

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

SILVER SPRING, MARYLAND

ORDER NO. 13,995

IN THE MATTER OF:

Served June 13, 2013

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

Case No. AP-2012-079

This matter is before the Commission (WMATC) on the application of Executive Technology Solutions, LLC (ETS or applicant) for a certificate of authority to transport passengers in irregular route operations between points in the Metropolitan District and after a hearing held on March 4, 2013 to supplement the record through oral testimony.

PROCEDURAL HISTORY

ETS held WMATC Certificate of Authority No. 985 from June 30, 2005 until February 17, 2012, when it was revoked by this Commission in Order No. 13,167.¹ That order found that ETS willfully failed to comply with Article XI, Section 6, of the Compact,² (operating without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). The order observed that ETS (i) failed over a ten-month period to present for inspection by Commission staff all vehicles added to applicant's fleet despite being ordered to do so; (ii) continued to operate on and after November 1, 2011 when Certificate No. 985 was suspended; and (iii) operated with "an obviously altered safety inspection certificate."³ As a result of those violations, the Commission revoked ETS's Certificate. Additionally, the Commission assessed a civil forfeiture against ETS for \$2,250 for performing a U.S. Navy contract for approximately two weeks while Certificate No. 985 was suspended, despite assurances from ETS that the Navy contract had been entirely subcontracted to another WMATC carrier.⁴

¹ *In re Exec. Tech. Solutions, LLC*, No. MP-10-090, Order No. 13,167 (Feb. 17, 2012).

² The Compact refers to Washington Metropolitan Area Transit Regulation Compact, Pub. L. No. 101-505, § 1, 104 Stat. 1300 (1990), amended by Pub. L. No. 111-160, 124 Stat. 1124 (2010) (amending Title I, art. III).

³ Order No. 13,167 at 6.

⁴ *Id.* at 5-6.

On March 1, 2012, ETS filed an application for a new certificate of authority. The Commission denied the application, noting that ETS's previous failures to comply with the Compact were serious enough to warrant revocation of Certificate No. 985.⁵ The Commission considered the mitigating circumstances offered by the applicant, including its payment of the \$2,250 civil forfeiture, the hiring of legal counsel, and the implementation of a new management and oversight structure at ETS, which included a greater management role by Ms. Miran Kim, the President and CEO of ETS.⁶ However, the Commission found evidence that ETS had continued to operate transportation services, including the United States Department of Homeland Security (DHS-CIS) contract, even after Certificate No. 985 had been revoked, and that ETS had failed to advise the Commission of that fact in its application or supplemental filings. The Commission concluded: "Inasmuch as applicant's violation of the Compact and regulations thereunder appears to be ongoing despite an alleged restructuring of management and the hiring of counsel, we cannot say that applicant has carried its burden of demonstrating regulatory compliance fitness."⁷ Accordingly, the Commission denied the application and ordered ETS to "immediately cease providing passenger transportation services under the [DHS-CIS] contract."⁸

On June 5, 2012, ETS filed a second application for a certificate of authority, which is currently before the Commission. The Commission accepted the application, subject to the requirement that ETS provide additional information. ETS supplemented its application on June 21 and July 16; however, the Commission determined that ETS's responses failed to resolve all regulatory compliance fitness issues.⁹ Specifically, in Order No. 13,357, the Commission noted that it appeared ETS had continued operating its transportation services for several months after it had been ordered to cease. The Commission therefore requested that ETS provide additional information related to certain government transportation contracts,¹⁰ including the identity of all carriers hired by ETS to perform the contracts on its behalf and the dates that each carrier performed those services.¹¹

ETS filed supplemental information on August 22, 2012; however, the Commission observed in Order No. 13,543 that it had failed to produce many of the documents required by the Commission's previous order, including the DSCA contract, correspondence with agencies with whom ETS had contracted, and a statement identifying all carriers hired by ETS to perform

⁵ *In re Exec. Tech. Solutions*, Case No. AP-2012-033, Order No. 13,250 (May 3, 2012) at 2. The Commission also denied ETS's subsequent motion for reconsideration and stay of Order No. 13,250. *In re Exec. Tech. Solutions*, LLC, No. AP-12-033, Order No. 13,311 (June 12, 2012) at 8.

⁶ Order No. 13,250 at 2-3.

⁷ *Id.* at 4.

⁸ *Id.*

⁹ *In re Exec. Tech. Solutions*, Case No. AP-2012-079, Order No. 13,357 (July 23, 2012) at 6.

¹⁰ The contracts at issue were the DHS-CIS Contract, the Navy contract, the Missile Defense Agency (MDA) contract, the District of Columbia Court Services and Offender Supervision Agency (CSOSA) contract, and the Defense Security Cooperation Agency (DSCA) contract.

¹¹ Order No. 13,357 at 6-7.

contracts on ETS's behalf.¹² Moreover, the Commission found that ETS had not ceased operating after its Certificate of Authority was revoked, but instead continued offering passenger transportation services within WMATC's jurisdiction, including while its application was pending.¹³ The Commission cited four examples, including (i) ETS performed the DHS-CIS contract from December 6, 2009 through July 13, 2012; (ii) ETS operated a shuttle bus between Walter Reed National Military Medical Center and the Medical Center Metro Station as late as July 19, 2012; (iii) ETS operated the CSOSA contract from October 1, 2005 to at least the issuance date of Order No. 13,543, (October 19, 2012); and (iv) ETS operated the DSCA contract on April 15, 2012.¹⁴ The Commission provided ETS with an opportunity to respond to these findings, show cause why it should not be assessed a civil forfeiture for knowingly and willfully violating the Compact, and show cause why the Commission should not deny ETS's application for failure to demonstrate regulatory compliance fitness.

The Commission also stated that ETS could submit within 15 days a written request for oral hearing to supplement the record, which it did on November 2, 2012. The Commission granted that request in an order issued on January 4, 2013,¹⁵ and set the hearing for March 4, 2013. The witness list submitted by ETS on February 19, 2013 included William S. Morrow, Jr., Executive Director and General Counsel for the Commission, and Jeffrey M. Lehmann, the Commission's Assistant General Counsel. The witness list also included Carol Ann Barner, an applicant for a certificate of authority in Case No. AP-2012-185.¹⁶ In Order No. 13,777, the Commission denied ETS's request to call Messrs. Morrow and Lehmann as witnesses, finding, *inter alia*, that leaving the Commission staff without disinterested attorneys to cross-examine witnesses would have a disruptive effect on the hearing.¹⁷ Additionally, the order noted that Ms. Barner, like ETS, raised a "disparate impact" claim in her application for a certificate of authority. Therefore, in order to obtain a "full airing of this common disparate treatment issue," the Commission consolidated the two proceedings pursuant to WMATC Rule No. 20-12.¹⁸

A Hearing Officer conducted a hearing for the Commission on March 4, 2013. There, ETS called three witnesses, who were Ms. Carol Ann Barner, Mr. Guy Whitney, a consultant for ETS and former ETS employee, and Ms. Raelene Bell, Director of Transportation Operations for ETS. Staff counsel called WMATC Motor Carrier Safety Specialist Chris Aquino as an impeachment witness. ETS, Ms. Barner, and staff counsel also provided post-hearing briefs on April 15, 2013 and reply briefs on April 25, 2013. At hearing and in its briefs, ETS argues that the Commission should grant its application for a certificate of authority because (i) ETS was prejudiced by the consolidation of the hearings and the refusal of the Commission to allow its General Counsel and Assistant General Counsel to be called as witnesses; (ii) ETS was subjected

¹² *In re Exec. Tech. Solutions*, Case No. AP-2012-079, Order No. 13,543 (Oct. 19, 2012) at 8.

¹³ *Id.* at 10.

¹⁴ *Id.*

¹⁵ *In re Exec. Tech. Solutions*, Case No. AP-2012-079, Order No. 13,664 (Jan. 4, 2013) at 2.

¹⁶ Ms. Barner also leased a bus owned by ETS.

¹⁷ *In re Exec. Tech. Solutions*, Case No. AP-2012-079, *In re Carol Ann Barner*, Case No. AP-2012-185, Order No. 13,777 (March 1, 2013) at 3.

¹⁸ *Id.* at 4-5.

to racial discrimination by Mr. Morrow; and (iii) ETS is in substantial compliance with the Commission's previous orders. In contrast, Commission staff argues that ETS's failure to comply with the requirements of the Compact and its history of disregarding Commission orders preclude a finding of regulatory compliance fitness. Commission staff further urges the Commission to impose a civil forfeiture on ETS in response to its ongoing operation of passenger transportation services after Certificate No. 985 was revoked.

DECISION

The Commission denies ETS's application for a certificate of authority without prejudice to re-filing after a one-year period from the date of this order has elapsed. ETS has continued to operate without a valid certificate and after the Commission has ordered it to cease and desist all passenger transportation services within WMATC jurisdiction. Additionally, the Commission assesses a \$10,000 civil forfeiture as a result of ETS's violations of the Compact.

I. APPLICATION FOR CERTIFICATE OF AUTHORITY

Title II of the Compact, Article CI, Section 7(a), authorizes the Commission to issue a certificate of authority if it finds that the proposed transportation is consistent with the public interest and that 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. If the applicant does not make the required showing, the application must be denied under Section 7(b).

An applicant for a certificate of authority has the burden of establishing financial fitness, operational fitness, and regulatory compliance fitness.¹⁹ A determination of compliance fitness is prospective in nature.²⁰ The purpose of the inquiry is to protect the public from those whose conduct demonstrates an unwillingness to operate in accordance with regulatory requirements.²¹ Past violations do not necessarily preclude a grant of authority but permit the inference that violations will continue.²²

A. History of Violations

ETS has a significant history of non-compliance with the Compact and violation of Commission orders. For example, the Commission conditionally approved the issuance of Certificate No. 985 to ETS in 2004 subject to a one year period of probation because of ETS's then recent violations of Federal Motor Carrier Safety Regulations.²³ In addition, Commission records show that Certificate No. 985 was suspended three times because of the applicant's

¹⁹ *In re Nur Corp.*, Case No. AP-2010-178, Order No. 12,730 (Feb. 15, 2011).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *In re Exec. Tech. Solutions, LLC*, Case No. AP-04-84, Order No. 8,273 (Sept. 20, 2004).

willful failure to comply with the Commission's insurance requirements contained in Regulation No. 58.²⁴

More recently, the Commission revoked ETS's Certificate of Authority on February 17, 2012. The Commission determined that ETS willfully failed to comply with Article XI, Section 6 of the Compact by operating passenger vehicle services without authority, and violated Regulation Number 55 by operating without an applicable tariff. Additionally, the Commission determined that ETS failed to comply with Regulation Number 62 by operating without a required vehicle lease and violated Order No. 12,798 by failing to present vehicles and produce documents for inspection upon Commission request.

ETS argues that these violations occurred in the past and should not currently be held against it.²⁵ Additionally, ETS claims that some of the past violations did not occur ("ETS was cited for an insurance lapse that never happened.")²⁶ ETS suggests that the history of violations is evidence of the Commission's discrimination against it. "The history between the Applicant and the Commission, specifically with Mr. Morrow, is a core component of the Applicant's position that it has been unfairly prevented from gaining a Certificate of Authority..."²⁷

The Commission rejects the applicant's attempt to relitigate past violations through a claim of discrimination. The Compact provides parties adversely affected by an order with 30 days to seek reconsideration from the Commission.²⁸ Commission orders on reconsideration may be appealed to the United States Court of Appeals within 60 days.²⁹ ETS made a decision not to contest the Commission's findings and those conclusions are now final. Of course, ETS's past violations are not dispositive of whether it should receive a new certificate; however, the violations do provide insight into whether future violations may occur, and whether the applicant can demonstrate regulatory compliance fitness.

B. Likelihood of Future Compliance

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)

²⁴ *In re Exec. Tech. Solutions, LLC*, Case No. MP-2011-096, Order No. 13,035 (Nov. 1, 2011); *In re Exec. Tech. Solutions, LLC*, Case No. MP-06-173, Order No. 10,045 (Nov. 1, 2006); *In re Exec. Tech. Solutions, LLC*, Case No. MP-05-168, Order No. 9,087 (Nov. 1, 2005).

²⁵ Counsel for ETS argued at the March 4 hearing that "the orders that reject these applications for certificate of authority and the ones for the pending certificate of authority the entire history of ETS starting from the order that I began with in October 2010 is always cited as their history of violations. ... We feel that we should be able to discuss their passage or violations today." March 4 Tr. at 86.

²⁶ Memorandum of Applicant at 7.

²⁷ *Id.*

²⁸ Compact, Title II, Art. XIII, Sec. 4(a).

²⁹ *Id.* at Sec. 5(a).

whether applicant has demonstrated a willingness and ability to comport with the Compact and rules and regulations thereunder in the future.³⁰

The Commission finds the applicant's past violations to be serious. ETS has repeatedly violated the Compact and past Commission orders by operating without authority under a revoked Certificate. The Commission suspended ETS's operating authority on November 1, 2011, and revoked Certificate No. 985 on February 17, 2012.³¹ Nevertheless, ETS continued providing passenger transportation services within WMATC jurisdiction in order to serve the DHS-CIS contract as well as its contract with the Department of the Navy. In fact, ETS operated the DHS-CIS contract from December 6, 2009 until July 13, 2012, over eight months after its Certificate had been suspended.

As a potentially mitigating factor, ETS contends that its failure to timely cease operations of its transportation services after the revocation of its Certificate was justifiable because of the importance of its government contracts and the difficulty in subcontracting them. At the hearing, Mr. Whitney stated "the tension was that the Commission wanted us to stop working immediately"³² and Ms. Bell claimed "You cannot just cease operations on a federal contract with the federal government."³³ Accordingly, ETS continued to perform its transportation services without authority on a revoked Certificate. Nevertheless, the Commission's direction to ETS was unequivocal. Order No. 13,250, served on May 3, 2012, instructed ETS to "immediately cease providing passenger transportation services under the United States Department of Homeland Security (DHS-CIS) contract." ETS's actions to the contrary were unlawful. As the Commission has held in similar situations, "we find it troubling that possessed of a belief it must either break the law or breach a contract, respondent chose to break the law. It is that failure to comply with the law that has placed respondent in this predicament."³⁴

The Commission further finds that ETS's violations were flagrant and persistent. For example, the applicant continued to operate the DHS-CIS contract for over eight months after its Certificate had been suspended. Moreover, ETS continued serving its Navy contract for an even longer period of time. The evidence presented from the hearing record and ETS's submissions to the Commission demonstrate that ETS served the Medical Center Metro Route until at least February 27, 2013, and potentially until the contract's expiration on March 1, 2013.³⁵ Indeed, WMATC enforcement staff personally witnessed and photographed ETS vehicles operating the route on July 19, 2012 and on February 27, 2013.³⁶ The latter violation occurred nearly nine

³⁰ Order No. 12,730 at 3.

³¹ Order No. 13,167, Order No. 13,543.

³² March 4 Tr. at 76.

³³ *Id.* at 104.

³⁴ *In re Safe Haven, Inc.*, Case No. MP-2002-14, Order No. 6,762 (Aug. 7, 2002) at 2.

³⁵ ETS submitted invoices indicating that it subcontracted its Navy Medical Center Metro contract for five days in June 2012; however, the evidence does not support the premise that ETS subcontracted this contract for any other portion of time.

³⁶ Mr. Aquino explained that the ETS "shuttle bus would come, pull down to bus bay B, drive around the loop and then cross over Rockville Pike into the Walter Reed Navy Hospital and then after it completed its work on that side of the Navy Hospital it would cross back over Rockville Pike and do the route again." March 4 Tr. at 151.

months *after* ETS submitted its June 5 application for a new certificate of authority, in which, through its president, it asserted that it “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.”

The Commission does not find that the applicant has made sincere efforts to correct its past mistakes. Unfortunately, ETS has failed to take ownership of its past violations or resolve to improve its performance in the future. Instead, it has attempted to cast doubt on Commission findings by trying to relitigate fully-resolved issues, some of which are years past the statutory deadlines for appeal. It has also attacked the integrity of the Commission’s staff, an accusation which, as described below, the Commission fully rejects. Given the applicant’s past violations and the inadequate explanations and baseless charges contained in its hearing testimony and written briefs, the Commission finds that ETS has not demonstrated a willingness and ability to comport with the Compact or the rules and regulations thereunder in the future.

C. Applicant’s Contentions

1. Alleged Discrimination

ETS claims that the Commission, through its Executive Director and General Counsel, William Morrow, racially discriminated against it because its President and CEO, Ms. Miran Kim, is Asian-American. In support of that allegation, ETS called Ms. Carol Ann Barner as a witness. She testified that she is an African-American and a woman who applied for a certificate of authority from the Commission on August 15, 2012, but has not yet received approval.³⁷ In contrast, she claimed that Reston Limousine and Travel Service, Inc. is a white-owned company and when it requested approval for a certificate of authority to operate several buses, “the authority license went straight through.”³⁸

Mr. Whitney also testified about alleged disparate treatment and stated that he is aware of three companies that in his opinion received preferential consideration and were not minority owned.³⁹ He claimed that TransCom operated without Commission authority for seven years and was fined \$30,000, which was later reduced to \$7,000. He reiterated Ms. Barner’s claim that Reston limousine received a certificate of authority more promptly than either ETS or Ms. Barner. He also argued that the Commission overlooked the fact that Beltway Transportation operates buses with inscribed names that do not comply with the size requirements of the Commission’s regulations.

Finally, ETS contends that William Morrow made a racially insensitive comment in reference to Ms. Kim. Mr. Whitney testified that Mr. Morrow called him on the telephone to ask him to retrieve a package of pens and pads that had the ETS company name inscribed on them

³⁷ March 4 Tr. at 25, 39. Ms. Barner’s application for a certificate of authority has been granted by the Commission in an order being issued the same date as this one.

³⁸ *Id.* at 22.

³⁹ *Id.* at 53-57.

and that Ms. Kim had delivered to the Commission as a gift during the Christmas holiday.⁴⁰ According to Mr. Whitney, Mr. Morrow stated “who is Miran Kim? She doesn’t sound like she is from this country. She doesn’t understand how things work here and that’s not how it works and you need to tell her and you need to come and pick this up.”⁴¹

We reject ETS’s claim of disparate treatment and the personal and unfounded accusations against Mr. Morrow. First, the delay in Ms. Barner’s application resulted in part from the Commission’s investigation into her lease and application signatures, which did not match. Ms. Barner conceded at the March 4 hearing that she asked another individual to assist her with her application process and that that individual signed her September 24, 2012 tariff.⁴² Ms. Barner also explained that previous injuries to her hand “caused my signature to remain inconsistent.”⁴³ The Commission therefore had good reason to investigate the discrepancy regarding her signatures, and the reference to Reston Limousine, whose application did not demonstrate such inconsistencies, is inapposite.

More tellingly, Ms. Barner’s hearing testimony demonstrates that the inquiries from Commission staff regarding her application stem from her association with ETS, a company with a significant history of violations, not from her race or gender. For example, she complained that Mr. Morrow “continues to treat me like I’m ETS. I’m not on their payroll. I’m Carol Ann Barner”⁴⁴ and “I hit this brick wall because all I got from Mr. Morrow was there’s a problem with ETS.”⁴⁵ Given ETS’s history of violations, Commission staff was required to give greater scrutiny to all ETS-related transactions, including Ms. Barner’s proposed lease of a bus from the company. Her association with ETS has therefore delayed review of her application, but the delay in no way implicates discrimination. Ms. Barner conceded as much when she stated “I made a big mistake by asking Mr. Whitney to help me. I made a mistake by contracting with ETS.”⁴⁶ Indeed, in an apparent effort to put her application in a better light, she represented to the Commission that she now has severed her business relationship with ETS.⁴⁷

Mr. Whitney’s claim that certain companies received a faster or better result than ETS is similarly unavailing. ETS has knowingly and willfully operated without authority and it is those unlawful actions, not the race of its President, that have confounded its operations. The examples ETS point to are not factually analogous. For example, unlike ETS, TransCom entered into a subcontract and lease arrangement with another WMATC carrier to perform its government contract while its applications were pending.⁴⁸ Nevertheless, it still received a

⁴⁰ *Id.* at 49-50.

⁴¹ *Id.* at 50-51.

⁴² March 4 Tr. at 35-36.

⁴³ Carol Barner Post Hearing Brief at 5.

⁴⁴ March 4 Tr. at 41.

⁴⁵ *Id.* at 141.

⁴⁶ *Id.* at 144.

⁴⁷ Barner April 25, 2013 Reply Brief.

⁴⁸ *In re Transcom*, Case No. AP-2007-192, Order No. 11,040 (Dec. 27, 2007) at 2, *In re Transcom*, Case No. AP-05-113, Order No. 10,114 (Nov. 30, 2006) at 4.

significant civil forfeiture. The Reston Limousine authorization proceeded more expeditiously than ETS's request because it did not present a lengthy history of violations (and potential current violations) that required review, again, unlike ETS. With regard to enforcement of lettering requirements, ETS has presented no evidence that another carrier's buses fail to comply; however, the Commission investigates all complaints brought to its attention. Indeed, as staff counsel points out, ETS has filed four formal complaints against other transportation companies that have resulted in the issuance of three civil forfeitures by the Commission.⁴⁹

Finally, there is no merit to the accusation that Mr. Morrow treated ETS in a disparate manner because of race. Assuming *arguendo* that he made the statement Mr. Whitney attributed to him,⁵⁰ the intent of the statement was clearly to alert ETS that the Commission cannot accept gratuities from applicants because of the appearance of impropriety. For that reason, the Commission has posted in its office a sign stating "Commission personnel CAN NOT accept gifts, services, or anything of monetary value for execution of their duties."⁵¹ The Christmas gift of ETS pens and pads made while ETS has a pending application before the Commission would certainly fall within that prohibition. Moreover, nothing in the actions taken by Mr. Morrow indicate that he treated ETS in an inappropriate manner whatsoever. He, like other Commission staff, investigated ETS's application in an objective and reasonable way.⁵²

2. Denial of Request to Call Certain Witnesses

ETS argues that it was prevented from eliciting "probative and relevant" testimony when the Commission denied its request to call Mr. Morrow and Mr. Lehmann as witnesses. The Commission disagrees for several reasons. First, Messrs. Morrow and Lehmann comprise the Commission's entire legal staff, and for ETS to call them as witnesses would leave Commission staff without unconflicted attorneys to present its case. Second, Commission staff did not rely on any affidavits or statements of fact from these witnesses at the hearing or in its briefs. Rather, it relied on the correspondence, contracts and other documents presented by ETS as well as testimony from ETS witnesses and WMATC Safety Specialist Mr. Aquino. Third, Messrs. Morrow and Lehmann have no personal knowledge of ETS relevant to its application for a certificate of authority. Instead, their knowledge of the case is derived from their review of ETS submissions to the Commission that are largely a matter of public record. In any event, the Commission's decision is based entirely on the public record and not on any personal knowledge of ETS or its history of violations that these individuals may possess.

Finally, we find that ETS's proposal to call the Commission's legal staff as witnesses would have served only to distract from the purpose of the hearing. As we stated in Order No.

⁴⁹ Staff Reply Brief at 4, citing *Exec. Tech. Solutions, LLC v. Vicar Limo. Serv., Inc.*, Case No. FC-2007-03, Order No. 11,680 (Nov. 12, 2008); *Exec. Tech. Solutions, LLC v. W & T Travel Servs. LLC*, Case No. FC-2008-01, Order No. 11,933 (Apr. 9, 2009); *Exec. Tech. Solutions, LLC v. W & T Travel Servs. LLC*, Case No. FC-2009-01, Order No. 12,282 (Jan. 14, 2010).

⁵⁰ We agree for purposes of this assumption that the statement would be racially insensitive.

⁵¹ Staff Counsel Reply Brief at 3.

⁵² ETS appears to have confused the Commission's decision-making role with that of Mr. Morrow (see March 4 Tr. at 54, 61). To address any confusion on the part of ETS, it is the Commissioners and not Mr. Morrow that make the decisions issued by WMATC, including the decisions related to ETS's application.

13,777, “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.”⁵³ ETS has failed to satisfactorily answer that question and its attempt to distract the Commission from the relevant issues by putting its staff on trial must be dismissed as a red herring.

3. Consolidation of Hearing with Ms. Barner’s Application

ETS argues that it was disadvantaged by the Commission’s decision to consolidate its hearing date with Ms. Barner’s proceeding, citing the time it spent in preparing for the hearing as well as the \$2,500 cost of the hearing transcript and Hearing Officer contract it was required to pay.⁵⁴ We find ETS’s argument unconvincing.

The Commission granted ETS’s request for a hearing on January 4, 2013, thereby giving ETS two full months’ notice prior to the March 4 proceeding. When the Commission decided to hold a consolidated hearing in Order No. 13,777, the March 4 hearing date and time remained the same. ETS was not required to prepare testimony or questions in haste or face unexpected witnesses. Indeed, ETS informed the Commission well before the order was issued consolidating the hearing that it intended to call Ms. Barner as a witness. Her accusation of disparate treatment, which ETS shared, was the reason the Commission consolidated the hearing. Nor was ETS denied an opportunity to present its entire case. The hearing was scheduled from 10:00 a.m. to 2:00 p.m. and even with Ms. Barner’s testimony, it concluded at 1:15 p.m., well before its scheduled end.

Finally, ETS objects that it has been unfairly required to shoulder the entire \$2,500 cost for the hearing. The fee for the hearing examiner would have been the same, however, regardless of whether or not the hearing was consolidated. The only variable cost – the transcript – amounted to \$875. Most of the transcript sections attributable to Ms. Barner, however, relate to her testimony on behalf of ETS. Her testimony on her own behalf comprises only about ten pages of the 188 page transcript.⁵⁵ We therefore find the costs ETS had to pay on behalf of Ms. Barner’s proceeding to be *de minimis*.⁵⁶

II. CIVIL FORFEITURE

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

⁵³ Order No. 13,777 at 3-4.

⁵⁴ Memorandum of Applicant at 1.

⁵⁵ See March 4 Tr. at 139-148.

⁵⁶ The \$2,500 deposit submitted by ETS exceeded the actual hearing officer and transcript costs and ETS therefore was sent a refund in the amount of \$1,325 on April 30, 2013.

\$5,000 for any subsequent violation.⁵⁷ Each day of the violation constitutes a separate violation.⁵⁸

The term “knowingly” means with perception of the underlying facts, not that such facts establish a violation.⁵⁹ The terms “willful” and “willfully” do not mean with evil purpose or criminal intent; rather, they describe conduct marked by intentional or careless disregard or plain indifference.⁶⁰

The Commission finds that ETS knowingly and willfully violated Article XIII, Section 6(f), of the Compact by continuing to operate passenger transportation services within WMATC’s jurisdiction despite having its Certificate of Authority revoked and being ordered to cease and desist all applicable transportation operations. For example, the applicant operated the DHS-CIS contract through July 13, 2012, well after the Commission suspended its authority on November 1, 2011 and revoked its Certificate on February 17, 2012. Additionally, ETS serviced its Navy contract through its Medical Center Metro route in violation of Commission orders through at least February 27, 2013.

In determining an appropriate level of forfeiture to assess, the Commission should take into account that the civil forfeiture provision of the Compact serves at least two fundamental purposes: first, deterrence of future violations, and second, disgorgement of unjust profits.⁶¹ The applicant’s continued operation without a valid certificate, including during the pendency of its current application, demonstrate that the Commission’s previous civil forfeiture of \$2,250 was insufficient to deter ETS. Additionally, evidence provided at the hearing shows that ETS profited significantly by operating these routes in violation of the law (Mr. Whitney testified that ETS earns approximately \$5 million in sales annually).⁶² Therefore, the Commission will assess a civil forfeiture against ETS in the amount of \$10,000 for operating passenger transportation services within WMATC’s jurisdiction without a valid certificate of authority.⁶³

THEREFORE, IT IS ORDERED:

1. That the application of Executive Technology Solutions, LLC, for a certificate of authority, irregular route operations, is hereby denied.

⁵⁷ Compact, Title II, Art. XIII, § 6(f)(i).

⁵⁸ *Id.* at § 6(f)(ii).

⁵⁹ *In re Angel Enter. Inc., t/a The Angels*, Case No. MP-10-028, Order No. 12,761 (Mar. 14, 2011); *In re Chukwunye Nnakwu, t/a Progressive Med. Care Servs.*, Case No. MP-08-242, Order No. 12,121 (Aug. 18, 2009); *In re Sams Health Care Servs. Inc.*, Case No. MP-08-005, Order No. 11,947 (Apr. 23, 2009).

⁶⁰ Order Nos. 12,761; 12,121; 11,947.

⁶¹ Order No. 12,761 at 6.

⁶² March 4 Tr. at 44.

⁶³ ETS operated without authority for extended periods of time. ETS is urged to consider that the \$5,000 per day per violation penalty authority provided in the Compact provides ample authority for significantly larger fines. This is the second time ETS has been assessed a civil forfeiture for operating without valid authority and it could face substantially higher civil forfeitures were that behavior to continue.

2. That Executive Technology Solutions, LLC is precluded from filing another application for a certificate of authority with the Commission for a period of one year from the issuance date of this Order.

3. That within 30 days of this Order, in accordance with WMATC Rule No. 28, Executive Technology Solutions, LLC, shall provide written verification to the Commission that it has ceased operating all passenger transportation services within WMATC jurisdiction and will not resume such services unless and until such time as it applies for and is granted a certificate of authority by this Commission.

4. That pursuant to Article XIII, Section 6(f), of the Compact, the Commission hereby assesses a civil forfeiture against Executive Technology Solutions, LLC in the amount of \$10,000 for knowingly and willfully violating Article XI, Section 6, of the Compact.

5. That Executive Technology Solutions, LLC is hereby directed to pay to the Commission within 30 days of the date of this order, by check or money order, the sum of ten thousand dollars (\$10,000).

BY ORDER OF THE COMMISSION:

S/Lawrence Brenner

Lawrence Brenner, Chairman

S/Richard D. Holcomb

Richard D. Holcomb, Commissioner

S/Terry L. Bellamy

Terry L. Bellamy, Commissioner