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BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

DEPT. OF TRANSPORTATION
DOCKETS

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U.S.-U.K. ALLIANCE CASE

Docket OST-01-11029 - 8

Joint Applications of

AMERICAN AIRLINES, INC.

and

BRITISH AIRWAYS PLC

Dockets OST-01-10387-161
and
01-10388-128

under 49 U.S.C. §41308-09 for approval and
antitrust immunity for agreement, under 14 CFR
Part 212 for statements of authorization and under
49 U.S.C. §40109 for related exemption authority

**JOINT ANSWER TO JOINT MOTION
FOR AN ORAL EVIDENTIARY HEARING**

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DATED: November 26, 2001

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

U.S.-U.K. ALLIANCE CASE)	
Joint Applications of)	
AMERICAN AIRLINES, INC.)	Dockets OST-01-10387
and)	and
BRITISH AIRWAYS PLC)	01-10388
under 49 U.S.C. §41308-09 for approval and)	
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)	

DATED: November 26, 2001

**JOINT ANSWER TO JOINT MOTION
FOR AN ORAL EVIDENTIARY HEARING**

United Air Lines, Inc. (“United”), British Midland Airways Limited (“bmi”), Austrian Airlines, Österreichische Luftverkehrs AG, Lauda Air Luftfahrt AG (“Austrian Group”), Deutsche Lufthansa AG (“Lufthansa”) and Scandinavian Airlines System (“SAS”) (hereafter collectively referred to as “Joint Applicants”) jointly submit the following answer to the joint motion of Delta Air Lines, Inc. (“Delta”), Continental Airlines, Inc. (“Continental”) and Northwest Airlines, Inc. (“Northwest”) (“Joint Movants”) for an Oral Evidentiary Hearing, dated November 19, 2001. Because the Department on November 20, 2001, by Order 01-11-10 consolidated the applications of United/bmi/Austrian Group/Lufthansa/SAS in Dockets OST-01-10575/76 with those of

American/BA, the Joint Applicants are filing this answer to address issues that might affect them if the Joint Motion were to be granted.

1. Joint Movants have requested that the Applications of American Airlines, Inc. (“American”) and British Airways PLC (“BA”) in Dockets OST-01-10387/88 be set for an oral evidentiary hearing before an Administrative Law Judge (“ALJ”). This request is based upon the Joint Movants’ description of numerous controversial issues of fact which they claim arise from the American/BA applications and which they argue should be ventilated in an oral evidentiary hearing before an ALJ. The Joint Movants refer (Joint Motion at 3-4) to the Department’s 1997 decision to conduct a non-ALJ proceeding to review a previous American/BA request for antitrust immunity based on its “regulatory complexity” and “issues of U.S. carriers’ expanded access into London’s Heathrow Airport,” citing Order 97-9-4. The Joint Movants go on to oppose any such “legislative-type hearing process” in this instance, urging instead a full evidentiary hearing before an ALJ with the right to cross examine witnesses. (Joint Motion. at 4, n.2).

Nowhere in their Motion do the Joint Movants cite any need for such a hearing regarding the applications of United, bmi and their European partners. Dockets OST-01-10575/76. Indeed, this is not surprising, considering that the United/bmi applications do not raise competition issues comparable to those raised by the American/BA applications. *See, e.g.*, United Answer, dated November 2, 2001, in Docket OST-01-10387 at 3-5 and bmi Answer, dated November 2, 2001, in the same docket at 2-3.

Normally, parties situated as are United, bmi and their European partners would have little interest in or concern with a Motion such as that filed by the Joint Movants which is directed solely to the procedures to be adopted for consideration of an alliance involving their competitors. The Department's action of November 20, 2001, however, to consolidate the American/BA and United/bmi applications into a single proceeding (Order 01-11-10) has required the Joint Applicants to address the Joint Motion insofar as its requested relief might inadvertently affect them.

2. United, bmi and their European partners opposed consolidation of their applications with those of American/BA for the very reason that the more controversial competitive issues arising from the American/BA applications could require more time to resolve than the far less controversial issues raised by their own applications. *See, e.g.*, Joint Answer, dated November 9, 2001, in Dockets OST-01-10387/88 and 10575/76 at 2. In its consolidation order, the Department does not disagree with the Joint Applicants' position that their applications raise fewer and less controversial issues. The Department, however, decided to consolidate the two sets of applications, notwithstanding the obvious differences in the competitive issues they raise, because they do have certain limited issues in common:

AA/BA contend that the existence of the United/bmi alliance is one factor showing that their own alliance will not reduce competition. United/bmi contend, on the other hand, that their alliance is necessary for creating a competitive counterweight to the alliance between AA and BA.

Order 01-11-10 at 8. The Department concluded that consolidation in these circumstances would “avoid duplication of resources both for the Department and the parties.” *Id.*

In granting consolidation, the Department assured the parties, including United/bmi, that this would “result in a speedier disposition of the various applications...” and would “cause no delay on either alliance proposal.” *Id.* at 8-9. The Department, thus, foresaw no risk of delay in consolidation of the less controversial United/bmi applications such as that feared by the Joint Applicants. Indeed, the Department declared that “neither case will be delayed [by consolidation], and both should ultimately be further expedited.” *Id.* at 9. Now, because of the Department’s intervening consolidation action, the request for a hearing on the American/BA applications poses a very real threat of just the sort of unnecessary delay United/bmi feared would result from consolidation.

3. Joint Applicants have no interest in briefing the Department on the need or lack thereof for a hearing regarding the merits of the American/BA applications. Significantly, no party has raised any arguments regarding the need for such procedures to resolve any issues regarding the United/bmi applications. Joint Applicants cannot reasonably be expected to respond to arguments regarding the need for a hearing on their own applications when such arguments have not been made and in circumstances where Joint Applicants have received no notice of any such arguments.

Joint Applicants are, however, constrained to note that the Joint Movants’ belated request for a hearing is merely the latest in a long string of delaying tactics these same carriers have concocted in their efforts to avoid the conclusion of an open skies

agreement with the U.K. These carriers for their own parochial reasons oppose such an agreement because they have no wish to see added alliance competition at London Heathrow for U.S. transatlantic services. *See, e.g.*, United Consolidated Reply, dated November 9, 2001, in Docket OST-01-10387 at 2-4. An ALJ hearing would create a delay that would certainly result in the loss of what may be the last opportunity for the U.S. to conclude an open skies agreement with the U.K. As the Department itself has recognized, the impending decision of the European Court of Justice may well preclude the U.K. from entering into an open skies agreement.¹ To avoid that possibility, the Department has denied previous requests of the Joint Movants aimed at delaying consideration of the American/BA applications and the open skies agreement with the U.K. Order 01-9-12 at 4-5. The same reasoning requires denial of the Joint Movants' latest delaying tactic which takes the form of a belated request for an oral evidentiary hearing.

4. Even if their request had any merit, it is woefully late. The Department's rules clearly require any request for a hearing involving applications for antitrust immunity to be made "within 21 days of the filing of an application." 14 C.F.R. §303.42(a). None of the Joint Movants made a timely request within that required period nor did they even make such a request in the answers they filed pursuant to the

¹ Order 01-9-12 at 4. It is now widely expected that the Advocate-General will issue his decision in the ECJ proceeding before the end of January and the decision of the ECJ itself will follow shortly thereafter.

Department's procedural notices.² Now, with a U.S./U.K. open skies agreement moving quickly toward a conclusion, the Joint Movants have sought to use the request for hearing as a last, desperate attempt to erect the roadblock that their previous procedural efforts failed to achieve.

The Department should reject this latest delaying tactic for the same reason it has rejected the previous efforts of these same parties. The goal of achieving open skies with the U.K. is well worth pursuing. The Department has recognized that "the U.K. is likely to be unwilling to sign an open skies agreement unless and until we have granted [American/BA's] request for approval and antitrust immunity." Order 01-9-12 at 4. Joint Movants' late-filed request for a hearing is designed to forestall the open skies agreement by delaying any approvals of the American/BA applications that are a recognized precondition for open skies.

Consistent with its previous procedural actions, the Department should continue to adhere to its expedited procedural schedule for both alliance applications in order to achieve an open skies agreement with the U.K. while there is still time to do so. The Department should act quickly to dismiss or deny the Joint Motion for an Oral Evidentiary Hearing on the American/BA applications.

² There is no request in the Joint Motion for leave to file late. Only Continental made a previous *pro forma* request for a hearing. Answer of Continental, dated November 2, 2001, in Dockets OST-01-10387/88 at 58. But Continental's request was procedurally deficient because it failed to define "with specificity the material issues of fact in dispute that cannot be resolved without such a hearing." 14 C.F.R. §303.42(c).

5. In the event that, contrary to the foregoing, the Department were to decide to proceed to schedule an oral evidentiary hearing, that hearing should be limited to the issues raised by the American/BA applications as identified in the Joint Motion. There is no basis even offered in the Joint Motion for dragging United/bmi and their European partners through an oral evidentiary hearing directed at resolving controversial issues raised by the American/BA applications. If such a hearing should be deemed necessary, then the issues in that hearing should be limited to those involving the applications of American/BA.

WHEREFORE, on the basis of the foregoing, Joint Applicants respectfully request that the Joint Motion of Delta, Continental and Northwest for an Oral Evidentiary Hearing be dismissed as late filed or, in the alternative, denied.

Respectfully submitted,



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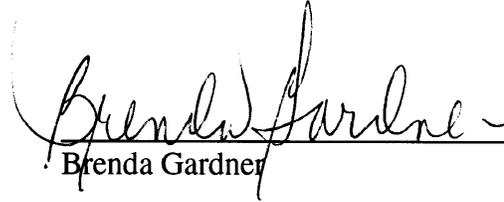
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DATED: November 26, 2001

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Joint Answer to Joint Motion For An Oral Evidentiary Hearing on all persons named on the attached Service List by causing a copy to be sent via first-class mail, postage prepaid.


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