BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Joint Applications of	)	
	)	
AIR FRANCE	)	
and	)	**Docket OST-99-5726**
DELTA AIR LINES, INC.	)	
	)	
For Statements of Authorization pursuant to	)	
14 C.F.R. Part 212 (U.S.-France Codesharing)	)	

PETITION FOR RECONSIDERATION OF DELTA AIR LINES, INC.

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May 25, 1999

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PETITION FOR RECONSIDERATION OF
DELTA AIR LINES, INC.

Delta Air Lines, Inc. ("Delta") files this petition urging the Department to reconsider and vacate Order 99-5-2 to the extent that it imposed a condition precluding Delta and Air France from giving any force or effect to the exclusivity provisions in their codeshare agreements.

In support of this Petition, Delta states the following:

I. The Department's Presumptive Disapproval Of Exclusivity Provisions Is Bad Policy.

Delta has serious concerns with the Department's new policy of redrafting commercial agreements to eliminate exclusivity clauses. Codeshare agreements are either pro-competitive and consistent with the public interest (as the Department found the Delta-Air France arrangement to be) and should be approved, or they are detrimental to competition and the public interest and should

be disapproved. In approving the Delta-Air France codeshare authority, the Department stated:

> We have decided to grant the requested statements of authorization, effective immediately for an indefinite period, subject to the conditions below. We found that our action was in the public interest. It is our policy in determining the public interest to consider a number of factors, most importantly, the extent to which the authority sought is covered by and consistent with bilateral agreements. The proposed services are fully consistent with the provisions of the recently-signed U.S.-France Air Transport Agreement. Furthermore, the new authority will represent clearly enhanced service options for the traveling public. Against this background, having carefully reviewed United's comments, we concluded that they did not provide a basis for us to delay approval of, or to limit the scope of, the requested bilaterally-agreed authority. Statement of Authorization #98-303, August 6, 1998.

As the Department's approval correctly recognized, the Delta-Air France codeshare arrangement has injected substantial new service and competition between the United States and France, and there is no reason the Department's public interest evaluation of the relationship has been or should be changed on the basis of the exclusivity provision, which, after all, was included in the agreement submitted to the Department before it made its public interest findings.

Placing limits on airlines' freedom of contract choices is undesirable because it diminishes the level of commitment that can be achieved between the parties, which is an important component in the formation of comprehensive and lasting commercial relationships. Moreover, striking exclusivity clauses unnecessarily limits the benefits that can be achieved through an alliance or

codeshare agreement. Exclusivity clauses provide an important basis for allowing the parties in a cooperative marketing arrangement to invest in systems development, training, marketing, facilities, new services, and other activities necessary to make the arrangement a success.

Disapproval of exclusivity provisions has proved to be an ineffective means to address competitive concerns. For example, the Department's approval of the American-TACA codeshare arrangement contained a rigorous exclusivity provision (which was predicated on the highly unusual U.S.-Latin America competitive situation at Miami). The Department indicated that it would carefully review the competitive situation in the U.S.-Central America markets, the AA-TACA relationship, and whether TACA had entered into another codeshare relationship before approving renewal. However, in the year that has passed since the Department's approval of that alliance, no other U.S. carrier has succeeded in entering into a codeshare agreement with TACA.

If, despite the substantial benefits of exclusivity provisions, the Department continues to disfavor exclusivity provisions as a matter of general policy, the Department should conclude that the Delta-Air France exclusivity provision is consistent with the public interest and should not be disturbed for the reasons discussed below.

II. Absent Compelling Public Interest Findings, There Is No Basis For The Department to Nullify The Delta-Air France Exclusivity Provision.

Although the Department's stated new policy is to examine each codeshare agreement on a case-by-case approach, Order 99-5-2 does not contain any analysis demonstrating that the Delta-Air France exclusivity provision impairs competition or the public interest. The only basis cited by the Department for the condition is the alleged absence of an open skies agreement with France and the unfounded conclusion "that an exclusive arrangement with Air France would constitute an unnecessary and unjustified additional restriction on competitive operations by non-participating airlines that cannot be justified by any alleged countervailing benefits." Order 99-5-2 at 9.

Order 99-5-2 is defective because it fails to consider the following material facts, which establish that the Delta-Air France exclusivity provision has no adverse impact on competition:

(A) Unlike Japan and China, the Department's Concerns About Exclusivity Clauses Do Not Apply To The U.S.-France Marketplace, Which Is A Highly Competitive Country-Pair.

The Department's new policy of disfavoring exclusivity clauses paints these types of commercial provisions with too broad a brush, applying the extraordinary remedy of presumptively invalidating all such commercial terms, rather than doing so only when necessary to remedy an identifiable threat to the public interest. In Order 99-5-2, the Department failed to appreciate the significant distinctions between the highly competitive U.S.-France marketplace and the highly restrictive U.S.-China and Japan marketplaces. These differences demonstrate, as a matter of law and fact, that the Delta-Air France exclusivity provision will have no adverse impact on competition between the United States and France.

Unlike China and Japan, the United States and France have entered into a liberalized bilateral arrangement which, after a transition period, will become fully open skies and, in the Department's own words, will allow "U.S. and French air carriers [to] operate in a fully liberalized market with no limits to the number of the flights they may operate between the United States and France." Order 98-5-8 at 1. Neither the U.S.-China nor U.S.-Japan bilateral agreements could be characterized as liberal agreements.

Currently, there are eight designated U.S. carriers authorized to serve U.S.-France, providing intense competition from multiple hub gateways located in every

region of the United States. After April 2000, there will be no limitations whatsoever on U.S. carrier designations. There are more U.S. carriers currently serving U.S.-France than there are serving most open skies countries. The level of U.S.-France services operated by eight U.S. carriers offers the traveling public multi-carrier competition at levels significantly more intense than in the U.S.-China and U.S.-Japan markets.

Not only is the U.S.-France bilateral agreement itself far more liberal than China or Japan, the actual competitive opportunities for future services are greater because there is room for expansion at Charles de Gaulle Airport, the primary international airport serving Paris. In contrast, there are significant slot constraints at Tokyo's Narita airport that have precluded Delta and other U.S. carriers from operating a number of important services that are authorized under the bilateral agreement. U.S. carriers serving China have experienced significant ground handling and other doing business problems. No such restrictions limit U.S.-France services.

Another important characteristic of the highly competitive U.S.-France marketplace is that there are no constraints on pricing under the U.S.-France bilateral agreement, in contrast to the tightly regulated pricing environments of China and Japan.

Order 99-5-2 also failed to consider the significant differences in network competition between the United States and France compared to U.S.-China and U.S.-Japan. In addition to the competing nonstop services of eight U.S. carriers, the U.S.-France bilateral agreement authorizes four third-country codeshare arrangements between the United States and France. See, Annex V, Section 2.

As a result, U.S.-France benefits from intense competition from several major networks, including United-Lufthansa, Northwest-KLM, Delta-Air France, Continental-Air France, plus two other third-country codeshare arrangements and the Continental-Northwest same-country codeshare arrangement. Neither China nor Japan boast of an equivalent level of network competition from as many alliances.

(B) Placing Extraneous Conditions On The Approval Of Bilaterally Authorized Codeshare Arrangements Is Inconsistent With The Expectations Of The Government Of France When It Entered Into The U.S.-France Bilateral Agreement.

The April 1998 bilateral agreement culminated years of effort by the U.S. Government to establish a liberalized regime with the Government of France, after France renounced the previous bilateral agreement. The new agreement not only regularized the aviation relationship, it committed both governments to a liberal marketplace after a transitional period. The new agreement contained detailed provisions relating to cooperative marketing agreements, including codeshare arrangements. Throughout the entire negotiation process, the U.S. Government

never once raised a concern about codeshare exclusivity. The Government of France, in good faith and with the support of Air France, approved the new bilateral agreement. For the Department to sua sponte disapprove exclusivity provisions, after having approved the arrangement, would be acting inconsistently with the U.S.-France agreement and negotiations.

Services consistent with the bilateral are presumptively in the public interest:

> It its our policy in determining the public interest to consider a number of factors, <u>most importantly, the extent to which the authority sought is covered by and consistent with the bilateral agreement</u>. Statement of Authorization, August 6, 1998 (emphasis added).

The only approval conditions contained in the bilateral agreement require "that all airlines in such arrangements (a) hold the appropriate authority and (b) meet the requirements <u>normally applied</u> to such arrangements." Article 8, Paragraph 7 (emphasis added). Nothing in the U.S.-France bilateral agreement limits or conditions the right of U.S. or French carriers to enter into exclusive agreements with carriers of the other party. To the contrary, the Department's policy was to apply anti-exclusivity conditions only in situations where necessary to remedy a unique competitive harm. For example, in the American/TACA case:

> The record indicates that over fifty-five percent of the total traffic in the U.S.-Central America market flows over the Miami gateway. . . . It is precisely because of the competitive concerns raised by the Department and

> the opposing parties concerning the applicants' dominance in the Miami-Central America market that we have decided to impose various conditions and limitations on the Joint Applicants operations . . . .
> Order 98-5-26 at 14.

As discussed above, the U.S.-France marketplace is highly competitive and service is not dominated by any particular carrier or gateway. Accordingly, there are no circumstances that would warrant the extraordinary remedy of disturbing the Delta-Air France commercial agreement and invalidating the exclusivity provisions. If the Department proceeds with the dubious policy of attempting, without strong public interest justification, to redraft private commercial agreements, the Department will soon find itself in the position of having to accept only conditional bilateral agreements -- as is currently the case with many open skies negotiations -- where the effectiveness of the agreement is stayed until the interests of the national carrier or carriers are satisfied through favorable action by the Department. The Government of France chose to enter into an immediately effective bilateral arrangement expressly providing for codeshare service, and it would be inconsistent with the MOC for the Department to add unanticipated unilateral approval conditions.

III. Presumptive Disapproval of Exclusivity Conditions In Agreements Involving Non-Open Skies Countries Is Inconsistent With Longstanding DOT Policy And Precedent.

The Department's longstanding policy with respect to intercarrier agreements (for example, route-transfer agreements) is to permit the agreements unless the Department finds, based upon substantial evidence, that the agreements would conflict with important aviation policy objectives. The Department's public interest evaluation must include an analysis of whether the agreement substantially reduces or eliminates competition. See, Order 89-3-21 at 7 (Federal Express–lying Tiger; Order 96-5-26 at 17 (Delta-Swissair/Sabena/
Austrian). The Department's Order concerning exclusivity reverses this approach by, for the first time, establishing a presumption that exclusivity clauses are inherently contrary to the public interest in non-open skies environments. Moreover, Order 99-5-2 changes the Department's longstanding policy without any rational explanation or demonstration of how the exclusivity provisions addressed in the Order would actually impair competition in the particular affected markets. Furthermore, the Order fails to consider, much less refute, the substantial public interest benefits of exclusivity clauses that provide a sound basis for the parties to invest money and resources in the development of service enhancements. Even more significantly, as discussed above, the Department has not established that the Delta-Air France exclusivity clause would have the effect of materially

reducing or eliminating competition between the United States and France, particularly in light of the highly competitive U.S.-France environment.

Under well-established antitrust legal precedents, exclusivity provisions in the context of joint venture arrangements are presumed to be valid unless otherwise shown to reduce competition. In fact, the courts, including the Supreme Court, have consistently allowed exclusivity provisions similar to those used in airline codeshare agreements, finding them to be "presumptively valid" because such clauses can actually enhance competition, rather than reduce it. See, Tampa Electric v. National Co., 365 U.S. 320, 327 (1961): exclusivity clauses will be permitted "unless the Court believes it is probable that performance of the contract will foreclose competition in a substantial share in the line of commerce affected."

The Department's application of a presumption disfavoring exclusivity clauses is also inconsistent with the Justice Department's policy with respect to the review of joint ventures, including codeshare arrangements. As the Assistant Attorney General for the Antitrust Division recently testified before the Senate Commerce Committee: "when we conduct an antitrust investigation of a codeshare, we always analyze the specific terms of each agreement on a case-by-case basis . . . . In sum, we examine all of the facts and circumstances surrounding each codeshare agreement and make our competitive assessment on a case-by-case basis." Testimony of Joel I. Klein, Assistant Attorney General, before the

Committee on Commerce Science and Transportation, United States Senate, March 12, 1999.

While Delta recognizes that the Department's ruling rests on its public interest authority and is not premised on antitrust principles, the Department cannot escape its obligation to justify its policy on the basis of a developed record supported by substantial evidence.

IV. Due Process Entitles Delta To Notice And The Opportunity To Comment On the Proposed Condition Before It Is Imposed.

It is highly unfair for the Department to disapprove the codeshare exclusivity provision between Delta and Air France without providing Delta prior notice and an opportunity to comment. To do so constitutes a serious violation of Delta's due process rights.

Order 99-5-2 was issued in response to petitions filed by Northwest Airlines, Inc. ("Northwest") and United Airlines, Inc. ("United") for reconsideration of the Department's anti-exclusivity conditions contained in two codeshare proceedings unrelated to Delta-Air France (Northwest-Air China and United-ANA). On May 8, 1998, well before the filing of the United-ANA and Northwest-Air China codeshare applications, the Department approved the Delta-Air France arrangement. No objections were raised by any party concerning the exclusivity provisions in the Delta-Air France codesharing agreements and the

Department's decision authorizing Delta and Air France to engage in codesharing made no mention of any concerns regarding the exclusivity issue. Subsequently, the Department conditioned its approval of the United-ANA and Northwest-Air China arrangements, precluding the effectiveness of exclusivity conditions contained in those agreements.

Both United and Northwest filed petitions for review of that decision. Although the petition United filed in the United-ANA docket referred to the Delta-Air France exclusivity provision, no petition for reconsideration or review of staff action was ever filed in the Delta-Air France codeshare proceeding, seeking to modify the Department's approval. Nor did the Department ever advise Delta of its intent to reconsider sua sponte its earlier approval of the Delta-Air France codeshare authorizations.

It is a fundamental notion of due process, administrative law and basic fairness that parties affected by agency action have a right to prior notice of administrative action that would have a significant effect on that party, and a meaningful opportunity to submit comments. Notice and comment is vital to ensure that the agency has a fully developed record, based upon substantial evidence, concerning the validity and potential impacts of its proposed action.

Contrary to the Department's conclusory statement, Delta has not "had an opportunity to comment on the general and specific issues involved". Order

99-5-2 at 8. Delta's involvement with the exclusivity issue was limited to responding to United's petition for review in the United-ANA proceeding, and in its submission Delta distinguished the United-ANA and Delta-Air France situations. Since no party filed to reopen the Delta-Air France proceeding, at no time was Delta given an opportunity to address fully the public interest benefits which support the maintenance of the exclusivity provision in the context of the Delta-Air France proceeding. On the basis of due process violations alone, the Department's Order as it relates to Delta-Air France should be reversed.

V. The Department Should Vacate Its Decision And Address the Issue In A Policy Rulemaking Proceeding In Which Industrywide Comments Are Obtained.

Delta submits that an important change in policy of the type announced in Order 99-5-2 should not be created on the basis of a limited record in cases involving the applications of only two U.S. carriers. Adoption of a new policy through an ad hoc process, without allowing all potentially affected parties an opportunity to comment, is not only unfair to other carriers such as Delta who have not been given the opportunity to fully address the issues, but also deprives the Department of critical information and guidance concerning the potential ramifications of its decision on the public interest, consumer welfare, and the Department's international aviation objectives. Given the significant policy ramifications to the future of international aviation commercial relationships, the Department should examine this significant issue in the context of a policy rulemaking proceeding in which all industry participants have the opportunity to submit comments.

WHEREFORE, Delta urges the Department to reconsider and vacate Order 99-5-2 with respect to its decision to disapprove the exclusivity clause in the Delta-Air France codeshare agreements.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Reconsideration of Delta Air Lines, Inc. has been served this 25th day of May, 1999, by first class mail, upon each of the following persons:

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