



**UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.**

Issued by the Department of Transportation  
on the 13<sup>th</sup> Day of February, 2010

**Joint Application of:**

**AMERICAN AIRLINES, INC.  
BRITISH AIRWAYS PLC  
FINNAIR OYJ  
IBERIA LÍNEAS AÉREAS DE ESPAÑA, S.A.  
ROYAL JORDANIAN AIRLINES**

**Docket DOT-OST-2008-0252**

**Under 49 U.S.C. §§ 41308-41309 for approval of  
and antitrust immunity for alliance agreements**

**Joint Application of:**

**AMERICAN AIRLINES, INC.  
and  
BRITISH AIRWAYS, PLC**

**Docket DOT-OST-2002-13861**

**Under 14 C.F.R. Part 212 and 49 U.S.C. § 40109  
for amended statements of authorization**

**SHOW CAUSE ORDER**

**I. SUMMARY**

Pursuant to 49 U.S.C. §§ 41308 and 41309, the Department of Transportation is proposing to grant antitrust immunity to American Airlines, British Airways, Iberia, Finnair, and Royal Jordanian – together referred to as the “Joint Applicants” or “applicants” – to form a global alliance subject to conditions. As members of “oneworld,” the applicants already have basic marketing agreements in place to sell each other’s products and services. If approved in a final order, the applicants would utilize the antitrust immunity to more closely coordinate international operations and launch an integrated joint venture in transatlantic markets. While all five

applicants would engage in close coordination, only American Airlines, British Airways, and Iberia would participate in the joint venture initially.

The application raises a question of whether the potential benefits of the applicants' cooperation in a number of airline markets, including some large markets between the United States and the United Kingdom, outweigh the potential competitive harm that could result from the reduction of competition on select overlap routes, including some routes in which there is limited available capacity due to infrastructure constraints. Provided the applicants abide by certain conditions, we have tentatively concluded that the potential benefits outweigh the potential harm.

Above all, if approved, the proposed alliance would enhance competition around the globe by creating a viable third immunized alliance that is comparable and more competitive with the product and service offerings of Star Alliance and SkyTeam, which have already received grants of antitrust immunity and are proceeding with their own alliance plans and integrated joint ventures. With its own immunized alliance and joint venture, oneworld could provide the traveling and shipping public with a wide range of valuable benefits, including:

- Lower fares on more itineraries between city-pairs,
- Accelerated introduction of new routes,
- Additional flights on existing routes,
- Improved schedules,
- Reduced travel and connection times, and
- Product and service enhancements that can provide full reciprocal access to their networks.

The proposed alliance, if approved, would also allow the alliance partners to improve efficiency, reduce costs, and strengthen their networks to better meet the demands of global customers. In the circumstances of this case, these benefits for the airlines would be passed on to consumers and airline employees. The anticipated expansion of each partner's network would increase the supply of air service, particularly in transatlantic markets, which would exert downward pressure on fares so that consumers would continue to have affordable air travel options.

We tentatively find that one immediate and tangible consumer benefit will be transatlantic code-sharing and fully reciprocal frequent-flyer programs for oneworld customers. Transatlantic code-sharing and full frequent-flyer cooperation allow customers of one airline to earn and redeem miles on the flights of another airline. Due to unique commercial issues affecting oneworld airlines, the oneworld alliance has been unable to provide consumers with these benefits absent an integrated joint venture that operates with a grant of immunity.

While the proposed alliance could, if approved, offer a wide range of benefits by creating a viable third immunized alliance, it could also potentially cause competitive harm in select markets. The potential harm is largely limited to flights between the U.S. and London's Heathrow International Airport ("Heathrow"), which serves as a primary hub for oneworld. Due to limited runway capacity at Heathrow, takeoff and landing rights – otherwise known as "slots" – are scarce. As a result, new competitive entry is difficult. Since the proposed alliance would allow

oneworld to control almost half of Heathrow's available slots, making new entry even more difficult, we tentatively find that it is necessary to take precautions to ensure adequate competition in the U.S.-Heathrow market.

Thus, to protect consumers against potential harm, but to still enable the benefits of the alliance, we propose that the applicants make four slot pairs available to competitors for new U.S.-Heathrow services. This slot remedy would offset the potential loss in competition that results from combining the international operations of American and British Airways, which currently compete in U.S.-Heathrow markets, and it would give competitors the opportunity to introduce new services and improve their access to Heathrow. We are also proposing other conditions that serve the public interest and enhance the competitive benefits of the transaction. For example, we are proposing that the applicants change certain terms of their joint venture agreement. The changes would remove competitive constraints and ensure that the applicants deliver the promised public benefits. Additionally, we are proposing standard conditions, such as the obligation to submit traffic data and the requirement that the applicants implement the proposed alliance within 18 months for the antitrust immunity to remain effective.

In the tentative decision below, we analyze the competitive issues in detail and take action on two specific requests made by the applicants: (1) a request for blanket code-sharing authority and (2) a request for approval of, and a grant of antitrust immunity for, a series of commercial alliance agreements. To support our proposed decision to grant both requests, we make a number of tentative findings and conclusions. We direct parties to "show cause" why we should not adopt those findings and conclusions in a final order. Parties have 45 days in which to file answers and 15 days in which to submit replies.

## **II. BACKGROUND**

### **A. History**

The Joint Applicants are requesting authority from the Department, including a grant of immunity from the antitrust laws, to operate an enhanced commercial airline alliance.<sup>1</sup> Under our established policy, the existence of an "open-skies" framework is a necessary predicate to our consideration of requests for antitrust immunity.<sup>2</sup> Open-skies international aviation agreements encourage more competitive airline service because market forces, not restrictive agreements, discipline the price, frequency, capacity levels, and quality of airline service. We are willing to consider the instant request because the United States has an "open-skies" relationship with all of the homelands of the foreign-carrier applicants in this proceeding – namely, the United Kingdom, Spain, Finland, and Jordan.<sup>3</sup> We note, in particular, the existence of the "open-skies-plus"

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<sup>1</sup> Joint Application (Aug. 14, 2008).

<sup>2</sup> *See, e.g.*, Star, Docket DOT-OST-2008-0234, Order 2009-4-5 at 2 (April 7, 2009).

<sup>3</sup> U. S.-EU Air Transport Agreement, signed April 30, 2007 (establishing an open-skies framework between the United States and the United Kingdom, Spain, and Finland, among other markets); Air Transport Agreement between the Government of the United States of America and the Government of the Hashemite Kingdom of Jordan, signed Nov. 10, 1996 (establishing an open-skies framework between the United States and Jordan).

agreement governing air services between the United States and Europe, which has been provisionally applied since March 2008 (“the U.S.-EU Agreement”).

This is the third case involving American and British Airways. The two founding members of the oneworld alliance have twice before sought a grant of antitrust immunity. The first case, beginning in 1997, ended when the Department terminated the proceeding after it became apparent that the United States and the United Kingdom were not reaching an open-skies agreement.<sup>4</sup> The second case, beginning in 2001, ended when the applicants withdrew their request because they would not accept the principal remedies proposed by the Department – the transfer of sufficient takeoff/landing rights (“slots”) at London’s Heathrow International Airport (“Heathrow”), proposed to facilitate substantial new entry into the U.S.-London market.<sup>5</sup> In that case, the Department assumed that the United States and the United Kingdom would reach an open-skies agreement that would have allowed all of the proposed new services to be introduced. When the applicants voluntarily withdrew their request, however, new entry in the U.S.-Heathrow market did not occur, and several years passed before liberalization was achieved in the context of the broader U.S.-EU Agreement.

To forge a deeper partnership and compete with SkyTeam and Star Alliance, the oneworld applicants have searched for ways to mitigate risks and balance the benefits of cooperation. This case reflects their decision to form a “metal-neutral” joint venture,<sup>6</sup> premised upon revenue sharing, to accomplish that goal. By sharing overall revenues and agreeing to sell each other’s products and services without regard to which airline is operating the aircraft and collecting the revenue, the applicants argue that the alliance as a whole can focus on developing the Joint Business and providing the customer with the best available products and services, while ensuring that no member of the alliance is put at a disadvantage.

## **B. Summary of the Record**

On August 14, 2008, the oneworld carriers filed two related applications: one for code-share authority in Docket DOT-OST-2002-13861 and another for antitrust immunity in Docket DOT-OST-2008-0252. In addition, the applicants filed a wide range of supporting materials, including documents, traffic data, pleadings, and copies of the written agreements between the airlines governing the proposed alliance (the agreements are referred to as the “Alliance Agreements”).<sup>7</sup>

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<sup>4</sup> See American/ British Airways I, Docket DOT-OST-97-2058, Order 99-7-2 (July 30, 1999).

<sup>5</sup> See American/ British Airways II, Docket DOT-OST-2001-10387, Order 2002-1-12 (Jan. 25, 2002) (granting tentative approval to the alliance subject to the condition that the alliance surrender 16 daily slot pairs – or 224 weekly slots – among other conditions), Joint Motion to Dismiss (Feb. 13, 2002) (moving for dismissal because the prospect of reaching open skies and agreeing upon remedies was remote), Order 2002-4-4 (April 4, 2002) (dismissing the application of American and British Airways, among other things).

<sup>6</sup> Metal neutrality is an industry term meaning that the partners in an alliance are indifferent as to which operates the “metal” (aircraft) when they jointly market services. Without a metal-neutral sales environment, the partners have a strong economic incentive to book passengers on their own aircraft in order to retain a larger share of the revenue for themselves, which may not be in the best interest of the consumer or the alliance as a whole. Metal neutrality may be achieved through revenue and/or comprehensive benefit sharing arrangements.

<sup>7</sup> See Joint Application at 2-3 (Aug. 14, 2008) (enumerating the Alliance Agreements for which the applicants have sought immunity); Joint Application at 5, 10-15, 22 (describing the terms of the Alliance Agreements); Joint

Subsequently, we granted a request to consolidate the related dockets and issued a request for additional information to ensure a complete record.<sup>8</sup> Once the additional information was supplied, we provided an initial comment period ending in May 2009 for interested parties to submit their views on the application.<sup>9</sup> We also provided a supplemental comment period, ending on January 11, 2010, to allow interested parties the opportunity to address issues raised in late filings.<sup>10</sup>

## **1. Joint Applicants' Filings**

The Alliance Agreements submitted by the applicants would create an integrated alliance in the areas of planning, marketing, and operations. All five airlines plan to engage in broad code sharing, coordinate customer service and ground operations, link their frequent-flyer plans, coordinate sales and corporate contracts, and jointly price and manage capacity on certain routes. Three of the airlines – American, British Airways, and Iberia – will enter into a comprehensive joint venture agreement, known as the “Joint Business Agreement (“JBA” or “joint venture”).<sup>11</sup>

Under the JBA, the participating carriers will jointly plan and manage all of their capacity and services over the North Atlantic, closely coordinating core business operations and sharing revenues. The arrangement is designed to achieve metal neutrality so that “each carrier acts for the benefit of – and is compensated for its contribution to – the alliance as a whole.”<sup>12</sup> The addition of Iberia to the alliance will, the applicants emphasize, help create a viable third alliance that can improve connections not just over Heathrow, but also over Iberia’s much less congested hub in Madrid.<sup>13</sup>

The applicants make a number of arguments in support of approval of the proposed alliance: (1) the proposed alliance meets the Department’s standards for a grant of antitrust immunity because it is an integrated alliance with a metal-neutral joint venture at its core; (2) the proposed alliance enables numerous efficiencies and valuable consumer benefits by reducing double marginalization;<sup>14</sup> (3) the proposed alliance enhances inter-alliance competition and delivers

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Application at Exhibit JA-1 (the Alliance Agreements); Joint Application at JA-4 (describing the relationship of the Alliance Agreements).

<sup>8</sup> Order 2008-11-7 (Nov. 12, 2008); Order 2008-12-11 (Dec. 19, 2008).

<sup>9</sup> Joint Applicants’ Consolidated Response to Order 2008-12-11 (March 13, 2009); Order 2009-4-15 (April 27, 2009); Order 2009-5-1 (May 1, 2009).

<sup>10</sup> Order 2009-12-16 (Dec. 22, 2009).

<sup>11</sup> See Joint Application at 2-3, 14-15 (Aug. 14, 2008).

<sup>12</sup> Joint Application at 2-3, 11, 14-15 (Aug. 14, 2008).

<sup>13</sup> Joint Application at 22-23, 29 (Aug. 14, 2008).

<sup>14</sup> Double marginalization, also called multiple mark-ups, occurs when two airlines have basic interline or code share arrangements to handle multiple segments but are unwilling to cooperatively price the combined itinerary for the consumer. Thus, for example, Airline A is not willing to accept a cooperative price for the segment it operates because it risks losing revenue to Airline B, which might operate the longer, more profitable segment in the itinerary. The consumer is ultimately not offered the most competitive fare or optimal routing. However, in a “metal-neutral” sales environment, with revenue- or benefit-sharing, the airlines can balance risks and benefits for the benefit of the consumer and alliance as a whole. The airlines are willing to cooperatively price itineraries and make seats available

genuine new benefits for consumers such as more expansive code sharing, frequent-flyer reciprocity, more competitive fares, and new routes; and (4) the proposed alliance operates in a pro-competitive environment because, due to the open regulatory framework provided by the U.S.-EU Agreement, competition will discipline any alliance that might otherwise seek to exercise market power. In addition, the applicants argue that the proposed alliance will not substantially reduce competition in any market, even though there are several markets in which the applicants' services overlap for nonstop services. In particular, they assert that other airlines and alliances now have full access to Heathrow. The Joint Applicants also state that they will not go forward with the alliance without antitrust immunity.<sup>15</sup>

Additionally, American (and its affiliates American Eagle Airlines, Inc. and Executive Airlines, Inc. d/b/a American Eagle) and British Airways (and its affiliate BA European Ltd t/a OpenSkies Airlines)<sup>16</sup> are seeking to amend their existing authority to engage in reciprocal code sharing. They argue that this request is consistent with the U.S.-EU Agreement and the public interest. American and British Airways expect the expanded code sharing to provide a more efficient use of capacity in the marketplace and to help maximize the range of service options available to the traveling and shipping public.<sup>17</sup>

## 2. BAA/ACL Filings

The Department sent requests for information to BAA Airports Limited ("BAA"), which owns and operates Heathrow, and Airport Coordination Limited ("ACL"), which coordinates operations and allocates slots there. The questions and the answers provided by BAA and ACL were submitted for the public record.<sup>18</sup>

BAA and ACL state that slots are scarce at Heathrow. Slots are allocated in accordance with EU slot regulations and IATA World Scheduling Guidelines, which allow incumbents to maintain their historical operations with grandfathering rights, subject to use-or-lose-it rules. The remaining slots, called "pool slots," are composed of new capacity, slots released or forfeited to the slot coordinator, or other unallocated capacity. New entrants are entitled to priority in the allocation of 50% of the pool slots. BAA/ACL explain that there are very few pool slots, and that no pool slots have been available for allocation to new transatlantic services.

BAA/ACL also explain that there is a secondary market for Heathrow slots. While the market suffers from lack of liquidity, some slots have changed hands since 2008. According to BAA/ACL, slots for competitor services may be found from incumbent carriers, from alliance partners, or from the secondary slot market generally. BAA/ACL state that they do not have data

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because they share the same economic incentive to make the sale and share the revenues. *See generally* Whalen, W.T. A Panel Data Analysis of Code Sharing, Antitrust Immunity, and Open Skies Treaties in International Aviation Markets, *Review of Industrial Organization*, 30: 39-61 (2007).

<sup>15</sup> *See* Joint Application (Aug. 14, 2008); Joint Applicants' Consolidated Reply (May 28, 2009).

<sup>16</sup> *See* OpenSkies Airlines Code Share Matter, Docket DOT-OST-2008-0064, Order 2008-5-19 (May 15, 2008) (authorizing OpenSkies Airlines to display British Airways' code on flights operated by OpenSkies Airlines to and from the United States).

<sup>17</sup> Joint Application to Authorize Blanket Open-Skies Code Sharing at 3 (Aug. 14, 2008).

<sup>18</sup> ACL/BAA Response (Jan. 28, 2009) (located at docket entries -3068 and -3069).

on compensation paid for slots, but it is probable that prices have fallen from the high levels paid during 2008. BAA/ACL notes that slot allocation is based upon runway, terminal, and aircraft parking constraints. Although Heathrow has terminal and aircraft parking capacity shortfalls, the shortfalls have not prevented the completion of a secondary slot trade.

### **3. Responsive Pleadings**

Numerous parties submitted comments on the proposed alliance. Some comments were filed initially in response to the application and others were filed as supplemental comments. No party has filed objections to the application of American and British Airways for expanded code-share authority.<sup>19</sup>

#### **a. Initial Comments**

Parties representing airports and coalitions of airports and cities support the alliance. Those parties include the Dallas-Fort Worth International Airport<sup>20</sup> and the City of St. Louis.<sup>21</sup> The parties believe that the proposed alliance is essential for oneworld to remain competitive, and that a stronger alliance will mean more services, and a stronger economy, in their cities.

Virgin Atlantic opposes the proposed alliance.<sup>22</sup> Virgin's major arguments are (1) circumstances have not changed significantly since the last American/ British Airways case, in which DOT identified significant competitive issues; (2) the proposed alliance is a grave threat to competition in several transatlantic markets in which the applicants' services overlap; (3) competitors to the alliance cannot respond due to severe infrastructure constraints at Heathrow airport, which is the preferred airport for travel to London; (4) the alliance members dominate corporate contracts; (5) the proposed alliance will not produce any consumer benefits; and (6) the competitive harm cannot be remedied.

The Allied Pilots Association ("APA"), which represents American's pilots, opposes the joint venture.<sup>23</sup> The APA believes that the provisions of the joint venture concerning revenue sharing and capacity management will reduce opportunities for American's pilots and result in lost jobs.

Two trade associations representing travel agents do not take a position on the proposed alliance, but they express reservations about a grant of immunity.<sup>24</sup> Specifically, the Interactive Travel Services Association and the American Society of Travel Agents ("ITSA/ASTA") are concerned that the proposed alliance could harm travel agents and reduce price transparency for

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<sup>19</sup> We note that Spirit raised concerns regarding the grant of antitrust immunity to code-share flights involving restricted entry markets in South America. *See* Answer of Spirit (May 18, 2009). We have addressed Spirit's concerns below in Section IV(C)(2) of this order.

<sup>20</sup> Answer of DFW (May 18, 2009).

<sup>21</sup> Answer of the City of St. Louis (May 18, 2009).

<sup>22</sup> Answer of Virgin Atlantic (May 18, 2009).

<sup>23</sup> Answer of APA (May 18, 2009).

<sup>24</sup> Answer of ITSA/ASTA (May 18, 2009).

consumers. Thus, ITSA/ASTA ask DOT to prevent the applicants from using a grant of immunity to negotiate jointly with travel agents.

Spirit Airlines does not take a position on the proposed alliance, but it does express concern about certain code-share operations to restricted markets in South America.<sup>25</sup> Spirit believes that American should not be permitted to code share with British Airways, and thereby leverage a dominant position, on restricted routes to Bolivia, Colombia, and Venezuela.

In response to the above parties, the Joint Applicants reiterate their position that approving the proposed alliance will place the three major global alliances on an equal footing and ensure adequate competition.<sup>26</sup> Disapproval of the proposed alliance, the Joint Applicants argue, would place oneworld's future in jeopardy as the gap between oneworld and the other two global alliances would continue to widen. The applicants assert that Virgin Atlantic hopes to impede oneworld for its own competitive advantage. The applicants point to perceived flaws in Virgin Atlantic's arguments, including a failure to acknowledge changes in the competitive landscape since the 1990s and manipulation of market data to distort actual competitive effects. The applicants argue that APA's assertions about potential job losses are based on erroneous arguments; the proposed alliance will actually carry more behind/beyond traffic, according to the applicants, which will require more flights and thus more jobs. With regard to ITSA/ASTA's answer, the applicants contend that the Department has already dismissed the same specific concerns of travel agents in prior cases. The applicants argue that ITSA/ASTA's antitrust arguments are unsupported and that its proposed carve-out remedy would disrupt the efficiencies of the joint venture.

#### **b. Supplemental Comments**

The Justice Department ("DOJ") filed supplemental comments.<sup>27</sup> DOJ argues that the proposed alliance will result in competitive harm on six transatlantic routes – Boston-London, Chicago-London, Dallas/Ft. Worth-London, Miami-London, Miami-Madrid, and New York-London. Based upon an empirical model, DOJ suggests that fares on the six transatlantic routes could materially increase. According to DOJ, nonstop competition demonstrably affects nonstop pricing, regardless of the presence of connecting competition.

Additionally, DOJ discounts the benefits that would flow from the alliance and concludes that the applicants have not shown that immunity is necessary to achieve whatever benefits there might be. Consequently, DOJ recommends that, "given the risk of significant competitive harm, any grant of immunity should be limited to protect competition. Three types of remedies could potentially provide that protection: (1) unencumbered slot divestitures, (2) earmarked slot divestitures, and (3) carve-outs from immunity."<sup>28</sup>

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<sup>25</sup> Answer of Spirit (May 18, 2009).

<sup>26</sup> Joint Applicants' Consolidated Reply (May 28, 2009).

<sup>27</sup> DOJ Comments (Dec. 21, 2009).

<sup>28</sup> DOJ Comments at 30 (Dec. 21, 2009).

Virgin Atlantic agrees with DOJ that a grant of antitrust immunity could result in competitive harm, and that entry constraints at Heathrow would prohibit effective competitive discipline against oneworld's alleged market power. However, while DOJ suggests that slot and carve-out remedies are necessary to approve the joint venture, Virgin argues that the competitive harm in this case cannot be remedied, and that DOT must simply deny the application. If DOT does choose to grant antitrust immunity, Virgin states that the Department must consider remedies above and beyond those suggested by DOJ.<sup>29</sup>

Also acknowledging DOJ's allegations of potential competitive harm, ITSA/ASTA filed supplemental comments. While they did not comment on DOJ's recommendations for carve-outs and slot remedies, the two travel groups cited DOJ's arguments to support their request that DOT prevent the applicants from jointly negotiating with independent travel agents. Furthermore, ITSA/ASTA claim that granting immunity would increase the applicants' market power, resulting in increased transatlantic fares, and that immunity would not produce any benefits from reduced double marginalization.<sup>30</sup>

Mr. Hubert Horan filed supplemental comments.<sup>31</sup> Mr. Horan states that the Department cannot accept a study submitted by the applicants concluding that the proposed alliance will result in \$92 million in annual public benefits from cooperative pricing on connecting routes. Mr. Horan states that the entire basis of the applicants' claim consists of one article plus statistical updates. Any evidence of price or capacity benefits are not due to cooperative pricing on connecting routes but rather improved supply/demand conditions and other changes in the marketplace. Mr. Horan concludes that the applicants have failed to provide sufficient evidence that the proposed alliance will lower prices.

The Joint Applicants filed their own supplemental comments on September 8<sup>th</sup> and responded to other supplemental comments as well.<sup>32</sup> In the September 8<sup>th</sup> pleading, the applicants address comments filed by DOJ in the recent Star Alliance case, arguing that DOJ's empirical model, the same being used here, to predict price effects is fundamentally flawed because it fails to account for the increased capacity that alliances provide. Additionally, the applicants dismiss the need for carve-outs on particular routes, on the grounds that carve-outs would destroy the efficiencies of their integrated joint venture.

In their subsequent pleadings, the applicants respond to DOJ's filing in this case, as well as to other parties who filed. Overall, the applicants assert that DOJ has not met its burden of proof in showing that a grant of antitrust immunity would lead to consumer harm. Specifically, the applicants state that DOJ's empirical model remains flawed, that DOJ does not consider the

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<sup>29</sup> Supplemental Comments of Virgin Atlantic (Jan. 11, 2010). Virgin Atlantic also filed a late reply on January 20<sup>th</sup>, reiterating its assertions that there are barriers to entry at Heathrow and urging DOT not to consider achieving "regulatory parity" among all three alliances operating transatlantic services. We will accept the pleading.

<sup>30</sup> Supplemental Comments of ITSA/ASTA (Jan. 11, 2010).

<sup>31</sup> Supplemental Comments of Hubert Horan (Jan. 10, 2010). Mr. Horan's comments, originally filed on January 10, were not properly served on parties to the case. Mr. Horan re-submitted his comments on January 31, along with a motion for leave to file, and served parties. We will grant the motion and accept the pleading.

<sup>32</sup> Joint Applicants' Supplemental Comments (Sept. 8, 2009); Joint Applicants' Reply to Answer of Virgin Atlantic (Sept. 28, 2009); Joint Applicants' Answer to DOJ Comments (Jan. 11, 2010).

competitive discipline that connecting service would provide in the markets of concern, and that entry into Heathrow is possible through the secondary market for slots. Furthermore, the applicants restate the benefits of the alliance, as well as the benefits of inter-alliance competition with an immunized oneworld alliance, and claim that DOJ has failed to refute these benefits. Attached to the comments are expert exhibits by Compass/Lexicon and the Brattle Group that outline the alleged methodological flaws in DOJ's empirical model and argumentation.

### III. DECISIONAL STANDARDS

There are two requests pending in this consolidated docket: a request for amended authority to allow blanket code sharing and a request for a grant of antitrust immunity covering a series of alliance agreements.

We evaluate the code-share request under 14 C.F.R. Part 212. Where airlines have underlying economic authority from the Department, we will issue a statement of authorization to allow code sharing if we find that it is in the public interest. In determining the public interest, we consider, among other things, the extent to which the authority sought is covered by and consistent with bilateral agreements to which the United States is a party, the extent to which a foreign applicant's home country deals with U.S. air carriers on the basis of substantial reciprocity, and whether the applicants have previously violated our code-share rules.<sup>33</sup>

We evaluate the antitrust immunity request under 49 U.S.C §§ 41308-41309. We engage in a two-step analysis of foreign air transportation agreements submitted for our approval. We must first determine under § 41309 whether the agreements are adverse to the public interest because they would substantially reduce or eliminate competition (the "competitive analysis"). If so, we must determine whether they are nonetheless necessary to meet a serious transportation need or to achieve important public benefits. If we make that finding, we will approve the agreements, provided that these public benefits cannot be met or achieved by reasonably available and materially less anticompetitive alternatives; U.S. foreign policy goals are a key element of these benefits.<sup>34</sup> A party opposing approval has the burden of showing that the agreement or request would substantially reduce or eliminate competition and that less anticompetitive alternatives are available. On the other hand, the party seeking approval of the agreement or request must submit evidence establishing the transportation need or public benefits.

If we approve the agreements under the analysis outlined above, we next decide whether to grant immunity under 49 U.S.C. § 41308. Under § 41308(b), Congress has given the Department the authority to exempt airlines from the antitrust laws to the extent necessary to allow a proposed transaction to proceed, provided that the exemption is *required by* the public interest. While the public interest determination under both sections 41309(b) and 41308(b) entails a comparison of anti-competitive effects and public benefits, the standard in section 41308(b) ("required by" rather

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<sup>33</sup> 14 C.F.R. § 212.11.

<sup>34</sup> We discuss the public benefits findings below.

than “not adverse to”) is higher.<sup>35</sup> We grant immunity if the public interest requires it and the parties to such an agreement would not otherwise go forward with the transaction.<sup>36</sup>

If we determine that the transaction *would* substantially reduce or eliminate competition, yet meets the test for approval under section 41309(b)(1), then we *must* exempt the parties to the transaction, pursuant to 49 U.S.C. § 41308(c).

The intended commercial effects of the Alliance Agreements are similar to those resulting from a merger of airline operations. Thus, we apply the Clayton Act test, which is used to predict the competitive effects of a proposed merger.<sup>37</sup> The Clayton Act test requires us to consider whether the Alliance Agreements are likely to substantially reduce competition and facilitate the exercise of market power – that is, to allow the Joint Applicants to profitably charge supra-competitive prices or reduce service or quality below competitive levels in any relevant market. To determine whether an alliance is likely to create or enhance market power, we primarily consider whether the alliance would significantly increase market concentration, whether the alliance causes potential competitive harm, and whether new entry into the market would be timely, likely, and sufficient either to deter or counteract the potential competitive harm.

Where new entry would not otherwise be sufficient to address competitive harm, or where there are external factors such as infrastructure constraints in the marketplace that exacerbate the competitive harm remedies may be necessary and appropriate to address competitive problems caused by the alliance, provided they still allow the benefits of the alliance to be realized.

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<sup>35</sup> See *United/ Lufthansa*, Docket DOT-OST-96-1116, Order 96-5-12 at 2 (May 9, 1996); *Star*, Docket DOT-OST-2008-0234, Order 2009-4-5, at 18 (April 7, 2009), *quoting* *Northwest/KLM*, Docket 46371, Order 93-1-1 at 11 (Jan. 11, 1993). See also *SkyTeam I*, Docket DOT-OST-2004-19214, Order 2005-12-12 at 32 (Dec. 22, 2005); *Air Canada/ Austrian/ bmi/ LOT/ Lufthansa/ SAS/ Swiss/ TAP/ United*, Docket DOT-OST-2005-22922, Order 2006-12-17 at 15 (Dec. 18, 2006).

<sup>36</sup> See *SkyTeam II*, Docket DOT-OST-2007-28644, Order 2008-4-17 at 17 (April 9, 2008); *Air Canada/ Austrian/ bmi/ LOT/ Lufthansa/ SAS/ Swiss/ TAP/ United*, Docket DOT-OST-2005-22922, Order 2006-12-17 at 8 (Dec. 18, 2006).

<sup>37</sup> See *Acquisition of Northwest/Wings Holdings, Inc.*, Docket 46731, Order 92-11-27 at 13; *SkyTeam II*, Docket DOT-OST-2007-28644, Order 2008-4-17 at 5 (April 9, 2008).

## **IV. TENTATIVE DECISION**

### **A. Tentative Approval of Code Sharing**

In this section, we consider the request by American and British Airways to expand their code-sharing relationship. Their request for blanket authority is the last piece of authority that the applicants would need to implement blanket code sharing under the umbrella of oneworld. The Department has already approved code-shares between American and Royal Jordanian, American and Iberia, American and Finnair, and some code-shares between American and British Airways.<sup>38</sup>

We tentatively find that approval of the requested authority, as conditioned, will enable American and British Airways to implement the expanded operational opportunities resulting from the U.S.-EU Agreement. Open-skies agreements with foreign countries give authorized carriers from either country the ability to serve any route between the two countries they wish (with open intermediate and beyond rights). We tentatively find that the expanded code-share authority that American and British Airways seek is encompassed by the U.S.-EU Agreement. We also tentatively find that it is in the public interest to expand the code-share authority, as it will result in new service opportunities for U.S. passengers and shippers.

Therefore, we tentatively approve the requests of American and British Airways to renew their existing statements of authorization and to amend their authority to allow blanket open-skies code sharing, subject to the conditions set forth in Appendix A.<sup>39</sup>

### **B. Tentative Approval of the Alliance Agreements**

In this section, we consider whether to approve the Alliance Agreements under § 41309. Our analysis involves a detailed assessment of the competitive effects of the proposed alliance at the regional, country-pair, and city-pair level. We will also discuss, to the extent relevant to this transaction, the dynamics of competition between the global alliances and the potential need for remedies to address competitive concerns. Although we discuss some specific competitive benefits of the alliance in this section, a more complete evaluation of public benefits is found in the next section.

Under the U.S.-EU Agreement, any U.S., U.K., or duly authorized EU airline may now enter the U.S.-Heathrow market, provided it can obtain slots. Some new entry has already occurred, as airlines have dealt with alliance partners or paid to acquire slots on the secondary market. Continental, Delta, Northwest (now a subsidiary of Delta), and US Airways – all of whom were excluded from Heathrow under the previous air services agreement – have commenced services. Meanwhile, the four “incumbents” at Heathrow –American, British Airways, United, and Virgin Atlantic - have responded by introducing several new services of their own. While some of the new Heathrow services were formerly operated from Gatwick, another London airport, others are

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<sup>38</sup> See Order 2003-5-33 and Renewal Application filed March 23, 2005, in the instant docket. The authority remains in effect pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. § 558(c), as implemented by 14 C.F.R Part 377, pending action on its timely-filed renewal application.

<sup>39</sup> The carriers request that their amended statements of authorization remain in effect indefinitely. We are tentatively granting the request.

genuinely new to the U.S.-London market because they involve an expansion of capacity in an existing city pair or a new gateway.<sup>40</sup>

Against the backdrop of a more liberalized marketplace, it is important to note that the applicants are planning broader and deeper cooperation than ever before. The proposed alliance features broad multilateral cooperation by five airlines on nonstop and connecting routes, which would allow oneworld to flow traffic over multiple hubs that are less congested than Heathrow and to compete more vigorously with Star Alliance and SkyTeam.

## **1. Market Analysis**

### **a. Network Level**

The proposed alliance involves large global airlines whose networks reach hundreds of points in the Americas, Europe, Africa, Asia, and the Middle East. However, the core focus of the alliance – integrating the services of American, British Airways, and Iberia under the JBA – will be traffic over the Atlantic Ocean. Accordingly, our analysis will focus on competitive effects in transatlantic markets between the United States and Europe.

Table 1, below, provides a broad snapshot of airline competition in the U.S.-Europe market. As seen in the data, there are many competitors, both in the form of individual carriers and immunized alliances. In total, there are approximately 39 airlines operating scheduled service in the market.<sup>41</sup> No single airline has a dominant share of nonstop passengers, indicating a generally competitive market.

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<sup>40</sup> “New entrants” operate new U.S.-Heathrow services from Atlanta (Delta), Cleveland (Continental that has been canceled for future seasons), Detroit (Delta/Northwest), Houston (Continental), Minneapolis (Delta), New York-EWR (Continental), New York-JFK (Delta), Philadelphia (US Airways). Economic and competitive factors will continue to dictate whether services in the market are sustainable. For example, Air France canceled its daily flight from Los Angeles and Delta canceled its daily flight from Seattle. Additionally, incumbent carriers have adjusted capacity in markets that were already served before open skies from Gatwick and/or Heathrow, resulting in new U.S.-Heathrow services from Atlanta (British Airways), Boston (American), Dallas/Ft. Worth (American and British Airways), Denver (United), Houston (British Airways), Raleigh (American), and Seattle (British Airways). At the same time, of course, incumbents have also reduced U.S.-Heathrow services in certain markets, including Chicago (American), Detroit (British Airways canceled its only daily flight), Los Angeles (American), New York JFK (American, British Airways, and Virgin Atlantic), and Washington, DC (Virgin Atlantic). Source: OAG scheduling data for July 2007-July 2009. Cf. Table 3, DOJ Comments at 20 (Dec. 21, 2009); Figure 2, Answer of Virgin Atlantic at 11 (May 18, 2009).

<sup>41</sup> OAG scheduling data for April 2009.

**Table 1**  
**Onboard Share in the U.S.-EU Market<sup>42</sup>**

<b>Pre-transaction</b>	<b>Passengers</b>	<b>Share</b>	<b>Post-transaction</b>	<b>Passengers</b>	<b>Share</b>
Austrian, bmi, Continental, LOT, Lufthansa, SAS, Swiss, TAP, United/ Air New Zealand <sup>43</sup> (Immunized)	15,371,629	31.7%	Austrian, bmi, Continental, LOT, Lufthansa, SAS, Swiss, TAP, United/ Air New Zealand (immunized)	15,371,629	31.7%
Air France, Alitalia, Delta/ Northwest, KLM, Czech (Immunized)	14,025,416	28.9%	Air France, Alitalia, Delta/ Northwest, KLM, Czech (immunized)	14,025,416	28.9%
British Airways	5,521,729	11.4%	American, British Airways, Iberia, Finnair (immunized)	10,793,182	22.3%
American, Finnair (Immunized)	4,401,137	9.1%	Virgin Atlantic	3,447,329	7.1%
Virgin Atlantic	3,447,329	7.1%	Other Traffic	2,645,402	5.5%
Other Traffic	2,645,402	5.5%	US Airways	2,212,080	4.6%
US Airways	2,212,080	4.6%			
Iberia	870,316	1.8%			
<b>Total</b>	48,495,038	100%	<b>Total</b>	48,495,038	100%

Source: T-100 nonstop segment data (“T-100 traffic data”) for 12 months ended June 2009.

The data suggest that the proposed alliance would enhance competition at the network level. The two leading competitors in the U.S.-Europe market, immunized Star Alliance (31.7%) and immunized SkyTeam (28.9%), retain their positions. In effect, the proposed alliance combines the third and fourth competitors to form a more competitive immunized oneworld alliance, with an initial share of 22.3% of the market. Oneworld becomes a strong third alliance competitor. This is also evident in the booking data submitted by the Joint Applicants. Those data show oneworld achieving a critical mass of traffic and becoming more competitive with SkyTeam and Star in 841 transatlantic markets, affecting almost five million passengers.<sup>44</sup>

<sup>42</sup> We define the U.S.-EU market to include scheduled airline operations for traffic between points in the United States and points in all 27 Member States of the European Union, plus Norway and Switzerland. In all tables, competitors are defined as having an independent airlines or groups of airlines operating with antitrust immunity. Competitors must have 1% market share to be listed. The term “market share” is shorthand for “nonstop segment passenger share” and should not be confused with the existence of a relevant antitrust market. The market shares of KLM, Lufthansa, and Swiss International Airlines include traffic carried by Privatair, which operates flights for all three airlines.

<sup>43</sup> United and Air New Zealand operate an immunized alliance, however Air New Zealand does not have authority to engage in immunized operations with any other airlines. *See* United/ Air New Zealand, DOT-OST-1999-6680, Order 2001-4-2 (April 3, 2001).

<sup>44</sup> Marketing Information Data Tapes Data (“MIDT booking data”) for YE 2Q08. The MIDT booking data was submitted in raw format under seal in Exhibit JA-28 of the Joint Application (Aug. 14, 2008). While the Department has worked from the raw data for its tentative findings in this order, the majority of relevant data outputs have been

## b. Country-Pair Level

The proposed alliance affects competition in three country-pair markets in which the services of the applicants overlap: U.S.-U.K., U.S.-Spain, and U.S.-France. Using T-100 traffic data, we evaluate competitive effects in each of these markets.

<b>Table 2</b>					
<b>Onboard Share in the U.S.-U.K. Market</b>					
<b>Pre-transaction</b>	<b>Passengers</b>	<b>Share</b>	<b>Post-transaction</b>	<b>Passengers</b>	<b>Share</b>
British Airways	5,520,975	33.7%	American, British Airways (immunized)	7,760,293	47.4%
Virgin Atlantic	3,447,329	21.0%	Virgin Atlantic	3,447,329	21.0%
bmi, Continental, United/Air New Zealand (Immunized)	3,055,001	18.6%	bmi, Continental, United /Air New Zealand (immunized)	3,055,001	18.6%
American	2,239,318	13.7%	Air France, Delta/ Northwest (Immunized)	1,407,576	8.6 %
Air France, Delta/ Northwest (Immunized)	1,407,576	8.6 %	US Airways	579,227	3.5%
US Airways	579,227	3.5%	Other Traffic	139,184	0.8%
Other Traffic	139,184	0.8%			
<b>Total</b>	<b>16,388,610</b>	<b>100%</b>	<b>Total</b>	<b>16,388,610</b>	<b>100%</b>

Source: T-100 traffic data for the 12 months ended June 2009.

As shown in Table 2, above, the primary change in the U.S.-U.K. market is the consolidation of American and British Airways, which results in a 47.4% post-transaction market share for oneworld. The alliance would carry nearly half the passengers between the two countries. We believe that the competitive effect of an immunized oneworld alliance is compounded in this market by several logistical factors.

First, the U.S.-U.K. market is large, accounting for more than one quarter of all traffic across the North Atlantic.<sup>45</sup> Second, the local market is crucial to the profitability of the routes. Approximately one half of the passengers in the U.S.-U.K. market are local, whereas only about one third of the passengers in U.S.-Continental Europe markets are local.<sup>46</sup> Third, there are few suitable hubs in between the United States and the United Kingdom. For passengers traveling to/from the east coast of the United States, connections at other domestic hubs are not optimal.

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produced publicly in Exhibit JA-27 of the Joint Application. The Department's analysis of the raw data resulted in nearly identical outputs as those shown in Exhibit JA-27.

<sup>45</sup> According to MIDT booking data for YE 2Q08, the traffic in the U.S.-U.K. market accounts for 26.8 percent of U.S.-E.U. traffic. The vast majority of the passengers in the U.S.-U.K. market travel to/from/via London.

<sup>46</sup> MIDT booking data for YE 2Q08.

For the passengers traveling to/from Europe, the evidence shows that Heathrow is uniquely situated. We agree with Virgin Atlantic’s assessment that “[a]lthough Heathrow attracts a robust share of connecting transatlantic traffic from other major European hubs, the converse is not true. Very few passengers originating in London, or at Heathrow, travel to the United States via other points in Europe.”<sup>47</sup>

**Table 3**  
**Onboard Share in the U.S.-Spain Market**

<b>Pre-transaction</b>	<b>Passengers</b>	<b>Share</b>	<b>Post-transaction</b>	<b>Passengers</b>	<b>Share</b>
Iberia	870,316	39.0%	American, Iberia (immunized)	1,159,356	52.0%
Delta	547,431	24.6 %	Delta	547,431	24.6 %
Continental	311,069	14.0%	Continental	311,069	14.0%
American	289,040	13.0%	US Airways	211,028	9.5%
US Airways	211,028	9.5%			
<b>Total</b>	2,228,884	100%	<b>Total</b>	2,228,884	100%

Source: T-100 traffic data for the 12 months ended June 2009.

Table 3, above, shows the competitive shares for the U.S.-Spain market. Similar to the U.S.-U.K. market, the pre-transaction market is characterized by one leading carrier and several smaller competitors. Even though oneworld’s share of the market would grow to greater than 50%, the overall structure of the market remains intact. Oneworld was, and will remain, the leading competitor. It is also important to note that two new entities will initiate service in the spring, namely United/ Aer Lingus and Air Europa. The new entry is facilitated, in part, by the available capacity at Madrid Barajas airport.<sup>48</sup>

<sup>47</sup> Answer of Virgin Atlantic at 8-9 (May 18, 2009).

<sup>48</sup> See Joint Application at 28 (Aug. 14, 2008).

**Table 4**  
**Onboard Share in the U.S.-France Market**

<b>Pre-transaction</b>	<b>Passengers</b>	<b>Share</b>	<b>Post-transaction</b>	<b>Passengers</b>	<b>Share</b>
Air France, Delta/ Northwest (Immunized)	4,325,183	70.1 %	Air France, Delta/ Northwest (Immunized)	4,325,183	70.1 %
Continental, United (Immunized)	744,339	12.1%	Continental, United (Immunized)	744,339	12.1%
American	658,382	10.7%	American, OpenSkies/ L'Avion (Immunized)	739,348	12.0%
Other Traffic	361,015	5.9%	Other Traffic	361,015	5.9%
OpenSkies/ L'Avion <sup>49</sup>	80,966	1.3%			
<b>Total</b>	<b>6,169,885</b>	<b>100%</b>	<b>Total</b>	<b>6,169,885</b>	<b>100%</b>

Source: T-100 traffic data for the 12 months ended June 2009.

Table 4, above, shows the shares resulting in the U.S.-France market, in which American's services overlap with those of British Airways' subsidiary, OpenSkies. For the purpose of this analysis, OpenSkies, which operates flights between the United States and Paris Orly airport, is grouped with L'Avion, which was purchased by the British Airways subsidiary in July 2009.<sup>50</sup> A grant of immunity would not significantly alter the structure of competition between United States and France. Oneworld's market share would only increase by 1.3 percentage points, giving it a 12 percent share of the overall market.

While the T-100 traffic data from the tables above are a useful metric, analysis of booking data from Marketing Information Data Tapes (MIDT) more accurately shows the effects of competing networks.<sup>51</sup> According to the booking data, the proposed alliance establishes oneworld as a strong third alliance competitor. It makes oneworld more competitive, and thus enhances inter-alliance competition, in eight of the top 10 markets: U.S. to Germany, Italy, France, the Netherlands, Switzerland, Ireland, Belgium, and Denmark.

Overall, the competitive change is positive in 23 of 29 markets. Only the U.S.-U.K. market experiences a reduction in competition. Five markets – U.S. to Spain, Poland, Finland, Slovenia, and Slovakia – experience no competitive change, either because oneworld's shares grow in a market in which it is already the clear leader or because oneworld's shares do not increase significantly enough to give it a competitive share of traffic.

<sup>49</sup> OpenSkies purchased L'Avion and integrated the carrier's operation into its own in July 2009.

<sup>50</sup> See Letter from Don H. Hainbach, Attorney for British Airways (Sept. 21, 2009) (submitted for the record).

<sup>51</sup> We explained the differences in T-100 traffic data and MIDT booking data in the recent Star Alliance case. See Star, Docket DOT-OST-2008-0234, Order 2009-4-5 at 8-10 (April 7, 2009).

### c. City-Pair Level

The proposed alliance affects competition in numerous city-pair markets in which the applicants offer overlapping service. As explained in Section III on decisional standards, we use traditional antitrust analysis to define relevant markets and measure concentration at the city-pair level. We then determine whether the proposed alliance will give the applicants the ability to sustainably increase prices or decrease output in any relevant market, and whether the proposed alliance raises competitive concerns in light of factors such as market structure, the likelihood that competing carriers will enter the affected markets if the proposed alliance is approved, and any infrastructure constraints.

#### *Defining Relevant Markets*

As DOJ stated in the previous American/ British Airways case,<sup>52</sup> relevant markets in the airline industry are transportation between city pairs. Demand is specific to city pairs; if the price of travel in City Pair A increases by a significant amount, consumers would not generally consider substituting travel in City Pair B.

However, the relevant market may be narrower than just transportation between city pairs. The global airline industry is a network enterprise in which the aggregation of traffic at hubs is currently the only economical way to operate expensive long-range aircraft. There are often several pathways and products available on the network in any given city pair. A passenger may prefer – and be willing to pay more for – nonstop versus connecting service, or service to a centrally-located airport versus other airports within the same population center, or premium service versus economy service. If an airline can identify and price separately for these services within the same city pair, then the services may constitute a separate relevant market.<sup>53</sup>

In this case, DOJ argues that nonstop services between the United States and Europe are relevant markets.<sup>54</sup> To support its argument, DOJ cites its own empirical work suggesting that the number of airlines operating in a nonstop market has a significant impact on fares, and that fares on certain routes are higher for nonstop service versus connecting service. DOJ also cites the standard airline industry practice of planning routes and capacity based on the assumption that offering nonstop service versus connecting service will translate to a greater market share. Finally, DOJ asserts that many businesses distinguish between nonstop and connecting travel, often requiring their employees to book nonstop travel unless there is a significant fare difference.

Virgin Atlantic argues that there are additional, more narrowly defined relevant markets that we must consider: nonstop services to Heathrow airport.<sup>55</sup> Virgin Atlantic points to the lengths that some airlines have gone to move their U.S.-London services from Gatwick to Heathrow when legal barriers to entry were removed, implying that there is no viable substitute for Heathrow. Virgin Atlantic uses booking data to suggest that airlines are able to charge a premium for travel to

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<sup>52</sup> American/ British Airways II, Docket DOT-OST-2001-11029, DOJ Comments at 11-12 (Dec. 17, 2001).

<sup>53</sup> See American/ British Airways II, Docket DOT-OST-2001-11029, DOJ Comments at 12 (Dec. 17, 2001).

<sup>54</sup> DOJ Comments at 9-10 (Dec. 21, 2009).

<sup>55</sup> Answer of Virgin Atlantic at 12-19 (May 18, 2009).

Heathrow, and it observes that Heathrow is a preferred airport for time-sensitive travelers because it serves as an international hub with a wide array of connections and other amenities. DOJ states that the evidence in the record “suggests” that Heathrow is a separate market.<sup>56</sup>

In contrast, the applicants favor a broader definition. In particular, they deny that service to Heathrow constitutes a separate market, arguing that London’s other airports offer competitive discipline to Heathrow service and that connecting flights are viable in the U.S.-U.K. market.<sup>57</sup>

We agree with DOJ and Virgin Atlantic as to market definition. Although we do not adopt Virgin Atlantic’s belief in the so-called “Heathrow premium,”<sup>58</sup> we do view the facts and circumstances in the record as supporting some of its conclusions. We tentatively find that the relevant markets in this case include (1) nonstop services for many travelers between the United States and Europe, and (2) nonstop services for time-sensitive travelers between the United States and London’s Heathrow airport.

With regard to Heathrow services, we believe the evidence as a whole shows that:

- Business passengers exhibit a strong preference for using Heathrow versus the other international airports in London, based largely upon Heathrow’s location and pattern of service. Virgin Atlantic states that

[t]here are many reasons why time-sensitive passengers in particular do not view flights operated from Gatwick as substitutes for Heathrow service. The most important attraction of Heathrow to time-sensitive passengers is its convenient schedules, greater frequency of flights and its extensive range of flight connections. Passengers know that if they miss a flight at Heathrow there is a good chance that they can catch a later flight, whereas at other London airports, a missed flight may mean an overnight wait or a journey to Heathrow to catch an alternative.<sup>59</sup>

The counterargument – that Gatwick and other airports are true substitutes for Heathrow for transatlantic service – is not compelling. Documents submitted by the applicants show that Heathrow is a separate market that is more convenient to business travelers and more suitable for launching long-haul services due to its hub and ground infrastructure.<sup>60</sup>

- The preference for business passengers to use Heathrow is strong enough that many travelers will choose to fly on a connecting itinerary out of Heathrow instead of a nonstop

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<sup>56</sup> DOJ Comments at 11 (Dec. 21, 2009).

<sup>57</sup> Joint Application at 41-46, Exhibit JA-26 (Aug. 14, 2008); Joint Applicants’ Consolidated Reply at 30-42, 46 (May 28, 2009).

<sup>58</sup> Answer of Virgin Atlantic at 12-19 (May 18, 2009).

<sup>59</sup> Answer of Virgin Atlantic at 17 (May 18, 2009).

<sup>60</sup> See, e.g., BA 02500; BA 002475-003190 at 03146-003149 and 02631-003041; AA 02883; AA 0003287.

itinerary out of Gatwick. By a three-to-one margin, passengers in the U.S.-U.K. market travel to/from Heathrow even when alternative Gatwick service is available.<sup>61</sup>

- Once the U.S.-EU Agreement took effect, removing barriers to serving Heathrow, numerous carriers moved their transatlantic services from Gatwick to Heathrow. American, Continental, Delta, Northwest (now a subsidiary of Delta), US Airways, and British Airways have all “switched” transatlantic services from Gatwick to Heathrow in the past eighteen months.<sup>62</sup> For the U.S. carriers that did not have slots at Heathrow, moving there entailed a large upfront investment to purchase slots.<sup>63</sup> The move to Heathrow, to the exclusion of other airports with capacity available, strongly suggests that Heathrow is a unique and separate market that is more attractive for business travelers and more lucrative for airlines, despite the large upfront investment required.
- Recent data regarding fares and yields in the London market are not conclusive. Virgin Atlantic believes that British Airways commands a substantial premium for its services at Heathrow versus Gatwick, and that fares are generally higher from Heathrow.<sup>64</sup> The applicants argue that the Heathrow premium no longer exists, not even for business travelers.<sup>65</sup> The O&D data submitted by the applicants, which, unlike MIDT booking data or T-100 traffic data, contains detailed revenue information, shows that some passengers are paying more to connect to/from Heathrow than to travel nonstop from Gatwick. In our view, variance in the data suggests that passengers have different utility and price elasticity in the overall U.S.-London market. Some are time-sensitive, some are airport-sensitive, and some are price-sensitive. While many passengers do favor Heathrow, and may even choose a connecting itinerary out of Heathrow instead of a nonstop itinerary out of Gatwick, the Heathrow passengers are not necessarily paying a premium. However, the effective date of the open-skies agreement was March 2008; thus, the data are limited.

Based on the totality of the circumstances, we tentatively find that Heathrow is a separate relevant market for time-sensitive travelers. Our tentative finding is consistent with our tentative decision in the previous American/ British Airways case.<sup>66</sup>

#### *Assessment of competitive effects*

Having defined the relevant markets, Table 5 shows the extent to which the applicants’ services overlap in those markets.

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<sup>61</sup> According to publicly-available Origin & Destination Survey Data (“O&D data”) for CY2008, which only includes data submitted by U.S. carriers, 232,770 passengers traveled in U.S.-U.K. service to/from Heathrow and Gatwick. More than 75% of those passengers chose Heathrow.

<sup>62</sup> See Answer of Virgin Atlantic at 11 (May 18, 2009); DOJ Comments at 20 (Dec. 21, 2009).

<sup>63</sup> See Answer of Virgin Atlantic at 30 (May 18, 2009).

<sup>64</sup> Answer of Virgin Atlantic at 5, 13-16, Appendix J (May 18, 2009).

<sup>65</sup> Joint Application at 51-52, Exhibit JA-26 (Aug. 14, 2008).

<sup>66</sup> American/ British Airways II, Docket DOT-OST-2001-11029, Order 2002-1-12 at 39-43 (Jan. 25, 2002).

**Table 5**  
**Nonstop Overlaps<sup>67</sup>**

Market	Change in # of Nonstop Competitors	Pre-trxn	Post-trxn	O&D Market Shares	Annual Market Size Each Way	Connecting Passengers on Nonstop Flights	O&D Passengers Who Connect
Dallas/Ft. Worth – London	2-to-1	51.2%	82.9%	Star (9.0%) SkyTeam (5.8%)	96,109	66.2%	26.7%
Miami – Madrid*	2-to-1	36.6%	83.2%	SkyTeam (7.1%) US Airways (5.8%)	83,183	67.4%	22.1%
Boston – London	3-to-2	27.5%	68.4%	Virgin Atlantic (22.5%)	313,035	44.5%	9.8%
Chicago – London**	3-to-2	25.6%	51.2%	Star (28.4%) Virgin Atlantic (13.4%)	276,889	75.3%	7.3%
Miami – London	3-to-2	22.5%	64.5%	Virgin Atlantic (24.5%)	267,590	45.8%	18.4%
New York - Paris	4-to-3	18.1%	23.7%	SkyTeam (44.8%) Star (23.0%) Air India (6.9%)***	639,308	52.4%	13.2%
Los Angeles – London	5-to-4	11.4%	37.7%	Star (27.2%) Virgin Atlantic (25.3%) SkyTeam (8.2%)	476,921	54.4%	12.1%
New York - London	5-to-4	17.6%	51.6%	Virgin Atlantic (25.6%) Star (8.4%) SkyTeam (6.7%)	1,617,181	37.4%	3.0%

\* Air Europa begins nonstop Miami-Madrid service March 2010

\*\* Virgin Atlantic reinstates nonstop Chicago-London service March 2010

\*\*\* Air India no longer serves New York-Paris.

Source: MIDT Data for YE 2Q08. “Pre-trxn” refers to the shares of American/ Finnair.

Interested parties express concern about a number of the nonstop overlap markets. Virgin Atlantic – which focuses on the six overlaps between the United States and the United Kingdom<sup>68</sup> – argues that the degree of overlap in these markets is unacceptable. Virgin Atlantic believes that, once the proposed alliance is formed, competing carriers will not be able to match the frequency and capacity shares of American and British Airways, creating a distinct disadvantage in their ability to compete for high-yield business traffic.<sup>69</sup> DOJ – which expresses concern about five of the overlaps between the United States and the United Kingdom, as well as Miami-Madrid<sup>70</sup> –

<sup>67</sup> Unlike the T-100 traffic data tables, which did not include any airlines that had less than a 1% share of the market, we have used a 5% standard in this table using MIDT booking data.

<sup>68</sup> Virgin Atlantic expresses concern about Boston-London, Chicago-London, Dallas/Ft. Worth-London, Los Angeles-London, Miami-London, and New York-London. *See* Answer of Virgin Atlantic at 39-58 (May 18, 2009).

<sup>69</sup> Answer of Virgin Atlantic at 33-39 (May 18, 2009).

<sup>70</sup> DOJ expresses concern about Boston-London, Chicago-London, Dallas/Ft. Worth-London, Miami-London, Miami-Madrid, and New York-London. *See* DOJ Comments at 1, 11-14 (Dec. 21, 2009).

argues that the increases in concentration could create or enhance market power. Relying on its empirical model, DOJ predicts that markets in which the number of competitors is reduced to two, or to one are likely to show price increases of 6.6% to 15% (the so-called 3-to-2 and 2-to-1 markets). Although 5-to-4 markets are not captured by its model, DOJ is nevertheless concerned about New York-London, based on the applicants' large share of business traffic on the route.

The applicants challenge DOJ's empirical model, centering on perceived flaws in the methodology. In particular, the applicants assert that DOJ misclassifies the passenger itineraries from which it draws its conclusions about price effects. The applicants explain that DOJ misunderstands the differences between online, code-share, immunized, and interline itineraries. After resting its case on erroneous classifications of these various kinds of itineraries, the applicants argue that DOJ's conclusions about the price effects of the oneworld alliance should be given no weight.<sup>71</sup>

We are concerned that DOJ may be viewing marketing as a proxy for pricing for a number of itineraries, when that is not the case. The key to correctly classifying itineraries for a price effects study is identifying which airline or entity is responsible for the pricing function. In the context of an immunized alliance, an itinerary may be marketed by one carrier but priced by another. If itineraries are not classified based on the airline or entity responsible for pricing them, conclusions about price effects are not reliable.

Further, any analysis must account for the significant integration of pricing that occurs within a joint venture. Northwest-KLM, the first transatlantic alliance with an integrated joint venture, and the only one for which long-term data are available, has been associated with lower fares, increased capacity, and greater service options for passengers.<sup>72</sup> The data on subsequent immunized alliances also suggest pro-consumer results,<sup>73</sup> even before those alliances moved towards deeper integration.<sup>74</sup> Past experience with immunized alliances (such as that between United/Lufthansa, Delta/Air France, and Northwest/KLM) shows that benefits from new direct routes, increased frequencies, greater capacity on hub-to-hub and other routes linking the airlines' networks, and associated increases in passenger volumes may be expected to develop over time as synergies from the integrated joint venture are realized.<sup>75</sup> Both SkyTeam and Star are now in the process of implementing their respective joint ventures recently approved by DOT. As a result, the price effects of these arrangements on transatlantic airfares have not yet been captured in data collected by DOT, and therefore cannot be evaluated using that data.

Nevertheless, we share many of DOJ's fundamental concerns. For example, we are particularly concerned about competitive effects in the Boston-London market. According to MIDT booking data, Boston-London is a substantially large market of more than 300,000 annual

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<sup>71</sup> Joint Applicants' Answer to DOJ Comments at 36-38 (Jan. 11, 2010).

<sup>72</sup> Cf. Reitzes, J. & Moss, D., *Airline Alliances and Systems Competition*, *Houston Law Review*, 48: 293-332 (2008).

<sup>73</sup> See *SkyTeam II*, Docket DOT-OST-2007-28644, Order 2008-4-17 (April 9, 2008); *Star*, Docket DOT-OST-2008-0234, Order 2009-4-5 (April 7, 2009).

<sup>74</sup> Cf. Brueckner, J.K. & Proost, S., *Carve-outs Under Airline Antitrust Immunity* (March 2009 working paper).

<sup>75</sup> Whalen, W.T. *A Panel Data Analysis of Code Sharing, Antitrust Immunity, and Open Skies Treaties in International Aviation Markets*, *Review of Industrial Organization*, 30: 39-61 (2007).

local passengers that will go from three competitors to two, resulting in an increase in concentration. Unique structural, geographic, and demographic factors raise competitive concerns in this market. Oneworld will obtain 68 percent of bookings and will open up a 41 point gap over the next largest competitor, Virgin Atlantic. Several carriers have exited the market in recent years, and no new carriers have entered, despite the open-skies agreement. We believe that the proposed alliance, if not remedied, will increase the risk and difficulty for airlines that may want to enter the market, especially if they do not have access to feeder traffic in Boston. Boston is the northeastern-most gateway to London from the United States. The lack of suitable intervening hubs between Boston and London – from which other airlines could compete with connecting flights – would leave consumers in the local market with fewer and less desirable options if prices increase or service quality decreases.

Like DOJ, the Department is also concerned that the proposed alliance will have diffuse negative effects in the remaining U.S.-U.K. overlap markets, as well as U.S.-U.K. markets generally. The proposed alliance combines the operations of British Airways and American, the two largest competitors in the market as measured by departures.<sup>76</sup> They are each other's primary competitors in the U.S.-U.K. market. Not surprisingly, the proposed alliance causes a share shift in many overlap markets involving London. For example, whereas British Airways is the leading competitor in New York-London pre-transaction, with 34 percent of bookings, post-transaction it would achieve almost 52 percent of bookings by joining with American. Virgin Atlantic retains its second-place position in the market, but instead of an eight-point gap with the first-place competitor, it would then face a 26-point gap. In such circumstances, the Department recognizes that it could be difficult for competitors to match the frequency, scheduling, hubbing, and capacity-share advantages of the oneworld alliance.

We tentatively conclude, however, that we should not disapprove the proposed alliance outright. The data in Table 5 show that most markets will continue to have a number of competitors even after the applicants combine their services; typically there will be a third, fourth, or fifth competitor with a substantial share of bookings. Only Dallas/Ft. Worth-London will ultimately have fewer than two competitors, and we agree with the applicants that nonstop service in this market would be difficult to sustain in the current environment without a substantial hub operation.<sup>77</sup> With fewer than 100,000 annual bookings, the Dallas/Ft. Worth-London market is only one-third the size of the next largest U.S.-London overlap market, Boston-London. Additionally, travelers in the Dallas/Ft. Worth-London markets have multiple connecting options. As shown in the data, a relatively large percentage of passengers connect within the Dallas/Ft. Worth-London city pair.

The data also show that all of the nonstop overlap markets are disciplined to an extent by connecting competition. The discipline is manifested in two ways: by the number of passengers who utilize connecting service in the origin and destination city pair (for example, Miami-New York-London) and by the number of passengers on nonstop flights who are connecting behind or beyond the nonstop trunk route (for example, Miami-London-Copenhagen). The mix of connecting and local passengers on these routes is important to the competitive analysis. In

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<sup>76</sup> OAG scheduling data for August 2009.

<sup>77</sup> Joint Applicants' Answer to DOJ Comments at 19-20 (Jan. 11, 2010); Joint Application at 55 (Aug. 14, 2008).

Chicago-London, Los Angeles-London, Miami-London, and New York-London, at least 37 percent of passengers are using the nonstop route as a segment on a connecting itinerary, and it is as much as 75 percent in the case of Chicago-London. In these markets, the applicants submit credible evidence in their September 8<sup>th</sup> pleading that their true economic incentive as alliance partners is to increase capacity on the nonstop segment and maintain competitive fares for both local and connecting passengers. The incentive to increase capacity exists because the alliance must continue to add capacity on trunk routes to accommodate the large number of connecting passengers and thus to compete with other network airlines.<sup>78</sup>

## 2. Infrastructure Issues

Since six of the nonstop overlaps involve services at Heathrow, where slots are scarce, we must examine how infrastructure constraints affect competition. There is ample evidence in the record that Heathrow is constrained, and that the operational constraints make new entry on transatlantic routes difficult, due to the limited window of time for departures and arrivals that consumers prefer. As BAA/ACL and other parties have indicated, Heathrow operates at near full capacity.<sup>79</sup> The primary constraint is runway capacity. It is highly unlikely that a prospective new entrant would be able to secure suitable landing or takeoff times from the ACL-administered slot pool. Thus, the prospective new entrant must hold existing Heathrow slots to trade or convert for use on transatlantic routes, or acquire the right to slots on the secondary market.

We note, however, that there is some scope for Heathrow incumbents and members of global alliances to introduce transatlantic services from existing holdings. For example, bmi uses 12 slots from its substantial Heathrow portfolio to fund a portion of its Heathrow-Brussels and Heathrow-Amsterdam services at times that are suitable for transatlantic service.<sup>80</sup> Similarly, SkyTeam member Air France controls slots that it could use – and, in fact, did use at times in 2008 – for U.S.-Heathrow service.<sup>81</sup>

Additionally, it is possible to acquire slots on the secondary market. However, BAA/ACL notes that there is limited liquidity in the secondary market and high prices.<sup>82</sup> Thus, there are still barriers to entry at Heathrow, especially for well-timed slots that are usable for transatlantic services. Passengers traveling eastbound, particularly business travelers, who account for the bulk of the revenue, have a relatively narrow window of time for departure and arrival due to time zone changes.<sup>83</sup> Flights from the eastern seaboard typically depart the United States in the late afternoon or early evening for an early morning arrival in London, which allows the traveler to

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<sup>78</sup> Joint Applicants' Supplemental Comments at 5 and Declaration of Don Casey (Sept. 8, 2009).

<sup>79</sup> Answer of Virgin Atlantic at 19-21 (May 18, 2009); ACL/BAA Response (Jan. 28, 2009).

<sup>80</sup> Bmi operates flights to Brussels departing at 0830, 1255, 1830, and returning to Heathrow at 0740, 1145, and 2120. Bmi operates flights to Amsterdam departing at 0830, 1240, and 1820, and returning to Heathrow at 0745, 1405, and 2135. These times are suitable for Heathrow services to JFK, LAX, Boston, Seattle, and Chicago, among other cities. Source: OAG scheduling data for November 2009.

<sup>81</sup> Joint Application at 9 (Aug. 14, 2008).

<sup>82</sup> ACL/BAA Response (Jan. 28, 2009). Sellers on the secondary market have fetched in excess of \$50 million for well-timed slots. *See* Figure 9, Answer of Virgin Atlantic at 30 (May 18, 2009).

<sup>83</sup> Answer of Virgin Atlantic at 22 (May 18, 2009); Joint Applicants' Consolidated Reply at 32-33 (May 28, 2009).

conduct a full day of business or make a connection. Even though westbound departure times are more flexible, the fact is that only certain slots at Heathrow are suitable for arrivals, making slot transfers more complicated and limiting new entry into the U.S.-London market.

Because the scope for new entry is limited, we tentatively find that the infrastructure constraints at Heathrow could exacerbate the potential competitive harm caused by the proposed alliance. If approved, an immunized oneworld would hold 47.2% of Heathrow slots,<sup>84</sup> including a large share of slots usable for transatlantic service. We believe that this factor, more than the loss of a competitor in the transatlantic market or any specific competitive effects in a city pair, poses the greatest risk of harm for consumers. Without more and easier access to Heathrow slots, competing carriers would find it difficult to introduce new services to compete with an immunized oneworld.

### **3. Remedies to Address Harm to Competition**

Given the potential competitive harm we identified above, plus the risk that the harm could be exacerbated by infrastructure constraints, we must determine whether there are any appropriate remedies that could mitigate the harm while still allowing the potential benefits of the proposed alliance to be realized. Interested parties have suggested several potential remedies, including slot divestitures, carve-outs, and mandatory interlining.

DOJ states that slot transfers could potentially protect consumers from the anti-competitive effects of the proposed alliance. DOJ suggests that we could require either unencumbered slot divestitures, in which new entrants would not be required to serve specific routes, or earmarked slot divestitures, in which new entrants would be required to serve specific routes. In crafting the best slot remedy, DOJ indicates that we must decide what measure of continuing oversight is appropriate under the circumstances. Earmarked slot divestitures have the advantage of being more narrowly tailored to restore lost competition, but continuing oversight may be necessary if the parties to the slot transfer are engaged in an ongoing relationship, as they would be in the case of a lease agreement. DOJ cautions, however, that an earmarked slot remedy could introduce inefficiency into the marketplace, since the divested slots could potentially be used more productively elsewhere.<sup>85</sup>

In addition to slot divestitures, DOJ suggests that “carve-outs” could be appropriate. A carve-out prohibits the airlines from coordinating pricing and capacity for a narrowly defined group of passengers, usually time-sensitive passengers or passengers in the local O&D market, who are most likely to rely upon nonstop flights and therefore feel the effects of reduced competition.

Virgin Atlantic, while maintaining that we should deny the application outright, states that slot divestitures would be essential if the application were to be approved. Virgin Atlantic emphasizes that prospective new entrants must be given the opportunity to use the slots before the applicants implement the proposed alliance.<sup>86</sup>

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<sup>84</sup> ACL/BAA Response, accompanying data (Jan. 28, 2009).

<sup>85</sup> DOJ Comments at 30-31 (Dec. 21, 2009).

<sup>86</sup> Answer of Virgin Atlantic at 81-82 (May 18, 2009).

Virgin Atlantic also argues for an interline remedy. In this instance, an interline remedy would require the applicants to accommodate connecting passengers from competing carriers at specific cities, such as Chicago, by providing through pricing, ticketing, and baggage, as well as access to inventory on reasonable terms. Specifically, Virgin Atlantic requests that we prevent the applicants from withdrawing from existing interline arrangements with non-oneworld carriers and require them to charge interline fares that are no less favorable than those they charge each other.<sup>87</sup> This remedy, according to Virgin Atlantic, is necessary to allow airlines to serve connecting passengers and compete with oneworld's powerful network.

#### **a. Slot Transfers**

We tentatively find that slot transfers would best address the potential competitive harm in this case. We tentatively determine that four slot pairs are necessary to remedy the potential harm, divided as follows: two slot pairs earmarked for the Boston-London Heathrow market (the "fixed slots") and two slot pairs to be used at any U.S. gateway for services in the U.S.-Heathrow market (the "flex slots"). Under this proposal, prospective new entrants would not be forced to compete where oneworld is strongest, such as in the Dallas/Ft. Worth-London market. Rather, they would be able to serve routes in which they have a greater chance of success and a greater opportunity to exert competitive discipline on the oneworld network.

This proposed approach would serve the public interest because it addresses the lost competition, particularly where it is most acute, in the Boston-London market, while also addressing the diffuse network-level effects of the proposed alliance across all U.S.-London markets, such as oneworld's superior network coverage, frequency, and ability to attract high-yield business traffic. This approach would also improve the chances that the slot pairs will be utilized and that new capacity will be added to the U.S.-London market. Meanwhile, the applicants can proceed with their alliance plans and deliver the promised public benefits.

We recognize that more information is needed to implement the proposed remedy. We are proposing a general framework for implementation. Mindful of DOJ's comments, urging us to avoid inefficiencies, we tentatively determine that an implementation mechanism should comport with the following principles:

- Airlines are not eligible recipients if they are members of the oneworld global alliance, affiliates of the applicants, or airlines in which the applicants have a substantial financial interest.
- The fixed and flex slots must be usable for transatlantic service and have commercially viable times.<sup>88</sup>

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<sup>87</sup> Answer of Virgin Atlantic at 82 (May 18, 2009).

<sup>88</sup> See *American/ British Airways II*, Docket DOT-OST-2001-10387, Order 2002-1-2 at 52 (Jan. 25, 2002) (establishing that Heathrow slots subject to divestiture should be "usable for transatlantic services"). See also Answer of Virgin Atlantic at 22-25 (May 18, 2009) (stating that morning arrivals from the United States are important due to time zone constraints and the requirements of time-sensitive travelers) (May 18, 2009); DOJ Comments at 21 (Dec. 21, 2009) (stating that the time of day is important for arrivals from the United States).

- Given that there is some scope for airlines to adjust their portfolios once they receive slots or eventually acquire slots through other means, we tentatively find that the applicants need not permanently divest their ownership rights in the four slot pairs subject to the remedy. Thus, the applicants may elect to lease, rather than sell, the slots, and collect limited compensation. We expect the compensation to be at such a level so as to attract prospective new entrants by *lowering* the barriers to entry below where they are today. We are proposing that the applicants make the slots available for a period of 10 years from the date of issuance of a final order in this case. The slots would be made available in time for recipients to launch services in the IATA 2011 Summer Season. If slots were not used initially, or if they were returned to the applicants, they would remain available for the full 10-year period.
- The proposed remedy should be administered expeditiously and independently. While we intend to exercise some oversight and monitor the process, we do not seek to administer the day-to-day tasks. We tentatively find that the applicants should appoint and pay for the services of a trustee, who must be approved by DOT.
- To the extent possible, the administration and implementation should be compatible with any remedy adopted by the European Commission, which is also reviewing this matter. Both the Department and the European Commission committed to explore compatible approaches to common matters in Annex 2 of the U.S.-EU Agreement.<sup>89</sup> Annex 2 was incorporated because both parties to the agreement recognized that incompatible approaches could frustrate the effective exercise of the parties' regulatory responsibilities. In the context of this case, it is possible that incompatible implementation and administration of a slot remedy could potentially place prospective new entrants at a disadvantage, jeopardizing efforts to reduce the competitive harm that we have tentatively found in the proposed transaction.

We invite the applicants and interested parties to comment on a proposed implementing mechanism that comports with these principles, achieves the objectives set forth in this order, and is workable.

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<sup>89</sup> Annex 2, U.S.-EU Air Transport Agreement, signed April 30, 2007.

## **b. Other Remedies**

We have carefully considered DOJ's and Virgin Atlantic's arguments concerning other potential remedies. We have tentatively decided not to impose a carve-out remedy. The recent fundamental shift in the character of alliances – towards integrated joint ventures – has made us more skeptical about the efficacy of carve-outs, especially in the context of joint ventures. In the recent SkyTeam and Star cases, we did not impose any carve-outs in overlap markets in which the joint venture partners planned to cooperate and to achieve truly integrative benefits that could be passed on to consumers.<sup>90</sup> We determined that the carve-outs would detract from the potential benefits of the alliance by introducing inefficiencies, and in some areas, impediments to pro-competitive cooperation.<sup>91</sup> Because airlines measure profitability by flight segment – so that each segment can be sold as part of dozens of different itineraries – carve-outs that are imposed on a city-pair basis disrupt the functioning of airline joint ventures and impair metal neutrality, limiting the benefits for both nonstop and connecting passengers.

In this case, we tentatively find that the facts and circumstances are similar to the SkyTeam and Star cases. All the nonstop overlaps in this case are subject to joint venture cooperation and the applicants have submitted a detailed joint venture agreement that seeks to achieve truly integrative benefits. Thus, for the same reasons expressed in the earlier cases, we tentatively do not think carve-outs are appropriate here.

We also tentatively decide not to impose an interline remedy. While Virgin Atlantic has stated that mandatory interlining is necessary in addition to slot transfers, it has provided little evidence that the applicants will be in a position to cause Virgin Atlantic or other carriers any specific harm. We are reluctant to get involved in the complicated contractual business relations of private parties without substantial evidence on the record concerning the potential harm that is likely to occur and how a legal requirement to interline would be effective in preventing it.

## **4. Tentative Conclusions**

We have carefully analyzed the impact of the proposed alliance at the network, country-pair, and city-pair level. On the one hand, the proposed alliance will provide a third global network that can better discipline the fares and services offered by the Star and SkyTeam alliances. The enhanced inter-alliance competition is beneficial for consumers across many markets, in particular the hundreds of transatlantic markets in which the applicants become more competitive as a direct result of the alliance. Travelers in those markets instantly gain new competitive options. On the other hand, the proposed alliance will increase concentration in several U.S.-London markets where the applicants would be in a position to potentially leverage substantial advantages in frequency, schedules, and access to corporate customers to exclude rivals. To address these potential anti-competitive effects, we have proposed a flexible slot transfer remedy that would

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<sup>90</sup> SkyTeam II, Docket DOT-OST-2007-28644, Order 2008-4-17 at 10 (April 9, 2009); Order 2008-5-32 at 3 (May 22, 2008). *See also* Star, Docket DOT-OST-2008-0234, Order 2009-7-10 at 18-21 (July 10, 2009).

<sup>91</sup> *See also* Brueckner, Jan K. and Stef Proost, Carve-Outs Under Antitrust Immunity, SSRN Working Papers (2009) (finding that carve-outs may be harmful when imposed on a joint venture alliance given the potential efficiency losses to the alliance of those carve outs).

require the applicants to make available four slot pairs at Heathrow to allow competitors to introduce new services.

Given the risk of competitive harm, we tentatively find that the proposed alliance must operate within a liberalized framework that enhances competition and promotes new entry regardless of national borders. The U.S.-EU Agreement – which permits entry by duly authorized airlines on any routes between the United States and the European Union (with open intermediate and beyond rights) – meets this objective. That landmark aviation agreement facilitates the competitive benefits and prevents some of the potential competitive harm of the proposed transaction. For example, the applicants will be able to better integrate their networks and compete with the other immunized alliances by, among other things, more flexibly deploying aircraft and crew in new markets, and expanding the joint venture’s operations in hubs dominated by other airlines. The same liberalized conditions created by the regional open-skies agreement will help to discipline oneworld and the other global alliances by making it easier for competitors and innovators to introduce new services. Without the U.S.-EU agreement, our competitive assessment and the proposed result would have been different.<sup>92</sup>

Provided that transatlantic markets continue to be governed by a regional open-skies agreement that promotes new entry regardless of national borders, and provided that the slot remedy is adopted, we see no persuasive basis upon which the applicants could impose and sustain supra-competitive prices or reduce service quality below competitive levels. Under these circumstances, we tentatively find that the proposed alliance, as conditioned, will not substantially reduce competition. Therefore, we tentatively conclude that the proposed alliance is not adverse to the public interest and should be approved under § 41309.

### **C. Tentative Grant of Antitrust Immunity**

In this section, we consider whether to make a grant of antitrust immunity to the applicants under § 41308 to implement their proposed alliance. Since we tentatively determined that the Alliance Agreements, as conditioned, would not substantially reduce competition, this is a discretionary matter. It is not our policy to confer antitrust immunity simply on the grounds that agreements do not violate the antitrust laws. We are only willing to grant immunity if the parties to agreements would not otherwise go forward without it, and if we find that the public interest requires that we grant antitrust immunity. Our public interest examination focuses on the public benefits that will be created by the proposed alliance and the extent to which a grant of antitrust immunity is required to realize those public benefits.

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<sup>92</sup> If the U.S.-EU open-skies agreement were to be suspended or scaled back, we would have to re-evaluate oneworld’s proposed immunity and authority. This is consistent with our guidance in the recent Star and SkyTeam cases. *See* Star, Docket DOT-OST-2008-0234, Order 2009-7-10 at 4, FN15 (July 10, 2009); SkyTeam II, Docket DOT-OST-2007-28644, Order 2008-5-32 at 4 (May 22, 2008) (adopting all tentative findings and conclusions in the Show Cause Order, which directly raised the importance of a regional open-skies agreement on page 13).

## 1. Benefits of the Proposed Alliance

The record centers on the question of whether the proposed alliance will generate sufficient public benefits to justify a grant of immunity. Several interested parties argue that benefits are lacking, while the applicants attempt to show, at length, that there are many substantial public benefits.

In sum, the interested parties have advanced the following arguments: DOJ argues that there are insufficient benefits to justify a grant of immunity; APA argues that the proposed alliance will have a detrimental effect on U.S. labor; ITSA/ASTA argue that the proposed alliance will harm travel agents and consumers because the applicants will be able to negotiate jointly with travel agents and independent travel distributors; and Spirit argues the proposed alliance will distort competition in restricted markets where American and its partners hold a limited number of traffic rights. Additionally, Virgin Atlantic argues that the joint venture will stifle competition and fail to generate the efficiencies claimed by the applicants. Virgin Atlantic highlights certain provisions of the joint venture agreement (the JBA) that it claims give British Airways control over pricing and capacity in U.S.-London markets. Rather than enhancing competition, Virgin Atlantic concludes that the alliance will allow British Airways to protect its market share and revenue.<sup>93</sup>

After evaluating the arguments and information in the record, we tentatively find that substantial public benefits are likely to be realized by the proposed alliance. The applicants provide a detailed account of how they will jointly manage their capacity and organize decision-making to take advantage of currently unexploited efficiency gains that are likely to benefit the traveling and shipping public, as well as the airlines and their employees.

Specifically, we tentatively find that the following public benefits are likely: (1) more options for travelers in numerous transatlantic city pairs, based on the applicants' ability to closely coordinate schedules and inventory and to achieve fare combinability; (2) lower fares resulting from the reduction in double marginalization on multi-segment itineraries; (3) volume discounting made possible when the alliance partners carry more passengers per flight and enjoy more efficient utilization of capacity; (4) expanded access to discounted fares resulting from coordinated inventory; (5) reduced costs through shared sales, marketing, distribution, procurement, fleet assignment, and frequent-flyer program management; and (6) expanded opportunities to earn and redeem miles due to the airline partners' ability to share risks. Additionally, we note the applicants' intentions to introduce new nonstop services and facilitate long-term operational changes, product enhancements, and investment in infrastructure.<sup>94</sup>

A grant of antitrust immunity is, we tentatively find, necessary to achieve most of these benefits, despite the concerns raised by some parties. We take seriously DOJ's concerns about double marginalization effects. We understand DOJ's point that economic studies, including the Department's own studies of transatlantic competition, do not prove that airlines can only eliminate multiple markups by engaging in activity that raises antitrust concerns.<sup>95</sup> Here, however,

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<sup>93</sup> See Answer of Virgin Atlantic at 72-73 (May 18, 2009).

<sup>94</sup> Joint Application at 24-26, 33-34, Exhibit JA-13, Exhibit JA-19 at 9-10 (Aug. 14, 2008).

<sup>95</sup> DOJ Comments at 26 (Dec. 21, 2009).

we do not expect the elimination of multiple markups to result from any anticompetitive conduct. Consistent with economic theory and the experience of other alliances, the proposed alliance is likely to significantly reduce fares on “interline” routes in which only one partner operates one segment and only another partner operates another segment.<sup>96</sup> The cooperation of the partners over the joint network increases overall traffic flows and revenue, providing each partner with the necessary incentive to avoid self-interested markups on a particular segment that they operate, which benefits consumers and the alliance as a whole. Many of the synergies of the alliance, including the ability to cooperatively price itineraries with multiple segments, would not occur but for the Alliance Agreements.

We have considered Virgin Atlantic’s concerns that antitrust immunity is not required because many of the public benefits of the transaction are already in place and because it is not necessary to facilitate the introduction of new services.<sup>97</sup> We addressed those concerns above when we tentatively found that the proposed alliance would create public benefits that are directly attributable to immunity. Among other things, the applicants have demonstrated that they will be able to implement a broader code-share, enable full frequent flyer reciprocity, and pursue the substantial microeconomic benefits of alliance cooperation, such as improved economies of scale, scope, and density. Through these economies they expect to be able to launch new services, such as Dallas/Ft. Worth-Madrid.<sup>98</sup> While we agree with Virgin Atlantic that antitrust immunity is not required as a legal or operational matter to launch new routes,<sup>99</sup> in some circumstances new routes are likely to be introduced more quickly where alliance partners have integrated and pro-competitive arrangements to aggregate behind and beyond traffic and share risks. In this way, alliances such as Northwest/KLM, now part of SkyTeam, have been able to introduce and sustain a large number of frequencies between their hubs, which benefits travelers in the local and connecting markets.<sup>100</sup>

We recognize Virgin Atlantic’s concern that the large degree of overlap between American and British Airways both eliminates competition and limits the public benefits that are possible from the alliance. That point highlights a key question raised by this case: whether the potential benefits of the applicants’ cooperation in a number of markets, including some large markets between the United States and the United Kingdom, outweigh the potential competitive harm that could result from the reduction of competition on select overlap routes, including some routes in which there is limited available capacity due to infrastructure constraints. Provided that the applicants abide by the conditions we have proposed, we tentatively find that the benefits outweigh the potential harm.

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<sup>96</sup> See, e.g., Brueckner, J.K. & Whalen, W.T., The Price Effects of International Airline Alliances, *Journal of Law and Economics*, 43: 503-545 (2000). See also Brueckner, J.K., International Airfares in the Age of Alliances: The Effects of Code-Sharing and Antitrust Immunity, *Review of Economics and Statistics*, 85: 105-118 (2003); Whalen, W.T. A Panel Data Analysis of Code Sharing, Antitrust Immunity, and Open Skies Treaties in International Aviation Markets, *Review of Industrial Organization*, 30: 39-61 (2007). For an application of double marginalization to this case, see Joint Application, Exhibit JA-19, Affidavit of the Brattle Group, (Aug. 14, 2008).

<sup>97</sup> See Answer of Virgin Atlantic at 68-71 (May 18, 2009).

<sup>98</sup> Joint Application at 24 (Aug. 14, 2008).

<sup>99</sup> DOJ also made this argument. See DOJ Comments at 23-25 (Dec. 21, 2009).

<sup>100</sup> Joint Applicants’ Supplemental Comments at 4-7, Declaration of Don Casey at 6 (Sept. 8, 2009).

We are persuaded by two factors. First, the applicants present for our consideration a detailed and integrated joint venture agreement. Where applicants seek immunity to combine networks that overlap substantially, it is important for them to demonstrate that their proposed arrangement will lead to efficiency-enhancing integration. As we explained in the SkyTeam and Star cases, a “metal-neutral” joint venture allows the joint venture partners to share risks and rewards fairly and it incentivizes them to offer customers the best available products and services, without regard to which partner owns and operates the aircraft.<sup>101</sup> Iberia’s inclusion in the application, and its participation in the joint venture, is important to the public benefits analysis. Unlike Heathrow, Iberia’s hub at Madrid Barajas has available capacity. Madrid’s airport is capable of 120 aircraft movements per hour but only handles approximately 98.<sup>102</sup> If the joint venture is implemented properly, the participants will have the option (and incentive) to utilize the Madrid hub to boost traffic and work around the constraints at Heathrow, sharing in the risks and rewards.

Second, the proposed transaction facilitates a third strategic alliance. This too is a public benefit. Oneworld will become more competitive in a number of markets, exerting increased competitive discipline on fares and services in those markets. Consumers getting a third viable option will enjoy more destinations, better connections, improved schedules, and better frequent flyer benefits. These benefits complement the annual surplus from price reductions and increased traffic on current interline routes.<sup>103</sup>

Of course, many of the public benefits discussed above depend upon the implementation of the joint venture. Yet the participants in the venture have not finalized the terms of the JBA. They await a grant of immunity to share the competitively sensitive information necessary to do so. Consistent with the recent SkyTeam and Star cases, we propose to limit the duration of the immunity unless and until the applicants complete their negotiations.<sup>104</sup> This condition will encourage the applicants to implement the joint venture and allow the consumer benefits to be realized quickly.

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<sup>101</sup> SkyTeam II, Docket DOT-OST-2007-28644, Order 2008-4-17 at 3 (April 9, 2008); Star, Docket DOT-OST-2008-0234, Order 2009-4-5 at 4 (April 7, 2009).

<sup>102</sup> Joint Application at 28 (Aug. 14, 2008).

<sup>103</sup> See Joint Application, Exhibit JA-19, Affidavit of the Brattle Group at 8, (Aug. 14, 2009). We understand Mr. Horan’s critique of the applicants’ \$92 million estimate of the benefits from cooperative pricing, as well as his general skepticism that the applicants have submitted sufficient evidence showing that public benefits will be realized by the alliance. Comments of Hubert Horan (Jan. 31, 2010). We disagree, however, with Mr. Horan’s total rejection of the Brueckner and Whalen models, which demonstrate the important principle that alliances facilitate cooperative pricing that can reduce prices and enhance joint products and services that consumers value. Mr. Horan does not recognize that antitrust immunity and the resulting integration of planning and pricing can fundamentally change the economics of connecting routes when each carrier participating in an itinerary shares equally in the benefits of cooperatively selling it. He correctly notes the role of airline revenue management systems, but fails to acknowledge that the purpose of these systems is to maximize revenue for the host carrier. As a result, even single-connect itineraries involving more than one carrier can have vastly different total revenue values to the host carrier, depending on which carrier operates the long-haul segment. When carriers are metal-neutral, they price, market, and revenue manage accordingly, opening availability of more seats and fares throughout the cabin on more itineraries in a given city pair.

<sup>104</sup> See SkyTeam II, Docket DOT-OST-2007-28644, Order 2008-4-17 at 15-16 (April 9, 2008); Star, Docket DOT-OST-2008-0234, Order 2009-4-5 at 19 (April 7, 2009). The applicants in this case have indicated that they will accept this condition. See Joint Application at 1 (Aug. 14, 2008).

## 2. Remedies to Achieve Full Public Benefits

While the proposed alliance offers substantial public benefits, several parties express concerns about the ability of the alliance members to capture a majority of the benefits for themselves, without passing them on to consumers, employees, and the public at-large. We agree with some of those concerns and tentatively conclude that some remedies are necessary to ensure adequate public benefits.

We recognize the concerns cited by Virgin Atlantic concerning the structure of the joint venture. Certain aspects of the joint venture are inconsistent with the Department's policy standard for granting antitrust immunity in cases involving large airlines and a substantial amount of network overlap.

In the recent SkyTeam and Star cases – which featured a degree of network overlap that is comparable to this case – we required the applicants to make a strong showing that immunity is justified to achieve specific, demonstrable public benefits at the time the immunity is requested.<sup>105</sup> To meet this standard, the applicants submitted joint venture agreements with sufficiently detailed terms to assess the competitive implications of the alliance and explained their plans to integrate core business functions and reconcile the network overlap that existed between them.<sup>106</sup> Our analysis of public benefits turned on the extent to which the partners had aligned their economic incentives and achieved metal neutrality. As the Joint Applicants in this case have indicated,<sup>107</sup> the alignment of incentives and metal neutrality is necessary for the partners to promote the interests of the alliance as a whole and to generate the most valuable consumer benefits from alliance cooperation such as the introduction of new capacity, reduced fares, and more efficient use of inventory across the joint network.

We tentatively find that, without changes to the joint venture agreement, the applicants will fall short of meeting the standard. Certain of the JBA's terms described by Virgin Atlantic, for which they have sought confidential treatment, contain competitive restraints that divide the governance of the venture among the partners and potentially allow a single carrier to exercise control over key functional areas on behalf of the alliance.<sup>108</sup> The terms permit a partner to act in its own economic interest, even if it means preventing the others from bringing new products and services to market if there is a demand. Thus, the record does not yet show that the applicants have aligned their economic incentives and made their best efforts to achieve metal neutrality, which would be in the best interest of consumers in this case.

We need not determine that the competitive restraints are contrary to the antitrust laws. The applicants have chosen to request a grant of immunity before they proceed. We will not grant that

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<sup>105</sup> See SkyTeam I, Docket DOT-OST-2005-19214, Order 2005-12-12 at 34 (Dec. 22, 2005); SkyTeam II, Docket DOT-OST-2007-28644, Order 2008-4-17 at 14 (April 9, 2008); Star, Docket DOT-OST-2008-0234, Order 2009-4-5 at 17-19 (April 7, 2009).

<sup>106</sup> SkyTeam II, Docket DOT-OST-2007-28644, Order 2008-4-17 at 15 (April 9, 2008); Star, Docket DOT-OST-2008-0234, Order 2009-4-5 at 19 (April 7, 2009).

<sup>107</sup> Joint Application at 8 (Aug. 14, 2008); Joint Applicants Supplemental Comments at 19-22 (Sept. 8, 2009).

<sup>108</sup> See Joint Application at Exhibit JA-1, page 92 (Aug. 14, 2008) (Joint Business Agreement at § 3.3, §3.3.4, §3.3.4.1, §9, and § 5.6).

request unless and until we are satisfied that immunity is required by the public interest.<sup>109</sup> In these circumstances, we do not think that immunity is required where the applicants have introduced competitive restraints that are not necessary to implement the joint venture or achieve the most valuable public benefits. We tentatively find, instead, that consumers will derive greater benefits from an arrangement that better promotes capacity growth over multiple hubs and better demonstrates consensus-based governance and a commitment by the partners to act in the interest of the alliance as a whole.<sup>110</sup>

Therefore, as a condition of obtaining a final grant of immunity, we tentatively find that it is necessary for the applicants to make changes to the JBA to eliminate these concerns. We provide the applicants with additional guidance to make these changes in Appendix B.<sup>111</sup>

We understand APA's root concern that the alliance could threaten the jobs of U.S. labor. With the changes we are requiring to the joint venture agreement, we believe the applicants will be in a better position to increase overall capacity and share the growth opportunities. While it is true that the joint venture involves revenue sharing, the joint venture partners must maintain their networks and execute their business plans to remain profitable under the venture. In short, we believe that American, like its partners, has the incentive to increase its flying if possible, which could provide more opportunities for its pilots and other labor groups.

We tentatively disagree with ITSA/ASTA regarding the need to restrict the ability of the alliance partners to cooperate in the area of marketing and sales. ITSA/ASTA's claim, which alleges that the Joint Applicants would gain increased monopsony power over travel agents by virtue of the alliance,<sup>112</sup> closely mirrors the argument they made in the recent Star Alliance case. In that case, the Department considered the merits of the travel agents' claim in detail. In the Final Order, we found that ITSA/ASTA did not meet the burden of proving that antitrust immunity would result in anticompetitive effects.<sup>113</sup> Specifically, the travel agents failed to prove that the alliance would be able to exercise market power and harm travel agents, and ignored the fact that reductions in travel agent commissions are attributable to structural changes in the travel distribution market and not an increase in immunized alliances.

Here, the facts are substantially the same. We tentatively find that ITSA/ASTA have similarly failed to provide persuasive arguments that the Joint Applicants would be able to exercise monopsony power and have the ability to increase prices and reduce capacity. Ultimately, an immunized oneworld would carry 22.3 percent of passengers in the broadly defined transatlantic market (see Table 1, above). Just as in the Star case, this share is not sufficient to prove that there would be any anti-competitive effects for travel agents or consumers overall. Furthermore, as elaborated in the Star Final Order, the ITSA/ASTA answer assumes that grants of immunity have resulted in reductions in travel agent commissions and does not consider structural changes to the travel industry.

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<sup>109</sup> See 49 U.S.C. § 41308(b).

<sup>110</sup> Cf. Answer of Virgin Atlantic at 71-73 (May 18, 2009).

<sup>111</sup> The appendix is available to interested parties pursuant to Rule 12 of the Department's Rules of Practice.

<sup>112</sup> Answer of ITSA/ASTA at 7 (May 18, 2009).

<sup>113</sup> Star, Docket DOT-OST-2008-0234, Order 2009-7-10 at 23 (July 10, 2009).

ITSA/ASTA also allege that a grant of antitrust immunity would result in competitive harm in U.S.-London markets by augmenting oneworld's market power at Heathrow.<sup>114</sup> In our analysis of U.S.-London markets above, the Department tentatively finds that the proposed alliance, as remedied, will not substantially reduce competition or enhance market power.

We are not persuaded by Spirit to limit the operations of the proposed alliance in Latin America. Spirit's request is focused on preventing code-share arrangements in select markets where there are still restrictions on new entry due to the lack of open-skies agreements. As we discussed in the Star show cause order, the Department's predicate for considering a request for antitrust immunity is an open-skies agreement between the United States and the homeland of the foreign carrier-applicant, not for every third-country market that may be served.<sup>115</sup> Spirit's concerns are understandable to the extent that entry into certain markets may be difficult. However, Spirit has failed to provide the Department with persuasive evidence that competitive harm in these markets would negate the broader network benefits that a grant of immunity would bring. As such, we tentatively decide not to jeopardize these benefits by limiting the points that can be served, without stronger evidence of competitive harm.

### **3. The Need for Antitrust Immunity**

Since we have tentatively found that the proposed alliance, as remedied, will deliver public benefits, we must now decide whether a grant of immunity is justified. Our policy is to grant immunity if the parties to the transaction would not otherwise go forward without it, and if we find that the public interest requires that we grant it. With regard to the latter element, we have found in previous cases, and we tentatively find here, that immunity is required by the public interest where the benefits are substantial and proximate to the granting of the authority.<sup>116</sup>

The applicants state that they will not proceed without a grant of antitrust immunity, due to the litigation risk inherent in the joining of two large networks and the commercial risks associated with the sharing of competitively sensitive information that would be necessary to complete the negotiations for the joint venture. They argue that a grant of immunity is necessary to achieve many of the public benefits of the transaction, including the closing of the transatlantic gap (for full code sharing and frequent flyer benefits), capacity and fare benefits attributable to integration under the joint venture, and joint corporate contracting, among others.<sup>117</sup>

Both DOJ and Virgin Atlantic challenge the applicants' position. As discussed more fully above, DOJ and Virgin Atlantic do not believe there are substantial public benefits that are attributable to a grant of immunity. They believe that whatever benefits the alliance will produce have been, or can be captured, through arms-length cooperation.

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<sup>114</sup> Answer of ITSA/ASTA at 20-23 (May 18, 2009).

<sup>115</sup> See Star, Docket DOT-OST-2008-0234, Order 2009-4-5 at 20 (April 7, 2009).

<sup>116</sup> See SkyTeam II, Docket DOT-OST-2007-28644, Order 2008-4-17 at 14-16 (April 9, 2008); Star, Docket DOT-OST-2008-0234, Order 2009-4-5 at 18-19 (April 7, 2009).

<sup>117</sup> Joint Application at 18-34, 58 (Aug. 14, 2008).

We tentatively find the applicants' position to be credible. Their third attempt to form an immunized alliance, made in conjunction with other partners under the oneworld umbrella, represents a deeper, more integrated and network-oriented approach. The efforts to integrate their entire global networks, with a focus on transatlantic markets, carry commercial risk. We tentatively find that immunity is necessary to facilitate the transaction and allow the partners to engage in the kind of revenue and benefit sharing that is necessary to alleviate the commercial risks and create substantial public benefits. It is highly unlikely that the parties would proceed with the proposed alliance absent a grant of antitrust immunity.

Based on the above public benefits analysis, we tentatively conclude that a grant of antitrust immunity is required by the public interest. Therefore, we tentatively make a grant of immunity to the applicants to implement the proposed alliance, subject to remedies and conditions.

#### **D. Tentative Conditions**

In this section, we summarize and explain all of the proposed conditions and remedies.

##### **1. Slot Transfers**

In Section IV(B), we tentatively found that it is necessary for the applicants to make available four Heathrow slot pairs at times usable for transatlantic services to offset the potential loss of competition associated with the joining of American's and British Airways' transatlantic networks. The slots would be made available to competitors in time for the start of the IATA 2011 Summer Season and would remain available for a period of 10 years from the date of issuance of a final order in this case. In our discussion, we proposed to earmark two slot pairs for Boston-London Heathrow service and indicated that the remaining two slot pairs could be used on a flexible basis for service in U.S.-Heathrow markets. Making available slot pairs in this way would reduce barriers to entry, enhance competition, and give competing airlines the opportunity to launch up to four new round trip flights between the U.S. and London.

We also asked parties to comment on a proposed implementing mechanism for the slot transfers. In the event that a mechanism is established in the final order, we would require the applicants to implement it expeditiously as a condition of keeping the antitrust immunity. Such a condition would be important to ensure that the potential competitive harm we identified is alleviated by the prospect of new entry. Thus, we propose to require the applicants to implement the slot transfer mechanism within three months of the issuance of a final order or else the antitrust immunity will automatically expire.

##### **2. Implementation of the Joint Venture**

In Section IV(C), we tentatively found that we should not make an indefinite grant of immunity due to the risk that many of the public benefits will not be realized unless the joint venture is implemented in a prompt fashion. We are proposing to require the applicants to submit evidence that the JBA has been implemented in order to keep the antitrust immunity. If, within 18 months of the issuance of a final order, they have not submitted verified statements attesting to the

full implementation of the joint venture and a copy of the executed joint venture agreement, the antitrust immunity granted to the proposed alliance will automatically expire.

We also tentatively found that it is necessary for the applicants to make changes in the text of the JBA to ensure that the applicants implement the venture in such a way so as to maximize public benefits. We are providing some guidance to assist the applicants as described further in Appendix B. The applicants should re-draft certain cited provisions of the JBA. The goal is to emphasize capacity growth over multiple hubs and enable the partners to act in the interest of the alliance as a whole. We expect these changes to be made and submitted on the record prior to the issuance of a final order.

### **3. Annual Reporting**

The competitive issues associated with the proposed alliance are complex. We tentatively find that it is necessary for the applicants to report to the Department concerning commercial developments in the alliance and the degree to which the public benefits envisioned in the application are being realized. As in the recent SkyTeam and Star decisions, we are proposing annual reports.<sup>118</sup> The reports should focus on progress made toward implementing the remedies and facilitating new entry, progress made toward achieving the alliance's stated goals, specific actions taken to implement each of the alliance agreements (including especially joint venture agreements), present or future planned cooperation among the alliance partners in all core airline functions, and a discussion of the public benefits that are being realized.

### **4. O&D Survey Data Reporting**

For many years, we have required foreign carriers to submit traffic data as a condition of obtaining immunity from U.S. antitrust laws. We ask those carriers to participate in the Department's Origin-Destination Survey of Airline Passenger Traffic ("O&D Survey"), which requires U.S. carriers to submit traffic data in markets they serve singularly or jointly with foreign airlines. Without foreign carrier participation in this effort, we would receive no detailed market information for passengers traveling to or from the United States when their entire trip is on foreign airlines, except for T-100 data for nonstop and single-plane markets. The absence of such foreign carrier data severely handicaps our ability to evaluate the competitive effects of alliances.

As in previous cases,<sup>119</sup> we have tentatively decided to require the foreign carrier applicants – British Airways, Iberia, Finnair, and Royal Jordanian – to report full-itinerary O&D Survey information for all passenger itineraries that contain a United States point. This duty encompasses all traffic to third countries in which the itinerary includes a U.S. point. Since the oneworld alliance has not relied on grants of immunity to a large extent, this is a new requirement for several of the applicants.<sup>120</sup>

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<sup>118</sup> See Star, Docket DOT-OST-2008-0234, Final Order 2009-7-10 at 26 (July 10, 2009); SkyTeam, DOT-OST-2007-28644, Order 2009-6-26 at 2 (June 26, 2009).

<sup>119</sup> See, e.g., United/ Lufthansa/ Austrian/ SAS/ Swiss/ LOT/ TAP/ Air Canada, Docket DOT-OST-2005-22922, Order 2007-2-16 (Feb. 13, 2007).

<sup>120</sup> Finnair already participates in the O&D Survey as a result of our previous grant of immunity to the American/ Finnair alliance, which contained the same condition. See American/ Finnair, Docket DOT-OST-2002-12063, Order

To prevent this reporting requirement from unfairly harming the foreign applicants' competitive positions, we tentatively decide to grant confidentiality to their O&D Survey reports and special reports on code-share passengers. Currently, we grant confidential treatment to all international Origin-Destination data. We propose to provide these data confidential treatment because of the potentially damaging competitive impact on U.S. airlines and the potential adverse effect upon the public interest that would result from unilateral disclosure of these data (data covering the operations of foreign airlines that are similar to the information collected in the Passenger O&D Survey are generally not available to the Department, to U.S. airlines, or to other U.S. interests).<sup>121</sup>

Our regulation, 14 C.F.R. Part 241 section 19-7(d)(1), provides for disclosure of international O&D Survey data to air carriers directly participating in and contributing to the O&D Survey. While we have tentatively found it appropriate to direct the foreign carrier applicants in this proceeding to provide certain limited O&D Survey data, they are not air carriers within the meaning of Part 241. The regulation, 14 C.F.R. Part 241, Section 03, defines an air carrier as “[a]ny citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation.” British Airways, Iberia, Finnair, and Royal Jordanian would have no access to the data filed by U.S. air carriers. Therefore, we would keep submissions confidential while maintaining the current restriction on access to U.S. air carrier O&D Survey data by foreign air carriers.

## **5. Withdrawal from IATA Tariff Coordination**

As we have found in earlier decisions, it is contrary to the public interest to permit immunized alliances to participate in certain price-related coordination that is already immunized within IATA tariff coordination. We therefore tentatively decide to condition our grant of antitrust immunity by requiring the Joint Applicants to withdraw, or to remain withdrawn, from participation in any IATA tariff activities that affect or discuss any proposed through fares, rates or charges applicable between the United States and any countries whose airline(s) have been or are subsequently granted antitrust immunity by the Department for participation in similar alliances. Such countries include the homelands of the applicants.<sup>122</sup> We tentatively find that this condition is in the public interest for the same reasons as stated in Order 2009-4-5.

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2002-7-39 (July 30, 2002). We tentatively find that Finnair should continue to report the O&D Survey information. Royal Jordanian was required to submit O&D Survey information for a period of time while it had antitrust immunity with America West. This order would require Royal Jordanian to regularly report the information.

<sup>121</sup> We treat the foreign airlines' O&D data as confidential, do not allow U.S. airlines any access to the data, and do not allow foreign airlines any access to U.S. airline O&D Survey data. We use these data only for internal analytical purposes.

<sup>122</sup> This condition currently applies to prices in markets that are subject to our prior antitrust immunity orders. Those markets are U.S.-Netherlands, U.S.-Germany (Order 96-5-27 at 17), U.S.-Denmark/ Norway/ Sweden (Order 96-11-1 at 23), U.S.-Austria (Order 2001-1-19 at 16), U.S.-Chile (Order 99-9-9 at 21), U.S.-Iceland (Order 2000-10-13 at 16), U.S.-Panama (Order 2001-5-1 at 11), U.S.-New Zealand (Order 2001-4-2 at 3), U.S.-Czech Republic/ France/ Italy (Order 2002-1-6 at 7), U.S.-Republic of Korea (Order 2002-6-18 at 14; Order 2003-5-18 at 12), U.S.-Finland (Order 2002-7-39 at 10), U.S.-Belgium (Order 2004-4-10 at 12), U.S.-Jordan (Order 2005-1-23 at 13), U.S.-Peru (Order 2005-10-8), U.S.-Poland/ Portugal/ Switzerland/ Canada (Order 2007-2-6), and U.S.-United Kingdom (Order 2007-9-

## 6. CRS Issues

Consistent with recent cases, we are not proposing any conditions regarding the management of Computer Reservations Systems (CRSs).<sup>123</sup> Any coordination between the applicants concerning the operation of separate businesses, such as CRSs, would not be transactions specifically approved or necessarily contemplated by our orders in this proceeding. While the Joint Applicants, individually or collectively, may maintain an interest in a CRS, the grant of immunity in this Order thus does not extend to their management of those interests.<sup>124</sup> On the other hand, the applicants' alliance relationships will likely require the coordination of the presentation and sale of the airlines' own services in the CRSs and each airline's operation of its internal reservations systems. Those activities will necessarily be covered by a grant of antitrust immunity.

## 7. Operation under a Common Name

Because implementation of the Alliance Agreements could raise important consumer issues and "holding out" questions, if the Joint Applicants choose to operate under a common name or use "common brands," they must seek separate approval from the Department prior to such operations. For example, it is Department policy to consider the use of a single air carrier designator code by two or more airlines to be unfair and deceptive unless the airlines give reasonable and timely notice to passengers of the actual operator of the aircraft.<sup>125</sup>

## 8. Standard Code Sharing Conditions

We are tentatively granting authority for the applicants to engage in blanket code sharing as a part of their alliance. The standard conditions for such code sharing are provided in Appendix A.

### ACCORDINGLY:

1. We direct all interested persons to show cause why we should not issue an order making final the tentative findings and conclusions discussed herein. Objections or comments to our tentative findings and conclusions shall be due no later than 45

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12). Also, by letter dated May 8, 1996, Northwest and KLM indicated their willingness to limit voluntarily their participation in IATA (Dockets DOT-OST-96-1116 and DOT-OST-95-618).

<sup>123</sup> See, e.g., SkyTeam II, Docket DOT-OST-2007-28644, Order 2008-5-32 (May 22, 2008).

<sup>124</sup> While any antitrust immunity granted in this proceeding would not cover the activities of Amadeus or any other system in which one of the Joint Applicants has an interest, we do, of course, have the authority under 49 U.S.C. § 41712 to prohibit any system operating in the United States from engaging in unfair or deceptive practices or unfair methods of competition. The Court of Appeals has upheld our determination that we had such jurisdiction. *Sabre, Inc. v. Dept. of Transportation*, 429 F.3d 1113 (D.C. Cir. 2005). We also have the authority to take action against conduct by a foreign system or a foreign airline that unreasonably discriminates against a U.S. system. 49 U.S.C. § 41310(g).

<sup>125</sup> See 14 C.F.R. § 399.82.

calendar days from the service date of this Order, and answers to objections shall be due no later than 15 calendar days thereafter;

2. We tentatively approve and grant antitrust immunity to alliance agreements between and among American Airlines, Inc. (along with its affiliates American Eagle, Inc. and Executive Airlines, Inc. d/b/a American Eagle), British Airways PLC (along with its affiliate OpenSkies SAS), Finnair OYJ, Iberia Líneas Aéreas de España, S.A., and Royal Jordanian Airlines, in so far as such agreements relate to foreign air transportation.<sup>126</sup> Without regard to other conditions described in the ordering paragraphs below, the approval and grant of antitrust immunity shall remain in effect indefinitely, provided that the Joint Applicants:
  - a. Submit for prior approval subsequent subsidiary agreements implementing their Alliance Agreements;<sup>127</sup>
  - b. Resubmit the Alliance Agreements before five years from the date of issuance of the final order in this case; and
  - c. Obtain prior approval if they choose to operate or hold out service under a common name or use common brands;
3. We tentatively renew the existing statements of authorization of American Airlines, Inc. and British Airways Plc and amend their existing authority to allow blanket reciprocal open-skies code sharing, subject to the conditions attached as Appendix A, under 14 CFR Part 212 for:
  - a. The display of British Airways Plc's "BA" designator code on flights operated by American Airlines, Inc. or its affiliates between (i) points in the United States, (ii) points in the United States and points in the European Union (either nonstop or via intermediate points in third countries), (iii) points in the United States and points in third countries, and (iv) points in the European Union and points in third countries; and
  - b. The display of American Airlines, Inc.'s "AA" designator code on flights operated by British Airways Plc between (i) points in the European Union, (ii) points in the European Union and points in the United States (either nonstop or via intermediate

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<sup>126</sup> The alliance agreements shall mean those agreements referred to on page 2 and Exhibits JA-1 and JA-4, of the Joint Application filed on August 14, 2008.

<sup>127</sup> Regarding this requirement, we do not expect the Joint Applicants to provide the Department with minor technical understandings that are necessary to implement fully their day-to-day operations but that have no additional substantive significance. We do, however, expect and direct them to provide the Department with all unredacted contractual instruments that implement or materially alter, modify, or amend the cooperation agreements, joint ventures, or confidentiality/antitrust guidelines. For avoidance of doubt, the applicants should submit any slot transfer agreements entered into pursuant to the immunized alliance and any agreements with a trustee. All documents shall be submitted to the Director, Office of Aviation Analysis.

points in third countries), (iii) points in the European Union and points in third countries, and (iv) points in the United States and points in third countries;

4. We tentatively determine that the Joint Applicants shall make available four slot pairs at London's Heathrow International Airport, subject to an expeditious and independent process, to duly authorized airlines that are not affiliates of the applicants or members of oneworld, for a period of at least 10 years from the issuance of a final order, at times that are usable for transatlantic services, for the purpose of introducing new services between the U.S. and London as described in this order.<sup>128</sup>

We tentatively determine that, unless the Joint Applicants implement a mechanism to transfer the slot pairs within three months of the issuance of the final order in this case, the authority herein shall expire and the grant of antitrust immunity shall be automatically withdrawn;

5. We tentatively direct the Joint Applicants to revise the Joint Business Agreement as set forth in section IV(D)(2) of this order and to submit the revised agreement on the record prior to the issuance of a final order in this case;
6. We tentatively direct the Joint Applicants to file with the Director of the Office of Aviation Analysis the following as evidence that the Joint Business Agreement has been implemented:
  - a. Verified statement(s) in Docket OST-2008-0252 attesting that the Joint Business Agreement has been executed and implemented pursuant to the terms described in the Joint Application, Exhibit JA-1 (Joint Business Agreement), and
  - b. A complete and unredacted copy of the Joint Business Agreement with appendices.

We tentatively determine that, unless the Joint Applicants make the filings described in this ordering paragraph within eighteen months of the issuance of a final order in this case, the authority herein shall expire and the grant of antitrust immunity shall be automatically withdrawn;

7. We tentatively direct the Joint Applicants to submit annual progress reports to the Office of Aviation Analysis, beginning one year from the date of issuance of a final order in this case, and continuing each year thereafter while the Alliance Agreements are effective;<sup>129</sup>
8. We tentatively direct American Airlines, Inc., British Airways PLC, Finnair OYJ, Iberia Líneas Aéreas de España, S.A., and Royal Jordanian Airlines to withdraw, or to

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<sup>128</sup> Section IV(B)(2) of this order indicates that 2 slot pairs are designated for Boston-Heathrow service and 2 slot pairs are designated for flexible use in U.S.-Heathrow city pairs.

<sup>129</sup> We expect the Joint Applicants to deliver the progress report by the close of business on the anniversary date. If that date falls on a weekend or federal holiday, the Joint Applicants may deliver the report by the close of business on the following business day.

- remain withdrawn, from participation in any International Air Transport Association tariff coordination activities that discuss any proposed through fares, rates, or charges applicable between the United States and any countries whose airlines have been or are subsequently granted antitrust immunity, or renewal thereof, to participate in similar alliance activities with a U.S. airline(s);
9. We tentatively delegate to the Director, Office of International Aviation, the authority to determine the applicability of the directive set forth in Ordering Paragraph 8 as to specific prices, markets, and tariff coordination activities, consistent with the scope and purpose of the condition, as previously described;
  10. We tentatively direct British Airways PLC, Finnair OYJ, Iberia Líneas Aéreas de España, S.A., and Royal Jordanian Airlines, to begin or to continue to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that include a U.S. point;
  11. We tentatively determine that we may amend, modify, or revoke this authority at any time without hearing;
  12. We grant the motions of Virgin Atlantic, submitted on January 20, 2010, and Hubert Horan, submitted on January 31, 2010, for leave to file late pleadings; and
  13. We will serve this Order on all parties on the service list in this docket.

By:

**SUSAN L. KURLAND**  
Assistant Secretary for Aviation  
and International Affairs

(SEAL)

*An electronic version of this document is available at: <http://www.regulations.gov>*

**APPENDIX A**  
**Code-share Conditions**

The statements of authorization are subject to the following conditions:

- (1) The statements of authorization will remain in effect only as long as (a) American and British Airways continue to hold the necessary underlying authority to operate the code-share services at issue, and (b) the code-share agreement providing for the code-share operations remains in effect;
- (2) American and/or British Airways must notify the Department no later than 30 days before they begin any new code-share service under the code-share services authorized here. Such notice shall identify the market(s) to be served, which carrier will be operating the aircraft in the code-share market added, and the date on which the service will begin. Such notices should be filed in Docket DOT-OST-2002-13861;
- (3) American and/or British Airways must notify the Department immediately if the code-share agreement under which these code-share services are operated is no longer in effect or if the carriers decide to cease operating all or a portion of the approved code-share services. Such notices should be filed in Docket DOT-OST-2002-13861;<sup>130</sup>
- (4) The code-sharing operations conducted under this authority must comply with 14 CFR Part 257 and with any amendments to the Department's regulations concerning code-share arrangements that may be adopted. Notwithstanding any provisions in the contract between the carriers, our approval here is expressly conditioned upon the requirements that the subject foreign air transportation be sold in the name of the carrier holding out such service in computer reservation systems and elsewhere; that the carrier selling such transportation (i.e., the carrier shown on the ticket) accept responsibility for the entirety of the code share journey for all obligations established in its contract of carriage with the passenger; and that the passenger liability of the operating carrier be unaffected;
- (5) Any service provided shall be consistent with the provisions of the U.S.-EU agreement, and all applicable agreements with other foreign countries involved. Furthermore, (a) nothing in the award of the blanket statement of authorization to American should be construed as conferring upon American rights (including code-share, fifth-freedom intermediate and/or beyond rights) to serve markets where U.S. carrier rights are limited unless American notifies us of its intent to serve such market and unless and until the Department has completed any necessary carrier selection procedures to determine which carrier(s) should be authorized to exercise such rights;<sup>131</sup> and (b) should there be a request by any carrier to use the limited-entry route rights that are included in American's authority by virtue of the blanket statement of authorization granted here, but that are not being used by American, the holding of such authority will not be considered as providing any preference for American in a carrier selection proceeding to determine which carrier(s) should be entitled to use the authority at issue.
- (6) The authority granted here is specifically conditioned so that neither American nor British Airways shall give any force or effect to any contractual provisions between themselves that are contrary to these conditions; and
- (7) We may amend, modify, or revoke the authority granted at any time without hearing at our discretion.

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<sup>130</sup> We expect this notification to be received within 10 days of such non-effectiveness or of such decision.

<sup>131</sup> The notice referenced in condition (2) above may be used for this notification.

**APPENDIX B**  
**Structural Changes to the Joint Venture**

[Redacted]

[Protected from Disclosure Pursuant to 14 C.F.R. Part 302.12. Persons who have filed appropriate affidavits in this docket, according to the guidelines set forth in the Department's August 19, 2008 Notice, may request the confidential version of this document from the DOT Dockets Office at 1200 New Jersey Avenue, SE, Washington, DC 20590.]