

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 1613

IN THE MATTER OF:

Served September 24, 1976

Application of NATIONAL BUS LEASING,)  
INC., for Certificate of Public )  
Convenience and Necessity to Perform) )  
Charter Operations Pursuant to )  
Contract )

Application No. 963

Docket No. 348

By petition for reconsideration, filed September 10, 1976, Atwood's Transport Line, Inc. (Atwood) seeks to have the Commission withdraw the temporary authority granted to National Bus Leasing, Inc. (National) by Order No. 1599, served August 31, 1976. Atwood's petition specifies as the only error the Commission's finding that there exists an immediate and urgent need for the temporary authority granted to National.

Initially, it must be noted that the Commission did not find in Order No. 1599, as asserted by Atwood, that there exists an immediate and urgent need to grant temporary authority to National. Rather, the Commission clearly found that the Energy Research and Development Administration (ERDA) has an immediate and urgent need for the transportation of persons travelling on official government business, government employees, and others travelling for personal convenience between its offices at 20 Massachusetts Avenue, N. W., Washington, D. C., and its office near Germantown, Maryland. Atwood apparently believes that the Commission based its grant of temporary authority to National upon a finding that there was an immediate and urgent need to grant temporary authority to National. This simply was not the basis.

The Compact empowers the Commission, in its discretion and without hearings or other proceedings, to grant temporary authority to enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need. See Compact, Title II, Article XII, Section 4(d)(3). The Commission, as previously stated, found that ERDA had an immediate and urgent need for the service temporarily authorized by Commission Order No. 1599. The Commission also found that there was no carrier service capable of meeting ERDA's need for the proposed service as of September 1, 1976. Upon these two findings, National was granted temporary authority.

Atwood apparently believes that the question confronting the Commission when considering National's temporary authority was whether

there was an immediate and urgent need for service which no existing carrier was willing to provide. Atwood equates willingness with capability and argues that to overcome the provision of the Compact, Title II, Article XII, Section 4(d)(3) merely requires a showing that an existing carrier is willing to perform the service and holds the proper authority to render it. No basis for such equation is set forth in Atwood's petition for reconsideration, and the Commission does not find that mere willingness together with adequate operating authority establishes the capability required to render charter operations pursuant to contract. To so find would result in a situation where a prospective purchaser of contract services, once it had successfully contracted with a carrier to provide those services, would never be able to contract with another carrier for the same services as long as the original carrier is willing to perform. Such a restrictive view is not warranted and would not serve the public interest. Rather, with respect to temporary authority to render charter operations pursuant to contract, a carrier with authority to render charter operations is not capable of performing charter operations pursuant to contract if it has no willing buyer.

At the time of Order No. 1599, the Commission had the verified application of National before it and the protest by Atwood. The verified application set forth that National had obtained a contract on bid from ERDA. The protest by Atwood merely set forth that it was willing to enter a contract with ERDA. As such, Atwood then was a certificated carrier authorized to render charter operations but without a willing purchaser of those services. Rather, the record indicated that ERDA desired to purchase the services from National as of September 1, 1976.

Atwood submits in its petition for reconsideration that the Commission's finding that there was no carrier capable of meeting ERDA's need for service was based upon an incomplete investigation of the existing facts. This submission is critical to Atwood's position. At the time of Order No. 1599, the Commission had before it the verified application and the protest. However, the petition for reconsideration indicates that Atwood had entered a modification of its prior agreement with ERDA. That modification was signed August 30, 1976, by the vice-president of Atwood and indicates that the term of the contract between ERDA and Atwood would be September 1, 1975, through September 30, 1976. Although Atwood had filed its ERDA contract with the Commission on August 29, 1975, it did not file the contract modification with the Commission until September 10, 1976. No reason is set forth in the petition for reconsideration explaining or justifying in any manner the basis for Atwood's failure to comply with Commission Regulation 56-03 concerning the filing of contracts and changes therein, or the reason Atwood did not promptly advise the Commission that ERDA had purchased its services for an additional thirty days. As a result, the Commission had not been advised by Atwood that an extension of the current contract had been entered prior to Order No. 1599.

Atwood submits that the Commission presumed that the contract between National and ERDA was in existence and then assigned weight to the contract. The Commission did not presume that the contract was in existence. Rather, the Commission considered the record as developed by National and Atwood. That record indicated that ERDA desired to terminate its purchase agreement with Atwood as of August 31, 1976, and to enter a purchase agreement with National as of September 1, 1976. The Commission did assign weight to ERDA's intention to contract with National as evidenced by a letter from ERDA to National advising that National's was the apparent low bid on the contract, and a bid specification indicating that "this contract shall commence on September 1, 1976." The weight accorded that intention was as support for National's request for temporary authority.

At the time of its decision and until the filing of this petition for reconsideration, the record before the Commission indicated the contemporaneous expiration of Atwood's one-year contract and the commencement of National's one-year contract. The single fact brought to light by this petition for reconsideration which warrants action by the Commission other than that taken in Order No. 1599 is that ERDA, for reasons not yet apparent on this record, has extended Atwood's contract for one month. Accordingly, Atwood is capable of rendering the services for ERDA until September 30, 1976. The Commission therefore shall modify Order No. 1599 by cancelling National's temporary authority. Otherwise, Atwood's petition for reconsideration shall be denied.

It also bears note that Atwood has been operating the extension of its ERDA contract in violation of Regulation 56-03. Considering the current status of this proceeding, and with a careful view toward the public interest in, and unquestioned necessity of, continuation of the service, the Commission shall waive the thirty days' notice required by Regulation 56-03, and permit Atwood to continue operating the extension of its ERDA contract through September 30, 1976. It is also noted that under the thirty-day notice requirement of Regulation 56-03, Atwood cannot operate a contract service for ERDA after September 30, 1976, without a specific waiver of the notice requirement from this Commission.

The Commission's determination to cancel National's temporary authority is based upon the uncertainty created by ERDA's unexplained August 30, 1976, change of contractors to provide service on September 1, 1976. It is apparent that the Commission relied, and must rely, heavily upon the agency's declaration of intention in such matters, since the agency's actions determine in part the ability of a carrier to perform.

One important element in the determination of either carrier's capability or ability (which terms the Commission considers to be synonymous) to perform the proposed service remains to be resolved. The existence of a willing buyer for the service, ERDA, is hardly open to question. It is equally clear that ERDA intends to enter a contract with only one carrier.

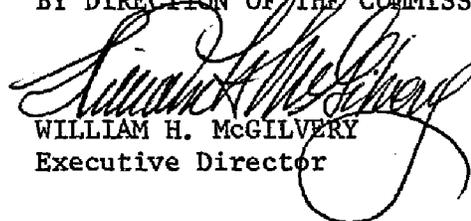
Thus, only the carrier selected by ERDA will be able, in one sense of the word, to perform the service. The Commission is responsible for the determination of a carrier's ability, and that determination must be made on the basis of suitable evidence. On the question of this one element in the capability of a carrier to perform the proposed service, the Commission believes that a reliable expression from ERDA, either directly to the Commission or through the selected carrier, would constitute suitable evidence.

Now, as when this proceeding was begun, Atwood has a contract with ERDA which will expire at the end of the month. National seeks authority to operate pursuant to a contract with ERDA. Again, there is little time for action and in view of finding of need, it would be inappropriate to permit a lapse of service. The Commission urges the parties and ERDA to come forward at the earliest possible time with a reliable expression of ERDA's intention in this matter.

THEREFORE, IT IS ORDERED:

1. That the petition for reconsideration filed by Atwood's Transport Lines, Inc., on September 10, 1976, be, and it is hereby, denied.
2. That the temporary authority granted to National Bus Leasing, Inc., in paragraph 6 of Order No. 1599, served August 31, 1976, be, and it is hereby, cancelled.
3. That the thirty-day notice requirement of Regulation 56-03, be, and it is hereby, waived with respect to the contract extension through September 30, 1976, between Atwood's Transport Lines, Inc., and the U. S. Energy Research and Development Administration.

BY DIRECTION OF THE COMMISSION:

  
WILLIAM H. MCGILVERY  
Executive Director