

information, including a printed schedule, may be obtained. The telephone number and address to which riders are referred for additional information about the campus routes belong to TALTRAN: they are the same address and phone number to which the public is referred for information on all routes on the general schedule.⁷ Thus, FTA finds that TALTRAN clearly has notified the general public that it is providing service on the FSU campus and that it is available to anyone wanting to use it.

Moreover, the service provided by TALTRAN is similar to examples of mass transportation service which appear in the preamble. In one example, a human services agency contracts with an FTA recipient for weekly service to a shopping center for the agency's clients. According to the preamble, as long as the FTA recipient is free to accept riders who are not clients of the agency, the service would be mass transportation.⁸ This example is analagous to the instant case. FSU has contracted for service on its campus and TALTRAN serves any rider on these routes, even if the rider is not affiliated with FSU.

CONCLUSION

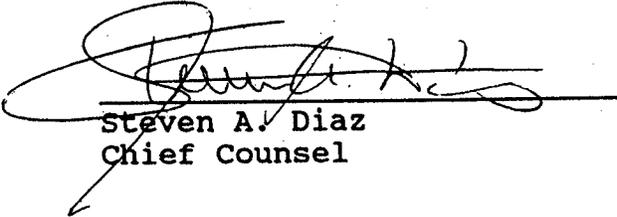
It is FTA's view that the bus service provided by TALTRAN on the FSU campus is mass transportation within the meaning of the Regulation. The Service Agreement which became effective in August, 1990 has placed control over the service with TALTRAN, and TALTRAN is operating the service on an open door basis, not restricting passengers to FSU students and staff, and publicizing the routes to the general public. The fact that members of the general public only use this service infrequently or on an incidental basis does not convert it to charter service. Accordingly, FTA finds that TALTRAN is not in violation of the Charter Service Regulation.

April 28, 1992

Date


Rita Daquillara

Approved:


Steven A. Diaz
Chief Counsel

⁷ TALTRAN's routes and schedules brochure dated August 1990.

⁸ 52 Fed. Reg. 11920



U.S. Department
of Transportation

Federal Transit
Administration

Headquarters

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

MAY 4, 1992

Carl F. Kiessling III, President
Kiessling School Transportation, Inc.
P.O. Box 153
South Walpole, Massachusetts 02071

Re: MA-PVTA/91-10-01

Dear Mr. Kiessling:

Please find enclosed a copy of the response of Marlene B. Connor, Director of Programs and Planning of the Pioneer Valley Transit Authority (PVTA), to your allegation that PVTA has engaged in impermissible charter service. Specifically, you allege that PVTA has been providing transportation services to the developmentally disabled clients of the Massachusetts Department of Mental Retardation (DMR), in violation of the Federal Transit Administration's (FTA) charter service regulation, 49 CFR Part 604.

Based on the information in Ms. Connor's letter, it appears that the service provided by the PVTA falls within the bounds of permissible charter service, as the PVTA provides direct charter service for state-certified human service agencies, pursuant to 49 CFR 604.9(b)(5), which states that a "recipient may execute a contract with a government entity or a private, non-profit exempt from taxation under subsection 501(c)(1), 501(c)(3), 501(c)(4), 501(c)(19) of the Internal Revenue Code to provide charter service upon obtaining a certification from that entity or organization." Therefore, it would appear that the service being provided by the PVTA, in this instance, does not violate FTA's charter service regulation.

Please do not hesitate to contact us if the FTA can provide you with further assistance.

Sincerely,

Steven A. Diaz
Chief Counsel

Enclosure



U.S. Department
of Transportation
**Federal Transit
Administration**

Headquarters

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

MAY 4, 1992

John J. Belli, President & CEO
Travel Time
277 Newbury Street
West Peabody, Massachusetts 01960

Re: MA-WRTA/91-10-01

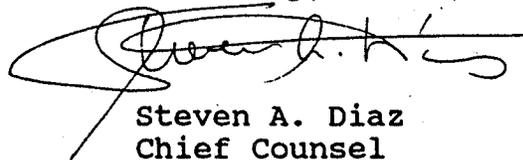
Dear Mr. Belli:

Please find enclosed a copy of the response of Robert E. Ojala, Administrator of the Worcester Regional Transit Authority (WRTA), to your allegation that WRTA has engaged in impermissible charter service. Specifically, you allege that WRTA has been providing transportation services to the developmentally disabled clients of the Massachusetts Department of Mental Retardation (DMR), in violation of the Federal Transit Administration's (FTA) charter service regulation, 49 CFR Part 604.

Based on the information in Mr. Ojala's letter, it appears that the WRTA is providing special service exclusively for the elderly and handicapped. The Federal Transit Administration has determined that this type of exclusive service, even when provided on a demand responsive basis, is "mass transportation" and is not considered to be charter. See 52 Fed. Reg. 42252 (November 3, 1987). Therefore, it would appear that the service being provided by the WRTA, in this instance, does not violate FTA's charter service regulation.

Please do not hesitate to contact us if the FTA can be of further assistance.

Sincerely,



Steven A. Diaz
Chief Counsel

Enclosure

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

In the Matter of:

THE AMERICA BUS ASSOCIATION,	}	
Complainant,	}	
	}	
versus	}	TX-08/89-01
	}	
VIA METROPOLITAN TRANSIT,	}	
Respondent	}	

DECISION

SUMMARY

The American Bus Association (ABA) complains on behalf of private bus operators in San Antonio, Texas, alleging that the San Antonio Metropolitan Transit Authority (VIA) provides charter service in violation of the Federal Transit Administration's (FTA) Charter Service Regulation, 49 CFR Part 604, (Charter Regulation or Regulation).² The complaint specifically alleges that VIA circumvents the Charter Regulation by steering charter business to an entity whose relationship with VIA is essentially

¹On December 18, 1991, the President signed the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA). Title III, Section 3004 of ISTEA, the Federal Transit Act, redesignates the Urban Mass Transportation Administration the "Federal Transit Administration." Under Section 3003 of Title III, the name of the agency's enabling statute is changed from the "Urban Mass Transportation Act of 1964" ("the UMT Act") to the "Federal Transit Act of 1991" ("the FT Act"). Consequently, all references in this decision to "UMTA" and the "UMT Act" mean "FTA" and the "FT Act."

²Under the charter regulation, recipients of FTA assistance may not provide charter service when there is a private operator willing and able to provide the service, unless one of the exceptions to the regulation applies.

that of a broker.³ The FTA finds that VIA does channel most of its charter business to one private operator, in violation of the Charter Regulation. The FTA orders VIA to cease and desist from this practice immediately.

BACKGROUND

On February 2, 1988, the ABA complained alleging that VIA leased vehicles to entities which were not "private charter operators" within the meaning of the Charter Regulation. On November 14, 1988, the FTA issued a cease and desist order against such practices ("the Prior Decision").⁴ The ABA now complains that VIA is not in compliance with the Prior Decision.

DISCUSSION

The ABA contends that VIA circumvents the Charter Regulation by steering a large volume of business to Convention Coordinators, which owns only one or two buses and whose relationship with VIA is essentially that of a broker rather than that of a carrier.⁵ Moreover, the ABA states that VIA engages in price discrimination because it gives Convention Coordinators a substantial discount on vehicle leases which is not available to other private operators. The ABA points out that this discount, based on the volume of buses that a subcontractor leases from VIA, ostensibly available to all. As a practical matter, however, it is granted only to Convention Coordinators, VIA's preferred provider.⁶

³ 49 U.S.C.A. § 10102(1) (West Supp. 1988), defines "broker" as follows:

- (1) 'broker' means a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out for solicitation, advertisement or otherwise as selling, providing, or arranging for transportation by motor carrier for compensation.

⁴Under 49 CFR 604.9(b)(2), a recipient may lease vehicles to a private charter operator which lacks the capacity to perform a particular charter trip. The FTA's decision found that several of the entities to which VIA was leasing equipment did not meet the definition of "private charter operator," since they owned no vehicles, and were not providers of transportation services.

⁵Complaint, p. 6.

⁶Complaint, p. 10.

VIA argues that the present complaint should be dismissed on res judicata principles; claiming that the issues presented were decided in the Prior Decision.⁷

VIA argues that the Charter Regulation is not authorized by the FT Act, and should in no event be applied to the use of federally funded equipment or facilities authorized before the effective date of the regulation.⁸ In the Prior Decision, the FTA affirmed that it is acting within its statutory authority, and that the Charter Regulation is not retroactive in its application.⁹ The FTA sees no need to elaborate on these points.

The doctrine of res judicata does not preclude FTA review since both the central legal question and the factual circumstances in this case are clearly distinguishable from those presented in the ABA's Prior Complaint. The main issue in that complaint was the leasing of vehicles to entities which owned no vehicles, and which were not transportation providers. To comply with the Prior Decision VIA has changed its leasing practices, and now leases only to private transportation providers which own at least one bus or one van.¹⁰ The issue now before the FTA is that VIA circumvents the Charter Regulation by steering charter business to an entity whose relationship with VIA is essentially that of a broker.

Moreover, under VIA's current leasing policy as revised on April 1, 1990, VIA now contracts with three private operators on a rotating basis.¹¹ However, documentation provided by VIA in response to the FTA's request indicates that one private operator, Convention Coordinators, was responsible for 96.6 percent of all VIA's charter invoicing in the period from April 1, 1990, to January 31, 1991.¹² VIA's quasi-exclusive relationship with this private operator, and not VIA's former practice of contracting with non-transportation providers, is the subject of the present complaint. Accordingly, the doctrine of res judicata is not applicable to this matter.

While VIA acknowledges that it subcontracts mainly with Convention Coordinators, it maintains that the charter regulation allows it to do so. VIA points out that the charter regulation does not regulate the relationship between a grantee and a private charter

⁷Response, p. 3.

⁸Response, pp. 9-10.

⁹Prior Decision, pp. 11-13.

¹⁰Response, p. 7.

¹¹Response, Exhibit 18.

¹²Response, Exhibit 14.

operator.¹³ Under 49 CFR 604.9(b)(2), a grantee has the right to contract or refuse to contract with all, some, or none of the private operators seeking to lease vehicles.¹⁴

VIA corectly notes that in the charter regulation the FTA intentionally does not interject itself in the relationship between a recipient and private charter subcontractors. In allowing recipients wide discretion in their subcontracting arrangements, the FTA relies on the recipients' good faith and sound business judgment.¹⁵ The FTA has nonetheless specifically stated that it will not allow this exception to be abused:

Grantees who have a roster of several private operators may use their discretion in determining which names to give to a member of the public who calls. They may give out all, some, or any one of the names of "willing and able" operators. However, the FTA will view any attempt on the part of a recipient to establish an exclusive subcontracting or brokering relationship with or steer customers to one particular operator, as a contravention of the regulation, and will, in such cases, take appropriate action.¹⁶

In the Prior Decision, the FTA explained that a prohibition of exclusive subcontracting arrangements ensures the effectiveness of the charter regulation:

UMTA's position on this issue is based on its perception that a recipient could easily circumvent the regulation by systematically channelling all charter business to operators with which it has established a brokering arrangement. Such an arrangement would allow the recipient to do indirectly what the regulation prohibits it from doing directly, namely to provide an unlimited amount of charter service in competition with private operators.

¹³Response, p. 27.

¹⁴Ibid.

¹⁵52 Federal Register 11916, 19925 (April 13, 1987).

¹⁶52 Federal Register 42248, 42250 (November 3, 1987).

It would moreover undermine one of the main purposes of the regulation, which is to promote the health and vitality of the private charter industry by fostering free and open competition among charter operators. UMTA believes that it is empowered to take any measure necessary to safeguard the effectiveness and integrity of the charter regulation, including imposing a prohibition on "steering" arrangements which would render it meaningless.¹⁷

As indicated above, despite VIA's purported policy of rotating charter referrals among three private operators, Convention Coordinators accounted for 96.6 percent of all VIA's charter invoicing during the period studied indicating that VIA has a quasi-exclusive subcontracting arrangement with Convention Coordinators, in violation of the charter regulation, and in contravention of specific FTA guidance.

The FTA orders VIA to cease and desist immediately from violating the charter regulation by either: 1) discontinuing all charter service; or, 2) subcontracting on an equal basis with all willing and able private charter operators in its service area. To ensure compliance with the terms of this order, the FTA orders VIA to provide a report covering the period from June 1, 1992, to November 30, 1992, that includes a list of the private operators to which it has leased charter vehicles, the number of vehicles leased to each operator, and the amounts charged by VIA to each operator for lease of these vehicles. VIA should submit this report to the FTA by December 15, 1992. If, upon review of this report, the FTA concludes that VIA has failed to comply with the terms of this order, it will suspend immediately all FTA assistance to VIA.

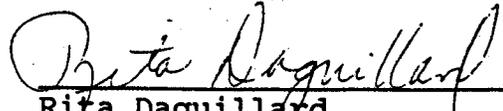
CONCLUSION

The FTA finds that VIA has violated the charter regulation by establishing an exclusive subcontracting arrangement with one private operator. The FTA orders VIA to cease and desist from this practice immediately. The FTA will monitor VIA's compliance with this order by reviewing VIA's charter subcontracting over a

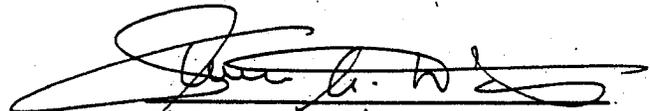
¹⁷Prior Decision, p. 13.

6-month period. If, at the end of this period, the FTA finds that VIA has failed to comply with this order, it will suspend immediately all FTA assistance to VIA.

Dated: May 6, 1992


Rita Daguiard
Attorney Advisor

Approved:


Steven A. Diaz
Chief Counsel



U.S. Department
of Transportation

Federal Transit
Administration

REGION I
Connecticut, Maine,
Massachusetts,
New Hampshire,
Rhode Island, Vermont

Transportation System Center
Kendall Square,
55 Broadway
Suite 904
Cambridge, Massachusetts 02142

JUN 8 1992

Darlene A. Reipold, President
F. M. Kuzmeskus, Inc.
P. O. Box 484
Turners Falls, MA 01376

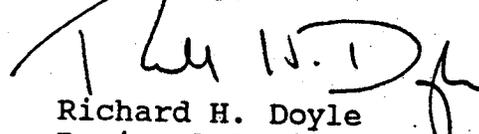
Dear Ms. Reipold:

Please find enclosed a copy of the response of Thomas Chilik, General Manager of the Greenfield Montague Transportation Area (GMTA), to your allegation that GMTA has engaged in impermissible school bus service. Specifically, you allege that GMTA has been providing transportation services to children enrolled in Headstart in violation of the Federal Transit Administration's (FTA) school bus regulation, 49 CFR Part 605.

Based on the information in Mr. Chilik's letter, it appears that GMTA is providing charter service for pre-school children who are enrolled in the local Headstart program which is operated by the Parent Child Development Center, Greenfield, Massachusetts. This type of charter service falls within an exception to the charter service regulation at 49 CFR Section 604.9(b)(5)(ii). Therefore, the service provided by GMTA, in this instance, is not in violation of federal regulations.

If you have any further questions, please contact Margaret Foley, Regional Counsel, at (617) 494-2055.

Sincerely,



Richard H. Doyle
Regional Administrator

Enclosures: 49 CFR Part 604
Mr. Chilik's letter of May 20, 1992

cc: Thomas Chilik, General Manager
GMTA



U.S. Department
of Transportation

Federal Transit
Administration

Headquarters

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

NOVEMBER 2, 1992

John J. Belli, President & CEO
Travel Time
277 Newbury Street
West Peabody, Massachusetts 01960

Dear Mr. Belli:

Re: MA-GATRTA/91-10-01

This responds to your complaint alleging that Greater Attleboro-Taunton Regional Transit Authority (GATRTA) has engaged in impermissible charter service. Specifically, you allege that GATRTA has been providing transportation services to the developmentally disabled clients of the Massachusetts Department of Mental Retardation (DMR) in violation of the Federal Transit Administration's (FTA) charter service regulation, 49 CFR Part 604.

Based on the information provided regarding GATRTA's operations, I find that GATRTA provides special charter service exclusively for the elderly and persons with disabilities. Previously, the FTA has determined that this type of exclusive service, even when provided on a demand responsive basis, constitutes "mass transportation"; it is not charter. See, "Charter Service Questions and Answers," 52 Fed. Reg. 42248, 42252 (November 3, 1987). Moreover, pursuant to 49 CFR 604.9(b)(5), an FTA "recipient may execute a contract with a government entity or a private, non-profit organization exempt from taxation under subsection 501(c)(1), 501(c)(3), 501(c)(4), or 501(c)(19) of the Internal Revenue Code to provide charter service upon obtaining a certification from the entity or organization." Thus, in this instance, I find that the service that GATRTA is providing is not in violation of the FTA's charter service regulation.

Please do not hesitate to contact us if the FTA can provide you with further assistance.

Sincerely,



Steven A. Diaz
Chief Counsel

cc: Mr. Francis J. Gay
Administrator, GATRTA

ID:

AUG 24 '93

14:28 No.003 P.02



U.S. Department
of Transportation
Federal Transit
Administration

Central Area Office
Region 5

55 East Monroe Street
Suite 1415
Chicago, Illinois 60603

MVRTA

NOV 2 1992

Ms. Lynette Wagner
Operations Management Assistant
Miami Valley Transit Authority
600 Longworth Street
P.O. Box 1301
Dayton, Ohio 45401-1301

Dear Ms. Wagner:

I am writing you to respond to the questions raised in your October 15, 1992 letter regarding the Federal Transit Administration (FTA) Charter Service Regulation. Your letter indicates that Miami Valley Transit Authority (MVRTA) wishes to engage in a limited amount of charter service involving its electric trolley buses and simulated streetcars. MVRTA, in accordance with 49 CFR part 604.11, has placed a notice in a local newspaper indicating its desire to provide charter service and requesting comment from the private charter operators. Your letter indicates that at the conclusion of the public notice process there is only one private operator who has requested that MVRTA not provide the service because they do not see where they will receive a benefit. According to your letter none of the private operators responding to the notice have either electric trolley buses or streetcars.

As a general rule a recipient of FTA funding may not provide charter service unless certain exceptions as stated in 49 CFR part 604.9 are applicable. One of these exceptions is a determination that there are no "willing or able" private charter operators capable of providing charter service. The rationale behind the requirement to publicly advertise a grantees desire to provide charter service is to determine if there is any private charter operator who is "willing and able" to provide charter service. FTA defines "willing and able" in its Charter Regulation which states:

Willing and Able means having the desire, having the physical capability of providing the categories of revenue vehicles requested, and possessing the legal authority... to provide the service in the area in which it is proposed to be provided. (emphasis added)

Based on the information that you have given me I believe that MVRTA has complied with the requirements of FTA's regulation. You may proceed to provide incidental charter service over the objection of the single private operator because it is unable to qualify as a willing and able provider due to the fact that it does not own or operate electric trolley buses or railcars. I would caution you on the fact that the only type of charter service that

~~streetcar is requested~~. If any other type of vehicle is requested MVRTA would be required under FTA's regulations to refer the requestor to a private operator.

I hope this information answers the questions that you had about the charter regulation. If you have any additional questions, please feel free to contact me.

Sincerely,



Dorval R. Carter Jr.
Regional Counsel



U.S. Department
of Transportation
**Federal Transit
Administration**

Headquarters

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

NOVEMBER 2, 1992

Alan F. Kiepper, President
New York City Transit Authority
370 Jay Street
Brooklyn, New York 11201

Dear Mr. Kiepper:

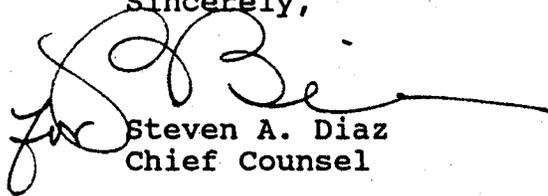
The United Bus Owners of America (UBOA) has forwarded to me a copy of a charter service notice dated September 15, 1992, issued by the New York City Transit Authority (NYCTA). The notice states that the NYCTA will not provide any of the categories of charter service listed therein if a private operator indicates willingness to provide the service, with four exceptions:

1. Transportation of employees for the purpose of attending funeral services of employees who die during period of active employment.
2. Transportation required in the interest of public safety, as in the case of police or other public safety emergency needs.
3. Transportation of juries on an on-demand basis through contractual arrangements with the Federal and/or other courts.
4. Transportation for groups attending NYCTA sponsored forums and ceremonies.

Please note that each of the above categories meets the definition of "charter service" set out in the FTA charter service regulation, at 49 CFR 604.5. Specifically, the service is by bus; to a defined group of people; there are no single contracts between the recipient and individual riders; the patrons have the exclusive use of the bus. Moreover, these categories are specifically described as charter service in the FTA's "Charter Service Questions and Answers," 52 Federal Register 42253 (November 3, 1987). However, as indicated in this same document, the FTA will allow recipients to provide the type of service described in Category 2 in the case of a serious emergency, in which time is of the essence for transporting victims, police officers, or rescue workers.

Accordingly, the NYCTA should amend its charter service notice to allow private operators to indicate willingness to provide the four types of service referenced above, with the exception of Category 2 in case of serious emergency. The NYCTA should submit a copy of the amended notice to this office within thirty (30) days of receipt of this letter.

Sincerely,

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

Steven A. Diaz
Chief Counsel

cc: Wayne Smith
UBOA



U.S. Department
of Transportation

Federal Transit
Administration

Headquarters

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

NOVEMBER 13, 1992

Richard Armour, President
Y.C.N. Transportation
19 Vernon Street
Norwood, Massachusetts 02062

Re: MA-BATA/91-10-01

Dear Mr. Armour:

This responds to your request for reconsideration of the above-cited decision, which held that the service being provided by the Brockton Regional Transit Authority (BATA) to the Massachusetts Department of Mental Retardation (DMR) is not impermissible charter service. The ruling indicated that the service falls within the definition of "mass transportation" at Section 12(c)(6) of the Federal Transit Act, as amended (FTA), which Congress extended in 1968 to include special service in addition to general service. The two examples of special service that Congress provided are service exclusively for the elderly and persons with disabilities, and service for workers who live in the innercity, but commute to a factory in the suburbs. See, H.R. Rep. No. 1785, 90th Cong., 2d. Sess., reprinted in 1968 U.S. Code Cong. Ad. & News, 2941.

I understand from your letter of November 6, 1992, and your conversation of that date with Rita Daguard of my staff, that you request reconsideration of this decision on the grounds outlined in a letter of June 26, 1992, submitted on your behalf by Mr. Jonathan Haverly. In his letter, Mr. Haverly maintains that documents obtained from the Massachusetts Comptroller through the Freedom of Information Act contradict BATA's characterization of the service as exclusively for the elderly and persons with disabilities. These documents, which are attached to his letter, include portions of BATA's service contract with the DMR describing the clientele eligible to be served under the contract. According to Mr. Haverly, this description indicates that the service is not mass transportation since it is restricted to clients of the DMR and is not available to all elderly and persons with disabilities in BATA's service area. Mr. Haverly points out that under Federal Transit Administration (FTA) guidance, to qualify as "exclusive," service must be open to all elderly and persons with disabilities in a particular geographic area and not restricted to a particular group of elderly and persons with disabilities. See, 52 Federal Register 42252, November 3, 1987. Mr. Haverly therefore concludes that the service is charter, and is being provided by BATA in violation of the FTA's charter regulation, 49 CFR Part 604.

The FTA finds that Mr. Haverly's conclusion is erroneous for two reasons. First, the FTA considers that service is restricted to a particular group when it is "designed to benefit some special organization such as a private club." See, 52 Federal Register 11920, April 13, 1987. The designation by a statewide human services agency of individuals as disabled and therefore eligible for specialized mass transportation, does not meet this criterion. In fact, the FTA recognizes that recipients may delegate the responsibility for certifying individuals as disabled to other agencies, provided that such agencies administer the certification in an acceptable manner and allow reasonable access to the elderly and disabled. See, FTA Circular 9060.1, pp. IX-2,3 (April 20, 1978). The FTA notes that many recipients make extensive use of both public and private social service agencies to identify individuals eligible for special mass transit benefits. Id.

Second, the "DMR Service Description" dated December 26, 1991, submitted by Mr. Haverly, states that the "DMR service is not exclusive and non-DMR clients are transported with DMR clients." Under FTA guidelines, the fact that service designed for the elderly and disabled is also open to the general public, is an indication that such service is mass transportation:

[A]ssume a human services agency contracts with a recipient to...provide service for the agency's clients. If the service is open-door and the recipient can put any rider on the vehicle in addition to the agency's clients, the service would probably be mass transportation. 52 Federal Register 11920, April 13, 1987.

Therefore, consistent with this guidance, the FTA maintains that the service provided by BATA to the DMR is mass transportation, and denies your request for reversal of its decision in MA-BATA/91-10-01.

Sincerely,



Steven A. Diaz
Chief Counsel

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

In the matter of:

LAS VEGAS TRANSIT SYSTEM, INC.

v.

REGIONAL TRANSPORTATION COMMISSION OF
CLARK COUNTY, NEVADA

NV06/92-2104

DECISION

SUMMARY

Las Vegas Transit System, Inc., (LVTS) filed this complaint with the Federal Transit Administration (FTA) alleging that the Regional Transportation Commission of Clark County, Nevada (RTC) had failed to comply with the provisions of the Federal Transit Act, as amended (FT Act), and the implementing guidance concerning participation of private enterprise in the provision of mass transportation. LVTS asked that the FTA withhold RTC's grant funds for restructured mass transit service in the Las Vegas area.

After a thorough review of the administrative record, the FTA finds that the RTC, which is also the local metropolitan planning organization (MPO), does not have a process for the review of local decisions that includes a second level of review. Under these circumstances, the lack of a two-tiered review process does not, however, affect the substantive rights of the parties and does not constitute a fatal flaw in RTC's disposition of this matter. The FTA finds that the RTC provided for the participation of private mass transportation companies in its proposal for fixed route service to the maximum extent feasible. Accordingly, the FTA finds that the RTC did not violate the

private sector provision of section 3(e) of the FT Act and the implementing policy.¹

COMPLAINT

LVTS filed this complaint with FTA on June 12, 1992. The complaint alleges that RTC failed to provide for the participation of the private sector to the maximum extent feasible in its proposal for restructuring the Las Vegas Valley transit system. LVTS states that RTC issued a "Request for Proposals" (RFP) that precluded LVTS from having an equal opportunity to submit a bid for fixed route service. LVTS states that "the [RFP] evaluation criteria imposed unreasonable restrictions that neither...LVTS nor any other local company could meet."² LVTS further claims that it objected to the RFP during the drafting stage, but its comments were ignored.

According to LVTS, the RFP imposed a mandatory requirement that was exclusionary and discriminatory. LVTS claims that the requirement called for each offeror to submit five references from cities where the company had previously provided mass transit service. LVTS claims that this requirement precluded consideration of companies like itself that have not provided services to other cities.

Nevertheless, LVTS states that it submitted a proposal, entitled "Segmentation Plan," but the proposal was denied on three separate occasions. LVTS claims that RTC's stated reason for the denials was that "[it] could not make a determination on the

¹ LVTS raised several other claims against RTC in its complaint to the FTA. Those claims involve alleged violations of sections 9 and 13(c) of the FT Act, and of the Common Grant Rule, 49 CFR Part 18, the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), and the President's Executive Order for Privatization of the Country's Infrastructure (Executive Order). The FTA finds that it does not have jurisdiction over LVTS' claims under section 9 and 13(c) of the FT Act. FTA Circular 4220.1B, "Third Party Contracting Guidelines," limits FTA's review of section 9 bid protests to claims that a grantee failed to have written protest procedures. Furthermore, alleged violations of section 13(c) should be directed to the Secretary of Labor. Finally, the FTA finds that LVTS has not articulated its claims under ISTEA and the Executive Order. Therefore, this decision is limited to an examination of the RTC's alleged violation of section 3(e) of the FT Act.

² LVTS has been the sole provider of fixed route service in Clark County, Nevada for approximately 45 years. LVTS asserts that RTC is restructuring the mass transit system primarily to eliminate LVTS from the business.

ability of [LVTS] to provide [the] service...."

Finally, LVTS claims that RTC did not attempt to resolve the dispute at the local level as called for by FTA's policy guidelines. LVTS claims that the FTA's guidelines required RTC at least to establish an independent internal body (i.e., a group separate from that which reviewed the proposals) to handle this dispute.

RESPONSE

The FTA reviewed LVTS' complaint and determined that the allegations, if substantiated, constituted violations of the private sector provision of the FT Act and the implementing policy. The FTA forwarded LVTS' complaint to the RTC on July 7, 1992, with 30 days to respond.

RTC's response is dated August 17, 1992. RTC claims that LVTS' complaint is totally without merit and states that the complaint is an attempt by LVTS to hold on to its "near monopoly position" in the Las Vegas Valley. RTC claims that its decision to restructure the mass transit service in Las Vegas Valley was based on the results of a local referendum. RTC states that the results of the referendum indicate that most transit passengers in the area were unsatisfied with the condition of mass transit service in the Las Vegas Valley.

In response to LVTS' claim under section 3(e) that RTC did not provide for the maximum feasible participation of the private sector in its proposed restructured service, RTC claims that LVTS lacks standing. RTC asserts that LVTS is not a private provider but instead a "publicly subsidized carrier...that has been the beneficiary of two types of Federal subsidies."³

Moreover, RTC states that even if LVTS has standing under 3(e), its claim against RTC is not valid. RTC asserts that it has complied with both sections 3(e) and 8(o) of the FT Act by attempting competitively to procure the services of the private sector to operate its new fixed route system.

According to RTC, the planning committee that drafted the RFP for the new fixed route services included an LVTS representative.

REBUTTAL

The FTA forwarded RTC's response to LVTS on August 21, 1992, and

³ LVTS operates 58 vehicles, 30 of which it has acquired through leases with the City of Las Vegas and the RTC. These leases permit LVTS to use federally-funded buses in exchange for LVTS contributing a local matching share.

provided LVTS with 30 days to submit a rebuttal. LVTS's rebuttal is dated October 6, 1992.

In its rebuttal, LVTS reasserts its position that "RTC has seriously and substantially violated the [FT Act]" by failing to provide for the meaningful involvement of the private sector in its new route services. LVTS admits that it participated in the RTC's planning committees; however, it claims that the subcommittees had no impact on the actual planning process.

Moreover, LVTS claims that the real problem lies in the fact that the RTC is the MPO. LVTS asserts that it is unreasonable to ask a private operator to appeal its 3(e) complaint to the same entity that initially dismissed its complaint. LVTS urges the FTA to demand RTC develop an independent dispute mechanism to review initial decisions on private sector complaints.

ANALYSIS

The FTA developed its private enterprise policy under the provisions of three sections of the FT Act, namely sections 3(e), 8(o), and 9(f). Under section 3(e) the FTA must, before approving a program of projects, find that such program provides for the maximum feasible participation of private enterprise. Section 8(o) directs FTA recipients to encourage private sector participation in the plans and programs funded under the Act. Finally, as a prerequisite to funding under section 9, recipients must develop a private enterprise program in accordance with the procedures set out in section 9(f).

In order to provide guidance in achieving compliance with these statutory requirements, the FTA issued its policy statement, "Private Enterprise Participation in the [Federal Transit] Program," 49 FR 41310, October 22, 1984. This policy statement sets forth the factors the FTA will consider in determining whether a recipient's planning process conforms to the private enterprise requirements of the FT Act. These factors include consultation with private providers in the local planning process, consideration of private enterprise in the development of the mass transportation program, the existence of records documenting the participatory nature of the local planning process and the rationale used in making public/private service decisions.

The FTA's private sector requirements are further detailed in Circular 7005.1, "Documentation of Private Enterprise Participation Required for Sections 3 and 9 Programs," December 5, 1986. The Circular outlines the minimum elements a grantee's private sector consultation process must contain, and describes the documentation required to demonstrate that the process has been followed.

The Circular states that a grantee's private sector process must include the following elements:

- a. Notice to and early consultation with private providers in plans involving new or restructured service as well as the periodic re-examination of existing service.
- b. Periodic examination, at least every three years, of each route to determine if it could be more efficiently operated by a private enterprise.
- c. Description of how new and restructured services will be evaluated to determine whether they could be more efficiently provided by private sector operation pursuant to a competitive bid process.
- d. The use of costs as a factor in the public/private decision.
- e. A dispute resolution process which affords all interested parties an opportunity to object to the initial decision. FTA's complaint process is designed to accept appeals of this local dispute resolution process.

The Circular also describes the complaint procedure which private operators may follow when they believe that a grantee's private sector policy is inadequate or has been improperly applied. Under this procedure, disputes should be resolved at the local level. The procedure requires dispute resolution between the grantee and the private operator and, failing settlement at this level, a review of the grantee's decision by either a local MPO or the FTA. Under the terms of the Circular, the FTA will entertain complaints only when a complainant has exhausted its local dispute resolution process.

FTA's review of the administrative record indicates that LVTS' complaint was originally submitted to the RTC as a bid protest, and that while the RTC reviewed and adjudicated the protest in accordance with its bid protest procedures, it did address the merits of the 3(e) complaint. In a memorandum dated January 2, 1992, counsel for RTC notes that LVTS included in its bid protest an allegation that RTC "failed to satisfy its obligation under 3(e) to provide for private sector participation in the project to the maximum extent feasible by not allowing LVTS to continue its existing operations."⁴ The memorandum dismisses the allegation on the ground that RTC's new fixed route service will be provided only by private operators, and that RTC therefore involved the private sector to the maximum extent feasible in the planning and provision of this service.

⁴ See Memorandum of Clark County Regional Transportation Commission, August 17, 1992 at Attachment J-1.

Therefore, FTA concludes that RTC did in fact render an initial decision rejecting LVTS' 3(e) complaint. Based upon the stipulation of the parties, we find that the parties have exhausted the local process.⁵ Thus, we reach the merits of this case.

The FTA recognizes that Nevada law delegates to the RTC, among other duties, the authority to act as the MPO. Specifically, section 373.1161 of the Nevada Revised Statutes gives the RTC the power to conduct studies, develop plans and conduct public hearings to establish short-range and regional plans for transportation. RTC has not submitted, however, a copy of its format process for the resolution of private sector complaints.⁶ Circular 7005.1 requires all recipients to develop a local dispute resolution process.

The FTA's policy requiring local dispute resolution is in accordance with the intent of the FT Act, which is to afford communities maximum discretion in local decision-making.⁷ The policy also recognizes the fact that the local decision-maker is most knowledgeable about the facts and events surrounding a local dispute, and best situated to make a determination with regard to them.

Therefore, in view of the fact that RTC has not established that it currently has a process for review of local decisions, but is willing to stipulate for the purpose of this complaint that the local 3(e) dispute process has been exhausted, and that a delay in hearing this appeal might prejudice both parties, the FTA will decide the section 3(e) complaint on the merits

The primary issue LVTS raises is that RTC did not provide for the participation of the private sector to the maximum extent feasible. The FTA's review of the administrative record shows

⁵In Santa Barbara Transportation, Inc. v. Santa Barbara Metropolitan Transit District, CA-03/87-01, the FTA directed its grantee to refer requests for reconsideration of private sector decisions to the local MPO before referral to the FTA. However, in this case, the grantee and the MPO are the same entity. It is therefore not feasible to expect an independent level of review of private sector decisions under this structure, and none is required.

⁶ Although the RTC states it adopted a grievance and complaint procedure for dealing with transit issues, the FTA finds that RTC did not submit any document that substantively supports that contention.

⁷ See sections 2(b) and 3(a)(1) of the FT Act.

that this argument is without merit. RTC involved private operators in the project's planning stage from as early as March 1989.

Both RTC and LVTS submitted materials that show that RTC set up a Transit Technical Study Committee to provide assistance in the restructuring of Las Vegas Valley's mass transit system. This committee included members of both the private and public sectors. The record also indicates that on June 14, 1990, RTC adopted the Transit Technical Study's Interim Report which specifically encouraged the RTC to competitively procure private sector services.⁸

Moreover, the record details a June 13, 1991, notice of intent to issue a request for proposal for transit service, in addition to an advertisement in Passenger Transport that noted RTC's proposed new service.⁹ In total, RTC received six proposals from the private sector based on these efforts.

Based on the record, the FTA finds that the RTC did not violate the provision of section 3(e) requiring private sector involvement. RTC fully provided for private sector involvement through early notice and consultation with those private providers.

A secondary issue raised by LVTS concerns RTC's failure to afford it "just and adequate compensation" under the provisions of section 3(e). Section 3(e) provides in pertinent part:

No financial assistance shall be provided under this Act to any State or local public body...for the purpose...of providing by contract or otherwise for the operation of mass transportation facilities and equipment in competition with or supplementary to, the service provided by an existing mass transportation company, unless...(3) just and adequate compensation will be paid to such companies for acquisition of their franchises or property to the extent required by applicable State or local laws....

As earlier noted in FTA's letter to LVTS, dated August 20, 1991, section 3(e) is intended to ensure that the rights of existing private transit operators are protected in the event of an acquisition by an FTA-funded public entity. The determination, however, of whether an acquisition has taken place, and what compensation is due to affected private providers as a result of such acquisition, is properly made under applicable State or

⁸ See RTC Memorandum, Attachment A at 5.

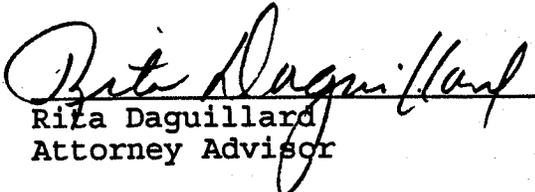
⁹ See RTC Memorandum, Attachment A at 10.

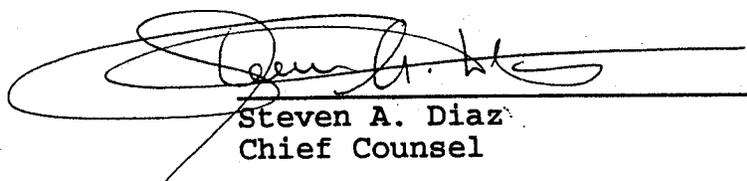
local law.¹⁰ Therefore, FTA will not make any findings based on this claim, which falls outside its jurisdiction.

CONCLUSION

The FTA requires that the RTC submit a copy of its local dispute resolution process, as required by Circular 7005.1, within 60 days of the date of this decision. FTA also finds that RTC complied with the requirements of section 3(e) by providing for the participation of the private sector to the maximum extent feasible in its proposal for restructured mass transit service in the Las Vegas Valley. LVTS should refer its claim for compensation for acquisition of its property by the RTC to the appropriate State or local forum.

November 25, 1992
Date


Rita Daguijard
Attorney Advisor


Steven A. Diaz
Chief Counsel

¹⁰ See, South Suburban Safeway Lines, Inc. v. City of Chicago et al., 416 F.2d 535 (7th Cir. 1968), and Rose City Transit Co. v. City of Portland, Or. Ct. App. 525 P.2d 1325 (1974).



U.S. Department
of Transportation

Urban Mass
Transportation
Administration

Headquarters

400 7th Street S.W.
Washington, D.C. 20530

DECEMBER 2, 1992

Richard Armour, President
Y.C.N. Transportation
19 Vernon Street
Norwood, Massachusetts 02062

Re: MA-BATA/91-10-01

Dear Mr. Armour:

This responds to your second request for reconsideration of the above-cited decision, which held that the service being provided by the Brockton Regional Transit Authority (BATA) to the Massachusetts Department of Mental Retardation (DMR) is not impermissible charter service. My ruling of November 13, 1992, on your first request for reconsideration stated that the service in question falls within the Federal Transit Administration (FTA) definition of special service for the elderly and persons with disabilities, and is therefore permissible mass transit. My ruling was based on two findings: 1) the service is not restricted to a particular group but is open to all persons designated by the DMR as elderly and disabled; and 2) the service is open door, and BATA can put any rider on the vehicles in addition to the agency's clients. The FTA has determined that service having these characteristics meets the criteria for mass transit set out in FTA guidance. See, 52 Federal Register 11920, April 13, 1987.

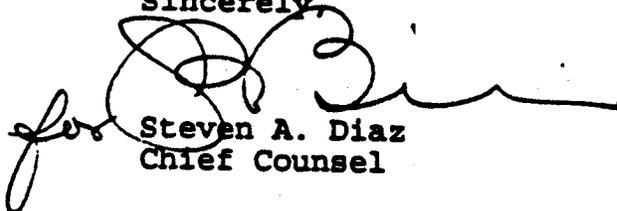
I understand that the arguments supporting your second request are presented in a letter dated November 17, 1992, submitted on your behalf by Jonathan Haverly. Mr. Haverly terms my first finding "unjustifiable" and states that "should you wish to persist in promoting this first argument, we are fully prepared to respond." Mr. Haverly notes that my second finding is based on the "DMR Service Description" dated December 26, 1991. He denies that he submitted this document to the FTA, and claims that it was submitted by BATA. In this connection, please find enclosed a copy of Mr. Haverly's letter to me of June 26, 1992, which, at page 2, references the document in question as "Attachment 3" and quotes from it extensively.

Neither of the points raised by Mr. Haverly meets the standard for review of initial decisions set out in the FTA's charter regulation, 49 CFR Part 604. Under 49 CFR 604.19(b), the FTA will take action on an appeal only if the appellant presents evidence

that there are new matters of fact or points of law that were not available or known during the investigation of the complaint. Moreover, the regulation provides for only one appeal of decisions. Under 49 CFR 604.21, a decision on appeal is final and conclusive, but is subject to judicial review pursuant to sections 701-706 of Title 5 of the U.S. Code.

In view of the foregoing, the FTA will entertain neither this nor any other request for reconsideration of its decision in MA-BATA/91-10-01.

Sincerely,



for Steven A. Diaz
Chief Counsel

Enclosure

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Chiron



U.S. Department
of Transportation
**Federal Transit
Administration**

Headquarters

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

JANUARY 8, 1993

Debra Swetnam
Assistant Transit Manager
Blacksburg Transit
300 South Main Street
Blacksburg, Virginia 24060

Dear Ms. Swetnam:

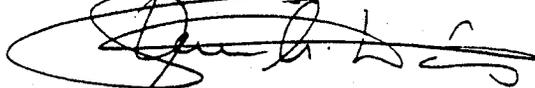
This is in response to your request, on behalf of Blacksburg Transit, for a hardship exemption to provide charter bus service authorized under the Federal Transit Administration's (FTA) charter service regulations, 49 CFR 604.9(b)(3)(ii). Blacksburg Transit claims that Abbott Bus Lines, Inc. (Abbott), the only willing and able private operator in the service area, is located too far from the town of Blacksburg. FTA has granted exemptions from this regulation to Blacksburg Transit for calendar years 1988, 1989, 1990, 1991, and 1992.

FTA has reviewed the materials submitted in your letter of December 8, 1992, as well as that provided in your telephone conversation with Rita Daguillard of my staff. Under 49 CFR 604.9(b)(ii), one of the factors that FTA may take into consideration in deciding whether to grant a hardship exemptions is the private operator's distance from the origin of the charter service, and the effect this distance may have on the price and other aspects of the service. The information you have provided indicates that Abbott is located 41 miles from the town of Blacksburg, most charter trips in Blacksburg's service are relatively short, and Abbott's minimum base rate and deadhead mileage adds approximately \$200.00 to the cost of a charter trip. The cost of Blacksburg Transit's average charter trip is about \$280.00.

FTA notes that Blacksburg Transit has provided written notice to Abbott, as required by the charter service regulation at 49 CFR 604.9(c)(1). FTA has received, both as part of Blacksburg Transit's submittals and directly from Abbott, notice of Abbott's objection to the granting of this hardship exemption. However, given the above-mentioned price difference between Blacksburg Transit and Abbott, and the fact that most of Blacksburg Transit's charter customers are nonprofit groups for whom this price difference would constitute a hardship, FTA believes that the exemption is nonetheless justified.

Based on the information provided in your petition, FTA has determined that Blacksburg Transit does qualify for an exemption under 49 CFR 604.9(b)(3)(ii). I am therefore granting your request for an exemption. Your exemption becomes effective on the date of this letter, and permits Blacksburg Transit to provide charter service throughout its service area for up to twelve months.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven A. Diaz", written over a horizontal line.

Steven A. Diaz
Chief Counsel

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

In the Matter of:

ACADEMY BUS TOURS, INC.)	
Complainant)	
v.)	No. NJ-05/92-2101
NEW JERSEY TRANSIT CORPORATION)	
Respondent)	
<hr style="width: 50%; margin-left: 0;"/>	

Decision of the Office of Chief Counsel

SUMMARY

Academy Bus Tours, Inc. (Academy), a private carrier, filed this complaint, dated May 15, 1992, with a supplement to the complaint, dated May 26, 1992, (docketed May 27, 1992) with the Federal Transit Administration (FTA). The complaint alleges that New Jersey Transit Corporation (NJT) failed to comply with the private sector provisions of the Federal Transit Act, as amended (FT Act), 49 U.S.C. app. section 1602(e) and section 1607(e), and the implementing guidance concerning participation of private enterprise in the provision of mass transportation. Specifically, Academy alleges that NJT improperly used its own "avoidable cost" methodology¹ instead of FTA's prescribed "fully allocated cost" methodology² to compare the costs of Academy's

¹ The avoidable cost methodology employed by NJT uses direct costs (e.g., fuel, parts, insurance), plus shared semi-fixed costs (e.g., garage costs, personnel and management costs) if they are significant, in the cost evaluation of a particular service. (New Jersey Transit Corporation Answer to Academy Bus Tours Complaint, August 6, 1992, at 19, note 11.)

² FTA's fully allocated cost methodology, as described in the FTA's "Fully Allocated Cost Analysis: Guidelines for Public Transit Providers," prepared by Price Waterhouse, April 1987, uses direct costs, shared semi-fixed costs, and shared fixed costs. Fixed costs are costs that cannot be eliminated (e.g., top management salaries, office building costs). The purpose of the fully allocated cost method is to provide an accurate and equitable accounting of both fixed and variable costs, so that FTA recipients may not derive an unfair advantage from their Federal subsidies.

proposal for bus service against the costs presented in the proposal of New Jersey Transit Bus Operations (NJT Bus). Based on this comparison, NJT awarded the contract to its own subsidiary, NJT Bus. The date of NJT's decision does not appear in the record before the FTA. Academy has asked the FTA to decide whether NJT is in violation of the provisions of FTA Circular 7005.1 for failing to use a "fully allocated cost" methodology to compare the costs of public and private proposals.

A threshold issue is whether the complainant exhausted local administrative remedies before appealing to the FTA.³ NJT, in its response, dated August 6, 1992, contends that Academy did not file a pre-award complaint with NJT's Board, nor did it later avail itself of other available administrative mechanisms. Academy, in its rebuttal, dated October 2, 1992, argues that NJT does not have a local process. The FTA finds that NJT has no written process for the local resolution of private sector disputes, as required by FTA Circular 7005.1. Academy was therefore unable to exhaust local remedies, and the FTA takes jurisdiction of this matter. The FTA directs NJT to develop a local resolution process, and to forward it to the FTA within sixty (60) days. The FTA also finds that NJT's avoidable cost methodology is inconsistent with the FTA's fully allocated cost guidelines. The FTA directs NJT to develop, before submitting bids to provide service in competition with private operators, a methodology which provides an accurate accounting of both fixed and variable costs, in keeping with the FTA's fully allocated cost methodology.

BACKGROUND

This dispute originated when NJT Bus and Academy competed for the Airlink bus route contract⁴. New Jersey Transit Bus Operations ultimately won the contract award, but Academy claims that New Jersey Transit Bus Operations' successful bid was predicated

³ According to NJT, in its response at p 2.n1, the parties are litigating the issue of whether NJT violated FTA's requirement by permitting the use of avoidable cost financing techniques for other routes in a New Jersey appeals court. Academy Bus Tours Inc., v. New Jersey Transit Corporation, Superior Court of New Jersey, Appellate Division, Nos. A-2195-90-K. Under FTA Circular 7005.1 entitled "Documentation of Private Enterprise Participation Required for Sections 3 and 9 Programs," December 5, 1986, complainants must exhaust local administrative remedies for resolving private sector complaints before appealing to the FTA.

⁴ The Airlink bus route runs daily between Broad Street and Pennsylvania Train Station in and the Newark International Airport.

upon its use of an avoidable cost methodology.⁵ Academy maintains that the use of the avoidable cost methodology is not only unfair, but a violation of the FTA Circular 7005.1, which prescribes the use of a fully allocated cost methodology. It is on these grounds that Academy filed its Section 3(e) complaint. Academy alleges it exhausted all local remedies.

According to NJT, Academy never exhausted its local remedies as outlined in the FTA Circular 7005.1. Thus, FTA should dismiss the matter.

In its rebuttal, Academy asserts that no local administrative mechanism exists to address its 3(e) complaint, therefore its complaint is properly before the FTA. Further, Academy claims that NJT has misread the provisions of the ISTEA concerning the amount of discretion that should be afforded to a local transit agency. Academy submits that "the FTA is free to demand that certain minimum criteria be employed by the grantee to determine exactly what satisfies 'local needs'."⁶ Finally, Academy reasserts its position that NJT is in violation of FTA Circular 7005.1 based on NJT's failure to consider the fully allocated costs in its cost comparison of private and public proposals.

DISCUSSION

In its complaint, Academy raises one primary issue, whether or not FTA Circular 7005.1 mandates that a grantee use a fully allocated cost methodology when it compares the costs of private and public proposals. The NJT, however, raises an issue in its response that must be decided before the FTA can make any findings on Academy's complaint, namely whether or not Academy exhausted the local review process.

The Circular describes the complaint procedure which private operators should follow when they believe that a grantee's

⁵ According to Academy, NJT has allowed NJT Bus to submit bid proposals based on an avoidable cost methodology since November 1990. Academy claims that this practice permits New Jersey Transit Bus Operations to exclude from its proposals "the shared costs of labor and overhead of its operation . . . when competing with private carriers pursuant to the grantee's private sector initiative." See, Academy Bus Tours Complaint, May 15, 1992, at 2. It is Academy's position that New Jersey Transit Bus Operations receives an unfair advantage over private carriers who include fully allocated cost in their proposals.

⁶See, Academy Bus Tours Rebuttal to NJT's Response, October 2, 1992, at 8.

private sector policy is inadequate or has been improperly applied. Under this procedure, disputes should be resolved at the local level. The Circular requires a process for the resolution of disputes at the local level between the grantee and the private operator and, failing settlement at this level, a review of the grantee's decision by either a local Metropolitan Planning Organization or the FTA. Under the terms of the Circular, the FTA will entertain complaints only when a complainant has exhausted its local remedies.

Academy contends that NJT has no local administrative process to hear Section 3(e) complaints. While NJT states that Academy has failed to exhaust local remedies, it fails to identify a specific dispute resolution process. The FTA has reviewed NJT's private sector involvement process, and finds that it contains no written procedures for the local resolution of disputes, as required by Paragraph 5(e) of Circular 7005.1. The FTA therefore finds that Academy could not avail itself of local administrative remedies, and takes jurisdiction of this matter.

The FTA fully allocated cost guidelines are stated and described in three documents. The Private Enterprise Participation in the Federal Transit Program (Federal Register, Volume 49, Number 205, October 22, 1984) is a policy statement regarding private enterprise participation in programs funded by FTA. As one of its provisions, this guidance states that:

When comparing the service proposals made by public and private entities, all the fully allocated costs of public and non-profit agencies should be counted. Subsidies provided to public carriers, including operating subsidies, capital grants and the use of public facilities should be reflected in the cost comparisons.

FTA Circular 7005.1 provides guidelines for the development and documentation of a local process for the consideration of private enterprise participation and private operation of mass transportation. The Circular states that one of the factors to be included in the process is:

- d. The use of costs as a factor in the private/public decision.

Costs are defined in the Circular as follows:

"Costs" means fully allocated costs which are attributable to the provision of the service. The application of these costing principles which reflect generally accepted accounting principals [sic] are more fully described in "Guidelines for Fully Allocated Costs in Transit Service," available from FTA.

The guidelines, entitled "Fully Allocated Cost Analysis: Guidelines for Public Providers" (April 1987), describe generally accepted approaches to fully allocated costing that are consistent with the guidance. The report defines fully allocated costing to include both fixed and variable costs (page 4):

Fixed Costs, which are constant over very large increments of service and therefore do not vary with small changes in the level of transit service. Examples of fixed costs include most administrative labor costs incurred directly to support revenue service.

Variable Costs, which normally vary with the level of transit service provided. Variable costs include driver wages and vehicle fuel costs which vary directly with the level of service.

The report also states that fully allocated costing requires the estimation of direct and shared costs (page 5):

Direct Costs of a segment of transit service - These are the costs which can be associated on a one-to-one basis with a segment of transit services. At the route or vehicle level, for example, direct costs generally consist of operator, mechanic and servicer wages, associated fringe benefits, fuel and lubricants, tires and tubes, and the depreciation costs associated with the vehicles used to operate that service, including spare vehicles.

Shared Costs of a segment of transit service - These are costs which cannot be associated on a one-to-one basis with a specific segment of transit services. The shared costs relevant to a single bus route or vehicle, for example, consists at a minimum of the costs to operate the facility from which the route or vehicle is dispatched. Shared costs must be allocated to specific segment of transit service in a logical manner which reflects the rate at which the cost is incurred to support the specific segment of service. [Emphasis in original.]

NJT's avoidable costing approach is not consistent with the FTA's costing guidelines. In its Response, NJT describes the NJT avoidable costing approach to include: 1) all direct costs; and 2) shared semi-fixed costs only if they are of significant scale to result in significant savings (footnote 11, page 19). By contrast, NJT states that the fully allocated method advocated by Academy requires that all direct and shared costs should be included in the costs for evaluation.

In its Response, NJT goes on to state that the NJT Board concluded that the fully allocated approach recommended by FTA was inappropriate in New Jersey. The Board recommended that the avoidable cost approach be used (page 20).

Later the NJT describes its use of the avoidable cost approach. It states that (page 25):

...only the costs which will actually change as a result of the contracting out of the service must enter into the financial evaluation. In the Airlink RFP, it would be irresponsible and illogical for NJ Transit to assess NJ Transit's fixed and unavoidable costs to a small and minute bus service which utilizes only a tiny fraction -- four (4) buses -- of NJ Transit's fleet of nearly 1,880 buses.

These statements indicate that NJT is familiar with the concepts involved in fully allocated and avoidable costing approaches. They also indicate that NJT's avoidable costing approach is not consistent with the FTA costing guidelines, since it takes into account only the variable and not the fixed costs of providing a particular service.

The FTA directs NJT to develop, before submitting further bids to provide service in competition with private operators, a methodology that takes into account both variable and fixed costs, consistent with the FTA's fully allocated cost methodology.

CONCLUSION

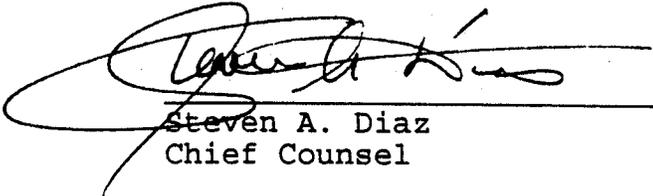
The FTA determines that NJT does not have a local process for resolving Section 3(e) disputes, and that Academy was unable to avail itself of a local process. The FTA directs NJT to develop a local dispute resolution process, and to submit it to the FTA within sixty (60) days of receipt of this decision. NJT should also develop, before submitting further bids on transit service in competition with private operators, a costing methodology that is consistent with the FTA's fully allocated cost principles.

The FTA intends to monitor NJT's compliance with this decision before approving future grants to NJT.

January 19, 1993
Date



Rita Daguillard
Attorney Advisor



Steven A. Diaz
Chief Counsel



U.S. Department
of Transportation
**Federal Transit
Administration**

Headquarters

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

Chron ^{file} 3F

January 25, 1993

Mr. Alan F. Kiepper
President
New York City Transit Authority
370 Jay Street
Brooklyn, New York 11201

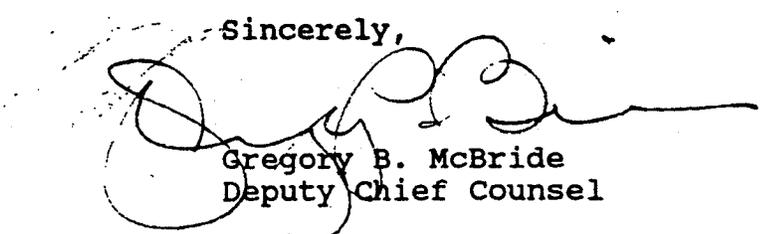
Dear Mr. Kiepper:

This responds to your letter of December 24, 1992, concerning the annual notice of charter service recently published by the New York City Transit Authority (NYCTA). Your letter states that NYCTA is willing to amend its charter notice to remove three of the exceptions enumerated in an earlier letter from the Federal Transit Administration (FTA). You state, however, that NYCTA believes that the fourth exception mentioned therein, i.e., transportation of service to NYCTA-sponsored ceremonies, does not fall within the definition of charter service. You seek clarification from the FTA concerning this category of service.

Your letter indicates that NYCTA believes that this service is mass transportation, since NYCTA will set the routes and schedules and decide which type of equipment will be used. The service therefore appears to have some of the characteristics of mass transportation as defined by the FTA at 52 Federal Register 11920 (April 13, 1987). However, this service, as described in your letter, lacks other characteristics set out in this definition, namely that the service be designed to benefit the public at large, and be provided on an open door basis. Moreover, the service meets the FTA's definition of charter service, set out at 49 CFR 604.5, since it is to a defined group of people, on a one-time basis, with no individual contracts between the users and the recipient. Accordingly, the FTA finds that this fourth category of service is charter service, and should not be cited as an exception in NYCTA's annual charter notice.

I trust that this provides the clarification you requested.

Sincerely,



Gregory B. McBride
Deputy Chief Counsel



March 5, 1993

Stephen Anzuoni, Executive Secretary
New England Bus Transportation Association
464 Statler Office Building
20 Park Plaza
Boston, MA 02116

Dear Mr. Anzuoni:

The enclosed correspondence from John Powell, General Manager of the Worcester Area Transportation Co., Inc. (WATC), responds to your allegation that the Worcester Regional Transit Authority (WRTA) intends to engage in impermissible charter service. Specifically, you claim that on March 11, 1993, the WRTA plans to use federally-funded buses to perform tours in connection with a conference sponsored by the NorthEast Transit Association (NETA).

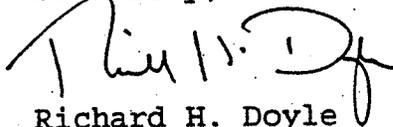
According to Mr. Powell, NETA asked ElderBus, a WRTA para-transit service operator, to provide a vehicle on March 11 to transport attendees of the "Sections 16 and 18 Rural Transit Operations Seminar" from the Host Hotel in Sturbridge to the ElderBus operation in Southbridge and then on to the Worcester Area Van Express (WAVE) operation in Worcester. Essentially, the ElderBus will be used to transport the public transit operators on a "tour" of the public transit facilities.

Based on the information contained in Mr. Powell's memorandum, the Federal Transit Administration (FTA) has determined that the tours scheduled for March 11 are promotional in nature and will serve to educate the conference attendees in the area of public transit. Therefore, NETA's use of the ElderBus for the limited purpose of

touring the public transit operations will not violate the Charter Regulation, 49 CFR Part 604.

If you have any questions, please call Margaret Foley, Regional Counsel, at (617) 494-2055.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard H. Doyle". The signature is written in a cursive style with a large initial "R" and "D".

Richard H. Doyle
Regional Administrator

Enclosure

cc: Mr. Robert E. Ojala
Administrator, WRTA

Mr. John Powell
General Manager, WATC



U.S. Department
of Transportation
**Federal Transit
Administration**

REGION I
Connecticut, Maine,
Massachusetts,
New Hampshire,
Rhode Island, Vermont

Transportation System Center
Kendall Square,
55 Broadway
Suite 904
Cambridge, Massachusetts 02142

APR 7 1993

Ray Penfold, General Manager
V.I.P. Tour & Charter Bus Company
129-137 Fox Street
Portland, ME 04101

Dear Mr. Penfold:

The enclosed correspondence from Kenneth W. McNeill of the Maine Department of Transportation (MDOT), responds to your allegation concerning the Western Maine Transportation Services, Inc. (WMTS), also known as Pine Tree Transit. Specifically, you allege that WMTS, a private nonprofit organization which receives federal funds through MDOT, has engaged in impermissible charter service between The Bethel Inn, Bethel, Maine, and the Sunday River Ski Resort, Newry, Maine.

Under Section 12(c)(6) of the Federal Transit Act (Act), "mass transportation" is defined as service to the public on a regular and continuing basis. By contrast, "charter service" usually involves a one-time provision of service and the user, not the recipient of federal funds, has control of the service. See 52 Federal Register 11919-20 (April 13, 1987).

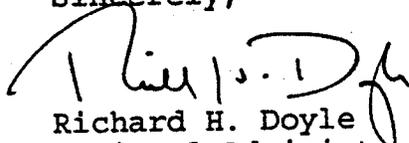
Based upon the information contained in MDOT's response, the service in question appears to fall within the definition of "mass transportation." First, WMTS exercised control over the service by setting the route and schedule and deciding what type of equipment to use. Second, the service was not restricted to guests of The Bethel Inn but was provided to benefit the public-at-large and was advertised as "open to the public" in a local newspaper. Third, WMTS provided the service on a regular and continuing basis during weekends and holidays.

Although you have styled your letter as a complaint under the FTA's charter service regulation, I note that your allegation is also in the nature of a private sector complaint under Section

3(e) of the Act. Under FTA's private sector participation guidelines, recipients of federal funds should consider the views of private providers when using FTA-funded vehicles to provide new or restructured transportation services. Moreover, when bidding in response to a request for service, the fully allocated costs of public and nonprofit agencies receiving federal funds should be disclosed. Subsidies provided to public and private nonprofit carriers, including operating subsidies, capital grants, and the use of public facilities should be reflected in the cost comparisons. According to Mr. McNeill, WMTS bid its fully allocated costs in response to The Bethel Inn's request for service between the Inn and the Sunday River Ski Resort.

In conclusion, please note that questions dealing with the fairness of local procedures and decisions involving private sector complaints should be addressed at the local level. Complaints which cannot be resolved at the local level should be resolved at the state level. If you have further questions involving private sector involvement in the provision of transit service, I recommend that you call or write to Kenneth W. McNeill, Director, Highway Mass Transportation Division, MDOT, State House Station 16, Augusta, ME 04333, (207) 287-3318.

Sincerely,



Richard H. Doyle
Regional Administrator

Enclosures: MDOT ltr dtd 2/19/93
MDOT ltr dtd 3/9/93

cc: Kenneth W. McNeill, MDOT



U.S. Department
of Transportation
**Federal Transit
Administration**

REGION I
Connecticut, Maine,
Massachusetts,
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Rhode Island, Vermont

Transportation System Center
Kendall Square,
55 Broadway
Suite 904
Cambridge, Massachusetts 02142

APR 7 1993

James M. Jalbert, President
C & J Trailways
P. O. Box 190
Dover, NH 03820

Dear Mr. Jalbert:

The enclosed correspondence from Joe R. Follansbee, Executive Director of the Cooperative Alliance For Seacoast Transportation (COAST), responds to your allegation that COAST may have engaged in impermissible charter service. Specifically, you allege that COAST provided transportation services to Pro Portsmouth for their Market Square Day event on June 8, 1992, and to the Prescott Park Arts Festival on August 23, 1992. You also claim that COAST has bid on and performed charter service for the University of New Hampshire (UNH) Alumni Center and for other organizations throughout the campus.

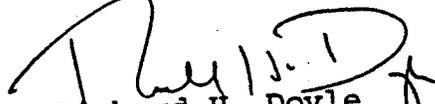
Based upon the information contained in Mr. Follansbee's letter, it appears that the transportation services provided on June 8 and August 23, 1992, did not meet the charter criteria of being provided under a single contract for the exclusive use of a defined group of people who have authority to decide the itinerary. According to Mr. Follansbee, COAST donated its services during the community events for traffic mitigation purposes. He states that COAST exercised control over the service by setting the route, rate and schedule and deciding what type of equipment to use. Moreover, the service was open to the public and was not restricted to a private group. The FTA has previously determined that this type of service is mass transportation and not charter. See 52 Federal Register 11919-20 (April 13, 1987).

With reference to transportation services conducted at UNH, Mr. Follansbee notes that the charter operator on campus is UNH Kari-Van. He maintains that COAST has absolutely no interface with UNH Kari-Van charters and emphatically denies that COAST conducts charter service on campus grounds. Accordingly, it does not appear that COAST is in violation of the FTA's Charter Service Regulation at 49 CFR Part 604.

In closing, I would like to take this opportunity to encourage both you and Mr. Follansbee to remain in close contact in order to enhance your opportunities, as a private operator, to participate in the development of new transportation services in and around the Portsmouth area.

I hope this information has been helpful. If you need any additional clarification or assistance, please call Margaret Foley, Regional Counsel (617) 494-2055.

Sincerely,



Richard H. Doyle
Regional Administrator

Enclosure

cc: Mr. Joe R. Follansbee
Executive Director, COAST



U.S. Department
of Transportation

Federal Transit
Administration

REGION I
Connecticut, Maine,
Massachusetts,
New Hampshire,
Rhode Island, Vermont

Transportation System Center
Kendall Square,
55 Broadway
Suite 904
Cambridge, Massachusetts 02142

JUL 16 1993

G. Stephen Anzuoni, Esq.
Statler Office Building
20 Park Plaza, Suite 464
Boston, MA 02116

Dear Mr. Anzuoni:

This responds to your letters dated May 6 and July 6, 1993, written on behalf of Gulbankian Bus Lines (GBL) alleging that AVCOA, a private, nonprofit organization which receives Section 9 funds through the Worcester Regional Transit Authority (WRTA), is providing impermissible charter service by transporting senior citizens to various shopping centers.

In response to your complaint, the WRTA forwarded a letter from Ms. Gail Heald, AVCOA's Planner for Elderly and Disabled Transportation. According to Ms. Heald, AVCOA provides coordinated regional transportation for the elderly/disabled residents of Southboro and five other WRTA member municipalities for any trip purpose, including shopping. Ms. Heald further maintains that each rider pays an individual fare to receive the demand responsive/shared ride service. In your July 6, 1993 rebuttal to AVCOA's response, you claim that the senior citizens do not pay individual fares but rather, the Town of Southboro pays a single charge for the transportation service. You further argue that AVCOA is "providing shopping trips, every Thursday, for prearranged groups of senior citizens."

Based upon the information provided regarding AVCOA's operations, the Federal Transit Administration (FTA) has determined that AVCOA is providing special service exclusively for the elderly and persons with disabilities. Previously, the FTA has determined that this type of exclusive service, even when provided on a demand responsive basis, is "mass transportation" not charter service. See, "Charter Service Questions and Answers," 52 Fed. Reg. 42248, 42252 (Nov. 3, 1987). To qualify as "exclusive" the service in question must be open to all elderly or disabled persons in a particular geographic service area and not restricted to a particular group of elderly or disabled persons. The FTA considers that service is restricted to a particular group when it is designed to benefit "some special organization such as a private club." See, 52 Fed. Reg. 11916, 11920 (Apr. 13, 1987). Scheduling shopping trips for senior citizens does not meet this criterion merely because the trips are "prearranged."

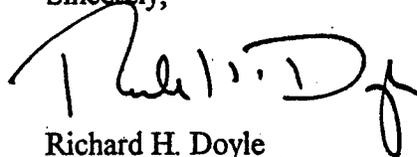
Several other characteristics of the service provided by AVCOA indicate that it is mass transportation rather than charter. According to Ms. Heald, AVCOA is in charge of the regional transportation services in question. Ms. Heald states that the riders do not exercise control over

the service; in fact, trips are clustered whenever possible in order to achieve greater operating/cost efficiencies. Furthermore, the fact that AVCOA provides the service every Thursday is consistent with the language at Section 12(c)(6) of the Federal Transit Act which defines "mass transportation" as service provided on a regular and continuing basis. Although a dispute exists regarding the question of whether the riders pay their fares individually or whether the Town of Southboro pays a single charge, the method of payment, by itself, is not dispositive of whether a service is charter or mass transportation. Rather, in any complaint situation, FTA must review the service in question and determine to which category it most properly belongs. See, 52 Fed. Reg. at 11920. Accordingly, based upon a review of all the information submitted, the FTA has determined that the service provided by AVCOA is mass transportation.

Since the FTA has determined that AVCOA is not in violation of FTA's Charter Regulation, 49 CFR 604, your request for damages and other appropriate relief is moot. However, I will take this opportunity to advise you that the FTA is a grant-making agency, not a regulatory or enforcement agency. As such, the FTA is not empowered to award damages or assess fines.

I trust this information has been helpful. If you need any additional clarification or assistance, please call Margaret E. Foley, Regional Counsel (617) 494-2055.

Sincerely,



Richard H. Doyle
Regional Administrator

cc: Gail Heald, Planner
Elderly and Disabled Transportation

Robert E. Ojala
Administrator, WRTA



U.S. Department
of Transportation
**Federal Transit
Administration**

REGION I
Connecticut, Maine,
Massachusetts,
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Kendall Square,
55 Broadway
Suite 904
Cambridge, Massachusetts 02142

AUG 13 1993

G. Stephen Anzuoni, Esq.
Statler Office Building
20 Park Plaza, Suite 464
Boston, MA 02116

Dear Mr. Anzuoni:

This responds to your request for reconsideration of my July 16, 1993, decision which held that AVCOA, a subrecipient of the Worcester Regional Transit Authority (WRTA), is not providing impermissible charter service to elderly citizens of Southboro, Massachusetts. The ruling indicated that the service falls within the definition of "mass transportation" at Section 12(c)(6) of the Federal Transit Act, as amended (FT Act), which Congress extended in 1968 to include special service in addition to general service. The two examples of special service that Congress provided are service exclusively for the elderly and persons with disabilities, and service for workers who live in the intercity, but commute to a factory in the suburbs. See, H.R. Rep. No. 1585, 90th Cong., 2d. Sess., reprinted in 1968 U.S. Code Cong. Ad. & News, 2941, and 52 Fed. Reg. 11920, April 13, 1987.

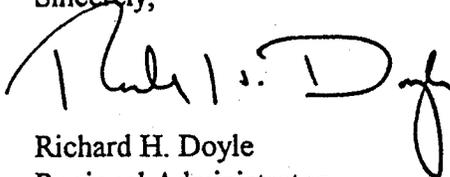
In requesting reconsideration you raise several issues. First, you allege that, if the service in question is mass transportation, AVCOA and the WRTA are in violation of Section 3(e) of the FT Act "for providing a mass transportation service that is competing with an existing private mass transportation company." You further claim that the WRTA did not put the service out to competitive bid. In response to this allegation, please note that Section 3(e) does not prohibit grantees from competing with private transportation providers, but rather, requires that grantees provide for the maximum feasible participation of private enterprise. The FTA's private sector requirements are further detailed in "Private Enterprise Participation in the Urban Mass Transportation Program," 49 Fed. Reg. 41310, October 22, 1984, and FTA Circular 7005.1, "Documentation of Private Enterprise Participation Required for Sections 3 and 9 Programs," December 5, 1986 (copies attached). These documents state that interested parties may appeal to the FTA only after exhaustion of the local dispute resolution process, and only on procedural grounds. Accordingly, if you intend to pursue a private sector complaint, you must first attempt to resolve the problem at the local level.

Next, you maintain that, if the service in question is special service, AVCOA is operating in violation of state law because the Massachusetts Department of Public Utilities (DPU), and not the WRTA, has jurisdiction over special service operating rights. In support of this contention,

you submitted a decision rendered by the DPU granting petitions filed by the Cape Cod & Hyannis Railroad, Inc., for a license and certificate to operate a shuttle bus service which would be restricted to passengers of the Railroad. According to the DPU, "when such restrictions exist, the resulting service is not within the meaning of mass transportation service providing public general or special service on a regular and continuing basis "as defined by the FT Act. (See DPU 1601/1602 at pages 10, 14-15.) Thus, the DPU's decision does not appear to be inconsistent with the FTA's ruling in this matter. Nevertheless, whether or not AVCOA and the WRTA are violating Massachusetts law is not an issue for the FTA to decide. Allegations regarding violations of state law should be referred to appropriate state authorities.

Finally, you contend that material issues of fact need to be explored and request an evidentiary hearing with an adequate procedure for full discovery of all relevant material. The FTA's determination in this matter was based upon the documents submitted by AVCOA, the WRTA and your client, Gulbankian Bus Lines. Your July 19, 1993, request for reconsideration does not contain new matters of fact or relevant points of law that were not available or not known during the investigation of the complaint. Therefore, consistent with the July 16, 1993, decision, the FTA maintains that the service provided by AVCOA to the elderly residents of Southboro is mass transportation, and denies your request for reconsideration. If you need any additional clarification or assistance, please contact Margaret E. Foley, Regional Counsel (617) 494-2055.

Sincerely,



Richard H. Doyle
Regional Administrator

Enclosures: 49 Fed. Reg. 41310, October 22, 1984
FTA Circular 7005.1, December 5, 1986

cc: Gail Heald, Planner
Elderly and Disabled Transportation, AVCOA

Robert E. Ojala, Administrator
WRTA



U.S. Department
of Transportation
Federal Transit
Administration

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

SEP 15 1993

Mr. Russell J. Olvera
Director
Regional Transit System
100 S.E. 10th Avenue
Gainesville, Florida 32602

Dear Mr. Olvera:

This responds to your request for a temporary waiver of the Federal Transit Administration's (FTA) charter regulation, 49 CFR Part 604. You indicate that this request by the Regional Transit System (RTS) is prompted by the failure of Breakaway Tours, Inc. (Breakaway), a private carrier that has been subcontracting RTS buses for charter service, to pay \$14,478.00 in arrears of leasing charges. You seek a waiver which would allow the RTS to provide charter service for the University of Gainesville and other local customers until Breakaway has settled its past due account.

Enclosed with your letter is a copy of the RTS' annual charter notice. Under 49 CFR 604.11, a private operator will only be determined willing and able if it responds to a recipient's notice in writing by the stated deadline. Therefore, if no private operator responds to the RTS' notice in writing by its deadline of September 30, 1993, none may be determined "willing and able." Thus, pursuant to 49 CFR 604.9, the RTS may begin providing direct charter service on that date.

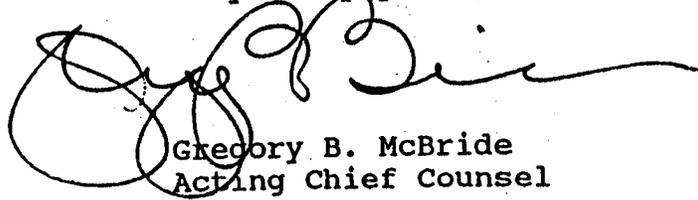
In the meantime, assuming that the RTS is barred from providing direct charter service because there is currently a willing and able local provider, the RTS may provide charter service through subcontracting arrangements with a private operator that lacks the capacity to perform a particular charter trip. The RTS may subcontract with any legitimate private charter operator, not only with an operator that has been determined willing and able under the procedures of 49 CFR 604.11. FTA has defined "legitimate private charter operator" as the owner of at least one vehicle which it is licensed to operate in charter service. See, B&T Fuller, et al. v. VIA Metropolitan Transit Authority, TX-02/88-01, November 18, 1988.

If, as you say, Breakaway Tours owns no buses with which to perform local charter work, it is not a legitimate private charter operator, and thus does not qualify either to lease vehicles from the RTS, or to be determined willing and able. It appears from your letter that the RTS may be able to provide direct charter service by September 30, 1993, or, in the

meantime, through subcontracting arrangements with operators other than Breakaway.

If you have further questions concerning the FTA's charter requirements, please contact Rita Daguillard at 202/366-1936.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Gregory B. McBride', with a long horizontal flourish extending to the right.

Gregory B. McBride
Acting Chief Counsel



U.S. Department
of Transportation
**Federal Transit
Administration**

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

PCV

SEP 27, 1993

✓
✓
Mr. Sonny Hall
President
Transport Workers Union of
Greater New York
80 West End Avenue
New York, New York 10023

Dear Mr. Hall:

This responds to your letter concerning a ruling of November 2, 1993, by then-Chief Counsel Steven A. Diaz. In this ruling, Mr. Diaz stated that certain categories of service listed in the New York City Transit Authority's (NYCTA) annual charter notice, including transportation for groups attending NYCTA-sponsored forums and ceremonies, constituted charter service. Under the Federal Transit Administration (FTA) charter regulation, 49 CFR Part 604, an FTA recipient may not provide charter service if there is a willing and able private operator.

You ask that FTA confirm your understanding that Mr. Diaz' ruling does not apply to service for the Annual Retiree Picnic for NYCTA employees. You state that NYCTA has sponsored and provided service for this event for the past fifteen years, but has recently indicated that it must discontinue doing so because the service falls within one of the categories of "charter service" mentioned in Mr. Diaz' ruling.

"Charter service" is defined at 49 CFR 604.5 as transportation, using buses or vans, of a group of persons who, pursuant to a common purpose and under a single contract, have acquired exclusive use of the vehicle to travel together under an itinerary specified in advance. Bus service exclusively for the transportation of NYCTA employees to the Annual Retiree Picnic appears to meet this definition. Accordingly, if there is a willing and able private operator, NYCTA may provide this service only under one of the exceptions to the regulation.

One of these exceptions, 49 CFR 604.9(b)(7), allows a recipient to provide particular types of charter service where a formal agreement has been executed between the recipient and willing and able local operators. The recipient must have referenced the services in question in its annual charter notice.

CONCURRENCES	
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