

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

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ORAL ARGUMENT

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IN THE MATTER OF: :

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STAGECOACH GROUP PLC :

AND COACH USE, INC., : STB Docket

MR. ZEV MARMURSTEIN, ET AL. : No. MC-F-21035

:

- ACQUISITION OF CONTROL - :

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TWIN AMERICA LLC :

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Tuesday,
April 27, 2010
Surface Transportation Board
Suite 120
395 E Street, S.W.
Washington, D.C.

The above-entitled matter came on
for hearing, pursuant to notice, at 9:30 a.m.
BEFORE:

DANIEL R. ELLIOTT III Chairman
FRANCIS P. MULVEY Vice Chairman
CHARLES D. NOTTINGHAM Commissioner

APPEARANCES:

PRIMARY APPLICANTS

On Behalf of Stagecoach Group PLC, Coach
USA, Inc., Mr. Zev Marmurstein, et. al.:

DAVID H. COBURN, ESQ.

Of: Steptoe & Johnson LLP
1330 connecticut Avenue, N.W.
Washington, D.C. 20036-1795
(202) 429-8063

MICHAEL P. A. COHEN, ESQ.

Of: Paul. Hastings, Janofsky & Walker LLP
875 15th Street, N.W.
Washington, D.C. 20005
(202) 551-1880
(202) 372-5345

FEDERAL GOVERNMENT PARTIES

On Behalf of New York State Attorney
General's Office:

JAMES YOON, ESQ.

Of: New York State Attorney General's Office

Antitrust Bureau
120 Broadway Avenue, Suite 26C
New York, NY 10271
(212) 416-8822

MICHAEL BERLIN, ESQ.

Deputy Attorney General for Economic

Justice

Of: New York State Attorney General's Office
Executive Division
120 Broadway Avenue
New York, NY 10271-0332
(212) 416-8085

OPPOSITION PARTIES

On Behalf of Continental Guest Services
Corporation:

MARK A. BERMAN, ESQ.

Of: Ganfer & Shore, LLP

3360 Lexington Avenue

New York, NY 10017

(212) 922-9250

(212) 922-9286

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P-R-O-C-E-E-D-I-N-G-S

9:27 a.m.

CHAIRMAN ELLIOTT: Good morning and welcome. Thank you for coming in today. Today, we'll hear oral argument in the case of Stagecoach Group and Coach USA, et al., acquisition of Control Twin America, STB Docket Number MC-F-21035. In an effort to move things along, the Board Members will not be making any opening remarks, this morning. But I wanted to cover a few procedural matters before we begin. We've asked each party to make a short statement of their arguments. The Counsel should be prepared to answer questions from the Board at any time during your allotted time. I assure you that we have read all of your pleadings and there is no reason to repeat every argument. We will have three sets of Counsel participating in argument, this morning, in the following order of presentation and respective times allotted: Applicant Stagecoach Group and its

1 subsidiaries and Zev Marmurstein -- I hope I
2 got that right -- and you have been allotted
3 a time of 20 minutes. We understand that you
4 wish to use 13 minutes for opening and seven
5 minutes for rebuttal, after the other two
6 parties present their arguments. If you wish
7 to make a change to reserve rebuttal time,
8 please advise us when you begin your opening
9 presentation. New York State AG's Office will
10 be allotted 16 minutes. Counsel for
11 Continental Guest Services Corp., will be
12 allotted four minutes.

13 Speakers, please note that the
14 timing lights are in front of me. You will
15 see a yellow light when you have one minute
16 remaining and a red light when your time has
17 expired. The yellow one-minute light will be
18 accompanied by a single chime, hopefully. And
19 the red light, signifying that your time has
20 expire, will be accompanied by two chimes.
21 Please keep to the time you have been
22 allotted. When you see the red light and hear

1 the double chime, please finish your thought
2 and take a seat.

3 Additionally, just a reminder,
4 everyone, please turn off your cell phones.
5 We will now proceed. Counsel for Stagecoach
6 and Coach USA and Mr. Marmurstein, you have an
7 allotment of 17 minutes for opening. Please
8 step up to the podium, introduce yourself,
9 indicate if you wish to change your time for
10 rebuttal, and then begin.

11 MR. COBURN: Thank you, Mr.
12 Chairman. My name is David Coburn. I
13 represent the Applicants. I have 13 minutes,
14 I believe, Mr. Chairman.

15 CHAIRMAN ELLIOTT: Yes. Thank
16 you. I have just been corrected by Vice
17 Chairman Mulvey.

18 MR. COBURN: Yes. Thank you.

19 CHAIRMAN ELLIOTT: Someone's in
20 big trouble. I wrote that down, let me tell
21 you.

22 MR. COBURN: I hope not.

1 CHAIRMAN ELLIOTT: No. No.

2 MR. COBURN: Good morning, Mr.
3 Chairman and Mr. Vice Chairman and
4 Commissioner Nottingham. With me at Counsel
5 table is Michael Cohen of the firm of Paul,
6 Hastings, Janofsky & Walker, who's been
7 representing Twin America in the anti-trust
8 investigation.

9 The question before this Board in
10 this proceeding is one that is addressed on
11 multiple occasions. And that is whether the
12 Board should approve the acquisition of
13 control of a federally regulated motor carrier
14 -- motor passenger carrier, in the exercise
15 of its authority under 49 USC 14303. Here,
16 Stagecoach Group and Coach USA, together with
17 one of the approximately 40 motor carriers
18 that they already control, International Bus
19 Service, seeks authority to control a new
20 interstate passenger carrier, Twin America.

21 Twin America was formed by the
22 consolidation of the transportation assets of

1 IBS, which operated or -- under the Grey Line
2 name in New York, and the City Sights --
3 Anthony's -- the City Sights Applicants. The
4 owner of City Sights, Mr. Zev Marmurstein, you
5 did get his name right, also seeks
6 authorization to control Twin America. He
7 needs that authorization because he controls
8 another motor passenger carrier, RW Express,
9 which was the subject of another separate
10 application pending -- or decided by this --
11 by this Board. And the remaining Applicant,
12 City Sights Twin, seeks authorization to
13 combine its transportation assets that it
14 inherited, so to speak, from City Sights LLC,
15 an operating carrier, with those of IBS, for
16 the operation of Twin America, which is a
17 joint venture. Twin America is a joint
18 venture between IBS and City Sights LLC.

19 The transaction occurred as a
20 result of difficult economic circumstances
21 that are well known to all of us, and
22 particularly pertinent to the transportation

1 -- tour transportation business in New York,
2 which suffered considerably during the
3 recession.

4 CHAIRMAN ELLIOTT: Can I ask a
5 quick question about City Sights and City
6 Sights Twin? Did either one of those ever get
7 their motor carrier certificate from a DOT, at
8 any point in time?

9 MR. COBURN: No.

10 CHAIRMAN ELLIOTT: Okay.

11 MR. COBURN: They did not. City
12 Sights, which operated as an interstate
13 carrier, we recognize, should have had a motor
14 carrier certificate. It did not. We were not
15 representing City Sights. It did not have
16 transportation counsel. It -- it had other
17 counsel who handled transactions for it. I
18 think it didn't recognize that the interstate
19 service that it was providing through joint
20 arrangements with other carriers was, in fact,
21 interstate and did, in fact, bring it -- bring
22 it within FMCSA jurisdiction and Board

1 jurisdiction. That may not have been obvious.
2 It was not obvious to -- to the folks who were
3 running the company. They understand it now.
4 And, through Twin America, they've applied for
5 FMCSA authority, which they have, which they
6 --

7 CHAIRMAN ELLIOTT: Well, the
8 thought is now that City Sights and City
9 Sights Twin are essentially gone and that
10 they're in the Twin America. So there's no
11 need?

12 MR. COBURN: Right.

13 CHAIRMAN ELLIOTT: Okay.

14 MR. COBURN: At this point,
15 there's no need. They are -- they are shell
16 corporations, at this time.

17 CHAIRMAN ELLIOTT: Okay.

18 VICE CHAIRMAN MULVEY: Why did
19 Twin America fail to seek STB approval for the
20 proposed joint venture, prior to August of
21 2009? And these are companies that are
22 sophisticated; have been before the Board

1 before. It strikes us that it -- it strikes
2 me, anyway, that there should have been an
3 application before this, rather than waiting
4 so long. Could you explain that?

5 MR. COBURN: Yes. I can explain
6 it. And I can certainly understand the
7 proposition you've raised, Vice Chairman
8 Mulvey. Because Coach USA has been here many
9 times. I've represented them on many of those
10 occasions. In fact, on all of those
11 occasions. But this was a different
12 transaction. It involved different people at
13 the company, who were primarily engaged in the
14 sight seeing aspect of the business in New
15 York. Totally different folks than those who
16 run the inter-city bus operations. So this
17 was a different animal. And they didn't
18 realize that the sight seeing operation was
19 within federal jurisdiction. That's point
20 one. Point two, it was a joint venture.
21 And, unlike going out and buying an intercity
22 bus company, which was the standard modus

1 operandi over the years, this was a creation
2 of a joint venture. And again, it didn't
3 occur to them that STB jurisdiction was
4 triggered. It occurred to them only after I
5 explained to them, once they hired me. And,
6 by the way, I was not involved in the
7 transaction. My firm was not involved in the
8 transaction. The lawyers who were involved in
9 the transaction were New York City -- and I
10 don't mean to demean them in any way, but
11 they're New York City transaction lawyers.
12 They just didn't understand the regulatory
13 setting. And it didn't occur to them. And it
14 didn't occur to my client that well, formation
15 of this joint venture would trigger federal
16 jurisdiction. They understand it now.
17 They're sorry. They can't unring that bell.
18 They're sorry they didn't file as they should
19 have, before the transaction. But here we
20 are. And there have been, as you know, many
21 instances where parties didn't know --
22 inadvertently, didn't know that Board

1 jurisdiction was triggered; came in
2 afterwards; and the Board has granted those
3 applications.

4 VICE CHAIRMAN MULVEY: Well, bus
5 companies have long been horizontally
6 integrated, offering both regular route
7 services, as well as charter and tour
8 services. I came to Washington D.C. to work
9 for the bus industry for the American Bus
10 Association many, many years ago. So --

11 MR. COBURN: Right. I recall
12 that.

13 VICE CHAIRMAN MULVEY: Go ahead,
14 right now. I will have a few more questions.

15 COMMISSIONER NOTTINGHAM: Mr.
16 Coburn, if I could.

17 MR. COBURN: Sure.

18 COMMISSIONER NOTTINGHAM: You just
19 mentioned about the history of Counsel in this
20 matter. Can you tell us who was advising your
21 client on the transactional side of this back
22 in the March time frame, pre-March of 2009,

1 when we all agree it would have been desirable
2 if the appropriate filings had been made to
3 this agency, as required by law?

4 MR. COBURN: Right. Right. It
5 was a small, New York City law firm. The name
6 of which, I don't know. Perhaps my co-counsel
7 knows the name of that firm? No. It was a
8 small firm that is no longer actively involved
9 as far as I know.

10 CHAIRMAN ELLIOTT: It wasn't
11 Sullivan and Cromwell? Sorry? Sullivan and
12 Cromwell?

13 MR. COBURN: It was not Sullivan &
14 Cromwell. No. No. Trust me, it was a small
15 firm.

16 CHAIRMAN ELLIOTT: But could you
17 provide that, for the record?

18 MR. COBURN: I'll be happy to
19 provide you the name of that firm.

20 CHAIRMAN ELLIOTT: And if we have
21 the names of the actual attorneys, that would
22 be helpful too.

1 MR. COBURN: Absolutely. I'll be
2 -- I'll be happy to do that. They are not
3 known to me because, again, they're not
4 transportation lawyers. They don't work in
5 the world in which I work. They're deal
6 lawyers who -- who were hired to draft the LLC
7 agreement and, you know, deal with that legal
8 aspect of the transaction and -- and we were
9 not involved.

10 CHAIRMAN ELLIOTT: Thank you.

11 MR. COBURN: It's the firm of
12 Saretsky, Katz, Dranoff & Glass. And Allen
13 Katz is the lawyer who -- who represented the
14 parties during the transaction.

15 So, faced with reduced ridership,
16 faced with challenging economic circumstances,
17 the Applicants undertook the transaction as a
18 means of achieving efficiencies needed to meet
19 these challenges and needed to maintain a --
20 a prosperous business, in the face of
21 difficult circumstances. And, in fact,
22 they've succeeded in doing that. They are

1 retaining and building a -- a higher and
2 higher level of service than existed before
3 the transaction.

4 Now, the New York Attorney General
5 argues that Twin America has been working hard
6 since March 2009, to bring the transaction
7 within STB jurisdiction. We submit it was
8 within STB jurisdiction at the time it
9 occurred, notwithstanding that no filing was
10 made. The Board clearly has authority under
11 14303 to approve transactions where one
12 carrier -- when one entity that already
13 controls more than carrier, assumes control of
14 another carrier. That's exactly the situation
15 here. And transactions in which the
16 transportation assets of two or more carriers
17 are consolidated for operation, again, that's
18 the situation here.

19 There's nothing suspect about the
20 timing of the transaction and nothing suspect
21 about the application. As I explained, I was
22 retained a few months after the transaction

1 occurred. We did an investigation. We
2 concluded that there was -- this was a control
3 situation. We made the filing within weeks
4 after that occurrence. Now, as it happens,
5 the New York Attorney General began his
6 investigation during that period, while the
7 application was being prepared and after we
8 had been retained and after we had decided,
9 jointly with the client, that it was
10 appropriate to make the filing -- in fact,
11 required to make the filing at the Board. The
12 Attorney General draws conclusions from that
13 timing. I would suggest that's just the way
14 things worked out.

15 CHAIRMAN ELLIOTT: Mr. Coburn?

16 MR. COBURN: Yes?

17 CHAIRMAN ELLIOTT: With respect to
18 your bringing the transaction, the
19 application, under 14303, it wasn't clear
20 which section of that you were bringing it
21 under. I know there's (a)(1)-5, I believe.
22 And this is more of a hypothetical. But let's

1 say, hypothetically, we found that City Sights
2 -- we didn't have jurisdiction over them at
3 any time, would we need to be here today,
4 under 14303, for this transaction to merge in
5 City Sights with Coach, with Gray Line?

6 MR. COBURN: Yes. We would still
7 be here. We would still have filed an
8 application. Because Coach USA and
9 Stagecoach, which control all the carriers,
10 are obtaining control through this joint
11 venture arrangement of the new carrier. That
12 alone triggers 14303.

13 CHAIRMAN ELLIOTT: Okay. And is
14 that -- that's 14303 (a)(5) or (a)(1)?

15 MR. COBURN: That is (a)(4),
16 acquisition of control of at least two
17 carriers by a person that is not a carrier.
18 Coach USA and Stagecoach are actually not
19 carriers.

20 CHAIRMAN ELLIOTT: Okay.

21 MR. COBURN: So it's (a)(4). And
22 I think we also fit within (a)(5), acquisition

1 of control of a carrier by a person that is
2 not a carrier, but that controls any number of
3 carriers. So there is certainly a
4 jurisdictional hook here, putting aside the
5 City Sights situation. But, for Mr.
6 Marmurstein, there's also a jurisdictional
7 hook because of his control of -- of RW
8 Express. And also, he did control City
9 Sights, which, before the joint venture, was
10 an operating carrier, albeit one without --
11 without the appropriate FMCSA authority.

12 VICE CHAIRMAN MULVEY: Mr. Coburn,
13 you mentioned that the reason for this was the
14 declining tourism market in New York City.
15 Did either of these carriers make any attempt
16 at trying to expand their market or capture
17 new business by reducing prices, by cutting
18 prices, to try to make their services more
19 attractive rather than go the route of
20 merging, as a way out of the crisis?

21 MR. COBURN: Right. They, in
22 fact, do offer discounts. They offer

1 discounts on a regular basis. If you buy over
2 the internet, you get it's either a five or a
3 ten percent discount.

4 VICE CHAIRMAN MULVEY: Were these
5 discounts in response to the declining market
6 conditions, or were these discounts that were
7 always in place?

8 MR. COBURN: They were always in
9 place, as far as I know, or at least in place
10 for quite some time. But I think there was
11 some more aggressive discounting, as a result
12 of the recession. But there was also a
13 determination that, in fact, Coach USA, or the
14 IBS side of the business, had not raised
15 prices for very many years -- I think four or
16 five years, they had not raised prices, other
17 than a fuel surcharge, which came and went,
18 depending on the price of fuel. And they
19 actually decided to maintain their revenues to
20 increase prices. And they did that in a
21 setting where a lot of the transfer -- where
22 a lot of the tourism business, including

1 transportation tours in New York, and there is
2 an exhibit on this, increased prices,
3 modestly, but they did increase prices. They
4 decided to do that in February, before the
5 deal. After the transaction, City Sights or
6 Twin America, I should say, decided the City
7 Sights side of the business should match what
8 Gray Line had done before the transaction, and
9 raised prices modestly. Prices have not gone
10 up since then. And, in fact, -- and the
11 discounting continues. Thank you.

12 CHAIRMAN ELLIOTT: Thank you.

13 Next, we will hear from Counsel for, I believe
14 Continental Guest Services Corp. And you have
15 four minutes. Please step up; introduce
16 yourself for the record; and begin.

17 MR. BERMAN: Good morning. My
18 name is Mark Berman. I'm from the law firm of
19 Ganfer & Shore, a small New York law firm,
20 representing Continental Guests. For the
21 record, Mr. Alan Katz, who was mentioned by
22 Counsel, did appear for the Applicants in the

1 New York litigation, representing them at the
2 -- at the temporary restraining order hearing.

3 Given my four minutes, I'm just --
4 if you do not mind, I will be reading somewhat
5 from my presentation to get all the pertinent
6 facts in. Continental Guests is an over 100
7 year old family owned company that's involved
8 in the selling of bus tickets in New York
9 City. That's double decker bus tickets,
10 through concierge desks. It is now being
11 exposed to grievous harm because of the anti-
12 competitive consequences directly attributed
13 to the aggregation of the market power of the
14 Applicants. At which market power aggregation
15 is now being formalized and entrenched if this
16 application is approved by the Board.

17 I speak on behalf of a client on
18 the ground. The first thing that needs to be
19 made clear is that a representative of Twin
20 America has affirmatively stated to my client
21 on multiple occasions that the reason why the
22 Applicant is seeking to take over my client's

1 concierge desks is to ensure that another
2 double decker bus company cannot enter the New
3 York City market. This statement is contained
4 in paragraph 49 of the Zang affidavit and is
5 not rebutted, in any fashion, by the Applicant
6 in their opposition to the preliminary
7 injunction papers submitted to the New York
8 court. That is the hallmark of anti-
9 competition. The fact is, Mr. Marmurstein had
10 come to my client, begging for Continental
11 Guests to sell his company's tickets.
12 Continental Guests could not, because they
13 were in an agreement with the other party
14 seeking application, Gray Line. When that
15 agreement expired, my client decided to
16 actively promote City Sights ticket over Gray
17 Line's. Why? Because City Sights gave my
18 client more of a commission. Now, that is, on
19 the other hand, the hallmark of competition.
20 The Applicant has made it clear, they do not
21 want Continental Guests to be able to do this
22 with any other double decker bus company in

1 the future, that might want to come into New
2 York City. One might ask how that can be
3 effectuated. Continental Guests has a 43
4 desks in hotels in this city. Those hotels
5 control approximately, based on the
6 Applicant's numbers in the New York action, 50
7 percent of the hotel rooms in New York.
8 That's how it could be effectuated. And
9 that's why Mr. Marmurstein knew, when he came
10 to my client years ago, why it was so
11 important to offer my client such a high
12 commission. They made -- my client made City
13 Sights. The service of my client provides
14 unequivocal and concrete proof that the
15 concerns articulated by the New York Attorney
16 General, regarding the competitive harm likely
17 to result from the aggregation of these bus
18 companies is not theoretical and not
19 speculative.

20 VICE CHAIRMAN MULVEY: About what
21 percent of the total charter bus market -- the
22 tour bus market rather, in New York, is

1 marketed through the concierge's desks? Do
2 you have any idea?

3 MR. BERMAN: I can't tell, because
4 I could tell, we have 43 desks.

5 VICE CHAIRMAN MULVEY: Yes.

6 MR. BERMAN: And there are other
7 concierge's desks. Some hotels have. Some
8 hotels do it in house. Some hotels use other
9 people. So I'm not aware of that figure.

10 VICE CHAIRMAN MULVEY: Aren't
11 there also other places in other venues where
12 you can buy tickets for these tour busses,
13 other than the hotels?

14 MR. BERMAN: Yes. Vice Chairman.
15 There are multiple other places.

16 VICE CHAIRMAN MULVEY: Yes.

17 MR. BERMAN: One would be the
18 hawkers or street sellers, the guys with the
19 vests on the street corners.

20 VICE CHAIRMAN MULVEY: Well, it's
21 important because I would consider this to be
22 a potential barrier to entry in a market

1 which, on the face of it, has very low
2 barriers. So, if this is an important selling
3 point, then that could comprise a very, very
4 serious barrier to market entry for new
5 entrants.

6 MR. BERMAN: The answer is the
7 evidence of it being a barrier to entry is the
8 factual statement that City Sights went and
9 begged to my client and we put them on the
10 market. They were a small guy running up
11 against Gray Line. How else do you come into
12 New York City, but by getting the one source,
13 if you will, that will have a captive market
14 of all the guests in -- in the hotels in New
15 York City. I understand my time is up. I
16 have not, Mr. Chairman, had the opportunity to
17 go through. If you'd like, I would, with the
18 Panel's permission, some of the anti-
19 competitive effects that have resulted post-
20 merger -- post-combination, since my client is
21 on the ground.

22 COMMISSIONER NOTTINGHAM: Mr.

1 Chairman, I'd like to ask --

2 CHAIRMAN ELLIOTT: I think we have
3 one more question and then we'll let you bring
4 out your point, as well, Mr. Berman.

5 COMMISSIONER NOTTINGHAM: But you
6 mentioned your client is located at 43 hotel
7 sites. I mean, rough estimate, how many
8 hotels would you estimate there are in New
9 York City?

10 MR. BERMAN: Based -- based on the
11 documents provided by the Applicants to New
12 York, their -- their list included 299 hotels.
13 Those 290 hotels represent about 60,000 and
14 some odd rooms. And, when you look at the 43
15 desks that my clients control or lease, those
16 hotels represent about 49 percent of the
17 60,000 some odd hotel rooms, based on the
18 chart submitted by the Applicant.

19 COMMISSIONER NOTTINGHAM: In your
20 presentation, you touched on a little bit of
21 the history, recent history and somewhat
22 recent history in this -- this market. You

1 mentioned your long-standing working
2 relationship with the Gray Line, which I
3 understand is -- had been, historically, the
4 long time dominant provider of this type of
5 service?

6 MR. BERMAN: Yes. Coach, Gray
7 Line, they -- they were the predominant double
8 decker tour bus company in New York. That is
9 correct.

10 COMMISSIONER NOTTINGHAM: And
11 then, somewhere along the line, a new entrant
12 entered the market?

13 MR. BERMAN: Correct. We had an
14 agreement with Gray Line. We sold their
15 tickets. Sometime down the line, City Sights
16 came to my client. Mr. Marmurstein had said
17 would you sell my double decker tour bus
18 tickets. We said no, because we're in an
19 arrangement with Gray Line. When the
20 agreement with Gray Line expired, we then sold
21 to both. City Sights offered my client --

22 COMMISSIONER NOTTINGHAM: If I

1 could, what happened to Mr. Marmurstein's
2 business when you said no. Did he -- was he
3 not able to enter the market at that point?
4 Or did he proceed to enter the market?

5 MR. BERMAN: I do not know the
6 precise timing. But the -- this was in 2007.
7 Mr. Commissioner, I believe that the requests
8 to my client came shortly prior to the
9 termination of the Gray Line agreement. So
10 the period of window was very small. But I
11 can't tell you -- I mean, factually, what City
12 Sights did during those couple of months. How
13 did they -- or did they not enter the market
14 with the anticipation that the agreement was
15 going to end? My client, very likely, said to
16 them well, I have an agreement with Gray Line.
17 It's ending in X months. And when the X
18 months expired, they -- they struck a deal.

19 COMMISSIONER NOTTINGHAM: The
20 record seems to indicate that there is a
21 history here of new entry into this market.
22 And, in fact, that's exactly what we've seen

1 is a new entrant that has actually pulled
2 together a pretty significant team of
3 companies and bundled them together. And it's
4 not -- to me, it's not a history of market
5 dominance by one carrier. It's a story of a
6 market that's been successfully penetrated and
7 it causes me to wonder why anybody who can get
8 their hands on a bus or two and has the
9 ambition to go out and work with street
10 hawkers, the internet, and any friendly
11 concierges they can befriend, can enter this
12 market. So what's mysterious or difficult
13 about entering this market?

14 MR. BERMAN: Well, first of all,
15 we have -- Gray Line was there for a very long
16 time. I believe the industry and the players
17 in the industry would testify or indicate
18 that, when City Sights came on board --

19 VICE CHAIRMAN MULVEY: Can you
20 speak up a little, please?

21 MR. BERMAN: When City Sights came
22 on board, they needed my clients to promote

1 City Sights ticket over Gray Line. And, in
2 fact, what happened is, as a result -- and I
3 think the numbers would reflect that using my
4 client as the venue -- the distribution
5 channel, City Sights was very, very, very
6 successful. As far as there's one other
7 double decker tour bus company, Big Taxi. I
8 think they have five busses in -- in the whole
9 -- in all of New York City. I think perhaps
10 their percentage is a percent or two, maybe
11 three. The Attorney General would have better
12 information about percentages. But when you
13 look at the -- the Applicants, they control
14 well in excess of 90 percent. So I don't
15 think the -- they're -- it's easy to enter.
16 And, if it was easy to enter, and there was no
17 barrier -- no barrier created, they wouldn't
18 have come to my client begging to use my
19 client's distribution channel as a means to
20 sell their tickets. So I don't think it's
21 easy. And, in fact, since Gray Line and since
22 City Sights, you haven't seen another company

1 come in, other than Big Taxi, which has a
2 couple busses and is virtually ineffective.

3 COMMISSIONER NOTTINGHAM: Just one
4 last question, if I could, Mr. Berman. You
5 work closely with -- it sounds like your
6 client works closely with a number of major
7 hotels in New York City, on a daily basis.

8 MR. BERMAN: That is correct.

9 COMMISSIONER NOTTINGHAM: In your
10 experience, or your client's experience, do
11 those hotels make it a practice of referring
12 their guests to tour businesses and tourist
13 businesses that don't provide good service;
14 that are either unsafe or are over charging
15 their customers? I mean, just in my
16 experience as an individual, guests at hotels,
17 usually, you can count on -- on the concierge
18 to, you know, give you the straight scoop.
19 They tell you, you know, don't go to that
20 restaurant. They're really over priced. You
21 really -- you'd probably prefer the one around
22 the corner. I mean, but what's the -- you're

1 there. I'm not an expert on that area of the
2 business.

3 MR. BERMAN: We have 43 desks. We
4 are full service. We have been in the
5 business for over 100 years. If we don't do
6 a good job, we don't sell the product. It's
7 unlike other venues. A -- yourself would go
8 over to the general manager or the reservation
9 desks and say, you know that concierge over
10 there, gave me a bum steer -- gave me a -- a
11 crummy restaurant, a bad -- gave me bad
12 guidance. And you get many of those, you get
13 terminated. So the answer is, if you're doing
14 a good job, you're providing full service, you
15 will be successful in the concierge's market.
16 And the fact of the matter is, double decker
17 tour bus tickets, because of their price
18 point, because of the ability where they're
19 guided, because, on nice days, they can be
20 outside, because of the hop on hop off
21 attribute of them, and because you can bring
22 your whole family, it is the number one

1 tourist attraction in the city. Everyone
2 wants to do it. They're all over the place
3 and a whole family could do it at a reasonable
4 price. The result is if, in fact, the
5 Applicants stop selling to us, we're no longer
6 full service. If we're no longer full
7 service, the hotels will terminate us because
8 their guests will come to the concierge and
9 we're going to be able to say you want a
10 double decker bus tour ticket? We can't
11 provide it. Go down the street and fight with
12 the hawkers -- the street sellers who are on
13 the corners who, right now, post combination,
14 are fighting with each other about
15 territories. And, in fact, hassling -- I
16 mean, right now, post combination, hassling
17 the consumer. I -- I understand my time is
18 up. I haven't had an opportunity to give --

19 CHAIRMAN ELLIOTT: Yes. I have
20 one follow-up question -- just finally, along
21 the lines of what Chip was asking you --
22 Commissioner Nottingham. Is there a reason

1 your client could not promote a new third
2 company along the lines of what Chip was
3 asking you?

4 MR. BERMAN: If a third company --

5 CHAIRMAN ELLIOTT: Came onto the
6 market.

7 MR. BERMAN: -- came to us and
8 said we're good. We have the services. This
9 is what we offer. Our client utilizes
10 everybody. We -- you know, whether it's some
11 sports, double decker tour busses -- if you're
12 quality, we've been around 100 years. If
13 you're -- and you're well priced; you do your
14 job; we'll use you. Right now, you'll -- you
15 know, being on the ground, what has happened
16 post combination, the lines have gotten
17 longer. The service -- the quality has gotten
18 -- gone down. The prices have gone up. The
19 cost, obviously, with the reduction of my
20 client's commission -- commissions have gone
21 down. The result is, with those lower costs,
22 have ticket prices gone down? No. And we

1 view -- and, of course, without multiple bus
2 companies out there, there's no competition
3 with -- vis a vie us. The fact of the matter
4 is, when it was Gray Line and City Sights and
5 they weren't combined, both offered
6 alternative commission rates. We played one
7 off against the other. That's gone now. They
8 set the unilateral -- unilaterally, it's take
9 it or leave it.

10 CHAIRMAN ELLIOTT: Thank you,
11 Counsel, very much. Next, we'll have Counsel
12 for the New York State Attorney General. You
13 have been allotted 16 minutes for your
14 argument. Please step to the podium;
15 introduce yourself for the record; and begin.

16 MR. YOON: Good morning
17 Commissioners. My name is James Yoon. I'm an
18 Assistant Attorney General from the Antitrust
19 Bureau of the New York City Attorney General's
20 Office. And with me today is Michael Berlin,
21 Deputy Attorney General also, for Economic
22 Justice, also from the New York Attorney

1 General's Office.

2 You've heard from the Applicants
3 about how the -- the different people were
4 involved in the transaction to the joint
5 venture. But I believe Mr. Kanir and Mr.
6 Moser signed affidavits to the earlier
7 transactions and to this particular joint
8 venture, also. So I don't understand why they
9 say different people are involved.

10 COMMISSIONER NOTTINGHAM: Just for
11 the record, could you explain who those
12 individuals are? Are you talking about
13 attorneys, private attorneys, or corporate
14 officers?

15 MR. YOON: No. These are the
16 individuals -- corporate officers,
17 representing Coach USA.

18 COMMISSIONER NOTTINGHAM: Thank
19 you.

20 MR. YOON: We feel that the joint
21 venture by the Applicants is -- harms
22 competition, harms employees, and we believe

1 the STB should deny the application because it
2 is not in the public interest. The effects of
3 this joint venture are not speculative. We've
4 already seen that the prices have gone up.
5 They've even said that, after the merger,
6 prices have gone up. They say a little. But
7 it's about ten percent. And the services --
8 we've heard from the unions, that the -- that
9 they've lost wages, lost hours. All these, I
10 believe, harm the consumer, ultimately, as
11 well as the employees.

12 The Applicants put forth some
13 efficiency justifications for this joint
14 venture. We believe those efficiencies are
15 not outweighed by the anti-competitive
16 effects. Some of these efficiencies that
17 claim -- that they claim can be done on their
18 own. For example, they say maintenance of
19 busses. I think that's something they can do
20 on their own. Replacing older busses and
21 fixing the older busses, you can do that on
22 your own, without this merger. Upgrading the

1 garage? I mean, do you really need a merger
2 to do all this? I don't think so.

3 VICE CHAIRMAN MULVEY: We have
4 this in most industries. When firms merge,
5 they try to consolidate some operations to
6 generate some cost savings. So you may have
7 a single garage doing the maintenance and you
8 may be dealing with only 150 percent of the
9 employees, instead of the 200 percent that
10 there were while operating separately. So
11 there tends to be some efficiency economies.
12 But my concern is much more on the entry
13 barriers. I know the AG's Office argues that
14 the hop on hop off, double decker bus market
15 is a unique product -- a separate market.
16 But, are there really significant barriers to
17 entry in this market? I mean, it seems like
18 almost anybody can buy a bus and get into the
19 market and begin operating.

20 MR. YOON: Well, I think the --
21 you have to have timely and sufficient -- a
22 timely manner and sufficient skill and it has

1 to be likely that there would be an entry. So
2 I believe the merger guidelines considered two
3 kinds of entry. There's committed and
4 uncommitted. The uncommitted are, you know,
5 the bus companies that can leave -- get a
6 license, have bus stops, but they may leave
7 the next day or, you know, the week after.

8 VICE CHAIRMAN MULVEY:

9 Contestability theory argues that if you have
10 low barriers to entry, then that, itself, can
11 be sufficient to keep down prices and create
12 competition, even if there aren't that many
13 actual competitors.

14 MR. YOON: But low barriers to
15 entry, I believe there are other barriers to
16 entry -- entry besides just getting a license.
17 As I said, the skill, in terms of having --
18 maybe now, you'd have to have more than 50
19 busses -- double decker busses. You'd have to
20 have -- invest in the office. You'd have to
21 invest in the arrangements with the ticket
22 sellers, travel agents, street sellers. As

1 the Applicant's economist has stated, most of
2 the tickets for Twin America, also which means
3 Coach and City Sights, were sold in the
4 streets, through ticket sellers. All that
5 sort of investment, for somebody to come in,
6 I believe would be very difficult. I believe
7 that would be a barrier.

8 Also, there are regulatory
9 concerns. There -- currently, New York City
10 is a mature market. There are many more
11 busses than there were a few years ago.
12 People have been complaining about the
13 congestion and the noise. And I know there
14 was a hearing on the New York City Commission
15 on sight seeing busses, to regulate that. So
16 that certainly is a future concern. Also, the
17 Applicants site to the City Sights of growing
18 from eight busses to 70 in four years. As I
19 said, the market is a little bit much more
20 mature now. And also, I would believe in
21 2003, there was another double decker bus
22 company -- Big Apple, New York Tours, that

1 they went out of business. And they were a
2 substantial company. Those assets were later
3 bought by Gray Line, I believe. So I think
4 the barriers to entry are not just getting a
5 license and bus stops. I believe that you
6 won't see another City Sights kind of company
7 growing that rapidly. And also, timely entry.
8 I think it has to be within two years or so.
9 It took City Sights four years. I believe
10 whoever tries to come in now, unless you have
11 really a lot of substantial amount of capital,
12 it will be very difficult.

13 The other barrier to entry --

14 CHAIRMAN ELLIOTT: Have there been
15 any new entrants since the joint venture
16 began?

17 MR. YOON: I'm not aware of any
18 new entrants that are that scale or scope.
19 And I believe the Applicants have stated that
20 the fuel costs are a big part of the costs of
21 operating a sight seeing business. And the
22 Applicants, in their earlier first

1 application, have said that they are going to
2 leverage the -- I guess, being part of the
3 Coach USA's company of busses, are getting
4 better prices. I believe the volume discounts
5 that they are able to achieve from the
6 economies of scale, somebody -- a new entrant
7 coming in, other than, as I said, an
8 uncommitted entrant, would be very difficult
9 to sustain.

10 COMMISSIONER NOTTINGHAM: Mr.

11 Yoon, if I could, frankly, I was a little
12 surprised when I saw that your office was
13 keenly interested in this transaction. But
14 you certainly have a -- I respect the office
15 and I just want to understand a little bit
16 more about it. How typical is it for your
17 office to get involved in the tourism market,
18 where you reference the 10 percent price
19 increase here? We read regularly in the press
20 that, you know, a lot of prices have gone up
21 in New York in the tourism business, sometimes
22 affecting Broadway shows, sometimes affecting

1 cruise line tour operations. I'm a baseball
2 fan, so I'm certainly familiar with the prices
3 at Yankee Stadium and the new Mets Stadium.
4 I mean, do you guys go in -- have you opened
5 up cases in all of those areas, looking out to
6 protect the consumers? Or is this just kind
7 of out of the ordinary for you?

8 MR. YOON: I guess I wouldn't say
9 out of the ordinary. I guess our concern is,
10 certainly, we are -- the tourism business and
11 the double decker busses and the other forms
12 of tourism are important to us. And I guess
13 our concern was that, because the double
14 decker bus business is unique, two major
15 players were getting together. We didn't see
16 any real alternative double decker bus
17 companies. They have a captive market. They
18 have the -- the market power to unilaterally
19 raise prices. And we felt that it was
20 important to at least investigate the
21 transaction -- the joint venture, that took
22 place in March. And, at that point, I believe

1 there wasn't any scrutiny by anyone at that
2 point. So we just wanted to see what was
3 going on there.

4 VICE CHAIRMAN MULVEY: One factor
5 to determine market power is demand
6 elasticity. And one would assume that, since
7 this is not like commuter operations where you
8 need to have access to transportation to get
9 to work, this is discretionary travel. And
10 one would assume, therefore, that demand was
11 much more elastic and therefore, much more
12 price sensitive. And that there are some real
13 limits as to how much they can raise rates.
14 Would you agree?

15 MR. YOON: Well, the elasticity --
16 the cost elasticity, I believe, deals with
17 sort of substitutability. So if prices were
18 to increase so that people -- the double
19 decker riders would go somewhere else, I
20 believe that, if there were something
21 substitutable for double decker busses, you
22 can sort of have that kind of study. But, as

1 we've said in our papers, we believe that the
2 double decker bus market is unique for all the
3 reasons. Number one, geographically, you're
4 going to all the sites in New York City. It's
5 -- you know, it's a finite area. The sights
6 that are very popular -- the tourist sites,
7 are also similarly finite. They run along the
8 routes where, physically, you can only have so
9 many busses at one time. The option of
10 getting on and off these busses, looking at
11 the sites, then waiting for another bus to go
12 to the next site, these are all unique
13 properties, I believe, that makes this double
14 decker bus market and the double decker busses
15 -- there are no redial substitutes.

16 VICE CHAIRMAN MULVEY: Why
17 couldn't a regular bus do the same thing; run
18 the same routes; stop; allow for hop on and
19 hop off service; have a guide who gives a
20 narrative. You wouldn't have the open top,
21 which, of course, isn't really good in winter
22 or when it's raining.

1 MR. YOON: Right.

2 VICE CHAIRMAN MULVEY: But
3 nonetheless, it could still do the same thing.
4 And I would think that that would be an
5 option, even if it wasn't a double decker.
6 You could stir up competition, but with
7 something that is a close substitute. No?

8 MR. YOON: I believe the -- the
9 point of, I guess, riding outside and, you
10 know, being at eye level with the sights, are
11 very important. I'll give you just a personal
12 example. I rode on one of these busses. And
13 I've lived in New York most of my life. And
14 they were giving a tour about Macy's. And, as
15 I was crossing 34th Street, they said the old
16 Macy's is across the street. You can see the
17 old Macy's sign, across the street from the
18 new Macy's. And, you know, sure enough, on
19 the wall is a sign, you know, that it was the
20 former Macy's. I've lived in New York all my
21 life and I never knew that. But that's
22 something I would never have seen, you know,

1 riding or being down at street level.

2 VICE CHAIRMAN MULVEY: I was born
3 and raised in New York. And, when I was a
4 kid, they actually had double decker, open
5 topped busses on Fifth Avenue. And that was
6 actual regular route transportation service.
7 But now you only have the tour busses.

8 MR. YOON: Right. And so --

9 CHAIRMAN ELLIOTT: Can I ask you a
10 quick question?

11 MR. YOON: Sure.

12 CHAIRMAN ELLIOTT: Just for
13 informational purposes only. Was your state
14 court action that you brought, was that just
15 strictly brought under state law -- state and
16 anti-trust law or was that federal also?

17 MR. YOON: We didn't bring any
18 action, yet.

19 CHAIRMAN ELLIOTT: Okay. It was
20 an investigation?

21 MR. YOON: Oh. That was -- the
22 state court action was by a private plaintiff.

1 We have not brought any action.

2 CHAIRMAN ELLIOTT: Okay.

3 MR. YOON: We are, as you know,
4 we've started an investigation under the
5 Donnelly Act. And we've sort of been
6 investigating with one hand tied behind our
7 backs. Because the Applicants have been, you
8 know, raising jurisdictional issues. And
9 they've voluntarily produced documents at
10 their leisure and discretion. I have
11 requests, for example, for since December and
12 January, for simple things like the
13 organization chart for Stagecoach.

14 CHAIRMAN ELLIOTT: Has justice had
15 any issue in this?

16 MR. YOON: Yes. Justice
17 Department has -- I believe they are not
18 involved in this investigation.

19 CHAIRMAN ELLIOTT: Okay.

20 MR. YOON: So, as I say, the -- if
21 we -- if we're allowed to go through our full
22 investigation, you know, we can take the

1 statements under oath; get certified that all
2 documents have been produced to us; and so,
3 this actually was referred to us by Justice.

4 CHAIRMAN ELLIOTT: But what do you
5 think of their jurisdictional arguments?

6 MR. YOON: I -- the jurisdictional
7 argument, as I've said, the joint venture
8 agreement of March 17, 2009 -- the joint --
9 the language of the joint venture agreement,
10 itself, as well as the documents that I've
11 cited in the exhibit, all show that the -- it
12 was intrastate; that it was a separate
13 business -- this double decker sightseeing
14 business was not part of their overall
15 intrastate business, if they had any. For
16 example, City Sights, I believe, did not. I
17 don't think their arguments about the double
18 decker business being interstate really makes
19 sense. The joint venture agreement, itself,
20 was contemplated within New York City. I
21 believe the parties may have, themselves, felt
22 that's why they didn't need to file with the

1 FTB because it was just intrastate. I can't
2 speculate but, you know, they've made all
3 these arrangements and through-ticketing
4 arrangement, I believe, which are sort of
5 after the joint venture of March 17, 2009.
6 And the -- their economist has stated that
7 their tickets are sold, most of it, on -- by
8 the ticket sellers on the street, literally
9 standing on the street. That was on -- in his
10 exhibit. So I believe it's very, very local.
11 The sites are local. These busses don't take
12 -- I've not seen a double decker bus go to
13 pick up anyone at the airport. I have not
14 seen anyone go out of state. I think this is
15 purely --

16 VICE CHAIRMAN MULVEY: Purely a
17 federal preemption? Is that your argument, is
18 that it's purely a federal preemption of the
19 New York State AG's authority of them? Is
20 that your suspicion?

21 MR. YOON: That the Applicants'?

22 VICE CHAIRMAN MULVEY: Yes. In

1 other words, they want to preempt the state
2 laws by --

3 MR. YOON: Oh, yes. I mean, the
4 -- the exhibit that I attached to one of my
5 applications, makes clear that they wanted to
6 avoid our scrutiny. I can't -- I can't see
7 anything that's --

8 VICE CHAIRMAN MULVEY: You say you
9 have an investigation going on and you've
10 asked us to postpone any decision until you
11 complete your investigation. Do you have any
12 sense as to how much longer your investigation
13 would take before it would be concluded?

14 MR. YOON: The -- I believe the
15 STB can -- has the authority to decide whether
16 the Applicants' business -- the double decker
17 business in intrastate or interstate. And
18 we've argued and you've seen our papers, that
19 we believe it's intrastate and that we should
20 be able to continue our investigation. Right
21 now, because the Applicants have stated that
22 the STB preempts the New York State AG from

1 going on with its investigation, we've just
2 taken documents and such, voluntarily. So --
3 yes, so we would like the guidance of the STB
4 to determine whether the double decker bus
5 business in intrastate or interstate. We
6 strongly believe it's intrastate for all the
7 reasons that we've stated. And we hope that,
8 if the STB believes that it's intrastate, we
9 hope that the STB will deny the Applicants'
10 application, because it's not in the public
11 interest. Thank you, Commissioners.

12 CHAIRMAN ELLIOTT: Thank you,
13 Counsel. Now Counsel for Stagecoach, you have
14 seven minutes for rebuttal. If I could ask,
15 if we could -- I do have some issues with
16 jurisdiction here, that were raised by Mr.
17 Yoon. And could you kind of take us through
18 the time line of when -- because it sounds
19 like there was some charter service added,
20 possibly. And I understand your through-
21 ticketing arguments. I know there was a trip
22 out to New Jersey. But if you could just kind

1 of take us through the time line and --
2 because I do have some concerns about
3 jurisdiction here.

4 MR. COBURN: Thank you, Mr.
5 Chairman. As part of the transaction, Twin
6 America received 12 standard, not double
7 decker, but standard motor coaches, the kind
8 you see on the highway all the time, through
9 -- from IBS. Those motor coaches had a
10 history when they were in IBS's control, of
11 being used for charter service. When Twin
12 America took them over, that was the logical
13 use. Twin America began, in fact, operating
14 them in charter service -- interstate charter
15 service.

16 CHAIRMAN ELLIOTT: When did that
17 start?

18 MR. COBURN: There were a few
19 charters operated after the transaction --
20 within a few months after the transaction.
21 That number has been growing, as they've been
22 focusing more on the charter side of the

1 business and putting those busses to
2 productive use. I know that, in March of this
3 year, they operated about 18 charters. And
4 that's the rate at which they're operating
5 them. The charters go to Atlantic City. They
6 go to Washington, D.C. They go to the casinos
7 in Eastern Connecticut. They go to various
8 other places, Philadelphia, etc. So these are
9 --

10 CHAIRMAN ELLIOTT: And you said,
11 as of March '09, when the transaction was
12 signed, that these 12 busses weren't with --
13 were part of that original transaction?

14 MR. COBURN: Yes, they were.

15 CHAIRMAN ELLIOTT: And the intent
16 was always to have this charter service?

17 MR. COBURN: That's the best way
18 of using these busses. The busses are
19 sometimes used for sight seeing services. But
20 besides that --

21 CHAIRMAN ELLIOTT: They are also
22 used in the double decker tour --

1 MR. COBURN: On rare occasions,
2 when they need extra busses.

3 CHAIRMAN ELLIOTT: Okay.

4 MR. COBURN: But, nine times out
5 of ten, it's -- it's the double decker busses
6 that operate the sight seeing services and
7 these motor coaches are used for other
8 services, primarily charter services. And it
9 was because they were operated for charter
10 services, that when we were hired, which was
11 in June -- it was in June of -- of '09, we
12 advised that they needed their own authority
13 to operate these charter busses, as charter
14 services. They had been thinking that they
15 could operate them because they had been IBS
16 busses, under IBS's operating authority. And
17 we explained that was not a possibility. That
18 they needed -- Twin America should have its
19 own authority; get its own insurance. It --
20 It advertises these -- the availability of
21 these busses for charter service and it
22 operates charter services as part of what it

1 does. So it -- there were two sides to the
2 business. There's the sight seeing side of
3 the business and there's the charter side of
4 the business. As far as the sight seeing side
5 -- and -- and there's one other side, which
6 is, that they operate vans to pick people up
7 at certain hotels in New Jersey and bring them
8 into New York City, where they then get on the
9 double decker sight seeing busses. Well that
10 van service is across state lines and it is
11 subject to regulation.

12 CHAIRMAN ELLIOTT: And that's all
13 part of Twin America?

14 MR. COBURN: That's all part of
15 Twin America. Those vans also.

16 CHAIRMAN ELLIOTT: And that
17 started from day one?

18 MR. COBURN: From day one.

19 CHAIRMAN ELLIOTT: Even the van
20 service?

21 MR. COBURN: Van service from day
22 one. And that -- that is a continuation of

1 service that IBS was offering, pre-
2 transaction. So nothing changed.

3 CHAIRMAN ELLIOTT: And was that in
4 the record in your verified statements?

5 MR. COBURN: It is in the record.
6 Yes, sir.

7 CHAIRMAN ELLIOTT: Okay. Thank
8 you.

9 MR. COBURN: The -- and then, of
10 course, the sight seeing service, itself, is
11 subject to these joint arrangements with Peter
12 Pan, with other bus companies, including some
13 of the Coach USA companies, with Metro-North,
14 a railroad that operates into Connecticut. We
15 have evidence in the record of a through-
16 ticketing arrangement with Peter Pan, where
17 you can buy a ticket to go from Connecticut,
18 down to New York City, get on a sight seeing
19 bus, do your sight seeing, and go home on
20 Peter Pan, all one ticket and one price.

21 VICE CHAIRMAN MULVEY: I have a
22 question along those lines. Before the Bus

1 Deregulation Act of 1982, regular intercity
2 services provided by Greyhound and Trailways
3 were different from the charter and tour
4 operations that were provided by other
5 carriers. Now, a company like Gray Line,
6 which focused on local tours in New York City,
7 for example, before 1982, did they need
8 authority from the ICC at that point? Or were
9 they strictly regulated locally -- by local
10 entities and were therefore exempt from ICC
11 regulation?

12 MR. COBURN: I can't speak to --
13 to Gray Line's situation. I would think, if
14 they operated in an area where they crossed
15 state lines, they should have had federal
16 authority. And I know that the Gray Line
17 companies that Coach USA bought back in 1998,
18 as I recall -- yes, it was 1998 -- including
19 Gray Line of New York and GL Bus, which was a
20 Gray Line company, they had federal operating
21 authority. Coach USA bought them. It's a
22 precedent for this proceeding, because those

1 were the companies that were operating the
2 double decker operations. And we explained
3 that back in 1998, when we came to the Board
4 and said we want to buy these companies.
5 Here's what they do. And the Board approved
6 that transaction. And we explained they
7 operate double decker sight seeing tours in
8 New York. So it's a precedent for this very
9 case.

10 COMMISSIONER NOTTINGHAM: Mr.
11 Coburn, if I could ask, in your reply brief on
12 page 9, you explain your client's application
13 to this Board, that the main reason for that
14 is that your client was taking "rational --
15 and legally required -- actions as a motor
16 passenger carrier to further its
17 transportation business and to comply with the
18 law." When -- when -- at what point in time
19 should your client have filed with the Board
20 to fully comply with the law?

21 MR. COBURN: They should have
22 filed, in a perfect world, they should have

1 filed before the transaction and waited the
2 period during which you would have deliberated
3 on their application.

4 COMMISSIONER NOTTINGHAM: And we
5 would have put that out for comment and we
6 would have heard, perhaps, from the New York
7 Attorney General's Office in a timely manner,
8 at that time.

9 MR. COBURN: Yes. Yes.

10 COMMISSIONER NOTTINGHAM: Or, and
11 other parties. Do you see any sense of
12 awkwardness or a problem with a regulatory
13 agency at the federal level, such as
14 ourselves, not being able to do our job
15 because we don't even know about the existence
16 of the transaction. And, in this case, thank
17 goodness it was not ten or 20 years. But it
18 could have been. We're lucky it wasn't. I
19 mean years could have gone by before
20 complaints could have risen that would have
21 triggered concerns on the ground in New York.
22 And then we would have learned wow. Do you

1 see a sense of why we would be concerned with
2 that scenario? We're in a climate here in
3 Washington where all regulatory agencies are
4 being scrutinized. You know, are we doing our
5 job? Are we protecting the public interest?
6 And here we are, we don't even know about what
7 we're supposed to be regulating because people
8 are failing to disclose that according to law.
9 And I guess the last part of the question is
10 are you familiar with some of the civil
11 penalty provisions in Title 49, that apply to
12 parties who fail to file various applications
13 with the Board?

14 MR. COBURN: We are -- we are
15 familiar, Commissioner. And we are respectful
16 of the Board and here we are. I must say that
17 our -- my colleague here, representing
18 Continental Guest, was not respectful of the
19 Board. They did not come before the Board.
20 And yet we heard arguments this morning about
21 affidavits that I've never heard of and all
22 sorts of facts that Mr. Berman is throwing

1 into the record. They didn't come before the
2 Board. They went right to state court. We --
3 my client was not a perfect actor here. We
4 acknowledge that. But once they determined
5 that there was a problem, here we are. We
6 came before the Board. We filed an
7 application. We're doing the best we can,
8 given those facts. And there are lots of
9 situations where, for any number of reasons,
10 we're not the first, where parties have come
11 to the Board after a transaction, in the
12 railroad area, as well as in the bus area.
13 And the Board has perhaps slapped the party on
14 the wrist. But where the transaction serves
15 the public interest, that's the ultimate test.
16 The Board has approved the transaction. And
17 that's what we submit you should do here. If
18 I may just -- there were so many points that
19 were raised, I really didn't get a chance to
20 respond to them. And I have just another
21 minute. About barriers to entry, I think the
22 barriers to entry argument is -- is really

1 illustrated so well by City Sights. City
2 Sights started with eight busses. They
3 quickly grew within two years to 50 busses,
4 without the cooperation -- without an
5 arrangement with Continental Guest Services --
6 without the concierge service, they grew to 50
7 busses, between 2005 and 2007. It was in
8 2007, when they first made an arrangement with
9 Continental Guests. So the notion that
10 Continental Guests is somehow -- that dealing
11 with them is somehow critical to success is --
12 it's belied by the fact that about 90 percent
13 of the sales for these busses is done through
14 street sellers and through the internet. You
15 go on Orbits; you go on Expedia; you can buy
16 these tickets. And lots of people do. In
17 fact, the hotels only represent about nine
18 percent of the sales. And Continental Guests
19 is only -- has concierges in -- out of -- in
20 43 hotels out of hundreds.

21 COMMISSIONER NOTTINGHAM: Mr.

22 Coburn, while you're on that point, can I ask

1 would your client object to Continental
2 Guests, in the future, purchasing tickets
3 online, on the internet, or from street
4 hawkers and reselling them?

5 MR. COBURN: They -- I think
6 they're free to do that. I think they're free
7 to do that. And so they don't need an
8 arrangement with us to sell tickets. In fact,
9 I was -- I walked through Times Square the
10 other day, enroute to Penn Station, and there
11 were street sellers at every corner, trying to
12 sell me tickets on City Sights busses and on
13 Gray Line busses. They're all over the place.
14 And for a new entrant to arrange for street
15 sellers is not -- is not a problem. It's not
16 --

17 VICE CHAIRMAN MULVEY: Well, what
18 about the allegation that Mr. Marmurstein has
19 told the concierge group that he wants to buy
20 them out, he wants them to turn over the
21 business for some compensation to Twin
22 America?

1 MR. COBURN: Well, I think he did
2 -- I'm not -- I'm not fully conversant with
3 the arrangement between the City Sights folks
4 and the Twin America folks and the concierge
5 group. But my understanding is that they did
6 try to buy the concierge group. Nothing wrong
7 with that. And have tried and, that having
8 failed, have tried to set up their own
9 concierge group. Perfectly within their
10 contract rights to do that. That will be
11 tested, I suppose, in a New York court. But
12 --

13 VICE CHAIRMAN MULVEY: Would that
14 kind of vertical integration now become a
15 barrier to entry? I mean, sometimes you can
16 be fooled by entry barriers. In the aviation
17 industry, many assumed that it had very low
18 entry barriers; that it was an easy business
19 to get into. But, at GAO, we discovered that
20 there were a lot of hidden barriers to entry,
21 marketing barriers, etc., that new entrants
22 couldn't get into in major airports. And I'm

1 wondering if there aren't some similarities
2 here, where, on the surface if it, it looks
3 very, very easy to get into the bus market.
4 Anybody can buy a bus. And yet, on the other
5 hand, because of the marketing situation, and
6 the marketing requirements, it really is
7 fairly difficult to get in, as Mr. Yoon
8 suggested.

9 MR. COBURN: Well again, City
10 Sights grew without the concierge assistance,
11 because they represent only a small percentage
12 of the sales. The vast majority of the sales
13 being on the internet and through ticket
14 sellers on the street. So even if you didn't
15 have any opportunity to make arrangement with
16 concierges and we're far from a situation
17 where City Sights or Twin America is going to
18 control all the concierge desks. But even
19 putting aside the concierge desks, there's
20 lots of opportunities to sell tickets. And
21 that's what City Sights did without the
22 assistance of the concierges. So I don't

1 think this is something for any of us to lose
2 sleep over. I think there's all sorts of
3 opportunity for new entrants and for existing
4 companies to grow their services and -- and,
5 just like City Sights did. On top of which,
6 the notion that we're talking about a market
7 here that is confined to just double decker
8 busses is a false premise. And I think our
9 papers and Dr. Willard's testimony, explore
10 that in great detail and demonstrate that the
11 market is, in fact, a much bigger market that
12 consists of all of the tourism opportunities
13 available to people in New York. Not only
14 land tours, but water tours, air tours, and
15 other kinds of attractions where they can
16 spend their tourist dollars.

17 VICE CHAIRMAN MULVEY: Thank you.

18 CHAIRMAN ELLIOTT: Thank you,
19 Counsel. I think we're --

20 MR. COBURN: If I may, just a
21 clarification for the record. The counsel for
22 Coach USA in the transaction was Robert

1 Okulski of Gibney, Anthony, and Flaherty, the
2 Alan Katz who I mentioned the other -- earlier
3 was a counsel for the City Sights side.

4 CHAIRMAN ELLIOTT: Sure. Yes.
5 You -- thank you, very much, Counsel. And if
6 you would like, I saw that you reacted to one
7 of the statements. And if you -- but just
8 keep it short.

9 MR. YOON: Thank you,
10 Commissioners. I just wanted to say that the
11 joint venture agreement excluded a general
12 charter business. I'm not sure about the
13 charter business that the Applicants were
14 talking about, number one. And number two,
15 the Applicants stated that they compete with,
16 you know, Harlem Bus Tours and boats and
17 whatnot. But their website actually
18 advertises these tours. So I don't think a
19 competitor -- they would advertise a
20 competitor's business.

21 CHAIRMAN ELLIOTT: Thank you,
22 Counsel. Thank you, very much, for your

1 arguments today. We've got your arguments.

2 We will take this matter under advisement.

3 And the meeting of the Board is not adjourned.

4 (Whereupon, the meeting was

5 adjourned at 10:20 a.m.)

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