

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

SILVER SPRING, MARYLAND

ORDER NO. 12,663

IN THE MATTER OF:

Served December 17, 2010

Application of METRO DAY TREATMENT )  
CENTER, INC., for a Certificate of ) Case No. AP-2010-032  
Authority -- Irregular Route )  
Operations )

Application of METRO HOMES, INC., ) Case No. AP-2010-004  
for a Certificate of Authority -- )  
Irregular Route Operations )

This matter is before the Commission on the unopposed applications of Metro Homes, Inc., and Metro Day Treatment Center, Inc., for WMATC operating authority. Applicants are commonly-controlled corporations sharing common officers and a common controlling shareholder. Each applicant has held WMATC operating authority in the past, and each has filed an application seeking reinstatement of its previous authority. Such applications normally are considered separately, but these applications are being consolidated under Rule No. 20-02 to resolve a common question of fitness.

**I. APPLICANT FITNESS**

Article XI, Section 7(a), of the Compact provides that the Commission shall issue a certificate of authority to any qualified applicant, authorizing all or any part of the transportation covered by the application, if the Commission finds that: (i) the applicant is fit, willing, and able to perform the proposed transportation properly, conform to the provisions of the Compact, and conform to the rules, regulations, and requirements of the Commission; and (ii) the transportation is consistent with the public interest.

An applicant must establish financial fitness, operational fitness, and regulatory compliance fitness.<sup>1</sup> These applicants have a history of regulatory violations. Our assessment of their fitness to hold WMATC authority again necessarily requires an examination of their past violations.

**II. APPLICANTS' PAST VIOLATIONS**

Metro Homes, Inc., previously held Certificate No. 634 from January 2, 2002, until December 23, 2002, when it was revoked for Metro Homes's failure to to comply with the Commission's insurance

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<sup>1</sup> *In re Carl's Place Inc.*, No. AP-10-020, Order No. 12,361 (Apr. 7, 2010).

requirements.<sup>2</sup> Certificate No. 634 was subsequently reinstated effective February 21, 2003<sup>3</sup>, and held by Metro Homes until December 10, 2003, when it was revoked a second time for failure to comply with the Commission's insurance requirements.<sup>4</sup>

Metro Day Treatment Center, Inc., held Certificate No. 635 from November 30, 2001, until December 19, 2003, when it was revoked for Metro Day's failure to comply with the Commission's insurance requirements in Regulation No. 58.<sup>5</sup>

The revocation orders gave applicants 30 days to remove all indicia of WMATC authority from their vehicles, file affidavits verifying removal, and surrender their certificates of authority. Neither complied.

Applicants' CEO, Maxwell Asenso, explains in an affidavit filed November 12, 2010, that he was not aware of the revocation of Metro Homes' authority until applicants' newly hired transportation manager, Kevin Mattison, informed him of that in December 2009. Mr. Asenso further states that he was not aware of the revocation of Metro Day's authority until Mr. Mattison informed him of that in February 2010. Mr. Asenso explains that he was not personally involved in such regulatory compliance matters, having delegated that responsibility to applicants' chief operating officer, Herman Bromfield.

For his part, Mr. Mattison explains in an affidavit filed November 12, 2010, that shortly after being hired in October 2009 to manage both fleets, he was in the process of inspecting two vans, one belonging to Metro Homes and one to Metro Day, when he noticed that the Metro Homes van displayed a WMATC number, "WMATC No. 634". He also noticed that no WMATC number appeared on the other van belonging to Metro Day. Mr. Mattison states that when he brought this to Mr. Bromfield's attention, Mr. Bromfield assured him that Metro Day did not need WMATC authority and that Metro Homes was in compliance with WMATC requirements. Mr. Mattison further states as follows:

In December 2009, I began researching WMATC requirements as they pertained to medical transport, eventually coming across the fact that Metro Homes was not listed as a provider on WMATC's current provider list. At that time, I was concerned about bringing Metro

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<sup>2</sup> See *In re Metro Homes, Inc.*, No. MP-02-117, Order No. 6976 (Dec. 23, 2002).

<sup>3</sup> See *In re Metro Homes, Inc.*, No. MP-02-117, Order No. 7044 (Feb. 21, 2003).

<sup>4</sup> See *In re Metro Homes, Inc.*, No. MP-03-125, Order No. 7597 (Dec. 10, 2003).

<sup>5</sup> *In re Metro Day Treatment Center, Inc.*, No. MP-03-154, Order No. 7636 (Dec. 19, 2003).

Homes into compliance. I did not focus on Metro Day because it was not transporting clients.

As a result, I prepared and submitted a WMATC application on December 4, 2009. That application is still pending.

Mr. Mattison later filed the Metro Day application in March 2010 after discovering that Metro Homes had used Metro Day's van to transport Metro Homes' clients.

Commission records show that Mr. Mattison also arranged for an existing WMATC carrier, Mobility Express, WMATC No. 668, to assume responsibility for transporting applicants' clients effective April 1, 2010, pending a decision on these applications.

Mr. Asenso states that applicants terminated Mr. Bromfield's employment for cause in October 2010.

### **III. FINDINGS**

Commission records show that Metro Day received notice of revocation on December 22, 2003, but there is no evidence that Metro Homes received notice from the Commission that its authority had been revoked. This would explain why the Metro Homes van displayed WMATC No. 634 and the Metro Day van did not display WMATC No. 635 when Mr. Mattison performed his inspection. Furthermore, this might constitute grounds for finding the unlawful transportation of Metro Homes' clients was not knowing and willful prior to December 2009 when Mr. Mattison discovered Metro Homes' true WMATC status. Thereafter, applicants cannot make this argument, and the record is clear that Mobility Express did not assume responsibility for transporting applicants' clients until April 1, 2010, more than three months later.

### **IV. ORDER TO SHOW CAUSE**

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.<sup>6</sup> Each day of the violation constitutes a separate violation.<sup>7</sup>

The term "knowingly" means with perception of the underlying facts, not that such facts establish a violation.<sup>8</sup> 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.<sup>9</sup> Employee negligence is no defense.<sup>10</sup>

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<sup>6</sup> Compact, tit. II, art. XIII, § 6(f)(i).

<sup>7</sup> Compact, tit. II, art. XIII, § 6(f)(ii).

<sup>8</sup> Order No. 12,361.

<sup>9</sup> *Id.*

"To hold carriers not liable for penalties where the violations . . . are due to mere indifference, inadvertence, or negligence of employees would defeat the purpose of" the statute.<sup>11</sup>

When an applicant has a record of violations, the Commission considers the following factors in assessing the likelihood of future compliance: (1) the nature and extent of the violations, (2) any mitigating circumstances, (3) whether the violations were flagrant and persistent, (4) whether applicant has made sincere efforts to correct its past mistakes, and (5) whether applicant has demonstrated a willingness and ability to comport with the Compact and rules and regulations thereunder in the future.<sup>12</sup>

Applicants shall have 30 days to show cause why the Commission should not assess a civil forfeiture and/or deny these applications for Metro Homes' and/or Metro Days' knowing and willful transportation of passengers for hire between points in the Metropolitan District from December 2009 through March 2010 notwithstanding a lack of WMATC authority.

THEREFORE, IT IS ORDERED:

1. That applicants shall have 30 days to show cause why the Commission should not assess a civil forfeiture against applicants for knowingly and willfully violating Article XI, Section 6(a), of the Washington Metropolitan Area Transit Regulation Compact.

2. That within thirty days of the date of this order, applicants shall show cause why the Commission should not find applicants unfit for knowingly and willfully violating Article XI, Section 6(a), of the Washington Metropolitan Area Transit Regulation Compact.

3. That applicant may submit within 15 days from the date of this order a written request for oral hearing, specifying the grounds for the request, describing the evidence to be adduced and explaining why such evidence cannot be adduced without an oral hearing.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS BRENNER, HOLCOMB, AND KUBLY:



William S. Morrow, Jr.

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<sup>10</sup> *In re Sams Health Care Servs. Inc.*, No. MP-08-005, Order No. 11,947 (Apr. 23, 2009).

<sup>11</sup> *United States v. Illinois Cent. R.R.*, 303 U.S. 239, 243, 58 S. Ct. 533, 535 (1938).

<sup>12</sup> Order No. 12,361.

Executive Director