Order 97-12-35

Served: December 31, 1997

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 31st day of December, 1997

AMERICAN AIRLINES, INC., et al., and THE TACA GROUP RECIPROCAL CODE-SHARE SERVICES PROCEEDING	**Docket OST-96-1700**

ORDER TO SHOW CAUSE

The TACA Group, composed of six Central American airlines: Aviateca S.A. ("Aviateca"), Compañia Panameña de Aviación S.A. ("COPA"), Líneas Aéreas Costarricenses S.A. ("LACSA"), Nicaraguense de Aviación S.A. ("NICA"), TACA International Airlines S.A. ("TACA"), and TACA de Honduras S.A. ("TACA de Honduras") (each individually a "TACA Group Affiliate Air Carrier," and hereafter collectively referred to as "the TACA Group") filed separate applications for exemptions authorizing each of these carriers to serve additional points in the United States, Canada, Europe, and Japan.[1] American Airlines, Inc. ("American"), its regional affiliates,[2] and the TACA Group filed a joint application for statements of authorization to engage in certain reciprocal code-sharing services.[3] These applications were filed under 49 U.S.C. section 40109 and 14 C.F.R. Parts 207 and 212, respectively, and were consolidated into this proceeding.

We have tentatively determined to exempt American and the TACA Group from the Department's regulations to the extent necessary to permit them to engage in the proposed code-sharing arrangement. We have, however, tentatively found it appropriate to condition and limit our exemption, as more fully explained below. We will require that the Joint Applicants (1)

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1 The TACA Group airlines state that they will use this additional authority to implement a proposed code-sharing arrangement with American Airlines, Inc.

2 Executive Airlines, Inc., Flagship Airlines, Inc., Simmons Airlines, Inc., and Wings West Airlines, Inc.

3 American also applied for an exemption to allow it to integrate its certificate authority to serve points in Central America and the Caribbean (Route 137), South America (Route 389), and Mexico (Route 560).

exclude the provision in the Alliance Agreement for the establishment/implementation of the proposed Joint Alliance Committee (hereafter referred to as "the Committee"); (2) exclude any condition in the Alliance or Code-Share Agreements implementing an exclusivity provision (hereafter referred to as "the Exclusivity Clause"); (3) employ fixed blocks-of-seats on their respective flights to be managed, marketed, and sold independently by the respective code-sharing partners under their own airline designator codes, in each of the affected Miami-Central America markets; (4) file all subsidiary and or subsequent agreement(s) with the Department for prior approval; and (5) resubmit for renewal their variously styled code-share agreement(s) within two years. We also tentatively specify certain criteria to be used upon review of this action. Furthermore, we tentatively find it in the public interest to direct the TACA Group carriers to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic (O&D Survey) data for all passengers to and from the United States (similar to the O&D Survey data reported by American).[4] We are providing the Joint Applicants and other interested parties the opportunity to comment on our tentative findings in this order.

We tentatively find that, subject to the conditions and limitations specified, our action here will advance important public benefits. Final approval would permit the Joint Applicants to operate more efficiently and provide the U.S. traveling and shipping public with expanded networks and seamless service in the U.S.-Central America market. With our proposed conditional approval to these U.S.-Central America markets, our proposed action will be consistent with our policy of facilitating code-share networks, where those networks point the way potentially to lower costs and enhanced service for U.S. and international consumers.

Importantly, we recognize that the United States and each of the respective foreign applicants' homeland governments have initialed agreements that include all of the essential provisions contained in the open-skies agreements that the United States has concluded with various countries in Europe and Asia. We have previously determined that the existence of a full open-skies agreement is a prerequisite to our consideration of applications for antitrust immunity. We now tentatively find this prerequisite appropriate for our consideration of code-share alliances that include the various market and operational characteristics associated with this case. We tentatively find this standard to be a necessary component of our public interest determinations because the Joint Applicants intend to integrate their combined operations to the fullest extent possible, making the isolation of pricing and joint scheduling extremely difficult to maintain but for the conditions tentatively imposed by this order. Additionally, the Joint Applicants would exercise significant market power in certain markets covered by the agreements without the conditions imposed by this order. We, therefore, must be assured that other U.S. carriers will be allowed an adequate opportunity to offer and operate competitive services to and beyond the several foreign markets affected in this case.

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[4] If our tentative decision is finalized, this provision will take effect in the first full quarter following issuance of a final decision in this matter.

I. Background

A. The Open-Skies Accords with the Foreign Applicants' Homeland Governments

On May 8, 1997, the Governments of the United States and Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Republic of Panama separately reached agreement with the United States on new open-skies aviation relationships. A predicate for our conditioned approval for the American-TACA Group alliance is the existence of the expansive, new aviation agreements between the United States and these several governments. These new accords allow any U.S. airline to serve between any point in the United States and a point or points in these six Central American countries (with open behind, intermediate, and beyond traffic rights) and provide similar rights to any airline from those countries.

Among other things, the open-skies accords provide that the national carriers of the contracting countries may enter into marketing arrangements such as blocked-space, code-sharing or leasing arrangements, if all airlines (1) hold appropriate authority, and (2) meet the requirements normally applied to such arrangements. As previous open-skies accords have demonstrated, open-skies aviation should also encourage increased competition in the U.S.-Central America marketplace. Since now the price and quality of U.S.-Central America airline service will be disciplined by market forces, instead of restrictive agreements, U.S. consumers should benefit from enhanced passenger and shipping options.

B. The TACA Group's Current U.S. Operating Authorities

Aviateca

By Notice of Action Taken on November 4, 1997, Docket OST-97-2676, the Department granted Aviateca an exemption from 49 U.S.C. 41301 to conduct: (1) scheduled foreign air transportation of persons, property and mail from points behind Guatemala, via Guatemala and intermediate points, to any point or points in the United States, and beyond; and (2) scheduled all-cargo operations between the United States and any point or points. Additionally, the Department granted the carrier an exemption to conduct charter foreign air transportation of persons, property and mail between: (1) any point or points in Guatemala and any point or points in the United States; and (2) any point in the United States and any point or points in a third country or countries, provided that (except with respect to cargo charters) such service constitutes part of a continuous operation, with or without a change of aircraft, that includes service to Guatemala for the purpose of carrying local traffic between Guatemala and the United States. The Department granted the authority for the period November 4, 1997 through November 4, 1999.[5]

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[5] These authorities are limited to operations conducted under wet lease by a duly authorized and properly supervised U.S. or foreign carrier. Aviateca may not conduct the operations authorized above using its own aircraft and crews without further Department action. However, this action did not affect Aviateca's authority to conduct operations to the United States as authorized by Notice of Action Taken October 27, 1993, in Docket 46583, Order 92-10-53, in Docket 46945 and Order 90-8-58, in Docket 46582 (those authorities remain effective under the automatic extension provisions of federal law (5 U.S. C. 558(c) as implemented by 14 C.F.R. Part 377)). Operations under these latter authorities could continue to be conducted by Aviateca using its own aircraft and crews, consistent with the scope of its Operations Specifications issued by

COPA

On May 16, 1997, Docket OST-97-2529, COPA filed an application for renewal of exemptions under 49 U.S.C. 41301 to conduct: (1) scheduled foreign air transportation of persons, property and mail between Panama City, Panama, and San Juan, Puerto Rico, via the intermediate point Santo Domingo, Dominican Republic; and (2) scheduled foreign air transportation of persons, property and mail between Panama City, Panama, and (a) the U.S. coterminal points Houston, Texas, and Los Angeles, California; and (b) New York, New York, and to coterminalize New York operations with COPA's existing Department authority to serve Miami, Florida.[6]

LACSA

By Notice of Action Taken on November 3, 1997, Docket OST-97-2682, the Department granted LACSA an exemption from 49 U.S. C. 41301 to conduct scheduled foreign air transportation of persons, property and mail from points behind Costa Rica, via Costa Rica and intermediate points, to any point or points in the United States, and beyond. Additionally, the Department granted the carrier an exemption to conduct charter foreign air transportation of persons, property and mail between: (1) any point or points in Costa Rica and any point or points in the United States; and (2) any point or points in the United States and any point or points in a third country or countries, provided that such service constitutes part of a continuous operation, with or without a change of aircraft, that includes service to Costa Rica for the purpose of carrying local traffic between Costa Rica and the United States. The Department granted the authority for the period November 3, 1997, through November 3, 1999. This authority was granted subject to the terms, conditions and limitations of LACSA's foreign air carrier permit (Order 86-7-2).

NICA

On June 2, 1993, Docket OST-95-480, NICA filed an application for renewal of an exemption under 49 U.S.C. 41301 to conduct scheduled foreign air transportation of persons, property and mail between Managua, Nicaragua, and Miami, Florida.[7]

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the Federal Aviation Administration, and with the Department's "Clarification Concerning Examination of Foreign Air Carriers' Request for Expanded Economic Authority", dated October 23, 1995. This authority was granted subject to the terms, conditions and limitations of Aviateca's foreign air carrier permit (Order 90-8-58).

[6] COPA's exemption authority is subject to the terms, conditions and limitations of its foreign air carrier permit (Order 85-12-29). COPA invoked the automatic extension provisions of section 5 U.S.C. § 558 (c) as implemented by 14 CFR Part 377 of the Department's regulations to continue the subject authorities in force pending the Department's final action on its renewal request.

[7] In the conduct of the services authorized, NICA may use only aircraft wet-leased from a carrier that receives requisite authority under the provisions of 14 CFR Parts 207, 208 or 212 of the Department's rules (See Order 92-7-6). NICA invoked the automatic extension provisions of section 5 U.S.C. § 558 (c) as implemented by 14 CFR Part 377 of the Department's regulations to continue the subject authority in force pending the Department's final action on its renewal request. Additionally, NICA has applied for exemption authority (1) to serve New York and to coterminalize New York with NICA's existing Managua/ Miami service (Docket OST-96-1085); and (2) under the "Open-Skies" Air Transport Agreement between the United States and Nicaragua (Docket OST-97-2678).

TACA International

By Notice of Action Taken on October 23, 1997, Docket OST-97-2674, the Department granted TACA International an exemption from 49 U.S. C. 41301 to conduct: (1) scheduled foreign air transportation of persons, property and mail from points behind El Salvador, via El Salvador and intermediate points, to any point or points in the United States, and beyond; and (2) scheduled all-cargo operations between the United States and any point or points. Additionally, the Department granted the carrier an exemption to conduct charter foreign air transportation of persons, property and mail between: (1) any point or points in El Salvador and any point or points in the United States; and (2) any point in the United States and any point or points in a third country or countries, provided that (except with respect to cargo charters) such service constitutes part of a continuous operation, with or without a change of aircraft, that includes service to El Salvador for the purpose of carrying local traffic between El Salvador and the United States. The Department granted the authority for the period October 23, 1997, through October 23, 1999.

TACA de Honduras

By Notice of Action Taken on October 17, 1997, Docket OST-97-2677, the Department granted TACA de Honduras an exemption from 49 U.S.C. 41301 to conduct: (1) scheduled foreign air transportation of persons, property and mail from points behind Honduras, via Honduras and intermediate points, to a point or points in the United States, and beyond; (2) scheduled all-cargo services between the United States and any point or points; and (3) charter foreign air transportation of persons, property and mail between: (a) any point or points in Honduras and any point or points in the United States; and (b) any point or points in the United States and any point or points in a third country or countries, provided that, except with respect to cargo charters, such service constitutes part of a continuous operation, with or without change of aircraft, that includes service to Honduras for the purpose of carrying local traffic between Honduras and the United States. The Department granted the authority for the period October 17, 1997, through October 17, 1999.[8]

C. Competing U.S.-Central America Operations

Besides American and the TACA Group, seven carriers provide single-plane service in 33 U.S.-Central America markets, including 21 markets served with 1,252 monthly nonstop flights, 17 markets with 486 one-stop flights, and 2 markets with 2-stop service.

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[8] This authority is limited to operations conducted under wet lease by a duly authorized and properly supervised U.S. or foreign carrier. TACA de Honduras may not conduct these operations with its own aircraft and crews without further Department action. Further, TACA de Honduras has held a Department exemption to conduct scheduled foreign air transportation of persons, property and mail between Honduras and Miami, Florida/Houston, Texas/New Orleans, Louisiana, via the intermediate point Belize City, Belize, and charters (See Order 95-7-35, in Docket OST 95-271). The carrier's authority to conduct those operations continued under the automatic extension provisions of federal law (5 U.S.C. § 558 (c), as implemented by 14 C.F.R. Part 377).

Continental and United provide the primary competition for the American/TACA Group. Continental operates single-plane service in a total of 16 markets. Continental serves 9 U.S.-Central America markets nonstop, with a total of 603 monthly nonstop flights. In addition, Continental operates 211 monthly one-stop flights in 9 markets (in two markets, Continental operates both nonstop and one-stop service). United provides single-plane service to 8 U.S.-Central America markets, including 2 nonstop markets, with 121 monthly nonstop flights, 4 one-stop markets, with 237 monthly flights, and 2 two-stop markets, with 116 monthly flights.

Furthermore, Canadian Airlines International Ltd. serves 4 U.S.-Central America markets nonstop, with 244 monthly nonstop flights. Iberia serves a total of 6 markets (including 5 nonstop with 170 monthly nonstop flights). Iberia also provides 12 monthly one-stop flights in one other market. EVA Airways Corporation serves the Los Angeles-Panama City, Panama, market with 18 monthly nonstop flights. LTU International Airways serves the Miami-San Jose, Costa Rica, market with 10 monthly nonstops. Aero Costa Rica Acori, S.A. serves the Miami/Orlando-San Jose, Costa Rica, markets with 62 monthly nonstops and 26 monthly one-stop flights.[9]

We also note that on December 10, 1997, Delta Air Lines, Inc. announced its intention to begin daily nonstop service (on or about April 5, 1998) between Atlanta, Georgia, and San Jose, Costa Rica; San Salvador, El Salvador; Guatemala City, Guatemala; and Panama City, Panama. The carrier additionally has a pending request to amend its certificate to provide service between the United States and Belize (See Docket OST-97-3218).[10]

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[9] Source: Official Airline Guide (ADP Version), December 1997.

[10] Delta holds open certificate authority on Route 152 to serve every country in Central America from the United States with the exception of Belize and Panama (Order 88-8-57). Delta has also recently applied for the issuance of broad Panama authority similar in scope to the Belize authority referenced above (See Docket OST-97-3207).

D. The Joint Applicants' Proposed Operational Relationship

American, its regional affiliates, and the TACA Group propose to engage in the following code-sharing services.[11]

1. American designator code on TACA Group flights:

a) Between Dallas/Ft. Worth, Houston, Los Angeles, Miami, New Orleans, Orlando, New York, San Francisco, San Juan, and Washington and points in Central America, South America, Mexico, and the Caribbean;

b) Between Belize City, Guatemala City, Managua, Panama City, San Jose, San Pedro Sula, and San Salvador and points in Central America, South America, Mexico, and the Caribbean;

c) Between Barranquilla, Buenos Aires, Cali, Caracas, Cartagena, Guayaquil, Lima, Quito, Rio de Janeiro, San Juan, Santo Domingo, Santiago, and Sao Paulo and points in Central America, South America, and the Caribbean.

2. The TACA Group designator code on American flights:[12]

a) Between Dallas/Ft. Worth and Miami and points in Central America;

b) Between Dallas/Ft. Worth, Los Angeles, Miami, and San Juan and points in the United States, Canada, the Caribbean, South America, London, Madrid, and Tokyo.

American and the TACA Group provide competing services in eight U.S.-Central America markets: between Miami and Belize City, Belize; Guatemala City, Guatemala; Managua, Nicaragua; Panama City, Panama; San Jose, Costa Rica; San Pedro, Honduras; San Salvador, El Salvador; and Tegucigalpa, Honduras.

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11 We note that the Federal Aviation Administration's International Safety Assessment Program currently classifies Guatemala as a Category II country and Honduras and Nicaragua as Category III countries. Therefore, at this time, Aviateca may only conduct new U.S. operations under approved wet leases, and TACA de Honduras/NICA may only serve the U.S. market under approved wet leases.

12 The TACA Group will publish the designator code of only one TACA Group affiliate airline on each city-pair flight operated by American.

II. The American-TACA Group Agreements

The Joint Applicants' proposed arrangements consists of six discrete but parallel Code-Share Agreements between (1) American and Aviateca, (2) American and COPA, (3) American and LACSA, (4) American and NICA, (5) American and TACA, and (6) American and TACA de Honduras. Additionally, the Joint Applicants have a seventh, overarching Alliance Agreement among all seven applicants that coordinates the six separate code-share agreements.

The agreements provide for the establishment of joint marketing programs (including frequent-flyer programs, third-party marketing, and advertising); coordinated flight schedules, route networks, and route planning; coordinated traffic commissions programs; standardization of contracts with suppliers, travel agents, general sales agents, and other organizations and individuals; a joint management committee to oversee project development and implementation; joint accounting and information systems, including sharing of marketing, fare, frequent-flyer, cost and revenue data, uniform product and service standards; coordinated capacity and inventory control (including inventory control coordinators); coordination of facilities, ground handling, staff training, security, and maintenance. The Joint Applicants state that they will pursue all areas of cooperation with the intent of lowering costs to the Alliance. In short, these various agreements, if approved, will allow the airlines to coordinate most day-to-day activities, while retaining their individual corporate identities as reflected by their ownership and control.

The Joint Applicants assert that the proposed arrangement will create certain network synergies that will produce substantial public benefit. Among the benefits identified by the Joint Applicants are (1) new and expanded entry in international markets by American and the TACA Group carriers, (2) a stimulation of traffic using the various partners' services between the U.S. and points in Central America and beyond, (3) increased service and price options for U.S. passengers and shippers, (4) improved connections and other service enhancements that American and the TACA Group will offer in conjunction with their proposed arrangement, and (5) new or expanded on-line service to various U.S. communities.

III. The Application and Responsive Pleadings

A. The Application and Preliminary Procedural Findings

The Joint Applicants filed a June 21, 1996, arrangement that sets forth their intent to negotiate and enter into an "Alliance Agreement." They state that the scope of the proposed alliance arrangement will include, at a minimum, code sharing, reciprocal frequent flyer program participation, and "other mutually supporting arrangements." The Alliance Agreement provides for certain significant synergies. Among these, the Joint Applicants fully intend to integrate the services of each of the joint partners.[13] The arrangement also envisions the establishment of an "Alliance Committee" that will review the planning and implementation of the alliance between the Parties, monitor and re-negotiate the terms of the alliance, and examine opportunities for

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[13] Agreement at 2-3.

expanding the scope of the proposed Alliance Agreement.[14] Additionally, the Joint Applicants state that they will pursue all areas of cooperation to lower costs, including, among others, "ground handling, joint purchasing of fuel and other items, facilities consolidation, maintenance and insurance."[15] Finally, the TACA Group says that it intends to implement a "premium class product" similar to American's business class product in the U.S.-Central America market.[16]

Based on our initial review, we determined that the application was not complete because it lacked certain relevant information needed by the Department to consider this matter fairly and expeditiously. Therefore, on September 13, 1996, we directed the parties to submit additional information and evidence, as a supplement to their joint application, and deferred the 21-day deadline for the filing of comments set forth in 14 C.F.R. Part 303 until further notice.[17] Additionally, we stated that when we determined that the joint application was complete, we would establish a procedural schedule for comments and such other responsive pleadings as may be determined necessary to decide this matter fairly and expeditiously. Order 96-9-15.

On December 31, 1996, and January 3, 1997, the Joint Applicants filed joint responses to our various information requests. They additionally filed a Motion under Rule 39 for confidential treatment of certain materials submitted in support of their request. As part of these submissions, they indicated that they had withheld, or provided redacted versions of, certain documents containing “extraordinarily sensitive” commercial information, which they would make available to Department of Transportation (hereafter referred to as "DOT" or "the Department") staff for review on an *in camera* basis so that the Department could determine the relevance of such information to the proceeding. The various motions and requests did not identify the referenced documents, but by letters dated December 31, 1996, January 28 and February 18, 1997, the Joint Applicants provided the Department with lists of various documents and materials all or partially withheld by the Joint Applicants for *in camera* inspection by the Department's staff.

Based on our review of these lists, we determined that the Joint Applicants had not sufficiently described those materials that they considered privileged and had therefore withheld from the record. As a result, we were unable to establish the relevance of the materials to specific issues we are evaluating. Therefore, we directed the Joint Applicants to describe fully the materials withheld (consistent with our advisory review standard, Order 95-11-5 at 7 n.5), as a supplement to their joint application, and deferred the 21-day deadline for the filing of comments set forth in 14 C.F.R. Part 303, until further notice. Additionally, we stated that when we determined that the

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14 Agreement at 5.

15 Agreement at 6.

16 Agreement at 6.

17 At that time, we also instituted the *American Airlines, Inc., et al., and the TACA Group Reciprocal Code-Share Services Proceeding* in this docket. On September 23, 1996, the Joint Applicants filed a Petition for Reconsideration of Order 96-9-15. By Order 96-11-12, issued November 18, 1996, the Department affirmed the actions taken by it in the instituting order. Moreover, we required the Joint Petitioners to submit certain documents/materials involving American Airlines or Sabre and each of the airlines of the TACA Group related to participation in U.S. computer reservation systems.

joint application was complete, we would establish a procedural schedule for comments and such other responsive pleadings as may be necessary to decide this matter. Order 97-3-17.[18]

On March 21, 1997, the Joint Applicants filed the requested supplemental descriptions, requesting *in camera* review of the material. By Order 97-5-4, we granted the Joint Applicants' motion for confidential treatment, and motion for review by Department staff of certain withheld documents that were considered privileged by the Joint Applicants. We further directed the Joint Applicants to file in the docket certain withheld information, finding that the material was relevant to our determinations in this case. Finally, finding the application substantially complete, we established procedural dates for the filing of answers and replies.

B. Responsive Pleadings

1. Answers

On June 2, 1997, answers were filed by the Dallas/Fort Worth Parties, Delta Air Lines, Inc.,[19] United Air Lines, Inc., and Continental Airlines, Inc.[20] On June 4, 1997, the Dade County Aviation Department filed an answer and a motion for leave to file late.[21] On June 5, 1997, Amadeus Global Travel Distribution, S.A. and System One Information Management LLC filed joint comments.[22]

The Dallas/Fort Worth Parties ("DFW") view the application favorably. DFW maintains that U.S.-Central America services are concentrated at Miami today. DFW says that approval of the request will alter the current pattern and make DFW "a major gateway for air services to Central America." DFW states that its development as a Central America gateway will provide another less congested and more convenient alternative customs clearance point thereby freeing congested gateways like Miami for more growth. DFW also notes that no TACA Group carrier now provides service to DFW.

DFW states that approval of these agreements will spur competition between the two Texas gateways – DFW and Houston – as America and the TACA Group add services to DFW. DFW

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[18] Also, by Notice dated March 13, 1997, to afford interested parties prompt access to the majority of the documents already filed in support of this application, we granted immediate, but limited, interim access to all documents covered by the Rule 39 Motion, except for those documents for which *in camera* examination had been requested.

[19] Delta also filed a motion for confidential treatment under Rule 39 to the extent required by the Department's grant of confidentiality in Order 97-5-4. We will grant the motion.

[20] Continental also filed a motion for confidential treatment under Rule 39 and Order 97-5-4. We will grant the motion.

[21] We will grant the motion.

[22] Amadeus and System One also filed a joint motion to file late and a joint motion for confidential treatment under Rule 39 and Order 97-5-4. We will grant both motions.

also says that the proposed arrangement will provide another competitive one-stop routing to Central America besides Houston for travelers from U.S. cities west of the Mississippi.

Finally, DFW notes that open-skies agreements are now in effect between the U.S. and each of the Central American countries. DFW notes that open skies assures that other U.S. airlines will have the right to compete on equal terms with American and the TACA Group, for example, in terms of airport self-handling, CRS displays, and the right to code share with other Central American and third-country airlines.

Delta Air Lines, Inc. ("Delta") opposes the proposed alliance. Delta states that the proposed arrangement is anti-competitive and anti-consumer, and will "eliminate virtually" all direct competition between the principal competitors now serving the U.S.-Central America market. Moreover, consummation of the Alliance would further "entrench" American's position as the dominant carrier to Latin America, and would effectively foreclose new entry through code sharing by American's U.S. competitors.

Delta asserts that the proposed alliance would not enhance overall competition because American will not increase its ability to enter new markets or expand its system. Delta notes that American already serves all the TACA Group nonstop destinations from Miami. Therefore, it maintains that American's principal motive in pursuing this arrangement is to "eliminate" competition between American and its main competitors on nonstop routes between Central America and the United States.

Delta further says that the proposed alliance would dominate nonstop service to Central America and would be harmful to competition and adverse to the public interest. Delta says that American operates "all" of the U.S. flag services between Miami and Central America. Delta argues that the TACA Group carriers essentially represent American's only effective nonstop competition between Miami and the Central American region. Delta states that if the proposed alliance is finalized, the resulting network would control about 85 percent of the nonstop service in the Miami-Central America market. Moreover, American will be able to exploit its hub strength at Miami to extend its dominance to points behind its Miami gateway.

Delta further argues that it is the intent and design of the American/TACA Agreement to exclude competition. Delta states that it is now pursuing a strategy to expand its presence as a network competitor in the U.S.-Latin America market.[23] Delta argues however that American has a "huge" starting advantage over other U.S. airlines in the affected marketplace, and that allowing American to align with the TACA Group airlines will provide American with an overwhelming advantage. Delta asserts that American is attempting to "tighten its stranglehold on Latin America by denying Delta and other U.S. carriers the opportunity to provide network competition through code-sharing."[24]

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[23] For example, the Department tentatively selected Delta for back-up authority to serve between Atlanta and Santiago, Chile, via Brazil (See Order 97-11-27, issued November 14, 1997, Docket OST-97-2586). Delta was also awarded an amended certificate to serve the Atlanta-Sao Paulo/Rio de Janeiro markets (See Order 97-4-13, issued April 11, 1997).

[24] For example, See Confidential Exhibit AA006942-AA006944.

Finally, Delta states that the various Open-Skies Agreements recently agreed to by the United States and the foreign applicants' homeland governments cannot "cure the fundamental anti-competitive nature of the proposed Alliance." Delta states that the proposed alliance would be "immune" to effective competition in Central America, whether or not there are open skies, because there would be no viable competitive substitutes for the services proposed by American and the TACA Group.

United Air Lines, Inc. ("United") opposes the proposed arrangement. United argues that the grant of these applications would (1) further entrench American as the dominant airline in the U.S.-Latin American market, (2) enable American to achieve an effective monopoly position in seven Central America city-pair markets it serves nonstop from its Miami hub, where it now faces competition from one or more of the TACA Group airlines, and (3) preclude United, and other U.S. airlines, from entering into code-sharing arrangements with the TACA Group that would facilitate the expansion of United's Latin America route network, and thereby enhance inter-network competition between United and American to the benefit of consumers.

United maintains that the record of this case clearly shows that the public will not benefit from this Alliance. Indeed, United asserts that the record indicates that American's own management recognized that such an alliance is anti-competitive and not in its own commercial interest, and that the only reason American has for pursuing these proposed arrangements is to foreclose other airlines from entering into code-share relationships with the TACA Group carriers that would enhance their ability to compete with American in the U.S.-Central America marketplace, and thereby "benefit consumers."[25]

United says that the proposed alliance would reduce competition in key U.S.-Central America markets; foreclose further network competition between American and the TACA Group; enhance American's position as the dominant carrier in Latin America; give the alliance a "virtual monopoly" position in seven Miami-Central America city-pair markets where the Joint Applicants now compete "head-to-head"; preclude United, and other U.S. airlines, from entering into a code-sharing arrangement with the TACA Group that would enable competing U.S. carriers to extend their global network into Central America; and set the stage for American to enter into similar arrangements with other Latin American airlines that would have similar anti-competitive consequences for the traveling and shipping public.
Finally, United urges the Department to apply the same type of merger analysis in its review of this proposed arrangement as it applies to applications for antitrust immunity. United argues that the proposed arrangement goes beyond simple code sharing and "clearly" indicates that the Joint Applicants intend to create the type of comprehensive alliance relationship for which other carriers have sought antitrust immunity.

Continental Airlines, Inc. ("Continental") is opposed to the proposed Alliance. Continental asserts that this combination would foreclose network competition from Continental and other

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25 For example, See Confidential Exhibit AA006942-AA006944.

carriers in the U.S.-Central America market by strengthening American's "stranglehold" on the affected market.

Continental argues that the proposed alliance should not be approved because (1) it would block network expansion by other competing carriers, (2) it would strengthen American's dominance of U.S.-Central America services, and (3) it is designed to "crush" competition. Moreover, Continental asserts that the proposed alliance cannot "pass muster" under Department of Justice and Federal Trade Commission merger analysis.

Finally, Continental urges the Department to consider the American/TACA Group proposal along with American's other proposed aviation-related arrangements. Continental states that when these requests are viewed along with the various other proposed American aviation relationships, "the anti-competitive results are staggering." Continental maintains that the net affect of these "mega-alliances" would be to entrench American's dominance in the U.S.-Canada transborder, U.S.-Central America, U.S.-South America, U.S.-U.K., U.K.-Central/South America, Canada-Central/South America and trans-Atlantic markets, raising fares in all of those markets and foreclosing entry by other airlines, to the detriment of the traveling and shipping public.

Dade County Aviation Department ("the County"), representing Miami International Airport, filed in support of the application. The County views the proposed arrangement to be beneficial to the Joint Applicants, the traveling and shipping public, the Greater Miami community, and Miami International Airport and the Dade County Aviation Department.

The County states that the arrangement would promote efficient operations and provide more convenient service to the public, and will benefit Miami's position as a "high-level" gateway to Central America. The County also states that the arrangement is consistent with the various open-skies agreements recently achieved by the United States and six Central America Governments. The County also views the arrangement as consistent with the Department's U.S. International Aviation Policy Statement.

Amadeus Global Travel Distribution, S.A. and System One Information Management LLC ("the CRS Parties")[26] urge the Department, at a minimum, to defer action on the pending requests "as long as any unlawful or anti-competitive activities in the CRS markets are being undertaken by any of these parties."[27]

The CRS Parties also state that the Joint Applicants have taken steps to implement certain CRS marketing matters that constitute "unfair" and "deceptive" practices under 49 U.S.C. § 41712. Therefore, they urge the Department to investigate fully and consider these matters before taking final action on these requests.[28]

2. Replies

On June 11, 1997, American Airlines, Inc. ("American"), the TACA Group, the SABRE Group ("Sabre"), and the City of Houston filed replies.[29]

American notes that the United States has entered into open-skies agreements with each of the six affected Central American countries. American points out that these agreements specifically provide that designated airlines of the United States may enter into cooperative marketing arrangements with designated airlines of the Central American countries; and asserts that there are no barriers to entry in any of the affected markets; and that code-sharing is specifically authorized.

American argues that the American/TACA Group arrangement is commercially balanced, with significant benefits for both sides. American also states that merger analysis is not appropriate, as American and the TACA Group are not seeking antitrust immunity, but will continue to be vigorous competitors – American maintains that the two sides will continue to price independently.[30] Further, contrary to Continental's argument, American is not seeking to "sabotage" Continental's existing relationship with the TACA Group – American notes that the agreements between American and the TACA Group explicitly provide that "the TACA Group's existing arrangement with Continental Airlines" is not subject to the exclusionary provisions of the Agreement (See Alliance Agreement, Section 9). American maintains the American-TACA Group exclusivity clause is not improper, since "the intent of the clause is to focus each side on coordinating its respective services to the benefit of travelers and shippers." American urges the

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26 Continental has an ownership interest in Amadeus and System One.

27 The CRS Parties claim that American and the TACA Group carriers have indicated that they intend to downgrade their participation in System One, are encouraging travel agents in Latin America to use Sabre exclusively and are telling passengers that bookings on those carriers are not valid unless they are made through American's Sabre (See September 13, 1996, Joint Comments of Continental and System One filed in OST-96-1145 at 4-5). These concerns are more fully discussed later in our decision.

28 The CRS Parties indicate that the TACA Group airlines recently agreed to upgrade their level of participation in Amadeus to the same level of functionality as those airlines maintain with Sabre. Joint Comments of the CRS Parties at 7.

29 American and the TACA Group also filed motions for confidential treatment under Rule 39 and Order 97-5-4. We will grant the motions.

30 Reply at 15.

Department to reject the opposing parties' attempt to impose a decisional standard on American "that has not been applied to their own code-sharing alliances."[31] Finally, American states that Amadeus, System One and Continental have offered baseless allegations regarding the Sabre CRS.

The TACA Group says that the newly achieved open-skies agreements will be meaningless if the proposed Alliance arrangements are not approved. The TACA Group maintains that denial would violate Article 8 of the open-skies agreements; that the TACA Group must code-share with a U.S. airline to compete effectively in the U.S. marketplace; that American is the TACA Group's only "realistic" option for a U.S. partner;[32] and that Continental is merely trying to exclude it from the U.S. marketplace, not "partner with it."

The TACA Group states that the proposed arrangement offers significant public benefits. It argues that the arrangement will enhance competition, and offer additional benefits to the public, such as new competition on behind/beyond-Miami and other U.S. gateway routes, more effective competition on international routes, and stimulation of the "underdeveloped but growing" U.S.-Central America air transportation system.

The TACA Group says that the opposing parties' arguments that the proposed arrangement is anti-competitive are misplaced. It argues that the proposed arrangements are in American's individual interest and will not raise barriers to new or expanded entry by other U.S. airlines. It says that there are no "meaningful" entry barriers in the U.S.-Central American market, and that the proposed Alliance will not raise barriers to entry or expansion by other U.S. airlines into the affected market.

The TACA Group also states that the alleged anti-competitive impact in the CRS market is unfounded and merits no consideration. The TACA Group says that it has not made any effort to discredit Amadeus or System One or disrupt their ability to reserve seats on any of the TACA Group carriers' flights. It notes that, to the extent that Amadeus and System One continue to maintain that they are the victims of unfair competitive practices, redress is available under existing statutory mechanisms rather than through the artifice of a comment filed in an unrelated code-share proceeding. Finally, regarding the commenters' concerns as to the impact/intent of the exclusivity provision of the alliance agreement, the TACA Group states that U.S. carriers are fully capable of serving the Central and South American markets without a code-share relationship with the TACA Group.

Finally, contrary to United's and Delta's purported interest in code sharing with it, the TACA Group states that these carriers have never demonstrated a real interest in establishing a mutually-beneficial code-share arrangement with it.

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[31] American notes that the Department's *International Air Transportation Policy Statement* (May 3, 1995) explicitly recognizes and endorses the public benefits of code-sharing alliances.

[32] Reply at 12.

Sabre maintains that the allegations made regarding its CRS practices are "groundless." It argues that Amadeus has offered no evidence that Sabre directed or initiated unfair marketing messages to Amadeus subscribers. Sabre also denies that its employees in Miami have engaged in a "whispering campaign" to discredit Amadeus, by which Sabre employees allegedly inform Amadeus subscribers that their reservations to Latin America may be canceled. Finally, Sabre states that there is nothing improper or illegal about encouraging travel agencies to change from one CRS to another.

The City of Houston and the Greater Houston Partnership ("the City") argues that the proposed arrangement would "seriously" weaken Houston's gateway service. It asserts that the arrangement would allow American to shift some of its U.S.-originating Central America traffic from the Miami gateway to a DFW gateway. In addition, the City says that the proposed agreement would assure the added support at DFW of TACA coded traffic, some of which would otherwise use Houston as a gateway. The City says that the arrangement will assure that intergateway competition to Central America will largely consist of "competition" between routings over American's hub at Miami and American's hub at DFW. Finally, the City says that approval of the arrangement will greatly increase American's market power in the Central and South America markets, and correspondingly weaken its U.S. airline competitors and their hubs.

On June 20 and 26, 1997, Continental and United, respectively, filed a surreply. On June 27, 1997, the Joint Applicants filed a joint response.[33]

Continental restates its previous arguments. Continental disputes the Joint Applicants' contention that the new open-skies agreements between the U.S. and Central American countries mandate approval of the proposed alliance. It says that the Department fully recognizes the "serious competitive" problems associated with the proposed requests, particularly given the market dominance of the partners involved. It maintains that the proposed alliance will further "entrench" American, preclude any possibility of network competition from other U.S. carriers, and reduce service options for travelers and shippers. It maintains that the record of this case fully confirms that the traveling and shipping public will not benefit from this alliance. Continental urges denial of the request.

United maintains that it remains committed to securing a code-sharing relationship with the TACA Group carriers that would enhance both party's ability to compete with American in the U.S.-Central America market. United says that the proposed arrangement is not anti-competitive and adverse to the public interest because the Joint Applicants have agreed to coordinate prices, but rather because of the nature and structure of the Miami-Central America and U.S.-Central America markets will make duopolistic coordination of their competitive behavior "simple and irresistible if the Department permits them to consummate their alliance."

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[33] Each commenter also filed a motion for leave to file an otherwise unauthorized document. We will grant the respective motions.

The Joint Applicants assert that the Continental and United pleadings add nothing to the record, and are merely intended for delay. The Joint Applicants again dispute each allegation offered in the surreplies.

IV. Motion to Require Supplemental Information

On July 18, 1997, Continental filed a motion to require a supplemental information submission. Continental states that American has announced that it is investing in and entering into an alliance with Aerolineas Argentinas and Austral Lineas Aereas S.A. ("Austral"), and that it and its proposed partner, British Airways PLC, have entered into alliances with Iberia, Lineas Aereas de Espana, S.A. ("Iberia"). Continental urged the Department to require the Joint Applicants to submit supplemental information related to these joint investments and alliances and to give interested parties adequate opportunity to comment on this information. Continental further requests the Department to suspend further proceedings in the interim.[34]

On July 24, 1997, TWA filed in support of Continental's motion. TWA states that the issues raised by Continental not only make it essential for the Department to require this information, but also to arrange for an oral evidentiary hearing to examine the competitive consequences of the multi-carrier arrangements intended by the Joint Applicants.

On July 25, 1997, the TACA Group filed an answer opposing Continental's motion. The TACA Group argues that Continental's motion is a "blatant and unjustifiable" attempt to further delay both the American/TACA and American/British Airways proceedings. They further state that, individually or collectively, they are not parties to any of the proposed transactions described by Continental.[35] Moreover, the TACA Group argues that the existing code-share agreement between it and American does not impose any obligation on it to enter into any type of code-share relationship or other alliance with any other carrier, including the carriers identified in Continental's motion. Therefore, the TACA Group asserts that they have no documents or information that would be responsive to Continental's proposed requests.[36]

On July 29, 1997, Delta, the City of Houston and the Greater Houston Partnership, and United filed in support of Continental's motion.

Delta maintains that important competition and public policy issues are raised by the proposed arrangements among American, Aerolineas Argentinas, British Airways, Iberia, and Austral. Delta states that the public interest compels a thorough evaluation of the interrelationships between and among the new cooperative arrangements and the American/TACA Group alliance pending in this case.

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34 Continental asked the Department to direct that similar supplemental submissions be filed in the pending American and British Airways PLC antitrust immunity case, Docket OST-97-2058.

35 Answer at 3.

36 Answer at 2 and 4.

United agrees with Continental that American's plan to invest in Iberia and Aerolineas Argentinas and to code-share with those carriers needs to be reviewed in the context of this case.[37]

The City of Houston agrees that this proceeding should be put on hold until the Joint Applicants have submitted information on these new reciprocal agreements and all interested parties have been given an opportunity to comment on those submissions.

On July 29, 1997, American filed an answer opposing Continental's motion. American states that it has reached agreements to create separate cooperative alliances between American and Iberia, on the one hand, and American and the Argentine carriers, Aerolineas Argentinas and Austral, on the other hand. American states that these respective alliances, subject to the negotiation of final documentation, provide for frequent-flyer relationships and reciprocal code-sharing services.

Regarding these distinct code-share relationships, American says that it does not presently intend to seek antitrust immunity between these carriers and American.[38] Further, American states that, if and when finalized, each of these separate code-share arrangements "should be considered by the Department in separate proceedings as they are submitted for approval."

Specifically, as to its relationship with Iberia, American states that it intends to engage in a traditional code-share relationship, with limited coordination to improve customer service while maintaining competition where the two carriers offer overlapping service.[39] Finally, American states that it neither has plans to include Iberia in its code-sharing agreement with the TACA Group, nor does it have plans to include Aerolineas Argentinas or Austral in the TACA Group relationship. American maintains that these are entirely separate matters, and should be considered by the Department in separate proceedings as they are submitted for approval.

On August 5, 1997, British Airways filed a motion for leave to file and a consolidated reply opposing the answers in support of Continental's motion.[40] British Airways states that it is not a party to, and has not filed comments in, the American/TACA Group proceeding. Moreover, British Airways says that it has no commercial relationship with the TACA Group.

V. Notice Requiring Supplemental Information and Evidentiary Response

By Notice dated August 22, 1997, the Department determined that the American-Iberia and American-Aerolineas Argentinas and Austral proposed cooperative arrangements involved matters relevant to our assessment of the competitive implications that we have been addressing in this case. Therefore, to enable us to consider the potential impact of these arrangements on the American/TACA Group Alliance, we directed American and the TACA Group to provide (1) a

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37 Answer at 2, fn 1.

38 Answer, at 2.

39 Answer, at 3.

40 We grant British Airways' motion to file late.

detailed explanation of the content, scope, objectives, and timing of these proposed cooperative arrangements and how the participants will be integrated; (2) complete information concerning investment by American in Aerolineas Argentinas, Austral, and Iberia; (3) complete information (including copies of commercial agreements in final, or in draft if there is no final) on the various cooperative arrangements, particularly on its relationship to the proposed American/TACA Group alliance, in terms of corporate strategy, marketing, yield and capacity management, and pricing; and (4) complete information on the extent to which these cooperative arrangements would affect operations between the U.S. and Central America by American and the TACA Group with respect to passengers with an origin or destination in third countries.[41]

A. Replies/Responses

On August 27, 1997, the TACA Group filed a consolidated reply. The TACA Group states that it is not a party to the proposed transactions involving Aerolineas Argentinas, Austral or Iberia and has no documents or information responsive to the Department's information request of August 22.

On August 27, 1997, American filed its response to our Notice requiring supplemental information.[42] American maintains that these proposed relationships are irrelevant to the Department's evaluation of its proposed code-share arrangement with the TACA Group carriers, and that Continental's claim that the Aerolineas Argentinas/Austral proposals are related to the TACA Agreement is frivolous. American further asserts that the commenters arguments that these newly established arrangements must somehow be linked with this proceeding are mistaken. American says that it would be unfair for the Department to delay processing this long-standing application to take into account the future effects of other later arrangements, which it has the legal authority to reject or condition.

Specifically, first, American states that it has (1) no plans for the integration of Aerolineas Argentinas or its affiliates into an arrangement with either the TACA Group or Iberia, and (2) no plans for the integration of Iberia into an arrangement with either the TACA Group, or Aerolineas Argentinas or Austral.[43] Second, regarding Aerolineas Argentinas and Austral, American states that it will purchase 10 percent of the total equity of Interinvest from Andes Holding. Interinvest,

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41 By proceeding in this fashion, we were able to give full consideration to recent developments which could have a bearing on the competitive implications of the proposed American/TACA Group alliance. The action also allowed us and interested parties an opportunity to examine record evidence on the proposed cooperative alliances before the issuance of this tentative decision. We stated that we would fully consider views of parties on this new evidence, along with the record material already filed. As a final matter, we found it appropriate to grant interim access to any subsequent materials filed in this docket under a Rule 39 Motion to counsel and outside experts for interested parties who file or who have previously filed appropriate affidavits with the Department in advance, unless the party filing the motion objects.

42 American filed certain supplemental information under Rule 39, limiting access to counsel and outside experts for interested parties who file, or have previously filed, appropriate affidavits with the Department, consistent with the confidentiality provisions provided for by the Department in its August 22, 1997, Notice Requiring Supplemental Information.

43 Response at 5.

holds about a 83 percent share of the equity of Aerolineas Argentinas and a 90 percent share of the equity of Austral. Andes Holding is now owned by Sociedad Estatal de Participaciones Industriales ("SEPI"), the parent company of Iberia, 42 percent; Merrill Lynch, 49 percent; and Bankers Trust, 9 percent. Andes Holding owns about 91 percent of Interinvest, with the balance, about 9 percent held by Iberia. American states that it will eventually control about 8.4 percent of Aerolineas Argentinas and 9 percent of Austral. Regarding Iberia, American says that it has agreed to consider an equity investment in Iberia, with the consent of Iberia and SEPI.[44] Third, American states that it intends to engage in code sharing with Iberia on selected American flights between Miami and points in Central America.[45] However, American and Iberia state that they fully intend to remain vigorous competitors with each other and the TACA Group on these routes and will continue to separately market and price their seats. Fourth, American says that these arrangements will not have any effect on operations between the United States and points in Central America by American and the TACA Group with respect to passengers with an origin and destination in third countries.

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[44] Response at 5-7. Further, American states that it does not now hold an equity position in Iberia (see Docket OST-97-2965, joint reply of American and Iberia, dated October 28, 1997, at 7.

[45] October 2, 1997, American and Iberia jointly filed, under 14 C.F.R. 207 and 212, for statements of authorization to engage in certain reciprocal code-share services. The application indicates that Iberia intends to use its designator code ("IB") on American flights between Miami and six points in Central America (Guatemala City, Managua, Panama City, San Jose, San Pedro Sula, and San Salvador). The application also indicates that no local traffic will be carried on American's flights in these markets using the "IB" code, and that such "segments will be sold only in conjunction with service to and from Spain via Miami." The application further indicates that American, among other things, intends to use its designator code ("AA") on Iberia flights in the Madrid- Chicago/Miami/New York/San Juan markets, and the Barcelona-Miami/New York markets. Joint Application at 2.

B. Answers and Comments

On September 11, 1997, certain motions and responsive pleadings were filed by Continental, Delta and United.[46]

Continental maintains that American's submission either fails to satisfy the Department's August 22 information requirements, or raises additional questions that must be addressed before the Department can further consider the proposed applications. Specifically, Continental says that American needs to explain more fully certain equity and control issues regarding its interests in Aerolineas Argentinas, Austral, Interinvest, and Iberia. Continental asserts that American should clarify how it would implement its proposed code-share arrangement with Iberia and what relationship American-Iberia will have to the proposed American-TACA Group arrangement. Continental reiterates its view that the Department should hold an oral evidentiary hearing to evaluate the public interest issues raised by the applications. Finally, Continental argues that certain agreements submitted by American do not qualify for limited Rule 39 review.

Delta concurs with Continental's views. Delta urges the Department to institute a thorough evaluation of the interrelationships between the new alliance proposals and the American-TACA and American-British Airways alliances now pending before the Department. Delta maintains that the present record does not provide the Department with an adequate basis to consider the extent to which the participants in the various alliances may integrate traffic flows.[47]

United maintains that the record of this case shows that the American-Iberia, and American-Aerolineas Argentinas alliances would increase the anti-competitive consequences of the proposed American-TACA Group arrangement. United argues that by adding Iberia to its alliance associations, American eliminates the last viable competitor for Miami-Central America services. United maintains that each of these various arrangements are intended to enhance and secure American's dominance in the Miami-Central America market. United asks the Department to deny the pending requests for authority.

VI. Tentative Decision

We have decided tentatively to grant the American and the TACA Group requests for exemptions from the Department's regulations and for their joint statement of authorization to the extent necessary to permit them to engage in the proposed reciprocal code-sharing services, subject to the conditions and criteria for review provided below. We propose to grant these various authorities for a period of two years from the date a final order in this case is issued.

The regulatory provisions applicable to our decision here, 49 U.S.C. § 40109 and 14 C.F.R. §§ 207.10 and 212.6 of the Department's regulations, all require a finding that the authority is in the

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[46] United also filed a motion to require a supplemental information submission concerning American's proposed alliance with Linea Aerea Nacional Chile S.A. -- Lan Chile Airlines. These concerns are more fully discussed later in this order.

[47] Delta also filed a motion for confidential treatment under Rule 39 to the extent required by the Department's grant of confidentiality in Order 97-5-4. We will grant the motion.

public interest. In determining the public interest, we consider a number of factors, including the extent to which the authority sought is covered by and consistent with bilateral agreements to which the United States is a party, and the benefits that would accrue to U.S. carriers, passengers, and shippers under the proposed arrangement. 49 U.S.C. § 40105 directs us to carry out our responsibilities consistent with the obligations of the United States under an international agreement.

As an initial procedural matter, Continental, Delta and TWA ask the Department to suspend its investigation of this case pending a formal oral evidentiary hearing to evaluate the competition and public interest benefit arguments made by the Joint Applicants.[48] The commenters contend that the recent investments and announced alliances/arrangements by American and British Airways with Aerolineas Argentinas, Austral, and Iberia, and by American and Lan Chile make the proposed American-TACA Group arrangement even more anti-competitive, requiring the strictest scrutiny of the documentary record. We do not agree that an oral evidentiary hearing is necessary. Consistent with our Notice of August 22, 1997, the Joint Applicants have filed certain supplemental information concerning their proposed arrangements with Aerolineas Argentinas, Austral, Iberia, and other relevant partners. Moreover, by this order, we are requiring that the Joint Applicants provide certain additional information regarding the American-Lan Chile arrangement. We find that by placing these documents in the record, together with the other information submitted into the record of this case, the Joint Applicants have substantially responded to our previous evidence and information requests and to requests of interested parties for further details to evaluate this particular matter.

Moreover, the commenters have not presented convincing arguments as to why full oral evidentiary procedures are required. There is no statutory requirement that the Department hold this type of hearing on this application. We believe that all material issues of fact can be resolved using non-oral procedures. Such oral evidentiary procedures are not necessary in the context of this proceeding for us to resolve any issues involving the veracity of evidence or the integrity of witnesses.

With respect to the substantive decisions in this matter, the Department has typically found code-sharing arrangements to be procompetitive and therefore consistent with the public interest because they create new services, improve existing services, lower costs, and increase efficiency for the benefit of the traveling and shipping public. For example, the record indicates that American intends to commence new code share services on TACA Group operated flights in the Los Angeles-San Jose/Guatemala City/San Salvador markets, and the San Francisco-Guatemala City/San Salvador markets. The record also indicates that the proposed arrangement will allow the Joint Applicants to establish new code-share operations to Washington, DC (Dulles Airport), New York (JFK Airport), New Orleans, Orlando, and Houston.[49]

Moreover, our examination of the Joint Applicants' proposal leads us to tentatively find that, as conditioned and limited by the Department, the integration of the Joint Applicants' services

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48 For example, See Continental Motion, dated July 18, 1997, at 6.

49 See American's Reply of June 11, 1997, at 12-13.

should allow them to improve online service and operate more efficiently. We also recognize that through a coordinated system, the traveling public can benefit from improved on-line connections, as well as the increased convenience of single-carrier reservation, and coordinated check-in and baggage handling procedures, each of these creating value for the consumer from code sharing. We also tentatively find that it is unlikely that the Alliance Agreement -- subject to the conditions, limitations, and review included here -- will substantially reduce competition in any relevant market.

Furthermore, we tentatively find that approval of the requested authority should provide additional or improved service options to the traveling and shipping public, provide greater access to Central America for these communities, and will enable the applicant carriers to fully effectuate the expanded operational opportunities resulting from the recently agreed open-skies accords. Open-skies agreements with foreign countries give authorized carriers from either country the ability to serve any route between the two countries they wish (and open intermediate and beyond rights). These agreements place no limits on the number of flights that can be operated, and a carrier can charge any fare, unless it is disapproved by both countries.[50]

Nevertheless, the record of this case raises concerns regarding future competition in the affected markets. However, on balance, we tentatively conclude that the overall competitive opportunities in these markets supplemented by the operational and organizational limitations being imposed here by the Department, together with the anticipated consumer benefits and efficiencies usually resulting from such arrangements, and considerations of international transportation policy regarding open-skies markets, justify extending our approval for a two-year period.[51] We emphasize that we will closely monitor the competitive environment in each of these affected markets, and that we intend to review this matter fully during the next 24 months, to determine whether our actions in this matter continue to be appropriate and in the best interests of consumers. This will allow us to determine if, as the Joint Applicants contend, they will operate to the benefit of consumers and competition.

We tentatively find that, as limited and conditioned below, our approval should result in pro-competitive and pro-consumer benefits intended to be gained from the fundamental liberalization of air services fostered by an open-aviation accord. In addition, based on our analysis of this case, we tentatively find that it is in the public interest to require the Joint Applicants to modify their proposed arrangement by (1) eliminating the provision for the establishment of the proposed Joint Alliance Committee; (2) eliminating any provision which would implement the “Exclusivity Clause” under the Alliance or Code-Share Agreements; (3) conducting fixed blocked-space operations in the Miami-Central America overlap markets to be managed, marketed, and sold independently by the respective code-sharing partners under their own airline designator codes; (4) filing all subsidiary and or subsequent agreement(s) with the Department for prior approval, as described below; and (5) resubmitting for renewal their Alliance and Code-Share Agreements within two years of the issuance of our final order in this case. We also tentatively find it in the

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50 Order 92-8-12, August 5, 1992.

51 The Department of Justice (DOJ) has reviewed this case and has taken no action.

public interest to direct the TACA Group to report full-itinerary O&D Survey data for all passengers to and from the United States (similar to the O&D Survey data reported by American).

VII. Evaluation and Discussion

The code-share arrangement proposed by the Joint Applicants in this case is unprecedented in many respects, posing a unique set of issues. American and the TACA Group represent that they fully intend to integrate their respective operations to the greatest extent possible, but without antitrust immunity. The record indicates that the Joint Applicants' long-term plan envisions their securing of antitrust immunity from the Department. The Joint Applicants intend to operate as a single carrier, but claim that they would not engage in fare coordination activities[52] or revenue pooling, which (among other activities) would be inconsistent with the antitrust laws or would otherwise require the grant of antitrust immunity from this Department.

49 U.S.C. § 40109 and 14 C.F.R. §§ 207.10 and 212.6 require us to determine that the proposed American-TACA Group code-share alliance is in the public interest. Importantly, we must determine that the proposed arrangement will not eliminate actual or potential competition so that American and the TACA Group will be able to raise prices above or reduce service below competitive levels. Moreover, we must consider that American and its partners in this proposed arrangement represent the major scheduled airlines in the Central America region, and that without some significant limitations, the presence of this combination could hinder the ability of competing U.S. firms to obtain comparable code-share agreements and integration alliances. However, with the conditions and review imposed here and the opportunities available in our open-skies accords with the foreign applicants' homeland governments providing U.S. carriers unrestricted access and enhanced business opportunities in Central America, we tentatively find that the consumer will benefit from the approval of this arrangement.

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52 The applicants state that they will independently set fares in each of the affected markets. Additionally, the respective code-share agreements provide that the operating carrier shall retain ultimate control over the management of seat inventories on the flights it operates. However, the marketing carrier shall have access to the operating carrier's local inventory class availability through an automated computerized interface, which both parties shall maintain throughout the term of this agreement to expedite the sale of inventory on the code-shared flights. See respective Code-Share Agreements sections 3.1 and 3.2.

A. The U.S. Central America Market and the U.S.-Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama Markets

As limited and conditioned, we tentatively find that the proposed arrangements should not substantially reduce or eliminate competition in these affected markets. However, the proposed Alliance will have a significant market share in each of these relevant markets (the U.S.-Central America market, and between the United States and the respective countries). The TACA Group represents the major scheduled carriers in Central America, and each of the TACA affiliates is the flag carrier of its respective homeland.[53] Nonetheless, we tentatively find that the conditions, limitations, and review mechanism that we have tentatively decided to impose in this case, combined with the opportunity provided to competitors by our open-skies agreements and by international transportation policy, will prevent the Joint Applicants from charging supra-competitive prices or reducing service below competitive levels.

While the proposed alliance will have a large initial market share, that should not substantially reduce competition, since other firms have the ability to enter the market within a reasonable time if the Joint Applicants charge supra-competitive prices. Despite the position of the Joint Applicants in the affected relevant markets, with the conditions and review procedures that we have tentatively imposed, we see no significant barriers to entry by other carriers in these markets. Because of the open-skies accords, any U.S. carrier may serve any of these foreign markets from any point in the United States. No party has indicated that any significant barrier to entry, such as access to slots or airport facilities, neutralizes the competitive environment created by the open-skies regimes. Moreover, the short-haul character of the U.S.-Central America routes should make it easier for a broad range of carriers to enter these markets, more similar to the transborder Canadian markets than to long-range, transoceanic routes. Thus, other competing carriers have the opportunity and ability to enter the U.S.-Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama markets and to increase their service if the Joint Applicants try to raise prices above competitive levels (or lower the quality of service below competitive levels).[54]

Regarding the benefits advanced by open-skies agreements, these accords assure the most liberal operating environment for air services and give any carrier from either country the right to serve any route between the two countries and beyond. These agreements place no limits on airline capacity and carriers are free to charge any price unless both countries disapprove. The foreign applicants' national authorities undertook to join the United States in open-skies aviation relations. Like an ever growing host of other countries worldwide, the Governments of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama have chosen open-market

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[53] The applicants jointly have about a 67 percent share of passengers transported in the U.S.-Central America market. The applicants combined market share of passengers transported in each of the affected country-pair markets is: Costa Rica, 65 percent; El Salvador, 52 percent; Guatemala and Honduras, 70 percent; Nicaragua, 79 percent; and Panama, 69 percent. Source: T-100 and T-100(f) segment and market data (Data Banks 28-IS and 28-IM) for the twelve month period ended March 1997.

[54] For example, on December 10, 1997, Delta announced its intention to begin daily nonstop service (on or about April 5, 1998) between Atlanta, Georgia, and San Jose, Costa Rica; San Salvador, El Salvador; Guatemala City, Guatemala; and Panama City, Panama.

competition in aviation over a tightly constrained, highly restricted and regulated operating environment.

For these reasons, open skies is a critical element of our international aviation policy. Therefore, unless there are adverse competitive impacts that cannot be mitigated so as to promote the consumer benefits to be gained by open skies, total rejection of cooperative arrangements provided for under an open-skies regime has the potential to frustrate, if not cancel, the overall benefits available through an open-skies regime.

B. City-Pair Markets

The eight specific overlap markets, on the other hand, raise serious concerns. The Joint Applicants' share of passengers transported in each of these markets is (1) Miami-Belize City, Belize, 100 percent; (2) Miami-Guatemala City, Guatemala, about 88 percent (Iberia has about 8 percent); (3) Miami-Managua, Nicaragua, about 91 percent and (Iberia has about 9 percent); (4) Miami-Panama City, Panama, about 94 percent (Iberia has about 3 percent); (5) Miami-San Jose, Costa Rica, 78 percent (Iberia has about 8 percent); (6) Miami-San Pedro Sula, Honduras, 91 percent (Iberia has about 9 percent); (7) Miami-San Salvador, El Salvador, 96 percent (Iberia has about 4 percent); and (8) Miami-Tegucigalpa, Honduras, 100 percent.[55]

The Joint Applicants now compete head-to-head in each of these Miami-Central America markets. The alliance agreement, as proposed, may further diminish this level of competition. Since no carrier besides American has a hub at Miami, it is unlikely that any other carrier would mount effective competitive nonstop service in any of these Miami-Central America markets, even if the Joint Applicants charged supra-competitive prices or reduced service below competitive levels. Furthermore, while connecting services may in certain circumstances provide travelers and shippers with a viable competitive alternative to nonstop service, this option is absent here since the Joint Applicants provide all connecting services in these markets. Therefore, we are persuaded tentatively to find that the proposed alliance, if approved by the Department, absent our proposed countervailing provisions, may result in certain anti-competitive outcomes in these eight city-pair markets, contrary to the public interest.

C. Tentative Conditions

Without imposition of effective conditions on any grant of an exemption to the Joint Applicants, and without the ability for competitors to implement our open-skies agreements and international transportation policy, we are in agreement with various parties that the proposed arrangement might further solidify American's position as the dominant carrier in Central America, and might have the effect of inhibiting new entry through code sharing by American's U.S. competitors. We find that in this case the market concentration, potential future barriers to entry, overall dominance and size of the Joint Applicants if not restricted in operation in the affected markets -- the Miami-Central America overlap markets -- could likely have an anti-competitive impact. Our international transportation policy is to consider the grant of these arrangements only where the

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55 Source: T-100 and T-100(f) segment and market data (12 months ended March 1997).

market(s) at issue are currently fully open to new entry and operations – both *de jure* (by reason of bilateral agreements) and *de facto*. Only in such markets can we be assured that our actions granting the request in circumstances presented by this application will have overriding competitive and consumer benefits and thus be in the public interest. It is for these reasons that we tentatively find it appropriate to mitigate certain potentially anti-competitive components associated with this alliance by conditioning our tentative approval in several respects.

1. Alliance Agreement

a. Proposed Provision for a Joint Alliance Committee

Under Section 8 of the Agreement, American and the TACA Group intend to establish a Joint Alliance Committee (the "Committee"),[56] meeting quarterly, with the expressed responsibility of overseeing the management of the transactions and relationships intended by the Alliance Agreement, reviewing the planning and implementation of the cooperation between the applicant carriers. Among other things, the proposed Committee will have the responsibility to monitor customer service quality, harmonize marketing and system development, performance of code-share flights, the shared use of facilities, and frequent flyer arrangements. It will also direct all other aspects of the alliance, including the implementation, operation, and compliance with all of the principal code-share agreements.

The Committee will be empowered to consider ways to improve the performance and efficiency of the allied services to reduce costs and to increase the benefits afforded to the Joint Applicants by the cooperative relationship. Moreover, the Committee will consider and develop opportunities for expanding the scope of the proposed allied relationships. The Joint Applicants state that through the Committee, American and the TACA Group will pursue all areas of cooperation, including, but not limited to, ground handling, joint purchasing of fuel and other items, facilities consolidation, maintenance, insurance, and any other matters between American and the TACA Group airlines.

In many respects, the Committee will function as if American and the TACA Group were one firm. In the circumstances of this case, with its serious potential to undermine the purported consumer benefits, we tentatively find that it is not in the public interest to authorize such a framework. We tentatively find that this proposed integration structure, for carriers as dominant in their market as the Joint Applicants, could facilitate the very anti-competitive behavior that must be avoided by carriers required to be in direct competition with each other. We understand that the Joint Applicants' proposal will require that they implement certain management synergies. However, as proposed, we tentatively find that this element of the proposed arrangement has the potential to undermine competition among the Joint Applicants in the affected markets. We therefore tentatively find it appropriate to condition our approval to preclude the Joint Applicants from giving any force or effect to the provision for the implementation and establishment of the proposed Joint Alliance Committee as defined under Section 8 of the Alliance Agreement.

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[56] American and the TACA Group (as a whole) shall each designate two representatives to the Committee and each shall have the right to replace its designees at any time.

b. Proposed Provision for an "Exclusivity Clause"

In conjunction with the condition discussed above, we tentatively find that section 9 of that Agreement,[57] to the extent that it would preclude either American or the TACA Group carriers from entering into a cooperative marketing arrangement with other carriers, should be eliminated.[58] Such a provision restricts competition to an extent not justified by the circumstances. We have limited or disallowed exclusivity provisions in the past and will also do so here.[59] Specifically, we will include a condition to our approval, providing that neither American nor the TACA Group affiliates shall give any force or effect to any exclusivity provision in their arrangement which (1) restricts the TACA Group affiliates from entering into any marketing and/or interline arrangement(s) with airline(s) domiciled in the United States, or (2) restricts American from entering into any marketing and/or interline arrangement(s) with airline(s) domiciled in Central America.

American argues that this provision is intended to benefit the traveling public, allowing the Joint Applicants to focus on coordinating their respective services. American contends that if other U.S. airlines are permitted to establish code-share relationships with the TACA Group, many of the benefits associated with code sharing would be diminished.[60] American further asserts that the Department has authorized several code-share relationships containing exclusivity arrangements.

We do not agree with American's argument that increased competition somehow diminishes consumer benefits. While exclusivity clauses are not uncommon, in the circumstances of this case it has the potential for anti-competitive results not present in other cases. For example, American is the dominant carrier at Miami, the present primary U.S. gateway to Central America. The TACA Group affiliates represent all of the major scheduled carriers in the Central America region. The Joint Applicants' share of the U.S.-Central America market is almost 68 percent of the passengers transported. The Joint Applicants provide all connecting services in each of the overlap markets.[61] Finally, without the complete unrestricted access under our open-skies agreements and international transportation policy it would be difficult for other U.S. carriers to develop the available opportunities to establish alternate gateways which can effectively provide

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57 Section 9 of the Alliance Agreement is by reference made part of and incorporated into the six separate code-share agreements between American and each of the TACA Group carriers.

58 Section 9 excludes the TACA Group's existing arrangement with Continental which now provides for the participation of the TACA Group in Continental's frequent flyer program. Additionally, section 9 provides that American may enter into a code-share arrangement with Aeroperlas, S.A. solely with respect to domestic routes within Panama.

59 See Orders 97-5-7, 94-10-27, and 94-9-4.

60 Reply at 25, dated June 11, 1997.

61 We also recognize that three of the TACA Group affiliates will be conducting limited or no U.S. operations. At this time, under the FAA's International Aviation Safety Assessment Program, Aviateca may commence no new U.S. operations with its own aircraft and crew, and TACA de Honduras/NICA may not conduct any U.S. operations with their own aircraft and crew.

competition for the American-TACA Group hubs. Therefore, the potential that any other qualified carrier would be particularly interested in providing competing services in the region would be reduced, absent the opportunity of forming a relationship with the TACA Group affiliates. For example, United Air Lines has stated on the record in this case its interest in such a relationship. For these reasons, we tentatively find it in the public interest to prohibit the implementation of Section 9 of the Alliance Agreement.

Opponents have cited evidence for their argument that American's only purpose in forming this arrangement with the TACA Group is to prevent other U.S. airlines from obtaining an alliance with the TACA Group.[62] We find that our imposition of this tentative condition allows just the type of alliance to counter this alleged intent. United Air Lines' suggestion of a competing alliance shows such interest.

In addition, therefore, in the circumstances of this case, competing arrangements could advance further the many consumer and service benefits promoted by an open-skies aviation environment. We thus encourage the TACA Group to consider seriously any proposal by other U.S. carriers to expand and enhance the TACA Group's U.S.-Central America code-sharing opportunities. For that reason, in reviewing any request for renewal of this proposed authority, and in its ongoing review of the conduct of these approved arrangements, the Department will consider the competitive structure of the market at that time, and consider whether the TACA Groups' failure to engage in code-share relationships with additional U.S. carriers has contributed to a market structure that does not continue to support the approval of a code-share arrangement as authorized by this proposed decision.

2. Code-Share Agreements

The code-share agreements provide that while the operating carrier retains control over the management of seat inventories, the marketing carrier will have access to the operating carrier's local inventory class availability through an automated computerized interface, which both parties will maintain throughout the term of the Agreement. While the marketing carrier is subject to capacity limitations on all operating carrier flights, the marketing carrier may increase, or presumably reduce these capacity limits on specific flights. This level of revenue/yield management coordination will allow the Joint Applicants to diminish the risk of loss normally associated with competitive business activities, while maximizing the potential for joint profits. Therefore, we tentatively find it appropriate to oblige explicitly the Joint Applicants to compete with each other over the affected routes, as follows:

1. The marketing carrier may acquire seat capacity on the operating carrier's flights to offer competitive non-stop service between Miami and Belize City, Guatemala City, Managua, Panama City, San Jose, San Pedro Sula, San Salvador, and Tegucigalpa for a fixed number of seats, based on a fixed price

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62 For example, See Confidential Exhibit AA006942-AA006944.

per seat – commonly described as a fixed blocked-space arrangement, to be determined by the contracting parties;[63]

2. The Joint Applicants shall maintain separate pricing, inventory and yield management with respect to local U.S.-point-of-sale passengers flying nonstop between Miami and Belize City, Guatemala City, Managua, Panama City, San Jose, San Pedro Sula, San Salvador, and Tegucigalpa; and

3. Regarding the city-pair markets specified in item 2. above, the Joint Applicants may not coordinate or provide more information by one party to the other concerning current or prospective fares or seat availability for such passengers than it makes available to airlines and travel agents generally.

We find that these proposed conditions are necessary to guarantee that American and the TACA Group continue vigorous head-to-head competition in these specific markets. If each carrier is required to market its portion of an aircraft as best it can, once the blocked-space arrangements are made, each will also have a strong incentive to compete to fill those seats, without the potential dilution of competition that may result from provisions permitting unsold seats to be exchanged. This incentive to independence will be reinforced by the second and third conditions. In the key overlap markets, any coordination of pricing, inventory, and yield management that is not already proscribed in the absence of antitrust immunity will be specifically forbidden here, and the applicants are obliged from refraining from even sharing information regarding fares and seat availability, except to the degree such information is generally available. These three conditions, taken together, erect a wall of independence around each of the applicant's marketing of services in these markets.

As a final matter, however, we must also be assured that competition in the U.S.-Central America market develops as intended by both our several U.S.-Central America open-skies accords and this proposed decision. For this reason, if our proposed decision is finalized, we would fully intend to carefully review the operation of the alliance in all markets. Should our continuing review of this arrangement indicate that other U.S gateways to Central America that might otherwise support competitive service were developing unacceptably high market concentrations, the imposition of similar fixed blocked-space requirements at these additional U.S. gateways would represent a potential remedy to ensure that consumers and shippers continued to secure the various benefits intended by our open-skies agreements and approval of this proposed alliance.

D. The American-Aerolineas Argentinas, Austral, and Iberia Arrangements

Certain commenting parties urge the Department to defer issuance of our tentative order until we have reviewed the issues regarding the overlapping character of the American-Aerolineas Argentinas/Austral/Iberia relationship. These parties generally conclude that certain equity, control, and implementation issues associated with these other pending arrangements should be

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[63] We direct American and the TACA Group to file any subsequent blocked-space agreement with the Department for review. See note 68, below.

examined in the context of this case. We do not agree. While each of these foreign airlines intend to form operational arrangements with American, we find that the various public interest issues/concerns attendant with these analogous yet separate cases can be appropriately examined by the Department in the context of their respective applications.

In the context of this case, we have examined the additional materials filed by American, and have concluded that these proposed new arrangements do not now significantly influence our assessment of the merits of the instant American and TACA Group alliance. Moreover, there is nothing in the record of this case to indicate that the TACA Group carriers have any association with Aerolineas Argentinas, Austral, or Iberia.

In addition, the Joint Applicants do not plan to integrate their U.S.-Central America code-sharing operations under the instant application with those anticipated under the American-Aerolineas Argentinas/Austral/Iberia arrangements. While American has stated its intent to establish code-share operations with Aerolineas Argentinas in the U.S.-Argentina market (and with Austral for service within Argentina), and with Iberia on selected American flights between Miami and points in Central America, the record shows that American and Iberia fully intend to remain competitors with each other and the TACA Group carriers on the Miami-Central America routes and will continue to market and price their seats separately.[64] However, we will consider the impact of the American-TACA Group alliance in our review of American's other applications.

E. Associated Concerns

The CRS Parties urge the Department to defer action on the pending applications. They maintain that the Joint Applicants and Sabre are engaged in certain "unlawful or anticompetitive" activities in the Latin America CRS markets. We recognize that these allegations, if true, could undermine the CRS Parties' ability to compete successfully for Latin American travel agency subscribers. This in turn could injure the ability of the systems' U.S. airline owners to compete in the affected air transportation markets. We are prepared to take action in such cases, if the allegations are determined to be true, since these actions would deny these competing U.S. systems and their affiliated airline(s) a reasonable opportunity to market their services in travel agencies in the TACA Group's respective foreign homelands. Order 88-7-11 (July 8, 1988).

Sabre, however, argues that these allegations are "groundless," and denies that it has engaged in any actions that would discredit Amadeus/System One in the Latin America market. Sabre further states that there is nothing improper or illegal about robust competition between competing CRS systems.

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64 Iberia intends to use its "IB" designator code on American's flights in the Miami-Guatemala City/ Managua/Panama City/San Jose, Costa Rica/San Pedro Sula/San Salvador markets. However, the American-Iberia joint application for statements of authorization to engage in certain reciprocal code-share services indicates that no local traffic will be carried in these markets under the "IB" code, but that these segments will be sold only in conjunction with services to/from Spain via Miami. See joint application filed October 2, 1997, at 2 n. 1.

The United States Government continues to be concerned with conduct by CRS firms that may deny competing U.S. systems a fair chance to compete. However, in this case, we have tentatively concluded that the difficulties alleged by the CRS Parties do not warrant our delaying or deferring our tentative decision in this matter. Importantly, we are encouraged that the CRS Parties have indicated in their pleadings in this case that the TACA Group airlines have agreed to upgrade their level of participation in Amadeus to the same level of functionality as those airlines maintain with Sabre. Moreover, we believe that other fora are more appropriate for addressing these concerns. We will take appropriate action to protect the rights of U.S. airlines to market their systems in foreign countries, as we have on past complaints by American and Worldspan, but this proceeding is not the proper place for us to take action.

While the Joint Applicants are not now seeking antitrust immunity from the Department for their proposed alliance, the record indicates that the Joint Applicants' long-term plan envisions the securing of immunity for their proposed arrangement. Furthermore, this application has raised competitive concerns comparable in many respects to those posed in our earlier antitrust-immunity cases. For example, while the Joint Applicants state that they will independently price their products, the extent of their proposed integration raises competitive concerns with regard to the establishment of fares in the affected markets. For this reason, we will explicitly require that American Airlines, Inc. and the TACA Group independently establish fares in each of the markets covered by the agreements.

VIII. O&D Survey Data Reporting Requirement

We have access to market data where our carriers operate, including markets that they serve jointly with foreign airlines, for example, the Department's Origin-Destination Survey of Airline Passenger Traffic (O&D Survey). We have also collected special O&D Survey code-share reports for three large alliances and have directed all other U.S. airlines to file reports for their transatlantic code-share operations beginning with the second quarter of 1996.

However, we receive no market information for passengers traveling to or from the U.S. when their entire trip is on a foreign airline, except for T-100 data for nonstop and single-plane markets. Such passengers account for a substantial portion of all traffic between the U.S. and foreign cities, and the absence of such information severely handicaps our ability to evaluate the economic and competitive consequences of the decisions we must make on international air service.

In addition to the added importance of our decision-making regarding international issues, we must also ensure that our decision in this matter does not lead to anti-competitive consequences. We have therefore tentatively decided to require each of the TACA Group carriers to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that contain a United States point (similar to the O&D Survey data already reported by American).

To prevent this reporting requirement from having any anti-competitive consequences, we have tentatively decided to grant confidentiality to the TACA Group's Origin-Destination report and special report on code-share passengers. Currently, we grant confidential treatment to international Origin-Destination data. We provide these data confidential treatment because of

the potentially damaging competitive impact on U.S. airlines and the potential adverse effect upon the public interest that would result from unilateral disclosure of these data (data covering the operations of foreign air carriers that are similar to the information collected in the Passenger O&D Survey are generally not available to the Department, to U.S. airlines, or to other U.S. interests).

14 C.F.R. Part 241 section 19-7(d)(1) provides for disclosure of international Origin-Destination data to air carriers directly participating in and contributing to the O&D Survey. While we have tentatively found it appropriate to direct the TACA Group to provide certain limited Origin-Destination data to the O&D Survey, the TACA Group is not an air carrier within the meaning of Part 241. 14 C.F.R. Part 241, Section 03 defines an air carrier as "[a]ny citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation." The TACA Group accordingly will have no access to the data filed by U.S. air carriers. Moreover, we will be making the TACA Group's submissions confidential while maintaining the current restriction on access to U.S. air carrier Origin-Destination data by foreign air carriers.

IX. Operation under a Common Name/Consumer Issues

Since operation of these various arrangements could raise significant consumer issues and "holding out" questions, if American and the TACA Group choose to operate under a common name or use "common brands," they will have to seek separate approval from the Department prior to such operations. For example, it is Department policy to consider the use of a single air carrier designator code by two or more carriers to be unfair and deceptive and in violation of the Act unless the airlines give reasonable and timely notice of its existence.[65]

X. American-Lan Chile Alliance

On September 11, 1997, United filed a motion asking us to require a supplemental information submission.[66] United argues that American has announced that it is entering into an alliance with Linea Aerea Nacional Chile S.A. -- Lan Chile Airlines ("Lan Chile"). United maintains that the American-Lan Chile arrangement is related directly and relevant to the Department's public interest concerns and must be considered in addressing the competitive issues of this case. United says that the information to be submitted should be comparable to the information that the Department required the Joint Applicants to submit regarding the American-Aerolineas Argentinas/Austral and American-Iberia relationships.[67]

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65 See 14 C.F.R. § 399.88.

66 On September 22, 1997, Continental and Delta filed in support of United's motion.

67 On September 17, 1997, American and the TACA Group filed separate replies and motions for leave to file. We will grant the motions. American maintains that its arrangement with Lan Chile has nothing to do with the American-TACA Group alliance. American says that the transactions are separate and distinct. American further states that it has had no discussion with either the TACA Group or Lan Chile about integrating the two transactions, and that none is planned. Finally, the TACA Group states that it is not a party to the proposed cooperative alliance between American and Lan Chile and has no documents or information that would be responsive to United's motion.

In early September, American and Lan Chile announced an agreement creating a cooperative alliance involving reciprocal code-sharing between the United States, Chile, and various points in the Caribbean/Canada/Central America/Japan/Mexico, as well as reciprocal frequent flyer program participation.

Under the announced terms of the code-sharing agreement American and Lan Chile will place their designator codes on each other's services between the Untied States and Chile, and on selected services beyond their respective gateways. The proposed cooperative arrangement involves matters relevant to our assessment of the competitive implications that we have been addressing in this case. To enable us to consider the potential impact of this arrangement on the American-TACA Group Alliance, we are directing the Joint Applicants to provide in English certain information set out in ordering paragraph 5 of this order. Because the requested additional material may contain certain information considered sensitive by the Joint Applicants, as with other documents covered by Rule 39 motions for confidential treatment, we will allow for limited interim access to these documents pending a decision on the basic Rule 39 motions. Accordingly, counsel and outside experts, for the interested parties only, may review the Joint Applicants' confidential documents under Rule 39, consistent with our previously established confidential affidavit procedures.

XI. Decision Summary

As we have earlier stated, the predicate for tentatively finding that this request is in the public interest, as conditioned and limited, is the attendant open-skies agreements between the United States and each of the foreign applicants' homeland governments. While these agreements do not guarantee an expansion of competition in the affected marketplace, these newly achieved initiatives do establish an aviation environment that maximizes the potential opportunity for an increased competitive presence by other U.S. airlines in the U.S.-Central America market.

We tentatively conclude that our grant of the requested authority should be conditioned and limited, as set forth in this order. We also tentatively direct American and the TACA Group to resubmit the pertinent code-share and alliance agreements two years from the date of the issuance of the final order in this case. However, the Department is not authorizing the Joint Applicants to operate under a common name or use common brands. If the Joint Applicants want to operate under a common name or brands, they will have to comply with our relevant procedures before implementing the change.

In addition, to the extent not otherwise limited, we tentatively limit and condition, as defined in subparagraphs (a) through (f) of ordering paragraph 1 of this order, the Joint Applicants' request regarding their proposed integration of services and operations between points in the United States and Central America, and beyond. We also tentatively direct American and the TACA Group to file all subsidiary and/or subsequent agreement(s) with the Department for prior

review,[68] and we tentatively direct the TACA Group carriers to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that contain a United States point (similar to the O&D Survey data already reported by American).

ACCORDINGLY:

1. We direct all interested persons to show cause why we should not issue an order making final our tentative findings and conclusions, granting (1) exemptions pursuant to 49 U.S.C. section 40109(c), and (2) statements of authorization pursuant to 14 C.F.R. Parts 207 and 212 to the extent necessary to permit American Airlines, Inc. and the TACA Group to conduct the proposed reciprocal code-share services as described in this order, subject to the proposed limits and conditions as set forth in (a) through (f) below:

(a) The authorities tentatively approved by this order shall be subject to the condition that neither American nor the TACA Group shall give any force or effect to the establishment of a Joint Alliance Committee as defined in section 8 of the Joint Applicants' Alliance Agreement;

(b) The authorities tentatively approved by this order shall be subject to the condition that neither American nor the TACA Group shall give any force or effect to any exclusivity provision in their arrangement which (1) restricts the TACA Group affiliates from entering into any marketing and/or interline arrangement(s) with airline(s) domiciled in the United States, or (2) restricts American from entering into any marketing and/or interline arrangement(s) with airline(s) domiciled in Central America;

(c) The authorities tentatively approved by this order shall be subject to the condition that the marketing carrier may acquire seat capacity on the operating carrier's flights to offer competitive non-stop service between Miami and Belize City, Guatemala City, Managua, Panama City, San Jose, San Pedro Sula, San Salvador, and Tegucigalpa for a fixed number of seats, based on a fixed price per seat – commonly described as a fixed blocked-space arrangement, to be determined by the contracting parties;

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[68] Regarding this requirement, we do not expect American and the TACA Group to provide the Department with minor technical understandings that are necessary to blend fully their day-to-day operations but that have no additional substantive significance. We do, however, expect and direct the applicants to provide the Department with any contractual instruments that may materially alter, modify, or amend the respective code-share and/or alliance agreements, and other major implementing agreements. Such agreements must be reduced to writing and are not covered by our actions here until and unless they are affirmatively granted. Significant implementing agreements related to the structure of the alliance must also be filed if written. In addition, the blocked-space arrangements mandated by the conditions imposed in our tentative approval must also be filed. If within the scope of the authority already granted, these agreements would continue to have effect until and unless disapproved. Contractual instruments and agreements in principal between the applicants and additional carrier partners, regardless of whether Department approval is sought for any activities related to such additional partners and/or whether the instruments/agreements may be drafted as separate agreements which merely supplement the "Code-Share and/or Alliance Agreements," must also be filed for review. In such cases, the Department will determine what further action, if any, may be required with respect to such agreements.

(d) The authorities tentatively approved by this order shall be subject to the condition that the Joint Applicants will tentatively be required to maintain separate pricing, inventory and yield management with respect to local U.S.-point-of-sale passengers flying nonstop between Miami and Belize City, Guatemala City, Managua, Panama City, San Jose, San Pedro Sula, San Salvador, and Tegucigalpa to be managed, marketed and sold independently by each of the applicant partners;

(e) The authorities tentatively approved by this order shall be subject to the condition that the Joint Applicants may not coordinate or provide more information by one party to the other concerning current or prospective fares or seat availability for such passengers than it makes available to airlines and travel agents generally; and

(f) The authorities tentatively approved by this order shall be subject to the condition that the Joint Applicants shall not operate or hold out service under a common name or brand without obtaining prior approval from the Department;

2. We tentatively direct American Airlines, Inc. and the TACA Group to resubmit their respective Code-Share and Alliance Agreements two years from the date of issuance of the final order in this case;

3. We tentatively direct the TACA Group to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic data for all passenger itineraries that include a United States point (similar to the O&D Survey data already reported by its alliance partner American Airlines, Inc.);

4. We tentatively direct American Airlines, Inc. and the TACA Group to submit any subsequent and/or subsidiary agreement(s) implementing the respective Code-Share Agreements and/or the Alliance Agreement for prior approval;

5. We direct American Airlines, Inc. and the TACA Group within seven business days of service of this order to provide the following information on the proposed American-Lan Chile Alliance:

A detailed explanation of the content, scope, objectives, and timing of the proposed cooperative arrangement (including all stages of integration) and how this arrangement will be integrated with the American-TACA Group Alliance; complete information concerning any investment by American in Lan Chile; complete information (including copies of commercial agreements in final, or in draft if there is no final) on the American-Lan Chile cooperative arrangement, particularly on its relationship to the proposed American/TACA Group alliance, in terms of corporate strategy, marketing, yield and capacity management, and pricing; and complete information on the extent to which the American-Lan Chile cooperative arrangement would affect operations between the U.S. and Central

America by American and the TACA Group with respect to passengers with an origin or destination in Chile and other third countries;

6. The authority tentatively granted in ordering paragraph 1 shall be effective immediately and remain in effect for a period of two years from the date of service of a final order in this case;

7. The authority tentatively granted in ordering paragraph 1 is expressly conditioned upon the requirement that the subject foreign air transportation be sold in the name of the carrier holding out such service in computer reservations systems and elsewhere, and that the carrier selling such transportation accept all obligations established in its contract of carriage with the passenger (*i.e.*, the ticket), and that where applicable the operator shall not permit the code of its U.S. code-sharing partner to be carried on any flight that enters, departs, or transits the airspace of any area for whose airspace the Federal Aviation Administration has issued a flight prohibition;

8. We tentatively require American Airlines, Inc. and the TACA Group to establish fares independently in each of the markets covered by the agreements;

9. We tentatively require American Airlines, Inc. and the TACA Group to comply with the rules for airline designator code sharing set forth in 14 C.F.R. 399.88 of the Department's regulations, and any amendments to the Department's regulations concerning code-share arrangements that may be adopted;

10. Regarding Aviateca S.A., Aviateca may not conduct the operations authorized above using its own aircraft and crews without further Department action. However, our action here does not affect Aviateca's Department authorities to conduct operations to the United States as authorized by Notice of Action Taken October 27, 1993, in Docket 46583, Order 92-10-53, in Docket 46945 and Order 90-8-58, in Docket 46582. Operations under these later authorities may continue to be conducted by Aviateca using its own aircraft and crews, consistent with the scope of its Operations Specifications issued by the Federal Aviation Administration, and with the Department's "Clarification Concerning Examination of Foreign Air Carriers' Request for Expanded Economic Authority," dated October 23, 1995;

11. Regarding Nicaraguense de Aviación S.A. and TACA de Honduras S.A., the authority tentatively granted above is limited to operations conducted under wet lease by a duly authorized and properly supervised U.S. or foreign carrier. Nicaraguense de Aviación S.A. and TACA de Honduras S.A. may not conduct the proposed operations authorized here with their own aircraft and crew without further Department action;

12. To the extent not otherwise granted or dismissed, we deny all requests and motions in Docket OST-96-1700;

13. We may amend, modify or revoke this authority at any time and without hearing;

14. We direct interested persons wishing (a) to comment on our tentative findings and conclusions, and/or (b) to file objections to the issuance of the order described above to file an

original and five copies in Docket OST-96-1700 and serve a statement of such objections or comments together with any supporting evidence the commenter wishes the Department to notice on all persons on the service list in this docket no later than 28 days from the service date of this order. Answers to objections shall be due no later than 7 business days after the last day for filing objections/comments;[69]

15. If timely and properly supported objections are filed, we will afford full consideration to the matters or issues raised by the objections before we take further action. If no objections are filed, we will deem all further procedural steps to have been waived; and

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69 Service should be by hand delivery or telefax. The original filing should be on 8½" by 11" white paper using dark ink and be unbound without tabs, which will expedite use of our docket imaging system.

16. We shall serve this order on all persons on the service list in this docket.

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

An electronic version of this document is available on the World Wide Web at http://dms.dot.gov/general/orders/aviation.html