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

Petition Of United Parcel Service Co. To
Institute A Public Inquiry Into The

**Citizenship And Foreign Control
of DHL Airways, Inc.**

Docket OST-2002-13089 -6

**MOTION FOR LEAVE TO FILE AN OTHERWISE UNAUTHORIZED DOCUMENT
AND REPLY OF FEDERAL EXPRESS CORPORATION**

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September 24, 2002

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Motion For Leave To File An Otherwise Unauthorized Document

Pursuant to 14 C.F.R. § 302.6(c), Federal Express Corporation (FedEx Express) seeks leave to file this reply. Good cause exists for the Department to grant this motion. The Department's rules do not specify the precise procedure to be followed in this matter, and DHL Airways has raised new arguments and made serious charges in its answer on which the Department should consider opposing views. Further, FedEx Express is filing its reply within a few days of that answer, so there should be no prejudice to any party.

Reply of FedEx Express

Introduction: DHL International Has Built A Global Flag-Of-Convenience Air Services Operator, Which the United States Should Not Tolerate.

Few policies have been as adverse to U.S. interests as its acceptance of the flag-of-convenience system for international ocean shipping. The system has facilitated tax avoidance and degraded safety, labor, and security practices in the industry. As the market for international ocean shipping services has become increasingly global, companies have been forced into the system by competitive pressures. Those companies that could not exercise that option, such as U.S.-flag operators, have all but disappeared.

The resulting lack of U.S.-owned and -controlled companies in international ocean

shipping has exacerbated U.S. trade and current account deficits, and adversely affected U.S. mobilization capabilities to meet national security needs.

The DHL network claims to have garnered a 40 per cent (40%) estimated share of international air express markets.¹ It has been able to do this by adopting a flag-of-convenience strategy.

[DHL International] . . . took a page from the annals of those slow-moving merchant ships of yesteryear. It flew flags of convenience to shelter its income in havens like Hong Kong and the Netherlands Antilles.²

In this process, DHL has developed a model for combining direct and indirect operations in a way that allows it to take advantage of favorable tax and regulatory rules wherever they occur throughout the world. It now seeks to apply that model to the U.S. market.

Until now, the United States consistently has rejected supporting the establishment of a flag-of-convenience regime for air transport. The Department has understood clearly that such a system is not in the U.S. interest. Moreover, the United States has insisted on strict enforcement of the citizenship rules as the key lever for

¹ Although DHL Airways, Inc., the purported U.S. air carrier, is not as large as either FedEx or UPS, no fair competitive analysis would compare only the DHL network's U.S. operations with the global operations of FedEx and UPS. According to the DHL network's own website, the network has an estimated 40% market share of international air express traffic and DHL ships more than FedEx, UPS and Airborne combined. <http://www.dhl-usa.com/aboutdhl>; http://www.dhl-usa.com/press_display/1,3574,21,00.html. See also, Air Cargo Management Group, "International Air Freight and Express Industry Performance Analysis 2001" at 49 (November 2001) (hereafter the "Express Industry Performance Analysis") (estimating DHL's share at 37%, FedEx's at 20%, UPS's at 15%, and TNT's at 12%).

² Charles Lewis, Bill Allison, and the Center for Public Integrity, *THE CHEATING OF AMERICA*, at 201, William Morrow 2001.

liberalizing worldwide air transport markets — a policy FedEx has consistently and unreservedly supported.

Congress has entrusted to the Department the responsibility for maintaining a sound air transport regulatory system — one that pays its fair share of U.S. corporate taxes, observes fair labor standards, and meets all U.S. safety, security, and environmental standards. The Department is required to ensure that U.S. air carriers compete on an equal footing with foreign air carriers.³ This responsibility has become even more important since last year's tragic events.

Finally, although DHL Airways says repeatedly that the Department itself has declared its new corporate structure consistent with U.S. law,⁴ it appears that the only actual review has been made at the staff level, and that review neither binds the Department nor constitutes its decision. It is also clear that the Department has not yet had the opportunity to consider fully the broader implications of the important issues raised by DHL's structure — in short, to consider fully the DHL network's strategy for DHL Airways.

³ Statement of Policy, 49 U.S.C. § 40101(a)(7) and (15).

⁴ *See, e.g.*, Consolidated Answer at 1 (“Airways is, and has been found by the Department to be, a citizen of the United States”), *citing* Letter of Assistant General Counsel for International Law dated May 1, 2002. *See also* Consolidated Answer at 8 (“The Department has reviewed on a confidential basis the documents effectuating the transaction and the arm's-length nature of the business relationship between Airways and other DHL companies, and has concluded that Airways is a citizen.”) Either this is not true, or the Department has not complied with its own rules regarding the public availability of orders and determinations.

FedEx Express thus renews its August 7 request that the Department review the staff's application of law to the facts of DHL Airways' corporate structure. If the Department has already reviewed the staff decision, FedEx Express requests that the Department reconsider its decision. The issues presented raise serious credibility questions that can be resolved only through an oral evidentiary hearing into the facts of DHL Airways' corporate structure.

1. DHL Airways Is A Tool For the DHL Network To Serve The U.S. Domestic Market. It Has No Viable Independent Existence.

The evidence of record proves that DHL Airways is under the DHL network's control. The Department must avoid allowing this one air cargo/express operator, the DHL network, to limit its exposure to the responsibilities of U.S. citizenship while giving it access to the lucrative U.S. domestic market through a complex subterfuge designed solely for the purpose of concealing the extent of control.

As explained in more detail below, DHL International has established a structure in the United States that allows it to control the "brand" (DHL Worldwide Express) under which it markets its services. The structure also allows DHL International — through its wholly-owned subsidiary DHL Holdings — to assume the economic risks and rewards of its U.S. operations, relieving DHL Airways of that burden. These changes will allow the DHL network to expand its U.S. presence through investments in DHL Holdings, which its previous structure had effectively limited. Accordingly, if the Department now sanctions this structure, it will establish a precedent for other air carriers, effectively

eroding the citizenship requirements of U.S. law. Far more importantly, however, it will establish a precedent whereby foreign flag-of-convenience operators can obtain access to the U.S. market. Eventually, even U.S. carriers will be forced by competitive pressures to reorganize themselves to take advantage of this system. The Department needs to examine carefully these issues before it takes such action.

DHL Airways provides air transportation to the DHL network under a so-called "ACMI" contract.⁵ An ACMI contract is a lease whereby the air carrier provides the aircraft, crew, maintenance, and insurance. The customer, or lessee, markets the service. As DHL Airways acknowledges, the DHL network is DHL Airways' principal customer. Indeed, the network is virtually its only customer, since it flew only about 134 hours during the first quarter of this year for any non-DHL entity.⁶ DHL Airways concedes this fact: its Consolidated Answer spends two full pages on this topic (see pages 18-20), yet it does not respond to or in any way dispute it.

An ACMI contract transfers the authority to hold out services on the aircraft. In assigning the customer the authority to market the services, it also transfers the economic risk of the operation (including changes in the price of fuel). All DHL services are

⁵ Petition of FedEx Express, Exhibit 1 at 2, 5, and 8, Notes to DHL Airways Form 41 Report, Line 5145.1, Item Aircraft Fuels, May 13, 2002, filed in Docket OST-2001-8736 (Aug. 7, 2002). According to the DOT website, DHL has not yet filed its second quarter results, although they were due on August 10. <http://ostpxweb.dot.gov/aviation/finance/fin20022.pdf> (visited Sept. 18, 2002). No other major carrier has failed to file its second quarter results.

⁶ See discussion in the Petition of FedEx Express at 11-12, Docket OST-2001-8736 (Aug. 7, 2002), subsequently consolidated into this proceeding.

marketed under the trademark DHL Worldwide Express.⁷ Since the DHL network owns the trademark (through DHL International) and controls the use of virtually all DHL Airways' aircraft under the ACMI agreement(s), it therefore has the exclusive right to hold out and market DHL Airways' services under its trademark to the public and to obtain the economic rewards of those operations. In short, DHL Airways is firmly under the effective control of the DHL network, both legally and economically. There is no public evidence to the contrary.

The network itself is foreign-owned and, but for its creation of DHL Airways, would be unable to operate for compensation or hire between two U.S. points.⁸ Further, its opportunities to participate in the carriage of U.S. mail and other U.S. government cargoes would be limited.⁹ However, using its authority to act as a foreign airfreight forwarder and its exclusive trademark marketing relationship with DHL Airways, the

⁷ The trademark, originally the property of DHL Corporation (the previous parent company to DHL Airways), was sold to DHL International in a transaction challenged by the Internal Revenue Service as not reflecting an arm's length price. The Tax Court found that the trademark was worth approximately five times the consideration DHL International paid DHL Corporation. *DHL Corp. v. Commissioner, DHL Corp. & Subsidiaries v. C.I.R.*, T.C. Memo 1998-461, 76 T.C.M. (CCH) 1122, T.C.M. (RIA) 98,461 (1998) (hereafter the "Tax Court case"). That portion of the decision was upheld on appeal, although other parts were reversed. *DHL v. C.I.R.*, 285 F.3d 1210 (9th Cir. 2002).

⁸ 49 U.S.C. § 41703(c) prohibits foreign civil aircraft from taking on "for compensation, at a place in the United States, passengers or cargo destined for another place in the United States" except in narrow circumstances.

⁹ See 49 U.S.C. § 41904 (permitting the United States Postal Service to use a noncitizen to transport mail to or in a foreign country where "necessary"); and 49 U.S.C. § 40118(b) (allowing for transportation by a foreign carrier if there has been a bilateral exchange of rights or where no U.S. carrier service is available (in the case of domestic transportation) or "reasonably available" (in the case of foreign air transportation)).

DHL network is able to offer domestic air transportation services to the public and contract with an alleged U.S. air carrier to transport its cargo. Technically, DHL Airways is acting as a direct carrier, with the DHL network representing that it is acting as an indirect carrier, but in actuality the direct carrier in this case is nothing more than a wet lessor to a foreign air carrier that is operating illegally in the United States. This arrangement also allows the DHL network to shed its U.S. identity when inconvenient, such as when it would interfere with the network's ability to serve places subject to sanction in the United States, like Cuba, Libya, and Syria.¹⁰

This arrangement also gives the network access to U.S. government and military cargoes. To carry government traffic, DHL Airways must have its designator code on the service. The application of SNAS Trading & Contracting in Docket OST-2002-13256 to code-share with DHL Airways provided an example of this arrangement. In that application, SNAS, a Saudi carrier, is a regional carrier managed by DHL International E.C., a Bahraini carrier. SNAS plans to wet-lease its aircraft to DHL International E.C. and to display DHL Airways' code on the service. As SNAS' application states, this arrangement enables the DHL network — a network owned and controlled by Deutsche Post — to carry U.S. government and military cargoes. It also enables DHL Airways,

¹⁰ See, e.g., Orders 86-12-48 (Syria), 98-2-5 (Sudan), and 90-8-4 (Iraq).

albeit indirectly, to wet-lease an aircraft from a foreign carrier, in violation of the FAA prohibition.¹¹

This code-sharing arrangement has serious implications for the United States, its people, and its economy. Most of the revenue earned in such a scenario will go to the operator, and be used to support a foreign economy and foreign jobs. Taxes on that revenue are mainly paid to foreign treasuries; very little will inure to the same U.S. Treasury and U.S. taxpayers that pay for these military cargoes — particularly if the arrangements are structured to ensure that the U.S. participant gets only a small part of the revenues. In addition, to the extent that the DHL network is able to lower its costs — whether it be the cost of complying with labor, tax, environmental, safety, or security rules — other U.S. carriers will ultimately be forced to copy its approach. They will seek havens in other countries having standards that are less expensive and burdensome to meet.

There is a real risk that combination carriers could adopt a similar structure. Applying the DHL network model to combination services, the U.S. air carrier could act as an ACMI contractor for a registered foreign public charter operator — an indirect air carrier that is the passenger analogue of a foreign airfreight forwarder. (The analogy is unaffected by whether the underlying direct carrier provides scheduled or charter service, since public charter operators are free to and do use the services of scheduled carriers to

¹¹ FedEx Express hereby incorporates its answer in Docket OST-2002-13256 by reference.

transport their passengers.) The foreign public charter operator would, in turn, register as a foreign public charter operator under 14 C.F.R. Part 380, and seek authority to engage in interstate and foreign air transportation. To carry U.S. government personnel, the U.S. air carrier need only place its code on the service. Further, the foreign indirect carrier could seek an exemption from 49 U.S.C. § 41301 to the extent necessary to allow it to sell, indirectly, interstate and foreign scheduled air transportation, subject to the condition that it use U.S. certificated air carriers for all U.S. domestic air transportation.

Moreover, DHL Airways' mode of operation is designed to mislead and confuse the customer, in clear violation of the Department's rules. Well-established Department policy declares that any joint activity between two carriers, such as DHL Airways and DHL International, for example, must satisfy certain "minimum safeguards" designed to ensure that one carrier is not able to pass itself off to the public as another or "as part of a unified system of which each is a part."¹² That Department policy applies, *inter alia*, where one carrier, directly or indirectly, owns or controls 10% or more of the other, and where one provides general agency services to the other, including express transportation. In these situations, the carriers may not engage in certain joint activities. For example, the Department's policy requires that:

(3) All forms of display, (including aircraft insignia), scheduled publications, advertising, or printed matter employed by affiliated carriers

¹² 14 C.F.R. § 399.82(d).

shall not state or imply that the services of either carrier are performed in common with the other carrier or as part of a single system;

* * *

(7) The respective personnel of the affiliated carriers shall preserve the individual identity of the respective carriers in all public dealings.¹³

This substantive rule is binding on the Department until changed, following notice and comment.¹⁴ Yet the most prominent name on a DHL Airways air waybill is DHL Worldwide Express, a trademark owned by DHL International and used by the entire network. Moreover, DHL Airways' condition of carriage further blurs the identities by stating, "DHL means any member of the DHL Worldwide Express Network."¹⁵

2. DHL Airways Has Failed to Show That It Is Free From Control by the DHL Network.

DHL Airways has not discharged its burden of showing that it is a citizen of the United States on the public record. Instead, the carrier states — without proof — that its relationship with other DHL companies is arms'-length and that its U.S.-citizen owner and managers are not under the control of any DHL company or affiliate.¹⁶

¹³ 14 C.F.R. § 399.82(c)(3).

¹⁴ If the Department were suddenly to abandon its rule without following required rulemaking procedures and explaining its reasons for doing so, such action would be arbitrary and capricious and thus unlawful. *Alaska v. Department of Transp.*, 868 F.2d 441, 446-47 (D.C. Cir. 1989).

¹⁵ DHL Worldwide Express, Terms and Conditions of Carriage, located at <http://www.dhl-usa.com/bs/carriagedoc/>.

¹⁶ The dispute between DHL and the IRS concerning the value of the trademark, DHL Worldwide Express, sheds further light on whether there is an arm's-length relationship between the two companies. See footnote 7 above.

The question of effective control remains unclear since the facts simply are not credible, without additional explanation. DHL Airways asserts that a founder and long-time U.S. citizen employee, Mr. William Robinson, holds 75% of the voting interest, but only 55% of the equity.¹⁷ He has the right to appoint three of the four directors. There is no explanation for why DHL Holdings (USA), Inc., a company acknowledged to be under foreign control, would invest 45% of the equity, but receive in return only 25% of the voting interest and the right to appoint only one director. No rational investor would agree to such a scheme absent other consideration. Mr. Robinson's involvement raises critical questions of fact, such as whether Mr. Robinson participates actively in DHL Airways' management, whether the "personal funds" he used to buy his interest in DHL Airways were loaned to him or leveraged in some way, and whether he acquired his interest pursuant to some implicit or explicit understanding that DHL Airways would continue to act as the DHL network's principal or exclusive source of air transportation within the United States. Those questions must be answered — and in public.

Other DHL Airways' assertions lack credibility as well. DHL Airways asserts that it is not under the control of DHL International, but its former parent corporation has been forced to recant such assertions when tested at trial. In a Tax Court case involving a

¹⁷ Supposedly, Mr. Robinson purchased 55% of DHL Airways with his own funds. DHL Airways is a successful ongoing enterprise with revenues of over \$1.4 billion in 2001 and has a fleet of over 100 transport category aircraft comprising B-727s, B-737s, DC-8-73s, reported as being worth more than \$400 million. Sources: DOT, Airline Quarter Financial Review 4Q2001; DHL Airways Form 41 Report for period ended Dec. 31, 2001, Sch. B-1; Express Industry Performance Analysis at 49-63.

similar issue — the existence of common control — DHL Corporation, a previous parent entity to DHL Airways, “denied the existence of any common control” until the time of trial.¹⁸ It was only at trial that DHL Corporation finally conceded this common control.¹⁹ The U.S. Court of Appeals for the Ninth Circuit this year upheld the Tax Court’s finding that the DHL Corporation and DHL International were commonly controlled from 1990 through 1992.²⁰

The public record certainly does not explain what may have changed to make DHL Airways independent. The foreign ownership and control of DHL International has become stronger and clearer, yet DHL Airways continues to claim that it is a separate and independent entity, free from foreign control. Given its prior conduct, as well as the conflicting representations to the FCC, its assertions demand the careful scrutiny of a trial-type adjudication before a neutral, unbiased administrative law judge.

DHL Airways’ description of its management team at pages 6-8 of its answer fails to clarify these contested issues, attempting instead to divert attention to the experience of that team — an issue that FedEx Express does not dispute. FedEx Express takes issue with DHL Airways’ citizenship.

¹⁸ *DHL Corp. & Subsidiaries v. C.I.R.*, 76 T.C.M. (CCH) 1122 at 1145-1147 (1998).

¹⁹ *Id.*

²⁰ *DHL Corp. v. C.I.R.*, 285 F. 3d 1210 (9th Cir. 2002).

Thus, the public has a right to know the actual consideration Mr. Robinson, the DHL network, and DHL Holdings (USA) may have received for their investments in a U.S. air carrier. If there are indeed documents that purport to protect DHL Airways from foreign influence, as DHL Airways suggests in its answer at 8, they should be placed in the public domain.

3. The Department Must Ensure that the U.S. Air Transport Industry Does Not Go the Way of the U.S. International Ocean Shipping Industry.

At the close of the Second World War, the United States had the strongest maritime presence in the world.²¹ However, the evolution of a regulatory system that permits shipping companies to establish themselves in countries having regulatory systems less burdensome than that of the United States has virtually eliminated the U.S. presence in international ocean shipping. The economic and national security interests of the United States have been compromised as a result of this lack of U.S. control over the carriage of U.S. exports and imports. Further, substandard shipping practices have emerged as a direct result of the flag-of-convenience regime for international ocean shipping.²²

²¹ “At the end of World War II the United States was the world’s most powerful nation. Preeminent on the high seas, America owned 60 percent of the world’s tonnage and for the second time in thirty years had at its disposal a huge war-built fleet . . . [w]hen the war ended the American flag was prominently displayed in all the world’s major ports. The established American shipping companies had profited while operating under government contract, and at war’s end they were eager to buy government-owned ships with their enhanced capital reserves.” See Andrew Gibson & Arthur Donovan, *THE ABANDONED OCEAN: A HISTORY OF UNITED STATES MARITIME POLICY, at 169-170* (University of South Carolina Press 2000).

²² The Paris-based Organization for Economic Co-operation and Development made an explicit connection between the “widespread expansion of ‘flag-of-convenience’ registers” and the general trend of

The U.S.-controlled liner shipping industry began to decline in the mid-1980s due to the combination of U.S. tax policy and the significant operating cost advantages of foreign-flagged competitors.²³ For example, in 1986, United States Lines, historically one of the largest and most advanced shipping companies in the world, declared bankruptcy. The company had just built several large, modern container ships for use in its round-the-world service, and had terminal operations in Asia and Europe. Almost overnight, the company and its global assets were gone.

In the 1990s, almost all remaining significant American liner companies were acquired by foreign interests. In 1997, Canada's conglomerate CP Ships acquired Lykes Brothers Steamship Co. In 1998, Singapore's Neptune Orient Group bought American President Lines. Then in 1999, the Danish A.P. Møller/Mærsk company acquired the last remaining global U.S. carrier, Sea-Land, an innovative company that developed containerization and international logistics. At the time of its sale to Mærsk, Sea-Land was one of the top five shipping companies in the world.²⁴ Foreign domination continues today, with the acquisition of Farrell Lines by the Dutch-Angelo shipping giant P&O

those registries' host countries to be "less rigorous in their pursuit of high standards, as this has conflicted with their greater aim of maximizing the number of ships under their registries." A substandard ship is "[a] vessel . . . that fails to meet basic standards of seaworthiness and thereby poses a threat to life and/or the environment." See Organization for Economic Co-operation and Development, Directorate for Science, Technology and Industry, *The Costs to Users of Substandard Shipping* at 7-8 (January 2001).

²³ See Claire Lyons, *Bad Mood on Main Street*, SEATRADE REVIEW, March 1998.

²⁴ See Andrew Pollack, *Higher Seas, Higher Costs; As Imports Swamp Exports, Shipping Lines Try to Cope*, N.Y. TIMES, April 21, 1999, at B1.

Nedlloyd, and the sale of Crowley Maritime's South American liner operations to Germany's Columbus Line/Hamburg-Süd.

What remains of U.S. interests in international liner shipping consists primarily of "American" companies that ultimately must subject themselves to the demands of their foreign partners. These companies have been described as intermediaries established only to qualify their foreign partners to continue receiving the benefit of federal operating subsidies, not to maintain a viable U.S. flag fleet owned and controlled by U.S. citizens.²⁵

What has happened to the U.S. ocean shipping is clear: foreign multinational corporations took advantage of U.S. government policies allowing them to establish foreign-controlled U.S. companies just to satisfy federal citizenship requirements. U.S. toleration of these schemes permitted these foreign corporations to receive direct and indirect subsidies, including the carriage of military cargoes, paid for by U.S. taxpayers. If the Department of Transportation permits the DHL network to control DHL Airways and take advantage of similar programs, other segments of the air carrier industry will be forced to adopt the DHL network's experiment at manipulating the system.

4. FedEx Express Has the Responsibility to Bring Inconsistent Statements Made by a Regulated Entity to a Regulator's Attention.

FedEx Express objects in the most strenuous terms to DHL Airways' allegations that it has violated any Departmental rule.²⁶ To the contrary, FedEx Express relied on

²⁵ See Peter J. Tirschwell, *The US-Flag Impasse*, JOURNAL OF COMMERCE WEEK, October 29, 2001.

²⁶ DHL Airways complains that FedEx Express' filing does not "conform or even bear any relation to any authorized form or pleading." Consolidated Answer at 24. DHL Airways is wrong. As FedEx

and drew reasonable conclusions from public statements of DHL entities made to the Department and FCC under penalty of perjury. With regard to statements made by a DHL entity but not under penalty of perjury (like the FAA presentation), FedEx Express offered them for the reasonable inferences that could be drawn from that information — not necessarily for the truth of the information they contained.²⁷

DHL Airways repeatedly but wrongly asserts that the Department has approved its corporate reorganization. Yet it offers **no** evidence that the Department has taken any such action with regard to DHL Airways' citizenship. Instead, DHL Airways offers only a two-paragraph opinion of the Assistant General Counsel for International Law that DHL Airways continues to satisfy the citizenship rules.²⁸ Under Departmental rules, economic regulatory actions of the airline industry are the responsibility of the Assistant Secretary for Aviation and International Affairs. 49 C.F.R. § 1.23(e). The Assistant Secretary is authorized to administer and perform that function and to carry out the functions transferred from the Civil Aeronautics Board under certain statutes. 49 C.F.R. § 1.54(b)(9); 49 C.F.R. § 1.56a(f). All orders, policies, or interpretations are to be made

Express stated in its original petition, it did not know what form the Department's alleged approval of DHL Airways' corporate structure took. However, official aviation regulatory actions of the Department can be taken only by the Assistant Secretary under authority delegated from the Secretary, or by the Assistant Secretary's staff under authority delegated from the Assistant Secretary. Absent the expected public order, FedEx Express filed a pleading that would cover either situation.

²⁷ See Petition of FedEx Express at 10 (stating that the FAA presentation "offers a telling insight into how DHL management views its U.S. operations").

²⁸ Exhibit 1 to Consolidated Answer of DHL Airways.

available in the DOT document inspection facilities. 49 C.F.R. § 7.7(a). The Assistant Secretary has delegated some of her authority to other personnel under her supervision, but she has not delegated her authority to make citizenship determinations to the Assistant General Counsel for International Law.²⁹ Accordingly, DHL Airways has shown no basis for asserting that “the Department” has made any determination of its citizenship or concluded any review. Certainly the Assistant General Counsel has made no such claim.

Although DHL Airways complains that the information FedEx Express provided in its initial petition was irrelevant, stale,³⁰ or misleading, the answer does little to explain the discrepancies that appear in the public record. Instead, DHL Airways criticizes FedEx Express because the latter submitted statements of DHL entities made in October 2001, and under penalty of perjury, after the Department had dismissed the complaint of FedEx Express in May 2001.³¹ Apparently this was before DHL Airways obtained the opinion of the Assistant General Counsel that its proposed structure would comply with

²⁹ The General Counsel is the Department’s chief legal officer, and is the final authority within the Department on questions of law. Whether DHL Airways is a citizen of the United States is not a question of law, but instead the application of law to fact. Factual determinations are not properly the responsibility of the General Counsel; economic regulation including citizenship determinations is the responsibility of the Assistant Secretary for Aviation and International Affairs. 49 C.F.R. §§ 1.23(e) and 1.56a(f). Citizenship determinations are not even specified in the functional responsibilities of the Office of International Law. DOT Order 1101.9 (1988).

³⁰ FedEx Express offered the 1989 press article discussed in footnote 13 of the DHL Airways answer for the proposition that one of the named shareholders has a long-standing affiliation with the DHL network. For that proposition, it is completely relevant and DHL Airways’ answer confirms it.

³¹ Order 2001-5-11 (May 11, 2001).

the law. Of course, FedEx Express had no way of knowing when that opinion issued, that DHL Airways was required to make changes, or when DHL Airways completed its reorganization. Admittedly, as early as May 2001,³² Mr. Robinson reportedly owned fifty-five percent (55%) of the equity of DHL Airways, but later DHL filings before the FCC described the ownership of DHL Airways quite differently.³³ Petitioner FedEx Express can hardly be faulted for relying on the DHL network's subsequent representations to the FCC made under penalty of perjury.

In fact, FedEx Express was fully justified in drawing conclusions based on the public records of the Federal Communications Commission (FCC). Federal law requires operators to seek approval before assigning or transferring a license or the control of a licensee.³⁴ DHL Airways, Inc. has three Federal Registration Numbers: 0001516756, 0004327862, and 0004512158.³⁵

³² W. Armbruster, "What's next for DHL?," JOURNAL OF COMMERCE (May 21, 2001)(reporting that Robinson will own 55% of the equity in Airways, but will control 75% of the voting stock).

³³ Petition of Federal Express Corporation at 5-9 and Exhibits 2-3, Docket OST-2001-8736-9 (Aug. 7, 2002).

³⁴ Section 310(d) of the Communications Act of 1934, as amended, requires prior approval of assignments and transfers of control by the FCC. Section 309 of the Act also subjects certain applications to a pre-grant notice and petition procedure.

³⁵ An entity should have only one such number. The status of radio stations licensed to DHL Airways is as follows:

- FRN 0001516756: Business radio station WPFC238 (last filing was an administrative update on 6/27/01, file no. 0000502812); Aviation Radio navigation stations WRLT2145 and WRLT2146 apparently cancelled as of 6/10/01; Business radio station WNEA319, apparently cancelled as of 1/21/01.

Before filing its petition, FedEx Express checked with the FCC on August 6, 2002 to determine whether an application for the transfer of control of DHL Airways had been filed, as promised in the October 12, 2001 amendment. A review of FCC records found no assignment or transfer of control applications involving DHL's aeronautical radio station licenses.³⁶ The record showed only that DHL Airways had cancelled some aeronautical radio licenses in 2001: 235DH was cancelled on May 10, 2001 and 24433FLT was cancelled on October 18, 2001. Then, on May 11, 2001, DHL Airways filed for a new license for aircraft station WPSJ572.³⁷ DHL Airways also appears to be currently licensed for business at aircraft radio station WPCF238.

FedEx Express stands by its evidence regarding the state of the FCC record. FCC licenses are public information. If the information on record with the FCC is inaccurate, the DHL licensees must correct it, not FedEx Express.³⁸ FedEx Express is not only fully

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- FRN 0004512158: Aircraft station WPSJ512 filed 5/11/01 and granted 5/22/01 under file no. 000458158; aircraft station 24433FLT, cancelled as of 10/18/01 under file no. 0000629225; and aircraft station 235DH, cancelled 5/10/01 under file no. 0004578828.
 - FRN 0004327862: No stations.

³⁶ At n. 19 of the Consolidated Answer, DHL Airways notes that the separate application was filed but subsequently withdrawn at the FCC's request after the licenses at issue expired.

³⁷ Aircraft stations are mobile stations in the aeronautical mobile service, which is a mobile service between aeronautical stations and aircraft stations, or between aircraft stations, in which survival craft stations may participate. Emergency position-indicating radio beacon stations may also participate in this service on designated distress and emergency frequencies.

³⁸ Section 1.65(a) of the FCC's rules, 47 C.F.R. § 1.65, provides that each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application. When the "information is no longer substantially accurate or complete in all significant respects," the applicant must amend or seek leave to amend as promptly as possible and, in any event, within 30 days, unless good cause

justified in relying on and bringing to the Department's attention apparently conflicting DHL network statements, it has a duty to do so. The integrity of Department proceedings is important to all regulated air carriers. In fact, representations by DHL Airways about its own structure, whether made to the FCC, the U.S. Tax Court or any other agency, are probative not only of that structure, but of their general credibility in these proceedings.

Finally, as a U.S. citizen, FedEx Express has every right to consult with others in exercising its constitutional right to petition its government to apply U.S. citizenship rules equally to all competitors.³⁹ FedEx Express has long been a staunch supporter of the Department's open skies policies and of fair competition.⁴⁰ It also believes that the

is shown. A similar obligation applies regarding substantial changes as to any other matter that may be of decisional significance.

³⁹ See *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (extending protection to petitioning before "all departments of Government," including the courts); *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 113 S.Ct. 1920 (1993).

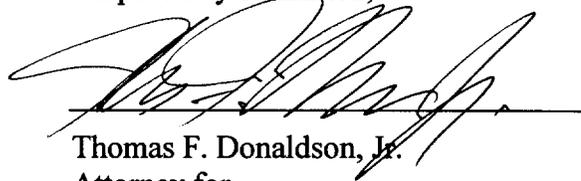
⁴⁰ FedEx Corp. Chairman and Chief Executive Officer Frederick A. Smith has been an active proponent of global commerce and open-skies agreements for aviation around the world. In 1976 he launched an airline deregulation campaign before Congress, the Department of Transportation, and the Civil Aeronautics Board to obtain an air cargo operating certificate for large aircraft. Mr. Smith regularly gives speeches and testimony on the benefits to the United States of liberalizing air services, especially air cargo services. See generally *Distribution Services 3; Faster It Goes, the Better for Business*, FINANCIAL TIMES (LONDON), Sept. 29, 1988; D. Higdon, *Dave Higdon's Inside Talk on Aviation*, THE JOURNAL OF COMMERCE, Feb. 1, 1988; *Federal Express not to demand Japanese 'open sky' policy*, JAPAN ECONOMIC NEWSWIRE, July 28, 1995; *U.S.-Japan Cargo Pact Favors UPS; Opens Door for Passenger Talks*, AIRLINE FINANCIAL NEWS, Apr. 1, 1996; *Washington Report: Sanctions Bill Gains Ground*, THE JOURNAL OF COMMERCE, June 10, 1996; C. Isidore, *Carriers Seek Unlinked Air Cargo Pacts*, THE JOURNAL OF COMMERCE, Mar. 10, 1999; G. Linn, *Seattle agenda will include plethora of air express issue*, THE JOURNAL OF COMMERCE, Oct. 19, 1999; *International Transportation Symposium: A Review*, WORLD AIRLINE NEWS, Oct. 13, 2000; J. Pearse and K. Walker, *Transport Ministers from Around the World Joined Airline and Industry Chiefs in Chicago in December to Discuss How to Shed the Bilateralism Legacy of the Historic 1944 Chicago Convention and Also Move beyond the Current Open Skies Regime to Multilateralism*, AIRLINE BUSINESS, Jan. 2000.

United States must work to support the pre-eminence of the U.S. flag in civil aviation by insisting on the effective removal of all competitive obstacles imposed by foreign governments. However, FedEx Express also strongly supports the stringent enforcement of U.S. citizenship rules as a necessary tool for achieving full liberalization of international air services.

Conclusion

The weight of evidence in the public record compels the conclusion that DHL Airways is controlled by the DHL network. Since approval of this structure by the Department would have significant implications for U.S. international air transportation policy and the U.S. economy, the Department should institute an oral evidentiary hearing into the citizenship of DHL Airways to consider these issues carefully.

Respectfully submitted,



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Before this Department, FedEx Express has consistently argued for expansion of opportunities for U.S. air carriers, for fair competition, and for the firm rejection of proposals that could diminish the interest of foreign airlines in complete liberalization. *See, e.g.*, Comments of Federal Express Corporation in U.S.-U.K. Alliance Case, Docket OST-11029-108 at 9 (arguing that “U.S. commercial interests lie in pursuing an open global trading system for all goods and services, including international aviation”). Accordingly, its view that U.S. citizenship rules should apply evenhandedly does not imply “patently obvious anti-competitive animus.”

Certificate of Service

I hereby certify that I have this 24th of September, 2002 caused this Motion for Leave to File an Otherwise Unauthorized Document and Reply of Federal Express Corporation to be mailed to each party listed below by first class mail, postage prepaid.



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