Served: September 5, 1997

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

Issued by the Department of Transportation
on the 5th day of September, 1997

Joint Application of **AMERICAN AIRLINES, INC.** **and** **BRITISH AIRWAYS PLC** under 49 U.S.C. Sections 41308 and 41309 for approval of and antitrust immunity for alliance agreement	**Docket OST-97-2058**

SCHEDULING NOTICE, DETERMINATION ON VARIOUS MOTIONS, AND OTHER MATTERS UNDER 14 C.F.R. 302.39

I. Application

On January 10, 1997, American Airlines, Inc. ("American") and British Airways PLC ("BA") (hereinafter "the Joint Applicants") filed in Docket OST-97-2058 an application for approval of and antitrust immunity for an "alliance agreement" (referred to also as "the Alliance") under 49 U.S.C. §§ 41308 and 41309.[1] The Joint Applicants also filed a motion under Rule 39 of the Department of Transportation's (hereinafter "the Department" or "DOT") regulations, 14 C.F.R. § 302.39, for confidential treatment of documents submitted in support of that application. Concurrently, American and BA filed applications in Dockets OST-97-2054, 2055, 2056, and 2057 for exemption and certificate/permit authority, to operate between the United States and the United Kingdom and beyond to numerous third countries, as well as an undocketed joint application for statements of authorization to engage in code-share activities.

II. Initial Procedural Determinations

[1] The application defines the "alliance agreement" to include the June 11, 1996, agreement to develop and carry out the alliance, any implementing agreements concluded pursuant to that agreement, and any subsequent agreements or transactions by the Joint Applicants pursuant to such agreements. In broad terms, the Alliance contemplates (a) coordination, through a joint venture or otherwise, of all passenger and cargo services that the two carriers operate between the U.S. and the European region and beyond, with profit sharing on North Atlantic alliance services, (b) code-sharing across each party's global networks where permitted by governmental authorities, and (c) worldwide reciprocity for mileage credit accrual and travel award redemption between frequent flyer programs of the Joint Applicants. The Alliance does not involve any exchange of equity or other forms of cross-ownership. Application, at 1-4.

On March 21, 1997, the Department found it appropriate to commence processing the alliance application and related authority requests concurrently with the ongoing bilateral open-skies negotiations with the United Kingdom.[2] At that time, the Department stated that its decision did not constitute a change in its policy and practice of requiring an open-skies agreement as one predicate to approving and granting antitrust immunity to an alliance application, even where that alliance is otherwise procompetitive. The Department also emphasized that *de facto* access to London-Heathrow Airport for U.S. carriers was among the necessary prerequisites to a possible grant of antitrust immunity in this proceeding. In taking this action, the Department stated that it was not making a determination that the application in Docket OST-97-2058 was substantially complete within the scope of 14 C.F.R. 303, Subpart E, and that, therefore, it was not yet establishing further procedures or deadlines.

On March 28, 1997, the Department granted limited interim access to certain information filed by the Joint Applicants in Docket OST-97-2058 for which they had requested confidential treatment, and directed the Joint Applicants to file a "Vaughn" index describing and justifying all documents withheld by American/BA for *in camera* inspection to determine their relevance. Furthermore, the Department noted that it would be difficult to rule on whether the alliance application was substantially complete until determinations could be made on the relevance of the withheld documents, which had been referenced as potentially within the scope of the DOT staff's initial information request, to our consideration of the application.[3]

III. Initial *In Camera* Submissions and Responsive Pleadings

On March 31 and April 7, 1997, American and BA, respectively, filed the supplemental descriptions requested in Order 97-3-42.[4] The Joint Applicants maintain that the documents described in their individual responses satisfy the Department's standards for *in camera* review. The Joint Applicants also argue that the information should be withheld from public disclosure.

On April 16, 1997, Continental Airlines, Inc. ("Continental"), Delta Air Lines, Inc. ("Delta"), Trans World Airlines, Inc. ("TWA"), United Air Lines, Inc. ("United"), US Airways, Inc. ("US Airways"), Virgin Atlantic Airways Limited ("Virgin"), and the City of Philadelphia (Division of

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2 By Order 97-3-4, issued March 21, 1997, the Department (a) dismissed the motion of United Air Lines, Inc. for an investigation in Docket OST-96-1850 to the extent inconsistent with the order, (b) denied the motion of Delta Air Lines, Inc. for a stay of all formal procedures in connection with the applications filed by the Joint Applicants in the above-captioned dockets, and (c) denied the motion of Trans World Airlines, Inc. for dismissal of the applications for authority filed in Dockets OST 97-2054 through 97-2057, and the request for a Statement of Authorization to engage in code sharing.

3 Order 97-3-42, served April 3, 1997.

4 At that time, we directed interested parties to file comments on the Joint Applicants' Motions for confidential treatment within seven business days after submission of the requested descriptions.

Aviation) filed answers/comments opposing the Joint Applicants' motion for confidentiality and/or *in camera* treatment.

Continental opposes the Joint Applicants' request for *in camera* review of documents relating to (1) Heathrow slots, (2) London market shares, (3) correspondence with the Office of Fair Trading, and (4) terms of the Joint Applicants' Alliance and the Joint Applicants' possible alliances with other airlines. Continental says that these documents are relevant to the DOT's evaluation of the public interest concerns raised by this application, and that the Joint Applicants have failed to demonstrate that the Department's normal confidentiality procedures under Rule 39 are insufficient to protect the Joint Applicants' competitive and commercial interests.[5] Continental also urges the Department to deny the Joint Applicants' request for confidential treatment of all other documents submitted by the Joint Applicants that do not contain commercially or competitively-sensitive information.

Delta maintains that a number of documents for which Rule 39 confidentiality was requested by the Joint Applicants do not warrant confidential treatment on the basis of any applicable FOIA exemption standard (citing, for example, AA 0001040 - 1041, AA 0005196 - 5197, AA 0005198 - 5235, AA 0006822 - 6830, SS 0007143 - 7150, AA 0007151 - 7158, BAP 15065, BAP 15094 - 15115, BAP 20042 - 68).[6] Moreover, Delta argues that the Joint Applicants have failed to meet their burden of demonstrating their position that certain withheld/redacted information is irrelevant to the competitive and public interest issues in this case, or that the Department's normal confidentiality procedures would not protect the alleged competitive and commercial interests of the applicants.

Finally, with respect to procedural timing, Delta maintains that interested parties should be given adequate opportunity to have access to all relevant documents before being required to submit substantive comments on the proposed alliance. Delta urges the Department to allow a period of not less than 45 days after the Department acts on the Joint Applicants' Motion for Confidentiality and the parties have received access to all documents submitted in the record.

TWA maintains that various documents described by the Joint Applicants should be made available to the interested parties in this proceeding on a confidential basis.[7] TWA says that the Joint Applicants have withheld/redacted certain documents/information that are relevant to the Department's evaluation of this case, specifically, data generally relating to (1) plans for operation and projections of future revenues, (2) Heathrow slots, (3) alliances with other airlines, (4) "Project Bermuda," and (5) BA's discussions with the British government. TWA argues that the Joint Applicants have failed to justify withholding these documents from the record of this

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5 Continental also states that the Joint Applicants have failed to provide an "index" to the documents for which they are seeking confidential treatment, as required under 14 C.F.R. § 302.39(e)(2)(i).

6 Delta says that these documents contain certain press "releases/inquires," and charts that do not contain any confidential data.

7 Answer at 1.

case, and that there is no basis for concluding that American or BA will be damaged by limited release of the documents to counsel and outside experts for the interested parties.

United argues that the Joint Applicants are proposing to exclude from the record several categories of documents and data that are relevant to the issues to be considered in this proceeding.[8] They further contend that aside from conclusory statements regarding the commercial sensitivity of these documents and data, neither of the Joint Applicants have offered sufficient justification for the exclusion of such documents from the record. United further states that the Joint Applicants have failed to explain why the Department's normal limited access procedures would not be sufficient to protect the confidentiality of these documents and data. United maintains that any documents addressing (1) other potential alliance partners, (2) impact of slot divestiture, (3) impact on competition, and (4) airport facilities are relevant to this proceeding and should therefore be included in the record.

While not maintaining that the various *in camera* documents withheld by the Joint Applicants should be denied confidential treatment by the Department, US Airways states that these materials are relevant and "critical" documents relating to the central issues presented by the joint application. US Airways urges the Department to require the Joint Applicants to file in the record of this case certain documents identified as follows: American Response Section II, ¶¶ 1-2, 4-10, and 12-15; and Section III, ¶¶ 4-12, 14-25, 27-30, 35-39 and 41; and BA Response ¶¶ 10-19, 26-37, 39-63 and 65-72.

US Airways asserts that these documents relate to particular analyses of the type required by 49 U.S.C. § 41309, which according to US Airways requires a detailed cost-benefit analysis both of the agreement and alternatives to the agreement. US Airways says that the documents are "unquestionably" relevant to this proceeding and do not merit *in camera* protection. Moreover, US Airways says that the Joint Applicants assertions that this is not the type of detail that the Department has found to be relevant is "wrong." US Airways urges the Department to require the Joint Applicants to make these documents available for restricted Rule 39 review by counsel and outside experts of the interested parties.

Virgin opposes the Joint Applicants' request to withhold certain documents from the record that Virgin understands to be relevant to the issues raised by this application. Virgin argues that all relevant documents must be included and made available at least to "qualified" persons executing confidentiality affidavits. Virgin also maintains that the Joint Applicants' claims of irrelevance simply "strain credulity." Based on Virgin's understanding of the *in camera* document descriptions offered by the Joint Applicants, Virgin states that many of the documents appear so clearly relevant to the basic statutory inquiry that "a failure to include them in the record would represent a fundamental denial of the procedural due process rights of interested parties."

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8 United also asserts that the Joint Applicants have failed to provide an index of the material for which they seek confidential treatment. United argues that once an index has been produced, the interested parties should be afforded an opportunity to respond to the motions for confidential treatment.

The City of Philadelphia states that the *in camera* documents being withheld by the Joint Applicants are relevant to this case and therefore urges the Department to deny American's and British Airways' requests for *in camera* treatment for the documents identified in their respective responses to Order 97-3-42. The City maintains that in order for it and other interested parties to formulate a response to the Joint Applicants' application, all relevant information must be filed in the record.

IV. Initial Review Determinations

On May 16, 1997, the Department notified the Joint Applicants that it had completed an initial review of the application and had determined that (1) filings of certain reports, meeting notes, and studies had to be updated, (2) certain documents and reports required clarification and further explanation of relevant details and/or key assumptions, and (3) certain documents or analyses had to be supplemented or expanded to include additional material. The Department found that each of these items was relevant to its determination as to both the public benefits and the competitive impact of the proposed alliance.[9]

Additionally, by letters dated May 19, 1997, the Department notified each of the Joint Applicants that it had completed an initial review of the general descriptions of documents requested in Order 97-3-42. At that time, the Department found that certain items were not sufficiently described to allow it to determine relevancy regarding its public interest assessment of the merits of this application. Therefore, the Department directed American and British Airways to submit certain documents identified by the Joint Applicants in their respective "Vaughn" indices for *in camera* review to determine relevancy.[10]

Finally, in order to facilitate *in camera* review of the confidentially filed materials by interested parties, the Department, by letter dated June 2, 1997, directed each of the applicants to submit a subject-index for the materials that each had filed under Rule 39. At that time, the Department determined that the subject-indices should, at a minimum, identify (1) based on the Department's Preliminary Antitrust Immunity Evidence Request of November 26, 1996, the evidence request item (by number and description) to which the materials were responsive, (2) the associated box number, and (3) the associated Bates number or range.[11]

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9 Order 97-5-13 served May 16, 1997.

10 The Department directed American to submit the documents identified in the carrier's index as items II. 6 and 15, and III. 31, 32, 33 and 34; and directed British Airways to submit the documents identified in the carrier's index as items 1, 4, 23, 25, 64 and 65 to the Department's Office of Aviation Analysis for further review. The staff reviewed these documents on August 18, 1997.

11 American and British Airways each filed an index on June 5, 1997.

V. Request for Modification and Clarification of Order 97-5-13

On May 23, 1997, TWA filed a motion for modification and clarification of Order 97-5-13. TWA urges the Department to rule in advance of its submission by the Joint Applicants that any supplemental materials relating to schedule and traffic information should be filed in the public record. TWA maintains that, if the Department provides for confidential treatment of these data, review by interested parties will be "extremely" difficult because the documents will only be available at the offices of the Joint Applicants or at the DOT. TWA says that the requirements to use confidential documents in a public hearing or in public comments will raise "unnecessary complexity."

TWA also notes that the Department has required the Joint Applicants to supply certain supplemental data not only on paper, but also on floppy disk. TWA says that the Joint Applicants should be required by the Department to provide copies of the floppy disks to other parties. Finally, TWA states that the Joint Applicants should be required to include simulated Computer Reservations System ("CRS") displays for all overlap city-pairs.

On June 4, 1997, American and British Airways filed a joint answer opposing TWA's motion for further expansion of the information requirements imposed by Order 97-5-13. Specifically, the Joint Applicants argue that the Department should not rule on the confidentiality of supplemental information/data in advance of its submission; should not require the distribution of confidential information on floppy disks; and should not add more city-pairs to the "immensely burdensome item 19 (simulated CRS displays)" required by Order 97-5-13.

On June 9, 1997, TWA filed a motion for leave to file and a reply suggesting a further modification of our item 19 (simulated CRS displays).[12]

VI. Motion to Require Supplementary Information

On July 18, 1997, Continental filed a motion to require certain additional information. Continental asks the Department to require the Joint Applicants and the TACA Group carriers[13] to submit information related to their joint investments in and alliances with Aerolineas Argentinas, Austral Lineas Aereas S.A. ("Austral") and Iberia, Lineas Aereas de Espana, S.A. ("Iberia"), give interested parties adequate opportunity to comment on this information, and suspend further proceedings in the interim.[14]

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12 We will grant TWA's motion for leave to file.

13 The TACA Group consists of six Central American carriers: Aviateca S.A., Compania Panamena de Aviacion S.A., Lineas Aereas Costarricenses S.A., Nicaraguense de Aviacion S.A., TACA International Airlines S.A. and TACA de Honduras S.A. De C.V. *See* Docket OST-96-1700.

14 Continental has asked the Department to direct that similar supplemental submissions be filed in the American and TACA Group Reciprocal Code-Share Services Proceeding, Docket OST-96-1700.

On July 24, 1997, TWA filed in support of Continental's motion. On July 29, 1997, Delta, the City of Houston, and United filed in support of Continental's motion.

TWA states that the issues raised by Continental not only make it essential for the Department to require this information, but also to arrange for an oral evidentiary hearing to examine the competitive consequences of the multi-carrier arrangements intended by the applicants.

Delta maintains that important competition and public policy issues are raised by the proposed arrangements among American, Aerolineas Argentinas, British Airways, Iberia, and Austral. Delta states that the public interest compels a thorough evaluation of the interrelationships between and among the new cooperative arrangements and the American/British Airways alliance pending in this case.

United agrees with Continental that American's plan to invest in Iberia and Aerolineas Argentinas and to code-share with those carriers needs to be reviewed in the context of this case.[15]

The City of Houston agrees that this proceeding should be put on hold until the applicants have submitted information on these new reciprocal agreements and all interested parties have been given an opportunity to comment on those submissions.

On July 25, 1997, the TACA Group carriers (collectively, "TACA") filed an answer opposing Continental's motion. As an initial matter, TACA states that they are not parties, nor have they filed comments, in this proceeding. TACA argues that Continental's motion is a "blatant and unjustifiable" attempt to further delay both the American/British Airways and American/TACA proceedings. They further state that, individually or collectively, they are not parties to any of the proposed transactions described by Continental.[16] Moreover, TACA argues that the existing code-share agreement between TACA and American does not impose any obligation on TACA to enter into any type of code-share relationship or other alliance with any other carrier, including the carriers identified in Continental's motion. Therefore, the TACA carriers assert that they have no documents or information that would be responsive to Continental's proposed requests.[17]

On July 29, 1997, American filed an answer opposing Continental's motion. American states that it has reached agreements to create separate cooperative alliances between American and Iberia, on the one hand, and American and the Argentine carriers, Aerolineas Argentinas and Austral, on the other hand. American states that these respective alliances, subject to the negotiation of final documentation, provide for frequent-flyer relationships and reciprocal code-sharing services.

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15 Answer at 2, fn 1.

16 Answer at 3.

17 Answer at 2 and 4.

Regarding these distinct code-share relationships, American says that it does not presently intend either to seek antitrust immunity for these respective cooperative arrangements, or to incorporate Austral, Aerolineas Argentinas, or Iberia as additional members of the proposed immunized alliance between American and British Airways.[18] Further, American states that, if and when finalized, each of these separate code-share arrangements "should be considered by the Department in separate proceedings as they are submitted for approval."

American states that these separate arrangements are not expected to have a direct impact on the American/British Airways alliance. Specifically, as to its relationship with Iberia, American states that it will have no role in the American/British Airways alliance in terms of common corporate strategies, marketing, yield management, capacity planning or pricing. American and British Airways state that they do not anticipate joint discussions of their "independent" relationships with Iberia concerning these various integration matters. American says that it intends to engage in a traditional code-share relationship with each of these carriers, with limited coordination to improve customer service while maintaining competition where the two carriers offer overlapping service.[19]

Finally, American notes that any future decision to include any of these carriers as a fully immunized member of the proposed American/British Airways alliance would be subject to an additional application for antitrust immunity. At that time, American states, interested parties would then have an opportunity to assess the public interest concerns associated with the inclusion of a third member in an American/British Airways alliance.

On August 5, 1997, British Airways filed a motion for leave to file and a consolidated reply opposing the answers in support of Continental's motion.[20] British Airways states that the Department has earlier requested and received documents relating to the Joint Applicants consideration of additional alliance partners, which included documents relating to Iberia. British Airways says that it fully intends to code-share with Iberia, but that it has "no current intentions to seek antitrust immunity for its Iberia relationship or otherwise incorporate Iberia as a third member of the American/British Airways immunized alliance."

Finally, British Airways opposes the proposal requesting an evidentiary hearing, maintaining that such a forum will only delay the proceeding unnecessarily. BA asserts that no additional relevant information would be produced by such a hearing, and that the evidence already requested and produced provides the Department with an adequate record for consideration of this case.

VII. Evidentiary Response to Order 97-5-13 and Responsive Pleadings

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18 *See* answer at 4, and American's response of July 25, 1997, at 10.

19 *See* American response of July 25, 1997, at 11.

20 We grant British Airways' motion to file late.

On July 25 and August 4 and 11, 1997, American and British Airways filed additional documents and information which they state satisfies the Department's evidentiary request specified in Order 97-5-13. In conjunction with these submissions, the applicants filed motions under 14 C.F.R. § 302.39 of our regulations requesting confidential treatment for certain documents and information.[21] The Joint Applicants assert that the information contained in the documents is proprietary, commercially sensitive, and confidential in nature, and therefore qualifies for being withheld from public disclosure. The Joint Applicants also ask that the Department restrict access to these data to counsel and outside experts for interested parties, consistent with well-established Department precedent. Additionally, the Joint Applicants withheld certain information that they consider privileged, and irrelevant to this proceeding, pending review by the Department's staff on an *in camera* basis and a determination by the Department of both its confidentiality and its relevance to this proceeding.

On August 4, 1997, TWA filed an answer opposing the applicants' proposals for *in camera* treatment. TWA asserts that there is no basis for the Joint Applicants to maintain that any sensitive information in the *in camera* documents will be given to unauthorized parties. TWA maintains that the applicants' descriptions of the withheld material indicate that the information is relevant to the Department's analysis of this case.

On August 5, 1997, Continental, United, and US Airways filed answers opposing the applicants' requests for confidential and *in camera* treatment.

Continental states that the Department has already found that "each of the items" responsive to Order 97-5-13 "is relevant to our determination as to both the public benefits and the competitive impact of the proposed alliance."[22] Continental argues that the documents which the applicants seek to withhold from the record go to the heart of the competition and public interest issues raised by the applicants' request for antitrust immunity. Continental notes that many documents concern projected profits and revenue sharing; the recently announced new alliances between and among the Joint Applicants and Aerolineas Argentinas and Iberia; other potential alliance partners for the Joint Applicants; Heathrow growth, strategy, and slot valuation; and communications with the Office of Fair Trading.

Continental maintains that the applicants have not shown that routine Rule 39 confidential procedures will not protect their competitive and economic interests. Continental, therefore, states that the Department should provide for access to these materials, at least for outside

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21 On July 31, 1997, the Department issued a notice providing limited access to these documents, or to any subsequent materials filed in this docket under a Rule 39 Motion, limited to counsel and outside experts for interested parties who file or who have previously filed appropriate affidavits with the Department in advance, unless the party filing the Motion objects.

22 Answer at 1-2, citing Order 97-5-13 at 2.

counsel and experts for interested parties.[23] Continental also urges the Department to conduct an oral evidentiary hearing, guaranteeing a "full and fair" airing of all public interest and competition issues in the case.

United says that neither American nor British Airways has offered sufficient justification for excluding certain documents and data from the record. United argues that the Department should require access to all documents containing relevant information regarding other potential alliance partners, impact of slot divestiture, impact on competition and materials prepared for U.K. regulators. United also asserts that the applicants are now attempting to exclude recent versions of documents they have previously filed under Rule 39.

US Airways opposes the motions to the extent that they seek *in camera* treatment for documents and data that the Department previously has found relevant.[24] US Airways asserts that the Department has already determined that information regarding alliances and other arrangements with third carriers, predicted performance and benefits of the proposed alliance, slots and facilities at Heathrow Airport, past performance by the applicants in the U.S.-U.K. market, implementation of the proposed alliance, and American's European market position are clearly relevant to the assessment of the Joint Applicants' proposed alliance. US Airways also states that these documents are well-suited for handling under the Department's Rule 39 procedures.

Finally, on August 6, 1997, Delta filed a motion for leave to file and a reply opposing the Joint Applicants' request to withhold and/or redact the information and evidence responsive to the Department's request detailed in Order 97-5-13.[25] Delta argues that the Department has already confirmed the relevance and materiality of these documents. Delta states that the Joint Applicants have failed to demonstrate that the withheld/redacted documents are not relevant and that the Department's confidentiality procedures are insufficient to protect the applicants' competitive and commercial interests.[26]

VIII. Decision

Pending a determination on the applicant's Rule 39 motions, we will grant interim access to the documents. Upon a review by the Department of certain American/British Airways information, we require that the Joint Applicants file specific documents in the docket, as more fully explained

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23 Continental also challenges the suitability of the indices submitted by the Joint Applicants, and asks the Department to require the Joint Applicants to index "properly" the documents for which they seek confidential treatment.

24 US Airways says that it does not object to subjecting these materials to confidential review under Rule 39. Answer at 2.

25 We grant Delta's motion to file late.

26 Answer at 2-3.

below. Assuming that these documents are filed in the docket as directed by this order, we find the application to be substantially complete. We are establishing a procedural schedule for the submission of answers and replies to the application. We defer action on Continental's motion pending our review of the *in camera* documents that we have directed to be placed in the record. Finally, we have determined to hold an oral hearing before the Decisionmaker following the filing by interested parties of answers together with direct exhibits and replies together with rebuttal exhibits, as discussed below.

A. Motions for Supplementary Information

TWA has urged the Department to expand its CRS display information request, at least to the extent of including the New York-London market. We appreciate TWA's concerns in this matter. However, the purpose of the Department's request for CRS screen simulations was to address concerns that, given the larger numbers of transatlantic gateways and frequencies of the American and British Airways alliance relative to competing services, competing carriers' services may be relegated to the third or later CRS display screen due to multiple or duplicated American and British Airways alliance listings. The potential for this occurrence is least in non-stop markets having a substantial presence of competing carriers. Based on current and proposed services under an open-skies regime, it is reasonable to assume that the New York-London market will have multiple competitors offering nonstop flights. Although screen crowding may occur, the first two screens are likely to be dominated by nonstop flights occupying only one line on a CRS screen, allowing for the maximum number of options possible to be listed on the screens. In this instance, the Department reasoned that CRS displays in such nonstop markets would be primarily, though not necessarily exclusively, a function of the time-of-day preference of the traveler (and the flights of carriers offered at that time) and would be less affected by any potential screen crowding resulting from the duplicative listings of flights by the alliance carriers.

We determined that the potential for problematic screen crowding would be most likely in behind and beyond markets, due to the numbers of flight frequencies that the alliance would probably offer from key airports, such as Chicago and New York. Indeed, at these key airports every bank of domestic flights arriving could potentially connect with a transatlantic flight to the London hub, as well as the multiple east- and west-bound routings over a variety of nonstop transatlantic gateways which could potentially be offered by the American and British Airways alliance. Technical limitations could further aggravate this situation, given that connecting services take up at least two lines on a CRS screen, limiting the CRS screen to a maximum of four options. Our concerns in these matters are that competing carrier connecting services would be subordinated to later screens and would therefore place these competing service offerings at a competitive disadvantage. Implicit in these concerns is the assumption that there is a link between prominent positioning on CRS screens and market share. While the Department decided to examine this issue, it also understood the administrative burden and cost involved in generating many CRS simulations would place on the Joint Applicants and therefore sought to balance these concerns by concentrating on markets likely to be most seriously affected. The choice of behind-beyond markets was constructed by randomly matching behind and beyond points likely to be most important and illustrative in assessing the marketing impacts of the alliance on competing carriers in a variety of market types.

As a final matter, Continental has asked the Department to suspend its investigation of this case pending the submission of certain materials by the Joint Applicants relating to various other aviation arrangements being pursued by American and British Airways. We do not agree that a deferral is necessary at this time. Consistent with Order 97-5-13, the Joint Applicants have filed certain supplemental information concerning their proposed arrangements with Aerolineas Argentinas, Austral, Iberia, and other relevant partners. Moreover, the Joint Applicants have identified a number of documents pertaining to these proposed relationships which have been withheld for *in camera* review to determine their relevancy. Based on our review of the descriptive index provided, and in a few cases the documents themselves, we have determined that most of these documents are relevant to our decision in this proceeding and should be filed in the docket, subject to our interim confidentially procedures.[27] We believe that by placing these documents in the record, together with the information contained in the Joint Applicants' other responses to Order 97-5-13, substantially respond to our previous evidence and information requests and to requests of interested parties for further details to evaluate this particular matter. Nonetheless, we will defer action on Continental Airlines' July 18, 1997 motion to require the Joint Applicants to furnish supplemental information, until we have reviewed the responsive documents.

B. Motions for Confidential Treatment and Access Issues

Pending our decision on the Joint Applicants' requests for confidential treatment for certain information and data filed on January 10, July 25, August 4 and 11, 1997,[28] we will restrict access to these materials to counsel and outside experts who represent the interested parties in this case.[29] We will require that all persons seeking access to these data submit properly executed affidavits as set forth in Order 97-3-42 at 4-5. We find these actions to be fully consistent with precedent.[30]

Further, the parties objecting to the confidentiality motions have presented no convincing arguments that confidentiality affidavit procedures under Rule 39 are insufficient to allow

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27 We direct that these documents be filed within three business days of the date of this order.

28 The July 25 and August 4 and 11, 1997, supplemental materials were filed pursuant to Order 97-5-13.

29 TWA has urged the Department to require the Joint Applicants to provide other parties with floppy disks of certain confidentially filed information and data. We do not concur. Consistent with our earlier interim Rule 39 determinations, we find it appropriate to continue to restrict review of these materials to the Department's Documentary Services Division and to the Washington offices of the Joint Applicants (See section XI of this order). However, we do note that American states that it will provide a disk version of its CRS display data to interested parties upon request (*see* August 4, 1997, answer at 2).

30 *See* Orders 97-5-4, 96-1-6 and 95-11-5.

meaningful comment on the issues raised or that the benefits of full public disclosure of the material would justify the risk of potential competitive harm to the Joint Applicants.

C. Request for *In Camera* Review to Determine Relevance

As an initial matter, we have previously determined that if, upon review of the descriptive index or the material itself, we find that the information is relevant to our decision, we will require that the information be filed in the record. Conversely, if we initially determine that the reviewed materials are not relevant to our decision, we will not require that the materials be filed in the docket, while reserving our right subsequently to decide, at any time, that the previously reviewed information is relevant, and therefore must be placed in the docket. Of course, the applicants may seek confidential treatment of such material under Rule 39.[31]

The Joint Applicants have withheld from the record particular material that they have characterized as "extraordinarily sensitive commercial information" and not relevant. The Joint Applicants have requested that we undertake an advisory review of this material to determine its relevance to this case. In response to Order 97-3-17, on March 31 and April 7, 1997, American and British Airways, respectively, submitted minimal descriptions of the data and information contained in their *in camera* documents.

In response to the Department's supplemental evidence request in Order 97-5-13, American on July 25 and British Airways on July 25 and August 4 and 11, 1997, filed responsive documents and information which they state satisfies the Department's request. Concurrently, the applicants filed motions under Rule 39 of our regulations. Each of the applicants also submitted an index of additional documents withheld for *in camera* review by the Department's staff.

We carefully reviewed the Joint Applicants' descriptions of their *in camera* documents and materials. In a few cases where the descriptions were insufficient to make a determination on relevancy, the staff asked the applicants to provide the actual documents for review.[32]

Based on the Joint Applicants' characterizations and descriptions of these materials (*see* the March 31, April 7, and July 25, 1997 pleadings), we have determined that the following documents, exhibits, information, and data are relevant or not relevant to this proceeding.

1. American Airlines:

   a. Not Relevant Documents:

      March 31 items: II.2, 3, 6 and 15-16; and III.25 and 31-34.

      July 25 items: I.1-3; II.1-3, and 5-7; III.5, 16, 25, 30, 38, 73, and 99.

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31 Order 95-11-5 at 6.

32 *See* letters dated May 19, 1997, and August 21, 1997,to the respective applicants.

b. Relevant Documents:

March 31 items: II.1, 4-5, and 7-14; III.1-24, 26-30, and 35-41.

July 25 items: II.4; III.1-4, 6-15, 17-24, 26-29, 31-37, 39-72, 74-98, and 100-111.

2. British Airways:

a. Not Relevant Documents:

April 7 items: 1, 3-4, 23-25, and 64-65.

July 25 items: 25-26, 28, 30, 32, 55-62, 69, 70, and 79-86.

b. Relevant Documents:

April 7 items: 2, 5-22, 26-63, and 66-72.

July 25 items: 1-24, 27, 29, 31, 33-54, 63-68, and 71-78.

We found that those documents deemed "not relevant" generally contain information on certain administrative matters, commissions, fees, or charges; frequent flyer fees; and other miscellaneous matters that we do not now consider to be particularly relevant to the issues in this case (*see* Order 95-11-5). However, if during the course of our review and analysis we subsequently determine that some or all this information is relevant, we reserve the right to require that the information be filed in this docket.

Although the documents deemed to be "relevant" may contain certain information considered by the Joint Applicants to be commercially sensitive, they nonetheless are relevant to the Department's statutory responsibilities to evaluate the competitive aspects of the proposed alliance and to implement our public interest assessment of the merits of this application. The Joint Applicants for the most part failed to show why the documents are not relevant beyond simple conclusory statements. Our standard for including documents in the record is not whether the documents are sensitive, but whether they are relevant to the issues. Clearly, the relevant documents must be included in the record of this case.[33]

As with other documents covered by Rule 39 motions for confidential treatment, we will permit limited interim access to these documents pending a decision on the basic Rule 39 motions. Accordingly, counsel and outside experts, for the interested parties only, may review the Joint Applicant's confidential documents under Rule 39, consistent with our previously established confidential affidavit procedures.

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[33] We direct the Joint Applicants to submit these additional documents and information into the docket, no later than 3 business days from the date that this order is served and, when the documents are filed, to notify all interested persons that are identified on the service list attached to the joint application.

IX. Procedural Dates

This application was filed on January 10, 1997 and included extensive unrestricted exhibits and documents, plus several boxes of confidential materials filed under Rule 39. As previously discussed, the Department on March 21, 1997, found it appropriate to commence processing the alliance application and related authority requests concurrently with the ongoing bilateral open-skies negotiations with the United Kingdom. Interested parties have had limited access to certain evidentiary materials since March 28, 1997. By Order 97-5-13, the Department requested certain supplementary information. The Joint Applicants filed their supplementary information on July 25 and 31, and August 4, 5 and 11, 1997. The Joint Applicants identified, with brief descriptions, certain documents for *in camera* review for relevance. The Department's staff reviewed the applicants' descriptions of these materials to determine their relevance and on August 18, 22, and 26 reviewed a few of the documents in person because some document descriptions were insufficient to determine their relevance. We have carefully reviewed all documents and materials submitted, together with the Joint Applicants' descriptions of supplemental information for which they have requested *in camera* review, and now have determined that, with the full submission of all relevant documents identified in this order, the application is substantially complete.

We will, however, defer action on Continental's motion and request with respect to documents involving Iberia, Aerolineas, and Austral until we have had an opportunity to review the *in camera* documents we have required the Joint Applicants to submit in the record.

Therefore, in order to provide interested parties sufficient time to analyze adequately and comment fully on all material in the public and non-public record, we will require that answers to the application, as well as any direct exhibits and testimony by the parties, be filed no later than 30 business days from the date that the Joint Applicants file their additional supplementary documents and information in the docket, and that replies, together with any rebuttal exhibits and testimony, be filed no later than 21 business days after the last day for filing answers.[34] Given the fact that interested parties have had ample opportunity to review previously filed materials in this docket, we do not believe that an additional 45 days, as proposed by Delta, are necessary for reviewing the additional *in camera* documents that by this Order we are deeming relevant and directing be placed in the docket.

We ask that parties, in preparing their answers and replies, together with any accompanying exhibits, delineate the public interest factors that the Department should consider in approving or disapproving the application. Parties may wish to provide exhibits that contain economic analysis supporting their position on these issues. Written testimony prepared by economic experts, senior airline or other executives, or any other person who would contribute to the development of the record in this case, may also be submitted to support that party's position or evidentiary exhibits.

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[34] We will issue a notice identifying these dates. If parties want to receive Department notices and orders by electronic mail (E-mail), they should provide an E-mail address on all pleadings. The Department will issue its decisions in Microsoft Word for Windows (version 7). Service of pleadings may be made by facsimile. Interested parties should include their facsimile numbers on all pleadings.

In an earlier order in this proceeding, we stated that an open-skies agreement with the U.K. and *de facto* Heathrow access remain among the necessary prerequisites to a possible grant of antitrust immunity, and that such access must include adequate provision for new and expanded U.S. carrier service through London-Heathrow Airport.[35] The open-skies issues are under discussion by the U.S. and U.K. governments; however, the question of what constitutes *de facto* access to Heathrow is an issue that will be considered in the context of the application before us in this proceeding. Therefore, we ask that parties focus on this particular issue in their answers and replies and can provide support for their position in accompanying exhibits and written testimony. Parties at this time may also address any other issues they believe to be relevant to a decision on this application.

X. Provision for Hearing Procedures

We conclude that some type of oral hearing is warranted in this case. This is an exceptional case, posing a unique set of issues. The proposed American Airlines-British Airways alliance entails an enormous degree of regulatory complexity. In weighing the distinct competitive and policy issues involved, we must also take into account the fundamental and unprecedented issue of U.S. carriers' expanded access into London's Heathrow Airport.

Accordingly, we find that it would be productive and useful for the Decisionmaker to hear interested parties express in person their particular opinions and views on the issues in this proceeding. The Decisionmaker will conduct an oral hearing on the record, after the parties have submitted answers and replies together with any direct and rebuttal exhibits and testimony. This oral hearing will use procedures similar in some respects to the hearing procedures employed by the International Trade Commission in antidumping and countervailing duty cases under its statutes. Parties will have the opportunity to challenge one another's exhibits and arguments in the course of the hearing procedures, so that the evidence will be thoroughly examined in a hearing context. This procedure will allow us the valuable benefits of an oral hearing, while avoiding unnecessary delay.

The hearing will be conducted using three panels—applicants, carrier opponents, and civic/consumer representatives—to present evidence and argument. The panel presentations, at the parties' discretion, may include direct and rebuttal testimony based on the direct and rebuttal exhibits previously filed in this proceeding, in addition to argument. The DOT Decisionmaker and staff will ask questions of each panel. In advance of the hearing, parties will be given an opportunity to submit proposed questions to the Decisionmaker for use in the questioning of other parties. The submitted questions, as deemed appropriate, may be used by the Decisionmaker and staff, in addition to their own questions, to present to the panels for response.

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35 Order 97-3-34 at 8-9.

The hearing will be held before the Assistant Secretary for Aviation and International Affairs. At the appropriate time, we will announce the location, date, time, and procedures for interested parties to participate in the hearing phase of this proceeding.

We believe that the oral hearing procedures outlined above will fully satisfy our regulatory needs for resolving the complex issues in this proceeding and will provide all parties with sufficient opportunity to present their views. We carefully considered the arguments of Delta, TWA, United, and Virgin Atlantic who have urged us to institute an oral evidentiary hearing before an administrative law judge to investigate the competitive issues raised by this case.[36] These parties have not presented convincing arguments as to why full oral evidentiary procedures are required. There is no statutory requirement that the Department hold this type of hearing on this application. The Department believes that all material facts can be resolved using the procedures detailed above. The issues in this proceeding are essentially economic and policy issues for whose resolution an oral evidentiary hearing is unnecessary. Nor are such procedures necessary for us to resolve issues involving the veracity of evidence or the integrity of witnesses.

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36 United and Virgin filed their requests on January 27 and 31, 1997, respectively. TWA and Delta filed their requests on July 24 and July 29, 1997, respectively.

XI. Access to Documents

To ensure an expeditious investigation of these matters and provide the interested parties with a fair and adequate opportunity to review all confidential materials, affiants having filed valid affidavits may examine the documents at the Department of Transportation Department's Documentary Services location, and in addition, at the following locations provided by the Joint Applicants in Washington, D.C.:

A. Sullivan and Cromwell, Counsel for British Airways, 1701 Pennsylvania Ave., N.W., 7th Floor, Washington, D.C. 20006
(contact Jeffrey W. Jacobs, 202.956.7510); and

B. Carl B. Nelson, Jr., Associate General Counsel for American Airlines, 1101 - 17th Street, N.W., Suite 600, Washington, D.C. 20036, (202.496.5647).

A stamped copy of the affidavit filed with the Department of Transportation must be presented prior to document examination by an interested party.

Accordingly:

1. We grant, to the extent indicated in this order, the Joint Applicants' January 10, 1997, joint motion for review by Department staff of certain documents withheld and considered privileged by American Airlines, Inc. and British Airways PLC;

2. We direct American Airlines, Inc. to file in this docket, no later than three (3) business days from the date that this order is served, its *in camera* documents, information, and data described in its March 31, 1997, submission as: II.1, 4-5, and 7-14; III.1-24, 26-30, and 35-41, and those described in its July 25, 1997, submission as: II.4; III.1-4, 6-15, 17-24, 26-29, 31-37, 39-72, 74-98, and 100-111;

3. With respect to the American Airlines, Inc. materials identified in its March 31, 1997 submission as: II.2, 3, 6 and 15-16, and III.25, 31-34 and those described in its July 25, 1997, submission as: I.1-3, II.1-3, 5-7, III.5, 16, 25, 30, 38, 73, and 99, these materials need not be submitted at this time;

4. We direct British Airways PLC to file in this docket, no later than three (3) business days from the date that this order is served, its *in camera* documents, information, and data described in its April 7, 1997, submission as: 2, 5-22, 26-63, and 66-72 and those described in its July 25, 1997, submission as: 1-24, 26-27, 29, 31, 33-54, 63-68, 71-78;

5. With respect to the British Airways PLC materials identified in its April 7, 1997, submission as 1, 3-4, 23-25, and 64-65, and those described in its July 25, 1997 submission as: 25, 28, 30, 32, 55-62, 69, 70, 79-86, these materials need not be filed at this time;

6. Except to the extent determined herein, we are deferring action on the Joint Applicants' motions for confidential treat under Rule 39 of the Department's regulations (14 C.F.R. § 302.39);

7. We grant interim confidential treatment to the information described in ordering paragraphs 2 and 4, limiting access to this material to counsel and outside experts upon their filing of an affidavit stating that the person will preserve the confidentiality of the information and will only use it to participate in this proceeding. Further, regarding information afforded limited access by the Department, each affidavit must specifically indicate that the person(s) are counsel or outside expert(s) for the interested parties in this case;

8. We direct interested parties to file answers to the joint application and direct exhibits and testimony no later than thirty (30) business days from the date that the Joint Applicants file their supplementary documents and information in this docket, and replies and rebuttal exhibits and testimony shall be filed no later than twenty-one (21) business days after the last day for filing answers;[37]

9. We reserve the right subsequently to determine, at any time, that the materials specified in ordering paragraphs 3 and 5 are relevant to specific issues in our evaluation of this proceeding and therefore must be placed in the docket;

10. We defer action on Continental Airlines' July 18, 1997, motion to require the Joint Applicants to furnish supplemental information concerning their investments in Aerolineas Argentinas, Austral Lineas Aereas S.A. ("Austral"), and Iberia, Lineas Aereas de Espana, S.A. ("Iberia");

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[37] The original submissions are to be unbound and without tabs on 8½" x 11" white paper, using dark ink (not green) to facilitate use of the Department's document imaging system.

11. Interested parties may review the confidential materials, described in ordering paragraphs 2 and 4 as follows: (a) in the Docket Section at the U.S. Department of Transportation, Room PL 401, 400 Seventh Street, SW, Washington, D.C. 20590; (b) in the offices of Sullivan and Cromwell, Counsel for British Airways, 1701 Pennsylvania Ave., N.W., 7th Floor, Washington, D.C. 20006 (contact Jeffrey W. Jacobs, 202.956.7510); and (c) in the offices of Carl B. Nelson, Jr., Associate General Counsel for American Airlines, 1101 - 17th Street, NW, Suite 600, Washington, D.C. 20036, 202.496.5647. Interested parties shall submit in advance an affidavit stating that the person will preserve the confidentiality of the information and will only use it to participate in this proceeding. Further, each affidavit must specifically indicate that the person(s) are counsel or outside expert(s) for the interested parties in this case;[38]

12. We grant all motions for leave to file, as indicated in the footnotes to this order;

13. All motions not otherwise granted or deferred are hereby denied; and

14. We will serve this order on all interested parties.

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

An electronic version of this document is available on the World Wide Web at http://www.dot.gov/general/orders/aviation.html

38 Any pleading or other filing that includes or discusses information contained in the confidential documents must be accompanied by a Rule 39 motion requesting confidential treatment.