WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 5098

IN THE MATTER OF: Served June 11, 1997

Application of SAFE RIDE SERVICES, INC., for a Certificate of Authority -- Irregular Route Operations) Case No. AP-97-03

On April 21, 1997, the Commission issued Order No. 5059, conditionally granting the application of Safe Ride Services, Inc. (Safe Ride), for an irregular-route certificate of authority, over the protests of Choice American Ambulance Service, Inc. (Choice), and Yellow Holding, Inc., trading as Yellow Transportation (Yellow Holding), based in pertinent part on a determination that applicant is fit, willing and able to provide the proposed transportation and that the proposed transportation is consistent with the public interest.

On May 21, 1997, Choice filed an application for reconsideration of Order No. 5059 pursuant to Title II of the Compact, Article XIII, Section 4, and Commission Rule No. 27. On June 2, 1997, Safe Ride filed a reply to the application for reconsideration.

I. STANDARD FOR DECISION

Under the Compact, a party to a proceeding 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 shall state specifically the errors claimed as grounds for reconsideration.[2] A reply may be filed within five days after service of the application, seven if service is by mail.[3] The Commission need not delay action on the application to await a reply.[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]

For the reasons explained below the application will be granted for the purpose of affirming Order No. 5059.

II. CHOICE's ALLEGATIONS OF ERROR

Choice alleges the Commission erred: (A) in holding that Choice lacks standing to protest Safe Ride's application; (B) in declining to consider the adequacy of the evidence presented by Safe Ride in its

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

[2] Id.

[3] Commission Rule No. 27-03.

[4] Id.

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

application as to the fitness of its facilities and vehicles; and (C) in declining to determine the issues raised by Choice with regard to a noncompetition agreement.

A. Choice's Lack of Standing Generally

An applicant bears the burden of establishing fitness and consistency with the public interest.[6] Once an applicant has made its prima facie case, the burden shifts to protestant to contravene that showing, which, in the case of a potential competitor, includes demonstrating that protestant's operations will be endangered or impaired contrary to the public interest.[7]

Choice does not possess a certificate of authority and asserts that it does not have one "because of the Commission's own order and regulation declining jurisdiction over transportation services which hold themselves out to the public as being capable of rendering life support services." The Commission, indeed, has stated that "[a]ny passenger requiring, requesting or expecting transportation in a vehicle outfitted with life support equipment or operated by persons with training in life support procedures should be referred to an ambulance service."[8] We assume without deciding, for the purpose of addressing Choice's standing, that Choice functions as an ambulance service.

The Commission approved Safe Ride's application on the condition that its contract tariff "comply in all respects with Regulation No. 55-09, which states that no tariff may contain a rate, rule or regulation for life support service."[9] If Safe Ride fails to satisfy that condition, Choice will not be injured by the Commission's decision because Safe Ride's conditional grant of operating authority shall become void, and its application shall stand denied.[10] If, on the other hand, Safe Ride satisfies that condition, Choice will not be injured by the Commission's decision because Choice would not be able to perform the transportation described in the conformed contract without a certificate of authority. Either way, Choice will not be injured and, hence, has no standing to complain.[11]

Choice likens itself to the taxicab companies that lacked certificates of authority but were found to have standing in In re Washington Shuttle, Inc., t/a Supershuttle, No. AP-96-13, Order No. 4966 (Nov. 8, 1996), and In re Malek Investment, Inc., t/a

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[6] In re Washington Shuttle, Inc., t/a Supershuttle, No. AP-96-13, Order No. 4966 (Nov. 8, 1996).

[7] Id.

[8] In re Rules of Prac. & Proc. & Regs., Nos. 51, 55 & 63, No. MP-96-21, Order No. 4786 at 4 (Mar. 12, 1996).

[9] Order No. 5059 at 7.

[10] Id.

[11] See Bennett v. Spear, ___ U.S. ___, ___, 117 S. Ct. 1154, 1163 (1997) (injury in fact is irreducible minimum for standing).

Montgomery Airport Shuttle, No. AP-91-44, Order No. 3884 (Feb. 11, 1992). There is a fundamental difference between taxicab service and ambulance service that makes the comparison inapposite. Taxicab service is a species of transportation for hire.[12] Ambulance service is not.[13] Moreover, in the Commission's judgment, it would take a disproportionate increase in the average price of ambulance service to cause a measurable increase in aggregate demand in the transportation-for-hire market.

The Commission recognizes, however, that bulk purchasers of ambulance service such as insurance companies and health maintenance organizations (HMOs) have an incentive to consider making bulk purchases in the transportation-for-hire market in an effort to control costs. If a physician determines that a particular patient does not need life support services, the insurance company or HMO paying for that patient's transportation would have the option of selecting a non-ambulance transportation service.[14] Under this scenario, the incumbent provider of ambulance service might conceivably experience a drop in demand.

There is nothing in the record indicating that Choice is the incumbent ambulance service provider for the Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc. (Kaiser), the other party to Safe Ride's proposed contract tariff. Further, there is nothing in the record to show that Safe Ride will divert a substantial number of passengers from Choice.

The burden on Choice was twofold. First, the protest must have been accompanied by some evidence of the alleged harm to Choice.[15] Second, the evidence must have been sufficient to support a finding that the harm to Choice would result in harm to the public interest.[16] Contrary to Commission Regulation No. 54-04(a), Choice filed a protest which was not sworn and not supported by available evidence. Consequently, the determination that Choice lacks standing still holds.

B. Choice's Lack of Standing to Contest Safe Ride's Operational Fitness

Choice's protest alleged that Safe Ride had not sufficiently established the fitness of its facilities and vehicles. Our response was that we did not see how this affected Choice. We then proceeded

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[12] Compact, tit. II, art. XI, § 1(b). Of course, the service described in Safe Ride's proposed tariff would not qualify as bona fide taxicab service because of the per capita and flat-fare rate structure. In re O. Oluokun, Inc., t/a Montgomery County Limo, No. MP-93-43, Order No. 4173 (Sept. 23, 1993).

[13] In re Rodwell Buckley t/a Elrod Transp. Serv., No. 337, Order No. 1749 (Sept. 16, 1977).

[14] Order No. 4786 at 4-5.

[15] Order No. 4966.

[16] Id.

to note that the party with a substantial interest on this issue is Kaiser and that Kaiser had expressed no concern with the facilities and vehicles described in Safe Ride's application. We further noted that all applicants, including Safe Ride, are required to file proof that their vehicles have passed safety inspection.

On reconsideration, Choice still has not explained how the alleged lack of Safe Ride's operational fitness harms Choice. In fact, it appears to us that just the opposite is true. An operationally unfit Safe Ride poses less of a threat to Choice -- if it poses a threat at all -- than an operationally fit Safe Ride does. If Safe Ride does not offer service that is suitable to its customers, the ultimate arbiters of adequacy, those customers will become disenchanted and turn to other providers.

Choice characterizes the Commission's decision on this point as an abdication of its responsibility to make the initial determination of safety and adequacy contemplated by the Compact. We have abdicated nothing.

On the issue of safety, a protestant bears the burden of demonstrating that an applicant is unable or unwilling to comply with Commission Regulation No. 64, titled "Safety Regulations," which adopts the Federal Motor Carrier Safety Regulations set out in Title 49 of the Code of Federal Regulations.[17] The best evidence that a carrier's vehicles comply with these regulations is proof that such vehicles have passed inspection under 49 CFR Part 396.[18] The Federal Highway Administration has determined that the inspection programs of the District of Columbia, Maryland and Virginia "are comparable to, or effective as, the Federal [periodic inspection] requirements" contained in Part 396.[19] The Commission's routine practice is to condition issuance of a certificate of authority on applicant's filing proof that its vehicles have passed safety inspection by one of the signatories or the United States Department of Transportation. This ensures compliance with all relevant vehicle safety standards.[20] The Commission followed that practice in this proceeding.

On the issue of adequacy, we have examined Safe Ride's description of vehicles and facilities, as supplemented by Safe Ride's Reply to Protest, and find that description adequate to make a finding of fitness. Safe Ride proposes commencing operations with eight sedans and three wheelchair vans. The proposed contract tariff calls for transportation of ambulatory passengers, as well as those in wheelchairs. It is reasonable to infer that the ambulatory will ride in sedans and the others will ride in vans. Choice has introduced no evidence of flaws in the design or manufacture of Safe Ride's vehicles that would make them unsuitable for their intended use.

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[17] In re D.C. Ducks, Inc., No. AP-94-21, Order No. 4361 at 6 (Aug. 9, 1994).

[18] Id.

[19] 59 Fed. Reg. 17830 (1994).

[20] Order No. 4361 at 7.

Accordingly, our finding of Safe Ride's operational fitness still stands.

C. Choice's Failure to Present the Entire Noncompetition Agreement

The Commission also held that even if Choice possessed a certificate of authority, its protest would not be actionable. The gravamen of Choice's protest is that a noncompetition agreement signed by Safe Ride's parent, Laidlaw Medical, prevents Safe Ride from competing against Choice in the Washington, DC, area. Protestants failed to submit a copy of the agreement as required by Commission Regulation No. 54-04(a). We held that we could not enforce an agreement we had not seen.

On reconsideration, Choice still has not furnished the agreement but insists it was error for the Commission not to reach the issues raised by the existence of said agreement in that a copy of an "applicable" page therefrom was submitted to the Commission with an earlier reply to a Safe Ride filing. Choice mistakes prudence for error.

A bedrock principle of contract law is that an agreement must be construed as a whole.[21] Until we see the entire agreement, we cannot be expected to make any determinations regarding its meaning and effect, its enforceability or whether it is even in our province to pass judgment.

Our decision stands.

THEREFORE, IT IS ORDERED:

1. That the application of Choice for reconsideration of Order No. 5059 is granted.

2. That Order No. 5059 is affirmed.

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

William H. McGilvery
Executive Director

[21] E.g., Emergency Medical Care, Inc. v. Marion Memorial Hosp., 94 F.3d 1059 (7th Cir. 1996); Sayers v. Rochester Tel. Corp. Supp. Mgmt. Pension Plan, 7 F.3d 1091 (2d Cir. 1993); Mercer Mgmt. Consulting, Inc. v. Wilde, 920 F. Supp. 219 (D.D.C. 1996).