



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

**May 20, 1999**

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Joint Application of	)	
	)	
<b>AMERICAN AIRLINES, INC.</b>	)	
<b>and</b>	)	<b>Docket OST-97-3285</b>
<b>LINEA AEREA NACIONAL CHILE, S.A.</b>	)	
<b>(LAN CHILE)</b>	)	
	)	
under 49 U.S.C. Sections 41308 and 41309 for	)	
approval of and antitrust immunity for alliance	)	
agreement	)	

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**OBJECTION OF DELTA AIR LINES, INC.**

The Department's Show Cause Order (Order 99-4-17) proposes to approve and grant antitrust immunity to the American/LAN Chile alliance. This decision will have serious competitive consequences not only for the U.S.-Chile marketplace, but also for Latin America and the vital Southern Cone region in particular. American is succeeding, with the Department's blessing, in reducing competition in Latin America by entering into immunized alliances, cooperative marketing agreements and equity investments with its major foreign-flag competitors. The Department should not assist American's tactics by approving this anticompetitive alliance. Delta objects to the Show Cause Order and urges the Department to reverse the tentative decision.

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### **I. Open Skies Are Not Justified at the Expense of the Public Interest**

Delta strongly supports the Department's objective to establish open skies agreements wherever possible. However, open skies at the price of reducing competition between the United States and South America is no bargain.

The Department should act to ensure that an open skies regime will result in viable new competitive opportunities. The U.S.-Chile open skies agreement holds no such promise. The competitive environment that would result from a U.S.-Chile marketplace dominated by the combined strength of American and LAN Chile will effectively stifle and thwart new entry.

The Wall Street Journal correctly observed that "No U.S. Carrier dominates any region the way American blankets Latin America." Wall Street Journal, "Yankee Aggressor, How American Airlines Is Building Dominance In The Latin American Market," January 9, 1998. Moreover, "Behind, the scenes, American courted Latin governments, most of which have maintained tight restrictions on air service to protect their national carriers. As governments allowed additional flights, American was the major beneficiary." *Id.*

Nowhere are those observations more apt than in the situation that is currently unfolding in the key Southern Cone region. American and its Latin American partners have been successful in influencing foreign governments when and where to make competitive opportunities available. The Department

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should reject American's market-dominating tactics and insist on open skies on terms favorable to the public interest -- not individual carriers -- even if that means temporarily forgoing adding Chile to the open skies list.

Because of the unique and unprecedented regional dominance enjoyed by American in Latin America, the DOT's strategy of establishing open skies beachheads, which it successfully applied to promote liberalization in Europe, will not work in this region. American and LAN Chile decided that their combined strength warrants opening the door to the possibility of additional competition.

In other Latin America countries, American and its partners have effectively closed the door to competition. For example, in neighboring Argentina, there will be no new opportunities for U.S. carriers in the foreseeable future because American and its equity partner, Aerolineas Argentinas, decided that they would be better off without additional competitors. The U.S. - Argentina talks were torpedoed last week. Had those talks succeeded, American was well aware that Delta had a strong and viable desire to begin Atlanta-Buenos Aires service. Again, American's reported behind the scenes activities are illuminating:

American has cultivated the Argentine authorities. It purchased several items for the Argentine air force, which manages the country's airports . . . American is so close to local officials that when the Argentine air force finally

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installed a new instrument landing system at Ezeiza in October, an American Airlines jet, carrying government personnel and dignitaries, tested it for more than three hours. Wall Street Journal, January 9, 1998.

The list goes on and on -- such as American's ploy last year that enabled it to secure JFK-Lima-Cuzco frequencies without going through the Department's normal route case proceedings: "On a trip to Lima, Peru, last summer, American Airlines Chief Executive Robert L. Crandall presented a helicopter to Peruvian President Alberto Fujimoro. A few months later, the Peruvian government gave American a coveted new route." Id.

It is critical for the Department to preserve a competitive marketplace between the United States and Latin America. Delta urges the Department to conduct a serious review of the competitive circumstances surrounding American's alliances and reject this and other anticompetitive partnerships in the region.

### **II. Important Factors Distinguish American/LAN Chile From Previously Approved Alliances.**

Delta has consistently been a strong supporter of airline alliances as a means to create efficient and competitive online networks. Contrary to the Show Cause Order's tentative findings, the proposed American-LAN Chile alliance will not produce the competition enhancing network benefits that have

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characterized the antitrust immunized alliances previously approved by the Department.

Under 49 U.S.C. §41309, before the Department can approve an antitrust immunized alliance, the Department must first determine that the proposed alliance is not adverse to the public interest or otherwise in violation of the transportation statute. The Department may not approve an agreement that substantially reduces or eliminates competition, unless it finds that the agreement is necessary to meet a serious transportation need or to achieve important public benefits that cannot be met by reasonably available alternatives that are less anticompetitive.

The facts are indisputable that American and LAN Chile dominate the U. S . -Chile marketplace. As the Show Cause Order states:

“. . . American’s position now as the dominant carrier in the U.S.-Chile market . . .”;

“. . . despite the large market share now held by the applicants . . .”  
Show Cause Order at 18.

The evidence submitted in the record shows that American operated 75 % of the U.S.-flag nonstop service to Chile and offered almost 70% of the U.S.-flag Chile nonstop seats. See, Exhibits DL-1 through DL-3 attached to Delta’s Comments filed on March 13, 1998. The de facto merger of American and LAN Chile will create a powerful and dominant entity. Combined, American and Chile carry nearly 70 % of all U.S. -Chile passengers and offer nearly five

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times as many frequencies as the next closest competitor, United. Exhibits DL-3 through DL-5.

Despite the overwhelming market domination of American and LAN Chile, the Show Cause Order nonetheless concludes that competition between the United States and Chile will not be impaired because of the existence of an open skies agreement. Delta disagrees. Delta has been a staunch proponent of the Department's policy to expand open skies agreements around the world. Obtaining open skies is a laudable international policy objective. But, approval of an antitrust immunized alliance between American and LAN Chile is too high a price to pay for an open skies agreement and would lessen competition and be detrimental to the public interest.

An open skies agreement, while ensuring that governmental obstacles to entry and price are removed, will not ensure effective competition between the United States and Chile. The Show Cause Order's reliance on the open skies agreement as the complete answer to the competitive analysis is misplaced. Delta submits that the Department's competition analysis is flawed because it overlooks the market structure characteristics of the Southern Cone region of South America, which is geographically isolated, lacks alternative competitive hubs and is dominated by American and its allies. These characteristics will

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effectively foreclose the opportunity for other U.S. carriers to discipline the anticompetitive behavior of the American-LAN Chile alliance.

The Show Cause Order cites with favor the procompetitive results of the antitrust immunized alliances it previously approved to Europe. However, the Department's reliance on the European open skies experience is in error. The Show Cause Order ignores the substantial differences in market structures between the United States-Europe and the United States-South America/Chile marketplaces. The U.S.-South American and U.S.-Chile market structures bare no resemblance to the U.S.-Europe market structures that provided the rigorously competitive backdrop against which the European alliances were approved.

First, unlike the antitrust immunized alliances to Europe, U.S.-South America and, more particularly, U.S.-Chile, is not characterized by numerous competing network systems to discipline the anticompetitive behavior of the American-LAN Chile alliance. In fact, many of the established alliances between the United States and South American involve partnerships in which American plays a key role. In addition to the proposed LAN Chile arrangement, American owns a significant stake in Aerolineas Argentinas, the major national flag carrier of Argentina. Argentina is one of the most important U.S.-South America/Southern Cone markets and one of the most restrictive. In addition,

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American has existing or proposed codeshare arrangements with Avianca to Colombia and Guatemala, TAM to Brazil, and Tam Mercosur to Paraguay, as well as a codeshare partnership with the airlines of the TACA Group to Central America. American's strategy to align itself with most of the major foreign flag competitors in Latin America should be of grave concern to the Department.

Second, unlike the European alliances, which were, for the most part, end-to-end combinations designed to create substantially expanded and highly competitive new network systems beyond the hub gateways, the American-LAN Chile alliance would essentially eliminate all horizontal competition between the two dominant U.S. -Chile carriers and create minimal network benefits. Thus, in examining the applications for approval of antitrust immunity for the U.S.- Europe alliances of United-Lufthansa/SAS, Delta-Austrian/Sabena/Swissair and Northwest-KLM, the Department found that the applicants' route networks were largely end-to-end, and that the alliances would facilitate the expansion of the carriers' overall networks into thousands of city pairs that each carrier could otherwise not serve on its own.'

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<sup>1</sup> For example the Department found that the Delta Alliance in Europe would bring new online service to 32,000 city-pairs with traffic totalling 21.4 million passengers. Order 96-5-26 at 19.

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In commenting on the distinction between the European alliances and the American-TACA alliance, the Department of Justice stated:

This almost exclusively horizontal American/TACA Agreement stands in stark contrast to the largely end-to-end agreements that the Department has approved in the past. Most significantly, the Delta-Swissair/Sabena/Austrian Airlines, United-Lufthansa, American/Canadian and United/Air Canada alliances involve fewer problematic overlapping city pairs, and significantly greater opportunities for the code-share partners to extend the reach of their networks beyond foreign gateways. DOJ Comments in Docket OST-96-1700 at 10.

The American-LAN Chile alliance involves the effective merger of two horizontal competitors without any significant countervailing benefits. The Joint Application identified no points in third-countries served by LAN Chile beyond Santiago to which new online services would be extended. While the application lists 15 smaller cities within Chile that would gain new online connections to the United States (allowing the applicants to claim alleged online service benefits in hundreds of tiny U.S. -Chile city-pairs), these benefits are illusory because they involve city-pairs that generate miniscule levels of traffic, such as, for example, Easter Island-Vail, Colorado. In short, the network expansion benefits of the proposed alliance would be de minimus, and are outweighed by the substantial adverse impacts on competition that the alliance would produce.

Third, there are few, if any, alternate hubs, especially in the far southern region of South America, through which other network carriers could offer

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passengers competing connecting service options. As previously noted, Argentina is a restricted entry market and negotiations to increase competitive opportunities for other U.S. carriers are proceeding at glacial speed. The Government of Argentina has shown very little interest in agreeing to a substantial liberalization of the aviation regime in the near future. The only other significant country in the deep southern region of South America is Brazil, which is also governed by a highly restrictive bilateral agreement that limits U.S.-flag entry to and beyond Brazil. The Southern Cone region therefore lacks the competitive environment that characterizes the European marketplace and which formed the basis of the Department's approvals of the various U.S.-Europe alliances.

Fourth, unlike the European situation, there is no reasonable expectation that an open skies agreement tied to the grant of antitrust immunity to American-LAN Chile would lead to "comparable opportunities . . . [becoming] available to other U. S . carriers", as was the case in each and every one of the U.S.-Europe antitrust immunized alliances. The intense competition among many closely proximate European hubs produced the ingredients necessary to encourage the proliferation of open skies agreements throughout Europe. Those ingredients do not prevail in the Southern Cone region, which lacks geographically proximate competing hubs and which have restricted bilateral regimes. Thus, open skies to

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Chile tied to approval of an antitrust immunized alliance would not lead to “comparable opportunities” for other U. S . carriers.

Fifth, U.S. -South America service is heavily concentrated at the Miami gateway, which is a principal destination for local South American visitors. U.S.-Europe has an extensive array of multiple competing hub gateways in the United States.<sup>2</sup> American is the only carrier with a hub at Miami. To the extent other South American governments seek to obtain “comparable opportunities”, they will demand as a condition to open skies that their national carrier be allowed to enter into an antitrust immunity with the dominant carrier at Miami, ~~This American~~ play right into American’s plan to dominate the U.S.-Latin America marketplace by “wooing its major Latin American competitors into alliances. ” Wall Street Journal, January 9, 1998.

It is highly unlikely that an open skies agreement would result in any significant increase in direct services by other U.S. carriers to Chile. Open skies would enable American and LAN Chile to significantly increase frequencies, which have been constrained as a result of the restrictive U.S.-Chile

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<sup>2</sup> Nonstop service to Europe is provided from numerous strong gateway hubs throughout the United States, including Atlanta, Cincinnati, JFK, Newark, Philadelphia, Washington Dulles, Chicago, Charlotte, Pittsburgh, Minneapolis-St. Paul, Detroit and Dallas/Ft. Worth. Each of these hub gateways compete with the other hub gateways for U.S.-Europe travel.

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bilateral agreement. The combination of giving American and LAN Chile the ability to operate unlimited frequencies along with the right to merge their U.S.-Chile route systems would make it virtually impossible for Delta and other U.S. carriers to compete effectively between the United States and Chile. It is unlikely that potential competitors would be willing to allocate expensive long-range intercontinental aircraft to provide nonstop service to Chile in the face of the competitively impregnable American-LAN Chile alliance.

Instead of creating “comparable opportunities” for U.S. carriers to expand their networks to South America, approval of the American-LAN Chile alliance will have the opposite effect, by foreclosing such opportunities and further strengthening the dominance of American and its partners throughout the region.

The best way to achieve a strong competitive network structure between the United States and South America along the lines of the European model, is for the Department to deny the American-LAN Chile application. Denial would encourage LAN Chile and the other major foreign carriers in the region to pursue alliances with other U.S. carriers, which would benefit competition and the public interest. For example, an alliance between Delta and LAN Chile would inject a strong new entrant in the Southern Cone region of South America

and would create new, strong competition with American and the other U.S. and foreign incumbents.

The Show Cause Order ignores the cumulative anticompetitive effects of American's program to establish alliances and partnerships with most of the major foreign competitors in Latin America. These arrangements give American unrivaled dominance in every region of Latin America, especially in the Southern Cone. The American-LAN Chile alliance is not only designed to further entrench American's already dominant position, it also precludes other U.S. carriers from entering into competing alliances.

**III. The Department's Proposed Anti-Exclusivity Condition Will Not Cure The Inherent Defects Of The Proposed Alliance.**

Delta respectfully disagrees with the Department's recent policy of attempting to redraft commercial agreements to eliminate exclusivity clauses. Proposed codeshare and alliance arrangements either benefit competition and the public interest and should be approved, or they are detrimental and should be denied. For the reasons discussed above, American/LAN Chile is demonstrably anticompetitive and anti-consumer and should be disapproved. Limiting the effectiveness of the carriers' exclusivity clause will not cure this fundamentally anticompetitive alliance.

Placing limits on carriers' freedom of contract choices is undesirable because it diminishes the level of commitment that can be achieved between the

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parties, which is an essential component in forming a comprehensive and lasting commercial relationship. Moreover, while striking exclusivity clauses unnecessarily limits the benefits that can be achieved through an alliance or codeshare agreement, this remedy has not proved to be an effective means to address the Department's competitive concerns.

The Department's approval of the American/TACA codeshare contained a more rigorous anti-exclusivity provision indicating that the Department expected TACA to enter into another codeshare relationship as a precondition to renewal. However, in the year that has passed since the Department's approval of that alliance, no U.S. carrier has succeeded in entering into a codeshare agreement with TACA.

There is even less reason to expect that a limitation on codeshare exclusivity would be an effective competitive remedy here. In contrast to the TACA arrangement, which involved only codeshare approval, American and LAN Chile will involve full antitrust immunity and a virtual merger of the two companies. Since American and LAN Chile will share as partners the revenues of their venture, there is every reason the parties will act to exclude rival carriers and no reason to expect that LAN Chile would assist other U.S. carriers in gaining a foothold in the Chile marketplace by entering into codeshare arrangements outside its alliance.

**IV. Conclusion.**

The Department's analysis of the competitive consequences of the American-LAN Chile alliance is flawed. It overlooks the unique market structure characteristics of U.S. -Chile and the Southern Cone region. An open skies agreement will not result in increased opportunities for other U.S. carriers. Instead, approval of the American-LAN Chile antitrust immunized alliance, coupled with open skies, will merely strengthen the already dominant position of American and LAN Chile and foreclose network expanding opportunities for other U.S. carriers. The Show Cause Order should be reversed and the joint application for grant of an immunized alliance should be denied.

Respectfully submitted,



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**Robert E. Cohn**  
SHAW PITTMAN POTTS  
& TROWBRIDGE  
2300 N Street, N.W.  
Washington, DC. 20037  
(202) 663-8060

Counsel for  
**DELTA AIR LINES, INC.**

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Objection of Delta Air Lines, Inc. has been served this 20th day of May, 1999, by hand delivery (except where otherwise noted), upon each of the following persons:

Carl B. Nelson, Jr.  
Associate General Counsel  
American Airlines, Inc.  
1101 17th Street, N.W., Suite 600  
Washington, D . C . 20036

Charles J. Simpson, Jr.  
Zuckert, Scoutt & Rasenberger, L.L.P.  
888 17th Street, N.W., Suite 600  
Washington, D.C. 20006

R. Bruce Keiner, Jr.  
Lorraine Halloway  
Crowell & Moring, LLP  
1001 Pennsylvania Ave., N.W.  
Washington, D . C . 20004

Bruce Rabinovitz  
Jeffrey A. Manley  
Kirkland & Ellis  
655 15<sup>th</sup> Street, N.W.  
Washington, D . C . 20005

Megan Rae Poldy  
Associate General Counsel  
Northwest Airlines, Inc.  
901 15th Street, N.W., Suite 310  
Washington, D. C . 20005

Donald T. Bliss  
O'Melveny & Myers LLP  
555 13th Street, N.W.  
Suite 500 West  
Washington, D. C. 20004

William H. Callaway  
Zuckert, Scoutt & Rasenberger, L.L.P.  
888 17th Street, N.W., Suite 600  
Washington, D. C. 20006

Nathaniel P. Breed, Jr.  
Shaw Pittman Potts & Trowbridge  
2300 N Street, N.W.  
Washington, D. C . 20037

R. Tenney Johnson  
2121 K Street, N.W., Suite 800  
Washington, D. C. 20037

Allan W. Markham  
2733 36th Street, N.W.  
Washington, D. C. 20007-1422

Marshall S. Sinick  
Squire, Sanders & Dempsey, LLP  
1201 Pennsylvania Ave., N.W.  
Suite 500  
Washington, D. C. 20004

Richard J. Fahy , Jr.  
Consulting Attorney  
Trans World Airlines, Inc.  
900 19th Street, N.W., Suite 350  
Washington, D. C. 20006

Michael F. Goldman  
Bagileo, Silverberg & Goldman, LLP  
1101 30th Street, N.W., Suite 120  
Washington, D. C. 20007

Pierre Murphy  
One Westin Center  
2445 M Street, N.W., Suite 260  
Washington, D . C. 20037

Alfred J. Eichenlaub  
Polar Air Cargo, Inc.  
100 Oceangate  
1 5<sup>th</sup> Floor  
Long Beach, CA 90802  
(by Federal Express)

Peter Reaveley  
Dade County Aviation Department  
Miami International Airport  
P.O. Box 592075  
Miami, FL 33159  
(by Federal Express)

David L. Vaughan  
Kelley, Drye & Warren  
1200 19th Street, N.W., Suite 500  
Washington, D . C . 20036

James W. Tello  
Filler, Weller & Tello, PC.  
117 N. Henry Street  
Alexandria, VA 223 14-0784

Thomas V. Lydon  
Director, Government Affairs  
Evergreen International Airlines, Inc.  
1629 K Street, N.W., Suite 301  
Washington, D . C . 20006

John L. Richardson  
Seeger, Potter, Richardson,  
Luxton, Joselow & Brooks  
2121 K Street, N.W., Suite 700  
Washington, D . C . 20037

William C. Evans  
Verner, Liipfert, Bernhard,  
McPherson and Hand  
901 15th Street, N.W., Suite 700  
Washington, D . C . 20005

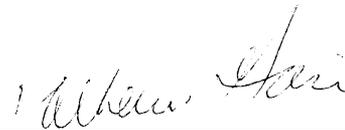
Aaron Goerlich  
Boros & Garofalo, P.C.  
1201 Connecticut Avenue, Suite 700  
Washington, D. C. 20036

David Marchick  
Deputy Assistant Secretary  
for Transportation Affairs  
U.S. Department of State  
2201 C Street, N.W., Room 5830  
Washington, D. C. 20520  
(by first class mail)

Roger W. Fones  
Chief, Transportation, Energy  
& Agriculture Section  
Antitrust Division  
Department of Justice  
325 7th Street, N. W., Suite 500  
Washington, D. C. 20530

Samuel Crane  
President  
Regional Business Partnership  
(Newark)  
One Newark Center  
Newark, NJ 07102  
(by Federal Express)

Director of Aviation  
Port Authority of New York  
and New Jersey  
One World Trade Center, Suite 65-N  
New York, NY 10048  
(by Federal Express)



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Katherine Gaines