

**UNITED STATES OF AMERICA
BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, DC**

Application of)	
)	
Virgin Atlantic Airways, Ltd.)	
Delta Air Lines, Inc.)	
Société Air France)	
Koninklijke Luchtvaart Maatschappij N.V.)	Docket DOT-OST-2013-0068
Alitalia Compagnia Aerea Italiana S.P.A.)	
)	
Under 49 U.S.C. §§ 41308 and 41309)	
for approval of and antitrust immunity for)	
Alliance Agreements)	

**REPLY OF THE AMERICAN ANTITRUST INSTITUTE TO RESPONSE OF JOINT
VENTURE PARTIES IN OPPOSITION TO MOTION FOR EXTENSION OF TIME
AND FOR LEAVE TO FILE AN UNAUTHORIZED DOCUMENT**

The American Antitrust Institute (AAI) replies to the JV Parties’ Response in Opposition to Motion for Extension of Time and for Leave to File an Unauthorized Document, OST-2013-0068 (Mar. 5, 2019) (“Response”), to ensure a complete and accurate record that adequately accounts for the competitive implications of the JV Parties’ request for expanded antitrust immunity.¹

The JV Parties’ Response is notable for what it does not say. The Response does not dispute AAI’s contention that the Department’s determination regarding the JV Parties’ request for expanded immunity would be significantly enhanced by (1) addressing several problematic, foundational assumptions involving immunity for the alliances; (2) considering the implications of U.S. airline consolidation for the competitive issues surrounding immunity; and (3) recognizing the implications of the Sky Team joint venture’s changed abilities and incentives to compete should the

¹ See Joint Motion to Amend Order 2013-9-14 to Approve and Extend Antitrust Immunity to Amended and Restated Transatlantic Joint Venture, OST-2013-0068-0033 (July 20, 2018) (hereinafter “Joint Motion”). AAI timely moves for leave to file this reply pursuant to 14 C.F.R. § 302.6. Good cause exists for leave to file this reply because it addresses key omissions, mistakes, and misguided claims in the Response.

Joint Motion be granted. It likewise does not dispute that AAI's comments help fill in the gaps in the record on these issues, or that contributions toward a more full and complete record constitute good cause for leave to file otherwise unauthorized documents, as one of the JV Parties has itself argued in other proceedings.² Moreover, although the JV Parties characterize AAI's comments as a "rehash" of "rhetoric and flawed empirical conclusions" contained in AAI's white paper,³ they do not engage with the merits of the white paper or even attempt to support this aggressive claim.

The silence speaks volumes. The JV Parties use the occasion of their Response to divert attention away from the Department's task at hand and the core competition issues raised in AAI's comments and white paper. They ignore that the goal of this proceeding is to ensure that the Department's decision is based on complete information, particularly given more recent changes in the alliance landscape, the *full* scope of academic literature on competitive effects and efficiencies, and analysis performed by AAI which importantly links domestic consolidation with competitive concerns over immunity. It is vital for the Department to consider these issues in order to promote competition and to protect consumers.

In opposing AAI's motion, the JV Parties' muster only three petty distractions. Their lead argument is that AAI's comments contain a supposedly false assertion "that the JV Parties' fail to cite 'empirical studies performed in the late 2000s to the present' which allegedly show harm to competition from immunized air carrier joint ventures."⁴ However, the JV Parties mischaracterize AAI's assertion by selectively (and misleadingly) quoting only a portion of the relevant sentence. The full sentence states, "However, empirical studies performed in the late 2000s to the present, which are not cited by the parties in their application, tell a very different story about the effects of

² See AAI Motion for Extension of Time and for Leave to File an Otherwise Unauthorized Document 2, OST-2013-0068 (Feb. 26, 2019) (citing Delta Airlines, Motion for Leave to File and Answer of Delta Airlines, Inc., OST-04-17355).

³ Response at 2.

⁴ *Id.* at 3 (quoting Comments of the American Antitrust Institute 8, OST-2013-0068 (Feb. 26, 2019) (hereinafter "AAI Comments")).

ATI on fares, capacity, and non-alliance rivals.”⁵ AAI submits that this assertion is completely and entirely true and correct. We encourage the Department to examine empirical studies that the JV Parties do not cite in their application that raise concerns about the competitive effects of ATI on fares, capacity, and non-alliance rivals.⁶

The JV Parties’ second claim is that AAI “mischaracterizes” findings in a paper by Whalen (2007) by citing the paper in support of the proposition “that immunity may lead to less competition in all markets, i.e., on both non-stop and one-stop routes.”⁷ The JV Parties’ assertion does not withstand basic scrutiny, as the following verbatim quotation from Whalen (2007)

illustrates:

While this research focuses primarily on the routes where the networks of the alliance partners are complementary, there are usually several, often densely traveled routes where alliance carriers provide substitute service. *Competition on these routes could be reduced by alliances, particularly ones immunized from the antitrust laws.*⁸

Moreover, the Whalen (2007) study reveals results that support the notion that immunity may reduce competition, including the finding that Open Skies are associated with higher fares, likely due to immunized alliance carriers shifting interline traffic away from non-alliance carriers and toward the alliance partner.⁹ These results highlight the vital importance of ensuring that the Department’s record in this proceeding reflects a comprehensive and balanced assessment of all the economic

⁵ AAI Comments at 8.

⁶ The Response makes much ado of the fact that a study referenced in footnote 11 of AAI’s comments is cited in an appendix to the Joint Motion prepared by the JV Parties’ commissioned expert, Dr. Keating. See Response at 3. But the JV Parties, among other things, fail to appreciate that “studies” is a plural noun. For other relevant studies that are cited neither in the Joint Motion nor any of its appendices, see, e.g., Volodymyr Bilotkach & Kai Hüscherlath, *Balancing Competition and Cooperation: Evidence from Transatlantic Airline Markets* (Discussion Paper No. 15-059, August 2015), <http://ftp.zew.de/pub/zew-docs/dp/dp15059.pdf>; Volodymyr Bilotkach & Kai Hüscherlath, *Airline Alliances, Antitrust Immunity, and Market Foreclosure* at 8-10 (ZEW Discussion Paper No. 10-083, 2012), <ftp://ftp.zew.de/pub/zew-docs/dp/dp10083.pdf>; Xian Wan, Li Zou, & Martin Dresner, *Assessing the Price Effects of Airline Alliances on Parallel Routes*, 45 TRANS. RES. PART E LOGISTICS & TRANS. REV. 627, 628 (2009). All of these studies are also cited in AAI’s Comments. See AAI Comments at 8 n.12, 9 n.15–16.

⁷ Response at 3–4 (quoting AAI Comments at 8–9).

⁸ W. Tom Whalen, *A Panel Data Analysis of Code-Sharing, Antitrust Immunity, and Open Skies Treaties in International Aviation Markets*, 30 REV. INDUS. ORG. 39, 42 (2007) (emphasis added). The Response also conveniently omits that a second study cited in the next sentence of the same paragraph also supports the proposition, see AAI Comments at 9, as does a third study cited in the sentence after that one. *Id.*

⁹ Whalen, *supra* note 8, at 56, 59, 60.

literature on immunity.

The Response also suggests, twice, that AAI wrongly “accuses the Joint Parties [sic] of failing to cite” Whalen (2007).¹⁰ These assertions are false, and baffling. AAI’s comments do not accuse the JV Parties of failing to cite Whalen (2007).

The JV Parties’ third and final reason for opposing AAI’s comments is that the comments do not credit the JV Parties’ arguments regarding the implications of entry and traffic share data cited in the Consolidated Joint Reply of the JV Parties.¹¹ This proves the opposite of the JV Parties’ point. The fact that AAI’s comments challenge the application’s attempt to ram through ATI approvals without skepticism or scrutiny of the applicants’ claimed efficiencies is not a basis for ignoring them. Rather, it illustrates the importance of accepting AAI’s comments and ensuring a full and complete record in this matter.¹²

For all of these reasons, AAI’s motion for an extension of time and for leave to file an otherwise unauthorized document should be granted, and the important substantive issues raised in AAI’s comments should be carefully considered.

¹⁰ Response at 3, 4.

¹¹ *Id.* at 4–5.

¹² It is conceivable that the Response could be construed as making a fourth argument in opposition to AAI’s comments insofar as it asserts that the white paper appended to AAI’s comments has “flawed empirical conclusions.” *Id.* at 2. However, since the JV Parties make no effort to support or even explain this bald assertion, we encourage the Department to treat it as yet another baseless distraction and focus instead on threatened harm to competition and consumers.

Respectfully submitted:

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Dated: March 11, 2019

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by electronic mail this 11th day of March, 2019 on the following:

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