

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 13,777

IN THE MATTER OF:

Served March 1, 2013

Application of EXECUTIVE TECHNOLOGY)
SOLUTIONS, LLC, for a Certificate)
of Authority -- Irregular Route)
Operations)

Case No. AP-2012-079

Application of CAROL ANN BARNER,)
for a Certificate of Authority -)
Irregular Route Operations)

Case No. AP-2012-185

This matter is before the Commission on applicant's response to WMATC Order No. 13,664, served January 4, 2013, which granted applicant's request to supplement the record through oral testimony on applicant's regulatory compliance fitness. The hearing has been set for March 4, 2013.

Applicant previously held WMATC Certificate of Authority No. 985 from June 30, 2005, until February 17, 2012, when Certificate No. 985 was revoked in Order No. 13,167 for applicant's willful failure to comply with Article XI, Section 6, of the Compact, (operating without authority), Regulation Nos. 55 (operating without applicable tariff) and 62 (operating without required vehicle lease), and Order No. 12,798 (failing to present vehicles and produce documents). Applicant reapplied for WMATC authority and was denied.¹ Applicant has reapplied again.

Applicant's history of violations, including the falsification of a vehicle safety inspection certificate and submission of false statements regarding operations while suspended, was recapped in Order No. 13,543, served October 19, 2012.

Order No. 13,543 noted that applicant apparently had yet to cease passenger carrier operations in the Metropolitan District notwithstanding the lack of WMATC operating authority. The order first noted jurisdiction over several of applicant's passenger carrier contracts with various government agencies in the Metropolitan District, including contracts with the Department of Homeland Security CIS (DHS-CIS), the Department of the Navy, and the District of Columbia Court Services and Offender Supervision Agency (CSOSA). The Commission then made the following preliminary findings:

¹ *In re Exec. Tech. Solutions, LLC*, No. AP-12-033, Order No. 13,250 (May 3, 2012).

The record shows that notwithstanding the suspension of WMATC Certificate No. 985 on November 1, 2011, the revocation of WMATC Certificate No. 985 on February 17, 2012, and the issuance of a Commission cease and desist order on May 3, 2012:

Applicant performed the DHS-CIS contract from December 6, 2009, through July 13, 2012, as noted above in the last paragraph of the "Instant Application" discussion above.

The Commission's Motor Carrier Safety Specialist observed applicant operating a shuttle bus between Walter Reed National Military Medical Center (WRNMMC) and the Medical Center Metro Station on the grounds of the National Institutes of Health in Bethesda, Maryland, on July 19, 2012.² The Commission's Motor Carrier Safety Specialist observed unlicensed carriers operating shuttle buses between WRNMMC and the Silver Spring Metro Station, apparently on applicant's behalf, that same day.³

Applicant has been operating the CSOSA contract continuously since its inception, from October 1, 2005, to present.

* * *

Under the circumstances, we believe it only fair to allow applicant an opportunity to respond to our findings and this reading of the record. The response should include an explanation of why the Commission should not assess a civil forfeiture against applicant under Article XIII, Section 6(f), of the Compact for knowingly and willfully violating the Compact and why the Commission should not deny this application under Article XI, Section 7(b), of the Compact for applicant's failure to demonstrate regulatory compliance fitness.

Order No. 13,543 gave applicant: (1) 30 days to show cause why the Commission should not assess a civil forfeiture against applicant for operating while suspended, revoked, and in violation of a cease and desist order; (2) 30 days to explain in writing why the Commission should not deny this application under Article XI, Section 7(b), of the Compact for applicant's failure to demonstrate regulatory compliance fitness; and (3) 15 days to submit a request for oral hearing that specifies the grounds for the request, describes the evidence to be adduced, and explains why such evidence cannot be adduced without an oral hearing.

² Affidavit of Chris Aquino.

³ *Id.*

Applicant timely submitted a Request for Oral Hearing on November 2, 2012, and responsive documents on November 16, 2012. Order No. 13,664, served January 4, 2013, addressed the request for hearing, noting that the factual grounds for hearing and the evidence to be adduced as stated in the request were as follows:

(1) An oral hearing is requested to examine witnesses under oath and on the record. There are multiple documents and items which are disputed in the history of violations as accounted for in Order No. 13,357 (sic) that have not been sufficiently understood by the Commission which will be better explained by oral testimony.

(2) Witnesses will be used to supplement the entire record regarding Order No. 13,357, (sic) including, but not limited to, an explanation of the documents that the Commission currently does not accept as evidence to dispute allegations that ETS has used unauthorized carriers; and to explain the circumstances leading to the filing of ETS complaints.

(3) Oral testimony, particularly evidence adduced from direct examination, is necessary to ensure that the Commission has sufficient understanding of the circumstances contributing to past alleged violations.

Order No. 13,543 granted the request for oral hearing and stipulated that "the parties may call any witness with personal knowledge of the evidence in the record, including the documents submitted November 16, 2012. The testimony shall be confined to matters directly relating to the evidence of record and shall be subject to cross-examination." The order further stipulated that the parties would have until February 19, 2013, to submit a witness list.

Applicant submitted its witness list on February 19, 2013. Among the witnesses applicant would call to testify are the Commission's lawyers, William S. Morrow, Jr., the Commission's Executive Director/General Counsel, and Jeffrey M. Lehmann, the Commission's Assistant General Counsel. We do not see what purpose would be served by allowing applicant to examine these members of the Commission's staff other than to place the Commission on trial by means of having its attorney's cross-examine each other.

Applicant alleges that Mr. Morrow and Mr. Lehmann have "[f]irsthand knowledge" of "items disputed" in "the history of violations." Which items those might be is not disclosed. But to the extent applicant is referring to matters previously litigated in proceedings now closed, the Commission will not be taking any testimony on those matters. Rather, it should be clear from Order No. 13,543 that the purpose of this hearing is to afford applicant an opportunity to explain the three contracts mentioned above that on *their face*, and in the absence of *documentation* showing that applicant

subcontracted all operations thereunder at all times during which applicant did not possess WMATC authority, lead us to the conclusion that applicant has yet to cease violating the Compact.

It also is not clear what applicant means by "firsthand". Certainly, Mr. Morrow and Mr. Lehmann have firsthand knowledge that evidence of the three contracts mentioned above is in the record. Beyond that, we do not see any affidavits or statements of fact in the record from these staff members concerning applicant's passenger carrier operations in the Metropolitan District, lawful or otherwise. And inasmuch as Commission staff will be calling no direct witnesses, much less these two, no such factual testimony shall be considered in reaching a determination on the merits of the application before us.

Our decision to exclude this testimony is buttressed by applicant's failure to propose as witnesses any personnel of the carriers that applicant says it subcontracted with during the time it was without WMATC authority.⁴ To the extent applicant has been unable to fully document those arrangements, the persons with "firsthand" knowledge of such matters would be applicant's personnel and personnel from such carriers, not the Commission's lawyers. Similarly, to the extent applicant was rebuffed in its attempts to secure such arrangements, the persons with "firsthand" knowledge of those matters in the first instance would be personnel from the carriers that declined to assist or ceased assisting applicant.

Accordingly, Mr. Morrow and Mr. Lehmann shall not be called as witnesses by either side.

Also on the applicant's witness list is Carol Ann Barner. According to applicant, Ms. Barner has "[f]irsthand knowledge of disparate treatment of ETS." Ms. Barner filed an application for WMATC authority on August 15, 2012. The Commission's Executive Director conditionally approved her application on September 7, 2012, in accordance with WMATC Regulation No. 54-07.⁵ Later, the Commission - not the Executive Director - stayed the conditional grant after Ms. Barner submitted a proposed vehicle lease from ETS.⁶ The stay was issued because what purported to be Ms. Barner's signature on the lease did not match her purported signature on other documents submitted in that proceeding.⁷ Ms. Barner has raised a "disparate" treatment argument in her application proceeding, as well. It appears that her argument in part is that whereas WMATC approved Reston Limousine, "a white owned company," as an ETS lessee in one day, WMATC has yet to approve Ms. Barner, a self-described "Black Economically Disadvantaged Woman Owned Business," as an ETS lessee despite the passage of several months. And if the stay is unfair to Ms. Barner

⁴ Witness subpoenas are governed by WMATC Rule No. 18.

⁵ *In re Carol Ann Barner*, No. AP-12-185, Order No. 13,464 (Sept. 7, 2012).

⁶ *In re Carol Ann Barner*, No. AP-12-185, Order No. 13,612 (Nov. 29, 2012).

⁷ *Id.*

the lessee then it follows that it is unfair to ETS the lessor. We therefore must consider the possibility that this is the disparate treatment of ETS to which Ms. Barner might speak.

Accordingly, we are consolidating the two proceedings under WMATC Rule No. 20-12 for a full airing of this common disparate treatment issue.

IT IS SO ORDERED.

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

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

William S. Morrow, Jr.
Executive Director