BEFORE THE

DEPARTMENT OF TRANSPORTATION

WASHINGTON, D.C.

U.S.-U.K. ALLIANCE CASE	:	Docket OST-01-11029

ANSWER OF CONTINENTAL AIRLINES, INC. TO NORTHWEST AIRLINES, INC. MOTION

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November 28, 2001

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Continental[1] strongly supports Northwest's November 16 motion to strike the American/British Airways appendices to their November 9 reply since acceptance by the Department would severely prejudice Continental and other interested parties which have been denied any meaningful opportunity to analyze them and respond to the summary and fallacious conclusions in them. The Department's original procedural schedule did not even allow Continental and other interested parties the opportunity to respond to the American/British Airways appendices submitted on November 9, which is apparently the reason American and British Airways have

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1 Common names are used for airlines.

withheld this material since August 10 to the detriment of due process and fairness in this proceeding. As American and British Airways are aware, these appendices include thirty separate analyses and studies raising complex issues and assumptions. The Department must not reward the wanton tactics of American and British Airways to circumvent the requirements of due process by failing to include these appendices in the American/British Airways application submitted to the Department thirteen weeks earlier. If, despite Northwest's compelling arguments, these appendices are not stricken, minimum due process requires that Continental and other interested parties be given the opportunity, as part of an oral evidentiary hearing, to submit rebuttal exhibits by other experts, cross-examine the authors of the appendices and submit briefs to an Administrative Law Judge who can evaluate the conflicting expert testimony objectively.

Continental states as follows in support of its position:

1. Although the Department's rules required American and British Airways to submit their "factual material, documentation and argument" as well as "economic analyses" which "include full explanatory details, including data sources" in their application itself (see § 303.31 of the Department's regulations), they have withheld these submissions for thirteen weeks without explanation and provided such information in appendices submitted on the reply date, when no response to them was allowed by the Department's procedural schedule. As Northwest has pointed out, submitting these appendices thirteen weeks after the American/British

Airways applications were submitted prejudices other parties who were entitled to evaluate these submissions as part of the original applications submitted on August 10 and respond to them on the November 2 answer date. For the reasons given by Northwest, these appendices should be stricken from the record.

2. American and British Airways concede none of the appendices were in the record before November 9, and Appendix B and Appendix D contain entirely new information.[2] Moreover, American and British Airways acknowledge Appendix A is "slightly altered" and, even if it was included in the confidential information submitted by American and British Airways, it was buried among nearly 19,000 pages of confidential documents which the Department did not give Continental and interested parties a sufficient opportunity to review and analyze. American and British Airways also concede Appendix C is mostly new information not in the record before November 9. Under these circumstances, the Department should not allow American and British Airways to obscure the fact that they have waited to submit information they could and should have submitted thirteen weeks earlier.

3. As Continental, Delta and Northwest have demonstrated, the Department must hold an oral evidentiary hearing to evaluate the applications of American and British Airways for authority which would exempt them from the antitrust laws and permit them to achieve their anticompetitive domination of

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[2] See the American/British Airways joint answer submitted November 21, 2001, at 5-6.

U.S.-London routes.[3] If the Department decides to consider the appendices which should have been included in the American/British Airways application, it must at least allow Continental and other interested parties the same amount of time to analyze them and prepare a response which they would have had if the appendices had been submitted properly with the application and permit cross-examination of the experts submitting the appendices. The limited amount of time available to submit further pleadings in the U.S.-U.K. Alliance Case at the same time the parties must review voluminous documents submitted by United and bmi and further information yet to be provided is clearly insufficient to respond to these appendices. They must be tested by other experts and by cross-examination if they are to be considered at all. Only an evaluation of the expert testimony by an independent Administrative Law Judge, based on oral testimony, cross examination and briefs submitted by the parties, can be expected to resolve fairly the issues raised by variations in the factual predicates and economic analyses presented or to be presented in these proceedings.

For the foregoing reasons, Continental urges the Department to grant Northwest's motion to strike the appendices to the American/British Airways reply submitted on November 9. If these appendices are not stricken, however, the Department must, at a minimum, give Continental and other interested parties a

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[3] See the motion for an oral evidentiary hearing submitted by Continental, Delta and Northwest on November 19, 2001, in these proceedings.

sufficient opportunity, as part of an oral evidentiary hearing, to submit rebuttal exhibits by other experts, cross-examine the authors of the appendices and submit briefs to an Administrative Law Judge who can evaluate the conflicting expert testimony objectively. Any other course of action would fail to meet minimum due process requirements and abuse the Department's discretion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have this date served the foregoing document on all parties to this proceeding in accordance with the Department's Rules of Practice.

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November 28, 2001

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