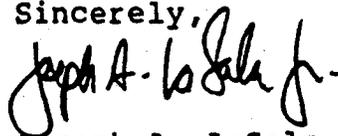


notice must provide at least 30 days in which a private operator may offer charter service. TMTA may not undertake charter service directly after August 11, 1987, until TMTA finds that no willing and able private operator has responded to a new notice that meets the requirements of 49 C.F.R. section 604.11(c).

Sincerely,



Joseph A. LaSala, Jr.
Chief Counsel

Enclosure

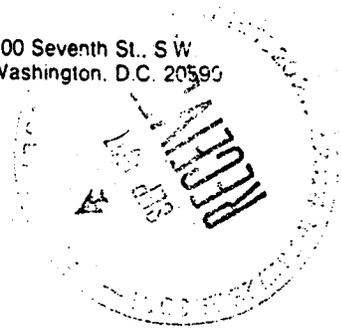


U.S. Department
of Transportation

Urban Mass
Transportation
Administration

Headquarters

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



AUG 26 1987

Mr. Wayne J. Smith
Executive Director
United Bus Owners of America
1275 K Street, N.W.
Washington, D.C. 20005-4006

Dear Mr. Smith:

This is in response to your letter of August 3, 1987, on behalf of Crescent Tour and Charter of Topeka, Kansas (Crescent Tour).

The Urban Mass Transportation Administration (UMTA) agrees with you that the Topeka Metropolitan Transit Authority's (TMTA) requirements for trolleys set forth in their notice is overly restrictive.

Moreover, the TMTA's requirements pertaining to Crescent Tour's legal authority may be too restrictive. Therefore, UMTA has written a letter to TMTA, informing them of our view and asking for further information about their legal requirements (copy enclosed).

In response to your questions about trolley buses, UMTA has not maintained a list of buses for which UMTA has provided assistance and is thus uncertain how many trolley buses have been acquired with UMTA assistance. UMTA affords its grantees much discretion in determining what type of vehicle best meets their mass transit needs. It is my impression that some of the trolleys acquired with UMTA assistance have been used to meet downtown circulation needs. I would emphasize that UMTA assistance is granted only for mass transportation purposes.

Sincerely,

Joseph A. LaSala, Jr.
Chief Counsel

Enclosure

URO-Z⁷



U.S. Department
of Transportation

Urban Mass
Transportation
Administration

The Deputy Administrator

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

SEP - 3 1987

The Honorable Loren Callendar
Mayor of Sioux City
City Hall
Sioux City, Iowa 51102-0447

Dear Mayor Callendar:

This is in response to your letter to Secretary Dole pertaining to the effect on the Sioux City Transit System of the Urban Mass Transportation Administration's (UMTA) rulemaking on "Charter Service" and the difficulties in obtaining affordable charter service from private operators.

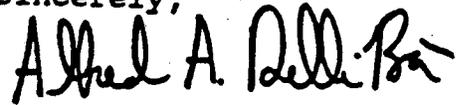
On April 13, 1987, UMTA published its revised regulations regarding the charter service which UMTA recipients may provide using UMTA-funded equipment and facilities. A copy of these regulations is enclosed.

UMTA's charter service regulations prohibit the Sioux City Transit System, an UMTA recipient, from providing directly any charter bus or van service which uses UMTA-funded equipment or facilities if there is at least one willing and able private charter operator. The Sioux City Transit System may supplement the capability of the private operator as set forth in the exception at 49 C.F.R. section 604.9(b)(2). In essence, this exception permits the Sioux City Transit System to lease its vehicles on an incidental basis to a private operator to meet the needs of a particular charter trip. If the Sioux City Transit System makes its buses, including its trolley bus, available to a private operator, such service must be incidental to its provision of mass transportation service.

UMTA took care in drafting these regulations to establish broad categories of revenue vehicles to preclude recipients from finding that a charter operator is not willing and able. For that reason, UMTA recognizes only buses and vans as appropriate categories of vehicles. Thus UMTA classifies a trolley bus as a bus for purposes of compliance with the regulations. 49 C.F.R. section 604.5(d). Although UMTA understands that considerable interest has been shown in chartering trolley buses, UMTA believes it is not essential to the public interest to accommodate this preference at the expense of private charter operators that may lack trolley buses. Therefore, UMTA believes an exception for trolley buses is inappropriate.

In drafting these regulations, UMTA determined that our statutory mandates to protect private charter bus operators from unfair competition from UMTA recipients, by virtue of their having obtained substantial Federal financial assistance, and to ensure that UMTA-funded equipment is used for mass transportation require that the regulations be as restrictive as they are. UMTA believes that the private charter industry is able to serve the Nation's essential charter needs. I believe the exceptions in the regulations assure that the actual transportation needs of the public can be met adequately.

Sincerely,



Alfred A. DelliBovi

Enclosure



U.S. Department
of Transportation

Urban Mass
Transportation
Administration

The Deputy Administrator

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

SEP 8 1987

The Honorable William Lehman
Chairman, Subcommittee on Transportation
Committee on Appropriations
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The House Report accompanying the Fiscal Year 1988 Department of Transportation and Related Agencies appropriation bill contains a number of directives to the Urban Mass Transportation Administration (UMTA) regarding the charter bus regulation UMTA recently issued. Included among those directives is a request that we survey our grantees to determine if any of them have purchased charter rights without Federal funds. While we are not providing this specific information, we think that the information discussed below responds to the thrust of this question.

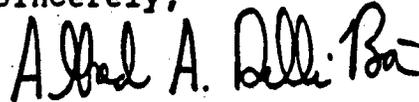
The purchase of private charter rights by a public transit operator is not eligible for Federal funding. While we do not know how many transit operators have purchased private charter rights, or whether such purchases were before or after enactment of the UMT Act, we can assure you that no private charter rights were purchased with UMTA funds. As a general policy matter, UMTA provides Federal assistance only for mass transportation activities. Charter bus activities are not mass transportation; the purchase of private charter rights by a transit operator are not eligible for Federal funding and have not been eligible for such funding at any time during the history of the UMTA program.

UMTA's charter bus regulation does not apply to non-federally funded equipment and facilities. The Committee's request for information appears to suggest that an exception should be created that would permit UMTA grantees to engage in charter bus activities so long as Federal funds are not involved. In fact, such an exception already exists. The charter bus regulation is inapplicable to any charter bus activities of an UMTA grantee that are carried out without federally funded equipment or facilities. In such a case, if a grantee can establish that Federal funds are not in any manner being used to support its charter bus activities, it may provide charter bus activities without restriction by UMTA.

The requirements of the charter bus regulation are triggered by the use of UMTA funded facilities and equipment. The question of whether a grantee has purchased private charter rights with non-Federal funds is irrelevant to the requirements of the charter bus regulation. As a matter of law, the charter bus requirement applies to "...any public body receiving such [Federal transit] assistance for the purchase or operation of buses...". (Section 3(f) of the UMT Act). Private charter rights purchased by an UMTA grantee should have been so purchased without Federal funds. Once any such grantee receives UMTA funding for the purchase or operation of buses, however, that grantee as a matter of law must, in using federally funded equipment or facilities, comply with the statutory and regulatory charter bus requirements.

I trust this is responsive to the Committee's request. If we can provide any further information regarding this matter, please contact me.

Sincerely,



Alfred A. DelliBovi

III. RESPONSE

By letter of March 14, 1986, UMTA informed Command of the complaint filed against it. The letter stated that Erin's allegations provided sufficient detail to enable UMTA to determine that a violation of Section 3(f) and 12(c)(6) of the UMT Act had occurred. The implementing regulations, the letter said, permitted only charter service that was incidental to the provision of mass transportation. The regulations presumed that weekday peak hour charters were not incidental, but permitted a recipient to rebut the presumption. Accordingly, UMTA gave Command 30 days from receipt of the letter to respond to the allegations. Since Command receives UMTA assistance solely through the New York City Department of Transportation (NYCDOT) and not directly from UMTA, UMTA asked Command to work with NYCDOT in preparing its response.

On March 14, 1986, UMTA sent to NYCDOT a similar letter, in which it stated that NYCDOT was also considered a respondent in this proceeding, and that it should respond within 30 days from receipt of the letter. UMTA received no response from NYCDOT. On May 26, 1986, UMTA sent a second copy of the complaint to NYCDOT, along with a letter which stated that the first copy of the correspondence had been forwarded to NYCDOT through DHL World Express Courier, whose records showed that it had been received. NYCDOT was given 30 days to respond, and was asked to work closely with Command in preparing its response. NYCDOT failed to respond to this second letter. In a telephone conversation of June 13, 1986, NYCDOT indicated to UMTA that it was preparing a response, and would forward it shortly. Despite this assurance, however, UMTA has never received a response from NYCDOT.

In a letter dated April 21, 1986, Command informed UMTA that Erin's letter of complaint had not been included in UMTA's correspondence of March 14, 1986. Command thus requested, since it did not have knowledge of the specific allegations brought against it, that UMTA grant it an extension of time in which to respond.

By letter of May 6, 1986, UMTA acknowledged the administrative oversight, and granted Command an extension of 30 days to respond to Erin's complaint.

Command responded to the complaint by letter dated May 29, 1986. In that letter, Command stated that the buses mentioned in the complaint had been part of the Mass Transportation Service Contract of March 2, 1979 between New York City and Pioneer Bus Corp., and subsequently transferred in the October 3, 1979 Assignment Assumption Agreement between Pioneer and Command. Command said that it had operated and maintained these vehicles since the date of the said transfer, and that they had been used principally for express bus service between Brooklyn and Manhattan.

Command further stated that it used these buses for charter service in compliance with the provisions of the above-cited Mass Transportation Service Contract. It quoted Article 24 of the said contract, which provides that the carrier may perform charter operations, as long as the buses used in such charter operations do not exceed 8.64% of the mileage accrued annually during the term of the contract.

As concerns the first incident cited in Erin's complaint, Command stated that it did not involve service to the airport during rush hour, but was rather a charter trip between and mid-Manhattan hotel and the Brooklyn Academy of Music, and began with a noon pickup. Command said that all morning trips on February 7, 1986, had been covered, and that spare buses were available.

As for the second incident, Command admitted that it did occur at the date and place indicated, but said that the buses used therein had not been deleted from service on its regular, franchised routes. All regular express and local bus runs, Command stated, had been covered on that date of February 11, 1986.

IV. REBUTTAL

UMTA forwarded to Erin a copy of Command's response on June 25, 1986. UMTA's letter noted that although a copy of the complaint had been sent to NYCDOT, no response had been received. UMTA stated that since the 30-day period for NYCDOT to respond had lapsed, UMTA would not consider any material subsequently received from NYCDOT as part of the administrative record on which it would base its decision. Erin was again given 30 days from receipt of the letter to rebut Command's response. UMTA stated that it would endeavor to issue a decision within 30 days of Erin's rebuttal.

UMTA received Erin's rebuttal on July 28, 1986. Erin therein stated that the incidents cited in its complaints were only two examples of what it considered to be a continuing, blatant disregard for UMTA regulations. Erin said that Command had openly advertised its intent to compete in the charter market, and had in fact recently made several local and interstate charter trips.

Erin moreover stated that given the overcrowding and insufficient number of Command buses, Command's claim that the charter buses had not been deleted from regular service, was implausible. Command's assertion that it "operates its franchised routes with the highest performance levels of service possible" was contradicted, Erin said, by the level of service Command provides.

V. UMTA'S REQUEST FOR ADDITIONAL INFORMATION

By letter of February 13, 1987, UMTA requested from Command additional information needed to clarify points made in Command's

response of May 29, 1986. UMTA first of all asked that Command provide it with information which could help establish that the buses in question had been purchased with UMTA funds, so that it could be determined whether they are subject to the UMTA charter bus regulations.

Secondly, UMTA noted that in its response, Command admitted that it did make a charter trip to the airport on February 10, 1986, but stated that the two buses used had not been deleted from regular service. UMTA stated that in order to accept Command's assertion, it must have specific information that its franchised routes had not been deprived of regular service during the rush period on that date. Accordingly, UMTA asked Command to send any supporting documents which could help establish this fact.

UMTA gave Command 30 days from receipt of its letter to provide the requested information, and stated that it would endeavor to issue a decision within 30 days of its receipt thereof. Command informed UMTA by telephone on March 22, 1987, that it had received the letter of February 26, 1987, and planned to respond within 30 days of that date. Since Command failed to do so, however, UMTA proceeded to issue this decision.

VI. DISCUSSION

Under Section 12(c)(6) of the UMT Act, "mass transportation", which is eligible for UMTA funding, does not include "...charter or sightseeing service". 49 C.F.R. 604.11(a) of the implementing charter regulation then in effect stated that no grantee or operator of UMTA-funded buses or equipment may engage in charter bus operations, except on an incidental basis, in compliance with the Opinion of the Comptroller General of the United States, B-160204 (December 7, 1966).² Among the charter uses presumed by the regulation not to be incidental, were the following:

- (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 a grantee's urban area;
- (3) Weekday charters which require the use of a particular bus for more than a total of six hours in any one day.

In its complaint, Erin alleged that Command, an operator of transportation services for UMTA's grantee, NYCDOT, had violated 49 C.F.R. 604.11(b)(1), by operating weekday charters during peak

² Incidental use, as defined by the Opinion of the Comptroller General, is that which "...does not detract or interfere with urban mass transportation service."

rush hours, using vehicles deleted from regular service. The complaint cited two alleged examples of such charter operations, one occurring during the February 7, 1986, morning rush hour, and the other during the February 10, 1986, peak period.

In its response, Command denied that it operated charter service to the airport on February 7, 1986. The charter run it made on that date, Command claims, was between a midtown Manhattan hotel and the Brooklyn Academy of Music. Command moreover stated that the trip did not take place during the morning rush hour, but rather began with a pickup at noon.

In its rebuttal, Erin offered no evidence to contradict Command's claim that the February 7 charter trip did not take place during the morning rush hours. Erin merely contented itself with making general assertions that Command's response is simply "perfunctory lip service" and "biased statements", without going to the heart of the very precise contention Command made with regard to this trip.

Given this lack of evidence to the contrary, then, Command's assertion that the February 7 charter was not weekday, peak hour service, must be accepted. This being the case, the incidental service provision of 49 C.F.R. 604.11(b)(1) does not apply, since the charter in question is clearly not the type prohibited by the regulation.

Such is not the case, however, with the February 10, 1986, charter trip, which Command acknowledges to have occurred at the time and place alleged in the complaint. Since this charter took place on a weekday and during peak rush hours, the presumption of 49 C.F.R. 604.11 that it was non incidental service which interfered with regularly scheduled service is triggered.

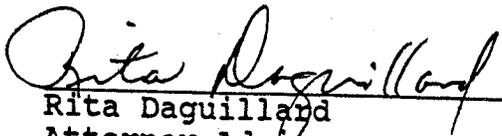
This presumption is not conclusive, however, and the respondent may overcome it by offering evidence or documentation sufficient to establish that all regular service requirements had been met on the day and time in question. Greyhound Lines, Inc. and Hopkins Limousine Service, Inc. v. Greater Cleveland Regional Transit Authority (August 26, 1982); Tower Bus, Inc. v. Southeastern Michigan Transportation Administration (November 5, 1984). While Command asserted in its response that the vehicles used in the February 10 charter operation had not been deleted from regular service, it offered no documentary evidence of this fact. UMTA's letter of February 13, 1987, to Command requested that Command furnish such information within 30 days of its receipt of the letter. Since Command did not respond to this request within the time allotted, UMTA holds that it has failed to rebut the presumption of 49 C.F.R. 604.11. Consequently, Command's charter operation of February 10, 1986, is held to be a violation of the incidental service provisions of the charter bus regulations in effect at the time of the complaint.

It should be noted that the above-cited charter regulation applied only to charter operations using UMTA-funded vehicles. While Command performs urban mass transportation service for UMTA's grantee, NYCDOT, neither party has presented any specific evidence that the buses used by Command in performing its charter services, were not purchased or operated with UMTA funds. Command's response of May 29, 1986, states that the buses in question had been part of a Mass Transportation Service Contract between New York City and Pioneer Bus Corporation, and subsequently transferred to Command by an Assignment Assumption Agreement. It provided no details, however, on whether the original purchase of the buses, or their assignment, had been made with UMTA funds. UMTA therefore requested, in its letter of February 13, 1987, that Command provide such information so that it could make a preliminary determination of whether the charter regulations were applicable. Since Command failed to respond to this request within the time allotted, UMTA must therefore assume that the vehicles in question were UMTA-funded, and consequently that the UMTA charter regulations then in effect did indeed apply to Command's operations.

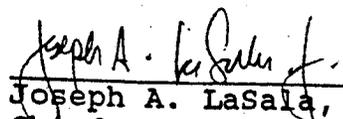
VII. CONCLUSION

Based on the foregoing, UMTA holds that Command has, at least on one occasion, used UMTA-funded vehicles during a weekday rush hour in non-mass transportation related operations. Since Command has offered no evidence to overcome the presumption of 49 C.F.R. 604.11(b)(1), we find that this use violated the charter bus regulation in effect as the time of the complaint, 49 C.F.R. 604.11(a).

However, the new charter regulations prohibit subrecipients of federal funds from providing charter service when there is a willing and able private operator. Assuming that Erin is such a willing and able private operator, Command is presumably no longer able to provide the type of service cited in the complaint. Consequently, UMTA finds that it is not necessary to impose sanctions upon Command for its violations of the former charter regulations.


 Rita Daguilland
 Attorney Advisor

9/9/87
 Date


 Joseph A. LaSala, Jr.
 Chief Counsel

9/25/87
 Date

Syracuse & Oswego Motor Lines, Inc.)
 Central NY Coach Lines, Inc. and)
 Onondaga Coach Corporation,)
)
 Complainants)
)
 v.) NY-11/85-01
)
 Central New York Regional Transportation)
 Authority, CNY CENTRO, Inc., CENTRO of)
 Cayuga, Inc., and CENTRO of Oswego, Inc.,)
)
 Respondents)
)

I. SUMMARY

On November 1, 1985, Syracuse & Oswego Motor Lines, Inc., Central NY Coach Lines, Inc., and Onondaga Coach Corporation (Complainants), filed a complaint with the Urban Mass Transportation Administration (UMTA) alleging that the Central New York Regional Transportation Authority (CNYRTA), CNY Centro, Inc., Centro of Cayuga, Inc., and Centro of Oswego, Inc. violated the charter bus restrictions in the Urban Mass Transportation Act of 1964, as amended (UMT ACT), and the implementing regulations, 49 CFR Part 604.1

After a thorough review of the materials submitted, UMTA finds that CNYRTA did not violate the regulations with respect to the incidental use provision, operating beyond its urban area, and predatory pricing.² However, at this time, UMTA finds that CNYRTA has not supported its contention that all expenses were properly allocated for charter service and charter revenues did not exceed charter costs for the years in question.

Since CNYRTA has, however, ceased providing charter service following the implementation of the new charter regulations on May 13, 1987, the issue of its nonconformity with former regulations has become moot. UMTA consequently finds that it is not in the public interest to issue any directive of guidance to CNYRTA with respect to charter operations pre-dating the current regulations.

1 The regulations that CNYRTA is alleged to have violated have been superseded by the revised regulations that UMTA published on April 13, 1987, 52 Federal Register 11916. This decision, for ease of drafting and to eliminate cumbersome writing, speaks in terms of the old regulation, published on April 1, 1976, as if it were still in effect.

2 CNYRTA is the parent corporation and CNY Centro, Inc., Centro of Cayuga, Inc., and Centro of Oswego, Inc. are subsidiaries of CNYRTA. Since all of the allegations concern the charter operations of the CNY Centro, Inc. subsidiary, this decision uses CNYRTA and CNY Centro, Inc. synonymously.

II. COMPLAINT

On November 1, 1985, complainants filed this complaint with UMTA pursuant to 49 CFR 604.40. The complainants allege that the Central New York Regional Transportation Authority, CNY Centro, Inc., Centro of Cayuga, Inc., and Centro of Oswego, Inc. breached its agreement with UMTA through a continuing pattern of operating charters: (1) on a non-incidentual basis; (2) beyond its urban area; (3) at charter rates which do not equal or exceed the actual cost of providing the service; and (4) at charter rates designed to foreclose competition by the private carriers.

The first allegation is that CNYRTA violated the non-incidentual use restrictions of mass transportation buses contained in 49 CFR 604.11, by operating charter bus service during peak periods and for over six hours.³ To support their claim of non-incidentual operations, the complainants made a request under New York's Freedom of Information Law to examine CNYRTA's charter bus records for the preceding three years. Copies of charter bus trip sheets for some 6000 charters operated by CNY Centro over these three years... were obtained as a result of the request, analyzed by the complainants and provided to UMTA. Based on that analysis, the complainants, allege that they identified 1560 instances where charters were run during either the morning or evening peak rush hours or during both peaks. The complainants define CYNRTA's peak rush periods as 7:00 a.m. to 9:00 a.m. and 4:00 p.m. to 6:00 p.m.

³ Section 604.11(b) of the regulation states that uses of mass transit buses in charter operations are presumed to be non-incidentual for weekday charters occurring during peak morning and evening rush hours, weekday charters which require buses to travel more than 50 miles beyond the grantee's urban area, and weekday charters which require the use of a particular bus for more than a total of six hours in any one day.

⁴ Charter orders 9874 and 9875 were identified as a two-bus charter alleged to have operated during both peaks on Wednesday, March 13, 1985. The complaint alleges that the trip left in the morning peak at 8:30 a.m. and ran all day, returning in the evening peak at 5:20. Each bus was alleged to have been in service for nine hours.

which required buses to be in charter service for more than a total of six hours in one day, in violation to 49 CFR 604.11(b)(3). Of the 1560 charters alleged to have operated during peak periods, 105 are alleged to have also been instances where buses were used in charter operations for more than six hours.

As representative of the six hour violations, the complainants described the four specific examples discussed in regard to the alleged peak period violations. Charter order 09874 and 09875 were alleged to have required the use of a bus for 9 hours each, while charter orders 09834 and 09906 were alleged to have operated for 8 hours and 7.8 hours, respectively.

The second allegation is that the respondent is engaged in and attempting to engage in charter business outside of its transportation district using "joint service arrangements" and "special services contracts," in violation of its present agreement with UMTA. The "out of district" charters are alleged to include runs to ski areas in Madison County and a released time school contract in Cortland County. The "special service contracts" are alleged to be operated on a daily basis through the morning and evening peak periods, but are reportedly not being treated as charters by CNYRTA. The complainants state that they have commenced an action in the Supreme Court of Onondaga County to end these charters.

Included in the complaint are copies of joint service agreements purported to exist between CNYRTA and Cortland and Madison counties. These agreements show that the legislatures of these two counties have entered into an agreement for the provision of charter and transportation services to be provided by CNYRTA. Also included as an attachment to the complaint is a copy of an advertisement describing a service which Centro provides to a ski area with stops in Cazenovia. The complainants allege that this is located in Madison County, outside of the CNYRTA transportation district.

Charter order 09834 was identified as a charter which operated as what CNY Centro calls a "shuttle" on Thursday, February 21, 1985. The initial pullout was alleged to be at 7:00 a.m., with the bus being used at different times of the day including 4:45 p.m. The complainants allege that this charter worked 8.03 hours, and cite it as another example of a charter which was run during both peak periods.

Charter order 09906 represents a charter which operated on Wednesday, April 24, 1985. The trip is alleged to have started at 8:45 a.m. and returned to the garage at 12:35 p.m. Then the trip continued and pulled out at 4:55 p.m., according to the complainants, and returned at 8:28 p.m., for a total of 7.8 hours of operation.

The third allegation is that CNYRTA provides intercity charter bus service, and that its total annual charter revenues do not equal or exceed its fully allocated annual charter operation costs.⁵ Through a comparison of CNYRTA's certification of costs of charter service for CYN Centro, Inc., for the fiscal year ended March 31, 1984, and copies of the CNYRTA's consolidated operating statements for the years 1983, 1984, and 1985, the complainants allege that the certification of costs for charter bus miles is inaccurate. The complainants further allege that had CNYRTA used a proper allocation of full costs to the charter operations CNYRTA's charter operations would have operated at a loss.

The complainants allege that the cost allocation plan for the fiscal year ending March 31, 1984, for CNY Centro does not properly include all the expenses in Appendix B of 49 CFR 604. They cite a number of items which they believe were either excluded or not properly accounted for including: (1) driver's wages for backup service or service on short notice; (2) wages for reserve drivers; (3) expenses for fringe benefits, including sick leave, holiday, and vacation pay; (4) cost for guaranteed pay for drivers; (5) claims costs; (6) attorney's fees; (7) sales tax; (8) expenses for vandalism; and (9) expenses for interest paid on borrowed funds.

The complainants allege that they compared the total reported direct, indirect, and dummy costs reported on the certification of costs for CNY Centro, for the fiscal year ending March 31, 1984 (\$8,783,627), with the operating expenses for CNY Centro, for this same period, as reported on CNYRTA's Consolidated Statement of Operations (\$14,510,734). As a result of this comparison, they assert that the cost allocation plan and certification of costs submitted for CNY Centro are inaccurate, because many operating costs were not properly included in the charter allocation plan.

Based on what the complainants believe to be the fully allocated operating costs of charter services, they report that CNY Centro charter operations would have operated at losses of \$41,913 in fiscal year 1983; \$75,158 in 1984; and \$95,146 in 1985. They submit that the information provided in the complaint shows that CNYRTA is operating its charter services at a loss, and is using Federal assistance from its line operations to subsidize its charter work.

⁵ The regulations specify in 49 CFR 604.13, that if a recipient desires to provide intercity charter service with UMTA-funded equipment or facilities and it earns more than \$15,000 in annual charter revenues, it must agree that annual revenues generated by all of its charter bus operations (both intercity and intracity) are equal to or greater than the cost of providing charter operations consistent with its cost allocation plan.

The fourth and final allegation is that CNYRTA operated charters at rates designed to foreclose competition by the private carriers, and that on some charters CNYRTA charged predatory rates.⁶

The complainants allege that based on a comparison of the CNY Centro's published tariff rates, the prices CNY Centro actually charged for the Charters, and the cost under the allocation of full costs, CNY Centro has consistently priced charters below not only its published tariff rates, but also below true costs. This practice, the complainants allege, is clearly designed to foreclose and has foreclosed competition from the private carriers.

Using what the complainants allege are CNY Centro's full operating costs based on maintenance and insurance allocated by miles and all other costs allocated by hour, costs per mile and per hour were computed for fiscal years 1983 through 1985. These costs per mile and per hour figures were applied to the associated miles and hours for each CNY Centro charter trip order which allegedly showed a peak time violation. The resulting figure represented what the complainants allege is the "actual cost" of each trip.

Summary sheets were prepared which compared the complainant's "actual costs" to the CNY Centro pricing tariff as approved by its Board of Directors, and the price charged by CNYRTA for a particular charter trip. These summary sheets, the complainants state, illustrate the consistent pattern of CNYRTA's practice of pricing well below CNYRTA's actual cost and below its own price listing, in a manner designed to foreclose competition by private charter bus operators in violation of 49 CFR 604.13. Three examples of these alleged improper pricing practices are discussed in the complaint.⁷

6 According to 49 CFR 604.13, every grantee who provides intercity charter service and earns more than \$15,000 in charter revenues is obligated to enter into an agreement with UMTA which states that it will not establish any charter rate which is designed to foreclose competition by private charter bus operators.

7 For CNY CENTRO charter order 9875, the complainants state that the "actual cost" per bus is \$313.31, while the tariff price calls for \$263.00 per bus, and CNY Centro only charged \$192.50. For charter order 09834, the complainants state that CNYRTA charged the customer only \$160, while the tariff price calls for \$240, and the "actual cost" was \$243.36. On charter order 09906, the complainants state that the customer was charged only \$206.60, while the tariff price calls for \$422, and the "actual cost" is \$437.52. Other alleged pricing violations were summarized in the complaint.

III. RESPONSE

UMTA sent a copy of the complaint to CNYRTA on January 21, 1986. Because the complaint contained a voluminous set of backup material alleged to support the four principal allegations, CNYRTA requested, and UMTA granted a 60-day extension for a total of 90 days to respond to the complaint. CNYRTA's response was received by UMTA on April 18, 1986.

In general, CNYRTA denies the complainants' allegations. Moreover, CNYRTA states that the filing of the complaint merely represents another effort by the complainants to harass CNYRTA and reduce, if not eliminate, the provision of charter services by CNYRTA.

Regarding the specific allegations, CNYRTA provided affidavits and supporting materials which it believes rebuts each allegation raised by the complainants. CNYRTA states that these materials provide proof of CNYRTA's assurances to UMTA that all charters were incidental and priced properly, that there was no predatory pricing, and that cost allocation plans and tariffs were complied with.

First, CNYRTA addresses the allegations regarding peak hour non-incidental use of mass transit buses in charter operations, and six hour violations. CNYRTA states that it does not use its federally funded buses in peak rush times except where it can be proved that these buses were incidental at the time, thus rebutting the presumption of non-incidental charters. CNYRTA's subsidiaries use the following definition to describe peak hour periods:

For the entire system, the peak time is that time at which the maximum number of buses is required for mass transportation. Any available bus could be used for charter service at other times.

This definition, CNYRTA states, assures that a federally funded bus would not be used in charter service if it would be needed as a spare, for regular route service, or maintenance.

CNYRTA states that its operating subsidiaries have different peak and maximum vehicle requirements at different times of the year, primarily as a result of ridership from students at Syracuse University, high schools, and community colleges. As a result, CNYRTA states that CNY Centro's morning peak period is from 7:45 a.m. to 8:15 a.m. during the fall, winter, and spring schedule when the universities and parochial schools are in session.

CNY Centro's afternoon peak period is reported to be from 5:00 p.m. to 5:15 p.m. Moreover, because the heavy demand by students peaks at 2:30 p.m., whereas the demand for space by adult commuters is greatest at 5:00 to 5:15 p.m., CNYRTA states that it operates 25 fewer buses during the afternoon peak than in the morning.

Therefore, CNYRTA states that during the summer or times during the fall, winter, and spring months when the university and/or the schools are closed, it will utilize federally funded buses for charter service during the morning peak period when there is no potential that these buses will be needed for regularly scheduled mass transit, or as a spare, or for maintenance. However, CNYRTA states that as a policy it will not operate a charter between 7:45 and 8:15 a.m. during the fall, winter, or spring when the universities and/or parochial schools are in session.

During the evening rush period at any time of the year, CNYRTA states that it will operate charter service because this period, as stated above, requires 25 fewer buses than the morning peak. CNYRTA states chartering up to 25 buses during the evening peak period is "incidental" use because these buses would otherwise be idle.

CNYRTA provides summary charts which show each of the 1560 alleged morning and evening peak hour violations, the day it operated, the seasonal schedule effective at that time, the alleged peak period, and comments that state why it believes that the presumption of non-incidental use is rebutted for a particular trip. The schedules must be analyzed in conjunction with a series of graphs, which are said to show the number of buses required to operate CNY Centro regular route service during the corresponding time period.

CNYRTA's response addresses what it states are 793 charter trips that the complainants allege occurred during the morning peak.⁸ Further, CNYRTA states that of these 793 alleged morning peak trips, only 24 charters actually occurred during seasons when the CNY Centro system operated at peak requirements as defined by CNYRTA. A detailed description of these 24 charters is provided by CNYRTA in an effort to rebut allegations of non-incidental use of mass transit buses during peak periods.

Of the 24 charters which CNYRTA admits CNY Centro operated during the 7:45 to 8:15 a.m. morning peak period, it reports that 13 were not charters by Federal definition, because they were used solely to augment their regular route service to Manley Field at Syracuse University or used in special shuttle operations at the university and that one was a non-charter marketing promotion. CNYRTA admits that the remaining 10 trips operated during the peak were charters within the Federal definition. However, CNYRTA states that regular route passengers were never inconvenienced or deprived of service, because spare buses were available.

⁸ It appears that CNYRTA presumes that the 777 charter trips alleged to have occurred during the evening peak do not violate the incidental use restrictions because CNY Centro has 25 idle buses available during the evening peak.

CNYRTA also provided certificates from the Director of Operations and Director of Maintenance which certify that all regularly scheduled trips were completed and that all regularly scheduled maintenance necessary to operate all line operations was conducted.

Next, CNYRTA provides a detailed discussion aimed at rebutting the complainants' allegation that it violated UMTA regulations by operating 105 weekday charters requiring the use of a bus for more than six hours in one day. It states that a careful review of the actual charter sheets included in the complaint prove that only 56 instances of six hour charters occurred. Moreover, CNYRTA states that all of these charters took place when it has been proven that CNY Centro had sufficient excess buses to operate a particular charter without any interference to its regular route customers.

Specifically, of these 56 charters, CNYRTA states that 33 were operated during the period between its morning and evening peak periods, or after the 5:15 p.m. peak period. Of the remaining 23 charters, CNYRTA states that 19 operated during the evening peak, when it has at least 20 available buses (CNYRTA stated earlier that it always has 25 buses available) and 4 violated the morning peak, but at a time when the University and/or schools were closed.

Second, Barry M. Shulman, Counsel to CNYRTA, addressed the allegations that CNYRTA operated charter service beyond its urban area. In an affidavit accompanying the response, Mr. Shulman states that CNYRTA discontinued all operations beyond its urban area (except service provided to stranded airline passengers) in approximately April of 1985, after the complainants filed suit in the State of New York seeking to have such service discontinued.

However, the use of interline and joint service agreements, under which the charter trips out of Centro's urban area were previously operated, had been specifically approved by the Attorney General of the State of New York on December 31, 1981, according to Mr. Shulman. Mr. Shulman also states that the use of these agreements was filed with UMTA, and approved by UMTA Chief Counsel G. Kent Woodman, on July 15, 1982.9

9 In this letter, UMTA states that in light of the New York Attorney General's opinion dated December 31, 1981, it has no objection to CNYRTA's provision of intercity charters based on joint service agreements. Prior to the December 31, 1981, interpretation, UMTA had held, based on UMTA's understanding of the Attorney General's opinion of August 20, 1974, that CNYRTA could only provide intercity charter service based on joint service agreements if the agreement were with a carrier. As a result of the changed interpretation by the State, CNYRTA could provide intercity charter if the agreement were with a carrier, county government, or any of several other entities.

After discontinuing the intercity charters, provided through joint service agreements, Mr. Shulman states that CNYRTA applied to UMTA Administrator Stanley to amend its charter bus agreement to permit expanded intercity charter operations. However, on November 25, 1985, UMTA Administrator Stanley denied the requested amendment.

At that point, according to Mr. Shulman, all charter service out of CNY Centro's urban area had been discontinued, except for the above referenced service to stranded airline passengers.

Although the private carriers were said to have never raised any objection to the service to airline passengers, CNYRTA's Board was said to have decided to discontinue all charter service out of Centro's urban area, by a resolution adopted February 21, 1986, which is attached to the affidavit. Additionally, Mr. Shulman states that CNYRTA sent a written notice to the three counties with whom it had interline or joint service agreements, that such agreements were terminated. Finally, Mr. Shulman states that CNYRTA's fiscal year commences on April 1, and that during the current fiscal year there have been no charters operated outside of CNYRTA's urban area.

Third, CNYRTA addressed the allegation that it used an improper method of allocating the costs of its charter operations which, if properly allocated, would mean that the charter service has been operated at a loss. CNYRTA states that the complainants used an improper method of allocating the costs of its charter operations, which in nearly every instance, overstates the true cost of each charter. Also, they state that Mr. Russell Ferdinand, President of Syracuse & Oswego Motor Lines, one of the complainants, and CNYRTA's former Chief Financial Officer, certified and calculated CNY Centro's cost allocation plans for nearly all of the period mentioned in the complaint.

CNYRTA compiled summary sheets that show that for the 1560 charters that are the principal focus of this complaint, it experienced a loss of \$4,234, comparing CNY Centro cost to actual price. CNYRTA cautions, however, that this loss must be viewed in light of several factors including: (1) the fact that CNY Centro made a profit from charter operations in each of the three years in question; (2) the fact that these 1560 charters were selectively chosen from more than 6000 available to the complainants; and (3) the fact that these 1560 charters represent only \$71,000 out of over \$1 million in charter revenues over the three years.

CNYRTA's accountant provided an affidavit which states that CNYRTA's certification of costs are prepared using generally accepted accounting principles consistent with CNYRTA's regular accounting methods. In addition, the affidavit states that the certification of cost and cost allocation plans are not a required part of the basic financial statements. However, the affidavit states that the cost and plans were subjected to the auditing procedures applied in the examination of the basic financial statements, and were fairly stated in all material respects in relation to the financial statements taken as a whole.

CNYRTA also included an affidavit from its Chief Financial Officer, Mr. Steven M. Share. Mr. Share states that the charter revenues for CNYRTA's subsidiaries exceeded their charter costs for fiscal years 1982/83, 1983/84, and 1984/85. The revenues exceed the costs in each of these years even after "dummy" costs are included. As an example, the charter profits for CNY Centro were \$57,379, \$40,014, and \$20,911 for the three fiscal years, respectively.

Fourth, CNYRTA addressed the allegation that it operated charters at rates designed to foreclose competition by the private operators and that on some charters, CNYRTA charged predatory rates. CNYRTA states that it has priced its charters in accordance with the tariff approved by the CNYRTA Board, and its cost allocation methodology demonstrates conclusively that charter revenues exceed the cost of charters from 1983 through 1985.

In addition, CNYRTA states that although there are isolated instances where CNY Centro has lost money on specific charters, this was not done with the intent of foreclosing competition. Moreover, CNYRTA states that the private operators have not presented any evidence that they have been foreclosed from competition because of CNYRTA's pricing policy.

Regarding the pricing procedures it used, CNY Centro gives three reasons why the private operators incorrectly priced its charter trips: (1) they had the incorrect tariff at the time; (2) they were unaware of the senior citizen discount which has historically been part of the tariff; and (3) they incorrectly interpreted the charter sheet.

CNYRTA prepared charts showing how CNY Centro calculated the price for each of the 1560 charters identified by the private operators. The methodology used to calculate the price is shown, and the final recalculated price is compared to the price actually charged. In the explanation section, CNYRTA describes how the private operators may have calculated the incorrect price.

In a few instances CNYRTA admits that it did price a charter below its tariff. However, it states that this was done unintentionally as a result of underestimating the exact number of miles or hours that a given charter would take where the customer was given a firm price.

CNYRTA states that a large number of the charters which the private operators allege were priced below cost, in a predatory manner, are what CNY Centro calls "weekly shopper buses." CNYRTA states these weekly shopper buses are not charters according to the Federal definition. CNYRTA states that while the buses are paid for by the grocery stores, the service now operates on published schedules open to the general public, and passengers ride the bus to and from the primary sponsor, but they also shop at other businesses around the sponsor's store.

CNYRTA states that it initiated the weekly shopper service early in the 1970s, as a response to the closing of a number of grocery stores throughout the inner city. A number of senior citizens were reported to have requested CNY Centro's "Call-A-Bus" service to the relocated grocery stores. CNYRTA states that the calls to the Call-A-Bus service requesting trips to grocery stores led them to institute the weekly shopper buses, so that CNY Centro would not have to commit all of its Call-A-Bus resources to serve shopper trips. The buses are billed as charters, according to CNYRTA, to avoid the overtime provisions necessary if it operated the shopper buses as Call-A-Bus service.

If the cost allocation methodology were applied to the weekly shopper buses, CNYRTA admits that it did not cover all of the costs, including the dummy costs. However, CNYRTA states that it increased the price of the service in April 1985, and again in April 1986, in an effort to eliminate all losses shown through the cost allocation methodology. In support of that claim, CNYRTA provides summary charts which show that the cost of the weekly shopper service exceeded revenues by \$235 in 1983, and increased to \$320 in 1984, but in 1985 the figure dropped to \$38.

IV. REBUTTAL

UMTA sent the complainants a copy of CNYRTA's response on May 1, 1986. The complainants sent their rebuttal to UMTA on July 7, 1986, after being given additional time to respond to the allegations.

The rebuttal addresses peak hour non-incidentual use, charter service beyond CNYRTA's urban area, inadequacy of CNYRTA's cost allocation plans, and improper pricing aimed at foreclosing competition. It also includes a footnote that repeats the claim of extended hour charters and states that the respondents admitted to 56 such instances.

In addition, the complainants state three additional allegations in their rebuttal that were either not mentioned at all in the initial complaint, or if they were, were discussed in conjunction with one of the above allegations. These additional allegations include claims that CNYRTA: (1) maintains a fleet which is larger than necessary to meet the needs of its line service; (2) improperly manipulates its peak service requirements so as to expand its available charter fleet; and (3) inflates peak requirements by improperly operating special school bus services and routes.

Allegations (1) and (2) will be discussed in conjunction with peak hour non-incidentual use since these allegations were mentioned in the complaint in conjunction with the non-incidentual use claim. However, since the complaint was not filed under 49 CFR Part 605, which is the applicable school bus regulation, the complainants' third claim will not be discussed. If complainants wish to file a separate school bus complaint, they may do so following the procedures set forth in 49 CFR Part 605.

First, the complainants state that CNYRТА's definition of peak periods contravenes the intent of the regulations, since UMTA regulations in 49 CFR 604 define peak periods as "rush hours." Additionally, they restate their claim that CNYRТА's peak periods are from 7:00 to 9:00 a.m., in the morning, and from 4:00 to 6:00 p.m. in the evening. These peak periods, the complainants state, are accurate, reasonable, and meet UMTA's definition of peak periods.

Also, the complainants state that CNYRТА's claim that any charter service they provided during peak periods was incidental because the charters were operated without interfering with regularly scheduled line operations, was not substantiated with any documentation.

Moreover, the complainants allege that it is only because CNYRТА has a bus fleet far in excess of that which is required for regularly scheduled operations, cutbacks and maintenance, that they are able to operate charter service during peak periods without interrupting line service. Similarly, the complainants attack CNYRТА's use of a 20 percent spare ratio as an effort to justify its excess fleet size.

Second, the complainants dispute CNYRТА's counsel's claim that CNYRТА "immediately" discontinued extraterritorial charter service when the complainants filed suit in New York in January 1985. To the contrary, they state that CNYRТА made no attempt to cancel the joint service agreements with Cortland or Madison counties or withdraw from out of district work until the resolution of the Board of Directors on February 27, 1986. This resolution, according to the complainants, was passed only after the private carriers had initiated its complaint with UMTA and the Administrator had issued its decision of "probable cause" on January 14, 1986.

Moreover, the complainants point to the fact that the joint service agreements were not cancelled until March 25, 1986, and, not coincidental, while CNYRТА's answer to the complaint was being prepared. This, the complainants allege, provides a clear indication that CNYRТА's limitations on its out of district work was only motivated by an attempt to moot the charges raised by the complaint and avoid a remedy.

Third, regarding the claim of improper cost allocation, the complainants question the content of the affidavit of CNYRТА's accountant. They state that the affidavit makes no conclusion and states no opinion that the certification of costs is in compliance with UMTA regulations. The complainants state that the affidavit also fails to challenge their contention that not all costs have been allocated in compliance with the regulations.

In addition, the complainants include an affidavit from a certified public accountant in support of their claim that CNY Centro used an improper cost allocation. The affidavit states that the accountant reviewed CNY Centro's cost allocation plan and certification of costs

for the fiscal year ended March 1, 1985, along with the charts of accounts, which revealed that several material expense items had not been allocated against charter revenues as required by UMTA regulations.

Furthermore, the accountant states that his analysis revealed an inconsistency in CNYRTA's overall allocation of costs. With respect to certain categories of cost, he states that items related to CNY Centro's Cortran operations were accounted for in separate accounts. However, he states that the allocation percentage originally used on all costs included the Cortran miles and hours. He reasoned that if CNY Centro eliminated the Cortran costs from consideration, then the related Cortran miles and hours should have also been excluded in allocating the remaining costs between line and charter activities.

Instead of the \$21,911 profit reported by Centro in fiscal year 1985, the complainants' accountant states that this profit would have been reduced to \$9,692 after the "Cortran adjustment." Furthermore, the accountant makes a calculation that he states shows that if additional expenses which CNY Centro omitted were also included, then the charter operations would show a net loss of \$36,494 for fiscal year 1985 (compared to a loss of \$95,146, estimated in the original complaint).

Fourth, the complainants addressed CNYRTA's response to their allegation that CNYRTA engaged in a practice of predatory pricing, and used this practice to foreclose competition by the private charter operators. The complainants state that CNYRTA's tariff was not established based on cost, but instead was set below cost so as to undercut the private carriers and dominate the charter market.

To support that allegation, they supplied an affidavit from Russell Ferdinand, President of Syracuse & Oswego Motor Lines and formerly Chief Financial Officer of CNYRTA. The affidavit states that CNYRTA established its charter tariff, not based on costs, but based on a comparison with the prices of local private charter operators. They also provided affidavits from other present and former Syracuse & Oswego employees, which are alleged to show a specific example of predatory pricing on a charter contract with a grocery chain.

The complainants requested that UMTA pay particular attention to CNYRTA's analysis of cost versus the price of the twelve subgroups of the 1560 charters in question, since CNYRTA admits that it suffered a loss on these charters in excess of \$4000. In addition, they state that CNYRTA gave no reason why these charters would not be representative of their charter operations.

V. DISCUSSION

The four principal allegations are that CNYRTA breached its agreement with UMTA through a continuing pattern of operating charters: (A) on a non-incidental basis; (B) beyond its urban area; (C) at charter rates which do not equal or exceed the actual cost of providing the service; and (D) at charter rates designed to foreclose competition by

the private carriers. Each of these allegations is discussed below, along with any other factual or legal issues that relate to them.

The charter regulations that were in effect when the complainants filed this complaint have changed. UMTA published final regulations revising the previous regulations on April 13, 1987. In this decision, UMTA is comparing CNYRTA's charter service with the old regulations, not the revised regulations.

A. Non-Incidental Use of Transit Vehicles

The complainants allege that CNYRTA violated 49 CFR 604.11 by operating non-incidental charters. Under 604.11(b), the uses of mass transportation buses in charter operations in the following ways are 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.

The definition of "incidental" is set forth in the regulation. Section 604.3 states, "'incidental' means charter bus operations which do not interfere with regularly scheduled service to the public (as defined in the Opinion of the Comptroller General of the United States, B-160204, December 7, 1966...)" Therefore, non-mass transit service is incidental only if it does not interfere with the provision of mass transportation service. The complainants charge that CNYRTA operated weekday charters during peak morning and evening rush hours, and operated weekday charters which require the use of a bus for more than six hours in one day.

The data presented to support that claim includes copies of CNY Centro charter orders, and an analysis of what is alleged to be 1560 violations of the peak hour incidental use restrictions, 105 of which are alleged to also show extended hour violations. In addition, the complainants included copies of CNYRTA's Section 15 submissions, in an effort to support their view of CNYRTA's peak periods.

CNYRTA responded to the allegations by pointing out inaccuracies in the complainants' analysis, and by showing that those peak and extended hour charters which did occur were incidental. CNYRTA submitted its own analysis of the same 1560 charter runs. CNYRTA's analysis shows based on its more limited definition of peak hours that only 56 instances of peak hour incidental use violations occurred. In each instance, they show that they had idle buses available to operate those charters. CNYRTA's analysis also shows that very few extended hour violations occurred, and in each instance they provide data to rebut the presumption of non-incidental use.

Furthermore, CNYRTA states that its evening rush period requires fewer buses, and therefore it always has 25 buses that can be used in charter operations with no adverse affect on line operations. Based on that operational factor, CNYRTA states that no evening peak hour violations occurred. In addition, CNYRTA asserts that "many of the charters labelled by the complainants as peak hour violations were not actually charters, but were buses used to augment regular service, and billed as charters to facilitate billing."

Regarding the extended hour charters, CNYRTA asserts that some of the charters designated by the complainants as requiring the use of a particular bus for more than six hours actually involved the use of more than one bus for less than six hours per bus. CNYRTA shows that in nearly every instance, the total time billed for each charter exceeded six hours, although each individual bus was used for less than six hours.

In addition to presenting evidence to refute the complainants' designation of runs as peak and extended hour charters, CNYRTA provided evidence to rebut the presumption that any peak or extended hour charters which took place were non-incidental. CNYRTA submitted calendars showing its schedule by season, an analysis of turn backs and extra trips, a peak vehicle repair study, and computer-generated vehicle requirement graphs for each year from 1983 through 1985, by season and by peak time period.

The graphs show the scheduled vehicles on the road during a particular peak, the number of operational spares used, the number of vehicles under repair at each time during the peaks, a 20 percent spare ratio, and the total number of buses owned at each point in time from 1983 to 1985. From these graphs the reader is able to determine whether CNYRTA had adequate vehicles available to operate regular service, during those periods when they admit to operating charters during peak periods.

CNYRTA also provided certificates from the Director of Operations and Director of Maintenance, which certify that all regularly scheduled trips were completed, and all regularly scheduled maintenance necessary to operate all line operations was conducted.

After an exhaustive review of the materials submitted by the parties, UMTA finds that the charter trips in question were incidental to the provision of mass transportation and thus, CNYRTA has rebutted the regulation's presumption. UMTA bases this finding principally on the certification submitted by CNYRTA's employees that all regularly scheduled trips and maintenance were performed. This is consistent with previous UMTA decisions and is sufficient to satisfy UMTA that the service was incidental. 2 Can Caravan, Inc. d/b/a/ San Antonio Trolley System v. San Antonio Metropolitan Transit Authority, d/b/a VIA Metropolitan Transit, 1987; Tower Bus, Inc. v. Southeastern Michigan Transportation Administration, November 5, 1984; Greyhound Lines, Inc. and Hopkins Limousine Service, Inc. v. Greater Cleveland Regional Transit Authority, August 26, 1983.

In addition, UMTA finds that the other evidence submitted by CNYRTA confirms this finding. For example, and of particular note, are the calendars and graphs that CNYRTA provided. These show visually that it had enough buses available on the days and times in question to provide the charter service at issue without disrupting any regularly scheduled mass transportation and related maintenance.

Another issue relating to non-incidentual service is the allegation that the peak periods CNYRTA identified in its response were not consistent with the peak periods identified in other UMTA submissions. In their rebuttal, the complainants allege that the peak hours which CNYRTA designated in its Section 15 reports are the peak periods that the complainants used, and are the ones which should be used in determining whether CNYRTA violated the charter bus regulations. According to this UMTA reporting program, peak periods in the morning and afternoon occur when the system operates headways closer than during the midday base. Using this definition, CNYRTA's peak periods would be much longer than it states they are.

The complainants define CNYRTA's peak hours as 6:00 to 8:00 a.m. and 4:00 to 6:00 p.m. CNYRTA submits that its operational definition of peak hours is 7:45 - 8:15 a.m. and 5:00 to 5:15 p.m., during the spring, fall, and winter when the universities and schools are open. During the summer, and when the universities and schools are closed, CNYRTA states that its operational policy allows buses to be used for charter operations during the designated peak periods because they have idle buses available. Under CNYRTA's definition, far fewer peak hour charters occurred.

It is not necessary for UMTA to decide whether the peak periods in CNYRTA's Section 15 reports are the peak periods which should be used for the incidental use presumptions. Regardless of what time period is used for the peaks, it is clear that CNYRTA had a sufficient number of idle buses available for charter operations to rebut the presumption that it operated non-incidentual peak hour charters. Therefore, UMTA finds it unnecessary to discuss this issue further.

The final issue raised by the complainants which relates to the allegations of non-incidentual use is the claim that CNYRTA's use of a 20 percent spare ratio is excessive, and stimulates and encourages the sort of aggressive approach to charter operations which have been followed by CNYRTA. The complainants state that a 10 percent spare ratio was in effect throughout the period covered in the complaint and that such a ratio is reasonable.

UMTA agrees with the complainants that a recipient may be able to operate extensive charter service if the recipient has a large spare ratio. In Greyhound, UMTA restricted the recipient's use of buses for charter operations because of the recipient's large spare ratio. Also mentioned in Greyhound was UMTA's general rule of thumb at that time that a spare ratio of 10 percent to 15 percent was acceptable. Id at 6.

The current guidelines, found in UMTA Circular 9030.1, dated June 17, 1985, state, "[t]he number of spare buses in the active fleet for grantees owning fifty of [sic] revenue vehicles should normally not exceed 20% of the vehicles operated in maximum service." UMTA has reviewed CNYRTA's spare ratio and according to the record it was 15 percent for the time period covered by the complaint. This is less than the 20 percent figure that UMTA uses now and we do not find that CNYRTA's spare ratio is excessive or require that the authority limit the number of spares that may be used for incidental charter service.

B. Charter Bus Operations Outside of the Urban Area

The complainants allege that CNYRTA operated charters outside of its urban area in violation of its charter agreement with UMTA. As part of their evidence, they submitted copies of joint service agreements alleged to exist between CNYRTA and Cortland and Madison counties, both of which are outside of CNYRTA's transportation district. In addition, the complainants provided a copy of an advertisement alleged to show a service CNY Centro operates to a ski area which makes stops in Cazenovia, New York, which is in Madison County.

Section 604.12 of the charter bus regulations specifies that a recipient of financial assistance from UMTA must enter into a charter bus agreement with UMTA if it desires to provide intercity charter bus service, i.e., charter service using UMTA equipment outside of its mass transportation service area, and if it earns more than \$15,000 annually in charter revenues.

The procedures which a recipient must follow to enter into or amend its charter agreements are set forth in 49 CFR 604.15. These procedures include giving public notice, holding a hearing, and submitting specific documents to UMTA so that UMTA may decide whether to agree to enter into an agreement or amend an existing agreement.

In a November 25, 1985, letter in response to a request by CNYRTA to amend its charter agreement to expand its intercity charter service, the UMTA Administrator discussed CNYRTA's current agreement with UMTA:

Currently, the charter bus agreement that CNYRTA operates under, and which UMTA approved on February 23, 1977, permits CNYRTA to operate intercity charter service outside of its three county area by way of joint service agreements with certain aviation facilities within New York State.

Letter from UMTA Administrator Ralph Stanley to Mr. Warren H. Frank, Executive Director, CNYRTA (Nov. 25, 1985).¹⁰

In its response, CNYRTA states that the interline or joint service agreement under which it operated service to counties adjoining its urban area was specifically approved by the Attorney General of the State of New York, filed with UMTA, and was approved by UMTA Chief Counsel, G. Kent Woodman, on July 15, 1982. The July 15, 1982, letter stated,

In light of the New York Attorney General's opinion dated December 31, 1981, explaining the informal opinion of August 20, 1974, UMTA no longer has any objection to CNYRTA entering into charter bus arrangements that are, "...joint service arrangements under which bus service is provided to a location outside,..."CNYRTA's district.

Letter from UMTA Chief Counsel G. Kent Woodman to Edward J. Moses, Esq., Mackenzie, Smith, Lewis, Mitchell & Hughes (July 15, 1982).

The evidence shows that UMTA approved of CNYRTA entering into joint service arrangements to provide charter service outside of CNYRTA's district. UMTA finds that CNYRTA did not violate the charter regulation with respect to charter trips outside its urban area which were conducted prior to the letter from UMTA Administrator Ralph Stanley, on November 25, 1985.

While the November 25, 1985, letter prohibited joint services agreements other than those to stranded airline passengers, CNYRTA's response makes it clear that it has stopped providing even this intercity charter service. UMTA finds that there is no evidence of violations of this permissible intercity charter service after November 25, 1985. Therefore, UMTA finds that CNYRTA has not violated its charter agreement with UMTA. We caution CNYRTA, however, that in the future if it were to resume intercity charter service that it must refrain from using UMTA funded buses in charter bus operations outside of the three county area of Oswego, Cayuga, and Onondaga counties, except for the service to aviation facilities.

C. Charter Rates

The complainants allege that CNYRTA's total annual charter revenues do not equal or exceed the fully allocated annual charter costs, in

¹⁰ CNYRTA was seeking to expand that authority to operate by way of joint service arrangements throughout New York State. However, the Administrator denied the request, finding a clear showing that the private charter operators were capable of providing all the necessary intercity charter service in the area CNYRTA proposed to serve.

violation of 49 CFR 604.13. Under that section of the regulation, an UMTA recipient that provides intercity provides charter service with UMTA funded equipment or facilities and earns more than \$15,000 in annual charter revenues, must agree that annual revenues generated by all of its charter bus operations (both intercity and intracity) are equal to or greater than the cost of providing charter bus operations consistent with its cost allocation plan.

The complainants allege that because CNYRTA did not use a proper allocation of full costs to the charter operations, CNYRTA's charter operations operated at a loss. They cite a number of items which they believe were either excluded or not properly accounted for in CNYRTA's cost allocation plan according to Appendix B of 49 CFR 604. In their complaint, the complainants alleged that had CNYRTA used a proper allocation of costs, CNY Centro charter operations would have operated at losses of \$41,913 in fiscal year 1983, \$75,158 in 1984, and \$95,146 in 1985. These losses were based on a comparison of items on CNY Centro's Consolidated Statements of Operations, with the cost allocation plans for each year in question.

In their rebuttal the complainants provided an analysis of CNY Centro's fiscal year 1985 cost allocation plan conducted by a certified public accountant familiar with charter operations. Instead of the original comparison of items in CNYRTA's Consolidated Statements of Operations with the cost allocation plans, the accountant focused on: (1) an alleged inconsistency in how CNYRTA accounted for the costs and mileage from its Cortran operations; and (2) an analysis of CNY Centro's chart of accounts.

Based on the alleged inconsistency, the accountant estimated that once a Cortran mileage adjustment was made, CNY Centro would have realized a profit of only \$9,692 for fiscal year 1985, instead of the \$20,911 it reported. The accountant's analysis of CNY Centro's chart of accounts alleges that after the items that were not properly accounted for are included, CNY Centro would have operated at a loss of \$36,494 in 1985.

The complainants demonstrate through their use of different approaches to allocating CNYRTA's charter cost, how difficult it is to reach a consensus on how such costs should be properly allocated. Their estimate of CNY Centro's charter losses for 1985 is \$95,146 in the initial complaint, and in the reply brief this same loss is estimated at \$36,494.

Regardless of this problem, UMTA is unable to conclude that CNYRTA's charter costs were accounted for properly in accordance with Appendix B of the rule. While CNYRTA asserts that even after the inclusion of dummy costs that it would have made a charter profit, there is no explanation of what the dummy costs are.

Complainants have listed several costs that Appendix B specifically states must be included. These include sick pay and holiday pay.

CNYRTA does not show that these costs have been included either in its usual course or in the adjustments as dummy costs.

Therefore, UMTA finds that CNYRTA did not comply with the regulation and that its costs for charter service were not fully allocated and we can not conclude that it earned charter revenues in excess of charter profits for the three years in question.

D. Predatory Pricing

The complainants allege that CNYRTA operated charters at rates designed to foreclose competition by the private carriers, and that on some charters CNYRTA charged predatory rates. Section 604.13 of the regulation requires each grantee to enter into an agreement with UMTA which states that it will not establish any charter rate which is designed to foreclose competition by private charter operators.

The question that UMTA must answer is whether the complainants produced sufficient evidence to support a claim of predatory pricing. We do not believe they have. Whether CNYRTA charged predatory rates can only be determined by making a comparison of the rate CNYRTA charged for a particular trip with the rate charged by the private operator for that same trip. However, the complainants did not provide sufficient evidence to enable UMTA to make such a comparison. Therefore, UMTA holds that because the complainants did not provide sufficient evidence to support a finding in their favor, the allegation of predatory pricing was not substantiated.

The complainants also made one specific allegation of predatory pricing regarding former business they had with the Price Chopper grocery chain. They allege that CNYRTA took their contract through predatory undercutting of pricing. Again, the complainants did not provide any evidence of their rate compared with the one charged by CNYRTA. However, CNYRTA admits that it "went to one of the most popular stores to see if they would be interested in sponsoring the direct cost of a bus." Response at Exhibit L.

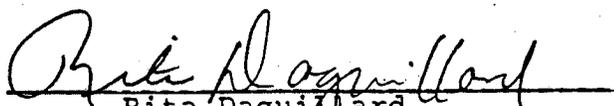
While the evidence does show that the private operators once had a charter contract with the grocery chain, CNYRTA has presented sufficient evidence to support a finding that the service is no longer operated as a charter, but instead, is a service which operates on published schedules open to the general public. CNYRTA stated that it only characterized the buses as charters to avoid the overtime provisions necessary if it operated the service as part of its Call-A-Bus service. Therefore, UMTA finds that the claim of predatory pricing regarding the grocery contract is not substantiated because there is no evidence that CNYRTA established a charter rate which was designed to foreclose competition.

VI. Conclusions and Order

In view of the foregoing, UMTA finds that the alleged violations regarding the incidental use provisions, operating beyond the urban area and predatory pricing are not substantiated. However, at this

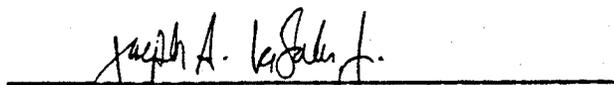
time, UMTA finds that CNYRTA has not supported its contention that all expenses were properly allocated for charter service and we cannot conclude that charter revenues did exceed charter costs for the years in question.

Since the date of this complaint, however, UMTA has implemented new charter service regulations, 49 C.F.R. 604, which provide that a recipient of Federal transportation assistance may not perform charter operations within its service area when there is a private operator willing and able to provide the service. UMTA has been informed that more than one private operator in CNYRTA's service area has been determined willing and able since May 13, 1987, the effective date of the new rule. Consequently, CNYRTA may no longer provide charter service. The issue of its nonconformity with the charter regulations has thus become moot, and does not require the issuance of any sanction or order on the part of UMTA.



Rita Daguiard
Attorney-Advisor

10/1/87
Date



Joseph A. LaSala, Jr.
Chief Counsel

10/2/87
Date



U.S. Department
of Transportation

Urban Mass
Transportation
Administration

The Deputy Administrator

1987 NOV -5 AM 10:50
400 Severn Ave. S.W.
Washington, D.C. 20390

URO 8

OCT 26 1987

Mr. Charles E. Colby
General Manager
Regional Transportation District
1600 Blake Street
Denver, Colorado 80202-1399

Dear Mr. Colby:

This is in response to your recent request for an exception under 49 C.F.R. 604.9(b)(4) which would allow the Denver Regional Transportation District (RTD) to provide charter service on the occasion of the 1988 Convention of the International Association of Lions Clubs, to take place from June 27 to July 2, 1988.

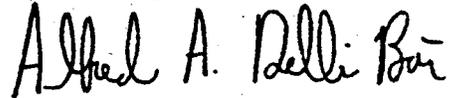
The preamble to the regulations, at page 11925, explains that the Urban Mass Transportation Administration (UMTA) will grant an exception under Section 604.9(b)(4) only for events of an extraordinary, special and singular nature. Your letter and enclosures indicate that this is to be the largest convention in Denver's history, with 35,000 persons expected to attend. Given the international importance of the convention, the fact that it constitutes a unique occasion for the city of Denver, and the large number of attendees expected, UMTA recognizes it as an event of a special and singular nature. Moreover, we understand from your letter that the combined resources of private charter operators in your area are insufficient to meet the service needs for this convention. Also, the American Bus Association has advised us that the City and the local private operator have been working together to coordinate the capabilities for this event. For these reasons, I hereby authorize the RTD to make available as many as 160 buses to accommodate the need for charter service for attendees at the International Association of Lions Clubs Convention, June 27 to July 2, 1988. This exception is valid only for shuttle service between hotels and the convention sites. Should RTD require additional buses or wish to perform operations other than shuttle service, you must request an additional exception under the procedures of 49 C.F.R. 604.9(d). Moreover, before undertaking charter operations using UMTA funded facilities and equipment, RTD should attempt to broker as much service as possible to private providers.

HK LM DB
RV LL JK
DC PVC

TRA H CD

You are reminded that, in accordance with 49 C.F.R. § 604.9(3), "Any charter service that a recipient provides under any of the exceptions of this part must be incidental charter service." The regulations define "Incidental Charter Service" as "charter service which does not (1) interfere with or detract from the provision of the mass transportation service for which the equipment or facilities were funded under the Acts; or (2) does not shorten the mass transportation life of the equipment or facilities." 49 C.F.R. 604.5(i). The preamble to the regulations provides further guidance on determining what constitutes charter service. 52 Fed. Reg. 11926, April 13, 1987.

Sincerely,

A handwritten signature in cursive script that reads "Alfred A. DelliBovi". The signature is written in dark ink and is positioned to the right of the typed name.

Alfred A. DelliBovi

3(e)
Hudson Bus Lines, Inc.)
Complainant)
v.)
Massachusetts Bay Transportation)
Authority)
Respondent)

MA-03/86-01

SUMMARY

Hudson Bus Lines, Inc., (Hudson) filed this complaint with the Urban Mass Transportation Administration (UMTA) alleging that the Massachusetts Bay Transportation Authority (MBTA) had violated Section 3(e) of the Urban Mass Transportation Act of 1964, as amended (UMT Act) in its operation of Route 326. After a thorough investigation, UMTA finds that Hudson was adequately involved in the plan to transfer operating responsibilities along Route 326, and thus concludes that there was no violation of Section 3(e) with respect to Hudson. UMTA concludes, however, that the MBTA violated section 3(e) by failing to involve other private operators in the proposed transfer. UMTA therefore orders the MBTA to follow the procedures set forth in paragraph A of its policy dated July 23, 1986, in any future plans to involve the private sector when planning or implementing any new or restructured service.

COMPLAINT

On March 5, 1986, Hudson filed this complaint with UMTA's Regional Office in Boston, Massachusetts. The Regional Office transmitted it to the Chief Counsel's Office for investigation and resolution on March 10, 1986.

In this complaint, Hudson alleges that the MBTA violates Section 3(e) of the UMT Act by operating bus service on Route 326 in competition with Hudson. The service allegedly operates from Medford and Medford Square to Boston. Hudson states that it has provided service to the City of Medford since 1938 and that it provides express service over the same route as the MBTA's Route 326. Hudson states that it provides 14 trips daily, Monday through Friday, from Medford and 12 trips daily, Monday through Friday, from Medford Square. Hudson included a map to show that its service and Route 326 are identical.

Hudson states that the MBTA has not complied with Section 3(e) of the UMT Act in providing this service. Indeed, the MBTA's noncompliance was exacerbated when it decreased the headways on this service on December 28, 1985. As a result of this action, Hudson alleges that the number of MBTA trips has increased to the point where its buses operate at times only several minutes prior to Hudson's buses.

Hudson further alleges that the MBTA violated a Massachusetts State law which allegedly gives preference to existing private carriers if a public authority wishes to introduce service over the same route. Mass. Gen. Laws Ann. ch. 161A, Section 5(k) (West 1976).

Hudson states that it attempted to resolve its problems with the MBTA by negotiating with the MBTA. Pursuant to an agreement that was negotiated between the parties, Hudson would release the MBTA from any claims against it for competitive service and the MBTA would drop half of its service on Route 326 as of January 1, 1986, and completely discontinue its service on Route 326 as of March 1986.

The agreement was, however, never put into effect. Since Hudson has never been able to learn the reasons for this failure, it filed this complaint with MBTA.

RESPONSE

UMTA sent a copy of the complaint to the MBTA on March 24, 1986, and provided it with 30 days from receipt to respond to the allegations. The MBTA's response is dated April 24, 1986.

The MBTA asserts that the service on Route 326 is not in competition with Hudson's service. The MBTA states that it began this service on June 26, 1973, and that it obtained the operating rights to provide the service by acquiring them from another company in 1968 and its assumption of the operations of a second company.

The MBTA states that Hudson filed a claim for \$3 million in damages against the MBTA for the operation of Route 326 in 1981. The claim was based on a violation of Mass. Gen. Laws Ann. ch. 161A, Section 5(k) (West 1976). The MBTA states that it denied the claim since it was not filed within 6 months of the commencement of the service as required by Mass. Gen. Laws Ann. ch. 161A, Section 14(a) (West 1976). The MBTA includes a copy of the relevant portions of the statute.

On January 27, 1981, the MBTA states that Hudson filed an administrative complaint with UMTA making many of the same allegations made in this complaint. The MBTA states that UMTA never formally disposed of the complaint.

The MBTA states that Hudson did not raise the issue again until April 29, 1985, when it approached the MBTA to negotiate for the operation of the service along Route 326 under contract with the MBTA. In exchange, Hudson would release the MBTA from any and all outstanding competition claims.

The MBTA states that it presented this proposal to its Board of Directors on December 18, 1985. The Board rejected the proposed transfer of the operations of Route 326 pending further analysis of revenue gains and losses. The MBTA claims that negotiation continued and that a possible transfer was contemplated. The transfer did not occur, however, because the MBTA had found that: 1) the public of the city of Medford opposed the transfer; 2) Hudson had no equipment accessible to handicapped persons; 3) Hudson had no adequate means to monitor the accuracy of the number of MBTA pass users that Hudson would carry; and 4) there would be no cost savings to the city of Medford.

The MBTA claims that it had to increase its service along Route 326 because of increased patronage, not to increase its competition with Hudson.

Finally, the MBTA notes that consistent with UMTA's guidance on the involvement of the private sector, it has a local mechanism for the resolution of complaints. This is the procedure in Mass. Gen. Laws Ann. ch. 161A, Section 14(a). This requires the filing of a complaint within 6 months of the commencement of the MBTA's complained of service. The MBTA states that since Hudson did not do so within 6 months of June 26, 1973, when it began Route 326, that Hudson is barred from making this complaint.

REBUTTAL

UMTA sent a copy of the MBTA's response to Hudson on May 7, 1986. Hudson states that it received the letter on May 13, 1986, and its rebuttal is dated June 10, 1986.

In its rebuttal, Hudson discusses how the MBTA did not comply with Mass. Gen. Laws Ann. ch. 161A, Section 5(k) (West 1976) when Route 326 was begun in 1973 and that the MBTA has not even attempted to justify its compliance with this State law. Hudson also claims that the MBTA has not complied with the requirements of this law in the provision of other bus service.

Hudson states it appeared that the agreement to transfer the operations on Route 326 was in place for the January 1, 1986, transfer, but that it never happened. Hudson states that it was informed on March 12, 1986, that the MBTA's Board disapproved the action. Hudson notes that further negotiations proved unsuccessful.

Hudson claims that its remedy under Mass. Gen. Laws Ann. ch. 161A, Section 14(a) (West 1976) is not its sole remedy and that it may complain under Section 3(e) of the UMT Act. Hudson states that

the MBTA did not comply with this requirement in the establishment of the service in 1973 and did not do so when it supplemented the service in December 1985.

Hudson states that while the MBTA does not believe that its decreased headways on Route 326 compete against Hudson, the result is, nonetheless, increased competition.

Hudson responds to the four reasons given by the MBTA for not putting the transfer into effect. Hudson states that the first reason given, that the public does not like Hudson's service, is incorrect and unfair. Hudson provides a discussion of the history of its operations and concludes that the quality of its service cannot be validly raised as a reason not to transfer the service.

Second, Hudson states that it was going to keep the fares the same as the MBTA charged on Route 326. Third, Hudson says that it cannot afford to purchase accessible equipment since it is not a subsidized carrier. Fourth, Hudson states that it could have activated its fare collection machinery to monitor the accuracy of the number of MBTA passes used on the service.

Hudson concludes by stating that it wants UMTA to order MBTA to cease its operations on Route 326 so that Hudson will have the "opportunity to provide bus service over Route 326 free from competition with MBTA."

DISCUSSION

The first issue that Hudson raises concerns an alleged violation of Massachusetts State law. Mass. Gen. Laws Ann. ch. 161A sec. 5(k) (West 1976). The statutory provision cited by the parties relates to the provision of service by the MBTA in competition with private operators. To the extent that the issue raises requires UMTA to review the MBTA's compliance with this provision, UMTA does not have the competence to interpret Massachusetts law nor the jurisdiction to determine compliance with it.

The alleged violation could also be construed as raising a section 3(e) issue concerning the MBTA's compliance with its private sector dispute resolution process. UMTA does review disputes concerning compliance with local procedures for resolution of disputes. 49 Fed. Reg. 41,310, 41,312 (Oct. 22, 1984). The issue raised here, however, concerns the MBTA's compliance with the state provision in instituting the service in 1973. As the complaint is raised thirteen years after the alleged violation occurred, UMTA will not review this claim as Hudson raises the issue in an untimely manner.

Second, Hudson alleges noncompliance with section 3(e) and Massachusetts law when the MBTA decreased headways on Route 326 in December 1985. Hudson claims that it provides 14 daily trips, Monday through Friday, from Medford and 12 daily trips, Monday through Friday, from Medford Square. Hudson provides copies of two MBTA schedules for Route 326, both dated December 28, 1985. The first reflects the schedule for the service if the transfer of service to Hudson was completed and the second reflects the service without the transfer to Hudson. Neither, however, indicates how much additional service the MBTA began to provide by reducing headways in comparison to the previous level of service. UMTA is unable to determine if the decrease of headways constituted "new or restructured service" and therefore will not apply UMTA requirements for private sector involvement in planning and implementing new or restructured service to the decrease of headways on Route 326.

Hudson's third allegation concerns the proposed transfer of service operation to a private operator. UMTA finds that this plan to transfer service constitutes "new or restructured service" as contemplated by UMTA Circular 7005.1, "Documentation of Private Enterprise Participation Required for Sections 3 and 9 Programs" (Dec. 5, 1986). Paragraph 4 defines "new or restructured services" as a significant service change. This may involve any of the following:

establishment of a new mass transportation service; addition of a new route or routes to a grantee's mass transportation system; a significant increase or decrease in service on an existing route in a grantee's mass transportation system; a significant realignment of an existing route in a grantee's mass transportation system; or a change in the type or mode of service provided on a specific regularly scheduled route in a grantee's mass transportation system.

Here, the transfer of operations to another entity, i.e. Hudson, clearly is a significant service change as it changes the type of service on a specific regularly scheduled route. The MBTA therefore must comply with the guidelines of Circular 7005.1 for new or restructured service.

Circular 7005.1, as well as predecessor guidance documents, do not set forth the steps that a grantee must take to involve and consider private enterprise in planning and implementing new or restructured service. The Circular instead leaves this to the local process as developed in the required grantee private enterprise consideration policy statement. Circular 7005.1 at paragraph 5.

Consistent with this requirement, the MBTA developed a process and submitted it to UMTA on August 7, 1986. The copy sent to UMTA states that the policy "will be incorporated into the daily operations of the Authority." The MBTA's process sets forth three policies regarding the planning of new or restructured service: 1. notify private carriers when new or restructured service is considered; 2. notify private carriers of the initiation and progress of all studies on transit service; and 3. notify private carriers of all public meetings regarding transit service. The policy statement also sets forth the implementation details for these policies.

Since the controversy in this complaint arose before the MBTA submitted this policy to UMTA, the MBTA may not have followed its specific steps. Nonetheless, because UMTA's guidance has stated since October 22, 1984, that such a local process for the involvement of the private sector is needed before instituting new or restructured service, UMTA examines the steps that the MBTA went through in its attempts to transfer the operations of Route 326.

UMTA finds that the MBTA did not follow an adequate process to consider the private sector. Although the MBTA clearly did consider and negotiate with one private provider, i.e. Hudson, in the transfer of this service, such action is not consistent with UMTA's policy, which stresses competition and the ability of all private operators to participate in the planning and provision of service.

The complainant here must realize that it is not entitled to special treatment simply because it already provides service along the corridor in which it seeks to expand operations. It must compete fairly with other interested private operators. UMTA recipients are required to provide a forum for such fair competition and to fairly evaluate all competitors.

In fact, UMTA's Third Party Contracting Guidelines, Circular 4220.1A provides contracting guidelines that require, in most instances, that recipients follow a competitive process in contracting out for goods or services. On January 21, 1987, then UMTA Administrator Ralph Stanley sent a letter to UMTA recipients reiterating that "[a]ll transit management, planning, route or other contracts, whether new or extending existing contracts, must be awarded in accordance with" Circular 4220.1A. Thus, unless one of the very limited sole source procurement exceptions applies, the MBTA could only contract the Route 326 service out to a private operators through a competitive process.

CONCLUSION

UMTA concludes that the MBTA did not follow UMTA section 3(e) requirements for the involvement of the private sector in planning to transfer Route 326 to a private operator, which is a restructuring of service. As the MBTA apparently is no longer contemplating such a transfer, there is no need for it to undertake such a process at this time. If at some later date the MBTA again contemplates the transfer of this route or any other route to a private operator, the MBTA must comply with UMTA Circular 7005.1 and the MBTA's policy statement adopted July 23, 1986. Further, in contracting with private operators to provide service, the MBTA must comply with the contracting guidelines of Circular 4220.1A.

Rita Daguillard
 Rita Daguillard
 Attorney-Advisor

11/6/87
 Date

Theodore A. Munter
 Theodore A. Munter
 Acting Chief Counsel

11/6/87
 Date



U.S. Department
of Transportation

Urban Mass
Transportation
Administration

The Deputy Administrator

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

NOV 10 1987

The Honorable Charles E. Grassley
United States Senate
Washington, D. C. 20510

Dear Senator Grassley:

This is in response to your letter enclosing a letter from Mr. Stewart Huff, Chairman of the Board of Trustees of the Sioux City Transit System (SCTS), regarding the effect of the Urban Mass Transportation Administration's (UMTA), rulemaking on "Charter Service." Each of the many issues raised in Mr. Huff's letter will be addressed.

On April 13, 1987, UMTA published its revised regulations regarding the charter service which UMTA recipients may provide using UMTA-funded equipment and facilities. A copy of these regulations is enclosed.

Issue No. 1

"The regulation places unreasonable restrictions on our [SCTS's] efforts to respond to specific public service transportation needs,"

UMTA's Response to Issue No. 1

UMTA's charter service regulations only address how an UMTA recipient may use its UMTA-assisted equipment and facilities. Because UMTA is not authorized to provide Federal assistance for charter service and because only incidental charter service may be performed with UMTA-assisted equipment and facilities, UMTA must take the necessary steps to assure that the equipment and facilities UMTA finances are not misused for purposes unauthorized by Federal statute. Federal assistance is not available for every type of service an UMTA recipient may be requested to supply.

Issue No. 2

"The regulation ... forces the underutilization of our public transit equipment and facilities in which taxpayers have invested,"

UMTA's Response to Issue No. 2

UMTA makes capital assistance available on the understanding that a recipient needs the equipment or facilities for mass transportation purposes. UMTA would note that if a recipient's UMTA-assisted equipment and facilities are underutilized, the recipient may have excess property that must be disposed of in accordance with the terms of OMB Circular A-102, Attachment N.

Issue No. 3

"The regulation ... eliminates a source of needed revenue for our financially strapped transit system."

UMTA's Response to Issue No. 3

Overall, UMTA believes that the provision of charter service to its recipients is more costly than the revenues that may be collected. This issue is more fully discussed in the preamble to the regulations at 52 Fed. Reg. 11932, April 13, 1987:

UMTA does not doubt that some recipients earn profits from their charter services. Many of the commenters stated that these revenues equal 1, 2, or 3 percent of their total revenues. While UMTA cannot deny that these amounts of revenues may be important to these recipients, they do not appear to be so enormous that their loss will seriously affect these recipients.

Furthermore, it is still UMTA's position that mass transportation is a local concern. Thus, while a loss of charter revenues may have an adverse impact on the services that these recipients are able to provide, we believe that such losses are the responsibility of the State and local government to correct.

Issue No. 4

The regulation is, "anti-competitive."

UMTA's Response to Issue No. 4

In drafting the regulations, UMTA determined that its statutory mandates to protect private charter operators from unfair competition from UMTA recipients and to ensure that UMTA-funded equipment is used for mass transportation require that the charter service regulations be as restrictive as they are. UMTA does not have the legal authority to provide Federal assistance for charter service. UMTA, therefore, does not have the legal authority to support its recipients' efforts to increase competition in charter

service. UMTA believes fair competition is best assured by providing a level playing field for all operators. To do this, UMTA removed the advantages enjoyed by recipients of UMTA assistance when they compete with entities that do not receive Federal assistance.

Issue No. 5

The regulation is, "federally intrusive."

UMTA's Response to Issue No. 5

Because UMTA's new charter service regulations impose fewer administrative burdens than were imposed by UMTA's previous charter bus regulations, UMTA believes the new regulations are far less intrusive than either the former charter bus regulations or the proposed charter bus regulations set forth in the notice of proposed rulemaking. For example, the preamble to the new regulations states at 52 Fed. Reg. 11918, April 13, 1987, "We have taken special pains to minimize the administrative and paperwork burdens imposed by the rule to ensure that all recipients will be capable of complying without hardship." In addition, the preamble notes that "UMTA has decreased the administrative burden on recipients in the public participation process by eliminating the hearing requirement," that was included in the notice of proposed rulemaking. 52 Fed. Reg. 11926, April 13, 1987.

Issue No. 6

The regulation is, "inconsistent with UMTA's privatization initiative since it will force private companies to choose between charter service or seeking line-haul service contracts with [a] public transit system."

UMTA's Response to Issue No. 6

Section 3(f) of the Urban Mass Transportation Act of 1964, as amended (UMT Act), states that its restrictions apply to the recipient, "or any operator of mass transportation," for the recipient. Therefore, substantially similar restrictions must be imposed on charter service by private operators who provide mass transportation service for recipients and on charter service by recipients. 52 Fed. Reg. 11918, April 13, 1987. Although UMTA is aware of a possible conflict between UMTA's private sector policies that encourage private operators to engage in mass transportation operations for recipients and the restrictions imposed by the charter service regulations on those private operators that provide mass transportation service for recipients, UMTA is bound by the terms of its legislation, which requires consistent treatment for both recipients and those private operators that provide mass transportation service for recipients. 52 Fed. Reg. 11919, April 13, 1987.

Issue No. 7

"The regulation is not authorized by statute: it is based on a regulatory approach specifically rejected by Congress in 1974 and exceeds UMTA's authority under section 3(f) and 12(c)(6) of the Urban Mass Transportation Act."

UMTA's Response to Issue No. 7

The statutory basis for the regulations is section 12(c)(6) and section 3(f) of the UMT Act. The regulations implement those two provisions of the UMT Act. The first provision, section 12(c)(6), has been part of the UMT Act since its enactment, and defines "mass transportation" specifically to exclude charter service, sightseeing service, or school bus service. The second provision, section 3(f), was enacted by Congress in the early 1970's and is more specific. Section 3(f) requires all applicants for UMTA assistance for the purchase or operation of buses to enter into an agreement with UMTA to ensure that the private intercity charter bus industry is not foreclosed from the charter business by public operators using publicly funded equipment.

I should also point out that Congress recently has passed legislation in a related area. As you know, the Surface Transportation and Uniform Relocation Assistance Act of 1987, enacted on April 2, 1987, reauthorized both the transit and highway programs for five years. Section 339 of that Act amended the laws governing the Interstate Commerce Commission. This provision precludes a public transit authority that has received Federal assistance from acquiring interstate charter rights beyond the area in which it provides regularly scheduled mass transportation services if any private operator is providing the service or is willing and able to provide the proposed service. This is noteworthy because UMTA has taken a parallel approach in its charter service regulations, which apply within a transit operator's service area.

A more detailed legal analysis is set forth in the preamble to the regulations at 52 Fed. Reg. 11930 and 11931, April 13, 1987. UMTA believes the charter service regulations are fully within UMTA's legal authority to administer UMTA's mass transportation program.

Issue No. 8

"Congress should act immediately to withdraw this regulation."

UMTA's Response to Issue No. 8

UMTA is aware of the congressional guidance set forth in the House report language accompanying the FY 1988 Department of Transportation and Related Agencies Appropriations Bill (H.R. 2890) pertaining to the impact of UMTA's new regulations on

non-profit entities that in the past have relied on charter service provided by UMTA recipients. That report language directs UMTA to undertake a rulemaking on a proposed amendment to the regulations that would permit certain entities to seek bids from public transit operators, notwithstanding the requirements of the regulations. That report language also directs UMTA to provide transit operators interim guidance that such a rule change is under consideration.

UMTA is now in the process of developing an appropriate notice of proposed rulemaking. In so doing, UMTA will be seeking to discern what segments of the public are actually unable to obtain charter service on a reasonable basis from the private sector, and thus must rely on UMTA recipients for service to meet their needs.

Issue No. 9

"We believe an investigation is in order as to why section 604.11(b)(3) came to be included in a federal regulation administered by the Department of Transportation."

UMTA's Response to Issue No. 9

UMTA's charter service regulations at 49 C.F.R. § 604.11(b)(3) require, as part of the public participation process, that the recipient send a copy of its notice of intent to provide charter service to the United Bus Owners of America (UBOA) and the American Bus Association (ABA). In proposing this requirement, UMTA has explained in its notice of proposed rulemaking set forth at 51 Fed. Reg. 7898, March 6, 1986, that:

It is UMTA's opinion that notice to these organizations would be helpful. UBOA and the ABA are the trade associations representing virtually all private charter bus companies. Consequently, notice to them would be another way to ensure that notice is received by the potential willing and able private charter operators in the proposed service area. This could be effectively done by UBOA and the ABA through their newsletters.

The preamble to the new charter service regulations states simply at 52 Fed. Reg. 11927, April 13, 1987, that:

UMTA believes that actual notice to these two trade associations is important to ensure that there is as wide a distribution as possible in order to get as large a response as possible.

Issue No. 10

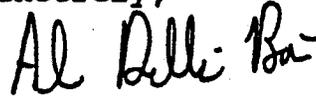
"SCTS is effectively prohibited from satisfying the special travel interests of our citizens," because the nearest charter operator is located in another State.

UMTA's Response to Issue No. 10

Among the approaches UMTA considered in establishing a proper balance between the provision of charter service by the private sector and UMTA recipients was a plan in which a recipient would be authorized to provide charter service if a customer had made a reasonable attempt to secure service from private operators. Having concluded an extensive rulemaking process in which more than 300 comments were received and analyzed, UMTA made a decision not to adopt regulations that would permit a grantee to be a "charter provider of last resort." One problem with the "charter provider of last resort" approach is that UMTA lacks the means to impose a penalty on a charter customer that misleads a recipient to believe that the customer genuinely made an adequate effort to secure service from private operators. In addition, by permitting charter service customers to continue their habitual practice of meeting their charter needs by securing the services of UMTA recipients, UMTA would be undermining the efforts of private operators to serve the public by making proper investments and other improvements. While UMTA recognizes that there might be, in a few instances, some minimal inconvenience to the public resulting from the transfer of charter relationships from UMTA recipients to private operators, UMTA's regulations were drafted to include exceptions that would preclude the imposition of actual hardship on the public. In drafting the regulations, UMTA determined that its statutory mandates to protect private charter operators from unfair competition from UMTA recipients and to ensure that UMTA-funded equipment is used for mass transportation require that the charter service regulations be as restrictive as they are.

In summary, UMTA believes its charter service regulations are fair and reasonable.

Sincerely,



Alfred A. DelliBovi

Enclosures



US Department
of Transportation

Urban Mass
Transportation
Administration

The Deputy Administrator

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

NOV 12 1987

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RECEIVED

Mr. Kevin L. Doyle
Assistant Transportation Planner
Johnson County Council of Governments
410 E. Washington Street
Iowa City, Iowa 52240

Dear Mr. Doyle:

This is in response to your recent request for an exception under 49 CFR 604.9(b)(4) which would allow Iowa City Transit, Coraville Transit, and University of Iowa CAMBUS to operate charter service on the occasion of the 1988 World Ag Expo, which will be held in the Amana Colonies, Iowa, from September 7 through 10, 1988.

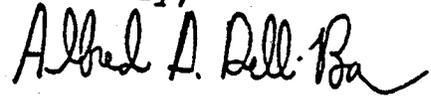
The preamble to the regulation, at page 11925, explains that the Urban Mass Transportation Administration (UMTA) will grant an exception under section 604.9(b)(4) only for events of an extraordinary, special and singular nature. Your letter indicates that this international agricultural exposition, which has been held in the United States only twice in the past twenty years, is expected to draw between 200,000 and 300,000 visitors. Given the international importance of the exposition and the large number of attendees expected, UMTA recognizes it as being the type of event envisaged by section 604.9(b)(4). Moreover, we understand from your letter that the resources of the one private operator in your area which has been determined "willing and able," are insufficient to meet the service needs for this exposition. Also, the American Bus Association has advised us that the local private operators have agreed that the three UMTA recipients in question should be allowed to provide charter service for this event.

For these reasons, I hereby authorize Iowa City Transit, Coraville Transit, and University of Iowa CAMBUS to make available buses to assist in accommodating the need for charter service during the World Ag Expo, from September 7 through 10, 1988. This exception is valid only for shuttle service between the parking lots and the exposition site. Should any of the three recipients to whom this

exception is granted, wish to perform operations other than shuttle service, they must request an additional exception under the procedures of 49 CFR 604.9(d).

You are reminded that in accordance with section 604.9(e) of the regulation, "Any charter service that a recipient provides under any of the exceptions of this part must be incidental charter service." The preamble to the regulation cites as an example of "incidental service" service using vehicles which do not exceed the recipient's spare ratio by more than 20 percent. Your letter indicates that the 20 percent ratio for Iowa City Transit would be 4 vehicles; for Coraville Transit, 1 vehicle; and for University of Iowa CAMBUS, 2 vehicles. Consequently, the number of vehicles used in charter service by these recipients during the exposition should not exceed these figures. Further guidance on determining what constitutes "incidental service" is provided in the preamble. 52 Fed. Reg. 11926, April 13, 1987.

Sincerely,



Alfred A. DelliBovi