

(formerly section 411 of the Federal Aviation Act) to determine whether the agreement's implementation would be an unfair or deceptive practice or unfair method of competition. We apply section 41712 in light of the express direction of the statute that we consider the public policy factors set forth in 49 U.S.C. 40101. If we found that the agreement would violate section 41712, we could issue an order directing the parties to cease and desist from the practices found to be unlawful.

Last year we reviewed another alliance between major airlines, the United/US Airways alliance. We determined to end the waiting period for the United/US Airways agreements and take no action at that time to prevent the airlines from implementing the agreements. 67 FR 62846, October 8, 2002. The information then available to us was not sufficient to indicate that an enforcement proceeding under section 41712 would be warranted, although we expressed concern that the alliance could lead to a lessening of competition between the two airlines in some markets. We also noted, however, that United and U.S. Airways had accepted certain restrictions imposed by the Department of Justice under its authority to enforce the antitrust laws. We additionally noted the United/US Airways alliance could benefit a number of travelers and could increase competition in some markets, as long as United and U.S. Airways had strong incentives to continue to compete with each other.

On August 23, 2003, the Alliance Carriers submitted their code-share and frequent flyer program reciprocity agreements for our review under 49 U.S.C. 41720. The proposed alliance would add Delta to the existing alliance between Continental and Northwest. We invited the public to submit comments on the proposed agreements. To enable interested parties to submit more meaningful comments, we required the Alliance Carriers to make available unredacted copies of their alliance agreements. 67 FR 69804, November 19, 2002.

After reviewing the comments and other material and conducting an extensive informal investigation, we determined that the agreements, if implemented as presented by the three airlines, could result in significant adverse impacts on airline competition unless the airlines accepted six conditions developed by us to limit potential competitive harm. Our January Notice explained the basis for this determination. We stated that we would direct our Aviation Enforcement Office to institute a formal enforcement

proceeding regarding the matter if the Alliance Carriers chose to implement the agreements without accepting those conditions.

We were aware that the Alliance Carriers represented that each of them would independently set its own fares and schedules and that they had structured their alliance so that each partner would continue to compete independently. Under that structure, the ticket price paid by a traveler would go to the operating airline, even if the passenger bought the ticket from a marketing airline. Since the marketing airline would not share in the ticket revenue, that airline would have an incentive to operate its own flights. In addition, they alleged that their agreements would not authorize any discussions prohibited by the antitrust laws. They would engage in discussions on subjects such as flight arrival times, gate locations, and certain other service features only in order to provide "more seamless service." They asserted that their alliance would benefit consumers by providing on-line services to travelers in markets that now have no on-line service and improved access to frequent flyer programs and airport lounges. See 68 FR 3295.

As described more fully in the January Notice, we nonetheless had several concerns with the alliance's potential impact on airline competition. The alliance would create a potential for collusion among the three partners; it could enable the Alliance Carriers to take advantage of their combined dominant market presence in a number of cities in ways that could force unaffiliated airlines to exit the markets and deter entry by other airlines; it would establish joint marketing efforts that could reduce competition between the partners and preclude effective competition from unaffiliated airlines; it could lead to a "hoarding" of airport facilities; and it could result in "screen clutter," causing the services of competing carriers to be downgraded in the displays offered to travel agents by computer reservations systems ("CRSs"). 68 FR 3295-3297. We developed six conditions in an attempt to address these concerns. The January Notice set forth the text of those conditions. 68 FR 3297-3299.

The Department of Justice, pursuant to its separate and independent authority to enforce the antitrust laws, reviewed the alliance agreements and determined that it would not challenge the implementation of the agreements under the antitrust laws if the Alliance Carriers accepted certain conditions, which the Department of Justice concluded were necessary to preserve

competition among the carriers. The three airlines have accepted those conditions. Under those conditions, Delta, Continental, and Northwest will not code-share on local traffic on routes where more than one of them offers nonstop service, including their hub-to-hub routes (Atlanta-Detroit/Houston, for example). For purposes of this restriction, Newark Liberty International Airport, John F. Kennedy International Airport, and LaGuardia Airport are treated as one point. The bar against code-sharing, however, does not cover flights between Washington Reagan National, LaGuardia, and Boston Logan. The Alliance Carriers also agreed to conditions that bar certain pricing conduct that could provide a vehicle for price signaling and collusion. Accordingly, each party is limited in the extent to which it can set prices on flights operated by another airline.<sup>1</sup> Finally, each Alliance Carrier must continue to act independently in establishing the terms and conditions of its frequent flyer programs and in bidding on corporate contracts, although when consistent with the antitrust laws the Alliance Carriers may offer customers the option of a joint bid. These conditions are substantially the same as the conditions accepted last year by United and U.S. Airways and by Northwest and Continental when they began implementing their own alliance five years ago.

While the Alliance Carriers accepted the Department of Justice conditions, they initially stated that they would implement their alliance without accepting our conditions. Soon thereafter, however, they asked whether we would consider alternatives for three of our six conditions and postponed the implementation of their alliance. On the basis of consultations with us, they resubmitted the agreements for our review with their proposed alternative conditions on February 28. They stated that they accepted, without change, our first, fifth, and sixth conditions, which involve the alliance's steering committee, CRS displays, and the agreements' exclusivity provision. They

<sup>1</sup> Under the pricing condition required by the Department of Justice, the marketing carrier's fares must be the same as the operating carrier's fares on routes that are not served by the marketing airline (the marketing airline is the airline that does not operate the flight but nonetheless sells seats under its code). On routes served by two or more of the partners with connecting service, when one airline is the marketing airline it must sell seats on flights operated by the partner airline for the same fares it charges for its own flights or for the fares established by the operating airline. On routes where one airline offers nonstop service and the other airline offers connecting service, the latter airline's fares for the nonstop service must be the same as the operating carrier's fares.