

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

SILVER SPRING, MARYLAND

ORDER NO. 12,729

IN THE MATTER OF:

Served February 15, 2011

Application of METRO DAY TREATMENT)
CENTER, INC., for a Certificate of)
Authority -- Irregular Route)
Operations)

Case No. AP-2010-032

Application of METRO HOMES, INC.,)
for a Certificate of Authority --)
Irregular Route Operations)

Case No. AP-2010-004

Applicants each seek a certificate of authority to transport passengers in irregular route operations between points in the Metropolitan District, restricted to transportation in vehicles with a seating capacity of less than 16 persons only, including the driver. The applications are unopposed.

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 have been consolidated under Rule No. 20-02 to resolve a common question of fitness.

Article XI, Section 7(a), of the Washington Metropolitan Area Transit Regulation Compact¹ 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.²

¹ Pub. L. No. 101-505, § 1, 104 Stat. 1300 (1990), amended by Pub. L. No. 111-160, 124 Stat. 1124 (2010) (amending tit. I, art. III).

² *In re Fon Pius Nde, t/a Piusmed World Transp.*, No. AP-08-134, Order No. 11,694 (Nov. 19, 2008); *In re Skyhawk Logistics, Inc.*, No. AP-07-195, Order No. 11,693 (Nov. 19, 2008); *In re Melwood Horticultural Training Center, Inc.*, No. AP-08-014, Order No. 11,692 (Nov. 19, 2008).

Each applicant verifies that it: (1) 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) 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) 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 be sufficient to establish an applicant's fitness,³ but these applicants have a history of regulatory violations.

I. 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 requirements.⁴ Certificate No. 634 was subsequently reinstated effective February 21, 2003⁵, 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.⁶

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. 58.⁷

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

³ Order Nos. 11,694; 11,693; 11,692.

⁴ See *In re Metro Homes, Inc.*, No. MP-02-117, Order No. 6976 (Dec. 23, 2002).

⁵ See *In re Metro Homes, Inc.*, No. MP-02-117, Order No. 7044 (Feb. 21, 2003).

⁶ See *In re Metro Homes, Inc.*, No. MP-03-125, Order No. 7597 (Dec. 10, 2003).

⁷ *In re Metro Day Treatment Center, Inc.*, No. MP-03-154, Order No. 7636 (Dec. 19, 2003).

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 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.

Based on the foregoing, the Commission made the following findings in Order No. 12,663, served December 17, 2010.

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.

Accordingly, Order No. 12,663, directed applicants 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.

II. FINDING OF WILLFULNESS AND ASSESSMENT OF FORFEITURE

In a response filed January 24, 2011, applicants concede the following:

CEO Maxwell Asenso affirms that given his overall responsibilities for the health and welfare of his clients, it was not until December 2009 and February 2010 that he first learned that Metro Homes and Metro Day clients were being transported without proper authorization and that the Certificates of Authority had been revoked. He states he was informed in December 2009 of these infractions by his newly-retained Transportation Manager Kevin Mattison. (Response at 3).

* * *

Mr. Asenso instructed Mr. Mattson to submit the necessary documents to WMATC for Metro Homes on December 4, 2009 (Metro Day was not transporting clients at the time); and on March 2010 for Metro Day. (Response at 4-5).

* * *

As correctly described in the Commission's Order to Show Cause, Metro Homes continued to transport its clients for three months before it executed an agreement with Mobility Express on April 1, 2010. (Response at 4).

Applicants argue that the violations occurring from December 2009 through March 2010 were not willful in that they were not the product of careless disregard. (Response at 6). We disagree.

Under the Compact, 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.⁸ Each day of the violation constitutes a separate violation.⁹

The term "knowingly" means with perception of the underlying facts, not that such facts establish a violation.¹⁰ 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.¹¹ Once a carrier is apprised of Compact requirements, the onus is on the carrier to determine whether its operations are in compliance.¹² Violations occurring thereafter are viewed as knowing and willful.¹³ Employee negligence is no defense.¹⁴ "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.¹⁵

Applicants appear to assert that the violations from December 2009 through March 2010 were the product of "the reckless behavior of the Chief Operating Officer", (COO), whose employment was terminated for cause in October 2010. Applicants explain that once their CEO, (the COO's superior), became aware in December 2009 that Metro Homes required but did not possess WMATC authority, he directed applicants' transportation manager to file the appropriate application. That is fine as far as it goes, but the CEO also should have instructed the transportation manager to make immediate arrangements for transportation of applicants' clients by a properly licensed carrier while the application was pending. In any event, once a carrier is apprised of Compact requirements, the onus is on the carrier to determine whether its operations are in compliance.¹⁶ Violations occurring thereafter are viewed as knowing and willful.¹⁷ In this case the CEO became aware of Metro Homes's WMATC status on December 4, 2009. The onus was on the CEO to ensure that Metro Homes did not continue violating the Compact thereafter. The violations occurring after December 4, 2009, are therefore viewed as knowing and willful within the meaning of the Compact.

We shall assess a forfeiture against Metro Homes in the amount of \$250 per day¹⁸ for 117 days,¹⁹ or \$29,250. We will suspend all but

⁸ Compact, tit. II, art. XIII, § 6(f)(i).

⁹ Compact, tit. II, art. XIII, § 6(f)(ii).

¹⁰ Order Nos. 11,694; 11,693; 11,692.

¹¹ Order Nos. 11,694; 11,693; 11,692.

¹² Order Nos. 11,694; 11,693; 11,692.

¹³ Order Nos. 11,694; 11,693; 11,692.

¹⁴ Order Nos. 11,694; 11,693; 11,692.

¹⁵ *United States v. Illinois Cent. R.R.*, 303 U.S. 239, 243, 58 S. Ct. 533, 535 (1938).

¹⁶ Order Nos. 11,694; 11,693; 11,692.

¹⁷ Order Nos. 11,694; 11,693; 11,692.

¹⁸ See Order Nos. 11,694 (same); 11,693 (same); 11,692 (same).

15 percent, rounded to the nearest \$100, or \$4,400, based on the presence of two reduction factors: admission of wrongdoing and voluntary filing of these applications.²⁰ Failure to pay the net forfeiture in a timely fashion shall result in reinstatement of the full \$29,250.

III. LIKELIHOOD OF FUTURE COMPLIANCE

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.²¹

Operating without authority is a serious violation. We find no mitigating circumstances for the violations occurring after December 4, 2009. On the other hand, we do not find that those violations were flagrant or persistent. That Metro Homes filed an application of its own volition is some evidence of willingness and ability to comport with the Compact and rules and regulations thereunder in the future,²² as is applicants' hiring of a licensed carrier to assume responsibility for transporting applicants' clients

¹⁹ December 5, 2009, through March 31, 2010.

²⁰ See Order Nos. 11,693 (net of 16.67% same based on admission of guilt and voluntary filing of application); 11,692 (net of 10.64% same).

²¹ *In re Veolia Transp. Servs., Inc., & Yellow Bus Serv., Inc., t/a Yellow Transp.*, No. AP-07-001, Order No. 11,580 (Sept. 18, 2008); *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).

²² *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); *In re Phoenix Limo. & Tour Co.*, No. AP-98-10, Order No. 5304 (Apr. 6, 1998); *In re Megaheds, Inc., t/a Megaheds Transp.*, No. AP-97-24, Order No. 5113 (June 26, 1997); *In re Jet Tours USA, Inc.*, No. AP-94-50, Order No. 4649 (Aug. 22, 1995); *In re Reston Limo. & Travel Serv., Inc., t/a Reston Limo.*, No. AP-93-36, Order No. 4232 (Jan. 11, 1994).

as of April 1, 2010,²³ and applicants' hiring of counsel to provide continuing regulatory advice.²⁴

Upon payment of the forfeiture assessed herein, the record will support a finding of prospective compliance fitness,²⁵ subject to a one-year period of probation.²⁶

IV. CONCLUSION

Based on the evidence in this record, and in consideration of the terms of probation and other conditions prescribed herein, the Commission finds that the proposed transportation is consistent with the public interest and that 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.

Applicants are admonished to keep their assets, books, finances and operations separate, one applicant from the other. Sharing of office space will be allowed, but this should not be construed as permission to share revenue vehicles or operating authority.²⁷

THEREFORE, IT IS ORDERED:

1. That pursuant to Article XIII, Section 6(f), of the Compact, the Commission hereby assesses a net civil forfeiture against Metro Homes in the amount of \$4,400 for knowingly and willfully violating Article XI, Section 6(a), of the Compact by transporting passengers for hire between points in the Metropolitan District on 117 separate days while Certificate No. 634 was revoked.

2. That Metro Homes is hereby directed to pay to the Commission within thirty days of the date of this order, by check or money order, the sum of four thousand four hundred dollars (\$4,400).

²³ *In re Zohery Tours Int'l, Inc.*, No. AP-07-053, Order No. 10,602 (July 5, 2007); *In re BLS Limo Group*, No. AP-07-056, Order No. 10,472 (May 9, 2007); *In re Shirlington Limo. & Transp., Inc.*, No. AP-02-20, Order No. 6709 (June 21, 2002); Order No. 4232; *In re Ruchman & Assocs., Inc., t/a RAI, Inc.*, No. AP-91-31, Order No. 3839 (Nov. 4, 1991), *aff'd*, No. AP-91-32, Order No. 3844 (Nov. 13, 1991).

²⁴ *In re Business Logistics Group, L.L.C., t/a ATS, L.L.C.*, No. AP-06-002, Order No. 9652 (June 15, 2006); *In re EMK Services Inc.*, No. AP-05-168, Order No. 9391 (Mar. 16, 2006); *In re Zee Transp. Serv. Inc.*, No. AP-05-01, Order No. 8749 (May 31, 2005); *In re VGA, Inc.*, No. AP-03-073, Order No. 7496 (Oct. 29, 2003); *In re Japan Travelers Serv., Inc.*, No. AP-92-34, Order No. 4055 (Feb. 17, 1993); *In re Ruchman & Assocs., Inc., t/a RAI, Inc.*, No. AP-91-32, Order No. 3911 (Mar. 25, 1992) (same).

²⁵ Order Nos. 11,694; 11,693; 11,692.

²⁶ Order Nos. 11,694; 11,693; 11,692.

²⁷ *In re Simon & Miriam Corp.*, No. AP-06-141, Order No. 10,109 (Nov. 30, 2006).

3. That the full forfeiture of \$29,250 assessed in this order shall be immediately due and payable if Metro Homes fails to timely pay the net forfeiture.

4. That upon Metro Homes's timely compliance with the requirements of this order, Certificate of Authority No. 634 shall be reissued to Metro Homes, Inc., 6856 Eastern Avenue, N.W., #376, Washington, DC 20012-2112.

5. That upon Metro Day's timely compliance with the requirements of this order, Certificate of Authority No. 635 shall be reissued to Metro Day Treatment Center, Inc., 6856 Eastern Avenue, N.W., #376, Washington, DC 20012-2112.

6. That Metro Homes may not transport passengers for hire between points in the Metropolitan District pursuant to this order unless and until Certificate No. 634 has been reissued in accordance with the preceding paragraph.

7. That Metro Day may not transport passengers for hire between points in the Metropolitan District pursuant to this order unless and until Certificate No. 635 has been reissued in accordance with the preceding paragraph.

8. That each applicant is hereby directed to present its revenue vehicle(s) 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.

9. That applicants shall be placed on probation for a period of one year commencing with the issuance of their respective certificates of authority as approved in this order, such that a willful violation of the Compact, or of the Commission's rules, regulations or orders thereunder, during the period of probation shall constitute grounds for immediate suspension and/or revocation of the violator's operating authority, regardless of the nature and severity of the violation.

10. That should either applicant fail to timely satisfy the conditions of issuance prescribed herein, the grant of authority to

that applicant shall be void and that applicant's application shall stand denied.

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

A handwritten signature in black ink, appearing to read "W. S. Morrow, Jr.", written in a cursive style.

William S. Morrow, Jr.
Executive Director