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**BEFORE THE UNITED STATES
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.**

Application of)
)
)
 VIRGIN AMERICA INC.)
) Docket No. OST-2005-23307
 for a Certificate of Public Convenience)
 and Necessity under 49 U.S.C. § 41102 to)
 engage in interstate scheduled air transportation)
)

**MOTION FOR LEAVE TO FILE AND FINAL REPLY OF VIRGIN AMERICA
TO THE REMAINING OBJECTIONS OF OPPOSING PARTIES**

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March 14, 2007

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While American,¹ Delta, US Airways, and ALPA continue their protectionist tirade to prevent the launch of Virgin America, they have largely ignored Virgin America’s sweeping financial, managerial, contractual, and structural changes.

Now, more than ever,² the Department should sweep aside these remaining objections, seize this truly historic opportunity to demonstrate its *bona fide* commitment to applying modern and rational interpretations of its statutory citizenship, and help an

¹ Common names of the previously identified parties are used throughout. Pursuant to Rule 6 Department’s Rules of Practice, Virgin America hereby moves for leave to File its Reply to the Answers of Opposing Parties to the Objections of Virgin America (“Reply”) and the Answers of Opposing Parties to its Motions for Leave to File Additional Evidentiary Material. No parties will be prejudiced by granting this motion, which will serve to clarify and correct the record in this proceeding and provide the Department with a complete and accurate record upon which to base its decision.

² While Virgin America has clearly demonstrated that its application complies with existing law regarding ownership and control of U.S. airlines and it is fully consistent with DOT's previous interpretations of this law, Virgin America notes that the U.S. and European Community may be on the verge of signing an historic Open Aviation Agreement that would further encourage global investment in the struggling U.S. airline industry. See STATEMENT FROM SECRETARY OF TRANSPORTATION MARY E. PETERS REGARDING TENTATIVE US-EU OPEN SKIES AGREEMENT, U.S. DEPARTMENT OF TRANSPORTATION (Mar. 2, 2007).

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exciting new airline provide great service and much needed competition to the American public.

I. Executive Summary

The Department and Administration have an unprecedented chance to create a legacy of international aviation leadership by approving Virgin America's application. Since December 5, 2005, Virgin America has submitted over 1,700 pages in support of its application, including most importantly documentation of extensive and far-reaching changes to Virgin America's corporate, financial, and governance structures in direct response to the issues identified by the Department's Order to Show Cause (the "Tentative Decision").³ While American, Delta, US Airways and other remaining opponents try to ignore or belittle these changes, they cannot dispute that:

- (1) The non-U.S. citizen investors from Virgin Group will hold less than 25% of the Company's voting equity and, indeed, will not hold anywhere near the new limits of 49% and beyond non-voting equity if the new E.U.-U.S. agreement goes into effect.
- (2) Virgin Group is going above and beyond statutory and regulatory requirements by placing its voting rights in a U.S. citizen trustee fully subject to the approval of the Department;
- (3) Virgin Group consent rights over a wide variety of transactions have been stripped, leaving only bare bones, minority investor protections approved in previous DOT decisions;
- (4) The parties have amended their Trademark License Agreement to clearly ensure Virgin America's ability to exist "outside of the brand," as is done in Australia with Virgin Blue;

³ Order 2006-12-23 (Dec. 27, 2006).

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- (5) With only two of eight seats, Virgin Group's presence on the Board is only 20% -- well below the one-third permitted under the statute;
- (6) The passive and diffuse nature of the hedge funds in this case are not materially different than those in the *Hawaiian* case; [CONFIDENTIAL]
- (7) The U.S. citizen Investors, who have abundant risk and incentives, have added another \$20 million in debt without any Virgin Group guarantee and another \$10 million in equity not subject to the put, and are now demonstrably exercising U.S. citizen control over Virgin America;⁴
- (8) Virgin America's Chairman, Don Carty, and new Vice Chairman, former Secretary of Transportation Samuel K. Skinner, are two of the most capable U.S. citizens serving on any airline board; and
- (9) The evidence now in the docket clearly demonstrates that former Delta President and U.S. citizen, Fred Reid, is beholden only to the U.S. majority controlled Board of Directors.

In short, Virgin America has done everything possible to meet even the strictest "totality of circumstances" test and comply with the statutory citizenship requirements. Thus, the Department can easily approve this application and bring a well financed and well recognized brand name – known for great service, competitive prices and fun – to consumers throughout this country.

The record here is now complete and ripe for action because once concerns were raised in the Department's Tentative Decision, Virgin America and its investors went above and beyond statutory and regulatory requirements to conclusively demonstrate not only that the application meets the statutory ownership requirement, but that it is under the control of U.S. citizens. To their credit, certain legacy carriers like United, Northwest, and now even Continental, have fallen silent in their opposition in the docket

⁴ See Motion for Leave to File Additional Evidentiary Material (Feb. 14, 2007).

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and have apparently decided to compete in the marketplace, not governmental corridors. Notably, no low cost carrier has filed in opposition to Virgin America's application. Additionally, over 71,000 letters in support of Virgin America's application have been submitted to the White House, the DOT, Members of Congress, and governors around the country.⁵

For the above reasons and given the overwhelming evidence in the docket that this applicant fully complies with all aspects of U.S. law and prior decisions governing ownership and control, Virgin America respectfully requests that the Department issue forthwith a Final Order approving its application for a certificate of public convenience and necessity to engage in interstate scheduled air transportation.

II. The Opposing Parties Largely Ignore Virgin America's Sweeping Changes

The Opposing Parties largely ignore the vast majority of Virgin America's extensive changes directly responsive to the concerns raised in the Tentative Decision, including the permanent relinquishment by the Virgin Group of one of its Board seats and the removal of Virgin Group consent rights related to: [CONFIDENTIAL] The record here is clear: while some Opposing Parties "assert" that what remains are non-standard minority investor protections, they have offered no proof, evidence, or expert opinion, because none exists. What remains are what Virgin America represented and proved in this proceeding: standard minority investor provisions that do not evidence "actual control."

Nor have the Opposing Parties commented on the extensive evidence of the active, independent leadership offered by U.S. citizen and Virgin America CEO Fred

⁵ The docket also reflects additional letters from Federal and State legislators, governors, and airport directors, all petitioning the Department to approve Virgin America's application.

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Reid; indeed, they ignored Virgin America's representations that it was even prepared to take the drastic action of removing him from the Board or Company to the extent the Department was truly concerned that he might somehow be "beholden" to the Company's minority investors, notwithstanding his legal and fiduciary obligations as a CEO, a Board member, and an officer of the Company.⁶ Additionally, nearly all the Opposing Parties ignored the significant addition – without Virgin Group input – of former U.S. Secretary of Transportation Samuel K. Skinner as Vice-Chairman of Virgin America.⁷

Additionally, no disagreement exists that: (i) over two-thirds of Virgin America's board and officers are U.S. citizens under the aviation statute; (ii) funding from U.S. investors will increase dramatically at the time of the Second Closing;⁸ and (iii) total voting equity held by Virgin Group can never exceed the 25% statutory limit.

Instead, the Opposing Parties focus on a handful of remaining "concerns" that are unsupported in law or fact. Virgin America's detailed responses to the purported control issues raised by the Opposing Parties – briefly summarized below – more than adequately demonstrate that Virgin America is a U.S. citizen within the meaning of 49 U.S.C. § 41102.

⁶ Objections of Virgin America at 6; 12. The additional evidentiary materials filed by Virgin America on February 14, 2007 include an officer certificate evidencing that the U.S. majority shareholders reappointed the U.S. majority Board and they, in turn, reappointed all officers of Virgin America, while the designees of Virgin Group recused themselves from these actions. None of the latest Answers filed by the Opposing Parties addresses the extensively detailed submission made by Virgin America in its Objections and supporting affidavits with respect to the independence of its managers, officers, and directors *See* Objections of Virgin America at 62-67. [CONFIDENTIAL]

⁷ While Delta was alone in acknowledging the addition of Samuel K. Skinner to the board, it only did so in its argument that the entire management team of Virgin America was "recruited and hired by representatives of the Virgin Group." Feb. 13 Answer of Delta at 17. It was impossible for Delta to expand this unsubstantiated blanket statement to Secretary Skinner since his appointment as Vice-Chairman came over one year after Virgin America submitted its application to the Department and was done without input from Virgin Group's Board representatives.

⁸ Objections of Virgin America at 26.

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- The Opposing Parties completely ignore the salient point about the Voting Trust: it is not designed to provide an interim fix to take impermissible equity holdings and phase them out, as in their cases cited. It simply represents further good faith efforts by Virgin America's minority investor to demonstrate lack of actual control, with terms explicitly subject to Department approval. All remaining Virgin Group consents may now only be exercised by the independent U.S. Trustee (approved by the Department).
- The revised Trademark License clearly allows Virgin America exist "outside the brand" and to fly anywhere without using the Virgin name. [CONFIDENTIAL]
- With the permanent relinquishment of one of Virgin Group's Board seats and with the appointment – without the input of Virgin Group – of Samuel K. Skinner as Vice Chairman, Virgin America has increased the level of control exercised by U.S. citizens on the Board of Directors beyond the level required under the aviation statute.
- [CONFIDENTIAL]
- The U.S. Investors' risk is significant under both the Put Agreement and the new \$30 million commitment in Virgin America. This new commitment is not subject to any guarantee or "put," notwithstanding Opposing Parties' efforts to cast aspersion on this additional at risk U.S.-based financing.
- As the Opposing Parties well know, Virgin America will be required to meet the Department's financial fitness test as a condition of a final order granting an effective certificate.

Finally, Virgin America has demonstrated time and again the enormous public and competitive benefit its service will bring to the marketplace, at a time when such benefits are critically needed.

III. Virgin America Meets the Statutory Citizenship Requirements

As Virgin America has previously demonstrated,⁹ given that the partners in the hedge funds are "genuinely passive" and "highly diffuse," the Department should apply

⁹ Objections of Virgin America at 48.

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the multiplying-out approach used in the *Hawaiian* case.¹⁰ In the alternative, the Department has discretion to apply a similarly flexible approach, given that the Department has “continually modified [its] interpretation [of citizenship] over time in light of changing conditions,”¹¹ as evidenced in *Hawaiian, Wings II*,¹² and Air Canada’s 27.5% total foreign equity investment in Continental at a time when Canada was not an Open Skies nation.

Second, in the event that the Department declines to apply the *Hawaiian* multiplying-out approach or a similarly flexible test, management of the funds are in the hands of U.S. citizens, and the hedge funds have agreed to take steps to eliminate foreign partner participation. [CONFIDENTIAL]

IV. Neither the Transaction Agreements nor the Terms of the Recent Equity Investment Evidence Impermissible Negative Control

Notwithstanding the removal of a host of prior written consents from the Bylaws, Subscription Agreement, and Stockholders Agreement, and despite the placement of the Virgin Group’s remaining consent rights in a voting trust with a U.S. citizen trustee, the

¹⁰ Conclusions of the Department of Transportation Regarding the Citizenship of Hawaiian Airlines (Mar. 7, 2005) available at Issues and Events, <http://ostpxweb.dot.gov/aviation/index.html>. Against a backdrop of global capital markets, several U.S. airlines rely on private equity and financing from hedge funds to expand operations and grow their businesses. The Department recognized the critical role played by foreign capital in the U.S. airline industry in its now withdrawn rulemaking on actual control and foreign ownership. “[G]lobalization has redefined the capital marketplace, and driven decisions regarding airline operations.” 70 Fed. Reg. 67392. In explaining the reason behind its rulemaking, the Department stated in February of 2006 that, “Substantial structural changes have taken place in global financial markets ... current interpretation[s] ha[ve] failed to keep pace with changes in the global economy and evolving financial and operational realities in the airline industry itself.” *Hearing Before the Aviation Subcomm. of the H. Transportation and Infrastructure Comm.*, 109th Cong. 2 (2006) (statement of Jeffrey N. Shane, Under Secretary for Policy, Dep’t of Transportation).

¹¹ 71 Fed. Reg. 71107.

¹² Order 91-1-41 (Jan. 23, 1991)

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Opposing Parties continue to argue that the transaction agreements evidence impermissible control over Virgin America.¹³

Notably absent is any proof or argument as to why the Virgin Group's remaining consent rights should be viewed as anything other than commercially reasonable and customary minority investor protections. In fact, none of the Opposing Carriers cites to a single case or any expert opinion to support their arguments that the consent rights retained by the Virgin Group constitute impermissible foreign control. Instead, the Opposing Parties rest on mere assertions that the rights retained by the Virgin Group, notwithstanding the voting trust, evidence control.

Also un-refuted is Virgin America's argument¹⁴ that while American finds standard minority protections to be objectionable, the Department approved similar investor protections when it allowed Air Canada to exercise super-majority voting rights over several Continental transactions in connection with a 25% voting equity stake in Continental. Such transactions included: 1) the authorization and modification of certain stock; 2) fundamental changes to Continental's business; 3) liquidation or dissolution; 4) bankruptcy petitions and events; and 5) changes to Continental's plan of reorganization.¹⁵

[CONFIDENTIAL]

Simply put, none of the Opposing Parties have offered any reason why the consents retained in the transaction agreements should be viewed as anything other than bare-bone minority protections. In addition, and as demonstrated above, the placement of

¹³ See Feb. 13 Answer of American at 24-25; Feb. 13 Answer of ALPA at 3.

¹⁴ Motion of Virgin America for Leave to File Additional Evidentiary Material (Jan. 30, 2007) at 9.

¹⁵ In the Air Canada/Continental transaction, the Department granted approval based upon an informal review, and explicitly rejected a petition to institute formal proceedings. See *In the Matter of the Acquisition by Air Canada of Continental Airlines, Inc.*, Order 92-11-40 (Dec. 4, 1992).

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all of the Virgin Group's shares in a voting trust with a U.S.-citizen trustee further ensures that control over Virgin America resides with U.S. citizens.

Ironically, the Opposing Parties also argue that the terms of the new \$10 million equity investment by U.S. citizens evidence foreign control.¹⁶ [CONFIDENTIAL]

V. The Revised Trademark License Agreement Does Not Evidence Actual Control Over Virgin America

[CONFIDENTIAL]

VI. Contrary To American's Erroneous Assertion, Virgin America Has Sufficient Resources To Meet Its Obligations.

In yet another effort to create an issue where none exists, American now asserts that Virgin America will not be able to meet its obligations at the Second Closing.¹⁷ This is simply not the case, reflecting a lack of understanding by American of the resources available to Virgin America.

As previously demonstrated by Virgin America, all of the interim debt provided by the Virgin Group will be repaid at the Second Closing which will occur following a DOT Final Order. [CONFIDENTIAL]

VII. The Debt Financing Provided By The Virgin Group Does Not Mean That Virgin America's Survival Is Contingent Upon The Virgin Group

Once again, the Opposing Parties argue, incorrectly, that the debt agreement between Virgin America and the Virgin Group evidences foreign control.¹⁸ As Virgin

¹⁶ March 1 Answer of Delta at 7; March 1 Answer of American at 4; March 1 Answer of US Airways at 2.

¹⁷ Feb. 13 Answer of America at 13.

¹⁸ Feb. 13 Answer of American at 11; Feb. 13 Answer of ALPA at 4-5; Feb. 13 Answer of Delta at 11. US Airways is alone in peddling the argument that the "subordinated note is really disguised equity." Feb. 13 Answer of US Airways at 6. For the reasons set forth, *supra.*, the argument is flawed because it ignores the large U.S. citizen cash infusion at the Second Closing. ALPA characterizes the agreements as "complete domination by Virgin Group of [Virgin America's] funding," and a proxy that Virgin America "is likely to turn to Virgin Group to fund shortfalls in the future." Feb. 13 Answer of ALPA at 4. Delta for its part cites language from *Silvas Air Lines*, 87 CAB 160 (1983) for the proposition that

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America previously noted, the additional investment from U.S. investors at the Second Closing – will infuse another \$108 million into the Company¹⁹ – and it is this fact, not interim loans, that is relevant to the Department’s review of Virgin America’s application.²⁰ Indeed under the Department’s own regulations and published procedures, show cause, final, and effective certificate orders are based upon an applicant’s financing plan,²¹ while evidence of *actual funding* is typically provided during the period between issuance of the final order and an effective certificate of public convenience and necessity; the Opposing Parties’ arguments in this area are without merit.²²

The Opposing Parties wrongly suggest that the Department should not view the loan as a material change directly responsive to citizenship because the loan term sheet has not been further memorialized.²³ Such arguments are not persuasive because the Department routinely conditions effective certification on verification of additional information.²⁴

[CONFIDENTIAL]

the mere presence of a major creditor can indicate impermissible control over an applicant. Feb. 13 Answer of Delta at fn. 3. While the creditor in *Silvas* was a minority shareholder, the control it exercised was “far greater than that of a normal creditor,” *id.* at 163, given that it would not allow the applicant to withdraw loan proceeds from the bank account without explicit approval. It was “clear that [the creditor] would retain substantial control over the company’s *funds* even after the loan technically had been completed.” *Id.* (emphasis added) Such far-reaching control is not present in the agreements between Virgin America and the Virgin Group.

¹⁹ At the time of the Second Closing, the U.S. investors will have committed a total of \$118 million to Virgin America, given their previous equity investment of \$10 million.

²⁰ Consolidated Reply of Virgin America at 26; Objections of Virgin America at 87.

²¹ “How to Become a Certificated Air Carrier,” Air Carrier Fitness Division (May 2005).

²² In fact, the most recent answers filed by the Opposing Parties demonstrate that they show that they want it both ways when attacking the various debt agreements – arguing that both Virgin Group and U.S. Investor debt constitute foreign control.

²³ Mar. 1 Answer of Delta at 6; Mar. 1 Answer of US Airways at 5.

²⁴ *See, e.g., Application of USAfrica Airways, Inc.*, Order 92-6-34 (Jun. 19, 1992) (stating that “we will condition the effectiveness of any certificate which may be awarded to [the applicant] upon its first providing certain additional financial information, *including a verification of its funding.*”) (emphasis added); *Application of Accessair Holdings, Inc.*, Order 97-6-15 (Jun. 11, 1997) (noting that, in light of future completion of applicant’s financing plan, the applicant, “prior to its receipt of effective certificate authority [] must provide us with up-to-date ownership information...”).

VIII. The U.S. Investors Bear Significant Risk

The Opposing Parties in their latest filings ignore the significant additional U.S. Investor financing of Virgin America at the Second Closing. [CONFIDENTIAL]

Setting aside the significant additional investment of \$108 million that the U.S. Investors will make once the Department grants Virgin America economic authority, and the significant economic incentives that the U.S. Investors have to exercise control over Virgin America to maximize the return on their investment, the Put Agreement in no way evidences a lack of risk.²⁵ [CONFIDENTIAL] In fact, from the U.S. Investors' point of view, they bear a *substantial risk* through the opportunity costs of deploying significant capital to invest in Virgin America, which could involve foregone earnings from much more lucrative ventures.

Furthermore, as Virgin America demonstrated in its February 14 Motion for Leave to File Additional Evidentiary Material, the U.S. Investors have already agreed to increase their financial commitment by another \$30 million – for a total of \$118 million by the Second Closing. Notably, this additional funding is not subject to any put rights, further evidencing the commitment of and significant equity risk taken by the U.S. Investors. With a total of \$118 million committed to Virgin America and the potential for sharing in the significant upside potential of a successful airline, the U.S. Investors

²⁵ As Virgin America previously explained, the first put agreement is irrelevant to the issue of actual control, as it is wholly contingent upon the occurrence of the Second Closing, which in turn follows the issuance of a certificate of public convenience and necessity. *See* Objections of Virgin America at 93. Thus if the put agreement is exercised due to lack of regulatory approval, ownership of (and control over) Virgin America is moot.

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have abundant incentives to exercise control over Virgin America, which they continue to do.²⁶

IX. The Voting Trust Further Reduces Any Asserted “Actual Control” By Virgin Group Over Virgin America

All of the Opposing Parties’ arguments on the proposed voting trust agreement (“Voting Trust”) among Carola Holdings Limited (“Carola”), Virgin Management Limited (“VML”), Virgin America, and the Trustee critically ignore that the Voting Trust is not intended to address a non-compliance with permissible equity stakes, and is *subject to Department approval*. Even without the Voting Trust, the remaining limited minority investor protections retained by the Virgin Group are standard and customary – a proposition that has not been refuted by the Opposing Parties – and do not demonstrate actual control by Virgin Group over Virgin America.

To be clear, the Voting Trust is not intended, as Delta suggests,²⁷ as the sole mechanism to address all of the Department’s concerns regarding “actual control,” rather the Voting Trust, *along with the many other changes* unequivocally demonstrates that Virgin America is not under the actual control of Virgin Group.

A. The Voting Trust Addresses “Actual Control” Not The “Statutory Citizenship Test” And Is Subject to Department Approval

First, the Voting Trust is one of the many sweeping changes made by Virgin America that goes *above and beyond* the concerns raised by the Department and demonstrates – without any doubt – that Virgin America is not under the actual control of Virgin Group and “assure[s] that there is no impropriety in regard to control over the

²⁶ [CONFIDENTIAL]

²⁷ Feb. 13 Answer of Delta at 6.

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securities placed in trust.”²⁸ Unlike the *Hutchinson Auto and Air Transport* case cited by American,²⁹ Virgin America complies fully with the statutory ownership test, and as in *Premiere*³⁰ and several other cases, the Voting Trust will address “actual control,” not statutory ownership requirements.³¹

Second, Delta’s argument that the proposed Voting Trust must be considered foreign appears to address the statutory citizenship cap.³² Although the Voting Trust already commits to a U.S. citizen trustee, the citizenship of the beneficiaries is immaterial since, as Virgin America has demonstrated, the total equity in the proposed voting trust would be below the statutory ceiling of 25%.³³ As to Delta’s speculation that mere presence of foreign beneficiaries implies impermissible control over a U.S. airline (notwithstanding the U.S.-citizen trustee), Delta fails to state with any particularity possible avenues in the Voting Trust Agreement through which Carola or the Virgin Group could exercise “actual control.” In fact, Delta only cites to *Discovery Airways*³⁴ for impermissible control that foreign beneficiaries might be able to exercise. There, however, the beneficiary was the president of a foreign corporation and held 75% of the carrier’s voting equity. In fact, the foreign corporation in *Discovery Airways* held an

²⁸ Objections at 77-78.

²⁹ Feb. 13 Answer of American at 17-18 (citing to use of voting trust in *Hutchinson Auto and Air Transport* to address issue of statutory ownership test).

³⁰ See *Premiere Airlines, Fitness Investigation*, Order 82-5-11 (permitting the use of a voting trust to meet the actual control test, subject to conditions imposed by the Department).

³¹ Delta and American wrongly imply that Virgin America is proposing the trust to address statutory ownership concerns. Feb. 13 Answer of American at 10; Feb. 13 Answer of Delta at 7-8. This is not the case.

³² In support of its proposition, Delta cites to *EOS Airlines*, Order 2005-8-4 (Aug. 5, 2005), where the DOT “noted that the trustees and trust beneficiaries are U.S. citizens.” Feb. 13 Answer of Delta at 7. In other words, according to Delta since both the trustees and trust beneficiaries were U.S. citizens in *EOS Airlines*, then, *ipso facto*, where beneficiaries are non-U.S. citizens then the voting trust itself must be deemed foreign. Delta’s reading of *EOS Airlines* is therefore overly broad.

³³ Contrary to Delta’s argument, in many of the DOT control cases involving the establishment of voting trust, the beneficiaries were indeed foreign.

³⁴ Order 89-12-41 (Dec. 22, 1989).

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additional 75% of the carrier's non-voting equity.³⁵ Unlike the beneficiary in *Discovery Airways*, Carola will hold less than 25% of Virgin America's voting equity. Therefore the language cited by Delta – and the rationale applied by the Department in *Discovery Airways* – is inapplicable to Virgin America's application.

Third, all Opposing Parties ignore the requirement that the Department approve the terms of the Voting Trust. The Letter Agreement clearly state that the parties will accept conditions on the Voting Trust as “conditions that must be satisfied prior to the effective date of any Final Order granting [Virgin America] a certificate of public convenience and necessity.”³⁶ [CONFIDENTIAL]

[CONFIDENTIAL]

Virgin America does not dispute that, for purposes of meeting the statutory ownership requirements, voting trusts have been typically used as interim measures while the carrier takes actions to bring its ownership structure into compliance. However, where as here, the voting trust is used to show a lack of actual control by the foreign investors, the Department has adopted a more flexible approach. For example, in *Premiere Airlines*,³⁷ the Department approved the use of a voting trust, along with other measures, to demonstrate that the carrier was under the actual control of U.S. citizens.³⁸

³⁵ While the Department noted in *Discovery Airways* that the proposed trust was not a “long-term solution to any control problem,” *id.* at 14, the beneficiary would continue to be the “owner of the *majority* of the company's stock.” *Id.* (emphasis added).

³⁶ Letter Agreement dated January 30, 2007 by and between VAI Partners, LLC, VAM Partners, LLC, Carola Holdings Limited, Virgin Management Limited, and Virgin America, Inc. (“Letter Agreement”) at 1-2.

³⁷ Order 83-5-11 (May 5, 1982).

³⁸ *Premier Airlines*, Order 82-5-11 at 103. *See also Discovery Airways, Inc.* Order 90-1-60 (permitting use of voting trust to show independence and requiring trustee to vote independently, not in concert with other shareholders.).

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Finally, as the Department well knows, the proposed Voting Trust here is substantially similar to the Voting Trust approved by the Department in *Wings II*, which remained in effect for years.³⁹

X. The Opposing Parties' Overstate The Relevance Of Prior Involvement By The Virgin Group And Ignore The Composition Of Virgin America At The Time Of Certification.

The Opposing Parties once again urge the Department to deny Virgin America's application based upon facts surrounding Virgin America's creation.⁴⁰ These arguments – which have been briefed extensively by the parties – are almost invariably accompanied by language from the *ASTAR* proceeding⁴¹ which, the Opposing Parties maintain, compel the Department to find that Virgin America does not meet the citizenship requirement of the aviation statute. As the Opposing Parties and the Department well know, the applicability of *ASTAR* is limited, since it did not involve the citizenship of a new entrant

³⁹ Department precedent does not require, as ALPA wrongly suggests, a proportional voting mechanism to show lack of actual control by foreign interests. Feb. 13 Answer of ALPA at 10. Each of the cases cited by ALPA involved airline mergers and Section 408 of the Federal Aviation Act, where the proportionality requirement served as a prophylactic mechanism to address antitrust concerns. *See, e.g. Application of Delta Air Lines, Inc.*, Order 86-10-13 (Oct. 7, 1986) (approving placement of 51% of voting equity in trust pending Department's review of Delta's proposed acquisition of Western Air Lines); *Alaska Air Group, Inc.*, Order 86-12-34 (Dec. 12, 1986) (approving placement of 51% of voting equity in trust pending Department's review of Alaska's proposed acquisition of Horizon); *Application of Trans World Airlines, Inc.*, Order 86-3-94 (Mar. 31, 1986) (approving placement of voting equity in trust pending Department's review of TWA's proposed acquisition of Ozark); *Application of Tiger-International Seaboard Acquisition Case*, Order 78-12-91 (allowing Tiger to hold 25% of Seaboard's voting equity in trust pending outcome of formal proceeding examining proposed acquisition); *Application of USAir Group*, Order 87-3-58 (Mar. 23, 1987) (allowing USAir to place all voting equity in voting trust pending Department's review of proposed acquisition of Piedmont). More importantly, each of the cases cited by ALPA precede December 1988, when the Department's jurisdiction to approve or disapprove airline mergers terminated. Of course, DOT retains jurisdiction to enforce consumer protection statutes and regulations.

The attempts by US Airways to discredit the Voting Trust by comparing it to the statutorily mandated blind and qualified trusts required for governmental officials and the Department of Defense have no bearing on the Department's evaluation of the Voting Trust as addressing its stated "actual control" concerns. As US Airways well knows, the Department has approved the use of voting trusts with a variety of terms on a case-by-case basis.

⁴⁰ Feb. 13 Answer of American at 15-16; Feb. 13 Answer of Delta at 16-17.

⁴¹ Order 2004-5-10 (May 13, 2004).

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applicant for economic authority. Indeed, the Department in *ASTAR* explicitly limited its inquiry to the current citizenship of a carrier that had *already received* an operating certificate, stating:

To the extent that the parties to this proceeding have attempted to probe into historical developments in the DHL Airways ownership structure, all participants are reminded that the Department *has already found that historical ownership is not relevant to the current citizenship status of ASTAR.*⁴²

Any prior involvement by the Virgin Group in the creation of Virgin America has been superseded by abundant independence on the part of its managers and, most importantly, the Board.⁴³

XI. Virgin America's Enormous Economic Benefits – With No Adverse Competitive Downside – Are Highly Relevant And A Permissible Consideration

Rather than answering Virgin America's Objections with respect to the public benefits of new low fare service, the Opposing Parties dismiss such benefits as irrelevant to the Department's evaluation of Virgin America's application.⁴⁴ Notwithstanding these efforts to disregard the significance of benefits to the traveling public and the American economy, public policy considerations are relevant to the issue of citizenship in an

⁴² Order 2003-7-36 at 3 (July 30, 2003) (emphasis added).

⁴³ To the extent that the Opposing Parties have tried to raise the specter of foreign manipulation of Virgin America as a result of previous association between the Virgin Group and Frederick Reid, Virgin America's CEO, the fact remains that Mr. Reid was chosen to lead Virgin America because of his distinguished career in airline management, and his appointment was confirmed, and more recently reconfirmed, by the U.S. citizen controlled Board of Directors. Mr. Reid has over 30 years of experience running some of the largest airlines in the world, including Pan Am, American Airlines, Lufthansa, and Delta Air Lines, where he served as President and COO. Mr. Reid is no more "beholden" to the Virgin Group than he is to the many other airlines that previously employed him. Finally, as Virgin America's CEO, Mr. Reid has a fiduciary duty to the Board of Directors and a duty of loyalty to Virgin America.

⁴⁴ American seemingly ridicules Virgin America for "self-serving arguments" contained in a "consultant's study," even though American recently submitted an 18-page consultant's study in connection with its opposition to expanded antitrust immunity for certain *Star Alliance* members. See Answer of American Airlines in OST-2005-22922 (Aug. 9, 2006).

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application for economic authority. Section 40101(a) directs the Secretary of Transportation to “plac[e] maximum reliance on competitive market forces and on actual and potential competition”⁴⁵ in all determinations of public convenience and necessity and consider “the availability of a variety of adequate, economic, efficient, and low-priced services.”⁴⁶ Thus, Delta’s assertion that the Department should not consider Virgin America’s “alleged public benefits that might result from its proposed service” is simply wrong as a matter of law and Department policy.⁴⁷

⁴⁵ 49 U.S.C. 40101(a)(6)

⁴⁶ 49 U.S.C. 40101(a)(4). Virgin America set forth significant public benefits in its Objections and in previous filings, including: 1) the creation of \$775 million in annual economic benefits in the form of new wages, business and tourism revenue, and state and local taxes; 2) savings to travelers of \$786 million annually as a consequence of lower fares; and 3) the creation of thousands of high paying jobs. Objections of Virgin America at 19; 21; 43; Consolidated Reply of Virgin America at 93-95. Moreover, by virtue of 42 U.S.C 40101(a)(6), *supra.*, the various press reports that Virgin America has brought to the Department’s attention in its Objections as well as its January 30 Motion are no less relevant to the Department’s evaluation of Virgin America’s application. Finally, the Department has explicitly weighed public policy considerations in evaluating citizenship concerns. *See, e.g., Friendship Airlines, Inc.*, Order 93-4-50 at 10; *ASTAR*, Order 2004-5-10 at 29; *USAir and British Airways*, Order 93-3-17 at 19 (Mar. 15, 1993).

⁴⁷ February 13 Answer of Delta at 22. In an attempt to hedge its arguments in the event that the Department properly weighs public benefits in assessing Virgin America’s application (as it is statutorily required to do, *supra.*), Delta proceeds to address no fewer than three of the public benefit arguments advanced by Virgin America in its Objections. Feb. 13 Answer of Delta at fn. 3.

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WHEREFORE, Virgin America respectfully requests that the Department grant its Motion for Leave and Final Reply to the Answers of the Remaining Opposing Parties to the Objections of Virgin America, Inc., and find that Virgin America, Inc. is owned and controlled by U.S. citizens, and fully fit to receive a certificate of public convenience and necessity to engage in interstate air transportation.

Respectfully submitted,

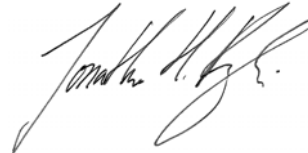


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CERTIFICATE OF SERVICE

I hereby certify that I have, this the 14th day of March, 2007, caused the foregoing Motion for Leave to File and Final Reply of Virgin America to the Remaining Objections of Opposing Parties to be served by electronic mail on the following persons:



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