



U.S. Department
of Transportation

Urban Mass
Transportation
Administration

The Deputy Administrator

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

NOV 23 1987

The Honorable Dave Nagle
House of Representatives
Washington, D.C. 20590

Dear Mr. Nagle:

This is in response to your letter enclosing a letter from your constituent, Mr. John Lundell, pertaining to the effect on the public of the Urban Mass Transportation Administration's (UMTA) rulemaking on "Charter Service."

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.

In particular, Mr. Lundell and you are concerned about the impact of the lack of charter service available to some communities alleged to be caused by the regulations' prohibition on UMTA recipients from providing any charter service if a private charter company responds to the recipient's public notice expressing interest in being the provider. In drafting the charter service 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 your letter, you also requested UMTA to, "...comment on the possibility of exemptions being made for UMTA recipients providing the service if the private company will not."

In general, UMTA believes that the private charter industry is able to serve the Nation's charter needs on reasonable terms, as explained in the preamble to the regulations set forth at 52 Fed. Reg. 11924, April 13, 1987. UMTA, however, has recognized that for a variety of reasons, a private operator may be unwilling or unable to perform certain charter trips. UMTA believes that a recipient may make the "willing and able" process more effective by expanding the content of its charter notice to include information which would be helpful to the private operator in deciding whether to respond. Thus, in addition to the

information required by 49 C.F.R. § 604.11(c), i.e., days, times of day, geographic area, and category of revenue vehicle to be used, a recipient may include in its notice descriptions of destination, trip purpose, or clientele to be served. As long as the notice does not discourage a response from a person who meets the criteria for a "willing and able" operator, a recipient has flexibility in using descriptions which allow private operators to decide whether they desire to perform a particular charter trip.

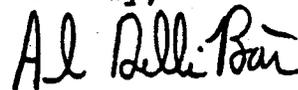
In addition to this formal notice process, recipients are encouraged to engage private operators in a dialogue through other means as well, such as written communications, conferences, or informal meetings. A recipient may also provide in its notice a telephone number that a private operator may call to obtain further information on the proposed service.

Furthermore, a recipient may perform a certain charter trip, even though it has been determined that there are "willing and able" private operators in its service area, when there is an agreement to this effect between the recipient and the private operator. The recipient's charter notice must, however, have provided for this type of agreement. If it did not, the recipient must, before undertaking the charter trip in question, amend its notice to refer specifically to such an agreement.

Such measures are in keeping with the spirit of the charter service regulations, which is to encourage cooperation between UMTA recipients and the private sector. Through their judicious use, recipients and private operators should be able to work together to ensure that critical consumer needs for charter service will be met.

I hope that this will helpful.

Sincerely,



Alfred A. DelliBovi

Enclosure



U.S. Department
of Transportation

Urban Mass
Transportation
Administration

The Administrator

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

NOV 23 1988

Barry M. Shulman, Esq.
Scolaro, Shulman, Cohen,
Lawler & Burstein, P.C.
90 Presidential Plaza
Syracuse, New York 13202

Re: Syracuse & Oswego Motor Lines, Inc.
v. Central New York Regional
Transportation Authority,
NY-05/86-01

Dear Mr. Shulman:

This responds to your request on behalf of the Central New York Regional Transportation Authority (CENTRO) for reconsideration of the decision of the Chief Counsel in the above-referenced matter. In his decision, the Chief Counsel found that CENTRO was impermissibly providing charter service between Manley Field House and Crouse-Irving Memorial Hospital (Hospital). You dispute the Chief Counsel's findings and state that the Urban Mass Transportation Administration (UMTA) should determine that the service is mass transportation as defined in UMTA's charter regulation, 49 CFR part 604.

You base your request on evidence which was not available at the time this complaint was filed in 1986, but which you feel should be taken into consideration in order to properly characterize the service in question.

First, in support of your contention, you state that the service in question is open door, since it is published in CENTRO's regularly published schedules which have been in print for over two years. While the Crouse-Irving Memorial shuttle timetable is different in format from other CENTRO schedules (e.g., undated, small card, restricted hours, etc.), CENTRO's Director of Operations argues that such differences are only due to the nature and extent of a particular service. UMTA has similarly determined that while CENTRO does publish a variety of different types of schedules (which have been submitted as evidence), these differences are due to the nature of a particular service and do not automatically categorize it as impermissible charter service.

Second, overlapping with the issue of open door, is the issue of exclusive use. You have submitted a form, devised by CENTRO's General Manager, which allowed staff to take a sampling, over a seven day period, of the bus ridership on the route in question. The sampling clearly illustrates that this shuttle is not for the exclusive use of employees of the Hospital and that members of the public board and disembark at points along its route.

Also, the General Manager of CENTRO has submitted bus driver procedure forms which clearly state that "[t]his is regular route service, and anyone can ride." Additionally, several bus drivers on the Crouse-Irving Memorial shuttle route have submitted Incident Reports in their own words and handwriting. The bus drivers indicated that they are instructed to pick up all members of the public at all stops along the scheduled route.

Moreover, after reviewing information submitted by CENTRO, UMTA has determined that the lot can be accessed by cars with Syracuse University permits, certain construction workers on building projects at the University, University faculty members, some University students as well as by those in possession of visitor permits. Also, the bus stop can be accessed by walking into the parking lot, as there is no restriction placed on physically entering the lot.¹

Therefore, while the Chief Counsel held in the original decision that it was highly unlikely that the Hospital's aim was to open the service up to the general public, we now find, based on all new information in the record, that there is an open door policy. The Crouse-Irving Memorial shuttle is not restricted to a particular group (i.e., hospital employees).

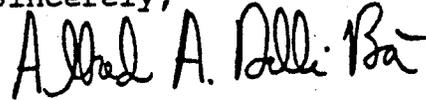
Third, in support of your contention, you argue that the shuttle service is under CENTRO's control. By your own admission, it is the Hospital which both solicited the service and pays for it. However, according to the contract between CENTRO and the Hospital (which you submitted as evidence), it is CENTRO that has exclusively determined the passenger stops for the shuttle as well as the deployment of vehicles for the route.

¹ It is important to note that the complainant, Syracuse & Oswego Motor Lines, Inc., had submitted a video cassette recorded by its President, Russell Ferdinand, on October 17, 1988. This tape depicted the layout of the Manley Field House parking lot as well as footage of alleged shuttle buses passing by riders waiting at designated bus stops. However, in a letter to UMTA dated November 1, 1988, Mr. Ferdinand has requested that this video cassette be withdrawn from evidence in determining CENTRO's appeal. UMTA granted Mr. Ferdinand's request, and has not considered the said video cassette as evidence in rendering this decision. Moreover, by letter dated November 8, 1988, counsel for CENTRO, which had been advised of Mr. Ferdinand's request to withdraw the cassette, indicated that CENTRO agreed to the withdrawal.

UMTA now finds that there is enough new information to determine that the shuttle service is under the control of the grantee, thus, bringing it within the definition of permissible mass transportation.

UMTA recognizes that there is a sometimes overlapping nature to mass transportation and charter service. However, UMTA concludes, based on the new information submitted by complainant and respondent in response to previous findings, that the service being provided by CENTRO is permissible mass transportation as per the definition in the preamble to the regulation.²

Sincerely,



Alfred A. DelliBovi

cc: Russell Ferdinand, President,
Syracuse & Oswego Motor Lines, Inc.

² The definition of mass transit is summarized in the preamble to the regulation, as follows: (1) it is under the control of the grantee; (2) it is designed to benefit the public at large; and (3) it is open door. 52 Federal Register 11920, April 13, 1987.



U.S. Department
of Transportation

Urban Mass
Transportation
Administration

Headquarters

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

URO7

DEC 10 1987

Mr. Rex C. McCall
Assistant General Counsel
City Utilities of Springfield
301 E. Central
P.O. Box 551
Springfield, Missouri 65801



Dear Mr. McCall:

Your recent letter to Mr. Lee Waddleton, Regional Administrator of the Urban Mass Transportation Administration (UMTA) has been referred to us for comment. We are concerned that your letter indicates that you have misinterpreted UMTA's charter regulation. We would like to clarify the issue raised in your letter in order to avoid any violation of the regulation by City Utilities of Springfield (CUS).

Your letter states that CUS is operated by the City of Springfield. You explain that CUS provides bus service for another City entity, the Convention and Visitors Advisory Board (CVAB). You indicate that it is your belief that this service is not charter service, since the same legal entity is both the provider and the beneficiary of the service. It is your opinion that the service does not conform to the charter criteria of being to a distinct group of people and pursuant to a contract between two parties.

UMTA does not share your view that separate divisions of a city government are one and the same entity. UMTA considers a municipal department which receives UMTA funds for mass transit purposes, as distinct from another department which is engaged in different activities and performs different functions. It would indeed undermine UMTA's mission of providing funding for mass transit purposes, if such funding could be utilized for other purposes on the pretext that the recipient is part of a larger entity that is free to use it as it chooses.

The issue of the provision of service by a transit division of a city government to another municipal department has been dealt with in UMTA's recently published Charter Questions and Answers, 52 Federal Register 42248 (November 3, 1987). The answer to question 33 clearly affirms that UMTA considers such movements to be charters within the definition of the charter regulation. UMTA states that a transit authority that wishes to provide service of this type must comply with the requirements of the regulation. A copy of these Questions and Answers is enclosed for your information.

Therefore, if CUS is now providing such bus service to the CVAB, it should discontinue doing so immediately. Any continuation of such practices could jeopardize CUS' Federal transportation assistance.

Please feel free to contact this office if you have any questions or need further guidance in the interpretation of UMTA's charter regulation.

Sincerely,


Theodore A. Munter
Acting Chief Counsel

Enclosure

cc: Jeanmarie Homan, URO-7



U.S. Department
of Transportation

Urban Mass
Transportation
Administration

The Administrator

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

DEC 10 1987

File charter
File charter
URO-3
Pillsbury
v2a

Mr. David I. L. Sunstein
Sun Coach Lines
1721 Busch Street
McKeesport, Pennsylvania 15132

Dear Mr. Sunstein:

This is in response to your letter pertaining to the Port Authority of Allegheny County's (Port Authority) annual charter permit charge of \$1,000.

At the outset, we would like you to know that the Urban Mass Transportation Administration (UMTA) does not provide Federal assistance to its recipients to purchase certificates to operate charter service. We are unaware of any records in our possession which would support your belief that UMTA did, in fact, provide Federal assistance in 1964 to the Port Authority to purchase all Pennsylvania Public Utility Commission Charter and Special Operations certificates to operate within Allegheny County.

Although UMTA is not empowered by law to regulate Port Authority's administrative charges in connection with issuing charter permits, UMTA has expressed its concern to the Port Authority about its annual charter permit fees. Enclosed is a copy of the Port Authority's response and an opinion of its counsel setting forth the basis in Pennsylvania law for the Port Authority's charter permit fees. In its letter, Port Authority claims its fees to cover the expenses of administering its charter permit program are reasonable. The Port Authority also states that the fees will be adjusted to reflect their experience.

For these reasons, UMTA will not take further action in this matter.

Sincerely,

Alfred A. DelliBovi
Alfred A. DelliBovi

Enclosure

EAGLE BUS, INC.)	
Complainant)	
)	
v.)	
)	NY-02/86-02
)	
NEW YORK CITY TRANSIT AUTHORITY,)	
Respondent)	

SUMMARY

Eagle Bus, Inc. (Eagle) filed this complaint with the Urban Mass Transportation Administration (UMTA) alleging that the New York City Transit Authority (NYCTA) had violated the provisions of the Urban Mass Transportation Act of 1964, as amended (UMT Act), and the implementing policy in its planning and provision of mass transportation service from Staten Island to Manhattan. After a thorough review of the materials submitted by the parties, UMTA finds that the NYCTA violated Sections 3(e), 8(e), and 9(f) of the UMT Act and the implementing policy by failing to involve the private sector in plans to implement new or restructured service. However, given the modest level of the service actually implemented and thus the de minimis nature of the NYCTA's violation, UMTA will not require the NYCTA to follow a public participation process with respect to this service. The NYCTA should nonetheless follow the guidelines set by its own private sector policy in any future planning or provision of new or restructured service.

COMPLAINT

On February 27, 1986, Eagle filed a complaint with UMTA regarding NYCTA's proposed service from Staten Island to Manhattan via New Jersey.(1) Eagle alleged that it would be adversely affected by this service if it were actually provided. Eagle furnished several attachments with its letter, including a copy of its correspondence with the NYCTA concerning the service, a copy of the information that the NYCTA had filed with the New York City Board of Estimate to obtain approval for the service, and a letter to Eagle from the Interstate Commerce Commission (ICC) concerning the operating authority needed to provide this service.

UMTA responded by letter dated March 28, 1986, acknowledging that the information presented indicated possible violations of the UMT Act and the policy guidance on the involvement of the private sector in the provision of mass transportation services that UMTA funds. Pursuant to UMTA's procedures for the resolution of such

(1) The service in question is referred to in this decision as "express service." It is in fact only partial express service, since both under the existing and the proposed plan, pick-ups are scheduled on Staten Island and in Brooklyn.

complaints, UMTA ordered Eagle to attempt to settle its dispute with the NYCTA at the local level for at least 30 days. If after that time no resolution was reached, Eagle was asked to request in writing that UMTA initiate a formal investigation of the complaint.

On May 1, 1986, Eagle did write to UMTA to state that it had attempted to resolve its problems and described the conversations that it had had with the NYCTA. Since, however, no resolution had been reached, Eagle asked UMTA to treat its letters as a formal complaint. The focus of Eagle's complaint was that the NYCTA was in the process of planning service over the same routes served by Eagle, and that Eagle had not been given the opportunity to participate in the planning and provision of the service. Eagle noted that as of the writing of this letter, the new service was not yet operational.

RESPONSE

UMTA reviewed the materials submitted by Eagle and determined that they did constitute a private sector complaint. UMTA sent a copy of both of Eagle's letters to the NYCTA on May 13, 1986, and provided it with 30 days from receipt to respond to the complaint. The NYCTA's response is dated June 10, 1986.

In its response, the NYCTA asserts that Eagle's complaint is without merit and that the portions of the UMT Act that Eagle cited are not applicable to the service at issue. NYCTA argues that the service does not involve new routes or new routing in the boarding and alighting areas. The NYCTA states that the same number of express lines will be operated to Manhattan as before and that the only change is that the express portion of NYCTA's existing service would be through New Jersey instead of through Brooklyn.

The NYCTA states that the reason for this change is to make the service faster and to save time for the patron. If improvements in the quality of service result in violations of the UMT Act, then the NYCTA argues that other improvements such as using new buses or air conditioned buses would also be violations.

The NYCTA argues that the changes will not introduce any additional levels of competition that have not existed since it began to provide service from Staten Island several years ago. In fact, the NYCTA states that Eagle had filed under Chapter 11 of the Federal bankruptcy laws and is, therefore, hardly able to adequately handle all of the transportation needs of Staten Island.

The NYCTA states that it has followed the required steps in order to operate this service and that it has the appropriate legal operating authority. It argues that its re-routing of service through New Jersey is not subject to the jurisdiction of the ICC, but rather to that of the New York City Board of Estimate, from which it has received proper authority. The NYCTA maintains that the Board of Estimate's authorization process included a public hearing held on December 19, 1985, at which Eagle could have presented its opposition.

The NYCTA provides a description of the service and indicated how it is different from the service provided by Eagle. First, the two operations have different pick-up and delivery points.

Second, the NYCTA explains that its service, unlike Eagle's, operates non-stop in New Jersey, i.e., it makes no pick ups or drop offs there. The NYCTA also stated that it had not begun to provide the service on routes x12 and x13.

Based on these facts, the NYCTA concludes by urging UMTA to reject Eagle's complaint.

REBUTTAL

UMTA sent a copy of the NYCTA's response to Eagle on July 7, 1986, and provided it with 15 days to rebut the evidence. Eagle's rebuttal is dated July 21, 1986.

Eagle's rebuttal makes three main points. First, Eagle takes issue with the NYCTA's argument that the service is not new and creates no new level of competition. Eagle describes the routing of the new service, emphasizing that it will operate from Staten Island to Manhattan over a route different from that now used by the NYCTA. Eagle provides maps of the service, which is to involve four bus lines described as x10, x12, x13 and x17. It also attaches copies of NYCTA's maps, showing how Eagle's service parallels or is identical to that which the NYCTA plans to provide. Eagle states that the change in route will create service to midtown Manhattan while the previous service was to downtown Manhattan. Since Eagle's service is to midtown Manhattan, it argues that the service is new and will increase competition.

Eagle responds to the NYCTA's statement that Eagle's service is not non-stop through New Jersey. Eagle states that its buses leave Staten Island, New York, and operate non-stop via New Jersey to New York, New York.

Eagle states that while it and the NYCTA may have different stops on Staten Island and New York, this is a difference without a distinction. According to Eagle, in the area served by both Eagle and the NYCTA in Manhattan, "different stops a few blocks apart in peak hours do not decrease competition and reduce the business available" to private operators.

Eagle asserts that the NYCTA'S proposed route will serve a different destination within Manhattan, and that the altered service will not reduce travel time. Instead, it will serve a completely different patron group, i.e., interstate and midtown commuters, the same group served by Eagle.

Eagle acknowledges that it did file under Federal bankruptcy laws, but stated that it is attempting to terminate its bankruptcy.

Eagle maintains that even conceding, arguendo, that the service is not new, the NYCTA must comply with UMTA's private sector policies since the service is significantly restructured. Eagle states that the NYCTA has no procedures to involve the private sector in the provision of such service.

In its second point, Eagle disputes the NYCTA's arguments that the NYCTA has the proper legal authority to operate the service. Eagle states that it did not present its case at the Board of Estimate's Hearing since that body was not the proper forum. Eagle states that since the proposed service involves interstate transportation, the matter is subject to the jurisdiction of the ICC.

In its third point, Eagle rebuts the NYCTA's arguments that the service does not constitute a violation of the UMT Act. Eagle contends that the NYCTA failed to involve Eagle in its plans to implement the new service, thereby violating Sections 3(e), 8(e), and 9(f) of the UMT Act, which require involvement of the private sector to the maximum extent feasible in the provision of service.

Eagle concludes by stating that the service is new and creates new competition, that it violates the ICC requirements, and that it violates the UMT Act. Eagle asks that UMTA grant appropriate relief.

REQUEST FOR ADDITIONAL INFORMATION

By letter dated March 5, 1987, UMTA requested additional information from the respondent. UMTA's letter stated that the materials submitted provide a description of routes x10, x12, x13, and x17 as they would be operated non-stop through New Jersey, but not as they were operated non-stop through Brooklyn. UMTA asked that this information be provided within 15 days.

The NYCTA's response is dated April 8, 1987. In its letter, the NYCTA states that only service along route x17 is in operation, since plans to operate service on the other three routes had not been implemented. NYCTA states that there were currently only two morning and two evening trips along the x17 line. NYCTA said that before operations through New Jersey began, the x17 route followed three service patterns in Manhattan, which it describes as follows:

- A trips) serving lower Manhattan;
- B trips) serving midtown Manhattan to 57th Street at 3rd Avenue;
- C trips) operating as a combination of A and B trips, serving lower and midtown Manhattan to 57th Street at 3rd Avenue.

NYCTA explains that it has chosen two of the four morning B trips and two of the five evening B trips to operate from Staten Island through New Jersey to midtown Manhattan via the Lincoln Tunnel. Morning trips proceed to 57th Street at 3rd Avenue, making no stops between the Lincoln Tunnel and Madison Avenue at 34th Street. Evening operations begin from 57th Street at 3rd Avenue. As in the morning, no stops are made between from 34th Street to the Lincoln Tunnel. These trips are identified as BJ trips.

NYCTA says that no change had been made in the local route path on Staten Island for these BJ x17 trips. The Manhattan route path did change, however, since entering Manhattan from the Lincoln Tunnel had made service below 34th Street impossible.

NYCTA maintains that the two remaining morning and three remaining evening B trips still operate non-stop through Brooklyn, with no change in their operating schedule. Likewise, according to NYCTA, all other A and C trips remain unchanged, and continue to operate express through Brooklyn.

Enclosed with NYCTA's letter were operating schedules, a public timetable, and a passenger information handout describing the revised xl7 routing through New Jersey.

COMMENTS ON ADDITIONAL INFORMATION

On April 17, 1987, UMTA forwarded to Eagle a copy of NYCTA's response to UMTA's request for additional information. Eagle was given 15 days from receipt to provide comments.

Eagle's response is dated May 1, 1987. Eagle's first comment concerns the NYCTA's statement that permission to operate the proposed express routes through New Jersey has been granted. Eagle contends that the NYCTA's service through New Jersey constitutes interstate transportation, and is thus subject to the jurisdiction of the ICC. Since the NYCTA has not obtained authorization from the ICC, Eagle contends, its provision of the service is invalid. Eagle states that it has filed a complaint against NYCTA with the ICC, and that a decision is expected.

Secondly, Eagle notes that Carol Coaches, Inc., a company owned and operated by Eagle, has begun servicing some of Eagle's routes, including the Staten Island to Manhattan via New Jersey route. Since Carol Coaches is now providing the service which is the subject of this complaint, Eagle asks that Carol Coaches be added or substituted as a complainant.

Third, Eagle states that NYCTA's BJ xl7 buses operate along Richmond Avenue on Staten Island. Eagle states that ten of Carol Coaches' schedules operate along Richmond Avenue, and that Richmond Avenue is a key traffic source for Carol, involving fifty percent of its traffic.

Eagle contends that since NYCTA began the service in question without consideration of the private sector, NYCTA should be considered in violation of the Sections 3(e), 8(e), and 9(f) of the UMT Act and implementing policy guidelines. Eagle concludes that UMTA should prohibit NYCTA's proposed service and grant relief as is appropriate under its applicable law and policy.

DISCUSSION

Before reaching the main issues raised by this complaint, UMTA believes that it is appropriate to address a subsidiary matter, namely Eagle's request that its affiliate, Carol Coaches, be added

as a complainant. Eagle states that Carol Coaches has assumed operation, under proper authority, of several of Eagle's routes, including the Staten Island to Manhattan through New Jersey route. Since Carol Coaches is a private operator entitled to the same protections under the UMT Act as Eagle, and since it is now performing the services on which this complaint is based, UMTA feels that its participation in this proceeding will not change or affect the issues raised. UMTA therefore accedes to Eagle's request that Carol Coaches be added as a complainant.

Having dispensed with this question, we will now proceed to examine the three main issues raised in this complaint, and which are as follows:

1) Whether the NYCTA was required to obtain ICC approval prior to implementation of its new express service

In its complaint, Eagle claims that since the NYCTA's planned Staten Island to Manhattan via New Jersey service is interstate, the NYCTA should have obtained prior authorization from the ICC. Eagle contends that since the NYCTA failed to obtain ICC authorization, its provision of the service is unlawful. Eagle states that it has filed a formal complaint with the ICC, and that the matter is now pending.

The NYCTA refutes Eagle's assertion that its new express service is subject to the jurisdiction of the ICC. It states that the service in question is exempted from the jurisdiction of the ICC by reason of the commercial zone exemption specified at 49 USC Section 1052(b) - i.e., authorizations received from the New York City Board of Estimate's and the New Jersey Department of Transportation lawfully enable the Authority to engage in the intrastate transportation of passengers over the length of the interstate routes involved.

Whatever the merits of these respective positions, UMTA feels that it has no authority to determine the jurisdiction of another body. Such a determination by UMTA is especially inappropriate in this case, where the matter has been formally raised before the ICC, which is expected to issue a decision on it. UMTA therefore declines to make a determination on the question.

UMTA's failure to decide the jurisdictional issue will have no effect on its funding of the NYCTA's mass transit projects. Under Section 3(a)(2)(A)(i) of the UMT Act, the Secretary may not make a grant unless the Secretary determines that the applicant has or

will have the legal capacity to carry out the proposed project.(2) This determination is based on assurances submitted by the applicant. In this case, the NYCTA has submitted evidence that it has obtained authorization from the New York City Board of Estimate, and has made assurances to UMTA that such authorization is valid. Therefore, unless an adverse finding is made by the ICC, UMTA must rely on the NYCTA's assurances that it has the requisite legal capacity to carry out the UMTA-funded projects. See Durango Transportation, Inc. v. City of Durango, Colorado, at page 7, CO-09/85-01 (February 24, 1987).

2) Whether the NYCTA's new express service constitutes "new or restructured service," requiring involvement of the private sector

Eagle's complaint alleges that in proposing to operate express bus service from Staten Island to Manhattan via New Jersey without consulting private operators, the NYCTA is in violation of the provisions of the UMT Act and UMTA's policy requiring maximum participation of the private sector.

UMTA's Circular 7005.1, "Documentation of Private Enterprise Participation Required for Sections 3 and 9 Programs," (December 5, 1986), provides guidance with respect to private sector involvement, and defines the type of "new or restructured service" which triggers such involvement.(3) The Circular states that "new or restructured service" may include 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;

(2) This authority has been delegated to the Administrator of UMTA in 49 CFR Sections 1.45 and 1.51.

(3) While Circular 7005.1 was not in effect at the time that the new service was proposed by NYCTA, involvement of the private sector has been a longstanding policy of UMTA, and is required by Sections 3(e) and 8(e) of the UMT Act. Moreover, UMTA's notice of policy, "Private Enterprise Participation in the Urban Mass Transportation Programs," 49 FR 41310 (October 22, 1984) stated that "...when new service needs are developed, or services significantly restructured, consideration should be given to whether private carriers could provide such service." The guidelines for determining what constitutes new or restructured service, and the private sector consultation process grantees must follow, have simply been definitized in Circular 7005.1. Since the Circular sets the standards currently in effect, these standards are the ones against which the NYCTA's compliance with UMTA's private sector policy should be measured.

The NYCTA's proposed new bus service involves, if not the establishment of new routes, at least a significant realignment of an existing route. While in its letter of November 7, 1985, to the New York City Board of Estimate, the NYCTA describes its proposed express service as "the establishment of four new omnibus routes," it states in its response to Eagle's complaint that the bus lines in question have simply been rerouted through New Jersey in an effort to provide faster service.

Whatever the intent of the NYCTA in proposing the new service, it is clear from a comparison of the proposed routes with a general map of the area, that the proposed bus lines would operate along very different corridors from the existing ones. Even though the destination points of the new routes are apparently the same as those of the NYCTA's existing routes, and even though the express buses would operate non-stop through most of the revised portion of the routes, the fact that they enter Manhattan at different points necessarily means that at least some of their stops and pick ups would be different. The NYCTA concedes as much when, in describing its new BJ x17 route, it states that these trips no longer stop below 34th Street, since "(e)ntering Manhattan directly into the Midtown area from the Lincoln Tunnel made service between Worth Street and 34th Street impossible." This type of significantly altered service clearly constitutes "new or restructured service" as contemplated by UMTA Circular 7005.1.

It should be noted, however, that the NYCTA did not implement all of its proposed express service. Instead of full service on four routes, the NYCTA instituted partial service on only one route, the x17. Thus, only four of the x17's nine daily trips follow the new express routing. Because of the modest level of the service change involved, UMTA will not require compliance with the private sector policy with respect to the service as implemented. However, since the express routes as proposed, both in terms of scope and in terms of the degree of alteration involved, constitute "new or restructured service," UMTA will examine whether the NYCTA's compliance with the private sector guidelines was adequate with respect to them.

3) Whether the NYCTA provided sufficient consideration for the private sector in proposing its new express bus service

Eagle contends that the NYCTA's planning and programming process has not provided for the maximum feasible participation of private transportation providers, consistent with the UMT Act and its implementing policy. It states that in planning the new service, the NYCTA failed to establish local procedures for involvement of the private sector or for a fair resolution of disputes.

The NYCTA, on the other hand, argues that an adequate forum for private operators was provided by the New York City Board of Estimate hearing on the new service. The NYCTA maintains that Eagle could have attended the hearing and voiced its opposition to the new service proposal.

UMTA's 1984 private enterprise policy notice, 49 FR 41310, which was in effect at the time of the NYCTA's proposed service plan, stated that:

It is UMTA's policy that a fair appraisal of private sector views and capabilities be assured by affording private sector providers an early opportunity to participate in the development of projects that involve new or restructured mass transit services. Private providers should be given an opportunity to present their views concerning the development of local transportation plans and programs and to offer their own service proposals for consideration.

Circular 7005.1 sets out the minimum elements an UMTA grantee's private sector consultation process must contain. These include:

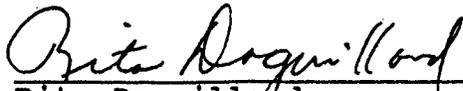
- a) Notice to and early consultation with private providers in plans involving new or restructured service as well as the periodic re-examination of existing service
- b) Periodic examination, at least every three years, of each route to determine if it could be more efficiently operated by a private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

UMTA believes that the possibility for a private operator to appear at a hearing convened by a body empowered to authorize a new service plan, does not meet the criteria set forth above. There is no evidence that the hearing provided any effective consultation with private operators, or that any of the

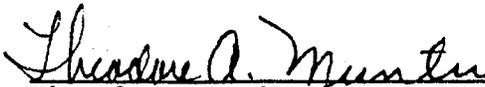
competitive bid or cost factors required by UMTA were considered. Moreover, the hearing was held and organized by a third party pursuant to its own mandate and procedures, and not by the grantee specifically in keeping with UMTA's private sector guidelines. As such, the Board of Estimate hearing cannot be considered an adequate substitute for the type of local consultation process described in UMTA's 1984 policy statement and in Circular 7005.1.

CONCLUSION

After a thorough investigation, UMTA concludes that the NYCTA failed to provide adequate consideration for the private sector in its proposal to institute four new express bus routes between Staten Island and Manhattan via New Jersey. UMTA finds that the service plan proposed by the NYCTA constitutes new or restructured service as contemplated by UMTA's 1984 policy notice and by UMTA Circular 7005.1. UMTA notes, however, that in September 1987, the Metropolitan Transit Authority, the NYCTA's parent organization, did submit to UMTA a private sector policy which essentially conforms to the requirements of Circular 7005.1. Since this policy was not in effect at the time the NYCTA established the service in question, the NYCTA violated UMTA's private sector policy by failing to adequately involve the private sector in its planning and provision of the service. Given, however, the modest scope of the service instituted and therefore the de minimis nature of the NYCTA's violation, UMTA will not require the NYCTA to follow a private sector consultation process with respect to this service. The NYCTA should nonetheless follow the guidelines of its own private sector policy in any future plans to establish new or restructured service.


 Rita Daguillard
 Attorney-Advisor

12/28/87
 (Date)


 Theodore A. Munter
 Acting Chief Counsel

12/28/87
 (Date)



U.S. Department
of Transportation

Urban Mass
Transportation
Administration

Midwestern Area Office

6301 Rock Hill Road
Suite 100
Kansas City, Missouri 64131

Kenneth R. LaRue
Manager, Transit Planning
Department of Transportation
200 N.E. 21st Street
Oklahoma City, Ok 73105-3204

Re: Charter Service

Dear Mr. LaRue:

As promised during our recent meeting, here are the copies of sample notices and agreements used in the exception processes under the Charter Service Regulation.

Attachment 1 illustrates the notice seeking willing and able private operators. This notice is the key process in operating charter services under the first exception set forth in the regulations. It is also an important step in the procedures required to operate charter under the fourth and the seventh exceptions (the "hardship" and the formal agreement exceptions). The exception requires that a notice seeking willing and able operators must be published annually and that a copy of each notice must be sent to the private operators' national associations. Instructions and addresses are set forth in the regulation at Section 604.11.

Attachment 2 is a sample lease agreement under which an UMTA grantee may lease equipment to a private charter operator under the second exception set forth in the regulations. Under the terms and conditions of UMTA grant agreements, UMTA must approve leases of UMTA-funded equipment. To facilitate the approval process for these short term leases, each region has implemented its own expedited process. Accordingly, I would suggest that you contact Region VI for further guidance on their process.

Attachment 3 is a copy of a formal agreement which was executed between an UMTA grantee and the private operators which were determined willing and able in response to the grantee's public notice. The formal agreement exception is set forth as exception seven in the regulation. It is important to note that the formal agreement process requires the grantee to give public notice of its intent and desire to enter into an agreement with the private operators. It may do this in its annual public notice or the grantee can do a three step process: 1) issue a public notice to determine the willing and able private operators (See, Attachment 1); 2) negotiate an agreement which includes each and every private operator determined to be willing and able; and, 3) publish notice of the proposed agreement.

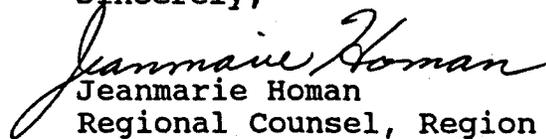
As I indicated to you at our meeting, we do not have a copy in our office of documentation relating to exception four, the "hardship" exception. Basically, the process is threefold: 1) publish a notice to determine all willing and able private operators (See, Attachment 1); 2) give all willing and able operators written notice that the grantee is going to petition UMTA for a "hardship" exception (The letter should explain why the grantee is seeking the exception and advise the private operators that they have at least 30 days to comment.); and, 3) send a written request for a "hardship" exception to the agency's Chief Counsel, submitting copies of the notice and the private operators comments along with the request. This is not expected to be a trip-by-trip process. Rather, the regulation permits the Chief Counsel to grant exceptions for a time period deemed appropriate, up to 12 months.

To operate charter services under exceptions five and six of the regulation requires neither a notice process nor a negotiated agreement. I believe we did clarify this point during our discussion. It does, however, require the grantee to obtain a signed certification for each charter trip from the agency contracting for the service. The language of each certification is set forth in the regulation, as amended in December of 1988. In exceptions five and six, there are a total of four different certifications to choose from depending upon the circumstances of the contracting agency and the passengers taking the trip. The variable features of each of the certifications can be summarized as follows: 5(i) targets trips for handicapped; 5(ii) targets trips for agencies receiving funds from the U.S. Department of Health and Human Services; 5(iii) is for trips for state certified agencies; and, 6 is for non-urbanized areas only and targets trips for the elderly.

As we discussed, I fully support your emphasizing to your transit operators the importance of reviewing the regulation, including the published amendment, before proceeding with any of the exception processes. The preambles to the regulation and the amendment also provide helpful information concerning the exception processes. The processes are not difficult but must be followed carefully to assure compliance with the regulation and the protection of the interests of private operators.

Please feel free to contact me at (816-926-5053) or your Region VI Office should you have any questions. Thank you again for the warm welcome I received from you, your staff and all the conference participants. I truly enjoyed my visit to Oklahoma.

Sincerely,


Jeanmarie Homan
Regional Counsel, Region VII

Attachments

PUBLIC NOTICE
PROVISION OF CHARTER TRANSIT SERVICES
CITY OF CEDAR RAPIDS, IOWA

The City of Cedar Rapids, Iowa proposes to provide the following charter services by the Cedar Rapids Bus Department, 427 8th Street N.W., Cedar Rapids, Iowa, 52405:

1. Bus transportation for elderly citizens to congregate meals and social events, Monday - Friday year-round, late morning and early afternoon, in Cedar Rapids;
2. Bus transportation for developmentally disabled citizens of Cedar Rapids and Marion to special schooling, Monday - Friday during June, July, and August, 8:00 - 10:00 AM and 3:00 - 5:00 PM, in Cedar Rapids, Marion;
3. Bus transportatin for low income children from the Jane Boyde Community Center to various holiday, social, and nutritional events, days varied, usually late AM and early PM, in Cedar Rapids and Marion.

Any private operator desiring to provide this service must demonstrate willingness and ability in writing within 30 days of publication of this notice in the Cedar Rapids Gazette. Such evidence shall be forwarded to the following:

City of Cedar Rapids Bus Department
427 8th Street N.W.
Cedar Rapids, Iowa 52405
Attention: William Hoekstra, Transit Director

Evidence necessary to demonstrate willingness and ability of the operator to provide service includes only the following:

1. A statement that the private operator has the desire and the physical capability to actually provide the category of revenue vehicle specified above (bus), and
2. A copy of documents showing that the private operator has the requisite legal authority to provide the proposed service, and that it meets all necessary safety certification, licensing, and other legal requirements to provide the proposed service.

The recipient (Cedar Rapids Bus Department) will review only the evidence submitted prior to the deadline and will complete said review within 30 days of the deadline. Any private operators proposing service in accord with this notice will be notified of the results of said review within 60 days of the deadline.

The City of Cedar Rapids will not provide any charter service using equipment or facilities funded under the Urban Mass Transportation Act of 1964, as amended, 49 USC 1601 et sequence, to the extent that there is at least one willing and able private charter operator, unless one or more exceptions listed in 49 CFR Section 604.9(b) applies.

Dated this _____, 1988.

Lyle Hanson
City Clerk

Published in the Cedar Rapids Gazette _____, 1988.

STANDARD FORM AGREEMENT
BETWEEN
THE TRANSIT AUTHORITY OF THE CITY OF OMAHA
dba METRO AREA TRANSIT
AND A PRIVATE CHARTER OPERATOR
FOR THE PROVISION OF CHARTER EQUIPMENT

THIS AGREEMENT is entered into on the _____ day of _____, 198____, between the Transit Authority of the City of Omaha, dba Metro Area Transit, hereinafter referred to as "MAT", and _____, hereinafter referred to as "Private Charter Operator".

WHEREAS, Private Charter Operator has been requested to provide charter service that exceeds its capacity; and

WHEREAS, MAT is agreeable to providing Private Charter Operator bus equipment and operator(s) from the MAT fleet for use as charter equipment on the terms and conditions as hereinafter specified.

NOW, THEREFORE, in consideration of the mutual covenants and conditions contained herein, the parties do agree as follows:

1. Provision of Equipment; Bus Operators. MAT agrees to provide to Private Charter Operator from time to time (subject to availability) equipment from the MAT fleet for use as charter equipment, along with qualified operator(s), to satisfy the needs of the charter. All requests for charter equipment shall be made in writing by a duly authorized representative of the private operator. Equipment will be provided in good operating condition and shall be cleaned prior to providing the same for Private Charter Operator. Said equipment is being provided to Private Charter Operator for such periods as may be requested on the charter order form, it being understood that, regardless of the length of time of usage, Private Charter Operator shall be charged at a minimum of four (4) hours usage for each piece of equipment provided.

2. Payment to MAT. Private Charter Operator shall pay the rates currently approved by the MAT Board of Directors (see Attachment "A") for charter service for each bus hour operated from the time the charter leaves the garage, until the charter returns, with a four (4) hour minimum as aforesaid. Private Charter Operator shall make payment in full within thirty (30) days after receipt of a billing statement from MAT. Payment shall be made to Metro Area Transit, 2222 Cuming Street, Omaha, Nebraska 68102. In the event that the amount provided in the statement is not paid within thirty (30) days from the date of billing, the unpaid balance shall bear interest at the rate of twelve percent (12%) per annum until the same is paid in full. No additional charter orders will be honored during such time as payments to MAT are not current.

3. Restrictions. The following restrictions shall apply in the use of the equipment provided hereunder:

(a) No charter shall be operated to any point more than five (5) miles outside of the corporate limits of the City of Omaha.

(b) At no time shall alcoholic liquors be consumed or open containers of alcoholic liquor be permitted on or in the equipment at any time that the same is being operated or is located upon any street, highway, or alley.

(c) No charter will be operated which conflicts in any way with UMTA Regulation 49 CFR, Part 604 to which MAT is obligated.

(d) This contract in no way shall be construed as an obligation on the part of MAT to operate the service requested by the Private Operator. MAT shall retain sole right of refusal of service requested.

(e) No member of or delegate to the Congress of the United States shall be admitted to any share or part of this contract or to any benefit arising therefrom.

No member, officer, or employee of the Authority or a local public body, during his tenure, or for one year thereafter, shall have any interest, direct or indirect, in this contract or the proceeds thereof.

4. Hold Harmless. Private Charter Operator agrees to save and hold MAT harmless from any and all claims, demands, liabilities, or suits of any nature whatsoever, arising out of, because of, or due to any acts on the part of the Private Charter Operator, its agents or employees, which result in bodily injury or property damage to riders, personnel of the Private Charter Operator, or any other persons.

5. Equal Employment Opportunity. In connection with the chartering of equipment provided hereunder, Private Charter Operator agrees that it shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, disability, national origin, or marital status. In the employment of persons, Private Charter Operator shall comply with any and all applicable federal equal employment opportunity provisions as required by the Urban Mass Transportation Act and regulations promulgated thereunder.

6. Amendment. This Agreement may be amended only by written amendment signed by all parties hereto.

7. Term and Termination. This Agreement shall remain in full force and effect from the date of execution by all parties hereto until terminated by either party giving to the other party no less than thirty (30) days written notice of termination.

IN WITNESS WHEREOF, the parties have executed this Agreement on the day and year first written above.

ATTEST:

THE TRANSIT AUTHORITY
OF THE CITY OF OMAHA

PRIVATE PROVIDER

EXECUTIVE DIRECTOR

WITNESS

WITNESS

Title

Title

CHARTER AGREEMENT
GREENVILLE TRANSIT AUTHORITY

Greenville Transit Authority (GTA) proposes the following charter agreement for the period January 1, 1988 through June 30, 1988, at which time these items or a new proposal based on existing conditions will be published.

1. Greenville Transit Authority will provide charter service with trolleys for the following:
 - A. Weddings;
 - B. City and County government or agencies thereof; and
 - C. College athletic teams.
2. Charter service shall be limited to Greenville County and shall not exceed three (3) hours of use.
3. Charter rates shall be at a competitive rate with local private operators.
4. GTA will subcontract to/with a private operator, who, by the conditions stipulated in the UMTA charter regulations does not have sufficient capacity to meet a charter request or is in need of handicapped equipped vehicles to meet a charter request. The rate for these subcontracts will be the same as in item 3 above. Such subcontracts shall be limited to off-peak periods of GTA service, within the state of South Carolina, insured by the private operator and subject to equipment availability.
5. Special events wherein passengers pay a fare for transportation and the service is open to the public is not considered charter as may be operated by GTA or other providers.

Date: December 11, 1987

TO: All Concerned

The undersigned agrees to the provisions of the GTA Charter Agreement dated December 11, 1987, effective for the period January 1, 1988 through June 30, 1988.

WAYNE J. SMITH

Printed or Typed Name

Wayne J. Smith

Signature

United Bus Owners of America

Company Name

1/19/88

Date

FILE 66



U.S. Department
of Transportation
**Urban Mass
Transportation
Administration**

Region III

841 Chestnut Street
Suite 714
Philadelphia, PA 19107

FEB 10 1988

RE: Leasing of UMTA-funded facilities and equipment
for charter operations by private providers

Dear Grantee:

As you know, Section 109 (Encumbrance of Project Property) of Part II (Terms and Conditions) of UMTA's standard Urban Mass Transportation Agreement prohibits a grantee from leasing UMTA-funded facilities and equipment for any purpose without prior written concurrence from UMTA.

However, as you may also be aware, UMTA's charter regulations specifically permit UMTA grantees to lease UMTA-funded facilities and equipment for charter operations in instances where a private operator has been asked to provide charter service that exceeds its capacity, or where the private operator is itself unable to provide equipment accessible to elderly and handicapped persons. See, 49 C.F.R. subsection 604.9(b)(2)

A number of grantees have asked whether pursuant to Section 109 of the Grant Agreement they are still required to seek UMTA'S written concurrence when they want to lease UMTA-funded facilities and equipment for charter purposes in accordance with UMTA's charter service regulation. They are not. Grantees should be mindful, however, that this and all other uses of UMTA-funded facilities and equipment are governed specifically by Section 108 (Use of Project Facilities or Equipment) of Part II of the standard Urban Mass Transportation Agreement, the property management standards set forth in OMB Circular A-102, Attachment N and OMB Circular A-110, Attachment N, as appropriate; and UMTA Circular 4220.1A (Third Party Contracting Guidelines).

UMTA recommends, further, that in each and every instance where a grantee wishes to lease UMTA-funded facilities and equipment to a private charter operator for use in accordance with UMTA's charter service regulation, the grantee execute a written lease agreement with the private operator that includes the following provisions:

Federal interest in facilities and equipment.

This lease agreement provides for the use of mass transportation facilities and equipment that have been financed in part by the Urban Mass Transportation Administration (UMTA). The lessor (UMTA grantee) and lessee (private charter operator) warrant that the use of these UMTA-funded facilities and equipment will comply with the UMTA charter service rule at 49 C.F.R. Part 604. The use of these UMTA-funded facilities and equipment is governed by the lessor's Urban Mass Transportation Agreement with UMTA; by UMTA Circular 4220.1A; and by the Office of Management and Budget Circulars A-102, Attachment N, and/or A-110, Attachment N.

Lessor's Right to Terminate. Upon notice to the lessee, the lessor may suspend or terminate this lease agreement for cause or convenience. Such suspension or termination is effective immediately upon notice.

Prohibition on Conflicts of Interest. The lessor and lessee warrant that no employee, officer, or agent of the lessor, nor any partner of such a person, nor any member of the immediate family of such a person, nor any organization which employs, or is about to employ, such a person, has a financial or other interest in the lessee or will otherwise benefit from the execution or performance of this lease agreement.

In addition to the provisions above, UMTA suggests that the written lease agreement between the grantee and the private charter operator include such legal and commercial clauses as are desirable from the grantee's vantage and appropriate under the State law that governs the lease agreement.

Should you have any questions about these suggested provisions, please feel free to contact my office. Please note, also, that in the November 3, 1987 Federal Register notice we previously provided you, UMTA has answered a number of recurring questions from grantees regarding UMTA's position on permissible leasing of UMTA-funded facilities and equipment for charter service.

Finally, you are reminded that UMTA's advance written concurrence is needed in all other (non-charter related) instances where leasing or other encumbrance of federally-funded property is contemplated.

Sincerely,

Peter N. Stowell
Regional Administrator

NA6:cc 2/9/88

raf 2/9/88

DECISION

WASHINGTON MOTOR COACH ASSOCIATION,	}	
Complainant	}	
	}	
v.	}	WA-09/87-01
	}	
MUNICIPALITY OF METROPOLITAN SEATTLE,	}	
Respondent	}	

SUMMARY

The Washington Motor Coach Association (WMCA) (1) filed a complaint with the Urban Mass Transportation Administration (UMTA) on September 21, 1987, alleging that the Municipality of Metropolitan Seattle (METRO) was providing charter service in violation of the UMTA charter regulation, 49 CFR Part 604. The service specifically complained of was METRO's "park and ride" service to the University of Washington (the University) stadium during the football season. After a thorough investigation, UMTA finds that the service was mass transportation, and therefore not in violation of the charter service regulation. However, METRO initiated this service without sufficient consideration and involvement of the private sector, as required by Sections 3(e) and 8(e) of the Urban Mass Transportation Act of 1964, as amended (UMT Act), and the implementing policy guidelines. These guidelines are set forth in UMTA's policy statement, "Private Enterprise Participation in the Urban Mass Transportation Program," 49 Fed. Reg. 41310, (October 22, 1984), and are further defined in UMTA Circular 7005.1, "Documentation of Private Enterprise Participation Required for Sections 3 and 9 Programs," (December 5, 1986). UMTA orders METRO to follow these guidelines prior to recommencing such service.

COMPLAINT

On September 21, 1987, WMCA filed this complaint with UMTA. The complaint alleges that METRO is engaging in service which is in violation of UMTA's charter rules. The complaint specifically focuses on charter service rendered by METRO for the University, and states that METRO began this service without determining if there were willing and able private operators, as required by 49 CFR 604.11.(2). WMCA seeks relief from this and any other illegal charter service in which METRO might be engaged.

(1) WMCA describes itself as "an association of motor passenger carriers whose members operate more than 90% of the privately owned intercity charter coaches domiciled in the State."

(2) This section requires UMTA grantees desiring to provide direct charter service, to undertake a public notice process aimed at determining if there are willing and able private operators. If there are such willing and able private providers, grantees may perform charter service only under one of the exceptions to the regulation.

WMCA states that the regulation applies to charter service, as defined in Section 604.5(e).(3) WMCA points out that UMTA has acknowledged in the preamble to the regulation that this definition is not the most comprehensive possible, and has in fact stated that there remain "many difficulties in determining in a given case which category the service fits into most appropriately." (52 Fed. Reg. 11919) Nonetheless, WMCA notes, UMTA has relied on years of Interstate Commerce Commission (ICC) decisions in arriving at this definition, which can therefore serve as guidance. Moreover, WMCA explains, UMTA has distinguished charter service from mass transit, which is characterized as : 1) being under the control of the grantee, 2) being designed to benefit the public at large, and 3) being open to the public and not closed door. (52 Fed. Reg. 11920) WMCA indicates that these characteristics can be used in a process of elimination test to determine what is not mass transportation and is therefore charter service. Based on these guidelines, WMCA maintains that the service performed by METRO for the University is charter service, in violation of UMTA's charter rule.

The service in question is described, WMCA states, in a document entitled "University of Washington Stadium Expansion Parking Plan and Transportation Management Program" (the Transportation Plan), prepared by the University of Washington Transportation Office and dated February 2, 1986. WMCA notes that the Plan describes a "transit scrip" program, designed to encourage passengers to ride public transportation to the stadium. Under the program, WMCA explains, a transit pass or "scrip" is provided by the University to each football ticket purchaser. The scrip allows the rider a free ride to and from football games on regular METRO service, on "Husky Special" routes (which, according to WMCA, are extra schedules on four existing routes), and on a park and ride service. It is the park and ride service that is the subject of this complaint.

Using the process of elimination test, WMCA maintains that the park and ride service lacks the first essential element of mass transit since it is under the control of a party other than the recipient. First, WMCA states, the University designates the number of buses that will be needed. Second, WMCA contends, the University has established the locations at which passengers will be picked up, as well as a primary and secondary route between each park and ride lot and the stadium. Third, WMCA notes, the University provides scrip for payment and pays to have the scrip printed. According to WMCA, it is clear from this description that the University and not METRO controls the service.

(3) Section 604.5(e) defines "charter service" as:
 "Transportation using buses or vans...of a group of persons who pursuant to a common purpose, under a single contract, at a fixed charge..., have acquired the exclusive use of the vehicle...under an itinerary...specified in advance..."

Again, applying the process of elimination test, WMCA states that the "park and ride" service is charter and not mass transit, since it is designed to benefit a specific group, and not the public at large. This group, WMCA argues, is composed of football ticket holders, since only they are provided with scrip, and only they are permitted to board the buses. According to WMCA, there are no other members of the public who might benefit.

WMCA also contends that the service fails to meet the mass transit criterion of being "open door," since, though theoretically, someone other than a football ticket holder could ride the bus, this is a logical impossibility. WMCA bases this assertion on the "virtual certainty that those using this park and ride transportation will be travelling to the football game," since there are no intermediate points between the park and ride lots and the stadium.

Consequently, WMCA argues, the park and ride service conforms to the definition of charter service set forth in Section 604.5(e), since it is provided to a specific group of persons (football game attendees), under a single contract (with the University), at a fixed charge for the exclusive use of the vehicle under an itinerary set in advance (by the University). Moreover, WMCA contends, the Plan shows that the service is under the control of the University.

For the reasons set forth above, WMCA asks that UMTA find METRO in violation of the charter regulation in the provision of its park and ride service, direct METRO to cease and desist from such activities, and direct METRO in the future to submit service proposals to UMTA in advance of their operation.

In support of its complaint, WMCA attaches excerpts from the Transportation Plan, copies of correspondence between METRO and a WMCA member concerning provision of the service, and a copy of METRO's private service proposal analysis.

RESPONSE

UMTA sent a copy of the complaint to METRO on October 19, 1987, and provided it with 30 days from receipt to respond. METRO's response is dated November 20, 1987.

In its response, METRO states that it is a municipal corporation organized under Washington State law. METRO explains that its statutory function includes the transportation of fare-paying passengers, "by means other than by chartered bus."

METRO explains that it has traditionally offered transportation to the University stadium on game days. It claims that this service is open door, since nothing prevents members of the general public from boarding, stopping at stops along the way, and paying a regular fare rather than transit scrip. METRO maintains that there is still much private charter service to the University football games, and these private charters have not been supplanted by METRO service.

METRO states that in 1983, in anticipation of an expansion of the football stadium and other University facilities, the city of Seattle and the University executed an agreement to create a "workable parking plan and traffic management program for the facility." The Transportation Plan was therefore developed and adopted by the Seattle City Council. It was pursuant to the Transportation Plan, METRO explains, that the transit scrip program was instituted in 1986. Under this program, METRO states, the University mails scrip along with game tickets for use on regular transit, Husky Special service, and park and ride service. METRO says that the University reimburses METRO for each individual piece of scrip collected. Each person pays individually on boarding, METRO states, and riders who have no scrip pay the regular fare.

METRO explains that it was also in 1986 and pursuant to the Transportation Plan that the park and ride service to the University stadium began. The service, METRO states, was a response to increased ridership due to an expansion of the stadium capacity from 58,500 to 72,200 seats. METRO remarks that use of the service has exceeded expectations: approximately 7,077 riders use the service each game day, and eighty-two buses and drivers, eleven supervisors, and nine administrative and support personnel are required to operate it.

METRO maintains that the park and ride service does not meet UMTA's definition of charter since it lacks two key elements: 1) "a single contract for a fixed charge...for the vehicle or service," and 2) "exclusive use of the vehicle."

As to the first element, METRO states that the Transportation Plan is not a contract between the University and METRO, but merely a blueprint of the University's response to the city of Seattle's requirement of a "workable transportation plan for the University stadium." METRO says that the only arguably applicable contract between METRO and the University is an "Interlocal Cooperation Agreement." However, METRO states, the terms of this Agreement do not establish a "single contract for a fixed charge," but rather an arrangement whereby the University reimburses METRO for individual fares.

METRO argues that its park and ride service also lacks the element of exclusivity. METRO refutes WMCA's contention that it is a "logical impossibility" that someone other than a football game attendee would use the service. While most riders will no doubt be heading for the game, METRO says, this is not necessarily the case for all, since the University hospital, shopping complex, and other facilities are in the vicinity. In short, METRO maintains, the service is clearly open door, and therefore not charter.

Moreover, METRO claims, UMTA's own interpretation of the charter regulation supports METRO in this dispute. METRO cites UMTA's recently issued "Charter Service Questions and Answers," in which "service to regularly scheduled but relatively infrequent events...that is open door, with fares collected from individuals" is held to be mass transportation and not charter. (See, Q&A 27c, 52 Fed. Reg. 44248-44255, November 3, 1987).

Furthermore, METRO maintains, even if the park and ride service were charter service, there is no private carrier able to adequately provide it. METRO cites 49 CFR 604.5(p), which states that a private carrier is willing and able to provide charter service if it has the desire and the "physical capability of providing the categories of revenue vehicles requested." While METRO acknowledges that there are private operators "willing" to provide the park and ride service, it states that none is "able" to do so. METRO explains that the park and ride service required the use of eighty-two buses each game day in 1987. METRO states that no private operator in the Seattle metropolitan area possesses the vehicle capacity to provide the park and ride service, and in order to perform it, would be obliged to lease vehicles from METRO. Moreover, METRO contends, the service requires not only equipment but expertise in radio communication, scheduling, route designation, and other types of supervision and coordination. According to METRO, WMCA has produced no evidence that any of its member carriers are "able" to provide these aspects of the service. Consequently, METRO argues, there is no showing that any private carrier is "willing and able" to perform the service.

METRO also presents three subsidiary arguments. First, METRO states, UMTA's charter rules exceed the scope of UMTA'S statutory authority, since they are based in part on section 3(f) of the UMT Act, which prohibits unfair competition by UMTA recipients with intercity operators. METRO claims that there is no statutory basis for extending this prohibition to intracity service. This being the case, METRO argues, even if the park and ride service were charter, UMTA would have no authority to prohibit it. Second, METRO states that there are public policy reasons which

require that WMCA's complaint be dismissed. METRO states that in providing the park and ride service, it is fulfilling its mission of providing economical mass transportation. Since no private carrier in the Seattle area has shown that it can provide service of similar cost and quality, the public interest requires that METRO be supported in its role. Third, METRO argues, the complaint is moot, since the park and ride service is designed to operated only during football season. Since 49 CFR 604.15 sets a time frame of 120 days for the resolution of complaints, a decision could not be issued before the end of the season. Accordingly, METRO maintains, the complaint should be dismissed.

Among the attachments submitted by METRO were copies of the April 1983 Agreement between the city of Seattle and the University, Transportation Plan, the Interlocal Cooperation Agreement, the 1987 Park and Ride Service Operation Plan, and affidavits by Michael E. Williams, Transportation Engineer in the University's Transportation Office, and by Rick Walsh, Manager of Service Planning and Market Development for METRO.

REBUTTAL

METRO forwarded a copy of METRO's response to WMCA on December 2, 1987, and provided it with 30 days from receipt to submit a rebuttal. WMCA'S rebuttal is dated December 21, 1987.

First, WMCA rejects METRO's argument that UMTA acted without legal authority in promulgating the charter regulation. WMCA maintains that the legal basis for the rule is adequately described in the preamble, at 52 Fed. Reg. 11930-1. Moreover, WMCA states, since the rule was adopted following appropriate rulemaking procedure, it can only properly be challenged before a court of competent jurisdiction, and not in this proceeding. WMCA also refutes METRO's contention that public policy reasons require dismissal of the complaint. The public policy reasons to be considered in this matter, WMCA asserts, are those underlying the regulation, namely the provision of mass transit services by UMTA recipients, and the protection of charter operators.

Second, WMCA takes issue with METRO's statement that there are no willing and able private operators. Noting that METRO has not undertaken a public notice process aimed at determining if there are willing and able operators, WMCA remarks "You don't know if you don't ask." Since METRO never requested public participation, WMCA points out, it is a legal possibility for it to now argue that there are no willing and able private operators. WMCA also challenges METRO's definition of willing and able, stating that vehicle capacity and the ability to supervise and coordinate bus

movements should not be included in the definition. WMCA states that to be found willing and able under the charter regulation, a private operator need only possess at least one bus or van.

Third, WMCA maintains that the park and ride service is charter service. WMCA states that the fares of most the riders are paid by the University under its transit scrip agreement with METRO, and persons paying cash are a de minimis proportion of all riders. According to WMCA, this demonstrates that the service is not open door. Moreover, WMCA contends, the Transportation Plan shows that the University designates routes from the parking lots, and the pick-up points of the buses. WMCA states that the service is thus not under the control of METRO, but rather under that of the University. These facts show, WMCA states, that the service meets UMTA's definition of charter. METRO argues that instead of Question 27c of UMTA's "Charter Service Questions and Answers," reference should be made to Question 27a, which describes service similar to the park and ride service as charter service.

Finally, WMCA states that its complaint is not moot, since the service will surely be run during the next football season unless METRO is directed to discontinue it. WMCA, moreover, maintains that the larger issues of what constitutes charter service, the definition of willing and able, and the application of the charter rule to services provided in Seattle, will survive the 1987 football season. WMCA also argues that dismissal would mean a re-filing of the complaint in 1988. Again, given the regulatory time frame, this complaint could not be dealt with on a timely basis. Accordingly, WMCA asks that UMTA entertain its complaint, and provide the relief requested therein.

DISCUSSION

Before reaching the main issues of this complaint, UMTA believes that it is appropriate to address the subsidiary questions raised by the respondent.

One threshold matter is the issue of mootness. Given the present capacity of the University stadium and the dictates of the Transportation Plan, UMTA considers it very likely that the service will be operated again in 1988. In view of the recurring nature of this service, the issue of its proper characterization is not moot, since it will probably arise during the forthcoming football season. UMTA therefore finds that it is appropriate to entertain the complaint at this time.

Moreover, UMTA agrees that there are substantial public policy grounds supporting METRO's position that it should be encouraged to provide mass transit services. However, these policies are not inconsistent with that underlying the charter regulation, namely that UMTA funds should be used for mass transit purposes only, and

not to compete unfairly with private charter operators. METRO's compliance with the charter regulation can only assist it in better fulfilling its mission by channelling its services and resources toward mass transit use. For this reason, dismissal of the complaint on the public policy grounds advanced by METRO is unwarranted.

UMTA also believes that it is appropriate to clarify the definition of "willing and able." The respondent's comments indicate a serious misinterpretation of this term as it is used in the charter regulation. 49 CFR 604.11 sets forth the procedures that a recipient must follow in determining whether there are willing and able private operators. This section limits the recipient to two factors in making its determination: 1) possession of legal authority, and 2) ability to provide the required category of vehicle. The preamble to the regulation, at page 11921, states that the definition should not include any notion of capacity, and that a private operator with one bus is just as willing and able as a private operator with 100 buses. METRO is thus incorrect in asserting that there are no willing and able private operators in the Seattle area, since none possesses the 82-vehicle capacity or supervisory expertise needed. The willingness and ability of private operators can only be determined after a recipient has completed the public participation process of 49 CFR 604.11. Moreover, in making its determination, a recipient may consider only the two above-mentioned factors, and no extraneous ones.

As concerns the respondent's contention that the charter regulation exceeds UMTA's statutory authority, UMTA believes that its position on this issue is clearly and comprehensively set forth on pages 11930-1 of the preamble to the rule. Moreover, since under the terms of the regulation, UMTA is limited in these proceedings to a consideration of the merits of the complaint, this is not the proper forum to raise a challenge to the legality of the regulation.

Having dispensed with these questions, we will proceed to an examination of the main issues of this complaint, and which are as follows:

1. Whether METRO's park and ride service is mass transportation or charter service

In its complaint, WMCA uses a process of elimination test to establish that the park and ride service provided by METRO is charter service. This test is based on UMTA's definition of mass transportation, which is set forth at page 11920 of the preamble

to charter regulation, and which is characterized as being service:

- 1) under the control of the grantee;
- 2) designed to benefit the public at large;
- 3) open to the public and not closed door.

WMCA argues that since the park and ride service does not contain these three elements, it is not mass transportation, but rather charter service.

WMCA contends that the first element is lacking, since the service is not under the control of METRO, but rather under that of another party, the University. According to WMCA, the University designates the number of buses that will be used, establishes pick-up points and routes, and pays the cost of the service.

The materials submitted by the respondent, however, fail to bear out WMCA's contentions on this point. The April 1983 Agreement between the city of Seattle and the University outlines the transportation objectives to be met as a result of the expansion of the University's facilities. The Agreement provides that "The City will assist the University in meeting these objectives and will reduce non-University generated traffic and transportation volumes by implementing additional programs." (4) The Agreement further stipulates that the University's role in this transportation scheme will be the formulation of a "Master Plan," to include a description of existing University facilities, and their projected expansion and use. (5) These provisions indicate that the intent of the Agreement is that METRO, using data and information supplied by the University as guidelines, should establish supplementary service to meet the needs of members of the general public travelling to the University.

METRO's primary responsibility for the service is confirmed by the statement of Rick Walsh, Manager of Service Planning and Market Development for METRO, that "METRO is responsible for determining the appropriate route for each park and ride lot to Husky Stadium." According to Mr. Walsh, "METRO also determines the scheduling of the buses, and fixes the amount of fare to be paid by each rider." (6) Both according to the terms of the Agreement then, and to the statements of its operations manager, the service is managed, supervised, and operated by METRO, with the University playing mainly an informational role. Accordingly, it meets the first mass transit criteria of being under the control of the grantee.

(4) "Agreement between the city of Seattle and the University of Washington," April 1983, page 15.

(5) Id., at page 2.

(6) Affidavit of Rick Walsh, p 4.

Referring to the second element of UMTA's definition, WMCA also maintains that the park and ride service is charter rather than mass transit, since it is not designed to benefit the public at large, but a particular group, namely football game attendees.

In this connection, it should be pointed out that on page 11920 of the preamble to the regulation, UMTA states that service is designed to benefit the public at large when it serves the needs of the general public, "and not some special organization such as a private club." It is questionable whether football game attendees form a well-defined and cohesive enough group to be considered a "special organization." Even admitting, arguendo, that such is the case, it is clear from the above description that METRO's park and ride service is not intended for the exclusive use of such riders, but is available to anyone wishing to board it. As such, it can be said to benefit the public at large, in keeping with UMTA's second criterion of mass transportation.

This second element overlaps with UMTA's third requirement for mass transportation, namely that the service be "open door." WMCA maintains that though theoretically, anyone could board the service, only football game goers are likely to do so, since there are no intermediate points between the park and ride lots and the football stadium.

METRO states, on the other hand, that the service is open door, since not only scrip holders, but also regular fare-paying passengers can ride it. METRO further argues that many members of the general public do in fact use the service, since the University museum, hospital, shopping center, and other facilities are located near the terminus.

In determining whether service is truly open door, UMTA looks not only at the level of ridership by the general public as opposed to a particular group, but also the intent of the recipient which offers it. The intent to make service open door can be discerned in the attempts that a recipient has made to make to service known and available to the public. UMTA thus takes into consideration the efforts a recipient has made to market the service. Generally, UMTA considers that this marketing effort is best accomplished by publishing the service in the grantee's preprinted schedules. UMTA notes that METRO has failed to submit copies of any such preprinted schedules, and assumes that none exist. However, UMTA notes that the Transportation Plan calls for active marketing of the service to the public by means of promotional mailings, billboard advertising, and radio and television public service announcements.(7) Assuming that METRO has followed

(7) "University of Washington Stadium Expansion Parking Plan and Transportation Management Program," page 9.

this strategy, UMTA concludes that METRO has adequately marketed the service during the 1987 football season. However, in order to strictly conform to UMTA's requirements for open door service, METRO should, before offering the service in the future, publish it in its preprinted schedules.

Based on the foregoing, UMTA concludes that METRO's park and ride service to the University stadium is mass transportation. This decision should not be taken as a ruling that all service provided by a recipient to regularly scheduled periodic events is mass transportation. Presented with a complaint, UMTA will look carefully at each individual case to determine whether the service provided contains the required elements of mass transportation. In short, UMTA cautions transit providers against reading this decision too widely, and reminds them that there are many cases which fall in between the two categories, and which should be examined on an individual basis.

2. Whether METRO should have undertaken a private sector involvement process before instituting the park and ride service.

In its response, METRO correctly argues that its park and ride service is mass transportation, since it conforms to the service described in Q&A 27c of UMTA's "Charter Service Questions and Answers," i.e., service to regularly scheduled but infrequent events, that is under the control of the grantee, with fares collected from individuals. For the reasons stated above, UMTA agrees that the example cited in Q&A 27c is applicable to this case. However, the following language from this same Q&A is equally applicable:

...such services would appear to be excellent candidates for privatization, since they may very well be self-supporting without the need for public subsidies. In accordance with UMTA's private enterprise policy, grantees should examine the interest and capability of the private sector in providing the service.

This statement is in conformity with the requirements of Section 3(e) of the Urban Mass Transportation Act of 1964, as amended (UMT Act), and UMTA's implementing policy guidelines, which require maximum participation of the private sector.

These guidelines are set forth in UMTA's notice of policy, "Private Enterprise Participation in the Urban Mass Transportation Programs," 49 Fed. Reg. 41310 (October 22, 1984). UMTA's Circular 7005.1, "Documentation of Private Enterprise Required for Sections 3 and 9 Programs," (December 5, 1986), provides further guidance with respect to private sector involvement, and defines the type of "new or restructured service" which triggers such involvement. The Circular states that "new or

restructured service" may include 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;

Clearly, METRO's park and ride service is of sufficient magnitude to be characterized as the establishment of a new mass transportation service. According to information supplied by METRO, it requires the use of 82 buses and drivers on each game day, transports about 7,000 riders, and is coordinated by 11 supervisors and nine support personnel. As such, it constitutes "new or restructured service" as contemplated by Circular 7005.1.

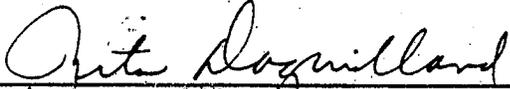
The same Circular sets out the minimum procedures which a grantee must follow in seeking to involve the private sector. These include:

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

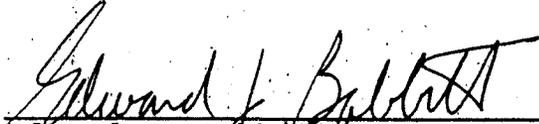
There is no indication in the submissions from the parties that METRO attempted to notify or involve private operators during the early stages of its planning of the service. METRO has shown that it did perform a private/public cost analysis. This analysis, however, appears to have been performed on the basis of limited information which was offered by, rather than solicited from, a single carrier. It also appears that METRO provided private operators with no dispute resolution process or opportunity to appeal its initial negative decision. Consequently, METRO's limited consideration of private sector alternatives appears to fail to meet the requirements of Circular 7005.1.

CONCLUSION

After a thorough investigation, UMTA concludes that METRO's park and ride service is mass transportation, since it substantially conforms to the following criteria: 1) it is under the control of the grantee; 2) it is designed to benefit the public at large; and 3) it is open door. With regard to the latter element, however, UMTA finds that the service fails to conform to one requirement, namely that it be published in the grantee's regularly published schedules. UMTA therefore orders METRO to publish the service in its preprinted schedules prior to re-instituting it. UMTA also finds that the park and ride service constitutes new or restructured service as contemplated by UMTA Circular 7005.1, thereby triggering UMTA's private sector involvement requirements. UMTA finds that the measures METRO took to involve the private sector did not fully meet the minimum requirements set out in the Circular. Therefore, prior to recommencing the service, METRO should undertake a public participation process which follows the guidelines set forth in UMTA Circular 7005.1.


 Rita Daquillard
 Attorney-Advisor

3/17/88
 (Date)


 Edward J. Babbitt
 Chief Counsel

3/21/88
 (Date)

DECISION

I. SUMMARY OF DECISION

This decision is the result of an investigation begun in response to a complaint received by the Urban Mass Transportation Administration (UMTA) on November 5, 1985, from Larry G. Ennen, President of Sequim Taxi. The complaint alleges that the local planning and programming process employed by Clallam Transit Service (CTS) did not include procedures for the maximum feasible participation of private transportation providers consistent with Section 3(e) of the Urban Mass Transportation Act of 1964, as amended (UMT Act). UMTA finds that the vehicles used to provide the service which is the subject of this complaint were not UMTA-funded, and CTS is therefore not required to follow the procedures of Section 3(e) in implementing this service.

II. BACKGROUND

A. Exhaustion of Local Remedies

Mr. Ennen originally complained to UMTA in September, 1985, claiming that CTS was detrimentally affecting his business. UMTA acknowledged the letter on September 24, indicating that a potential violation of UMTA requirements had been shown, but that Sequim Taxi must first make an attempt to resolve the problem locally before UMTA could entertain a protest. Because CTS is not a direct recipient of UMTA funding, but a subrecipient under the state-administered Section 18 program, UMTA notified the State of the complaint and requested that the State attempt to resolve the matter locally. By letter dated October 23, 1985, the State notified UMTA that local efforts to resolve the dispute had been completed. According to the State's letter, Mr. Ennen had sought to increase his company's participation in the provision of dial-a-ride services, and specifically that he be allowed to lease or operate CTS vehicles used to provide such service. The contract between Sequim Taxi and CTS was to expire on December 31, 1985, and CTS was planning to solicit proposals for operation of dial-a-ride services that would include the opportunity to use CTS equipment. It, therefore, appeared that Sequim Taxi's concerns had been satisfactorily addressed.

B. The Complaint

However, by letter dated November 1, 1985, Mr. Ennen notified UMTA that he did not consider the complaint adequately resolved, and formally requested UMTA's assistance. For purposes of this complaint, we have indicated Sequim Taxi as the complainant. It is somewhat unclear from the correspondence whether Sequim Taxi is also doing business as Sequim Transportation, Inc. and we use the names interchangeably. The letter alleged that the local planning and programming process had not established procedures for the maximum feasible participation of private transportation providers. Although the letter alleges that the contract terms are drafted in a manner that precludes Sequim Taxi from bidding, it does not elaborate. It also states that the "preliminary process for establishing ways to work out disputes and resolutions was not followed by CTS", but again it does not explain the reasons for this conclusion.

C. The Response.

The State of Washington responded by letter dated December 17, 1985, indicating that contrary to Sequim Taxi's allegation, CTS did favorably consider its request to permit potential contractors the ability to lease or otherwise operate CTS-owned equipment under the contract. The response indicates that the solicitation process used by CTS allowed for input and modification, and provided a forum for resolution of complaints through its regular Board meeting process. The real problems, according to the State, result from on-going contract administration disputes arising out of an existing contract between CTS and Sequim Taxi. The response concludes that, while CTS did not have a formal private enterprise participation policy or process at the time the complaint was filed, that in practice it complies with the spirit of the 3(e) requirements by considering the complaint and making changes to address the concerns raised.

D. The Rebuttal

Although the complainant was given the opportunity to rebut the State's response, no rebuttal was offered.

E. Request for Additional Information

By letter dated January 23, UMTA requested that the State provide additional information relative to the planning process following by CTS, in particular with

respect to its decision to expand the special transportation business during the term of Sequim Taxi's contract.

F. Supplementary Response by State

By letter dated February 3, 1986, the State responded to UMTA's request for additional information. The response makes the following points:

1. Two changes were made to the program in June of 1984: a) the hours of operation were expanded to match fixed route service, and b) lift-equipped vehicles were made available to ambulatory passengers.
2. Mr. Ennen's contract was amended to allow for the increased hours of operation. (It is unclear whether the expanded use of CTS lift-equipped vehicles by ambulatory passengers was consistent with the contract.)
3. The State disagrees with Mr. Ennen's assertion that these changes resulted in a loss of business. In support of its position the State notes that payments to Mr. Ennen under the contract increased dramatically after July 1984 over previous payments. Furthermore, the contract with Sequim Taxi was intended to be a supplementary service and not a guarantee of an exclusive right to provide transportation.
4. CTS did meet with the complainant to discuss Mr. Ennen's concerns. However, CTS indicated at that meeting that it would not consider Mr. Ennen's proposal to use CTS vehicles until certain existing billing problems could be corrected. CTS maintained that Sequim Taxi was not following proper billing procedures in accordance with its contract. According to the State, it is this contract dispute which really forms the basis for the instant complaint, rather than a failure to fulfill private enterprise requirements. In any case, the CTS Board decision to provide the service through a competitive process is considered by the State to have cured any such failure.

G. Rebuttal to Supplemental Response

Mr. Ennen submitted a rebuttal to the State's supplemental response by letter received on March 4, 1986. This rebuttal included numerous attachments. Briefly, the rebuttal makes the following points:

1. The June 1984 changes by CTS, increasing use of lift-equipped vehicles, were unilateral. There was no prior consultation. Further, the subsequently negotiated contract, which supposedly provided for these changes, was ignored by CTS.
2. A chart was provided showing weekly earnings over a 4-year period to demonstrate that CTS, through its Dial-A-Ride program, has taken over the taxi business. Further, although the complainant's gross income has risen, net income has actually declined.
3. With respect to the meeting between CTS and the complainant, the meeting was not consultative in nature and did not address the issue of use of CTS vehicles by the complainant.
4. Complainant disputes allegations relative to improper billings under the contract.
5. The competitive solicitation was too big, and the financial and paperwork requirements were too onerous, to permit complainant to submit a responsive bid.

H. Additional Supplemental Response by State

By letter dated March 31, 1986, the State made the argument that neither UMTA nor the State has jurisdiction because no UMTA funding is directly involved in the elderly and handicapped services contracted out by CTS.

III. Discussion

CTS and Sequim Taxi were parties to a contract under which Sequim Taxi provided special transportation to the elderly and handicapped in the Sequim area. The contract was renewed in August 1984. During the course of the contract, Sequim Taxi raised concern about the level of competition from CTS vehicles which were allegedly diverting customers from Sequim Taxi.

In June of 1984, CTS unilaterally expanded service with its lift-equipped vans. Although no prior consultation occurred, CTS and Sequim Taxi did conduct subsequent discussions concerning the use of the vans.

During these discussions, Sequim Taxi proposed that CTS make its vans available to Sequim Taxi in return for a mutual guarantee of service on Sequim's part, and restricted operation on CTS' part. CTS declined, based on questioned billing practices by Sequim arising out of the existing contract.

CTS eventually issued a new solicitation for special transportation service, which permitted the successful contractor to utilize CTS equipment to provide the service. The complainant did not submit a bid, and another provider was awarded the contract. Sequim Taxi complains that CTS did not follow the procedures set forth by Section 3(e) of the UMT Act in the awarding of this contract.

Before UMTA will deal with a complaint pertaining to a violation of the terms of Section 3(e), it must be established that the type of assistance which the grantee receives falls within the perimeters of this provision.

Section 3(e) provides, in pertinent part:

No financial assistance shall be provided under this Act to any State or local public body or agency thereof for the purpose, directly or indirectly ... of providing by contract or otherwise for the operation of mass transportation facilities or equipment in competition with, or supplementary to, the service provided by an existing mass transportation company ... unless the Secretary finds that such program, to the maximum extent feasible, provides for the participation of private mass transportation companies.

CTS is a subrecipient of UMTA funds under the State-administered Section 18 program. Materials submitted by the parties, however, show that this assistance has been provided exclusively for capital purposes, and has not been utilized to acquire or operate the vehicles involved in the instant complaint.

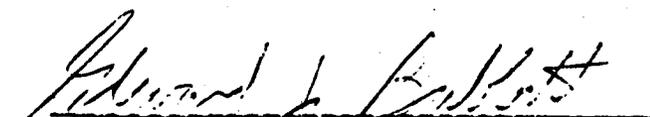
Consequently, CTS is not subject to the requirements of Section 3(e) in its provision of this service. Therefore, though Sequim Taxi's allegations are not without merit, and though UMTA notes that at the time this complaint was filed, CTS lacked a private sector participation process as required by Section 3(e), UMTA lacks jurisdiction to make a decision or ruling on this matter.

IV. Conclusion

Before UMTA will rule on a complaint pertaining to a violation of the terms of a grant agreement, it is essential that jurisdiction be established. In this case, CTS does not receive operating assistance from UMTA. If it did, UMTA would assert jurisdiction on the ground that any operating assistance would be indirectly, if not directly, involved in the provision of transit service by CTS. CTS has utilized UMTA assistance solely for capital purposes, and no UMTA funds were used to operate the vans which are the subject of this complaint. For this reason, UMTA concludes that the provisions of Section 3(e) are inapplicable to the service which CTS provides using the vans in question, and that UMTA therefore lacks jurisdiction to make a ruling on this matter.


 Rita Daguillard
 Attorney-Advisor

4/26/88
 Date


 Edward J. Babbitt
 Chief Counsel

5/13/88
 Date