BEFORE THE

DEPARTMENT OF TRANSPORTATION

WASHINGTON, D.C.

LOVE FIELD SERVICE INTERPRETATION PROCEEDING	:	Docket OST-98-4363

REPLY COMMENTS OF CONTINENTAL EXPRESS, INC.

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INTRODUCTION

The comments submitted in this proceeding demonstrate the absurd lengths to which the City of Fort Worth ("Fort Worth"), the Dallas/Fort Worth Airport Board ("DFW Airport Board") and American Airlines[1] will go to prevent or inhibit competition at Love Field. No other airport anywhere in the United States is subject to anything like the operating restrictions these parties would impose on operations at Love Field, yet they claim that their version of the original "deal" between the City of Fort Worth and the City of Dallas should govern continuing operations at Love Field despite:

[1] Common names of carriers are used.

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- DFW's growth from a deserted field to one of the world's largest airline hubs, from 11.3 million passengers enplaned in 1979 to 60.5 million passengers enplaned in 1997.
- Love Field's growth from 402,000 passengers enplaned in 1979 to 3.4 million passengers enplaned in 1997, thanks to numerous decisions preempting the closure of Love Field to Southwest or other operations.
- The transition from close route-by-route regulation of airlines in the U.S. to a Congressional decision that airlines should be able to fly wherever they want whenever they want.
- Enactment of the Wright Amendment permitting unrestricted operations using commuter aircraft with maximum passenger configurations of 56 or fewer seats.
- Enactment of the Shelby Amendment precisely to permit long-haul operations with larger aircraft, albeit configured for 56 or fewer seats, at Love Field.
- American's development of a 71% market share at DFW with its commuter partner.[2]

Times have changed, and the federal aviation laws applicable to Love Field service today mandate that Continental Express be permitted to operate interstate service at Love Field without restrictions using its 50-seat jet aircraft.

I. A CONTRACT BETWEEN TWO AIRPORT OWNERS REQUIRING ONE OF THEM TO LIMIT OPERATIONS AT ITS AIRPORT IS PREEMPTED BY FEDERAL AVIATION LAW

Both the DFW Airport Board and Fort Worth claim that their voluntary agreement embodied in the 1968 Regional Airport Concurrent Bond Ordinance ("the Bond Ordinance") allows them to prohibit services authorized by the Airline

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[2] See "U.S. Carrier Systemwide Market Share At Leading U.S. Airports," Aviation Daily, April 28, 1998 at 169.

Deregulation Act,[3] the Wright Amendment[4] and the Shelby Amendment[5] because the Civil Aeronautics Board ("CAB") induced them to operate a regional airport to meet the needs of Dallas and Fort Worth for transcontinental service some 30 years ago. The DFW Airport Board says "a deal is a deal" and can never be changed. They keep repeating this argument despite new laws which control whether the restrictions imposed are "legally permissible" as required by the Bond Ordinance and the fact that the "deal" has been altered repeatedly by state and federal decisions as well as by decisions of Fort Worth and Dallas to keep airports other than DFW open or to develop new airports such as Alliance.

Aviation and the laws and policies which govern it have changed dramatically and fundamentally since 1973, when the CAB dismissed the <u>Dallas-Fort Worth Regional Airport Investigation</u> by Order 73-9-82. By way of example, that very same month the CAB denied a stay of a capacity reduction agreement between American, TWA and United on four transcontinental routes and approved capacity reduction discussions on the Los Angeles/San Francisco-Honolulu routes (Orders 73-9-61 and 73-9-106), ordered investigations of fares offered to military

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[3] Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978).

[4] Section 29, International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, 94 Stat. 35, 48-49 (1980).

[5] Section 337, Department of Transportation and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-66, 111 Stat. 1425, 1447 (October 27, 1997).

personnel by Pan American and to groups of travelers by Northwest because they were too low (Orders 73-9-71 and 73-9-98) and redetermined subsidy refunds due to the government from Hughes Air Corp. d/b/a Airwest (Order 73-9-90) because excess subsidies had been paid to its predecessor airlines for local services.

Although Fort Worth and the DFW Airport Board seek to enforce their own capacity reduction agreement for Love Field, remain concerned about enhanced service and fare competition at Love Field and seek indirect subsidies for DFW by airlines, passengers and shippers who want to use Love Field, they are out of step with modern aircraft technology, today's aviation laws and the strong consumer demand for service at both Love Field and DFW.[6]

By clinging to the past, the DFW Airport Board, American and Fort Worth fail to account for the decisions concluding early on that the regulator of routes, not the airport authority, determines what routes airlines may serve at Love Field (see City of Dallas, Texas v. Southwest Airlines Co., 494 F.2d 773, 777 (5th Cir. 1974); see also, Southwest Airlines Co. v. Texas International Airlines, 546 F.2d 84, 102-3 (5th Cir. 1977). Their focus on the past also seeks to reverse the Airline

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[6] CAB decisions on competitive issues were never immutable. Thus, CAB at one point might well determine that only one airline should be authorized to serve a particular route, only to determine several years later that traffic had grown so substantially that two carriers should serve the route. Similar considerations could dictate changing a conclusion that only one airport should serve the Dallas/Fort Worth area in 1979 when the combined enplanements at Love Field and DFW totaled 11.7 million while two or more airports would be appropriate when the combined enplanements reached 63.9 million in 1997.

Deregulation Act decisions that airlines can serve any routes they wanted to serve within the United States and that the ability of local authorities to determine what routes would be flown at Love Field is preempted (see the Initial Decision of Administrative Law Judge William A. Kane, CAB Docket 34582, June 28, 1979 at 30 and CAB Order 79-9-192, CAB Docket 34582, September 28, 1979 at 8-9). Finally, the City of Fort Worth, American and the DFW Airport Board also fail to recognize that the Wright Amendment established new parameters for service at Love Field rather than embedding decisions reached by the airport proprietors in federal law and that the Shelby Amendment was enacted to assure that 56-seat aircraft that weigh less than 300,000 pounds could be operated at Love Field without geographic restrictions. (See Continental Express' comments at 14-16)

The DFW Airport Board argues that the provision in the Bond Ordinance stating that Dallas and Fort Worth would take only "legally permissible" actions to "phase out at Love Field, Redbird, GSIA and Meacham Field" all certificated carrier services (a defined term) means that the parties would not violate "presently outstanding legal commitments or covenants preventing such action." (DFW Airport comments at 10-11) If that had been the parties' intent, they could have simply included those words without the more general "legally permissible" language. Moreover, the notion that the parties agreed to take legally impermissible actions to phase out the airports is absurd. More to the point, the parties were clearly aware that closing the airports might not be legally permissible, and their subsequent course of conduct recognizes that the airports

must remain open to meet legal requirements. Otherwise, the years of litigation by Southwest for the right to continue operating at Love Field would have been wasted. (See Southwest's comments at 3-11)

The DFW Airport Board, American and Fort Worth have attempted to justify the imposition of draconian limitations on air service at Love Field by claiming that cases permitting the implementation of perimeter rules at slot-regulated airports justify the imposition of far more stringent rules at Love Field. Although the Port Authority of New York and New Jersey imposed a perimeter rule at LaGuardia airport to deal with congestion which was overwhelming the airport's facilities despite the imposition of federal slot controls at the airport, that perimeter rule simply prohibited nonstop flights between LaGuardia and points more than 1,500 miles distant from LaGuardia. See Western Air Lines, Inc. v. Port Authority of New York & New Jersey, 658 F. Supp. 952, (S.D. N. Y. 1986), aff'd, 817 F.2d 222 (2d Cir. 1987) ("Western Airlines" hereafter). Similarly, the Federal Aviation Administration ("FAA") has imposed perimeter rules at Washington National (now Ronald Reagan Washington National) airport ("National" hereafter), another slot-controlled facility. That perimeter rule dealt with a genuine congestion concern by imposing limited restrictions.[7] In the case of Love Field there are no legitimate concerns, and the restrictions proposed are overly broad. (See Legend's comments at 78-82)

The perimeter rules imposed at LaGuardia and National are far less restrictive than the limitations the DFW Airport Board, American and the City of Fort Worth seek to force Dallas to impose at Love Field. (Id.) More importantly, the LaGuardia and National perimeter rules were justified by legitimate congestion concerns and studies which are not present at Love Field. (See Western Airlines and City of Houston v. FAA, 679 F.2d 1184 (5th Cir. 1982) ("City of Houston"). The limitations Dallas and Fort Worth seek to impose go far beyond the perimeter rules imposed at LaGuardia and National or the parameters established by the Wright and Shelby amendments. Thus, the limits on flights at Love Field would not be mileage-based and would preclude interstate service between Love Field and the three additional states at which service is added by the Shelby Amendment. Moreover, Fort Worth and the DFW Airport Board seek to regulate the types of aircraft used on flights which do not even serve Love Field by permitting through and connecting service when small aircraft are used beyond Houston but precluding such service when large aircraft are used beyond Houston. Although neither LaGuardia nor National perimeter rules limit through flights beyond the restricted nonstop segment, Fort Worth and the DFW Airport Board apparently seek to prohibit not only flight continuations not prohibited by Wright or Shelby but also connecting services for beyond points. (See the discussion in Section III, infra)

(…continued)

[7] Congress has subsequently narrowed those restrictions further.

Even the imposition of simple perimeter rules is extraordinary and permitted only to the extent such rules are justified as a rational means of dealing with legitimate congestion or noise concerns. As the City of Dallas has recognized, "Dallas surely could not . . . under the pretext of regulating local noise or congestion, enforce travel or facilities restrictions solely designed to protect the economic interests of DFW." (City of Dallas Comments at 27 (emphasis in original)) Clearly, neither Fort Worth nor the DFW Airport Board is genuinely concerned about noise or congestion at Love Field, which does not suffer from the "overcrowded parking lots and aircraft aprons, insufficient counterspace, traffic congestion, too little baggage claim area, and harsh environmental effects" which were detailed in hundreds of pages of reports justifying the perimeter rule at National. (See City of Houston, 679 F. 2d at 1193) As the Department and other parties have concluded repeatedly, even the fears of economic loss to DFW are entirely unfounded.[8] If "one could shoot off a cannon in the . . . terminal at midday without a chance in the world of hitting anyone" or if DFW were "deserted" except between the "hours from 4:00 to 8:00 p.m." (see City of Houston, 679 F.2d at 1191) and Love Field were unreasonably congested, there might be some justification for limitations on Love Field, but no such conditions exist. Instead, as various parties

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[8] "DFW International is on the threshold of becoming the world's busiest airport." (See Dallas/Fort Worth International Airport Web Site, http://dfwairport.com, at 1, as published on October 2, 1998)

have demonstrated, the primary objective of those opposing additional service at Love Field is to prevent competition for American Airlines and DFW from other airlines at Love Field. (See Legend's comments at 2-11, Southwest's comments at 3-11 and the City of Dallas' comments at 24-25) Without a rational justification for limitations on Love Field service based on legitimate noise or congestion concerns, the failure to authorize operations at Love Field consistent with the Airline Deregulation Act, the Wright Amendment and the Shelby Amendment is both preempted and violative of the grant assurances made by the City of Dallas when it has secured federal funds for use at Love Field.

Finally, airports which have been permitted to establish perimeter rules far less restrictive than the limitations proposed for Love Field by the City of Fort Worth and the DFW Airport Board are only those operated by a single proprietor in a multi-airport system.[9] Although the City of Dallas has a 7/11ths interest in DFW

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[9] The comments submitted by the Airports Council International, North America, and the American Association of Airport Executives ("ACI/AAAE") and some of their members assume that Dallas or the DFW Airport Board is a true multi-airport proprietor. Since that assumption is incorrect, their comments are based on an erroneous assumption. Moreover, they fail to recognize that what the DFW Airport Board, Fort Worth and American Airlines are trying to do is force the City of Dallas, as proprietor of Love Field, to engage in prohibited regulation because it would "tell air carriers . . . what routes to fly." (ACI/AAAE comments at 4) Finally, the regulation proposed by Fort Worth and the DFW Airport Board has "no rational basis, unfairly discriminate[s]" and seeks "to accomplish an illicit objective," i.e., the elimination of competition. Thus, this particular case would, by the standards ACI/AAAE themselves espouse, be invalid. (ACI/AAAE comments at 5)

and commensurate representation on the DFW Airport Board, decisions permitting additional operations at Love Field are subject to the veto of Fort Worth since eight votes are required (see the Bond Ordinance provision quoted in the DFW Airport Board comments at 11). Moreover, it is clear that if the City of Dallas truly controlled the DFW Airport Board the two parties would not be on opposite sides of the litigation over Love Field access. Finally, it is clear that the DFW Airport Board is not the "proprietor" of Love Field nor an "operator of a multi-airport system." (See Continental Express' comments at 11, n.10)

Although American claims the Department has never enacted a policy statement on airline preemption (American comments at 8, n.6), in fact § 399.110 of the Department's Policy Statements, adopted in 1979, says proprietary powers and rights can be exercised "when such exercise is reasonable, nondiscriminatory, nonburdensome to interstate commerce, and designed to accomplish a legitimate State objective in a manner that does not conflict with the provisions and policies of the Act." (§ 399.110(f)) The exercise of proprietary powers at Love Field to preclude Continental Express' nonstop Cleveland service and through or connecting service via Houston would be unreasonable, discriminatory, burdensome to interstate commerce and designed to accommodate an illegitimate Fort Worth/DFW Airport Board objective, which is preventing competition at Love Field.

If the Bond Ordinance were construed to encompass the legally impermissible closure of Love Field to operations permitted under the Wright and Shelby Amendments, both the Bond Ordinance and the Use Agreements would be

preempted. Indeed, American itself agrees that the Use Agreements at DFW cannot constrain operations at Love Field if the provisions of the Bond Ordinance which preclude services at Love Field inconsistent with the Wright and Shelby Amendments are preempted. (See American's comments at 56-70)

For all these reasons, the Department should conclude that efforts of the City of Fort Worth and the DFW Airport Board to prevent the Cleveland services proposed by Continental Express and restrict its through and connecting service are preempted by the Airline Deregulation Act,[10] the Wright Amendment and the Shelby Amendment.

II. CONTINENTAL EXPRESS' FLIGHTS ARE PERMITTED BY THE WRIGHT AND SHELBY AMENDMENTS AND CAN BE OPERATED WITHOUT RESTRICTIONS ON THROUGH OR CONNECTING SERVICE

Continental Express flights with 50-seat aircraft are permitted expressly by the Wright and Shelby Amendments, and the restrictions against through and connecting service do not apply to Continental Express' commuter operations with 50-seat aircraft.

When the Wright Amendment was enacted, Part 298 of the CAB's (now the Department's) regulations defined a "commuter air carrier" as an "air taxi operator"

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[10] Although the DFW Airport Board argues that the deal was made "years before" the Airline Deregulation Act and its preemption provisions, the DFW Airport Board's effort to shut down Love Field were preempted almost immediately. See, e.g., City of Dallas v Southwest Airlines Co., 371 F. Supp. 1015 (N.D. Tex. 1973).

that "carries passengers on at least five round trips per week on at least one route between two or more points according to its published flight schedules that specify the times, days of the week, and places between which those flights are performed." (§ 298.2(e)) An "air taxi operator" in turn was defined as a carrier which did "not utilize large aircraft," and "large aircraft" was defined as "any aircraft designed to have a maximum passenger capacity of more than 60 seats." (§ 298.2(h)) Thus, Congress knew when it enacted the Wright Amendment that a "commuter air carrier" was defined as an operator of aircraft with up to 60 seats, and that the definition of commuter air carrier contained no limitation whatever on the distance over which a commuter could operate flights. Although Congress chose a different maximum seating capacity for exempt operations at Love Field, it imposed no geographic limitations on the scope of their operations. If Congress had intended geographic limitations, it would have said so. Despite the City of Fort Worth's disengenuous argument that Continental Airlines is operating at Love Field "in the guise of a commuter," it ignores what the Department knows well: Continental Express is a separately certificated and regulated commuter airline.

If, as American, Fort Worth and the DFW Airport Board suggest, the Wright Amendment intended to limit commuter flights to short-haul service and preclude connections between commuter flights and other flights operating beyond the Love Field service area specified in section (c)(2) of the Wright Amendment, the commuter exception in section (a) of the Wright Amendment would have been meaningless and superfluous. By definition, if there were no commuter exclusion

section (c) would have precluded commuter carriers from operating long-haul service and from offering connecting service beyond the area specified. Congress chose instead to exempt commuter flights altogether from the restrictions imposed on flights with large aircraft. Thus, as the Department has advised – and the DFW Airport Board has conceded – commuter carriers can operate flights between Love Field and Denver, Colorado, a point not included within the permissible service area for large aircraft.[11]

In addition to operating small aircraft, the other key characteristic of commuter operations when the Wright Amendment was adopted – as now – is that commuter flights operate to feed larger aircraft at airline hubs. Congress – which had just recently enacted the Airline Deregulation Act and changed the maximum

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[11] See the DFW Airport Board's comments at 39-40, which attempt to distinguish the Department's prior statements by noting that propeller aircraft rather than jet aircraft were to be used by Centennial for its proposed Denver service. The DFW Airport Board objects to the use of 50-seat jets because their "attractiveness to the public, including shorter flying times and greater passenger comfort, would cause significantly more passengers to utilize Love Field (at the expense of DFW) . . ." (DFW Airport Board comments at 38) The fact that comfortable, attractive 50-seat jet aircraft were unavailable in 1980 does not change the straightforward legal requirements that "commuter" aircraft not exceed 60 seats under the Airline Deregulation Act and the Department's regulations or 56 seats under the Wright Amendment. Indeed, these small jet aircraft have been designed precisely for commuter operations, and Continental Express acquired them in reliance upon regulations which permit their use as "commuter" aircraft. Even if the notion that Congress intended to regulate the type of engine which could be used on aircraft at Love Field, as the DFW Airport Board contends, when it enacted the Wright Amendment were not plainly absurd, the DFW Airport Board's argument must fail because the drafters of the Shelby Amendment knew full well

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seat size for commuter aircraft from 30 seats to 60 – certainly knew that commuter airlines existed primarily to feed major carriers at their hubs. For this reason, the Wright Amendment excepts commuter airlines generally from any of the restrictions in section (c) so commuter flights can serve their intended purpose: feeding major airline flights at their hubs by offering through and connecting service without restrictions.

Only the tortured logic of the DFW Airport Board could generate the argument that Continental Express cannot provide through or connecting service because its Love Field flights serve Houston rather than a point outside Texas. In fact, Continental Express is authorized "to provide the transportation of individuals, by air, as a common carrier for compensation or hire between Love Field, Texas, and one or more points outside the state of Texas" as specified in section (a) of the Wright Amendment without being subject to the "except as provided in subsection (c) proviso" because its is excepted directly by subsection (a)(2) from any restrictions imposed by the Wright Amendment. Because Continental Express is carrying both passengers who originate and terminate

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(…continued)

that jet aircraft would be used for the nationwide services they were permitting. (See Continental Express' comments at 15-16)

within Texas and passengers who are traveling beyond Texas, its entire operations are subject to federal regulation.[12]

Although the Department disclaims having already determined definitively that operations with fewer than 56 seats are exempted from the Wright Amendment prohibitions, its previous actions clearly suggest that this interpretation is correct. In the Love Field Amendment Proceeding, the Department said it was prohibited "from authorizing interstate service (other than limited charter and commuter flights) to Love Field, except in accordance with the remaining provisions of the Amendment . . ." (Order 85-12-81 at 3, emphasis added) In that same order, the Department also said, "we find that operations" by a

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[12] Southwest takes no position on the Shelby Amendment authorization for carriers to operate jet aircraft with a passenger capacity of 56 seats or less (and weighing less than 300,000 pounds) to engage in longhaul service between Love Field and any city in the United States beyond recognizing it as "the law of the land." (Southwest's comments at 29) Nonetheless, Southwest argues that no distinction has been made between 56-seat aircraft and Southwest's 122 or more seat aircraft within "the eight state Love Field service area." (Southwest comments at 30-31) The ironic result of Southwest's argument – leaving aside the fallacy inherent in arguing that the 56-seat exception in section (a) of the Wright Amendment is really no exception at all – is that Continental Express could operate its 50-seat jet aircraft nonstop anywhere it wanted to, but it could not carry passengers between the same points via connections at Houston or Cleveland. Southwest complains that this "law of the land" would be unfair because Southwest could not operate such services itself. In point of fact, Southwest and other airlines are free to acquire 50-seat jets like Continental Express' or to reconfigure aircraft such as Southwest's B-737's for 56 or fewer seats and enjoy the same exception Continental Express (and Legend) enjoy.

"carrier using small aircraft are exempt from the Amendment with respect to Love Field operations." (Order 85-12-81 at 13, emphasis added)[13]

As Legend points out, the Department's September 19, 1996, letter and its brief in Astrea Aviation Services v. Department of Transportation both recognized that aircraft with maximum seating configurations of up to 56 seats could offer Love Field services without restriction and the Department's motion to dismiss the appeal in that proceeding said, "any . . . air carrier may, pursuant to 29(a)(2) of the International Air Transportation Competition Act of 1979, operate jet aircraft reconfigured to accommodate 56 or fewer passengers . . . from Love Field to any destination."[14] As the Department has agreed in its motion, any doubt about Continental Express' ability to operate 50-seat jet aircraft between Love Field and "any destination" was resolved by the Shelby Amendment, which was enacted to

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[13] Although the Department concluded that airlines could not evade the restrictions in the Wright Amendment by serving a point in Texas before flying elsewhere, that decision assumed large aircraft operations which were subject to the Wright Amendment restrictions, not small aircraft operations, which were not. (See Order 85-12-81 at 13-14)

[14] See Legend's comments at 95-96. If the Department has any doubts about its prior statements or Congressional intentions it should heed the words of the Chairman of the House Committee on Transportation and Infrastructure, who says the Shelby Amendment "clarified that any jet aircraft (under 300,000 pounds) with 56 seats or less can be operated from Love Field to any destination." (See the attachment to American's September 2, 1998 Motion in this proceeding)

accommodate Legend's proposal to operate 56-seat aircraft between Love Field and points throughout the United States.[15]

Although opponents of Continental Express' service at Love Field have argued that exceptions to the Wright and Shelby Amendments should be "narrowly construed," they have it wrong. The Wright and Shelby Amendments are extraordinary exceptions to the general principles established in the Airline Deregulation Act, and the Wright and Shelby Amendment restrictions on airline service otherwise broadly authorized by the Airline Deregulation Act should be narrowly construed.

In addition to this general principle of statutory construction, when the Department carries out its duties and interprets its statutory mandate, it is to place "maximum reliance on competitive market forces and on actual and potential competition . . . to provide the needed air transportation system," as well as to "adapt the air transportation system to the present and future needs of . . . the commerce of the United States" and encourage "air transportation at major urban areas through secondary airports. . . ." (49 U.S.C. § 40101(a)) Moreover,

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[15] Although Continental Express is the commuter air carrier offering service between Love Field and Houston and proposing service between Love Field and Cleveland, the Department's analysis would be the same even if Continental Airlines, Inc. were operating the flights. This is so because the Department considers only the size of the aircraft operated and has already concluded that "operations by either a certificated or non-certificated carrier using small aircraft are exempt from the [Wright] Amendment with respect to Love Field operations." See Order 85-12-81 at 13.

"encouraging, developing and maintaining an air transportation system relying on actual and potential competition – . . . to provide efficiency, innovation, and low prices; and . . . to decide on the variety and quality of, and determine prices for, air transportation services" and "encouraging entry into air transportation markets" are important principles which guide the Department. (Id.) All of these principles suggest that the Department should construe the restrictions of the Wright and Shelby Amendments narrowly and heed the Department's mandate to enhance competition in North Texas as well as throughout the rest of the United States.

III. THE DEPARTMENT MAY PROPERLY RULE ON THE FEDERAL LAW ISSUES WHILE THE STATE AND FEDERAL COURT PROCEEDINGS ARE PENDING, AND IT SHOULD DO SO

The Department may and should rule expeditiously on the federal law issues surrounding the federal and state court litigation in Texas on Love Field service. The Department's interpretation of the federal law issues will be entitled to judicial deference by the courts. Accordingly, the Department should deny the requests of American, the City of Dallas, the City of Fort Worth and the DFW Airport Board for the Department to dismiss this proceeding, and should deny the City of Fort Worth's Motion to Dismiss filed previously with the Department.

A. The Department's Interpretation of the Federal Law Issues Will Eliminate Litigation, Not Multiply It

American says the Department's proceeding "will multiply litigation" because the parties adversely affected by the Department's ruling will seek federal appellate court review. (American Comments at 11) This is an incorrect statement, but this

thinly-veiled threat does reveal how far American is prepared to go in stopping any expansion of Love Field service. Actually, the net burden of litigation to the parties will be less if the federal and state courts in Texas have the benefit of the Department's ruling now. The federal and state courts in Texas need the Department's expertise in interpreting the legal and factual issues involving federal aviation statutes and regulations, including the proper exercise of the proprietary powers provision under 14 C.F.R. § 399.110(f). Moreover, the Department's ruling will prevent conflict between decisions by the federal and state courts in Texas and future FAA action involving Love Field under Centennial Express Airlines v. Arapahoe County Public Airport Authority.[16] Because of Arapahoe and the U.S. Constitution's Supremacy Clause, any Texas court decision against expanded service at Love Field could have no legal or practical effect. The Department could determine under Arapahoe that the DFW Airport Board or the City of Dallas had violated federal law under the federal preemption standard. The Department's ruling will clarify the federal law issues now and enable the Texas courts to render a decision avoiding this Arapahoe effect.

Because the Department's ruling will create more certainty on how the federal and state courts in Texas should interpret the federal laws at issue, the inevitable result will be less litigation and a faster resolution to the cases. Without the Department's ruling, the federal and state courts in Texas and the parties will

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[16] See Order 98-8-29 at 4.

have nothing short of a litigation mess. While a litigation mess may be the objective of Fort Worth, the DFW Airport Board and American, particularly in light of their extraordinary litigious history on Love Field, the public interest will be served by prompt resolution of the federal aviation law issues, as the City of Dallas, Legend, Southwest and Continental Express have recognized.

B. The Department Has Primary Jurisdiction Over the Federal and State Court Proceedings in Texas

The City of Fort Worth disputes the Department's primary jurisdiction over the federal law issues surrounding the federal and state cases in Texas. (City of Fort Worth Comments at 14) This is clearly the wrong legal conclusion. The City of Fort Worth bases its conclusion on the Supreme Court's requirement that litigation ripe for an agency's primary jurisdiction must contain "some issue within the special competence of an administrative agency." (Reiter v. Cooper, 507 U.S. 258, 268, 113 S.Ct. 1213, 1220 (1993)(emphasis added)) The requirement is merely that "some issue" must be within the special competence of the administrative agency, not all issues. (Id.) On their face, the four federal law issues identified by the Department in this proceeding each contain at the very least "some issue within the special competence" of the Department. (See Order 98-8-29 at 4) The Department has special competence on numerous core issues involving the statutory preemption provision under 49 U.S.C. 41713(b), the proprietary powers exception under 49 U.S.C. 41713(b)(3), the Wright Amendment and the Shelby Amendments and Use Agreements binding major carriers not to exercise their certificate authority

despite the Airline Deregulation Act protections. Clearly, the Department is the federal agency charged with determining regulatory action on the "rates, routes and services" of airlines.

The City of Fort Worth cannot reasonably say the Department lacks special competence on at least "some issue" involving each of the federal law questions before the federal and state courts in Texas. All of these issues involve the Department's "primary responsibility for governmental supervision or control" of aviation in the United States. (See Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 68, 91 S.Ct. 203, 208 (1970)) The Department is responsible for administering the federal statutes at the core of the federal law issues surrounding the Texas litigation. (Order 98-8-29) The City of Fort Worth implicitly acknowledges as much in its comments discussing judicial deference under the Chevron test. (See City of Fort Worth Comments at 19-21)

The proper legal test for primary jurisdiction, as synthesized in New England Legal Foundation v. Massachusetts Port Authority, 883 F.2d 157 (1st Cir. 1989), was earlier articulated by the Supreme Court in Chicago Mercantile Exchange v. Deaktor, 414 U.S. 113 (1973), and Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973). Those Supreme Court cases, not the Fifth Circuit case the City of Fort Worth cites (Wagner & Brown v. ANR Pipeline Co., 837 F.2d 199, 201 (5th Cir. 1988)), are controlling and, when applied to the facts of this proceeding and the related litigation, allocate primary jurisdiction to the Department for resolving the federal law issues. (See Continental Express Comments at 25-29) Nonetheless,

under either legal standard, the Department has primary jurisdiction to rule on the federal law issues now.

Under the Wagner & Brown test, the City of Fort Worth says the Department lacks primary jurisdiction because it "does not have any expertise or competence which exceeds that of the judiciary with respect to the issues of proprietary powers and preemption." (City of Fort Worth comments at 14) That argument ignores the fact that proprietary powers and preemption is governed by 49 U.S.C. § 41713, which is a federal statute the Department is charged with administering. That statute is complex and has required the Department's interpretation in the past. As the parties to the federal and state court cases in Texas, including the City of Fort Worth, have demonstrated in their court pleadings the lack of consensus on what the statute means, the Department's expertise or competence on this statute will be instructive to the litigants and the court.

Similarly, the City of Fort Worth says the Department lacks "special competence" on the Wright Amendment and the Shelby Amendment. (City of Fort Worth Comments at 16) Since the Wright and the Shelby Amendments govern the extent of the Department's authority to issue certificates for Love Field service, the Department is uniquely experienced in administering these statutes. Similarly, the Department has been called upon to provide guidance to Congress on the Wright Amendment and the Shelby Amendment and has rendered opinions on federal law questions involving the Wright Amendment. This is special competence by any definition of the term. In fact, the City of Fort Worth has drawn upon the

Department's special competence by citing the Department's past orders and interpretations to support its positions in this proceeding. (See, e.g., City of Fort Worth Comments at 40-42)

C. The Department's Interpretation of the Federal Law Issues Is Entitled to Judicial Deference Under the Chevron Doctrine

The City of Fort Worth says the Department has no "more than ordinary knowledge respecting the [Love Field federal law] matters subjected to agency regulations." (City of Fort Worth Comments at 18-21 (citing the judicial deference standard in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)) Thus, the City of Fort Worth concludes that the Department's interpretation of the federal law issues is "entitled to no judicial deference." (City of Fort Worth comments at 19) However, under the Supreme Court's test in Chevron, the City of Fort Worth's argument simply runs out of gas.

The first prong of the Chevron test asks if the "unambiguously expressed intent of Congress" is found in the language of the statute. (Chevron, 467 U.S. 837, 842) Contrary to the City of Fort Worth's reading of the statute, the Wright Amendment's proprietary powers language is not "unambiguously expressed" in the statute itself. The term "proprietary powers" is not defined in the statute or its implementing regulations, and one must look to the legislative history of the Airline Deregulation Act to find the statute intended "proprietary powers" to mean "normal proprietary functions . . . such as the establishing of curfews and landing fees which are consistent with other requirements in Federal law." (123 Cong. Rec. 30, 595-96

(Sept. 23, 1977)) Since the statute itself does not reflect "unambiguously expressed" language for the term "proprietary powers," that part of the Wright Amendment fails the first prong of the Chevron test. Thus, "that is not the end of the matter." (Chevron, 467 U.S. 837, 842)

The second prong of the Chevron test says the Department's interpretation must be followed by the court if it is based on a "permissible construction of the statute." (Id. at 843) Because the legislative history of the Airline Deregulation Act limits the definition of "proprietary powers" and does not include enforcing a locally-imposed perimeter rule, the Department's interpretation consistent with the legislative history would be based on a "permissible construction of the statute." Thus, the Department's interpretation of the federal law issues would be entitled to judicial deference from courts if the statute was entrusted to the Department to administer. (See Chevron, 467 U.S. 837, 842) The City of Fort Worth says the Department does not administer the Wright Amendment and the Shelby Amendment. Those statutes enacted by Congress direct the Department not to grant certificate authority to air carriers for long-haul Love Field service using aircraft with a capacity of more than 56 seats. The Department has been administering the Wright Amendment's statutory mandate since 1979 and the Shelby Amendment's statutory mandate since earlier this year. The "unambiguously expressed" intent of Congress is that the Department administers both statutes.

The City of Fort Worth also argues New England Legal Foundation, supra, does not entitle the Department to judicial deference to its legal interpretations. The City of Fort Worth misreads the importance of the case. As discussed above, the Supreme Court's test for primary jurisdiction as synthesized by the court in New England Legal Foundation provides the basis for the Department to rule on the federal law issues now. That is distinct from the issue of whether the Department's ruling, once it is made, is entitled to judicial deference, which it is, under the Chevron test.

The Department may and should rule expeditiously on the federal law issues involving the federal and state court cases in Texas. The Department's ruling is entitled to judicial deference from the courts. The Department should deny the requests of American, the City of Dallas, the City of Fort Worth and the DFW Airport Board for the Department to dismiss this proceeding, and should deny the City of Fort Worth's Motion to Dismiss filed previously with the Department in this proceeding.

IV. CONCLUSION

For the foregoing reasons, Continental Express asks the Department to reject the arguments of other parties and resolve the issues as Continental Express has suggested as promptly as possible so the residents of Dallas and Cleveland can enjoy the benefits of Continental Express' Love Field-Cleveland service, the residents of Dallas can continue to enjoy the benefits of connections with Continental's world via Houston Intercontinental and the express intentions of

Congress in enacting the Wright and Shelby Amendments permitting such operations can be effectuated.

Respectfully submitted,

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October 2, 1998

CERTIFICATE OF SERVICE

I certify that I have this date served the foregoing document by hand on Washington counsel for all parties to this proceeding and by overnight delivery to parties not represented by Washington counsel.

/s/ R. Bruce Keiner, Jr.

R. Bruce Keiner, Jr.

October 2, 1998
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