

STATEMENT OF JAMES BURNLEY, DEPUTY SECRETARY OF TRANSPORTATION, BEFORE THE AVIATION SUBCOMMITTEE OF THE HOUSE PUBLIC WORKS AND TRANSPORTATION COMMITTEE, CONCERNING LEGISLATIVE PROPOSALS RELATING TO AIRLINE DEREGULATION AND CAB SUNSET, MARCH 13, 1984.

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I APPRECIATE THIS OPPORTUNITY TO APPEAR BEFORE YOUR SUBCOMMITTEE TO DETAIL THE DEPARTMENT OF TRANSPORTATION'S POSITION ON LEGISLATIVE PROPOSALS FOR CAB SUNSET AND RELATED SUBSTANTIVE MATTERS.

SECRETARY DOLE APPEARED BEFORE THIS SUBCOMMITTEE FEBRUARY 29 AND ADVISED YOU OF OUR BASIC POSITION ON CAB SUNSET LEGISLATION: WE BELIEVE THAT THE PROVISIONS OF THE 1978 AIRLINE DEREGULATION ACT ACCOMPLISH SUNSET, AND THAT ANY ADDITIONAL LEGISLATION AT THIS POINT COULD BECOME THE MAGNET FOR DIVERSE AMENDMENTS BY SPECIAL INTERESTS THAT COULD CONFUSE OR INTERFERE WITH ORDERLY SUNSET OF THE CAB.

SECRETARY DOLE ASSURED YOU THAT THE DEPARTMENT WOULD JUDGE CLARIFYING LEGISLATION ON ITS MERITS BEFORE MAKING A RECOMMENDATION TO THE PRESIDENT WHETHER OR NOT HE SHOULD SIGN IT. ONE OF THE PRIMARY CRITERIA SHE WILL USE IN REVIEWING ANY SUCH LEGISLATION IS THE REQUIREMENT THAT IT NOT CHANGE THE EXISTING JURISDICTIONAL ARRANGEMENT FOR SUNSET.

HOWEVER, THE DEPARTMENT CONTINUES TO BELIEVE STRONGLY THAT ADDITIONAL LEGISLATION IS NOT NEEDED. AFTER 40 YEARS OF EXTENSIVE ECONOMIC REGULATION OF THE AIRLINE BUSINESS IN THE UNITED STATES, CONGRESS WISELY DEREGULATED DOMESTIC PASSENGER AIRLINE SERVICE IN 1978. THIS DEREGULATION HAS BEEN PHASED IN AND WILL CULMINATE ON JANUARY 1, 1985. THE CAB HAS FULFILLED CONGRESS' MANDATE. EXPERIENCE SINCE 1978 AMPLY DEMONSTRATES THAT THE AIRLINES ARE BETTER OFF WITHOUT RATE AND ROUTE REGULATION, BETTER ABLE TO RESPOND TO ECONOMIC CHANGES, AND BETTER ABLE TO PROVIDE A REASONABLY PRICED PRODUCT TO THE CONSUMER. IT IS FAIR TO SAY THAT THE VAST MAJORITY OF CARRIERS, CONSUMERS, AND OTHER AFFECTED PARTIES DO NOT WANT TO TURN BACK THE CLOCK.

THE 1978 ACT CLEARLY TRANSFERRED THE REGULATORY RESPONSIBILITY OVER INTERNATIONAL AIR SERVICE AND ESSENTIAL AIR SERVICE TO DOT, AND WE LOOK FORWARD TO CARRYING OUT OUR EXPANDED RESPONSIBILITIES IN THIS AREA. THE AUTHORITY TO APPROVE AND IMMUNIZE AGREEMENTS AMONG CARRIERS FROM THE ANTITRUST LAWS, A MODIFIED FORM OF DOMESTIC MAIL RATE AUTHORITY AND A GOVERNMENT ROLE IN EMPLOYEE PROTECTION DETERMINATIONS WERE ALSO CONTINUED AND ASSIGNED TO SUCCESSOR AGENCIES. WE FULLY SUPPORT THESE TRANSFERS UNDER THE STATUTE.

DISPOSITION OF CAB FUNCTIONS NOT TRANSFERRED IN THE 1978 ACT

THE 1978 ACT DID NOT SPECIFICALLY ADDRESS THREE CAB FUNCTIONS IN THE DOMESTIC AREA WHICH ARE OF CONCERN TO THE COMMITTEE AND

THE PUBLIC. WE HAVE PROVIDED YOU WITH OUR DETAILED LEGAL ANALYSIS, WHICH CONCLUDES THAT THE AUTHORITY PROVIDED BY TITLE IV OF THE FEDERAL AVIATION ACT TO HANDLE THESE MATTERS LAPSES AT SUNSET.

DATA COLLECTION: DOT'S AUTHORITY UNDER TITLE 49 IS FULLY ADEQUATE TO CONTINUE ALL NEEDED DATA COLLECTION ON A MANDATORY BASIS. MOREOVER, THE DEPARTMENT HAS BEEN WORKING CLOSELY WITH THE CAB FOR SEVERAL YEARS TO INSURE THE CONTINUED ADEQUACY OF AIRLINE DATA COLLECTION AFTER SUNSET. WE PLAN NO SIGNIFICANT CHANGES IN THIS AREA BEYOND THE CULLING OUT OF UNNECESSARY REPORTING. THIS IS A PROCESS ALREADY UNDERWAY AT THE CAB.

DOMESTIC FITNESS: ANOTHER NON-TRANSFERRING FUNCTION IS THAT OF EVALUATING THE "ECONOMIC FITNESS" OF DOMESTIC CARRIERS TO BEGIN OR CONTINUE SERVICE, EXCEPT FOR COMMUTER CARRIER SERVICE TO EAS-ELIGIBLE POINTS WHICH REMAINS SUBJECT TO THE "FITNESS" STANDARD APPEARING IN SECTION 419.

TO THE EXTENT THAT FINANCIAL AND MANAGEMENT ISSUES BEAR ON SAFE OPERATIONS, WE ARE ABLE TO RELY ON THE "SAFETY FITNESS" DETERMINATION UNDER SECTION 604 OF THE FEDERAL AVIATION ACT TO REACH THESE ISSUES. BEYOND THIS CAREFUL SAFETY REVIEW, WE BELIEVE ENTRY INTO THE DOMESTIC AIRLINE INDUSTRY DOES NOT JUSTIFY A SEPARATE, INITIAL OR CONTINUING "ECONOMIC FITNESS" TEST. ADEQUATE CONSUMER PROTECTION REGULATIONS, COMPARABLE TO THOSE APPLICABLE TO CARRIER OPERATORS, SHOULD BE SUFFICIENT

TO PROTECT CONSUMERS FROM ABUSES BY NEW ENTRANTS, SUCH AS THE HAWAII PACIFIC AIRLINES EXAMPLE CITED IN YOUR EARLIER HEARINGS. ENTRY INTO MOST OTHER COMMERCIAL ACTIVITIES IS NOT BARRED BY AN INITIAL ECONOMIC FITNESS EXAMINATION, AND WE DO NOT THEREBY EXPOSE THE PUBLIC TO UNJUSTIFIED RISKS. THE LAPSE OF A PURELY ECONOMIC "FITNESS" TEST TO ENTER DOMESTIC AIRLINE TRANSPORTATION IS AN APPROPRIATE CONSEQUENCE OF CAB SUNSET.

CONSUMER PROTECTION: THE THIRD AREA OF CONCERN TO THE COMMITTEE IS CONTINUATION OF THE CAB'S CONSUMER PROTECTION FUNCTION. WHILE THE 1978 ACT CONTINUES THIS FUNCTION AT DOT FOR INTERNATIONAL AIR SERVICE, NO AGENCY WAS SPECIFICALLY NAMED TO CONTINUE ADMINISTERING THE SECTION 411 "UNFAIR TRADE PRACTICES" AUTHORITY. HOWEVER, CONGRESS INCLUDED IN SECTION 102 OF THE ACT PARTICULARLY WITH RESPECT TO DOMESTIC AIR TRANSPORTATION THE POLICY THAT "UNFAIR, DECEPTIVE, PREDATORY, OR ANTICOMPETITIVE PRACTICES IN AIR TRANSPORTATION" ARE CONTRARY TO THE PUBLIC INTEREST.

OUR LEGAL ANALYSIS CONCLUDED FROM THIS AND OTHER LEGISLATIVE HISTORY THAT CONGRESS COULD NOT REASONABLY HAVE MEANT TO LEAVE THE CONSUMER TOTALLY UNPROTECTED FROM UNFAIR TRADE PRACTICES IN DOMESTIC AIR TRANSPORTATION. CLEARLY, THE FTC WAS ORIGINALLY BARRED FROM THIS AREA FORTY YEARS AGO BECAUSE OF THE PRESENCE OF THE CAB. THUS, IN OUR VIEW, THIS CONSUMER PROTECTION AUTHORITY REVERTS TO THE FTC THE DAY THE CAB GOES OUT OF BUSINESS.

WE BELIEVE THE SHIFT OF THIS AUTHORITY CAN BE ACCOMPLISHED SMOOTHLY WITHOUT LEGISLATION AND WITH NO LOSS OF PROTECTION TO THE CONSUMER. DOT PROPOSES TO ENTER INTO A MEMORANDUM OF UNDERSTANDING WITH THE FTC, ENSURING THAT THE FTC IS THE LEAD AGENCY IN THIS AREA. UNDER THE MEMORANDUM OF UNDERSTANDING, DOT WOULD CONFORM ITS INTERNATIONAL CONSUMER PROTECTION RULES TO THE FTC'S DOMESTIC REGULATIONS. ACCORDINGLY, THE "SPLIT JURISDICTION" THAT HAS CONCERNED SOME CARRIERS WILL BE MORE APPARENT THAN REAL.

WITH REGARD TO THE LAPSE OF SECTION 404(a) "SAFE AND ADEQUATE" AUTHORITY, WE BELIEVE THE FORCES OF THE MARKET PLACE WILL REQUIRE THE CARRIERS TO CONTINUE REASONABLE RULES FOR THE SEPARATION OF SMOKERS AND NON-SMOKERS IN FLIGHT.

INSULATION OF THE DECISION-MAKING PROCESS AT DOT

THE COMMITTEE'S EARLIER HEARINGS ON CAB SUNSET, AS WELL AS SENATOR KASSEBAUM'S AND YOUR SPECIFIC INQUIRIES, HIGHLIGHT THE QUESTION OF WHETHER OR NOT DOT OR ANY OTHER EXECUTIVE BRANCH AGENCY SHOULD BE RELIED UPON TO MAKE INTERNATIONAL ROUTE AWARDS AND COMPARABLE CHOICES AMONG PARTIES IMPARTIALLY, WITHOUT SPECIAL, LEGISLATIVELY PRESCRIBED PROTECTION OR "INSULATION" OF THE PROCESS. MY RESPONSE IS AN UNEQUIVOCAL "YES".

CONGRESS HAS ALREADY ENACTED THE ADMINSTRATIVE PROCEDURE ACT TO ASSURE FAIRNESS IN AGENCY ACTIONS BASED ON QUASI-JUDICIAL

DECISIONMAKING AFFECTING COMPETING PARTIES OR RATE OR ENFORCEMENT ACTION WITH REGARD TO A SINGLE PARTY. THE AGENCY'S DECISION MUST BE BASED ON A WEIGHING OF FACTUAL EVIDENCE IN THE MATTER, AND IT IS ACCEPTED THAT THE DECISION SHOULD BE BASED ON A WRITTEN RECORD THAT CONTAINS ALL THE MATTER BROUGHT TO THE ATTENTION OF THE DECISION MAKER. AS YOU KNOW, THIS APPROACH PROVIDES A BASIS FOR JUDICIAL REVIEW OF THE COMPLETE RECORD OF CONSIDERATIONS THAT WENT INTO THE DECISION. WE INTEND TO CONTINUE THE CAB'S PRACTICE WITH REGARD TO ON-THE-RECORD DECISIONMAKING.

THUS, EX PARTE CONTACTS WITH THE INITIAL OR FINAL DECISIONMAKER ABOUT ANY SUCH CASE WILL BE PROHIBITED. THE TWO STAFF FUNCTIONS -- ADVOCACY OF THE PUBLIC INTEREST BEFORE THE ADMINISTRATIVE LAW JUDGE ON THE ONE HAND, AND ADVICE AND RECOMMENDATIONS TO THE FINAL DECISION MAKER ON THE OTHER HAND -- WILL BE STRICTLY SEPARATED. THE PREPARATION OF AND RELIANCE ON A WRITTEN RECORD WILL CONTINUE, USING THE SAME CAB ALJ'S IN THE SAME SITUATIONS WHERE ORAL PROCEEDINGS ARE NOW USED.

DESPITE OUR PLANS, THERE REMAINS CONCERN THAT IMPARTIAL DECISION-MAKING WILL BE THREATENED AFTER SUNSET BECAUSE THE ALJ'S DECISION WILL BE FORWARDED TO A CAREER CIVIL SERVANT FOR FINAL ACTION, RATHER THAN A TENURED, MULTI-MEMBER BOARD OF POLITICAL APPOINTEES. IN THE EXECUTIVE BRANCH, HOWEVER, IT IS COMMON TO RELY ON CAREER CIVIL SERVANTS TO MAKE ECONOMICALLY SIGNIFICANT DISTINCTIONS AMONG APPLICANTS FOR FEDERALLY-

DISPENSED RIGHTS, SUBJECT IN ALL CASES TO POLICY GUIDANCE FROM THE SECRETARY. THE IMPORTANT POINT IS THAT WE RELY ON THE SCRUTINY INHERENT IN PUBLIC PROCESSES, PARTICULARLY THAT OF THE DISAPPOINTED APPLICANT, AS WELL AS THE LIKELIHOOD OF CONGRESSIONAL OVERSIGHT OR JUDICIAL REVIEW, TO ASSURE FAIRNESS IN THE PROCESS.

OUR PLAN FOR POLICY OVERSIGHT OF THE CAREER CIVIL SERVANT CALLS FOR RETENTION BY THE SECRETARY OF THE OPTION TO REMAND A DECISION TO THE CIVIL SERVANT FOR FURTHER PROCEEDINGS WHERE THE FINAL DECISION IS CONTRARY TO HER UNDERSTANDING OF STATUTORY POLICY OR THE FACTS OF THE CASE. IT IS IMPORTANT TO REMEMBER AT ALL TIMES DURING DISCUSSION OF THIS ISSUE THAT THE SECRETARY WILL NOT HAVE THE RIGHT TO ENTER HER OWN FINAL DECISION IN PLACE OF THAT OF THE SENIOR CIVIL SERVANT. GIVEN THAT EVERY ACTION OF A CABINET OFFICER IS SUBJECT TO INTENSE SCRUTINY, AND THAT JUDICIAL REVIEW OF EACH ON-THE-RECORD DECISION IS AVAILABLE, WE CAN EXPECT THE SAME FAIRNESS OF DECISION-MAKING THROUGH THIS MECHANISM WE PRESENTLY HAVE AT THE CAB.

THIS SECRETARIAL OVERSIGHT WOULD BE EXERCISED ONLY IN NOVEL OR EXTREMELY SIGNIFICANT ACTIONS. CONGRESSMAN HAMMERSCHMIDT SUGGESTED TO THE SECRETARY THAT IT MIGHT BE HELPFUL TO HAVE WRITTEN GUIDELINES FOR THE EXERCISE OF THIS REMAND OPTION. THE SECRETARY AGREES, AND WE ARE DRAFTING CRITERIA FOR ADDITION TO OUR PLAN.

YOU RAISED THE QUESTION IN YOUR EARLIER HEARING WHETHER THE

SECRETARY'S OVERSIGHT OF EAS CARRIER SELECTIONS AND SERVICE LEVEL DETERMINATIONS SHOULD BE JUST AS CIRCUMSCRIBED AS INTERNATIONAL AWARDS. I BELIEVE THE CASES ARE DIFFERENT, BECAUSE EAS INVOLVES FEDERAL SUBSIDIES MADE FROM LIMITED FUNDS. THIS EXERTS A NATURAL PRESSURE ON THE DEPARTMENT TO STRESS EFFICIENCY AND RESIST PRESSURES TO MAKE AWARDS TO THE LESS EFFICIENT APPLICANT.

THE DEPARTMENT'S PROCEDURES IN EAS CASES WILL BE SIMILAR TO THOSE THE CAB NOW USES. FOR EXAMPLE, EAS SERVICE LEVEL DETERMINATIONS WILL BE MADE BY THE HEAD OF THE EAS OFFICE, A CAREER OFFICIAL. IF THERE IS AN APPEAL, THE COMMUNITY WILL BE GIVEN THE OPPORTUNITY FOR AN ON-SITE INFORMAL HEARING, TO BE CONDUCTED BY A STAFF LEVEL PANEL WHICH WILL MAKE ITS RECOMMENDATIONS TO THE ASSISTANT SECRETARY FOR POLICY AND INTERNATIONAL AFFAIRS. IN CARRIER AND RATE DETERMINATION CASES, THE EAS OFFICE WILL NEGOTIATE WITH CARRIERS AND ANALYSE THEIR PROPOSALS. THE HEAD OF THE EAS OFFICE WILL THEN DRAFT A FINAL DECISION FOR THE ASSISTANT SECRETARY FOR POLICY AND INTERNATIONAL AFFAIRS.

CHAIRMAN MCKINNON, ON BEHALF OF A MAJORITY OF THE BOARD, MADE TWO SPECIFIC RECOMMENDATIONS IN HIS TESTIMONY BEFORE THIS COMMITTEE FOR IMPROVING THE DOT INSULATION PLAN. FIRST, THE CAREER CIVIL SERVANT SHOULD HAVE A STAFF THAT IS EQUALLY INSULATED FROM INFLUENCE. THE SPECIFIC CONCERN WAS WITH LEGAL ADVICE BEING PROVIDED BY THE DOT GENERAL COUNSEL'S OFFICE,

WHICH, OF COURSE, ANSWERS TO THE SECRETARY. SECOND, IT WAS SUGGESTED THAT THE DECIDING OFFICIAL SHOULD DRAFT THE INSTITUTING ORDER THAT GOVERNS THE OBJECTIVE CRITERIA FOR DECISION, NOT A POLICY OFFICE THAT IDENTIFIES MORE CLOSELY WITH THE SECRETARY'S GENERAL POLICY RESPONSIBILITIES.

I BELIEVE THE DOT PLAN SATISFACTORILY ADDRESSES THESE ISSUES. IN THE CASE OF THE INSTITUTING ORDER, THE POLICY OFFICE AND GENERAL COUNSEL'S OFFICE MAY MAKE RECOMMENDATIONS TO THE CAREER CIVIL SERVANT, BUT HE OR SHE ACTUALLY ISSUES AND IS RESPONSIBLE FOR THE CONTENTS OF THE INSTITUTING ORDER. AS FOR LEGAL ADVICE FROM THE GENERAL COUNSEL'S OFFICE, DOT AND MANY OTHER AGENCIES HAVE THE SAME ARRANGEMENT FOR PROVIDING LEGAL SERVICES TO THE INDEPENDENT INSPECTORS GENERAL. WE HAVE HAD NO INSTANCES OF ATTEMPTED COERCION OR OTHER IMPROPER INFLUENCE. AS YOU KNOW, THE INSPECTORS GENERAL OF EACH AGENCY HAVE A STATUTORY RESPONSIBILITY TO REPORT ANY SUCH INSTANCES TO THE CONGRESS, AND THERE HAS BEEN NO OCCASION FOR SUCH A REPORT. NONETHELESS, IN REVIEWING OUR PLAN WITH THE CAB STAFF AND WITH OTHERS SINCE ITS ISSUANCE, WE HAVE BEEN PERSUADED OF THE DESIRABILITY OF THE DECISIONMAKER HAVING A SMALL STAFF OF TWO TO THREE PERSONS TO ASSIST HIM OR HER IN CARRYING OUT THE DUTIES AND RESPONSIBILITIES CONTEMPLATED BY THE PLAN.

SUBSTANTIVE LEGISLATION ON CAB SUNSET
OR RELATED AVIATION MATTERS

THE SECRETARY COMMENDS THE PUBLIC STATEMENTS AND FIRM

CONVICTION OF THE CHAIRMAN OF THIS SUBCOMMITTEE THAT ANY CAB LEGISLATION ORIGINATED BY THE COMMITTEE WILL NOT BECOME THE VEHICLE FOR UNDESIRABLE RE-REGULATORY PROVISIONS. OF COURSE, OPINIONS VARY ON WHAT SUBSTANTIVE LEGISLATION IS OR IS NOT DESIRABLE. YOUR HEARING NOTICE, FOR EXAMPLE, CITES THE PROPOSAL TO SHIFT CAB'S ANTITRUST RESPONSIBILITIES TO DOT RATHER THAN JUSTICE. WE FLATLY OPPOSE SUCH A TRANSFER, BECAUSE THIS INDUSTRY IS MATURE AND SHOULD BE SUBJECT TO THE SAME GOVERNMENTAL PROCESSES AS ANY OTHER INDUSTRY. THERE IS NO LEGITIMATE POLICY REASON TO SHIFT ANTITRUST OVERSIGHT OF THIS INDUSTRY OUT OF THE JUSTICE DEPARTMENT JUST BECAUSE IT IS THE AIRLINE INDUSTRY.

AS TO THE ECONOMIC TRANSPORTATION BENEFITS THAT SHOULD BE TAKEN INTO ACCOUNT IN REACHING ANY AGREEMENT APPROVAL AND IMMUNITY DECISIONS UNDER SECTIONS 412 AND 414, DOT IS COMFORTABLE WITH OUR PRESENT AND CONTINUING ABILITY TO FILE COMMENTS WITH THE JUSTICE DEPARTMENT. ALSO, WE ARE IN THE PROCESS OF REACHING UNDERSTANDINGS WITH THE DEPARTMENT OF JUSTICE ON A CLEAR DIVISION OF AUTHORITY, WITH DOT RESPONSIBLE FOR APPROVAL OF INTERNATIONAL RATES AND RELATED MATTERS, LEAVING APPROVAL OF ORGANIC AGREEMENTS AT JUSTICE. IN THE DOMESTIC ARENA, JUSTICE HAS ALREADY ANNOUNCED THAT IT WILL CONSIDER GRANTING LIMITED ANTITRUST IMMUNITY TO PREVENT TREBLE DAMAGE RECOVERIES WHERE APPROVED CONDUCT IS LIKELY TO BE THE OBJECT OF VEXATIOUS LITIGATION.

AS FOR THE MANY NON-SUNSET, SUBSTANTIVE CHANGES IN THE LAW

THAT ARE CANDIDATES FOR ATTACHMENT TO ANY SUNSET LEGISLATION, MOST APPEAR TO US TO BE CONTRARY TO THE ADMINISTRATION'S GOAL OF DEREGULATING THE DOMESTIC INDUSTRY. SUGGESTIONS TO RE-REGULATE FARES, MANDATE CONDITIONS FOR JOINT FARES, AND IMMUNIZE TRAVEL AGENT PRACTICES FROM ANTITRUST LAWS, ARE BUT A FEW OF THE IDEAS FLOATING AROUND IN SEARCH OF AN APPROPRIATE LEGISLATIVE VEHICLE. WE CONTINUE TO OPPOSE THEM.

WE ALSO OPPOSE SCHEMES TO RECREATE THE CAB IN DOT, INCLUDING PROPOSALS TO TRANSFER ALL CONSUMER FUNCTIONS AND ANTITRUST AUTHORITY TO DOT, AS WELL AS THE SUGGESTION THAT A NEW, CIVIL AVIATION ADMINISTRATION BE CREATED WITHIN DOT. IF WE ARE TRULY TO SUNSET THE CAB AND TO PUT THE ERA OF DOMESTIC AIRLINE REGULATION BEHIND US, WE MUST DISPERSE THESE FUNCTIONS CONSISTENT WITH THE PROVISIONS OF THE 1978 DEREGULATION ACT, WITH THE JUSTICE DEPARTMENT HANDLING ANTITRUST MATTERS, THE POSTAL SERVICE ADMINISTERING AIRMAIL RATES, THE FEDERAL TRADE COMMISSION ASSUMING CONSUMER PROTECTION AUTHORITY, AND THE DEPARTMENT OF TRANSPORTATION OVERSEEING INTERNATIONAL TRANSPORTATION POLICY AND SMALL COMMUNITY AIR SERVICE SUBSIDIES.

THIS CONCLUDES MY PREPARED REMARKS. I WOULD BE PLEASED TO RESPOND TO ANY QUESTIONS FROM YOU OR THE COMMITTEE.