

BCC: Peter J. Pantuso, President  
American Bus Association  
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Federal Transit Administration  
United States Department of Transportation

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

Headquarters

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

June 16, 2003

Paul J. Yesawich, III, Esq.  
Harris Beach  
99 Garnsey Road  
Pittsford, New York 14534

Re: *Kemps Bus Service, Inc. v. Rochester-Genesee Regional Transportation Authority*  
Charter Complaint Docket No. 2002-02

Dear Mr. Yesawich:

On January 2, 2003, Federal Transit Administrator Dorn issued a final decision on this charter service complaint. She found that the Rochester-Genesee Regional Transportation Authority (RGRTA) was providing prohibited charter service in three specific cases: Wegman's Grocery Shuttle, Ladies Professional Golf Association Wegman's Rochester International Golf Tournament (LPGA), and Rochester Institute of Technology (RIT) campus service. Since then, RGRTA has consulted with FTA's Office of Chief Counsel in order to bring its service into compliance with that decision and FTA's charter service regulation, 49 CFR Part 604. The following summarizes the measures RGRTA has undertaken.

#### *Wegman's Grocery Shuttle*

RGRTA has provided information that Wegman's Grocery has arranged with Medical Motor Service of Rochester and Monroe County, Inc., for the provision of transportation service to persons with disabilities between certain senior citizen complexes and the Wegman's stores. Since this service is restricted, the general public will no longer be served. Since the number of riders on some of the routes exceeds the capacity of Medical Motors, it has subcontracted with Regional Transit Service (RTS) (a subsidiary of RGRTA) to provide service on those routes as authorized by section 604.9(b)(2)(i).

#### *Wegman's International LPGA*

RTS has provided copies of published schedules for the LPGA and similar seasonal events. RTS has established public routes for each of the seasonal events. The routes will operate only on the days of the events. RTS has established a fare per rider. As with all other public routes, senior citizens, persons with disabilities, and children (ages 6-11) pay one-half fare, while children age 5 and under ride for free. RTS has posted the schedule on its website. LPGA will not subsidize the

fare this year. If no one else elects to subsidize the fare, each person boarding a bus to ride to the LPGA event will be required to pay the regular fare.

*Rochester Institute of Technology*

RGRTA has provided FTA with a draft of a subsidy agreement between RTS and RIT (which RIT has indicated it is willing to sign) in which RTS retains control of the service. RGRTA has represented to FTA that standard RTS bus stop signs have been placed throughout the campus. In addition, RTS states that it has placed a number of shelters on the campus of the same design and appearance as shelters on other public routes. There are a number of stops on campus where the public can transfer from routes that travel off-campus to those that operate only on campus, providing connectivity between campus and non-campus service. At this time, the portion of the RTS website where schedules are given contains a link to the portion of the RIT website where the schedule for the intra-campus routes is found. RTS states that it is in the process of integrating all its route schedules on its website.

RTS states that it is no longer contracting directly with any university for the purpose of providing services for its graduation events or special shuttle service to other transportation services around school holidays. RGRTA provided evidence, however, that Kemps Bus Service, Inc., and Golden Memories Transportation have both sought to subcontract certain graduation services to RTS because of a lack of capacity and, in some cases, an inability to provide equipment accessible to persons with disabilities.

*Conclusion*

Based on the information RGRTA has provided, I conclude that RGRTA, with respect to the service at issue in this case, is now in compliance with FTA's charter service regulation.

Very truly yours,  
(Signed)  
Gregory B. McBride  
Deputy Chief Counsel

cc: John H. Kemp, President  
Kemps Bus Service, Inc.  
2926 Lakesville Road  
Avon, NY 14414

Susan H. Lent, Esq.  
Akin Gump Strauss Hauer & Feld  
1333 New Hampshire Ave., N. W.  
Washington, DC 20036

Peter J. Pantuso, President and Chief Executive Officer  
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1100 New York Ave., NW, Suite 1050  
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Letitia Thompson, Regional Administrator, TRO-2

Maisie Grace, Regional Counsel, TRO-2

Jeffrey Shane, DOT, OST, S-3

Emil H. Frankel, DOT, OST, P-1



U.S. Department  
of Transportation  
Federal Transit  
Administration

Administrator

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

JUL 7 2003

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

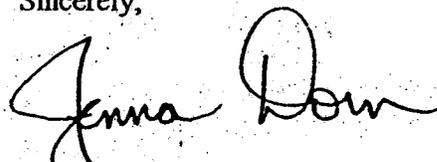
Re: Docket Number 2002-07

Dear Mr. Cromwell:

In a decision by Regional Administrator Leslie Rogers, dated January 3, 2003, the Federal Transit Administration (FTA) found that SunLine Transit Agency (SunLine) was providing charter service in violation of FTA's charter service regulation, 49 CFR Part 604, and ordered SunLine to cease and desist providing such service. SunLine appealed the decision to me on January 20, 2003.

I am not taking any action on the appeal since SunLine presented no new matters of fact or points of law that were not available or not known during the investigation of the complaint, as required by section 604.19 of the regulation; accordingly, the Regional Administrator's decision is administratively final.

Sincerely,



Jennifer L. Dorn

cc: Mr. Bill Miller  
Desert Resorts  
P.O. Box 2084  
Rancho Mirage, California 92270

Lisa Garvin Copeland, Esq.  
74-040 Highway 111, Suite 225  
Palm Desert, California 92260

Leslie Rogers, Regional Administrator

**BEFORE THE FEDERAL TRANSIT ADMINISTRATION**

California Bus Association,  
On behalf of Amador Bus Lines,

Complainant

Charter Complaint #2003-01  
49 U.S.C. Sections 5303, 5304,  
5306, 5307, and 5323

v.

Sacramento Regional Transit District,

Respondent.

**DECISION**

**INTRODUCTION**

On March 6, 2003, the California Bus Association (CBA) filed this complaint with the Federal Transit Administration (FTA) alleging that the Sacramento Regional Transit District (RT) has violated the conditions placed on the receipt of Federal assistance by the Federal transit laws (49 U.S.C. Chapter 53) by instituting the Downtown Circulator service, which among other things, replaced a service operated by a private operator, Amador Bus Lines, under contract to the State of California Department of General Services (DGS). After reviewing the allegations and the filings of the parties, FTA concludes as follows:

- that RT's Downtown Circulator is not impermissible charter service under FTA's charter service regulation at 49 CFR Part 604; that RT's Downtown Circulator is "mass transportation" within the meaning of the Federal transit laws; and, accordingly, that the requirements of 49 U.S.C. 5323(d)(1) regarding a public authority's provision of charter service in competition with a private operator of charter bus service do not apply to RT's service; and
- that since Amador's shuttle service contract with DGS was for charter service, not mass transportation service, the requirements of 49 U.S.C. 5323(a)(1) regarding a public authority's provision of mass transportation service in competition with a private operator of mass transportation service do not apply; that with regard to participation by the private sector, RT has met the minimum statutory requirements for public notice and comment in section 5307; and that while it appears that RT could have done more to explore the use of private sector providers in this situation, RT has met the minimum requirements of section 5306.

### **CBA's complaint**

Under its contract with DGS, Amador provided shuttle service for the exclusive benefit of state employees parking in state lots. Sometime in 2002, the State contacted RT to determine whether RT could add new routes to its downtown service area that would meet the needs of its employees who travel between State parking lots and State office buildings. As a result of these discussions, RT developed the Downtown Circulator service (also referred to as the Capital Shuttle), which now consists of three fixed routes numbered 141, 142, and 143 within the Central City of Sacramento. As a part of this plan, RT also changed the frequency of its previously existing Route 140.

This expansion of RT's service is provided by FTA-funded CNG-powered buses. DGS and RT entered into an agreement whereby DGS compensates RT for the additional costs of increasing downtown service in consideration of RT's acceptance of the State employee ID card as proof of fare payment along these new routes. Passengers who do not possess a State ID card pay the applicable fare. DGS purchases Central City Passes for its employees at a discounted rate.

On January 28, 2003, DGS notified Amador that its contract would not be renewed when it expired on April 7, 2003. In its March complaint, CBA requested that FTA investigate, alleging that RT violated private sector participation requirements under 49 U.S.C. 5303 (f)(4), 5304(d), 5306(a) and 5307(c)(2) and (6) by failing to inform or involve the private sector in its plan to use Federal assistance to purchase expansion buses for the purpose of displacing the private operator.

CBA also cites 49 U.S.C. 5323(a)(1)(A) and (B) in arguing that RT's federally assisted expansion buses are being used, unlawfully, to prevent an existing private transportation operator from fairly competing to provide this service.

CBA also asserts RT's Downtown Circulator service violates FTA's charter regulations, arguing that the Downtown Circulator is not mass transportation service as defined by 49 U.S.C. 5302(a)(7) and 49 CFR Part 604. CBA cites the agreement with DGS for RT to provide shuttle service for DGS employees and the RT planning documents describing DGS' approaching RT to operate the service needed to replace the shuttle service performed by Amador.

### **RT's response**

On March 20, 2003, RT responded to the complaint. RT related the history of its development of the Downtown Circulator service, including its public hearing in June 1999 for the program of projects that included expansion of its CNG fleet. At that time, RT did not have a specific plan for deploying these new buses, other than to meet growing demand for service in the region. In addition, RT anticipated that it might need more buses to accommodate the service changes that would be required with the opening of the South Sacramento and the Amtrak-Folsom Light Rail Corridor Light Rail Extension projects. Last year, RT developed the service plan to determine where to

deploy these new buses, which are only now being delivered to RT. RT argued it met the private enterprise consultation obligations regarding procurement of these buses with its published notices.

RT argued that it complies with the FTA public participation requirement by publishing a notice annually that solicits private enterprise participation in RT's development of its program of projects to be funded under FTA grants. RT also publishes a notice of its program of projects inviting comments before the program is adopted, combining this notice with its budget public hearing notice. It provided a copy of the notices for the last three years. The notice in June of 1999 included expansion of RT's bus fleet. In addition, RT published a public hearing notice in August 2002 for the new Downtown Circulator service. RT states that its public notice process was reviewed as part of FTA's 1997 and 2000 triennial reviews and that no deficiencies in the public participation process were noted.

RT states that although the new routes are designed to serve State employees, the Downtown Circulator service is part of RT's fixed route system of mass transportation and is not charter service as defined by the three factors cited by FTA: (1) open to the public and not closed door, (2) designed to benefit the public at large, and (3) under the control of the recipient.

In response to CBA's argument that section 5323 applies to this situation, RT argues that FTA funds are not used to operate the competing service and that the shuttle service operated by Amador was charter service, not "mass transportation service" protected by the statute.

Finally, RT argues that CBA's protest is untimely because Amador knew on January 27, 2003 that RT would be operating this service because it testified at RT's public hearing on that day but waited until March 8<sup>th</sup> to submit its protest.

RT believes the MPO for the Sacramento metropolitan urban area has properly provided the notice required by sections 5303(f)(4), 5304(d), and 5307(c)(2) and (6).

#### **CBA's response to RT**

On April 7, 2003, CBA responded to RT's March 20 and 25 responses, stating as follows:

1. RT is not in compliance with private sector participation requirements because it did not disclose that its 1999 program of projects bus expansion plan would include the Downtown Circulator service. Further, CBA states that RT's August 26, 2002 public hearings did not include the private sector in consultation regarding this new service.
2. RT is not excused from FTA private sector participation requirements because it does not receive FTA operating assistance.

3. Amador has standing to be protected under section 5323 because of its likelihood to be financially injured.
4. RT's Downtown Circulator is not mass transportation, but charter under contract to DGS. RT's 1992 Sacramento Downtown Shuttle Feasibility Study Draft Final Report does not support the new service in question. CBA maintains there is no demonstrable demand for the Downtown Shuttle other than to serve State employees. Further, all of RT's public notices in 2002 identify this service as "New Downtown State Shuttles." CBA argues that while the service agreement with DGS was converted into a purchase of Central City passes, the subsidy from DGS remains substantially the same.
5. CBA's complaint is not untimely because while RT approved the Downtown Shuttle Service on September 30, 2002, it was not until a February 14, 2003 meeting with DGS that CBA was told that DGS was not interested in pursuing discussions with CBA.

### RT's second response

On June 3, 2003, RT provided additional information regarding its compliance with 49 U.S.C. sections 5306 and 5307 regarding private enterprise participation. RT responded that the requirement in section 5306(a) applies to plans and programs developed by the metropolitan planning organization, in this case the Sacramento Area Council of Governments. RT states it complied with section 5307(c) requirements for participation of interested parties, including private transportation providers.

### DISCUSSION

#### 1. Charter Service.

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

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

Charter service is usually a one-time provision of service over which the passenger, not the service provider, exercises control. 52 *Fed. Reg.* 11916, 11919 (April 13, 1987). In contrast, the Federal transit laws define "mass transportation" as transportation that provides regular and continuing general or special transportation to the public. 49 U.S.C. § 5302(a)(7). In the preamble to its charter service regulation, FTA has articulated other features that flow logically from this definition:

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

*52 Fed. Reg. 11920.*

Given the many varying scenarios existing in the transportation industry, FTA has determined that a balancing test must be used to determine the nature of the service involved in any complaint filed with FTA. As the preamble to the charter regulation points out, there is no fixed definition of charter service, and the characteristics cited by FTA are illustrative, not exhaustive. *52 Fed. Reg. 11919-11920.*

*Under the control of the recipient*

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

The RT and DGS arrangement, the Central City Pass Agreement, provides that RT retains control of routes and service. Such pass agreements are not features of charter service, instead constituting "group demand" service as contemplated by Q&A Number 27(e), "Charter Questions and Answers," *52 Fed. Reg. 42248, 42252* (November 3, 1987), which provides that group demand service is not charter service where groups such as employees of a common workplace contract with a transit authority for service and each individual pays his or her own fare, so long as the authority controls routes and service and the service is open door.

*Designed to benefit the public at large*

Service is designed to benefit the public at large when it serves the needs of the general public, instead of those of "some special organization such as a private club." *52 Fed. Reg. 11920* (April 13, 1987). *Annett Bus Lines v. City of Tallahassee, FL-TALTRAN/90-02-01* (April 28, 1992). In this regard, CBA has provided evidence that the Downtown Circulator service was structured to meet the needs of State employees to travel from parking lots to State office buildings, that it is a service designed to substitute for the State's contract service with

Amador, and that the service since instituted carries almost exclusively State employees. The record supports these assertions; however, none of these facts, taken into consideration with the information provided by RT, results in the conclusion that the Downtown Circulator service is anything but mass transportation.

While the service is designed to accommodate the State employees primarily, it is not restricted to their exclusive use, but is available to anyone wishing to board; moreover, this service has been integrated into RT's larger route structure, providing greater transportation connectivity in the downtown area for riders of the fixed route system. FTA finds that the service benefits the public at large.

(CBA argues that RT's 1992 study supports a different downtown service configuration, not the Downtown Circulator service. FTA is not willing to substitute its judgment for the grantee's in this regard.)

*Open to the public and not closed door*

In determining whether service is truly "open door," FTA looks both at the level of ridership by the general public, as opposed to a particular group, and at the intent of the recipient in offering the service. The intent to make service open door can be discerned in the attempts to make the service known and available to the public. FTA thus takes into account the efforts a recipient has made to market the service. Generally, this effort is best evidenced by publication of the service in the recipient's preprinted schedules. *Washington Motor Coach Association v. Municipality of Metropolitan Seattle*, WA-09/87-01 (March 21, 1988). FTA has also interpreted "open door" to mean a substantial public ridership and/or an attempt by the transit authority to widely 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).

RT advises that the Downtown Circulator routes and schedules are set out in the pocket timetables that will be supplied in each bus assigned to these routes. In addition, the new routes are included in the June 2003 edition of SRT's Bus and Lightrail Timetable Book. FTA finds that SRT has demonstrated that the service is, in fact, open door.

Accordingly, FTA concludes that RT's Downtown Circulator is permissible mass transportation, not charter service, within the meaning of the Federal transit laws. We now turn to the question of RT's compliance with the private sector participation requirements in the Federal transit laws.

## 2. Private Sector Involvement.

### *Compliance with private sector participation requirements*

The relevant provisions of 49 U.S.C. 5306 focus mainly on including the private sector in participating in local transit programs, ensuring that adequate compensation is provided a private provider when its transit facilities and equipment are acquired by a state or local government authority, and protecting private providers of transit from competition with federally assisted transit providers.

Federal transit law (49 U.S.C. 5303(f)(4)) and the joint FTA/Federal Highway Administration planning regulations direct special attention to the concerns of private transit providers in planning and project development, specifically requiring that private transit providers, as well as other interested parties, be afforded an adequate opportunity to be involved in the early stages of the plan development and update process (23 CFR 450.322).

FTA does not impose prescriptive requirements for determining whether a grant applicant has made adequate efforts to integrate private enterprise in its transit program, as explained in the FTA Notice "Private Enterprise Participation," dated April 26, 1994 (59 *Fed. Reg.* 21890 *et seq.* (1994)); FTA Circular 9030.1C, Page V-39, Para. 24. *Private Enterprise Concerns* (October 1, 1998).

FTA grantees must comply with rigorous planning and private enterprise requirements (49 U.S.C. 5303-5307) and the joint FTA/FHWA planning regulations. To determine the adequacy of a grant applicant's efforts to incorporate private enterprise in its transit program, FTA monitors compliance with statutory and regulatory private enterprise requirements as part of the triennial reviews. Indeed, FTA's Fiscal Year 2000 Triennial Review Report noted a deficiency in RT's public participation process. On July 3, 2001, RT took corrective action through adoption of a Standard Operating Procedure establishing a new coordination and consultation process in developing the annual federal program of projects. Upon review, FTA accepted this procedure and closed the finding.

### *Competition with the private sector*

Federal law recognizes the special concerns of private transportation providers and affords them certain safeguards from competition with public agencies. Specifically, FTA is prohibited from providing Federal assistance to a governmental body that provides service in competition with, or supplementary to, mass transportation service provided by a private transportation company, unless FTA finds that the local transportation program developed in the planning process provides for participation of private mass transportation companies to the maximum extent feasible (49 U.S.C. 5323(a)(1)(B)).

RT argues that this restriction in section 5323(a)(1) applies only if FTA funds are used to operate the competing service and the company is providing "mass

Recess?  
Notice?  
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transportation" service and that neither condition is met here. RT states the Downtown Circulator service does not fall under this restriction. CBA has provided information to support its assertion that the Downtown Shuttle service was instituted to meet, at least in part, the needs of the State, as employer, to replace the service it had previously contracted for with Amador.

The term "mass transportation" is defined in section 5302(a)(7) as "transportation by a conveyance that provides regular and continuing general or special transportation to the public, but does not include school bus, charter or sightseeing transportation." Emphasis added. The term "charter" is defined in the FTA regulations at 49 CFR 604.5(e) as follows:

"Charter Service" means transportation using buses or vans, or facilities funded under the Act of a group of persons who pursuant to a common purpose, under a single contract, at a fixed charge (in accordance with the carrier's tariff) for the vehicle or service, have acquired the exclusive use of the vehicle or service to travel together under an itinerary either specified in advance or modified after having left the place of origin . . . ."

Under this standard, it is clear that the service Amador provided under contract with DGS was charter service; moreover, Amador is not a "private mass transportation company" to which the protections of section 5323 apply.

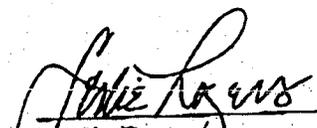
**CONCLUSION**

While it appears that RT could have done more to explore the use of private sector providers in this situation, RT has met the minimum requirements under the law. The service RT is providing, known as the Downtown Circulator, is not charter service, but permissible mass transportation service.

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

  
\_\_\_\_\_  
Renee Marler  
Regional Counsel

8/5/03  
Date

  
\_\_\_\_\_  
Leslie Rogey  
Regional Administrator

8/5/03  
Date



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

Administrator

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

AUG 5 2003

Mr. Richard Cromwell, III  
General Manager & CEO  
Sunline Transit Agency  
32-505 Harry Oliver Trail  
Thousand Palms, CA 92276

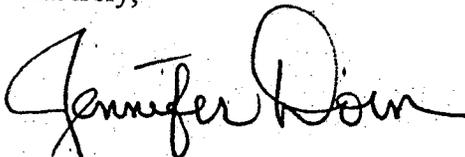
Re: Docket No. 2002-11

Dear Mr. Cromwell:

In a decision by Regional Administrator Leslie Rogers, dated April 28, 2003, the Federal Transit Administration (FTA) found that SunLine Transit Agency (SunLine) had provided charter service in violation of FTA's charter service regulation, 49 CFR Part 604. Sunline appealed the decision to me on May 14, 2003.

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

Sincerely,



Jennifer L. Dorn

cc: Mr. Bill Miller

Leslie Rogers, Regional Administrator



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

Administrator

**AUG 19 2003**

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

Mr. Ronald R. Bast  
President  
Motorcoach Division  
Riteway Bus Service, Inc.  
W201 N13900 Fond du Lac Avenue  
Richfield, WI 53076

Re: Charter Services by Publicly Funded Transit Organizations

Dear Mr. Bast:

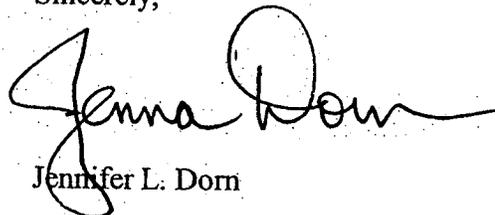
Senator Herb Kohl forwarded your letter regarding charter services to me for response. I understand that, as the owner of Riteway Bus Service, Inc., you wish to reinforce the position taken by the American Bus Association regarding the issue of the illegal provision of charter services by publicly funded transit organizations. You ask that the Federal Transit Administration (FTA) work to strengthen its charter service regulation to ensure that publicly funded transit operators not take business away from privately operated motorcoach companies.

Since my appointment as FTA Administrator, I have worked with both the American Bus Association and the American Public Transportation Association to educate both the private and public sector about FTA's charter service regulation. Enclosed is a copy of a letter I sent to the industry on December 27, 2001, expressing the need for the public and private sectors to work together in the provision of transportation services. Also enclosed is a copy of the "Charter Service Information" brochure FTA created, published, and widely distributed that highlights the key provisions of the regulation. Both documents are also available on our website. In addition, FTA continues to investigate allegations, make decisions, and enforce its regulation regarding prohibited charter service.

In response to your specific concerns, the Department of Transportation's proposal for the Safe, Accountable, Flexible, and Efficient Surface Transportation Equity Act of 2003 (SAFETEA) provides for the involvement of the private sector in the transportation planning process and proposes amendments to the charter service remedy provision of the statute.

Public and private mass transportation providers have much to offer each other and the riding public. Thank you for your interest in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Jennifer L. Dom". The signature is fluid and cursive, with a large initial "J" and "D".

Jennifer L. Dom

Enclosures

cc: Senator Herb Kohl  
Washington Office



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

Administrator

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

SEP 16 2003

Mr. Michael R. Waters  
President  
California Bus Association  
11020 Commercial Parkway  
Castroville, CA 95012

Re: Charter Service Docket Number 2003-01

Dear Mr. Waters:

In a charter service decision by Regional Administrator Leslie Rogers, dated August 5, 2003, the Federal Transit Administration (FTA) found that Sacramento Regional Transit District was providing mass transportation, not charter service, and, therefore, was not in violation of FTA's charter service regulation, 49 CFR Part 604. California Bus Association (CBA) appealed the decision to me on August 15, 2003.

The charter service regulation provides that the Administrator will only take action on an appeal if the appellant presents evidence that there are new matters of fact or points of law that were not available or not known during the investigation of the complaint, 49 CFR Section 604.19.

In accordance with the charter service regulation, I am not taking any action on the appeal since CBA presented no new matters of fact or points of law that were not available or not known during the investigation of the complaint, as required by Section 604.19 of the regulation; accordingly, the Regional Administrator's decision is administratively final.

Sincerely,

Jennifer L. Dorn

cc: Beverly A. Scott, General Manager, CEO, Sacramento Regional Transit District  
Mark W. Gilbert, Chief Legal Counsel, Sacramento Regional Transit District  
William R. Allen, President, Amador Stage Lines  
Leslie Rogers, Regional Administrator, TRO-IX  
The Honorable Doug Ose, U. S. House of Representatives



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Michigan, Minnesota,  
Ohio, Wisconsin

200 West Adams Street  
Suite 320  
Chicago, IL 60606-5253  
312-353-2789  
312-886-0351 (fax)

VIA FACSIMILE FOLLOWED BY HARD COPY.

September 25, 2003

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

RE: Request for Charter Waiver, Docket No. 2003-18

Dear Ms. Gibbons-Allen:

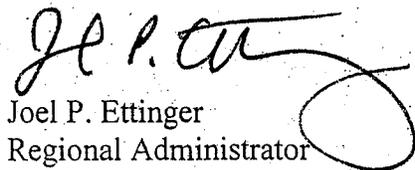
This letter serves as the Federal Transit Administration's (FTA) reply to the Detroit Department of Transportation's (DDOT) request for a waiver of the charter regulations dated September 10, 2003.

DDOT is requesting a waiver of the charter regulations pursuant to 49 C.F.R. Section 604.9(b)(4) for the United States -- Arab Economic Forum as a special event. However, DDOT has failed to provide justification evidencing a need for the waiver, and it has also failed to provide evidence that it has determined that there are no willing and able charter providers able to provide the requested service.

Therefore, FTA is denying DDOT's request for a waiver of the charter regulations pursuant to Section 604.9(b)(4).

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

Sincerely,



Joel P. Ettinger  
Regional Administrator



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

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Ohio, Wisconsin

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312-353-2789  
312-886-0351 (fax)

VIA CERTIFIED MAIL

OCT 23 2003

Mr. Dennis Streif, Vice President  
Vandalia Bus Lines, Inc.  
P.O. Box 400  
312 West Morris Street  
Caseyville, IL 62232

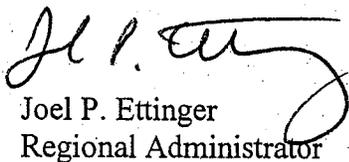
RE: FTA Charter Service Complaint # 2003-14

Dear Mr. Streif:

The Federal Transit Administration (FTA) has received documentation from South Central Illinois Mass Transit District (SCIMTD) relating to your charter complaint. SCIMTD has rescinded their proposal for athletic transportation services for Kaskaskia College. Therefore, this case is considered closed and no further action will be taken.

As always, if you have any questions regarding the Federal Transit Administration procedures, please contact Nancy-Ellen Zusman, Regional Counsel, at (312) 353-2789.

Sincerely,

  
Joel P. Ettinger  
Regional Administrator

2003 - 14

Enclosure

cc:



U.S. Department  
of Transportation  
Federal Transit  
Administration

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

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

October 28, 2003

Robert J. Dostal, Jr.  
Motorcoach Marketing International, Inc.  
6920 N.E. 4<sup>th</sup> Lane  
Ocala, Florida 34470

Re: Charter Complaint

Dear Mr. Dostal:

The Federal Transit Administration (FTA) has completed its review and investigation of the complaints filed by Motorcoach Marketing International, Inc., Fame Tours, Inc., and the United Motorcoach Association that principally allege certain bus service provided by the Metropolitan Transit Authority of Harris County, Texas, (Houston METRO) in connection with the annual Houston Livestock Show and Rodeo (Rodeo) was in violation of the FTA's Charter Service regulation, 49 CFR Part 604. As each of the three complaints sets forth essentially the same allegations, this letter will serve as the FTA's response to all three of the complaints.

Specifically, it has first of all been alleged that the City of Houston, Texas, for many years has awarded a contract to Houston METRO for the provision of bus service in connection with the Rodeo and, consequently, Houston METRO is providing charter service for the Rodeo with federally funded equipment in violation of the FTA's Charter Service regulation. Secondly, it is alleged that Houston METRO, as a public transportation provider, has engaged in a monopoly with its special event bus service in Houston, Texas. Finally, it is alleged that Houston METRO improperly uses federally funded buses to exclude many private operators from competing for charter service for the Rodeo and other special events.

With respect to the first allegation in the complaint concerning impermissible charter service being provided by Houston METRO in connection with the Rodeo, the FTA has conducted a thorough review of the role and manner in which Houston METRO has provided the bus service in this case. As a part of the analysis to determine whether the Rodeo service provided by Houston METRO in this case is impermissible charter service or permissible mass transportation, it will be helpful to review the definitions of the terms "charter service" and "mass transportation" as they are defined in the FTA's Charter Service regulation and in the Federal Transit Act, respectively.

The term "charter service" is defined in 49 CFR Section 604.5(e) as follows:

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

The term "mass transportation" is defined in the Federal Transit Act at 49 U.S.C. Section 5302 (a) (7) as follows:

Mass transportation means transportation by a conveyance that provides regular and continuing general or special transportation to the public, but does not include school bus, charter, or sightseeing transportation.

Although perhaps not readily apparent from the above definitions, based on the language in the preamble to the FTA's Charter Service regulation, 52 Fed. Reg. 11916 (April 13, 1987), and many FTA administrative decisions that have since interpreted these definitions, there are three important characteristics that distinguish "mass transportation" from "charter service".

The first characteristic of mass transportation is that the service provider must exercise a significant degree of control over the transportation. By contrast, an operator that provides charter service typically does not possess any control in establishing, for example, the schedule or trip destination. Therefore, to determine the degree of control in this case, the FTA must ascertain the extent of Houston METRO's role in establishing the schedules, fares, and the routes of the service. A second characteristic of mass transportation is that the service must be designed to benefit the public at large and not some special organization or group of persons. Charter service, on the other hand, will involve a single contract for transportation between the service provider and an organization or a group of persons. Thus, the FTA will examine how the service was structured in this case and whether the service in this case was intended to benefit an organization rather than the general public. Finally, the third characteristic of mass transportation is that the service must be open to the public and not be closed-door service. As charter service is service exclusively for an organization or a group of persons, the FTA will review whether the public was notified of the availability of open-door service in this case or whether the service provided to the Rodeo was closed-door service to the patrons of the event. Therefore, in view of the foregoing characteristics, the FTA conducted the following analysis of pertinent aspects of the service provided by Houston METRO in this case to determine whether Houston METRO engaged in impermissible charter service or permissible mass transportation.

A.

*Did Houston METRO exercise a sufficient degree of control over the schedules, fares, routes, and the equipment that would be used to provide the service?*

The record reflects that Houston METRO entered into a one-year contract – as it had done in previous years – with Houston Livestock Show & Rodeo, Inc. (Corporation), a non-profit

corporation that sponsors the Rodeo, to coordinate and provide transportation services for this annual event. This one-year contract between Houston METRO and the Corporation, however, is not a "single contract" as that term is used in the definition of charter service because the recipient's control of the transportation is not significantly diminished by the terms of the contract. Rather than requiring Houston METRO to provide transportation under a single contract to a specific group of persons at a fixed charge using a certain number and type of vehicles, the contract in this case essentially amounts to a cost-sharing arrangement whereby the Corporation will participate in fifty percent (50%) of the fully allocated cost for transportation service provided by Houston METRO in connection with the Rodeo. Indeed, as to the issue of control, Article 1 of the contract specifically provides in relevant part that the Corporation "shall exercise no control over METRO's employees, servants, agents, subcontractors or representatives, nor the method or means employed by METRO in the performance of such work or services". Article 2 of the contract, on the other hand, provides that Houston METRO would provide transportation services on "routes specified by" the Corporation. While there is a partial conflict between Article 1 of the contract that allows Houston METRO to have complete control over the "method and means" of transportation and Article 2 that allows the Corporation to specify "routes", it is the FTA's view that the Article 2 provision does not *per se* appreciably detract from the overall degree of control exercised by Houston METRO in this case. In fact, the record further supports that Houston METRO, not the Corporation, determines what level of service will be required, what number of buses will be used, what type of buses will be used, and what schedules will be operated. Moreover, with respect to the fares that are charged for the transportation, the record reflects that Houston METRO, not the Corporation, establishes the individual fares for the transportation provided during the Rodeo based upon an estimate of the fully allocated costs and projected ridership. Clearly, therefore, based on the express terms of the contract and the facts in this case, Houston METRO, not the Corporation, exercises substantial control over the "method and means" in providing transportation in connection with the Rodeo.

In addition, it is noted that the degree of control exercised by the recipient in this case is clearly distinguishable from that exercised by a grant recipient in a recent case decided by the FTA on January 2, 2003, involving the Rochester-Genesee Regional Transportation Authority (RGRTA). Among the findings in the RGRTA case whereby it was determined that the grant recipient provided impermissible charter service in connection with an annual golf tournament, the FTA specifically found that the event sponsor, rather than the recipient, exercised control over the bus schedules, the number of buses, and the type of buses that would be used for the service. That is clearly not the case in this instance because Houston METRO possesses control over virtually all aspects of the service whereas, by contrast, in the Rochester-Genesee case the recipient in fact had very limited control of the service. Accordingly, based on the facts in this case, the record establishes that Houston METRO exercises not only a sufficient, but a substantial, degree of control over the schedule, fares, and the equipment that are used to provide service in connection with the Rodeo.

B.

*Did Houston METRO design the service to benefit the public at large or the Corporation?*

Reviewing the record in this case, it is apparent that Houston METRO widely advertised to the public the availability of the transportation service that would be provided in conjunction with the Rodeo. Specifically, Houston METRO published notice of this transportation service in printed materials, such as in printed bus schedules and in daily newspapers in the Houston, Texas, area,

and further made spot announcements of the availability of this service in the electronic media in the Houston, Texas, area. In addition, Houston METRO posted notice of the availability of this transportation on its internet website. There is no evidence in the record to show that Houston METRO sought to limit service in this case to the Corporation or only to patrons who would attend the Rodeo. To the contrary, the record would reflect that Houston METRO designed and advertised this transportation service to clearly benefit the public at large and not just the Corporation.

C.

*Did Houston METRO provide open-door or closed-door service?*

To determine whether the service provided by Houston METRO was in fact "open-door" service, the FTA often considers the intent of the recipient in offering the service. This intent can be evidenced in part by the efforts that the recipient has taken to market the service to the public. Generally, this effort is best evidenced by publication of the service in the recipient's preprinted schedules. *Washington Motor Coach Association v. Municipality of Metropolitan Seattle, WA-09/87-01* (March 21, 1988). In addition, efforts by the recipient to market the service to the public will also be taken into consideration. *Blue Grass Tours and Charter v. Lexington Transit Authority, URO-III-1987*. As discussed above, Houston METRO widely advertised the service to the public and notice of the service was further placed in printed notices and bus schedules. Moreover, in response to the FTA's direct inquiry, Houston METRO has represented that the service offered in connection with the Rodeo is open-door, and not closed-door, service to the public. As open-door service, anyone may pay the fare established by Houston METRO and be entitled to use the service. Furthermore, the FTA's review of a public advertisement that includes information regarding the service for the Rodeo supports Houston METRO's representation that service was not limited exclusively to patrons who attend the Rodeo but rather the record would reflect that the service was available to anyone who paid the fare.

Accordingly, based on the foregoing review and analysis of the facts in this case, it is the FTA's finding that the transportation service provided by Houston METRO in connection with the Rodeo does not constitute impermissible charter service. Rather, based on the facts in this case, the FTA finds that the transportation service provided by Houston METRO in connection with the Rodeo is consistent with the elements of "mass transportation" as this term is defined in the Federal Transit Act and as it has been interpreted by the FTA. Moreover, the FTA finds that the service is "regular and continuing" because Houston METRO has provided service for this event - which has been held annually in Houston for over sixty years - on an annual basis for a considerable number of years. In addition, it is the FTA's finding that the service is "general service" because it is "open-door" service that was designed by Houston METRO to benefit the public at large.

The second allegation in the complaints states that Houston METRO uses FTA-funded buses to engage in a monopoly with special event bus service in Houston, Texas. However, the record reflects that there are only thirteen (13) special events, including the Rodeo, for which Houston METRO participates in or coordinates transportation service. On the other hand, it is estimated by the Greater Houston Convention & Visitors Bureau that there is an average of 250 conventions per year in the Houston area and this figure does not include smaller conferences and other events. As Houston METRO coordinates and participates in service for only thirteen (13) special events, which represents only a very small percentage of the total number of conventions and other special events that are held annually in the Houston area, there is thus no evidence to support the allegation

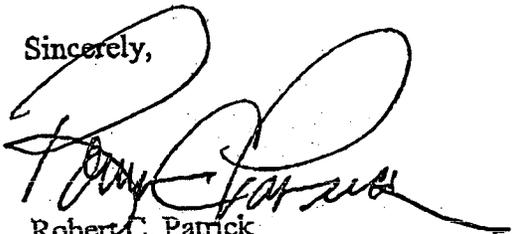
that Houston METRO has established a monopoly over the provision of special event transportation service in Houston, Texas.

The third allegation concerns Houston METRO's role in the thirteen (13) special events for which it does participate in or coordinate service and whether it improperly excludes private operators from these events. The facts reflect that Houston METRO – as the public transportation agency for the greater Houston metropolitan area – issued and widely advertised an invitation for bids on September 21, 2001, to solicit private operators that would be interested in providing special event transportation services for thirteen (13) events, including the Rodeo, in the Houston area during calendar years 2002 and 2003. This invitation for bids, however, was not a federally funded solicitation and therefore it was not subject to the FTA's procurement requirements in Circular 4220.1D (now Circular 4220.1E), "Third Party Contracting Requirements", although it appears that the procedures used by Houston METRO in the selection of prospective contractors were nonetheless substantially in accordance with the principles and requirements of Circular 4220.1D.

Although not subject to the FTA's procurement requirements, Houston METRO has provided information to the FTA regarding the selection process. Assuming that the service provided by Houston METRO in connection with these other events is consistent with the manner in which service is provided for the Rodeo, the service will be deemed permissible mass transportation. As to the selection process, Houston METRO advises that the invitation for bids invited prospective contractors to provide a schedule of available vehicles and revenue-hour prices for providing transportation service for the Rodeo and twelve other special events in calendar years 2002 and 2003. Based on the data provided by the interested private operators, Houston METRO selected qualified operators to participate in providing service for the Rodeo and other special events based on need and the contractor's equipment availability and relative cost-effectiveness. In addition, with respect to service in connection with the Rodeo, although Houston METRO provides much of the service, it is the FTA's understanding that private operators, in accordance with or in addition to this selection process, in fact provide the largest number of buses for this event. Therefore, having reviewed the selection process utilized by Houston METRO for the participation of private charter operators in providing service for the thirteen (13) events, it is the FTA's view that the selection process appeared to be based primarily on valid, objective criteria and Houston METRO employed this process in a fair manner to obtain the participation by many, but not all, private operators who responded to the solicitation.

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

If you have any questions or comments regarding this decision or the appeal procedure, please feel free to call Eldridge Onco, Regional Counsel, or me at (817) 978-0550.

Sincerely,  
  
Robert C. Patrick  
Regional Administrator

cc: **United Motorcoach Association**  
**Fame Tours, Inc.**  
**Shirley DeLibero**



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

REGION VII  
Iowa, Kansas,  
Missouri, Nebraska

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

November 4, 2003

Mr. Stephen Spade  
Des Moines Metropolitan Transit Authority  
1100 MTA Lane  
Des Moines, IA 50309

Re: Charter Complaint 2003-20, Des Moines MTA

Dear Mr. Spade:

On October 24, 2003, you and Sheri Kyras of your staff participated in an informal conciliation process to resolve the above reference complaint filed by Majestic Limousine Services ("MLS"). The process followed that outlined in my letter to you of October 17, 2003, and was agreed to by the parties. As a result of this process, the complainant, MLS, and MTA agreed to the FTA finding of facts attached hereto as Exhibit 1. Based on these facts, FTA finds that MTA violated the charter rule (49 CFR Part 604) by: maintaining a web site and telephone listing for charter service, engaging in an exclusive subcontracting with one private operator or broker, and by providing charter service using equipment and facilities provided under the Mass Transit Laws when there were private charter operators willing and able to provide the charter service.

MLS agrees that its complaint will be satisfied by the implementation of the following actions, and FTA hereby requires MTA to:

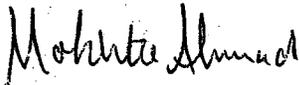
1. Cease and desist from engaging in the provision of charter services either by:
  - a. discontinuing all charter service; or,
  - b. subcontracting on an equal basis with all private charter operators willing and able to provide charters in the service area.
  
2. Because implementation of the charter rule has been problematic for Des Moines MTA (as evidenced by the last Triennial Review findings and FTA's letter to Des Moines MTA of March 20, 2003), FTA will closely monitor both the MTA web site and any charter service provided under an exception to the general rule for a period of not less than six (6) months and not more than 1 year.

3. Monitoring will include:
  - a. Periodically checking the web site to assure deletion of all references to charter service.
  - b. Requiring proof of actual, direct notice to willing and able transit providers of any intent to provide service under any exception requiring notice.
  - c. Possible file review to see that any charters provided under an exception do in fact meet the requirements of said exception.
4. Des Moines MTA shall cease maintaining a listing in the Yellow Pages for Charter/Trolley. Since the current listing may continue to generate inquiries, MTA will respond to any and all telephone inquiries until the listing expires and is not renewed by indicating that it no longer provides general charter service. MTA shall also supply to all callers a list of all willing and able providers in alphabetical order. This list will be updated after Des Moines MTA publishes a new charter notice and provides direct notice to all willing and able providers.
5. Des Moines MTA shall publish a new charter notice that fully complies with 49 CFR Part 604.
6. Des Moines MTA will review the charter rule with its staff, especially staff responding to the Charter/Trolley phone listing, and document the same.
7. Des Moines MTA will provide FTA Region VII with a report covering the period November 15, 2003 through June 15, 2004, which includes a list of the private operators to whom it has leased charter vehicles or for whom it has provided charter services, the number of vehicles by category involved, the dates of service, the amounts charged by Des Moines MTA to each private operator. MTA shall submit this report to FTA by July 1, 2004.

If, upon review of any data or report requested and/or any review performed, the FTA concludes that Des Moines MTA has failed to comply with the terms of this order and the agreement resulting from the informal conciliation process, MTA's access to FTA funding may be suspended.

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

Sincerely,



Mokhtee Ahmad  
Regional Administrator

**Charter Complaint 2003-20**  
**Majestic Limousine Service vs. Des Moines MTA**

FTA Finding of Facts:

1. Web page as in existence on the date of the complaint is evidence of violation of charter rule. Web page is an ongoing advertisement that MTA provides charter service using federally-assisted equipment.
2. A listing in the current S.W. Bell Telephone Yellow Pages for MTA includes a Charter/Trolley telephone number. This listing is evidence of violation of the charter rule and is an ongoing advertisement that MTA provides charter service.
3. No charter provider in market area received direct notice that MTA intended to provide charter service.
4. There are more than 1 willing and able, charter providers serving the Des Moines, IA metropolitan area and Majestic Limousine services the complainant is one such provider. Carnival Coaches is another.
5. Majestic Limousine Service and Carnival Coaches, with which Majestic Limousine Service sometimes works, were denied a charter opportunity to supply 4 to 47 passenger coaches to First Tours on October 20, 2003, and these services were instead performed by MTA using federally-assisted equipment.
6. MTA has in the past provided service for Magical History Tours, which owns at least one 15 passenger van. MTA did not first establish whether Magical History Tours had the category of vehicles requested by the party seeking charter services, and it did not establish whether Magical History Tours' vehicle was in service and therefore unavailable or inadequate to meet the service capacity requested. MTA was therefore unable to determine if the service met all requirements of exception number 2 ( found at 49 CFR 604.9(b)(2)).
7. MTA has a quasi-exclusive relationship with Magical History Tours. This raises serious concerns that MTA has circumvented the charter regulation by systematically channeling all charter business to one entity with whom MTA has a brokering arrangement. This allows MTA to do indirectly what it cannot do directly, namely to provide an unlimited amount of charter service in competition with private operators.



U.S. Department  
of Transportation  
Federal Transit  
Administration

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

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

January 14, 2004

Shirley A. DeLibero  
President & Chief Executive Officer  
Metropolitan Transit Authority  
1201 Louisiana  
P.O. Box 61429  
Houston, Texas 77208-1429

Re: Charter Waiver Request

Dear Ms. DeLibero:

The Federal Transit Administration (FTA) has completed its review of the request of the Metropolitan Transit Authority (Houston METRO) to provide charter service for a special event under the exception set forth in the FTA's Charter Service regulation at 49 CFR §604.9(b)(4). Specifically, this request for an exception, if granted, would allow Houston METRO to provide charter bus service in support of the 2004 Super Bowl on February 1, 2004, and associated activities that will be held in Houston, Texas.

The implementing guidance states that the central issue in this exception is the determination of the extent to which private charter operators are capable of providing the charter service for the special event. See, 52 Federal Register 11925, April 13, 1987. If private charter operators are not capable of meeting the demand for the special event service, under the regulation the FTA may nonetheless grant an exception even if there are willing and able private charter operators.

As a part of this determination process, the FTA notified the American Bus Association and the United Motorcoach Association, which represent private operators in the Houston area, in order to determine the private sector's capacity to provide service for this event. As a result of this notice, the FTA subsequently received objections from the American Bus Association and the Texas Bus Association, Inc. that basically objected on grounds that Houston METRO did not notify and/or adequately evaluate the capacity of private charter operators in the Houston area to provide charter service for this event. In addition, the FTA previously received objections to this request from Atchison Transportation Services located in Spartanburg, South Carolina, and Eagle Tours, Inc., a private charter operator located in Irving, Texas, which stated that they were willing and able providers.

The special event exception provided in 49 CFR §604.9(b)(4) of the FTA's Charter Service regulation does not prescribe a specific procedure or manner by which "capability" of private charter companies is determined. Indeed, the regulation chose not to define the term "capable" in

order to provide for the maximum degree of flexibility. See, 52 Federal Register 11925, April 13, 1987. Although it has been argued that Houston METRO did not individually contact private charter operators to assess their "capability" to provide service for the Super Bowl event and associated activities, the FTA considers it reasonable and appropriate to look at the facts of each case, rather than a specific procedure, to determine whether a "capability" determination is acceptable.

In this case the facts reflect that Houston METRO has been involved in numerous meetings with the National Football League, which is the sponsor of the annual Super Bowl event that is held in various U.S. cities, to assess the expected demand for transportation services for this event. Based on these meetings, Houston METRO has advised the FTA that based on comparable historical data provided by the National Football League with respect to other cities that have previously hosted the Super Bowl, the expected transportation demand for days immediately preceding the day of the event will require 800-900 buses. Moreover, based on experience with this same event in previous years in other cities, the event sponsor has informed Houston METRO that it anticipates that the transportation demand will increase by at least 30% on the day of the Super Bowl.

Houston METRO, by virtue of its having acquired considerable experience in coordinating transportation for various large events in the Houston area, which has involved the participation of many private charter companies, possesses substantial knowledge, experience, and a close familiarity of the number of private bus operators in Houston. This general knowledge and experience has enabled Houston METRO to assess whether private charter companies in fact have the capability to provide service for this size of special event. Specifically, Houston METRO advises that it regularly coordinates transportation for large events with thirty-three (33) private bus companies but that these firms often have available fleet sizes of fifteen (15) or fewer buses. Therefore, even under a generous estimate of the capability of these private charter companies, it is apparent that the number of available buses that would be provided by private charter operators would only be 500-600 buses, although the minimal expected demand for the days preceding this event would be 800-900 buses.

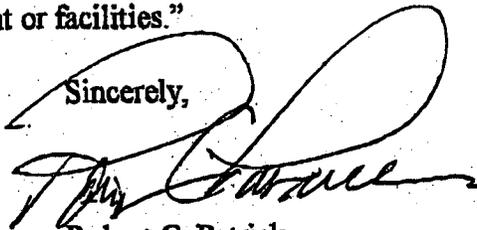
Moreover, to further support its request for an exception, Houston METRO has provided written assurance to the FTA that private operators will be used to the maximum extent possible and that Houston METRO will not engage in charter transportation for the Super Bowl unless and until the services of private charter companies have been exhausted. Houston METRO has further assured the FTA that any private operator which approaches it for transportation services for other entities associated with the Super Bowl (e.g., ESPN, CNN, etc.) will be referred to those entities for direct contracting opportunities.

Accordingly, based on the facts that have been submitted to the FTA by Houston METRO concerning whether private charter operators will be capable of meeting the expected demand for charter service for this event, it is the FTA's determination that the demand for charter service on the date of the Super Bowl, including the days immediately preceding this event, will exceed the capability of private charter operators. Therefore, based on this lack of capability and the written assurances of Houston METRO, in accordance with the provisions of 49 CFR §604.9(b)(4), the FTA hereby grants an exception to Houston METRO to provide incidental charter service on the occasion of the Super Bowl that will be held on February 1, 2004, in Houston, Texas, and further to the extent that private charter firms will not be capable of meeting the transportation demand for

the days immediately preceding the Super Bowl for associated event activities, this exception will apply for the time period from January 24, 2004, through February 1, 2004.

It should be emphasized, however, in accordance with 49 CFR §604.9(e), that any charter service that a recipient provides under any of the exceptions must be incidental charter service. The FTA's Charter Service regulation at 49 CFR §604.5(i) defines "incidental charter service" as "charter service which does not: (1) interfere with or detract from the provision of mass transportation service for which the equipment or facilities were funded under the Acts; or (2) does not shorten the mass transportation life of the equipment or facilities."

Sincerely,



Robert C. Patrick  
Regional Administrator

Cc:

Jennifer Dorn, Administrator, FTA  
Peter J. Pantuso, President & CEO, American Bus Association  
Jerry Prestridge, Executive Director, Texas Bus Association, Inc.  
Pinckney L. Spencer, Atchison Transportation Services  
Gene Shields, President, Eagle Tours, Inc.  
Paula Alexander, Esq., Houston METRO

BEFORE THE FEDERAL TRANSIT ADMINISTRATION

September Winds Motor Coach, Inc., and  
Great Lakes Limousine Association,  
Complainants

v.

Charter Service Docket Nos. 2003-08  
and 2003-24  
49 U.S.C. Section 5323(d)

Toledo Area Regional Transit Authority,  
Respondent.

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DECISION

Summary

On July 10, 2003, September Winds Motor Coach, Inc. ("September Winds") filed a complaint with the Federal Transit Administration ("FTA") alleging that Toledo Area Regional Transit Authority ("TARTA" or "Respondent") was providing charter service in violation of FTA's charter regulation, 49 Code of Federal Regulations (C.F.R.) Part 604. Subsequently, during TARTA's Triennial Review, also in July 2003, the Respondent was found to be out of compliance with the charter regulations, specifically 49 C.F.R. Section 604.9(b) and was told to immediately cease and desist from providing charter service. The final report of the Triennial Review was conveyed to TARTA on August 14, 2003.

The Respondent filed a reply to the September Winds complaint dated September 17, 2003. On October 2, 2003, September Winds provided additional information indicating that TARTA was still offering charter service, and on October 7, 2003, FTA issued a second letter ordering TARTA to immediately cease and desist providing charter service. September Winds responded to TARTA's reply on October 22, 2003.

On November 13, 2003, the Respondent was involved in an incident with the Ohio Department of Public Safety ("ODPS"). ODPS discovered underage drinking of alcohol on TARTA buses that were running between the University of Toledo and Headliner's Bar. FTA was notified via telephone of the incident on November 18, 2003. Also, on November 18, 2003, Great Lakes Limousine Association ("Great Lakes") filed a complaint against the Respondent for charter violations.

After contacting TARTA via telephone on November 18, 2003, FTA followed up with a letter on November 24, 2003, reiterating for the third time that TARTA must immediately cease and desist operating charters until it had properly completed the willing and able charter determination process. TARTA indicated that it would cancel all existing charters.

One of the cancelled charters was a charter with Paula Chasteen for her wedding. Ms. Chasteen contacted FTA via telephone on November 26, 2003, to complain about the cancellation of her wedding charter. Ms. Chasteen provided a copy to FTA of TARTA's charter confirmation on December 17, 2003.

TARTA met with FTA on December 1, 2003, to discuss outstanding charter issues. TARTA was asked to respond to all additional allegations in writing, specifically the Great Lakes complaint and the ODPS incident. TARTA indicated that it had issued a notice for willing and able private providers on November 28, 2003. TARTA provided its response to the additional allegations on December 29, 2003.

FTA consolidated the two charter complaints and the ODPS incident based on the similarity of the allegations and the incident circumstances. Upon reviewing the allegations in the complaints and the subsequent filings of both the Complainants and the Respondent, FTA has concluded that the service in question does violate FTA's regulations regarding charter service. Respondent is hereby ordered to cease and desist providing such illegal service.

#### Complaint History

September Winds filed its complaint with the FTA on July 10, 2003. The complaint alleges the following:

1. TARTA provided unauthorized charter for the following events:
  - a. Crosby Garden Festival of Arts;
  - b. Parade of Homes;
  - c. Senior Open;
  - d. School Runs;
  - e. Employment Services;
  - f. Christmas Shuttle Service; and
  - g. Wedding Trolleys.
2. September Winds replied to TARTA's annual notification to willing and able charter providers and never received a response;
3. TARTA underbid September Winds on the A-Plus Employment Services contract;
4. TARTA's phone book listing included bus and trolley charters; and
5. TARTA advertised group tours, weddings and parties under the heading "Buses-Charter & Rentals" in the phone book.

During the Triennial Review in July, TARTA was found to be out of compliance with the charter requirements. It was told verbally to cease and desist from providing charter service. On August 14, 2003, the final report of the Triennial Review was conveyed to TARTA, and it was told in writing to stop operating charters.

On October 2, 2003, September Winds supplemented its complaint with an ad showing TARTA service for Mud Hens games and pages from TARTA's website listing a variety of services that TARTA offered, specifically the availability of its trolleys for lunchtime service and rental, including for weddings and parties.

On October 7, 2003, FTA wrote TARTA again reiterating that it was under a cease and desist order to cease charter operations. FTA also indicated that it had never received a response to the September Winds complaint.

FTA subsequently received a response from TARTA dated September 17, 2003. In its response, TARTA indicated the following as to September Winds allegations:

1. Crosby Garden Festival of the Arts- service provided through a contract with Toledo Aero Charters;
2. Parade of Homes- service provided through a contract with Toledo Aero Charters;
3. Senior Open- no additional TARTA service was provided;
4. School Runs- it is permissible tripper service;
5. Employment Services- TARTA does not provide such service;
6. Christmas Shuttle Service- TARTA utilizes its trolleys on regular published routes;
7. Wedding Trolley- TARTA provides direct charter service after reaching agreements with all willing and able private providers; TARTA has never received a response from September Winds; and
8. TARTA acknowledged it had been cited during the recent Triennial Review for improper wording on its willing and able notice, but that the notice was in the process of being revised.

On October 22, 2003, September Winds responded to TARTA's reply. It stated the following:

1. TARTA's reply was untimely;
2. TARTA never contacted September Winds regarding a willing and able notice, but in June 2000, the American Bus Association contacted them about TARTA's notice, September Winds responded as a willing and able provider, but it never heard back from TARTA;
3. There is no address or listing for Toledo Aero Charters and the only phone number for them is listed as Wisniewski Funeral Home or Toledo Limousine Service;
4. Another private operator has photos of TARTA buses at various events (Cedar Point Amusement Park, Crosby Gardens Festival, etc.); and
5. Christmas Shuttle and Wedding Shuttles are part of a complaint from another operator.<sup>1</sup>

On November 18, 2003, FTA was notified via telephone by a private charter operator that TARTA had been involved in an incident involving charter service and that there was a news story about the incident. The news article from a Toledo news station stated that on November 13, 2003, undercover agents from the ODPS arrested students on a TARTA bus for underage drinking. TARTA had been running a shuttle service from the University of Toledo to Headliner's Bar on Thursday nights. The shuttle was advertised as a "party bus."

FTA immediately contacted TARTA by telephone on November 18, 2003, regarding the ODPS incident. FTA followed up with TARTA in an email on November 19, 2003. FTA requested that TARTA explain the circumstances of the incident and provide supporting documentation. TARTA indicated that it had provided a shuttle service from the University of Toledo to Headliner's Bar through Toledo Aero Charter. FTA stated it wanted information on Toledo Aero

<sup>1</sup> September Winds refers to a complaint filed by Tecumseh Trolley and Limousine Service ("Tecumseh Trolley") against TARTA. FTA never received a complaint from Tecumseh Trolley.

Charter since FTA had been unable to find a listing for Toledo Aero Charter, and its only phone number was listed to Wisniewski Funeral Home.

On November 21, 2003, FTA obtained from ODPS a copy of the contract between TARTA and Verso Group, which represented Headliner's Bar. ODPS also supplied a copy of the "party bus" advertisement.

FTA issued a third letter to TARTA on November 24, 2003, asking TARTA to explain in writing the ODPS incident and the Verso contract. Again, FTA reiterated that TARTA should not be providing direct charter service nor leasing its vehicles until the ODPS incident was fully explained.

Subsequently, FTA received a complaint from Great Lakes dated November 18, 2003. In its complaint, Great Lakes alleged that its members consistently complain about TARTA providing illegal charters. TARTA was seen providing a charter from the COBO Hall to a Red Wings Hockey game on September 25, 2003, with a marquee marked "charter"; other charters included Comerica Park for Detroit Tigers games, Cedar Pointe Ohio for the amusement park, etc. Great Lakes alleges that TARTA despite a cease and desist order from FTA is still advertising and providing wedding charters with its trolley. Great Lakes alleges that TARTA admits it does approximately 300 weddings a year. Because Great Lakes allegations were the same general allegations as the prior complaints, FTA consolidated the complaint with the September Winds complaint.

On November 25, 2003, TARTA admitted that it had stopped booking new charters, but it was continuing to provide charter service because it disagreed with FTA's cease and desist order. FTA informed TARTA that cease and desist meant stop all charters immediately. TARTA indicated it would cancel all its outstanding booked charters.

On November 26, 2003, Paula Chasteen contacted FTA to complain that her wedding charter with TARTA scheduled for November 28, 2003, had been cancelled. Ms. Chasteen subsequently provided a copy to FTA of her contract with TARTA and her confirmation dated October 29, 2003. The confirmation states that alcohol is permitted on the trolleys.

TARTA met with FTA on December 1, 2003. In that meeting, TARTA was asked to provide a written response to all the outstanding allegations against it. FTA again reiterated that until TARTA went through the willing and able determination process, it should not be providing direct or indirect charter.

TARTA sent in its response dated December 29, 2003, stating the following:

1. Past booking of charters- TARTA had been leasing vehicles for charter use to Aero Charters/ Toledo Limousine (Aero Charters) since 1995 based on its capacity constraints. TARTA only learned this year that Aero Charters had no vehicles. TARTA will stop doing business with Aero Charters. TARTA was also providing direct charter service with its trolleys, because it alleged it had agreements with the private willing and able providers. TARTA has ceased doing that and is currently going through the willing and able determination process. It received seven responses and will attempt to obtain

agreements with all seven private providers. It will not provide direct charter with its trolleys if it cannot reach agreements.

2. Service in Great Lakes complaint- The trips referenced by Great Lakes were "No Crumb" trips. Trips were organized and driven by TARTA drivers at minimal cost to outside organizations. The driver or group is assessed a charge of \$50 or \$100 to cover fuel costs and wear and tear on the vehicle. TARTA has stopped providing "No Crumb" trips.
3. Headliner's Incident- TARTA entered into an agreement with the Verso Group through Aero Charters to provide a shuttle from University of Toledo to Headliners and a coffee house. TARTA states it has a policy of no alcohol on its vehicles and the driver did not know underage drinking was going on. TARTA will no longer take work that potentially may involve underage drinking.
4. School Tripper service- TARTA provides permissible tripper service for school children.
5. Holiday Trolley Sleigh Service- TARTA provides holiday service utilizing its trolleys between two malls. The service is open to the public and listed on TARTA's regular schedules.

#### Acceptable Charter Service

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

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

There are a number of exceptions listed for providing charter service. However, the Respondent has not complied with the procedural prerequisites for the exceptions and in some instances has provided service that does not even fall within an exception.

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

- (1) At least 60 days before it desires to begin to provide charter service...
- (b) The public participation process must at a minimum include:
  - (1) Placing a notice in a newspaper, or newspapers, of general circulation within the proposed geographic charter service area;
  - (2) Send a copy of the notice to all private charter service operators in the proposed geographic service and to any private charter service operator that requests notice;
  - (3) Send a copy of the notice to the United Bus Owners of America, 1300 L Street,

NW., Suite 1050, Washington, DC 2005 and the American Bus Association, 1100 New York Avenue, SW, Suite 1050, Washington, DC 20005-3934.

(c) The notice must:

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

### Discussion

Recipients of federal financial assistance can provide charter service under these very limited circumstances. In the absence of one of the limited exceptions, the recipients are prohibited from providing the service. 49 C.F.R. Section 604.9(a). Complainants allege that the Respondent is providing charter service utilizing both its buses and its trolleys. Complainants also allege that Respondent is utilizing a non-existent company to provide direct charter service and improperly leasing its vehicles for direct charter service. Additionally, Complainants are asserting that none of the charter exceptions apply. Respondent receives Section 5307 so it is required to comply with the charter regulations.

Respondent was found to be out of compliance with the charter regulations during its recent triennial review. TARTA's willing and able determination notice was improperly worded, and TARTA was informed to cease and desist providing charter service until it had properly gone through the willing and able determination process as required by 49 C.F.R. Section 604.11. TARTA ignored FTA's cease and desist order for three months and was ordered to cease and desist three times before it finally obeyed the order.

#### A. Aero Charters Service

Respondent acknowledged in its response dated September 17, 2003, that the trips for the Crosby Garden Festival of the Arts and the Parade of Homes were leasing TARTA vehicles through Aero Charters. TARTA also acknowledged in its letter dated December 29, 2003, that the Headliner's shuttle service also involved the leasing of TARTA vehicles to Aero Charters. Respondent admits that Aero Charters has no vehicles and a search on the internet reveals that its phone number is listed to a funeral home, as September Winds properly states. Under the charter regulations, vehicles can only be leased for capacity or accessibility reasons to private providers (Section 604.9(b)(2)). Aero Charters does not qualify as a private provider so all of these incidents constitute improper charter.

Additionally, the contract for the Headliner's shuttle service showed TARTA's and Aero Charters's names on the contract. Therefore, it appears that TARTA itself may have been running a direct charter service under the name Aero Charters. Either way, since TARTA was providing the charter service without following the proper procedure for determining whether there were willing and able private providers, the Headliner's shuttle service constituted impermissible charter service under 49 C.F.R. Part 604.

#### B. "No Crumb" Service

The Respondent acknowledges in its December 29, 2003, letter that the charter service alleged in the Great Lakes complaint constituted "no crumb" service. TARTA describes this service as trips organized and driven by TARTA drivers at minimal cost to outside organizations. The driver or group was assessed a minimal charge. These trips clearly constituted charter under Section 604.5(e). The Respondent does not even allege that any of the charter exceptions applies. All the "no crumb" trips constituted impermissible charter.

#### C. Weddings

TARTA acknowledges that it was providing direct charters for weddings using its trolleys because it had agreements with local private providers. However, TARTA has not supplied any agreements with willing and able providers and during its recent triennial review its notice for determining willing and able providers was found to be deficient because it did not indicate what type of service TARTA intended to provide, as required by Section 604.11. Any direct charter service that TARTA supplied using its trolleys constituted impermissible charter service since it had not complied with the requirements for determining whether there were any willing and able private providers as required under Section 604.9. TARTA should also not have been advertising in the phonebook nor on the internet that it was offering direct charter service. TARTA needs to remove those advertisements.

#### D. Tripper Service

The evidence supports a finding that the school service TARTA is providing is permissible tripper service under 49 CFR Part 605. It is regularly scheduled mass transportation which is open to the public and it is listed on TARTA's regular scheduled published routes.

### E. Holiday Shuttles

The holiday shuttles using TARTA vehicles are permissible mass transportation. They are open to the public and listed on regular published schedules.

### F. Procedural Determination

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

In addition to the notice, the Respondent is required to send a copy of the notice to the United Bus Owners Association (UBOA) and the American Bus Association (ABA), which it had not done. 49 C.F.R. § 604.11(b)(2) requires the Respondent to send a "copy of the notice to all private charter service operators in the proposed geographic charter service area and to any private charter service operator that requests notice." Respondent failed to send copies to the UBOA and the ABA and also failed to send notice to September Winds. September Winds alleges that they responded to the notice and never received a reply.

Until TARTA determines that there are no willing and able private providers it should not be operating any charters. Since TARTA received responses from seven private providers as a result of its recent willing and able notice, it will not be able to provide any charter service until it has reached written agreements with each of the private willing and able providers. TARTA can only lease its vehicles to private providers if one of the limited exceptions applies under 49 CFR Section 604.9(b)(2).

### G. Alcohol Use on Charter Trips

Complainants have alleged that alcohol is present during some of Respondent's charter trips. FTA does not regulate the use of alcohol on charter trips. However, TARTA should be complying with Ohio law regarding the consumption of alcohol on its vehicles. The contract provided by Ms. Chasteen indicates that TARTA was allowing the consumption of alcohol on its vehicles. This fact is contrary to representations that TARTA made to FTA. TARTA should also be complying with Ohio law with regard to the consumption of alcohol by minors.

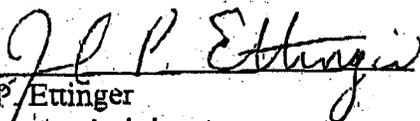
### Remedy

Complainants have requested that Respondent immediately cease and desist its charter operations. TARTA has stopped providing charter service pursuant to FTA's current cease and desist order. It is currently proceeding with the willing and able determination process. Until TARTA completes the process it cannot resume charter operations. Also, it cannot provide charter service unless one of the limited exceptions applies.

Conclusion and Order

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

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

  
Joel P. Ettinger  
Regional Administrator

02-07-07  
Date



U.S. Department  
of Transportation  
Federal Transit  
Administration

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

61 Forsyth Street, S.W.  
Suite 17T50  
Atlanta, GA 30303-8917  
404-562-3500  
404-562-3505 (fax)

April 22, 2004

Ms. Sharon Dent  
Executive Director  
Hillsborough Area Regional Transit Authority  
4305 East 21<sup>st</sup> Avenue  
Tampa, Florida 33605-2300

RE: Charter Regulation Requirements

Dear Ms. Dent:

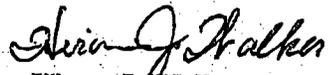
The Federal Transit Administration (FTA) is aware that on March 26, 2003, Hillsborough Area Regional Transit Authority (HART) provided nine (9) of twenty (20) buses based on a request from the White House. The remaining eleven (11) buses were secured from three private charter operators. The buses were needed to provide transportation to support President Bush's "Briefing to the Troops" at MacDill Air Force Base and transported media and military families from a park located outside the base to a hangar inside. The buses were requested for an eight-hour period. The White House reimbursed HART for the use of the buses on May 9, 2003. FTA does not know whether regular HART service was impacted by the use of the buses.

FTA is aware that the White House indicated that for specific security reasons it wished to utilize HART buses and requested background checks on all drivers. A one-time event of this type would probably have qualified as an exception to the charter regulations under the special events exception. FTA is aware that this was a special request from the White House with a very narrow timeframe. FTA would have responded extremely quickly to either a written or verbal request (followed up later with a written request) for an exception. However, HART did not seek the Administrator's approval for an exception. This letter is being sent as a reminder that HART is required to follow the charter regulations, including the procedural requirements.

The charter regulations prohibit recipients from providing charter service with FTA funded equipment unless one of the specific charter exceptions applies. 49 Code of Federal Regulations (CFR) § 604.9(a). Under the regulations, there is a charter exception that applies for special events to the extent that private charter operators are not capable of providing the service. 49 CFR § 604.9(b)(4). However, in order to utilize the exception the recipient needs to petition the Administrator for an exception. *Id.* The petition should describe the event, explain how it is special, and explain the amount of charter service the private operators are not capable of providing. 49 CFR § 604.9(d). Additionally, the service provided can only be incidental. 49 CFR § 604.9(e). Incidental service means that the service does not interfere with or detract from the provision of mass transportation service. 49 CFR § 604.5.

As you well know, the service provided by HART was not open to the public. HART used federally funded equipment to provide transportation for a specific group of individuals for a specific purpose. The service provided clearly falls within the definition of charter. HART did not petition for an exception to the charter regulations. FTA is bringing this matter to your attention so that should a similar situation occur, you will contact FTA immediately. Should you have any questions regarding this matter, please feel free to contact me.

Sincerely,

  
Hiram J. Walker  
Regional Administrator

# THE NATIONAL ACADEMIES

## *Advisers to the Nation on Science, Engineering, and Medicine*

The **National Academy of Sciences** is a private, nonprofit, self-perpetuating society of distinguished scholars engaged in scientific and engineering research, dedicated to the furtherance of science and technology and to their use for the general welfare. On the authority of the charter granted to it by the Congress in 1863, the Academy has a mandate that requires it to advise the federal government on scientific and technical matters. Dr. Bruce M. Alberts is president of the National Academy of Sciences.

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