

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 8042

IN THE MATTER OF:

Served June 1, 2004

Application of CITY SIGHTSEEING)
USA INC. for a Certificate of)
Authority -- Irregular Route)
Operations)

Case No. AP-2004-39

Applicant seeks a certificate of authority to transport passengers in irregular route operations between points in the Metropolitan District. Old Town Trolley Tours of Washington, Inc., (Old Town), WMATC Carrier No. 124, has filed a protest in opposition. The protest includes a request for oral hearing in the event we do not require applicant to produce additional evidence of financial fitness. Applicant has filed a reply.

The Compact, Title II, Article XI, Section 7(a), provides that the Commission shall issue a certificate to any qualified applicant, authorizing all or any part of the transportation covered by the application, 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.

An application for a certificate of authority must be in writing, verified, and in the form and with the information that Commission regulations require.¹ Commission Regulation No. 54 requires applicants to complete and file the Commission's application form. The form itself requires supporting exhibits. The evidence thus submitted must establish a prima facie case of fitness and consistency with the public interest.²

Once applicant has made its prima facie case, the burden shifts to protestant to contravene applicant's showing.³ If the protestant is

¹ Compact, tit. II, art. XI, § 8.

² In re Thomas B. Howell, t/a Presidential Ducks, No. AP-00-07, Order No. 5955 (Aug. 10, 2000); In re Washington Shuttle, Inc., t/a Supershuttle, No. AP-96-13, Order No. 4966 (Nov. 8, 1996); In re Double Decker Bus Tours, W.D.C., Inc., No. AP-95-21, Order No. 4642 (Aug. 9, 1995).

³ Order No. 5955 at 2; Order No. 4966 at 2; Order No. 4642 at 3.

an existing carrier, the burden is on protestant to show that competition from the applicant would adversely affect protestant to such a degree or in such a manner as to be contrary to the public interest.⁴ The protest must be accompanied by all available evidence on which the protestant would rely.⁵

I. APPLICATION

Applicant proposes commencing operations with five double-decker buses. Applicant's proposed tariff contains individual sightseeing rates and group charter rates, with minimum charges.

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

We find that applicant has complied with Regulation No. 54 and has established thereby a prima facie case of fitness and consistency with the public interest.

II. PROTEST

Old Town opposes the application on both fitness and public interest grounds.

A. Fitness

Old Town correctly notes that the Commission looks at an applicant's financial fitness, operational fitness and regulatory compliance fitness. Old Town contends that the application process as currently constructed does not yield enough information on these sub-issues for the Commission to make the requisite finding of applicant's overall fitness. In particular, Old Town takes exception with the Commission's current application form adopted in Order No. 6805, served September 19, 2002, in that it no longer requires a balance sheet and projected operating statement as part of an applicant's prima facie case. Old Town characterizes the elimination of financial statements as an abrogation of the Commission's financial fitness standard. Old Town also claims that the current application form is flawed because it was adopted without opportunity for comment.

⁴ Order No. 5955 at 2; Order No. 4966 at 2; Order No. 4642 at 3; In re Battle's Transp., Inc., No. AP-85-12, Order No. 2722 (June 20, 1985); see Old Town Trolley Tours of Washington, Inc., v. WMATC, 129 F.3d 201 (D.C. Cir. 1997) (existing carrier has standing to protest unfair competition).

⁵ Commission Regulation No. 54-04(a).

The financial fitness standard has not changed so much as the form of proof in an applicant's prima facie case has evolved. As noted in Order No. 6805, the test is whether applicant has demonstrated an ability to sustain operations for one year. Previously, the Commission would examine an applicant's financial statements to determine whether the applicant had demonstrated the ability to acquire the necessary vehicles and insurance while establishing an adequate reserve for contingencies.⁶ Today, an applicant must aver: (a) that it 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 the application; and (b) that it owns, or has the means to acquire, a motor vehicle liability insurance policy that provides the minimum amount of coverage required by Commission regulations. The Commission thus has replaced two financial statements with two verbal statements that say essentially the same thing. The money that would be spent on hiring an accountant to formulate the financial statements may now be used to fund the reserve for contingencies.

As for adopting a new application form without first providing Old Town an opportunity to comment, there is nothing in the Compact that requires the Commission to vet changes to its rules of procedure prior to their adoption or amendment. It has been the practice of the Commission, at least since the latest amendments to the Compact took effect in 1991, to promulgate revised application forms without first offering existing carriers or the public an opportunity to comment.⁷ This is consistent with the federal Administrative Procedure Act's exception to notice-and-comment rulemaking requirements for rules of agency procedure,⁸ which although strictly speaking does not apply to the Commission is instructive, nevertheless.⁹

Of course, Old Town in fact did have an opportunity to comment, albeit after the fact. Order No. 6805 was publicly posted at the office of the Commission for thirty days. If Old Town felt aggrieved, it could have sought reconsideration under Article XIII, Section 4, of

⁶ See e.g., In re Nichelle L. Campbell, t/a Nasira Transp. Serv., No. AP-02-39, Order No. 6692 (June 14, 2002) (application denied where statement of net worth showed only \$1,500 in cash, no revenue vehicle and no commercial auto insurance).

⁷ See In re Revised Application Forms & Incidental Authority, No. MP-98-39, Order No. 5328 (May 8, 1998) (no comment period); In re Revised Application Form, No. MP-92-42, Order No. 4026 (Dec. 14, 1992); In re Application Form, No. MP-91-04, Order No. 3599 (Jan. 17, 1991).

⁸ 5 U.S.C. § 553(b) (A).

⁹ See 129 F.3d at 204 (adopting federal APA scope of review standards at 5 U.S.C. § 706(2) (a)-(d)).

the Compact within that thirty day period. On the other hand, it is not clear that Old Town would have been aggrieved. Order No. 6805 did not alter the rights or obligations of existing WMATC carriers, and we do not understand Old Town to be complaining that if this was Old Town's application, say an application to acquire control of another WMATC carrier's theme vehicles,¹⁰ Old Town would insist on making public what it undoubtedly considers confidential proprietary financial information.

We will, however, require additional fitness evidence from applicant as a precondition to the issuance of a certificate of authority, as we do in all applications. That evidence shall consist of proof of financial responsibility in the form of a \$5 million WMATC Certificate of Insurance and Policy Endorsement, vehicle safety inspection certificates, copies of the for-hire vehicle registrations and production of vehicles for inspection by Commission staff. We will also require applicant to furnish proof that its initial vehicle operators are properly trained and possess the proper commercial driver's licenses.

B. Public Interest

Our assessment of Old Town's public interest challenge begins with the presumption that promoting competition is consistent with the public interest -- insulating carriers from competition is not.¹¹ Old Town counters with two arguments: (1) that competition from this applicant might not be beneficial to the public; and (2) that applicant may have ties to Double Decker Bus Tours, W.D.C., Inc., whom the Commission investigated for possibly submitting invalid double-decker inspection certificates during the application process.¹²

Old Town argues that it cannot be determined from the application whether applicant is undercapitalized and that allowing an undercapitalized carrier to compete in the market will harm Old Town and ultimately lead to a reduction in the supply of service to the public. Old Town offers no evidence, however, that would sustain this charge, including no analysis of the relevant market, no evidence of what objectively constitutes a proper level of capitalization, and no evidence of Old Town's own capital investment. Most importantly, Old Town offers no expert studies substantiating the novel public harm theory that the protest propounds. Indeed, we reject Old Town's premise that a carrier's success is determined ultimately by the level of initial capitalization. "In the motor carrier industry . . . the

¹⁰ See In re Old Town Trolley Tours of Wash., Inc., & D.C. Ducks, Inc., No. AP-96-44, Order No. 4941 (Sept. 25, 1996) (approving license to operate other WMATC carrier's amphibious vehicles).

¹¹ Order No. 5955 at 3; In re Seth, Inc., t/a Kids Kab, No. AP-93-40, Order No. 4243 at 3-4 (Feb. 9, 1994).

¹² See In re Double Decker Bus Tours, W.D.C., Inc., No. AP-95-21, Order No. 5963 (Aug. 15, 2000) (opening investigation).

basic plant devoted to public use is relatively short-lived, and the strategic financial problem turns upon the current operating costs and their delicate relationship to operating revenues."¹³

On the other side of the ledger, we see that each of applicant's double-decker buses holds approximately twice the number of passengers that an Old Town trolley holds (75-79 passengers vs. 37-42 passengers). So in addition to offering passengers an upper-level perspective not available from Old Town's trolleys, the introduction of double-decker buses into the market might very well result in a reduced increase in traffic congestion as the sightseeing industry grows.

Finally, if as Old Town claims the relevant market is theme vehicle sightseeing, then it would appear that Old Town currently has only one competitor -- Gold Line, Inc., WMATC No. 25, whose theme vehicles are also trackless trolleys. We do not see how perpetuating a theme vehicle duopoly is in the public interest.

We will, however, require applicant to file a list of applicant's shareholders with the number of shares held by each, a list of applicant's directors, a list of applicant's officers and their respective titles, and a statement regarding any relationship applicant may have with Double Decker Bus Tours, W.D.C., Inc., and its New York affiliate New York Apple Tours, Inc., including whether either of these companies is the source of applicant's buses. Although Old Town does not accuse applicant of harboring an undisclosed relationship, and while applicant's reply appears to deny any link, still, it would not hurt to have this minimally intrusive disclosure on the record. If there is an undisclosed relationship, this proceeding will still be open for the purpose of taking any action that may be necessary.

III. REQUEST FOR ORAL HEARING

Because we are not requiring applicant to provide any financial data, we consider Old Town's request for "an oral hearing . . . with opportunity for discovery and cross-examination of relevant witnesses." Old Town's request for hearing is actually two requests: a request for discovery and a request for oral hearing.

A request for discovery in an application proceeding is governed by Commission Rule No. 18-01,¹⁴ which states that a request for subpoena must "specify with particularity the books, papers, or documents sought, and the facts expected to be proved thereby" and

¹³ In re Alexandria, Barcroft & Wash. Transit Co., No. 137, Order No. 703 (Apr. 14, 1967); In re Washington, Va. & Md. Coach Co., No. 135, Order No. 702 (Apr. 14, 1967).

¹⁴ Order No. 5955 at 11; In re Washington Shuttle, Inc., t/a Supershuttle, No. AP-96-13, Order No. 4996 at 3 (Jan. 8, 1997).

will be granted only on a showing of "general relevance and reasonable scope."

A request for oral hearing in an application proceeding is governed by Commission Regulation No. 54-04(b), which provides that a request for oral hearing must state reasonable grounds showing good cause for such a hearing, including a description of the evidence to be adduced and an explanation of why it cannot be adduced without an oral hearing.

Old Town requests that we allow it discovery of applicant's financial information and operating plans and cross-examination of relevant witnesses. We do not see the wisdom in this. On the one side, we already have enough information to decide the application, and applicant will be required to present its vehicles for inspection and furnish confirmatory documents as a condition precedent to the issuance of a certificate of authority. On the other side, we see that Old Town has failed to adduce any evidence that would support its public harm theory -- evidence that is not peculiarly within applicant's possession, custody or control and without which Old Town has no case. Without that foundational evidence and having rejected the premise underlying Old Town's protest, it would not be fitting to burden applicant with the additional expense and delay of discovery and a hearing. We are thus compelled to conclude that as the record stands now, acquiescing to Old Town's request for a fishing expedition and protracted proceedings is unlikely to accomplish anything other than delaying applicant's eventual entry into the marketplace and making applicant a less formidable competitor when it gets there.

The requirement for an oral hearing in an application proceeding was eliminated in 1991.¹⁵ The purpose was to reduce the burden on applicants in order to encourage applications from new carriers and thereby promote competition.¹⁶ Today, oral hearings on applications for operating authority are the exception, not the rule.¹⁷ Old Town has not shown good cause for invoking the exception.

IV. CONCLUSION

For the foregoing reasons, we deny Old Town's Protest and Request for Hearing and approve the application subject to the conditions specified below.

THEREFORE, IT IS ORDERED:

1. That upon applicant's timely compliance with the requirements of this order, Certificate of Authority No. 931 shall be

¹⁵ Order No. 5955 at 13; Order No. 4996 at 3-4.

¹⁶ Order No. 5955 at 13; Order No. 4996 at 3-4; Order No. 4243 at 3.

¹⁷ Order No. 5955 at 13; Order No. 4996 at 4.

issued to City Sightseeing USA Inc., 1730 M Street, N.W., #400, Washington, DC 20036-4517.

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) a list of applicant's shareholders with the number of shares held by each; (b) a list of applicant's directors; (c) a list of applicant's officers and their respective titles; and (d) a statement identifying the source of applicant's vehicles and describing applicant's relationship, if any, with Double Decker Bus Tours, W.D.C., Inc., and New York Apple Tours, Inc.

4. That applicant is hereby directed to present its revenue vehicles and file the following documents within the 180-day maximum permitted in Commission Regulation No. 66: (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 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) for each initial driver, a copy of the driver's Commercial Driver's License 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 double-decker vehicles.

5. 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. McGilvery
Executive Director