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BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.

DEPT. OF TRANSPORTATION  
PERMITS

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Joint Applications of )  
AIR FRANCE )  
and )  
DELTA AIR LINES, INC. )  
for Statements of Authorization pursuant to 14 )  
CFR Part 212 (U.S.-France Codesharing) )  
\_\_\_\_\_ )

Docket OST-99-5726 - 2

ANSWER OF UNITED AIR LINES, INC.

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**DATED: June 4, 1999**

**BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
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**DATED: June 4, 1999**

**ANSWER OF UNITED AIR LINES, INC.**

United Air Lines, Inc., (“United”) submits the following answer to the petition of Delta Air Lines, inc. (“Delta”) for reconsideration of Order 99-5-2:

1. In Order 99-5-2, the Department acted on petitions for review and reconsideration relating to conditions imposed on contractual code-share exclusivity provisions. These petitions pointed out inconsistencies in the Department’s previous actions with respect to the imposition of conditions on the enforceability of contractually-agreed code-share exclusivity provisions. Among the inconsistencies noted were the conditions imposed on the exclusivity provisions in the United/All Nippon Airways code-share agreement and the lack of conditions imposed on the exclusivity provisions in the virtually contemporaneous approvals of the code-share arrangements between Delta and Air France and between Continental and Air France. See United Petition for Review, dated August 17, 1998, pp. 6-9.

2. In Order 99-5-2, the Department sought to address the inconsistencies in its previous actions by adopting a policy with respect to code-share exclusivity. This policy is based on the type of bilateral agreement that is in force between the U.S. and the homeland of a U.S. carrier's code-share partner. Essentially, contractual code-share exclusivity is presumed to be valid, absent countervailing competitive circumstances, in the case of agreements involving carriers from countries having pro-competitive bilateral agreements, such as "open skies" agreements. Such exclusivity will be more carefully scrutinized, however, in the case of carriers from countries governed by less competitive bilateral agreements.

3. Delta argues that the Department's attempt to regulate code-share exclusivity based on the distinctions set forth in Order 99-5-2 is bad policy and should be reversed. Delta instead urges that code-share partners should be free to fashion exclusivity provisions based on commercial considerations and that such provisions have been deemed to be beneficial to competition and presumptively valid in other industries.

United made similar arguments in support of the exclusivity provision in its contract with ANA, and United continues to believe, consistent with Delta's position, that such exclusivity clauses are, in the great preponderance of cases, competitively beneficial. See e.g., United Petition for Reconsideration, dated November 5, 1998 relating to the Northwest/Air China code share. See also Joint Submission of Northwest and United, dated April 8, 1999, in Dockets OST-98-36 19/22, et al.

The policy adopted by the Department in Order 99-5-2 largely rejected this approach in favor of a more intrusive regulatory intervention into code-share exclusivity issues

than is applied under general antitrust principles. Certainly, if the Department is prepared to reconsider this decision in response to Delta's petition, United would support such action so long as it is applied evenhandedly and consistently. Such action would also require reconsideration of the imposition of the conditions which preclude United and ANA from enforcing their contractual exclusivity provision, which conditions were, in large part, confirmed in Order 99-5-2.

4. As an alternative to wholesale reversal of the Department's policy for conditioning exclusivity provisions, Delta seeks to distinguish the Delta/Air France exclusivity agreement from those of United/ANA and Northwest/Air China on the basis of the allegedly more competitive terms of the U. S./France agreement. This argument was already raised in previous pleadings and considered by the Department in Order 99-5-2. United noted in its pleadings in the United/ANA case that the U.S./France bilateral agreement contained terms that were less competitive than those in the U.S./Japan agreement, especially as regarded code sharing. See. e.g., Petition of United, dated August 17, 1998, supra, and Consolidated Reply of United, dated September 8, 1999, pp. 5-6. Both Delta and Continental sought to rebut United's arguments concerning the comparison between the terms of U. S./Japan and U.S./France bilateral agreements.

The Department considered these arguments and rejected the position of Delta, which Delta now seeks to elaborate by describing the U.S./France agreement as an "open skies" agreement. In Order 99-5-2, the Department addresses this argument and rejects it:

With restrictions on fifth-freedom service, capacity limitations, and other limitations on third-country code sharing via third countries to France, our agreement with France cannot be regarded as Open Skies.

Id. at 8-9.

Delta's instant petition is simply an effort to rehash arguments regarding the U.S./France and U.S./Japan agreements that the Department has already considered and rejected. As such, this portion of Delta's pleading (Section II.A, pp. 4-7) is a successive petition and should be summarily rejected by the Department under 14 CFR §302.37(c).<sup>1</sup> If, however, notwithstanding the successive nature of Delta's petition, the Department is prepared to reconsider its findings with respect to the competitive nature of the U.S./France agreement, then it must at the same time reconsider its findings with respect to the competitive nature of the U.S./Japan agreement for the reasons United has already cited.<sup>2</sup>

5. Finally, Delta argues that the Department's action in conditioning its contractual exclusivity provisions has denied it due process. If the Department is prepared to reconsider the conditions on the Delta/Air France exclusivity provisions on procedural grounds, however, it must also grant reconsideration of its decision on the United/ANA condition on the same basis.

Delta was afforded more procedural rights than was United in the Department's consideration of exclusivity conditions. United had no opportunity to comment on the Department's condition before it was issued and had no reason to expect that such a condition

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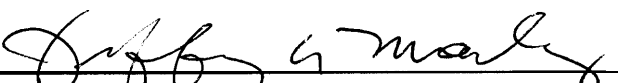
<sup>1</sup> Delta also adds a new argument (Section II.B, pp. 7-9) in which it notes that the U.S. government failed to notify the government of France of the U.S. policy on code-share exclusivity. The same is also true of the U. S./Japan negotiations in which the U. S. similarly did not raise the code-share exclusivity issue. To the extent that this factor is deemed to warrant reconsideration of the conditions imposed on the Delta/Air France exclusivity provision, it applies with equal weight to reconsideration of the United/ANA exclusivity condition.

<sup>2</sup> As United pointed out in its pleadings in the United/ANA case, the code-share terms of the U.S./Japan agreement are far more liberal than those in the U.S./France agreement.

would be imposed based on the Department's previous actions. Delta, on the other hand, was put on notice both by the Department's action in conditioning the United/ANA code share and by United's petition for review which cited the Department's inconsistent action in the contemporaneous Delta/Air France case. Indeed, Delta was served with United's petition and responded to it, making much the same arguments that it makes in its instant petition. See Answer of Delta, dated August 27, 1998, re undocketed United/ANA code-share application.

In these circumstances, any action by the Department to reconsider the Delta/Air France exclusivity conditions on procedural grounds must be accompanied by similar reconsideration of the Department's condition on the United/ANA exclusivity provisions which were adopted subject to even more summary procedures than were applied in the case of Delta/Air France.

Respectfully submitted,

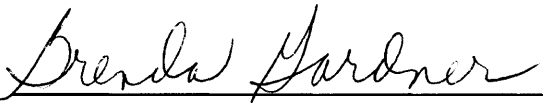
  
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**DATED: June 4, 1999**

**CERTIFICATE OF SERVICE**

I hereby **certify** that I have this date served a copy of the foregoing Answer of United Air Lines, Inc. on all persons named on the attached Service List by causing a copy to be sent via first class mail, postage prepaid.

  
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Brenda Gardner

**DATED: June 4, 1999**

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