



U.S. Department  
of Transportation

Urban Mass  
Transportation  
Administration

Headquarters

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

*File Chart*  
UCC-30  
Chron

AUG 17 1988

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

Re: NY/CENTRO 88-05-02

Dear Mr. Shulman:

This is in response to your letter of July 11, 1988, in which you inquired about the reference to printed schedules as being critical to the determination of whether service is classified as mass transit or charter.

The definition of "mass transportation" set forth at section 12(c)(6) of the Urban Mass Transportation Act of 1964, as amended (UMT Act), 49 U.S.C. Section 1608(c)(6) provides as follows:

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

It is the view of the Urban Mass Transportation Administration (UMTA) that, in general, a grantee best demonstrates that a service will be performed on a regular and continuing basis by including that service on its regular printed schedules.

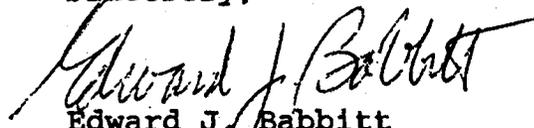
UMTA recognizes that the Charter Service Regulation itself did not stress the importance of regularly-printed schedules as a criteria for establishing that service constitutes mass transportation. Since the UMT Act defines "mass transportation," UMTA did not create a new definition of "mass transportation" for its Charter Service Regulation. However, the preamble to the regulation does state, in several places, the necessity that service to be "regular and continuing" before it may qualify as mass transportation. See preamble to the Charter Service Regulation, 52 Fed. Reg. 11919 and 11920, April 13, 1987. In addition, the preamble emphasizes that, for service to qualify as mass transportation, the recipient (rather than the customer) must

establish the routes and schedules to be followed. A recipient best demonstrates that it (rather than the customer) has established a particular route and schedule by including the route and schedule in its regularly-printed schedules. Provision of service that deviates from the recipient's printed routes and schedules does not, in all cases, disqualify such service as "mass transportation." Nevertheless, a recipient might easily circumvent the restrictions of the Charter Service Regulation, if the recipient could merely adopt those routes and schedules desired by particular customers without first printing those routes and schedules, particularly if the desired service were sporadic or infrequent.

Although UMTA's Charter Service Questions and Answers, 52 Fed. Reg. 42248 et seq., November 3, 1988, do not expressly mandate regularly-printed routes and schedules, the importance of regularly-printed routes and schedules is alluded to in the reference to "regularly scheduled" service in Question 27.c. Moreover, the Answer to Question 39 states that, "UMTA would be suspicious or concerned about incidents in which recipients operate service which, though it conforms to the above criteria [for sightseeing service], is without pre-arranged schedules and is specifically designed to accommodate the desires or a particular group."

Therefore, UMTA is pleased that Centro will include its shuttle service for the New York State Fair in its printed schedules of service. In addition, UMTA appreciates the efforts Centro is making to privatize this and other service.

Sincerely,

  
Edward J. Babbitt  
Chief Counsel

cc: Mr. Russell Ferdinand



U.S. Department  
of Transportation

Urban Mass  
Transportation  
Administration

The Administrator

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

L.A. 11111  
UCC-30  
Chron

AUG 18 1988

Mr. Patrick L. Hamric  
General Manager  
Lexington Transit Authority  
109 Loudon Avenue  
Lexington, Kentucky 40508

Re: Blue Grass Tours & Charter v.  
Lexington Transit, KY-08-08/01

Dear Mr. Hamric:

I am writing in reference to your appeal of the decision of the Urban Mass Transportation Administration's (UMTA) Chief Counsel in the above-referenced matter. In his decision, the Chief Counsel found that the service provided by the Lexington Transit Authority (Lextran) to the University of Kentucky was impermissible charter service, in violation of UMTA's charter regulation, 49 CFR Part 604. You state that Lextran is in compliance with the charter regulation, and list a number of areas you feel that UMTA should take into account in reconsidering its decision.

First, you dispute the Chief Counsel's finding that "the service complained of runs at the behest of the University, which dictates locations and schedules." You state that the University and Lextran mutually agree on the routes and schedules. This practice, you point out, is used throughout the country with major employers, schools of all types, hospitals, and retail centers. Moreover, you maintain, while schedules for the service may change according to need, the routes have remained virtually the same for several years.

UMTA agrees that the provision of service by a grantee to a university complex may be mass transit. See Q&A 27(d) of UMTA's "Charter Service Questions and Answers," 52 Fed. Reg. 42248, 42252, November 3, 1987. However, one requirement for being categorized as such is that the service in question be under the control of the UMTA recipient. While you maintain that this is the case with the campus service provided by Lextran, the Chief Counsel's investigation revealed that the University essentially dictates the routes and schedules. A copy of the University's bid proposal for the forthcoming school year confirms the Chief Counsel's finding. In this document, the University solicits bids from providers for "intra-campus transportation for the University of Kentucky Department Of Parking and Transportation." The University specifies in the bid proposal the type of vehicles required, and states that the service will follow routes and schedules determined by the University. Moreover, the proposal

states that the bus stops will be designated by the University, and that "these University designated bus stops shall be the only stops recognized by the Provider's operators." A copy of the bid proposal is enclosed for your information.

It is clear from this description that the service is under the control of the University, and not of Lextran. As such, it lacks a major characteristic of mass transportation.

Second, you take issue with the Chief Counsel's conclusion that the service is "not advertised or promoted to make the public aware of its availability (except on campus)." You state that the service is indeed open to the public, and enclose a Lextran route map indicating the University service.

UMTA notes, however, that the Lextran route map for the campus service is not current, but is dated January 1, 1982. Moreover, though Lextran states that it provides information on the service to telephone callers, there is, as the Chief Counsel's decision pointed out, no indication of an attempt on the part of Lextran to market the service to the general public. Consequently, UMTA considers that the campus bus service is not open to the public, but is designed for the exclusive use of students and campus personnel.

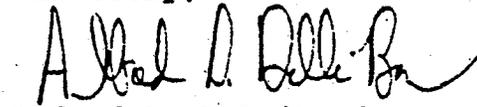
Finally, you explain that the University campus is located in the heart of the general urban area of Lexington, and that the route serves a number of residential areas and businesses close to the University.

The fact that the campus bus service concomitantly serves immediately adjacent off-campus areas is not enough to transform its essential character. As the Chief Counsel's investigation found, and the University's bid proposal confirms, the service is provided by Lextran under contract with the University for the purpose of transporting students. Even admitting that members of the public may and occasionally do board the campus buses, such use of the service by the general population of Lexington is clearly secondary to its main purpose.

I therefore conclude that the Chief Counsel correctly ruled on the record provided by the parties, and that the service provided by Lextran to the University of Kentucky meets the UMTA's criteria for charter service since it is under a single contract, under the control of a party other than the grantee, and for the exclusive use of a particular group. Therefore, I find no basis for overturning his decision.

Accordingly, I hereby deny your appeal of the Chief Counsel's decision in the above-cited matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Alfred A. DelliBovi".

Alfred A. DelliBovi

cc: Wallace C. Jones, Jr.  
Blue Grass Tours & Charter

Enclosure



U.S. Department  
of Transportation

**Urban Mass  
Transportation  
Administration**

REGION VIII  
Colorado, North Dakota,  
Montana, South Dakota,  
Utah, Wyoming

1050 17th Street  
Prudential Plaza  
Suite 1822  
Denver, Colorado 80265

August 25, 1988

Richard C. Thomas, Public Transit Director  
City of Phoenix  
101 South Central Avenue, Suite 600  
Phoenix, AZ 85004

Subject: Charter Service Public Notice

Dear Mr. Thomas: *Dick*

Pursuant to our phone conversation regarding charter service public notice requirements, please note the answer to question number 13, page 42250, in the enclosed Federal Register notice. The answer indicates that a grantee does not have to publish a notice if the grantee already knows that at least one willing and able private charter operator exists in the area, but the grantee intends to provide charter service only through subcontracting arrangements with the private sector. The answer also states that a grantee will not be precluded from obtaining a special events exception solely on the grounds that it failed to publish a notice of general willingness to provide charter. The latter provision appears to be designed for the grantee that does not originally intend to provide charter service at all, but is suddenly faced with a need for special events service and has no time for the usual notice process.

As I understand the facts, Phoenix intends to provide charter service only through subcontracting arrangements or for special events. The City also already knows that private operators exist in the area. Therefore, there is no absolute requirement for the City to publish an annual charter notice.

When requesting a special events exception from UMTA, however, a grantee is first required to notify all willing and able private operators of its intent to provide the charter service and give them an opportunity to comment. The annual charter notice is the usual means for determining which operators are willing and able to provide service and thus must be notified in such circumstances.

Since Phoenix is already aware that it may want to provide special events service and would have time to go through the usual notice process, the City may wish to issue the public notice so that it can establish a list of operators to contact when special events do occur. If the City has some other reasonable means of identifying private charter operators, however, it appears that the annual public notice would not be an absolute prerequisite to obtaining a special events exception.

I hope this information will be helpful.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Helen".

Helen M. Knoll  
Regional Counsel



U.S. Department  
of Transportation

Urban Mass  
Transportation  
Administration

REGION I  
Connecticut, Maine  
Massachusetts,  
New Hampshire,  
Rhode Island, Vermont

Transportation System Center  
Kendall Square,  
55 Broadway,  
Suite 904  
Cambridge, Massachusetts 02142

*Subject  
INNER CITY*

August 31, 1988

Arthur L. Handman  
Executive Director  
Greater Hartford Transit District  
One Union Place  
Hartford, Connecticut 06103

Dear Mr. Handman:

I am responding to your letter of August 24, 1988 regarding the interpretation of "special services" relating to the transportation of workers from the inner city to suburban job sites. You ask whether such service could be expanded to include carrying the children of the workers to day care centers at or near the suburban job sites and to include transporting the inner city workers to remedial training sessions either prior to or after their employment periods.

The definition of mass transportation, UMT Act section 12(c)(6), includes "special service". The legislative history states that special service includes transportation of workers who live in the inner city, but work in a factory in the suburbs. See H.R. Rep. No. 1785, 90th Cong., 2d Sess., rep. in 1968 U.S. Code Cong. Ad. & News 2941. Thus, your description of the service that transports the workers to their job sites is special service and therefore can be operated closed door. (Please note that in order that the service not constitute charter service it must meet other characteristics of mass transportation. See Charter Rule Preamble, 52 Fed. Reg. 11,916, 11920, col. 1 (Apr. 13, 1987).)

Although the additional service to transport the workers' children for day care and to transport the workers to training sessions is not specifically contemplated by the legislative history, this service as described is ancillary to the main objective of transporting workers from the inner city to suburban job sites. As such, the transportation of such workers to the suburbs, with the ancillary transportation of their children to day care and the workers to job training, would still constitute special service as contemplated in the legislative history

underlying UMT Act section 12(c)(6). Please note that this interpretation is based on the close linkage of the ancillary transportation to the main thrust of the service: transporting workers from the inner city to suburban job sites. Any alteration in the structure of the described service might well result in recasting such service outside the narrow statutory definition of special service. Please contact me if any changes to the proposed service might alter this legal opinion.

If you have any questions on this matter, please feel free to contact me.

Sincerely,

ORIGINAL SIGNED BY

Paul C. Bauer  
Regional Counsel



SBT claims that in 1985, it again offered the District to provide paratransit service at 50% of the District's cost, and to provide regularly scheduled service. According to SBT, both offers were refused by the District's General Manager.

SBT states that in 1986, it again approached the District with an offer to provide paratransit service at 50% of the District's cost and to provide regularly scheduled service. SBT alleges that in an attempt to punish SBT, the District underbid SBT on a contract for shuttle service that SBT was operating for the City of Santa Barbara. SBT states that the District's bid was far below its fully allocated cost to provide the service.

SBT states that in 1986, it requested to be considered by the District to provide scheduled bus service. SBT indicates that the District invited bids to provide 20% of its regularly scheduled service. SBT claims that it submitted a bid within the five working days allowed by the District for response, but that the District's General Manager termed its bid "non-responsive." SBT asserts that its bid was for \$722,000, and that the District had stated that its own fully allocated cost to provide the service was \$1,135,000.

The District's General Manager, claims SBT, had advised the District's Board of Directors not to contract with SBT, as only \$380,000 could be saved from the District's \$6,000,000 budget by doing so. A month later, states SBT, at an UMTA-sponsored meeting, the General Manager passed out a handout showing that \$635,000 could be saved by contracting with a private company.

SBT alleges that in bidding out this service, the District violated every part of its own dispute resolution process which, according to SBT, was written after the bid. SBT asks UMTA to investigate these alleged violations of UMTA's private sector policy.

#### RESPONSE

UMTA reviewed SBT's complaint and determined that the allegations, if substantiated, constituted violations of the private sector provisions of the UMT Act and the implementing policy. UMTA forwarded SBT's complaint to the District on March 21, 1988, and provided it with 30 days to respond.

The District's response is dated March 30, 1988. In its response, the District characterizes SBT's allegations as "unsupportable, simply false, or a fabrication."

In response to SBT's allegation that the District had unfairly rejected its offer to operate paratransit service, the District states that it does not have a paratransit service to subcontract. the District denies that it had helped to establish a nonprofit organization. The District explains that in 1977, it had operated a paratransit service. In 1979, the District states, the Easter Seals Society of Santa Barbara purchased lift-equipped vans through UMTA's 16(b)(2) program,<sup>1</sup> and started Easy Lift, its own independent transit operation. The District notes that it ceased its own paratransit operation, and began allocating a portion of its California Development Act funds to Easter Seals as a partial operating support.

The District further denies that it "punished" SBT by attempting to underbid SBT on a contract SBT had with the City of Santa Barbara. The District states that it had never obtained a contract to operate such service, but merely designed the service for the City and suggested that the City bid it out.

The District moreover disputes SBT's allegation concerning the District's consideration of its bid for regularly scheduled service. The District states that it solicited bids for about 15% of its scheduled service during the preceding summer. According to the District, the bid solicitation was issued immediately upon completion of the proposed public schedule, and bidders were given far more than five days to respond. <sup>f</sup><sup>2</sup> Not only was SBT's bid non-responsive, the District maintains, but it was also for \$980,066, and not for \$722,000, as stated in SBT's complaint.

The District states that § 13(c) of the UMT Act precludes transit operators from laying off workers without compensation.<sup>3</sup> Since its labor contract mandates lay-offs on the basis of seniority, the District maintains, it would, if it subcontracted, be obliged to lay off most of its low-wage, part-time employees. The cost of compensating these workers, the District states, as well as increased overall labor costs resulting from the lay-off of its low-wage employees, would result in savings of only \$380,000.

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<sup>1</sup>Section 16(b)(2) of the UMT Act authorizes UMTA to make grants to private nonprofit corporations for the purpose of assisting them in providing transportation services for the elderly and handicapped.

<sup>2</sup>The District fails to specify, however, exactly how many days the bidders were given.

<sup>3</sup>This statement is technically incorrect, since §13(c) contains no provision mandating compensation for laid-off workers. However, this section does direct grantees to protect the interests of their employees, and to undertake such measures as may be necessary to protect their rights, privileges, and benefits.

As for SBT's claim that the District's General Manager had stated that \$635,000 could be saved by contracting 20% of the District's service, the District indicates that these figures have no relationship to its subcontract bid. The District states that its subcontract bid was for 15% of its service. The 20% figure was mentioned in a speech by its General Manager, the District notes, to demonstrate that as greater levels of service are subcontracted, more real savings may occur. The 20% was offered only for explanatory purposes, MTD contends, and was not the level it requested proposals for.

With regard to the \$1,135,000 that SBT claims is the District's cost for providing the service in question, the District states that SBT "made up that figure." The District maintains that its fully allocated costs for providing the service are nowhere near that amount.

Finally, the District asserts that SBT had been given ample opportunity to have its case heard. The District Board of Directors, states the District, had given SBT several months to explain its case. The case was heard by the Board and rejected, the District maintains. SBT then appealed to the local MPO for relief, explains the District, and was denied a hearing. According to the District, every effort had been made to hear SBT's appeal.

The District concludes by affirming that UMTA's investigation will show that SBT's allegations are full of inaccuracies.

#### REBUTTAL

UMTA forwarded the District's response to SBT on April 7, 1988, and provided SBT with 30 days to submit a rebuttal. SBT's rebuttal is dated May 12, 1988.

In its rebuttal, SBT first of all disputes the District's claims that Easy Lift, the local nonprofit organization which provides paratransit service, is not funded by the District. SBT states that the District supplies most of Easy Lift's operating budget and has provided that organization with two lift-equipped vans.

SBT indicates that for four consecutive years, from 1984 to 1987, it had requested to be considered to provide paratransit service. According to SBT, it had not been allowed to make a presentation to the the District Board, despite repeated requests to the District's General Manager. The paratransit service was awarded to Easy Lift, states SBT, for each of the years in question.

SBT states that it bid on the service again in late 1987, when the Area Planning Council, the local MPO, required the District to put the service out for bid. Information available at the time, claims SBT, indicated that 55% of the users of the paratransit service were ambulatory and did not require lift-equipped vehicles. SBT states that the MPO drafted the bid specifications to reflect this fact, but that the District's General Manager changed the specifications to require lift-equipped vehicles only. SBT explains that only two transit providers bid on the contract, namely SBT and Easy Lift. Since all of Easy Lift's vehicles are lift-equipped, SBT indicates, Easy Lift won the contract, despite the fact that its cost per trip is substantially higher than SBT's.

SBT complains that the District's decision was almost totally based on subjective criteria, and not on the normal bid criteria of cost, company experience, financial strength, and qualifications of the management team. SBT states that there was no pre-bid conference, and it was not allowed to be interviewed by the Board of Directors. As a result, claims SBT, it was again unfairly excluded from providing the paratransit service.

Second, SBT states that while it is correct that the District has never operated a shuttle service for the City of Santa Barbara, "it is not from lack of trying." SBT claims that in 1985 and 1986, the District attempted to undercut SBT's cost for operating the service by offering to provide it at less than its allocated cost.

In 1987, SBT states, it won a two-year contract to provide the service. SBT indicates that since then, the District has been making renewed attempts to acquire the contract. Recently, SBT maintains, the District's General Manager placed the District employees on SBT's shuttle buses in order to monitor operations and passenger counts. SBT states that it expects the District to present a new cost undercutting proposal to the City before the present shuttle service contract expires on July 1, 1989.

Third, SBT states that the District did not follow UMTA guidelines when it put its transit service out for bid in July 1987. SBT claims that it was given only five working days to respond to a \$1 million bid. Moreover, SBT maintains, "...it has been shown by the experts that the District's fully allocated cost to provide the service is \$1,135,000." SBT states that its own bid was about \$980,000, but that it offered to reduce its price to \$722,276 if it could buy or lease the District buses at market value and use UMTA-funded fareboxes. The bid was rejected by the District, SBT indicates, on the advice of the General Manager, who told the District Board not to grant the bid to SBT as the District's partial incremental costs to provide the service were only \$380,000.

Stating that the District had unfairly thwarted all privatization opportunities and the accompanying cost savings during the past five years, SBT asks that UMTA end such alleged abuses and require the District to give fair consideration to bids from private companies.

#### DISCUSSION

UMTA developed its private enterprise policy in conformance with three provisions of the UMT Act, namely Sections 3(e), 8(e), and 9(f). Under Section 3(e) UMTA must, before approving a program of projects, find that such program provides for the maximum feasible participation of private enterprise. Section 8(e) directs UMTA recipients to encourage private sector participation in the plans and programs funded under the Act. Finally, as a precondition to funding under Section 9, recipients must develop a private enterprise program in accordance with the procedures set out in Section 9(f).

In order to provide guidance in achieving compliance with these statutory requirements, UMTA issued its policy statement, "Private Enterprise Participation in the Urban Mass Transportation Program," 49 Federal Register 41310, October 22, 1984. This policy statement sets forth the factors UMTA will consider in determining whether a recipient's planning process conforms to the private enterprise requirements of the UMT Act. These factors include consultation with private providers in the local planning process, consideration of private enterprise in the development of the mass transportation program, and the existence of records documenting the participatory nature of the local planning process and the rationale used in making public/private service decisions.

UMTA's private sector requirements are further detailed in Circular 7005.1, "Documentation of Private Enterprise Participation Required for Sections 3 and 9 Programs," December 5, 1986. The Circular outlines the minimum elements which a grantee's private sector consultation process must contain, and describes the documentation required to demonstrate that the process has been followed.

The Circular states that a grantee's private sector process must include the following elements:

- a. Notice to an 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 efficiently provided by private sector operation pursuant to a competitive bid process.
- d. The use of costs as a factor in the public/private decision.
- e. A dispute resolution process which affords all interested parties an opportunity to object to the initial decision. UMTA's complaint process is designed to accept appeals of this local dispute resolution process.

The Circular also describes the complaint procedure which private operators may follow when they believe that a grantee's private sector policy is inadequate or has been improperly applied. Under this procedure, disputes should be resolved at the local level. The procedure ideally envisages a first stage of dispute resolution between the grantee and the private operator and, failing settlement at this level, a review of the grantee's decision by the local MPO. The Circular states that the MPO should develop its own dispute resolution process, and that complaints to UMTA will be referred to the MPO for an attempt at local settlement. Under the terms of the Circular, UMTA will entertain complaints only when a complainant has exhausted its local dispute resolution process.

In its complaint, SBT asks UMTA to resolve its dispute with the District, since it has exhausted local review. The District's response explains that SBT had asked the District's Board of Directors to reconsider its bid to provide transit service, and that this request had been denied. The District indicates that SBT then appealed to the Area Planning Council (APC), the local MPO, which refused to hear its appeal.

In a letter dated January 12, 1987, to the California Bus Association (CBA), which sought to bring the appeal on behalf of SBT, the APC states:

The APC staff is aware that the Santa Barbara Metropolitan Transit District had previously adopted a privatization policy which includes a dispute resolution process involving

the Area Planning Council. However, the policy was never presented to the Council for approval or acceptance. Furthermore, the APC has never indicated a desire to accept such a role since it has no authority to effect a resolution of disputes involving the SBMTD and private contractors.

The APC's position in this matter is contrary to UMTA's dispute resolution process, as outlined in Circular 7005.1. Under this process, MPOs are expected to constitute an independent level of review of grantees' decisions. UMTA recognizes that an MPOs staffing and resources may not allow it to perform a thorough, substantive investigation of private sector complaints in all cases, but expects that MPOs will at the very least review the grantee's decision and indicate its concurrence or nonconcurrence before referring the complaint to UMTA.

UMTA's policy requiring local dispute resolution is in accordance with the underlying spirit of the UMT Act, which is to afford communities maximum discretion in local decision-making. The policy also recognizes the fact that the local decision-maker is most knowledgeable about the facts and events surrounding a local dispute, and best situated to make a determination with regard to them.

UMTA views unfavorably the APC's decision not to accept a role in the resolution of local disputes. This is especially the case, since the APC justifies its refusal on the ground that such a role was never presented to the APC for approval or acceptance. Under the terms of the UMTA Circular, the MPO is expected to develop a dispute resolution process on its own and independently, and not subsequent to referral by the grantee. UMTA believes that the APC's rejection of a dispute resolution role in this instance is a clear abnegation of its responsibilities in the private sector complaint process.

This refusal is all the more regrettable in the present instance, since the parties make sharply contradictory statements which are difficult for UMTA, with its removal from the local situation, to reconcile. For instance, the parties make conflicting claims with regard to the establishment and funding of Easy Lift and the awarding of the paratransit service contract to that organization. According to SBT, Easy Lift was created and is funded by the District, while the District maintains that it is a totally independent organization to which the District merely passes along state development funds. SBT further alleges that Easy Lift won the local contract to provide paratransit service because the

District changed the contract specifications to correspond to Easy Lift's equipment capacity. The District, on the other hand, indicates that the contract was awarded to Easy Lift because of the quality of its service. Since, according to the statements of both parties, the APC determines the level of funds the District allocates to Easy Lift and participated in the bid solicitation process, it is clearly in a better position than UMTA to decide the accuracy of the parties' claims.

Likewise, the parties differ significantly in their claims concerning the shuttle service SBT provides to the City of Santa Barbara. SBT insists that the District is using cost undercutting tactics to win its shuttle contract, while the District denies the allegation, and maintains that it merely suggested that the City bid the service out. As the body which has direct control of federal funding to the District and general involvement in local transportation matters, the APC has a distinct advantage over UMTA in determining the merits of these contradictory statements.

Furthermore, at the heart of SBT's complaint with regard to its bid on the District's transit service, is its criticism of the cost allocation method used by the District. SBT alleges that the District used arbitrary cost comparison methods in rejecting its competitive service bid, while the District states that its analysis was based on standard, UMTA-approved cost allocation guidelines. Since, under Circular 7005.1, MPOs are responsible for providing UMTA with a description of proposals submitted to grantees by private operators and how they are evaluated, UMTA presumes that the APC has direct knowledge of the cost allocation method used by the District. Again, therefore, UMTA believes that this is a question which could best be decided by the APC.

UMTA recognizes, however, that by its own admission, the APC currently has no dispute resolution process in place, and that it might be several months before the APC can develop such a process. UMTA further recognizes that the complainant may be prejudiced by this delay in the hearing of its appeal. UMTA therefore believes that fairness to the complainant requires that UMTA decide these issues on the merits.

As concerns the first issue raised by SBT, UMTA's review of the administrative record shows that, for the current year at least,

the District did adhere to the requirements of the private sector policy in the awarding of the paratransit contract. Materials submitted by the parties show that the District issued a request for proposals for the paratransit service on March 29, 1988. Bidders were given until April 19, 1988, to respond, and service was scheduled to begin on July 1, 1988. The record further indicates that the District received proposals from two transportation providers, namely SBT and Easy Lift, and that these proposals were thoroughly reviewed by an Evaluation Committee. This review, the records shows, was followed by a detailed recommendation to the the District Board, which included an item-by-item comparison of the two proposals. The Committee recommended in favor of awarding the contract to Easy Lift for various qualitative reasons, including the fact that SBT, unlike Easy Lift, had failed to submit a detailed budget and operating plan for the service.

UMTA's investigation also failed to corroborate SBT's claim that Easy Lift is an organization established and funded by the District. Not only has SBT failed to show that Easy Lift was created or is controlled by the District, but it has also presented no clear evidence that the District provides funding to Easy Lift in addition to the funds which it is authorized under the California Transportation Development Act (TDA) to pass along to that organization. It indeed apparent from the administrative record that Easy Lift is an independent organization which receives funding from several sources, including the TDA funds distributed by the District.

On the basis of these findings, UMTA concludes that there is no merit to SBT's allegations with regard to the paratransit service contract. UMTA finds that by providing adequate notice to private providers and by using objective criteria to evaluate their proposals, the District conducted its bid process for the paratransit service in accordance with the private policy guidelines.

The second issue raised by SBT concerns bidding by the District on a contract for shuttle service which SBT has with the City of Santa Barbara. While the District denies in one part of its response that it has any interest in the shuttle contract, it states elsewhere that "there is the possibility that Mertran may be forced by the City of Santa Barbara to expand its services in that area."

Although the requirements of Circular 7005.1 apply only to a grantee's contracting of its own mass transit services, a grantee is nonetheless bound by the provisions of Section 3(e) of the UMT Act when engaged in competitive bidding against a private operator. This Section requires that recipients of UMTA assistance must provide for the maximum feasible participation of private operators in the provision of mass transit services. UMTA would view actions such as those allegedly taken by the District

in attempting to win the shuttle contract from SBT, as a violation of this provision.

However, UMTA notes that the District strongly denies using cost undercutting tactics or harassment to win the shuttle contract from SBT. It should moreover be noted that SBT has not yet suffered any actual injury in this regard, since it is still operating the service under the existing contract, which is set to expire on July 1, 1989. UMTA therefore believes that no corrective measures are called for in the matter of the shuttle contract, beyond an admonition to the District that as an UMTA recipient, it must refrain from any action which would be deliberately detrimental to the interests of private providers, and must adhere to the requirements of Section 3(e) when competing with a private operator.

The third aspect of SBT's complaint deals with its bid on part of the District's mass transit service. SBT in essence claims that the District failed to follow its own private sector guidelines by allowing bidders only 5 days to submit proposals, and by using improper cost allocation methods.

The District denies that bidders were given an inadequate amount of time to submit proposals, but fails to specify how much time they were allotted. Moreover, while the District maintains that it used an UMTA approved cost allocation method, the brief submitted to the MPO by the California Bus Association (CBA) on behalf of SBT questions this assertion. The CBA found that the cost allocation practices used by the District in this instance were inconsistent with UMTA's cost analysis guidelines in several important respects. These include the deletion by the District of approximately \$211,493 in operating costs from its fully allocated model for the service. The CBA appropriately points out that "If all fixed and variable resources are included in a fully allocated cost estimate, the model is not in conformance with the guidelines." The CBA also notes that the District used two different figures to represent its "marginal cost" to operate the service, citing the sum of \$461,212 in a letter to the the District Board, and \$380,508 at the Board hearing on the matter. The District Board correctly describes these procedures as irregularities in the area of cost allocation.

Since the District has failed to refute SBT's allegations concerning its bid solicitation deadline and its cost allocation practices, UMTA must assume that they are true. UMTA therefore concludes that the procedures which the District used in contracting out part of its transportation services are not in compliance with its own private sector participation process.

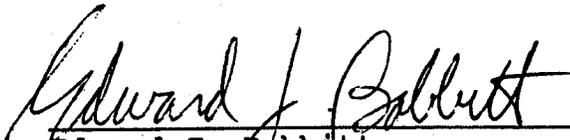
Since UMTA finds that the process used by the District in this instance unnecessarily excluded the private sector from competitive contracting of mass transit services, it orders the District to rebid, by January 1, 1989, the portion of that service which is the subject of this complaint. In so doing, the District should follow the guidelines for private enterprise involvement set out in Circular 7005.1, and its own private sector policy.

CONCLUSION

UMTA concludes that the Area Planning Council, the local MPO, failed to follow UMTA guidelines with respect to the development of a local dispute resolution process. UMTA encourages the MPO to develop a procedure for the review of grantees' decision, in conformance with the private sector guidelines set out in Circular 7005.1. UMTA also finds that the District did not follow its own private enterprise policy in bidding out part of its mass transit services, and orders the District to rebid the service by January 1, 1989.

  
\_\_\_\_\_  
Rita Daquillard  
Attorney Advisor

9/15/88  
\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Edward J. Babbitt  
Chief Counsel

9/21/88  
\_\_\_\_\_  
Date

BEFORE THE URBAN MASS TRANSPORTATION ADMINISTRATION

In the matter of:

<u>B&amp;T FULLER DOUBLE DECKER BUS</u>	}	
<u>COMPANY, et al.</u>	}	
Complainants	}	
	}	
v.	}	TX-02/88-01
	}	
<u>VIA METROPOLITAN TRANSIT</u>	}	
<u>AUTHORITY,</u>	}	
Respondent	}	

DECISION

SUMMARY

This complaint was filed with the Urban Mass Transportation Administration ("UMTA") on February 2, 1988, by the American Bus Association ("ABA") on behalf of three private bus operators, B&T Fuller Double Decker Bus Company ("Fuller"), Greyhound Lines, Inc. ("Greyhound"), and River City Coaches ("River City"). The complaint alleged that the San Antonio Metropolitan Transit Authority, also known as VIA Metropolitan Transit Authority ("VIA"), had violated UMTA's charter regulation, 49 CFR Part 604. UMTA's investigation finds that VIA has violated the regulation by leasing vehicles to entities which are not "private charter operators" within the meaning of the charter regulation. UMTA orders VIA to cease and desist from such practices immediately. UMTA's investigation also leads it to believe that VIA may be providing charter service using surplus assets. In order to make a clear determination on this matter, UMTA will conduct an independent study of VIA's charter and mass transit operations.

COMPLAINT

The ABA, a national trade association of private bus operators, filed this complaint on February 2, 1988, on behalf of three of its members which provide charter service in the San Antonio, Texas area. The complaint alleges that VIA has violated UMTA's charter regulation, 49 CFR Part 604. The ABA specifically describes its complaint as follows:

The ABA states that on August 11, 1987, VIA published a public charter notice pursuant to 49 CFR 604.11.<sup>1</sup> The notice indicated, explains the ABA, that VIA would complete its willing and able determination process by November 9, 1987.

The complainants and other private operators submitted the evidence required by the notice, indicates the ABA, and were determined by VIA to be willing and able to provide charter service. The ABA maintains that VIA nonetheless made known its intent not to comply with the charter regulation by soliciting proposals from private charter providers or brokers to provide charter service for VIA under an exclusive arrangement with VIA. The ABA attaches to its complaint a copy of VIA's request for proposals (RFP).

The ABA states that on October 24, 1987, it protested VIA's RFP on behalf of its members likely to be adversely affected by it. The ABA indicates that VIA did not implement the proposal.

The ABA maintains that VIA nevertheless failed to comply with the charter regulation by failing to complete its public participation process by August 11, 1987, as required by 49 CFR 604.11(a)(2), and continued to provide charter service subsequent to that date using UMTA funded facilities and equipment.

Moreover, states the ABA, by memo dated October 13, 1987, school department heads were advised by Antonio G. Alvarez, Assistant Superintendent of the San Antonio School District, that they had the option of calling either Convention Coordinators or Lance Livingston Productions for charter service to be performed through October 27, 1987. The ABA attaches a copy of this memo.<sup>2</sup>

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<sup>1</sup>Under 49 CFR 604.11, recipients of UMTA funds desiring to provide charter service, must complete a public participation process in order to determine if there are willing and able private operators. This process, which must be followed annually, includes publishing in a newspaper a notice describing the proposed service, with a copy to all private operators in the area, as well as to the ABA and the United Bus Owners of America. If a recipient determines that there is at least one willing and able private operator, it may provide charter service only under one of the exceptions to the regulation.

<sup>2</sup>The charter regulation became effective on May 13, 1987. UMTA recipients which were providing charter service on that date and desired to continue doing so, were required to publish their charter notice not more than 90 days thereafter. Recipients were expected to suspend charter operations after August 11, 1987, until they had established through the notice process that there were no willing and able operators in their service area.

According to the ABA, although VIA may occasionally refer charter customers to private bus operators, it attempts to channel most of its business to brokers or bus operators who are chronically short of equipment, and who must necessarily use VIA's equipment. The ABA maintains that VIA provides charter service unlawfully under sham arrangements with one or more brokers, but principally with Convention Coordinators and Lance Livingston Productions. The ABA describes VIA's establishment of subcontracting and brokerage relationships and the steering of customers to firms having no equipment or chronically short of equipment, as a prohibited practice.

The ABA requests that the UMTA Chief Counsel direct VIA to advise the complainants and UMTA whether it has provided charter service directly to customers or under sham arrangements with private firms; withhold UMTA funds or use other appropriate remedies; and, order VIA to cease and desist from providing illegal charter service.

#### RESPONSE

By letter of February 26, 1988, UMTA advised the ABA that the allegations contained in its letter, if substantiated, might constitute violations of the charter regulation. UMTA stated that under 49 CFR 604.15, parties should attempt conciliation at the local level before filing a complaint with UMTA. UMTA stated that if this attempt were not successful, the parties should notify UMTA in writing so that it could proceed with an investigation of the complaint.

On April 8, 1988, the ABA wrote to UMTA to state that it had attempted to resolve the dispute with VIA but had failed. The ABA stated that the complainants had met with representatives of VIA on March 28, 1988. A summary of the meeting, attached to the ABA's letter, showed that its results had been inconclusive.

UMTA wrote to VIA on April 19, 1988, to state that it had been advised by the complainants that they had been unsuccessful in resolving their dispute with VIA. UMTA informed VIA that it was consequently undertaking a formal investigation of the complaint, in conformance with 49 CFR 604.15(c). UMTA asked for VIA's response within 30 days. VIA's response is dated May 20, 1988.

In its response, VIA denies that it has violated the charter regulation. VIA states that it has taken all the required steps to determine that private charter operators are willing and able to provide charter service. VIA maintains that after the publication of the regulation, it went through the public notice process prescribed by 49 CFR 604.9(a) and 604.11. In support of its assertions, VIA attaches copies of its published notice, of evidence received from private operators, and of VIA's letters to private operators informing them of the willing and able determination.

VIA further denies that it has provided direct service to charter customers. VIA states that it has provided no unauthorized service directly to customers after the determination was made, and has no intention of doing so. VIA attaches a copy of its current policy stating that it no longer provides direct charter service.

VIA states that since the implementation of the regulation, it has provided charter equipment and service under contract only to bona fide private charter operators, and not to brokers. VIA notes that under 49 CFR 604.9(b)(2), an UMTA recipient may lease equipment to private operators which lack handicapped accessible buses or the vehicle capacity required to provide a particular charter trip. VIA points out that under this exception to the regulation, a grantee may contract with all private operators, and not just those determined willing and able. Section 604.5(p) of the regulation, explains VIA, states that an operator is willing and able if it desires to provide service, and possesses the required vehicles and legal authority. VIA states that since it takes so little to be determined willing and able, it is difficult to imagine what private charter operators are not willing and able. One explanation, states VIA, is that a broker is a private charter operator, though not a willing and able one.

VIA claims that despite this uncertainty as to whether a grantee may contract with a broker, it has not entered into subcontracts with brokers, but only with bona fide charter operators. VIA states that it has verified that each operator owns at least one bus or one van. VIA attaches a list of the operators with which it has contracted, as well as representations from each operator showing that it has one bus or one van.

According to VIA, the complainant's claim that VIA subcontracts to charter operators which are "chronically short of equipment" denotes a misunderstanding of the charter regulation, which treats all operators alike, whether they have one bus or 100 buses. Moreover, states VIA, Texas law prohibits discrimination against small operators. Furthermore, VIA notes, UMTA encourages grantees to contract with small businesses. VIA also adds that a refusal to do business with small operators could have serious antitrust implications.

VIA disputes the complainants' claim that it has had an exclusive contract with a private charter operator. VIA maintains that its policy has been to contract with all private operators which request such service. VIA attaches a list of the private operators with which it has contracted.

VIA affirms that although it will continue to comply with the charter regulation, it considers the regulation invalid. VIA contends that UMTA has exceeded its authority in implementing the regulation. Section 12(c)(6) of the Urban Mass Transportation Act of 1964, as amended (UMT Act), notes VIA, defines "mass transportation," and prohibits funding solely or primarily for charter service. However, VIA states, nothing in this section justifies a total ban on charter service. On the contrary, VIA maintains, Section 3(f) reveals that the Congressional intent was to protect intercity, and not intracity, operators from unfair, not from all, competition by public operators. In support of its point, VIA presents a legislative and regulatory history of the UMT Act, as well as excerpts from the Comptroller General's opinion of December 7, 1966 (B-160204), which states that grantees may use UMTA-funded equipment to provide incidental charter service.<sup>3</sup>

According to VIA, the new charter regulation should in no event be applied to the use of equipment and facilities funded by Federal grants before the effective date of the regulation. VIA contends that principles of equity require that new regulations should not be applied retroactively. VIA moreover states that when the Federal government disburses money under its spending power, its relationship with the grantee is in the nature of a contract. When the Federal government tries to impose new, damaging restrictions on the recipient after the funding of the grant, maintains VIA, it changes the nature of the contract with the recipient and impairs the bargain.

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<sup>3</sup> UMTA has chosen to define "incidental charter service" as service which does not interfere with or detract from a grantee's mass transit services. Several examples of what UMTA considers to be "incidental charter service" are cited on page 11926 of the preamble to the charter regulation (52 Fed. Reg. 11916, April 13, 1987).

VIA moreover explains that it has expended funds in reliance on the former charter regulation. UMTA's retroactive implementation of the new regulation, contends VIA, prohibits the generation of revenue from the equipment and facilities upon which VIA had relied in good faith. UMTA's change in long-standing Federal policy, argues VIA, deprives VIA of a valuable stream of incidental income from assets purchased under the prior regulation and should be applied, if at all, only to assets funded with Federal funds after the effective date of the new regulation.

VIA further argues that it is not a violation of the regulation for VIA to give out the names of one or more private charter operators. VIA states that it has distributed a list of private charter operators, and to its knowledge, all the operators listed have one bus or one van. According to VIA, there are four reasons why the complainant's allegations of "steering" are meritless. First, says VIA, the charter regulation gives the grantee discretion in recommending charter operators. VIA states that the complainants' objections appear to be based on the philosophy that all charters should be provided with private equipment, and that private operators must subcontract vehicles from private operators. VIA points out that UMTA rejected this position in its final charter rule.

Second, VIA maintains that giving out the names of one or more operators is not "steering." VIA states that the complainants base their complaint on Q&A 19 of UMTA's "Charter Service Questions and Answers," 52 Fed. Reg. 42248, 42251, November 3, 1987. However, VIA states, the Q&A does not define "steering," or cite any part of the regulation which prohibits it. Nonetheless, contends VIA, it has neither steered nor actively promoted any one private operator, but has merely recommended certain operators.

Third, argues VIA, even if it had engaged in "steering," this practice is not prohibited by the charter regulation. VIA states that the regulation does not mention, much less prohibit steering. VIA maintains that UMTA can mandate such a prohibition only through the rulemaking process, which it has thusfar failed to do.

Fourth, states VIA, the complainants allege that VIA's policy of recommending charter operators is contrary to the "intent" of the charter regulation. VIA argues that the "intent" of a regulation should not be an issue, unless there is some ambiguity in the regulation itself or in its enabling statute. According to VIA, 49 CFR 604.9(b)(2) needs no clarification.

VIA maintains that even if Q&A 19, which characterizes "steering" as inappropriate, were to be defended as an agency interpretation of its regulation, such an interpretation would be invalid. VIA states that a Federal agency may not by interpretation read a requirement into a regulation which is not there. An interpretation of a regulation may not, argues VIA, enlarge the scope of the regulation beyond the enabling statute under which it was promulgated. VIA contends that an interpretation of the charter regulation which would allow UMTA to regulate the private charter market is plainly outside the scope of the UMT Act.

VIA states that its actions have been completely consistent with Congressional intention. VIA asserts that its federally funded buses are not primarily used in charter service, and not at all in intercity operations. VIA moreover states that it does not subsidize charter operations. In fact, says VIA, it has made a profit on its charter service. VIA attaches, in support of its assertion, a copy of its most recent auditor's report.

VIA concludes by recapitulating the main points raised in its response, and requests that the UMTA Chief Counsel find that VIA has not violated Federal law or regulations as complained of in Complaint TX-02/88-01.

#### REBUTTAL

By letter of May 27, 1988, to the ABA, UMTA stated that it understood that a copy of VIA's response had been sent to the ABA. UMTA advised the ABA that it could submit a rebuttal within 30 days of receipt of the letter.

The ABA's rebuttal is dated July 1, 1988. The ABA states that VIA has violated UMTA's charter regulation, and accordingly disputes each of the main points raised in VIA's response.

The ABA states that VIA has complied with the "willing and able" determination process as required by 49 CFR 604.9(a) and 604.11, with the one exception that the process was not completed by August 11, 1987, as required by 49 CFR 604.11(a)(2). On October 6, 1987, the ABA maintains, VIA had found at least one private operator willing and able. Consequently, states the ABA, VIA was precluded from providing direct charter service after that date.

The ABA states that it does not allege that VIA has provided direct charter service after October 8, 1987. Rather, affirms the ABA, the gist of its complaint is that VIA has circumvented the prohibition against direct charter service, by referring its charter customers to brokers. The result of these actions has been, maintains the ABA, that VIA has been providing the same amount of charter service since the implementation of the current charter regulation as before.

VIA denies, the ABA indicates, that it has provided direct charter service to brokers. However, states the ABA, this denial is premised on the position that an entity which transports passengers in a bus or van cannot be a broker. The ABA points to the statement in VIA's response that a broker can be a "private charter operator," though not a "willing and able" one. VIA's position, states the ABA, is that it can subcontract with all "private charter operators," and not just with those that are "willing and able." Thus, maintains the ABA, VIA is operating on the principle that it can subcontract with brokers, since it considers them to be to be "private charter operators" to the extent that they operate a bus or a van.

The ABA indicates that VIA's standard is overly broad, since in order to subcontract with an UMTA recipient, a one-bus or one-van operator must be acting as a motor carrier, and not engaged in service as a broker. VIA fails to recognize, states the ABA, that an entity which owns or operates one bus or one van under appropriate legal authority may nevertheless be operating predominantly as a broker. The ABA cites Section 10102(1) of the revised Interstate Commerce Act, 49 U.S.C.A. 10102(1) (West Supp. 1988), which defines "broker" as a person, other than a motor carrier, which sells or offers to sell transportation by motor carrier. Consequently, affirms the ABA, even though a person may own and operate motor vehicles and may be certificated by the Interstate Commerce Commission ("ICC"), it may nevertheless be found to be operating as a broker rather than as a private charter operator in a particular instance.

The ABA notes that VIA has attached to its response a list of the entities to which it has provided charter service under contract and their qualifications to engage in a direct contractual relationship with charter customers. The ABA contends that VIA's service to ten of the entities listed was unlawful because these entities did not hold appropriate operating authority and, even if they possessed such authority, they dealt with VIA as brokers and not as carriers. The ABA provides a list of the ten entities in question, as well as of the number of passenger vehicles which they own and operate and of their motor carrier operating authority.

The ABA states that VIA's financial statements for the year ended February 29, 1988, show charter and contract service revenues of \$2,597,761. The ABA expressed its belief that VIA has derived similar monthly revenue since February 29, 1988, despite the limitations imposed on its charter service by UMTA's charter regulations. This volume of contract charter business could not have been generated, argues the ABA, unless one or more of the entities listed above acted as a broker in arranging for charter

transportation in VIA's buses.

In fact, the ABA alleges, VIA has established sham arrangements with pseudo brokers in order to circumvent the charter regulation. Under these subterfuge arrangements, the ABA claims, VIA generates most of the charter business and channels it to an ostensible provider of charter transportation with the understanding that this provider will call upon VIA to provide the service under contract in UMTA-funded buses.

Moreover, states the ABA, VIA's argument that a refusal to deal with small operators could raise antitrust implications, is disingenuous. By conspiring with certain entities to circumvent UMTA's charter regulation, claims the ABA, VIA and its co-conspirators have restrained competition in the San Antonio charter bus market and have attempted to monopolize that market to the detriment of their competitors.

The ABA disputes VIA's claim that UMTA's charter regulation is not authorized by the UMT Act. The ABA argues that nothing in the statute or legislative history supports this assertion. Congress has, the ABA states, empowered UMTA to determine to what extent UMTA-funded equipment may be used for charter service.

As concerns the interpretation of section 12(c)(6) by the Comptroller General, the ABA states that this opinion is an advisory one, issued without public notice and comment, and has no legal force or effect. UMTA has, argues the ABA, modified in its 1976 charter regulation and in the current charter regulation, the "incidental use" concept enunciated by the Comptroller General.

The ABA further disputes VIA's contention that the charter regulation is "...directly contrary to the expressed intention of Congress." Conference Report language accompanying the 1988 Department of Transportation Appropriations Act, the ABA points out, does not direct that the regulation be rescinded, but rather that UMTA recipients be permitted to provide charter service under certain circumstances.

VIA attacks, notes the ABA, UMTA's legal authority to implement the charter regulation by contending that if Section 12(c)(6) contained an absolute prohibition on the provision of charter service, UMTA would not need to also rely on Section 3(f). The ABA counters this view by stating that Section 3(f) is not superfluous, although it does overlap to some extent with Section 12(c)(6). Section 3(f), states the ABA, unlike Section 12(c)(6), authorizes UMTA to regulate charter service by its recipients irrespective of whether that service is provided with buses funded under the UMT Act, or funded by non-Federal sources.

The ABA agrees with VIA that the current charter regulation

differs markedly from UMTA's previous charter regulations. However, the ABA cites three court decisions which have held that an administrative agency may depart from its established precedents when the decision to do so is supported by sufficient analysis.<sup>4</sup>

The ABA rebuts VIA's argument that the charter service regulation applies retroactively to the use of UMTA-funded equipment and facilities. The regulation, argues the ABA, does not apply to UMTA-funded assets prior to the effective date of the regulation, but rather to the use of those assets after May 13, 1987. Accordingly, states the ABA, the regulation has no more retroactive impact than a prospective property tax increase applied to buildings constructed before the effective date of the tax increase.

Finally, the ABA states that it is unlawful for VIA to generate charter business and channel it to brokers for the purpose of circumventing the regulation. The ABA maintains that it would not object to a policy under which VIA recommended charter customers to all, some, or only one bona fide charter bus operators in the San Antonio area. However, claims the ABA, VIA generates a large volume of charter business, which it refers to paper intermediaries with the understanding that VIA will be retained to provide the physical service under the contract. These sham arrangements, states the ABA, which serve no economic purpose other than regulatory evasion, constitute the gravamen of its complaint.

The ABA maintains that if the complaint were groundless, the truth of the matter could easily have been demonstrated by financial and traffic data in VIA's files. The ABA notes that no such refutation appears in VIA's response. The ABA points out that Exhibit H of the response shows that VIA derived \$2,597,761 in charter and contract revenues for the year ended February 29, 1988. The ABA states that it believes that VIA continues to derive revenues in the same approximate amount from its charter service. The ABA states that the Chief Counsel should obtain information from VIA's files which would establish this fact.

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<sup>4</sup>The decisions cited by the ABA are: Columbia Broadcasting System, Inc. v. F.C.C., 454 F. 2d 1018 (D.C. Cir. 1971); Public Interest Research Group v. F.C.C., 522 F. 2d 1060, 1065, (1st Cir. 1975); and, Greyhound Corp. v. I.C.C., 551 F. 2d 414, 416 (D.C. Cir. 1977).

The ABA concludes by stating that VIA has not complied with 49 CFR Part 604 but, on the contrary, has circumvented it by sham arrangements with brokers and carriers. The ABA requests that the Chief Counsel find that there has been a continuing pattern of violation of the regulation by VIA and, as provided in 49 CFR 604.17(b), bar VIA from the receipt of further financial assistance for mass transportation facilities and equipment.

#### DISCUSSION

This complaint raises a myriad of factual and legal issues. For the sake of clarity and logical progression, UMTA has divided these into four subsidiary issues and two central issues. The subsidiary issues mainly concern the legality and applicability of the charter regulation. Although these issues are not vital to a determination on this matter, UMTA believes that it is appropriate to deal, at least succinctly, with the questions that they raise.

The first subsidiary issue is whether UMTA's current charter regulation is authorized by the UMT Act. VIA maintains that UMTA has exceeded its statutory authority in promulgating the regulation, since Section 12(c)(6)'s basic definition of "mass transportation" defined the projects eligible for Federal aid, but was not intended as a broad grant of authority for UMTA to become a charter marketing and regulatory agency. Moreover, states VIA, Section 3(f) gives UMTA the authority to regulate, to a limited extent, the intercity, and not the intracity, activities of a grantee. VIA therefore concludes that UMTA has gone beyond its statutory mandate in implementing a regulation which prohibits a grantee from providing any charter service, except under one of the narrow exceptions to the regulation.

UMTA has addressed the question of statutory authority on pages 11930-1 of the preamble to the charter regulation. UMTA therein explains that comments from recipients and trade associations representing them argued, in basically the same terms that VIA is now arguing, that UMTA had exceeded its statutory authority in implementing the regulation. UMTA's extensive discussion in the preamble refutes these arguments, and explains the legal basis for the rule. UMTA therefore believes that its position on this matter has been clearly and comprehensively set forth. Moreover, UMTA has ruled that since, under the terms of the charter regulation, UMTA is limited in these proceedings to an examination of the merits of the complaint, it does not consider this the proper forum for raising a challenge to the legality of the rule. Washington Motor Coach Association v. Municipality of Metropolitan Seattle, WA-09/87-01, March 21, 1988.

The second subsidiary issue raises the question of the retroactive

application of the charter regulation. VIA contends that the current regulation should be applied, if at all, only to assets funded with federal moneys after its effective date, since a retroactive application of the rule would create an undue burden on VIA. As the ABA correctly points out, however, the charter regulation does not apply to facilities and equipment funded by UMTA before the effective date of the rule, but rather to the use of these capital assets after that date. As such, the charter regulation is not retroactive, but rather prospective in its application.

Directly linked to the question of retroactivity is the third subsidiary issue, namely whether the charter regulation has imposed new and damaging restrictions on VIA which impair its contractual agreement with UMTA. VIA contends that it had relied on UMTA's prior charter regulation when making decisions regarding acquisitions and projects. For example, states VIA, when constructing some of its federally funded buildings, VIA relied on the fact that it would be able to use them incidentally in charter service to produce a stream of income. VIA argues that UMTA's charter regulation marks an abrupt change in long-standing Federal policy which, if applied to assets funded before the effective date of the new rule, would deprive VIA of a valuable stream of income on assets purchased under the prior regulation.

UMTA's current charter regulation is a departure from the prior rule only in the sense that it establishes more restrictive conditions under which a recipient may provide charter service. As is stated in the preamble, this regulation does not preclude the provision of incidental charter service with UMTA-funded assets, but simply creates a new and tighter definition of incidental service. The current regulation, like the one which preceded it, is designed to ensure that UMTA assistance is used for mass transit purposes only, and not in support of charter operations.<sup>5</sup>

VIA was, therefore, misguided in relying on the 1976 charter regulation to acquire assets which would produce a stream of income. That regulation established strict conditions under which a recipient could provide charter service. It presumed that charter service during peak hours, beyond 50 miles of a recipient's service area, and which required the use of a bus for more than six hours, was non-incidental and therefore prohibited. UMTA fails to understand how these restrictive conditions could be construed as a mandate to invest extensively in equipment and facilities to be used for charter service. On the contrary, UMTA has never sanctioned the acquisition and use of assets for charter

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<sup>5</sup>See, 41 Fed. Reg. 14122, 14123 (April 1, 1976); and, 52 Fed. Reg. 11916, 11930 (April 13, 1987).

purposes. UMTA's participation in these assets was on the condition that they be used for mass transit purposes only. VIA's reliance on the prior charter regulation to purchase such assets with UMTA funds was despite the rule and not because of it. Clearly, then, the current charter regulation has not impaired VIA's contractual agreement with UMTA, since, through implementation of both it and of the 1976 regulation, UMTA has sought to limit the use of UMTA-funded facilities and equipment for purposes other than mass transit.

The final subsidiary issue is whether UMTA is empowered to prohibit VIA's "steering" of charter customers. VIA maintains that the charter regulation neither defines nor prohibits "steering." VIA states that even if characterized as "steering," VIA's practice does not contravene the intentions of the regulation or the Act.

UMTA states in Q&A 19 of its "Charter Service Questions and Answers," that under the charter regulation, recipients may use their discretion in determining which names of charter operators they may give out to the public. However, UMTA notes, it will view any attempt on the part of a recipient to establish an exclusive brokering or subcontracting relationship as a contravention of the regulation. UMTA's position on this issue is based on its perception that a recipient could easily circumvent the regulation by systematically channelling all charter business to operators with which it has established a brokering agreement. Such an arrangement would allow the recipient to do indirectly what the regulation prohibits it from doing directly, namely to provide an unlimited amount of charter service in competition with private operators. It would moreover undermine one of the main purposes of the regulation, which is to promote the health and vitality of the private charter industry by fostering free and open competition among charter operators. UMTA believes that it is empowered to take any measure necessary to safeguard the effectiveness and integrity of the charter regulation, including imposing a prohibition on "steering" arrangements which would render it meaningless.

Having dispensed with these questions, we will turn to the central issues raised by this complaint, and which are as follows:

1) Whether VIA has leased vehicles to charter operators in violation of 49 CFR 604(b)(2)

The crux of the ABA's complaint is that VIA has provided charter service under sham arrangements with private operators. The ABA claims that VIA channels business to brokers who lack equipment, or to private charter operators who are chronically short of equipment, and who must necessarily use VIA's equipment. These brokering arrangements, states the ABA, are invalid under the charter regulation.

VIA responds by stating that while it disagrees with UMTA's position that subleasing to brokers is prohibited under the charter regulation, it has not contracted with brokers, since all of the operators with which it has contracted own at least one bus or one van. Moreover, states VIA, the charter regulation allows recipients to lease vehicles to any operator it chooses, regardless of the size of that operator's vehicle fleet.

In order to resolve this question, it is necessary to examine the basic intent of the regulation, which is to protect private charter operators from unfair competition by UMTA recipients. This competition may come directly from the recipient's provision of service to charter customers, or indirectly from the conclusion of arrangements which allow the recipient to provide service through an intermediary.

Under the exception of 49 CFR 604.9(b)(2), a recipient may lease vehicles to "private charter operators" which lack the capacity or handicapped-accessible vehicles required to provide a particular charter trip. Although the charter regulation does not define the term "private charter operator," it is clearly the intent of the regulation that such an operator be the owner of at least one bus or one van which it is licensed to operate as a provider of charter transportation. The intent of the rule that leasing by grantees be restricted to owners of vehicles can be gathered, first of all, from the goal of the regulation as stated above. Secondly, the regulation requires that to lease buses from a grantee, an operator must have exhausted its capacity or have no accessible equipment. This requirement would be meaningless if the operator were a broker, who has no equipment of any type to begin with. For this reason, UMTA disagrees with VIA's conclusion that a broker may be a private charter operator.

UMTA also disagrees with VIA's position that VIA meets the requirements of the charter regulation when it subleases vehicles to any entity which owns a bus or a van, regardless of whether that entity is licensed to operate such vehicle in charter service. VIA's interpretation of the regulation could lead to substantial abuse. It is common for organizations such as schools, nursing homes, social or recreational clubs, or even business whose mission is unrelated to transportation, to own a bus or a van. VIA has, for instance, submitted evidence showing that one of the "private charter operators" to whom it has leased vehicles is a catering service, most of whose vehicles are cargo vans. Mere ownership of a vehicle does not transform such an organization into a "private charter operator" for the sake of the regulation. If the regulation is to fulfill the purpose for which it was intended, it is essential that recipients be allowed to lease vehicles only to legitimate operators of at least one vehicle which they are licensed to operate in charter service, and which is not merely a tool for use in an unrelated activity.

There is no evidence in the administrative record that VIA has concluded a written or verbal agreement to channel business to any particular entity. It is, however, apparent that VIA has subleased vehicles to entities which are not "private charter operators" under the criteria set forth above. These include the above-mentioned catering service, as well as travel agencies, convention organizers, and one entity, identified as "J&P Enterprises," whose business activity is not specified. UMTA finds that such practices, even if they are not a deliberate attempt to circumvent the regulation, are at least contrary to its intent and purpose, and should be prohibited.

In order to ensure that VIA is subleasing UMTA-funded equipment only to bona fide private charter operators, UMTA order VIA to provide, within 3 months and 6 months successively, of the date of receipt of this decision, a list of the private charter operators with which it has contracted, describing the number and type of vehicles which they operate, and their operating authority.

2. Whether VIA has provided service which is not incidental to the provision of mass transportation

The second major aspect of the ABA's complaint concerns the level of charter service which VIA is providing. The ABA claims that VIA is operating as much charter service under the current regulation as it did under the prior one, and points to the figures provided by VIA which show that for the fiscal year ended February 29, 1988, VIA derived \$2,597,761 in charter and contract revenues. VIA, on the other hand, states that this service was provided under the capacity exception to the charter regulation, and moreover meets UMTA's definition of incidental charter service.

UMTA states in the preamble to the charter regulation that in order to ensure maximum flexibility, it has chosen to define "incidental" in broad terms. Under this definition, charter service is incidental when it does not interfere with or detract from the provision of mass transit, or shorten the mass transit life of vehicles and facilities. UMTA provides in the preamble three examples of non-incidental service, including peak hour service, service which does not meet its fully allocated cost, and service using buses in excess of a 20% spare ratio. UMTA specifically points out, however, that this list is not exhaustive, and that there are many other possible examples of non-incidental service.

UMTA believes that one of these examples is charter service which generates a disproportionately large percentage of the grantee's transit revenues. VIA's charter revenues for the most recent fiscal year, which ended more than nine months after the implementation of the regulation, represent, according to VIA's own financial statement, nearly one-third of its regular line service revenues. The sheer magnitude of VIA's charter revenues leads UMTA to suspect that the charter service VIA is providing fails to conform to UMTA's incidental service guidelines.

Moreover, UMTA is also led to conclude that in order to generate such large revenues, VIA may have a substantial amount of excess resources which it is using to provide charter service. UMTA will therefore conduct an independent study of VIA's charter and mass transit operations to determine whether this substantial amount of charter revenue is due to the use of surplus equipment and facilities. If such is the case, UMTA may determine that VIA should sell or dispose of these surplus assets in accordance with UMTA and Office of Management and Budget (OMB) guidelines.

#### CONCLUSION

UMTA's examination of the administrative record shows that VIA has leased vehicles to entities which are not "private charter operators" within the meaning of the charter regulation. UMTA orders VIA to cease and desist from these practices immediately. UMTA also orders VIA to provide, within 3 months and 6 months successively from the date of receipt of this decision, information which would enable it to determine VIA's compliance with the terms of this order. UMTA reminds VIA that failure to comply with the charter regulation may jeopardize VIA's Federal transportation assistance. UMTA also finds that VIA may be providing service which is not incidental to the provision of mass transit, and which is operated using surplus equipment and facilities. In order to make a determination on this matter, UMTA will conduct an independent study of VIA's charter and mass transit facilities.

  
 Rita Daguiard  
 Attorney Advisor

NOV 14 1988

Date

  
 Theodore A. Munter  
 Deputy Chief Counsel

NOV 14 1988

Date



U.S. Department  
of Transportation

Urban Mass  
Transportation  
Administration

Headquarters

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

UMTA  
File charter

DEC 5 1988

Russell Ferdinand  
President  
Syracuse & Oswego Motor Lines, Inc.  
105 Terminal Road  
P.O. Box 2667  
Syracuse, New York 13220

Re: Use of UMTA Buses for Charter

Dear Mr. Ferdinand:

This responds to your recent letter dated November 17, 1988, wherein you query whether S&O Tours, Inc. would be in conformance with the Urban Mass Transportation Administration's (UMTA) charter regulation under various conditions. UMTA will enumerate each condition, followed by our analysis of the regulation.

1. At no time can line service be compromised in any manner to operate a charter. It should be noted this policy originated in the 1930's when the company first received ICC authority.

True. As stated in 52 Federal Register 42251, Question Number 24, even when an UMTA recipient falls within one of the exceptions which would permit it to provide charter service with UMTA funded equipment and facilities, such service must be "incidental." "Incidental" is described as charter service which does not "interfere with or detract from" providing mass transportation service or does not "shorten the mass transportation life of the equipment or facilities" being used.

2. The company would be requested to operate charters that exceed charter capacity (sp).

Initially, it is important to note that the regulations apply to subrecipients of UMTA funds which use UMTA-funded equipment just as it does to recipients. Thus, a recipient, or in this case a subrecipient, can enter into a contract to sublease charter equipment to a private operator when the operator needs equipment in excess of its capacity. This is an exception, which permits a recipient to provide charter service with UMTA funded equipment and facilities.

3. The company has a separate set of accounts for its charter business. The separation is audited by a CPA firm.

To the extent that S&O Tours, Inc. is truly an independent company, it is like any other private company and can lease to anyone they please without being subject to the regulation. However, if this independent company is determined to be a sham, UMTA will pierce the corporate veil.

4. The company swaps miles to insure that the UMTA funded equipment does not operate in excess of total line miles. Thus, if an UMTA funded bus travels 100 miles on a charter a company charter bus will operate 100 miles of line service. This insures that UMTA capital value is not misused.

UMTA is unclear as to the purpose of this question and needs more information in order to respond.

5. The company charters buses to other willing and able private companies when their capacity is exceeded. Points #1 & #4 would still apply in this circumstance.

The preamble to UMTA's charter regulation, 52 Federal Register 11916, 11918 (April 13, 1987), states that the regulation only applies to charter service using UMTA-funded equipment and facilities. If a recipient or subrecipient sets up a separate company that has only locally funded equipment, or is able to maintain separate accounts for its charter operation that show the charter service is truly a separate division, then the charter regulation would not apply. Moreover, such a separate entity could even lease buses or garage space from an UMTA recipient or subrecipient on an incidental basis. In short, there are no restrictions on the charter activities of an UMTA subrecipient's separate charter entity which uses only non-UMTA funded vehicles and facilities.

I trust that this provides you with the necessary clarifications.

Sincerely,



Theodore A. Munter  
Deputy Chief Counsel



U.S. Department  
of Transportation

Urban Mass  
Transportation  
Administration

Headquarters

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

December 28, 1988

Mr. Patrick L. Hamric  
General Manager  
LEXTRAN  
109 Loudon Avenue  
Lexington, Kentucky 40508

Re: Blue Grass Tours and Charter v.  
Lexington Transit, KY-88/08-01

Dear Mr. Hamric:

I am writing to close the investigation of the above-cited complaint, which was filed by Blue Grass Tours and Charter a year ago. Based on the information you have provided, we can conclude that the service Lexington Transit (Lextran) provides in the area around the University of Kentucky is mass transit as opposed to charter.

In the course of her visit with you on December 14, 1988, Nancy Greene, Regional Counsel, Urban Mass Transportation Administration (UMTA) Region III, learned that while the service is still provided to the University, it is no longer provided pursuant to a contract which links payment to hours of service. Instead, Lextran receives an annual grant from the University. Schedules have been published for the two routes that circulate in the University area. Students have the privilege of riding free upon showing a student ID, while the general public pays the regular fare. Bus stops are marked with signs showing the Lextran logo and route number and transfers to the other routes in the Lextran system are indicated.

In short, it appears that you have successfully converted what we believe was charter service to mass transit. In fact, you have provided an example for other grantees who are similarly situated to follow.

I would like to point out, however, that in accordance with UMTA's private sector policy, Lextran should examine the interest and capability of the private sector in providing this service. This is especially the case since, according to the information you have furnished, this service has been operated by Lextran since

1982. Under the guidelines set forth in Circular 7005.1, "Documentation of Private Enterprise Participation Required for Section 3 and 9 Programs" (December 5, 1986), UMTA grantees should examine each route at least every three years to determine if it could be more efficiently operated by private enterprise.

Sincerely,



Theodore A. Munter  
Deputy Chief Counsel

cc: Wallace Jones

Nancy Greene, URO-III



Company at way below fair market value. Martucci states this also resulted in destructive competition.

#### RESPONSE

UMTA reviewed Martucci's complaint and determined that the allegations could possibly constitute violations of the private sector provisions of the UMT Act and the implementing policy. UMTA forwarded Martucci's complaint to NJT on April 16, 1987, and provided it with thirty days to respond.

NJT's response is dated May 15, 1987. In its response, NJT states that Martucci has not alleged any violations of either the UMT Act or UMTA policy. "The real complaint," states NJT "is that they were unable to negotiate a favorable business deal like the business deal negotiated by the ONE Company."

In response to Martucci's allegation that NJT had unfairly rejected the offer to have complainant acquire the number 24 route, NJT states that Martucci's real complaint was that a deal was made with the ONE Company and not with complainant. NJT explains that by agreeing to a trade of routes between it and the newly created ONE Company, the number of buses operated by private carriers in the affected area has increased from 25 to 36 buses, thus effectuating UMTA's private enterprise policy.

NJT further does not deny that negotiations between ONE and NJT (to have ONE purchase the operating rights of the small private carriers in exchange for the number 24 route) were kept confidential until all purchases were consummated. The Assistant Executive Director, in a supporting affidavit, states that a year prior to these negotiations, in the summer of 1984, NJT began to meet with private carriers to determine if they might be interested in transferring to another route or in being bought out. NJT concluded that these small independent carriers were being unreasonable and that they believed that NJT would be willing to pay whatever price was necessary to accomplish its goals; NJT subsequently terminated said negotiations. Thus, in September 1986, while the agreement between ONE Company and NJT was being finalized in secrecy, ONE succeeded in purchasing almost all the operating rights of the independents (except for Martucci). NJT states that this arrangement saves them approximately \$600,000 annually in operating losses, it eliminates inefficient, duplicative service and it is in accordance with UMTA's private enterprise policy.

NJT moreover contends that Martucci never attempted to locally resolve its claim of destructive competition. NJT states that it has adopted detailed procedures to resolve destructive competition complaints and Martucci has not exhausted this local administrative remedy. Lastly, NJT claims that Martucci has

offered no evidence that NJT has actually engaged in destructive competition.<sup>1</sup>

NJT concludes by stating that the complainant is unable to allege any violations of either the UMT Act or UMTA policy.

#### REBUTTAL

UMTA forwarded NJT's response to Martucci. On April 28, 1988, UMTA advised Martucci that it had not received its rebuttal statement. By letter of May 2, 1988, Martucci filed a photocopy of its rebuttal, which is dated June 9, 1987.

In its rebuttal, Martucci initially states that the basis of its complaint is that NJT "has improperly benefitted members of the private sector at the expense of the taxpayers of the State of New Jersey, the taxpayers of the United States ... and the members of the private sector that we are representing in this action."

Specifically, Martucci alleges that the agreement between ONE Company and NJT has virtually forced it out of business and negated its profitability margin. ONE Company, states Martucci, was able to purchase the independent bus companies at 'bargain basement' prices and exchange those operating certificates for the right to operate the Number 24 route. Martucci complains that while NJT broke off negotiations with the independents because they were demanding prices in excess of fair market value, NJT was then willing to make a deal with the ONE Company, which was finalized in September 1986, to trade NJT's operating rights for far below fair market value. It is alleged that ONE Company purchased the independents with a very small amount of cash, the balance in long term notes.

Second, Martucci complains that prior to the transfer of operations to the ONE Company, NJT had conducted coordinated operations on the Number 24 route with Martucci as well as with Wohlgemuth Bus Company, which is operated by Robert White, who is also the President of ONE Company. (White also represents the independent carriers in the Newark-Elizabeth area on the Private Carrier Advisory Committee).<sup>2</sup> These private companies, including Martucci, were given first choice in the selection of runs which permitted them to operate profitably without the need to seek state subsidies. However, subsequent to the transfer, Martucci was assigned runs by NJT which were less favorable, resulting in both reduced revenue and income.

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<sup>1</sup> NJT's regulation for destructive competition provides for an impartial administrative law judge to conduct a hearing and make recommendations to the NJT Board. See, New Jersey Administrative Code 16:74-1, et seq.

<sup>2</sup> The NJT Board created the Private Carrier Advisory Committee (PCAC) to advise the Board concerning policy matters affecting all private carriers. Mr. White is one of its members and Frank Gallagher, President of ONE Company, chairs the PCAC.

Third, Martucci states that the ONE Company did not exist prior to the agreement between NJT and ONE. Therefore, claims Martucci, "to all appearances [ONE] is undercapitalized in the sense that its first action was to go out and purchase a number of bus routes by means of using promissory notes."

Fourth, Martucci alleges that the ONE Company has been provided with new buses to conduct its operations while NJT has refused to replace the older buses presently leased to Martucci. Also, NJT has redetermined its standard formula for making payments under its Bus Card Program which has resulted in substantially reduced payments to Martucci.

Fifth, states Martucci, "as a result of the transfer of operation from the private companies to NJT and NJT's decision to hold off on a formal conclusion of the ONE Company, the ONE Company has fallen under the direction of NJT rather than the the New Jersey Department of Transportation and has been able to make changes in its route structure without going through the long administrative process required by the Department of Transportation." In sum, claims Martucci, ONE Company has been able to circumvent a process that Martucci is bound to follow; that is, Martucci must receive approval from the New Jersey Department of Transportation to conform its routes to that of ONE Company.

Sixth, Martucci alleges that ONE Company has been privy to inside information in negotiating its agreement with NJT. ONE Company is composed of Frank Gallagher and Robert White. As stated above, Mr. Gallagher chairs the PCAC and Mr. White represents the independent carriers in the Newark-Elizabeth area on the PCAC. Martucci states that Mssrs. Gallagher and White used information obtained in their capacity as members of the PCAC in order to negotiate favorable business deals to their personal benefit.

Finally, Martucci states that UMTA is neither governed nor bound by state law in deciding this case. Thus, the New Jersey regulations concerning destructive competition can be overridden by the intervention of a Federal agency.

#### DISCUSSION

UMTA developed its private enterprise policy in conformance with three provisions of the UMT Act, namely Sections 3(e), 8(e), and 9(f). Under Section 3(e) UMTA must, before approving a program of projects, find that such program provides for the maximum feasible participation of private enterprise. Section 8(e) directs UMTA recipients to encourage private sector participation in the plans and programs funded under the Act. Finally, as a precondition to funding under Section 9, recipients must develop a private enterprise program in accordance with the requirements set out in Section 9(f).

In order to provide guidance in achieving compliance with these statutory requirements, UMTA issued its policy statement, "Private Enterprise Participation in the Urban Mass Transportation Program." 49 Federal Register 41310, October 22, 1984. UMTA's private sector requirements are further detailed in Circular 7005.1, "Documentation of Private Enterprise Participation Required for Sections 3 and 9 Programs," December 5, 1986.

However, before a private enterprise complaint is entertained by UMTA, there must be an initial determination that UMTA has jurisdiction over the issues raised therein. UMTA will not examine the substantive issues before making this initial determination. After reviewing all evidence contained in the administrative record, UMTA has concluded that none of the issues raised by Martucci falls within the scope of UMTA's private sector policy. Thus, UMTA has no jurisdiction over Martucci's complaint, and specifically over the six allegations outlined in its rebuttal.

The first allegation in Martucci's rebuttal states that Martucci was virtually forced out of business when NJT traded its operating rights to the ONE Company at far below market value, thus enabling the ONE Company to purchase the independent bus companies at 'bargain basement' prices. The ONE Company in turn, states Martucci, traded these operating rights to NJT in exchange for the right to operate the Number 24 route, in competition with Martucci.

While UMTA agrees that the above mentioned arrangement may have provided the ONE Company with a distinct advantage over its competitor, Martucci, such matters do not fall within the scope of UMTA's private sector policy. UMTA's private sector policy in no way dictates, or even addresses, the substance or conduct of a grantees' business transactions, or the manner in which these transactions are financed.

Moreover, Martucci's complaint is not that it was not consulted in connection with the plan to exchange operating rights on the Number 24 route, but rather, that it was later excluded from these negotiations, which were then continued with the ONE Company. At the time that these negotiations were being conducted, late in 1985 through September 1986, UMTA's private sector policy was contained in 49 Federal Register 41310 (October 22, 1984). The Federal Register Notice simply required that "when ... services are significantly restructured, consideration should be given to whether private carriers could provide such service." NJT met this requirement when it undertook negotiations with Martucci. Although the policy guidelines now in effect in Circular 7005.1 (December 5, 1986) contain more stringent requirements, including a competitive bid process and cost factoring, NJT could not be held to these requirements in the case of route planning or negotiations which predate the Circular. Consequently, both because NJT met its private sector obligations to Martucci under the guidelines in effect at the time, and because Martucci's

allegations with respect to the structuring and financing of route trade with the ONE Company falls outside of the scope of UMTA's private sector policy, UMTA will not entertain the first issue raised in Martucci's rebuttal.

In its second allegation, Martucci states that subsequent to the transfer of operations to the ONE Company, Martucci was assigned runs which were less favorable, resulting in both reduced revenue and income. Martucci's second allegation stems directly from the first one since the re-assignment of runs is a direct consequence of the route trade between NJT and the ONE Company. Since UMTA has determined that Martucci's first allegation is outside of UMTA's jurisdictional boundaries and moreover would not constitute a violation of the guidelines in effect at the time of the events in question, this second allegation similarly cannot be entertained.

In its third allegation, Martucci states that the ONE Company is undercapitalized and was formed mainly to carry out the transaction between ONE Company and NJT. UMTA's private sector policy addresses only the measures that a grantee has taken to involve the private sector in its provision of service. However, it does not address issues pertaining to financial structure. Thus, UMTA does not have jurisdiction to decide this issue. Rather, complainant should address this issue to a proper state judicial and/or administrative forum.

In its fourth allegation, Martucci states that the ONE Company has been provided with new buses while Martucci's request for newer equipment has been denied. Initially, it should be noted that NJT has developed a complex formula for bus allocation including a bus allocation plan dispute resolution process. Martucci has not sought redress under this state procedure. However, even if this procedure had been followed, UMTA has determined that Martucci has not alleged facts sufficient to make a determination that there has been a violation of UMTA's private sector policy.

In its fifth allegation, Martucci states that NJT is holding off on formally transferring ONE Company's operation of routes so that it does not fall under the jurisdiction of the New Jersey Department of Transportation (NJ DOT). This is not a matter that is within UMTA's jurisdiction. Any complaint wherein a party has not followed proper NJ DOT procedures must be addressed to the NJ DOT.

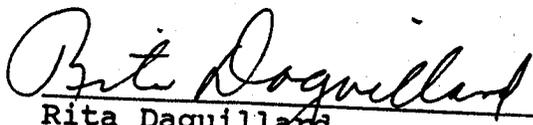
In its sixth allegation, Martucci states that ONE Company has had access to inside information. Similarly, this is not a matter that is within UMTA's jurisdiction; Martucci may address this issue to an appropriate state forum.

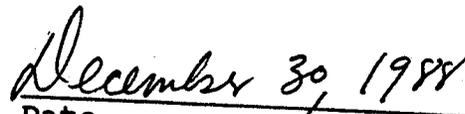
Finally, Martucci states that UMTA is neither bound nor governed by New Jersey law. As a general rule, Federal law preempts state law. However, the legislative intent as expressed through UMTA's private sector guidelines, clearly mandates the development or

adoption of a local process. Both the Federal Register notice and Circular 7005.1 expressly state that disputes should be resolved on the local level, and that UMTA will entertain a complaint only when local remedies have been exhausted. Thus, in the case of private enterprise dispute resolution, UMTA has consented to decision-making by local jurisdiction.

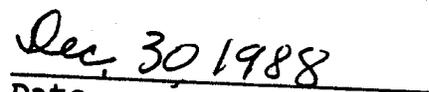
#### CONCLUSION

UMTA concludes that the violations alleged by Martucci do not fall within the scope of the private sector provisions of the UMT Act and the implementing policy. Moreover, while two of Martucci's allegations might conceivably fall within the scope of the private sector policy now in effect, the conduct at issue predated the enactment of more stringent private sector guidelines. Therefore, UMTA has no jurisdiction to entertain this complaint. Accordingly, UMTA dismisses Martucci's complaint.

  
\_\_\_\_\_  
Rita Daguiillard  
Attorney Advisor

  
\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Theodore A. Munter  
Deputy Chief Counsel

  
\_\_\_\_\_  
Date



U.S. Department  
of Transportation

Urban Mass  
Transportation  
Administration

The Administrator

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

UCC-31  
Chron

JAN - 5 1989

The Honorable Silvio O. Conte  
House of Representatives  
Washington, D.C. 20515

Dear ~~Mr.~~ <sup>Sil</sup> Conte:

Thank you for your letter concerning the Urban Mass Transportation Administration's (UMTA) amendment to its charter service regulation, which was recently published in the Federal Register. Your letter commends UMTA on its amendment which, you state, clearly reflects an intent to help persons with disabilities. However, you suggest certain changes to the amendment which you believe will assure that UMTA's charter regulation does not inadvertently burden people with disabilities.

First, you state, the definition of "transportation disadvantaged" appears to be limited to "persons of limited fiscal or financial means." You suggest that the definition be expanded so that it is clear that "transportation disadvantaged" also includes the mentally impaired.

In response to comments on its notice of proposed rulemaking (NPRM) on the amendment, UMTA considered the possibility of including mental impairment in the definition of "transportation disadvantaged." However, UMTA determined that the inclusion of this category of persons was not feasible because of the difficulty of establishing criteria or guidelines for defining eligibility. The rule does not limit and in fact UMTA encourages its recipients to provide the broadest possible coverage in defining handicaps eligible for the exception, including mental impairment.

Second, you ask that UMTA carefully review the rule and modify it where necessary to ensure that the chartering process is as simple and direct as possible. You suggest that UMTA adopt two suggestions made by the Consortium for Citizens with Developmental Disabilities (the Consortium) in its comments of July 22, 1988, on the NPRM.

The Consortium's first suggestion is that contracting agencies be able to obtain a single certification for charter services for multiple groups. UMTA agrees that a single certification may be

appropriate under some circumstances, and has allowed for it in the final rulemaking. The amendment as now drafted recognizes situations where one contract may cover more than one trip for the same passengers and the same purposes, such as a week-long day camp program for handicapped children. Under these situations, a single certification would be acceptable.

The Consortium's second comment addresses the question of allowing non-disabled persons to benefit from the exception as long as the purpose of their trip is directly related to assisting disabled persons. UMTA again believes that the inclusion in the amendment of such a broad category of persons would be impractical and unworkable and generate complaints of abuse. At the same time, UMTA is mindful of the fact that organizers or sponsors of activities for the disabled may in some cases have a valid need to contract charter services from UMTA recipients. UMTA believes, however, that the needs of these groups will in large part be met through use of the formal agreement process, which UMTA has included in the final rulemaking. This process allows a recipient to provide certain charter services when it has concluded a formal agreement with the willing and able private operators in its service area. The only procedural requirement, in addition to the conclusion of a formal agreement, is that the recipient's published notice provide for this type of agreement or be subsequently amended to specifically refer to the agreement. UMTA believes that this procedure will provide the most flexible and least burdensome mechanism for meeting the charter needs of sponsors of events for disabled persons.

Finally, you state that one exemption under the final rule would be limited to those groups receiving funds only from the U.S. Department of Health and Human Services (USDHHS). You ask that the exemption be expanded to cover low income people receiving funds from Federal agencies other than USDHHS.

Several organizations provided UMTA with similar comments on the NPRM. In response to these comments, UMTA has expanded the exception to include organizations which receive or are eligible to receive, from a State or local body, funding comparable to that provided by certain USDHHS programs. In order to be eligible for the exception, these groups must be certified by the State under a procedure set out in the final rule. It should moreover be noted that the charter needs of groups receiving funds from Federal agencies other than USDHHS or from State sources may be met through use of the formal agreement process outlined above.