BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON., D.C.

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ORIGINAL

Applications of AMERICAN AIRLINES, INC. and AEROLINEAS ARGENTINAS, S.A. for exemptions under 49 U.S.C. §40109 and Statements of Authorization under 14 CFR Part 212	Dockets OST-99-6225 - 2 6226 - 2 6227 - 4

CONSOLIDATED ANSWER OF UNITED AIR LINES, INC.

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CONSOLIDATED ANSWER OF UNITED AIR LINES, INC.

United Air Lines, Inc., ("United") submits the following consolidated answer to (1) the joint application filed by American Airlines, Inc. ("American") and Aerolineas Argentinas, S.A. ("Aerolineas") for statements of authorization to code share on each other's services between the U.S. and Argentina and (2) the individual applications of American and Aerolineas for exemption authority to serve additional points in Argentina and the U.S., respectively, under their proposed code-share alliance:

I. INTRODUCTION

Even though United has long been a proponent of global alliances and an advocate of open skies agreements, it strongly opposes American's and Aerolineas' applications for code-share authority. American's proposed alliance with Aerolineas is merely the latest in a steady stream of attempts by American to solidify its dominant position in Latin America at its Miami hub through anticompetitive cooperation agreements with its major foreign-flag competitors.

American has recently escalated its campaign for dominance of Western Hemisphere north/south traffic by attempting to acquire Air Canada and end United's alliance with that carrier. In view of American's recent efforts to monopolize international services in the Western Hemisphere, it is all the more important that the Department act decisively now to stop American's campaign for dominance. Denial of the American/Aerolineas alliance is a necessary step in preserving competition in these important world markets.

As with most air travel markets in Central and South America (referred to herein collectively as "Latin America"), entry into the U.S.-Argentina market is severely restricted due to the government of Argentina's historic insistence upon capacity controls that effectively limit both the number of carriers the United States may designate and the number of frequencies U.S.-designated carriers may operate. These restrictions have been retained by Argentina in order to protect Argentine carriers, such as Aerolineas, from U.S. carrier competition. Now, the government of Argentina is offering to replace these capacity limits with a phased-in increase in the capacity cap followed by an open skies agreement, but only if the Department grants Aerolineas the right to code share with American and, ultimately, immunity from U.S. antitrust laws for an alliance with American. Aerolineas entered into an alliance with American nearly two years ago. That alliance, if approved, would collectively control over 60% of the U.S.-Argentina market and wholly dominate the Miami-Buenos Aires city-pair, which alone accounts for nearly 50% of local U.S.-Buenos Aires demand.

In order for the Department to promote the public interest and secure for the long term a more open and competitive market structure throughout Latin America, it must reject this

bargain. Open skies agreements are not ends in themselves, only means to an end – the opening of international aviation markets to increased competition and the opportunity for carriers to enter or exit individual city-pair markets solely in response to supply and demand considerations, not governmental route policies. Open skies agreements in themselves do not ensure that markets will perform competitively, only that governmental barriers to entry in the form of designation limitations and frequency and capacity controls are eliminated.

Nor can open skies agreements in themselves substitute for competition policy in ensuring that markets perform competitively. This was confirmed by the Department of Justice, when it cautioned against the Department authorizing American to enter into a broad-scale, code-sharing alliance with the members of the TACA Group of carriers similar to the code-sharing alliance American is now proposing with Aerolineas, despite the existence of open skies agreements between the United States and each of the TACA carriers' homelands. Comments of the United States Department of Justice dated January 28, 1998 in Docket OST-96-1700. In commenting on the American/TACA alliance, the Department of Justice noted that the mere existence of an open skies agreement is not dispositive in determining whether an alliance would be efficiency enhancing and, therefore, pro-competitive, or would instead pose substantial risks to competition. Id. at 2.

The Department is being asked by American and Aerolineas to approve yet another alliance between American and the dominant carrier in a major Latin American country before the ink is even dry on the Department's recent grant of antitrust immunity for a similar alliance between American and LAN Chile. Order 99-9-9. Such alliances pose substantial risks to

competition that cannot be offset by bringing into force open skies agreements. Rather than promote competition, the grant of American's and Aerolineas' code-share applications would:

- further entrench American as the dominant carrier in U.S.-Argentina and U.S.-Latin America air travel markets;
- enable American to increase its dominant position at the strategic Miami gateway, which is used by nearly 70% of all U.S.-Buenos Aires air travelers;
- preclude United (and other U.S. carriers) from entering into an alliance agreement with Aerolineas that would facilitate the expansion of an alternative Latin America route network, and thereby enhance inter-network competition with American at Miami and throughout Latin America to the benefit of consumers; and
- significantly increase the pressure on the Department to approve other alliances between American and major Latin American carriers, effectively excluding other U.S. carriers from having an opportunity to develop alliance relationships with these carriers that would provide them cost-efficient means to extend their on-line networks into Central and South American markets, and thereby to initiate much broader network-to-network competition with American throughout Latin America.

The Department has faced these same competitive issues in the past cases involving *American/TACA* and *American/LAN Chile.* Each time, rather than confront the issue of the foreclosure of competition represented by such agreements, the Department of Transportation has allowed the agreements to be implemented in order to reward countries that have signed open skies agreement (*American/TACA*) or to fulfill conditions that will bring such an agreement into effect *(American/LAN Chile)*.

These actions create the unintended impression that DOT may have become so biased in favor of implementing open skies agreements in Latin America that it cannot reach a reasoned judgment on the competitive merits of commercial contracts concluded between private

companies in conjunction with or in anticipation of such open skies agreements. In this particular case, DOT personnel have participated in the negotiation of a bilateral agreement that contains an unprecedented undertaking to approve code sharing between American and Aerolineas as a precondition to expansion of frequencies for non-aligned carriers. In fact, in this case, the bilateral agreement states unequivocally that "the Department of Transportation would endeavor to approve" applications of American and Aerolineas to code share 90 days before the new frequency rights become available. See U.S./Argentina Memorandum of Consultations, August 12, 1999 at 1. ("MOC")

Leaving aside the question of whether the conclusion of such an agreement was a wise decision, that agreement raises a serious procedural issue in this proceeding. To avoid any appearance of prejudgment and to preserve the integrity of the Department's process, United respectfully requests that the Department personnel that took part in the negotiation of the U.S./Argentina bilateral agreement recuse themselves from any participation in the decision on the American/Aerolineas applications in this proceeding. Such recusal is consistent with the Department's legal obligations to assure fair and unbiased decisionmaking.

Moreover, in this and all future proceedings involving participation by the Department of Justice, the DOT should place DOJ's advice on the public record. DOT should then include in its order disposing of the matter under review a reasoned explanation of its decision with respect to DOJ's advice. Such procedures are needed to avoid any possible implication that DOT ignored DOJ's advice.

To approve the American/Aerolineas applications, an unbiased Departmental decisionmaker must be able to find that such approval would be consistent with the public interest. No such findings can be made here given the adverse impact that the proposed American/Aerolineas alliance would have in the U.S.-Latin America and U.S.-Argentina markets.

II. ARGUMENT

A. The Proposed American/Aerolineas Code-Share Alliance Should Not Be Approved In View Of American's Dominance Of The Overall U.S.-Latin America Air Travel Market.

American's proposal to form an alliance with Aerolineas must be reviewed in the context of American's overall dominance of U.S.-Latin America air travel markets, the unprecedented number of alliance agreements American is seeking to implement throughout the region and the relationship already in place between American and Aerolineas which extends well beyond code sharing.[1] By any measure, American is the dominant carrier between the U.S. and Latin America. It is the only carrier with an established online route network that links its hubs in the United States with virtually all of the countries in Central and South America.

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[1] As explained infra, American is seeking to implement these alliances in order to foreclose its U.S.-flag competitors from developing alliances with these Latin American carriers that would enable them to extend their networks into Latin America and thereby gain efficiency benefits comparable to those American already enjoys as the result of having established an online network that links its hubs in the U.S. with most of the major population centers in Latin America. Because American's online network already extends to most of Latin America, American achieves no new efficiencies from entering into alliance agreements with its foreign-flag competitors in Latin America that would benefit consumers.

Even without an alliance with Aerolineas, American operates more U.S.-South America service than all of its U.S.-flag competitors combined! See *Exhibit UA-I.* Between the U.S. and South America, American today operates 57% of the scheduled service provided by U.S.-flag carriers. American currently operates 50% of the U.S.-flag nonstop service between the U.S. and Argentina. Id. American and Aerolineas combined operate over 60% of the currently available nonstop service between the U.S. and Argentina. See *Exhibit UA-2.*

Not only does American already dominate U.S.-Latin America air travel markets, but it is seeking to further entrench its position in these markets through a series of unprecedented alliance agreements with its principal foreign competitors throughout the region, including the six carriers of the TACA Group, Avianca, Aeropostal, TAM-Mercosur, and TAM, as well as, most recently, LAN Chile.[2]

Although couched as an application for approval of a code-share alliance, the American/Aerolineas relationship goes far beyond mere code sharing. American has already acquired a substantial ownership interest in Aerolineas. Using the leverage created by that ownership, American placed two of its management personnel in key management posts at

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[2] American also has an alliance with Aero California for U.S.-Mexico services, and displays the codes of its alliance partners, Canadian International and Iberia on certain of its U.S.-Latin America flights to facilitate those carriers' abilities to provide Latin America services. The additional through traffic American gains from being able to display Canadian's and Iberia's code on its Miami-Latin America services contributes to American's ability to exercise its dominance in these markets.

Aerolineas: one as President and CEO and the other as Chief Operating Officer. American paid $25 million for the controlling stake in Aerolineas that was formerly held by Iberia.[3]

Moreover, the code sharing under the American/Aerolineas arrangement would take place almost entirely in U.S.-Argentina gateway-to-gateway markets where these two carriers today compete with each other: Miami-Buenos Aires and New York-Buenos Aires. These two overlapping markets account for over 70% of the local traffic between the U.S. and Buenos Aires. The Department of Justice addressed a nearly identical situation elsewhere in Latin America in the *American/TACA* proceeding, and urged the Department to reconsider its tentative approval of that alliance because of the substantial risk to competition it poses.

> In those comments, the Justice Department pointed out that:
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> [Alliance] agreements have the potential to promote the public interest by creating consumer and pro-competitive benefits that airlines cannot provide on their own. Potential public interest benefits occur when an airline extends the reach of its route network by code-sharing on flights operated by an airline that operates a route network in another geographic region – i.e., an end-to-end network combination.

Comments at 2-3. The Justice Department then goes on to demonstrate, however, that:

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[3] See FORT WORTH STAR-TELEGRAM (September 1, 1998) (Business Section at 3) and *Reed Business Information,* AIR TRANSPORT INTELLIGENCE (November 6, 1998). Under an agreement with the U.S. Department of Justice, American was forced to restructure its acquisition by relinquishing the right to name members of Aerolineas' Board of Directors. In clearing the transaction as revised, DOJ noted its concern about the American/Aerolineas code share, which had not been cleared by DOJ and which DOJ remained free to challenge. USDOJ Press Release #98-320 (July 8, 1998) at {www.usdoj.gov/atr/public/press_release/1998/1825.htm}. ("DOJ PRESS RELEASE")

> [While] American can extend its existing network through code sharing with TACA carriers by using TACA's regional network in Central America to extend its reach to passengers traveling between the United States and smaller Central American cities beyond . . . [the TACA carriers' Central American gateways,] [t]hese cities . . . account for very few passengers. . . .

Id. at 8. The Justice Department concludes from this that the "agreement does not offer significant pro-competitive efficiencies . . . [,]" but does pose a substantial risk to competition. Id. at 11.

In this case, the benefits consumers would gain from American's code sharing on Aerolineas are no more substantial than those identified by the Justice Department in the *TACA* case. For example, in their applications, the parties identify 15 smaller cities in Argentina that would gain new online connections to points in the United States from their alliance, but identify no points in third countries served by Aerolineas beyond Buenos Aires that would gain new online service.[4] The 15 secondary Argentina points identified accounted in the aggregate for a total of less than 10% of U.S.-Argentina O&D passengers in 1998.[5] Moreover, code-share

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[4] American already has access to the major third-country markets beyond Buenos Aires in Chile, Brazil, Paraguay and Uruguay either in its own equipment or that of its existing partners: LAN Chile, TAM, and TAM Mercosur. The cities to be served by American and Aerolineas in Argentina are Cordoba, Mendoza, Bahia Blanca, Comodoro Rivadavia, Iguazu, Mar del Plata, Neuquen, Resistencia, Rio Gallegos, Rosario, Salta, San Carlos de Bariloche, Santa Fe, Tucaman, and Ushuaia.

[5] Source: CRS BOOKING DATA, Calendar 1998. The two largest Argentine markets beyond Buenos Aires are Cordoba and Mendoza. Those two cities alone account for nearly 80% of the total beyond-Buenos Aires traffic. Id. With respect to both Cordoba and Mendoza, American already has potential online access on LAN Chile which operates multiple daily nonstop services to both cities from Santiago. OAG WORLDWIDE (Sept. 1999) at 1908 and 1910.

services to these 15 Argentine points would require a change-of-airport in Buenos Aires, making it unlikely that code sharing would produce any meaningful improvements in services to these points!

Thus, by code sharing on Aerolineas, American does not extend the scope of its network in Latin America, and there are no efficiency benefits to be passed through to consumers from such code sharing. The net result is that the joint applicants have utterly failed to demonstrate that their alliance produces net public benefits in circumstances where the main impact of their code share would be in existing gateway-to-gateway markets where their services overlap and there is no appreciable U.S. traffic to the new beyond gateway points in Argentina to which American would offer new online services.

B. Approval Of An American/Aerolineas Code-Share Alliance Will Not Have The Effect Of Promoting Competition In Latin America, But Will, In Fact, Have The Opposite Effect

Approval of the American/Aerolineas code share would be only the first step in an inexorable progression toward a request for antitrust immunity. The terms of the U.S./Argentina bilateral agreement as well as the established relationship between American and Aerolineas assure that progression. In granting antitrust immunity to previous alliances, the Department was

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[6] The only code-share beyond points served by Aerolineas from Ezeiza, the Buenos Aires airport used for services to/from the U.S., are Cordoba, Mendoza, and Rosario, and Aerolineas accepts no interline connections on those services. OAG WORLDWIDE (September 1999). As noted below, in Phase I of the U.S./Argentina transitional agreement (September 1, 2000-May 31, 2001), only Cordoba and one other Argentine point could be served by American under the code share.

able to conclude that such approval would foster inter-alliance competition and increase competitive benefits for the public. For example, one of the principal factors influencing the Department's decision in Northwest/KLM was its belief that:

> [O]ur Open Skies accord with the Netherlands and our approval and grant of antitrust immunity to the [Northwest/KLM] Agreement . . . [will] encourage other European countries to liberalize their aviation services so that comparable opportunities may become available to other U.S. carriers.

Order 92-11-27 at 13-14, emphasis added.

There is no reason to believe, however, that an open skies agreement with countries such as Chile or Argentina, tied as they are to the granting of antitrust immunity to American's alliance with the dominant foreign carriers in the market, will lead to "comparable opportunities . . . [becoming] available to other U.S. carriers." Id. at 14. On the contrary, because of the unique structure of U.S.-Latin America air travel markets – primarily the dominant role played by Miami as both the gateway of choice for the majority of U.S.-Latin America air travelers and the principal destination in the U.S. for most visitors from Latin America, and the fact that only American has a hub at Miami – if the Department approves the American/Aerolineas alliance, it will face the same demand by other governments throughout Latin America. In other words, if the U.S. wants an open skies agreement, it will have to extend antitrust immunity to an alliance between American and each country's national carrier. Indeed, the Department's recent agreement with Argentina was premised on the same type of agreement with Chile, which gained open skies only at the price of a merger of the two dominant carriers: American and LAN Chile.

Rather than creating opportunities for increased entry and competition throughout Latin America for other U.S. carriers, open skies under these terms will reduce competition, particularly at Miami. It would also foreclose the opportunity for other U.S. carriers to utilize code sharing and alliance agreements to extend their networks into Latin America, thereby substantially increasing network-to-network competition with American, the dominant competitor throughout the region.

In Europe, the U.S. was able to use successfully the extension of antitrust immunity to the Northwest/KLM alliance to gain open skies agreements with a majority of the member states of the European Union and to provide opportunities for other U.S. carriers to enter into global alliances with a number of KLM's European competitors. The same phenomenon is occurring in the Asia/Pacific region.[7] As the Department expected, this has created a market structure in which "these global alliances . . . [are] play[ing] a critically important role in ensuring that consumers . . . have multiple competing options to travel where they wish as inexpensively and conveniently as possible." Order 96-5-26 at 27.

A similar strategy will not work in Latin America, however. If the Department approves American's alliance with Aerolineas, that decision will have profoundly anti-competitive consequences not only in the U.S.-Argentina market but throughout Latin America.

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[7] With America's implementation of alliances with Cathay Pacific, EVA, Asiana, Japan Air Lines, and China Eastern, and expansion of its alliance with Qantas, the U.S.-Asia/Pacific market is moving in the same direction as the U.S.-Europe market, with passengers able to choose between the price and service offerings of competing alliances. Only in Latin America is there a serious risk that passengers will not have the benefit of network-to-network competition from at least one other competing alliance.

Such an approval would further reduce the opportunity for other U.S. carriers to develop regional alliances that could challenge American's market dominance, especially at Miami. If the Department approves American's alliance with Aerolineas, on top of those with LAN Chile and the TACA carriers, then major foreign competitors in other countries in Latin America will demand no less than the ability to share monopoly rents before their governments agree to open skies.[8]

If the Department intends to achieve a more pro-competitive outcome in Latin America, and to lay the groundwork for broad network-to-network competition throughout the region, as it has successfully done in Europe and the Asia/Pacific region, it must deny American's and Aerolineas' applications for approval of their alliance. By so doing, it will encourage the major foreign carriers in the region to form alliances with other U.S. carriers such as United, Continental and Delta, which are extending their online networks into Latin America. These alliances would be entirely pro-competitive and would provide the basis for the public

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[8] In the *American/LAN Chile* case, the Department attempted to analogize Latin American experience with that in Europe by citing what it deems to be inter-alliance competition in Latin America. Orders 99-4-17 at 6, n. 12 and 99-9-9 at 11-12. The inter-network Latin American competitors the Department refers to, however, involve alliances which are precluded from offering online competition to Chile via the foreign partners' homeland. Thus, the Department cites United's alliance with Varig and Delta's with Transbrasil as likely to compete with the American/LAN Chile network. In fact, neither United nor Delta can offer online services to or from Chile on their Brazilian partners that would compete with the American/LAN Chile online network because such services are not allowed under the U.S./Brazil bilateral air services agreement. The Department's conclusions as to the likelihood of inter-network competition in Latin America are, thus, based on wholly erroneous assumptions.

obtaining the benefits of network-to-network competition in U.S.-Latin America markets comparable to what is happening in Europe and Asia.'

C. American's Obvious Objective In Seeking Alliances Throughout Latin America Is To Foreclose Other U.S. Carriers From Doing So, Insulating Its Latin America Network From Additional Competition

American already has an extensive online network that extends to virtually all of the key population centers throughout Latin America, including the three largest markets in Argentina: Buenos Aires, Cordoba and Mendoza. [10] American is not dependent, therefore, upon securing alliance agreements with Latin American carriers to extend its route system into the region. Rather, American is continuing to pile up these alliances in order to ensure that its foreign partners do not form alliances with its U.S.-flag competitors that are struggling to extend their networks into Latin America to offer a meaningful competitive alternative to American.

So long as carriers such as TACA, Aviateca, Aeropostal, Lacsa, TACA de Honduras, Nica, Avianca, LAN Chile, Aerolineas Argentinas, TAM and TAM Mercosur are tied up in alliance agreements with American, they cannot form alliances with American's

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[9] In the recent *American/LAN Chile* case, the Department relies on the benefits of new U.S. carrier entry as a justification for granting antitrust immunity to American and LAN Chile as a precondition to the effectiveness of a U.S./Chile open skies agreement. Order 99-4-l 7 at 7, 17-19. However, the facts indicate otherwise. Continental, the primary new entrant to which the Department refers, has reduced its U.S.-Chile service from daily to 5 flights per week and has made a similar reduction in its U.S.-Brazil services. OAG WORLDWIDE (September 1999). Moreover, United recently reduced its services to Santiago when it suspended its onestop service between Miami and Santiago via Lima. Thus, even under the current restrictive U.S.-Chile agreement, not all of the service opportunities available to U.S. carriers are being fully utilized.

[10] See footnote 5, supra.

competitors that could challenge American's dominance in Latin America. If American is successful in foreclosing competition by United (or another U.S. carrier competitor) in Argentina and other markets in Latin America through a code-sharing arrangement with Aerolineas, or any of American's other putative regional partners, American will have insulated its U.S.-Latin America route network from competition and increased the barriers to entry into these markets.

American is the only carrier with an established online route network that links its hubs in the United States with virtually all of the countries in Latin America. However, code sharing can provide United and other U.S. carriers a cost-efficient means to extend their route networks into Central and South American markets, and thereby to initiate much broader network-to-network competition with American than would otherwise be possible. It is to forestall that competition, and to retain its dominant position in the market, that American is seeking to establish alliances throughout Latin America.

If it approves American's alliance with Aerolineas, not only will the Department have facilitated American's effort to protect its U.S.-Argentina route network from competition, but it will have sent a strong signal to other Latin American carriers that it would be competitively safer and more profitable to follow Aerolineas' course and seek an alliance with American that would ultimately be immunized from U.S. antitrust laws, rather than to continue as independent competitors, and possibly as alliance partners of other U.S. carriers looking to compete with American. Such a signal would be particularly damaging to the formation of competitive alliances coming on top of the Department's approval of the American/LAN Chile alliance.

Furthermore, if the American/Aerolineas alliance is approved despite its obvious anticompetitive consequences, the Department will itself be under substantial pressure to approve similar alliances between American and other Western Hemisphere carriers, including Aeropostal, Avianca, LAN Peru and others despite the Department of Justice's concern that such alliances pose a substantial risk to competition. If the Department approves the American/Aerolineas alliance, it will be hard put to turn down other American alliance applications. With each subsequent alliance, American's regional dominance will increase yet more, the cost of entry will rise, and the opportunity for United and other U.S. carriers to use code sharing as a means to provide a competitive counter-weight to American will diminish.

Indeed, American's latest move in solidifying its position through alliances represents a substantial escalation in its efforts. This involves American's attempts to eliminate inter-alliance competition in Canadian as well as Latin American markets. In Canada, unlike Latin America, however, American and its partner, Canadian Airlines International, have faced real network competition from the Air Canada/United alliance. Now American is stepping up its campaign for dominance by participating in a proposed acquisition of Air Canada that would end that carrier's alliance with United, and eliminate United's ability to support its network of U.S.-South America services (including Miami-South America routes) with feed from Air Canada's network in Canada. The Department should not cooperate in this effort but should act decisively in the case of the proposed American/Aerolineas code share to bring a halt to American's campaign.

D. Approval Of The American/Aerolineas Alliance Will Increase American's Domination Of The Strategic Miami Gateway

American's control of U.S.-Latin America air travel markets depends on its dominant position at its Miami hub where American alone operates 86% of the total U.S. carrier nonstop seats between Miami and Central and South America. *Exhibit UA-3.* Miami is the predominant U.S. gateway to Argentina, just as it is to the rest of Latin America, with nearly 70 percent of total U.S.-Argentina passenger traffic using the Miami gateway. *Exhibit UA-4.* And, local Miami-Buenos Aires passengers constitute nearly 50% of total U.S.-Argentina demand. *Exhibit UA-5*.[11]

A decision by the Department to approve an alliance between American and Aerolineas would lead directly to yet another substantial reduction in competition at the key Miami gateway. As noted previously, in view of American's ownership interest in Aerolineas and the appointment of that carrier's senior management, further cooperation in the form of code

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[11] Local Miami demand to Buenos Aires as a percent of total U.S. demand for services to that point is based on CRS booking data for calendar year 1998. In the *American/LAN Chile* case, the Department sought to understate the degree of Miami's dominance as a source of local traffic in an effort to avoid the issues raised by United. E.g., Order 99-4-l 7 at 18, n.29 ("Only 15 percent of the total U.S.-Chile passenger traffic were [sic] to/from American's Miami gateway. Source: U.S. CARRIER O&D SURVEY DATA.") and Order 99-9-9 at 13 ("Our reexamination of the U.S. carrier O&D Survey Data bearing on this issue shows that Miami-Santiago local passengers constitute approximately 20 percent of the total U.S.-Chile market.") The O&D Survey, however, on which the Department relied, excludes any Miami-Santiago local traffic booked on foreign carriers and is a wholly inadequate source for determining gateway or industry market shares in U.S. international markets where foreign carriers are operating. The CRS booking data, on the other hand, include foreign carrier bookings and are a far more accurate source for such market share data.

sharing between these carriers will eliminate their remaining competition, particularly where all of their gateway-to-gateway routes overlap.

Miami's leading role as a U.S. gateway to Latin America is due both to the high level of local demand in Miami-Latin America city-pair markets and the city's unique geographic location as the most direct gateway to most of Latin America from the Eastern and Central regions of the United States. Because of Miami's unique position as gateway and destination for such a large portion of U.S.-Latin America traffic, maintaining competition in Miami-Latin America city pairs is far more important than at other U.S. points where there is less local demand.

Unlike other U.S. international markets, there is no real alternative to Miami as a gateway to Latin America. In other international markets, there is substantial inter-gateway competition for behind gateway passengers, and local O&D demand is not concentrated at a single gateway. For example, nonstop services to Europe from the U.S. operate through a range of gateways, all of which are hubs for one or more carriers, including Newark and Cleveland (Continental), JFK (American/Delta), Pittsburgh and Philadelphia (US Airways), Washington Dulles (United), Atlanta (Delta), Chicago (United/American), Cincinnati (Delta) and Dallas/Ft. Worth (American). All of these hubs compete with each other for passengers traveling between U.S. points at and behind these gateways and points throughout Europe.

In Latin America, however, that is not the case. Because of Miami's unique geographic location, as well as the large and affluent Spanish speaking population living in South Florida, Miami controls both the flow and the source of traffic to virtually all of Latin America.

Moreover, Miami has become the primary business center for this region, with banking and other regional businesses located there. Because of this, local demand in U.S.-Latin America air travel markets is concentrated at a single U.S. destination, Miami, to a degree not matched by any other inter-continental market. And the mere signing of an open skies agreement with Argentina (or any other country in Latin America) will not change the structural nature of demand in this market.[12]

Because of Miami's unique status as both the principal destination and leading gateway for Latin American travel, any reduction in competition on Miami-Latin America city-pair routes has a proportionally greater effect on the traveling public than would, for example, a similar reduction in any individual U.S.-Europe city-pair market. Maintaining competition at Miami is complicated, however, by the fact that American alone maintains a hub at Miami and dominates overall traffic at that strategic gateway. This domination extends not only to the international routes from Miami South into Latin America, but also the routes from Miami North to other points in the U.S., as well as to points in Canada and Europe.

American operates more capacity at Miami than all other U.S. carriers combined. *Exhibit UA-3.* In Miami-South markets, American controls 86 percent of U.S. carrier departures. Id. In many of these markets, particularly to South America, American's attainment of its

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[12] This is amply demonstrated by experience in U.S.-Central American markets where local demand is also heavily concentrated at Miami despite the absence of any governmental barriers to entry into these markets. As noted below, the approval of code shares between American and the TACA carriers has resulted in a deterioration of competition at the key Miami gateway notwithstanding the existence of open skies agreements.

dominant status has been aided by the fact that entry by U.S. carriers is limited by various restrictive bilateral agreements. In the Miami-North markets, American accounts for over half of the total service measured by either departures or seats. Id.

With this degree of market concentration, Miami truly is a fortress hub at which American is uniquely situated to fend off competition. With that goal in mind, American has entered into alliances not only with Aerolineas, but with the six carriers in the TACA Group, TAM, TAM Mercosur, Avianca, Aeropostal, and LAN Chile and will no doubt soon seek to add LAN Chile's Peruvian subsidiary (LAN Peru) to that list. With the exception of the Brazilian carrier, TAM, all of these alliances are pre-emptive in nature and intended principally to assure that no other U.S. carrier can use cooperation with these carriers to enhance its competitive presence in Latin America in general or at Miami in particular.

Because American already has achieved a dominant position in U.S.-Latin America air travel markets, it should not be allowed in effect to merge with its major foreign-flag competitors in these markets. By acquiring its foreign-flag competition, American forecloses the ability of its U.S.-flag competitors to establish alliances with these foreign carriers that would enable them to achieve economies of scope and scale comparable to those which American already enjoys on its services to Latin America from its Miami hub – economies that would allow American's competitors to compete on a more level playing field with American in these markets.

E. American's Motive In Entering Into An Alliance With Aerolineas Is To Foreclose Other U.S. Carriers From Using Such An Alliance To Challenge American's Dominant Position In Latin America

As noted above, American gains no access to valuable new markets in South America beyond Buenos Aires through an alliance with Aerolineas. Similarly, the records in the *LAN Chile* and *TACA* proceedings show conclusively that American gained no meaningful access to beyond points in Latin America through its proposed alliance with those carriers. See also *Comments of United,* dated March 13, 1998 in Docket OST-97-3285 at 1 O-12; *Answer of United,* dated June 2, 1997, in Docket OST-96-1700 at 13-l 5. American, therefore, is not using cooperation with Aerolineas, any more than with LAN Chile or the TACA Group, to extend its own online network into significant markets in Latin America that the carrier does not already serve on its own.

Why then is American willing to provide Aerolineas, LAN Chile and the TACA Group carriers access to its substantial feed network north of Miami? The record in the *LAN Chile* and *TACA* cases show that American is willing to grant these carriers such access in order to preclude other U.S. carriers from entering into alliances with them. Such alliances would make both the foreign carriers and their U.S. partners more competitive with American at Miami, a result American desperately wants to avoid.

American's motives in this case are no different. By agreeing to an alliance with Aerolineas, American trades off the access it grants Aerolineas to American's network north of Miami against the benefits it gains from foreclosing other U.S. carriers' ability to secure an alliance with Aerolineas that might threaten American's dominance at Miami.

In the case of Aerolineas, accepting an alliance with American, in addition to expanding its network, allows it to avoid having to continue competing with American, the dominant carrier in the market, for U.S.-Argentina traffic. From Aerolineas' standpoint, if it can secure an alliance with American, it will have no need (or desire) to enter into an alliance with another U.S. carrier, effectively sealing for American the benefit of its $25 million bargain.

United is the only carrier that has been seeking to develop a network of services at Miami that could serve as a competitive counter-weight to the network American already has in place in all major (and many minor) Miami-Latin America markets. However, if the Department allows American to enter into alliance agreements with most of the major foreign carriers in Latin America, United's ability to operate profitably and efficiently a network of Miami-Latin America services for local passengers will be seriously eroded.

From Aerolineas' standpoint, effectively selling out to American makes more economic sense than would entering into an alliance with another U.S. carrier. The reason is that by selling out to American, it will be able to share in the monopoly rents American will be able to earn if American is successful in maintaining its dominant status. On the other hand, if Aerolineas enters into an alliance with another U.S. carrier, it would merely be one participant in a competitive market, an outcome that would certainly be less profitable than joining with American to achieve a monopoly. Because American has a uniquely dominant hub at Miami, the calculus will always be the same for every carrier in Latin America: merge with American and share in the monopoly rents American hopes to gain on its Miami-Latin America services, or

enter into an alliance with another U.S.-flag carrier to achieve a second efficient network of services that will compete with American between Miami and Latin America.

A decision by the Department to approve the American/Aerolineas alliance will facilitate the maintenance of a Miami-Latin America market structure in which it is impossible for another carrier such as United to gain alliance partners that would enable it to achieve minimum efficient scale on its Miami-Latin America services that it can use to challenge profitably American's domination of these markets. In such event, United may have no choice but to exit these markets and assign its aircraft resources to other global markets with greater profit potential.[13]

The issue the Department must resolve in this proceeding is how to preserve meaningful competition in Miami-Latin America city-pair markets where American is moving to implement alliance agreements with the foreign-flag carriers that are its principal nonstop competitors. This is an issue that cannot be resolved by relying on conclusion of an open skies agreement with Argentina (or with any other government in Latin America). Such agreements do not assure continued competition if they come at the cost of allowing American and its principal foreign flag competitors to join forces and achieve monopolies.

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[13] If United were forced to exit the market solely because of American's superior competitive performance, United's exit would be of no governmental concern. However, if United is forced to exit because of a decision by the Department that forecloses its ability to establish a second efficient competing network through alliances with Aerolineas, TACA, LAN Chile and other Latin American carriers, the Department will have failed to carry out its responsibility under the statute to exercise its administrative discretion to promote competition and serve the public interest.

So long as these foreign carriers are free to enter into alliances with American, it would be economically irrational for them to forego monopoly returns and cooperate with any of American's U.S.-flag competitors. In the case of Aerolineas, American's ability to influence its management through its ownership interest and ability to appoint key personnel loyal to American further increase the risk that Aerolineas will not do anything to displease American. By approving American's multiple overlapping alliance agreements in Latin America, the Department will effectively be denying American's U.S.-flag competitors the ability to utilize code sharing and alliance agreements with these foreign carriers to create a U.S.-Latin America market structure in which there is broad-scale network-to-network competition between competing alliances.

F. The Anticompetitive Results Of Alliances Such As American Continues To Propose Are Now Demonstrable In The U.S.-Central America Markets

Experience in Miami-Central America city pairs, since the Department approved American's code-share alliance with the TACA Group of carriers in 1998, confirms that this alliance has led to a reduction in competition in those markets, just as United, the Department of Justice, and other carriers had predicted in opposing it. For example, in April 1998, there were a total of 207 weekly nonstop frequencies scheduled between Miami and the nine principal destinations in Central America. Based on schedules being held out in CRS systems, by April of next year, the total number of weekly scheduled nonstop flights in these Miami-Central America city pairs will have decreased by nearly 13%. While the total number of weekly frequencies and seats available in Miami-Central America nonstop city pairs is declining, American's share of the

service available is increasing; as of next April, American will hold a nearly 60% share of the service available in these city pairs, compared to 54% in April 1998.

The Department's decision to approve the American/TACA alliance prevented the development of a second viable network in Miami-Central America city pairs that could compete with American for local traffic. Not surprisingly, the result has been a substantial increase in fares in these city pairs for local passengers.[14] Even though the open skies agreements in place in Central America have made it possible for Continental and Delta to enter markets in Central America from other gateways, those services offer no competition to American/TACA for the large number of Miami-Central America local passengers, due to Miami's unique geographic location. And, Miami-Central America city pairs continue to be the largest U.S.-Central America city pairs by a considerable margin."

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[14] For example, a review of the lowest available roundtrip fares published in the Miami-San Jose, Guatemala City, Panama City, and San Salvador markets shows that between June 1998 and June 1999, fares rose by 158%, 138%, 118%, and 213%, respectively. Fares in other Miami-Central America city pairs also rose, although by a lesser amount. For example, the lowest published roundtrip fare between Miami and Belize rose by 22%; between Miami and Managua, the increase was 39%.

[15] In its recent order granting antitrust immunity to the American LAN/Chile alliance, the Department concluded that there was no problem with competition in the U.S.-Central America markets. This was based on an increase in capacity in city pairs other than Miami where Delta and Continental added service. The Department went on to claim that this competition was perceived to have had a positive effect in the Miami market where "average fares" in certain markets had decreased. Order 99-9-9 at 12-l 3. The Department has not released the data on which it based these conclusions, and the fact remains that the actual fares in the marketplace for Miami-Central America traffic this summer have increased while the seats available have decreased and American's dominance has grown.

The structural advantages American enjoys in Miami-Central America city pairs that prevent other carriers from challenging its dominant position in those markets are also present in the Miami-Buenos Aires market. If the Department, nonetheless, proceeds to approve the American/Aerolineas alliance, the end result will be the same as it has been in Central America: no carrier will be able to develop a viable second network linking Miami to Buenos Aires that can compete with American for local Miami-Buenos Aires passengers, insulating American's service in the market from effective network competition. Unless the Department intends to repeat the Miami-Central America experience in Argentina, it should not approve the American/Aerolineas alliance. [16]

G. *Approval Of The American/Aerolineas Alliance Is Not Mandated By The Terms Of The Recent U.S./Argentina Agreement*

American and Aerolineas argue (Joint Application in Docket OST-99-6227 at 2) that approval of their alliance is consistent with the terms of the recent U.S./Argentina bilateral air services agreement. Under that agreement, designated carriers of each side may enter into code-share arrangements with each other provided that such arrangements "meet the requirements normally applied." One of the requirements "normally applied" by the Department in approving such arrangements is a finding that the arrangement be in the public interest.

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[16] In the pending *New U.S. -Argentina Combination Service Opportunities* proceeding, Docket OST-99-62 10, none of the new services proposed would offer competition for local Miami-Buenos Aires traffic.

Because of the anticompetitive impact any approval of the American/Aerolineas arrangement would have, the Department cannot make that finding in this instance.

American and Aerolineas, with the help of the Argentine government, anticipated this problem. In an effort to induce the Department to approve their code-share alliance notwithstanding its anticompetitive impact, they tied such approval to the nominal increase in U.S.-Argentina frequencies for U.S. carriers permitted under the interim agreement. See discussion below.

The Department is not, however, bound to approve this particular code-share arrangement in order to gain access to additional interim frequencies or, indeed, gain ultimate approval of an open skies agreement. Once Aerolineas and its government become aware that the U.S. will not approve an alliance between the dominant U.S.-Argentina carriers, Aerolineas will have to seek a new strategy to gain a U.S. alliance partner.

If that results in the need for further negotiation or delays implementation of the present agreement, the procompetitive result would be well worth it. Such action will send a signal not only to Aerolineas but to other Latin American carriers that the Department will uphold its responsibilities to promote competition and uphold the public interest rather than simply pursuing pro forma open skies agreements.

H. To Assure A Fair And Unbiased Decision, The DOT Officials Responsible For Concluding The Recent U.S./Argentina MOC Should Recuse Themselves From Any Participation In The Decisionmaking Process

The recent amendments to the U.S./Argentina bilateral air services agreement were negotiated with full knowledge that American had acquired Aerolineas and that the two carriers had concluded a cooperation agreement. The government of Argentina insisted that any expansion of services by other carriers must be explicitly tied to implementation of the American/Aerolineas code-share agreement. Indeed, the U.S./Argentina agreement is even more explicit in this regard than was that between the U.S. and Chile, which provided the premise for DOT's immunizing the American/LAN Chile alliance from the antitrust laws.

In this case, the U.S. delegation agreed that, even while anticompetitive capacity limits continued during a transition to open skies, there would be no expansion of frequencies under such capacity limits unless and until DOT approved the instant code-share arrangements between American and Aerolineas on terms acceptable to Aerolineas and its government. Specifically, the August 12, 1999, MOC contains an unprecedented undertaking that the "U.S. Department of Transportation would **endeavor to approve** applications by airlines of Argentina and the United States to code share together" at least 90 days before additional frequencies become available. (MOC at 1. Emphasis supplied.) The MOC goes on to recite that both delegations understood that the new frequencies "will not be brought into force automatically" if the airlines filed their code-share applications on or before September 15, 1999. In a side letter, also dated August 12, 1999, the government of Argentina states that it will agree to implement the frequency increases "only upon approval by the U.S. Department of Transportation, under

conditions acceptable to the Argentine Government, of a code-share application submitted by an Argentine airline with a U.S. partner." Letter of Roque Benjamin Fernandez, dated September 12, 1999.[17]

Given the unqualified written commitment made in the MOC by the members of the U.S. delegation to approve the code-share applications submitted by American and Aerolineas, there is now an appearance that the Department's processes have been compromised through a prejudgment of the issues in this proceeding. In the unique circumstances of this proceeding, and to avoid any appearance of impropriety, United respectfully requests those officials of the Department of Transportation who were members of the U.S. delegation in the bilateral negotiations leading up to the August 12, 1999 MOC to recuse themselves from any decisionmaking role regarding the instant code-share applications. Such action will serve to preserve the integrity of the Department's processes in the unprecedented circumstances raised by the apparent commitment contained in the MOC.

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[17] In addition, the open skies agreement that is intended to take effect as early as June 1, 2003, will not be allowed to do so unless American and Aerolineas are granted antitrust immunity to expand their cooperation and cease to be competitors. Again, the agreed open skies provisions will not become effective automatically if a U.S. and Argentine carrier file a request for antitrust immunity on or before June 1, 2002. If such a request is filed, the open skies provisions will become effective only if the U.S. Department of Transportation approves, under conditions acceptable to Argentina, an application for antitrust immunity submitted by an Argentine airline and a U.S. partner. With respect to such an application, the MOC notes that any decision by DOT would be "the subject of an independent regulatory process that cannot be prejudged." MOC at 4. No such reservation appears in the MOC with respect to the code-share applications which the U.S. delegation agreed that DOT would "endeavor to approve" prior to the beginning of Phase 1, although as noted above, the text of the code-sharing provision in the agreement itself states that such arrangements must "meet the requirements normally applied."

Such recusal would also be consistent with a report recently released by a committee of the Transportation Research Board ("TRB"). That report raises questions about the role of competition policy in DOT's approval of airline alliances. The report questions, in particular, DOT's ability to assess objectively the competitive effects of requests of a carrier alliance in cases where a foreign government has conditioned the acceptance of an open skies agreement on the grant of immunity to an alliance between its national carrier and a U.S. partner, just as Argentina did in the recently concluded negotiations not only with respect to open skies but also with respect to increases of capacity prior to open skies.[18]

Because of the position taken by the government of Argentina, this appears to be precisely the type of case cited in the committee report where the committee is concerned about the objectivity of DOT's competition analyses. To avoid any appearance of the lack of objectivity, DOT needs to demonstrate persuasively on the record in this proceeding that it has objectively reviewed the risks to competition posed by the grant of approval for code sharing by American and Aerolineas, and that its decision has not been unduly influenced by Argentina's insistence that increased capacity is contingent upon the grant of such approval.

The surest way for the Department to demonstrate that such concerns are unfounded is to show that its decisionmakers did not participate in the conclusion of the agreement approving Argentina's conditions and that those decisionmakers are prepared to act consistently with advice the Department has received from DOJ. It must be clear that code-share

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[18] Transportation Research Board, National Research Council, *Entry and Competition In the US. Airline Industry: Issues and Opportunities* (July 1999) pp. 4-I 4, 15.

approval is not being granted solely to fulfill the undertaking made in the MOC with Argentina should DOJ recommend against such approval.

Indeed, this unique situation raises such serious questions about fundamental procedural fairness that recusal is advisable. For example, prior involvement as counsel in a case demands recusal from ruling on it. *American Gen. Ins. Co. v. FTC, 589* F.2d 462 (9th Cir. *1979).* In *Cinderella Career & Finishing Sch. Inc. v. FTC, 425* F.2d 583 (D.C. Cir. 1970), the FTC Chairman participated in an investigation of Cinderella for false advertising even though he had earlier made a speech commenting on the case and strongly indicating that he thought Cinderella was guilty as charged. The danger of allowing officials to participate in cases where they have already indicated a position is clear. The prior involvement "may have the effect of entrenching the [officials] in a position which [they] have publicly stated, making it difficult, if not impossible for [them] to reach a different conclusion in the event they deem it necessary to do so after consideration of the record." *Cinderella*, at 590. The Department officials here were involved in difficult and complicated negotiations and were under considerable pressure to reach an agreement. An independent inquiry involving those same officials after such an experience and only a couple of months later is extremely unlikely. Therefore, fundamental fairness requires that those officials involved in negotiating the MOC with Argentina not take any part in deciding whether this code-share agreement is in the public interest.

While agency officials are given deference on recusal decisions, "recognition of [an] institutional bias claim is appropriate when structural infirmities within [the] decisionmaking body render it biased as a matter of law." *NEC Corp. v. U.S. Dept. of*

Commerce, 978 F.Supp. 3 14 (Ct. Int'l Trade 1997). Further, the Supreme Court has long recognized that when "review of an initial decision is mandated, the decisionmaker must be other than the one who made the decision under review" to ensure fairness to all parties. See *Witherow v. Larkin*, 421 U.S. *35, 58* n.25 (1975). *See* also *Gagnon v. Scarpelli,* 411 U.S. 778 (1973), *Morrissey v. Brewer,* 408 U.S. 471 (1972). Officials of the Department of Transportation participated in the negotiation of an agreement with Argentina knowing full well that Argentina required approval of the American/Aerolineas code-share agreement. However, Argentinian expectations should not determine whether such code sharing is in the public interest. The integrity of the decisionmaking process requires an impartial investigation that allows for all sides to introduce new evidence to an independent and impartial decisionmaking body. The involvement of the individuals that took part in the negotiations would foreclose fair and effective consideration of that issue. This is clearly a case where the Department officials appear to have "demonstrably made up [their] minds about important and specific factual questions and [to be] impervious to contrary evidence." *United Steelworkers of America v. Marshall, 647* F.2d 1189, 1209 (D.C. Cir. 1980), cert. denied, 453 U.S. 913 (198 1). Those officials involved in the negotiations should, in this instance, allow others to determine whether the American/Aerolineas code-share agreement is in the public interest."

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[19] United also believes that in future bilateral negotiations and related licensing proceedings, there should be a clear separation of functions between the negotiating and licensing staffs. A policy should be adopted to provide clear guidance to negotiating and decisionmaking personnel as to how these functions are to be separated.

I. Even If The Department Were Prepared To Approve An American/Aerolineas Arrangement, The Arrangement In The Form Proposed Cannot Be Approved

Even if, contrary to the foregoing, the Department were to decide to approve the American/Aerolineas applications, it should not immediately grant all of the extensive authorities American and Aerolineas request. American and Aerolineas seek authorities, which, by the terms of the bilateral agreement, cannot be operated for years to come. Some of those authorities involve points specified in the bilaterally-agreed route, but others involve points yet to be selected by either the government of the United States or the government of Argentina. The joint application seeks to make the Department a party to a scheme to pre-empt the choices by the two governments of both the optional gateway and code-share only points available under the bilateral agreement. See *Exhibit UA-6.*

Both the gateway and code-share-only points should be selected by the governments. The bilateral agreement specifies procedures for the selection process and provides the governments with the option of changing any point by giving 60 days written notice to the other government. See footnotes to Section I.B. 1 and 2 of Annex I of the agreement. No such selections have been made. At least with respect to the Argentine points to be served by U.S. carriers, the Department should not make such determinations now for a transition period that will not even begin until nearly a year from now and will continue for at least the next three years after that. American and Aerolineas may terminate their alliance or other U.S. carriers may form alliances with Argentine or third-country carriers in that period. Others should have an opportunity to propose the points they wish to serve.

In the past, the Department has been careful not to foreclose future possibilities – especially future possibilities involving expanded consumer options and increased competition – and should not now make itself a party to the American/Aerolineas attempt to preempt the choices the bilateral agreement promises for the future. The Department has, for example, withheld effective authority for optional points not yet selected by the government of the carrier requesting the authorization. See, e.g., Notices of Action Taken dated (July 1, 1997) in Dockets OST-97-2358 (United/VARIG) and OST-97-2419 (American/TAM), deferring full and final action on code-sharing applications until the government of Brazil notified the government of the United States of its selection of the optional code-share-only points available under the applicable bilateral agreement. The same caution would be required here if the Department decides to consider the American/Aerolineas applications.

To allow American and Aerolineas, **at this point,** to occupy the entire field, and to choose for themselves and then secure for themselves **all** code sharing rights available throughout the full transitional term of the bilateral agreement would unduly and unnecessarily harm competition in this market. It would deny to any U.S. carrier other than American or any Argentine carrier other than Aerolineas the opportunity even to request its government to make available to it one of the key benefits of the agreement – selection of additional service points. It would exclude competing carriers, including competing code-sharing partners, from participation in the limited benefits of the agreement by depriving them of the opportunity to plan their own operations. All that should be considered at this time is the code share involving the first phase

of the transitional agreement, which would involve only one new point on each side to be selected at the option of the governments.

Approval of code-share authority for the Argentine points named by American/Aerolineas also raises issues regarding the public benefits their proposed services would provide. Only flights to Cordoba, Rosario and Mendoza connect at Buenos Aires' international Ministro Pistarini Airport (Ezeiza) and even those flights are restricted by Aerolineas to "online connecting traffic only." Thus, the traditional benefits of code sharing – seamless connections to an expanded number of points, ease of passenger flow and decreased travel time – are simply not available for the Argentine cities listed for alleged on-line code-share service under this agreement. Aerolineas flights available for interline connections between these cities and Buenos Aires all use Aeroparque Airport, making the prospect of improved service for traffic between these points and the U.S. unlikely. No explanation is even offered as to how these airlines plan to offer code-share connections between these two airports.[20]

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[20] The services operated by Aerolineas between Ezeiza and Cordoba, Mendoza and Rosario are restricted to "online connecting traffic only" by CRS notation. See, e.g., OAG WORLDWIDE (September 1999) at 593. Because of this restriction, United is unable to offer interline connections on Aerolineas' services between Ezeiza and these three Argentine interior points. United has a full interline traffic and baggage agreement with Aerolineas but, notwithstanding that agreement, United is not able to offer interline service to these three points via Ezeiza. It is not clear from their pleadings whether Aerolineas intends to allow American to construct interline connections on a code-share basis to Cordoba, Mendoza and Rosario via Ezeiza on Aerolineas' online-restricted services. Certainly, if the Department were to permit Aerolineas to code share for American on these flights, it should insist that interline connections also be made available by Aerolineas on a nondiscriminatory basis on these same flights to other U.S. carriers serving Ezeiza with which Aerolineas has interline agreements.

American and Aerolineas have not proposed any new gateway-to-gateway services but are only code sharing on their overlapping Miami-Buenos Aires and New York-Buenos Aires services. Although their contracts appear to contemplate services to the Dallas/Ft. Worth gateway, no such services are specifically proposed. American lacks the frequencies to add services at a new gateway such as Dallas/Ft. Worth without transferring existing frequencies. While American might be willing to do that if Aerolineas would replace services abandoned by American (e.g., at Miami), such concerted action would be unfair to other U.S. carriers and communities, which lack the flexibility to add service at new gateways.[21] Such actions would also appear to be contrary to the conditions imposed by the Department of Justice when it approved American's acquisition of Aerolineas.[22]

Indeed, the Department should not accept any collusive action by these two carriers to add services carrying American's code at new or even existing gateways using dormant or newly available Argentine carrier frequencies unless the carriers are willing to make the same number of frequencies available to U.S. carriers as they are adding through their joint efforts. Such new U.S. carrier frequencies would be made available by transferring from American to the Department for reallocation to another U.S. carrier the same number of U.S. carrier frequencies which American and Aerolineas add on joint services using Argentine-carrier

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[21] In United's case, it could not move frequencies to a new gateway without sacrificing existing services.

[22] See DOJ PRESS RELEASE, supra, in which DOJ said that it "reserves the right to challenge the transaction in the future if it appears that American will have the ability to influence Aerolineas' competitive decisions affecting U.S. markets. . ."

frequencies. Only by transferring such frequencies from American can the Department avoid unfair competition against U.S. carriers which do not have access to the large pool of unused frequencies held by Argentina.

In any event, there are no compelling public benefits discernible from the code sharing proposed under these applications while there is, on the other hand, obvious competitive harm that would occur. On balance, the Department should not approve these applications, at least in their present form and on the present record.

J. The Department Cannot Proceed With Consideration Of The American/Aerolineas Code-Share Alliance Without Directing The Parties To Submit Additional Information

At a minimum, before proceeding with consideration of these applications, the Department should require of American and Aerolineas information comparable to that required from American and TACA in Docket OST-96- 1700. It is only on the basis of a record made complete with such information that an unbiased Departmental decisionmaker can make an independent, impartial assessment of the public interest. There is no doubt that the American and Aerolineas applications, like the American/TACA applications, "raise competitive issues requiring further examination," due to the position these carriers hold in the U.S.-Argentina market. See Order 96-l l-12 at 6. Moreover, American's acquisition of an interest in Aerolineas as well as its investment in that company and appointment of its CEO and COO raise issues relating to American's degree of influence over Aerolineas' management.

Supplemental information such as that required in the *American/TACA* proceeding is similarly "essential" here "for a thorough assessment of the proposed arrangements." Order 96-9-l 5 at 3. United believes, consistent with its position with respect to the American/TACA arrangements, that "any information concerning the market shares projected by American [and Aerolineas] pursuant to their cooperation under this alliance is relevant and central to the issues in this proceeding. . . ." Order 97-5-4 at 5. It is only with such information that the Department can obtain an overview of American's overall Latin American strategy, via its Western Hemisphere alliances and code-sharing agreements with LAN Chile, the six carriers of the TACA group, TAM, TAM Mercosur, Avianca, Aeropostal, Canadian International and Iberia.

This is not "doomsday rhetoric" on the part of United. It is merely a reflection of the stated concerns of the competition authorities of the United States. The Department of Justice has already described its concerns as "antitrust objections" to the prospect of American "influenc[ing] competitive decisions by Aerolineas." See DOJ PRESS RELEASE, July 8, 1998. When DOJ reached its accommodation with American last year, it specifically noted:

> American and Aerolineas have also been negotiating a "code-share" agreement that would permit the carriers to market seats on one another. The Department . . . has concerns about that agreement and . . . remains free to challenge the agreement under the antitrust laws.

The code-sharing arrangement submitted by American and Aerolineas, which if put into effect, would affect competition in overlapping markets which account for over 70 percent of the total U.S.-Argentina traffic, warrants the highest level of scrutiny possible by disinterested government officials. United, therefore, urges the Department, in light of the issues

raised by the American/Aerolineas applications, to require the applicants to file in these dockets the following information which is based on the information required in the *American/TACA* case:

PLANS AND AGREEMENTS

1. To the extent not already submitted, complete copies of all "agreements/arrangements," including marketing and any other cooperative agreements/arrangements, that involve the creation or implementation of the proposed code-sharing relationship and related relationships between American and Aerolineas.

2. Separate description of each party's strategic objectives in forming the code-share agreements/arrangements.

3. All studies, reports, and analyses, dated or produced within the last three years, that discuss route development, internal expansion, service expansion, or marketing plans or strategies, concerning air services between the U.S. and Argentina and air services behind and beyond the U.S. and Argentina. This should include all studies, reports, and analyses, dated or produced within the last three years related to choices for code-shared flights as reflected in Annex B of the Codeshare Agreement dated January 6, 1998, as amended, and changes in those choices.

4. All studies, surveys, analyses and reports, dated or produced within the past three years, which were prepared by or for any officer, director, or individual exercising similar functions that evaluate or analyze the subject of potential code sharing or other cooperative agreements/arrangements between Aerolineas and any U.S. carriers.

5. All studies, surveys, analyses and reports, dated or produced within the last three years, which were prepared by or for any officer, director, or individual exercising similar functions for the purpose of evaluating or analyzing the proposed agreements/arrangements with respect to market shares, competition, competitors, fares, markets, potential for traffic growth or expansion into geographic markets.

6. All documents that discuss any service or operational changes planned, anticipated or considered as a result of the proposed agreements/arrangements.

ROUTES

7. A list of all routes that each of the parties is currently serving, and of routes each would serve if the agreements/arrangements between American and Aerolineas are approved. Additionally, fully identify all of the parties' current code-share/alliance arrangements and their route systems and any plans or proposals to alter such arrangements, or route systems if the American/Aerolineas alliance is approved.

8. A list of all "overlap" markets now existing between American and the Aerolineas Group, including markets served in combination with other code-share or marketing partners (specifically, include all gateway-to-gateway, all nonstop, and all connecting markets). A list of any non-overlap markets.

9. A list of all of the new markets that would receive "first on-line service" as a result of the alliance; estimates of the number of passengers that would benefit from this new "on-line service" and estimates of how many of these passengers would be U.S.-originating travelers. Explain how the alliance proposes to connect passengers for interior Argentine points at Buenos Aires.

SERVICES

10. A discussion of the level of service that each carrier party intends to provide in the U.S.-Argentina market including behind- and beyond-gateway markets.

11. A discussion of significant service and equipment changes that the parties would expect to make within four years of DOT approval of the proposed alliance.

TRAFFIC

12. An analysis of how much traffic each code-share partner carries in each "overlap" market, differentiating between local gateway-to-gateway traffic, behind traffic, and beyond traffic.

PUBLIC INTEREST AND COMPETITION

13. A discussion of whether and how the alliance is consistent with the public interest, and what public benefits are expected to result from the agreements/arrangements.

14. A discussion of how the agreements/arrangements would affect important international aviation policy objectives of the United States.

15. A discussion of the agreements'/arrangements' impact on both U.S. domestic and international airline competition.

16. Forecast information and data concerning any traffic diversion anticipated from other U.S. flag carriers should the agreements/arrangements be approved.

17. Complete information describing the extent to which airport facilities, including, but not limited to, gates, counter space, and ground-handling, are or will be made available to any U.S. airline desiring to begin or increase service at Argentina airports.

18. All studies, surveys, analyses, dated or produced within the last three years, which discuss airline competition in any U.S.-Argentina market.

19. All studies, surveys, analyses, and reports, dated or produced within the last three years, which discuss the impact on American Airlines of any of the code-sharing relationships between Continental Airlines, Delta Air Lines or United Air Lines and any Latin American carrier ("Latin American carrier" means all carriers domiciled in either Central America or South America) including the impact of any such relationship on American Airlines' ability to compete for traffic in any U.S.-Latin American market.

20. All studies, surveys, analyses, and reports that discuss the impact on Continental Airlines, Delta Air Lines or United Air Lines of the proposed code-sharing relationships between American Airlines and Aerolineas, LAN Chile, any of the airlines of the TACA group, Avianca, Aeropostal, TAM Mercosur or TAM.

21. An assessment of availability of commercially usable slots at the Aerolineas' homeland international gateway airports for U.S. airlines, particularly new entrants.

    a. Detailed analysis of slot and gate allocations by each airline serving the foreign homeland gateway international airports.

    b. Description of the slot allocation procedures for homeland gateway international airports.

    c. Any other evidence of meaningful access to homeland gateway international airports for U.S. airlines.

22. Marketing agreements and any other cooperative agreements/arrangements dated or produced within the past three years involving American or SABRE and Aerolineas relating to participation in U.S. computer reservations systems; and all studies, surveys, analyses, and reports discussing a) the impact of the proposed code-sharing and

cooperative arrangement on the marketing of computer reservation systems or on competition between or among Sabre, Worldspan, Galileo and Amadeus, and b) the use of the proposed code-sharing and cooperative arrangements for promoting the marketing of Sabre in South America.

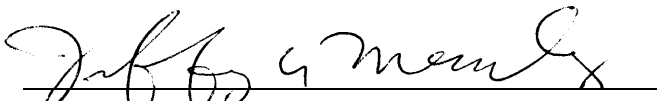
23. All contracts or agreements between or among American, Aerolineas, Diego Cousio and David Cush relating to the employment of these two individuals by Aerolineas; provide an explanation of any relationship these individuals continue to have with American.

24. A list of all former employees of AMR, American, or Sabre who are currently employed by Aerolineas, their titles, responsibilities and the date on which their employment commenced. A list of all former employees of Aerolineas who are currently employees of AMR, American or Sabre, their titles, responsibilities and the date on which their employment commenced.

III. CONCLUSION

On the basis of the foregoing, United urges the Department to deny the applications of American and Aerolineas for authority to code share. In the alternative, and at the very least, United urges the Department to require American and Aerolineas to submit additional information comparable to that required in the similar case of the American/TACA Group code-share before proceeding to any further consideration of these applications.

Respectfully submitted,



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UNITED AIR LINES, INC.

DATED: September 29, 1999

AMERICAN OPERATES MORE SERVICE TO LATIN AMERICA THAN ALL OF ITS U.S. COMPETITORS COMBINED

SEPTEMBER 1999

	Departures	% of Departures	Seats	% of Seats
		U.S.-Argentina		
American Airlines	42	50%	10,094	48%
Other U.S. Carriers	42	50%	11,060	52%
TOTAL U.S. Carriers	84	100%	21,154	100%
		U.S.-South America		
American Airlines	428	57%	85,068	56%
Other U.S. Carriers	328	43%	65,604	44%
TOTAL U.S. Carriers	756	100%	150,672	100%
		U.S.-Central America		
American Airlines	216	46%	36,152	49%
Other U.S. Carriers	256	54%	37,022	51%
TOTAL U.S. Carriers	472	100%	73,174	100%

Source: OAG Sep-99

AMERICAN AND AEROLINEAS ARGENTINAS WILL DOMINATE THE U.S.-ARGENTINA MARKET

SEPTEMBER 1999

U.S.-Argentina

	Departures	% of Departures	Seats	% of Seats
American Airlines	42	34%	10,094	30%
Aerolineas Argentinas	32	26%	10,856	33%
All Other Carriers	48	39%	12,440	37%
TOTAL Industry	122	100%	33,390	100%
AA/AR Combined	74	**61%**	20,950	**63%**

Source: OAG Sep-99

Dockets OST-99-6225,
6226 and 6227
Exhibit UA-3

AMERICAN CONTROLS THE DOMINANT U.S. GATEWAY TO LATIN AMERICA

SEPTEMBER 1999

	Departures	% of Departures	Seats	% of Seats
Miami-Central/South America				
American Airlines	266	86%	49,872	85%
Other U.S. Carriers	42	14%	8,988	15%
TOTAL U.S. Carriers	308	100%	58,860	100%
Miami-All Other				
American Airlines	1,491	59%	197,955	66%
Other U.S. Carriers	1,047	41%	104,068	34%
TOTAL U.S. Carriers	2,538	100%	302,023	100%
Total Miami Service				
American Airlines	1,757	62%	247,827	69%
Other U.S. Carriers	1,089	38%	113,056	31%
TOTAL U.S. Carriers	2,846	100%	360,883	100%

Note: Central America excludes Mexico and Caribbean
Source: OAG Sep-99

Dockets OST-99-6225,
6226 and 6227
Exhibit UA-4

MIAMI IS THE DOMINANT U.S. GATEWAY FOR U.S.-ARGENTINA PASSENGERS

CALENDAR 1998

U.S.-Argentina

	INS **Passenger** Departures and Arrivals	%of Pax
Miami Gateway	743,027	69%
Other U.S. Gateways	338,418	31%
TOTAL U.S. Gateways	1,081,445	100%

Note: Totals are non-directional (sum of U.S.-Argentina and Argentina-US.)
Source: INS Full Year 1998

Dockets OST-99-6225,
6226 and 6227
Exhibit UA-5

M/AM/ACCOUNTS FOR MORE THAN ONE-HALF OF U.S.-BUENOS AIRES PASSENGER TRAFFIC

CALENDAR 1998

U.S. Market tolfrom EZE	Total **Passengers**	% of Total
MIA	748,512	**48.5%**
EWR/JFK/LGA	333,780	**21.6%**
LAX	110,235	**7.1%**
MCO	43,698	**2.8%**
WAS	32,665	**2.1%**
Other	273,346	17.7%
TOTAL U.S.	**1,542,236**	100.0%

Source: CRS Bookings, Full Year 1998

AMERICAN AND AEROLINEAS ARE SEEKING TO PRE-EMPT MARKET SELECTIONS UNDER THE U.S./ARGENTINA MOC

Period	Total MOC Benefits and Options (Annex 1)	American/Aerolineas Request	Options Remaining After Grant of American/ Aerolineas Request
Present to 31 August 2000	**US:** *US points and behind, via intermediates to Buenos Aires and Córdoba, and beyond to Santiago and Montevideo* **ARG:** *(a) Argentina points and behind, via intermediates, to Miami, New York, Los Angeles, San Juan, Orlando and Atlanta and beyond to Montreal, Toronto and Korea and; (b) Argentina via intermediates, to San Juan and beyond to third countries*	Exemptions necessary to supplement existing operating authority and authorize operations to all specified points.	N/A

Period	Total MOC Benefits and Options (Annex 1)	American/Aerolineas Request	Options Remaining After Grant of American/ Aerolineas Request
September 1, 2000 to May 31, 2001	**US:** *Benefits available at present (See No. 1) PLUS one additional optional point in Argentina to be selected by the U.S.* **ARG:** *Benefits available at present (See No. 1) PLUS Dallas PLUS one additional optional point in U.S. to be selected by Argentina*	All specified points and "selected" points as per selection of U.S. and Argentina	N/A

Period	Total MOC Benefits and Options (Annex 1)	American/Aerolineas Request	Options Remaining After Grant of American/ Aerolineas Request
June 1, 2001 to May 31, 2002	**US:** *Benefits available at present (See No. 1) PLUS 2 additional optional points in Argentina PLUS 5 additional optional code-share only points in Argentina, with the seven optional points to be selected by the United States* **ARG:** *Benefits available at present (See No. 1) PLUS Dallas PLUS Spain as an additional beyond PLUS 2 additional optional points in the U.S. PLUS 5 additional optional code-share only points in the U.S., with the seven optional points to be selected by the United States*	Cordoba *Mendoza*[1] *Rosario* *Iquazu* *Neuquen* *San Carlos da Bariloche* *Tucuman* *Ushuaia* Atlanta *Boston* *Chicago* Dallas/Fort Worth *Denver* *Houston* *Las Vegas* Los Angeles Miami New York Orlando *San Francisco* San Juan *Washington, D.C.*	**ZERO**

[1] Italic type indicates the optional points to be selected by the governments of Argentina and the United States.

Period	Total MOC Benefits and Options (Annex 1)	American/Aerolineas Request	Options Remaining After Grant of American/ Aerolineas Request
From June 1, 2002	**US:** *Benefits available at present (See No. 1) PLUS 4 additional optional points in Argentina, PLUS 10 additional optional code-share only points in Argentina, with the 14 optional points to be selected by the United States*	Cordoba *Mendoza* *Rosario* *Iquazu* *Neuquen* *San Carlos da Bariloche* *Tucuman* *Ushuaia* *Resistencia* *Salta* *Bahia Blanca* *Comodoro Rivadavia* *Mar del Plata* *Rio de Gallegos* *Sante Fe*	**ZERO**

Period	Total MOC Benefits and Options (Annex 1)	American/Aerolineas Request	Options Remaining After Grant of American/ Aerolineas Request
From June 1, 2002 (cont'd)	**ARG:** *Benefits available at present (See No. 1) PLUS Dallas PLUS Spain, Italy and France as additional beyonds PLUS code-share only to Japan PLUS 4 additional optional points in the U.S. PLUS 10 additional optional code-share only points in the U.S., with the 14 optional points to be selected by the United States*	Atlanta *Boston* *Chicago* Dallas/Fort Worth *Denver* *Detroit* *Houston* *Las Vegas* Los Angeles Miami *Minneapolis/St. Paul* *New Orleans* New York Orlando *Philadelphia* *Salt Lake City* *San Diego* *San Francisco* San Juan *Seattle* *Washington, D.C.*	**ZERO**

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Consolidated Answer of United Air Lines, Inc. on all persons on the attached Service List by causing a copy to be sent via first-class mail, postage prepaid.

Brenda Gardner

DATED: September 29, 1999

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