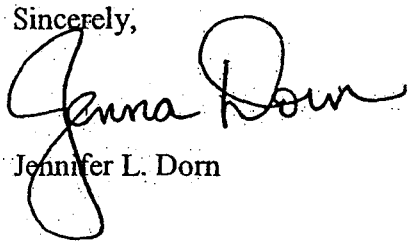
The interconnected nature of America's transportation network requires that we work together to maintain the vitality and effectiveness of every component of our system. Local transit agencies, especially in rural areas, are providing connecting feeder and distributor services to intercity operators. Local transit operators have become ticket agents for both local and intercity service. Intercity over-the-road bus operators have become contractors to public governmental agencies, particularly providing long distance commuter services, and have made their resources available for special events in times of unusually high demand. The fact is, the health of every component – public and private – affects the health and effectiveness of our entire passenger transportation system.

As public transit agencies move to expand service, it is important to respect the needs of private sector agencies to operate effectively in a competitive marketplace for services that do not receive subsidies. In 1987, the Federal Transit Administration (FTA) issued charter service rules, as required by Federal law, to ensure that publicly funded services do not put private services at a competitive disadvantage. FTA also affords flexibility within its rules for public agencies to meet special community needs when it is not practical for the private sector to respond in a cost-effective manner.

I have enclosed a brochure that highlights and reviews the key provisions of the FTA charter service regulation and the specific responsibilities of FTA grant recipients. Please take a few moments to review this information.

Public and private mass transportation providers have much to offer each other and the riding public--America is depending upon all of us to keep our communities safe and moving.

Sincerely,



Jennifer L. Dorn

Enclosure

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION IX
Arizona, California,
Hawaii, Nevada, Guam
American Samoa,
Northern Mariana Islands

201 Mission Street
Suite 2210
San Francisco, CA 94105-1839
415-744-3133
415-744-2726 (fax)

JAN 15 2002

Mr. Richard Cromwell
General Manager and CEO
SunLine Transit Agency
32-505 Harry Oliver Trail
Thousand Palms, CA 92276

Mr. Jim Seal
Jim Seal Consulting Services
2431 32nd Street
Santa Monica, CA 90405

Dear Messrs. Cromwell and Seal:

It has come to our attention that Federal Transit Administration (FTA) failed to issue its final determination letter in response to correspondence submitted by the SunLine Transit Agency (SunLine) and the California Bus Association (CBA) concerning the reconfiguration and reinstatement of SunLine's group trip service. We regret this omission, and herewith transmit FTA's decision.

Background

On February 10, 1997, the FTA issued a decision finding that SunLine's fixed-route group trip service was charter service in violation of 49 CFR Part 604. SunLine was ordered to discontinue operating the service and advised that if it wished to reinstitute group trip operations, it must reconfigure the service to conform to FTA's mass transportation guidelines. Shortly thereafter, the FTA granted a temporary stay of its decision based on SunLine's revelation that the information it had provided to FTA prior to the February 10 decision was outdated; the parties had resolved their differences during an October 1996 meeting; and the charter infractions had been corrected. In response, CBA denied that the issues were resolved and claimed that SunLine was still performing impermissible charter service.

Both parties filed supplemental documentation, with SunLine maintaining that the group trip operation is "fixed route deviation service" within the meaning of mass transportation, and CBA continuing to claim that the group trip violates the charter regulation. Thereafter, in response to FTA's request for clarification of its supplemental information, SunLine stated in its January 21, 1998, letter:

> "There were a total of 164 group trips during the period 9/1/97 through 1/4/98. 100% of these group trips were for schools. None of the schools requested a

deviation... 69 of the 164 trips included a deviation of ¼ mile or less. We made the decision to 'deviate' from the exact fixed route in order to provide a safer boarding point for these students, almost all of who are grade schoolers. The deviation in these cases means that the bus leaves the exact route, travels a few blocks to a convenient, on the street (never on school property) location, boards the children, and immediately returns to the exact fixed route. This routing assures that no bus stop is missed in making these deviations."

Discussion

Based on the supplemental information gathered since issuing its February 10 decision, FTA finds that SunLine has not made the changes necessary to bring the group trip service within the definition of mass transportation. There may be several ways, however, that SunLine could provide the service, which would be consistent with Federal law and regulation.

First, according to SunLine, SunBuses have used computerized rolling head signs to display regular route designations for all routes since June 1996. Moreover, the number of group trips performed, including 69 deviations over a four-month period, may justify placing a bus stop in front of all schools served as well as the group trip destination points. Finally, adopting this reconfiguration would assure that group trip pick-up and drop-off points would be published in the regular fixed-route schedule.

Second, SunLine might consider implementing site-specific route deviation service as an alternative that would offer SunLine a degree of route flexibility while limiting overall schedule impact. Under this approach, certain major trip generators or destinations, such as public housing or group homes, senior centers, service agencies, and so forth are identified on the advertised schedule. Deviation requests are only accepted for these specific sites. Customers and agencies can request that new sites be considered and these may be included on the schedule the next time the routes are adjusted or schedules updated. Site-specific route deviation combines fixed route and demand response service, both of which FTA has determined to be mass transportation. The fact that it combines aspects of both rather than being simply one or the other would not make it any less mass transit, as long as it is available to any individual or group within the service area.

According to SunLine, "100%" of its group trips are performed for schools, which clearly establishes that the service is performed exclusively for students and school personnel rather than for the general public. Therefore, if SunLine does decide to reconfigure its service as site-specific route deviation, it must take steps to vigorously advertise and promote the service to ensure that the public is aware of whatever routes or deviation possibilities are offered. Generally, this marketing effort is best evidenced by publication of the service in the recipient's preprinted schedules and doing other types of advertising as well. SunLine's success in these marketing efforts to the general public will be determined by the diversity of the clientele requesting deviations and the percentage of deviation requests that can be attributed to each; i.e. group homes/20%.

Conclusion

In conclusion, SunLine's group trip service is charter service rather than mass transportation and therefore, results in an impermissible use of FTA funded facilities and equipment. Under FTA's charter regulation, SunLine may not provide charter service using FTA funded equipment or

facilities if there is a private operator in its geographic area willing and able to provide that charter service unless one or more of the exceptions listed in 49 CFR § 604.9(b) apply. Furthermore, any charter service provided by SunLine under an exception must be incidental. Moreover, if SunLine wishes to provide direct charter service it must engage in the public notice process set forth in 49 CFR § 604.11. If, as a result of the public notice process, SunLine determines that there is no willing and able private operator, it may provide charter service.

In accordance with 49 CFR § 604.19, either party may appeal this decision within ten days to Jennifer L. Dorn, Administrator, Federal Transit Administration, 400 Seventh Street, S.W., Room 9328, Washington, DC 20590.

Sincerely,

Leslie T. Rogers
Regional Administrator

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION V
Illinois, Indiana,
Michigan, Minnesota,
Ohio, Wisconsin

200 West Adams Street
Suite 2410
Chicago, IL 60606-5253
312-353-2789
312-886-0351 (fax)

April 15, 2002

Joseph A. Calabrese, CEO
General Manager
Greater Cleveland Regional Transit Authority
1240 West 6th Street
Cleveland, Ohio 44113

RE: Request for Waiver of Charter Regulations

Dear Mr. Calabrese:

This letter serves as the Federal Transit Administration's (FTA) response to your request dated April 10, 2002, for an exception to the charter regulations. Specifically, the Greater Cleveland Regional Transit Authority (GCRTA) wants an exception to the charter regulations so that it may provide charter service for the U.S. Department of Veterans Administration (VA). The VA is hosting the National Wheelchair Games in Cleveland from July 8-14, 2002. GCRTA requested the waiver under 49 C.F.R. § 604.9(b)(5)(i), the non-profit exception.

The VA would need approximately 20 buses, which would need to be temporarily outfitted to provide additional capacity for wheelchair passengers. As the VA stated in its letter dated April 3, 2002, it is a government entity, there will be a significant number of physically challenged persons, and the charter trip is consistent with the function and purpose of the VA. The VA also completed all the required certifications. GCRTA states in its letter that the charter service is incidental service, as required by 49 C.F.R. § 604.9(e). Therefore, FTA grants GCRTA's request for an exception, as the proposed charter service meets all the requirements of 49 C.F.R. § 604.9(b)(5)(i).

Should you have any questions regarding this matter, please feel free to contact Nancy-Ellen Zusman. She can be reached at (312) 353-2789.

Sincerely,

Joel P. Ettinger
Regional Administrator

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION V
Illinois, Indiana,
Michigan, Minnesota,
Ohio, Wisconsin

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APR 2 4 2002

Claryce Gibbons-Allen
Director
Detroit Department of Transportation
1301 East Warren
Detroit, MI 48207

RE: Request for Waiver of Charter Regulations

Dear Ms. Gibbons-Allen:

This letter responds to the Detroit Department of Transportation's (DDOT) request for a special events charter exception under 49 CFR Section 604(b)(4) dated April 19, 2002, addressed to the Federal Transit Administration (FTA). DDOT is requesting a special events exception to allow it to operate charter service for the G-8 Energy Summit (the "Summit") in Detroit from May 1, 2002, to May 5, 2002. The City of Detroit was selected by the U.S. Department of Energy to host the Summit.

The preamble to the charter regulation explains that the FTA will grant an exception under § 604.9(b)(4) only for events of an extraordinary, special and singular nature such as the Pan American Games and visits of foreign dignitaries, 52 Fed. Reg. 11925 (April 13, 1987). This event is an international conference. Attendees will include energy ministers from Canada, France, Germany, Italy, Japan, Russia, the United Kingdom, and the European Union. FTA understands that the City of Detroit has special concerns for the attendees' safety and seeks a higher level of security for these people. As a result, the City of Detroit has requested that DDOT provide mass transit buses, which have the necessary capacity and which do not contain undercarriage storage. Due to issues of security related to the attendees, as well as the unusual and unique nature of this event, the FTA recognizes the G-8 Energy Summit as the type of event envisaged by § 604.9(b)(4). DDOT has also indicated that the use of the buses at the conference will constitute incidental service.

For these reasons, I hereby authorize DDOT to make FTA funded buses available to accommodate the need for a secure charter service during the G-8 Energy Summit. DDOT may, in accordance with the information provided to the FTA, utilize approximately 30 buses for the conference in the provision of this charter service.

DDOT is reminded that, in accordance with 49 C.F.R. § 604.9(e), "Any charter service that a recipient provides must be incidental charter service." The regulations define "incidental charter service" as service that does not interfere with or detract from mass transit use or shorten the mass transportation life of FTA funded facilities or equipment.

Should you have any questions regarding this matter, please feel free to contact Ms. Nancy-Ellen Zusman. She can be reached at (312) 353-2577.

Sincerely,

Joel P. Ettinger
Regional Administrator

U.S. Department
of Transportation
Federal Transit Administration

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Illinois, Indiana,
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May 10, 2002

Thomas J. Ross
Executive Director
PACE
550 West Algonquin Road
Arlington Heights, IL 60005

RE: Request for Exception of Charter Regulations

Dear Mr. Ross:

This letter serves as the Federal Transit Administration's (FTA) response to your request dated May 8, 2002, for an exception to the charter regulations. Specifically, PACE wants an exception to the charter regulations so that it may provide charter service for a visit by the President of the United States on May 13, 2002, to Chicago, IL. PACE requested the waiver under 49 C.F.R. § 604.9(b)(4), the special events exception.

PACE would need approximately 20 buses to transport employees of United Parcel Service from their suburban location to their hub downtown for the President's visit. PACE has contacted approximately XX number of private charter operators who have indicated they are unable to provide the service on such short notice with the required security measures. PACE received the request from the White House after normal business hours on May 7, 2002. PACE states in its letter that the charter service is incidental service, as required by 49 C.F.R. § 604.9(e). Therefore, FTA grants PACE's request for an exception, as the proposed charter service meets the requirements of 49 C.F.R. § 604.9(b)(4).

Should you have any questions regarding this matter, please feel free to contact Nancy-Ellen Zusman. She can be reached at (312) 353-2789.

Sincerely,

Joel P. Ettinger
Regional Administrator

THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

August 6, 2002

The Honorable Michael R. McNulty
U.S. House of Representatives
Washington, DC 20515-3221

Dear Congressman McNulty: MRG:

Thank you for your letter of June 3 supporting the waiver application submitted by the Capital District Transportation Authority (CDTA) for the City of Albany to use trolley vehicles to promote tourism.

I must address the Federal Transit Administration's (FTA) current stance in regard to charter regulations. The FTA has not revised its interpretation of the charter service regulation as a result of the impacts on the private transportation industry of the terrorist acts of September 11, 2001, as suggested by Mayor Jennings of Albany. That interpretation has not changed substantially since it was issued in 1987.

On June 5 FTA responded directly to CDTA's waiver request. Unfortunately, there is no legal basis on which a waiver can be granted, as the enclosure explains in more detail. CDTA, however, may still be able to maintain and store the vehicles in its FTA funded facility if it can make a determination in accordance with FTA's charter service regulation that there are no willing and able private operators.

You may contact Ms. Maisie Grace, FTA Regional Counsel in New York at (212) 668-2178 for additional details if needed. If I can provide further information or assistance, please feel free to call me.

Sincerely yours,

Norman Y. Mineta

Enclosure

cc: Dennis Fitzgerald, Executive Director
Capital District Transportation Authority
110 Watervleit Avenue
Albany, New York 12206

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

Cardinal Buses, Inc.,
Complainant

v.

Charter Complaint #2002-08
49 U.S.C. Section 5323(d)

Interurban Transit Partnership,
Respondent.

DECISION

Summary

On June 20, 2002, Cardinal Buses, Inc. ("Complainant") filed a complaint with the Federal Transit Administration ("FTA") alleging that Interurban Transit Partnership ("Respondent") was going to provide a service in violation of FTA's charter regulation, 49 Code of Federal Regulations (C.F.R.) Part 604. The service specifically complained of pertains to Respondent's providing bus service for a radio station's birthday on June 22, 2002. Respondent filed an answer dated July 12, 2002. Complainant filed a response dated July 23, 2002. Upon reviewing the allegations in the complaint and the subsequent filings of both the Complainant and the Respondent, FTA has concluded that the service in question does violate FTA's regulations regarding charter service. Respondent is hereby ordered to cease and desist in providing such illegal service.

Complaint History

Complainant filed its complaint with the FTA on June 20, 2002. The complaint alleges that the Respondent was going to provide charter service[1] for a radio station promotional event on June 22, 2002. Specifically, Complainant alleges that the Respondent was intending to provide charter service for the event and as a private charter provider he had never been contacted by the Respondent. The Complainant also alleges that in the past he has received a "willing and able" questionnaire from the Respondent or its predecessor organization, Grand Rapids Transit Authority, but he has not received one in the past couple of years.

Respondent filed its answer on July 12, 2002. In it, Respondent denied that the service it provided for the radio "Birthday Bash" was charter service. Respondent indicated the service was open to the public, no fee was charged and there was no contract. The service, Respondent also indicated, did not interfere with its regularly scheduled service. Respondent states that it no longer provides charter service, which is why it no longer sends out a "willing and able" questionnaire.

[1] Respondent receives Section 5307 and 5309 funds from FTA; therefore, they must comply with the charter regulations.

Complainant responded on July 23, 2002. In its reply Complainant stated that although there may not have been financial reimbursement, the Respondent benefited from the positive publicity it received in the radio announcements. This reply reiterated the assertion that Respondent's service was an illegal charter operation and that Complainant was not provided an opportunity to offer its own charter service. Complainant requested a cease and desist order.

Discussion

As Complainant has accurately stated, recipients of federal financial assistance can provide charter service in very limited circumstances. In the absence of one of the limited exceptions, the recipients are prohibited from providing the service. 49 C.F.R. Section 604.9(a). Complainant is not asserting that any of the charter exceptions apply, but rather that the service they are providing is not charter service.

The regulations define charter service as the following:

> [T]ransportation using buses or vans, funded under the Acts of a group of persons who pursuant to a common purpose, under a single contract, for a fixed charge for the vehicle or service, who have acquired the exclusive use of the vehicle or service in order to travel together under an itinerary either specified in advance or modified after leaving the place of origin. Includes incidental use of FTA funded equipment for the exclusive transportation of school students, personnel, and equipment. 49 C.F.R. § 605.5(e).

Thus, a determination needs to be made as to whether Respondent's service meets the definition of charter by examining the elements required for charter service. In order to qualify as charter service, the following questions need to be answered:

a) Is this transportation service using buses funded with FTA money?
b) Is the service for a common purpose?
c) Is it under a single contract?
d) Is it for a fixed charge for the vehicle or service?
e) Is the exclusive use of the vehicles to travel together under an itinerary either specified in advance or modified after leaving the place of origin?

Each of these elements is discussed below. If Respondent's service includes each of these elements, then it is charter service. If it is charter service, a determination needs to be made as to whether it is permissible charter service.

A. Is this transportation service using buses funded with FTA money?

The Respondent receives federal money for its buses and its capital maintenance expenses. It is a publicly funded transportation service. Its primary source of funding is dollars it receives from the FTA. Respondent's purpose is to provide public transportation through a bus system. The buses it uses are purchased with federal money.

B. Is the service for a common purpose?

Although there was not a formal agreement, Respondent acknowledges that the radio announcements stated service was provided from park and ride lots to the event. The event, according to Complainant, was held at the Allegan County Fair Grounds.

C. Is it under a single contract?

The arrangement although not under a written contract does evidence a single oral contract. It appears that in exchange for the radio providing publicity for the Respondent, the Respondent provided free shuttle service for the "Birthday Bash" event.

D. Is it for a fixed charge for the vehicle or service?

Although the service was provided for free, FTA has indicated that charter service does not necessarily require there to be monetary payment. In its 1987 Charter Service Questions and Answers, 52 Federal Register 42248, FTA stated the following:

> 27. *Question:* Do the following types of service fall within the definition of "charter service" for the purposes of the regulation:
>
> a. Service that is provided for free but otherwise meets the criteria in the definition of charter?
>
> *Answer:* Cost is irrelevant in determining whether service is mass transportation or charter service. Thus, service which meets the criteria set by UMTA [FTA's precursor agency the Urban Mass Transportation Administration], i.e., service controlled by the user, not designed to benefit the public at large, and which is provided under a single contract, will be charter regardless of the fact that it is provided for free.
>
> As a general rule, free charter service would be "non-incidental" since it does not recover its fully allocated cost, and could not be performed by an UMTA recipient, even under one of the exceptions to the charter regulations. However, UMTA will consider certain types of free charter service to be "incidental." An example of this would be free service to an economically disadvantaged group when there is no private operator willing and able to perform the service. Since UMTA is concerned about the diversion of mass transit revenues and the reduction in mass transportation life resulting from service provided below cost, it will, when presented with a complaint, consider such service "incidental" charter only in a very limited number of cases.

Therefore, based on the facts in this case, the fact that the service was free is irrelevant.

E. Is the exclusive use of the vehicles to travel together under an itinerary either specified in advance or modified after leaving the place of origin?

The Respondent acknowledges that the vehicles were used to shuttle individuals from the park and ride lots to the event. The event, according to Complainant, was held at the Allegan County Fair Grounds.

The Respondent entered into an oral contract with the radio station to provide free shuttle service for its "Birthday Bash." The buses, which were purchased with federal dollars, were for the exclusive use of the shuttle service and those individuals interested in attending the event, not the general public at large. The schedule for the service was not available to the public with the other regular route information. Presumably, the radio station may have even dictated when the service should be provided based on the schedule of its event. The Respondent was clearly providing a private charter service. If the Respondent wanted to provide this type of charter service, it should have determined whether there were any willing and able private charter providers interested in providing the service.

Acceptable Charter Service

If a recipient of federal funds, like the Respondent wishes to provide charter service, then it must comply with the procedural requirements. The regulation states the following:

> If a recipient desires to provide any charter service using FTA equipment or facilities the recipient must first determine if there are any private charter operators willing and able to provide the charter service ... To the extent that there is at least one such operator, the recipient is prohibited from providing charter service with FTA funded equipment or facilities unless one or more of the exceptions applies, 49 C.F.R. Section 604.9(a).

There are a number of exceptions listed for providing charter service. However, the Respondent has not contended that one of the exceptions to the charter regulations applies in this case. By filing his complaint, Complainant has indicated there was at least one willing and able private provider interested in providing the service.

The regulations clearly state that before a recipient provides charter service it must determine if there is any willing and able charter operator. 49 C.F.R. § 604.9(a). In order to determine if there is at least one private charter operator willing and able to provide the service, the recipient must complete a public participation process. 49 C.F.R. § 604.11(a). The regulations under 49 C.F.R. § 604.11(a) require that the recipient complete the following:

> (1) At least 60 days before it desires to begin to provide charter service...
>
> (b) The public participation process must at a minimum include:
> (1) Placing a notice in a newspaper, or newspapers, of general circulation within the proposed geographic charter service area;
> (2) Send a copy of the notice to all private charter service operators in the proposed geographic service and to any private charter service operator that requests notice;
> (3) Send a copy of the notice to the United Bus Owners of America, 1300 L Street, NW., Suite 1050, Washington, DC 2005 and the American Bus Association, 1100 New York Avenue, SW, Suite 1050, Washington, DC 20005-3934.
> (c) The notice must:
> (1) State the recipients name;
> (2) Describe the charter service that the recipient proposes to provide limited to days,

times of day, geographic area, and categories of revenue vehicle, but not the capacity or the duration of the charter service;

(3) Include a statement providing any private charter operator...at least 30 days... to submit written evidence...

(4) State the address to which the evidence must be sent;

(5) Include a statement that the evidence necessary for the recipient to determine if a private charter operator is willing and able includes the following:

(i) A statement that the private operator has the desire and the physical capacity to actually provide the categories of revenue vehicle specified, and

(ii) A copy of the documents to show that the private charter operator has the requisite legal authority to provide the proposed charter service and that it meets all necessary safety certification, licensing and other legal requirements to provide the proposed charter service.

(6) Include a statement that the recipient shall review only that evidence submitted by the deadline, shall complete its review within 30 days of the deadline, and within 60 days of the deadline shall inform each private operator that submitted evidence what the results of the review are.

(7) Include a statement that the recipient shall not provide any charter service using equipment or facilities funded under the Acts to the extent that there is at least one willing and able private charter operator unless the recipient qualifies for one or more of the exceptions in 49 C.F.R. § 604.9(b).

Procedural Determination Discussion

The regulation under 49 C.F.R. § 604.11 clearly sets forth the procedures for determining if any willing or able private charter operators exist. The onus is upon the recipient to provide a "public participation process." At a minimum, the recipient is required to provide any private charter operator with at least 30 days to submit written evidence to prove that it is willing and able, and then it must inform each private operator what the results are at least 60 days before the deadline.

The Complainant has indicated that it is a "willing and able" charter service within the geographic area in question. The Respondent does not challenge this assertion. Respondent acknowledges that it no longer sends out "willing and able" questionnaires, because it no longer provides charter service. However, Respondent needs to understand what constitutes charter service in order to be able to state that it no longer provides charter service.

Respondent failed to properly determine whether there were any willing any private charter operators willing and able to provide the service to the event. Therefore, since Respondent has not raised any of the exceptions that would apply to providing charter service, it is prohibited from providing charter service with FTA funded equipment or services under 49 C.F.R. § 604.9(a).

Remedy

Complainant has requested that Respondent cease from providing charter operations in the future, and that it refers charter requests to private providers. FTA grants Complainant's request for the

cease and desist order and orders Respondent to cease providing charter service in the future, and if they desire to provide charter service, then the Respondent must follow the notice and review procedures for determining if there are any willing and able private charter operators.

Conclusion and Order

FTA finds that Respondent provided impermissible charter service and orders it to cease and desist any such further service. Refusal to cease and desist in the provision of this service could lead to additional penalties on the part of FTA.

In accordance with 49 C.F.R. § 604.19, the losing party may appeal this decision within ten days of receipt of the decision. The appeal should be sent to Jennifer Dorn, Administrator, FTA, 400 Seventh Street, S.W., Room 9328, Washington, D.C. 20590.

J. P. Ettinger

Joel P. Ettinger
Regional Administrator

08-20-02
Date

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

Kemps Bus Service, Inc.
Complainant

v.

Charter Complaint
49 U.S.C. Section 5323(d)

Rochester-Genesee Transportation Authority,
Respondent.

DECISION

Summary

By letter dated March 18, 2002, Kemps Bus Service, Inc. ("Complainant") filed a complaint with the Federal Transit Administration ("FTA") alleging that Rochester-Genesee Transportation Authority ("Respondent") is providing service in violation of FTA's charter regulation, 49 Code of Federal Regulations (C.F.R.) Part 604. The service specifically complained of pertains to Respondent's bus service to a funeral in Syracuse, a school field trip, local supermarket service, a golf tournament and college campus service. Respondent filed a Response dated April 3, 2002. Respondent filed a second Response dated April 23, 2002. Complainant filed a Rebuttal dated May 6, 2002. Complainant filed a Second Rebuttal on May 21, 2002. Respondent filed a 3rd Response by letter dated July 15, 2002. Complainant filed a 3rd Rebuttal by letter dated July 17th, 2002. Upon reviewing the allegations in the complaint and the subsequent filings of both the Complainant and the Respondent, FTA has concluded that the service in question does violate FTA's regulations regarding charter service. Respondent has admitted that Respondent's charter procedures were in violation of FTA's regulations and is hereby ordered to cease and desist in providing such illegal charter service.

Complaint History

Complainant filed its complaint with the FTA by letter dated March 18, 2002. The complaint alleges that the Respondent is providing illegal charter service[1] by providing private charter service for (1) the Rochester Firefighters attending a funeral, (2) a field trip for the Livonia School District, (3) local supermarket chains, (4) a local LPGA golf tournament and (5) inter-campus shuttling and commencement around a private college. Specifically, Complainant alleges that this service is charter because Respondent did not follow the required public participation process and did not receive a waiver from FTA to provide these services

Respondent filed its Response by letter dated April 3, 2002. In it, Respondent denied that it was providing illegal charter service, and attached as an exhibit a copy of a letter from an unidentified signatory stating that the service was requested for "March 2002" because it exceeded Golden

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Memories By letter dated April 15, 2002, FTA requested Respondent to flesh out more fully its Response to the Complaint.

Respondent filed a Second Response dated April 23, 2002. This response reiterated that the funeral service and school trip were done because such service exceeded the capacity of a private charter operator. It also stated that the LPGA event and the supermarket service are of a public nature and any member of the public may board according to their timetable. Respondent attached as exhibits a copy of a "Grocery Shuttle Outline" dated 4/23/02 and various college campus shuttles timetables, which purport to be public schedules

Complainant sent their Rebuttal on May 6, 2002. This Rebuttal reiterated the assertion that Respondent's service is an illegal charter operation and also noted that Complainant was not provided proper notice for an opportunity to offer its own charter service. Respondent reasserted its allegations regarding the Livonia School District field trip and provided a copy of an invoice from Respondent to such school. Complainant states that contracts should not be between a recipient of Federal funds such as the Respondent and a charter customer In addition, Complainant raises several other alleged charter trips that were referenced in Respondent's Response such as the service on behalf of the Town of Chili and the Siena Catholic Academy. With respect to the commencement service and the LPGA event, Complainant states that it contacted these organizations to try and provide the service and was informed that these services were under contract with Respondent. Complainant alleges that this service would not fit within one of the "special event" exceptions to the FTA regulations

Complainant submitted a Second Rebuttal dated May 21, 2002, in response to Respondent's Second Response. Complainant submits that the LPGA event is not public service because it is performed pursuant to a contract and that an opportunity was not first given to the private operators. Complainant points out that it is a special 5 day event for which passengers do not pay a fare. With respect to the supermarket service, Complainant alleges that this is also performed pursuant to a contract between Respondent and the supermarkets and that the passengers pay no fare. Complainant alleges that the service was taken over by Respondent after a private operator went out of business ten years ago and that there was no public participation process. Lastly, Complainant explains that the college service, which they are complaining of, is service for inter-campus shuttling and graduation commencement, not the other shuttles with links to off-campus life. Complainant states that the commencement service was not addressed by Respondent's responses and that this service is solely within the campus and is not regular route service. Also, Complainant again alleges that the college service is pursuant to a direct contract with the college.

By letter dated June 26, 2002, FTA requested further information of Respondent in order to clarify Complainant's allegations.. Generally, the FTA inquired into the existence of the alleged contracts, the basis of the fares, whether the campus is open to the general public, whether there is commencement service provided and how the charters were obtained.

Respondent filed a 3rd Response by letter dated July 12, 2002. Respondent again claimed that the supermarket service, LPGA service and college service are public routes with publicly advertised schedules and fares, open to the public. Respondent states that the supermarket service is "underwritten" by the grocery stores, although no contract is attached and no fare is charged.

Respondent states again, with respect to the LPGA service, that it is a public route, open to the public and advertised, pursuant to a contract with the golf tournament. A copy of the schedule and contract is attached. Similarly, the Respondent states that the college service for the Rochester Institute of Technology is a public route, no fare is collected; it is open to the general public and it is performed pursuant to a contract with the college. FTA's question regarding access to the campus by the public was not addressed. A copy of the contract with RIT was attached as an exhibit. Respondent asserts that the commencement service is an expansion of the existing route structure. Lastly, Respondent states that with respect to the Funeral service, Livonia School District and Siena Catholic Academy service that, Respondent acknowledges "procedural irregularities" for these charter requests and states that they have taken corrective measures to avoid any further "misapplications" of FTA's charter policies.

Discussion

As Complainant has accurately stated, recipients of federal financial assistance can provide charter service in very limited circumstances. In the absence of one of the limited exceptions, the recipients are prohibited from providing the service. 49 C.F.R. Section 604.9(a). Complainant is no longer asserting that any of the charter exceptions apply, but rather that the service they are providing is not charter service.

The regulations define charter service as the following:

> transportation using buses or vans, funded under the Acts of a group of persons who pursuant to a common purpose, under a single contract, at a fixed charge 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 leaving the place of origin. 49 C.F.R. § 605.5(e).

Thus, a determination needs to be made as to whether Respondent's service meets the definition of charter by examining the elements of charter service. In order to determine whether service is charter, FTA looks at the following questions:

a) Is this transportation service using buses funded with FTA money?
b) Is the service for a common purpose?
c) Is it under a single contract?
d) Is it for a fixed charge for the vehicle or service?
e) Is the exclusive use of the vehicles to travel together under an itinerary either specified in advance or modified after leaving the place of origin?

See United Limo, Inc. v.South Bend Public Transportation Corporation

With respect to Complainant's allegations, it must be determined whether the service is "charter" service as described above or whether it more closely fits the definition of "mass transportation" Mass transportation is defined as service provided to the public and operating on a regular and continuing basis. 49 U.S.C. Section 5302 (a)(7).Mass transportation can be recognized by the following features: it is under the control of the recipient; the recipient sets the route, rate and

schedule and decides on the equipment; the service benefits the public at large and not some special organization and it is open to the public. 52 Fed. Reg. 11920, April 13, 1987.

A). The RIT campus service

Beginning with Respondent's service provided in and around the RIT campus, in the questions and answers section of the implementing charter regulations in the federal register, a relevant question was posed. The question asked whether service within a university complex according to routes and schedules requested by the university would constitute charter service. The answer indicated that "if the service is for the exclusive use of students and the university sets fares and schedules, the service would be charter. However, such service operated by a recipient which sets fares and schedules and is open door, though it serves mainly university students, would be mass transportation [Question 27(d)]." 52 FR 42248 (November 3, 1987) (DOT Charter Service Questions and Answers.

A review of the various exhibits to Respondent's July 15, 2002 Response indicates that factually the Respondent's service is more similar to the former, than the latter type of service. The university decides when it wants to add another bus to the schedule and the time of day the bus will operate. It is the university that decides whether the service will continue to operate or not. The contract between Respondent and the university sets forth (as best as can be determined) the numbers of hours a day a route will operate. Overall, there is a per hour rate charged the university for the bus service. The Respondent keeps track of the actual hours operated and adjusts the university's invoice accordingly. Periodically, the university requests special service from the campus to Amtrak and the Airport for special days of the year. As the letter contract says, "RIT may elect to add additional operating days", if the service proves worthwhile. Despite Respondent's contention that the service is open to the public and regular route service, it appears that the service is established pursuant to a single contract or series of contracts, that there is a fixed charge, the itinerary is specified in advance and that it is specifically designed to meet the needs of the university students. Moreover, the service is designed and under the control of the university, although operated by the Respondent. As the letter contracts demonstrate, although anyone boarding the bus travels for free, the service is not set up to benefit the general public except as the public might coincidentally need to travel around the campus area. While there are published schedules, one factor alone is not determinative of whether a service is mass transportation or charter. See Blue Grass Tours v. Lexington Transit Authority. The Respondent's inter-campus service more closely fits the definition of charter described above.

B). Funeral Service and Livonia School Trip

As FTA's response and rebuttal investigation process proceeded, Respondent acknowledged that these services were impermissible charter service as Respondent contracted directly with the customer and it did not fall within an exception to the general charter prohibition. Respondent has stated that it has implemented new procedures and will have to provide a copy of these procedures in writing to FTA and Complainant within thirty (30) days of the date of this decision to ensure that these charter violations do not reoccur.

C). Supermarket service

Respondent maintains that this supermarket service is open to the public and pursuant to regular schedules, which were submitted as exhibits. Further, Respondent states that there is nothing in

the regulations, which prohibits service being underwritten by others. This is true if it were the only factor; however, the "schedules" as submitted do not appear to be like Respondent's other regular schedules. In fact, the documents submitted are entitled "View of Regular Lease Service Provided Weekly". Within the exhibit, it states that certain service is "guaranteed revenue". These are indications that the service is, in fact, charter done pursuant to a contract at a fixed rate (although such contract information was not provided). On the "Lease Trip Log", it states that there can be no standees and that they should "make an extra trip if necessary". Further, it states that they should be sure to make a record of such extra trip. .On another Lease Trip Log, it states that the driver should stop at the First Federal Bank, if one of the passengers so requests. This service "underwritten" by the Grocery store appears to be operated for the benefit of a certain group of individuals, living in apartment complexes, which the grocery store wants to bring to its store to shop. One can infer that the pick-up locations were developed at the behest of the grocery store and its clients. It is not intended for the public at large and specific stops and extra trips will be operated to fits the needs of this group. Therefore, this service appears more like charter than mass transportation.

D).LPGA Golf Service

The service at issue here is advertised and open to the public. It is performed under a single contract and no fare is charged. Although it stops at different public locations and is open to the public at large, these stops are specified in the contract as are the number of buses to be operated each day. The contract also specifies the days of service, the times and the parking lots to be used. Unlike mass transportation, this service is not provided on a regular and continuing basis. It operates only a week a year when the golf tournament is in session. All decisions regarding the service are determined by the tournament association and not by the Respondent; hence, while it has some elements of mass transportation, it is more akin to charter than mass transportation.

E. Town of Chile Service Contract

Respondent did not respond to the issue of the service under the Respondent's contract with the Town of Chile, raised by Complainant in its May 6, 2002 letter. This appears to be similar to the service Respondent performed for the Livonia School District in that the request did not come from a private charter operator. If the Respondent wants to perform direct charter service, the Respondent should first comply with the requirements of 49 C.F.R.Section 604.11; otherwise, service should fit within one of the exceptions to Section 604.9(b).

Conclusion and Order

FTA finds that Respondent has been providing impermissible charter service and orders it to cease and desist any such further service, as soon as practicable in accordance with the Respondent's existing contracts. Refusal to cease and desist in the provision of this service could lead to penalties on the part of FTA. Respondent shall also provide a copy of its new charter procedures to Complainant and FTA for FTA's review and shall advise FTA within thirty (30) days of the dates of contract termination

In accordance with 49 C.F.R. § 604.19, the losing party may appeal this decision within ten days of receipt of the decision. The appeal should be sent to Jennifer Dorn, Administrator, FTA, 400 Seventh Street, S.W., Room 9328, Washington, D.C. 20590.

Letitia Thompson
Regional Administrator

9-18-02
Date

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

Indian Trails, Inc., Classic Caddy Limousine, and
The Tecumseh Trolley & Limousine,
Complainants,

Capital Area Transportation Authority,
Respondent.

Charter Complaints
49 U.S.C. Section 5323(d)
Docket Nos. 2002-01, 2002-04,
and 2002-10

DECISION

Summary

On March 7, 2002, Classic Caddy Limousine ("Classic Caddy") filed a complaint with the Federal Transit Administration ("FTA") alleging that Capital Area Transportation Authority ("Respondent") is providing service in violation of FTA's charter regulation, 49 Code of Federal Regulations (C.F.R.) Part 604, as well as improperly leasing its vehicles. Classic Caddy followed up with some additional information on March 27, 2002. The service specifically complained of pertains to Respondent's use and leasing of its trolleys for charter service. Respondent filed an answer dated May 1, 2002. Complainant filed a reply on June 13, 2002.

On April 1, 2002, The Tecumseh Trolley & Limousine ("Tecumseh Trolley") filed a complaint with the FTA alleging that Respondent is providing service in violation of FTA's charter regulation, 49 C.F.R. Part 604, as well as improperly leasing its vehicles. On July 9, 2002, Tecumseh Trolley filed additional information with the FTA.

On June 20, 2002, Indian Trails Incorporated ("Indian Trails") submitted a letter to the American Bus Association complaining about the Respondent providing unauthorized charter service. FTA was also provided with a copy of the information. On July 16, 2002, FTA consolidated the three complaints and asked that the Respondent answer a number of questions related to its trolleys. On August 14, 2002, the Respondent requested a thirty (30) day conciliation period and an extension for filing its response to the consolidated complaints. On August 15, 2002, FTA granted the request for the conciliation period, but denied the request for an extension. On August 16, 2002, Respondent filed its response to the three consolidated complaints. The thirty (30) day conciliation period, which ended on September 14, 2002, did not result in a settlement.

Upon reviewing the allegations in the three complaints and the subsequent filings of all three of the Complainants (Classic Caddy, Tecumseh Trolley, and Indian Trails, hereinafter are referred to collectively as the "Complainants") and the Respondent, FTA has concluded that the service in question does violate FTA's regulations regarding charter service. Respondent is hereby ordered to cease and desist in providing such illegal service. Respondent is also ordered to disallow improper charter mileage for the vehicles to be used for the purposes of calculating useful life.

Complaint History

Complainant Classic Caddy filed its complaint with the FTA on March 7, 2002, and provided follow up information on March 27, 2002. The complaint alleges that the Respondent is providing illegal charter service[1] by providing private charter service using its trolleys, as well as improperly leasing the trolleys. Specifically, Complainant alleges the following: (1) the annual notice was improper; (2) the notice was only sent to two bus services in the area when there are many more willing and able charter providers in the area; (3) the Respondent improperly found Classic Caddy not to qualify as a willing and able charter provider; (4) the Respondent has vehicles in its fleet that are only used for charter service, specifically trolleys; (5) Respondent is improperly leasing vehicles in its fleet when there is not a legitimate capacity constraint; (6) Classic Caddy alleges that Dean Transportation and Indian Trails are improperly leasing Respondent's vehicles without a legitimate capacity constraint; and (7) Respondent is allowing alcohol to be consumed on charter trips. Classic Caddy provided additional documentation on March 27, 2002.

Respondent filed its answer on May 1, 2002. In it, Respondent stated that it provided charter service briefly in fiscal year 2001 after following the annual notice procedures. Respondent alleges that no willing and able charter providers responded to the annual notice. Respondent states that it received seven responses to its annual notice dated August 28, 2001. It attempted to negotiate with the private operators, and subsequently issued an Indication of Interest form for private providers to complete if they were interested in leasing Respondent's vehicles based on capacity constraints. Three private providers returned the forms, Indian Trails, Dean Transportation, and Tecumseh Trolley. The Respondent states it ceased to provide charter service because it could not reach agreement with the private willing and able charter operators. Respondent alleges that requests for charter are referred to private operators. The Respondent states that the charter regulations relate to intercity charter service and that it does not provide any intercity charter service.

On June 13, 2002, Classic Caddy filed its reply to Respondent's answer. In its reply, Classic Caddy reiterated its allegations and added that the Respondent provided charter service for the International Art Festival in East Lansing, MI.

On April 1, 2002, Tecumseh Trolley filed a complaint alleging the same violations as Classic Caddy. Additionally, on July 9, 2002, it provided documentation supporting its allegations.

On June 20, 2002, Indian Trails submitted a letter to the American Bus Association complaining about the Respondent providing unauthorized charter service. FTA was also provided with a copy of the information. Indian Trails included with its materials copies of the Respondent's charter terms.

On July 16, 2002, FTA consolidated the three complaints and asked that the Respondent answer a number of questions related to its trolleys. On August 16, 2002, Respondent replied to the three

[1] Respondent receives Section 5307 and 5309 funds from FTA; therefore, they must comply with the charter regulations.

consolidated complaints, as well as responded to FTA's additional questions. Respondent stated that it has two trolleys, which were state funded. Respondent states that the trolleys are in its active fleet; however, the trolleys are not currently being used for a scheduled route[2], but rather for special occasions. The trolleys are also being leased for charter service. Respondent states that it is not providing any direct charter service and that it is leasing the trolleys to private providers based on capacity constraints. Respondent states that the service provided for the International Art Festival was not charter service, but scheduled service.

Respondent states that as of August 8, 2002, it ceased accepting any bookings of its trolleys for private operators. It alleges this was done in an attempt to resolve the outstanding complaints. Respondent requested a thirty (30) day conciliation period, which was granted on August 15, 2002. The conciliation period ran on September 14, 2002, but the parties did not reach a settlement.

Discussion

As Complainants have accurately stated, recipients of Federal financial assistance cannot provide charter service using Federally funded equipment or facilities, unless one of the limited exceptions applies. In the absence of one of the limited exceptions, the recipients are prohibited from providing the service. 49 C.F.R. Section 604.9(a). Respondent is asserting that it is not providing direct charter service and that it is leasing its trolleys pursuant to the exception under 49 C.F.R. Section 604.9(b)(2).

A. Regulations

Under 49 C.F.R. Section 604.9(a), if a recipient desires to provide charter service, it must first determine whether there are any willing and able private charter providers. If there is at least one willing and able provider, the recipient is prohibited from providing charter service unless one of the exceptions applies. *Id.* The recipient must follow all the procedures for determining willing and able private operators under 49 C.F.R. § 604.11. The public participation process requires at a minimum that a notice be placed in a newspaper of general circulation and a notice is required to be sent to all private charter service operators in the proposed geographic charter service area. 49 C.F.R. § 604.11(b)(1) and (2). The notice needs to include among other items, the categories of revenue vehicle. *Id.* at (c)(2). There are only two categories of revenue vehicle, buses and vans. 49 C.F.R. § 604.5(d).

B. Prior Triennial Finding

On October 3, 2000, the Respondent had a deficient finding with regard to charter bus. At that time, FTA stated that the Respondent was providing trolleys to private charter operators under Exception 2, when it should be utilizing Exception 7. The FTA required the Respondent to publish its annual notice to determine whether there were any willing and able private charter operators.

[2] Respondent sent a clarifying letter dated September 23, 2002.

C. Annual Notice

On September 5, 2000, and August 31, 2001, the Recipient published annual notices in the *Lansing State Journal*. The notices proposed that the Respondent intended to provide charter service using Chance Trolley vehicles. The notice was misleading, since it did not properly state what type of revenue service the Respondent intended to provide, namely bus or van service. The notice implied that if a private provider could not provide trolley service it could not qualify as a willing and able charter provider. Additionally, the Respondent was required to provide notices to all private charter operators in the area. Respondent in its answer dated May 1, 2002, states only that it published the notice. It does not indicate that notices were sent directly to all private charter operators in the geographic area as required under 49 C.F.R. § 604.11(b)(2).

D. Leasing Trolleys

The Respondent has been leasing the trolleys to private operators pursuant to its Indication of Interest forms. Although the form states that the Respondent's equipment will only be used "when the charter operator lacks capacity to provide charters or is unable to provide equipment accessible to elderly and handicapped persons for charters," private operators have been using the trolleys when there is not a capacity constraint. Capacity should relate to the private operator's overall vehicle capacity. The private operator does not have a capacity constraint, simply because it does not have a trolley. It would only have a capacity constraint if it did not have enough buses or vans to handle its private charter business. This misinterpretation was cited in FTA's triennial findings dated October 3, 2000, when the Respondent was informed that it should not be leasing trolleys under Exception 2 of the regulations, but rather Exception 7. Tecumseh Trolley has admitted that it filled out the Indication of Interest form when it did not lack capacity, regarding buses and vans.

Although Respondent indicated in a letter dated August 9, 2002, that as of August 8, 2002, it "ceased accepting bookings for use of its equipment by charter operators, including the trolleys which had been used for weddings," it still is working out commitments for bookings made prior to August 8, 2002. It appears that even now, CATA is still improperly leasing its vehicles for charters. The trolleys are not being used for regular service and are only being used for charter service either directly by the Respondent or improperly leased to private operators for charter service. Finally, the regulations state that "[a]ny charter service that a recipient provides under any of the exceptions in this part must be incidental charter service." 49 C.F.R. § 604.9(e). Incidental service is defined as "charter service which does not: (1) interfere or detract from the provision of the mass transportation service for which the equipment or facilities were funded under the Act; or (2) does not shorten the mass transportation life of the equipment or facility." 49 C.F.R. § 604.5(i). The trolleys were solely being used for charter service and were not being used for mass transportation at all.

E. International Art Fair

The regulations define charter service as the following:

> transportation using buses or vans, funded under the Acts of a group of persons who

pursuant to a common purpose, under a single contract, for a fixed charge for the vehicle or service, who have acquired the exclusive use of the vehicle or service in order to travel together under an itinerary either specified in advance or modified after leaving the place of origin. Includes incidental use of FTA funded equipment for the exclusive transportation of school students, personnel, and equipment. 49 C.F.R. § 605.5(e).

Thus, a determination needs to be made as to whether Respondent's service meets the definition of charter by examining the elements required for charter service. In order to qualify as charter service, the following questions need to be answered:

a) Is this transportation service using buses funded with FTA money?
b) Is the service for a common purpose?
c) Is it under a single contract?
d) Is it for a fixed charge for the vehicle or service?
e) Is the exclusive use of the vehicles to travel together under an itinerary either specified in advance or modified after leaving the place of origin?

The International Art Fair (the "Fair") service utilized buses that were funded with Federal funds. There was a common purpose, specifically for the Fair. It was a one-day event, not regularly scheduled service. Although the service provided was free. FTA guidance states that the cost of the service was irrelevant.[3] The exclusive use of the vehicles was to transport individuals to the Fair, although the service was open to the public, it was not mass transportation. It was only for those individuals interested in attending the Fair. This service did not involve additional buses on a regularly scheduled route, which would have not been charter service, but rather involved service that was added without following the required procedures for providing a new route. This service does not fall under any of the recognized exceptions; therefore, it is illegal charter service.

F. Willing and Able Status of Classic Caddy

The Respondent determined that Classic Caddy was not a willing and able charter provider. In the Charter Questions and Answers from 52 FR 42248 (November 3, 1987), the Answer to No. 12 stated that "[i]f a private operator submits documentary evidence that it has the desire to provide

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[3] In an answer to the cost issue in the Charter Questions and Answers from 52 FR 42248 (November 3, 1987), Question No. 27(a), UMTA (the Urban Mass Transportation Administration a precursor to FTA) stated the following:

"Cost is irrelevant in determining whether service is mass transportation or charter service. Thus, service which meets the criteria set by UMTA, i.e., service controlled by the user, not designed to benefit the public at large, and which is provided under a single contract, will be charter regardless of the fact that it is provided for free.

As a general rule, free charter service would be "non-incidental" since it does not recover its fully allocated cost, and could not be performed by an UMTA recipient, even under one of the exceptions to the charter regulations. However, UMTA will consider certain types of free charter service to be "incidental." An example of this would be free service to an economically disadvantaged group when there is no private operator willing and able to perform the service. Since UMTA is concerned about the diversion of mass transit revenues and the reduction in mass transportation life resulting from service provided below cost, it will, when presented with a complaint, consider such service "incidental" charter only in a very limited number of cases."

service and the ability to supply vehicles, as well as the necessary legal authority, it must automatically be determined 'willing and able.'" The Respondent can only conduct a further investigation of a private operator's status if there is reasonable cause to believe that the information has been falsified. The Respondent should have determined that Classic Caddy was "willing and able."

G. Alcohol Use on Charter Trips

Complainants have alleged that alcohol is present during Respondent's charter trips. FTA does not regulate the use of alcohol on charter trips.

H. State Funding

CATA states that the trolleys are state funded. If the vehicles were procured without Federal funds, they could be used for charter service if they were kept completely separate from any Federally funded facility or activity. The trolleys could not be stored in a Federally funded facility.[4] The trolleys would need to be kept completely separate from all Federally funded activities, including maintenance. CATA has not demonstrated that the trolleys are kept separate from the rest of its Federally funded fleet.

I. Intracity Service

CATA has stated that it is providing intracity service as a reason why the service they are providing is allowable. Although 49 U.S.C. Section 5323(d) only discusses that recipients of federal assistance cannot provide intercity charter service, it references the agreement that recipients must enter into with the Department of Transportation as a condition of receiving the assistance. Pursuant to FTA's Master Agreement MA(9), October 1, 2002, Section 28, a recipient cannot provide charter service unless the service is under one of the exceptions in FTA's regulations, 49 C.F.R. Part 604. FTA's charter regulations, 49 C.F.R. Part 604, prohibit any type of charter service. Intracity service is not one of the listed charter exceptions under FTA's regulations, 49 C.F.R. § 604.9(b). Therefore, CATA cannot provide the service as it currently does.

Conclusion

Based on all the information provided, FTA finds that the Respondent has been providing illegal charter with its trolleys, both direct and indirect service through improperly leasing the vehicles. The Respondent has also conducted illegal charter using its buses for functions such as the International Art Fair. The Respondent improperly determined that Classic Caddy was not a "willing and able" charter provider. If the Respondent wishes to use its trolleys for charter service, they must be segregated from all Federally funded assets.

[4] In an answer to Question No. 26, relating to the use of locally funded buses for charter in the Charter Questions and Answers from 52 FR 42248 (November 3, 1987), UMTA stated in order to use the vehicles they need to be kept completely separate from Federally funded assets, including maintenance activities.

Remedy

Complainants have requested that Respondent immediately cease the charter operations at issue. FTA grants Complainants' request for the cease and desist order and orders Respondent to cease providing charter service using its trolleys and any other vehicles and cease and desist improperly leasing its vehicles. If Respondent desires to provide charter service, they must follow the notice and review procedures for determining if there are any willing and able private charter operators pursuant to 49 C.F.R. Part 604. Another alternative, if the trolleys are state funded would be to separate the trolley service from all CATA's other operations, and then FTA's charter requirements would not apply.

Order

FTA finds that Respondent has been providing impermissible charter service and orders it to cease and desist any such further service. Refusal to cease and desist in the provision of this service could lead to additional penalties on the part of FTA. Additionally, the mileage for improper charter use should not accrue towards the useful life of the Federally funded vehicles.

In accordance with 49 C.F.R. § 604.19, the losing party may appeal this decision within ten days of receipt of the decision. The appeal should be sent to Jennifer Dorn, Administrator, FTA, 400 Seventh Street, S.W., Room 9328, Washington, D.C. 20590.

J. P. Ettinger

Joel P. Ettinger
Regional Administrator

10-11-02
Date

U.S. Department
of Transportation
**Federal Transit
Administration**

Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

OCT 15 2002

The Honorable Rosa L. DeLauro
U.S. House of Representatives
59 Elm Street, Second Floor
New Haven, Connecticut 06510

Dear Congresswoman DeLauro: Congresswoman DeLauro —

This is in response to the question raised by your constituent, Ms. Donna Carter, Executive Director of the Greater New Haven Transit Authority (NHTA). The NHTA would like to be able to provide prospective business owners with promotional tours on one of its new natural gas trolleys purchased with Federal Transit Administration (FTA) funds.

As you note, however, such service might be prohibited by FTA's charter service regulation, 49 C.F.R. Part 604. NHTA must first determine whether any private charter operators are willing and able to provide the service. If so, NHTA may not do so with FTA-funded equipment or facilities unless one or more of the exceptions apply, which appears unlikely based on the facts you present. I should note that NHTA would not violate FTA's charter service regulation, however, if it were to take prospective business owners on the natural gas trolleys' regular route service. This approach could have the additional benefit of providing a more realistic view of the NHTA system at work.

As public transit agencies move to expand service, it is important to respect the needs of private sector companies to operate effectively in a competitive marketplace for services that do not receive subsidies. The interconnected nature of America's transportation network requires that FTA work together with the private transportation industry to maintain the vitality and effectiveness of every component of our system. The health of every component, public and private, affects the health and effectiveness of our entire passenger transportation system.

I hope you find this information responsive to your request. Please contact me if you need additional information or assistance in this matter.

Sincerely,

Jennifer L. Dorn

cc: Washington Office
Donna Carter, Executive Director
New Haven Transit Authority

Richard Doyle, Regional Administrator, TRO-I
Margaret Foley, Regional Counsel, TRO-I
Elizabeth Martineau, Attorney-Advisor, Office of Chief Counsel

U.S. Department
of Transportation
**Federal Transit
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Sandy Draggoo, Executive Director
Capital Area Transportation Authority
4615 Tranter Avenue
Lansing, MI 48910

RE: Amended Charter Decision
Indian Trails Inc., Complaint #2002-10
Classic Caddy Limousine, Complaint #2002-01
The Tecumseh Trolley & Limousine, Complaint # 2002-04

Dear Mr. Chandler and Ms. Draggoo:

This letter serves as the Federal Transit Administration's (FTA) response to your letter dated October 18, 2002, as well as an amended decision for the earlier charter decision dated Oct. 11, 2002. The Region is aware that since your letter, the Capital Area Transportation Authority (CATA) has appealed the Region V decision to the FTA Administrator; however, the Region is still addressing the issues raised in your letter, as well as amending its earlier charter decision based on new information.

First, as to the points you raised in your letter, I will address them in the order you have raised them as follows:

1. CATA indicated that it never received the original complaint. However, CATA was sent a copy of the complaint dated March 7, 2002, via registered mail on April 2, 2002. The complaint was received by CATA on April 9, 2002, and signed for by Gloria Corts.
2. CATA indicated that it never received the information from Tecumseh Trolley. However, CATA was sent the information from Tecumseh Trolley on July 11, 2002, via registered mail. The material from Tecumseh Trolley was received by CATA on July 15, 2002, and signed for by C. Fitzergerald.
3. CATA stated that there was no evidence that any of the private operators lacked capacity. However, on October 10, 2002, Tecumseh Trolley acknowledged to FTA that it did not lack capacity when it signed the Indication of Interest form. Therefore, FTA had evidence that at least one private operator did not lack capacity when it executed the Indication of Interest form. If the private operators had capacity constraints, they should have been leasing CATA's buses, not CATA's trolleys, since the buses have a

larger capacity than the trolleys. Although FTA does not require the transit agency to investigate the private operator's capacity constraint representation, if there is evidence of false statements or fraud, then the transit agency should conduct an inquiry to determine whether the operator truly lacks capacity when it leases one of the transit agency's vehicles.[1] It is ultimately the transit agency's responsibility to comply with the charter regulations. The use of the trolleys by a private operator should be incidental service. In this case, the trolleys are only being used for charter service. This use does not fit the definition of incidental use.

4. CATA stated it should not be held responsible if a private operator misrepresented that it lacked capacity. See prior answer. Tecumseh Trolley's documentation states that CATA may have been booking charters for Indian Trails to use its trolleys. The documentation states that based on contacting several brides who had rented the trolleys for their weddings, the brides were unaware that Indian Trails was even involved with the vehicle rental. If that is the case, which in and of itself is a violation of the regulations, CATA should have been aware whether Indian Trails truly lacked capacity.
5. CATA contends that the International Art Fair service was not charter service. The service provided by CATA for the International Art Fair was not on a regularly published route. A private operator indicated that it would have been willing and able to provide the service.
6. CATA states that the guidance regarding fully recovering allocated costs should not apply in this case, since the trolleys are state funded. FTA is amending its decision because it was based on the misrepresentation by CATA that the trolleys were 100% state funded. Michigan DOT and CATA's

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[1] The question and answer for No. 32 from Charter Questions and Answers from 52 FR 42248 (November 3, 1987) states the following:

> 32. *Question*: When a private operator requests buses from a grantee to run a given charter service, what is a grantee's responsibility to assure the circumstances fit the limited exceptions set forth in § 604.9(b)(2)?
>
> *Answer:* The above-cited regulation allows grantees to contract with private operators only when and to the extent that the private operator lacks equipment that is accessible to the elderly and handicapped or lacks capacity. UMTA will allow its grantees to use their reasonable, good faith judgment as to whether the requirements of the regulations have been met, and, in the absence of apparent fraud or falsified statement, will not require them to look behind a request for the use of their buses by a private operator.

However, if a private operator continuously leases the transit agency's trolley vehicles week after week, as Indian Trails did in the documentation that Tecumseh Trolley supplied, it should raise the question as to whether the private operator truly has a capacity constraint.

own counsel have now acknowledged that the trolleys were partially funded with Federal Highway Administration (FHWA) funds. The applicability section of the charter regulations, 49 CFR Sec. 604.3(b), states that the charter regulations apply to all recipients of Federal financial assistance under "Sections 103(e)(4), 142(a), or 142(c) of Title 23 United States Code which permit the use of Federal-Aid Highway funds to purchase buses." The definition of the "Acts" under Sec. 604.5(b) also includes the same sections of the U.S. Code. The charter regulations apply to the trolleys even if they are maintained and housed separately from the rest of CATA's vehicles. CATA should not be leasing the trolleys for charter use **unless** one of the charter exceptions applies.

7. CATA contends since the service was open to the public, it was not exclusive. The service was provided exclusively for attendees of the International Art Fair.

Second, based on the new information that the trolleys were funded with FHWA funds, FTA amends its earlier decision dated October 11, 2002. The trolleys cannot be used for any indirect or direct charter service unless one of the charter exceptions applies. CATA must immediately cease and desist using the trolleys for charter service. CATA has been aware of the charter issue since its triennial finding in October 2000, and it has been aware of the charter complaints since April 2002. It has had a great deal of time to make alternate arrangements. It should have stopped taking charter trolley bookings a long time ago.

Federal funds were provided for the lease purchase of the trolleys to use them for mass transportation. CATA has acknowledged that the trolleys are only being used for special service, primarily private wedding charters. This use does not fit the definition of mass transportation.

By this letter, FTA amends its earlier decision, which allowed CATA to separate the trolleys from a federally funded facility and use them for charter service. The trolleys were federally funded; therefore, they cannot be used for charter service unless one of the exceptions applies.

FTA finds that CATA has been providing impermissible charter service and orders it to cease and desist any such further service. Refusal to cease and desist in the provision of this service could lead to additional penalties on the part of FTA. Additionally, the mileage for improper charter use should not accrue towards the useful life of the Federally funded vehicles.

In accordance with 49 C.F.R. § 604.19, the losing party may appeal this decision within ten days of receipt of the decision. The appeal should be sent to Jennifer Dorn, Administrator, FTA, 400 Seventh Street, S.W., Room 9328, Washington, D.C. 20590.

CATA has ten days to amend its appeal based on this amended decision.

Sincerely,

Joel Ettinger
Regional Administrator

cc: Robert McAnallen, Classic Caddy Limousine (w/enc.)
Steve Pixley, The Tecumseh Trolley & Limousine (w/enc.)
Gordon Mackay, Indian Trails, Inc. (w/enc.)
Robert Gardella w/enc.

READING FILE

U.S. Department
of Transportation
Federal Transit
Administration

REGION IX
Arizona, California,
Hawaii, Nevada, Guam
American Samoa,
Northern Mariana Islands

201 Mission Street
Suite 2210
San Francisco, CA 94105-1839
415-744-3133
415-744-2726 (fax)

NOV 26 2002

Mr. Richard C. Prima, Jr.
Public Works Director
City of Lodi
City Hall, 221 West Pine Street
P. O. Box 3006
Lodi, California 95241-1910

Re: Lodi Station Parking Survey and Charter Regulations

Dear Mr. Prima:

In response to your letter dated June 21, 2002, you offered to provide parking surveys to document the utilization of the Lodi Station Parking structure. Because the parking structure and the adjacent Multimodal Station parking lot appear under utilized, a parking survey of both facilities would be appropriate. This survey should document the transit and non transit use of the facilities at different times.

In addition, the City of Lodi has provided incidental charter service, which may be in violation of the federal charter regulation. Guidance is enclosed to assist the City in complying with the charter rules. Charter service is particularly forbidden if willing and able providers exist. However, the regulation offers additional exceptions, when notice, documentation, agreements, approval and certifications are provided.

If you have any questions regarding the nature of these topics, please contact Mr. John M. Hunt, Project Manager, at 415-744-2597.

Sincerely,

F. Jamie Kenna

for Leslie T. Rogers
Regional Administrator

Enclosure

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

Desert Resorts Transportation Complainant	:	
	:	Charter Complaint #2002-07
v.		
	:	49 U.S.C. Section 5323(d)
SunLine Transit Agency, Respondent	:	

DECISION

Introduction

Desert Resorts Transportation (Desert Resorts) filed this complaint with the Federal Transit Administration (FTA) on April 26, 2002, alleging that the SunLine Transit Agency (SunLine) provided charter service in violation of the FTA charter regulation, 49 CFR Part 604. The service complained of pertains to SunLine's bus service to an annual film festival. Based upon a review of the allegations in the complaint and the subsequent filings of the parties, FTA concludes that the service in question is charter service as defined by 49 CFR 604.5(e) because it was performed under a single contract at a fixed charge for the vehicles. FTA orders SunLine to cease and desist from providing the service as it is currently configured.

Complaint

Desert Resorts filed this complaint with the FTA by letter dated April 26, 2002. The complaint alleges that SunLine provided charter service in violation of FTA's charter rules on two separate occasions; specifically, under contract with the Nortel Networks Palm Springs International Film Festival (PSIFF) from January 11-20, 2002, and at the Desert Resorts Regional Airport on April 8, 2002.

In a letter dated June 28, 2002, FTA directed the parties to attempt local conciliation for thirty days under 49 CFR 604.15. In correspondence dated July 25 and August 12, 2002, SunLine aknowledges that the service performed at the airport was impermissible charter service and states that it paid Desert Resorts $560.00 in full settlement and release of all claims. SunLine maintains, however, that the service provided for the PSIFF is mass transportation and reports that the parties are unable to resolve this dispute. By letter of August 27, 2002, FTA advised Desert Resorts and SunLine that it would proceed with a formal investigation concerning the PSIFF service.

In its complaint, Desert Resorts claims that SunLine provided bus service under contract to the PSIFF at a fixed charge of $50.00 per hour per vehicle without notifying local charter operators or national bus associations as required by 49 CFR 604.11. Desert Resorts included with its complaint three "SunLine News" press releases which state the free SunBus PSIFF shuttle is conveniently timed to connect with the SunLink schedule to

allow for a full day to enjoy viewing world class films, shopping or dining. The press releases emphasize the positive effect the SunLink/SunBus[1] partnership will have on reducing traffic congestion and harmful emissions.

Response

SunLine's response is dated September 10, 2002. SunLine states that from January 11-20, 2002, it provided additional fixed-route service with two buses that operated open door. SunLine claims that the service is an enhancement to its regular fixed-route service and operates without any negative impact on its regular service.

SunLine included with its response a December 17, 2001 Agreement (Exhibit C) signed by SunLine's Transit Marketing Coordinator and the Chairman of the PSIFF. The Agreement stipulates that SunLine will operate two PSIFF-wrapped buses free to the public between four theater venues every 10 minutes from January 10-21, 2002[2] between the approximate hours of 8:00 a.m. and 11:00 p.m. It identifies the four theater venues and provides that the stop at the Palm Springs High School Auditorium is pending School District and SunLine approval. The Agreement further provides that the cost to the PSIFF to operate this special service is $50.00 per hour per bus. In addition, the Agreement provides that SunLine will operate two wrapped buses on various SunBus routes from December 2001 through May 2002, for a monthly advertising fee of $1,000 per bus.

According to SunLine, the $50.00 charge indicates the subsidy that PSIFF agreed to pay so that the fare would be free for all riders and to assist with the marketing efforts which were extensive. SunLine maintains that its arrangement with the PSIFF is a marketing agreement, not a transit service agreement. As part of the marketing agreement, SunLine notes that it provided SunBus passes to members of an association called the Elderhostel; the SunBus passes allowed riders access to all fixed-route service during January 2002.

SunLine also submitted a flyer (Exhibit A) and a placard (Exhibit B). The flyer and placard offer free shuttle service, list the bus schedule, and direct festivalgoers to look for PSIFF signs at select SunBus stops. The flyer contains a map outlining the PSIFF route to four theater venues: #1 Festival of Arts Cinemas, #2 PS High School Auditorium, #3 Courtyard 10, and #4 Annenberg Theater (Palm Springs Museum). SunLine maintains that it placed the flyer and placard on its regular fixed route buses to advertise the service and that the flyer was placed at all PSIFF locations as well. Moreover, SunLine states that every newspaper ad and every TV spot for the festival included news of the service.

Rebuttal

Desert Resorts' rebuttal is dated September 27, 2002. Desert Resorts claims that the December 17, 2001, Agreement contains terms and conditions typically used in any

[1] SunLine's preprinted schedule states that SunBus is a "Valley-wide fixed route bus service" and SunLink is an "express service to the Inland Empire."

[2] According to subsequent correspondence, the dates were changed to January 11-20, 2002.

contract for charter service, such as the hourly rate per bus, hours of service, and location of stops. In addition, Desert Resorts argues that the service is controlled by the user and is not designed to benefit the public at large because the buses stop only at the four PSIFF theater venues stipulated in the Agreement. Moreover, Desert Resorts asserts that SunLine has not provided any evidence that the PSIFF service was regularly scheduled or route deviation service.

Desert Resorts contends that SunLine has engaged in a continuing pattern of violation, including the service performed at Desert Resorts Regional Airport as well as alleged violations which are the subject of a separate charter complaint filed by Desert Resorts and currently pending before FTA. Desert Resorts asks FTA to order SunLine to reimburse to complainant the sum of $23,400.00 plus penalties.

Second Response

By letter of October 8, 2002, FTA requested additional information from SunLine including its preprinted schedule and any supplemental documentation pertaining to the Agreement of December 17, 2001.

By letter dated October 18, 2002, SunLine submitted its supplemental response and enclosed its regular published schedule along with a November 26, 2001, letter it had sent to the PSIFF formalizing discussions that took place between the parties on September 19, 2001. The letter states SunLine will create and operate the bus route; one bus will allow for service every 20 minutes; and two buses will provide service every 10 minutes. SunLine's letter further stipulates that additional stops along the designated route are at the discretion of the SunBus driver and only when it is safe and legal to do so. In addition, the letter provides that it is the parties' intent to produce a successful special event that nurtures the use of public transit. SunLine maintains that the November 26, 2001, correspondence confirms SunLine's creation of the route and control of the service.

SunLine further argues that it designed the PSIFF service to overlay its regular fixed route in an effort to encourage riders to transfer and utilize the additional free service.[3] According to SunLine, it added two stops to the PSIFF service that did not previously exist on its regular fixed route: #2 Ramon [PS High School Auditorium] and #4 Annenberg Theatre [Palm Springs Desert Museum]. SunLine claims that all of the film festival venues, with the exception of #4 Annenberg Theatre can be accessed by the regular fixed-route service.[4] SunLine claims that the service does not inconvenience any

[3] A comparison of the film festival flyer with the published schedule at pages 10 and 17 indicates that the PSIFF service follows segments of SunLine's regular fixed-route service on Lines 14, 24, 30 and 111 as well as on Line 23 along Ramon between Farrell and Sunrise. The flyer shows the PSIFF route detours approximately one block from SunLine's regular fixed-route at Palm Canyon where it continues along Amado, turns left on Museum Drive and turns left again at Tahquitz to return to Palm Canyon.

[4] The preprinted schedule contains a section entitled "Places to Go on Sunbus" on page 13 and lists theater venues #1,# 3 and #4 as accessible on the regular fixed-route service. As to venue #2, pages 9 and 10 of the schedule indicate that PS High School Auditorium is adjacent to SunLine's fixed route service on Lines 14 and 23, respectively.

riders by deviating from regular fixed route service and is designed to integrate with the regular route to maximize availability of the service to the general public.

SunLine states that it performed the PSIFF service for the first time in January 2001 and intends to provide the same type of service annually, subject to FTA's finding that the service is mass transit and not charter service.

Second Rebuttal

By letter dated October 28, 2002, Desert Resorts provided its second rebuttal. Desert Resorts points out that the service was provided under a single contract for $50.00 per hour per vehicle and operated during peak hours. Further, Desert Resorts argues that SunLine does not have the final say for setting and modifying the route, rate, schedule and equipment. Rather, Desert Resorts reiterates that SunLine's arrangements with the PSIFF are identical to private charter operations where the client requests transportation and dictates the location and frequency of service while the charter operator sets a schedule based on driving time and client desires. Moreover, Desert Resorts maintains that the service does not benefit the public at large because it is designed to serve only attendees of the PSIFF; none of the four film venue stops coincide with SunLine's regular fixed route service; and the PSIFF service overlaps existing routes only in terms of the streets travelled over. Desert Resorts emphasizes that the theater venues are located at least 300-500 feet from the closest regular SunBus stops.

Third Response

On October 30, 2002, SunLine provided additional information pertaining to the PSIFF service. Thereafter, Desert Resorts indicated it intended to rebut the October 30 submission. In a November 25, 2002, conference call among FTA, Desert Resorts and SunLine, it was agreed that the FTA would not consider the October 30 information as part of the administrative record and Desert Resorts would not file an additional rebuttal.

Discussion

Before reaching the main issue of this complaint, two subsidiary questions raised by complainant will be addressed. First, in settling the dispute involving the service at the Desert Resorts Regional Airport, SunLine made a decision at the local level to pay $560.00 in damages to Desert Resorts. Desert Resorts now requests that FTA order SunLine to pay $23,400.00 plus penalties for providing the PSIFF service. The FTA is a grant-making agency, not a regulatory or enforcement agency. As such, the FTA does not award damages or assess fines and therefore, will not entertain Desert Resort's request. Next, Desert Resorts refers to various allegations it raised in another complaint involving SunLine which is currently pending before this agency. FTA will issue a separate decision in that matter. We turn now to the main concerns of Desert Resorts' complaint.

The essential issue in this matter is whether the service provided by SunLine is impermissible charter service or permissible mass transportation. The definition of charter service found in FTA's regulations at 49 CFR 604.5(e) is as follows:

> [T]ransportation 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 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.

Charter service is usually thought of as a one-time provision of service and the user, not the recipient, has the control of the service. 52 Federal Register 11916, 11919 (April 13, 1987).

In contrast, the Federal Transit Laws define "mass transportation" as transportation that provides regular and continuing general or special transportation to the public. 49 U.S.C. § 5302(a)(7). In the preamble to the regulation, the FTA has articulated other features which locally flow from this definition:

> First, mass transportation is under the control of the recipient. Generally, the recipient is responsible for setting the route, rate, and schedule, and deciding what equipment is used. Second, the service is designed to benefit the public at large and not some special organization such as a private club. Third, mass transportation is open to the public and is not closed door. Thus, anyone who wishes to ride on the service must be permitted to do so.

52 Fed. Reg. 11920.

While these distinctions may appear to be clear, there are many difficulties in determining in a given case which category the service fits into most appropriately. FTA has previously stated that a balancing test must be applied to determine the nature of the service involved in any complaint filed with FTA because, as the preamble to the charter regulation points out, there is no fixed definition of charter service, and the characteristics cited by FTA are not exhaustive, but merely illustrative. 52 Fed. Reg. 11919-11920. FTA has reached the findings and determinations below on the basis of such an analysis.

Designed to benefit the public at large

FTA has previously stated that service is designed to benefit the public at large when it serves the needs of the general public, instead of those of "some special organization such as a private club." 52 Fed. Reg. 11920 (April 13, 1987). The charter regulation requires that riders outside a target group of customers be eligible to use the service. Annett Bus Lines v. City of Tallahassee, FL-TALTRAN/90-02-01 (April 28, 1992).

The record is persuasive that the film festival route was designed to interconnect with SunLine's regular fixed-route and that all four theater venues can be accessed on SunLine's regular service. Further, the "SunLine News" press releases indicate the film festival shuttle was conveniently timed to connect with SunLine's regular service to allow for a full day to enjoy viewing world class films, shopping or dining. In FTA's view, the festivalgoers are not a sufficiently defined enough group to be considered a "private club." Moreover, while the service may accommodate them primarily, it is not restricted to their exclusive use but is available to anyone wishing to board it. Therefore, FTA finds that the service was designed to benefit the public at large.

Open to the public and not closed door

In determining whether service is truly "open door," FTA looks both at the level of ridership by the general public as opposed to a particular group and at the intent of the recipient in offering the service. The intent to make service open door can be discerned in the attempts to make the service known and available to the public. FTA thus takes into account the efforts a recipient has made to market the service. Generally, this marketing effort is best evidenced by publication of the service in the recipient's preprinted schedules. Washington Motor Coach Association v. Municipality of Metropolitan Seattle, WA-09/87-01 (March 21, 1988). FTA has also interpreted "open door" to mean a substantial public ridership and/or an attempt by the transit authority to widely market the service. Blue Grass Tours and Charter v. Lexington Transit Authority, URO-III-1987. The posting of bus stop signs and connections to other transportation routes are also considered indicators of "opportunity for public ridership." Seymour Charter Bus Lines v. Knoxville Transit Authority, TN-09/88-01 (November 29, 1989).

FTA finds that SunLine made concerted efforts to demonstrate its intent to make the service open door. Although the film festival service is not listed in the preprinted schedule, SunLine actively marketed the service to the public through press releases, the flyer and placard, advertisements on wrapped buses, newspaper ads and TV spots, and integration with its fixed-route service. If a decision is made to reconfigure the service in accordance with FTA requirements, SunLine should publish the service in its preprinted schedules.

Under the control of the recipient

The charter service criteria include bus transportation under a single contract at a fixed rate for the vehicle or service. FTA has previously determined that control of fares and schedules is the critical element in the balancing test FTA uses to distinguish charter service from mass transportation. Seymour, at page 10. Compensation on the basis of hours of service is evidence of charter operations, whereas individual fares[5] paid by each rider indicates the service is mass transportation. Seymour, at pages 9-10.

[5] Cost is irrelevant in determining whether service is mass transportation or charter service. Generally, free charter service would be "non-incidental" since it does not recover its fully allocated cost. and FTA recipients cannot provide it, even under one of the charter exceptions. Q&A No. 27(a), 52 Fed. Reg., 42248, 42252.

The record is convincing that SunLine created and operated the PSIFF route and schedule to integrate and connect with its regular fixed-route service. Moreover, the November 26, 2001, letter from SunLine to the PSIFF provides further evidence of SunLine's control over the service by the statement "additional stops along the designated route are at the discretion of the SunBus driver." In these respects, the service is similar to mass transportation. We note, however, that the December 17, 2001, agreement between SunLine and the PSIFF specifically states that both the School District and SunLine have final approval over the new stop located at venue #2 Palm Springs High School Auditorium; and therefore, it is unclear whether SunLine had the final say over this location.

SunLine maintains the service is mass transportation and, subject to FTA approval, intends to offer the film festival service on an annual basis. In published guidance, FTA explains that "service to regularly scheduled but relatively infrequent events (sporting events, annual festivals) that is open door, with the routes and schedules set by the grantee and with fares collected from individuals, whether or not the individual fares are subsidized by a donor," does not meet the charter criteria. Q&A No. 27(c), "Charter Questions and Answers," 52 Fed. Reg. 42248, 42252 (November 3, 1987). The PSIFF service is similar in some respects to the service described in Q&A No. 27(c); however, it is provided pursuant to a single contract at a fixed charge of $50.00 per hour per bus and fares are not collected from individuals. Therefore, SunLine failed to clear a critical hurdle in the balancing test, and the FTA concludes that the PSIFF service is charter service.

As noted in Q&A No. 27(c), FTA suggests that service such as an annual festival may be an excellent candidate for privatization. SunLine is reminded that FTA recipients are required to provide for the participation of private mass transportation companies to the maximum extent feasible. 49 U.S.C. Section 5323(a).

Conclusion

After a thorough investigation, FTA concludes that SunLine's service for the PSIFF is charter service because it meets the charter criteria of being performed under a single contract at a fixed charge for the vehicles. Therefore, SunLine shall immediately discontinue operating the service as it is presently configured.

In accordance with 49 CFR 604.19, the losing party may appeal this decision within ten days of receipt of the decision. The appeal should be sent to Jennifer Dorn, Administrator, FTA, 400 Seventh Street, S.W., Room 9328, Washington, D.C. 20590.

Margaret E Foley
Margaret E. Foley
Regional Counsel

January 2, 2003
Date

Leslie Rogers
Leslie Rogers
Regional Administrato

JAN 3 2003
Date

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION IX
Arizona, California,
Hawaii, Nevada, Guam
American Samoa,
Northern Mariana Islands

201 Mission Street
Suite 2210
San Francisco, CA 94105-1839
415-744-3133
415-744-2726 (fax)

January 3, 2003

Mr. Thomas F. Larwin
General Manager
Metropolitan Transit Development Board
1255 Imperial Avenue, Suite 1000
San Diego, CA 92101-7490

Re: Charter Service Exception
for Super Bowl XXXVII

Dear Mr. Larwin: Tom

This is in response to your letter of September 18, 2002, requesting a waiver of the Federal Transit Administration's (FTA) Charter Service Rules in order to allow the Metropolitan Transit Development Board (MTDB) and the North County Transit District (NCTD) to operate charter service on January 26, 2003, for Super Bowl XXXVII in San Diego, California. You have not stated the particular waiver that you are seeking.

The preamble to the Charter Regulation explains that FTA will grant an exception under 49 CFR §604.9(b)(4) only for events of an extraordinary, special and singular nature such as the Pan American Games and the visits of foreign dignitaries. 52 Federal Register 11925(April 13, 1987). Regularly scheduled yearly or periodic events would not qualify for the exception. "Charter Service Questions and Answers," 52 Federal Register 42251(November 3, 1987).

Based on the facts provided in your letter, it appears that the service, which you seek to provide, is an incidental use under 49 CFR §604.5(i). 'Incidental Charter Service means charter service, which 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.

You have followed the public participation process set forth in 49 CFR §604.11 and have determined that there are no willing and able providers of the charter service which you seek to provide. If no willing and able operator exists, MTDB and NCTD may provide charter service for Super Bowl XXXVII as long as it is incidental charter use as defined above.

Sincerely,

Leslie T. Rogers
Regional Administrator

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION VI
Arkansas, Louisiana,
New Mexico, Oklahoma,
Texas

819 Taylor St. Suite 8A36
Fort Worth, TX 76102
817-978-0550
817-978-0575 (fax)

January 27, 2003

Philip O. Pumphrey
Executive Director
Ozark Regional Transit Authority
P.O. Box 785
2423 East Robinson
Springdale, Arkansas 72765-0785

Re: Request for Waiver

Dear Mr. Pumphrey:

This is in reply to your letter dated January 8, 2003, to the Federal Transit Administration (FTA), wherein you confirmed that transportation service provided by Ozark Regional Transit Authority (Ozark) for three private non-profit organizations (i.e., EOA Children's House, Ozark Guidance Center, and the Benton County Sunshine School) would be subject to an exception in FTA's Charter Service Rule because each of the private non-profit organizations is the recipient of funds from one or more of the Federal programs that are listed in Appendix A of the FTA's Charter Service Rule.

Accordingly, by submitting a statement to your grant sponsor whereby Ozark certifies that these organizations meet the requirements of a social service agency in accordance with the provisions of Section 604.9(b)(5)(ii), Ozark would be permitted to provide charter service for the three private non-profit organizations. However, in accordance with Section 604.9(e) of the Charter Service Rule, let me further point out that any charter service provided by a recipient under an exception, such as in your case, must be "incidental charter service."

FTA has interpreted "incidental charter service" to mean (1) charter service which does not interfere with or detract from providing mass transportation service or does not shorten the mass transportation life of the equipment or facilities being used and (2) charter service which recovers its fully allocated cost.

If you have any further questions or comments on this matter, please feel free to call Regional Counsel Eldridge Onco or me at (817) 978-0550.

Sincerely,

Robert C. Patrick

Robert C. Patrick
Regional Administrator

CONCURRENCES
RTG. SYMBOL ONCO
INITIALS/SIG EO
DATE 1-28
RTG. SYMBOL
INITIALS/SIG
DATE 1-28-03
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U.S. Department
of Transportation
Federal Transit
Administration

REGION VII
Iowa, Kansas,
Missouri, Nebraska

901 Locust Street
Suite 404
Kansas City, MO 64106
816-329-3920
816-329-3921 (fax)

February 11, 2003

Mr. Bill Osborne, Director
SMTS, Inc.
704 E. HWY 72
P.O. Box 679
Fredericktown, MO 63645

Re: Charter Exemption – Scared Straight

Dear Mr. Osborne:

You have requested approval of an exception to the Federal Transit Administration's (FTA) charter rule found at 49 CFR Part 604. More specifically, you have requested confirmation that the exception found at 49 CFR 604.9(b)(5)(ii) is appropriate to the circumstances described in your letter (and its attachments) to the FTA dated February 10, 2003.

The facts as represented in your letter are:

1. The services would be provided to the Missouri Department of Corrections, Board of Probation and Patrol, and this is a governmental entity.
2. This service recipient either directly or indirectly receives federal funds from one or more of the programs listed in Appendix A to Part 604.
3. This service recipient has certified to the same as evidenced in a letter dated as received via facsimile on February 11, 2003 by both SMTS, Inc. and FTA.
4. The 5 charter trips in question are consistent with the purpose of the service recipient and related to prevention of incarceration of at risk youth.
5. The charter trips are offered (organized and provided) in a non-discriminatory manner.

Based on these facts, we find that the charter exception identified at 49 CFR 604.9(b)(5)(ii) is applicable and that no public advertising is required.

If you have any questions regarding this matter, please contact Regional Counsel, Paula L. Schwach at 816-329-3935 or at Paula.Schwach@fta.dot.gov.

Sincerely,

Mokhtee Ahmad

Mokhtee Ahmad
Regional Administrator

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION IV
Alabama, Florida, Georgia,
Kentucky, Mississippi,
North Carolina, Puerto
Rico, South Carolina,
Tennessee

61 Forsyth Street, S.W.
Suite 17T50
Atlanta, GA 30303-8917
404-562-3500
404-562-3506 (fax)

Mr. Jeff Hackbart
Director Public Works
City of Frankfort
315 West Second Street
P.O. Box 697
Frankfort, Kentucky 40602

February 13, 2003

Re: Governor's Kentucky Derby Breakfast

Dear Mr. Hackbart:

Based on the information provided in your letter dated January 6, 2003, Frankfort Transit is granted permission to provide bus service for the special event of the Governor's Kentucky Derby Breakfast Activities.

If you have any questions, I can be contacted at 404/562-3518.

Sincerely,

Donald Alford
Office of Oversight & Project Management

U.S. Department
of Transportation
Federal Transit Administration

REGION V
Illinois, Indiana,
Michigan, Minnesota,
Ohio, Wisconsin

200 West Adams Street
Suite 320
Chicago, IL 60606-5253
312-353-2789
312-886-0351 (fax)

VIA CERTIFIED MAIL

MAR 2 1 2003

Mr. Gus Lluberes
Michigan Department of Transportation
P.O. Box 30050
425 W. Ottawa St.
Lansing, MI 48909

RE: FTA Charter Service Complaint

Dear Mr. Lluberes:

Gladwin Limousine Service (Gladwin) has alleged that a sub-recipient of Michigan Department of Transportation (MDOT), Isabella County Transportation Commission (ICTC), violated Federal Transit Administration (FTA) charter rules pursuant to 49 C.F.R. Part 604. A copy of an e-mail from Gladwin setting forth their allegations is enclosed.

FTA regulations require that certain procedures be followed when a recipient or sub-recipient desires to provide charter service. In accordance with the rule, recipients must determine if willing and able private operators exist prior to providing incidental charter service pursuant to public notice. If willing and able private providers do exist, recipients are prohibited from providing charter service unless one of the enumerated exceptions to the charter rule apply.

As the recipient through which ICTC receives their pass through funding, FTA requests MDOT to conduct an inquiry into these allegations. Please request a copy of ICTC's published charter notice and describe whether any responses from private providers were received. If they have provided incidental charter service, they must describe the nature of that service. If they have received any complaints from any private providers, including Rod and Laurie Knierim, they must also provide a description of those complaints and responses thereto.

Once received, FTA will review this information and determine if sufficient evidence exists which merits the initiation of a formal complaint process in accordance with 49 C.F.R. Part 604.15. A prompt response will be appreciated.

If you have any questions or concerns regarding this matter, please contact FTA's Regional Counsel, Paul Jensen, at (404) 562-3525.

Sincerely,

Joel P. Ettinger
Regional Administrator

Enclosure

cc: Gladwin Limousine Service

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION IX
Arizona, California,
Hawaii, Nevada, Guam
American Samoa,
Northern Mariana Islands

201 Mission Street
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415-744-3133
415-744-2726 (fax)

APR 28 2003

Bill Miller
Desert Resorts Transportation
PO Box 2084
Rancho Mirage, CA 92270

Richard Cromwell III
General Manager, CEO
SunLine Transit Agency
32-505 Harry Oliver Trail
Thousand Palms, CA 92276

Re: Charter Complaint 2002-11, Desert Resorts Transportation v. SunLine Transit Agency

Dear Mr. Miller and Mr. Cromwell:

In accordance with the Federal Transit Administration (FTA) Charter Service regulations, Title 49 Code of Federal Regulations (CFR) Part 604, the Federal Transit Administration (FTA) has reviewed the above captioned Complaint along with related materials submitted by both parties. For administrative convenience FTA has consolidated 106 individual complaints filed by Desert Resorts Transportation (Desert) against the SunLine Transit Agency (SunLine) for purposes of this decision as all complaints arise out of the same set of circumstances.

In earlier decisions (California Bus Association (CBA) v. SunLine) rendered on February 10, 1997 and January 15, 2002, FTA determined that group trips performed by SunLine, including those, which are the subject of the instant complaint, constitute charter service subject to the procedural requirements and limitations contained in the FTA Charter Service regulations. FTA also determined that SunLine failed to comply with the Charter Service regulations in agreeing to provide such services. Accordingly, the only issue to be decided at this time is what, if any, remedies authorized under the regulations (49 CFR §604.17) should be imposed.

Background

On February 10, 1997, the FTA issued a decision finding that SunLine's fixed-route group trip service was charter service in violation of 49 CFR Part 604. SunLine was ordered to discontinue operating the service and advised that if it wished to reinstitute group trip operations, it must reconfigure the service to conform to FTA's mass transportation guidelines. Shortly thereafter, FTA granted a temporary stay of its decision based on SunLine's assertions that the information it had provided prior to the February 10 decision was outdated; the parties had resolved their

differences during an October 1996 meeting; and the charter service infractions had been corrected. Based on supplemental information obtained following the February 10, 1997 decision, on January 15, 2002, FTA found that SunLine had not made the changes necessary to bring the group trip service within the definition of mass transportation. SunLine's reconfigured group trip service was found to be charter service rather than mass transportation and therefore, an impermissible use of FTA funded facilities and equipment. FTA suggested several ways in which SunLine could reconfigure the service in order to bring it into compliance with Federal requirements; however, SunLine failed for a variety of reasons to adopt those suggestions.

As of the January 15, 2002 letter of decision, SunLine had obligated itself and scheduled to perform approximately 146 group trips according to information provided by both parties. Following the January 15 decision, SunLine hosted a meeting of private charter operators to explain the situation and to see if any of them could carry out the group trip contracts. Thirty-Nine or forty of those trips were cancelled by SunLine. The remaining 106 were not cancelled and form the basis of Desert's 106 Complaints. In a letter dated May 3, 2002, addressed to Pacific Coast Bus Service, Inc. SunLine admits carrying out the balance of the group trips and states that the last trip was performed on April 23, 2002.

Discussion

Desert is seeking remedies under 49 CFR §604.17 which says that: "(a) If the Regional Administrator determines that a violation of this part has occurred, the Regional Administrator may order such remedies as the Regional Administrator determines are appropriate. (b) If the Regional Administrator determines that there has been a continuing pattern of violation of this part, the Regional Administrator may bar the respondent from the receipt of further financial assistance for mass transportation facilities and equipment."

To remedy SunLine's admitted violations, Desert asks FTA not only to withhold further Federal funding from SunLine, but to also require SunLine to pay Desert monetary damages in an amount equal to that which would have been received had Desert provided the service. In support of its requests Desert relies on the preamble to the charter regulation found at 52 Federal Register (FR) 11916, April 13, 1987, page 11929. In the discussion of Section 604.17 Remedies, the preamble says, "this section of the final rule sets forth the remedies, or penalties, that UMTA may impose on a recipient if we find that there has been a violation of the regulation."

In response, SunLine argues that it booked the 106 group trips before the January 15, 2002 decision letter was issued in reliance on the temporary stay granted earlier by FTA and in good faith believing that it was properly reconfiguring the service based on advice from FTA. The record reflects that the trips were booked before the FTA decision and completed in approximately three months following the decision.

In determining whether to impose the remedies requested, SunLine's intent in providing the group trips following the FTA decision of January 15 must be balanced with the likely effects of such remedies. Nothing in the record suggests that SunLine was acting in defiance of the FTA decision. To the contrary, the meeting held with private operators to see if they could perform any

of the contracted group trips suggests that SunLine made a concerted effort to carry out the intent of the decision. Nothing in the record suggests that SunLine was knowingly attempting to harm Deserts or any other private operator. Rather, SunLine appears to have acted in the mistaken belief that its group trips were a permissible form of mass transportation.

On the other hand, suspension of SunLine's eligibility for further Federal financial assistance would likely result in a noticeable reduction in the quality of mass transportation service to transit riders in the SunLine service area. That result would be contrary to FTA goals for increasing transit ridership and making public transportation the mode of choice for the traveling public. Accordingly, FTA will not impose that penalty in the absence of evidence that less drastic remedies will not suffice.

In the preamble to the issuance of the Charter Service regulations FTA purposely declined to specify any particular penalties that might be imposed upon finding a violation, beyond the possibility of withdrawing future financial assistance. "In this final rule, UMTA [now FTA] has decided not to specify any penalties. We agree with several of the commenters that this approach provides UMTA with the flexibility needed to fashion a remedy that fits the situation. While this may permit the possibility of arbitrary penalties and remedies, UMTA's close reliance on and following of precedents should prevent this."

In the fifteen years the regulations have been in effect, FTA has neither withheld future financial assistance, nor awarded monetary penalties in response to a violation, so there is no such precedent to apply in this case. With respect to Desert's request that FTA require SunLine to pay Desert the amount Desert would have earned had Desert provided the group trips, Desert has not shown that it would necessarily have been hired over other private charter operators. Even if it could be shown that Desert would have been awarded the contracts, it is purely speculative to suggest that Desert would have earned a particular sum on such business.

The preamble does provide some guidance regarding one appropriate remedy to be applied where charter service is impermissibly performed. At 52 FR 11926 discussion of spare ratios and useful life rely on Section 9 [now 5307] Formula Grant Application Instructions, to wit, "a transit bus has a mass transit useful life of 12 years. UMTA will not permit a recipient to count charter service toward meeting this 12-year mark. As a result, UMTA will, absent extenuating circumstances, only permit a bus to be replaced after the bus is used in 12 mass transportation years, not just 12 calendar years."

Further guidance with regard to remedies is found in the Questions and Answers promulgated by UMTA at 52 FR 42248, November 3, 1987. Question 28 asks, "How should grantees calculate 'mass transit useful life' less 'charter life' of vehicles?" The Answer is as follows: "Any reasonable method of calculation is sufficient (e.g. average hours per week, month, or year subtracted from total hours; average miles per week, etc., subtracted from total miles). The calculation does not necessarily have to be done for each particular bus, and averages can be applied to an entire fleet. For instance, a grantee that provides 3 days of charter service per year per bus, would subtract 36 days from the 12-year useful life of each individual bus...." Other expenses for which grant money may not be used when charter is performed include depreciation, fuel, maintenance and labor.

Conclusion

Because the charter services performed by SunLine between January 15, 2002 and April 23, 2002, had been contracted for and scheduled prior to the date of FTA's January 15 decision letter, and

there is no evidence in the record to suggest that SunLine acted in bad faith or in defiance of the FTA decision, FTA will neither withhold future financial assistance to SunLine, nor impose monetary penalties payable to Desert pursuant to 49 CFR §604.17, consistent with prior precedent. Desert's requests that FTA deny further financial assistance to SunLine and that SunLine be directed to pay monetary damages to Desert are hereby denied.

However, in light of the continuing nature of the violations and the apparent inability of SunLine to conform its behavior to the regulatory requirements with respect to its so called "group trips", SunLine is hereby ordered to cease and desist from offering to perform any type of group service, except for services designed to meet the special needs of elderly or handicapped patrons otherwise permitted under the Charter Service regulations.[1] In determining the in-service useful life of FTA funded vehicles, equipment, and facilities used in support of "group trips" since January 1, 1997, SunLine must calculate and deduct all associated use (mileage, time, or depreciation) from the inventory records required to be maintained in accordance with 49 CFR Part 18 and related terms and conditions of FTA Assistance Agreements. No reference to group trips is to be published in the SunLine Rider's Guide as was done in July 2001. SunLine must take all necessary steps to conform its service in all respects to the requirements of FTA's regulations and guidelines for mass transit.

In accordance with 49 CFR §604.19 appeals of this decision must be made within ten days of receipt of this decision. The appeal should be sent to Jennifer Dorn, Administrator, FTA, 400 Seventh Street, S.W., Room 9328, Washington, D.C. 20590.

Sincerely,

Leslie Rogers
Regional Administrator

[1] This order encompasses all group service as described in SunLine's July 2001 Rider's Guide. A separate complaint has been filed by Desert regarding SunLine services designed to meet the special needs of elderly and handicapped patrons as advertised on SunLine's internet web page. Those services are not covered by this decision and will be addressed in a response to the recent complaint.

U.S. Department
of Transportation
**Federal Transit
Administration**

Administrator

h St., S.W.
n, D.C. 20590

MAY 14 2003

Mr. Dan W. Chandler
Chandler Bujold & Chandler, PLC
2855 Coolidge Highway, Suite 109
Troy, Michigan 20590

Re: Classic Caddy Limousine v. Capital Area Transportation Authority, Charter Service Docket Number 2002-01; The Tecumseh Trolley & Limousine Service v. Capital Area Transportation Authority, Charter Service Docket Number 2002-04; Indian Trails, Inc., v. Capital Area Transportation Authority, Charter Service Docket Number 2002-10

Dear Mr. Chandler:

In an initial decision by Regional Administrator Joel Ettinger dated October 11, 2002, and amended November 6, 2002, the Federal Transit Administration found that Capital Area Transportation Authority (CATA) was providing charter service in violation of the Federal Transit Administration's charter service regulation, 49 CFR Part 604, and ordered CATA to cease and desist providing such service. CATA appealed both the initial and the amended decisions to me on October 24, 2002, and November 15, 2002, respectively.

I am not taking any action on the appeals since CATA presented no new matters of fact or points of law that were not available or not known during the investigation of the complaint. This decision is administratively final.

Sincerely,

Jennifer L. Dorn

cc: Sandy Dragoo, Executive Director
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Joel Ettinger, FTA Regional Administrator, TRO-5

Nancy Ellen Zusman, Regional Counsel, TRO-5

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Washington, D.C. 20006

U.S. Department of Transportation
Federal Transit Administration

Headquarters

400 Seventh St. S.W.
Washington, D.C. 20590

June 16, 2003

Paul J. Yesawich, III, Esq.
Harris Beach
99 Garnsey Road
Pittsford, New York 14534

Re: *Kemps Bus Service, Inc. v. Rochester-Genesee Regional Transportation Authority*
Charter Complaint Docket No. 2002-02

Dear Mr. Yesawich:

On January 2, 2003, Federal Transit Administrator Dorn issued a final decision on this charter service complaint. She found that the Rochester-Genesee Regional Transportation Authority (RGRTA) was providing prohibited charter service in three specific cases: Wegman's Grocery Shuttle, Ladies Professional Golf Association Wegman's Rochester International Golf Tournament (LPGA), and Rochester Institute of Technology (RIT) campus service. Since then, RGRTA has consulted with FTA's Office of Chief Counsel in order to bring its service into compliance with that decision and FTA's charter service regulation, 49 CFR Part 604. The following summarizes the measures RGRTA has undertaken.

Wegman's Grocery Shuttle

RGRTA has provided information that Wegman's Grocery has arranged with Medical Motor Service of Rochester and Monroe County, Inc., for the provision of transportation service to persons with disabilities between certain senior citizen complexes and the Wegman's stores. Since this service is restricted, the general public will no longer be served. Since the number of riders on some of the routes exceeds the capacity of Medical Motors, it has subcontracted with Regional Transit Service (RTS) (a subsidiary of RGRTA) to provide service on those routes as authorized by section 604.9(b)(2)(i).

Wegman's International LPGA

RTS has provided copies of published schedules for the LPGA and similar seasonal events. RTS has established public routes for each of the seasonal events. The routes will operate only on the days of the events. RTS has established a fare per rider. As with all other public routes, senior citizens, persons with disabilities, and children (ages 6-11) pay one-half fare, while children age 5 and under ride for free. RTS has posted the schedule on its website. LPGA will not subsidize the

fare this year. If no one else elects to subsidize the fare, each person boarding a bus to ride to the LPGA event will be required to pay the regular fare.

Rochester Institute of Technology

RGRTA has provided FTA with a draft of a subsidy agreement between RTS and RIT (which RIT has indicated it is willing to sign) in which RTS retains control of the service. RGRTA has represented to FTA that standard RTS bus stop signs have been placed throughout the campus. In addition, RTS states that it has placed a number of shelters on the campus of the same design and appearance as shelters on other public routes. There are a number of stops on campus where the public can transfer from routes that travel off-campus to those that operate only on campus, providing connectivity between campus and non-campus service. At this time, the portion of the RTS website where schedules are given contains a link to the portion of the RIT website where the schedule for the intra-campus routes is found. RTS states that it is in the process of integrating all its route schedules on its website.

RTS states that it is no longer contracting directly with any university for the purpose of providing services for its graduation events or special shuttle service to other transportation services around school holidays. RGRTA provided evidence, however, that Kemps Bus Service, Inc., and Golden Memories Transportation have both sought to subcontract certain graduation services to RTS because of a lack of capacity and, in some cases, an inability to provide equipment accessible to persons with disabilities.

Conclusion

Based on the information RGRTA has provided, I conclude that RGRTA, with respect to the service at issue in this case, is now in compliance with FTA's charter service regulation.

Very truly yours,
(Signed)
Gregory B. McBride
Deputy Chief Counsel

cc: John H. Kemp, President
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Letitia Thompson, Regional Administrator, TRO-2

Maisie Grace, Regional Counsel, TRO-2

Jeffrey Shane, DOT, OST, S-3

Emil H. Frankel, DOT, OST, P-1

U.S. Department
of Transportation
**Federal Transit
Administration**

Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

JUL 7 2003

Mr. Richard Cromwell III
General Manager, CEO
SunLine Transit Agency
32-505 Harry Oliver Trail
Thousand Palms, California 92276

Re: Docket Number 2002-07

Dear Mr. Cromwell:

In a decision by Regional Administrator Leslie Rogers, dated January 3, 2003, the Federal Transit Administration (FTA) found that SunLine Transit Agency (SunLine) was providing charter service in violation of FTA's charter service regulation, 49 CFR Part 604, and ordered SunLine to cease and desist providing such service. SunLine appealed the decision to me on January 20, 2003.

I am not taking any action on the appeal since SunLine presented no new matters of fact or points of law that were not available or not known during the investigation of the complaint, as required by section 604.19 of the regulation; accordingly, the Regional Administrator's decision is administratively final.

Sincerely,

Jennifer L. Dorn

cc: Mr. Bill Miller
Desert Resorts
P.O. Box 2084
Rancho Mirage, California 92270

Lisa Garvin Copeland, Esq.
74-040 Highway 111, Suite 225
Palm Desert, California 92260

Leslie Rogers, Regional Administrator

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

California Bus Association,
On behalf of Amador Bus Lines,

Complainant

Charter Complaint #2003-01
49 U.S.C. Sections 5303, 5304, 5306, 5307, and 5323

v.

Sacramento Regional Transit District,

Respondent.

DECISION

INTRODUCTION

On March 6, 2003, the California Bus Association (CBA) filed this complaint with the Federal Transit Administration (FTA) alleging that the Sacramento Regional Transit District (RT) has violated the conditions placed on the receipt of Federal assistance by the Federal transit laws (49 U.S.C. Chapter 53) by instituting the Downtown Circulator service, which among other things, replaced a service operated by a private operator, Amador Bus Lines, under contract to the State of California Department of General Services (DGS). After reviewing the allegations and the filings of the parties, FTA concludes as follows:

- that RT's Downtown Circulator is not impermissible charter service under FTA's charter service regulation at 49 CFR Part 604; that RT's Downtown Circulator is "mass transportation" within the meaning of the Federal transit laws; and, accordingly, that the requirements of 49 U.S.C. 5323(d)(1) regarding a public authority's provision of charter service in competition with a private operator of charter bus service do not apply to RT's service; and

- that since Amador's shuttle service contract with DGS was for charter service, not mass transportation service, the requirements of 49 U.S.C. 5323(a)(1) regarding a public authority's provision of mass transportation service in competition with a private operator of mass transportation service do not apply; that with regard to participation by the private sector, RT has met the minimum statutory requirements for public notice and comment in section 5307; and that while it appears that RT could have done more to explore the use of private sector providers in this situation, RT has met the minimum requirements of section 5306.

CBA's complaint

Under its contract with DGS, Amador provided shuttle service for the exclusive benefit of state employees parking in state lots. Sometime in 2002, the State contacted RT to determine whether RT could add new routes to its downtown service area that would meet the needs of its employees who travel between State parking lots and State office buildings. As a result of these discussions, RT developed the Downtown Circulator service (also referred to as the Capital Shuttle), which now consists of three fixed routes numbered 141, 142, and 143 within the Central City of Sacramento. As a part of this plan, RT also changed the frequency of its previously existing Route 140.

This expansion of RT's service is provided by FTA-funded CNG-powered buses. DGS and RT entered into an agreement whereby DGS compensates RT for the additional costs of increasing downtown service in consideration of RT's acceptance of the State employee ID card as proof of fare payment along these new routes. Passengers who do not possess a State ID card pay the applicable fare. DGS purchases Central City Passes for its employees at a discounted rate.

On January 28, 2003, DGS notified Amador that its contract would not be renewed when it expired on April 7, 2003. In its March complaint, CBA requested that FTA investigate, alleging that RT violated private sector participation requirements under 49 U.S.C. 5303 (f)(4), 5304(d), 5306(a) and 5307(c)(2) and (6) by failing to inform or involve the private sector in its plan to use Federal assistance to purchase expansion buses for the purpose of displacing the private operator.

CBA also cites 49 U.S.C. 5323(a)(1)(A) and (B) in arguing that RT's federally assisted expansion buses are being used, unlawfully, to prevent an existing private transportation operator from fairly competing to provide this service.

CBA also asserts RT's Downtown Circulator service violates FTA's charter regulations, arguing that the Downtown Circulator is not mass transportation service as defined by 49 U.S.C. 5302(a)(7) and 49 CFR Part 604. CBA cites the agreement with DGS for RT to provide shuttle service for DGS employees and the RT planning documents describing DGS' approaching RT to operate the service needed to replace the shuttle service performed by Amador.

RT's response

On March 20, 2003, RT responded to the complaint. RT related the history of its development of the Downtown Circulator service, including its public hearing in June 1999 for the program of projects that included expansion of its CNG fleet. At that time, RT did not have a specific plan for deploying these new buses, other than to meet growing demand for service in the region. In addition, RT anticipated that it might need more buses to accommodate the service changes that would be required with the opening of the South Sacramento and the Amtrak-Folsom Light Rail Corridor Light Rail Extension projects. Last year, RT developed the service plan to determine where to

deploy these new buses, which are only now being delivered to RT. RT argued it met the private enterprise consultation obligations regarding procurement of these buses with its published notices.

RT argued that it complies with the FTA public participation requirement by publishing a notice annually that solicits private enterprise participation in RT's development of its program of projects to be funded under FTA grants. RT also publishes a notice of its program of projects inviting comments before the program is adopted, combining this notice with its budget public hearing notice. It provided a copy of the notices for the last three years. The notice in June of 1999 included expansion of RT's bus fleet. In addition, RT published a public hearing notice in August 2002 for the new Downtown Circulator service. RT states that its public notice process was reviewed as part of FTA's 1997 and 2000 triennial reviews and that no deficiencies in the public participation process were noted.

RT states that although the new routes are designed to serve State employees, the Downtown Circulator service is part of RT's fixed route system of mass transportation and is not charter service as defined by the three factors cited by FTA: (1) open to the public and not closed door, (2) designed to benefit the public at large, and (3) under the control of the recipient.

In response to CBA's argument that section 5323 applies to this situation, RT argues that FTA funds are not used to operate the competing service and that the shuttle service operated by Amador was charter service, not "mass transportation service" protected by the statute.

Finally, RT argues that CBA's protest is untimely because Amador knew on January 27, 2003 that RT would be operating this service because it testified at RT's public hearing on that day but waited until March 8th to submit its protest.

RT believes the MPO for the Sacramento metropolitan urban area has properly provided the notice required by sections 5303(f)(4), 5304(d), and 5307(c)(2) and (6).

CBA's response to RT

On April 7, 2003, CBA responded to RT's March 20 and 25 responses, stating as follows:

1. RT is not in compliance with private sector participation requirements because it did not disclose that its 1999 program of projects bus expansion plan would include the Downtown Circulator service. Further, CBA states that RT's August 26, 2002 public hearings did not include the private sector in consultation regarding this new service.
2. RT is not excused from FTA private sector participation requirements because it does not receive FTA operating assistance.

3. Amador has standing to be protected under section 5323 because of its likelihood to be financially injured.
4. RT's Downtown Circulator is not mass transportation, but charter under contract to DGS. RT's 1992 Sacramento Downtown Shuttle Feasibility Study Draft Final Report does not support the new service in question. CBA maintains there is no demonstrable demand for the Downtown Shuttle other than to serve State employees. Further, all of RT's public notices in 2002 identify this service as "New Downtown State Shuttles." CBA argues that while the service agreement with DGS was converted into a purchase of Central City passes, the subsidy from DGS remains substantially the same.
5. CBA's complaint is not untimely because while RT approved the Downtown Shuttle Service on September 30, 2002, it was not until a February 14, 2003 meeting with DGS that CBA was told that DGS was not interested in pursuing discussions with CBA.

RT's second response

On June 3, 2003, RT provided additional information regarding its compliance with 49 U.S.C. sections 5306 and 5307 regarding private enterprise participation. RT responded that the requirement in section 5306(a) applies to plans and programs developed by the metropolitan planning organization, in this case the Sacramento Area Council of Governments. RT states it complied with section 5307(c) requirements for participation of interested parties, including private transportation providers.

DISCUSSION

1. Charter Service.

The threshold issue is whether the service provided by RT is impermissible charter service or permissible mass transportation. The definition of charter service found in FTA's regulations at 49 CFR 604.5(e) is as follows:

> [T]ransportation 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 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.

Charter service is usually a one-time provision of service over which the passenger, not the service provider, exercises control. 52 *Fed. Reg.* 11916, 11919 (April 13, 1987). In contrast, the Federal transit laws define "mass transportation" as transportation that provides regular and continuing general or special transportation to the public. 49 U.S.C. § 5302(a)(7). In the preamble to its charter service regulation, FTA has articulated other features that flow logically from this definition:

> First, mass transportation is under the control of the recipient. Generally, the recipient is responsible for setting the route, rate, and schedule, and deciding what equipment is used. Second, the service is designed to benefit the public at large and not some special organization such as a private club. Third, mass transportation is open to the public and is not closed door. Thus, anyone who wishes to ride on the service must be permitted to do so.

52 *Fed. Reg.* 11920.

Given the many varying scenarios existing in the transportation industry, FTA has determined that a balancing test must be used to determine the nature of the service involved in any complaint filed with FTA. As the preamble to the charter regulation points out, there is no fixed definition of charter service, and the characteristics cited by FTA are illustrative, not exhaustive. 52 *Fed. Reg.* 11919-11920.

Under the control of the recipient

The charter service criteria include bus transportation under a single contract at a fixed rate for the vehicle or service. FTA has previously determined that control of fares and schedules is the critical element in the balancing test FTA uses to distinguish charter service from mass transportation. *Seymour*, at 10. Compensation on the basis of hours of service is evidence of charter operations, whereas individual fares paid by each rider indicates the service is mass transportation. *Seymour*, at 9-10.

The RT and DGS arrangement, the Central City Pass Agreement, provides that RT retains control of routes and service. Such pass agreements are not features of charter service, instead constituting "group demand" service as contemplated by Q&A Number 27(e), "Charter Questions and Answers," 52 *Fed. Reg.* 42248, 42252 (November 3, 1987), which provides that group demand service is not charter service where groups such as employees of a common workplace contract with a transit authority for service and each individual pays his or her own fare, so long as the authority controls routes and service and the service is open door.

Designed to benefit the public at large

Service is designed to benefit the public at large when it serves the needs of the general public, instead of those of "some special organization such as a private club." 52 *Fed. Reg.* 11920 (April 13, 1987). *Annett Bus Lines v. City of Tallahassee*, FL-TALTRAN/90-02-01 (April 28, 1992). In this regard, CBA has provided evidence that the Downtown Circulator service was structured to meet the needs of State employees to travel from parking lots to State office buildings, that it is a service designed to substitute for the State's contract service with

Amador, and that the service since instituted carries almost exclusively State employees. The record supports these assertions; however, none of these facts, taken into consideration with the information provided by RT, results in the conclusion that the Downtown Circulator service is anything but mass transportation.

While the service is designed to accommodate the State employees primarily, it is not restricted to their exclusive use, but is available to anyone wishing to board; moreover, this service has been integrated into RT's larger route structure, providing greater transportation connectivity in the downtown area for riders of the fixed route system. FTA finds that the service benefits the public at large.

(CBA argues that RT's 1992 study supports a different downtown service configuration, not the Downtown Circulator service. FTA is not willing to substitute its judgment for the grantee's in this regard.)

Open to the public and not closed door

In determining whether service is truly "open door," FTA looks both at the level of ridership by the general public, as opposed to a particular group, and at the intent of the recipient in offering the service. The intent to make service open door can be discerned in the attempts to make the service known and available to the public. FTA thus takes into account the efforts a recipient has made to market the service. Generally, this effort is best evidenced by publication of the service in the recipient's preprinted schedules. *Washington Motor Coach Association v. Municipality of Metropolitan Seattle*, WA-09/87-01 (March 21, 1988). FTA has also interpreted "open door" to mean a substantial public ridership and/or an attempt by the transit authority to widely marked the service. *Blue Grass Tours and Charter v. Lexington Transit Authority*, URO-III-1987. The posting of bus stop signs and connections to other transportation routes are also considered indicators of "opportunity for public ridership." *Seymour Charter Bus Lines v. Knoxville Transit Authority*, TN-09/88-01 (November 29, 1989).

RT advises that the Downtown Circulator routes and schedules are set out in the pocket timetables that will be supplied in each bus assigned to these routes. In addition, the new routes are included in the June 2003 edition of SRT's Bus and Lightrail Timetable Book. FTA finds that SRT has demonstrated that the service is, in fact, open door.

Accordingly, FTA concludes that RT's Downtown Circulator is permissible mass transportation, not charter service, within the meaning of the Federal transit laws. We now turn to the question of RT's compliance with the private sector participation requirements in the Federal transit laws.

2. Private Sector Involvement.

Compliance with private sector participation requirements

The relevant provisions of 49 U.S.C. 5306 focus mainly on including the private sector in participating in local transit programs, ensuring that adequate compensation is provided a private provider when its transit facilities and equipment are acquired by a state or local government authority, and protecting private providers of transit from competition with federally assisted transit providers.

Federal transit law (49 U.S.C. 5303(f)(4)) and the joint FTA/Federal Highway Administration planning regulations direct special attention to the concerns of private transit providers in planning and project development, specifically requiring that private transit providers, as well as other interested parties, be afforded an adequate opportunity to be involved in the early stages of the plan development and update process (23 CFR 450.322).

FTA does not impose prescriptive requirements for determining whether a grant applicant has made adequate efforts to integrate private enterprise in its transit program, as explained in the FTA Notice "Private Enterprise Participation," dated April 26, 1994 (59 *Fed. Reg.* 21890 *et seq.* (1994)); FTA Circular 9030.1C, Page V-39, Para. 24. *Private Enterprise Concerns* (October 1, 1998).

FTA grantees must comply with rigorous planning and private enterprise requirements (49 U.S.C. 5303-5307) and the joint FTA/FHWA planning regulations. To determine the adequacy of a grant applicant's efforts to incorporate private enterprise in its transit program, FTA monitors compliance with statutory and regulatory private enterprise requirements as part of the triennial reviews. Indeed, FTA's Fiscal Year 2000 Triennial Review Report noted a deficiency in RT's public participation process. On July 3, 2001, RT took corrective action through adoption of a Standard Operating Procedure establishing a new coordination and consultation process in developing the annual federal program of projects. Upon review, FTA accepted this procedure and closed the finding.

Competition with the private sector

Federal law recognizes the special concerns of private transportation providers and affords them certain safeguards from competition with public agencies. Specifically, FTA is prohibited from providing Federal assistance to a governmental body that provides service in competition with, or supplementary to, mass transportation service provided by a private transportation company, unless FTA finds that the local transportation program developed in the planning process provides for participation of private mass transportation companies to the maximum extent feasible (49 U.S.C. 5323(a)(1)(B)).

RT argues that this restriction in section 5323(a)(1) applies only if FTA funds are used to operate the competing service and the company is providing "mass

transportation" service and that neither condition is met here. RT states the Downtown Circulator service does not fall under this restriction. CBA has provided information to support its assertion that the Downtown Shuttle service was instituted to meet, at least in part, the needs of the State, as employer, to replace the service it had previously contracted for with Amador.

The term "mass transportation" is defined in section 5302(a)(7) as "transportation by a conveyance that provides regular and continuing general or special transportation to the public, *but does not include* school bus, *charter* or sightseeing transportation." Emphasis added. The term "charter" is defined in the FTA regulations at 49 CFR 604.5(e) as follows:

> "Charter Service" means transportation using buses or vans, or facilities funded under the Act 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 . . . ."

Under this standard, it is clear that the service Amador provided under contract with DGS was charter service; moreover, Amador is not a "private mass transportation company" to which the protections of section 5323 apply.

CONCLUSION

While it appears that RT could have done more to explore the use of private sector providers in this situation, RT has met the minimum requirements under the law. The service RT is providing, known as the Downtown Circulator, is not charter service, but permissible mass transportation service.

In accordance with 49 CFR 604.19, the losing party may appeal this decision within ten days of receipt of the decision. The appeal should be sent to Jennifer Dorn, Administrator, FTA, 400 Seventh Street, S.W., Room 9328, Washington, D.C. 20590.

Renée Marler
Regional Counsel

8/5/03
Date

Leslie Rogers
Regional Administrator

8/5/03
Date

U.S. Department
of Transportation
**Federal Transit
Administration**

Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

AUG 5 2003

Mr. Richard Cromwell, III
General Manager & CEO
Sunline Transit Agency
32-505 Harry Oliver Trail
Thousand Palms, CA 92276

Re: Docket No. 2002-11

Dear Mr. Cromwell:

In a decision by Regional Administrator Leslie Rogers, dated April 28, 2003, the Federal Transit Administration (FTA) found that SunLine Transit Agency (SunLine) had provided charter service in violation of FTA's charter service regulation, 49 CFR Part 604. Sunline appealed the decision to me on May 14, 2003.

I am not taking any action on the appeal since Sunline presented no new matters of fact or points of law that were not available or not known during the investigation of the complaint. This decision is administratively final.

Sincerely,

Jennifer L. Dorn

cc: Mr. Bill Miller

Leslie Rogers, Regional Administrator

U.S. Department
of Transportation
**Federal Transit
Administration**

Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

AUG 19 2003

Mr. Ronald R. Bast
President
Motorcoach Division
Riteway Bus Service, Inc.
W201 N13900 Fond du Lac Avenue
Richfield, WI 53076

Re: Charter Services by Publicly Funded Transit Organizations

Dear Mr. Bast:

Senator Herb Kohl forwarded your letter regarding charter services to me for response. I understand that, as the owner of Riteway Bus Service, Inc., you wish to reinforce the position taken by the American Bus Association regarding the issue of the illegal provision of charter services by publicly funded transit organizations. You ask that the Federal Transit Administration (FTA) work to strengthen its charter service regulation to ensure that publicly funded transit operators not take business away from privately operated motorcoach companies.

Since my appointment as FTA Administrator, I have worked with both the American Bus Association and the American Public Transportation Association to educate both the private and public sector about FTA's charter service regulation. Enclosed is a copy of a letter I sent to the industry on December 27, 2001, expressing the need for the public and private sectors to work together in the provision of transportation services. Also enclosed is a copy of the "Charter Service Information" brochure FTA created, published, and widely distributed that highlights the key provisions of the regulation. Both documents are also available on our website. In addition, FTA continues to investigate allegations, make decisions, and enforce its regulation regarding prohibited charter service.

In response to your specific concerns, the Department of Transportation's proposal for the Safe, Accountable, Flexible, and Efficient Surface Transportation Equity Act of 2003 (SAFETEA) provides for the involvement of the private sector in the transportation planning process and proposes amendments to the charter service remedy provision of the statute.

Public and private mass transportation providers have much to offer each other and the riding public. Thank you for your interest in this matter.

Sincerely,

Jennifer L. Dorn

Enclosures

cc: Senator Herb Kohl
Washington Office

U.S. Department
of Transportation
**Federal Transit
Administration**

Administrator

400 Seventh St., S.W.
Washington, D.C. 20590

SEP 16 2003

Mr. Michael R. Waters
President
California Bus Association
11020 Commercial Parkway
Castroville, CA 95012

Re: Charter Service Docket Number 2003-01

Dear Mr. Waters:

In a charter service decision by Regional Administrator Leslie Rogers, dated August 5, 2003, the Federal Transit Administration (FTA) found that Sacramento Regional Transit District was providing mass transportation, not charter service, and, therefore, was not in violation of FTA's charter service regulation, 49 CFR Part 604. California Bus Association (CBA) appealed the decision to me on August 15, 2003.

The charter service regulation provides that the Administrator will only take action on an appeal if the appellant presents evidence that there are new matters of fact or points of law that were not available or not known during the investigation of the complaint, 49 CFR Section 604.19.

In accordance with the charter service regulation, I am not taking any action on the appeal since CBA presented no new matters of fact or points of law that were not available or not known during the investigation of the complaint, as required by Section 604.19 of the regulation; accordingly, the Regional Administrator's decision is administratively final.

Sincerely,

Jennifer L. Dorn

cc: Beverly A. Scott, General Manager, CEO, Sacramento Regional Transit District
Mark W. Gilbert, Chief Legal Counsel, Sacramento Regional Transit District
William R. Allen, President, Amador Stage Lines
Leslie Rogers, Regional Administrator, TRO-IX
The Honorable Doug Ose, U. S. House of Representatives

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION V
Illinois, Indiana,
Michigan, Minnesota,
Ohio, Wisconsin

200 West Adams Street
Suite 320
Chicago, IL 60606-5253
312-353-2789
312-886-0351 (fax)

VIA FACSIMILE FOLLOWED BY HARD COPY

September 25, 2003

Claryce Gibbons-Allen
Director
Detroit Department of Transportation
1301 East Warren
Detroit, MI 48207

RE: Request for Charter Waiver, Docket No. 2003-18

Dear Ms. Gibbons-Allen:

This letter serves as the Federal Transit Administration's (FTA) reply to the Detroit Department of Transportation's (DDOT) request for a waiver of the charter regulations dated September 10, 2003.

DDOT is requesting a waiver of the charter regulations pursuant to 49 C.F.R. Section 604.9(b)(4) for the United States -- Arab Economic Forum as a special event. However, DDOT has failed to provide justification evidencing a need for the waiver, and it has also failed to provide evidence that it has determined that there are no willing and able charter providers able to provide the requested service.

Therefore, FTA is denying DDOT's request for a waiver of the charter regulations pursuant to Section 604.9(b)(4).

Should you have any questions regarding this matter, please feel free to contact Nancy-Ellen Zusman of my staff. Ms. Zusman can be reached at (312) 353-2789.

Sincerely,

Joel P. Ettinger
Regional Administrator

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION V
Illinois, Indiana,
Michigan, Minnesota,
Ohio, Wisconsin

200 West Adams Street
Suite 320
Chicago, IL 60606-5253
312-353-2789
312-886-0351 (fax)

OCT 2 3 2003

VIA CERTIFIED MAIL

Mr. Dennis Streif, Vice President
Vandalia Bus Lines, Inc.
P.O. Box 400
312 West Morris Street
Caseyville, IL 62232

RE: FTA Charter Service Complaint # 2003-14

Dear Mr. Streif:

The Federal Transit Administration (FTA) has received documentation from South Central Illinois Mass Transit District (SCIMTD) relating to your charter complaint. SCIMTD has rescinded their proposal for athletic transportation services for Kaskaskia College. Therefore, this case is considered closed and no further action will be taken.

As always, if you have any questions regarding the Federal Transit Administration procedures, please contact Nancy-Ellen Zusman, Regional Counsel, at (312) 353-2789.

Sincerely,

2003 - 14

Joel P. Ettinger
Regional Administrator

Enclosure

cc:

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION VI
Arkansas, Louisiana,
New Mexico, Oklahoma,
Texas

819 Taylor St. Suite 8A36
Fort Worth, TX 76102
817-978-0550
817-978-0575 (fax)

October 28, 2003

Robert J. Dostal, Jr.
Motorcoach Marketing International, Inc.
6920 N.E. 4th Lane
Ocala, Florida 34470

Re: Charter Complaint

Dear Mr. Dostal:

The Federal Transit Administration (FTA) has completed its review and investigation of the complaints filed by Motorcoach Marketing International, Inc., Fame Tours, Inc., and the United Motorcoach Association that principally allege certain bus service provided by the Metropolitan Transit Authority of Harris County, Texas, (Houston METRO) in connection with the annual Houston Livestock Show and Rodeo (Rodeo) was in violation of the FTA's Charter Service regulation, 49 CFR Part 604. As each of the three complaints sets forth essentially the same allegations, this letter will serve as the FTA's response to all three of the complaints.

Specifically, it has first of all been alleged that the City of Houston, Texas, for many years has awarded a contract to Houston METRO for the provision of bus service in connection with the Rodeo and, consequently, Houston METRO is providing charter service for the Rodeo with federally funded equipment in violation of the FTA's Charter Service regulation. Secondly, it is alleged that Houston METRO, as a public transportation provider, has engaged in a monopoly with its special event bus service in Houston, Texas. Finally, it is alleged that Houston METRO improperly uses federally funded buses to exclude many private operators from competing for charter service for the Rodeo and other special events.

With respect to the first allegation in the complaint concerning impermissible charter service being provided by Houston METRO in connection with the Rodeo, the FTA has conducted a thorough review of the role and manner in which Houston METRO has provided the bus service in this case. As a part of the analysis to determine whether the Rodeo service provided by Houston METRO in this case is impermissible charter service or permissible mass transportation, it will be helpful to review the definitions of the terms "charter service" and "mass transportation" as they are defined in the FTA's Charter Service regulation and in the Federal Transit Act, respectively.

The term "charter service" is defined in 49 CFR Section 604.5(e) as follows:

> [T]ransportation 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 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.

The term "mass transportation" is defined in the Federal Transit Act at 49 U.S.C. Section 5302 (a) (7) as follows:

> Mass transportation means transportation by a conveyance that provides regular and continuing general or special transportation to the public, but does not include school bus, charter, or sightseeing transportation.

Although perhaps not readily apparent from the above definitions, based on the language in the preamble to the FTA's Charter Service regulation, 52 Fed. Reg. 11916 (April 13, 1987), and many FTA administrative decisions that have since interpreted these definitions, there are three important characteristics that distinguish "mass transportation" from "charter service".

The first characteristic of mass transportation is that the service provider must exercise a significant degree of control over the transportation. By contrast, an operator that provides charter service typically does not possess any control in establishing, for example, the schedule or trip destination. Therefore, to determine the degree of control in this case, the FTA must ascertain the extent of Houston METRO's role in establishing the schedules, fares, and the routes of the service. A second characteristic of mass transportation is that the service must be designed to benefit the public at large and not some special organization or group of persons. Charter service, on the other hand, will involve a single contract for transportation between the service provider and an organization or a group of persons. Thus, the FTA will examine how the service was structured in this case and whether the service in this case was intended to benefit an organization rather than the general public. Finally, the third characteristic of mass transportation is that the service must be open to the public and not be closed-door service. As charter service is service exclusively for an organization or a group of persons, the FTA will review whether the public was notified of the availability of open-door service in this case or whether the service provided to the Rodeo was closed-door service to the patrons of the event. Therefore, in view of the foregoing characteristics, the FTA conducted the following analysis of pertinent aspects of the service provided by Houston METRO in this case to determine whether Houston METRO engaged in impermissible charter service or permissible mass transportation.

A.

Did Houston METRO exercise a sufficient degree of control over the schedules, fares, routes, and the equipment that would be used to provide the service?

The record reflects that Houston METRO entered into a one-year contract – as it had done in previous years – with Houston Livestock Show & Rodeo, Inc. (Corporation), a non-profit

corporation that sponsors the Rodeo, to coordinate and provide transportation services for this annual event. This one-year contract between Houston METRO and the Corporation, however, is not a "single contract" as that term is used in the definition of charter service because the recipient's control of the transportation is not significantly diminished by the terms of the contract. Rather than requiring Houston METRO to provide transportation under a single contract to a specific group of persons at a fixed charge using a certain number and type of vehicles, the contract in this case essentially amounts to a cost-sharing arrangement whereby the Corporation will participate in fifty percent (50%) of the fully allocated cost for transportation service provided by Houston METRO in connection with the Rodeo. Indeed, as to the issue of control, Article 1 of the contract specifically provides in relevant part that the Corporation "shall exercise no control over METRO's employees, servants, agents, subcontractors or representatives, nor the method or means employed by METRO in the performance of such work or services". Article 2 of the contract, on the other hand, provides that Houston METRO would provide transportation services on "routes specified by" the Corporation. While there is a partial conflict between Article 1 of the contract that allows Houston METRO to have complete control over the "method and means" of transportation and Article 2 that allows the Corporation to specify "routes", it is the FTA's view that the Article 2 provision does not *per se* appreciably detract from the overall degree of control exercised by Houston METRO in this case. In fact, the record further supports that Houston METRO, not the Corporation, determines what level of service will be required, what number of buses will be used, what type of buses will be used, and what schedules will be operated. Moreover, with respect to the fares that are charged for the transportation, the record reflects that Houston METRO, not the Corporation, establishes the individual fares for the transportation provided during the Rodeo based upon an estimate of the fully allocated costs and projected ridership. Clearly, therefore, based on the express terms of the contract and the facts in this case, Houston METRO, not the Corporation, exercises substantial control over the "method and means" in providing transportation in connection with the Rodeo.

In addition, it is noted that the degree of control exercised by the recipient in this case is clearly distinguishable from that exercised by a grant recipient in a recent case decided by the FTA on January 2, 2003, involving the Rochester-Genesee Regional Transportation Authority (RGRTA). Among the findings in the RGRTA case whereby it was determined that the grant recipient provided impermissible charter service in connection with an annual golf tournament, the FTA specifically found that the event sponsor, rather than the recipient, exercised control over the bus schedules, the number of buses, and the type of buses that would be used for the service. That is clearly not the case in this instance because Houston METRO possesses control over virtually all aspects of the service whereas, by contrast, in the Rochester-Genesee case the recipient in fact had very limited control of the service. Accordingly, based on the facts in this case, the record establishes that Houston METRO exercises not only a sufficient, but a substantial, degree of control over the schedule, fares, and the equipment that are used to provide service in connection with the Rodeo.

B.

Did Houston METRO design the service to benefit the public at large or the Corporation?

Reviewing the record in this case, it is apparent that Houston METRO widely advertised to the public the availability of the transportation service that would be provided in conjunction with the Rodeo. Specifically, Houston METRO published notice of this transportation service in printed materials, such as in printed bus schedules and in daily newspapers in the Houston, Texas, area,

and further made spot announcements of the availability of this service in the electronic media in the Houston, Texas, area. In addition, Houston METRO posted notice of the availability of this transportation on its internet website. There is no evidence in the record to show that Houston METRO sought to limit service in this case to the Corporation or only to patrons who would attend the Rodeo. To the contrary, the record would reflect that Houston METRO designed and advertised this transportation service to clearly benefit the public at large and not just the Corporation.

C.

Did Houston METRO provide open-door or closed-door service?

To determine whether the service provided by Houston METRO was in fact "open-door" service, the FTA often considers the intent of the recipient in offering the service. This intent can be evidenced in part by the efforts that the recipient has taken to market the service to the public. Generally, this effort is best evidenced by publication of the service in the recipient's preprinted schedules. *Washington Motor Coach Association* v. *Municipality of Metropolitan Seattle*, WA-09/87-01 (March 21, 1988). In addition, efforts by the recipient to market the service to the public will also be taken into consideration. *Blue Grass Tours and Charter* v. *Lexington Transit Authority*, URO-III-1987. As discussed above, Houston METRO widely advertised the service to the public and notice of the service was further placed in printed notices and bus schedules. Moreover, in response to the FTA's direct inquiry, Houston METRO has represented that the service offered in connection with the Rodeo is open-door, and not closed-door, service to the public. As open-door service, anyone may pay the fare established by Houston METRO and be entitled to use the service. Furthermore, the FTA's review of a public advertisement that includes information regarding the service for the Rodeo supports Houston METRO's representation that service was not limited exclusively to patrons who attend the Rodeo but rather the record would reflect that the service was available to anyone who paid the fare.

Accordingly, based on the foregoing review and analysis of the facts in this case, it is the FTA's finding that the transportation service provided by Houston METRO in connection with the Rodeo does not constitute impermissible charter service. Rather, based on the facts in this case, the FTA finds that the transportation service provided by Houston METRO in connection with the Rodeo is consistent with the elements of "mass transportation" as this term is defined in the Federal Transit Act and as it has been interpreted by the FTA. Moreover, the FTA finds that the service is "regular and continuing" because Houston METRO has provided service for this event – which has been held annually in Houston for over sixty years – on an annual basis for a considerable number of years. In addition, it is the FTA's finding that the service is "general service" because it is "open-door" service that was designed by Houston METRO to benefit the public at large.

The second allegation in the complaints states that Houston METRO uses FTA-funded buses to engage in a monopoly with special event bus service in Houston, Texas. However, the record reflects that there are only thirteen (13) special events, including the Rodeo, for which Houston METRO participates in or coordinates transportation service. On the other hand, it is estimated by the Greater Houston Convention & Visitors Bureau that there is an average of 250 conventions per year in the Houston area and this figure does not include smaller conferences and other events. As Houston METRO coordinates and participates in service for only thirteen (13) special events, which represents only a very small percentage of the total number of conventions and other special events that are held annually in the Houston area, there is thus no evidence to support the allegation

that Houston METRO has established a monopoly over the provision of special event transportation service in Houston, Texas.

The third allegation concerns Houston METRO's role in the thirteen (13) special events for which it does participate in or coordinate service and whether it improperly excludes private operators from these events. The facts reflect that Houston METRO – as the public transportation agency for the greater Houston metropolitan area – issued and widely advertised an invitation for bids on September 21, 2001, to solicit private operators that would be interested in providing special event transportation services for thirteen (13) events, including the Rodeo, in the Houston area during calendar years 2002 and 2003. This invitation for bids, however, was not a federally funded solicitation and therefore it was not subject to the FTA's procurement requirements in Circular 4220.1D (now Circular 4220.1E), "Third Party Contracting Requirements", although it appears that the procedures used by Houston METRO in the selection of prospective contractors were nonetheless substantially in accordance with the principles and requirements of Circular 4220.1D.

Although not subject to the FTA's procurement requirements, Houston METRO has provided information to the FTA regarding the selection process. Assuming that the service provided by Houston METRO in connection with these other events is consistent with the manner in which service is provided for the Rodeo, the service will be deemed permissible mass transportation. As to the selection process, Houston METRO advises that the invitation for bids invited prospective contractors to provide a schedule of available vehicles and revenue-hour prices for providing transportation service for the Rodeo and twelve other special events in calendar years 2002 and 2003. Based on the data provided by the interested private operators, Houston METRO selected qualified operators to participate in providing service for the Rodeo and other special events based on need and the contractor's equipment availability and relative cost-effectiveness. In addition, with respect to service in connection with the Rodeo, although Houston METRO provides much of the service, it is the FTA's understanding that private operators, in accordance with or in addition to this selection process, in fact provide the largest number of buses for this event. Therefore, having reviewed the selection process utilized by Houston METRO for the participation of private charter operators in providing service for the thirteen (13) events, it is the FTA's view that the selection process appeared to be based primarily on valid, objective criteria and Houston METRO employed this process in a fair manner to obtain the participation by many, but not all, private operators who responded to the solicitation.

Pursuant to 49 C.F.R. §604.19, the losing party or parties may appeal this decision with ten days of receipt of this decision. The appeal should be sent to Jennifer Dorn, Administrator, FTA, 400 Seventh Street, S.W., Room 9328, Washington, D.C. 20590.

If you have any questions or comments regarding this decision or the appeal procedure, please feel free to call Eldridge Onco, Regional Counsel, or me at (817) 978-0550.

Sincerely,

Robert C. Patrick
Regional Administrator

cc: United Motorcoach Association
Fame Tours, Inc.
Shirley DeLibero

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION VII
Iowa, Kansas,
Missouri, Nebraska

901 Locust Street
Suite 404
Kansas City, MO 64106
816-329-3920
816-329-3921 (fax)

November 4, 2003

Mr. Stephen Spade
Des Moines Metropolitan Transit Authority
1100 MTA Lane
Des Moines, IA 50309

Re: Charter Complaint 2003-20, Des Moines MTA

Dear Mr. Spade:

On October 24, 2003, you and Sheri Kyras of your staff participated in an informal conciliation process to resolve the above reference complaint filed by Majestic Limousine Services ("MLS"). The process followed that outlined in my letter to you of October 17, 2003, and was agreed to by the parties. As a result of this process, the complainant, MLS, and MTA agreed to the FTA finding of facts attached hereto as Exhibit 1. Based on these facts, FTA finds that MTA violated the charter rule (49 CFR Part 604) by: maintaining a web site and telephone listing for charter service, engaging in an exclusive subcontracting with one private operator or broker, and by providing charter service using equipment and facilities provided under the Mass Transit Laws when there were private charter operators willing and able to provide the charter service.

MLS agrees that its complaint will be satisfied by the implementation of the following actions, and FTA hereby requires MTA to:

1. Cease and desist from engaging in the provision of charter services either by:
   a. discontinuing all charter service; or,
   b. subcontracting on an equal basis with all private charter operators willing and able to provide charters in the service area.

2. Because implementation of the charter rule has been problematic for Des Moines MTA (as evidenced by the last Triennial Review findings and FTA's letter to Des Moines MTA of March 20, 2003), FTA will closely monitor both the MTA web site and any charter service provided under an exception to the general rule for a period of not less than six (6) months and not more than 1 year.

3. Monitoring will include:
    a. Periodically checking the web site to assure deletion of all references to charter service.
    b. Requiring proof of actual, direct notice to willing and able transit providers of any intent to provide service under any exception requiring notice.
    c. Possible file review to see that any charters provided under an exception do in fact meet the requirements of said exception.

4. Des Moines MTA shall cease maintaining a listing in the Yellow Pages for Charter/Trolley. Since the current listing may continue to generate inquiries, MTA will respond to any and all telephone inquiries until the listing expires and is not renewed by indicating that it no longer provides general charter service. MTA shall also supply to all callers a list of all willing and able providers in alphabetical order. This list will be updated after Des Moines MTA publishes a new charter notice and provides direct notice to all willing and able providers.

5. Des Moines MTA shall publish a new charter notice that fully complies with 49 CFR Part 604.

6. Des Moines MTA will review the charter rule with its staff, especially staff responding to the Charter/Trolley phone listing, and document the same.

7. Des Moines MTA will provide FTA Region VII with a report covering the period November 15, 2003 through June 15, 2004, which includes a list of the private operators to whom it has leased charter vehicles or for whom it has provided charter services, the number of vehicles by category involved, the dates of service, the amounts charged by Des Moines MTA to each private operator. MTA shall submit this report to FTA by July 1, 2004.

If, upon review of any data or report requested and/or any review performed, the FTA concludes that Des Moines MTA has failed to comply with the terms of this order and the agreement resulting from the informal conciliation process, MTA's access to FTA funding may be suspended.

If you have any questions regarding this letter, please contact Regional Counsel, Paula L. Schwach, at 816-329-3935 or at Paula.Schwach@fta.dot.gov.

Sincerely,

Mokhtee Ahmad

Mokhtee Ahmad
Regional Administrator

Charter Complaint 2003-20
Majestic Limousine Service vs. Des Moines MTA

FTA Finding of Facts:

1. Web page as in existence on the date of the complaint is evidence of violation of charter rule. Web page is an ongoing advertisement that MTA provides charter service using federally-assisted equipment.

2. A listing in the current S.W. Bell Telephone Yellow Pages for MTA includes a Charter/Trolley telephone number. This listing is evidence of violation of the charter rule and is an ongoing advertisement that MTA provides charter service.

3. No charter provider in market area received direct notice that MTA intended to provide charter service.

4. There are more than 1 willing and able, charter providers serving the Des Moines, IA metropolitan area and Majestic Limousine services the complainant is one such provider. Carnival Coaches is another.

5. Majestic Limousine Service and Carnival Coaches, with which Majestic Limousine Service sometimes works, were denied a charter opportunity to supply 4 to 47 passenger coaches to First Tours on October 20, 2003, and these services were instead performed by MTA using federally-assisted equipment.

6. MTA has in the past provided service for Magical History Tours, which owns at least one 15 passenger van. MTA did not first establish whether Magical History Tours had the category of vehicles requested by the party seeking charter services, and it did not establish whether Magical History Tours' vehicle was in service and therefore unavailable or inadequate to meet the service capacity requested. MTA was therefore unable to determine if the service met all requirements of exception number 2 (found at 49 CFR 604.9(b)(2)).

7. MTA has a quasi-exclusive relationship with Magical History Tours. This raises serious concerns that MTA has circumvented the charter regulation by systematically channeling all charter business to one entity with whom MTA has a brokering arrangement. This allows MTA to do indirectly what it cannot do directly, namely to provide an unlimited amount of charter service in competition with private operators.

U.S. Department
of Transportation
Federal Transit
Administration

REGION VI
Arkansas, Louisiana,
New Mexico, Oklahoma,
Texas

819 Taylor St. Suite 8A36
Fort Worth, TX 76102
817-978-0550
817-978-0575 (fax)

January 14, 2004

Shirley A. DeLibero
President & Chief Executive Officer
Metropolitan Transit Authority
1201 Louisiana
P.O. Box 61429
Houston, Texas 77208-1429

Re: Charter Waiver Request

Dear Ms. DeLibero:

The Federal Transit Administration (FTA) has completed its review of the request of the Metropolitan Transit Authority (Houston METRO) to provide charter service for a special event under the exception set forth in the FTA's Charter Service regulation at 49 CFR §604.9(b)(4). Specifically, this request for an exception, if granted, would allow Houston METRO to provide charter bus service in support of the 2004 Super Bowl on February 1, 2004, and associated activities that will be held in Houston, Texas.

The implementing guidance states that the central issue in this exception is the determination of the extent to which private charter operators are capable of providing the charter service for the special event. See, 52 Federal Register 11925, April 13, 1987. If private charter operators are not capable of meeting the demand for the special event service, under the regulation the FTA may nonetheless grant an exception even if there are willing and able private charter operators.

As a part of this determination process, the FTA notified the American Bus Association and the United Motorcoach Association, which represent private operators in the Houston area, in order to determine the private sector's capacity to provide service for this event. As a result of this notice, the FTA subsequently received objections from the American Bus Association and the Texas Bus Association, Inc. that basically objected on grounds that Houston METRO did not notify and/or adequately evaluate the capacity of private charter operators in the Houston area to provide charter service for this event. In addition, the FTA previously received objections to this request from Atchison Transportation Services located in Spartanburg, South Carolina, and Eagle Tours, Inc., a private charter operator located in Irving, Texas, which stated that they were willing and able providers.

The special event exception provided in 49 CFR §604.9(b)(4) of the FTA's Charter Service regulation does not prescribe a specific procedure or manner by which "capability" of private charter companies is determined. Indeed, the regulation chose not to define the term "capable" in

order to provide for the maximum degree of flexibility. See, 52 Federal Register 11925, April 13, 1987. Although it has been argued that Houston METRO did not individually contact private charter operators to assess their "capability" to provide service for the Super Bowl event and associated activities, the FTA considers it reasonable and appropriate to look at the facts of each case, rather than a specific procedure, to determine whether a "capability" determination is acceptable.

In this case the facts reflect that Houston METRO has been involved in numerous meetings with the National Football League, which is the sponsor of the annual Super Bowl event that is held in various U.S. cities, to assess the expected demand for transportation services for this event. Based on these meetings, Houston METRO has advised the FTA that based on comparable historical data provided by the National Football League with respect to other cities that have previously hosted the Super Bowl, the expected transportation demand for days immediately preceding the day of the event will require 800-900 buses. Moreover, based on experience with this same event in previous years in other cities, the event sponsor has informed Houston METRO that it anticipates that the transportation demand will increase by at least 30% on the day of the Super Bowl.

Houston METRO, by virtue of its having acquired considerable experience in coordinating transportation for various large events in the Houston area, which has involved the participation of many private charter companies, possesses substantial knowledge, experience, and a close familiarity of the number of private bus operators in Houston. This general knowledge and experience has enabled Houston METRO to assess whether private charter companies in fact have the capability to provide service for this size of special event. Specifically, Houston METRO advises that it regularly coordinates transportation for large events with thirty-three (33) private bus companies but that these firms often have available fleet sizes of fifteen (15) or fewer buses. Therefore, even under a generous estimate of the capability of these private charter companies, it is apparent that the number of available buses that would be provided by private charter operators would only be 500-600 buses, although the minimal expected demand for the days preceding this event would be 800-900 buses.

Moreover, to further support its request for an exception, Houston METRO has provided written assurance to the FTA that private operators will be used to the maximum extent possible and that Houston METRO will not engage in charter transportation for the Super Bowl unless and until the services of private charter companies have been exhausted. Houston METRO has further assured the FTA that any private operator which approaches it for transportation services for other entities associated with the Super Bowl (e.g., ESPN, CNN, etc.) will be referred to those entities for direct contracting opportunities.

Accordingly, based on the facts that have been submitted to the FTA by Houston METRO concerning whether private charter operators will be capable of meeting the expected demand for charter service for this event, it is the FTA's determination that the demand for charter service on the date of the Super Bowl, including the days immediately preceding this event, will exceed the capability of private charter operators. Therefore, based on this lack of capability and the written assurances of Houston METRO, in accordance with the provisions of 49 CFR §604.9(b)(4), the FTA hereby grants an exception to Houston METRO to provide incidental charter service on the occasion of the Super Bowl that will be held on February 1, 2004, in Houston, Texas, and further to the extent that private charter firms will not be capable of meeting the transportation demand for

the days immediately preceding the Super Bowl for associated event activities, this exception will apply for the time period from January 24, 2004, through February 1, 2004,.

It should be emphasized, however, in accordance with 49 CFR §604.9(e), that any charter service that a recipient provides under any of the exceptions must be incidental charter service. The FTA's Charter Service regulation at 49 CFR §604.5(i) defines "incidental charter service" as "charter service which does not: (1) interfere with or detract from the provision of 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."

Sincerely,

Robert C. Patrick
Regional Administrator

Cc:

Jennifer Dorn, Administrator, FTA
Peter J. Pantuso, President & CEO, American Bus Association
Jerry Prestridge, Executive Director, Texas Bus Association, Inc.
Pinckney L. Spencer, Atchison Transportation Services
Gene Shields, President, Eagle Tours, Inc.
Paula Alexander, Esq., Houston METRO

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

September Winds Motor Coach, Inc., and
Great Lakes Limousine Association,
Complainants

v.

Charter Service Docket Nos. 2003-08
and 2003-24
49 U.S.C. Section 5323(d)

Toledo Area Regional Transit Authority,
Respondent.

DECISION

Summary

On July 10, 2003, September Winds Motor Coach, Inc. ("September Winds") filed a complaint with the Federal Transit Administration ("FTA") alleging that Toledo Area Regional Transit Authority ("TARTA" or "Respondent") was providing charter service in violation of FTA's charter regulation, 49 Code of Federal Regulations (C.F.R.) Part 604. Subsequently, during TARTA's Triennial Review, also in July 2003, the Respondent was found to be out of compliance with the charter regulations, specifically 49 C.F.R. Section 604.9(b) and was told to immediately cease and desist from providing charter service. The final report of the Triennial Review was conveyed to TARTA on August 14, 2003.

The Respondent filed a reply to the September Winds complaint dated September 17, 2003. On October 2, 2003, September Winds provided additional information indicating that TARTA was still offering charter service, and on October 7, 2003, FTA issued a second letter ordering TARTA to immediately cease and desist providing charter service. September Winds responded to TARTA's reply on October 22, 2003.

On November 13, 2003, the Respondent was involved in an incident with the Ohio Department of Public Safety ("ODPS"). ODPS discovered underage drinking of alcohol on TARTA buses that were running between the University of Toledo and Headliner's Bar. FTA was notified via telephone of the incident on November 18, 2003. Also, on November 18, 2003, Great Lakes Limousine Association ("Great Lakes") filed a complaint against the Respondent for charter violations.

After contacting TARTA via telephone on November 18, 2003, FTA followed up with a letter on November 24, 2003, reiterating for the third time that TARTA must immediately cease and desist operating charters until it had properly completed the willing and able charter determination process. TARTA indicated that it would cancel all existing charters.

One of the cancelled charters was a charter with Paula Chasteen for her wedding. Ms. Chasteen contacted FTA via telephone on November 26, 2003, to complain about the cancellation of her wedding charter. Ms. Chasteen provided a copy to FTA of TARTA's charter confirmation on December 17, 2003.

TARTA met with FTA on December 1, 2003, to discuss outstanding charter issues. TARTA was asked to respond to all additional allegations in writing, specifically the Great Lakes complaint and the ODPS incident. TARTA indicated that it had issued a notice for willing and able private providers on November 28, 2003. TARTA provided its response to the additional allegations on December 29, 2003.

FTA consolidated the two charter complaints and the ODPS incident based on the similarity of the allegations and the incident circumstances. Upon reviewing the allegations in the complaints and the subsequent filings of both the Complainants and the Respondent, FTA has concluded that the service in question does violate FTA's regulations regarding charter service. Respondent is hereby ordered to cease and desist providing such illegal service.

Complaint History

September Winds filed its complaint with the FTA on July 10, 2003. The complaint alleges the following:

1. TARTA provided unauthorized charter for the following events:
    a. Crosby Garden Festival of Arts;
    b. Parade of Homes;
    c. Senior Open;
    d. School Runs;
    e. Employment Services;
    f. Christmas Shuttle Service; and
    g. Wedding Trolleys.
2. September Winds replied to TARTA's annual notification to willing and able charter providers and never received a response;
3. TARTA underbid September Winds on the A-Plus Employment Services contract;
4. TARTA's phone book listing included bus and trolley charters; and
5. TARTA advertised group tours, weddings and parties under the heading "Buses-Charters & Rentals" in the phone book.

During the Triennial Review in July, TARTA was found to be out of compliance with the charter requirements. It was told verbally to cease and desist from providing charter service. On August 14, 2003, the final report of the Triennial Review was conveyed to TARTA, and it was told in writing to stop operating charters.

On October 2, 2003, September Winds supplemented its complaint with an ad showing TARTA service for Mud Hens games and pages from TARTA's website listing a variety of services that TARTA offered, specifically the availability of its trolleys for lunchtime service and rental, including for weddings and parties.

On October 7, 2003, FTA wrote TARTA again reiterating that it was under a cease and desist order to cease charter operations. FTA also indicated that it had never received a response to the September Winds complaint.

FTA subsequently received a response from TARTA dated September 17, 2003. In its response, TARTA indicated the following as to September Winds allegations:

1. Crosby Garden Festival of the Arts- service provided through a contract with Toledo Aero Charters;
2. Parade of Homes- service provided through a contract with Toledo Aero Charters;
3. Senior Open- no additional TARTA service was provided;
4. School Runs- it is permissible tripper service;
5. Employment Services- TARTA does not provide such service;
6. Christmas Shuttle Service- TARTA utilizes its trolleys on regular published routes;
7. Wedding Trolley- TARTA provides direct charter service after reaching agreements with all willing and able private providers; TARTA has never received a response from September Winds; and
8. TARTA acknowledged it had been cited during the recent Triennial Review for improper wording on its willing and able notice, but that the notice was in the process of being revised.

On October 22, 2003, September Winds responded to TARTA's reply. It stated the following:

1. TARTA's reply was untimely;
2. TARTA never contacted September Winds regarding a willing and able notice, but in June 2000, the American Bus Association contacted them about TARTA's notice, September Winds responded as a willing and able provider, but it never heard back from TARTA;
3. There is no address or listing for Toledo Aero Charters and the only phone number for them is listed as Wisniewski Funeral Home or Toledo Limousine Service;
4. Another private operator has photos of TARTA buses at various events (Cedar Point Amusement Park, Crosby Gardens Festival, etc.); and
5. Christmas Shuttle and Wedding Shuttles are part of a complaint from another operator. [1]

On November 18, 2003, FTA was notified via telephone by a private charter operator that TARTA had been involved in an incident involving charter service and that there was a news story about the incident. The news article from a Toledo news station stated that on November 13, 2003, undercover agents from the ODPS arrested students on a TARTA bus for underage drinking. TARTA had been running a shuttle service from the University of Toledo to Headliner's Bar on Thursday nights. The shuttle was advertised as a "party bus."

FTA immediately contacted TARTA by telephone on November 18, 2003, regarding the ODPS incident. FTA followed up with TARTA in an email on November 19, 2003. FTA requested that TARTA explain the circumstances of the incident and provide supporting documentation. TARTA indicated that it had provided a shuttle service from the University of Toledo to Headliner's Bar through Toledo Aero Charter. FTA stated it wanted information on Toledo Aero

[1] September Winds refers to a complaint filed by Tecumseh Trolley and Limousine Service ("Tecumseh Trolley") against TARTA. FTA never received a complaint from Tecumseh Trolley.

Charter since FTA had been unable to find a listing for Toledo Aero Charter, and its only phone number was listed to Wisniewski Funeral Home.

On November 21, 2003, FTA obtained from ODPS a copy of the contract between TARTA and Verso Group, which represented Headliner's Bar. ODPS also supplied a copy of the "party bus" advertisement.

FTA issued a third letter to TARTA on November 24, 2003, asking TARTA to explain in writing the ODPS incident and the Verso contract. Again, FTA reiterated that TARTA should not be providing direct charter service nor leasing its vehicles until the ODPS incident was fully explained.

Subsequently, FTA received a complaint from Great Lakes dated November 18, 2003. In its complaint, Great Lakes alleged that its members consistently complain about TARTA providing illegal charters. TARTA was seen providing a charter from the COBO Hall to a Red Wings Hockey game on September 25, 2003, with a marquee marked "charter"; other charters included: Comerica Park for Detroit Tigers games, Cedar Pointe Ohio for the amusement park, etc. Great Lakes alleges that TARTA despite a cease and desist order from FTA is still advertising and providing wedding charters with its trolley. Great Lakes alleges that TARTA admits it does approximately 300 weddings a year. Because Great Lakes allegations were the same general allegations as the prior complaints, FTA consolidated the complaint with the September Winds complaint.

On November 25, 2003, TARTA admitted that it had stopped booking new charters, but it was continuing to provide charter service because it disagreed with FTA's cease and desist order. FTA informed TARTA that cease and desist meant stop all charters immediately. TARTA indicated it would cancel all its outstanding booked charters.

On November 26, 2003, Paula Chasteen contacted FTA to complain that her wedding charter with TARTA scheduled for November 28, 2003, had been cancelled. Ms. Chasteen subsequently provided a copy to FTA of her contract with TARTA and her confirmation dated October 29, 2003. The confirmation states that alcohol is permitted on the trolleys.

TARTA met with FTA on December 1, 2003. In that meeting, TARTA was asked to provide a written response to all the outstanding allegations against it. FTA again reiterated that until TARTA went through the willing and able determination process, it should not be providing direct or indirect charter.

TARTA sent in its response dated December 29, 2003, stating the following:

1. Past booking of charters- TARTA had been leasing vehicles for charter use to Aero Charters/ Toledo Limousine (Aero Charters) since 1995 based on its capacity constraints. TARTA only learned this year that Aero Charters had no vehicles. TARTA will stop doing business with Aero Charters. TARTA was also providing direct charter service with its trolleys, because it alleged it had agreements with the private willing and able providers. TARTA has ceased doing that and is currently going through the willing and able determination process. It received seven responses and will attempt to obtain

agreements with all seven private providers. It will not provide direct charter with its trolleys if it cannot reach agreements.

2. Service in Great Lakes complaint- The trips referenced by Great Lakes were "No Crumb" trips. Trips were organized and driven by TARTA drivers at minimal cost to outside organizations. The driver or group is assessed a charge of $50 or $100 to cover fuel costs and wear and tear on the vehicle. TARTA has stopped providing "No Crumb" trips.
3. Headliner's Incident- TARTA entered into an agreement with the Verso Group through Aero Charters to provide a shuttle from University of Toledo to Headliners and a coffee house. TARTA states it has a policy of no alcohol on its vehicles and the driver did not know underage drinking was going on. TARTA will no longer take work that potentially may involve underage drinking.
4. School Tripper service- TARTA provides permissible tripper service for school children.
5. Holiday Trolley Sleigh Service- TARTA provides holiday service utilizing its trolleys between two malls. The service is open to the public and listed on TARTA's regular schedules.

Acceptable Charter Service

If a recipient of federal funds, like the Respondent, wishes to provide charter service, then it must comply with the procedural requirements. The regulation states the following:

> If a recipient desires to provide any charter service using FTA equipment or facilities the recipient must first determine if there are any private charter operators willing and able to provide the charter service ... To the extent that there is at least one such operator, the recipient is prohibited from providing charter service with FTA funded equipment or facilities unless one or more of the exceptions applies, 49 C.F.R. Section 604.9(a).

There are a number of exceptions listed for providing charter service. However, the Respondent has not complied with the procedural prerequisites for the exceptions and in some instances has provided service that does not even fall within an exception.

The regulations clearly state that before a recipient provides charter service it must determine if there is any willing and able charter operator. 49 C.F.R. § 604.9(a). In order to determine if there is at least one private charter operator willing and able to provide the service, the recipient must complete a public participation process. 49 C.F.R. § 604.11(a). The regulations under 49 C.F.R. § 604.11(a) require that the recipient complete the following:

> (1) At least 60 days before it desires to begin to provide charter service...
>
> (b) The public participation process must at a minimum include:
> (1) Placing a notice in a newspaper, or newspapers, of general circulation within the proposed geographic charter service area;
> (2) Send a copy of the notice to all private charter service operators in the proposed geographic service and to any private charter service operator that requests notice;
> (3) Send a copy of the notice to the United Bus Owners of America, 1300 L Street,

NW., Suite 1050, Washington, DC 2005 and the American Bus Association, 1100 New York Avenue, SW, Suite 1050, Washington, DC 20005-3934.

(c) The notice must:

(1) State the recipients name;

(2) Describe the charter service that the recipient proposes to provide limited to days, times of day, geographic area, and categories of revenue vehicle, but not the capacity or the duration of the charter service;

(3) Include a statement providing any private charter operator...at least 30 days... to submit written evidence...

(4) State the address to which the evidence must be sent;

(5) Include a statement that the evidence necessary for the recipient to determine if a private charter operator is willing and able includes the following:

(i) A statement that the private operator has the desire and the physical capacity to actually provide the categories of revenue vehicle specified, and

(ii) A copy of the documents to show that the private charter operator has the requisite legal authority to provide the proposed charter service and that it meets all necessary safety certification, licensing and other legal requirements to provide the proposed charter service.

(6) Include a statement that the recipient shall review only that evidence submitted by the deadline, shall complete its review within 30 days of the deadline, and within 60 days of the deadline shall inform each private operator that submitted evidence what the results of the review are.

(7) Include a statement that the recipient shall not provide any charter service using equipment or facilities funded under the Acts to the extent that there is at least one willing and able private charter operator unless the recipient qualifies for one or more of the exceptions in 49 C.F.R. § 604.9(b).

Discussion

Recipients of federal financial assistance can provide charter service under these very limited circumstances. In the absence of one of the limited exceptions, the recipients are prohibited from providing the service. 49 C.F.R. Section 604.9(a). Complainants allege that the Respondent is providing charter service utilizing both its buses and its trolleys. Complainants also allege that Respondent is utilizing a non-existent company to provide direct charter service and improperly leasing its vehicles for direct charter service. Additionally, Complainants are asserting that none of the charter exceptions apply. Respondent receives Section 5307 so it is required to comply with the charter regulations.

Respondent was found to be out of compliance with the charter regulations during its recent triennial review. TARTA's willing and able determination notice was improperly worded, and TARTA was informed to cease and desist providing charter service until it had properly gone through the willing and able determination process as required by 49 C.F.R. Section 604.11. TARTA ignored FTA's cease and desist order for three months and was ordered to cease and desist three times before it finally obeyed the order.

A. Aero Charters Service

Respondent acknowledged in its response dated September 17, 2003, that the trips for the Crosby Garden Festival of the Arts and the Parade of Homes were leasing TARTA vehicles through Aero Charters. TARTA also acknowledged in its letter dated December 29, 2003, that the Headliner's shuttle service also involved the leasing of TARTA vehicles to Aero Charters. Respondent admits that Aero Charters has no vehicles and a search on the internet reveals that its phone number is listed to a funeral home, as September Winds properly states. Under the charter regulations, vehicles can only be leased for capacity or accessibility reasons to private providers (Section 604.9(b)(2)). Aero Charters does not qualify as a private provider so all of these incidents constitute improper charter.

Additionally, the contract for the Headliner's shuttle service showed TARTA's and Aero Charters's names on the contract. Therefore, it appears that TARTA itself may have been running a direct charter service under the name Aero Charters. Either way, since TARTA was providing the charter service without following the proper procedure for determining whether there were willing and able private providers, the Headliner's shuttle service constituted impermissible charter service under 49 C.F.R. Part 604.

B. "No Crumb" Service

The Respondent acknowledges in its December 29, 2003, letter that the charter service alleged in the Great Lakes complaint constituted "no crumb" service. TARTA describes this service as trips organized and driven by TARTA drivers at minimal cost to outside organizations. The driver or group was assessed a minimal charge. These trips clearly constituted charter under Section 604.5(e). The Respondent does not even allege that any of the charter exceptions applies. All the "no crumb" trips constituted impermissible charter.

C. Weddings

TARTA acknowledges that it was providing direct charters for weddings using its trolleys because it had agreements with local private providers. However, TARTA has not supplied any agreements with willing and able providers and during its recent triennial review its notice for determining willing and able providers was found to be deficient because it did not indicate what type of service TARTA intended to provide, as required by Section 604.11. Any direct charter service that TARTA supplied using its trolleys constituted impermissible charter service since it had not complied with the requirements for determining whether there were any willing and able private providers as required under Section 604.9. TARTA should also not have been advertising in the phonebook nor on the internet that it was offering direct charter service. TARTA needs to remove those advertisements.

D. Tripper Service

The evidence supports a finding that the school service TARTA is providing is permissible tripper service under 49 CFR Part 605. It is regularly scheduled mass transportation which is open to the public and it is listed on TARTA's regular scheduled published routes.

E. Holiday Shuttles

The holiday shuttles using TARTA vehicles are permissible mass transportation. They are open to the public and listed on regular published schedules.

F. Procedural Determination

The regulation under 49 C.F.R. § 604.11 clearly sets forth the procedures for determining if any willing or able private charter operators exist. The onus is upon the recipient to provide a "public participation process." At a minimum, the recipient is required to provide any private charter operator with at least 30 days to submit written evidence to prove that it is willing and able, and then it must inform each private operator what the results are at least 60 days before the deadline.

In addition to the notice, the Respondent is required to send a copy of the notice to the United Bus Owners Association (UBOA) and the American Bus Association (ABA), which it had not done. 49 C.F.R. § 604.11(b)(2) requires the Respondent to send a "copy of the notice to all private charter service operators in the proposed geographic charter service area and to any private charter service operator that requests notice." Respondent failed to send copies to the UBOA and the ABA and also failed to send notice to September Winds. September Winds alleges that they responded to the notice and never received a reply.

Until TARTA determines that there are no willing and able private providers it should not be operating any charters. Since TARTA received responses from seven private providers as a result of its recent willing and able notice, it will not be able to provide any charter service until it has reached written agreements with each of the private willing and able providers. TARTA can only lease its vehicles to private providers if one of the limited exceptions applies under 49 CFR Section 604.9(b)(2).

G. Alcohol Use on Charter Trips

Complainants have alleged that alcohol is present during some of Respondent's charter trips. FTA does not regulate the use of alcohol on charter trips. However, TARTA should be complying with Ohio law regarding the consumption of alcohol on its vehicles. The contract provided by Ms. Chasteen indicates that TARTA was allowing the consumption of alcohol on its vehicles. This fact is contrary to representations that TARTA made to FTA. TARTA should also be complying with Ohio law with regard to the consumption of alcohol by minors.

Remedy

Complainants have requested that Respondent immediately cease and desist its charter operations. TARTA has stopped providing charter service pursuant to FTA's current cease and desist order. It is currently proceeding with the willing and able determination process. Until TARTA completes the process it cannot resume charter operations. Also, it cannot provide charter service unless one of the limited exceptions applies.

Conclusion and Order

FTA finds that Respondent has been providing impermissible charter service and orders it to cease and desist any such further service. Refusal to cease and desist in the provision of this service could lead to additional penalties on the part of FTA. Additionally, the mileage for improper charter use should not accrue towards the useful life of the Federally funded vehicles.

In accordance with 49 C.F.R. § 604.19, the losing party may appeal this decision within ten days of receipt of the decision. The appeal should be sent to Jenna Dorn, Administrator, FTA, 400 Seventh Street, S.W., Room 9328, Washington, D.C. 20590.

J. P. Ettinger

Joel P. Ettinger
Regional Administrator

02-04-07
Date

U.S. Department
of Transportation
Federal Transit Administration

REGION IV
Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, Puerto Rico, South Carolina, Tennessee

61 Forsyth Street, S.W.
Suite 17T50
Atlanta, GA 30303-8917
404-562-3500
404-562-3505 (fax)

April 22, 2004

Ms. Sharon Dent
Executive Director
Hillsborough Area Regional Transit Authority
4305 East 21st Avenue
Tampa, Florida 33605-2300

RE:Charter Regulation Requirements

Dear Ms. Dent:

The Federal Transit Administration (FTA) is aware that on March 26, 2003, Hillsborough Area Regional Transit Authority (HART) provided nine (9) of twenty (20) buses based on a request from the White House. The remaining eleven (11) buses were secured from three private charter operators. The buses were needed to provide transportation to support President Bush's "Briefing to the Troops" at MacDill Air Force Base and transported media and military families from a park located outside the base to a hangar inside. The buses were requested for an eight-hour period. The White House reimbursed HART for the use of the buses on May 9, 2003. FTA does not know whether regular HART service was impacted by the use of the buses.

FTA is aware that the White House indicated that for specific security reasons it wished to utilize HART buses and requested background checks on all drivers. A one-time event of this type would probably have qualified as an exception to the charter regulations under the special events exception. FTA is aware that this was a special request from the White House with a very narrow timeframe. FTA would have responded extremely quickly to either a written or verbal request (followed up later with a written request) for an exception. However, HART did not seek the Administrator's approval for an exception. This letter is being sent as a reminder that HART is required to follow the charter regulations, including the procedural requirements.

The charter regulations prohibit recipients from providing charter service with FTA funded equipment unless one of the specific charter exceptions applies. 49 Code of Federal Regulations (CFR) § 604.9(a). Under the regulations, there is a charter exception that applies for special events to the extent that private charter operators are not capable of providing the service. 49 CFR § 604.9(b)(4). However, in order to utilize the exception the recipient needs to petition the Administrator for an exception. *Id.* The petition should describe the event, explain how it is special, and explain the amount of charter service the private operators are not capable of providing. 49 CFR § 604.9(d). Additionally, the service provided can only be incidental. 49 CFR § 604.9(e). Incidental service means that the service does not interfere with or detract from the provision of mass transportation service. 49 CFR § 604.5.

As you well know, the service provided by HART was not open to the public. HART used federally funded equipment to provide transportation for a specific group of individuals for a specific purpose. The service provided clearly falls within the definition of charter. HART did not petition for an exception to the charter regulations. FTA is bringing this matter to your attention so that should a similar situation occur, you will contact FTA immediately. Should you have any questions regarding this matter, please feel free to contact me.

Sincerely,

Hiram J. Walker
Regional Administrator

THE NATIONAL ACADEMIES

Advisers to the Nation on Science, Engineering, and Medicine

The **National Academy of Sciences** is a private, nonprofit, self-perpetuating society of distinguished scholars engaged in scientific and engineering research, dedicated to the furtherance of science and technology and to their use for the general welfare. On the authority of the charter granted to it by the Congress in 1863, the Academy has a mandate that requires it to advise the federal government on scientific and technical matters. Dr. Bruce M. Alberts is president of the National Academy of Sciences.

The **National Academy of Engineering** was established in 1964, under the charter of the National Academy of Sciences, as a parallel organization of outstanding engineers. It is autonomous in its administration and in the selection of its members, sharing with the National Academy of Sciences the responsibility for advising the federal government. The National Academy of Engineering also sponsors engineering programs aimed at meeting national needs, encourages education and research, and recognizes the superior achievements of engineers. Dr. William A. Wulf is president of the National Academy of Engineering.

The **Institute of Medicine** was established in 1970 by the National Academy of Sciences to secure the services of eminent members of appropriate professions in the examination of policy matters pertaining to the health of the public. The Institute acts under the responsibility given to the National Academy of Sciences by its congressional charter to be an adviser to the federal government and, on its own initiative, to identify issues of medical care, research, and education. Dr. Harvey V. Fineberg is president of the Institute of Medicine.

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The **Transportation Research Board** is a division of the National Research Council, which serves the National Academy of Sciences and the National Academy of Engineering. The Board's mission is to promote innovation and progress in transportation through research. In an objective and interdisciplinary setting, the Board facilitates the sharing of information on transportation practice and policy by researchers and practitioners; stimulates research and offers research management services that promote technical excellence; provides expert advice on transportation policy and programs; and disseminates research results broadly and encourages their implementation. The Board's varied activities annually engage more than 5,000 engineers, scientists, and other transportation researchers and practitioners from the public and private sectors and academia, all of whom contribute their expertise in the public interest. The program is supported by state transportation departments, federal agencies including the component administrations of the U.S. Department of Transportation, and other organizations and individuals interested in the development of transportation.
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