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B-160204 December 7, 1966

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Date: 1966-12-07

B-160204 December 7, 1966

The Honorable Bob Wilson House of Representatives

Dear Mr. Wilson:

The enclosure whith your letter of October 4, 1966, concerns the legality of providing a grant under the Urban Mass Transportation Act of 1964 to the City of San Diego, (City), California. The problem involved arises in connection with the definition in subsection 9(d)(5) of the act, 49 U.S.C. 1608(d)(5), excluding charter or sightseeing service from the term "mass transprotation."

It appears from the enclosure with your letter that the City originally included in its great application a request for funds to purchase 8 buses designed for charter service. Subsequently the City amended its application by deleting a request for a portion of the funds attributable to the charter bus coaches. However, in addition to the 8 specially designed charter buses initially applied for, the City allegedly uses about 40 of its transit type buses to a substantial extent for charter- type services. In light of htese factors surrounding the application by the City, the enclosure requests our opinion with regard to the legality of grants under the act as it applies to certain matters (in effect questions), which are numbered and quoted below and answered in the order presented.

Number one:

"The grant of funds to a City to purchase buses and equipment which are intended for substantial use in the general charter bus business as well as in the Mass Transportation type business."

The Urban Mass Transportation Act of 1964 does not authorize grants to assist in the purchase of buses or other equipment for any service other than urban mass transprotation service. Section 3(a) of the act limits the range of eligible facilities and equipment to "busses and other rolling stock, and other real or personal property needed for an efficient and coordinated mass transportation system." In turn, "mass transprotation" is defined, in section 9(d)(5) of the act, specifically to exclude charter service. We are advised by the Department of Housing and Urban Development (HUD) that under these provisions, the Department has limited its grants to the purchase of buses of types suitable to meet the needs of the particular kind of urban mass transportation service proposed to be furnished by the applicant.

HUD further advised that:

"One of the basic facts of urban mass transportation operations is that the need for rolling stock is far greater during the morning and evening rush hours on weekdays than at any other time. For that reason, any system which has sufficient rolling stock to meet the weekday rush-hour needs of its customers must have a substantial amount of equipment standing idle at other times, as well as drivers and other personnel being paid when there is little for them to do. To relieve this inefficient and uneconomical situation, quite a number of cities have offered incidental charter service using this idle equipment and personnel during the hours when the same are not needed for regularly scheduled runs. among the cities so doing are Cleveland, Pittsburgh, Alaneda, Tacoma, Detroit and Dallas.

"Such service contributes to the success of urban mass transportation operations by bringing in additional revenues and providing full employment to drivers and other employees. It may in some cases even reduce the need for Federal Capital grant assistance.

"We do not consider that there is any violation of either the letter or the spirit of the Act as a result of such incidental use of buses in charter service. to guard against abuses, every capital facilities grant contract made by this Department contains the following provisions:

"'Sec. 4. Use of Project Facilities and Equipment-The Public Body agrees that the Project facilities and equipment will be used for the provision of mass transportation service within its urban area for the period of the useful life of such facilities and equipment. The Public Body further agrees that during the useful life of the Project facilities and equipment it will submit to HUD such financial statements and other data as may be deemed necessary to assure compliance with this Section'"

It is our view that grants may be made to a city under section 3(a) of the act to purchase buses needed by the city for an efficient and coordinated mass transportation system, even though the city may intend to use such buses for charter use when the buses are not needed on regularly scheduled runs (i.e. for mass transportation purposes) and would otherwise be idle.

Number two:

"Whether a grant of such funds is proper if charter bus use is incidental to mass public transportation operations. If no, what is the definition of 'incidental use.'"

We are advised by HUD that under its legislative authority, it cannot and does not take charter service requirements into consideration in any way in evaluating the needs of a local mass tranportation system for buses or other equipment.

HUD further advises that:

"However, as indicated above, we are of the opinion that any lawful use of project equipment which does not detract from or interfere with the urban mass transportation service for which the equipment is needed would be deemed an incidental use of such equipment, and that such use of project equipment is intirely permissible under our legislation. What uses are in fact incidental, under this test, can be dtermined only on a case-by-case basis."

In view of what we stated above in answer to the first question, the first part of question two is answered in the affirmative.

As to the second part of the question, in Security National Insurance Co. v. Sequoyah Marina, 246F.2d 830, "incident" is defined as meaning "that which apportains to something else which is primary." Thus, we cannot say HUD'S definition of "incidental use" as set forth above is unreasonable. Under the act involved grants may be made to purchase buses only if the buses are needed for an efficient and coordinated mass transportation system. It would appear that if buses are purchased in order to meet this need, and are, in fact, used to meet such need, the use of such buses for charter service when not needed for mass transportation services would, in effect, be an "incidental use," insofar as pertinent here. In our opinion such incidental use would not violate the provisions of the 1964 act.

Number three:

"The great of funds for mass public transportation purposes to a City which has expressed an intent to engage in the general charter bus business when such funds would in effect constitute a subsidy to the City of its intended charter bus operations; i.e. freeing Municipal funds with which to purchase charter bus equipment."

Section 4(a) of the 1964 Act (49 U.S.C. 1603(a)) provides, in part, as follows:

" * * * The Administrator [now Secretary], on the basis of engineering studies, studies of economic feasibility, and data showing the nature and extent of expected utilization of the facilities and equipment, shall estimate what portion of the cost of a project to be assisted under section 1602 of this title cannot be reasonably financed from revenues- which portion shall hereinafter be called 'net project cost'. The Federal grant for such a project shall not exceed two-thirds of the net project cost. The remainder of the net project cost shall be rpovided, in cash, from sources other than Federal funds."

It is clear from the legislative history of the act involved that the "revenues" to be considered are mass transportation system revenues including any revenues from incidental charter operations. There is nothing in the language of the act which requires HUD to take into account the status of the general funds of an applicant city in determining how much capital grant assistance to extend to that city.

It should be noted that in a sense nearly every capital granted to a city constitutes a partial subsidy of evey activity of the city which is supported by tax revenues, since it frees tax revenues for such other uses.

Number four:

"With specific reference to the application of the City of San Diego for funds under its application to the Department of Housing and Urban Development dated June 2, 1966, whether the Act permits a grant to purchase equipment wherein 25 per cent of such equipment will be used either exclusively or substantially in the operation of charter bus services."

As to the City of San Diego's grant application, we have been advised by HUD as follows:

"As explained above, the Act authorizes assistance only for facilities to be used in mass transportation service. We could not, therefore, assist San Diego in purchasing any equipment to be used 'exclusively' in the operation of charter bus service. Furthermore, as also explained above, assisted mass transportation equipment can be used only incidentally for such charter service.

"Whether equipment used 'substantially' in such service qualifies under this rule can be answered only in the light of the specifics of the San Diego situation. We have already, during our preliminary review of the City's application, disallowed about $150,000 of the proposed project cost which was allocated to the purchase of eight charter-type buses.

"The final application of the City of San Diego is presently under active consideration by this Department. In particular, we have requested the City to funish additional informatio as to the nature and extent of the proposed use, if any, of project facilities and equipment in charter service, so that we can further evaluate the application under the criteria above set forth. We have also requested dimilar information from Mr. fredrick J. Ruans, who has filed a taxpayers' suit (Superior Court for San Diego County Civil #297329) against the City, contesting its authority to engage in charter bus operations."

As indicated above, it is clear that under the act in question grants may not legally be made to purchase buses to be used "exclusively" in the operation of charter bus service. However, in view of the purposes of the act involved it is our opinion that a city which has purchased with grant funds buses needed for an efficient mass transportation system, is not precluded by the act from using such buses for charter service during idle or off-peak periods when the buses are not needed for regularly scheduled runs. As indicated above, such a use would appear to be an incidental use.

The fourth question is answered accordingly.

As requested, the correspondence enclosed with your letter is retruned herewith.

Sincerely yours,

Frank H. Weitzel Assistant Comptroller General of the United States

Enclosure