UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

June 6, 2003

United States Department of Transportation
400 7th St., S.W.
Washington, D.C. 20590

Re: Federal Trade Commission Comments to be filed in Dockets OST-97-2881, OST-97-3014, and OST-98-4775

The Department of Transportation ("DOT" or "Department") has requested comment on its rules governing airline computer reservations systems ("CRSs" or "systems"). The Federal Trade Commission ("FTC" or "Commission") offers the following comments to assist DOT in its rulemaking. Although the interpretation of the Department's legal authority is not within the FTC's purview, the Commission offers its comments to address and clarify some of the references to FTC doctrine discussed and relied upon in DOT's rulemaking proceeding.

The FTC is charged by statute with enforcing laws prohibiting unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.[(1)] Pursuant to this statutory mandate, the Commission is responsible for protecting consumers and maintaining competition through, *inter alia*, the enforcement of the antitrust laws, including the development and articulation of the legal principles underlying such laws.

To the extent that the proposed DOT regulations rely by analogy[(2)] upon the scope of the Commission's unfairness authority as expressed in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244-45 n.5 (1972), the Department should be aware that the FTC's use of its unfairness doctrine has substantially evolved since *Sperry*. Confronted by concerns about the proper scope of the unfairness standard, the Commission in 1980 issued its *"Unfairness Statement*" in response to an inquiry from a congressional subcommittee.[(3)] In setting out the applicable standard, the Commission noted, among other things:

The present understanding of the unfairness standard is a result of an evolutionary process. The statute was deliberately framed in general terms since Congress recognized the impossibility of drafting a complete list of unfair trade practices that would not quickly become outdated or leave loopholes for easy evasions. The task of identifying unfair trade practices was therefore assigned to the Commission, subject to judicial review, in the expectation that the underlying criteria would evolve and develop over time.

Unfairness Statement at 2, 104 F.T.C. at 1072. The Commission also noted that "[u]njustified consumer injury is the primary focus of the FTC Act" (*id.* at 1073) and stated that to justify a finding of unfairness, any consumer injury must satisfy three tests: (1) the injury must be substantial; (2) it must be not outweighed by any offsetting benefits to consumers or competition; and (3) the injury must be one that consumers could not reasonably have avoided. *Id.* at 1073-74. The Commission further observed that, "[a]lthough public policy" has been listed "as a separate consideration, it is used most frequently by the Commission as a means of providing additional evidence on the degree of consumer injury caused by specific practices." *Id*. at 1075.[(4)] Subsequently, in 1984, the Commission applied and formally adopted its 1980 *Unfairness Statement* as the standard that would govern adjudications in proceedings that challenge specific acts or practices as unfair*. International Harvester Co.*, 104 F.T.C. 949, 1060-62 (1984).

Most recently, in 1994, Congress amended the FTC Act[(5)] by effectively codifying the Commission's modern definition of unfairness in Section 5(n):

The Commission shall have no authority under this section or section 18 to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

15 U.S.C. § 45(n).

Thus, to pursue a cause of action successfully under the FTC's current unfairness standard, the Commission must establish that: (1) the respondent/defendant has engaged in an act or practice that caused, or is likely to cause, substantial injury to consumers; (2) the injury is not reasonably avoidable by consumers; and (3) the injury to consumers is not outweighed by countervailing benefits to consumers or to competition.

The second aspect of DOT's rationale that the Commission wishes to address is the suggestion that, under Commission law, a monopolist can be held liable for engaging in unfair methods of competition by virtue of the impact of its business practices on an adjacent market in which the monopolist does not operate. In making this point, DOT relies upon two Commission cases that are more than two decades old, *LaPeyre v. FTC*, 366 F.2d 117 (5th Cir. 1966), and *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980) ("*OAG*"). In *LaPeyre*, the Commission majority found that the monopolist also did compete in the adjacent market, and that its establishment of a price differential was an attempt to protect its own interests in the adjacent market by limiting competition in that market. 366 F.2d at 120. Although the Fifth Circuit decided the case on broader grounds, the Second Circuit subsequently criticized that expansion in *OAG*. 630 F.2d at 926. In contrast to *LaPeyre*, *OAG* was clearly a case in which the Commission sought to challenge a monopolist's behavior that impacted an adjacent market in which the monopolist did not participate. However, the Second Circuit expressly rejected this rationale, ruling that "even a monopolist, as long as he has no purpose to restrain competition or to enhance or expand his monopoly, and does not act coercively, retains [the right unilaterally to decide with whom he will deal]." 630 F.2d at 927-28.

Shortly after *OAG*, the Commission indicated in *dicta* that it believed the Second Circuit's decision was erroneous and that it continued to believe that "arbitrary" refusals to deal by monopolists were actionable. *See General Motors Corp.*, 99 F.T.C. 464, 580 (1982). Since *OAG*, however, the Commission has not issued a decision holding that a monopolist violated the FTC Act by using unfair methods of competition that affected customers in an adjacent market in which the monopolist did not operate. The Commission's single-firm conduct cases have focused on the alleged monopolist's conduct in markets in which it operated. *See, e.g., Intel Corp.*, http://www.ftc.gov/os/1999/03/d09288intelanalysis.htm. Moreover, in light of subsequent legal developments,[6] as well as scholarly criticism of the more expansive theory espoused by the FTC in the *OAG* litigation,[7] the agency would not take such a position today.

DOT's NPR also refers to the doctrines of "monopoly leveraging" and "essential facilities." As the Commission and the United States have recently argued in a joint *amicus curiae* brief filed in the United States Supreme Court, neither of these doctrines provides an independent basis for liability under Section 2 of the Sherman Act.[8] Rather, unilateral conduct should be condemned under the Sherman Act only if it "reasonably appear[s] capable of making a significant contribution to creating or maintaining monopoly power"[9] and is "exclusionary," in that it "not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way."[10] DOT should carefully consider whether the conduct it addresses in its proposed rule would be likely, in the absence of regulation, to meet that standard.

If we can be of further assistance, please do not hesitate to contact our General Counsel, William Kovacic.

By direction of the Commission.

Timothy J. Muris
Chairman

Endnotes:

1. Federal Trade Commission Act, 15 U.S.C. § 45.

2. *See* Notice of Proposed Rulemaking ("NPR") at 35.

3. Letter from the Federal Trade Commission to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation (Dec. 17, 1980), *reprinted in International Harvester Co.*, 104 F.T.C. 1070 (1984). For a discussion of the policy developments that led to the preparation of the Commission's 1980 Unfairness Statement, *see* Neil W. Averitt, "The Meaning of 'Unfair Acts or Practices' in Section 5 of the Federal Trade Commission Act," 70 Geo. L.J. 225 (1981); Timothy J. Muris and J. Howard Beales, III, "The Limits of Unfairness

under the Federal Trade Commission Act," Association of National Advertisers Publication, 1991 (also discussing the Commission's use of unfairness subsequent to 1980).

4. The Commission clarified that the use of public policy is not an independent basis for finding unfairness, but rather that it "may provide additional evidence" of unfairness, in a March 5, 1982 letter to Senators Packwood and Kasten. The reduced role of public policy is also evident in the Credit Practices Rule, as adopted by the Commission in 1984:

Earlier articulations of the consumer unfairness doctrine have also focused on whether "public policy" condemned the practice in question. In its December 1980 statement, the Commission stated that it relies on public policy to help it assess whether a particular form of conduct does in fact tend to harm consumers. We have thus considered established public policy "as a means of providing additional evidence on the degree of consumer injury caused by specific practices."

Credit Practices Rule, Statement of Basis and Purpose and Regulatory Analysis, 49 Fed. Reg. 7740, 7743 (Mar. 1, 1984). Congress subsequently codified this reduced role in 1994.

5. Federal Trade Commission Act Amendments of 1994 (H.R. 2243).

6. *See, e.g., Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993); *Aquatherm Indus., Inc. v. Florida Power & Light Co.*, 145 F.3d 1258, 1262 (11th Cir. 1998).

7. *See, e.g.* K. Glazer & A. Lipsky, Jr., *Unilateral Refusals to Deal Under Section 2 of the Sherman Act*, 63 Antitrust L.J. 749, 783-85 (1995); P. Areeda & H. Hovenkamp, Antitrust Law ¶¶ 652b.2, 774d (2d. ed. 2002).

8. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP* (Sup. Ct. May 2003) (No. 02-682), http://www.usdoj.gov/atr/cases/f201000/201048.pdf.

9. P. Areeda & H. Hovenkamp, Antitrust Law ¶ 651f, at 83-84 (2d ed. 2002); *see Spectrum Sports, supra*, 506 U.S. at 458-59.

10. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585, 602, 605 n.32 (1985).