

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.;

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;

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*.

B E T W E E N :

THE COMMISSIONER OF COMPETITION

Applicant

- and -

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

Respondents

RESPONSE OF THE RESPONDENTS, UNITED CONTINENTAL HOLDINGS, INC., UNITED AIR LINES, INC. AND CONTINENTAL AIRLINES, INC. TO THE REQUEST OF WESTJET FOR LEAVE TO INTERVENE

1. The Respondents United Continental Holdings, Inc., United Air Lines, Inc. and Continental Airlines, Inc. (collectively the “UCH Respondents”) submit this response to the request of WestJet Airlines Ltd. (“WestJet”) for leave to intervene in the Application of the Commissioner of Competition (the “Commissioner”).

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| COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE FILED / PRODUIT September 7, 2011 Jos LaRose for / pour REGISTRAR / REGISTREUR OTTAWA, ONT | # 27 |
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2. The UCH Respondents adopt paragraphs 7 to 26 of the response of Air Canada (“AC”) to the WestJet request for leave to intervene. Subject to the terms set out herein and in the AC Response, the UCH Respondents do not oppose WestJet’s request for leave to intervene. The position taken by the UCH Respondents in response to WestJet’s request for leave should not be taken as any indication that the UCH Respondents accept any of the factual allegations or submissions in the materials filed by WestJet in support of its request for leave, including but not limited to allegations that WestJet will suffer competitive harm if the relief sought by the Commissioner is not granted.

3. Principles of procedural fairness, repeatedly recognized by this Tribunal, require that any intervention by WestJet be on terms that will not prejudice the UCH Respondents. The UCH Respondents submit that they will be prejudiced by WestJet’s intervention unless terms of intervention include the following:

- (a) WestJet must submit an affidavit of documents and be subject to examinations for discovery on the topics upon which it is granted leave to intervene (subject to appropriate confidentiality provisions), pursuant to the same schedule as the UCH Respondents, AC and the Commissioner.
- (b) WestJet will only have access to those discovery documents of the parties which are relevant to the issues regarding which leave to intervene has been granted, and may review discovery transcripts but not participate in discoveries of the UCH Respondents and AC;
- (c) WestJet will only be permitted to call non-repetitive *viva voce* evidence on the issues for which leave to intervene has been granted and in respect of which a witness statement has been filed at the same time as any witness statements filed by the Commissioner, and may engage in non-repetitive examination or cross-examination of witnesses only on those issues;
- (d) WestJet will only be permitted to call expert evidence, if required, on the issues for which leave to intervene has been granted, and in respect of which an expert report has been filed at the same time as the Commissioner files her expert evidence, and may engage in non-repetitive cross-examination of experts on those issues;
- (e) WestJet will only be permitted to make submissions or legal argument at pre-hearing motions or conferences on matters directly relating to WestJet’s intervention and only to the extent such arguments are not duplicative of the Commissioner’s arguments;

- (f) WestJet will only be permitted to make written and oral legal argument at the hearing with respect to the issues for which leave has been granted and only to the extent such arguments are not duplicative of the Commissioner's arguments.

4. The allegations that WestJet seeks leave to advance mirror, supplement and reinforce the central allegations the Commissioner has levied against the Respondents in her Application, including the allegation that the Alliance Agreements (as defined in the UCH Respondents' Response to the Commissioner's Application) create or enhance the Respondents' ability to exercise market power on transborder air passenger service routes between Canada and the United States and the allegation that the TBJV (as defined in the UCH Respondents' Response to the Commissioner's Application) will further enhance the Respondents' ability to exercise market power, leading to a likely substantial prevention or lessening of competition on transborder air passenger service routes between Canada and the United States.

5. The UCH Respondents have denied the allegations which WestJet seeks to advance if granted leave to intervene. In particular, but without limitation,

- (a) the UCH Respondents have denied that there are barriers to entry that prevent non-legacy carriers such as WestJet from competing against the UCH Respondents;¹ and
- (b) the UCH Respondents have denied that the Alliance Agreements and the TBJV have resulted or will likely result in a substantial prevention or lessening of competition.²

6. The UCH Respondents must know the case they have to meet if WestJet is permitted to intervene to make representations and lead evidence on any of the topics set out in paragraph 32 of its request for leave to intervene, including without limitation the representations it wishes to make respecting:

- (a) alleged barriers to entry, including the allegation that WestJet is not servicing what WestJet defines as the WestJet Considered Transborder Overlap Routes due to barriers to entry; and

¹ See paragraphs 20-23 of the UCH Respondents' Response to the Commissioner's Application, which adopt paragraphs 51-76 of the AC Response to the Commissioner's Application)

² See, *inter alia*, paragraph 38 of the UCH Respondents' Response to the Commissioner's Application which adopts paragraphs 42-62 of the AC Response to the Commissioner's Application

- (b) alleged competitive impacts of the Alliance Agreements and the TBJV, including alleged competitive impacts on the WestJet Considered Transborder Routes.

7. Principles of fundamental fairness dictate that if WestJet is granted leave to intervene that it be on terms that protect the UCH Respondents from being taken by surprise. As this Tribunal stated in *Canadian Pacific, infra*, discovery is granted “to avoid surprises at the hearing and consequent delays and disruptions”.

8. The Tribunal regularly provides for discovery (documentary and/or oral) as a term of intervention. For example:

- (a) in *Canada (Director of Investigation & Research) v. Canadian Pacific Ltd.*³, the presiding judicial member allowed the Montreal Port Corporation to intervene in support of the respondents’ position on the condition that the Director would have a right of documentary and oral discovery on the topics upon which the Montreal Port Corporation was granted leave to intervene;
- (b) in *Canada (Director of Investigation & Research) v. A.C. Nielsen Company of Canada Ltd.*,⁴ the presiding judicial member allowed Information Resources, Inc., which supported the Commissioner’s position (and as here was a direct competitor of the respondent), to intervene on the condition that the respondent would have a right of written and oral discovery on the topics upon which Information Resources, Inc. was granted leave to intervene.
- (c) in *Commissioner of Competition v. Saskatchewan Wheat Pool Inc.*⁵, the presiding judicial member allowed Canadian Wheat Board leave to intervene in support of the Commissioner’s Application on terms that included that the respondents would have the right of documentary and oral discovery on the topics upon which Canadian Wheat Board was granted leave to intervene;
- (d) in *Commissioner of Competition v. Saskatchewan Wheat Pool Inc.*⁶, Canadian Pacific Railway Company was granted leave to intervene in support of the respondents’ position on the condition that the Commissioner would have the right of documentary and oral discovery on the topics upon which Canadian Pacific Railway Company was granted leave to intervene;
- (e) in *Commissioner of Competition v. The Canadian Real Estate Association*⁷, National FSBO Network Inc. was granted a limited right to intervene through

³ (1997), 74 C.P.R. (3d) 37 (Comp. Trib.)

⁴ 1994 CanLII 1901

⁵ 2006 Comp. Trib. 7, File No. CT-2005-009

⁶ 2006 Comp. Trib. 8, File No. CT-2005-009

⁷ 2010 Comp. Trib. 12, File No. CT-2010-002

the filing of affidavit evidence on the condition that the affiant would appear before the Tribunal to be examined on his affidavit; and

- (f) in *Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*⁸, The Toronto-Dominion Bank and The Canadian Bankers Association were granted leave to intervene in support of the respondents' position on terms that included that the Commissioner would have a right to discover them on the issues on which each had been leave to intervene.

9. In each of these cases, where the intervenor was granted leave to introduce *viva voce* evidence and/or expert evidence, it was on terms that included that the intervenor abide by the procedures set out in the *Competition Tribunal Rules* and case management decisions. In each case, these procedural protections were necessary to avoid surprise and ensure fairness.

10. In light of the above, the UCH Respondents submit that the terms and conditions set out in paragraph 3 above are necessary to ensure the procedural fairness to the UCH Respondents in defending the prosecution of the Commissioner's Application.

11. Pursuant to Rule 44(2)(b) of the *Competition Tribunal Rules*, SOR / 2008-141, the UCH Respondents state that a hearing should be held to consider WestJet's request to intervene unless WestJet and the Commissioner agree that the scope and terms of its intervention should be as proposed by the UCH Respondents herein and in the AC Response to WestJet's request for leave to intervene.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto, Ontario, this 6th day of September, 2011.



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⁸ 2011 Comp. Trib. 2, File No. CT-2010-10

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