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U.S. Department
of Transportation
**Research and
Innovative Technology
Administration**

1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

January 28, 2009

Mr. David H. Pflieger
Senior Vice President & General Counsel
Virgin America Inc.
555 Airport Boulevard
Burlingame, CA 94010

Dear Mr. Pflieger:

This letter is in response to Virgin America, Inc's. ("Virgin America's") July 7, 2008, petition requesting review of the Office of Airline Information staff action on June 26, 2008, denying Virgin America's request to withhold from public disclosure certain Form 41 financial, traffic, and Origin and Destination Survey (O&D) data submitted to the Bureau of Transportation Statistics (BTS). (See Docket OST-2008-0107, March 14, 2008).

M. Clay Moritz, Jr., BTS Acting Assistant Director, Aviation Information, initially reviewed the appeal of staff action denying Virgin America's motions for confidential treatment. I have been informed by Mr. Moritz that he did not find a basis for overturning the original denial of Virgin America's motions for confidential treatment. As a result and in accordance with the provisions of Title 14 Code of Federal Regulations sections 385.33 and 385.34, Mr. Moritz forwarded Virgin America's Petition for Review of Staff Action to me to review as the Department's Reviewing Official.

PLEADINGS

Virgin America's petition for review repeated its initial assertion that public release of the detailed operational, traffic, and financial information contained in its Form 41 submissions would likely cause Virgin America to suffer substantial competitive harm because of the local nature of its passenger traffic from its point-to-point markets and the limited number of aircraft types operated by Virgin America. According to Virgin America, such a public release will enable competitors to: (1) obtain commercially sensitive competitive information of Virgin America's service in these markets; and (2) accurately calculate a variety of market-specific information, including cost per available seat-mile ("CASM"), passenger-yield, revenue per available seat-mile ("RASM") and profit margins. Virgin America noted that although the public release of this Form 41 data has the potential to harm Virgin America competitively, the exclusion of the detailed Virgin America-specific data for an indeterminate time period will have

no appreciable effect on the Department's overall data collection and industry analysis efforts. Virgin America further asserted that, while competitors could use Virgin America data to precisely direct their competitive response to Virgin America's low-fare service, Virgin America cannot, conversely, use Form 41 data to its advantage because of the difficulties in disaggregating competitors' market and aircraft specific financial data from a larger and more diverse number of markets, services, and aircraft types. Virgin America also asserted that its request for confidential treatment of its Form 41 information is fully consistent with the Department's prior confidentiality determinations, including its decision to protect the confidentiality of essentially the same information provided by Virgin America in its initial certification and fitness review. Carriers routinely submit business forecasts as part of their initial certification and fitness review. Historically, the Department does grant confidential treatment to such forecasts. It should be noted, however, that once an air carrier receives a certificate and begins operations, the carrier operates under a new set of regulations and standards.

Virgin America claimed that the information should be withheld under Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. & 552(b) (4), which permits protection of trade secrets and commercial or financial information obtained from a person and privileged or confidential, see *General Electric v. NRC*, 750 F. 2d 1394 (7th Cir. 1984; see also *Massachusetts v. EPA*, 127 S. Ct. 1438, 1463 (2007); *Canadian Commercial Corp. v. Dep't of the Air Force*, 442 F. Supp. 2d 15, 30 (D.D.C. 2006 affd 514 F. 3d 37 (D.C. Cir. 2008); *Critical Mass Energy Project v. NRC*, 975 F. 2d 871 (D.C. Cir. 1992); *Gulf & Western Industries, Inc. v. United States*, 615 F. 2d 527, 529 (D.C. Cir. 1979); *McDonnell Douglas Corp. v. NASA*, 975 F. Supp. 12, 16 (D.D.C. 1997) rev'd 180 F. 3d 303 (D.C. Cir. 1999); *Pub. Citizen Health Research Group v. FDA*, 185 F. 3d 898 (D.C. Cir. 1999).

In these citations, Virgin America asserts that the Department must provide "specific reasoning" for rejecting Virgin America's claims that public disclosure of Form 41 information will result in the likelihood of competitive harm. Failure to provide "a reasoned explanation for its decision sets aside its action as arbitrary and capricious." Virgin America further asserts that Exemption 4 of FOIA may be "reexamined" under the *National Parks* test as noted in *Critical Mass Energy Project v. NRC*, 975 F. 2d 871 (D.C. Cir. 1992) to "correct some misunderstandings as to its scope and application." That is, the appropriate inquiry is to determine whether it is either (A) a trade secret or (B) information that is (1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential. Continuing this line of reasoning, Virgin America argues that it has carried its burden of showing that the release of its aviation data is likely to cause it substantial competitive harm. Further, Virgin America asserts that the appeal decision should not focus on any collateral public benefits but rather whether disclosure is likely to result in substantial competitive harm for Virgin America.

ANSWERS

On July 11, 2008, Alaska Airlines, Inc. (Alaska), American Airlines, Inc. (American), Delta Air Lines, Inc. (Delta), JetBlue Airways Corporation (JetBlue), Northwest Airlines, Inc. (Northwest), United Air Lines, Inc. (United), Southwest Airlines Co. (Southwest), and US

Airways, Inc. (US Airways) jointly answered in opposition to Virgin America's July 7, 2008 petition.

In their answer, the above airlines objected to Virgin America's petition by noting that it raised no new material issues that would justify a reversal of the Department's well-reasoned staff action which denied Virgin America's motion for confidential treatment.

Furthermore, the carriers noted that Virgin America stated that the "Department should limit or curtail the public disclosure of information collected under Part 241 by all reporting carriers." (Virgin America's July 7, 2008 Petition for Reconsideration, Page 4). Such action would require a rulemaking petition before the Department and not a specific air carrier data confidentiality request. Thus, Virgin America's request is beyond the scope of this review.

The dissenting carriers also noted that the Department's rejection of the ExpressJet request for Form 41 confidential treatment definitively rejected the same arguments that Virgin America continues to utilize to delay the publication of its own data. As stated in the Department's final decision of December 6, 2007, in the ExpressJet case, "The Department seeks to avoid shielding any carrier from competition, including new entrants, or favoring one competitor over another in a deregulated environment. Such action would not be consistent with the DOT's mandate to encourage, develop, and maintain an air transportation system that relies primarily on market forces."

The carriers' also reject, as irrelevant, Virgin America's assertion that, as a privately-held company it should be held to a different standard than the publicly traded companies like ExpressJet. In its appeal,Virgin America argued that ExpressJet's SEC-mandated reports were publicly available at the time of its confidentiality request (Virgin America's July 7, 2008 Petition for Reconsideration, Page 6). It should be noted that the Department's Form 41 requirements for revenue, equipment-specific cost data, and route-specific traffic data are much more comprehensive than SEC-provided corporate information. This level of data detail is not generally available in SEC filings.

In its case, ExpressJet had requested confidential treatment of its "branded service" markets that Virgin America claims are more difficult to disaggregate for competitive analysis than its own route system. The dissenting airlines believe this contention is false and does not rise to the level of "substantial competitive harm." In fact, in the case of ExpressJet's branded service, it would be easier to disaggregate their data as only one aircraft type is operated in those markets compared to two distinct aircraft types operated by Virgin America. Therefore, according to the dissenting carriers, Virgin America's ability to disaggregate competitive data while other carriers cannot do the same for Virgin America data "provides undue preferential treatment to one carrier and is unfair and inequitable to all others." (Joint Answer of Dissenting Carriers, Page 7, July 11, 2008).

FINDINGS

Virgin America's July 7, 2008, petition to set aside the June 26, 2008 initial decision has provided no compelling new evidence to warrant overturning the initial decision. Accordingly, I

am denying the requests for confidential treatment of Virgin America's Form 41 financial, traffic, and O&D data submissions to the Department for the months of October, November, and December, 2007; and January, February, March, April, May, June, July, August, September and, October 2008; O&D data for the quarter ended June 30, 2008; and Form 41 Schedules P-1(a) for the months of January, February, March, April, May, June, July, August, September, October, November, and December 2008.

As stated previously, Virgin America asserted that the Department "should limit or curtail the public disclosure of information collected under Part 241." This assertion is dismissed as beyond the scope of the June 26, 2008 initial decision.

As an alternative, Virgin America further requests that the Department "limit or forestall the disclosure of traffic and financial performance of new entrants and small carriers." Once again, Virgin America's request goes beyond the scope of the initial decision and the administrative process. The Department reiterates the fact that Virgin America has requested that its reported Form 41 statistics be granted confidential treatment, not the initiation of a rulemaking action. If it wishes to pursue this course of action, Virgin America is free to file a Petition for Rulemaking regarding the collection of airline data.

Virgin America's labeling the Department's failure to find distinctions between Virgin America's situation and the situation of ExpressJet as "arbitrary and capricious" is unfounded. Virgin claims there are two key differences between its confidentiality request and that of ExpressJet. First, unlike ExpressJet, Virgin America is a privately held company and unlike a publicly held company which publicly releases its financial information through various SEC filings (e.g. 10-K, 10-Q, 8-K), Virgin America is not compelled to file certain SEC reports. By implication, Virgin America appears to be arguing that a publicly traded company could request confidentiality based on the fact it filed reports with the SEC. This assertion is erroneous in that the data elements required in the Department's Form 41 filings are much more rigorous and comprehensive than ExpressJet's most recent 10-Q filing with the SEC (Second Quarter 2008). Thus, I do not find the "publicly traded" versus "privately held" argument to be persuasive.

Secondly, Virgin America claims that the ExpressJet financial data were consolidated for three distinct brands, and Virgin America's Form 41 information reflects operations under a single brand. Therefore, disaggregation of these Form 41 data for Virgin America into specific costs and revenue would be a relatively simple task and therefore competitive harm to Virgin America is more likely than in the ExpressJet case. In fact, disaggregation of ExpressJet's branded service markets is somewhat easier than with the Virgin America data. ExpressJet utilizes only one aircraft type in its branded service markets--the Embraer 145. Virgin America, on the other hand, operates both Airbus 319 and Airbus 320 aircraft in its markets.

It is important to note in this discussion regarding the availability and importance of market data disaggregation, that the most important elements for competitive analysis in a market driven airline industry environment are price, schedules, and quality of service. These competitive elements are fully transparent to the public and all airlines including Virgin America or

ExpressJet. The Department, therefore, continues to believe portions of its ruling in the ExpressJet motion are applicable in supporting its denial of Virgin America's appeal.

Next, Virgin America claims that the initial decision by the Department deviated from FOIA case law in that it used "other factors" to decide the petition. Virgin America points out that the decision stated that the Department was unaware of any actual competitive harm by the public disclosure of this type of aviation data. Virgin America points out that the standard is not actual harm, but rather the likelihood of substantial competitive harm. In fact, in its initial denial of confidentiality for Virgin America's aviation data, the Department rendered its decision based on the facts at hand, not presuming to announce a legal "conclusion." In both the initial denial and in this current denial on review of Virgin America's appeal, the Department did not and does not presume a higher evidentiary standard for Virgin but solely to ascertain if that carrier carried its burden with documentation of its arguments or if the carrier relied on simple assertions. In reviewing Virgin America's appeal, I find that Virgin America's assertions do not satisfy the legal standard.

Virgin America's petition contends that the Department's initial decision was in error when it referenced the usefulness and benefits that aviation statistics provide to other air carriers and academia because these public collateral benefits are "immaterial" to a determination of whether Virgin America has clearly shown that it faces the likelihood of substantial competitive harm if there is public disclosure of its data. In making this interpretation of the Department's initial denial of confidentiality, Virgin America appears to presume that the Department balanced the "public interest" against the merits of Virgin America's private interests. In fact, Virgin America did not correctly interpret the initial decision, which stated:

"It would be counter to the Department's longstanding data dissemination practices and the public interest for us to grant a motion of confidential treatment for Virgin America's Form 41 financial, traffic and O & D data *absent strong evidence of the likelihood of substantial competitive harm.*" (Emphasis added)

Finally, Virgin America claims that the initial decision views "public disclosure" as "simply the cost of doing business as a certificated air carrier" in its reference to the text of the initial denial that:

"Public disclosure of financial, traffic and O & D data enumerated in Part 241 of the Department's regulations is one of the obligations that comes from being a certificated air carrier."

Again, Virgin America has ignored the legal standard that was applied in the Department's initial decision. Absent a showing of the likelihood of substantial competitive harm, public disclosure of certain Part 241 data is one of the requirements of the Department's regulations.

As the Deputy Director[1], Bureau of Transportation Statistics, I am the Reviewing Official and I am exercising my discretionary right of review for the June 26, 2008, staff action. I have reviewed the appeal of the staff action denying Virgin America's motions for confidential treatment and considered all documents properly filed in DOT Docket OST-2008-0107. I find that Virgin America did not present any additional evidence to demonstrate a likelihood that Virgin America would suffer substantial competitive harm from the release of certain Form 41 financial, traffic, and O&D data submitted to the DOT. Based on my review of the record in Docket 0107, I am affirming the staff action in this matter because I did not find a compelling justification for overturning the original denial of Virgin America's motions for confidential treatment.

Accordingly, Virgin America's July 7, 2008, appeal requesting confidentiality for its Form 41 financial, traffic , and O & D reports is denied. This action is taken under 14 CFR sections 385.19(i) and 385.34 of Part 385 of the Department's Organization Regulations and is final and not subject to a petition for reconsideration. In accordance with the above regulations, where the Reviewing Official affirms the staff action, the staff action stayed by the petition for review shall become effective on the second business day following the date of service of the Reviewing Official's order. Therefore, on the second business day following the service date, Virgin America's Form 41 schedules B-1, B-12, P-1.2, P-1(a), P-2, P-5.1, P-6, for the quarters ending December 2007; March 2008; June 2008, and September 2008: Schedule T-100 reports for October, November, and December 2007; January, February, March, April, May , June, July, August, September, and October 2008; The O & D Survey report for the quarters ended March 31, 2008 and June 30, 2008, and the monthly Form 41 Schedule P-1(a)s for January, February, March, April, May, June, July, August, September, October, November, and December 2008, will be released to the general public.

Sincerely,

Steven K. Smith
Deputy Director, Bureau of Transportation Statistics
U.S. Department of Transportation

1_Dr. Steven Dillingham is presently serving a six month detail and, as such, I am issuing this decision in my acting capacity.

Cc:
RTS-42
File (Leonard)
File (Rife)
File (Stankus)
File (Moritz)
File (Suissa)
Monniere
Dillingham
Smith, Steve