

# Holland & Knight

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September 6, 2011

**VIA HAND DELIVERY**

The Surface Transportation Board  
Attention Cynthia T. Brown  
Chief Section of Administration  
395 E Street SW  
Washington, DC 20423

ENTERED  
Office of Proceedings

SEP - 6 2011

Part of  
Public Record

RECEIVED  
SEP 6 2011  
MANAGEMENT  
STB

Re: STB Docket Number MCF21040 -- *City Sightseeing Washington DC, Inc. - CSL, LLC Transaction*

Dear Ms Brown,

Enclosed please find an original and ten (10) copies of the Verified Notice of Exemption of City Sightseeing Washington DC, Inc. to be filed in the above-referenced docket pursuant to 49 C.F.R. § 1182.9. City Sightseeing Washington DC, Inc. has enclosed a check in the amount of \$2,000 payable to the Surface Transportation Board for the required filing fee.

Should you have any questions, please do not hesitate to contact us at 202-955-3000.

Sincerely yours,

HOLLAND & KNIGHT LLP



J. Michael Cavanaugh

Stephanie J. Bagot

*Attorneys for City Sightseeing Washington DC, Inc.*

Enclosures

**FILED**

SEP - 6 2011

**SURFACE  
TRANSPORTATION BOARD**

**FEE RECEIVED**

SEP - 6 2011

**TRANSPORTATION BOARD**

**BEFORE THE SURFACE TRANSPORTATION BOARD**

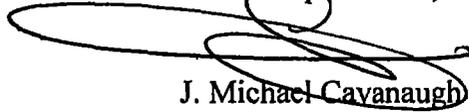
**STB DOCKET NO. MCF21040**

**CITY SIGHTSEEING WASHINGTON DC, INC. - CSL, LLC TRANSACTION**

**VERIFIED NOTICE OF EXEMPT TRANSACTION**

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Dated: September 6, 2011



J. Michael Cavanaugh

Stephanie J. Bagot

HOLLAND & KNIGHT LLP

2099 Pennsylvania Avenue, NW

Suite 100

Washington DC 20006

202 955 3000

Attorneys for City Sightseeing Washington  
DC, Inc.

**BEFORE THE SURFACE TRANSPORTATION BOARD**

**STB DOCKET NO. MCF21040**

**CITY SIGHTSEEING WASHINGTON DC, INC. - CSL, LLC TRANSACTION**

**VERIFIED NOTICE OF EXEMPT TRANSACTION**

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Pursuant to the Surface Transportation Board's regulations at 49 CFR 1182.9, City Sightseeing Washington DC, Inc., a New York corporation, trading in Washington DC as Open Top Sightseeing Washington DC ("Open Top") hereby files this Verified Notice of Exemption ("Notice") with respect to the transaction described below. The Verification of Open Top's President is attached to this Notice.

Open Top currently operates individually-ticketed, on-demand sightseeing tour businesses in the District of Columbia and holds (i) a Washington Metropolitan Area Transit Commission Certificate of Authority No. 931 (attached as Exhibit A), (ii) a Motor Carrier Certificate MC-651595-C (attached as Exhibit B), and (iii) a U.S. Department of Transportation Number 1212054 (attached as Exhibit C). Open Top intends to acquire (through its parent company, Open Top Sightseeing USA, Inc., a Delaware corporation), 100 percent of the membership interests in CSL, LLC, a District of Columbia limited liability company ("CSL"), currently holding (i) a Washington Metropolitan Area Transit Commission Certificate of Authority No. 1240, (ii) a Motor Carrier Number MC-604689 and (iii) a U.S. Department of Transportation Number 1641284.

The purpose of the transaction is to allow Open Top to provide a more efficient and streamlined service to the public, allow for environmental benefits in cleaner air and lesser noise resulting from fewer vehicles being used more efficiently to handle the combined Open Top and

CSL patrons, allow for less replication of services and congestion and eliminate any potential public confusion between Open Top and CSL services in the District of Columbia.

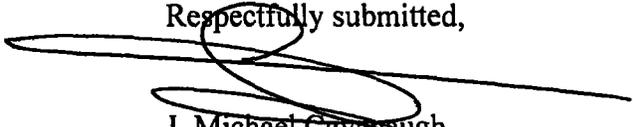
The Washington Metropolitan Area Transit Commission by Order No. 12,969 dated August 30, 2011 (attached as Exhibit D) approved the transaction. As the Washington Metropolitan Area Transit Commission noted in Order No. 12,969, the transaction results in the transfer of 19 buses from CSL to Open Top in a Metropolitan District "served by 17 other WMATC carriers operating 542 vehicles"; therefore this transaction "is unlikely to result in any significant increase in individually-ticketed sightseeing market concentration" and therefore present little concern to increased market share. Therefore, there should be no change in the competitive balance as a result of this transaction.

The main agreements that Open Top anticipates entering in this transaction are: (i) a purchase agreement to buy 90 percent of the membership interests in CSL from the majority owners containing typical terms and conditions for such transaction; and (ii) a purchase agreement to buy 10 percent of the membership interests in CSL from the minority owners containing typical terms and conditions for such transaction.

After the transaction is consummated, Open Top will undertake to retain the majority of established, full-time employees of CSL with a policy of no compulsory redundancies. The business of Open Top and CSL is by definition largely dependent on a seasonal workforce. The timing of this transaction will enable the natural reduction in scale to take place as seasonal staff return to their studies or other work as they would have done at this time of year irrespective of the transaction. Furthermore, the combination of Open Top and CSL staff offers CSL staff more opportunities to advance in the larger Open Top organization than they would have in CSL alone.

The proposed closing date for this transaction is September 14, 2011. The business address for Open Top is 5500 Tuxedo Road, Hyattsville, MD 20781 (telephone number: 1-877-332-8689). Undersigned counsels are available to respond to any questions that may arise with respect to this Notice.

Respectfully submitted,



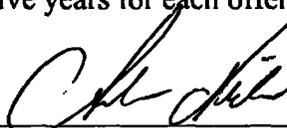
J. Michael Cavanaugh  
Stephanie J. Bagot  
HOLLAND & KNIGHT LLP  
2099 Pennsylvania Avenue, NW  
Suite 100  
Washington DC 20006  
202 955 3000

Attorneys for City Sightseeing Washington  
DC, Inc.

September 6, 2011

## VERIFICATION

My name is Anders Nielsen, I am president of City Sightseeing Washington DC, Inc. I hereby certify under penalty of perjury, under the laws of the United States of America, that all information supplied in connection with this Notice is true and correct. I know that willful misstatements or omissions of material facts constitute Federal criminal violations punishable under 18 U.S.C. 1001 by imprisonment up to five years and fines up to \$10,000 for each offense. Additionally, these misstatements are punishable as perjury under 18 U.S.C. 1621, which provides for fines up to \$2,000 or imprisonment up to five years for each offense.



\_\_\_\_\_  
Anders Nielsen

Dated September 5, 2011

**EXHIBIT A**

**WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION**

**CERTIFICATE OF AUTHORITY**

**No. 931**

**City Sightseeing Washington DC Inc.  
Trading as Open Top Sightseeing Washington  
1730 M Street, N.W., #400  
Washington, DC 20036-4517**

*By Order Nos. 8599 and 10,353 of the Washington Metropolitan Area Transit Commission, Issued March 21, 2005, and March 28, 2007, respectively;*

*WHEREAS, the above-named carrier is entitled to receive authority to transport passengers within the Washington Metropolitan Area Transit District;*

*THIS CERTIFICATE OF AUTHORITY is hereby issued to the named carrier as evidence of the authority to engage in the for-hire transportation of passengers by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privilege granted to the named carrier:*

*IRREGULAR ROUTES, transporting passengers between points in the Washington Metropolitan Area Transit District;*

*RESTRICTED TO operations conducted according to the named carrier's applicable tariff on file with the Commission; and*

*RESTRICTED AGAINST (1) transportation solely within the Commonwealth of Virginia and (2) any passenger transportation for hire on an individual fare paying basis in competition with any existing, scheduled, regular-route, passenger transportation service performed by, or under a contract with, the Federal Government, a signatory to the Compact, a political subdivision of a signatory, or the Washington Metropolitan Area Transit Authority.*

*THIS CERTIFICATE OF AUTHORITY DOES NOT AUTHORIZE ANY TRANSPORTATION BY ANY PERSON OTHER THAN THE CARRIER NAMED HEREON.*

*THIS CERTIFICATE OF AUTHORITY IS NOT VALID UNLESS THE CARRIER NAMED HEREON IS IN COMPLIANCE WITH THE INSURANCE REQUIREMENTS OF THE COMMISSION*

*IT IS A FURTHER CONDITION of this certificate of authority that the carrier named hereon shall (a) provide safe and adequate transportation service, equipment, and facilities and (b) observe and enforce Commission regulations*

FOR THE COMMISSION



William S. Morrow, Jr  
Executive Director



Issued May 25, 2007

**EXHIBIT B**



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

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

**SERVICE DATE**  
October 16, 2008

**CERTIFICATE**

**MC-651596-C**

**CITY SIGHTSEEING WASHINGTON DC INC  
D/B/A OPEN TOP SIGHTSEEING WASHINGTON DC  
HYATTSVILLE, MD**

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 386); 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.

Kathy Weiner, Chief  
Information Systems 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 C**



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

400 Seventh St., S.W.  
Washington, D.C. 20590  
February 19, 2004

CITY SIGHTSEEING USA INC  
1730 M STREET NW SUITE 400  
WASHINGTON DC 20036

In reply refer to:  
USDOT Number: 1212054  
PIN: 5B33MV7J

Dear Motor Carrier:

Your application seeking federal registration to operate in interstate commerce has been approved. Your USDOT number, personal identification number (PIN) and MC number, if applicable, can be found in the upper right hand corner of this letter. The USDOT number should be marked on your commercial motor vehicles as required by Section 390.21 of the Federal Motor Carrier Safety Regulations (FMCSRs). A copy of this regulation is enclosed.

As a new entrant, the Federal Motor Carrier Safety Administration (FMCSA) will evaluate your safety management practices through a safety audit and monitor your on-road performance for 18 months prior to granting you permanent registration. You must maintain minimum safety standards and comply with the FMCSRs and applicable Hazardous Materials Regulations (HMRs) in order to continue operating in interstate commerce during and after this 18-month period. Failure to comply with these requirements may result in the revocation of your permanent registration authority.

An FMCSA safety auditor will be contacting you to schedule the audit. The purpose of the safety audit is to provide you with educational and technical assistance and to gather safety data needed to make an assessment of your safety performance and adequacy of your basic safety management controls. The auditor will review a sample of your safety management systems and a sample of required records to assess compliance with the FMCSRs, applicable HMRs and related record-keeping requirements specified in Appendix A of Part 385 of Title 49 of the Code of Federal Regulations (49 CFR Part 385).

Upon completion of the audit, the auditor will review the findings with you. This discussion will be followed up within 45 days with a letter advising you whether or not FMCSA has determined that you have adequate basic safety management controls. In accordance with 49 CFR 385.337, failure to permit a safety audit to be performed on your operations may result in the revocation of your registration and/or the penalty provisions in 49 U.S.C. 521(b)(2)(A).

Please note that you will be required to file an updated motor carrier registration form, the MCS-150 (Motor Carrier Identification Report), every two years. A copy of this regulation is enclosed.

**EXHIBIT D**

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

SILVER SPRING, MARYLAND

ORDER NO. 12,969

IN THE MATTER OF:

Served August 30, 2011

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

Case No. AP-2011-101

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

Case No. AP-2011-102

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

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

**I. STANDARDS FOR APPROVAL**

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

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

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

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

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

## II. PERMANENT APPROVAL

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

### A. Fitness

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The presumption of fitness therefore stands.

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

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

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

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

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

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

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

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

### C. Competitive Balance

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

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

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

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

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

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

### III. TEMPORARY APPROVAL

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

### IV. COMMENCING OPERATIONS

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

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

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

THEREFORE, IT IS ORDERED:

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

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

3. That the application for temporary approval is denied.

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

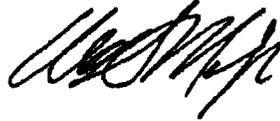
5. That Certificate of Authority No. 1240 shall stand revoked and be surrendered to the Commission upon applicant taking possession of assets currently held by CSL LLC.

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

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

BY DIRECTION OF THE COMMISSION; COMMISSIONERS BRENNER AND HOLCOMB:

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

William S. Morrow, Jr.  
Executive Director