



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Order 2014-5-7

**Action on IATA Agreement
Issued by the Department of Transportation
on the 21st day of May 2014**

Served: May 21, 2014

Agreement among Member Carriers
of the International Air Transport
Association concerning an agreement
(Resolution 787) of the Passenger
Services Conference

Docket OST-2013-0048

ORDER TO SHOW CAUSE

Summary

On March 11, 2013, the International Air Transport Association (IATA) filed with the Department under section 41309 of Title 49 of the United States Code (the Code), and Part 303 of the Department's regulations, an agreement that adopts new Resolution 787 (Enhanced Airline Distribution).¹ The agreement was adopted at the 34th meeting of the Passenger Services Conference (PSC) in Abu Dhabi, October 18-19, 2012.² Resolution 787 establishes a process for developing a technical standard for data exchange in the air transportation marketplace using Extensible Markup Language (XML). Resolution 787 additionally establishes certain goals associated with using the new technical standard, including capability to provide personalized pricing offers to consumers who shop for air transportation. These goals are called the "New Distribution Capability" (NDC). IATA seeks Department approval of IATA Resolution 787.

By this order, we tentatively find that, subject to certain conditions enumerated herein (and set forth in the attached Appendix), approval of IATA Resolution 787 would be in the public interest, and direct interested parties to show cause why the Department should not approve the resolution. Objections to this order are to be filed no later than 21 days from the issuance date of this order.

Filing Procedures for IATA Agreements

By Order 2012-4-18, served April 13, 2012, the Department granted an expanded exemption from condition #2, one of the conditions on the IATA by-laws which requires IATA to file all agreements, resolutions and recommended practices for appropriate action by the Department before they may be implemented by IATA members. The exemption was designed to facilitate

¹ DOT-OST-2013-0048-0001.

² IATA memorandum PSC RESO/156.

prompt implementation of routine but essential standard-setting and interline coordination agreements without antitrust immunity, while preserving public notice and regulatory options. Order 2012-4-18 established a three-tiered system for the filing and implementation of IATA agreements. The first tier includes all traffic conference agreements, except those included in tiers two and three. IATA may declare Tier 1 agreements effective 30 days after filing unless the Department extends the review period for another 60 days. The second tier consists of agreements in specific subject areas, listed in Order 2012-4-18, that the Department wishes to review on a case-by-case basis before implementation. After review the Department may approve, disapprove, or exempt each Tier 2 agreement. The third tier consists of recommended practices, agreements, or resolutions that IATA still wishes to file with the Department for approval and, optionally, antitrust immunity under sections 41308 and 41309 of 49 U.S.C. All such third tier filings must await the Department's review and appropriate action before implementation.

IATA's Application

IATA submitted Resolution 787 for approval, without antitrust immunity, under the third tier of the review system. Resolution 787 establishes a process for developing a technical standard for data exchange in the air transportation marketplace using XML, the modern language of the internet. The NDC goals contained in the resolution are associated with using the new technical standard, and include the capability to provide personalized pricing offers to consumers who shop for air transportation. In its application, IATA states that the resolution meets the public interest test for approval under 49 U.S.C. § 41309(b) because updating the current "EDIFACT" technical standard for data exchange to an XML standard will help modernize air travel shopping in the future. IATA states that it is not seeking an endorsement of the business requirements or marketplace aspirations of NDC, and recognizes that any additional IATA agreements on standardization of distribution practices would need to be filed with the Department before becoming effective.

IATA argues that if the XML standard is developed and its use allows carriers to adopt the NDC approach, many consequential benefits will flow to both consumers and other participants in the air travel distribution marketplace. IATA contends that, if successful, NDC, based on the new XML standard, would have the pro-consumer effects of allowing a consumer to shop, select and purchase ancillary services or fares packaged with ancillary services. IATA claims that this method of shopping for fares and ancillary services would allow a consumer to compare competing airline product offerings, such as leg room, premium seats, in-flight entertainment, lounge access or Wi-Fi access along with price, leading to greater carrier competition on services and price. IATA claims that carriers will be able to customize service and amenity packages and prices based on consumer attributes, such as loyalty program status, which the current distribution methods cannot support. Additionally, IATA argues that adoption of this standard will allow for greater competition in the larger air transportation distribution marketplace because it will allow third-party technology providers to develop methods outside of the current distribution system. Along with the possibility of new market entrants, IATA notes that Resolution 787 assumes the co-existence of current business processes and the EDIFACT system alongside XML, and the continuation of anonymous shopping. IATA asserts that the evolution

of the distribution system will be determined by the market, which allows for a competitive air transportation marketplace.

Responsive Pleadings

Airlines and related associations

Thirty-four³ air carriers and five airline associations⁴ filed pleadings in support of IATA's application for approval of Resolution 787, based on consumer benefits and efficiency improvements. Their main arguments cite the benefits of XML standards that will increase the ability for airlines to provide customers with greater information about fare alternatives, ancillary services, and on-board amenities. Airlines argue that the XML standard will be able to support a new system that would provide customers and intermediaries with access to the kind of dynamic or customized content on ancillary services that is currently available only through individual airline websites that employ newer internet technologies. Airlines contend that the new standard would increase competition in the distribution of airline tickets by allowing airlines to directly present offers to the consumer, providing a wider and more cost effective product range for travel agents, and allowing global distribution systems (GDSs) to offer expanded content from the airlines. Airlines claim that the new standard has the potential to improve comparison shopping, by supporting a distribution system that aggregates content from multiple sources, including third party channels. This would support cross-airline comparisons of like products in a single side-by-side display, including fares and other ancillary products and services. With the adoption of NDC, airlines note that consumers would be able to select an airline offer through a menu of options that would allow for comparisons across multiple airlines.

Proponents also argue that consumer privacy would not be negatively impacted since the consumer would determine the level of information to provide. Proponents also cite additional benefits in the data transmission and exchange by adopting the new standard, including the ability for airlines to implement, at their own option, communication formats which allow for more expansive and consumer-friendly products and services. They also state that Resolution 787 is voluntary. It would not force airlines to adopt the new data transmission standard, and airlines would retain the option to use a standard of their choice and distribute through the GDS network. According to proponents, an additional benefit of the proposed standard is that it would potentially save on GDS costs and increase efficiency by allowing for the use of a single computer program instead of overlapping software.

³ Air carriers that filed pleadings include: Delta Airlines, Cathay Pacific, Qatar Airways, Air France, Aerovias de Mexico, Korean Airlines, Swiss International Air, Etihad Airways, Aeroflot-Russian Airlines, Lufthansa, Egyptair, China Airlines, Japan Airlines, Finnair, SATA Air Acores, Copa Airlines, Jet Airways (India), TACA, Avianca, Transamerican Airlines, Saudi Arabian Airlines, Ari Air, China Eastern Airlines, Euro Atlantic Airways, Air New Zealand, Air Canada, Turkish Airways, Bangkok Airways, Emirates Airlines, Alitalia, LATAM, United Airlines, and U.S. Airways.

⁴ Airlines associations that filed pleadings include: African Airlines Association, Scandinavian Airlines System, Latin American & Caribbean Air Transport Association, Association of European Airlines, and the Arab Air Carriers Organization. Mr. Monte Brewer, a former CEO of Air Canada, also submitted comments supporting approval.

The Airline Tariff Publishing Company also supports IATA's application and views Resolution 787 as providing the ability for content distribution through either existing or new distribution models.

Third party technology providers

Third party technology providers, including Farelogix, Hexaware Technologies, Skeye Aviation Systems, T2Impact LLC, and JR Technologies, also filed in support of the Department's approval of Resolution 787, noting that the Resolution focuses only on the data transmission standard. These proponents note that use of the standard is not mandatory and would allow the market to determine the success of any potential new business model, including NDC. Proponents also identify benefits that would likely result from implementation of the new standard. Specifically, a distribution system based on the new standard would allow airlines to compete on a spectrum of products and services, in addition to the base fare. Such competition between airlines would lead to increased transparency in the display of fees for ancillary products. Proponents also point out that the new standard would create potential for increased competition in the technology sector, which is currently dominated by three GDSs, because new technology would need to be developed to implement a distribution system that allows consumers to shop for the full range of products and services in addition to the base fare, as well as a continued capability for anonymous shopping.

Railroads

VIA Rail Canada supports approval of Resolution 787 on the grounds that it will provide consumer benefits. NS Dutch National Railways supports approval, and states that an XML-based standard and the NDC could benefit other transportation providers, such as railways, by promoting multi-modal journeys which would enable railways to compete on customer service as well as price.

GDS and travel trade associations

In their initial comments, several GDSs,⁵ along with three travel trade associations,⁶ opposed IATA's application for approval of its Resolution 787. They argued that Resolution 787 would lead to anti-competitive practices and raised privacy concerns. These entities argue, in their initial filings, that IATA's proposal would support a distribution system that allows airlines to engage in anti-competitive price discrimination by offering a fare based on the consumer's personal information and shared preferences. Existing distributors stated a concern that airlines would no longer have to file publicly available fares as they do under the current system, thereby decreasing the transparency of airfares and inhibiting the consumer from effectively comparison-shopping. These entities point out that the Passenger Distribution Group (PDG), composed of eleven of the largest airlines, helped develop Resolution 787 and included mandatory language inherently contradictory to a market-dictated business model. These entities state a belief that the

⁵ The GDS that filed a specific opposition to the Department's approval of IATA's application was Sabre, Inc. The Travel Technology Association (Travel Tech) filed in opposition as well. Travel Tech's members are Amadeus, Expedia, Orbitz Worldwide, Priceline.com, Sabre Holdings, Travelocity, Travelport, and Vegas.com.

⁶ Travel trade associations include Open Allies for Airfare Transparency, Business Travel Coalition, and Consumer Travel Alliance.

Resolution is not limited to a technical data exchange, and that IATA seeks DOT approval for the NDC.

Another objection presented by these entities was that the Resolution's provisions raise significant privacy concerns. The Resolution includes language stating that consumers must disclose personal information, listed under paragraph 3.1.1.1, to receive a fare offer. These entities argue that, under the wording of that section of the Resolution, consumers are coerced to submit personal information by the airline's requirement for disclosure. They further argue that, by requiring personal information, a potential system supported by the new standard would identify consumers based on the information they choose to disclose.

Amadeus, a GDS, recommended that the Department approve the Resolution with conditions. These conditions include the removal of mandatory language in Resolution 787, clarifying that it is a recommended practice; removal of language that discourages or prohibits backwards compatibility; removal of language regarding content ownership; and a requirement that IATA adequately address the privacy concerns.

Travel agents and companies

Twenty-eight travel agencies and related tour and travel associations⁷ filed responses with twenty-six⁸ opposing Resolution 787. They argue that the Resolution would eliminate the role of travel agents, which would reduce competition between air carriers and have a negative impact on the consumer. They further argue that the Resolution discriminates against independent sales and distribution channels. ASATUR Paraguay argues that, by taking out the independent players, Resolution 787 allows for invested parties (airlines) to potentially discriminate through the distribution channels. The Bolivian Agents Tour and Travel Association points out the anti-competitive risk of airlines collaborating in the distribution of offers and fares. The Asociacion Ecuatoriana de Agencias de Viajes (ASECUT) also notes that the elimination of the independent sales channel would reduce contestability in the air transport market, thereby creating barriers for new actors. BCD Travel argues that IATA's proposal would create a new business model.

Opponents note the privacy concerns raised under Resolution 787 through the use of personal identifiable information with its potential impact on consumer fare transparency. ARCTEC Alaska also refers to the potential risk of identity theft associated with storing personal information online.

⁷ This includes ABVYT-La Paz; Acendas; Agent Tour and Travel Association (ABVYT); Alaska Travel Source; ARCTEC Alaska; ASATUR Paraguay; American Society of Travel Agents; ASECUT; Asociacion Argentina de Agencias de Viajes y Turismo; Asociacion Colombiana de Agencias de Viajes y Turismo; BCD Travel; Berkeley's Northside Travel; Bolivian Agents Tour and Travel Associations; Distinctive Cruises & Tours; European Travel Agents' and Tour Operators' Associations (ECTAA) and Guild of European Business Travel Agents (GEBTA); Expedia, Inc.; Hariworld Travel Group; Carlson Wagonlit Travel; Chamberlin's Travel; Chilean Travel Association; Corniche Travel; Orbitz Worldwide, LLC; Peruvian Agents Tour & Travel Association; Short's Travel Management; Top Tours; Travel-On, Ltd.; Travelplan Partners Ltd./FCm Ireland; and United States Tour Operators Association.

⁸ All opposed Resolution 787 except for United States Tour Operators Association and Short's Travel Management.

Opponents also point out the Resolution's incompatibility with the current distribution model, which would create problems in distributing interline tickets or code-share tickets with a mix of airlines participating in a new system based on the proposed standard and non-participatory airlines. European Travel Agents' and Tour Operators' Associations (ECTAA) and Guild of European Business Travel Agents (GEBTA) also assert incompatibility with provisions of EU Law.

The American Antitrust Institute (AAI) filed an answer opposing the Resolution.⁹ AAI sees NDC as an agreement of the 11 large airlines in the PDG of IATA to impose new distribution standards on the entire airline industry. AAI argues that if IATA was only attempting to develop a new technical standard for sharing information, then it would not need DOT approval, and that the way IATA crafted the application indicates that it is seeking DOT approval for a new business standard. AAI alleges that the NDC could lessen competition head-to-head between airlines and other market participants in airfare distribution. AAI does not believe that Resolution 787 was adopted in an open process, noting that the PDG developed NDC and the resolution for nearly a year before allowing other stakeholder participation. AAI argues that this standardization of a distribution agreement between rivals is an "agreement on the rules of competition," which will create an environment for higher prices, restriction of choice, and less transparency.

Individuals

Among the individuals who commented on IATA's application, several provided detailed comments. Cornish Hitchcock, an attorney who formerly directed the Aviation Consumer Action Project and chaired Orbitz's consumer advisory board, urges approval, arguing that an XML standard will allow for the improvement and modernization of airfare and service option displays for consumers.¹⁰ Mr. Hitchcock states that NDC will be more consumer-friendly than the current system and will improve comparison shopping. He argues that opponents have never satisfactorily explained how NDC would lead to collusion or "jack up" prices. He also responds to allegations that the standard will result in price discrimination by noting that prices already vary among passengers based on differences such as legroom, meals, and Wi-Fi access, and there is no reason to artificially restrict consumer access to customized service options in order to protect intermediaries. Concerning privacy, Mr. Hitchcock notes that NDC will not require passengers to provide more information than they do today, and if they are willing to provide more information in order to obtain more choices, they should be free to do so.

Aviation professor Narwal Taneja submitted a comment in favor of approval.¹¹ Professor Taneja notes that adoption of a new standard will allow airlines to respond to modern consumers by balancing simplification of the airfare shopping process with more choice for the consumer. Professor Taneja believes that the development of an XML standard would benefit travel agents by mitigating an existing technological barrier in order to provide access to better price, product, and service choices. Professor Taneja argues that, once agents have better access to price, product, and service choices, their customers will be able to more easily compare offers from

⁹ DOT-OST-2013-0048-0388.

¹⁰ DOT-OST-2013-0048-0367.

¹¹ DOT-OST-2013-0048-0175

various airlines, increasing their sales. Professor Taneja also comments that the marketplace will determine the pace of adoption of the XML standards and development of the functional capabilities the Resolution anticipates.

Edward Hasbrouck, a consumer advocate, opposes approval of Resolution 787, and argues that it would result in a reduction in competition and fewer choices for consumers. Mr. Hasbrouck alleges that if airlines move away from published tariffs, consumers would not have access to all of a carrier's fares, but only the ones that the carrier chooses to show them based on provision of personal information. He notes that airlines are still required by law, in 49 U.S.C. § 41510, to offer only fares that are specified in tariffs filed with the Department and to make their tariffs available to the public.

Over 250 other individuals submitted comments in favor or in opposition to approval of the resolution.

IATA's Reply

On June 21, 2013, IATA filed a reply to the arguments presented by parties that had filed in opposition to Resolution 787.¹² In this reply, IATA addresses those parties' arguments, and also offers possible limiting conditions that the Department might include in any order approving Resolution 787, as a way to address the concerns raised.

IATA reasserts that Resolution 787 is about the adoption of an XML standard. IATA argues that it is not seeking adoption of a new business model. Therefore, IATA proffers a limiting condition that "approval of Resolution 787 does not constitute approval of any agreement among airlines regarding any method of distributing air transportation." Similarly, IATA notes that the adoption of the XML standard is a voluntary choice made by airlines. It proposes a limiting condition reiterating the voluntary nature of the standard and the fact that adoption of the standard does not restrict an airline's choice to use any other data transmission standard or standards.

Regarding passenger privacy, IATA notes that the Resolution establishes a standard that will allow airlines the capability to "authenticate" a passenger seeking a specific offer. IATA notes that this capability is a voluntary one, arguing that participants in the XML development process believe that many consumers will want to see personalized options, but some may want to shop anonymously. IATA's suggested condition to address concerns related to anonymous shopping and privacy would state that approval of IATA Resolution 787 "does not constitute approval of any agreement among airlines to require, as a condition of receiving an offer for air transportation, the disclosure by any passenger of personal information of any kind."

IATA agrees that Resolution 787 is not the proper venue to address ownership of data, and proposes a limiting condition to make clear that Resolution 787 does not constitute an agreement

¹² DOT-OST-2013-0048-0403.

among airlines regarding the ownership of the data that would be transmitted using the new XML-based data transmission standard.

IATA addresses the issue of backwards compatibility by noting that the PSC included the freedom from a backward compatibility constraint because it sought to expedite the development of the XML standard. IATA notes that it is willing to accept a condition to assert that individual carriers are still free to continue to use the EDIFACT system if the carrier wishes.

IATA addresses other arguments by noting that the XML-based standard will allow for more transparency in pricing because consumers could potentially get an “all-in” price that meets their needs. IATA notes that the XML-based standard is being developed through a collaborative process in its Distribution Data Exchange Working Group which has representation from airlines, GDSs, travel agents and their associations, and new technology providers.

Finally, IATA claims that the opponents of Resolution 787 have not met their burden to show that adoption of the agreement is against the public interest. Section 41309(b)(2) requires opponents of an agreement to prove that the agreement is adverse to the public interest or substantially reduces or eliminates competition. IATA reasserts that the Resolution is not adverse to the public interest and must be approved by the Department.

Joint Motion

On January 22, 2014, IATA, along with Open Allies for Airfare Transparency representing various sellers of air transportation and distributors of air transportation, including GDSs and agents, who had previously opposed Resolution 787, filed a joint motion urging the Department to approve the resolution subject to several agreed conditions.¹³ As discussed below, this joint statement proposes limiting conditions, agreed to by the parties, addressing the main areas of concern raised by opponents, including the scope of the resolution, the use of personal information, the use of other data transmission standards, data ownership, and backwards compatibility. IATA and Open Allies have also agreed to work together and with other stakeholders to establish an industry forum to support a collaborative approach to distribution standards.

Answers

Edward Hasbrouck, in a response to the Joint Motion, asserts that DOT should reject IATA's proposal for approval of Resolution 787 because it is inconsistent with continuing tariff requirements. Mr. Hasbrouck states that IATA, in its response to his initial comments, erred in claiming that, due to the conclusion of liberal air services agreements and DOT exemptions from tariff-filing requirements, airlines are no longer required to sell transportation to all would-be customers on the basis of an impersonal, publicly disclosed tariff. Mr. Hasbrouck states that exemptions from tariff filing requirements do not relieve carriers from other statutory and regulatory duties to have tariffs, to make them public, and to sell tickets only in accordance with those publicly disclosed tariffs. Mr. Hasbrouck further articulates that if the Department

¹³ DOT-OST-2013-0048-0412.

nevertheless approves Resolution 787, it should strengthen the condition on privacy to effectively prohibit personalized pricing by barring any airline from requiring disclosure of any personal information or linking any fare quote to submission of personal information.

Tentative Decision

Summary

After careful review of IATA's application and other pleadings on the record, the Department has tentatively decided to approve Resolution 787, subject to certain conditions. Under 49 U.S.C. § 41309(b), the Department shall approve intercarrier agreements that it finds are not adverse to the public interest or in violation of the statute. The Department shall disapprove any agreement that it finds substantially reduces or eliminates competition, unless it finds that the agreement is necessary to meet a serious transportation need or to achieve important public benefits that cannot be met or achieved by reasonably available alternatives that are materially less anticompetitive. Tentative approval of IATA's application appears warranted because of our tentative conclusion that the modernized communication standards and protocols and the marketing innovation they could facilitate would be procompetitive and in the public interest, provided that certain safeguards are imposed. We have carefully considered the suggested conditions put forward by IATA and Open Allies in their joint motion, and tentatively believe that, with certain modifications and clarifications, they will adequately address the public interest issues raised in this proceeding. In addition to those conditions, carriers and ticket agents must also continue to comply with 49 U.S.C. § 41712, which prohibits unfair and deceptive practices, and all of the Department's relevant consumer protection regulations regarding fare and fee displays.

Public benefits

Resolution 787, if implemented as conditioned, would offer two broad categories of public benefits. First, it would create modern, industry-wide technical standards and protocols for data transmission throughout the distribution chain, promoting efficiency, cost savings, and innovation through a real-time exchange of price and service information among carriers, travel agents, customers, and other parties, such as web-based aggregators. Second, the use of common technical standards could facilitate the marketplace development of distribution practices and channels that would make it easier for consumers to compare competing carriers' fares and ancillary products across multiple distribution channels, make purchasing more convenient, allow carriers to customize service and amenity offers, and increase transparency, efficiency, and competition.

Scope of approval

In their initial comments, Open Allies and some other parties expressed concerns that Resolution 787 went far beyond formulation of a new communications standard, sought to fundamentally change the industry's distribution system, and would establish a mandatory business process for

all airlines that wish to distribute enhanced content. In the Joint Motion, IATA and Open Allies¹⁴ would address this issue with the following conditions:

“Approval of Resolution 787 does not constitute approval of any agreement among IATA member airlines regarding any method or business model of distributing air transportation, nor restrict the use of any channels available for the distribution of air transportation, including indirect distribution by other than airlines.

Any future agreement among IATA member airlines regarding business models for the distribution of air transportation shall not be implemented without prior compliance with any applicable government approval or notification process.”

We will tentatively adopt these draft conditions, which make it clear that any IATA agreements on standardization of distribution practices would have to be filed with the Department for appropriate action before becoming effective. The shape of distribution in the airline industry will ultimately be determined in the marketplace, and our decision in this proceeding is not an endorsement of any particular distribution model or practice, present or aspirational.

Modernized data exchange

Resolution 787 would help modernize airline product distribution by generating common industry-wide, real-time communications standards and protocols so that all of the participants in the distribution chain – airlines, travel agents, GDSs, and consumers – could speak the same electronic language in their communications with each other. None of the parties appear to dispute the desirability of establishing a more contemporary standard for transmitting data, in place of the pre-internet EDIFACT standard that is still used for exchanges among GDSs, carriers and agents. The new data exchange standards and protocols will use XML, the modern internet programming language. There is little doubt that modern, industry-wide XML data standards would promote efficiency, cost savings, and innovation. In fact, some GDSs and airlines are currently developing XML-based processes.¹⁵

Notwithstanding the broad support for a modernized method for exchanging data, some parties expressed concerns about the pace and structure of the development process, the perceived mandatory nature of a future standard, and backward compatibility with existing methods. To address these concerns, IATA and Open Allies propose the following conditions on DOT approval:

¹⁴ In view of the Joint Motion, it is our intention to dismiss as moot in the final order the Motion of Open Allies for Airfare Transparency to Require Applicant International Air Transport Association to Produce Additional Documents, dated March 18, 2013.

¹⁵ We note that IATA has already established XML standards for the electronic exchange of information in the air cargo industry. See IATA press release “IATA Launches Cargo-XML Manual and Toolkit Offering Next-Generation Air Cargo Electronic Messaging Standards,” February 26, 2014.

Use of Other Data Transmissions Standards

“Approval of IATA Resolution 787 does not constitute approval of any agreement among IATA member airlines to require the use of any particular data transmission standard(s).”

Backwards Compatibility/Other Standards

“Any communications or message standards or protocols developed under Resolution 787 shall be open standards, meaning useable by distributors of air transportation and intermediaries in the distribution of air transportation, including CRSs and other aggregators, on a non-discriminatory basis.

Approval of Resolution 787 does not constitute approval of any agreement to prohibit individual IATA member airlines or groups of such airlines from continuing to utilize any communication or message protocol, including existing standards.

Nothing in the approval of Resolution 787 shall be deemed to be an approval of either a restriction on backwards compatibility or a restriction on development of a communications or messaging standard that is not backward compatible. Further, nothing in Resolution 787 shall be construed to inhibit the ability of distributors of air transportation to use other standards, including existing standards, in combination with any standard developed under Resolution 787. Notwithstanding any language in Section 1.2.4 of Resolution 787, airlines and technology service providers are free to pursue backward compatibility of Resolution 787 communications or message standards or protocols based on their particular business needs.”

We will tentatively adopt the conditions proposed by IATA and Open Allies regarding the data transmission standards, which clearly articulate that each airline is free to choose its own data exchange methodologies. The Department has approved or exempted numerous agreements of the IATA passenger and cargo services conferences that establish common, industry-wide technical standards and more efficient procedures.¹⁶ However, DOT approval or exemption of IATA standard-setting agreements does not mandate adherence to them. IATA has no power to enforce compliance with its resolutions and recommended practices, and we have considered them to be non-binding and voluntary. In addition, we have often attached conditions to our approvals designed to reinforce carriers’ ability to take independent action, and to ensure that their implementation of IATA resolutions and recommended practices is consistent with public policy objectives.¹⁷

Comparison shopping, customized offers, and competition

Modernized technical data exchange standards and practices could improve comparison shopping by allowing travel agents and other third party distribution channel agents to aggregate content from multiple sources, enabling cross-airline comparisons of like products, including the

¹⁶ See, for example, Order 2010-5-21, May 18, 2010 (Docket OST-2009-0113) and Order 2011-3-3, March 1, 2011 (Docket OST-2009-0123).

¹⁷ See, for example, Order 85-3-79, March 28, 1985 (Docket 38623) and Order 85-11-12, November 6, 1985 (Docket 43263).

price for transportation plus desired amenities such as extra baggage, seat selection, premium seating, boarding priority, meals, in-flight entertainment, and Wi-Fi.

According to stakeholders, consumers are unable to effectively compare price and service offerings by multiple carriers. They assert that this is due, in part, to the inefficiencies of EDIFACT transmission, the inability of GDSs to handle dynamic data on airline ancillary products, existing contractual relationships among the parties in the distribution chain, and the varying complexity of the airlines' own fare and ancillary product information. We tentatively find that the new communications standards and protocols to be established under Resolution 787 would address one of the most significant of these barriers.

Comparison shopping under the current system is generally limited strictly to comparing fares, and it is difficult to make price/quality comparisons of different carriers' product offerings, in part because of limitations on what can be displayed by systems which rely on static messaging technology. A system based on newer XML-based technologies could potentially facilitate real-time, dynamic communication of varying product offers. For example, some fares include free checked baggage or superior seating, while others do not. Travelers' interests now extend well beyond fares; comparison shopping would be improved by consumer access to better and more comprehensive information on baggage allowances and fees, extra leg room, Wi-Fi, in-flight entertainment, advance seat selection, boarding privileges, and other ancillary services to go along with the basic price of travel.

The modernized distribution practices that might be facilitated by the resolution could enhance the air travel shopping experience and allow multiple airlines to respond directly to a query from a travel agent or customer with a customized offer that could include not only the fare, but also ancillary products that the passenger wishes to include, as well as attributes such as loyalty program status that the customer is willing to disclose in the shopping process. Improved comparison shopping would make it possible for travelers to make better informed decisions, enhancing competition. Airlines would be able to distribute ancillary products more broadly, enabling them to compete more intensively on service offerings as well as price. Customers would have greater access to distribution channels than currently provided through individual airline websites, and travel agents would have a wider product range.

Privacy and anonymous shopping

A number of aspects of NDC as presented in Resolution 787 created serious concerns in the related areas of privacy and anonymous shopping. First, many parties are concerned with protecting customers' privacy, and oppose creation of any obligation for passengers to disclose personal information beyond that required to complete a purchase. Second, a number of parties express concerns that NDC might undermine anonymous shopping, with deleterious effects on passengers and competition. They argue that requiring passengers to disclose information such as age, marital status, type of trip (e.g. leisure or business), frequent flyer status, or nationality as a condition for receiving a quote would enable carriers to engage in more perfect price discrimination, raise fare levels, and harm competition. The Joint Motion would address these concerns with the following condition:

“Approval of IATA Resolution 787 does not constitute approval of any agreement among IATA member airlines to require the disclosure by any passenger of personal information of any kind.”

We will tentatively adopt the condition agreed by IATA and Open Allies, but we will augment it to address protection of information that passengers do supply. The implementation of any data standard, existing or future, that asks a passenger to voluntarily supply personal information, is subject to the applicable privacy policy of the airline or ticket agent asking for such information and storing such information. Failure by an entity to follow its established privacy policy for the sharing and storing of personal information is a violation of 49 U.S.C. § 41712, the statute prohibiting unfair and deceptive practices. We will make this requirement explicit, and the condition *in toto* would read:

“Approval of IATA Resolution 787 does not constitute approval of any agreement among IATA member airlines to require the disclosure by any passenger of personal information of any kind. In addition, approval of Resolution 787 is conditioned on the airline or ticket agent that is requesting and receiving the personal information of the buyer of air transportation following its privacy policy in effect at the time the request is made for the sharing and storage of personal information.”

We want to make clear our determination that consumers’ ability to shop anonymously must not be undermined as new data standards and distribution practices are implemented, whether as a function of an industry agreement on data standards and protocols or through implementation of such standards by individual airlines and ticket agents. Our tentative approval of IATA’s agreement, as conditioned, should not be construed as approval for individual airlines to require disclosure of personal data. An airline may request data necessary to identify on whose behalf a request is being made, but providing such information cannot be mandatory in order to receive an airfare or ancillary product offer. The data exchange standards developed must continue to allow for anonymous shopping. Whether an airline may obtain personal information about a passenger if the passenger chooses to provide such information in order to receive a personalized quote depends on the nature of the information requested. The Department has not found fare differences associated with certain status indicators, such as family fares, companion fares, affinity travel, and corporate and government travel management arrangements, to be unreasonably discriminatory. On the other hand, we have made it clear that invidious discrimination based on characteristics such as race, creed, color, sex, religious or political affiliation, disability or national origin are unlawful, and the Department will vigorously pursue violations.¹⁸ Whether other potential bases for price discrimination, such as income level, marital status, and trip purpose, would be unreasonably discriminatory or constitute an unfair or deceptive trade practice we leave to future determination. Both personalized fare offers and anonymous fare quotes are subject to 49 U.S.C. § 41712, which includes the statutory prohibition against unfair or deceptive practices and unfair methods of competition in air transportation or the sale of air transportation.

¹⁸ See 49 U.S.C. § 41705, 49 U.S.C. § 40127, and Docket OST-1996-1505.

In addition, all of the Department's regulations requiring transparency in carrier and ticket agents' displays of fares and ancillary products would continue to apply, including the disclosure of the full fare inclusive of mandatory taxes and fees that the consumer must pay in order to fly, 14 CFR 399.84(a); disclosure of applicable baggage fees, 14 CFR 399.85(a-c); and disclosure of flights operated under a codeshare agreement, 14 CFR 257.5(d) and 49 U.S.C. § 41712(c). Even if carriers adopt the standard and begin offering personalized fare quotes, carriers with websites marketed to U.S. consumers would continue to be required by 14 CFR 399.85(d) to prominently disclose via a central webpage on the website a listing of fees for all optional services that are available to a passenger purchasing air transportation. We have also made it clear that a pattern of direct consumer fraud or deception, or conduct that would violate the antitrust laws, are unlawful, and the Department will vigorously pursue violations.

We cannot conclude, *a priori*, that every type of customized pricing that may develop in the future would necessarily raise fares, reduce competition, or otherwise harm the public interest. Under 49 U.S.C. § 41507, the Department may take action against unreasonably discriminatory prices in foreign air transportation, and under 49 U.S.C. § 41712 against unfair or deceptive practices. Prices paid by individual passengers already vary widely due to carriers' virtually universal use of yield management techniques, though this price variation has generally been based on variation in the nature of the trip (including when it was booked) rather than variation in the nature of the person taking the trip. We are tentatively not prepared to prohibit future innovations that may better match capacity with demand.

The preservation of anonymous shopping and display transparency, including the ability of consumers and the Department to compare anonymous and personalized offers and monitor industry behavior, will help to guard against unreasonable price discrimination and unfair, deceptive or anticompetitive practices.

We are tentatively not convinced by Mr. Hasbrouck's allegations that customized pricing offers would be illegal because statutory and regulatory provisions still prohibit carriers from charging any price not contained in publicly disclosed, published tariffs, notwithstanding the fact that the Department has exempted carriers from officially filing such tariffs with the Department. The clause in 49 U.S.C. § 41510 under which carriers are to charge only prices identical to those in the tariff "in effect for such transportation" presumed filing of those tariffs with the Department under § 41504 as part of a comprehensive economic regulatory regime. Domestic tariff filing was terminated by the Deregulation Act of 1978. With progressive liberalization of international air services, including implementation of over 100 open skies agreements, the Department has, under § 40109(c) and 14 CFR Part 293, progressively exempted carriers from filing tariffs in liberalized international markets. Nor does 14 CFR 221 Subpart K still require carriers to post their tariffs for public inspection, as Mr. Hasbrouck alleges. 14 CFR Part 293.20, adopted in 1999, relieves carriers of the tariff posting, notification and subscription requirements of Part 221, except for those relating to the contract of carriage.

Data ownership

A number of parties oppose section 1.2.7 of the Resolution, which states "This distribution model assumes that each airline distributing its products and services is the owner of its own

content,” and assert that this could create new limitations on the use of data or raise legal concerns such as privacy issues. To address this issue, IATA and Open Allies propose the following condition:

“This approval does not in any way address the issue of data ownership and specifically does not include approval of Section 1.2.7 of Resolution 787 or of any other reference to ownership in the Resolution.”

We will tentatively adopt the condition with a minor editorial amendment (See Appendix).

Taking into account all of the above discussion, we tentatively find that IATA Resolution 787, as contained in the agreement in Docket OST-2013-0048, will not be adverse to the public interest, in violation of the Code, or likely to lessen competition substantially, provided that approval is subject to the conditions proposed herein.

ACCORDINGLY,

1. We direct all interested persons to show cause why the Department should not approve IATA Resolution 787, incorporated in the agreement in Docket OST-2013-0048, subject to the conditions enumerated in the Appendix;
2. Objections or comments to our tentative findings and conclusions shall be filed no later than 21 days from the issuance date of this order. Answers to objections shall be due no later than seven business days thereafter; and
3. This Order will be served on IATA and the parties listed in the service list attached to the January 22, 2014, Joint Motion of IATA and Open Allies for Airfare Transparency.

By:

Susan L. Kurland
Assistant Secretary for Aviation and International Affairs

(SEAL)

*An electronic version of this document is available
on the World Wide Web at
<http://www.regulations.gov>*

TENTATIVE CONDITIONS ON APPROVAL

1. Scope of approval

a) Approval of Resolution 787 does not constitute approval of any agreement among IATA member airlines regarding any method or business model of distributing air transportation, nor restrict the use of any channels available for the distribution of air transportation, including indirect distribution by other than airlines.

b) Any future agreement among IATA member airlines regarding business models for the distribution of air transportation shall not be implemented without prior compliance with any applicable government approval or notification process.

2. Use of Other Data Transmissions Standards

Approval of Resolution 787 does not constitute approval of any agreement among IATA member airlines to require the use of any particular data transmission standard(s).

3. Backwards Compatibility/Other Standards

a) Any communications or message standards or protocols developed under Resolution 787 shall be open standards, meaning useable by distributors of air transportation and intermediaries in the distribution of air transportation, including CRSs and other aggregators, on a non-discriminatory basis.

b) Approval of Resolution 787 does not constitute approval of any agreement to prohibit individual IATA member airlines or groups of such airlines from continuing to utilize any communication or message protocol, including existing standards.

c) Nothing in the approval of Resolution 787 shall be deemed to be an approval of either a restriction on backwards compatibility or a restriction on development of a communications or messaging standard that is not backward compatible. Further, nothing in Resolution 787 shall be construed to inhibit the ability of distributors of air transportation to use other standards, including existing standards, in combination with any standard developed under Resolution 787. Notwithstanding any language in Section 1.2.4 of Resolution 787, airlines and technology service providers are free to pursue backward compatibility of Resolution 787 communications or message standards or protocols based on their particular business needs.

4. Privacy and anonymous shopping

Approval of Resolution 787 does not constitute approval of any agreement among IATA member airlines to require the disclosure by any passenger of personal information of any kind. In addition, approval of Resolution 787 is conditioned on the airline or ticket agent that is requesting and receiving the personal information of the buyer of air transportation following its

privacy policy in effect at the time the request is made for the sharing and storage of personal information.

5. Data ownership

Approval of Resolution 787 does not in any way address the issue of data ownership and specifically does not include approval of Section 1.2.7 of Resolution 787 or of any other reference to ownership in the Resolution.