

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 3262

IN THE MATTER OF:

Served December 8, 1988

Application of WASHINGTON SHUTTLE,)
INC., for a Certificate of Public)
Convenience and Necessity to)
Conduct Special Operations)

Case No. AP-88-32

On November 28, 1988, counsel for Washington Shuttle, Inc. (Applicant), filed a petition for issuance of a subpoena duces tecum to protestant The Airport Connection, Inc. (TAC). The petition contains fourteen specifications seeking documents and/or communications concerning complaints against Applicant, service schedules, passenger statistics, comparisons of passenger statistics, balance sheets, profit and loss statements, plans of reorganization under bankruptcy, and proof that Protestant earned a profit in 1988.

On November 29, 1988, Applicant filed an additional petition for issuance of a subpoena duces tecum to TAC. The petition contains three specifications seeking documents and communications concerning purchase or lease of equipment for multiple ride van services, advertisements for multiple ride van services, and infusion and/or loan of capital to TAC.

Both petitions assert that the requests are relevant and reasonable in scope, as is required by Commission Rule No. 18-01. Both petitions assert that, by the documents requested, Applicant expects to prove:

1. Public convenience and necessity is not being served by Protestant's transportation services.
2. There is an outstanding public need for services proposed by Applicant.
3. Protestant is incapable of providing the transportation needs it claims to offer.
4. Applicant's proposed operations will not endanger or impair Protestant's operations contrary to the public interest.

On December 2, 1988, TAC filed its objection to the subpoena requests. TAC asserts with regard to the November 28 request that the requested material is largely irrelevant, inadequately described, and too broad and burdensome. TAC further asserts that it has operated under its present management only since July 1988 pursuant to proceedings in the United States Bankruptcy Court, that operations prior to that date are irrelevant, and that the plans of reorganization requested by Applicant are not in the custody of TAC but in the custody of the bankruptcy court. TAC argues that Applicant asks it to prove its claim of making a profit in 1988 without establishing that it made such a claim.

Concerning the November 29 subpoena request, TAC asserts that Applicant seeks documents relating to TAC's case, and that Applicant will have ample opportunity to cross examine any witness of TAC.

Along with its objection to the issuance of the requested subpoenas, TAC filed a request that the public hearing in this case be postponed until January 17, 1989. In support of this request, TAC states that its chief executive and principal witness in this case must be scheduled for surgery in Montreal within the ten days prior to the scheduled public hearing. TAC asserts this person's assistance in preparation of TAC's case is essential and no qualified replacement is available. In this filing TAC asserts that a substantial delay in the hearing date would be needed if it should be required to respond to the subpoena requests.

TAC declares its intention to subpoena data from Applicant and asks that a prehearing conference be scheduled on December 13 in lieu of public hearing to resolve matters of procedure and discovery.

On December 2, 1988, protestant Metropolitan Washington Airports Authority (MWAA) filed a motion to postpone the public hearing. MWAA asserts that it does not have sufficient time to prepare, that it needs time to locate information requested directly by letter from Applicant, that MWAA's "attorneys and expert witnesses" would need time to review any materials submitted pursuant to Applicant's subpoena requests, that MWAA will request discovery from Applicant, that MWAA's "experts and other witnesses" would require time to analyze the products of discovery, that no prejudice to any party would result if this motion were granted, and that counsel for MWAA will be in Europe from February 25 to March 12, 1989.

On December 5, 1988, Applicant responded to the above-described filings of TAC and MWAA. Applicant asserts that protestants seek only to delay consideration and ruling on the application, that the subpoenas should be granted, and that the hearing should commence as scheduled.

As to the subpoena requests, applicant asserts that the requested materials are relevant and that the contract between TAC and MWAA requires that these records be kept in the ordinary course of business.

As to the hearing date, Applicant asserts that MWAA's claim of insufficient time is without merit, and that MWAA has had adequate notice.

While Applicant strongly asserts the relevance of the information to the proceeding, Applicant would prefer to go forward as scheduled, without the information, rather than delay the hearing. In the event that the Commission would postpone the hearing to allow TAC to respond to the subpoenas, Applicant withdraws its subpoena requests.

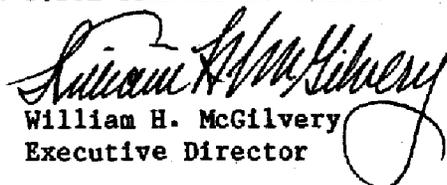
Finally, Applicant asks that TAC's postponement request be denied, asserting that other company representatives are available and that MWAA appears prepared to present arguments on behalf of TAC.

If Applicant required these materials to prove what it claims they will prove, these subpoena requests should have been filed contemporaneously with the application or, at least, in a more timely manner. When filed, given the time allowed by the Commission's rules for objection and reply, these requests would leave only a very few days for compliance prior to the hearing. Certainly Applicant need not have waited until after The Airport Connection, Inc., had filed a protest. Coming when they did, these data requests have a retaliatory flavor.

Taken together, the data requests alone cover some four pages and include seventeen specifications. The requests are unduly burdensome, overreaching, and lack the showing and level of relevance required for issuance of a subpoena duces tecum.

For the reasons cited, the subpoena requests are hereby denied. There is no showing at this time that a postponement of the hearing is justified. The hearing will commence as scheduled.

BY DIRECTION OF ADMINISTRATIVE LAW JUDGE FRANCIS A. WELCH:


William H. McGilvery
Executive Director