

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 11,580

IN THE MATTER OF:

Served September 18, 2008

Application of VEOLIA TRANSPORTATION)
SERVICES, INC., to Merge with)
YELLOW BUS SERVICE, INC., Trading)
as YELLOW TRANSPORTATION, WMATC)
No. 280)

Case No. AP-2007-001

Application of VEOLIA TRANSPORTATION)
ON DEMAND, INC., to Acquire Control)
of WASHINGTON SHUTTLE, INC.,)
Trading as SUPERSHUTTLE, WMATC)
No. 369)

Case No. AP-2007-006

Veolia Transportation Services, Inc., (VTS), has applied in Case No. AP-2007-001 for Commission approval to merge with Yellow Bus Service, Inc., trading as Yellow Transportation, WMATC Carrier No. 280.

Veolia Transportation On Demand, Inc., (VTOD), has applied in Case No. AP-2007-006 for Commission approval to acquire control of Washington Shuttle, Inc., trading as SuperShuttle, (Washington Shuttle or SuperShuttle) WMATC Carrier No. 369.

The applications were consolidated in Order No. 10,445, served May 3, 2007, and are unopposed.

I. SCOPE OF APPLICATIONS

After examining the applications and documents filed in support, the Commission has identified three transactions requiring Commission approval.

The first transaction occurred in September 2005 when the parent of VTS and VTOD, Veolia Transportation, Inc., (VTI), purchased the stock of an unrelated carrier, ATC/Vancom, Inc., (ATC). At the time of the purchase, VTI controlled Yellow Transportation and was known as Connex North America, Inc., and ATC was performing charter contract service in the Metropolitan District without a WMATC certificate of authority. Instead of assigning the contracts to Yellow Transportation, which held WMATC Certificate No. 280, VTI permitted ATC to continue operating its contracts in the Metropolitan District until April 2006, at which time the contracts apparently were assigned to VTS.

The second transaction occurred in July 2006 when VTOD acquired control of Washington Shuttle by purchasing the stock of Washington

Shuttle's parent, SuperShuttle International, Inc., pursuant to a reverse subsidiary merger agreement dated July 2006. Under the agreement Washington Shuttle remains intact. VTOD proposes that Washington Shuttle will continue providing contract charter service under WMATC Certificate No. 369.

The third transaction occurred in December 2006 when ATC and Yellow Transportation statutorily merged with and into VTS. VTS is the survivor and proposes providing general and contract charter service under WMATC Certificate No. 280, including service under the aforementioned ATC contracts.

II. STANDARD FOR APPROVAL

These transactions are governed by Title II of the Compact, Article XII, Section 3(a),¹ which provides as follows:

A carrier or any person controlling, controlled by, or under common control with a carrier shall obtain Commission approval to

(i) consolidate or merge any part of the ownership, management, or operation of its property or franchise with a carrier that operates in the Metropolitan District;

(ii) purchase, lease, or contract to operate a substantial part of the property or franchise of another carrier that operates in the Metropolitan District; or

(iii) acquire control of another carrier that operates in the Metropolitan District through ownership of its stock or other means.

The Commission may approve an application under Article XII, Section 3, if it finds that the proposed transaction is consistent with the public interest.² The public interest analysis focuses on the fitness of the acquiring party, the resulting competitive balance, and the interest of affected employees.³

The primary concern when assessing the effect on competition of a transaction under Article XII, Section 3, is whether the transaction will increase the acquiring party's market share.⁴ Transactions which do not increase market share give little pause for concern, and the

¹ *In re Veolia Transp. Servs., Inc.*, No. AP-07-001, Order No. 11,130 (Feb. 6, 2008).

² Compact, tit. II, art. XII, § 3(c).

³ Act of Sept. 15, 1960, Pub. L. No. 86-794, § 3, 74 Stat. 1031, 1050 (1960) (codified at DC CODE ANN. § 9-1103.04 (2007)); *In re Executive Coach, Ltd., & Executive Sedan Mgmt. Servs., Inc., t/a Washington Car & Driver*, No. AP-02-75, Order No. 6797 (Sept. 3, 2002); *In re Laidlaw, Inc., & Greyhound Lines, Inc.*, No. AP-98-53, Order No. 5504 (Jan. 22, 1999)

⁴ *In re Crown Charters & Tours, LLC, & Southern Comfort Lines, Inc.*, No. AP-05-205, Order No. 9471 (Apr. 13, 2006); *In re Transp. Centers, Inc. & Fairfax Coach Lines, Inc.*, No. AP-05-116, Order No. 9308 (Feb. 8, 2006).

Commission will approve even those transactions which tend to increase market share as long as there is sufficient post-transaction competition to check any adverse effects that such transactions otherwise might produce.⁵ A transfer of assets from one member of a controlled family to another does not increase the controlling party's market share and thus causes no concern.⁶

We shall analyze the transactions at issue in the following order: (1) the September 2005 acquisition of ATC; (2) the July 2006 acquisition of Washington Shuttle; and (3) the December 2006 merger of ATC and Yellow Transportation into VTS.

III. SEPTEMBER 2005 ATC ACQUISITION

VTI's acquisition of ATC in September 2005 requires Commission approval under Article XII, Section 3, because the acquisition had the effect of vesting in VTI control over previously unrelated carriers operating in the Metropolitan District - ATC and Yellow Transportation.

ATC held several contracts for transportation service in the Metropolitan District at the time of the acquisition - including a contract with Arlington County, Virginia, primarily for fixed-route service in Arlington but also for charter service; a contract with King Farm Transportation Demand Management Company, LLC, for shuttle service in Rockville, MD; and a contract with the Agency for Healthcare, Research and Quality (AHRQ) for shuttle service in Rockville, MD. Yellow Transportation held four contracts for service in the Metropolitan District at the time of the ATC acquisition: one with Georgetown University, one with Prince George's County, and two with Fairfax County. The record shows that those four contracts currently require 312 vehicles. The three held by ATC currently require 39 vehicles. It thus appears that the increase in VTI's market share was not insubstantial.

Commission records, on the other hand, reveal twenty other WMATC carriers with unrestricted authority that currently provide, or have recently provided, the type of contract charter service represented by the ATC contracts.⁷ These carriers operate 736 vehicles combined. We thus find that there is sufficient post-transaction competition to check any potential adverse competitive effects from the ATC acquisition.

As for employees, VTS states that the ATC acquisition resulted in some consolidation and overall reduction of management. Otherwise, no employees were terminated as a result of the ATC acquisition.

⁵ Order No. 9471; Order No. 9308.

⁶ Order No. 6797.

⁷ The twenty include WMATC Carrier Nos. 17, 38, 99, 122, 135, 157, 213, 223, 227, 259, 398, 444, 498, 530, 764, 833, 860, 1265, 1283, & 1431.

VTI's fitness is another matter. The record shows that VTI permitted ATC to continue operating its Metropolitan District contracts without WMATC authority from September 2005 to April 2006, when the 2006 merger process began. VTI then apparently permitted VTS to take over the ATC contracts even though VTS had no WMATC authority either.

When an applicant or a person controlling an applicant has a record of violations, or a history of controlling companies with such a record, the Commission considers the following factors in assessing the likelihood of applicant's future compliance: (1) the nature and extent of the violations, (2) any mitigating circumstances, (3) whether the violations were flagrant and persistent, (4) whether the controlling party has made sincere efforts to correct past mistakes, and (5) whether the controlling party has demonstrated a willingness and ability to comport with the Compact and rules and regulations thereunder in the future.⁹ This test may also be used for determining whether common control is in the public interest.⁹

Operating without authority is a serious violation, and the operation of the ATC contracts by ATC from September 2005 to April 2006 and then by VTS thereafter qualifies as persistent. The record is void of any evidence of mitigating circumstances. On the other hand, the Commission has approved transactions such as this upon payment of a civil forfeiture¹⁰ and subject to a period of probation.¹¹

Based on this record, and in consideration of the forfeiture and terms of probation assessed herein, the Commission finds that VTI's acquisition of ATC is consistent with the public interest.

IV. JULY 2006 SUPERSHUTTLE ACQUISITION

VTOD's acquisition of Washington Shuttle in July 2006 requires Commission approval under Article XII, Section 3, because the acquisition had the effect of vesting in VTI control over previously unrelated carriers operating in the Metropolitan District - Yellow Transportation and VTS, on the one hand, and Washington Shuttle, on the other.

VTOD states that Washington Shuttle's SuperShuttle operations under WMATC Certificate No. 369 have remained the same since Washington Shuttle became a VTOD subsidiary, with no reduction in vehicle operators (149). The fitness of VTI, the "acquiring party" for purposes of Article XII, Section 3, is addressed above. The

⁸ *In re E&H Transp., LLC*, No. AP-06-142, Order No. 10,075 (Nov. 16, 2006); *In re ResponseCare Mobile Health Servs., LLC, t/a ResponseCare & ResponseCare Mobility Servs. & LifeStar Response of Md., Inc., t/a LifeStar Response*, No. AP-99-42, Order No. 5709 (Sept. 23, 1999).

⁹ *In re Double Decker Bus Tours, W.D.C., Inc.*, No. AP-95-21, Order No. 4730 (Jan. 4, 1996); see Order No. 5709 (applying test).

¹⁰ See Order No. 6797 (conditionally approving merger); Order No. 5709 (conditionally approving asset purchase).

¹¹ See Order No. 4730 (one year).

twenty contract charter operators noted above are sufficient to check any potential adverse effects from the increase in VTI's contract charter market share from its acquisition of control over Washington Shuttle.

Based on this record, and in consideration of the forfeiture and terms of probation assessed herein, the Commission finds that the common control of Yellow Transportation, VTS, and Washington Shuttle is consistent with the public interest.

V. DECEMBER 2006 ATC/YELLOW TRANSPORTATION/VTS MERGER

The 2006 merger of ATC and Yellow Transportation into VTS requires Commission approval because VTS is a "carrier or . . . person controlling, controlled by, or under common control with a carrier" within the meaning of Article XII, Section 3, of the Compact.

The 2006 merger of ATC and Yellow Transportation with and into VTS did not increase the combined market share of the WMATC carriers controlled by VTI immediately prior to the merger and thus raises no competition concerns.¹²

Applicants do not believe the merger will have any effect on employees, and there is no evidence in the record to the contrary.

As for fitness, VTS verifies that: (1) VTS owns or leases, or has the means to acquire through ownership or lease, one or more motor vehicles meeting the Commission's safety requirements and suitable for the transportation proposed in this application; (2) VTS owns, or has the means to acquire, a motor vehicle liability insurance policy that provides the minimum amount of coverage required by Commission regulations; and (3) VTS has access to, is familiar with and will comply with the Compact, the Commission's rules, regulations and orders, and Federal Motor Carrier Safety Regulations as they pertain to transportation of passengers for hire.

Normally, such evidence would establish an applicant's fitness,¹³ but as noted above, VTS has been operating the ATC contracts since April 2006. VTS acknowledges that these contracts require WMATC authority, but VTS has no such authority. Operating without authority is a serious violation, and operation of the ATC contracts since April 2006 qualifies as persistent. The record is void of any evidence of mitigating circumstances. On the other hand, the Commission has approved transactions such as this upon payment of a civil forfeiture¹⁴ and subject to a period of probation.¹⁵

¹² Order No. 6797.

¹³ *In re Transcom, Inc.* No. AP-05-113, Order No. 10,114 (Nov. 30, 2006); *In re Executive Technology Solutions, L.L.C.*, No. AP-04-84, Order No. 8273 (Sept. 20, 2004).

¹⁴ See Order No. 6797 (conditionally approving merger); Order No. 5709 (conditionally approving asset purchase).

¹⁵ See Order No. 4730 (one year).

Based on this record, and in consideration of the forfeiture and terms of probation assessed herein, the Commission finds that the merger of ATC and Yellow Transportation with and into VTS is consistent with the public interest.

VI. ASSESSMENT OF FORFEITURE

A person who knowingly and willfully violates a provision of the Compact, or a rule, regulation, requirement, or order issued under it, or a term or condition of a certificate shall be subject to a civil forfeiture of not more than \$1,000 for the first violation and not more than \$5,000 for any subsequent violation.¹⁶

The term "knowingly" means with perception of the underlying facts, not that such facts establish a violation.¹⁷ The term "willfully" does not mean with evil purpose or criminal intent; rather, it describes conduct marked by careless disregard whether or not one has the right so to act.¹⁸

Article XI, Section 11(b), of the Compact provides that: "A person other than the person to whom an operating authority is issued by the Commission may not lease, rent, or otherwise use that operating authority." Certificate of Authority No. 280, issued to Yellow Transportation on December 8, 1994, echoes this prohibition in the following warning: "THIS CERTIFICATE OF AUTHORITY DOES NOT AUTHORIZE ANY TRANSPORTATION BY ANY PERSON OTHER THAN THE CARRIER NAMED HEREON."

Under the circumstances, neither ATC nor VTI had any reasonable basis for believing that ATC could operate the ATC contracts from September 1, 2005, to April 2006, and neither VTS nor VTI had any reasonable basis for believing that VTS could operate the ATC contracts from April 2006 until December 31, 2006, when the merger of Yellow Transportation and VTS became effective.

The record thus supports a finding that ATC and VTS knowingly and willfully operated the ATC contracts without WMATC authority for 335 days from September 1, 2005, through December 31, 2006,¹⁹ and that VTI knowingly and willfully caused these acts to occur in furtherance of its carrier acquisition strategy. We will assess a civil forfeiture against ATC, VTS, and VTI in the amount of \$250 per day for 335 days, for a total of \$83,750.²⁰ We will suspend all but \$25,000 in recognition of the parties' production of inculpatory documents.²¹

¹⁶ Compact, tit. II, art. XIII, § 6(f).

¹⁷ Order No. 6797.

¹⁸ Order No. 6797.

¹⁹ The 335 days derives from the terms of the King Farm contract which calls for service Monday through Friday except certain designated federal holidays.

²⁰ See *In re Malek Investment, Inc., t/a Montgomery Airport Shuttle, & Malek Investment of Va., Inc., & Assadollah Malekzadeh*, No. MP-98-53, Order

In addition, we will assess a civil forfeiture against VTS in the amount of \$500 for VTS's knowing and willful failure to obtain Commission approval in advance of the merger with ATC and Yellow Transportation in 2006 and against VTI in the amount of \$500 each for VTI's knowing and willful failure to obtain Commission approval in advance of: (1) the acquisition of ATC in 2005; and (2) the acquisition of SuperShuttle in 2006.²²

Failure to pay the net combined forfeiture of \$26,500 in a timely fashion shall result in reinstatement of the full combined forfeiture of \$85,250.

VII. PETITION FOR RELIEF UNDER REGULATION NO. 62

VTOD has filed a petition in AP-2007-006 seeking relief from Commission Regulation 62 governing vehicle leases.

Under Regulation No. 62-01, a WMATC carrier may not operate a vehicle that is not titled in the carrier's name except pursuant to a lease agreement approved by the Commission. Under Regulation No. 62-08, the lease of a vehicle with a driver provided by the same lessor is prohibited, except as provided by Regulation 62-12(c)(1), which permits such leases between WMATC carriers. Under Regulation No. 62-11, a WMATC carrier may not lease a vehicle to a non-WMATC carrier for operation in the Metropolitan District without Commission permission, which may be granted upon a showing that the transportation to be performed by the lessee does not require WMATC operating authority.

According to the petition, VTOD subsidiary Washington Shuttle conducts its SuperShuttle operations through "franchise" agreements with independent drivers. Some SuperShuttle vehicles are owned by the drivers. Some are leased to the drivers by either Washington Shuttle or its VTOD affiliate, Blue Van Leasing. None of the drivers holds WMATC operating authority. VTOD has submitted copies of the franchise agreements but not the leases. We cannot rule on the petition without seeing the leases.

A related issue is the proscription in Article XI, Section 11(b), of the Compact, against one carrier operating under the authority of another. Only Washington Shuttle may transport passengers for hire under Certificate No. 369. The franchise agreements refer to SuperShuttle drivers as "independent contractors". This calls into question just who is the carrier: Washington Shuttle or its so-called franchisees? Again, although we have copies of the operative franchising documents, we cannot answer that question without seeing the leases, as well.

No. 5707 (Sept. 22, 1999) (assessing \$250 per day against carrier and carrier's owner).

²¹ See *id.* (suspending portion of forfeiture for production of same).

²² See Order No. 5709 (assessing \$500 for unauthorized acquisition).

VTOD shall have thirty days to file copies of all leases relating to all vehicles operated under Certificate No. 369.

THEREFORE, IT IS ORDERED:

1. That pursuant to Article XIII, Section 6(f), of the Compact, the Commission hereby assesses a civil forfeiture against ATC, VTS, and VTI, jointly and severally, in the amount of \$83,750 for knowingly and willfully violating Article XI, Sections 6(a) and 11(b), of the Compact, of which all but \$25,000 is suspended.

2. That VTS and VTI are hereby directed to pay to the Commission, within thirty days of the date of this order, the sum of twenty-five thousand dollars (\$25,000).

3. That pursuant to Article XIII, Section 6(f), of the Compact, the Commission hereby assesses a \$500 civil forfeiture against VTS and a \$1,000 civil forfeiture against VTI for knowingly and willfully violating Article XII, Section 3, of the Compact.

4. That VTS is hereby directed to pay to the Commission, within thirty days of the date of this order, the sum of five hundred dollars (\$500).

5. That VTI is hereby directed to pay to the Commission, within thirty days of the date of this order, the sum of one thousand dollars (\$1,000).

6. That the full combined forfeiture of \$85,250 shall stand reinstated and become immediately due and payable upon the failure of VTS and VTI to timely pay the net combined forfeiture of \$26,500.

7. That in consideration of the forfeiture and terms of probation assessed herein, the Commission finds that the 2005 acquisition of ATC, the 2006 acquisition of Washington Shuttle, and the 2006 merger of ATC and Yellow Transportation into VTS are consistent with the public interest.

8. That Certificate of Authority No. 280 shall be reissued to Veolia Transportation Services, Inc., 2015 Spring Road, Oak Brook, IL, 60523, upon VTS's timely compliance with the requirements of this order.

9. That VTS may not transport passengers for hire between points in the Metropolitan District pursuant to this order unless and until Certificate No. 280 has been reissued in accordance with the preceding paragraph.

10. That VTS and Washington Shuttle are hereby directed to present their revenue vehicles for inspection and file the following documents within the 180-day maximum permitted in Commission Regulation No. 66: (a) evidence of insurance pursuant to Commission Regulation No. 58 and Order No. 4203; (b) an original and four copies

of a tariff or tariffs in accordance with Commission Regulation No. 55; (c) a vehicle list stating the year, make, model, serial number, fleet number, license plate number (with jurisdiction) and seating capacity of each vehicle to be used in revenue operations; (d) a copy of the for-hire vehicle registration card, and a lease as required by Commission Regulation No. 62 if applicant is not the registered owner, for each vehicle to be used in revenue operations; and (e) proof of current safety inspection of said vehicle(s) by or on behalf of the United States Department of Transportation, the State of Maryland, the District of Columbia, or the Commonwealth of Virginia.

11. That Washington Shuttle shall file with the Commission within thirty days copies of all current leases relating to all vehicles operated under Certificate No. 369.

12. That VTS and VTI shall be placed on probation for a period of one year commencing with the reissuance of Certificate No. 280 in accordance with the terms of this order and that a willful violation of the Compact, or of the Commission's rules, regulations or orders thereunder, by either during the period of probation shall constitute grounds for immediate suspension and/or revocation of Certificate No. 280 without further proceedings, regardless of the nature and severity of the violation.

13. That the approval granted herein shall be void and the applications shall stand denied upon applicants' failure to timely satisfy the conditions prescribed herein.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS YATES AND CHRISTIE:



William S. Morrow, Jr.
Executive Director

