Order 2005-12-12
Served: December 22, 2005

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

Issued by the Department of Transportation
on the 22nd day of December, 2005

Joint Application of **Alitalia-Linee Aeree Italiane-S.p.A.,** **Czech Airlines,** **Delta Air Lines, Inc.,** **KLM Royal Dutch Airlines,** **Northwest Airlines, Inc., and** **Société Air France** for Approval of and Antitrust Immunity for Alliance Agreements under 49 U.S.C. §§ 41308 and 41309	**Docket OST-2004-19214**
Joint Application of **Delta Air Lines, Inc.,** **KLM Royal Dutch Airlines,** **Northwest Airlines, Inc.,** **Société Air France,** **Alitalia-Linee Aeree Italiane-S.p.A., and** **Czech Airlines** for Statements of Authorization under 14 C.F.R. Part 212 (blanket code sharing)	

ORDER TO SHOW CAUSE

SUMMARY

In this consolidated docket, Alitalia-Linee Aeree Italiane-S.p.A., Czech Airlines ("CSA"), Delta Air Lines, Inc., KLM Royal Dutch Airlines, Northwest Airlines, Inc., and Société Air France (collectively referred to as the "Joint Applicants") propose to expand cooperation under the umbrella of the SkyTeam global marketing alliance. Specifically, they seek blanket statements of authorization to engage in reciprocal code shares and approval of, and six-way antitrust immunity for, alliance agreements covering foreign air transportation via transatlantic routings.[1]

[1] We refer to applicants and parties by their common names (*e.g.*, "Delta" for Delta Air Lines, Inc.).

We have tentatively decided to grant the blanket statements of authorization, subject to standard conditions, thereby approving the application for code shares. We base this on our tentative conclusion that granting blanket statements of authorization is in the public interest because, under the SkyTeam umbrella, the Joint Applicants may use expanded code share authority to produce some public benefits, including some new online service and more frequent and convenient online service options. We have also tentatively decided that granting antitrust immunity for the alliance agreements is not required by the public interest. We have been unable to find, based on the present record and current circumstances, that the Joint Applicants have demonstrated that approval of antitrust immunity for the alliance agreements would provide sufficient public benefits. This tentative decision is consistent with the recommendation of the United States Department of Justice ("DOJ"), which urged us to deny the request for antitrust immunity on the grounds that the Joint Applicants had failed to show that expanded antitrust immunity would provide significant public benefits. While we have tentatively decided not to approve additional immunity, the existing Northwest/KLM and Delta/Air France/Alitalia/Czech immunized alliances may continue to operate with their current rights and privileges, and subject to the same conditions and restrictions.

A determination as to whether a particular transaction is required by the public interest is made only on a case-by-case basis, in light of the specific facts and circumstances affecting that case. This case is novel in several respects. It comes before us at a time that the regulatory framework governing transatlantic markets is in flux. The United States and the European Commission have recently completed negotiation of a comprehensive, first-step air services agreement that is being assessed by the European Union Member States. The new agreement would enhance transatlantic market dynamics in important ways, including by increasing the potential for improved service and other public benefits. At this time, however, the agreement has not yet been adopted.

We cannot yet determine, therefore, whether the end result of ongoing changes in the regulatory environment would affect the outcome of this case. By statute, the Department must make a tentative decision now.[2] Furthermore, the Joint Applicants urge us to make a prompt determination on the merits.[3]

This case is also very different from previous applications that have come before the Department because the Joint Applicants' requests involve six global airlines, including – for the first time – two large U.S. airlines. Moreover, the proposed alliance combination represents a merger of two existing immunized alliances: on the one hand, the Northwest/KLM alliance, and on the other hand, the alliance between early SkyTeam members Delta, Air France, Alitalia, and CSA. The route networks of these existing alliances largely overlap each other, meaning that the proposed, expanded, immunized SkyTeam alliance will not result in the initiation of online services in new markets to any significant degree.

Enhancing service and competition in our international aviation markets is one of our most important international aviation objectives. Open skies agreements and inter-alliance competition are two of our major tools for achieving these objectives. Therefore, the Department has followed a policy designed to enable the development of new international alliances. Since

---

[2] *See* 49 U.S.C. § 41710 (2003).

[3] Joint Applicants' Consolidated Response at 9 (No. OST-2004-19214-190).

1993, we have approved and granted requests for antitrust immunity between a U.S. airline and one or more foreign airlines where the homeland of the foreign applicant is a party to an open-skies agreement with the United States and where the Department has determined that granting antitrust immunity is required by the public interest because it would be pro-competitive, provide important consumer benefits, and be consistent with our international aviation competition policy.

Those past cases generally involved alliances that linked end-to-end route networks. The immunity requested in this case would not link end-to-end networks; instead, it would, in effect, fully merge two alliances that already have been granted antitrust immunity and that have networks that overlap substantially. We thus require a stronger showing of public benefits that would flow specifically from a grant of antitrust immunity than was required in prior cases where the Department granted antitrust immunity. In the particular facts and circumstances of this case, the current record does not demonstrate to the Department's satisfaction that substantial and proximate public benefits, beyond those made possible by arms-length code sharing or other lawful forms of collaboration, will be produced if we were to grant six-way antitrust immunity combining fully two existing immunized alliances, each with a major U.S. air carrier.

In reaching our tentative decision, we note that the Joint Applicants have not persuaded us that, absent the requested immunity, they would be unable to provide many of the benefits cited in their pleadings. As the DOJ points out, the Joint Applicants have already engaged in a substantial amount of integration of their services to date, and are likely to integrate further without immunity, even though they may not coordinate their services and fares as much as they would with antitrust immunity. The expanded SkyTeam alliance, moreover, includes Continental, which has no antitrust immunity for its relationships with the other alliance members, but which is nonetheless participating in collaborative efforts to strengthen the alliance's marketing and services.

We direct all interested persons to show cause why we should not issue an order making final our tentative findings and conclusions. Parties have three weeks to submit comments and seven business days to submit reply comments. We will make a final decision on the applications after we review the parties' comments and reply comments.

BACKGROUND

A. Alliance history

Northwest and KLM, which were granted antitrust immunity in 1993, are pioneers in the development of global marketing alliances. Since the late 1990s, Northwest and KLM have operated a highly integrated, common bottom line joint venture that enables those two carriers to function as a single economic entity with respect to the transatlantic market. Continental, a partner with Northwest since 1998 through a long-term marketing alliance, has been a marketing partner of KLM since 2001, although Continental and KLM do not have immunity. The Northwest/Continental marketing alliance was expanded and augmented to include Delta in 2003. The three airlines have no immunity for that primarily domestic alliance.

In 2000, Delta, Air France, Aeromexico, and Korean Air Lines founded SkyTeam, a global branded airline alliance designed to enable those airlines to better compete with the Star and oneworld global marketing alliances and the Northwest/KLM alliance. Alitalia and CSA joined SkyTeam in 2001. Air France, Delta, Alitalia, CSA, and Korean were granted antitrust immunity in 2002.

In May 2004, Air France acquired KLM. Both airlines continue to operate as separate airlines, but are managed by a common holding company controlled by former Air France shareholders. The European Commission determined that the Air France/KLM merger, subject to certain conditions, would not violate the European Union's competition laws, and the DOJ determined that it would not challenge the merger.[4]

The merger of Air France and KLM created what the Joint Applicants refer to as a "gap in immunity" between the Northwest/KLM alliance, on the one hand, and the separate immunity enjoyed by certain members of the SkyTeam alliance, on the other hand.[5] On September 13, 2004, Northwest, KLM, and Continental became members of the SkyTeam global marketing alliance. On September 24, 2004, the Joint Applicants applied to "bridge the gap" between the immunized alliances by obtaining six-way antitrust immunity. They do not seek antitrust immunity, however, for their alliance relationship with Continental, or for Northwest's alliance relationship with Korean, whose alliance with Air France, Delta, Alitalia, and CSA has antitrust immunity.

In this proceeding, our task is not whether to approve the expansion of the SkyTeam alliance, but rather to determine whether the Joint Applicants have demonstrated, based on the present record and under the current circumstances, that six-way immunity is necessary to that expansion and required by the public interest. Northwest, KLM, and Continental have each joined the ranks of SkyTeam. They have already taken steps to integrate under the SkyTeam banner, including offering customers alliance-wide frequent flyer and airport lounge access benefits, co-locating their airport facilities, and harmonizing procedures and customer services.[6]

B. Procedural history

The Joint Applicants first filed their applications in separate dockets – the antitrust immunity application in Docket OST-2004-19214 and the code-share application in Docket OST-2004-19215. On October 18, 2004, the Department granted access to documents and information according to its standard procedures and consolidated the proceedings into Docket OST-2004-19214. *See* Notice and Order (Oct. 18, 2004).

---

[4] *See* Case No. IV/M.3280 Air France/KLM (European Commission decision declaring a concentration to be compatible with the common market according to Council Regulation (EEC) No. 4064/89 (Feb. 11, 2004)); Deputy Assistant Attorney General J. Bruce McDonald, Remarks to the ABA Section of Antitrust Law, Transportation Industry Committee (Mar. 31, 2004), *at* http://www.usdoj.gov/atr/public/speeches/203369.pdf.

[5] *See, e.g.*, Joint Application for Antitrust Immunity at 43 (No. OST-2004-19214-1); Joint Applicants' Supplemental Information Response at 3 (No. OST-2004-19214-48).

[6] *See* SkyTeam Customer Benefits, *at* http://www.skyteam.com/EN/aboutSkyteam/doc/customer.pdf (n.d.).

During our review of the record, we issued several procedural orders. The first, on November 18, 2004, acknowledged the presence of novel issues in the proceeding and requested additional information to ensure a complete factual record. *See* Order 2004-11-15 (Nov. 18, 2004). The Joint Applicants responded on February 8, 2005, by producing documents and a Supplemental Information Response that contained written answers to each of the Department's clarification questions.[7] The second, on April 22, 2005, found that the record would be substantially complete when the Joint Applicants satisfactorily provided additional information necessary to clarify the record. *See* Order 2005-4-21 (April 22, 2005). The Joint Applicants responded on May 9, 2005, submitting letters, translations, documents, logs, and information responses.[8] The third, on June 1, 2005, declared the record substantially complete and ordered a limited *in camera* review of certain documents withheld by Northwest. *See* Order 2005-6-1 (June 1, 2005). We issued further procedural orders and notices to complete the record and ensure that all parties had sufficient time in which to comment. *See* Order 2005-6-8 (June 10, 2005) (supplementing the record); Notice (July 15, 2005) (extending procedural dates); Notice (Aug. 10, 2005) (extending procedural dates).

In reliance on the Joint Applicants' representation that they had not agreed that Continental would join the immunized alliance if we grant their request in this docket for antitrust immunity, we denied American's request that we treat Continental as if it were seeking to join the immunized alliance. We noted that our analysis would be different if we were considering a proposal for Continental to join an immunized alliance that included Delta, Northwest, Air France, KLM, Alitalia, and CSA. *See* Order 2005-4-21, at 6 (April 22, 2005).

Two motions are pending.[9] On July 15, the Joint Applicants moved to strike American's July 6 Reply from the record. American responded to that motion on July 18. Additionally, American moved to suspend the proceeding on September 15. The Joint Applicants responded on September 16.[10]

---

[7] *See* Joint Applicants' Supplemental Information Response (No. OST-2004-19214-48). *See also* KLM Supplemental Information Response (No. OST-2004-19214-46); Air France Supplemental Information Response (No. OST-2004-19214-47); Letter from Alexander Van der Bellen, Counsel for Delta, to Dorothy Beard, Chief, Dockets and Media Management (Feb. 8, 2005) (No. OST-2004-19214-49); Letter from Megan Rae Rosia, Managing Director, Government Affairs, Northwest Airlines, Inc., to Dorothy Beard, Chief, Dockets and Media Management (Feb. 8, 2005) (No. OST-2004-19214-50); Letter from Richard Mathias, Attorney for Alitalia, to Dorothy Beard, Chief, Dockets and Media Management (Feb. 9, 2005) (No. OST-2004-19214-51); Letter from Allan I. Mendelsohn, Counsel for CSA, to Dorothy Beard, Chief, Dockets & Media Management (Feb. 17, 2005) (No. OST-2004-19214-52.

[8] *See* Response of Air France to Order 2005-4-21 Clarification Questions (No. OST-2004-19214-75); KLM Supplemental Information Response (No. OST-2004-19214-76); Supplemental Information Response of Northwest (No. OST-2004-19214-77); Response of Delta (No. OST-2004-19214-78); Letter from Allan I. Mendelsohn, Counsel for CSA, to Dorothy Beard, Chief, Dockets & Media Management (May 11, 2005) (No. OST-2004-19214-80); Letter from Richard D. Mathias, Counsel for Alitalia, to Dorothy Beard, Chief, Dockets & Media Management (May 12, 2005) (No. OST-2004-19214-81) (referencing confidential documents).

[9] We will grant all motions for leave to file unauthorized pleadings.

[10] For reasons explained below, we will deny both motions.

JOINT APPLICATIONS

A. Application for statements of authorization

On September 24, 2004, the Joint Applicants requested blanket statements of authorization to engage in reciprocal code shares.[11] The Joint Applicants state that the requested authority is an important element of their efforts to join together the Northwest/KLM and Delta/Air France/Alitalia/CSA alliances. The code-share services, the Joint Applicants add, are fully consistent with the open skies agreements between the United States and the Netherlands, France, Italy, and the Czech Republic. The Joint Applicants request blanket statements of authorization to remain in effect for an indefinite term, subject to the Department's usual conditions. They represent that each applicant holds, or is separately applying for, the underlying authority to engage in the requested code-share activities.

B. Application for approval and antitrust immunity

In their September 24, 2004 filing, the Joint Applicants and their majority-owned affiliates applied for approval and antitrust immunity.[12] The application seeks approval of and antitrust immunity for (i) bilateral cooperation agreements between KLM and Delta, and between Northwest and SkyTeam carrier-applicants Delta, Air France, Alitalia, CSA; (ii) a multilateral coordination agreement among the Joint Applicants; and (iii) existing and future agreements between and among the Joint Applicants concerning the activities contemplated by the coordination agreements. Together, we refer to these agreements – covering all major functional areas of the Joint Applicants' operations – as the "alliance agreements." According to the Joint Applicants, these alliance agreements provide a general framework for subsequent definitive agreements covering all major functional areas of the airlines' operations.

The Joint Applicants initially applied for approval and antitrust immunity for a worldwide alliance relationship. The DOJ expressed concern that the Joint Applicants made no effort to justify a grant of immunity of that scope – such immunity, the DOJ argues, would include cooperation in transpacific and North American markets.[13] In response to the DOJ's concerns, the Joint Applicants offered to modify their request and agreed to limit the scope of the alliance agreements to foreign air transportation via transatlantic routings.[14] Our tentative decision will only consider this modified and limited request.

The Joint Applicants state that their application should be approved because it meets the statutory criteria under 49 U.S.C. § 41308-41309. First, the Joint Applicants argue that the proposed alliance – on a global, transatlantic, country-pair or city-pair basis – does not eliminate

---

[11] Joint Application for Statements of Authorization at 1-2 (No. OST-2004-19215-1).

[12] Joint Application for Antitrust Immunity (No. OST-2004-19214-1).

[13] [Public] Comments of the DOJ at 2 (No. OST-2004-19214-164).

[14] [Public] Consolidated Response of the Joint Applicants at 3-4, 30 (No. OST-2004-19214-179). The Joint Applicants offer to agree to this condition: "Delta and Northwest agree that the commercial cooperation between their companies pursuant to this Agreement shall, in all cases, be limited to coordination and cooperation in passenger and cargo matters that are "Foreign Air Transportation" via a transatlantic routing and shall exclude coordination of prices, services and other marketing activities involving "Interstate Air Transportation," as those terms are defined in 49 U.S.C. § 40102."

or substantially reduce competition and is not adverse to the public interest. They argue in the alternative that, even if the Department were to find a substantial reduction or elimination in competition, the alliance would still qualify for approval because it achieves important public benefits – namely the preservation of benefits and efficiencies captured by the Northwest/KLM and SkyTeam immunized alliances, the introduction of new flights and connections, more frequent and convenient service, increased competition among branded global marketing alliances, and international comity.

Second, the Joint Applicants argue that the public benefits of the alliance cannot be achieved through any available alternative means, such as arms-length code sharing. The Joint Applicants want to agree explicitly on international routes and schedules, fares and related terms, and capacity additions and to discuss service enhancements that can reduce costs and create public benefits. This process requires antitrust immunity, the Joint Applicants claim. They believe that the envisioned public benefits are not achievable through conventional code sharing because, with conventional code sharing, carriers retain economic incentives to advance their own individual interests rather than the interests of the alliance as a whole. The Joint Applicants cite the Northwest/KLM alliance, which over a period of years evolved from arms-length code sharing to a highly integrated common bottom line arrangement.

Third, the Joint Applicants state that they cannot pursue the proposed alliance without antitrust immunity. They are unwilling to run the risk of lawsuits by private parties that may result because of potential antitrust exposure. Rather than run these risks, the Joint Applicants claim that they would inevitably forgo the potential benefits of the alliance; the feasibility of alliance formation is predicated on securing antitrust immunity, they state. The Joint Applicants contend that the need for immunity is more compelling in this instance than in prior proceedings, because of the "gap in immunity" created by the merger of Air France/KLM. The Joint Applicants state that, in the absence of immunity for the six carriers, there will be circumstances in which the combined Air France/KLM will have to forgo collaborative activities with either Northwest or Delta, in order to avoid claims, however erroneous, that Northwest and Delta have somehow colluded through the combined Air France/KLM entity.

Fourth, the Joint Applicants argue that international comity and foreign policy considerations favor approval of this application. Failure to approve the application, the Joint Applicants assert, would frustrate both the original and current expectations of the foreign governments involved and would contravene the spirit of the open skies accords. The Joint Applicants note that the proposed alliance involves only carriers from countries with open skies agreements.

Fifth, the Joint Applicants argue that the inclusion of two U.S. carriers (Northwest and Delta) does not affect the competition analysis, because the carriers do not seek immunity with respect to their domestic operations, which will remain fully subject to the antitrust laws. They state that there is no competitive problem presented by combining their international operations. They warn against denying the application on the basis that it includes two U.S. carriers, because such a denial would create a scenario in which a significant number of U.S. carriers would be excluded from participation in the kind of immunized alliances that the Department has allegedly found important and helpful to a competitive marketplace.

Lastly, the Joint Applicants discuss conditions that the Department has commonly placed on approvals and grants of immunity. The Joint Applicants agree to accept a range of conditions

that are similar to those imposed in past cases. The conditions concern ownership and management of computer reservation systems (CRSs), duration of approval and immunity, International Air Transport Association (IATA) tariff coordination, Origin & Destination Survey data reporting, and common branding.

Supplements

On February 8, 2005, the Joint Applicants submitted additional documents, data, and a Supplemental Information Response.[15] The Supplemental Information Response addressed 17 questions posed by the Department in order to supplement the record and clarify statements made in the application. The information contained in the Supplemental Information Response was evaluated by the Department and weighed prior to making a determination that the record was substantially complete. *See* Order 2005-4-21 (April 22, 2005) (seeking clarification of the record); Order 2005-6-1 (June 1, 2005) (establishing a procedural schedule); Order 2005-6-8 (June 10, 2005) (supplementing the record).

In their Supplemental Information Response, the Joint Applicants seek to clarify their need for, and proposed use of, antitrust immunity. They state that the Northwest/KLM and SkyTeam immunized alliances currently coordinate across a range of competitively sensitive matters within the spheres of their immunity, and plan to harmonize and expand that cooperation if immunity is granted. That cooperation could include alliance-wide revenue and profit-sharing. They believe that antitrust immunity is necessary for the development and implementation of a comprehensive revenue/profit sharing arrangement, even though achieving such an arrangement will likely proceed in incremental steps. They further believe that, in order for them to develop such an arrangement, they will have to be able to exchange and discuss current and future competitively sensitive information that relates to future developments in the marketplace. The Joint Applicants predict that, with immunity, they will eventually be in a position to negotiate a comprehensive revenue/profit sharing agreement. Moreover, antitrust immunity is allegedly needed not only to preserve the existing benefits of the Northwest/KLM and SkyTeam immunized alliances, but also to obtain new consumer benefits that would require carriers to maximize the benefits of the alliance as a whole and negotiate necessary trade-offs to harmonize competing interests. They specifically state that additional code-sharing beyond that detailed in the code-share agreements submitted with the application depends upon receiving antitrust immunity.

The Joint Applicants also seek to clarify the consumer benefits that could be created if the transaction is approved and immunized. The Joint Applicants reiterate that thousands of city-pairs could receive new online service, and many more city-pairs that one or more alliance carriers presently serve online could receive more convenient or frequent service. Adding these

---

[15] *See* Joint Applicants' Supplemental Information Response (No. OST-2004-19214-48). *See also* KLM Supplemental Information Response (No. OST-2004-19214-46); Air France Supplemental Information Response (No. OST-2004-19214-47); Letter by Alexander Van der Bellen, Counsel for Delta, to Dorothy Beard, Chief, Dockets & Media Management (Feb. 8, 2005) (No. OST-2004-19214-49); Supplement by Northwest (No. OST-2004-19214-50); Letter by Richard D. Mathias, Counsel for Alitalia, to Dorothy Beard, Chief, Dockets & Media Management (Feb. 9, 2005) (No. OST-2004-19214-51); Letter by Allan I. Mendelsohn, Counsel for CSA, to Dorothy Beard, Chief, Dockets & Media Management (Feb. 17, 2005) (No. OST-2004-19214-53).

services will be more likely with antitrust immunity, the Joint Applicants suggest.[16] The Joint Applicants also remind the Department that new routings, timings, and capacity additions could result.

The Joint Applicants offer that the best way to encourage alliance carriers to secure these benefits and make decisions in the interest of the alliance as a whole is to allow them to enter into agreements to share revenues or divide profits. While, in the face of an antitrust challenge, such agreements may be upheld as reasonable ancillary restraints to an otherwise legitimate joint venture, the Joint Applicants explain their reluctance to enter into such agreements based on the courts' differing interpretations and applications of the antitrust laws to joint venture agreements.

On May 9, 2005, the Joint Applicants further supplemented the record with documents and information.[17] Both Northwest and Delta submitted information responses attempting to clarify the scope of their proposed cooperation.

In its May 9 supplement, Northwest states that it fully recognizes that a grant of immunity would only apply to the coordination of international services; Northwest commits to not disclosing "any competitively sensitive domestic information,"[18] and seeks to dissuade the Department from creating a partition between Northwest's domestic and international pricing and revenue management functions. With respect to pricing, Northwest argues that, because international pricing is completely independent of domestic pricing, Northwest and Delta will be able to coordinate pricing on international routes without having to reach agreements or exchange competitively sensitive information about pricing on domestic segments. With respect to revenue management, Northwest foresees little change from the way Northwest interacts with Delta in the context of its non-immunized domestic marketing and code-share alliance; that is, it will use a class-mapping protocol that requires virtually no coordination between the code-sharing airlines once mapping has been set.

Delta also seeks to dissuade the Department from creating a partition between Delta's domestic and international pricing and revenue management functions, because, Delta alleges, those functions are either inherently partitioned, or create little or no risk that competitively sensitive information will be shared with competitors. With respect to pricing, Delta maintains that its domestic and international pricing decisions are inherently partitioned into discrete domestic and international components because each city-pair is unique and pricing in one city-pair generally does not affect pricing in any other. Delta informs the Department that its decision-making regarding fares offered in a given city-pair is a dynamic process driven by competitive conditions that are unique to that city-pair. Delta avers that its domestic and international pricing are managed by entirely different business groups within the company.

---

[16] Joint Applicants' Supplemental Information Response at 33-34 (No. OST-2004-19214-48).

[17] *See* Response of Air France to Order 2005-4-21 Clarification Questions (No. OST-2004-19214-75); KLM Supplemental Information Response (No. OST-2004-19214-76); Supplemental Information filed by Northwest (No. OST-2004-19214-77); Response of Delta (No. OST-2004-19214-78); Letter by Allan I. Mendelsohn, Counsel for CSA, to Dorothy Beard, Chief, Dockets & Media Management (May 11, 2005) (No. OST-2004-19214-80); Letter by Richard D. Mathias, Counsel for Alitalia, to Dorothy Beard, Chief, Dockets & Media Management (May 12, 2005) (No. OST-2004-19214-81).

[18] Supplemental Information Response of Northwest, Response to Questions 26 and 27, at 5 (No. OST-2004-19214-77).

With respect to inventory management, Delta claims no partition is necessary because the type of inventory management data that Delta exchanges with immunized alliance partners is not materially different, and need not be different at all, from information that Delta exchanges with non-immunized partners to facilitate arms-length code shares. Delta states that, like Northwest, it uses a class-mapping protocol to facilitate the lawful transfer of inventory management data. From the perspective of the inventory management system, Delta contends that it is irrelevant whether the itineraries are domestic or international.

Assuming that the application is approved, Delta attempts to explain what specific information it will and will not share with Northwest. Delta anticipates that it may cooperate with Northwest by sharing competitively sensitive information, not just with respect to transatlantic international air transportation, but also with respect to international air transportation between North America and Central American/South American/Caribbean markets. Such information sharing may span the functional areas of network planning, pricing, inventory and revenue management, sales, and marketing. Delta states that it will not exchange any competitively sensitive information with Northwest on any routes on which both Korean and Northwest provide competing service. With respect to network planning, Delta notes that international network planners necessarily take into account the domestic feed available to support contemplated international service from Delta's international gateways, but it offers that traffic data used for international route forecasting is historic and generally publicly available.

RESPONSIVE PLEADINGS

A. Answers

Civic Parties • June 24, 2005

Civic parties from Atlanta, Cincinnati, Detroit, Memphis, and Minneapolis-St. Paul, which are hubs for either Delta or Northwest, submitted answers in support of the applications. They argue that the proposed alliance will create significant new benefits for consumers and preserve the benefits achieved by the Northwest/KLM alliance and the immunized alliance between Delta/Air France/Alitalia/CSA. The civic parties stress that approval of the proposed alliance will generate additional international traffic flows over SkyTeam hubs, and will lead to new and improved services for consumers. Several of them express a concern that the denial of antitrust immunity may reduce or end Northwest's participation in the SkyTeam alliance, which could lead to a reduction in the cities' transatlantic service.

American • June 24, 2005

American answered in opposition to a grant of antitrust immunity. American argues that the additional immunity sought by the SkyTeam carriers in this proceeding – particularly the U.S. carriers, Delta and Northwest – will provide few benefits and will instead enable SkyTeam partners to leverage their combined market share to obtain higher fares. American states that the Coordination Agreement at issue is global in scope and will have an impact on competition in all international markets, including some that are highly regulated, like Mexico, China, and Japan.

It will also affect competition in U.S. domestic markets, since international and domestic operations are "inextricably intertwined."[19]

American believes that a competitive analysis should begin with an assessment of the current state of international competition among immunized alliances, non-immunized alliances, and non-aligned carriers. American states that the early effects of immunized alliances were consistent with the Department's stated goals – lower fares and more capacity – but, due to the lack of meaningful inter-alliance competition, the beneficial effects of open skies have been reversed, resulting in higher fares and fewer choices at immunized European hubs. American concludes that capacity has grown faster in non-open skies markets, such as U.S.-London, than in open skies markets where immunized alliance partners operate hubs.[20] American believes that immunized alliances have been gaining a larger share at their hubs, while the share of non-aligned airlines has been declining. Concordantly, American states that foreign airline partners in immunized alliances have been adding capacity while the capacity of their U.S. partners has been declining. American argues that fares have been rising in markets to open skies countries, including behind-beyond markets, while rising by a smaller amount or falling in markets to non-open skies countries.[21]

American sees competitive harm in these trends. The harm, it alleges, has occurred because the greater entry permitted by open skies agreements has been outweighed by the greater market power amassed by European alliance partners at their hubs. American claims that U.S. airlines cannot viably enter a country market unless they can carry connecting traffic in the beyond markets. When the homeland carriers (such as Air France and Lufthansa) control access to beyond markets, American alleges that they take steps to eliminate interline competition through hubs (such as Paris and Frankfurt). Denying independent airlines the ability to compete for interline traffic will eventually drive them out of the local market, American believes.

American points to Air France's interline policies as an example. American alleges that Air France's recently announced prorate terms have reduced American's interline traffic on the Air France system by ninety percent, year-over-year. American concludes that Air France is pursuing a discriminatory strategy that makes interlining with Air France very costly for non-alliance members.[22]

American concludes that the proposed alliance would create an immunized global alliance duopoly and increase concentration, resulting in higher fares. Granting the application would eliminate competition, American believes, because Delta and Northwest are actual or potential competitors in many international markets (some of which are not within the open skies framework). American also believes that the existing Delta/Northwest/Continental domestic alliance would further strengthen SkyTeam's market position by foreclosing competitive opportunities for international traffic. American criticizes the Joint Applicants' claim that they will face competition in their transatlantic markets, because that claim assumes that Continental will compete vigorously. American does not believe that Continental will compete vigorously, because, among other things, it is already a full member of SkyTeam. Further, American argues

---

[19] [Public] Answer of American at 2 (No. OST-2004-19214-97).

[20] [Public] Answer of American at 5 (No. OST-2004-19214-97).

[21] [Public] Answer of American at 6 (No. OST-2004-19214-97).

[22] *See, e.g.*, [Public] Answer of American at 32-38 (No. OST-2004-19214-97).

that Delta has a contractual commitment to assist Continental in joining the immunized alliance under the Delta/Northwest/Continental domestic Marketing Agreement.[23]

Next, American argues that immunizing Delta and Northwest would have significant adverse effects on domestic competition. American contends that the Department cannot lawfully grant Delta and Northwest immunity for their participation in the proposed alliance because the operative statutes, 49 U.S.C. § 41308-41309, prohibit the Department from immunizing transactions that in any way relate to domestic travel. Yet, the application necessarily includes domestic travel, American states, because network carriers like Delta and Northwest do not operate separate international and domestic networks. American explains that part of the revenue associated with international traffic is generated by domestic flights. Thus, the immunity sought by the Joint Applicants would reduce domestic competition between Northwest and Delta. Because domestic flights carry a significant number of international passengers, because international traffic now accounts for nearly 30% of Delta's and Northwest's total revenues, and because Delta and Northwest will share in each other's international revenues by virtue of their immunized relationship, American concludes that they will have a stake in each other's business and an incentive not to compete with each other as much in domestic markets.

American worries that granting approval would lead to the spillover of competitive information and would create an atmosphere of cooperation between Delta and Northwest that would permeate all markets. American complains that the Joint Applicants have failed to provide any documents showing how they would insulate their domestic decisions from their collaboration on international services and have stated only that they are still considering how they would insulate their decision-making on domestic services.

Looking beyond issues of domestic spillover, American declares that the Joint Applicants have failed to show any compelling procompetitive justification for granting immunity. American maintains that this application would open no new markets; instead, it would create overlaps affecting 4.8 million passengers annually.[24]

American also attacks one of the Joint Applicants' primary justifications for obtaining immunity: to close the "immunity gap" between Northwest/KLM and the Delta/Air France-led component of SkyTeam. American states that this gap could be fixed with clarification from the Department; this alleged problem does not require the global grant of immunity sought by the applicants. Furthermore, American states that the application will create a new gap between Northwest and Korean, because Delta but not Northwest has immunity for an alliance with Korean.

The Brattle Group

James D. Reitzes, Dorothy Robyn, and Kevin Neels (together, referred to by the name of their employer, The Brattle Group), prepared a report to accompany American's answer. The Brattle Group states that immunized alliances have the potential to harm consumers, as a result

---

[23] [Public] Answer of American at 103 (No. OST-2004-19214-97) (citing Marketing Agreement at § 6.2(g)).

[24] [Public] Answer of American at 76-77 (No. OST-2004-19214-97).

of both vertical and horizontal effects. The Brattle Group warns of exclusionary conduct, alternatively referred to as foreclosure, access discrimination, and raising rivals' costs.

The Brattle Group surveyed past economic studies of immunized alliances and conducted an update to the Department's most recent published study in 2000. The Brattle Group drew the following conclusions:

- Over the last five years (1999-2004) fares in transatlantic Open Skies markets have increased significantly in all traffic sectors, whereas fares in non-Open Skies markets have increased negligibly or decreased.
- Non-Open Skies markets experienced both a larger increase in passenger traffic and a smaller reduction in the number of flights compared to Open Skies markets.
- One explanation for the double-digit fare increases observed in Open Skies markets is that immunized alliances have exercised market power. This explanation is plausible because (1) alliance carriers recently have taken clear actions that raise their rivals' interlining costs; (2) SkyTeam average fares at CDG have increased significantly in all market sectors since the alliance received immunity; (3) the dominant (immunized) alliance has been able to increase its market share even as its fares have gone up on routes between the U.S. to Frankfurt and Paris.
- The net economic effects of immunized alliances have changed significantly for the worse. Air travel across the Atlantic has become dominated by four major international alliances, and non-allied carriers have found themselves in a weakened competitive position. What was a positive trend is now moving in the wrong direction. A substantial expansion in the scope of antitrust immunity offered to particular alliances, or combinations of alliances, should require compelling evidence that there are economic efficiencies that would justify the expanded immunity that could not be achieved absent the immunity.[25]
- The Joint Applicants' request for immunity differs from prior requests because it involves a horizontal combination between two alliances that operate largely parallel route networks, because it involves two U.S. carriers, and because it offers little prospect for further liberalization.
- Approval of the application could harm competition because (1) the number of competing alliances would drop from four to three; (2) the number of highly concentrated and monopoly routes would increase significantly; (3) competition at major continental European gateways would decline; (4) incentives for engaging in exclusionary behavior with respect to non-allied carriers would be strengthened.

Gary J. Dorman

Gary J. Dorman, an economist at the National Economic Research Associates, Inc. submitted a declaration along with American's comments.

Dr. Dorman's point is that the international and domestic operations of network airlines are fundamentally intertwined. He asserts that U.S. network carriers have relatively few international routes that can be operated economically without domestic feed, which explains why so many of their international flights originate from their hubs. Because of this fact, many of the key activities of network airlines necessarily incorporate both the domestic and international dimensions of their operations.[26]

---

[25] [Public] Answer of American, Exhibit 1, at 4 (No. OST-2004-19214-97).

[26] Dr. Dorman goes on to assert that, even if domestic and international fares are determined independently, yield management mechanisms necessarily must allocate the seat inventories on domestic flights between local traffic, domestic connecting traffic and the "domestic portion of international journey" (DPIJ) traffic. In addition, he states that other key activities of network airlines also intertwine

Dr. Dorman states that the intertwining of the domestic and international operations of U.S. network carriers means that there is no basis for assuming the proposed immunized SkyTeam alliance involving Delta and Northwest would have no effects on domestic competition. He advises that it is not possible to predict precisely which domestic services would be affected, especially because neither carrier has provided specifics about how its international route structure would change if the proposed alliance were to be approved. However, he concludes that it is likely that an international route realignment by Delta and Northwest in the context of an immunized SkyTeam alliance would have a significant effect on domestic airline service and a consequent effect on domestic airline competition. Approving the proposed alliance, Dr. Dorman warns, would allow a fundamental and likely irreversible structural change that may collapse the U.S. airline industry into a small number of truly competing networks.

Jan K. Brueckner

Jan K. Brueckner, Professor of Economics at the University of California, Irvine, submitted an affidavit along with American's comments. Professor Brueckner's affidavit includes an analysis showing that antitrust immunity for the proposed alliance will generate few benefits for passengers and will possibly lead to serious anticompetitive effects by reducing the number of competitors in a large number of international city-pairs.

Professor Brueckner finds that, because there is very little unimmunized interline traffic on the current "SkyWings" carriers, the consumer benefits akin to those from past immunized alliances, such as lower interline fares, are unlikely to be realized by approving the proposed alliance. He states that while the availability of the new immunized pairings may generate new routing choices for "SkyWings" passengers, no new potential immunity benefits will arise, given that the vast majority of existing interline traffic using "SkyWings" carriers already is subject to immunity. He does acknowledge that greater routing flexibility by itself may generate some potential passenger benefits, but this gain is likely to be the only source of potential benefits from "SkyWings." He further states that the potential magnitude of any such gain is highly likely to be far smaller than any losses from a reduction in international competition, beyond any impact from the Air France/KLM merger.

Professor Brueckner contends that almost 5 million passengers travel in city-pairs in which the number of competitors would be reduced by the proposed alliance. He states that most of this anticompetitive effect would come not from lost interline competition between SkyTeam and "Wings" carriers (Northwest/KLM), but rather from elimination of online competition between Northwest and Delta in hundreds of international city-pairs that they jointly serve. On the other hand, he states that the proposed alliance is likely to generate very few opportunities to create new immunized travel, which can be a source of potentially significant passenger benefits.

---

domestic and international operations including the entire range of route entry and exit decisions, capacity planning and scheduling; many aspects of sales and marketing, and frequent flyer programs; and that some aircraft operate on a mixture of domestic and international routes.

U.S. Department of Justice • August 19, 2005

The DOJ answered in opposition to a grant of antitrust immunity. The DOJ frames the question before the Department not as one in which we decide whether to condemn the expansion of SkyTeam, but rather whether antitrust immunity is necessary to that expansion. The DOJ reminds the Department that the Joint Applicants must meet a "significant burden" to justify their request for immunity.[27] While on the one hand, the DOJ suggests that the expanded SkyTeam alliance might achieve some procompetitive benefits without harming competition, the DOJ also cautions that the specific structure and extent of the ultimate cooperation under the SkyTeam umbrella could harm consumers without achieving any substantial benefits. Under the present circumstances, the DOJ concludes that the record does not adequately support the requested antitrust immunity.

The DOJ states that the statutory scheme disfavors immunity and places a significant burden on the applicants to justify their request. Citing the Airline Deregulation Act, the DOJ states that an important goal of airline deregulation was to make the airline industry subject to the same competitive and antitrust standards applicable to other industries, as far as is practicable. As a result, the DOJ observes, the Civil Aeronautics Board and the Department have been mindful of competitive consequences when exercising their authority to grant immunity.

Given the statutory scheme, the DOJ advises that a request for an exemption from the antitrust laws should be treated with great caution. The DOJ asserts that the burden is on the Joint Applicants to make a strong showing that immunity is required. The DOJ further asserts that immunity is appropriate only if necessary to the public interest, and if awarded at all, it should be awarded only to the extent necessary. Because all prudent businesses devote some concern to antitrust liability – which the DOJ characterizes as normal and, from a consumer standpoint, generally healthy – the DOJ argues that subjective fears of antitrust litigation are an insufficient basis upon which to grant immunity.

The DOJ had concluded that it did not have sufficient evidence that the Air France/KLM merger would substantially reduce transatlantic or domestic competition to justify challenging the merger under the antitrust laws. While the two alliances (Northwest/KLM and Delta/Air France/Alitalia/CSA) competed in a number of transatlantic city-pair markets, most of those markets had substantial actual or likely potential competition from other airlines or alliances, which would adequately protect the interests of consumers. The DOJ believes that the same analysis suggests that the combination of the Delta/Air France/Alitalia/CSA and Northwest/KLM alliances would not likely reduce transatlantic competition.

The pending antitrust immunity application, however, presents issues that were not raised in the Air France/KLM merger analysis. The DOJ concludes that immunizing an alliance between Delta and Northwest risks significant harm to certain international and domestic competition. To support this conclusion, the DOJ first states that the proposed coordination of the international, non-transatlantic operations of Northwest and Delta threatens harm to competition. The DOJ observes that Delta and Northwest compete on routes between the U.S. and Canada, Mexico, the Caribbean, and Asia. The DOJ notes that the application provides no justification for the proposed immunity with respect to these markets.

---

[27] *See also* [Public] Comments of the DOJ at 8, 15, footnote 37 (No. OST-2004-19214-164).

Next, the DOJ alleges that the proposed immunity threatens competitive harm to domestic markets related to the covered transatlantic routes. The DOJ notes that Delta and Northwest are vigorous domestic competitors with overlapping networks. Citing the Department's Origin & Destination Survey data, the DOJ states that Delta and Northwest are the only two carriers with nonstop service in five domestic city-pairs, they are two of the three carriers with nonstop service in two other city-pairs, and they are significant competitors in many other city-pairs.[28] The DOJ warns that the presence of two major domestic competitors warrants closer scrutiny of the potential scope of immunity and the potential effect of immunized cooperation on domestic markets. In this case, the DOJ believes that immunity would create opportunities for collusion. The DOJ expresses concern that the coordination by Delta and Northwest on international initiatives, and on serving international passengers originating at interior U.S. points, could present opportunities for Delta and Northwest to discuss and resolve, explicitly or tacitly, competitive issues and may lessen competition on their domestic routes.

The DOJ expresses concern that immunity may allow Delta and Northwest to shield coordinated conduct from scrutiny and enforcement. In the face of a future well-founded antitrust enforcement action, the DOJ predicts that the Joint Applicants may argue, and a court might wrongly agree, that possible anti-competitive effects in domestic markets were justified as part of the coordination authorized for their immunized alliance.

The DOJ finds that few specifics have been agreed to or provided for the record. The agreements are inchoate, the DOJ argues, and worded in such a way as to allow Delta and Northwest the widest possible latitude to combine any and all of their activities that involve international air transportation. The DOJ asserts that the Joint Applicants cannot assure the federal government that they will not exchange competitive information or engage in activities that undercut domestic competition, without presenting more definitive agreements.[29]

The DOJ argues that we should consider the likely benefits of the proposed coordination and whether those benefits could be obtained without immunity. Regarding transatlantic markets, the DOJ argues that the purported benefits – namely additional routings and more frequencies – do not justify immunity. Because open skies agreements have been signed with the home countries of all the foreign applicants and their foreign competitors in other immunized alliances, granting additional immunity in this proceeding will not advance the Department's open skies initiative, the DOJ believes. In contrast to past alliance applications, the DOJ explains, the proposed cooperation will create new service in only a few additional markets, while the added connectivity benefits are uncertain and likely to be modest. Furthermore, the DOJ argues that any benefits dependent on comprehensive revenue sharing are difficult and costly to achieve. The DOJ points out that, even with expanded immunity, reaching agreement among this large and diverse group of airlines on a common bottom line would be no small challenge. The more carriers that participate, the more difficult it will be to reach consensus.

The DOJ contends that the Joint Applicants have not shown that immunity is necessary to achieve the purported benefits of the transaction. The DOJ believes that the evidence in the record suggests that the Joint Applicants will continue to integrate further with or without the

---

[28] [Public] Comments of the DOJ at 15-16 (No. OST-19214-164).

[29] [Public] Comments of the DOJ at 22 (No. OST-19214-164).

requested immunity.[30] The DOJ suggests that an expanded SkyTeam will have the incentive to continue coordinating without further immunity. The DOJ points out that if the Joint Applicants' claim of significant benefits is accurate, their prediction that they will forgo large additional profits if they are not granted additional immunity is unpersuasive. The DOJ states that the principal reason cited by the Joint Applicants for forgoing the benefits of integration absent immunity is the general fear of unfounded antitrust lawsuits. The DOJ then suggests that the anticipated cost of frivolous lawsuits would need to be quite high for it to outweigh the purported benefits of integration.

B. Replies

American's Reply to Civic and Corporate Parties • July 6, 2005

American submitted a reply to the comments from the various civic and corporate parties that supported the application. In its reply, American suggests that these parties would not be enthusiastic supporters of the application if they had been privy to the alliance's internal documents. American believes that the comments of the civic and corporate parties are based on the mistaken belief that SkyTeam seeks immunity because it intends to expand service paths available to consumers.

Joint Applicants • July 6, 2005

The Joint Applicants filed a reply addressing the concerns raised by American. First, the Joint Applicants argue that American's criticisms of immunized alliances are without merit. They state that open skies agreements and immunized alliances have led to dramatically improved on-line service, lower fares, and more U.S.-Europe services from more U.S. gateways than ever before.[31] For this reason, they urge the Department to continue to follow its policy of pursuing open skies agreements and approving immunized alliances.[32] The Joint Applicants produce studies they claim show that service levels and competition at open skies hubs have not been harmed by immunized alliances, as American argues.[33] Additionally, they attempt to rebut the argument that Air France interline policies are discriminatory. The Joint Applicants state that American's interlining complaints against Air France have little to do with the merits of this proceeding.

---

[30] [Public] Comments of the DOJ at 32 (No. OST-2004-19214-164).

[31] [Public] Reply of the Joint Applicants at 9 (No. OST-2004-19214-114).

[32] [Public] Reply of the Joint Applicants at 13-15 (No. OST-2004-19214-114).

[33] The Joint Applicants allege that The Brattle Group study does not take account of the different GDP growth rates in open skies versus non-open skies countries, the effects of September 11, 2001 and other exogenous events, and the failure of flag airlines (Swissair and Sabena) from two open skies countries. The Joint Applicants also characterize American's use of 1994 as a base year as misleading because it attributes capacity reductions at Paris and Frankfurt to the granting of immunity and open skies when other factors correctly explain the reductions. The Joint Applicants state that U.S. carriers' transatlantic available seat miles share to/from all open skies countries, considered together, improved slightly between 1992 and 2004, and held steady from 1999 to 2004. The Joint Applicants also state that U.S. carrier performance in open skies markets has exceeded their performance in non-open skies markets since 1995. They claim that American's analysis ignores service increases at Amsterdam and the fact that the Frankfurt hub Delta acquired from Pan Am was inherently uneconomical.

Second, the Joint Applicants argue that this alliance will not substantially lessen or eliminate competition. In support of this argument, they state that the vast majority of passengers would continue to have three or more independent carriers or alliances from which to choose for transatlantic service.[34] They criticize American's argument that the proposed transaction will reduce the number of airline alliances. They argue that American incorrectly assumes that airline alliances constitute relevant product markets, that there are four meaningful global alliances today, and that there is a four alliance status quo that would be maintained if the application were denied. Further, American allegedly makes no showing that a reduction in alliances from four to three would have an adverse price or service effect on passengers.

Third, the Joint Applicants argue that immunity is required to preserve and enhance the benefits of the existing SkyTeam and Northwest/KLM alliances. The combined Air France-KLM entity will want to realize the efficiencies of the merger and cease competing with itself out of the U.S.

Further, the Joint Applicants plead that the situation created by the Air France/KLM merger is not comparable to Delta's alliance with Korean. The Joint Applicants assert that as Delta and Northwest plan and expand their coordination in international activities, they will do so with the understanding that there is no immunity between Korean and Northwest. The Joint Applicants pledge that Northwest will be excluded from discussions or coordinated activities between Delta and Korean that require antitrust immunity, and Korean will be excluded from discussions or coordinated activities between Delta and Northwest that require antitrust immunity.

Fourth, the Joint Applicants argue that granting the Joint Application would not immunize activities by Delta and Northwest that could have an anticompetitive effect on domestic operations. The Joint Applicants contend that, contrary to American's analysis, the Department does have the authority to immunize an alliance that includes two U.S. carriers. The Joint Applicants believe that, in keeping with the statute, they can agree on matters relating to foreign air transportation without agreeing on matters related to interstate air transportation. In this regard, they state that they will not discuss or agree on domestic fares or share competitively-sensitive domestic information.

Fifth, the Joint Applicants argue that American's assertions about future alliance activities are without merit. The Joint Applicants state for the record that, while discussions have taken place, there are no plans for Continental or Korean to become immunized members of SkyTeam at this time. Competitive issues raised by subsequent applications can be evaluated by the Department at that time, the Joint Applicants add.

Daniel M. Kasper and Darin N. Lee

Daniel M. Kasper and Darin N. Lee (hereinafter "Kasper and Lee") submitted a declaration and economic analysis along with the Joint Applicants' reply. Kasper and Lee argue that Professor Brueckner, in his affidavit that accompanied American's answer, substantially overstated the potential competitive harm of the proposed alliance. Contrary to what Professor Brueckner stated, Kasper and Lee argue that the consumer benefits of six-way immunity are

[34] [Public] Reply of the Joint Applicants at 7-8 (No. OST-2004-19214-114).

likely to exceed any potential anticompetitive effects. They also argue that that Professor Brueckner's assumption that the Northwest/KLM alliance can remain as a fourth global alliance is wrong because denial of immunity is far more likely to force Northwest or Delta to withdraw from the merged alliance or to limit one of the U.S. carriers to non-immunized code-share partner status. Either scenario would reduce consumer welfare benefits. Kasper and Lee suggest that most markets where Delta and Northwest currently have overlapping service, which represent almost 90% of the overlap passengers, would continue to be served by at least four online U.S. competitors, and this does not even take into account competition from foreign carriers or code-sharing alliances.

Kasper and Lee also argue that The Brattle Group's analysis is either flawed or irrelevant. Kasper and Lee cite The Brattle Group's finding that trends have turned negative for consumers in open skies markets. They claim that The Brattle Group's finding suffers from serious flaws that undermine its reliability, including its lack of consideration of differential gross domestic product growth rates, other industry factors (such as the cessation of service of Sabena and Swiss Air, a hub closure, pre-immunity service expansion in France), and external shocks. Kasper and Lee state that the lack of foreign carrier data in the Department's Origin & Destination Survey further undermines the usefulness and reliability of The Brattle Group's analysis. They contend that the study is also flawed because it fails to consider alternative, more plausible causes for the price changes, such as changes in passenger mix. The Brattle Group also allegedly fails to recognize that declining prices at London Heathrow may have been caused by competitive pressures generated by other open skies agreements in Europe. Kasper and Lee state that American's arguments regarding Air France's interline policies are not supportable because a discriminatory strategy would not have benefited Air France, and American's load factor performance to and from Paris Charles de Gaulle airport improved considerably as its interline connections with Air France were declining.

Lastly, Kasper and Lee argue that denial of immunity would undermine U.S. efforts to negotiate further international liberalization of air services.

Carl Shapiro and Theresa Sullivan

Carl Shapiro and Theresa Sullivan (hereinafter "Shapiro and Sullivan") submitted a declaration along with the Joint Applicants' reply. They argue that Professor Brueckner's analysis is flawed because it assumes that the competition that existed between the members of SkyTeam and Northwest/KLM prior to the Air France/KLM merger will continue if immunity is not granted. Shapiro and Sullivan note that the merger has eliminated the possibility that such pre-merger competition will continue. They state that the elimination of competition between the two alliances is properly attributed to the Air France/KLM merger, not the current application, and that both the DOJ and the EU analyzed and approved the Air France/KLM merger as if it were a six-way transatlantic joint venture among the applicants. They further state that Professor Brueckner's unrealistic assumption that competition between the two alliances would continue in the absence of immunity causes him to greatly overstate the costs of granting antitrust immunity and greatly understate the costs of a failure to grant immunity.

Shapiro and Sullivan argue that Brueckner's study fails in other respects. First, he understates the effect of losing the benefits produced by the current alliances. If the Department were to deny further immunity, Shapiro and Sullivan suggest that, at best, one of the alliances would

revert to non-immunized code sharing status and, at worst, one of U.S. carriers would end its alliance, with both results producing a loss of benefits (both fare and service quality benefits). They believe that it is unlikely that the parties would agree to continue code sharing in the absence of immunity, and even if some limited code sharing continues, if either Delta or Northwest were forced to withdraw from its immunized alliance, consumers would pay higher prices and service quality would decline.[35]

Second, Shapiro and Sullivan argue that Brueckner greatly overstates the costs of granting immunity due to a potential loss of competition. They note that fully 77% of the passengers in Professor Brueckner's online overlap markets will still have at least four competitors to choose from and are unlikely to see any noticeable increase in fares.[36] Shapiro and Sullivan state that carriers with small market shares in a given city-pair route can rather easily constrain attempts by carriers with large market shares to exercise market power, because the carriers with small market shares usually face low barriers to expansion.

Third, Shapiro and Sullivan argue that Professor Brueckner fails to address many of the benefits associated with granting immunity in this proceeding. Shapiro and Sullivan comment that approval will produce benefits in the form of new or expanded hub-to-hub service, new online city pairs, more path choices, more choice in departure and arrival times, and improved travel times.

Timothy J. Muris

Timothy J. Muris, former Chairman of the Federal Trade Commission, submitted a statement on behalf of Northwest on July 6, 2005. Mr. Muris states that, without antitrust immunity, competition will decrease, because the SkyTeam alliance will be a less effective competitor. As a result, Mr. Muris continues, either Northwest or Delta would have to scale back its immunized alliance activities or withdraw entirely from the alliance, because otherwise there would be an unacceptable risk of litigation under the antitrust laws. He explains that there is no credible concern that the international coordination permitted by antitrust immunity will cause anticompetitive spillovers on competition between Delta and Northwest in domestic markets. Mr. Muris believes that adequate public and private remedies exist to address any abuses.

Michael E. Levine

At the request of Northwest, Michael E. Levine filed comments representing his independent opinions regarding the policy issues being debated in this proceeding. Mr. Levine argues that the merger of Air France and KLM, being a *fait accompli*, has reduced the possible number of global competitive alliances from four to three. On balance, Mr. Levine believes that the proposed expanded SkyTeam alliance will be a much stronger competitor to the oneworld (composed of American, British Airways, and others) and Star alliances than would either of its previous components. He further states that the Department should not be concerned that Delta and Northwest's cooperation would extend to areas outside that which would be immunized by the

[35] Carl Shapiro and Theresa Sullivan, Airline Antitrust Immunity 8 (July 6, 2005) (submitted with [Public] Reply of the Joint Applicants, No. OST-2004-19214-114).

[36] Carl Shapiro and Theresa Sullivan, Airline Antitrust Immunity 11 (July 6, 2005) (submitted with [Public] Reply of the Joint Applicants, No. OST-2004-19214-114).

Department, because the legal penalties for doing so are sufficiently severe to deter such behavior.

Air Line Pilots Association • July 6, 2005

The Air Line Pilots Association ("ALPA"), representing pilots at Delta and Northwest, filed a reply in support of the application for antitrust immunity. ALPA's concern is that denial of antitrust immunity could have a severe negative impact on either Delta or Northwest. ALPA states that such action could force one or the other U.S. carrier to operate without a partner in the North Atlantic, thus putting the carrier at a severe competitive disadvantage.

American's Surreply • July 15, 2005

American filed a surreply to the Joint Applicants' July 6 reply. American criticizes the Joint Applicants' response to its competitive analysis, claiming among other things that the Joint Applicants were unable to dispute the fact that consumers traveling on SkyTeam to or through Paris are paying 20% more than passengers traveling on another airline or connecting at another European airport. American asserts that the results of The Brattle Group's study are not an indictment of open skies agreements, but rather a reflection of market power being abused by the existing duopoly of immunized alliances now serving U.S.-European travelers. According to American, the Joint Applicants continue to ignore the fact that domestic routes are a key component of international services, and fail to address the inextricably intertwined nature of yield management, capacity planning, and alliance sales and marketing activities.

American takes issue with the Joint Applicants' assertion that either Delta or Northwest will withdraw from SkyTeam unless the Department approves this application. If the Joint Applicants wanted to preserve their existing immunities, American suggests that they could simply seek clarification that joint activities between Delta and KLM, or between Northwest and Air France, would not be subject to antitrust liability. American points out that US Airways, Continental, and American all continue to participate in non-immunized alliances, thus undermining the Joint Applicants' argument. American proposes a new arrangement in which Delta and Northwest could cooperate with Air France/KLM, but not directly with each other, so long as the cooperation relates to Air France/KLM service, as opposed, for example, to discussing U.S.-Mexico or U.S.-Japan discounts using Air France/KLM as an intermediary.

With respect to domestic spillover, American states that the Joint Applicants have ignored its entire argument – that immunizing Delta and Northwest for international traffic would alter their incentives to compete domestically, whether or not they ever enter into an explicit agreement. American states that this proceeding is not a Sherman Act restraint-of-trade case where an agreement must be proven; rather, it is analogous to a merger review, in which the unilateral effects of eliminating competition are plainly relevant.

Jan K. Brueckner

Professor Brueckner submitted a reply to the Joint Applicants and their experts as part of American's surreply. He points out that none of the Joint Applicants' experts challenge his basic argument that this merger of alliances will not generate significant new travel benefits and that the experts admit that any benefits will arise mainly from new routing and scheduling choices for

existing passengers. In response to criticisms of his analysis on the effects of a reduction in the number of competitors in Delta and Northwest online overlapping city pairs, Professor Brueckner states that while many passengers in such markets may be unaffected by approval of immunity, passengers in overlap markets where the initial level of competition is modest will be subjected to substantial harm in the form of higher fares. In response to criticisms of his analysis' reliance on a status quo competitive situation, Professor Brueckner states that the Joint Applicants have offered no credible basis to believe that significantly different alliance arrangements will emerge if their application is denied, and for that reason, the only proper recourse is to evaluate the application relative to the status quo.

The Brattle Group

The Brattle Group submitted a reply accompanying American's surreply. The Brattle Group contends that any substantial expansion in the scope of antitrust immunity offered to particular alliances or combinations of alliance should, at a minimum, require compelling evidence that there are efficiencies that would justify the expanded immunity and that could not be achieved absent the immunity. In response to Kasper and Lee's criticisms of the Brattle Group's finding that transatlantic fares have increased more in open skies markets than in non-open skies markets, The Brattle Group states that limitations to the Department's Origin & Destination Survey data do not significantly affect the reliability of its price analysis, that the fare changes were not likely due to an increase in the proportion of high-yield passengers, and that fares to Heathrow were not likely affected by fares to other European hubs. The Brattle Group also provides the results of a competitive analysis that it states corrects for the problem of measuring competition when carriers depend on inputs from dominant European hub carriers in order to provide competition in certain O&D city pairs. The Brattle Group states that their analysis shows that the combination of SkyTeam and Wings would produce high levels of concentration in a majority of behind-beyond U.S.-central/northern Europe O&D city pairs.

James F. Rill

James F. Rill, former Assistant Attorney General in charge of the Department of Justice's Antitrust Division, submitted a statement in support of American's surreply. Mr. Rill states that antitrust immunity represents extraordinary relief and that in light of competitive concerns, the potential for adverse domestic effects, evidence of reversal of positive trends in open skies markets, and little potential for consumer welfare enhancing conduct, the Joint Applicants have fallen well short of meeting the standard for granting their immunity request. Mr. Rill argues the Joint Applicants' contention that denial of expanded antitrust immunity will cause Delta or Northwest to abandon their current international relationships is unrealistic, because their current collaboration is mutually beneficial. Mr. Rill states that the fact that the U.S. airline industry is in crisis is not a valid justification for granting antitrust immunity, because suppressing competition is a particularly inefficient and ineffective means for providing subsidies to distressed industries. Mr. Rill argues that the Joint Applicants' concerns about the adequacy of antitrust protections granted by their current separate immunity orders can be addressed simply by a Department clarification that once Air France and KLM have integrated, its separate immunized communications with Delta and Northwest will not give rise to antitrust claims. Mr. Rill argues that, since the domestic and international networks of Delta and Northwest are inextricably intertwined, a wait-and-see approach with respect to potential adverse domestic effects must be rejected.

United • August 30, 2005

United replied in opposition to the application.[37] United argues that immunity was never intended to be, and should not be, used as a substitute for domestic mergers. United states that facilitating domestic cooperation as a by-product of a grant of immunity for international services would likely harm domestic competition and would not generate any of the efficiency gains or cost reductions that a merger inevitably drives. United agues that such immunity grants risk distorting normal market forces that would otherwise drive domestic industry restructuring toward the most efficient outcomes. United states that the Department should adopt a clear policy to prohibit immunity between domestic carriers absent evidence it would achieve important benefits not otherwise attainable.

Joint Applicants' Consolidated Response • August 30, 2005

The Joint Applicants filed a consolidated response. The Joint Applicants argue that since there is no material reduction in competition and the Joint Application will produce a number of important public benefits, it qualifies for approval and antitrust immunity.

The Joint Applicants state that they believe that the DOJ's reservations as expressed in its August 19 comments are without merit. Nonetheless, the Joint Applicants state that they are willing to amend the alliance agreements and thereby accept a more narrowly targeted grant of immunity limited only to foreign air transportation via transatlantic routes. The Joint Applicants also state that they will amend their alliance agreements to make clear that the agreements will not cover matters involving interstate air transportation and to agree to conditions. The Joint Applicants also argue that the DOJ's view that the Joint Applicants do not require immunity because their envisaged cooperative activities do not create unacceptable antitrust risk is untenable and is at odds with Department precedent. The Joint Applicants maintain that they cannot achieve the full benefits of their alliance without immunity, and they are entitled to the same consideration received by other immunized alliance applicants that made the same kind of showing.

The Joint Applicants assert that immunity is essential to full alliance participation by Delta and Northwest with a single European partner. The Joint Applicants state that, without immunity, both U.S. carriers will be unable to participate simultaneously as full, immunized partners as Air France/KLM continues to integrate operations and centralize decision-making. The Joint Applicants state that coordinating certain activities without immunity presents unacceptable antitrust risk, and that without immunity one U.S. carrier or the other will be forced to withdraw from its immunized relationship, to the detriment of both the affected carrier and consumers. The Joint Applicants maintain that American's proposed solution of granting separate immunities to Delta and Air France/KLM, on the one hand, and Northwest and Air France/KLM, on the other hand, is meaningless and unworkable. The Joint Applicants state that

[37] In an earlier reply, United did not take a position on SkyTeam's application for immunity. In this earlier reply, United criticized American's analysis and motives and urged the Department to analyze the immunity application solely on the basis of the Department's established criteria. *See* Reply of United (No. OST-2004-19214-120).

the approval of the proposed alliance will advance open skies, including in negotiations with the United Kingdom.

The Joint Applicants stress that concerns about domestic spillover are speculative, theoretical, and provide no grounds for denial of the application. They state that they can agree on matters relating to foreign air transportation without agreeing on matters relating to interstate air transportation and understand that they will remain subject to the antitrust laws with respect to U.S. domestic markets. The Joint Applicants maintain that, with the proposed amendments and conditions, there can be no serious concern that the antitrust immunity that they request would be misapplied to permit Delta and Northwest to collude in U.S. domestic markets.

The Joint Applicants further state that American's theory that anticompetitive unilateral effects will occur post-transaction is flawed, because it does not recognize that the combining parties must have been such significant competitors with one another prior to the merger and that the elimination of their competition will allow the post-merger entity to raise prices or reduce service. The Joint Applicants contend that denial of immunity on grounds of potential domestic spillover would create a *per se* rule that would disadvantage U.S. carriers and consumers, as there are more U.S. carriers than there are likely to be global alliances, while several immunized alliances already include multiple European carriers.

The Joint Applicants state that American's claims that immunized alliances have resulted in higher fares and less service in open skies countries are wrong. They maintain that average fares to and via Heathrow are still substantially higher than those at open skies hubs and that immunized alliances have not resulted in fewer services at open skies hubs.[38] They also maintain that American mischaracterizes the confidential record in this case with respect to alleged alternative plans for a two-family immunized alliance, alleged links between the application and a domestic code-share arrangement, and a characterization (by Delta) of Lufthansa's interline practices.

Timothy J. Muris

On August 30, 2005, Mr. Muris filed a supplemental statement on behalf of Northwest. Mr. Muris argues that the DOJ recognizes that benefits do exist, but overlooks them with an unsubstantiated assertion that immunity is unnecessary to achieve the benefits. Mr. Muris also states that the DOJ admits that rejecting the Joint Applicants' position would be contrary to the Department's general practice of relying on applicants' assertions about their conduct in the event immunity is denied.

Mr. Muris states that, in view of the Air France/KLM merger, a separate, competitive Northwest/KLM alliance cannot continue and that only three global alliances will exist. Mr. Muris states that denial of immunity will present Delta and Northwest with serious antitrust risks and will almost certainly cause one of them to draw back from full participation in the alliance to avoid the antitrust risk. Mr. Muris comments that the separate immunity clarification advocated by Mr. Rill on behalf of American does not solve Delta and Northwest's fundamental antitrust law dilemma.

---

[38] [Public] Consolidated Response of the Joint Applicants at 38-43 (No. OST-2004-19214-179).

Carl Shapiro

On August 30, 2005, Professor Carl Shapiro, who had jointly filed earlier comments with Dr. Theresa Sullivan as summarized above, submitted a critique of American's comments regarding anticompetitive unilateral effects. Professor Shapiro draws a distinction between unilateral effects that are procompetitive versus those that are anticompetitive. Professor Shapiro states that the key element necessary to establish a meaningful unilateral anti-competitive effect is a showing that the merging firms were important, direct rivals prior to the merger, such that the elimination of competition between them will allow the merger firm to raise price or reduce output without losing so many sales to rivals so as to make such anticompetitive conduct unprofitable. Professor Shapiro states that American has provided no evidence that, according to established doctrine, anticompetitive unilateral effects will occur in any relevant city-pair market.

Kasper & Lee

On August 30, 2005, Kasper and Lee submitted a surrebuttal directed toward American, The Brattle Group, and the DOJ. Kasper and Lee state that the data contained in American's answer directly contradicts The Brattle Group's contention that U.S. carrier fares are a good surrogate for unreported European carrier fares. Kasper and Lee state that, adjusted for data limitations, average London Heathrow fares are more than 30% higher than those at either of the Joint Applicants' European hubs, while Gatwick fares are more than 17% higher.[39] Kasper and Lee state that diverging premium traffic trends help explain the differing trends in average fares at Heathrow versus at immunized alliance hubs. Kasper and Lee maintain that there is no evidence to support The Brattle Group's contention that the decline in interlining between Air France and American at Paris CDG harmed either American or competition more generally. Kasper and Lee state that, contrary to American's assertion, immunity will create 8,700 new online city-pairs.

Kasper and Lee state that only hub-to-hub routes are likely to meet any parts of Professor Shapiro's anticompetitive unilateral effects tests; however, since only a very small percentage of the passengers traveling on these routes are domestic portion of international journey ("DPIJ") passengers, the likelihood that immunity would result in an anticompetitive unilateral effect is exceedingly remote.

American's Surreply • September 9, 2005

American filed a surreply responding to the Joint Applicants' August 30 Joint Response. American asserts that the only remaining issues are SkyTeam's impact on transatlantic competition and ensuring that consumers are protected from the adverse domestic effects of eliminating international competition between Delta and Northwest.

American states that immunizing the proposed alliance on the eve of renewed attempts to obtain U.S.-EU open skies is unnecessary. American argues that, to the extent such an open skies agreement dispenses with the restrictions imposed by Bermuda 2, the Department could mitigate the problem of elimination of inter-alliance competition sought in this proceeding by simultaneously immunizing an American/British Airways/Iberia alliance. American also argues

[39] Surrebuttal of Daniel M. Kasper & Darin N. Lee at 11 (No. OST-2004-19214-181).

that, since the actual integration of Air France and KLM will not take place until bilateral foreign ownership restrictions are eliminated in the context of a multilateral open skies agreement, the Department should refrain from issuing a decision.

American further states that the adverse domestic effects of eliminating international competition between Delta and Northwest will be incurable. American endorses the DOJ's position that immunity should not be granted, but that if immunity is granted, it must not extend to domestic effects of international cooperation or information exchange. American states that taking a wait-and-see approach with respect to concerns raised about domestic spillover is unreasonable, because immunity would eliminate any remedy for anticompetitive conduct. American states that the Joint Applicants' proposed limiting language offered in response to the DOJ's comments creates an exception that would immunize the domestic effects of immunized cooperation, and thus fails to address issues that American and the DOJ raised in their comments.

The Brattle Group

American's September 9 surreply includes additional comments by The Brattle Group that respond to the August 30 surrebuttal of Kasper and Lee. The Brattle Group states that Kasper and Lee fail to show that changes in passenger mix explain the extent of the fare increases in open skies markets or the decline in fares at Heathrow. It states that it performed a regression analysis in an attempt to isolate the effects of immunity on fares, and that this analysis showed a statistically significant relationship between SkyTeam's receipt of antitrust immunity and fare increases on gateway-to-gateway and behind-to-gateway routes. The Brattle Group disputes Kasper and Lee's contention that the decline in interlining between Air France and American is benign, especially if restricted access to beyond gateway passenger flows results in cutbacks in transatlantic services by rival carriers.

Marius Schwartz

American's September 9 surreply includes a statement by Professor Marius Schwartz. He states that the post-immunity capacity diversion scenario that American has put forth in the context of its discussion about domestic spillover does constitute an anticompetitive unilateral effect as the term in normally used in economics. Professor Schwartz states that the comments of Professor Shapiro and Mr. Muris do not dispute the logical validity of American's capacity diversion theory, but rather dispute the factual premises. Given the validity of American's scenario, Professor Schwartz cautions that the Department should proceed cautiously in deciding whether to grant immunity.

Gary J. Dorman

American's September 9 surreply includes a declaration by Dr. Dorman that responds to the August 30 Statement of Carl Shapiro and the August 30 Surrebuttal of Kasper and Lee. In response to Professor Shapiro, Dr. Dorman states that it is likely that an international route realignment by Delta and Northwest in the context of an immunized SkyTeam alliance would have a significant effect on domestic airline service, and a consequent effect on domestic airline competition. Dr. Dorman states that Professor Shapiro's anticompetitive unilateral effects test is flawed, because it ignores network competition with its focus on direct route overlaps.

In response to Kasper and Lee, Dr. Dorman states that Kasper and Lee's narrow focus on direct route overlaps is flawed because it too ignores network competition. Dr. Dorman states that Kasper and Lee compound this error by examining domestic portion of international journey traffic only on Delta and Northwest hub-to-hub routes, which he maintains are the routes least likely to carry such traffic because the hubs at issue offer nonstop service to multiple international destinations. Dr. Dorman states that Kasper and Lee's focus on passengers rather than revenues understates the importance of domestic portion of international journey traffic, since international passengers account for a disproportionate share of revenues.

US Airways • September 12, 2005

US Airways filed a motion for leave to file and reply taking no position on the application.[40] US Airways states that the Department should not establish any blanket bar against antitrust immunity for international alliances with more than one U.S. airline member. US Airways states that such an approach would severely disadvantage carriers like itself, effectively "freezing out" all but the three U.S. airlines that currently participate in an immunized alliance. US Airways instead argues that the Department should evaluate immunity requests involving multiple U.S. carriers, including any concerns about domestic spillover, on a case-by-case basis.

C. Other pleadings

1. Motion to strike

On July 15, 2005, the Joint Applicants filed a motion to strike, asserting that the reply of American submitted on July 6, 2005 is based on a gross and irresponsible mischaracterization of Delta's confidential documents and comes close to constituting an abuse of the Department's confidentiality procedures. On July 18, 2005, American responded, arguing that the motion to strike is wholly without merit.

2. Motion to suspend the proceedings

On September 15, 2005, American filed a motion to suspend consideration of the application for antitrust immunity in light of the bankruptcy filings of both Northwest and Delta on September 14. American argues that the bankruptcies have a significant and material effect on the record in this proceeding, and that their full impact on the antitrust immunity being sought will remain uncertain for a considerable period of time.

On September 16, 2005, the Joint Applicants filed a consolidated response to American's September 9 surreply and American's motion for suspension. The Joint Applicants believe that the record has vindicated their position with respect to domestic spillover. They argue that American's concerns – which started out addressing collusion, then morphed into concerns about anticompetitive unilateral effects – are now reduced to speculation about competitive effects in domestic markets in which Delta and Northwest do not overlap. The Joint Applicants state that American misconstrues the limiting language proposed by the Joint Applicants (see summary of

[40] In an earlier answer, US Airways stated that the Department's decision would create a significant precedent. *See* Answer of US Airways (No. OST-2004-19214-100).

Joint Applicants' August 30 Consolidated Response). They state that the language in question would not immunize them from liability premised on a claim that their coordinated transatlantic activities had an anticompetitive effect on domestic commerce in some manner that allegedly violated the antitrust laws. The Joint Applicants also state, in response to comments filed by United, that the Department should reject any proposal that would compel U.S. carriers to merge as a prerequisite to full participation in existing immunized alliances.

With respect to American's motion for suspension, the Joint Applicants state that the Department should reject American's motion because the Department has found the record in this proceeding to be complete and because the Joint Applicants are entitled to a prompt decision on the merits of their application. The Joint Applicants also state that the Chapter 11 filings by Northwest and Delta demonstrate the need for expedition in this proceeding so that they can promptly take advantage of the benefits and efficiencies of the proposed alliance in operating their international services.

DECISION

We have tentatively decided to approve the requested code shares, subject to the conditions set forth in Appendix A. Those code shares, if implemented, are likely to create some public benefits. Our approval of the Joint Applicants' expanded code-sharing authority will enable the Joint Applicants to engage in the joint marketing and promotion of their services. We have also tentatively decided to deny a grant of antitrust immunity for the alliance agreements because we find that, due to the timing and particular circumstances of this case, immunity is not required by the public interest. That tentative conclusion is consistent with the DOJ's recommendation in this matter. In determining whether to make these tentative decisions final, we will, of course, take into account the parties' comments and reply comments.

A. Tentative approval of code shares

The Joint Applicants seek blanket statements of authorization to engage in reciprocal code sharing. The Department has already granted blanket statements of authorization for code-sharing between Northwest and KLM, between Delta and Air France, between Delta and Alitalia, between Delta and CSA, and between Air France and Alitalia.[41] This code share application proposes to expand reciprocal code sharing among SkyTeam alliance members by including Northwest and KLM.[42] The Joint Applicants ask for blanket statements of authorization for code-sharing between Delta and KLM, between Northwest and Air France, between Northwest and Alitalia, and between Northwest and CSA.[43]

---

[41] Northwest/KLM, Notice of Action Taken (Dep't of Transp. July 11, 2003) (No. OST-2003-15191); Delta/Air France, Statement of Authorization #98-303 (Dep't of Transp. Aug. 6, 1998); Delta/Alitalia, Dep't Action on Application (Dep't of Transp. Oct. 26, 2001) (No. OST-2001-10417); Delta/CSA, Dep't Action on Application (Dep't of Transp. Feb. 27, 2001) (No. OST-2000-8207); Air France/Alitalia, Dep't Action on Application (Dep't of Transp. Jan. 8, 2003) (No. OST-2002-13958); Indefinite statement of authorization for Delta and Air France, #98-303 (Dep't of Transp. Aug. 6, 1998). *See also* Joint Application for Statements of Authorization at 2, 6, paragraphs 2, 8 (No. OST-2004-19215-1).

[42] *See* Joint Application for Statements of Authorization, at 2, paragraph 1, and Appendix I (No. OST-2004-19215-1).

[43] Joint Application for Statements of Authorization, Appendix I (No. OST-2004-19215-1).

No party has opposed this code-sharing request.

We review applications for statements of authorization under 14 C.F.R. Part 212. Where carriers have underlying economic authority, we will issue a statement of authorization for code sharing if we find that it is in the public interest. In determining the public interest, we consider, among other things, the extent to which the authority sought is covered by and consistent with bilateral agreements to which the United States is a party, the extent to which a foreign air carrier-applicant's home country deals with U.S. air carriers on the basis of substantial reciprocity, and whether the applicants have previously violated our code share rules. 14 C.F.R. § 212.11. We frequently issue statements of authorization by a notice published in the public docket. *See, e.g.*, Notice of Department Action dated January 13, 2005, Docket No. 2000-8028 (permitting American to code share with TAM between certain points); Notice of Action Taken dated January 13, 2005, Docket No. OST-1997-2421 (new authority for TAM to code share with American).

The Department has typically found international code sharing arrangements to be pro-competitive and therefore consistent with the public interest because they create new online services, improve existing services, lower costs, and increase efficiency for the benefit of the traveling and shipping public. Here, we come to the same tentative conclusions.[44] Our examination of the Joint Applicants' proposal leads us to tentatively find that, as conditioned, the integration of the Joint Applicants' services should allow them to improve online service and operate more efficiently. We also recognize the potential for incremental benefits to consumers from this expanded code-sharing authority. Concurrently with Northwest and KLM's introduction into the SkyTeam global alliance marketing in September 2004, all of the Joint Applicants began offering consumers new benefits, including alliance-wide frequent flyer/status recognition, reciprocal airport lounge access, and enhanced check-in and baggage handling procedures across the expanded association of carriers. Approval of blanket code sharing will enable the Joint Applicants to augment this portfolio of benefits. It will enable members of SkyTeam to offer the traveling public single SkyTeam member-marketed itinerary options in markets in which, at present, they can only offer multiple-coded itineraries. Code-sharing will also enable members of SkyTeam to offer consumers more frequent and convenient service through the creation of more online routings in markets where one or more SkyTeam members can already market one or more online service options. The authority to code-share will also facilitate valuable marketing support to new gateway-to-gateway flights that have been, and will likely continue to be, initiated by the SkyTeam carriers to take advantage of the network linkages created when Northwest and KLM (and Continental) joined SkyTeam last year.

We tentatively find that approval of the requested authority, as conditioned, will enable the Joint Applicants to effectuate the expanded operational opportunities resulting from the open skies accords in place between the United States and the homelands of the foreign applicant-carriers. Open skies agreements with foreign countries give authorized carriers from either country the ability to serve any route between the two countries they wish (with 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.

---

[44] *C.f.*, American/TACA Case, Order 97-12-35 at 22, No. OST-96-1700-89 (Dep't of Transp. Dec. 31, 1997) (order to show cause).

In view of our findings, we tentatively grant, subject to the conditions attached as Appendix A, the requested statements of authorization.

B. Tentative denial of antitrust immunity

Air France has an immunized alliance with Delta that includes Alitalia and CSA, while KLM has an immunized alliance with Northwest. The Joint Applicants seek immunity covering joint activity between these two existing immunized alliances. Specifically, the Joint Applicants seek a grant of antitrust immunity covering foreign air transportation involving transatlantic routings, as provided in three classes of agreements: bilateral cooperation agreements, a multilateral coordination agreement, and existing and future agreements that may arise within the scope of bilateral and multilateral cooperation. The alliance agreements contemplate taking full advantage of commercial opportunities provided under open skies agreements by generating efficiencies and synergies for transatlantic air transportation.[45] Their scope is broad; the Joint Applicants agree to cooperate on passenger and cargo matters that involve international air transportation, but not coordination of prices, services and other marketing activities involving air transportation solely within the United States.[46] The cooperation – which may occur between or among any of the applicants, including between just Delta and Northwest – will take place in two stages. The first stage of cooperation consists of code-share, frequent flyer, lounge access agreements, which have been reached and submitted for our consideration.[47] The second stage consists of enhanced commercial arrangements for marketing and sales programs, including joint representation, joint marketing, coordinated fare rules, coordinated distribution, coordinated scheduling, revenue sharing, joint contracting, and other means of cooperation.[48] No specific second-stage agreements have apparently been reached, and none have been submitted for our consideration.[49] The alliance agreements therefore provide little indication about the structure of second-stage cooperation, such as what routes would be covered or what concrete and binding commitments would result.[50]

---

[45] *See* Joint Application for Antitrust Immunity, Coordination Agreement, at Recitals (No. OST-2004-19214-1).

[46] *See* Joint Application for Antitrust Immunity, Coordination Agreement, at 1.5 (No. OST-2004-19214-1).

[47] *See, e.g.*, Joint Application for Antitrust Immunity, Northwest-Air France Cooperation Agreement, at Article 2.2 (No. OST-2004-19214-1). The Joint Applicants have already reached code-share and frequent flyer/lounge access agreements. Pursuant to Rule 12, they filed them with the Department under seal.

[48] *See, e.g.*, Joint Application, Northwest-Air France Cooperation Agreement, at Article 2.2 (A)-(P) (No. OST-2004-19214-1).

[49] *C.f.* [Public] Comments of the DOJ at 22-23 (No. OST-2004-19214-164) (stating that evaluating the possible competitive harm is not possible without the agreements' specifics, which have not been agreed to or provided); [Public] Answer of American, Declaration of Dr. Gary J. Dorman at 4 (No. OST-2004-19214-97) (stating that it is not possible to predict which domestic services would be affected by the transaction because the Joint Applicants have not provided specifics); Reply of United at 5 (No. OST-2004-19214-175) (stating that the record does not indicate that Delta and Northwest currently contemplate engaging in the types of antitrust-sensitive activities that run a real risk of antitrust litigation).

[50] *C.f.* [Public] Comments of the DOJ at 22, note 61 (No. OST-2004-19214-164).

By statute, we must move to a decision in a timely fashion, despite uncertainty in the current industry, regulatory, and competitive environment. We have no way of knowing whether any changes to the environment that may occur would affect our findings on the merits, but we must base our tentative decision on the current record and any changes that appear probable, as shown in the record. Thus, our tentative decision rests upon a careful examination of the available evidence in light of the public interest standard set forth in section 41308. We tentatively conclude that, even if we were to approve the alliance agreements under section 41309, tentatively finding that they are *not adverse* to the public interest (and that they met the other standards for approval), the grant of antitrust immunity nonetheless would not be *required* by the public interest under section 41308.

1. Unique Features of this Case

We published studies in 1999 and 2000 that described an "alliance network effect" in international markets that results when airlines link their end-to-end networks to form geographically broad alliances.[51] Marketing and code-share alliances provide a vehicle for airlines to integrate their product offerings and broaden their online-service products. Collectively, the addition of small numbers of passengers in a huge number of markets results in a large increase in total traffic. As the respective alliances continue to expand, so do the markets and consumers that benefit from the competitive service. Similarly, in earlier orders we found that the procompetitive effect of global alliances is particularly evident in the case of the behind-gateway and beyond-gateway markets where integrated alliances with coordinated connections, marketing, and services can offer competition well beyond mere interlining.[52] An alliance gives the partners the incentive to offer through fares in such markets that are lower than the fares otherwise available, and the reduction in fares, coupled with the improved on-line service, leads to large increases in traffic in such markets. In other words, end-to-end network linkages create the most opportunity for airlines to integrate for the benefit of consumers. However, we have also cautioned that alliances are not de facto pro-competitive and that each alliance must be examined on a case-by-case basis, considering all of its aspects and the market configuration in which it is set to operate.[53]

This case is one of first impression. Here the Department faces a request for antitrust immunity that would not create a new transatlantic alliance network or expand an existing network, but would fully consolidate and immunize two existing transatlantic immunized alliances, each with a major U.S. partner, whose respective networks overlap substantially. This

---

[51] U.S. DEP'T OF TRANSP., OFFICE OF THE SEC'Y, INTERNATIONAL AVIATION DEVELOPMENTS: GLOBAL DEREGULATION TAKES OFF (FIRST REPORT) (Dec. 1999); U.S. DEP'T OF TRANSP., OFFICE OF THE SEC'Y, TRANSATLANTIC DEREGULATION: THE ALLIANCE NETWORK EFFECT, (Oct. 2000). Both reports are available at http://ostpxweb.dot.gov/aviation/index.html.

[52] *See, e.g.*, Delta/Air France/Alitalia/CSA Case, Order 2001-12-18 at 9, No. OST-2001-10429 (Dep't of Transp. Dec. 21, 2001) (order to show cause); American/SN Brussels Case, Order 2004-4-10 at 7, No. OST-2003-16530 (Dep't of Transp. April 15, 2004) (final order); American/Swiss Int'l Case, Order 2002-11-12 at 8, No. OST-2002-12688 (Dep't of Transp. Nov. 22, 2002) (final order); America West/Royal Jordanian Case, Order 2005-1-23 at 8, No. OST-2004-18613 (Dep't of Transp. Jan. 27, 2005) (final order).

[53] U.S. DEP'T OF TRANSP., OFFICE OF THE SEC'Y, INTERNATIONAL AVIATION DEVELOPMENTS: GLOBAL DEREGULATION TAKES OFF (FIRST REPORT) at 2 (Dec. 1999).

case also marks the first time that the Department has been asked to immunize an alliance that includes more than one U.S. carrier, a circumstance that raises the novel issue of the potential for competitive harm in domestic markets.

This case is different not merely because it would merge two immunized alliances with substantial network overlap and because it includes two large U.S. carriers. It is also unique in its timing. The regulatory framework governing transatlantic markets is in flux. The United States and the European Commission have recently completed negotiation of a comprehensive, first-step air services agreement that is being assessed by the European Union Member States. Meanwhile, the competitive structure of the global airline industry is changing in unprecedented ways through mergers, financial restructurings, and additional forms of cooperative agreements. The impact of these changes on global networks, and the structure of the industry as a whole, is unknown.

2. Decisional standards for approval and antitrust immunity

We review applications for approval and antitrust immunity of cooperative agreements under 49 U.S.C. §§ 41309 and 41308. To grant immunity, we must first approve an agreement under section 41309. That section states that we should approve an agreement that is not adverse to the public interest and not in violation of the statute. We may not approve an agreement that substantially reduces or eliminates competition unless we find that the agreement is necessary to meet a serious transportation need or to achieve important public benefits, if that need or those benefits cannot be met or achieved by reasonably available alternatives that are materially less anticompetitive. Under section 41309, parties opposing the agreement have the burden of proving that it substantially reduces or eliminates competition and that less anticompetitive measures are available. On the other hand, the parties defending the agreement have the burden of proving the transportation need or public benefits. *See* 49 U.S.C. § 41309(c)(2).

Section 41308 gives us the discretion to exempt the parties to a cooperative agreement approved under section 41309 from the antitrust laws "to the extent necessary to allow the person to proceed with the transaction," if we determine that the exemption is required by the public interest. If we approve an anti-competitive agreement in order to meet a transportation need or obtain public benefits that otherwise cannot practicably be met or obtained, we then grant the agreement antitrust immunity. As a general matter, the parties seeking antitrust immunity under section 41308 have the burden of proof. *See* Section 7(c) of the Administrative Procedure Act, 4 U.S.C. § 556(d); *Director, OWCP v. Greenwich Collieries,* 512 U.S. 267 (1994).

Although sections 41308 and 41309 both include public interest tests, the two tests do not require the same showing. Section 41309 states that we should approve agreements that are "not adverse" to the public interest, if they satisfy the other standards for approval. Section 41308, in contrast, allows us to grant antitrust immunity *only* if we determine that immunity "is required by the public interest." We have "always recognized that the public interest standard in [section 41308] is a much more stringent standard than [section 41309's] public interest standard" and that "granting antitrust immunity under [section 41308] requires a similar, but tougher, public interest examination by the Department." *Northwest/KLM*, Order 93-1-11 at 11 (Jan. 15, 1993). We consider public interest issues on a case-by-case basis, in light of the specific facts and circumstances affecting that case.

Because the antitrust laws represent a fundamental national economic policy, one that serves consumers and travelers well, we recognize that immunity from the antitrust laws should be the exception, not the rule.[54] It is not our policy to confer antitrust immunity simply on the grounds that an agreement does not violate the antitrust laws.[55] Rather, we confer antitrust immunity only upon "a strong showing on the record that antitrust immunity is required in the public interest, and that the parties will not proceed with the transaction without the antitrust immunity."[56]

The Joint Applicants, noting that we have immunized several alliance agreements between a U.S. airline and one or more foreign airlines, seemingly assume that we should grant antitrust immunity on a minimal showing of public benefits, regardless of the particular facts and circumstances of this case.[57] The contrary is true. While we have granted immunity to numerous alliances, as shown, the circumstances presented by the Joint Applicants' proposed merger of alliances are far different from those presented in past cases where we considered requests for immunity for alliance agreements. The Joint Applicants' contention that our past decisions require the grant of immunity for their alliance merger does not adequately take into account the novel elements of their immunity request. Nor does it recognize our record of imposing conditions on proposed alliances in order to protect the public interest.[58] This request for an additional grant of immunity covers the combined networks of two existing immunized alliances and involves more than one large U.S. carrier. It involves a substantial amount of network overlap.[59] Given the particular facts and circumstances of this case, we believe that a closer look is amply justified.

---

[54] Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 421 (1986) (stating that the antitrust laws represent a fundamental national economic policy); Republic Airlines, Inc. v. C.A.B., 756 F.2d 1304, 1317 (8th Cir. 1985) (stating that Congress intended for antitrust immunity to be the exception and not the rule). *See also* UATP-1976 Agreements, 85 C.A.B. 2481, 2512-14 (1980) (Order 80-6-66); Airline Fuel Corporation Case, 83 C.A.B. 1358, 1363-64 (1979) (Order 79-9-120); Competitive Mktg. of Air Transp., 99 C.A.B. 1, 13 (1982) (Order 82-12-85); [Public] Comments of the DOJ at 9-11 (No. OST-2004-19214-164).

[55] Air Carrier Agreements Affecting Interstate and Overseas Air Transp. (Civil Aeronautics Bd. 1988) (Order 88-12-11 at 1); *C.f.* Northwest/KLM Case, Order 93-1-11 at 11, No. OST-92-48342 (Dep't of Transp. Jan. 15, 1993) (order to show cause).

[56] Northwest/KLM Case, Order 93-1-11 at 10, No. OST-92-48342 (Dep't of Transp. Jan. 15, 1993) (order to show cause).

[57] [Public] Consolidated Response of the Joint Applicants at 7-9 (No. OST-2004-19214-179).

[58] For example, when we tentatively approved and immunized the proposed alliance between American and British Airways subject to conditions based on public benefit findings requiring them to divest slots at Heathrow to other U.S. airlines, the two applicants withdrew their request for approval and immunity. *See* U.S.-U.K. Alliance Case, Order 2002-4-4 at 3, No. OST-2001-11029 (Dep't of Transp. April 4, 2002) (final order).

[59] Our analysis of MIDT data from the one-year period ending second quarter of 2004 indicates that 89 percent of Delta/Air France/Alitalia/CSA transatlantic bookings occurred in markets that overlapped with Northwest/KLM. Similarly, 89 percent of Northwest/KLM transatlantic bookings occurred in markets that overlapped with Delta/Air France/Alitalia/CSA. *See also* [Public] Comments of the DOJ at 6 (No. OST-2004-19214-164) (drawing similar conclusions).

3. Public benefit analysis

As a matter of course, we require applicants for antitrust immunity to identify and demonstrate public benefits that will flow from the transaction, and our orders granting antitrust immunity under section 41308 make detailed findings regarding the existence of those benefits and the likelihood that they will be realized.[60] This proposed transaction would fully link two existing immunized alliances, each with a U.S. airline. Where applicants seek extraordinary relief from the antitrust laws for the purposes of network linkage and integration, and thereby seek active facilitation of a reduction in the number of competing global alliance networks, we believe that the public interest requires a strong showing that immunity is justified to achieve specific, demonstrable public benefits at the time the immunity is requested.

We tentatively conclude first that the Joint Applicants have failed to show that the proposed transaction will provide sufficient public benefits to warrant an extraordinary grant of antitrust immunity, and second that the alleged benefits of immunity are largely obtainable without antitrust immunity. In this regard, the Joint Applicants have not demonstrated to the Department's satisfaction that substantial and proximate public benefits, beyond those made possible by arms-length code sharing or other lawful forms of collaboration, will be produced if we were to make an additional grant of immunity to the expanded SkyTeam alliance. The Joint Applicants' showing of public benefits attributable to a grant of antitrust immunity, many of which are theoretical and attenuated, falls well short of what we would expect in order to conclude that such an unprecedented antitrust exemption is required by the public interest.

Additionally, in the particular circumstances of this case, we are reluctant to immunize the alliance agreements when the Joint Applicants have given us so little information about their plans for implementing a grant of antitrust immunity under section 41308. We are deferential to the DOJ, which cautioned us about the potential harm to domestic competition, which the DOJ states cannot be assessed without information on the specific terms of the Joint Applicants' agreements for cooperation.[61] We recall the Civil Aeronautics Board's observation that, "It is often difficult to predict the competitive effects of an agreement which has not yet been implemented and we have no assurance that we could always do so accurately."[62]

Potential new and improved services resulting from the expanded alliance

The Joint Applicants argue that the proposed transaction will enable the partners to provide new and improved services that will create significant public benefits. They assert that this alliance merger will "promote the development of nonstop service in various markets that do not have any such service today."[63] Several of the civic parties support the Joint Applicants' request for antitrust immunity because they believe that it will lead to new or expanded nonstop services on routes between U.S. hubs used by Delta or Northwest and European hubs used by any of the

---

[60] *See, e.g.*, American/Lan Peru/Lan Airlines Case, Order 2005-10-8 at 12, No. OST-2004-19964 (Dep't of Transp. Oct. 13, 2005) (final order); Delta/Air France/Alitalia/CSA Case, Order 2001-12-8 at 8-9, 16-17, No. OST-2001-10429 (Dep't of Transp. Dec. 21, 2001) (order to show cause).

[61] [Public] Comments of the DOJ at 22 (No. OST-2004-19214-164).

[62] Competitive Mktg. of Air Transp., 99 C.A.B. 1, 127 (1982) (Order 82-12-85).

[63] [Public] Consolidated Response of the Joint Applicants at 15 (No. OST-2004-19214-179).

European partners.[64] Despite these arguments, the Joint Applicants acknowledge that their proposed alliance merger does not offer, as a primary public benefit, new online service that could not already be facilitated by the Northwest/KLM or Delta/Air France/Alitalia/CSA/Korean alliances.[65] Nevertheless, the Joint Applicants claim that the alliance will make new nonstop services economically feasible and give many transatlantic travelers greater flexibility by creating more pathways for their journeys and will shorten total time for many passengers.[66] The DOJ believes, however, that relatively few travelers will obtain substantial time savings.[67]

The public benefits analysis in past cases was more straightforward. Past cases invariably involved alliances that combined end-to-end networks, even though the partner airlines in some cases had a few overlapping routes. The alliances between a U.S. airline and one or more foreign airlines linked the U.S. airline's route network behind the partners' U.S. gateways and their homeland gateways. Such alliances enabled the partners to offer online services in many markets that no individual alliance member could serve online. The Northwest/KLM alliance, for example, enabled the two airlines to offer online service over Minneapolis-St. Paul and Amsterdam from Spokane to Warsaw.

Here, in contrast, relatively few travelers will benefit from new online service if the Joint Applicants implement the merger of their existing immunized alliances. While the Joint Applicants claim that the expanded alliance can provide on-line service in 8,700 new markets, none of those markets now are of significant size, and together they constitute a very small percentage of all U.S.-European city-pair markets. The total number of passengers in the 8,700 markets is far below the number of passengers in the markets that received new online service from the creation of other alliances such as the Northwest/KLM, Air France/Delta, and United/Lufthansa alliances.[68]

We agree that new nonstop service in markets that now have no such service could be a significant benefit. However, because we believe that the alliance partners are likely to provide such service without immunity, as explained below, we have tentatively determined that these benefits are not sufficient to justify the grant of antitrust immunity in the particular circumstances of this case.

The Joint Applicants' ability to achieve service benefits without immunity

We are not persuaded that additional antitrust immunity is required by the public interest in this case, because most of the new public benefits claimed by the Joint Applicants are achievable

---

[64] *See, e.g.*, Answer of the Cincinnati/Northern Kentucky Parties at 1-2 (No. OST-2004-19214-92); Answer of the Memphis Parties at 9 (No. OST-2004-19214-93).

[65] [Public] Consolidated Response of the Joint Applicants at 13-14 (No. OST-2004-19214-179) (citing the DOJ's concern that the proposed transaction would create few truly new online services and explaining – in a footnote – that the Department has previously approved and immunized alliances that created fewer online connections than the instant case).

[66] [Public] Consolidated Response of Joint Applicants at 15-18 (No. OST-2004-19214-179).

[67] [Public] Comments of the DOJ at 28 (No. OST-2004-19214-164).

[68] [Public] Comments of the DOJ at 25-26 (No. OST-2004-19214-164).

through alternative forms of collaboration, such as code sharing, that do not require antitrust immunity. The DOJ emphasized this point.[69]

With the blanket code-share authority that we propose to grant, the Joint Applicants may augment the expanded benefits that they began offering consumers when Northwest and KLM joined the SkyTeam alliance in September 2004. Among other things, code sharing will allow the expanded SkyTeam to market online service in markets in which it is unable to do so today. Six-way immunity is not required for the Joint Applicants to offer this public benefit; it can occur as soon as code-share authority is granted. Nor is immunity required for the Joint Applicants to offer more frequent and convenient single-code routing options in city-pairs that one or more SkyTeam members already serve on an online basis; there is no regulatory obstacle to offering this benefit after code-share authority is received. With respect to both new online markets and existing online markets, we note that consumers can already combine flights operated by different SkyTeam members, earning frequent flyer miles in their program of choice and enjoying alliance-wide status recognition. The incremental benefit (to consumers and, by extension, to the Joint Applicants) would be the ability to buy tickets for these same trips under the marketing identity of a single SkyTeam member airline. If the Joint Applicants want to offer more online marketed service to consumers, they are free to do so after receipt of code-share authority.

The authority to code share will also facilitate valuable marketing support to new gateway-to-gateway flights that have been, and will likely continue to be, initiated by the SkyTeam carriers to take advantage of the network linkages created when Northwest and KLM (and Continental) joined SkyTeam last year. Immunity is not necessary for the SkyTeam carriers to start new routes between their hubs. The mere association of carriers under marketing arrangements such as the SkyTeam alliance creates additional demand that naturally flows over the hub-to-hub routes that serve as network-linking conduits. Indeed, current SkyTeam members have already initiated new hub-to-hub services, with potentially significant benefits to the alliance and to consumers in local and connecting markets. Air France has started new nonstop Detroit-Paris service,[70] and KLM has resumed nonstop Atlanta-Amsterdam service.[71] Continental, which does not have transatlantic immunity and was not even a member of SkyTeam until recently, added Houston-Amsterdam service in May 2002 as it expanded its (non-immunized) marketing cooperation with KLM. Over time, Continental has increased capacity and frequency in that market, despite its lack of transatlantic immunity.[72] These examples illustrate that immunity is not required for the initiation of new transatlantic routes between the hubs of alliance partners. We also note that the code-share authority that we propose to grant should help to facilitate new gateway-to-gateway flights by increasing intra-SkyTeam traffic flows.

---

[69] *See* [Public] Comments of the DOJ at 36 (No. OST-2004-19214-164).

[70] *See* Press Release, Air France, Air France Opens New U.S. Gateway in Detroit (June 13, 2005), *available at* http://www.airfrance.us/cgi-bin/AF/US/en/local/toutsurairfrance/actualites/pc_detroit_061305.htm.

[71] Joint Application for Antitrust Immunity at 17 (No. OST-2004-19214-1).

[72] Press Release, Continental Airlines, Continental Airlines Launches Daily Nonstop Service Between Houston and Amsterdam, April 30, 2002, *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=85779&p=irol-newsArticle&ID=553292&highlight= ; OAG Schedule Data Guide (May 2002-October 2005).

Enhanced integration of operations

Many of the airline and the consumer benefits that are perhaps most directly attributable to antitrust immunity appear to be dependent on the successful implementation of an economic benefit sharing agreement among the alliance partners, or at least measured progress in that regard. The Joint Applicants indicate that, with an additional grant of immunity, they will begin the process of negotiating comprehensive benefit-sharing agreements. Such agreements could offer the Joint Applicants many of the efficiencies and revenue opportunities of a merger. These efficiencies and opportunities could, in turn, enhance inter-alliance competition and consumer welfare by improving airline services and reducing prices on international journeys, provided the market is competitive.

We are unable to find that those theoretical benefits, even if substantial, justify a grant of immunity for the Joint Applicants at this time. The Joint Applicants provide few specifics about how the Joint Applicants plan to cooperate under the protection of immunity and how or when they might be in a position to implement second-stage agreements involving more advanced benefit-sharing that would undoubtedly require antitrust immunity. Given that the two existing immunized alliances have two very different economic benefit sharing arrangements in place, the proposed six-way alliance would have to replace these two arrangements with a new harmonized economic benefit sharing arrangement in order to realize the commercial and consumer benefits of expanded antitrust immunity.

The record shows that the Joint Applicants have not even begun to negotiate second-stage agreements. Therefore, the Department does not have sufficient information to evaluate whether a new economic benefit sharing arrangement would be more or less comprehensive than the current arrangements, and whether and when a new arrangement would provide substantial public benefits that could be effectively passed on to consumers. The Joint Applicants claim that antitrust immunity is necessary in order to negotiate a new arrangement. While the degree of overlap in the networks of the Joint Applicants may indicate heightened antitrust risk in operating fully-integrated international services without immunity, the process of negotiating joint venture agreements to share revenues and benefits – where the pro-competitive and efficiency enhancing benefits of the resulting agreements outweigh the potential anticompetitive effects – could occur without violating the antitrust laws.[73]

Antitrust risk and the "gap in immunity"

The Joint Applicants have repeatedly argued that six-way antitrust immunity is necessary to bridge the "gap in immunity" created by the Air France/KLM merger and preserve the public benefits created by the existing alliances. Air France has an immunized alliance with Delta that includes Alitalia and CSA, while KLM has an immunized alliance with Northwest. Without immunity to operate as a single venture under the SkyTeam umbrella, they assert that it will be increasingly impractical and infeasible to operate two separate immunized alliances. As Air

---

[73] Antitrust Guidelines for Collaborations Among Competitors § 1.2, Issued by the Federal Trade Commission and the United States Department of Justice (April 2000), *at* http://www.usdoj.gov/atr/public/guidelines/jointindex.htm; VAKERICS, THOMAS V., ANTITRUST BASICS § 10.01 (2005 ed.).

France and KLM take further steps to realize the efficiencies of their merger, Delta and Northwest assert that they would eventually face unacceptable antitrust risks if they continued cooperating with their foreign immunized partners. Delta and Northwest suggest that either carrier may be forced to withdraw from its alliance or scale back its activities, thereby destroying existing consumer benefits. Such a scenario, Delta and Northwest argue, would greatly harm the withdrawing carrier, due to the reliance it has placed on its immunized relationship.

As an example of the potential harm, Northwest cites the reciprocal sales representation of the Northwest/KLM alliance. Because KLM fully represents Northwest in European marketing, Northwest has withdrawn its marketing resources from Europe, including its ticket stock. Northwest's withdrawal from the Northwest/KLM alliance, or from SkyTeam, would allegedly be harmful because Northwest would be left with no sales presence in Europe.

Opponents argue that bridging the immunity gap is not necessary to preserve the consumer benefits created by the existing alliances. They suggest that the Department should simply clarify that Delta and Northwest could, now and after the completion of the Air France/KLM merger, continue to cooperate with their respective immunized airline partners, but not with each other. Thus, Northwest could continue cooperating with KLM as a separate unit of Air France/KLM, and Delta could continue to cooperate with the Air France unit. Delta and Northwest would have no immunity to cooperate with each other, on transatlantic routes or otherwise.[74] Opponents warn the Department not to take seriously Delta's and Northwest's suggestions that they would withdraw from their alliances if immunity is not granted.[75]

We tentatively conclude that bridging the immunity gap is not required by the public interest at this time. The Joint Applicants' own public statements, which downplayed the significance of six-way immunity, support this conclusion.[76] Furthermore, owing to the necessity of maintaining KLM's Dutch citizenship, among other reasons, Air France and KLM are committed, for a period of years, to remain two separate airlines, albeit under a single corporate entity. This fact has implications for the achievability of public benefits resulting specifically from the Joint Applicants' request to bridge the "gap in immunity" and obtain six-way immunity. The impediments that Air France and KLM face in order to effectively function as one indicate that we cannot reasonably expect the Joint Applicants to act as a single economic entity (facilitated by a common benefit sharing arrangement) at any time in the near future, even if they were to receive immunity right now. For now, Northwest and KLM, on the one hand, and Delta, Air France, Alitalia, and CSA, on the other hand, have elected to continue their immunized alliances, along with their respective economic benefit-sharing agreements. There is no evidence

---

[74] *See, e.g.*, [Public] Surreply of American, Statement of James F. Rill at 9 (No. OST-2004-19214-128).

[75] *See, e.g.*, [Public] Comments of the DOJ at 32, footnote 91 (No. OST-2004-19214-164); [Public] Surreply of American, Statement of James F. Rill at 4 (No. OST-2004-19214-128).

[76] AF 00858 (Nov. 2003 transcript of Air France meeting with analysts), also available at http://www.sec.gov/Archives/edgar/data/56316/000119312503085057/d425.htm (public disclosure under Securities Act of 1933, Rule 425, and Securities Exchange Act of 1934, Rule 14d-2). *See also* Interview by Cathy Buyck, Air Transport World, with Jean-Cyril Spinetta, Chairman/CEO of Air France, and Leo van Wijk, Vice Chairman of Air France (April 2005, p42), *available at* http://www.atwonline.com/magazine/article.html?articleID=1246; [Public] Comments of the DOJ at 32 (No. OST-2004-19214-164);

in the record indicating that the Air France Group, as the common holding company, is actively seeking to rationalize the two very different agreements. Air France and KLM are utilizing protocols to prevent competitively sensitive information from being passed between non-immunized partners within the larger SkyTeam alliance.[77]

Based on their existing commercial relationships, we are skeptical that the alleged "gap in immunity" would in any event cause the European partners to end their cooperation with either Delta or Northwest. Their existing alliance relationships obviously increase the European airlines' revenues, and those carriers should have every incentive to maintain their relationships with both U.S. airlines, as the DOJ contends.[78] The SkyTeam members, after all, cooperate on business matters with Continental, even though Continental has no immunized relationship with any of the alliance's other European members (or with Delta or Northwest). Similarly, US Airways is a member of the Star Alliance, with no immunized relationship with any other Star member. And oneworld partners in transatlantic markets – American, British Airways, Aer Lingus, and Iberia – closely cooperate on various marketing initiatives, but do not have antitrust immunity. There is therefore ample evidence that absent immunity, foreign and domestic carriers can and do form strategic alliances that involve reciprocal code sharing, frequent flyer program benefits, and airport lounge access, and other lawful forms of collaboration. A well executed marketing alliance can produce many of the benefits associated with more integrated forms of cooperation.

In fact, the immunity gap is not stopping the Joint Applicants from continuing to increase their collaboration. We agree with the DOJ that the Joint Applicants will likely continue to integrate under the SkyTeam banner, with or without the additional requested immunity.[79] Air France and KLM are pursuing joint sales and global corporate accounts with other SkyTeam carriers.[80] Old and new SkyTeam members have expanded joint fare products such as "Round the World" and "Europe Pass" to include new partners,[81] participated in regular Governing Board meetings of the alliance,[82] coordinated the co-location of their airport facilities,[83] developed joining requirements,[84] launched an Associate Member program and admitted new

---

[77] Joint Applicants' Supplemental Information Response at 43-45 (No. OST-2004-19214-48).

[78] [Public] Comments of the DOJ at 32 (No. OST-2004-19214-164).

[79] [Public] Comments of the DOJ at 32 (No. OST-2004-19214-164).

[80] Press Release, Primezone Media Network, SkyTeam and Phillips Strengthen Relationship Through Global Contract (Oct. 25, 2005), *at* http://www.primezone.com/newsroom/news.html?d=88505; David Jonas, *Air France-KLM Melding Sales Platforms*, BTNONLINE.COM, June 7, 2004, *at* http://www.btnmag.com/businesstravelnews/search/article_display.jsp?vnu_content_id=1000526115.

[81] *See* Press Release, SkyTeam Alliance, SkyTeam Round the World and Europe Pass Fares Now Offer Travelers More Choices (April 13, 2005), *at* http://www.skyteam.com/EN/aboutSkyteam/pressCenter/pr041305.jsp.

[82] *See e.g.* Press Release, SkyTeam Alliance, SkyTeam NewsFlash (Nov. 2004), *at* http://www.skyteam.com/EN/aboutSkyteam/pressCenter/pr111004.jsp.

[83] *See* Press Release, SkyTeam Alliance, SkyTeam NewsFlash (April 2005), *at* http://www.skyteam.com/EN/aboutSkyteam/pressCenter/pr042205.jsp.

[84] *See* Press Release, SkyTeam Alliance, SkyTeam NewsFlash (Nov. 2004), *at* http://www.skyteam.com/EN/aboutSkyteam/pressCenter/pr111004.jsp.

associate members,[85] and developed reciprocal interline e-ticketing arrangements.[86] The Joint Applicants' willingness to further integrate their services is consistent with the activities of other alliances. Oneworld's members, for example, have engaged in a significant degree of coordination on their transatlantic services even though American has antitrust immunity for its relationship with Finnair, but not for its relationships with British Airways, Aer Lingus, or Iberia.

The Joint Applicants' expressed fears about their potential antitrust liability due to the uncertain standards for joint ventures do not compel us to grant immunity. Their reliance on *Dagher v. Saudi Ref. Inc.*, 369 F.3d 1108 (9th Cir. 2004), is not persuasive. The brief submitted by the DOJ and the Federal Trade Commission ("FTC") to the Supreme Court urged the Court to reverse this Ninth Circuit decision, which they argued misapplied established antitrust law standards in a suit charging that a gasoline refining and marketing joint venture acted unlawfully by setting a common price for two separate gasoline brands sold by the joint venture. The Supreme Court granted the petition.[87] We cannot agree with the Joint Applicants that the possible risk of a court misapplying the antitrust laws mandates a grant of antitrust immunity in this case. We note that the DOJ and FTC have issued guidelines on joint ventures that carry significant weight with the courts.[88]

The Joint Applicants then cite *Polygram, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005).[89] In *Polygram* the Court of Appeals affirmed an FTC determination that two joint venturers had violated the antitrust laws when they agreed that each would cease promoting a product marketed separately by each firm in order to protect a new product being introduced by the joint venture. The Joint Applicants' suggestion that *Polygram* somehow puts legitimate joint venture activities at risk is at odds with the conventional understanding of the antitrust laws. As the Court of Appeals summed up the conduct held unlawful in that case, "An agreement between joint venturers to restrain price cutting and advertising with respect to products not part of the joint venture looks suspiciously like a naked price fixing agreement between competitors, which would ordinarily be condemned as *per se* unlawful."[90]

Deferral of section 41309 analysis

Normally, we first consider whether an agreement meets the standards for approval under section 41309 in proceedings where airlines have requested approval and antitrust immunity for an inter-carrier agreement. Of course, we cannot grant antitrust immunity to an agreement unless we have approved that agreement under section 41309. In this case, however, we decline to make tentative findings under section 41309. Our analysis in this Order assumes *arguendo* – as

---

[85] *See* Press Release, SkyTeam Alliance, Four Carriers to Join SkyTeam Associate Program (June 9, 2005), *at* http://www.skyteam.com/EN/aboutSkyteam/pressCenter/pr060905.jsp.

[86] *See* Press Release, SkyTeam Alliance, SkyTeam NewsFlash (Dec. 2004), *at* http://www.skyteam.com/EN/aboutSkyteam/pressCenter/pr121704.jsp.

[87] Texaco, Inc. v. Dagher, 125 S.Ct. 2957 (2005).

[88] Antitrust Guidelines for Collaborations Among Competitors § 1.2, Issued by the Federal Trade Commission and the United States Department of Justice (April 2000), *at* http://www.usdoj.gov/atr/public/guidelines/jointindex.htm.

[89] [Public] Consolidated Response of the Joint Applicants at 10 (No. OST-2004-19214-179).

[90] Polygram Holding, Inc. v. FTC, 416 F.3d 29,37 (D.C. Cir. 2005).

the Joint Applicants have in fact argued – that the alliance agreements will not substantially reduce or eliminate competition in any relevant market.[91]

We note the DOJ's conclusion that the alliance is unlikely to reduce competition in transatlantic markets. At the same time, the DOJ believes that the antitrust immunity sought by the Joint Applicants could harm competition in domestic markets "by providing cover for competitors to discuss competitive matters outside the immunity and shielding anticompetitive conduct from antitrust enforcement."[92] The DOJ states that evaluating the potential for harm would require an analysis of the Joint Applicants' specific plans regarding information sharing, but the Joint Applicants do not yet have such agreements. Their existing alliance agreements are "worded to allow Delta and Northwest the widest possible latitude to combine any and all of their activities that 'involve international air transportation,' except those 'involving air transportation solely within the United States.'"[93] According to the DOJ, until the Joint Applicants have more definitive agreements, "the applicants cannot assure the Government that they will not exchange competitive information or engage in activities that undercut domestic competition." [94]

Because we have tentatively concluded that the Joint Applicants fail to show that the public interest requires antitrust immunity, a finding by us that their agreements could be approved under section 41309 would have no practical impact. If we approved the agreements without immunity, and the Joint Applicants' implementation of the agreements were later challenged in an antitrust suit, the courts would not likely treat our finding under section 41309 as relevant to their determination whether the Joint Applicants had, through particular activities alleged to exceed the scope of the immunity, violated the Sherman or Clayton Acts.[95] The Joint Applicants, moreover, do not need our approval under section 41309 to implement their agreements.

Potential harm to domestic competition

An analysis of the proposed alliance merger under section 41309 would require us to consider a domestic competition issue raised by the DOJ. We have tentatively decided, as explained above, to deny the request for additional antitrust immunity because the Joint Applicants have failed to demonstrate on the record, and under the current circumstances, that granting antitrust immunity would likely create significant public benefits. The DOJ has argued that a grant of immunity in the circumstances of this case would create the risk that the resulting coordination between Delta and Northwest could lead to a reduction in competition in domestic markets. Noting that "[a]n airline's domestic and international operations are closely integrated," the DOJ believes that "the presence of two major domestic competitors within one immunized international alliance – which purports to approach the operation of a single firm – creates a risk that coordination arguably covered by 'international' immunity will spill over into

---

[91] The Department does not draw any tentative conclusions regarding whether the alliance agreements substantially reduce or eliminate competition.

[92] [Public] Comments of the DOJ at 16 (No. OST-2004-19214-164).

[93] [Public] Comments of the DOJ at 22 (No. OST-2004-19214-164).

[94] [Public] Comments of the DOJ at 22 (No. OST-2004-19214-164).

[95] *Cf.* Aloha Airlines v. Hawaiian Airlines, 489 F.2d 203, 211 (9th Cir. 1973); Foremost Int'l Tours v. Qantas Airways, 478 F. Supp. 589, 593 (D. Hawaii 1979).

anticompetitive domestic coordination." The DOJ states, "Accommodation and coordination on the domestic 'behind and beyond' consequences of international initiatives could present opportunities for Delta and Northwest to discuss and resolve, explicitly or tacitly, competitive issues and may lessen competition on their domestic routes."[96] The DOJ notes that "[a]t a minimum, in the ordinary course, the applicants expect to engage in extensive sharing of competitively sensitive information that relates to their international operations," that the applicants hope to negotiate "mechanisms and formulas to share revenues and costs attributable to domestic as well as international segments," that doing so may well cause Delta and Northwest "to share detailed domestic revenue, traffic, and cost information in order to agree upon and implement cost-sharing formulas for international passengers traveling over domestic segments," and that "[s]uch sharing can lead to less vigorous competition, lower output, and higher prices."[97]

The DOJ additionally alleges that a grant of antitrust immunity could seriously undermine the enforcement of the antitrust laws, because immunity would enable the Joint Applicants to argue that their activities related in some way to international service which were broadly shielded from antitrust challenge. In that regard, the DOJ cites statements made by Timothy J. Muris when he was Chairman of the FTC. He then stated that unnecessary or excessively broad grants of antitrust immunity "may harm consumers by providing a pretextual reason for parties inappropriately to discuss and collaborate on matters that are not, or should not be, exempt," and that an antitrust exemption "may be perceived as providing shelter for firms inclined to discuss off-limits topics, particularly when there is some interpretative flexibility about what subject matters are reasonably 'related to' the objectives of the legislation."[98]

The Joint Applicants deny that "domestic spillover" is a legitimate concern in this proceeding. They believe that, in keeping with the statutory scheme, they can agree on matters relating to foreign air transportation without agreeing on matters related to interstate air transportation. They pledge not to discuss or agree upon domestic fares or share competitively-sensitive domestic information.[99] They state that their domestic operations will remain subject to the antitrust laws and they remind all parties that the treble damages arising from an antitrust action are incentive enough to comply with the antitrust laws.[100] They contend that we cannot deny immunity on the basis of speculation that one or more of the Joint Applicants might act unlawfully.[101]

Various parties identified the issue of domestic spillover as a possible issue early in this proceeding and we sought information from the Joint Applicants to amplify the record. We have

---

[96] [Public] Comments of the DOJ at 16-17 (No. OST-2004-19214-164).

[97] [Public] Comments of the DOJ at 19-20 (No. OST-2004-19214-164).

[98] [Public] Comments of the DOJ at 21 (No. OST-2004-19214-164).

[99] [Public] Reply of the Joint Applicants at 8-9, 60-61 (No. OST-2004-19214-114); [Public] Consolidated Response of the Joint Applicants at 4, 28-31 (No. OST-2004-19214-179) (discussing domestic spillover issues and proposing certain conditions to mitigate concerns about domestic competition).

[100] [Public] Reply of the Joint Applicants at 65 (No. OST-2004-19214-114).

[101] [Public] Consolidated Response of the Joint Applicants at 26-30 (No. OST-2004-19214-179).

now tentatively determined to deny the application because there are insufficient public benefits to require a grant of immunity without reaching the question of domestic spillover at this time.

State of transatlantic competition

Large portions of the record in this case were devoted to debate on the state of transatlantic competition and its impact on consumers. American suggested that the pro-consumer fare and service trends that characterized the initial period of immunized alliance development have reversed course due to immunized alliance market power. The Joint Applicants responded that American's criticisms were meritless and that service levels and competition at open skies hubs have not been harmed by immunized alliances. In the context of this case, we take no position on the merits of the debate on the state of transatlantic competition. However, these issues could be relevant in future antitrust immunity proceedings depending on the specific circumstances of those cases. In particular, the enhanced transatlantic market dynamics likely to result from a U.S.-EU agreement, including the increased potential for improved service and other public benefits, would have an important bearing on future cases.

Status of the Joint Applicants' existing immunized alliances

Given the ongoing integration efforts, we are not persuaded that denying the application will destroy the gains and benefits that have apparently been achieved by the existing immunized alliances. We are proposing to deny six-way antitrust immunity, but make no changes to the approvals and immunities obtained by Northwest/KLM and, separately, Delta/Air France/Alitalia/CSA/Korean. We intend that those alliances may continue to operate with the same rights and privileges currently granted, subject to the same conditions and restrictions. Notably, airlines operating with antitrust immunity are required to inform the Department of material changes to their alliance structure and provide copies of subsidiary agreements. *See, e.g., Delta/Air France/Alitalia/CSA*, Order 2002-1-6, at 7, paragraph 6 (Jan. 18, 2002) (final order).

E. Pending motions

On July 15, 2005, the Joint Applicants filed a Joint Motion to Strike. We have decided to deny the motion. We believe that the Joint Applicants had ample opportunity to rebut the arguments advanced by American. In any event, our tentative decision does not rely upon any of the information in question.

On September 15, 2005, American filed a motion to suspend consideration of the application for antitrust immunity in light of the bankruptcy filings of both Northwest and Delta on September 14. We have decided to deny the motion. We agree with the Joint Applicants that there is no compelling reason to postpone our tentative decision. While a dramatically restructured Delta or Northwest might well change our analysis, the mere filing for bankruptcy protection *per se* does not substantially affect the decisional issues on the current record. We note that American and other parties will have the opportunity in their comments and reply comments to show why those filings may be material. We believe we can make all appropriate inquiries and findings under the circumstances, and that the Joint Applicants are entitled to a fair and prompt decision on the merits.

CONCLUSION

We hereby direct all interested persons to show cause why we should not issue an order making final our tentative findings and conclusions. Objections or comments to our tentative findings and conclusions are due no later than 21 calendar days from the service date of this order. Answers to objections shall be due no later than 7 business days thereafter.

Accordingly:

1. We grant all pending motions for leave to file and accept all untimely or unauthorized pleadings already filed;

2. We deny the Joint Motion to Strike, submitted by Delta Air Lines, Inc., Northwest Airlines, Inc., Société Air France, KLM Royal Dutch Airlines, Alitalia-Linee Aeree Italiane-S.p.A., and Czech Airlines on July 15, 2005;

3. We deny the Motion to Suspend Consideration of the Joint Application, submitted by American Airlines, Inc. on September 15, 2005;

4. We direct all interested persons to show cause why we should not issue an order making final our tentative findings and conclusions, granting approval of blanket statements of authorization under 14 C.F.R. § 212 to Delta Air Lines, Inc., Northwest Airlines, Inc., Société Air France, KLM Royal Dutch Airlines, Alitalia-Linee Aeree Italiane-S.p.A., and Czech Airlines;

5. We tentatively grant, subject to the conditions attached as Appendix A, blanket statements of authorization under 14 CFR Part 212 for:

    a. the display of KLM Royal Dutch Airlines' "KL" designator code on flights operated by Delta Air Lines, Inc. between (i) any point or points in the United States and any point or points in the Netherlands (either nonstop or via intermediate points), (ii) any points in the United States in conjunction with foreign air transportation services held out by KLM Royal Dutch Airlines, (iii) any point or points in the United States or the Netherlands and any point or points in any third country, and (iv) any points in third countries;

    b. the display of Delta Air Lines, Inc.'s "DL" designator code on flights operated by KLM Royal Dutch Airlines between (i) any point or points in the United States and any point or points in the Netherlands (either nonstop or via intermediate points), (ii) any points in the United States in conjunction with foreign air transportation services held out by KLM Royal Dutch Airlines, (iii) any point or points in the Netherlands or the United States and any point or points in any third country, and (iv) any points in third countries;

    c. the display of Société Air France's "AF" designator code on flights operated by Northwest Airlines, Inc. between (i) any point or points in the United States and any point or points in France (either nonstop or via intermediate points), (ii) any points in

the United States in conjunction with foreign air transportation services held out by Société Air France, (iii) any point or points in the United States or France and any point or points in any third country, and (iv) any points in third countries;

d. the display of Northwest Airlines, Inc.'s "NW" designator code on flights operated by Société Air France between (i) any point or points in the United States and any point or points in France (either nonstop or via intermediate points), (ii) any points in France, (iii) any point or points in France or the United States and any point or points in any third country, and (iv) any points in third countries;

e. the display of Alitalia-Linee Aeree Italiane-S.p.A.'s "AZ" designator code on flights operated by Northwest Airlines, Inc. between (i) any point or points in the United States and any point or points in Italy (either nonstop or via intermediate points), (ii) any points in the United States in conjunction with foreign air transportation services held out by Alitalia-Linee Aeree Italiane-S.p.A., (iii) any point or points in the United States or Italy and any point or points in any third country, and (iv) any points in third countries;

f. the display of Northwest Airlines, Inc.'s "NW" designator code on flights operated by Alitalia-Linee Aeree Italiane-S.p.A. between (i) any point or points in the United States and any point or points in Italy (either nonstop or via intermediate points), (ii) any points in Italy, (iii) any point or points in Italy or the United States and any point or points in any third country, and (iv) any points in third countries;

g. the display of Czech Airlines' "OK" designator code on flights operated by Northwest Airlines, Inc. between (i) any point or points in the United States and any point or points in the Czech Republic (either nonstop or via intermediate points), (ii) any points in the United States in conjunction with foreign air transportation services held out by Czech Airlines, (iii) any point or points in the United States or the Czech Republic and any point or points in any third country, and (iv) any points in third countries;

h. the display of Northwest Airlines, Inc.'s "NW" designator code on flights operated by Czech Airlines between (i) any point or points in the United States and any point or points in the Czech Republic (either nonstop or via intermediate points), (ii) any points in the Czech Republic, (iii) any point or points in the Czech Republic or the United States and any point or points in any third country, and (iv) any points in third countries;

6. We direct all interested persons to show cause why we should not issue an order making final our tentative findings and conclusions, denying antitrust immunity to existing and future alliance agreements between and among Delta Air Lines, Inc., Northwest Airlines, Inc., Société Air France, KLM Royal Dutch Airlines, Alitalia-Linee Aeree Italiane-S.p.A., and Czech Airlines;

7. We direct all interested persons to show cause why we should not issue an order making final our tentative findings and conclusions, making no changes in the final orders in dockets OST-92-46371 (Northwest/KLM) and OST-2002-10429 (Delta/Air

France/Alitalia/Czech) and thus permitting the applicants in those dockets to proceed with their existing rights and privileges, subject to existing conditions and restrictions;

8. We defer action on the motions filed by Delta Air Lines, Inc., Northwest Airlines, Inc., Société Air France, KLM Royal Dutch Airlines, Alitalia-Linee Aeree Italiane-S.p.A., Czech Airlines, American Airlines, Inc., and the United States Department of Justice, for confidential treatment of certain data and information; and

9. Objections or comments to our tentative findings and conclusions are due no later than 21 calendar days from the service date of this order. Answers to objections shall be due no later than 7 business days thereafter.

By:

MICHAEL W. REYNOLDS
Acting Assistant Secretary for Aviation
and International Affairs

Date: December 22, 2005

(SEAL)

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

APPENDIX A

The statements of authorization granted are subject to the following conditions:

(a) The statements of authorization will remain in effect only as long as (i) KLM Royal Dutch Airlines, Société Air France, Czech Airlines, Alitalia-Linee Aeree Italiane-S.p.A., Delta Air Lines, Inc., or Northwest Airlines, Inc. continue to hold the necessary underlying authority to operate the code-share services at issue, and (ii) the code-share agreement providing for the code-share operations remains in effect.

(b) KLM Royal Dutch Airlines, Société Air France, Czech Airlines, Alitalia-Linee Aeree Italiane-S.p.A., Delta Air Lines, Inc., or Northwest Airlines, Inc. must promptly notify the Department (Office of International Aviation) if the code-share agreement providing for the code-share operations is no longer effective or if the carriers decide to cease operating all or a portion of the approved code-share services. Such notices should be filed in Docket OST-2004-19215.[102]

(c) KLM Royal Dutch Airlines, Société Air France, Czech Airlines, Alitalia-Linee Aeree Italiane-S.p.A., Delta Air Lines, Inc., or Northwest Airlines, Inc. must notify the Department no later than 30 days before they begin any new code-share service under the code-share services authorized here. Such notice shall identify the market(s) to be served, which carrier will be operating the aircraft in the code-share market added, and the date on which the service will begin. Such notices should be filed in Docket OST-2004-19215.

(d) The code-sharing operations conducted under this authority must comply with 14 CFR 257 and with any amendments to the Department's regulations concerning code-share arrangements that may be adopted. Notwithstanding any provisions in the contract between the carriers, our approval here is expressly conditioned upon the requirements that the subject foreign air transportation be sold in the name of the carrier holding out such service in the computer reservation systems and elsewhere; that the carrier selling such transportation (*i.e.,* the carrier shown on the ticket) accept responsibility for the entirety of the code-share journey for all obligations established in its contract of carriage with the passenger; that the passenger liability of the operating carrier be unaffected; and that the operating carrier 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.

(e) Any service provided shall be consistent with all applicable agreements between the United States and the Governments of the Netherlands, France, Czech Republic, and Italy, and all applicable agreements with other foreign countries involved. Furthermore, (i) nothing in the award of this blanket statement of authorization should

---

[102] We expect this notification to be received within 10 days of such non-effectiveness or of such decision.

be construed as conferring upon Delta Air Lines, Inc. or Northwest Airlines, Inc. rights (including code-share, fifth-freedom intermediate and/or beyond rights) to serve markets where U.S. carrier rights are limited unless Delta or Northwest notifies us of their intent to serve such market and unless and until the Department has completed any necessary carrier selection procedures to determine which carrier(s) should be authorized to exercise such rights;[103] and (ii) should there be a request by any carrier to use the limited-entry route rights that are included in Delta's or Northwest's authority by virtue of the blanket statement of authorization granted here, but that are not being used by Delta or Northwest, the holding of such authority will not be considered as providing any preference for Delta or Northwest in a carrier selection proceeding to determine which carrier(s) should be entitled to use the authority at issue.

(f) The authority granted here is specifically conditioned so that neither KLM Royal Dutch Airlines, nor Société Air France, Czech Airlines, Alitalia-Linee Aeree Italiane-S.p.A., Delta Air Lines, Inc., or Northwest Airlines, Inc. shall give any force or effect to any contractual provisions between themselves that are contrary to these conditions.

(g) We may amend, modify, or revoke the authority granted at any time without hearing at our discretion.

[103] The notice referenced in condition (c) above may be used for this notification.