

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 4361

IN THE MATTER OF:

Served August 9, 1994

Application of D.C. DUCKS, INC.,)
for a Certificate of Authority --)
Irregular Route Operations)

Case No. AP-94-21

By application filed May 6, 1994, D.C. Ducks, Inc. (DC Ducks or applicant), a District of Columbia corporation, seeks a certificate of authority to transport passengers, together with baggage in the same vehicles as passengers, in irregular route operations between points in the Metropolitan District.

Notice of this application was served on May 10, 1994, in Order No. 4297, and applicant was directed to publish further notice in a newspaper and file an affidavit of publication and an amended proposed tariff. Applicant complied.

On June 14, 1994, Ride the Ducks, Inc., of Branson, MO, and Seaweed Incorporated, d/b/a/ Boston Duck Tours, of Boston, MA, (collectively protestants) filed a protest and request for oral hearing. Applicant filed its reply on June 22, 1994. On July 13, 1994, protestants filed a motion to supplement the record in support of their protest, together with accompanying affidavits. Applicant filed its answer on July 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 conducting sightseeing tours on land and water with four GMC model DUKW-353 amphibious military vehicles, so-called "Ducks," seating 33 passengers each and renovated for commercial use. Applicant proposes leasing these vehicles from an affiliate, U.S. Ducks, Inc. Applicant's proposed tariff contains special operations rates and charter rates with minimum charges.

Applicant's chairman owns 90 percent of applicant's stock and 100 percent of the stock of Delta Ducks, Inc., which for the past four years has operated a sightseeing business in Memphis, TN, similar to that proposed by applicant. Applicant's president is an officer of Delta Ducks and is actively involved in its day-to-day operations.

Applicant certifies that neither applicant nor any person holding an equity interest in applicant has ever held any equity interest in any carrier that now holds or has ever held or applied for WMATC operating authority.

Applicant filed a balance sheet as of April 30, 1994, showing current assets of \$100,000, and equity of \$100,000. Applicant's projected operating statement for the first 12 months of WMATC operations shows WMATC operating income of \$369,000; operating expenses of \$335,400; and net income of \$33,600.

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.

DISCUSSION

This case is governed by the Compact, Title II, Article XI, Section 7, regarding applications for certificates of authority, and Article XII, Section 3, regarding applications for approval of common control.

I. Application for Certificate of Authority

Article XI, Section 7(a), of the Compact 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.¹ Based on the information in the application, as described above, the Commission finds applicant has made its prima facie case.

Once an applicant has made its prima facie case, the burden shifts to protestant to show the opposite, including that protestant's operations would be endangered or impaired contrary to the public interest.² The protest must contain a concise statement clearly setting forth the substantial interest of the protestant in the proceeding³ and must be accompanied by all available evidence on which

¹ In re Seth, Inc., t/a Kids Kab, No. AP-93-40, Order No. 4243 (Feb. 9, 1994); In re Peter Pan Bus Lines, Inc., No. AP-93-19, Order No. 4149 (Aug. 11, 1993).

² Order No. 4243 at 2; Order No. 4149 at 2.

³ Commission Rule No. 13-02. Although we have serious doubts that protestants' alleged interest is "substantial" within the meaning of the rule, our resolution of the protest in applicant's favor renders the issue moot.

protestant would rely.⁴ A protestant may not assert the interests of another as grounds for standing.⁵ A request for oral hearing must describe the evidence to be adduced and explain why it cannot be adduced without oral hearing.⁶

The gravamen of the protest is that applicant's vehicles are unsafe and that applicant is not fit to operate Duck vehicles safely. In support, protestants have filed the affidavit of Seaweed's president, who assails the fitness of applicant and its vehicles -- directly and derivatively via an attack on the fitness of applicant's affiliate -- with respect to operations on both land and water. Because the Compact requires that each certificated carrier "provide safe and adequate transportation service, equipment, and facilities,"⁷ and because the fitness of the persons controlling an applicant is relevant to a determination of the application,⁸ we find that the aforementioned affidavit raises safety concerns which merit consideration. To address these concerns, we examine in turn our jurisdiction with respect to applicant's operations on water and the applicable standards for safe operations on land.

A. Jurisdiction Over Transportation by Water

The starting point for interpreting a statute is the language of the statute itself.⁹ "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."¹⁰ Article XI, Section 3, of the Compact declares in pertinent part that: "Excluded from the application of this Act are . . . transportation by water, air, or rail."¹¹ The plain language of the statute thus removes from our jurisdiction the operations applicant proposes to conduct on water. This interpretation is affirmed by the legislative history.

⁴ Commission Regulation No. 54-04(a).

⁵ In re Malek Investment, Inc., t/a Montgomery Airport Shuttle, No. AP-91-44, Order No. 3884 (Feb. 11, 1992).

⁶ Commission Regulation No. 54-04(b).

⁷ Compact, tit. II, art. XI, § 5(a).

⁸ In re Mi ju Express, Inc., No. AP-91-36, Order No. 3865 (Dec. 19, 1991).

⁹ Consumer Prod. Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 100 S. Ct. 2051 (1980).

¹⁰ 100 S. Ct. at 2056.

¹¹ Compact, tit. II, art. XI, § 3(a).

When the Compact was approved by Congress and signed into law in 1960,¹² all rules, regulations, orders and decisions promulgated by the Interstate Commerce Commission (ICC), the Public Utilities Commission of the District of Columbia (DCPUC), the Public Service Commission of Maryland (MDPSC), and State Corporation Commission of Virginia (VASCC), in force on the date of enactment of the Compact became enforceable under the Compact as if promulgated by this Commission.¹³ Similarly, those commissions were directed to transfer pertinent records to this Commission, and this Commission was authorized to assume jurisdiction over proceedings pending before those commissions to the extent necessary or appropriate in the exercise of this Commission's powers and duties under the Compact.¹⁴ Congress took the additional step of explicitly transferring the jurisdiction of the ICC and DCPUC to this Commission.¹⁵ All conflicting federal and state laws were declared suspended during the life of the Compact.¹⁶

The legislative history shows that when Congress consented to the Compact it did not intend to transfer the ICC's water carrier jurisdiction to this Commission. The report of the Senate Committee on the Judiciary bears this out.¹⁷ The last page of the report examines the federal laws suspended in whole or in part because of conflicts with the Compact and notes the suspension of Chapter 8 of the Interstate Commerce Act -- Motor Carriers -- but not Chapter 12 -- Water Carriers.¹⁸ Clearly, Congress must have understood from the absence of any conflict between Chapter 12 and the Compact that none of the ICC's water carrier jurisdiction was being transferred to this Commission.¹⁹ This is persuasive evidence that Congress did not

¹² Act of Sept. 15, 1960, Pub. L. No. 86-794, 74 Stat. 1031 (codified at D.C. CODE ANN. §§ 1-1410, 1-1411-1416 (1973)).

¹³ D.C. CODE ANN. § 1-1410 (tit. II, art. XII, § 21) (1973).

¹⁴ D.C. CODE ANN. § 1-1410 (tit. II, art. XII, §§ 22, 23(b)) (1973).

¹⁵ D.C. CODE ANN. § 1-1412 (1973); see also D.C. CODE ANN. § 1-2414 (1992) (same).

¹⁶ D.C. CODE ANN. § 1-1410 (tit. II, art. XII, § 20(a)), 1-1412 (1973); see also D.C. CODE ANN. § 1-2414 (1992) (same); Compact, tit. II, art. XIV, § 2 (suspending laws of signatories and ICC jurisdiction to extent they conflict with current Compact).

¹⁷ Wash. Metro. Area Transit Reg. Compact, S. Rep. No. 1906, 86th Cong., 2d Sess. (1960).

¹⁸ Id. at 55-56; see 49 U.S.C.A. §§ 901-923 (1963) (re: Water Carriers).

¹⁹ Additional legislative history confirms this construction. The Alper report, prepared for the National Capital Planning Commission and the National Capital Regional Planning Council as part of a study directed by Congress, unequivocally states that "any transportation by water would be exempt from the jurisdiction of the compact commission." District of Columbia, Maryland and Virginia Mass Transit

intend to transfer the water carrier jurisdiction of the DCPUC either.²⁰ We find it unlikely that Congress would have withheld such jurisdiction in the one instance but not the other without so much as a comment.

Our holding that Congress did not transfer to this Commission the ICC's and DCPUC's jurisdiction over transportation by water precludes our consideration of the safety issues raised in the protest to the extent they relate exclusively to applicant's proposed water operations.²¹ On the other hand, our authority to "attach to the issuance of a certificate and to the exercise of the rights granted under it any term, condition, or limitation that is consistent with the public interest"²² is sufficiently broad that we may require proof that applicant's vehicles have been registered as watercraft and inspected by the proper authorities.²³

According to the application, applicant's water operations will be conducted in the Potomac River. Applicant proposes that its vehicles will enter the river at a point adjacent to National Airport. This portion of the Potomac River constitutes part of the navigable waters of the United States and the District of Columbia.²⁴ We, therefore, note the probable jurisdiction of the United States Coast Guard²⁵ and the DC Harbor Master.²⁶ We also note the possible jurisdiction of the Public Service Commission of the District of

Compact: Hearings on H.J. Res. 402 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 86th Cong., 1st Sess. 46, 81 (1959) (report titled: "Transit Regulation for the Metropolitan Area of Washington, D.C.") (emphasis added).

²⁰ When the Compact was enacted in 1960, DCPUC had jurisdiction over common carriers, which included "every corporation . . . company, . . . partnership, and person, . . . owning, operating, controlling, or managing any agency . . . for public use for the conveyance of persons or property within the District of Columbia for hire." D.C. CODE ANN. § 43-111 (1973). This has been construed to include jurisdiction over common carriers of passengers by water. D.C. Mun. Regs. tit. 15, ch. 17 (1991).

²¹ See Affidavit of Andrew Wilson at 6-7, ¶¶ IV & V(3)-(6).

²² Compact, tit. II, art. XI, § 7(d) (emphasis added).

²³ See In re Edwards Trucking Co., Inc., No. CP-85-13, Order No. 2787 (Nov. 8, 1985) (applicant directed to register backup vehicle with local jurisdiction).

²⁴ Petersen v. Head Constr. Co., 367 F. Supp. 1072, 1075 (D.D.C. 1973); In re Jack B. Dembo, No. MP-81-03, Order No. 2258 (Oct. 8), aff'd on reconsideration, Order No. 2292 (Dec. 9, 1981).

²⁵ 14 U.S.C. § 1 et seq.

²⁶ D.C. CODE ANN. § 4-107 (1994).

Columbia (DCPSC)²⁷ and the ICC.²⁸ As a condition to the issuance of a certificate of authority, applicant will be required to file evidence that its vehicles have passed safety inspection by the Coast Guard and have been registered with both the Coast Guard and the Harbor Master.²⁹ Applicant also will be required to file proof of compliance with the DCPSC filing requirements published at 15 DCMR § 1701. Finally, applicant will be required to file evidence of submission of an application for ICC water-carrier authority or request for an opinion of the ICC's General Counsel that such authority is unnecessary.

B. Safe Operations on Land

Protestants bear the burden of demonstrating that applicant is unable or unwilling to comply with Commission Regulation No. 64, titled "Safety Regulations." Regulation No. 64, provides as follows:

The Commission adopts and incorporates herein by reference the Federal Motor Carrier Safety Regulations as amended from time to time, to the extent that the said regulations apply to the operations of passenger carriers. These regulations are set out in Title 49 of the Code of Federal Regulations.

With respect to the charge that applicant proposes to operate unsafe vehicles, Seaweed's president avers that the braking systems on the vehicles slated for operations in the Metropolitan District do not conform to the standards published in 49 CFR and that brake failure was the cause of an accident experienced by applicant's affiliate.³⁰ Seaweed's president also implies that applicant's vehicles lack working speedometers and questions the adequacy and safety of onboard fire suppression systems.

The federal requirements for braking systems, as adopted by Regulation No. 64, are stated in 49 CFR Part 393, subpart C. Speedometer requirements and fire suppression system requirements may be found at 49 CFR §§ 393.82 and 393.95, respectively. The best evidence that a carrier's vehicles are able to meet these requirements is proof that such vehicles have passed inspection under 49 CFR Part 396. The Federal Highway Administration has determined that the inspection programs of the District of Columbia, Maryland and Virginia "are comparable to, or effective as, the Federal [periodic inspection] requirements" contained in Part 396.³¹ In accordance with our normal practice, we will condition issuance of a certificate of authority to

²⁷ D.C. CODE ANN. § 43-211 (1990); D.C. Mun. Regs. tit. 15, ch. 17 (1991); see supra, n.20.

²⁸ 49 U.S.C. § 10541; see supra, n.18.

²⁹ Applicant has indicated its intent to take this action voluntarily.

³⁰ Applicant's majority owner states in reply that the accident occurred prior to the time he acquired any interest in Delta Ducks.

³¹ 59 Fed. Reg. 17830 (1994).

applicant on applicant's filing proof that its vehicles have passed safety inspection by one of these three jurisdictions or the United States Department of Transportation. This ensures compliance with all relevant vehicle safety standards.

With respect to the assertion that applicant is unfit to operate Duck vehicles safely, the protest alleges that applicant "does not have the . . . depth of qualified trained personnel . . . to ensure that public convenience and necessity are being served,"³² and Seaweed's president alleges deficiencies in applicant's "procedures for medical emergencies." Protestants' reliance on an obsolete "public convenience and necessity" standard³³ is misplaced, and the record does not sustain protestants' position. According to the application, all of applicant's drivers must have a:

1. Good driving record.
2. Current commercial driver's license with class "P" endorsement for carrying passengers for hire.
3. Minimum of 360 eight-hour days of service on any waters.
4. Currently valid certificate indicating completion of a first-aid course in the last 12 months.
5. Currently valid "CPR" certificate from the American Red Cross.
6. Department of Transportation drug screening test from a NIDA approved lab.
7. Physical examination from a Coast Guard approved physician.
8. Master inland steam or motor vessel license of not less than 25 tons to carry passengers for hire from the U.S. Coast Guard.

What more we should require of applicant is not specified in the protest or supporting affidavits. Commission precedent suggests the answer is little else. In In re RDM Enters., Inc., No. AP-91-18, Order No. 3801 (Aug. 6, 1991), we approved the application of a wheelchair-van carrier whose drivers had to "be at least 25 years old, be appropriately licensed, pass physical and drug examinations, and pass written and road tests for safety." Id. at 2. In addition, applicant's drivers received "Red Cross first-aid and CPR" training. Id. at 2. The above-quoted driver qualifications in this proceeding appear to measure up to the RDM standards.

Of course, applicant will be expected to enforce the full panoply of driver qualification regulations in 49 CFR Part 391. In that regard, given the unique nature of applicant's vehicles -- amphibian, all-wheel drive, double rear axle -- we will require applicant to file with respect to each of its initial drivers a copy of a Certification of Road Test prepared in accordance with 49 CFR § 391.31. Each certification shall show that the test was

³² This allegation is unsupported by affidavit and is, therefore, entitled to little or no weight.

³³ "Today, a finding of need for service is not a prerequisite to the issuance of a certificate." Order No. 4243 at 3.

administered by applicant in applicant's amphibious vehicles. Moreover, we will require applicant to file copies of the commercial driver's licenses (CDLs) for those drivers.

II. Application for Approval of Common Control

Because applicant is under common control with Delta Ducks, this case is governed by Title II, Article XII, Section 3,³⁴ which provides in pertinent part that a "carrier or any person controlling, controlled by, or under common control with a carrier shall obtain Commission approval to . . . acquire control of another carrier that operates in the Metropolitan District through ownership of its stock or other means." The Commission may approve such a transaction if it is consistent with the public interest.³⁵

Prior to the 1990 amendment of the Compact, effective 1991, the public interest analysis in an acquisition through ownership of stock focused on the fitness of the acquiring party, the fairness of the purchase price, the resulting competitive balance, any dormancy of operating rights, the benefits to the riding public, and the interest of affected employees.³⁶ The purchase price and dormancy inquiries are no longer relevant under the amended Compact.³⁷

Analysis of the four surviving factors supports a finding here of consistency with the public interest. First, the relevant acquiring party in this case is the applicant's majority shareholder. Our current finding of applicant's fitness permits an inference of the acquiring party's fitness. Indeed, in finding applicant fit, we specifically considered the challenges levelled by protestants against the vehicles and operations of applicant's affiliate at a time when the affiliate allegedly was under said acquiring party's control. Second, the evidence here indicates that applicant is not currently affiliated with any WMATC carrier. Certification of applicant, therefore, should not result in any consolidation of market power in the Metropolitan District. Third, the benefit to the riding public derives from the increased competition in sightseeing service that

³⁴ In re Washington-Dulles Transp., Ltd., No. AP-94-16, Order No. 4315 (June 9, 1994); In re Metro Access of Md., Inc., No. AP-94-07, Order No. 4284 (Apr. 26, 1994); Order No. 4149.

³⁵ Order No. 4315; Order No. 4284; Order No. 4149.

³⁶ D.C. CODE ANN. § 1-2414 (1992); In re George A. Coupe, Bernard Resnick & Executive Limo. Serv., Inc., No. AP-81-23, Order No. 2321 (Mar. 4, 1982).

³⁷ In re WestScot Ltd. Partnership & Conference Ctr. Interests, Inc., t/a Westfields Int'l Conference Ctr., No. AP-93-24, Order No. 4175 (Sept. 30, 1993); In re Boston Coach-Wash. Corp., No. AP-93-21, Order No. 4163 (Sept. 13, 1993).

this application portends, which is presumptively in the public interest.³⁸ Fourth, applicant's employees presumably have an interest in seeing their employer obtain valuable WMATC operating rights.³⁹

CONCLUSION

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 also finds that, subject to the specified conditions, the proposed transportation and acquisition of control are consistent with the public interest. We further find that our disposition of the protest obviates any need for oral hearing.

In consideration of applicant's intention to lease vehicles from an affiliate, applicant's attention is directed to Commission Regulation No. 62-02, which mandates that vehicles operated by a carrier as lessee "shall be operated by, and under the complete control of, the lessee, and no other, for the entire period of the lease," and during that period "neither the lessor nor the lessee shall enter into any other . . . lease or sublease of the same vehicle(s) without the approval of the Commission."

THEREFORE, IT IS ORDERED:

1. That D.C. Ducks, Inc., 116 S. Front Street, Memphis, TN 38103, is hereby conditionally granted, contingent upon timely compliance with the requirements of this order, authority to transport passengers, together with baggage in the same vehicles as passengers, in irregular route operations between points in the Metropolitan District.

2. 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

³⁸ Order No. 4284 at 3; Order No. 4243 at 3-4; Order No. 4149 at 3.

³⁹ To the extent we are charged with safeguarding the interests of employees of Delta Ducks -- a non-WMATC carrier operating hundreds of miles outside the Metropolitan District -- our concerns are allayed by the fact that the two carriers operate in completely separate geographic markets. Because the labor pools associated with the two markets are independent of one another, and because it would not be in Delta Ducks's economic interest to discontinue operations in Memphis if those operations remain profitable, expansion of carrier operations into one market should not unduly prejudice employee interests in the other.

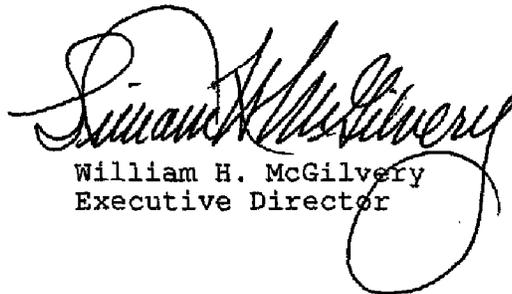
behalf of the United States Department of Transportation, the State of Maryland, the District of Columbia, or the Commonwealth of Virginia; (f) proof of current safety inspection of said vehicle(s) by the United States Coast Guard; (g) proof of current registration of said vehicle(s) with the United States Coast Guard and DC Harbor Master; (h) a complete copy of all documents submitted to DCPSC under 15 DCMR § 1701, bearing indicia of proper filing; (i) proof of submission of an application for ICC water-carrier authority or request for an opinion of the ICC's General Counsel that such authority is unnecessary; (j) for each initial driver, a copy of the driver's CDL and a copy of a Certification of Road Test prepared in accordance with 49 CFR § 391.31, showing administration of the test by applicant in applicant's amphibious vehicles; and (k) a notarized affidavit of identification of vehicles pursuant to Commission Regulation No. 61, for which purpose WMATC No. 267 is hereby assigned.

3. That upon timely compliance with the requirements of the preceding paragraph and acceptance of the documents required by the Commission, Certificate of Authority No. 267 shall be issued to applicant.

4. That applicant may not transport passengers for hire between points in the Metropolitan District pursuant to this order unless and until a certificate of authority has been issued in accordance with the preceding paragraph.

5. That pursuant to Commission Regulation No. 66, unless applicant complies with the requirements of this order within 180 days from the date of issuance, 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