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ORIGINAL
DEPT. OF TRANSPORTATION
DOCKET SECTION

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BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Joint Application of)
)
)
DELTA AIR LINES, INC.)
SWISSAIR, SWISS AIR TRANSPORT)
COMPANY, LTD.)
SABENA S.A., SABENA BELGIAN WORLD)
AIRLINES, and)
AUSTRIAN AIRLINES, ÖSTERREICHISCHE)
LUFTVERKEHRS AG)
)
)
for Approval of and Antitrust Immunity for)
Alliance Agreements Pursuant to 49 U.S.C.)
§§ 41308 and 41309)

Docket OST-95-618-43

REPLY OF THE INTERNATIONAL AIR TRANSPORT
ASSOCIATION TO COMMENTS OF THE DEPARTMENT OF JUSTICE

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REPLY OF THE INTERNATIONAL AIR TRANSPORT
ASSOCIATION TO COMMENTS OF THE DEPARTMENT OF JUSTICE

In its May 28, 1996 comments on the Department's Show Cause Order, the Department of Justice ("**DOJ**") supports the proposed condition limiting alliance carrier participation in IATA tariff coordination as the price for antitrust immunity for the alliance agreements. However, DOJ, like DOT, is unable to articulate a record-based rationale for the imposition of the condition. Rather, DOJ references old decisions that are currently under review in Docket 46928 and its own positions in that proceeding which have been thoroughly rebutted by IATA. **DOJ's** recourse to Docket 46928 merely reinforces **IATA's** showing that it is improper for DOT to use these alliance proceedings to resolve issues that

are currently pending in that docket and involve many other parties.

DOJ starts by agreeing that the DOT should make the applicants **"choose"** between approval of their alliances or continued participation in IATA tariff coordination. DOJ at 26. However, DOJ cannot explain why this should be so. It offers two reasons, but these are mere generalities with no specific linkage to the facts of record.

First, DOJ argues that, **"[e]ven** though IATA tariff coordination does not eliminate all competition in these markets, and even if existing levels of competition will not be substantially lessened by this [alliance] transaction," DOT should nonetheless impose the condition because **"IATA** price fixing is clearly anticompetitive." Id. at 27. For this latter proposition, DOJ cites a ten-year-old CAB Order whose critical findings are under review by the DOT in Docket **46928.**^{1/}

What DOJ seems to be saying, then, is that DOT is legally justified in treating participation in IATA tariff coordination as a target of opportunity simply because any restriction thereon would ipso facto **"increase"** competition. Thus, regardless of whether there is any actual record support for the condition, DOJ apparently believes that a slap at IATA would always be legally sustainable. Justice's non-record approach to adding conditions

^{1/} DOJ argues that **"[t]hose** findings remain valid regardless of whether DOT is currently reviewing the grant of antitrust immunity that was in those **orders."** Id. at 27, n.16.

is utterly offensive to established principles of administrative law. Moreover, in the present circumstances, it denies fair consideration to the views of all the participants in Docket 46928 where these IATA tariff coordination participation issues are intended to be heard and resolved by **DOT**.^{2/}

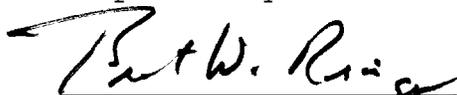
DOJ's second argument also is not supported by the record, but merely reflects **DOJ's** policy position. DOJ argues that DOT is justified in imposing the condition because it is consistent with **DOJ's** view of a true open skies bilateral regime. That is, there should be no tariff coordination if the governments themselves have foregone their unilateral rights to regulate rates and fares. To amplify this point, DOJ cites to its position in Docket 46928 that "**DOT** should consider immunity for IATA tariff coordination on a country-by-country basis." Id. at 28, n.17. In that docket, DOJ argued that "[a]n international comity analysis would likely conclude that our open skies bilateral trading partners would not have an overriding interest in preserving IATA price fixing at the expense of U.S. antitrust principles." Id. Whether this proposition is true, however, is properly a subject to be resolved in Docket 46928, a comprehensive proceeding in which many governments have submitted their positions on the need for and value of IATA tariff

^{2/} To ignore the record in Docket 46928 seems especially odd, because the Department of State went to considerable lengths to solicit foreign government participation therein and to make of record their positions on the need for tariff coordination and related issues.

coordination. **DOJ's** ipse dixit cannot lend support to the IATA condition proposed here where there has been no record developed.

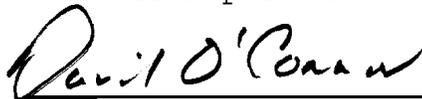
DOJ's support of DOT's condition on tariff coordination therefore hinges critically on considerations that are not a part of the record in the instant proceeding, but which are squarely at issue in Docket 46928. For DOT to impose its condition on such a basis would clearly compromise the rights and interests of all participants in that docket.

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May 31, 1996

CERTIFICATE OF SERVICE

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