BEFORE THE

DEPARTMENT OF TRANSPORTATION

WASHINGTON, D.C.

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

ANSWER OF CONTINENTAL AIRLINES, INC.

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June 17, 2003

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More than a year has gone by since the Department approved an alliance between United,[1] bmi, and their European partners, Austrian, Lufthansa and SAS (the Star Alliance carriers), if and only if, "the United States achieves, within six months from the issue date of this order, an Open Skies agreement with the United Kingdom that meets U.S. aviation policy objectives." (Order 2002-4-4 at 1, 8, 11; Order 2002-6-2 at 1-2) More than 14 months later, the runways at London Heathrow are as firmly closed as ever to new entrants such as Continental, the European Union now has a mandate to negotiate an aviation agreement on behalf of the U.K. and the other E.U. member states, and U.S. hopes for reaching a

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1 Common names are used for airlines.

"transformative" agreement with the U.K. meeting the U.S. objectives of opening up London Heathrow have been dashed once and for all. Nonetheless, United, bmi and their European partners have the audacity to ask the Department for the antitrust immunity consistently denied the Star Alliance carriers at London Heathrow because of the failure to meet the U.K. agreement pre-condition firmly established by the Department for approval. In apparent recognition that such a request is virtually certain to be denied, they request alternatively a further contingent approval period extension of seven and a half years, 15 times longer than the period originally imposed to expedite the U.S.-U.K. negotiations process.

Rather than equivocating further, the Department should deny the motions and focus instead on negotiation of the transformative agreement covering London Heathrow access which must be the sine qua non for reaching any comprehensive aviation agreement with the European Union.

1. The Star Alliance carriers argue that the award of codeshare authority to American and British Airways for service between the U.S. and open-entry points in the U.K. and on flights behind and beyond their U.S. and U.K. gateways justifies the award of antitrust immunity for the Star Alliance carriers at London Heathrow. The Department's position on this argument has already been made clearly and correctly:

> We . . . do not find that we should remove the conditions that we imposed on United/bmi and their partners in Order 2002-4-4, in particular, the condition that final approval and antitrust immunity for their alliance will be subject to achievement of an Open-Skies agreement with

> the United Kingdom that meets U.S. aviation policy objectives. It has been our long-standing policy not to grant antitrust immunity in cases where an Open-Skies aviation agreement does not exist between the United States and the foreign country involved. No such agreement now exists between the United States and the United Kingdom.

(Order 2003-5-33 at 9) United and bmi have held for years the same authority recently awarded to American and British Airways. Both U.K. carrier partnerships with the only two U.S. carriers authorized to operate flights at London Heathrow now hold broad codeshare authority which expands the dominance of the incumbent airlines at London Heathrow to the exclusion of Continental and other potential entrants but provides no justification whatever for awarding antitrust immunity to the Star Alliance carriers. Although United/bmi complain about the fact that American and British Airways are stronger than United/bmi at London Heathrow, United and bmi together are already immensely stronger at London Heathrow than carriers such as Continental which cannot even operate their own flights at London Heathrow and have no antitrust-immunized transatlantic alliances whatever. The Department has concluded repeatedly that neither of the two U.K.-U.S. London Heathrow partnerships should receive antitrust immunity while U.S. carriers such as Continental continue to be locked out of London Heathrow,[2] and that conclusion remains entirely valid today. (Order 2003-5-33 at 9)

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[2] See, e.g., Order 2002-4-4 at 1, 8, 11, Order 2002-6-2 at 1-2.

2. Even the Star Alliance carriers must recognize that their chances of getting antitrust immunity because American and British Airways can now do the same codesharing the Star Alliance partners have done for years are slim to non-existent. In fact, the request for immediate antitrust immunity may be nothing more than a ruse to make their equally-outrageous request for automatic approval of their antitrust immunity if an agreement meeting U.S. requirements at London Heathrow is reached at any time during the eight years and nine months following the Department's original contingent action on the Star Alliance exemption application seem less unreasonable. Clearly this request mocks the Department's original conception of the contingent approval as hastening resolution of the London Heathrow access issues at the heart of the U.S.-U.K. negotiations. The entire aviation world of today may well be unrecognizable by the end of 2010, and the Department could never lawfully conclude that the record created in 2001 and 2002 would not be completely stale by 2010.[3]

3. The record in this proceeding is now six months older than it was when the Department last extended its contingent approval, and the likelihood of reaching an open skies agreement with the U.K. achieving the U.S. objective of opening up London Heathrow for flights by Continental and other airlines is even more remote than it was in December. Recent history makes it clear that the

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[3] Approval for the American/British Airways codeshare on which the Star Alliance carriers pin their hopes for expanded authority extends only for a period of two years. See Order 2003-5-3 at 12.

Department's optimism regarding a possible transforming agreement with the U.K. on London Heathrow has proven unwarranted for at least the last 15 months. The Department's general policy of terminating back-up authority after a one-year period and requiring new applications thereafter because the information on which the original decision was based is stale after a year should be applied in this proceeding. Given the rapid changes now being experienced in global air transportation, stale information should be of even greater concern to the Department. Now that 15 months have passed, the time has come for dismissal of the Star Alliance request for antitrust immunity at London Heathrow without prejudice to submission of a new application when and if London Heathrow is truly opened to operations by new-entrant carriers such as Continental. Only after new entrants are given the slots and facilities necessary to compete fully at London Heathrow should antitrust immunity for United and its partners be considered again.

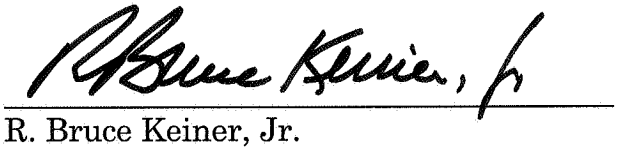
4. The U.S. pursuit of open skies at London Heathrow has been endless, but to no avail. The U.K. has consistently refused to reach any such agreement, despite both carrots and sticks proffered by the U.S. Now that the European Union has gained its mandate to negotiate air services agreements, however, the rules of the game are changing rapidly. Thus, the E.U. has indicated that it will be negotiating with the U.S. not only on behalf of the U.K. carriers serving London Heathrow but also on behalf of other European airlines serving London Heathrow. As a result, the E.U. will be seeking rights at London Heathrow for Austrian,

Lufthansa and SAS as well as bmi, a proposal requiring new negotiating and competition analyses far different from the ones the Department has applied in the past. Given these vast changes, the likelihood of a rapid agreement opening London Heathrow is even less than it was a year ago, and the record on which the Department based its decision is certain to be even more out of touch with current realities when and if an open skies agreement covering London Heathrow is reached.

For the foregoing reasons, Continental urges the Department to deny the Star Alliance carriers' motion.

Respectfully submitted,

CROWELL & MORING LLP



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CERTIFICATE OF SERVICE

I certify that I have this date served the foregoing document on counsel for the Star Alliance carriers and all parties served with the Star Alliance carriers motion in this proceeding in accordance with the Department's Rules of Practice.

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June 17, 2003

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