



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

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

200 West Adams Street  
Suite 2410  
Chicago, IL 60606-5253  
312-353-2789  
312-886-0351 (fax)

April 15, 2002

Joseph A. Calabrese, CEO  
General Manager  
Greater Cleveland Regional Transit Authority  
1240 West 6<sup>th</sup> Street  
Cleveland, Ohio 44113

RE: Request for Waiver of Charter Regulations

Dear Mr. Calabrese:

This letter serves as the Federal Transit Administration's (FTA) response to your request dated April 10, 2002, for an exception to the charter regulations. Specifically, the Greater Cleveland Regional Transit Authority (GCRTA) wants an exception to the charter regulations so that it may provide charter service for the U.S. Department of Veterans Administration (VA). The VA is hosting the National Wheelchair Games in Cleveland from July 8-14, 2002. GCRTA requested the waiver under 49 C.F.R. § 604.9(b)(5)(i), the non-profit exception.

The VA would need approximately 20 buses, which would need to be temporarily outfitted to provide additional capacity for wheelchair passengers. As the VA stated in its letter dated April 3, 2002, it is a government entity, there will be a significant number of physically challenged persons, and the charter trip is consistent with the function and purpose of the VA. The VA also completed all the required certifications. GCRTA states in its letter that the charter service is incidental service, as required by 49 C.F.R. § 604.9(e). Therefore, FTA grants GCRTA's request for an exception, as the proposed charter service meets all the requirements of 49 C.F.R. § 604.9(b)(5)(i).

Should you have any questions regarding this matter, please feel free to contact Nancy-Ellen Zusman. She can be reached at (312) 353-2789.

Sincerely,

Joel P. Ettinger  
Regional Administrator



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**APR 24 2002**

Claryce Gibbons-Allen  
Director  
Detroit Department of Transportation  
1301 East Warren  
Detroit, MI 48207

RE: Request for Waiver of Charter Regulations

Dear Ms. Gibbons-Allen:

This letter responds to the Detroit Department of Transportation's (DDOT) request for a special events charter exception under 49 CFR Section 604(b)(4) dated April 19, 2002, addressed to the Federal Transit Administration (FTA). DDOT is requesting a special events exception to allow it to operate charter service for the G-8 Energy Summit (the "Summit") in Detroit from May 1, 2002, to May 5, 2002. The City of Detroit was selected by the U.S. Department of Energy to host the Summit.

The preamble to the charter regulation explains that the FTA will grant an exception under § 604.9(b)(4) only for events of an extraordinary, special and singular nature such as the Pan American Games and visits of foreign dignitaries, 52 Fed. Reg. 11925 (April 13, 1987). This event is an international conference. Attendees will include energy ministers from Canada, France, Germany, Italy, Japan, Russia, the United Kingdom, and the European Union. FTA understands that the City of Detroit has special concerns for the attendees' safety and seeks a higher level of security for these people. As a result, the City of Detroit has requested that DDOT provide mass transit buses, which have the necessary capacity and which do not contain undercarriage storage. Due to issues of security related to the attendees, as well as the unusual and unique nature of this event, the FTA recognizes the G-8 Energy Summit as the type of event envisaged by § 604.9(b)(4). DDOT has also indicated that the use of the buses at the conference will constitute incidental service.

For these reasons, I hereby authorize DDOT to make FTA funded buses available to accommodate the need for a secure charter service during the G-8 Energy Summit. DDOT may, in accordance with the information provided to the FTA, utilize approximately 30 buses for the conference in the provision of this charter service.

DDOT is reminded that, in accordance with 49 C.F.R. § 604.9(e), "Any charter service that a recipient provides must be incidental charter service." The regulations define "incidental charter service" as service that does not interfere with or detract from mass transit use or shorten the mass transportation life of FTA funded facilities or equipment.

Should you have any questions regarding this matter, please feel free to contact Ms. Nancy-Ellen Zusman. She can be reached at (312) 353-2577.

Sincerely,

Joel P. Ettinger  
Regional Administrator



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May 10, 2002

Thomas J. Ross  
Executive Director  
PACE  
550 West Algonquin Road  
Arlington Heights, IL 60005

RE: Request for Exception of Charter Regulations

Dear Mr. Ross:

This letter serves as the Federal Transit Administration's (FTA) response to your request dated May 8, 2002, for an exception to the charter regulations. Specifically, PACE wants an exception to the charter regulations so that it may provide charter service for a visit by the President of the United States on May 13, 2002, to Chicago, IL. PACE requested the waiver under 49 C.F.R. § 604.9(b)(4), the special events exception.

PACE would need approximately 20 buses to transport employees of United Parcel Service from their suburban location to their hub downtown for the President's visit. PACE has contacted approximately XX number of private charter operators who have indicated they are unable to provide the service on such short notice with the required security measures. PACE received the request from the White House after normal business hours on May 7, 2002. PACE states in its letter that the charter service is incidental service, as required by 49 C.F.R. § 604.9(e). Therefore, FTA grants PACE's request for an exception, as the proposed charter service meets the requirements of 49 C.F.R. § 604.9(b)(4).

Should you have any questions regarding this matter, please feel free to contact Nancy-Ellen Zusman. She can be reached at (312) 353-2789.

Sincerely,

Joel P. Ettinger  
Regional Administrator



THE SECRETARY OF TRANSPORTATION  
WASHINGTON, D.C. 20590

August 6, 2002

The Honorable Michael R. McNulty  
U.S. House of Representatives  
Washington, DC 20515-3221

*MIKE:*  
~~Dear Congressman McNulty:~~

Thank you for your letter of June 3 supporting the waiver application submitted by the Capital District Transportation Authority (CDTA) for the City of Albany to use trolley vehicles to promote tourism.

I must address the Federal Transit Administration's (FTA) current stance in regard to charter regulations. The FTA has not revised its interpretation of the charter service regulation as a result of the impacts on the private transportation industry of the terrorist acts of September 11, 2001, as suggested by Mayor Jennings of Albany. That interpretation has not changed substantially since it was issued in 1987.

On June 5 FTA responded directly to CDTA's waiver request. Unfortunately, there is no legal basis on which a waiver can be granted, as the enclosure explains in more detail. CDTA, however, may still be able to maintain and store the vehicles in its FTA funded facility if it can make a determination in accordance with FTA's charter service regulation that there are no willing and able private operators.

You may contact Ms. Maisie Grace, FTA Regional Counsel in New York at (212) 668-2178 for additional details if needed. If I can provide further information or assistance, please feel free to call me.

Sincerely yours,

Norman Y. Mineta

Enclosure

cc: Dennis Fitzgerald, Executive Director  
Capital District Transportation Authority  
110 Watervleit Avenue  
Albany, New York 12206

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

Cardinal Buses, Inc.,  
Complainant

v.

Charter Complaint #2002-08  
49 U.S.C. Section 5323(d)

Interurban Transit Partnership,  
Respondent.

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DECISION

Summary

On June 20, 2002, Cardinal Buses, Inc. ("Complainant") filed a complaint with the Federal Transit Administration ("FTA") alleging that Interurban Transit Partnership ("Respondent") was going to provide a service in violation of FTA's charter regulation, 49 Code of Federal Regulations (C.F.R.) Part 604. The service specifically complained of pertains to Respondent's providing bus service for a radio station's birthday on June 22, 2002. Respondent filed an answer dated July 12, 2002. Complainant filed a response dated July 23, 2002. Upon reviewing the allegations in the complaint and the subsequent filings of both the Complainant and the Respondent, FTA has concluded that the service in question does violate FTA's regulations regarding charter service. Respondent is hereby ordered to cease and desist in providing such illegal service.

Complaint History

Complainant filed its complaint with the FTA on June 20, 2002. The complaint alleges that the Respondent was going to provide charter service<sup>1</sup> for a radio station promotional event on June 22, 2002. Specifically, Complainant alleges that the Respondent was intending to provide charter service for the event and as a private charter provider he had never been contacted by the Respondent. The Complainant also alleges that in the past he has received a "willing and able" questionnaire from the Respondent or its predecessor organization, Grand Rapids Transit Authority, but he has not received one in the past couple of years.

Respondent filed its answer on July 12, 2002. In it, Respondent denied that the service it provided for the radio "Birthday Bash" was charter service. Respondent indicated the service was open to the public, no fee was charged and there was no contract. The service, Respondent also indicated, did not interfere with its regularly scheduled service. Respondent states that it no longer provides charter service, which is why it no longer sends out a "willing and able" questionnaire.

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<sup>1</sup> Respondent receives Section 5307 and 5309 funds from FTA; therefore, they must comply with the charter regulations.

Complainant responded on July 23, 2002. In its reply Complainant stated that although there may not have been financial reimbursement, the Respondent benefited from the positive publicity it received in the radio announcements. This reply reiterated the assertion that Respondent's service was an illegal charter operation and that Complainant was not provided an opportunity to offer its own charter service. Complainant requested a cease and desist order.

### Discussion

As Complainant has accurately stated, recipients of federal financial assistance can provide charter service in very limited circumstances. In the absence of one of the limited exceptions, the recipients are prohibited from providing the service. 49 C.F.R. Section 604.9(a). Complainant is not asserting that any of the charter exceptions apply, but rather that the service they are providing is not charter service.

The regulations define charter service as the following:

[T]ransportation using buses or vans, funded under the Acts of a group of persons who pursuant to a common purpose, under a single contract, for a fixed charge for the vehicle or service, who have acquired the exclusive use of the vehicle or service in order to travel together under an itinerary either specified in advance or modified after leaving the place of origin. Includes incidental use of FTA funded equipment for the exclusive transportation of school students, personnel, and equipment. 49 C.F.R. § 605.5(e).

Thus, a determination needs to be made as to whether Respondent's service meets the definition of charter by examining the elements required for charter service. In order to qualify as charter service, the following questions need to be answered:

- a) Is this transportation service using buses funded with FTA money?
- b) Is the service for a common purpose?
- c) Is it under a single contract?
- d) Is it for a fixed charge for the vehicle or service?
- e) Is the exclusive use of the vehicles to travel together under an itinerary either specified in advance or modified after leaving the place of origin?

Each of these elements is discussed below. If Respondent's service includes each of these elements, then it is charter service. If it is charter service, a determination needs to be made as to whether it is permissible charter service.

#### A. Is this transportation service using buses funded with FTA money?

The Respondent receives federal money for its buses and its capital maintenance expenses. It is a publicly funded transportation service. Its primary source of funding is dollars it receives from the FTA. Respondent's purpose is to provide public transportation through a bus system. The buses it uses are purchased with federal money.

#### B. Is the service for a common purpose?

Although there was not a formal agreement, Respondent acknowledges that the radio announcements stated service was provided from park and ride lots to the event. The event, according to Complainant, was held at the Allegan County Fair Grounds.

C. Is it under a single contract?

The arrangement although not under a written contract does evidence a single oral contract. It appears that in exchange for the radio providing publicity for the Respondent, the Respondent provided free shuttle service for the "Birthday Bash" event.

D. Is it for a fixed charge for the vehicle or service?

Although the service was provided for free, FTA has indicated that charter service does not necessarily require there to be monetary payment. In its 1987 Charter Service Questions and Answers, 52 Federal Register 42248, FTA stated the following:

*27. Question:* Do the following types of service fall within the definition of "charter service" for the purposes of the regulation:

a. Service that is provided for free but otherwise meets the criteria in the definition of charter?

*Answer:* Cost is irrelevant in determining whether service is mass transportation or charter service. Thus, service which meets the criteria set by UMTA [FTA's precursor agency the Urban Mass Transportation Administration], i.e., service controlled by the user, not designed to benefit the public at large, and which is provided under a single contract, will be charter regardless of the fact that it is provided for free.

As a general rule, free charter service would be "non-incidenta" since it does not recover its fully allocated cost, and could not be performed by an UMTA recipient, even under one of the exceptions to the charter regulations. However, UMTA will consider certain types of free charter service to be "incidenta." An example of this would be free service to an economically disadvantaged group when there is no private operator willing and able to perform the service. Since UMTA is concerned about the diversion of mass transit revenues and the reduction in mass transportation life resulting from service provided below cost, it will, when presented with a complaint, consider such service "incidenta" charter only in a very limited number of cases.

Therefore, based on the facts in this case, the fact that the service was free is irrelevant.

E. Is the exclusive use of the vehicles to travel together under an itinerary either specified in advance or modified after leaving the place of origin?

The Respondent acknowledges that the vehicles were used to shuttle individuals from the park and ride lots to the event. The event, according to Complainant, was held at the Allegan County Fair Grounds.

The Respondent entered into an oral contract with the radio station to provide free shuttle service for its "Birthday Bash." The buses, which were purchased with federal dollars, were for the exclusive use of the shuttle service and those individuals interested in attending the event, not the general public at large. The schedule for the service was not available to the public with the other regular route information. Presumably, the radio station may have even dictated when the service should be provided based on the schedule of its event. The Respondent was clearly providing a private charter service. If the Respondent wanted to provide this type of charter service, it should have determined whether there were any willing and able private charter providers interested in providing the service.

### Acceptable Charter Service

If a recipient of federal funds, like the Respondent wishes to provide charter service, then it must comply with the procedural requirements. The regulation states the following:

If a recipient desires to provide any charter service using FTA equipment or facilities the recipient must first determine if there are any private charter operators willing and able to provide the charter service ... To the extent that there is at least one such operator, the recipient is prohibited from providing charter service with FTA funded equipment or facilities unless one or more of the exceptions applies, 49 C.F.R. Section 604.9(a).

There are a number of exceptions listed for providing charter service. However, the Respondent has not contended that one of the exceptions to the charter regulations applies in this case. By filing his complaint, Complainant has indicated there was at least one willing and able private provider interested in providing the service.

The regulations clearly state that before a recipient provides charter service it must determine if there is any willing and able charter operator. 49 C.F.R. § 604.9(a). In order to determine if there is at least one private charter operator willing and able to provide the service, the recipient must complete a public participation process. 49 C.F.R. § 604.11(a). The regulations under 49 C.F.R. § 604.11(a) require that the recipient complete the following:

- (1) At least 60 days before it desires to begin to provide charter service...
- (b) The public participation process must at a minimum include:
  - (1) Placing a notice in a newspaper, or newspapers, of general circulation within the proposed geographic charter service area;
  - (2) Send a copy of the notice to all private charter service operators in the proposed geographic service and to any private charter service operator that requests notice;
  - (3) Send a copy of the notice to the United Bus Owners of America, 1300 L Street, NW., Suite 1050, Washington, DC 20005 and the American Bus Association, 1100 New York Avenue, SW, Suite 1050, Washington, DC 20005-3934.
- (c) The notice must:
  - (1) State the recipients name;
  - (2) Describe the charter service that the recipient proposes to provide limited to days,

- times of day, geographic area, and categories of revenue vehicle, but not the capacity or the duration of the charter service;
- (3) Include a statement providing any private charter operator...at least 30 days... to submit written evidence...
  - (4) State the address to which the evidence must be sent;
  - (5) Include a statement that the evidence necessary for the recipient to determine if a private charter operator is willing and able includes the following:
    - (i) A statement that the private operator has the desire and the physical capacity to actually provide the categories of revenue vehicle specified, and
    - (ii) A copy of the documents to show that the private charter operator has the requisite legal authority to provide the proposed charter service and that it meets all necessary safety certification, licensing and other legal requirements to provide the proposed charter service.
  - (6) Include a statement that the recipient shall review only that evidence submitted by the deadline, shall complete its review within 30 days of the deadline, and within 60 days of the deadline shall inform each private operator that submitted evidence what the results of the review are.
  - (7) Include a statement that the recipient shall not provide any charter service using equipment or facilities funded under the Acts to the extent that there is at least one willing and able private charter operator unless the recipient qualifies for one or more of the exceptions in 49 C.F.R. § 604.9(b).

#### Procedural Determination Discussion

The regulation under 49 C.F.R. § 604.11 clearly sets forth the procedures for determining if any willing or able private charter operators exist. The onus is upon the recipient to provide a “public participation process.” At a minimum, the recipient is required to provide any private charter operator with at least 30 days to submit written evidence to prove that it is willing and able, and then it must inform each private operator what the results are at least 60 days before the deadline.

The Complainant has indicated that it is a “willing and able” charter service within the geographic area in question. The Respondent does not challenge this assertion. Respondent acknowledges that it no longer sends out “willing and able” questionnaires, because it no longer provides charter service. However, Respondent needs to understand what constitutes charter service in order to be able to state that it no longer provides charter service.

Respondent failed to properly determine whether there were any willing any private charter operators willing and able to provide the service to the event. Therefore, since Respondent has not raised any of the exceptions that would apply to providing charter service, it is prohibited from providing charter service with FTA funded equipment or services under 49 C.F.R. § 604.9(a).

#### Remedy

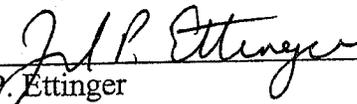
Complainant has requested that Respondent cease from providing charter operations in the future, and that it refers charter requests to private providers. FTA grants Complainant’s request for the

cease and desist order and orders Respondent to cease providing charter service in the future, and if they desire to provide charter service, then the Respondent must follow the notice and review procedures for determining if there are any willing and able private charter operators.

Conclusion and Order

FTA finds that Respondent provided impermissible charter service and orders it to cease and desist any such further service. Refusal to cease and desist in the provision of this service could lead to additional penalties on the part of FTA.

In accordance with 49 C.F.R. § 604.19, the losing party may appeal this decision within ten days of receipt of the decision. The appeal should be sent to Jennifer Dorn, Administrator, FTA, 400 Seventh Street, S.W., Room 9328, Washington, D.C. 20590.

  
\_\_\_\_\_  
Joel P. Ettinger  
Regional Administrator

08-20-02  
Date

## BEFORE THE FEDERAL TRANSIT ADMINISTRATION

Kemps Bus Service, Inc.  
Complainant

v.

Charter Complaint  
49 U.S.C. Section 5323(d)

Rochester-Genesee Transportation Authority,  
Respondent.

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DECISION

Summary

By letter dated March 18, 2002, Kemps Bus Service, Inc. ("Complainant") filed a complaint with the Federal Transit Administration ("FTA") alleging that Rochester-Genesee Transportation Authority ("Respondent") is providing service in violation of FTA's charter regulation, 49 Code of Federal Regulations (C.F.R.) Part 604. The service specifically complained of pertains to Respondent's bus service to a funeral in Syracuse, a school field trip, local supermarket service, a golf tournament and college campus service. Respondent filed a Response dated April 3, 2002. Respondent filed a second Response dated April 23, 2002. Complainant filed a Rebuttal dated May 6, 2002. Complainant filed a Second Rebuttal on May 21, 2002. Respondent filed a 3<sup>rd</sup> Response by letter dated July 15, 2002. Complainant filed a 3<sup>rd</sup> Rebuttal by letter dated July 17<sup>th</sup>, 2002. Upon reviewing the allegations in the complaint and the subsequent filings of both the Complainant and the Respondent, FTA has concluded that the service in question does violate FTA's regulations regarding charter service. Respondent has admitted that Respondent's charter procedures were in violation of FTA's regulations and is hereby ordered to cease and desist in providing such illegal charter service.

Complaint History

Complainant filed its complaint with the FTA by letter dated March 18, 2002. The complaint alleges that the Respondent is providing illegal charter service<sup>1</sup> by providing private charter service for (1) the Rochester Firefighters attending a funeral, (2) a field trip for the Livonia School District, (3) local supermarket chains, (4) a local LPGA golf tournament and (5) inter-campus shuttling and commencement around a private college. Specifically, Complainant alleges that this service is charter because Respondent did not follow the required public participation process and did not receive a waiver from FTA to provide these services

Respondent filed its Response by letter dated April 3, 2002. In it, Respondent denied that it was providing illegal charter service, and attached as an exhibit a copy of a letter from an unidentified signatory stating that the service was requested for "March 2002" because it exceeded Golden

Memories By letter dated April 15, 2002, FTA requested Respondent to flesh out more fully its Response to the Complaint.

Respondent filed a Second Response dated April 23, 2002. This response reiterated that the funeral service and school trip were done because such service exceeded the capacity of a private charter operator. It also stated that the LPGA event and the supermarket service are of a public nature and any member of the public may board according to their timetable. Respondent attached as exhibits a copy of a "Grocery Shuttle Outline" dated 4/23/02 and various college campus shuttles timetables, which purport to be public schedules

Complainant sent their Rebuttal on May 6, 2002. This Rebuttal reiterated the assertion that Respondent's service is an illegal charter operation and also noted that Complainant was not provided proper notice for an opportunity to offer its own charter service. Respondent reasserted its allegations regarding the Livonia School District field trip and provided a copy of an invoice from Respondent to such school. Complainant states that contracts should not be between a recipient of Federal funds such as the Respondent and a charter customer. In addition, Complainant raises several other alleged charter trips that were referenced in Respondent's Response such as the service on behalf of the Town of Chili and the Siena Catholic Academy. With respect to the commencement service and the LPGA event, Complainant states that it contacted these organizations to try and provide the service and was informed that these services were under contract with Respondent. Complainant alleges that this service would not fit within one of the "special event" exceptions to the FTA regulations

Complainant submitted a Second Rebuttal dated May 21, 2002, in response to Respondent's Second Response. Complainant submits that the LPGA event is not public service because it is performed pursuant to a contract and that an opportunity was not first given to the private operators. Complainant points out that it is a special 5 day event for which passengers do not pay a fare. With respect to the supermarket service, Complainant alleges that this is also performed pursuant to a contract between Respondent and the supermarkets and that the passengers pay no fare. Complainant alleges that the service was taken over by Respondent after a private operator went out of business ten years ago and that there was no public participation process. Lastly, Complainant explains that the college service, which they are complaining of, is service for inter-campus shuttling and graduation commencement, not the other shuttles with links to off-campus life. Complainant states that the commencement service was not addressed by Respondent's responses and that this service is solely within the campus and is not regular route service. Also, Complainant again alleges that the college service is pursuant to a direct contract with the college.

By letter dated June 26, 2002, FTA requested further information of Respondent in order to clarify Complainant's allegations.. Generally, the FTA inquired into the existence of the alleged contracts, the basis of the fares, whether the campus is open to the general public, whether there is commencement service provided and how the charters were obtained.

Respondent filed a 3<sup>rd</sup> Response by letter dated July 12, 2002. Respondent again claimed that the supermarket service, LPGA service and college service are public routes with publicly advertised schedules and fares, open to the public. Respondent states that the supermarket service is "underwritten" by the grocery stores, although no contract is attached and no fare is charged.

Respondent states again, with respect to the LPGA service, that it is a public route, open to the public and advertised, pursuant to a contract with the golf tournament. A copy of the schedule and contract is attached. Similarly, the Respondent states that the college service for the Rochester Institute of Technology is a public route, no fare is collected; it is open to the general public and it is performed pursuant to a contract with the college. FTA's question regarding access to the campus by the public was not addressed. A copy of the contract with RIT was attached as an exhibit. Respondent asserts that the commencement service is an expansion of the existing route structure. Lastly, Respondent states that with respect to the Funeral service, Livonia School District and Siena Catholic Academy service that, Respondent acknowledges "procedural irregularities" for these charter requests and states that they have taken corrective measures to avoid any further "misapplications" of FTA's charter policies.

### Discussion

As Complainant has accurately stated, recipients of federal financial assistance can provide charter service in very limited circumstances. In the absence of one of the limited exceptions, the recipients are prohibited from providing the service. 49 C.F.R. Section 604.9(a). Complainant is no longer asserting that any of the charter exceptions apply, but rather that the service they are providing is not charter service.

The regulations define charter service as the following:

transportation using buses or vans, funded under the Acts of a group of persons who pursuant to a common purpose, under a single contract, at a fixed charge for the vehicle or service, have acquired the exclusive use of the vehicle or service to travel together under an itinerary either specified in advance or modified after leaving the place of origin.  
49 C.F.R. § 605.5(e).

Thus, a determination needs to be made as to whether Respondent's service meets the definition of charter by examining the elements of charter service. In order to determine whether service is charter, FTA looks at the following questions:

- a) Is this transportation service using buses funded with FTA money?
- b) Is the service for a common purpose?
- c) Is it under a single contract?
- d) Is it for a fixed charge for the vehicle or service?
- e) Is the exclusive use of the vehicles to travel together under an itinerary either specified in advance or modified after leaving the place of origin?

See United Limo, Inc. v. South Bend Public Transportation Corporation

With respect to Complainant's allegations, it must be determined whether the service is "charter" service as described above or whether it more closely fits the definition of "mass transportation". Mass transportation is defined as service provided to the public and operating on a regular and continuing basis. 49 U.S.C. Section 5302 (a)(7). Mass transportation can be recognized by the following features: it is under the control of the recipient; the recipient sets the route, rate and

schedule and decides on the equipment; the service benefits the public at large and not some special organization and it is open to the public. 52 Fed. Reg. 11920, April 13, 1987.

#### A). The RIT campus service

Beginning with Respondent's service provided in and around the RIT campus, in the questions and answers section of the implementing charter regulations in the federal register, a relevant question was posed. The question asked whether service within a university complex according to routes and schedules requested by the university would constitute charter service. The answer indicated that "if the service is for the exclusive use of students and the university sets fares and schedules, the service would be charter. However, such service operated by a recipient which sets fares and schedules and is open door, though it serves mainly university students, would be mass transportation [Question 27(d)]." 52 FR 42248 (November 3, 1987) (DOT Charter Service Questions and Answers).

A review of the various exhibits to Respondent's July 15, 2002 Response indicates that factually the Respondent's service is more similar to the former, than the latter type of service. The university decides when it wants to add another bus to the schedule and the time of day the bus will operate. It is the university that decides whether the service will continue to operate or not. The contract between Respondent and the university sets forth (as best as can be determined) the numbers of hours a day a route will operate. Overall, there is a per hour rate charged the university for the bus service. The Respondent keeps track of the actual hours operated and adjusts the university's invoice accordingly. Periodically, the university requests special service from the campus to Amtrak and the Airport for special days of the year. As the letter contract says, "RIT may elect to add additional operating days", if the service proves worthwhile. Despite Respondent's contention that the service is open to the public and regular route service, it appears that the service is established pursuant to a single contract or series of contracts, that there is a fixed charge, the itinerary is specified in advance and that it is specifically designed to meet the needs of the university students. Moreover, the service is designed and under the control of the university, although operated by the Respondent. As the letter contracts demonstrate, although anyone boarding the bus travels for free, the service is not set up to benefit the general public except as the public might coincidentally need to travel around the campus area. While there are published schedules, one factor alone is not determinative of whether a service is mass transportation or charter. See Blue Grass Tours v. Lexington Transit Authority. The Respondent's inter-campus service more closely fits the definition of charter described above.

#### B). Funeral Service and Livonia School Trip

As FTA's response and rebuttal investigation process proceeded, Respondent acknowledged that these services were impermissible charter service as Respondent contracted directly with the customer and it did not fall within an exception to the general charter prohibition. Respondent has stated that it has implemented new procedures and will have to provide a copy of these procedures in writing to FTA and Complainant within thirty (30) days of the date of this decision to ensure that these charter violations do not reoccur.

#### C). Supermarket service

Respondent maintains that this supermarket service is open to the public and pursuant to regular schedules, which were submitted as exhibits. Further, Respondent states that there is nothing in

the regulations, which prohibits service being underwritten by others. This is true if it were the only factor; however, the "schedules" as submitted do not appear to be like Respondent's other regular schedules. In fact, the documents submitted are entitled "View of Regular Lease Service Provided Weekly". Within the exhibit, it states that certain service is "guaranteed revenue". These are indications that the service is, in fact, charter done pursuant to a contract at a fixed rate (although such contract information was not provided). On the "Lease Trip Log", it states that there can be no standees and that they should "make an extra trip if necessary". Further, it states that they should be sure to make a record of such extra trip. On another Lease Trip Log, it states that the driver should stop at the First Federal Bank, if one of the passengers so requests. This service "underwritten" by the Grocery store appears to be operated for the benefit of a certain group of individuals, living in apartment complexes, which the grocery store wants to bring to its store to shop. One can infer that the pick-up locations were developed at the behest of the grocery store and its clients. It is not intended for the public at large and specific stops and extra trips will be operated to fit the needs of this group. Therefore, this service appears more like charter than mass transportation.

#### D).LPGA Golf Service

The service at issue here is advertised and open to the public. It is performed under a single contract and no fare is charged. Although it stops at different public locations and is open to the public at large, these stops are specified in the contract as are the number of buses to be operated each day. The contract also specifies the days of service, the times and the parking lots to be used. Unlike mass transportation, this service is not provided on a regular and continuing basis. It operates only a week a year when the golf tournament is in session. All decisions regarding the service are determined by the tournament association and not by the Respondent; hence, while it has some elements of mass transportation, it is more akin to charter than mass transportation.

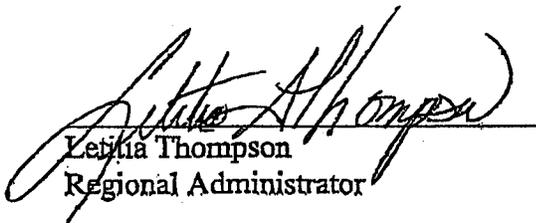
#### E. Town of Chile Service Contract

Respondent did not respond to the issue of the service under the Respondent's contract with the Town of Chile, raised by Complainant in its May 6, 2002 letter. This appears to be similar to the service Respondent performed for the Livonia School District in that the request did not come from a private charter operator. If the Respondent wants to perform direct charter service, the Respondent should first comply with the requirements of 49 C.F.R. Section 604.11; otherwise, service should fit within one of the exceptions to Section 604.9(b).

Conclusion and Order

FTA finds that Respondent has been providing impermissible charter service and orders it to cease and desist any such further service, as soon as practicable in accordance with the Respondent's existing contracts. Refusal to cease and desist in the provision of this service could lead to penalties on the part of FTA. Respondent shall also provide a copy of its new charter procedures to Complainant and FTA for FTA's review and shall advise FTA within thirty (30) days of the dates of contract termination

In accordance with 49 C.F.R. § 604.19, the losing party may appeal this decision within ten days of receipt of the decision. The appeal should be sent to Jennifer Dorn, Administrator, FTA, 400 Seventh Street, S.W., Room 9328, Washington, D.C. 20590.



Letitia Thompson  
Regional Administrator

9-18-02  
Date

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

Indian Trails, Inc., Classic Caddy Limousine, and  
The Tecumseh Trolley & Limousine,  
Complainants,

Capital Area Transportation Authority,  
Respondent.

Charter Complaints  
49 U.S.C. Section 5323(d)  
Docket Nos. 2002-01, 2002-04,  
and 2002-10

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DECISION

Summary

On March 7, 2002, Classic Caddy Limousine ("Classic Caddy") filed a complaint with the Federal Transit Administration ("FTA") alleging that Capital Area Transportation Authority ("Respondent") is providing service in violation of FTA's charter regulation, 49 Code of Federal Regulations (C.F.R.) Part 604, as well as improperly leasing its vehicles. Classic Caddy followed up with some additional information on March 27, 2002. The service specifically complained of pertains to Respondent's use and leasing of its trolleys for charter service. Respondent filed an answer dated May 1, 2002. Complainant filed a reply on June 13, 2002.

On April 1, 2002, The Tecumseh Trolley & Limousine ("Tecumseh Trolley") filed a complaint with the FTA alleging that Respondent is providing service in violation of FTA's charter regulation, 49 C.F.R. Part 604, as well as improperly leasing its vehicles. On July 9, 2002, Tecumseh Trolley filed additional information with the FTA.

On June 20, 2002, Indian Trails Incorporated ("Indian Trails") submitted a letter to the American Bus Association complaining about the Respondent providing unauthorized charter service. FTA was also provided with a copy of the information. On July 16, 2002, FTA consolidated the three complaints and asked that the Respondent answer a number of questions related to its trolleys. On August 14, 2002, the Respondent requested a thirty (30) day conciliation period and an extension for filing its response to the consolidated complaints. On August 15, 2002, FTA granted the request for the conciliation period, but denied the request for an extension. On August 16, 2002, Respondent filed its response to the three consolidated complaints. The thirty (30) day conciliation period, which ended on September 14, 2002, did not result in a settlement.

Upon reviewing the allegations in the three complaints and the subsequent filings of all three of the Complainants (Classic Caddy, Tecumseh Trolley, and Indian Trails, hereinafter are referred to collectively as the "Complainants") and the Respondent, FTA has concluded that the service in question does violate FTA's regulations regarding charter service. Respondent is hereby ordered to cease and desist in providing such illegal service. Respondent is also ordered to disallow improper charter mileage for the vehicles to be used for the purposes of calculating useful life.

## Complaint History

Complainant Classic Caddy filed its complaint with the FTA on March 7, 2002, and provided follow up information on March 27, 2002. The complaint alleges that the Respondent is providing illegal charter service<sup>1</sup> by providing private charter service using its trolleys, as well as improperly leasing the trolleys. Specifically, Complainant alleges the following: (1) the annual notice was improper; (2) the notice was only sent to two bus services in the area when there are many more willing and able charter providers in the area; (3) the Respondent improperly found Classic Caddy not to qualify as a willing and able charter provider; (4) the Respondent has vehicles in its fleet that are only used for charter service, specifically trolleys; (5) Respondent is improperly leasing vehicles in its fleet when there is not a legitimate capacity constraint; (6) Classic Caddy alleges that Dean Transportation and Indian Trails are improperly leasing Respondent's vehicles without a legitimate capacity constraint; and (7) Respondent is allowing alcohol to be consumed on charter trips. Classic Caddy provided additional documentation on March 27, 2002.

Respondent filed its answer on May 1, 2002. In it, Respondent stated that it provided charter service briefly in fiscal year 2001 after following the annual notice procedures. Respondent alleges that no willing and able charter providers responded to the annual notice. Respondent states that it received seven responses to its annual notice dated August 28, 2001. It attempted to negotiate with the private operators, and subsequently issued an Indication of Interest form for private providers to complete if they were interested in leasing Respondent's vehicles based on capacity constraints. Three private providers returned the forms, Indian Trails, Dean Transportation, and Tecumseh Trolley. The Respondent states it ceased to provide charter service because it could not reach agreement with the private willing and able charter operators. Respondent alleges that requests for charter are referred to private operators. The Respondent states that the charter regulations relate to intercity charter service and that it does not provide any intercity charter service.

On June 13, 2002, Classic Caddy filed its reply to Respondent's answer. In its reply, Classic Caddy reiterated its allegations and added that the Respondent provided charter service for the International Art Festival in East Lansing, MI.

On April 1, 2002, Tecumseh Trolley filed a complaint alleging the same violations as Classic Caddy. Additionally, on July 9, 2002, it provided documentation supporting its allegations.

On June 20, 2002, Indian Trails submitted a letter to the American Bus Association complaining about the Respondent providing unauthorized charter service. FTA was also provided with a copy of the information. Indian Trails included with its materials copies of the Respondent's charter terms.

On July 16, 2002, FTA consolidated the three complaints and asked that the Respondent answer a number of questions related to its trolleys. On August 16, 2002, Respondent replied to the three

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<sup>1</sup> Respondent receives Section 5307 and 5309 funds from FTA; therefore, they must comply with the charter regulations.

consolidated complaints, as well as responded to FTA's additional questions. Respondent stated that it has two trolleys, which were state funded. Respondent states that the trolleys are in its active fleet; however, the trolleys are not currently being used for a scheduled route<sup>2</sup>, but rather for special occasions. The trolleys are also being leased for charter service. Respondent states that it is not providing any direct charter service and that it is leasing the trolleys to private providers based on capacity constraints. Respondent states that the service provided for the International Art Festival was not charter service, but scheduled service.

Respondent states that as of August 8, 2002, it ceased accepting any bookings of its trolleys for private operators. It alleges this was done in an attempt to resolve the outstanding complaints. Respondent requested a thirty (30) day conciliation period, which was granted on August 15, 2002. The conciliation period ran on September 14, 2002, but the parties did not reach a settlement.

### Discussion

As Complainants have accurately stated, recipients of Federal financial assistance cannot provide charter service using Federally funded equipment or facilities, unless one of the limited exceptions applies. In the absence of one of the limited exceptions, the recipients are prohibited from providing the service. 49 C.F.R. Section 604.9(a). Respondent is asserting that it is not providing direct charter service and that it is leasing its trolleys pursuant to the exception under 49 C.F.R. Section 604.9(b)(2).

#### A. Regulations

Under 49 C.F.R. Section 604.9(a), if a recipient desires to provide charter service, it must first determine whether there are any willing and able private charter providers. If there is at least one willing and able provider, the recipient is prohibited from providing charter service unless one of the exceptions applies. *Id.* The recipient must follow all the procedures for determining willing and able private operators under 49 C.F.R. § 604.11. The public participation process requires at a minimum that a notice be placed in a newspaper of general circulation and a notice is required to be sent to all private charter service operators in the proposed geographic charter service area. 49 C.F.R. § 604.11(b)(1) and (2). The notice needs to include among other items, the categories of revenue vehicle. *Id.* at (c)(2). There are only two categories of revenue vehicle, buses and vans. 49 C.F.R. § 604.5(d).

#### B. Prior Triennial Finding

On October 3, 2000, the Respondent had a deficient finding with regard to charter bus. At that time, FTA stated that the Respondent was providing trolleys to private charter operators under Exception 2, when it should be utilizing Exception 7. The FTA required the Respondent to publish its annual notice to determine whether there were any willing and able private charter operators.

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<sup>2</sup> Respondent sent a clarifying letter dated September 23, 2002.

### C. Annual Notice

On September 5, 2000, and August 31, 2001, the Recipient published annual notices in the *Lansing State Journal*. The notices proposed that the Respondent intended to provide charter service using Chance Trolley vehicles. The notice was misleading, since it did not properly state what type of revenue service the Respondent intended to provide, namely bus or van service. The notice implied that if a private provider could not provide trolley service it could not qualify as a willing and able charter provider. Additionally, the Respondent was required to provide notices to all private charter operators in the area. Respondent in its answer dated May 1, 2002, states only that it published the notice. It does not indicate that notices were sent directly to all private charter operators in the geographic area as required under 49 C.F.R. § 604.11(b)(2).

### D. Leasing Trolleys

The Respondent has been leasing the trolleys to private operators pursuant to its Indication of Interest forms. Although the form states that the Respondent's equipment will only be used "when the charter operator lacks capacity to provide charters or is unable to provide equipment accessible to elderly and handicapped persons for charters," private operators have been using the trolleys when there is not a capacity constraint. Capacity should relate to the private operator's overall vehicle capacity. The private operator does not have a capacity constraint, simply because it does not have a trolley. It would only have a capacity constraint if it did not have enough buses or vans to handle its private charter business. This misinterpretation was cited in FTA's triennial findings dated October 3, 2000, when the Respondent was informed that it should not be leasing trolleys under Exception 2 of the regulations, but rather Exception 7. Tecumseh Trolley has admitted that it filled out the Indication of Interest form when it did not lack capacity, regarding buses and vans.

Although Respondent indicated in a letter dated August 9, 2002, that as of August 8, 2002, it "ceased accepting bookings for use of its equipment by charter operators, including the trolleys which had been used for weddings," it still is working out commitments for bookings made prior to August 8, 2002. It appears that even now, CATA is still improperly leasing its vehicles for charters. The trolleys are not being used for regular service and are only being used for charter service either directly by the Respondent or improperly leased to private operators for charter service. Finally, the regulations state that "[a]ny charter service that a recipient provides under any of the exceptions in this part must be incidental charter service." 49 C.F.R. § 604.9(e). Incidental service is defined as "charter service which does not: (1) interfere or detract from the provision of the mass transportation service for which the equipment or facilities were funded under the Act; or (2) does not shorten the mass transportation life of the equipment or facility." 49 C.F.R. § 604.5(i). The trolleys were solely being used for charter service and were not being used for mass transportation at all.

### E. International Art Fair

The regulations define charter service as the following:

transportation using buses or vans, funded under the Acts of a group of persons who

pursuant to a common purpose, under a single contract, for a fixed charge for the vehicle or service, who have acquired the exclusive use of the vehicle or service in order to travel together under an itinerary either specified in advance or modified after leaving the place of origin. Includes incidental use of FTA funded equipment for the exclusive transportation of school students, personnel, and equipment. 49 C.F.R. § 605.5(e).

Thus, a determination needs to be made as to whether Respondent's service meets the definition of charter by examining the elements required for charter service. In order to qualify as charter service, the following questions need to be answered:

- a) Is this transportation service using buses funded with FTA money?
- b) Is the service for a common purpose?
- c) Is it under a single contract?
- d) Is it for a fixed charge for the vehicle or service?
- e) Is the exclusive use of the vehicles to travel together under an itinerary either specified in advance or modified after leaving the place of origin?

The International Art Fair (the "Fair") service utilized buses that were funded with Federal funds. There was a common purpose, specifically for the Fair. It was a one-day event, not regularly scheduled service. Although the service provided was free. FTA guidance states that the cost of the service was irrelevant.<sup>3</sup> The exclusive use of the vehicles was to transport individuals to the Fair, although the service was open to the public, it was not mass transportation. It was only for those individuals interested in attending the Fair. This service did not involve additional buses on a regularly scheduled route, which would have not been charter service, but rather involved service that was added without following the required procedures for providing a new route. This service does not fall under any of the recognized exceptions; therefore, it is illegal charter service.

#### F. Willing and Able Status of Classic Caddy

The Respondent determined that Classic Caddy was not a willing and able charter provider. In the Charter Questions and Answers from 52 FR 42248 (November 3, 1987), the Answer to No. 12 stated that "[i]f a private operator submits documentary evidence that it has the desire to provide

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<sup>3</sup> In an answer to the cost issue in the Charter Questions and Answers from 52 FR 42248 (November 3, 1987), Question No. 27(a), UMTA (the Urban Mass Transportation Administration a precursor to FTA) stated the following:

"Cost is irrelevant in determining whether service is mass transportation or charter service. Thus, service which meets the criteria set by UMTA, i.e., service controlled by the user, not designed to benefit the public at large, and which is provided under a single contract, will be charter regardless of the fact that it is provided for free.

As a general rule, free charter service would be "non-incidental" since it does not recover its fully allocated cost, and could not be performed by an UMTA recipient, even under one of the exceptions to the charter regulations. However, UMTA will consider certain types of free charter service to be "incidental." An example of this would be free service to an economically disadvantaged group when there is no private operator willing and able to perform the service. Since UMTA is concerned about the diversion of mass transit revenues and the reduction in mass transportation life resulting from service provided below cost, it will, when presented with a complaint, consider such service "incidental" charter only in a very limited number of cases."

service and the ability to supply vehicles, as well as the necessary legal authority, it must automatically be determined 'willing and able.'" The Respondent can only conduct a further investigation of a private operator's status if there is reasonable cause to believe that the information has been falsified. The Respondent should have determined that Classic Caddy was "willing and able."

#### G. Alcohol Use on Charter Trips

Complainants have alleged that alcohol is present during Respondent's charter trips. FTA does not regulate the use of alcohol on charter trips.

#### H. State Funding

CATA states that the trolleys are state funded. If the vehicles were procured without Federal funds, they could be used for charter service if they were kept completely separate from any Federally funded facility or activity. The trolleys could not be stored in a Federally funded facility.<sup>4</sup> The trolleys would need to be kept completely separate from all Federally funded activities, including maintenance. CATA has not demonstrated that the trolleys are kept separate from the rest of its Federally funded fleet.

#### I. Intracity Service

CATA has stated that it is providing intracity service as a reason why the service they are providing is allowable. Although 49 U.S.C. Section 5323(d) only discusses that recipients of federal assistance cannot provide intercity charter service, it references the agreement that recipients must enter into with the Department of Transportation as a condition of receiving the assistance. Pursuant to FTA's Master Agreement MA(9), October 1, 2002, Section 28, a recipient cannot provide charter service unless the service is under one of the exceptions in FTA's regulations, 49 C.F.R. Part 604. FTA's charter regulations, 49 C.F.R. Part 604, prohibit any type of charter service. Intracity service is not one of the listed charter exceptions under FTA's regulations, 49 C.F.R. § 604.9(b). Therefore, CATA cannot provide the service as it currently does.

#### Conclusion

Based on all the information provided, FTA finds that the Respondent has been providing illegal charter with its trolleys, both direct and indirect service through improperly leasing the vehicles. The Respondent has also conducted illegal charter using its buses for functions such as the International Art Fair. The Respondent improperly determined that Classic Caddy was not a "willing and able" charter provider. If the Respondent wishes to use its trolleys for charter service, they must be segregated from all Federally funded assets.

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<sup>4</sup> In an answer to Question No. 26, relating to the use of locally funded buses for charter in the Charter Questions and Answers from 52 FR 42248 (November 3, 1987), UMTA stated in order to use the vehicles they need to be kept completely separate from Federally funded assets, including maintenance activities.

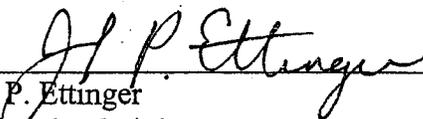
Remedy

Complainants have requested that Respondent immediately cease the charter operations at issue. FTA grants Complainants' request for the cease and desist order and orders Respondent to cease providing charter service using its trolleys and any other vehicles and cease and desist improperly leasing its vehicles. If Respondent desires to provide charter service, they must follow the notice and review procedures for determining if there are any willing and able private charter operators pursuant to 49 C.F.R. Part 604. Another alternative, if the trolleys are state funded would be to separate the trolley service from all CATA's other operations, and then FTA's charter requirements would not apply.

Order

FTA finds that Respondent has been providing impermissible charter service and orders it to cease and desist any such further service. Refusal to cease and desist in the provision of this service could lead to additional penalties on the part of FTA. Additionally, the mileage for improper charter use should not accrue towards the useful life of the Federally funded vehicles.

In accordance with 49 C.F.R. § 604.19, the losing party may appeal this decision within ten days of receipt of the decision. The appeal should be sent to Jennifer Dorn, Administrator, FTA, 400 Seventh Street, S.W., Room 9328, Washington, D.C. 20590.

  
Joel P. Ettinger  
Regional Administrator

10-11-02  
Date



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

Administrator

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

OCT 15 2002

The Honorable Rosa L. DeLauro  
U.S. House of Representatives  
59 Elm Street, Second Floor  
New Haven, Connecticut 06510

Dear Congresswoman DeLauro:

*Congresswoman DeLauro*

This is in response to the question raised by your constituent, Ms. Donna Carter, Executive Director of the Greater New Haven Transit Authority (NHTA). The NHTA would like to be able to provide prospective business owners with promotional tours on one of its new natural gas trolleys purchased with Federal Transit Administration (FTA) funds.

As you note, however, such service might be prohibited by FTA's charter service regulation, 49 C.F.R. Part 604. NHTA must first determine whether any private charter operators are willing and able to provide the service. If so, NHTA may not do so with FTA-funded equipment or facilities unless one or more of the exceptions apply, which appears unlikely based on the facts you present. I should note that NHTA would not violate FTA's charter service regulation, however, if it were to take prospective business owners on the natural gas trolleys' regular route service. This approach could have the additional benefit of providing a more realistic view of the NHTA system at work.

As public transit agencies move to expand service, it is important to respect the needs of private sector companies to operate effectively in a competitive marketplace for services that do not receive subsidies. The interconnected nature of America's transportation network requires that FTA work together with the private transportation industry to maintain the vitality and effectiveness of every component of our system. The health of every component, public and private, affects the health and effectiveness of our entire passenger transportation system.

I hope you find this information responsive to your request. Please contact me if you need additional information or assistance in this matter.

Sincerely,

*Jenna Dorn*  
Jennifer L. Dorn

cc: Washington Office  
Donna Carter, Executive Director  
New Haven Transit Authority

Richard Doyle, Regional Administrator, TRO-I  
Margaret Foley, Regional Counsel, TRO-I  
Elizabeth Martineau, Attorney-Advisor, Office of Chief Counsel



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**Fédéral Transit  
Administration**

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NOV 6 2002

Dan W. Chandler  
Chandler Bujold & Chandler, PLC  
2855 Coolidge Hwy., Suite 109  
Troy, MI 48084

Sandy Draggoo, Executive Director  
Capital Area Transportation Authority  
4615 Tranter Avenue  
Lansing, MI 48910

RE: Amended Charter Decision  
Indian Trails Inc., Complaint #2002-10  
Classic Caddy Limousine, Complaint #2002-01  
The Tecumseh Trolley & Limousine, Complaint # 2002-04

Dear Mr. Chandler and Ms. Draggoo:

This letter serves as the Federal Transit Administration's (FTA) response to your letter dated October 18, 2002, as well as an amended decision for the earlier charter decision dated Oct. 11, 2002. The Region is aware that since your letter, the Capital Area Transportation Authority (CATA) has appealed the Region V decision to the FTA Administrator; however, the Region is still addressing the issues raised in your letter, as well as amending its earlier charter decision based on new information.

First, as to the points you raised in your letter, I will address them in the order you have raised them as follows:

1. CATA indicated that it never received the original complaint. However, CATA was sent a copy of the complaint dated March 7, 2002, via registered mail on April 2, 2002. The complaint was received by CATA on April 9, 2002, and signed for by Gloria Cortes.
2. CATA indicated that it never received the information from Tecumseh Trolley. However, CATA was sent the information from Tecumseh Trolley on July 11, 2002, via registered mail. The material from Tecumseh Trolley was received by CATA on July 15, 2002, and signed for by C. Fitzgerald.
3. CATA stated that there was no evidence that any of the private operators lacked capacity. However, on October 10, 2002, Tecumseh Trolley acknowledged to FTA that it did not lack capacity when it signed the Indication of Interest form. Therefore, FTA had evidence that at least one private operator did not lack capacity when it executed the Indication of Interest form. If the private operators had capacity constraints, they should have been leasing CATA's buses, not CATA's trolleys, since the buses have a

larger capacity than the trolleys. Although FTA does not require the transit agency to investigate the private operator's capacity constraint representation, if there is evidence of false statements or fraud, then the transit agency should conduct an inquiry to determine whether the operator truly lacks capacity when it leases one of the transit agency's vehicles.<sup>1</sup> It is ultimately the transit agency's responsibility to comply with the charter regulations. The use of the trolleys by a private operator should be incidental service. In this case, the trolleys are only being used for charter service. This use does not fit the definition of incidental use.

4. CATA stated it should not be held responsible if a private operator misrepresented that it lacked capacity. See prior answer. Tecumseh Trolley's documentation states that CATA may have been booking charters for Indian Trails to use its trolleys. The documentation states that based on contacting several brides who had rented the trolleys for their weddings, the brides were unaware that Indian Trails was even involved with the vehicle rental. If that is the case, which in and of itself is a violation of the regulations, CATA should have been aware whether Indian Trails truly lacked capacity.
5. CATA contends that the International Art Fair service was not charter service. The service provided by CATA for the International Art Fair was not on a regularly published route. A private operator indicated that it would have been willing and able to provide the service.
6. CATA states that the guidance regarding fully recovering allocated costs should not apply in this case, since the trolleys are state funded. FTA is amending its decision because it was based on the misrepresentation by CATA that the trolleys were 100% state funded. Michigan DOT and CATA's

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<sup>1</sup> The question and answer for No. 32 from Charter Questions and Answers from 52 FR 42248 (November 3, 1987) states the following:

32. *Question:* When a private operator requests buses from a grantee to run a given charter service, what is a grantee's responsibility to assure the circumstances fit the limited exceptions set forth in § 604.9(b)(2)?

*Answer:* The above-cited regulation allows grantees to contract with private operators only when and to the extent that the private operator lacks equipment that is accessible to the elderly and handicapped or lacks capacity. UMTA will allow its grantees to use their reasonable, good faith judgment as to whether the requirements of the regulations have been met, and, in the absence of apparent fraud or falsified statement, will not require them to look behind a request for the use of their buses by a private operator.

However, if a private operator continuously leases the transit agency's trolley vehicles week after week, as Indian Trails did in the documentation that Tecumseh Trolley supplied, it should raise the question as to whether the private operator truly has a capacity constraint.

own counsel have now acknowledged that the trolleys were partially funded with Federal Highway Administration (FHWA) funds. The applicability section of the charter regulations, 49 CFR Sec. 604.3(b), states that the charter regulations apply to all recipients of Federal financial assistance under "Sections 103(e)(4), 142(a), or 142(c) of Title 23 United States Code which permit the use of Federal-Aid Highway funds to purchase buses." The definition of the "Acts" under Sec. 604.5(b) also includes the same sections of the U.S. Code. The charter regulations apply to the trolleys even if they are maintained and housed separately from the rest of CATA's vehicles. CATA should not be leasing the trolleys for charter use **unless** one of the charter exceptions applies.

7. CATA contends since the service was open to the public, it was not exclusive. The service was provided exclusively for attendees of the International Art Fair.

Second, based on the new information that the trolleys were funded with FHWA funds, FTA amends its earlier decision dated October 11, 2002. The trolleys cannot be used for any indirect or direct charter service unless one of the charter exceptions applies. CATA must immediately cease and desist using the trolleys for charter service. CATA has been aware of the charter issue since its triennial finding in October 2000, and it has been aware of the charter complaints since April 2002. It has had a great deal of time to make alternate arrangements. It should have stopped taking charter trolley bookings a long time ago.

Federal funds were provided for the lease purchase of the trolleys to use them for mass transportation. CATA has acknowledged that the trolleys are only being used for special service, primarily private wedding charters. This use does not fit the definition of mass transportation.

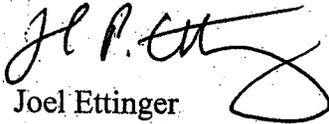
By this letter, FTA amends its earlier decision, which allowed CATA to separate the trolleys from a federally funded facility and use them for charter service. The trolleys were federally funded; therefore, they cannot be used for charter service unless one of the exceptions applies.

FTA finds that CATA has been providing impermissible charter service and orders it to cease and desist any such further service. Refusal to cease and desist in the provision of this service could lead to additional penalties on the part of FTA. Additionally, the mileage for improper charter use should not accrue towards the useful life of the Federally funded vehicles.

In accordance with 49 C.F.R. § 604.19, the losing party may appeal this decision within ten days of receipt of the decision. The appeal should be sent to Jennifer Dorn, Administrator, FTA, 400 Seventh Street, S.W., Room 9328, Washington, D.C. 20590.

CATA has ten days to amend its appeal based on this amended decision.

Sincerely,



Joel Ettinger  
Regional Administrator

cc: Robert McAnallen, Classic Caddy Limousine (w/enc.)  
Steve Pixley, The Tecumseh Trolley & Limousine (w/enc.)  
Gordon Mackay, Indian Trails, Inc. (w/enc.)  
Robert Gardella w/enc.



U.S. Department  
of Transportation  
Federal Transit  
Administration

REGION IX  
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Hawaii, Nevada, Guam  
American Samoa,  
Northern Mariana Islands

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415-744-3133  
415-744-2726 (fax)

NOV 26 2002

Mr. Richard C. Prima, Jr.  
Public Works Director  
City of Lodi  
City Hall, 221 West Pine Street  
P. O. Box 3006  
Lodi, California 95241-1910

Re: Lodi Station Parking Survey and Charter Regulations

Dear Mr. Prima:

In response to your letter dated June 21, 2002, you offered to provide parking surveys to document the utilization of the Lodi Station Parking structure. Because the parking structure and the adjacent Multimodal Station parking lot appear under utilized, a parking survey of both facilities would be appropriate. This survey should document the transit and non transit use of the facilities at different times.

In addition, the City of Lodi has provided incidental charter service, which may be in violation of the federal charter regulation. Guidance is enclosed to assist the City in complying with the charter rules. Charter service is particularly forbidden if willing and able providers exist. However, the regulation offers additional exceptions, when notice, documentation, agreements, approval and certifications are provided.

If you have any questions regarding the nature of these topics, please contact Mr. John M. Hunt, Project Manager, at 415-744-2597.

Sincerely,

Leslie T. Rogers  
Regional Administrator

Enclosure

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

Desert Resorts Transportation :  
Complainant :  
v. : Charter Complaint #2002-07  
: 49 U.S.C. Section 5323(d)  
SunLine Transit Agency, :  
Respondent :

DECISION

Introduction

Desert Resorts Transportation (Desert Resorts) filed this complaint with the Federal Transit Administration (FTA) on April 26, 2002, alleging that the SunLine Transit Agency (SunLine) provided charter service in violation of the FTA charter regulation, 49 CFR Part 604. The service complained of pertains to SunLine's bus service to an annual film festival. Based upon a review of the allegations in the complaint and the subsequent filings of the parties, FTA concludes that the service in question is charter service as defined by 49 CFR 604.5(e) because it was performed under a single contract at a fixed charge for the vehicles. FTA orders SunLine to cease and desist from providing the service as it is currently configured.

Complaint

Desert Resorts filed this complaint with the FTA by letter dated April 26, 2002. The complaint alleges that SunLine provided charter service in violation of FTA's charter rules on two separate occasions; specifically, under contract with the Nortel Networks Palm Springs International Film Festival (PSIFF) from January 11-20, 2002, and at the Desert Resorts Regional Airport on April 8, 2002.

In a letter dated June 28, 2002, FTA directed the parties to attempt local conciliation for thirty days under 49 CFR 604.15. In correspondence dated July 25 and August 12, 2002, SunLine acknowledges that the service performed at the airport was impermissible charter service and states that it paid Desert Resorts \$560.00 in full settlement and release of all claims. SunLine maintains, however, that the service provided for the PSIFF is mass transportation and reports that the parties are unable to resolve this dispute. By letter of August 27, 2002, FTA advised Desert Resorts and SunLine that it would proceed with a formal investigation concerning the PSIFF service.

In its complaint, Desert Resorts claims that SunLine provided bus service under contract to the PSIFF at a fixed charge of \$50.00 per hour per vehicle without notifying local charter operators or national bus associations as required by 49 CFR 604.11. Desert Resorts included with its complaint three "SunLine News" press releases which state the free SunBus PSIFF shuttle is conveniently timed to connect with the SunLink schedule to

allow for a full day to enjoy viewing world class films, shopping or dining. The press releases emphasize the positive effect the SunLink/SunBus<sup>1</sup> partnership will have on reducing traffic congestion and harmful emissions.

### Response

SunLine's response is dated September 10, 2002. SunLine states that from January 11-20, 2002, it provided additional fixed-route service with two buses that operated open door. SunLine claims that the service is an enhancement to its regular fixed-route service and operates without any negative impact on its regular service.

SunLine included with its response a December 17, 2001 Agreement (Exhibit C) signed by SunLine's Transit Marketing Coordinator and the Chairman of the PSIFF. The Agreement stipulates that SunLine will operate two PSIFF-wrapped buses free to the public between four theater venues every 10 minutes from January 10-21, 2002<sup>2</sup> between the approximate hours of 8:00 a.m. and 11:00 p.m. It identifies the four theater venues and provides that the stop at the Palm Springs High School Auditorium is pending School District and SunLine approval. The Agreement further provides that the cost to the PSIFF to operate this special service is \$50.00 per hour per bus. In addition, the Agreement provides that SunLine will operate two wrapped buses on various SunBus routes from December 2001 through May 2002, for a monthly advertising fee of \$1,000 per bus.

According to SunLine, the \$50.00 charge indicates the subsidy that PSIFF agreed to pay so that the fare would be free for all riders and to assist with the marketing efforts which were extensive. SunLine maintains that its arrangement with the PSIFF is a marketing agreement, not a transit service agreement. As part of the marketing agreement, SunLine notes that it provided SunBus passes to members of an association called the Elderhostel; the SunBus passes allowed riders access to all fixed-route service during January 2002.

SunLine also submitted a flyer (Exhibit A) and a placard (Exhibit B). The flyer and placard offer free shuttle service, list the bus schedule, and direct festivalgoers to look for PSIFF signs at select SunBus stops. The flyer contains a map outlining the PSIFF route to four theater venues: #1 Festival of Arts Cinemas, #2 PS High School Auditorium, #3 Courtyard 10, and #4 Annenberg Theater (Palm Springs Museum). SunLine maintains that it placed the flyer and placard on its regular fixed route buses to advertise the service and that the flyer was placed at all PSIFF locations as well. Moreover, SunLine states that every newspaper ad and every TV spot for the festival included news of the service.

### Rebuttal

Desert Resorts' rebuttal is dated September 27, 2002. Desert Resorts claims that the December 17, 2001, Agreement contains terms and conditions typically used in any

<sup>1</sup> SunLine's preprinted schedule states that SunBus is a "Valley-wide fixed route bus service" and SunLink is an "express service to the Inland Empire."

<sup>2</sup> According to subsequent correspondence, the dates were changed to January 11-20, 2002.

contract for charter service, such as the hourly rate per bus, hours of service, and location of stops. In addition, Desert Resorts argues that the service is controlled by the user and is not designed to benefit the public at large because the buses stop only at the four PSIFF theater venues stipulated in the Agreement. Moreover, Desert Resorts asserts that SunLine has not provided any evidence that the PSIFF service was regularly scheduled or route deviation service.

Desert Resorts contends that SunLine has engaged in a continuing pattern of violation, including the service performed at Desert Resorts Regional Airport as well as alleged violations which are the subject of a separate charter complaint filed by Desert Resorts and currently pending before FTA. Desert Resorts asks FTA to order SunLine to reimburse to complainant the sum of \$23,400.00 plus penalties.

### Second Response

By letter of October 8, 2002, FTA requested additional information from SunLine including its preprinted schedule and any supplemental documentation pertaining to the Agreement of December 17, 2001.

By letter dated October 18, 2002, SunLine submitted its supplemental response and enclosed its regular published schedule along with a November 26, 2001, letter it had sent to the PSIFF formalizing discussions that took place between the parties on September 19, 2001. The letter states SunLine will create and operate the bus route; one bus will allow for service every 20 minutes; and two buses will provide service every 10 minutes. SunLine's letter further stipulates that additional stops along the designated route are at the discretion of the SunBus driver and only when it is safe and legal to do so. In addition, the letter provides that it is the parties' intent to produce a successful special event that nurtures the use of public transit. SunLine maintains that the November 26, 2001, correspondence confirms SunLine's creation of the route and control of the service.

SunLine further argues that it designed the PSIFF service to overlay its regular fixed route in an effort to encourage riders to transfer and utilize the additional free service.<sup>3</sup> According to SunLine, it added two stops to the PSIFF service that did not previously exist on its regular fixed route: #2 Ramon [PS High School Auditorium] and #4 Annenberg Theatre [Palm Springs Desert Museum]. SunLine claims that all of the film festival venues, with the exception of #4 Annenberg Theatre can be accessed by the regular fixed-route service.<sup>4</sup> SunLine claims that the service does not inconvenience any

<sup>3</sup> A comparison of the film festival flyer with the published schedule at pages 10 and 17 indicates that the PSIFF service follows segments of SunLine's regular fixed-route service on Lines 14, 24, 30 and 111 as well as on Line 23 along Ramon between Farrell and Sunrise. The flyer shows the PSIFF route detours approximately one block from SunLine's regular fixed-route at Palm Canyon where it continues along Amado, turns left on Museum Drive and turns left again at Tahquitz to return to Palm Canyon.

<sup>4</sup> The preprinted schedule contains a section entitled "Places to Go on Sunbus" on page 13 and lists theater venues #1, #3 and #4 as accessible on the regular fixed-route service. As to venue #2, pages 9 and 10 of the schedule indicate that PS High School Auditorium is adjacent to SunLine's fixed route service on Lines 14 and 23, respectively.

riders by deviating from regular fixed route service and is designed to integrate with the regular route to maximize availability of the service to the general public.

SunLine states that it performed the PSIFF service for the first time in January 2001 and intends to provide the same type of service annually, subject to FTA's finding that the service is mass transit and not charter service.

### Second Rebuttal

By letter dated October 28, 2002, Desert Resorts provided its second rebuttal. Desert Resorts points out that the service was provided under a single contract for \$50.00 per hour per vehicle and operated during peak hours. Further, Desert Resorts argues that SunLine does not have the final say for setting and modifying the route, rate, schedule and equipment. Rather, Desert Resorts reiterates that SunLine's arrangements with the PSIFF are identical to private charter operations where the client requests transportation and dictates the location and frequency of service while the charter operator sets a schedule based on driving time and client desires. Moreover, Desert Resorts maintains that the service does not benefit the public at large because it is designed to serve only attendees of the PSIFF; none of the four film venue stops coincide with SunLine's regular fixed route service; and the PSIFF service overlaps existing routes only in terms of the streets travelled over. Desert Resorts emphasizes that the theater venues are located at least 300-500 feet from the closest regular SunBus stops.

### Third Response

On October 30, 2002, SunLine provided additional information pertaining to the PSIFF service. Thereafter, Desert Resorts indicated it intended to rebut the October 30 submission. In a November 25, 2002, conference call among FTA, Desert Resorts and SunLine, it was agreed that the FTA would not consider the October 30 information as part of the administrative record and Desert Resorts would not file an additional rebuttal.

### Discussion

Before reaching the main issue of this complaint, two subsidiary questions raised by complainant will be addressed. First, in settling the dispute involving the service at the Desert Resorts Regional Airport, SunLine made a decision at the local level to pay \$560.00 in damages to Desert Resorts. Desert Resorts now requests that FTA order SunLine to pay \$23,400.00 plus penalties for providing the PSIFF service. The FTA is a grant-making agency, not a regulatory or enforcement agency. As such, the FTA does not award damages or assess fines and therefore, will not entertain Desert Resort's request. Next, Desert Resorts refers to various allegations it raised in another complaint involving SunLine which is currently pending before this agency. FTA will issue a separate decision in that matter. We turn now to the main concerns of Desert Resorts' complaint.

The essential issue in this matter is whether the service provided by SunLine is impermissible charter service or permissible mass transportation. The definition of charter service found in FTA's regulations at 49 CFR 604.5(e) is as follows:

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

Charter service is usually thought of as a one-time provision of service and the user, not the recipient, has the control of the service. 52 Federal Register 11916, 11919 (April 13, 1987).

In contrast, the Federal Transit Laws define "mass transportation" as transportation that provides regular and continuing general or special transportation to the public. 49 U.S.C. § 5302(a)(7). In the preamble to the regulation, the FTA has articulated other features which locally flow from this definition:

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

52 Fed. Reg. 11920.

While these distinctions may appear to be clear, there are many difficulties in determining in a given case which category the service fits into most appropriately. FTA has previously stated that a balancing test must be applied to determine the nature of the service involved in any complaint filed with FTA because, as the preamble to the charter regulation points out, there is no fixed definition of charter service, and the characteristics cited by FTA are not exhaustive, but merely illustrative. 52 Fed. Reg. 11919-11920. FTA has reached the findings and determinations below on the basis of such an analysis.

#### Designed to benefit the public at large

FTA has previously stated that service is designed to benefit the public at large when it serves the needs of the general public, instead of those of "some special organization such as a private club." 52 Fed. Reg. 11920 (April 13, 1987). The charter regulation requires that riders outside a target group of customers be eligible to use the service. Annett Bus Lines v. City of Tallahassee, FL-TALTRAN/90-02-01 (April 28, 1992).

The record is persuasive that the film festival route was designed to interconnect with SunLine's regular fixed-route and that all four theater venues can be accessed on SunLine's regular service. Further, the "SunLine News" press releases indicate the film festival shuttle was conveniently timed to connect with SunLine's regular service to allow for a full day to enjoy viewing world class films, shopping or dining. In FTA's view, the festivalgoers are not a sufficiently defined enough group to be considered a "private club." Moreover, while the service may accommodate them primarily, it is not restricted to their exclusive use but is available to anyone wishing to board it. Therefore, FTA finds that the service was designed to benefit the public at large.

#### Open to the public and not closed door

In determining whether service is truly "open door," FTA looks both at the level of ridership by the general public as opposed to a particular group and at the intent of the recipient in offering the service. The intent to make service open door can be discerned in the attempts to make the service known and available to the public. FTA thus takes into account the efforts a recipient has made to market the service. Generally, this marketing effort is best evidenced by publication of the service in the recipient's preprinted schedules. Washington Motor Coach Association v. Municipality of Metropolitan Seattle, WA-09/87-01 (March 21, 1988). FTA has also interpreted "open door" to mean a substantial public ridership and/or an attempt by the transit authority to widely market the service. Blue Grass Tours and Charter v. Lexington Transit Authority, URO-III-1987. The posting of bus stop signs and connections to other transportation routes are also considered indicators of "opportunity for public ridership." Seymour Charter Bus Lines v. Knoxville Transit Authority, TN-09/88-01 (November 29, 1989).

FTA finds that SunLine made concerted efforts to demonstrate its intent to make the service open door. Although the film festival service is not listed in the preprinted schedule, SunLine actively marketed the service to the public through press releases, the flyer and placard, advertisements on wrapped buses, newspaper ads and TV spots, and integration with its fixed-route service. If a decision is made to reconfigure the service in accordance with FTA requirements, SunLine should publish the service in its preprinted schedules.

#### Under the control of the recipient

The charter service criteria include bus transportation under a single contract at a fixed rate for the vehicle or service. FTA has previously determined that control of fares and schedules is the critical element in the balancing test FTA uses to distinguish charter service from mass transportation. Seymour, at page 10. Compensation on the basis of hours of service is evidence of charter operations, whereas individual fares<sup>5</sup> paid by each rider indicates the service is mass transportation. Seymour, at pages 9-10.

<sup>5</sup> Cost is irrelevant in determining whether service is mass transportation or charter service. Generally, free charter service would be "non-incidenta" since it does not recover its fully allocated cost, and FTA recipients cannot provide it, even under one of the charter exceptions. Q&A No. 27(a), 52 Fed. Reg., 42248, 42252.

The record is convincing that SunLine created and operated the PSIFF route and schedule to integrate and connect with its regular fixed-route service. Moreover, the November 26, 2001, letter from SunLine to the PSIFF provides further evidence of SunLine's control over the service by the statement "additional stops along the designated route are at the discretion of the SunBus driver." In these respects, the service is similar to mass transportation. We note, however, that the December 17, 2001, agreement between SunLine and the PSIFF specifically states that both the School District and SunLine have final approval over the new stop located at venue #2 Palm Springs High School Auditorium; and therefore, it is unclear whether SunLine had the final say over this location.

SunLine maintains the service is mass transportation and, subject to FTA approval, intends to offer the film festival service on an annual basis. In published guidance, FTA explains that "service to regularly scheduled but relatively infrequent events (sporting events, annual festivals) that is open door, with the routes and schedules set by the grantee and with fares collected from individuals, whether or not the individual fares are subsidized by a donor," does not meet the charter criteria. Q&A No. 27(c), "Charter Questions and Answers," 52 Fed. Reg. 42248, 42252 (November 3, 1987). The PSIFF service is similar in some respects to the service described in Q&A No. 27(c); however, it is provided pursuant to a single contract at a fixed charge of \$50.00 per hour per bus and fares are not collected from individuals. Therefore, SunLine failed to clear a critical hurdle in the balancing test, and the FTA concludes that the PSIFF service is charter service.

As noted in Q&A No. 27(c), FTA suggests that service such as an annual festival may be an excellent candidate for privatization. SunLine is reminded that FTA recipients are required to provide for the participation of private mass transportation companies to the maximum extent feasible. 49 U.S.C. Section 5323(a).

Conclusion

After a thorough investigation, FTA concludes that SunLine's service for the PSIFF is charter service because it meets the charter criteria of being performed under a single contract at a fixed charge for the vehicles. Therefore, SunLine shall immediately discontinue operating the service as it is presently configured.

In accordance with 49 CFR 604.19, the losing party may appeal this decision within ten days of receipt of the decision. The appeal should be sent to Jennifer Dorn, Administrator, FTA, 400 Seventh Street, S.W., Room 9328, Washington, D.C. 20590.

Margaret E. Foley  
Margaret E. Foley  
Regional Counsel

January 2, 2003  
Date

Leslie Rogers  
Leslie Rogers  
Regional Administrator

JAN 3 2003  
Date



U.S. Department  
of Transportation  
Federal Transit  
Administration

REGION IX  
Arizona, California,  
Hawaii, Nevada, Guam  
American Samoa,  
Northern Mariana Islands

201 Mission Street  
Suite 2210  
San Francisco, CA 94105-1839  
415-744-3133  
415-744-2726 (fax)

January 3, 2003

Mr. Thomas F. Larwin  
General Manager  
Metropolitan Transit Development Board  
1255 Imperial Avenue, Suite 1000  
San Diego, CA 92101-7490

Re: Charter Service Exception  
for Super Bowl XXXVII

*Tom*  
Dear Mr. Larwin:

This is in response to your letter of September 18, 2002, requesting a waiver of the Federal Transit Administration's (FTA) Charter Service Rules in order to allow the Metropolitan Transit Development Board (MTDB) and the North County Transit District (NCTD) to operate charter service on January 26, 2003, for Super Bowl XXXVII in San Diego, California. You have not stated the particular waiver that you are seeking.

The preamble to the Charter Regulation explains that FTA will grant an exception under 49 CFR §604.9(b)(4) only for events of an extraordinary, special and singular nature such as the Pan American Games and the visits of foreign dignitaries. 52 Federal Register 11925(April 13, 1987). Regularly scheduled yearly or periodic events would not qualify for the exception. "Charter Service Questions and Answers," 52 Federal Register 42251(November 3, 1987).

Based on the facts provided in your letter, it appears that the service, which you seek to provide, is an incidental use under 49 CFR §604.5(i). Incidental Charter Service means charter service, which does not: (1) interfere with or detract from the provision of the mass transportation service for which the equipment or facilities were funded under the Acts; or (2) does not shorten the mass transportation life of the equipment or facilities.

You have followed the public participation process set forth in 49 CFR §604.11 and have determined that there are no willing and able providers of the charter service which you seek to provide. If no willing and able operator exists, MTDB and NCTD may provide charter service for Super Bowl XXXVII as long as it is incidental charter use as defined above.

Sincerely,  
*Leslie T. Rogers*  
Leslie T. Rogers  
Regional Administrator



U.S. Department of Transportation Federal Transit Administration

REGION VI Arkansas, Louisiana, New Mexico, Oklahoma, Texas

819 Taylor St. Suite 8A36 Fort Worth, TX 76102 817-978-0550 817-978-0575 (fax)

January 27, 2003

Philip O. Pumphrey Executive Director Ozark Regional Transit Authority P.O. Box 785 2423 East Robinson, Springdale, Arkansas 72765-0785

Re: Request for Waiver

Dear Mr. Pumphrey:

This is in reply to your letter dated January 8, 2003, to the Federal Transit Administration (FTA) wherein you confirmed that transportation service provided by Ozark Regional Transit Authority (Ozark) for three private non-profit organizations (i.e., EOA Children's House, Ozark Guidance Center, and the Benton County Sunshine School) would be subject to an exception in FTA's Charter Service Rule because each of the private non-profit organizations is the recipient of funds from one or more of the Federal programs that are listed in Appendix A of the FTA's Charter Service Rule.

Accordingly, by submitting a statement to your grant sponsor whereby Ozark certifies that these organizations meet the requirements of a social service agency in accordance with the provisions of Section 604.9(b)(5)(ii), Ozark would be permitted to provide charter service for the three private non-profit organizations. However, in accordance with Section 604.9(e) of the Charter Service Rule, let me further point out that any charter service provided by a recipient under an exception such as in your case, must be "incidental charter service."

FTA has interpreted "incidental charter service" to mean (1) charter service which does not interfere with or detract from providing mass transportation service or does not shorten the mass transportation life of the equipment or facilities being used and (2) charter service which recovers its fully allocated cost.

If you have any further questions or comments on this matter, please feel free to call Regional Counsel Eldridge Onco or me at (817) 978-0550.

Sincerely,

Robert C. Patrick

Robert C. Patrick Regional Administrator

CONCURRENCES table with columns: RTG SYMBOL, INITIALS/SIG, DATE. Contains handwritten entries for dates 1-28 and 1-25-02.



U.S. Department  
of Transportation  
Federal Transit  
Administration

REGION VII  
Iowa, Kansas,  
Missouri, Nebraska

901 Locust Street  
Suite 404  
Kansas City, MO 64106  
816-329-3920  
816-329-3921 (fax)

February 11, 2003.

Mr. Bill Osborne, Director  
SMTS, Inc.  
704 E. HWY 72  
P.O. Box 679  
Fredericktown, MO 63645

Re: Charter Exemption – Scared Straight

Dear Mr. Osborne:

You have requested approval of an exception to the Federal Transit Administration's (FTA) charter rule found at 49 CFR Part 604. More specifically, you have requested confirmation that the exception found at 49 CFR 604.9(b)(5)(ii) is appropriate to the circumstances described in your letter (and its attachments) to the FTA dated February 10, 2003.

The facts as represented in your letter are:

1. The services would be provided to the Missouri Department of Corrections, Board of Probation and Patrol, and this is a governmental entity.
2. This service recipient either directly or indirectly receives federal funds from one or more of the programs listed in Appendix A to Part 604.
3. This service recipient has certified to the same as evidenced in a letter dated as received via facsimile on February 11, 2003 by both SMTS, Inc. and FTA.
4. The 5 charter trips in question are consistent with the purpose of the service recipient and related to prevention of incarceration of at risk youth.
5. The charter trips are offered (organized and provided) in a non-discriminatory manner.

Based on these facts, we find that the charter exception identified at 49 CFR 604.9(b)(5)(ii) is applicable and that no public advertising is required.

If you have any questions regarding this matter, please contact Regional Counsel, Paula L. Schwach at 816-329-3935 or at [Paula.Schwach@fta.dot.gov](mailto:Paula.Schwach@fta.dot.gov).

Sincerely,

Mokhtee Ahmad  
Regional Administrator



U.S. Department  
of Transportation  
Federal Transit  
Administration

REGION IV  
Alabama, Florida, Georgia,  
Kentucky, Mississippi,  
North Carolina, Puerto  
Rico, South Carolina,  
Tennessee

61 Forsyth Street, S.W.  
Suite 17750  
Atlanta, GA 30303-8917  
404-562-3500  
404-562-3506 (fax)

Mr. Jeff Hackbart  
Director Public Works  
City of Frankfort  
315 West Second Street  
P.O. Box 697  
Frankfort, Kentucky 40602

February 13, 2003

Re: Governor's Kentucky Derby Breakfast

Dear Mr. Hackbart:

Based on the information provided in your letter dated January 6, 2003, Frankfort Transit is granted permission to provide bus service for the special event of the Governor's Kentucky Derby Breakfast Activities.

If you have any questions, I can be contacted at 404/562-3518.

Sincerely,

Donald Alford  
Office of Oversight & Project Management



U.S. Department  
of Transportation  
Federal Transit  
Administration

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

200 West Adams Street  
Suite 320  
Chicago, IL 60606-5253  
312-353-2789  
312-888-0351 (fax)

VIA CERTIFIED MAIL

MAR 21 2003

Mr. Gus Lluberes  
Michigan Department of Transportation  
P.O. Box 30050  
425 W. Ottawa St.  
Lansing, MI 48909

RE: FTA Charter Service Complaint

Dear Mr. Lluberes:

Gladwin Limousine Service (Gladwin) has alleged that a sub-recipient of Michigan Department of Transportation (MDOT), Isabella County Transportation Commission (ICTC), violated Federal Transit Administration (FTA) charter rules pursuant to 49 C.F.R. Part 604. A copy of an e-mail from Gladwin setting forth their allegations is enclosed.

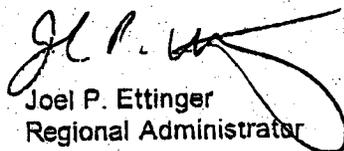
FTA regulations require that certain procedures be followed when a recipient or sub-recipient desires to provide charter service. In accordance with the rule, recipients must determine if willing and able private operators exist prior to providing incidental charter service pursuant to public notice. If willing and able private providers do exist, recipients are prohibited from providing charter service unless one of the enumerated exceptions to the charter rule apply.

As the recipient through which ICTC receives their pass through funding, FTA requests MDOT to conduct an inquiry into these allegations. Please request a copy of ICTC's published charter notice and describe whether any responses from private providers were received. If they have provided incidental charter service, they must describe the nature of that service. If they have received any complaints from any private providers, including Rod and Laurie Knierim, they must also provide a description of those complaints and responses thereto.

Once received, FTA will review this information and determine if sufficient evidence exists which merits the initiation of a formal complaint process in accordance with 49 C.F.R. Part 604.15. A prompt response will be appreciated.

If you have any questions or concerns regarding this matter, please contact FTA's Regional Counsel, Paul Jensen, at (404) 562-3525.

Sincerely,

  
Joel P. Ettinger  
Regional Administrator

Enclosure

cc: Gladwin Limousine Service



U.S. Department  
of Transportation  
Federal Transit  
Administration

REGION IX  
Arizona, California,  
Hawaii, Nevada, Guam  
American Samoa,  
Northern Mariana Islands

201 Mission Street  
Suite 2210  
San Francisco, CA 94105-1839  
415-744-3133  
415-744-2728 (fax)

APR 28 2003

Bill Miller  
Desert Resorts Transportation  
PO Box 2084  
Rancho Mirage, CA 92270

Richard Cromwell III  
General Manager, CEO  
SunLine Transit Agency  
32-505 Harry Oliver Trail  
Thousand Palms, CA 92276

Re: Charter Complaint 2002-11, Desert Resorts  
Transportation v. SunLine Transit Agency

Dear Mr. Miller and Mr. Cromwell:

In accordance with the Federal Transit Administration (FTA) Charter Service regulations, Title 49 Code of Federal Regulations (CFR) Part 604, the Federal Transit Administration (FTA) has reviewed the above captioned Complaint along with related materials submitted by both parties. For administrative convenience FTA has consolidated 106 individual complaints filed by Desert Resorts Transportation (Desert) against the SunLine Transit Agency (SunLine) for purposes of this decision as all complaints arise out of the same set of circumstances.

In earlier decisions (California Bus Association (CBA) v. SunLine) rendered on February 10, 1997 and January 15, 2002, FTA determined that group trips performed by SunLine, including those, which are the subject of the instant complaint, constitute charter service subject to the procedural requirements and limitations contained in the FTA Charter Service regulations. FTA also determined that SunLine failed to comply with the Charter Service regulations in agreeing to provide such services. Accordingly, the only issue to be decided at this time is what, if any, remedies authorized under the regulations (49 CFR §604.17) should be imposed.

#### Background

On February 10, 1997, the FTA issued a decision finding that SunLine's fixed-route group trip service was charter service in violation of 49 CFR Part 604. SunLine was ordered to discontinue operating the service and advised that if it wished to reinstitute group trip operations, it must reconfigure the service to conform to FTA's mass transportation guidelines. Shortly thereafter, FTA granted a temporary stay of its decision based on SunLine's assertions that the information it had provided prior to the February 10 decision was outdated; the parties had resolved their

Page 2

differences during an October 1996 meeting; and the charter service infractions had been corrected. Based on supplemental information obtained following the February 10, 1997 decision, on January 15, 2002, FTA found that SunLine had not made the changes necessary to bring the group trip service within the definition of mass transportation. SunLine's reconfigured group trip service was found to be charter service rather than mass transportation and therefore, an impermissible use of FTA funded facilities and equipment. FTA suggested several ways in which SunLine could reconfigure the service in order to bring it into compliance with Federal requirements; however, SunLine failed for a variety of reasons to adopt those suggestions.

As of the January 15, 2002 letter of decision, SunLine had obligated itself and scheduled to perform approximately 146 group trips according to information provided by both parties. Following the January 15 decision, SunLine hosted a meeting of private charter operators to explain the situation and to see if any of them could carry out the group trip contracts. Thirty-Nine or forty of those trips were cancelled by SunLine. The remaining 106 were not cancelled and form the basis of Desert's 106 Complaints. In a letter dated May 3, 2002, addressed to Pacific Coast Bus Service, Inc. SunLine admits carrying out the balance of the group trips and states that the last trip was performed on April 23, 2002.

### Discussion

Desert is seeking remedies under 49 CFR §604.17 which says that: "(a) If the Regional Administrator determines that a violation of this part has occurred, the Regional Administrator may order such remedies as the Regional Administrator determines are appropriate. (b) If the Regional Administrator determines that there has been a continuing pattern of violation of this part, the Regional Administrator may bar the respondent from the receipt of further financial assistance for mass transportation facilities and equipment."

To remedy SunLine's admitted violations, Desert asks FTA not only to withhold further Federal funding from SunLine, but to also require SunLine to pay Desert monetary damages in an amount equal to that which would have been received had Desert provided the service. In support of its requests Desert relies on the preamble to the charter regulation found at 52 Federal Register (FR) 11916, April 13, 1987, page 11929. In the discussion of Section 604.17 Remedies, the preamble says, "this section of the final rule sets forth the remedies, or penalties, that UMTA may impose on a recipient if we find that there has been a violation of the regulation."

In response, SunLine argues that it booked the 106 group trips before the January 15, 2002 decision letter was issued in reliance on the temporary stay granted earlier by FTA and in good faith believing that it was properly reconfiguring the service based on advice from FTA. The record reflects that the trips were booked before the FTA decision and completed in approximately three months following the decision.

In determining whether to impose the remedies requested, SunLine's intent in providing the group trips following the FTA decision of January 15 must be balanced with the likely effects of such remedies. Nothing in the record suggests that SunLine was acting in defiance of the FTA decision. To the contrary, the meeting held with private operators to see if they could perform any

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of the contracted group trips suggests that SunLine made a concerted effort to carry out the intent of the decision. Nothing in the record suggests that SunLine was knowingly attempting to harm Deserts or any other private operator. Rather, SunLine appears to have acted in the mistaken belief that its group trips were a permissible form of mass transportation.

On the other hand, suspension of SunLine's eligibility for further Federal financial assistance would likely result in a noticeable reduction in the quality of mass transportation service to transit riders in the SunLine service area. That result would be contrary to FTA goals for increasing transit ridership and making public transportation the mode of choice for the traveling public. Accordingly, FTA will not impose that penalty in the absence of evidence that less drastic remedies will not suffice.

In the preamble to the issuance of the Charter Service regulations FTA purposely declined to specify any particular penalties that might be imposed upon finding a violation, beyond the possibility of withdrawing future financial assistance. "In this final rule, UMTA [now FTA] has decided not to specify any penalties. We agree with several of the commenters that this approach provides UMTA with the flexibility needed to fashion a remedy that fits the situation. While this may permit the possibility of arbitrary penalties and remedies, UMTA's close reliance on and following of precedents should prevent this."

In the fifteen years the regulations have been in effect, FTA has neither withheld future financial assistance, nor awarded monetary penalties in response to a violation, so there is no such precedent to apply in this case. With respect to Desert's request that FTA require SunLine to pay Desert the amount Desert would have earned had Desert provided the group trips, Desert has not shown that it would necessarily have been hired over other private charter operators. Even if it could be shown that Desert would have been awarded the contracts, it is purely speculative to suggest that Desert would have earned a particular sum on such business.

The preamble does provide some guidance regarding one appropriate remedy to be applied where charter service is impermissibly performed. At 52 FR 11926 discussion of spare ratios and useful life rely on Section 9 [now 5307] Formula Grant Application Instructions, to wit, "a transit bus has a mass transit useful life of 12 years. UMTA will not permit a recipient to count charter service toward meeting this 12-year mark. As a result, UMTA will, absent extenuating circumstances, only permit a bus to be replaced after the bus is used in 12 mass transportation years, not just 12 calendar years."

Further guidance with regard to remedies is found in the Questions and Answers promulgated by UMTA at 52 FR 42248, November 3, 1987. Question 28 asks, "How should grantees calculate 'mass transit useful life' less 'charter life' of vehicles?" The Answer is as follows: "Any reasonable method of calculation is sufficient (e.g. average hours per week, month, or year subtracted from total hours; average miles per week, etc., subtracted from total miles). The calculation does not necessarily have to be done for each particular bus, and averages can be applied to an entire fleet. For instance, a grantee that provides 3 days of charter service per year per bus, would subtract 36 days from the 12-year useful life of each individual bus...." Other expenses for which grant money may not be used when charter is performed include depreciation, fuel, maintenance and labor.

### Conclusion

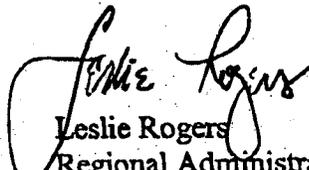
Because the charter services performed by SunLine between January 15, 2002 and April 23, 2002, had been contracted for and scheduled prior to the date of FTA's January 15 decision letter, and

there is no evidence in the record to suggest that SunLine acted in bad faith or in defiance of the FTA decision, FTA will neither withhold future financial assistance to SunLine, nor impose monetary penalties payable to Desert pursuant to 49 CFR §604.17, consistent with prior precedent. Desert's requests that FTA deny further financial assistance to SunLine and that SunLine be directed to pay monetary damages to Desert are hereby denied.

However, in light of the continuing nature of the violations and the apparent inability of SunLine to conform its behavior to the regulatory requirements with respect to its so called "group trips", SunLine is hereby ordered to cease and desist from offering to perform any type of group service, except for services designed to meet the special needs of elderly or handicapped patrons otherwise permitted under the Charter Service regulations.<sup>1</sup> In determining the in-service useful life of FTA funded vehicles, equipment, and facilities used in support of "group trips" since January 1, 1997, SunLine must calculate and deduct all associated use (mileage, time, or depreciation) from the inventory records required to be maintained in accordance with 49 CFR Part 18 and related terms and conditions of FTA Assistance Agreements. No reference to group trips is to be published in the SunLine Rider's Guide as was done in July 2001. SunLine must take all necessary steps to conform its service in all respects to the requirements of FTA's regulations and guidelines for mass transit.

In accordance with 49 CFR §604.19 appeals of this decision must be made within ten days of receipt of this decision. The appeal should be sent to Jennifer Dorn, Administrator, FTA, 400 Seventh Street, S.W., Room 9328, Washington, D.C. 20590.

Sincerely,

  
Leslie Rogers  
Regional Administrator

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<sup>1</sup> This order encompasses all group service as described in SunLine's July 2001 Rider's Guide. A separate complaint has been filed by Desert regarding SunLine services designed to meet the special needs of elderly and handicapped patrons as advertised on SunLine's internet web page. Those services are not covered by this decision and will be addressed in a response to the recent complaint.



U.S. Department  
of Transportation  
Federal Transit  
Administration

Administrator

MAY 14 2003

4th St., S.W.  
Washington, D.C. 20590

*procedural*

Mr. Dan W. Chandler  
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2855 Coolidge Highway, Suite 109  
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Re: Classic Caddy Limousine v. Capital Area Transportation Authority, Charter Service Docket Number 2002-01; The Tecumseh Trolley & Limousine Service v. Capital Area Transportation Authority, Charter Service Docket Number 2002-04; Indian Trails, Inc., v. Capital Area Transportation Authority, Charter Service Docket Number 2002-10

Dear Mr. Chandler:

*Mr. Chandler*

In an initial decision by Regional Administrator Joel Ettinger dated October 11, 2002, and amended November 6, 2002, the Federal Transit Administration found that Capital Area Transportation Authority (CATA) was providing charter service in violation of the Federal Transit Administration's charter service regulation, 49 CFR Part 604, and ordered CATA to cease and desist providing such service. CATA appealed both the initial and the amended decisions to me on October 24, 2002, and November 15, 2002, respectively.

I am not taking any action on the appeals since CATA presented no new matters of fact or points of law that were not available or not known during the investigation of the complaint. This decision is administratively final.

Sincerely,

Jennifer L. Dorn

cc: Sandy Drago, Executive Director  
Capital Area Transportation  
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Joel Ettinger, FTA Regional Administrator, TRO-5

Nancy Ellen Zusman, Regional Counsel, TRO-5