

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 5400

IN THE MATTER OF:

Served August 31, 1998

Application to Transfer)
Certificate No. 309 from BACH)
VU, Trading as AFFORDABLE)
AIRPORT CHARTER, to AFFORDABLE)
AIRPORT CHARTER, INC.)

Case No. AP-97-47

Investigation of Unauthorized)
Operations of AFFORDABLE AIRPORT)
CHARTER, INC., and Affiliation)
with BACH VU, Trading as)
AFFORDABLE AIRPORT CHARTER,)
WMATC No. 309)

Case No. MP-97-76

This matter is before the Commission on respondents' request for oral hearing, show-cause response to Order No. 5350, and application for reconsideration of Order No. 5350. For the reasons explained below, the request for oral hearing shall be denied, a net civil forfeiture of \$2,500 will be assessed, the application for reconsideration shall be denied, and the transfer application that was denied in Order No. 5350 shall be conditionally approved.

I. RECAP OF ORDER NO. 5350

Order No. 5350 was issued in this matter on June 2, 1998. The order assessed a civil forfeiture against respondents for Affordable Airport Charter Inc.'s (AACI's) unauthorized transportation of passengers in the Metropolitan District in knowing and willful violation of the Compact.¹ The order also denied respondents' request to transfer Certificate No. 309 from Bach Vu to AACI on the ground that having knowingly and willfully violated a Commission cease-and-desist order,² AACI was not fit. Transferring Certificate No. 309 to AACI, therefore, would not be consistent with the public interest. The order further gave Bach Vu thirty days to show cause why

¹ Article XI, Section 6(a), provides: "A person may not engage in transportation subject to this Act unless there is in force a 'Certificate of Authority' issued by the Commission authorizing the person to engage in that transportation."

² Order No. 5178, served August 5, 1997, directed AACI to "refrain from, and/or cease and desist from, transporting passengers for hire between points in the Metropolitan District unless and until otherwise ordered by the Commission."

Certificate No. 309 should not be revoked and fifteen days to request an oral hearing.

II. REQUEST FOR ORAL HEARING

Under Article XI, Section 10(c), of the Compact, the Commission may suspend or revoke a certificate of authority after notice and hearing. A paper hearing is normally all the statute requires.³ An oral hearing is unnecessary, in any event, if no material issue of fact is in dispute.⁴

Bach Vu requests an oral hearing to show that he did not intend to violate the Compact when, as an officer and controlling shareholder, he permitted AACI to transport passengers for hire in the Metropolitan District without a certificate of authority and in violation of a Commission cease and desist order. He argues that his lack of intent cannot be demonstrated without an assessment of his credibility and sincerity and that this can only be adduced by putting him on the witness stand.

Bach Vu's alleged lack of intent to violate the Compact is not at issue. In order to suspend or revoke a certificate of authority, the Commission must find that a carrier's noncompliance with the Compact was "willful." The term "willful" does not mean with evil purpose or criminal intent; rather, it describes conduct marked by careless disregard.⁵ A finding of intent to evade or avoid regulation is not a prerequisite to a determination of willful noncompliance.⁶

The request for oral hearing shall be denied accordingly.

III. SHOW CAUSE RESPONSE

In his show-cause response, Bach Vu adopts the prior affidavit of Rufus Akintimehin (Bach Vu's operations manager) and based on that and newly submitted evidence argues that Certificate No. 309 should not be revoked.

³ E.g., In re Bill Appell, t/a Personal Pace Tours/Tech Tours Wash., No. MP-95-18, Order No. 4618 (June 26, 1995) (carrier suspended and revoked without oral hearing for failure to file annual report and pay annual fee).

⁴ In re Diamond Tours, Inc., No. MP-82-06, Order No. 2347 (June 24), aff'd on reconsideration, Order No. 2354 (Aug. 5, 1982).

⁵ In re All-Star Presidential, LLC, & Presidential Coach Co., & Presidential Limo. Serv., Inc., No. MP-95-82, Order No. 4961 (Oct. 29, 1996); In re Capital Tours & Transp., Inc., t/a Suburban Airport Shuttle, No. MP-95-88, Order No. 4765 (Feb. 13, 1996); Order No. 4618.

⁶ In re Air Couriers Int'l Ground Transp. Servs., Inc., t/a Passenger Express, & United Mgmt. Corp., t/a Passenger Express, No. MP-92-05, Order No. 3955 (June 15, 1992).

Mr. Akintimehin's prior affidavit does not help Mr. Vu. The show cause portion of Order No. 5350 was predicated in large part on the affidavit's confirmation that Mr. Vu permitted AACI to continue operating after the cease and desist order had issued.⁷ In assessing a civil forfeiture against respondents, we found that Mr. Vu had acted knowingly and willfully within the meaning of the statute. Mr. Vu has presented no evidence to the contrary. Mr. Vu's new evidence, on the other hand, militates against revocation.

The evidence is in two parts. First, on July 1, 1998, respondents paid the \$5,500 forfeiture assessed in Order No. 5350. Second, also on July 1, 1998, Mr. Vu submitted a copy of a bank statement in the name of "Bach Vu" trading as "Affordable Airport Charter," indicating that Mr. Vu resumed operations as a sole proprietor on or about June 1, 1998, from which we may conclude that AACI ceased operating at that time as claimed in Mr. Vu's response.

Payment of a Commission assessed forfeiture is evidence of a carrier's ability and willingness to abide by Commission regulations. AACI's apparent cessation of operations speaks for itself.

In consideration of the foregoing, we will not revoke Certificate No. 309 at this time; however, in light of the willful nature of AACI's unlawful operations for five months in 1998 -- which were not considered in assessing the \$5,500 forfeiture -- we will assess an additional forfeiture of \$2,500 against AACI and Bach Vu.⁸

Bach Vu also is admonished that Regulation No. 62 prohibits him from operating vehicles titled in AACI's name unless and until one or more leases covering said vehicles, and identifying Mr. Vu as the lessee, are filed with the Commission.

IV. APPLICATION FOR RECONSIDERATION

Under the Compact, a party affected by a final order of the Commission may file within 30 days of its publication a written application requesting Commission reconsideration of the matter involved.⁹ The application must state specifically the errors claimed as grounds for reconsideration.¹⁰

⁷ See Order No. 5350 at 2 & n.5, 4 (citing Akintimehin affidavit and discussing violation of cease-and-desist order as ground for show cause).

⁸ The earlier forfeiture of \$5,500 was assessed for 363 days of unlawful operations in 1997. Order No. 5350 at 2. Five-twelfths of \$5,500 is \$2,292.

⁹ Compact, tit. II, art XIII, § 4(a).

¹⁰ Compact, tit. II, art XIII, § 4(a).

Bach Vu and AACI argue in their application for reconsideration that the Commission erred in Order No. 5350 by not approving the transfer application subject to a period of probation for AACI.

The first issue is whether Order No. 5350 is a final order within the meaning of the statute.

An order is final if it imposes an obligation, denies a right, or fixes some legal relationship, usually at the consummation of an administrative process. Normally, in an adjudication a final order is one that disposes of all issues as to all parties. Viewed in this light a final order in a licensing proceeding . . . would be an order granting or denying a license.¹¹

Although Order No. 5350 is the equivalent of an order denying a license, it does not dispose of all issues as to all parties. It does not dispose of the issue of Bach Vu's fitness, the subject of this order. Furthermore, any reconsideration of our findings on Bach Vu's fitness in this order would require reconsideration of our findings on AACI's fitness in Order No. 5350, inasmuch as Bach Vu controls AACI. Reconsideration of Order No. 5350, therefore, should wait until this order has been issued. All of our findings and rulings in this consolidated proceeding, including those in this order and Order No. 5350, may be reconsidered at that time without prejudice to any of the parties and without raising the potential for piecemeal judicial review that could result if we allowed separate reconsideration of Order No. 5350.

Because we hold that Order No. 5350 is not a final order within the meaning of the statute, the application for reconsideration shall be denied. We will, however, vacate our denial of the transfer application for the following reasons.

When an applicant has a record of violations, the Commission usually considers the following factors in assessing the likelihood of 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.¹² We did not consider

¹¹ Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 680 F.2d 810, 815 (D.C. Cir. 1982) (citations omitted).

¹² In re Megaheds, Inc., t/a Megaheds Transp., No. AP-97-24, Order No. 5113 (June 26, 1997); In re Madison Limo. Serv., Inc., t/a Madison Limo, No. AP-96-18, Order No. 4857 (May 22, 1996); In re William J. Appell, t/a Tech Tours, No. AP-96-01, Order No. 4830 (May 8, 1996).

these factors in Order No. 5350, and we did not have Bach Vu's new evidence before us. We will reassess our decision in light of these factors and the new evidence.

Willful failure to comply with a cease-and-desist order of the Commission is a serious violation, as is operating without authority. AACI's violations -- as permitted by its controlling shareholders and officers, Bach Vu and Rufus Akintimehin -- were flagrant, and we find no mitigating circumstances.

On the other hand, respondents have paid the forfeiture we assessed against them for unlawful operations in 1997, and they have produced evidence indicating that AACI has ceased operations within our jurisdiction. From this we may conclude Bach Vu and AACI are willing and able to comply with the Compact in the future. Once the additional forfeiture of \$2,500 is paid, respondents' correction of past mistakes will be complete. Accordingly, subject to a period of probation as prescribed below, we believe the record now supports a finding of prospective compliance fitness with regard to AACI.

We must also examine AACI's financial fitness and operational fitness before deciding whether to approve or deny the transfer application.¹³

AACI proposes refiling Bach Vu's tariff as its own and commencing operations with seven vans.

AACI filed a balance sheet as of December 31, 1997, showing assets of \$60,158; liabilities of \$35,000 (including \$17,000 in stockholder loans); and equity of \$25,158. AACI's projected operating statement for the first twelve months of WMATC operations shows operating income of \$247,851; expenses of \$248,773; and a net loss of \$922.

Based on the evidence in this record, the Commission finds AACI fit, willing, and able to perform the proposed transportation properly and to conform with applicable regulatory requirements and, therefore, that the transfer of assets to AACI, including Certificate No. 309, is consistent with the public interest -- provided that AACI serve a 180-day period of probation as a condition of approval pursuant to Article XI, Section 7(d), such that a subsequent finding that AACI has willfully violated the Compact, or the Commission's rules, regulations

¹³ See In re Ira A. Austin, Sr., t/a Ira's Transp. Serv., & Ira's Transp. Serv., Inc., No. AP-97-42, Order No. 5193 (Sept. 9, 1997) (transfer of assets, including WMATC certificate, by sole proprietor in exchange for controlling interest in corporation is governed by certificate transfer section and raises fitness issues only); In re Washington Shuttle, Inc., t/a Supershuttle, No. AP-96-13, Order No. 4966 (Nov. 8, 1996) (fitness inquiry focuses on financial fitness, operational fitness, and regulatory compliance fitness).

or orders thereunder, during the period of probation shall constitute grounds for suspension and/or revocation of Certificate No. 309, regardless of the nature of the violation.

THEREFORE, IT IS ORDERED:

1. That the request for oral hearing is denied.

2. That the application for reconsideration is denied.

3. That pursuant to Article XIII, Section 6, of the Compact, the Commission assesses a civil forfeiture against respondents for knowing and willful violations of the Compact in 1998, in the amount of \$250 per day for 151 days, or \$37,750, of which all but \$2,500 is suspended.

4. That respondents shall pay to the Commission within thirty days of the date of this order, by money order, certified check, or cashiers check, the sum of two thousand five hundred dollars (\$2,500), for knowing and willful violations of the Compact.

5. That the denial of the transfer application in Order No. 5350 is vacated.

6. That the transfer of assets to AACI, including Certificate No. 309, is approved subject to the following conditions.

a. Bach Vu and AACI shall timely pay the forfeiture assessed herein.

b. AACI shall file the following documents within thirty days of the date of this order: (i) evidence of insurance pursuant to Commission Regulation No. 58 and Order No. 4203; (ii) an original and four copies of a tariff or tariffs in accordance with Commission Regulation No. 55; (iii) 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; (iv) evidence of ownership or a lease as required by Commission Regulation No. 62 for each vehicle to be used in revenue operations; (v) 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 (vi) a notarized affidavit of identification of vehicles pursuant to Commission Regulation No. 61.

c. AACI shall serve a 180-day period of probation commencing on the day Certificate No. 309 is reissued in AACI's name, such that a subsequent finding that AACI has willfully violated the Compact, or the Commission's rules, regulations or orders thereunder, during the period of probation shall

constitute grounds for suspension and/or revocation of Certificate No. 309, regardless of the nature of the violation.

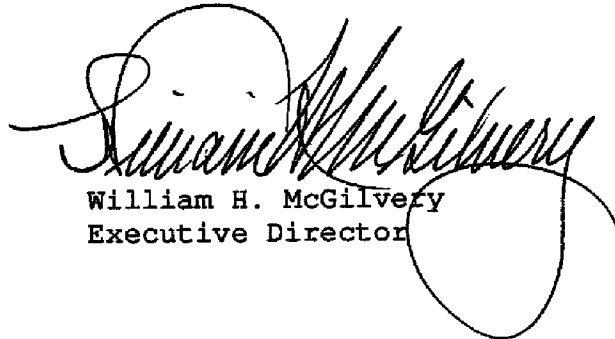
7. That upon applicants' timely compliance with the payment and filing requirements prescribed herein, Certificate of Authority No. 309 shall be reissued to Affordable Airport Charter, Inc., 8041 Queenair Drive, #4, Gaithersburg, MD 20879.

8. That AACI may not transport passengers for hire between points in the Metropolitan District pursuant to this order unless and until Certificate of Authority No. 309 has been reissued in accordance with the preceding paragraph.

9. That the full civil forfeiture of \$37,750 shall stand reinstated and become immediately due and payable upon applicant's failure to timely pay the net forfeiture of \$2,500.

10. That the approval of transfer herein shall be void and the application shall stand denied upon applicants' failure to timely comply with the payment and filing requirements prescribed herein.

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



William H. McGilverey
Executive Director