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Competition in the Airline Industry

BEFORE
THE HOUSE JUDICIARY COMMITTEE

ON

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I. INTRODUCTION

Mr. Chairman, Ranking Member Smith, and other distinguished members of the Judiciary Committee, I want to thank you for giving me the opportunity today to speak about competition in the airline industry in general and more specifically the potential anticompetitive effects inherent in a new wave of consolidation that may be spurred by the proposed merger of Continental Airlines and United Airlines. I speak today on behalf of myself and the American Antitrust Institute,[1] based upon my experience as an Antitrust Division trial attorney focused on deregulated industries, as an economist, and as a law professor whose research and writing has focused on antitrust issues arising in the context of regulated/deregulated industries, including airlines.[2]

The last mega-merger in this industry was the merger of Northwest Airlines and Delta Air Lines. Since that merger, little has changed for the better in the airline

[1] Per University of Houston guidelines, the views I express here do not purport to reflect those of the University of Houston system and should not be construed as reflecting the position of the University of Houston or the State of Texas. The American Antitrust Institute is an independent, non-profit 'virtual network of experts' whose website is www.antitrustinstitute.org.
[2] The term "deregulation" is a bit of a misnomer. *See* Harry First, *Regulated Deregulation: The New York Experience in Electric Utility Deregulation*, 33 LOY. U. CHI. L. J. 911 (2002)(noting that New York's electricity market was not deregulated, but in fact replaced "one regulatory system with another.").

industry, except that the pressure to consolidate has increased in the wake of this previous merger, and the pending transaction reflects what I believe to be the start of yet another airline merger wave.

The substance of my testimony is divided into four parts. Part II of my testimony examines what I think are the *potential* anticompetitive harms of the transaction. This section should be treated not as an indictment of the transaction, but as a guide to issues I think key in determining when the effect of such merger "may be substantially to lessen competition, or to tend to create a monopoly."[3] Part III addresses what I believe are the key *potential* benefits of the transaction. Part III strongly cautions against interpreting the antitrust laws as allowing mergers because of a wrongly yet widely held belief that efficiencies generally, even if not fully evidenced, somehow should be a trump card which enables a proposed merger to fly despite antitrust review even when the transaction raises serious anticompetitive issues. Part IV offers speculation as to the reason behind the transaction, and the problems associated with the mindset that mergers and acquisitions resolve issues caused by uncertainty in input markets and economic factors as a whole.

[3] 15 U.S.C. § 18.

II. WHAT ARE THE ANTICOMPETITIVE EFFECTS OF THE MERGER?

a. Nonstop Competition Is Potentially Injured

The first question that must be addressed is whether the proposed merger will be harmful to consumers. The standard antitrust answer to this question is a complicated analysis to determine the relevant market in which the merging parties overlap, the concentration within that market, the likely anticompetitive effects that arise due to the proposed merger within the relevant market, and whether entry mitigates the injury to consumers caused by those anticompetitive effects or whether efficiencies outweigh the anticompetitive effects to such a degree as to justify the transaction. This classic analysis embedded in the Department of Justice/Federal Trade Commission Horizontal Merger Guidelines is the standard tool of antitrust analysis within the agencies.[4]

The relevant market traditionally examined in airline mergers is the non-stop city-pair or airport-pair market. These routes are usually examined first in any merger of major carriers because hub-to-hub routes between competitors are commonly duopoly routes served only by the merging parties, or, in some circumstances, the routes are served by an additional nonstop competitor such as a low cost carrier. For example, in the Department of Justice's Press Release discussing the threatened challenge of the United's acquisition of U.S. Airways,[5] the press release noted that these two carriers, the second and sixth largest at the time, would create "a monopoly or duopoly on nonstop service on over 30 routes."[6] Additionally the press release stated that, "US Airways is

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[4] U.S. Dep't of Justice & FTC, Horizontal Merger Guidelines (1992), *available* at http://www.usdoj.gov/atr/public/guidelines/hmg.htm (hereafter Horizontal Merger Guidelines). The recently published draft revised guidelines do not change this.
[5] http://www.usdoj.gov/atr/public/press_releases/2001/8701.htm. The proposed merger was abandoned due in large part to the Department of Justice's threatened suit.
[6] *Id.* The DOJ's analysis should be compared with its press release in the Northwest/Delta merger. This will be discussed infra.

United's most significant competitor on densely-traveled, high revenue routes between their hubs, such as Philadelphia and Denver, as well as for nonstop travel to and from Washington D.C. and Baltimore, and on many routes up and down the East Coast."[7]

Similarly there are issues with respect to nonstop routes served by Continental and United. For instance, at the very least, the Antitrust Division will likely examine the overlap between United and Continental on nonstop hub to hub routes. In particular, the routes that are problematic are: 1. Cleveland-O'Hare; 2. Cleveland-Denver; 3. Cleveland-Dulles; 4. Cleveland-San Francisco; 5. Cleveland-LAX; 6. Houston Intercontinental-Denver; 7. Houston Intercontinental – O'Hare; 8. Houston Intercontinental – Dulles; 9. Newark-O'Hare; 10. Newark-Denver; 11. Newark-Dulles; and 12. National Airport-O'Hare.[8] Hawaiian and international markets may be implicated as well in this transaction, in particular flights from Los Angeles to Honolulu.

b. Competition on a Connection Basis May Be Potentially Injured

The next issue typically raised by airline mergers is whether or not the combined firm will operate the bulk of hubs providing connecting service between cities in the Midwest and the Eastern United States. Only certain connections make sense, depending on geography. The more circuitous the route, the more expensive the ticket and the less likely that option will be chosen even among passengers who do not have the ability to enjoy nonstop service. For example, connections from origins or destinations east of

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[7] *Id.*

[8] The airport pairs I list above have, in many instances, close-in airports which may serve as substitutes for *some* passengers. For example, Midway Airport may be a substitute for some classes of customers for flights to O'Hare. However, for some classes of customers, such as time-sensitive business passengers, such airports may not be acceptable substitutes. In some instances, however, close-in airports would need to be considered in the analysis. For example, Washington-Dulles and National Airport may be close substitutes. Thought would have to be given to JFK/La Guardia/Newark with respect to the New York City metropolitan area.

Colorado in the Midwest to East coast destinations may only have as reasonable connections options the hubs of the merging firms or the hubs of Northwest/Delta. In other words, after the merger of Northwest and Delta, consumers in the Midwest may face increasingly limited choices—mainly between Northwest/Delta and United/Continental in terms of connecting from the Midwest heading eastbound. These two entities would have hubs at O'Hare, Cleveland, Cincinnati, Minneapolis/St. Paul, Memphis and Detroit.

The potential injury to connection markets is also potentially true on the eastern seaboard, where reasonable connections up and down the east coast are potentially reduced to three airlines (U.S. Airways out of Charlotte and Philadelphia, United/Continental out of Newark and Dulles, and Delta/Northwest out of New York).

c. The Two Carriers Are Potential Competitors

In other markets, United and Continental may be potential competitors[9] in hub to hub routes. One example might be Los Angeles – Houston, where United might have provided nonstop service. The threat of that potential nonstop service may in some cases be sufficient to provide a competitive response on the route even though United is currently not providing the service. In addition, there are numerous potential competition opportunities in connection markets.

[9] *See* Darren Bush and Salvatore Massa, *Rethinking the Potential Competition Doctrine*, 2004 WIS. L. REV. 1035; John Kwoka, *Non Incumbent Competition: Mergers Involving Constraining and Prospective Competitors,* 52 CASE W. RES. L. REV. 173 (2001-2002).

d. Competition for Contracts May Be Injured.

As the government stated in its press release concerning United/U.S. Airways, major airlines bid for high volume contracts with large corporations, "negotiating discounts to their airfares in return for a corporation's commitment to concentrate travel on the airline."[10] United and Continental may compete vigorously with each other for these contracts, particularly when the corporation requires significant travel on nonstop routes where the companies compete. Moreover, the sheer size of the combined system may make it more difficult for smaller carriers to compete for those contracts.

e. The Combination May Foreclose Downstream and Upstream Markets

Airlines may be less vertically integrated than in the past, with airlines outsourcing maintenance and other items not core to their business. However, there are still vertical implications for any merger in the airline industry. Specifically, care must be taken to examine the nature of any contract vital to the core function of providing air passenger service. In particular, contracts between the merging parties and vendors and suppliers should be examined to determine whether there is the potential that the combined firm could foreclose competitors from obtaining vital services.

As an example, the combined firm would potentially have the ability to eliminate downstream marketers and other product offerings, focusing customer attention solely to its website. It could, for example, fully withdraw from offering products to Orbitz, Expedia, and other online travel sites, or at least secure more favorable terms from them. It could also, for example, eliminate bundled offerings with some partners (such as hotel-

[10] http://www.usdoj.gov/atr/public/press_releases/2001/8701.htm.

airfare vacation bundles), or at least renegotiate more favorable terms that might not have been obtained if competition had remained the status quo.

The upshot is that sellers in downstream and upstream markets will have fewer buyers to whom they can sell services. Hence, where buyers are few, they have reduced bargaining power, distorting market competition.

f. Follow-on Mergers May Lead to Further Anticompetitive Issues

At the time of announcement of the Northwest/Delta merger, it was thought by many that the merger may lead to follow-on mergers. The one most contemplated in the popular media at the time was a merger between United and Continental. Follow-on mergers occur because the competitors of the merging parties perceive that there is some potential advantage to merger and consolidation, regardless of the veracity of that notion.

Once an industry is concentrated, follow-on mergers raise serious issues, including further reduction in nonstop and connect service along the lines described above. While this hearing is not explicitly about mergers not yet announced, it is important to keep in mind that such mergers are likely. Follow-on mergers raise other concerns not previously addressed in this statement.

It is important that the Department of Justice and anyone wanting to understand antitrust law understand the plans and motivations for follow-on mergers. Follow-on mergers in times of industry distress (perceived or actual) are almost inevitable. Such an understanding is particularly important where the industry in question is a network industry such as airlines, where firms not only compete head to head on a nonstop basis, but where the systems as a whole serve the basis of competition. It is unclear to me how five systems will offer consumers better service when it seems impossible in an already highly concentrated market for the airlines to do so.

g. Entry by Low Cost Carriers Will Not Cure These Effects

Low cost carrier [LCC] entry will be unlikely to cure the most egregious anticompetitive effects of the merger. As the American Antitrust Institute pointed out in its white paper concerning the Northwest/Delta transaction:

> Empirical evidence supports the notion that LCCs could be expected to serve as a competitive constraint only on high-density routes. LCC entry into smaller markets served more efficiently by hub-and-spoke networks of the legacy carriers like Delta and Northwest would undermine the cost-effectiveness of their existing point-to-point networks. Delta/Northwest are thus unlikely to face a competitive threat from LCCs on more thinly-traveled routes. And on high-density routes, the proposed merger creates the most egregious increases in concentration, making entry on a viable scale by LCCs that do not currently operate in those markets even less probable (and less attractive). Moreover, there is a compelling argument that because airlines face each other in several markets, the fear of retaliation in one market diminishes the incentive to compete vigorously in another.[11]

This argument applies with equal veracity to the United/Continental merger. Moreover, should an LCC enter a route in which the combined carrier holds monopoly power, there is great risk that the incumbent carrier will match the LCC's fares and add capacity to the route, eliminating the ability of the LCC to exceed or even achieve break even load factors such that the LCC will be profitable on the route.[12]

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[11] AMERICAN ANTITRUST INSTITUTE, THE MERGER OF DELTA AIR LINES AND NORTHWEST AIRLINES: AN ANTITRUST WHITE PAPER 18 (2008).
[12] United States v. AMR Corp., 140 F. Supp. 2d 1141 (D. Kan. 2001), *aff'd*, 335 F.3d 1109 (10th Cir. 2003).

III. WHAT ARE THE BENEFITS OF THE MERGER?

a. Cost Savings or Market Power?

According to United and Continental's press release:

> The merger is expected to deliver $1.0 billion to $1.2 billion in net annual synergies by 2013, including between $800 million and $900 million of incremental annual revenues, in large part from expanded customer options resulting from the greater scope and scale of the network, and additional international service enabled by the broader network of the combined carrier. Expected synergies are in addition to the significant benefits derived from the companies' existing alliance and expected from their future joint venture relationships. The combined company is also expected to realize between $200 million and $300 million of net cost synergies on a run-rate basis by 2013. One-time costs related to the transaction are expected to total approximately $1.2 billion spread over a three-year period.[13]

The language of the press release is interesting. Ordinarily, one speaks of efficiencies in terms of reducing costs. However, the benefits arising from cost cutting are pegged by the companies at around $200- $300 million. By far the larger portion purportedly will arise from some revenue enhancements related to the scope and scale of operations.[14] It is difficult to determine from the press release how these efficiencies will miraculously appear, particularly as it does not appear from the merger website that the company anticipates closing any hubs.[15]

However, it is possible to speculate as to the efficiencies which might be obtained from the transaction. The first potential efficiency might arise from the rationalization of the combined firm's fleets. For example, Delta and Northwest argued that the nature of

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[13] *Available* at http://www.unitedcontinentalmerger.com/press-release.
[14] *See* http://www.unitedcontinentalmerger.com/press-release.
[15] As I point out *infra*¸ the antitrust enforcement agencies do not view anticompetitive reductions in output or service and accompanying increases in fares as "efficiencies." Instead, they are redistributions of wealth from consumers to the firm with monopoly power.

Delta and Northwest's aircraft size were different, with Delta having more mid-range capacity and Northwest having low and large capacity aircraft. With complementary fleets, the merged firm could "right-size" aircraft on routes, allowing the proper capacity to meet demand.

More questions must be asked concerning this type of proposed efficiency. Have the airlines been buying the wrong gauge of equipment such that they have been mismanaging capacity on their routes? Is it not possible for the airline companies to rationalize their fleets absent the merger? In which routes are capacity mismatched with demand? With respect to the last question, one might argue that the greatest benefits might arise from international route capacity rationalization. However, such an efficiency gain does not cure a loss of competition in United States nonstop and connect markets.

A second potential efficiency, one seemingly argued in the United/Continental press release, arises from an airline industry specific phenomenon. It could be argued that network airlines are trying to reach optimum scope or "presence" not yet achieved by their already enormous size, allowing them to broaden their network in any given market so they can provide more destinations to the traveling public served by the system. The argument suggests both a gain in terms of presence within particular routes and over the system as a whole.[16]

[16] "As for service, [Continental CEO] Smisek said the new United will focus on increasing the number of business-class travelers, since they pay more for their airline tickets and bring in more revenue. But this will not be at the expense of the everyday people who fly coach, he said." *CEO: United-Continental Deal Won't Mean Fare Hikes*, *available* at http://cbs2chicago.com/business/united.continental.merger.2.1673675.html. This statement suggests that somehow the merged airline will be able to yield manage such that business passengers will elect to pay even higher fares without concern that those passengers will take advantage of other fare classes. Ordinarily, airlines limit lower classes of fares to avoid such "spill" from higher fare categories.

The problems with this assertion are manifold. To begin, it is not entirely clear how this strategy translates to any efficiencies or cost savings, apart from the fleet rationalization argument described above. To the extent that the argument involves tightly run hubs yielding efficiencies, the argument should be treated with caution. As the American Antitrust Institute properly pointed out in its white paper on the Northwest/Delta merger:

> Past a certain point . . ."hubbing" can neutralize or even negate economies of density. For example, bigger networks create peak-load problems because network effects encourage a hub carrier to bunch its flights at peak times. This increases the disparity during the day in the number of arrivals and departures and creates problems for efficient staffing of gate, ticket, and maintenance personnel. Bunching of flights at hubs occurs even at the cost of additional delays to a carrier's own flights and is the largest contributor to air traffic congestion. Indeed, empirical research demonstrates that as networks become larger (e.g., through merger), economies of scale and scope begin to diminish.[17]

In short, the efficiency argument here requires greater specificity. At its inception it is at best is illusory and ephemeral.

But the real concern is that the presence and accompanying revenue effect relates to the monopoly power of the combined entity post merger. With a reduction in network carrier competition, the only competitors capable of mitigating potential monopoly power on particular city-pair routes are low costs carriers.[18] The problem is that the very "efficiencies" described by this theory are substantial barriers to entry for any non-network competitor. [19] In other words, that which purportedly makes the airlines stronger

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[17] AMERICAN ANTITRUST INSTITUTE, THE MERGER OF DELTA AIR LINES AND NORTHWEST AIRLINES: AN ANTITRUST WHITE PAPER 14 (2008).

[18] *See* U.S. GEN. ACCOUNTING OFFICE, AIRLINE INDUSTRY: POTENTIAL MERGERS AND ACQUISITIONS DRIVEN BY FINANCIAL AND COMPETITIVE PRESSURES 39 (2008) [hereinafter AIRLINE INDUSTRY GAO REPORT.

[19] The carriers are asserting an economy of scope that is not exhausted unless a carrier gets at least as big as the combination of United and Continental. Moreover, the purported efficiency gain is not through direct cost reduction, but through enhanced benefits to consumers due to network interconnections that can only

also kills competitors and presumably results in higher prices and less competition. Thus, such combinations do not yield "efficiencies" in the Department of Justice/Federal Trade Commission Horizontal Merger Guidelines sense of the term.[20]

As with all mergers, unless more concrete and tangible information is provided, the only realistic efficiency is the reduction in management and staff. The problem is that there is a rich history of airline mergers. There is little history of, in spite of these transactions in the past, the airline industry improving profitability.[21] The default position for the government, therefore, should be that efficiencies must be proven, not merely asserted.[22] As I will discuss in the next section, I have come to question whether that is what occurs in reality, particularly in industries which are prone to distress.

b. "Efficiencies" Analysis Is King, To the Detriment of Consumers

As the Department of Justice/ Federal Trade Commission Horizontal Merger Guidelines state,[23] merger specific efficiencies do not arise from anticompetitive reductions in output or service; and are cognizable.[24] If the efficiencies "likely would be

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be captured if the carriers are merged (an alliance isn't enough). The empirical predicates for these claims are unproven and theoretically highly questionable for the reasons set forth in the prior discussion.

[20] My concern is exacerbated when competitors of the merging parties endorse the transaction. "'It makes the industry more efficient. We end up with less fragmentation. It makes the industry stronger and therefore makes US Airways stand-alone stronger,'' [U.S. Airways CEO] Parker said." *U.S. Airways CEO Supports UAL/CAL Merger*, *available* at http://news.airwise.com/story/view/1274229288.html. Efficiencies in one system do not transfer to that of a competitor. Therefore, the only benefit that U.S. Airways would obtain is from reduced competition and the associated reduction in capacity.

[21] *See* GAO REPORT at 1.

[22] While Delta operated at a loss in 2009, some other carriers are seeing a more rapid return to profitability. Southwest and Continental, for example, were reporting positive profits in the fourth quarter of 2009.

[23] "The Agency will consider only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects. These are termed merger-specific efficiencies. Only alternatives that are practical in the business situation faced by the merging firms will be considered in making this determination; the Agency will not insist upon a less restrictive alternative that is merely theoretical." Horizontal Merger Guidelines, Section 4.

[24] *Id.*

sufficient to reverse the merger's potential to harm consumers in the relevant market, *e.g.*, by preventing price increases in that market,"[25] they are relevant for purposes of determining the net effect of the transaction. However, "the Agency will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies."[26]

This recitation of the Horizontal Merger Guidelines is important because, in my opinion, it has recently been the case in much of antitrust law that efficiencies have been a trump card, allowing transactions to proceed and anticompetitive conduct to continue even where efficiencies are speculative at best. It should not be the case, given the serious potential for anticompetitive harm in these markets that the purported efficiencies are taken at face value. Any purported efficiencies should meet the requirement that they are cognizable, verifiable, merger-specific, and not obtainable via alternatives less restrictive to competition.

As evidence to support my concern, one need only compare the Department of Justice's (DOJ) press release in the proposed United/U.S. Air merger to its press release in the Northwest/Delta merger. In the former case, the DOJ's concerns[27] were hub-to-hub nonstop markets, particularly DC/Baltimore nonstop markets, as well as east coast connect markets. The DOJ also raised concerns in the press release as well over

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[25] Id.
[26] Id.
[27] Press Release, Department of Justice – Antitrust Division, Department of Justice and Several States Will Sue to Stop United Airlines from Acquiring US Airways: Deal Would Result in Higher Air Fares for Businesses and Millions of Consumers (July 27, 2001), *available* at http://www.usdoj.gov/atr/public/press_releases/2001/8701.htm.

international routes, corporate and business arrangements, and enhanced dominance in airline service in general.[28] The press release did not mention efficiency claims.

In contrast, in its press release in Delta/Northwest, the DOJ stated that the "two airlines currently compete with a number of other legacy and low cost airlines in the provision of scheduled air passenger service on the *vast majority of nonstop and connecting routes* where they compete with each other."[29] The implication of this statement was that in some markets there would be a substantial loss of competition, but the DOJ statement never identified how many or which markets were to be sacrificed for the sake of "efficiencies." The press release continued "In addition, the merger *likely* will result in efficiencies such as cost savings in airport operations, information technology, supply chain economics, and fleet optimization that will benefit consumers. Consumers are also likely to benefit from improved service made possible by combining under single ownership the complementary aspects of the airlines' networks."[30]

The difficulty with the press release is that it lacks sufficient information to determine upon what information the DOJ relied in rendering its decision. It also makes the efficiencies seem speculative and dubious, or at the very least vague. However, if the efficiencies were as purported by the CEOs of the companies in the press and to this Committee, there is much reason to believe that the DOJ's examination appears to have ignored anticompetitive effects that might occur in the remainder of the nonstop markets in which they compete and instead focused on the efficiencies that might never occur.

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[28] *Id.*

[29] *Delta Airlines and Northwest Airlines Merger Approved*, Oct. 29, 2008, http://pressmediawire.com/article.cfm?articleID=19588.

[30] *Id.*

The result is an incipiency standard turned on its head.[31] In other words, instead of saying that a merger that might lead to less competition must be halted, the DOJ seems to be saying in some instances that a merger that might lead to more efficiency must be approved. Mergers in industries under distress or in the face of broader economic crisis appear to yield fewer questions from enforcement agencies in the moment about future anticompetitive effects while efficiencies are more heavily weighed. Yet the history of airline mergers already teaches us the outcome. Airlines have consolidated but have not improved profitability.[32] The passenger flying experience is at an all-time low,[33] and passengers are seeking legislative protections that might otherwise not be required were competition effective.[34] In short, the cycle of consolidation, crisis, consolidation continues in the airline industry.[35]

What may explain this apparently inconsistent result? If, as the foregoing analysis has demonstrated, the dominant incumbent airlines are able, by use of their networks and differential prices, to exclude more efficient new entrants, then, what we would observe is markets with firms, i.e., the dominant airlines, barely breaking even and more efficient rivals excluded. What this shows is that evidence of current or even

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[31] *See* 15 U.S.C. § 18 (prohibiting acquisitions the effect of which "may be substantially to lessen competition or to tend to create a monopoly"). *See also* Robert H. Lande, *Resurrecting Incipiency: From Von's Grocery to Consumer Choice*, 68 ANTITRUST L.J. 875 (2001).

[32] Dempsey, *infra* note 35, at 432-34 (detailing the economic history of the airline industry and its corresponding lack of profitability).

[33] *See* http://businesscenter.jdpower.com/news/pressrelease.aspx?ID=2009121. *See also* Jad Mouawad, *In United-Continental Deal, Birth of A Behemoth*, available at http://www.nytimes.com/2010/05/04/business/04air.html. ("[CEO Smisek] has started charging for exit-row seats, eliminated Continental's free food on domestic flights and quickly matched a bag fee increase that Delta Air Lines introduced. He has also criticized as "inane" the new federal rule imposing fines for tarmac delays of more than three hours and compared Continental's previous membership in the SkyTeam alliance, where Delta Air Lines was the dominant carrier, as "a lot like being married to a woman who wants to poison your food.")

[34] *See id.*

[35] Paul Dempsey's work has demonstrated that, despite increased consolidation, the industry is worse off than ever. *See* Paul Dempsey, *The Financial Performance of the Airline Industry Post-Deregulation*, 45 HOUS. L. REV. 421 (2008).

projected price-cost relationships may not indeed reveal the likely competitive effects of a merger. In the case of airlines, to be specific, the continued mergers among the historic firms appear as much intended to concentrate market power among an increasing small group of inefficient firms as to advance any kind of legitimate goals. Yet, the potential for such firms to retain over a long period of time dominance is also a real and substantial risk because as dominance increases the capacity of potential entrants to enter and compete successfully will diminish.

IV. WHAT IS THE REAL REASON FOR THIS MERGER?

A second consideration that is not addressed seriously under modern antitrust analysis is the purpose of the merger. While outsiders lack the inside understanding of the United or Continental management, it should not be presumed that the merger's purpose is profit maximization and efficiencies. Mergers are marriages. People tend to get married for a variety of reasons. Many times, these reasons are bad. Often times, people do not want to be alone during the difficult times of their lives. Airlines, during a time of high fuel costs and a looming recession with associated reduced demand, perhaps sought out bad marriages out of fear and as a knee jerk reaction to increased difficulty. And when times are apparently better, they will assume that the marriage will make them even happier. It is difficult to see how two organizations in the same dire straits will, when combined, produce a better airline. But it is easy to see that a merger is more like a DeBeers diamond: *i.e.*, forever. Once the higher level of concentration is obtained, a growing economy may not yield additional competitive airlines.

Business as usual, albeit in a much-larger combined company, will apparently not translate into an improved customer experience. Business as usual has not been working, despite repeated previous eras of consolidation, and it should not be incumbent upon the airline passenger to subsidize a potentially anticompetitive merger because a dominant carrier has the ability to extract dollars from the wallets of consumers.[36]

The fear of the major carriers is understandable. Their business model has not proven to be all that profitable. However, it should not be the case that those factors are relevant to any antitrust analysis. These firms are not failing in any sense of the term, except perhaps failing to understand the nature of their own markets such that they continue to look towards consolidation as the answer to every challenge.

V. CONCLUSION

For many years now I have been greatly concerned about the role of antitrust laws in deregulated industries. It is not a lack of faith in my former colleagues at the staff level at the Department of Justice, as they are hard-working and dedicated public servants who, when properly led, have served to protect competition and consumers. Rather, my concern is about the role of antitrust law in general, particularly where there are serious high-stakes mergers coming to the forefront, particularly in the airline industry.

First, antitrust law should take into account not only the obvious anticompetitive harms associated with a merger. In the case of airlines, nonstop competition is the obvious relevant analysis. However, other forms of competition are important in the

[36] *See, e.g.*, Gary Stoller, *Airlines Add $10-$30 fees for peak travel days in summer*, available at http://www.usatoday.com/travel/flights/2010-05-24-1Aairsurcharge24_ST_N.htm. Depending on the airline, fees have been charged to consumers for checked-in baggage, exit row seating or other premium seats, carry-on baggage, and food.

airline industry, a fact that the Department of Justice attempted to teach us in its United/U.S. Airways press release. Other important factors include connect competition, alliance competition, competition for business contracts, and the overall level of concentration in the number of systems available. It is my hope that the Department of Justice is as thorough in its analysis of this transaction as it was in that case.

The problem is that in recent time efficiencies analyses have become the end of the analyses. When efficiencies, real, potential, or imagined are present, it appears from recent antitrust lore, including some recent Department of Justice decisions, that antitrust should ignore the competitive issues underlying any transaction. That is not what antitrust law is about, it is not what the Horizontal Merger Guidelines teach us, and it is certainly not the way to run a competition policy. Efficiencies, even if proven, must mitigate anticompetitive harms caused in the relevant market due to the transaction's consummation.

This Committee can use the United/Continental transaction to examine these issues and restore antitrust law to its rightful place as the Magna Carta of free enterprise.[37] It can also use this merger to ask the harder questions as to the nature of antitrust analysis, even as such analysis has been eroded partly by certain recent Department of Justice investigations, but also by recent Supreme Court decisions, with one very recent exception.[38]

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[37] United States v. Topco Assoc., 405 U.S. 596, 610 (1972).

[38] *See, e.g,* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 127 S. Ct. 1069 (2007); Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007); Credit Suisse Secs. (USA) LLC v. Billing, 127 S. Ct. 2383 (2007); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007); Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); *c.f.* American Needle, Inc. v. National Football League, __ U.S. ___ (slip op. May 24, 2010).