

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

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Motion of )  
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 **VIRGIN AMERICA, INC.** ) Docket DOT-OST-2008-0107  
 )  
 for confidential treatment under Rule 12 )  
 (Form 41 Schedules) )  

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

Communications with respect to this document should be sent to:

MARY BARNICLE  
Manager – International & Regulatory Affairs  
UNITED AIR LINES, INC.  
77 West Wacker Drive, HDQIZ  
Chicago, IL 60601

JULIE OETTINGER  
Managing Director – International &  
Regulatory Affairs  
JEFFREY A. MANLEY  
Senior Advisor—Regulatory Affairs  
UNITED AIR LINES, INC.  
1025 Connecticut Avenue, N.W.  
Suite 1210  
Washington, D.C. 20036  
(301) 229-8571 (Phone)  
jeffrey.manley@united.com (email)

**Dated:            March 25, 2008**

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**DATED: March 25, 2008**

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

United Air Lines, Inc. ("United") submits the following answer to the above-captioned motion filed by Virgin America, Inc. ("Virgin") in this docket.

1. In its motion, Virgin seeks virtually the same (albeit broader) relief as that recently sought by ExpressJet, Inc. and denied by the Department. Virgin seeks confidential treatment of most of the Form 41 financial and traffic reports it (and all other certificated carriers) are required to file periodically with the Department in an effort to preclude the public (including competitors) from gaining knowledge of the success (or failure) of its business plan and, thus, theoretically forestalling competitors' ability to use such information in deciding whether to enter city pairs where Virgin has chosen to institute service. Why Virgin would seek such relief in the teeth of the precedent of DOT's recent denial of the more limited relief sought by ExpressJet is not difficult to fathom. Merely by filing the paperwork seeking such relief, ExpressJet managed to gain

most of what it sought: from May 30, 2007 (the date ExpressJet filed its initial motion) until sometime in December 2007 (over 6 months later), ExpressJet's data was withheld from public disclosure while the Department considered its request.<sup>1</sup> Thus, even though the Department ultimately found that it would be inconsistent with the public interest to grant ExpressJet's request, the public was denied access to the data for over six months simply because ExpressJet made its request. The Department must avoid a similar result here by acting quickly to deny Virgin's motion based on its clear and unequivocal statement of policy in the *ExpressJet* case. Letter dated December 5, 2007, in Docket DOT-OST-2007-28396 (hereafter "*ExpressJet*").<sup>2</sup>

2. The bases for the Department's denial of ExpressJet's relief apply with equal weight to that sought by Virgin. The Department has "long held that competition is promoted, and consumers benefit, by maximizing the amount of accurate information in the public domain." *ExpressJet* at 4. An exception may be made only in the case of "clear evidence of the likelihood of substantial competitive harm." *Id.* (emphasis in original). In addition to finding no substantial competitive harm to ExpressJet, the Department also considered it to be:

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<sup>1</sup> ExpressJet sought only the withholding of its T-100 traffic reports in those markets where it had recently started services under its own brand rather than under a code-share. Its rationale for such relief was, however, identical to that of Virgin—it wished to avoid other carriers knowing the results of its new operations and thereby preclude them using such data in deciding whether to respond competitively to its new services.

<sup>2</sup> In this regard, United supports the motion of American filed yesterday (March 24, 2008) urging the Department to eliminate the initial review by the staff and move immediately to final action under 14 CFR §385.7. Given the clear statement of the Department's policy in the recent *ExpressJet* case, this initial layer of review is unnecessary.

Unfair [and] prejudicial to other reporting carriers, and adverse to the public interest, to withhold ExpressJet's T-100 data when the data submitted by these and all other carriers are released immediately. Moreover we view the unilateral disclosure of data submitted by one group of carriers when another group of carriers is not disclosing similar data as contrary to the public interest. *Id.*

These same principles apply with equal (if not greater) force to Virgin's instant motion and require that it be denied quickly. To allow Virgin to achieve its goal for six months or more, as happened with *ExpressJet*, would be to grant it most of what it seeks, which is to deny its competitors and other members of the public (including, perhaps, its investors) the benefits of knowing reported details of Virgin's business results while other carriers' results are open to public view. The Department has concluded that "more rather than less transparency will enhance new entry and reliance on competitive market forces..." *Id.* at 3. The relief sought by Virgin is diametrically opposed to this policy and should be summarily denied.

3. Virgin urges that its relief is distinguishable from that sought by ExpressJet. It is certainly distinguishable by the greater scope of data Virgin is seeking to have withheld than did ExpressJet. But the reason for withholding the data offered by Virgin is identical to that offered by ExpressJet and already rejected as inconsistent with the public interest. Both claim it would be unfair to them to allow other carriers access to their data because they could use it to target markets for introduction of competitive services. But as was the case with ExpressJet, Virgin fails to explain why such additional competition would constitute substantial harm. The Department conceded that the T-100 data ExpressJet sought to withhold, together with other available data "would provide some

operational understanding.” It also concluded that the information was not detailed enough “to provide direct insight into ExpressJet’s branded operation to the extent it would allow a competitor to make specific strategic market decisions that would likely cause **substantial** harm to ExpressJet’s competitive position.” *ExpressJet* at 2 (emphasis in original).

The same way here, Virgin has failed to demonstrate that any substantial harm to its market position would occur if other carriers had access to its Form 41 reports. It fears (Motion at 14) that these carriers would be able to introduce services or prices in the reported markets designed to give them a competitive advantage over Virgin. But Virgin has utterly failed to explain why that should be so, or why any new service that other carriers might choose to offer in the city pairs where Virgin has elected to offer service would be anything other than simple competition, unless the carrier is engaging in predatory pricing or scheduling (in which case Virgin would have access to antitrust laws). In a deregulated marketplace, the introduction of new competition is hardly to be avoided on the theory that it might cause competitive injury to an incumbent. Virgin is no more entitled to protection from new competition than United would be in those markets where Virgin’s market research showed at what frequency, capacity and price levels it would be advantageous for Virgin to introduce competition with United. No doubt, Virgin’s market researchers made use of Form 41 data filed by United in seeking to secure Virgin a competitive advantage in those markets.

In fact, Virgin has trumpeted the advantages that accrue to all consumers in a market Virgin enters, as incumbent carriers are forced to match or undercut its fares in

order to remain competitive. *See, e.g.*, Consolidated Reply of Virgin, dated February 29, 2008, in Docket DOT-OST-2008-0056 at 6 and Consolidated Answer of Virgin, dated February, 26, 2008, Exhibit VX-R-10, in that same docket. This is merely competition at work, and Virgin itself has proclaimed its benefits. In this proceeding, Virgin has switched gears and is claiming that such new service, if directed at it, is not beneficial but injurious to competition. Virgin is now in effect urging the Department to interfere in the marketplace by protecting it from the same scrutiny of its own traffic and financial reports that Virgin's market researchers undertook of other carriers' reports to identify opportunities for new service.<sup>3</sup> But, as noted above, the Department's policy is not to protect competitors from each other by giving some regulatory advantages over others.

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<sup>3</sup> Virgin claims that it cannot use other carriers' market data as effectively as they can use its own because it operates with only one aircraft type in relatively few markets whereas the others have multiple aircraft types in multiple markets. This would suggest either that Virgin is being disingenuous or that it needs to hire different market data analysts. In a recent case, Virgin highly touted its internal route planning expertise, including high-level personnel with extensive previous route planning experience at carriers such as US Airways and JetBlue, which operate multiple aircraft types in multiple markets. *See* Exhibit VX-101 in Docket DOT-OST-2008-0056. Moreover, other carriers which operate only one type of aircraft (most notably Southwest) seem to manage their route planning activities pretty well. In fact, using public Form 41 and O & D Survey data, an experienced market analyst can make a very close approximation of a carrier's cost of operation and revenue stream in a specific city pair market and determine where there are new opportunities available. This requires some effort and expertise that might not be needed in the case of Virgin's own reported data, which, as it says, may require less "disaggregation." But that should not exempt Virgin's data from publication any more than it did ExpressJet's for which similar arguments were offered and rejected. *ExpressJet* at 1-2. Indeed, if anything, ExpressJet had a better case on this point than does Virgin since ExpressJet's data related to small underserved markets where it claimed to have identified a limited opportunity for one carrier to introduce a modest amount of direct service in small aircraft, whereas Virgin is operating in large, established markets in which there are already numerous competitors which all disclose their Part 241 data.

And it would be inconsistent with that policy and Virgin's own pronouncements to give it the protections it is seeking in this proceeding.<sup>4</sup>

4. Virgin claims that its request is modest and will not affect the Department's overall data collection activities. It seeks to withhold the data until an undetermined date when it reaches the threshold of filing requirements applicable to Class III carriers. But ExpressJet made a similar plea and said that it would be satisfied with having its data withheld only until May 30, 2008 (a goal it half-achieved simply by filing its motion). In both cases, if granted, the Department would have to grant similar relief to other carriers that are similarly situated. Contrary to Virgin's claims, it is not uniquely situated but has started services in a number of new markets. For example, in a recent carrier selection case, Virgin claimed that it had a "proven track record of competing head-to-head with the large, legacy carriers...in some of their most important markets, including San Francisco-New York, Los Angeles-New York..." *etc.* Exhibit VX-T-1, pp. 4, 6, in Docket DOT-OST-2008-0056. Thus, Virgin is hardly a fragile hothouse plant needing special protection to survive in a competitive marketplace (at least not when it is applying for new route awards).

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<sup>4</sup> What Virgin seems to fear is that its Form 41 data will show that its costs are not in fact so low as to enable it achieve net revenues at levels needed to sustain its operations at the fares it is charging. As noted below, that very issue was raised in a pending carrier selection case where Virgin was an applicant. In any event, such a revelation, while embarrassing to Virgin's management and revealing to its investors, is hardly a substantial competitive injury.

In any event, the Department has forcefully rejected this plea for special protection of new services introduced by smaller carriers when it was raised by ExpressJet for reasons that are equally applicable here.

ExpressJet is essentially asking the Department to shield its new service from competitive pressure. The Department agrees with the Petition's opponents that while ExpressJet may face reciprocal competition from its competitors, it does not mean that such competition would result in the likelihood of ExpressJet suffering "substantial competitive harm" that warrants withholding its traffic data. ExpressJet appears to equate competition with the likelihood of substantial competitive harm—hardly the same standard. The Department seeks to avoid shielding any carrier from competition, including new entrants, or favoring one competitor over another in a deregulated environment. Such action would not be consistent with the Department's mandate to encourage, develop, and maintain an air transportation system that relies primarily on market forces. *ExpressJet* at 3.

For these same reasons that the Department relied upon in rejecting a "modest 'head start'" for ExpressJet, it should take the same action here with respect to Virgin.<sup>5</sup>

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<sup>5</sup> It is hard to conceive of a case where a competitive injury could be found under FOIA Exemption 4 that would warrant nondisclosure by one competitor in an industry where other competitors are required to disclose the same data. The data at issue here would be treated as confidential by all carriers if they were able to do so. It is by nature sensitive, commercial information that they would not otherwise disclose. But the Department requires them to report it and makes it public to foster competition. As the Department found in *ExpressJet*, to allow one competitor to protect itself from disclosure in this situation is unfair to the others which continue to be required to disclose their valuable commercial information. Virgin cites no cases where Exemption 4 has been applied to protect a party from disclosure in these circumstances. In fact, in the only two cases identified by Virgin as involving data submitted to the government subject to reporting requirements, the reported data was not routinely released to the public as is the case with the data at issue here. So, in those cases there was no need to consider the unfairness to other parties caused by the preferential withholding of data submitted by one party such as Virgin seeks here. *National Parks and Conservation Assn. v. Kleppe and Gilda Industries*, as cited in Motion at 7.

5. Virgin suggests that, because the Department granted confidential treatment in its recent fitness investigation to certain data similar to those in its Form 41 reports, this is a precedent for granting the relief it seeks here. There are several reasons why that action serves as no precedent for what Virgin now requests. By similar data withheld in the fitness case, Virgin presumably refers to projections of future revenue and traffic, whereas in this case the data relate to actual historic results. There was no issue of unfair treatment of other carriers from nondisclosure in the fitness case since they were not filing such projections on a continuing basis, unlike the mandatory reporting of historic revenue and traffic data under Part 241. Moreover, in the fitness case, the data were, in fact, made available to other carriers that participated in that proceeding to enable them to use it to the extent it was relevant to issues they were briefing. In this case there is no suggestion that Virgin's data would be made available even under the limited release procedures involving confidentiality commitments such as are used in fitness and other DOT proceedings. Ironically, if Virgin had revealed in its recent fitness proceeding that it could not survive in a competitive marketplace without being afforded ongoing confidential treatment of its traffic and financial reports, there is a very real question of whether the Department would have been able to find it fit, willing and able to operate as an air carrier.

Indeed, the lack of public availability of this data is already adversely affecting other carriers' rights in a pending DOT carrier selection case in which Virgin is a party. *2008 Los Angeles-San Jose del Cabo Exemption Proceeding*, Docket DOT-OST-2008-0056. In that case United and Delta argued that it would be inconsistent with the public

interest to award an international route to a carrier such as Virgin which had yet to prove its staying power in the marketplace. One example of Virgin's start-up problems was the low load factors (59 percent) reflected in its T-100 reports for the third quarter of 2008 (a point Virgin disputed by claiming its actual load factors were an equally unsustainable 61 percent). It was argued that to give a valuable international route to such an untested carrier would be unprecedented and would risk the wastage of this valuable asset if Virgin proved unable to implement and sustain its services. This issue was particularly relevant to the Los Angeles-Los Cabos route because the case was begun after another low-fare carrier (Frontier) proved unable to sustain service. Answer of United, dated February 26, 2008, at 5-6; Answer of Delta, dated February 26, 2008, at 13-14; Reply of United, dated February 29, 2008, at 15-16; Reply of Delta, dated February 29, 2008, at 6-8; and Consolidated Reply of Virgin, dated February 29, 2008, at 6 (Docket DOT-OST-2008-0056).

By withholding its data from public disclosure, Virgin shields its results from the scrutiny required for decision-making in this still pending proceeding. While Virgin argues (Motion at 2) that it will file the data with the Department for its ongoing regulatory purposes, this does not suffice for decision-making in the pending carrier selection case.<sup>6</sup> In the first place, competing carriers cannot comment on how Virgin's

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<sup>6</sup> Indeed, any failure to ensure that the applicants have continuing access to these data (especially the T-100 reports) – which, as noted in the text, are directly related to the question of whether an award of the open designation for the LAX-SJD route to Virgin would be consistent with the public interest – during the pendency of the Mexico route proceeding would deny them due process, even if the Department did ultimately decide (wrongly) to grant Virgin's motion.

reported results would affect relevant issues in the proceeding. There is no limited access for competing applicants to this data such as was granted in Virgin's fitness case. Moreover, although the Department will have the data, it cannot use it on an *ex parte* basis to resolve issues in the carrier selection case without violating the due process rights of other applicants. In fact, Virgin's current attempts to suppress this data forcefully suggest that its recent results are so abysmally contrary to its claims of the likelihood of sustainable operations in the Los Angeles-San Jose del Cabo market as to disqualify it for selection for the very reasons cited by United and Delta.

6. In conclusion, United urges the Department to deny the Motion of Virgin to withhold most of its Part 241 reports from public disclosure.<sup>2</sup> The Department's reasoning and findings relating to its recent denial of the similar relief sought by ExpressJet, as discussed above, apply with equal or even greater weight to the more expansive relief sought here by Virgin. In addition, United urges the Department to act quickly to deny Virgin's motion to avoid the result in the *ExpressJet* case where most of the anticompetitive benefits sought by the carrier were achieved as a result of the delay in the Department's decision-making process. These issues have now been fully ventilated and resolved in the *ExpressJet* case, and the Department's policy and reasoning fully set

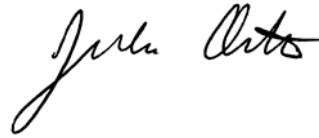
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<sup>2</sup> United has no objection to Virgin's request as to its Form B-43 report relating to aircraft and engine data in circumstances where other carriers are consistently allowed to do so.

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forth in its decisions. That same policy should now be applied quickly to Virgin by expeditiously denying its Motion.

Respectfully submitted,

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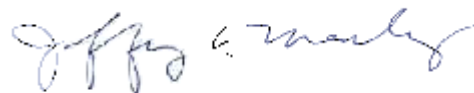
JULIE OETTINGER  
Managing Director – International &  
Regulatory Affairs  
UNITED AIR LINES, INC.  
1025 Connecticut Avenue, N.W., Suite 1210  
Washington, D.C. 20036

**DATED: March 25, 2008**

**CERTIFICATE OF SERVICE**

I hereby certify that I have this date served a copy of the foregoing document on all persons named below by causing a copy to be sent via e-mail to the following:

[dave.pflieger@virginamerica.com](mailto:dave.pflieger@virginamerica.com)

A handwritten signature in black ink, appearing to read "Jeffrey A. Manley". The signature is written in a cursive style with a large initial "J".

Jeffrey A. Manley  
Senior Advisor—Regulatory Affairs

**DATED:      March 25, 2008**