

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. MC-F 21035

STAGECOACH GROUP PLC AND COACH USA, INC., ET AL.–
ACQUISITION OF CONTROL–TWIN AMERICA, LLC

Digest:¹ Two competing motor carriers that provide sightseeing bus services primarily in New York City sought after-the-fact STB approval of their joint business arrangement. Concluding that the transaction was not in the public interest because it would create an entity with excessive market power, the Board denied the request for authority. The Board is now denying a request to reconsider that decision.

Decided: January 9, 2012

SUMMARY

In a decision issued February 8, 2011 (the “underlying decision”), the Board denied approval, sought after-the-fact, of the application of 2 competing motor carriers that provide sightseeing bus service primarily within New York City (NYC) for approval of their joint venture Twin America, LLC (Twin America). The Board found that the transaction was not in the public interest because it overly concentrates market power in the joint venture, and because Applicants² did not demonstrate public benefits derived from the joint venture. The Board then

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 Plan Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² Applicants consist of the corporate families of International Business Services (IBS), which operates local and interstate bus services under the Gray Line New York (Gray Line) trade name, and City Sights Twin, an entity that took over the NYC sightseeing operation of a business called City Sights (collectively, City Sights). The corporate family of IBS/Gray Line includes Stagecoach Group PLC (Stagecoach), its noncarrier intermediate subsidiaries (Stagecoach Transport Holdings plc, SCUSI Ltd., and Coach USA Administration, Inc.), and Coach USA, Inc. (Coach USA). The Stagecoach/Coach USA group controls numerous passenger carriers throughout the United States. Its umbrella organization, Coach Group, is based in the United Kingdom (UK) and operates bus, coach, tram, and train operations throughout the UK as well as the United States. The corporate owner of City Sights is Mr. Zev Marmurstein. It is uncontested that, in addition to Twin America (of which he was named president and chief executive officer),

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proposed two potential remedies, without ordering Applicants to select either one: (1) Applicants could dissolve their joint venture, or (2) Applicants could sell the interstate component of the joint entity's business, thus removing Twin America from the scope of the Board's jurisdiction. The Board ordered Applicants to submit a plan as to how they would bring themselves into compliance with our decision and the applicable law. Applicants timely sought reconsideration and a stay of the underlying decision pending reconsideration. By decision served on March 9, 2011, the Board granted Applicants' request to stay the underlying decision pending reconsideration, but cautioned the parties "to proceed no further with steps to integrate these two companies during the pendency of the petition for reconsideration." On March 21, 2011, the New York State Attorney General (NYSAG) filed an opposition to the petition for reconsideration. Other interested persons also filed comments in response to Applicants' petition.³

We will deny the petition for reconsideration. Applicants have failed to demonstrate material error in the Board's finding that the transaction is not in the public interest or in proposing possible remedies to the unlawful consummation of Applicants' transaction.

BACKGROUND

In August 2009, Applicants filed an application under 49 U.S.C. § 14303⁴ to acquire control of an entity called Twin America that they formed in March 2009 and began operating shortly thereafter. According to the terms of the formation agreement, Twin America's essential transportation purpose is to operate hop-on, hop-off double-decker tour buses within NYC. The formation of Twin America combined Applicants' previously competing hop-on, hop-off double-decker tour bus operations, which were, by far, the largest 2 such operations in NYC.

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Mr. Marmurstein has (since 2003) controlled a motor carrier called R.W. Express, LLC. See Mr. Zev Marmurstein—Continuance in Control—R.W. Express, LLC, MC-F-21036 (STB served Oct. 16, 2009).

³ Onel Alfaro filed comments in opposition to the Applicants' petition for reconsideration on May 6, 2011. Karen Fleming filed an Amicus Curia Statement contesting testimony Applicants attached to their petition to stay our underlying decision on May 10, 2011. The International Brotherhood of Teamsters, Local Union No. 966 filed a letter on May 11, 2011, indicating that, having received certain assurances from Twin America, Local 966 is not objecting to approval of the transaction. Applicants responded on May 20, 2011. Karen Fleming filed comments in response to Applicants' May 20 filing on July 7, 2011.

⁴ Under 49 U.S.C. § 14303(b), we must approve and authorize a transaction that we find consistent with the public interest, taking into consideration at least: (1) the effect of the transaction on the adequacy of transportation to the public; (2) the total fixed charges that result; and (3) the interest of the affected carrier employees. Thus, in determining whether the transaction is consistent with the public interest, the Board may evaluate many factors, including whether there are anticompetitive effects that would result from the joint venture.

Applicants initially proceeded as if Twin America's services were subject only to local jurisdiction. They subsequently engaged the federal licensing process by filing their application with the Board (and their operating registration with the Federal Motor Carrier Safety Administration (FMCSA)), but not until 4 months after the joint venture was actually formed. The apparent trigger for their federal filing was NYSAG's service of subpoenas on Applicants concerning antitrust implications arising from Twin America's formation and operations. Applicants also modified the transaction to include interstate transportation, thereby raising the likelihood that the transaction would come within the scope of Board jurisdiction.

The Board found that it had jurisdiction over the joint venture, primarily because of a small amount of interstate bus service Twin America provides between NYC and points in other states, pursuant to the changes to the transaction made just after the NYSAG's antitrust inquiry began.

To ascertain whether the Twin America transaction was in the public interest, the Board conducted an analysis of the competitive harms and offsetting public benefits the transaction produced. In addition to its usual approach of looking at potential harms and benefits in merger cases, there the Board was also able to examine *actual* changes in the competitive environment since Applicants' premature consummation of their joint venture. It was also able to consider Applicants' progress, if any, toward the realization of public benefits. The Board's broad public interest inquiry examined 5 basic components.

First, based on undisputed evidence, the Board observed that Applicants had implemented price increases shortly before and after the consummation of the joint venture. Gray Line had implemented a price increase just prior to entering the joint venture, and Twin America subsequently increased the fares of City Sights between 10% and 17% shortly after Twin America began operations. At oral argument, counsel for Applicants conceded that Twin America had increased its prices in order to "match" the fares of its affiliate Gray Line.⁵

Second, under its broad public interest inquiry, the Board found that the market in which the transaction should be examined was hop-on, hop-off double-decker tour buses within NYC. Applicants had argued that Twin America competes with a vast array of NYC tour operations, including trolleys, coaches, bicycle tours, pedi-cabs, Segway tours, horse and carriage tours, and helicopter tours.⁶ But the Board found that Applicants' proposed broad spectrum of competitive tour operators were not close substitutes for Twin America's tour product. Rather, the Board concluded that hop-on, hop-off double-decker, guided tour bus operations in NYC are unique. The Board found that the other tour options proffered by Applicants differed significantly with respect to fares, weather constraints, speed, comfort, and convenience. The Board also noted that the narrower market definition that it found appropriate corresponded directly with Applicants' own business documents prepared contemporaneously with Twin America's formation.

⁵ See Transcript 22.

⁶ V.S. Willig 9-10, Nov. 17, 2009.

The Board was guided in part by the “Small but Significant Non-Transitory Increases in Price” test used by the Department of Justice (DOJ) and the Federal Trade Commission (FTC).⁷ The Board found that Twin America’s 2009 price increase was an example of a significant price increase because it was in excess of the 5% considered problematic in the Merger Guidelines. The 2009 price increase was non-transitory – it has remained in effect for more than 2 years. Following its application of this test and based on the evidence about tour product characteristics, the Board concluded that the market was limited to hop-on, hop-off double-decker buses in NYC.

Third, after defining the market, the underlying decision examined market share. While acknowledging the imperfections of the varying means proposed by the parties to calculate market share, the Board reached a conclusion that is indisputable –Twin America dominates the hop-on, hop-off double-decker tour bus market in NYC. The only other similar carrier, Big Taxi Tours, controls only a small fraction of the routes and buses in the market.

Fourth, the underlying decision discussed barriers to entry. While acknowledging that historically the *intercity* bus market has not been difficult to enter, the Board noted that the particular hop-on, hop-off double-decker tour bus market has seen no new entrants since Twin America was formed, notwithstanding Twin America’s price hike. The Board also noted the presence of entry barriers unique to the market. Thus, the Board concluded that Applicants had not met their burden to show that the barriers to entry in this market were low enough to overcome our concerns about the high level of market concentration.

Finally, the Board examined the public benefits of the joint venture. The Board found that, for the most part, public benefits had not materialized. Cross-ticketing was very limited. There was no record evidence of shortened wait times for passengers. Nor did the Board find evidence that the estimated \$7-\$11 million in savings from joint operations was being passed on to consumers.

Based on these findings, the Board denied the application and suggested 2 possible means by which Applicants could comply with the law – dissolution of the transaction or divestiture of the interstate operations that brought Twin America within our jurisdiction. Applicants seek reconsideration of the underlying decision.

⁷ U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (Merger Guidelines) 9, August 19, 2010. This test sequentially adds the next closest substitute product or geographic area to those of the merging participants until the point where a hypothetical monopolist controlling those products or areas could profitably implement a small but significant non-transitory price increase or reduction in service.

DISCUSSION AND CONCLUSION

Under 49 U.S.C. § 722(c) and 49 C.F.R. § 1115.3(b), we will grant a petition for reconsideration only upon a showing that the prior action will be affected materially because of new evidence or changed circumstances, or because the action involves material error. Applicants allege our underlying decision errs in the following 4 ways: 1) by defining the market too restrictively; 2) by relying on a price increase to show market power; 3) by indicating that a lack of other market entrants suggests barriers to entry; and 4) by not allowing Applicants an opportunity to present alternative remedies.

Applicants' petition for reconsideration does not persuade us that the underlying decision contained material error. After unlawfully consummating a joint venture without the required approval, Applicants belatedly sought Board authorization for a transaction that created an entity that dominates the market in which it competes and has the ability to raise rates or reduce service without sufficient competitive restraints. Moreover, there have been no meaningful benefits passed on to the public through the creation of Twin America. The Board properly found, under those circumstances, that the transaction was not in the public interest.

Nothing in the petition for reconsideration affords a basis for modifying that finding, as shown below. Moreover, given this lengthy proceeding that included a rarely ordered oral argument, Applicants cannot mount a credible argument that they lacked the opportunity to present argument on the appropriate remedy should the Board not approve the transaction in its current form.

We will turn now to the specific objections raised by Applicants regarding our prior analysis. Applicants produced new verified statements with their petition for stay. But these verified statements do not offer new evidence that would help Applicants' case that was not discoverable before we issued our underlying decision. Instead, Applicants simply re-argue the same points and assert that the Board imposed an unfair remedy.

Public Interest

1. Market definition

Applicants' primary contention concerning market definition is that the Board's definition of the market as hop-on, hop-off double-decker bus tours in NYC limits the relevant market to Twin America's own products, without testing the boundaries of how other tours and attractions constrain double-decker tour prices. However, the Board's underlying decision explored the other tourist options in NYC that Applicants' witness, Professor Robert Willig, asserted were Twin America's competition. It explained with specificity why those products and services – such as bike rentals, helicopter tours, and Segway⁸ rentals – possess physical or

⁸ The Transport Workers Union of America informed us that the use of Segways in NYC is illegal, Comments 20, Feb. 1, 2010, a point unrebutted by Applicants.

financial limitations that placed them outside of the market for the services offered by Twin America. Moreover, Applicants ignore the Board's inclusion of the products of one other tour company, Big Taxi Tours, in the market. Significantly, Applicants fail to refute that their own transaction documents support a market definition limited to hop-on, hop-off double-decker tour buses in NYC.⁹ Consequently, we do not find material error regarding our market definition determination.¹⁰

2. Price Increase

Applicants allege that the Board's second error was to rely on Twin America's price increase as evidence of pricing power. Applicants allege that the Board failed to examine whether Twin America's price increase would have occurred in the absence of a joint venture or to "disentangle that partial price increase from general price increases occurring throughout the transportation tour sector or other passenger transportation services facing the same cost increases in NYC generally."¹¹ Applicants are incorrect.

The Board did examine whether Gray Line's and City Sights' price increases were independent of general transportation price increases by examining evidence in the record, specifically, Exhibit 4 to Prof. Willig's March 10, 2010 verified statement. That exhibit shows that during the relevant time period, some of the Applicants' selected array of transportation tour sector prices increased but others did not.¹² Moreover, some increased by large amounts and others by very small amounts. With this mixed and less-than-exhaustive record, it was reasonable for the Board to conclude that Twin America's price increase was independent of others occurring throughout the transportation section, particularly given that the Exhibit 4 tour products are not particularly close substitutes to Twin America. In addition, Applicants' explanation that their price increases were driven by the increases in fuel prices since the fourth

⁹ See, e.g., Limited Liability Company Agreement of Twin America LLC at 7-8, defining "Sightseeing business," "Territory," and "Purpose" for Twin America. NYSAG Reply, Mar. 11, 2010. Because this agreement was submitted under seal, we will not discuss the details of the document further.

¹⁰ Applicants argue, at various points, that the Board was required to mount a full-scale antitrust analysis in order to reach its conclusions regarding market definition. See, e.g., V.S. Willig 3-6, Feb. 18, 2011. Applicants are mistaken. While the Board can and does consider antitrust principles in its consideration of public interest factors, these doctrines are guidance and their strict application is neither required nor determinative. In any event, the Board properly considered well-established antitrust principles in this case.

¹¹ Pet. for Reconsideration 3.

¹² Applicants provided no explanation for how they identified the companies whose pricing information is included in Exhibit 4, nor did they say whether other tour companies not listed had different pricing trends. Although Exhibit 4 contains data for many water-based tours, it does not include pricing data for Big Taxi Tours, the only other, hop-on, hop-off double-decker tour bus operator in NYC.

quarter of 2007¹³ was unconvincing, because Applicants' evidence shows that while fuel prices went up in 2007, Gray Line and City Sights fares rose only 1-3%.¹⁴ The 2009 fare increases of 10-17% – completed after the formation of Twin America – were put in place during a period of depressed passenger demand and when fuel prices were dropping.¹⁵

In the most recent verified statement of Prof. Willig, Exhibit A again shows a similar distribution of prices for transportation-based tours that stayed the same, increased, or decreased from 2008 to 2011.¹⁶ Given its similarity to Exhibit 4, Exhibit A does nothing to refute the Board's finding.¹⁷ The fact remains that the record regarding price increases/decreases of other tour operators is mixed, and that none of the companies on Exhibit A are particularly close competitors to Twin America. It is also still the case that Applicants were able to effect a 10-17% price increase that has lasted over 2 years. Under these circumstances and using DOJ/FTC policy as a guideline, it was reasonable for the Board to conclude that this price increase, which was well above the 5% increase rule-of-thumb used by the antitrust agencies and was sustained for a non-transitory period, was solid evidence of pricing power.¹⁸ Although Professor Willig may be correct that a price increase of 5% or more may mean different things in different markets depending on the particular market characteristics, he offers no compelling argument for why a significant price increase in this market should not be viewed with great concern. Additionally, Applicants' self-serving post-hoc argument that City Sights "would have unilaterally taken price up had the joint venture not occurred" is not entitled to significant weight.¹⁹ Therefore, we do not find material error with our price increase determination.

3. Barriers to Entry

The last material error Applicants allege with respect to the competitive analysis deals with barriers to entry. Applicants state that the Board "committed material error in concluding that lack of entry into the market since the Twin America merger indicates high entry barriers."²⁰ This argument mischaracterizes the Board's prior decision and fails to persuade us that there was material error.

¹³ V.S. Willig 9, Nov. 17, 2009.

¹⁴ V.S. Willig 10, Mar. 10, 2010.

¹⁵ Applicants' Reply, V.S. Willig, Ex. 2, Nov. 17, 2009.

¹⁶ V.S. Willig, Ex. 4, Mar. 10, 2010; V.S. Willig, Ex. A, Feb. 18, 2011.

¹⁷ V.S. Willig 4, Feb. 18, 2011. Despite the Board's finding that Big Taxi Tours was Applicants' closest competitor, Exhibit A provides no data whatsoever on the pricing of Big Taxi.

¹⁸ See Merger Guidelines 8-10.

¹⁹ See V.S. Willig 4, Feb. 18, 2011.

²⁰ Pet. for Reconsideration 4.

The underlying decision explains that Applicants had the opportunity to rebut the finding that the joint venture created an impermissibly high level of market concentration by showing that entry barriers were sufficiently low to discipline a market-dominating competitor like Twin America. The Board acknowledged that the agency has typically viewed barriers to entry into the *intercity* bus market as theoretically low, and that a sustained price increase does not *per se* indicate substantial barriers to entry. But, after carefully analyzing the record regarding the number of double-decker buses in NYC, their licensing requirements, the availability of bus stops, and the difficulty of entering into a market with established dominant brands, the Board concluded that Applicants had not satisfied their burden to demonstrate that entry barriers are sufficiently low enough to discipline their conduct.

There was no material error in the finding that Applicants failed to meet their burden on this issue. The record supports a finding that the principal restraint on Gray Line was its direct competitor, City Sights, and vice versa. And when they merged, they were able to raise prices by 10-17% for a 2-year period without a new competitor entering the marketplace and placing a competitive restraint on their pricing. On reconsideration, Applicants submit no new evidence to suggest that there has been new entry since the underlying decision.

Moreover, it was entirely reasonable for the Board to rely, in part, on the absence of any new entity. It is undisputed that Twin America increased prices, and that no entrant has entered the market since Twin America was formed. Other than City Sights' entry into the hop-on, hop-off double-decker tour bus market in 2005²¹ - which occurred prior to Twin America's domination of the current market - Applicants point to no concrete evidence that entry barriers are low. Applicants' argument that the lack of entry following Twin America's market domination and price increase merely "evidences a market characterized by high quality product offerings at competitive prices" is unpersuasive.²² It is a bald assertion without supporting evidence and, more importantly, would render meaningless the entry-barriers analysis - a common way of evaluating whether market power can be sustained - in every case.

Applicants also assert that our suggestion that the post-transaction market may be "mature" is "unclear."²³ To do so, they ignore the explanation we provide in the underlying decision. We pointed out that NYC's hop-on, hop-off double-decker tour bus market is populated by 2 well-established and valuable brands - Gray Line and City Sights, brands that Twin America continues to use. The DOJ/FTC Commentary on Horizontal Merger Guidelines notes that in such markets, successful entry requires substantial investment in advertising and promotional activity over a long period of time to build and achieve widespread distribution through retail channels.²⁴ In other words, it is harder to enter such established or "mature" markets than it is to enter less established markets.

²¹ V.S. Marmurstein 2, Nov. 17, 2009.

²² See Pet. Reconsideration 4.

²³ Id.

²⁴ DOJ/FTC Commentary on Horizontal Merger Guidelines (March 2006) 38.

Under these circumstances – a dominant Twin America, a sustained price increase, no responsive entry, and the existence of some entry barriers – it was Applicants’ responsibility to provide persuasive evidence that entry barriers were, nonetheless, low enough to impact market behavior. They failed to do so, and we do not find material error with our underlying decision.

Remedies

In light of the finding that the formation of Twin America was not in the public interest, the Board was confronted with an unusual issue. Applications under § 14303 are required to be submitted to the Board before a transaction is consummated. Parties to such transactions are prohibited by that statutory provision from implementing the transaction, and they must remain separate entities until and unless the Board approves their application.

Here, however, Applicants unlawfully consummated their joint venture prior to seeking approval from the Board. As a result, the Board lacked the usual remedy of prohibiting the transaction from taking place. The underlying decision noted that Applicants have at least 2 alternative options to remedy their premature consummation and the Board’s subsequent denial of authority: unwinding the transaction, or discontinuing or divesting the interstate services that Twin America began after antitrust concerns were raised about its intracity operations. The former would alleviate the public interest concerns created by Twin America’s market domination. The latter option would leave Twin America intact, but would remove it from our jurisdiction (and place it within the jurisdiction of the NYSAG), because it would be solely an intrastate operator. The underlying decision directed Applicants to provide the Board with a report detailing the steps they will take to comply with the Board’s order denying authority for the transaction.

Most of Applicants’ petition for reconsideration is devoted to the allegation that we committed material error by “failing to consider alternative remedies and failing to provide the applicants the opportunity to address the question of alternative remedies.”²⁵ Applicants rest their remedies argument primarily on Gilbertville Trucking v. United States, 371 U.S. 115 (1962) (Gilbertville). In Gilbertville, our predecessor, the Interstate Commerce Commission (ICC), had ordered divestiture of assets by a principal to terminate a violation of a statute prohibiting common control or management of motor carriers without prior approval. Gilbertville, 371 U.S. at 123. The Gilbertville court acknowledged that divestiture was a remedy within the scope of the ICC’s power (Gilbertville, 371 U.S. at 129), but remanded the case back to the ICC because it held that a prerequisite to judicial review, limited by statute to ascertaining whether the ICC made an allowable judgment on its choice of remedy, “is evidence that a judgment was in fact made, that the parties were heard on the issue, that proper standards were applied.” Id. at 130.

The underlying decision does not conflict with Gilbertville. As noted, the Board’s decision offers 2 possible, but not exclusive, alternative remedies, and we did not compel

²⁵ See Pet. for Reconsideration 4.

Applicants to pursue either at that stage. More fundamentally, however, Applicants have had the opportunity to argue the appropriateness of prospective remedies.

The parties to this case raised alternative remedies 3 times. First, NYSAG, in addressing remedies, asked the Board to deny the application for control of Twin America.²⁶ In the alternative, NYSAG asked that we condition the approval of the application by ordering a divestiture of the tour guided sightseeing business by double-decker buses in the 5 boroughs of NYC from the transaction.²⁷ In other words, NYSAG contemplated the converse of one of the potential remedies we identified – approving the transaction’s interstate component once the intrastate aspect, which is really the lion’s share of Twin America’s business, was spun off. Applicants filed a responsive pleading to the NYSAG’s comments, but ignored addressing the proposed alternative remedy.²⁸

Next, the Transport Workers Union of America (TWU) also filed a request that the Board deny the application.²⁹ In the alternative, TWU requested that the Board order Applicants to produce documents to support Applicants’ claims that the public and employees have not been and will not be harmed by the creation of Twin America.³⁰ Again, Applicants filed a responsive filing to TWU’s comments, but in that filing failed to address the concept of alternative remedies.³¹

Finally, NYSAG again discussed the potential remedies in this case when it asked the Board to reject the application on the grounds that it is not in the public interest, or, in the alternative, to reserve the Board’s decision until NYSAG could conduct its own investigation.³² This time, Applicants did address that remedy and argued against the Board “forego[ing] its exclusive jurisdiction under Section 14303 in favor of the [state] agency’s state law antitrust investigation[.]”³³

²⁶ NYSAG Comments 7, Nov. 2, 2009.

²⁷ Id.

²⁸ Reply of Applicants to Comments of the New York State Attorney General, Nov. 17, 2009.

²⁹ TWU Comments 26, Feb. 1, 2010.

³⁰ Id.

³¹ Reply of Applicants to Sur-Reply of the New York State Attorney General and to Comments of the Transport Workers Union AFL-CIO, Local 225, Mar. 10, 2010.

³² Sur-Reply of the State of New York to Reply of Applicants to Comments of the New York State Attorney General, Feb. 1, 2010.

³³ Reply of Applicants to Sur-Reply of the New York State Attorney General and to Comments of the Transport Workers Union AFL-CIO, Local 225 at 8, Mar. 10, 2010.

In short, the parties addressed remedies. The Board considered their filings and suggested 2 alternative means to bring Applicants in compliance with the law – dissolution or divestiture (or discontinuing) of Twin America’s interstate activities. In doing so, the Board did not order either remedy. The Board did order Applicants to submit a plan indicating how they would bring themselves in compliance with our decision. None of that is material error.

Although the Board has not yet ordered a remedy, we find it necessary at this time to address one of Applicants’ arguments about potential remedies. Applicants argue that we cannot order the dissolution of the joint venture because they have integrated virtually every operational function of Gray Line and City Sights while this application was pending, including sharing information, joining bus operations and associated marketing, sales, management operations, back-office support, information technology support and intellectual property, such as “call centers, central dispatching, charter business, organized group sales, training, information technology operations, human resources, marketing and advertising departments, and sales.”³⁴ Applicants present us with a *fait accompli*, and essentially argue that we cannot order the dissolution of Twin America. They are mistaken. Their decision to consummate the transaction without regulatory approval was one Applicants made at their own peril, and the law does not require that we reward them for their violation of the federal requirement of pre-approval of this transaction. Dissolution of the joint venture remains an option that the Board may consider, depending on the results of the proposed compliance plan that Applicants have been ordered to submit.³⁵

In sum, Applicants have failed to present new evidence or substantially changed circumstances that would materially affect the case or to show material error in our underlying decision. They have not satisfied their burden under 49 U.S.C. § 722(c) or 49 C.F.R. § 1115.3. Accordingly, their request for reconsideration is denied.

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

³⁴ Pet. for Reconsideration 7, V.S. Marmurstein 1,3, Feb. 18, 2011.

³⁵ Moreover, the finality of Applicants’ integration and the inability of Twin America to return to its component companies are at least in doubt. In their letter filing on July 8, 2010, Applicants submitted into the record here a decision from the National Labor Relations Board (NLRB) pertaining to an action filed by TWU, Local 225. The Local had sought a determination that the companies forming Twin America had merged, and that thus a contract vote was in order. Twin America opposed that petition, and the NLRB ruled in Twin America's favor. In doing so, the NLRB found, "There has not been any significant physical consolidation of operations." In re: Twin America and Local 225, Transport Workers Union, AFL-CIO, Case 22-RC-13115, Decision and Order, NLRB, Region 22 (June 28, 2010), at 11. Thus, Applicants’ own evidence here casts doubt on their argument on the consequences of dissolution.

It is ordered:

1. Applicants' petition for reconsideration is denied.
2. The stay issued by the Chairman on March 8, 2011, is removed.
3. Applicants are directed to provide the Board with a report by February 10, 2012, on compliance with the underlying decision and this one.
4. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.