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March 16, 2011

MAR 17 2011

VIA OVERNIGHT MAIL

Mr. Dennis Weldon, Jr.
General Counsel
Philadelphia Parking Authority
301 Market Street, 2nd Floor
Philadelphia, Pennsylvania 19104

Re: Philadelphia Parking Authority Notice of Proposed Rulemaking on Act 94 of 2004

Dear Mr. Weldon:

The American Bus Association, Inc. ("ABA") appreciates the Philadelphia Parking Authority's interest in regulating certain commercial motor vehicle operations in Philadelphia such as taxicab and limousine services. ABA member companies daily bring regular route and charter/tour buses into the City of Philadelphia and we are committed to working with local government officials to find solutions that meet the transportation needs of the metropolitan area.

ABA has concluded, however, that the Parking Authority's proposed rules implementing Act 94 of 2004 (the "Act") would, if enacted, be in violation of federal law and constitutional principles. Your inclusion of intercity buses as "limousines," which subjects them to registration and other requirements, is unlawful.

The Act generally amended Pennsylvania law to grant authority to Philadelphia, as a first class city, over certain matters once under the jurisdiction of the Pennsylvania Public Utilities Commission. Included were amendments relating to authority over limousines. The Act amended the definition of "limousine service" to include

• local, nonscheduled common carrier service for passengers on an exclusive basis for compensation, and

• common carrier service for passengers for compensation to and from any airport, railroad station or hotel. 53 Pa. C.S. § 5701.

Exempt from the definition of limousine service are taxicab service, service that was otherwise exempt from the Pennsylvania PUC prior to the effective date of the subparagraph, other paratransit service, and employee commuter van pools. *Id.*

The Parking Authority has apparently taken the position that the Act includes large charter/tour and scheduled service buses operating within Philadelphia. The proposed rulemaking implementing the Act defines "limousine" as "A vehicle meeting the definition provided in section 5701 of the act (relating to definitions)." 41 Pa. Bull. No. 3 at 499 (Jan. 15, 2011) (the "Proposed Rules"). As the Pennsylvania Bus Association has pointed out in comments to the rulemaking docket, section 5701 of the Act does not contain a definition of the term "limousine." While there is a definition of "limousine service" in the Act, as noted above, the Proposed Rules are inconsistent with that definition.

The Proposed Rules include provisions for large vehicles and remote carriers in §§ 1053.41, .42 and .43. Large vehicles are referred to as limousines with a seating capacity of 16 or more passengers including the driver. Proposed Rules, § 1053.41(a). Such vehicles are exempt from the provisions of Chapter 1053 except for the registration and regulation requirements of § 1053.43(c)-(f). *Id.* § 1053.41(b). Thus, under the Authority's interpretation, buses are large limousines which must have a valid PUC certificate and be registered with the Parking Authority. *Id.* § 1053.41(a). Registrations are required for each vehicle and must be renewed annually, with payment of a $15 registration fee required. *Id.* § 1053.43(c). Buses are also subject to Parking Authority regulation and enforcement for Pennsylvania DOT inspection standards. *Id.* § 1053.43(d). Bus operators must also comply with § 1065.1 relating to limousine insurance, at least insofar as the insurance coverage does not exceed PUC insurance requirements. *Id.* § 1053.43(e). Finally, buses must have an alternative carrier sticker issued by the Authority after the bus operator has complied with the provisions of § 1053.43. *Id.* § 1053.43(f).

Additionally, limousines of any size are subject to the vehicles and equipment requirements of Chapter 1055. Included in that chapter is a requirement that all limousines "be equipped with working seatbelts for every passenger and the driver." *Id.* § 1055.4(b)(3).

Preemption of State and Local Regulatory Authority under the Interstate Commerce Act

Beyond the fact that the Proposed Rules are not supported by the Act, the Rules are preempted by federal law. Intercity bus operators engaging in interstate commerce operate under authority (known as registration) granted by the Federal Motor Carrier Administration ("FMCSA"). That registration is issued to interstate bus common carriers under federal statute and authorizes these carriers to provide either so-called regular route scheduled service or charter service between any points in the United States, pursuant to 49 U.S.C. § 13902. Thus, carriers holding federal registration authority are authorized to operate to and from Philadelphia. These operators and their vehicles are subject to extensive federal regulations for safety, operations and accessibility established by the FMCSA and (with respect to accessibility) the U.S. Department of Transportation. Because the federal government has created such a comprehensive regulatory scheme for interstate bus operators, Congress has enacted statutory provisions that prohibit state and local governments from adopting or enforcing additional regulations that address these same issues. Moreover, the U.S. Supreme Court has recognized that the Commerce Clause of the U.S. Constitution prohibits certain state or local taxes that unduly burden interstate commerce.

Specifically, the registration system the Proposed Rules envision would be preempted by 49 U.S.C. § 14501(a) to the extent that they would be applied to a federally registered motor carrier. With respect to such operators which engage in regular route scheduled bus service, § 14501(a)(1)(A) provides:

> *No state or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact any rule, law, regulation, standard, or other provision having the force and effect of law relating to—*
>
> *(A) scheduling of interstate or intrastate transportation (including discontinuance or reduction in the level of service) provided by a motor carrier of passengers subject to jurisdiction under subchapter 1 of chapter 135 of this title on an interstate route . . .*

See, e.g., East West Resort Transportation, LLC d/b/a Colorado Mountain Express v. Binz, 494 F. Supp. 2d 1197 (D. Colo. 2007) (preempting state regulation of the operation of passenger bus carriers over federally authorized routes).

To the extent that the permit system would be applied to operators in charter bus service, § 14501(a)(1)(C) provides:

> *No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact any rule, law, regulation, standard, or other provision having the force and effect of law relating to—*
>
> *(C) the authority to provide interstate or intrastate charter bus transportation.*

See, e.g., Greyhound Lines, Inc. v. The City of New Orleans, 29 F. Supp. 2d 339 (E.D. La. 1998) (preempting local charter bus service ordinance); *Kozak v. Hillsborough Public Transportation Comm'n*, 695 F. Supp. 2d 1285 (M.D. Fla. 2010) (recognizing the preemptive effect of § 14501(a)(1)(C) over local charter bus authority).

The registration and regulation provisions of § 1053.43(c) and (d) would determine which intercity bus carriers, both scheduled and charter operators, are able to operate to and from Philadelphia in interstate commerce in violation of the above-referenced statutes. The registration requirements of the Proposed Rules are also preempted by the federal government's registration system for interstate bus carriers, which as noted allows these carriers to operate between any points in the United States. Were an operator denied registration, it would *de facto* be denied the ability to operate in Philadelphia, contrary to the operator's federal permit. The Parking Authority would be regulating the authority to operate and the schedules for interstate bus service in Philadelphia in plain violation of federal law.

Moreover, the Proposed Rules require large buses to hold valid PUC certificates to be registered by the Authority. Proposed Rules, § 1053.43(a). The PUC, however, has no authority over buses which operate in interstate commerce with authority granted by the federal government. *See* FMCSA Declaratory Order re: Petition for Declaratory Order by Fullington Trailways, LLC, 75 *Federal Register* 4443 (Jan. 27, 2010). Thus, the Proposed Rules require

interstate bus operators to put themselves under PUC jurisdiction when the PUC has no jurisdiction over them according to federal law.

ABA does not question the right of a local government to adopt reasonable and non-discriminatory limits on where buses may stop to pick-up and discharge passengers. However, ABA does oppose any system that would authorize potential limits on the ability of a federally-authorized bus operator to operate within a locality through a comprehensive permit and registration process such as the Parking Authority has proposed.

Preemption of Registration and Fees under the UCRA

The Proposed Rules are also contrary to the preemption provisions of the Unified Carrier Registration Act. That statute provides, in 49 U.S.C. § 14504a(c), that

> *it shall be considered an unreasonable burden upon interstate commerce for any State or any political subdivision of a State, or any political authority of two or more States—*
>
> > *(1) to enact, impose, or enforce any requirement or standards with respect to, or levy any fee or charge on, any motor carrier or motor private carrier providing transportation or service subject to jurisdiction under subchapter I of chapter 135 (n this section referred to as an "interstate motor carrier" and an "interstate motor private carrier", respectively) in connection with—*
> >
> > > *(A) the registration with the State of the interstate operations of the motor carrier or motor private carrier;*
> > >
> > > *(B) the filing with the State of information relating to the financial responsibility of a motor carrier or motor private carrier pursuant to sections 31138 or 31139;*
> > >
> > > . . .
> > >
> > > *(D) the annual renewal of the intrastate authority, or the insurance filings, of the motor carrier or motor private carrier, or other intrastate filing requirement necessary to operate within the State . . .*

With this statute, Congress has declared it to be an unreasonable burden on commerce, and thus a violation of the Commerce Clause of the U.S. Constitution, for the City of Philadelphia to enact a rule establishing registration and insurance requirements on interstate carriers. The Proposed Rules, however, do exactly that. Thus, they are preempted under this statutory scheme as unreasonable burdens on interstate commerce.

Preemption of Decal Requirements

In addition, the Proposed Rules' requirement that buses display an alternative carrier sticker is expressly preempted by 49 U.S.C. § 14506(a), which prohibits local requirements for carrying identification on or in a commercial motor vehicle:

> *No State, political subdivision of a State, interstate agency, or other political agency of two or more States may enact or enforce any law, rule, regulation or standard, or other provision having the force and effect of law that requires a motor carrier . . . to display any form of identification on or in a commercial motor vehicle (as defined in section 14504a), other than forms of identification required by the Secretary of Transportation under section 390.21 of title 49, Code of Federal Regulations.*

The Proposed Rule in § 1054.43(f) does not fall into any of the exceptions to that general rule authorized in 49 U.S.C. § 14506(b). It is. therefore, preempted by federal law.

Unconstitutionality of Flat Sticker Fee

Additionally, the $15 registration fee (§ 1054.43(c)(3)) violates the Commerce Clause prohibition on flat fees on commercial motor vehicles operating in interstate commerce as set forth in *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987). There, the U.S. Supreme Court struck down a $36 per axle flat fee on commercial trucks operating in Pennsylvania as the fee tended to discriminate against carriers from out-of-state. The proposed flat $15 per vehicle fee would also favor Pennsylvania-based vehicles as they would operate, on average, more miles in Philadelphia than vehicles from out of state, in violation of the principles established in *Scheiner*.

Preemption of Seat Belt Requirements under Federal Law

Finally, the inclusion of buses as limousines runs afoul of federal statutes relating to equipment on intercity buses. Federal law requires the Secretary of Transportation to issue regulations relating to motor vehicle safety standards. 49 U.S.C. § 30111(a). Federal law also preempts any state or local motor vehicle safety standard that is not identical to a federal standard:

> *(b) Preemption--*
>
> > *(1) When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance or a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter.*

49 U.S.C. § 30103(b)(1).

The National Highway Traffic and Safety Administration has established rules regarding seat belts in vehicles. 49 C.F.R. § 571.208 (FMVSS 208). For large buses of the type covered by Proposed Rules § 1054.41 and § 1055.4(b)(3), the federal standard requires seat belts only for the driver's position. FMVSS 208, S4.4.2.1, S4.4.2.2, S4.4.3.1. There is no requirement that large buses install seat belts in the passenger positions, therefore the Proposed Rule is not identical to the federal standard. NHTSA has found that efforts by state governments to require the installation of seat belts for passengers on large buses to be preempted by federal law. *See*

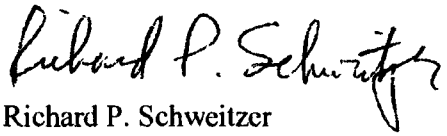
Attachment (Letter of NHTSA Chief Counsel to Motor Coach Industries finding proposed New York state legislation preempted).

Section 1055.4(b)(3) requires limousines to be equipped with working seat belts for every passenger and the driver. That requirement is not identical to the federal standard, which mandates seat belts only for the driver. The Proposed Rule is thus preempted by 49 U.S.C. § 30103(b)(1).

ABA would be pleased to meet with you and other Parking Authority and Pa. PUC officials to discuss the issues raised in the Proposed Rules. We appreciate your consideration of our concerns.

With best regards,

Sincerely,



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