AGL ND D Minot AFB, ND [Revised]

Minot AFB, ND
(lat. 48°24′56″N, long. 101°21′28″W)
Deering TACAN
(lat. 48°24′54″N, long. 101°21′54″W)

That airspace extending upward from the surface to and including 4,200 feet MSL within a 4.5-mile radius of Minot AFB, and within 2.2 miles each side of the Deering TACAN 113° radial extending from the 4.5-mile radius to 6.1 miles southeast of the TACAN, and within 2.2 miles each side of the Deering TACAN 303° radial, extending from the 4.5-mile radius to 6.1 miles northwest of the TACAN. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective dates and times will thereafter be continuously published in the Airport/Facility Directory.

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Issued in Des Plaines Illinois on October 14, 1997.

Maureen Woods,

Manager, Air Traffic Division.

[FR Doc. 97–29195 Filed 11–4–97; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Part 255

[Docket OST–96–1145 [49812]]

RIN 2105–AC35

Computer Reservations System (CRS) Regulations

AGENCY: Office of the Secretary (DOT).

ACTION: Final rule.

SUMMARY: The Department is adopting a rule that will prohibit each computer reservations system (CRS) from adopting or enforcing contract clauses that bar a carrier from choosing a level of participation in that system that would be lower than the carrier's level of participation in any other system, if neither the carrier nor any affiliate of the carrier owns or markets a CRS. The Department believes that this rule is necessary to promote competition in the CRS and airline industries, since the contract clauses at issue unreasonably limit the ability of airlines without CRS interests to choose how to distribute their services through travel agencies. This rule will allow a CRS to enforce such a contract clause against an airline that owns or markets a competing CRS or that has an affiliate that owns or markets a CRS. The Department is acting on a rulemaking petition filed by Alaska Airlines.

DATES: This rule is effective December 5, 1997.

FOR FURTHER INFORMATION CONTACT: Thomas Ray, Office of the General Counsel, 400 Seventh St. SW., Washington, DC 20590, (202) 366–4731.

SUPPLEMENTARY INFORMATION:

Introduction

Almost all airlines in the United States depend heavily on travel agencies for the distribution of their services, and travel agencies in turn rely heavily on computer reservations systems (CRSs) in responding to their customers' requests for information on airline services and for booking seats. The large majority of travel agencies use only one CRS (the agencies using a system are called ''subscribers''). As a result, virtually every airline must make its services available through each of the four CRSs operating in the United States in order to distribute its services through the travel agencies using each system (the airlines that make their services available through a system are called ''participating airlines''). Because each airline must participate in each system, the systems do not compete with each other for airline participants and have long been able to dictate the terms for participation (in contrast, the systems compete for travel agency users). Each of the systems is controlled by one or more airlines or airline affiliates, which can use their market power over airline participants to distort airline competition. We therefore have rules regulating CRS operations. 14 CFR Part 255, adopted by 57 FR 43780, September 22, 1992, after publication of a notice of proposed rulemaking, 56 FR 12586, March 26, 1991.

Alaska Airlines asked us to amend those rules by adding a prohibition of parity clauses—contract terms imposed by three of the four CRSs operating in the United States that require a participating airline to purchase at least as high a level of service from it as the airline does from any other system. We issued a notice of proposed rulemaking that tentatively determined to adopt such a rule. 61 FR 42197, August 14, 1996. Our proposed rule stated: ''No system may require a carrier to maintain any particular level of participation in its system on the basis of participation levels selected by that carrier in any other system.'' We tentatively determined that the proposed rule would make airline operations more efficient and promote competition in the CRS and airline industries.

However, airlines that own or market a CRS (or have an affiliate that does so) may limit their participation in a competing system in order to frustrate that system's ability to obtain travel agency subscribers. Our notice therefore asked whether we should allow a system to enforce a parity clause against an airline that owned or marketed a competing system.

After considering the comments and reply comments, we have determined to prohibit parity clauses, subject to an exception allowing a system to impose such a clause on an airline that owns or markets a competing system (this reference to airlines that own or market a system, and other such references in this document, include airlines with affiliates that own or market a system). Since the parity clauses are currently injuring some carriers, we are making a final decision now on Alaska's rulemaking petition rather than waiting for the completion of other pending CRS proceedings.

As explained in more detail below, parity clauses cause airlines either to buy more CRS services than they wish to buy from some systems or to stop buying services from other systems that they would like to buy, which creates economic inefficiencies and injures airline competition. In addition, the clauses eliminate competition between the systems for higher levels of participation. Without the clauses, such competition would exist, since the airlines' need to participate in systems does not compel them to buy the higher levels of service from each system. For these reasons the Department of Justice, several smaller airlines, and the CRS that does not use a parity clause, Galileo, support our proposal.

We have considered the arguments made by the parties opposing the proposal, but we have determined that the rule would benefit competition and airline efficiency. None of the opponents denies that the parity clauses compel airlines to buy services that they do not want and that the clauses provide no significant benefit to airlines. We also conclude that our rule will not adversely affect travel agencies. Each airline's interest in facilitating travel agency sales of its services should ensure that no important airline will reduce its participation in any system by enough to seriously interfere with the efficiency of travel agency operations.

By adopting this rule we are following our long-standing policy of promoting the ability of airlines to choose how they will distribute information on their services and enable travel agencies to carry out booking and ticketing transactions through electronic means. Parity clauses unreasonably interfere with the ability of individual airlines without CRS ties to choose the level of CRS service they will buy and to choose how best to communicate with travel

agencies in distributing their services, and this harm is not offset by any competitive benefits. Our prohibition of airline parity clauses, moreover, is consistent with our existing rule prohibiting the use of parity clauses in travel agency CRS contracts, 14 CFR 255.8(b). We prohibited parity clauses in travel agency contracts in order to eliminate unreasonable restrictions on the travel agencies' ability to change systems and use more than one system.

We have concluded, however, that entirely banning the use of parity clauses would be unreasonable, since an airline that owns or markets a CRS may limit its participation in other systems in order to compel travel agencies in areas where it is the dominant airline to subscribe to its own system. The apparent use of such tactics by some U.S. airlines caused us to adopt a rule requiring significant owners of a CRS to participate at equivalent levels in competing systems, 14 CFR 255.7 (''the mandatory participation rule''), and some foreign airlines have apparently reduced their participation in a U.S. system in order to frustrate that system's marketing efforts in the foreign carriers' homelands. Our rule will therefore allow systems to enforce parity clauses against airlines that own or market a competing system.

Finally, several parties have proposed other changes in our mandatory participation rule and other CRS rules. We will consider their proposals in our next major CRS rulemaking, not here.

Background

The Systems' Role in Airline Distribution

As we explained in the notice of proposed rulemaking, each CRS is able to dictate its terms for airline participation because virtually all airlines must participate in each system due to the role of travel agencies in airline distribution and the agencies' reliance on CRSs. 61 FR at 42198. Almost all airlines depend heavily on travel agencies for the sale of their services, and travel agencies sell about seventy percent of all airline tickets. Travel agents primarily rely upon CRSs to determine what airline services and fares are available, to book seats, and to issue tickets for their customers. Travel agents use CRSs for these tasks because the systems are the most efficient method of carrying out these tasks. *Ibid.*

Travel agencies typically use only one CRS for obtaining airline information and making bookings. As a result, an airline that wants its services sold by a travel agency must make its services available for sale in the CRS used by that agency. If the airline does not participate in that system, that system's subscribers are likely to make significantly fewer bookings on the airline, which will substantially undermine the airline's ability to compete with other airlines that do participate in the system. Given the importance of marginal revenues in the airline industry, an airline's loss of a few passengers on each flight will substantially reduce, and perhaps eliminate, the airline's ability to operate profitably. 61 FR at 42198.

Because most airlines are therefore compelled to participate in each system, the systems do not compete for airline participation and their prices and terms for participation are not disciplined by market forces. 61 FR at 42198. In contrast, the systems do compete for travel agency subscribers, and travel agencies do not pay supracompetitive prices for CRS services (indeed many agencies receive CRS services and equipment for free). Saber Reply at 1, n. 1; Justice Dept. Comments at 5.

Some airlines, particularly Southwest, compete successfully without participating in all of the systems. Southwest, for example, participates only in Saber. As explained below, most airlines could not duplicate Southwest's ability to avoid full CARS participation, so Southwest's experience does not invalidate our finding that each system has market power over almost all airlines. *See* 61 FR at 42198. We note, moreover, that some airlines like Western Pacific and ValuJet have recently decided to participate in CRSs.

The Systems' Different Participation Levels and the Parity Clauses

Each system offers several levels of participation in its system and various enhancements to the different levels of participation. When an airline uses a higher level of service, it must pay higher fees. When an airline participates at the ''full availability'' level in a system, the travel agents subscribing to that system can obtain a display of the airline's schedules and fares, learn whether seats are available, book a seat, and issue a ticket. However, if the airline participates at a higher level, the travel agent can obtain realtime availability information and make a booking in the airline's internal reservations system. If the airline chooses to purchase the enhancements offered by a system, travel agents can also issue boarding passes and select specific seats on the basis of seat maps. Southwest, on the other hand, uses a level of service offered by Saber called Basic Booking Request. Saber does not display Southwest's availability, so the travel agent must send Southwest an electronic message to find out whether seats are available. 61 FR at 42199.

While almost all airlines must participate in each system at the full availability level, participation at the higher levels does not appear to be essential for many airlines. Moreover, higher-level participation increases an airline's CARS fees. Many airlines accordingly choose not to participate at higher levels, and, but for the parity clauses, many would consider participating at a higher level in some systems but not in other systems. The parity clauses, however, deny airlines the ability to participate at different levels in different systems. Three CRSs—Saber, Worldspan, and System One—impose parity clauses on their airline participants, while the fourth system—Galileo—does not. 61 FR at 42199.

The History of CARS Regulation

Each of the four systems is owned by or affiliated with one or more airlines. American Airlines' parent corporation, AMR, controls Saber, the largest system. United Air Lines, US Airways, several European airlines, and Air Canada own most of Galileo, the second-largest system, which is sold under the name Apollo in North America. Galileo and Saber also have public shareholders. Delta Air Lines, Northwest Airlines, Trans World Airlines, and Abacus, a partnership of several Asian airlines, own Worldspan. System One is owned by Amadeus, which is owned by Lufthansa, Air France, Iberia, and Continental Air Lines. 61 FR at 42198.

Each of the airlines that owns a system has the incentive to use its control of a system to prejudice the competitive position of other airlines. We therefore regulate CARS operations in order to protect competition in the airline industry and help ensure that consumers obtain accurate and complete information on airline services. 61 FR at 42198. Our current rules, adopted in 1992, modified the rules originally adopted by the Civil Aeronautics Board (''the Board''), the agency that had been responsible for the economic regulation of airlines. 49 FR 32540, August 15, 1984, *afield, United Air Lines,* 766 F.2d 1107 (7th Cir. 1985). Both we and the Board adopted the CARS rules under our authority to prevent unfair methods of competition and unfair and deceptive practices in the marketing of airline transportation. 49 U.S.C. 41712, formerly section 411 of the Federal Aviation Act, codified then as 49 U.S.C. 1381. 57 FR at 43789–43791. Since our rules by their terms will expire at the end of 1997, 14 CAR

255.12, we will begin a major reexamination of the rules in 1997.

Two features of our 1992 rulemaking are relevant here. First, we revised the rules to give airlines and travel agencies a greater ability to use alternative electronic methods for communicating information and conducting transactions. In particular, we stated that a system could not bar a travel agency from using CARS terminals to access other systems and databases with airline information, unless the system owned the terminals. We intended this rule to make possible direct links between the airlines' internal reservations systems and individual travel agencies. 57 FR at 43796–43800. We had hoped that this rule would avoid the need for more intrusive regulation. 57 FR at 43781. In addition, we prohibited several types of restrictive contract clauses imposed by systems on subscribers—minimum use clauses, roll-over clauses, and parity clauses—that unreasonably limited the travel agencies' ability to switch systems or use multiple systems. 57 FR at 43822–43826.

Secondly, we found that some U.S. airlines with an ownership interest in a CARS appeared to be limiting their participation in competing systems to prejudice competition in the CARS business. If an owner airline limited its participation in competing systems, travel agencies in areas where that airline was the major airline would be compelled to subscribe to its system in order to obtain the best information and transactional capabilities on the airline. 56 FR at 12608; 57 FR at 43800–43801. We therefore adopted the mandatory participation rule, which requires each airline deemed a ''system owner'' to participate in other systems at the same level in which it participates in its own system as long as the terms for such participation are commercially reasonable. 14 CFR 255.7. An airline is a system owner if it and its affiliates hold five percent or more of a system's equity interest. 14 CFR 255.3. Since we focused on the domestic CARS market in adopting the mandatory participation rule, we excluded carriers with a small CARS ownership interest from the rule's coverage, since those airlines appeared unlikely to have an incentive to distort CARS competition within the United States. 57 FR at 43795.

We have also addressed CARS issues in other contexts. First, we found in several proceedings under the International Air Transportation Fair Competitive Practices Act (''IATFCPA''), 49 U.S.C. 41310(c), that a foreign airline was apparently refusing to participate in a U.S. system at an adequate level (or at all) in order to give a marketing advantage to the system owned by that airline or an affiliate in the airline's homeland. *Complaint of American Airlines against British Airways,* Order 88–7–11 (July 8, 1988); *Complaint of United Air Lines* v. *Japan Air Lines,* Order 88–9–33 (September 15, 1988); *Complaint of American Airlines* v. *Iberia, Lineas Aereas de España,* Order 90–6–21 (June 8, 1990). We concluded in those orders that a foreign airline would be engaging in unreasonably discriminatory conduct if it refused to participate in a U.S. system in order to frustrate that system's ability to compete with the foreign airline's own system, since that would interfere with the right of U.S. airlines to a fair and equal opportunity to compete. *See also Complaint of American Airlines* v. *Iberia, Lineas Aereas de España et al.,* Order 93–2–37 (February 17, 1993).

In addition, we have completed two studies of the CARS business and its impact on airlines. *Airline Marketing Practices: Travel Agencies, Frequent-Flyer Programs, and Computer Reservation Systems,* prepared by the Secretary's Task Force on Competition in the Domestic Airline Industry (February 1990) (*Airline Marketing Practices*); and *Study of Airline Computer Reservation Systems* (May 1988). We are currently conducting another study, begun by Order 94–9–35 (September 26, 1994), which will provide information for our review of the CARS rules.

History of This Proceeding

As we explained in detail in the notice of proposed rulemaking, Alaska had been considering lowering its level of participation in Saber while maintaining a higher level of participation in other systems. When Saber learned of this, it told Alaska that any such action would violate the parity clause in Alaska's CARS contract with Saber. Saber also sued Alaska to enforce the parity clause. 61 FR at 42199–42200. After we issued our notice of proposed rulemaking, the court dismissed Saber's suit on the ground that Saber's claims, all based on state contract law, were preempted by federal law, particularly in light of our tentative decision that parity clauses should be prohibited as unfair methods of competition. *American Airlines* v. *Alaska Airlines,* N.D. Tex. Civ. No. 4–94CV–595–Y (September 18, 1996 memorandum opinion).

In addition to defending itself in the litigation, Alaska petitioned us for a rule prohibiting parity clauses. We published a notice inviting comments on Alaska's petition. 59 FR 63736, December 9, 1994. American, Worldspan, and System One filed comments opposing Alaska's petition, as did the two major travel agency trade associations, the American Society of Travel Agents (ASTA) and the Association of Retail Travel Agents (ARTA), and three travel agencies. Galileo International Partnership submitted comments supporting Alaska's petition.

While Alaska's rulemaking petition was pending, Saber told Alaska, Midwest Express, and a number of other airlines that they were participating in another system at a higher level than they were in Saber, that each of them was therefore violating the parity clause in its Saber contract, and that their continued participation in Saber required each of them to either upgrade its participation in Saber or downgrade its participation in the other systems. December 8, 1995, Letter of Scott Alvis, included as Attachment D to Alaska's Reply. At our request, Saber agreed to postpone enforcing this demand against Alaska and Midwest Express for a short time to give us an opportunity to rule on Alaska's petition. See 61 FR at 42201. We have not asked System One or Worldspan to suspend enforcement of their clauses, which to our knowledge have not recently generated as much controversy as Sabre's clause.

We then issued a notice proposing to adopt the rule sought by Alaska. 61 FR 42197, August 14, 1996. The basis for our proposal was our tentative finding that parity clauses unreasonably interfered with each airline's ability to choose the level of CRS services that it would buy and injured competition in both the CRS and airline industries. We recognized, however, that parity clauses could be a legitimate tool against discriminatory conduct by airlines that own or market a competing system. We therefore specifically requested comment on whether we should include an exception in the prohibition so that a system could enforce a parity clause against an airline that owned or marketed a competing CRS. 61 FR at 42197, 42198, 42206.

In proposing the ban on parity clauses, we summarized our reasoning as follows, 61 FR at 42198:

> [T]he vendor contract clauses at issue appear to us to be fundamentally inconsistent with our goals of eliminating unreasonably restrictive practices in the CRS business that limit competition. By denying each non-vendor airline an opportunity to change its level of participation in a system in response to the quality and price of the services offered by each vendor and the airline's own marketing and operating needs, the contract clauses unreasonably restrict competition in the CRS and airline businesses.

Thus, despite our reluctance to regulate CRS contracts, we proposed to ban parity clauses because they ''substantially—and unfairly—restrict a non-vendor airline's ability to choose the level at which it is willing to participate in a system.'' 61 FR at 42201.

We further noted that the parity clauses injured CRS competition: ''[A] system offering more attractive prices and services may obtain less business than it otherwise would, because some airlines will be unwilling to purchase a higher level of that system's services when doing so will force them to increase their purchases from other systems, even if the latter offer lower quality services or charge higher fees.'' 61 FR at 42202. Galileo in fact had alleged that four airlines had already lowered their participation level in Galileo due to Sabre's threat to enforce the parity clause and that Galileo expected more airlines would take such action. 61 FR at 42201.

Furthermore, the parity clauses could drive up a non-vendor airline's costs by forcing it to buy more services from some systems than it would otherwise purchase, without the offsetting benefit of precluding a CARS vendor from compromising CARS competition. Alaska and Midwest Express, for example, stated that Saber's demands that they upgrade their level of participation would increase their CARS costs by more than ten percent. 61 FR at 42201.

We tentatively determined that we could adopt the proposed rule under our power to prohibit unfair methods of competition in the airline industry, a power which authorizes us to prohibit conduct which violates the letter or the spirit of the antitrust laws. 61 FR at 42202. We based that determination on our finding that each CARS has market power over the airlines. Each system had market power because the economics of the airline and travel agency businesses forced airlines (with few exceptions) to participate in each system, no matter how onerous the terms of participation. Because the systems have market power, the parity clauses appeared to be analogous to conduct prohibited by the antitrust laws, such as tying arrangements. 61 FR at 42203.

While we concluded that parity clauses appeared to unreasonably restrict competition as to airlines that did not own or market a CARS, we recognized that an airline that owned or marketed a CARS could choose to lower its participation in competing systems in order to give its own system a competitive advantage. In the past several foreign airlines had lowered their participation in Saber or another U.S. system in order to cause travel agencies in the foreign airline's homeland to subscribe to its system. Saber represented that it had recently used the parity clause against some Latin American carriers in order to ensure that they participated in Saber at the same level that they participated in the CARS they were marketing. 61 FR at 42206. We therefore asked for comments on whether we should modify the proposed rule to prevent unfair competition by barring airline parity clauses except when enforced against a carrier owning or marketing another system. 61 FR at 42197, 42198, 42206.

The Comments and Reply Comments

The Department of Justice; Galileo; several smaller airlines—Alaska, America West, Midwest Express, and Reno; an association consisting of smaller airlines, the National Air Carrier Association; the American Automobile Association; and the European Civil Aviation Conference filed comments supporting the proposed rule. Saber, American, Worldspan, Delta, Northwest, TWA, Continental and System One, the American Society of Travel Agents (ASTA), the Association of Retail Travel Agents, and the United States Travel Agent Registry opposed the proposal. In addition, several hundred travel agencies filed letters opposing the prohibition against parity clauses (most of these letters, however, followed form letters prepared by Saber).

We will discuss the arguments made by the commenters in the following explanation of our decision to adopt a rule generally prohibiting parity clauses but allowing their enforcement against airlines that own or market a competing CARS.

Introduction to Our Decision

We have determined to adopt the proposed rule barring parity clauses, subject to an exception allowing a system to enforce such a clause against an airline that owns or markets a competing CARS. We agree with the Justice Department's findings that the clauses injure airline competition by making airline distribution less efficient and by eliminating the possibility of competition among the CRSs for higher-level participation by airline participants. We further find that, subject to the exception for airlines owning or marketing a competing system, prohibiting parity clauses will promote rather than injure CARS competition and will not significantly injure travel agencies. We are relying on the facts, undisputed by any party in this proceeding, that parity clauses force airlines to buy CARS services that they do not want, that airline participants in CRSs are compelled to accept parity clauses, and that airlines receive no benefit in return for the burdens imposed on them by the clauses.

The parties opposing our proposal base their position in large part on the claim that an airline choosing to buy more service from one system than from another is improperly ''discriminating'' against the latter system. This claim has no merit as to airlines that neither own nor market the favored system. If an airline without such CARS ties chooses to favor one system over another, the airline is only ''exercis[ing] the normal freedom of a purchaser in a competitive market to choose its suppliers and the quantity of goods or services that it will buy from each,'' as we stated in our notice of proposed rulemaking. 61 FR at 42204. In that case the airline has decided that the higher level of service offered by the favored system is more desirable in terms of price, quality, or value than the comparable services offered by other systems. If another system wants that airline to upgrade its participation level, it should do what firms in competitive industries do to win customers—lower its price or otherwise make its service more attractive.

Moreover, while Saber has legitimately complained about foreign airlines that discriminated against it in order to promote the system they own, Saber's position in this rulemaking—that any airline's participation in one system at a higher level than in other systems is unreasonable discrimination—is inconsistent with Saber's own conduct. Saber has established a marketing arrangement with Southwest Airlines, a major U.S. airline that has long refused to participate in any other system. Since Southwest does not participate at all in other systems, those systems' parity clauses cannot affect Southwest. Southwest's participation in Saber (and the airline's refusal to participate in any other system) surely handicaps the other systems' ability to market themselves in areas where Southwest is a major airline. Yet in response to the other systems' argument that we should expand the mandatory participation rule to cover airlines that market a CARS, not just airlines deemed ''system owners,'' Saber says, ''[If a carrier elects not to participate in a system at all, it should be allowed to act as it deems appropriate, including marketing another system.'' Saber Reply at 25.

In this proceeding we are not taking any steps to expand the coverage of the mandatory participation rule, as

explained below, or finding Southwest's conduct improper. Southwest, after all, refused to participate in the other systems long before it agreed to market Saber. However, in our view Saber has not reconciled its position that any airline's decision to participate at a lower level in one system rather than another is discrimination with its position that it is entirely proper for an airline marketing one system to refuse to participate at all in other systems.

Saber wrongly complains that the proposed rule amounts to ''micro management'' of the CARS business and is inconsistent with the Administration's goal of eliminating unnecessary regulation. Saber Comments at 2. Our rule is necessary—market forces do not significantly discipline the systems' treatment of participating airlines, and the systems have used their market power to impose contract terms that reduce competition in the CARS and airline industries and make airline distribution less efficient. This rule is consistent with other actions we have taken to restrict the business choices of CASS and their airline owners when doing so is necessary to keep them from using a dominant market position to frustrate competition. See, *e.g., Complaint of American Airlines* v. *Iberia, Lines Aereas de España,* Order 90–6–21 (June 8, 1990) at 9–10; *Complaint of United Air Lines* v. *Japan Air Lines,* Order 88–9–33 (September 15, 1988) at 11–12.

Before setting forth the basis for our rule in detail, we will explain why we are acting now rather than delaying our decision until the completion of other pending CRS matters.

The Need to Resolve the Parity Clause Issue

Given the harm caused by parity clauses, and the lack of any justification for their continuation as to airlines without CRS ties, our decision to adopt a final rule prohibiting the clauses now is clearly reasonable. Nonetheless, several of the opponents argue that we should delay a decision on the parity clause issue, either because the issue allegedly cannot be rationally resolved until the completion of our pending CRS study and our planned consideration of all CRS regulatory issues in our reexamination of the CRS rules, or because the rule proposed by us would have no significant practical consequences. We cannot agree that any delay is warranted.

First, all of the parties have had an ample opportunity to address the issues in this proceeding, both by filing comments on Alaska's petition and by filing comments and reply comments on our notice of proposed rulemaking. The record in this proceeding, coupled with our earlier analyses of CRS issues (which parties were free to dispute in their comments here), provides more than an adequate basis for resolving the issues in this rulemaking. Thus there is no need for us to delay our decision here until the completion of our pending CRS study.

Worldspan and others argue that the requests by several commenters for changes in other rules, primarily the mandatory participation rule, necessarily mean that this rulemaking should be postponed until we can consider all of the commenters' requests for rule changes. *See, e.g.,* Worldspan Reply at 2–3. Despite these arguments, we conclude that we can rationally and fairly decide the parity clause issue without deciding other issues or changing other CRS rules.

Several parties have urged us to reexamine the mandatory participation rule applicable to airlines with a significant CRS ownership interest, either by limiting the rule or by broadening its scope, and we recognize that the mandatory participation rule involves competitive and economic efficiency issues like those presented by the parity clause issue. Even so, the relationship between the two rules is not close enough to require them to be decided together. No one, for example, has claimed that our adoption of the proposed rule on parity clauses will make compliance with the mandatory participation rule more burdensome for the airlines subject to that rule.

We disagree with ASTA's position that it would be unfair to travel agencies for us to act on Alaska's petition without addressing the travel agencies' contention that their CRS contracts will not allow them to switch to a different system if the quality of a system's service declines during the contract term because some airlines reduce their participation levels in that system as a result of our rule. Assertedly the travel agencies entered into contracts with systems in the expectation that no airline participant could lower its level of participation in one system while maintaining a higher level in other systems. ASTA Comments at 2–3. However, travel agencies have never had any implied guarantee that a system will not become less useful during the term of the subscriber contract. For example, Galileo, Worldspan, and System One changed their rules on non-participant airlines with the result that their subscribers could no longer ticket Southwest through the CRS. That change immediately made those systems less attractive for agencies in areas where Southwest was an important airline. Similarly, after a travel agency chooses a system because its owner is the major airline in the agency's area, that airline may decide to drastically reduce its operations in the area. See, *e.g., Marketing Practices Report* at 24, n. 50. Moreover, travel agencies have more bargaining leverage with the systems than the airlines do. That travel agencies benefit from the systems' competition for their subscriptions is shown by the systems' reliance on the suppliers of travel services for almost all of their revenues; subscribers, in contrast, contribute only about ten percent of CRS revenues. Justice Dept. Comments at 2, 5.

Deferring this proceeding until the completion of the major rulemaking could also lead to a significant delay in remedying the competitive harm addressed by this rule. While the reexamination of all of the CRS rules is scheduled to be completed by the end of 1997, that will probably not happen. Our last major reexamination of the CRS rules took much longer than expected. We did not publish our revised rules until September 1992, almost two years after the original deadline of December 1990.

Furthermore, delaying the completion of this rulemaking would postpone the beginning of potential competition among the systems for airline purchasers of higher levels of CRS service. Equally importantly, it could create substantial risks for Alaska and Midwest Express, since Sabre has told them that it considered them in violation of the parity clause and that they would be excluded from Sabre if they did not upgrade their level of participation in Sabre (or reduce their level of participation in other systems). Sabre agreed not to enforce the parity clause against them only for a short period, not indefinitely. 61 FR at 42201; Alaska Reply at 5.

Sabre has argued that the parity clause issue is too insignificant to warrant prompt action. Sabre bases this argument in part on its contention that its clause only applies when the fees and quality of service offered by Sabre are comparable to those offered by the system in which the airline is participating at a higher level. Sabre Comments at 3–4. Sabre's contention, however, does not accurately characterize the contract clause, as explained below. But even if the characterization were accurate, the clause should still be prohibited due to the competitive harm it causes.

Sabre asserts that the parity clauses cannot have any significant impact, since the airlines operating the great

majority of domestic service are subject to the mandatory participation clause and since the amount of revenue obtained by Sabre as a result of the parity clause is so small that a prohibition of parity clauses would have no significant impact on U.S. airlines. Sabre Reply at 2–3. We disagree. Even though this rulemaking will not change the applicability of our mandatory participation rule to airlines with CRS ownership interests, Alaska and Midwest Express have estimated that Sabre's most recent threat to enforce the clause against them would have increased their CRS expenses by more than ten percent. 61 FR at 42201. Galileo has stated that at least four airlines reduced their participation levels in Galileo as a result of Saber's recent threats to enforce the parity clause and that other airlines are likely to do so if we do not issue a final rule in this proceeding. Galileo Comments at 2–3. And, as shown by the Justice Department's comments, the systems' recent enforcement of the parity clauses has thwarted efforts by Reno Air and at least one other airline to improve the efficiency of the distribution of their services. Justice Dept. Comments at 6–7, 8–9. While the increased CRS expenses imposed on an airline by the parity clause may be small, even small expenses are important because of the thin margins in the airline business. 57 FR at 43783. In addition, airlines like Alaska must lower their expenses since they increasingly face competition from Southwest and other low-fare carriers that have lower distribution costs. See 61 FR at 42199; United Comments at 6–7.

The Systems' Market Power

Airlines must accept parity clauses as part of the price for obtaining any services from three of the systems. The systems can compel airlines to accept the clauses because each system has market power over airline participants, as we have found in our past rulemakings and CRS studies. 56 FR at 12591–12600; 57 FR at 43783–43784; *Airline Marketing Practices* at 44, 76–77, 83–84, and 91–93. The Justice Department thus states, Justice Dept. Comments at 2–3 (footnote omitted):

> Each CRS provides access to a large, discrete group of travel agents, and unless a carrier is willing to forego access to those travel agents, it must participate in every CRS. Thus, from an airline's perspective, each CRS constitutes a separate market and each system possesses market power over any carrier that wants travel agents subscribing to that CRS to sell its airline tickets.

See also Midwest Express Comments at 4; Alaska Reply at 16.

Our conclusion that each system has market power is consistent with the Supreme Court's analysis in *Eastman Kodak Co.* v. *Image Technical Services*, 504 U.S. 451 (1992). There the Court explained that market power is the power ''to force a purchaser to do something that he would not do in a competitive market,'' 504 U.S. at 464, quoting *Jefferson Parish Hospital* v. *Hyde*, 466 U.S. 2, 14 (1984), and ''the ability of a single seller to raise price and restrict output.'' 504 U.S. at 464, quoting *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 503 (1969).

The Court's definition of market power fits the systems' imposition of parity clauses, since there is no evidence that an airline would accept an obligation like the parity clause in a competitive market. We noted in the notice of proposed rulemaking that no one had given us an example of any comparable practice by a seller in a competitive industry (while Sabre cites the most favored nations clauses imposed by buyers in some markets, those clauses are different from the parity clauses imposed on buyers by the systems, as discussed below). 61 FR at 42202.

In addition, the clauses demonstrate the systems' ability to raise prices or restrict output by forcing airlines to choose between paying higher CRS fees for unwanted services or reducing their purchase of services from a competing system.

In *Eastman Kodak* the Court also noted that market power is usually inferred from the seller's possession of ''a predominant share of the market.'' 504 U.S. at 464. Insofar as electronic access to travel agency subscribers is concerned, each system effectively holds a monopoly market share. Justice Dept. Comments at 2–3. See also 57 FR at 43783–43784, quoting the Department of Justice's analysis in the last comprehensive CRS rulemaking.

Sabre nonetheless contends that no system has market power. Sabre, however, does not argue that any airline has an alternative means for electronically giving travel agencies the ability to obtain information on its services and conduct booking and ticketing transactions. Sabre similarly offers no analysis showing that market forces limit in any way a system's ability to raise the fees charged participating airlines. While Sabre submitted an affidavit from Dr. Gary Dorman, an economist, in an attempt to refute our findings of market power, his affidavit is unpersuasive. He claims that the relationships between airlines and CRSs ''closely resemble those found between suppliers and distributors throughout the economy.'' Dorman Affidavit at 1. He provides no support for this assertion. He suggests that the Justice Department's rationale—that each system has a monopoly over electronic access to its subscribers—would be irrational if applied to grocery stores. *Id.* at 2–3. We agree—the grocery store business is quite competitive. The Justice Department, however, based its rationale on its analysis of the airline and CRS businesses, and Dr. Dorman submitted no analysis of his own. While he asserts that the Justice Department has failed to show that the CRS fees charged participating airlines are at supracompetitive levels, *id.* at 3, he has presented no analysis indicating that Sabre's booking fees do not exceed the system's costs. The Justice Department's conclusion, on the other hand, is consistent with our past findings on the systems' ability to charge airlines fees that are unrelated to their costs. 57 FR at 43785.

While Sabre additionally argues that the systems cannot have market power since Southwest has prospered while participating only in Sabre, Sabre Comments at 23, we think Southwest's experience does not disprove the systems' possession of market power over airline participants. Southwest itself has chosen to participate in Sabre, the system with the largest market share in the United States. More importantly, Southwest's operations are substantially different from those of other airlines. Southwest operates as a low-fare carrier relying heavily on direct sales to consumers, not on travel agency sales. For these and other reasons, few other airlines can copy Southwest's experience and thereby avoid depending on CRSs for the distribution of their services. Alaska Reply at 16; Midwest Express Comments at 7. As the Justice Department points out, while some new entrant airlines have tried to bypass CRSs by creating alternative methods for bookings, ''the vast majority of tickets are still booked through travel agents using a traditional CRS, and airlines that desire access to consumers who purchase through such channels must participate in each CRS.'' Justice Dept. Comments at 3, n. 2.

While Sabre claims that airlines can avoid depending on CRSs due to the growth in use of the Internet for airline bookings, Sabre Comments at 23, the Internet cannot enable airlines to avoid CRS participation, at least not in the near future. ASTA Comments at 3–4. The great majority of airline tickets are

still sold by travel agents, not through direct purchases by consumers.

Thus, despite the existence of some alternative means of distribution, most airlines depend on travel agencies for distribution, so the systems have market power over those airlines. The systems have used that power to impose parity clauses on airline participants which reduce competition in the airline and CRS businesses and make airline operations more inefficient, as explained next.

The Inefficiency and Reduced Competition Caused by the Parity Clauses

Because of the parity clauses, the systems need not compete on price and service quality to obtain higher-level participation by airlines. Such competition might well exist otherwise (although somewhat limited for airlines subject to our mandatory participation rule). While virtually all airlines must participate in each system at the full availability level, the competitive demands of the airline business do not compel them to participate in the highest levels of CRS service. Alaska and Midwest Express, for example, have chosen not to purchase some of the enhancements offered by Sabre, a decision that led to Sabre's threats to exclude them entirely from the system. Alaska Reply at 5.

In a competitive market, each system would compete to obtain higher levels of participation by airlines, in order to make the system more attractive to the travel agencies doing business in regions where those airlines have a significant market share. See, *e.g.*, Justice Dept. Comments at 2. Systems would also compete for higher levels of participation in order to increase revenues, since airlines pay higher fees for higher levels of participation.

The parity clause, however, reduces or eliminates the systems' competition for higher level participation by airlines, as the Justice Department has explained, Justice Dept. Comments at 5:

> Without the parity provision, each CRS would likely have to respond competitively to a large booking fee decrease offered by one of its competitors to airlines. With the parity provision, however, each CRS knows that a participating carrier cannot be induced by price to upgrade its service level in a competing CRS without also upgrading in its own. Thus, there is little reason for any CRS to lower booking fees to induce participating carriers to upgrade their service levels. [footnote omitted]

In addition, the Justice Department states that the parity clauses have kept the systems from working with airlines to create levels of service that will meet their needs. The Justice Department cites Reno Air's experience as an example. When Reno Air, which participates in all four systems, wanted a system to develop a level of service that would meet its distribution needs, none of the systems would work with it. In contrast, when Southwest wanted Sabre to develop a participation level that suited Southwest's needs, Sabre was willing to create such a product. Southwest, unlike Reno, is not bound by the parity clauses since it participates in only one system, Sabre. Justice Dept. Comments at 6–7.

Furthermore, as shown by the Justice Department, the parity clauses reduce the systems' incentive to provide satisfactory service to participating airlines. Because each airline must participate in each CRS, the airline's only credible response to poor service would be a threat to lower its participation level. The parity clause, however, prevents an airline from taking such action, unless it simultaneously lowers its participation level in the other systems. Justice Dept. Comments at 7–8.

Finally, of course, parity clauses create inefficiency by compelling non-vendor airlines, which have no incentive to skew CRS competition, to buy a higher level of service from the systems than they would otherwise choose. Without the clauses an airline might well decide that participation at a higher level in some systems but not others would be the most efficient method for distributing its services. Justice Dept. Comments at 8–9; Midwest Express Comments at 3–5; Alaska Reply at 19–20; America West Reply at 2–4.

The parties opposing our proposal argue that the parity clauses do not injure airlines and, even if airlines were injured, the clauses provide competitive benefits that outweigh any possible injury. We find these arguments unpersuasive.

According to Sabre, parity clauses do not give it the power to increase airline fees due to the impact of our rules. One rule, 14 CFR 255.6(a), requires fees to be nondiscriminatory, while the mandatory participation rule requires system owners to participate in competing systems only if the terms for participation are commercially reasonable. Sabre contends that these two rules in combination ''severely'' restrict a system's ability to raise prices. Sabre Comments at 16–18. Sabre's contention is contradicted by the systems' ability to impose fees on airlines for CRS services that are unrelated to the costs of providing CRS services. 57 FR at 43785. We doubt that the systems' fees would be so high if our rules had the effect suggested by Sabre. Moreover, airlines have increasingly complained about the continuing series of fee increases imposed by the systems in recent years. See, *e.g.*, Justice Dept. Comments at 5.

Sabre further contends that a rule allowing airlines to ''discriminate'' against one or more systems will lead to higher levels of concentration in the U.S. CRS market. Assertedly the United States CRS market is one of the most competitive in the world ''largely because airline discrimination against CRSs is rare,'' whereas in foreign markets discrimination is much more likely. Sabre Reply at 17. We think that the U.S. market is more competitive than foreign markets primarily because the United States had five large airlines (American, United, TWA, Eastern, and Delta) that each had the resources to create a CRS when the CRS business was developing. However, even if Sabre's analysis were correct, our mandatory participation rule already prevents any of the largest airlines in the United States from selectively lowering its participation in competing systems because each of those airlines holds a significant CRS ownership interest and is covered by that rule.

Sabre argues that parity clauses are essential for ensuring competition in the CRS market, since otherwise carriers could discriminate against one or more systems, as shown by past experience. Sabre Comments at 9–10, 19–20. As discussed below at greater length, however, the anticompetitive discrimination that has occurred has involved decisions to reduce or end participation in competing systems by an airline that either itself or through an affiliate owned or marketed a system. Those kind of abuses should be prevented by our mandatory participation rule and the exception included in this rule that allows a system to enforce a parity clause against an airline that directly or indirectly owns or markets a competing system.

Sabre also repeats the argument made by others earlier in this proceeding that eliminating the parity clauses will make it more difficult for the smaller CRSs to survive. Sabre Comments at 14. We concluded that this claim was unpersuasive—a smaller system can obtain higher-level participation by airlines if it offers attractive prices and service. 61 FR at 42205. Moreover, System One, previously the smallest U.S. system, is now part of Amadeus, one of the largest systems in the world. In addition, as we explained earlier, the smaller systems' past conduct indicates that they do not view the ability to offer competitive functionality on all

significant airlines as crucial to their ability to survive in the U.S. market, since they changed their policies on the treatment of non-participating airlines and thereby ended their subscribers' ability to issue tickets on Southwest through the CRS. 61 FR at 42205. Although Southwest had never been willing to pay for CRS services in those systems—Worldspan and System One—or in Galileo, each of those systems nonetheless had displayed some information on Southwest's flights and allowed travel agents to write Southwest tickets using the system until 1994. Because of Southwest's continuing refusal to pay for CRS services, each of those systems then decided to change its policies on the treatment of non-participating airlines and thus to remove Southwest flight information from its displays and to bar the system's use for writing Southwest tickets. These steps greatly reduced the efficiency of travel agencies subscribing to one of those systems when they were located in regions where Southwest is an important airline. 61 FR at 42198. We recognize the claims that each system's action was a rational response to Southwest's continuing refusal to pay CRS fees, Worldspan Comments at 9–10, but their action still undermines Sabre's argument that a system must provide functionality on all important airlines that is comparable to the functionality available from competing systems.

Sabre additionally disputes our competitive analysis by arguing that the elimination of parity clauses could cause the systems to limit the number of different levels of service offered participating airlines because the systems ''might find it necessary'' to phase out the lower levels of service or to reduce the price differentials between the various levels of service in order to limit the airline participants' ability to discriminate against the system. Sabre Comments at 16–17; Sabre Reply, Dorman Affidavit at 4. Sabre does not explain why the systems would reduce the number of options available to airline participants when airlines have a greater ability to choose the level of service they wish to purchase. Sabre also does not explain why eliminating the lower levels of service would solve its alleged discrimination problems. If Sabre eliminates the less costly levels of service, it might also discourage smaller airlines from participating at all in Sabre. If Sabre's arguments were accurate, that could hamper the system's ability to obtain subscribers. But if Sabre in fact reacted to our decision by reducing the levels of service available to participating airlines, that would seem to confirm that it believes that it has the power to control the distribution choices of the airlines that used the eliminated service levels.

The Broad Applicability of the Parity Clauses

In concluding that the parity clauses unreasonably deny airlines the ability to choose how much CRS service they wish to purchase, we read the clauses as requiring an airline to upgrade its participation in a system if it is already participating at a higher level in another system, even if the system requiring the upgraded participation offers inferior service or charges higher prices than the system whose higher-level service is already being used by the airline. 61 FR at 42201–44202.

Sabre and Worldspan now contend that we mischaracterized their parity clauses. Sabre claims that its parity clause requires upgraded participation only when Sabre offers the higher-level service at a price and on terms comparable to those offered by the system in which the airline is already participating at the higher level. Sabre Comment at 18. Worldspan similarly contends that it enforces its parity clause only when Worldspan's service is comparable in price and quality to the higher-level service purchased by the airline participant from a competing system. Worldspan Reply at 5–7. The record does not support these claims.

Sabre's clause states, ''[A]ny improvements, enhancements, or additional functions to Participating Carrier's reservations services offered to end users of any [CRS] will be offered by Participating Carrier to SABRE Subscribers on the same terms and conditions as are agreed to with such [CRS].'' Alaska Reply at 22. Alaska contends that the clause appears to impose an obligation on the participating airline, not on Sabre, to use the same terms and conditions; the clause does not imply that the airline is excused from the higher level of Sabre participation if Sabre's terms and conditions are different. In addition, Alaska points out that Sabre's current interpretation is very new: Sabre did not interpret the clause as requiring a higher level of participation only when Sabre offered comparable price and terms until after we issued our notice of proposed rulemaking. Neither Sabre's comments on Alaska's rulemaking petition nor its pleadings in its suit against Alaska stated that Sabre's price and terms for higher-level participation had to be comparable to those offered by the system in which the airline was already participating at a higher level. Alaska Reply at 22–23. See also Galileo Reply at 4–5.

We also note that Sabre's reading of its clause would make the clause difficult to implement, since different systems use different pricing methods and do not offer the same levels of service.

Sabre, for example, makes much less use of transaction pricing than the other systems. As Alaska notes, Sabre has had to read the word ''same'' in its contract clause as ''comparable'' in order to make its interpretation plausible, but the resulting interpretation is inconsistent with the contract's literal language. Alaska Reply at 22, n. 7.

Worldspan, unlike Sabre, does not contend that the language of its clause requires an airline to increase its participation in Worldspan only when Worldspan's prices and services are comparable to the higher-level service already being purchased by the airline from another system. Worldspan instead claims only that it does not enforce its clause against airlines unless Worldspan's price and quality are comparable. However, Worldspan's parity clause in no way limits Worldspan's ability to enforce the clause, whether or not its price and quality are comparable. Worldspan's clause, included as an attachment to Alaska's rulemaking petition, reads as follows, ''Participating Carrier will provide Worldspan users with any improvements, enhancements, or functions related to Participating Carrier's reservations services as offered to users of any other CRS.'' The clause would not block Worldspan from changing its enforcement policy in the future.

As a result, we conclude that our notice of proposed rulemaking correctly interpreted the scope of the parity clauses. Moreover, even if the interpretation now offered by Sabre and Worldspan were correct, airline participants would have little protection, since Sabre or Worldspan would decide whether the price and quality of the competing system's service were comparable to the service offered by itself. Midwest Express Reply at 5.

More importantly, even if the parity clauses were limited as claimed by Sabre and Worldspan, allowing systems to enforce them against airlines with no CRS ownership or marketing interest would still be contrary to the public interest. Parity clauses eliminate price and service competition among the systems for higher levels of CRS service and make airline distribution less efficient. If the clauses were limited as proposed by Sabre and Worldspan, the

systems would still have no need to improve their prices and services relative to their competitors. For example, parity clauses of the type proposed by Sabre and Worldspan would still eliminate any need by a system to respond to Reno Air's request for a new level of service that would match Reno's distribution needs. And airlines would still be forced to either buy more CRS services than they wanted or reduce their purchase of services from some systems in order to avoid violation of the parity clauses imposed by other systems. Midwest Express Reply at 4–5.

For these reasons, we also find unacceptable Sabre's proposal that we modify our rule to allow a system to enforce a parity clause against an airline as long as the system's price and other terms for participation are comparable to those offered by the system in which the airline already participates at a higher level.

The Systems' Claims of Discrimination by Airline Participants

In arguing that parity clauses are essential for fair CRS competition, Sabre characterizes an airline's decision to participate at a higher level in one system than in another as ''discrimination.'' We cannot agree with Sabre's view with respect to airlines that do not own or market a system. An airline is not engaging in ''discrimination'' when it decides to participate at a higher level in one system than in other systems. 61 FR at 42204. When a firm in a competitive industry chooses to buy more service from one supplier than another, no one characterizes that choice as ''discrimination.''

In arguing the contrary with respect to airline choices on their levels of CRS participation, Sabre complains that an airline's decision to participate at a lower level in one system than in other systems will handicap the former system's ability to compete in regions where the airline is a major carrier. For example, Sabre alleges that it might be forced to withdraw from the Pacific Northwest and State of Alaska CRS markets if Alaska Airlines downgraded its participation in Sabre. Sabre contends that Alaska's choice of a lower participation level would make using Sabre less efficient for travel agencies in those regions, where Alaska is a principal airline, and thus end Sabre's ability to obtain subscribers in those regions. Sabre Comments at 7–8.

If Sabre's claims were true, however, Southwest's participation in Sabre and refusal to participate at all in other systems should have eliminated those systems from regions like California where Southwest is a major airline. We have no evidence that Sabre has driven Galileo, Worldspan, and System One from those regions. And the continuing policy of those systems not to allow their subscribers to use the CRS to issue tickets on Southwest further suggests that a system's failure to provide as much information and booking capability on a significant airline as do other systems is not a fatal competitive handicap. 61 FR at 42205.

In any event, if Alaska participates in Sabre at at least the full availability level, as is its stated intent, Alaska Comments at 4, Sabre agencies could obtain schedule, fare, and availability information on Alaska's services, make bookings on Alaska, and issue Alaska tickets through Sabre. We doubt that Alaska's choice of a lower participation level in Sabre than in other systems would drastically reduce Sabre's competitiveness in Alaska and the Pacific Northwest.

Even if Sabre were correct in claiming that a regionally-important airline's decision to participate at a lower level in one system than in other systems is a substantial competitive handicap, the proper remedy would not be the system's use of market power to compel the airline to buy a higher level of service than it wanted, when the airline neither owns nor markets a competing system. The system instead should make its price and service more attractive so that the airline will determine that the system's higher level of service is economically worthwhile. Midwest Express Reply at 3.

We note, moreover, that Galileo believes that it can obtain an adequate number of airline users of its higher-level services by offering better service. Galileo, whose contracts contain no parity clause, asserts that airlines are willing to participate in its higher-level features because of their superiority. Galileo Comments at 2.

Sabre suggests that an airline that neither holds a CRS ownership stake nor has a contract compensating it for marketing another system may still choose to lower its participation level in a system in order to distort competition in the CRS business. Sabre Comments at 10–11. Sabre has provided no evidence of such conduct, and we consider such a scenario unlikely. Given the importance of CRS participation to an airline's ability to distribute its services efficiently and the significant differences in fees between different levels of CRS participation, we see no reason why an airline that neither owns nor markets a competing system would base its decision on extraneous factors instead of an assessment of its distribution needs and costs. Even if such an airline might choose a lower level of participation in one system for illegitimate reasons, the slight possibility of such an occurrence cannot justify the systems' elimination of the ability of all other non-owner airlines to choose their level of participation in each system. We will, however, add an exception to the rule so that a system can enforce a parity clause against airlines that own or market another system.

Finally, in an effort to bolster its discrimination claims, Sabre asserts that Alaska's motive for lowering its participation level in Sabre was Alaska's interest in obtaining payments from Galileo under an arrangement between Alaska and Galileo for switching travel agencies from Sabre to Galileo. Sabre Comments at 11. Alaska, Galileo, and Galileo's marketing affiliate, Apollo Travel Services, have each denied that any such arrangement ever existed or was considered.

Alaska Reply at 12–13; Galileo Reply at 4; Apollo Travel Services Reply. Sabre's charge seems implausible—Sabre only made the charge at a late stage in this proceeding, and the affidavits submitted by Sabre largely rely on speculation and hearsay. But if Sabre's charge were true, our rule would allow Sabre to enforce the parity clause against Alaska—or any other participating airline—that had a marketing arrangement with another system.

Impact on Travel Agencies

In proposing the rule prohibiting parity clauses, we tentatively determined that such a rule would not significantly harm travel agencies. We noted that airlines like Alaska rely on travel agencies for their distribution and so would not likely take steps that would deny travel agencies the ability to obtain information and make bookings electronically. 61 FR at 42205–42206. In addition, travel agencies using any system other than Sabre were already handicapped, since they could not use their system to issue tickets on Southwest, a major airline in many domestic markets, since 1994. 61 FR at 42206.

We find unpersuasive the arguments by Sabre, ASTA, and several other parties that the rule will harm U.S. travel agencies, although we recognize that most travel agencies use only one system and thus largely depend on that system to electronically obtain airline information and conduct booking and ticketing transactions.

First, the largest airlines are CRS owners and thus subject to the mandatory participation rule. Secondly, the claims that U.S. travel agencies will be injured essentially assume that one or more important airlines without CRS ownership or marketing ties will reduce their participation in some systems below the full availability level, with the result that travel agents using that system could neither obtain availability information nor make bookings and issue tickets on those airlines through the CRS. No one has shown that airlines are likely to use the rule to do that. Airlines participate in the systems, after all, to make their services readily saleable by the agents using each system, and no airline (other than Southwest and some other low-fare airlines) is likely to reduce its participation level in any system to an extent that would keep the airline from being booked through the system. See, e.g., Alaska Comments at 5–6.

We assume that airlines without CRS ownership or marketing ties would use the rule to avoid buying higher levels of participation from one or more systems—in other words, those airlines will participate at the full availability level but may choose not to participate in direct access or all of the enhancements offered by a system. While an airline's non-participation in these features may cause some inconvenience to the travel agents using that system, the amount of inconvenience should not cause substantial inefficiencies. Furthermore, if the systems could maintain parity clauses, airlines could respond by lowering their participation in systems that they would otherwise participate in at a higher level. Galileo thus states that some airlines have lowered their participation in its system as a result of Sabre's threats to enforce its parity clause. Galileo Comments at 2–3. The Justice Department states that Reno Air reduced its participation level in the systems as a result of the systems' enforcement of the parity clause. Justice Dept. Comments at 7. And the American Automobile Association believes that our rule will lead to a greater degree of airline participation in CRSs, not less participation.

In addition, while each airline must participate in every system, most travel agencies can choose between systems. The systems compete for travel agency subscribers—indeed, according to Sabre, some agencies receive cash bonuses in exchange for agreeing to use a system. Sabre Reply at 1, n. 1. Thus travel agencies should have some ability to influence systems to make higher levels of functionality attractive to non-owner airlines.

Furthermore, our CRS rules include several provisions that give travel agencies the ability to use two or more systems. In 1992, for example, we prohibited parity clauses and minimum use clauses in travel agency contracts, gave travel agencies the right to use their own equipment, stated that equipment owned by a travel agency could be used to access any database, CRS, or internal reservations system of any airline, and required systems to offer travel agencies three-year contracts. 57 FR at 43822–43826. Thus, a travel agency should have some ability to protect itself if one system offers unsatisfactory information and booking capability on an airline important to the agency.

ASTA further contends that our proposed rule is unfair, since travel agencies will have no protection if their chosen system becomes less efficient due to an important airline's reduction in its participation level. As noted, we doubt that airlines will use the rule to drastically downgrade their participation in any system. Travel agencies, moreover, have never had a guarantee that all important airlines not covered by the mandatory participation rule will participate in each system. Indeed, as shown, Southwest has only participated in Sabre, so agencies using one of the other three systems have never been able to obtain availability information on Southwest's flights or to book Southwest through their CRS. Nonetheless, many travel agencies were willing to subscribe to one of those systems.

We have also received a large number of letters from travel agencies opposing our proposal. We recognize, as shown by these letters, that travel agencies would prefer to obtain the best possible information and functionality on all airlines from each of the systems. However, that result would require us to allow the systems to continue using their market power to force some participating airlines to buy a higher level of service than they wish, a result that would be inconsistent with our policy of enabling airlines (and travel agencies) to benefit from CRS competition.

In addition, a large portion of the travel agency letters are form letters solicited by Sabre, according to Alaska's reply comments. Alaska Reply at 8–9. Moreover, the letters using Sabre's suggested form predict that airlines will lower their participation in a system in order to injure travel agencies. Given the airlines' reliance on the agencies for distribution, we do not believe that an airline will be taking steps just to injure travel agencies; an airline will only change its level of participation if it decides that doing so is cost-effective. We also note, as explained by Alaska, that the material used by Sabre to obtain the letters did not accurately describe the CRS business. Alaska Reply at 8–9.

Worldspan contends that the rule would hurt travel agencies by reducing the systems' ability to compete for subscribers in areas where an important airline lowered its participation level in some systems but not others. Worldspan Comments at 7. As discussed, a system can compete for higher-level participation by airlines. And Worldspan's prediction, even if correct, could not justify the continuation of a regime where the systems use their market power to force airlines to buy more services than they want. Furthermore, our ban on airline parity clauses essentially duplicates our ban on parity clauses in subscriber contracts. 57 FR at 43826.

Legal Authority for Adopting the Proposed Rule

The adoption of the rule prohibiting parity clauses is clearly within our statutory authority. As we explained in our notice of proposed rulemaking, 61 FR at 42202–42203, we may investigate and determine whether any air carrier or ticket agent has been or is engaged in unfair methods of competition in the sale of air transportation. 49 U.S.C. 41712, formerly section 411 of the Federal Aviation Act (and codified then as 49 U.S.C. 1381). Our authority, modelled on section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, allows us to define and prohibit as unfair methods of competition practices that do not violate the antitrust laws. See, *e.g., United Air Lines,* 766 F.2d 1107, 1114 (7th Cir. 1985). We may not prohibit a practice as an unfair method of competition, however, if the practice does not violate the letter or the spirit of the antitrust laws. See, *e.g., E.I. Du Pont de Nemours & Co.* v. *FTC,* 729 F.2d 128 (2d Cir. 1984).

In the notice of proposed rulemaking, we tentatively concluded that the parity clauses were comparable to antitrust violations on several grounds, based on our finding that each of the systems had market power over airline participants. We reasoned that the parity clauses were analogous to impermissible tying arrangements, violations of the essential facility doctrine, and attempts to monopolize the electronic distribution of information on airline services to travel agencies. 61 FR at 42203.

Sabre's parity clause—and the similar clauses used by Worldspan and System

One—violate antitrust principles because they deny an airline the ability to choose for itself the level of service it will buy from each system. As the Supreme Court has stated, ''A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with [the] fundamental goal of antitrust law'' that price and output should respond to consumer preference. *NCAA* v. *Board of Regents,* 468 U.S. 85, 107 (1984). *NCAA* also undermines Sabre's contention that the parity clause merely allows Sabre to compete on an equal footing with other systems, for the Court rejected a similar defense by the NCAA. The NCAA had argued that its restraints were necessary since its preferred product—tickets for college football games—would not attract enough consumers without limits on televised games. The Court reasoned this justification was inconsistent with the basic policy of the Sherman Act. 468 U.S. at 116–117.

Only Sabre objected to our tentative conclusion that our legal authority enables us to adopt a rule prohibiting parity clauses, and Sabre has not shown that our analysis was invalid.

Significantly, Sabre has not challenged several key points in our reasoning. We stated our doubt that firms in any competitive industry could unilaterally impose a requirement like the parity clauses on their customers. We noted that purchasers typically obtained offsetting benefits, such as a guaranteed supply or a lower price, when they agreed with suppliers in competitive industries to requirements contracts or contracts requiring purchases in large quantities or over long periods of time. *Cf. Barry Wright Corp.* v. *ITT Grinnell Corp.,* 724 F.2d 227, 237 (1st Cir. 1983) (Breyer, J.). As we pointed out, no one in this proceeding had claimed that participating airlines obtained any benefit from the clauses or obtained other benefits in exchange for accepting the clauses. 61 FR at 42202. Neither Sabre nor any other party argues the contrary, nor has Sabre or any other party cited comparable business practices in competitive industries (while Sabre contends that the most favored nation clauses used by some health insurers are comparable, we find that they are not, as explained below).

In arguing that we have no legal authority to prohibit parity clauses, Sabre disputes our finding that each system has market power over airline participants, but, as discussed above, after reviewing the comments, we have determined that the systems do have market power.

Sabre further contends that we may not prohibit parity clauses, because the clauses allegedly have no impact on airline competition and our authority to prohibit unfair methods of competition runs only to practices that reduce airline competition. Sabre is mistaken in arguing that the clauses have no impact on airline competition. The clauses force airlines with no CRS ownership interest to buy a higher level of service than they would buy if they had the freedom to choose what level of service to buy from each system. The clauses thereby increase the costs of the airlines competing with the system owners and injure those airlines' ability to compete effectively. See, e.g., Midwest Express Comments at 6; National Air Carrier Ass'n Comments at 2–3. See also Justice Dept. Comments at 6–7, 8–9.

Sabre in any event errs in contending that our authority is limited to practices that interfere with airline competition. The statute expressly authorizes us to prohibit ''an unfair method of competition in * * * the sale of air transportation.'' 49 U.S.C. 41712. Parity clauses clearly affect ''the sale of air transportation'' and affect competition among the systems in distributing airline information and booking capabilities. The clauses thus are within our authority over unfair methods of competition. By requiring airlines to purchase services they do not want (or to avoid the purchase of services they do want), the clauses drive up airline costs and thus increase airfares.

Judicial Rulings on Most Favored Nation Clauses

Sabre's principal challenge to our legal analysis is its argument that the courts have approved practices that allegedly resemble the parity clauses—most favored nation clauses imposed by buyers—as pro-competitive. Sabre cites such cases as *Ocean State Physicians Health Plan* v. *Blue Cross,* 883 F.2d 1101 (1st Cir. 1989), *cert. denied,* 494 U.S. 1027; and *Blue Cross & Blue Shield* v. *Marshfield Clinic,* 65 F.3d 1406, 1415 (7th Cir. 1995), *cert. denied,* 64 U.S.L.W. 3624 (March 19, 1996). Sabre analogizes the most favored nation clauses imposed by buyers with its clause, which protects a seller against a buyer's decision to buy more service from another supplier. As a result, Sabre argues, we cannot conclude that the clauses are an unfair method of competition.

Sabre made this same argument in its response to Alaska's rulemaking petition, and we found it unpersuasive. As we explained, in the cases cited by Sabre, the courts upheld a buyer's insistence on a most favored nation clause which assured the buyer that its supplier would not give any other customer a lower price. The courts reasoned that a most favored nation clause imposed by a buyer represented the buyer's insistence on obtaining the lowest price and thus was a practice which tended to promote competition on the merits. Such a clause benefited consumers by giving them lower prices. 61 FR at 42204.

We concluded that the most favored nation clause cases did not support Sabre's position. Unlike the most favored nation clauses imposed by buyers, the parity clauses imposed by the CRSs on their airline customers do not promote efficiency, do not lead to lower prices for airline participants, and cause consumers to pay higher prices, as we explained in our notice of proposed rulemaking. 61 FR at 42204. And we pointed out that the Justice Department believed that most favored nation clauses imposed by buyers could violate the antitrust laws. *Ibid.,* citing the proposed consent decrees in *United States* v. *Vision Service Plan* and *United States* v. *Delta Dental Plan of Arizona,* published respectively at 60 FR 5210, January 26, 1995, and 59 FR 47349, September 15, 1994.

Sabre has not shown that our earlier analysis of the most favored nation clause cases was incorrect. Sabre again cites the court cases that held that a health insurer's insistence on ''most favored nation'' clauses did not violate the antitrust laws, *e.g., Ocean State Physicians Health Plan and Blue Cross & Blue Shield,* and additionally cites *E.I. Du Pont de Nemours & Co.* v. *FTC,* 729 F.2d 128 (2d Cir. 1984). In *Du Pont* the Second Circuit reversed an FTC order that held unlawful several practices used by the major suppliers of lead additives for gasoline, one of which was a ''most favored nation'' clause given purchasers. Sabre Comments at 21–22.

Sabre has again failed to show that the health insurer clauses upheld by the courts are equivalent to the parity clauses imposed by the systems on their airline customers. In particular, Sabre has not shown that the parity clauses provide consumer benefits like the ''most favored nation'' clauses used by health insurers. In *Ocean State Physicians* the First Circuit held that Blue Cross' conduct benefited consumers by giving them lower prices. 883 F.2d at 1111. *Cf. Blue Cross & Blue Shield, supra,* 65 F.3d at 1415 (''the antitrust laws seek to encourage'' a buyer's efforts to minimize its costs). Unlike the health insurer clauses, the parity clauses do not enable any consumers to receive lower prices. The clauses instead force airlines to buy

services they neither need nor want, and the resulting increase in airline costs can cause consumers to pay higher fares or receive less service. Furthermore, one court has indicated that most favored nation clauses may injure competition. *Willamette Dental Group P.C.* v. *Oregon Dental Service Corp.*, 882 P.2d 637, 642–643 (Or. App. 1994).

Sabre does not attempt to show that parity clauses result in lower costs for airline participants or their customers, the travelling public. Instead, Sabre initially claims that a most favored nation clause has the same effect whether imposed by a seller or a buyer. Sabre Comments at 21. But a seller's insistence on most favored nation treatment, unlike a buyer's demand for such treatment, is unlikely to result in lower prices. Sellers, after all, are typically interested in obtaining higher revenues, which typically does not result in lower prices.

Equally unavailing is Sabre's theory that its parity clause is comparable to the health insurer clauses, because the parity clause ensures that Sabre receives the same information as competing CRSs. Sabre Comments at 22. This theory again ignores Sabre's position as a seller of the service, not a buyer. Significantly, Sabre has made no showing that its airline participants benefit as a result. Sabre's parity clause operates as a means of saving Sabre the trouble of competing to entice airlines to purchase a higher level of CRS service—the clause enables Sabre to compel such participation if an airline participating in Sabre chooses to participate at the higher level in another system without regard for the price and quality of Sabre's service or the airline's need for the increased functionality in Sabre.

Sabre argues that we may not rely on the Justice Department's position, reflected in the consent decrees cited in our notice of proposed rulemaking, that the ''most favored nation'' clauses unreasonably restrain competition. Allegedly we cannot prefer the Justice Department's position to the holdings of the courts. Sabre Comments at 22–23. This argument misconstrues the scope of our authority to prohibit unfair methods of competition. We may outlaw conduct that the courts would find permissible under the antitrust laws. *United Air Lines,* 766 F.2d at 1114. And Sabre wrongly implies that the courts necessarily disagree with the Justice Department's position. The Seventh Circuit, for example, amended its opinion in *Blue Cross & Blue Shield* to state that it had not rejected the Justice Department's view that ''most favored nation'' clauses may be anti-competitive in some cases—the court noted instead that there was no evidence of an anti-competitive effect in the case before it. 65 F.3d at 1415. And one district court recently refused to dismiss a Justice Department suit against a most favored nation clause imposed by a health insurer. *United States* v. *Delta Dental of Rhode Island,* 943 F.Supp. 172 (D.C. R.I. 1996).

The *Du Pont* case cited by Sabre is also consistent with our analysis. That case involved an FTC decision that invalidated several pricing practices used by manufacturers of lead additives for gasoline; one of the practices was a most favored nation clause protecting the manufacturer's customers against other customers obtaining lower prices. In reversing the FTC's decision, the Second Circuit found that the competitive conditions in the gasoline additive industry, which were far different from those in the CRS business, did not support the FTC's conclusion. Although the gasoline additive industry was an oligopoly, its participants did not have monopoly power and competed with each other: ''Notwithstanding the highly concentrated structure of the industry, there was substantial price and non-price competition during the 1974–1979 period that is the subject of the [FTC's] complaint.'' 729 F.2d at 132. In the CRS business, on the other hand, there has been no price or non-price competition on providing services to airlines. Furthermore, the Court held that the FTC could invalidate a business practice as unfair on ''proof of a violation of the antitrust laws or evidence of collusive, coercive, predatory, or exclusionary conduct * * *.'' 729 F.2d at 140. The Court reversed the FTC in part because there was no evidence of coercive conduct. *Ibid.* Here, in contrast, there is such evidence—the system refuses to provide any CRS services to an airline unless the airline agrees to buy at least as high a level of service from the system as the airline buys from any other system.

We therefore conclude that the most favored nation clause cases cited by Sabre do not support its argument that we may not prohibit parity clauses. We will instead make final our tentative conclusion that we may define the parity clauses as unfair methods of competition, since a parity clause is equivalent to an unlawful tying agreement, a denial of access to an essential facility on reasonable terms, and an attempt to maintain monopoly control over electronic access to each system's subscribers. We will begin with our conclusion that the parity clauses are equivalent to a tying arrangement prohibited by the Sherman Act.

Tying Arrangements

We viewed parity clauses as analogous to the tying arrangements prohibited by the antitrust laws, since the parity clauses result from a system's use of its market power to force each participating airline to purchase services that it may not want as a condition to obtaining any service. A tying arrangement—a seller's agreement to sell one product only on condition that the buyer purchase a second product from the seller (or promise not to buy the product from another seller)—is a *per se* violation of the Sherman Act if the seller has appreciable market power in the tying product and if the arrangement affects a substantial volume of commerce in the tied product. *Eastman Kodak Co., supra,* 504 U.S. at 461–462 (1992). Tying arrangements are objectionable because they force buyers to accept conditions that they would not accept in a competitive market. See, *e.g., Jefferson Parish Hospital,* 466 U.S. at 12–15. As the Court has explained, ''The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.'' When a seller imposes a tying arrangement on a buyer, ''competition on the merits in the market for the tied item is restrained * * *.'' *Jefferson Parish Hospital,* 466 U.S. at 12. A tying arrangement can well cause consumers to pay higher prices, a result that violates the goals of the antitrust laws. *Eastman Kodak Co.,* 504 U.S. at 478.

A parity clause is like a tying arrangement, because the clause represents the system's use of its market power to force each airline participant to buy at least as much service from the system as it buys from any other system. Like the tying arrangements proscribed by the Sherman Act, the CRS clauses restrict competition on the merits for the tied service—the higher levels of service offered by each system—and cause the systems' airline participants to pay higher prices. Since each system offers several different levels of participation, as well as various enhancements, the parity clause is akin to a tie, since the system will not sell an airline any service unless the airline buys a specified level of services.

Sabre does not challenge our reasoning that the parity clauses have the effect of a tying arrangement. Instead, Sabre objects that there is no tie, since each level of service is

mutually exclusive and thus each level of service is being sold separately rather than in combination. Sabre Comments at 24.

Sabre's position is obviously flawed—even if each level of service is mutually exclusive, Sabre's parity clause operates in practice like a prohibited tying arrangement. An airline can not obtain the services included within the lower level of service if it buys a higher level of service from any other system, even though Sabre otherwise offers the lower level of service as a separate product to airline participants. As explained above, the parity clause has the same effects as an unlawful tying arrangement—the parity clause restrains competition in the tied product, the higher levels of service, and the clause causes airlines to pay higher fees.

In addition, while Sabre sells different levels of service as separate items, Sabre also sells enhancements as additions to the various levels of service. Alaska Comments at 2, n. 1. Enhancements also operate as tied products. Indeed the pending dispute between Sabre, on the one hand, and Alaska and Midwest Express, on the other hand, involved the two airlines' failure to buy enhancements. Midwest Express Comments at 11.

The Essential Facility Doctrine

Secondly, we tentatively determined that the parity clauses are comparable to a violation of the essential facility doctrine. That doctrine requires a firm that controls a facility essential for competition to give its competitors access to the facility on reasonable terms. The firm will violate section 2 of the Sherman Act if it denies access (or imposes unreasonable conditions on access). A facility is essential if it cannot be feasibly duplicated by a competitor and if the competitor's inability to use it will severely handicap its ability to compete. 61 FR 42203, citing *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); and *Delaware & Hudson Ry.* v. *Consolidated Rail Corp.*, 902 F.2d 174 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2041.

In our last major rulemaking we determined that each of the systems is comparable to an essential facility and must therefore offer airlines access to its services on reasonable terms. 57 FR at 43790. We tentatively concluded in this proceeding that a system is denying access on reasonable terms if it makes a non-owner airline's participation contingent on the airline's agreement to purchase at least as high a level of services from that system as it does from any other system, without regard for the price or quality of the system's services. 61 FR 42203.

Sabre objects on several grounds to our reliance on the essential facility doctrine. According to Sabre, we may not consider a CRS to be an essential facility because the Ninth Circuit held in a private antitrust case, *Alaska Airlines* v. *United Air Lines*, 948 F.2d 536 (9th Cir. 1991), that CRSs were not essential facilities. As we explained in both the notice of proposed rulemaking in this proceeding and in our last major CRS rulemaking, the Ninth Circuit's decision does not preclude us from basing our CRS rules on an analogy with the essential facility doctrine. 57 FR at 43791; 61 FR at 42203.

Sabre further claims that, if anything is ''essential'', it is the information provided by important airlines, since otherwise the CRS cannot provide adequate information to travel agents and so cannot obtain subscribers. Sabre Comments at 25. But the relationship between the systems and airline participants indicates that an airline's control over its information does not give it any power over the systems. Participating airlines have had little or no ability to bargain over a system's terms for participation. The systems instead have been able to impose terms on airlines that are not disciplined by market forces.

Sabre's primary defense is its argument that the essential facility doctrine allows the owners of essential facilities to impose reasonable non-discriminatory conditions on access to the facility and that the parity clause is such a reasonable non-discriminatory condition. Sabre Reply at 21–22. We disagree—the clause is not a reasonable condition. The clause forces airlines to either buy more service than they want from some systems or less service than they would like from other systems. The airlines, moreover, obtain no benefits in return.

In arguing that the clause is a reasonable condition for access, Sabre alleges that the clause carries out the same goal as our mandatory participation rule, which requires system owners to participate in competing systems at the same level that they participate in their own system. Sabre Reply at 21. However, as shown, the parity clauses, unlike our rule, do not require that the service be offered on commercially reasonable terms. More importantly, we adopted the mandatory participation rule to keep system owners from distorting CRS competition by unreasonably limiting their participation in competing systems. Airlines like Alaska have no incentive to distort CRS competition, since they have nothing to gain from doing so if they neither own nor market a system.

Monopolization

Finally, since, as shown, most travel agencies subscribe to only one CRS, the system used by those agencies will essentially hold a monopoly over the electronic provision of information to the agencies and the agencies' ability to carry out booking and ticketing transactions electronically. If an airline established a direct link between its internal reservations system and a travel agency, the agency could obtain some information and conduct some transactions without using the CRS. A parity clause, however, requires an airline to participate in a system at a higher level than it prefers (and to pay higher fees than it would otherwise pay for CRS services). The parity clause thereby reduces the travel agencies' incentive to accept and use an alternative channel and the airline's ability to fund an alternative channel. Establishing direct links is costly, and an airline will have little incentive to incur that cost if it must still participate in every system at a high level (and pay the higher CRS fees). Alaska Reply at 27–28; Midwest Express Reply at 5–6.

By discouraging the creation and use of alternative methods of electronically providing travel agencies with information and booking capabilities, the parity clause helps to maintain the system's existing monopoly over electronic access to its subscribers. We found that the clause is comparable to conduct designed to maintain or create a monopoly, which would be unlawful under section 2 of the Sherman Act. 61 FR at 42203.

Sabre asserts that the parity clauses cannot be comparable to unlawful monopolization since the systems have a legitimate business reason for adopting the clauses—preventing exclusionary tactics by other systems. Sabre Comments at 26. The clauses, however, apply to all airline participants, not just those with ties to a CRS, and thus are not legitimate insofar as they restrict the choices of non-owner airlines.

Sabre and Worldspan also attack our analysis of an airline's incentives for creating a direct link with travel agencies. They claim that an airline will have a greater incentive to find alternatives for CRSs if its costs go up, so the systems' enforcement of the parity clauses will give airlines the incentive to find alternatives such as direct links, since the clauses increase their CRS costs. See, *e.g.*, Sabre Comments at 26; Worldspan Comments at 6. We disagree—while airlines always

have an incentive to avoid higher CRS fees, the parity clause in practice seems likely to discourage airlines from creating such links, given the cost of doing so and the agencies' reduced incentive for using them.

The Exception for Owners and Sellers of Other Systems

While we have determined that parity clauses are an unfair method of competition when imposed on airlines that have no CRS affiliation, we agree with the Justice Department, Sabre, Worldspan, Delta, TWA, and System One/Continental that parity clauses can provide an effective means of countering some forms of discriminatory conduct by airlines that own or market a competing CRS. As suggested in our notice of proposed rulemaking, we will therefore create an exception in our rule allowing a system to enforce a parity clause against an airline that owns or promotes a competing system. We are not adopting the much broader exception sought by Sabre, which would apply to any airline with ties of any kind with a CRS-owning airline, such as a code-sharing relationship. Sabre has not shown that that exception is necessary, and it would virtually destroy the prohibition against parity clauses.

Discriminatory Conduct by Airlines with CRS Affiliations

As we stated in our notice of proposed rulemaking, 61 FR at 42206, in the past we have considered cases where a foreign airline apparently reduced (or ended) its participation in a U.S. system in order to frustrate the U.S. system's ability to market itself in the foreign carrier's homeland. See, *e.g., Complaint of American Airlines against British Airways,* Order 88–7–11 (July 8, 1988). We have been prepared to take countermeasures against foreign airlines that deny U.S. systems a fair chance to compete in the foreign airline's homeland, thereby interfering with the right of the U.S. airlines affiliated with those systems to a fair and equal opportunity to compete. Furthermore, in our last major CRS rulemaking we concluded that there was evidence that U.S. airlines had limited their participation in competing CRSs in order to promote the system that they owned, a conclusion which caused us to adopt the mandatory participation rule. 56 FR at 12608; 57 FR at 43800. That rule requires each airline with a significant ownership interest in a CRS operating in the United States to participate in other systems at at least as high a level as it participates in its own system, assuming the terms for participation are commercially reasonable. 14 CFR 255.7.

Sabre, moreover, has stated that it created its parity clause to keep other airlines from engaging in unfair competition by participating at a high level in their affiliated system while participating at a low level in competing systems like Sabre, and that it has successfully used the parity clause in recent years to stop foreign airlines from discriminating against Sabre and in favor of a system affiliated with the foreign carrier. 61 FR at 42206.

In recognition of the apparent value of the parity clauses in preventing discrimination by airlines affiliated with a competing CRS, we specifically requested parties to comment on whether a rule prohibiting parity clauses should include an exception allowing a system to enforce a parity clause against an airline that owned or marketed a competing CRS. 61 FR at 42197, 42198, 42206.

The Parties' Comments

In response to our request for comments, the Justice Department, Sabre, Worldspan, Delta, TWA, and Continental/System One stated that they supported an exception that would allow a system to use a parity clause against airlines owning or marketing a competing system. Galileo opposes any such exception, while Midwest Express does not object to the enforcement of parity clauses against foreign airlines that own or market a system. Alaska opposes any exception allowing enforcement of a parity clause against an airline without an ownership interest in a system, even if the airline markets a system.

The Need for the Exception

We have determined to allow systems to enforce parity clauses against airlines that own or market a competing system. As shown by our own experience with both U.S. and foreign airlines, an airline that owns a CRS may well decide to limit its participation in other systems in order to encourage travel agencies in areas where it is a major airline to use the system that it owns. While our past experience has involved airlines that either owned or were affiliated with an owner of a system, the same incentive to downgrade participation in competing systems could well exist in an airline that is marketing a system. Sabre has cited cases where some South American airlines reduced their participation in Sabre in order to create a marketing advantage for a system that they marketed but did not own. See 61 FR at 42206.

Galileo claims that discrimination is unlikely, as shown by the decisions of some of Galileo's airline owners and marketers to participate in other systems at a higher level than they participate in Galileo. Galileo Comments at 5–6. While this indicates that many airlines with CRS ties do not discriminate, it does not show that discrimination never occurs or is so unlikely that we should deny a system a useful tool for ending such discrimination. Indeed, Worldspan and its owners complain that Egyptair, which markets Galileo, is discriminating against Worldspan in order to promote Galileo. Worldspan Comments at 8–9; TWA Comments at 3. Continental and System One similarly complain that the TACA carriers in Central America, which are associated with American, are discouraging Central American agencies from using System One. System One/Continental Comments at 4–5.

Galileo and Alaska argue that any potential discrimination problem does not warrant creating an exception from the ban on parity clauses, because there are other means available for preventing discriminatory conduct by a foreign airline, in particular, the complaint procedures established by the International Air Transportation Fair Competitive Practices Act (''IATFCPA''), codified as 49 U.S.C. 41310(c). Sabre and Worldspan, however, point out that the statutory remedy has a number of restrictions that limit its effectiveness, including the requirement that the complaint be filed by a U.S. airline rather than a system. In addition, a system's use of the private contractual remedy has other advantages, including the avoidance of a dispute between the United States and the foreign government. Sabre Reply at 8–10; Worldspan Reply at 8–9. See also 57 FR at 43819.

The Scope of the Exception

Despite our willingness to create an exception in the rule that will protect the legitimate interests of U.S. systems, we do not wish to create an exception that will swallow the rule. We are therefore unwilling to accept Sabre's argument that a system should be entitled to enforce a parity clause against any airline whose reduced participation would arguably harm the system's ability to obtain subscribers. Sabre Comments at 32–33. In addition, as discussed below, Sabre has not shown that a broader exception is essential.

Sabre argues that a system could pay a regionally-important airline without any CRS ownership interest to lower its participation in competing systems and that the airline's discriminatory

lowering of its participation level would prejudice the marketing efforts of the competing systems. According to Sabre, a system owned by the dominant airline in a country has many ways to induce smaller airlines in that country to create a marketing advantage for itself. The system and its owner could secretly compensate a non-owner airline for lowering its participation level by giving it better pro-rates for interline travel, discount ground-handling services, lower prices for reservations services, and slots or space at crowded airports. Sabre Reply at 10–11.

We appreciate Sabre's concerns, but the broad exception urged by Sabre would destroy the ban on parity clauses. We note, for example, that Alaska has a code-sharing relationship with Northwest, one of Worldspan's owners; thus, if we created the broad exception sought by Sabre, we would deny Alaska the benefit of the general prohibition against parity clauses. Similarly, Alaska and Midwest Express are hosted in Sabre, so an exception allowing systems to enforce parity clauses against airlines hosted in another system would deny those two airlines the ability to lower their participation level in any system but Sabre.

At the same time, the expansive exception sought by Sabre seems to be unnecessary, for every case of discrimination cited by Sabre or otherwise known to us has involved either an airline that owned a system (British Airways, Iberia, and Japan Air Lines), an airline that was affiliated with an owner of a system (Air Inter and Iberia's domestic affiliates), or an airline that was marketing a system (Egyptair, the South American airlines cited by Sabre, and the TACA carriers cited by Continental and System One). We are unaware of any case where an airline without any affiliation with the owner or marketer of a system reduced its participation in another system in order to prejudice that system's ability to market itself to travel agencies.

Sabre claims that a number of small airlines hosted in Amadeus have been unwilling voluntarily to participate in Sabre at the same level that they participate in Amadeus. Sabre Reply at 11. However, Sabre has neither named the airlines nor explained how their levels of participation varied or why a small airline's presence in Sabre would significantly affect Sabre's ability to market itself in foreign countries. Our rule will allow Sabre to enforce the parity clause against all airlines that own or market a competing system, such as Amadeus, a category that should include the critical mass of airlines in the countries where Sabre is being marketed. In addition, even if we allowed Sabre to enforce the parity clause against airlines hosted in a system but not otherwise affiliated with that CRS, those airlines, unlike U.S. airlines, might well decide to withdraw entirely from Sabre, which would put them out of reach of the parity clause.

We are at this time also skeptical of Sabre's assertion that a system and its owner airlines could secretly pay an unaffiliated airline to lower its participation level in Sabre. Furthermore, given the importance of CRS use to airlines, it seems doubtful that an airline would change its level of participation in a system in exchange for unrelated benefits. And Sabre would presumably become aware of any efforts by the unaffiliated airline to market the system itself.

However, we are willing to reconsider the issue in our next major CRS rulemaking, if Sabre can show that unaffiliated airlines will change their participation level in order to distort CRS competition and can suggest a rule modification that would alleviate that problem without making the overall prohibition of parity clauses ineffective. In the meantime, we have the ability to address specific issues or problems with our foreign counterparts.

Having determined that systems should be allowed to enforce parity clauses against airlines promoting a different CRS, we must craft a rule that will allow systems to counteract discrimination by airlines owning or marketing a competing system without allowing them to coerce the participation level choices of airlines with no CRS interests. Midwest Express and Alaska have suggested we should give the systems the ability to enforce a parity clause against foreign airlines but not U.S. airlines. Alaska Reply at 11; Midwest Express Comments at 10–11. Because of the United States' international agreements, we may not discriminate against foreign airlines. If we adopted such an exception allowing the enforcement of parity clauses only against foreign airlines, we would be violating our obligation to treat U.S. and foreign airlines the same. See also Continental/System One Reply at 2, n. 3; Galileo Comments at 7, n. 4. Although Midwest Express has noted the CRS market in the United States differs in important respects from the CRS market in many foreign countries, Midwest Express Reply at 13–15, we doubt that those differences would justify a rule allowing systems to enforce parity clauses against all foreign airlines but no U.S. airlines.

The Justice Department has proposed that we allow enforcement of a parity clause against airlines that themselves or through affiliates own or market a system and that we define ''market'' as ''to cause, encourage, or persuade a person or entity to subscribe to a particular foreign or domestic system in return for some material benefit that is conditioned upon the number of subscriptions received.'' Justice Dept. Comments at 11. Two commenters would accept the Justice Department's proposal if the phrase ''that is conditioned upon the number of subscriptions received'' is struck, for they believe that a system could easily compensate an airline for marketing on some basis other than the number of subscriptions received. TWA Reply; System One/Continental Reply at 6.

We have decided not to adopt the Justice Department's proposed definition of ''to market'' or otherwise attempt to define that term in the rules. We are concerned that a system seeking to enforce a parity clause may have difficulty proving that an airline received a ''material benefit'' for marketing a competing system. We do not, however, intend to give the systems broad authority to assert that an airline participant is marketing a competing system. For example, neither a code-sharing relationship between a non-owner airline and an owner airline nor a hosting agreement between a non-owner airline and a system can cause the non-owner airline to be deemed a marketer of a system, unless the non-owner airline is specifically engaged in promoting the system to travel agencies. We appreciate the concern raised by Alaska that any exception for airlines marketing a system phrased in general language will give the systems too much discretion. Alaska Reply at 10–11. See also Midwest Express Reply at 13–15. But, given past and current problems with discrimination by airlines that market a CRS, some exception to our general ban on parity clauses seems necessary. However, we will reexamine the language of our rule if the systems attempt to use the exception to enforce a parity clause against airlines uninvolved in marketing another system.

Furthermore, we will impose a fourteen days notice requirement on the enforcement of a parity clause. A system may not enforce a parity clause against an airline without first giving us and that airline fourteen days written notice of its intent to take that action. The notice requirement would give the airline time to complain if it considered the system's action unauthorized by our rule and give us time to intervene if necessary. We included a similar requirement in our rule excusing a

system from complying with our rules if a foreign airline owns or is affiliated with a system that discriminates against U.S. airlines. Section 255.11; see 57 FR at 43829, 56 FR at 12637.

As provided by the Justice Department's proposed language, the exception in the rule will allow enforcement of a parity clause against an airline that markets a CRS in foreign countries, even if that CRS does not do business in the United States.

Inclusion of Enhancements

We will modify the rule's language to clarify its applicability to enhancements, as requested by Alaska. The language proposed by us would prohibit a system from requiring any airline to maintain ''any particular level of participation in its system'' on the basis of the airline's level of participation in another system. Alaska and Midwest Express ask us to revise the language to make it clear that a system also cannot use a parity clause to force an airline to purchase enhancements from it on the ground that the airline is purchasing those enhancements from another system. Alaska Comments at 4–5; Midwest Express Comments at 11–12. Galileo supports this proposal, Galileo Reply at 5–6, but Worldspan claims that it was not included in the notice of proposed rulemaking, Worldspan Reply at 4.

Both logic and policy support our inclusion of enhancements within the scope of the prohibition of parity clauses. First, the systems have used parity clauses to require airlines to purchase enhancements, not just to require them to upgrade their level of participation. Indeed, when Sabre at the beginning of 1996 threatened to use the parity clause against Alaska and Midwest Express, Sabre was demanding that the two airlines buy some enhancements from Sabre because their level of participation in one or more other systems allegedly included those enhancements. Alaska Comments at 3; Midwest Express Comments at 11. In addition, according to Alaska, Sabre's lawsuit against Alaska also argued that the parity clause applied to enhancements. March 8, 1995 Alaska Reply at 3–4. And we noted in the notice that Alaska's current interest in the parity clause issue involved its wish to avoid purchasing some enhancements from Sabre that it bought from other airlines. 61 FR at 42207.

Furthermore, the reasons for our findings that parity clauses reduce CRS and airline competition and make airline distribution less efficient are fully applicable to the systems' use of parity clauses to force airlines to buy enhancements. Whether a system is forcing an airline to buy an enhancement or to upgrade its overall level of participation, the system is using its market power to force an airline to buy unwanted services (or to cancel its purchase of services from another system that it did want to buy).

Thus, when we proposed to prohibit parity clauses, we intended to prohibit any use of the clauses, whether the system wanted to force an airline to upgrade to a higher level of participation or to buy enhancements that the airline preferred not to buy. As noted by Alaska, however, the proposed rule did not expressly refer to enhancements. We will therefore modify it to make that clear.

Worldspan opposes Alaska's proposal. It argues that including enhancements in the rule would substantially change the proposal, since enhancements allegedly had not been included in the proposal, and could not be included without a new notice of proposed rulemaking. Worldspan Reply at 4. Worldspan, however, has not explained why a prohibition against the use of parity clauses for enhancements would involve any new or different issues. The analysis of the benefits and harm caused by the clauses is the same in either case. Moreover, this proceeding resulted in large part from Sabre's use of its parity clause to make Alaska and Midwest Express buy enhancements, so the use of parity clauses to require airlines to buy enhancements was inherently at issue when we issued our proposal. Every party in the proceeding should have understood that the use of the clauses as to participation in enhancements would be an issue. We note in that regard that no one else has supported Worldspan's position on enhancements.

The Parties' Proposals for Other Rule Changes

Our request for comments on our proposal to prohibit parity clauses generated a number of requests for changes to other provisions in our CRS rules, especially the mandatory participation rule.

Galileo, Worldspan, Delta, Northwest, TWA, and System One/Continental urge us to amend the mandatory participation rule, 14 CFR 255.7, so that it requires airlines that market a system, not just airlines with a significant CRS ownership interest, to participate in other systems. Such an amendment would require Southwest to participate in Galileo, Worldspan, and System One, if it continues to promote Sabre. Southwest opposes this suggestion, as does Sabre.

United argues that we should eliminate the mandatory participation rule, since CRS owner airlines should be able to choose the level of CRS participation needed for distributing their services. Delta also favors the elimination of the mandatory participation rule if it is not extended to cover airlines marketing a system. TWA, on the other hand, supports extending the mandatory participation rule to airlines that market a system, but asserts that the rule should require only participation at the full availability level, not at higher levels.

Delta suggests that we should bar systems from contractually tying non-travel agency services to participation in agency services. Under Delta's proposal, an airline could choose whether to participate in the information and booking functions provided by a system to Internet sites.

Worldspan asks us to amend the rule authorizing a system to take countermeasures against foreign airlines affiliated with a CRS, 14 CFR 255.11, so that a system would have broader authority to react to discriminatory treatment.

Finally, ASTA and USTAR contend that, if we adopt the parity clause prohibition, we should allow travel agencies to cancel their CRS contracts if the quality of a system's service is greatly reduced by a carrier's decision to lower its participation in that system.

We have decided not to proceed on any of these suggested changes before the next major rulemaking, which is scheduled for this year. We could not in any event adopt any of these proposals without a new notice of proposed rulemaking, since none of them were proposed in our notice of proposed rulemaking. We have issued an advanced notice of proposed rulemaking on the CRS rules, since, as discussed above, those rules will expire at the end of 1997 unless extended. 62 FR 47606, September 10, 1997. The suggestions for additional rule changes made by the parties can be considered in the coming rulemaking.

Procedural Issues

We have considered Alaska's request for a rule barring parity clauses through informal rulemaking procedures. Those procedures, which included the opportunity to file comments and reply comments on our notice of proposed rulemaking, have enabled every party to fully present its position on the legal and factual issues.

Our use of informal rulemaking procedures here follows our consistent past practice. When we reexamined and readopted the Board's rules, we used

informal rulemaking procedures. No one asserted that those procedures were improper or unfair, 57 FR at 43792, although American had initially argued that a formal hearing should be held to resolve factual disputes. *See* 56 FR 12586, 12603, March 26, 1991. In an earlier proceeding we used informal rulemaking procedures to amend the CRS rules as part of a package of rules designed to reduce airline delay problems. 52 FR 34056, September 9, 1987.

Most importantly, when the Board adopted the original CRS rules, it did so in an informal rulemaking proceeding over United's objections, and the Seventh Circuit affirmed the Board's procedural decision in *United Air Lines* v. *CAB*.

Sabre nonetheless argues that we may not adopt the proposed ban on parity clauses without holding a formal hearing. Sabre Reply at 18–20. Sabre's objection has no merit.

Sabre recognizes that the Seventh Circuit held that the Board could adopt comprehensive CRS rules without a formal hearing. Sabre Reply at 19. Sabre, however, suggests that the Court decided the United Air Lines case incorrectly, because the language of the statute authorizing us to define and prohibit unfair methods of competition and unfair and deceptive practices, 49 U.S.C. 41712, allegedly requires the holding of a formal hearing. Sabre Reply at 19, n. 20. We disagree. As the Seventh Circuit explained in rejecting the same contention made by United, the statute clearly authorizes the use of informal rulemaking procedures for prohibiting unfair methods of competition and unfair and deceptive practices. *United Air Lines*, 766 F.2d at 1111–1112.

Sabre wrongly contends that this rulemaking is so different from the rules upheld in *United Air Lines* that the Seventh Circuit's decision is inapplicable here. Sabre argues that we cannot use informal rulemaking procedures since our decision necessarily involves a determination on the ''nature and validity of past conduct.'' Sabre Reply at 19. Most rulemaking decisions made by regulatory agencies, however, involve findings about the reasonableness of the private parties' past conduct, as did the Board's original CRS rulemaking. *Cf. United Air Lines*, 766 F.2d at 1107. Moreover, like the Board's CRS rules, this rule imposes no sanctions on anyone for past conduct.

Sabre similarly errs in arguing that a formal hearing is needed here because the allegations made by the parties are unsupported and ''under cross-examination would be exposed as seriously flawed.'' Sabre Reply at 19. Most rulemaking decisions require the resolution of disputed issues of material fact, but that does not force the agency to hold a formal hearing. The Administrative Procedure Act, after all, expressly authorizes agencies to adopt rules without such a hearing. Indeed we may decide adjudicatory cases without holding a formal hearing, even when there are material factual issues in dispute. See, *e.g.*, *City of St. Louis* v. *DOT*, 936 F.2d 1528, 1534, n. 1 (8th Cir. 1991). We are satisfied, moreover, the record here amply supports our findings in this rule.

According to Sabre, however, this proceeding is also different from the Board's original rulemaking because our proposed rule ''may also retroactively alter some expectations,'' since the rule would allegedly ''disrupt'' the expectations of the systems and their subscribers. Sabre Reply at 19–20. The Board's rules in fact were much more disruptive. See *Republic Airlines* versus *United Air Lines*, 796 F.2d 526 (D.C. Cir. 1986), where the Court held that a system could require an airline to pay higher fees for CRS participation, since the Board's rules invalidated the contract allowing the airline to pay lower fees. We are not interferring here with any party's reasonable contract expectations. But, even if we were disrupting existing contracts, we could still act by rulemaking. As the Court stated in *Republic*, 796 F.2d at 528, ''There is of course no question that the CAB had the power, as a matter of federal law, to render the violative CRS contracts entered into by the airlines unenforceable from the effective date of the rule.''

Finally, Sabre alleges that a hearing is necessary since we cannot adopt rules prohibiting unfair methods of competition without first finding that antitrust violations have occurred, a step which would require a formal hearing, according to Sabre. Sabre Reply at 19, n. 20. Sabre's allegation is plainly wrong, for we need not find that anyone has violated the antitrust laws as a condition for prohibiting a practice as an unfair method of competition. 49 FR at 32545. *Cf. United Air Lines*, 766 F.2d at 1119–1120.

Worldspan asserts that we cannot fairly rely on our past analyses of the CRS business and its impact on airlines, both because those findings are now several years old and because we allegedly did not specifically identify which of the past findings are relevant to our proposed rule. Worldspan Comments at 4. Our use here of our earlier rulemakings and studies is neither unfair nor irrational. We relied on our past findings on the basic structure and operation of the CRS and airline businesses, and their structure and operation have not changed significantly since our last rulemaking. The past findings on which we relied were identified in the notice of proposed rulemaking. If Worldspan believed that our past findings were outdated or inaccurate, it had the chance in its comments to argue that those findings were no longer valid, as we specifically said in our notice. 61 FR at 42206. *Cf.* 57 FR at 43793.

The other procedural issues concern the motions by the Department of Justice and America West for leave to file pleadings after the due date for comments or reply comments and the late submission of letters from a number of travel agencies and from the European Civil Aviation Conference (ECAC). The Justice Department filed its comments soon enough to give other parties the ability to address its arguments in their reply comments. While America West filed its reply comments long after the applicable deadline, its reply responds to the points in the initial round of comments and contains no new factual or legal arguments. The late travel agency letters, which were largely generated by Sabre, primarily used Sabre's form response and thus duplicated the views stated in the timely letters. ECAC's comment states its position but does not present new arguments and evidence. Thus the acceptance of the late comments and letters will not prejudice anyone. We will therefore accept the Justice Department's comments, America West's reply comments, ECAC's comments, and the late letters from travel agencies.

Finally, we note that Sabre has tried to persuade the Departments of State and Commerce, the United States Trade Representative, and the Office of Management and Budget to keep us from adopting a rule prohibiting parity clauses. Our ex parte docket contains OMB's outline of Sabre's meeting with OMB officials.

Regulatory Process Matters

Regulatory Assessment

This rule is a significant regulatory action under section 3(f) of Executive Order 12866 and has been reviewed by the Office of Management and Budget under that order. Executive Order 12866 requires each executive agency to prepare an assessment of costs and benefits under section 6(a)(3) of that order. The proposal is also significant under the regulatory policies and

procedures of the Department of Transportation, 44 FR 11034.

Our notice of proposed rulemaking stated our tentative conclusions that the rule would benefit competition and innovation and give non-owner participating airlines a greater ability to choose the distribution methods that best meet their needs. We further stated that we did not think the rule would significantly injure travel agencies or affect the systems' operations. Among other things, no airline appeared likely to use the rule to lower its level of participation in any system below the full availability level. We found that the costs and benefits of the proposed rule appeared to be unquantifiable, but we asked interested persons to provide information on the costs and benefits. 61 FR at 42207.

After reviewing the comments and reply comments submitted in response to our notice of proposed rulemaking, we have determined that the rule should provide significantly more benefits than costs. We do not have data, however, that would enable us to accurately quantify the benefits of the rule for airlines and airline passengers and the costs of the rule for systems and travel agencies, although we had asked for such data. We are therefore providing a qualitative assessment of the rule's costs and benefits.

The rule will benefit airlines that do not own or market a CRS because it will allow them to choose the level of service purchased from each system. The rule will thereby enable each such airline to choose the most efficient method for distributing its services. Airlines can also avoid purchasing services they do not need, which may save them significant amounts of money. Alaska and Midwest Express, for example, had estimated that Sabre's most recent threat to enforce the parity clause against them would raise their booking fee expenses by more than ten percent. 61 FR at 42201.

The rule should also cause the systems to compete for airline purchasers of higher-level services. Although virtually all airlines must participate in each system at the full availability level, many non-owner airlines do not need to purchase higher levels of service from each system (our mandatory participation rule generally requires airlines with significant CRS ownership interests to buy an equivalent level of service from each system). Since a system's services will be more attractive to travel agencies if more airlines participate at higher levels, and since higher-level participation by more airlines will produce more revenue for a system, the systems should compete for higher-level participation by offering better service and perhaps lower fees.

In addition, if airlines can operate more efficiently, they can reduce their costs, which should lead to lower fares for airline travellers. However, while CRS costs are relatively large in relation to airline profit margins, they are relatively small in relation to total operating costs, so lower CRS costs are unlikely to result in large fare decreases.

We do not expect the rule to impose a substantial burden on the systems. The rule will not require the systems to change their method of operations. If the systems compete for higher-level airline participation, they are likely to incur additional marketing and developmental expenses, but nothing in the record indicates that those expenses would be significant. The systems may also have to lower their fees for higher-level participation. However, since the fees charged airlines do not currently appear to be disciplined by market forces, any marketplace discipline on the systems' fees would be economically beneficial.

The rule should not significantly affect travel agencies. We doubt that any significant airline that currently participates in CRSs will reduce its level of participation in any system below the full availability level, so travel agents using any system should continue to have the ability electronically to obtain information on the airline's schedules, fares, and availability, to make bookings, and to issue tickets. While some airlines are likely to reduce their level of participation in some systems, the operations of the travel agents using those systems should not become significantly less efficient, since the higher-level participation does not appear to greatly affect the efficiency of agency operations. Furthermore, if the systems could continue to enforce the parity clauses, airlines that would otherwise prefer to buy a higher level of service from one or a few systems would have the option of reducing their level of participation in those systems rather than upgrading their level of participation in the other systems. Thus the rule should not cause a significant reduction in the efficiency of travel agency operations.

Barring the systems from enforcing a parity clause against airlines that own or market a competing system would reduce CRS competition, since some airlines with CRS ties might well choose to discriminate against competing systems in order to create a marketing advantage for the system that they own or promote. Since our rule will allow systems to continue enforcing a parity clause against airlines that own or market a system, our rule should not cause any distortions in CRS competition.

The Department does not believe that there are any alternatives to the rule which would accomplish the goal of giving each participating carrier (other than carriers with a significant ownership interest in a CRS, which remain bound by section § 255.7(a)) the ability to choose its level of participation in each system.

Some parties have suggested that we should adopt a rule allowing a system to enforce parity clauses when the price and quality of its higher level of participation are comparable to those of the systems from which the airline is already purchasing the higher level of service. That proposal, however, would neither promote price and service competition among the systems for higher-level participation nor give participating airlines the ability to choose what service levels were most efficient for them.

This rule does not impose unfunded mandates or requirements that will have any impact on the quality of the human environment.

Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.*, was enacted by Congress to ensure that small entities are not unnecessarily and disproportionately burdened by government regulations. The act requires agencies to review proposed regulations that may have a significant economic impact on a substantial number of small entities. For purposes of this rule, small entities include smaller airlines and travel agencies. The notice of proposed rulemaking contained our initial regulatory flexibility analysis. This rule and our notice of proposed rulemaking set forth the reasons for our adoption of Alaska's rule proposal and the objectives and legal basis for the rule.

A number of the commenters submitted their views on our proposal's impact on small entities. We considered their comments in deciding whether to make final our proposed ban on parity clauses final.

The rule will primarily affect two types of small entities, smaller airlines and travel agencies. To the extent that airlines can operate more efficiently and reduce their costs, the rule will also affect all small entities that purchase airline tickets, since airline fares may be somewhat lower than they would otherwise be, although the amount may not be large.

The rule, as explained above, will give smaller non-owner airlines the ability to choose the level of service they will buy from each system by barring the use of airline parity clauses. Smaller non-owner airlines will be able to choose how they will distribute their services and thus be better able to operate more efficiently.

The rule will not directly affect travel agencies but may affect the operations of smaller travel agencies. If an airline reduces its level of participation in one or more systems without reducing its level of participation in all of the systems, agencies using a system in which the airline reduced its level of participation would not be able to operate as efficiently as before or as efficiently as some of the agencies' competitors. That loss in efficiency would be significant for an agency only if the airline provided a substantial amount of the airline service in the area where the agency conducts its business and if the reduction in the level of participation made it substantially more difficult for an agent to book the airline's services. We doubt that any significant airline currently participating in the systems will drastically reduce its level of participation in any system, so changes in participation levels are not likely to significantly interfere with the efficiency of travel agency operations. Furthermore, the parity clauses give airlines the option of either reducing their level of participation in the favored system or upgrading their level of participation in other systems. Since a participating airline may well choose to reduce its participation level in the favored system, parity clauses do not ensure that every airline will participate at a high level in all systems. For these reasons, we conclude that the rule will not significantly harm travel agencies.

In addition, the rule should encourage airlines and other firms to develop alternative means of transmitting information on airline services and enabling travel agencies to carry out booking transactions. In the long term these developments would benefit travel agencies.

The only alternative rule suggested by the commenters was Sabre's proposal that we allow each system to enforce a parity clause as long as that system's terms for the higher level of participation or enhancement were comparable to the terms offered by the competing system in which the airline was already participating at a higher level. As discussed above, we decided against adopting this proposal, since it would not promote competition in the CRS and airline industries and would force airlines without any CRS affiliation to buy more services than they considered desirable.

Our rule contains no direct reporting, recordkeeping, or other compliance requirements that would affect small entities. There are no other federal rules that duplicate, overlap, or conflict with our proposed rules.

The Department certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. *et seq.*) that this regulation will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

This rule contains no collection-of-information requirements subject to the Paperwork Reduction Act, Public Law 96–511, 44 U.S.C. Chapter 35.

Federalism Implications

The rule we are adopting will have no substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12812, we have determined that the rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

This rule does not impose unfunded mandates or requirements that will have any impact on the quality of the human environment.

List of Subjects for 14 CFR Part 255

Air carriers, Antitrust, Reporting and recordkeeping requirements.

Accordingly, the Department of Transportation amends 14 CFR Part 255, Carrier-owned Computer Reservations Systems, as follows:

PART 255—[AMENDED]

1. The authority citation for part 255 is revised to read as follows:

Authority: 49 U.S.C. 40101, 40102, 40105, 40113, 41712, recodifying 49 U.S.C. 1301, 1302, 1324, 1381, 1502 (1992 ed.).

2. Section 255.6 is amended by adding paragraph (e) to read as follows:

§ 255.6 Contracts with participating carriers.

* * * * *

(e) No system may require a carrier (other than a carrier that owns or markets, or is an affiliate of a person that owns or markets, a foreign or domestic computerized reservations system) to maintain any particular level of participation or buy any enhancements in its system on the basis of participation levels or enhancements selected by that carrier in any other foreign or domestic computerized reservations system. A system may not compel a carrier that owns or markets, or is an affiliate of a person that owns or markets, a foreign or domestic computerized reservations system, to maintain a particular level of participation or buy an enhancements in its system on the basis of participation levels or enhancements selected by that carrier in another foreign or domestic computerized reservations system, until 14 days after it has given the Department and such carrier written notice of its intent to take such action.

Issued in Washington, D.C. on October 28, 1997.

Rodney E. Slater,

Secretary of Transportation.

[FR Doc. 97–29295 Filed 11–4–97; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 4 and 375

[Docket No. RM95–16–000; Order No. 596]

Regulations for the Licensing of Hydroelectric Projects; Final Rule

Issued October 29, 1997.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is revising its procedural regulations governing applications for licenses and exemptions for hydroelectric projects. The regulations offer an alternative administrative process whereby in appropriate circumstances the pre-filing consultation process and the environmental review process will be combined. This alternative process is designed to improve communication among affected entities and to be flexible and tailored to the facts and circumstances of the particular proceeding. The final rule does not delete or replace any existing regulations.

EFFECTIVE DATE: December 5, 1997.

FOR FURTHER INFORMATION CONTACT:

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