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BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.

DEPT. OF TRANSPORTATION  
BOOKETS

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

OST-2001-10387 - 45

Joint Application of )  
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 AMERICAN AIRLINES, INC. )  
 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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OST-2001-10388 - 35

JOINT ANSWER OF AMERICAN AIRLINES, INC. AND  
BRITISH AIRWAYS PLC IN OPPOSITION TO THE MOTION  
TO DISMISS OF CONTINENTAL AIRLINES, INC. AND TO  
THE MOTION FOR EXTENSION OF PROCEDURAL DATES  
OF NORTHWEST AIRLINES, INC.

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September 7, 2001

BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.

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JOINT ANSWER OF AMERICAN AIRLINES, INC. AND  
BRITISH AIRWAYS PLC IN OPPOSITION TO THE MOTION  
TO DISMISS OF CONTINENTAL AIRLINES, INC. AND TO  
THE MOTION FOR EXTENSION OF PROCEDURAL DATES  
OF NORTHWEST AIRLINES, INC.

American Airlines, Inc. and British Airways Plc file this joint answer in opposition to the motion to dismiss submitted by Continental Airlines, Inc. on August 31, 2001 and to the motion for extension of procedural dates submitted by Northwest Airlines, Inc. on September 5, 2001. Both motions should be denied.

Dismissal of the Application or Extension of the Existing Procedural Schedule Will Derail U.S.-U.K. Open Skies.

Continental's citations notwithstanding, the more relevant statement President Bush made with Prime Minister Blair after their meeting this past February confirmed their mutual commitment "to intensify our efforts to liberalize fully our bilateral civil aviation relationship." Significantly, today's "Aviation Daily" reports that "U.S.-U.K. government-to-government talks are scheduled Oct. 17-18 in London." The Continental and Northwest motions, and the supporting answers to Continental's motion submitted by Delta Air Lines, Inc. and Northwest, can only be construed as a coordinated attempt to frustrate bilateral efforts to achieve a U.S.-U.K. open skies agreement.

The Government of the United Kingdom has made no secret of the fact that it will not enter into an open skies agreement without assurances that U.K. carriers will be given effective access to the U.S. domestic market.<sup>1</sup> As this access will only be available through immunized alliances with U.S. carriers, given existing statutory restrictions prohibiting cabotage and foreign ownership and control of U.S. carriers, it is clear that just as the Government of the Netherlands would not enter into an open skies agreement with the U.S. in 1992 absent assurances regarding anti-trust immunity for Northwest and KLM, the U.K. Government will not do so without assurances that U.K. carriers will get antitrust immunity with their chosen U.S. partners.

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<sup>1</sup> The September 4, 2001 "Aviation Daily" quoted a British Embassy spokesman as stating that the United Kingdom "has made it clear repeatedly that it would be prepared to enter into such an [open-skies-type] agreement, freeing up access to Heathrow, were our airlines able to gain effective access to the U.S. domestic market."

Accordingly, dismissal of the AA/BA immunity application would ensure that no U.S.-U.K. open skies agreement will be obtained.

Contrary to Northwest's allegations, and as demonstrated by the prompt launch of the European Commission's investigation, there is no basis for concern that the pending European Court of Justice (ECJ) case may delay the Commission's review of the AA/BA alliance. (See the publication in the Official Journal of the European Communities of a request for comments on the Alliance which requires comments to be filed within 20 days of publication (OJ C243/5, 31 August 2001)). Indeed it would be improper for the European Commission's Competition Directorate to delay examination of competition effects of the alliance because of the pending ECJ proceedings.

Furthermore, Northwest incorrectly states that American and British Airways could not implement their alliance without EC approval. This is wrong for two reasons: First, approval of the alliance is to be given by the U.K. Office of Fair Trading, under the EC Competition Law (Articles 84 and 85) Enforcement Regulations 2001, not by the European Commission (The Regulations provide for the enforcement of Articles 81 and 82 of the EC Treaty in cases involving air transport services between the U.K. and non-EC Member States. For these cases, the U.K. has a duty under Article 84 of the EC Treaty to rule on whether or not a particular case is compatible with Articles 81 and 82.) Second, European law does not prevent the parties from implementing the agreement while a decision of the competent authority is pending - as demonstrated by the fact that the Lufthansa/United/SAS alliance and the Northwest/KLM alliance

have both been fully implemented despite the fact the investigations into those alliances have been ongoing by the European Commission for over four years.

The positions of Continental and Northwest are disingenuous. Grant of the relief they request would slam the door on any possibility of successful open skies negotiations and ensure continuation of the status quo for the foreseeable future.<sup>2</sup> While the Department has consistently demonstrated that it will not grant immunity absent an effective open skies agreement, the prospects for that are greater now than ever before.

The opponents' objective can only be to delay substantive consideration of the merits of the application, and to postpone the day when their own transatlantic partnerships face full and unfettered alliance competition in the U.S.-U.K., Europe, and beyond markets.

The Opponents Have Already Been Provided Far Greater Access Privileges Than Made Available to Interested Parties in Any Comparable DOT Proceeding.

The opposing parties' due process arguments are specious. They have received far greater access to the joint applicant's confidential materials than that normally provided in comparable proceedings. Since 1992, the Department has processed 16 applications requesting antitrust immunity for carrier alliances. In 14, the Department established a 21-day answer

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<sup>2</sup> Delta, which answered in support of Continental's motion to dismiss, is itself an applicant for antitrust immunity with Air France, in advance of open skies negotiations between the U.S. and France (OST-2001-10429, filed August 15, 2001).

period.<sup>3</sup> In one of the two remaining proceedings -- the precedent-establishing Northwest/KLM proceeding in 1992 -- only 14 days were allowed for answers. In the overwhelming majority of these proceedings, access to confidential materials began on the first day of the 21 day answer period.

The only proceeding in which the Department allowed more than 21 days for answers was the unconsummated 1997 American/British Airways proceeding. The procedural schedule issued by the Department on August 27, 2001 in the current proceeding following its determination that the application is substantially complete, reflects a reasonable attempt to avoid the extraordinarily excessive and repetitive pleadings that characterized the 1997 proceeding. The schedule established by the Department is neither arbitrary and capricious, nor an abuse of discretion.

The opponents to this application have already obtained more extensive access to the applicants' confidential materials than that typically provided. The Department's notice providing access to these materials was issued on August 16, 2001. Accordingly, opponents and other interested parties were given access to the applicants' confidential materials 35 days before the answer date, far more than the 21 days typically provided. Thirty-five days is more than sufficient to enable diligent parties to review all of the confidential materials submitted with the application. That the opponents have elected not to use the entire 35 day period made available to them, and have chosen instead to expend their time and energy on procedural motions, does

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<sup>3</sup> In one of those proceedings, Delta/Swissair/Sabena/Austrian, the Department subsequently extended the answer period by 10 days to allow for consideration of additional documents and materials the applicants were required to submit into the docket.

not justify extending the schedule of this proceeding.<sup>4</sup>

The opponents further assert that the Department's document review facilities (the same facilities provided in all other comparable proceedings) are inadequate for this proceeding. To the extent this argument had any merit -- which the joint applicants do not concede -- it has been mooted by the Department's providing additional facilities, requiring the applicants to provide more copies, and allowing interested parties, for the first time ever in any immunity proceeding, to copy commercially sensitive confidential materials submitted by the joint applicants.<sup>5</sup>

Moreover, the opponents' due process arguments are belied by their obvious ability to marshal extensive substantive arguments in the supposedly procedural pleadings submitted to date, undermining their professed inability to adequately respond to the joint application.

To date, 54 attorneys and outside experts representing nine separate parties have

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<sup>4</sup> The affidavit of Elliot M. Seiden attached to Northwest's motion fails to explain why Mr. Seiden waited until August 29, 2001, -- 13 days following issuance of the Department's access notice -- to file his confidentiality affidavit and to review of the applicants' confidential materials. Nor does Delta explain why its representatives also waited until August 29, 2001, to file their affidavits, thereby allowing almost two weeks to go by.

<sup>5</sup> In a further effort to ameliorate any possible logistic problem, the applicants are providing Northwest with a set of their confidential materials, subject to certain conditions, acceptable to Northwest, designed to protect their confidentiality. The applicants will provide similar access to other parties upon request. These unprecedented actions have granted the opponents far greater access to the applicants' confidential materials than that provided in any comparable Department proceeding.

submitted affidavits to obtain access to the applicants' confidential materials.<sup>6</sup> The resources available to them, and the steps taken voluntarily by the applicants as well as the Department, provide ample opportunity for development of a complete record in this proceeding.

Conclusion

President Bush and Prime Minister Blair have committed their respective governments to intensive efforts to achieve the long sought U.S.-U.K. open skies agreement. Dismissal of the pending application, or acceptance of the excessive delay as suggested by the movants, would frustrate that objective.

For the reasons set forth herein, American and British Airways urge the Department to deny the motions submitted by Continental and Northwest and to maintain to the established procedural schedule.

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September 7, 2001

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<sup>6</sup> Northwest representatives alone filed 14 affidavits.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing joint answer by first-class mail, postage pre-paid, on all persons named on the attached service list.

  
Don H. Hainbach

September 7, 2001

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