

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 4658

IN THE MATTER OF:

Served September 6, 1995

Application of DOUBLE DECKER BUS)
TOURS W.D.C., INC., Trading as)
DOUBLE DECKER BUS WASHINGTON,)
D.C., for a Certificate of)
Authority -- Irregular Route)
Operations)

Case No. AP-95-21

On August 9, 1995, the Commission issued Order No. 4642, conditionally approving the application of Double Decker Bus Tours W.D.C., Inc., for a certificate of authority. On August 31, 1995, protestant, Old Town Trolley Tours of Washington, Inc., WMATC Carrier No. 124, filed an application for reconsideration of Order No. 4642 and a motion to stay its execution in the alternative.

The application for reconsideration raises serious allegations concerning applicant's prospective compliance fitness and carries with it grave implications for the safety of the riding public. Attached to the application for reconsideration is a copy of a notice of hearing issued August 11, 1995, by the New York City Department of Consumer Affairs (DCA), the agency which licenses applicant's commonly-controlled affiliate, New York Apple Tours, Inc.¹ The notice charges New York Apple with operating vehicles without DCA plates, switching DCA plates from licensed to unlicensed vehicles, and breaching a DCA Consent Judgment/Order. Under Commission precedent the compliance fitness of a commonly-controlled carrier is relevant to a determination of an applicant's compliance fitness, and post-order events suggesting a lack of compliance fitness are proper grounds for reconsideration.²

We will stay Order No. 4642 until we have had time to sufficiently weigh the allegations and response. Our decision to issue the stay is guided by the familiar four factors of Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958), as modified by WMATC v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977). Accord, Union Pacific R.R. -- Abandonment, 6 I.C.C.2d 641 (Apr. 9, 1990); Norfolk & Western Ry. & B&O R.R. -- Control, 363 I.C.C. 122 (June 4, 1980). The factors to be considered in determining whether a stay is warranted are: (1) the likelihood that the party seeking the stay will prevail on the merits; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the stay is

¹ The Commission takes official notice of the DCA's action under Commission Rule No. 22-07.

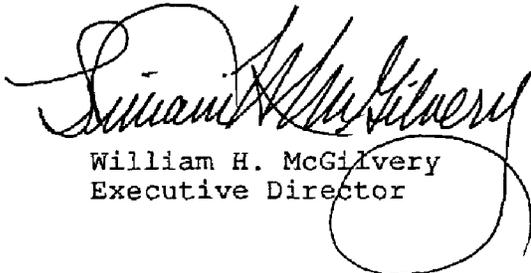
² Order No. 4642; In re Ruchman & Assocs., Inc., t/a RAI, Inc., No. AP-91-32, Order No. 3868 (Dec. 19, 1991).

granted; and (4) the public interest in granting the stay. Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985) (citing Holiday Tours, 559 F.2d at 843). The necessary "level" or "degree" of possibility of success movant must establish will vary according to the strength of the other factors. Holiday Tours, 559 F.2d at 843.

Because denial of a stay will visit no harm on protestant, we cannot issue a stay on protestant's motion. We can, however, issue a stay on our own motion. In that posture the issue under the second factor becomes whether the public is exposed to irreparable harm.³ The harm must be evaluated in terms of its substantiality and the likelihood of its occurrence.⁴ In this case, the repetitious nature of New York Apple's unlicensed operations as admitted by New York Apple and as alleged by DCA and the level of risk to the public engendered by operations in unlicensed vehicles outweigh what little harm this commonly-controlled -- and as yet uncertificated -- applicant might experience from a brief delay. Issuing the certificate of authority without first giving full consideration to the issues raised by protestant's application would not be in the public interest. Inasmuch as factors (2), (3) and (4) favor a stay and the likelihood of adverse DCA findings is not insubstantial, a stay is warranted.

THEREFORE, IT IS ORDERED that the execution of Order No. 4642 shall be stayed pending a determination of the application for reconsideration.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS ALEXANDER, LIGON, AND SHANNON:



William H. McGilvery
Executive Director

³ See Ohio ex rel. Celebrezze v. NRC, 812 F.2d 288 (6th Cir. 1987) (where state is movant irreparable injury inquiry looks to potential for harm to public).

⁴ Id. at 291.