

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:

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT	
August 24, 2011	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 19

THE COMMISSIONER OF COMPETITION

Applicant

-AND-

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

Respondents

**REQUEST FOR LEAVE TO INTERVENE
ON BEHALF OF WESTJET (an ALBERTA PARTNERSHIP)**

WestJet (an Alberta Partnership)(**WestJet**) requests leave of the Competition Tribunal pursuant to Section 9(3) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19, as amended, to intervene in this proceeding. In support of this request WestJet relies on the affidavit of Hugh Dunleavy, sworn August 23, 2011 (the **Dunleavy Affidavit**).

Capitalized words used in this Request for Leave to Intervene that have not been defined have the meaning ascribed to them in the Application by the Commissioner of Competition (the **Commissioner's Application**).

I. BACKGROUND

A. Name and address of WestJet

1. The name and address of WestJet is:

WestJet Airlines Ltd.
22 Aerial Place NE
Calgary, AB T2E 8N

Attention: Hugh Dunleavy, Executive Vice President, Strategy and Planning

Phone: 403-444-2675
Fax: 403-444-2475

2. The address for service of WestJet is:

Burnet Duckworth & Palmer LLP
2400, 525-8th Avenue SW
Calgary, AB T2P 1G1

Attention: D.J. McDonald, Q.C.

Phone: 403-260-5724
Fax: 403-260-0332

B. About WestJet

3. WestJet was founded in 1996 by a team of Calgary entrepreneurs as a western Canadian carrier with three aircraft flying to five cities. Today, WestJet is a high value, low-fare airline offering scheduled service to 71 destinations in Canada, the United States, Mexico and the Caribbean, with its fleet of 91 Boeing Next Generation 737-series aircraft.

4. WestJet is Air Canada's principal Canadian competitor for domestic and transborder air passenger services. For the year ending December 31, 2010, WestJet's estimates that its share of domestic air passenger services, calculated on a total seats/week basis, was 29.7% and its share of transborder air passenger services for passengers departing from Canadian cities, calculated on a total seats/week basis, was 10.1%.

5. Historically, WestJet has been predominantly a leisure airline and has selected transborder and international markets where there is a significant volume of leisure customers. In recent years, however, WestJet has made the strategic decision to adjust its focus to provide a competitive product and service offering to the business traveler segment.

6. As part of its focus, WestJet has invested heavily in more aircraft and new technologies, has developed a new loyalty program, has entered into interline and codeshare arrangements (discussed below) with other airlines, and has implemented frequency and schedule changes on several of its domestic, transborder and international routes to make them more attractive to business travellers.

C. WestJet's Transborder Air Passenger Services

7. WestJet commenced providing transborder air passenger services in the fall of 2004 with a mix of scheduled and seasonal transborder air passenger services to and from 6 destinations in the United States. Today, WestJet provides non-stop, scheduled and seasonal transborder air passenger services to and from 18 destinations in the United States.

8. In addition to providing transborder air passenger services directly to its passengers, WestJet has entered into interline agreements with two U.S. carriers (American Airlines and Delta Airlines). These agreements allow guests to travel across the networks of more than one airline with a single reservation, and may permit the airline operating the first leg of the flight to issue all required boarding passes and check baggage to the passenger's final destination.

9. While interline agreements facilitate travel for passengers who require flights with more than one airline to reach their final destination, this type of arrangement does not permit the airlines to share competitively sensitive information, coordinate flight offerings, coordinate on pricing, inventory and yield management, coordinate on route planning, sales, marketing or scheduling across networks or to share net revenues and/or costs on the particular routes that are the subject of these arrangements.

10. In order to more effectively enter into and expand its transborder air passenger services WestJet has recently negotiated a phased codeshare agreement with a U.S. carrier (American Airlines) and is in negotiations for a similar agreement with another U.S. carrier (Delta Airlines).

11. Codeshare agreements allow two or more airlines to sell space on the same flight as if it were their flight. The airline selling seats is referred to as the marketing carrier and the airline providing the aircraft, crew and ground-handling support is referred to as the operating carrier. The result is a single operating flight bearing the two-character airline codes of each airline that is a party to the codeshare arrangement.

12. While codesharing allows airlines to offer their guests a range of travel options that extend beyond their own network, this type of arrangement does not permit the airlines to share competitively sensitive information, coordinate flight offerings, coordinate on pricing, inventory and yield management, coordinate on route planning, sales, marketing or scheduling across networks or to share net revenues and/or costs on the particular routes that are the subject of these arrangements.

13. WestJet does not have any form of anti-trust immunized agreement with any other airline for its transborder operations.

D. WestJet Served Transborder Overlap Routes

14. Of the 19 Transborder Overlap Routes identified by the Commissioner in Table 1 of the Commissioner's Application, WestJet provides non-stop, direct transborder air passenger services on 3 of these routes (the **WestJet Served Transborder Overlap Routes**):

- (a) Calgary - San Francisco;
- (b) Vancouver - Los Angeles; and
- (c) Vancouver - San Francisco.

E. WestJet Considered Transborder Overlap Routes

15. Of the 19 Transborder Overlap Routes identified by the Commissioner in Table 1 of the Commissioner's Application, WestJet has considered but, for reasons related to significant barriers to entry and expansion of both a structural and contractual nature as more fully described in the Dunleavy Affidavit, decided against entry on 13 of these routes (the **WestJet Considered Transborder Overlap Routes**):

- (a) Vancouver - New York;

- (b) Calgary – Chicago;
- (c) Calgary- Houston;
- (d) Toronto - Chicago;
- (e) Toronto - Cleveland;
- (f) Toronto - Denver;
- (g) Toronto - Houston;
- (h) Toronto - New York;
- (i) Toronto - San Francisco;
- (j) Toronto - Washington, D.C.;
- (k) Ottawa - Washington, D.C.;
- (l) Montreal - Chicago; and
- (m) Montreal - Washington, D.C.

II. TEST FOR INTERVENTION

16. WestJet satisfies all of the criteria for the granting of intervenor status in this proceeding. In particular:

- (a) WestJet is directly affected and will suffer competitive consequences if the relief sought is not granted;
- (b) the matter alleged to affect WestJet are within the scope of the Tribunal's consideration or are matters sufficiently relevant to the Tribunal's mandate;
- (c) the representations to be made by WestJet are relevant to an issue specifically raised by the Commissioner; and
- (d) WestJet will bring to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the issues before it.

17. Each element of the test for intervention is outlined more specifically in the Dunleavy Affidavit and, as such, form a part of this Request for Leave to Intervene in the proceeding.

III. MATTERS TO BE ADDRESSED IN MOTION FOR LEAVE TO INTERVENE

18. Section 43(2) of the *Competition Tribunal Rules* requires a person making a motion for leave to intervene to set out:

- (a) the title of the proceedings in which the person making the motion wishes to intervene;
- (b) the name and address of that person;
- (c) a concise statement of the matters in issue that affect that person and the unique or distinct perspective that the person will bring to the proceeding;
- (d) a concise statement of the competitive consequences arising from the matters in paragraph (c) with respect to which the person wishes to make representations;
- (e) the name of the party, if any, whose position that person intends to support;
- (f) the official language to be used by that person at the heading of the motion and, if leave is granted, in the proceedings; and
- (g) a description of how that person proposes to participate in the proceedings.

19. The title of the proceedings and the name and address of WestJet are set out above, the concise statements referred to in Sections 43(2)(c) and (d) of the *Competition Tribunal Rules* are set out in Part IV below, and the matters identified in Sections 43(2)(e)-(g) of the *Competition Tribunal Rules* are set out in Part V below.

IV. MATTERS IN ISSUE THAT AFFECT WESTJET; WESTJET'S UNIQUE OR DISTINCT PERSPECTIVE; COMPETITIVE CONSEQUENCES ON WHICH WESTJET WISHES TO MAKE REPRESENTATIONS

A. Statement of Matters in Issue that Affect WestJet

20. WestJet is directly affected by the matters identified in the Commissioner's Application.

21. WestJet is a rival competitor on the WestJet Served Transborder Overlap Routes and a potential competitor on the WestJet Considered Transborder Overlap Routes. As such, WestJet is directly affected by the outcome of this proceeding.

22. Effective and competitive entry and expansion by WestJet on a particular route is a function of WestJet's ability to operate that route on a viable scale. For entry and/or expansion into a new or existing market to be viable for WestJet, WestJet must be able to operate on a sufficient scale to ensure the route is profitable. When considering entry or expansion into a market, WestJet considers a number of factors, including:

- (a) the ability to attract a sufficient number of behind market passengers (that is, those flying into a hub airport) and beyond market passengers (that is, those flying out of a hub airport);
- (b) the ability to attract a mix of different types of revenue generating passengers (leisure vs. business), which is a function of the nature of consumer demand for each market. By way of example:
 - (i) sun destination markets appeal to leisure travelers who, in WestJet's experience, tend to be more price sensitive and are willing to accept some schedule and routing inconvenience (time of day, 1-stop versus non-stop) provided it is offset by a meaningful price discount;
 - (ii) in predominantly business markets, it is WestJet's experience that consumers tend to be more time sensitive rather than price sensitive and the quality of the service offering (time of day travel options, direct non-stop service, ability to travel out and return on the same day) become increasingly important characteristics that differentiate between competing airlines;
- (c) the frequency of flights required to satisfy the requirements of passengers, with leisure passengers requiring less frequency and business passengers requiring greater frequency; and
- (d) the scheduling of flights to provide passengers with suitable and appropriate routings and flight times to meet their leisure or business travel needs.

23. If viable service is likely to be impeded by barriers to entry and expansion, WestJet may decide not to enter that market, WestJet may decide to enter that market on a seasonal basis only, or WestJet may choose not to expand its existing service in that market.

24. The barriers to entry and expansion that exist in the Transborder Overlap Routes are significant and include barriers resulting from the interaction of two principal sources, namely:

- (a) structural barriers to entry and expansion (the **Structural Barriers**), specifically:
 - (i) the network hub system referred to in the Commissioner's Application; and
 - (ii) the fact that certain airports on the Transborder Overlap Routes have insufficient capacity to allow for sufficient access to take-off and landing slots, and/or may have other constraints based on the capacity of their existing facilities that increase barriers to effective entry or expansion; and
 - (iii) the fact that pre-clearance facilities in Canada and post-clearance facilities in the United States are significant and real constraints that increase barriers to effective entry or expansion of services; and
- (b) contractual and behavioural barriers to entry and expansion (the **Contractual Barriers**):
 - (i) resulting from the ability of the Respondents to coordinate on key aspects of competition under the Alliance Agreements, including the ability to:
 - a. share competitively sensitive information;
 - b. coordinate flight offerings, coordinate on price, inventory and yield management, route planning, sales, marketing and scheduling across networks;

- c. provide reciprocal access to each of their respective frequent flyer programs; and
 - d. enter into joint marketing arrangements, particularly in support of corporate and business travel; and
- (ii) that are likely to result from the ability of the Respondents to operate virtually as a single entity following implementation of the Proposed Merger, including by sharing net revenues and/or costs on Transborder Overlap Routes, free from any incentive to compete with one another.

25. When airlines are free to combine their individual data on traffic flows, combine their traffic pattern data on corporate accounts, compare traffic volume data on operated flights, compare yield data on operated flights, and compare corporate market share requirements, discount levels with their individual corporate customers, assess the strength of each of their respective frequent flyer, loyalty and incentive programs, they are able to leverage that knowledge to create Contractual Barriers and enhance Structural Barriers, including by:

- (a) implementing marketing and sales strategies to promote increased loyalty from frequent traveller guests (particularly business travellers), resulting in ever higher switching costs for participating passengers;
- (b) determining which flights to consolidate to reduce over-all capacity and redeploy aircraft to other markets (both domestic, transborder and international);
- (c) maximizing (rather than optimizing) the utilization of airport and air traffic facilities by selecting the aircraft size that maximizes revenue from the route and minimizes the ability of competing carriers, such as WestJet, from accessing those facilities;
- (d) setting prices in response to a new entry;
- (e) increasing schedule coverage throughout the day; and
- (f) applying shared corporate travel, discount parameters to establish new corporate contracts and utilizing pricing and market power in those markets where they are dominant.

26. The types of arrangements contemplated by the Alliance Agreements, significantly reduce, but do not entirely eliminate, competition between the parties to those arrangements. That is, each airline continues to have an economic motive to compete on some level on one or more aspects of competition. For example, they may want to retain their relationship with their best frequent flyers or their best corporate customers. There is still an economic incentive for each airline to maintain an individual operating presence on markets that are considered key.

27. When parties to a proposed arrangement are able to engage in the types of activities described in paragraph 25 free from any incentive to behave for their own economic or other competitive benefit, as is contemplated by the Proposed Merger, the extent to which the parties will engage in the types of activities described in paragraph 25 is complete. Their ability to significantly enhance and entrench their market dominance is increased by virtue of the fact that they are economically and operationally aligned to act as a single, dominant competitor.

28. Specifically, the ability of Air Canada, United and Continental to leverage shared information and to coordinate on pricing and other activities to a significant extent under the Alliance Agreements, and completely and wholly following implementation of the Proposed Merger, has served, will continue to serve, and will further serve to strengthen the Structural Barriers that enhance and entrench the market dominance of Air Canada, United and Continental, with the effect that competitors and potential competitors, such as WestJet will be unable to gain access to sufficient volumes of passenger traffic or to obtain sufficient and timely access to the necessary airport infrastructure and services, in order to provide effective competition.

B. WestJet's Unique or Distinct Perspective

29. WestJet will bring a unique or distinct perspective to the proceeding for the following reasons:

- (a) WestJet is Air Canada's principal Canadian competitor for domestic and transborder air passenger services
- (b) there is no other Canadian airline that competes against Air Canada, United and Continental for the provision of transborder air passenger services on the same scope and scale as WestJet;

- (c) there is no other Canadian airline that competes against Air Canada on the same scope and scale as WestJet, whether domestically, nationally or internationally;
- (d) there is no other Canadian airline carrier that has the financial strength, business plan and desire to compete against Air Canada for the provision of transborder air passenger services involving all regions of the United States;
- (e) there is no other Canadian airline that has the level of experience that WestJet has involving considerations relevant to the entry and/or expansion of transborder air passenger services;
- (f) there is no other Canadian airline that has entered into wide-ranging interline and codeshare relationships with major U.S. airlines for transborder operations;
- (g) WestJet does not have any form of anti-trust immunized agreement with any other airline for its transborder operations; and
- (h) WestJet is the subject of a number of specific references in the Response of Air Canada filed August 15, 2011 (the **AC Response**) and adopted by United and Continental in the Response of United Continental Holdings, Inc., United Airlines, Inc. and Continental Airlines, Inc. (the **United/Continental Response**).¹

C. The Competitive Consequences with respect to which WestJet Wishes to Make Representations

30. WestJet is of the view that if the relief sought by the Commissioner is not granted, WestJet's ability to enter and/or expand its transborder air passenger services on the Transborder Overlap Routes will continue to be significantly prevented or lessened for the following reasons:

- (a) WestJet will be unable to gain access to sufficient volumes of passenger traffic (including behind market passengers and beyond market passengers) because:

¹ See paragraph 18 of the AC Response (adopted at paragraph 8 in the United/Continental Response); paragraphs 29 and 31 of the AC Response (adopted at paragraph 15 of the United/Continental Response); paragraphs 67, 68, 69, 70, 71 and 72 (adopted at paragraph 20 of the United/Continental Response); and paragraphs 101, 110 and 112 (adopted at paragraph 38 of the United/Continental Response).

- (i) one or both ends of these Transborder Overlap Routes involve a hub airport operated by Air Canada (in Canada) and United or Continental (in the United States);
 - (ii) with respect to business customers, many of these customers are employed by corporations that have made corporate travel arrangements with the Respondents, either individually or jointly, and the corporations will lose significant benefits (including benefits relating to their domestic travel requirements) resulting from these arrangements if they redirect a meaningful portion of their business to a competing carrier; and
 - (iii) business customers will lose the very significant benefits they obtain from participating in the reciprocating frequent flyer and incentive programs operated by Air Canada, United and Continental; and
- (b) WestJet will be unable to obtain sufficient and timely access to the airport infrastructure and services necessary to provide sufficiently frequent and appropriately scheduled flying times as the requisite level of the airports at one or both ends of these Transborder Overlap Routes are not available at viable times or at all:
- (i) lack of available landing slots at hub airports (the majority of which are held by one or more of Air Canada, United and Continental);
 - (ii) lack of available terminal gates;
 - (iii) lack of check-in counter positions; and
 - (iv) inability to obtain customs and immigration clearance, including by reasons of lack of access to staff that are able to provide customs and immigration clearance.

31. WestJet is further of the view that if the relief sought by the Commissioner is not granted, particularly as it relates to the Proposed Merger and pursuant to which the Respondents will be able to act as a single entity on all relevant aspects of competition, WestJet will face additional competitive impacts on other domestic, transborder and international routes on which it competes with Air Canada (domestically) or with one or more of Air Canada, United

and Continental (on transborder and other international routes) (collectively, **Other Competing Routes**) arising as a result of:

- (a) the ability of passengers to use points they have earned for travelling with the Respondents on the Transborder Overlap Routes for travel on domestic, other transborder and international routes;
- (b) the corporate marketing and travel arrangements that provide large corporations with incentives and pricing discounts for travel with the Respondents on their domestic and other international routes if they direct a significant portion of their transborder air travel to the Respondents; and
- (c) the ability of the Respondents to redeploy aircraft onto other domestic, transborder or international routes that are no longer required to provide transborder services on any of the Transborder Overlap Routes as a result of the consolidation of flights on these routes by Air Canada, United and Continental,

(collectively, the **Competitive Impacts on Other Competing Routes**).

32. With respect to the competitive consequences arising from the matters that directly affect WestJet and for which WestJet has a unique or distinct perspective, WestJet wishes to make representations on the following matters (the **WestJet Proposed Topics**):

- (a) the Structural Barriers and their impact on WestJet's ability to provide viable transborder air passenger services on the Transborder Overlap Routes;
- (b) the Contractual Barriers and their impact on WestJet's ability to provide viable transborder air passenger services on the Transborder Overlap Routes;
- (c) the relationship between the Structural Barriers and the Contractual Barriers and how these impact competition in the airline industry generally and WestJet in particular;
- (d) the competitive impacts of the Alliance Agreements and the likely competitive impacts of the Proposed Merger on WestJet's expansion plans involving the WestJet Served Transborder Overlap Routes;

- (e) the competitive impacts on WestJet's ability to offer viable non-stop transborder air passenger services on the Transborder Routes;
- (f) the competitive impacts of the Alliance Agreements and the likely competitive impacts of the Proposed Merger on WestJet's entry and expansion plans involving the WestJet Considered Transborder Overlap Routes;
- (g) the Competitive Impacts on Other Competing Routes that affect or are likely to affect WestJet;
- (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; and
- (k) the statements made and conclusions drawn by Air Canada concerning WestJet specifically and non-legacy carriers (to the extent they apply to WestJet) generally in the AC Response and adopted by United and Continental in the United/Continental Response.²

V. SCOPE OF PARTICIPATION

A. The Party whose Position WestJet Intends to Support

33. WestJet intends to support the Commissioner's Application.

B. A Description of how WestJet Proposes to Participate in the Proceeding

34. WestJet proposes to participate in the proceeding to the extent they pertain to the WestJet Proposed Topics as follows:

² See footnote 1, see also the following Paragraphs of the AC Response: 3(d), 17 (adopted at Paragraph 8 of the United/Continental Response), 45 (adopted at Paragraph 16 of the United/Continental Response), 64 (adopted at Paragraph 20 of the United/Continental Response), 92 (adopted at Paragraph 37 of the United/Continental Response), 105, 106, 109, 111 and 115 (each adopted at Paragraph 38 of the United/Continental Response).

- (a) the review of discovery transcripts and access to discovery documents of the parties to the Commissioner's Application, subject to the appropriate confidentiality protection, but not direct participation in the discovery process;
- (b) the calling of non-repetitive *viva voce* evidence relating to any issues that affect WestJet or the remedies sought that affect WestJet;
- (c) the non-repetitive examination and cross-examination of witnesses;
- (d) the filing of expert evidence in accordance with the Rules of the Competition Tribunal, if required;
- (e) the submission of written and oral legal argument relating to any of the issues in the Commissioner's Application and at any pre-hearing motion or pre-hearing conferences; and
- (f) such further and other manner as WestJet may request and the Tribunal may grant.

35. WestJet's participation in this proceeding in the manner requested will assist the Tribunal in deciding the issues before it. In particular, by addressing the WestJet Proposed Topics, WestJet will assist the Tribunal to determine whether and/or the extent to which:

- (a) the Alliance Agreements have and are likely to continue to, prevent or lessen competition substantially on the Transborder Overlap Routes, the Other Competing Routes and potentially on other routes, for the purposes of the order requested by the Commissioner under section 90.1 of the Act; and
- (b) the Proposed Merger is likely to prevent or lessen competition substantially on the Transborder Overlap Routes, the Other Competing Routes and potentially on other routes, for the purposes of the order requested by the Commissioner under section 92 of the Act.

C. Hearing Request

36. If any of the parties oppose WestJet's Request for Leave to Intervene, WestJet respectfully requests an oral hearing of the motion.

D. The Official Language to be used by WestJet at the Hearing of the Motion and, if Leave is Granted, in the Proceeding

37. English is the official language WestJet intends to use at the hearing of the Request for Leave to Intervene and, if leave is granted, in the proceeding.

DATED at Calgary, Alberta, this 23rd day of August, 2011.



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