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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. Robert E. Cohn
Ms. Sheryl R. Israel
Counsel for Shuttle America Airline, Inc.
Hogan & Hartson L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004

Dear Mr. Cohn and Ms. Israel:

This letter is in response to the July 7, 2008, Petition for Review of Staff Action (Petition), filed by Shuttle America Corporation (Shuttle America). The Petition appeals the June 25, 2008, decision denying the motions filed by Shuttle America seeking confidential treatment of certain financial data reported on Form 41 Schedules B-1, B-12, P-1(a), P-1.2, P-5.1, and P-6 for the third quarter of 2005 through 2007. In the June 25, 2008, decision we granted Shuttle America's December 12, 2007, motion for confidentiality of the aircraft cost data reported on its Form 41 Schedule B-7 for the quarters ended September 30, 2005 through December 31, 2007. In the same decision, we also granted Shuttle America's motions dated April 6, 2006, March 30, 2007, and March 21, 2008, for confidential treatment of the aircraft cost data reported on its Schedule B-43 for the years ended December 31, 2005, December 31, 2006, and December 31, 2007, respectively. Pending the Department's decision on the petition for review, we have kept confidential certain Form 41 data on Shuttle America's Form 41 Schedules B-1, B-12, P-1(a), P-1.2, P5.1, and P-6 for the third quarter of 2005 through 2007. Subsequent motions for confidential treatment have been filed by Shuttle America covering its 2008 Form 41 data submissions. Due to this fact, the motions applicable to Shuttle America's 2008 Form 41 data are also included in the scope of this decision.

In accordance with the provisions of Title 14 Code of Federal Regulations (CFR) section 385.33, M. Clay Moritz, Jr., Acting Assistant Director, Aviation Information, initially reviewed the appeal of staff action denying Shuttle America's motions for confidential treatment. He has informed me that he did not find a compelling basis for overturning the original staff decision denying Shuttle America's motions for confidential treatment. Accordingly, Mr. Moritz forwarded Shuttle America's Petition to me for action as the Department's Reviewing Official. Under the provisions of 14 CFR 385.34(b), I am exercising my discretionary right of review for the June 25, 2008, staff action.

In the July 7, 2008 Petition, Shuttle America objected to DOT's conclusion that release of the Form 41 data for Shuttle America's operations under a long-term fixed fee-for-service code-share agreement will not permit "a competitor to use this information to make strategic judgments that would likely cause substantial harm to Shuttle America's competitive position." Shuttle

America's code-share operations utilize a single aircraft type with two mainline customers. Shuttle America argued that it would demonstrate that the agency's findings of material fact were clearly erroneous, the decision was substantially deficient on its face, the legal conclusions were contrary to applicable law and precedent, and the initial decision involves substantial and important questions of policy.

In the July 7, 2008 Petition, Shuttle America asserted that the June 25, 2008, Decision of the Acting Assistant Director was based on clearly erroneous facts and was deficient on its face by ignoring key facts. Under the applicable legal standard, the test for treating Shuttle America's commercial and financial information as confidential under Exemption 4 of the Freedom of Information Act (FOIA) is whether the disclosure of the information is "likely to cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks & Conservation Ass'n. v. Kleppe*, 547 F.2d 673, 677 (D.C. Cir. 1976); (*"National Parks II"*) citing *National Parks & Conservation Ass'n. v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (*"National Parks I"*). Shuttle America stated that "It is not necessary that Shuttle America show actual competitive harm, but to show that (1) Shuttle America faces competition and (2) public disclosure of the information will likely result in substantial competitive injury to Shuttle America." (Petition, Page 2). Shuttle America noted the June 25, 2008, Decision confirmed that Shuttle America satisfied the first prong of the *National Parks* test; but the Decision concluded that Shuttle America did not meet the second prong of the test, erroneously finding that the release of the information will not "permit a competitor to use this information to make strategic judgments that would likely cause substantial harm to Shuttle America's competitive positions." (Petition, Page 2). Shuttle America asserted that the Decision's conclusions were based on erroneous findings of fact, and the Decision was deficient on its face because it did not discuss, much less refute, critical and undisputed facts presented by Shuttle America showing why, because of Shuttle America's unique situation, disclosure is likely to substantially harm its competitive position. Shuttle America stated that:

> "The critical facts which the decision wholly ignored are that Shuttle America now operates only a <u>single</u> aircraft type under a long-term fixed fee-for-service code-share agreement with just two main-line customers. Because Shuttle America operates with only a single aircraft type for these two mainline customers, public disclosure of the information sought to be protected would enable Shuttle America's competitor's to precisely determine Shuttle America's aircraft acquisition costs and how much is paid by its mainline customers." (Petition, Page 3)

In the July 7, 2008 Petition, Shuttle America also claimed that the June 25, 2008, Decision of the Acting Assistant Director failed to apply the proper legal standard under Exemption 4 of FOIA and was contrary to law and precedent and therefore must be reviewed and reversed. Shuttle America also concluded that while the Staff Action accurately describes the well-settled legal standard established by *National Parks I, National Parks II, and Gulf & Western Industries* – that FOIA Exemption 4 is a legitimate basis to exempt disclosure when evidence exists showing the likelihood of substantial competitive harm to the competitive position of the person from whom the information is obtained – the decision significantly departs from this standard by improperly creating two new legal standards: (1) the requirement "to overcome the public's right to aviation

data," and (2) that it would be "unfair for the Department to deny Shuttle America's competitors access to Shuttle America's reports while their reports are subject to review by Shuttle America." Shuttle America also asserted that the "Department should limit or curtail the public disclosure of information collected under Part 241 by all reporting carriers." This assertion is beyond the scope of this decision in that it would require a rulemaking by the Department, including a review of public comments. If Shuttle America believes the Department should initiate a rulemaking, it should file a rulemaking petition with the Department and **not** a request for specific air carrier confidentiality.

Shuttle America also claimed that the disclosure of Shuttle America's Form 41 information raised an important question of policy; the Department's longstanding policy to preserve the confidentiality of financial components of code-share agreements. Shuttle America noted that in connection with Shuttle America's certification proceedings, the Department granted confidentiality to the Regional Jet Services Agreement between Shuttle America and its mainline customers, noting it met the criteria for confidential treatment. Shuttle America also noted that the terms of the agreement between Shuttle America and its code-share partners contain competitively sensitive commercial information that has not been released in any public forum, and should not be released through the "back door" via the Form 41 line items. Shuttle America claimed that release of Shuttle America's information would reverse well-settled policy to preserve the data confidentiality of information thus ensuring that the underlying economic terms of the code-share agreements are not revealed to third-parties.

Shuttle America is correct that the Department's Air Carrier Fitness Division granted a request by Republic, Shuttle America's sister company, for confidential treatment by Order 2004-7-26, concluding that "release of Shuttle America's first year forecast for scheduled service could harm its ability to compete by providing competitors with information on the cost structure upon which its agreement with its code-share partner is based." (Shuttle America's December 12, 2005 Motion, Page 14). However, while the Department will withhold financial information such as budgets or forecasts and certain agreements containing financial information from public release during the DOT "certification and fitness proceedings," Form 41 financial data including income statements are routinely reported by all air carriers under 14 CFR Part 241 and released to the public. It should be noted, however, that once an air carrier receives a certificate and begins operations, such exclusionary treatment has never been granted. In addition, one of the FOIA mandates is that the public should have access to Federal agency records, except to the extent those records are exempt from disclosure.

Shuttle America stated that the June 25, 2008 Decision was based on clearly erroneous facts and, by ignoring key facts, was deficient on its face and the decision failed to apply the proper legal standard under Exemption 4 of FOIA and was contrary to law and precedent. I do not agree, however, that the Decision ignored key facts and significantly departed from this standard by improperly creating two new legal standards: (1) the requirement "to overcome the public's right to aviation data," and (2) that it would be "unfair for the Department to deny Shuttle America's competitors access to Shuttle America's reports while their reports are subject to review by Shuttle America." I also do not believe that the prior decision was erroneous or that the legal conclusion was contrary to law. The decision at issue was based on the lack of evidence that

release of the data would likely cause substantial harm to Shuttle America's competitive position. Shuttle America is correct and I concur that the Staff Action accurately described the well-settled legal standard established by *National Parks I, National Parks II, and Gulf & Western Industries* – that FOIA Exemption 4 is a legitimate basis to exempt disclosure when evidence is presented showing the likelihood of substantial competitive harm to the competitive position of the person submitting the information.

Shuttle America also claimed that the Decision was erroneous based on an important question of policy. Shuttle America noted that the release of its Form 41 data would produce an unacceptable result – providing third parties with the direct information or the tools to readily calculate the competitively sensitive terms of the code-share agreement, contrary to long-standing DOT policy--"to preserve the confidentiality of financial components of code-share agreements." Shuttle America unquestionably has competition from a number of carriers and undoubtedly these carriers will review Shuttle America's Form 41 data, but I believe there is nothing unique about Shuttle America's fixed fee-for-service code-share operation that would justify the exclusionary treatment it is seeking. The goal of the DOT is to foster a competitive aviation system, however the Department has long held that competition is promoted, and consumer's benefit, by maximizing the amount of accurate information available in the public domain. I continue to believe that 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 Form 41 data absent an air carrier providing evidence of the likelihood of substantial competitive harm.

As part of the review process, I have considered the concerns of the dissenting air carriers. On July 11, 2008, Alaska Airlines, Inc., American Airlines, Inc., Delta Air Lines, Inc., JetBlue Airways Corporation, Northwest Airlines, Inc., United Air Lines, Inc., and US Airways, Inc. jointly answered in opposition to Shuttle America's July 7, 2008, "Petition for Review of Staff Action." (see DOT Docket OST-2005-23354). The dissenting carriers noted that they are very concerned about the proliferation of special requests for confidentiality such as those submitted by ExpressJet, Virgin America, Shuttle America, and Republic, and the "misuse" of the Department's Part 385 review process in the face of controlling precedent that has already settled the issue of public release of Form 41 data. The dissenting carriers noted that a bedrock principle underlying Form 41 reporting is that all carriers are subject to public release of their data, and thus no carrier is placed at an unfair disadvantage because its data are made public while data of competitors is withheld. The dissenting carriers also noted that the Department has correctly applied that principle in denying the motions of Shuttle America and Republic. In their answer, the dissenting carriers concluded:

> "The Shuttle America and Republic petitions for review do not raise any new material issues that would warrant disturbing the staff's thorough and well-supported decisions of June 26, 2008 denying each carrier's confidentiality motion. Accordingly, the petitions for review should be immediately denied, and the withheld data should be made public without further delay."

I also agree with the Petition's dissenters that while Shuttle America may face reciprocal competition from its competitors, it does not mean that such competition would translate into the

likelihood of Shuttle America suffering "substantial competitive harm." Shuttle America appears to equate competition with the likelihood of substantial competitive harm – hardly the same standard. I also agree with these dissenters that, absent the required showing, it would be unfair, prejudicial to other reporting carriers, and adverse to the public interest to withhold Shuttle America's Form 41 data when the data submitted by these dissenters and all other carriers are released immediately. Thus, without the requisite showing, Shuttle America would be receiving an unfair advantage by having its Form 41 reports withheld from public disclosure. We seek to avoid shielding any carrier from competition, including new entrants and code-share partners, or favoring one competitor over another in a deregulated environment. Such action would not be consistent with DOT's mandate to encourage, develop, and maintain an air transportation system that relies primarily on market forces. Moreover, without the required showing, we view the unilateral disclosure of data submitted by one group of carriers when another group of carriers is not disclosing similar data as contrary to the public interest.

As the Deputy Director, Bureau of Transportation Statistics, I am the Reviewing Official in the absence of the BTS Director[1] and I am exercising my discretionary right of review for the June 25, 2008, staff action. I have reviewed the appeal of the staff action denying Shuttle America's motions for confidential treatment and have reviewed all documents properly filed in DOT Docket OST-2005-23354, including the responses of the dissenting carriers. I find that Shuttle America did not present any additional evidence to demonstrate the likelihood that Shuttle America would suffer substantial competitive harm from the release of the Form 41 data. Based on my review of the record in Docket 23354, I am affirming the staff action in this matter because I did not find a compelling justification for overturning the original denial of Shuttle America's motions for confidential treatment.

This action is taken under 14 CFR section 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, Shuttle America's Form 41 Schedules B-1, B-12, P-1.2, P-5.1, and P-6 (except the cost data reported on Schedules B-7 and B-43) for the quarters ended September 30, 2005 through September 30, 2008 will be released to the general public. In addition, Shuttle America's monthly Schedule P-1(a) report for the months ended June 30, 2005 through November 30, 2008 will also be released to the general public.

Sincerely,

Steven K. Smith, Ph.D
Deputy Director
Bureau of Transportation Statistics

[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 (Rife)
File (Stankus)
File (Moritz)
File (Leonard)
Monniere
Suissa
Dillingham
Smith, Steven