

It is my understanding that NYCTA has referenced service to transport NYCTA employee to NYCTA-sponsored events in its annual charter notice. NYCTA is therefore eligible for this exception.

Please do not hesitate to contact me if I can be of further assistance.

Very truly yours,

Gregory B. McBride
Deputy Chief Counsel

Gregory B. McBride
Acting Chief Counsel

cc: Alan F. Kiepper
President, NYCTA



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

REGION VIII
Arizona, Colorado, Montana
Nevada, North Dakota,
South Dakota, Utah, Wyoming

Columbine Place
216 Sixteenth Street
Suite 650
Denver, Colorado 80202

October 12, 1993

Richard C. Thomas, Public Transit Director
City of Phoenix
302 N. First Avenue, Suite 700
Phoenix, AZ 85003

Subject: Exception to Provide Direct Charter Service

Dear Mr. Thomas:

The City of Phoenix has requested an exception under 49 CFR Section 604.9(b)(4) to allow Phoenix Transit System (PTS) to be the primary provider and organizer of charter service for the Lions Club International annual convention to be held in Phoenix during July 1994. PTS has been asked by the Lions to coordinate the service, based on PTS' experience and type of equipment and operations.

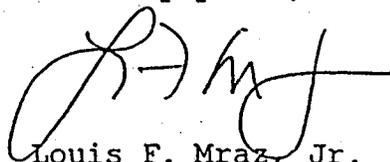
A petition for a special events exception must describe the event, explain how it is special, and explain the amount of charter service which private charter operators are not capable of providing. 49 CFR Section 604.9(d)(2). The service to be provided must be incidental charter service in accordance with 49 CFR Sections 604.5(i) and 604.9(e), that is, it must not interfere with or detract from mass transit operations.

The City of Phoenix has described the extraordinary size of the Lions' convention and the number of buses that will be needed to serve the organizations' needs. Further, Phoenix has stated that a combination of public and private contractors will be needed to provide the service. Phoenix has assured FTA that any charter service provided by PTS will not interfere with scheduled, fixed-route service. Therefore, Phoenix has met the criteria for a special events exception.

Accordingly, FTA hereby grants an exception to provide charter service during the Lions' convention to the extent that private operators are not capable of providing the service. 49 CFR 604.9(b)(4). The City shall assure that private operators are notified of their opportunity to participate in the service and are permitted to participate to the maximum extent feasible.

Thank you for submitting the request for an exception in such a timely fashion. Best wishes to both the Lions and the City for a successful convention in 1994.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'L. F. Mraz, Jr.', with a large, stylized initial 'L' and a horizontal line extending to the right.

Louis F. Mraz, Jr.
Regional Administrator



U.S. Department
of Transportation

Federal Transit
Administration

Headquarters

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

November 24, 1993

Mr. R. Jeffrey Henning
President
VPSI, Inc.
1220 Rankin Street
Troy, MI 48083-6004

Dear Mr. Henning:

VPSI, Inc. filed this complaint with the Federal Transit Administration (FTA) alleging that the Suburban Bus Division of the Regional Transportation Authority (PACE) had failed to comply with provisions of the Federal Transit Act, as amended (FT Act), and implementing guidance concerning the participation of private enterprise in the provision of mass transportation. Specifically, VPSI alleges that PACE initiated a vanpooling service, PACE VIP Vanpool Program, without determining that such service is essential to its program of projects. Further, VPSI contends that PACE has not allowed VPSI to avail itself of the local dispute resolution process. VPSI asserts that its complaint is "against the use of federal funds to unfairly compete with the private sector."

FTA concludes that PACE did undertake a process to determine that it was essential to provide subsidized vanpool services and provided opportunities for private carriers to participate in that program. FTA's review of this matter also indicates that PACE has a local dispute resolution process, and has followed this process in its handling of VPSI's complaint. FTA further finds that PACE's process afforded VPSI a fair opportunity to resolve this dispute. Accordingly, FTA finds that PACE has met the applicable procedural requirements. Since under FTA's private enterprise policy statement FTA may entertain private enterprise complaints only on the grounds that a recipient has not established or has not followed fair and equitable procedures for considering private sector participation in federally assisted programs and resolving disputes, FTA will not further consider this matter.

Complaint/Supplemental Information

VPSI filed its complaint with FTA on August 7, 1992. By letter dated October 7, 1992, FTA requested that VPSI submit additional information and documentation in order to clarify the complaint for continued processing under FTA Circular 7005.1. When VPSI failed to respond, FTA sent a second request, dated February 19, 1993, seeking the supplemental information. VPSI forwarded the information on March 8, 1993. On April 15, 1993, FTA requested that PACE respond to the VPSI supplemental information. FTA received the PACE response, dated May 18, 1993,

Background

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

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

FTA Circular 7005.1 outlines the minimum elements to be included in a grantee's private sector consultation process:

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

The Circular also describes the complaint procedure private operators should follow when they believe that a grantee's private sector policy is inadequate or has been improperly applied. Under this procedure disputes should be resolved at the local level. The procedure requires a dispute resolution process

between the grantee and the private operator and, failing settlement at this level, a review of the grantee's decision by either a local MPO or FTA. Under the terms of the Circular, FTA will entertain complaints only when a complainant has completed its local dispute resolution process.

Discussion

The policy statement provides that FTA will entertain complaints from private enterprise organizations only on grounds that (1) the recipient does not have a local private enterprise process that includes dispute resolution procedures, (2) the local process was not followed, or (3) the local process does not provide for the fair resolution of disputes. The policy statement also provides that FTA will not review disputes concerning the substance of local decisions regarding service or the appropriate service provider. The threshold issue in this matter is therefore whether PACE has met the three aforementioned procedural requirements.

First, PACE clearly has a private enterprise process that includes dispute resolution procedures, as is evidenced by a copy of these procedures submitted to FTA by VPSI on June 4, 1993.

Second, we conclude that in processing VPSI's complaint, PACE followed its written local procedures. The record indicates that on November 13, 1991, VPSI filed with PACE a complaint that PACE is providing subsidized vanpooling service in competition with similar service provided by VPSI. PACE issued an initial decision on December 29, 1991. On January 22, 1992, VPSI requested reconsideration. PACE denied the request on February 10, 1992. VPSI then appealed to the Chicago Metropolitan Planning Organization (MPO), which on July 17, 1992, refused to entertain the appeal on the ground that it did not fall within the MPO's subject matter jurisdiction. Under the local dispute resolution process, the MPO will only entertain complaints dealing with planning issues or the participation of the private sector in the planning and programming process.

VPSI cites the failure of the MPO to hear its appeal as evidence that the local dispute resolution is flawed since it does not provide complainants with adequate recourse against adverse decisions.

FTA guidance has never required that a local appeals process be part of the local dispute resolution process. While a local dispute resolution process may provide for local avenues of appeal, FTA does not require one. See, e.g., Durango Transportation, Inc. v. City of Durango, CO-09/85-01, February 24, 1987. Consequently, the absence of such a component does not invalidate the local process, nor is it a basis upon which FTA would entertain an appeal.

Third, FTA finds that PACE's process afforded VPSI a full and fair opportunity to settle its dispute. Indeed, in attempting to resolve this matter, PACE exceeded the requirements of its local written process. VPSI's own submittals indicate that between January 1992 and July 1992, VPSI participated in numerous meetings and telephone conferences with PACE officials to discuss and resolve issues related to its complaint.

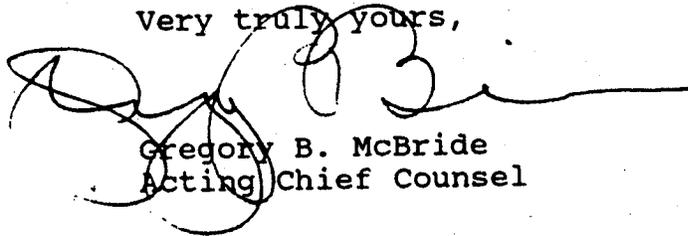
Moreover, in ruling on VPSI's complaint, PACE responded specifically and in detail to all of VPSI's allegations concerning the establishment of its vanpool service. PACE noted that the service had been competitively bid, and that VPSI not only was invited to submit a proposal, but also appeared at the pre-bid meeting. For reasons it has failed to explain, VPSI chose not to bid on the service. The bid was won and the service is now being provided by another private operator.

PACE further noted that prior to establishing its program, PACE had met with representatives of VPSI to discuss PACE's interest in vanpooling and possible VPSI involvement. PACE also met with representatives of other vanpool programs across the nation to discuss the operational, legal and market impacts of its involvement. In response to VPSI's allegation that PACE's program duplicates VPSI's service, PACE cites several studies--including one by the local MPO--indicating that the Chicago metropolitan area could support between 1,200 and 2,000 vanpools, only a fraction of which are currently operating in the region.

Conclusion

FTA finds that PACE has established and followed local dispute resolution procedures and that these procedures afforded VPSI an equitable opportunity to resolve this dispute. Since under the policy statement FTA will not review the substance of a local decision, FTA hereby dismisses VPSI's appeal. This decision constitutes FTA's final agency action in this matter.

Very truly yours,



Gregory B. McBride
Acting Chief Counsel

cc: Mr. Joseph DiJohn
Executive Director, PACE



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

Administrator

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

DEC 1 1993

G. Stephen Anzuoni, Esq.
Statler Office Building
2 Park Plaza, Suite 464
Boston, Massachusetts 02116

Dear Mr. Anzuoni:

This responds to your appeal on behalf of Gulbankian Bus Lines (GBL) of a decision by Richard H. Doyle, Regional Administrator, Federal Transit Administration (FTA) Region I, which held that the Assabet Valley Council on Aging (AVCOA), a subsidiary of the Worcester Regional Transit Authority (WRTA), is not providing impermissible charter service to elderly citizens of Southboro, Massachusetts. The ruling indicated that the service falls within the definition of "mass transportation" at section 12(c)(6) of the Federal Transit Act, as amended (FT Act), which Congress extended in 1968 to include special service such as transportation of the elderly, in addition to general service.

Under FTA's charter regulation, at 49 CFR 604.19, a losing party may appeal a decision to the FTA Administrator if it presents evidence that there are new facts or points of law that were not available or known during the investigation of the complaint. You indicate that there are several facts or points of law that were not available or known to GBL during the investigation of this matter.

First, you state that FTA recently changed its procedural rules for the processing of charter complaints, and that GBL was unaware of these rules at the time it filed its complaint.

There has been no substantive change in FTA's procedural rules for the processing of charter complaints. On December 1, 1992, under Order 1100.50, Change 2 ("FTA Delegations of Authority"), responsibility for deciding complaints under 49 CFR Part 604 was delegated to the FTA Regional Administrators. FTA has issued a Federal Register notice advising of this delegation (58 FR 52684, October 12, 1993). The Region I Office has informed me that you were notified of this delegation at the time you filed your complaint. Indeed, your submittals in this matter are addressed to the Regional Administrator, and not to the FTA Chief Counsel. It is apparent from this documentation that you had requisite knowledge of FTA procedures during the investigation of your complaint, and that these procedures were available and known to you at that time.

Second, you state that GBL was unaware of the definition of "special service," since this term does not appear in 49 CFR Part 604 or the FT Act.

In the preamble to its charter regulation (52 FR 11920, April 13, 1987), FTA discussed the definition of "special service." FTA noted that in 1968, Congress amended the definition of "mass transportation" to permit special service in addition to general service. One example of special service provided by Congress was service exclusively for elderly and handicapped persons. FTA stated that henceforth it would consider any exclusive service meeting this definition to be mass transportation. Since FTA published this information in the Federal Register on April 13, 1987, it was available to GBL at the time of the investigation of this complaint.

Third, you claim that GBL was unaware of the exact nature of AVCOA's service at the time it filed its complaint. You state that the Central Massachusetts Regional Planning Commission, which responded to the complaint on behalf of AVCOA, described it in general terms, and that GBL therefore lacks essential information concerning AVCOA's service. You request that AVCOA provide detailed responses to an extensive list of questions concerning this service.

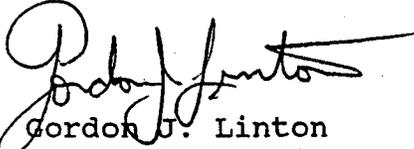
My review of the record indicates that GBL filed submittals in this matter on June 14, July 6 and July 19, 1993. In none of these submittals did GBL request the type of detailed information concerning AVCOA's service that it is now seeking. Having failed to solicit this information during the investigation of the complaint, GBL may not now claim that it was unavailable at that time.

Finally, you state that coincidentally, in an envelope postmarked August 17, 1993, you received unsolicited correspondence relating to a complaint against the Massachusetts Bay Transportation Authority (MBTA) alleging violations of the private sector provisions of the FT Act. This correspondence indicates that the Regional Administrator had referred the complaint to the MBTA with a request that the MBTA respond directly to the complainant's allegations. You state that this correspondence presents evidence relating directly to the Regional Administrator's past practice regarding the resolution of private sector complaints, and constitutes a new matter of fact not available or known during the investigation of this matter.

FTA finds that the availability of information concerning the processing of private sector complaints is not germane to this matter, which alleges a violation of FTA's charter service regulation. The Regional Administrator's practice in handling private sector complaints is therefore not a new matter of fact that justifies an appeal under 49 CFR Part 604.

In view of the foregoing, I deny your request for an appeal of the Regional Administrator's decision in this matter.

Sincerely,



Gordon J. Linton



U.S. Department
of Transportation
Federal Transit
Administration

December 8, 1993

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

G. Stephen Anzuoni, Esq.
Statler Office Building
2 Park Plaza, Suite 464
Boston, Massachusetts 02116

Dear Mr. Anzuoni:

In response to your correspondence of December 3, 1993, concerning the appeal of Gulbankian Bus Line (GBL) of a decision by Richard H. Doyle, Regional Administrator, Federal Transit Administration (FTA) Region I, concerning alleged charter violations by the Assabet Valley Council on Aging (AVCOA), I am enclosing a copy of FTA's denial of this appeal.

After reviewing the record in this matter, Gordon H. Linton, FTA Administration, concluded that GBL had presented no new facts of points of law that were not known of available during the investigation of this complaint. Mr. Doyle's decision that AVCOA's service for the elderly is permissible mass transit therefore stands.

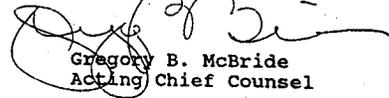
Your letter states that "in the nature of an alternative argument, GBL, on October 19, 1993, took Mr. Doyle at his word" and filed a complaint with the Worcester Regional Transit Authority (WRTA), AVCOA's parent organization, alleging that AVCOA and WRTA had failed to follow FTA's private enterprise guidance. You state that GBL has received no response to this complaint.

FTA's private enterprise policy guidance (FTA Circular 7005.1) provides that complaints should be resolved locally, and that FTA will entertain complaints from private operators only after the complainant has exhausted the local dispute resolution process.

Accordingly, I am forwarding a copy of this complaint to WRTA for resolution at the local level.

I trust that this responds to your concerns.

Very truly yours,



Gregory B. McBride
Acting Chief Counsel

Enclosure

cc: Richard H. Doyle, TRO-1



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

REGION VIII
Arizona, Colorado, Montana
Nevada, North Dakota,
South Dakota, Utah, Wyoming

Columbine Place
216 Sixteenth Street
Suite 650
Denver, Colorado 80202

December 29, 1993

Craig D. Busskohl, President
Arrow Stage Lines, Inc. 4001
4001 S. 34th Street
Phoenix, AZ 85040

Subject: City of Phoenix Charter Service

Dear Mr. Busskohl:

Your letter of December 13, 1993, expresses your concerns about the exception given to the City of Phoenix by FTA so that Phoenix Transit System (PTS) may provide charter service for the Lions Club International convention to be held in Phoenix during July 1994. This special events exception was granted through an exercise of FTA discretion under 49 CFR Section 604.9(b)(4). A copy of the application for the exception, including supporting documentation, and a copy of FTA's determination, dated October 12, 1993, are enclosed.

As the determination points out, the application for the exception included information that is sufficient to meet the requirements of 49 CFR Section 604.9(d)(2), 604.9(e) and 604.5(i). Therefore, the exception was approved.

In addition, Phoenix has demonstrated that private operators will be relied upon to help provide the charter service. In accordance with Sections 3(e) and 8(o) of the Federal Transit Act, FTA is requiring that Phoenix include private operators in the charter service to the maximum extent feasible.

The special events exception in FTA's charter regulations is designed for just such large-scale gatherings as the Lions convention, where it appears that local private operators may be unable to provide the amount and type of service that is needed without significant involvement or leadership by FTA grantees. Although your letter indicates that you feel capable of brokering charter service for the Lions, the Lions and others have indicated that PTS services and equipment are essential.

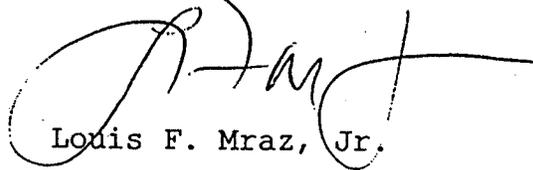
*Never given
the opportunity*

As a matter of precedent, FTA has previously granted special events exceptions for other Lions Club conventions, as well as papal visits, Olympics, etc. Currently, FTA is also working with

a number of other grantees and large organizations to ensure the provision of service for extraordinary events.

I hope that you will work with the City and PTS so that Arrow Stage Lines will have an opportunity to participate with other private operators in providing charter service for the Lions convention in Phoenix.

Sincerely yours,

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

Louis F. Mraz, Jr.

Enclosures

cc: Richard Thomas



U.S. Department
of Transportation

**Urban Mass
Transportation
Administration**

Headquarters

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

FEB 17 1994

Mr. Lawrence J. Hanley
President and Business Agent
Amalgamated Transit Union, Division 726
40 Yukon Avenue
Staten Island, New York 10314

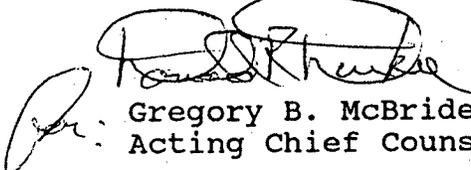
Dear Mr. Hanley:

This responds to your letter asking what regulations govern the ability of a federally funded transit agency, specifically the New York City Transit Authority (NYCTA), to provide service for events such as employee funerals.

Under the Federal Transit Administration (FTA) charter regulation, 49 CFR Part 604, an FTA recipient may not provide charter service if there is a willing and able private operator. "Charter service" is defined at 49 CFR 604.5 as transportation, using buses or vans, of a group of persons who, pursuant to a common purpose and under a single contract, have acquired exclusive use of the vehicle to travel together under an itinerary specified in advance. Bus service exclusively for the transportation of NYCTA employees to employee funerals would appear to meet this definition. Accordingly, if there is a willing and able private operator, NYCTA may provide this service only under one of the exceptions to the rule.

I am enclosing a copy of the charter regulation for your information. Should you have further questions concerning the provision of charter service by FTA recipients, please contact Rita Daguiard at 202/366-1936.

Very truly yours,


Gregory B. McBride
Acting Chief Counsel

Enclosure



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

Headquarters

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

*File Charter
1/10/94*

MAR 24 1994

The Honorable Leonard Stavisky
New York State Senate
10-17 147th Street
Flushing, New York 11357

Dear Senator Stavisky:

This responds to your request for clarification of the procedural requirements for obtaining an exception to the Federal Transit Administration (FTA) charter regulation that would allow Queens Surface, a private subrecipient of funds from FTA, to provide charter service for the North Flushing Senior Center (Flushing). You indicate that Flushing is a tax-exempt, non-profit social service center.

The FTA charter regulation, 49 CFR Part 604, prohibits the provision of charter service using FTA-funded facilities or equipment, unless one of the exceptions to the regulation applies.

One of these exceptions, at subsection 604.9(b)(5)(i), provides that a recipient or subrecipient of FTA funds may use FTA-funded vehicles to provide charter service for certain tax-exempt, non-profit social service agencies that receive funds either directly or indirectly under one of the U.S. Department of Health and Human Services (USDHHS) programs listed in Appendix A of the regulation. These programs include Administration on Aging (ADA) grants for supportive services and senior centers, and ADA social service block grants. If Flushing is receiving funding under one of these programs, it should submit to Queens Surface a certification in accordance with subsection 604.9(b)(5)(i). Queens Surface may then provide direct charter service to Flushing without seeking or obtaining a waiver from FTA.

If Flushing does not receive USDHHS funds, it may also be eligible for an exception to the charter regulation if it receives assistance from a State or local government comparable to the assistance provided by USDHHS under the programs listed in Appendix A. In subsection 604.9(b)(5)(iii), FTA has established a mechanism by which a State may petition FTA for inclusion in Appendix A of such an organization.

The State must petition FTA on behalf of the requesting organization, including in its petition the following information: (1) the name of the organization, a description of its membership, and the type of public welfare activities it performs; (2) evidence that the organization is exempt from taxation under section 501(c)(1), (3), (4), or (19) of the

Internal Revenue Code; and (3) a certification by the organization that: (a) it is tax-exempt; (b) it receives or is eligible to receive from a State or local government assistance comparable to that provided by USDHHS to the programs listed in Appendix A; and (c) that in the course of carrying out its activities, it arranges for travel of groups who are transit-disadvantaged or transit-dependent.

If FTA approves the petition, it will provide the State and the organization in question with a written statement to the effect that an FTA recipient or subrecipient may provide direct charter service to the organization.

Rita Daguillard of my staff would be happy to provide any assistance you may need in submitting on behalf of Flushing either a certification to Queens Surface under subsection 604.9(b)(5)(i) or a petition to FTA under subsection 604.9(b)(5)(iii). You may contact her at 202/366-1936.

I hope that this provides the necessary clarification.

Very truly yours,



Gregory B. McBride
Acting Chief Counsel

JUN 13 1994

Mr. Charles D. Busskohl
Chief Executive Officer
Arrow Stage Lines
4001 South 34th Street
Phoenix, Arizona 85040

Dear Mr. Busskohl:

Your letter to Senator John McCain has been forwarded to me for response. You express concern that your company, Arrow Stage Lines, will be adversely affected by the Federal Transit Administration's (FTA) recent rescission of its private enterprise policy.

In rescinding this guidance, FTA followed the requirements of section 12(i) of the Federal Transit Act, as amended (FT Act), which prescribes prior notice and a 60-day public comment period for all significant changes in agency law or policy. In its final Notice of Rescission of Private Enterprise Participation Guidance (59 Federal Register 21890, April 26, 1994), FTA noted that commenters opposed to the rescission failed to provide substantive evidence that the previous policy had resulted in a significant increase in private sector involvement in the provision of mass transit services or assisted in the improvement of mass transit systems. Accordingly, FTA cannot agree that the rescission will cause financial harm to private operators.

FTA's action was also based on its judgment that the requirements imposed by the previous guidance, while ineffective, have unduly infringed on the decisionmaking authority that local officials are entitled to exercise under the FT Act. FTA believes that this rescission is within the broad limits of its authority under the FT Act, represents a policy choice that is reasonable and valid in light of the agency's experience in administering the provisions over the past ten years, and is fully within the limits of its policymaking discretion.

I wish to emphasize that in rescinding these requirements, the agency continues to support the participation of private enterprise in the FTA program. Indeed, the section 8 planning process and the section 9(f) consultation process, during which key decisions concerning private enterprise participation are

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made, represent a thorough and comprehensive approach to the consideration of private enterprise at the local level, consistent with the requirements of the FT Act. FTA is confident that these processes will provide local officials with the flexibility to decide whether service is to be operated by public or private mass transportation companies, as determined by local needs.

Sincerely,

/s/ original signed by

Gordon J. Linton

cc: Senator John McCain



U.S. Department
of Transportation
Federal Transit
Administration

JUL 11 1994

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

G. Steven Anzuoni, Esq.
Statler Office Building
20 Park Plaza, Suite 464
Boston, Massachusetts 02116

Dear Mr. Anzuoni:

This responds to your letter of May 19, 1994, alleging that the Massachusetts Bay Transportation Authority (MBTA) made material misrepresentations of fact to the Federal Transit Administration (FTA). You state that in response to the FTA's inquiry concerning a private enterprise complaint filed by your former client, Hudson Lines, Inc. (Hudson), the MBTA made knowing and willful false statements that "constitute fraud on a tribunal."

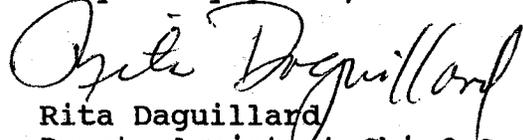
Specifically, you allege that in its letter of December 27, 1993, the MBTA sought to convey to FTA the impression that it was working diligently to resolve the complaint by conducting and evaluating various surveys, studies, etc. The truth of the matter, you state, is that since receiving Hudson's complaint of June 30, 1993, the MBTA neither conducted nor evaluated anything at all as regards the service or routes concerned. Hence, you conclude that the MBTA's letter of December 27, 1993, contained material misrepresentations of fact and constituted willful misconduct.

Please find enclosed a copy of a letter dated June 24, 1994, from Peter B. Morin, General Counsel of the MBTA, which emphatically denies your charge that the MBTA sought to deceive FTA. Mr. Morin explains that the resolution of Hudson's private enterprise complaint was directly related to the resolution of more global issues regarding transportation for all commuters in and around the town of Stoneham. He states that the MBTA did, in fact, conduct studies and did evaluate these studies and related data in arriving at its decision concerning transportation options for that area. I understand that Mr. Morin forwarded copies of these studies to you on May 6, 1994.

CONCURRENCES	
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In view of Mr. Morin's explanations and submission of the reports in question, as well as of the fact that you have presented no substantive evidence that the MBTA knowingly and willfully intended to deceive or mislead FTA, I find further inquiry into your complaint unwarranted. Accordingly, FTA closes its file on this matter.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Rita Daguillard".

Rita Daguillard
Deputy Assistant Chief Counsel
for General Law

Enclosure

cc: Peter B. Morin, Esq.



U.S. Department
of Transportation
Federal Transit
Administration

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

Chron Free Charts

JUL 15 1994

Mr. Craig D. Busskohl
Arrow Stage Lines
4001 South 34th Street
Phoenix, Arizona 85040

Dear Mr. Busskohl:

Thank you for your letter concerning charter operations by recipients of funds from the Federal Transit Administration (FTA). You ask for stricter enforcement of FTA's charter regulation, and request a commitment that FTA-funded equipment will no longer be leased for charter purposes.

Your concern appears to stem from FTA's granting of a special events exception to permit Phoenix Transit System (PTS), a subrecipient of FTA funds, to provide charter service for the Lions Convention. In a recent letter to Mr. James L. Schmidt of Arrow Stage Lines, FTA Administrator Gordon Linton explained that the granting of this waiver by Mr. Louis F. Mraz, Regional Administrator, FTA Region VIII, was both appropriate under the circumstances and consistent with the requirements of FTA's charter regulation, 49 CFR Part 604.

Under 49 CFR 604.9(b)(4), a recipient of FTA funds may obtain a waiver to provide charter service for special events to the extent that private charter operators are not capable of providing the service. FTA chose not to define "capable" to provide for a maximum degree of flexibility. Nevertheless, FTA stated that it would consider that private charter operators would not be capable of providing charter service if, for example, their fleets, even when pooled together, would not equal or even approximate the level of service required for this event. FTA noted that it added this exception to cover the situation where a city is hosting an event of national or international importance and private charter operators simply would not be capable of delivering the service needed. 52 Federal Register 11925 (April 13, 1987).

According to information FTA received, the Lions Club International meeting is expected to draw more than 20,000 attendees and to contribute over \$20 million to the local economy. The Lions Club and the Phoenix and Valley of the Sun Convention and Visitors Bureau requested in writing that PTS, the principal contractor for the city of Phoenix (the City), coordinate transportation for the event, based on their perception that its experience, personnel and equipment best qualified it to provide the service required. The City stated

that in requesting that PTS coordinate the arrangements, the Lions Club specified that because of the large amount of hotel-to-convention shuttle service involved, it would prefer to use as many urban style, two-door buses as possible, and to contract with an operator specializing in the delivery of urban service on a day-to-day basis.

FTA granted the City's petition for a special events exception based on these factors and on the condition that private operators would be given an opportunity to participate in this service to the maximum extent feasible. Moreover, the City assured FTA that, in accordance with 49 CFR 604.9(e), any charter service provided by PTS will be "incidental," i.e., will not interfere with or detract from scheduled, fixed route service. FTA's charter regulation allows the use of FTA-funded equipment for charter service for special events and in other situations where private operators are unable to meet the anticipated need. Any commitment by FTA that FTA-funded equipment will no longer be used in charter service would therefore be inconsistent with the regulation and contrary to the interest of the transit-riding public.

I assure you, however, that FTA actively enforces the charter regulation. For this reason, FTA carefully examines every request for exceptions to the charter regulation, and grants them only when it is clear that the factors presented meet the regulatory criteria. Moreover, FTA monitors its grantees' compliance with the charter regulation through triennial reviews and periodic audits and through the investigation of complaints by private operators. These measures meet the regulatory goal of protecting private charter operators from federally subsidized competition with public agencies, while providing these agencies with the flexibility to meet charter needs that otherwise would not be served.

Very truly yours,


Rita Daguiard
Deputy Assistant Chief Counsel
for General Law

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

In the matter of:	}	
	}	
Ark Transportation, Inc.	}	CHARTER COMPLAINT
Complainant	}	
	}	49 U.S.C. § 5323(d)
v.	}	
	}	TRO-1/VT-12/94-01
Marble Valley Regional Transit District,	}	
Respondent	}	

DECISION

SUMMARY

Ark Transportation, Inc. (Ark), filed this complaint with the Federal Transit Administration (FTA), alleging that the Bus Company, Inc., a/k/a/ Marble Valley Regional Transit District (MVRTD) is providing charter service in violation of the FTA charter regulation, 49 CFR Part 604. The complaint specifically alleged that MVRTD had executed an "Operating Agreement for Transportation Services" (Operating Agreement) to provide charter service for Killington, Ltd. (Killington), a Vermont corporation. Applying a balancing test to the service in question, FTA finds that the service is in fact mass transportation, and therefore, not in violation of the charter service regulation. However, some terms of the Operating Agreement interfere with the MVRTD's prerogative to control the service in the public interest. In order to correct that deficiency, the Operating Agreement must be changed to make clear that MVRTD will exercise sufficient control over the transportation services in accordance with FTA's definition of mass transportation. MVRTD must report to FTA within thirty days on the measures it has taken to comply with the terms of this order.

MVRTD and Killington entered into the Operating Agreement on September 29, 1994, which commenced upon execution and is to terminate on March 30, 1997, unless ended sooner by mutual agreement of the parties in writing. On November 21, 1994, MVRTD and Killington executed an Addendum to the Operating Agreement which provides that provisions therein shall prevail over the September 29 agreement. The Addendum deleted Paragraph D of Section III concerning MVRTD obligation to supply Killington with four 6-passenger waiting shelters.

COMPLAINT

Ark, which operates the Killington Shuttle Bus, is a private bus operator located in Killington, Vermont. By letter dated October 7, 1994, Ark filed this complaint with the FTA alleging that the service in question is actually a form of prohibited charter service. Ark attached a copy of the Operating Agreement to the complaint. The definition of charter service found in FTA's regulations at 49 CFR § 604.5(e) is as follows:

...transportation using buses or vans, or facilities funded under the Acts of a group of persons who pursuant to a common purpose, under a single contract, at a fixed charge...for the vehicle or service, have acquired the exclusive use of the vehicle or service to travel together under an itinerary either specified in advance or modified after having left the place of origin....

Specifically, Ark complains that MVRTD contracted with Killington to provide charter service operations along the Killington Access Road. According to its complaint, Ark had previously performed these services pursuant to contracts with Killington and with restaurants, lodges and nightclubs in the area. In addition, Ark states that MVRTD intends to provide services from Rutland to Sherburne, Vermont, for employees of Killington and the general public. Ark bases its complaint upon eleven allegations.

In Allegation #1, Ark contends that the service in question is a classic charter operation and not mass transit. First Ark states that MVRTD will pick up employees of Killington, along with members of the public, at 6:30 a.m. each morning during the ski season. Moreover, Ark asserts that the fact Killington is paying MVRTD to transport its employees roundtrip from Rutland to Killington, Vermont, each day is further evidence that the service in question is charter. Finally, Ark claims that MVRTD is running the same shuttle service that Ark performed previously under contract with Killington whereby the scheduled times and pick up points were set by Killington.

In Allegation #3, Ark maintains that the service is charter because riders will pay a set fare of \$1.00 or more which will be turned over to Killington. Ark further claims that Killington and local businesses will set the schedule for the service. In addition, Ark contends that MVRTD has no authority to operate on the Killington Access Road or to operate at night.

In Allegation #4, Ark claims that the local businesses have been pressured to accept the terms of the transportation services.

Under Allegation #5, Ark maintains that MVRTD and Killington had already decided to enter into a contract well before the bidding process and that the terms and conditions contained in the bid documents do not correspond to the contract executed between MVRTD and Killington.

Ark further alleges in Allegation #6 that MVRTD did not fully allocate its costs and is unable to separate its federally funded and private-for-profit operations.

In Allegation #10, Ark claims that in effect the contract between MVRTD and Killington will put Ark out of business. Ark further states that its buses will be taken back by their manufacturer and resold to MVRTD which currently does not have sufficient equipment to meet its contractual obligations with Killington.

Allegation #11 states that Ark is a willing and able provider of charter service and has the authority to provide this service.

Finally, Ark claims that MVRTD failed to comply with FTA's charter regulation for the following additional reasons: MVRTD did not publish a notice of its intent to provide charter service (Allegation #2); MVRTD did not send a notice of its intent to provide charter service to the American Bus Association or the United Bus Owners of America (Allegation #7); the service in question does not fall within an exception to the charter regulation (Allegation #8); and MVRTD is using federally funded equipment and facilities to compete unfairly with private charter operators (Allegation #9).

RESPONSE

By letter dated October 18, 1994, FTA informed MVRTD of the complaint filed against it. The letter stated that pursuant to the implementing regulation, a recipient of FTA funding may not provide charter service using FTA funded facilities or equipment if there is a private operator in its geographic area willing and able to provide that charter service, unless one or more of the exceptions listed at 49 CFR § 604.9(b) apply. Furthermore, MVRTD was advised that any charter service provided by a recipient under an exception must be incidental. The letter further stated that if MVRTD was providing charter service that is impermissible under the regulation, it should discontinue doing so immediately. In order to expedite the matter, FTA gave MVRTD until November 4, 1994, to respond to the complaint.

In its response dated November 3, 1994, MVRTD argues that the service being provided under the Operating Agreement with Killington is "mass transportation." In answer to Allegation #1, MVRTD contends that the fact that Killington is paying for the fares of its guests and employees does not defeat a finding that the service in question is mass transportation. Moreover, MVRTD claims that the issue of whether the service is provided under a single contract, or under separate contracts with each individual patron, is not the touchstone of a charter service. Instead, MVRTD notes that according to the Operating Agreement, it will provide "open door" service which is not limited to Killington employees and guests. MVRTD maintains that approximately 30 to 40 Killington employees will use the service and that members of the general public will take the remaining 80 to 90 seats on a first-come, first-served basis. With reference to the shuttle service from downtown Rutland to Sherburne which will transport Killington employees, MVRTD likewise argues that this service is mass transportation because access is extended to

anyone who wishes to ride on the buses. Furthermore, MVRTD contends that the mere fact that employees and guests of Killington may take greater advantage of the Rutland-Sherburne shuttle does not make this a charter service.^{1/} In support of this contention, MVRTD cites the preamble of FTA's charter regulation which states that under all FTA programs, "recipients provide subscription service, parking lot shuttles and other services that while open to the public may be of limited utility due to destination, hours of service or need." (52 Fed. Reg. 11919, Apr. 13, 1987) As further evidence that the service is public in nature, MVRTD notes that the schedules prepared by MVRTD and Killington will be advertised by MVRTD in the local papers and posted by Killington at its ski area in accordance with the terms of the Operating Agreement. In sum, MVRTD claims that the "open door" character of the service in question is central to the conclusion that the service constitutes mass transportation, not charter service.

In the second part of its response to Allegation #1, MVRTD addresses the issue of its control over setting the routes and schedules identified under the Operating Agreement. MVRTD explains that the routes and schedules were developed by MVRTD, in conjunction with its transportation consultant, Multi-Systems, Inc., as part of MVRTD's Short Range Transit Plan. While MVRTD acknowledged that Killington served in an advisory capacity by identifying areas and times of peak traffic flow and supplying information regarding routes and schedules which had proven satisfactory in the past, MVRTD states that Killington did not have "control" over the routes and schedules. MVRTD asserts that it is clearly responsible for setting the routes because under the Operating Agreement it is obligated to provide regularly scheduled service and to mutually coordinate any changes in the routes with Killington.

In response to Allegation #3, MVRTD submits that the night service does not qualify as charter merely because the fares collected from patrons will be forwarded to Killington. As stated previously, MVRTD claims that the issue of whether the service is provided under a single contract, or under separate contracts with each rider, does not establish the service as charter. Rather, MVRTD contends the service is clearly mass transportation because it is open to the general public and the routes and schedules are established by the recipient. In reply to Ark's contention that it has no authority to perform the service herein, MVRTD submits that it has been granted authority under 24 Vermont Statutes Annotated Section 5121, *et seq.* to deliver transportation services to all points within Rutland County. MVRTD further states that it is not constrained by the limits of the Certificate of Public Good issued to "The Bus" in 1981.

With reference to Allegation #4, MVRTD argues that Ark's claim that local businesses have been pressured to accept the terms of the transportation services is irrelevant in determining whether the service in question is charter. Nevertheless, MVRTD responds that there is nothing in the

^{1/} MVRTD attached copies of schedules for the Killington Shuttle Bus mid-day service and the Rutland/Mendon/Sherburne commuter service which indicates the first bus will depart Rutland at 6:15 a.m. and arrive at Killington at 7:30 a.m.

Operating Agreement that requires local businesses to take advantage of the transportation services and claims they are free to obtain services elsewhere. Moreover, the bus stop structures being provided to Killington under separate contract will be placed at high-traffic stops on public roads along MVRTD-designated bus routes.

Responding to Allegation #5, MVRTD again notes that the issue of whether MVRTD and Killington had already decided to enter into a contract before the bidding process began is irrelevant to a determination of charter service herein. However, MVRTD responds that Killington contacted Ark on about May 9, 1994, requesting submission of a bid for the services in issue for the 1994-95 ski season. Ark submitted its bid to Killington on June 14, 1994. The transportation service contract was awarded to MVRTD on July 19, 1994. Thus, MVRTD contends that Ark's allegation that the contract bid was somehow a "done deal" before Ark had a chance to bid on the contract is simply untrue.

Furthermore, MVRTD maintains that the issues raised in Allegation #6 concerning full cost allocation are totally irrelevant to Ark's contention that MVRTD is providing charter service. Moreover, MVRTD contends that since the service in question is mass transportation, and not charter service, this allegation is moot. Nevertheless, MVRTD responds that it has fully complied with the applicable regulations governing full cost allocation.

In Allegation #10, Ark claims that the contract between MVRTD and Killington will put Ark out of business. MVRTD again responds that this issue is wholly irrelevant in determining whether the service herein is charter and states that Ark's financial woes are in no way attributable to the Operating Agreement.

With reference to Ark's claim under Allegation #11, MVRTD claims that Ark is not a willing and able provider of charter service as defined at 49 CFR § 604.5(p) because Ark's equipment has been repossessed by Commonwealth Thomas and thus, Ark is currently unable to provide charter services.

In conclusion, MVRTD responds that since the service in question is mass transportation and not charter: it was not required to solicit responses from willing and able charter service operators through a newspaper notice (Allegation #2), it was not required to send a notice to American Bus Association or the United Bus Owners of America (Allegation #7), the charter exceptions provided under 49 CFR § 604.9(b) are not applicable (Allegation #8), and the transportation services to be provided under the Operating Agreement are mass transit which is fully consistent with federal and state law (Allegation #9).

REBUTTAL

By letter dated October 18, 1994, FTA notified Ark to submit any comments on MVRTD's response not later than 15 days after receipt thereof. In its rebuttal, dated November 15, 1994,

Ark argues that the FTA decisions of Seymour Charter Bus Lines v. Knoxville Transit Authority, TN-09/88/01, and Blue Grass Tours and Charter v. Lexington Transit Authority, URO-III-1987 support the complainant's position that the service in question is charter and not mass transportation. These cases involved service in and around university campuses which the FTA determined was charter and not mass transportation.

Specifically, Ark contends that the Operating Agreement is actually an agreement under a single contract for two defined groups of people, employees of Killington and skiers who come to the Killington region. Ark claims that Killington's employees and the skiers essentially have exclusive use of the buses. In support of this contention, Ark cites the Bluegrass case which stated that "[a]lthough the service is 'open-door' in the sense that anyone wanting to ride on it is not excluded from doing so, [FTA] has interpreted 'open-door' to mean involving a substantial public ridership and/or an attempt by the transit authority to widely market the service." As to exclusive use by the employees, Ark argues that the first buses will arrive at the ski area more than one hour prior to the operation of the lifts and therefore, the statement that the early buses are open door is fallacy. Ark explains that skiers and other members of the public would not be interested in arriving at the ski area at such an early hour. With reference to exclusive use by the skiers, Ark claims that the bus schedules indicate they were drawn up for the convenience of the skiers and notes that transportation between Rutland and Killington for individuals interested in shopping is extremely limited. In addition, Ark notes that the shuttle bus does not stop at all restaurants and hotels on the Killington Access Road but only at those particular businesses who are paying for the service.

Furthermore, Ark argues that under the Bluegrass case, it is clear that the service in question is charter because it is being provided based upon an hourly rate. Moreover, according to the midday public transit schedule, the bus stops and bus shelters are located on private property and not along public roads. In addition, Ark claims that it has sole authority to make stops along the Killington Access Road. Ark contends that these facts clearly place the Operating Agreement within the ambit of the Seymour case because although there supposedly is an "open door" policy and regular schedules, there is no posting of bus stop signs on public right-of-ways and the service only operates during the ski season from mid-November through April.

On the issue of control, Ark asserts that the Operating Agreement is actually for service provided under a single contract whereby Killington determines the route, rate and schedule. Moreover, Ark claims that MVRTD cannot be setting the scheduling for the Village Shuttle because the scope of the service is exactly the same as that provided by Ark in the past during which time Killington set the schedule. Ark also points out that under the terms of the Operating Agreement, Killington is required to supply MVRTD with two-way radio communication equipment in order to interface with Killington which indicates that Killington has control over the service. In further support of its contention that Killington has control over the service, Ark notes that Killington will retain ownership of the ski racks/holders which it is obligated to install on the buses pursuant to the Operating Agreement and will have exclusive advertising rights on all buses.

In response to MVRTD's statement that Ark is not a willing and able provider of charter service, Ark claims that it was a willing and able provider at the time of the contract bids and is presently capable of providing the service to Killington. Ark further claims that it was not given the opportunity to bid on all of the services now being provided by MVRTD.

FTA'S REQUEST FOR ADDITIONAL INFORMATION

By letter of November 22, 1994, FTA requested from MVRTD additional information needed to clarify points concerning the extent of control which the MVRTD will exercise in carrying out the provisions set forth in the Operating Agreement. The information requested and MVRTD's response of November 29, 1994, are summarized as follows:

QUESTION: Paragraph III.A: Please clarify the terms stating that the service may vary upon reasonable notice from Killington and whether MVRTD has the prerogative of honoring the questions or not.

ANSWER: The District may increase or decrease routes and scheduling based upon demand and volume. Hours and service have been designed and coordinated by the District's consultant, Multi-system Inc., in cooperation with Killington. The District has the final say in setting schedules and hours. For confirmation of this, see paragraph III. F. 2. and 3. of the Operating Agreement which provides that it is the District's obligation or responsibility to alter frequency of pick-ups or days or hours of operation.

QUESTION: Paragraphs III.C and F: Please clarify MVRTD's obligation to provide additional vehicles and services and explain what flexibility MVRTD has in this regard.

ANSWER: The District has no contracted obligation to provide any specific number of buses or size of buses. It is the District's responsibility to provide "fixed-route, open door service" but, beyond that, Killington has only the ability just as any resident would to suggest additional routes or stops.

QUESTION: Paragraph III.F: Please clarify the provision that at Killington's election, members of the public using the services may be charged \$1.00 per ride which will be turned over to Killington. This fact indicates that Killington will be setting and retaining fares for services provided by MVRTD. Please explain this issue more fully.

ANSWER: It is true that a \$1.00 fare will be refunded to Killington for Evening Route users as a partial return of the Killington subsidy. However, the District still retains the right to charge more than \$1.00. The District intends to charge a \$1.00 fare one-way to the general public between Rutland and Sherburne. This is the same fare charged by the District on its other routes. These dollars will not be refunded to Killington. The suggested \$1.00 fee was set by the District and its consultant Multi-system, Inc., with input from Killington. The fare was conceived to offset the

cost of service elements that could have hindered system delivery and thus make some service unavailable to or for the public. The City of Rutland, Town of Proctor and other communities subsidize the District's existing mass transit system in a similar fashion as Killington will do in this case.

QUESTION: Paragraphs VI.A and XI: Please clarify these paragraphs in terms of restrictions on MVRTD control.

ANSWER: Paragraph VI.A, "Employees and Use of Sub-Contractors" was intended to require that the District supply the mass transit services contemplated in the Operating Agreement and not a third party hired by the District. Killington wanted a mass transit system in place and is willing to subsidize it to make it happen. Killington did not want the District to be able to hire a subcontractor to perform any of the routes.

Paragraph XI is a standard arbitration clause. The parties desired to work collaboratively to bring mass transit to Sherburne and wanted to underscore the need to meet in person and resolve any differences.

Along with its November 29, 1994, response to FTA's questions, MVRTD submitted a responsive memorandum to Ark's rebuttal.^{2/} MVRTD argues that there are substantial factual differences between the Seymour and Blue Grass cases and the instant case. First, both of the cited cases involved service to a university campus where the university was found to have set the schedules and fares which MVRTD claims is not true in this case. Also in Blue Grass, there was a finding that while service to the campus was open to all, it was not advertised sufficiently to make the public aware of its availability. In MVRTD's case, the service will be advertised in several local papers, on the buses, and by Killington and other eating and sleeping establishments in the area. Moreover, MVRTD explains that it allows riders who take the evening bus to Rutland to transfer and utilize other MVRTD routes, unlike the service at issue in the Blue Grass or Seymour cases. Secondly, MVRTD argues that Blue Grass and Seymour involved services to an identifiable group of people attending a university which is distinct from MVRTD's situation which is not geared toward any defined group but to the public at large. MVRTD explains that the service will provide public transportation to the thousands of people living, shopping and working along U.S. Route 4, in Rutland, Mendon and Sherburne and not only to employees of Killington or skiers. MVRTD notes that Killington's competitor, Pico Ski Area, will no doubt benefit from the same service.

^{2/} MVRTD' attached its cost breakdown which indicates the following: Killington will be charged an annual rate of \$101,949.76 (3,872 hours at \$26.33 per hour) for the Daytime Shuttlebus; \$9,242 (351 hours at \$26.33 per hour) for the Commuter Route; and \$33,518 (1,273 hours at \$26.33 per hour) for the Evening Route.

MVRTD explained that the public demand for transportation services that exist in the Rutland-Sherburne region is due to the fact that two large ski areas are located in the Rutland area. MVRTD argues that "[s]kiers, in this factual background, are not a 'defined group,' they are the 'transportation public.'" MVRTD claims that its mass transportation services between Rutland and Sherburne further the goals of FTA's program of transit assistance for nonurbanized areas as set forth in FTA Circular 9040.1C, dated November 3, 1992.

In response to Ark's contention that the early morning service will be for the exclusive use of Killington's employees, MVRTD states that there is no evidence that skiers will not use the morning shuttle run and claims that the service is timed to get most skiers to the ski area in time for lifts to open. MVRTD states that under the present schedule buses depart Rutland for Killington at 7:00 a.m., lifts at Killington open at 8:00 a.m. on weekends and 9:00 a.m. during the week, and lifts at Pico open daily at 8:30 a.m. Furthermore, MVRTD anticipates that the service will take extra time in order to facilitate pick-ups and drop-offs throughout the service area. As to Ark's position that the service is for the exclusive use of the skiers, MVRTD states that the general public is already making use of the service going up and down the mountain and several businesses along the route have asked to be included in the service.

Referring to Ark's argument that under Blue Grass the service is charter because it is being provided on an hourly basis, MVRTD points out that some base had to be established with regard to subsidy. Furthermore, MVRTD's CPA and business manager configured service cost with full cost allocation. In reply to Ark's assertion that the bus stops are not located along public roads, MVRTD states that bus stop signs are located along the Killington Road and MVRTD buses will stop when they are flagged by the public, in safe areas. Further, MVRTD claims that there is no authority or documentation to substantiate the contention that Ark has sole authority to operate along the Killington Road. MVRTD states that the Killington Road is a public road and MVRTD buses are entitled to use it. Although the service only operates during the ski season, MVRTD explains that year-round service might be offered if demand necessitates.

With regard to the issue of control, MVRTD responds that although it coordinates with Killington, under the Operating Agreement MVRTD has the final say in choosing the rates, routes and schedules for the service. MVRTD notes that in reaching its decision in the Blue Grass case, the FTA considered the fact that the university had the prerogative to alter routes and schedules. Here, while Killington will be consulted, MVRTD claims it has the final say over schedules and routes and relied heavily on its consultant to design the system. MVRTD further contends that the Operating Agreement herein does not dictate what equipment is to be used as was the case in Blue Grass.

In response to Ark's allegation that there is a single contract between MVRTD and Killington, MVRTD contends that the Operating Agreement is essentially a subsidy agreement for public mass transportation. Furthermore, MVRTD argues that although Ark served the same general area previously, the service is open to the public this year as opposed to past years. MVRTD notes that it asked Killington to supply two-way radio communications as an extra precaution to

allow MVRTD to patch into town highway departments to facilitate help if needed with respect to road conditions. MVRTD claims it will use its own two-way communications equipment for dispatch and other everyday functions of service delivery. In regard to Killington's exclusive advertising rights on the buses, MVRTD asserts that all advertising is subject to approval in advance by MVRTD and claims that Killington in coordination with MVRTD will use advertising space to display route schedules and configurations.

As to Ark's claim that it is a willing and able provider of charter service, MVRTD responds that it was informed by Commonwealth Thomas that Ark vehicles were taken back by Commonwealth, are on Commonwealth's floor, and could be purchased by the MVRTD. Moreover, MVRTD claims that none of Ark's vehicles are ADA equipped and therefore, are unsuitable for public transportation.

COMMENT ON SUPPLEMENTAL RESPONSE

On December 6, 1994, Ark provided the following comments on the supplemental information furnished by the respondent. The FTA will consider those comments which concern issues previously raised in this proceeding and which are relative to the determination of whether the service herein is charter or mass transportation.

Ark takes issue with MVRTD's claim that "[t]he District has no contracted obligation to provide any specific number of buses or size of buses." Ark points out that Paragraph III.C specifically provides that MVRTD is obligated to provide up to four 32-passenger buses and one back-up bus.

In addition, Ark contends that the buses used in the night shuttle and mid-day shuttle will be used exclusively by Killington because Killington has contracted with MVRTD for their use. Ark takes issue with MVRTD's response that the service is open to the public this year as opposed to past years because the buses stop at condominiums located on private property that are connected to a ski area via a shuttle service just as apartments were connected to a university in the Seymour case. Furthermore, Ark claims that the fact that MVRTD is advertising the service in the "Mountain Times" underscores the fact that the service caters to vacation visitors as the paper's greatest circulation is in Sherburne at local eating, dining and lodging facilities.

Ark further contends that according to MVRTD schedules, it does not appear that riders may transfer to and from the Rutland/Sherburne route. With reference to the bus stop signs along the Killington Road, Ark claims that the signs, and posts they are attached to, are owned by Ark, not MVRTD.

Finally, Ark denies that its vehicles were taken back by Commonwealth Thomas. Instead, Ark explains that it asked Commonwealth to floor plan the vehicles which Ark can have back at any time.

DISCUSSION

The essential issue in this matter is whether the service provided by MVRTD is impermissible charter service or permissible mass transportation.

In its complaint, Ark claims that the service provided under the terms of the Operating Agreement is clearly charter service and is merely "cloaked" in mass transportation. Ark's argument that the service provided by MVRTD is charter service is based in large part on the Chief Counsel's determinations in the Blue Grass and Seymour cases and the definition of charter service set out at 49 CFR 604.5(e).

In Blue Grass, the Chief Counsel determined that the service provided by the Lexington Transit Authority (LexTran) basically corresponded to the definition of charter for the following reasons. First, the service was provided under a single contract, was operated on terms set by the university, and the recipient was compensated on an hourly rate. Second, the service was operated and managed differently from the recipient's other routes because there were no published schedules for the campus routes and the service was provided free to individual riders. Third, the service had been designed to meet the transportation needs of the university students and personnel, and, though it was operated open door, only coincidentally served the needs of the general public.

It should be noted that following the Chief Counsel's decision in Blue Grass, LexTran modified the service by ceasing to provide it under an agreement linking payment to hours of service, instead receiving an annual grant from the university. In addition, LexTran modified the service by publishing schedules for its campus service, advertising them to the public, and marking campus stops with its logo, thereby evidencing an attempt to invite public ridership. Subsequently, in a letter to the recipient, FTA recognized that by assuming control of the campus service and by making it open to the general public, the service had been converted to mass transportation.

In Seymour, the Chief Counsel found the campus service met FTA's criteria for charter service because it was provided under an agreement with the university which linked the cost of the service to the number of hours operated. Furthermore, pursuant to the agreement, the university was allowed to set fares and schedules which placed control of the service with a party other than the recipient. The Chief Counsel concluded that in order to come into compliance with FTA requirements, the recipient would be required to reconfigure the service to conform to FTA's mass transportation guidelines.

In the preamble to the charter regulations, FTA states that the main features of charter are: 1) the service is by bus or van; 2) the service is to a defined group of people; 3) there is a single contract between the recipient and the riders, not individual contracts between the recipient and each

rider; 4) the patrons have the exclusive use of the bus; 5) the charge for the bus is a set rate; and 6) the riders have the sole authority to set the destination. (52 Fed. Reg. 11919, Apr. 13, 1987)

In the instant case, Ark first argues that the service is charter because it is provided to two "defined groups" of people, skiers and Killington's employees, who essentially have exclusive use of the buses. Second, Ark maintains that the Operating Agreement is, in reality, an agreement under a single contract, whereby the service is being provided on a hourly rate. Third, Ark claims that Killington actually determines the route, rate and schedule, and Killington, and the riders via their rental contract with Killington, set the destination.

As stated by the Chief Counsel in Seymour, a balancing test must be applied to determine the nature of the service involved in any complaint filed with FTA, since, as the preamble to the charter regulation points out at pages 11919-20, there is no fixed definition of charter service, and the characteristics cited by FTA are given as examples only.

In applying the balancing test to the instant case, FTA notes that the service provided by MVRTD has similarities to that provided in Blue Grass and Seymour in that it is provided pursuant to an agreement and paid for on a hourly basis.

Moreover, certain provisions in the Operating Agreement appear to diminish MVRTD's control over the service. Specifically, although in its November 22, 1994, response to questions posed by the FTA, MVRTD stated that "it is the District's obligation or responsibility to alter frequency of pick-ups or days or hours of operation," a reading of Section III.F indicates that MVRTD will, in fact, be obligated to provide additional services at Killington's request. Furthermore, Section VI, "Employees and Use of Sub-Contractors," appears to lessen MVRTD's control over the service by providing that MVRTD will not be discharged from any obligation or liability by subcontracting or delegating any services except as specifically set forth in writing in advance of such delegation. In addition, while the FTA would encourage resolution of any differences which might arise between Killington and MVRTD, Section XI, "Dispute Resolution and Arbitration," puts both parties on an equal footing and therefore, appears to diminish MVRTD's control over the service. Further, although MVRTD responded that it has no contracted obligation to provide any specific number of buses or size of buses, the Operating Agreement states that MVRTD is obligated to provide up to four 32-passenger buses and one back up bus. On this point, FTA notes that determining the number of vehicles used is merely an operational detail; however, the type of equipment used should be decided by the recipient. Finally, Section III.F provides that "[a]t Killington's election" members of the public may be charged \$1.00 per ride which will be turned over to Killington to defray the cost of providing services. On this issue, the decision to charge fares should be MVRTD's not Killington's. Moreover, the fares received should not be transmitted directly to Killington, but instead, Killington's subsidy fee for the service should be reduced by the amount of any extraneous fares received from members of the general public.

In consideration of the foregoing, FTA has determined that the language in Operating Agreement should be changed to make clear that MVRTD has primary responsibility for the service and that Killington merely makes suggestions concerning the service and otherwise serves only in an informational capacity.

Although the service provided by MVRTD is somewhat similar to that provided in Blue Grass and Seymour, it has other characteristics which more easily fit the definition of mass transportation. While the Federal Transit Laws, as codified, at 49 U.S.C. § 5302(a)(7) define mass transportation as service provided to the public and operating on a regular and continuing basis, the FTA has further distinguished charter service from mass transportation by characterizing it as: 1) being under the control of the grantee, who generally is responsible for setting the route, rate, and schedule and deciding what equipment is used, 2) being designed to benefit the public at large and not some special organization such as a private club, and 3) being open to the public and not closed door so that anyone who wishes to ride on the service must be permitted to do so. (52 Fed. Reg. 11920, Apr. 13, 1987)

Ark argues that because the service provided by MVRTD does not contain these three elements, it is not mass transportation, but rather charter service. Ark claims that the first element is lacking because Killington sets the route, rate and schedule. In addition, Ark asserts that Killington has control over the service because it will supply MVRTD with two-way radio communication equipment which will be used to interface with Killington. As further confirmation of Killington's control over the service, Ark notes that Killington will have exclusive advertising rights on the buses and will retain ownership of the ski racks/holders attached to the vehicles.

The documentation submitted by MVRTD refutes this contention. MVRTD's maintains that the routes and schedules identified under the Operating Agreement were developed by MVRTD in conjunction with its transportation consultant, Multi-Systems, Inc., as part of MVRTD's Short Range Transit Plan (Plan). The MVRTD submitted a draft copy of a portion of the Plan which outlines the transportation objectives to be met as a result of bus service between Rutland and Killington. Section 8.2.2 of the Plan indicates that the purpose behind the service design is to combine ski-mountain shuttle bus service with regularly scheduled public bus service between Rutland and Killington Village. The Plan further provides that the service would be for (1) employees from Rutland and Castleton State College traveling to work on the ski mountain; (2) day skiers from Rutland and possibly from Castleton State College; and (3) Killington Village visitors who might be interested in day-time shopping opportunities in Rutland. According to the Plan, the immediate objective is to develop a service design for an operation that will be cost-efficient, convenient, and well-used. These provisions indicate that it is MVRTD's intent to use information supplied by Killington to assist in designing service to meet the needs of members of the general public travelling between Rutland and Killington.

Moreover, MVRTD's control over the service is evidenced by its response that MVRTD has the final say in setting schedules and may increase or decrease routes and scheduling based upon demand and volume. According to MVRTD, Killington merely has the ability to suggest

additional routes or stops. MVRTD further states that it intends to charge \$1.00 to the public between Rutland and Sherburne and retains the right to charge more than that amount for the evening service. Furthermore, it appears that the radio equipment supplied by Killington does not necessarily diminish MVRTD's control, but instead will likely facilitate MVRTD's operations. In addition, although Killington will have exclusive advertising rights on the buses, according to the terms of the Operating Agreement the advertisements must be approved by MVRTD in writing in advance and thus this provision does not seem to lessen MVRTD's control. Finally, as to the ski racks/holders which Killington will attach to the buses and retain ownership of, the Operating Agreement provides that MVRTD must give approval prior to installation, and therefore, this factor does not appear to decrease MVRTD's control over the service.

Therefore, assuming that MVRTD will change the language in the Operating Agreement to strictly conform to FTA's definition of control, the FTA finds that the service meets the first mass transportation criterion of being under the control of the grantee. This corrective action is consistent with the FTA's decision in Washington Motor Coach Association v. Municipality of Metropolitan Seattle, WA-09/87-01, where the Chief Counsel found that service was mass transportation although it failed to conform in one aspect, namely that the service be published in the grantee's schedules. In that case, before reinstating the service, the grantee was ordered to publish the service in its preprinted schedules.

With reference to the second element of FTA's definition of mass transportation, Ark maintains that the service is charter because it is not designed to meet the needs of the public at large, but rather two defined groups, namely skiers and employees of Killington.

In this regard, it should be noted that in the preamble to the charter regulation, FTA states that service is designed to benefit the public at large when it serves the needs of the general public and not some special organization such as a private club. (52 Fed. Reg. 11920, April 13, 1987) MVRTD claims that the service will provide mass transportation to thousands of people living, shopping and working in Rutland, Mendon and Sherburne and not only to skiers or Killington's employees. In addition, MVRTD notes that it is likely that Killington's competitor, Pico Ski Area, will benefit from the service. Assuming arguendo that the skiers and employees of Killington formed two "defined groups," it is clear from MVRTD's submission that MVRTD's service is not intended for the exclusive use of such riders, but is available to anyone wishing to board it. As such, it is being provided to benefit the public at large and is consistent with the second criterion of mass transportation.

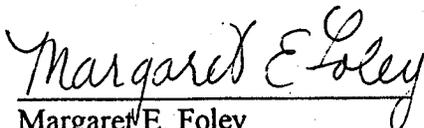
This second element of mass transportation extends over to FTA's third requirement for mass transportation, namely that the service be "open door." Ark claims that the skiers and employees of Killington essentially have exclusive use of the buses. In this connection, Ark states that members of the public will not avail themselves of the early morning service and that transportation services for shoppers is extremely limited.

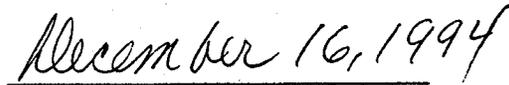
On the other hand, MVRTD states that the service is open door because access is extended to anyone who wishes to ride on the buses. MVRTD points out that skiers in the Rutland area do not fit into a "defined group" but actually are the transportation public. In addition, MVRTD claims that the general public is already using the service and states that several businesses along the route have asked to be included in the service.

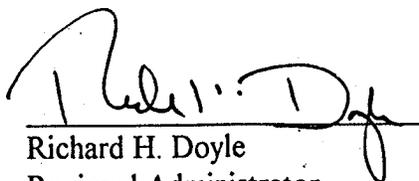
In determining whether service is open door, FTA looks not only to the level of ridership by the general public as opposed to a defined group, but also to the intent of the recipient who provides the service. The intent to provide service that is open door can be discerned by the efforts that a recipient has made to make the service known and available to the public. FTA thus takes into consideration the efforts a recipient has made to market the service. Generally, FTA considers that this marketing effort is best accomplished by publishing the service in the recipient's preprinted schedules. FTA notes that MVRTD has submitted copies of its schedules for the Killington mid-day and evening shuttle bus, and the Rutland/Mendon/Sherburn daytime and late afternoon/evening commuter service. Moreover, MVRTD claims that its service schedules will be advertised in several local papers and on the buses, and posted at local restaurants, lodging facilities, and the ski area. Accordingly, the FTA finds that the service conforms to the third criterion of mass transportation in that it is open to the public and not closed door.

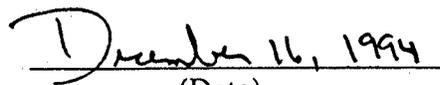
CONCLUSION

After a thorough investigation, FTA concludes that the service provided by MVRTD is mass transportation because it substantially conforms to the following criteria: 1) it is under the control of the grantee; 2) it is designed to benefit the public at large; and 3) it is open door. With regard to the first element, however, FTA finds that certain provisions in the Operating Agreement interfere with the MVRTD's prerogative to control the service in the public interest. FTA, therefore, orders MVRTD to change the language of the Operating Agreement to make clear that MVRTD is responsible for setting the route, rate and schedules and deciding what equipment is used, with Killington playing mainly an informational role. MVRTD must report to FTA within thirty days on the measures it has taken to comply with the terms of this order.


Margaret E. Foley
Regional Counsel


(Date)


Richard H. Doyle
Regional Administrator


(Date)

FEB 16 1995

Mr. H. Edward Dowling, Jr.
Owner/Operator
Florida Stage Lines, Inc.
3016 W. 38th Street
Orlando, Florida 32839

Dear Mr. Dowling:

Thank you for your correspondence of January 30, 1995, alleging that the Regional Transit System (RTS) of Gainesville, Florida is in violation of the Federal Transit Administration's (FTA) charter regulation, 49 CFR Part 604. Specifically, you allege that RTS continues to lease vehicles to Breakaway Tours, which is not a legitimate private operator.

Under the charter regulation, FTA recipients are barred from providing direct charter service if there is a willing and able private local provider. Recipients may, however, provide charter service through subcontracting arrangements with a legitimate private operator that lacks the capacity to perform a particular charter trip. FTA has defined "legitimate private charter operator" as the owner of at least one vehicle which it is licensed to operate in charter service. See, B&T Fuller, et al. v. VIA Metropolitan Transit Authority, TX-02/88-01, November 18, 1988.

Complaints that recipients are in violation of the charter regulation are investigated by the appropriate FTA Regional Office. Accordingly, by copy of this letter, I am forwarding your correspondence to Paul T. Jensen, Regional Counsel, FTA Region IV. You may contact him at 404/347-3948.

Very truly yours,

Berle M. Schiller
Chief Counsel

cc: Paul Jensen, TRO-4
Russell J. Olvera

CONCURRENCES	
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GRIC



U.S. Department of Transportation
Federal Transit Administration

400 Seventh St., S.W.
Washington, D.C. 20560

FEB 28 1995

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

Dear Mr. Olvera:

This responds to your request for an interpretation of the Federal Transit Administration's (FTA) charter regulation, 49 CFR Part 604, as it applies to the provision of charter service by the Regional Transit System (RTS) of Gainesville, Florida.

You state that on June 18, 1994, RTS published a notice of intent to provide charter service, requesting a response from private operators by July 31, 1994. No private operator responded to RTS' notice within the deadline. On October 26, 1994, Florida Stage Lines of Orlando/Ocala contacted RTS to request that it be determined "willing and able." You ask whether Florida Stage Lines is eligible to be determined "willing and able," since it failed to respond to RTS' notice by the stated deadline, and also since it lacks a valid occupational license as required by municipal ordinance. You moreover point out that Florida Stage Lines' principal place of business is in Orlando, which is approximately 125 miles from Gainesville.

Under 49 CFR 604.11, a private operator will only be determined "willing and able" if it responds to a recipient's notice in writing by the required deadline. Therefore, if Florida Stage Lines did not respond to RTS' notice by July 18, 1994, it may not be determined "willing and able" for the period covered by that notice.

Florida Stage Lines may be determined "willing and able" in response to a subsequent charter notice if it meets the criteria of 49 CFR 604.5(p), i.e., if it possesses the categories of revenue vehicles required and the legal authority to provide charter service in the affected area. An operator's distance from the service area may not be considered in making a "willing and able" determination. I understand from your letter that Florida Stage Lines does not have a valid permit to provide charter service in the Gainesville area. If such is indeed the case, Florida Stage Lines does not meet one of the required criteria and therefore may not be determined "willing and able."

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You also ask if, in the absence of a legitimate private charter operator in the Gainesville area, RTS may lease vehicles to Breakaway Tours, a local travel agency.

As FTA stated in its letter of September 15, 1993, RTS may subcontract only with a legitimate charter operator. FTA has defined "legitimate charter operator" as the owner of at least one vehicle which it is licensed to operate in charter service. See, B&T Fuller, et al. v. VIA Metropolitan Transit Authority, TX-02/88-01, November 19, 1988. If Breakaway Tours owns no vehicles with which it may provide charter service, it is not a legitimate private charter operator and thus does not qualify to lease vehicles from RTS.

However, in the absence of a "willing and able" charter operator in its service area, RTS may provide any type of incidental charter service, including direct service to clients of Breakaway Tours. FTA defines "incidental" as service that does not detract from or interfere with a grantee's regular mass transit operations.

Please contact Rita Daguiard at 202/366-1936 if you need further information concerning FTA's charter service requirements.

Very truly yours,



Borle M. Schiller
Chief Counsel

cc: Charles Webb, Esq.
H. Edward Dowling, Esq.
Paul Jensen, TRO-6



U.S. Department
of Transportation
Federal Transit
Administration

REGION V
Illinois, Indiana,
Michigan, Minnesota,
Ohio, Wisconsin

55 East Monroe Street
Suite 1415
Chicago, IL 60603
312-353-2789
312-886-0351 (fax)

Mr. Thomas P. Kujawa
Managing Director
Milwaukee County Transit System
1942 North 17th Street
Milwaukee, Wisconsin 53205-0016

MAR 13 1995

Dear Mr. Kujawa:

This letter is in response to your request dated March 8, 1995 for guidance as to whether the Milwaukee County Transit System (Milwaukee) may provide charter service to Lambeau Field in Green Bay, Wisconsin. I understand that Milwaukee has been providing service to various sporting events at Milwaukee County Stadium since 1976, but that effective in 1995 the Green Bay Packers will play all of their home games at Lambeau Field. Season ticket holders have been offered tickets to attend the football games in Green Bay and Milwaukee would like to provide charter service to those season ticket holders.

As you know, the Federal Transit Administration (FTA) charter regulations (49 CFR Part 604) do not allow a recipient of federal funds to use FTA funded vehicles for the provision of charter service except under certain limited situations. It is my opinion that the facts presented in your letter would not qualify for any of the exceptions contained in the regulations. Unless Milwaukee can determine that there are no willing and able private charter operators in the Milwaukee area capable of fulfilling this need for charter service, Milwaukee may not provide charter service for the purpose described in your letter.

Please be advised that this opinion is not intended to preclude Milwaukee from providing charter service under a subcontract arrangement with a private charter operator pursuant to 49 CFR Part 604.9(b)(2) as long as such service is considered incidental and does not impact Milwaukee's ability to meet its regular fixed route demand. I hope that this letter answers your questions regarding this matter, if you have any additional questions or need additional information please feel free to call me at 312-664-7200.

Sincerely,

Dorval R. Carter Jr.
Regional Counsel



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

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

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

MAR 13 1995

Mr. Robert E. Ojala
Administrator
Worcester Regional Transit Authority
287 Grove Street
Worcester, MA 01605

Dear Mr. Ojala:

This responds to your letter of February 24, 1995, concerning the FY 1994 Triennial Review of the Worcester Regional Transit Authority (WRTA). Specifically, you dispute the finding of non-compliance with the Federal Transit Administration's (FTA) charter regulation and maintain that the services WRTA provides in addition to its regularly scheduled routes do not constitute charter service. These additional services involve the use of FTA-funded buses by advertisers and the City of Worcester. According to the Triennial Review report, these services are provided on an incidental basis approximately two to three times per year on Saturdays.

You submit the following reasons to support your contention. First, you state that the WRTA has five painted buses in its fleet. You explain that the entire exterior of each of these buses has been painted with an advertisement by one advertiser who pays the painting cost and a monthly fee. The WRTA allows the advertisers to use the painted buses at various promotional events where, in most cases, the buses are merely on display. Under WRTA's current policy, the buses are provided either free of charge without a driver or for \$30 per hour with a driver. Next, you cite two examples where the WRTA provided transportation services to accommodate the City of Worcester in conjunction with official events. In the first instance, a van accompanied the Mayor and other city officials during the "Mayor's Walk," and in the second instance, the WRTA provided a van to transport visiting dignitaries on a tour of the city and various revitalization sites.

Based on the information contained in your letter and the Triennial Review report, the FTA makes the following findings. The incidental use of the painted buses by advertisers is not in violation of FTA's charter regulation so long as the vehicles are used for demonstration purposes only. However, if the advertisers use the vehicles to transport passengers, the services will be considered charter.

In response to the issue concerning the use of FTA-funded buses to accommodate the City of Worcester, the FTA has determined that these services are charter because the city officials had exclusive use of the vehicles and sole authority to set the itinerary. Moreover, the services were designed to benefit a defined group of people and not the public at large. Furthermore, from the

facts submitted it appears the services were operated closed door and were not open to the public. Indeed, the transportation services WRTA provided to the City of Worcester are analogous to the charter services described in Question and Answer No. 33 contained in "Charter Service Questions and Answers," 52 Fed. Reg. 42253, Nov. 3, 1987 (copy enclosed). However, it is important to note that the enclosed final rule published in the Federal Register on October 7, 1994 (59 FR 51133) extended through October 31, 1995, a charter services demonstration program to permit transit operators to meet the transit needs of government, civic, charitable and other community activities, as directed by Section 3040 of the Intermodal Surface Transportation Efficiency Act (ISTEA). Thus, while the services WRTA is providing to the City of Worcester are presently prohibited by the charter regulation, the FTA is currently evaluating this type of service and depending on the data collected during the demonstration program, the FTA may revise the charter regulation to permit this type of service in the future.

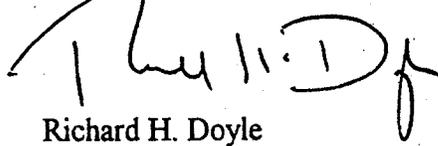
Please be reminded that the FTA charter service regulation prohibits a recipient of FTA assistance from providing charter service which uses FTA-funded facilities or equipment when there is at least one willing and able private charter bus operator. A recipient wishing to provide direct charter service must engage in the public notice process set forth at 49 CFR Part 604.11. If, as a result of the public notice process, a recipient determines that there is no willing and able private operator, it may provide charter service. Even if a recipient determines that there is a willing and able private operator, it may qualify for one of the exceptions set out at 49 CFR 604.9.

If WRTA wishes to continue providing the charter service described above it must take the following action immediately, as the 90-day period allowed to come into compliance with the Triennial Review has passed. As stated in the Triennial Review Report and in compliance with 49 CFR 604.11, the WRTA must annually publish a notice that describes the charter service that it proposes to provide in order to determine if there is a willing and able private provider of charter service. The notice must also be sent to all private charter service operators in the proposed geographic charter service area and to any private charter service operator that requests notice. In addition, a copy of the notice must be sent to the United Bus Owners of America, 1100 New York Avenue, N.W., Suite 1050, Washington, DC 20005-3934 and the American Bus Association, 1015 15th Street, N.W., Suite 250, Washington, DC 20006.

With reference to the service WRTA provided during the NCAA Championships in 1992, the FTA notes that the WRTA certifies that it will follow the proper procedures to obtain a "Special Events" exception in the future. For guidance regarding services which fall within this exception, see the information in Question and Answer No. 21 and the paragraph beginning "Exception 5" at 52 Fed. Reg. 42251, Nov. 3, 1987.

I hope this information is helpful. If you have any questions, please call Carol Morrissey at (617) 494-2396 or Margaret Foley at (617) 494-2409.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard H. Doyle". The signature is fluid and cursive, with a large initial "R" and a distinct "D" at the end.

Richard H. Doyle
Regional Administrator

Enclosures: Federal Register, Vol. 52, No. 212, Nov. 3, 1987
Federal Register, Vol. 59, No. 194, Oct. 7, 1994

investigation of the October 6, 1994 Complaint filed by Ark, as required by section 604.15. As discussed below, I find that Ark's appeal does in fact meet that standard.

I turn now to the principal issue of this case, whether the service in question is impermissible charter service or mass transportation. The Federal transit laws define "mass transportation" as "transportation by a conveyance that provides regular and continuing general or special transportation to the public, but does not include schoolbus, charter, or sightseeing transportation." 49 U.S.C. § 5302(a)(7). From this provision, FTA has identified three salient characteristics of mass transportation:

First, mass transportation is under the control of the recipient. Generally, the recipient is responsible for setting the route, rate, and schedule, and deciding what equipment is used. Second, the service is designed to benefit the public at large and not some special organization such as a private club. Third, mass transportation is open to the public and not closed door.

52 Fed. Reg. 11919-20 (April 13, 1987)

1. Under the control of the recipient. Ark makes several allegations related to the control criterion. First, Ark suggests that the schedule and routes of the village shuttle are controlled by Killington, noting that the routes and times have not changed since Ark ran the village shuttle. However, section III(k) of the Subsidy Agreement vests MVRTD with sole responsibility and authority for the setting and modification of routes and schedules. Ark presents no evidence that this provision has in fact been violated.

Second, Ark suggests that MVRTD lacks control over the service because it is limited to charging one dollar for its evening service. Again, the Subsidy Agreement provides that "MVRTD shall have the option, at its discretion, to charge an appropriate fee to the general public utilizing public transportation services" provided under the Agreement (§III (G)).

Third, Ark alleges that the use of two-way radios between Killington and MVRTD demonstrates Killington's control over MVRTD's routes and schedules. Ark argues that since local ordinances proscribe the use of radios to contact local police, the radios cannot be used for safety purposes. However, MVRTD has provided evidence that the radios are used for safety purposes, not as a means for Killington's control. Ark has not rebutted this evidence, nor has it explained how such radios have been used to control MVRTD's routes and schedules.

Fourth, Ark questions the section of the Subsidy Agreement requiring MVRTD to provide additional services at Killington's request. According to Ark, the only time MVRTD need not comply with the request is if MVRTD does not have sufficient equipment. Ark believes that MVRTD will always have sufficient equipment, so it has no effective right to refuse Killington's request for additional services. However, Ark has provided little evidence of MVRTD's excess capacity. In the absence of such evidence, the Subsidy Agreement adequately addresses this concern: section III(F) provides that additional public transportation services may be requested by Killington in exchange for a mutually agreed-upon extra subsidy. MVRTD will not be required

to provide the extra services if it does not have vehicles available, if the scope and extent of the additional services would significantly or materially alter the Agreement, or if agreement cannot be reached on price. In addition, section III(K) gives final responsibility and authority to MVRTD for any setting and modification of routes and schedules. Hence, ultimate control rests with MVRTD.

Fifth, Ark objects to sections VI and XI of the Subsidy Agreement, which deal respectively with assignment of contract and dispute resolution. Ark claims that both interfere with MVRTD's control over service. Again, Ark has failed to show how these provisions interfere with MVRTD's control over the routes, rates, and the equipment to be used. We find, on the contrary, that the assignment of contract provision increases MVRTD's control over its liability. Moreover, the dispute resolution provision does not interfere with MVRTD's control over rates, routes, and equipment; rather, it sets the ground rules for dispute resolution, which makes the agreement more predictable for both parties.

Finally, Ark contends that a letter sent by Killington requesting contributions from local businesses for bus service shows that Killington, not MVRTD, is in control of the service. Ark contends that the letter was sent only to businesses that previously supported Ark's charter service. This request for contribution does not give local businesses control over the service because payment is not obligatory. Nothing in the letter indicates that service will be cut off if the contribution is not sent.

Ark argues that Killington's request for contribution is analogous to Killington's collecting fares for the night shuttle, which FTA found in its December 16, 1994, decision to diminish MVRTD's control over the service (Decision, at 12). However, requesting contributions from businesses is distinguishable from collecting fares for the night shuttle. The passengers on the night shuttle are obligated to pay the fare in order to ride the bus. The businesses in the present scenario are not obligated to subsidize the service in order to benefit from it. Nothing prevents Killington from asking local businesses to contribute in order to reduce its subsidy to MVRTD. In any future letters, however, we recommend that Killington clarify that it is collecting to reduce its own subsidy, rather than to provide transportation services at the demand of the contributors. In addition, the letter stated that the contribution could be made either to MVRTD or Killington. As discussed above, Killington may attempt to solicit contributions to reduce its own subsidy. As for checks written to MVRTD, the Subsidy Agreement provides that fees charged to the general public by MVRTD will be applied as a credit toward Killington's annual subsidy. (See Agreement, §III(G).)

2. The service is designed to benefit the public at large. FTA has noted in prior decisions that service is designed to benefit the public at large when it serves the needs of the general public, instead of those of "some special organization such as a private club." 52 Fed. Reg. 11920 (April 13, 1987). Ark alleges that MVRTD's village shuttle is not open to the public because the routes accommodate only those traveling among condominium developments, and not persons traveling to Rutland or throughout Sherburne during most of the day. In FTA's view, persons renting condominiums and their guests are not a sufficiently defined group to be considered a "private club." Moreover, while the service accommodates them primarily, it is not restricted to their

exclusive use. FTA has found that service provided in this manner is designed to benefit the public at large. Las Vegas Transit System, Inc. v. Regional Transportation Commission of Clark County, Nevada, NVO6/92-2104 (November 25, 1992); Washington Motor Coach Association v. Municipality of Metropolitan Seattle, WA-09/97-01 (March 21, 1988).

3. Mass transportation is open to the public and not closed door. In determining whether service is truly "open door," FTA looks both at the level of ridership by the general public as opposed to a particular group and at the intent of the recipient in offering the service. The intent to make service open door can be discerned in the attempts to make service known and available to the public. FTA thus takes into account the efforts a recipient has made to market the service.

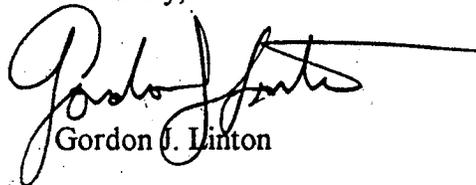
Generally, this marketing effort is best evidenced by publication of the service in the grantee's preprinted schedules (Washington Motor Coach, at 10). According to Blue Grass Tours and Charter v. Lexington Transit Authority, URO-III-1987 (May 17, 1988), FTA has interpreted "open door" to mean a substantial public ridership and/or an attempt by the transit authority to widely market the service (Blue Grass, at 5). The posting of bus stop signs and the connections to other transportation routes were also considered indicators of "opportunity for public ridership" in Seymour Charter Bus Lines v. Knoxville Transit Authority, TN-09/99-01 (November 29, 1989) at 9. These are simply examples of how recipients may manifest their intent to make service open door. A recipient is not required to make all of these efforts in order to have manifested the intent to make service open door.

I find that MVRTD has made adequate efforts to demonstrate its intent to make service open door. MVRTD has a preprinted schedule that is made available on request and has published the schedule several times in local newspapers. In addition, MVRTD has stated its intention to place signs along the route. In the meantime, MVRTD has stated in its schedule that it will pick up anyone who flags its buses so long as safety allows. The level of public ridership (which includes skiers using the village shuttle) is also significant. Ark makes a series of allegations regarding lack of MVRTD signage along the route, MVRTD's failure to advertise routes in certain local newspapers, lack of "public" ridership, and lack of connections with other local routes. However, as noted, a recipient is not required to make all the efforts outlined in earlier FTA decisions, only enough effort to manifest an intent that the service is open door. That level of effort has been reached in this case.

Conclusion

In summary, the service provided by MVRTD to the Killington, Vermont, ski area meets FTA's criteria for mass transportation. I therefore affirm the December 16, 1994, decision of the Administrator of FTA Region I that the service is not in violation of FTA's charter regulations.

Sincerely,



Gordon J. Linton

cc: John A. Facey, III, Esq.

Reiber, Kenlan, Schwiebert, Hall & Facey, P.C.