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THE REGULATION OF AIRLINE MERGERS BY THE DEPARTMENT OF TRANSPORTATION

LUCILE S. KEYES*

INTRODUCTION: THE LEGAL MANDATE

UNDER THE ORIGINAL Civil Aeronautics Act of 1938,¹ and for forty years following its passage, federal regulation of airline mergers and acquisitions differed sharply from the regulation of such transactions under the general antitrust laws. The 1938 Act provided that a proposed merger or acquisition was to be approved by the Civil Aeronautics Board unless it found that the proposal would “not be consistent with the public interest,” subject to the proviso that no transaction was to be approved “which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party” to the transaction.² In determining consistency with the public interest, the statute required the Board to consider a number of factors, including competition.³ Competition, however, was not accorded any special weight.⁴ Moreover, the Board’s approval carried with it automatic immunity from prosecu-

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¹ Civil Aeronautics Act of 1938, Pub. L. No. 75-706, 52 Stat. 973 (repealed by Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 31 (codified as amended at scattered sections of 49 U.S.C. app.)).

² *Id.* at 52 Stat. 1001-02.

³ *Id.* at 1002-03. The Board was required to consider the possibility of interlocking relationships, profits from the sale of securities, and loans and financial aid. *Id.*

⁴ *Id.* The Act provided that the Board “may, upon its own initiative or upon complaint by an air carrier,” investigate competition. *Id.*

tion under the antitrust laws.⁵ Antitrust standards, therefore, quite properly did not decisively affect the Board's regulation of mergers.⁶

The Airline Deregulation Act of 1978⁷ accords far more weight to traditional antitrust standards, but at the same time allows for an "efficiencies defense," commonly referred to as the so-called "Bank Merger Act defense," which may or may not be presently valid under the general antitrust laws.⁸ Under the new law, the Board may still not approve a proposed transaction which it finds to be inconsistent with the public interest.⁹ However, the Board must apply two additional tests (known as the "antitrust tests"). The first is the "Sherman Act" test,¹⁰ which forbids approval of any proposal which "would result in a monopoly or would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of air transportation in any region of the United States."¹¹ The second, or "Clayton Act" test,¹² forbids approval of any proposal:

[T]he effect of which in any region of the United States may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless the Board finds that the an-

⁵ *Id.* at 1004.

⁶ Merger regulation under the old law is reviewed in Keyes, *Notes on the History of Federal Regulation of Airline Mergers*, 37 J. AIR L. & COMM. 357 (1971).

⁷ Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified as amended at scattered sections of 49 U.S.C. app.).

⁸ The "efficiencies defense" is a type of argument used by merger proponents seeking to show that the anticompetitive effects of their proposals will be outweighed by their beneficial effects on the efficiency of the merged enterprise. The "Bank Merger Act defense" takes its name from an analogous provision in the Bank Merger Act of 1966, Pub. L. No. 89-356, 80 Stat. 7 (codified at 12 U.S.C. § 1828 (1982)). The Department of Justice apparently takes the view that this defense is valid under the general antitrust laws. See Keyes, *Revised Guidelines - 1984*, REVIEW OF INDUSTRIAL ORGANIZATION, Summer, 1984. However, the Supreme Court appears to have taken the opposite view on at least one occasion. See *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

⁹ 49 U.S.C. § 1384 (Supp. II 1978).

¹⁰ Sherman Act, 15 U.S.C. §§ 1-7 (1982).

¹¹ 49 U.S.C. app. § 1378(b)(1)(A) (1982).

¹² Clayton Act, 15 U.S.C. §§ 12-27 (1982).

ticompetitive effects of the proposed transaction are outweighed in the public interest by the probable effect of the transaction in meeting significant transportation conveniences and needs of the public, and unless it finds that such significant transportation conveniences and needs may not be satisfied by a reasonably available alternative having materially less anticompetitive effects.¹³

Opponents of the transaction must "bear the burden of proving the anticompetitive effects," while proponents must "bear the burden of proving that it meets the significant transportation conveniences and needs of the public and that such conveniences and needs may not be satisfied by a less anticompetitive alternative."¹⁴ Antitrust immunity *may* be granted, but only after a finding that it is required in the public interest, and only "to the extent necessary to enable [participants] to proceed with the transaction specifically approved . . . and those transactions necessarily contemplated" by the order of approval.¹⁵

The Civil Aeronautics Board continued to regulate airline mergers until the end of 1984. At that time, the duty of merger regulation was transferred to the Department of Transportation (DOT) with no change in the underlying statutory mandate.¹⁶ The same legislation further provided that special treatment of airline mergers and similar intercarrier transactions would terminate at the end of 1988,¹⁷ but also directed the Secretary of Transportation to make recommendations regarding the future of special treatment in a report (to be submitted before

¹³ 49 U.S.C. app. § 1378(b)(1)(B) (1982).

¹⁴ *Id.*

¹⁵ *Id.* § 1384.

¹⁶ Merger approval authority was originally transferred to the Department of Justice (DOJ) effective January 1, 1985. 49 U.S.C. app. § 1551(b)(1)(C) (1982). This authority was transferred yet again, this time to the DOT, with the same effective date. 49 U.S.C. app. § 1551(b)(1)(c) (Supp. III 1985). According to the DOT, both it and the DOJ "generally opposed" the transfer. U.S. DEPARTMENT OF TRANSPORTATION, REPORT TO CONGRESS: ADMINISTRATION OF AVIATION ANTITRUST FUNCTIONS 4 (1987) [hereinafter DOT REPORT].

¹⁷ 49 U.S.C. app. § 1384 (Supp. III 1985).

July 1, 1987) which was also to review the Department's own performance of its "antitrust" functions.¹⁸

The Department's report, made public in May, 1987, not only supports the termination of special treatment but recommends that this step be taken immediately, stating:

Since the airline industry is a mature, deregulated industry, it should be treated like other industries. Without section 408, airline transactions will be subject to notice and review procedures . . . which are more effective and less burdensome than those required by section 408. Experience has demonstrated that application of the antitrust laws is far better suited to the dynamic needs of a competitive industry than the prior approval requirements imposed by the Federal Aviation Act. The repeal of sections 408 and 409, moreover, will provide for a more efficient use of government resources, for airline transactions would no longer require simultaneous review by two separate departments.¹⁹

This recommendation seems entirely justified, since there appears to be no valid argument for applying a specially tailored antitrust policy to mergers between airlines.²⁰

The Department's review of its regulatory experience²¹ leaves much to be desired. The summary treatment accorded this experience, although a useful guide for further investigation, provides little insight into the underlying rationale of the Department's decisions and does not deal with the serious antitrust issues involved. Whether or not special antitrust treatment is abandoned, these issues will retain their practical importance. As will be seen, the merger decisions have turned solely upon criteria which are also contained in the general antitrust laws. The precedents established by the DOT can therefore be expected to remain relevant even if special regula-

¹⁸ Pub. L. No. 98-443, 98 Stat. 1705 (1984).

¹⁹ DOT REPORT, *supra* note 16, at 22.

²⁰ The legislative history in this area appears to contain no valid argument for the special treatment of airline mergers. See Keyes, *A Preliminary Appraisal of Merger Control under the Airline Deregulation Act of 1978*, 46 J. AIR LAW & COMM. 71 (1980).

²¹ DOT REPORT, *supra* note 16, at 5-13.

tion is abolished. Moreover, the present DOJ has been in basic agreement with DOT's historic economic analysis of competition in the airline industry.²² More generally, a study of the DOT's experience should be a continuing help to those who make antitrust policy, if only by enabling them to avoid past errors.

A review of merger decisions under the Deregulation Act indicates that both the Board and the Department have devoted most of their attention to the competitive effects of proposals brought before them. The result, however, has been that in practically every case considered since 1978, the DOT has granted approval on the ground that the opposing parties were unable to carry their burden of showing a reasonable probability of substantial reduction of competition. The two notable exceptions occurred relatively early in the history of regulation under the new Act. In one case, the proposal in question was resubmitted and approved less than two years later.²³ In the other, the proposal was turned down, without a detailed decision concerning its merits, at a time when the Board was about to announce its decision permitting acquisition of the sought-after carrier (National Airlines) by other parties.²⁴ More recently, merger activity has been exceptionally high. Especially notable is the large group of major transactions approved in the last two years.²⁵

²² See, e.g., Northwest-Republic Acquisition Case, Docket No. 43,754, Recommended Decision of the Administrative Law Judge (June 17, 1986), at 23-24 (noting that all parties, including the DOJ, accepted the theory that open entry would effectively prevent emergence of market power in any airline market).

²³ Continental-Western Merger Case, dismissed by DOT Order No. 79-9-185 (Aug. 14, 1979); approved by DOT Order Nos. 81-6-1/2 (March 31, 1981).

²⁴ Application of Eastern Air Lines, Inc., for Approval of Acquisition of Control of National Airlines, Inc., DOT Order No. 79-12-74 (Dec. 13, 1979).

²⁵ See, e.g., AIRLINE ECONOMICS, INC., AIRLINE CONSOLIDATION: WHERE IT STANDS — WHAT'S TO COME (1987), where it is noted that "[o]ver 25 mergers and acquisitions have occurred since late 1985, 23 by Major (large) carriers; four Major carriers: People Express, Eastern, Republic, and Western, were acquired in 1986 — only nine of the former 13 Major carriers remain; every one of the nine remaining Majors have been involved in a merger or acquisition in the past two years. Together they hold nearly 95% of the market today." *Id.* at 1. Of course, brisk merger activity and/or high national concentration does not in itself imply lax administration of merger law or any need for tighter legislation.

The "Bank Merger Act defense," with its implied case-by-case weighing of "transportation conveniences and needs" against anticompetitive effects, has not played a part in the actual administration of the law.

The following discussion will focus on the line of reasoning which has led to these somewhat surprising results. After all, legislation deliberately applying antitrust regulation to airline mergers would lead one to believe that Congress expected some proposed transactions to have a substantial anticompetitive impact, and the provision for a "Bank Merger Act defense" would suggest an expectation that on some occasion this defense would be needed and used. The cases to be considered here have all been decided since the beginning of 1985, when jurisdiction passed to the DOT. As will be seen, however, the agency's interpretation of the law appears to be quite consistent with that of the Civil Aeronautics Board. Although not all merger decisions in this period are discussed, the coverage is broad enough to give an accurate picture of DOT policy.²⁶

EARLY DECISIONS: THE POLICY ANNOUNCED

In its first important opinion after assuming jurisdiction over airline mergers,²⁷ the DOT clearly indicated that it did not anticipate that airline mergers, even among competing carriers, would ordinarily produce anticompetitive consequences. Announcing its "tentative" decision to follow the lead of the Civil Aeronautics Board in evaluating competition, the DOT rejected the market share criteria

²⁶ Of the twelve transactions on which the Department issued final decisions between January 1, 1985 and May 1, 1987, nine are dealt with here. The exceptions are Midway-Air Florida Show-Cause Order, DOT Order No. 85-4-3 (April 1, 1985) where the "failing company" doctrine was clearly applicable; Joint Application of U.S. Air Group, Inc. and Pacific Southwest Airlines, DOT Order No. 87-3-11 (Mar. 4, 1987), and Joint Application of American Airlines, Inc. and ACI Holdings, Inc., DOT Order No. 87-3-80 (Mar. 30, 1987). None of these decisions departs from the DOT's usual policy line or throws additional light on its meaning.

²⁷ Southwest-Muse Acquisition Show Cause Order, DOT Order No. 85-5-28 (May 10, 1985).

widely employed in general antitrust analyses.²⁸ In support of this rejection, the DOT cited the CAB's well-known statement that "[a]irline markets are nearly always concentrated by traditional antitrust standards, yet most are competitive in performance,"²⁹ so that other factors must be considered to determine whether a proposed transaction would confer market power³⁰ (power to raise prices or reduce service profitably) upon the surviving carrier.³¹ In this connection, the regulator, according to the DOT, must focus his attention upon the ease or difficulty of entry into the affected markets. In the words of the DOT:

In a regulated environment, air carriers are free to enter or leave domestic markets at will. In addition, the primary capital asset of the air transportation industry, aircraft, is highly mobile. In the absence of restraints on entry, the threat of new entry will ordinarily curb the exercise of market power by an incumbent to increase prices or reduce service, even when that incumbent enjoys a substantial market share. However, as the Board recognized, factors such as restraints on airport access may insulate an incumbent carrier from competitive forces by making new entry more difficult or time consuming. Likewise, other factors, such as the importance of feed traffic or other efficiencies from hubbing, may make new entry more expensive, or at least more risky. Such factors may also insulate an incumbent carrier from competitive forces and permit the exercise of market power.³²

Taking a second look at the "insulating factors," the DOT, again following the Board's lead, indicated that they may not be very significant after all. The DOT found

²⁸ *Id.* at 5.

²⁹ See, e.g., *National Airlines Acquisition*, 84 C.A.B. 408, 420 (1979) (CAB stating that it will not rely heavily on market share data because such data has not been particularly helpful in establishing probable competitive performance).

³⁰ Market power is commonly defined as the power to raise prices or reduce services profitably while restricting the entry of competitors. See, e.g., Alpert, *Is Market Structure Proof of Market Power?*, 19 MERGERS & ACQUISITIONS 47 (1984).

³¹ *Southwest-Muse*, Order No. 85-5-28, at 6.

³² *Id.* at 6-7.

that although "the presence of a hub operation at a city can affect the relative efficiencies of an incumbent carrier vis-a-vis a potential entrant in city-pair markets involving a hub . . . other factors — such as hubbing at the other end of a city pair, low cost structures, or access to local and interline feed traffic — can overcome the efficiency effects of hubbing."³³ The fact that facilities are not available from the airport operator at a given airport, because they are fully leased, need not be a barrier. Unless the existing facilities are held by one or few airlines, subleases may be obtained.³⁴

Furthermore, the Department echoed the Board in arguing that there is no need to fear a reduction of competition simply because one would-be merger partner is a potential competitor of the other in one or more city-pair markets, except "where [the market in question] is not performing in a fully competitive fashion and the potential entrant lost through the merger is one of a very few potential entrants."³⁵ The merits of the Department's position regarding the anticompetitive impact of mergers will, in general, not be considered until the concluding section. This treatment of the elimination of a potential competitor seems especially questionable, however, because: (1) "fully competitive" performance may well be the result of the existence of potential competition; and (2) unless there is governmental control of entry, potential entrants are always numerous in principle but individ-

³³ *Id.* at 12.

³⁴ *Id.* at 13. "The Board recognized that the need to sublease airport facilities does not become an entry barrier unless there are only one or a few carriers that control all of an airport's facilities. . . . In that situation, an incumbent might decide that the potential for lost air transportation revenues diverted to a new entrant would outweigh revenues to be gained from leasing facilities. However, when there are more than a small number of carriers, the danger that incumbents will block entry for competitive reasons is much lower. Absent collusion, an incumbent cannot readily assume that its refusal to sublease to a new entrant will deny access to the airport and thereby protect its air transportation revenues from diversion. Market forces can be relied on to assure that a new entrant will be able to negotiate a sublease." *Id.*

³⁵ *Id.* at 10.

ual potential entrants do not have the same capacity to impose competitive discipline.

Since the Department had "tentatively" concluded that Muse was in dire financial straits and the merger would have qualified for approval under the "failing company" doctrine³⁶ if such approval had been sought by the applicants, resolution of the case did not require any extensive discussion of its anticompetitive impact.³⁷ Although the prospective participants in the merger competed in a number of city-pair markets (including several where they offered the only services between airport pairs with distinctive advantages in convenience as compared with available substitutes), and although both maintained hubs at Dallas and Houston, no anticompetitive effect was expected because Muse was on the point of leaving the scene anyway.³⁸ Nevertheless, the Department seized this early opportunity to announce its support of the general view that airline mergers do not ordinarily result in a substantial reduction of competition, regardless of the existing or potential market relationships between the would-be participants.

The DOT's next important decision, which approved United Airlines' purchase of Pan American's Pacific Division as an operating entity, involved international markets subject to a type of official entry control unknown in United States domestic air transportation.³⁹ These controls, together with the superior resources and traffic access possessed by United as compared with Pan American, caused the DOT to conclude that the United States-Japan and United States-Far East markets were "likely to be-

³⁶ The "failing company" doctrine is a type of defense used by merger proponents seeking to show that their proposed transactions are necessary to prevent the failure of one of the participant firms. Thus, it may be argued that competition between the participants would be eliminated even if the merger would not proceed, so that the merger itself will not reduce competition. It may also be argued that the merger will produce a social benefit by preventing the wasteful liquidation of a going concern.

³⁷ *Southwest-Muse*, Order No. 85-5-28, at 5.

³⁸ *Id.* at 11.

³⁹ *Pacific Division Transfer Case*, DOT Order No. 85-11-67 (November 4, 1985).

come significantly more competitive," as a result of the transfer of Pan American's operating rights to United, in spite of the limited amount of competition between the two carriers in these markets.⁴⁰ The decision appears to throw no light on domestic acquisition policy and therefore will not be considered further. Some have suggested that the decision affected domestic policy by forcing approval of further acquisitions.⁴¹ However, it seems that the decisions allegedly so affected were, as will be seen, entirely consonant with existing domestic policy and therefore in need of no special *ad hoc* explanation.

The competition analysis in *Piedmont-Empire Acquisition Show Cause Proceeding*⁴² emphasizes the Department's view that elimination of specific potential competitors is generally of minor significance. The analysis again follows precedents established by the CAB. Three types of geographic markets were recognized as relevant: (1) the nation; (2) city pairs; and (3) individual points served.⁴³ In each case, the "product" was defined as scheduled pas-

⁴⁰ *Id.* at 4.

While structural factors (chiefly, barriers to entry and expansion by new and fringe competitors) are relatively restrictive in these markets, the overriding fact is that they apply to United just as to other would-be or fringe competitors. The barriers do not limit JAL [Japan Air Lines], Northwest, and Pan American in the same way. The fact that the barriers to competition in the relevant markets do not have the same impact on all carriers, together with the fact that the relevant markets are growing rapidly, means that, absent substantial additional operational flexibility, United's competitive significance in the relevant markets would likely diminish over the near future, if this transaction were disapproved. Moreover, based on its financial and operating strengths, the transaction may enable United to provide stronger competition than Pan American and United now can separately.

Id.

⁴¹ The Economist, Nov. 1, 1986, at 24, reports that Professor Alfred E. Kahn has asserted that the Pacific Division purchase "made it impossible to deny Northwest-Orient the right to gobble up Republic . . . so a chain of mergers, acquisitions and marketing deals were sanctioned that removed much of the local competition for passengers and then trapped them into a particular carrier's network."

⁴² DOT Order No. 85-12-17 (Dec. 9, 1985).

⁴³ *Id.* at 5.

senger air transportation.⁴⁴ A similar position had already been “tentatively” endorsed in *Southwest-Muse*.⁴⁵ The combined post-merger share of traffic in the national market was found to be suitably small.⁴⁶ In the only city-pair market where the carriers both offered nonstop service, their combined market share was calculated to be four percent and competitive nonstop service was provided by four major airlines in addition to commuter airlines. Between other city pairs served by both, the connecting service offered by one was “significantly less convenient than the other’s nonstop service.”⁴⁷ At none of the twelve points served by both Empire and Piedmont would the merger result in “dominance” by the combined carrier.⁴⁸ At Baltimore, where Piedmont’s “dominant” share of enplanements would rise from 44.1 percent to 44.4 percent, there was “[n]o indication that other carriers would be unable to begin or extend service” and approximately nine carriers were already operating.⁴⁹ Similar conditions existed at four other points where the combined carrier would account for more than ten percent of enplanements.⁵⁰

As the evidence shows, the immediate effect of the acquisition, measured in terms of loss of competitive service, was not large. Nevertheless, the evidence also strongly suggests that Empire was well placed to be a source of new competition especially in Piedmont’s local markets, and to respond in those markets to any slackening or overpricing of the existing service. These consider-

⁴⁴ *Id.*

⁴⁵ *Southwest-Muse*, Order No. 85-5-28, at 7.

⁴⁶ *Piedmont-Empire Show Cause*, Order No. 85-12-17, at 5. The Piedmont-Empire merger would result in “a combined national market share considerably smaller than the national market share created by several other recently approved airline mergers.” *Id.* (citation omitted).

⁴⁷ *Id.* at 6.

⁴⁸ *Id.* at 6-8.

⁴⁹ *Id.* at 7.

⁵⁰ *Id.* Although the combined Piedmont-Empire carrier would account for more than ten percent of enplanements at these points, the combined carrier would still not be “dominant.” *Id.*

ations were characteristically ignored, in line with the Department's view that this sort of potential competition was irrelevant unless the affected market's performance was already not "fully competitive" and the to-be-extinguished firm was one of only a very few potential competitors.

The direct economic effect of the decision in *Horizon-Cascade Acquisition Show Cause Proceeding*⁵¹ was apparently negligible. However, the opinion contained an important explanation of the DOT's general policy of merger regulation. Here, the to-be-acquired carrier was bankrupt and was continuing to operate only because of funds provided by the would-be acquirer.⁵² It would seem, therefore, that the transaction would not eliminate any existing or potential competition. The Department took this occasion, however, to elaborate its view that the elimination of a viable competitor, will not "ordinarily" permit the survivor to exercise "market power" because of the threat of new entry.⁵³ Even though Horizon and Cascade were direct competitors in eleven nonstop markets and in nine of these there were no others, the DOT found that in view of the general absence of entry barriers, "potential airline competition [could] prevent the exercise of market power."⁵⁴

Most notably, in response to evidence indicating that airline fare levels tend to vary inversely with the number of actual competitors in a given market, the DOT nevertheless concluded that a reduction in the number of actual competitors did not imply a "reduction in competition."⁵⁵ The DOT stated "that fares are likely to be lower in mar-

⁵¹ DOT Order No. 86-1-43 (Jan. 22, 1986). The tentative approval was made final on January 30, 1986. *Horizon-Cascade Acquisition Show Cause Proceeding Final Order*, DOT Order No. 86-1-67 (Jan. 30, 1986).

⁵² *Horizon-Cascade Show Cause*, Order No. 86-1-43, at 3.

⁵³ The DOT did not consider the applicability of the "failing company" doctrine to this case because the applicants failed to provide the required documentation. *Id.* at 11.

⁵⁴ *Id.* at 7.

⁵⁵ *Id.* at 10. The State of Washington, opposing the merger, felt that the markets were "too thin to support competition." *Id.* The DOT responded by stating

kets with actual competition, but potential competition should keep fares *close* to competitive levels.”⁵⁶ As an indicator of what the Department meant by the term “close,” it declared with apparent satisfaction that “[s]ome commentators believe that the difference in fares between concentrated and overconcentrated markets is no more than ten percent.”⁵⁷

LATER DECISIONS: FAR-REACHING CONSEQUENCES

Each of the next two merger decisions had a far more significant immediate impact on competition in the domestic market than those discussed above. Both concerned carriers with extensive competitive overlaps. In both cases, the merger proponents operated hubs at the same cities. Unlike *Southwest-Muse*, neither case involved a moribund participant. These two decisions highlight the difficulties faced by merger opponents under the DOT’s interpretation of the law.

As described by the Administrative Law Judge, pre-merger competition between Northwest Airlines and Republic Airlines, two vigorous and viable carriers, was extensive:

The Department of Justice has identified 97 city pairs affected by the proposed acquisition. These markets include 26 Minneapolis-St. Paul [MSP] and 12 Detroit city-pairs in which both Northwest and Republic provide non-stop service. . . . In addition, 53 city-pairs emanating from one of these two hubs are served by one carrier and not the other: At MSP, Republic serves 15 . . . and Northwest 6 . . . not served by the other merger partner; at Detroit, Republic serves 32 Detroit city-pairs not served by Northwest. . . . Rounding out the 97 city pairs, DOJ identifies 6 non-Minneapolis/Detroit city-pair markets that are served

that, if the state were correct, “they would not receive competitive service on a long-term basis, even if we disapproved the acquisition.” *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 10-11 (citation omitted).

nonstop by both carriers.⁵⁸

As the judge also noted, the evidence unmistakably showed that Northwest's president believed that one of the merger's main benefits to the participants would come "from the elimination of excess competition, vis-a-vis each other."⁵⁹ Nevertheless, the judge felt compelled to recommend approval of the transaction on the ground that "no party ha[d] sustained the burden of proving that the proposed merger [would] substantially reduce competition in any relevant market."⁶⁰ In fact, no party, not even the Department of Justice, argued that the extensive elimination of competitive services amounted to "anticompetitive effects" within the meaning of the law. According to the judge, all parties agreed that:

"free entry into domestic markets under the Deregulation Act raises the possibility that any carrier can enter any market to replace the loss of competition by removal of Republic or Northwest and that such entry will discipline the market and prevent the incumbent from exercising monopoly or market power by exacting supracompetitive prices or reducing service below competitive levels."⁶¹

Acceptance of this view, the judge believed, "would appear in fact to render the burden of proof attaching to a merger opponent almost insurmountable."⁶² Barriers to market entry were regarded as necessary for the existence of anticompetitive effects. Traditional entry barriers such as facilities and slot constraints were ordinarily absent. It would, therefore, be difficult indeed for opponents to prove that entry in any affected market would be *unlikely* to occur, and thus that anticompetitive consequences were probable. In *Northwest-Republic*, for example, where no "traditional" entry barriers existed, the DOJ at-

⁵⁸ Northwest-Republic Acquisition Case, DOT Docket No. 43,754, Recommended Decision of the Administrative Law Judge (June 17, 1986), at 23-24.

⁵⁹ *Id.* at 18 n.40.

⁶⁰ *Id.* at 5.

⁶¹ *Id.* at 18.

⁶² *Id.* at 19.

tempted to show that replication of Republic's hub would be required to discipline competition in some of the MSP city pairs, and that this could not be accomplished, in part because of airport capacity limitations. The judge apparently regarded the DOJ's supporting evidence as insufficiently specific. The judge decided, however, that, even if it had been specific, it could not "meet the theoretical objection that a potentially unlimited number of commuters or other new entrants may be available to discipline the market."⁶³ Given a reading of the law which requires merger opponents to prove that new entry is unlikely in markets where the merger has eliminated a competitive service, the judge's conclusion seems inescapable.⁶⁴ In the absence of traditional barriers, it is easy to imagine arguably plausible scenarios for new entry in any particular market.

The DOT expressly rejected the judge's evaluation of the plight of airline merger opponents.⁶⁵ In analyzing the effects of proposed mergers, noted the Department, its attention is focused primarily on factors affecting competition. The chief factors, according to DOT, "are entry barriers, which include 'a wide range of factors that could cause unacceptable delays in competitive activity, even if

⁶³ *Id.* at 20. Here the judge further commented:

We accept the submission by Justice . . . that competition must be assessed and maintained in individual city pair markets and not merely in the national market (as argued by the applicant) in order to vitiate anticompetitive assertions. We also accept the Justice Department's contention that it may not be possible to replicate Republic's hub at MSP [Minneapolis-St. Paul] within two years. However, these pyrrhic proofs cannot overcome the theoretical presumption of unlimited open entry by potential competitors and the statutory presumption of innocence ascribed to mergers under the Deregulation Act.

⁶⁴ A slightly different reading of the law would, of course, produce very different results: "If the burden of showing the absence of anticompetitive effects were shifted to applicants, we would conclude that the merger should not be approved, since the applicants have not proven the likelihood of entry in certain city pairs, any more than opponents have proven the likelihood of non-entry." *Id.* at 14.

⁶⁵ NWA-Republic Acquisition Case, DOT Order No. 86-7-81, 7 (July 31, 1986) (stating that the ALJ "seriously overstated the magnitude of the burden and the difficulty in meeting it").

the conditions are not irremediable over the long term.'"⁶⁶ Accordingly:

[O]pponents are not required to prove that entry will be impossible, or that the firms remaining in a market will be able to exercise market power after a merger. Nor are they required to overcome some "theoretical presumption of unlimited open entry." . . . What we do require is a factual basis that allows us to evaluate entry conditions, to assess possible impediments to entry, and to weigh these factors against various pro-competitive factors that we know, from experience and from the record, are operative in most airline markets. If such impediments make entry in response to supracompetitive pricing unlikely (or if they can be expected to delay such entry materially), then a transaction that eliminates actual competition in markets where those conditions exist must be disapproved.⁶⁷

In the *NWA-Republic* case, the DOT concluded that merger opponents had not shown that entrants would be unable to establish new hubs to provide sufficient "feed traffic" to support new competition at all MSP points. The DOT also found that "every [affected] city-pair market should be subject to multiple forms of entry," so that competitive forces, "especially when considered together, should limit attempts to exercise market power."⁶⁸ In this connection, the Department listed the following sources of competitive discipline which had been noted by the judge in his market-by-market analysis:

- (1) actual competition or new entry by carriers with hubs at the other endpoints of the MSP routes,
- (2) actual and potential competition with one-stop and connecting service through intermediate hubs,
- (3) potential entry by carriers without hubs in eleven of the city pairs that have large amounts of local traffic and that therefore, in the ALJ's view, can be served by carriers without feed traffic,
- (4) potential entry by carriers with tag-end flights,
- (5) en-

⁶⁶ *Id.* at 6 (citation omitted).

⁶⁷ *Id.* at 7. The DOT regarded the establishment of a new small hub at MSP by a large carrier as both "feasible and likely" after this merger. *Id.* at 19.

⁶⁸ *Id.* at 16.

try into many of the shorter, thinner markets by commuter carriers, (6) entry by carriers with lower operating costs, and (7) entry by carriers that already operate at both endpoints.⁶⁹

Considering all these possibilities, it appears that an opponent would indeed have a hard time proving that post-merger new entry would be unlikely. Except for its particular emphasis on the significance of "material delay" of entry, as distinguished from permanent entry barriers,⁷⁰ the Department's reading of the law seems to be remarkably similar to that of the judge.

The second case, whose central issue was "whether a combination of two carriers hubbing at the same city is likely to substantially reduce competition,"⁷¹ concerned the acquisition of Ozark Airlines by TWA, both of which operated hubs at St. Louis.⁷² These carriers competed nonstop on thirty city-pair routes, nineteen of which had no other nonstop services. In forty-one other St. Louis city pairs, either Ozark or TWA (but not both) operated nonstop. Here again, the DOT justified approval of the transaction by pointing out that there were no apparent obstacles which would prevent the "timely" establishment of a new hub at St. Louis⁷³ and that, even should this not occur, non-hub services could provide adequate competitive discipline.⁷⁴ Thus, in neither of these cases did the Department find that the merger of two carriers with hubs at the same city would substantially reduce competition in all cases where the available airport facilities were inadequate to accommodate a new, competitive hub service. The crucial question was whether new entrants would be prevented from entering any "affected city-pair markets within a reasonable period of time (two years) in response

⁶⁹ *Id.* "Tag-end flights" are defined as "those in which the operating carrier does not have a hub at either endpoint." *Id.* at 18.

⁷⁰ See text accompanying *supra* note 67.

⁷¹ TWA-Ozark Acquisition Case, DOT Order No. 86-9-29, 2 (Sept. 12, 1986).

⁷² *Id.*

⁷³ *Id.* at 3.

⁷⁴ *Id.* at 7-8.

to an attempt by the combined TWA and Ozark to raise prices above competitive levels."⁷⁵ The inability to establish a hub would not necessarily have this effect.

Market access was again the crucial issue in the *Texas Air Eastern Acquisition Case*.⁷⁶ Here the markets concerned a specific type of service — “shuttle” service — between two specific airport pairs, Washington National (DCA) and Laganrdia (LGA), and LGA and Logan (BOS). Eastern Airlines and Texas Air (through its subsidiary, New York Air) provided the only shuttle-type service in these two markets and both LGA and DCA were (and are) “slot-controlled” under the FAA high-density rule.⁷⁷ The DOT held that, unless adequate facilities for a competitive shuttle service were provided, the merger would substantially reduce competition in both the DCA-LGA and the LGA-BOS shuttle markets.⁷⁸ Accordingly, it approved the transaction only after Texas Air had made agreements enabling Pan American to obtain enough slots at DCA and LGA to operate fifteen daily round-trip flights in each of the shuttle markets.⁷⁹

To differentiate shuttle service from other services between the same points, the DOT declared that many business travellers do not regard the non-shuttle operations as a “practicable alternative” because they are more time-consuming and more costly, and that a large proportion of the shuttle traffic consisted of this class of traveller.⁸⁰ The Department placed particular emphasis on evidence showing that the levels of fares charged at other airports did not affect the level of the shuttle fares.⁸¹ However, no attempt was made to state the precise criterion which the

⁷⁵ *Id.* at 6.

⁷⁶ Texas Air-Eastern Acquisition Order to Show Cause, DOT Order No. 86-7-21 (July 9, 1986).

⁷⁷ See 14 C.F.R. § 93-123 (1987). At slot-controlled airports, rights to specific times for take-off and landing are allocated among carriers on a long-term basis.

⁷⁸ *Texas Air-Eastern Show Cause*, Order No. 86-7-21, at 15-16.

⁷⁹ *Id.* at 16.

⁸⁰ *Id.* at 13.

⁸¹ *Id.* at 14.

Department believed to be appropriate for the delineation of the boundaries of a given market. There was, for example, no indication of how quickly and to what extent the price within the market in question would have to react to the "outside" price changes in order to call in question the existence of the separate "inner market," and thus to suggest that the elimination of competition within it was not a substantial reduction of competition after all.⁸² In this respect, the Department's position is reminiscent of the traditional method of judging the anticompetitive impact of mergers by using concentration ratios, where the legality of a transaction hinged on an essentially arbitrary market definition.⁸³

Defining the market was also an important issue in connection with another acquisition by Texas Air which followed hard upon the heels of *Texas Air-Eastern*. Like *Texas Air-Eastern* this merger involved a substantial competitive overlap in the northeast transportation corridor. Here, Texas Air proposed to merge People Express into a newly formed subsidiary and to acquire most of the remaining assets (including a leasehold interest in fifteen gates at the main Denver airport) of People's bankrupt subsidiary, Frontier Airlines.⁸⁴ People Express itself was in dire financial straits with no apparent prospect of any improvement.⁸⁵ Approval of the merger did not, however, result from the application of the "failing company" defense.⁸⁶

The extensive competitive overlap between the merger participants was not in dispute. There were seventeen

⁸² The DOT simply stated that "the key question in deciding whether services are in the same market is whether (and to what extent) the prices for one service respond to changes in prices for the other service." *Id.* (citations omitted).

⁸³ See, e.g., Keyes, *Proposals for the Control of Conglomerate Mergers*, 34 S. ECON. J. 67 (1967).

⁸⁴ Texas Air-People Express Acquisition Show Cause, DOT Order No. 86-10-26, 4 (Oct. 14, 1986).

⁸⁵ Texas Air-People Express Acquisition, Final Order, DOT Order No. 86-10-53, 6 (Oct. 24, 1986).

⁸⁶ The applicants failed to provide adequate information to enable the DOT to consider the merger under the "failing company" doctrine, so the DOT evaluated the merger in the competition analysis framework. *Texas Air-People Express Show Cause*, Order No. 86-10-26, at 9.

nonstop markets in which People Express and one of the two Texas Air affiliates (New York Air or Eastern) were currently competing. Of these, sixteen had one endpoint at New York City.⁸⁷ In its preliminary tentative decision to approve the merger, the DOT clearly indicated that entry conditions, and especially any airport access constraints affecting these conditions, would be the decisive factors determining the prospective merger's anticompetitive effect. "With the exception of slot constraints at DCA [Washington National]," noted the DOT, "resolution of the question of whether Texas Air's acquisition of People Express will lessen competition depends on whether there are any impediments to entry at New York, and that question turns on entry conditions at EWR [Newark]."⁸⁸ Newark was the only available access point to the New York market other than LGA and Kennedy (JFK), both of which were at least partially subject to slot restrictions under the high-density rule. The slot controls at DCA would not be a problem, in the agency's opinion, because entry at Washington's Dulles International Airport (IAD) was not constrained.⁸⁹

In the end, despite the fact that the would-be merger participants accounted for roughly sixty percent of the service in the crowded northeast corridor markets (New York-Washington and New York-Boston), the agency concluded that the merger would not substantially reduce competition because expansion or entry was possible in at least one airport in each of the three cities.⁹⁰ This conclusion, in turn, depended upon a finding that Newark "had, or will soon have, adequate facilities and air traffic capacity to accommodate carriers desiring to enter or expand operations in the New York markets."⁹¹ Outside the northeast corridor, concern about possible anticompeti-

⁸⁷ *Texas Air-People Express Final Order*, Order No. 86-10-53, at 9.

⁸⁸ *Texas Air-People Express Show Cause*, Order No. 86-10-26, at 14.

⁸⁹ *Texas Air-People Express Final Order*, Order No. 86-10-53, at 9.

⁹⁰ *Id.*

⁹¹ *Id.*

tive affects had centered on Denver's Stapleton Airport where it was feared that the acquisition of a large proportion of scarce gate space by a dominant competitor (Texas Air) could substantially increase "potential entrants' difficulties in obtaining access to the necessary facilities."⁹² Here the Department was able to obtain evidence convincing it that there was no prospect of a future shortage of gate space.⁹³

Within the northeast corridor, however, there was another special problem area. In the EWR-DCA route, the only suppliers of nonstop service were New York Air and People Express, and access to DCA was undeniably limited by slot control. The Department dealt with this difficulty by the use of two lines of argument: (1) that the EWR-DCA route was not a separate market or submarket; and (2) that even if it were a separate market, the acquisition would not substantially reduce competition because other carriers would be able to begin competitive service.

In support of the first argument, the DOT stretched its concept of the "market" to its logical extreme. "A specific airport pair," it declared, "will constitute a separate market if there is a large number of travellers who will rarely consider using alternative airports and if the carriers serving that airport pair can therefore *disregard the level of fares and service offered at other airports, in determining their fares and service levels.*"⁹⁴ The DOT went on to state:

We recognize that Newark and Washington National appear to be the most desirable airports for many travellers between the New York and Washington metropolitan areas and that in recent years many passengers have used DCA-EWR flights. We see no basis for concluding that these airport preferences will enable a carrier on the DCA-EWR route to *ignore the fares and service provided in other New York-Washington city pairs.*⁹⁵

⁹² *Texas Air-People Express Show Cause*, Order No. 86-10-26, at 20.

⁹³ *Texas Air-People Express Show Cause*, Order No. 86-10-53, at 18.

⁹⁴ *Id.* at 16 (emphasis added.)

⁹⁵ *Id.* (emphasis added.)

Thus, *any* substitutability, however slight, with a service outside the boundary of a designated product group will apparently suffice to destroy the group's "market" status.

This formulation provides an illuminating contrast with that in *Northwest-Republic*. In that case, market definition was based on whether:

products are sufficiently substitutable so that prices for the first have a *strong* influence on prices for the second, *one cannot ignore a product once it is excluded from the market . . .* even if a 'product' such as ground transportation or connecting service is excluded from the market, one should nevertheless consider whether and to what extent that product can have a meaningful impact on the prices that are charged for the product that remains in the market.⁹⁶

The DOT's second argument was supported by the use of a similarly elastic view of the "entry barrier" concept. Even though tight slot restrictions existed at DCA, it was held that the required "discipline" could be maintained by other carriers already present at that airport, which could divert capacity into the DCA-EWR route, and by the purchase or lease of additional slots from carriers already holding them.⁹⁷ The situation on this route was distinguished from the shuttle routes case by the larger number of slots required to compete effectively in the latter. However, this distinction seems to be questionable on at least two grounds: (1) an effective disciplining of any market would seem to require the ability to enter (and to operate) on a more than minimal scale (relative to the size of the market); and, (2) it is presumably always possible to acquire any number of the existing slots anywhere at *some* price.

In short, the defining characteristic of an "entry barrier" which makes it sufficiently "high" to compel rejection of an airline merger is not made at all clear. The same can be said of the defining characteristic of a "market" which gives "power" to the firm which dominates it.

⁹⁶ *NWA-Republic*, Order No. 87-7-81, at 9 (emphasis added.)

⁹⁷ *Texas Air-People Express Final Order*, Order No. 86-10-53, at 17-18.

To serve the purpose intended by the DOT, the term "barrier to entry into a market" would not only have to be definite in meaning, but also to be defined in such a way so as to identify factors known to produce "substantial" harm to market participants. The latter requirement would obviously be far more difficult to meet, and the DOT's suggested two-year delay of entry does not fill the bill.

Delta Airlines' acquisition of Western Airlines⁹⁸ raised no new or difficult issues related to anticompetitive impact. The route overlap between the participants was minimal and in these markets the Department saw "no evidence of barriers that would prevent other carriers from providing competitive service."⁹⁹ Moreover, the merging carriers' combined share of the airport facilities at hubs served by both was not enough to threaten access by others even if these facilities had been especially scarce, which did not appear to be the case.¹⁰⁰ It does appear, however, that there may have been a real probability of future competition between the two carriers, but there was ample precedent for ignoring this consideration.

THE "NATIONAL MARKET"

In accordance with long-standing precedent, the Department also considered the effect of the Delta-Western transaction on concentration in the "national market" for scheduled passenger air transportation. This analysis requires the DOT to consider the merger's effect on the distribution of the national output of this product among all carriers. Although national concentration was by this time verging on levels normally attracting concern under the Justice Department's guidelines for mergers,¹⁰¹ this

⁹⁸ Delta-Western Acquisition Case Show Cause, DOT Order No. 86-10-44 (Oct. 23, 1986).

⁹⁹ *Id.* at 6.

¹⁰⁰ *Id.* at 7-8.

¹⁰¹ Department of Justice 1984 Merger Guidelines, 49 Fed. Reg. 26,823 (1984). When evaluating the national market, the DOJ uses the Herfindahl-Hirshman Index (HHI). The HHI provides a statistical model of the concentration of an in-

transaction, because of the relatively small size of one participant, would have escaped challenge under the antitrust laws, even if the DOJ had taken the view that the "national market" existed.¹⁰²

Recent mergers with large quantitative impact have also been subjected to the DOJ tests and found to be harmless. For the Texas-Eastern merger, which was expected to make Texas Air the nation's largest carrier, accounting for 16.8 percent of the total national revenue passenger miles, the Transportation Department had estimated that the post-merger Herfindahl-Hirshman Index (HHI)¹⁰³ value would be below 1000.¹⁰⁴ The effect of the Texas-People combination, which would have increased the national HHI from 1023.4 to 1140.8 if the traffic of both carriers had continued to match pre-merger levels, was discounted because People's dismal business prospects made such continuance highly unlikely.¹⁰⁵

Having inherited from the CAB the custom of including in its merger opinions assessments of the proposal's effect on the national concentration of airline output,¹⁰⁶ the DOT has carried this practice on without explaining the official theory of the relationship between these effects and the actual anticompetitive impact of the transactions dealt with. The nation's whole output of scheduled passenger air transportation is certainly not all in one market,

dustry by summing the squares of the market shares of the resident firms. *Id.* at 26,830-31. A monopolistic industry would have an HHI value of 10,000, while an atomistic industry would have an HHI value approaching zero. *Id.* at 26,831 n.13. (monopolistic industry has only one firm with a 100% market share, $100 \times 100 = 10,000$). The DOJ uses the HHI to determine the effect a merger will have on the concentration of the industry by calculating the HHI of the industry before and after the merger. *Id.* at 26,831. If the post merger HHI is below 1000, the DOJ will generally not challenge the merger, a post merger HHI of 1000 to 1800 may draw a challenge, and a post merger HHI of greater than 1800 will probably draw a challenge. *Id.*

¹⁰² *Delta-Western Show Cause*, Order No. 86-10-44, at 5-6.

¹⁰³ See *supra* note 101 for an explanation of the application of the Herfindahl-Hirshman Index.

¹⁰⁴ *Texas Air-Eastern Show Cause*, Order No. 86-71-21, at 10.

¹⁰⁵ *Texas Air-People Express Show Cause*, Order No. 86-10-26, at 12-13.

¹⁰⁶ *Southwest-Muse*, Order No. 85-5-28, at 9.

if "market" is defined in terms of ready substitutability of products or cross-elasticities of demand. As has been seen, it is this type of definition that the Department has appeared to favor in connection with city-pair services.

It has been said that the "national market is analyzed because the Department recognizes that the basic industry assets, airplanes, are highly mobile and that entry barriers are low."¹⁰⁷ This comment suggests that the Department may believe that national concentration may bring about "substantial reduction of competition" because of a scarcity of *existing* carriers (as distinguished from possible new operators) capable of entering the markets of others who seek to raise prices or reduce the quality of service. But such a position would be inconsistent with the agency's general view that "substantial reduction of competition" can occur *only* if there is some factor which will prevent the beginning of new competition for *a minimum of two years*. Experience indicates that the launching of a new airline does not take that long. From the Department's point of view, therefore, even a merger creating one comprehensive national air carrier would not necessarily imply a "substantial reduction of competition" in any airline market. Provided that access to each "market" could be obtained within a two-year period, there would in fact be no such reduction. As the Department has reminded us, it would not be necessary for the *same* new entrant to compete in all the affected markets. Because of the elusive nature of the "market" concept, however, the exact meaning of the proviso remains in doubt.

CONCLUSION: THE NEED FOR A NEW APPROACH

As the example of the "national market" suggests, the DOT's working criterion for "substantial reduction of competition" leaves much to be desired. Under the law, a finding of "substantial reduction of competition" in con-

¹⁰⁷ TWA-Ozark Acquisition Case, Recommended Decision of the Administrative Law Judge, DOT Docket No. 43,837 (August 7, 1986) at 11.

nection with a proposed merger means that the merger must be disapproved unless it can pass a rigorous test. This test requires a showing that the transaction will produce certain benefits which outweigh its anticompetitive effects. In this context, the regulatory criterion must be able to indicate whether the merger is or is not likely to cause economic performance to deteriorate to such an extent that this test should be run. The DOT criterion is unsatisfactory because it cannot be relied upon to perform this task.

First, the criterion does not take into account the anticompetitive effect of removing an existing competitor, irrespective of whether or not there are obstacles to entry. While the Department may well be right in believing that this removal will typically result in only a small percentage increase in price for each unit of output,¹⁰⁸ the aggregate effect in a large market, or in many smaller markets (for example, as in *Northwest-Republic*) could be quite substantial. Moreover, it is reasonable to expect that the quality of service (at any given price) will decrease when an existing rival seller is eliminated. The aggregate effect will, of course, vary directly with the period of time which elapses before a new entrant appears. However, there is no reason to assume that the effect is always negligible if this time period is less than two years.

As was noted above, in connection with *Southwest-Muse*, the Department has also refused to take into account the effect of removing a potential competitor except under restrictive conditions that do not seem justified. However, if the DOT view on direct competition is accepted, then it is evidently easy to justify ignoring the state of potential competition to the same extent.

It has been suggested that the DOT view on elimination of competition is an integral part of the rationale of the Deregulation Act. To justify this law, in other words, it is necessary to argue that, in the absence of obstacles to en-

¹⁰⁸ See *supra* note 57 and accompanying text.

try, unregulated market forces will produce "optimum" economic results (usually defined so as to imply the equality of price with marginal cost) in all airline markets, including those which contain only one firm. This argument is not only unnecessary to support deregulation; it is evidently misguided.

The fact is that neither existing nor potential competition can be expected to produce "optimum" results in airline markets, or in the vast majority of other markets, regulated or unregulated. Examples of "perfect competition" and "perfect contestability" are not abundant in the real world. For reasons which cannot be dealt with here, there is no good case for trying to bring these results about by governmental action. The Deregulation Act cannot and need not be justified by arguing that it will realize an economic "ideal." What it does promise is the removal of the obviously undesirable effects of protective regulation, notably excessive airline operating costs and unresponsiveness to consumer demand. By maintaining competition, antitrust-type merger regulation can help to prevent the reappearance of these economic evils.

Second, there is no reason to assume that the expected "reduction of competition" caused by eliminating a competitor suddenly becomes "substantial" if it is likely that there will be a two-year delay in entry. For example, if the affected market is quite small, the anticompetitive effect could still be quite small also. Of course, this objection does not apply exclusively to a *two-year* cut-off point. It is equally applicable to any similarly time-determined test for "substantiality."

Third, the operational content of the criterion depends crucially upon a method of defining the market which is neither clear in meaning nor defended by economic argument, and is therefore subject to different interpretations in any particular case. This ambiguity has important implications, because entry conditions in individual "markets" are the factors which are held to determine whether or not there will be "substantial reduction of competi-

tion.” The way in which markets are defined, which is significantly discretionary, may often decide the fate of particular merger proposals. (Consider, for example, the importance of market definition in *Texas Air-People*.)

The practical application of the DOT criterion has served to justify approval of an impressive number of mergers between airlines, including some companies which were competitive or potentially competitive in many markets. In only one major case (*Texas Air-Eastern*),¹⁰⁹ which involved “traditional entry barriers,” was it necessary to require an important change in a proposal before it could be approved. If the above analysis is correct, some of the approved transactions were in fact capable of producing significant anticompetitive effects. As has been noted, termination of special regulatory treatment of airline mergers, which may occur in the near future, cannot be expected to produce any substantial change in policy.

¹⁰⁹ See *supra* notes 76 to 83 and accompanying text.