IF YOU BUILD IT, WE WON'T COME

THE COLLECTIVE REFUSAL OF THE MAJOR AIRLINES TO COMPETE IN THE CHICAGO AIR TRAVEL MARKET

An Analysis of the Per Se Violations of Federal Antitrust Laws by Major Airlines in Their Refusal to Compete with Each Other in Fortress Hub Markets – with Metropolitan Chicago as a Case Example

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SUBURBAN O'HARE COMMISSION
117 EAST GREEN STREET · BENSENVILLE · ILLINOIS · 60106
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The Suburban O'Hare Commission

The Suburban O'Hare Commission (SOC) is an inter-governmental agency representing more than one million residents who live in communities surrounding O'Hare Airport. SOC's leadership is made up of mayors and other officials who are both advocates for the quality of life and health of their communities and business persons who are concerned about the economic health of the region. Over the past several years SOC has conducted a number of studies relating to the environmental, safety, public health, and economic issues surrounding air transportation in the Chicago metropolitan region.

This current (SOC) report focuses on one of the significant economic issues relating to air transportation — monopoly power and high monopoly-supported air fares — and the legality of the Fortress Hub system under the nation's antitrust laws. However, as is discussed in the report, the major airlines' drive for preservation and expansion of their Fortress Hub system (especially at Fortress O'Hare) — and their corresponding refusal to compete in each other's Fortress Hub markets — creates serious economic, social, and environmental harm in broad areas of the metro Chicago region.

PREFACE

In the past several years there have been numerous congressional hearings and media stories about a phenomenon in the airline industry known as "Fortress Hubs" and the problem of high monopoly supported airfares charged to airline passengers traveling from or through these Fortress Hubs.

However, most of the attention of Congress, the Administration, and the media has focused on two narrow facets of the Fortress Hub problem: 1) restrictions on access by so-called "low cost" "new entrant" carriers to a few of the Fortress Hubs, and 2) the allegations of predatory pricing by a dominant major airline against a new low-cost entrant. But this narrow focus has ignored a much more fundamental question:

> **Does the Big Seven Airlines Fortress Hub geographic allocation of markets – and their corresponding refusal to compete in each other's Fortress Hub markets – violate federal antitrust laws?**

Virtually ignored by Congress and the Administration has been the concerted refusal of the major airlines – the so-called "Big Seven" (Northwest, United, American, Delta, US Air, Continental, and Trans World) – to compete with their fellow major airlines in each other's Fortress Hub cities. This study, prepared by the Suburban O'Hare Commission (SOC), focuses on the collective refusal of the Big Seven to compete with each other and examines the question as to whether this geographic allocation of Fortress Hub markets by the Big Seven violates federal antitrust laws.

> **Does the Big Seven's refusal to compete in Metropolitan Chicago – their refusal to use the South Suburban Airport: "If you build it, we won't come." – violate federal anti-trust law?**

This SOC study also focuses on the metropolitan Chicago market as a case study of the Big Seven's *de facto* arrangement not to compete with their fellow major airlines in each other's Fortress Hub cities. A glaring example of this concerted refusal by the major airlines to compete in their fellow major airlines' Fortress Hub markets can be found in the decision of the major airlines to boycott the proposed new South Suburban Airport in metropolitan Chicago. The major airlines' "If you build it, we won't come" argument is simply a manifestation of the majors' overall horizontal geographic restraint of major markets across the nation — and particularly in metropolitan Chicago.

THE FINDINGS OF THIS STUDY

The study's findings include:

1. **De Facto Geographic Allocation of Fortress Hub Markets by the Big Seven.** The heart of the monopoly problem in Fortress Hub markets – and the resultant high monopoly-induced air fares – has been the *de facto* agreement among the Big Seven to stay out of each other's Fortress Hub markets with any competitively significant level of entry into that market.

2. **The Fortress Hub Monopoly Dominance Geographic Allocation by the Big Seven is Likely Costing the Nation's Air Travelers Billions of Dollars Annually.** There is an overwhelming body of evidence that – because of the Fortress Hub monopoly dominance of one or two of the Big Seven at many metropolitan areas across the country – the Big Seven airlines are able to charge excessive air fares totaling *billions* of dollars a year. The principal victims of this monopoly-induced Fortress Hub excess fares are: 1) the time-sensitive business traveler who pays unrestricted coach fares and 2) the so-called "spoke" passenger who must connect through one of the "Fortress Hubs" to get to his or her ultimate destination. The cost of this territorial "Fortress Hub" monopoly to the American consumer: *billions* of dollars per year in excess fares – hundreds of millions per year in metropolitan Chicago alone.

3. **The Big Seven's De Facto Geographic Allocation of Major Air Travel Markets in the Nation Through the Development of "Fortress Hubs" Constitutes a Per Se Violation of Federal Antitrust Laws.** Little discussion or analysis has been undertaken by Congress or the Administration as to whether this concerted refusal by the Big Seven to compete in their fellow major airlines' Fortress Hub markets – which costs consumers billions annually – constitutes a violation of federal antitrust laws. Based on clear and repeated Supreme Court precedent, it clearly does. The Big Seven's *de facto* geographic allocation of major air travel markets in the nation through the development of "Fortress Hubs" constitutes a per se violation of the antitrust laws. The Supreme Court has uniformly condemned arrangements to carve up horizontal markets as per se violations of Section 1 of the Sherman Act. *See e.g., Palmer v. BRG Group of Georgia*, 498 U. S. 46, 49 (1990); *United States v. Topco Associates, Inc*., 405 U.S. 596, 607-609 (1972).

4. **The Big Seven's Explicit Refusal to Compete in Metropolitan Chicago: If You Build It, We Won't Come.** In the metropolitan Chicago air travel market, the illegal collective refusal of the Big Seven to compete is manifested by two actions: 1) the *de facto* abandonment by members of the Big Seven (other than United and American) of any significant role at O'Hare Airport and 2) the announcement by the Big Seven and its allies in the Air Transport Association that they would refuse to use a new South Suburban Regional Airport. In the popular jargon of the media, the Big Seven have said "If you build it, we won't come."

   In reality, this collective refusal to use a new regional airport is nothing more than a manifestation of the Big Seven's horizontal market agreement not to compete in any significant way with United and American in their dominant Chicago market. This refusal by major airlines such as Delta, Northwest, USAir, and Continental to use new metropolitan Chicago airport capacity to compete in metropolitan Chicago is but an individual example of the per se antitrust violation of allocating geographic markets by the major airlines. "If

you build it, we won't come" is a blatant violation of the federal antitrust laws.

5. **The City of Chicago's Participation in Opposing New Capacity and in Assisting Big Seven in Their Refusal to Use the New South Suburban Airport is Not Immune from Antitrust Law Prosecution.** The available evidence is clear that the City of Chicago and its agents have been active participants in helping the Big Seven Airlines in their refusal to compete in the Chicago market and their refusal to use the proposed South Suburban Airport. Absent express approval by the State of the monopolistic practice, political subdivisions of the State — like the City of Chicago — are not free to violate the antitrust laws under the guise of state action.

   While Congress has made municipalities immune from damages for violations of the antitrust laws, Chicago and its officials are not immune from prosecution for their attempts to assist the Big Seven in their refusal to compete in the metro Chicago market and in United and American's attempts to monopolize that market.

6. **It Appears That Federal Taxpayer Funds May Have Been Used to Suppress Competition and Violate the Antitrust Laws in the Chicago Market.** United and American (the dominant carriers at O'Hare) – along with other major airlines through the Air Transport Association – have engaged in a concerted effort to defeat construction of a new South Suburban Airport, an airport that would provide significant capacity opportunities for major new competition to enter the Chicago market. United executives have stated their goal as "Kill Peotone".

   United and American have been assisted in their "Kill Peotone" (and thus kill new competitive capacity) campaign by representatives of the City of Chicago — including Chicago's consultants. Chicago's consultants have been paid several million dollars in fees to assist Chicago and United and American in expanding O'Hare and in obstructing development of a new South Suburban Airport.

   Much of the money paid to these consultants has come from either: 1) federal Passenger Facility Charge (PFC) funds, 2) federal Airport Improvement Program (AIP) funds, or 3) federally subsidized municipal airport bonds ("GARBs" General Airport Revenue Bonds). Thus, we have the following spectacle — not only are the airlines and Chicago engaged in a monopolistic arrangement designed to prevent new competition from entering the Chicago market (*i.e.*, through the new airport) — but much of the money to implement this illegal arrangement is coming from federal taxpayer dollars. The GAO and the Department of Justice should be asked to conduct an independent audit of all PFC, AIP, and GARB expenditures at O'Hare to determine if any federal funds were used as part of a campaign to "Kill Peotone" – *i.e.*, a campaign to oppose construction of a new South Suburban Airport.

7. **Federal Officials Have Participated in and Supported the Big Seven's Illegal Monopolistic Arrangement to Refuse to Compete in the Chicago Market.** Not only have federal funds been used to support the major airlines illegal monopolistic arrangement to refuse to compete in the Chicago market, but it appears that federal officials within the Administration have worked with the major airlines and Chicago to assist in this antitrust arrangement to prevent the development of a new airport in metropolitan Chicago. For the last several years, federal administration officials — several of whom are former Chicago officials who worked for the City of Chicago — have blocked development of the new South Suburban Airport through a series of spurious legal claims that federal law requires that there be a "consensus" between the State of Illinois and the City of Chicago before a new metropolitan airport can be constructed. No such legal requirement exists.

   Because of the active participation of key figures in the current administration in promoting and supporting the continued blockage of new airport development in metropolitan Chicago — in concert with the illegal refusal of the major airlines to compete in the Chicago market by using the new airport — the impartiality and lack of bias of the Administration in conducting law enforcement in this area is legitimately suspect. The Attorney General should be asked to appoint an independent prosecutor to conduct the antitrust investigation and to undertake all appropriate civil legal actions needed to correct the ongoing antitrust violations.

8. **Defining the Market Under Monopoly Control and in Need of New Competition – The Hub-And-Spoke Market.**

   The heart of the monopoly overcharges to travelers in the Chicago market is the absence of competition in the "hub-and-spoke" market in Chicago. None of the other Big Seven will come into the Chicago market to establish a competitive hub-and-spoke operation.

   In an attempt to expand their monopoly and prevent new competition from entering the Chicago market, United and American – along with their surrogate allies[1] – have sought to distract attention by suggesting a south suburban airport in metro Chicago as a "point-to-point" airport – not unlike Midway. United and American argue that O'Hare should be the only "hub-and-spoke" airport in metropolitan Chicago.

1 United and American have been sponsoring two business organizations – the "Civic Committee" and the Chicagoland Chamber of Commerce to be their public relations advocates on this issue. Both of these organizations have ignored the per se violations of the antitrust laws discussed here and have been willing allies of United and American in continuing and expanding the monopolistic practices at Fortress O'Hare. The airlines have also used a paid consultant, Booz-Allen & Hamilton, to prepare arguments designed to defeat new hub-and-spoke competition from entering the Chicago market.

By shaping the argument in this fashion, United and American guarantee that they will be allowed to continue and dramatically expand their Fortress Hub monopoly at O'Hare. According to their arguments, the lion's share of all the origin-destination traffic in the region – and all of the connecting and international traffic – should go to the sole hub-and-spoke airport in the region: O'Hare. Any minor overflow of "point-to-point" origin-destination traffic that a dramatically expanded O'Hare and Midway could not handle (if any) could be addressed in a small "point-to-point" airport like the South Suburban Airport or Gary.

What United and American gloss over is the fact that there is plenty of competition in the Chicago market in point-to-point service. The real lack of competition in the Chicago market is in the lack of additional hub-and-spoke competition to challenge the hub-and-spoke duopoly of United and American at Fortress O'Hare. It is this market dominance of the hub-and-spoke market – not the point-to-point – where lack of competition gouges the business traveler and those travelers from "spoke" cities who must use a single Fortress Hub. There is a desperate need for new competitive hub-and-spoke service in the Chicago market and the place to put that hub-and-spoke is the new South Suburban Airport.

9. Beyond Antitrust Law Enforcement, Federal Transportation Officials Play a Major Antitrust Policy Role – In Either Promoting Monopoly Abuses or Encouraging Competition – By Their Decisions on the Use of Federal Taxpayer Funds.

Not only have federal officials blocked development of new competition by blocking a new airport, federal approval of federal expenditures for major physical changes at O'Hare will exacerbate the monopoly power of American and United in this region.

Chicago's so-called "World Gateway" program has been designed in consultation with United and American to enhance and expand United and American's hub-and-spoke system at O'Hare. Chicago's World Gateway proposal is not designed to bring new hub-and-spoke competition into O'Hare or the Chicago market to compete with United and American.

Thus, Chicago's World Gateway proposal will enhance and expand United and American's Fortress Hub monopoly in the Chicago market. Since the physical design proposed by United and American and Chicago can only go forward if federal Transportation Department officials approve federal taxpayer funds to subsidize the project, federal officials are being asked to use billions of dollars in federal taxpayer funds to expand and enhance the illegal Fortress Hub monopoly of American and United at O'Hare. No federal officials appear to be examining whether spending 10 billion dollars (much of it from federal taxpayers) at O'Hare makes economic sense when much more new capacity to support competitive hub-and-spoke operations can be

constructed at a new metropolitan airport for less than half the cost. Nor are federal officials examining whether the use of billions of dollars of federal taxpayer funds to expand United and American's hub-and-spoke duopoly at Fortress O'Hare – essentially using federal taxpayer funds to subsidize expansion of monopoly power – is a proper use of federal funds.

10. **The Lifting of the Slot Limits at O'Hare Will Not Provide Sufficient Capacity to Allow Significant New Competition to Enter the Chicago Area Market.** Much of the debate over the recent passage of the federal reauthorization of the Federal Aviation Program involved the issue of lifting "slot restrictions" at LaGuardia and Kennedy airports in New York and O'Hare in Chicago. One of the principal asserted justifications for lifting the slots was to provide access to so-called "new entrant" carriers that would presumably provide competition for the dominant carriers at O'Hare and force prices down. Yet FAA's own capacity studies at O'Hare demonstrate that O'Hare is already beyond acceptable limits of capacity and can provide only marginal capacity access – if any.

    In addition, as predicted by Senator Peter Fitzgerald and Congressman Henry Hyde, any arguable incremental theoretical capacity at O'Hare will rapidly be consumed by United and American – expanding their monopoly. As stated by the Illinois Department of Transportation, the only effective way to provide sufficient capacity for major new competition in the Chicago market is to build major new capacity in the metropolitan Chicago area.

11. **A New Runway at O'Hare is Intended to Increase Capacity to Expand United and American's Monopoly Power.** The airlines' current public relations argument is that the lion's share of all the origin-destination traffic in the region (and <u>all</u> of the connecting and international traffic) should go to the sole hub-and-spoke airport in the region (O'Hare). Any minor overflow of point-to-point origin-destination traffic that a dramatically expanded O'Hare and Midway could not handle (if any) could be addressed in a small point-to-point airport like the South Suburban Airport or Gary.

    Paralleling this argument is the claim by the airlines' allies that a new runway at O'Hare is needed to "reduce delays." They claim that a new runway would not increase O'Hare capacity but simply reduce delays.

    Yet an analysis using FAA's own capacity analysis standards and criteria demonstrates that a new runway at O'Hare would substantially increase the capacity of the airport. This capacity increase at O'Hare would dramatically expand American's and United's hub-and-spoke monopoly at Fortress O'Hare. Further, it would virtually doom the economic justification for the new south suburban airport because the new "delay" runway – once built – could easily be used to carry the new additional traffic for which the new airport was intended. Simply by piecemealing incremental expansion at

O'Hare, Chicago and American and United can keep the region under the thumb of the Fortress O'Hare monopoly.

12. **United's and American's Fight to Preserve and Expand Fortress Hub Monopoly Power at O'Hare Has Grave Social, Economic, Public Health, and Quality of Life Consequences for the Region.** Much of the discussion in this paper focuses on the billions of dollars in monopoly induced overcharges inflicted on air travelers – particularly the business traveler – as a result of the Fortress Hub monopoly system. But these monopoly abuses also inflict other serious harm on a variety of important public and social interests.

    The consequences of these abuses of monopoly power for the metro Chicago region are stark and severe:

    - O'Hare area communities will be subjected to more noise, more air pollution, and more safety hazards because – under the United, American, and Chicago proposal – all the international, all the transfer traffic, and the lion's share of the origin-destination traffic are jammed into an already overstuffed O'Hare. Any new airport – even if built – will simply receive the origin-destination overflow (if any) from a vastly expanded O'Hare and Midway.

    - South Chicago and south suburban communities will continue to suffer serious economic decline because the South Suburban Airport – which should have been built years ago – lies hostage to the unholy alliance struck between the monopoly interest of United and American and the political pique of Chicago's mayor.

RECOMMENDATIONS

Based on the facts and the antitrust law analysis contained in this report, the Suburban O'Hare Commission recommends the following actions:

1. The United States Attorney General and the United States Attorney for the Northern District of Illinois should initiate an investigation into the collective refusal of the Big Seven airlines to compete against each other in each other's Fortress Hub Markets. Included in the investigation should be an examination of the role of third party collaborators in the antitrust violations – including the City of Chicago and other private organizations and individuals who have assisted the Big Seven (including United and American) in perpetrating these violations. Because of the involvement by federal officials in affirmatively assisting the Big Seven and the City of Chicago in keeping significant competition out of Chicago, the Attorney General should be asked to consider the appointment of independent counsel.

2. The United States Attorney General and the United States Attorney should bring a civil action in federal court to enjoin and break up the illegal Fortress

Hub geographic market allocation by the Big Seven and prohibit the collective refusal by the Big Seven to compete in each other's Fortress Hub markets. Included in the relief should be a requirement that members of the Big Seven halt their collective refusal to use a new South Suburban Airport in metropolitan Chicago and a requirement that competitive hub-and-spoke operations be established in metro Chicago to compete with United and American.

3. The State Attorneys General should initiate civil damage actions to recover treble damages for the billions of dollars per year in excess monopoly profits in airfare overcharges that have been charged at the Big Seven's Fortress Hubs. The Illinois Attorney General should bring suit to recover treble damages for the hundreds of millions of dollars in monopoly overcharges by American and United at Fortress O'Hare. On a multiple year basis in Illinois alone, the treble damages recoverable for consumers would exceed several billion dollars.

4. The GAO and the Department of Justice should undertake an immediate and detailed audit of all federal funds that may have been used to further the refusal of the other members of the Big Seven to compete with United and American in metropolitan Chicago – particularly the campaign by the airlines and Chicago to "Kill Peotone."

5. The United States Department of Transportation should withhold any further approvals of federal funds for expansion of the United and American duopoly at Fortress O'Hare.

6. The House and Senate Judiciary Committees should conduct immediate hearings on these issues.

7. Our Governor and our two United States Senators, the Speaker of the House, and our Illinois Attorney General should be respectfully asked what specific actions they will take to 1) break up the Fortress Hub system – particularly Fortress O'Hare; 2) bring new hub-and-spoke competitors into the Chicago market; 3) recover the billions in excess monopoly profits from the Fortress O'Hare overcharges; 4) prevent the Big Seven from continuing to refuse to use the new capacity provided by the South Suburban Airport; and 5) assemble the federal and state resources needed to rapidly build the South Suburban Airport.

8. Our Governor should hold fast to his promise not to permit any additional runways at O'Hare. To do otherwise would simply enhance and expand the monopoly power of Fortress O'Hare and doom the opportunity to bring new competition into the region at the South Suburban Airport.

9. The two candidates for President of the United States – both of whom have likely received large campaign contributions from the Big Seven – should be

respectfully asked what they will do to break up the Fortress Hub system nationally and Fortress O'Hare in particular. Vice President Gore in particular should be asked why his administration has for the past eight years looked the other way while the Big Seven has used violations of the nation's antitrust laws to literally steal billions of dollars from American consumers. Mr. Gore should also be asked to explain why his administration has literally blocked development of new competitive capacity in metro Chicago – *i.e.*, a new South Suburban Airport – at every turn. Finally, Mr. Bush should be asked specifically what he will do to build the South Suburban Airport and break up Fortress O'Hare.

INTRODUCTION

Relevant Quotations

Alfred Kahn, the "father" of airlines deregulation:[2]

> Anyone who says applying antitrust laws is the same as re-regulation is simply ignorant. To preserve competition we need the antitrust laws and vigorous enforcement of the antitrust laws
>
> ***
>
> When we deregulated the airlines, we certainly did not intend to exempt them from the antitrust laws.

Gordon Bethune, Chairman and CEO, Continental Airlines:[3]

> "Continental chief says hub competition over,":
>
> Competition among airlines for dominance at major U.S. airports is virtually a thing of the past, the chairman of Continental Airlines said on Monday.
>
> Continental chief executive Gordon Bethune, in a break from the usual industry line that competition reigns supreme, said the large air carriers have staked out their respective hubs and will be difficult to dislodge.
>
> 'In the last 20 years, the marketplace of the United States has been sorted out. American (Airlines) kind of controls Dallas-Fort Worth and Miami and we've got Newark, Houston and Cleveland. Delta's got Atlanta," Bethune said in remarks to the National Defense Transportation Association annual conference.

U. S. Senator Mike Dewine:

> During the last year, there has been rising concern among some of the smaller airlines that the seven largest passenger carriers in the

2 Alfred Kahn as quoted in testimony of Mark Kahan April 23, 1998 before the House Committee On Transportation And Infrastructure Aviation Subcommittee and in the testimony of Paul Dempsey, Vice Chairman of Frontier Airlines, Hearing on Barriers To Airline Competition before the Subcommittee On Transportation Of The U.S. Senate Committee On Appropriations, March 5, 1998.

3 Reuters News story October 26, 1998 quoting Continental Airlines Chairman and CEO Gordon Bethune, quoted in testimony of T. Allan McArtor Chairman and CEO of Legend Airlines, Inc. before The House Committee On Transportation And Infrastructure Aviation Subcommittee, October 20, 1999.

U.S. are no longer competing against each other. Essentially, the argument goes, the "Big Seven" have carved up the U.S. aviation market…[4]

CEOs of 16 major airlines tell Illinois' Governor that they will not use new airport in metropolitan Chicago:

We are writing to express our concerns about further planning and development of the so-called Third Chicago Airport. It is our understanding that the State of Illinois will not proceed with the construction of a third airport without the support of the airlines. This letter is intended to inform you that the airlines oppose further planning and construction of this facility…[5]

USA TODAY:

In the two decades since deregulation forced the government to stop telling carriers what fares to charge and which cities to serve, the big airlines have built up "fortress hubs" where, without meaningful competition, they alone decide where to go, how often to go there and how much to charge.

***

What travelers suspect is true: Airfares are climbing fast, and nowhere is the situation worse than at the hubs for the nation's largest airlines.

***

Business travelers have been especially hard hit at hubs

***

And almost everywhere, hub fares, especially for business fliers, are soaring.

***

4 Statement of U.S. Senator Mike Dewine before the Senate Judiciary Committee Subcommittee On Antitrust, Business Rights, And Competition, April 1, 1998.

5 Letter from 16 CEOs of airlines who are members of the Air Transport Association, January 17, 1995

> Even when low-fare carriers enter a hub market, they usually control so little of the traffic that they can't do much to bring fares down. [6]

NEW YORK TIMES:

> Business travelers feel particularly abused because they account for more than half of airline revenue. For in the through-the-looking-glass world of airline pricing, the fares paid by leisure travelers, who book as long as a month in advance and stay over a weekend night, have in many cases declined, while last-minute fully refundable fares, which are most often paid by business travelers, are skyrocketing.
>
> "The carriers always say that the business traveler is inelastic," said Peter M. Buchheit, director of travel and meeting services for the Black & Decker Corporation, which spent $18 million on air tickets for its American employees last year. "We need to travel so we will pay whatever it costs. But it has reached a point where we can't pay it anymore."
>
> The burden of high fares is even greater on small companies. John W. Galbraith, president of Twin Advertising, a small company based in Rochester that had $2 million in billings last year, said he was thinking about dropping clients outside the city because the high cost of visiting them cancels out the profit he makes from having their business.
>
> "Basically, what the airlines have done to companies like ours is kept us from growing," he said.
>
> New York Times January 11, 1998

United States Supreme Court on horizontal market allocations as <u>per</u> <u>se</u> violations of federal antitrust law:

> One of the classic examples of a per se violation of § 1 [of the Sherman Antitrust Act] is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition.... This Court has reiterated time and time again that '[h]orizontal territorial limitations ... are naked restraints of trade with no purpose except stifling of competition.' Such limitations are per se violations of the Sherman Act.[7]

6 FLYING INTO 'POCKETS OF PAIN', USA TODAY, February 23, 1998.

The United States Supreme Court in the 1990 decision in *Palmer v. BRG Group of Georgia*, 498 U. S. 46, 49 (1990)

Relevant Provisions of The Sherman Act:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
>
> Title 15 United States Code §1
>
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
>
> Title 15 United States Code §2
>
> The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.
>
> Title 15 United States Code §4
>
> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the

7 The United States Supreme Court in *Palmer v. BRG Group of Georgia*, 498 U. S. 46, 49 (1990) quoting from *United States v. Topco Associates, Inc*., 405 U.S. 596 (1972).

amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Title 15 United States Code §15

ANALYSIS

1. Focusing on the Elephant in the Corner.

Over the last decade there have been extensive congressional hearings and much media coverage of so-called "Fortress Hubs"[8]. But much of the attention has focused on two aspects of the Fortress Hub phenomenon:

- Various "constraints" that the so-called "low-cost" "new-entrant" airlines (*e.g.*, Spirit, Vanguard) say have prevented these new entrants from entering and competing in Fortress Hub markets; and

- In those instances where the new low-cost airlines could physically enter the Fortress Hub market, the dominant hub airlines are alleged to have engaged in predatory pricing to drive the so-called "low-cost" "new-entrant" competitors out of the market.

But while Congress and the Administration have focused on these elements, they have ignored what might be called "the elephant in the corner" aspect of the Fortress Hub issue. Virtually ignored in these debates has been the role of the so-called "major" airlines – *i.e.*, the so-called "Big Seven" controlling members of the trade group known as the Air Transport Association (ATA) – in creating and maintaining the Fortress Hub system. While Congress and the U.S. DOT talked about the anti-competitive aspects of keeping the new "low-cost" airlines out of the Fortress Hub market, little attention has been directed toward the issue of whether the Big Seven's Fortress Hub system is itself a violation of the nation's antitrust laws[9].

The purpose of this study is to: 1) analyze the known facts of the Fortress Hub system; 2) determine if the known facts demonstrate the existence of a violation of federal antitrust laws, 3) examine the role of the "Big Seven's" conduct in the Chicago air travel market as a case study illustration of their collaborative conduct nationally in maintaining the national Fortress Hub network, and 4) propose remedial action.

The findings of this study unequivocally demonstrate that the Fortress Hub system maintained by the Big Seven – alone and through their trade organization, the Air Transport Association – is an illegal cartel in violation of the Nation's antitrust laws.

8 *See e.g.*, Hearing on the State of Airline Competition before the House Committee on Transportation, Subcommittee on Aviation, October 20 and 21, 1999; Hearing on the State of Competition in the Airline Industry before the House Judiciary Committee, May 19, 1998; Hearing Before the Senate Committee on Commerce Science and Transportation, Subcommittee on Aviation, April 23, 1998; Hearing on Airline Hubs, Fair Competition or Predatory Pricing, Senate Judiciary Committee, Subcommittee on Antitrust, Competition and Business Rights, April 1, 1998. USDOT Statement of Enforcement Policy Regarding Unfair Exclusionary Conduct Docket OST 98-3713-1 (April 8, 1998).

9 There has been some attention paid to this issue. See *e.g.*, Dempsey, *Robber Barons in the Cockpit: The Airline Industry in Turbulent Skies* 18 Transp. L. J. 133 (1990) Testimony of Joseph Karaganis before the House Judiciary Committee; Hearing on the State of Competition in the Airline Industry, May 19, 1998.

2. Geographic Market Allocation through Fortress Hubs – Mutual Protection of Fortress Hub Dominance Against New Competition from Other Big Seven Airlines.

There is overwhelming and incontrovertible evidence that, since "deregulation" in 1978, the major airlines have carved up major areas of the Nation into territories of geographic market dominance known as "Fortress Hubs". Under this Fortress Hub arrangement, one or two major airlines are ceded geographic market dominance and other major airlines tacitly agree not to compete in that geographic market.

Thus Delta has Fortress Hubs at Atlanta and Cincinnati, USAir at Pittsburgh, Northwest at Minneapolis and Detroit, American at Dallas-Ft. Worth, American and United at Chicago O'Hare, etc. The other Big Seven airlines — either implicitly or by explicit agreement — have agreed to stay out of each other's Fortress Hub markets in any significant way. Thus, for example, Delta remains unchallenged by United, Northwest, and others at Atlanta. In turn, Delta doesn't provide significant challenge to United and American at O'Hare or to Northwest at Minneapolis and Detroit. Similar *de facto, quid pro quo* non-compete accommodations by the major airlines can be found at virtually every Fortress Hub where one or two airlines have dominant control of the local market.

As stated by one congressional witness:

> The major airlines … developed high market share hubs in large sections of the country. Given the market power that they have developed, the major airlines have raised prices far above the competitive level in their market hubs (as study after study has shown). Furthermore, the major airlines defend their high price hub markets with predatory pricing. These markets are descriptively called "fortress hubs".
>
> ***
>
> There are two things the major airlines are doing to monopolize large segments of the country. First, they work hard to see that entry to their huge markets remains closed or difficult. Second, if a discounter enters a few of their markets they use predatory pricing to drive the discounters out of business.[10]

The broad reach of this Fortress Hub system is illustrated in a table prepared by the National Association of Attorneys General.

10 Testimony of Professor Fred Allvine Hearings on Airline Competition Before the Subcommittee On Transpiration and Related Agencies of the Senate Committee on Appropriations, S. Hrg. 105-936, October 21, 1997, at p. 27.

Cities Where Fortress Hubs Are Located[11]

City	Dominant Airline
Atlanta	Delta
Chicago O'Hare	United and American
Cincinnati	Delta
Dallas	American
Detroit	Northwest
Houston International	Continental
Minneapolis/St. Paul	Northwest
Denver	United
Pittsburgh	US Air
St. Louis	TWA

3. Monopoly Fare Premiums at Fortress Hubs.

There is a large body of evidence and expert opinion — as articulated by the General Accounting Office, USDOT, business travel organizations, and the Illinois Department of Transportation — that the dominance of these major markets by one or two carriers results in a monopolistic ability to raise fares beyond the air fares that would exist if there was strong competition in these Fortress Hub markets. As stated by the GAO as far back as 1990:

> "Airports where one or two carriers handle most of the enplaning traffic have higher fares than airports where the traffic is less concentrated. Moreover, the data show that fares tend to rise as concentration increases. While many factors can influence fare changes, the evidence that we have collected strongly suggests that fares and concentration at an airport are related. Fares are higher at concentrated airports than at relatively less concentrated ones, and the evidence suggests that the gap is increasing.[12]

11 Statement of the Attorneys General of 25 states in DOT proceeding OST-98-3713 Enforcement Policy Regarding Unfair Exclusionary Conduct In The Air Transportation Industry. It is important to note that only one of the metropolitan Fortress Hub areas on this list – Chicago – contains a so-called "slot-controlled" airport. All these other metropolitan areas are free of slot controls yet dominated by one or two of the Big Seven – with the other members of the Big Seven failing to provide significant competition in those markets. Clearly – at least as to the Big Seven airlines – something other than "slot restrictions" is driving their collective refusal not to compete in each other's Fortress Hub markets.

12 *Airline Competition, Higher Fares and Reduced Competition At Concentrated Airports.* (GAO/RCED-90-102)

Subsequent studies by GAO since 1990 have confirmed the problem of higher fares at Fortress Hubs – higher than would exist in a competitive environment. *See e.g.*, *Barriers to Entry Continue in Some Markets* (GAO/T-RCED-98-112; March 5, 1998); *Airline Deregulation: Barriers to Entry Continue to Limit Competition in Several Key Domestic Markets* (GAO/RCED-97-4, Oct. 18, 1996); *Domestic Aviation: Barriers to Entry Continue to Limit Benefits of Airline Deregulation* (GAO/T-RCED-97-120, May 13, 1997); *Airline Competition: Higher Fares and Less Competition Continue at Concentrated Airports* (GAO/RCED-93-171, July 15, 1993); *Airline Competition: Effects of Airline Market Concentration and Barriers to Entry on Airfares* (GAO/RCED-91-101, Apr. 26, 1991).

While repeatedly emphasizing the problem of higher monopoly fares caused by lack of competition, GAO continued to emphasize the lifting of slot restrictions at three of the nation's airports as a partial solution to the problem. GAO's prime emphasis has been to obtain access to airport capacity for the so-called "low-cost" new entrant airlines into the Fortress Hub markets.

But GAO has never analyzed the issue of the "capacity" of these slot-restricted airports to service new competition – even if the slot restrictions were lifted. As discussed below, the FAA has repeatedly emphasized that the practical capacity of an airport is limited (*see discussion, infra.*) and that as traffic growth approaches the physical limits of the airport's capacity, aircraft delays rise geometrically – essentially leading to gridlock.

As the analysis contained in the 1995 DOT report *A Study of the High Density Rule*, and this study show, there simply is not enough capacity at O'Hare – even with the slots lifted – to allow significant new competition to enter the Chicago market. This is why the Big Seven's collective refusal (discussed infra) to use and support the major new capacity that would be provided by the new South Suburban Airport is a central component in the preservation of the Fortress Hub problem in metropolitan Chicago. Moreover, any arguable minor increment of available capacity at O'Hare will rapidly be consumed by United and American[13]. There simply is not enough room at O'Hare to allow a major new competitor to gain the "critical mass" to compete with United and American.

The Illinois Department of Transportation has repeatedly emphasized its opinion that monopoly dominance at O'Hare results in higher airfares paid by Chicago area travelers and that major new regional airport capacity is essential to breaking the monopoly stranglehold of Fortress O'Hare:

> There are numerous examples besides these to demonstrate that without the competition of a new entrant, the fares at Chicago are increasing or remain inordinately high.

***

13 See April 20, 2000 Chicago Tribune, United and American propose to add 400 additional flights per day at O'Hare.

> We encourage and support your [USDOT's] focus on anticompetitive practices that are injuring commerce, smaller cities, and consumers in Illinois and throughout the region serviced by O'Hare Airport as the hub of United Airlines and American Airlines. We strongly urge, however, that the enforcement policies should be part of a broader initiative that will insure that there will be airport capacity available in the Chicago area that will provide new airline entrants the opportunity to compete with United and American. Additional airport capacity is vital to restoring airline competition in the Chicago, Illinois, and Midwestern markets.
>
> ***
>
> There is simply no room at O'Hare for new entrant airlines to pose competitive challenges to the dominant airlines[14].

4. Time Sensitive Business Traveler Biggest Loser in Fortress Hub Monopoly System.

The air travel consumer most seriously harmed by this horizontal Fortress Hub market allocation is the business traveler — particularly the small to medium size business traveler who cannot negotiate bulk fare discounts and who must make time sensitive business trips at unrestricted coach fares.

The Illinois Department of Transportation estimates this monopoly based fare penalty at O'Hare alone exceeds several hundred million dollars per year[15]. Nationally, the loss to the traveling public from these monopoly premiums at Fortress Hubs is likely to exceed several billion dollars annually.

As stated in major articles on the subject by *USA Today* and the *New York Times*:

> What travelers suspect is true: Airfares are climbing fast, and nowhere is the situation worse than at the hubs for the nation's largest airlines.
>
> ***
>
> Business travelers have been especially hard hit at hubs
>
> ***

14 Letter of July 23, 1998 from Kirk Brown, Illinois Secretary of Transportation to US DOT Secretary Rodney Slater, OST-98-3713-770. (emphasis added)

15 See *South Suburban Airport Fare Analysis* (1991-1995) A Supplemental Study Prepared For the Illinois Department of Transportation (January 1997) and supplemental memorandum dated June 16, 1998.

> And almost everywhere, hub fares, especially for business fliers, are soaring.
>
> USA Today February 23, 1998
>
> Business travelers feel particularly abused because they account for more than half of airline revenue. For in the through-the-looking-glass world of airline pricing, the fares paid by leisure travelers, who book as long as a month in advance and stay over a weekend night, have in many cases declined, while last-minute fully refundable fares, which are most often paid by business travelers, are skyrocketing.
>
> "The carriers always say that the business traveler is inelastic," said Peter M. Buchheit, director of travel and meeting services for the Black & Decker Corporation, which spent $18 million on air tickets for its American employees last year. "We need to travel so we will pay whatever it costs. But it has reached a point where we can't pay it anymore."
>
> The burden of high fares is even greater on small companies. John W. Galbraith, president of Twin Advertising, a small company based in Rochester that had $2 million in billings last year, said he was thinking about dropping clients outside the city because the high cost of visiting them cancels out the profit he makes from having their business.
>
> "Basically, what the airlines have done to companies like ours is kept us from growing," he said.
>
> New York Times January 11, 1998

Put bluntly, the Big Seven has used their monopoly power at Fortress Hubs to literally extort billions of dollars annually from captive travelers – most often time sensitive business travelers living in these airlines' own Fortress Hub communities[16].

5. The Second Biggest Loser in the Fortress Hub Monopoly System is the "Spoke" Passenger.

16 The dominant Chicago airlines, United and American, have funded a study purporting to show that fares are not excessive at O'Hare. See Booz-Allen and Hamilton, Inc. 1998 study prepared for the Chicagoland Chamber of Commerce and paid for by United and American. But that study only compared Fortress Hub fares at O'Hare with other Fortress Hub fares. It did not compare O'Hare fares with what fares would be in a free competitive market. For Booz-Allen to argue that the monopolists at Fortress O'Hare only overcharge at the same level as monopolists at the other Big Seven Fortress Hubs is hardly justification for the hundreds of millions in overcharges inflicted on travelers at Fortress O'Hare.

The second biggest loser from this Fortress Hub monopoly system is the so-called "spoke" passenger in the small to medium size community that serves as the "spoke" to a single large metropolitan Fortress Hub. Because the dominant Big Seven airline at a Fortress Hub has no competition at its hub, it is free to charge the spoke passenger – who must use the hub to get to his or her destination – excessive monopoly fares[17].

The Illinois Department of Transportation – again emphasizing the lack of capacity to handle both new competition and service to smaller and mid-size communities – has stated the problem as follows:

> The dominant airlines are diminishing and even abandoning service to smaller Illinois and Midwestern cities in favor of routes that are more lucrative or that increase the power of their hub networks[18].

Because the dominant O'Hare airlines prioritize the limited capacity at O'Hare to service the flight operations with the highest profitability, the small community "spoke" traveler gets harmed on two levels. First, he loses service when the dominant airlines cut small community service to use the limited capacity to service more lucrative long-haul or international traffic – eliminating less profitable small community service. Second, as to the small community traffic that the dominant airlines still service, they are able to charge exorbitant rates – knowing that the small community spoke traveler is at their mercy.

6. The Big Seven's Fortress Hub Geographic Market Allocation is a Per Se Violation of the Antitrust laws.

Neither the Administration nor the Congress appears to have critically examined a central question: Does the Big Seven's Fortress Hub geographic market allocation violate the Nation's antitrust laws? Based on clear and repeated Supreme Court precedent, it clearly does.

The major airlines general *de facto* geographic allocation of major air travel markets in the nation through the development of "Fortress Hubs" constitutes a per se violation of the antitrust laws. The Supreme Court has uniformly condemned arrangements to carve up horizontal markets as per se violations of Section 1 of the Sherman Act. *See e.g.*, *Palmer v. BRG Group of Georgia*, 498 U. S. 46, 49 (1990); *United States v. Topco Associates, Inc*., 405 U.S. 596, 607-609 (1972).

Virtually all laymen and most lawyers shy away from antitrust law as an economic morass difficult to understand. But there is one area where the United States Supreme Court has been clear and unequivocal: horizontal arrangements to carve up geographic

17 There is some evidence of some competition between Fortress Hubs where a "spoke" city is served by commuter service from competing Fortress Hubs. But that competition does not help the spoke community tied to a single Fortress Hub.

18 IDOT letter of July 23, 1998.

markets are an automatic – a "per se" – violation of the federal antitrust laws. Because this law is so-clear and unambiguous – and recognizing that the airlines will claim that the law can be ignored – we believe it important to quote the United States Supreme Court on this subject:

> While the Court has utilized the 'rule of reason' in evaluating the legality of most restraints alleged to be violative of the Sherman Act, it has also developed the doctrine that certain business relationships are per se violations of the Act without regard to a consideration of their reasonableness. In Northern Pacific R. Co. v. United States, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958), Mr. Justice Black explained the appropriateness of, and the need for, per se rules:
>
> '(T)here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable— an inquiry so often wholly fruitless when undertaken.'
>
> It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act. See generally Van Cise, The Future of Per Se in Antitrust Law, 50 Va.L.Rev. 1165 (1964). One of the classic examples of a per se violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. Such concerted action is usually termed a 'horizontal' restraint, in contradistinction to combinations of persons at different levels of the market structure, e.g., manufacturers and distributors, which are termed 'vertical' restraints. This Court has reiterated time and time again that '(h)orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition.' White Motor Co. v. United States, 372 U.S. 253, 263, 83 S.Ct. 696, 702, 9 L.Ed.2d 738 (1963). Such limitations are per se violations of the Sherman Act. See Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136 (1899), aff'g 85 F. 271 (C.A.6 1898) (Taft, J.); United States v. National Lead Co., 332 U.S. 319,67 S.Ct. 1634, 91 L.Ed. 2077 (1947); Timken Roller Bearing

> Co. v. United States, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951); Northern Pacific R. Co. v. United States, supra; Citizen Publishing Co. v. United States, 394 U.S. 131, 89 S.Ct. 927, 22 L.Ed.2d 148 (1969); United States v. Sealy, Inc., 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238 (1967); United States v. Arnold, Schwinn & Co., 388 U.S. 365, 390, 87 S.Ct. 1856, 1871, 18 L.Ed.2d 1249 (1967) (Stewart, J., concurring in part and dissenting in part); Serta Associates, Inc. v. United States, 393 U.S. 534, 89 S.Ct. 870, 21 L.Ed.2d 753 (1969), aff'g 296 F.Supp. 1121, 1128 (N.D.Del.1968).
>
> *United States v. Topco Associates, Inc*., 405 U.S. at 607-608 (emphasis added)

The Big Seven's carving up of geographic markets into the current Fortress Hub system is nothing more than a naked horizontal restraint repeatedly condemned by the Supreme Court as a per se violation of the Sherman Act.

Put in terms the average citizen understands — Could McDonald's tell Burger King: We won't compete in Atlanta if you won't compete in Chicago? Could Ford tell GM: We won't sell Fords in Michigan if you won't sell Chevys in Illinois? The answer is clearly no. Each would be a horizontal market restraint and a per se violation of the Sherman Act just as the Big Seven's Fortress Hub system – and their refusal to compete in each other's hub markets – is a horizontal market restraint and a per se violation of the Sherman Act.

The law is equally clear it is not necessary to demonstrate a formal written agreement among the Big Seven to carve up the geographic Fortress Hub market in order to find a conspiracy in violation of the Sherman Act. The existence of such an agreement or arrangement can be inferred from the course of conduct of the members of the industry. *Norfolk Monument Company v. Woodlawn Memorial Gardens,* 394 U.S. 700, 704 (1969)[19]; *American Tobacco company v. United States,* 328 U.S. 781, 809-810 (1946)[20];

19 "It is settled that '(n)o formal agreement is necessary to constitute an unlawful conspiracy,' [citation omitted] and that business behavior is admissible circumstantial evidence from which the fact finder may infer agreement.' [citation omitted]"

20 "No formal agreement is necessary to constitute an unlawful conspiracy. Often crimes are a matter of inference deduced from the acts of the person accused and done in pursuance of a criminal purpose. Where the conspiracy is proved, as here, from the evidence of the action taken in concert by the parties to it, it is all the more convincing proof of an intent to exercise the power of exclusion acquired through that conspiracy. The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in any exchange of words."

InterstateCircuit v. United States, 306 U.S. 208, 221, 226-227 (1939).[21]

7. The Metropolitan Chicago Market: An Egregious Example of the Geographic Market Allocation and Refusal to Compete — "If You Build It, We Won't Come."

A particularly egregious implementation of this horizontal agreement not to compete in each other's Fortress Hub markets can be found in the major airlines' announced refusal to use a new major airport in the metropolitan Chicago. The most visible manifestation of their refusal to compete in the Chicago market can be found in letters written by sixteen Chief Executive Officers (CEOs) of the major airlines to Illinois Governor Jim Edgar[22] and his successor George Ryan[23]. In those letters — drafted in coordination with representatives of the City of Chicago and the Air Transport Association — the major airlines tell the Illinois Governor that they will refuse to use the proposed new metropolitan Chicago airport:

> We are writing to express our concerns about further planning and development of the so-called Third Chicago Airport. It is our understanding that the State of Illinois will not proceed with the construction of a third airport without the support of the airlines. This letter is intended to inform you that the airlines oppose further planning and construction of this facility…[24]

Chicago area news media have characterized the major airlines' refusal to use a new airport as "If you build it, we won't come." In reality, this collective refusal to use a new regional airport is nothing more than a manifestation of the major airlines' horizontal market agreement not to compete in any significant way with United and American in their dominant Chicago market. This refusal by major airlines such as Delta, Northwest, USAir, and Continental to use new metropolitan Chicago airport capacity to compete in metropolitan Chicago is but an individual example of the per se antitrust violation of allocating geographic markets by the major airlines.

21 "As is usual in cases of alleged unlawful agreements to restrain commerce, the government is without the aid of direct testimony that the distributors entered into any agreement with each other to impose the restrictions upon subsequent-run exhibitors. In order to establish agreement it is compelled to rely on inferences drawn from the course of conduct of the alleged conspirators." *** "It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it" *** "It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. [citation omitted] Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."

22 January 17, 1995 letter by CEOs of major airlines to Governor Edgar attached. Discovery in the Birkett case shows that much of this letter was drafted by the City of Chicago in collaboration with the major airlines.

23 April 7, 1999 letter by CEOs of major airlines to Governor Ryan.

24 Letter from 16 CEOs of airlines who are members of the Air Transport Association.

8. The Fortress Hub System and the Big Seven's Collective Refusal to Compete in Each Other's Fortress Hub Markets – as Illustrated by Their Collective Refusal to Use the New South Suburban Airport – Represent Serious Violations of Federal Law.

These clear violations by the Big Seven airlines in creating and maintaining the Fortress Hub system and the refusal of the Big Seven to compete in each other's markets represent serious violations of the antitrust laws. If the GAO and IDOT estimates are accurate, nationally the Fortress Hub system literally illegally steals several billion dollars per year from the nation's air travelers – several hundred million dollars in the Chicago area alone.

Because these antitrust violations are so blatant[25], it is important for the public to know the significant sanctions and remedies available to cure these violations.

Section 1 of the Sherman Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court
>
> Title 15 United States Code §1 (emphasis added)

Section 2 of the Sherman Act provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or

25 The Fortress Hub refusal-to-compete arrangement by the Big Seven is not the first example of antitrust violations by a major airline. The blatant disregard of some airline executives for the rule of law and the clear prohibitions of the antitrust law is illustrated by the conduct of then American Airlines CEO Robert Crandall, who was caught in a blatant felony attempt to monopolize fares at Dallas/Ft. Worth. See United States v. American Airlines, 743 F.2d 1114 (5th Cir. 1984). For an unedited verbatim transcript of Mr. Crandall's damning conversation see Dempsey, *Robber Barons in the Cockpit: The Airline Industry in Turbulent Skies* 18 Transp. L. J. 133 at 143 n.26 (1990).

> by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
>
> Title 15 United States Code §2 (emphasis added)

Section 4 of the Act provides civil injunction remedies and mandates the Department of Justice to "institute proceedings in equity to prevent and restrain such violations":

> The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.
>
> Title 15 United States Code §4 (emphasis added)

Section 15 provides that any person injured by the violations of the antitrust laws can recover treble (triple) damages for the monetary losses caused by the violations.

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.
>
> Title 15 United States Code §15

In summary, the statutory sanctions for these antitrust violations are significant. Thus far, federal Department of Justice officials have been unwilling to initiate antitrust enforcement proceedings to break up the Fortress Hub monopoly of the Big Seven.

9. The Major Airlines Geographic Market Allocation — A Per Se Violation of the Antitrust laws — Is Not Immunized by the "Noerr-Pennington" Doctrine.

The major airlines' have engaged in this *de facto* Fortress Hub geographic market allocation scheme for more than a decade. It is likely that the airlines will assert that their collective refusal to compete in the metropolitan Chicago market — and the manifestation of that refusal by their letters to Governors Edgar and Ryan — is immunized from antitrust law enforcement by the "Noerr-Pennington" doctrine.[26] That doctrine immunizes antitrust violations where the principal vehicle for achieving the monopolistic goal is political expression — *i.e.*, lobbying government.

But the post-Noerr-Pennington case law makes clear that where a business arrangement — that otherwise violates the antitrust laws — has one component that involves the exercise of First Amendment speech, there is no immunity from antitrust enforcement under the "Noerr-Pennington" doctrine. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 505-506 (1988); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423-426 (1990); *Sandy River Nursing Care v. Aetna Casualty*, 985 F.2d 1138, 1142-43 (1st Cir.1993); *In re Brand Name Prescription Drugs Antitrust Litigation*, 186 F.3d 781, 788-789 (7th Cir. 1999).

10. The Major Airlines Geographic Market Allocation — A Per Se Violation of the Antitrust laws — Is Not Immunized by the "State Action Doctrine".

It is common for those accused of antitrust violations to claim that their monopolistic practices are immunized from antitrust liability under the so-called "state action" doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). The Supreme Court's rationale in *Parker* for "state action" immunity was that Congress had not intended in the Sherman Act to control the activities of states in engaging in conduct directed by the state legislature. 317 U. S. at 351-352.

But the Supreme Court has severely limited the availability of "state action" immunity when invoked by private parties such as the airlines in an attempt to immunize conduct clearly violative of the antitrust laws. The Supreme Court has established two requirements for "state action" immunity where private parties participate in the antitrust violation: 1) the monopolistic activity must be clearly expressed and affirmatively adopted as being the policy of the State[27], and 2) the monopolistic activity must be

26 *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc*., 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

27 Absent express approval by the State of the monopolistic practice, political subdivisions of the State — like the City of Chicago — are not free to violate the antitrust laws under the guise of state action. *City of Lafayette v. Louisiana Power & Light Co*., 435 U.S. 389, 416 (1978); *Town of Hallie v. Eau Claire*, 471 U.S. 34, 38-39 (1985) ("Municipalities, on the other hand, are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign. Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 412, 98 S.Ct. 1123, 1136, 55 L.Ed.2d 364 (1978) (opinion of BRENNAN, J.). Rather, to obtain exemption, municipalities must demonstrate that their anti-competitive activities were authorized by the State "pursuant to

actively supervised by the State itself. *Federal Trade Commission v. Ticor Title Insurance Co*, 504 U.S. 621, 633-634 (1992); *Patrick v. Burget*, 486 U.S. 94, 101-102 (1988); *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-106 (1980).

In the case of Fortress O'Hare and the collective campaign of United, American and Chicago to keep significant new hub-and-spoke competition from coming into the metro Chicago market, there is no question that the "state action" defense does not apply. First, the State of Illinois has not authorized the Fortress O'Hare monopoly maintained by United and American and has actively spoken out against the monopoly problem there. Second, the State is not actively supervising and approving the anti-competitive conduct by United and American and Chicago.

11. Federal Taxpayer Funds May Have Been Used to Suppress Competition and Violate the Antitrust Laws in the Chicago Market.

As stated above, other major airlines through the (ATA), United and American (the dominant carriers at O'Hare) have engaged in a concerted effort to defeat construction of a new South Suburban Airport, an airport that would provide significant capacity opportunities for major new competition to enter the Chicago market. United executives have privately stated their goal as "Kill Peotone".

United and American have been assisted in their "Kill Peotone" (and thus kill new competitive capacity) campaign by representatives of the City of Chicago — including Chicago's consultants. Chicago's consultants have been paid several million dollars in consulting fees to assist Chicago and United and American in expanding O'Hare and in obstructing development of a new South Suburban Airport.

Much of the money paid to these consultants has come from either: 1) federal Passenger Facility Charge (PFC) funds, 2) federal Airport Improvement Program (AIP) funds, or 3) federal tax subsidies for municipal airport bonds ("GARBs" General Airport Revenue Bonds). Not only are the airlines and Chicago engaged in a monopolistic arrangement designed to prevent new competition from entering the Chicago market (*i.e.*, through the new airport), but much of the money to implement this illegal arrangement is coming from federal taxpayer dollars. The GAO and the Department of Justice should be asked to conduct an independent audit of all PFC, AIP, and GARB expenditures at O'Hare to determine if any federal funds were used as part of a campaign to "Kill Peotone" and to assist in the violation of federal antitrust laws.

state policy to displace competition with regulation or monopoly public service." Id., at 413, 98 S.Ct., at 1137.") Chicago will likely contend that the Illinois Local Governmental Antitrust Immunity Act, 50 ILCS 35/1, constitutes the requisite state approval of its antitrust conduct here. But that statute only exempts municipal actions which are "expressly or by necessary implication authorized by Illinois law" or are "within traditional areas of local governmental activity." It is difficult to imagine that Chicago's participation in a monopoly which gouges air travelers — especially Illinois businessmen — hundreds of millions of dollars each year is an activity "expressly or by necessary implication authorized by Illinois law" or is an activity "within traditional areas of local governmental activity."

12. Federal Officials Have Participated in and Supported the Big Seven's Illegal Monopolistic Arrangement to Refuse to Compete in the Chicago Market.

Not only have federal funds been used to support the major airlines illegal monopolistic arrangement to refuse to compete in the Chicago market, but it appears that federal officials within the Administration have worked with the major airlines and Chicago to assist in this antitrust arrangement[28] to prevent the development of a new airport in metropolitan Chicago. For the last several years, federal administration officials — several of whom are former Chicago officials who worked for the Chicago Aviation Department — have blocked development of the new South Suburban Airport through a series of spurious legal claims that federal law requires that a "consensus" must exist between the State of Illinois and the City of Chicago before a new metropolitan airport can be constructed. No such legal requirement exists.

Because of the active participation of key figures in the current administration in promoting and supporting the continued blockage of new airport development in metropolitan Chicago — in concert with the illegal refusal of the major airlines to compete in the Chicago market by using the new airport — the impartiality and lack of bias of the Administration in conducting law enforcement in this area is suspect. The Attorney General should be asked to appoint an independent prosecutor to conduct the antitrust investigation and to undertake all appropriate actions needed to correct the ongoing antitrust violations.

13. Defining Essential Remedies – A New Regional Airport With Sufficient Capacity to Support New Competitive Hub-And-Spoke Operations.

There have been two "remedies" asserted to eliminate the monopoly dominance of Fortress O'Hare in the Chicago market. The first – eliminating slot restrictions at O'Hare

28 We use the term "arrangement" rather than the normal term used in collective antitrust violations — *i.e.*, "conspiracy" — to avoid the popular negative connotations of that term, *e.g.*, as in "conspiracy theory". It is clear however that the existence of a "conspiracy" to violate the antitrust laws can be inferred from circumstantial evidence. "It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition. No formal agreement is necessary to constitute an unlawful conspiracy. Often crimes are a matter of inference deduced from the acts of the person accused and done in pursuance of a criminal purpose. Where the conspiracy is proved, as here, from the evidence of the action taken in concert by the parties to it, it is all the more convincing proof of an intent to exercise the power of exclusion acquired through that conspiracy. The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in any exchange of words. United States v. Schrader's Son, 252 U.S. 85, 40 S.Ct. 251, 64 L.Ed. 471. Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified. Neither proof of exertion of the power to exclude nor proof of actual exclusion of existing or potential competitors is essential to sustain a charge of monopolization under the Sherman Act." *American Tobacco Co. v. United States*, 328 U.S. 781, 809-810 (1946). Here the evidence is both circumstantial and direct: 1) the obvious carving up of geographic markets, and 2) the correspondence written by 16 CEOs refusing to use new capacity in the Chicago market.

– was proposed and passed by Congress this year. According to proponents of lifting the slot limits, elimination of slot controls would bring new competition into O'Hare.

A. Lifting the Slot Limits Was an Unmitigated Disaster

At the time the federal laws lifting the slot limits was passed, Illinois Senator Peter Fitzgerald and Congressman Henry Hyde both voted against the bill. They argued that the slot limitations were not an artificial constraint but a recognition of the already exhausted limited capacity of O'Hare. They argued that lifting the slots would be a disaster because 1) added flights would lead to a massive delay gridlock at O'Hare, and 2) that even if there were any additional capacity, that capacity would be rapidly consumed by American and United. Under these circumstances, they argued that lifting the slot limits would simply expand United's and American's monopoly – not increase competition.

Senator Fitzgerald and Congressman Hyde can rightfully say: I told you so. On April 20, 2000 United and American announced their intent to add 400 new daily flights to O'Hare. The sad reality is that O'Hare does not have the capacity for these 400 new flights. But Fitzgerald's and Hyde's point was made; whatever arguable minor incremental capacity exists at O'Hare (if any), it has been rapidly consumed by United and American – not used by new competition. Instead of reducing the monopoly, the new federal law has helped United and American expand the monopoly.

United's and American's actions – coupled with the limited capacity of O'Hare – illustrate a salient point. There simply is not enough capacity at O'Hare to bring any significant new competition into O'Hare. Any new competitive entry will be token at best and not provide meaningful competition to the hub-and-spoke dominance of United and American.

Lifting the slot limit, coupled with United and American's actions to jam more than 400 new flights into O'Hare, also means massive new delay increases for the traveling public this Summer. To illustrate these points and to demonstrate why the recently passed federal legislation makes matters much worse at O'Hare requires a brief analysis of the related issues of capacity and delay at airport – particularly O'Hare.

FAA, the airlines, Chicago and IDOT define capacity as the number of operations that can be processed at an airport at an acceptable level of delay. There is a recognition that there is a difference between absolute maximum physical throughput and a lower level of operations that can be put through without experiencing intolerable levels of delay and cancellations. As stated by the City of Chicago:

> The practical capacity of an airfield will be defined as the maximum level of average all-weather throughput achievable <u>while maintaining an acceptable level of delay</u>.

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> Ten minutes per aircraft operation will be used as the maximum level of acceptable delay for the assessment of the existing airfield's capacity, subject to future levels of forecast demand. This level of delay represents an upper bound for acceptable delays at major hub airports.[29]

This relationship between maximum physical throughput and practical, delay-sensitive capacity is illustrated in a FAA chart copied from an FAA report on the subject, *Airfield and Airspace Capacity/Delay Policy Analysis*, FAA-APO-81-14.

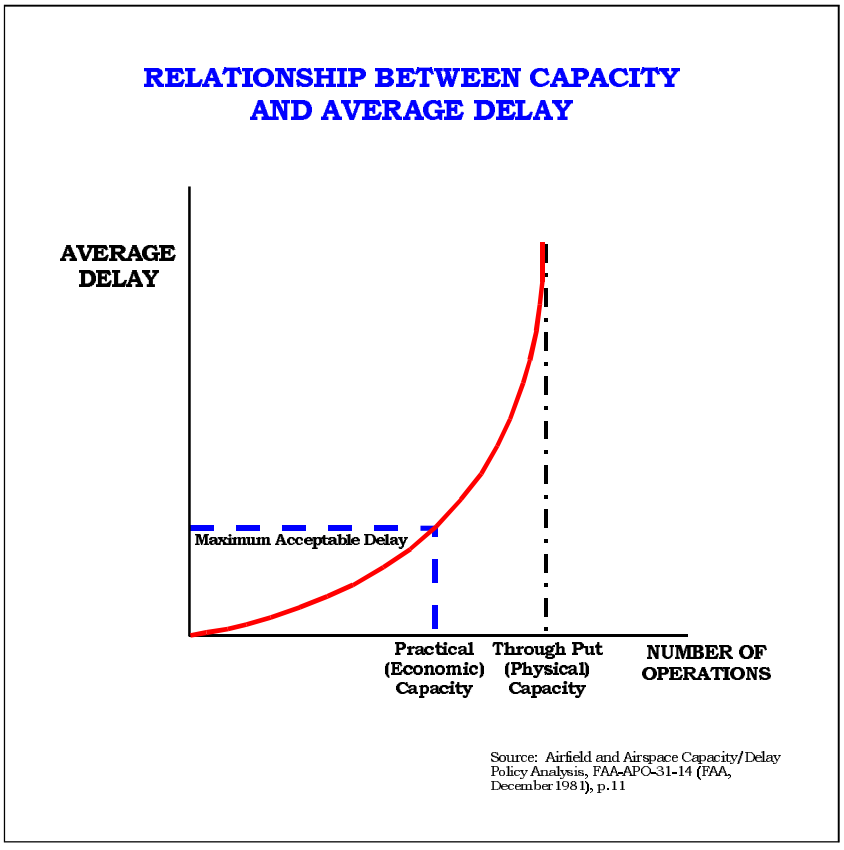

Figure 1

This relationship holds true whatever the input data as to the level of demand or whatever the capacity of the airport under study. Once the demand reaches a point approaching the physical capacity of the airport the delay levels for all traffic at the airport rise geometrically. The acceptable or "practical capacity" of the airport is that level where delays are acceptable. To push more traffic beyond that point is a certain invitation to massive delays, major cancellations, and gridlock.

29 City of Chicago Preliminary Airline Planning Criteria (O'Hare Master Plan Update) January 1993 (emphasis added).

At one point FAA defined the acceptable level for practical capacity of an airport as four minutes average annual delay. That translated into about a 30-minute delay in peak periods. Now FAA, IDOT and Chicago defined the acceptable level of delay to define practical capacity as 10 minutes average annual delay. This translates (in equivalent terms) into more than an hour delay in peak periods.

What is important to emphasize is that all FAA and Chicago – and most likely Booz-Allen and United and American – runs of the SIMMOD model for O'Hare show average annual delay at O'Hare is currently in excess of 10 minutes average annual delay – already above acceptable capacity limits without adding more flights. FAA and Chicago and United and American all know that to push 400-500 new flights per day into O'Hare is going to lead to: 1) massive increases in delays and 2) widespread cancellations. FAA (USDOT) *A Study of the High Density Rule* illustrates the massive delay increase that adding just a few flights at O'Hare beyond the slot limits will do to all passengers at O'Hare. This analysis shows that adding 400-500 flights per day will lead to disastrous delays for all passengers – more than doubling the delays for all passengers, not just those who are on the new additional flights.

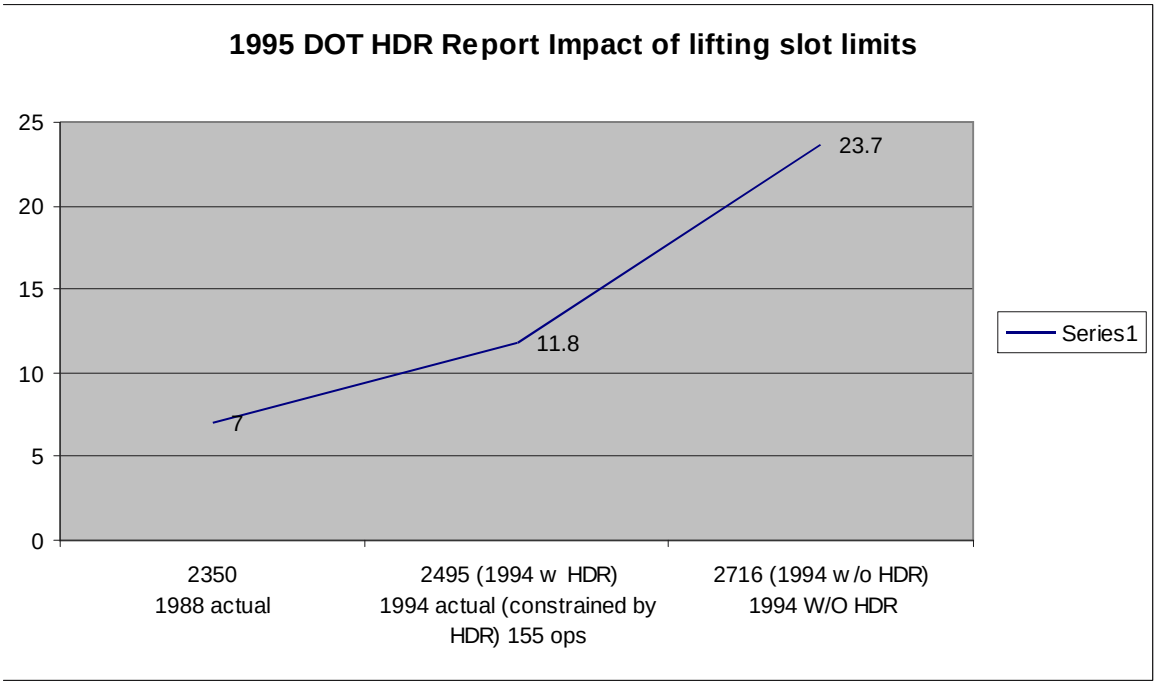

Figure 2

We anticipate that FAA and United and American will claim that the delay and capacity results of DOT in 1995 have been changed because of capacity improvements at O'Hare in intervening years. But if so, a few questions need answering. What are the capacity improvements since 1995? How much new capacity has been provided? What will be the capacity/delay numbers (comparable to DOT's 1995 analysis) with the new capacity? Why were there no public hearings and environmental disclosure on these capacity improvements?

We suspect the answer is that there have not been any capacity changes at O'Hare since 1995 and DOT's numbers remain valid. Conversely, if there have been capacity changes, FAA has failed to inform both affected elected officials (*e.g.,* Congressman Hyde and Senator Fitzgerald) and they have failed to tell the public and give the public an opportunity to be heard.

There is another important point to emphasize about this throughput/delay relationship shown on the FAA charts. Where the airport is at the limits of acceptable delays – *i.e.,* the practical capacity limit – very small shifts in either traffic demand or capacity can dramatically increase delays for all passengers. Thus a small increase in traffic demand beyond the practical capacity limit will generate huge increases in delays for all passengers. Similarly, a slight decrease in capacity – such as experienced this past year when regional jet pilots were refusing Land-And-Hold-Short for safety reasons – can dramatically increase delays with little or no increase in throughput. The point here is that O'Hare is already at the breaking point – brought there by the resistance of Chicago and the Fortress Hub airlines at O'Hare (United and American) to the building of a new regional airport. O'Hare cannot handle 400-500 new flights per day and United and American know it. Their own SIMMOD analysis tells them that.

Why then do United and American announce a literally foolhardy plan to jam 400-500 flights into O'Hare – an announcement made the same day that United's and American's front organization (the Civic Committee) calls for a new runway at O'Hare? By deliberately creating chaos at O'Hare, United and American will then be able to say that delays are at crisis levels and we must immediately build a new runway at O'Hare.

B. The "Point-To-Point" Shell Game: Building the South Suburban Airport as a "Point-To-Point" Airport Will Not Break the Hub-And-Spoke Monopoly of Fortress O'Hare.

The heart of the monopoly overcharges to travelers in the Chicago market is the absence of competition in the hub-and-spoke market in Chicago. None of the other Big Seven will come into the Chicago market to establish a competitive hub-and-spoke operation.

United and American propose using close to 10 billion dollars (much of it in federal funds) to expand United and American's hub-and-spoke empire at Fortress O'Hare. In an attempt to expand their monopoly and prevent new competition from entering the Chicago market, United and American (along with the "Civic Committee" and the Chicagoland Chamber[30]) have sought to distract attention by suggesting a south suburban airport in Chicago as a "point-to-point" airport – not unlike Midway. United and American argues that O'Hare should be the only "hub-and-spoke" airport in metropolitan Chicago.[31]

30 Both of these organizations are captive front organizations for United and American. Despite the huge monopoly overcharges to Chicago area business by the Fortress O'Hare monopoly, these "business" organizations either ignore the monopoly problem altogether or advocate expanding United's and American's monopoly.

By shaping the argument in this fashion, United and American guarantee that they will be allowed to continue and dramatically expand their Fortress Hub monopoly at O'Hare. According to their arguments, the lion's share of all the origin-destination traffic in the region – and all of the connecting and international traffic – should go to the sole hub-and-spoke airport in the region: O'Hare. Any minor overflow of "point-to-point" origin-destination traffic that Midway could not handle could be addressed in a small "point-to-point" airport like the South Suburban Airport or Gary.

What United and American gloss over is the fact that there is plenty of competition in the Chicago market in point-to-point service. The real lack of competition in the Chicago market is in the lack of additional hub-and-spoke competition to challenge the hub-and-spoke duopoly of United and American at Fortress O'Hare. It is this market dominance of the hub-and-spoke market – not the point-to-point – where lack of competition gouges the business traveler and the traveler from "spoke" cities. There is a desperate need for new competitive hub-and-spoke service in the Chicago market and the place to put that hub-and-spoke is the new South Suburban Airport.

No federal administration officials appear to be examining whether spending 10 billion dollars (much of it from federal taxpayers) at O'Hare makes economic sense when much more new capacity to support competitive hub-and-spoke operations can be constructed at a new metropolitan airport for less than half the cost. Nor are federal officials examining whether the use of billions of dollars of federal taxpayer funds to expand United and American's hub-and-spoke duopoly at Fortress O'Hare – essentially using billions of dollars of federal taxpayer funds to subsidize expansion of monopoly power – is proper use of federal funds.

C. A New Runway at O'Hare is Intended to Increase Capacity to Expand United and American's Monopoly Power.

As discussed above, the airlines' current public relations argument is that the lion's share of all the origin-destination traffic in the region (and all of the connecting and international traffic) should go to the sole hub-and-spoke airport in the region (O'Hare). Any minor overflow of point-to-point origin-destination traffic that a dramatically expanded O'Hare and Midway could not handle (if any) could be addressed in a small point-to-point airport like the South Suburban Airport or Gary.

Paralleling this argument is the claim by the airlines allies that a new runway at O'Hare is needed to "reduce delays". They claim that a new runway would not increase O'Hare capacity but simply reduce delays.

31 Under the scenario painted by United, American, and Chicago, O'Hare would be "reconfigured" with "quad" runways. The total cost of the expansion proposed by the airlines at O'Hare – approximately 10 billion dollars (3.7 billion dollars for the so-called World Gateway segment of the Integrated Airport Plan; 2.2 billion dollars for the related Capital Improvement Program and between 3 and 5 billion dollars for two new east-west runways.)

Yet an analysis using FAA's own capacity analysis standards and criteria demonstrates that a new runway at O'Hare would substantially increase the capacity of the airport. As discussed above, the concepts of capacity and delay are closely interrelated. The FAA and Chicago both define capacity as that level of aircraft operations that can be processed at an airport at an acceptable level of delay.

The FAA's published graphic (see Figure 1 above and Figure 3 below) showing the relationship of capacity and delay illustrates a how a so-called "delay reduction" at one level of traffic results in an increase in capacity at the airport to accommodate additional levels of traffic.

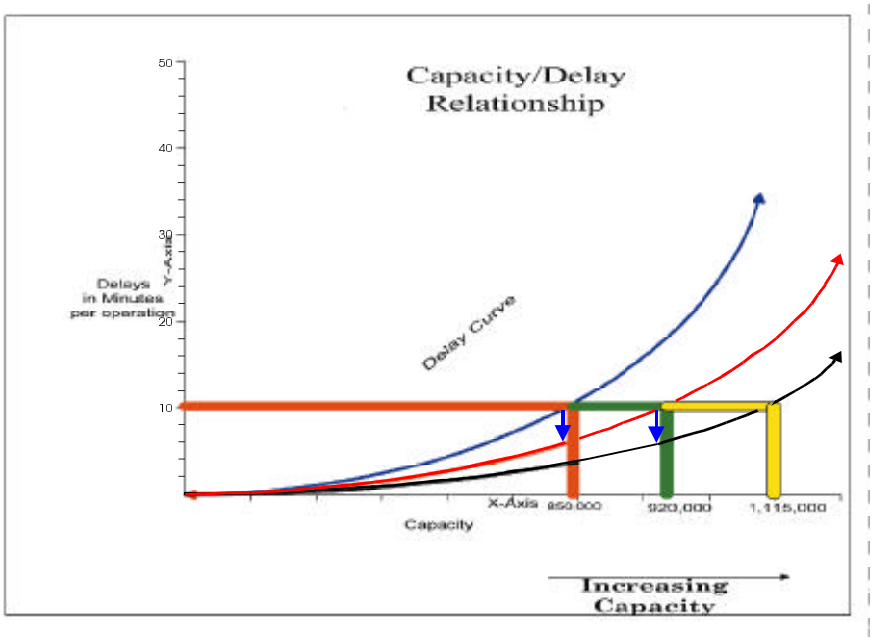

Figure 3

This capacity increase at O'Hare – by building a runway to "reduce delay" – would dramatically expand American's and United's hub-and-spoke monopoly at Fortress O'Hare. Further, it would virtually doom the economic justification for the new south suburban airport because the new "delay" runway – once built – could easily be used to carry the new additional traffic for which the new airport was intended. Simply by piecemealing incremental expansion at O'Hare, Chicago and American and United can keep the region under the thumb of the Fortress O'Hare monopoly.

14. United's and American's Fight to Preserve and Expand Fortress Hub Monopoly Power at O'Hare has Grave Social, Economic, Public Health, and Quality of Life Consequences for the Region.

In their passion to expand Fortress O'Hare and defeat the prospect of new hub-and-spoke competition coming into a new airport, United and American have disregarded safety, public health, and quality of life for the communities around O'Hare. All parties are in

agreement that growth in air traffic should be accommodated with major increases in new airport capacity in the metropolitan Chicago region.

The choices are stark: 1) a new regional airport which will have an environmental land buffer three times the size of O'Hare and plenty of capacity to accommodate new hub-and-spoke competition or 2) an overstuffed O'Hare with no land buffer and continued dominance of the metropolitan hub-and-spoke market by United and American. But for the addiction to monopoly revenues at Fortress O'Hare, the decision is simple – send the traffic growth to a new environmentally sound, competitively open new regional airport.

Instead we have United and American and their political surrogates urging more air pollution, more noise, and more safety hazards be imposed on O'Hare area communities – simply to protect and expand the Fortress O'Hare monopoly. We now live in a bizarre world where the desire to protect and expand violations of antitrust law and illegal overcharges trumps protection of public health, safety and quality of life.

The consequences of these abuses of monopoly power for the metro Chicago region are stark and severe:

- O'Hare area communities will be subjected to more noise, more air pollution, and more safety hazards because – under the United, American, and Chicago proposal – all the international, all the transfer traffic, and the lion's share of the origin-destination traffic are jammed into an already overstuffed O'Hare. Any new airport – even if built – will simply receive the origin-destination overflow (if any) from a vastly expanded O'Hare and Midway.

- South Chicago and south suburban communities will continue to suffer serious economic decline because the South Suburban Airport – which should have been built years ago – lies hostage to the unholy alliance struck between the monopoly interest of United and American and the political pique of Chicago's mayor. Residents of South and South Suburban Chicago legitimately ask why United and American oppose the hundreds of thousands of jobs and billions in economic benefits that would accrue to this area if the new airport is built. Some attribute United and American's position to racial intent. More accurately, United and American are willing to ignore the severe economic harm their monopolistic position inflicts on an area with a significant African-American population if that harm is a necessary consequence of preserving and expanding their monopoly at Fortress O'Hare. In a world of pure economic rationality, monopoly power and the social and economic injustices incident to that monopoly power might be excused as central to the maximization of profit. However, in a world of law and justice – where political leaders must account for their failure to correct these abuses – such destructive monopoly power should not be tolerated.

RECOMMENDATIONS

Based on the facts and the antitrust law analysis contained in this report, the Suburban O'Hare Commission recommends the following actions:

- The United States Attorney General and the United States Attorney for the Northern District of Illinois should initiate an investigation into the collective refusal of the Big Seven airlines to compete against each other in each other's Fortress Hub Markets. Included in the investigation should be an examination of the role of third party collaborators in the antitrust violations – including the City of Chicago and other private organizations and individuals who have assisted the Big Seven (including United and American) in perpetrating these violations. Because of the involvement by federal officials in affirmatively assisting the Big Seven and the City of Chicago in keeping significant competition out of Chicago, the Attorney General should be asked to consider the appointment of independent counsel.

- The United States Attorney General and the United States Attorney should bring a civil action in federal court to enjoin and break up the illegal Fortress Hub geographic market allocation by the Big Seven and prohibit the collective refusal by the Big Seven to compete in each other's Fortress Hub markets. Included in the relief should be a requirement that members of the Big Seven halt their collective refusal to use a new South Suburban Airport in metropolitan Chicago and a requirement that competitive hub-and-spoke operations be established in metro Chicago to compete with United and American.

- The State Attorneys General should initiate civil damage actions to recover treble damages for the billions of dollars per year in excess monopoly profits in airfare overcharges that have been charged at the Big Seven's Fortress Hubs. The Illinois Attorney General should bring suit to recover treble damages for the hundreds of millions of dollars in monopoly overcharges by American and United at Fortress O'Hare. On a multiple year basis in Illinois alone, the treble damages recoverable for consumers would exceed several billion dollars.

- The GAO and the Department of Justice should undertake an immediate and detailed audit of all federal funds that may have been used to further the refusal of the other members of the Big Seven to compete with United and American in metropolitan Chicago – particularly the campaign by the airlines and Chicago to "Kill Peotone".

- The United States Department of Transportation should withhold any further approvals of federal funds for expansion of the United and American duopoly at Fortress O'Hare.

- The House and Senate Judiciary Committees should conduct immediate hearings on these issues.

- Our Governor and our two United States Senators, the Speaker of the House, and our Illinois Attorney General should be respectfully asked what specific actions they will take to 1) break up the Fortress Hub system – particularly Fortress O'Hare; 2) bring new hub-and-spoke competitors into the Chicago market; 3) recover the billions in excess monopoly profits from the Fortress O'Hare overcharges; 4) prevent the Big Seven from continuing to refuse to use the new capacity provided by the South Suburban Airport; and 5) assemble the federal and state resources needed to rapidly build the South Suburban Airport.

- Our Governor should hold fast to his promise not to permit any additional runways at O'Hare. To do otherwise would simply enhance and expand the monopoly power of Fortress O'Hare and doom the opportunity to bring in new competition into the region at the South Suburban Airport.

- The two candidates for President of the United States – both of whom have likely received large campaign contributions from the Big Seven – should be respectfully asked what they will do to break up the Fortress Hub system nationally and Fortress O'Hare in particular. Vice President Gore in particular should be asked why his administration has for the past eight years looked the other way while the Big Seven has used violations of the nation's antitrust laws to literally steal billions of dollars from American consumers. Mr. Gore should also be asked to explain why his administration has blocked development of new competitive capacity in metro Chicago – i.e. a new South Suburban Airport – at every turn. Finally, Mr. Bush should be asked specifically what he will do to build the South Suburban Airport.

CONCLUSION

The monopoly abuses of the Fortress Hub system – and especially the abuses of Fortress O'Hare and the refusal of the Big Seven to compete in metropolitan Chicago – are a national disgrace. It's time to end it.