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VIA E-FILING

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

RE: STB Docket Nos. MC-F-21062 and MC-F-21062TA

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 Celerity Partners IV, LLC and its affiliates (including Ace Express Coaches, LLC) (collectively, "Applicants") in the above-referenced proceedings. Pursuant to the Board's rules of practice at 49 CFR § 1114.6, we ask the Board to take official notice of the two documents attached to this letter, both of which are matters of public record in the State of Colorado.

Attachment 1 is an Interim Decision of the Public Utilities Commission of the State of Colorado ("CO PUC") served on May 15, 2015, which apparently challenges the Board's exclusive jurisdiction over the motor passenger carrier transactions pending before it in the above dockets. Attachment 2 is the Applicants' Motion filed with CO PUC on June 1, 2015, asking that body to reconsider and vacate its Interim Decision for want of jurisdiction.

Ms. Cynthia T. Brown

June 3, 2015

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We bring these documents to the Board's attention because it does not appear that CO PUC was courteous enough to provide a copy of its Interim Decision to the Board, even though Applicants timely served CO PUC with the Applications pending in the referenced Board dockets as required by the Board's rules. Please note that if the Board were inclined to protect its jurisdiction by filing a comment with the CO PUC, or by taking other action, the Interim Decision sets June 17, 2015 as the due date for such comments.

Applicants also note that comments to the Board in its above-referenced dockets are due Monday, June 8, 2015. Although no such comments have been filed at this writing by the CO PUC or any other parties, Applicants reserve their right of reply under 49 CFR § 1182.6(b) to any such comments that may be timely filed.

Please do not hesitate to contact the undersigned counsel if the Board has any questions about this letter or the attachments. Thank you.

Respectfully submitted,



Mark J. Andrews

Attachments

cc: Mr. John Montgomery
Thomas J. Burke, Esq.
David Coburn, Esq.

Decision No. C15-0467-I

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.

**INTERIM DECISION ISSUING NOTICE AND REFERRING
PROCEEDING TO ADMINISTRATIVE LAW JUDGE**

Mailed Date: May 15, 2015
Adopted Date: May 13, 2015

TO THE PARTIES IN THIS MATTER AND ALL INTERESTED PERSONS, FIRMS, OR CORPORATIONS:

I. BY THE COMMISSION

A. Statement

1. On April 20, 2015, Ace Express Coaches, LLC (Ace Express) and Industrial Bus Lines, Inc. (IBL), filed a Notification of Interim Transfer of Certificates of Public Convenience and Necessity, Permits, and Related Properties. The notification states that Evergreen Trails, Inc., doing business as Horizon Coach Lines, has transferred its state and federal carrier authorities to IBL and Ace as of April 16, 2015. 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 (STB).¹

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. Consistent with the discussion below, we conclude that the Commission's authority over the transfer of common and contract carrier authorities is not automatically preempted by the STB's decision. For the Commission's authority to be preempted here, the underlying transfer must directly relate to and affect interstate commerce. Because there is insufficient information in the record for the Commission to determine whether it is preempted, we provide notice of this proceeding and refer it to an Administrative Law Judge (ALJ) for further legal and factual determinations.

B. Findings and Conclusion

3. The notification asserts that "[t]his Commission has previously recognized that state law relating to the transfer of intrastate authorities is preempted by [49 U.S.C.] section 14303(f),"² citing a 2008 Decision where the Commission determined that its authority over the transfer of certificates of public convenience and necessity was preempted.³

4. The Colorado Supreme Court and the United States District Court for the District of Colorado have issued opinions delineating when the Commission has authority over the transfer of intrastate authorities is preempted. The criteria for preemption are:

- 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.⁴

² IBL and Ace Express Notification, p. 3.

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); see also *Trans Shuttle, Inc. v. Pub. Utils. Comm'n*, 89 P.3d 398, 405 (Colo. 2004) (applying the same test and finding no evidence of interstate services other than the motor carrier's federal permit).

5. The application of this test requires multiple factual determinations about the motor carrier's services; however, Ace Express and IBL have not submitted any evidence relevant to the preemption criteria listed above. Because the applicants have not presented sufficient facts into the record to make a preemption determination, we refer this decision to an ALJ for a recommended decision. We direct the ALJ to address the preemption determination and to address whether the parties must file an application for approval of the transfer, pursuant to Rule 6205, 4 *Code of Colorado Regulations* 723-6 of the Rules Regulating Transportation by Motor Vehicle.

6. By this Decision, we also establish a 30-day notice and intervention period. We will issue a notice of this filing to interested persons, firms, and corporations in the May 18, 2015, bi-weekly transportation notice.

II. ORDER

A. The Commission Orders That:

1. This proceeding is referred to an Administrative Law Judge for issuance of a recommended decision, consistent with the discussion above.

2. Notice of the Notification of Interim Transfer of Certificates of Public Convenience and Necessity, Permits, and Related Properties will be provided in the May 18, 2015 bi-weekly transportation notice.

3. Any person desiring to intervene or participate as a party in this proceeding shall file a petition for leave to intervene on or before **June 17, 2015**. All persons who file a motion to permissively intervene shall do so in accordance with the instructions set forth in the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1, and this Decision. Alternatively, persons who do not wish to intervene or become a party, but desire to file

comments, may send written comments addressed to the Public Utilities Commission, 1560 Broadway, Suite 250, Denver, Colorado 80202. All persons who file an objection, notice of intervention as of right, motion to permissively intervene, or any other appropriate pleading shall do so in accordance with the instructions set forth in the Commission's Rules of Practice and Procedure and this Decision.

4. If an interested party does not meet the requirements of this Decision and the Rules of Practice and Procedure, 4 CCR 723-1, the Commission may dismiss or strike the intervention upon motion filed by any other party, or upon the Commission's own motion, unless good cause for failure to meet the requirements is shown.

5. If a hearing is required in this matter, the Commission will notify the parties of the hearing date, time, and location.

6. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
May 13, 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

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 5967, OF PERMIT NOS. B-9441, CSB-00179 AND ORC-0091, 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

**MOTION BY INTERVENORS
INDUSTRIAL BUS LINES, INC. D/B/A ALL ABOARD AMERICA!
AND ACE EXPRESS COACHES, LLC
REQUESTING THE COMMISSION TO RECONSIDER AND VACATE
INTERIM DECISION NO. C15-0476-I INSTITUTING THIS PROCEEDING**

I. Introduction and Summary

This Motion is filed by Industrial Bus Lines, Inc. d/b/a All Aboard America! ("IBL") and Ace Express Coaches, LLC ("Ace") (collectively, "Intervenors"). They respectfully submit that the Public Utilities Commission of the State of Colorado ("CO PUC" or "Commission") must reconsider and vacate its Interim Decision No. C15-0476-I issued on May 18, 2015 (the "May 15 Decision").¹ That decision purported to question the exclusive and preemptive jurisdiction of the United States Surface Transportation Board ("STB") over Intervenors' purchase (the "Acquisition") of certain passenger transportation assets, including Colorado intrastate operating authorities, from Evergreen Trails, Inc. d/b/a Horizon Coach Lines ("Seller" or "Horizon"). The STB's jurisdiction over the Acquisition is exclusive and preemptive under 49 U.S.C. § 14303(f), as will be explained in this Motion. Moreover, the May 15 Decision is impossible to reconcile

¹ Because the May 15 Decision specifically targeted IBL and Ace, they assume that their formal intervention in this proceeding is unnecessary. Should the Commission disagree, IBL and Ace ask that this Motion also be treated as their petition to intervene as a matter of right.

with the Commission's prior recognition of § 14303(f) preemption in 2012, when *the exact same Colorado intrastate passenger authorities now being purchased by Intervenors were acquired by Seller.*

Additionally, the May 15 Decision is riddled with the following errors of law and fact:

- (i) it misapprehends the statutory basis for the preemptive jurisdiction of the STB in this matter, instead citing case law that has nothing to do with § 14303;
- (ii) it ignores sworn testimony in the record before the STB that the volume of interstate traffic historically handled by Seller with the assets included in the Acquisition is more than sufficient to support the STB's preemptive jurisdiction under case law which does construe § 14303;
- (iii) it fails to appreciate that the power to make legal and factual determinations as to the scope of STB jurisdiction under § 14303 rests solely with the STB itself in the first instance (subject to federal court review), and not with this Commission; and
- iv) it even relies in part on the fact that Seller heretofore did not participate in this proceeding – a fact which is irrelevant to the exclusive jurisdiction of the STB, and which in any event is no longer even a fact because Seller is filing its own intervention herein.

By coming before this Commission and urging it to rectify the errors described above, Intervenors in no way concede that the Commission has either personal or subject-matter jurisdiction over them relating to any aspect of the Acquisition. Intervenors also reserve their right to seek judicial review and other judicial remedies relating to the May 15 Decision and to any subsequent Commission action in this proceeding or related dockets, including (without

limitation) their injunctive and monetary remedies for deprivation of rights under 42 U.S.C. §§ 1983 and 1988.

On a more positive note, Intervenor would remind the Commission of the public-interest factors that led the STB to grant interim approval of the Acquisition on April 8, 2015 (the “Interim Approval Decision”). As stated in that decision (copy attached as Exhibit A), Transferor had elected to non-renew the liability insurance that had enabled it to operate in interstate and intrastate commerce. That being the case, the STB found it necessary to allow Intervenor to step in and continue passenger services that otherwise would be lost to the public. Intervenor suggest that the Commission should welcome their willingness to continue those services under the Interim Approval Decision, rather than diverting its own and Intervenor’s resources to debates over settled principles of federal preemption.

II. Argument

A. The Commission Has Ignored Its Own, On-Point Precedent Concerning the Same Intrastate Rights Involved Here.

Intervenor invite the Commission’s attention to its own Decision No. C12-1074, adopted on September 12, 2012 in its Docket No. 12M-925CP (the “2012 Decision”, copy attached as Exhibit B). In the 2012 Decision, the Commission was dealing with a Notification of Transfer (the “2012 Notification”) filed by counsel for Horizon, the same carrier that is now the Seller in the present proceeding. The 2012 Notification (copy attached as Exhibit C in pertinent part) stated that Horizon was acquiring Colorado intrastate passenger authorities as part of a larger transaction which was subject to exclusive STB jurisdiction under 49 U.S.C. § 14303. Included in the 2012 Notification was a detailed discussion of prior case law establishing that an STB-

approved transaction of this type could be consummated by the involved parties “without the approval of a state authority” (see § 14303(f)).

In response to the 2012 Notification, the Commission styled its 2012 Decision as an “Order Recognizing Transfer” of the involved Colorado intrastate authorities to Horizon. The Commission did not open a notice-and-comment proceeding, as it has done here; it did not require the non-Colorado attorney who filed the 2012 Notification to file a *pro hac vice* motion and retain local counsel, as it has done here. (See *Pro Hac* Motion separately filed in this proceeding.) Instead, without further ado, the Commission simply *recognized the transfer of the intrastate rights*, subject only to ministerial notification requirements as to insurance, tariff adoption, vehicle stickers and the like with which Intervenors have no issue. (See STB regulations at 49 CFR § 1182.8(f), requiring compliance with “ministerial requirements of relevant State procedures.”)

Copies of the 2012 Notice and the 2012 Decision were supplied to Intervenors’ counsel by Commission staff on March 27, 2015, after the Commission was served with Intervenors’ application for STB approval of the Acquisition (the “STB Application”). The staff encouraged Intervenors to submit a similar Notification of Transfer regarding their Acquisition – which they filed on April 16 and updated on May 15, 2015 (the “2015 Notifications”). Intervenors’ 2015 Notifications were consciously modelled on Seller’s 2012 Notification. *But there the similarities end between the Commission’s treatment of the 2012 transaction and this Acquisition.* At no point does the Commission’s May 15 Decision in the present docket make any attempt to explain why it is opening a “proceeding” on Intervenors’ 2015 Notifications, rather than simply issuing

an Order Recognizing Transfer as it did in response to the 2012 Notification.² The disparate treatment of transfers of the same involved intrastate rights in 2012 and 2015 represents the essence of arbitrariness.

B. The Commission Confuses the Differing Statutory Bases for Federal Preemption Concerning Services over Particular Bus Routes as Distinct from Business Combinations among Bus Carriers.

The May 15 Decision appears to rely on *East West Resort Transp., LLC v. Binz*, 494 F.Supp.2d 1197 (D. Colo. 2007) (“*Binz*”), as establishing the “criteria for preemption” by the STB relating to this Acquisition (id., p.2 and n.4). *Binz*, however, did not arise under 49 U.S.C. § 14303, which gives the STB its exclusive jurisdiction over bus carrier mergers and acquisitions. Instead *Binz* construed 49 U.S.C. § 13902(b)(3), defining the circumstances under which bus carriers providing interstate service over regular routes could provide intrastate services on the same routes, and the extent to which this Commission could regulate intrastate schedules and fares along such routes. Section 13902(b)(3) relates to *a particular carrier’s* services, schedules and fares over particular routes, but has nothing to do with business combinations *among* two or more carriers such as the Acquisition involved here.

By contrast, the Acquisition falls precisely within § 14303. It is explicitly covered by § 14303(a)(2) because it involves the “purchase” by IBL and Ace – which are federally regulated interstate motor carriers of passengers – of “properties” of another such carrier, i.e., Seller. The STB Application specifically sought approval of the Acquisition under § 14303, and was promptly served upon this Commission as pointed out earlier. The STB Application (at pp. 15-17) included a “jurisdictional statement” carefully explaining how the applicability of §

² Because Intervenor’s STB application, their April 16 and May 15 Notifications of Transfer, and the Commission’s May 15 Decision presumably are already part of the Commission’s docket in this proceeding, Intervenor’s are not burdening the record with additional copies of these documents as exhibits to this Motion.

14303(a)(2) resulted in exclusive and preemptive STB jurisdiction under § 14303(f). The STB Application also provided citations (at pp. 5-6) to the existing interstate authorities of IBL and the Seller, as well as to the then-pending interstate authority of Ace. Subsequently Ace has received its interstate authority; see Exhibit D attached.

C. The Commission Chooses to Ignore Evidence in the STB Record that Supports the STB's Preemptive Jurisdiction.

The Commission's assertion that Intervenors "have not submitted any evidence" relevant to the STB's preemptive jurisdiction (May 15 Decision, at p. 3) is simply incorrect. As particularly pertinent here, the STB Application included Seller's and Intervenors' testimony (*id.*, at p. 17 n. 6) – which was sworn to (*id.*, Exhibit 1) – that the assets included in the Acquisition had been utilized by Seller to provide substantial services in both interstate and intrastate commerce. Intervenors likewise swore (*id.*, at pp. 10-12) that they intended to continue those services through use of their own interstate authorities plus the Colorado intrastate authorities and Colorado operating assets that they were acquiring from Seller. In fact, Intervenors certified that they were not planning any "substantial change in the physical operations or service patterns currently conducted" with the involved assets (*id.* at p. 17). Neither the Commission nor any other party has controverted this sworn evidence that substantial interstate and intrastate operations have been conducted by Seller and are contemplated for the future by Intervenors. Accordingly, the STB published a tentative decision on April 22, 2015 ("Tentative Permanent Approval," copy attached as Exhibit E), which found that the evidence of Intervenors and Seller will be sufficient (if opposing comments are not filed by June 8, 2015) to warrant permanent approval of the Acquisition under § 14303.

Nonetheless, the Commission's May 15 Decision claims (at pp. 2-3) that interstate commerce must constitute a "substantial portion of the motor carrier's business" along the involved "intrastate routes" in order to support preemption, and that Intervenor had failed to make such a showing. As pointed out earlier, this attempt to invoke a "substantiality" test reflects confusion between 49 U.S.C. §§ 13902(c) and 14303(f). Properly analyzed, the "substantiality" of interstate operations for purposes of § 14303 is not subject to a mathematical test, such as the ones the Commission unsuccessfully advocated for purposes of § 13902(c) in *Binz*, supra (494 F.Supp.2d, at 1205-06). At most, the proper "substantiality" test under § 14303 is the one stated in *North Alabama Express, Inc. v. I.C.C.*, 62 F.3d 361 (11th Cir. 1995), which hinges preemption on whether there have been sufficient bona fide interstate operations to establish that the reviewed transaction will effect a "change in interstate commerce" (*id.* at 365). Here, the previously-cited sworn testimony to the STB, quantifying past interstate operations by Seller to and from Colorado as an estimated percentage of its total operations with the involved assets, is more than sufficient to satisfy any such test of substantiality or bona fides.

D. If the Commission Wishes to Challenge the STB's Jurisdictional Determination, Its Proper Recourse is to the STB Itself.

It is not for the Commission to undertake its own assessment of whether there are "sufficient facts [in] the record to make a preemption determination" (May 15 Decision, at p. 3). The case law is clear that the STB, like its predecessor agency (the former Interstate Commerce Commission), has primary jurisdiction to determine the extent of its own regulatory authority. See, e.g., *Merchants Fast Motor Lines, Inc. v. I.C.C.*, 5 F. 3rd 911, 916 (5th Cir. 1993). If the Commission questions any of the sworn evidence presented to the STB by Intervenor or Seller, it is free to challenge that evidence in comments filed with the STB on or before June 8, 2015.

Intervenors wish to put the Commission on notice, however, that if it tries to mount such a challenge, Intervenors and Seller will exercise their right of reply under STB rules (see 49 C.F.R. § 1182.6(b)). Any such reply will present to the STB (the proper forum) a complete traffic study showing dates, revenue and equipment data for more than 300 physically interstate charters handled by Seller in calendar year 2014. Based on that additional evidence, Intervenors will argue that the STB should uphold and finalize its Tentative Permanent Approval. The supposed issue of whether the Acquisition will substantially affect interstate commerce is simply not one on which the Commission can prevail.

E. Seller's Past Participation in This Proceeding Is a Non-Issue.

The May 15 Decision (at p. 1 and n.1) makes much of the fact that the STB Application and the 2015 Notifications were filed by Intervenors and certain affiliates without formal joinder by Seller. This assertion is a red herring for at least three reasons. First, Seller did provide a signed Verification as to the factual content relating to Seller in that application (id., Exhibit 1). Second, joinder by the Seller was not required by the rules of the STB, the body with exclusive jurisdiction over the Acquisition. In any event, the Seller separately is filing its own intervention in this proceeding, which will join in this Motion and in 2015 Notifications filed by Intervenors.

III. Conclusion and Request for Relief

Curiously absent from the May 15 Decision is any consideration of the public interest factors which have informed the STB's Interim Approval Decision and its Tentative Permanent Approval. The primary public interest factor under 49 U.S.C. § 14303(b)(1) is "[t]he effect of the proposed transaction on the adequacy of transportation to the public." The STB Application

provides detail (at pp. 11-12) on the wide variety of passenger transport services provided by Seller in the past. But for the interim STB approval sought by and granted to Intervenor, all of these services would have been terminated when Seller decided to exit the Colorado market and non-renew its liability insurance in April 2015. Intervenor already have made, and plan to continue making, substantial investments in maintaining and improving Seller's past service to Colorado interstate and intrastate markets. If those investments are impeded or devalued by added delay and expense due to the Commission's refusal to recognize the STB's exclusive and preemptive jurisdiction over this Acquisition, Intervenor will be forced to pursue judicial remedies. In that regard, the one relevant holding by the U.S. District Court for the District of Colorado in *Binz*, supra, was that any Commission interference with lawful interstate commerce by carriers operating under federal authority may expose the Commission to monetary damages and/or award of attorney fees under 42 U.S.C. §§ 1983 and/or 1988. See 494 F.Supp. 2d at 1208-09.

WHEREFORE, Intervenor respectfully request (1) that they be granted leave (if necessary) to intervene in this matter for the purpose of contesting the Commission's jurisdiction in the premises, and (2) that the Commission reconsider and vacate its May 15 Decision initiating this proceeding.

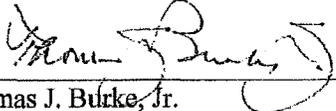
Respectfully submitted on this 1 day of June 2015,

INDUSTRIAL BUS LINES, INC. d/b/a ALL ABOARD AMERICA!
ACE EXPRESS COACHES, LLC

By Their Attorneys

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Exhibits:

- A – Interim Approval Decision of STB regarding this Acquisition
- B – 2012 Decision by CO PUC recognizing transfer to Seller of same intrastate rights involved here
- C – 2012 Notification to CO PUC by Seller regarding transfer of intrastate rights
- D – Interstate authority now held by Ace
- E – Tentative Permanent Approval by STB regarding this Acquisition

CERTIFICATE OF SERVICE

I certify that I have caused copies of the foregoing Motion and related Exhibits A through E to be served on Intervenor, on Seller, on the ALJ and on the STB. The CO PUC has not yet published a service list in this proceeding, and the undersigned is not aware of any other parties upon whom service must be made at this time. Dated at Denver, Colorado this 1 day of June, 2015.

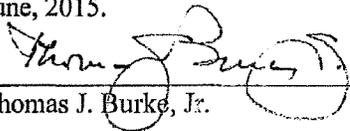

Thomas J. Burke, Jr.

EXHIBIT A

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. MCF 21062 TA

ACE EXPRESS COACHES, LLC, ET AL.
—CONTROL—

CERTAIN PROPERTIES OF EVERGREEN TRAILS, INC. D/B/A HORIZON COACH LINES

Digest:¹ This decision grants the request filed by Ace Express Coaches, LLC (Buyer), its affiliated parties, and Industrial Bus Lines, Inc. (IBL) for interim approval for the Buyer and IBL to manage and operate certain assets of Evergreen Trails, Inc. d/b/a Horizon Coach Lines.

Decided: April 8, 2015

On March 23, 2015, Ace Express Coaches, LLC (Buyer), and its affiliated parties (All Aboard America! Holdings, Inc. (AHI), Celerity AHI Holdings SPV, LLC (Celerity Holdings), Celerity Partners IV, LLC (Celerity Partners), and Industrial Bus Lines, Inc. (IBL)) (collectively, Applicants) applied for interim authority under 49 U.S.C. § 14303(i) and the Board's regulations at 49 C.F.R. § 1182.7(b) to permit the Buyer and IBL to manage and operate certain assets of Evergreen Trails, Inc. d/b/a Horizon Coach Lines (Seller). Interim approval would permit Applicants to complete the first phase of their proposed transaction pending a decision on their concurrently filed application for permanent authority.² The details of the entire proposed transaction will be outlined in our decision in Docket No. MCF 21062.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² Section 14303(i) provides in relevant part as follows:

- (i) **Interim approval.**—Pending determination of an application filed under this section, the Board may approve, for a period of not more than 180 days, the operation of the properties sought to be acquired by the person proposing in the application to acquire those properties, when it appears that failure to do so may result in destruction of or injury to those properties or substantially interfere with their future usefulness in providing adequate and continuous service to the public.

Specifically, the first phase of the proposed transaction contemplates that the Buyer and IBL would acquire control of the assets currently operated by the Seller, a federally regulated motor carrier of passengers in Colorado. These assets include the Seller's facilities, vehicles, leases, and contracts based in Colorado. The Seller currently provides both government and corporate shuttle services, scheduled shuttle services between Denver and two mountain resort towns in Colorado, and leisure travel services to, from, and within Colorado.³ IBL, a motor carrier of passengers (MC-133171) currently providing charter and contract services in Texas, New Mexico, and Arizona, would operate the assets in Colorado on a temporary basis. Applicants state that the Buyer is in the process of obtaining operating authority from the Federal Motor Carrier Safety Administration (FMCSA). Once the Board grants permanent authority to the Buyer and it has obtained FMCSA operating authority, the Buyer plans to take over the management and operation of the assets from IBL.

Applicants request that approval of interim control be granted by April 8, 2015, because the Seller plans to terminate its service with the assets subject to the transaction by April 14, 2015. According to Applicants, April 14, 2015, is the Seller's deadline for a \$500,000-payment to ensure continued public liability insurance coverage, and it is not prepared to pay the premiums to insure the operation of the assets for the short period prior to the consummation of the sale. Applicants argue that, if interim authority is granted by April 8, 2015, that would allow sufficient time for the assets to be transferred to IBL in advance of Seller's anticipated termination of services on April 14, 2015. IBL could then insure the assets under its liability policies and continue operating the assets. Furthermore, Applicants assert that, absent interim approval, the assets likely would diminish in value because service will have ceased, and the public will have been disadvantaged by the loss of continuous service.

Under 49 U.S.C. § 14303(i) and 49 C.F.R. § 1182.7(b), we find that Applicants have demonstrated that failure to grant interim approval of the proposed finance transaction may result in destruction of or injury to the properties being acquired or substantially interfere with their future usefulness in providing adequate and continuous service to the public.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

³ The government shuttle services include services provided under a contract between the Seller and the U.S. Department of Defense (DOD). Under DOD regulations, the Buyer would have to wait one year from the date on which IBL begins operating this service before taking it over. In addition, the Seller plans to begin providing intercity passenger service within a few months under a contract with the Colorado Department of Transportation.

It is ordered:

1. The Buyer and IBL have interim approval to manage and operate the Seller's assets described above for a period of not more than 180 days. The application for permanent authority will be addressed in a separate decision.

2. This decision is effective on its service date.

3. A copy of this decision will be served on: (1) the U.S. Department of Transportation, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, S.E., Washington, DC 20590; (2) the U.S. Department of Justice, Antitrust Division, 10th Street & Pennsylvania Avenue, N.W., Washington, DC 20530; and (3) the U.S. Department of Transportation, Office of the General Counsel, 1200 New Jersey Avenue, S.E., Washington, DC 20590.

By the Board, Acting Chairman Miller and Vice Chairman Begeman.

EXHIBIT B

Decision No. C12-1074

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 12M-925CP

IN THE MATTER OF THE NOTIFICATION OF TRANSFER OF CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY PUC NOS. 44908, 47967, AND L52393, AND PERMIT NOS. B-9941, ORC-00191, AND CSB-00179 FROM CUSA BCCAE, LLC, DOING BUSINESS AS BLACK HAWK CENTRAL CITY ACE EXPRESS, AS TRANSFEROR TO EVERGREEN TRAILS, INC., DOING BUSINESS AS HORIZON COACH LINES, AS TRANSFEREE.

**ORDER RECOGNIZING TRANSFER OF
CERTIFICATE OF PUBLIC CONVENIENCE AND
NECESSITY PUC NOS. 44908 AND 47967, AND
PERMIT NOS. B-9941, ORC-00191, AND CSB-00179**

Mailed Date: September 14, 2012
Adopted Date: September 12, 2012

I. BY THE COMMISSION

A. Statement, Findings, and Conclusions

1. This matter comes before the Commission for consideration of a Notification of the Transfer of Certificates of Public Convenience and Necessity (CPCN) PUC Nos. 44908, 47967, and L52393, and Permit Nos. B-9941, ORC-00191 (Notification), and CSB-00179 filed by CUSA BCCAE, LLC, doing business as Black Hawk Central City Ace Express (Ace Express) and Evergreen Trails, Inc., doing business as Horizon Coach Lines (Evergreen Trails) on August 14, 2012.

2. Evergreen Trails, in the Notification, states as follows:

This notification of transfer of the referenced intrastate operating authority as described in the caption of this filing is being filed for record purposes only. There are no present [Commission] Rules governing notification to the Commission of transfers of state-issued operating authorities under federal law at 49 U.S.C. § 14303, which provides, as pertinent to this Commission's jurisdiction:

(a) Approval required. - The following transactions involving motor carriers of passengers subject to jurisdiction under subchapter I of chapter 135 may be carried out only with the approval of the [STB] Board:

(1) Consolidation or merger of the properties or franchises of at least 2 carriers into one operation for the ownership, management, and operation of the previously separately owned properties;

(2) A purchase, lease or contract to operate property of another carrier by any number of carriers.

(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 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*. [emphasis added.]

This Commission has previously recognized that state laws relating to the transfer of intrastate authorities is preempted by 49 U.S.C. § 14303(f). *See Order Recognizing Transfer of Certificate of Public Convenience and Necessity PUC No. 7321*, Docket No. 08M-406CP, Decision No. C08-1078 (adopted October 9, 2008) ("*Transfer of PUC No. 7321*").

Bolding and Italics in original. Underscore added.

3. Evergreen Trails also states that the transfer of Ace Express' assets is part of a larger ongoing proceeding in a U. S. Bankruptcy Court in which it and a related company are acquiring the assets of 12 motor carrier subsidiaries owned by Coach America Holdings, Inc. (Coach America).

4. Coach America owns 12 motor carrier companies, with subsidiaries based in various locations in the United States. Ace Express is one of the 12 motor carrier companies, with subsidiaries owned by Coach America. Coach America filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on January 3, 2012, with the U.S. Bankruptcy Court of the District of Delaware. Coach America subsequently filed a Motion to sell all of its assets in the U.S. Bankruptcy Court on January 13, 2012.

5. The U.S. Bankruptcy Court issued an Order on May 24, 2012, approving and authorizing the sale of the assets of Coach America to Transportation Management Services, Inc. (TMS). The assets to be acquired by TMS¹ included the intrastate authorities of Ace Express.

6. On June 4, 2012, Frank Sherman together with FSCS Corporation, TMS West Coach, Inc., Evergreen Trails, and Cabana Coaches, LLC (Applicants) filed an application with the Surface Transportation Board (STB) to acquire the assets of 12 separate interstate motor passenger common carrier subsidiaries of non-carrier Coach America and to consolidate certain of those assets into Evergreen Trails and others into Cabana Coaches, LLC. The STB, in a decision served on June 29, 2012, granted the Applicants authority on an interim basis to acquire management control of the assets of the Coach America subsidiaries. The Applicants were granted permanent authority to acquire the assets of the Coach America subsidiaries by the STB in a decision served on September 6, 2012.

7. In the Notification filed on August 14, 2012, Evergreen Trails identifies the intrastate authorities of Ace Express as CPCN PUC Nos. 44908, 47967, and L52393, and Permit Nos. B-9941, ORC-00191, and CSB-00179. CPCN PUC Nos. 44908 and 47967, and Permit No. B-9941 were issued to Ace Express by the Commission. Ace Express may, under CPCN PUC Nos. 44908 and 47967, provide intrastate scheduled and call-and-demand passenger transportation between points in Colorado. Ace Express may, under Permit No. B-9941, provide intrastate contract carrier service between points in the Denver metro area for United Airlines, Inc.

¹ Evergreen Trails, in its Notification, states the asset purchase agreement filed with and approved by the U.S. Bankruptcy Court, grants TMS, an affiliate of Evergreen Trails, the right to purchase the assets of Coach America. However, the application filed with the STB assigns the right to purchase the assets of Coach America to either Evergreen Trails or to Evergreen Trails' parent company (FSCS Corporation). Coach America's assets are to be consolidated into Evergreen Trails.

8. Evergreen Trails also requests the transfer of CPCN PUC No. L52393. However, Casino Transportation, Inc., the previous owner of CPCN PUC No. 52393, filed an application in 2008 to lease a portion of CPCN PUC No. 52393 to Ace Express. The lease of a portion of CPCN PUC No. 52393 to Ace Express was granted by Decision No. C08-0573, Docket No. 08A-137CP-Lease issued June 10, 2008. Casino Transportation, Inc. subsequently filed an application in 2011 to transfer CPCN PUC No. 52393 to Ace Express. The transfer of CPCN PUC No. 52393 to Ace Express was granted by Decision No. C11-1171, Docket No. 11A-691CP-Transfer issued November 1, 2011. The authority named in CPCN PUC No. 52393 was consolidated by Decision No. C11-1171 into CPCN PUC No. 47967. As a result of the consolidation, CPCN PUC No. 52393 was canceled. Therefore, CPCN PUC No. 52393 cannot be transferred to Evergreen Trails.

9. Ace Express may provide off-road scenic charter service under Permit No. ORC-00191 and charter bus service under Permit No. CSB-00179. Both of these permits are defined as limited regulation by § 40-10.1-301, C.R.S., and were issued to Ace Express by the Commission.

10. Evergreen Trails argues that, pursuant to 49 U.S.C. § 14303, only the STB and not the Commission must approve the requested transfer of state issued operating authorities. Therefore, Evergreen Trails asks that the Commission recognize the transfers and update its records accordingly.

11. We find good cause to recognize the transfer of CPCN PUC Nos. 44908 and 47967, and Permit Nos. B-9941, ORC-00191, and CSB-00179.

II. ORDER**A. The Commission Orders That:**

1. The Notification of the Transfer of Certificates of Public Convenience and Necessity (CPCN) PUC Nos. 44908, 47967, and L52393, and Permit Nos. B-9941, ORC-00191, and CSB-00179 filed by CUSA BCCA, LLC, doing business as Black Hawk Central City Ace Express (Ace Express) and Evergreen Trails, Inc., doing business as Horizon Coach Lines (Evergreen Trails) is noted, consistent with the discussion above.

2. Evergreen Trails shall operate in accordance with all applicable Commission rules and regulations.

3. Ace Express shall file a terminating annual report from the first of January, 2012, to the date of this Order.

4. Evergreen Trails shall not commence operation until it has:

- (a) caused proof of insurance (Form E or self-insurance) or surety bond (Form G) coverage to be filed with the Commission in accordance with applicable rules;
- (b) paid to the Commission, the motor vehicle fee (\$5) for each vehicle to be operated under authority granted by the Commission, or in lieu thereof, paid the fee for such vehicle(s) pursuant to the Unified Carrier Registration Agreement;
- (c) filed an adoption notice that adopts as its own the currently effective tariffs and time schedules of Ace Express;
- (d) paid the applicable issuance fee (\$5);
- (e) filed an acceptance of transfer form, executed by both Ace Express and Evergreen Trails; and,
- (f) received notice in writing from the Commission that it is in compliance with the above requirements and may begin service.

5. Ace Express and Evergreen Trails are requested to comply with the requirements of this Order within 60 days of its effective date. For good cause shown, the Commission may grant additional time for compliance if the request for additional time is filed within the 60 days.

6. Within six months of the Mailed Date of this Order, Evergreen Trails shall file an advice letter, tariffs, and time schedules in its own name.

7. The 20-day time period provided by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the Commission mails or serves this Order.

8. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
September 12, 2012.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

JAMES K. TARPEY

PAMELA J. PATTON

Commissioners

EXHIBIT C

1330 Connecticut Avenue, NW
Washington, DC 20036-1795

202 429 3000 main
www.steptoel.com

Steptoe
STEPTOE & JOHNSON LLP

David H. Coburn
202 429 8063
dcoburn@steptoel.com

August 13, 2012

VIA Federal Express

Gary Gramlick
Public Utilities Commission
1560 Broadway, Suite 250
Denver, CO 80202

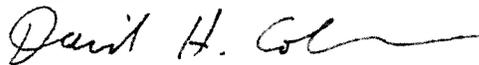
**Re: Notification of the Transfer of Certificates of Intrastate Operating
Authorities Pursuant to a Transaction Subject to Surface Transportation
Board Jurisdiction**

Dear Mr. Gramlick:

Please find enclosed an original and one copy of the notice regarding the transfer of intrastate operating authorities from CUSA BCCA, LLC dba Black Hawk Central City Ace Express to Evergreen Trails, Inc. dba Horizon Coach Lines that you have discussed with my colleague Chris Falcone.

If you have any questions, please do not hesitate to call me. We appreciate your cooperation.

Respectfully,



David H. Coburn
Christopher G. Falcone
STEPTOE & JOHNSON LLP
Attorneys for Evergreen Trails, Inc.

Colorado PUC E- Filings System

2012 AUG 14 AM 10:19
STATE OF COLORADO
PUBLIC UTILITIES COMMISSION

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO**

Miscellaneous Docket No. _____

IN THE MATTER OF THE TRANSFER OF CERTIFICATES OF PUBLIC
CONVENIENCE AND NECESSITY PUC NOS. 44908 AND 47967 AND PERMIT NOS.
B-9941, ORC-00191, CSB-00179 AND L52393 FROM CUSA BCCAE, LLC DBA
BLACK HAWK CENTRAL CITY ACE EXPRESS, TO EVERGREEN TRAILS INC.
dba HORIZON COACH LINES

**NOTIFICATION OF THE FORTHCOMING
TRANSFER OF CERTIFICATES OF PUBLIC
CONVENIENCE AND NECESSITY AND
PERMITS**

RECEIVED
STATE OF COLORADO
PUBLIC UTILITIES COMM.
2012 AUG 14 AM 10:19

CUSA BCCAE, LLC dba Black Hawk Central City Ace Express (“CUSA”) and
Evergreen Trails, Inc. dba Horizon Coach Lines (“Evergreen”) hereby notify the Commission
of the forthcoming transfer of Certificates of Public Convenience and Necessity PUC Nos.
44908 and 47967 and Permit Nos. B-9941, ORC-00191, CSB-00179 and L52393 from
CUSA to Evergreen. This transfer, as described further below, will take place upon the
closing of a transaction that will occur only after the Surface Transportation Board (“STB”)
has issued a decision approving the transaction. In connection with this forthcoming
transfer, CUSA and Evergreen advise the Commission as follows:

1. Notification. On June 4, 2012, Evergreen and affiliated parties filed an
application with the STB to acquire control of the assets, including the intrastate authorities,
of CUSA and other related motor carriers. That application remains pending. On July 3,
2012, the STB issued a decision seeking comments on the application. A copy of that
decision is attached hereto.

This notification of transfer of the referenced intrastate operating authority as
described in the caption of this filing is being filed for record purposes only. There are

no present Public Utilities Commission (“Commission”) Rules governing notification to the Commission of transfers of state-issued operating authorities under federal law at 49 U.S.C. § 14303, which provides, as pertinent to this Commission's jurisdiction:

(a) Approval required. - The following transactions involving motor carriers of passengers subject to jurisdiction under subchapter I of chapter 135 may be carried out only with the approval of the [United States Surface Transportation] Board:

- (1) Consolidation or merger of the properties or franchises of at least 2 carriers into one operation for the ownership, management, and operation of the previously separately owned properties;
- (2) A purchase, lease or contract to operate property of another carrier by any number of carriers, (bracketed material supplied).

* * *

(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 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*. . . (emphasis added).¹

¹ Federal courts and the STB have held that state regulation of the transfer of intrastate authorities is preempted where the transfer is part of a transaction approved by the STB. *See, Tennessee PSC v. Interstate Commerce Comm'n*, 891 F.2d 292 (6th Cir. 1989) (holding that pursuant to the predecessor of 14303(f), a carrier was not required to obtain Tennessee Public Service Commission approval for the transfer of an intrastate certificate to a new company resulting from a merger approved by the Interstate Commerce Commission, predecessor to the STB); *Minnesota Transp. Regulation Bd. v. United States*, 966 F.2d 335, 337 (8th Cir. 1992) (“[T]he ICC's exemption of this transaction allowed the firms to transfer the ‘grandfather’ authority without regard to its non-transferability under Minnesota law.”); *Leaseway Transp. Corp. v. Bushnell*, 888 F.2d 1212 (7th Cir. 1989) (holding that an Illinois statute requiring approval of the Illinois Commerce Commission for the transfer of intrastate license was preempted by the predecessor or 14303(f)); *Oregon Public Util. Comm. v. Interstate Commerce Comm.*, 979 F.2d 778 (9th Cir. 1992) (holding that Oregon’s attempts to regulate the transfer of intrastate authority were preempted by the predecessor to section 14303(f)); *Global Passenger Services, L.L.C.--Control--Bortner Bus Company, et al.*, Docket No. MC-F-20924, 1998 STB LEXIS 185, at *5 n.11 (served July 17, 1998) (“[I]f the participants to a finance transaction are motor carriers of passengers, subject to Board jurisdiction under

This Commission has previously recognized that state law relating to the transfer of intrastate authorities is preempted by 49 U.S.C. § 14303(f). *See Order Recognizing Transfer of Certificate of Public Convenience and Necessity PUC No. 7321*, Docket No. 08M-406CP, Decision No. C08-1078 (adopted October 9, 2008) (“*Transfer of PUC No. 7321*”). In that order, the Commission noted that it expected parties involved in a transaction subject to STB jurisdiction to provide a notice of transfer while the STB decision is pending. As noted above, the transfer of the assets, including the intrastate authorities, of CUSA to Evergreen is part of a larger transaction that is currently pending before the STB.

This Commission has stated that state law regarding the transfer of intrastate authorities is not preempted by 49 U.S.C. § 14303(f) if the transaction subject to STB jurisdiction is a sham designed for the purpose of avoiding state jurisdiction. *See Transfer of PUC No. 7321* at 4. In *Transfer of PUC No. 7321*, the Commission noted that the transaction involving the transfer of intrastate authorities at issue was not a sham because the transferee had no preexisting CPCN on file with the Commission to provide the types of services offered by the transferor and because after the transfer, the transferor would not retain any portion of CPCN PUC No. 7321. Similarly, in the present case, Evergreen does not at present hold the CPCNs or permits necessary to provide the intrastate services offered by CUSA and, after the transaction, CUSA will not retain any portion of the CPCNs or permits currently held by CUSA. In *Transfer of*

49 U.S.C. 13501, then under 49 U.S.C. 14303(f), they are subject to our exclusive and plenary jurisdiction in all matters relating to their consolidation, merger, and acquisition of control, and this extends to intrastate operating rights.”); *Colorado Mountain Express, Inc. and Airport Shuttle Colorado, Inc., d/b/a Aspen Limousine Service, Inc.--Consolidation and Merger--Colorado Mountain Express*, STB Docket No. MC-F-20902, 2 S.T.B. 68; 1997 STB LEXIS 338 at *3 (STB served Feb. 28, 1997) (same).

PUC No. 7321, this Commission also noted that one federal court case, *North Alabama Express, Inc. v. Interstate Commerce Comm'n*, 971 F.2d 661 (11th Cir. 1992), considered whether the transaction at issue affected interstate commerce. The transaction at issue here directly relates to and affects interstate commerce. In this case, Evergreen, which is an interstate carrier, is acquiring the assets of CUSA, which is also an interstate carrier that operates service between Colorado and surrounding states. After the transactions, Evergreen will take over the interstate and intrastate operations previously conducted by CUSA. CUSA will be left without any substantial assets and will cease all motor passenger operations. In other words, this transaction will consolidate the operations of two interstate carriers. Thus, this transaction directly relates to and affects interstate commerce.

2. Description of the Transaction. The transfer of the assets, including the intrastate authorities, of CUSA to Evergreen is part of a larger transaction through which Evergreen and a related company intend to acquire the assets of 12 separate motor carriers. These 12 carriers are currently owned by Coach America Holdings, Inc. ("Coach America"). Both Coach America and these 12 subsidiaries are in Chapter 11 bankruptcy. The asset sale has been approved by the U.S. Bankruptcy Court for the District of Delaware. See attached Order. A copy of the asset purchase agreement will be supplied upon request.

The asset purchase agreement grants Transportation Management Services, Inc., an affiliate of Evergreen, the right to purchase the assets of the Coach America Subsidiaries. However, as described in the application to the STB, the right to purchase the assets of CUSA will

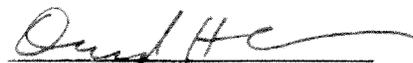
be assigned to either Evergreen or to Evergreen's parent company (FSCS Corporation) and those assets will be consolidated into Evergreen. A copy of the STB application was previously supplied to the Commission, but is also attached to this Notification.

3. Insurance Coverages. Evergreen will undertake to make the necessary filings with the Commission evidencing required insurance coverages upon consummation of the purchase transaction and the initiation of its intrastate operations in Colorado.

WHEREFORE, CUSA and Evergreen respectfully request that this Commission enter an Order in the present miscellaneous docket recognizing the forthcoming transfers referred to above, such transfers to become effective upon the closing of the described transaction. Evergreen will advise the Commission when the closing occurs at which point the Commission can enter the order and update its records accordingly.

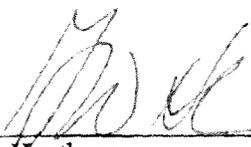
DATED this day of August 13, 2012

Respectfully submitted,



David H. Coburn
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Washington, DC 20036
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Attorneys for Evergreen Trails, Inc.



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Attorney for CUSA BCCAЕ, LLC

EXHIBIT D



U.S. Department of Transportation
Federal Motor Carrier Safety Administration

1200 New Jersey Ave., S.E.
Washington, DC 20590

SERVICE DATE
May 14, 2015

CERTIFICATE

MC-908184-C

U.S. DOT No. 2589674
ACE EXPRESS COACHES, LLC
GOLDEN, CO

This Certificate is evidence of the carrier's authority to engage in transportation as a **common carrier of passengers, in charter and special operations**, by motor vehicle in interstate or foreign commerce.

This authority will be effective as long as the carrier maintains compliance with the requirements pertaining to insurance coverage for the protection of the public (49 CFR 387); the designation of agents upon whom process may be served (49 CFR 366); and schedules (49 CFR 374.305). The carrier shall also render reasonably continuous and adequate service to the public. Failure to maintain compliance will constitute sufficient grounds for revocation of this authority.

A handwritten signature in black ink, appearing to read "Jeffrey L. Secrist".

Jeffrey L. Secrist, Chief
Information Technology Operations Division

NOTE: Applicant is a nonrecipient of governmental financial assistance.

NOTE: Willful and persistent noncompliance with applicable safety fitness regulations as evidenced by a DOT safety fitness rating of "Unsatisfactory" or by other indicators, could result in a proceeding requiring the holder of this certificate or permit to show cause why this authority should not be suspended or revoked.

CPN

EXHIBIT E

44397
EB

SERVICE DATE – APRIL 22, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. MCF 21062¹

ACE EXPRESS COACHES, LLC, ET AL.—ACQUISITION AND CONTROL—CERTAIN
PROPERTIES OF EVERGREEN TRAILS, INC. D/B/A HORIZON COACH LINES

AGENCY: Surface Transportation Board.

ACTION: Notice Tentatively Approving and Authorizing Finance Transaction.

SUMMARY: Ace Express Coaches, LLC (Buyer), and its affiliated parties (All Aboard America! Holdings, Inc. (AHI), Celerity AHI Holdings SPV, LLC (Celerity Holdings), Celerity Partners IV, LLC (Celerity Partners), and Industrial Bus Lines, Inc. (IBL)) (collectively, Applicants) have filed an application under 49 U.S.C. § 14303 for the Buyer to acquire certain assets of Evergreen Trails, Inc. d/b/a Horizon Coach Lines (Seller), and for the continuance in control of the Buyer by AHI, Celerity Holdings, and Celerity Partners once the Buyer becomes a federally regulated motor carrier of passengers. The Board is tentatively approving and authorizing the transaction, and, if no opposing comments are timely filed, this notice will be the final Board action. Persons wishing to oppose the application must follow the rules at 49 C.F.R. §§ 1182.5 and 1182.8.

DATES: Comments must be filed by June 8, 2015. Applicants may file a reply by June 22, 2015. If no comments are filed by June 8, 2015, this notice shall be effective on June 9, 2015.

ADDRESSES: Send an original and 10 copies of any comments referring to Docket No. MCF 21062 to: Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001. In addition, send one copy of comments to Applicants' representative: Mark J. Andrews, Strasburger & Price, LLP, Suite 717, 1025 Connecticut Avenue, N.W., Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Matthew Bornstein: (202) 245-0385. Federal Information Relay Service (FIRS) for the hearing impaired: 1-800-877-8339.

SUPPLEMENTARY INFORMATION: The Buyer is a newly established limited liability company under the laws of Delaware. Applicants state that the Buyer applied to the Federal

¹ Concurrently with their application, the parties also filed a request for interim approval under 49 U.S.C. § 14303(i). In a decision served on April 8, 2015, in related Docket No. MCF 21062 TA, interim approval was granted, effective on the service date of that decision.

Motor Carrier Safety Administration (FMCSA) for nationwide charter and special operations authority, as a motor passenger carrier operating over irregular routes, in Docket No. MC-908184. IBL, a motor carrier of passengers (MC-133171), is a corporation established under the laws of New Mexico. IBL provides charter and contract services in Arizona, New Mexico, and Texas utilizing 101 motor coaches and minibuses. The Buyer and IBL are under the control of AHI, Celerity Holdings, and Celerity Partners, each a noncarrier organized under the laws of Delaware. AHI also owns 100 percent of the stock of two other federally regulated motor carriers of passengers: Hotard Coaches, Inc. (Hotard) (MC-148331) and Sureride Charter Inc. d/b/a Sundiego Charter Co. (Sundiego) (MC-324772).² Hotard operates local and regional charter and contract services within Louisiana and southern Mississippi. Sundiego conducts charter, sightseeing, and various shuttle operations to, from, and within California and adjoining states.

The Seller, a motor carrier of passengers (MC-107638), is a corporation established under the laws of the State of Washington. The Seller is under the control of Francis W. Sherman, a noncarrier individual. Mr. Sherman exercises control of the Seller through intermediate holding companies FSCS Corporation and TMS West Coast, Inc. Applicants state that the Seller currently provides both government and corporate shuttle services, scheduled shuttle services between Denver and two mountain resort towns in Colorado (carrying both patrons and employees of the casinos located there), and leisure travel services to, from, and within Colorado. The government shuttle services include services provided under a contract between the Seller and the U.S. Department of Defense (DOD). Applicants state that the Seller utilized approximately eight vans and minibuses for the corporate shuttles, 11 motor coaches for the casino operations, and 33 coaches plus two minibuses for all other work. Applicants indicate that the revenue mix generated by these assets in 2014 for the government/corporate shuttles, casino operations, and charters was approximately 9, 48, and 43 percent, respectively. In addition, the Applicants state that the Seller has been awarded an intercity passenger service contract with the Colorado Department of Transportation (CDOT) under which 13 additional CDOT-owned coaches will commence operations within the next few months.

Applicants explain that the proposed transaction would close in three phases. The first phase, as discussed in MCF 21062 TA, contemplates that the Buyer and IBL would acquire control of the assets currently operated by the Seller in Colorado.³ All of the non-DOD assets,

² The Board authorized control of Hotard and IBL by AHI and the Celerity entities in Celerity Partners IV—Control—Calco Travel, MCF 21044 (STB served May 11, 2012). The Board also authorized control of Sundiego by AHI and the Celerity entities in Celerity Partners IV—Control—Sureride Charter, MCF 21055 (STB served Oct. 29, 2013).

³ These assets include: (i) the Seller's operations center in Golden, Colorado, plus six other leased terminals and parking facilities; (ii) approximately 44 motor coaches and 23 other vehicles; (iii) all maintenance facilities and supplies for these vehicles; (iv) certain licenses and permits necessary to operate the assets; (v) furniture, fixtures, office equipment, software, and
(continued . . .)

including vehicles, would be operated by IBL (under its existing FMCSA authority) pursuant to an interim management agreement between IBL and the Buyer. Vehicles owned by the Seller would be leased to the Buyer, and vehicle leases to the Seller by third parties would be assigned to the Buyer. The DOD contract would be assigned to and performed by IBL under a management agreement with the Buyer, as required by DOD regulations, which preclude contracts with passenger carriers in existence less than a year.

The second phase of the proposed transaction would entail the Buyer becoming permanent owner and operator of all the non-DOD assets, including vehicles, upon the effective date of the Board's approval of the transaction and once the Buyer has obtained FMCSA operating authority. Any interim role of IBL managing such assets would therefore end. Lastly, the third phase of the proposed transaction would occur as soon as practicable after the first anniversary of the phase two closing. The Buyer would replace IBL as the direct operator of the DOD contract and the proposed acquisition would then be complete.

Under 49 U.S.C. § 14303(b), the Board must approve and authorize a transaction that it finds consistent with the public interest, taking into consideration at least: (1) the effect of the proposed transaction on the adequacy of transportation to the public; (2) the total fixed charges that result; and (3) the interest of affected carrier employees. Applicants have submitted information, as required by 49 C.F.R. § 1182.2, including the information to demonstrate that the proposed transaction is consistent with the public interest under 49 U.S.C. § 14303(b), and a statement that Applicants' aggregate gross operating revenues of the Buyer, IBL, Hotard, Sundiego, and the Colorado assets of the Seller exceeded \$2 million for the preceding 12-month period, see 49 U.S.C. § 14303(g).

Applicants submit that the proposed transaction would have a positive net impact on the adequacy of transportation to the public because Applicants do not intend to change the operations of Seller's assets, but intend to modernize the bus fleet used in those operations. They anticipate that the proposed transaction would enhance services to the public by implementing vehicle sharing arrangements, coordinated driver training and safety management services, and by centralizing certain management support functions. With respect to fixed charges, Applicants state that the combined scale of operations of the Buyer, IBL, Hotard, and Sundiego would allow the Buyer to enhance its volume purchasing power, thereby reducing insurance premiums and achieving deeper volume discounts for tires, equipment, and fuel. Applicants claim that the proposed transaction also would have a positive impact on employees. The Buyer intends to retain Seller's existing management and hourly employees who are involved in the operation of the assets being acquired. Applicants assert that this would result in continued job security and opportunities for growth in the combined business of the Buyer and its affiliated carriers.

(... continued)

intellectual property in use for such operations; and (vi) existing and prospective charter and shuttle contracts based in Colorado.

Applicants further claim that the acquisition would not likely affect competition because the markets in which the Seller's Colorado assets and the previously approved combination of Sundiego, IBL, and Hotard operate are adjacent, but do not significantly overlap. Applicants note that numerous carriers compete with the Seller's operations in Colorado and that the Seller operates fewer than 50 percent of all coaches in the Denver and Colorado Springs markets. These local and regional carriers include Seller's largest competitor, Busco, Inc. d/b/a Arrow Stage Lines (Busco), which operates 33 motor coaches from its Denver facility and has 216 coaches in its total fleet. Ramblin Express, Inc. (Ramblin) also operates 45 units and has facilities in Denver and Colorado Springs, and Colorado Tour Line LLC, which operates under the GrayLine brand, operates motor coaches in both markets. In addition, Applicants state that Colorado Charter Line, Inc. (CCL) and Premier Charter (Premier) are two smaller charter companies that operate in the Denver area.

According to Applicants, in the casino shuttle market, the Seller and Ramblin are the current operators (regulated by the Colorado Public Utility Commission), and the Buyer merely would replace the Seller in this market. Applicants argue that services provided under contract involve a competitive bidding process where the competing local and regional carriers mentioned above could bid for shuttle services, along with any interested nationwide operators and that thus, the market would remain competitive if the proposed transaction were approved. Applicants state that services provided on a "spot basis" are the norm for much of Seller's charter business involving leisure travel and that these charter operations face competition from nationwide operators in addition to the local and regional carriers mentioned above (Busco, Ramblin, CCL, and Premier). They also note that motor passenger carriers face intense market competition from other transportation modes, such as private automobiles, airlines, and trains.

On the basis of the application, the Board finds that the proposed acquisition is consistent with the public interest and should be tentatively approved and authorized. If any opposing comments are timely filed, these findings will be deemed vacated, and, unless a final decision can be made on the record as developed, a procedural schedule will be adopted to reconsider the application. See 49 C.F.R. § 1182.6(c). If no opposing comments are filed by the expiration of the comment period, this notice will take effect automatically and will be the final Board action.

Board decisions and notices are available on our website at "WWW.STB.DOT.GOV".

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The proposed transaction is approved and authorized, subject to the filing of opposing comments.
2. If opposing comments are timely filed, the findings made in this notice will be deemed vacated.

3. This notice will be effective June 9, 2015, unless opposing comments are filed by June 8, 2015.

4. A copy of this notice will be served on: (1) the U.S. Department of Transportation, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, S.E., Washington, DC 20590; (2) the U.S. Department of Justice, Antitrust Division, 10th Street & Pennsylvania Avenue, N.W., Washington, DC 20530; and (3) the U.S. Department of Transportation, Office of the General Counsel, 1200 New Jersey Avenue, S.E., Washington, DC 20590.

Decided: April 16, 2015.

By the Board, Acting Chairman Miller and Vice Chairman Begeman.

**SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C. 20423-0001**

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