

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

Joint Application of)
)
 AMERICAN AIRLINES, INC.) Docket OST-2001-10387
 and)
 BRITISH AIRWAYS PLC)
)
 under 49 USC 41308 and 41309 for approval)
 of and antitrust immunity for agreement)
)
)

Joint Application of)
)
 AMERICAN AIRLINES, INC.) Docket OST-2001-10388
 and)
 BRITISH AIRWAYS PLC)
)
 under CFR Part 212 for statements of)
 authorization (blanket codesharing) and)
 under 49 USC 40109 for related exemption)
 authority)
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**ANSWER OF DELTA AIR LINES, INC. TO
MOTION TO DISMISS OF CONTINENTAL AIRLINES, INC.**

September 4, 2001

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**ANSWER OF DELTA AIR LINES, INC. TO
MOTION TO DISMISS OF CONTINENTAL AIRLINES, INC.**

Delta Air Lines, Inc. ("Delta") supports the motion filed by Continental Airlines, Inc. ("Continental") and urges the Department to defer further proceedings with respect to the joint application filed by American Airlines, Inc. ("American") and British Airways PLC ("British Airways") pending the later of (a) the execution by the Governments of the United States and the United

Kingdom of an agreement to replace the current restrictive Bermuda II Agreement that provides for "open skies" in fact, between the United States and London Heathrow and Gatwick Airports, including ironclad guarantees that U.S. carriers will have full access to sufficient numbers of commercially-viable slots and airport facilities at Heathrow to enable them to initiate new competitive U.S.-Heathrow services, and (b) completion of the investigations and determinations by all relevant competition authorities of the proposed alliance. In no event should the Department require the submission of answers to the joint application earlier than 60 days after an order is issued in connection with Continental's motion.

Delta is a strong proponent of alliances as an effective means for offering consumers an expanded network of seamless global online service. Delta has not opposed alliances designed to achieve those objectives, such as American's alliance with Swissair and Sabena or United's alliance with Lufthansa, SAS, Austrian and Lauda. Indeed, Delta has its own proposed alliance with Air France, Alitalia and Czech Airlines pending before the Department. Delta welcomes the expansion of alliances because it recognizes that in most cases alliances normally result in market-expanding competitive opportunities through liberalized open skies bilaterals. However, this is not true with respect to the

United Kingdom because even with open skies, U.S. airlines would not be able to gain meaningful competitive access to London Heathrow Airport.

In addition, the American-British Airways' proposed alliance is distinctly different from any transatlantic alliance that has ever been presented to the Department. This alliance is not about network expansion, because American already has an immunized transatlantic alliance giving it broad access to Europe and beyond, and, moreover, the Benefits Agreement applies only to local U.S.-London markets. This alliance quite simply is about domination of the largest local O&D international market (U.S.-Heathrow) in the world by that market's two principal competitors.

Five years ago, the previous administration made the mistake of initiating a long and protracted proceeding to examine the proposed alliance between American and British Airways before the issues of open skies and access to Heathrow were resolved. After 2 ½ years of administrative proceedings, including thousands of pages of pleadings filed by scores of parties and the establishment of an oral hearing, the Department was forced to terminate the case because "the fundamental predicate for processing the captioned applications no longer exists". Order 99-7-22. The "fundamental predicate" to which the Department referred was

"the existence *de jure* and *de facto* of an open skies agreement meeting U.S. objectives. Moreover, . . . the Department made clear that *de facto* open skies in the case of the United Kingdom must include **adequate provision for new and expanded U.S. carrier service through London airports, particularly Heathrow**, and that the ability of U.S. carriers to provide such service notwithstanding the constraints at Heathrow would be a critical consideration in our evaluation of the proposed Alliance." ¹ (emphasis added.)

¹ Order 99-7-22 at 2. The Department's insistence on the achievement of ***de facto*** open skies providing for meaningful competition by other U.S. carriers between the United States and Heathrow has been a fundamental policy objective which has been affirmed and reaffirmed by the Department time and again. See, Statement of Secretary of Transportation Peña before the Committee on Commerce, Science and Transportation, July 15, 1994 at 13-14 ("The existence of an 'open skies' environment and the elimination of other competitive restrictions, would be key factors in any consideration of a request for immunity."); Speech of Deputy Assistant Secretary Murphy before the AAAE, June 11, 1994 at 14 ("But even for us to begin to consider an alliance which includes antitrust immunity will absolutely require a full 'open skies' agreement and more. I say more because we need not only open skies ***de jure***, but we need them ***de facto***."); Order 96-5-38 at 16 ("Our policy remains to consider the grant of antitrust immunity only where the market(s) at issue are currently specified to be fully open to new entry and operations - - ***de jure*** (by reasons of bilateral agreements and ***de facto***. Only in such markets can we be assured that immunity will be pro-competitive and pro-consumer, the touchstones of our immunity approach."); Order 97-3-34 ("We have made it clear that ***de facto*** open skies must include adequate provision for new and expanded U.S. carrier services from London-Heathrow Airport, and that the ability of U.S. carriers to provide such service notwithstanding the constraints at Heathrow is a critical consideration in the Department's evaluation of the proposed alliance."); Order 97-9-4 ("This is an exceptional case, posing a unique set of issues . . . We must also take into account the fundamental and unprecedented issue of U.S. carriers' expanded access into London's Heathrow Airport. . . . ***de facto*** Heathrow access remains among the necessary prerequisites to a possible grant of antitrust immunity, and that such access must

The Department should not repeat the mistake of embarking on another wasteful, resource-draining proceeding until the full scope and nature of U.S.-London Heathrow access is fully established. Otherwise, third parties and the Department would be required to speculate as to the elements of whatever agreements, if any, may or may not be reached between the United States and the United Kingdom and what access to Heathrow may or may not be available. Moreover, the bare existence of a so-called open skies agreement would not alone assure that *de facto* open access to London Heathrow really exists, especially in light of the current and future substantial entry barriers to Heathrow access and the overall dominance and size of the combined alliance.

The Department must be assured of more than just token access to Heathrow. Unlike the European airports of the other existing and proposed transatlantic alliances, where there are no barriers to competitive entry at key airports, London Heathrow Airport is operating at full capacity, with no room for new U.S. airlines to gain meaningful competitive entry and with no near term hope for improvement.

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include adequate provision for new and expanded U.S. carrier service through London-Heathrow Airport."); Order 99-7-22 at 2 (quoted above).

The prospect for achieving a regime that will offer real access by U.S. carriers to Heathrow Airport is as dim today as it was when the Department dismissed the earlier American-British Airways application. Negotiations with the United Kingdom have not even been scheduled. Moreover, without an undertaking of slot divestitures there can be no effective access at Heathrow for U.S. carriers. Indeed, every competition authority that has ever reviewed the American-British Airways alliance, including the Department of Justice, the U.K. Office of Fair Trading, and the European Commission Directorate General IV, has concluded that the divestiture of Heathrow slots is the *only* means to ensure meaningful competitive access to Heathrow.

The joint applicants have steadfastly stonewalled this critical requirement. In fact, that unwillingness to consider slot divestitures was one of the key reasons why the previous proceeding was aborted. The joint applicants continue to oppose slot divestitures; however, this time they have concocted the fanciful argument that the marketplace has somehow changed since the last time their alliance was examined. Nothing has changed. Heathrow is still closed to new entry. The U.S.-Heathrow market is still dominated by British Airways and American. And, the lack of availability of Heathrow slots still imposes an impenetrable barrier to entry at Heathrow by other U.S. carriers.

The notion that U.S. carriers will be able to obtain slots from their alliance partners in sufficient numbers to inject meaningful competition against the American-British Airways monolith is absurd; since it would require those other carriers to eliminate scores of Heathrow flights in their key home markets that are offered in direct competition with British Airways. Delta alone requires at least 140 weekly Heathrow slots at a minimum to be in a position to provide an effective response to the American-British Airways monolith. In the last proceeding, Delta submitted substantial evidence demonstrating that it would be impossible for U.S. carriers to obtain adequate numbers of Heathrow slots without divestiture by the joint applicants. And as noted, all of the relevant competition authorities agreed. As the EC Competition Directorate concluded with respect to the earlier AA-BA alliance proposal, "...it will therefore be very difficult if not impossible, for airlines other than BA and AA to gain [U.S.-Heathrow] access following the conclusion of the agreement between these two airlines." Commission Statement of Objections, March 30, 1996, at 20.

Since the joint applicants have essentially taken the issue of slot divestiture off the table, it makes no sense for the Department to engage in another costly and protracted proceeding at this time.

While the Department should stay further procedures, the proposed American-British Airways Alliance provides an important opportunity for the

competition authorities (particularly the Department of Justice) to resume their investigation of the complex antitrust issues raised by the proposed alliance. However, consideration by the Department should not be initiated until the Department of Justice has completed its evaluation. DOJ's evaluation is critical since it would assist the Department in refining its bilateral negotiation position with respect to the key attributes of London Heathrow access (slots and airport facilities) requirements that will need to form the basis of an open skies agreement.

The proposed American-British Airways alliance is like no other alliance past or pending. It raises unparalleled competition and public policy issues due to the confluence of a number of unique factors, including the overwhelming dominance of American and British Airways in U.S.-Heathrow markets; the inability of U.S. carriers to gain access to Heathrow due to the lack of slots and airport facilities; and the inability of one stop services over other European gateways to discipline the U.S.-London nonstop services of the combined American-British Airways. These factors have not changed since the last American-British Airways case, and led the Department of Justice to conclude that "if DOJ were reviewing the alliance under the antitrust laws, we would

oppose it."² DOJ found that the American-British Airways alliance "will significantly reduce competition in many U.S.-U.K. city pairs without producing sufficient efficiencies to outweigh the harm [T]he Department of Justice has concluded... that the potential benefits of open skies are not sufficient to outweigh the harm of the Alliance as it is currently proposed, in large part because slot constraints at London Heathrow create grave doubts that open skies alone will produce significant entry and competition in U.S.-London markets."

Finally, although Delta strongly urges the Department to stay further procedures in order to avoid having another aborted and wasteful proceeding, if the Department determines to allow procedures to continue, given the unique complexities of this particular Alliance, the Department should establish an answer date no earlier than 60 days after an Order is issued on Continental's Motion.

² Comments of the Department of Justice, Docket OST-97-2058, May 21, 1998, pp. 1-2.

WHEREFORE, Delta supports Continental's motion and requests that the Department defer further procedures in the above-captioned Dockets for the reasons stated above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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