

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

DEPT. OF TRANSPORTATION
DOCKETS

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Joint Application of)
)
ALITALIA-LINEE AEREE ITALIANE-)
S.p.A.)
and)
KLM ROYAL DUTCH AIRLINES)
and)
NORTHWEST AIRLINES, INC.)
)
for approval of and antitrust immunity for)
agreements pursuant to 49 U.S.C. §§ 41308)
and 41309)

ORIGINAL

Docket OST-99-5674 - 10

**JOINT MOTION OF ALITALIA-LINEE AEREE ITALIANE-S.P.A.,
KLM ROYAL DUTCH AIRLINES AND NORTHWEST AIRLINES, INC.
FOR CONFIDENTIAL TREATMENT PURSUANT TO RULE 39 OF THE
DEPARTMENT'S RULES OF PRACTICE AND 49 U.S.C. SECTION 40115**

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Dated: July 15, 1999

**BEFORE THE
DEPARTMENT OF TRANSPORTATION
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ALITALIA-LINEE AEREE ITALIANE-)	
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FOR CONFIDENTIAL TREATMENT PURSUANT TO RULE 39 OF THE
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Alitalia-Linee Aeree Italiane-S.p.A. (“Alitalia”), KLM Royal Dutch Airlines (“KLM”), and Northwest Airlines, Inc. (“Northwest”) (collectively the “Joint Applicants”), pursuant to Rule 39 of the Department’s Rules of Practice, 14 C.F.R. § 302.39, and 49 U.S.C. section 40115, hereby jointly move that the Department withhold certain proprietary and sensitive documents and information from public disclosure.

In connection with their joint application for alliance approval and antitrust immunity and in response to the Department’s Order 99-5- 10, the Joint Applicants today are separately submitting certain proprietary and sensitive corporate documents to the Department. The Joint Applicants hereby request that access to those documents be restricted to counsel and outside experts for interested parties following procedures that the Department previously has

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established in conjunction with other applications for alliance approval and antitrust immunity.’

In addition., Alitalia is separately submitting a response to item C of Order 99-5-10, which response contains proprietary information. That response also is submitted subject to this joint motion for confidential treatment.

In support of this joint motion, the Joint Applicants state as follows:

I. THE JOINT APPLICANTS’ CONFIDENTIAL DOCUMENTS ARE PROTECTED FROM PUBLIC DISCLOSURE BY THE FREEDOM OF INFORMATION ACT

The: confidential documents and information submitted herewith is protected from public disclosure under various exemptions established under the Freedom of Information Act, including 5 U.S.C. sections 552 (b)(3) and (4). The purpose of these exemptions “is to protect the confidentiality of information which citizens provide to their government, but which would customarily not be released to the public, and to facilitate citizens’ ability to confide in their government.” Burke Energy Corn. v. DOE, 583 F. Supp. 507,510 (D. Kansas 1984).

Exemption (4) exempts from public disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4). This exemption has been construed to prevent public disclosure of information that is not of the type usually released to the public, and that if released would cause substantial harm to the competitive position of the person from whom the information was obtained. See, e.g., Gulf &

¹ See DOT Notice, Jan. 9, 1998 (American/Lan Chile); Order 96-7-25, July 18, 1996 (United/SAS); Order 96-7-1 6, July 12, 1996 (United/Air Canada); Order 96-3-26, Mar. 13, 1996 (United/Lufthansa); Order 96-1-6, Jan. 11, 1996 (American/Canadian International); DOT Notice, Oct. 13, 1995 (Delta/Swissair/Sabena/Austrian) (in each case, DOT restricted access to confidential information to interested parties’ counsel and outside experts upon submission of a valid affidavit, pending a ruling on the merits of the joint applicants’ motion for confidential treatment).

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Western Industries, Inc. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1980); American Airlines, Inc. v. NMB, 588 F.2d 863, 871 (2d Cir. 1978); National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673,684 (D.C. Cir. 1976); Order 94-5-42, May 3 1, 1994 (Delta/Virgin Atlantic); Order 93-12-32, Dec. 18, 1993 (United/Lufthansa); Order 93-1-1 1, Jan. 11, 1993, at 19 (Northwest/KLM); Information Directives Concerning CRS, Order 88-5-46, May 18, 1988; Carrier-Owned Computer Reservations Systems, ER-1385, Order 86-5-54, May 14, 1986; Information Directives Concerning CRS, Order 83-12-136, Dec. 29, 1983.

For information to qualify for exemption (4), the information must be (1) commercial or financial in nature, (2) obtained from a person, and (3) privileged or confidential. See Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983). All of the confidential information submitted by the Joint Applicants satisfies this three-part test.

First, the confidential information that is the subject of this joint motion is commercial or financial in nature and relates to the commercially sensitive and proprietary internal decision-making processes of the three applicants. The Joint Applicants would not otherwise make public such confidential, proprietary, and commercially sensitive information. It is being submitted so that the Department may expeditiously evaluate the public interest benefits that will result from granting approval of and antitrust immunity for the Northwest/Alitalia/KLM alliance.

Second, the information has been “obtained from a person” within the meaning of exemption (4).

Third, the information is “confidential.” This confidential information is not available to the public, and its public disclosure is not required to further the public interest or to promote competition. In National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974), the court held that information is “confidential” for purposes of exemption (4) if it would

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not customarily be released to the public by the person from whom it was obtained, and if disclosure is likely to either: “(1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.” The Joint Applicants submit that public disclosure of the type of confidential information at issue here would cause substantial harm to their respective competitive positions, and could impair the Government’s ability to obtain similar information on a voluntary basis in the future.

The: subject materials contain highly sensitive commercial information relating to international planning and strategic decision-making by the Joint Applicants. The information contained in these documents has not been publicly released. If released, competitors would gain valuable insights into each of the Joint Applicants’ internal strategies, objectives, and business plans with respect to the most competitively sensitive matters, including, but not limited to, the Joint Applicants’ proposed relationship.

In addition, withholding the subject confidential information from public disclosure is also provided for under exemption (3). 5 U.S.C. § 552(b)(3). Exemption (3) pertains to information specifically exempted from disclosure by some other statute, such as 49 U.S.C. section 40115. The release of the information which is the subject of this motion may “prejudice the formulation and presentation of positions of the United States in international negotiations” with foreign governments and “would have an adverse effect on the competitive position of an air carrier in foreign air transportation,” and would therefore be inconsistent with 49 U.S.C. section 401.15.

**II. ACCESS TO THESE CONFIDENTIAL DOCUMENTS SHOULD
BE RESTRICTED TO COUNSEL AND OUTSIDE EXPERTS**

The Joint Applicants are submitting highly sensitive internal corporate documents and information that should be accorded limited access. Such access should be granted only to counsel and outside experts who file Rule 39 affidavits stating that the affiant will (1) use the information only for the purpose of participating in this proceeding, and (2) not disclose such information to anyone other than counsel or outside experts who have filed a valid affidavit.

In order to minimize the risk of harmful disclosure of this competitively sensitive information, access should be strictly limited, as requested. Northwest, Alitalia, and KLM are separately filing, concurrently with this joint motion, three copies of this information, in sealed cartons labeled “Confidential Treatment Requested Under 14 C.F.R. Section 302.39; Access Is Limited To Counsel Or Outside Experts Who Have Filed Valid Affidavits.”

The request to limit disclosure to counsel and outside experts is fully consistent with Department precedent and policy. Thus, in United/Lufthansa, Order 93-12-32, supra, the Department granted the applicants’ request to limit access to certain confidential information to counsel and outside experts who filed Rule 39 affidavits. In restricting such access, the Department balanced the disclosure of confidential information against the competitive harm to the applicants that would result if access were expanded, and concluded that “the undue competitive harm to the applicants outweighs the commenters’ need for expanded access to the highly sensitive material in this case.” Id. at 5. The Department also noted that “interested parties to this proceeding can obtain adequate advice on the merits of the application through outside experts and persons authorized to review the materials.” Id. See also Order 96-1-6, Jan. 11, 1996, at 3 (American/Canadian International).

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Access to the joint applicants' internal documents and data should be limited in a comparable manner, in light of the undue competitive harm to the joint applicants that would result from a broader disclosure of such highly sensitive information.

For the foregoing reasons, the Department should grant the Joint Applicants' motion to withhold certain proprietary and commercially sensitive confidential documents and information from public disclosure, as requested herein.

Respectfully submitted,



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Dated: July 15, 1999

CERTIFICATE OF SERVICE

I certify that on this 15th day of July 1999, a copy of the foregoing Joint Motion of Alitalia-Linee Aeree Italiane-S.p.A., KLM Royal Dutch Airlines, and Northwest Airlines, Inc. was served by first class mail, postage prepaid, upon the following:

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