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DEPT. OF TRANSPORTATION
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BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

U.S.-U.K. ALLIANCE CASE

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:
Docket OST-01-11029 -131

Joint Application of American Airlines, Inc.
and British Airways Plc for statements of
authorization and related exemption authority :

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Docket OST-99-6507, # .

PETITION OF
CONTINENTAL AIRLINES, INC.
FOR RECONSIDERATION

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April 24, 2002

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Despite the inability of the United States to negotiate an “open skies” agreement with the United Kingdom for decades and years of disagreements among interested stakeholders about what an open skies agreement with the U.K. must accomplish, particularly at London Heathrow, the Department has taken the unprecedented step of granting “~~final~~ approval and antitrust immunity for alliance agreements” between United,¹ bmi, Austrian, Lauda, Lufthansa and **SAS**

¹ Common names are used for airlines.

(collectively, “Star Alliance” hereafter) without any “open skies” agreement before it. Granting **final** approval and antitrust immunity without even giving interested parties the opportunity to consider the proposed alliance and its impact in light of whatever “open skies” agreement is accomplished would be arbitrary and capricious and violate the due process rights of parties to comment on the alliance in light of relevant provisions in any such “open skies” agreement and whether London’s Heathrow airport **will** be open to effective new competition by U.S.-flag carriers as a result of the agreement.

Continental urges the Department to reconsider its approval of the proposed alliance agreement and either deny approval or defer final action until a true open skies agreement is reached with the U.K. and open access at London Heathrow is ensured for U.S.-flag carriers.² At the very least, the Department must defer final action on the proposed alliance at London Heathrow until a new U.S.-U.K. “open skies” agreement has been negotiated and interested parties are given an adequate opportunity to address issues raised by the alliance in light of the “open skies” agreement and commitments for new access at London Heathrow.

Continental states as follows in support of its petition **for** reconsideration.

1. Granting **final** approval and antitrust immunity to the Star Alliance carriers at London Heathrow would combine the second largest U.S. and U.K.

² Continental does not seek reconsideration **of** the Department’s decision to grant the motions of American and British Airways to dismiss their joint applications for antitrust immunity and codeshare authority.

carriers at London Heathrow with their major European partners at one of the world's most exclusive airports, making effective new entry even more difficult. At the same time, British Airways and American have vowed that they "fully intend to remain partners" and "maintain and strengthen the relationships" among them,³ maintaining another formidable barrier to new entry at London Heathrow. With these four carriers aggressively seeking to maintain their dominance of slots and facilities at London Heathrow, and with no meaningful prospect of substantial airport and runway expansion at London Heathrow any time soon, an "open skies" agreement with the U.K. would be meaningless at the absolutely critical London Heathrow airport unless new entry there is truly ensured. Even if the U.K. were to agree to the model U.S. "open skies" agreement tomorrow,⁴ no effective access at London Heathrow would necessarily be ensured.

2. Although the Department's approval and antitrust immunity for the Star Alliance partners at London Heathrow have been subjected to the condition that "within six months from the date of issuance of this Order the United States achieves an Open Skies agreement with the United Kingdom that meets U.S.

³ See the joint motion of American Airlines and British Airways in this proceeding, February 13, 2002, at 2.

⁴ Admittedly, this is highly unlikely, since, so far as Continental is aware, the U.K. authorities have not even agreed to meet with the U.S., and even bmi, a potential beneficiary of an open skies agreement, is seeking only "liberalisation" of U.S.-U.K. routes, not "open skies," saying "bmi firmly rejects the view that liberalisation between the U.S. and the U.K. cannot be achieved." (see bmi press release 30 January 2002.

aviation policy objectives,”⁵ those objectives are unstated, and what the U.S. government will decide behind closed doors meets “U.S. aviation policy objectives” cannot be used as a basis for approval and antitrust immunity for an agreement before any “open skies” agreement is negotiated and considered publicly on the record by all interested parties. The Department and the Civil Aeronautics Board before it dismissed applications for authority that was not already available pursuant to a bilateral agreement absent truly extraordinary circumstances not present here. (See, e.g., Order **93-6-6**) When the Department deviated from this policy to consider and approve the transfer of Pan American and TWA London Heathrow authority to United and American, the unfortunate result was Bermuda 2, the very agreement that has precluded additional entry at London Heathrow. Clearly, the Department’s willingness to consider American/British Airways alliances and antitrust immunity twice in hopes of reaching a U.S.-U.K. “open skies” agreement has not produced such an agreement. Although the Department did approve an alliance between American and Lan-Chile prior to actual implementation of the U.S.-Chile open skies agreement, the terms of that agreement already had been concluded and airport access at Santiago was readily available to new-entrant **U.S.** carriers. In this case, however, the terms of any U.S.-U.K. open skies agreement are **unknown** and access at London Heathrow is entirely unavailable to new U.S. operators at present and unlikely to be available under an “open skies” agreement absent specific remedies ensuring such access. Thus, the

⁵ See Order **2002-4-4** at 1, 8, 10.

Department's decision to approve first and reach agreement later is both unprecedented and unwise.

3. The Department's final order says, "we do not believe that it is in the public interest to permit United/bmi to implement their proposed alliance before we achieve Open Skies with the United Kingdom," citing its 'long-established policy that a U.S. airline and a foreign airline may obtain the authority to operate an immunized alliance only when the United States has an Open Skies agreement with the foreign airline's homeland.'" (Order 2002-4-4 at 10) Granting approval for codesharing and antitrust immunity based on the mere signing of an Open Skies agreement without meaningful access at critical airports would make a sham of the U.S. "open skies" policy and the reasons it was adopted. In the context of the U.S.-U.K. negotiations and consideration of a U.S.-U.K. alliance, the Department said,

We **are** unwilling to approve and immunize an alliance if other airlines are unable to provide effective competition to the alliance partners. This policy is directly relevant here, for **U.S.** airlines have had little or no opportunity to enter or expand service at London's Heathrow airport Obviously, we could not grant approval and immunity for the Joint Applicants' alliance unless other U.S. airlines could compete effectively in the markets affected by the Alliance, since otherwise the Alliance would not be in the public interest.

(Order **97-3-34** at **4**) Nothing suggests that entry by new airlines operating at London Heathrow would be enhanced by approval of the Star Alliance combination there. As the Department of Justice said recently, "**DOJ's** assessment in **1998** was that slots and facilities limitations at Heathrow made the prospect of competitive entry into the relevant markets . . . highly unlikely. . . . Entry conditions have not

improved in the intervening three years.” (See DOJ’s public comments in Docket **OST-01-10387**, December **17,2001** at **35**) Indeed, United itself has recognized that “there are insufficient slots and other facilities at Heathrow to accommodate the needs of carriers that would seek to expand services between that airport and the U.S. under an open skies regime.” (See United’s November **2,2001**, answer in Docket **OST-01-10387** at **5**, n. **5**) Given the Department’s historic commitment that antitrust immunity “can only be provided where there are no significant restrictions on the ability of other airlines to enter the markets served by the alliance partners and to respond freely to their initiatives,”⁶ the Department has **no** basis for immunizing an alliance between United and bmi at London Heathrow absent open entry at London Heathrow.

4. Even if the U.S. is able to negotiate an “open skies” agreement with the U.K. which would truly open entry at London Heathrow, serious questions have been raised about whether actions by the European Court of Justice would require fundamental changes to the U.S. “open skies” model or prompt denunciation of any U.S.-U.K. agreement which failed to make such changes. In particular, the January 31,2002, Opinion of the Advocate General for the Commission of the European Communities concludes that open skies agreements between the U.K. and other

⁶ Testimony of Charles A. Hunnicutt, Assistant Secretary of Transportation for Aviation and International Affairs Before the Antitrust, Business Rights and Competition Subcommittee of the Senate Judiciary Committee, March **19, 1998**, at **5**. This standard has also been reflected in the Department’s Orders **99-7-22** at **2**, **98-3-31** at **4** and **97-3-34** at **4, 8-9**.

countries and the U.S. would be unlawful if they include provisions governing pricing on intra-community routes, **CRS** regulation and the nationality of carriers designated by European countries. Since provisions governing these issues have been deemed essential by the Department in open skies agreements and since the Advocate General's opinion suggests the European signatories would be obligated to denounce their agreements with the U.S. if they contain nationality clauses (see the Advocate General's Opinion at paragraphs **143** and **144**), adoption of the Advocate General's Opinion would appear to make negotiation of an open skies agreement meeting **U.S.** aviation policy objectives impossible. Moreover, if a U.S.-U.K. "open skies" agreement required the U.S. to permit London Heathrow-U.S. operations by Lufthansa, SAS and Austrian, the potential impact of an immunized Star Alliance at London Heathrow would be far different than the impact contemplated by the Department's orders in this proceeding. Although the Advocate General's opinion has not yet been adopted by the European **Court** of Justice, it raises the very real prospect of negotiating an "open skies" agreement which is not consistent with U.S. aviation policy objectives as defined to date or facing a mandatory denunciation by the U.K. shortly thereafter. Given these uncertainties, failure to provide adequate notice of the terms of any **U.S.-U.K.** "open skies" agreement and an opportunity to comment on the proposed alliance and antitrust immunity **for it** in light of the terms of such an agreement and new access available at London Heathrow would constitute reversible error.

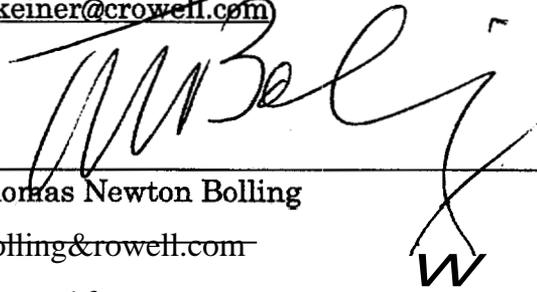
For the foregoing reasons, Continental urges the Department to deny the Star Alliance application for approval **or** defer final action on the proposed alliance at London Heathrow until a new U.S.-U.K. "open skies" agreement has been negotiated and interested parties have been given an adequate opportunity to address issues raised by the alliance in light of the "open skies" agreement and access to London Heathrow.

Respectfully submitted,

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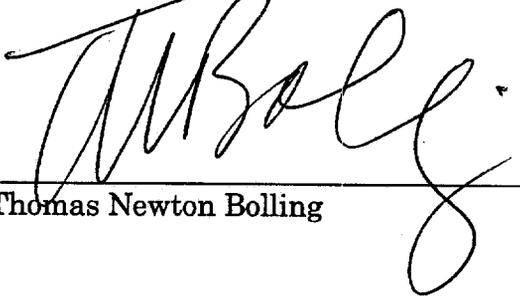
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April 24, 2002
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CERTIFICATE OF SERVICE

I certify that I have this date served the foregoing document on all parties to
this proceeding in accordance with the Department's Rules of Practice.



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April 24, 2002

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