

systems, to be operated by public or private mass transportation companies as determined by local need." 4/

Reliance on local decision making is central to the entire program of federal financial assistance for mass transportation systems. Section 1 of the Urban Mass Transportation Assistance Act of 1970, for example, provides that the purpose of the Act is--

". . . to create a partnership which permits the local community, through federal financial assistance, to exercise the initiative necessary to satisfy its urban mass transportation requirements." 49 U.S.C. 1601a.

The emphasis on local decision making in determining how best to serve the transportation needs of the local area was recognized in Pullman, Inc. v. Volpe, where the court stated:

"The statutory scheme of UMTA emphasizes the large role to be played by the local bodies responsible for urban mass transit This reliance on the local or state group is consistent with the statute's encouragement of local responsibility in urban mass transportation. The statute does not promote a centralized procedure which leaves all decisions with the Secretary (of Transportation), but rather, emphasizes local solutions to problems." 337 F.Supp. 432, 438-439 (E.D. Pa. 1970).

Within this framework, Congress has consistently expressed its desire that private enterprise be afforded the opportunity to participate "to the maximum extent feasible" in the locally determined, federally funded program of mass transportation services. The 1964 Act contained two provisions, Section 3(e) and the first two sentences of Section 4(a), which expressed

4/ 49 U.S.C. 1601(b)(3). Similarly, Sections 2(b)(1) and 2(b)(2) each state a purpose of the Act that calls for the cooperation of mass transportation companies, "both public and private."

this intent. Section 4(a) provided as follows:

"No federal financial assistance shall be provided pursuant to subsection (a) of Section 3 unless the Secretary determines that the facilities and equipment for which the assistance is sought are needed for carrying out a program, meeting criteria established by him, for a unified or officially coordinated urban transportation system as a part of the comprehensively planned development of the urban area, and are necessary for the sound, economic and desirable development of such area. Such program shall encourage to the maximum extent feasible the participation of private enterprise." (Emphasis added).

The Federal Public Transportation Act of 1978 deleted that provision, but added a new section, Section 8, that contains this requirement. In part, the new section provides as follows:

"(a) It is declared to be in the national interest to encourage and promote the development of transportation systems embracing various modes of transportation in a manner which will serve the States and local communities efficiently and effectively. To accomplish this objective, the Secretary shall cooperate with the State and local officials in the development of transportation plans and programs which are formulated on the basis of transportation needs with due consideration to comprehensive long-range land use plans, development objectives, and overall social, economic, environmental, system performance, and energy conservation goals and objectives, and with due consideration to their probable effect on the future development of urban areas of more than 50,000 population. . . .

* * *

(e) The plans and programs required by this section shall encourage to the maximum extent feasible the participation of private enterprise." 49 U.S.C. 1607 (Emphasis added).

Section 3(e), as revised by the 1978 Act, provides as follows:

"No financial assistance shall be provided under this Act to any State or local public body or agency thereof for the purpose, directly or indirectly, of acquiring any interest

in, or purchasing any facilities or other property of a private mass transportation company, or for the purpose of constructing, improving, or reconstructing any facilities or other property acquired . . . from any such company, or for the purpose of providing by contract or otherwise for the operation of mass transportation facilities or equipment in competition with or supplementary to, the service provided by an existing mass transportation company, unless (1) the Secretary finds that such assistance is essential to the program of projects required by section 8 of this Act, (2) the Secretary finds that such program, to the maximum extent feasible, provides for the participation of private mass transportation companies, (3) just and adequate compensation will be paid to such companies for acquisition of their franchises or property to the extent required by applicable State or local laws, and (4) the Secretary of Labor certifies that such assistance complies with the requirements of section 13(c) of this Act." 49 U.S.C. 1602(e) (Emphasis added). ^{5/}

III. Congressional Intent

The United States Court of Appeals for the Seventh Circuit, in South Suburban Safeway Lines, Inc. v. City of Chicago, was the first appellate court to review UMTA's compliance with Section 3(e). The Court observed the following with respect to the intent of Congress in enacting this provision:

"In section 1602, Congress seems to have been primarily concerned over the possibility of public acquisition of private facilities (a subject not involved in this action) although competition with and supplementation of existing facilities were also dealt with." 416 F.2d 535, 539 (7th Cir., 1969).

The legislative history of Section 3(e) bears this out. In brief, Section 3(e) originated in Senate Bill S.6, (88th Cong., 1st Sess.), one of the bills which resulted in the Urban Mass Transportation Act of 1964.

^{5/} Thus, the Act specifically permits grants to be made for competitive and supplementary services, as long as the requisite findings are made. This is consistent with the principle that there is no Constitutional right to be free from governmental competition. See: Tennessee Electric Power Co. v. T.V.A., 306 U.S. 118, 138-139 (1939); Westport Taxi Service, Inc. v. Adams, Civil No. B-76-369 (D.Conn., April 13, 1977), slip opinion at 12; aff'd in part, rev'd in part, 571 F.2d 697 (2d Cir., 1978).

The principal sponsor of the bill, Senator Harrison Williams of New Jersey, indicated that this provision intended to further a neutral Federal posture on the question of whether public or private companies should operate federally assisted mass transportation services. In discussing the provisions of the bill, Senator Williams said:

" . . . the public body would not have to operate the transit facilities and equipment itself. It could provide for their operation by lease or other arrangement. Thus, every locality would remain free to choose public or private operation of its transportation system or any combination of the two." 109 Cong. Rec. 198 (Daily ed., January 14, 1963) (Emphasis added).

Senator Williams' version of Section 3(e) differed in one respect from the provision which was ultimately enacted. As originally introduced, the bill permitted the applicant for assistance to certify to the Administrator that, among other things, the program, to the maximum extent feasible, provides for the participation of private mass transportation companies. As amended, the Administrator was required to find that the federally assisted program includes, to the maximum extent feasible, the participation of such companies.

In the House of Representatives, an amendment to H.R. 3881 (88th Conc., 1st Sess.) contained language substantially similar to that which the Senate had passed. Subsequently, the Senate adopted the House language, and the provision was signed into law. The debate in the House revealed that the intent of Section 3(e) was to provide fair and equitable treatment of private operators, and to require the Administrator to use his judgment in making the required findings. 6/

Clearly, the statutory requirement of private participation "to the maximum extent feasible," was not intended by Congress to prohibit the use of federal assistance to fund services which might compete with or supplement

6/ In the South Suburban Safeway Lines, Inc. decision, the Seventh Circuit said the following:

' The elements of the findings to be made are discretionary, essentially more quasi legislative than quasi judicial. Surely Congress intended no trial de novo. The procedure which was followed shows that the administrative agency did address itself to the questions posed by section 1602(c), in a rational manner, and resolve them by findings which met the statutes.' 416 F.2d at p. 540.

existing services. In fact, the statute expressly permits competitive or supplementary services as long as the findings can be made. It is also noteworthy that the statute's history provides no guidance on the question of how the required findings are to be made in cases involving competition among two or more private mass transportation companies. Nor is the statute intended to foster private operations over publicly owned operations. The overriding concern of the sponsors of the provisions in the 1964 Act was to guard against unnecessary or coerced public takeovers of existing private operators. ^{7/} As the District Court in Westport Taxi Service, Inc. v. Adams said:

"If there is a federal statutory right to protection from governmental competition, . . . , it derives from the Congressional intent expressed in 49 U.S.C. sections 1602(e) and 1603 to provide for and encourage 'to the maximum extent feasible' the participation of private enterprise and to compensate private mass transportation companies 'for acquisition of their franchises or property to the extent required by applicable State or local laws.' . . . All the statute requires is encouragement of private participation to the maximum extent feasible.' It does not allow private transit operators to write their own ticket. ^{8/}

The statutory scheme viewed as a whole thus juxtaposes two potentially conflicting interests: private participation and local determination. By authorizing the Administrator to use his discretion in making the required findings, Congress has placed the responsibility for resolving such conflict, where it exists, in the hands of the Federal agency. Moreover, by using language as general as "to the maximum extent feasible," without any additional guidance as to the standard to be used, Congress has given the agency extremely broad discretion in carrying out this responsibility.

^{7/} See statement of Congressman Rains, 110 Cong. Rec. 14464 (Daily ed., June 25, 1964):

" . . . this amendment would prevent any force on the part of the municipal body to just taking over the authority whether or not private enterprise wanted it done."

^{8/} Civil No. B-76-369 (D.Conn., April 13, 1977), slip opinion at 12; aff'd in part, rev'd in part, 571 F.2d 697 (2d Cir. 1978). The requirement of Section 3(e)(3) that "just and adequate compensation will be paid to such companies for acquisition of their franchises or property" is further evidence that the congressional concern was over unnecessary public takeovers of private companies.

IV. New Jersey's Mass Transportation Program

The State of New Jersey, and especially the northeastern portion of the State which makes up part of the New York metropolitan area, constitutes one of the most densely populated areas of the nation. Consequently, mass transportation plays an inordinately important role in maintaining the vitality of the area.

Since the early 1800's, railroads have played a major part in providing transportation service to the State. 9/ Today's commuter railroad network has its roots in the mid-nineteenth century. (The system's history is described in detail in the Application of the New Jersey Department of Transportation, which is appended hereto as Attachment 5). Presently, all commuter rail service in the area is provided by Conrail, which includes the services formerly provided by the Erie Lackawanna, Penn Central, Central Railroad of New Jersey and the New York & Long Branch Railroads. In 1978, the combined ridership of these lines was approximately 34.7 million.

New Jersey's bus system is also one of the most extensive in the nation. While consolidation and abandonment of bus operations has reduced the number of companies providing bus service in New Jersey over the years, the State is presently served by approximately 245 operators, carrying an estimated annual ridership of over 210 million passengers. By far the largest bus company in the State, Transport of New Jersey (TNJ) carries almost 90 million passengers annually in its fleet of almost 1200 buses.

What is significant is that with two minor exceptions, all bus and commuter rail operations in the State are privately owned. 10/

The Tri-State Regional Planning Commission, the Metropolitan Planning Organization (MPO) designated by the Governor, is responsible for the transportation planning process, which includes the development of planning programs, a transportation plan and transportation improvement programs (TIP)

9/ The description of mass transportation services which follows in the text is taken from the Application of the New Jersey Department of Transportation for an Operating Assistance Grant for the 1978 fiscal year, (NJ-05-0015).

10/ The two public carriers are Mercer Metro and the Salem County Improvement Authority. TNJ is a wholly owned subsidiary of Public Service Electric and Gas Company, a privately owned utility company. Maplewood Equipment Company is a subsidiary of TNJ. Conrail, pursuant to its authorizing legislation, (45 USC 701 et seq.), was specifically precluded from being established as an agency or instrumentality of the Government, and was specifically authorized to be established as a "for profit corporation." It is therefore clear that TNJ, Maplewood, and Conrail are private mass transportation companies.

for the northeastern New Jersey area. ^{11/} The Regional Transportation Plan developed by Tri-State includes among its stated public transit objectives the following: Preserve and stabilize all vital existing operations; Attain fastest feasible travel time to central business districts; Provide rail, bus, and paratransit services to all areas of sufficient density; Coordinate, integrate and promote all public transportation operations. ("Maintaining Mobility," submitted as Exhibit C to State's Response to Complaint, p. 10). These, as well as other objectives, have guided the continuing and comprehensive planning process for the northeastern New Jersey area, and have resulted in a series of UMTA-funded projects, including both capital and operating assistance, to meet these locally determined goals.

Under the program of operating assistance authorized by Section 5 of the UMT Act, the State of New Jersey, through the Commuter Operating Agency (COA) of the New Jersey DOT, has received grants for eligible operating assistance for each fiscal year since 1975. Under the program of capital assistance authorized by Section 3 of the UMT Act, UMTA has made a number of grants to NJDOT, benefitting both rail and bus services. Under the provisions of Section 17 of the UMT Act, emergency operating assistance for Conrail has also been made available.

Independent of the federal program of assistance is New Jersey's own statutory program of operating assistance to motor bus carriers within the State. There are two such programs authorized by State law, whereby contracts are entered into between the COA and motor bus carriers. N.J.S.A. 27:1A-19 provides the following:

"The agency may enter into contracts with any motor bus carrier or carriers to operate passenger service which the agency shall determine (a) to be necessary to provide or encourage adequate commuter or intercity bus service and (b) would not otherwise be provided or made available without State assistance. Payment by the agency for such passenger service shall be based on the actual cost of such service to the motor bus carrier plus a 6% return on investment."

N.J.S.A. 27:1A-28.7 further provides as follows:

"The Department of Transportation is hereby authorized to contract with any motor bus carrier operating bus or rail transit service in the state which is in imminent danger of terminating all bus services or all rail transit services provided by said motor bus companies to insure the continuance of that portion of the bus and rail transit services which is essential. Payment by the Department under such a contract shall not exceed the actual cost to the motor bus carrier for providing such services and shall not include any return on investment."

^{11/} The requirements for the transportation planning process are contained in the regulations jointly issued by UMTA and the Federal Highway Administration, 40 Fed. Reg. 42976 et seq. (September 7, 1975); 23 CFR Part 450 and 49 CFR Part 613.

Since the State operating assistance program was initiated in 1970, 34 private bus companies have received more than \$126 million in State subsidies. In Fiscal Year 1977 alone, over \$42 million was distributed to 24 private companies. 12/ It must be emphasized, however, that such funds are authorized to be made available only under certain conditions. Payments under N.J.S.A. 27:1A-28.7 are restricted to bus companies which are in "imminent danger of terminating all bus services," and for services which are "essential." These are limitations imposed by the New Jersey State Legislature, and express the locally determined needs of the State.

The apportionment of State funds to private operators meeting the statutory criteria is affected by the availability of Federal financial assistance under Section 5 of the UMT Act. The application submitted to UMTA for Section 5 operating assistance (Attachment 5 hereto) specifies that the purpose of such assistance is to provide funds to Conrail and TNJ for operating expenses in Fiscal Year 1978. Counsel for the State explained in the November 17, 1978 conference that the reason that these two carriers alone are specified in the application is that the total amount of UMTA assistance available under the Section 5 formula is far less than the amount needed to provide assistance to all eligible carriers in the State. The difference is made up with State funds. (Attachment 4, p. 123). Therefore, the State's operating assistance program must be considered to include both State funds under the aforescribed statute and UMTA funds made available under Section 5 of the UMT Act.

In addition to the program of operating assistance to bus companies, the State has purchased a large number of buses, with UMTA assistance. All such buses have been leased to private bus companies. 13/ Finally, the State provides operating assistance and, through UMTA grants, capital assistance, to the commuter railroads serving the State. (See attachment 5, p. 37).

12/ See Attachment 5, pp. 39-40. It is of interest to note that assistance payments were made to two of the Complainants, Hudson Bus Transportation Co. and Manhattan Transit Co. at various times during the 1970-77 period. While it is undeniable that one company, TNJ, has received the largest amount of such payments, e.g., over 70 percent of the total in FY 1977, assistance is available to any operator meeting the statutory criteria.

13/ See Attachment 5, p. 35. Again, it is noteworthy that each of the Complainants operates some number of State owned buses. Attachment 3, p. 12.

It is this program which the Complainants allege is violative of the "private enterprise" provisions of the UMT Act. Specifically, the Complainants claim that "the various programs are not designed or intended to encourage participation of private enterprise 'to the maximum extent feasible' but rather are designed and intended to cause the demise of private enterprise." (Attachment 1, p. 3). This is the essence of the complaint; and the discussion which follows will address those portions of Complainants' argument which we believe are relevant to a claim under the statutes at issue.

V. Discussion

The complaint is based upon a theory that the "private enterprise" provisions of the UMT Act prohibit competition between services which receive Federal assistance and those which operate without the benefit of such assistance. The Complainants claim that competition exists in their service areas, and has resulted in a situation whereby their federally assisted competitors can maintain fares at artificially depressed levels, thus gaining a competitive advantage. They claim that they cannot participate in the State's subsidy program, and thus maintain fares at comparable levels, because of the State's utilization of the subsidy program authorized by N.J.S.A. 27:1A-28.7, which does not permit recipients to earn a return on investments. They, therefore, conclude that the State's program discriminates against them, does not meet the requirements of the UMT Act, and should not receive any further UMTA assistance until the alleged statutory violations are corrected. (See Attachment 2, p. 5).

As will be further discussed below, we do not agree that the State's program violates either the letter or the spirit of the "private enterprise" provisions of the UMT Act. While we are aware of the need for NJDOT to re-examine many of its present policies and practices in order to further improve mass transportation services for the public and to execute a more efficient use of Federal mass transportation assistance funds, we reject Complainants' request that the State be precluded from receiving any further UMTA assistance.

A. The State Subsidy Program Is Not Inconsistent With the UMT Act.

Central to the complaint is the question whether the State subsidy program authorized by N.J.S.A. 27:1A-28.7 is consistent with Federal requirements. The purpose of the State program, as revealed by the very words of the statute, is to provide public funds to bus operators which are in "imminent danger of terminating all bus services. . . to insure the continuance of essential services." Such purpose is clearly consistent with the underlying purpose of the UMT Act, which is to alleviate the societal problems caused by "the deterioration or inadequate provision of urban transportation services." 49 U.S.C. 1601(a)(2).

Moreover, a basic fact which cannot be overemphasized is that virtually all of the recipients of such assistance are private mass transportation companies. In fact, the State subsidy program exists for the purpose of assisting such companies to continue their operations. 14/

The debate in Congress regarding the "private enterprise" provisions reveals that an overriding concern was the potential use of Federal funds to convert, unnecessarily, private operations to public ownership. The State of New Jersey has not used UMTA funds to convert private bus companies to public ownership. 15/ Rather, the State has decided to distribute available Federal funds and independently authorized State funds solely to private mass transportation companies. This, by itself, is persuasive in determining whether the State's program meets the requirements of the relevant statutes.

Complainants, however, raise the question of whether the implementation of a program which restricts itself to private companies in jeopardy of going out of business, and which provides payments not to exceed the actual cost of providing essential services without any return on investment, satisfies the requirement that the program "encourage to the maximum extent feasible the participation of private enterprise." There is no basis in the UMT Act for a finding that the preclusion of a return on investment as a condition to the receipt of operating assistance is inconsistent with the "private enterprise" provisions or that Congress intended UMTA to declare State statutory assistance programs, such as New Jersey's, improper. Rather, Congress made clear that local mass transportation programs are to be developed and operated according to local needs. As one court has noted, the UMT Act "emphasizes local solutions to problems." Pullman, Inc. v. Volpe, supra, 337 F.Supp. 439.

The legislature of the State of New Jersey, through the enactment of the State subsidy program statutes, has provided a local solution to the problem of private bus companies in jeopardy of going out of business. The Governor, through the State Department of Transportation, has further provided a local solution to the problem of carrying out the intent of the legislature in the absence of unlimited financial resources. That is, the State has chosen to operate under the program which does not permit a return on investment, although a 6 percent return would be permitted under the other State subsidy program statute. Such local determinations are well within the discretion of the local decision making bodies.

14/ Certainly, New Jersey is not unique in this respect. As complainants' counsel correctly indicated, several areas within UMTA Region II are presently served by private bus operators. See Attachment 4, p. 156.

15/ Yet, such use of UMTA funds is by no means prohibited. Section 2b of the Act specifically permits operation by "public or private mass transportation companies as determined by local needs." 49 U.S.C. 1601(b)(3). Section 3(e) permits, so long as "adequate compensation" is paid to such private companies, the acquisition of private companies by UMTA grantees. 49 U.S.C. 1602(e)(3).

B. The Provision of Assistance to Conrail Does Not Violate The UMT Act.

Complainants claim that New Jersey's program of mass transportation assistance discriminates against them in that a disproportionate amount of Federal assistance is made available to commuter rail operations. It is undisputed that while more passengers are carried by bus than by rail in New Jersey, more Federal assistance has been made available to the railroads than to the bus operators. Nevertheless, there is no basis for a finding that such funding is inconsistent with the "private enterprise" provisions, or any other provisions of the UMT Act.

Section 8 of the UMT Act declares that it is in the national interest "to encourage and promote the development of transportation systems embracing various modes of transportation in a manner that will serve the States and local communities efficiently and effectively." With respect to the rail transit mode, UMTA has issued a policy statement on Rail Transit which sets forth at length the rationale for Federal support of rail transit projects. 16/

More importantly, the local transportation planning process has identified the continuation and upgrading of rail services as a priority need for northern New Jersey. (See Transportation Improvement Program. Attachment 3, Exhibit D). This is consistent with the following statement from the area's Transportation Plan, "Maintaining Mobility":

"The backbone of the public transport system is the rail network--subways and commuter railroads--capable of carrying large amounts of people at high speeds along fixed routes. Express buses provide high-quality service to areas lacking rail service. Local buses offer still wider coverage at slow speeds. Taxi and paratransit services meet special needs." (Attachment 3, Exhibit C, p. 3).

What is clear from the foregoing is that it has been recognized by both Federal and local decision makers that the various transportation modes serve different transportation requirements, and each mode should be considered on its own merits in deciding an area's particular mix of modes. Such consideration is properly the responsibility of local decisionmakers. We do not believe that it was the intention of the drafters of the "private enterprise" provisions to interfere with this process. Hence, we cannot agree with the complainants that "disproportionate" levels of assistance to the area's rail carriers violates the provisions of the UMT Act, so long as the program demonstrates that private mass transportation companies participate "to the maximum extent feasible."

16/ 43 Fed. Reg. 9428-30 (March 7, 1978). While UMTA's Policy Statement is intended to guide decisions on the design and construction of new rail transit facilities, it is nevertheless instructive for purposes of describing the national commitment to financing rail transit systems.

C. The "Private Enterprise" Provisions Do Not Prohibit Competition Between Federally Assisted Carriers and Carriers Which Do Not Receive Assistance.

The complainants emphasize that they are at a disadvantage because they must compete for passengers with TNJ and Conrail, both of which are recipients of assistance from the State and UMTA. The disadvantage results from fare differentials made possible, it is claimed, by their competitors receiving assistance. Complainants claim that this situation violates the "private enterprise" provisions to the extent that the State does not provide for a formula-based assistance program by which all operators would receive assistance based on passengers and passenger miles. 17/

To state that the "private enterprise" provisions prohibit competition between assisted and unassisted private mass transportation companies is to misconstrue the requirements of those provisions. Section 3(e) of the Act states that in order to provide financial assistance for the purpose of operating mass transportation services in competition with services provided by an existing private mass transportation company, the UMTA Administrator must make certain findings, including that the assisted program, "to the maximum extent feasible, provides for the participation of private mass transportation companies." Therefore, when the Administrator makes such findings, competition may exist, as is expressly recognized by the statute.

It is nevertheless disturbing to recognize that the existing route structure in northern New Jersey may result in duplication of services and inefficiencies which may deleteriously affect not only the profitability of bus operations, but also the level of services being provided to the public, and the fares being charged for such services. The issue of the efficiency of New Jersey's bus program, in fact, has been addressed by UMTA, and there is a continuing effort underway to alleviate many of the problems identified by the Complainants. 18/ This is not to say, however, that a basis does not exist upon which the Administrator may make the findings required by the Act.

With respect to Complainants' contention that the relevant statutes require "parity" for all passengers in the area, (i.e., an assistance formula based on passengers and passenger miles), there is simply no basis whatever for such a requirement. To impose such a formula on the State would be allowing these operators "to write their own ticket." Westport Taxi Service, Inc. v. Adams, supra, p. 12.

17/ See, e.g., Attachment 2, pp. 13, 18, 24, 38; Attachment 4, pp. 5, 8, 17, 20, 28, 31, 60, 66, 69, 86, 93, 102, 156.

18/ Letter of November 16, 1978 from Hiram J. Walker to Robert A. Keith, Attachment 6. UMTA's concern regarding the State's bus program is discussed further, below.

D. There Is Ample Basis For A Finding That New Jersey's Program, To The Maximum Extent Feasible, Provides For The Participation Of Private Mass Transportation Companies.

Congress provided little guidance as to the meaning of the "private enterprise" provisions. By the use of general language, however, the statute gives the Administrator broad discretion in implementing the requirement. This discretion has been exercised on a case-by-case basis in determining whether the required findings can be made.

In the case of New Jersey's program, the record discloses ample evidence that private mass transportation companies participate to the maximum extent feasible. The program is premised upon an existing system of bus and rail services, all of which are operated by private companies. Through a combination of State and Federal programs, assistance is made available to continue essential services and to upgrade capital facilities and purchase new equipment. Any private operator may apply to the State for assistance, and any operator meeting the State's criteria may receive such assistance. While competition may exist between assisted and unassisted carriers, such competition is expressly authorized by the UMT Act as long as the required findings can be made.

However, the Complainants emphasize the effect which competition has on the fares which unsubsidized carriers can charge. Complainants state that they would apply for fare increases, but must maintain fares at depressed levels in order to remain competitive with subsidized carriers operating on the same or similar routes. The rail services offered by Conrail differ in kind from the services offered by the Complainants, and we therefore do not consider such services competitive. Competition among bus operators, while expressly authorized by the UMT Act, may indeed have an effect on the services provided to the public. This is an area which the State should examine to determine whether the mass transportation system is serving the public efficiently and effectively. 19/

In order to increase the efficiency and effectiveness of service, the State should examine existing routes, schedules, and fares to determine whether changes should be made to avoid unnecessary duplication of service. A State Reorganization plan, effective January 1, 1979, provides the State with this opportunity, and should help maximize efficiency in the provision

19/ UMTA is prohibited from regulating in any manner the mode of operation of any mass transportation system receiving assistance under the Act. 49 U.S.C. 1608(d). This prohibition specifically includes the regulation of fares. Yet, the Act declares that mass transportation systems should serve the public "efficiently and effectively." 49 U.S.C. 1607(a).

of mass transportation services. 20/ The State is presently developing a program of capital projects for which UMTA assistance will be sought. As many as 1,000 buses are anticipated to be purchased, and bus related facilities may be constructed. This program provides the State with an additional opportunity to examine the needs of New Jersey's bus operators as well as the needs of the public. It is anticipated that the program may also include the construction of bus maintenance facilities and garages, park and ride lots and other supportive facilities, and that the buses purchased will be allocated among the State's many private bus operators in a rational and efficient manner.

The issues raised by the Complainants do not preclude the Administrator from making the required findings. It is not the purpose of this memorandum to provide a general statement on the issue of private participation in UMTA-assisted programs. Rather, we have been asked to examine the situation in New Jersey. That examination has revealed that certain problems exist, but that steps are being taken to resolve them. Our review of the State's program has not, however, revealed any substantive reason for withholding funds from New Jersey.

VI. Conclusion

The complaint of Hudson Bus Transportation Co. and the other private bus companies has been thoroughly considered. Complainants have had the opportunity to present their case to the Administrator through written submissions and at a conference with UMTA attorneys. The State has responded to the allegations contained in the Complaint.

The record developed in this proceeding is voluminous. As described herein, the record provides a basis for a finding that New Jersey's program, while requiring a thorough examination to correct certain problems, satisfies the requirements of the "private enterprise" provisions. Private mass transportation companies are provided, to the maximum extent feasible, opportunity to participate in New Jersey's program.

Complainants' request that UMTA not approve financial assistance to New Jersey should be denied.

20/ In the past, a number of agencies have had jurisdiction over the operations of New Jersey's bus operators. The Commuter Operating Agency of the Department of Transportation has had contractual control over the fares, routes and schedules of all subsidized mass transportation operators. The Board of Public Utilities has had jurisdiction over routes, fares and schedules of the nonsubsidized carriers. The Interstate Commerce Commission has had jurisdiction over the operations of interstate, trans-Hudson, operators. As stated by Governor Byrne, the former split in jurisdiction was "confusing, inefficient and duplicative and has hindered the development of a rational public transportation system in the State." On January 1, 1979, pursuant to a State Reorganization plan, the functions of the Board of Public Utilities as they apply to bus and rail operations, will be transferred to the Department of Transportation. (Governor's Message and Reorganization Plan appended hereto as Attachment 7).



DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION
WASHINGTON, D.C. 20590

File Charter 1602 (f)
UCC-1

Reading

APR 5 1979

Mr. Dean A. Hetrick
General Manager
Greater Portland Transit
District (GPTD)
P.O. Box 1097
Portland, Maine 04104

Dear Mr. Hetrick:

The Urban Mass Transportation Administration (UMTA) has completed a review of the Greater Portland Transit District's (GPTD) charter operations. It is our determination that GPTD has engaged in charter operations outside of the urban area in which it provides regularly scheduled mass transportation services, without an agreement under section 3(f) of the Urban Mass Transportation Act of 1964, as amended, (49 U.S.C. § 1601, et seq.) (the UMT Act) and UMTA charter regulations, as amended, 41 F.R. 14122 (April 1, 1976). GPTD is therefore ordered to cease and desist from any charter operations outside of the urban area in which it provides regularly scheduled mass transportation services, as defined by the laws of the State of Maine. For the purposes of this order GPTD's urban area is defined to include the Cities of Portland, South Portland, and Westbrook. This order shall remain in effect for a period of three (3) years from the date of its issuance. During that time, and until such time as GPTD is eligible and applies for a charter agreement under section 3(f) of the UMT Act, GPTD shall submit annually to this office effective 30 days from the date of this order:

1. A complete description of all proposed charter operations within its urban area during the impending year;
2. An estimate of the number and type of buses which will be employed in the proposed service and a statement of their availability;
3. A certification of costs for the proposed charter operations. Such certification shall include all relevant expenses specified in Appendix B of UMTA charter regulations, 41 F.R. 14122 (April 1, 1976); and
4. A cost allocation plan.

GPTD is required to submit charter cost data to UMTA for a period of three (3) years from the date of this order although its charter activity during that period will be limited to the urban area in which it provides regularly scheduled mass transportation service. UMTA's decision to require this submittal was prompted by GPTD's charter activity outside of its urban area since the issuance of UMTA charter regulations on April 1, 1976. Because GPTD has not complied with UMTA's cost reporting requirements contained in the April 1, 1976 regulations, UMTA has been denied the opportunity to review the adequacy of GPTD's current charter rates. UMTA will therefore conduct such a review over the next three (3) years to insure that GPTD's charter rates are not designed to foreclose private carriers from the charter industry.

UMTA received a complaint from Brunswick Transportation Co., Inc. (Brunswick) dated May 19, 1978, and a subsequent complaint from Hudson Lines, Inc., (Hudson) both private carriers in Maine, alleging certain violations by GPTD of the UMT Act and UMTA charter regulations. On June 26, 1978, UMTA issued a Notice of Probable Violation (Notice) to GPTD citing possible violations of its charter bus regulations and the UMT Act. GPTD responded to the UMTA Notice by letter and supporting documents dated on July 28, 1978, setting forth why it believed it had not violated UMTA requirements. Brunswick submitted a rebuttal to the GPTD response on October 13, 1978. Hudson's response was submitted on October 12, 1978.

With respect to charter service outside of its urban area, GPTD has admitted in its response that it regularly contracts such charter without an appropriate agreement, in violation of UMTA regulations. GPTD alleges, however, that the amount of charter work done outside its urban area is not significant since such charters amounted to only 5 percent of its total charter work during the first six (6) months of 1978. GPTD further explains its lack of a charter agreement with UMTA as follows:

"On March 25, 1975, a request for an Agreement with the Secretary of Transportation on charter rights was submitted to UMTA (copy enclosed). Subsequently the District was notified, verbally, to hold the request until final regulations were published in April, 1976, the District has filed one additional Section 5 grant application under the old application procedures. The old procedures were used for the calendar year (our fiscal year) 1977 because the application was nearly complete when UMTA Circular C 9050.1 was issued June 10, 1977 and received by us in July, 1977. Page two, paragraph two of C 9050.1 indicated that the old procedures were acceptable until January 1, 1978. The District is preparing the calendar year 1978, Section 5 application under the new procedures including Exhibit E: Charter and School Bus Operations.

Section 604.20, Modifications of Agreements and Amendments of Application; and Section 604.21, Amendment of Application for Assistance, require the District to develop a certification of costs for its charter bus operations and send it with its proposed or existing charter bus operations and cost allocation plan to private charter bus operators whose service originates in the grant's urban area. The District had neglected to do this, but a certification of costs and a description of charter bus operations have been sent to Brunswick Transportation Co., Inc., the carrier whose service originates in South Portland, a city in our urbanized area. A copy of that certification is enclosed." (Attachment No. 1)*

The record indicates that GPTD did not send the certification mentioned above to Brunswick until July 27, 1978, one day before GPTD responded to the UMTA Notice. There is no indication in our records that GPTD ever sought final approval of Attachment No. 1 as a formal charter agreement.

We disagree with GPTD's position that the amount of charter work done outside of its urban area was not significant. Section 3(f) of the UMT Act provides in part as follows:

"No Federal financial assistance under this Act may be provided for the purchase of buses unless the applicant or any public body receiving such assistance for the purchase or operation of buses, or any publicly owned operator receiving such assistance, shall as a condition of such assistance enter into an agreement with the Secretary that such public body, or any operator of mass transportation for such public body, will not engage in charter bus operations outside the urban area within which it provides regularly scheduled mass transportation service, except as provided in the agreement authorized by this subsection" (emphasis added)

Under section 3(f) and UMTA regulations implementing it, any charter operations by a grantee outside its urban area subject that grantee to the charter regulations if that grantee grosses more than \$15,000 annually (section 604.2) from its total charter operations.

In conclusion we find that GPTD operated charter service outside of its urban area without an agreement in violation of section 3(f) of the UMT Act and UMTA regulations issued thereunder. GPTD therefore

should not engage in any charter service outside of its urban area as defined herein. Such charters may not be originated or terminated outside of the urban area. Any violation of this order may be considered grounds to establish a pattern of continuing violations and may result in GPTD being barred from further assistance under the UMT Act.

Sincerely,
/s/ Margaret M. Ayres
Chief Counsel

Margaret M. Ayres
Chief Counsel

Enclosures

* To the extent that Attachment No. 1 complies with this order, it may be used as GPTD's initial filing under this order.

UMTA:PCOOK:d1c:2/9/79

cc: UCC-1 Reading

UCC-1 Chron

UCC-File--CHARTER COMPLAINT AGAINST GPTD

UCC-31 PCook



DEPARTMENT OF TRANSPORTATION
 URBAN MASS TRANSPORTATION ADMINISTRATION
 WASHINGTON, D.C. 20590

write reply-1
Rice

Mr. James C. Riffe
 President
 Chesapeake & Northern Transportation
 Corporation
 5604 Capelle Road
 Portsmouth, Virginia 23703

JUL 12 1979

Dear Mr. Riffe:

Thank you for your letter of June 20, 1979, concerning the use of transit buses owned by the Tidewater Transportation District Commission (TTDC) in employee hauling (charter service). We are informed by your letter that TTDC has leased transit buses to the Betsy Corporation, and that the latter is using those buses in competition with your company in providing charter services. You have requested that we review that matter to determine if such actions violate section 3(f) of the Urban Mass Transportation Act, as amended (49 U.S.C. 1602(f)) (the UMT Act).

The Urban Mass Transportation Administration (UMTA) does not permit its grantees to use or allow the use of UMTA-assisted buses in any charter service which interferes with regularly scheduled mass transportation service. In this respect, any charter service offered by UMTA grantees or operators for such grantees must be incidental to the provision of mass transit service. No UMTA-assisted buses can be assigned primarily to charter service. Any such assignment would violate section 604.11 of UMTA's charter bus regulations, 41 F.R. 14122 (April 1, 1976) (copy enclosed), which were promulgated under section 3(f) of the UMT Act.

We have requested the UMTA Regional Office in Philadelphia to review this matter and determine whether TTDC is in compliance with our charter regulations, specifically with respect to its leasing of equipment to the Betsy Corporation.

We appreciate your bringing this matter to our attention. We will inform you of our findings and of any action we may take.

You may direct any further inquiry on this matter to our Regional Office Counsel, Ms. Nancy Greene, at 215/597-8098.

Sincerely,
 /s/ Margaret M. Ayres
 Chief Counsel

Margaret M. Ayres
 Chief Counsel

Enclosure

UMTA:PCOOK:dla:7/10/79
 cc: UCC-1 Reading
 UCC-1 Chron
 UCC-F1e--
 UCC-31 PCook
 Region III - N. Greene
 UOA-10(2)
 Control No. 004435 L

Ch. Carter

AUG 31 1979

Mr. Irwin J. Borof
Attorney At Law
125 Twelfth Street
Suite 105
Oakland, California 94607

Dear Mr. Borof:

I have received your letter, dated August 21, 1979, regarding A.C. Transit's charter operations. You have requested that A.C. be required to prescribe the specific boundaries of its service; your suggestion is that, since A.C. Transit's San Francisco service is limited to Treasure Island and the bus terminal, it should not be permitted to operate charter service throughout the city.

The UMTA regulations governing charter operations (49 C.F.R. Part 604) require that a grant recipient engaging in charter operations outside the urban area within which it provides regularly scheduled mass transportation service and from which it derives more than \$15,000 in revenue, must enter into a charter agreement with UMTA to ensure that UMTA assistance is not used in support of charter operations. "Urban area" is defined as "the entire area in which a local public body is authorized by appropriate local, State, and Federal law to provide regularly scheduled mass transportation service", which includes all areas within the urbanized area served by the operator.

A.C. Transit provides regularly scheduled service within the San Francisco-Oakland urbanized area and is, therefore, not required to enter into a charter agreement, as long as its charter service remains within that area. Any other interpretation of the regulation would result in the limitation of charter operations to only these areas which are served by A.C. routes.

Sincerely,

M.M.T.H.

Melanie J. Morgan
Regional Counsel

cc: Mr. Nisbet, A.C. Transit

MORGAN/ddb 083079



Charter

**DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION
WASHINGTON, D.C. 20590**

DEC 27 1979

Donald J. Ellis, Esquire
Troutman, Sanders, Lockerman
and Ashmore
Attorneys at Law
Candler Building
Atlanta, Georgia 30303

Dear Mr. Ellis:

The Urban Mass Transportation Administration (UMTA) has completed a review of the charter bus operations of the Metropolitan Atlanta Rapid Transit Authority (MARTA) as a result of an April 7, 1978, complaint filed by Tamiami Tours, Inc., and Continental Tennessee Lines, Inc., both doing business as Trailways (Trailways). It is our determination that MARTA has not engaged in charter bus operations in violation of either section 3(f) of the Urban Mass Transportation Act of 1964, as amended (the UMT Act), UMTA Charter Bus Regulations, 49 CFR Part 604, or MARTA's charter bus agreement with UMTA submitted under the preceding requirements.

UMTA received a complaint from Trailways dated April 7, 1978, alleging certain violations by MARTA of the UMT Act and UMTA charter regulations. Specifically, Trailways made the following allegations which will be addressed individually herein.

1. MARTA's charter operations violate Federal laws and regulations;
2. MARTA has violated its agreement with UMTA concerning the operations of charter bus service;
3. MARTA's federally subsidized low charter rates are foreclosing private enterprise;
4. MARTA's charter bus rates are not producing income equal to or greater than the costs of providing such service, thus converting Federal assistance to a subsidy for charter operations;

5. MARTA's charter bus operations have interfered with MARTA's primary urban mass transit functions;
 - (a) MARTA has provided charter bus service during weekday morning and evening rush hours;
 - (b) MARTA has provided weekday charter bus service requiring the use of a particular bus for longer than six hours in any one day;
 - (c) MARTA has provided charter bus service beyond its urban area as if it is a private interstate charter bus operation;
6. MARTA has engaged in certain practices in an effort to avoid the limitations on the use of federally financed equipment and facilities in charter bus operations; and
7. MARTA's illegal acts and practices compel remedial action by UMTA.

On April 21, 1978, UMTA issued a Notice of Probable Violation (Notice) to MARTA citing possible violation of its charter bus regulations and the UMT Act. MARTA responded to the UMTA Notice by letter and supporting documents dated June 1, 1978, setting forth why it believed it had not violated UMTA's requirements.

On June 15, 1978, a hearing was held on the Trailways complaint at the UMTA Region IV office in Atlanta, Georgia. Both Trailways and MARTA were represented by counsel at this hearing. Both presented witnesses and documentary evidence, which along with the official transcript of this matter, and all documents received in evidence up to and including those filed by MARTA dated August 9, 1978, constitute the official record.

At the June 15 hearing, counsel for Trailways moved to strike MARTA's reply to the Trailways complaint. In that reply, MARTA alleges that charter bus operations are permitted by both state and Federal law. Trailways alleges that charter service is not permitted under MARTA's enabling legislation or under any Federal statute. MARTA opposed the Trailways motion to strike on the grounds that Trailways was raising a new issue at the hearing which was not previously raised in its complaint, i.e., whether MARTA was authorized to engage in charter operations by its enabling legislation. The hearing officer agreed that the issue raised by Trailways was a new one which had not been previously raised by the Trailways complaint. However, since the issue was relevant, the hearing officer agreed to allow Trailways to submit evidence in support of its position that MARTA's enabling legislation does not allow MARTA to engage in charter service. Such

evidence was to be submitted along with Trailways' response to MARTA's reply of June 1, 1978, which was due approximately thirty (30) days subsequent to the filing of the reply by MARTA. MARTA was allowed twenty (20) days after the filing of the Trailways' response to rebut the new issue raised by Trailways. The hearing officer stated that upon the filing of the rebuttal by MARTA, the record in this matter would be closed to further submittals. (See Transcript pages 127-135). The disposition on all preliminary motions was to be addressed in the decision by UMTA on the Trailways complaint.

The Trailways motion to strike portions of MARTA's reply of June 1, 1978, concerning its authority to engage in charter service is denied. The Attorney General of Georgia in Opinion 73-60, May 4, 1973, has expressly ruled on MARTA's authority to provide charter service inside of its urban area by the following statement:

"MARTA is a public body corporate created as a joint instrumentality of the participating governments existing for the purpose of establishing and administering '... a rapid transit system within the metropolitan area ...' Ga. Laws 1965, pp. 2243, 2252, Sections 3, 7. The responsibility of MARTA with respect to a 'rapid transit system' includes the 'right to provide group and party service'. Id. Sections 2(g), and 2(i) ... it is clear, therefore, that MARTA does have the authority to provide charter service"

The Attorney General also answered in the affirmative the question of whether MARTA could, under State law, provide charter service outside the metropolitan Atlanta area by the following statement:

"... it follows that MARTA may provide charter service for trips originating within the metropolitan area, but extending beyond those borders where it concludes that such charters are reasonably necessary to serve its statutorily mandated objective within the metropolitan area."

The above portions of the opinion of the Georgia Attorney General provides a sufficient basis for UMTA to find that MARTA is authorized under State law both to engage in charter service and to engage in charter service outside of its urban area. In this respect, UMTA is not persuaded by Trailways arguments that the decision of the Attorney General of Georgia should not control this issue because such opinion is not binding as law. As authority for its position that the Attorney General's decision should not be followed, Trailways cites Gable Industries, Inc. v. Blackman, 233 Ga. 542 (1975). That opinion, however, merely states that the Attorney General's opinion is not binding on the courts. In this matter, where no court opinion is available to aid UMTA in

deciding the issue presented here, our view is that the opinion of the Attorney General should be given great weight, particularly since the issue to be decided involves an interpretation of a local statute. Therefore, it is our opinion that MARTA is permitted by its enabling legislation to engage in charter bus operations both inside and outside of its urbanized area.

Counsel for Trailways also moved to strike Exhibits 1 and 4 of MARTA's reply of June 1, 1978. Trailways contends that the letters in Exhibit 1 complimenting MARTA for the quality of its charter service cannot be used as a basis to establish the lawfulness of that service. We agree that public support for charter service does not affect the legality of that service under UMTA requirements. The Trailways motion is granted on the grounds that Exhibit 1 is not relevant to the purpose of this review which is to determine the legality of MARTA's charter service. However, Trailways' motion to strike Exhibit 4 which describes the scope of MARTA's charter service is denied on the grounds that Exhibit 4 is relevant in establishing the magnitude of MARTA's charter operations.

Counsel for Trailways also moved to strike paragraph 1 of page (6) of MARTA's June 1, 1978, response which provides as follows:

"In summary, the Authority's charter service has historically been an incidental but essential service that addresses a specific transportation need, recognized by Congress in the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. § 1602(f)) (hereinafter referred to as the "UMT Act").

Trailways' grounds for objection is that MARTA "... is basically saying that the provision of charter service addresses a specific transportation need recognized by Congress in the Urban Mass Transportation Act of 1964, as amended. This is clearly not so and should be deleted and not considered for the purpose offered." The Trailways motion is denied on the grounds that the statement by MARTA is supported by the existence of section 3(f) of the UMT Act and the December 7, 1966 decision of the Comptroller General of the United States (supra) which indicate that Congress recognized that transit operators would carry out charter service and that such services do in fact address a specific transportation need.

Finally, Trailways moved to strike the questions posed by William C. Nix, Director of Transportation, Engineering and Evaluation for MARTA, to John Spellings of Trailways on cross examination concerning the convenience of arranging service among private carriers. The grounds for objection is that MARTA cannot justify its charter service on the basis of the need for that service. Trailways further states that Mr. Nix's questions imply that because no one carrier can provide

sufficient buses to provide charter service to the metropolitan area, some people will go without service. [Page 98-99, Hearing Transcript, June 15, 1978]. The Trailways motion is denied. We agree that need alone does not justify MARTA providing charter service. However, as we have determined earlier, we find that such service is permitted under section 3 of the UMT Act.

We now address specifically the allegations of the Trailways complaint of April 7, 1978. Trailways first alleges that MARTA's charter bus operations violate Federal laws and regulations. The UMT Act authorizes Federal funds to finance the acquisition, construction, reconstruction, and improvement of facilities and equipment for use in mass transportation. The term "mass transportation" is defined in section 12(c)(6) of the UMT Act to mean "...transportation by bus, or rail, or other conveyance, either publicly or privately owned, which provides to the public general or special service (but not including school buses or charter or sightseeing service) on a regular and continuing basis." (emphasis added). UMTA is prohibited from assisting in the purchase or operation of equipment which would be used primarily 1/ in charter bus operations under this definition and under section 3(f) of the UMT Act which in its entirety provides as follows:

No Federal financial assistance under this Act may be provided for the purchase or operation of buses unless the applicant or any public body receiving such assistance for the purchase or operation of buses, or any publicly owned operator receiving such assistance, shall as a condition of such assistance enter into an agreement with the Secretary that such public body, or any operator of mass transportation for such public body, will not engage in charter bus operations outside the urban area within which it provides regularly scheduled mass transportation service, except as provided in the agreement authorized by this subsection. Such agreement shall provide for fair and equitable arrangements, appropriate in the judgment of the Secretary, to assure that financial assistance granted under this chapter will not enable public bodies and publicly and privately owned operators for public bodies to foreclose private operators from the intercity charter bus industry where such private operators are willing and able to provide such service. (emphasis added).

1/ While section 12(c)(6) of the UMT Act prohibits the agency from making a bus grant expressly for the purpose of providing charter service, the Comptroller General of the United States in opinion B-160204, December 7, 1966, has ruled that buses purchased with UMTA funds may be used in incidental charter service. In that opinion, the Comptroller General stated "...we are of the opinion that any lawful use of project equipment which does not detract from or interfere with the urban mass transportation service for which the equipment is needed would be deemed an incidental use of project equipment, and that such use of project equipment is entirely permissible under our legislation."

Section 3(f) of the UMT Act reflects amendments to that section by section 813(b) of the Housing and Community Development Act of 1974, August 22, 1974 (P.L. 93-383, 88 Stat. 633). Before those amendments all charter service by UMTA grantees outside of the grantee's service area was prohibited by section 164(a) of the Federal Aid Highway Act of 1973 which, prior to its repeal read as follows:

"No Federal financial assistance shall be provided under (1) subsection (a) or (c) of section 142, title 23, United States Code, (2) paragraph (4) of subsection (e) of section 103, title 23, United States Code, or (3) the Urban Mass Transportation Act of 1964, for the purchase of buses to any applicant for such assistance unless such applicant and the Secretary of Transportation shall have first entered into an agreement that such applicant will not engage in charter bus operations in competition with private bus operators outside of the area within which such applicant provides regularly scheduled mass transportation service. A violation of such agreement shall bar such applicant from receiving any other Federal financial assistance under those provisions of law referred to in clauses (1), (2), and (3) of this subsection."

Section 3(f) of the UMT Act differs from section 164(a) of the Highway Act in that section 3(f) expressly allows UMTA grantees to engage in charter bus operations outside the grantee's urban area in competition with private carriers so long as such charter operations are carried out pursuant to an agreement which the Secretary of Transportation finds to contain fair and equitable arrangements for protection of the economic interest of competing private carriers.

The April 1, 1976 UMTA charter bus regulations implement section 3(f) of the UMT Act by setting forth the terms which are "fair and equitable" in the opinion of the Secretary to protect the economic interests of private charter operators. At the same time, the regulations are designed to establish minimum conditions under which all public operators may engage in charter bus operations in competition with private carriers and yet not foreclose the latter from the intercity charter bus industry.

The basic thrust of the regulations is twofold: (1) they require grantees who engage in charter bus operations outside of their urban area to assure that Federal assistance is not used to subsidize charter operations by certifying that revenues generated from those operations are equal to, or greater than the cost of providing that service; and (2) they codify the "incidental" charter restrictions on the use of Federally-assisted equipment which the Comptroller General set forth in his opinion of 1966. (Comptroller General of the United States, B-160204 (December 7, 1966)). (See Appendix B, UMTA Charter Bus Regulations, 41 F.R. 14122, April 1, 1976).

With respect to the economic thrust of the charter regulations, grantees are required to certify that they have taken into account those expenses outlined in Appendix B of the charter regulations in developing their charter rates. In addition to the expenses outlined in Appendix B, grantees are also required to add depreciation on all Federally-assisted buses and taxes as expenses.

The certifications made by grantees are made available to private carriers under section 604.18 of the charter regulations prior to UMTA approval of a charter agreement. Private carriers have the opportunity to comment on these certifications either at a public hearing or through written comments which are forwarded to UMTA by the grantee. In addition to commenting on the grantee's certification, private carriers are also allowed to state their objections to a grantee's charter operations.

If such objections state a legally sufficient basis for UMTA to limit or prohibit a grantee's charter operations under the UMTA charter regulations, appropriate action will be taken by UMTA.

MARTA's first request for a charter agreement under UMTA charter bus regulations was made in September 1976. Upon approval of documentation submitted by MARTA on September 10, 1976, UMTA approved an interim charter agreement which allowed MARTA to conduct charter service outside of its urban area for a period of sixty (60) days pending approval of a final charter bus agreement. [See MARTA Exhibit 3 in its April 7, 1978 reply to the Trailways Complaint].

On November 2, 1976, UMTA gave unconditional approval of MARTA's request for a charter agreement. An approved charter agreement remains in effect for twelve months unless an UMTA grantee makes major changes in its charter operations within that time period. Upon the expiration of its November 2, 1976, charter agreement, MARTA requested a new agreement by letter and supporting documents dated October 7, 1977. ^{2/} In response to MARTA's October 7 request, UMTA approved its charter agreement on December 5, 1977. The December 5 charter agreement was in effect at the time the Trailways complaint was filed. Therefore, to the extent that section 3(f) of the UMT Act and UMTA charter regulations require a charter agreement as a condition of operating charter service outside of a grantee's service area, it is our finding that MARTA has met those requirements as evidenced by the referenced approved charter agreements with UMTA. We therefore find that MARTA's operations are not in violation of Federal laws and regulations. The extent to which MARTA has fulfilled the commitments made in its agreements will be discussed further herein.

^{2/} The Transcript of the public hearing conducted by MARTA on its proposed charter operations indicate that Trailways representatives appeared at the hearing. That testimony opposing MARTA's charter services is a part of that record. However, the objections put forth by Trailways at the hearing did not establish a legal basis for denying approval of MARTA's charter agreement under the UMTA charter regulations.

The following allegations by Trailways will be discussed together because of their general relationship: MARTA has violated its agreement concerning the operation of charter services; MARTA's Federally subsidized low charter rates are foreclosing private enterprise; and MARTA's charter bus rates are not producing income equal to or greater than the costs of providing such service, thus converting Federal assistance into a subsidy for charter operations. The extent to which MARTA has complied with its charter agreement with UMTA can be clarified by a discussion of the regulations which require that agreement. Section 604.15 of UMTA charter regulations as amended, 41 F.R. 56651 (December 29, 1976) provides that "each applicant who engages or wishes to engage in charter bus operations outside of its urban area shall include the following in its application...a certification of costs and ...a cost allocation plan... ." Under section 604.3 of the charter regulations, "Certification of costs" and "cost allocation plan" are defined, respectively, as follows:

"Certification of costs" means a statement prepared using generally accepted accounting principles, consistent with a grantee's regular accounting methods, and certified to be true and accurate by a grantee's chief financial officer. This statement indicates the elements of cost that are attributable to a grantee's charter bus operations. A grantee's statement must include depreciation expense on federally-assisted buses, facilities and equipment as an element of cost, and State and Federal taxes, whether or not the grantee is required to pay such taxes. This statement shall also give assurance that the revenues generated by charter bus operations are, and shall remain, equal to or greater than the cost of providing the service.
..."

"Cost allocation plan" means the documentation identifying, accumulating, and distributing costs attributable to charter bus operations together with the allocation methods used."

[See 604.3, 41 F.R. 14123, April 1, 1976].

MARTA's charter agreement for fiscal year 1977, approved December 5, 1977, complies with the above requirements. MARTA's certified cost statement indicates that MARTA charter revenues exceeded its charter expense by \$35,738 during that period after appropriate treatment of: (a) relevant expenses listed in Appendix B of the regulations, (b) \$70,407 for depreciation of Federally-assisted equipment, and (c) \$12,323 for State and Federal taxes. (The latter items, depreciation and taxes, are not actual expense items, but are required by the charter regulations in order to ensure that grantee charter rates are not so artificially low in comparison to those of private carriers by virtue of Federal subsidy or tax exempt status as to foreclose private carriers from the charter industry).

MARTA's cost allocation plan indicates that charter costs were determined by the ratio of total charter miles to total miles traveled by MARTA. The rate derived by that comparison provides a basis for determining charter costs as a percentage of total cost which are uniformly applied on a system-wide basis. UMTA's review of MARTA's certification of cost and cost allocation plan indicated that it was prepared using generally accepted principles of accounting and was consistent with MARTA's regular accounting methods. It also indicated that costs were less than revenues.

Trailways has not challenged specifically any element of expense in MARTA's certified cost statement, nor has Trailways challenged MARTA's method of cost allocation. The following dialogue from the June 15, 1978 hearing illustrates this point:

MR. COOK: (Hearing Officer) Do you challenge any specific element of expense which they have listed?

MR. ELLIS: (Trailways) We challenge the document, and our accountants have analyzed this document. And due to the lack of information system-wide for the MARTA System, they have told us that they're unable to make a judgment on that that they would rely on without knowing all the System's figures. However, they did state to us that there were several factors in the cost allocation plan which they questioned, and we have reserved that issue for our supplemental brief or our response. And at that time, we will make such response as we deem appropriate.

[Pages 193-194, transcript, June 15 hearing].

Trailways' supplemental brief of July 11, 1978, did not specifically challenge MARTA's certification of cost or cost allocation plan, or any element thereof. That brief did, however, discuss the issue of whether MARTA's charter rate is foreclosing Trailways from the charter industry because its charter rate is lower. [Pages 26-37, Trailways response of July 11, 1978]. UMTA's regulation does not provide for the setting of rates by comparison to those of private carriers. The adequacy of a grantee's charter rate should be determined by the expenses incurred by the grantee as reflected in Appendix B of the charter regulations, plus taxes and depreciation on Federally-assisted equipment and must be reasonable by comparison to such documented costs. Private carriers determine their charter rates based on their expenses plus a desired rate of profit. Both expenses and profit margins vary significantly among carriers. UMTA charter regulations attempt to establish a basis for a reasonable charter rate for grantees notwithstanding these variables in determining rates among competing carriers. As a result of the expenses which grantees are required to take into account in determining their charter rates, grantees are placed on an equal footing with private carriers with respect to expenses relating to charter service. Other factors such as the type of equipment offered, the level of service

provided and the availability of such service provide additional subjective criteria which go into the setting of a charter rate, and also provide additional reasons why UMTA grantees should be allowed to establish charter rates within the general parameters of the regulations.

On the issue of foreclosure, Trailways states that "...if the intent is to foreclose competition from private carriers by gaining an unfair competitive advantage through a lower price, then the charter rate is illegal." [Page 28, Trailways July 11, 1978 response]. It is within this context that Trailways has specifically challenged MARTA's "charitable" rate under which certain non-profit organizations are provided charter service at a reduced rate. Section 604.13 of the charter regulations incorporates by reference the following provisions in each approved charter agreement:

The grantee, or any operator of project equipment, agrees that it will not establish any charter rate which is designed to foreclose competition by private charter bus operators.

The grantee agrees that it will not engage in any practice which constitutes a means of avoiding the requirements of this agreement or part 604 of the Urban Mass Transportation regulations.

MARTA offers the following justification for the existence of its charitable rate:

Prior to July 1, 1974, the MARTA charter tariff made no distinction in its rate structure with respect to the status of the chartering party. All groups were quoted the same rate and all groups were subject to a three-hour minimum charge. Under urging by the private sector, however, the Board considered and approved a five-hour minimum charge, along with various other increases in rates for charter service. Currently, the regular rate represents a five-hour minimum time charge, and the special rate represents a three-hour minimum time charge. The Authority's current charter tariff is attached as Exhibit 18, and the Authority's proposed tariff charter is attached as Exhibit 19.

The special rate was established to assist non-profit institutions with limited funds, which have need for charter services of short duration, and who should not, in the opinion of MARTA's Board of Directors, pay excessive charges for time not needed or used. Thus, elimination of the requirement to pay for time not

needed or used is the thrust of the non-profit rates, as opposed to any discount or bargain rate. For the first three hours, the charge per hour for charter services is the same under the regular rate as it is under the special rate. Although the current charge for each additional hour under the special rate is somewhat less than the charge for each additional hour under the regular rate (\$15.00 as opposed to \$16.00), the purpose of the special rate has always been to make charter services available to groups and organizations with limited funds, and for short durations--institutions which might otherwise be foreclosed from the use of charter service altogether.

[Page 20, MARTA response of April 7, 1978].

It is our finding that the above offers an adequate explanation for the existence of MARTA's special rate and that because MARTA's overall charter revenues exceeded costs as required by the regulation, the special rate does not foreclose competition by private carriers. Notwithstanding this finding, however, UMTA will require that all future special rates be submitted with MARTA's request for a charter agreement and that such rates be specifically approved by UMTA.

Finally, Trailways raises the following related issues regarding MARTA's charter operations: MARTA's charter bus operations have interfered with MARTA's primary urban mass transit functions; MARTA has provided charter bus service during weekday morning and evening rush hours; MARTA has provided weekday charter bus service requiring the use of a particular bus longer than six hours in one day; and, MARTA has provided charter bus service beyond its urban area as if it is a private interstate charter bus operation. Section 604.11 of UMTA charter bus regulations regulates the use of equipment purchased under an UMTA grant as follows:

- (a) No grantee or operator of mass transportation equipment shall engage in charter bus operations using buses, facilities, or equipment funded under the Act except on an incidental basis in strict compliance with the Opinion of the Comptroller General of the United States, B-160204, December 7, 1966, in Appendix A of this part.
- (b) Any of the following uses of mass transportation buses in charter bus operations will be presumed not to be incidental:

- (1) Weekday charters which occur during peak morning and evening rush hours;
- (2) Weekday charters which require buses to travel more than fifty miles beyond the grantee's urban area; or
- (3) Weekday charters which require the use of a particular bus for more than a total of six hours in any one day.

To rebut these presumptions a grantee must establish in its agreement to UMTA's satisfaction that its proposed use of a bus in charter service during weekday rush hours, during weekdays more than fifty miles outside of its service area or during weekdays for more than six hours in a single day, will not interfere with its obligation to provide regular transit service. MARTA's approved charter agreement of December 5, 1977 indicates the peak AM and PM requirements for MARTA buses. These requirements are further established by MARTA Exhibit 11 in its April 7, 1978 reply. By those documents, MARTA has shown the times during which buses are in service and the times during which those buses are idle. By its submittal, MARTA has established that, because of the variations of routes serviced by its buses and the differing times during which those routes are served, MARTA has as many as 18 buses available for charter service during the AM peak period and 32 during the PM peak period during weekdays. The evidence presented in this matter does not establish that MARTA has booked any charters in excess of those available buses or that those buses are not available for transit needs or that MARTA has too many transit buses to meet its peak hour need. In this regard, MARTA has established that the peak period must be defined in terms of the use of the particular bus in question and has therefore overcome the presumption established in section 604.11 of the charter regulations that charter service performed during the peak period is a violation of the regulations. MARTA has shown that not all buses are used throughout the peak rush hour period for the City of Atlanta. Some buses operate on as few as one route during the day and therefore are idle during the greater part of the day. This is a natural consequence of UMTA's policy of funding a grantee's peak period requirements. The Comptroller General made the following observation of that practice by this agency:

"One of the basic facts of urban mass transportation operations is that the need for rolling stock is far greater during the morning and evening rush hours on weekdays than at any other time. For that reason, any system which has sufficient rolling stock to meet the weekday rush-hour needs of its customers must have

a substantial amount of equipment standing idle at other times, as well as drivers and other personnel being paid when there is little for them to do. To resolve this inefficient and uneconomical situation, quite a number of cities have offered incidental charter service using this idle equipment and personnel during the hours when the same are not needed for regularly scheduled runs. Among the cities so doing are Cleveland, Pittsburgh, Alameda, Tacoma, Detroit and Dallas.

"Such service contributes to the success of urban mass transportation operations by bringing in additional revenues and providing full employment to drivers and other employees. It may in some cases even reduce the need for Federal capital grant assistance.

[Appendix A, 41 F.R. 14126, April 1, 1976].

If a bus has served its primary function, the provision of mass transit service, UMTA has no objections to that bus engaging in the charter operations mentioned in section 604.11(b)1-3. It is therefore our finding that MARTA's charter service does not interfere with its provision of mass transit service and that such charter service does not violate UMTA charter regulations.

Trailways also alleges that MARTA's recordkeeping process does not disclose the number of miles away from the urban area which a bus travels nor do the records show the total number of hours that buses are actually used on weekdays. According to Trailways, the records either show an estimated duration of the charter trip or no estimation at all. [Page 17, Trailways' complaint, April 7, 1978]. This practice by MARTA is alleged to violate section 604.13 of the charter regulations which incorporated by reference the requirement that:

The grantee agrees that it will not engage in any practice which constitutes a means of avoiding the requirements of this agreement or part 604 of the Urban Mass Transportation regulations.

MARTA offers the following response to the Trailways allegation:

MARTA is not in violation of its Agreement with UMTA, since it keeps and has kept complete records of its charter service activities. The two items of information which both Mr. Spellings and Mr. Bach allege were not recorded, were readily available on both occasions when those two representatives visited

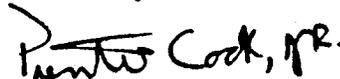
the MARTA Operating Facility at 125 Pine Street, N.E., in Atlanta. Those gentlemen examined only the file copies of charter order forms for the period in question. However, if these gentlemen had made known the information which they were seeking, they would have been directed to the operating copy of the same charter form. On that final copy, actual duration and actual distance outside the urban area are recorded, but only after the trip is completed, a practice which is only to be expected. Moreover, as the affidavit of Mr. H. R. Kilgo, Chief of Charter Services for MARTA, shows, (Exhibit 25), the Trailways representatives asked for operator pay tickets and additional specific information which was not kept at the location of Mr. Kilgo's office. They were advised as to where the information was located, but apparently were unwilling to travel to the location where that information was kept.

[Page 26-27, MARTA reply, June 1, 1977].

Based on the above response by MARTA it is our view that MARTA has not engaged in a practice which constitutes a means of avoiding requirements with respect to its charter recordkeeping process.

Therefore, for the reasons stated herein, it is our finding that MARTA is not in violation of section 3(f) of the UMT Act, UMTA charter regulations or MARTA's charter bus agreement with UMTA.

Sincerely,



Prentis Cook, Jr.
Attorney-Advisor



DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION
WASHINGTON, D.C. 20590

DECISION

Charter and Sightseeing Operations

San Antonio Sightseeing, Inc.
Complainant

v.

San Antonio Metropolitan Transit Authority
Respondent

I. Summary

This decision is the result of an investigation into the sightseeing and charter bus operations of the San Antonio Metropolitan Transit Authority (SAMTA). The investigation disclosed that SAMTA has substantially complied with restrictions imposed on charter and sightseeing activities of UMTA grantees by the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. §1601 et seq.), and the Act's implementing regulations. (49 CFR Part 604) Some isolated violations were found and are ordered corrected by this decision; however, no pattern or practice of violations was disclosed by the investigation into the respondent's operations.

II. Background

UMTA received a complaint filed against SAMTA on August 2, 1979, by San Antonio Sightseeing, Inc., (D/B/A B&T Fuller Double-Decker Bus Co.) through its President, Thomas M. Fuller. The complainant alleged that SAMTA is engaging in charter and sightseeing operations in violation of 49 U.S.C. 1602(f)(Section 3(f) of the Urban Mass Transportation Act of 1964, as amended (the "UMT Act")), and UMTA's implementing regulations set out in 49 C.F.R. 604 et seq. Specifically, the complainant alleged that SAMTA "has pursued and is continuing to pursue acts which are in controvention of the express policy of the Administration, in that said acts are designed to fore-close willing and able private operators."^{1/}

These acts are alleged to include: the payment of charter and sightseeing tour discounts, commissions, and tips; the use of Federally funded equipment in SAMTA's sightseeing operations; the use of excess buses in charter operations; and the use of UMTA assisted buses for sightseeing and charter operations during peak mass transit hours.

^{1/} Complaint, page 2

These practices are alleged to be in violation of 49 C.F.R. 604.13(5). The Complainant requests that UMTA order the Respondent, SAMTA, to cease and desist from engaging in the practices complained of, and require SAMTA to dispose of 58 transit buses alleged to be in excess of its needs. 2/

Supporting the complaint are various exhibits. 3/

III. Responses to the Complaint

The Respondent, SAMTA, has asserted as its defense that:

- A. 49 C.F.R. Sections 604.13-604.18 do not apply to its charter and sightseeing operations since SAMTA conducts no charter or sightseeing operations outside the urban area within which it provides regularly scheduled mass transportation services.
- ✓ B. None of the buses used for sightseeing service are Federally funded. Thus, the presumptions concerning prohibited uses in Section 604.11 do not apply; and the remainder of Part 604 does not apply to sightseeing services since the activities are conducted within the recipient's urban area.
- C. SAMTA maximizes the use of non-Federally funded buses in its charter bus operations, with Federally funded buses and equipment used only "incidentally." Such use is in substantial compliance with the Opinion of the Comptroller General of the United States, B-160204, December 7, 1966.
- D. All expenses incurred in providing charter and sightseeing services are fully allocated and covered by revenue from such operations, in accordance with an UMTA approved cost allocation plan, and are assumed entirely by SAMTA with no Federal financial participation.
- E. Sightseeing services provided with non-Federally funded buses are specifically excluded from the definition of "charter bus operations."

2/ Complaint, pages 4 and 5.

3/ Those exhibits include Exhibit 1, an Ordinance, which grants a franchise to San Antonio Sightseeing, Inc., to operate sightseeing services in the City of San Antonio; Exhibit 2, a "special notice" promoting the 50% discount coupons by SAMTA; Exhibit 3, a VIA Metropolitan Transit Budget Performance Report dated June 1979; Exhibit 4, an advertisement promoting sightseeing "via Gray Line"; and Exhibit 5, which includes a newspaper article published in the San Antonio Express/News, Sunday, March 18, 1979, a "roster of equipment."

Supporting the response are various exhibits. 4/

Supplementary correspondence was submitted by the parties in further support of the positions taken by each party on the issues in this case.

IV. Findings and Determinations

A. Sightseeing Operations

To determine whether the complainant's allegations are substantiated, the initial point of review must begin with a determination of: (1) whether sightseeing operations are eligible for UMTA assistance and (2) whether UMTA assistance is being used to support the sightseeing operations. This question initially leads us first to examine Section 12(c)(6) of the UMT Act (49 U.S.C. §608(c)(6) which defines "mass transportation" for purposes of determining the eligibility of projects for Federal financial assistance. That section states:

The term "mass transportation" means transportation by bus, or rail, or other conveyance, either publicly or privately owned which provides to the public general or special service (but not including school buses or charter or sightseeing service) on regular and continuing basis.

Section 12(c)(6) thus plainly distinguishes three separate categories of bus service from "mass transportation" that are not eligible for UMTA assistance: school bus and charter and sightseeing service. However, the UMT Act does not define the three ineligible bus services. UMTA has administratively defined charter and school bus services in its implementing regulations. See 49 C.F.R. 604.3 and 605.3. Sightseeing service has not been defined in either set of regulations. Also UMTA has not issued any regulations specifically on sightseeing services. As a consequence sightseeing service remains undefined.

4/ Those exhibits are: Exhibit A, a map of the San Antonio urbanized area; Exhibit B, a roster of SAMTA equipment; Exhibit C, a map of metropolitan San Antonio; Exhibit D, a schedule of service dated September 4, 1979; Exhibit E, San Antonio MTA cost allocation plan and audit findings; Exhibit F, a schedule of sightseeing services offered by SAMTA; Exhibit G, a advertisement promoting San Antonio sightseeing service; Exhibit H, an expense and revenue statement for SAMTA charter and sightseeing services; Exhibit I, tariffs for San Antonio's sightseeing services from 1961 through 1979; Exhibit J, portions of an UMTA grant application for the amendment of UMTA grant TX-03-0005 proposing the retention of 100 GMC vehicles; Exhibit K, a letter signed by Glen Ford, Regional Director, UMTA, approving the amendment; Exhibit L, a "recap" or revenue miles and hours operated; Exhibit M, a final audit report for operating assistance grant TX-05-4032; Exhibit N, a response from C. L. Williamson, Comptroller and Treasurer, VIA Metropolitan Transit, to the final audit report and closeout to operating assistance grant TX-05-4032; and Exhibit P, a statement by SAMTA regarding the use of federally funded buses in school and charter bus operations.

Although the complainant claims that the charter bus regulations apply to sightseeing operations, it is our interpretation of the pertinent statutes and regulations that sightseeing service is a distinguishable albeit ineligible, activity from charter bus operations. Consequently, we conclude that the complainant's assertion that UMTA's charter bus regulations, 49 C.F.R. 604 et seq., regulate SAMTA's provision of sightseeing service is incorrect. This conclusion is supported by comparison of the UMTA definition of charter bus operations (see 49 C.F.R. 604.3) with the sightseeing operations actually conducted by the respondent.

Section 604.3 states:

"Charter bus operations" means transportation by bus of a group of persons who, pursuant to a common purpose, and under a single contract, at a fixed charge for the vehicles or service, in accordance with the carrier's tariff, have acquired the exclusive use of a bus to travel together under an itinerary, either agreed on in advance, or modified after having left the place or origin. (This includes the incidental use of buses for the exclusive transportation of school students, personnel and equipment.)

The respondent's sightseeing operations have fixed itineraries, which users must accept or decline as is (see Respondent's response, Exhibit F); the respondent's sightseeing activities are not operated under a single contract, but under a fare per-person structure (see Respondent's response, Exhibit G); and the respondent's sightseeing operations do not restrict service or a bus to one group of persons, but accepts customers for the tours by any combination of unrelated individuals or groups (see Respondent's response, Exhibit G). Thus, SAMTA's sightseeing activities do not meet UMTA's definition of charter bus operations.

For the forgoing reasons we hold that UMTA's charter bus regulations, 49 C.F.R. 604 et seq., do not regulate or restrict in any manner SAMTA sightseeing operations and that for the same reasons section 3(f) of the UMT Act does not apply.

However, as previously shown UMTA cannot provide assistance for sightseeing operations (see above regarding §12(c)(6) of the UMT Act that shows sightseeing service ineligible for UMTA assistance). For this reason it is our determination that UMTA recipients must not use UMTA assisted equipment for sightseeing operations when needed for mass transportation purposes. But a question that remains is what uses may the equipment be put to when not needed for mass transportation service.

We find that when SAMTA's sightseeing activities are considered in light of this question that SAMTA's sightseeing activities using UMTA assisted buses, facilities or equipment are governed by analogy by the same principles that govern recipient's charter bus operations. That is, the buses, facilities or equipment may be used for any other lawful purpose so long as the other use is not in derogation of mass transportation services provided by the recipient or against any UMTA regulation or statutory requirement. Thus, we hold that recipients may use the UMTA-assisted buses, facilities and equipment for sightseeing service so long as the use is in strict compliance with the December, 1966 decision of the Comptroller-General of the United States. 5/

The underlying principle by which UMTA defines "incidental use" was set out in the Comptroller's-General Decision cited earlier. That principle is:

"...any lawful use of project equipment which does not detract from or interfere with the urban mass transportation service for which the equipment is needed would be deemed an incidental use of such equipment, and that such use of project equipment is entirely permissible under [the] legislation. What uses are in fact incidental, under this test, can be determined only on a case-by-case basis." 6/

Therefore, whether UMTA-assisted buses, facilities or equipment have been used for sightseeing service is not the crucial question. What is crucial is whether such use has detracted from the purpose for which UMTA provided the assistance, i.e., provision of mass transportation. If the sightseeing activities have not been in derogation of that purpose the use is then incidental, and thus permissible.

The record shows that most of the Respondent's sightseeing operations do not involve UMTA assistance. 7/ However, the Respondent did admit that it uses UMTA-assisted patrol cars in sightseeing operations. The complainant has also claimed that UMTA-assisted facilities support sightseeing operations.

5/ Op. Com. Gen. No. B-160204, December 7, 1966. See 49 C.F.R. Part 604, Appendix A (1976). Also it does not follow that the UMTA charter bus regulation (49 C.F.R. Part 604) would apply to the Respondent's sightseeing operation, especially since (i) Congress distinguished between charter and sightseeing service in section 12(c)(6) of the UMT Act; (ii) section 3(f) of the Act refers only to "charter bus operations" and the "intercity charter bus industry," without any reference to sightseeing service; and (iii) the regulations in their entirety refer only to "charter bus operations."

6/ See Appendix A of 49 C.F.R. Part 604.

7/ See Respondent's response, Exhibit E, that contains a cost allocation plan for SAMTA operations including charter and sightseeing service, plus a letter from UMTA's regional office approving the plan

The Respondent states that UMTA assisted patrol cars were used for sightseeing operations only when the cars would otherwise be idle; i.e., not needed in support of mass transportation service (Respondent's response, p. 15). We find nothing in the record that contradicts the respondent's assertion. As a consequence, we conclude that the complainant's allegation of the wrongful use of patrol cars is not substantiated.

With regard to the use of other equipment or of facilities involving UMTA assistance, no evidence has shown a use for sightseeing operations that detracted from mass transportation service. Thus, we conclude that these allegations of misuse of UMTA-assisted support facilities are also not substantiated.

B. Promotional Devices

The complainant also alleges that the respondent uses promotional devices such as tipping, discounts, and commissions to encourage patronage of sightseeing and charter operations and that such devices violate UMTA's requirements. The record shows that the costs for such devices are fully and properly allocated to non-Federal sources, and separated from mass transportation operations of the Respondent. This is apparent from UMTA's review of the Respondent's applications for assistance which shows that UMTA has granted a level of funding appropriate only for the Respondent's needs to fulfill its mass transportation obligation.

In addition, the Respondent in an effort to ensure that it would not use UMTA assistance to support non-eligible activities, formulated and submitted to UMTA a cost allocation plan showing that both its sightseeing and charter bus operations are not supported by UMTA assistance. That plan was reviewed and approved by UMTA auditors. (Respondent's response, Exhibit E).

Since the promotional devices have been shown not to involve programs or activities that are supported with UMTA assistance, those devices clearly do not violate any UMTA sightseeing or charter operation statute or regulation.

C. Charter Bus Operations

The Complainant alleges that respondent's charter bus operations violate UMTA's charter bus regulation including sections 604.13 through 604.18.

The Respondent disagrees; respondent states that section 604.13 through 604.18 do not apply to its operation since the respondent conducts all its operations within its urban area, and that in addition, section 604.11 allows the charter bus uses conducted with UMTA-assisted buses, facilities and equipment on an incidental basis. We agree with the respondent that since it conducts all its activities (charter, sightseeing, and urban mass transportation) within its urban area, the principle by which its charter operations are regulated is found in 49 C.F.R. 604.11 relating to "incidental use."

However, SAMTA has admitted that it has either inadvertently or due to exceptional circumstances used UMTA-assisted buses for charter bus service within its urban area during peak hours in "isolated instances." These uses trigger the presumption in 49 C.F.R. 604.11(b)(1). 8/

Subparagraph (a) of that provision demands "strict compliance" with the Comptroller's-General decision, cited earlier (not approximate compliance or substantial compliance). 9/ However, nothing in the record counters the respondent's characterization that the uses were other than "isolated." As a consequence, we conclude that the uses were violations, but violations that were not part of a continuing pattern that indicated disregard of the restrictions imposed on the Respondent's charter operations. 10/ On the contrary, the respondent's overall efforts with regard to its administration and management of non-mass transportation operations show that the respondent seeks to assure that those operations stand on their own, apart from urban mass transportation operations, without use of UMTA assistance. 11/

Under these circumstances the Respondent must institute such additional measures that will prevent future violations.

Conclusion

The Respondent's sightseeing and charter bus operations are conducted substantially in compliance with UMTA's restrictions and limitations. However, the Respondent has admitted isolated uses of UMTA-assisted mass transportation vehicles during peak hours in non-mass transportation related operations. Since the uses were not explained so to overcome the presumption of 49 C.F.R. 604.11(b)(1), we find that the uses violated the charter bus regulations, 49 C.F.R. 604.11(a).

8/ 49 C.F.R. 604.11(b)(1) states: "Any of the following uses of mass transportation buses in charter bus operations will be presumed not to be incidental: (1) Weekday charters which occur during peak morning and evening rush hours; ..."

9/ 49 C.F.R. 604.11(a)

10/ 49 C.F.R. 604.43(c) requires: "If the Administrator should determine that a violation has occurred, he will include a statement as to whether there has been a continuing pattern of violations."

11/ See footnote 7.

The Respondent is hereby ordered to submit a plan to UMTA for approval that will provide additional safeguards so that isolated or inadvertent violations do not re-occur. Such plan shall be submitted within 30 days of receipt of this decision.

Finally, we conclude that all other alleged violations are not substantiated.

Submitted by: Paul Jensen
Paul Jensen
Regional Counsel

May 19, 1980
date

Approved by: Margaret M. Ayres
Margaret M. Ayres
Chief Counsel

July 7, 1980
date



DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION

300 SOUTH WACKER DRIVE--SUITE 1740
CHICAGO, ILLINOIS 60606

REGION V

Mr. Adam J. Milewski
President
Valley Transit Corp.
9001 West 79th Place
Justice, Illinois 60458

JUL 11 1980

Dear Mr. Milewski:

Your letter of May 2, 1980 addressed to our Chief Counsel, Margaret M. Ayres, regarding charter business of the Chicago Transit Authority has been forwarded to this office for disposition. Your allegations will be investigated shortly and the results of our examination will be communicated to you as soon as possible.

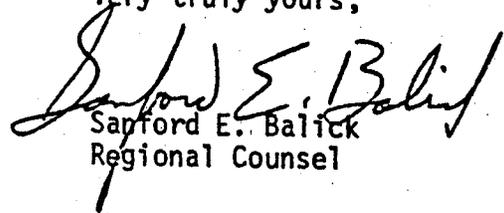
I have completed an investigation of the complaint communicated to me in a telephone conversation with you held on May 28, 1980. You informed me at that time that the C.T.A. had successfully bid on a contract to furnish bus service to a Rotary convention that was held in Chicago early in June. Due to the number of buses required to provide the needed service you were concerned that the C.T.A. would have to divert a large number of buses from scheduled service, an action that would be contrary to regulations issued by the Urban Mass Transportation Administration.

Ronald F. Bartkowicz, C.T.A. First Deputy General Attorney, informed me that the C.T.A. subcontracted a portion of the subject charter service to the Willett Bus Company. Even with the subcontracted service it was necessary for the C.T.A. to use as many as fifteen buses at any one time during the contract period (May 31 - June 5, 1980). The C.T.A. informed us that none of the buses dedicated to the charter operation were removed from scheduled service and that all charter vehicles were available from a pool of extra buses that are usually available during peak hours. In such circumstances it is permissible for UMTA grantees to engage in charter work provided such operations otherwise comport with the terms of our regulations.

Mr. Bartkowicz also informed me that Valley Transit was accorded an opportunity to bid on the Rotary subcontract but chose not to do so.

If you have additional information or any evidence that would be contrary to the representations made by C.T.A. I would appreciate your forwarding such information to me.

Very truly yours,



Sanford E. Baick
Regional Counsel



DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION
WASHINGTON, D.C. 20590

JUL 17 1980

Mr. Wayne Smith, President
United Bus Owners of America
Suite 201
600 Water Street, S.W.
Washington, D.C. 20024

Dear Mr. Smith:

Thank you for the explanation and comments on the United Bus Owner's proposals to modify the UMTA charter bus regulation, 49 CFR Part 604, that you and Paul Nagle provided us at our recent meeting on June 30, 1980. I wish to confirm the points of discussion we arrived at in the meeting about the UBOA proposals and on other matters that have come up about the operation and enforcement of the present UMTA charter regulation.

As we noted in the meeting modification of sections 604.11 and 604.15 as UBOA suggested in its April 16, 1980 position paper to the Administrator, is not authorized by the Urban Mass Transportation Act of 1964, as amended, 49 USC 1601 et seq. (the UMT Act). The proposed standards for protection of private charter bus operators of "adverse effect" proposed for inclusion in sections 604.11 and 604.15 and of "affirmative action" proposed for inclusion in section 604.15 of the regulation appear to be a departure from sections 3(e), 3(f), 12(c)(6), or any other provisions of the UMT Act.

As we also discussed, our current regulation does not require that private operators alleging violations of UMTA charter bus provisions be represented by legal counsel when filing and pursuing administrative complaints with UMTA. We feel the process is an informal one which does not require formal procedures like those of the Federal district courts. Also, UMTA cannot comment on the other UBOA proposals since federal rulemaking procedures require that UMTA obtain the comments and proposals of all interested parties to the regulation before UMTA takes any position on possible revision of the regulation. However, we will include a summary of the UBOA proposals in our notice proposing revision to the charter bus regulation that UMTA plans to publish in the Federal Register at the end of August, 1980 and request the public's comments on the proposals.

UMTA may hold a hearing in connection with any revision of the regulation. If we do, UBOA along with other interested parties would be invited to testify.

With regard to your request that UBOA staff members be allowed to assist UMTA staff in rewriting the regulation, I am unable to accept your offer of assistance. The federal rulemaking process requires us to follow prescribed procedures that do not permit actions that might give the appearance that UMTA is giving an advantage to any one interested party. To accept UBOA's assistance might give that appearance.

I wish to thank you for the invitation for members of UMTA's legal staff to attend the UBOA regional conferences in September to explain the operation of the proposed revision. Mr. Ernesto Fuentes will attend the Washington, D.C. conference. We have tentatively scheduled Mr. Sanford Balick, the UMTA Region V Counsel for the Chicago conference and Ms. Melanie Morgan, the UMTA Region IX Counsel for the San Francisco conference. Mr. Balick and Ms. Morgan's schedules must be confirmed. Mr. Fuentes will call you within the next two weeks to confirm the schedules or give you the names of the persons who will be attending in their places.

Finally, as you may know, Mr. Munter and Mr. Fuentes have been working with Paul Nagle to keep UBOA informed about the status of several complaints that have been pending with UMTA for some time. Please feel free to continue to work with them on these matters.

I thank you for pointing out areas where the UMTA charter bus regulation may merit revision. The UBOA position paper and comments you made during our April and June meetings with UMTA's Administrator will be fully considered when we draft the proposed revisions to the charter regulation. I also will look forward to UBOA's additional comments during the rulemaking process that will follow.

Sincerely,

Therese A. Munter Acting for

Margaret M. Ayres
Chief Counsel

Chen



DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION
WASHINGTON, D.C. 20590

Chen to Borof

JUL 24 1980

Mr. Irwin J. Borof
Attorney at Law
125 Twelfth Street
Suite 105
Oakland, California 94607

Subject: Definition of "Urban Area"
- UMIA Charter Bus Regulations

Dear Mr. Borof:

This is in response to your letter, dated September 13, 1979 to Ms. Melanie Morgan UMIA's Region IX Counsel, and your letter of March 24, 1980 to UMIA's Region IX Office concerning the charter bus operations of Alameda-Contra Costa County Transit District (AC Transit).

Your September 13, 1979 letter objects to the interpretation of "urban area" for AC Transit advanced in an August 31, 1979 letter to you from Ms. Melanie Morgan. The regional counsel described the urban area, for purposes of the UMIA charter bus regulation, within which AC Transit provides regularly scheduled mass transportation service as the San Francisco-Oakland urbanized area.

As you correctly pointed out in your letter, the Urban Mass Transportation Act of 1964, as amended, 49 USC 1602(f), requires imposition of certain arrangements on UMIA recipients through a special agreement with UMIA to prevent foreclosure of privately owned operators by a grantees who engage in intercity charter bus operations. The standard that triggers imposition of such arrangements is found in Section 3(f) of the UMT Act, 49 USC §1602(f); it states:

...the applicant or any public body receiving...assistance for the purchase or operation of buses...shall as a condition of such assistance enter into an agreement with the Secretary that such public body...will not engage in charter bus operations outside the urban area within which it provides regularly scheduled mass transportation service, except as provided in the agreement authorized by this subsection.

The UMIA regulation promulgated to implement that provision, defines urban area in section 49 CFR §604.3, as follows:

"Urban area" means the entire area in which a local public body is authorized by appropriate local, State and Federal law to provide regularly scheduled mass transportation service. This includes all areas which are either: (a) within an "urbanized area" as defined and fixed in accordance with 23 CFR Part 470, subpart B; or (b) within an "urban area" or other build-up place as determined by the Secretary under section 12(c) (4) of the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1608(c) (4)).

The statute and the regulation together then provide a two-part standard that triggers imposition of the additional "fair and equitable arrangements over grantees who engage in intercity charter bus operations. That is, the recipient must engage in charter bus operations outside the area in which it is both (a) providing mass transportation service, and (b) authorized to provide the mass transportation service. Since the urbanized area in which AC Transit's district is located is the Oakland-San Francisco urbanized area as defined by the U.S. Bureau of the Census (See 49 USC 12(c)(11), the UMIA charter regulation allows AC Transit to conduct charter bus operations in San Francisco without the additional arrangements required of grantees who conduct intercity charter bus operations so long as the other portions of AC Transit's charter operations do not go outside its urban area.

Further, we have reviewed the enabling statute of AC Transit (found in California Public Utilities Code (CPU) §24501 et seq.) to determine the area in which AC Transit is authorized to operate mass transit service. Section 24561, which you cited to support your position, only refers to the geographic area that may be part of the AC Transit district; we do not find in that section any indication of the area where AC Transit may provide mass transportation service. However, Section 25801 does address that question. It states:

A district may acquire, construct, own, operate, control or use rights of way, rail lines, bus lines, stations, platforms, switches, yards, terminals, and any and all other facilities necessary or convenient for transit service within or partly without the district...

Although, §25801 does not delineate the extent of the permissible operations it may conduct outside its district, it is clear that service for its district can entail operations "partly without the district."

While this interpretation that may seem, on the surface, incongruous, the interpretation is consistent with other California transit districts enabling statutes. For instance, the San Francisco Bay Area Transit District (BART) is empowered to operate "in the eighty-four (84) individual units of county, city-and-county, and city governments located in the area...although its service must be coordinated with that of other transit facilities in areas to be served." CPU §28501. This area includes among others the AC Transit District. CPU Code §28504.

In connection with this you have cited a prior UMIA decision involving the Chicago Transit Authority (CTA) in support of your position that AC Transit's urban area should be defined as the AC Transit district. In that February 11, 1977 decision, UMIA found, as you correctly pointed out, that CTA was limited to conducting charter operations without the additional arrangements imposed by 49 CFR §604.13, to the area where it was providing authorized mass transportation services. However, on pages 2 and 3 of the decision, we found against CTA because it did not have state or local authority to provide transportation service in the area where the disputed CTA charter operations were occurring. CTA was required by state statute to obtain local agreements to conduct the transportation services into these areas. CTA did not show it obtained the agreements. AC Transit, on the other hand, is authorized to conduct mass transportation service into San Francisco without agreements like those in CTA. As a consequence, we find that the CTA decision does not support your position.

You have also raised the question of whether Ms. Morgan's interpretation of the charter regulation would allow AC Transit to run freely within the five-county San Francisco bay area. Construction of the state statute is ultimately the prerogative of the California state government and state courts; however, our review indicates that the state statute places no specific limits on AC Transit's operations outside its district. In fact, CPU §25801, cited earlier, appears to allow AC Transit's mass transit operations to extend to any place in the state of California so long as the transit operations are "necessary and convenient" for the AC Transit district and only "partly without the district." Thus, in considering whether AC Transit's charter operations in a particular case are conducted within its urban area, we would primarily consider whether AC Transit was actually providing mass transportation services to an area where it is authorized to provide service. If an affirmative answer is obtained to this question, AC Transit is within its urban area for charter bus purposes, and may operate charter bus services without the additional arrangements imposed on intercity charter operators by section 3(f) of the UMT Act.

A closely related question you have raised is whether only two mass transportation lines run from AC Transit's district to two points in San Francisco are sufficient to allow AC Transit to consider the entire city of San Francisco part of its urban area. Since San Francisco is part of AC Transit's urbanized area the amount of service provided is not relevant. However, the question is relevant to situations in which AC Transit might provide charter service to an area not part of the Oakland-San Francisco urbanized but where AC Transit provides authorized mass transportation services. Of particular relevance to this question is the fact that neither section 3(f) of the UMT Act nor the definition of urban area in the UMIA charter bus regulation, 49 CFR 604.3, place a quantitative minimum of mass transportation service that must be provided to an area before it satisfies the "providing mass transportation service" standard of the statute or regulation.

For the foregoing reasons, we find that San Francisco is for charter bus purposes part of AC Transit's urban area. Further we find that to the extent that AC Transit extends its regularly scheduled mass transportation service to other cities, AC Transit's urban area, for charter bus purposes will expand to include those additional areas. Finally, we find that the Oakland/San Francisco urbanized area constitutes AC Transit's urban area for charter purposes.

In your March 24, 1980 letter you oppose the award of UMTA assistance to AC Transit. You raise as the bases for that opposition similar questions raised in your September 13, 1979 letter about AC Transit's charter bus operations.

The March letter claims that AC Transit has falsely stated that it conducts all its charter operations within its urban area. In support of that allegation you claim AC Transit performs contracts with BART and others that take AC Transit out of its service area and that the contracts are in the nature of charter bus services. You also claim that you have a right to a hearing on these matters before UMTA. Finally, you state that you have been unable to get AC Transit to define its service area for you for charter bus purposes.

We are aware that AC Transit is conducting some feeder line service for BART. However, the nature of those feeder lines serve the mass transportation needs of BART's patrons who disembark at BART stations in Alameda and Contra Costa Counties and continue to points within and without the AC Transit district. Your challenge to these BART contracts raises the question of whether such service is "mass transportation service," as defined in the UMT Act, 49 USC 1608(c)(6) or "charter bus operations," as defined in the UMTA charter bus regulation, 49 CFR 604.3. The distinction is obviously crucial, since if the contracts are mass transportation services the charter regulation does not apply.

On the other hand, if you believe the services are charter operations conducted in violation of UMTA's restrictions, you may file a complaint with us under the procedures of 49 CFR 604.42 and we will investigate the matter. Before we can do so, we need the information specified by 49 CFR 604.40; that is, we need a detailed description of the services AC Transit conducts for BART that are objectionable to you, the same type of information about the "other" contract work you referred to. The descriptions must be sufficient to enable the Administrator to make