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Regulations
(14 C.F.R. Part 255)

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COMMENTS OF
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I. INTRODUCTION.

On September 10, 1997, the Department instituted a rulemaking to determine whether it should continue or modify its existing regulations on Computer Reservations Systems (“CRS”), 14 C.F.R. Part 255 (the “Rules”). 62 Fed. Reg. 47606. This rulemaking is being conducted in the context of the sunset provisions of the CRS Rules, which would otherwise expire on December 31, 1997.¹ Additionally, on October 14, 1997, American West Airlines, Inc. (“America West”) filed a petition requesting the Department to amend the Rules to prevent certain abusive fees and booking practices. The Department has invited comments on the renewal and revision of the CRS Rules and the America West petition.

¹ The Department has proposed to extend the CRS rules on an interim basis until March 31, 1999, while it conducts this rulemaking. 62 Fed. Reg. 59313 (November 3, 1997).

Delta supports the Department's preliminary position that the CRS Rules should be continued, but with some important revisions. The Rules are essential to ensure vigorous and effective competition in the airline industry. By and large the Rules have been effective in eliminating the most blatant forms of unfair competition, particularly those relating to CRS display bias. However, additional changes are required in order to promote and strengthen CRS and airline competition.

The Department's primary objective in the current rulemaking should be to increase competition among CRS vendors for information services and booking fees by eliminating contract and other CRS vendor-created barriers that prevent or limit travel agents from using multiple CRS databases and Internet connections to competitive sources of travel information. The Advanced Notice of Proposed Rulemaking ("ANPRM") recognizes that "[a]irlines could exert some competitive pressure on the systems if they could encourage travel agencies to use one system instead of another, but that has appeared to be impracticable." 62 Fed. Reg. at 47607.

Contract-imposed restrictions on travel agent flexibility represent the greatest inhibitors of CRS competition and must be addressed in any CRS rulemaking proceeding. The continued proliferation of long-term CRS vendor-supplier contracts, coupled with productivity pricing, restrictive hardware

agreements, and the potential exposure to enormous damages for early termination of contracts, all combine to unduly restrict the ability of travel agents to utilize multiple CRSs and other data bases. As a result, CRS systems are largely immune from competitive market forces that would otherwise discipline CRS services and booking fees. In light of the artificial reduction of CRS competition resulting from vendor-imposed contract restrictions, the Department should use this opportunity to promote effective competition in the CRS industry by revising the CRS Rules to remove barriers that enslave travel agencies to a single CRS supplier.

This rulemaking comes at a critical historic juncture, just as the Internet is coming of age and improvements in data communications technology are making more information sources available to travel agents and consumers. The rules adopted here will have a lasting impact on the development of competition in the CRS and airline industries for years to come. Adoption of Delta's proposed revisions to the CRS Rules would encourage and enhance competition among the numerous new and evolving sources of information available to consumers and would allow market forces to determine the most efficient result.

Delta believes that it would not be appropriate to extend the CRS rules to distribution over the Internet or to adopt new rules specifically targeted at regulating CRS distribution over the Internet. In light of the rapidly evolving

distribution technologies, and the vigorous competitive environment in that arena, Delta does not believe that regulatory proscriptions relating to Internet activity are necessary.

The Department's Rules should encourage travel agent access to alternative sources of information, including travel information available on the Internet. The Department has an opportunity to significantly enhance CRS and airline competition by requiring CRS vendors to offer airlines a separate participation agreement for Internet products. CRS and airline competition will significantly improve if CRS vendors are forced to compete for participants based on the prices charged to carriers for products offered to travel agents, corporations and consumers on the Internet. This will result in the opportunity for carriers to participate in only those products which offer a competitive product at a reasonable price. Since this area is changing rapidly, the Department should monitor the situation and plan to conduct a comprehensive review of Internet distribution within three years of issuing a final rule in this proceeding.

II. RESTRICTIVE CONTRACT TERMS UNDULY LIMIT COMPETITION IN THE CRS INDUSTRY.

The DOT and the Department of Justice have time and again concluded that CRS vendors hold market power over participating carriers. The

Department has observed that if a carrier drops out of a system, it will lose a large portion of business from travel agencies using that system. See, 57 Fed. Reg. 43780, 43783 (Sept. 22, 1992 Final Rule). Because the economic penalties of withdrawing from a system are so high, carriers have no choice but to participate in each system. Thus, participating carriers lack bargaining power, and the dominant CRSs are able to impose unreasonable costs and unreasonable terms. To make matters worse, CRS vendor-subscriber contracts are designed to encourage excessive CRS usage, racking up huge costs that are borne by the carriers and ultimately by consumers. This unusual tri-party arrangement separates subscribers from payment liability (carriers) and leads to perverse results that would not occur in a competitive marketplace.

CRS vendors compete among one another to enlist subscribers, but participating carriers are held captive by the CRS vendors. Thus, CRSs have a strong impetus to lure subscribers with attractive financial packages, but no incentive to hold carrier booking fees to reasonable levels. The Department has observed that “if vendors are exercising market power to extract above normal profits, they appear to be doing so by targeting participating airlines rather than subscribers.”² The competition for subscriber accounts has contributed to the rapid escalation of CRS fees.

² DOT, Study of Airline Computer Reservation Systems at 36 (1988).

CRS vendors are more than willing to provide subscribers with CRS terminals and services at little or no cost, provided that the agents meet productivity targets. Under productivity pricing schemes, only a small fraction of CRS subscribers pay full price for their systems.³ Indeed, as noted by the Department, some CRS vendors have even paid travel agencies to install and use a particular CRS system. Cash bonuses running into the millions of dollars have been paid to lure and retain subscribers. *Id.* A recent article in *Travel Weekly* (Sept. 25, 1997 page 46) indicates that AAA expects to receive some \$75 million in segment productivity fees during its five-year contract with Apollo. These incentive packages amount to huge sums of money laid at travel agents' feet, and are ultimately paid for by the airlines. The excessive bookings fees necessary to cover these subsidies to travel agents drive up the cost of air transportation and are detrimental to the public interest.

The Department's Rules governing subscriber contracts were designed to encourage competition among CRS vendors for travel agency subscribers. Although CRSs compete vigorously for new subscriber contracts, once a contract has been signed, travel agencies are effectively locked in to a single

³ See DOT, Airline Marketing Practices: Travel Agencies, Frequent Flyer Programs and Computer Reservations Services at 14, 23 (Feb. 1990).

CRS vendor for long periods of time. The Department's observations at the start of the 1992 rulemaking remain equally true today:

“only a small proportion of agencies use more than one system for the great majority of their airline bookings. Thus, each system generally is its subscribers' only source of information on what airline services and fares are available when a client wishes to make travel arrangements. Each CRS therefore has some degree of monopoly power on providing information on airline services to agencies that use the CRS as either their only or their primary source.”

56 Fed. Reg. 12586 (March 26, 1991 NPRM).

The DOT's 1992 Rules, by eliminating “minimum use” pricing, providing (at least in theory) for shorter-term contracts, and proscribing restrictions on the use of third-party software in limited circumstances, were intended to diminish the enormous market power enjoyed by the dominant CRSs. Unfortunately, the 1992 Rules did not go far enough, and the dominant vendors have been able to maintain their market power and thereby evade the intent of the Rules by using contract provisions that have the same harmful result as those the Department sought to eliminate.

The Department should apply the lessons learned over the past five years and use this opportunity to eliminate abusive contracting provisions that restrict competition in the CRS industry in the following areas:

A. Inability to Use Third-Party Software on Any Terminal.

One of the most important actions the Department should take in this proceeding would be to enable travel agents to access any CRS or travel information database from any workstation. By refusing to allow travel agents flexibility to access other databases from system terminals, the dominant CRS vendors have made it economically and logistically impractical for travel agents to employ multiple systems in their daily operations, thus eliminating competition among CRS systems at the basic transactional level.

The Department was absolutely correct in 1992 when it concluded that “eliminating the vendors’ unreasonable restrictions on the use of third-party hardware and software and on using a CRS terminal to access other databases will promote competition in the CRS and airline industries. . .” 57 Fed. Reg. at 43797.

If travel agents were able to chose the best source of information from a number of services available at their workstations each time they began a reservations assignment, competition among CRSs and within the industry would be greatly intensified. Each CRS would be forced to compete for daily transactions by an individual travel agent. In addition, CRSs would be required to compete with alternate travel databases, including carrier databases. This

increased competition for efficient and more cost-effective reservations service would drive down prices in the CRS and airline industries.

The third party software rule contained in Section 255.9 was adopted in order to promote such competition by allowing travel agents to access multiple databases and CRSs from a single terminal. In fact, as originally proposed the rule would have allowed:

“the interconnection of third-party computer hardware or software to system equipment, except on grounds of demonstrated technological incompatibility, or the use of vendor-supplied hardware and communications lines to access directly any other system or database.” 56 Fed. Reg. 12586.

This is indeed the correct approach. However, at the urging of the dominant CRS vendors the Department adopted a significantly watered-down version of the third-party hardware/software rule which exempts system-owned terminals from this important access provision. See 14 C.F.R. 255.9(a)(2). As a result, the exemption has been allowed to swallow the rule and has enabled the dominant CRS vendors to perpetuate their single-supplier stranglehold over most travel agencies. Delta submits that the Department was wrong to conclude in the 1992 rulemaking that “if a subscriber is using terminal owned by the vendor, we think the vendor should have some ability to control the use of its equipment.” 57 Fed. Reg. at 43796. In practice, the ability of the dominant CRSs to control

the use of vendor-supplied equipment effectively has enabled vendors to restrict travel agents to using only that vendor's system.

Thus, while the 1992 Rules provided travel agents with the right to use third-party hardware and software, this right is illusory for several reasons: First, vendors provide hardware equipment to subscribers at little or no cost as part of CRS contracts -- indeed, sometimes they provide large cash incentives to agents for agreeing to have such equipment installed. Second, CRS vendors do not allow their equipment to be used to access other databases (and to the limited extent agents might have access using their own equipment, CRS vendors effectively block access through the imposition of productivity pricing requirements, discussed infra at page 12). Third, given the choice of free vendor-provided equipment, or purchasing independent hardware at agency expense, travel agents will opt for the free deal hands down. Accordingly, even though the costs of computer hardware necessary to run CRS applications has plummeted dramatically since 1992, and it is now possible to buy personal computers capable of running CRS programs for well under \$1,000, the majority of travel agent hardware is controlled by CRS vendors.

As a result, the policy objectives of 255.9 have been largely defeated.

These restrictions have prevented effective competition at the individual

transaction level and impaired smaller CRSs and third-party vendors from entering markets that are controlled by the dominant CRSs.

Rapidly evolving communications and data technologies have now made it possible for CRSs and other third parties to offer direct connections to their electronic travel databases, which could provide important new avenues of competition to the major CRSs at the individual transaction level. For example, if travel agents had the ability to access a CRS offering a lower booking fee from the agents' individual work stations, an airline could then provide competition incentives to travel agents to book tickets using that CRS. This would result in new and meaningful price competition among the major CRS vendors, which the DOT and the Department of Justice have observed are able to collect supracompetitive booking fees that are not reasonably related to cost. See 57 Fed. Reg. at 43817. The Department has stated that it would encourage proposals to control booking fees that relied on market forces. Id. Delta's proposal does exactly that. However, in order to unleash this potential competition, the Department must take steps to ensure that travel agents have the unfettered ability to use their workstations to access multiple CRSs and other databases.

Delta urges the Department to revise section 255.9(a)(2) to eliminate the exemption for vendor-owed equipment. In the alternative, the Department

should not permit CRS vendors to offer hardware as part of a CRS service contract. Hardware contracts should be offered separately and at prevailing market rates, with no restrictions on installing any program or using any other service or database. This would free travel agents from the restrictions that lock agencies in to a single information source when they obtain equipment from a CRS vendor. The Department's new Rules should seek to promote the greatest possible access for travel agents to competing sources of information.

B. Productivity Pricing

Five years ago, productivity pricing seemed like a good idea designed to promote the efficient use of CRS equipment by subscribers, and received widespread support from many commenters. However, experience has shown productivity pricing to be detrimental to competition and it should be eliminated by the Department. First, productivity pricing prevents competition by providing strong financial disincentives to the use of information sources other than the agency's primary CRS provider. Second, productivity pricing encourages abusive booking and usage practices, so that subscribers can generate inflated activity in order to obtain their preferred rates.

In terms of practical effect, productivity pricing has been used as a surrogate for minimum use clauses that were banned by the Department in the 1992 rulemaking. Minimum use clauses required an agency to make a certain

number of bookings. The failure to meet this booking target resulted in a breach of contract, triggering substantial contract damages. Productivity pricing is the other side of the same coin. Under productivity pricing, subscribers are given substantial discounts off the standard “rack” rates, depending on terminal usage. Delta urges the Department to prohibit productivity pricing as was initially proposed in the Department’s 1991 draft rule. 56 Fed. Reg. at 12642. (“In our view such a fee structure would also undermine the agencies’ ability to use multiple systems. We also doubt that such a system of fees is required economically. We therefore propose to prohibit vendors from using a fee structure that increases charges for subscribers that do not satisfy volume booking standards.”)

With “minimum use” no longer an option, dominant CRS vendors have made effective use of productivity pricing to safeguard revenues and prevent subscribers from straying to other information sources. By setting high productivity figures to obtain favorable pricing treatment and establishing artificially high rack rates, travel agents are faced with essentially the same dilemma as under the old minimum use clauses.⁴

⁴ See, Marj P. Leaming, *Enlightened Regulation of Computerized Reservations Systems Requires a Conscious Balance Between Consumer Protection and Profitable Airline Marketing*, 21 Transp. L.J. 469, 477 (1993).

A recent article in Travel Weekly magazine explained the exorbitant costs that may be imposed on an agency if it fails to meet the productivity quotas when it adds vendor equipment:

Under [Sabre and Apollo's] pricing formulas, just one extra unproductive CRT could cost you upwards of \$47,000 over the next five years. . . with Sabre and Apollo, you pay a penalty for each booking on each CRT below your quota . . . Sabre's penalty is relatively simple: you pay about \$3.05 for each booking below the quota found in the Cluster Amendment for your multilocation agency. For example, if your quota is 260, covering 40 CRTs each now doing 260 bookings, and if you add a 41st CRT without increasing your bookings, you will owe a penalty of \$793 (260 multiplied by \$3.05) per month, or \$47,580 over 60 months. . . Therefore, to avoid being a victim of this kind of price gouging, do not add any equipment unless you are absolutely sure you will have the extra bookings to make it free.

Travel Weekly (emphasis added).

Thus, productivity pricing creates a powerful incentive for agents to use one and only one CRS system, or risk losing economically vital preferential pricing rates and owing huge penalties to the CRS vendors. Since agents have no way of knowing in advance whether they will reach their productivity quota for the month, the fear of not achieving the quota hangs like the sword of Damocles and effectively eliminates any incentive for agents to explore alternative information sources. To make matters worse, there is undue

temptation for agents to engage in speculative, hypothetical or abusive bookings simply to make sure that productivity quotas are met.

Thus, experience has demonstrated that productivity pricing produces the same injurious practices the Department sought to prohibit when it banned minimum use clauses:

- “[Productivity Pricing] discourages agencies from making significant use of more than one system.”
- “[Productivity Pricing] seems designed to protect the vendor’s subscriber base from competition. . .”
- “these clauses operate as a penalty, giving the agency little ability to limit its usage of a system.”

See, 57 Fed. Reg. at 43826.

In summary, productivity pricing and the high costs travel agents incur if they fail to meet target quotas distort competition for CRS services by making it unreasonably difficult for smaller vendors and other third parties to market their systems against the dominant providers, Sabre and Apollo. The intended effect of productivity pricing is to preclude agents from switching or experimenting with other systems or other databases, even if those alternatives provide superior reservations information at lower cost. Productivity pricing unreasonably restricts competition for information services, and should be eliminated.

C. Length of Contract Terms

A third method used by the dominant CRSs to limit CRS competition is long-term travel agent contracts with huge damage exposure for early termination.

The 1991 NPRM sought to enhance and encourage CRS competition by reducing the maximum permissible length of contract term to three years from five years. However, the largest CRSs urged the Department to continue to allow five-year contracts on the basis that such contracts would permit lower rates and allow vendors and agents to amortize capital costs over a longer term. The final rule allowed a maximum contract term of five years, with the requirement that a three year term be offered to the potential subscriber simultaneously with the five year offer. Section 255.8.

Delta submits that the current rule has not alleviated the significant dampening effect of five-year contracts on competition. CRS vendors have, for the most part, avoided three year contracts. By providing vastly different commercial terms, CRS vendors have ensured that five year contracts remain the industry standard in the United States. The Department should thoroughly investigate the impact of the current rule, including the number of travel agents that have obtained CRS contracts with three year terms. Moreover, the Department should consider the duration of CRS contracts offered to travel

agents in the full context of other ancillary contract and financial inducements used to lock-in travel agents to a single source of travel information, and the need to maximize competition in the CRS industry.

Given that computer hardware costs have fallen dramatically due to innovation in the computer industry, there appears to be increasingly less justification for allowing long term contracts to amortize such costs. Indeed, by separating hardware and CRS service contracts as proposed above by Delta, equipment amortization costs would be eliminated altogether from the service contract. The agency could amortize its equipment costs over whatever term it chooses in the hardware contract, without locking in long-term obligations for CRS services.

In light of the apparent failure of the Department's five year-three year "option" rule to achieve any actual reductions in contract duration and improvements in travel agency access to competing sources of travel information, the Department should consider a definitive short term contract term limitation. The Department should give serious consideration to adopting a final rule similar to the European Commission Code, which allows subscribers to terminate a CRS contract without penalty with three months notice after the first year of the contract has elapsed. It is particularly important for the Department to limit the duration of traditional CRS contracts in light of the alternative

information sources available to consumers and other purchasers on the Internet. The dubious economic benefits of a lengthy amortization period are significantly outweighed by the compelling competitive benefits of short term contract limitations.

D. Exposure to Excessive Damages Limits Travel Agent Access to Alternative Sources of Travel Information

The risk of exposure to exorbitant damages if agents were to switch CRSs in mid-stream inhibits agent access to alternate sources of information and impedes CRS competition. The CRS vendors' claim to excessive damages is due to the combination of productivity contract provisions with excessively long contract terms, because damages are essentially a function of multiplying the vendor's future revenue stream from airline booking fees (resulting from productivity clauses) by the remaining contract term. The Department can alleviate this impediment to competition by eliminating productivity requirements and reducing the maximum length of contract terms as described above.

However, because CRS vendors often have been able to evade the intent of the Department's regulations, the DOT should specifically address the issue of excessive damages, which it declined to do in the 1992 rulemaking. 57 Fed. Reg. 43827. The threat of enormous damages has the anticompetitive effect of locking subscribers into a particular CRS, entrenching vendors, and preserving market power.

By barring minimum use clauses, the Department intended to take a significant step in eliminating lost booking fees as a basis for calculating liquidated damages. However, since the Department permits productivity pricing, CRS vendors have alternative means to derive excessive damages in the event a subscriber seeks to terminate a contract. See 21 Transp. L.J. at 477. In the example described by Travel Weekly Magazine, *supra*, page 14, a single computer terminal produced a potential financial liability to the travel agency approaching \$50,000 over the life of a five year contract. It is easy to see how liquidated damages based on high rack rates could quickly escalate into hundreds of thousands of dollars, even for small agencies.

Moreover, in the last rulemaking, the Department recognized, but failed to remedy, the ability of CRS vendors to make claims for excessive amounts of liquidated damages available even in the late stages of a contract. Some vendors are able to claim huge damages right up to the very end of the contract term by treating productivity pricing discounts as credits that must be repaid if the subscriber terminates the contract before the end of its term. 57 Fed. Reg. 43846. In essence, the Department threw up its hands and declared that “the vendors’ use of contracts enabling them to demand the repayment of ‘credits’ on an agency’s breach indicates the difficulty of attempts to regulate contract terms in detail.” Id. However, given the potential for abuse that is every bit as

harmful as minimum use clauses, the Department should not abdicate its duty to protect against the harmful effects such practices have on CRS and therefore airline competition. Rather, the Department should adopt regulations to curb these practices.

The Department certainly has the expertise necessary to recognize that such onerous damages claims adversely affect competition for CRS services, competition in the airline industry, and the public interest. The courts, on the other hand, apply a legalistic approach to the specific contract language, with no appreciation of the complex nature of the CRS industry or its relation to air transportation service and competition. Therefore, the Department should adopt an explicit regulation prohibiting damages that may be claimed by a CRS vendor against a travel agent for breach of contract which are based, in whole or in part, on anticipated revenues from third parties (including fees paid by carriers to CRS vendors). By eliminating the potential for damages based on revenues generated from airline fees paid to CRS vendors, the Department will increase travel agent access to alternate sources of travel information and thus encourage competition in the CRS and airline industries.

III. FORCED PARTICIPATION ISSUES.

A. 14 C.F.R. Section 255.7(a).

1. The Forced Participation Rule Should Be Eliminated.

The forced participation requirement contained in Section 255.7(a) is detrimental to competition in the CRS and airline industries and should be eliminated. This rule, adopted in 1992, was designed to address the problem caused by a host carrier reducing its level of participation in a competing system to increase its CRS market share in a strategic hub market. In many respects, the “cure” has been worse than the “illness.” Forced participation effectively eliminates the ability of host carriers to bargain with other CRS providers over system enhancements, leading to economically inefficient results.

The rule was adopted in response to an isolated incident involving a single carrier, and there is no indication that other host carriers had adopted similar approaches to promote their systems. Indeed, there are strong market forces that tend to discourage such tactics: a carrier’s decision not to participate in competitors’ CRSs at the highest level of functionality may assist the marketing of that carrier’s preferred CRS in certain limited geographic areas, but it will seriously harm the carrier’s national and international sales if travel agents across the country using competing CRSs are not able to obtain adequate booking information.

The forced participation rule unduly restricts a host carrier's ability to make rational participation decisions concerning a competing system's "enhancements." A carrier may have legitimate reasons to decide not to participate in a vendor's enhancement. For example, although an enhancement offered by a vendor may have a similar name as a feature offered by the host carrier's service, the enhancement may be significantly inferior to the host carrier's product. Nevertheless, if the enhancement is offered at terms that are commercially reasonable, the host carrier is required to participate.

The rule also reduces a host carrier's ability to negotiate with vendors to improve the functionality of the enhancement. Prior to the enactment of the mandatory participation rule, Delta frequently secured improvements to CRS products by conditioning its participation in such products on certain improvements. The mandatory participation rule effectively stripped this bargaining power from Delta and other host carriers. Indeed, the rule currently encourages vendors to introduce similarly named features and enhancements at the earliest possible moment (even before they are technically ready for distribution) because vendors have a captive group of carriers who are forced to participate in such enhancements, or be put at risk for regulatory enforcement action. Delta is very concerned about the loss of its ability to negotiate the terms and conditions affecting its participation in other systems.

In the parity clause rulemaking, the Department of Justice observed that forced participation "has created an inefficiency by requiring airlines to participate in CRSs at price/service levels that they would not otherwise choose." DOJ Comments at 8 (Docket OST-96-1145). The inefficiencies cited by DOJ are the products of forced participation whether mandated by contract or by regulation.

Elimination of the forced participation rule would increase airline and CRS competition. As the Department is well aware, Delta has been extremely concerned about rising costs, and in particular rising CRS costs. Between 1990 and 1997, CRS fees paid by Delta increased by more than two hundred (200) percent, and this alarming trend is likely to continue unless the Department takes significant regulation action in this proceeding.

These CRS cost increases are passed on to the traveling public in the form of higher fares. Delta's successful cost-cutting program has had little effect in the CRS arena because of the enormous market power held by the CRS vendors. As the Department of Justice observed, "The booking fees that CRSs charge are widely believed to be at supra-competitive levels and appear to have little relation to costs. While the costs of computing power have dropped dramatically over the last decade, the price of CRS services has risen substantially."

Department of Justice Comments at 4-5 (Docket OST-96-1145).

The elimination of forced participation requirements will also enhance CRS competition. The Department of Justice summed it up well: "the airline's best market mechanism to prod the CRSs to act [more responsibly to market forces] -- is the real threat of a downgrade on only the offending CRS vendor." DOJ Comments at 8 (Docket OST-96-1145). Increased competition among CRS vendors will result in lower costs and "those savings should be passed on to the flying public because of competition among airlines for passengers." *Id.* at 5, N.6.

2. If the Department Retains the Forced Participation Rule, Carriers Must be Allowed to Adjust Participation for Discrete Carrier Products.

If, notwithstanding its adverse competitive effect, the Department determines to retain the forced participation rule, the rule should be modified to permit carriers to tailor their CRS participation needs with their product offerings. The existing rule significantly restricts a carrier's ability to adjust its CRS participation to meet its distribution and cost-reduction requirements. For example, numerous carriers subject to the rule have developed alternative airline products, such as Delta Express, designed to meet the demands of a specific segment of the traveling public. The rule should be modified to permit carriers to select an alternative level of participation for such products. Such a modification would permit carriers to elect a lower level of participation where

the product does not require need the full range enhancements offered at the highest levels of CRS participation. Adding this flexibility to the existing rule would enhance CRS and airline competition by allowing carriers to lower distribution costs for specific products offerings.

3. If the Department Retains the Forced Participation Rule, System Marketers Must Also Be Subject to the Rule.

If the Department decides to continue the forced participation rule, then the rule must be extended to include system marketers. The Department has long recognized that marketing relationships can be and have been used to enhance certain CRSs at the expense of others. Financial incentives to bias the marketplace by influencing subscriber participation in a particular region can exist through an ownership or marketing relationship with a CRS. There was almost universal support in a recent rulemaking proceeding for extending the participation requirement to cover CRS marketers. As stated by the Department of Justice:

"An exception to the rule proposed here that would allow the use of a parity provision in contracts with any carrier that owns or markets a CRS would be consistent with Section 255.7 and help prevent carriers from varying participation levels for reasons that will not induce better CRS performance." DOJ comments at 10-11 (Docket OST-96-1145).

Thus, there should be no regulatory distinction between a carrier that owns a system and a carrier that markets a system.

B. Participation in CRS Internet Booking Products

As a general matter, Delta believes that the Internet is a very promising low cost and inherently competitive distribution medium. Airlines and consumers (and, in theory, travel agents) have a host of sites from which to choose to conduct business, all of which are readily accessible from any personal computer. Although the Internet is rapidly expanding, it is still in its infancy, and Delta believes that it would be premature for the Department to adopt extensive regulations aimed at controlling CRS distribution on the Internet. Such regulations could have adverse unintended consequences and slow the development of this promising new resource. Rather, the Department should encourage a free and open marketplace on the Internet, and take regulatory action only if and when specific abuses are identified. The Department should revisit the issue of Internet regulation three years after issuing a final rule in this proceeding to determine if further rules are necessary.

The Internet provides a significant opportunity for the Department to bring competitive forces into the relationship between airlines and CRS vendors. In order to stimulate competition and provide the greatest range of options and highest levels of service, travel agents should be able to choose among CRSs and the various Internet information sites and use the site that best suits their customer's travel needs. Similarly, airlines should be able to choose which sites

will represent them and market their products to consumers. Accordingly, airlines must be able to withdraw from certain sites while supporting others that provide a quality service at a competitive price.

As noted by the Department in the ANPRM, Delta has identified one important aspect of CRS distribution on the Internet that should receive prompt corrective regulatory action. The Department's CRS regulations were designed to address the traditional distribution of CRS "Systems" marketed by CRS vendors to travel agents. The Department's concern with the distribution of CRSs was based on the fact that once a travel agent was "locked-in" to a particular CRS, the agent had no opportunity to access alternative sources of travel information. The vendor's ability to restrict access to alternative sources of information was accomplished in a variety of ways, including, as noted above, long term contracts, minimum use provisions, restrictions on using vendor equipment with competitive software/hardware, and the threat of enormous damages. However, there were also a number of practical impediments to using alternative systems, including agency training issues, the incompatibility of ticket printers designed to communicate solely with the vendor's system, proprietary back office accounting systems, and the fact that travel agent access to the CRS was via a private telecommunications network that connected directly to the vendor's mainframe computer.

The Internet provides the Department with the opportunity to unshackle competitive forces in the CRS industry, but in order to do so, airlines must have the opportunity to negotiate the terms of participation in Internet products offered by CRS vendors. Most CRSs have interpreted the DOT regulations (and their CRS participation contracts) to require that each airline participate not only in traditional CRS products offered to travel agents, but also in the distribution of competitive products on the Internet. Thus, while Delta has requested a separate participation contract, CRS vendors have refused, claiming that the Department's mandatory participation rule also requires Delta to participate in the vendor's Internet products, including non-"System" products offered to consumers and corporations. For example, Sabre takes the position that participation in the Sabre CRS mandates that a carrier participate in Travelocity, a product Sabre offers on the Internet, whether the carrier wants to or not.

Because these Internet products are not "Systems," the mandatory participation rule contained in Section 255.7(a) should not apply to those products. However, the CRS regulations should be clarified to state that the Department's definition of "System" does not include products offered on the Internet. Also, the regulations should specify that CRSs must offer separate contracts for participation in such Internet products. Otherwise, a carrier that fails to agree to accept the non-System product risks being dropped from the

CRS and in violation of Part 255.7(a). Apart from the regulatory conundrum faced by carriers, unilateral termination from a CRS would substantially injure the carrier's competitive position.

CRS vendors should not be allowed to manipulate the regulatory structure as a means to enhance sales of non-System products. Consequently, Delta urges the Department to amend the definition of System in section 255 to prohibit CRS vendors from tying CRS participation to participation in Internet distribution outlets.

The Department should reject any CRS claims that Internet booking sites are merely one component of a CRS provided to the airlines. CRS vendors should not be allowed to bundle the sale of two separate and distinct products -- CRS services provided to travel agents -- and Internet travel services available to consumers and other third parties, that the airlines might not otherwise purchase if offered as a separate option. The marketing and sale of CRS products to travel agents is distinct from the products offered by CRS vendors on the Internet. Consequently, this bundling of products is an illegal tying arrangement prohibited under Section 2 of the Sherman Act. Any failure of the Department to prohibit such tying arrangements will restrict competition on the merits of the Internet service, permit CRSs to force airlines to purchase services the airlines may not want or may want to procure from a different source, and require

airlines to pay higher prices for distribution services than they would otherwise pay in a competitive marketplace.

The Department should also prohibit CRSs from enforcing any parity clause that affects Internet participation regardless of whether the airline owns an interest in a CRS. Permitting CRSs to enforce parity clauses covering Internet services would eliminate price competition and cause airlines to buy more Internet services than they desire from some systems. As noted in the recent parity clause final rule, such distortions “create market inefficiencies and injure airline competition.” 62 Fed. Reg. 59784 (Nov. 5, 1997).

In a competitive market, free of tying arrangements and parity clauses, each Internet vendor will compete to obtain participation by airlines in order to attract higher levels of use by consumers. Internet vendors will also compete to provide better services to consumers in order to increase consumer usage and attract airline participation. Only if the Department acts to ensure that carriers are offered a separate participation agreement will consumers realize the maximum potential offered by the Internet revolution.

IV. THE DEPARTMENT SHOULD CLARIFY THAT DISTRIBUTION OF BIAS-INDUCING SOFTWARE IS PROHIBITED AT ANY POINT IN THE CRS DISTRIBUTION CHAIN.

The plain language and central purpose of section 255.4 are to prohibit the introduction CRS display bias favoring the services of one carrier over

another on the basis of carrier identity. While Delta believes that the intent of the Part 255 regulations to prohibit display bias is abundantly clear, abuses by American in developing and distributing its "Preference MAAnager" software have resulted in unnecessarily complicated enforcement proceedings. (Docket OST-95-430).

American has attempted, through a convoluted reading of section 255.9's provisions permitting the use of third-party software, to differentiate a display bias provided by American in diskette form at the system user's end of the CRS pipeline from the clear regulatory prohibition which bars Sabre from introducing the same bias at the beginning of the pipeline. Delta has already explained in detail the fallacy of American's position in Delta's pleadings in Docket OST-95-430.

In short, to argue that section 255.9 can be interpreted to provide an opportunity for a major air carrier and CRS owner, such as American, to evade the anti-bias prohibitions of the CRS Rules, and thus defeat the central purpose of the Department's regulations is to turn logic on its head. Delta urges the Department to put an end to this nonsense by adding a new subsection to section 255.9 expressly prohibiting the introduction of carrier CRS display bias at any point in the distribution chain.

V. THE DEPARTMENT SHOULD ACT TO ELIMINATE ABUSIVE BOOKINGS PRACTICES AND COMPENSATION SCHEMES.

The Department should use this rulemaking to take action against abusive CRS pricing structures and bookings practices by the dominant CRS vendors that impose valueless costs on carriers and are injurious to competition and the public interest. Delta believes that the most effective method of ensuring a competitive CRS industry is to provide travel agents with access to third party hardware and software, eliminate subscriber contract provisions that “lock-in” travel agents to a single source of information, and ensure that airlines can negotiate the terms of participation in contracts for Internet products. However, in the event that the Department supports the alternative approach suggested by America West in its petition, Delta offers the following comments.

A. CRS Fees Should be Based on Ticketed Segments

Productivity pricing and other use-based incentive programs reward travel agents for making bookings, whether real or phantom, in order to maximize CRS booking activity. This is counter to the interests of participating carriers in encouraging efficient system utilization and minimizing booking fees. If travel agents are rewarded every time they touch a CRS keyboard, abuses in this area are likely to occur. Accordingly, the Department should eliminate current transactional pricing methods and adopt a rule that allows CRSs to receive compensation only for ticketed segments.

The current system engenders a host of valueless, indeed harmful, booking transactions that participating carriers are required to pay for under adhesionary CRS contracts. Fictitious bookings are one of the most obvious examples, where agents simply invent passengers to achieve productivity targets. Not only are airlines required to pay for fictitious bookings, but such tinkering results in the unnecessary spoilage of airline inventory. There are some 35,000 travel agents booking millions of CRS transactions. Airlines simply do not have the resources to police these vast numbers of travel agent transactions. CRS vendors have little interest in monitoring their subscribers for such abuses. By requiring the CRS fee system to be based on ticketed segments, the Department would take an important step to ensure that airlines receive value for the fees charged.

B. Participating Airlines Should Have the Right to Refuse Passive Bookings

Participating carriers should be allowed to refuse to accept passive bookings from CRS vendors. Passive bookings occur when an agent creates a segment in a CRS that is not communicated to the participating carrier's internal reservations system. Passive bookings produce a greater percentage of abusive booking practices and also lead to difficulties with inventory control, including overbooked flights.

Moreover, forcing passive bookings on participating carriers creates a discriminatory and anticompetitive situation. This is because American and United, the owners of Sabre and Apollo, have taken steps to immunize themselves from being charged for abusive passive booking on their own CRSs. Sabre agents are able to make passive inquiries using a cost-free "YK" status code, and Apollo agents simply do not have passive booking capability. This places other carriers participating in Sabre and Apollo -- the dominant U.S. reservations systems -- at a competitive disadvantage vis-a-vis American and United, and violates the non-discrimination requirement of section 255.6. The Department should adopt regulations to ensure that participating carriers have the same ability to refuse passive bookings liabilities as system owners.

VI. CONCLUSION

The Department should use this opportunity to improve CRS competition by removing artificial barriers that prevent subscribers from using the many sources of airline booking information that would be available in a free marketplace. The Department should eliminate the current ability of the dominant CRS vendors to prevent access to competitive sources of information through their control of system hardware, coupled with productivity pricing, long-term contracts, and excessive damages claims. The Internet provides the potential to bring significant competitive forces to the CRS market provided that airlines are given the opportunity to negotiate the terms of participation in contracts for Internet products. The suggestions of Delta are designed to maximize competition in the CRS Industry which should improve airline competition and result in lower prices for consumers.

Respectfully submitted,



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