BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Joint Application of **UNITED AIR LINES, INC.** **BRITISH MIDLAND AIRWAYS LIMITED** **AUSTRIAN AIRLINES, OSTERREICHISCHE LUFTVERKEHRS AG,** **LAUDA AIR LUFTFAHRT AG,** **DEUTSCHE LUFTHANSA, A.G.** And **SCANDINAVIAN AIRLINES SYSTEM** under 49 U.S.C. §§41308 and 41309 for approval of and antitrust immunity for an Alliance Expansion Agreement and an Amended Coordination Agreement	)	Docket OST-01-10575

MOTION OF BRITISH MIDLAND AIRWAYS LIMITED D/B/A BMI BRITISH MIDLAND FOR CONFIDENTIAL TREATMENT
UNDER 14 C.F.R. §302.12

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DATED: October 18, 2001

BEFORE THE
DEPARTMENT OF TRANSPORTATION

Joint Application of **UNITED AIR LINES, INC.** **BRITISH MIDLAND AIRWAYS LIMITED** **AUSTRIAN AIRLINES, OSTERREICHISCHE LUFTVERKEHRS AG,** **LAUDA AIR LUFTFAHRT AG,** **DEUTSCHE LUFTHANSA, A.G.** And **SCANDINAVIAN AIRLINES SYSTEM** under 49 U.S.C. §§41308 and 41309 for approval of and antitrust immunity for an Alliance Expansion Agreement and an Amended Coordination Agreement	)	Docket OST-01-10575

MOTION OF BRITISH MIDLAND AIRWAYS LIMITED D/B/A BMI BRITISH MIDLAND FOR CONFIDENTIAL TREATMENT
UNDER 14 C.F.R. §302.12

British Midland Airways Limited d/b/a bmi british midland ("bmi") hereby moves that the Department of Transportation ("Department") withhold certain proprietary and commercially sensitive confidential information from public disclosure pursuant to Rule 12 of the Department's Rules of Practice.[1] bmi is submitting confidential information in connection with the pending application of United, bmi, Austrian, Lauda, Lufthansa and SAS for approval of and antitrust immunity for an Alliance Expansion Agreement and an Amended Coordination

[1] 14 C.F.R. §302.12, formerly 14 C.F.R. §302.39

Agreement, filed on September 5, 2001 in the above-captioned docket. The confidential information submitted by bmi consists of documents prepared by and for bmi for its use in evaluating and planning various business strategies and competitive options. bmi requests that access to these documents be limited to counsel and third-party experts for interested parties who have executed and filed with the Department an appropriate confidentiality affidavit.

In support of this motion, bmi respectfully states as follows:

1. The confidential information submitted herewith is protected from public disclosure under various exemptions in the Freedom of Information Act, including 5 U.S.C. §552(b)(3) and 5 U.S.C. §552(b)(4). These exemptions exist to protect the "confidentiality of information which citizens provide to their government, but which would customarily not be released to the public[.]"[2]

Exemption 552(b)(4) exempts from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." This exemption has been construed to prevent public disclosure of information that is not of the type usually publicly released, and that if released would cause substantial harm to the competitive position of the person from whom the information was obtained.[3]

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[2] *Burke Energy Corp. v. DOE*, 583 F.Supp. 507, 510 (D.Kansas 1984).

[3] *See, e.g., Gulf & Western Industries, Inc. v. United States*, 615 F.2d 527, 530 (D.C.Cir. 1980); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 684 (D.C.Cir. 1976); *Joint Application of Delta Airlines, Inc. and Virgin Atlantic*, Order 94-5-42, May 28, 1994; *Joint Application of United Air Lines, Inc. and Lufthansa German Airlines*, Order 93-12-32, December 18, 1993; *Joint Application of Northwest Airlines, Inc. and KLM Royal Dutch Airlines*, Order 93-1-11, January 8, 1993.

For information to qualify for exemption under 552(b)(4), the information must be (i) commercial or financial in nature; (ii) obtained from a person; and (iii) privileged or confidential.[4] The confidential information submitted by bmi satisfies this three-prong test.

First, the confidential information is commercial or financial in nature, in that it relates to commercially sensitive, proprietary and privileged financial and corporate information. As such confidential information is proprietary and commercially sensitive, it would not otherwise be made available publicly. bmi is submitting the confidential information so that the Department can expeditiously evaluate the public interest benefits that will result from granting approval of and antitrust immunity for the Alliance Expansion Agreement and an Amended Coordination Agreement.

Second, the information has been "obtained from a person" within the meaning of Section 552(b)(4).

Third, the information is "confidential." This prong of Section 552(b)(4)'s requirements has been interpreted as meaning that information is confidential if it would not customarily be released to the public by the person from whom it was obtained, and if disclosure is likely to have either of the following results: (i) impair the Government's ability to obtain necessary information in the future; or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained."[5] This information is not available to the public, and its public disclosure is not required to further the public interest or promote competition. In fact, bmi submits that public disclosure of the confidential information at issue here would cause substantial harm to its competitive position and could impair the government's future ability to

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4 *See Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C.Cir. 1983).

obtain similar information on a voluntary basis from individuals. The information thus qualifies for confidential treatment under Section 552(b)(4).

Withholding confidential information from public disclosure is also authorized under Section 552(b)(3). Exemption 3 pertains to information exempted specifically from disclosure by a statute, such as 49 U.S.C. §40115. Section 40115 provides that the Department may, on written request of a person, withhold certain information from public disclosure. bmi submits that release of the information that is the subject of this motion would "have an adverse effect on the competitive position of an air carrier in foreign air transportation" in that the documents pertain to strategies involving U.S. air carriers. Release of this information would therefore be contrary to the statutory requirement embodied in 49 U.S.C. §40115.

3. bmi is submitting highly sensitive internal corporate documents, studies, surveys, analyses and reports that should be accorded only limited access. Such access should rightly be granted only to counsel and third-party experts who have submitted affidavits pursuant to Rule 12 stating that they will use this confidential information only for the purpose of participating in this proceeding, and that they will not disclose such information to anyone other than counsel or third-party experts who have first executed and filed with the Department a valid affidavit.

The subject documents contain contain highly sensitive commercial information relating to bmi's international business operations. The information contained in these documents has not been released publicly. If released, competitors would gain valuable insights into bmi's internal strategies and objectives with respect to the most sensitive matters relating to bmi's business plan and goals. To minimize the risk of harmful disclosure of these documents, access

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[5] *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C.Cir. 1974).

should be limited strictly. In accordance with the Department's rules, bmi is separately filing with this motion six (6) copies of these documents in sealed boxes marked "Confidential Treatment Requested Under 14 C.F.R. §302.12."

bmi's request to limit disclosure to counsel and third-party experts is fully consistent with the Department's precedent and policy. In prior instances, the Department has granted requests to limit access to confidential documents to counsel and third-party experts who have submitted confidentiality affidavits.[6] bmi's motion is consistent with requests made in prior similar instances, and access to the documents should be restricted in a comparable manner.

[6] *See, Joint Application of United Air Lines, Inc. and Lufthansa German Airlines*, Order 93-12-32, December 18, 1993; *Joint Application of American Airlines, Inc. and Canadian International Airlines*, Order 96-1-6, January 11, 1996.

WHEREFORE, for the foregoing reasons, the Department of Transportation should grant British Midland Airways Limited d/b/a bmi british midland's motion to withhold from public disclosure its proprietary and commercially sensitive confidential information, as requested herein.

Respectfully submitted,

Marshall S. Sinick/ECC

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DATED: October 18, 2001

British Midland Airways, Ltd. d/b/a bmi british midland
Index to Confidential Documents

Box #	Number Range	Date	Description	Responds to Question #
1/1	BD0001-BD0003	Undated	Product Offering – Business Products	2
1/1	BD0004-BD0007	Undated	Product Offering – Enhanced Economy Products	2
1/1	BD0008-BD0009	Undated	Product Offering – Economy Products	2
1/1	BD0010-BD0014	Undated	Ground Product Offering at Heathrow	2
1/1	BD0015	Undated	Transatlantic Services from LHR and LGW – July 2000	2
1/1	BD0016-BD0021	Undated	Transatlantic Product Development, Chauffer Cars for Full Fare Business Class Passengers	2
1/1	BD0022-BD0049	Undated	British Midland Airways – Long-Haul Aircraft Evaluation Preparer unknown	1, 2, 4
1/1	BD0050-BD0054	Undated	Trans-Atlantic Cooperation Issues Preparer unknown	1, 2
1/1	BD0055-BD0056	Undated	Washington to Manchester – Economy Structure	2
1/1	BD0057-BD0059	Undated	Manchester to Washington – Economy Structure	2
1/1	BD0060-BD0062	Undated	Manchester to Chicago – Economy Structure	2
1/1	BD0063-BD0064	Undated	Chicago to Manchester – Economy Structure	2
1/1	BD0065-BD0067	Undated	Manchester to Washington – Premium and Economy Structure	2
1/1	BD0068-BD0070	Undated	Manchester to Chicago – Premium and Economy Structure	2
1/1	BD0071-BD0072	Undated	Chicago to Manchester – Premium and Economy Structure	2
1/1	BD0073-B0075	Undated	Transatlantic Services from LHR/LGW/MAN – July 2000	2
1/1	BD0076-BD0079	Undated	Comparison of Forecast to Bookings	2
1/1	BD0080-BD0088	Undated	Long-haul arrivals lounge product specifications	2, 3

British Midland Airways, Ltd. d/b/a bmi british midland
Index to Confidential Documents

Box #	Number Range	Date	Description	Responds to Question #
1/1	BD0089-BD0093	Undated	Heathrow Future Requirements 2001-2002	3, 4
1/1	BD0094-BD0172	Undated	Our Future Requirements at Heathrow Airport	2, 3, 4
1/1	BD0173-BD0187	Undated	Questionnaire	2
1/1	BD0188-BD0191	Undated	Proposed Tariffs	2
X	BD0192-BD0193	X	Not used	X
1/1	BD0194	Undated	Long Haul Strategy Options/Outcomes Prepared by Alex Grant	1, 4
1/1	BD0195-BD0426	6/1999	Air France/British Midland/Delta Air Lines Strategic Partnership Proposal	2, 4
1/1	BD0427-BD0475	7/12/99	Presentation on behalf of Alitalia, Northwest Airlines, Continental Airlines to British Midland	2, 4
1/1	BD0476-BD0514	7/16/99	Star Alliance Profitable Growth at Low Risk Preparer unknown	1, 2, 3, 4
1/1	BD0515-BD0529	8/16/99	Questionnaire	2
1/1	BD0530-BD0544	9/13/99	Questionnaire	2
1/1	BD0545-BD0559	9/13/99	Questionnaire	2
1/1	BD0560-BD0628	9/1999	Optimising the Transatlantic in-flight experience – a qualitative debrief	2
1/1	BD0629-BD0680	9/1999	British Midland Trans-Atlantic Evaluation, Summary Report Prepared by Martin Clough Associates/Route Development Co. Ltd.	1, 2, 4
1/1	BD0681-BD0687	11/11/99	Business Critical – Name – Airline – Product Development Strategic Analysis and Plan	2, 3, 4
1/1	BD0688-BD0722	2/10/00	BD Manchester Transatlantic Network, Financial Evaluation, Board Presentation	2

British Midland Airways, Ltd. d/b/a bmi british midland
Index to Confidential Documents

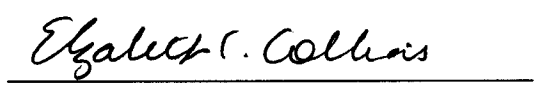
Box #	Number Range	Date	Description	Responds to Question #
1/1	BD0723-BD0732	3/15/00	Transatlantic Product Definition Approval in Principle, Concierge	2, 3
1/1	BD0733-BD0746	3/15/00	Transatlantic Product Definition Approval in Principle, Chauffer Cars	2, 3
1/1	BD0747-BD0791	4/2000	The UK North Atlantic Business Market Segmentation Report	2
1/1	BD0792-BD0871	4/2000	UK North Atlantic Prepared by Taylor Nelson Sofres Travel Research Centre	1, 2
1/1	BD0872-BD0878	6/28/00	UA Current Performance Jan – Apr 00 Prepared by Brian Brett/Peter Hind	1, 2
1/1	BD0879-BD0922	7/6/00	Draft Transatlantic Product Definition Guide	2, 3
1/1	BD0923-BD0934	7/14/00	British Midland Transatlantic Services Regulatory Update	2, 4
X	BD0935-BD0938	X	Not Used	X
1/1	BD0939-BD0945	8/3/00	Check-in Desk Allocation at Manchester	2, 3
1/1	BD0946	8/11/00	BD-UA Joint Venture Contract Timelines and Issues Prepared by Crawford Rix	1
1/1	BD0947-BD1022	8/2000	A Qualitative Investigation of the Optimum BM Transatlantic Offer	2
1/1	BD1023-BD1027	9/5/00	Draft Terms Of Reference and Workplan	2, 3, 4
1/1	BD1028-BD1150	9/12/00	Transatlantic Forecasts Prepared by Crawford Rix	1, 2, 4
1/1	BD1151-BD1196	10/2000	Benefits to British Midland Airways and the STAR Alliance of Establishing a Manchester Hub: an Update to the Presentation of July 1999	2, 4
1/1	BD1197-BD1199	11/13/00	Slot Update Attached to e-mail sent by Simon Foster	1, 2, 3, 4
1/1	BD1200-BD1208	12/13/00	Trans-Atlantic Forecast Update Prepared by bmi Network Planning	1, 2

British Midland Airways, Ltd. d/b/a bmi british midland
Index to Confidential Documents

Box #	Number Range	Date	Description	Responds to Question #
1/1	BD1209-BD1287	Winter 2000-2001	Information Supporting the Case for United Kingdom – SFO Passenger Air Service	2
1/1	BD1288-BD1311	Winter 2000-2001	San Francisco International Airport, bmi british midland presentation	2
1/1	BD1312-BD1313	1/16/01	Schedule of Comments, UA/BD Contract dated 13 September 2000, Prepared by Tim Bye	1, 4
1/1	BD1314-BD1316	2/2/01	BMI british midland Codeshare on United Airline Service Prepared by Crawford Rix	1, 5
1/1	BD1317-BD1318	3/14/01	Expansion of BD marketing codeshare on UA operated services Prepared by Roy Kinnear	1, 5
1/1	BD1319-BD1352	5/2001	Long-Haul Route Development Opportunities from Manchester	2, 4
1/1	BD1353-BD1354	5/24/01	Status Report on Long Haul Options	1, 2, 4
1/1	BD1355-BD1356	5/24/01	Status Report on Long Haul Options Prepared by Alex Grant	1, 2, 4
1/1	BD1357-BD1358	5/25/01	Longhaul Strategy Prepared by Austin Reid	1, 2, 4
1/1	BD1359-BD1364	6/25/01	Candidate Long-Haul Routes	2
1/1	BD1365-BD1366	7/3/01	LHR Long Haul	3, 4
1/1	BD1367	7/11/01	Product Spec for LHR	3, 4
1/1	BD1368-BD1370	7/24/01	Long Haul Development Options Prepared by Alex Grant	1, 2, 4
1/1	BD1371	7/26/01	Summary of Competitor Lounge Offering at LHR	2
1/1	BD1372-BD1411	7/2001	Overview of Potential Transatlantic Growth Opportunities at Manchester for bmi British Midland	2

CERTIFICATE OF SERVCE

I hereby certify that one copy of the foregoing Motion has this day been served on each of the following individuals via first-class mail, postage pre-paid.



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