WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 10,305

IN THE MATTER OF:	Served March 6, 2007
Application of CITY SIGHTSEEING BUSES LLC for a Certificate of Authority -- Irregular Route Operations	Case No. AP-2006-013

This matter is before the Commission on the Answer/Reply of City Sightseeing Washington DC Inc., (City Sightseeing DC), WMATC Carrier No. 931, to Order No. 10,265, served February 1, 2007.

Applicant has filed a rejoinder, supported by an amended tariff. Neither the Commission's Rules nor Order No. 10,265 provide for any pleadings from applicant at this point. Accordingly, we shall not consider applicant's rejoinder, including the tariff in support, for purposes of this decision.

I. BACKGROUND

The Commission approved the issuance of Certificate No. 1240 over the objection of City Sightseeing DC in Order No. 9651, served June 15, 2006, subject to the precondition that applicant file certain documents and present its vehicle(s) for inspection within 180 days. Applicant failed to meet the deadline, thereby voiding the grant under the terms of Order No. 9651 and Commission Regulation No. 66. Applicant thereafter filed an application for reconsideration of the voiding of the grant, supported by the documents required by Order No. 9651 and proof that applicant's sole vehicle had subsequently passed inspection by Commission staff.

We denied applicant's request for reconsideration in Order No. 10,265 for applicant's failure to specify Commission error, a statutory prerequisite, but because applicant had apparently, if belatedly, satisfied the substantive conditions prescribed in Order No. 9651, we proposed reopening this proceeding under Commission Rule No. 26-04 and issuing Certificate of Authority No. 1240 in accordance with *In re Boone-McNair Transp., LLC*, No. AP-02-66, Order No. 7063 (Mar. 4, 2003). Consistent with the Commission's rules on reconsideration and reopening, however, we decided to seek comment from City Sightseeing DC, first.

II. CITY SIGHTSEEING'S ANSWER/REPLY

City Sightseeing DC opposes reopening the proceeding and issuing Certificate No. 1240 on the grounds that: (1) the precedent cited in Order No. 10,265 does not support the action proposed by the Commission and amounts to "rulemaking by decision"; (2) applicant has not satisfied the conditions specified in Order No. 9651; and (3)

applicant's post-grant conduct demonstrates that it is not fit to receive a certificate of authority.

A. Commission Precedent

We cited *In re Boone-McNair Transp., LLC*, No. AP-02-66, Order No. 7063 (Mar. 4, 2003), in Order No. 10,265 in support of our proposal to reopen this proceeding and issue Certificate No. 1240. City Sightseeing DC challenges our reliance on *Boone-McNair*, arguing that the applicant in *Boone-McNair* attempted to satisfy the conditions of the grant before its 180 days expired, whereas this applicant did not. City Sightseeing DC urges the Commission to rely on *In re Westview Medical & Rehabilitation Services, P.C. Inc.*, No. AP-01-50, Order No. 6557 (Mar. 4, 2002), instead.

First, *Boone-McNair* is on point as a matter of law. The central holding in *Boone-McNair* is that:

> [T]he voiding of a conditional grant of authority pursuant to Regulation No. 66 represents the final decision of the Commission. A party may not petition the Commission to reopen a proceeding and receive additional evidence after a final decision has been entered. The only channel for challenging a final decision of the Commission is filing an application for reconsideration under Article XIII, Section 4, of the Compact.[1]

Applicant here filed a timely application for reconsideration.

Second, *Boone-McNair* is on point as a matter of fact. Although the applicant in *Boone-McNair* attempted to satisfy the conditions of the grant before its 180 days had run, the only ground cited in Order No. 7063 for reopening the proceeding and issuing applicant's certificate of authority was that applicant had finally satisfied the substantive conditions of the grant.[2] As explained below, we find that this applicant has satisfied the substantive conditions of the grant in Order No. 9651.

City Sightseeing DC criticizes this process as "rulemaking by decision" because it has "the effect" of "converting Rule 66's 180 provision for compliance into a rule providing for a 210 day period."[3] We disagree. Regulation No. 66 is primarily a check on the Executive Director. Prior to adoption of Regulation No. 66 in 1991,[4] the Executive Director's power to grant extensions under Rule No. 7-05 was only limited by a requirement to find good cause. Conceivably, the Executive Director could have extended an application proceeding indefinitely. That changed in 1991 with the adoption of Regulation

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[1] Order No. 7063 at 2-3.

[2] *Id.* at 3.

[3] Answer/Reply of City Sightseeing DC at 3.

[4] *In re Rules of Prac. & Proc. & Regs.*, No. MP-91-05, Order No. 3600 (Jan. 17, 1991).

No. 66 and amendment of Rule No. 7-05 to preclude any extension of an application by the Executive Director beyond 180 days after the issuance of a conditional grant. The Commission, on the other hand, may waive Regulation No. 66 in its discretion or for good cause shown under Rule No. 29.[5]

Regulation No. 66 is not controlling once the record is closed, in any event. Closed proceedings are governed by the Commission's rules on reopening and reconsideration, Rules No. 26 and 27, respectively. Other than an amendment incorporating the statutory reversal of an automatic stay provision not relevant here,[6] these two rules were not materially changed when they were recodified in the rulemaking adopting Regulation No. 66 in 1991.[7] Not surprisingly, the Commission has not changed its interpretation of these rules since then either. The Commission has relied on evidence adduced in support of an application for reconsideration to reopen an application proceeding, despite denying reconsideration, both before[8] and after[9] Regulation No. 66 was added in 1991.

And although an applicant may not petition for reopening under Rule No. 26-01 once a decision has been rendered, there is no such limitation on the Commission's right to reopen under Rule No. 26-04. Indeed, it would appear there is no time limit at all.[10] The question

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[5] *See In re* Ariana's Transportation Services, LLC, No. AP-06-057, Order No. 10,156 (Dec. 21, 2006) (waiving Reg. No. 66 for good cause shown); *In re JET Enterprise, LLC, t/a Access Mobility Transp.*, No. AP-05-111, Order No. 9755 (July 19, 2006) (same); *In re Old Town Trolley Tours of Wash., Inc., & D.C. Ducks, Inc.*, No. AP-96-44, Order No. 5053 (Apr. 2, 1997) (same).

[6] The original Compact provided for automatic stay of a final Commission order or decision upon the filing of an application for reconsideration. Act of Sept. 15, 1960, Pub. L. No. 86-794, § 1, tit. II, art. XII, § 16, 74 Stat. 1031, 1046 (1960). Article XIII, Section 4(e), of the current Compact provides just the opposite.

[7] *In re Rules of Prac. & Proc. & Regs.*, No. MP-91-05, Order No. 3600 (Jan. 17, 1991).

[8] *See In re Rapidtrans, Inc.*, No. AP-90-28, Order No. 3606 (Feb. 5, 1991) (applying pre-1991 rules to dismiss reconsideration but reopen and accept compliance documents); *In re P&T Transp. Co.*, No. AP-87-28, Order No. 3131 (Mar. 8, 1988) (denying reconsideration but reopening to accept new evidence).

[9] *Eg., In re Norvel F. Wood, Jr., t/a D C Tours & Transp.*, No. AP-06-070, Order No. 10,263 (Feb. 1, 2007) (denying reconsideration but reopening and accepting compliance documents); *In re Titus A A Nmashie, t/a Tan Transp.*, No. AP-06-066, Order No. 10,235 (Jan. 18, 2007) (same); *In re Dominic McDuff, t/a Safety First Medical Transp.*, No. AP-06-060, Order No. 10,234 (Jan. 18, 2007) (same); *In re Derrick Chapman*, No. AP-06-041, Order No. 10,233 (Jan. 18, 2007) (same).

[10] *See In re Double Decker Bus Tours, W.D.C., Inc.*, No. AP-95-21, Order No. 5963 (Aug. 15, 2000) (reopening application proceeding pursuant to Rule No. 26-04 to determine whether certificate of authority was granted and/or issued in error contrary to the public interest five years earlier); *In re The Greyhound Corp.*, Order No. 3426 (Oct. 26, 1989); (reopening App. No. 96 dismissed 25 years earlier in Order No. 366); *In re Safeway Trails, Inc.*, App. No. 96, Order No. 3337 (May 15, 1989) (same).

then becomes whether the standard of Rule No. 26-04 has been met. Rule No. 26-04 provides that:

> If, after the hearing in a proceeding, the Commission shall have reason to believe that conditions of fact or of law have so changed as to require, or that the public interest requires, the reopening of such proceeding, the Commission will issue an order reopening.

It would not be in the public interest to require an applicant properly before the Commission on reconsideration to consume additional resources, its own as well as the Commission's, prosecuting a new application when the substantive conditions of the grant have been satisfied. Declining to reopen under these circumstances would delay the benefits to the public of increased competition and would be contrary to the public interest by making the new entrant a less formidable competitor through the diversion of financial resources from provision of "safe and adequate transportation service, equipment, and facilities."[11]

The Commission has approved the issuance of certificates of authority in the past in situations similar to this. In those cases, the 180-day approval period had run, and the conditional grant was considered void, but applicants satisfied the substantive conditions of the grant within the thirty-day window for seeking reconsideration.[12] Reopening on the basis of compliance documents timely submitted in support of an application for reconsideration strikes an appropriate balance between the public interest in conserving resources as contemplated by Rule No. 26-04, on the one hand, and the need for closure and maintaining the integrity of the Commission's fitness findings as promoted by Regulation No. 66, on the other.

The *Westview* case cited by City Sightseeing DC is inapposite because the applicant in that case: (1) sought a sixty day extension; (2) still had not satisfied the conditions of the grant thirty-five days after the 180-day deadline had passed; and (3) offered no assurance that sixty days would be enough.[13] Had the applicant in *Westview* satisfied all of the conditions of the grant within thirty days after the 180-day deadline had passed, Commission precedent would have supported reopening the proceeding and issuing applicant's certificate of authority.[14]

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[11] Compact, tit. II, art. XI, § 5(a).

[12] *In re JBT Enterprise, LLC, t/a Access Mobility Transp.*, No. AP-05-111, Order No. 9755 (July 19, 2006) (citing *In re Dillon, Inc.t/a Perfedia Sedan and Limo. Servs.*, No. AP-05-84, Order No. 9572 (May 18, 2006); *In re Tech Systems, Inc.*, No. AP-05-81, Order No. 9571 (May 18, 2006) *In re Smart Ride, Inc.*, No. AP-05-67, Order No. 9570 (May 18, 2006)).

[13] Order No. 6557.

[14] *See In re Old Town Trolley Tours of Wash., Inc., & D.C. Ducks, Inc.*, No. AP-96-44, Order No. 5053 (Apr. 2, 1997). (granting 30-day waiver of Regulation No. 66).

B. Satisfaction of Conditions

City Sightseeing DC contends that applicant has not satisfied the condition prescribed in Order No. 9651 that applicant file a tariff "in accordance with Commission Regulation No. 55" because the tariff filed by applicant does not contain any rules, regulations and practices pertaining to rates, fares, charges and services.

Article XI, Section 14(a), of the Compact provides that: "Each carrier shall file with the Commission, publish, and keep available for public inspection tariffs showing (i) fixed-rates and fixed-fares for transportation subject to this Act; and (ii) practices and regulations including those affecting rates and fares, *required by the Commission.*" (emphasis added).

Commission Regulation No. 55-07(c) requires in turn that a tariff shall contain: "A statement of *the carrier's* rules, regulations, and practices that pertain to rates, fares, charges, transportation, and transportation related services." (emphasis added). This regulation does not say what rules and regulations a carrier must adopt, or even that a carrier must have rules and regulations, but merely that the rules and regulations a carrier has adopted must be stated in the carrier's tariff.

If the words "the carrier's" were absent, then we would agree with City Sightseeing DC that each carrier would be under a duty to adopt rules and regulations for display in a tariff. Indeed, that was exactly the thrust of Regulation No. 55 prior to its amendment in 1991 pursuant to Order No. 3600, which revised the Commission's Rules and Regulations to effectuate amendments to the Compact in 1990.[15]

Prior to the 1990 amendments, the Compact required each carrier to file a tariff showing fares and "to the extent required by regulations of the Commission, the regulations and practices of such carrier affecting such fares."[16] This was implemented through Regulation No. 55-05(3) which stated that each tariff shall contain: "Rules, regulations and practices covering the general application of fares and charges and other pertinent matters." Carriers, thus, were under a duty to adopt rules and regulations and file them in a tariff prior to 1991. That degree of economic regulation, however, was precisely the target of the 1990 amendments.

The 1990 congressional testimony of Carlton R. Sickles, Chairman of the Washington Metropolitan Area Transit Regulation Compact Review Committee, highlights the objectives of the 1990 amendments:

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[15] *In re Rules of Prac. & Proc. & Regs.*, No. MP-91-05, Order No. 3600 (Jan. 17, 1991).

[16] Act of Sept. 15, 1960, Pub. L. No. 86-794, § 1, tit. II, art. XII, § 5(a) 74 Stat. 1031, 1039 (1960) [Original Compact].

> The new Compact is a comprehensive revision that incorporates stylistic and substantive changes to enhance the efficiency of the WMATC. In brief, the revised Compact lowers barriers to market entry and reduces *rate and accounting oversight*, while maintaining a regional approach to transportation and keeping those controls necessary for the security of the public.[17]

Consistent with the objective of reduced rate oversight, carriers today need not include rules and regulations in a general tariff unless they intend to enforce them. The Commission, however, may still hear a complaint about, or inquire into, a particular carrier's practice of operating without rules and regulations and order appropriate relief, including requiring the adoption of specific rules and regulations, as warranted.[18]

City Sightseeing DC also contests applicant's tariff provision allowing children less than five years old to ride free of charge on the theory that this violates the requirement in Regulation No. 55-07(d) that: "Rates, fares, and charges shall be expressed in dollars and cents of United States currency and shall be *universally applicable to all customers*, except for operations covered by contract tariffs." (emphasis added) This language from Regulation No. 55-07(d) is just another way of saying that a carrier shall have only one general tariff and that said tariff shall apply to any passenger not covered by one of the carrier's contract tariffs, if any.

Furthermore, Article XI, Section 16(a), of the Compact recognizes that carriers may establish rates by class of customer, provided that no class enjoys any undue preference. It would appear that applicant's rate policy in this regard is designed to meet the competition. Applicant's competitors, Old Town Trolley Tours of Washington, Inc., WMATC No. 124, and Gold Line, Inc., WMATC No. 14, operate sightseeing buses under a similar per capita rate structure. Old Town does not charge for children under four, and Gold Line generally does not charge for children under three. Such a policy is not unduly preferential.[19]

C. Post-Grant Conduct

Finally, City Sightseeing DC complains that the name "City Sightseeing" appears on page two of applicant's tariff "despite the

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[17] *Granting the Consent of Congress to the Wash. Metro. Area Transit Reg. Compact, Hearing Before the Subcomm. on Admin. Law & Governmental Relations of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 35 (1990) (emphasis added).

[18] *See* Compact, tit. II, art. XI, § 16 (Commission may hear complaint/investigate carrier practice and prescribe lawful regulation); art. XIII, § 1 (Commission may hear complaint/investigate carrier practice and effect just and reasonable relief).

[19] *See In re Interstate Taxicab Rates and Charges*, No. MP-05-032, Order No. 9240 at 6-7 (Jan. 6, 2006) (adopting children-ride-free policies of local taxicab licensing jurisdictions for interstate trips).

specific conclusions of the Commission in Order No. 9651 regarding a public interest issue with respect to name confusion."

Just so the record is clear, we made no findings on the issue of name confusion in Order No. 9651. We did observe, however, that: (1) protestant requested "that the Commission deny the application or, in the alternative, require applicant to "alter its name so as to eliminate confusion;" (2) "[t]he appropriate remedy for potential name confusion is ordering an applicant to propose a different name for use in the Metropolitan District, rather than denying an application;" and (3) "[a]fter the protest was lodged, applicant of its own volition amended its legal name to CSL LLC, yielding the alternative relief sought by protestant."

While it was inappropriate of applicant to submit its rate sheet on "City Sightseeing" letterhead, the subheading clearly states that the rates displayed are those of CSL, LLC. We find that using "City Sightseeing" letterhead under these circumstances is not so egregious as to warrant withholding Certificate No. 1240.[20] Applicant, however, shall refrain from using that name in the Metropolitan District, directly or indirectly, in the future.

III. CONCLUSION

We find that as of January 12, 2007, applicant had satisfied the conditions specified in Order No. 9651. Accordingly, we shall reopen this proceeding and issue Certificate No. 1240, subject to the requirement that within thirty days, applicant shall file a new general tariff omitting any reference to "City Sightseeing".

THEREFORE, IT IS ORDERED:

1. That this proceeding is reopened.

2. That Certificate of Authority No. 1240 shall be issued to CSL, LLC, 1791 Lanier Place, N.W., #34, Washington, DC 20009.

3. That within thirty days, applicant shall file a new general tariff omitting any reference to "City Sightseeing" and that the $50 filing fee under Regulation No. 67-01 shall apply.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS YATES AND CHRISTIE:

William S. Morrow, Jr.
Executive Director

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[20] See *In re Ruchman & Assocs., Inc., t/a RAI, Inc.*, No. AP-91-32, Order No. 3911 (Mar. 25, 1992) (affirming fitness finding in conditional grant order despite subsequent operations prior to issuance of certificate of authority).