

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 4996

IN THE MATTER OF:

Served January 8, 1997

Application of WASHINGTON)
SHUTTLE, INC., Trading as) Case No. AP-96-13
SUPERSHUTTLE, for a Certificate)
of Authority -- Irregular Route)
Operations)

On November 8, 1996, the Commission issued Order No. 4966, conditionally granting the application of Washington Shuttle, Inc., trading as SuperShuttle, for an irregular-route certificate of authority, over the protests of the District of Columbia Taxicab Commission (DCTC), the Coalition for Fair Transportation (CFT),¹ and Malek Investment, Inc., trading as Montgomery Airport Shuttle (MAS), WMATC Carrier No. 202, based on a determination that applicant is fit, willing and able to provide the proposed transportation and that the proposed transportation is consistent with the public interest. Order No. 4966 denied the requests of DCTC and CFT for discovery and an oral hearing.

DCTC and CFT have filed applications for reconsideration of Order No. 4966 pursuant to Title II of the Compact, Article XIII, Section 4, and Commission Rule No. 27.

For the reasons explained below the applications will be denied and Order No. 4966 affirmed.

I. STANDARD FOR DECISION

Under the Compact, a party to a proceeding affected by a final order or decision of the Commission may file within 30 days of its publication a written application requesting Commission reconsideration of the matter involved, and stating specifically the errors claimed as grounds for the reconsideration.² The Commission shall grant or deny the application within 30 days after it has been filed.³ If the Commission does not grant or deny the application by order within 30 days, the application shall be deemed denied.⁴ If the application is granted, the Commission shall rescind, modify, or

¹ CFT is an association of taxicab companies licensed by Prince George's County, Maryland, and two WMATC carriers, namely, Capital Tours & Transportation (Virginia), Inc., WMATC No. 327, and Diamond Transportation Services, Inc., WMATC No. 122.

² Compact, tit. II, art XIII, § 4(a).

³ Compact, tit. II, art XIII, § 4(b).

⁴ Compact, tit. II, art XIII, § 4(c).

affirm its order or decision with or without a hearing, after giving notice to all parties.⁵ Filing an application for reconsideration may not act as a stay upon the execution of a Commission order or decision, or any part of it unless the Commission orders otherwise.⁶ The Commission may stay an order upon the filing of an application for reconsideration if all parties consent⁷ or if consideration of applicant's likelihood of success on the merits, the harm to the parties and the public interest indicates a stay is warranted.⁸

II. DCTC's APPLICATION

DCTC argues that denial of discovery and oral hearing was arbitrary and capricious, that the public interest determination is not based on substantial evidence and that the petition for intervention filed by the Metropolitan Washington Airports Authority (MWAA) was improperly granted. For those reasons, DCTC requests a stay of Order No. 4966.

A. Denial of Discovery

"[T]he conduct and extent of discovery in agency proceedings is a matter ordinarily entrusted to the expert agency in the first instance and will not, barring the most extraordinary circumstances, warrant the Draconian sanction of overturning a reasoned agency decision."⁹ There is nothing extraordinary in the circumstances surrounding the Commission's denial of DCTC's request for discovery.

In its protest, DCTC requested "[f]ull discover[y] and evidentiary hearings to determine the impact of granting the application on taxicabs and other passenger vehicles for hire licensed to operate in the District of Columbia." The Commission was not obliged to grant such an open-ended request.

The Commission's regulations contemplate that the Commission will entertain a protest to an application for operating authority only where the protestant has fore-knowledge that either the applicant is not fit or the proposed transportation is not consistent with the public interest. Commission Regulation No. 54-04(a) states that a protest must be accompanied by all available evidence on which protestant would rely. This regulation makes clear that no protest will be entertained on the mere hope that evidence will be found later in support. DCTC's failure to submit any evidence with its protest

⁵ Compact, tit. II, art XIII, § 4(d).

⁶ Compact, tit. II, art XIII, § 4(e).

⁷ Commission Regulation No. 27-05.

⁸ In re Double Decker Bus Tours, W.D.C., Inc., No. AP-95-21, Order No. 4658 (Sept. 6, 1995).

⁹ Lakeland Bus Lines, Inc. v. ICC, 810 F.2d 280, 286 (D.C. Cir. 1987); Trailways Lines, Inc., v. ICC, 766 F.2d 1537, 1546 (D.C. Cir. 1985).

and the open-ended nature of the request itself clearly place that request in the "mere hope" category.

The Commission's discovery rules are in accord. A subpoena is the only discovery mechanism provided in the Commission's Rules of Practice and Procedure. Commission Rule No. 18-01 states that a request for subpoena will be granted only on a showing of "general relevance and reasonable scope." In other words, open-ended discovery requests will not be granted. DCTC's request for "full discovery" does not satisfy the reasonable-scope prong. What the D.C. Circuit said in Lakeland Bus Lines is equally applicable here.

[T]he Commission is well within its authority to reject a discovery request that merely restates the statutory criteria and asks for anything that might be relevant under those criteria, without narrowing the focus of the inquiry to aid both the Commission and the applicant who would be the subject of the discovery request."

Lakeland Bus Lines, 810 F.2d at 286.

In any event, as the Commission observed in Order No. 4966:

Evidence of harm to taxicabs and the riding public would not be peculiarly in applicant's possession; rather, such evidence may be sought in the financial statements of the carriers DCTC regulates and in market statistics. Evidence regarding the market is as available to DCTC as it is to applicant.

Thus, discovery of applicant's records was not essential to DCTC's prosecution of its protest.

B. Denial of Oral Hearing

Prior to 1991, the Compact required the Commission to issue a certificate to an applicant upon finding "after hearing held upon reasonable notice" that the applicant was fit and that the proposed transportation was required by the public convenience and necessity.¹⁰ This meant that a successful applicant's operations would be restricted to the type of service, area of service and/or type of vehicles for which a need was established, effectively insulating carriers from competition the Commission considered unnecessary. The Compact was amended in 1990, effective 1991,¹¹ chiefly to eliminate the hearing requirement and to substitute a public interest test for

¹⁰ Act of Sept. 15, 1960, Pub. L. No. 86-794, § 1, tit. II, art. XII, § 4(b) 74 Stat. 1031 (1960) [Original Compact].

¹¹ Act of November 3, 1990, Pub. L. No. 101-505, § 1, 104 Stat. 1300 (1990) [Amended Compact or Compact].

the public convenience and necessity test.¹² Those amendments, along with the commandment that irregular-route operating authority shall be coextensive with the Metropolitan District,¹³ were designed to reduce the regulatory burden on carriers and introduce competition in the markets for their services. Today, oral hearings on applications for operating authority are the exception, not the rule. The prospect of protracted certificate proceedings is a vision of the past now that the amended Compact clearly calls for a simpler, smoother certification process.¹⁴

Requests for oral hearing in an application proceeding are governed by Commission Regulation No. 54-04(b), which states that a request for oral hearing must contain reasonable grounds showing good cause, including a description of the evidence to be adduced and an explanation of why it cannot be adduced without a hearing. DCTC neither described the evidence to be adduced nor explained why it could not be adduced without an oral hearing. Accordingly, there was no basis for granting DCTC's request.

C. Findings Based on Substantial Evidence

DCTC argues that Order No. 4966 is not based on substantial evidence, as required by the DC Administrative Procedure Act (DCAPA),¹⁵ and that

WMATC has based Order No. 4966 solely upon the unsubstantiated statements proffered in Supershuttle's Application without affording parties to the proceeding the opportunity to rebut the evidence offered. Moreover, the Application of Supershuttle has not been offered into evidence or sponsored by a witness that could be subject to cross-examination. Failure to permit cross-examination relating to the witness's credibility constitutes error.

DCTC Application for Reconsideration at 3.

The rules of procedure specified in the DCAPA, and the cases cited by DCTC interpreting that statute, do not apply to this Commission. The law of one signatory does not bind an interstate compact agency absent the consent of the other signatories.

Upon entering into an interstate compact, a state effectively surrenders a portion of its sovereignty; the compact governs the relations of the parties with

¹² Compare Original Compact, tit. II, art. XII, § 4(b), with Amended Compact, tit. II, art. XI, § 7.

¹³ Compact, tit. II, art. XI, § 9(b).

¹⁴ Cf., Lakeland Bus Lines, 810 F.2d at 287 (discussing effect of Bus Regulatory Reform Act of 1982).

¹⁵ D.C. CODE ANN. § 1-1501 et seq.

respect to the subject matter of the agreement and is superior to both prior and subsequent law. Further, when enacted, a compact constitutes not only law, but a contract which may not be amended, modified, or otherwise altered without the consent of all parties. It, therefore, appears settled that one party may not enact legislation which would impose burdens upon the compact absent the concurrence of the other signatories.

C.T. Hellmuth & Assocs., Inc., v. WMATA, 414 F. Supp. 408 (D. Md. 1976).

The Hellmuth Court held that the Maryland Public Information Act was not applicable to the Washington Metropolitan Area Transit Authority (WMATA) since, regardless of how similar the public information laws of the other parties to the interstate compact which created WMATA might be, imposition of Maryland's preferences in such regard would be an intrusion on the interests of the other parties and in derogation of the WMATA Compact. 414 F. Supp. at 410. We find this reasoning persuasive on the issue of whether the DCAPA applies to this Commission. The WMATC Compact itself leaves no room for doubt.

The WMATC Compact provides that "[r]ules of practice and procedure adopted by the Commission shall govern all hearings, investigations, and proceedings under [the Compact], but the Commission may apply the technical rules of evidence when appropriate."¹⁶ There is no allegation that the Commission's Rules of Practice and Procedure have been violated with respect to the method of receiving evidence in this proceeding. The WMATC Compact further provides that an application for a certificate of authority shall be in writing, verified and "in the form and with the information that the Commission regulations require."¹⁷ There is no allegation that these requirements were not met in this proceeding.

Order No. 4966 is supported by substantial evidence, in any event. On the issue of consistency with the public interest, which was the only issue litigated by DCTC, Order No. 4966 noted that currently, no WMATC carrier has access to on-demand passengers at either National Airport or Dulles Airport. The taxis regulated by DCTC, on the other hand have had access to on-demand passengers at National Airport for years. Although those taxis do not have access to on-demand passengers at Dulles Airport, that is a matter outside the Commission's jurisdiction.¹⁸ MWAA's decision to grant a WMATC carrier access to on-demand customers at both airports -- without disturbing the current on-demand access that taxis have at National and the current reservation-basis access that all taxis and WMATC

¹⁶ Compact, tit. II, art. XII, § 2(b) (emphasis added).

¹⁷ Compact, tit. II, art. XI, § 8.

¹⁸ Staff informs us that DCTC is working through DC's appointed members on the MWAA board to achieve greater access at Dulles for DC licensed taxicabs.

carriers enjoy at both airports -- will result in more choices for passengers at National and Dulles, notwithstanding that said access is pursuant to an exclusive contract with MWAA. Order No. 4966 also noted that applicant proposes commencing operations with twenty-five vans capable of operating on clean-burning fuel, such as natural gas; indeed, this is a requirement under the MWAA contract. DCTC does not dispute any of these facts, which by any reasonable definition of the term constitute "substantial evidence" of consistency with the public interest.

Of course, ultimately, whether approval of an application is in the public interest is a question of law committed to agency discretion in the first instance.¹⁹ What is important is that we consider all relevant factors and ignore irrelevant factors.²⁰ We considered DCTC's argument in its protest that the proposed transportation would have "an adverse impact on taxicab service and the taxicab industry in the District of Columbia and Metropolitan District by systematically eliminating alternative modes of ground transportation service for passengers to and from National Airport and Dulles International Airport"²¹ but rejected that argument for lack of any evidence in support and because the evidence of record was to the contrary.

DCTC's opportunity to rebut the evidence presented by Washington Shuttle was when it filed the protest. If DCTC had no evidence to support the allegations in its protest, then DCTC should not have made those allegations. As noted above in the discovery discussion, Commission Regulation No. 54-04(a) makes clear that no protest will be entertained on the mere hope that evidence will be found later in support. DCTC counters with the argument that "DCTC is not a commercial competitor to Supershuttle. DCTC is a governmental entity whose statements concerning Supershuttle's adverse impact on the taxicab industry and the irreparable harm that approval of the application would have must be given great weight." We disagree. Whereas official agency findings carry evidentiary weight,²² allegations in an agency's brief are not accorded the same status.²³ No official findings were filed in support of DCTC's protest.

DCTC's argument that it should have been afforded an opportunity to cross-examine witnesses is essentially an argument that

¹⁹ City of St. Louis v. Department of Transp., 936 F.2d 1528 (8th Cir. 1991).

²⁰ Id.

²¹ DCTC Protest at 1.

²² See FED. R. EVID. 803(8) (hearsay exception for public records and reports).

²³ See City of Kansas City v. HUD, 923 F.2d 188, 192 (D.C. Cir. 1991) (deference due agency decisionmaking, not rationale developed as part of litigation strategy).

the Commission improperly denied DCTC's request for oral hearing. That contention is addressed above.

D. Intervention Without Oral Hearing

DCTC alleges that the Commission improperly granted the petition for intervention filed by MWAA by not scheduling an oral hearing first. Petitions for intervention are governed by Rule No. 16. According to Rule 16-03, any reply in opposition to a petition for leave to intervene must be filed within five days of service, seven days if service is by mail. DCTC never filed a reply in opposition. Further, DCTC fails to explain how granting MWAA's petition for intervention harms DCTC. In any event, DCTC misconstrues the Commission's rules. Simply stated, those rules do not make intervention dependent on the scheduling of an oral hearing. Furthermore, DCTC's interpretation of Commission Rule No. 16, if followed, would eliminate virtually all intervention, since oral hearings on applications for operating authority are now the exception, not the rule. Such an outcome would not be in the public interest.

E. Request for Stay

Inasmuch as DCTC has not obtained the consent of all parties to a stay and has failed to demonstrate irreparable harm to itself or the industry it regulates, DCTC's request for stay will be denied. Our affirmance herein of Order No. 4966 mandates no less.

II. CFT's APPLICATION

CFT's application for reconsideration has been stamped by Commission staff: "RECEIVED December 10, 1996." The filing deadline was December 9, 1996, as calculated according to Commission Rule No. 7-01. CFT filed an affidavit verifying that its application was delivered to the Commission's offices on the 9th after the offices had closed for the day by slipping the application under the door. Pursuant to the Court's holding in Yohalem v. WMATC, 412 F.2d 1124 (D.C. Cir. 1969) (per curiam) (rev'g Order No. 911), we find that CFT's application was timely filed. The application is denied, however, for the following reasons.

CFT argues that the Commission's decision in Order No. 4966 violated CFT's due process rights by denying CFT an opportunity to present and challenge evidence, that the Commission's finding of Washington Shuttle's fitness was arbitrary and capricious and not supported by substantial evidence, and that the Commission failed to give adequate consideration to the anticompetitive effects of the MWAA contract in reaching a determination on the public interest issue. For these reasons, CFT requests a stay of Order No. 4966.

A. Due Process

CFT claims its due process rights were violated because the Commission allegedly did not afford it a reasonable opportunity to "present evidence or challenge evidence offered by the Applicant." In further support of this claim, CFT contends that: (a) the six-month

delay in ruling on Washington Shuttle's challenge to CFT's standing was arbitrary and capricious; (b) the decision to approve Washington Shuttle's application and name CFT a party in the same order deprived CFT of the ability to exercise its rights as a party, especially the right to seek a subpoena; and (c) the alleged failure to give consideration to CFT's request to present expert testimony deprived CFT of its right to be heard.

We disagree that CFT's due process rights have been violated. Due process is not offended simply because a determination of fitness and consistency with the public interest is made within the confines of a streamlined decisionmaking process that provides for limited discovery rights and infrequent use of oral hearings.²⁴

The Commission's procedures for deciding applications for operating authority have been designed and are enforced to guard against frivolous protests interposed by competitors for the purpose of delaying a rival's entry into the market place. That is why a competitor, such as one of CFT's members, must present some evidence in support of the protest when the protest is filed. It is the most effective means of ensuring that the battleground for market share is not improperly shifted to the offices of the Commission. Delay works in favor of such a protestant by increasing an applicant's carrying costs and allowing protestant an opportunity for strategic positioning while the potential entrant's application languishes before the Commission. These advantages can be significant. The Commission's protest procedures protect against this type of abuse.

We find that CFT had sufficient opportunity to present and challenge evidence under the Commission's rules. If CFT had evidence to support its protest, the time for filing such evidence was when it filed its protest. If CFT had no evidence, then we question why CFT made the allegations it did.

Nevertheless, we recognize that in some instances a protestant might need to rely in part on evidence that is not available when the protest is filed. CFT stated in its protest, filed April 29, 1996, that CFT had retained an economic consulting firm to analyze "the economic impact of SuperShuttle's proposed operations on existing carriers and the public's access to transportation alternatives throughout the Metropolitan District." CFT then stated that it would take "approximately 45 days to complete this study." CFT might have had room for argument if Order No. 4966 had been issued before the 45 days had run, but Order No. 4966 was not issued until November 8, 1996, more than six months later. CFT thus had ample opportunity to move for leave to supplement the record with its expert testimony.

Similarly, CFT was not prejudiced by the Commission "naming" CFT a party in the same order that announced our decision on Washington Shuttle's application. Commission Rule No. 2-05 defines a party as "any person who is an applicant, complainant, petitioner, respondent, protestant" Rule No. 2-03 defines a person as

²⁴ See Lakeland Bus Lines, 810 F.2d at 288 n.8 (denial of discovery and oral hearing not violation of due process).

"any individual, firm, partnership, corporation, company, association" Thus, under the Commission's rules, CFT became a party upon filing its protest and, thereafter, was free to exercise its rights as a party. Moreover, nowhere in Commission Rule No. 18 does it state that issuance of a subpoena depends on the Commission first having issued an order naming the movant a party.

B. Financial Fitness

To establish financial fitness, an applicant must show the present ability to sustain operations during the first year under WMATC authority.²⁵ CFT asserts that measuring Washington Shuttle's application against this standard was arbitrary and capricious because the MWAA contract is for five years and is to be phased in over two years. CFT misapprehends the reason we only require projections for a one-year period.

The one-year time frame recognizes the limited ability of the applicant and the Commission to predict with confidence the results of operations beyond one year. At some point, projections into the future leave the territory of educated guesses and enter the realm of pure conjecture. Under CFT's rule, a proposed ten-year contract tariff would require applicant and the Commission to predict results of operations ten years into the future. Obviously, the value of such predictions would be minimal to say the least. In our opinion, one year tests the outer limits of predictability.

Of course, no specific period for projecting financial fitness is mandated by the Compact. The Compact does not specify the criteria we should apply in determining a carrier's prospective fitness. Developing the relevant criteria is left to our discretion. We have devised the financial fitness test as one means of determining a carrier's prospective over-all fitness. We also examine an applicant's prospective operational fitness and regulatory compliance fitness. We have applied the current financial fitness test across the board since 1991 and have found that practice quite satisfactory. Applying different standards to different carriers as suggested by CFT would unduly complicate an application process that Congress and the signatories intended should be simplified.

In fact, an argument could be made that the current test is more complicated than it needs to be. The test for financial fitness at the federal level is a simple one -- proof of liability insurance.²⁶ As a creature of Congress and successor to a portion of

²⁵ In re WDC Sightseeing Tours, Inc., AP-92-33, Order No. 4036 (Jan 12, 1993).

²⁶ Under 49 U.S.C. § 13902(a), the Secretary of Transportation may register a person as a motor carrier if the Secretary finds the person is willing and able to comply with the regulations of the Secretary and Surface Transportation Board, the Secretary's safety regulations and the Secretary's insurance regulations. These three criteria parallel our three criteria -- compliance fitness, operational fitness and financial fitness, respectively.

the Interstate Commerce Commission's jurisdiction, the Commission has borrowed from federal regulations over the years in crafting policy under the Compact.²⁷ If we adopted the federal financial fitness standard no one could seriously contend we had exceeded the bounds of our discretion. On the other hand, we do not perceive that the one-year test is unduly burdensome or that it has unfairly barred carriers from entering the market. As applied, it is a modest hurdle that has served well, and we see no reason to discard it at this time.

Returning to CFT's application, CFT also argues the Commission erred by not accounting for the change in Washington Shuttle's financial condition between March 21, when the application was filed, and November 8, when Order No. 4966 was issued. CFT claims that Washington Shuttle has sustained "unprojected costs and expenses" during that period. There is no indication in the record that any expense incurred by Washington Shuttle while awaiting a decision on its application, has so weakened Washington Shuttle that it cannot possibly sustain operations for one year. The May 8 affidavit of Washington Shuttle's president, cited by CFT as evidence of "unanticipated losses," does not constitute evidence of changed circumstances and certainly does not warrant exposing Washington Shuttle to delay and further expense to the benefit of CFT's members and the detriment of Washington Shuttle and its potential customers.

Before leaving this issue, we take the opportunity to register our reservations about entertaining a competing carrier's assault on an applicant's financial fitness. Under Commission precedent, a competing carrier protesting an application for operating authority must demonstrate that approval of the application will endanger or impair its operations contrary to the public interest.²⁸ The burden on protestant is twofold. First, the protest must be accompanied by some evidence of the alleged harm to protestant.²⁹ Second, the evidence must support a finding that the harm to protestant will result in harm to the public interest.³⁰ Because any grant of authority carries with it the potential for diverting some passengers from existing carriers to a new entrant, a protestant must allege more than a mere diversion of revenue.³¹ Moreover, as long as competition flourishes there is no need to protect individual carriers.³² Given

²⁷ See Commission Regulation No. 64 (safety regulations); In re Appendix to Rules of Prac. & Proc. & Regs., Cert. of Ins., No. MP-93-41, Order No. 4203 (Nov. 15, 1993) (insurance regulations).

²⁸ In re Double Decker Bus Tours, W.D.C., Inc., No. AP-95-21, Order No. 4642 at 3 (Aug. 9, 1995). Because CFT is asserting the interests of its members, CFT bears the burden its members would bear if the members appeared here in their individual capacities.

²⁹ Id. at 7.

³⁰ Id. at 7.

³¹ Id. at 7.

³² Id. at 8.

the narrow path a competing carrier must tread as a protestant, we do not see how mounting an argument that a particular applicant for operating authority is financially incapable of sustaining operations for one year advances a competing carrier's case in a competitive market setting, such as the market setting for ground transportation services at National and Dulles.

C. Operational Fitness

CFT maintains that our finding of operational fitness is in error because there is "insufficient evidence in the record to establish that Applicant is capable of fulfilling its contractual obligations under the MWAA contract." This was essentially the argument raised in CFT's protest. Instead of responding to our findings and conclusions on this issue as reported in Order No. 4966, CFT merely parrots its protest. Consequently, this allegation does not offer any basis for reconsideration.

CFT disagrees with our ruling in Order No. 4966 that "[w]hether a carrier can comply with a contract such as MWAA's is not in and of itself a measure of that carrier's fitness to serve the public under the carrier's general tariff." CFT's disagreement proceeds from a misperception of the facts. According to CFT, "[b]ecause the only operations Applicant proposes to perform are those contemplated by the MWAA contract, an evaluation of Applicant's fitness to serve the public necessarily involves an evaluation of its ability to comply with the MWAA contract." The proposed general tariff filed by Washington Shuttle is not restricted to service under the MWAA contract. Our ruling stands.

D. Consistency with the Public Interest

CFT asserts the Commission's public interest determination was in error because the Commission did not give reasoned consideration to the anticompetitive effect of the MWAA contract. The Commission did consider CFT's allegation of anticompetitive effect but rejected that claim for lack of evidence and because CFT's predatory pricing theory did not make economic sense. CFT replies that the Commission failed to provide CFT with an opportunity to substantiate its allegations. As noted above, if CFT had evidence to support its protest, the time for filing such evidence was when it filed its protest. If CFT had no evidence, then we question why CFT made the allegations it did.

CFT also claims the Commission mischaracterized its public interest challenge as a "simple 'predatory pricing' claim." The claim, therefore, bears repeating. According to CFT's protest, Washington Shuttle's

proposed rates are set at an artificially low level and are designed to unfairly seize market share and drive its competitors out of business. In order to sustain its operations, [applicant] must eventually raise its rates to a level equal to or greater than that now prevailing in the market-place.

CFT Protest at 2.

The following passage from the Court's opinion in Dial A Car, Inc., v. Transportation, Inc., 82 F.3d 484 (D.C. Cir. 1996), should put to rest any doubt that CFT was advancing a predatory pricing claim.

Appellant argues that its complaint goes beyond alleging only a competitive injury to itself because the complaint also alleges that, "if and when they succeed in eliminating Plaintiff as a competitor in the Relevant Market . . . Defendants intend to replace their illegal low-priced Relevant Market service by Regular Taxicab with their own, lawful, higher-priced Blue Car Relevant Market services, without fear of competition." . . . Thus, appellant analogizes appellees' behavior to a predatory pricing case, where a party initially increases competition, but only to drive competitors out of the market and achieve monopoly power.

Dial A Car, 82 F.3d at 487.

Finally, CFT contends that the Commission's analysis on this issue failed to recognize the monopoly position awarded to Washington Shuttle under the MWAA contract. The MWAA contract does not award Washington Shuttle a monopoly. As we observed in Order No. 4966, the market is characterized by intermodal competition (e.g., Metrorail, coach service, taxicab service, van service, limousine and sedan service, car rental, private auto) and intramodal competition (e.g., airport van service provided by WMATC carriers nos. 122, 202, 224, 253, 262, 270, 276, 279, 309, 325, 327, 338). The intermodal competition includes competition for on-demand passengers at both airports. The MWAA contract does not change this. What has changed is that CFT's taxicab members will now face competition for access to on-demand passengers at National.

We recognize that CFT's WMATC-carrier members do not have access to on-demand passengers at National, and we understand that none of CFT's members have access to on-demand passengers at Dulles. But that is not a result of the MWAA contract. Rather, it is a function of MWAA's regulations. According to the MWAA contract, "Shared Ride service may be provided to and from the Airports by persons or entities other than the contractor to the extent such service is permitted by the Metropolitan Washington Airports Regulations, as may be amended from time to time."³³ As relevant to CFT, those regulations currently allow access to on-demand passengers

³³ MWAA Contract, art. III, § A.1. (emphasis added). The contract also permits MWAA to enter contracts for other ground transportation services "such as, but not restricted to: limousine and executive sedan services, taxicab service, and motor coach service on a scheduled, unscheduled, regular route or irregular route basis." Id., art. III, § A.3.

only at National and, at that, only by taxicab. Disapproving Washington Shuttle's application will not change those regulations.³⁴

Had we denied Washington Shuttle's application, passengers flying into National and Dulles would continue to enjoy the on-demand ground transportation options currently available but not the option of on-demand transportation by WMATC carrier. Our decision to grant Washington Shuttle's application leaves the current options intact, while adding a new one.

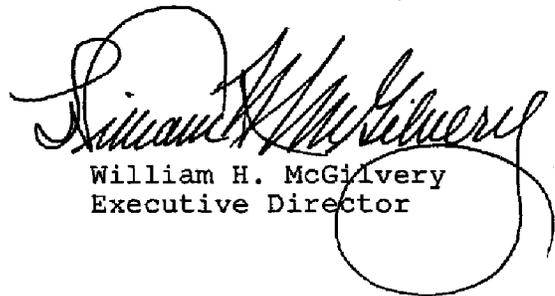
E. Request for Stay

Inasmuch as CFT has not obtained the consent of all parties to a stay and has failed to demonstrate irreparable harm to its members, CFT's request for stay will be denied. Our affirmance herein of Order No. 4966 mandates no less.

THEREFORE, IT IS ORDERED:

1. That the applications of DCTC and CFT for reconsideration of Order No. 4966 are denied.
2. That the requests of DCTC and CFT for stay of Order No. 4966 are denied.
3. That Order No. 4966 is affirmed.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS LIGON AND MILLER:



William H. McGilvery
Executive Director

CHAIRMAN ALEXANDER DISSENTS.

³⁴ CFT is not without a remedy. CFT's members hail from Maryland and Virginia. Both States appoint members to the MWAA board. CFT, or its members, might consider following DCTC's lead and petition their MWAA representatives for relief from the current regulations.