

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 7527

IN THE MATTER OF:

Served November 10, 2003

Application of NEVAH TRANSPORTS, )  
LLC, for a Certificate of )  
Authority -- Irregular Route )  
Operations )

Case No. AP-2003-106

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.

Under Article XI, Section 7(a), of the Compact, the Commission shall issue a certificate of authority to any qualified applicant, authorizing all or any part of the transportation covered by the application, if the Commission finds that: (i) 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; and (ii) the transportation is consistent with the public interest.

Applicant proposes commencing operations with two 7-passenger vans and one 15-passenger van. Applicant's proposed tariff contains individual and group rates for senior citizens 55 years of age or older. The group rate applies when any van is completely occupied and apparently yields the same overall fare regardless of the size of the van hired. This means that individuals will pay the same fare whether they hire a 7-passenger van or the 15-passenger van, but groups will pay approximately twice as much on a per-person basis when hiring a 7-passenger van as they will when hiring the 15-passenger van. No justification is offered for such a rate structure. Therefore, consistent with Article XI, Section 16(a), of the Compact, we find the group rate unduly discriminatory as to groups hiring a 7-passenger van and pursuant to Article XI, Section 7(a), shall not approve the proposed group rate as part of this application.<sup>1</sup>

Applicant verifies that: (1) applicant owns or leases, or has the means to acquire through ownership or lease, one or more motor vehicles meeting the Commission's safety requirements and suitable for the transportation proposed in this application; (2) applicant owns, or has the means to acquire, a motor vehicle liability insurance policy that provides the minimum amount of coverage required by Commission regulations; and (3) applicant has access to, is familiar with and will comply with the Compact, the Commission's rules,

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<sup>1</sup> See In re Transcare Sys., Inc., No. AP-01-96, Order No. 6458 (Dec. 17, 2001) (disapproving portion of application based on rates conflicting with Commission Regulations Nos. 51-12, 55-09 and 63-05).

regulations and orders, and Federal Motor Carrier Safety Regulations as they pertain to transportation of passengers for hire.

Normally, such evidence would establish applicant's fitness,<sup>2</sup> but in this case one of applicant's owners has a history of regulatory violations. When a person controlling an applicant has a record of violations, or a history of controlling companies with such a record, the Commission considers the following factors in assessing the likelihood of applicant's future compliance: (1) the nature and extent of the violations, (2) any mitigating circumstances, (3) whether the violations were flagrant and persistent, (4) whether applicant has made sincere efforts to correct its past mistakes, and (5) whether applicant has demonstrated a willingness and ability to comport with the Compact and rules and regulations thereunder in the future.<sup>3</sup>

#### I. HISTORY

Applicant is owned in part by Cassandra White. Ms. White previously conducted passenger carrier operations in the Metropolitan District through Safe Haven, Incorporated, (Safe Haven I), a nonprofit corporation formed in the District of Columbia in 1993.<sup>4</sup> Safe Haven I held WMATC Certificate of Authority No. 382 from March 18, 1997, until March 2, 1999, when it was revoked for Safe Haven I's, willful violation of the Commission's insurance requirements.<sup>5</sup> It was the third such revocation for Safe Haven I in the two years it held WMATC operating authority.<sup>6</sup>

Ms. White subsequently incorporated Safe Haven, Inc., (Safe Haven II), in the District of Columbia on May 21, 1999, and caused that corporation to file an application for a certificate of authority on October 27, 1999.<sup>7</sup> The application was approved on February 9, 2000, subject to a one-year period of probation.<sup>8</sup> Certificate No. 382 was reissued on February 28, 2000, and Safe Haven II held it until March 27, 2002, when it was revoked for Safe Haven II's willful violation of the Commission's insurance requirements.<sup>9</sup>

Reinstatement of Certificate No. 382 was denied on August 7, 2002, in Order No. 6762. The evidence showed that Safe Haven II

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<sup>2</sup> In re VGA, Incorporated, No. AP-03-73, Order No. 7496 (Oct. 29, 2003).

<sup>3</sup> Id.

<sup>4</sup> See In re Safe Haven, Incorporated, No. AP-96-70, Order No. 5018 (Feb. 4, 1997) (conditionally granting Certificate No. 382).

<sup>5</sup> In re Safe Haven, Incorporated, No. MP-99-03, Order No. 5538 (Mar. 2, 1999).

<sup>6</sup> See id.; In re Safe Haven, Incorporated, No. MP-98-46, Order No. 5417 (Sept. 25, 1998); In re Safe Haven, Incorporated, No. MP-97-71, Order No. 5189 (Sept. 4, 1997).

<sup>7</sup> In re Safe Haven, Inc., No. AP-99-73, Order No. 5738 (Nov. 3, 1999).

<sup>8</sup> In re Safe Haven, Inc., No. AP-99-73, Order No. 5808 (Feb. 9, 2000).

<sup>9</sup> In re Safe Haven, Inc., No. MP-02-14, Order No. 6589 (Mar. 27, 2002), reconsideration denied, In re Safe Haven, Inc., No. MP-02-14, Order No. 6682 (June 4, 2002); reinstatement denied, In re Safe Haven, Inc., No. MP-02-14, Order No. 6762 (Aug. 7, 2002).

operated for 98 days while suspended or revoked and without the minimum amount of insurance required by Commission Regulation No. 58.<sup>10</sup>

## II. FIRST NEVAH APPLICATION

This is the second application filed by Nevah. The first was denied for failure to establish compliance fitness.<sup>11</sup> We found that the violations committed by Safe Haven II under Ms. White's control, as described above, were serious, extensive, flagrant and persistent. We found no mitigating circumstances, and the record did not support a finding that Ms. White had made sincere efforts to correct these past mistakes and demonstrate a willingness and ability to comport with the Compact and rules and regulations thereunder in the future. On the contrary, the record showed that although in forming Nevah Ms. White had allied herself with someone without a history of regulatory violations, Richard Russell, there was no evidence that Mr. Russell had any financial stake in the company. Hence, there was no basis for finding that Mr. Russell had an incentive to keep the company on the right track. Any doubts we had about Ms. White turning over a new leaf were erased when she fired Nevah's attorney adviser, apparently without consulting Mr. Russell.

## III. CURRENT RECORD

The current application appears to have addressed the problems raised by the first application.

Supporting this application is an operating agreement signed by Mr. Russell and Ms. White that in pertinent part provides as follows: "The management of the Company shall be vested in Richard N. Russell, as the Company's exclusive manager unless removed by a unanimous vote by its Members. The manager acts as the exclusive agent of the Company."

The operating agreement also provides that contributions to capital shall be as agreed to by the members and that the members shall share in profits and losses in accordance with their respective interests as reflected in Nevah's books. Those operating agreement provisions are supplemented by Mr. Russell's statement that he has been the sole source of cash contributions "to this point" and the sworn statement of Mr. Russell and Ms. White that profits shall be divided between them on a 60/40 basis, respectively.

The record thus supports a finding that Mr. Russell is in control of Nevah and has sufficient incentive to ensure that Nevah complies with the Compact and the Commission's rules, regulations and orders thereunder. Consequently, approval of the application is warranted;<sup>12</sup> provided that, considering Ms. White's forty percent ownership interest in Nevah and a provision in the operating agreement that appears to permit the continuation of Nevah by one of its members

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<sup>10</sup> Order No. 6762.

<sup>11</sup> In re Nevah Transports, LLC, No. AP-02-121, Order No. 7001 (Jan. 21, 2003).

<sup>12</sup> See In re Miju Express, Inc., No. AP-91-36, Order No. 3865 (Dec. 19, 1991) (application approved where untainted 40% co-owner had means and motivation to ensure compliance).

in the event of dissolution, applicant shall serve a one year period of probation as a means of ensuring prospective compliance.<sup>13</sup>

We shall impose one other condition, as well. According to Nevah's articles of organization, Nevah's existence shall be perpetual. The operating agreement, on the other hand, states that: "The term of the Company shall continue from its formation until and expire on December 31, 2005 unless sooner terminated as hereinafter provided or as otherwise provided by law." Clearly there is a conflict between the terms of the articles and the terms of the operating agreement, and while the articles control,<sup>14</sup> if the intent of the members at the outset is to create an entity of limited duration, the public interest requires that either the operating authority be limited to the same duration or the members reform their intent. Rather than attempting to keep track of a limited duration certificate of authority, we will require that Nevah's members modify their operating agreement so as not to conflict with the perpetual duration provision in Nevah's articles of organization.

#### IV. CONCLUSION

Based on the evidence in this record, and in consideration of the terms of probation and other conditions prescribed herein, the Commission finds that the proposed transportation is consistent with the public interest and that 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.

#### THEREFORE, IT IS ORDERED:

1. That upon applicant's timely compliance with the requirements of this order, Certificate of Authority No. 854 shall be issued to Nevah Transports, LLC, 375 - 62<sup>nd</sup> Street, N.E., Washington, DC 20019.

2. 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.

3. That applicant is hereby directed to file the following documents within thirty days: (a) evidence of insurance pursuant to Commission Regulation No. 58 and Order No. 4203; (b) an original and four copies of a tariff or tariffs in accordance with Commission Regulation No. 55; (c) a vehicle list stating the year, make, model, serial number, fleet number, license plate number (with jurisdiction) and seating capacity of each vehicle to be used in revenue operations; (d) a copy of the for-hire vehicle registration card, and a lease as required by Commission Regulation No. 62 if applicant is not the

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<sup>13</sup> See In re Shirlington Limo. & Transp., Inc., No. AP-02-20, Order No. 6709 (June 21, 2002) (applicant with history of Compact violations placed on 1 year probation); In re Adventures By Dawn L.L.C., No. AP-00-89, Order No. 6087 (Jan. 16, 2001) (applicant placed on 1 year probation where controlling shareholders had history of Compact violations).

<sup>14</sup> See D.C. CODE ANN. § 29-1018(a) (2003) (LLC operating agreement may contain provisions not inconsistent with articles of organization).

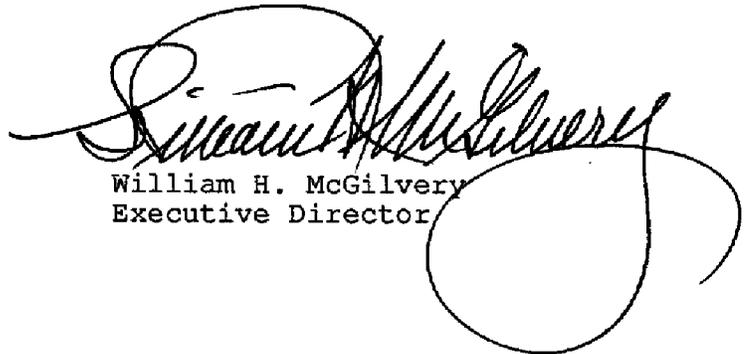
registered owner, for each vehicle to be used in revenue operations; (e) proof of current safety inspection of said vehicle(s) by or on behalf of the United States Department of Transportation, the State of Maryland, the District of Columbia, or the Commonwealth of Virginia; and (f) a notarized affidavit of identification of vehicles pursuant to Commission Regulation No. 61.

4. That applicant shall be placed on probation for a period of one year commencing with the issuance of a certificate of authority in accordance with the terms of this order and that a willful violation of the Compact, or of the Commission's rules, regulations or orders thereunder, by applicant or its members during the period of probation shall constitute grounds for immediate suspension and/or revocation of applicant's operating authority without further proceedings, regardless of the nature and severity of the violation.

5. That within thirty days applicant's members shall file a modified operating agreement that does not conflict with the THIRD provision of applicant's articles of organization providing for perpetual duration.

6. That the grant of authority herein shall be void and the application shall stand denied upon applicant's failure to timely satisfy the conditions of issuance prescribed herein.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS YATES, MILLER, AND MCDONALD:



William H. McGilver  
Executive Director