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VIA EMAIL

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

RE: STB Docket No. MC-F-21062

Celerity Partners IV, LLC et al. – Continuance in Control – Ace Express Coaches, LLC

Ace Express Coaches, LLC et al. – Acquisition of Certain Properties of Evergreen Trails, Incorporated d/b/a Horizon Coach Lines

Dear Ms. Brown:

This office represents Ace Express Coaches, LLC (“Purchaser”) and certain of its affiliates (collectively, “Applicants”) in the pending passenger carrier acquisition proceeding referenced above. Applicants are writing to support the letter filed with you on July 24, 2015 by Evergreen Trails, Inc. d/b/a Horizon Coach Lines (“Seller”), which requested prompt issuance of a final decision in this matter. Please note that the application was filed on March 23, 2015, was tentatively approved by a Board decision served April 22, 2015, and has stood submitted since June 15, 2015 on a further record consisting of a single protest and replies thereto by Purchaser and Seller (filed respectively on June 11 and 15, 2015). Purchaser’s reply (at p. 2) specifically requested the Board to decide this matter on the basis of the existing record without further evidentiary submissions, as per 49 CFR § 1182.6(c)(1).

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As pointed out in Seller's July 24 letter, prior decisions by both the Board and the Colorado Public Utilities Commission ("CO PUC") have found that the supposed state-law issue providing the sole predicate for the protest has been mooted by subsequent events. We also note that the CO PUC issued a further order this past Monday, July 27, 2015, which recognizes the Board's exclusive jurisdiction over the pending transaction between Purchaser and Seller, and therefore vacates the prior CO PUC decision that had instituted an "investigation" of that transaction. A copy of the July 27 decision by the CO PUC is attached for the Board's convenience.

Finally, Applicants would point out that delay in issuing a decision in this matter is creating business issues for Purchaser as well as Seller. Purchaser contemplates significant investments in upgrading the Colorado assets it has operated under interim authority granted by the Board on April 8, 2015. It cannot prudently undertake those investments, however, until the parties are able to close their asset sale transaction pursuant to permanent approval from the Board.

Applicants therefore renew their prior request for a prompt decision based on the current evidentiary record in this proceeding.

Respectfully,



Mark J. Andrews
Attorney for Applicants

Enclosure

cc: Mr. John Montgomery
All Parties of Record

Decision No. C15-0761

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 15M-0263CP

IN THE MATTER OF THE INTERIM TRANSFER OF CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY PUC NOS. 44908 AND 47967, OF PERMIT NOS. B-9941, CSB-00179 AND ORC-00191, AND OF RELATED PROPERTIES FROM EVERGREEN TRAILS INC. D/B/A HORIZON COACH LINES TO INDUSTRIAL BUS LINES, INC. D/B/A ALL ABOARD AMERICA! AND TO ACE EXPRESS COACHES, LLC.

**DECISION GRANTING MOTION TO
RECONSIDER AND CLOSING PROCEEDING**

Mailed Date: July 27, 2015

Adopted Date: July 16, 2015

I. BY THE COMMISSION

A. Statement

1. On April 20, 2015, Ace Express Coaches, LLC and Industrial Bus Lines, Inc., doing business as All Aboard America! (collectively Ace Express), filed a Notification of Interim Transfer of Certificates of Public Convenience and Necessity, Permits, and Related Properties (Notification). The Notification asserts that the companies do not need Commission approval for the transfer of the state authorities because Commission approval is preempted by the approval of the transfer by the Federal Surface Transportation Board under 49 U.S.C. § 14303(f).

2. Consistent with the discussion below, we conclude that the Commission's authority over the transfer of common and contract carrier authorities is preempted by the Surface Transportation Board's decision. There is a limited exception—that does not apply here—where state commissions may intercede if the transaction is a sham and the provisioning of interstate and intrastate carriage by the seller and buyer is not altered through the transaction. We therefore acknowledge the interim transfer and close this proceeding.

B. Background

3. The Notification states that Evergreen Trails, Inc., doing business as Horizon Coach Lines (Horizon Coach), had transferred its state and federal carrier authorities to Ace Express as of April 16, 2015. The Notification asserts that, because the transfer was authorized under an interim approval by the Surface Transportation Board, the Commission's authority to approve the transfer is preempted.¹

4. On May 15, 2015, by interim decision,² the Commission noticed the Notification and referred the proceeding to an Administrative Law Judge (ALJ). The Commission instructed the ALJ to determine whether the acquired intrastate routes are related to interstate commerce, and whether the related intrastate and interstate routes constitute a substantial portion of the motor carrier's business, such that a decision by the Federal Surface Transportation Board approving the transfer preempted the Commission's authority over the transfer of Horizon's intrastate certifications.

5. On June 1, 2015, Ace Express filed a Motion to Reconsider the Commission's interim decision under Rule 1502(c) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1, which allows parties aggrieved by an interim decision to file a written motion for reconsideration. Ace Express argues that under federal law, the Commission is always preempted by a Surface Transportation Board decision granting the transfer of carrier authorities. To support the preemption argument, Ace Express referenced documents in its motion that were not part of the Commission's record in this proceeding, and it cited additional

¹ Generally, the transferor and the transferee file a joint application for prior authorization by the Commission of the transfer. See § 40-10.1-205, C.R.S., and Rule 6205 of the Rules Regulating Transportation by Motor Vehicle, 4 *Code of Colorado Regulations* 723-6.

² Decision No. C15-0467-I.

case law that was not cited in the Notification. The motion requests that the Commission reconsider and vacate its May 15 decision initiating this proceeding.

6. On June 17, 2015, Colorado Jitney LLC, doing business as Colorado Jitney (Colorado Jitney) intervened as of right, and on June 29, 2015, it filed a Motion to Strike and Alternate Response (Motion to Strike) opposing Ace Express's Motion to Reconsider. Colorado Jitney argues that the Motion to Reconsider should be stricken because Colorado Jitney was never served with the motion. In the alternative, Colorado Jitney argues that the motion should be denied because the Commission has jurisdiction to determine whether it has the authority to review the transfer or if it is preempted by federal authority.

7. On July 7, 2015, Ace Express filed a response to Colorado Jitney's Motion to Strike arguing that Ace Express could not possibly have served its Motion to Reconsider on Colorado Jitney because the motion was filed on June 1, 2015 and Colorado Jitney did not intervene until June 17, 2015. Ace Express also disagreed with Colorado Jitney's legal argument.

8. On July 13, 2015, Colorado Jitney filed a second Motion to Strike, this time against Ace Express's response to Colorado Jitney's first Motion to Strike. Colorado Jitney argues that Ace Express's response violated Rule 1400(e) of the Rules of Practice and Procedure, 4 CCR 723-1, which provides that a movant cannot file a reply to a response without leave of the Commission. According to Colorado Jitney, its first Motion to Strike was actually a response to Ace Express's Motion to Reconsider, and Ace Express did not have Commission approval to reply.

9. Finally, on July 15, 2015, Ace Express filed a response opposing Colorado Jitney's second Motion to Strike.

C. Findings and Conclusions

10. The Commission's May 15, 2015, Interim Decision (No. C15-0467-I) ruled that the jurisdictional question turned on facts relating to the relationship of Horizon Coach's intrastate routes and interstate commerce. As stated in the Interim Decision, application of that test was premised upon a 2008 Commission decision citing Colorado and federal case law.³ The cases cited in the 2008 Commission decision examined whether the Commission could impose penalties for a carrier's failure to obtain a state certification or for a carrier's failure to adhere to rates on file with the Commission.⁴ In both cases, the carrier operated over routes with end points within Colorado.

11. Those cases held that a Surface Transportation Board decision does not preempt the Commission's authority *over rates and service territories* of intrastate carriers absent evidence that:

- a) the services are regularly scheduled,
- b) there is a nexus between the intrastate routes and interstate commerce, and
- c) the intrastate routes that are related to interstate commerce constitute a substantial portion of the motor carrier's business.⁵

12. The proceeding here, however, presents a narrower circumstance, which is whether state commissions may review the intrastate components *of an acquisition* that is subject to the approval authority of the Federal Surface Transportation Board.

³ See Decision No. C08-1078, in Proceeding No. 08M-406CP issued October 15, 2008.

⁴ See *East West Resort Transp., LLC v. Binz*, 494 F.Supp.2d 1197, 1200-06 (D. Colo. 2007) (holding that a substantial portion of Colorado Mountain Express's intrastate services were related to interstate travel, so the Commission was preempted from regulating the carrier's rates); see also *Trans Shuttle, Inc. v. Pub. Utils. Comm'n*, 89 P.3d 398, 405 (Colo. 2004) (holding that Trans Shuttle's federal permit was insufficient evidence of interstate services, and the Commission was not preempted from requiring that the carrier obtain a Certificate of Public Convenience and Necessity).

⁵ *East West Resort Transp., LLC*, 494 F.Supp.2d at 1200-06 ; *Trans Shuttle, Inc.*, 89 P.3d at 405.

13. Ace Express's Motion to Reconsider cites the following provision from Title 49 of the federal code, which requires Surface Transportation Board approval of motor carrier acquisitions and then prescribes effect of an approval, as follows:

- (f) Effect of approval. A carrier or corporation participating in or resulting from a transaction approved by the Board under this section, or exempted by the Board from the application of this section pursuant to [49 U.S.C.] section 13541, may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in the approved or exempted transaction is exempt from the antitrust laws [15 U.S.C. §§ 1, *et seq.*] and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

49 U.S.C. § 14303(f).

14. The legislative intent behind the federal statute is “to facilitate merger and consolidation in the national transportation system.” *County of Marin v. United States*, 356 U.S. 412, 416 (*citing* S. Rep. No. 433, 76th Cong., 1st Sess. 28-32; H.R. Rep. No. 1217, 76th Cong. 1st Sess. 6, 12, 17; H.R. Rep. No. 2016, 76th Cong., 3d Sess. 61; H.R. Rep. No. 2832, 76th Cong., 3d Sess. 68-69). Preclusion of state and other judicial and administrative proceedings “promote[s] economy and efficiency in interstate transportation by [removing] the burdens of excessive expenditure.” *Railway Labor Executives' Ass'n v. Southern Pac. Trans. Co.*, 7 F.3d 902, 906 (9th Cir. 1993) (quotations and citations omitted). Permitting parties to litigate “the scope of an approved merger . . . would invite a barrage of collateral challenges to the ICC's [the predecessor to the Surface Transportation Board] authority,” and would “frustrate and delay the administration of mergers in a way that section 11341(a) was clearly meant to avoid.” *Id.* at 906-07; *see also AT&T Communications, Inc. v. Conrail*, 285 F.Supp.2d 649, 655 (E.D. Pa. 2003). “The Act also serves the public interest in ensuring that efficiency-promoting

consolidations occur in a timely manner. For example, former 49 U.S.C. § 11341(a) [now 49 U.S.C. § 14303(f)] provided that, once the ICC had approved a transaction, the parties participating in the approved transaction were ‘exempt from the antitrust laws and from all other law’ to the extent necessary to carry out the transaction.” *United Transp. Union v. Surface Transp. Bd.*, 114 F.3d 1242, 1246 (D.C. Cir. 1997).

15. This legislative intent underlies the grant of exclusive federal jurisdiction to the Surface Transportation Board over “a purchase, lease, or contract to operate property of another carrier by any number of carriers.” *Minn. Transp. Regulation. Bd. v. United States*, 966 F.2d 335, 339 (8th Cir. 1992). Concomitant with the Surface Transportation Board’s exclusive jurisdiction over a transaction approved by the federal agency is preclusion of other proceedings—including state commission proceedings—from considering transfers of intrastate certifications.

Several cases reflect this principle:

- a) [T]he ICC’s authority to effect the transfer of intrastate carrier certificates between merging interstate carriers is both plenary and exclusive and does not interfere with the [Tennessee Commission’s] intrastate regulatory authority.

Tennessee PSC v. Interstate Commerce Comm’n, 891 F.2d 292, 292 (6th Cir. 1989).

- b) In the ICC proceeding referenced above by the Sixth Circuit Court of Appeals, the agency stated: “Thus it is clear that [the federal statute] gives the Commission plenary and exclusive power to exempt the change in control and transfer of Thurston’s [the motor carrier’s] intrastate rights as part of the transaction involving interstate rights. [The Tennessee Commission] may not require Thurston and BTT to seek its approval for the change in control or transfer of Thurston’s rights. Such requirement is inconsistent with provisions of the Interstate Commerce Act and with the Commission’s prior exemption of the transaction from substantive regulatory review.”

In re Thurston Motor Lines, Inc., Brown Transp. Co., Inc., and Brown Transport Truckload, Inc., No. MC-C-30123; 1989 MCC LEXIS 8, 11, January 5, 1989.

- c) The Oregon Public Utility Commission challenged the ICC’s ruling exempting a purchase of intrastate trucking rights before the Ninth Circuit Court of Appeals. The Oregon Commission had previously denied the

purchaser's application to transfer intrastate certifications, and therefore the state Commission requested the court to limit the ICC's jurisdiction to allow the state to determine the regulatory propriety of the intrastate transfer. The Ninth Circuit denied the Oregon Commission's argument, relying upon the grant of "exclusive authority" to the ICC over the transactions listed in the federal statute, which included the purchase of intrastate certifications as "property" that is "purchased" by an acquiring motor carrier.

Oregon Public Utility Comm'n v. ICC, 979 F.2d 778, 780-81 (9th Cir. 1992).

16. These cases demonstrate the preemption of state commission authority over the acquisition of intrastate certifications that are included in an acquisition of interstate certifications approved by the Surface Transportation Board.

17. A narrow exception to federal preemption exists, but it does not apply here. If the acquisition qualifies as a "sham," in which no additional, practical authority to provide regulated services is acquired, then the federal agency cannot use its authority to preclude state jurisdiction over intrastate regulation. *North Alabama Express Inc. v. ICC*, No. 91-7662 (11th Cir. Sept. 3, 1992). Here, there is nothing to suggest that Ace Express will not obtain additional authority to provide transportation services as a result of the transaction.

18. We therefore conclude that the Commission is preempted from exercising its jurisdiction to review the transfer of authorities from Horizon Coach to Ace Express. By this decision we grant the Motion to Reconsider, recognize the interim transfer as approved by the Surface Transportation Board, and close this proceeding.

19. Because our authority over this proceeding is preempted and our decision closes this proceeding, we deny the two Motions to Strike filed by Colorado Jitney as moot.

II. ORDER

A. The Commission Orders That:

1. The Motion to Reconsider and Vacate the Interim Decision No. C15-0476-I filed by Industrial Bus Lines, doing business as All Aboard America!, and Ace Express Coaches, LLC on June 1, 2015, is granted.

2. Proceeding 15M-0263CP is now closed.

3. The Motion to Strike and Alternate Response filed by Colorado Jitney LLC, doing business as Colorado Jitney (Colorado Jitney) on June 29, 2015, is denied.

4. The Motion to Strike filed by Colorado Jitney on July 13, 2015, is denied.

5. Within 30 days of a final decision by the Surface Transportation Board (Docket No. MCF-21062), Ace Express Coaches, LLC shall file a notification with the Commission regarding its application for permanent authorization of the transfer.

6. The 20-day time period provided by § 40-6-114, C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Decision.

7. This Decision is effective upon its Mailed Date.

8/17

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
July 16, 2015.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

PAMELA J. PATTON

GLENN A. VAAD

Commissioners

Colorado.gov



COLORADO
 Department of
 Regulatory Agencies
 Public Utilities Commission



E-Filings

Certificate of Service

I, Doug Dean, hereby certify that on July 27, 2015, I served a true and correct copy of Decision Granting Motion to Reconsider and Closing Proceeding in Proceeding No. 15M-0263CP upon each of the persons appearing below either through the E-Filing system or by other means in accordance with applicable law.

All Non-Confidential Documents

Recipient	Address	Method
Colorado PUC	1560 Broadway, Suite 250 Denver, CO 80202	Colorado PUC E-Filings
Ace Express Coaches, LLC	15150 Preston Rd Dallas, TX 75248	Colorado PUC E-Filings
All Aboard America!	15150 Preston Rd Dallas, TX 75248	Colorado PUC E-Filings
Colorado Jitney	4412 quitman st Denver, CO 80212	Colorado PUC E-Filings
The Burke Law Firm, PC, Thomas Burke	1801 Broadway Suite 1100 Denver, CO 80202	Colorado PUC E-Filings
Law Offices of Richard J Bara, Richard Bara	1155 Sherman Street Suite 205 Denver, CO 80203	Colorado PUC E-Filings
Strasburger & Price, LLP, Mark Andrews	1025 Connecticut Avenue, N.W. Washington, DC 20036	Colorado PUC E-Filings
Horizon Coach Lines	14000 W. 44th Ave. Golden, CO 80403	Colorado PUC E-Filings