

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

SILVER SPRING, MARYLAND

ORDER NO. 13,246

IN THE MATTER OF:

Served May 2, 2012

Application of ECOLOGICAL)
TRANSPORTATION GROUP, LLC, Trading)
as ECOLOGICAL RIDE & ECOLOGICAL)
LIMO, for a Certificate of)
Authority -- Irregular Route)
Operations)

Case No. AP-2011-112

This matter is before the Commission on applicant's request for an extension of time to satisfy the conditions of a grant of operating authority issued in Commission Order No. 12,975, served September 13, 2011, and on applicant's request for a waiver of Commission Regulation No. 62-08, which prohibits carriers from leasing a vehicle and driver from the same source.

I. EXTENSION OF CONDITIONAL GRANT DEADLINE

Order No. 12,975 conditionally granted Certificate of Authority No. 1851 and stipulated that applicant would have the full 180 days available under Commission Regulation No. 66, or until March 12, 2011, under Rule No. 7-01, to satisfy the conditions of the grant.

Regulation No. 66-01 states: "Except as provided in Regulation No. 66-02, the time for complying with the conditions of a grant of authority shall not be extended beyond 180 days from the date of the grant. A conditional grant of authority shall be void on the 181st day following the date of the grant if full compliance has not been achieved at that time." Regulation No. 66-02 states: "Upon timely request for an extension of the 180-day deadline in Regulation No. 66-01, the Commission's Executive Director may grant a maximum extension of 31 days." Applicant timely requested an extension of the 180-day period on March 9, 2012.

The Commission's Executive Director advised applicant by letter dated April 10, 2012, that approval of applicant's extension request would depend on applicant taking action on or before April 12, 2012, to address two remaining matters: (1) the need for a clear explanation in applicant's proposed tariff of when Ecological Limo rates apply, as opposed to Ecological Ride rates; and (2) resolution of certain lease issues raised in Order No. 13,226, served April 10, 2012. Applicant responded on April 12, 2012, with an amended proposed tariff and documents addressing the outstanding lease issues.

Based on our review of applicant's April 12 submission, we find that applicant's proposed tariff has been adequately amended to clearly indicate when Ecological Limo rates apply, as opposed to Ecological

Ride rates. We further find that applicant has adequately addressed the outstanding lease issues, as explained below.

II. WAIVER OF LEASE REGULATION NO. 62-08

Applicant proposes commencing operations in vehicles leased from independent contractors. Applicant proposes that each vehicle will be driven by its owner.

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.¹ It reflects the rebuttable presumption that an entity that furnishes both a vehicle and a driver under a lease agreement is actually a passenger carrier.²

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 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 requests a waiver of Regulation No. 62-08. This is applicant's third such request. The first request was denied in Order No. 13,179, served February 29, 2012. The second was denied in Order No. 13,226, served April 10, 2012.

Order No. 13,179 denied the first request because applicant's initial proposed lease contained internal contradictions³ and because

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

² *Id.*

³ Order No. 13,179 at 2. The rejected lease consisted of the WMATC Contract of Lease form and an appendix. The appendix contained terms that contradicted provisions in the Commission's form.

applicant's initial proposed operating agreement placed the ultimate financial risk of operations on the shoulders of the lessor and failed to acknowledge that providing safe and adequate transportation service, equipment, and facilities is the primary responsibility of the carrier, not the owner of the vehicle.⁴

Order No. 13,226 denied the second request because the operator agreements supporting the second request encouraged lessor-drivers to obtain their own insurance policies to indemnify applicant for claims arising out of the lessor-drivers' operation of vehicles under applicant's WMATC authority, which is incompatible with the stipulation in Regulation No. 58-02 that "not more than one policy may be obtained for any one tier or layer" of commercial auto liability insurance coverage, and because the operator agreements supporting the second request reserved to applicant the option to require a lessor-driver to defend and pay claims arising out of the lessor-driver's operation of his/her vehicle, which reinforced the presumption that the lessor-driver is the carrier, not applicant.⁵

The current request is supported by seven signed WMATC Contract of Lease forms - the Commission's approved vehicle lease form. Unlike the proposed lease rejected in Order No. 13,179, the WMATC Contract of Lease forms supporting this request have not been altered or augmented. They do not suffer from the defects that led to rejection of applicant's first proposed lease. None includes any contradictory language, by appendix or otherwise.

The current request also is supported by seven signed operator agreements. The operator agreements spell out the respective rights and responsibilities of the lessor-drivers and applicant with respect to operations proposed to be conducted under applicant's WMATC authority once that authority has been issued. The opening paragraph includes pertinent provisions prohibiting lessor-drivers from using vehicles covered by the agreement for commercial purposes other than those directed by applicant (referred to as Company):

These vehicles are operated by and under the complete control of the Company, and no other, for the entire period of the lease, and for all regulatory purposes including 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 Company.

. . .

Drivers shall only operate the Service Vehicle commercially at the direction and under the control of the Company dispatch operation ("Dispatch").

⁴ *Id.* at 2-3.

⁵ Order No. 13,226 at 4.

Drivers may not engage in any transportation transaction using the Service Vehicle except as instructed by Dispatch and to collect fares on behalf of the Company.

Like the operator agreements supporting the second request, the operator agreements supporting this request acknowledge applicant's responsibility for providing safe and adequate transportation service, equipment, and facilities, but unlike the operator agreements supporting the second request, the current operator agreements unequivocally place on applicant the responsibility to defend claims arising out of a lessor-driver's operation of vehicles under applicant's WMATC authority. And unlike the operator agreements supporting the second request, the current operator agreements do not urge lessor-drivers to obtain their own commercial auto liability insurance policies in violation of WMATC Regulation No. 58-02.

III. CONCLUSION

For the foregoing reasons, we shall grant applicant's request for extension of the 180-day conditional grant period and applicant's request for waiver of Regulation No. 62-08;⁶ provided, that applicant shall neither amend the operator agreements submitted April 12, 2012, nor enter into any new operator agreements containing language that deviates from the operator agreements submitted April 12, 2012, without Commission approval.

THEREFORE, IT IS ORDERED:

1. That the 180-day conditional grant period referenced in Order No. 12,975 is extended to April 12, 2012.

2. That Regulation No. 62-08 is waived as to any vehicle leased to applicant using a WMATC approved Contract of Lease on file with the Commission and covered by a WMATC approved operator agreement.

3. That Certificate of Authority No. 1851 shall be issued to Ecological Transportation Group, LLC, trading as Ecological Ride and as Ecological Limo, 2331 Mill Road, #100, Alexandria, VA 22314-4687.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS BRENNER AND HOLCOMB:



William S. Morrow, Jr.
Executive Director

⁶ See *In re Ceepco Contracting, LLC*, No. AP-09-079, Order No. 12,362 (Apr. 7, 2010) (waiving Regulation No. 62 and accepting documents filed within 31 days following expiration of 180-day deadline).