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**BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, DC**

DEPT. OF TRANSPORTATION
DOCKETS

OST-2005-23354 P 3:13

Motion of

SHUTTLE AMERICA CORPORATION

for Confidential Treatment under
14 CFR § 302.12
(Form 41, Schedule P-1(a))

Docket No. OST-2005-23354

**MOTION OF SHUTTLE AMERICA CORPORATION
FOR CONFIDENTIAL TREATMENT**

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December 23, 2008

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Docket No. OST-2005-23354

**MOTION OF SHUTTLE AMERICA CORPORATION
FOR CONFIDENTIAL TREATMENT**

Shuttle America Corporation (“Shuttle”) hereby requests confidential treatment under 14 CFR § 302.12 of certain line items on its Form 41, Schedule P-1(a) for the month ended November 30, 2008.¹ Shuttle hereby incorporates by reference the information and arguments set forth in the Motions for Confidential Treatment and related pleadings filed by Shuttle in this docket, and Shuttle’s Petition for Review of Staff action filed on July 7, 2008, which sets forth in detail the legal bases for granting confidential treatment of the discrete competitively-sensitive

¹ Attached to this Motion is a confidential and redacted copy of Shuttle’s Form 41 Schedule P-1(a) for the month ended November 30, 2008. The confidential version of the report is sealed in an envelope labeled “Confidential Treatment Requested Under § 302.12.” The redacted version of the report omits the identified confidential commercial and financial line items.

commercial and financial line item data for which confidential treatment is requested herein.²

In further support of this Motion, Shuttle states as follows:

Shuttle is seeking confidential treatment of the following line items contained in its Form 41, Schedule P-1(a) report for the month ended November 30, 2008:

Interim Operating Report - Schedule P-1(a):

4999 *Total Operating Revenues*
7999 *Operating Profit or Loss*
9899 *Net Income*
3901 *Psgr. Rev.- Scheduled Service*

Shuttle is not requesting confidential treatment of line item 7199, *Total Operating Expenses*, or 9900.7 and 9900.8, *Number of Full-time and Part-time employees*.

I. PUBLIC DISCLOSE OF THE SPECIFIED LINE ITEMS WILL LIKELY CAUSE SUBSTANTIAL COMPETITIVE HARM TO SHUTTLE.

Confidential treatment of the specified line items of Schedule P-1(a) is warranted under Exemption 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C.

² By letter dated June 25, 2008 ("Staff Decision"), the Acting Assistant Director, Aviation Information, Bureau of Transportation Statistics (BTS) denied Shuttle's Motions for confidential treatment of certain line items of its Form 41 reports, including Schedule P-1(a). On July 7, 2008, Shuttle filed a Petition for Review of Staff Action pursuant to 14 C.F.R. Part 385, demonstrating why the staff decision should be reviewed and reversed, and an Order should be issued granting the Motions for confidential treatment. Under 14 C.F.R. § 385.32, the effectiveness of the Staff Decision is stayed pending disposition of the Petition for Review by the Department. As such, confidential treatment of the specified line items on the Schedule P-1(a) reports previously submitted by Shuttle continue to be withheld from public disclosure. Shuttle seeks comparable confidential treatment of its most recent Schedule P-1(a) monthly report for the current month.

§ 552(b)(4), and under applicable DOT and court precedent. Release of this confidential, competitively-sensitive commercial and financial information would likely result in substantial harm to Shuttle's competitive position because release of the identified line items on the Schedule P-1(a) Interim Operating Report would reveal a snapshot of Shuttle's income level to competitors, and give competitors information to calculate Shuttle's reimbursement rates under its code-share agreements with its three mainline customers.³ Because Shuttle operates only a single aircraft type for these three mainline customers, and the number of aircraft operated for each customer is publicly available, Shuttle's billing rates for each customer can be readily calculated with the confidential Schedule P-1(a) financial information in question. At the same time, Shuttle cannot garner reciprocal competitively-sensitive information from its competitors' Schedule P-1(a) data because, to the best of Shuttle's knowledge, other regional jet operators operate either multiple aircraft types and/or operate for a number of mainline customers so that the financial information is "bundled" in a way that cannot be disaggregated to extrapolate the same information.

³ During November 2008, Shuttle America started operations pursuant to a code-share agreement with Mokulele Airlines, in addition to its operations under code-share agreements with Delta and United.

Such disclosure will give Shuttle's competitors an unfair competitive advantage over Shuttle; it would reveal to Shuttle's competitors information about Shuttle's code-share financial arrangements that is not similarly available to Shuttle for those it competes against. Disclosure of the monthly information would enable competitors to use this information to underbid Shuttle, and thereby undermine Shuttle's competitive position.

A. SHUTTLE'S REQUEST FOR CONFIDENTIALITY MEETS THE APPLICABLE LEGAL STANDARD FOR WITHHOLDING INFORMATION FROM PUBLIC DISCLOSURE.

The purpose of the FOIA exemptions "is to protect the confidentiality of information which citizens provide to their government, but which would customarily not be released to the public, and to facilitate citizens' ability to confide in their government." *Burke Energy Corp. v. DOE*, 583 F. Supp. 507, 510 (D. Kansas 1984). Exemption 4 exempts from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). This exemption prevents public disclosure of

information that if released would likely cause substantial harm to the competitive position of the person from whom the information was obtained.⁴

For information to qualify under Exemption 4, the information must meet three tests. It must be:

- (1) commercial or financial in nature,
- (2) obtained from a person, and
- (3) privileged or confidential. *See Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983).

The information for which Shuttle seeks confidential treatment qualifies for exemption from public disclosure under this three-part test. The Department has consistently found that Form 41 financial data meet the first two prongs:

“It is well established that the Form 41 financial data petitioned for non-disclosure meets the first two requirements: (1) contains commercial or financial information and (2) the information was obtained from a person outside the government. Therefore, the question is whether the information is privileged and confidential.”
See, Staff Decision, page 5.

With respect to the third prong, the D.C. Circuit has consistently held that a commercial or financial matter is “confidential” for purposes of Exemption 4 if, in the case of information required to be submitted to the government, disclosure is

⁴ *See, e.g., Gulf & Western Industries, Inc. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979); *McDonnell Douglas Corporation v. Department of the Air Force*, 375 F.3d 1182 (D.C. Cir. 2004); *American Airlines, Inc. v. NMB*, 588 F.2d 863, 871 (2d Cir. 1978); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 684 (D.C. Cir. 1976) (“*National Parks II*”); *Joint Application of United and Lufthansa*, Order 93-12-32, December 18, 1993; *Joint Application of Northwest and KLM*, Order 93-1-11, January 8, 1993, p. 19; *Information Directives Concerning CRS*, Order 88-5-46, May 22, 1988;

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likely to have either of the following results: “(1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.”

National Parks & Conservation Ass’n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) (“*National Parks I*”); *Gulf & Western* at 530; *McDonnell Douglas Corporation v. Department of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004). The Court in *McDonnell Douglas* stated that “*National Parks I*, of course, does not require the party invoking Exemption 4 to prove that disclosure would actually cause it substantial competitive harm, but only that disclosure would ‘likely’ do so.” *Id.*

Thus, to qualify as “confidential” under FOIA Exemption 4, it is not necessary that Shuttle show actual competitive harm, but to show that (1) Shuttle faces competition and (2) public disclosure of the information will likely result in substantial competitive injury to Shuttle.

Shuttle has clearly satisfied this test that the financial information in the identified line items is “confidential.” The Staff Decision specifically found that Shuttle faces competition: “Shuttle unquestionably has competition from a number of air carriers and undoubtedly these carriers will review Shuttle’s data.” *See*, Staff Decision, page 6.

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Carrier-Owned Computer Reservations Systems, ER-1385, Order 86-5-54, May 19, 1986; *Information Directives Concerning CRS*, Order 83-12-136, December 29, 1983.

In addition, Shuttle satisfies the second prong of the *National Parks I* test as to whether information qualifies as “confidential” in that public disclosure of this information will likely result in substantial competitive injury to Shuttle.⁵ As noted, release of the Schedule P-1(a) data in question can be used to determine Shuttle’s periodic income level and allow for the precise calculation of the reimbursement rates under Shuttle’s code-share agreements with its two mainline customers. Shuttle’s competitors would likely use this information to underbid and undermine Shuttle’s competitive position with its customer, causing substantial competitive harm to Shuttle, and at the same time, gain an unfair competitive advantage over Shuttle, because Shuttle cannot similarly calculate the same information from the Form 41 submissions of its competitors that operate more than a single aircraft type and/or operate for multiple mainline customers.

Shuttle’s reimbursement rates under its code-share agreements are highly sensitive, confidential financial and competitive information that are closely guarded

⁵ In its Petition for Review of Staff Action, Shuttle explained how the Staff Action decision erred in concluding 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’s competitive positions.” This conclusion is based on erroneous findings of fact and fails to address critical and undisputed facts presented by Shuttle showing why, because of Shuttle’s unique situation, disclosure is likely to substantially harm its competitive position. The assertions in Shuttle’s Petition apply with equal force to the instant Motion seeking confidential treatment of the specified line items of its Schedule P-1(a) report for this current month.

by Shuttle and not disclosed in any public forum or in any public financial filing.⁶ Currently, there is a level competitive playing field as Shuttle's regional jet competitors do not have the ability to calculate Shuttle's reimbursement rates and Shuttle does not have the ability to calculate the financial terms of their code-share agreements from their Form 41 submissions.

Thus, disclosure of Shuttle's information would give its competitors unfair and unilateral insight into Shuttle's reimbursement rates, not only causing substantial competitive harm to Shuttle, but also undermining competition in the fee-for-service sector. This directly contradicts the Department's stated "mandate to encourage, develop, and maintain an air transportation system that relies primarily on market forces." (*See*, Staff Decision, page 8).

The Department's longstanding policy has been to preserve the confidentiality of financial components of code-share agreements. In connection with the certification and fitness review of Republic Airline Inc., the Department granted confidentiality to the Regional Jet Services Agreement between Republic and its

⁶ Shuttle's financial information is disclosed only in a consolidated format by its parent company, Republic Airways Holdings, Inc. ("RJET"), reporting the combined performance of Shuttle and its two affiliated companies, Republic Airline Inc. and Chautauqua Airlines, Inc. Together, the three affiliated companies operate a number of different aircraft types for a number of different mainline partners, and as a result, it is virtually impossible to breakdown the reimbursement rates under Shuttle's contracts.

mainline customer, noting that it met the criteria for confidential treatment.⁷ In other cases involving “fee for services” arrangements involving similar regional jet services agreements, the Department reached the same conclusion. The terms of the agreement between Shuttle 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” with any of the identified Form 41 line items. Release in either format produces the same unacceptable result—providing competitors with the direct information or the tools to readily calculate the competitively sensitive financial terms of the code-share agreement, contrary to long-standing DOT policy. Release of Shuttle’s information would reverse well-settled policy to preserve the confidentiality of information to ensure that the underlying economic terms of the code-share agreements are not revealed to third-parties.

As the D.C. Circuit in *National Parks II* emphasized, “in light of the extremely detailed and comprehensive nature of the financial records..., we consider the likelihood of substantial harm to their competitive positions to be virtually axiomatic.” *National Parks II* 547 F.2d at 684 (emphasis added). Just as in *National Parks II*, “[d]isclosure would provide competitors with valuable insights

⁷ See letter from Patricia Thomas, Chief, Air Carrier Fitness Division, dated May 9, 2003 and DOT Order 2004-7-26 (Docket OST-2003-14579) granting confidential treatment to the competitively-sensitive terms of code-share agreements.

into the operational strengths and weaknesses, while [competitors] could continue in the customary manner of ‘playing their cards close to their chest.’” *Id.*

It is significant that the Court in *National Parks II* examined not only competition among other competitors, but also “competition...in the renewal of their concession agreement.” *Id.* at 678 (emphasis added). Disclosure here would substantially harm Shuttle’s competitive position not only with respect to other regional carriers seeking to displace Shuttle’s arrangement but also with respect to renewal/renegotiation with Shuttle’s mainline customers.

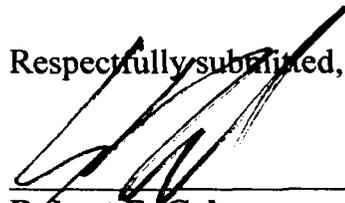
As the Court of Appeals stated in *McDonnell Douglas Corporation v. Department of the Air Force*, citing *Gulf & Western Industries*, “substantial competitive harm [is] likely where disclosure ‘would allow competitors to estimate, and undercut, its bids’ ...[and] by informing the bids of its rivals in the event the contract is rebid.” 375 F.3d 1182, 1189 (D.C. Cir. 2004). Only a few months ago, the D.C. Circuit in *Canadian Commercial Corp. v. Department of Air Force*, 514 F.3d 37 (DC Cir 2008), reaffirmed the vitality and importance of *McDonnell Douglas* in overturning an agency’s refusal to extend confidentiality to a corporation’s pricing information. The same holds true here, where confidentiality should be extended under FOIA Exemption 4 to the Form 41 data that can be used to determine Shuttle’s confidential pricing information.

II. CONCLUSION.

For the reasons set forth herein, and in the pleadings filed by Shuttle in this docket and incorporated by reference herein, the Department should grant Shuttle's request for confidentiality with respect to each line item identified in its Form 41, Schedule P-1(a) report for the month ended November 30, 2008.

WHEREFORE, Shuttle hereby moves the Department, pursuant to Rule 12 of the Department's Rules of Practice, to grant confidential treatment to the information described herein.

Respectfully submitted,



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Certificate of Service

I hereby certify that I have on this day, December 23, 2008, served the foregoing Motion of Shuttle America Corporation for Confidential Treatment on the following:

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