

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

SILVER SPRING, MARYLAND

ORDER NO. 13,179

IN THE MATTER OF:

Served February 29, 2012

Application of ECOLOGICAL )  
TRANSPORTATION GROUP, LLC, Trading ) Case No. AP-2011-112  
as ECOLOGICAL RIDE & ECOLOGICAL )  
LIMO, for a Certificate of )  
Authority -- Irregular Route )  
Operations )

This matter is before the Commission on the motion of applicant to waive Commission Regulation No. 62-08.

Regulation No. 62 governs vehicle leases. Under Regulation No. 62-02, no WMATC carrier may "charter, rent, borrow, lease, or otherwise operate in revenue service any motor vehicle to which such carrier does not hold title" unless the carrier has filed a lease with the Commission and the Commission has approved it.

Under Regulation No. 62-08, a carrier generally may not lease a vehicle and driver from the same source. Regulation No. 62-08 is designed to prevent carriers without WMATC authority from operating in the Metropolitan District through the guise of a so-called lease arrangement.<sup>1</sup> It reflects the rebuttable presumption that an entity which furnishes both a vehicle and a driver under a lease agreement is actually a passenger carrier.<sup>2</sup>

In determining the party who in reality is performing a given transportation service, the overall test of substance involving an inquiry into all pertinent factors - including control, responsibility, and assumption of financial risk - is the decisive consideration. Usually, no single factor is by itself conclusive. See *United States v. Drum*, 82 S.Ct. 408 (1962). In the final analysis the question is: does the purported carrier assume to a significant degree the characteristic burdens of the transportation business? Hence, a lessee in a bona fide vehicle-lease arrangement resulting in private carriage must (a) control, direct, and dominate the operations and (b) assume the responsibilities, the risks, the duties and the burdens of transportation. For instance, though a lessee may have

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<sup>1</sup> *In re Orbital Shuttle, Inc.*, No. AP-99-60, Order No. 5736 (Nov. 2, 1999).

<sup>2</sup> *Id.*

operational control over the vehicle, and driver, the lessee is not a bona fide private carrier if the lessor rather than the lessee is actually controlling and directing the transportation service.

*Washington, Va. & Md. Coach Co. v. Scenic Coach Rental, Inc.*, No. 165, Order No. 837 at 4-5 (July 10, 1968).

Applicant proposes commencing operations in vehicles leased from independent contractors. Each vehicle will be driven by its owner. The motion is supported by a proposed vehicle lease and a proposed operator agreement.

The proposed lease consists of the Commission's Contract of Lease form, plus an appendix. The Commission's lease form places all control and insurance risk on the carrier lessee as follows:

The lessor and lessee agree by the filing of this contract of lease with the WMATC that the motor vehicle(s) named in this lease shall be operated by and under the complete control of the lessee, and no other, for the period of the lease; and for all regulatory purposes including, but not limited to, insurance, rates and charges, vehicle identification, and motor vehicle fuel and road taxes, such motor vehicle(s) shall be considered as the vehicle(s) of the lessee.

The appendix, however, negates the maintenance and vehicle tax language in the lease by providing that throughout the term of the lease, "Lessor shall maintain the leased vehicle in good working order, gassed and ready, and shall clean, paint and repair the vehicle as required for it to operate as part of Lessee's fleet and shall pay all motor vehicle fuel and road taxes required to be paid by Lessee." This has the effect of assigning primary maintenance and vehicle tax responsibility to the lessor in direct contradiction of the provisions in the Commission's lease form. The appendix reserves applicant's right to assume maintenance and vehicle tax responsibility in the event a lessor shirks his/her duty, but this is not required, which leaves the primary responsibility for maintenance and vehicle taxes in the hands of the lessor.

Under the operating agreement, each lessor warrants that his/her "vehicle is in good operating condition and meets the industry safety standards for a vehicle of its kind." But under Article XI, Section 5, of the Compact, providing "safe and adequate transportation service, equipment, and facilities," is the primary responsibility of the carrier, not the owner of the vehicle. There is no acknowledgment of applicant's responsibilities in this regard.

The operating agreement further stipulates that the lessor "will indemnify and hold [applicant] harmless from any claim arising out [of], relating to, or based on allegations of Lessor's negligence

or lack of due care as a vehicle operator." And although the agreement begins by describing each lessor as an "agent", and the agreement acknowledges that "whenever any agent of [applicant's] acts, [applicant] is at risk," the agreement closes by disavowing any "agency relationship" between the lessor and applicant, leaving the ultimate financial risk on the shoulders of the lessor.

The foregoing lease and operating agreement provisions lodge substantial control and risk in each lessor and thus reinforce the presumption that each lessor/driver is the carrier, not applicant. The parroting of language to the contrary from the Commission's lease form at the outset of the operating agreement offers little comfort inasmuch as the proposed appendix to the lease compromises the lease's integrity.

In conclusion, we find that applicant has not carried its burden of rebutting the presumption that the lessors who will be driving their own vehicles are the carriers, not applicant.

The motion to waive Commission Regulation No. 62-08 therefore is denied without prejudice.

IT IS SO ORDERED.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS BRENNER AND HOLCOMB:



William S. Morrow, Jr.  
Executive Director