

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

SILVER SPRING, MARYLAND

ORDER NO. 12,969

IN THE MATTER OF:

Served August 30, 2011

Application of CITY SIGHTSEEING )  
WASHINGTON DC INC., Trading as OPEN )  
TOP SIGHTSEEING WASHINGTON, DC, to )  
Acquire Assets from CSL LLC, )  
TRADING AS DOUBLE DECKER TOURS; BIG )  
BUS TOURS; BIG BUS DC; AND BIG BUS )  
WASHINGTON DC, WMATC No. 1240 )

Case No. AP-2011-101

Application of CITY SIGHTSEEING )  
WASHINGTON DC INC., Trading as OPEN )  
TOP SIGHTSEEING WASHINGTON, DC, for )  
Temporary Approval to Acquire )  
Assets from CSL LLC, TRADING AS )  
DOUBLE DECKER TOURS; BIG BUS TOURS; )  
BIG BUS DC; AND BIG BUS WASHINGTON )  
DC, WMATC No. 1240 )

Case No. AP-2011-102

By application accepted for filing August 5, 2011, applicant, City Sightseeing Washington DC Inc., trading as Open Top Sightseeing Washington, DC, WMATC No. 931, seeks Commission approval to acquire the assets of CSL LLC, trading as Double Decker Tours; Big Bus Tours; Big Bus DC; and Big Bus Washington DC, WMATC No. 1240, in a two-step transaction. First, Open Top Sightseeing USA, which owns 100% of applicant, will acquire 90% of the outstanding equity of CSL LLC. Then, operational control of the underlying assets will be transferred to applicant. Applicant seeks temporary approval, as well.

Notice of the application in Case No. AP-2011-101 was posted on the Commission's website for 14 days. The applications are unopposed.

**I. STANDARDS FOR APPROVAL**

This transaction is governed by Title II of the Compact, Article XII, Section 3(a)(iii), which provides: A carrier or any person controlling, controlled by, or under common control with a carrier shall obtain Commission approval to acquire control of another carrier that operates in the Metropolitan District through ownership of its stock or other means.

The Commission may approve an application under Article XII, Section 3, if it finds that the proposed transaction is consistent

with the public interest.<sup>1</sup> The public interest analysis focuses on the fitness of the acquiring party, the resulting competitive balance, and the interest of affected employees.<sup>2</sup>

Under Article XII, section 3(d), of the Compact: Pending determination of an application filed under this section, the Commission may grant 'temporary approval' without a hearing or other proceeding up to a maximum of 180 consecutive days if the Commission determines that grant to be consistent with the public interest. The public interest analysis under Section 3(d) requires an assessment of the fitness of the carrier acquiring control and of whether and to what extent a denial of temporary approval would cause a diminution in value or utility of the subject property.<sup>3</sup>

Under Commission Rule No. No. 20-02, proceedings involving a common question of fact, in this case the fitness of the acquiring parties, may be consolidated.

## **II. PERMANENT APPROVAL**

The Commission finds applicant's acquisition of CSL LLC assets consistent with the public interest for the following reasons.

### **A. Fitness**

An acquiring party already controlling an existing WMATC carrier is entitled to a presumption of fitness,<sup>4</sup> as is an existing WMATC carrier.<sup>5</sup> Although a complaint filed by CSL LLC against applicant is pending, no findings have been made, CSL has stated its intent to withdraw the complaint before closing, and where a complainant and respondent have settled their differences, and there is no valid public purpose to be served independent of the controversy between complainant and respondent, then dismissal is appropriate.<sup>6</sup>

The complaint alleges that applicant's advertising brochures display a name not authorized by the Commission. The Commission's advertising regulation, Regulation No. 63, does not prohibit this.

The complaint further alleges that applicant's buses similarly display a name not authorized by the Commission. The Commission's vehicle marking regulation, Regulation No. 61, does not prohibit this,

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<sup>1</sup> Compact, tit. II, art. XII, § 3(c).

<sup>2</sup> Act of Sept. 15, 1960, Pub. L. No. 86-794, § 3, 74 Stat. 1031, 1050 (1960) (codified at DC CODE ANN. § 9-1103.04); *In re Academy Express, L.L.C.*, t/a Academy, No. AP-11-079, Order No. 12,932 (Aug. 2, 2011).

<sup>3</sup> *In re Old Town Trolley Tours of Wash., Inc., & D.C. Ducks, Inc.*, No. AP-96-44, Order No. 4932 (Sept. 17, 1996).

<sup>4</sup> *In re First Transit, Inc.*, No. AP-07-194, Order No. 11,729 (Dec. 4, 2008).

<sup>5</sup> Order No. 12,932.

<sup>6</sup> *VIP Coach Servs., Inc., & White House Sightseeing Corp.*, No. AP-84-06, Order No. 2550 (May 1, 1984).

as long as the vehicle markings say "operated by" "City Sightseeing Washington DC Inc.", or "operated by" "Open Top Sightseeing Washington, DC."

The complaint also alleges that CSL operates over the same color-coded routes as applicant. In our estimation, this is the essence of competition. This makes it easier for passengers to compare prices and service.

The complaint additionally alleges that applicant has been charging rates not listed in its WMATC tariff in violation of Article XI, Section 14, of the Compact and Commission Regulation No. 55. The Commission, however, has received no overcharge complaints against applicant. The appropriate remedy thus is to remind the carrier to charge only those rates listed in its tariff.<sup>7</sup> Applicant is so admonished.

The complaint finally alleges that applicant was seen operating vehicles in the District of Columbia with license plates issued by California and Nevada, that these vehicles did not display a valid DC trip permit, and that these vehicles have not been reported to WMATC. Photos accompanying the complaint show that the Nevada plates are "apportioned". To the extent that these vehicles are operated under applicant's U.S. Department of Transportation authority<sup>8</sup> and registered under the apportionment provisions of the International Registration Plan as adopted by the District of Columbia,<sup>9</sup> it would appear these vehicles are in compliance with applicable laws. In any event, any complaint CSL LLC may have about applicant's possible violation of the District's trip permit requirements should be lodged with the District, not WMATC.

Under the circumstances, it does not appear that the public interest requires investigation of the allegations in the complaint at this time. If the proposed acquisition ultimately is not consummated, complainant will be given an opportunity to supplement the complaint to address the foregoing comments.

The presumption of fitness therefore stands.

#### **B. Effect on Employees**

Applicant offers the following statement regarding the proposed transaction's anticipated effect on employees.

After the acquisition, Open Top would undertake to retain the majority of established, full-time employees of CSL with a policy of "no compulsory redundancies".

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<sup>7</sup> See *C.P.R. Med. Transp. LLC*, No. MP-10-053, 12,454 (June 23, 2010) (directing carrier to file tariff with accurate rates for existing service).

<sup>8</sup> USDOT No. 1212054.

<sup>9</sup> D.C. Code § 50-1507.01, *et. seq.*

Whilst the business is by definition largely dependent on a seasonal workforce, the timing of this deal would enable the natural reduction in scale to take place as seasonal staff return to their studies and other work as they would have done at this time of year irrespective of the acquisition. Furthermore, the combination would offer CSL staff more opportunities to advance in the larger Open Top organization than they would have had available in CSL alone.

We believe that this statement adequately addresses the interest of affected employees.

### C. Competitive Balance

The primary concern when assessing the effect on competition of a transaction under Article XII, Section 3, is whether the transaction will increase the acquiring party's market share.<sup>10</sup> Transactions which do not increase market share give little pause for concern, and the Commission will approve even those transactions which tend to increase market share as long as there is sufficient post-transaction competition to check any adverse effects that such transactions otherwise might produce.<sup>11</sup>

Both parties had tariffs on file with the Commission for individually-ticketed sightseeing service at the time the application was filed. The individually-ticketed sightseeing market<sup>12</sup> in the Metropolitan District is served by 17 other WMATC carriers operating 542 vehicles. The transfer of 19 vehicles from CSL LLC to applicant, which also has 19 WMATC vehicles, is unlikely to result in any significant increase in individually-ticketed sightseeing market concentration.<sup>13</sup>

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<sup>10</sup> Order No. 12,932.

<sup>11</sup> *Id.*

<sup>12</sup> Commission precedent does not distinguish between group charter sightseeing and individually-ticketed sightseeing. See e.g., *In re Old Town Trolley Tours of Wash., Inc., & D.C. Ducks, Inc.*, No. AP-96-44, Order No. 4941 (Sept. 25, 1996) (sightseeing market, sightseeing carriers, sightseeing service); *In re Eugene H. George, t/a Silver Star Sightseeing Tours, & Samuel J. Howell*, No. AP-89-23, Order No. 3393 (Aug. 17, 1989) (sightseeing industry); *In re Whitehouse Sightseeing Corp.*, No. MP-79-07, Order No. 2156 (Oct. 24, 1980) (sightseeing operations, sightseeing certificates, on-bus guided tours); *In re Greyhound Corp. & Airport Transport, Inc.*, No. 195, Order No. 951 (June 4, 1969) (sightseeing tours). Yet, even under the more narrow definition of the relevant market adopted in this order, there should be sufficient post-transaction competition to check any adverse effects from the proposed transaction.

<sup>13</sup> See *id.* (citing federal Horizontal Merger Guidelines), available at <http://www.usdoj.gov/atr/public/guidelines/hmg.htm>); *First Transit, Inc.*, No. AP-07-194, Order No. 11,729 (Dec. 4, 2008) (same).

### III. TEMPORARY APPROVAL

Inasmuch as the determination of the permanent approval application is no longer pending, the temporary approval provision under Article XI, Section 3(d), by its own terms does not apply.

### IV. COMMENCING OPERATIONS

Before placing a CSL LLC vehicle in service, City Sightseeing Washington DC Inc., trading as Open Top Sightseeing Washington, DC, WMATC No. 931, shall submit to the Commission with respect to such vehicle proof of current vehicle safety inspection and proof of compliance with Commission Regulation No. 61, governing vehicle markings, and as applicable, Regulation No. 62, governing operation of non-owned vehicles.

### V. TERMINATION AND SURRENDER OF CERTIFICATE NO. 1240

Upon applicant taking possession of assets now held by CSL LLC, Certificate of Authority No. 1240 shall stand revoked and be surrendered to the Commission.<sup>14</sup>

THEREFORE, IT IS ORDERED:

1. That Case Nos. AP-11-101 and AP-11-102 are hereby consolidated pursuant to Commission Rule No. 20-02.

2. That the acquisition of CSL LLC equity by Open Top Sightseeing USA and transfer to applicant of assets now held by CSL LLC are hereby approved.

3. That the application for temporary approval is denied.

4. That applicant may not transport passengers under Certificate No. 931 in any vehicle now held by CSL LLC unless and until prior to placing such a vehicle into service, applicant has submitted to the Commission: (a) proof that the vehicle has passed a safety inspection within the prior 12 months; (b) evidence that the vehicle has been marked in accordance with Commission Regulation No. 61; and (c) a copy of a lease in accordance with Regulation No. 62 if the vehicle is not titled in applicant's name.

5. That Certificate of Authority No. 1240 shall stand revoked and be surrendered to the Commission upon applicant taking possession of assets currently held by CSL LLC.

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<sup>14</sup> See *In re Tri State Casino Tours, Inc., & D.A.Y. Enters., Inc., & New World Tours, Inc.*, No. AP-95-36, Order No. 4670 (Sept. 29, 1995) (revoking certificate of merging carrier); *In re Carey Limo. D.C., Inc., & ADV Int'l Corp., t/a Moran Limo. Serv.*, No. AP-94-53, Order No. 4499 (Feb. 16, 1995) (same); *Air Couriers Int'l Ground Transp. Servs., Inc., t/a Passenger Express, & United Mgmt. Corp., t/a Passenger Express*, No. AP-92-12, Order No. 3956 (June 15, 1992) (same).

6. That the approval granted herein shall be void upon applicant's failure to satisfy the conditions of approval within 180 days from the date of this order.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS BRENNER AND HOLCOMB:

A handwritten signature in black ink, appearing to read "W. S. Morrow, Jr.", written in a cursive style.

William S. Morrow, Jr.  
Executive Director