

Dated: April 1, 2003.

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Assistant Secretary for Democracy, Human Rights and Labor, Department of State.

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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Termination of Review Under 49 U.S.C. 41720 of Delta/Northwest/Continental Agreements

AGENCY: Office of the Secretary, Department of Transportation.

ACTION: Termination of Review of Joint Venture Agreements.

SUMMARY: On February 28, Delta Air Lines, Northwest Airlines, and Continental Airlines resubmitted their code-share and frequent-flyer program reciprocity agreements to the Department for review under 49 U.S.C. 41720. The implementation of these two agreements would constitute a key part of the three airlines' proposed alliance. In their resubmission, the airlines accepted three of the six conditions that the Department had stated were necessary to avoid a formal enforcement proceeding, and they proposed alternative language for the other three conditions. The Department has determined that the alternative language proposed by the airlines adequately addresses the competitive concerns relating to those three conditions. The Department is therefore terminating its current review of the agreements. In reaching this conclusion, the Department is relying on the terms of the agreements, the airlines' representations that they will compete independently on capacity and fares, and their formal acceptance of the six conditions as modified.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: On February 28, Delta, Northwest, and Continental ("the Alliance Carriers") resubmitted their code-share and frequent-flyer program reciprocity agreements to us for review under 49 U.S.C. 41720. These agreements form essential elements of the airlines' proposed alliance, which will be a comprehensive marketing arrangement that will also include reciprocal access to airport lounges and some joint marketing. Their alliance agreement has a ten-year term. See 68 FR 3293, 3295, January 23, 2003.

The Alliance Carriers initially submitted the agreements on August 23, 2002. After an extensive investigation and analysis, we concluded that the agreements as presented raised serious competitive concerns. We stated that we would direct our Enforcement Office to begin a formal enforcement proceeding to determine whether the alliance would be unlawful unless the Alliance Carriers accepted six conditions that would address our competitive concerns. 68 FR 3293, January 23, 2003 ("the January Notice"). The Alliance Carriers at first refused to accept our conditions but thereafter consulted with us on possible modifications to the language of three of the conditions. On the basis of those consultations, they resubmitted their agreements on February 28, stated that they would accept three of our original six conditions, proposed alternative language for the other three conditions, and acknowledged our legal authority to impose conditions to prevent unfair methods of competition in the airline industry.

We invited interested persons to submit comments on the proposed alternative language. 68 FR 10770, March 6, 2003. We received public comments from JetBlue Airways; U.S. Airways; Galileo International, a computer reservations system; the Airports Council International-North America ("ACI"), which represents local, regional, and state governing bodies that own and operate the principal U.S. airports used by scheduled service airlines; the Massachusetts Port Authority ("Massport"), which operates Boston-Logan International Airport; the Montana Department of Transportation; the Memphis-Shelby County Airport Authority; and M. Michelle Buchecker. JetBlue, USAirways, Galileo, and Ms. Buchecker contend that we should not accept the alternative language. Massport asserts that we should require the Alliance Carriers to surrender different gates at Boston Logan. ACI expresses concern that we may, in the future, take steps that would interfere with the airports' right to manage their own affairs. The Montana state agency and the Memphis airport authority support the alternative language.

A group of airlines ("the Non-aligned Carriers")—AirTran, America West, Frontier, JetBlue, Midwest, Southwest, and Spirit—filed joint comments that oppose the alternative language and requested confidential treatment for their filing.

After considering the Alliance Carriers' resubmission and the comments, we have determined that the

alternative conditions adequately address our competitive concerns at this time. We are therefore ending our review of the agreements. The three airlines have agreed to our conditions with some modifications. We believe that these restrictions on their behavior should adequately reduce the possibility of anti-competitive behavior. Each airline has also represented that it will continue to compete independently on fares and service levels. Finally, the Alliance Carriers have separately agreed to abide by certain additional conditions imposed by the Department of Justice under its authority to enforce the antitrust laws.

We recognize that the implementation of the alliance could ultimately reduce competition in the airline industry, despite the conditions, although we do not expect such a result. We further recognize that the Alliance Carriers' actual implementation of the alliance may differ from their anticipated behavior. In addition, we are fully aware that world events and general economic conditions may lead to major changes in the airline industry, which could change the alliance's impact on airline competition. We will therefore closely monitor the Alliance Carriers' implementation of their agreements to ensure that they abide by their representations to us and comply with the conditions. Furthermore, in our ongoing monitoring of industry conditions, we will be watchful for major changes in the level and type of competitive behavior in the airline industry. We have the statutory authority to undertake a new review of the competitive effects of the alliance at any time that we believe that such a review is warranted. We will not hesitate to initiate such a review if developments indicate that it is necessary.

Background

The statute requiring our review of the alliance agreements—49 U.S.C. 41720—requires certain kinds of joint venture agreements among major U.S. passenger airlines to be submitted to us at least 30 days before they are implemented. The statute does not expressly require the parties to obtain our approval before proceeding. We may extend the waiting period by 150 days with respect to a code-sharing agreement and by 60 days for other types of agreements. At the end of the waiting period (either the 30-day period or any extended period established by us), the parties may implement their agreement. To prohibit the parties from implementing an agreement, we would normally institute a formal enforcement proceeding under 49 U.S.C. 41712