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Order 99-4-17

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UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

54110

Issued by the Department of Transportation
on the 22nd day of April, 1999

Joint Application of

AMERICAN AIRLINES, INC.
and
LINEA AEREA NACIONAL CHILE, S.A.
(LAN CHILE)

under 49 U.S.C. Sections 41308 and 41309 for
approval of and antitrust immunity for alliance
agreement

Docket OST-97-3285-47

ORDER TO SHOW CAUSE

American Airlines, Inc. ("American") and Linea Aerea Nacional Chile, S.A. ("LAN Chile") have applied for approval and antitrust immunity under 49 U.S.C. §§ 41308 and 41309, for an Alliance Agreement,¹ whereby they will plan and coordinate service over their respective route networks as if there had been an operational merger between the two airlines.² Concurrently, they filed a joint motion under 14 C.F.R. 302.39 of our regulations requesting confidential treatment for certain evidentiary material.³

We have tentatively determined, effective upon implementation of an open-skies regime with Chile, (1) to grant approval of and antitrust immunity for the Alliance Agreement between American and LAN Chile, and (2) to exempt LAN Chile from the Department's regulations to

¹ The term "Alliance Agreement," as used herein, means (1) the agreement entered into on September 5, 1997 (*see* Exhibit JA-1); (2) any implementing agreements that the joint applicants conclude pursuant to the September 5, 1997, agreement to develop and carry out the American and LAN Chile alliance (including, but not limited to, the Code-Share Agreement dated September 5, 1997); and (3) any subsequent agreement(s) or transaction(s) by the joint applicants pursuant to the foregoing agreements.

² By Order 98-2-21, we consolidated into this case a LAN Chile application (Docket OST-97-2982) for an exemption, and an undocketed application filed jointly by American and LAN Chile for a statement of authorization to conduct reciprocal code-share services. These applications were filed with the Department on October 7, 1997.

³ By Notice dated January 9, 1998, we granted immediate interim access to all documents covered by the Rule 39 Motion to counsel and outside experts for interested parties, in accordance with our confidential affidavit procedures.

the extent necessary to permit them to engage in the proposed code-share arrangement. We have, however, tentatively found it appropriate to condition our approval as more fully explained below. We will require American and LAN Chile to (1) exclude certain matters relating to fares and capacity for particular categories of U.S. point-of-sale local passengers flying nonstop between Miami, Florida and Santiago, Chile;⁴ (2) withdraw from all International Air Transport Association (IATA) tariff conference activities affecting through prices between the United States and Chile and for other markets described below; (3) tentatively eliminate any provision which would implement the "Exclusivity Clause" under the Alliance Agreement; (4) file all subsidiary and or subsequent agreement(s) with the Department for prior approval; and (5) resubmit for renewal their Alliance Agreement within three years from the date that this order becomes final. We also tentatively find it in the public interest to direct LAN Chile to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic (O&D Survey) data for all passengers to and from the United States (similar to the O&D Survey data reported by American). We are providing American, LAN Chile, and other interested parties the opportunity to comment on our tentative findings in this order.

We tentatively find that our action in this matter will advance important public benefits. Final approval would permit the two airlines to operate more efficiently, and provide enhanced service options to the U.S. traveling and shipping public. With our proposed limitations, our actions in this matter will be consistent with our policy of facilitating our international aviation policy toward more open-skies relationships, and of encouraging competition among emerging multinational airline networks, where those networks may lead to lower costs and enhanced service for U.S. and international consumers. We are aware that the trend toward expanding international airline networks is an inevitable response to the underlying network economics of the airline industry. We also recognize that our action here will allow our airlines to continue to be significant players in the globalization of the airline industry.⁵

Our tentative decision here is consistent with our earlier actions approving and granting antitrust immunity for other alliances between U.S. and foreign airlines in support of our international aviation policy.⁶ The Department's actions in these earlier cases have allowed these various airlines to integrate their operations so that they operate very much like a single airline. The Department's experience in these matters has demonstrated that such alliances between U.S. and foreign airlines can benefit consumers. For example, the alliance between Northwest and KLM has enabled the two airlines to operate more efficiently, to provide integrated service in many more markets than either partner could serve individually,⁷ and to provide opportunities for increased global competition.

⁴ See Appendix A at 1.

⁵ Order 96-5-26 at 2.

⁶ See Orders 96-11-1, 96-6-33, 96-5-27, and 93-1-11.

⁷ *International Aviation: Airline Alliances Produce Benefits, but Effect on Competition is Uncertain* (GAO/RCED-95-99, April 6, 1995); and *A Study of International Airline Code Sharing*, Gellman Research Associates, Inc., December 1994.

In granting airlines immunity from the operation of our antitrust laws so that they may form efficient alliances, we tentatively believe it is not in the public interest to permit alliances simultaneously to participate with other alliances in certain price-related aspects of antitrust IATA tariff coordination. This circumstance would raise unacceptable risks to competition and consumers. We therefore propose to condition our approval and grant of antitrust immunity in this case by requiring the joint applicants to withdraw from participation in any IATA tariff conference activities that discuss any proposed through fares, rates or charges applicable between the United States and Chile, or between the United States and any other countries whose designated carriers have been granted antitrust immunity or renewal thereof by the Department for participation in similar immunized alliances with a U.S. airline.

I. Background

A. The Open-Skies Agreement with Chile

Open-Skies agreements with foreign countries assure the most liberal operating environment of air services and give any carrier from either country the right to serve any route between the two countries and beyond. These agreements place no limits on airline capacity, and carriers are free to charge any price unless both countries disapprove. The foreign applicant's national authority undertook to join with the United States in open-skies aviation relations, under certain conditions. Chile was thus in the forefront of progressive South American nations when it chose open-market competition in aviation over a tightly constrained, highly restricted and regulated, operating environment.

On October 28, 1997, delegations of the Governments of the United States and Chile initialed an agreement regarding a new open-skies' aviation relationship between the two countries. The predicate for our conditioned approval for the American-LAN Chile alliance is the existence of the potential open-skies aviation agreement between the United States and Chile. The new accord will allow any U.S. carriers to serve any point in Chile (and open intermediate and beyond rights) from any point in the United States and will allow any Chilean carrier to do the same.

Among other things, the open-skies agreement provides that the national carriers of the United States and Chile may enter into marketing arrangements such as blocked-space, code-sharing or leasing arrangements, if all airlines (1) hold appropriate authority, and (2) meet the requirements normally applied to such arrangements. As previous open-skies agreements have demonstrated, open-skies aviation should also encourage more competition in the U.S.-Chile marketplace. When the open-skies agreement comes into effect, market forces will discipline the price and quality of U.S.-Chile airline service, instead of restrictive agreements, and U.S. consumers should benefit from enhanced passenger and shipping options.

B. The Joint Applicants' Proposed Operational Relationships⁸

American and LAN Chile propose to engage in the following code-share services:

1. American's "AA" designator code on LAN Chile flights:
 - a. between Santiago, Chile, and Miami, Los Angeles, and New York; and
 - b. between Santiago, Chile, and Antofagasta; Arica; Concepcion; Easter Island; Iquique; Puerto Montt; Punta Arenas; and Temuco, Chile.
2. LAN Chile's "LA" designator code on American flights:
 - a. between Santiago, Chile, and Dallas/Ft. Worth and Miami;
 - b. between Miami and Atlanta; Boston; Chicago (O'Hare Airport); Dallas/Ft. Worth; Denver; Houston; New York; Orlando; Philadelphia; San Juan; and Washington, D.C./Baltimore;
 - c. between Dallas/Ft. Worth and Atlanta; Boston; Chicago (O'Hare Airport); Denver; Houston; New York; Orlando; Philadelphia; San Juan; and Washington, D.C./Baltimore; and
 - d. between New York and Boston; Philadelphia, and Washington, D.C./Baltimore.

American and LAN Chile provide competing nonstop service only between Miami and Santiago, Chile.

II. The American and LAN Chile Alliance Agreement

The Alliance Agreement will establish a contractual framework for implementation of comprehensive coordinated activities by the two companies. For example, the Alliance Agreement provides for coordinated pricing; the establishment of an "Alliance Committee" to oversee and manage the two companies' cooperative activities; joint marketing, sales, advertising and distribution networks; coordinated flight schedules, route networks, and route planning; revenue pooling and sharing; joint identity (including, an "alliance mark" to represent their alliance and frequent flyer program linkage); cooperation regarding existing internal information systems (including inventory, yield management, reservations, ticketing, and distribution); coordinate purchasing of goods and services from third-party suppliers, travel agents, general sales agents; sharing of facilities at airports; uniform service standards; and coordinated cargo programs. In short, the Alliance Agreement, if approved, will allow the applicants effectively to

⁸ See joint application for statements of authorization dated October 7, 1997, Annexes A and B.

operate much as a single firm, while retaining their individual identities regarding ownership and control.

III. The Application and Responsive Pleadings

A. The Joint Application

On December 23, 1997, American and LAN Chile filed a request seeking approval of and antitrust immunity for an Alliance Agreement, for a five-year term.⁹ Through their Alliance Agreement, the applicants state that they intend to offer the traveling and shipping public a greater choice of destinations, providing air transportation to approximately 4,000 city-pair markets by their alliance network. While the applicants state that the alliance does not involve any “exchange of equity or other forms of cross-ownership,” they state that the objective of the Alliance Agreement is to enable the two companies to plan and coordinate service over their respective route networks as if there had been an operational merger between them.

The applicants assert that approval of and antitrust immunity for the proposed alliance is supported by substantial public and commercial benefits and efficiencies and by U.S. international aviation policy. They maintain that the alliance will create beneficial network synergies by creating a coordinated network of services between the United States and Chile and beyond, and producing cost efficiencies and savings through integration and coordination that can be passed on to consumers, as global competition between alliances increases. They assert that the alliance will create a seamless American-LAN Chile network that will promote enhanced competition in the U.S.-Chile market and the worldwide marketplace by enabling them to compete with other global alliances, thereby increasing global competition. Conversely, they argue that denial of their requests will prevent consummation of the Alliance Agreement and thereby deny these benefits to the public. They state that the objectives promoted by the proposed alliance agreement will not be achieved without antitrust immunity. Moreover, they state that “the alliance agreement is expressly predicated on antitrust immunity and, even if it were not, the applicants would not risk antitrust attacks by proceeding absent immunity.”¹⁰ The airlines regard antitrust immunity as an essential condition precedent to implementation of the Alliance Agreement.¹¹

The applicants say that neither carrier can attain these public interest benefits individually, due to a host of legal, economic, and logistical barriers and financial considerations; or through merger, because U.S. and Chilean laws concerning nationality and ownership effectively preclude mergers of U.S. and Chilean airlines. Therefore, they state that, in the absence of a merger, the

⁹ By Order 98-2-21, issued February 20, 1998, we found that the record of this case was substantially complete, and established procedural deadlines. We also provided to counsel and outside experts for interested parties interim access to the confidential information filed in the American-TACA Group case (Docket OST-96-1700), subject to certain affidavit procedures and requirements.

¹⁰ Joint Application, at 40.

¹¹ The Agreement, § 3.2 (*see* Exhibit JA-1, at 3).

proposed joint venture requires that they craft business understandings that will expose them to the risk that these coordinated activities would be challenged on antitrust grounds. They say that the proposed arrangement will allow them to develop mechanisms to enhance efficiencies, reduce costs and provide better service to the traveling and shipping public by providing for: increased frequencies and enhanced on-line services; expanded and improved service in behind-gateway markets; coordinated networks and transatlantic segments; expansion of discount fares; inventory control; reduced sales, marketing and reservations costs; and more effective equipment utilization.

The applicants maintain that the grant of antitrust immunity will accelerate liberalization of the international marketplace, thus achieving an important goal of the Department's open-skies initiative. Further, the applicants assert that the Alliance Agreement is fully consistent with the Department's policy of encouraging and facilitating the globalization and cross networking of air transportation. They maintain that approval of the arrangement coupled with antitrust immunity will create further competitive pressures on other aviation authorities to open their markets to the benefits offered by more liberalized open-skies aviation regimes.

The applicants hold the view that their application is warranted by foreign policy considerations. They maintain that the proposed alliance is fully consistent with U.S. international aviation policy, and an envisioned outcome of the newly liberalized open-skies aviation arrangement between Chile and the United States. The applicants assert that denial of their application for antitrust immunity would prevent consummation of the proposed alliance, be inconsistent with the U.S. Government's commitment to open-entry markets and free and fair international competition, and, generally, undermine and frustrate any prospect for an "effective" open-skies agreement with Chile and would undermine the U.S. policy of achieving liberalized agreements in the U.S.-South America market.

The applicants maintain that the Alliance Agreement will not substantially reduce or eliminate competition between the United States and Latin America. Indeed, they argue that a fully implemented Alliance Agreement will enable them to increase their competitiveness, placing additional commercial pressure on rival Latin American carriers and carrier alliances. They also maintain that almost all significant Latin America city-pair routes are or can be served by multiple U.S. and/or Latin America airlines on either a nonstop, single-plane, or one-stop on-line connecting basis.¹²

Regarding the U.S.-Chile market, the applicants assert that balancing the pro-competitive effects of the proposed alliance against any potential anticompetitive aspects of the alliance weighs heavily in favor of approval. They note that United Air Lines also operates nonstop service

¹² For example, they note that United Air Lines, through its "Star Alliance" partnership with Varig, S.A., South America's largest airline, has online service to "every major destination in Latin America." Moreover, the joint applicants maintain that Delta Air Lines has either sought permission from the Department or confirmed its plans to commence or increase service to at least nineteen Latin American cities.

between the United States and Chile.¹³ Moreover, the applicants claim that examining the current U.S.-Chile market shares in isolation is misleading. They maintain that once the U.S.-Chile open-skies agreement is implemented, an increase in service both by existing competitors and new entrants can be expected.

Regarding the city-pair markets, the applicants note their alliance has only one overlapping nonstop city-pair market: Miami-Santiago, in which United Air Lines already provides competing nonstop service. Therefore, they argue that the overlap situation in this case is "less troubling" than the overlapping routes that were part of alliances that the Department has previously immunized. Further, they assert that the open-skies agreement between the U.S. and Chile will assure competitive discipline by providing for open entry and pricing and service freedom.

Finally, the applicants state that grant of antitrust immunity here should also cover the coordination of (1) the presentation and sale of the applicant carriers' airline services in Computer Reservations System (CRS), and (2) the operations of their respective internal reservations systems.

B. Responsive Pleadings

On March 13, 1998, Continental Airlines, Inc. ("Continental"); Delta Air Lines, Inc. ("Delta"); and United Air Lines, Inc. ("United") filed answers to the application.

1. Continental

Continental urges the Department to deny the application. Continental states that the proposed alliance raises the same competitive problems as the American-TACA Group application (Docket OST-96-1700).¹⁴ Continental argues that the applicants combined strength in the U.S.-Chile market, coupled with the various agreements American has achieved with other South American carriers, would prevent competing U.S. carriers from establishing effective competition for the proposed alliance over U.S.-Chile routes.

Continental argues that the value of this arrangement to American is that it prevents American's global competitors from forming efficient networks to compete with American. Continental states that the proposed code-share agreement is exclusive with respect to the city-pairs covered by the agreement, and that approval of the alliance would preempt other competing U.S. carriers from code sharing with LAN Chile. Continental argues that approval of the proposed alliance will allow American to replace its dominance throughout Latin America based on restrictive

¹³ United Air Lines provides daily, nonstop service in the Miami-Santiago market. Additionally, we note that in May 1998, Continental Airlines commenced nonstop service in the Newark-Santiago market.

¹⁴ By Order 98-5-26, issued May 20, 1998, the Department granted final approval for the various applications of American and the TACA Group to the extent necessary to permit them to conduct reciprocal code-share services operated by these carriers for a period of two years, subject to conditions.

bilateral agreements with commercial dominance gained through alliances with its major foreign competitors in the region.

Continental states the American-LAN Chile alliance is “almost entirely horizontal,” involving the dominant U.S. carrier on most U.S.-Latin America routes and at Miami (the key Latin America gateway). Continental states that the proposed American-LAN Chile alliance is far different from the pro-competitive, end-to-end previously-immunized alliances. Moreover, Continental alleges that the dominance of American-LAN Chile in the affected market resulting from approval of this application would “nullify” any competitive benefit for U.S. passengers and American’s U.S. competitors from open skies between the U.S. and Chile.

Continental says that application of the traditional Clayton Act test shows that the proposed alliance will substantially reduce competition in the U.S.-Chile market and foreclose “meaningful” competition even under open skies. Finally, Continental claims that, unlike an American-LAN Chile alliance, a LAN Chile alliance with Continental, or another competing U.S. carrier, would more appropriately expand passenger and shipper options in the U.S.-Chile market.

2. Delta

Delta opposes the application and urges that it be denied. Delta says that the record establishes that the proposed alliance is anticompetitive, anti-consumer, and lacks countervailing public interest benefits. Delta states that approval would “entrench” American’s position as the dominant carrier to Chile and Latin America, and would “foreclose significant competitive challenge to American through a code-sharing arrangement between LAN Chile and another U.S. carrier.”

Delta maintains that an American-LAN Chile alliance would create an “impervious” barrier to competition, even with an open-skies agreement. Delta says that American’s dominance at the Miami gateway, coupled with LAN Chile’s customer base in Chile, will enable the applicants to amass a disproportionate market share between the U.S. and Chile, and allow American to further exploit its hub strength at Miami. Delta maintains that, unlike the U.S.-Europe market where a number of competing network alliances discipline the services and behavior of any one alliance in any city-pair market, no such network alternatives currently provide an effective disciplining mechanism to American-LAN Chile.

Delta argues that the proposed arrangement does not offer to American a “meaningful” ability to enter new markets or to expand its system. It says that any benefits alleged by the applicants are outweighed by the negative impact on competition that the proposed arrangement would produce; the elimination of competition between American and LAN Chile would result in significant competitive harm; and an immunized alliance between the applicants would curtail the competitive options available to consumers. Finally, Delta maintains that there are other less anticompetitive alternatives to the proposed alliance, such as a Delta-LAN Chile alliance.

3. United

United urges denial of the application. The carrier says that American is a dominant carrier throughout Latin America, seeking to entrench its position in these markets through alliances with virtually every foreign carrier in the region. United maintains that the Department cannot review each of American's alliances in isolation from the others. United argues that the other alliance relationships that American has forged in the U.S.-Latin America region pose a substantial risk to competition.

United maintains that granting the proposed request will further entrench American as the dominant carrier in the U.S.-Chile and U.S.-Latin America markets and enable American to increase its dominant position at its Miami gateway. United maintains that approval of this arrangement will preclude it (and other competing U.S. carriers) from entering into an alliance agreement with LAN Chile that would promote the expansion of United's Latin America route network and would provide competition for American at Miami and throughout Latin America. United asserts that approval of the application would increase the pressure on the Department to approve other alliances between American and other major Latin American carriers, diminishing the likelihood that other competing U.S. carriers would be able to establish broader network-to-network competition with American throughout Latin America.

United says that the competitive issues raised by this case are not comparable to the other immunized alliances approved by the Department, and that the applicants' reliance on those earlier decisions is misplaced. United argues that rather than creating opportunities for increased entry and competition throughout Latin America for other U.S. carriers, open skies under the proposed terms of this alliance will reduce competition, particularly at Miami. United says that approval of the application will foreclose the opportunity for other U.S. carriers to use code sharing and alliance agreements to extend their networks into Latin America to provide network-to-network competition for American in the region.

United argues that this application is further confirmation of its view that American's objective in seeking alliances throughout Latin America is to foreclose other U.S. carriers from doing so, thus insulating American's Latin America network from effective competition. United contends that the Department should only approve alliances where the applicants can show that their proposed arrangement will enhance consumer benefits without leading to any significant impairment of competition in any relevant market. United maintains that this application does not satisfy this standard and, therefore, should be denied.

Finally, United says that approval of this request will increase American's dominance at the Miami gateway. United maintains that, unlike the U.S.-Europe market where U.S. carriers operate through a range of competitive gateways, there is no alternative to Miami as a gateway to Latin America. United argues that because of Miami's unique geographic location, as well as the large and affluent Spanish population living in South Florida, Miami controls both the flow and the source of traffic to virtually all of Latin America. United further maintains that any reduction

in competition on Miami-Latin America city-pair routes has a greater effect on the traveling public than would a similar reduction in any individual U.S.-Europe city-pair market.

On March 24, 1998, Aerovias de Mexico, S.A. de C.V (“Aeromexico”); the Regional Business Partnership (“Newark”); and the Joint Applicants filed replies.

4. Aeromexico

Aeromexico urges the Department to deny the application. It argues that denial of the proposed alliance is necessary to preserve competition in the airline industry; to ensure against abuses of market power in Latin America; and to preserve competitive travel options for U.S. and other consumers.¹⁵ Aeromexico maintains that the proposed alliance is not necessary to meet either a serious transportation need or to achieve important public benefits. Aeromexico states that the only consequential benefit deriving from approval of the application would flow to American and its existing and proposed affiliates, *i.e.*, domination of the Latin America marketplace.

Aeromexico asserts that the proposed alliance would hinder competition in the Latin America market, as to air transportation choices and options available to various U.S. interests. Aeromexico argues that the proposed alliance will neither create nor improve new nonstop passenger destinations or services, nor will the arrangement allow American to enter markets that it could not access absent the proposed alliance.

Aeromexico maintains that the alliance will “dramatically” reduce competition to and throughout Latin America. Aeromexico says that the American-LAN Chile dominance in the affected market would have a particularly anticompetitive impact on a regional basis. Aeromexico asserts that, unlike Europe or Asia, multiple competing alliance groups do not now exist in Latin America, and the geography of the Latin America region results in a limited number of alternative hubs that could offer passengers competing service options.

Aeromexico argues that the proposed alliance would not only exclude new entrant carriers from the affected market, but would also “ensure that they will not be able to do competitive business within entire regional route systems.” Finally, Aeromexico maintains that the dominance of the applicants in the U.S.-Latin America market coupled with American’s financial strength assures that consumers are more likely to see fare increases than fare discounts in the affected market if the proposed alliance is approved by the Department.

¹⁵ Aeromexico argues that the proposed alliance would significantly reduce competition on routes not merely in the U.S.-Chile market, but also between Chile and other key Latin America destinations, such as Mexico City. Aeromexico plans to develop Mexico City as an alternative hub between the United States and Latin America.

5. Newark

Newark urges the Department to deny the application. Newark states that the proposed alliance would eliminate competition on U.S.-Chile routes, even if current bilateral restrictions were removed. Newark claims that American's various Latin America alliances are aimed at preempting development of competing U.S. carrier alliances and networks in the affected region. Newark also maintains that approval of the proposed alliance would make it "impossible" for Continental and other U.S. carriers to develop alternate hubs for U.S.-Chile services and would jeopardize Continental's nonstop service in the Newark-Santiago, Chile market.

6. Joint Applicants

The applicants urge the Department to grant the application, code-sharing authorizations and related exemptions. They state that the proposed alliance is consistent with the public interest, enhances competition, and furthers the fundamental U.S. foreign policy objective of achieving open-skies agreements between aviation bilateral partners.

The applicants note that since filing their application the U.S.-Latin America market has experienced "sweeping" pro-competitive changes. They state that the opposing parties ignore the pro-competitive implications of the U.S.-Chile open-skies' agreement and the unfavorable implications of a failure to grant the American-LAN Chile applications. They state that the proposed alliance is fully consistent with U.S. international aviation policy, and the arrangement will allow LAN Chile to realize new opportunities under open skies and to provide new price, quality, and service options to consumers in the global marketplace. The applicants assert that the proposed alliance provides the impetus for the opening of the currently-restricted U.S.-Chile market, and that the *status quo* is maintained without the proposed alliance.

The applicants state that Continental, Delta, and United each having failed to achieve its own alliance with LAN Chile through the normal course of a free, competitive process now asks the Department to intervene and "force" LAN Chile to do business with them. They maintain there are no barriers to entry at Santiago (Comodoro Arturo Merino Benitez Airport), or at any other airport in Chile.

While the opposing parties argue that American's dominance at Miami International Airport creates a virtual anticompetitive situation, the applicants note that each of the opposing parties have a dominant market share at a U.S. hub airport.¹⁶ American argues that its determination to invest "billions of dollars" in developing the Miami gateway should not preclude LAN Chile and American from entering into an alliance using Miami as the key connecting point. American says that there are no facilities constraints at issue in this proceeding, in contrast to a number of other antitrust-immunized alliances.

¹⁶ Continental at George Bush Intercontinental Airport; Northwest Airlines at Detroit Metropolitan Airport and Minneapolis/St. Paul International Airport; Delta Air Lines at Atlanta Hartsfield Airport, Cincinnati Airport, and Salt Lake City; and United Airlines at Denver International Airport.

The applicants dispute United's view that its ability to operate profitably in the Miami-Latin America market will be "seriously" undermined if the Department approves the proposed alliance. They maintain that United's ability to compete effectively in this market is related directly to United's earlier business decisions not to invest its resources to develop a hub at Miami. Further, contrary to United's assertions, the applicants say that the alliance will allow them to provide a broad array of new services to the public, in all relevant markets.

Finally, LAN Chile states that its decision to form the proposed alliance was based strictly on "sound commercial criteria." LAN Chile says that it met with Continental, Delta, and United to discuss possible marketing arrangements, and that in each case a "sufficiently attractive proposal" was not achieved.

7. Ancillary Responses

On March 27, 1998, American filed a motion to strike Aeromexico's pleading of March 24. American argues that the pleading is not a "legitimate" reply, but a late-filed objection and, consequently, it does not conform to the Department's established procedural order. The applicants also maintain that Aeromexico does not have standing in this matter.¹⁷

On April 2, 1998, United filed a reply and a motion for leave to file an otherwise unauthorized document. United says that the record of this case shows that the proposed alliance is part of American's plan to "perpetuate" its dominance of key U.S.-Latin America markets. United maintains that the applicants have not demonstrated that their application would be consistent with 49 U.S.C. § 41309. United argues the record demonstrates that the market structures of U.S.-Europe and U.S.-Latin America are not comparable, and it would be a mistake for the Department to presume that the strategy it has pursued to open U.S.-Europe markets can be replicated in Latin America without adverse competitive consequences.¹⁸ Finally, United argues that because Miami is the pre-eminent gateway for U.S.-Latin America travel, if American can insulate its competitive position at Miami from challenge, American will be positioned to dominate the U.S.-Latin America market.

On April 3, 1998, Aeromexico filed in opposition to American's March 27 motion to strike Aeromexico's pleading of March 24. Aeromexico urges the Department to deny American's motion. In the alternative, it requests that the Department treat its pleading as a Motion for Leave to Late-File Comments.

¹⁷ While Aeromexico may have filed its responsive pleading late, our consideration of its arguments in this matter has not deprived interested parties of an opportunity to respond. In this instance, we also find Aeromexico's answer constructive in enhancing the evidentiary record. For these reasons, we will deny American's motion to strike.

¹⁸ United notes that it offers nonstop service from Miami to nine U.S. points, which produce over 50 percent of the U.S. traffic to Chile that originates outside of Miami, and online connections to virtually every other U.S. point that accounts for a meaningful number of U.S.-Chile passengers. Reply at 10.

On April 7, 1998, Continental filed an answer, a consolidated surreply, and a motion for leave to file an otherwise unauthorized document. Continental maintains that American's position in this case cannot be reconciled with American's recent statements about it being driven out of three U.S.-European city-pair markets because of the advantages immunized alliances possess over unaffiliated airlines. Continental argues that an American-LAN Chile alliance will preempt network competition. In support, it is Continental's view that the Latin America market will not support a large number of competitive alternative hubs and service options, and that there are not multiple alliance groups in competition in the U.S.-Latin America market, in constant to Europe and Asia. Finally, Continental urges the Department to accept Aeromexico's pleading.

On April 9, 1998, American filed a response and a motion for leave to file late asking the Department to reject United's April 2 reply and motion, and Continental's April 7 submission. American states that these pleadings add nothing new to the record, and it urges the Department not to accept them.

On April 10, 1998, LAN Chile filed an answer opposing admission into the record of each of the late filed pleadings in this case. LAN Chile says that the true objective of each of these pleadings is to delay action on the its pending applications.

IV. Tentative Decision

We tentatively find that the Alliance Agreement should be approved and granted antitrust immunity under §§ 41308 and 41309, to the extent provided below. Our examination of the joint applicants' proposal tentatively leads us to find, as limited and conditioned by the Department, that the integration of the two carriers' services should, on balance, allow them to improve online service and allow them to operate more efficiently. We also tentatively find that it is unlikely that the Alliance Agreement -- subject to the conditions included here -- will substantially reduce competition in any relevant market.

Nevertheless, the record of this case raises concerns about the potential loss of competition in some particular aspects of the Miami-Santiago city-pair market. Our concerns about the effect of this proposed arrangement on the availability of competitive options for time-sensitive (usually business) travelers have led us to withhold approval and grant of antitrust immunity for joint activities involving certain fare categories. However, on balance, we tentatively conclude that the overall competitive opportunities in the affected markets, supplemented by the conditions and limitations that the Department is imposing here, together with the anticipated consumer benefits and efficiencies usually resulting from such arrangements, and considerations of international transportation policy regarding open-skies markets, justify our approval.

In addition, we will require the joint applicants (1) to withdraw from all International Air Transport Association (IATA) tariff conference activities relating to through prices between the United States and Chile, as well as between the United States and the homeland(s) of foreign carriers participating with U.S. carriers in other immunized alliances; (2) to file all subsidiary and

subsequent agreement(s) with the Department for prior approval; (3) to tentatively eliminate any provision which would implement the "Exclusivity Clause" under the Alliance Agreement; and (4) to resubmit for renewal their variously styled alliance agreement(s) in three years. We also find it in the public interest to direct LAN Chile to report full-itinerary O&D Survey data for all passenger itineraries that contain a United States point (similar to the O&D Survey data already reported by American).

V. Decisional Standards under 49 U.S.C. Sections 41308 and 41309

A. Section 41308

Under 49 U.S.C. Section 41308, the Department has the discretion to exempt a person affected by an agreement under Section 41309 from the operations of the antitrust laws "to the extent necessary to allow the person to proceed with the transaction," provided that the Department determines that the exemption is required by the public interest. It is not our policy to confer antitrust immunity simply on the grounds that an agreement does not violate the antitrust laws. We are willing to make exceptions, however, and thus grant immunity, if the parties to such an agreement would not otherwise go forward without it, and we find that the public interest requires that we grant antitrust immunity.

B. Section 41309

Under 49 U.S.C. Section 41309, the Department must determine, among other things, that an intercarrier agreement is not adverse to the public interest and not in violation of the statute before granting approval.¹⁹ The Department may not approve an inter-carrier agreement that *substantially* reduces or eliminates competition unless the agreement is necessary to meet a serious transportation need or to achieve important public benefits that cannot be met, and those benefits cannot be achieved, by reasonably available alternatives that are materially less anticompetitive.²⁰ The public benefits include international comity and foreign policy considerations.²¹

The party opposing the agreement or request has the burden of proving that it substantially reduces or eliminates competition and that less anticompetitive alternatives are available.²² On the other hand, the party defending the agreement or request has the burden of proving the transportation need or public benefits.²³

¹⁹ Section 41309(b).

²⁰ Section 41309(b)(1)(A) and (B).

²¹ Section 41309(b)(1)(A).

²² Section 41309(c)(2).

²³ *Id.*

VI. Tentative Approval of the Agreement

A. Antitrust Issues

American and LAN Chile say that the Alliance Agreement is intended to create a legal framework which will allow them, while retaining their separate corporate and national identities, to cooperate to the extent necessary to create a seamless air transport system. The Alliance Agreement's intended effects accordingly are equivalent to those resulting from a merger of the two airlines. In determining whether the proposed transaction would violate the antitrust laws, we apply the Clayton Act test used in examining whether mergers will substantially reduce competition in any relevant market.²⁴

The Clayton Act test requires the Department to consider whether the Agreement will substantially reduce competition by eliminating actual or potential competition between American and LAN Chile so that they would be able to produce supra-competitive pricing or reduce service below competitive levels.²⁵ To determine whether a merger or comparable transaction is likely to violate the Clayton Act, the Department of Justice and the Federal Trade Commission use their published merger guidelines.²⁶ The Merger Guidelines' general approach is that transactions should be blocked if they are likely to create or enhance market power, market power being defined as the ability profitably to maintain prices above competitive levels for a significant period of time (firms with market power can also harm customers by reducing product and service quality below competitive levels). To determine whether a proposed merger is likely to create or enhance market power, the Department of Justice and the Federal Trade Commission primarily consider whether the merger would significantly increase concentration in the relevant markets, whether the merger raises concern about potential competitive effects in light of concentration in the market and other factors, and whether entry into the market would be timely, likely, and sufficient either to deter or to counteract a proposed merger's potential for harm.

1. Global Competition

The traditional analysis for airline mergers has focused on discrete city-pair routes. Without minimizing the significance of city-pair analysis, however, we have found that it is important to recognize that the rapid growth and development of global airline alliance networks requires an additional perspective on competitive impact -- the perspective of a worldwide aviation market in which travelers have multiple competing options for reaching destinations over multiple intermediate points. We have previously demonstrated that integrated alliances can offer a multitude of new online services to a vast array of city-pair markets, on a global basis. Thus, a significant element in antitrust analysis is the extent to which facilitating airline integration (through antitrust immunity or otherwise) can enhance overall competitive conditions.

²⁴ Order 92-11-27 at 13.

²⁵ *Id.*

²⁶ 57 Fed. Reg. 41552 (September 10, 1992).

The development of global network systems has fundamentally changed how we must evaluate the competitive effects of actions such as the formation of the proposed alliance in each relevant market. Greater emphasis must now be placed on network competition, both in terms of identifying which city-pair markets may be affected by the formation of an alliance, and also in terms of understanding how the development of world-wide traffic flows support competitive service to any given city such as Santiago, Chile.

Traffic flows have particularly important competitive implications in both the Central and South America markets, where a large proportion of traffic moving to U.S. gateway cities travels beyond those gateway cities to other points in the United States and beyond. Indeed, the rate of O&D passenger traffic growth between Central and South America cities and cities beyond the United States (*i.e.*, into Canada, Europe and the Far East) far outpaces traffic growth to the United States. These traffic flows explain why other competing U.S. airlines are expanding their service into Central and South America despite American's strong position in these Latin America markets.

With this perspective, we address, below, the issue of airline competition in each of the relevant markets. In doing so, we note that concentration figures are not conclusive. Individual airline nonstop city-pair markets usually have high levels of concentration, since only a few airlines serve most nonstop markets. A key consideration for determining whether the American-LAN Chile alliance (or any other airline merger or joint venture) is likely to reduce competition is potential competition, *i.e.*, whether other airlines have the opportunity to enter the relevant markets in response to inadequate service or supra-competitive prices. When it comes into effect, the open-skies agreement with Chile will eliminate all governmental restrictions on entry into U.S.-Chile markets for U.S. and Chilean airlines. The agreement will accordingly eliminate perhaps the most significant remaining government barrier to entry in those markets. Therefore, the relevant considerations here are whether other factors will prevent U.S. and foreign airlines from entering U.S.-Chile markets, should the applicants increase fares above, or lower service below, competitive levels.

Generally, airlines like other firms may engage in joint ventures and cooperative arrangements without violating the antitrust laws. The courts and the enforcement agencies have usually found that such arrangements are likely to promote economic efficiency and further competition.²⁷ As discussed above, that has been our experience with the Northwest-KLM alliance -- the integration of those partners' operations has increased the efficiency of their operations and made it possible for the two carriers to offer more service and lower fares.

²⁷ See, *e.g.*, *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 295 (1985).

2. Particular Markets

There are three relevant markets requiring a competitive analysis: first, the U.S.-South America market; second, the U.S.-Chile market; and, third, the Miami-Santiago, Chile market.

(a) The U.S.-South America Market

We have tentatively determined that the Alliance Agreement will not substantially reduce competition in the U.S.-South America market. For the year ending June 1998, American's U.S.-South America scheduled passenger share was 36 percent, and LAN Chile's scheduled passenger share was only about 2 percent (the airlines' combined share of the market was 38 percent). In contrast, the United (13.4 percent) and Varig (9.4 percent) code-share alliance had a 22.8 percent scheduled passenger share and Continental had a 5.4 percent scheduled passenger share.²⁸ While the combination of American-LAN Chile operations in the U.S.-South America market will have an effect on concentration (about 2 percent), we find that our actions here will not substantially reduce competition in the U.S.-South America market. Importantly, we note that there has been significant new and enhanced service into a number of South American markets by Continental and Delta since June 1998. For example, Delta has added daily, nonstop service between Atlanta and Lima, Peru, and it has increased its daily operations in the Atlanta-Caracas, Venezuela market from one to two nonstops. Continental has added daily, nonstop service between Houston and Quito, Ecuador, and it has increased its daily operations in the Newark-Rio de Janeiro/Sao Paulo, Brazil markets from one to two nonstops.

(b) The U.S.-Chile Market

In the U.S.-Chile market, American and LAN Chile will have the largest market share. Based on the applicant's existing presence in this market, the opposing parties contend that the alliance will create a barrier to competition, even with an open-skies agreement. However, we do not find that the proposed integration, coupled with the introduction of open skies, will enable the applicants either to impede competition or to increase fares above, or lower service below, competitive levels.

To the contrary, we conclude, that when effective, the U.S.-Chile open-skies accord will foster new entry and enhanced competition in the U.S.-Chile aviation markets that would not otherwise occur.

There are now major government restraints on competition in those markets. Bilateral restrictions limit new entry, the number of U.S. airlines that may serve the market, and the number of flights they can provide, and therefore, the service and fare options that U.S. airlines may now provide. A fundamental purpose of our new open-skies agreement with Chile is to eliminate those restrictions by creating opportunities for new entry, the expansion of existing services, and competition.

²⁸ Source: T-100 and T-100(f) nonstop segment and market data.

A major benefit of our approval would be the increased opportunity for new entry and competition that will result from new service between the U.S. and Chile that will be possible with the implementation of an U.S.-Chile open-skies regime. Thus, we are approving the American-LAN Chile alliance in large part because we believe that U.S. airlines will take advantage of those opportunities, and by doing so, effectively discipline the activities of this alliance. Several factors support this tentative conclusion.

First, despite American's position now as the dominant carrier in the U.S.-Chile market the vast majority of passengers in that market travel beyond each of the current U.S. gateway cities. The Miami-Santiago route, a focus of the opposing parties, accounts for a relatively small proportion of the total U.S.-Chile market.²⁹ Thus, other airlines with established domestic and international networks will be able to compete for the preponderance of traffic to and from Chile over their own gateway cities. Second, over 550,000 passengers now travel between the U.S. and Chile annually, and the market is growing at a very rapid rate.³⁰ This growth will support additional service by existing and new entrant carriers. Third, strong traffic growth between Chile and third countries should also provide an additional source of support for U.S.-Chile air service. In this regard, it is significant to note that strong traffic growth has occurred between third countries in Asia, Canada, and Europe and cities in Central and South America that benefit from having access to competing global networks via hubs in the United States.³¹ Similarly, we anticipate strong traffic growth between Chile and the beyond U.S. market as well because the open-skies agreement will create opportunities for new competitive network services between Chile and third countries via the U.S. This will also support additional entry in the U.S.-Chile market. Fourth, in the existing competitive circumstances, traffic to and from Chile is subject to relatively high fares. Consequently, in addition to service stimulation resulting from new entry, we anticipate a more competitive pricing environment that will further stimulate demand in support of additional U.S.-Chile service.

Thus, network effects are an important reason why we expect an open-skies agreement with Chile to result in more intense competition than now exists. Chile will become an important spoke that will feed traffic through competing global networks. This is precisely the type of market envisioned and promoted by the U.S.-Chile open-skies accord and by our overall international aviation policy. For these reasons, despite the large market share now held by the applicants, we see no significant barriers to entry by other U.S. airlines in the Chile market. Two U.S. airlines besides American are currently serving Chile. United operates a daily nonstop flight to Santiago from Miami. In addition, Continental operates a daily nonstop flight to

²⁹ Only 15 percent of the total U.S.-Chile passenger traffic were to/from American's Miami gateway. Source: U.S. carrier O&D Survey data.

³⁰ The International Air Transport Association has estimated that Chilean international traffic will grow 10.5 percent annually through 2002. Source: *Aviation Daily*, March 26, 1999 (Article 128034).

³¹ For example, during the past two years, Central America-Europe traffic over the United States has increased 46 percent. Source: O&D Survey data.

Santiago from Newark International Airport. Moreover, our open-skies agreement with Chile creates new opportunities for entry.

The U.S.-Chile open-skies accord, when effective, provides that any U.S. airline may serve Chile from any point in the United States. As we have previously stated, open skies is a critical element of our international aviation policy. No party has indicated that any significant barrier to entry, such as access to slots or airport facilities, would neutralize the competitive environment created by an open-skies regime. Thus, when the agreement is effective, the U.S.-Chile market will be free of government intervention; this will significantly ease entry in this market. For example, we have seen an impressive array of new U.S.-Central America services introduced by Continental and Delta since the U.S. achieved open-skies regimes with a number of Central American governments. Delta launched new nonstop service in the Atlanta-San Jose, Costa Rica; Panama City, Panama; Guatemala City, Guatemala; and San Salvador, El Salvador markets. Continental started new nonstop service in the Newark-San Jose, Costa Rica market. This new entry occurred in markets where we have approved the American-TACA relationship.

Open-skies agreements assure the most liberal-operating environment for air services, and give any carrier from either country the right to serve any route between the two countries and beyond. These agreements place no limits on airline capacity, and carriers are free to charge any price unless both countries disapprove. The Government of Chile undertook to join the United States in open-skies aviation relations, if certain conditions are met, such as grant of antitrust immunity for this alliance.³² Like an ever-growing number of other countries in Latin America and worldwide, the Government of Chile has shown its preference for open-market competition in aviation over a tightly constrained, highly restricted and regulated operating environment. Therefore, we see no reason why U.S. airlines could not also begin new service to Chile if the applicants charge supra-competitive fares or lower service below competitive levels.

(c) The City-Pair Markets

The Miami-Santiago market, on the other hand, raises competitive concerns; specifically regarding the alliance partners' (1) hub strength at each end of the Miami-Santiago market, and (2) joint ability to set prices and capacity that would reduce or eliminate competition. American and LAN Chile are two of only three airlines providing nonstop Miami-Santiago service.³³ For the twelve months ended September 1998, American and LAN Chile operated about 77 percent of the total departures from Miami, and carried about 70 percent of the passengers from Miami. The alliance agreement, as proposed, may further diminish this level of competition. American is the hub-dominant airline at Miami, and the applicants may therefore have some power over

³² On October 28, 1997, the Government of Chile notified the United States that it would be possible for Chile to proceed to the signature of the U.S.-Chile open-skies air transport agreement upon grant, on terms acceptable to Chile, of the regulatory approvals, including antitrust immunity, as requested by LAN Chile and American in connection with their code-share agreement and cooperative alliance.

³³ At Miami, both American and LAN Chile operate two daily nonstop flights, and United operates one daily nonstop flight. OAG Official Traveler - Worldwide, April 1, 1999.

prices and capacity in this market. Since no carrier besides American has a hub at Miami, we find it relatively unlikely that any other carrier would mount an effective competitive response, even if the applicants decided to raise prices above competitive levels (or lower the quality of service below competitive levels). Therefore, consistent with previous determinations in matters similar to these, we tentatively find it appropriate to exclude certain local traffic in the Miami-Santiago market for time-sensitive passengers traveling on certain "unrestricted fares" (*i.e.*, published fares not requiring either a Saturday night stay or a minimum stay of seven days or more). These latter are more typically used by the bulk of passengers whose greater flexibility in time of travel permits them readily to take advantage of competing one-stop and connecting fares on other carriers.³⁴

While our exclusion in this matter now only affects certain unrestricted fares, we emphasize that we will closely monitor the competitive environment in the Miami-Santiago market, and that we intend to review this matter fully during the next 36 months, to determine whether our actions in this matter continue to be appropriate and in the best interests of consumers. This will allow us to determine if, as the applicants contend, they will operate to the benefit of consumers and competition.

B. Public Interest Issues

Under Section 41309, we must determine whether the Alliance Agreement would be adverse to the public interest. A similar public interest examination is required by Section 41308. Except as noted, we tentatively find that approval of the Alliance Agreement will promote the public interest.

Open-Skies agreements with foreign countries give any authorized carrier from either country the ability to serve any route between the two countries (and open intermediate and beyond rights) if it so wishes. These agreements place no limits on the number of flights that can be operated, and carriers can charge any fare unless it is disapproved by both countries.³⁵

For the reasons explained above, we have found that approving the Alliance Agreement is likely to benefit the traveling public and is unlikely, subject to the conditions imposed by the Department, to reduce competition significantly in most markets. Furthermore, we tentatively find that approval of the requested authority should provide additional or improved service options to the traveling and shipping public, and, when the U.S.-Chile open-skies regime is effective, provide greater access to interior U.S. and international destinations.

We believe that market-based aviation relationships provide the greatest opportunity for aviation alliances to form and grow. In these circumstances, one of the major public benefits resulting from our success in signing open-skies aviation agreements around the globe is the creation of new competitive airline alliances that we are now seeing to provide global aviation services.

³⁴ See Orders 96-5-12 at 23-24 and 96-5-26 at 26.

³⁵ Order 92-8-13, August 5, 1992.

Markets in Asia, Europe and North America are now an integral part of existing competing airline networks. We based our decision to seek open-skies agreements in South America in part on our desire to extend the benefits of network services to the consumers of that region. Our open-skies agreement with Chile is an important step in that direction.

As enunciated in our April, 1995 U.S. International Air Transportation Policy Statement, airlines around the world are forming alliances and linking their systems to become partners in transnational networks to capture the operating efficiencies of larger networks, and to permit improved service to a wider array of city-pair markets. We are already seeing the benefits of these international alliances, and we have undertaken to facilitate them and the efficiencies they can generate, where possible to do so consistently with consumer welfare. We believe that competition between and among these global alliances is likely to play a critically important role in ensuring that consumers in this emerging environment have multiple competing options to travel where they wish as inexpensively and conveniently as possible. We find that our actions here, coupled with the start of the U.S.-Chile open-skies regime, will begin the process of linking both the South America and Chile markets to the several evolving transnational networks, benefiting U.S. travelers by providing more connections to beyond-U.S. points.

In this case, having tentatively determined that the overall competitive effect of the Alliance Agreement is beneficial and consistent with our international aviation policy, we believe that the public interest favors the grant of antitrust immunity. In so stating, of course, we will continue to monitor closely the effects of an immunized alliance on consumers and on competition, to ensure that the immunized alliance continues to serve the public interest.

VII. Tentative Grant of Antitrust Immunity

We have the discretion to grant antitrust immunity to agreements approved by us under Section 41309 if we find that immunity is required by the public interest. It is not our policy to confer antitrust immunity simply on the grounds that an agreement does not violate the antitrust laws. We are willing, however, to grant immunity if the parties to such an agreement would not otherwise go forward, and if we find that grant of antitrust immunity is required by the public interest.

American and LAN Chile have stated that they will not proceed with the Alliance Agreement without antitrust immunity.³⁶ We agree. The confidential documents submitted by the joint applicants support this conclusion. American and LAN Chile maintain that the public benefits that the airlines seek to achieve through the formation of this alliance cannot be accomplished absent antitrust immunity. They state that the proposed integration of services will surely expose them to antitrust risk, since they fully intend to establish a common financial objective, permitting them to compete more effectively with other strategic alliances. Additionally, they indicate that full operational integration will necessarily mean that they will coordinate all of

³⁶ See application, at 38-40.

their U.S.-South America business activities, including scheduling, route planning, pricing, marketing, sales, and inventory control.³⁷

Since the antitrust laws let competitors engage in joint ventures that are pro-competitive, we think it unlikely that the integration of the applicants' services would be found to violate the antitrust laws.³⁸ However, since the applicants will be ending their competitive service in some markets, they could be exposed to liability under the antitrust laws if we did not grant immunity.

To the extent discussed above, we tentatively find that we should grant antitrust immunity to the Alliance Agreement. We also intend to review and monitor the joint applicants' progress in implementing the Agreement, if we approve and immunize it, in order to ensure that they are carrying out the Agreement's pro-competitive aims. We will also require them to resubmit the Alliance Agreement for review in three years, if we make final this tentative decision to approve and immunize it.

While we tentatively conclude that the alliance should be approved and given immunity, we find, as discussed next, that certain other conditions appear necessary to allow us to find that approval and immunity are in the public interest.

VIII. IATA Tariff Coordination Issue

As we have determined in other immunity cases, it is contrary to the public interest to permit alliances to participate in certain price-related coordination that is now immunized within IATA tariff coordination. We therefore tentatively condition our approval and grant of antitrust immunity in this case by requiring American and LAN Chile to withdraw from participation in any IATA tariff conference activities that discuss any proposed through fares, rates or charges applicable between the United States and Chile, or between the United States and any other countries designating a carrier that has been granted antitrust immunity or renewal thereof by the Department for participation in similar alliances with a U.S. air carrier.³⁹

Consistent with our earlier decisions, we therefore have tentatively decided to condition our grant of antitrust immunity to the Alliance upon the withdrawal by American and LAN Chile from IATA tariff coordination activities affecting through prices between the U.S. and Chile and between the U.S. and any other country that has designated a carrier whose alliance with a U.S.

³⁷ See application, at 7-11.

³⁸ Cooperative arrangements between airlines are today commonplace. We are unaware of any holding that such arrangements violate the antitrust laws. Order 92-11-27 at 19.

³⁹ This condition currently applies to prices between the United States and the Netherlands; between the United States and Germany (*see* Order 96-5-27 at 17); between the United States and Denmark, Norway, and Sweden (*see* Order 96-11-1 at 23); and between the United States and Austria, Belgium, and Switzerland (*see* Order 96-6-33 at 23-24). *See* also May 8, 1996, letter in Dockets OST-96-1116 and OST-95-618 from Northwest and KLM indicating their willingness to limit voluntarily their participation in IATA.

carrier has been or is subsequently given immunity by us. Under this condition, the Alliance carriers may not participate in IATA tariff coordination activities affecting fares, rates and charges between the United States and Chile and between the United States and the homeland(s) of their similarly-immunized alliance competitors. Through prices between the U.S. and other countries, as well as all local fares in intermediate and beyond markets, tentatively would not be covered by the condition.⁴⁰

We tentatively find that this condition is in the public interest for a number of reasons. The immunity that is requested in this proceeding includes broad coverage of price coordination activities between American and LAN Chile. With respect to internal Alliance needs, tariff coordination through the IATA conference mechanism is duplicative and unnecessary. At the same time, one of the reasons that we tentatively find supports immunity for the proposed Alliance activities is the potential for increased price competition between the Alliance carriers and other carriers, particularly other international alliances. We have tentatively found that such potential competition will, on balance, outweigh any potential anticompetitive effects of price coordination within the Alliance itself and encourage the passing on of economic efficiencies realized by the Alliance to consumers in the form of lower prices. Permitting American and LAN Chile to continue tariff coordination within IATA undermines such competition.

IX. O&D Survey Data Reporting Requirement⁴¹

We have access to market data where our carriers operate, including markets that they serve jointly with foreign airlines, for example, the Department's Origin-Destination Survey of Airline Passenger Traffic (O&D Survey). We have also collected special O&D Survey code-share reports for three large alliances and have directed all other U.S. airlines to file reports for their transatlantic code-share operations beginning with the second quarter of 1996.

However, we receive no market information for passengers traveling to or from the U.S. when their entire trip is on foreign airlines, except for T-100 data for nonstop and single-plane markets. Such passengers account for a substantial portion of all O&D traffic between the U.S. and foreign cities, and the absence of such information severely handicaps our ability to evaluate the

⁴⁰ Under this condition, the Alliance carriers could not participate in IATA discussions of the total ("through") price (*see* 14 C.F.R. § 221.4) between a U.S. point of origin or destination and an origin or destination in Austria, Belgium, Denmark, Germany, Norway, Sweden, Switzerland, and the Netherlands, or a homeland of a subsequently immunized alliance, whether such prices are offered for direct, on-line or interline service. They could, however, discuss local segment prices, arbitraries or generic fare construction rules that have independent applicability outside such markets. IATA activities covered by our condition would include all those discussing prices proposed for agreement, including both meetings and exchanges of documents such as those preceding meetings and those used in mail votes.

⁴¹ We will provide confidentiality protection for these data, as we do for international O&D data submitted by U.S. airlines. Although we will use these data for internal monitoring purposes, we will not disclose it to any other airlines.

economic and competitive consequences of the decisions we must make on international air service.

In addition to the added importance of our decision-making regarding international issues, we must ensure that our grant of antitrust immunity does not lead to anticompetitive consequences. We have therefore tentatively decided to require LAN Chile to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that contain a United States point (similar to the O&D Survey data already reported by American).⁴²

To prevent this reporting requirement from having any anti-competitive consequences, we have tentatively decided to grant confidentiality to LAN Chile's Origin-Destination report and special report on code-share passengers. Currently, we grant confidential treatment to international Origin-Destination data. We provide these data confidential treatment because of the potentially damaging competitive impact on U.S. airlines and the potential adverse effect upon the public interest that would result from unilateral disclosure of these data (data covering the operations of foreign air carriers that are similar to the information collected in the Passenger O&D Survey are generally not available to the Department, to U.S. airlines, or to other U.S. interests).

14 C.F.R. Part 241 section 19-7(d)(1) provides for disclosure of international Origin-Destination data to air carriers directly participating in and contributing to the O&D Survey. While we have tentatively found it appropriate to direct LAN Chile to provide certain limited Origin-Destination data to the O&D Survey, LAN Chile is not an air carrier within the meaning of Part 241.

14 C.F.R. Part 241, Section 03 defines an air carrier as “[a]ny citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation.” LAN Chile accordingly will have no access to the data filed by U.S. air carriers. Moreover, we will be making LAN Chile's submissions confidential while maintaining the current restriction on access to U.S. air carrier Origin-Destination data by foreign air carriers.

X. Computer Reservations System (CRS) Issues

Another competitive issue concerns ownership interests that the joint applicants have in competing CRS's. American owns about 80 percent of the SABRE CRS, while LAN Chile has an ownership interest in Sistemas de Distribucion Amadeus Chile, S.A. ("Amadeus Chile"). As with the Delta Air Lines-Austrian/Sabena/Swissair (*see* Order 96-5-26 at 31-32) and the Northwest-KLM (*see* Order 92-11-27 at 16) arrangements, the proposed integration of marketing operations of the joint applicants presents a risk that CRS competition may be reduced.

⁴² Consistent with our determinations in Orders 96-6-33, 96-7-21, and 96-11-1, we intend to request other foreign carrier members of immunized international alliances involving U.S. carriers to submit O&D Survey data and condition any further grants or renewals of antitrust immunity on provision of such data. We will treat the foreign carriers' O&D data as confidential, will not allow U.S. carriers any access to the data, and will not allow LAN Chile or other foreign carriers any access to U.S. carrier O&D Survey data.

In view of these factors, we tentatively find that any grant of antitrust immunity for the Alliance Agreements should exclude the carriers' CRS interests and operations. We invite the joint applicants and other parties to comment on this issue.

XI. Article 24 Exclusivity of the Code-Share Agreement

Continental argues that this provision would bar it from code sharing with LAN Chile between Los Angeles, Miami, New York's JFK Airport and Santiago, Chile, on behind-U.S. gateway segments and on behind-Santiago segments.⁴³ We tentatively find that Article 24, to the extent that it would preclude either American or LAN Chile from entering a cooperative marketing arrangement with other airlines, should be eliminated.⁴⁴ In this instance, such a provision restricts competition to an extent not justified by the circumstances.

In the circumstances of this case, we find that the exclusivity clause has the potential for anti-competitive results. We have concluded that the proposed alliance as conditioned herein, in concert with an U.S.-Chile open-skies regime, will open opportunities for more intense competition than exists today. Nevertheless, American is the dominant carrier at Miami, the present primary U.S. gateway to South America. LAN Chile is the dominant Chilean scheduled airline. In these circumstances, we find that the proposed alliance agreement should not preclude LAN Chile from entering cooperative marketing arrangements with other airlines. Indeed, we would encourage LAN Chile to consider proposals by other U.S. airlines to expand and enhance LAN Chile's U.S.-Chile and U.S.-South America code-sharing opportunities.

Therefore, we will include a condition to our approval, providing that neither American nor LAN Chile shall give any force or effect to any exclusivity provision in their arrangement which (1) restricts LAN Chile from entering into any marketing and/or interline arrangement(s) with airline(s) domiciled in the United States, or (2) restricts American from entering into any marketing and/or interline arrangement(s) with airline(s) domiciled in South America.

XII. Operation under a Common Name/Consumer Issues

Since operation of the Alliance Agreement could raise important consumer issues and "holding out" questions, if the joint applicants choose to operate under a common name or use "common brands," they will have to seek separate approval from the Department prior to such operations. For example, it is Department policy to consider the use of a single air carrier designator code by two or more carriers to be unfair and deceptive and in violation of the Act unless the air carriers give reasonable and timely notice to passengers of the actual operator of the aircraft.⁴⁵

⁴³ Consolidated Answer at 8-9.

⁴⁴ Article 24 precludes American and LAN Chile from entering into or maintaining competing marketing relationships, including code sharing, with other airlines in city-pairs on which American and LAN Chile operate code-shared flights between the United States and Chile.

⁴⁵ See 14 C.F.R. 399.88.

XIII. Summary

We tentatively conclude that granting the application for approval and antitrust immunity for the Alliance Agreement will benefit the public interest by enhancing service options available to travelers, benefit U.S. consumers, and encouraging a further liberalization of the U.S.-South America and global marketplace. We believe that the Alliance Agreement will strengthen competition in the markets that the applicants serve, since it will enable them to offer better service and to operate more efficiently.

We tentatively conclude that our grant of approval and antitrust immunity to the Alliance Agreement should be conditioned, as set forth in this order. We also tentatively direct American and LAN Chile to resubmit the pertinent Alliance Agreement three years from the date of the issuance of the final order in this case. However, the Department is not authorizing the joint applicants to operate under a common name. If the joint applicants wish to operate under a common name, they will have to comply with our relevant procedures before implementing the change.

In addition, we tentatively limit and condition, as delineated in Appendix A to this order, the joint applicants' request regarding their proposed integration of services and operations between Miami, Florida, and Santiago, Chile. We also tentatively direct American and LAN Chile as a condition to withdraw from all International Air Transport Association (IATA) tariff conference activities relating to through fares, rates or charges between the United States and Chile, as well as between the United States and the homeland of any other foreign carrier granted antitrust immunity or renewal thereof, by the Department for participation in similar alliance activities with a U.S. carrier; and file all subsidiary and/or subsequent agreement(s) with the Department for prior approval. We also tentatively direct LAN Chile to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that contain a United States point (similar to the O&D Survey data already reported by American).

ACCORDINGLY:

1. We direct all interested persons to show cause why we should not issue an order making final our tentative findings and conclusions, granting approval and antitrust immunity to the Alliance Agreement between American Airlines, Inc. and Linea Aerea Nacional Chile, S.A, effective upon implementation of the open-skies provisions of the agreement between Chile and the United States, subject to the provisions that the antitrust immunity will not cover any activities of American and LAN Chile as owners of SABRE and Amadeus Chile computer reservations systems businesses, and subject to the proposed limits and conditions indicated in Appendix A;
2. The authorities tentatively approved by this order shall be subject to the condition that neither American nor LAN Chile shall give any force or effect to any exclusivity provision in their arrangement which (1) restricts LAN Chile from entering into any marketing and/or interline arrangement(s) with airline(s) domiciled in the United States, or (2) restricts American

from entering into any marketing and/or interline arrangement(s) with airline(s) domiciled in South America;

3. We tentatively direct American Airlines, Inc. and Linea Aerea Nacional Chile, S.A. to resubmit their Alliance Agreement three years from the date of issuance of the final order in this case;

4. We tentatively direct interested persons to show cause why we should not further condition our grant of approval and immunity to require American Airlines, Inc. and Linea Aerea Nacional Chile, S.A. to withdraw from participation in any International Air Transport Association (IATA) tariff conference activities that discuss any proposed through fares, rates or charges applicable between the United States and Chile, and/or between the United States and any other countries whose designated carriers participate in similar agreements with U.S. airlines that are subsequently granted antitrust immunity or renewal thereof by the Department;

5. We tentatively direct Linea Aerea Nacional Chile, S.A. to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that include a United States point (similar to the O&D Survey data already reported by its alliance partner American Airlines, Inc.);

6. We direct interested persons wishing to comment on our tentative findings and conclusions, or objecting to the issuance of the order described in ordering paragraphs 1-5 to file an original and five copies in Docket OST-97-3285 and serve a statement of such objections or comments together with any supporting evidence the commenter wishes the Department to notice on all persons on the service list in that docket no later than 28 days from the service date of this order. Answers to objections shall be due no later than 7 business days after the last day for filing objections/comments;⁴⁶

7. If timely and properly supported objections are filed, we will afford full consideration to the matters or issues raised by the objections before we take further action. If no objections are filed, we will deem all further procedural steps to have been waived;

⁴⁶ Service should be by hand delivery or telefax. The original filing should be on 8½" by 11" white paper using dark ink and be unbound without tabs, which will expedite use of our docket imaging system.

8. We grant all motions to file unauthorized documents; and
9. We shall serve this order on all persons on the service list in this docket.

By:

A. BRADLEY MIMS
Acting Assistant Secretary for Aviation
and International Affairs

(SEAL)

*An electronic version of this document is available on the World Wide Web at:
http://dms.dot.gov/reports/reports_aviation.asp*

**CONDITIONS GOVERNING THE ANTITRUST IMMUNITY FOR THE
ALLIANCE AGREEMENT BETWEEN AMERICAN AIRLINES, INC.
AND LINEA AEREA NATIONAL CHILE, S.A.**

Grant of Immunity

The Department grants immunity from the antitrust laws to American Airlines, Inc. (American) and Linea Aerea National Chile, S.A. (Lan Chile), and their affiliates, for the Alliance Agreement dated September 5, 1997, between American and Lan Chile and for any agreement incorporated in or pursuant to the Alliance Agreement.

Limitations on Immunity

The foregoing grant of antitrust immunity shall not extend to the following activities by the parties: pricing, inventory or yield management coordination, or pooling of revenues, with respect to unrestricted coach class fares or any business or first class fares for local U.S.-point-of-sale passengers flying nonstop between Miami and Santiago, or the provision by one party to the other of more information concerning current or prospective fares or seat availability for such passengers than it makes available to airlines and travel agents generally.

Exceptions to Limitations on Immunity

Despite the foregoing limitations, antitrust immunity shall extend to the joint development, promotion or sale by the parties of the following discounted fare products with respect to local U.S.-point-of-sale passengers flying nonstop between Miami and Santiago: corporate fare products; consolidator/wholesaler fare products; promotional fare products; group fare products; and fares and bids for government travel or other traffic that either party is prohibited by law from carrying on service offered under its own code. For immunity to apply, however: (i) in the case of corporate film products and group fare products, local U.S. point-of-sale non-stop traffic shall constitute no more than 25% of a corporation's or group's anticipated travel (measured in flight segments) under its contract with American and Lan Chile; and (ii) in the case of consolidator/wholesaler fare products and promotional fare products, the fare products must include similar types of fares for travel in at least 25 city-pairs in addition to Miami-Santiago.

Definitions for Purposes of this Order

"Corporate fare products" means the offer of non-published fares at discounts from the otherwise applicable tariff prices to corporations or other entities for authorized travel, which discounts may be stated as percentage discounts from specified published fares, not prices, volume discounts, or other forms of discount.

"Consolidator/wholesaler fare products" means the offer of non-published fares at discounts from the otherwise applicable tariff prices to (i) consolidators for sale by such consolidators to members of the general public either directly, or through travel agents or other intermediaries, at prices to be decided by the consolidator, or (ii) wholesalers for sale by such wholesalers as part of tour packages in which air travel is bundled with other travel products, which discounts, in either case, may be stated either as net prices due the parties on sales by such consolidator or wholesaler, or as percentage commissions due the consolidator or wholesaler on such sales.

"Promotional fare products" means published fares that offer directly to the general public for a limited time discounts from previously published fares having similar travel restrictions.

"Group fare products" means the offer of non-published fares at discounts from the otherwise applicable tariff prices for the members of an organization or group to travel from multiple origination points to a single destination to attend an identified special event, which discounts may be stated either as percentage discounts from specified published fares or net prices.

Clarification of Scope of Limitation on Immunity

Under no circumstances shall the limitations on antitrust immunity set forth above be construed to limit the parties' antitrust immunity for activities jointly undertaken pursuant to the Alliance Agreement other than as specifically set forth in this Order. Immunized activities include, without limitation: decisions by the parties regarding the total number frequencies and types of aircraft to operate on the Miami-Santiago route, and the configuration of such aircraft; coordination of pricing, inventory and yield management and pooling of revenues, with respect to non-local passengers traveling on non-stop flights on the Miami-Santiago route; and the provision by one party to the other of access to its internal reservations system to the extent necessary for use exclusively in checking-in passengers or making sales to or reservations for the general public at ticketing or reservations facilities.

Review of Limitations on Immunity

Within eighteen months from the date that this Order becomes final, or at any time upon application of the parties, the Department will review the limitations on antitrust immunity set forth above to determine whether they should be discontinued or modified in light of current competitive conditions in the Miami-Santiago city pair; the efficiencies to be achieved by the parties from further integration that would be made possible by discontinuation of the limitations on immunity, when balanced against any potential for harm to competition from such a discontinuation; regulatory conditions applicable to competing alliances; or other factors that the Department may deem appropriate.