

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 2 on Competition and Regulation

**DISCUSSION ON METHODS FOR ALLOCATING CONTRACTS FOR THE PROVISION OF
REGIONAL AND LOCAL TRANSPORTATION SERVICES**

-- United States --

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The attached document is submitted to Working Party No. 2 of the Competition Committee FOR DISCUSSION under item V of the agenda at its forthcoming meeting on 25 February 2013.

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1. Overview of Urban Bus Services

1. The vast majority of U.S. urban bus systems were privately owned until the 1960s, when municipalities and regional authorities started granting private carriers exclusive franchises to operate specific routes. Public utility commissions regulated fares and service level on these routes. Congress passed the Urban Mass Transit Act in 1964, granting subsidies to public agencies that provided mass transit. As a result, over the next decade almost all transit systems were taken over by state and local governments or public agencies.¹ The trend reversed in the 1980s, when the federal government reduced its funding and started to require public transit agencies to cooperate more with the private sector.² States like California and Colorado were pioneers in the partial or full privatization of urban bus services.

2. Today, the majority of U.S. local bus networks are still operated by municipalities or public agencies. For example, in 2009, 62.3 percent of local transit agencies were operating their bus network themselves, 13.1 percent were contracting out part of the operations, and 24.6 percent had contracted out their entire operations.³ Over the past five years, the trend has been towards slightly more partial contracting and less direct operating.⁴ However, there is a great variety of systems for providing urban bus services across U.S. states and municipalities, and regulation of those services similarly varies.

3. Examples of publicly-operated bus services include New York City, where the Metropolitan Transportation Authority (MTA) is a public-benefit corporation chartered by the New York State Legislature in 1965. The MTA Bus Company (New York City Transit is the division of MTA operating public buses) was created in 2004 to assume the operations of seven bus companies that operated under franchises granted by the New York City Department of Transportation. The takeover of the lines began in 2005 and was completed in 2006. MTA Bus is responsible for both the local and express bus operations of the seven companies, consolidating operations, maintaining existing buses, and purchasing new buses to replace the aging fleet currently in service.⁵

4. In Chicago, the Regional Transportation Authority (RTA) is considered a special purpose unit of local government and a municipal corporation of the State of Illinois. RTA includes “Pace,” which was

¹ See Randal O’Toole, *Fixing Transit, The Case for Privatization*, Cato Institute, November 2011, at 2-3, available at <http://www.cato.org/sites/cato.org/files/pubs/pdf/PA670.pdf>; see also National Center for Transit Research, *Analysis of Contracting for Fixed Route Bus Service*, Jun. 2011, at 3, available at <http://www.nctr.usf.edu/wp-content/uploads/2011/08/77923.pdf>.

² See Karen Trapenberg Frick, Brian Taylor, Martin Wachs, *Contracting for Public Transit Services in the US: Evaluating the Tradeoffs*, Privatisation and Regulation of Urban Transit Systems, OECD International Transport Forum, 2008, at 53, available at <http://www.internationaltransportforum.org/Pub/pdf/08rt141.pdf>; see also National Center for Transit Research, *Analysis of Contracting for Fixed Route Bus Service*, Jun. 2011, at 3-4, available at <http://www.nctr.usf.edu/wp-content/uploads/2011/08/77923.pdf>.

³ See National Center for Transit Research, *Analysis of Contracting for Fixed Route Bus Service*, Jun. 2011, at 36, available at <http://www.nctr.usf.edu/wp-content/uploads/2011/08/77923.pdf>.

⁴ *Id.*

⁵ See Public Transportation for the New York Region, The MTA Network, available at <http://www.mta.info/mta/network.htm>.

created by the 1983 RTA Act to unify the numerous disparate suburban bus agencies that existed at that time. In doing so, fares, branding, and management were made consistent throughout the region.⁶

5. Other public agencies have been relying more on contracting over the past 10 to 15 years, at least for part of their operations. Such combinations of public and private operators in one local network are often driven by the necessity for transit agencies to cut their expenses by giving up routes that are not profitable, opening niche opportunities for private operators with different cost structures.

6. For example, in New York City, as MTA had to give up a number of routes and bus stops over the past decade to cut costs, private carriers, regulated by the city, emerged to serve the public's transit needs in the areas abandoned by MTA. In Los Angeles, part of the bus network (8 routes) was contracted to Veolia, a multinational, France-based company in 2008.⁷ Privately-provided commuter buses that operate during peak hours and offer customer-oriented routes with limited stops and coach amenities to suburban employment destinations such as the Silicon Valley are well developed in the San Francisco Bay area.⁸ In the Boston Bay area, private commuter buses and the Massachusetts Bay Transportation Authority work closely together.⁹ A partnership also exists between large employers and the transit agency in Seattle.¹⁰ In Denver and San Diego, some of the bus routes are operated by private carriers under contracts with the Regional Transportation District, a public agency. Examples of urban bus networks entirely outsourced include the operation of the bus system in Nassau County (Long Island, NY), which was contracted to Veolia in 2012. In the framework of this public-private partnership, the County retains ownership of the buses and buildings and Veolia operates the buses. Although Veolia can make recommendations, the County regulates fares and bus routes.¹¹ Veolia has similar arrangements operating the bus systems in the cities of Phoenix and Las Vegas.

7. The recent trend has been toward full contracting in newer, developing transit systems; partial contracting is generally used in larger, already developed transit systems. When contracting only part of their services, agencies tend to select only specific lines, which are usually the less profitable, often outlying areas with lower ridership.

2. Overview of the Intercity Bus Industry

8. With the advent of the interstate highway system in 1956, and with incomes growing, more Americans were able to own automobiles. As a result, many moved to the suburbs, and the U.S. intercity bus system declined.¹² Through the 1970s, reduced ridership and governmental controls on pricing and

⁶ See Regional Transportation Authority, available at <http://rtachicago.com/about-the-rta/overview-history-of-the-rta.html>.

⁷ See *Veolia Transportation Wins Downtown DASH in Los Angeles*, Nov. 13, 2008, available at http://www.veoliatransportation.com/pdfs/Downtown_Dash_Contract.pdf.

⁸ Krute Singa, Jean-David Margulici, *Privately-Provided Bus Services, Role in the San Francisco Bay Area Regional Transportation Network*, California Center for Innovative Transportation, University of California Berkeley, Mar. 2010, at 3, 6, 8, available at <http://cdm15025.contentdm.oclc.org/cdm/singleitem/collection/p266401coll4/id/4558/rec/2>.

⁹ *Id.*, at 14.

¹⁰ *Id.*, at 13.

¹¹ See *Nassau Approves Veolia Bus Contract*, Dec. 13, 2011, available at <http://archive.longislandpress.com/2011/12/13/nassau-approves-veolia-bus-contract/>.

¹² Joseph P. Schwieterman, Lauren Fischer, Sara Smith, and Christine Towles, *The Return of the Intercity Bus: The Decline and Recovery of Scheduled Service to American Cities, 1960–2007*, Chaddick Institute

routes made the bus industry economically unsustainable.¹³ As part of a wider movement in the 1980s and 1990s to deregulate the U.S. transportation industry, the Bus Regulatory Reform Act of 1982 largely deregulated the intercity passenger bus market.¹⁴ The regular-route sector, based on a hub-and-spoke service from brick and mortar bus depots, declined further. A series of mergers consolidated the traditional bus industry into a single national carrier, Greyhound.

9. However, the 2001 terrorist attacks and the heightened security in airports, followed by the sharp rise in oil prices in 2006 and the rebirth of urban business districts, have increased the appeal of the intercity bus.¹⁵ Since 2006, the intercity bus industry has averaged an annual growth rate of approximately 7 percent.¹⁶ Most notable is the establishment of point-to-point¹⁷ bus service along busy corridors by small operators.¹⁸ These bus services are often characterized by low fares, street-corner pick-ups, on-board wifi service and electrical outlets, and electronic ticketing systems. Due to the popularity of these buses, the larger carriers (Greyhound¹⁹ and Megabus²⁰) have started to offer similar services on their standard bus routes. Intercity bus service in the U.S. is provided by private operators, and does not involve the contracting or franchise operations sometimes found in local transportation services.

3. Regulation by the Surface Transportation Board

10. The Surface Transportation Board (STB) has jurisdiction over certain company structure, financial and operational matters of interstate passenger buses. STB regulation of interstate passenger bus service focuses mainly on competition within the industry – specifically on pooling of services or earnings and on mergers and acquisitions. With respect to the former, STB approval is required for pooling and dividing traffic, services, or earnings.²¹ Pooling is allowed if it will promote better service to the public or economy of operation and will not unreasonably restrain competition. A carrier may participate in an arrangement approved by or exempted by the STB without the approval of any other federal, state, or municipal body. A carrier participating in an approved or exempted arrangement is exempt from the

for Metropolitan Development, Chicago, 2007, at 3-4, available at <http://las.depaul.edu/chaddick/docs/Docs/IntercityBusStudy.pdf>.

13 *Id.*

14 Remaining regulation of interstate buses, see 49 U.S.C. § 13501, is carried out by the Secretary of Transportation and the Surface Transportation Board (STB). The STB’s regulation focuses on combinations and pooling, while the Secretary’s licensing and registration focus on safety.

15 *Supra*, note 2, at 4.

16 Joseph P. Schwieterman, *The Intercity Bus Rolls to Record Expansion: 2011 Update on Scheduled Motor Coach Service in the United States*, Chaddick Institute for Metropolitan Development, Chicago, 2011, at 3, available at http://las.depaul.edu/chaddick/docs/2011-2012_Reports/The_Intercity_Bus_Rolls_to_Record_Expans.pdf.

17 These buses are also termed “curbside” service.

18 Mostly “metropolitan areas separated by 175 to 300 miles in the East and Midwest.” See Joseph P. Schwieterman, Lauren Fischer, Sara Smith, *2008 Update on Intercity Bus Service: Summary of Annual Change*, Chaddick Institute for Metropolitan Development, Chicago, 2008, at 3, available at http://las.depaul.edu/chaddick/docs/Docs/2008_Update_on_Intercity_Bus_Service.pdf.

19 Greyhound, together with Peter Pan, operates the point-to-point bus company BoltBus.

20 Megabus, which is owned by British Stagecoach, operates its own point-to-point service.

21 49 USC § 14302.

antitrust laws and from all other law, including state and municipal law, as necessary to carry out the arrangement.²²

11. With respect to mergers and acquisitions, federal law²³ requires STB approval for carriers whose aggregate gross operating revenues for the prior year exceeded \$2 million. The STB will approve a transaction when it finds that the transaction is consistent with the public interest. In doing so, the STB must consider at least:

1. the effect of the proposed transaction on the adequacy of transportation to the public;
2. the total fixed charges that result from the proposed transaction; and
3. the interest of carrier employees affected by the proposed transaction.

12. With either pooling agreements or mergers and acquisitions, the STB can maintain continued oversight of an approved transaction. It can impose conditions on approval, and with respect to mergers and acquisitions, it can provide interim approval authority. STB approval provides an automatic antitrust exemption and preemption from other federal, state and local laws.

4. Rate and Route Regulation

13. Generally, rates and services are not regulated. But carriers must establish reasonable “through routes”²⁴ with other carriers of the same type and individual and joint rates applicable to those routes. The STB has the authority to prescribe through routes and related conditions.²⁵ Federal law provides a strong federal preemption of state and local regulation relating to scheduling, rates, and service.²⁶

5. Recent Antitrust Enforcement and STB Regulation

5.1 *Twin America LLC*

14. The Antitrust Division of the U.S. Department of Justice (Division) has had very little antitrust enforcement activity related to regional and local bus service.²⁷ The Division recently challenged a joint venture involving hop-on, hop-off tourist buses in New York City, however.²⁸ On December 11, 2012, the Division and New York State Attorney General filed a civil antitrust lawsuit against a tour bus joint venture formed by Coach USA Inc. and City Sights LLC alleging that the joint venture, known as Twin

²² 49 USC § 14302(f).

²³ 49 USC § 14303.

²⁴ A “through route” is an arrangement (1) between connecting carriers, (2) for the offering of a transportation service, (3) from a point on the line of one carrier to a point on the line of the other carrier. Simply stated, there must be an origin by the first carrier, interchange and delivery to the second carrier and final delivery by the second carrier. *See, e.g., Carolina Clinchfield & Ohio Railway Co. v. Southern Railway Co.*, 299 I.C.C. 335, 337 (1956).

²⁵ 49 U.S.C. § 13705.

²⁶ 49 U.S.C. § 14501.

²⁷ Section 5(a)(2) of the Federal Trade Commission (FTC) Act expressly exempts from the FTC’s jurisdiction “common carriers subject to the Acts to regulate commerce.” 15 U.S.C. § 45(a)(2).

²⁸ *See* press release Justice Department and New York Attorney General File Antitrust Lawsuit against New York City Tour Bus Joint Venture of Coach USA and City Sights, December 11, 2012, *available at* http://www.justice.gov/atr/public/press_releases/2012/290136.htm.

America LLC, had resulted in higher prices for hop-on, hop-off bus tours in New York City. The complaint said that the formation of Twin America gave Coach and City Sights a monopoly over the more than \$100 million New York City hop-on, hop-off bus tour market and enabled Coach and City Sights to increase prices to consumers by approximately 10 percent for tourists visiting some of New York City's leading attractions, including the Empire State Building, Times Square, and Central Park. The lawsuit seeks to dissolve the joint venture and impose other relief to restore competition and redress the anticompetitive effects of the parties' conduct.

15. The complaint states that prior to the joint venture, two firms accounted for approximately 99 percent of the hop-on, hop-off bus tour market in New York City: Coach, the long-standing market leader through its "Gray Line New York" brand, and City Sights, a firm that commenced operations in 2005. From 2005 until the 2009 creation of the joint venture, the parties engaged in vigorous head-to-head competition on price and product offerings that directly benefitted consumers. The complaint said that no other operator of hop-on, hop-off bus tours in New York City has entered or expanded their services to sufficiently replace the competition lost through the parties' combination in the more than three years that Twin America has been operating.

16. The transaction forming Twin America was not required to be reported under the Hart-Scott-Rodino Antitrust Improvements Act. As a result, the Division did not learn about the joint venture until after it had been consummated. The New York State Attorney General began investigating Twin America shortly after its March 2009 formation, however, and issued subpoenas seeking information about the joint venture. Shortly after the subpoenas were issued, Coach and City Sights delayed the state's antitrust investigation by asserting that the Twin America transaction was within the exclusive jurisdiction of the STB, whose approval would exempt the parties' transaction from the antitrust laws. In early 2012, after more than two years of proceedings, the STB denied approval of the transaction as not in the "public interest," and directed the parties to either dissolve Twin America or terminate minimal interstate operations that provided the basis for STB jurisdiction. Coach and City Sights chose the latter option and continue to operate the joint venture.

5.2 *Peter Pan Bus Lines, Inc. – Pooling – Greyhound Lines, Inc.*

17. Another recent matter involved a dispute between competing bus companies that operate in the Northeast United States. In 1997-98, the STB gave its approval for Peter Pan Bus Lines, Inc. and Greyhound Lines, Inc. to pool bus operations between New York City, and Washington, D.C.; Philadelphia; Boston; and Springfield, and authorized intermediate stops. In 1997, the STB found that the pooling parties had offered substantial evidence to justify the pooling of their operations between destination cities, including low passenger loads caused by overlapping services. The carriers argued that pooling would reduce excess capacity, eliminate unnecessary duplication of facilities and staff, and allow for capital improvements to provide better service. The STB concluded that for each application, the sharing arrangements would foster improved service to the public and economy of operation and would not unreasonably restrain competition.²⁹

²⁹ The Division filed comments with the STB in 1997 opposing the application to pool the operations of these carriers between New York City and Washington, DC. The comments argued that there was a substantial likelihood that the proposed pooling agreement would unduly restrain competition. Peter Pan and Greyhound were the only bus lines that provided scheduled transportation between New York City and Washington, DC. The Division argued that if the pooling agreement were approved, bus service between those cities would be provided by what is in effect one company. The Division's comments noted that there was no evidence that service from other common carrier modes of transportation -- trains and airplanes -- nor rented or privately owned automobiles, would provide effective competition to the provision of scheduled bus service by the pooled companies on this route. As a result, the pooled companies would

18. In 2008, the pooling parties unveiled “BoltBus,” a new curbside passenger pick-up and drop-off service. Before BoltBus, they had served passengers only at terminals or bus stations. Another competitor, Coach USA, Inc. (Coach), which also offers a competing curbside service through its subsidiary Megabus Northeast, LLC (Megabus), objected to the BoltBus service and asked the STB to reopen the pooling proceeding to stop the competing curbside service. Coach argued that the BoltBus service fell outside the scope of the 1997 authorization. The STB rejected Coach’s attempt to block the BoltBus service, concluding that it did not expand the pooling parties’ shared service on a new route or into a new geographic territory.³⁰

19. In March 2011, the pooling parties announced new services, notifying the public that they would soon establish a hub in Newark, N.J. providing daily buses from Newark to Baltimore and Washington (and the reverse), with curbside pick-up and drop-off. The pooling parties announced that they were also planning to offer pooled service between Newark and Boston, between Newark and Philadelphia, and between Philadelphia and Boston. Coach again challenged these new pooled services as exceeding the scope of the STB’s approval, but its challenge was unsuccessful. Instead, the STB found that these new services were permitted because they are more efficient ways of providing already-authorized services in a market where bus competition is flourishing.

20. The central issue in the case was whether the services now offered by the pooling parties fell within the scope of the earlier approvals. Over time, the business model evolved from a hub-and-spoke network to one where curbside service became more attractive and desired. The STB found that the new direct services by the pooling parties do not present a competitive problem and were within the scope of its prior approval. Furthermore, the STB determined that the risk of anticompetitive harm to the intercity bus market was minimal, and that competition in the market was flourishing. Indeed, in 2011, the STB found that, since authorizing the original pooling agreements, the number of bus companies providing intercity services in the Northeast had grown significantly, equipment had improved, bus fares had decreased, and competition had steadily expanded.

21. The STB found that, consistent with the National Transportation Policy,³¹ it would be illogical to condition the approval of Peter Pan and Greyhound’s application to pool bus operations between Boston and Philadelphia on the condition that the buses stop, no matter how briefly, in New York, because they can already pool their other buses from Boston to New York and from New York to Philadelphia. It concluded that allowing the pooling parties to provide direct service between the previously approved cities encourages innovative, competitive, and efficient transportation services, benefitting consumers. The STB found that it was not its role to protect Coach from the introduction of a more efficient service that will plainly benefit the public. It determined that the number of existing competitive transportation alternatives and the ease of new entry (as shown by the many recent entrants) to the intercity bus market in the Northeast precluded the pooling parties from engaging in anticompetitive behavior, such as collectively raising rates to supracompetitive levels.

likely raise bus fares above competitive levels. The STB order approved the Peter Pan - Greyhound pooling application subject to the condition that they file periodic reports on the fares they charge for service between the points in their pooling agreement. The STB noted the pervasive intermodal competition in the market for intercity passenger travel and the declining position of intercity buses in this market, and stated that the Division had not submitted sufficient countervailing evidence with respect to the Washington-New York route.

³⁰ *Peter Pan Bus Lines, Inc.—Pooling—Greyhound Lines, Inc. (April 2011 Decision)*, MCF 20904, *et al.* (STB served Apr. 20, 2011).

³¹ 49 U.S.C. § 13101.