

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 5736

IN THE MATTER OF:

Served November 2, 1999

Application of ORBITAL SHUTTLE)
INC. for a Certificate of)
Authority -- Irregular Route)
Operations)

Case No. AP-99-60

Applicant 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 seating capacity of less than 16 persons only, including the driver. The application is unopposed.

The Compact, Title II, Article XI, Section 7(a), authorizes the Commission to issue a certificate of authority if it finds that the proposed transportation is consistent with the public interest and that the applicant is fit, willing, and able to perform the proposed transportation properly, conform to the provisions of the Compact, and conform to the rules, regulations, and requirements of the Commission. If an applicant does not make the required showing, the application must be denied under Section 7(b).

Applicant proposes operating an airport shuttle service by leasing vans from independent owner-operators on a monthly basis. Applicant would license and insure the vehicles it leases from the owner-operators. The owner-operators, in turn, would fully reimburse applicant pursuant to the terms of a mandatory independent contractor agreement. The owner-operators also would be directly responsible for fuel purchases and maintenance expenses. In exchange, the owner-operators would keep seventy percent of the fares they collect from applicant's customers and be permitted to generate customers of their own.

The agreement applicant proposes is inconsistent with Commission Regulation No. 62-08, which prohibits the lease of a vehicle and driver from a single source, except when the lease is between two WMATC carriers, the driver is a bona fide employee of the lessee, or the driver is furnished through an independent personnel supplier. The proposed agreement does not require the owner-operators to be WMATC carriers, expressly disclaims any employer-employee relationship with the owner-operators, and does not contemplate the use of any independent personnel supplier.

Regulation No. 62-08 is designed to prevent carriers without WMATC authority from operating in the Metropolitan District through the guise of a so-called lease arrangement. It reflects the rebuttable presumption that an entity which furnishes both a vehicle

and a driver under a lease agreement is actually a passenger carrier.¹ That presumption is not rebutted in this case given the significant level of control that owner-operators would retain and applicant's avoidance of the risks, responsibilities and burdens of transportation.²

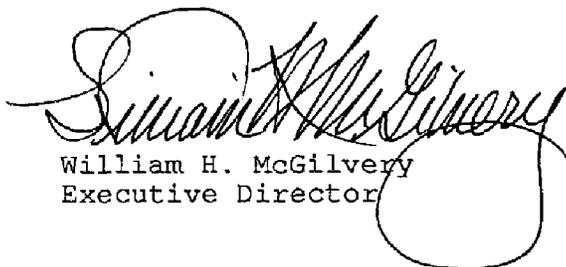
Applicant relinquishes some control by recognizing the right of owner-operators to transport their own customers and by not restricting the owner-operators' use of vehicles leased to applicant when those vehicles are not being used for transporting applicant's customers. It would not be consistent with the public interest for owner-operators to transport their own customers -- customers not referred by applicant and therefore not covered by applicant's tariff and insurance -- in vehicles that prominently display applicant's name and WMATC number. Yet, this is what the agreement seemingly would permit.

The proposed agreement also would relieve applicant from the responsibilities and burdens of transportation. As noted above, the owner-operators would be directly responsible for maintenance and fuel expenses and indirectly responsible for license and insurance expenses. Even the monthly lease fee of \$100 per vehicle, paid by applicant to the owner-operators, would be offset by a monthly "advertising" fee of \$100 per vehicle, paid by the owner-operators to applicant. These burden-shifting provisions place the risk of loss from carrier operations entirely on the owner-operators.

Overall, the proposed agreement would have the practical effect of consigning applicant to the role of a transportation broker. The Commission issues authority to carriers, not brokers.

THEREFORE, IT IS ORDERED that the application of Orbital Shuttle Inc. for a certificate of authority, irregular route operations, is hereby denied without prejudice.

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


William H. McGilvery
Executive Director

¹ In re Carey Limo. D.C., Inc., & ADV Int'l Corp., t/a Moran Limo. Serv., No. AP-94-53, Order No. 4499 (Feb. 16, 1995).

² See, Washington, Va. & Md. Coach Co. v. Scenic Coach Rental, Inc., No. 165, Order No. 837 (July 10, 1968) (to qualify lessee as carrier, lessee must (a) control, direct and dominate vehicle operations and (b) assume the responsibilities, risks, duties and burdens of transportation).