WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 13,311

IN THE MATTER OF:	Served June 12, 2012
Application of EXECUTIVE TECHNOLOGY SOLUTIONS, LLC, for a Certificate of Authority -- Irregular Route Operations	Case No. AP-2012-033

This matter is before the Commission on applicant's request for reconsideration of Order No. 13,250, served May 3, 2012, denying without prejudice the above-captioned application for WMATC operating authority, directing applicant to cease providing passenger transportation services under a contract with the United States Department of Homeland Security, Citizenship and Immigration Services, (DHS-CIS), requiring applicant to verify that it has ceased operating the DHS-CIS contract, and directing applicant to corroborate the verification with written statements from the DHS-CIS contracting officer and the WMATC carrier hired to perform said contract on applicant's behalf.

I. STANDARD FOR RECONSIDERATION

Under Article XIII, Section 4, of the Compact, a party 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.[1] The application must state specifically the errors claimed as grounds for reconsideration.[2] The Commission must 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 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]

Applicant's request for reconsideration of Order No. 13,250 was timely received for filing in this proceeding on May 23, 2012.

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[1] Compact, tit. II, art XIII, § 4(a).

[2] Compact, tit. II, art XIII, § 4(a).

[3] Compact, tit. II, art XIII, § 4(b).

[4] Compact, tit. II, art XIII, § 4(c).

[5] Compact, tit. II, art XIII, § 4(d).

[6] Compact, tit. II, art XIII, § 4(e).

II. COLLATERAL ATTACK

Applicant's obligation to cease operating the DHS-CIS contract arose on November 1, 2011, when the WMATC Insurance Endorsement on file for respondent expired without replacement and WMATC Certificate No. 985, which applicant had held since June 30, 2005, became automatically suspended under Regulation No. 58-12.[7] The obligation to confirm timely cessation of all WMATC operations, including the DHS-CIS contract, arose under Commission Rule No. 28 at the same time.[8] Applicant chose not to seek reconsideration of the subsequent revocation order, Order No. 13,167, served February 17, 2012,[9] and the deadline for doing so has passed. The request for reconsideration in this proceeding therefore may be viewed as an impermissible collateral attack on the suspension and revocation orders issued in those other proceedings.[10]

In any event, the assertions urged as grounds for reconsideration in this proceeding offer an insufficient basis for staying or altering Order No. 13,250.

III. ROLE OF EXECUTIVE DIRECTOR

Applicant's overarching argument is that Order No. 13,250 is the product of an abuse of discretion by the Commission's Executive Director. This argument proceeds from a fundamental misunderstanding of the Executive Director's role and the difference between orders issued by the Executive Director under delegated authority and orders issued by the Executive Director as directed by a majority vote of the Commissioners.

Article V, Section 4, of the Compact stipulates that: "The Commission may delegate by regulation the tasks that it considers appropriate." Commission Rule No. 1-04 states that: "The Commission may designate and authorize one or more of its members, employees, or representatives to conduct any inquiry, investigation, hearing, or other process or act necessary to its duties and function." Rule No. 31, titled "Staff of the Commission", provides that:

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[7] *In re Exec. Tech. Solutions, LLC*, No. MP-11-096, Order No. 13,035 (Nov. 1, 2011).

[8] *See In re Adesina Adegbie Ganiyu*, No. AP-10-107, Order No. 12,637 at 2 (Nov. 29, 2010) (Rule No. 28 requires carrier to verify cessation of operations after automatic suspension).

[9] *In re Exec. Tech. Solutions, LLC,* No. MP-10-090, Order No. 13,167 (Feb. 17, 2012).

[10] *See In re Frank Martz Coach Co.*, No. 283, Order No. 1689 (May 13, 1977) (denying petition for reconsideration alleging error in earlier order as to which reconsideration was not sought); *In re D.C. Transit Sys., Inc.*, No. 32, Order No. 981 at 15 (Oct. 17, 1969) (rejecting argument that was contrary to findings in prior order that was not challenged through reconsideration), *aff'd in pertinent part w/o opinion*, 589 F.2d 1115 (D.C. Cir. 1978).

> The Executive Director is in charge of the offices of the Commission. The staff is under the direct supervision of the Executive Director. In the performance of administrative functions, the Executive Director works under the direction of, and is responsible to, the Chairman of the Commission.[11] Otherwise, the Executive Director is under the direction of, and is responsible to, the full Commission.

In addition to the general delegations of authority in Rule Nos. 1-04 and 31, the Commission has issued specific delegations of authority to the Executive Director at various times throughout its history. Those delegations are published in the Commission's Rules of Practice and Procedure and Regulations.[12]

Regulation Nos. 54-07 and 54-08 specify the criteria for determining when the Executive Director may approve operating authority applications. There are no criteria for determining when the Executive Director may deny operating authority applications. The Executive Director does not possess such delegated authority. Indeed, an examination of the record in this proceeding and Order No. 13,250 reveals that the application in this proceeding was not denied by the Executive Director. It was denied by a majority vote of Commission members.

It appears that applicant believes Order No. 13,250 represents the decision of the Executive Director because the order is signed by the Executive Director. The Commission's Executive Directors have signed Commission orders since the Commission began issuing orders in 1961.[13] All Commission orders are signed by the Executive Director, or Acting Executive Director, as proof of authenticity. This is so whether the order is issued under delegated authority or by direction of the vote of a majority of WMATC Commissioners.

Orders issued under delegated authority bear the notation, "FOR THE COMMISSION", just above the Executive Director's signature. Orders not issued under delegated authority bear the notation, "BY DIRECTION OF THE COMMISSION", just above the Executive Director's signature. An examination of Order No. 13,250 reveals that it was issued "BY DIRECTION OF THE COMMISSION; COMMISSIONERS BRENNER AND HOLCOMB:". Commission records show that we directed the Executive Director to issue Order No. 13,250 after we considered the application

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[11] Under Article III, Section 3(b), of the Compact: "The chairman shall be responsible for the Commission's work and shall have all powers to discharge that duty."

[12] Available at www.wmatc.gov.

[13] *See e.g.*, *In re All About Town, Inc.*, No. MP-12-061, Order No. 13,302 (June 4, 2012); *In re D. C. Transit System, Inc.*, Order No. 1 (Mar. 31, 1961).

and evidence filed in this proceeding - including the evidence of applicant's post-revocation operations.

The only exercise of Executive Director discretion that we see in this record consists of requests for additional information from applicant issued by the Executive Director pursuant to Regulation No. 54-04(b), which permits the Executive Director to request "additional information necessary to a full and fair determination of the application." Those requests led to the Commission's discovery of applicant's current DHS-CIS contract. Our decision to deny the application in Order No. 13,250 was based in large part on the existence of that contract as evidence of applicant's ongoing illegal operations. We also considered applicant's less than satisfactory explanation of why the contract had not been disclosed earlier. Ensuring a full and fair determination of the application does not constitute an abuse of discretion.

Having clarified the Executive Director's role, we turn to the remainder of applicant's alleged errors.

IV. MANAGEMENT CHANGES AS EVIDENCE OF FITNESS

To obtain a WMATC certificate of authority, an applicant must establish financial fitness, operational fitness, and regulatory compliance fitness.[14] A determination of compliance fitness is prospective in nature.[15] The purpose of the inquiry is to protect the public from those whose conduct demonstrates an unwillingness to operate in accordance with regulatory requirements.[16] The application in this proceeding was denied because applicant failed to demonstrate regulatory compliance fitness. Applicant complains that recent alleged changes in management offered as evidence of applicant's willingness and ability to conform to the Compact and Commission Rules and Regulations in the future were not given proper weight. We disagree.

As we stated in the final concluding paragraph of Order No. 13,250: "Inasmuch as applicant's violation of the Compact and regulations thereunder appears to be ongoing despite an alleged restructuring of management and the hiring of counsel, we cannot say that applicant has carried its burden of demonstrating regulatory compliance fitness." The use of the word "despite" indicates that we took the allegation of changed management at face value.

But the question is not whether applicant changed management. The question is whether after the revocation of Certificate No. 985, applicant "put in place personnel and/or process sufficient to prevent recurring violations of routine regulatory requirements."[17]

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[14] *In re Nur Corp.,* No. AP-10-178, Order No. 12,730 (Feb. 15, 2011).

[15] *Id.*

[16] *Id.*

[17] *In re HP Transp. Servs., Inc.*, No. AP-07-257, Order No. 11,242 at 2

Applicant's post-revocation violations uncovered by the diligence of Commission staff clearly demonstrate that applicant has yet to do that.

V. LACK OF ORAL HEARING

Applicant also complains that no oral hearing was scheduled in this proceeding.

The requirement for an oral hearing in an application proceeding was eliminated in 1991.[18] The purpose was to reduce the burden on applicants in order to encourage applications from new carriers and thereby promote competition.[19] Today, oral hearings on applications for operating authority are the exception, not the rule.[20]

A request for oral hearing in an application proceeding is governed by Commission Regulation No. 54-04(d), which provides that a request for oral hearing must state the reason for the request, describe the evidence to be adduced, and explain why such evidence cannot be adduced without an oral hearing.

We see no request for oral hearing in this proceeding - either in connection with our decision on the application for a certificate of authority or in connection with our decision on this request for reconsideration.

VI. DUTY TO VERIFY COMPLIANCE

Applicant objects to the requirement in Order No. 13,250 that applicant corroborate verification of its cessation of operations with a written statement from the DHS-CIS contracting officer on the ground that no other WMATC carrier has been required to do this. We have reviewed the two cases offered by applicant in support of this argument, plus two others. In three of these cases the contracting agencies were made aware by other means. In the fourth, notification was deemed unnecessary. But first, we explain why customer notification was the prudent thing to require in this case.

Under Article XI, Section 14(c), of the Compact: "A carrier may not charge a rate or fare for transportation subject to [the Compact] other than the applicable rate or fare specified in a tariff filed by the carrier under [the Compact] and in effect at the time."[21] Under Regulation No. 55, a carrier must file a general tariff if it offers

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(Mar. 31, 2008).

[18] *In re Thomas B. Howell, t/a Presidential Ducks*, No. AP-00-07, Order No. 5955 at 13 (Aug. 10, 2000).

[19] *Id*. at 13.

[20] *Id*. at 13.

[21] *See also* Commission Regulation No. 55-02 ("[n]o carrier shall demand, receive, or collect any compensation for any transportation or transportation-related service, except such compensation as is specified in its currently effective tariff for the transportation or transportation-related service provided.")

standardized service at universally applicable rates.[22] A carrier must file a contract tariff if it offers tailored service on a continuing basis at negotiated rates.[23]

Applicant has a history of failing to timely file contract tariffs. For example, the record in this proceeding shows that applicant entered into a contract with the United States Navy on September 2, 2009. The contract calls for passenger transportation between points in the Metropolitan District. Applicant renewed the Navy contract in November 2011. But applicant did not file the contract tariff for that service until March 22, 2012, after its existence had come to light in the revocation proceeding mentioned above.

After Certificate No. 985 became suspended in 2011, applicant told the Commission that it had secured the services of another carrier, one with WMATC authority, to perform the Navy contract on applicant's behalf. But applicant failed to disclose to the Commission an 8-day lapse, when the other carrier apparently was not available and applicant performed the contract itself while still suspended.[24]

As for the DHS-CIS contract, Commission files show that applicant filed a DHS-CIS Contract Tariff in 2004. The contract term was for one year commencing October 1, 2004,[25] with four one-year option periods, not to exceed 60 months. That tariff expired by its own terms in 2009, at the latest. We can find no record of applicant filing a copy of the current DHS-CIS contract with this Commission.

Considering the lack of any evidence suggesting that applicant might have subcontracted the DHS-CIS service to a duly licensed WMATC carrier, it seemed only prudent to ensure that the contracting agency was aware that applicant had lost its WMATC authority.

As to the cases cited by applicant as examples of disparate treatment, applicant first complains that no similar customer notification requirement was imposed on W & T Travel Services LLC, trading as WTTS, WMATC No. 1372, in 2008 when applicant filed a complaint with the Commission alleging that WTTS was conducting passenger transportation under contract with the National Institutes of Health (NIH) in Bethesda, MD, in vehicles exceeding the 15-person seating capacity restriction in Certificate No. 1372.[26] In that case,

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[22] Regulation No. 55-07; *In re First Choice Health Servs. LLC,* No. MP-11-075, Order No. 13,136 at 6 (Jan. 31, 2012).

[23] Regulation No. 55-08; Order No. 13,136 at 6.

[24] Order No. 13,167 at 5.

[25] *In re Exec. Tech. Solutions, LLC*, No. AP-04-84, Order No. 8725 at 2 (May 19, 2005).

[26] *In re Exec. Tech. Solutions, LLC, v. W & T Travel Servs. LLC, t/a WTTS*, No. FC-08-001, Order No. 11,933 (Apr. 9, 2009).

however, the contract commenced September 1, 2008, and was filed as WTTS's Contract Tariff No. CT-2 on September 4, 2008.[27] Furthermore, WTTS promptly subcontracted patient transportation service to Priority One Services, Inc., WMATC No. 135, for the duration of WTTS's Contract Tariff No. CT-2.[28] This left WTTS with the responsibility of performing the non-patient portion of the contract.[29] Although the NIH contract expressed a preference for the use of 24-passenger buses in connection with non-patient transportation, WTTS was permitted to substitute smaller vehicles, which albeit, it failed to do for four months.[30] In any event, NIH was fully aware of the situation, as evidenced by a letter from the NIH contracting officer lodged in support of a temporary authority application filed by WTTS.[31]

Applicant likewise complains that no similar requirement was imposed on Transcom, Inc., WMATC Carrier No. 582, in a somewhat similar situation. Transcom first applied for WMATC authority in 2000 but did not receive a certificate of authority at that time.[32] Transcom reapplied in 2005 and again in 2007.[33] The Commission noted in 2005 that Transcom had entered into a subcontract with an existing WMATC carrier, Vicar Limousine Service, Inc., WMATC Carrier No. 357, to perform a federal agency passenger contract on Transcom's behalf.[34] The Commission noted in 2007 that the arrangement was still in place and that Transcom and Vicar had entered into a similar arrangement with respect to a second federal agency contract.[35] The arrangements between Transcom and Vicar, however, did not cover a third federal agency contract newly-acquired by Transcom, and the Commission ordered Transcom to cease and desist operations under the new contract.[36] Within a week, Transcom had its WMATC authority, and the issue was moot.

Although there is nothing in the Commission's files to indicate that the agencies involved were notified of Transcom's status and subcontracts, unlike this applicant, Transcom did not have a history of entering into subcontract agreements for service to particular agencies and then ignoring those agreements and resuming illegal operations for those agencies. In retrospect, notice to the affected agencies would not have been inappropriate.

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[27] *Id*. at 5-6.

[28] *Id*. at 6.

[29] *Id*. at 6.

[30] *Id*. at 6-7.

[31] *Id*. at 6 n.18.

[32] *In re Transcom, Inc.*, No. AP-07-192, Order No. 11,040 (Dec. 27, 2007) (citing *In re Transcom, Inc.*, No. AP-00-81, Order No. 6053 (Dec. 4, 2000)).

[33] Order No. 11,040 at 1-2.

[34] *Id*. at 2.

[35] *Id*. at 5-6.

[36] *Id*. at 6.

In a third case, not cited by applicant, Commission records show that in 2010 the Commission directly served the federal agency customers of VGA, Incorporated, WMATC No. 445, with a copy of the Commission order revoking Certificate No. 445.[37]

The fourth case is perhaps the most relevant. The record in Case No. AP-2004-84, the application proceeding in 2004 that culminated in the issuance of Certificate No. 985 to applicant, shows that while the application was pending, applicant's management - of its own volition - notified the DHS-CIS contracting officer that applicant was not authorized to perform the contract. Applicant's management thought that was appropriate then, and we agree. Why applicant's management now thinks it inappropriate is unclear and more than a little troubling.

VII. CONCLUSION

Much of the request for reconsideration focuses outward on others whom applicant would blame for the consequences properly meted out by Commission order for applicant's repetitive violations. In this respect, the new management does not appear dissimilar from the old management.

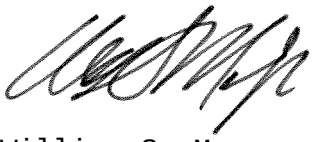
Going forward, applicant should concentrate on changing its corporate culture to one of compliance. Once applicant shoulders the responsibility of installing personnel and processes sufficient to bring these repeat violations to an end, the record in a future application may support a finding of fitness.[38]

THEREFORE, IT IS ORDERED:

1. That the request for reconsideration is denied.

2. That Order No. 13,250 is not stayed.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS BRENNER AND HOLCOMB:



William S. Morrow, Jr.
Executive Director

[37] *In re VGA, Inc.*, No. MP-09-108, Order No. 12,439 (June 11, 2010).

[38] We duly note the application filed June 5, 2012, in Case No. AP-2012-079 while this proceeding was still pending.