

BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.

DEPT. OF TRANSPORTATION  
DOCKET SECTION

97 DEC -9 PM 4:57

QA 29495

In the Matter of

COMPUTER RESERVATIONS SYSTEMS  
(CRS) REGULATIONS

Docket OST-97-2881 -44

COMMENTS OF  
CONTINENTAL AIRLINES, INC.

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December 9, 1997

33pgs.

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INTRODUCTION

The Department must renew its rules governing computer reservation systems ("CRSs") to prevent anticompetitive abuses by some systems, system owners and marketers which take advantage of their ability and incentive to use the systems to prejudice the competitive position of other systems and airlines.<sup>1</sup> When the Department renews the CRS rules it should revise them to address technological developments and industry changes which have occurred since 1992. The revised rules should: extend CRS rules to Internet booking services, corporate travel departments and CRS marketers; limit booking fees to ticketed segments; and restrict the use of productivity pricing.

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<sup>1</sup> See 62 Fed. Reg. 63837, 63838 (Dec. 3, 1997).

December 9, 1997

Continental<sup>2</sup> responds to the Department's Advance Notice of Proposed Rulemaking ("ANPRM")<sup>3</sup> and America West's petition for a rulemaking on booking practices,<sup>4</sup> and in support of America West's request for expedited rules on abusive booking practices, as follows:

I. **THE CRS RULES SHOULD BE CONTINUED, FURTHER STRENGTHENED AND REVIEWED AGAIN FIVE YEARS FROM THE DATE THEY ARE READOPTED**

A. **The CRS Rules Should Be Continued and Strengthened**

Continental strongly supports renewal of the CRS rules. Since the Civil Aeronautics Board ("CAB") adopted the rules in 1984, the need for CRS regulation has never been greater. When the Department adopted the present rules five years ago, it determined "that CRS rules remain necessary to prevent the carriers controlling the systems (the vendors) from using the systems to prejudice airline competition and mislead consumers." (57 Fed. Reg. 43780, Sept. 22, 1992) Those concerns led the Department to strengthen the 1984 rules, and further strengthening is required now to eradicate old and new forms of anticompetitive behavior on the part of some CRS vendors and airlines which control and promote CRS systems. The only valid question before the Department in this proceeding is

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<sup>2</sup> Common names of carriers are used.

<sup>3</sup> 62 Fed. Reg. 47606 et seq. (Sept. 10, 1997).

<sup>4</sup> Docket OST-97-3014.

how CRS regulation can maximize protection against anticompetitive abuses without intruding unduly on market forces.

The adage that, "The more things change, the more they stay the same" aptly describes today's CRS environment. The rise of the Internet and tremendous technological developments have led to substantial changes in the use of CRSs and the benefits they provide, but there are still only four CRSs operating in the U.S., and the CRS rules are still needed to prevent anticompetitive abuses which injure systems, airlines, travel agents, and consumers. The Department concluded in 1992 that CRSs had "become essential for the marketing of the services of virtually all airlines,"<sup>5</sup> and airlines still depend primarily on CRSs for marketing of their services. Southwest, which in 1992 advocated non-participation in CRSs, today continues to participate in Sabre and also promotes it. "[S]eventy-percent of all airline bookings in the U.S. are made by travel agencies, and travel agencies have relied almost entirely on CRSs to determine what airline services are available and to make reservations for their customers." (62 Fed. Reg. at 59315, Nov. 3, 1997). Seventy-nine percent of Continental's total bookings are made through a CRS. CRS costs are second only to travel agent costs among Continental's distribution costs.

The complaints filed against CRSs and their owners since 1992 show that abuses continue despite the regulatory reforms adopted five years ago. Some

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<sup>5</sup> 57 Fed. Reg. at 43790.

CRSs and their airline owners still create and distribute displays which disadvantage flights of their competitors. For example, in American Airlines, Inc. and Sabre Travel Information Network (Enforcement Proceeding), Docket OST-95-430, Northwest demonstrated that American was providing Sabre subscribers with software that ranked American and American Eagle flights first. Although the Administrative Law Judge in that proceeding found arguments "that CRS display bias lessens competition and deceives consumers" were "persuasive," he concluded that the existing CRS rules do not prohibit CRS owners from distributing biased software.<sup>6</sup> Several years ago Alaska (supported by Continental, Midwest Express and ASTA) challenged Galileo's revision of its Apollo Basic Display algorithm to equate on-line connecting flights with direct service, which benefited Galileo's owner, United. The Department initially agreed with United and Galileo that the algorithm did not violate Section 255. (See Order 94-4-9)<sup>7</sup> At least one CRS, Sabre, selectively charges participating carriers segment cancellation fees, depending upon their level of participation, but the Department has held that the present rules only require nondiscrimination in fees charged to participants at the same service level. (Order 96-10-48)

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<sup>6</sup> Northwest and DOT's Office of Aviation Enforcement and Proceedings are seeking reversal of this decision.

<sup>7</sup> The Department subsequently found that Galileo had failed to disclose its plan to alter the Apollo Basic Display when it sought an exemption to offer a separate North American display and ruled the change was inconsistent with the exemption granted. Order 94-8-5 at 14-18.

Other problems exist. To cite just a few:

- **Corporate discounts:** Airline owners are approaching travel agencies and warning them they will lose their corporate clients' accounts unless they subscribe to the CRS owned by that airline. System One has sued American for tortious interference involving the Burger King account, and Delta requires corporate clients to use Worldspan to obtain discounts on airfares.
- **Alliances:** The growing number of code-share alliances and current algorithms have led to screen clutter and have pushed independent flights off the first screen in favor of duplicate listings of the same code-shared flights.
- **Predatory Action Abroad:** In apparent furtherance of their code-share agreement, American and its TACA Group partners (Aviateca, COPA, LACSA, NICA, TACA and TACA de Honduras) had threatened to downgrade their participation in System One, encouraged travel agents in Latin America to use Sabre exclusively and told passengers that bookings on those carriers were not valid unless they were made through American's Sabre.
- **Internet:** CRS abuses have also spread to the Internet. Examples include: (1) speculative and fraudulent bookings from agencies and consumers booking reservations through the Internet (e.g., frequent flyers booking up available first-class space to increase their chances of receiving an upgrade); (2) duplicate bookings created from Internet sites that do not have the ability to determine whether a consumer already has a similar booking; and (3) refusal of some CRS vendors to identify on-line agencies which access their systems.

Without question, there is a need to retain and strengthen the CRS rules.

B. **The CRS Rules Adopted In This Proceeding Should Sunset No Later Than Five Years Hence, At Which Time They Should Be Reviewed Again**

Fast-changing technology requires that sunset of the CRS rules adopted in this proceeding occur no later than five years after they are adopted. This will allow the Department to reevaluate the competitive effects of new technology and

determine appropriate regulatory responses on a timely basis. In the 1992 rulemaking, the Department recognized that changing technology and other developments would require reevaluation of the revised CRS rules. At that time, the Department struck the balance between the need to review subsequent developments, on the one hand, and the effort of undertaking such a comprehensive review of the CRS rules, on the other hand, at five years. (See 56 Fed. Reg. 12586, 12627; 57 Fed. Reg. 43780, 43830) The pace of technological progress has increased dramatically since 1992. As a result, the Department should reevaluate the overall effectiveness of the rules it adopts in this proceeding no later than five years after those rules are issued in final form. In addition, the Department should review individual provisions, and revise them if necessary, as specific issues arise, rather than waiting to do so during comprehensive reviews.

II. **THE CURRENT CRS RULES HAVE BEEN REASONABLY EFFECTIVE, BUT THEY SHOULD BE REVISED TO CLOSE EXISTING LOOPHOLES AND TO ADDRESS TECHNOLOGICAL ADVANCES, CHANGED CRS OWNERSHIP PATTERNS AND THE RISE OF INTERNET AND ON-LINE COMPUTER PRODUCTS FOR CONSUMERS**

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A. **The Present Rules Have Been Reasonably Effective**

The present CRS rules have curbed and prevented many abuses. For example, the CRS rules prevent systems from dropping participating airlines discriminatorily and applying fees based on airline size or geographic market. Electronic backup billing information required by the present rules has allowed participating airlines to identify at least some of the abuses requiring further

relief. Booking information is more available to participating carriers today, leading to enhanced competition. The 1992 revisions to the display rules have reduced display biasing in favor of CRS owners' schedules, although they have not eliminated it.<sup>8</sup>

B. The Rise Of The Internet Increases The Need For Expanded CRS Rules

The explosion of Internet and on-line reservations services during the last five years has increased the fundamental need for CRS rules. Although some predicted that the growth of these on-line services would reduce the reliance of travelers and agents on CRSs, it has not. Instead, all of the major Internet browser services are dependent upon one of the four CRSs: Travelocity, with over a million subscribers, is a gateway for Sabre; Microsoft's Expedia is linked to Worldspan; and Excite Travel, Preview Travel, ITN Travel and Yahoo Flifo are all Apollo gateways.<sup>9</sup> The Internet services have shown that they will not discipline

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<sup>8</sup> See, e.g., American Airlines, Inc. and Sabre Travel Information Network (Enforcement Proceeding), Docket OST-95-430; Alaska v. United and Galileo, Docket 49255.

<sup>9</sup> America West Petition for a Rulemaking in Docket OST-97-3014 at 26 n.14. Travelocity, a Sabre subsidiary, lures consumers into a system in which AAnswers, an AMR subsidiary, is automatically designated for ticketing unless the customer selects a particular agency for ticketing. Thus, many Continental bookings through Travelocity result in Continental's paying both Sabre and AAnswers fees and commissions, respectively, all to the benefit of AMR. If the customer selects a particular agency other than AAnswers, Sabre charges the agent a three dollar referral fee as well as charging the airline for the CRS booking.

their own anticompetitive tendencies, and the combined power of Internet services with the strength of the CRS vendors compounds the potential for serious abuses. There are already reports of anticompetitive activity by non-airline owned on-line services. For example, competitors claim that Microsoft is using its lock on the Windows 95 operating platform to leverage its on-line travel service, Expedia, and shut out competition. ("Trade Hits, Expedia's Browser," Travel Weekly (Nov. 10, 1997) at 1)

When the CRS rules were last revised in 1992, the Department specifically declined to extend the rules to systems not used by travel agencies, including those systems used by corporate travel departments and systems available to home computer users. Between 1992 and 1996, however, use of home computers exploded: While only 20% of the U.S. households (over 22 million) had personal computers in 1992, by 1996, almost 40% of the U.S. households (37 million) had personal computers.<sup>10</sup> As use of on-line home and corporate computer systems continues to grow, it is imperative that software products used on those systems become subject to the same anti-display-bias rules that apply to systems offered to travel agents, since consumers are even less able to work their way through bias displays than travel agents are. Canada's new CRS rules and rules under discussion at ICAO recognize that systems offered to consumers and corporate

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<sup>10</sup> See Comments on AMADEUS Global Travel Distribution, S.A. in Docket OST-96-1639 filed October 15, 1996, at 8.

users should be regulated. Failure to revise the Department's CRS rules as technology advances will leave a regulatory gap for anticompetitive abuses and leave U.S. regulatory efforts lagging behind those of our trading partners.

III. SOME RULES SHOULD BE MODIFIED TO INCREASE THEIR EFFECTIVENESS, AND THE DEPARTMENT SHOULD ADOPT MORE EFFECTIVE ENFORCEMENT AND ALTERNATIVE DISPUTE RESOLUTION METHODS

A. Some Rules Require Tightening To Close Loopholes

A number of the present CRS provisions should be revised to eliminate regulatory gaps which have led to anticompetitive abuses by airlines and systems.

1. The Display Rule Should Prohibit System Owners and Affiliates From Distributing Biased Software. One rule requiring revision is the display rule (14 C.F.R. § 255.4), which should be modified to prohibit system owners and their affiliates from creating and distributing to the system's subscribers software which biases displays in favor of that airline owner or marketer. Although the Administrative Law Judge ("ALJ") in the recent Preference MAAnager enforcement case agreed that the Department had disapproved of "a vendor practice enabling travel agencies to force their agents to use biased secondary displays" and that biased software "will deceive consumers," he concluded that the distribution of Preference MAAnager did not violate the current CRS rules.<sup>11</sup> He

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<sup>11</sup> Order Denying Motions of AEP and Northwest and Granting Cross-Motion of American for Summary Judgement in American Airlines, Inc. and Sabre Travel Information Network (Enforcement Proceeding), Docket OST-95-430 ("Preference MAAnager case") at 5.

recognized, however, that "a re-examination" of the CRS rules "may now be in order."<sup>12</sup> Unless the Department reverses the ALJ's decision and rules that the current language in Section 255.4 bars system owners, as well as vendors, from developing and distributing biased software to subscribers, the Department should revise Section 255.4 to outlaw distribution of biased displays by system owners and their affiliates.

Additionally, the prohibition in Section 255.4 should apply to CRS marketers. The same rationale for prohibiting systems from distributing biased software in 1992 also mandates barring the owners and marketers of those same systems from distributing biased software.<sup>13</sup> In addition, the third-party software and hardware rules should be amended to clarify that CRS owners, marketers and agents do not qualify as "third-parties."

2. The Department Should Ban Some Forms of Productivity Pricing.

In the last CRS rulemaking, the Department attempted to draw a line between

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<sup>12</sup> Id. at 8.

<sup>13</sup> As Continental recommended in OST-96-1145, the term marketer should include any airline which causes, encourages or persuades a person or entity to subscribe to or continue to subscribe to a particular foreign or domestic system in return for some material benefit. Additional recommendations for modification of Section 255.4 are discussed in Part VI below.

minimum use and productivity pricing clauses,<sup>14</sup> electing to ban the former while permitting CRSs to continue basing subscriber fees on productivity. Continental advocated productivity pricing five years ago, and it continues to support productivity pricing to the extent it permits systems to award all travel agents (and other subscribers) discounts and credits towards equipment and service costs based on the number of a subscribers' bookings. The Department should, however, prohibit productivity pricing which awards subscribers bonuses above their costs.<sup>15</sup>

3. The Mandatory Participation Rule Should Be Expanded To Include Marketers. One new phenomenon requiring the Department's attention in this rulemaking is the rise of marketing arrangements between niche carriers and a particular CRS (e.g., the arrangement between Southwest and Sabre and the TACA Group's marketing arrangement with Sabre). Under the current mandatory participation rule, for example, Southwest, which markets Sabre, has no obligation to participate in competing systems.<sup>16</sup> AMADEUS had great difficulty securing

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<sup>14</sup> Under a minimum use clause, a subscriber's failure to make a certain number of bookings on the system each month was a breach of its subscription agreement and the subscriber became liable for liquidated damages, including lost booking fees. Productivity pricing "differs from minimum use clauses because a subscriber's failure to meet the minimum booking requirement does not constitute a breach of the agreement making the agency liable for substantial damages." 57 Fed. Reg. at 43826.

<sup>15</sup> Continental's recommendation for a rule limiting productivity pricing is discussed more fully in Section X below.

<sup>16</sup> Continental's proposal for expansion of the mandatory participation rule is discussed more fully in Section VI below.

direct access participation by all of the TACA Group carriers, which was important to AMADEUS customers on the U.S. East and West coasts. There is no reason to treat such niche carrier-marketers differently than system owners, and unless all airlines allied with a CRS are required to participate in all systems (and at equal levels) non-system owner airlines will remain free to use their positions as strong regional carriers to manipulate the CRS market. The mandatory participation rule has been effective in requiring owner-airlines to participate in competing systems, but the mandatory participation rule needs to be expanded to include marketers.

B. The CRS Rules Will Not Be Truly Effective Until There Are Speedier Dispute Resolution And Enforcement Mechanisms

1. Arbitration Should Be Available to Vendors, Participating Carriers and Subscribers for Redress of CRS Violations. In the 1992 rulemaking, Continental supported the Department's proposal that arbitration be made available to vendors, participating carriers and travel agents as a means for redressing CRS violations. Continental continues to advocate arbitration as an efficient alternative dispute resolution mechanism that will conserve government resources. Arbitration should be available to aggrieved parties as a means of remedying any and all violations of the CRS rules, as it is available in many commercial disputes. Assuming the arbitrators chosen have sufficient technical expertise, they can decide disputes arising from a vendor's failure to share service

enhancements with non-host carriers and resolve billing, booking fee and other disputes between vendors and participating carriers. Arbitrators should have authority to issue cease and desist orders and also to award affirmative relief and monetary damages in an appropriate case. As America West recommends, participating carriers should be permitted to withhold payments for booking fees without fear of termination by a vendor pending resolution of billing disputes through arbitration.<sup>17</sup> Absent such authority, arbitration will not be as effective in remedying unlawful CRS practices, and a time-consuming third-party enforcement proceeding by DOT will remain the sole means of redressing injuries from CRS violations.

So that the arbitration process is not susceptible to costly and time-consuming delays by parties, the Department should adopt procedures governing the conduct of arbitrations. Whether it adopts the rules of the American Arbitration Association, the Federal Mediation and Conciliation Service or an industry arbitration group, the Department's overriding objective should be to prescribe a process which ensures prompt and effective resolution of the substantive merits of CRS disputes.

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<sup>17</sup> Continental also endorses America West's proposed rule providing for escrow of disputed booking fees and prohibiting a vendor from terminating a complaining carrier which has offered to arbitrate the dispute. See America West Petition at 32.

2. Informal and Formal Complaints Filed Under DOT's Rules of Practice Should be Resolved More Quickly. The Department's arbitration proposal in the 1992 rulemaking was prompted by complaints about its failure to enforce the rules in the past. (See 57 Fed. Reg. at 43829) Arbitration was ultimately rejected in favor of a pledge to give future CRS complaints "careful consideration and institute enforcement proceedings when appropriate." (Id.) However, the Department has dismissed more third-party complaints than it has granted relief on, and processing of complaints has been slow.<sup>18</sup> Northwest's still pending (on reconsideration) complaint against American was filed more than two years ago.

In addition to the arbitration option, complainants should retain the right to redress CRS violations through the Department's formal and informal complaint procedures in Subpart B of the Department's Rules of Practice. The choice of redressing a grievance through arbitration or enforcement should be up to the complainant, although each grievance should be subject to only one of the two

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<sup>18</sup> The Department dismissed Delta's complaint against American and Sabre alleging discriminatory cancellation fees (Order 96-10-48) and Alaska's complaint against United and Galileo alleging display bias (Order 94-4-9). The Department found "reasonable grounds" to believe that a violation of its CRS rules occurred in only one case (see the Department's Notice of October 28, 1996), instituting a formal enforcement proceeding to investigate Northwest's allegations against American and Sabre of display bias), but an Administrative Law Judge subsequently concluded the Department's current rules were not intended to prohibit distribution of biasing software by system owners, although a re-examination of the rules would be in order. Order Denying Motions of AEP and Northwest and Granting Cross Motion of American for Summary Judgment in Docket OST-95-430, served March 17, 1997, at 6.

procedures. Regardless of whether the Department adopts an alternative dispute mechanism or not, it should improve the time for processing enforcement complaints involving CRS issues.

IV. CHANGES IN OWNERSHIP LEVELS AND AFFILIATION  
DICTATE A RE-EXAMINATION OF THE SCOPE OF THE  
CRS RULES BUT NOT THE ANALYTICAL BASIS FOR CRS  
REGULATION

A. There Is Still A Need For The CRS Rules Despite  
Limited CRS Divestiture

Although there has been some divestiture since 1992, American still controls 91% of Sabre's voting shares and United still owns 77% of Apollo (which will be acquired by Galileo) as well as 38% of Galileo.<sup>19</sup> The fact that all four U.S. CRSs now have multiple owners and at least one CRS is now publicly owned in part, these divestitures have not eliminated CRS abuses.

- American may own slightly less of Sabre, but it nonetheless still distributes software to Sabre's subscribers which rearranges their displays to list flights of American and American Eagle before other flights.
- Sabre and American have continued their predatory activities in Latin America.
- Northwest charges travel agencies \$300 annually for access to a support group if they do not use Worldspan.
- Delta requires corporate customers to book through Worldspan to obtain discounts on Delta flights.

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<sup>19</sup> America West Petition for a Rulemaking in Docket OST-97-3014 at 2.

Internet providers and other systems which are not owned by airlines also have an incentive to bias displays in return for cash bonuses or other compensation by airlines. Clearly, the decisions by some airline owners to reduce their CRS ownership interests do not indicate that there is less need for CRS regulation. The difference between bias favoring an owner airline and bias favoring an airline paying a bounty is insignificant.

B. Marketers Have The Same Incentive To Distort The CRS Market As Do System Owners And Should Be Subject To The Same Participation Rules

The history of the CRS rules shows that the Department has always been concerned about combining airline strength with CRS strength to dominate markets. As the Department said when it commenced its Study of Airline Marketing Practices three years ago:

CRSs present potential competitive concerns because each of the major systems operating in the United States -- Sabre, Galileo, Worldspan, and System One -- is owned by one or more firms affiliated with airlines. Since the carriers with CRS ownership interests could use the systems to prejudice the competitive position of other airlines, we and the [CAB] have found it necessary to regulate CRS operations.

Order 94-9-35 at 1. While some airlines are decreasing their ownership interests in CRSs, other airlines are entering into marketing arrangements with systems. American's use of its special relationship with Southwest to leverage sales of Sabre in the southwestern region of the United States is one example. Because marketers, like CRS owners, are likely to make CRS participation decisions based

on the effect such participation has on the profits of the CRSs they promote, marketers can put competing CRSs at a disadvantage and similarly harm subscribers of those competing systems by depriving them (and their customers) of data and connectivity.

Earlier this month the Department recognized that CRS marketers have the same incentive to distort the CRS market as do airlines that own CRSs. In the Department's words:

As shown by our own experience with both U.S. and foreign airlines, an airline that owns a CRS may well decide to limit its participation in other systems in order to encourage travel agencies in areas where it is a major airline to use the system that it owns. While our past experience has involved airlines that either owned or were affiliated with an owner of a system, the same incentive to downgrade participation in competing systems could well exist in an airline that is marketing a system.

(62 Fed. Reg. at 59797 (Nov. 5, 1997))

In revising the present CRS rules, the Department should take heed of the changing nature of CRS affiliations and extend individual rules appropriately to guard against CRS market distortions by airlines other than airline owners. In particular, as discussed in Part VI below, the Department should extend the mandatory participation rule to CRS marketers. The Department should also allow systems to enforce parity clauses against CRS owners and marketers.

V. THE THIRD PARTY HARDWARE/SOFTWARE RULES ARE GOOD AND SHOULD BE RETAINED

The third-party equipment rules are working well and they should be retained. Like the Department's mandatory participation and parity clause rules, however, the third-party equipment rules should be revised to recognize that one or more dominant airline(s) affiliated with a CRS can use their market power in any regional airline market to deter or block agencies from exercising their rights under the rules. The Department should clarify that CRS owners, marketers and their agents do not qualify as "third-parties" within the meaning of Section 255.9 (see Order Denying Motions of AEP and Northwest and Granting Cross-Motion of American for Summary Judgment, Docket OST-95-430, served March 17, 1997, at 4 n.2).

VI. THE MANDATORY PARTICIPATION RULE SHOULD BE EXTENDED TO COVER MARKETERS

The mandatory participation rule should be retained because it has strengthened competition in the airline and CRS businesses. Airlines with significant ownership interests or marketing arrangements with one system will be able to manipulate the marketability of competing CRSs if the rule is weakened or eliminated. As the Department recognized in 1992, limiting participation in a competing system is a powerful "weapon to obtain more subscribers at [a CRS owner's hub,] and no one has denied the potential usefulness of such tactics." (57 Fed. Reg. at 43800) Moreover, any lost bookings from subscribers in another

system when an owner reduces its level of participation "can be outweighed by the gain in CRS subscriptions (and the likely increase in its airline revenues from the new subscribers)." (Id.)

As discussed above in Part IV, the mandatory participation rule should be expanded to cover airline marketers as well as airline owners. The same rationale that underlies the recently-created exception to the parity clause ban permitting CRSs to enforce parity clauses against airline marketers supports requiring CRS marketers to participate in all systems, not just the one they promote. Airlines with significant ownership interests in CRSs are using their special relationships with regionally strong non-owner airlines to restrict the marketability of competing CRSs. The most obvious example is Sabre's special hosting and marketing relationship with Southwest (discussed above).

A CRS derives the same type of halo effect from marketers that it does from its airline owners and vice versa. Marketers have the same incentive that system owners have in weakening the competitive position of other systems and airlines, thus posing the same threat to airline and CRS competition. The revised ICAO CRS Code of Conduct defines a "System vendor" as "an entity that operates or markets a CRS." (Article 2; emphasis added) The U.S. should do the same.

**VII. THE CRS RULES SHOULD APPLY TO ACCESS TO CORPORATE AND OTHER DISCOUNT FARES**

Continental believes the Department already has authority under 255.8(b) and (c) (which prohibit system owners from impeding a subscriber from obtaining

or using any other system and requiring use of its system by a subscriber in any sale of its air transportation services) to prohibit a system owner from requiring a subscriber to use only its system for ticketing air transportation at a negotiated discount fare. The Department should clarify that this is so or adopt a separate rule requiring that discounts offered by system owners or marketers must be available in all CRSs.

Similarly, the rules should be extended to corporate users of CRSs. Although corporations may once have had leverage over airlines, corporate emphasis on cost-cutting and the strength of the domestic hub system, reinforced by the combined strength of global alliances which dominate multiple international gateway hubs, have shifted the balance of power to the largest airlines and their global partners, especially in their hub markets. Such airlines are now also warning travel agencies they will lose their corporate client accounts unless they subscribe to the airline's CRS. CRS-developed corporate software products entrench companies in single CRS systems and reduce competition. The same dangers of anticompetitive incentives and productivity structure that exist today in the agency environment also apply to the corporate environment.

**VIII. ALL "NEUTRAL" PROVIDERS OF AIRLINE INFORMATION SHOULD BE SUBJECT TO THE SAME DOT RULES**

Internet bookings are a growing phenomenon. This exploding segment of airline distribution compels several revisions to the present display rules.

A. The CRS Rules Should Be Expanded To Cover Internet  
And Other On-Line Airline Information And Booking  
Services

Consumers now have direct, on-line access to airline information via the Internet. Airlines pay the same booking fees and commissions for tickets issued on non-travel agent Internet systems as they pay for tickets issued by travel agents without Internet services. Consumers are relying increasingly on the computer to make their travel arrangements, and consumers are even more susceptible to the anticompetitive effects of biased displays than are travel agents. As use of on-line home and corporate computer systems rises, it is all the more imperative that those software products be subject to the same anti-display bias rules that apply to systems which are offered to travel agents, whether the software products are offered by CRS vendors or airline-owners or third parties.

B. All Neutral Providers of Airline Information Should  
Be Subject To The CRS Rules.

Any system that holds itself out as a neutral provider of airline information should be subject to the CRS rules. There should be an exception for websites that are extensions of a particular airline's reservations system and do not pretend to be a neutral source of information. (See Section C below) Canada's new CRS rules and ICAO's revised CRS Code of Conduct recognize that systems offered to consumers and corporate users should be regulated. Failure to follow this trend and extend the U.S. CRS rules consistent with new technology advances will leave a regulatory gap for anticompetitive abuses.

C. Non-Neutral Providers Of Airline Information Should Disclose Their Bias

As a corollary to the preceding rule, all non-neutral providers of airline information should be required to label clearly that they are offering biased (non-neutral) products. Consumers have a right to know when providers are not using neutral information.

IX. DISPLAY ALGORITHMS INJURE AIRLINE COMPETITION, AND THE DISPLAY BIAS RULES SHOULD BE MODIFIED

As the Department concluded in 1992, "display bias can mislead travel agencies and their customers and can substantially reduce competition." (57 Fed. Reg. at 43802) The current rules on display bias have worked reasonably well, but some modification of the display rules in Section 255.4 is required.

First, CRSs and their owners and marketers should be required to provide only unbiased displays to travel agents and consumers. Such a rule would have prevented American from distributing software to Sabre subscribers that rearranged displays to give American and American Eagle flights priority.

Second, the Department should reemphasize that the current display bias rules apply to all integrated displays, primary and secondary alike. This is necessary because the complexity of technology today has produced an environment in which CRSs are now reintroducing biased displays in the marketplace. Some CRS vendors are today aggressively marketing guided user interfaces to Internet, corporate and agency customers. For example, Sabre has a

primary display, Native Sabre, that is an efficient tool only for seasoned users because it requires extensive prompting and codes. Sabre steers new users instead into a secondary Sabre display called Planet Sabre, which has a point-and-click interface that is easier to learn and use. Planet Sabre contains screen space designated for banner and point of sale advertising. Users have the ability to bias Planet Sabre through control of user-inputted parameters. Eventually Sabre hopes to migrate all Native Sabre users to Planet Sabre. American takes the position that because it interfaces, Planet Sabre is not subject to the anti-display bias rules although it is an integrated display. The Department should clarify (or modify) the rules to cover all integrated displays.

Third, with respect to international services, the Department should follow the European Union's practice of allowing code-share partners to list international nonstop flights and connections only once by each carrier. (See paragraphs 9 and 10 of the E.U. CRS Code of Conduct)

**X. THE DEPARTMENT SHOULD ADOPT THE BOOKING FEE RULES PROPOSED BY AMERICA WEST AND MODERATE PRODUCTIVITY PRICING**

**A. New Booking Fee Rules Should Be Adopted**

Continental agrees with America West that participating carriers should not be charged for passive bookings.<sup>20</sup> Passive bookings do not generate the same

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<sup>20</sup> For purposes of this discussion, a "passive" booking is a Passenger Name Record ("PNR") made in a CRS that does not correspond to a matching PNR in the airline's host system.

connectivity costs for a vendor at any level of carrier participation because they do not transmit a message to the system from the subscriber. Yet, all of the CRSs charge participating carriers for passive bookings, and Sabre charges as much as \$2.98 for passive bookings.<sup>21</sup> Continental agrees with America West that participating carriers should have to pay booking fees to a CRS only for actual travel. In view of the difficulty of determining which segments are actually flown, however, Continental advocates a rule limiting booking fees to ticketed segments. Such a rule would alleviate some of the current problems Continental has in obtaining adequate and timely billing data to confirm the validity of booking fees assessed by the CRSs. Additionally, Continental urges the Department to require CRSs to provide billing data which identify the source and type of each transaction (e.g., E-ticket vs. paper, Internet vs. agency). Continental supports America West's recommendation that the Department propose a rule addressing abusive booking practices before completing the overall CRS rulemaking.

B. Productivity Pricing Requires Moderation

Continental agrees with America West that productivity agreements lead to booking abuses by travel agents. Productivity pricing encourages duplicate, fictitious and passive bookings. Developments since 1992 lead Continental to urge that the Department limit permissible productivity pricing by prohibiting bonuses

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<sup>21</sup> The three CRSs using transaction-based pricing (AMADEUS, Galileo and Worldspan) charge much lower booking fees for passive segments.

and other payments above stated equipment and service costs. Only discounts and credits earned toward equipment and services stated at the time the subscriber agreement is executed should be allowed.

The Department's 1992 decision to ban minimum use clauses but allow productivity pricing has encouraged some system owners to continue the same anticompetitive activities under the guise of productivity pricing. As America West has pointed out in its pending petition for booking fee rules, productivity incentives encourage travel agencies to book as many segments as possible because the greater its "productivity" the lower its payments are to the vendor. As a result of productivity pricing, some travel agents pay nothing for CRS services and equipment while others receive bonuses and other payments much higher than their equipment and service costs for using a particular system. As of 1990, the Department reported that some agencies received bonuses as high as \$1 million to obtain or keep a subscriber.<sup>22</sup> Limiting the types of productivity rewards to coverage of equipment and service costs would reduce the incentive for travel agencies to make improper bookings.

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<sup>22</sup> America West Petition at 21, citing Airline Marketing Practices: Travel Agencies, Frequent Flyer Programs and Computer Reservation Services at 14, 23 (Feb. 1990).

XI. THE DEPARTMENT SHOULD OUTLAW ALL FORMS OF TYING AIRLINE MARKETING BENEFITS TO CHOICE OF CRS SYSTEMS

There is no doubt that some airlines with CRS ownership interests have coerced travel agencies into using their systems and thereby unreasonably limited competition in both the CRS and airline industries. The dominant carriers in a region can and do penalize travel agents for booking on competing systems. For example, Continental understands that Delta offers its discounted fares only to those Savannah agents booking on Worldspan.

The Department should prohibit all forms of tying airline marketing benefits and incentives to an agency's CRS subscription. Airlines should be prohibited from tying marketing benefits and incentives to an agency's use or choice of a CRS. Prohibiting airline tie-ins will allow CRSs to compete for agency business on their own merits rather than have the agent's choice of a CRS influenced by incentives from the host airline. Override commissions, the classic example of such incentives, are just one illustration of the host carriers' tools to distort CRS competition. Other airline benefits, such as waiver of fare rules, free tickets, priority wait-listing, and similar favors distributed to agents who use the affiliated CRS are also harmful. The Department has agreed that "the tying of airline marketing benefits to the agency's CRS subscription is a competitive abuse" (57 Fed. Reg. 43828), and it should prohibit all forms of tying. The Canadian CRS rules prohibit participating carriers from requiring the use of any particular CRS system by a travel agent to obtain any discounts, rebate, benefit,

commission or other incentive for the sale of or as a condition of access to its air service. (Rule 32) The Department should adopt the same rule.

Since tying airline marketing benefits to CRS selection is anticompetitive, the Department should outlaw it, even if enforcement of the rule proves difficult. However, Continental disagrees with the Department's 1992 conclusion that enforcement of a tie-in prohibition is not feasible. Other airlines will undoubtedly complain about and provide evidence on violations of the tying rule. Additionally, enforcement of a tying prohibition will be facilitated by adoption of mechanisms proposed five years ago by Continental and System One which would (1) require CRS and owner/marketer/airlines to disclaim tie-ins annually, (2) require owners to disclose the total and percentage of marketing incentives they provide to agencies, broken down by subscribers and non-subscribers, and (3) require CRS vendors to keep records to facilitate Department random audits and investigation of third-party complaints.

**XII. THE CRS RULES SHOULD PROHIBIT ANTICOMPETITIVE  
CONDUCT INVOLVING THE SALE OF "AIR TRANSPORTATION"  
ABROAD**

U.S. airlines and CRSs have engaged in anticompetitive behavior abroad. Continental has previously cataloged predatory actions by American, Sabre and its potential code-share partners in Central America. For example:

- The TACA Group airlines told passengers that bookings on them are not valid unless they are made through American's Sabre.

- TACA's sales representatives have told travel agency managers and owners that TACA will no longer be accessed in AMADEUS.
- TACA sales representatives have told travel agency managers that the agencies will not be able to issue TACA tickets using AMADEUS.
- The TACA Group airlines have encouraged travel agents in Latin America to use Sabre exclusively.<sup>23</sup>

These dirty tricks are consistent with American President Crandall's view that the airline business "is a nasty, rotten business, and we've got to play to win."<sup>24</sup>

American's actions are also anticompetitive, especially combined with American's dominance at Miami and its preemptive code-share arrangements throughout Latin America. The CRS rules must provide explicitly that U.S. CRSs, system owners and marketers may not engage in any conduct abroad that is outlawed here by those rules. Such an approach is consistent with the antibribery provisions of the Foreign Corrupt Practices Act, which prohibit certain payments by U.S. individuals and corporations to foreign officials.<sup>25</sup> The CRS rules should

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<sup>23</sup> In addition, American sales representatives have approached travel agents in Central America and told them they will not have access to American's deep discount fares unless they use a Sabre terminal. See Continental's June 2, 1997 Answer in Docket OST-96-1700 at 13.

<sup>24</sup> Petzinger, Thomas, Jr., Hard Landing at 380 (Random House, First Paperback Ed., 1996)

<sup>25</sup> 15 U.S.C. §§ 78dd-1, 78dd-2.

similarly prohibit conduct by U.S. and foreign airlines and system owners related to "air transportation" whether the conduct occurs in the U.S. or abroad.

XIII. CONCLUSION

The 1992 rules have been effective in many ways, but technological developments, the rise of marketing arrangements between CRSs and participating carriers, and explosive growth of Internet booking services compel revisions to those rules. Continental stands ready to assist the Department in crafting language to fill existing regulatory loopholes and address new developments.

Respectfully submitted,

CROWELL & MORING

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December 9, 1997

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