

Before the Federal Transit Administration
U.S. Department of Transportation
49 CFR Part 604
Request for an Advisory Opinion and Cease and Desist Order:
Jean's Bus Service, Re: Clemson Area Transit
Docket No. FTA-2008-0023

Advisory Opinion and Cease and Desist Order 08-24 (*Subscription Service*)

On August 27, 2008, Jean Cauley, President of Jean's Bus Service (JBS), requested an advisory opinion and cease and desist order concerning university service provided by Clemson Area Transit (CAT). Specifically, JBS expresses concern regarding CAT's provision of park and ride lot service to the Foothills YMCA. JBS alleges that on August 14, 2008, JBS entered into a contract with Foothills YMCA to provide park and ride shuttle service for Clemson University football games. On August 21, 2008, however, Foothills YMCA called JBS to cancel the contract and advised JBS that it had entered into an agreement with CAT to perform the service. JBS asserts that CAT's activity has cost it \$13,600.00.

1. Additional Information Submitted by the Parties

On September 17, 2008, the Federal Transit Administration (FTA) sent an email to Al Babinicz of CAT requesting a response to the request for an advisory opinion and cease and desist order. On September 18, 2008, Mr. Babinicz sent a response stating that it does not offer any charter services and it does not have a contract with Foothills YMCA to perform the park and ride shuttle service. On September 25, 2008, FTA called CAT to speak with Mr. Babinicz regarding his email response to JBS's advisory opinion and cease and desist request. FTA spoke with Mr. Babinicz and Mr. Rick Cotton. During that conversation, CAT agreed to submit a more formal response regarding JBS's allegations.

On September 26, 2008, CAT submitted a written response to JBS's allegations. The response outlines CAT's relationship with Clemson University (Clemson) and notes that Clemson provides approximately \$1.1 million to CAT for operating and capital assistance. CAT also described its "SUITS" service that it previously provided to Clemson, but discontinued because of the revised charter regulation. Under "SUITS," Clemson could request a CAT bus for a specific event and CAT would bill Clemson for that service. CAT asserts that after speaking with FTA staff, it discontinued this service because it clearly fit within the revised definition of charter service. In its place, CAT provides "subscription" service to Clemson, which is shuttle service that Clemson pays for in bulk (\$100,000). CAT does not bill Clemson for individual service to specific events.

In addition, CAT responded directly to the allegations contained in JBS's request for an advisory opinion and cease and desist order. CAT states that it does not know why Foothills YMCA sent out a request for proposals for park and ride shuttle service. It also

does not know why Foothills YMCA cancelled its contract with JBS. CAT alleges that it was never involved in contract discussions with Foothills YMCA and CAT explained to Clemson that it could not provide charter services for the Foothills YMCA. According to CAT, Clemson requested that CAT provide park and ride shuttle service to the Foothills YMCA on August 14, 2008. CAT believes Clemson requested this service because football fans crossing the Lake Hartwell Bridge would present an extremely hazardous condition. CAT asserts that “no third party bills have been or will be paid after this service is provided and any person can board the bus regardless of where they park on the west side of Lake Hartwell.”

FTA contacted the South Carolina Department of Transportation (SCDOT) regarding JBS’s allegations. SCDOT was able to obtain and provided to FTA a copy of CAT’s agreement with Clemson for the 2008-2009 school year. The agreement confirms CAT’s assertions that it removed the charter services from the agreement and instead provides subscription service to Clemson. The agreement specifically states: “Pursuant to changes by the FTA and SCDOT grant agencies, the City of Clemson will not provide charter service. However, Clemson University desires to receive and pay for Subscription Transportation Services that will be provided during this contract period. . . . Subscription services totaling 1,667 hours will be available to the university for the amount of one-hundred, thousand dollars . . .”

Finally, on September 29, 2008, JBS submitted photos of the park and ride service provided by CAT to the Foothills YMCA. The photo depicted a CAT bus with a message board indicating “YMCA Shuttle.”

2. Regulatory Requirements

Under 49 CFR Section 604.3(a)(1), charter service is “transportation provided by a recipient at the request of a third party for the exclusive use of a bus or van for a negotiated price.” The regulation also lists several “characteristics” of charter service that FTA may consider when determining whether service is charter. Those characteristics are: (1) A third party pays the transit provider a negotiated price for the group; (2) Any fares charged to the individual members of the group are collected by a third party; (3) The service is not part of the transit provider’s regularly scheduled service, or is offered for a limited period of time; or (4) A third party determines the origin and destination of the trip as well as scheduling.

In addition, the word exclusive in the definition of charter is defined as “service that a reasonable person would conclude is intended to exclude members of the public.”

Finally, in considering a request for a cease and desist order the Chief Counsel “may grant a request for a cease and desist order if the interested party demonstrates, by a preponderance of the evidence, that the planned provision of charter service by a recipient would violate this part.” 49 C.F.R. Section 604.24(a). Furthermore, the “Chief Counsel shall consider the specific facts shown in the signed, sworn request for a cease

and desist order, applicable statutes and regulations, and any other information that is relevant to the request.” 49 C.F.R. Section 604.23(b).

3. Analysis

At the outset, FTA must first address CAT’s assertion that the service it provides is not charter because “No third party bills have been or will be paid after this service is provided and any person can board the bus regardless of where they park on the west side of Lake Hartwell.” From this statement, it is clear that CAT misunderstood the advice provided by FTA staff. As noted above, the definition of charter service is “transportation provided at the request of a third party for the exclusive use of a bus or van for a negotiated price.” The definition makes no mention of billing a third party for the service. Thus, the fact that CAT does not bill Clemson for each event is not determinative of whether the service is charter. In fact, FTA advised CAT that if it has an operating budget sufficient to allow it to provide free charter service to Clemson, then that sort of service would not be considered charter because there is no “negotiated price.”

Furthermore, the service described in CAT’s agreement with Clemson as “subscription service” appears to be another name for charter service. Subscription service typically is a standing reservation for demand response service or regularly scheduled service that is open to the public, but is provided at the request of a third party and usually paid for by a third party. An example of the latter would be a case where a business park pays a transit provider to extend its route out to the business park for the convenience of its employees. The route is fixed route and any member of the public can board the bus and pay the regular fixed route fare. In this case, however, Clemson requests irregular services from CAT for groups of individuals typically involving the exclusive use of a bus or van. While CAT correctly asserts the charter regulations allow for “short-term changes in transit routes to accommodate local conditions,” the regulations do not contemplate that such changes would be for-profit. Rather, the revised definition of charter service allows for free service when a third party requests transportation or service at the regular fixed-route fare when the transit agency initiates service. Here, CAT specifically contracted with Clemson to provide charter service (renamed subscription service) for the sum of \$100,000. The agreement between CAT and Clemson clearly ties the performance of exclusive bus service with specific funding for those services.

Next, with regard to the service described in JBS’s request for an advisory opinion and cease and desist order, Clemson requested service for the Foothills YMCA park and ride service. CAT performed the service as evidenced by its own admission as well as the photographic evidence submitted by JBS. Furthermore, FTA obtained from the Foothills YMCA website a copy of the Foothills YMCA parking area. It is clear from the map that a member of the public wishing to board the bus at Foothills YMCA would have to walk a good distance from Highway 93 to reach the parking area. Thus, a reasonable person would conclude the service is designed to exclude members of the public. This conclusion is further supported by the fact that the CAT bus had a message board

indicating "YMCA Shuttle," which also sends a message to the public that the service is exclusive for those parking at the Foothills YMCA.

In addition to providing exclusive service, the service provided by CAT at the request of Clemson for the Foothills YMCA meets all of the characteristics of charter service. First, a third party, Clemson, pays the transit provider a negotiated price for the group. Second, fares charged to individual members of the group are collected by a third party, Foothills YMCA. Third, the service is not part of CAT's regularly scheduled fixed route service and is offered for a limited period of time. Fourth, Clemson determined the origin and destination of the trip as well as scheduling.

4. Cease and Desist

Given the above analysis, it is appropriate to issue a cease and desist order in this case. JBS demonstrated by a preponderance of the evidence that it is more likely than not that CAT is providing unauthorized charter service to the Foothills YMCA at the request of Clemson. It is also clear that JBS suffered an economic loss as a result of this service that is distinct from any loss that might be suffered by other private providers in the area. Namely, JBS had an agreement with the Foothills YMCA to perform the service and the contract was cancelled in favor of CAT performing the service.

In order to perform this service within the charter regulations set out at 49 C.F.R. Part 604, CAT would have to send a notice to the list of registered charter providers describing the service and providing an opportunity for registered charter providers to bid on the service. To that end, and given that the football season is well underway, CAT will have thirty (30) days to send notice to the list of registered charter providers and allow those providers 72 hours to respond to the notice. If no registered charter provider responds affirmatively to the notice, then CAT may provide the service under the exception contained in 49 C.F.R. Section 604.9.

This advisory opinion and cease and desist order applies only to the service described in JBS's letter dated August 27, 2008, and is based on the facts as presented by the opinion requester. Should new or different facts be presented or the facts of the actual service provided differ in any way, which are deemed significant by FTA in the determination of charter service, this opinion shall have no force or effect.

For these reasons, we advise JBS that its request for a cease and desist order is hereby **GRANTED** because CAT's park and ride service for Foothills YMCA constitutes "charter" service. CAT has a thirty (30) day transition period to cease providing the service.

A party may appeal the cease and desist order pursuant to 49 C.F.R. Part 604, Subpart J, by filing an appeal within 21 days after the Chief Counsel's decision is served on the parties. Any appeal must be sent to ombudsman.charterservice@dot.gov and must follow the procedures for service set out at 49 C.F.R. Sections 604.30 and 604.31.

Dated this 24th day of October 2008.

for SA Seckle

Severn E.S. Miller
Chief Counsel