

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

SILVER SPRING, MARYLAND

ORDER NO. 12,545

IN THE MATTER OF:

Served September 14, 2010

Application of CSL LLC to Change) Case No. AP-2010-056
Trade Name on Certificate No. 1240)
from DOUBLE DECKER TOURS to CITY)
SIGHTSEEING DOUBLE DECKER TOURS)

CSL LLC has filed an application to change the trade name appearing on Certificate of Authority No. 1240 from "Double Decker Tours" to "City Sightseeing Double Decker Tours" pursuant to Title II, Article XI, Section 10(b), of the Washington Metropolitan Area Transit Regulation Compact.¹ The application is supported by proof of registration of the new trade name with the District of Columbia Department of Consumer and Regulatory Affairs.

The application is opposed by City Sightseeing Washington DC Inc., t/a Open Top Sightseeing Washington, which holds Certificate of Authority No. 931, issued by the Commission, or WMATC, on September 22, 2005.

I. BACKGROUND

The Commission approved the issuance of Certificate No. 1240 to CSL over the objection of City Sightseeing Washington DC Inc. in June 2006.² CSL's legal name at the time was City Sightseeing Buses LLC. City Sightseeing Washington DC protested on the ground that issuing a certificate of authority in applicant's then legal name would unduly confuse the public given that protestant was already authorized to operate in the Metropolitan District under a substantially similar name. Before the Commission could rule on the merits of the protest, CSL changed its legal name to CSL LLC. The Commission found that this resolved the public interest issue raised by the protest and conditionally approved the issuance of Certificate No. 1240 in the name of CSL LLC.³

The approval order, Order No. 9651, stipulated that the issuance of Certificate No. 1240 was subject to the precondition that CSL file certain documents and present its vehicle(s) for inspection within 180 days.⁴ CSL failed to meet the deadline, thereby voiding the Commission's approval under the terms of Order No. 9651 and Commission

¹ Washington Metropolitan Area Transit Regulation Compact, Pub. L. No. 101-505, § 1, 104 Stat. 1300, 1307 (1990), amended by Pub. L. No. 111-160, 124 Stat. 1124 (2010) (amending Article III of Title I).

² *In re City Sightseeing Buses LLC*, No. AP-06-013, Order No. 9651 (June 15, 2006).

³ *Id.* at 2-3.

⁴ *Id.* at 2-3.

Regulation No. 66.⁵ CSL thereafter filed an application for reconsideration of the voiding of approval, supported by the documents required by Order No. 9651 and proof that applicant's sole vehicle had subsequently passed inspection by Commission staff.⁶ The Commission denied reconsideration on the ground that the application for reconsideration did not allege any error on the part of the Commission, as required by Article XIII, Section 4(a), of the Compact.⁷ The Commission, however, reopened the proceeding under Rule No. 26 and issued Certificate No. 1240 on the strength of applicant's belated satisfaction of the conditions stipulated by Order No. 9651.⁸

In the course of reopening CSL's application, the Commission had occasion to admonish CSL not to use the name "City Sightseeing" in connection with its operations under Certificate No. 1240. We believe it helpful to recount what the Commission said.

Finally, City Sightseeing DC complains that the name "City Sightseeing" appears on page two of [CSL's WMATC] tariff "despite the specific conclusions of the Commission in Order No. 9651 regarding a public interest issue with respect to name confusion."

Just so the record is clear, we made no findings on the issue of name confusion in Order No. 9651. We did observe, however, that: (1) protestant requested "that the Commission deny the application or, in the alternative, require applicant to "alter its name so as to eliminate confusion;" (2) "[t]he appropriate remedy for potential name confusion is ordering an applicant to propose a different name for use in the Metropolitan District, rather than denying an application;" and (3) "[a]fter the protest was lodged, applicant of its own volition amended its legal name to CSL LLC, yielding the alternative relief sought by protestant."

While it was inappropriate of applicant to submit its rate sheet on "City Sightseeing" letterhead, the subheading clearly states that the rates displayed are those of CSL, LLC. We find that using "City Sightseeing" letterhead under these circumstances is not so egregious as to warrant withholding Certificate No. 1240. Applicant, however, shall refrain from using that name in the Metropolitan District, directly or indirectly, in the future.

Order No. 10,305 at 6-7 (footnote omitted).

⁵ *In re City Sightseeing Buses LLC*, No. AP-06-013, Order No. 10,305 at 1 (Mar. 6, 2007).

⁶ *Id.* at 1.

⁷ *Id.* at 1.

⁸ *Id.* at 7.

Certificate No. 1240 was subsequently issued on March 8, 2007, in the name of CSL LLC. A few months later, the Commission approved CSL's application to add the trade name Double Decker Tours,⁹ and Certificate No. 1240 was reissued November 16, 2007, in the name of CSL LLC, trading as Double Decker Tours.

II. APPLICATION AND PROTEST

Under Title II of the Compact, Article XI, Section 10(b), the Commission may amend a certificate of authority upon application by the holder. Name change requests may be granted for good cause shown.¹⁰

As noted above, CSL's application is supported by proof of registration of the new trade name with the District of Columbia Department of Consumer and Regulatory Affairs. The application, however, does not address the public interest issue that surfaced in the original licensing proceeding. That issue is raised in the protest.

The protest alleges that approving CSL's trade name application would likely lead to public confusion not merely because the proposed trade name is "nearly identical" to protestant's legal name but also because the services offered by CSL and protestant "are the same", and "the markets are identical."¹¹ As the protest puts it: "Imagine, two companies offering sightseeing services in red double-decker buses and both under the name 'City Sightseeing'. What could be more confusing?"¹²

The protest also alleges that since Certificate No. 1240 was issued, "there have been actual instances of confusion between [CSL's] operations and those of Protestant, even without the 'official' use of 'City Sightseeing' as part of Applicant's name."¹³ The protest offers several examples, including separate warnings from the District of Columbia Department of Transportation and the United States Park Police that were served on protestant but that should have been served on CSL, CSL vouchers presented to protestant for redemption by various passengers, and a passenger complaint against CSL that was misdirected to protestant because the complainant mistakenly identified the WMATC carrier number as 931.¹⁴

CSL does not deny the allegations of confusion. Instead, CSL argues that the alleged confusion was not the product of the two carriers using similar names. According to CSL, protestant has operated under the Open Top Sightseeing trade name and not "use[d] the

⁹ *In re CSL LLC*, No. AP-07-116, Order No. 10,586 (June 29, 2007).

¹⁰ *In re Whiting, Bayard & Morris Coach Serv., Inc., t/a Prof. Tours, & Morris & Morris Coach Serv., Inc., t/a Prof. Tours*, No. AP-04-67, Order No. 7935 (Apr. 9, 2004).

¹¹ Protest at 3.

¹² Protest at 4.

¹³ Protest at 3.

¹⁴ Protest at 3-4.

words City Sightseeing on any of [protestant's] buses, bus stops, websites, literature, uniforms or even business cards" since May 2007.¹⁵ CSL states that it believes the reason protestant has been operating under the Open Top Sightseeing trade name "in no small part . . . is due to the difficulties [protestant] would face in operating as City Sightseeing without infringing on our [CSL's] US and international trademarks which they are very well aware of and which we police aggressively."¹⁶

CSL admits that it "understood" the reasoning behind the Commission's decision "that it could be confusing to have two operators, offering similar services with the same name on the side of the vehicles."¹⁷ At the same time, CSL argues that, "What is perhaps more confusing to [CSL's] clients is that a brand they are used to in nearly 100 other cities worldwide is running under a different name in just one location."¹⁸

III. DISCUSSION

The Commission's mandate includes protecting the public from unfair competition.¹⁹ The use of a name that is similar to that of a competitor, which has the capacity to confuse or deceive the public, may be prohibited by the Commission as a method of unfair competition.²⁰ The appropriate remedy for potential name confusion is ordering an applicant to propose a different name for use in the Metropolitan District.²¹

There is no dispute that CSL and protestant are already being confused one for the other. Allowing both to operate under similar names would only add to that confusion. CSL seems to understand this but nevertheless would have the Commission add "City Sightseeing" to the existing trade name on Certificate No. 1240 on the ground that protestant does not currently display that name on its buses or in its advertising. But CSL ignores the potential for increased confusion if protestant were to resume displaying its legal name on its buses and in its advertising. There is nothing in the Commission's regulations that would prohibit protestant from doing that. Indeed, Regulation No. 61-01(a) gives each WMATC carrier the option of displaying on its vehicle(s) "the carrier's legal name or trade name appearing on the carrier's certificate of authority."

CSL also ignores the public display of protestant's legal name on the Commission's website. The Commission's website displays basic

¹⁵ Reply to Protest at 1-3.

¹⁶ Reply to Protest at 2.

¹⁷ Reply to Protest at 2.

¹⁸ Reply to Protest at 4.

¹⁹ *In re D C Tours Inc*, No. AP-02-113, Order No. 7047 (Feb. 25, 2003) (citing *Old Town Trolley Tours of Washington, Inc. v. Double Decker Bus Tours W.D.C., Inc.*, 129 F.3d 201 (D.C. Cir. 1997)).

²⁰ *Id.* (citing *American Airlines, Inc. v. North American Airlines, Inc.*, 351 U.S. 79, 86, 76 S. Ct. 600, 605 (1956)).

²¹ *Id.*

information on all WMATC carriers - including operating status, type of service, filed rates, insurance coverage, and vehicle data. Each carrier is identified by its legal name, any trade name, and its carrier number. All of this information - including each carrier's legal name and any trade name - is displayed in a format compatible with standard internet search tools. Thus, even if protestant did not resume displaying its existing legal name either on its vehicles or in its advertising, simultaneous publication of CSL's proposed "City Sightseeing Double Decker Tours" trade name and protestant's "City Sightseeing Washington DC Inc." legal name on the Commission's website would add to the confusion that already exists, unless protestant changed its legal name.

CSL cites no authority for the proposition that the Commission should order a WMATC carrier to change its existing legal name to avoid confusion with an applicant's proposed trade name. Indeed, Commission precedent is to the contrary. The appropriate remedy for potential name confusion is ordering an applicant to propose a different name for use in the Metropolitan District.²²

CSL may believe it possesses some superior legal right in the "City Sightseeing" name, but the Commission's mandate does not include vindicating a carrier's private rights in a name.²³ "The courts of law are open to competitors for the settlement of their private legal rights, one against the other."²⁴ The Commission's jurisdiction in this matter is limited to protecting the public interest.²⁵

IV. CONCLUSION

Given the similarity of the parties' vehicles and service, the proximity of each party's operations to the other's, and the evidence of existing confusion, we find that CSL LLC has not shown good cause for amending Certificate No. 1240 as requested.

THEREFORE, IT IS ORDERED, that the application of CSL LLC to change the trade name appearing on Certificate of Authority No. 1240 from "Double Decker Tours" to "City Sightseeing Double Decker Tours" is denied without prejudice.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS BRENNER, HOLCOMB, AND KUBLY:



²² Order No. 7047 at 2-3.

²³ See *American Airlines, Inc.*, 351 U.S. at 83, 76 S. Ct. at 604 (passenger carrier regulatory agency may not employ its powers to vindicate private rights).

²⁴ *American Airlines, Inc.*, 351 U.S. at 83, 76 S. Ct. at 604.

²⁵ See 351 U.S. at 82-84, 76 S. Ct. at 603-04 (passenger carrier regulatory agency's consideration of name confusion limited to protecting public interest).

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Executive Director