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DEPT. OF TRANSPORTATION
SECTION 20 110:36

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Joint Application of)
)
DELTA AIR LINES, INC.,)
SWISSAIR, SWISS AIR TRANSPORT)
COMPANY, LTD.,)
SABENA S.A., SABENA BELGIAN WORLD)
AIRLINES, and)
AUSTRIAN AIRLINES, ÖSTERREICHISCHE)
LUFTVERKEHRS AG)
)
For approval of and antitrust immunity for Alliance)
Agreements pursuant to 49 U.S.C. §§ 41308 and)
41309.)

Docket OST-95-618 - 36

JOINT REPLY OF DELTA AIR LINES, INC.,
SWISSAIR, SWISS AIR TRANSPORT COMPANY, LTD.,
SABENA S.A., SABENA BELGIAN WORLD AIRLINES, and
AUSTRIAN AIRLINES, ÖSTERREICHISCHE LUFTVERKEHRS AG

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I. INTRODUCTION.

Delta Air Lines, Inc. ("Delta"), Swissair, Swiss Air Transport Co., Ltd. ("Swissair"), Sabena S.A., Sabena Belgian World Airlines ("Sabena") and Austrian Airlines, Österreichische Luftverkehrs AG ("Austrian") (the "Joint Applicants") hereby submit this Joint Reply to the answers filed by Trans World Airlines, Inc. ("TWA"), Tower Air, Inc. ("Tower"), United Air Lines, Inc. ("United") and American Airlines, Inc. ("American").

United and American do not oppose the Joint Application. Although United takes no position on whether the proposed Alliance meets the Department's approval standards, United strongly encourages the Department to grant antitrust immunity to those alliances

where the overall net effect is to improve the alliance partners' ability to respond to consumer demand and to increase competition. American states that it "has no objection to the Delta/Swissair/Sabena/Austrian Joint Application", but asserts that if the Delta/Swissair/Sabena/Austrian Alliance is approved, the Department should also grant the American-Canadian Airlines International Joint Application filed in Docket OST-95-792.

Answers opposing the Joint Application were filed by only two commenters -- TWA and Tower. These opposing comments contain a litany of unsubstantiated claims and exaggerated rhetoric and misinterpret the law, policy and facts. The opponents have failed to establish any basis for denial of the Joint Application under the decisional standards which govern this proceeding.

The Joint Applicants seek approval to enter into a proposed Alliance that will expand their limited code-share relationships by permitting the carriers to coordinate and integrate their U.S.-Europe services as if they were a merged single entity. The ability to establish a seamless transportation system of coordinated hub and spoke networks on both sides of the Atlantic is fully consistent with Department policy. The Alliance will enable the Joint Applicants to enhance efficiencies, reduce costs and expand online service options to the traveling and shipping public. Moreover, approval of the Alliance will foster the expansion of Open Skies agreements throughout Europe and thereby enhance competition and consumer benefits.

Neither TWA nor Tower dispute that achieving open skies agreements with other European countries -- including countries that currently adopt restrictive aviation regimes

-- is in the public interest. In fact, TWA expresses its full support for the Department's Open Skies Initiative. TWA Answer at 2. The nine-country Open Skies Initiative was only the first step in the open skies process and was designed to "encourage other new partners. . . to join us in seeking full free trade in aviation services." Remarks of Secretary Peña announcing the Open Skies Initiative, November 1, 1994. Nor do the opponents challenge the proposition that approval of the Joint Application will encourage other countries to allow their flag carriers to form similar alliances -- which can only be done in the context of a fully liberalized Open Skies regime. Instead, the opponents seek to derail the proposed Alliance because, for whatever reasons, they are either unable or unwilling to form alliances of their own.

Just as TWA's efforts to defeat the practice of code-sharing have been unavailing," so too will TWA fail to stop the inexorable process of the globalization of the international aviation marketplace. The Department's International Aviation Policy Statement recognizes that globalization is "here to stay":

"We believe that enhanced airline competition and the trends of privatization, marketing alliances, code-shares and cross-border investments that fuel globalization are here to stay -- and that these developments offer great benefits for all nations."²¹

The Joint Applicants have fully met the standards for approval and grant of anti-trust immunity under applicable law. The Department's policy with respect to

¹ See, TWA Petition for Rulemaking, Docket 49622, June 21, 1994.

² Remarks of Secretary of Transportation Federico Peña, November 1, 1994, unveiling the Department's International Policy Statement.

applications of this type is to “apply the standard Clayton Act test used in examining whether mergers will substantially reduce competition in any relevant market.” Order 92-11-27 at 13. As the Department stated in Northwest-KIM, which precedent applies in this case, “the primary issue in the decision making process is straightforward: whether the agreement would substantially reduce competition in any relevant market, and not whether it will infringe on any particular carrier’s market share.” Order 92-9-30 at 5 (emphasis included in original). Thus, competition is the dispositive issue in this case. The Joint Applicants have demonstrated that, consistent with the Policy Statement and the GAO Study, the Alliance Agreements will enhance competition and consumer benefits. The opponents have failed to demonstrate that the proposed Alliance will substantially reduce competition. Consequently, the Alliance Agreements should be approved and accorded antitrust immunity.

In further support of this Joint Reply, the Joint Applicants state the following:

II. TWA.

A. TWA Has Long Opposed Carrier Alliances For Self-Serving Reasons.

TWA has been a frequent and longstanding opponent of code-sharing, cooperative marketing arrangements and other global alliances. See, for example, TWA’s Rulemaking Petition filed on June 21, 1994 in Docket 49662, seeking a rule that would have the effect of prohibiting code-sharing by preventing carriers from dual-listing services in computer reservations systems. Suddenly, TWA now professes to support alliances designed to secure competitive opportunities in the international markets for U.S.-flag carriers, as well as the Secretary’s International Policy Statement and Open Skies Initiative.

TWA's endorsement of alliances rings hollow. While paying lip service to globalization, TWA would like nothing better than to derail this alliance as well as others that may be proposed. TWA's antipathy to alliances stems from its inability or unwillingness to find an alliance partner. In essence, TWA wants to ban dancing because it cannot find a dance partner.

B. TWA Has No Current Service To Switzerland, Belgium Or Austria And Its Interest Is Highly Attenuated.

TWA does not even serve the three European countries of the Alliance partners. TWA claims that it was "forced to discontinue service because of its financial difficulties", and while it expresses concern that the proposed Alliance will somehow "foreclose TWA's market opportunities both through the Alliance countries and beyond," it does not indicate if or when it plans ever to serve the three countries. In any event, TWA's concerns are both unsubstantiated and without merit. TWA's (or any other carrier's) ability to serve the three European countries has never been foreclosed and is now enshrined in the Open Skies agreements the U.S. has concluded with these and six other countries. Furthermore, TWA has failed to demonstrate how the proposed Alliance would in any way impair its ability to serve the three European countries or any other European markets, nor does it offer any specific evidence, aside from generalized allegations of alleged airport congestion, that it could not reenter any or all of the three countries. TWA has contrived a series of rhetorical and legalistic arguments designed to derail the proposed Alliance. The arguments have no basis in law, fact or policy and should be rejected.

C. The Joint Application Must Be Considered Under The Clayton Act Standard.

Contrary to TWA's claim, the Department's well-settled application of the Clayton Act standard applies in this proceeding. TWA erroneously claims that the Clayton Act standard does not apply because "the Joint Applicants have no intention of operating as a single entity, even if they could legally do so." TWA's claim is wrong. The Clayton Act standard applies because the Joint Applicants have made it quite clear that they seek the flexibility to engage in single-firm route planning, sales and marketing activities as if the transaction were a merger. This is the standard that was used in the Northwest-KLM case under circumstances that were similar in all material respects to this case, and it is the standard that should apply here. Not satisfied, TWA makes the ridiculous claim that the Joint Applicants must affirm that, absent legal prohibitions, they would consider a merger. Such a requirement is wholly inappropriate for a number of reasons.

First, it makes no sense to require the Joint Applicants to speculate on what they might do if the law were different. Suffice it to say that U.S. law (including the citizenship requirement and proscriptions on cabotage), limitations imposed in bilateral aviation agreements, (including ownership and nationality restrictions) and foreign country laws on foreign investment, preclude the Joint Applicants from using an actual corporate merger to achieve a global alliance. Consequently, the Joint Applicants have turned to the Alliance Agreements and this Joint Application to accomplish the objective of integrating their networks.

Second, the Department did not require Northwest and KLM to affirm that, absent legal obstacles, they would consider a merger. Indeed, Northwest and KLM expressly told the Department that “the Northwest-KIM agreement is not a merger. There is no acquisition of stock or assets, and there is no change in ownership or control.” Joint Reply of Northwest and KLM, filed on December 7, 1992 at 4, Docket 48342.

Thus, contrary to TWA’s claim, the Joint Application stands on similar legal footing with Northwest-KIM requiring the application of the Department’s Clayton Act legal standard. Because the proposed Alliance would not substantially reduce or eliminate competition, there is no need for the Joint Applicants to demonstrate “important public benefits” that “cannot be achieved by reasonably available alternatives that are materially less anticompetitive,” (the alternative standard under Section 4 1309(b)(1) which does not apply here) and they are not required to do so under settled Department precedent. Consequently, TWA’s discussion of what it asserts are less anticompetitive alternatives is simply irrelevant in this proceeding.

D. The Alliance Agreements Will Not Substantially Reduce Competition In Any Relevant Market.

1. Overall U.S.-Europe Market.

TWA does not dispute that the Alliance Agreements would not substantially reduce competition in the overall United States-Europe market. The Joint Applicants believe that the U.S.-Europe market is the relevant market for analyzing the competitive effects of the proposed Alliance. Virtually every significant transatlantic city-pair route is or can be served by numerous major U.S. and/or European carriers on either a nonstop,

single-plane or single-stop online connecting basis. Given the significant numbers of overlapping networks of transatlantic service by U.S. and European airlines, the most appropriate relevant market to analyze the competitive effects of the transaction is the overall U.S.-Europe market.

The Joint Application conclusively demonstrated that the proposed Alliance would not reduce competition in the overall U.S.-Europe market. The combination's market share would only be less than 4% higher than Delta's current market share and the proposed Alliance would not have the power to dominate the U.S.-Europe market or to charge higher than competitive prices or to reduce service below competitive norms. Furthermore, as the Joint Application noted, under the Merger Guidelines used by the Department of Justice and the Federal Trade Commission, the combination of Delta, Swissair, Sabena and Austrian would result in an HHI of less than 1,000. As the Department said in Northwest-KIM:

“The Merger Guidelines consider a market with an HHI figure of less than 1,000 as unconcentrated and provide that mergers in such markets are unlikely to have any adverse competitive effects.”

Order 92- 1 1-27 at 15.

2. Country-Pairs And City-Pairs.

The Joint Applicants recognize that in addition to the U.S.-Europe market, the Department also considers U.S country-pair and city-pair competition. The Joint Application contained a detailed analysis of the competitive alternatives in each applicable country-pair and city-pair. TWA does not contest the availability of numerous alternative

services. Rather, TWA states, without any substantiation whatsoever, that the availability of alternative services over other U.S. or European gateways would not effectively discipline the Alliance carriers' competitive behavior.

TWA's position is inconsistent with the Department's policy of enhancing inter-gateway competition through the creation of global hub-and-spoke networks. As the Department noted in its International Policy Statement, "Internationally, an even larger portion of traffic moving over hub-and-spoke systems will require the use of at least two hubs (e.g., a hub in both the U.S. and Europe for a passenger moving from an interior U.S. point to a point beyond the European hub)." Policy Statement at 3. Such global networks "can benefit consumers by increasing international service options and enhancing competition between carriers, particularly for traffic to or from cities behind major gateways." Id. at 4.

Thus, the Department's International Policy Statement recognizes that a successful international hub-and-spoke system requires hubs in both the United States and Europe. By definition, the linkage of networks will necessarily occur at the carriers' hubs where they have significant positions. However, the linkage of the hubs will serve to enhance U.S.-Europe competition, not reduce it, and will work effectively only if there is close coordination. A principal objective of the proposed Alliance is to give the carriers the ability to coordinate and integrate their transatlantic systems into a single seamless transportation network just as they would if the carriers were, in fact, merged. Under the antitrust laws, when companies merge, competition between them necessarily would be eliminated and the combined entity will thereafter be able to compete more effectively

against rivals as a unified, more efficient enterprise. See, e.g., Conner-weld Corn. v. Independence Tube Corn., 467 U.S. 752 (1984). Requiring the partners to compete would eliminate the procompetitive benefits of the combination.

TWA asserts that “the same policy [as applied in Northwest-KIM] should apply here” (TWA Answer at 24), in connection with the analysis of the country-pair and city-pair impacts. The Joint Applicants submit that the Department’s analysis and conclusions in Northwest-KIM with respect to country-pair and city-pair overlaps in that case, apply with equal force to the country-pairs and city-pairs under review in this proceeding. Because of the similarity between the country-pairs and city-pairs analyzed in Northwest-KLM and those at issue here, it is instructive to repeat the Department’s findings in Northwest-KIM:

“The second relevant market is the United States-Netherlands market. In that market KLM and Northwest will have a dominant market share. KLM, after all, is the major scheduled carrier in the Netherlands. Nonetheless, we do not believe that the proposed integration will enable the applicants to charge supra-competitive prices or to reduce service below competitive levels.

Even if a merger creates a firm with a dominant market share, the merger would not substantially reduce competition if other firms have the ability to enter the market within a reasonable time if the merged firms charge supra-competitive prices. Despite the dominant position of KLM in the U.S.-Netherlands market, we see no barriers to entry by other carriers in that market.”

Order 92- 1 1-27 at 15.

Similarly, in the overlap city-pairs at issue in the Northwest-KLM case, the Department recognized that the Northwest-KLM Agreement would end competition between Northwest and KLM, the only carriers then providing nonstop service between Minneapolis/St. Paul and Amsterdam and between Detroit and Amsterdam. While observing that “we doubt that any other carrier would be particularly interested in providing nonstop service between Amsterdam and either Detroit and Minneapolis/St. Paul”, the Department stated that “the fares charged in the two routes should be disciplined to some extent by the fares offered for connecting service, since travelers can reach Amsterdam from Detroit or Minneapolis/St. Paul by using the connecting service now offered by” other U.S. and foreign carriers. Id. at 16. Just as there were viable competitive alternatives in Northwest-KLM, there are numerous viable competitive alternatives offered by U.S. and foreign carriers in the U.S. country-pairs and U.S. city-pairs pertinent to this case to ensure competitive discipline and to prevent fares from rising above or service from falling below competitive levels. And, as demonstrated in the Joint Application, fares charged by Northwest and KLM have remained under effective competitive discipline.

Furthermore, with respect to the city-pair overlaps, the Joint Applicants submitted evidence demonstrating that the local O&D component of passengers traveling between Atlanta and Cincinnati, on the one hand, and the European gateways, on the other hand, is so small as to be competitively insignificant. See, Joint Application at 33. Most passengers traveling over the Atlanta and Cincinnati transatlantic segments are connecting passengers from behind the gateway. Id. Moreover, the evidence also shows that a

significant percentage of the local Atlanta/Cincinnati-Europe O&D passengers use connecting service via gateways other than Atlanta and Cincinnati. These facts buttress the applicability to this case of the Department's finding in Northwest-KLM (Order 92- 1 1-27 at 16) that the overlap city-pairs will be disciplined by service and fares offered on alternative connecting service by other U.S. and European carriers.

Moreover, the Open Skies agreements between the United States and Switzerland, Austria and Belgium will ensure the ability of any U.S. carrier to serve all three European countries from any point in the United States. As the Department observed in the same Order (at 15-16): "Because of the Open Skies Accord, any U.S. carrier may serve the Netherlands from any point in the United States. As a result, other carriers have the opportunity and ability to enter the U.S.-Netherlands market and to increase their service if the applicants try to raise prices above competitive levels (or lower the quality service below competitive levels)."

Thus, just as in the Northwest-KLM case, the loss of competition between Delta and its Alliance partners would not be substantial and would be outweighed by the significant competitive benefits to the traveling and shipping public that would result through the integration of the carriers' U.S.-Europe networks.

E. There Are No Entry Barriers In The U.S.-Switzerland/Austria/Belgium Markets.

TWA's claim that because of "marketplace barriers" it would be difficult for any U.S. carrier to enter Austria and Switzerland in competition with the Applicants, is without foundation. TWA Answer at 24. First, TWA claims that the national carriers

exercise control over travel agents through alleged CRS dominance and through commission and override payments. Sabena does not own any interest in a computer reservations system. Austrian and Swissair are relatively small, part-owners of Galileo and do not substantially own or effectively control that CRS. Moreover, the DOT's regulations on CRS's prevent unfair, deceptive, predatory and anticompetitive practices in foreign air transportation. TWA's CRS argument is bogus.

Equally erroneous is TWA's argument concerning the alleged control the national carriers would have over their home countries' travel agents. The carriers do not control their home country travel agents today and would not be able to do so after the Alliance is approved. The objective of the proposed Alliance is to enable the participants to become more, not less, competitive in the U.S.-Europe marketplace. The antitrust immunity will apply to activities among the Alliance partners; the Alliance itself will continue to be governed by applicable law, including the antitrust laws.

Finally, TWA alleges that "a final barrier to entry will be the connecting hubs that the Applicants propose to create with antitrust immunity." What TWA ignores is the fact that the hubs ~~already existed~~ ^{The proposed} Alliance would not create new hubs, but rather interconnect the existing hubs of Delta and the European carriers in order to achieve operational efficiencies. This linkage will allow Delta to expand its online coverage to serve numerous additional U.S.-Europe city-pairs, thereby increasing global competition, and *vice versa* for the European partners.

Moreover, the proposed Alliance with antitrust immunity will reduce entry barriers to other countries because, in the Department's words, it would "encourage other

European countries to agree to liberalize their aviation services so that comparable opportunities may become available to other U.S. carriers.” Order 92-11-27 at 13-14. Thus, the grant of this Application will provide strong incentives for other countries, particularly countries from more restrictive aviation regimes, to enter into Open Skies agreements with the United States in order to secure “comparable opportunities” for their flag carriers.

F. TWA’s Claim That The Applicants Do Not Need Antitrust Immunity To Accomplish The Proposed Objectives Is Mistaken.

The Joint Application and the supplemental submissions in response to the Department’s Information Request discuss in detail the benefits the Alliance carriers seek to achieve through the formation of the Alliance which cannot be accomplished in the absence of antitrust immunity under the limited code-share arrangements. These benefits include (1) increased gateway-to-gateway and behind-gateway online services, (2) expanded market access, (3) coordinated hubs and coordinated transatlantic segments, (4) enhanced utilization of aircraft and seat inventory which would result in the ability to offer more discount fares and discount seats, and (5) reduced sales, marketing and reservations costs. See, Joint Application at pages 36-41 and Responses to DOT Information Item No. 3, filed on October 10, 1995.

Contrary to TWA’s claim, the Joint Applicants cannot achieve these benefits without immunity. The immunized Alliance would correct at least two major deficiencies in the current limited code-share arrangements. First, and most importantly, an immunized alliance permits the Alliance carriers to establish a common financial objective, which

would allow the Alliance to compete more effectively with other strategic alliances. The common financial objective would provide the economic incentive for Delta and the European partners to direct the flow of their passengers onto each other's networks. Second, the Alliance would correct the current situation in which Delta's separate code-share arrangements with Austrian, Sabena and Swissair are essentially uncoordinated. Under the Alliance, the carriers can coordinate all of their U.S.-Europe business activities including scheduling, route planning, pricing, marketing, sales, inventory control, etc. The level of collaboration and coordination necessary to integrate the carriers' respective systems into a multi-hub seamless transatlantic network cannot, as a practical matter, proceed without the grant of antitrust immunity.

Furthermore, the short answer to TWA's assertion is that the Joint Applicants have categorically stated that "they will not carry out the collaboration, coordination and integration contemplated by the Alliance Agreements in the absence of antitrust immunity because of the substantial risk that the Joint Applicants would be subject to antitrust litigation." Joint Application at 42. Without antitrust immunity, there is no assurance that the Alliance would not be challenged on antitrust grounds. The very real threat of this challenge -- which is substantiated by the objections filed by TWA and Tower -- would make it impossible for the Alliance carriers to proceed with the proposed Alliance, unless antitrust immunity were granted.

G. TWA's Attempt To Distinguish The Northwest-KLM Case Is Unavailing.

TWA claims that the Joint Applicants cannot rely on the Department's decision in Northwest-KIM as precedent for the Joint Application. TWA strains mightily to distinguish the Joint Application from the application of Northwest and KLM. The alleged distinctions are without decisional significance.

1. TWA claims that Northwest and KLM were "much smaller than that of the applicants, and competed in fewer markets". The short answer to TWA's observation is that the combined U.S.-Europe market share of the Alliance carriers may be larger than the combined market share of Northwest and KLM or that there are a few more overlap cities than in Northwest-KIM is not meaningful. The fundamental question is whether the proposed alliance would substantially reduce competition. The Joint Applicants have clearly demonstrated that there would be no substantial reduction in competition. First, the U.S.-Europe market is unconcentrated. Delta's existing market share does not give it the ability to dominate the market, nor would the minimal increase -- less than 4% -- to market share that would result by combining Delta with Swissair, Sabena and Austrian. The Alliance would be unable to dominate the U.S.-Europe market in a way that would enable it to charge supra-competitive prices or to reduce service below competitive levels. There will always be more than adequate numbers of competitors between the United States and Europe which will provide market discipline and ensure competition. It is noteworthy that the combined market share of the Alliance carriers (16.7% of passengers (Joint Application Exhibit 2), 16.7 1% of weekly seats (Joint Application Exhibit 3)) would be lower than the current market shares of United, American and Delta in the

domestic U.S. air transportation market. TWA's concern about "the sheer mass of the proposed combination" rests on unsupported rhetoric, not fact. Second, as discussed in the Joint Application and above, the country-pairs and city-pairs will continue to have numerous alternative competitive services to discipline the behavior of the Alliance.

2. Next, TWA attempts to concoct a distinction by claiming that the Joint Applicants do not propose to operate as a merged carrier, in contrast to Northwest-KLM. To support this erroneous claim, TWA attempts to draw significance out of minor differences between the Alliance Agreements and the Northwest-KLM Agreement. The Alliance Agreements are virtually identical to the Northwest-KLM Agreement; the differences are not significant, and the ultimate objective is similar. The Alliance Agreements are designed to provide the legal frameworks to allow the carriers to coordinate and integrate their services in order to operate a seamless transportation network as if the carriers were merged. The elements of the proposed coordination, integration and joint activity are set forth in detail in the Cooperation Agreements which contain descriptions of proposed joint activities that are virtually identical to the Northwest-KLM Agreement. Although TWA claims that KLM and Northwest planned on "the fundamental equivalent of a merger", here is what Northwest and KLM said about their planned alliance:

"The Northwest-KLM Agreement is not a merger. There is no acquisition of stock or assets, and there is no change in ownership or control. To the contrary, Northwest and KLM are seeking permission to engage in single-firm pricing and marketing without merging, and have clearly stated to the Department that they cannot merge because of statutory restrictions on foreign ownership and control."

Joint Reply of Northwest and KLM, filed December 7, 1992, at 4, Docket 48342 (emphasis in original). Similarly, Delta, Swissair, Sabena and Austrian seek permission to allow them to engage in single-firm pricing and marketing activities because they cannot merge in light of statutory and bilateral restrictions relating to foreign ownership and control.

In summary, TWA's effort to distinguish the proposed Alliance Agreements from the Northwest-KIM alliance is without validity.

3. Another distinction claimed by TWA is that KLM "had a substantial equity interest in Northwest" at the time of the proposed alliance. While the Joint Applicants submit that pre-existing ownership is not a decisionally relevant factor, there is currently cross-ownership among the Joint Applicants. Delta and Swissair each hold equity interests in the other constituting approximately 5% of the voting stock of each airline. Swissair holds a 10% equity stake in Austrian and holds 49.5% of Sabena's voting stock. Moreover, as the current corporate governance spat between Northwest and KLM demonstrates, there is no magic to a large equity stake.

H. Foreign Policy Supports Grant Of The Joint Application.

Foreign policy considerations support approval of and grant of antitrust immunity to the Alliance Agreements, just as foreign policy considerations supported the grant of the Northwest-KIM alliance. Contrary to TWA's assertion, the Open Skies agreements between the United States and Austria, Belgium and Switzerland are fundamentally the same as the Open Skies agreement between the United States and Netherlands and the foreign expectations are not dissimilar.

In the Northwest-KIM case, the Department expressly recognized that nothing in the U.S.-Netherlands Open Skies agreement or the Memorandum of Consultations required approval and antitrust immunity of the Northwest-KIM agreement:

“We recognize that the accord between the United States and the Netherlands does not expressly require us to grant a request for approval and antitrust immunity of an agreement on integrating the services of a U.S. carrier and a Dutch carrier.”

Order 92- 1 1-27 at 17. Nevertheless, the Department concluded that it would be “contrary to the spirit of the accord” to disapprove the agreement or to prevent its consummation by denying antitrust immunity and that “the Netherlands would consider it to be inconsistent with the Open Skies spirit if we deny the applicants’ request.” Id. See also, Order 93-1-11 at 12.

“We believe that the Netherlands would consider a denial of immunity contrary to the Open Skies Initiative, unless we had a strong basis for refusal to grant antitrust immunity.”

In commenting on the Northwest-KIM decision, the GAO observed that the Department’s grant to Northwest and KLM of antitrust immunity “implied a favorable treatment of future applications by other U.S. and foreign airlines in exchange for liberal aviation accords.” GAO Report at 52. This is because one of the primary goals sought to be achieved by the Department in approving Northwest-KIM was to “encourage other countries to seek similar liberal aviation arrangements with the United States. . . so that comparable onnortunities may become available to other U.S. carriers.” Order 92-1 1-27 at 12, 14 (emphasis added). Furthermore, when the Secretary unveiled his Open Skies Initiative with nine European countries, he stated that: “When these open skies

agreements are concluded, they will provide substantial benefits to U.S. travelers, shippers and communities as well as to the U.S. economy. . . . U.S. airlines will have new opportunities to participate in the globalization of air services, and U.S. communities will have new opportunities to attract international air services.” Statement of Secretary Peña, dated January 27, 1995.

All of this formed the backdrop against which the Governments of Austria, Belgium and Switzerland entered into the Open Skies agreements with the United States earlier this year. While straining to draw language distinctions between the various MOCs, TWA ignores the fact that the Belgium and Austria MOCs expressly recognized the importance placed by the Governments of Austria and Belgium on the direct relationship between open skies and the need for antitrust immunity. See, for example, the MOC between the Governments of the United States and Belgium dated March 1, 1995, which states: “The Belgium delegation indicated that antitrust immunity is an essential complement to open skies in order to compete against other global alliances.” In these circumstances, the fact that the Netherlands MOC used the phrase “sympathetic consideration”, whereas the Belgium and Austria MOCs used the phrase “due consideration” is not significant. After all, the Netherlands MOC was concluded in the context of no previous precedent for approval of a global alliance, whereas the Switzerland/Austria/ Belgium Open Skies Agreements were concluded in the aftermath of the favorable precedent established in Northwest-KIM.

Disapproval of the Alliance Agreements or the prevention of their consummation by withholding antitrust immunity would contravene the spirit and intent of the open

skies agreements between the United States and Austria, Belgium and Switzerland, and be inconsistent with the Department's express undertaking to provide "comparable opportunities" in exchange for open skies agreements. Foreign policy considerations therefore strongly support grant of this application.

I. TWA's Argument That The Application Is Premature Should Be Rejected._____

TWA claims that the Alliance Agreements do not contain the actual operating agreements and therefore the Application for antitrust immunity is premature. A similar argument was rejected by the Department in Northwest-KIM. In that case, American claimed that the Agreement submitted for approval was merely a general statement and that before the DOT could approve the Agreement and grant antitrust immunity, the commercial cooperation, integration, marketing, and other agreements to which the Agreement referred should be submitted for Department review and approval. The Department rejected American's position and found that the Application for approval was substantially complete. Order 92-9-30.

The Alliance Agreements are complete as submitted. If the Department determines that the Alliance Agreements should be approved and the carriers should be permitted to act as if they are a merged firm, then the follow-on agreements would, in effect, be internal determinations of a single entity. In the Northwest-KIM case, the Department required Northwest and KLM to submit the subsidiary agreements for prior review only because of issues relating to the citizenship of Northwest and the control of that carrier by KLM:

“We had tentatively determined not to require separate approval for the future subsidiary agreements between Northwest and KLM that are needed to implement the integration of their services. However, the changed circumstances created by Northwest’s recent restructuring program dictates that we review the subsidiary agreements to the Agreement to monitor the control of the U.S. carrier.”

Order 93-1-11 at 11.

J. A Hearing Is Not Necessary In This Case.

The Department should reject TWA’s request for a formal oral evidentiary hearing for the same reasons it rejected a similar request for a hearing in the Northwest-KLM case:

“We see no reason to provide additional procedures in this case, even though some parties urge us to hold a formal hearing before we decide whether to approve and immunize the Agreement. Such a hearing is unnecessary and would unduly prolong this proceeding. The parties have had several opportunities to present their legal and factual arguments in this case. No oral evidentiary hearing is needed for the examination of any material significant issue relevant to this case. Furthermore, Sections 4 12 and 4 14 [now codified in 49 U.S.C. §§ 41308 and 41309] by their terms do not require an oral hearing for the consideration of applications for approval and antitrust immunity for carrier agreements, and we have customarily resolved such applications without such a hearing.”

Order 93-1-11 at 18.

III. TOWER AIR.

A. The Proposed Alliance Will Not Create Barriers For Small Carriers.

Tower did not challenge or rebut the competitive analysis submitted in the Joint Application. Rather, Tower states in conclusory terms that the approval of the Alliance will create barriers to smaller carriers, because the Alliance carriers will somehow be able to “control” traffic over four U.S. and European hubs.

Tower’s claims are belied by its own success. Tower has successfully carved out a niche as a low-cost, low-price point-to-point carrier in both the domestic U.S. and international markets. Tower’s answer indicates that it successfully operates in numerous domestic and international city-pairs in competition with larger U.S. and foreign carriers that have hubs at the gateway cities, including New York-Los Angeles, New York-San Francisco, New York-Miami, New York-San Juan, New York-Amsterdam, New York-Paris, New York-Sao Paulo, New York-Tel Aviv, New York-Bombay, Miami-Rio de Janeiro, and will soon operate New York-Rio de Janeiro. The Aviation Daily recently reported that Tower’s traffic has increased by over 73% year-over-year (see Aviation Daily, November 9, 1995, page 232). Notably, Tower serves the U.S.-Amsterdam market despite the immunized Northwest-KLM alliance, with its European base in Amsterdam.

Tower’s claim that the Alliance carriers somehow will be able to “control all traffic flowing through four hubs” is simply overblown rhetoric without any logical or evidentiary support. Delta does not have the ability to control all traffic flowing over its hubs -- because there is intense intergateway competition, and the Alliance will not give Delta or the European parties the ability to control flow traffic of the hubs. Just as there is intense

competition domestically, there is and will be equally intense competition between the United States and Europe. Tower already competes successfully with Delta at New York, and does not even serve the Alliance's European hubs. Furthermore, grant of this Application should foster an expansion of open skies and thereby increase opportunities for U.S. carriers, including Tower.

The DOT in its International Policy Statement recognized the important and continuing role that smaller carriers will play in the international marketplace:

". . . there will continue to be a role for air services outside of global networks. The U.S. experience with deregulation indicates that -- absent legal barriers to entry -- specialized competitors will enter the market and discipline the pricing and service behavior of the larger network operators. The introduction of technologically-advanced aircraft such as the B-767, the MD-11 and the B-777 make direct service on longer or thinner routes economically viable. Moreover, airlines can viably serve heavily traveled routes with **point-to-point** service. In short, as indicated by our domestic experience, a variety of service forms -- global networks with carriers participating either as the sole provider or as participant in a joint network, and regional niche carriers -- can exist in the international aviation market and the competition among these services will enhance consumer benefits through **efficient** operations and low fares. Thus, our international aviation strategy should provide opportunities for all of these forms of service so that we realize the benefits from maximum competition among them."

Policy Statement at 5-6. The Open Skies policy is intended to expand these benefits and Tower will be among those who will share in them.

Tower's concerns about anticompetitive pricing are also wrong. Tower first argues that the Alliance's fares will be too high; yet in the same breath, Tower asserts concern

that the Alliance's fares will be too low. As discussed above and in the Joint Application, the Alliance will not be able to charge supra-competitive fares because of competitive market forces. Tower is really concerned that the Alliance will enable the partners to operate more efficiently and be more competitive by reducing fares. Low fares will benefit consumers. If Tower believes the pricing behavior of the Alliance is predatory, it can pursue whatever remedies it has under applicable law to challenge that behavior.

B. The Department Should Not Mandate Interline Agreements.

Tower asks DOT to mandate "most favored nation" interline agreements. The Joint Applicants urge the Department to reject this recommendation, which is, even according to Tower, "a drastic" remedy. Moreover, it is a remedy to a problem that does not exist. As noted, the Northwest-KLM alliance to Amsterdam has not precluded Tower from serving the New York-Amsterdam market. Tower's proposal would have the Department move in the wrong direction, toward greater regulation. This is contrary to the Department's policy to rely on the marketplace, not more governmental intervention. The Department rejected a similar request a decade ago in the Continental v. American, Order 85-12-69. There, the Department denied a request by Continental to force American to enter into a interline agreement with Continental. After pointing out that the law long ago eliminated a requirement for carriers to interline, the Department stated:

"If we attempted to dictate airline interlining practices, we would be acting contrary to the Congressional intent that the carriers, not the government, should determine the method of operations."

Order 85-12-69 at 6

C. Tower's Opposition To The Joint Application Because It Fears That Department Approval Will Spawn Other Transactions Has No Merit.

As the Department has stated, each transaction will be considered on a case-by-case basis. To the extent that the proposed Alliance might encourage the development of other alliances, the Joint Applicants submit that the end result would significantly enhance competition and public benefits on a global basis. After all, a prerequisite to the approval of such alliances is the existence of a liberalized, open skies bilateral agreement. If this Alliance encourages restrictive governments to liberalize their aviation regimes, competition and opportunities for U.S. carriers -- including Tower -- would increase.

IV. AMERICAN.

American's Answer expressly states that it has no objection to the Joint Application. However, American asserts that if the Joint Application is granted, similar treatment should be accorded to the American-Canadian International Joint Application in Docket OST-95-792. American's comparisons of the U.S.-Europe and U.S.-Canada markets are not relevant to this proceeding. American's application will be considered in a separate docket and judged on its individual merits and it would be inappropriate to consider it here. There is, however, a fundamental distinction between the two applications. Here, there exist fully effective open skies agreements between the United States and each of the affected European countries. By contrast, the U.S.-Canada bilateral agreement remains subject to significant restrictions with respect to U.S. carrier service to the three largest Canadian markets (Toronto, Montreal and Vancouver) for the next few years.

V. **CONCLUSION.**

The objections of TWA and Tower have failed to establish any basis for disapproval of the Alliance Agreements or for denial of the Application for antitrust immunity. The proposed Alliance is fully consistent with DOT policy, meets all applicable legal standards, is supported by foreign policy considerations, and will produce important public benefits and substantially increase transatlantic competition. Delta, Swissair, Sabena and Austrian urge the Department promptly to approve the Alliance Agreements pursuant to 49 U.S.C. §§ 41308 and 41309.

Respectfully submitted,



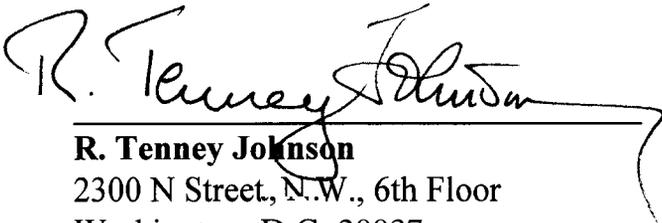
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I certify that a copy of the foregoing Joint Reply of Delta Air Lines, Inc., Swissair, Swiss Air Transport Co., Ltd., Sabena S.A., Sabena Belgian World Airlines, and Austrian Airlines, Österreichische Luftverkehrs AG was served this 20th day of November, 1995, on all persons listed on the attached service list.



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