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U.S. DEPARTMENT OF TRANSPORTATION

U.S. Department of Transportation Notice of Practice Regarding Proposed Airline Mergers and Acquisitions

AGENCY: Office of the General Counsel, U.S. Department of Transportation (DOT).

ACTION: Notice of DOT Authorities and Practice.

SUMMARY: This notice explains the U.S. Department of Transportation's (DOT) authorities and practice in the areas of proposed airline mergers and acquisitions.

SUPPLEMENTARY INFORMATION:

I. Background:

This Notice describes the U.S. Department of Transportation's practice and authorities with regard to airline mergers and acquisitions, including those that involve a transfer of slots. The Notice is not proposing any changes, new procedures, or new approaches.

II. Legal Authority to Review Slot Transactions Resulting from Proposed Airline Mergers and Acquisitions

The DOT has authority over slot transactions that stem from proposed airline mergers and acquisitions.¹ The authority arises from several statutory provisions, as outlined below.

Under 49 U.S.C. 41712, DOT is authorized to prohibit airline conduct comparable to antitrust violations. Specifically, DOT may prohibit conduct that it determines is an "unfair method of competition."² In addition, like several other agencies with respect to their regulated entities, DOT has independent authority under the Clayton Act.³ This independent authority

¹ With respect to slot transactions, this Notice relates to the DOT's practice for reviewing slot transactions that result from proposed airline mergers or acquisitions. It does not apply to DOT's review of standalone slot transactions. For more information regarding DOT's authority and proposed procedures for reviewing standalone slot transactions at the New York City area airports, please see the notice of proposed rulemaking titled, Slot Management and Transparency for LaGuardia Airport, John F. Kennedy International Airport, and Newark Liberty International Airport, RIN 2120-AJ89, available in the docket for the rulemaking at www.regulations.gov.

derives from 15 U.S.C. 21, under which DOT may prohibit airline acquisitions and mergers that may reduce competition or tend to create a monopoly in the airline industry.⁴

The DOT/Federal Aviation Administration (FAA) also has authority to administer airline slots under 49 U.S.C. 40103.⁵ This authority permits the FAA to assign the use of airspace to ensure its efficient use and modify or revoke a slot assignment when required in the public interest. Section 40101, Title 49, directs DOT and the FAA, in carrying out aviation programs, to consider certain enumerated factors, plus additional factors that may be considered in the Secretary or FAA Administrator's discretion, as being in the public interest,⁶ including furthering airline competition.

III. The DOT Review of Airline Merger or Acquisition Transactions

With respect to DOT's competition and public interest review authorities, DOT's practice has been to use its expertise with respect to the airline industry to provide the Department's views and otherwise assist the U.S. Department of Justice (DOJ) in DOJ's analysis of airline mergers or acquisitions. The DOT will continue this practice for airline mergers and acquisitions under DOJ review. DOT will consult with DOJ, inform DOJ as early as possible regarding any concerns, and defer to DOJ judgment where DOJ determines that a merger or acquisition violates the antitrust laws and should be enjoined. The DOT will not duplicate review or enforcement

² See 49 U.S.C. 41712, authorizing DOT to investigate and prohibit any unfair or deceptive practice or an unfair method of competition of an air carrier, foreign air carrier, or ticket agent.

³ Section 7 of the Clayton Act, 15 U.S.C. 18, prohibits mergers and stock acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly" in a relevant market.

⁴ See 15 U.S.C. 21, authorizing the Secretary to enforce section 7 of the Clayton Act, and 15 U.S.C. 18, prohibiting U.S. and foreign air carrier acquisitions that may substantially lessen competition or tend to create a monopoly.

⁵ See 49 U.S.C. 40103(b), authorizing the FAA to "develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure . . . the efficient use of airspace [and] to modify or revoke an assignment when required in the public interest."

⁶ See 49 U.S.C. 40101(a), which directs the Secretary to consider identified matters, "among others," as being in the public interest. See also 49 U.S.C. 40101(d), which directs the Administrator to consider identified matters (including enhancing safety) "among others," as being in the public interest.

activities carried out by DOJ and will not create undue expense or burdens upon parties to an airline merger or acquisition.

In the event that DOT has concerns that fall outside the DOJ competition review process, DOT, in the discretion of the Secretary, may seek independent resolution of these concerns, as has been its practice. In doing so, DOT will work with the relevant parties, including DOJ, as it did in the recent merger between US Airways and American Airlines, to determine whether public interest remedies are appropriate, and if so, to pursue such remedies. In that case, DOT applied the Section 40101 public interest policy considerations to maintain and enhance service to small communities with respect to the merger between US Airways and American Airlines. The DOT entered into an agreement under which the carriers committed to use certain slots at Reagan Washington National Airport to preserve nonstop service from DCA to small and medium-sized communities.⁷ In the event that DOT exercises its public interest authority, DOT will confer with DOJ to ensure that any public interest remedies it seeks to impose are harmonized with any antitrust relief sought or imposed by DOJ.

Issued in Washington, DC, on January 9, 2015.

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General Counsel.

⁷ See Agreement regarding Merger Between US Airways Group, Inc. and AMR Corporation, (Nov. 12, 2013), available at http://www.dot.gov/sites/dot.dev/files/docs/FinalAgreement_DOT_US_AA_.pdf. Under the Agreement, New American committed to schedule all DCA commuter slots held or operated by New American entities to serve medium, small and non-hub airports for five years.

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