

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 4243

IN THE MATTER OF:

Served February 9, 1994

Application of SETH, INC., Trading )  
as KIDS KAB, for a Certificate of )  
Authority -- Irregular Route )  
Operations )

Case No. AP-93-40

By application filed November 30, 1993, Seth, Inc., trading as Kids Kab (Seth or applicant), a Maryland corporation, seeks a certificate of authority to transport passengers in irregular route operations between points in the Metropolitan District, restricted to transportation in vehicles with a manufacturer's designed seating capacity of 15 or fewer persons, including the driver.

Notice of this application was served on December 1, 1993, in Order No. 4217, and applicant was directed to publish further notice in a newspaper and file an affidavit of publication, an amended proposed tariff and an amended balance sheet. Applicant complied.

The Taxicab Unit of the Division of Transit Services of the Department of Transportation for Montgomery County, MD (Montgomery County), filed comments on January 3, 1994. Barwood, Inc., trading as Barwood Taxi (protestant), filed a protest on January 4, 1994. Kids Kab International Franchises (KKIF) filed a reply to the protest on Seth's behalf on January 18, 1994.

SUMMARY OF EVIDENCE

The application includes information regarding, among other things, applicant's corporate status, facilities, proposed tariff, finances, and regulatory compliance record.

Applicant proposes to commence operations with vehicles seating 12 passengers each. Applicant's proposed tariff contains individual and group zone rates for trips up to 15 miles from the point of origin and flat rates with a per capita surcharge for transfer service to and from Washington National Airport and Washington-Dulles International Airport.

Applicant filed a balance sheet as of November 30, 1993, showing current assets of \$24,248; other assets of \$131,402; long-term liabilities of \$154,650; and equity of \$1,000.<sup>1</sup> Applicant's projected

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<sup>1</sup> Applicant's debt-to-equity ratio is relatively high, but applicant's shareholder is the sole source of the debt. A highly leveraged applicant may be found financially fit where its shareholders are the principal source of balance sheet debt. In re Sky Lines, Inc., No. AP-91-46, Order No. 3886 (Feb. 12, 1992).

revenue and expenses for the first twelve months of WMATC operations shows revenue of \$354,447; expenses of \$331,622; and net income of \$22,825.

Applicant certifies it has access to, is familiar with, and will comply with the Compact, the Commission's rules and regulations, and United States Department of Transportation regulations relating to transportation of passengers for hire. Applicant further certifies that neither applicant nor any person controlling, controlled by, or under common control with applicant has any control relationship with a carrier other than applicant.

#### DISCUSSION AND CONCLUSION

This case is governed by the Compact, Title II, Article XI, Section 7(a), which provides in relevant part that:

. . . the Commission shall issue a certificate to any qualified applicant . . . if it finds that --  
(i) the applicant is fit, willing, and able to perform [the] transportation properly, conform to the provisions of this Act, and conform to the rules, regulations, and requirements of the Commission; and  
(ii) that the transportation is consistent with the public interest.

An applicant bears the burden of establishing fitness and consistency with the public interest.<sup>2</sup> Based on the evidence in this record, the Commission finds applicant has made its prima facie case.

Once an applicant has made a prima facie case, the burden shifts to protestant to show the contrary, including that its operations would be endangered or impaired contrary to the public interest.<sup>3</sup> The protest must be accompanied by all available evidence on which protestant would rely.<sup>4</sup>

Protestant does not challenge applicant's fitness. There are no allegations that applicant's vehicles are unsuitable or unsafe, that applicant is insufficiently capitalized, or that applicant's compliance fitness has been questioned by local authorities. Instead, protestant contends that granting the application would be inconsistent with the public convenience and necessity and contrary to the public interest.

With the amendment of the Compact in 1990, effective February 1991, an applicant no longer must establish that the transportation it proposes "is or will be required by the public convenience and necessity;" an applicant now must establish that it is fit and that

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<sup>2</sup> In re Peter Pan Bus Lines, Inc., No. AP-93-19, Order No. 4149 (Aug. 11, 1993).

<sup>3</sup> Id. at 2.

<sup>4</sup> Commission Regulation No. 54-04(a).

the proposed transportation is consistent with the public interest, as noted above.<sup>5</sup> Today, a finding of need for service is not a prerequisite to the issuance of a certificate.<sup>6</sup>

Protestant argues that Montgomery County has determined a public need exists to restrict the number of taxicabs operating in its jurisdiction because of "slack ridership demand and an abundance of taxicabs," and that adding more taxicab service at this time would be contrary to the public interest. Supposedly, applicant is attempting an end run around the alleged taxicab market entry restrictions in Montgomery County by applying for operating authority here.

We do not agree with protestant's characterization of applicant's proposed service as "taxicab" service or "bona fide taxicab service." We strictly construe the meaning of those terms because such service is excluded from the Compact's certification requirements.<sup>7</sup> Although applicant and protestant may well be competing for some of the same customers, transportation in a vehicle seating more than 9 persons, including the driver, is not taxicab service.<sup>8</sup> Flat-rate airport transfer service with a per capita surcharge -- in any size vehicle -- also is not taxicab service.<sup>9</sup>

We also do not agree that applicant is engaged in any subterfuge. On the contrary, Montgomery County's comments reveal that applicant's franchisor was advised it "must contact the . . . Washington Metropolitan Area Transit Commission to determine the authority required for [its] service."<sup>10</sup>

Protestant misconstrues the intent of the Compact. The 1990 amendments to the Compact were designed to encourage applications from new carriers.<sup>11</sup> Those amendments represent the considered judgment of the signatories, including the State of Maryland, that competition is

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<sup>5</sup> Compare Washington Metropolitan Area Transit Regulation Compact, Pub. L. No. 86-794, § 1, tit. II, art. XII, § 4(b), 74 Stat. 1031 (1960) with Washington Metropolitan Area Transit Regulation Compact, Pub. L. No. 101-505, § 1, tit. II, art. XI, § 7(a), 104 Stat. 1300 (1990) (codified at MD. TRANSP. CODE ANN. § 10-203 (1993)).

<sup>6</sup> See In re Mildred Davis Roopnaraine, t/a MDR Transporting Serv., No. AP-92-02, Order No. 3912 (Mar. 25, 1992) (lack of immediate need for service not ground for denial).

<sup>7</sup> D.C. Transit Sys., Inc. v. WMA Transit Co., No. 96, Order No. 521 (Sept. 2, 1965).

<sup>8</sup> Commission Regulation Nos. 51-04, 09. Apparently, Montgomery County does not view applicant's proposed service as taxicab service under its regulations either. Comments of Montgomery County at 2.

<sup>9</sup> In re O. Oluokun, Inc., t/a Montgomery County Limo, No. MP-93-43, Order No. 4173 (Sept. 23, 1993).

<sup>10</sup> Comments of Montgomery County at 2.

<sup>11</sup> In re Safai Mgmt. Co., t/a Para-Med Wheelchair Transp., No. AP-92-09, Order No. 3930 (Apr. 30, 1992).

presumptively in the public interest.<sup>12</sup> Insulating carriers from competition is inconsistent with the public interest.<sup>13</sup> It is telling that Montgomery County is not protesting the application.

The burden was on protestant to show that its operations would be endangered or impaired contrary to the public interest.<sup>14</sup> The protest contains no allegations that granting this application would harm protestant individually. Although it may be inferred from protestant's allegation of "slack ridership demand" for taxicab service in Montgomery County that protestant may suffer a loss of revenue from the introduction of applicant's service, protestant has adduced no evidence of a stable or shrinking market. Evidence of an expanding market would tend to weaken any implied claim of impairment.<sup>15</sup> In any event, protestant must allege more than a mere diversion of revenue.<sup>16</sup>

Protestant also urges denial of the application on the ground that the proposed tariff is confusing and therefore unreasonable. The remedy for an unreasonable tariff is prescription of one that is reasonable,<sup>17</sup> not denial of operating authority. We do not regard zone rate systems as unreasonable per se, and while the zone rate system proposed by applicant is certainly novel we are not persuaded that we should find it unreasonable in the absence of any empirical evidence of its effect. Applicant's customers have recourse to this Commission in the event they are overcharged as a result of any confusion. Consequently, we will not prescribe a different tariff at this time.

Finally, protestant claims applicant's proposed trade name, Kids Kab, would confuse and mislead the public into thinking that applicant was offering taxicab service. Montgomery County has expressed the same concern. Protestant asserts this as a ground for denial of the application and, in the alternative, requests the Commission to require applicant to use a trade name not suggestive of taxicab service. We decline to disapprove the application on this ground. There is, however, some support for requiring applicant to propose a new trade name.

In In re Ernest H. Bannister, Sr., No. AP-79-06, Order No. 1996 (May 11, 1979), the Commission noted that Ernest H. Bannister, Sr., was a sole proprietor operating under the trade name Bannister Transportation, Ltd., and that "inclusion of 'Ltd.' in Bannister's

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<sup>12</sup> Order No. 4149 at 3.

<sup>13</sup> Order No. 3930 at 2.

<sup>14</sup> Order No. 4149 at 2.

<sup>15</sup> In re Battle's Transp., Inc., No. AP-85-12, Order No. 2722 (June 20, 1985).

<sup>16</sup> In re Shaw Bus Serv., Inc., No. AP-85-25, Order No. 2819 (Feb. 4, 1986); In re Dan Jenkins, t/a Jenkins Transp. Serv., No. AP-84-30, Order No. 2649 (Jan. 10, 1985) (on reconsideration).

<sup>17</sup> Compact, tit. II., art. XI, § 16.

trade name strongly implic[d] a corporate status which applicant, in fact, [did] not enjoy." Bannister was directed to submit a new proposed trade name which was "less susceptible to misconstruction by the public." Requiring deletion of the term "Ltd." from Bannister's trade name posed little or no threat to Bannister, and he remained a viable competitor with or without that appellation. Prohibiting Seth's use of the name "Kids Kab," on the other hand, would injure Seth and, perhaps, competition, as well.

According to KKIF's reply, the name Kids Kab is a registered service mark.<sup>18</sup> Franchisees such as Seth are not permitted to operate under any other name.<sup>19</sup> Seth enjoys the benefits of KKIF's national advertising.<sup>20</sup> Ordering Seth to adopt a different trade name would present Seth with legal difficulties, deprive it of the value inherent in name brand recognition and probably diminish its effectiveness as a competitor. Weighing the possibility that the public might be misled into thinking applicant maintains a status it does not enjoy against the Compact's goal of promoting healthy competition, we will exercise our authority under Article XI, Section 7(d), of the Compact, and issue applicant's certificate of authority subject to a condition conceived by KKIF.

KKIF supports specifically advising potential customers of the distinction between taxicab service and the service offered by Kids Kab.<sup>21</sup> Montgomery County has accepted that offer.<sup>22</sup> Applicant will be directed to honor KKIF's commitment and ensure that all advertisements of its services contain the following caveat: "Kids Kab is not a taxicab service." Failure to satisfy this condition shall constitute grounds for suspension and revocation of applicant's certificate. Naturally, applicant must adhere to the advertising content restrictions of Commission Regulation No. 63, as well.

Based on the evidence in this record, the Commission finds applicant to be fit, willing, and able to perform the proposed transportation properly and to conform with applicable regulatory requirements. The Commission further finds that, subject to the foregoing condition, the proposed transportation is consistent with the public interest.

THEREFORE, IT IS ORDERED:

1. That Seth, Inc., trading as Kids Kab, 5802 Hubbard Drive, Rockville, MD 20852, is hereby conditionally granted, contingent upon timely compliance with the requirements of this order, authority to transport passengers in irregular route operations between points in

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<sup>18</sup> Reply at 4.

<sup>19</sup> Id. at 4.

<sup>20</sup> Id. at 3, 4.

<sup>21</sup> Reply at 3.

<sup>22</sup> Comments of Montgomery County at 2.

the Metropolitan District, restricted to transportation in vehicles with a manufacturer's designed seating capacity of 15 or fewer persons, including the driver.

2. Applicant is hereby directed to advise its customers, including potential customers, of the distinction between its services and those offered by taxicabs.

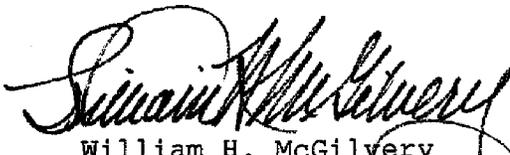
3. Applicant is hereby directed to ensure that all advertisements of its services contain the following caveat: "Kids Kab is not a taxicab service."

4. That applicant is hereby directed to file the following documents with the Commission: (a) evidence of insurance pursuant to Commission Regulation No. 58 and Order No. 4203; (b) four copies of a tariff or tariffs in accordance with Commission Regulation No. 55; (c) an equipment list stating the year, make, model, serial number, vehicle number, license plate number (with jurisdiction) and seating capacity of each vehicle to be used in revenue operations; (d) evidence of ownership or a lease as required by Commission Regulation No. 62 for each vehicle to be used in revenue operations; (e) proof of current safety inspection of said vehicle(s) by or on behalf of the United States Department of Transportation, the State of Maryland, the District of Columbia, or the Commonwealth of Virginia; and (f) a notarized affidavit of identification of vehicles pursuant to Commission Regulation No. 61, for which purpose WMATC No. 246 is hereby assigned.

5. That upon timely compliance with the filing requirements of the preceding paragraph and acceptance of the documents required by the Commission, Certificate of Authority No. 246 shall be issued to applicant.

6. That unless applicant complies with the filing requirements of this order within 30 days from the date of its issuance, or such additional time as the Commission may direct or allow, the grant of authority herein shall be void and the application shall stand denied in its entirety effective upon the expiration of said compliance time.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS DAVENPORT, SCHIFTER, AND SHANNON:



William H. McGilvery  
Executive Director