

ONE HUNDRED ELEVENTH CONGRESS  
**Congress of the United States**  
**House of Representatives**

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
2157 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6143

Majority (202) 225-5051  
Minority (202) 225-5074

June 15, 2010

Mr. Jeffery A. Smisek  
Chairman, President, and CEO  
Continental Airlines, Inc.  
P.O. Box 4607  
Houston, TX 77210-4607

Dear Mr. Smisek:

The Domestic Policy Subcommittee of the House Oversight and Government Reform Committee here requests documents from Continental Airlines, Inc. ("Continental") in furtherance of the Subcommittee's inquiry into the proposed merger between UAL Corporation ("United") and Continental. The post-merger United Airlines (the "New United"), with projected revenues near \$30 billion, would be the world's largest airline measured in terms of carrying capacity and volume of passenger traffic. The merger is a culmination of Continental's efforts over the past two years to integrate its operations with those of United. Less than a year ago, the Department of Transportation ("DOT") granted Continental antitrust immunity to join United in a marketing alliance and joint venture over the strenuous objections of the Department of Justice ("DOJ").

The proposed full-fledged merger raises a number of significant policy concerns and antitrust issues that must be considered by regulators under section 7 of the Clayton Act and the Horizontal Merger Guidelines (the "Guidelines").<sup>1</sup> Among others is the prospect that the New

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<sup>1</sup> The Guidelines mandate a five-part inquiry: First, the Agency assesses whether the merger would significantly increase concentration and result in a concentrated market, properly defined and measured. Second, the Agency assesses whether the merger, in light of market concentration and other factors that characterize the market, raises concern about potential adverse competitive effects. Third, the Agency assesses whether entry would be timely, likely, and sufficient either to deter or to counteract the competitive effects of concern. Fourth, the Agency assesses any efficiency gains that reasonably cannot be achieved by the parties through

United will exercise market power to the detriment of consumers through the adoption of anticompetitive measures, including service cuts to certain regional locations and price increases that will subsequently be adopted industry-wide because of reduced industry competition and capacity. Furthermore, fare increases and service cuts and associated job reductions threaten to disproportionately harm Cleveland and surrounding communities now served by Continental's Cleveland hub irrespective of whether Cleveland loses its hub status.

The ability of regulators to enforce antitrust law rests in part on the veracity of Continental's various representations, which is an aspect of the merger application process where I have additional concerns. There is reason to believe that Continental may not have been completely forthright with Congress and regulators with respect to the proposed merger.

In 2009, the DOT, over DOJ's strong objection, granted Continental's application for antitrust immunity to join United and 20 other airlines in the Star ATI Alliance, a marketing alliance allowing for code sharing, coordinated processes for reservations and baggage transfer, through-ticketing, frequent flyer reciprocity and lounge sharing; and to launch Atlantic Plus Plus ("A++"), an integrated joint venture among Continental, United, Air Canada, and Lufthansa, permitting participants to jointly manage capacity, scheduling, pricing, revenue management, sales, marketing, and to share revenue on certain transatlantic routes. In a May 27, 2010 Senate hearing on the proposed merger, Senator John Cornyn stated that Continental officials seeking his support for its antitrust immunity application informed him that immunity for the alliance and joint venture was an attractive alternative to Continental merging with United. Continental further explained to Senator Cornyn that a merger "wasn't in the best interest of its shareholders, employees or the communities [Continental] serves," antitrust immunity for the alliance and joint venture "would provide much of the benefit of a merger without the labor integration and financial risks," and "Houston and Cleveland would be some of the biggest losers in terms of jobs" in the event of a merger.<sup>2</sup> Following these representations, Senator Cornyn joined members of the Texas Congressional delegation in a letter to DOT Secretary Ray LaHood supporting antitrust immunity for Continental as a mechanism for Continental and United "to achieve additional network reach *without moving forward with a full-scale merger.*"<sup>3</sup> Similarly,

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other means. Finally the Agency assesses whether, but for the merger, either party to the transaction would be likely to fail, causing its assets to exit the market. *See* Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* (April 8, 1997) (online at [www.justice.gov/atr/public/guidelines/hmg.htm](http://www.justice.gov/atr/public/guidelines/hmg.htm)).

<sup>2</sup> *See* Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy and Consumer Rights, *Hearing on The United/Continental Airlines Merger: How Will Consumers Fare?* 111th Cong. (May 27, 2010) (online at [judiciary.senate.gov/hearings/hearing.cfm?id=4607](http://judiciary.senate.gov/hearings/hearing.cfm?id=4607)).

<sup>3</sup> Letter from Senator Kay Bailey Hutchinson, Senator John Cornyn, et al. to Raymond H. LaHood, Secretary, DOT (Jan. 23, 2009) (online at

Cleveland's Mayor, Frank G. Jackson, wrote DOT supporting antitrust immunity as a way to "ensure the long term viability of [Continental's] Cleveland Hub,"<sup>4</sup> and Ohio Senators George V. Voinovich and Sherrod Brown wrote DOT supporting antitrust immunity to "help *both* airlines maintain their financial viability while operating as *independent competitors*."<sup>5</sup>

Continental's pitch of the alliance and joint venture as an advantageous alternative to the merger when possibly gearing up the proposal for the same merger that was finalized only a year later calls into question its credibility. Perhaps more importantly, these earlier representations contradict current representations of Continental (and United) on issues central to the merger's legality under the Clayton Act and the Guidelines, including the general issue of whether the merger would be in the interest of its shareholders, employees, and communities; and subsidiary issues regarding the extent of the financial risk of the merger, the likelihood and magnitude of jobs losses in Houston and Cleveland, and whether there are any additional benefits of merger over efficiencies already or expected to be realized through entry into the Star ATI Alliance and the launch of the A++ joint venture.

More generally, Continental's apparent willingness to make whatever representations are necessary to elected officials and regulators to garner support for its plans casts doubt on both Continental's stated motivations for the present merger and its intended post-merger conduct. Continental and United have stated that they have no present plans to close hubs in a New United and refuse to offer any predictions whether Cleveland would lose its status. They have also stated that the purpose and likely effects of the merger is not to restrict services or consolidate hubs but to moderately decrease overhead costs and more substantially realize between \$800 and \$900 million of revenue gains by more effectively routing network customers through hubs for more profitable business and international flights, from increasing market share, and from more efficiently deploying New United's larger fleet, matching plane capacity with passenger load.<sup>6</sup> Not surprisingly, Continental does not list cutting flights or raising fares as a means to revenue growth.

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[www.regulations.gov/search/Regs/home.html#docketDetail?R=DOT-OST-2008-0234](http://www.regulations.gov/search/Regs/home.html#docketDetail?R=DOT-OST-2008-0234)  
(emphasis added).

<sup>4</sup> Letter from Frank G. Jackson, Mayor of Cleveland, to Raymond H. LaHood, Secretary, DOT (April 2, 2009) (online at [www.regulations.gov/search/Regs/home.html#docketDetail?R=DOT-OST-2008-0234](http://www.regulations.gov/search/Regs/home.html#docketDetail?R=DOT-OST-2008-0234)).

<sup>5</sup> Letter from Senator George V. Voinovich and Senator Sherrod Brown to Raymond H. LaHood, Secretary, DOT (Jan. 30, 2009) (online at [www.regulations.gov/search/Regs/home.html#docketDetail?R=DOT-OST-2008-0234](http://www.regulations.gov/search/Regs/home.html#docketDetail?R=DOT-OST-2008-0234)) (emphasis added).

<sup>6</sup> See, e.g., United, *Investor Presentation: Let's Fly Together*, at 18-19 (May 3, 2010) (online at

However, many of the numerous market observers contacted by Subcommittee staff – including some who support the merger – take a different view. First, they doubt the magnitude of the merger-specific efficiencies, including United and Continental’s projection of revenue gains realized by rationalizing the use of a combined fleet or by more efficient use of their networks. A substantial portion of the claimed network efficiency gains may already have been realized by Continental joining United in the Star ATI Alliance and the A++ joint venture. Moreover, analysts and scholars have pointed to the extensive and rocky track record of past airline mergers: the purported cost and revenue synergies of past airline mergers have almost never materialized; and, despite the theoretical ability of low-cost and regional carriers to enter markets exited by merging airlines, service cuts and loss of hubs have been a common consequence of past mergers. Many analysts flatly predict that Cleveland will lose its hub and service to communities formerly served by the hub will not be supplied either New United service out of surviving hubs or low-cost carriers entering the market.<sup>7</sup>

Perhaps more troubling, industry analysts and scholars regard the proposed merger as way in which Continental and United can eliminate up to ten percent of their post-merger capacity and increase their and the industry’s profitability by subsequently raising fares. According to many merger supporters, the industry’s tens of billions of dollars of losses since deregulation are largely a product of destructive competition among airlines that has led to overcapacity and artificially low prices.<sup>8</sup> Those who approve the merger applaud the fact that the New United and

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[www.unitedcontinentalmerger.com/sites/default/files/pdfs/FINAL+Investor+Presentation%5B1%5D.pdf](http://www.unitedcontinentalmerger.com/sites/default/files/pdfs/FINAL+Investor+Presentation%5B1%5D.pdf)).

<sup>7</sup> See Testimony of Professor Darren Bush of the University of Houston Law School and Mr. William J. McGee, Consumers Union, *Hearing on The United/Continental Airlines Merger: How Will Consumers Fare?* 111th Cong. (May 27, 2010) (online at [judiciary.senate.gov/hearings/hearing.cfm?id=4607](http://judiciary.senate.gov/hearings/hearing.cfm?id=4607)) (fiercely criticizing the proposed merger and discussing historical evidence of severe service reductions not sufficiently mitigated by the entry of low-cost carriers into de-hubbed or more greatly concentrated markets, including the elimination of 840 jobs and 123 flights from the Delta’s hub in Cincinnati after the 2008 Delta-Northwest merger). The testimony also includes a litany of possible anticompetitive consequences of the merger cognizable under the Clayton Act, including vertical restraints on competition, declining service quality, and the creation of new airline that is “too big too fail.”

<sup>8</sup> See, e.g., Paul Mifsud, Carlos Bonilla, and Vaughn Cordle, *United + Continental: A Big Win for All Stakeholders - US/AA Next?* (May 3, 2010) (online at [seekingalpha.com/instablog/398764-vaughn-cordle/66397-united-continental-a-big-win-for-all-stakeholders-industry](http://seekingalpha.com/instablog/398764-vaughn-cordle/66397-united-continental-a-big-win-for-all-stakeholders-industry)). While the arguments that destructive competition and overcapacity are the root of the industry’s losses and consolidation is the appropriate mechanism for industry’s sustainable profitability is advanced by merger supporters, I find its premise unpersuasive and its proposed remedy deeply troubling from a legal and public interest perspective.

the industry in general would profit from the decreased number of market participants in efforts to reduce capacity and raise fares.

This possible narrative is of great concern to me and I would hope to DOJ. First, increased fares and declines in service are prototypical examples of the adverse competitive effects of the exercise of market power contemplated under step two of the Guidelines. Second, with respect to efficiency gains, the guidelines require DOJ to assess "any efficiency gains that reasonably cannot be achieved by the parties through other means." It is quite possible that any efficiency gains that are trumpeted as a result of the merger, to the extent that they are cognizable and not vague and speculative, may have already been or will soon be realized through the Star ATI Alliance and A++ joint venture. Finally, cognizable efficiency gains "are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service."<sup>9</sup> Revenue gains realized by exercising market power to cut service and increase fares should not count.

I am encouraged that, pursuant to this administration's commitment to "vigorous antitrust enforcement in this challenging era," DOJ's applied the same Guidelines relevant to the merger review to appropriately interrogate Continental's assertion of the rationale for and efficiency gains to be expected from its bid to enter the alliances. Given the importance of the decision whether to approve the merger and the complexity and fact-specific nature of the claims Continental has adduced in support of the merger, I hereby request the following documents to further the Subcommittee's inquiry:

- (1) All documents relating to any representation that Continental made to any government agency or to the public, during the period it was seeking regulatory approval for its entry into the Star ATI Alliance and the A++ joint venture, relating to Continental's then or future intentions or plans to merge with United; and
- (2) All documents relating to whether there would be any revenue gains realized by the proposed merger with United above those already realized by joining the Star ATI Alliance and the A++ joint venture, during the period Continental began to seek regulatory approval for its entry into the Star ATI Alliance and the A++ joint venture to the present; and
- (3) All documents relating to any planning for, or financial modeling/projections of, a possible Continental merger with United (including but not limited to documents related to job cuts, service reductions, and fare hikes as a possible goal or result of

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<sup>9</sup> See J. Bruce McDonald, Deputy Assistant Attorney General, Antitrust Division, DOJ, *Antitrust for Airlines* (Nov. 3, 2005) (online at [www.justice.gov/atr/public/speeches/217987.htm](http://www.justice.gov/atr/public/speeches/217987.htm)).

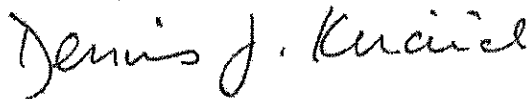
Mr. Jeffery A. Smisek  
June 15, 2010  
Page 6

the merger), during the period Continental began to seek regulatory approval for its entry into the Star ATI Alliance and the A++ joint venture to the present.

The Oversight and Government Reform Committee is the principal oversight committee in the House of Representatives and has broad oversight jurisdiction as set forth in House Rule X. An attachment to this letter provides information on how to respond to the Subcommittee's request.

I request that you provide these documents as soon as possible, but in no case later than 5:00 p.m. on Wednesday, June 30, 2010.

  
Sincerely,



Dennis J. Kucinich  
Chairman  
Domestic Policy Subcommittee

Enclosure

cc: Jim Jordan  
Ranking Minority Member