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## Unexpected Turbulence: An Examination of External Factors That Influenced the DOJ's Intense Review of the American Airlines/US Airways Merger and Its Potential Impact on Future Mergers

Jordan T. Sawyer

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**UNEXPECTED TURBULENCE: AN EXAMINATION OF  
EXTERNAL FACTORS THAT INFLUENCED THE DOJ'S  
INTENSE REVIEW OF THE AMERICAN AIRLINES/US  
AIRWAYS MERGER AND ITS POTENTIAL  
IMPACT ON FUTURE MERGERS**

JORDAN T. SAWYER\*

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\* J.D. candidate, SMU Dedman School of Law, 2016; B.B.A., Texas A&M University, 2013. Jordan is grateful to those who provided assistance in publishing this comment and would like to thank his family, and specifically his wife, Stephanie, for their support throughout law school.

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## I. INTRODUCTION

**I**N FEBRUARY OF 2013, US Airways and American Airlines announced they had come to terms on a merger. The \$11 billion combination was poised to create the world's largest airline.<sup>1</sup> It also represented the fourth mega-airline merger since 2008.<sup>2</sup> Each of these deals helped the newly combined airline steady itself in the unstable airline market. The Department of Justice (DOJ), which is tasked with analyzing potential anti-trust issues in the mergers, cleared the other mergers for takeoff with little to no issue. Despite allowing these other mergers, the DOJ announced in August of 2013 that it was going to challenge

<sup>1</sup> Chris Isidore, *US Airways–American Airlines to Merge*, CNN MONEY (Feb. 14, 2013), <http://money.cnn.com/2013/02/14/news/companies/us-airways-american-airlines-merger/index.html>.

<sup>2</sup> Tal Yellin, *The Runway to the Final Four*, CNN MONEY, <http://money.cnn.com/infographic/news/companies/airline-merger> (last visited Nov. 16, 2015).

the proposed US Airways and American Airlines merger as an antitrust violation.<sup>3</sup> This move “surprise[d]” many in business in the airline industry and came as a shock to the leaders of the to-be-formed American Airlines, who had previously said “they were not worried about getting antitrust approval,” based in large part on the DOJ’s lenient stance on the previously approved mega-airline mergers.<sup>4</sup>

The antitrust battle between the “new” American and the DOJ continued for months before the DOJ finally announced that it would allow the merger.<sup>5</sup> This announcement came at great cost to the new airline, however, as the DOJ concurrently announced that in exchange for approval, American agreed to give up hundreds of millions of dollars worth of airport gates and slots at major airports and to forgo future business at these locations.<sup>6</sup> The airline industry, which had seen four major deals approved in the previous eight years with almost no resistance from the DOJ, was stunned.<sup>7</sup>

While American Airlines is finally and formally merged, the staunch resistance that it faced leaves a question behind: Why did the DOJ deviate so drastically from the course it took in previous airline mergers? This comment seeks to answer this question and will look at the legal reasons that the DOJ explicitly announced in its challenge of the new American. Finding these to be insufficient, however, this comment will turn to other implicit reasons for the challenge that may have been the driving force behind the DOJ’s resistance to the merger. These reasons in both policy and politics help to serve as a forecast for how the DOJ may treat future mega-mergers in the airline industry and in other unrelated industries.

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<sup>3</sup> Complaint ¶ 13, *United States v. US Airways Grp.*, 38 F. Supp. 3d 69 (D.D.C. Apr. 25, 2014) (No. 13-01236), 2013 WL 4055128.

<sup>4</sup> Gregory Karp, *Justice Department Sues to Block US Airways-American Merger*, CHI. TRIB. (Aug. 13, 2013), [http://articles.chicagotribune.com/2013-08-13/business/chi-us-airways-american-merger-20130813\\_1\\_ceo-tom-horton-us-airways-american-american-airlines](http://articles.chicagotribune.com/2013-08-13/business/chi-us-airways-american-merger-20130813_1_ceo-tom-horton-us-airways-american-american-airlines).

<sup>5</sup> See Press Release, Justice Department Requires US Airways and American Airlines to Divest Facilities at Seven Key Airports to Enhance System-Wide Competition and Settle Merger Challenge (Nov. 12, 2013), <http://www.justice.gov/opa/pr/justice-department-requires-us-airways-and-american-airlines-divest-facilities-seven-key> [hereinafter Press Release, Justice Department Requires Airlines to Divest Facilities].

<sup>6</sup> *Id.*

<sup>7</sup> See Marilyn Geewax, *DOJ Suit Seen Delaying, Not Killing Big Airline Merger*, NPR (Aug. 13, 2013), <http://www.npr.org/2013/08/13/211729307/doj-suit-seen-delaying-not-killing-big-airline-merger>.

The comment is broken down into six parts. Part A discusses the legal requirements of an airline merger. Part B provides background information regarding previous airline mergers and how they were treated by the DOJ. Part C discusses the particulars of the American Airlines/US Airways deal. Part D discusses some of the reasons the DOJ challenged the merger as put forth in its Complaint. Part E speaks to other reasons why the DOJ may have challenged the merger so strictly in light of the other previously approved mergers. Finally, Part F predicts how this merger will affect future mergers in both the airline industry and other unrelated industries.

The DOJ's departure in the American merger from its recent record of approving mergers stunned many. While the deal looked very similar to many of its predecessors from a purely legal standpoint, the DOJ's resistance stands as a lesson to those in both the airline industry and the general business community that there are many factors to consider when seeking federal approval for a merger. This comment seeks to shed light on these factors in hopes that those considering merger in the future may be able to avoid the unexpected turbulence that American Airlines and US Airways encountered.

## II. LEGAL AUTHORITY OVER AIRLINE MERGERS

First, a brief introduction is required to introduce the laws important to airline mergers and the governmental bodies that enforce these laws. Antitrust law, as a whole, has developed out of the longstanding need to carefully balance the government's role in limiting anticompetitive economic activity without negatively impacting precompetitive economic activity within the United States economy. There is sometimes confusion as to the main goals of these laws,<sup>8</sup> but they undoubtedly play an important role in shaping the modern American economy. Antitrust laws in the United States trace their way back to the Sherman Act, which prohibits business actions that are in "restraint of trade," without expressly defining what exactly this means.<sup>9</sup> Over time, other statutes and case law have added some clarity to the "restraint of trade" language for specific economic areas. With

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<sup>8</sup> See Catherine A. Peterman, Comment, *The Future of Airline Mergers After the US Airways and American Airlines Merger*, 79 J. AIR L. & COM. 781, 783 n.7 (2014) (discussing tension noted in ABA Section of Antitrust Law, Monograph No. 12, *Horizontal Mergers: Law and Policy* 5-7 (1986)).

<sup>9</sup> 15 U.S.C.S. §§ 1, 2 (2012).

regard to airline mergers, the governing statutory provisions are within Section 7 of the Clayton Act.<sup>10</sup> This section prohibits mergers that “substantially . . . lessen competition.”<sup>11</sup> Whether or not the merger has a substantial impact on competition is one of the main points of contention that antitrust enforcement agencies have raised in regard to airline mergers.

#### A. AIRLINE MERGER REGULATION PRIOR TO THE DEPARTMENT OF JUSTICE

While the Clayton Act gives a statutory basis for challenging airline mergers, different regulatory bodies over time have had the power to enforce this rule. In 1938, Congress gave regulatory authority over the newly formed and booming airline industry to the Civil Aeronautics Board (CAB).<sup>12</sup> The CAB used its authority to promote the status quo of the airline industry, discouraging both the failure and creation of major airlines.<sup>13</sup> The stability of this time was radically altered when leadership in Washington and within the CAB determined that the airline industry should be able to compete and grow within itself.<sup>14</sup>

After determining that the CAB was no longer in the best position to promote this new freer airline industry, Congress signed into law the Airline Deregulation Act in 1978.<sup>15</sup> This act brought new life into the airline industry, which was beginning to stagnate in the wake of the energy crisis, reduced air travel, and increased fees—all due in large part to the rigidity of the CAB administration.<sup>16</sup> In addition to this shift in regulation, the Airline Deregulation Act also appointed the Department of Transportation (DOT) to oversee potential airline mergers.<sup>17</sup>

The DOT took a completely different approach to airline mergers than the CAB. The DOT was exceedingly friendly to the proposed mergers, and in the 1980s it approved almost every

<sup>10</sup> *Id.* § 18.

<sup>11</sup> *Id.*

<sup>12</sup> Civil Aeronautics Act of 1938, 49 U.S.C. app. 401–722 (repealed 1958).

<sup>13</sup> Jeff Mosteller, Comment, *The Current and Future Climate of Airline Consolidation: The Possible Impact of an Alliance of Two Large Airline and an Examination of the Proposed American Airlines-British Airways Alliance*, 64 J. AIR L. & COM. 575, 577 (1999).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* (citing 9 U.S.C. 1551(a)(7) (1958) (repealed 1994)).

<sup>16</sup> Fred L. Smith Jr. & Braden Cox, *Airline Deregulation*, CONCISE ENCYCLOPEDIA OF ECON. (Feb. 3, 2015), <http://www.econlib.org/library/Enc/AirlineDeregulation.html>.

<sup>17</sup> Mosteller, *supra* note 13, at 577 (citing the Airline Deregulation Act).

merger with which it was presented.<sup>18</sup> In fact, many of the airlines that are discussed in the remainder of this article, and indeed much of the airline industry as a whole, were part of mergers that occurred between 1978 and 1988.<sup>19</sup> While the DOT was allowing these mergers to take place, new financial problems arose that again began to clip the wings of the airline industry.<sup>20</sup>

### B. THE DOJ'S AUTHORITY OVER AIRLINE MERGERS

The Airline Deregulation Act provided the DOT with authority over airlines until January 1, 1989.<sup>21</sup> In consideration of the extensive financial losses realized in the airline industry over the preceding years, Congress decided to let the DOT's authority expire on that date.<sup>22</sup> Thereafter, authority to govern the airline industry passed to the DOJ's antitrust department.<sup>23</sup> This new authority was quickly met with a change in the airline industry when Kuwait was invaded in 1990 and oil prices doubled overnight.<sup>24</sup> In turn, as many major airlines began to file for bankruptcy, the merger-packed 1980s began to slow down substantially.<sup>25</sup> It appeared that the DOJ's chance to review major airline mergers would have to wait for a little bit longer.

## III. PREVIOUS TREATMENT OF AIRLINE MERGERS

### A. EARLY DOJ TREATMENT OF AIRLINE MERGERS

While this comment focuses on the DOJ's recent move towards a more heady response to proposed airline mergers, it should be noted that before the DOJ allowed the mergers of the major airlines discussed below, this hard stance is not unprecedented under the DOJ's regulation. In 1989, shortly after receiving its authority, the DOJ moved to block a transfer of airline

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<sup>18</sup> See Alberto G. Rossi, Comment, *Grounding Future Consolidation: United-US Airways Cancel Flight*, 54 ADMIN. L. REV. 883, 887 n.14 (2002).

<sup>19</sup> See Mosteller, *supra* note 13, at 578 (noting that between 1978–1988 there were some 51 mergers in the airlines industry).

<sup>20</sup> *Id.* at 579 (noting that the airline industry suffered loss of \$280 million in 1980 and \$900 million in 1982).

<sup>21</sup> *Id.* at 578.

<sup>22</sup> *Id.* (citing 49 U.S.C. 1551(a)(7) (1958), repealed 1994).

<sup>23</sup> *Id.*

<sup>24</sup> Mosteller, *supra* note 13, at 579.

<sup>25</sup> *Id.*

gates between Eastern Airline and other airlines.<sup>26</sup> Shortly thereafter, in 1991, the DOJ's lawsuit against US Airways and British Airways blocked a proposed joint investment between the two airlines.<sup>27</sup>

In 1998, the DOJ took another step to assert its power over airline mergers. After Northwest Airlines announced its plan to acquire a controlling share of Continental Airline's stock—a merger of the fourth and fifth largest airlines at the time<sup>28</sup>—the DOJ brought a lawsuit to block the merger.<sup>29</sup> The DOJ felt that the merger would violate the “substantially . . . lessen competition in interstate trade and commerce” language of antitrust laws.<sup>30</sup> The airlines abandoned their consolidation plans following the lawsuit.

One more group of airlines, however, attempted to steer around this new stormy DOJ, when US Airways and United Airlines announced their plans to merge in May of 2000.<sup>31</sup> The DOJ, however, announced that it would sue to stop this combination and the deal was ultimately abandoned.<sup>32</sup> Then Attorney General John Ashcroft noted that this merger would hurt both competition and consumers.<sup>33</sup> While Ashcroft admitted that “mergers [in the airline industry] can further competition . . . ,”<sup>34</sup> it appeared that the DOJ was, nevertheless, somewhat hesitant to allow these mergers.

Many in the airline industry felt the DOJ was “sending a message” that the pro-merger atmosphere under the Department of Transportation was officially gone.<sup>35</sup> Many also took this as a sign that the DOJ was not going to allow mergers among the five

<sup>26</sup> Rossi, *supra* note 18; United States v. USAir Group, Inc., Public Comments and Response on Proposed Final Judgment, 58 Fed. Reg. 36,996 (1993).

<sup>27</sup> Rossi, *supra* note 18; United States v. USAir Group, Inc., Public Comments and Response on Proposed Final Judgment, 58 Fed. Reg. 36,996 (1993).

<sup>28</sup> *U.S. Sues to Halt Merger of Northwest, Continental Plan Would Unfairly Limit Competition, Justice Dept. Claims*, BALTIMORE SUN (Oct. 24, 1998), [http://articles.baltimoresun.com/1998-10-24/business/1998297044\\_1\\_continental-airlines-north-west-and-continental-two-airlines](http://articles.baltimoresun.com/1998-10-24/business/1998297044_1_continental-airlines-north-west-and-continental-two-airlines).

<sup>29</sup> Complaint, United States v. Northwest Airlines Corp., No. 98-74611 (E.D. Mich. 1998) (arguing merger violates the Clayton Act).

<sup>30</sup> *Id.* ¶ 42.

<sup>31</sup> Press Release, Department of Justice and Several States Will Sue to Stop United Airlines from Acquiring US Airways (July 27, 2001), [http://www.justice.gov/archive/atr/public/press\\_releases/2001/8701.htm](http://www.justice.gov/archive/atr/public/press_releases/2001/8701.htm).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *U.S. Sues To Halt Merger of Northwest, supra* note 28.



largest airlines at the time: Delta, United, American, Northwest, and Continental.<sup>36</sup>

## B. DELTA AND NORTHWEST AIRLINES

As time passed from the DOJ's 2001 rejection of the US Airways/United merger, the airline industry continued to face "deteriorating industry conditions" and many major airlines went into bankruptcy.<sup>37</sup> The airline industry needed to change the course of this deterioration, and despite the previous DOJ rejections, it appeared that in these desperate times at least a few airlines were willing to attempt a merger.

In April 2008, Delta Airlines announced that it was planning to acquire Northwest Airlines in a \$3.1 billion deal.<sup>38</sup> This deal would lead to the creation of the world's largest airline at the time.<sup>39</sup> While both of these companies had recently gone into bankruptcy, this combination allowed the two companies to pool many of their resources and to expand their flight schedule.<sup>40</sup> These changes, while not necessarily harmonious at first,<sup>41</sup> could provide a testing ground to prove that mergers between large airlines could work.<sup>42</sup> Many believed that mergers like this were needed to help turn around the struggling airline industry.

The DOJ's approval was necessary before the merger could actually take place. This approval was far from a foregone conclusion. In light of the previous rejections, many expected a long and arduous argument opposing the merger from the DOJ. However, no such argument was made; instead the DOJ's approval of the merger was announced in a single page press

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<sup>36</sup> *Id.*; Rossi, *supra* note 18, at 377.

<sup>37</sup> Susan Carey & Paulo Prada, *Delta, Northwest Agree to Merge; May Start Trend*, WALL ST. J. (Apr. 15, 2008, 12:01 AM), <http://www.wsj.com/articles/SB120821053431914201>; Yellin, *supra* note 2 (chart shows that between 2000 and 2008, five of the top ten U.S. airlines went into bankruptcy, including both Delta and Northwest).

<sup>38</sup> Chris Isidore, *Delta Acquires Northwest in \$3.1B Deal*, CNN MONEY (Apr. 15, 2008), [http://money.cnn.com/2008/04/14/news/companies/delta\\_northwest/index.htm?iid=EL](http://money.cnn.com/2008/04/14/news/companies/delta_northwest/index.htm?iid=EL).

<sup>39</sup> *Id.*

<sup>40</sup> Jad Mouawad, *Delta-Northwest Merger's Long Complex Path*, N.Y. TIMES (May 18, 2011), [http://www.nytimes.com/2011/05/19/business/19air.html?pagewanted=all&\\_r=1&](http://www.nytimes.com/2011/05/19/business/19air.html?pagewanted=all&_r=1&).

<sup>41</sup> *Id.*

<sup>42</sup> Julie Johnsson, *United, US Airways Renew Merger Talks*, CHI. TRIB. (Apr. 9, 2010), [http://articles.chicagotribune.com/2010-04-09/business/ct-biz-0408-uni-ted-usairways-20100407\\_1\\_united-airlines-continental-ceo-gordon-bethune-airways](http://articles.chicagotribune.com/2010-04-09/business/ct-biz-0408-uni-ted-usairways-20100407_1_united-airlines-continental-ceo-gordon-bethune-airways).

release in October of the same year.<sup>43</sup> The DOJ said the combined airline would not “substantially lessen competition.”<sup>44</sup> The Department went further still and praised the merger by saying that it felt the merger would produce “substantial and credible efficiencies.”<sup>45</sup> The statement did include language that the ruling in this merger should not be taken as binding authority as to how the DOJ would rule in future mergers.<sup>46</sup> However, as the next major airline merger took place only a few short years after the Delta/Northwest deal was given DOJ approval, the airline industry felt that the DOJ had shown its hand and was more willing to accept airline mergers.

### C. UNITED AND CONTINENTAL AIRLINES

Shortly after the Delta/Northwest merger, other airlines began seeking partners to help them compete with the new airline giant. In 2008, United and Continental began to consider merging, but talks broke down shortly thereafter.<sup>47</sup> United continued searching for a partner, including US Airways.<sup>48</sup> However, in May of 2010, United and Continental finally decided that it was time to announce plans for a \$3.2 billion merger that would create the largest airline in the world.<sup>49</sup>

While the previous allowance for the Delta/Northwest merger gave some hope that the DOJ would allow this merger as well, antitrust approval was far from guaranteed.<sup>50</sup> On top of the uncertainty of how the DOJ would view this deal, there was the concern that the deal would not be approved. The DOJ had recently undergone changes in its makeup following President

<sup>43</sup> Press Release, Dep’t of Justice, Statement of Department of Justice’s Antitrust Division on Its Decision to Close Its Investigation of the Merger of Delta Airlines Inc. and Northwest Airlines Corporation (Oct. 29, 2008), <http://www.justice.gov/archive/opa/pr/2008/October/08-at-963.html> [hereinafter Press Release, Merger of Delta and Northwest].

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Aaron Smith, *United and Continental to Merge*, CNN MONEY (May 3, 2010), [http://money.cnn.com/2010/05/03/news/companies/United\\_Continental\\_merge/](http://money.cnn.com/2010/05/03/news/companies/United_Continental_merge/).

<sup>48</sup> *United-US Airways Merger Dead*, ABC NEWS (July 27, 2010), <http://abcnews.go.com/Business/story?id=87893>.

<sup>49</sup> Smith, *supra* note 47.

<sup>50</sup> *United and Continental Announce Merger*, N.Y. TIMES DEALBOOK (May 3, 2010), <http://dealbook.nytimes.com/2010/05/03/united-and-continental-announce-merger/?r=0> (noting that there are “still major hurdles to clear,” including antitrust concerns).

Obama's election in 2008.<sup>51</sup> The President had campaigned hard against a previous "lax enforcement" of antitrust issues,<sup>52</sup> and when Eric Holder was named as the new Attorney General, many expected him to follow through with President Obama's desires.

Despite this concern, the DOJ announced that it would approve the merger in August of 2010, just three months after the initial merger had been announced.<sup>53</sup> The DOJ announced that it had granted its acceptance "in light of an agreement" between Continental and United that it felt limited the antitrust issues.<sup>54</sup> While such an agreement may sound like a capitulation on the part of Continental and United, the deal ultimately resulted in the new United Airlines transferring a limited number of airport slots at Newark Liberty Airport to Southwest Airlines.<sup>55</sup> The DOJ noted that giving up these few slots "resolve[d] the department's principal competition concerns."<sup>56</sup>

While these slots were more than the DOJ had required of Delta/Northwest, it appeared that these concessions were minimal at most. The DOJ had once again allowed a major airline to merge, and in doing so appeared to signal that the others airlines were free to attempt a merger.

#### D. SOUTHWEST AIRLINES AND AIRTRAN

Shortly after the new United was approved, Southwest Airlines announced its plans to acquire AirTran in September 2010.<sup>57</sup>

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<sup>51</sup> See Press Release, Office of the President-Elect, President-Elect Obama Announces Key Department of Justice Posts, [http://change.gov/newsroom/entry/president-elect\\_obama\\_announces\\_key\\_department\\_of\\_justice\\_posts/](http://change.gov/newsroom/entry/president-elect_obama_announces_key_department_of_justice_posts/) (last visited Nov. 16, 2015).

<sup>52</sup> Michael Bobelin, *Uptick in Antitrust Enforcement Falls Short of Obama's Promises*, FORBES (Feb. 14, 2012), <http://www.forbes.com/sites/michaelbobelian/2012/02/14/uptick-in-antitrust-enforcement-falls-short-of-obamas-promises/>.

<sup>53</sup> Compare Press Release, Dep't of Justice, United Airlines and Continental Airlines Transfer Assets to Southwest Airlines in Response to Department of Justice's Antitrust Concerns (Aug. 27, 2010), <http://www.justice.gov/opa/pr/united-airlines-and-continental-airlines-transfer-assets-southwest-airlines-response> (approving the deal in three months), with Press Release, Merger of Delta and Northwest, *supra* note 43 (the approval of the Delta/Northwest deal took six months).

<sup>54</sup> Press Release, United Airlines and Continental Airlines Transfer Assets, *supra* note 53.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Mike Esterl, *Discount Carriers Southwest Airlines, AirTran Tie Knot*, WALL ST. J. (Sept. 28, 2010), <http://www.wsj.com/articles/SB10001424052748704654004575517510208350940>.

This combination was one of the first between (to borrow a college football denotation) “non-Power 5” airlines under the DOJ’s watch.<sup>58</sup> Southwest was typically seen, and even treated by the DOJ, as a “low cost carrier”<sup>59</sup> that had never before entered into acquisition territory.<sup>60</sup> This purchase would allow Southwest to begin to compete with some major airlines and give Southwest its first international flights.<sup>61</sup>

In approaching the antitrust questions, however, there was still cause for concern. AirTran and Southwest served about thirty of the same cities,<sup>62</sup> a major overlap compared to the previously approved mergers.<sup>63</sup> While similar overlaps had given the DOJ pause and were noted as an underlying reason for the DOJ asking United to give up certain airport slots (to Southwest, interestingly enough),<sup>64</sup> the DOJ announced its approval of the merger in a one page announcement.<sup>65</sup> The release simply stated “the division has determined that the merger is not likely to substantially lessen competition.”<sup>66</sup>

#### IV. THE AMERICAN AND US AIRWAYS MERGER

##### A. THE DEAL

In light of these recent mergers, American Airlines and US Airways both saw their rankings among the major airlines fall.<sup>67</sup> In addition, rising workforce prices were hurting the airline industry as a whole. Many major airlines were forced into bankruptcy, including the ones that resulted from previous

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<sup>58</sup> *Id.*

<sup>59</sup> Press Release, United Airlines and Continental Airlines Transfer Assets, *supra* note 53.

<sup>60</sup> Esterl, *supra* note 57.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> See Press Release, United Airlines and Continental Airlines Transfer Assets, *supra* note 53.

<sup>64</sup> *Id.*

<sup>65</sup> Press Release, Dep’t of Justice, Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of Southwest’s Acquisition of AirTran (Apr. 26, 2011), <http://www.justice.gov/opa/pr/statement-department-justice-antitrust-division-its-decision-close-its-investigation>.

<sup>66</sup> *Id.*

<sup>67</sup> Chris Isidore & Blake Ellis, *American Airlines Files for Bankruptcy*, CNN MONEY (Nov. 29, 2011), <http://money.cnn.com/2011/11/29/news/companies/american-airlines-bankruptcy/> (noting American was world’s largest airline until 2006, when mergers pushed it back to third).

mergers—Continental in 1990,<sup>68</sup> United in 2002,<sup>69</sup> and Delta in 2005.<sup>70</sup> Bankruptcy allowed these airlines to restructure their company and shed extra labor “baggage.”<sup>71</sup> US Airways also filed for bankruptcy in both 2002<sup>72</sup> and 2004<sup>73</sup> and was still looking to regain its status as an elite airline. American Airlines was one of the last major airlines to declare bankruptcy in December of 2011. Its CEO at the time noted the bankruptcy was due in large part to American’s inability to keep up with the other airlines that had already restructured themselves.<sup>74</sup> Between 2007 and 2011, American lost \$4.8 billion primarily because of an \$800 million per year difference in labor costs between American’s workforce and the workforces of the restructured airlines.<sup>75</sup> American hoped to use the bankruptcy court’s power to allow the qualified petitioner to void collectively bargained agreements, as permitted by § 1113 of the bankruptcy code.<sup>76</sup>

These efforts to restructure workforce agreements and to reestablish their place as major airlines ultimately led both American and US Airways, like the other major airlines before them, to merge to create the world’s largest airline.

## B. THE COMPLAINT AND CONCESSIONS

The initial complaint against American and US Airways and the concessions that the DOJ insisted on in exchange for approval give insights into how the DOJ viewed the merger.

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<sup>68</sup> Agis Salpukas, *Continental Files for Bankruptcy*, N.Y. TIMES (Dec. 4, 1990), <http://www.nytimes.com/1990/12/04/business/continental-files-for-bankruptcy.html>.

<sup>69</sup> *Timeline of United Airlines’ Bankruptcy*, USATODAY.COM (Feb. 1, 2006, 7:32 AM), [http://usatoday30.usatoday.com/travel/flights/2006-02-01-united-timeline\\_x.htm](http://usatoday30.usatoday.com/travel/flights/2006-02-01-united-timeline_x.htm).

<sup>70</sup> Yellin, *supra* note 2.

<sup>71</sup> See Max Schatzow, *An Alternative Universe to § 1113 of the Bankruptcy Code: The Meditation Between American Airlines and Its Workforce*, 10 RUTGERS BUS. L.J. 1, 3 (2013); Chris Isidore, *Delta Air Lines Files for Bankruptcy*, CNN MONEY (Sept. 15, 2005), <http://money.cnn.com/2005/09/14/news/fortune500/delta/>.

<sup>72</sup> See Schatzow, *supra* note 71; Patty Davis, *US Air Files for Bankruptcy*, CNN MONEY (Aug. 12, 2002), <http://money.cnn.com/2002/08/11/news/companies/usair/>.

<sup>73</sup> See Schatzow, *supra* note 71; *US Air Files Chapter 11*, CNN MONEY (Sept. 13, 2004), <http://money.cnn.com/2004/09/12/news/fortune500/usairbank/index.htm?cnn=yes>.

<sup>74</sup> See Schatzow, *supra* note 71; Isidore & Ellis, *supra* note 67.

<sup>75</sup> Isidore & Ellis, *supra* note 67.

<sup>76</sup> 11 U.S.C. § 1113(b).

### 1. *The Complaint*

The DOJ's civil antitrust suit against American and US Airways was signed by the U.S. Attorney General as well as by those with the same position in several states,<sup>77</sup> including Arizona<sup>78</sup> and Texas<sup>79</sup> where the airlines were headquartered. The Complaint claimed that the merger violated Section 7 of the Clayton Act because it would "likely substantially lessen competition, and tend to create a monopoly."<sup>80</sup>

The DOJ advanced a number of points of contention against the proposed merger. Each of these points fits into five major arguments against the merger. Of these five main arguments, four are discussed in great detail later in the comment as potential reasons the DOJ strictly reviewed this merger. The other argument, increased market concentration,<sup>81</sup> has been addressed by other comments on this complaint<sup>82</sup> and therefore will not be discussed in great detail. The remaining arguments used by the DOJ to challenge the proposed merger are as follows: (1) the proposed merger was not necessary for the individual airlines to succeed; (2) a move to only four major airlines would potentially be anticompetitive; (3) other airlines, especially smaller airlines, needed government protection; and (4) the DOJ has a mandate to protect consumers.<sup>83</sup>

### 2. *The Concessions*

After the Complaint was filed, the DOJ announced that it would allow the merger but only after American agreed to certain concessions.<sup>84</sup> These concessions represented the "sticking points" of the merger, which the DOJ was unable to allow. These concessions give insight beyond the arguments listed in the DOJ's complaint as to why it felt the merger was anticompetitive. These concessions may also give insight to how the DOJ may rule in the future.

<sup>77</sup> See generally Complaint, *supra* note 3.

<sup>78</sup> US AIRWAYS, <http://www.usairways.com/en-US/contact/general.html> (last visited Nov. 16, 2015).

<sup>79</sup> AMERICAN AIRLINES, <http://www.aa.com/i18n/amrcorp/corporateInformation/facts/structure.jsp> (last visited Nov. 16, 2015).

<sup>80</sup> Complaint, *supra* note 3, ¶ 13.

<sup>81</sup> *Id.* ¶ 37.

<sup>82</sup> See generally Peterman, *supra* note 8.

<sup>83</sup> See Complaint, *supra* note 3.

<sup>84</sup> Press Release, Justice Department Requires Airlines to Divest Facilities, *supra* note 5.

The major requirement of the merger imposed by the DOJ was the divestment of slots and gates at various “key” airports to low-cost carrier airlines.<sup>85</sup> This concession has two points. First, is the divestment of the slots and gates. Slots are defined in the Complaint as being necessary at a few airports for takeoff and landings.<sup>86</sup> Gates are similar and are typically assigned to an airline to fly in and out of. In the concessions, the new American airlines was required to give up *all* 104 “air carrier” slots it had at Reagan National airport (one of the airports the DOJ listed it was specifically concerned would be affected by the merger);<sup>87</sup> thirty-four slots at LaGuardia International Airport; and two gates each at Boston Logan Airport, Chicago O’Hare Airport, Dallas Love Field, Los Angeles International Airport, and Miami International Airport.<sup>88</sup>

The second part of the concession of slots and gates was that the gates given up were to go to “low cost carrier airlines” or “LCCs.” The International Civil Aviation Organization defines LCCs as carriers that have low-cost structures as compared to other airlines and that offer low fares and rates.<sup>89</sup> Some of the most widely recognized LCCs include JetBlue and Southwest Airlines, each of which received advantageous opportunities through the slot divestment.<sup>90</sup> These LCCs were given benefits by the DOJ in an effort to “enhance system-wide competition” and to allow for “more competitive airfares for consumers.”<sup>91</sup>

The Reagan slots were to be sold to other low cost airlines, including JetBlue and Southwest Airlines.<sup>92</sup> This alone was a major blow to the new American. The slots at Reagan, which were valued at over \$2 million, were described by the DOJ as expensive, difficult to obtain, and rarely changing hands between airlines.<sup>93</sup> While the new American was able to keep the proceeds

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<sup>85</sup> *Id.*

<sup>86</sup> See Complaint, *supra* note 3, ¶ 31.

<sup>87</sup> *Id.*

<sup>88</sup> See Press Release, Justice Department Requires Airlines to Divest Facilities, *supra* note 5.

<sup>89</sup> International Civil Aviation Organization, *ICAO Glossary*, [http://www.icao.int/dataplus\\_archive/Documents/GLOSSARY.docx](http://www.icao.int/dataplus_archive/Documents/GLOSSARY.docx).

<sup>90</sup> See Press Release, Justice Department Requires Airlines to Divest Facilities, *supra* note 5.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> See Complaint, *supra* note 3, ¶ 30.

from the sale of these valuable slots,<sup>94</sup> it was nevertheless a multi-million dollar job to the new American before it even started. It was nothing short of a startling demand, unique in all of the examined DOJ's merger challenges.

In addition to its enormous impact on the new American and LCCs, the divestment concession gives light to the DOJ's reasons for staunchly opposing the American merger. It is clear from the Complaint and from these demands that the DOJ felt it needed to intervene. While the merger was ultimately permitted, it is impossible to say that the new American was let off easy by the DOJ. Just why the DOJ held American to such strict review will be explored next.

## V. EXPLICIT REASONS BEHIND THE DOJ'S CHALLENGE

As mentioned above, the DOJ put forth four major arguments for why it was challenging the merger.<sup>95</sup> The four arguments raised by the DOJ were that: (1) both airlines could succeed independently without the merger; (2) the reduction in the number of major airlines would lead to anticompetitive results; (3) the merger would hurt smaller airlines; and (4) consumers would be harmed by the merger.<sup>96</sup> Each argument, however, had its own shortcomings.

Further, these arguments do not appear to fully account for the DOJ's strict treatment of the American Airlines/US Airways merger. Their shortcomings appear either when applying the argument to the instant merger or when comparing the DOJ's treatment here with previously approved mergers. These issues are highlighted in a subsection for each argument the DOJ brought against American Airlines.

In short, this comment notes that the DOJ's explicit arguments do not add up to the treatment that the American Airlines merger received. Thus, in Section E *infra*, other potential reasons underlying the DOJ's harsh ruling on American Airlines are addressed as well.

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<sup>94</sup> See Press Release, Justice Department Requires Airlines to Divest Facilities, *supra* note 5 (noting the gates would be "sold").

<sup>95</sup> *Supra* Section IV.B.1.

<sup>96</sup> See Complaint, *supra* note 3.



## A. NO NEED TO MERGE

1. *The DOJ's Position*

One argument the DOJ made against the merger was that it was not necessary for the success of either company. The Complaint argued that both American and US Airways “can and will compete effectively as standalone companies.”<sup>97</sup> The DOJ attempted to develop this argument by pointing to the recent performance of the two airlines, noting that US Airways had “record profits” in 2012<sup>98</sup> and American Airlines was “one of the most recognized” brands in the world.<sup>99</sup> The DOJ further points to a “standalone business plan” that American Airlines adopted to get out of bankruptcy and restore “American to industry leadership.”<sup>100</sup> This plan included American placing the “largest order for new aircraft in the industry’s history” in 2011.<sup>101</sup> From these arguments it does appear, admittedly, that the two airlines could continue to operate independently. The DOJ used this point to argue that the two airlines should stay apart. If this were the case, why would the business minds of each of the companies decide to merge? Assuming that the merger was not strictly for anticompetitive purposes, which even the DOJ did not say is the case, both US Airways and American Airlines clearly felt that the merger put them in a better business position.

2. *Issues with the DOJ's Argument*

In 2005, prior to any of the major mergers mentioned here, American Airlines was the number one airline in the world and US Airways was near the top of the rankings as well. At the time of their proposed merger, American and US Airways were the “smallest of the . . . airlines.”<sup>102</sup> The DOJ uses this fact in its Complaint to argue that the two airlines had incentives to grow and compete aggressively on their own. In reality, however, it is a reason why blocking the merger would be unfair. All of the airlines in the industry compete with each other for “razor-thin profit margins,”<sup>103</sup> and business analysts have noted that previ-

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<sup>97</sup> *Id.* ¶ 12.

<sup>98</sup> *Id.* ¶ 19.

<sup>99</sup> *Id.* ¶ 20.

<sup>100</sup> *Id.* ¶ 21.

<sup>101</sup> *Id.* ¶ 68.

<sup>102</sup> *See id.* ¶ 81.

<sup>103</sup> Ashley Lutz & Gus Lubin, *Airlines Have an Insanely Small Profit Margin*, BUS. INSIDER (June 15, 2012), <http://www.businessinsider.com/airlines-have-a-small-profit-margin-2012-6> (stating the average domestic flight makes 1% profit).

ous mergers allowed airlines to stay profitable despite these margins.<sup>104</sup> Therefore, while the merger may allow American and US Airways to join forces in ways that allow them to keep up with the other airlines, it would be unfair to stop this merger after allowing the others.

Many felt that “the time for the DOJ to act was five or six years ago when this wave of mergers started.”<sup>105</sup> Airline and business analysts alike believe that the Justice Department’s obstruction of the American merger was unfair to the new airline in light of previous approvals of airline mergers. These previous approvals put the DOJ in an “indefensible position.”<sup>106</sup> Once the DOJ allowed the creation of the “super-Delta” and the “super-United,” they almost “had to create a super-American.”<sup>107</sup> To do otherwise would put both US Airways and American at a distinct disadvantage when trying to compete with their merged counterparts.

Additionally, the DOJ has put forth a set of Merger Guidelines that encapsulate the “principal analytical techniques, practices and enforcement policy of the Department of Justice” in reviewing proposed mergers.<sup>108</sup> While these Guidelines are not mandatory authority,<sup>109</sup> they show the public and interested businesses what the DOJ is looking at when making its decision. The Guidelines Overview states that the DOJ specifically seeks to “avoid . . . unnecessary interference with mergers that are competitively beneficial or [even] neutral.”<sup>110</sup> The Guidelines further point out “a primary benefit of mergers . . . is [to] enhance the merged firm’s ability and incentive to compete,”<sup>111</sup> and that these “efficiencies” include allowing “two ineffective competitors to form a more effective competitor.”<sup>112</sup> Further, the Guidelines never mention the “need” to merge as a point that should be

<sup>104</sup> *Id.*

<sup>105</sup> Karp, *supra* note 4.

<sup>106</sup> Jad Mouawad & Christopher Drew, *Justice Dept. Clears Merger of 2 Airlines*, N.Y. TIMES DEALBOOK (Nov. 12, 2013), [http://dealbook.nytimes.com/2013/11/12/u-s-said-to-be-near-settling-american-us-airways-merger-lawsuit/?\\_r=0](http://dealbook.nytimes.com/2013/11/12/u-s-said-to-be-near-settling-american-us-airways-merger-lawsuit/?_r=0).

<sup>107</sup> *Id.*

<sup>108</sup> U.S. DEP’T OF JUSTICE AND FTC, HORIZONTAL MERGER GUIDELINES (2010), [www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf](http://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf) [hereinafter HORIZONTAL MERGER GUIDELINES].

<sup>109</sup> See generally Peterman, *supra* note 8 (citing *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1046 (5th Cir. 2008)).

<sup>110</sup> HORIZONTAL MERGER GUIDELINES, *supra* note 108, at 4.

<sup>111</sup> *Id.* at 29.

<sup>112</sup> *Id.*

considered in judging the merger, despite the DOJ making this argument in the Complaint.<sup>113</sup>

The DOJ is fully aware, as is shown by these points within its own Guidelines, that mergers are sometimes necessary to allow effective competition. In the case of American/US Airways, it appears that the business leaders of the two airlines and industry analysts believed that this merger would allow the new American to compete more effectively with the other recently merged airlines. This belief held by the heads of the two major corporations does not lend itself to questioning by the DOJ; thus, an argument that there is no need to merge does not seem to hold much weight. While it may be true that the airlines did “not need this merger to . . . survive,” it appears that the airlines’ leaders felt that it was, in fact, necessary for them to thrive in competition with recently merged airlines.<sup>114</sup>

## B. COORDINATED EFFORTS OF THE NEW AIRLINES

### 1. *The DOJ’s Position.*

The DOJ also raised a concern about the increasing concentration among airlines. While one commentator noted that he did not see “much difference”<sup>115</sup> between this merger and the ones that the DOJ previously approved, the DOJ did point to, at a very broad level, at least one important difference. Undoubtedly, the previous mergers reduced the number of major airlines. However, the DOJ appeared especially cautious with this merger because it reduced the “number of major domestic airlines from five to four.”<sup>116</sup> While this may seem like an unspectacular distinction, the DOJ was more concerned about this drop than it was with any of the other airline mergers.<sup>117</sup> This reduction, the DOJ feared, would cause both increased market concentration (which, as mentioned above, will not be addressed in depth in this comment)<sup>118</sup> and enhanced coordinated behavior between the major airlines.

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<sup>113</sup> See generally HORIZONTAL MERGER GUIDELINES, *supra* note 108.

<sup>114</sup> See Complaint, *supra* note 3, ¶ 12.

<sup>115</sup> Alex Davies, *Justice Department to Airlines: Your Days of Mega-Consolidation Mergers Are Over*, BUS. INSIDER (Aug. 14, 2013), <http://www.businessinsider.com/doj-block-of-airline-merger-shows-new-policy-2013-8>.

<sup>116</sup> Complaint, *supra* note 3, ¶ 1.

<sup>117</sup> See *id.* ¶ 34–35 (describing the other airline mergers as less offensive based on the end number of airlines).

<sup>118</sup> See generally Peterman, *supra* note 8.

Coordinated behavior is discussed in the DOJ's Merger Guidelines as "coordinated interactions" involving "conduct by multiple firms that are profitable for each of them only as a result of the accommodating reactions of the others."<sup>119</sup> The DOJ appeared to be especially wary of allowing this combination because it felt it would increase the likelihood of such interactions, noting "the structure of the airline industry is already conducive to coordinated behavior."<sup>120</sup> The industry structure includes "few large players [that] dominate the industry; each transaction is small; and most pricing is readily transparent."<sup>121</sup>

The Complaint goes on to detail how airlines set their prices for flights. This process includes careful consideration of opponent's prices as well as wariness of the potential that a competitor could react to a price that would be considered "aggressive."<sup>122</sup> A major aspect of this process, according to the DOJ, is the use of "'cross-market incentives' or 'CMIs'" that are used to prevent fare wars between the airlines.<sup>123</sup> CMIs often include opponent airlines matching discounts in one market by another airline with extreme discounts in another market.<sup>124</sup> The DOJ argued that these and other similar tactics used in the airline industry to set and maintain fare prices would become easier as the number of airlines drops, and therefore this merger should not be allowed.<sup>125</sup>

The DOJ further argued that it was not only the drop in the total number of major airlines, but the similarity in business models of the new airlines that makes coordinated behavior more likely.<sup>126</sup> The major airlines, the DOJ appeared to argue, would start to look more like each other and would start to act more like each other. For contrast, the DOJ once again pointed to Southwest and Jet Blue, which have "business models that differ significantly" from the major airlines.<sup>127</sup> While these and other LCCs have different fare and fee structures than the major airlines, it appears that they are actually competing for different markets of people.<sup>128</sup> Thus, in an effort to help create some

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<sup>119</sup> See HORIZONTAL MERGER GUIDELINES, *supra* note 108.

<sup>120</sup> Complaint, *supra* note 3, ¶ 41.

<sup>121</sup> *Id.*

<sup>122</sup> See Complaint, *supra* note 3, ¶ 43.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* ¶ 46.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* ¶ 47.

<sup>128</sup> *Id.*

overlap between these differently modeled airlines and the major players, the concessions required the newly merged American to include specific divestments to LCCs in major airports.<sup>129</sup> The DOJ hoped that by introducing and strengthening these differently modeled airlines into major airports it could help break up some of the coordination in the airline industry.

Further, while the airline industry appears rife with opportunities for coordinated behavior, it appears that the DOJ was wary about allowing this specific combination because of previous coordinated behavior between its players. In fact, the Complaint noted that the United States previously filed a lawsuit against major airline players for coordinated behavior.<sup>130</sup> This case, *United States v. Airline Tariff Publishing Co.*,<sup>131</sup> focused on airlines' use of the Airline Tariff Publishing Company (ATP), which is a company that publishes real time information about each airline's individual pricing structure.<sup>132</sup> The United States averred that the major airlines, including American, Continental, Delta, Northwest, United, and US Airlines, were using the information to coordinate their fare pricing.<sup>133</sup> This coordinated behavior, the government argued, was hurting consumers and was in violation of antitrust regulations.<sup>134</sup> This case never went to trial and was ultimately settled by a consent decree that is now expired.<sup>135</sup> Despite this, the case is a good insight into the coordinated behavior the DOJ feared between US Airways and American Airlines.

## 2. *Issues with the DOJ's Argument*

The Airline Tariff Publishing case also showed that the DOJ's questions about coordinated behavior in the airline industry were rooted in broader policy concerns. However, in actuality, this case raised more questions about why the other airline mergers were allowed to succeed. The arguments of the case were held in 1992,<sup>136</sup> over a decade before the initial major air-

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<sup>129</sup> See Press Release, Justice Department Requires Airlines to Divest Facilities, *supra* note 5.

<sup>130</sup> Complaint, *supra* note 3, ¶ 44.

<sup>131</sup> 836 F. Supp. 9 (D.D.C. 1993).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 10.

<sup>134</sup> *Id.*

<sup>135</sup> Complaint, *supra* note 3, ¶ 44.

<sup>136</sup> *Airline Tariff Publ'g Co.*, 836 F. Supp. at 10–11.

line mergers took place.<sup>137</sup> It is clear from its reference back to this case in the current Complaint<sup>138</sup> that the behavior that was the focus of the case is still a concern for the DOJ. Yet, the previous airline mergers were allowed to proceed, almost completely unhindered. Possibly because each of these mergers reduced the number of major airlines, and, using the DOJ's argument, "[c]oordination becomes easier as the number of major airlines dwindles . . . ."<sup>139</sup> Consequently, it appears that the coordinated behavior concerns should have been raised in each of the previous mergers. But these concerns never surfaced, and if they did, they did not result in major concessions.

While the argument that the reduction from five to four major airlines increased the potential for coordination follows both evidence and reason, it appears this argument was accelerated to new and costly heights in the Complaint. Further, while there is some truth in the DOJ's belief that the combination would create more similarly suited airlines, the previous mergers also led to this result. In addition, as already addressed, the airline industry has not been exceedingly profitable in recent years. Thus, the push towards a new airline model may be a necessity for the industry, and not just a way for greedy airlines to make more money. It appears that while this may underpin some of the DOJ's fears regarding the new merger; absent some other concern, it is insufficient to mandate the large concessions forced upon American.

### C. THE PROTECTION OF LCCs

#### 1. *The DOJ's Position*

As the Complaint<sup>140</sup> and, more pointedly, the concessions<sup>141</sup> made clear, the DOJ was interested in protecting and promoting the ability of low cost carrier airlines to compete with the major airlines. These airlines, the DOJ argued, create competition within the airline industry because they are structured differently and can price themselves differently than the major airlines.<sup>142</sup> The availability of these airlines may help to provide

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<sup>137</sup> Complaint, *supra* note 3, ¶ 4 (noting the consolidation "wave" began in 2005).

<sup>138</sup> *Id.* ¶ 44.

<sup>139</sup> *Id.* ¶ 46.

<sup>140</sup> *Id.* ¶ 47.

<sup>141</sup> Press Release, Justice Department Requires Airlines to Divest Facilities, *supra* note 5.

<sup>142</sup> Complaint, *supra* note 3, ¶ 47.

consumers with more options to choose from when they are flying. The DOJ appeared to hope that these airlines would force the other major airlines to compete on price as well as baggage and cancellation fees.<sup>143</sup> In light of these benefits, the DOJ felt that ensuring a stable class of LCCs was important to protect the airline industry as a whole.

However, ensuring that the LCCs stay in business is no simple task. Because they are fundamentally different and smaller than the other airlines, they have a harder time building the economies of scale that the larger airlines enjoy. In addition, they have more difficulties obtaining slots and gates at airports that are necessary for their flights.<sup>144</sup> The Complaint<sup>145</sup> and concessions<sup>146</sup> focused on the ability for LCCs to get gates at airports where major airlines have large concentrations, specifically Reagan National Airport. This airport services a majority of Washington D.C. and a large number of Congressmen and lobbyists who may have played a role in this decision. The Complaint also pointed to how JetBlue, a recent LCC entrant into this airport, raised competition and lowered prices.<sup>147</sup> The Complaint then went on to show that the merger, if allowed, may take the slot rights away from JetBlue, which would block future LCC entry into slots at this and other major airports.<sup>148</sup> The inability to get slots is due in large part to an LCC's smaller size and inability to quickly grow in size. On top of this, the LCCs face significant responses by the other major airlines when they try to undercut prices.<sup>149</sup> The DOJ recognized that all of this amounts to "significant barriers to success" for LCCs as well as for new airlines.<sup>150</sup>

These barriers to success have existed in the airline industry for almost as long as there have been major airlines. In fact, the DOJ has previously sued American Airlines to protect these LCCs. The case, *United States v. AMR Corp.*, focused on "predatory pricing" practices that the DOJ argued American was using to keep LCCs from succeeding in the market.<sup>151</sup> "Predatory pric-

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<sup>143</sup> *Id.* ¶ 86.

<sup>144</sup> *Id.* ¶ 86-88.

<sup>145</sup> *Id.*

<sup>146</sup> Press Release, Justice Department Requires Airlines to Divest Facilities, *supra* note 5.

<sup>147</sup> Complaint, *supra* note 3, ¶ 88.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* ¶ 9-94.

<sup>150</sup> *Id.* ¶ 91.

<sup>151</sup> *United States v. AMR Corp.*, 140 F. Supp. 2d 1141, 1143 (D. Kan. 2001), *aff'd*, 335 F.3d 1109.

ing” is defined as pricing below a certain level for the purpose of eliminating competition in the short run and making up the losses from this low pricing from the reduction in competition in the long run.<sup>152</sup>

The case centered around responses to new market conditions created by growing LCCs at American Airlines’s “home” airport, Dallas-Fort Worth Airport (DFW).<sup>153</sup> The DOJ claimed that American responded to these growing LCCs by reducing its prices and increasing the number of flights flown out of DFW.<sup>154</sup> As American took these actions, the LCCs saw their profits fall and many were forced to move out of DFW.<sup>155</sup> When the LCCs left and the competition in DFW lessened, American then resumed its previous fare and flight schedule.<sup>156</sup> While the LCCs and the DOJ strenuously fought against American, the case was ultimately dismissed,<sup>157</sup> and the dismissal was affirmed by the 10th Circuit Court of Appeals.<sup>158</sup> The case shows both that the DOJ has a history of protecting LCCs and that it has specifically noted American to be a potential offender of these LCCs.

While it is unlikely that the DOJ attempted to block the American merger because this previous case was dismissed (I, for one, hope that the DOJ is not that vindictive), it is more likely that this previous case illustrates an example of the type of behavior the DOJ feared may reoccur after the merger was complete. The Complaint noted that the DOJ accepted that the prominence of the major airlines was not in danger of being overtaken by the LCCs.<sup>159</sup> However, the DOJ wanted to protect these airlines as a way of preventing complete control over the industry arising from the “cozy relationships” between the big four airlines.<sup>160</sup> The concessions show that the DOJ was willing to go to extreme and costly measures to protect the LCCs.

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<sup>152</sup> See BLACK’S LAW DICTIONARY (10th ed. 2014); D. Jarrett Arp, *Predatory Pricing & Unfair Trade Practice*, GIBSON DUNN (Feb. 2, 2009), <http://www.gibsondunn.com/publications/Documents/Arp-PredatoryPricingAndUnfairTradePractices.pdf>.

<sup>153</sup> *AMR Corp.*, 140 F. Supp. 2d at 1144.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 1194–96 (noting the government failed to show that American had priced its flights at a level that was so low as to be inconsistent with business practices).

<sup>158</sup> See *United States v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003).

<sup>159</sup> Complaint, *supra* note 3, ¶ 91.

<sup>160</sup> Press Release, Justice Department Requires Airlines to Divest Facilities, *supra* note 5.



## 2. *Issues with the DOJ's Argument*

The DOJ has long been aware of the importance of the LCCs in preserving diversity and competition in the airline industry. However, the Department has held its proverbial tongue in protecting these LCCs when the other major airlines merged. Why is it that this merger gave rise to such extensive protections for the LCCs? While the DOJ pointed to the reduction in airlines from five to four, that argument seems insufficient for ordering the divestment of approximately \$200 million worth of airline gates at a single airport. Like the reduction in number of airlines argument (addressed above), however, there is some evidence that the DOJ was truly justified in its requirements on the American merger because of its sincere desire to protect the LCCs. However, it seems again that there is something still more that drove the DOJ to order such incredible demands from the new American.

### D. PROTECTING THE CONSUMER

All three of the previous arguments of the DOJ dovetail in this argument. The DOJ's main purpose in preventing antitrust and anticompetitive behavior is eliminating harm to the consumer. While the DOJ made different arguments about how it was attempting to protect the consumer, the gist of its argument was that a combination of American and US Airways would harm the consumer. The DOJ's consumer protection position essentially breaks down into three separate arguments: (1) the merger would increase price for consumers; (2) the merger would force American to forego its expansion plan; and (3) the merger would force the new American to stop offering "Advantage Fare" pricing offers.

Each of these arguments is addressed in its own sub-section below, with counterpoints to each argument raised in the immediately following sub-section. In addition, because all three of these arguments are ultimately focused on consumer protection, a sub-section at the end of this part will address overarching issues related to this argument as a whole.

#### 1. *Increased Price*

##### a. The DOJ's Position

The first consumer protection argument centers on the increased price that consumers would have to pay in light of this

merger. The DOJ,<sup>161</sup> and a number of commentators,<sup>162</sup> argued that the mergers over the last decade and a half led to increased fares and decreased services among the major airline providers. While there is some research that suggests that it is not necessarily true that an across-the-board increase in fares was a result of the mergers,<sup>163</sup> it appears that the DOJ and many ordinary consumers have associated the mergers with increases in prices. Specifically, the DOJ argued that consumers are seeing increased prices for flights because of the increasing acceptance of “ancillary” fees among major airlines, the reduction in price competitive flights offered by major airlines, and a “capacity discipline” being used among major airlines.<sup>164</sup>

Ancillary fees include fees on non-fare items, such as charging for checked baggage and ticket change fees.<sup>165</sup> The Complaint noted that these fees have been applied by the major airlines over time in a “lockstep” method.<sup>166</sup> With this method, one of the major airlines introduces or increases a fee and the others make a similar change shortly thereafter.<sup>167</sup> This process is used, according to the Complaint, because the “success of any individual attempt to impose a new fee or fee increase depends on whether the other [major airlines] follow suit.”<sup>168</sup> The DOJ also pointed out that they believe the new American would likely lead to fee increases either through newly introduced fees<sup>169</sup> or through “fee harmonization,” where the two merging airlines adopt a common level for these ancillary fees.<sup>170</sup> The DOJ has argued that increased consolidation in the market has been a

<sup>161</sup> Complaint, *supra* note 3, ¶ 1.

<sup>162</sup> Barbara E. Lichman, *Airline Mergers Seriously Impacting Prices and Services*, AVIATION & AIRPORT DEVELOPMENT LAW NEWS (Nov. 26, 2013), <http://www.aviation-airportdevelopmentlaw.com/2013/11/articles/aviation-and-airport-news/airline-mergers-seriously-impacting-prices-and-services/>.

<sup>163</sup> Brad Seitz, *The Myth and Reality of Airline Mergers And Higher Fares*, BUS. TRAVEL NEWS (Aug. 30, 2013), <http://www.businesstravelnews.com/More-News/The-Myth-And-Reality-Of-Airline-Mergers-And-Higher-Fares/?ida=Airlines&a=proc> (pointing to a study that shows that over time not all airfare prices have increased and many have decreased, and that the increases cannot necessarily be tied to the mergers).

<sup>164</sup> See Complaint, *supra* note 3, ¶ 59.

<sup>165</sup> *Id.* ¶ 4.

<sup>166</sup> *Id.* ¶ 72.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* ¶ 73.

<sup>169</sup> *Id.* ¶ 78 (pointing to talks about a future potential checked bag fee on flights to Europe).

<sup>170</sup> *Id.* ¶ 79.

driving force behind these fees, but without pointing to a specific reason why.<sup>171</sup> However, the DOJ did specifically claim that if US Airways and American Airlines were to be kept separate, they could use reduced ancillary fees to compete with the other major airlines.<sup>172</sup>

The DOJ also expressed concerns that the merger would “likely lead to increased industry-wide ‘capacity discipline.’”<sup>173</sup> In the airline industry, this phrase means “restraining growth,” or in some cases, reducing the currently offered services of the airline in response to actions by other competitors.<sup>174</sup> The DOJ pointed to evidence that each previous merger in the airline industry led to at least some capacity discipline.<sup>175</sup>

#### b. Issues with the DOJ’s Argument

It seems arguable that in discussing fee increases in the airline industry, especially from the many consumers that see them every day, that a plan that encourages an airline to reduce ancillary fees is a defensible strategy to take. However, these arguments apparently failed in light of the previous mergers. While the DOJ raised the concern that specific potential fee increases were directly related to the proposed American merger, the majority of these increases were present in all the previously approved mergers. Encouraging US Airways and American Airlines to stay separate as the two “smallest of the airlines” and to compete with the other major airlines in terms of ancillary prices seems akin to purposefully tying a hand (or a pocket-book) behind someone’s back to make them fight harder. While it may make for a more enraged fighter, it more often than not ends in the fighter’s defeat. Analysts noted that blocking this merger put these airlines “at a competitive disadvantage.”<sup>176</sup>

In addition, while the DOJ made a convincing argument that the use of capacity discipline may cause harm to consumers, their own Complaint addressed that this was a known issue in

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.* ¶ 81.

<sup>173</sup> *Id.* ¶ 59.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* ¶ 61–65 (The American West and US Airways merger lead to reduced capacity, including cuts at Pittsburgh and Las Vegas. The Delta and Northwest Airlines merger, “despite promises to the contrary,” reduced capacity. The United and Continental merger reduced capacity at “nearly all of its major hubs.” Finally, the Southwest and AirTran merger led to a reduction in services).

<sup>176</sup> Karp, *supra* note 4.

the previous airline mergers. Despite these concerns, the other mergers were allowed without penalty. There does not appear to be anything about the capacity discipline argument that applies specifically to the American Airlines merger, nor does it appear to justify this different treatment.

## 2. American Airlines Growth Plan

### a. The DOJ's Position

The DOJ made an argument specific to American as well: By keeping American as its own airline, the DOJ believed that it was encouraging American's growth.<sup>177</sup> For this argument, the DOJ pointed specifically to American's 2011 placement of the "largest order for new aircraft in the industry history."<sup>178</sup> This expansion plan was met with hostility in the airline industry.<sup>179</sup> The other major airline players believed that if American was able to implement its plan, they would have to come up with their own strategies for growth, that in turn may disrupt the entire industry.<sup>180</sup> This disruption is something that the DOJ felt was necessary for the airline industry to ensure competition and in turn to protect the consumers from falling service offerings. This argument is one of the first encountered by this comment that is specific to the American merger, and thus may serve as one of the underlying reasons for the differing treatment between this merger compared with the others.

### b. Issues with the DOJ's Argument

However, while the argument is specific to the merger at hand, it is based on a major, and ultimately invalid, assumption that American would completely forego expansion after the merger is complete.<sup>181</sup> As it was working its way out of bankruptcy, American introduced a plan that would allow it to retake a role of airline prominence.<sup>182</sup> One of the most important steps was to launch a comprehensive expansion project, which began

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<sup>177</sup> Complaint, *supra* note 3, ¶ 68.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* ¶ 69.

<sup>180</sup> *Id.* ¶ 68.

<sup>181</sup> *Id.* ¶ 68–69.

<sup>182</sup> *Id.*; Marc Scribner, *The American/US Airways Case Highlights The Absurdity of Antitrust Regulation*, FORBES (Nov. 22, 2013), <http://www.forbes.com/sites/real-spin/2013/11/22/the-americanus-airways-case-highlights-the-absurdity-of-antitrust-regulation/> (noting American's need to "modernize its aging aircraft fleet").

with the 2011 order addressed above.<sup>183</sup> The DOJ argued that this expansion project would be abandoned if American were allowed to merge.<sup>184</sup> However, this seems a tenuous argument at best. This is especially true when it is noted (perhaps with the unfair advantage of foresight) that American did in fact go through with a \$2 billion expansion project after the merger.<sup>185</sup> Further, because there is nothing in the concessions that addressed this expansion plan, this is not necessarily as persuasive an argument against the merger as it initially appears to be.<sup>186</sup> While the DOJ argued that it sought to protect the interests of the consumers, this argument ultimately does not fly as far as it initially seems it would.

### 3. *Advantage Fares Program*

#### a. The DOJ's Position

A third way the DOJ feared consumers would be forced to pay more after this merger is that the combining airlines would reduce their price competitive flight offerings. Specifically, the DOJ feared that the merger would result in the elimination of US Airways's "Advantage Fares" program. The Advantage Fares Program was a unique offering by US Airways that offered certain flights for up to 40% off other services.<sup>187</sup> The DOJ provided examples of how the Advantage Fare program would save consumers money by giving them another option when flying and by forcing some airlines to reduce their fares to compete.<sup>188</sup> In merging with American, however, the DOJ feared that US Airways would be forced to forego this option for travelers, because it would be subject to reactionary pricing by the other three major competitors after the merger.<sup>189</sup>

This last argument is one of the strongest, and most specific to American Airlines, that the DOJ made in its case against this merger. Unlike many of the other arguments addressed above,

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<sup>183</sup> Complaint, *supra* note 3, ¶ 69.

<sup>184</sup> *Id.* ¶ 70.

<sup>185</sup> *Going for Great*, AMERICAN AIRLINES, <http://www.aa.com/i18n/urls/going-for-great.jsp> (last visited Nov. 16, 2015) (noting all of the new improvements American is making after the merger).

<sup>186</sup> See Press Release, Justice Department Requires Airlines to Divest Facilities, *supra* note 5.

<sup>187</sup> Complaint, *supra* note 3, ¶¶ 7, 49.

<sup>188</sup> *Id.* ¶¶ 48–54 (noting specific flight examples where "[a]dvantage fares have proven highly disruptive to the industry's overall coordinated pricing dynamic").

<sup>189</sup> *Id.* ¶ 55.

the fear that consumers would be harmed by the discontinuation of the Advantage Fare program is limited to this merger alone.

b. Issues with the DOJ's Argument

The discontinuation of the Advantage Fare program remains something that was always within US Airways's ability, even without the merger. US Airways was struggling to compete with some of the major airlines and it is arguable that its Advantage Fare program may have helped to keep them afloat. However, it is equally arguable that with the small profit margins present in the airline industry, both today and for the foreseeable future, US Airways may have decided to get rid of the Advantage Fare program by itself in its need to raise more money. This would be a business decision, though likely met with angry consumers, which would not have drawn the ire of the DOJ. Thus, while this argument is one of the strongest that the DOJ made specifically about the American merger, it still remains a shaky argument for invalidating what was really just another business decision by US Airways.

4. Overall Issues with the DOJ's Consumer Protection Argument

Each of these consumer protection arguments had at its background a desire to stop the airlines from unfairly collecting increased fees. It appears the DOJ believed these fares are unfairly applied to the consumers.<sup>190</sup> The DOJ, and apparently even some of the airlines, tied the fee increases to the consolidations themselves.<sup>191</sup> However, many of these fees may, in actuality, be due to the airline industry and the very thin margins present therein.<sup>192</sup> The former American Airlines CEO responded to questions concerning the DOJ's initial attempt to block the merger by saying: "If Airlines have a history of anticompetitive behavior, they are the least able practitioners of the art in the history of mankind."<sup>193</sup> This quip was designed to bring light to the fact that many of the airlines' actions, while potentially viewed as anticompetitive in nature, may actually be an attempt to keep the airlines themselves in business.

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<sup>190</sup> *Id.* ¶ 1.

<sup>191</sup> *Id.* ¶ 4.

<sup>192</sup> Scribner, *supra* note 182.

<sup>193</sup> *Id.*

Viewing the actions of the airline industry as self-protective rather than anticompetitive takes an even brighter light when viewing all the recent bankruptcies that rocked the industry.<sup>194</sup> Almost every major airline has filed for bankruptcy in the last twenty years, a time period when many of the “anticompetitive” behaviors discussed in this section, and complained of by the DOJ in its Complaint, were taking place. While this does not necessarily mean that they should be completely shielded from anticompetitive review, viewed in this light, these actions are not necessarily part of a greedy regime of major airlines. Instead they may actually be more of an attempt to keep the airlines airborne.

It appears that the challenge to this merger, and the large concessions, may not be all based on the desire to prevent what the DOJ feared was anticompetitive behavior. While it is likely that these concerns may have led to easily adaptable legal arguments in the DOJ’s challenge, it appears, especially in light of the previously approved mergers (many, if not all of which, had these exact same concerns), that there was something else driving the DOJ’s draconian approach to the American merger.

## VI. POTENTIAL IMPLICIT REASONS FOR THE DOJ’S CHALLENGE

This comment is not written to call attention to the inadequacy of the DOJ’s arguments against the American merger. These arguments, for the most part, are backed by the DOJ’s Horizontal Merger Guidelines and therefore the legal purpose behind them is not questioned. However, as the previous Part points out, these arguments by themselves do not explain the difference between the DOJ’s treatment of the American Airlines merger and the previously approved mergers.

This Part seeks to bring to light some of the potential implicit reasons for the extensive concessions American was forced to make. These reasons include: (1) increased pressure from consumers; (2) changes in political leadership; and (3) changes to policies. These may have been the actual background to the DOJ’s Complaint. While these reasons do not make a neat legal argument, they nonetheless almost certainly made a major impact on why the American Airlines merger met such stiff opposition.

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<sup>194</sup> Yellin, *supra* note 2.

After a discussion of these underlying reasons, the following section expands on how these reasons may affect future challenges in large mergers. These predictions are based on extrapolations from how the DOJ acted in this specific merger, and therefore remain predictions only. Further, because these reasons and the policy underlying them may change over time, predicting how they will come to fruition in future cases is inexact. However, many similar underlying issues that were prevalent in the American deal will influence future treatment of mergers. It remains important for those considering these deals to weigh these undertones carefully.

#### A. CHANGES IN CONSUMER REACTIONS

As has been noted repeatedly above, antitrust issues were prevalent not only in this merger, but in each one of the major airline mergers that have been announced.<sup>195</sup> Each time a merger was announced, many consumers feared that the price of an airline flight was about to go up astronomically.<sup>196</sup> In each of the previous mergers, as the DOJ's Complaint noted, there were indeed increases on both flight prices and certain ancillary fees.<sup>197</sup> However, these increases did not reach the levels that some consumers feared.<sup>198</sup> Despite this, these misgivings resurfaced once again, and with renewed vigor, when the American and US Airways merger was announced.

It appears that the DOJ's treatment of this merger was based on these fears. As the concession language shows, the DOJ felt that it was its job to protect consumers from mega-airlines.<sup>199</sup> The goal of the DOJ in its Complaint and the concessions was to protect "consumers who benefit from both more competitive prices and enhanced travel options."<sup>200</sup> In ordering the divestments to the LCCs, the DOJ put a feather in its "consumer protection" hat by allowing these lower-cost airlines a chance to compete. However, the question must be answered, why did the DOJ feel it is so necessary to step in to protect consumers from the American/US Airways merger, instead of in the previous airline mergers?

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<sup>195</sup> *Supra* Section V.D.

<sup>196</sup> Lichman, *supra* note 162.

<sup>197</sup> Complaint, *supra* note 3, ¶ 1.

<sup>198</sup> Scribner, *supra* note 182.

<sup>199</sup> Press Release, Justice Department Requires Airlines to Divest Facilities, *supra* note 5.

<sup>200</sup> *Id.*



One reason for this change may have been the consumers' increased awareness of the effect of the previous airline mergers. While each previous merger was met with consumer trepidation concerning its effect on prices, the Complaint made it clear that in the years and months before this merger was announced, these effects were being widely reported and better understood.<sup>201</sup> In fact, the airlines themselves were only beginning to see how mergers allowed them to increase their prices in 2011, after the other mergers had been consummated.<sup>202</sup> While the consumers paid the increased prices that followed the previous mergers, this may have been their first opportunity to protest a merger before it was completed by using the information about increased fees. In turn, the DOJ may have been able to point to consumer unrest for the first time when defending its interference with the deal.

Another potential reason for the increased consumer misgivings about the American Airlines merger is its distance from the Recession of 2008. When Delta and Northwest Airlines merged in April 2008, the U.S. was in the middle of one of the worst recessions in recent history.<sup>203</sup> And when both the new United and the new Southwest were formed in 2010, the American economy was still in the midst of its recovery.<sup>204</sup> However, when American and US Airways launched their merger, a majority of the U.S. economy had returned to pre-Recession norms.<sup>205</sup> While the DOJ's Complaint addressed this in its "no need" argument,<sup>206</sup> the American public may have viewed this merger as less necessary as well. While the proposed mergers may have been more digestible to a consumer during the Recession and the following recovery as a necessity, a merger announced in better economic times may have been harder to swallow.

These consumer concerns may have been one of the major drivers for the DOJ's work against the American merger. While federal antitrust enforcement has always been tasked with pro-

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<sup>201</sup> Complaint, *supra* note 3, ¶ 1–4.

<sup>202</sup> *Id.* ¶ 4.

<sup>203</sup> Heidi Shierholz, *Six Years from Its Beginning, the Great Recession's Shadow Looms Over the Labor Market*, ECON. POLICY INST. (Jan. 9, 2014), <http://www.epi.org/publication/years-beginning-great-recessions-shadow/>.

<sup>204</sup> Annalyn Kurtz, *Recession Ended 4 Years Ago: How Far Have We Come*, CNN MONEY (May 4, 2013), <http://economy.money.cnn.com/2013/06/04/recession-ended-4-years-ago/>.

<sup>205</sup> *Id.*

<sup>206</sup> *See supra* Section V.A.1.

tecting consumers, the consumer distrust of this specific merger may have actually sparked the DOJ into action.

### B. CHANGES IN POLICY

When the concessions for the American Airlines merger were announced, Attorney General Eric Holder noted that the “agreement has the potential to shift the landscape of the airline industry.”<sup>207</sup> It is evident the DOJ intended these concessions to serve as precedent for future major mergers in the airline industry and potentially as a signal for how the DOJ would resolve conflicts for major mergers in other industries as well. But why make such a signal now? While this drastic step was not addressed in the Complaint, other considerations may have led the DOJ to adopt this new policy towards mega-mergers. Examining the recent changes in antitrust policy as a whole helps shed light on why this change was adopted and will remain important in determining how the DOJ might rule in future mergers.

One of these policy changes is a new draft of the DOJ Antitrust Division’s “Policy Guide to Merger Remedies” (Policy Guide).<sup>208</sup> This draft was released in June of 2011, less than two months after the DOJ reviewed the Southwest Airlines and Air-Tran merger, the last major merger before American Airlines.<sup>209</sup> The Policy Guide was an update to a previous edition, drafted in 2004,<sup>210</sup> and was designed to help the DOJ review potential horizontal mergers.<sup>211</sup> In the Policy Guide, the DOJ notes that when companies attempt to merge, the “parties frequently seek to avoid litigation by offering to cure the Division’s concerns when the Division determines the proposed merger is illegal.”<sup>212</sup> In light of this, the Policy Guide allows the DOJ to consider “a broad range of potential remedies” to avoid litigation with the parties.<sup>213</sup> The main focus of these remedies is to “effectively preserve competition in the relevant market.”<sup>214</sup>

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<sup>207</sup> Press Release, Justice Department Requires Airlines to Divest Facilities, *supra* note 5.

<sup>208</sup> See *Antitrust Division Policy Guide to Merger Remedies*, U.S. DEP’T OF JUSTICE, ANTITRUST DIVISION (June 2011), <http://www.justice.gov/atr/public/guidelines/272350.pdf>.

<sup>209</sup> *Id.*

<sup>210</sup> *See id.*

<sup>211</sup> *See id.*

<sup>212</sup> *Id.* at 1.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

Compared to the 2004 draft, the 2011 Policy Guide gives the DOJ more “flexibility” in dealing with challenged mergers.<sup>215</sup> This increased flexibility allows the DOJ to use more types of remedies than they could before.<sup>216</sup> One of the newer remedies that the DOJ is specifically authorized to pursue in settling a challenged merger is the divestiture of assets to another buyer.<sup>217</sup> These divestitures “must be substantial enough to enable the purchaser to effectively preserve competition.”<sup>218</sup> While these divestitures are not an entirely new remedy for challenged mergers,<sup>219</sup> the Policy Guide empowers the DOJ to require them in a more straightforward and certain manner. By mandating American to divest 148 of its airport gates and slots,<sup>220</sup> some of which were worth approximately \$2 million each,<sup>221</sup> it is clear that the DOJ is already more than comfortable with exercising this remedy.

The 2011 Policy Guide was updated to “reflect[ ] the changes in the merger landscape and the lessons the division has learned from the remedies it has entered since the issuance of the original guide in 2004.”<sup>222</sup> In addition to these lessons, this Policy Guide almost certainly reflects the changes in antitrust policy the DOJ has undergone in the last several years. While the required divestitures were “groundbreaking”<sup>223</sup> in the area of airline mergers, the policy of enforcing these divestiture remedies is now embedded in the very policy of the DOJ. As the next section points out, this policy stems in large part from the political powers of the time, and with changes in the near future to the current political structure, it remains to be seen exactly how they will affect future mega-mergers.

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<sup>215</sup> MAUREEN MCGUIRL, 2 CORPORATE ACQUISITIONS AND MERGERS Ch. 17, § 17.04 (Matthew Bender 2015), LexisNexis.

<sup>216</sup> ANTITRUST LAWS AND TRADE REGULATION, Ch. 32, § 32.02 (Matthew Bender, 2d ed. 2015), LexisNexis.

<sup>217</sup> *Antitrust Division Policy Guide to Merger Remedies*, *supra* note 208, at 2–11.

<sup>218</sup> *Id.*

<sup>219</sup> *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 330–31 (1961) (“Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should be in the forefront of a court’s mind when a violation of § 7 has been found.”).

<sup>220</sup> Press Release, Justice Department Requires Airlines to Divest Facilities, *supra* note 5.

<sup>221</sup> Complaint, *supra* note 3, ¶ 30.

<sup>222</sup> Press Release, U.S. Dep’t of Justice, Antitrust Division Issues Updated Merger Remedies Guide (June 17, 2011).

<sup>223</sup> Press Release, Justice Department Requires Airlines to Divest Facilities, *supra* note 5 (quoting Assistant Attorney General Bill Baer).

## C. CHANGES IN LEADERSHIP

In his bid for office, President Obama criticized the preceding Bush administration for having the “weakest record of antitrust enforcement of any administration in the last half century.”<sup>224</sup> He promised that, if elected, he would increase enforcement measures to stop anticompetitive and antitrust issues.<sup>225</sup> Therefore, when he was elected in 2008, many believed that a new wave of antitrust policy was not far behind. In the first years of his presidency, there were strides toward increased enforcement of antitrust issues, including a redraft of the Horizontal Merger Guidelines in 2010,<sup>226</sup> which was analyzed at length above, and a new draft of the Policy Guide to Merger Remedies in 2011.<sup>227</sup> These new drafts altered the focus of merger antitrust challenges and increased the possibility for “behavioral remedies” that allow a merger to proceed after the parties agree to certain commitments. These behavioral remedies appear to give the DOJ more authority to seek certain concessions from merging companies.

Newly named Attorney General Eric Holder assisted President Obama in revising these policies and in reinvigorating the administration’s antitrust enforcement.<sup>228</sup> As mentioned above, Holder’s nomination occurred before the United merger and was completed in 2009. Analysts at the time expected Holder to push forward President Obama’s enforcement of antitrust issues.<sup>229</sup> Further, many in the airline industry expected a more complex review than the previous merger between Northwest and Delta, which took place during the Bush Administration.<sup>230</sup> Despite these concerns, the United merger was allowed to take place after the new airline agreed to give up transfer slots to

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<sup>224</sup> David A. Crane, *Has the Obama Justice Department Reinvigorated Antitrust Enforcement?*, 65 STAN. L. REV. ONLINE 13 (July 18, 2012), [www.stanfordlawreview.org/online/obama-antitrust-enforcement](http://www.stanfordlawreview.org/online/obama-antitrust-enforcement); Senator Barack Obama, Statement for the American Antitrust Institute (Sept. 27, 2007), [http://www.antitrustinstitute.org/files/aai-%20Presidential%20campaign%20-%20Obama%2009-07\\_092720071759.pdf](http://www.antitrustinstitute.org/files/aai-%20Presidential%20campaign%20-%20Obama%2009-07_092720071759.pdf).

<sup>225</sup> Crane, *supra* note 224, at 13.

<sup>226</sup> *Id.*; HORIZONTAL MERGER GUIDELINES, *supra* note 108.

<sup>227</sup> Crane, *supra* note 224; *Antitrust Division Policy Guide to Merger Remedies*, *supra* note 208.

<sup>228</sup> *White House Profile: Eric Holder*, WHITE HOUSE, <http://www.whitehouse.gov/blog/author/Eric%20Holder> (last visited Nov. 5, 2015).

<sup>229</sup> Bobelin, *supra* note 52.

<sup>230</sup> *United and Continental Announce Merger*, *supra* note 50.

Southwest Airlines at Newark International Airport,<sup>231</sup> a small demand compared to American's.

Although concerns that the new AG might put a stop to airline mergers were not immediately realized, it appears that even before the new Policy Guide to Merger Remedies was published, the AG felt that these concessions were available. In the American Airlines merger, armed with the newly revised and expanded Policy Guide, it appears that Mr. Holder was able to take a more exacting approach to exercising these behavioral remedies.

In addition to these changes at a broad level of executive policymaking, there was an even more recent change that may truly punctuate the DOJ's change here. This was the confirmation of William J. Baer as the Assistant Attorney General (AAG) for the DOJ's antitrust division in December of 2012.<sup>232</sup> Mr. Baer is "recognized as a leading and influential antitrust lawyer," and previously served as the Director for the Bureau of Competition at the Federal Trade Commission.<sup>233</sup> While serving for the FTC, Mr. Baer was deemed the "eager sheriff" for his antitrust practices and for leading "easily the most aggressive antitrust activity in 25 years."<sup>234</sup> At the FTC, he presided over many complex antitrust cases including suits against the merger of Staples and Office Depot, as well as against major companies like Toy's-R-Us and Intel for using their market power for predatory conduct.<sup>235</sup> He is also noted for forcing companies to take what was seen as a controversial step of engaging in large divestitures in order to merge.<sup>236</sup> For example, under his purview, Exxon-Mobil was forced to pay the largest FTC divestiture ever to merge in 1999, which included the sell-off of over 2,000 gas stations.<sup>237</sup> As AAG

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<sup>231</sup> Press Release, United Airlines and Continental Airlines Transfer Assets to Southwest Airlines in Response to Department of Justice's Antitrust Concerns (Aug. 27, 2010), <http://www.justice.gov/opa/pr/united-airlines-and-continental-airlines-transfer-assets-southwest-airlines-response>.

<sup>232</sup> *Meet the Assistant Attorney General*, DEP'T OF JUSTICE, <http://www.justice.gov/atr/about/baer.html> (last visited Nov. 5, 2015).

<sup>233</sup> *Id.*

<sup>234</sup> Susan B. Garland, *Trustbuster William Baer: The FTC's Eager Sheriff*, BLOOMBERG (July 5, 1998), <http://www.bloomberg.com/bw/stories/1998-07-05/trustbuster-william-baer-the-ftcs-eager-sheriff> (noting that in five months Mr. Baer opposed twenty mergers, compared to the average of twenty-two oppositions a year preceding his arrival).

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> Press Release, Exxon/Mobil Agree to Largest FTC Divestiture Ever in Order to Settle FTC Antitrust Charges; Settlement Requires Extensive Restructuring

for the Antitrust Division, Mr. Baer has already challenged other major mergers, including the take-over of Grupo Modelo by Anheuser-Busch.<sup>238</sup>

In turn, when Mr. Baer announced that the DOJ would be challenging the American merger, those who knew his history were not completely surprised.<sup>239</sup> While this sort of challenge to airline mergers was new, it was perfectly in line with the antitrust challenges that Mr. Baer had previously spearheaded. Further, when the concessions of the new American were announced, those who had studied the history of Mr. Baer likely expected to see the divestiture requirement in place.<sup>240</sup> Mr. Baer's willingness to challenge a merger and demand divestiture and the newly revised and expanded allowance of "behavioral remedies" appear to have coincided—much to the expense of American Airlines.

These changes in antitrust leadership may have played a major role in the increased challenge that American Airlines faced. Business analysts felt that the DOJ's challenge was an "indication of Mr. Baer's leadership,"<sup>241</sup> which was part of the larger changes over antitrust policy and enforcement prior to the announcement of the merger. Additionally, some of the people that influenced these factors may be changing, including the confirmation of Loretta Lynch as Attorney General,<sup>242</sup> who served on the New York Federal Reserve Board at a time when "big business" faced extreme scrutiny.<sup>243</sup> Regardless of the people in charge, however, these political influences that may have caused the DOJ to act against American Airlines are important to highlight because they help bring to light the political underpinnings of future complaints of this kind. While these factors were not openly addressed in the Complaint, it appears that

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and Prevents Merger of Significant Competing U.S. Assets, (Nov. 30, 1999), <http://www.ftc.gov/news-events/press-releases/1999/11/exxonmobil-agree-largest-ftc-divestiture-ever-order-settle-ftc>.

<sup>238</sup> Peter Coy, *Meet Bill Baer, the Trustbuster Blocking the Airline Merger*, BLOOMBERG (Aug. 13, 2013), <http://www.bloomberg.com/bw/articles/2013-08-13/meet-bill-baer-the-trustbuster-blocking-the-airline-merger>.

<sup>239</sup> *Id.*

<sup>240</sup> See Garland, *supra* note 234.

<sup>241</sup> Scribner, *supra* note 182.

<sup>242</sup> *Meet the Attorney General*, DEP'T OF JUSTICE, <http://www.justice.gov/ag/meet-attorney-general> (last visited Nov. 5, 2015).

<sup>243</sup> David Dayen, *Loretta Lynch's Wall Street Friends: What You Should Know About AG Nominee's Finance Past*, SALON (Nov. 10, 2014), [http://www.salon.com/2014/11/10/loretta\\_lyncchs\\_wall\\_street\\_friends\\_what\\_you\\_should\\_know\\_about\\_ag\\_nominees\\_finance\\_past/](http://www.salon.com/2014/11/10/loretta_lyncchs_wall_street_friends_what_you_should_know_about_ag_nominees_finance_past/).

they nonetheless played an exceedingly important role. These political aspects need to be a consideration for future mergers and it remains important to look between the words that are used explicitly by the DOJ.

## VII. THE EFFECT OF THESE CHANGES ON FUTURE PROPOSED MERGERS

The DOJ's Guidelines note that an analysis of the effect of a proposed merger is "necessarily predictive."<sup>244</sup> Thus, an analysis of how changes in merger regulations will effect how the DOJ analyzes future mergers is doubly so. Further, because of the changes inherent in the country's political future, the reasons addressed above may change. However, a prediction of these future reviews is one of the most important reasons for analyzing the American Airlines merger so closely. When there is nothing solid to stand on in the legal realm, it is often the most comforting to at least cling to precedent, and so this comment clings.

In the aftermath of the American merger, the DOJ faced a number of other major mergers, including Sprint's attempt to buy out T-Mobile and the merger between 21st Century Fox and Time Warner.<sup>245</sup> However, both of these mergers were abandoned without the DOJ ever filing a case.<sup>246</sup> While the years before the American deal had been marked with major mergers, including the many major airline mergers discussed above, commentators felt that these mergers were ultimately called off because the companies were unwary of the DOJ's "recent aggressive enforcement efforts," which undoubtedly includes its challenge of American.<sup>247</sup> Business people in all industries must now consider each proposed merger in light of the millions of dollars of divestitures that the DOJ has already authorized. Even the DOJ's antitrust "attack dog,"<sup>248</sup> Mr. Bill Baer, appears to rest on the haunches of the DOJ's "willingness and ability" to strictly enforce antitrust regulations.<sup>249</sup>

However, the strong hand of the DOJ has not siphoned off large mergers completely. In fact, 2014 saw many sizable merg-

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<sup>244</sup> HORIZONTAL MERGER GUIDELINES, *supra* note 108, at 1.

<sup>245</sup> James B. Stewart, *For Mergers, a Shadow of Antitrust Challenges*, N.Y. TIMES (Aug. 8, 2014), [http://www.nytimes.com/2014/08/09/business/threat-of-regulatory-challenge-loomed-over-dropped-deals.html?\\_r=1](http://www.nytimes.com/2014/08/09/business/threat-of-regulatory-challenge-loomed-over-dropped-deals.html?_r=1).

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> Scribner, *supra* note 182.

<sup>249</sup> Stewart, *supra* note 245.

ers completed, including a \$5 billion merger between Oracle and Micros<sup>250</sup> and a \$34.6 billion merger of oil field competitors Halliburton and Baker Hughes.<sup>251</sup> Additionally, in 2015, Charter Communications and Time Warner Cable agreed to merge<sup>252</sup> and Family Dollar and Dollar Tree closed their merger in July.<sup>253</sup>

In the airline industry specifically, there have not been any other notable mergers since the new American was formed. Further, as the DOJ specifically argued, the consequences of reducing the number of major airlines from five to four lead many to believe it is highly unlikely that there will be another major airline merger approved. If creating the fourth major airline cost hundreds of millions of dollars, what would it cost to go down to three? However, as seen in the concession, the DOJ has a desire to protect the future of LCCs in the airline industry. Therefore, there are some in the airline industry who still see a potential for future consolidations within this group of smaller airlines,<sup>254</sup> albeit at the different end of the airline scale than the American merger.

In every industry, however, it is clear that the DOJ's antitrust presence and influence is felt. The DOJ's Guidelines recognize that many mergers are "competitively beneficial or neutral."<sup>255</sup> However, it is the DOJ who ultimately will decide whether or not the merger is allowable, and what remedies (if any) are necessary. Unquestionably, the DOJ has much power, and as the American challenge shows, it is not afraid to use it. This fear, for

<sup>250</sup> *2015 Mergers and Acquisitions: Anticipated Deals Going Down This Year*, MONEY MORNING (Jan. 21, 2015), <http://moneymorning.com/2015/01/21/2015-mergers-and-acquisitions-anticipated-deals-going-down-this-year/>.

<sup>251</sup> Michael J. De La Merced, *Halliburton and Baker Hughes Agree to Friendly \$34.6 Billion Merger*, N.Y. TIMES (Nov. 17, 2014), <http://dealbook.nytimes.com/2014/11/17/halliburton-to-buy-baker-hughes-for-34-billion/>.

<sup>252</sup> Press Release, Charter Communications to Merge with Time Warner Cable and Acquire Bright House Networks (May 26, 2015), <http://ir.timewarnercable.com/investor-relations/investor-news/financial-release-details/2015/Charter-Communications-to-Merge-with-Time-Warner-Cable-and-Acquire-Bright-House-Networks/default.aspx>.

<sup>253</sup> Katherine Peralta, *Dollar Tree Completes Purchase of Family Dollar*, CHARLOTTE OBSERVER (July 6, 2015), <http://www.charlotteobserver.com/news/business/article26568373.html>.

<sup>254</sup> Ben Mutzabaugh, *Airline Merger Mania Over? Not So, Says Industry Veteran*, USA TODAY (Jan. 21, 2015), <http://www.usatoday.com/story/todayinthesky/2015/01/21/airline-merger-mania-over-not-so-says-industry-veteran/22101281/> (discussing the potential for low cost, and ultra low cost airlines to merge in the future).

<sup>255</sup> HORIZONTAL MERGER GUIDELINES, *supra* note 108, at 1.



lack of a better business term, of the DOJ's power appears to be partially behind the DOJ's strict policy in American. As Mr. Baer stated "[t]here's a real value to having companies considering a strategic merger to think about the role of antitrust enforcement . . . ." <sup>256</sup>

### VIII. CONCLUSION

The DOJ, no doubt, took exacting steps they argued were necessary to "protect consumers" through its challenge and demanded concessions of American Airlines. The DOJ initially challenged the merger on the grounds of enforcing antitrust law; however, it appears that these arguments were influenced by other, stronger outside forces. These forces and the steps taken in this deal had effects far outside the airline industry and will be part of the consideration of every business leader planning a merger. While the words of the Complaint encompassed the DOJ's legal argument against a specific merger, the underlying forces shed light on the reasons and political influences that stand before all mergers.

The new American Airlines has adopted a new slogan, bought new airplanes, and even created an entire new brand after the DOJ approved its creation. It has set out to improve many of the areas where it believed it was behind other airlines and has spent billions of dollars in purchasing and improving new aircraft. It is believed that the merger has helped save the company. However, before any of this could happen, the merger had to survive a most unexpected and unprecedented antitrust challenge.

While the DOJ argued that the merger should be stopped because it was not necessary, it would lead to anticompetitive results, it would hurt smaller airlines, and it would harm consumers, none of these arguments, alone or together, supported the magnitude of the challenge that American faced. Instead, it is only when the layers of this challenge are peeled back, and the other intrinsic reasons are analyzed, including the changes in consumer reaction, politics, and political leaders, that the underlying cause of this challenge becomes more clear. While the DOJ advanced legal reasons against the merger, these underlying influences likely had more import in the fight against American.

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<sup>256</sup> Stewart, *supra* note 245.

While there is a new American today, the turbulent path to its creation shows the importance of considering both legal and political reasons for all American businesses planning to merge in the future.



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