

BEFORE THE  
UNITED STATES DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.

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COMPUTER RESERVATIONS SYSTEM ) Docket Nos. OST-97-2881,  
(CRS) REGULATIONS ) OST-97-3014, and  
) OST-98-4775  
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COMMENTS OF ALASKA AIRLINES, INC.  
AND HORIZON AIR INDUSTRIES, INC.  
d/b/a HORIZON AIR

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DATED: September 22, 2000

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Alaska Airlines, Inc. and Horizon Air Industries, Inc., d/b/a Horizon Air (collectively referred to herein as “Alaska”)<sup>1</sup> submit these comments to the United States Department of Transportation (the “Department” or “DOT”) in response to the Department’s July 24, 2000 Supplemental Advance Notice of Proposed Rulemaking (“SANPRM”) concerning its Computer Reservations System (“CRS”) Rules, 14 C.F.R. Part 255. 65 FR 45551 (July 24, 2000). These comments are intended to supplement those filed by Alaska in this proceeding on December 23, 1997.

The July 24, 2000 SANPRM asks commenters to address two broad issues reflecting CRS-related market developments since the Department’s original ANPRM was issued in September 1997: whether the Department can and should extend the scope of the CRS Rules to cover (1) CRSs that are not airline-owned; and/or (2) various types of Internet websites through which airline tickets are sold.

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<sup>1</sup> Alaska Airlines and Horizon Air are both subsidiaries of Alaska Air Group, Inc.

The first of these market developments is the apparent trend toward non-airline ownership of CRSs. Ever since the CRS Rules were adopted by the Civil Aeronautics Board in 1984, they have applied only to CRSs that are owned by one or more airline. As a practical matter, that limitation has made little difference, for virtually all major CRSs have been airline-owned. In recent years, however, some CRSs appear to be divesting themselves of airline ownership in favor of public or other non-airline ownership. For the reasons set forth below, Alaska believes that the Department has clear legal authority to regulate non-airline-owned CRSs, and that it should exercise that authority to regulate all CRSs equally, whether they are airline-owned or not.

The other market development is the growing use of the Internet as a medium for shopping and purchasing air transportation. The Internet has created new channels through which airlines can sell their services directly to the public, by-passing traditional travel agents and even their own reservations agents. These channels do not follow any single pattern. They include single-carrier websites that list and sell only the sponsoring carrier's flights; single-carrier websites that offer the ability to purchase seats on multiple carriers; airline joint venture websites (such as Orbitz) which will offer the ability to purchase seats on a large number of carriers; websites (such as Travelocity) that are simplified travel products offered by the traditional CRSs for Internet use; and multi-carrier websites offered by companies that are otherwise unaffiliated with the airline industry (such as Microsoft's Expedia). As discussed below, Alaska believes that the Department clearly has the legal authority to regulate non-airline-owned Internet sites through which air transportation is sold, and that regulation of some, but not all, Internet websites is justified and necessary.

I. The CRS Rules Can And Should Apply to Non-Airline-Owned CRSs to the Same Extent That They Apply to Airline-Owned CRSs

As the Department explains in the July 24 SANPRM, one of the principal justifications for adopting the CRS Rules was that, absent federal regulation, an airline that owned a CRS would have both the ability and the incentive to manipulate its system to its competitive advantage in the downstream air transportation market and to the disadvantage of its airline competitors. See 65 FR at 45552. This rationale does not directly apply to non-airline CRS owners because non-airline owners do not compete in the downstream air transportation market and therefore arguably lack the incentive to manipulate their CRSs in competition-distorting ways.

In reality, however, non-airline owners of CRSs have a very substantial incentive to engage in practices that distort competition in the air transportation market: they can reap substantial revenue from selling bias and priority positions to the highest bidders, or by entering into other contractual arrangements in which one or a group of airlines is favored in return for direct or indirect compensation or services (e.g., promotional services). Such conduct inevitably results in the provision of misleading schedule and fare information to travel agents and consumers, and interferes with competition on the merits in the air transportation market. Indeed, that very type of conduct led to the adoption of the original anti-bias rule in 1984, and there is no reason to believe it would not happen again.

The very largest carriers would be able to command the most prominent display positions to the disadvantage of carriers lacking the financial resources (or the desire) to compete for the purchase of bias. The larger carriers would also be well-situated to demand (and likely receive) lower booking fees simply by threatening to participate at lesser levels of functionality or not at all. Smaller carriers without preferential arrangements with at least one major CRS would be

faced with appreciably higher distribution costs – putting upward pressure on their fares – and potential market foreclosure in various regions of the country. Only by extending the protections of the CRS Rules to non-airline-owned CRSs can these anticompetitive consequences be avoided.

Without regulation of non-airline-owned CRSs, moreover, it is unlikely that the market alone would be able to restore a competitive balance between favored and disfavored carriers. The Internet may provide an alternative method of reaching potential passengers, for example, but it has hardly replaced CRSs. Internet sales still represent a relatively small portion of all air transportation sales, and they are highly unlikely to approach sales through CRS-connected travel agents anytime in the foreseeable future. Multi-carrier Internet sites do not by-pass CRSs in any event; every major site uses a CRS as at least a database. Absent regulation, a non-airline CRS owner could also lock travel agent subscribers into the use of its system through long-term contracts, minimum booking requirements, and other practices that are denied to airline-owned CRSs, thus perpetuating the competitive imbalance between favored and disfavored airlines.

The distinction between airline-owned and non-airline-owned CRSs is not necessarily a meaningful one in any event. An airline may divest itself of direct ownership of a CRS while retaining effective control over the system through contractual ties or other means. Control – with or without ownership – enables a carrier to continue to manipulate the CRS to its competitive advantage in the downstream market. Exempting non-airline-owned CRSs from the scope of the CRS Rules, even where one or more airlines continues to control that CRS, could therefore result in the very type of anticompetitive impact the Rules were designed to prevent. But neither should the scope of the Rules turn on airline control, because a control relationship can take many diverse forms and be far less obvious or easy to establish than ownership.

Whether or not the CRS Rules apply to a particular system should not depend upon a complex factual investigation of the various strings through which the system may continue to be controlled by an airline. The only equitable solution, Alaska submits, is to apply the Rules equally to all CRSs, whether they are airline-owned or not.

The benefits of applying the rules to all CRSs equally would far outweigh the burdens. None of the four major CRSs in use in the United States could assert that compliance is a new requirement. Each has been subject to the Rules for many years, so a history of compliance already exists. Furthermore, experience with the regulations since their adoption in 1984 demonstrates that they impose no appreciable burden on the distribution of air transportation services.

There is little doubt that the Department has the legal authority to extend the CRS Rules to cover non-airline-owned CRSs. The Department's legal authority for issuing the existing CRS Rules is found at 49 U.S.C. § 41712, the current codification of Section 411 of the Federal Aviation Act. Section 411 provides in relevant part that “[T]he Secretary may investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation” (emphasis added). A “ticket agent” is defined in 49 U.S.C. § 40102(a)(40) as one who “as principal or agent sells, offers for sale, negotiates for, or holds itself out as selling, providing, or arranging for, air transportation.” Non-airline-owned CRSs clearly meet this definition: as agents of their participating carriers, they sell, offer to sell, provide, and arrange for air transportation. Alternatively, DOT could simply exercise its unquestioned jurisdiction over domestic and foreign airlines to prohibit them from selling tickets through non-airline-owned CRSs that engage in practices found to be unfair, deceptive, or anticompetitive.

## II. More Limited Rules Should Apply To Internet Websites

In general, there appears to be somewhat less justification for regulating the sale of air transportation through Internet websites than through CRSs used by travel agents. Travel agents typically subscribe to a single CRS, which traditionally has been the only effective vehicle through which an airline can make its fares and schedules accessible to that CRS's travel agent subscribers and those agents' customers. If a carrier does not participate in a particular CRS, then for practical purposes it is cut off from a substantial portion of its potential retailers. With few exceptions, therefore, every airline has been compelled to participate in every major CRS. The Internet, by contrast, provides a near-infinite number of channels through which any carrier may reach all Internet users. As long as multiple channels can provide reasonably comparable schedule and fare information, with similar ease of access, an airline does not risk cutting itself off from the universe of Internet users when it chooses not to participate, or is not allowed to participate, in any given website.

If any one site does achieve Internet dominance, however, then all airlines will be effectively compelled to participate in it, and the familiar problems of carrier dependence on a single means of reaching a substantial group of potential customers will soon reappear in the Internet context. The Department's paramount objective with respect to the Internet, therefore, should be to prevent any one channel from becoming the dominant portal for the sale of air transportation, i.e., the one channel that all Internet consumers must access in order to find and purchase the best fare and schedule combinations. In order to avoid such dominance, Alaska submits that DOT should prohibit website owners from imposing exclusionary terms (or the functional equivalent of exclusionary terms) on the site's airline participants, i.e., terms that forbid or inhibit airline participants from dealing with other Internet sites on whatever basis they

wish. Orbitz, for example, has been accused of providing substantial financial incentives to participating carriers that agree to offer Orbitz their very lowest fares on an exclusive basis. Without addressing the factual accuracy of this accusation, it seems clear that any such exclusionary practice should be barred. The Department should prohibit all websites from imposing exclusionary terms on their participants, and from offering financial incentives or disincentives that are the functional equivalent of exclusionary terms. In the absence of such a prohibition, a single channel such as Orbitz could well become the dominant Internet site because it would be the only site where consumers could be sure of finding the very lowest fares.

Alaska further believes that the CRS Rules as a whole should be extended to cover two types of websites: (1) sites that are owned and/or marketed by airlines that collectively account for more than a 50% share of the downstream U.S. air transportation market; and (2) sites that fail to disclose any airline sponsorship. “Sponsorship” in this context would include ownership, partial ownership, the purchase of bias, promotional arrangements, or other relationships that could reasonably be expected to encourage favoritism.

A site that is owned and/or marketed by airlines that represent more than half of the U.S. air transportation market is, virtually by definition, a dominant website: the airlines’ collective market power in the U.S. air transportation market can be easily translated into dominance in the Internet market. The airline owners and marketers have an obvious incentive to favor their site with their most attractive schedule and fare offerings, and by virtue of their collective share of the air transportation market, consumers could ill-afford to by-pass the site in their search for travel options. As a channel that is indispensable to consumers, non-owner/marketer airlines would then be effectively compelled to participate – and to do so on terms that, in the absence of regulation, could be dictated by their competitors, the airline owners and marketers.

The Rules should also be extended to websites with undisclosed airline sponsors. When an Internet consumer selects a channel with an airline brand (e.g., www.alaskaair.com), the consumer must reasonably anticipate that the site is likely to favor that carrier's flights. For this reason, Alaska believes that there is no compelling justification for applying the CRS Rules to single-carrier websites, or even to the websites of airline alliances such as the Star Alliance and **one**world, as long as the site's airline sponsorship is clearly disclosed to consumers on the site itself (and the alliance members do not account for more than 50% of the domestic air transportation market).

Multi-carrier websites without identified airline sponsors present a different situation. A consumer's expectations with respect to an apparently neutral website are presumably the same as those of a travel agent's customer: that no airline or group of airlines is favored over others. Indeed, the major travel websites often encourage this perception of neutrality by holding themselves out to the public as avenues to the lowest fares – at the same time they actively market display bias to the airlines. The risk of consumer harm is even more insidious in this situation, where the public is the direct user of the technology, than it is in the travel agent context. Unlike travel agents, consumers generally have little knowledge of how web-based search engines, and the CRSs that underlie them, can be manipulated; they are even more likely to assume that the information they are receiving is objective, when in fact it often is not.

Application of the CRS Rules, we submit, is justified with respect to such multi-carrier, apparently neutral sites. The Department should ensure that biased content in a site that is not identified as airline-sponsored is not permitted to deceive consumers or distort competition in the downstream air transportation market. The anti-bias portion of the CRS Rules, 14 C.F.R. § 255.4, for example, should apply to such websites in order to avoid consumer deception,

confusion, and the adverse competitive effects of display bias in the downstream air transportation market. Similarly, the portions of the CRS Rules which mandate uniform participation fees and charges, 14 C.F.R. § 255.6, and non-discriminatory access to marketing data, 14 C.F.R., § 255.10, should be carried over to the Internet context in the case of multi-carrier websites without identified airline sponsorship. As in the CRS context, imposing higher costs on some airline participants than others in a supposedly neutral site necessarily distorts the competitive balance in the air transportation market.<sup>2</sup>

The grounds for extending these provisions of the CRS Rules to multi-carrier websites that do not display any airline sponsorship exist without regard to the ownership of these sites. Whether they are airline-owned (such as Orbitz), owned by a CRS (such as Travelocity), or owned by a company that is otherwise unaffiliated with the airline industry (such as Microsoft's Expedia), the absence of airline sponsor information leads to consumer expectations of neutrality among the listed carriers, and any biased content in such a site will inevitably distort competition in the downstream market. As a practical matter, moreover, regulation of all sites with undisclosed airline sponsorship creates a level playing field and does not artificially differentiate between sites that, apart from their ownership, are otherwise comparable from the perspective of consumers and of participating carriers.

Alaska, as a pioneer in the use of the Internet to sell its services, strongly supports the growth of online distribution of air transportation. Application of the CRS Rules to certain types of Internet sites, however, would be no more burdensome than application to the CRSs themselves. Any website wanting to avoid application of the Rules, moreover, could do so

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<sup>2</sup> Alaska submits that participation fees and charges should be defined broadly. A site's requirement that non-equity owners provide promotional allowances, for example, may constitute a form of discrimination by equity owners against non-equity owners.

simply by providing meaningful disclosure of its sponsorship. These burdens are slight in relation to the significant benefits that would flow from ensuring informed use of the Internet by consumers and healthy competition among airlines.

As with non-airline-owned CRSs, it seems clear that non-airline-owned Internet websites through which air transportation is sold are subject to DOT regulation. Many if not most such sites are in fact travel agencies licensed by ARC and/or IATA. As travel agencies, they clearly fall within the definition of “ticket agent.” Even those sites that are not official travel agencies nevertheless hold themselves out as agents for the sale of air transportation and are thereby encompassed within the definition of “ticket agent.” DOT could also regulate non-airline-owned sites indirectly by exercising its jurisdiction over domestic and foreign airlines to prohibit them from selling seats through any website that engaged in practices found to be unfair, deceptive, or anticompetitive.<sup>3</sup>

### III. Conclusion

For the reasons set forth above, Alaska respectfully urges the Department to modify and reissue the CRS Rules in accordance with its December 1997 comments in this proceeding, and additionally to: (a) extend the applicability of the modified Rules to (i) all CRSs, whether airline-owned or not, and (ii) and to Internet websites that are owned and/or marketed by airlines that collectively account for more than a 50% share of the U.S. air transportation market, or that provide fare and schedule information for multiple carriers without disclosing any airline sponsorship (including ownership, partial ownership, the purchase of bias, promotional

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<sup>3</sup> As noted above, virtually all multi-carrier websites also use one or more CRSs as their database. The Department should treat websites and the CRSs used by those websites separately for purposes of regulatory oversight. Only limited regulation of most Internet sites is necessary or justified. But there is no reason to apply less than the full set of CRS Rules with respect to any CRS, regardless of whether it is being used by travel agents or in conjunction with an Internet site; either way, it imposes booking fees and other charges on participating carriers who have no choice but to pay.

arrangements, or other relationships that could encourage favoritism); and (b) prohibit all Internet websites from imposing exclusionary terms, or the functional equivalent of exclusionary terms, on their airline participants.

Respectfully submitted,

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Dated: September 22, 2000