

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, constituted 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 specific 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 regulation

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 compensated 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 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. Moreover, 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.

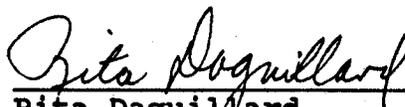
Should K-TRANS wish to continue providing service to the University, it must reconfigure the service to conform to UMTA's mass transportation guidelines. It should be pointed out, however, that even if K-TRANS were to operate the campus service as mass transportation it should, in accordance with UMTA's 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.

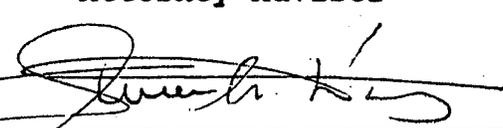
CONCLUSION AND ORDER

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 Daguiyard
Attorney-Advisor

APPROVED: 

Steven A. Diaz
Chief Counsel



U.S. Department
of Transportation

Urban Mass
Transportation
Administration

Headquarters

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

Chro

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,

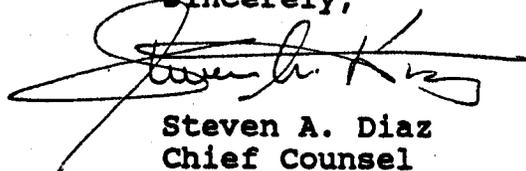
non-profit organization which is tax-exempt under subsections 501(c)(1), (3), (4), or (19) of the Internal Revenue Code; (2) the proposed charter is consistent with the requesting organization's function or purpose; and (3) the proposed charter complies with Title VI of the Civil Rights Act of 1964, 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,

A handwritten signature in black ink, appearing to read "Steven A. Diaz", with a long, sweeping horizontal stroke extending to the right.

Steven A. Diaz
Chief Counsel

Enclosure

File *Chiron*



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.

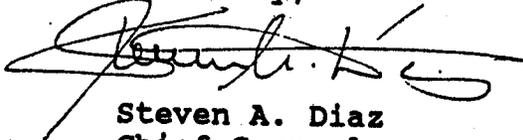
The provision which you cite was found in the regulation which was superseded by the current charter rule on May 13, 1987. 52 Fed. Reg. 11916 et seq. (April 13, 1987). The regulation now in effect prohibits UMTA recipients from providing charter service using UMTA-funded equipment when there is a private 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

complaints RO-8



U.S. Department
of Transportation

Headquarters

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

Urban Mass
Transportation
Administration

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.

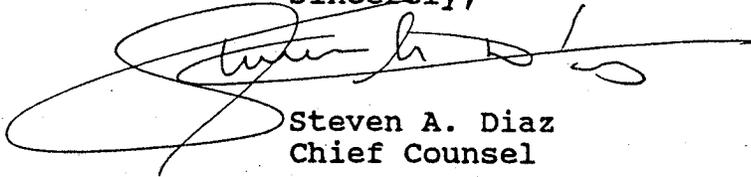
The information UMTA has received so far is insufficient for it to make a complete analysis of whether the services at issue were impermissible charter service. The charter service regulation provides two exceptions to the basic prohibition against charter service which may be applicable to Phoenix Transit's 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. Haugslund

~~URO-IX~~

URO-VII

RECEIVED
90 FEB 15 AM 10:29



U.S. Department
of Transportation

Urban Mass
Transportation
Administration

Headquarters

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

Chiron

File Charter

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.

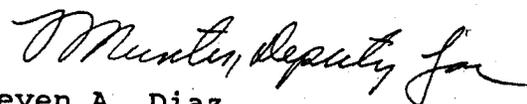
To take advantage of this exception, the recipient must complete the review process on all replies to its annual charter notice. Except for the limitations of incidental use, the recipient and the private charter operators may define the excepted charter service in any terms and conditions agreed to.

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.

Page 2

My staff would be happy to provide you with any further information or guidance you require with regard to this exception.

Sincerely,

A handwritten signature in cursive script, appearing to read "S. A. Diaz".

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, 1988

*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,


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.

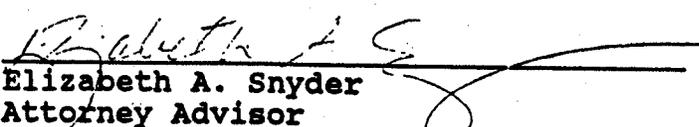
Lastly, Complainants argued that even if neither Lakeland nor International were "brokers" within the strict definition of the term by UMTA, they should be considered as brokers because they are so "in fact." Complainants offered no evidence that either Lakeland or International were brokers "in fact." The evidence established that both Lakeland and International entered into valid subcontracting arrangements with WMATA.

CONCLUSION

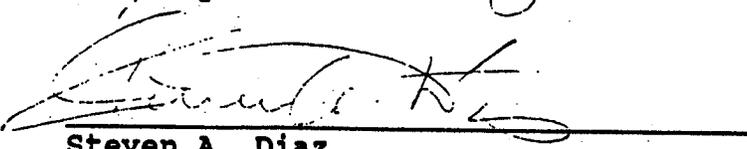
UMTA finds that it is beyond the scope of its jurisdiction to consider an issue related to the operating authority of companies with which WMATA subcontracts UMTA vehicles for charter service.

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,

¹UMTA 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.

²In 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. The MTC's Bid on the Southwest Route 53 Service Does Not Comport with UMTA's Private Sector Guidelines

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.

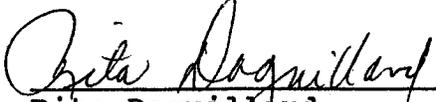
UMTA therefore concludes that in bidding both its fully allocated costs and its marginal costs for the Southwest Route 53 service, and in contracting to provide the service on a marginal cost basis, the MTC acted in contravention of UMTA's private sector guidelines.

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.

³See, discussion of UMTA's position on this issue in JAUNT at page 9.



Rita Daquillard
Attorney-Advisor

12/31/90

(Date)



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.

UCC-50
file

(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.

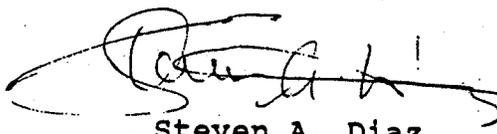
(3) Would there be any difference in regulation, as it regards this issue, between this Company operating an out of area trip and the Regional Transportation Authority operating a similar trip?

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:

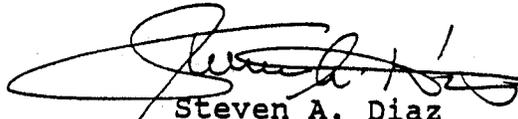
This responds to your request on behalf of Jefferson Transit Authority (JTA) for a "hardship" exception under 49 CFR 604.9(b)(3) which would allow JTA to provide charter services within Jefferson County and the Olympic Peninsula, Washington.

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
Concurrence
Valid*

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,

IS/

Brian W. Clymer

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Enclosures

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JUN 12 1991

PCV

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. This information would be helpful to the private operator in deciding whether

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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

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, 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.

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I look forward to receiving your response within thirty (30) days of receipt of this letter.

Sincerely,

SA Diaz

Steven A. Diaz
Chief Counsel

Enclosure

URBAN MASS TRANSPORTATION ADMINISTRATION
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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

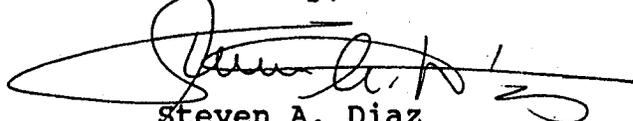
Dear Mr. Savill:

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 of 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 forwarded
 by Leonora Drake

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.

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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

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

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.

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

³ Rebuttal Statement at 5.

⁴ Rebuttal Statement at 4.

⁵ TALTRAN'S complaint of May 16, 1991, at page 5.

⁶ Op. cit.