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September 13, 2006

The Honorable Arlen Specter, Chairman  
Committee on the Judiciary  
United States Senate  
711 Hart Building  
Washington, DC 20510

The Honorable Patrick J. Leahy,  
Ranking Member  
Committee on the Judiciary  
United States Senate  
433 Russell Senate Office Bldg.  
Washington, DC 20510

The Honorable F. James Sensenbrenner, Jr., Chairman  
Committee on the Judiciary  
United States House of Representatives  
2449 Rayburn House Office Building  
Washington, DC 20515

The Honorable John Conyers, Jr, Ranking Member  
Committee on the Judiciary  
United States House of Representatives  
2426 Rayburn House Office Building  
Washington, DC 20515

Dear Honorable Sirs:

I am writing in response to a letter issued to your respective offices dated September 8, 2006. The letter (hereafter D/FW response letter)<sup>1</sup>, signed by well-respected attorneys in

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<sup>1</sup> According to the Dallas Morning News, the law firm of Hogan & Hartson represents D/FW while Vinson & Elkins represents the City of Dallas and Southwest Airlines. See Sudeep Reddy and Robert Dodge, *Texans Working Overtime on Wright*, available at <http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/091306dnbuswright.273d53b.html>. See also Maria Recio, *Panel Plans Wright Vote*, available at

the law offices of Hogan & Hartson, LLP and Vinson & Elkins, LLP, attempts to address issues that were raised in a letter submitted by myself and other antitrust law professors to you on August 29, 2006 (“Antitrust Professors’ letter). Unfortunately, the DFW response letter fails to address few if any of our substantive issues.

With respect to the competition issues, the D/FW response letter is mistaken in its characterization of our positions in the Antitrust Professors’ letter. First, the D/FW response letter states that through-ticketing will create a “Southwest effect” in Love Field. The Antitrust Professors’ letter stated clearly that the “only procompetitive benefits stem from the relaxation of through-ticketing restrictions in the short run and the complete elimination of the Wright Amendment in the long term.” In short, we already acknowledged that fact, although one question that ought to be raised is whether there are less restrictive alternatives to achieve the benefits of through-ticketing as well as other potential benefits. For example, the competitive benefits of through-ticketing will likely be reduced given the reduction in gates that will limit the expansion capability of Southwest at Love Field. In other words, the disciplinary effect of the “Southwest effect” will be hampered to some degree. Thus, one less restrictive alternative would be to eliminate the gate restriction provision in the proposed legislation. The D/FW response letter does not address this issue.

Moreover, the extent of the “Southwest effect” could depend crucially on whether new entrants can initiate service at Love Field. As discussed in the Antitrust Professors’ letter, “such additional service, likely provided by a low cost carrier (LCC), would potentially have the effect of reducing fares while expanding service options for passengers flying to and from the DFW metropolitan area.”<sup>2</sup> Indeed, Pinnacle Airlines found the status quo sufficiently attractive to start entering before the Compromise was made public.

Second, the D/FW response letter mentions that the Antitrust Professors’ letter is “simply wrong” about the ability of the incumbent carriers at Love Field to blockade entry. Clearly, the agreement essentially provides for the restriction of entry before the termination of the Wright Amendment. Post-Wright, the restrictions as to gates and the like do not go away. Moreover, insofar as the proposed legislation confers power upon the parties to implement the legislation, there is likely an issue of implied immunity. This latter issue is also addressed in detail in the Antitrust Professors’ letter.

The Antitrust Professors’ letter also mentioned that competition in the offering of air passenger service on a particular route has some degree of time-sensitivity. For example, suppose Southwest offers flights on a particular route at 9 a.m., 1 p.m., and 4 p.m.

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<http://www.dfw.com/mlf/dfw/business/15507201.htm>. (“A day before the letter was sent, Hogan & Hartson got a 10 percent, or \$2,000 per month, boost in pay and half-year extension from D/FW.”) If true, this information was not disclosed in the letter. In fairness, I disclose that I do not represent anyone in the matter of the Wright Amendment repeal and the Love Field Agreement. I am thus speaking solely on my own behalf as a scholar of antitrust law & economics and airline deregulation.

<sup>2</sup> A memo from the DOJ on the Love Field agreement accurately makes this claim. See also Entry and Competition in the U.S. Airline Industry: Issues and Opportunities, Transportation Research Board, Special Report 255, (1999), p. 52.

Suppose further that these are the optimal times for business travelers. Southwest's use of gates at these optimal times may preclude competitors from offering services at those times regardless of the Love Field Master plan. Nothing in the Master Plan appears to address that issue. Additionally, the D/FW response letter suggests DFW is a substitute airport to Love Field in terms of potential entry. This is also an issue we addressed in our letter where we note that Love Field's location perhaps makes it a superior choice to business travelers located in Dallas.

Third, the D/FW response letter's characterization of the *Noerr-Pennington* doctrine is not compelling.<sup>3</sup> While I do not wish to delve into a determination of whether the negotiation of the agreement is exempt from antitrust scrutiny under *Noerr*, I do wish to note that the *Noerr* exemption would depend largely upon how the agreement is characterized. If the agreement goes beyond the petitioning of Congress, *Noerr* may not apply.

The D/FW response letter also mentions state action doctrine as an exemption implicated by the proposed legislation.<sup>4</sup> I am skeptical as to the application of that doctrine to federal law given that state action doctrine is a principle of federalism. I am, of course, cognizant of the implied immunity and primary jurisdiction issues inherent in the promulgation of federal legislation. In fact, the Antitrust Professors' letter raises these issues in great detail with respect to the Love Field agreement.

Apart from the D/FW response letter's challenge to our antitrust analysis, I wish to emphasize other components of the D/FW response letter that are troubling. First, the D/FW response letter acknowledges that outright repeal of the Wright Amendment could confer competitive benefits. However, the D/FW response letter notes that one must consider the environmental effects of the agreement, and other costs and benefits that are unrelated to competition.

In part, I agree with this approach, as I am on record as noting that Congress should weigh the costs and benefits of any proposed legislation.<sup>5</sup> However, the weighing of costs and benefits is not done in a vacuum. Instead, less restrictive alternatives should be considered. In other words, if it is possible to achieve the same positive effects with fewer costs, then this less restrictive alternative might be a better solution than the one originally proposed.

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<sup>3</sup> See *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961). *Noerr* held that the exercising of the right of association for the political purpose of influencing legislation is immune from Sherman Act challenge. However, "[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." 365 U.S. at 144.

<sup>4</sup> See *Parker v. Brown*, 317 U.S. 341 (1943); see also *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 632-633 (1992) (Noting that in *Parker*, the Supreme Court "announced the doctrine that federal antitrust laws are subject to supersession by state regulatory programs. Our decision was grounded in principles of federalism.")

<sup>5</sup> See Darren Bush, Gregory K. Leonard, and Stephen Ross, *A Framework for Policymakers to Analyze Proposed and Existing Antitrust Immunities and Exemptions: Report Prepared by Consultants to the Antitrust Modernization Commission*, available at [http://www.amc.gov/commission\\_hearings/pdf/IE\\_Framework\\_Overview\\_Report.pdf](http://www.amc.gov/commission_hearings/pdf/IE_Framework_Overview_Report.pdf).

For example, one of the arguments weighing in favor of the destruction of gates and restriction of competition at Love Field relates to noise pollution. Certainly, having fewer flights and fewer gates at Love Field will reduce noise, post termination of the Wright Amendment. However, there are less restrictive alternatives to this approach. There are a variety of measures that could mitigate noise pollution associated with airport growth, such as noise limitations, restrictions on plane size, or the imposition of fines and fees. Noise pollution is also a function of the type of aircraft flying into Love Field. The newer, quieter passenger jets that would be utilized in an expanded Southwest presence and by new entrants create less noise and pollution than most of the cargo jets (typically older aircraft like DC-10s) that currently utilize Love Field.<sup>6</sup>

Second, the agreement is portrayed as a compromise between warring factions. That may be the case, but other stakeholders are implicated here who are not part of this agreement, have had no say in this agreement, and who are injured by this agreement. Specifically, this agreement implicates competition beyond the reaches of the state of Texas. As the Antitrust Professors' letter stated, "Any passenger seeking to fly to the DFW area or through the DFW area from a city outside the Wright Amendment territory is affected by the Wright Amendment restriction." In short, this is an issue of interstate commerce, with effects outside the state of Texas. It is not just a local issue between two airlines and two cities.

The debate fostered by the Antitrust Professors' letter and the D/FW response letter suggests need for Congress to approach the proposed legislation restricting competition at Love Field with care. The D/FW response letter fails to address any of the concerns raised in our initial letter. Thus, I can only conclude my letter as I did the previous one: Namely, the "proposed agreement and legislation confers few, if any benefits to consumers, while producing significant anticompetitive effects. In particular, the agreement as structured would nullify any procompetitive effect arising from the elimination of the Wright Amendment. In particular, it would likely cause a reduction in service, an increase in fares, and the eradication of any potential competition in the provision of air passenger service to and from the DFW metropolitan area. It should, therefore, not be blessed with any sort of antitrust immunity, express or implied. Instead, the least restrictive alternative (and the one conferring the most consumer benefit) is the eradication of the Wright Amendment without the underlying proposed agreement."

Very truly yours,



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<sup>6</sup> See Eric Torbenson and Suzanne Marta, *Who's Making Noise at Love?*, available at <http://www.dallasnews.com/sharedcontent/dws/bus/wright/stories/050306dnbusnoise.2c41a23.html>.