

UNITED STATES OF AMERICA □
BEFORE THE □
DEPARTMENT OF TRANSPORTATION

Agreement Adopted by the Passenger)	
Services Conference of the International)	Docket OST-2013-0048
Air Transport Association)	

**MOTION FOR EXTENSION OF TIME, MOTION FOR LEAVE TO FILE AN
OTHERWISE UNAUTHORIZED DOCUMENT, AND RESPONSE OF THE
AMERICAN ANTITRUST INSTITUTE**

Motion for Extension of Time under 14 C.F.R. 302.9(a)(2)

The American Antitrust (AAI)¹ respectfully moves for an extension of time under 14 C.F.R. § 302.9(a)(2) to file an otherwise unauthorized document pursuant to 14 C.F.R. § 302.6(c)(1) to respond to the Reply of the International Air Transport Association, U.S. Department of Transportation Docket OST-2013-0048, June 21, 2013 (hereinafter “IATA Reply”). Under § 302.6(d), a motion for leave to file a further responsive document must be filed within seven days of the document to which the proposed filing is responsive, unless, among other things, an extension is allowed under § 302.9(a)(2). Under § 302.9(a)(2), a Department of Transportation (DOT) decisionmaker, as appropriate, may permit the filing of a further responsive document after the expiration of a specified time period where good cause for the failure to act on time is clearly shown.

¹ The AAI is an independent and nonprofit education, research, and advocacy organization whose mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. The AAI is managed by its Board of Directors, with the guidance of an Advisory Board consisting of approximately 130 prominent antitrust lawyers, law professors, economists, and business experts. The AAI’s Board of Directors alone has approved this filing for AAI. The individual views of members of the Advisory Board may differ from AAI positions.

Here, the DOT should find good cause to allow an extension of time. Although the AAI was timely served with the IATA Reply by U.S. mail, it did not receive and discover the IATA Reply, which was an optional filing not required under 14 C.F.R. § 302.6(a), until after the expiration of the seven-day statutory period. The AAI prepared the above-referenced motions and responsive comments promptly upon learning of the existence of the IATA Reply. The IATA Reply also is deficient in several respects that bear critically upon a proper evaluation of IATA's application for approval of Resolution 787 ("Application"). Because allowing the AAI to respond to the IATA Reply would aid the DOT in its evaluation by elucidating these deficiencies, the AAI submits that an extension of time is in the public interest. For all of these reasons, the DOT should exercise its discretion to grant the AAI's motion for an extension of time to file an otherwise unauthorized document.

Motion for Leave to File an Otherwise Unauthorized Document

The AAI also moves for leave to file an otherwise unauthorized document pursuant to 14 C.F.R. § 302.6(c)(1) to respond to the IATA Reply. Under § 302.6(c)(1), the DOT will accept otherwise unauthorized documents if leave has been obtained on written motion for good cause shown. Here, the DOT should find good cause to allow the AAI to file a response to the IATA Reply, for several reasons. First, the IATA Reply suggests ordering language, admonitions, or restrictions that the DOT could incorporate in its approval that tacitly or explicitly would purport to alter the scope of such approval in ways the Application would not.² Because this language was not included in the

² See IATA Reply at 9, 12, 14, 15.

Application itself, the AAI has never had the opportunity to comment on IATA's full proposal. Allowing the AAI to file a response to the IATA Reply would afford the AAI an opportunity to address IATA's now "complete" proposal for the first time. Second, as discussed in AAI's responsive comments incorporated into this motion below, the IATA Reply sidesteps important concerns about the potential competitive effects of Resolution 787. The AAI submits that full consideration of the potential competitive effects of Resolution 787 is in the public interest. For all of these reasons, the DOT should grant the AAI's motion for leave to file an otherwise unauthorized document.

Response of the American Antitrust Institute

I. Introduction

The AAI incorporates these responsive comments to the IATA Reply ("AAI Response") into its motion for leave to file a further responsive document in the above-captioned proceeding pursuant to 14 C.F.R. § 306(c)(2). As a general matter, the IATA Reply raises more questions regarding Resolution 787 than it purports to answer. For example, the document contains additional ordering language, admonitions, and restrictions that will undoubtedly have a material impact on the interpretation of the original Resolution 787 language. The Reply also carves out and largely eliminates discussion of the New Distribution Capability (NDC) from the XML technical standard proposal. Yet XML and NDC are closely intertwined in Resolution 787. Finally, fundamental questions remain as to the substantive implications of IATA's filing approach in purportedly seeking approval only of an XML messaging standard.

The foregoing problems collectively serve to make Resolution 787 a “moving target” for which IATA asks for DOT approval. This disadvantages not only the DOT, but also industry stakeholders and public interest proponents in their quest to provide useful input as part of the DOT’s open advocacy process. Moreover, Resolution 787 is perhaps one of the most important instances in which the DOT will be asked to opine on an issue where consumer protection and competition issues intersect so closely. As many commenters have aptly pointed out, the authentication provisions of Resolution 787 raise fundamental issues associated with consumer privacy and choice. The NDC standard – which Resolution 787 intertwines with the XML standard – generates significant concerns regarding the competitive process and outcomes surrounding the distribution of airline products and services. The IATA Reply does nothing to address commenters’ concerns regarding the vast implications of the “nexus” of these two major public policy issues. Those issues are arguably at the heart of the DOT’s statutory mission in overseeing the domestic aviation industry.

IATA’s Reply is deficient or non-responsive to the issues raised by the AAI in its comments filed in this docket on May 1, 2013 (“AAI Comments”),³ in at least two respects: (1) IATA sidesteps the competitive issues surrounding the NDC model raised in AAI’s Comments; and (2) IATA does not address the substantive risks inherent in transitioning to the XML standard through a Tier 3 approval of Resolution 787, as compared to Tier 1 adoption of an XML standard by itself. For the reasons described below, the cumulatively assembled language of Resolution 787, IATA’s Application, and

³ American Antitrust Institute, *Comments of the American Antitrust Institute*, U.S. Department of Transportation Docket OST-2013-0048, May 1, 2013 (hereinafter “AAI Comments”)

IATA's Reply should lead the DOT to reject IATA's request for approval in its current form.

II. IATA's Reply Sidesteps the Competitive Issues Raised by the NDC Model by Redefining Resolution 787 Solely Around the XML Standard

Numerous commenters in this proceeding articulated concerns regarding the competitive effects of Resolution 787, particularly the process through which the NDC proposal was crafted within IATA and the potential effect of the agreement on competition. AAI, for example, noted that Resolution 787 raised important policy issues relating to potential anticompetitive coordination among rivals. AAI's Comments explained that the NDC proposal may potentially constitute an anticompetitive agreement among competitors on the "rules" of competition. Integral to this concern was that the stakeholder process for developing Resolution 787 did not appear open, transparent, and inclusive, but rather was confined only to a small group of member airlines charged with promulgating the NDC proposal.⁴

In its Reply, IATA almost entirely sidesteps the competitive concerns centered on anticompetitive coordination raised in AAI's Comments. Instead, the Reply attempts to refocus the debate solely on the technical XML standard and to introduce qualifying language that takes the NDC proposal out of the unwanted spotlight. Indeed, unlike the Resolution 787 proposal, in which NDC shared the stage with XML, there is scarce reference at all to NDC in the body of IATA's Reply. What attention is paid to NDC resides primarily in Appendix A, which addresses comments regarding the adoption of NDC by IATA's membership at their Annual General Meeting on June 3, 2013 – well after the passage of Resolution 787 as it was filed in this proceeding.

⁴ AAI Comments at 8-10, 11-12.

In refocusing the debate exclusively on XML, the IATA Reply essentially asks the DOT to “pay no attention to the man behind the curtain.” That “man,” of course, is the NDC standard that is intimately intertwined with the XML standard according to the plain language of the Resolution 787 proposal. Moreover, what meager response the IATA Reply offers to the competition issues raised in the AAI Comments falls short because it mischaracterizes the relevant issues. The Reply summarily states, for example, that opponents (citing AAI, among others) contend that Resolution 787 is not in the public interest because “it would displace today’s fare filing system.”⁵ The Reply also interprets concerns over the lack of transparency and inclusiveness in IATA’s process for producing the NDC as “excluding other distribution system participants from assisting in the XML data transmission standard.”⁶

These characterizations are a misreading of the AAI’s concerns. For example, the AAI Comments state:

Imposition of a uniform distribution model (NDC) that is the product of an agreement among the largest airlines could soften existing competition between airlines and between the airlines’ direct-connect distribution channel and other channels of distribution, such as online and offline retail and corporate travel agencies.⁷

AAI’s focus is on how a mandated NDC standard developed through a potentially anticompetitive agreement among major airlines on “rules” could soften intra-channel and inter-channel competition. Indeed, the concern is not the preservation of the existing airline fare filing system, but promotion of a competitive process that produces robust

⁵ IATA Reply at 7.

⁶ *Id.* at 21.

⁷ AAI Comments at 11.

rivalry between market participants and distribution channels and models, thus delivering benefits to consumers.

The IATA Reply offers a similarly errant characterization of AAI's concerns over IATA's internal process for reaching agreement on the NDC model. AAI's Comments note:

[Absent an open and inclusive industry stakeholder process], the Application raises fundamental concerns about the intent of the XML-NDC proposal as a competition-neutral or competition-enhancing process. The record evidence indicates that IATA's adoption of Resolution 787 may not reflect an open and inclusive stakeholder process. . . . Deviation from an inclusive process would cast a shadow on the intent of Resolution 787, potentially raising pressing policy questions or even – if the outcome is anticompetitive – antitrust liability.⁸

AAI's concern is not that some distribution system participants were simply excluded from "assisting in the XML data transmission standard." Rather, the salient issue is that such exclusion could reveal a Resolution 787 development process that potentially involved anticompetitive collaboration among major airlines, the outcome of which could be harmful to competition and consumers. Not only does the Reply miss this fundamental point, it fails to address the logistical question of why the IATA membership voted out the NDC standard before two critical meetings of stakeholder groups were scheduled.

In addition to sidestepping the difficult competitive concerns raised by the development process and substance of the XML-NDC proposal, IATA takes a "Band-Aid" approach to solving the circumscribed set of competitive concerns the Reply does choose to address. This solution is to suggest a variety of caveats and qualifiers to a proposed DOT approval order. As described in more detail below, the AAI notes that the first ordering language proposed in the IATA Reply poses more questions than it

⁸ AAI Comments at 8, 9-10.

answers: “Approval of Resolution 787 does not constitute approval of any agreement among airlines regarding any method of distributing air transportation.”⁹ At a minimum, the proposed language highlights the incongruity in IATA’s Reply, namely that the proposed language is one of the few instances where the document even refers to NDC. If the proposed language rises to the level of a proposed amendment to Resolution 787 or the Application, then surely the issues raised by commenters regarding the NDC distribution standard deserve more discussion in the IATA Reply. Second, if in fact the Resolution 787 proposal does not constitute *approval* of any agreement among airlines regarding any method of distribution, then it does not belong in IATA’s DOT filing. IATA should therefore withdraw its Application, untangle the NDC standard from the XML standard, and resubmit an appropriate application.

III. IATA’s Reply does not Explain Why the DOT Should Assume the Risk of Approving Resolution 787 When a Transition to the XML Standard Could Have Been Filed under the Expedited Tier 1 Procedure

IATA’s Reply does not address the serious risks it asks the DOT to voluntarily assume by granting unneeded approval of the XML standard. In its Application and Reply, IATA has always maintained that it believes “Resolution 787 could have been filed for information only under DOT Order 2012-4-18 (Tier 1),” because IATA is seeking approval of Resolution 787 “only insofar as it describes a means to modernize distribution communications technology with a new XML standard.”¹⁰ Taking it at its word, IATA has never offered a reasonable explanation for why its implementation of a

⁹ IATA Reply at 9.

¹⁰ Application at 2, 17.

non-exclusive, non-mandatory XML messaging standard is before the DOT in a Tier 3 application for approval.¹¹

IATA's Application should be rejected in its current form because IATA continues to believe it does not need the only approval it purports to seek.¹² This fact might be insignificant if Resolution 787 described only the XML messaging standard that could have been filed under Tier 1, because the DOT could then approve the resolution without any risk that approval would be construed as something over and above that which already qualifies for expedited approval. The plain language of Resolution 787, however, describes and intimately intertwines the NDC distribution standard with the XML messaging standard. The Application in its current form, which seeks approval of Resolution 787 in its current form, therefore invites obvious confusion about whether DOT approval can be construed as approval of the NDC standard, or any aspects of the NDC standard. Among other things, this confusion would be highly susceptible to dangerous interpretations in other administrative or judicial proceedings, because

¹¹ See Dep't of Trans., Order 2012-4-18, *Action on IATA Agreement, Application for Further Exemption From Condition #2*, at 1-2 (Apr. 13, 2012) (hereinafter Order 2012-4-18) (granting broad exemption to Condition #2 "designed to facilitate prompt implementation of routine but essential standard setting . . . agreements without antitrust immunity"); Dep't of Trans., Order 2002-1-15, *Action on IATA Agreement, Order Granting Exemption*, at 1, A3 (hereinafter Order 2002-1-15) (granting exemption from advance approval for 37 specified resolutions or best practices, including Resolution 783, described as "Passenger and Airport Data Interchange Standards [(PADIS)] Board"); Resolution 783, IATA Passenger Services Conference Manual I & II at 725-26 (hereinafter Resolution 783) ("A [PADIS] Board . . . is established to develop and maintain . . . eXtensible Markup Language (XML) specifications and also future specifications for electronic interchange of data for airline passenger travel . . .") (emphasis added); Resolution 787 at 1.2.2 ("PADIS message standards shall be used for the transmission of data. *Development of messaging standards shall be in accordance with the provisions of Resolution 783.*") (emphasis added).

¹² In both its Application and Reply, IATA has never retreated from its statement that "Resolution 787 could have been filed for information only under DOT Order 2012-4-18 (Tier 1)." Application at 17 (emphasis added).

decisionmakers would be forced to form their own conclusions about why otherwise unnecessary approval was sought and awarded. One such conclusion is that more must have been intended by both IATA and the DOT, respectively.¹³

In its Reply, IATA tacitly acknowledges the risk of unintentional full or partial NDC approval by asking the DOT to implement ordering language, admonitions, or restrictions that would purportedly limit the scope of approval. The DOT, however, should decline this invitation to negotiate with itself. IATA's new language would only invite more interpretive confusion because it does nothing to alter the language of Resolution 787, which intimately intertwines the NDC standard with the XML standard. Moreover, IATA's proposed language does not specify to which sections of Resolution 787 it would apply. As such, it would only add to the morass of existing litigation questions created by the dissonance between the language of IATA's Application for approval and the language of Resolution 787. The proposed ordering language would simply interject new litigation questions about how the new language applies to each.

Instead of asking future decisionmakers to make a jigsaw-puzzle determination as to the scope of approval actually conferred, IATA should withdraw its Application, issue the XML standard under Tier 1, and submit a separate application for approval of the NDC standard at another time, subject to separate notice requirements, with full opportunity for public comment. Otherwise, the DOT should reject IATA's Application. Anything less than a separation of dockets serves to muddy the waters around the Resolution 787 proposal, risks confusing the public on the scope and breadth of the

¹³ *Cf., e.g.,* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (1st ed. 2012) (discussing the “surplusage canon” and suggesting that no statutory provision “should be given an interpretation that causes it . . . to have no consequence”).

competitive issues surrounding NDC, and seriously threatens to short circuit full DOT review.

In its Reply, IATA's only response to being confronted with this substantively problematic aspect of its filing is to suggest that its approach was procedurally cognizable. That IATA had a cognizable procedural path to filing a Tier 3 application is obvious – nothing in Order 2012-4-18 affirmatively prevents IATA from *seeking* Tier 3 approval – but it also misses the point. IATA maintains that it was *obligated* to proceed with a Tier 3 application because it sought approval of the XML standard using a PSC Resolution, and it is required to file all such conference resolutions for DOT review under Condition #2 to the approval of the Traffic Conference Provisions.¹⁴ This “no choice” argument is specious if IATA truly seeks approval only to implement the XML standard. Resolution 787 expressly provides that message standards shall be developed in accordance with the provisions of Resolution 783, and Order 2002-1-15 exempts Resolution 783 from Condition #2.¹⁵ The argument is also plainly irreconcilable with both IATA's Application, which clearly states that it could have “*filed*” under Tier 1,¹⁶ and other arguments made simultaneously in IATA's Reply, which clearly states that IATA “*decided*” to file under Tier 3.¹⁷

¹⁴ IATA Reply at 26-27.

¹⁵ Resolution 787 at 1.2.2; Order 2002-1-15 at 1, A3. Resolution 783 provides for the creation of a Board to, among other things, “develop and maintain . . . eXtensible Markup Language (XML) specifications and also future specifications for electronic interchange of data for airline passenger travel . . .”. *See also id.*, Order 2002-1-15, Order 2012-4-18, and Resolution 787, *supra* note 11.

¹⁷ IATA Reply at 27 (“IATA *decided* to skip the false start that would result from filing under Tier 1”) (emphasis added).

More fundamentally, however, the “no choice” argument conflates IATA’s internal decisionmaking with its obligations under Condition #2 to the approval of the Traffic Conference Provisions. IATA is master of its internal operations and makes its own decisions as to how to seek approval for a technical standard. If IATA’s decision to present XML for approval to the DOT using a PSC Resolution tied to a highly controversial new distribution standard committed IATA to submitting the XML standard to unnecessary scrutiny, with great cost and delay, this may be grounds for introspection on IATA’s part. It is not, however, a basis for approval of the Application in its current form. The Application is *substantively* problematic because it creates obvious confusion regarding the scope of approval being sought, and the scope of approval that would be conferred.

IATA also suggests that seeking approval for the XML standard under Tier 1 would have been a waste of time because of the likely public outcry, and proceeding under Tier 3 allows it to “skip the false start,” consistent with unspecified DOT staff guidance.¹⁸ This argument ignores the elephant in the room. Any suggestion that the legions of concerned commenters were moved by the threat of an XML messaging standard, rather than NDC, should not be taken seriously. As IATA itself notes, “XML has become the standard way to describe data structures and transmit data over the Internet,” and many of the commenters to this proceeding already use it.¹⁹ The DOT has already exempted from approval a PADIS Board established “to develop and maintain . .

¹⁸ *Id.* IATA does not specify the nature or timing of the “informal” staff guidance, or if DOT staff was fully aware at the time that IATA planned to submit a resolution describing two standards, one of which qualified for Tier 1 approval and one of which did not, and that it would attempt to seek approval only for the standard qualifying for Tier 1 approval.

¹⁹ Application at 4.

. eXtensible Markup Language (XML) specifications and also future specifications for electronic interchange of data for airline passenger travel.”²⁰ Of the approximately 400 comments filed, those who oppose Resolution 787 have almost unanimously expressed concerns about NDC, while not a single commenter argued against approval exclusively on the basis of competition or consumer protection concerns caused by the implementation of an XML standard.²¹ The DOT has already confirmed for IATA that “the work of the service conferences [that] involves technical standards and procedures . . . seldom raises public interest issues.”²²

Public outcry over XML alone is even more implausible if movement to XML would be made expressly and unequivocally non-exclusive and non-mandatory, as IATA contends.²³ Although a mandatory, exclusive technical standard (whether express or de facto) can occasionally lead to anticompetitive effects,²⁴ there is simply no basis to suspect that a truly non-exclusive, optional XML “standard” would draw the ire of competition and consumer protection advocates. Indeed, one has to wonder about the purpose, or utility, of seeking to adopt an optional, non-exclusive XML “standard” if it is

²⁰ Order 2002-1-15 at 1, A3.

²¹ *See generally*, Dep’t of Trans., Public Comments on Agreement Adopted by the Passenger Services Conference of the International Air Transport Association, Docket No. OST-2013-0048, *available at* <http://www.regulations.gov> (search docket number). In its Reply, IATA cites only Open Allies for Airfare Transparency as a lone commenter with concerns specifically tied to the XML standard. IATA Reply at 20. However, the vast majority of this commenter’s concerns pertain to NDC. *See* Comments of Open Allies for Airfare Transparency on Notice of Proposed Rulemaking, Enhancing Airline Passenger Protections, Docket No. DOT-OST-2010-0140.

²² Order 2002-1-15 at 2-3.

²³ *See* Application at 7 (contending that “[n]othing in [Resolution 787] compels conversion to the use of XML.”); IATA Reply at 13-14 (arguing that the text of Resolution 787 can be read to suggest that movement to the XML standard would be non-exclusive and non-mandatory).

²⁴ *See, e.g.*, George S. Cary, Larry C. Work-Dembowski & Paul S. Hayes, *Antitrust Implications of Abuse of Standard-Setting*, 15 G. Mas. L. Rev. 1241 (2008).

conceptually separate from seeking approval to implement NDC,²⁵ particularly given the pace of innovation in electronic messaging standards and the possibility that XML will soon undergo fundamental changes or be surpassed by a competing technology.²⁶

IATA would be wise to “skip the false start” if and when it openly seeks full approval of NDC, but it would be highly disingenuous to suggest that implementing an optional XML messaging standard by itself, without any reference to NDC, would generate a comparable public outcry. Such a view is not borne out by the experience of any other standards setting organization that has implemented an XML messaging standard in the 15 years since the WC3 first adopted its XML 1.0 Recommendation.²⁷ Contrary to IATA’s suggestion, the enormous outpouring of public attention to this matter favors separating the XML and NDC dockets, not approving the Application and Resolution 787 in their current form.

If IATA insists on pressing this application in its current form, IATA’s request for approval of Resolution 787 should be denied in its entirety. If IATA seeks approval solely and exclusively to implement a non-exclusive, non-mandatory XML technical standard for electronic data transmission, it should file for separate approval pursuant to the expedited Tier 1 procedure described in Order 2012-4-18.

²⁵ *Accord supra* note 13 and accompanying text.

²⁶ Five editions of XML 1.0 have been released since its inception 15 years ago, *see* Worldwide Web Consortium, *Extensible Markup Language (XML) 1.0 (Fifth Edition)*, Nov. 26, 2008, *available at* <http://www.w3.org/TR/2008/REC-xml-20081126/>, and some experts believe that competing standards are superior, *see, e.g.*, David Mertz, *XML Matters: YAML Improves on XML*, IBM developerWorks, Oct. 1, 2002, *available at* <http://www.ibm.com/developerworks/library/x-matters23.html> (arguing that “YAML is a great deal simpler to read, edit, modify, and produce than XML”).

²⁷ *See* Press Release, World Wide Web Consortium, The World Wide Web Consortium Issues XML 1.0 as a W3C Recommendation (Feb. 10, 1998), *available at* <http://www.w3.org/Press/1998/XML10-REC>.

Respectfully submitted,

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