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OTTAWA, ONT.

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THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c.C-34, as amended;

IN THE MATTER OF the proposed transborder joint venture between Air Canada and United Continental Holdings, Inc.;

AND IN THE MATTER OF the "Marketing Cooperation Agreement" between Air Canada and United Air Lines, Inc.;

AND IN THE MATTER OF the "Alliance Expansion Agreement" between Air Canada and United Air Lines, Inc.;

AND IN THE MATTER OF the "Air Canada/Continental Alliance Agreement" between Air Canada and Continental Airlines Inc.;

AND IN THE MATTER OF an Application by the Commissioner of Competition for one or more Orders pursuant to sections 90.1 and 92 of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

-AND-

**AIR CANADA, UNITED CONTINENTAL HOLDINGS, INC., UNITED AIR LINES, INC.,
and CONTINENTAL AIRLINES INC.**

Respondents

REPLY OF WESTJET TO THE RESPONSES OF:

**THE COMMISSIONER OF COMPETITION
AIR CANADA**

**UNITED CONTINENTAL HOLDINGS, INC., UNITED AIR LINES, INC., AND
CONTINENTAL AIRLINES, INC.,**

TO WESTJET'S REQUEST FOR LEAVE TO INTERVENE

I. INTRODUCTION¹

1. This is the Reply of WestJet to the Responses of the Commissioner of Competition, Air Canada and the UCH Respondents to WestJet's Request for Leave to Intervene.
2. The Commissioner and the Respondents do not oppose an order granting WestJet leave to intervene, but each proposes certain terms that differ from those proposed by WestJet. Those terms relate to:
 - (a) the WestJet Proposed Topics;
 - (b) discovery;
 - (c) expert evidence; and
 - (d) participation at the hearing.

II. THE WESTJET PROPOSED TOPICS

3. *Commissioner's position:* The Commissioner does not oppose any of the WestJet Proposed Topics.
4. *Air Canada's and UCH Respondents' position:* WestJet should not be permitted to address the following topics in paragraph 32 of WestJet's Request:
 - (h) the impact on WestJet if the relief granted by the Commissioner is not granted;
 - (i) the significant adverse effects on Canadian consumers if WestJet is unable to provide effective, viable air passenger services in competition with Air Canada, United and Continental;
 - (j) the nature of the competitive landscape in transborder markets;

5. Air Canada claims that paragraph 32(i) is not a proper topic for intervention because it is hypothetical, WestJet is not uniquely positioned to address this topic, it presupposes that

¹ Capitalized words used in this Reply have the meaning ascribed to them in the Request of WestJet for Leave to Intervene and the Responses thereto.

WestJet would be able to provide effective competition to the Respondents and because the Commissioner would be expected to address this topic. Air Canada claims paragraph 32(j) is not a proper topic for intervention because the parties are capable of leading evidence on the "competitive landscape" and the Tribunal does not need the assistance of an intervenor.

6. *WestJet's submission:* Paragraph 32(h) addresses the impact (that is, the competitive consequences) on WestJet if the relief sought by the Commissioner is not granted. Those consequences are described in paragraphs 30 and 31 of WestJet's Request for Leave to Intervene. In summary, WestJet is of the view that its ability to enter and/or expand its transborder air passenger services will continue to be significantly prevented or lessened for the reasons given in paragraph 30 and WestJet will face additional competitive impacts on other domestic, transborder and international routes as described in paragraph 31. WestJet has a unique or distinct perspective on these matters, and it cannot meaningfully address the other topics in paragraph 32 without also addressing the competitive impacts on WestJet, including those described in paragraphs 30 and 31.

7. Paragraph 32(i) addresses the significant adverse effects on Canadian consumers if WestJet is unable to effectively compete with the Respondents. WestJet's historical competitive impact on markets on which Air Canada operates is not hypothetical and is relevant to the Tribunal's consideration of the extent to which the Proposed Merger is likely to prevent or lessen competition substantially. WestJet has a unique or distinct perspective as Air Canada's principal Canadian competitor for domestic and transborder air passenger services. As a low cost carrier and competitor of Air Canada, WestJet's entry and expansion in both the domestic and transborder markets has provided more travel options and lower fares for Canadian consumers, and effective competition to Air Canada. WestJet does not intend to make the case for the Commissioner nor to duplicate the Commissioner's evidence, but to provide its own perspective.

8. Paragraph 32(j) addresses the nature of the competitive landscape in transborder markets. As a low cost carrier and a competitor in transborder markets, WestJet has a unique or distinct perspective on this matter, and it cannot meaningfully address the other topics in paragraph 32 without also addressing the underlying nature of the competitive landscape in transborder markets.

III. DISCOVERY

A. Inspection of Documents

9. *Commissioner's position:* WestJet should not have the right to inspect documents. The only reason given is that this "will allow the Tribunal to remain focused, as it must, on the competition matters relevant to" the proceeding.

10. *Air Canada's and UCH Respondents' position:* WestJet should only have access to those discovery documents of the parties which are relevant to the issues regarding which leave to intervene has been granted.

11. *WestJet's submission:*

- (a) In response to the Commissioner, WestJet submits that the right to inspect documents will not cause the Tribunal to lose focus on the competition matters that are relevant to the proceeding. If WestJet is not permitted to inspect documents (subject to a confidentiality order), it will be unable to fully understand the parties' evidence, will be unable to provide a factual basis for its experts to consider, and its ability to play a meaningful role in the hearing will be severely compromised. The Commissioner's request to deny WestJet any right to inspect documents is neither reasonable nor appropriate.
- (b) In response to Air Canada and the UCH Respondents, WestJet's interest in the discovery documents only relates to the topics upon which it is granted leave to intervene, but WestJet is in the best position to identify the documents that are relevant to its participation and those that are not.
- (c) In *(Director of Investigation & Research) v. Canadian Pacific Ltd.*² the Director requested that the Montreal Port Corporation's access to documents be restricted to those documents that are relevant to the issues on which leave to intervene was granted. While the Competition Tribunal considered this a logical request,

² 1997 CarswellNat 3117, 74 C.P.R. (3d) 37 (Comp Trib.) (Air Canada Authorities Tab 5)

the Competition Tribunal did not restrict the Montreal Port Corporation's access on this basis, holding:

...The Director requested that the Port's access to documents be restricted to those documents which are relevant to the issues on which the Port has been granted leave to intervene. *While this request is logical, it is not easily implemented*; questions of relevancy are matters of judgment and debate. There will, therefore, be no restriction in the order on the class of documents which the Port is entitled to receive, subject to any order regarding confidentiality. The Port is nevertheless expected to use its best efforts to limit its entitlement to copies of documents which bear on the issues with respect to which it has been granted to leave. [emphasis added]³

- (d) This reasoning applies equally to these proceedings. WestJet's ability to review documents without restriction (other than restrictions imposed by a confidentiality order) will not have a negative impact on the parties. WestJet, with the assistance of its experts, is in the best position to make judgments regarding the relevancy of documents to its topics.

B. Review of Transcripts of Examinations for Discovery of the Parties

12. *Commissioner's position:* WestJet's review of the discovery transcripts and any evidence should be subject to a confidentiality order that restricts disclosure to the WestJet Proposed Topics and is limited to external counsel for WestJet insofar as the information to be disclosed has been determined by the producing party to be competitively sensitive and/or proprietary.

13. *Air Canada's and UCH Respondents' position:* No objection to WestJet's proposal to review discovery transcripts and access to discovery documents for which leave to intervene has been granted, subject to the appropriate confidentiality protection.

14. *WestJet's submission:* WestJet agrees that it should be bound by the terms of a confidentiality order (as should the parties with respect to documents WestJet produces) and that its access to discovery transcripts and other evidence should be limited by the order, which

³ *Supra*, at ¶24

WestJet anticipates will permit access by WestJet's external counsel and experts. For the reasons given regarding the inspection of documents, WestJet and its experts, not the producing parties, should make the judgments regarding which parts of the transcripts are relevant to WestJet's proposed topics. Access to discovery transcripts should include WestJet's experts, who are better able to appreciate the facts relevant to their areas of expertise than are external counsel.

C. Examinations for Discovery

15. *Commissioner's position:* WestJet should not participate in examinations for discovery of the parties. WestJet should not be examined for discovery.

16. *Air Canada's and UCH Respondents' position:* WestJet should not participate in examinations for discovery of the parties. WestJet should submit an affidavit of documents and be subject to examination for discovery on the topics it is permitted to address.

17. *WestJet's submission:* WestJet has not proposed that it should participate in the examinations for discovery of the parties. WestJet opposes a term that it submit an affidavit of documents and be subject to examination for discovery, but proposes that it produce a list of the documents upon which it intends to rely and that a representative of WestJet may be examined for discovery on those documents and on the WestJet Proposed Topics.

IV. EXPERT EVIDENCE

18. *Commissioner's position:* WestJet should not be permitted to file expert evidence. The only reason given is that this "will allow the Tribunal to remain focused, as it must, on the competition matters relevant to" the proceeding.

19. *Air Canada's and UCH Respondents' position:* No objection to WestJet's proposal to file expert evidence on the issues for which intervention is granted.

20. *WestJet's submission:* WestJet submits that granting it the right to lead expert evidence will not cause the Tribunal to lose focus on the competition matters that are relevant to the proceeding.

21. In *Canadian Pacific*, the Director opposed giving the Montreal Port Corporation the right to call expert evidence. The Competition Tribunal disagreed, holding:

The Port may file expert evidence in accordance with the Rules. The Director argues that intervenors should have something unique to offer to the Tribunal and should not have resort to expert evidence to make their contribution. A contradiction of sort is said to arise from the request by the Port to be authorized to adduce expert evidence. In the circumstances before me, I do not find anything contradictory or inconsistent in recognizing that the Port has a unique perspective relating to the issues of market definition and efficiency gains while allowing it to bring forward expert evidence to support its intervention. The Port is not required to have personal expertise in the economics of competition law in relation to issues which affect it.⁴

22. This reasoning applies equally in the present proceedings. WestJet, like the Montreal Port Corporation, is not required to have personal expertise on the economics of competition law. It requires experts and WestJet will not be able to participate in a meaningful way without the benefit of its own expert witnesses.

V. PARTICIPATION AT THE HEARING

23. *Commissioner's position:* WestJet should be limited to three witnesses. Its evidence should be submitted in accordance with the Tribunal Rules and its submissions should be non-repetitive.

24. *Air Canada's and UCH Respondents' position:* WestJet must file witness statements at the same time as any witness statements filed by the Commissioner. WestJet should be permitted to make non-duplicative oral and legal arguments on these issues for which leave is granted.

25. *WestJet's submission:* WestJet agrees to be limited to three witnesses, subject to the right to seek leave to call additional witnesses if it requires more witnesses than are presently anticipated. WestJet accepts that it should be subject to the same requirements as the parties regarding the filing of witness statements. WestJet also agrees that it should only be permitted

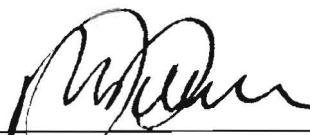
⁴ *Supra*, at ¶21

to make submissions at pre-hearing motions, conferences and at the hearing on matters for which leave is granted.

VI. HEARING REQUESTED

26. WestJet requests a hearing to consider WestJet's Request for Leave to Intervene and in particular the scope and terms of its intervention.

DATED at Calgary, Alberta, this 13th day of September, 2011.



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