BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Computer Reservations System (CRS) Regulations (14 C.F.R. Part 255) – Advance Notice of Proposed Rulemaking	))))))	**Dockets OST-97-2881 OST-97-3014 OST-98-4775**

SUPPLEMENTAL COMMENTS
OF DELTA AIR LINES, INC.

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I. INTRODUCTION.

On July 24, 2000, the Department published a Supplemental Advanced Notice of Proposed Rulemaking ("SANPRM") in the Federal Register requesting comments to update the record on two issues: First, the Department has asked commenters to address the implications of reduced ownership ties between the CRSs and the airlines that have historically owned and controlled them. Second, the Department has asked whether it should adopt new rules regulating airline distribution practices on the Internet.

So far as traditional CRSs are concerned, Delta believes that there is no regulatory distinction to be drawn between carriers that own, control *or market* a CRS system. Indeed, the current CRS regulations, at least partially, recognize this to be the appropriate rule. See § 255.2. So long as carriers have an interested financial relationship with a CRS – whether through direct ownership, or through commercial

alliances – there will continue to be incentives for each partner to help the other succeed – with potentially adverse consequences for competition in the sale of air transportation.

Given these circumstances, the Department should either abolish the CRS Rules altogether, or apply them even-handedly to all CRSs and their respective owners and marketers. Due to the unique characteristics and interdependence of the CRS and airline industries – in which travel agents continue to be highly dependent on single-source CRS suppliers to assist consumers in purchasing tickets – the Department previously determined that CRS rules were necessary to prevent air carriers from using their affiliations with CRSs to unfairly influence competition.

There is a sufficient nexus for the Department to continue to exercise jurisdiction over CRSs that are marketed, as well as owned, by carriers. Since, at the present time, all CRSs operating in the United States have marketing and/or ownership affiliations with one or more air carriers, the Department need not reach the question of whether it has authority to regulate a completely independent CRS.

Delta therefore recommends that the Department continue the existing rules – with certain clarifications and improvements – for another three to five year period. If, at the end of that time, the Department determines that the commercial ties (including marketing relationships) between air carriers and CRSs have diminished to the point where neither partner would have the ability or incentive to

influence the marketplace, then the Department may reevaluate the need for the rules.

A fundamentally different analysis applies to the need to regulate airline distribution practices on the Internet. Delta's previous comments explained in detail the differences between (1) the traditional CRS agency-subscriber arrangement – which is highly restrictive - and continues to require regulatory protections to ensure that travel agents have access to unbiased information to assist consumers in purchasing air transportation, and (2) the Internet -- which, due to its completely open and unrestricted architecture -- is not subject to the same competitive concerns.

In the absence of any demonstrated harm to consumers (of which there is none) the Department should not regulate Internet distribution channels, and should allow this medium to continue its natural unencumbered evolution. This is consistent with the Administration's "hands off" approach to e-commerce (as embodied in the Administration's Framework for Global Electronic Commerce). There is no reason to treat air transportation differently than any other commodity or service for sale online.

II. CHANGES IN CRS OWNERSHIP HAVE NOT AFFECTED THE NEED FOR THE CRS RULES.

Although historic airline ownership interests in CRSs have diminished, they have been supplanted by marketing ties and commercial alliances between carriers and CRSs. These affiliations can create the same incentives to influence the marketplace as CRS ownership. In order to ensure fair and effective competition in the sale of air transportation, the Department should continue to regulate the CRS distribution mechanism – which remains both restrictive in nature, and subject to carrier influence.

The Department has previously recognized that marketing relationships, as well as ownership interests, create the potential for carrier/CRS influence. See, 62 Fed. Reg. 59797 (1997). Indeed, the CRSs themselves have argued that marketing relationships create incentives for discrimination:

> "[CRS rules are] also necessary to remedy the most obvious instance of discriminatory participation by a carrier that markets a CRS – Southwest Airlines. As the Department is aware, Southwest provides assistance with the marketing of the SABRE system. Southwest participates in SABRE, but has declined to participate in any other CRS. As we have previously advised the Department, despite repeated overtures from Galileo over the course of many years, Southwest has refused even to speak with Galileo personnel about potential terms of CRS participation that might be acceptable to Southwest. The Apollo system has been less attractive to travel agents as a result of Southwest's refusal to participate in Apollo while participating in the competing SABRE system. Galileo has been puzzled by Southwest's refusal even to discuss the possibility of Apollo participation and has encouraged the Department to investigate whether the terms of the agreement between SABRE and

> Southwest may have influenced Southwest's conduct." Docket OST-97-2881 Galileo comments at 16-17 (December 11, 1997).

To be sure, for the reasons stated in its prior comments, Delta disagrees with the need for a forced participation rule, *per se*. However, this serves as just one example of how, within the parameters of the existing rules, marketing relationships may affect CRS distribution channels and, by extension, competition in the airline industry.

If the Rules were eliminated as between non-airline owned CRSs and their "marketers" it is easy to see that cross-incentives are likely to develop between CRSs and their favored carrier marketing agents. Indeed, if the Department abolished the CRS rules only for non-owned CRSs, other carriers could be motivated to divest their remaining CRS ownership interests to take advantage of this new competitive loophole in the distribution channel.

Prior to the Department's promulgation of the CRS rules in 1984, the history of the CRS industry was characterized by blatant examples of anti-competitive airline biasing of the CRS distribution channel. In the absence of an effective continuing set of governing rules, carrier/CRS marketing partnerships could again introduce bias into the information supplied to travel agents. Such bias need not be as blatant in order to be effective – perhaps showing a few additional connect points, or other subtle display preferences for a favored marketing carrier. CRSs could also harm non-marketing carriers by not loading new fare and schedule information as

quickly as their partners' information. Favored marketing carriers could negotiate more advantageous participation terms and lower booking fees, just as they were able to do prior to 1984.

In the most extreme case, completely unregulated CRSs could again provide highly biased displays – without even a single neutral display option -- effectively locking out disfavored non-allied carriers from travel agencies that had a subscriber agreement with that CRS. CRSs would be free to sell bias to carriers, with the result being a balkanized system of biased CRS displays, where the highest bidder would prevail. Not only would this harm airline competition, but such practices would also serve to drive up distribution costs and ultimately prices paid by consumers (by forcing carriers to pay for favored positions).

III. TRAVEL AGENTS REMAIN LARGELY DEPENDENT ON SINGLE CRS SUPPLIERS, AND THE DEPARTMENT SHOULD TAKE ACTION TO ELEMINATE HARMFUL CONTRACT TERMS THAT PERPETUATE THIS SITUATION.

The Department correctly noted in the SANPRM that "CRS regulation [was] necessary because, among other things, most travel agencies used only one system, travel agencies could not easily switch systems or use more than one system, and time pressures on travel agents tend to cause them to book one of the first flights shown on a display . . ." 65 Fed. Reg. at 45557. And, in the 1992 rulemaking, the Department stated "Each CRS therefore has some degree of monopoly power on

providing information on airline service to agencies that use the CRS as either their only or primary source." 56 Fed. Reg. 12586 (March 26, 1991).

Unfortunately, those observations are as true today as they ever were. Thus, if a CRS and its marketing partner team up to promote and distribute biased CRS products which favor a particular carrier, that carrier's competitors will be unfairly harmed.

Delta has previously explained the various ways in which CRSs lock travel agents into *de facto* exclusive supplier agreements. The Department's prior changes to the CRS rules have been ineffective in eliminating these types of contractual terms. Delta's proposals for rules relating to CRS subscriber contracts would serve two purposes:

- First, it would be consistent with the primary focus of this rulemaking to "increase competitive market forces in the CRS industry." 65 Fed. Reg. at 45553. Restrictive contract terms insulate CRSs from competitive market forces that would otherwise discipline CRS services and booking fees.

- Second, eliminating such terms, may, over time, reduce the amount of influence CRSs are able to exert on airline competition, and eventually lessen the need for regulation in this area. However, at the present time,

the risk of harm to airline competition is too great to eliminate the existing CRS rules.

In that regard, as recommended by Delta in its initial comments, the Department should use this rulemaking to eliminate the following harmful contracting practices:

- **Excessive Length of Contract Term and Unreasonable Cancellation Damages.** Long-term contracts and the threat of enormous damages have the anticompetitive effect of locking subscribers into a particular CRS contract, entrenching vendors, and preserving market power. The Department needs to set an outside limit of three years on all subscriber contracts and/or allow subscribers to terminate the contract after one year without penalty. The Department should also adopt explicit rules prohibiting CRSs from collecting damages based on future bookings, requiring travel agents to disgorge productivity pricing credits, or any similar arrangement designed to block travel agents from switching CRS vendors or using alternative sources of travel information.

- **Inability to Use Third-Party Software on Any Terminal.** If travel agents were able to choose 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. CRSs would be forced to compete for daily

transactions by an individual travel agent. In such a world, which would begin to emulate the open and unrestricted competitive environment that exists for consumers on the Internet today, it might be possible to eventually relax the regulatory prescriptions of Part 255 – once travel agents are able to emancipate themselves from the *de facto* single-supplier contracts with CRSs. Therefore, the Department should promptly eliminate the exemption for system-owned terminals under section 255.9(a)(2) that prevents travel agents from using their system terminals to access other databases.

- **Productivity Pricing.** Productivity pricing creates a powerful incentive for agents to use one and only one CRS system. Travel agents that fail to satisfy productivity requirements risk losing economically vital preferential rates and face huge penalties owed to the CRS vendors. To make matters worse, productivity pricing also encourages inefficient booking and usage practices.

IV. JURISDICTIONAL ISSUES AND THE NEED TO CLARIFY THE RULES PERTAINING TO SYSTEM MARKETERS.

The Department has asked commenters "(i) whether [section 41712] authorizes us to regulate the conduct of a system that is not owned, controlled or marketed by an airline or airline affiliate and (ii) whether our determinations that the

system practices prohibited by our rules are unfair methods of competition are still valid, when those determinations relied on the systems' control by airlines that competed with airlines dependent on the systems for distribution." 65 Fed. Reg. 45556.

Due to the continuing essential nature of CRSs to distribute air transportation products, and the market power that CRSs continue to hold over carriers at traditional brick-and-mortar travel agency locations, the Department's prior findings that justified the need for the CRS rules remain valid. It would be extremely difficult for any reasonable party to dispute that the practices prohibited by section 255 are unfair methods of competition – whether they are practiced by a CRS that is owned or marketed by an airline. The Department's CRS rules prevent systems from unfairly biasing displays, from unreasonably discriminating against carriers on terms relating to system participation, and from unfair practices in system dealings with travel agents, which the Department has found would be harmful to the public interest.

The Department's jurisdiction under section 41712 is limited to prohibiting unfair methods of competition practiced by "air carriers" or "ticket agents." However, if the Department lacked jurisdiction over a CRS that had no affiliation with a carrier – either through ownership or a marketing agreement – then any unfair or deceptive practices or methods of competition by such a CRS would be subject to

jurisdiction by the Federal Trade Commission under its analogous powers under section 5 of the FTC Act.[1]

As noted, there are no CRSs currently operating in the United States that do not have an ownership or marketing relationship (or both) with a carrier. Therefore, given the continuing jurisdictional nexus, and the expertise the Department has already attained in administering the rules, Delta believes it would be prudent, for the

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[1] The Department notes that under the Second Circuit's holding in *Official Airline Guides, Inc. v. FTC*, 630 F.2d (2d Cir. 1980), the FTC may not regulate the conduct of a firm in one industry in order to promote competition in a second industry, unless the firm competes in the second industry as well. SANPRM at 45554. However, the holding of *Official Airline Guide Case* is readily distinguishable from the need to regulate CRS distribution channels. Central to the court's decision was the fact that "[the OAG] though possibly a monopolist in the airline schedule publishing industry, admittedly had **no anticompetitive motive or intent with respect to the airline industry** . . ." *Id.* at 926 (emphasis added). Therefore, the court concluded that "even a monopolist, as long as he has **no purpose to restrain competition** or to enhance or expand his monopoly, and does not act coercively, retains this right." *Id* at 927-28 (emphasis added).

Such is not the case with respect to dealings between carriers and CRSs. Because CRSs generate booking fees in *direct proportion* to the tickets sold by *their participating carriers*, CRSs can possess the purpose and motive to restrain competition in the airline industry. In the simplest example, if a CRS stood to receive $1 per booking from one carrier, and $2 per booking from another, the CRS would benefit by taking steps to maximize the number of tickets sold on its system by the carrier with which it had the most favorable commercial relationship. The motivations of an interested CRS are entirely different from the *Official Airline Guide* situation, where the OAG profits equally regardless of the number of tickets sold by a particular carrier. In light of the clear competitive linkage between the CRS and airline industries, the FTC would most certainly have jurisdiction to curb anticompetitive tactics by CRSs if the DOT does not.

time being, for the Department to continue regulating in this area, rather than abdicating jurisdiction to the FTC.

A. A Uniform Rule is Needed for All CRSs.

1. A Two-Track Regulatory Scheme Would Be Extremely Burdensome.

The current CRS rules promote certainty in the marketplace, and ensure air carriers and travel agents that services are being appropriately published and displayed. Moreover, a single uniform set of rules promotes even-handed and efficient oversight by the Department. A nearly impossible situation would be created if the Department decided to place CRSs into different regulatory classifications based on their degree of carrier ownership or marketing affiliations.

Delta strongly believes that all CRSs should be subject to the same regulations. The Department should not seek to retain jurisdiction over some CRSs, but allow others – including the largest CRS, Sabre—to go unregulated, or, more likely, be subject to different and as yet undefined oversight by the FTC, which lacks the DOT's expertise in this area.

2. Unilateral Regulation of Carrier-Owned CRSs Would Prejudice them in the Marketplace.

Subjecting some carriers but not others to regulation would prejudice regulated CRSs in the marketplace. Assuming the FTC did not adopt precisely parallel rules to part 255, non-carrier owned CRSs, such as Sabre, could be free to

peddle display bias to carriers and engage in whatever discriminatory carrier participation contracts and agency-subscriber agreements Sabre felt would maximize profits.

Regulated CRSs, on the other hand, would continue to be bound by the Department's rules, perhaps forcing the remaining carrier-owners to divest their interests so that the formerly carrier-owned CRSs could compete with their unregulated counterparts on equal terms.

B. The Department Should Clarify the Applicability of the Rules to Systems Marketed by Carriers.

The legal and policy arguments for treating carrier-owned and carrier-marketed CRSs equally under the rules are compelling, and, for the reasons explained above, Delta believes that it is in the public interest for the rules to be continued. However, the Department needs to clarify the rules' application to systems marketed by carriers, and, as explained in section C, below, either eliminate the forced participation rule (the preferable alternative) or extend the rule to system marketers.

The Department's existing rules have it at least half right. Thus, in defining the applicability of the rules, section 255.2, makes it clear that the Department intended to regulate not only carriers that own or control CRSs, but also those that "*. . . **market*** computer reservations systems for travel agents in the United States. . ."

§ 255.2. However, the Department's definition of "system" leaves some ambiguity as to the applicability of the rules to systems that are only marketed by carriers:

> *System* means a computer reservations system **offered by a carrier** or its affiliate to subscribers . . . (Section 255.3 emphasis added)

Delta believes that the existing rules are intended to cover systems such as Sabre that are marketed by carriers. A carrier that markets a system to travel agents and induces them to enter into a subscriber contract with a specific CRS could be deemed to be an "offerer" of that system. However, there is unnecessary ambiguity under the existing rules of what is meant by "offered by a carrier." Therefore, Delta recommends that the Department adopt a new definition of "carrier system marketer agreement" and amend the existing definition of "system" to include systems that have a "carrier system marketer agreement":

Proposed:

> *Carrier System Marketer Agreement* means any marketing, promotional, or financial arrangement or agreement between a System and a Carrier other than a standard system participating carrier agreement.
>
> *System* means a computer reservations system that has a Carrier System Marketer Agreement or that is offered by a carrier or its affiliate to subscribers . . . (Section 255.3 emphasis added)

These proposed changes will help to bring the rules up to date, and ensure that carrier system marketers and their allied CRS counterparts are appropriately covered as the Department intended in section 255.2.

C. The Forced Participation Rule Should Be Eliminated, or, in the Alternative, Must Be Applied Equally To Carrier System Marketers.

For the reasons explained in its initial comments, Delta believes that the forced participation requirement contained in Section 255.7(a) is detrimental to competition in the CRS and airline industries and should be eliminated. Forced participation effectively eliminates the ability of carriers to bargain with other CRS providers over system enhancements, leading to economically inefficient results. See Delta Comments at 21-25.

It is essential that all carriers have the ability to tailor their CRS participation levels to be consistent with the needs of discrete carrier product offerings. The existing forced participation rules prevent system owners, such as Delta, from doing this. For example, Delta Express does not require the full range of enhancements offered at the highest levels of CRS participation to meet its booking needs. Delta Express is unfairly handicapped in competing with other carriers, such as Southwest (a Sabre marketer), that are able to select a lower cost level of CRS participation more appropriate to their product. Likewise, American (also a Sabre marketer)

would have the flexibility to take advantage of lower cost CRS participation options that are not available to Delta.

The forced participation rule should be eliminated. Nevertheless, if the Department retains the forced participation rule, carrier system marketers must also be subject to it. The changes in market circumstances make it critical for the Department to resolve disparity immediately. We are now in the absurd situation where Sabre, the country's largest CRS, and American and Southwest, two of the largest U.S. carriers, are allied through a marketing relationship, but are immune from the forced participation rule. This gives American and Southwest important bargaining leverage in dealings with other CRSs that competing airlines lack.

V. INTERNET ISSUES

A. There is No Need for the Department to Interfere in the Development of the Online Marketplace.

With respect to the need to regulate the Internet, the Department seems to have at least partly answered its own question. The Department's supplemental notice correctly found that "CRS regulation [was] necessary because, among other things, most travel agencies could not easily switch systems or use more than one system, and the time pressures on travel agents tend to cause them to book one of the first flights shown on a display, even if flights displayed later may better suit the

traveler's needs. . . . **These factors seem unlikely to be true for consumer use of Internet booking sites.**" SANPRM at 45557 (emphasis added).

Indeed they are not. Consumers have been empowered as never before, and are aggressively using the Internet for comparison shopping both among the many competing websites and with traditional sources of information. Consumers are ferreting out discount fares offered by carriers, on travel agent websites, and though innovative new online vendors like priceline.com. The Internet is revolutionizing the way corporations and consumers interact in virtually every industry in the country. People are buying groceries, toys, pet supplies and drug store products online, and corporations in all industries are seeking to connect with customers over the Internet, now that traditional barriers for "B to C" communication are crumbling.

The prevalence of vigorous and healthy competition for the sale of air transportation on the Internet makes it unnecessary and unwise for the Department to extend rules designed to regulate traditional CRS business practices to the online marketplace. The Internet makes it possible for consumers to access a myriad of information sources from any desktop computer. If one source of information does not provide complete information about a carrier's services, the consumer can jump to another site with the click of a mouse. In a world where consumers have free access to multiple competing sources of information on the Internet, there is simply

no need or justification for the Department to extend traditional CRS rules to Internet sites.

As discussed below, the Administration has recognized the importance of taking a minimalist, "hands off" approach to regulating e-commerce, so as to enable this promising medium to reach its full potential. The sale of air transportation is no different than any other product or service for sale online, and the Department should allow the electronic marketplace to continue its natural evolution, intervening only when strictly necessary to remedy an identified public harm.

Delta is extremely concerned that application of the traditional CRS rules to Internet sites could stifle innovation and competition, and serve to extend the dominance of established CRSs to the online world. In light of the rapidly evolving distribution technologies, and the vigorous competitive environment that currently exists on the Internet, no additional regulatory proscriptions relating to Internet activity are necessary at this time.

B. Unnecessary Interference Could Stifle Innovation.

1. New Business Models.

Although commercial utilization of the Internet has taken dramatic strides since the inception of this rulemaking in 1997, the Internet is still in its infancy. New business models are evolving that do not fit the traditional air service distribution mold, and the ill-advised application of a set of rules designed to

regulate a fundamentally different brick-and-mortar industry could have adverse consequences for the virtual marketplace.

For example, at the time the Department began this proceeding in 1997, the practice of consumer bidding for air transportation was something of a novelty. A few carriers were experimenting with selling very limited numbers of tickets though online auctions. Today, *millions* of customers are able to "name their own price" for discount air transportation through priceline.com.

Priceline does not fit the traditional distribution model. In fact, Priceline does not even inform customers of the identity of the carrier they have purchased a ticket on or when they will be traveling until after a customer's bid is selected and the transaction is complete. How could this practice conform to the traditional CRS requirements to provide an identity-neutral display of carriers and service options? Should the Department be regulating or prohibiting these types of internet business practices?

Delta believes the answer is an emphatic "NO". The online marketplace is a vibrant competitive environment, and, in the absence of specifically identifiable harm to competition or consumers, the application of broad prophylactic regulation to the Internet would only serve to stifle innovation and new methods of competition.

2. Alternative Low-Cost Data Sources.

Another promising potential future development that would be deterred by unnecessary regulation is the ability of Internet sites to drive down escalating CRS distribution costs by relying on alternative low-cost data sources. Delta's initial comments detailed the problem of rapidly escalating CRS fees, and the powerlessness of carriers to reign in CRSs, which, by virtue of their market power over carriers, are free to charge virtually whatever they want in the way of booking fees.

For the first time, the Internet represents a meaningful opportunity to break the stranglehold of CRSs on the rates charged for booking fees. All major carriers maintain their own databases of schedules, fares and inventory, which carrier reservations agents and carrier websites are able to access without the onerous booking fees charged by CRSs. As noted by the Department, the differences in distribution costs are dramatic. In the example mentioned by the Department, a carrier paid $23 for a full-service booking through a travel agent, versus $6 for a booking made though the carrier's own website. Carriers have shown a willingness to pass these savings along to consumers by offering discounts for tickets purchased through carrier websites.

Industry distribution costs would be driven down – with attendant benefits to competition and consumers – if Internet purveyors of air transportation services

were able to rely on low-cost carrier inventory databases, rather than high-cost CRSs.

The Department notes that the major Internet portals currently use established CRSs as their booking engines. While a full transition to lower cost data sources has not yet taken place, there is no *technological* reason why it cannot. The Department should not adopt a *regulatory* proscription that would have the effect of extending the dominance and market power of the CRSs to online booking services.

Requiring Internet websites to comply with the CRS rules would have precisely this effect, because it is extremely unlikely that any individual website would be willing to invest the resources to develop a system of database linkages and display algorithms that would be fully compliant with the Department's rules.

Existing CRSs have provided a ready platform for Internet travel retailers to rapidly bring new websites to market. However, as the online travel industry matures, there may be increasing interest in exploring attractive cost-reducing measures, such as alternative data sources. Consistent with the Department's stated objective in this proceeding to "increase competitive market forces in the CRS industry" the Department should do nothing to frustrate this promising potential development.

C. Unnecessary Regulation of Internet Travel Sites Would be Inconsistent with the Administration's E-Commerce Policy Statement.

The Administration has recognized that the measures government takes to regulate the Internet dramatically influence the future potential of electronic commerce. The rules the Department adopts (or refrains from adopting) in this proceeding will have a profound effect of whether online competition for the sale of air transportation is facilitated or inhibited. Delta believes that the Department should, consistent with the Administration's policy statement on e-commerce, respect the unique nature of the medium and recognize that widespread competition and increased consumer choice are the guiding principles in deciding whether any regulation is necessary.

In the absence of any demonstrated harm to consumers (of which there has been none), the Department should maintain a hands-off approach to regulating Internet distribution channels. This is fully consistent with the Administration's Framework for Global Electronic Commerce:

> 1. The private sector should lead. The Internet should develop as a market driven arena not a regulated industry. Even where collective action is necessary, governments should encourage industry self-regulation and private sector leadership where possible.
>
> 2. Governments should avoid undue restrictions on electronic commerce. In general, parties should be able to enter into legitimate agreements to buy and sell products and services across the Internet with minimal government involvement or intervention. Governments should refrain from imposing new and unnecessary regulations, bureaucratic procedures or new taxes and tariffs on commercial activities that take place via the Internet.
>
> 3. Where governmental involvement is needed, its aim should be to support and enforce a predictable, minimalist, consistent and simple legal environment for commerce. Where government intervention is

> necessary, its role should be to ensure competition, protect intellectual property and privacy, prevent fraud, foster transparency, and facilitate dispute resolution, not to regulate.
>
> 4. Governments should recognize the unique qualities of the Internet. The genius and explosive success of the Internet can be attributed in part to its decentralized nature and to its tradition of bottom-up governance. Accordingly, the regulatory frameworks established over the past 60 years for telecommunication, radio and television may not fit the Internet. Existing laws and regulations that may hinder electronic commerce should be reviewed and revised or eliminated to reflect the needs of the new electronic age.
>
> 5. Electronic commerce on the Internet should be facilitated on a global basis. The Internet is a global marketplace. The legal framework supporting commercial transactions should be consistent and predictable regardless of the jurisdiction in which a particular buyer and seller reside.
>
> See, http://www.whitehouse.gov/WH/New/Commerce

The extension of the traditional CRS rules, which do not fit the Internet model, would not be consistent with the minimalist regulatory policy urged by the Administration. The President's policy correctly recognizes the "decentralized nature [of the Internet] and its tradition of bottom-up governance" tend to make the online marketplace self policing. The Department should take the proactive steps urged by Delta - such as eliminating forced participation in CRS-sponsored Internet sites - to accentuate these positive characteristics of the Internet, rather than engaging in superfluous and ineffective regulation.

There has been no evidence of unfair competition in the sale of air transportation on the Internet. Accordingly, no regulation is warranted at this time.

If and when intervention by the Department or the FTC becomes necessary to protect competition, it should be narrowly tailored to address a particular competitive harm.

D. The Department Should Adopt No Regulations that Would Frustrate the Development of Competitive Online Travel Sites by Carriers.

Certain trade associations, representing primarily traditional "brick and mortar" travel agencies, have urged the Department to take action to prevent the development of new online competitors, such as Orbitz, which is jointly owned by several airlines. The primary motivation of these organizations is to protect the franchise of their brick and mortar constituents.

It is neither appropriate nor in the public interest for the Department to engage in such overreaching and protectionist regulation. There has been no showing that the formation of a jointly owned airline website would harm consumers, or that it would have any effect on the fierce competition that exists between airlines. It is axiomatic that the Department's rules and the antitrust laws are intended to protect competition and not competitors. Nowhere is that principal more applicable than here.

Moreover, notwithstanding the proliferation of online travel sites similar to Orbitz, travel agencies remain the predominate method of airline ticket distribution in the United States. As noted by the Department, Sabre estimates that five years from now, travel agencies will still account for the majority of airline bookings.

Delta recognizes that travel agents provide a valued service to airlines and consumers. However, like all industries, travel agents need to adapt to the changing marketplace. Organizations such as ASTA would have the Department attempt to turn back the clock on the Internet revolution by adopting new rules that would limit competition for online sales. It is not in the public interest for the Department to restrain the natural evolution of electronic commerce.

1. The Creation of a New Travel Website is Procompetitive.

Consumers have demonstrated a growing desire to use the Internet for making travel arrangements, and large, comprehensive websites such as Orbitz make this easier. There are already a number of comprehensive travel sites operating on the web, including well known names such as Travelocity and Expedia. Orbitz will be one more choice for consumers on the Internet, and will be a new online competitor to existing online travel super-stores.

There is vigorous competition today among the major online travel sites, and there will be even greater competition following the entry of Orbitz next year. Orbitz will inject new competition and force the major established Internet travel sites to innovate and keep up with the product and customer service enhancements of the joint airline site.

For example, Orbitz will be powered by revolutionary new software. It has new features, such as enabling consumers to instruct Orbitz to look for low fares at

alternative area airports within a specified driving distance. The ease of searching for discount flights and the clear and concise organization of the Orbitz flight options has received praise from the likes of the Washington Post. In a recent article, the Post described the new search engine as a "breakthrough" technology that is vastly superior to the presentation of data by the major incumbent sites, such as Travelocity. See Washington Post, Travel Section, December 5, 1999. Already, the existing sites are taking steps to improve their services to match these developments.

The real winner in the expanded competition for online travel services is, of course, the consumer. There is no sound public interest basis to discourage competition in this area and limit consumer choice of travel websites by regulating the formation of Orbitz.

2. The Formation of Orbitz by Air Carriers Does Not Present Any Unique Competitive Problems.

The fact that airlines *provide* air transportation in the real world does not give them any advantage in *selling* air transportation in the virtual world. E-commerce has shown a company's brick-and-mortar operations can be a poor indicator of the likelihood of success on the Internet. For example, Barnes and Nobel is the largest conventional bookseller in the United States, but this does not give them an advantage on the Internet, where Amazon.com is bigger. Some of the most

successful e-commerce businesses, such as ebay, have almost no business or tangible assets other than in the virtual world.

Orbitz is a technology company that is being formed with the primary purpose of competing in the growing market for distribution services on the web. There is no reason to preclude the development of a new business that will offer competition to the incumbent online travel sites.

3. The Stake Holders in Orbitz Have Appropriate Business Incentives to Maximize Participation and Provide Unbiased Displays for All Airlines.

The joint owners of Orbitz have appropriate business incentives to maximize the value of this new company. Orbitz can only realize its market potential, and maximize returns for its owners, if it is successful in gaining widespread carrier participation and consumer acceptance. Thus, it is not in the joint airlines' interest to exclude or disadvantage any airline wanting to participate in Orbitz. In addition to the major carrier founders, small and low fare carriers including American Trans Air, AirTran, Frontier and Vanguard have all signed up to participate.

One of the founding principles for Orbitz is the requirement that Orbitz operate in a non-biased manner. This requirement is clearly stated in the Orbitz charter documents filed with the State of Delaware. In addition, Orbitz has signed agreements with more than 30 airlines which contractually bind Orbitz to operate its site in a completely unbiased manner or be subject to lawsuits for breach of

contract. Copies of these documents have been provided to the Department of Justice.

Moreover, as previously noted, display bias on the Internet is self-policing. If consumers are not getting accurate comparative information from one site, they will quickly move to another portal. Thus, any bias in Orbitz would severely handicap the efforts to develop Orbitz into a preferred online travel site.

E. There is Serious Doubt that the Department Has Jurisdiction to Regulate Travel Websites on the Internet.

In addition to the many practical and policy considerations that make it unwise for the Department to extend the CRS rules to the Internet, the Department's jurisdiction to regulate in this area is in question. There is substantial doubt the Department's limited statutory authority to prohibit demonstrated competitive abuses by airlines or ticket agents would apply to the non-airline, non-ticket agent vendors of Internet travel information, particularly when there is no evidence of any competitive abuse. See Delta Reply Comments at pp. 8-12.

F. The Department Should Require Separate Contracts for Internet Products Marketed by CRS Vendors.

One necessary and procompetitive action the Department should take to promote healthy competition in online distribution services is to require CRSs to provide separate contracts for participation in Internet products, e.g. Travelocity by Sabre. Delta and other airline commenters have strongly urged the Department to

draw a clear line of demarcation between traditional CRS products that are marketed to professional travel agents via a dedicated telecommunications network and CRS products that are made available to travel agents and consumers via the Internet.

As previously described by SABRE, the traditional CRS product and the Internet product are two separate and distinct commodities:

- A dedicated network linked to professional travel agents. Although this is the "traditional" channel, a travel agent from twenty years ago would hardly recognize today's multi-functional systems which are far more capable than the limited-function terminals found on travel agents' desks in those early days.

- Internet services provided to individual travelers, who are able to access SABRE and make reservations from their home computers using SABRE's Travelocity and easy SABRE products. SABRE Comments at 4.

The Department should not permit CRS vendors to utilize the mandatory participation rule and adhesionary contract terms to force carriers to participate in Internet products that the vendors bundle together with traditional CRS services.

This is a classic tying arrangement prohibited by the Sherman Act. Airlines obligated to participate in a vendor's traditional CRS product are forced to buy a separate product offered by that vendor or its affiliate via Internet outlets (where the CRS acts as the booking engine) since these products are packaged together by the vendors. Because CRS vendors hold market power over participating carriers in the

traditional CRS products offered via a dedicated network, no carrier can afford to drop out of a CRS, and thus participation in the vendor's Internet products is assured.

There are many valid reasons why carriers may not want to participate in select Internet products offered by CRS vendors. The Department recognized as much in the parity clause rulemaking. See, 62 Fed. Reg. 59784 (November 5, 1997). Moreover, in the case of CRS Internet products, carriers can be subject to excessive unproductive booking fees by virtue of the unrestricted access CRSs grant untrained retail customers.

Carriers need not participate in every product on the Web to enjoy the advantages of Internet marketing. Airlines should be free to shop around for the best deals to meet their Internet distribution needs. If airlines are permitted to negotiate separately for Internet products -- as opposed to a single contract where CRS vendors can exercise market power -- then carriers would have the ability to leverage one system against another in order to obtain the most favorable contract terms possible. For example, a carrier might negotiate a lower booking fee for Internet products to compensate for inefficient and inexpert consumer use of system resources.

Rational business decisions by carriers concerning selective participation in Internet products represents a healthy functioning marketplace. 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.

The Department should seek to encourage the same type of beneficial competition for Internet products as the Department did in the parity clause rulemaking with respect to CRS participation levels. Refraining from unnecessary regulation of the Internet and requiring CRS vendors to offer separate participation contracts for Internet products will accomplish this important objective.

VI. PUBLIC AVAILABILITY OF CRS BOOKING DATA (SECTION 255.10).

Delta continues to support the public availability of CRS booking data, which enhances competition in the airline industry by making timely and accurate traffic data available to all carriers. By enabling carriers to respond quickly to changes in market demand, CRS data helps airlines to optimize service patterns, discount (sales) programs and other incentives offered to consumers and travel agents.

Section 255.10 requires CRSs to make available on ***nondiscriminatory terms*** the various types of sales data it elects to generate from its system. Delta believes that the Department is correct in its fundamental precept that the availability of such traffic and sales data is procompetitive, so long as it is made available to all carriers on equal terms. The Department has applied these principles not only to CRS

booking data under section 255.10, but also to the various data sources maintained by the Department pursuant to its Uniform System of Accounts and Reports (Part 241), such as T-100 (Sec. 19-6) and Passenger Origin-Destination Survey Data (Sec. 19-7).

For example, in order to promote competition, the Department makes detailed domestic T-100 on-flight market data available as soon as it is processed. (Sec. 19-6). Likewise, the Department makes Origin-Destination survey data available to any air carrier participating in and contributing data to the survey.

Thus, section 255.10 is consistent with other similar provisions on traffic data, because it enhances competition through the public availability of pertinent data yet protects carriers from the potential harmful effects of unilateral disclosure by requiring that such data be available to all carriers on nondiscriminatory terms. Conversely, if, as urged by some commenters, the Department were to abolish section 255.10 on the theory that it allows airlines to see what their competitors are doing, then the Department would need to re-think its entire policy on the public availability of air carrier data – which Delta believes has served competition and the public interest extremely well.

The recently filed comments of the Air Carrier Association of America (ACAA) ignore the many competitive benefits derived from the public availability of CRS data, and grossly exaggerate the alleged potential for competitive harm. ACAA

misrepresents the record claiming that "No party has submitted a comment defending §255.10(a)." Delta, among others, supported the continuation of section 255.10 in the initial rounds of this proceeding. See e.g. Delta Reply Comments at 37-38.

Delta reiterates its support for the continued availability of this data to all carriers on a non-discriminatory basis. CRS data offers significant advantages over DOT data, especially for international route planning. DOT data offers very limited information about foreign flag carriers, making CRS data the main industry data source in analyzing international markets. Also, the timeliness of the data is a major benefit for both international and domestic network analysis, as DOT data is received with a lag of several months.

The following are some of the many ways in which CRS Booking data is utilized by Delta to improve its competitive service offerings:

Competitive Analysis and Tracking of Industry Traffic Trends:

- *Monitor airline industry traffic growth trends*. This is especially significant in international markets where a large amount of the traffic is carried by foreign flag carriers.
- *Trend market share performance*. Accurate and timely CRS data enables Delta to track its traffic share at regional, city and O&D levels, and to identify areas where Delta is doing well, and where it needs to improve its sales and marketing efforts.
- *Project advance booking shares*. Delta monitors share trends based on advance bookings, enabling Delta to be proactive in sales initiatives.

- *Track and measure effectiveness of initiatives taken to stimulate markets.*
- *Analyze worldwide traffic dynamics.* Monitor worldwide share trends of all carriers including foreign flag carriers. Study the impacts of alliances without limiting the scope to just U.S. O&D traffic.
- *Analyze O&D traffic on foreign flag carriers' flights to the U.S.* The foreign flag carrier data from DOT is limited to segment onboard traffic. CRS data is the only source for O&D traffic on a foreign flag carrier. This helps to improve the competitiveness of U.S. carriers in the international marketplace.

Route Planning:

- *Estimate demand for new international routes.* CRS data gives a more accurate reading on traffic size of markets as foreign flag carriers are included in the data. Also, it is the sole source of traffic for regions without nonstop U.S. service.
- *Analyze components of industry traffic to determine potential impact on success of new routes.* CRS data facilitates a more detailed study of the breakdown of the traffic by point of origin and class of service. Incorporating these factors improves the accuracy of new route forecasts.
- *Analyze seasonality of new markets.*

Thus, contrary to the claims of the ACAA, it is clear that there are a multitude of useful and procompetitive uses for CRS booking data.

VII. CONCLUSION

Delta appreciates this opportunity to submit supplemental comments to assist the Department in formulating the next set of CRS rules. For the foregoing reasons, Delta believes that CRS rules – as applied to traditional travel agency/subscriber type arrangements – are plainly warranted, fall within the Department's existing jurisdiction, and need to be clarified to apply to systems marketed by carriers. However, in light of the fundamentally different open and competitive environment that exists on the Internet, the Department should refrain from regulation in this area.

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