BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Joint Application of	)	
	)	
ALITALIA-LINEE AEREE ITALIANE-S.p.A.	)	
CZECH AIRLINES	)	
DELTA AIR LINES, INC.	)	**OST-2004-19214**
KLM ROYAL DUTCH AIRLINES	)	
NORTHWEST AIRLINES, INC.	)	
SOCIÉTÉ AIR FRANCE	)	
	)	
Under 49 U.S.C. §§ 41308 and 41309 for approval of	)	
and antitrust immunity for alliance agreements	)	
	)	

PUBLIC

COMMENTS OF THE DEPARTMENT OF JUSTICE

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Dated: August 19, 2005

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COMMENTS OF THE DEPARTMENT OF JUSTICE

The United States Department of Justice (DOJ) hereby submits to the Department of Transportation (DOT) these comments on the Joint Application For Approval Of and Antitrust Immunity For Alliance Agreements between Alitalia-Linee Aeree Italiane-S.p.A. (Alitalia), Czech Airlines, Delta Airlines, Inc. (Delta), KLM Royal Dutch Airlines (KLM), Northwest Airlines, Inc. (Northwest) and Société Air France (Air France) (hereinafter "Joint Application").

For the reasons set forth below, the DOJ concludes that the current record does not adequately support the antitrust immunity sought in the Joint Application.

Executive Summary

Antitrust enforcement is central to the policies that have brought increased competition and consumer benefits to the deregulated airline industry. Accordingly, requests for antitrust immunity are disfavored. To overcome the presumption against antitrust immunity, applicants

must demonstrate that their collaboration will generate significant benefits that outweigh any harm to competition, that such benefits cannot be achieved without immunity, and that the particular immunity proposed is narrowly tailored to achieve the benefits claimed.

The DOJ believes the Joint Application fails to demonstrate these required elements. First, the Joint Application is the first to request alliance immunity relating to two major United States airlines. These airlines are important competitors on numerous international and domestic routes. But the Joint Application seeks to preserve the widest possible discretion for the parties to exchange information and coordinate their conduct. Under these circumstances, there is a significant risk that the requested immunity would reduce competition on certain international routes (*i.e.*, non-transatlantic international routes) and would reduce domestic competition related to the immunized international routes. Second, the claimed benefits are modest, even by the applicants' own description. Unlike earlier applications, the Joint Application applies to largely overlapping airline networks, not end-to-end extensions of networks. This situation increases the risk of harm and reduces the potential benefit to consumers. Third, the requested immunity has not been shown necessary to achieve all of these benefits. The applicants already have engaged in significant integration of their activities and could achieve a substantial portion of the claimed benefits through codesharing of the type that presents minimal antitrust risks.

More specifically, the DOJ concludes as follows:

- The Joint Application provides no justification for the immunity requested for transpacific routes, and routes to Canada, Mexico and the Caribbean. Further, the requested immunity threatens to lessen competition on some of these international routes. Accordingly, DOT should reject the requested immunity for these routes.

- The requested immunity is not likely to lessen competition on the transatlantic routes, but does threaten to reduce competition on related domestic routes. While

the potential harm to domestic competition likely could be largely – although not entirely – mitigated through limitations on the scope of the immunity, the Joint Application provides insufficient justification to warrant granting immunity on these transatlantic routes.

- If the DOT were to decide that the benefits obtainable only through antitrust immunity are sufficient to warrant a grant of immunity, the DOT should adopt conditions that, to the extent possible, protect domestic competition.

The question before the DOT is not whether to condemn a substantial expansion of the SkyTeam alliance, as the application implies, but rather whether antitrust immunity is necessary to that expansion. Indeed, the DOJ has no reason to conclude that the proposed expanded SkyTeam alliance necessarily would violate the antitrust laws. Depending on the specific structure and limits of the ultimate cooperation, the SkyTeam alliance might achieve procompetitive benefits without harming competition. By the same token, however, the specific structure and extent of the ultimate cooperation could harm consumers without achieving any substantial benefits. Under these circumstances, the DOT should conclude on this record that the Joint Application does not meet its burden to justify the requested antitrust immunity.

Background

SkyTeam membership. The SkyTeam alliance is currently composed of the following carriers:

- *Air France-KLM.* Air France and KLM merged in May 2004 but have continued as separate airlines. KLM serves 117 destinations, including eight U.S. gateways, from its Amsterdam hub. Air France serves 144 destinations, including thirteen U.S. gateways, from its Charles DeGaulle Airport hub in Paris. Prior to their merger, KLM was the fourth-largest European airline and Air France was the second-largest European airline. Merged, this is the largest airline group in the world.

- *Delta.* Delta is the third-largest U.S. airline, with over $15 billion in annual revenue. It is a network carrier with hubs at Atlanta, Cincinnati, Salt Lake City

and, for international service, New York Kennedy. Delta extends its own network through its domestic codeshare alliance with Northwest and Continental Airlines (the "DNC alliance") and with codeshare service by several domestic partners, including Alaska Airlines and a number of regional airlines. Delta extends its international network through relationships with immunized partners Air France, Alitalia, Czech Airlines, and Korean Air, and non-immunized partners including Continental, Aeromexico, and Northwest.

- *Northwest.* Northwest is the fourth-largest airline in the United States, with over $11 billion in revenue in 2004. Also a network carrier, Northwest has domestic hubs at Detroit, Minneapolis and Memphis and a significant presence in transpacific markets, including routes from the U.S. to Japan and Korea. It is part of the DNC Alliance and also codeshares with Alaska, America West, Hawaiian Airlines, and regional partners. Its alliance with KLM is immunized and it has non-immunized international relationships with Delta, Continental, Malev Hungarian Airline, and Air Alps.

- *Alitalia.* Alitalia is the sixth-largest European airline, serving 98 destinations, including six in the U.S., from hubs in Rome and Milan.

- *Czech Airlines.* Czech Airlines serves 75 destinations, including New York, from Prague.

- Aeromexico Airlines, Continental Airlines, and Korean Air are also members of SkyTeam. However, they are not parties to the application.

Alliances among SkyTeam carriers. The current SkyTeam carriers have other alliances, some of which have antitrust immunity (ATI). These include:

- *Northwest/KLM.* Northwest and KLM formed their transatlantic alliance in 1992 and obtained immunity in 1993. The alliance combined largely end-to-end networks; at the time they formed their alliance, the only significant overlaps between Northwest and KLM involved block-space service on two gateway-to-gateway routes to Amsterdam.[1] Over the next decade, Northwest and KLM worked to achieve a highly integrated operation with a "common bottom line."[2]

REDACTED

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[1] Order 92-11-27 at 14.

[2] *See* Supplemental Information Response of Northwest, May 9, 2005 (hereinafter "Northwest Supplemental Response"), Attachment D at 4; Joint Applicants' Supplemental Information Response, February 8, 2005 (hereinafter "Joint Supplemental Response") at 16, 36.

REDACTED

[3] While Northwest and KLM "have separate yield management systems, the joint venture flights are managed by one fully integrated department with staff from both carriers."[4]

- *Original SkyTeam alliance.* Four SkyTeam members – Alitalia, Delta, Czech Airlines, and premerger Air France – received ATI in 2002 for transatlantic routes. These airlines and Korean Air also received ATI in 2002 for transpacific routes. The combination of these carriers was also predominantly an end-to-end combination; it involved only a few significant overlapping routes and offered new online service for a substantial number of passengers.[5] The current level of coordination between Air France and Delta is less extensive than Northwest/KLM's.[6] Delta and Air France have begun to implement a revenue sharing agreement formed in the fall of 2004, [7] REDACTED

- *Continental/Northwest/KLM.* Continental and Northwest have an extensive non-immunized alliance relationship, which includes codesharing on most domestic and select international routes. Continental also codeshares internationally with KLM.[8] Continental's and Northwest's current relationship has evolved from a transaction in 1998, in which the carriers formed a coordination agreement and Northwest acquired an equity interest in Continental.

- *The DNC alliance.* The Delta/Northwest/Continental alliance is a non-immunized codeshare agreement covering over a thousand domestic flights. When the DNC alliance was formed, both the DOT and DOJ recognized the alliance could lessen

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[3] *See* NW 00054-57 NW 00081-91 REDACTED

[4] Joint Supplemental Response at 48.

[5] *See* Order 2001-12-18 at 5 and 17.

[6] Reply of the Joint Applicants, July 6, 2005 (hereinafter "Joint Reply"), at 51.

[7] Joint Supplemental Response at 17, fn 4. *See* DL 01909-10, 01927-35 REDACTED

[8] Continental does not have antitrust immunity for its coordination with KLM or with any of the members of SkyTeam.

domestic competition. To address the Government's concerns, the DNC carriers modified their agreement to include conditions designed to preserve their existing competition.[9]

SkyTeam history. Before the Air France-KLM merger and the expansion of SkyTeam, the Northwest/KLM alliance and previous SkyTeam alliance were two of the four major transatlantic alliances. The alliance's current membership is the product of the Air France-KLM merger and the decision by Continental and Northwest to join SkyTeam formally in September 2004.[10] The networks of the two alliances overlap significantly. In 2003, approximately 84% of the transatlantic passengers carried by the Northwest-KLM alliance traveled in markets also served by SkyTeam and 87% of SkyTeam's transatlantic passengers traveled in markets served by both alliances.[11] In other words, the Northwest-KLM alliance and the previous SkyTeam alliance were competitors.

The expanded alliance has moved to develop and implement coordinated programs and products, **REDACTED** .[12] The

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[9] *See* Termination of Review of Joint Venture Agreements, 68 Fed. Reg. 16854-55 (Apr. 7, 2003).

[10] SkyTeam Press Release: *Continental, KLM and Northwest Join the SkyTeam Alliance. Solidifies Position as a Leading Global Alliance* (September 13, 2004); available at http://www.skyteam.com/EN/aboutSkyteam/pressCenter/pr091304.jsp.

[11] Figures based on MIDT data for the fourth quarter of 2003.

[12] *See* NW-ST-ITA 07202-04; NW-ST-ITA 04997-5014; NW-ST-ITA 07132; NW-ST-ITA 01108-38; NW-ST-ITA 10253; SkyTeam Press Release: *Skyteam Round the World and Europe Pass Fares Now Offer Travelers More Choices* (April 13, 2005); available at http://www.skyteam.com/EN/aboutSkyteam/pressCenter/pr041305.jsp (also noting that new

(continued...)

applicants have also applied for authorization to codeshare on many routes[13] and Air France-KLM has initiated new nonstop routes.

As this matter comes before the DOT, the applicants, as members of the expanded SkyTeam, are actively collaborating.[14] They seek antitrust immunity to coordinate their worldwide operations, with the one limitation that coordination between Delta and Northwest "shall exclude coordination of prices, services and other marketing activities involving air transportation *solely* within the United States."[15] Under their Coordination Agreement,

> [t]his includes, without limitation, programs designed to coordinate and reach agreements in the areas of sales, fares, seat allocations, revenue management, schedules, flights, route networks, joint marketing programs, frequent flyer programs, distribution programs, Internet distribution, travel agent programs, travel agent and GSA compensation, form agreements, revenue sharing, cost sharing, joint purchasing, computer systems, information sharing, facilities, information systems, quality and service standards, consumer marketing programs, advertising, budgets, business plans and other related passenger matters.[16]

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[12](...continued)
partners will soon join SkyTeam's America Pass product offering).

[13] They have applied for blanket statements of authorization to allow for codesharing between Delta and KLM, Northwest and Air France, Northwest and Alitalia, and Northwest and Czech Airlines. Joint Application of Delta Air Lines, Inc., KLM Royal Dutch Airlines, Northwest Airlines, Inc., Société Air France, Alitalia-Linee Aeree Italiane-S.p.A., and Czech Airlines for Statements of Authorization, September 24, 2004.

[14] *See About SkyTeam: History*; available at http://www.skyteam.com/EN/aboutSkyteam/history.jsp.

[15] *See* Article 1.5 of Coordination Agreement; Article 1.3 of Delta/Northwest Cooperation Agreement (emphasis supplied).

[16] Coordination Agreement, Article 2.

The parties, however, have not begun to negotiate their joint venture's implementing agreements. Although the applicants promise and predict no anticompetitive conduct, their agreements and their application do not describe the markets in which they will agree to coordinate, the extent of that coordination, what form those agreements will take, or which carriers will be involved.

Comments & Authorities

I. The statutory scheme disfavors immunity and places a significant burden on the applicants to justify their request.

Under Section 41308, exemptions from the antitrust laws are extraordinary:

> When the Secretary of Transportation decides it is required by the public interest, the Secretary, as part of an order under . . . this title, may exempt a person affected by the order from the antitrust laws to the extent necessary to allow the person to proceed with the transaction specifically approved by the order and with any transaction necessarily contemplated by the order.[17]

Accordingly, two principles should inform the Secretary's decision. First, immunity is appropriate only *if* necessary to the public interest. Second, if awarded at all, immunity should be awarded only *to the extent* necessary.

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[17] 49 U.S.C. § 41308(b). Although the focus of the Joint Application and of these comments is on the discretionary immunity authority provided in Section 41308(b), the Joint Application also suggests that the expanded alliance might qualify for *mandatory* immunity under 49 U.S.C. § 41308(c). Joint Application at 11-12. Under Section 41308(c), a grant of immunity is mandatory if DOT finds an agreement will substantially reduce competition but is necessary to meet serious transportation needs or to achieve important public benefits. For the same reasons set forth in these comments, the Joint Application fails to demonstrate that the requested immunity is necessary to meet serious transportation needs or to achieve important public benefits. Accordingly, the grant of immunity should not be deemed mandatory.

A. The Airline Deregulation Act assumed a central role for antitrust enforcement to maintain a competitive industry.

Antitrust enforcement protects U.S. consumers. Accordingly, the "antitrust laws represent a fundamental national economic policy."[18] The antitrust laws rest on "the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress."[19]

Congress has not decreed a smaller role for antitrust in the airline industry than in the rest of the economy. To the contrary, an important goal of airline deregulation was to "make the airline industry subject to the same competitive and antitrust standards applicable to other industries, as far as is practicable."[20] As the Civil Aeronautics Board ("CAB") itself recognized, regulatory protection from antitrust enforcement may have unanticipated consequences:

> Congress intended the Board to be circumspect in its use of 414 [the antitrust exemption for airlines], both because the threat of antitrust liability is a valuable regulator of business conduct and because the consequences of the grant of immunity can be difficult to predict.[21]

Accordingly, the CAB and DOT have exercised their authority to grant immunity mindful of competitive consequences:

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[18] *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 421 (1986). *See also Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982) (noting that the Sherman Act expresses "a longstanding congressional commitment to the policy of free markets and open competition," and consequently, both implicit and express statutory exemptions must be construed narrowly) (citations omitted).

[19] *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

[20] Air Carrier Agreements Affecting Interstate and Overseas Air Transportation, Order 88-12-11 at 1 (1988).

[21] National Airlines, Acquisition, 84 C.A.B. 408, 415 (1979).

> In enacting the ADA, Congress directed that control of the air transportation system be returned to the marketplace. We have consistently held that a part of the return to market control is exposure of participants to the antitrust laws, as that exposure exists in unregulated industries.[22]

The CAB and DOT even undertook a program to review agreements that had been immunized prior to deregulation and remove such immunities unless they were required.[23] These policies have proved beneficial. The increasing competitiveness of the airline industry since deregulation is evidence that the free market – aided by enforcement of the nation's antitrust laws – has served consumers well. A request for an exception to this regime should be treated with great caution.

B. The Secretary may grant immunity only if the applicants show it is required by the public interest, including that immunity is *necessary* for the applicants to achieve significant efficiencies.

The burden is on the applicants to make "a strong showing on the record that antitrust immunity is required by the public interest, and that the parties will not proceed with the transaction without the antitrust immunity."[24] The DOT "determined that it will grant antitrust immunity only if it is necessary to enable a transaction that will provide significant public

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[22] Competitive Marketing of Air Transportation, Order 82-12-85, 99 C.A.B. 1, 131 (1982). "ADA" refers to the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, codified as amended at 49 U.S.C. §§ 40101-46501 (2005).

[23] *See* DOT Report to Congress: Administration of Aviation Antitrust Functions, at 17 (May 1987) ("[T]he Department has continued the CAB practice of reviewing previously approved and immunized agreements to determine whether continued approval and immunity is necessary"). *See also* Air Cargo, Inc. Agreement, Order 82-5-106, 95 C.A.B. 478, 482 (1982) (announcing its continued approval of an agreement while revoking antitrust immunity); Competitive Marketing of Air Transportation, Order 82-12-85, 99 C.A.B. 1, 124 (1982) (granting two years of transitional immunity to modify travel agency programs, "to permit a smooth transition to a fully competitive environment"); Scheduled Airlines Traffic Office (SATO) Agreements, Order 86-1-62, 1986 WL 69784, 3 (1986) (phasing out over seven months immunity for joint venture providing travel and ticketing services).

[24] Order 93-1-11 (Northwest/KLM) at 10.

benefits to go forward."[25] Previous decisions have described the "high standard" or exceptional showing required.[26] And the courts have upheld this prudent approach. For example, in affirming a CAB denial of antitrust immunity, the Eighth Circuit explained "[e]xamination of [the approval and immunity provisions] and their legislative history clearly reveals that antitrust immunity for airline agreements is intended to be the exception and not the rule."[27]

All prudent businesses devote some concern to antitrust liability; this level of awareness is normal and, from a consumer standpoint, generally healthy. Subjective fears of antitrust litigation therefore are an insufficient basis for granting immunity:

> Petitioners seem to read the [Federal Aviation Act] as authorizing immunity on demand for any agreement which produces public benefits. Neither the text nor the legislative history of the statute supports such a reading, which would make the grant of antitrust immunity turn on the subjective desire of the parties to avoid antitrust litigation. This desire is one shared by all businesses subject to the Sherman Act, and we do not believe that it is relevant to the Board's task. Petitioners are entitled to immunity on the basis of an *objective* demonstration that the statutory requirements for such immunity have been met.[28]

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[25] DOT Report to Congress: Administration of Aviation Antitrust Functions, at 16 (May 1987). *See also* 49 U.S.C. § 41308(b) (stating the "necessary" requirement).

[26] *See, e.g.*, UATP-1976 Agreements, Order 80-6-66, 85 C.A.B. 2481, 2512-14 (1980) ("[F]ull exposure to antitrust liability is consistent with the marketplace orientation of [the Airline Deregulation Act]"); Airline Fuel Corporation Case, Order 79-9-120, 83 C.A.B. 1358, 1363-64 (1979) (holding that Board's continuing jurisdiction over agreements was not sufficient substitute for antitrust exposure and noting that threat of unwarranted litigation is "simply one of the risks of doing business"); *see also*, Competitive Marketing of Air Transportation, Order 82-12-85, 99 C.A.B. 1, 13 (1982) (recognizing that "full antitrust exposure is consistent with deregulation," and proceeding to set a "high standard for granting antitrust immunity").

[27] *Republic Airlines, Inc. v. C.A.B.*, 756 F.2d 1304, 1317 (8th Cir. 1985).

[28] *Id.* (emphasis in original). In prior alliance cases, DOT has accepted parties' assertions that they would not go forward with their alliance because of fears of antitrust risk. *See, e.g.*, Order 92-11-27 (Northwest/KLM) at 19 (1992). In this case, however, the relative lack (continued...)

An application for immunity must therefore make a "strong showing" that, from the standpoint of the public interest, the *predicted* value of antitrust immunity is greater than the *proven* value of the normal antitrust regime.

C. The analysis must consider whether the alliance will reduce competition either in markets covered by the immunity or in other, related markets.

The central question in antitrust evaluation of cooperation among competitors is whether the joint venture is likely to harm competition in any relevant markets by increasing the participants' ability or incentive to raise price or reduce output.[29] The first part of this analysis asks whether the venture will reduce competition in the markets within which the venture operates. The second asks whether the joint venture may reduce competition in other markets where the joint venturers remain competitors.

The likelihood of any harm to competition depends on, among other things, "the nature of the collaboration, its organization and governance, and safeguards implemented to prevent or minimize disclosure."[30] A joint venture may facilitate collusion by providing opportunities for the exchange of competitively sensitive information, providing the participants with an

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[28](...continued)
of complementary network benefits and the risks inherent from including two major domestic competitors within the scope of the immunity warrant a more concrete demonstration of need.

[29] Antitrust Guidelines for Collaborations Among Competitors, at 1.2; 3.3 (April 2000) (hereinafter "Joint Venture Guidelines"). These guidelines, prepared by the DOJ and Federal Trade Commission and available at http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf, explain the framework for analysis of the competitive effects of a joint venture such as this alliance.

[30] *See* Joint Venture Guidelines at 3.34(e).

opportunity to discuss and agree on anticompetitive terms or enhancing their ability to detect and punish deviations from a collusive agreement.[31]

Evaluating the competitive benefits and harms requires a detailed and fact-intensive analysis of the specifics of the joint venture structure and proposed operations in the relevant markets.

II. Immunizing an alliance between these two U.S. airlines risks significant harm to certain international and domestic competition.

A. The proposed coordination of the international, non-transatlantic operations of Northwest and Delta threatens harm to competition.

The application seeks immunity for coordinating the worldwide operations of all five carriers.[32] Delta and Northwest currently compete independently on routes between the U.S. and Canada, Mexico, and the Caribbean. The many routes on which Delta and Northwest compete head to head, without their European partners, include routes between U.S. cities and Montreal, Toronto, Ottawa, Montego Bay, Nassau, Cancun, and Mexico City.

Delta and Northwest also compete on numerous transpacific routes, including between the U.S. and Tokyo (where Delta and Northwest compete directly) and between the U.S. and Korea (where Delta's immunized alliance partner, Korean Air, and Northwest are important competitors). Korean Airlines offers nonstop service between Seoul and many cities in the U.S., and connecting service from points in the U.S. in cooperation with Delta. Northwest provides service to Korea through its hub in Tokyo, and competes with Korean Airlines on over 300

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31 *Id.* at 3.31(b).

32 Or six, if Air France and KLM are counted separately.

connecting routes from the U.S. to Korea.[33] On most of these routes, they are two of only three independent competitors with any significant traffic.[34] Delta and Northwest acknowledge that they must limit transpacific coordination to avoid competitive problems.

As described in Section III below, the Joint Application is devoid of any justification for the proposed immunity with respect to these transpacific routes, and routes to Canada, Mexico and the Caribbean.

B. The proposed immunity threatens competitive harm to domestic markets related to the covered transatlantic routes.

In 2004, the DOJ examined the Air France-KLM merger as if it were a combination of the transatlantic operations of all of the immunized alliance members.[35] The DOJ concluded that there was not sufficient evidence that the combination would substantially reduce transatlantic or domestic competition to warrant a challenge under the antitrust laws.[36] Although the two alliances competed in a number of transatlantic city pairs, most of those city pairs had substantial

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[33] Figures based on MIDT data for the year ending June 2004.

[34] The other two principal carriers serving Korean markets from the U.S. are United Airlines and Asiana Airlines, which are members of the same immunized alliance.

[35] The European Commission also reviewed the transaction. The EC determined that there were three nonstop routes between Europe and the U.S. on which there was a serious risk that the operation would create a dominant position. To resolve the EC concerns, the parties submitted undertakings with conditions (such as making slots available at the Amsterdam and Paris airports and implementing a frequency freeze) designed to encourage entry. Regulation (EEC) No. 4064/89 (November 2, 2004) ("European Commission Order"). These city-pairs were New York City-Amsterdam, Paris-Detroit, and Amsterdam-Atlanta. European Commission Order at 23-25.

[36] *See* "Transportation Update: Remarks to the ABA Section of Antitrust Law Transportation Industry Committee," Speech by Bruce McDonald (March 31, 2004); available at http://www.usdoj.gov/atr/public/speeches/203369.pdf. In this regard, the DOJ analysis treated Continental and other carriers as independent competitors.

actual or likely potential competition from other carriers or alliances, which was deemed sufficient to protect the interests of consumers.[37] That same analysis indicates that approving the current SkyTeam application would not lessen *transatlantic* competition.

The Joint Application nevertheless raises issues not presented by the Air France-KLM merger.[38] Delta and Northwest are, as the applicants put it, "vigorous domestic competitors."[39] They have overlapping networks and compete directly in many domestic markets.[40] They are the only two carriers offering nonstop service between five city-pairs: Atlanta-Detroit,[41] Cincinnati-Detroit, Cincinnati-Minneapolis, Salt Lake City-Detroit and Salt Lake City-Minneapolis. These five city-pairs generate over $100 million in annual revenue from over 700,000 annual Delta and

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[37] Because the merger of alliances would not substantially lessen competition, the DOJ does not have reason to believe the applicants' coordination agreement would violate the antitrust laws. The question for the DOT, however, is whether the applicants have met the much higher burden to justify antitrust immunity.

[38] The DOJ did not find it likely that the merger of Air France and KLM would itself lead to anticompetitive effects in domestic markets because the merging parties – Air France and KLM – did not compete on domestic city-pairs. Further, Air France-KLM lacks an incentive to coordinate domestic collusion between Delta and Northwest and, if it tried to do so, such collusion would be more cumbersome and likely easier to detect than coordination by Delta and Northwest under the umbrella of a grant of immunity for their international operations.

[39] Joint Supplemental Response at 10.

[40] An example of the benefit to consumers from this competition was noted recently: "Northwest on Sunday rescinded the fare increases it implemented late last week after Delta and other carriers refused to match because the Northwest increases would have put fares over the Delta $499 one-way cap." *Northwest Pulls Fare Increases as Competitors Fail To Match*, Aviation Daily, June 14, 2005, at 3.

[41] AirTran recently announced that it will begin service on Atlanta-Detroit in November 2005.

Northwest passengers.[42] In two other city-pairs, Atlanta-Memphis and Atlanta-Minneapolis, they are two of three nonstop carriers. On both routes, which generate over $70 million from over 500,000 Delta and Northwest passengers annually, their combined nonstop capacity exceeds 70% of the total nonstop capacity available. Delta and Northwest are significant competitors in many other U.S. markets.[43]

The presence of two major domestic competitors in the request for expanded immunity warrants closer scrutiny of the potential scope of cooperative activity and the potential effect of such cooperation on the domestic markets. Here, the requested immunity may harm domestic competition by providing cover for competitors to discuss competitive matters outside the immunity and shielding anticompetitive conduct from antitrust enforcement.[44]

1. Immunity would create opportunities for collusion in U.S. domestic markets.

An airline's domestic and international operations are closely integrated. Domestic passengers are seated next to international passengers traveling on a domestic leg of the connecting route to their foreign destination. For both Delta and Northwest, domestic-leg

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[42] Figures based on DOT Origin & Destination data, covering the year ending September 2004.

[43] For the year ending September 2004, there were over 1,000 other city pairs with at least five passengers per day each way where Delta and Northwest each had at least a 10% share of traffic and where their combined share was at least 40%. In these markets, Delta and Northwest carried over 8 million passengers and generated more than $1.5 billion in annual revenues. Figures based on DOT Origin & Destination data.

[44] As discussed in Section IV below, the potential harm to competition in domestic markets likely could be largely mitigated – although not eliminated entirely – by limitations or conditions on any immunity grant.

international traffic can have a significant impact on domestic flights' profitability.[45] Within each carrier's inventory management system, international passengers seeking to travel on connecting routings "compete" with local passengers for seats within each fare class for each flight segment. Therefore, a single firm with both international and domestic operations will naturally coordinate both types of service for the benefit of the whole. In the Joint Application, the presence of two major domestic competitors within one immunized international alliance – which purports to approach the operation of a single firm – creates a risk that coordination arguably covered by "international" immunity will spill over into anticompetitive domestic coordination.

In the expanded SkyTeam, the applicants assert that, with immunity, they would "engage in more extensive reciprocal codesharing across their networks as they are able to discuss and make trade-offs that otherwise could present antitrust risks, including through the formation of 'mini-JVs' to develop new routes by sharing the costs and benefits of codesharing behind and beyond those routes."[46] Accommodation and coordination on the domestic "behind and beyond" consequences of international initiatives could present opportunities for Delta and Northwest to discuss and resolve, explicitly or tacitly, competitive issues and may lessen competition on their domestic routes.

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[45] During the third quarter of 2004, on average, 8% of the passengers on Delta-operated domestic flights and 9% of the passengers on board Northwest-operated domestic flights were flying on international itineraries. Figures based on DOT Origin and Destination data for the third quarter of 2004. These are significant percentages, particularly given the fact that the industry's thin profit margins mean that a few marginal passengers on any flight can have a significant impact on the flight's profitability.

[46] Joint Supplemental Response at 17.

In the context of such "mini-JVs," decisions about which routes to serve on a codeshare basis, which carriers should provide how much service, and how to route traffic could have competitive consequences on the domestic behind and beyond city-pairs. Those consequences would be a natural subject of discussion and may lead to trade-offs between Delta and Northwest. For example, where international initiatives affect the profitability of one carrier's domestic behind or beyond domestic segments, immunized international coordination between Delta and Northwest could provide an opportunity for accommodations that might lessen domestic competition between them.[47] Similarly, coordinated steps taken to harmonize international service may advantage one alliance member and disadvantage the other, requiring compensation of the disadvantaged competitor and leading to further exchanges of competitive domestic market information.[48] In many domestic markets, trade-offs that might lessen domestic

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[47] Consider Northwest's expansion from Indianapolis (IND) as an example. *See* Northwest Press Release: *Northwest to Offer Nonstop Service From Indianapolis to Four New Cities* (March 9, 2005); available at http://www.nwa.com/corpinfo/newsc/2005/pr030920051567.html. Suppose Northwest were to decide to enter the Indianapolis-Atlanta market, in competition with Delta, and to seek permission from Delta to place the Northwest code on Delta's beyond-Atlanta transatlantic flights, further decreasing traffic on Delta's IND-ATL service. Under the umbrella of international planning discussions, Delta might report the negative effect on Delta revenues of Northwest's new service and seek from Northwest trade-offs that could discourage Northwest from instituting the new domestic service, induce Northwest to limit it in some way, or encourage Northwest to forbear from competition on some other domestic route.

[48] For example, Delta and Northwest both provide connecting service to Barcelona (BCN) from Minneapolis-St. Paul (MSP). The Delta passenger connects over Atlanta (ATL) – on a domestic segment where Delta competes with Northwest – and then flies directly to Barcelona. The Northwest passenger flies to Amsterdam and connects on KLM to Barcelona. As part of their coordination on international routes, Delta and Northwest could agree to harmonize their service offerings so that connections were more favorable over Northwest's MSP-AMS-BCN than Delta's MSP-ATL-BCN, even though this would result in traffic losses for Delta's MSP-ATL service. Compensating Delta may require that Delta provide domestic-leg

(continued...)

competition between Delta and Northwest could be accomplished within the framework of the international coordination. The parties might argue, and a court might wrongly accept, the contention that such coordination was justified as part of the immunized alliance.

At a minimum, in the ordinary course, the applicants expect to engage in extensive sharing of competitively sensitive information that relates to their international operations. As they put it, the carriers may exchange "current and future competitively sensitive information – such as route profitability data" on affected routes.[49] Consistent with their agreement, they may develop "comprehensive revenue/profit sharing arrangement[s]."[50] They hope to follow the lead of Northwest and KLM by negotiating mechanisms and formulas to share revenues and costs attributable to domestic as well as international segments.[51] It could be useful and perhaps necessary for Delta and Northwest to share detailed domestic revenue, traffic, and cost information in order to agree upon and implement cost-sharing formulas for international passengers traveling over domestic segments.[52] The DOJ agrees with the applicants that this sort

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[48](...continued)
revenue and cost information to justify its MSP-ATL losses and could be accomplished by Northwest giving up some advantage to Delta on a domestic city-pair.

[49] Joint Supplemental Response at 12.

[50] *Id.*

[51] *See id.* at 16-17.

[52] Within an airline's cost accounting system, nearly all costs are assigned to particular passengers or operations, based on allocations that may vary depending on the airline and the purpose for which the accounts are being maintained. The cooperating airlines would naturally want to verify and monitor the level and allocation of those costs by their counterparts.

of information sharing "is precisely the kind that can present problems under the antitrust laws."[53] Such sharing can lead to less vigorous competition, lower output, and higher prices.

2. Immunity may allow Delta and Northwest to shield coordinated conduct from scrutiny and enforcement.

The applicants acknowledge that "potential anticompetitive domestic agreements between Delta and Northwest . . . would not be immunized by the Order the Joint Applicants have requested."[54] Yet the applicants also assert that "ripple effects in domestic markets that are the by-product of changes in international operations that may come about as a result of the proposed alliance . . . are neither beyond the authority of the Department to immunize nor a basis of legitimate concern."[55] The ambiguity in this distinction highlights the fact that the line between the effects of international and domestic coordination may be difficult to discern. There is a serious risk that in any future well-founded antitrust enforcement action, the carriers would expanding upon their current "ripple effects" view – argue for a broad interpretation of immunization.

A grant of immunity will provide the SkyTeam carriers with an opportunity to argue that a broad range of conduct related in some way to international service is effectively shielded from antitrust challenge. The result could be to seriously impede legitimate antitrust enforcement. As

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[53] Joint Supplemental Response at 13. Although the parties suggest that they cannot imagine any need for them to exchange domestic route-specific information, they could plausibly claim that such exchanges were contemplated by their agreement – international route decisions do affect domestic route profitability and traffic and such effects are not "solely" related to domestic air transportation. Moreover, their assertions that they will not share "competitively sensitive information" leave it to them to determine what information is and is not sensitive.

[54] Joint Reply at 54.

[55] *Id.*

former FTC Chairman Tim Muris, now counsel for Northwest in this proceeding, testified in 2003,

> [U]nnecessary, imprecise, or excessively broad antitrust immunities may harm consumers by providing a pretextual reason for parties inappropriately to discuss and collaborate on matters that are not, or should not be, exempt. Such conduct is difficult to detect and prosecute and can hinder, rather than facilitate, the important economic and security contributions that it was hoped the particular industry would make.[56]

Muris went on to note:

> Any meeting among competitors, regardless of whether an antitrust exemption applies, carries some risk that the discussion may spill over into competitively sensitive matters. An antitrust exemption, however, may be perceived as providing shelter for firms inclined to discuss off-limits topics, particularly when there is some interpretive flexibility about what subject matters are reasonably 'related to' the objectives of the legislation.[57]

In response to these concerns, the applicants repeat that they "will not," do not "intend to," or do not foresee a need to exchange competitively sensitive information or engage in conduct that may lessen competition on domestic routes.[58] These precatory statements are insufficient to demonstrate that the structure and operation of the joint venture will not lessen domestic competition if immunized with the broad sweep sought by applicants.

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[56] Timothy J. Muris, Chairman, Federal Trade Comm'n, Prepared Statement of the Federal Trade Comm'n Before the Committee on the Judiciary, Antitrust Task Force, United States House of Representatives, Concerning An Overview of Federal Trade Comm'n Antitrust Activities, at 5 (July 24, 2003), at http://www.ftc.gov/os/2003/07/antitrustoversighttest.htm.

[57] *Id.* at n. 46.

[58] *See, e.g.*, Joint Reply at 60; Northwest Supplemental Response, Exhibit D, at 5-6. Delta also refers to SkyTeam Codes of Conduct that contain little specificity and no explicit limitations on interactions or information exchanges. Response of Delta Air Lines, Inc. to Order 2005-4-21 (hereinafter "Delta Response") at 11 (May 9, 2005).

Evaluating the possible competitive harm requires considering the agreements' specifics,[59] which have not been agreed to by the applicants and therefore not provided to the DOT or DOJ. The applicants' agreements are inchoate and worded to allow Delta and Northwest the widest possible latitude to combine any and all of their activities that "involve international air transportation," except those "involving air transportation solely within the United States."[60] Without presenting more definitive agreements for review, the applicants cannot assure the Government that they will not exchange competitive information or engage in activities that undercut domestic competition. Given the breadth and inchoate form of their agreements, the pertinent question for the DOT is what conduct the applicants *could* engage in – whether or not they would *need* to – if granted the immunity they request.[61]

III. The evidence in this record of predicted benefits of the requested immunity is insufficient to carry the applicants' burden.

The applicants have the burden of showing immunity is required by the public interest. In assessing whether they have met their burden, the DOT should consider the likely benefits of the proposed coordination and whether those benefits could be obtained without immunity. Here,

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[59] Joint Venture Guidelines at 3.34(e).

[60] While the application is no more vague in this regard than prior alliance applications (*see, e.g.*, Order 96-5-26 (Delta/Swissair) at 6), none of those cases raised the kind of spillover issues presented by this case. In addition, the end-to-end nature of the transactions made the potential benefits and potential harms easier to perceive and evaluate.

[61] To evaluate a joint venture under its "business review" procedure, the Antitrust Division requires far more information about the planned venture and its structure than the applicants have presented here. 28 C.F.R. § 50.6 (2005). The parties could reduce the competition risk associated with the current Joint Application by providing more specific information about their cooperation or more concrete and binding commitments limiting the extent of their cooperation.

the applicants have shown that expanded integration is likely to achieve some benefits. The evidence in the record does not, however, establish how large those benefits likely will be or to what extent immunity is necessary to achieve them.

A. The Joint Application claims no benefits relating to coordinating their transpacific and North American international routes.

The applicants present no evidence that coordination on non-transatlantic routings will enhance efficiency or create any consumer benefits.[62] They do not describe how much they will integrate,[63] what new routes they might serve, or why their proposed combination will not substantially lessen competition on the routes where Delta and Northwest now offer competing non-transatlantic international service. Given this absence of a showing by the applicants, non-transatlantic immunity should be denied.

B. The benefits claimed for transatlantic cooperation do not justify immunity.

Unlike many previous applications, the proposed alliance will not advance open skies and does not integrate principally complementary networks. Instead, the primary claimed benefits are additional routings and more frequencies. These benefits appear here to be modest and of uncertain value.

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[62] In their Joint Application , the Applicants describe the expanded service that they hope to achieve – but only identify transatlantic routings. Joint Application at 30-32 and at Exhibit JA-2.

[63] Delta has stated that it "anticipates that it may cooperate with Northwest in similar ways [that it now cooperates with Air France, Alitalia, and CSA Czech Airlines] with respect to international air transportation between North America and Central American/South American/Caribbean markets." Delta Response at 11.

1. Immunizing SkyTeam will not advance open skies.

The DOT has granted antitrust immunity to over twenty alliance agreements.[64] The principal public interest benefit made possible by granting many of these past immunity applications has been the negotiation of open skies agreements with the home country of the U.S. carriers' alliance partners. Indeed, such a use of immunity grants is the reason DOT asked the Congress to retain that authority for international agreements.[65]

In granting immunity to the Northwest/KLM alliance, for example, foreign policy considerations led DOT to overcome its normal reluctance to grant antitrust immunity: "We have rarely been willing to grant antitrust immunity to carrier agreements because immunity is usually inconsistent with airline deregulation and the promotion of airline competition. In this case, however, the grant of immunity should promote competition by furthering our efforts to obtain less restrictive aviation agreements with other European countries."[66]

Open skies agreements have brought significant competitive benefits to U.S. travelers, reducing regulation and removing barriers to air service between the U.S. and now 60 other countries. In this case, open skies agreements have been signed with the home countries of all

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[64] DOT has published lists of open skies agreements and immunized alliances at http://ostpxweb.dot.gov/aviation/X-40%20Role_Files/bilatosagreement.htm and at http://ostpxweb.dot.gov/aviation/X-50%20Role_files/immunizedalliances.htm.

[65] As DOT told Congress, "[t]he Department believes that its authority to approve and immunize international agreements is an important element in its conduct of U.S. international aviation policy and regulatory oversight . . . This important tool allows us to address special foreign relations issues – for example, those raised in dealing with non-market economies." Report to Congress: Administration of Aviation Antitrust Functions, May 1987, Report at 24.

[66] Order 93-1-11 at 11-12.

the foreign applicants and those foreign carriers will continue to be members of one or the other immunized alliances, whatever the DOT decides here.[67] Therefore, an expansion of immunity offers no open skies benefits for U.S. consumers.[68]

2. The cooperation agreements will lead to new online service in few additional markets.

Prior successful alliance applications promised to extend carriers' networks into many new markets. For example, the DOT determined that the end-to-end combination of Northwest and KLM would result in the two airlines providing online service "in many markets where neither carrier can do so on its own."[69] This source of potential competitive benefit is minimal here. The applicants claim the SkyTeam expansion will provide new online service in 8,700 U.S.-Europe city pairs;[70] but they acknowledge "[i]t is difficult to predict precisely how many passengers will benefit from this additional online service" because "[m]any of the city-pairs

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[67] Although in some previous cases, DOT granted immunity to a new alliance after open skies were achieved, these decisions occurred where the foreign carrier's original alliance with a U.S. carrier had terminated or where the citizen airline of the open skies partner was newly joining an alliance with a single U.S. carrier. As DOT has explained, "the existence of an open-skies relationship in no way guarantees any grant of immunity. To the contrary, it is possible that immunity will not be found to be pro-competitive or pro-consumer in particular cases, notwithstanding an open national market, depending on such factors as relevant market concentration, potential future barriers, overall dominance and size of the applicants, among other things[;] . . . an Open-Skies agreement is a necessary, but not automatically sufficient, basis for the grant of antitrust immunity." Order 2001-12-18 (Delta/Air France/Alitalia/Czech) at 2.

[68] The EU and the U.S. have been negotiating a possible liberalization agreement. There has been no claim here that granting expanded immunity to SkyTeam would lead to success in those negotiations.

[69] Order 92-11-27 at 4.

[70] Joint Application at 30.

involved do not presently generate substantial traffic."[71]

REDACTED

[72]

This contrasts with previous alliances. For example, last year the Northwest/KLM alliance generated bookings from 450,000 passengers in about 10,100 city-pairs that neither carrier was in a position to serve on its own; Air France-Delta booked about 110,000 passengers in about 7,200 such city-pairs; and United-Lufthansa booked about 300,000 passengers in about 9,800 such city-pairs.[73]

The applicants assert that immunizing the expanded SkyTeam will benefit consumers because studies by the DOT and others have concluded that immunized alliances have lowered prices.[74] But these studies, the strengths and weaknesses of which have been hotly debated by

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[71] *Id. See also* Joint Reply at 40 (acknowledging that the number of city pairs in which new service might be instituted represents "a very small percentage of total U.S.-Europe city pairs.").

[72] *See* NW 00102-12.

[73] Figures based on MIDT data for the year ending June 2004. City-pairs discussed are those that generated bookings, where neither carrier operated flights at both endpoints according to the July 2005 Official Airline Guide ("OAG").

[74] Joint Application at 28-30, citing Jan K. Brueckner, *The Benefits of Codesharing and Antitrust Immunity for International Passengers, with an Application to the Star Alliance*, University of Illinois at Urbana-Champaign (June 2000), Jan K. Brueckner & W. Tom Whalen, *Consumer Welfare Gains from United's Alliances with Lufthansa and SAS*, University of Illinois at Urbana-Champaign (Dec. 1998), *International Aviation Developments: Global Deregulation Takes Off* (First Report), U.S. Department of Transportation, Office of the Secretary (Dec. 1999), (continued...)

the participants in this proceeding, examined very different alliances, ones that combined complementary networks that could offer online service in markets the alliance members could not serve alone. Here, where the applicants' networks largely overlap and additional end-to-end service is modest, such past evidence does not support the applicants' arguments that immunizing SkyTeam will significantly benefit consumers.

3. The added connectivity benefits claimed for an expanded SkyTeam are uncertain and likely to be modest.

The applicants assert that their enhanced alliance agreements will make possible more routing options on city-pairs they already serve online, more timing alternatives, and more frequencies.[75] The value of any such benefits – and the necessity of immunity to realize them – are much less certain than for past, successful applications.[76] The applicants' own description suggests this category of claimed benefits may be modest. Although they claim SkyTeam carriers will offer more travel options on 15,280 city pairs and reduced travel time on 4,263 city pairs, the benefit to passengers in most markets is likely to be relatively small. For example, on

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[74](...continued)
at 14- 15; *International Aviation Developments: Transatlantic Deregulation, The Alliance Network Effect* (Second Report), U.S. Department of Transportation, Office of the Secretary (Oct. 2000), at 2-3, 5.

[75] Joint Application at 30-31.

[76] *See, e.g.*, DL 00364 **REDACTED**

DL 02147

only 474 city pairs would the improved travel time be in excess of one hour on a roundtrip itinerary.[77]

4. Any benefits dependent on comprehensive revenue sharing are difficult and costly to achieve.

The applicants assert they cannot achieve all of the claimed benefits unless they reach comprehensive revenue sharing agreements with a common bottom line, which will not occur without immunity. But such benefits are modest, as discussed above, and may not be obtained in any event.[78] Even with expanded immunity, reaching agreement among this large and diverse group of airlines on a common bottom line would be no small challenge. **REDACTED**

[79]

Delta and Air France needed nearly three years from their immunity grant to execute a more modest revenue sharing agreement. **REDACTED**

[80] As the parties recognize, the more carriers that participate

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[77] Joint Reply at 42. The consumer benefit that might result from any potential new online routings depends on the value that consumers place on the new routings relative to other available alternatives. This value is particularly difficult to assess when the new routings are differentiated from existing alternatives only on the basis of such features as travel time and time of departure.

[78] The applicants acknowledge that "it is likely that the carriers will proceed in incremental steps toward comprehensive revenue/profit sharing. Such steps are likely to include limited revenue sharing on particular trunk routes, or bilateral or multilateral arrangements that do not involve all of the Joint Applicants." Joint Supplemental Response at 13.

[79] NW-ST-ITA 01762 **REDACTED**

[80] *See* DL 00690 **REDACTED**

in an alliance, the more difficult it will be to reach consensus.[81] **REDACTED**

[82]

[84]

Moreover, the potentially significant costs of further integrating, even if immunity were to be granted, also need to be taken into account when determining the net effect of granting immunity.

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[81] *See* Joint Supplemental Response at 33 (arguing that immunity is needed to facilitate negotiation, the Joint Applicants state: "[I]mpediments to broad codesharing grow exponentially as the number of carriers to an alliance increases. . . . [T]he need for multiple carriers to reach a consensus greatly complicates the negotiation process. As the number of participants increases, so, too, does the difficulty in reaching a consensus").

[82] NW-ST-ITA 00248–77 **REDACTED**

NW-ST-ITA 00279

NW-ST-ITA 00805

DL 00154

NW-ST-ITA 00326

[83] *See, e.g.*, DL 02185 **REDACTED**

DL 00690

[84] *See* AF-00858 **REDACTED**

Under these circumstances, any benefits attributable to immunity alone are even more uncertain.

C. The Joint Application has not shown that immunity is necessary to achieve the claimed benefits.

In fact, they already have taken steps to integrate across the two alliances and have incentives to continue in this direction.

REDACTED

[86]

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[85] Joint Supplemental Response at 25.

[86] KL-0657

REDACTED

[87] *See* KL-0345

REDACTED

REDACTED

[88]

Moreover, if their proposed integration will achieve substantial benefits without harming competition as the applicants claim, the expanded SkyTeam will have the incentive to continue coordinating even without immunity.

REDACTED

[89]

[90]

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[88] AF-00858 REDACTED

[89] Joint Supplemental Response at 23-24.

[90] *Id.* Absent immunity, it may take the applicants more time to implement more comprehensive codesharing but it is likely that they will move toward further integration if that would be the efficient outcome.

If Applicants' claim of significant benefits is accurate, their prediction that they will forego large additional profits if they are not granted additional immunity is unpersuasive.[91] The principal reason cited by applicants for foregoing these benefits if immunity is not granted is a subjective and general fear of unfounded antitrust lawsuits. The anticipated cost to them of frivolous lawsuits would need to be quite high for it to outweigh the claimed benefits from operating a more integrated alliance. As the CAB recognized long ago, "An agreement that offers participants a significant potential for scale efficiencies they could not otherwise obtain, provides its own inducement to participants . . . . Since deregulation, we have consistently rejected the argument that carriers are incapable of acting in their own economic interest."[92] Moreover, as the courts have recognized, a grant of antitrust immunity does not turn on "the subjective desire of the parties to avoid antitrust litigation," and "[i]t is not realistic to expect a flood of antitrust lawsuits attacking a substantially procompetitive agreement."[93]

In this regard, the evidence suggests that applicants will continue to integrate further with or without the requested immunity. Air France and KLM are moving forward to implement their merger, the current alliance relationships are continuing, and the expanded SkyTeam carriers have integrated further.[94] Air France-KLM has drawn its current alliance relationships closer.

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[91] The applicants' further suggestion that a denial of expanded immunity will cause one or more of them to walk away from their alliance relationships also appears implausible.

[92] Competitive Marketing of Air Transportation, Order 82-12-85, 99 C.A.B. 1, 9 (1982).

[93] *Republic Airlines, Inc. v. C.A.B.*, 756 F.2d 1304, 1317 (8th Cir. 1985).

[94] A recent article reported that Air France-KLM "stressed that mutual benefits from the merger were ahead of target," noted that the airline posted a 20.2% increase in group net

(continued...)

Delta and Air France concluded their first revenue sharing agreement in September 2004 and have begun to implement it.[95] Northwest/KLM continue to use their governance procedures to address operational and commercial issues in their alliance.[96]

Most importantly, the expanded SkyTeam has taken steps to integrate transatlantic service.

REDACTED

[97]

[98] SkyTeam has expanded joint fare products such as "Round the World" and

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[94](...continued)
profit this year, and quoted its chairman as saying that the merger has been "a complete success." *Air France-KLM Tout "Complete Success" in First Fiscal Year*, Aviation Daily, May 23, 2005 at 4. Another article reports that, since the carriers joined forces, Air France-KLM's net income has jumped 42% to $443 million. Michael Friedman & Deborah Orr, *The Long Haul*, Forbes, March 28, 2005 available at http://www.forbes.com/business/global/2005/0228/022.html.

[95] Joint Supplemental Response at 17 n.4.

[96] *Id.* at 44.

[97] NW-ST-ITA 07139-40 **REDACTED**

; NW-ST-ITA 07202-04

NW-ST-ITA 01108-38

NW-ST-ITA 07110-13

[98] NW-ST-ITA 10253 **REDACTED**

"Europe Pass" to include the new partners.[99]

REDACTED

[100]

[101] New SkyTeam members have participated in regular Governing Board meetings.[102]

REDACTED

[103] They

[99] *See* SkyTeam Press Release: *Skyteam Round the World and Europe Pass Fares Now Offer Travelers More Choices* (April 13, 2005); at http://www.skyteam.com/EN/aboutSkyteam/pressCenter/pr041305.jsp (also noting that new partners will soon join SkyTeam's America Pass product offering).

[100] *See, e.g.*, NW-ST-ITA-04997-5014 NW-ST-ITA-04920-45 **REDACTED** NW-ST-ITA-05021-35

[101] DL 02722-26 NW-ST-ITA 04916-19 **REDACTED**

[102] *See, e.g.*, SkyTeam Press Release: *SkyTeam NewsFlash* (Nov. 2004); available at http://www.skyteam.com/EN/aboutSkyteam/pressCenter/pr111004.jsp, (describing nine-way Governing Board Meeting); NW-ST-ITA 010374-76 **REDACTED**

[103] *See* NW-ST-ITA 01359 NW-ST-ITA 010374-77 **REDACTED**

REDACTED [104] have coordinated the co-location of their airport facilities.[105] They have developed new membership requirements,[106] launched an Associate Member program and admitted four new Associate carriers.[107] Nearly all the SkyTeam members have developed reciprocal interline e-ticketing arrangements with each other[108] and in June of 2005, Air France and KLM launched "Flying Blue," a combined Air France-KLM frequent flyer program.[109] Finally, SkyTeam carriers have begun service on new nonstop routes in expectation of the additional traffic that their cooperation and codesharing will generate.[110]

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[104] NW-ST-ITA 07132 **REDACTED**

[105] *See* SkyTeam Press Release: *SkyTeam NewsFlash* (April 2004); available at http://www.skyteam.com/EN/aboutSkyteam/pressCenter/pr042205.jsp (announcing SkyTeam's "newest co-location," as Delta joined Northwest, KLM and Continental in Detroit's Edward McNamara Terminal); KL-3081
REDACTED

[106] *See* SkyTeam Press Release: *SkyTeam NewsFlash* (Nov. 2004); at http://www.skyteam.com/EN/aboutSkyteam/pressCenter/pr111004.jsp, (describing a nine-carrier Governing Board meeting where new joining requirements were developed).

[107] *See* SkyTeam Press Release: *Four Carriers to Join Skyteam Associate Program* (June 9, 2005); available at http://www.skyteam.com/EN/aboutSkyteam/pressCenter/pr060905.jsp (announcing the admission of Air Europa, Copa Airlines, Tarom, and Kenya Airways).

[108] *See* SkyTeam Press Release: *SkyTeam NewsFlash* (Dec. 2004), available at http://www.skyteam.com/EN/aboutSkyteam/pressCenter/pr121704.jsp, (announcing e-ticketing arrangements between virtually all SkyTeam members, including carriers that have no antitrust immunity such as Continental).

[109] *See* Air France-KLM Press Release: *"FLYING BLUE": The new joint frequent flyer program for the 66,3 million customers of the Air France - KLM Group*, available at http://www.klm.com/nl_en/news_items/news_one/newspageten.jsp.

[110] KLM initiated nonstop service on the Amsterdam-Atlanta route "in the expectation that cooperation with Delta would generate sufficient traffic to make the flight

(continued...)

The integration the applicants already have undertaken suggests that they do not need immunity to achieve many of the benefits that they claim from expansion of the alliance, let alone to continue operations under the current arrangements.[111]

IV. If DOT decides to grant some form of immunity on transatlantic routes, it should impose conditions to protect U.S. domestic competition.

The competition concern with the proposed immunity on transatlantic routes arises from a potential harm to competition in related domestic markets. If the DOT were to decide that the benefits attributable to a grant of immunity on these routes were sufficient to justify some form of immunity, the Secretary should impose conditions to mitigate to the extent possible the threatened harm to domestic competition, as called for by the statute.[112] The DOT could consider, for example, making express that any immunity does not apply to exchanges of information relating to transportation between points in the United States regardless of whether such transportation is part of an international route, and making it express that the antitrust laws remain fully applicable to the extent that the Joint Applicants' conduct is alleged to have an effect on any domestic market. These comments do not attempt to set forth all of the appropriate

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[110](...continued)
profitable." Joint Supplemental Response at 27. Air France started nonstop service between Paris and Detroit on June 13, 2005, according to the July 2005 OAG.

[111] One of the justifications frequently cited for DOT's authority to grant antitrust immunity in the international context is that the restriction on foreign ownership prevents transborder airline mergers that could achieve efficiencies without antitrust exposure under a joint venture analysis. Such foreign ownership restrictions, of course, do not apply to a potential merger between the two domestic carrier applicants, Northwest and Delta.

[112] *See* 49 U.S.C. § 41308(b). As discussed above, another important limitation on any grant of immunity would be the exclusion of non-transatlantic international routes.

limitations.[113] Rather, DOJ will address the issue in more detail if the DOT decides that a grant of immunity might be appropriate. Such limiting conditions would not condemn the combination or denote unacceptable conduct, but would make clear the continuing applicability of the antitrust laws, requiring any plaintiff to prove its claim and allowing defendants to defend their actions.

Conclusion

Approval of the Joint Application would represent an extension of the DOT's prior practice in granting antitrust immunity. Applicants seek to create the first immunized international alliance to include two major U.S. airlines. It would be primarily an overlapping combination, in contrast to the largely end-to-end collaborations for which the original SkyTeam and Northwest/KLM alliances obtained immunity. The benefits attributable to immunity likely would be modest. And the application leaves the most important details of the coordination

[113] While appropriate limitations likely could substantially reduce the potential harm to domestic competition, the DOJ believes that the Joint Application nevertheless provides insufficient justification for the requested immunity.

undefined, making it difficult to conclude on these facts that the purported benefits of immunity justify weakening the protections afforded the public by the nation's antitrust laws. Accordingly, the DOJ believes that the current record does not adequately support the requested antitrust immunity for the expanded SkyTeam alliance.

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Dated: August 19, 2005

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been served by email this 19th day of August, 2005 upon each of the following addresses:

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August 19, 2005