DEPARTMENT OF TRANSPORTATION DOCKET OST-2008-0234
APPLICATION TO EXPAND STAR ALLIANCE ANTITRUST IMMUNITY

COMMENTS OF HUBERT HORAN
ON THE DEPARTMENT OF JUSTICE PUBLIC COMMENTS OF 26 JUNE 2009
3 July 2009

My name is Hubert Horan. During my 25 year aviation career I have done consulting work with over 30 airlines and held airline management positions with Northwest, America West, Swissair and Sabena. I am based in Phoenix, Arizona.

I have significant experience in international airline competition and the actual operation and economics of airline alliances. While at Northwest I was personally responsible for the original development of the KLM-Northwest Alliance network and introduced the intense hub-to-hub operations that allowed Northwest to become the most profitable US carrier on the North Atlantic, and established the template followed by all of the subsequent alliance networks. I spent four years at Swissair-Sabena, including the transition of Swissair's alliance from Delta to American, and thus have been involved in alliance management on both sides of the Atlantic. I have a strong focus on the actual competitive and financial performance of alliances. I have not only helped build highly successful alliances, I have helped shut down highly unprofitable ones, including the intra-European Qualiflyer alliance, and the domestic alliance between Continental and America West.

Over the years I have written extensively on airline competition, global airline consolidation, and airpolitical treaty negotiations. I also testified before Congress on the Delta-Northwest merger. A full list of publications and further biographical information is available at my website, horanaviation.com.

I have no active business or financial interests with any of the parties to this case, and am only commenting as a private citizen concerned about the issues raised by this case.

COMMENTS ON THE DOJ OPINION-SUMMARY

I agree with and support the DOJ's concerns about potential harm to consumers in transpacific and transborder markets, and their objections to the elimination of existing immunity carve-outs. I agree with the review standards outlined by the DOJ in section III, including

- the requirement that DOT disapprove a proposal that "substantially reduces or eliminates competition" unless DOT finds that the agreement "is necessary to meet a serious transportation need or to achieve important public benefits" and there is no less anticompetitive alternative.
- antitrust immunity is authorized only if required by the public interest, and that the burden is on the Applicants to make "a strong showing that antitrust immunity is required by the public interest"

The central issues raised by the DOJ Opinion were that the Star Alliance Applicants completely failed to meet the basic evidentiary standards needed to demonstrate that the requested antitrust exemptions would produce the level of public benefits needed to offset the reduction in competition, and that the DOT Show Cause Order completely failed to demonstrate that the DOT had either undertaken an independent , objective analysis of the public interest/competitive risk tradeoffs, or carefully scrutinized the evidence submitted by the Applicants. Across every one of the issues raised by the application, the DOJ Opinion identified shortcomings that strongly suggest that the DOT was willing to accept the Applicant's assertions as "proof" of consumer benefits and/or that the DOT reviewed the case with a presumptive bias that collusion between international airlines naturally produces large enough efficiency and service improvements and creates few, if any, competitive risks.

- p.17—"the Applicants made no showing that such entry(that could curb any anti-competitive abuse) would be timely, likely, or sufficient"
- p. 18-"The (DOT) Order contains no analysis of the competitive effects of immunizing the non-transatlantic international operations of Continental and United"
- p.25—"The Applicants have failed to show that nonstop entry would prevent fare increases by Continental and its antitrust immunity partners in overlap markets"

- p.29—"DOT cites the Applicant's assertion that the ATI integrated venture will enable its participants to "pool resources to achieve substantial efficiencies and cost savings". In DOJ's view, it is not sufficient, however, merely to point towards claimed benefits; rather the Applicants need to demonstrate that immunity is necessary to achieve them. In this regard, the Applicants fall short."
- p.30—"The Applicants present no evidence however, that customers will receive quantitatively or qualitatively different service if Continental receives antitrust immunity, compared to what would be provided if Continental merely interacted with the level of cooperation expected of any member of the broader, non-immunized Star Alliance"
- p.30—"The Applicants do not describe which specific important consumer benefits will be lost if DOT does not grant the requested immunity. Nor do the Applicants make any attempt to quantify how much smaller the benefits enduring to the traveling public would be if Continental merely engaged with the Star ATI members without antitrust immunity, in such standard alliance cooperation practices as codesharing, through-ticketing, frequent flyer reciprocity and lounge sharing—in short the type of interaction Continental currently has with immunized Skyteam members or that USAirways has with the Star ATI members including United."
- p.33—"The Applicants also suggest, without evidentiary support, that consumers benefit from competition between alliances, particularly immunized alliances"
- p.35—"The Applicants overemphasize the likelihood that immunity for the proposed alliance will substantially reduce double marginalization (extra markups imposed on joint fares)…In fact using 2005-2008 data, DOJ has found that connecting fares offered by non-immunized alliance carriers for transatlantic routes are no more expensive than fares offered by immunized alliances"
- p.37---"The analysis underlying DOT's conclusions on carve-outs is unclear. The order declines to carve-out the overlap transborder routes in which Continental and the Star ATI members currently compete on an nonstop basis without citing evidence from the record describing the public benefits likely to result from coordination on these routes…The Order cites no evidence to support revoking the (FRA-CHI/WAS) carve-outs beyond the Applicants own self serving statements. The Applicants do not provide specific evidence or quantification of diminished efficiencies or consumer value even though Star members have long operated carve-outs imposed in prior cases"
- p.41—"DOT dismisses concerns about the scope of the immunity on the grounds that the other Star partners have had global immunity with each other for many years. Therefore DOT concludes that it "has enough information to analyze alliance plans" and that restricting the scope here would unfairly disadvantage Continental. DOT does not cite the other information it relies upon to analyze the alliance plans, nor does it explain how Continental, or more significantly consumers, would be harmed by the lack of global immunity"

Neither the DOJ Opinion, or this Comment, are in any way intended to definitely establish whether the evidence in this case "proves" that benefits outweigh or do not outweigh risks. The core issue here is the legitimacy of the evidence used to estimate the balance between the two. What is the gap between legitimate, objective, verifiable evidence that the immunity grant would generate tangible consumer benefits and the legitimate, objective, verifiable evidence of risks from reduced competition?

While I am deeply appreciative that the DOJ had identified that proper evidentiary standards have not been met in this case, I am offering this Comment in the belief that the DOJ has materially understated the problem. There is a serious flaw in the evidence supporting the Applicant's claim of alliance benefits that the DOJ has overlooked, and the DOJ Opinion fundamentally failed to evaluate the legitimacy of the evidence that the proposed immunity grant would cause minimum harm. I object to the DOJ's support for a more restricted grant of immunity in transatlantic markets, because I believe the evidence supporting the DOJ's transatlantic conclusion suffers from the same deficiencies as the data they have criticized elsewhere. I believe that the DOJ should object to <u>any</u> extension of Star Alliance antitrust immunity until the DOT completes a new review of the case that addresses all the evidentiary problems that have been identified. All comments below will focus specifically on transatlantic immunity, the largest and most important of the Applicant's requests, as I have no disagreements in other areas.

THE DOJ OPINION UNDERSTATED THE DEFICIENCIES IN THE EVIDENCE USED BY THE DOT TO SUPPORT THE CLAIM OF PUBLIC BENEFITS JUSTIFYING THE ANTITRUST IMMUNITY GRANT

This section

- ☐ reviews the economic drivers of the consumer benefits achieved following the original introduction of Collusive Alliances on the North Atlantic in the mid 90s
- ☐ demonstrates that the impact of these Alliances peaked in the late 90s, and has been steadily declining ever since, and the market conditions that would allow new (or expanded) Alliances to achieve major benefits no longer exist
- ☐ argues that the DOT/Star Alliance claim of significant public benefits from alliance expansion is presumptively false since the market conditions that are the basis of that claim do not exist, and the Applicants failed to present legitimate evidence that would support the claim of incremental public benefits under current market conditions.

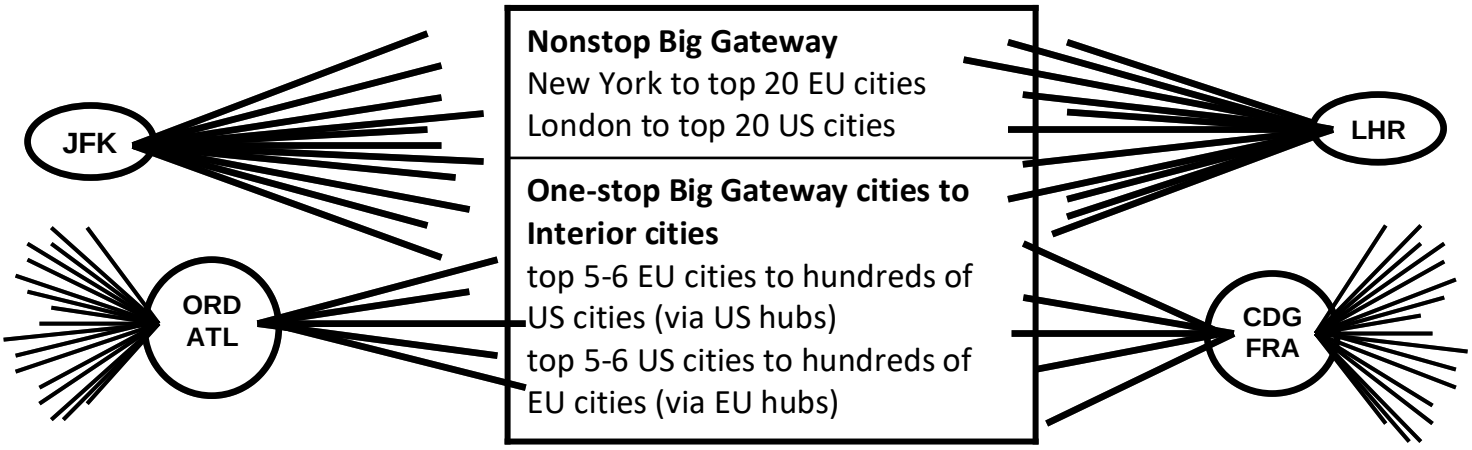
The Public Benefits Created By The Original North Atlantic Collusive Alliances Came From Vastly Improved Service To A Specific Market Segment

■ The DOJ Opinion correctly distinguishes between non-immunized "Branded Alliances", which operate globally and emphasize products such as frequent flyer reciprocity, codesharing, common terminal and lounge facilities, and the "Collusive Alliances" found exclusively on the North Atlantic, where members have antitrust immunity to collude on pricing, capacity and operations. The Collusive Alliances require careful antitrust scrutiny while the Branded Alliances do not.

Branded Alliances --global scope	start date	**Collusive Alliances** --limited to North Atlantic	start date
Global Excellence (DL)	1990 (x)	KL-led alliance (NW)	1992 (x)
Star (UA, US, CO)	1997	SR-led alliance (DL,later AA)	1995 (x)
One World (AA)	1998	LH-led alliance (UA)	1997
Skyteam (DL, NW, CO)	2000	AF-led alliance (DL)	2000
(x) defunct		BA-led alliance (AA)	2009

■ In 1990, 70% of the traffic on the North Atlantic were in citypairs that had good single-carrier schedules and a full range of discount fares. This included not only the nonstop service operated in large "gateway" markets, but one-stop online service via large hubs on both sides of the Atlantic.

- ☐ European carriers connected the full range of European markets to the largest US destinations via hubs such as Frankfurt and Paris, while US carriers connected the full range of interior US markets to the largest European destinations via hubs such as Atlanta and Chicago



- But the other 30% of the market had poor service and much higher fares—hundreds of citypairs linking USA Interior Cities to European Interior Cities such as St. Louis-Brussels or Milwaukee-Munich
  - Interline service existed, but schedules were limited, connections were badly timed, passengers were often required to change terminals or airports; only the highest fare levels were available, and passengers had higher risks of missed connections and baggage problems
- The original three mid-90s Collusive Alliances (NW-KL, DL-SR-SN and UA-LH) succeeded by providing a high-quality online-equivalent service to this underserved market segment, offering consumers much better schedules, lower fares, and higher-quality connecting hubs than had been previously been available in those citypairs, and customers responded strongly to the new services
- The strong profitability of the original three Collusive Alliances was based on a clear competitive advantage over other airlines in this important "double connect" market segment, just as other airlines had clear competitive advantage in different market segments
- The strong competitive advantage in this "double connect" segment provided the profitable foundation for the growing North Atlantic operations of the alliance carriers (NW, KL, DL, SR); that foundation created ancillary consumer benefits, including increased competition in one-stop markets where no carrier had a competitive advantage (for example Rome-Detroit, where seven airlines or Collusive Groups offered similar one-stop connecting service in 1999, but there were no nonstops) and expanded nonstop service from the alliance carriers' hub cities (Detroit-Amsterdam, Cincinnati-Zurich), although these second-order benefits would not have been sustainable without the strong profitability of the highly competitive "double connect" service.
- If the entire 1990 North Atlantic market had received high-quality nonstop or one-stop service from the existing hub competitors, there would have been no incremental public benefits from Collusive Alliances, and if even if they had been approved in the absence of evidence of public benefits, they would not have succeeded against the many other strong competitive alternatives in the marketplace.

<u>The Public Benefits Created By the Original1990s Alliances Were Huge and Easily Measured</u>

- Industry "quality of service"-type planning tools have long been capable of measuring the public benefits of any merger/alliance proposals.[1] Measurements of the consumer benefits from the introduction of the original alliances showed
  - huge improvements in quality of service in each individual citypair that would demonstrably change consumer behavior (markets where the best option had been interline connections with high fares now had multiple online services with faster schedules and lower fares)
  - huge aggregate net gains in service quality across the entire North Atlantic, given the large number of passengers receiving significantly improved service
- Antitrust regulators can readily test the reasonableness of model-based claims of huge public benefits
  - by confirming the plausibility of citypair-level consumer assumption (major shifts in consumer choice linked to major improvements in service quality, not to additional connections offered in markets with good nonstop service)
  - by testing that aggregate results can be readily explained by basic business logic (major shifts driven by the creation of strong competitive advantage in a sizable market segment)
  - by testing the claimed aggregate benefits remain large even after likely competitive responses
- These models helped demonstrated that the original Collusive Alliances did not harm North Atlantic competition in the 90s since the size of the public benefits was clearly larger than the competitive risks; the elimination of competitors was immaterial because the overall market enjoyed robust competition (24 airlines or collusive groups); the Collusive Alliances did not have a large share of the overall market and were not exploiting any artificial market power (such as bilateral constraints on market entry, pricing power due to airport capacity limits, local market distribution power)

[1] As recognized by the DOJ Opinion at page 22

The Consumer Benefits of Collusive Alliances Reached Its Peak in the Late 90s, and Has Been Steadily Eroding Ever Since, and Collusive Alliances Have Never Offered Consumer Benefits Anywhere Outside This Specific North Atlantic Niche

- The original 1990s development of the hub-to-hub Alliance services was a major network innovation, just as the major expansion of the large Intercontinental hubs (Frankfurt, Amsterdam, Atlanta, etc) had been in the 1970s and 80s, but by end of the 1990s when all three Collusive Groups were in place, the Alliance networks had reached maturity, having fully exploited the potential of the market segments where they enjoyed competitive advantage
- There is no reason to expect that adding more and more alliances, or continually expanding the scope of the existing alliances would increase consumer benefits, and there is much more reason to expect returns from alliance expansion would rapidly diminish
  - Just as the first Intercontinental hubs added enormous value (Frankfurt, Paris, Amsterdam) adding more and more of these hubs (Milan, Brussels, Vienna, Madrid, Gatwick, Copenhagen) added very little additional value, and once the markets where the original hubs had competitive advantage were saturated, the incremental value added became negative.
- While the three Collusive Alliances remained profitable, their natural competitive strengths began eroding from the late 90s onward, with the rapid proliferation of new transatlantic routes that created superior nonstop and one-stop service options in many markets where Alliance double-connect schedules had previously provided the only online service option.
  - As the base of profitable "double-connect" traffic steadily diminished, the carriers that had been most dependant on it (NW, KL, SR, UA) saw their overall North Atlantic performance diminish relative to the carriers more focused on the growing nonstop and onestop markets
- Despite the clear competitive and financial power of the original mid-90s North Atlantic Collusive Alliances, the world's airlines have never applied this approach to any other market because the underlying market conditions (the ability to link the small markets "behind" two distant Intercontinental hubs (as with Detroit-Amsterdam or Chicago-Frankfurt), required to make them competitively and financially viable do not exist.
  - in other Intercontinental markets (Europe and the US to Asia and South America), the "double connect" segment is miniscule; consumers don't benefit from separate new category of Collusive Alliance carriers, and since the revenue gains don't clearly justify the costs of Collusive Alliances, carriers haven't pursue them
- Just as there was no legitimate basis for the proliferation of hubs beyond a certain point, the expansion of North Atlantic Collusive Alliances generated no public benefits based on consumer value or competitive advantage. The expansion of Collusion Alliances since 2000 can only be explained by the value of reduced competition—gains to the airlines at the expense of consumers
  - It is important to emphasize that the evidence in this section shows that Collusive Alliances are not *per se* anti-competitive—in certain market situations they can be hugely pro-competitive. However, Collusive Alliances that are cannot be clearly linked to significant competitive advantage in clearly defined market segments should be presumed to be anti-competitive. Antitrust analysis must be based on objective evidence of the specific market dynamics that would allow a merger or immunized collusion to generate consumer benefits.
  - The DOT Show Cause Order takes historical evidence that Collusive Alliance once created public benefits as the sole basis for concluding that that all Collusive Alliances, in any market, at any time must also be pro-competitive. The DOT's analysis is willfully indifferent to the massive changes in the market over the last 15 years, and willfully indifferent to the marketplace evidence linking consumer benefits to conditions in this unique niche market.

While the DOJ Opinion Recognized That The Consumer Benefit Claims in the Star Alliance Application and the DOT Show Cause Order Were Merely Undocumented, Unverifiable Assertions, It Failed To Recognize Significant Marketplace Evidence Of The Implausibility of Those Claims

- There is substantial evidence that the DOT/Star Alliance assertion that expanded antitrust immunity will generate significant public benefits in today's market environment can be presumed to be false
  - there is no evidence that alliance expansion would create substantially higher quality service options for a large portion of North Atlantic travelers, comparable to the evidence of consumer gains shown when the original alliances were introduced 15 years ago

- ☐ there is strong evidence that the market conditions required for Collusive Alliance to produce significant incremental consumer benefits no longer exist on the North Atlantic just as they never existed in other international markets
- ☐ unlike 1990, when markets primarily served by interline schedules had much higher fares than markets with single carrier service, there are no North Atlantic markets where passengers pay much higher fares than passengers in other comparable markets, thus there is no possibility that expanded antitrust immunity could generate significant public benefits from lower fares
- ☐ neither the DOT or the Star Alliance identifies any new competitive advantage that would facilitate faster or more profitable growth, or any new source of consumer benefits based on current market conditions; the Star Alliance could not have presented legitimate, verifiable modeling results showing significant consumer benefits because the market conditions required to generate them do not exist
- ☐ many of the claimed consumer benefits (including for example the cited Brueckner and Whalen study)[2] were based on 1990s market conditions that no longer exist
- ☐ the Star Alliance's claim of public benefits explicitly assumes that there is no competitive response to its expanded alliance[3] even though the application for One World alliance immunity—a much larger competitive action than the Star expansion—is already pending

■ While the DOJ Opinion correctly observed that the Star Alliance failed to "meet the heavy burden to prove benefits specific to their alliance agreement that justify immunity" and that the DOT improperly took the Applicants assertions of new consumer benefits at face value without requiring verifiable evidence substantiating those claims, it failed to clearly define the exact nature of the evidentiary problem vis-à-vis the DOT's claims of public benefits in transatlantic markets, and appears to have seriously understated the extent of the evidentiary deficiencies. This is not a situation where there is strong likelihood of significant public benefits, but the Applicants simply failed to follow appropriate standards of data collection and analysis. This is a situation where readily available data and basic industry economics strongly suggest that the claimed public benefits could not possibly exist to the degree claimed, and enforcement of proper DOT/DOJ evidentiary standards would have produced data consistent with the counter-arguments outlined above.

■ Even though the DOJ Opinion identifies extraordinary evidentiary deficiencies across the entire range of case issues, the DOJ's conclusions inexplicably distinguish between non-transatlantic issues (where the lack of evidence requires reversal) and transatlantic, where the DOJ supports the DOT's grant of immunity (excepting five isolated nonstop markets) despite the exact same deficiencies. The evidentiary weaknesses cited by the DOJ clearly requires the DOT to not grant any of the requested immunity until a legitimate evidentiary base showing strong public benefits has been established. The DOJ has correctly attacked the DOT Show Cause Order for failing to show a clear link between evidence and conclusions, but the DOJ Opinion appears to be guilty of this as well. It is not just that the DOJ Opinion supporting transatlantic immunity fails to meet the "strong showing on the record that antitrust immunity is required by the public interest" standard—the DOJ Opinion is not based on any legitimate, objective, verifiable data linking expanded North Atlantic immunity to significant public benefits.

[2] Brueckner and Whalen, "The Price Effects of International Airline Alliances" *Journal of Economics and Statistics*, vol 43, p. 503

[3] Interrogatories for Expanded Star ATI, page 3

THE DOJ OPINION FAILED TO ADDRESS MAJOR DEFICIENCIES IN THE EVIDENCE USED BY THE DOT TO SUPPORT THAT ANTITRUST IMMUNITY GRANT POSED MINIMAL COMPETITIVE RISKS

The Clayton Act competitive standards, as laid out by the DOT "requires us to consider whether the Alliance Agreements are likely to substantially reduce competition and facilitate the exercise of market power – that is, to allow the Joint Applicants to profitably charge supra-competitive prices or reduce service or quality below competitive levels in any relevant market" The DOT says this determination should be based on "whether the alliance would significantly increase market concentration, whether the alliance raises concerns about potential anticompetitive effects in light of other factors, and whether new entry into the market would be timely, likely and sufficient either to deter or counteract a proposed alliance's potential for harm" [4]

An evaluation of the competitive impacts of this application must therefore be based on

- evidence that the markets potentially affected by reduced competition are fully contestable, so there would be a high likelihood that any future anti-competitive abuses could be disciplined by market entry; this would include evidence of the realistic possibility of new market entry, especially by carriers with low costs best able to compete on price, and evidence that existing competitors with partially overlapping services (such as connections vs. nonstops) would aggressively respond to supra-competitive pricing.
- evidence as to whether the levels of concentration that would result from approval would create (in combination with entry barriers) serious risks of oligopoly behavior, or whether remaining competitors would fight one another aggressively in pursuit of market share.
- evidence as to whether increased concentration could be justified by companies reaction to tangible external "competitive market forces" (such as scale economies, demand shifts, above average growth of highly efficient carriers and the decline of inefficient ones) or whether increased concentration had been artificially engineered by companies and/or governments

This section

- ☐ argues that the DOJ improperly limited its analysis of competitive risks to the universe of O&D citypairs, and ignored competition at the hub level, which is the predominant factor affecting industry structure and the potential for future competition
- ☐ describes historical evidence of high entry barriers and the accelerating trend towards very high levels of North Atlantic market concentration that the DOJ failed to consider
- ☐ argues that the DOT and DOJ improperly limited their analysis to the incremental impact of this transaction in isolation, despite abundant evidence of concerted efforts to artificially reduce North Atlantic competition
- ☐ argues that the DOT and DOJ failed to consider the competitive risks combined effect of the current immunity petitions, whereby 3 competitors would control over 90% of the market

By Failing to Focus on the Competitively "Relevant Markets" The DOJ Opinion Assumed Away Structural Deficiencies in the North Atlantic Market That Are Critical To Any Competition Analysis

- In considering the "relevant markets" as the universe of O&D citypairs, the DOJ Opinion incorrectly applied the "Joint Venture Guidelines"[5] which asks whether the joint venture harms competition in relevant markets by increasing their ability to raise price or reduce output. While the damage from anti-competitive behavior would manifest itself at the citypair level, the ability to engage in anti-competitive behavior would have been created at the operating network (hub) level. The risk of artificially higher prices and reduced service across transatlantic markets would depend much more on issues such as the impact of hubs on the minimum scale required to compete, and the ability of new competitors to enter the North Atlantic than on the current number of airlines serving individual markets such as New York-Munich.
- Airlines use two primary operating models: Hub Network, and Point-to-Point. The North Atlantic, the only traffic area served by Collusive Alliances, is the most extreme Hub Network-oriented market in the world. The market is totally dominated by carriers operating very large connecting hubs. North Atlantic competition is, for all intents and purposes, competition between the large hubs where those operations are based (Frankfurt, Paris, Newark,

[4] DOT Show Cause Order p.7, which appears fully consistent with DOJ/ FTC Joint Venture Guidelines standards
[5] Antitrust Guidelines For Collaborations Among Competitors, www.ftc.gov/os/2000/04/ftcdojguidelines

Atlanta). Unlike the domestic US, there is no market split between Hub and point-to-point operations, because there is no subset of large markets where point-to-point carriers can achieve a significant cost advantage.[6] The largest O&Ds (such as New York-London) have hubs at one or both ends, and thus are also dominated by the hub carriers. No point-to-point carrier has ever achieved a market share of more than 2% on the North Atlantic, and numerous recent attempts to establish point-to-point airlines focusing on specific niche markets have failed. Point-to-point service on the North Atlantic is currently limited to a small group of markets that the large hub carriers deliberately avoid. A competitive analysis that is limited to isolated O&D citypairs might be a reasonable approach in pure point-to-point markets[7] but is totally inappropriate in pure hub markets.

- From a competitive standpoint the North Atlantic can be usefully split into two main geographic segments, US-Continental Europe (75-80% of the total market) and US-UK/Ireland (20-25%). Passenger flows are almost completely separate, as US passengers do not use Continental hubs to fly to London (85% of the UK-Ireland market), and the Heathrow hub is no longer scheduled to flow large blocks of Western European traffic to North America. The Continental Europe is the purest Hub market, almost 100% dominated by service operated via large hubs, whereas the UK/Ireland market, because of the size of the London market and the geography of Ireland, has some limited potential for competition from point-to-point flights.
- The extreme hub-orientation of the North Atlantic creates extremely high barriers to competitive entry and (as is also seen in the domestic US market) scale and scope economies mean that larger hubs have powerful advantages over smaller ones. The last new entrant that was able to achieve a market share of at least 2% was USAirways in 1993. There is no possibility that a future new entrant could ever achieve a significant, sustainable presence on the North Atlantic as that would require a large hub operation in a large market, and a large fleet of modern (A330/777) widebodies. A new entrant would also find that access to many of the most important airports (LHR, FRA, CDG, JFK, EWR, ORD) was extraordinarily limited and expensive. The DOT competitive analysis is not based on any evidence regarding entry barriers whatsoever. The DOJ Opinion recognizes serious entry barriers in five nonstop markets[8] but because of its myopic focus on O&D citypair level competition, it does not examine evidence as to the impact of entry barriers on competition generally across the North Atlantic.
- At the heart of any competition analysis is the "industry structure" question—given the underlying production/network/demand economics, how many competitors could the market sustainable produce? The number of North Atlantic competitors capable of sustaining a non-trivial market presence (greater than 2% share) has, for several decades, been defined by the number of independent airlines controlling large hubs that could support multiple transatlantic services on a standalone basis. The 16 hubs in the table below tracks very closely with the actual competitive environment of 1991 where 15 hub carriers had market shares of 2% or more.[9] In 2002, following the introduction of the three Collusive Alliances and the acquisition of the Pan Am and TWA networks by Delta and American, there were still10 large competitors. Any merger or antitrust immunity agreement between these carriers permanently reduces the number of viable competitors, and may create pressure for further consolidation. Neither the DOT or DOJ competitive analysis is based on any evidence as to the drivers of industry structure, past or present. Neither the DOT or DOJ conclusions about the impact of expanded Star Alliance immunity on future industry structure are not based on hub operations, network economics, or any other discernable theory of what might determine the number of viable competitors.

Viable large US Atlantic Hubs		Viable large EU Atlantic Hubs		
New York JFK	Atlanta	London LHR	Frankfurt	Zurich
Newark	Detroit	Paris CDG	Brussels	Milan MXP

[6] Point-to-point services can achieve very low costs in large markets but have great difficulty competing in smaller markets. Hub Networks have higher average costs, and have difficulty when they directly compete with point-to-point carriers in large markets but are the only efficient way to serve most smaller markets. Absent airport capacity or regulatory entry constraints, high volume point-to-point markets have low barriers to entry, while barriers are much higher in hub markets, because of the limited number of viable hub airports, and the large minimum scale needed to establish a hub network.

[7] for example the domestic airline markets in India, Russia and China, which have no US-type domestic hubs

[8] New York to Stockholm, Copenhagen, Lisbon, Geneva and Zurich

[9] historical capacity shares and concentration levels are shown in Appendix A. Transatlantic service has operated from other hubs, but these have been excluded from the table if they could not have independently supported an airline's North Atlantic hub operation for reasons of geography (Madrid, Houston, Rome, Dublin) runway capacity (London LGW) or small local origin market size (Cincinnati, Vienna, Charlotte). Services from these airports have only been sustainable in conjunction with services from the larger hubs shown on the table

Philadelphia Chicago ORD Washington IAD	Amsterdam Munich Copenhagen

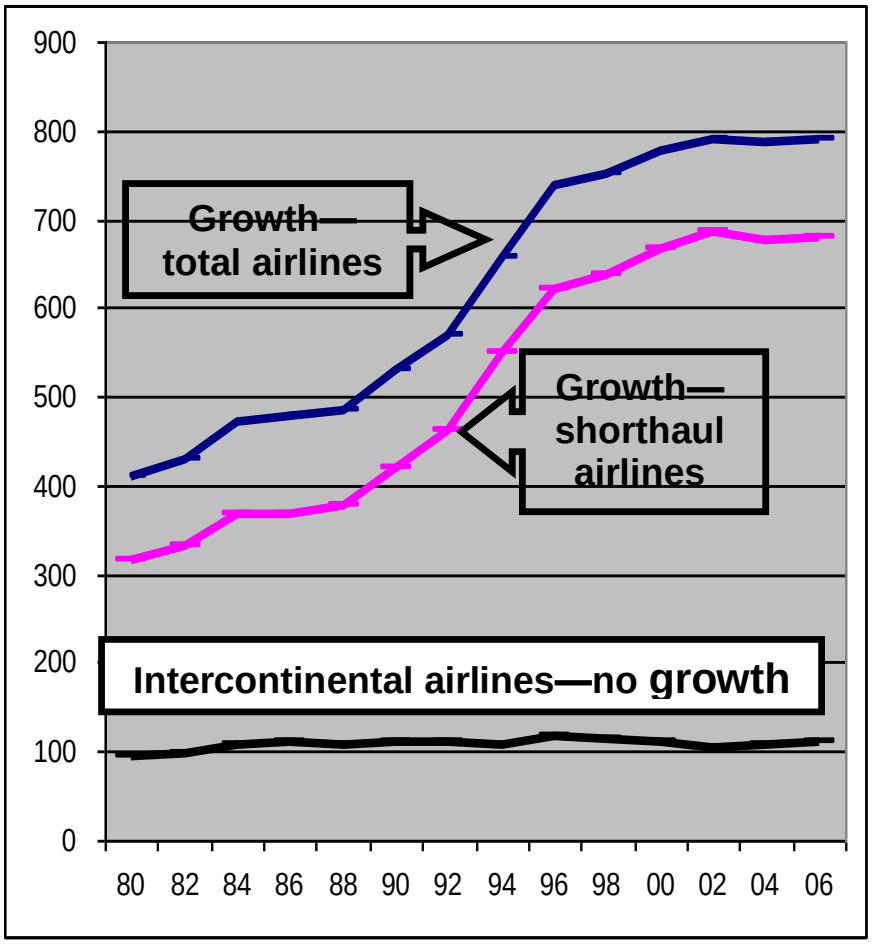
- "Low Cost" oriented point-to-point carriers could never successfully compete on the North Atlantic, as there would be no way that a price-oriented competitor could achieve large traffic volumes while establishing a significant cost advantage over the incumbent hub operators and sufficient marketing presence to counteract natural product and brand disadvantages. None of the successful low cost narrowbody operators in the US or Europe (Southwest, Ryanair, Jetblue, Easyjet) have any experience with the operational and marketing requirements of Intercontinental service, and none have plans to acquire longhaul aircraft. There are only two Intercontinental "Low Cost" airlines anywhere in the world; Jetstar (Australia, 6 widebodies) began longhaul operations in late 2006 and Air Asia X (Malaysia, 5 widebodies) began flying in late 2007. Since the longhaul Low Cost airline approach has not been proven in the marketplace, there is no basis for assuming that low cost new entrants could discipline future anti-competitive abuses on the North Atlantic. But neither the DOT or DOJ competitive analysis considers the issue of whether future low cost entrants might discipline any anti-competitive pricing behavior, and neither presents any evidence as to the likelihood of future new entry.
  - The only attempt of a European "low cost" airline to pursue North Atlantic came with Ryanair's 2006 hostile bid for Aer Lingus. This was blocked by the European Union, in a naked attempt to protect its large flag carriers from low cost intercontinental competition. [10] Ryanair has subsequently disavowed any interest in longhaul, widebody markets, but this case clearly contradicts any claim of market contestability based on potential future low cost entry
- The DOJ Opinion correctly notes the enormous consumer and industry benefits generated by the Open Skies treaties that the State Department has helped implement, and that the competitive risks of antitrust immunity grants in the 90s were justified by the increasingly liberal aviation agreements they helped achieve. But while US-Europe Open Skies represents a major advance over the Bermuda-style treaties of the past, the DOJ Opinion is mistaken in assuming that the North Atlantic market functions in the same open manner as the domestic US market. In fact, the DOT explicitly assumes that the existence of an "Open Skies" treaty, by definition, allows one to assume that markets are fully contestable, and that future entry would be "timely, likely or sufficient"[11], and there is no need to examine evidence of actual entry barriers, actual market entry or actual contestability, and the readily available evidence of structural deficiencies can be ignored.
  - The DOT describes Open Skies as "a regulatory framework that enhances competition and promotes new entry"[12] but the actual North Atlantic evidence shows that even where open entry exists, actual entry does not occur, and (as will be documented below) the level of competition is rapidly declining. The only "new entry promoted" by Open Skies was the elimination of decades old Bermuda II restrictions in the UK market, which were highly beneficial to consumers, but were a one-time event, and will have no bearing on the level of market entry that will occur across North Atlantic markets in the future.

- The Intercontinental sector of the airline industry, has always been competitively deficient, with a highly stagnant industry structure with extremely limited market entry. While global aviation is perceived to be extraordinary dynamic, with low barriers to entry and cutthroat competition, this is only true of regional (narrowbody) airline markets, including the US domestic market. All of the dramatic growth in the number of passenger airlines in the last three decades was limited to short and medium haul airlines. Despite the explosive growth in world trade and airline productivity, the number of intercontinental Airline sector has remained absolutely flat, with the rare new entrants (Emirates, China Southern) offset by occasional exits (Pan Am, Sabena, Canadian). The DOT and DOJ conclusions on market contestability are not based on any actual historic evidence that these markets are dynamic.

[10] The EU blocked the Ryanair-Aer Lingus merger proposal by imposing antitrust standards totally inconsistent with those used in any previous airline case, for example ruling that Ryanair service to distant satellite airports such as Beavais and Haan was a perfect substitute for Aer Lingus service to Paris CDG and Frankfurt, and by ruling that the loss of competition in a market such as Dublin-Paris was an irremediable antitrust violation—the EU would block the merger unless there was a new entrant ready to immediately replace the lost competition. In all prior and subsequent cases, the EU accepted reduced O&D competition as long as slots were reserved for a hypothetical new entrant, but there was no requirement that new entry actually occur. "An Update on Industry Consolidation and EU-US Treaty Negotiations" (Aviation Strategy No.113, March 2007) p. 9.

[11] DOJ Opinion p.17

[12] DOT Show Cause Order, p.17



source: Airliners Magazine, Jan 2009 data excludes very small commuter carriers

<u>The DOT and DOJ Evaluated the Star Alliance Application as a Completely Isolated Event, Ignoring Overwhelming Evidence That It Was Part Of a Concerted Effort to Reduce North Atlantic Competition</u>

- The current consolidation of North Atlantic competition is being driven by three coordinated actions; as each set of applicants have publicly claimed that their proposals were a necessary response to previous consolidation, and each makes claims of public benefits outweighing competitive risks based on the precedent established by regulatory approval of the previous consolidation, none of the competitive impacts of individual transactions can be evaluated in isolation
  - Expanded Skyteam antitrust immunity and the Delta-Northwest merger, which completed the process of eliminating independent competition from the KLM-Northwest alliance (which was an inevitable outcome of the 2004 Air France-KLM merger)[13]
  - The current expanded Star Alliance antitrust immunity application, which will eliminate independent competition from Continental Airlines
  - The current Oneworld antitrust immunity application which will eliminate (nominally) independent competition from American Airlines/Finnair and Iberia

[13] Northwest's right to codeshare and operate an integrated alliance network with KLM would have expired at the end of its contractual term. Once the Air France-KLM merger established Delta as the US partner of the merged carrier, Northwest's only options were to abandon efforts to operate a significant North Atlantic network, merge with Delta, or attempt to establish an alliance with Lufthansa or British Airways. Thus regulatory approval of the Air France-KLM merger was a decision to eliminate Northwest as a North Atlantic competitor, although this inevitable result was not publicly acknowledged by either European or US regulators.

- Although the DOT and DOJ clearly acknowledges that they are required to evaluate evidence as to "whether the alliance would significantly increase market concentration" both limit their concentration analysis to an improper and deliberately misleading comparison of market shares the day before approval to market shares the day after approval. A proper competitive review must not only consider the combined impact of applications such as Oneworld that are formally pending, but should also consider the impact of additional responses where there is public evidence that market participants are already actively pursuing them[14], or there is serious reason that smaller competitors adversely affected by alliance expansion would need to pursue in order to remain viable. It is especially important that the concentration analysis consider likely competitor responses to this application, since the DOT's positive findings in this case make it more likely that those subsequent consolidation moves would also be approved. For example, since the DOT made a blanket finding that expanding Star immunity to a second large US carrier created major public benefits and will actually be pro-competitive, one must consider the possibility that USAirways will subsequently join the Star ATI group, since there is absolutely no evidence or reasoning in the DOT Show Cause Order that could possibly justify approval of extending immunity to Continental, but would preclude extending immunity to USAirways.
  - ☐ As the DOJ has acknowledged, the Star applicants specifically made "due process" and "equitable" treatment claims that there was no basis given the evidence and logic behind the Skyteam decision that the DOT could deny the comparable requests made in this application[15]
- At no point did the DOT or DOJ examine any evidence as to whether approval of expanded Star immunity or the related transactions would threaten consumers by harming smaller airlines unable to remain viable competitors against increasingly large Collusive Alliance groups, or any evidence supporting or refuting the counter-explanation that the expanded alliances are hoping to profit by driving previously viable competitors out of the market, or use market power to force them to join their alliances on highly disadvantageous terms. It makes absolutely no sense to accept at face value the DOT/DOJ's implicit (but undocumented) assertion that carriers like USAirways and Aer Lingus, with 3-4% market positions would continue to provide meaningful competition to the expanded Collusive Alliances groups that are five to ten time larger[16]
- A proper analysis of the impact on market concentration would show the range of highly likely concentration levels that might result if the application is approved. The table below, which uses data from the DOT's Table 1,[17] shows the impact of the Skyteam immunity expansion (an increase in top three concentration from 56% to 66%), the immediate impact of the both current and the pending Oneworld application (which are both direct responses to Skyteam) as well as likely short-term responses to approval of those two applications. The DOT analysis focuses on concentration levels under the most improbable scenario (Star is approved but Oneworld is not, and there is no subsequent industry consolidation of any kind), a scenario that is totally inconsistent with the logic behind the DOT's decision to approve the Star application. The table below clearly illustrates the rapid (2007-2009) shift to very extreme concentration that the Collusive Alliance carriers are seeking.

North Atlantic onboard shares (CA=Collusive Alliance)	prior to Skyteam, CO/Star, BA/AA	after Skyteam, prior to CO/Star, BA/AA	CO/Star approved, BA/AA banned; no further consolidation	BA/AA approved but no further consolidation	BA/AA approved plus further consolidation
top 3 share	**56%**	**66%**	**75%**	**86%**	**97%**
LH-led C. A.	24%	24%	33%	33%	45%

[14] There have been multiple press reports that Aer Lingus and Virgin Atlantic have initiated negotiations to join the Star Alliance. Star member Singapore Airlines is a 49% shareholder in Virgin Atlantic, and there have been reports of ongoing talks to combine Virgin's operations at London-Heathrow with those of Lufthansa-owned BMI.

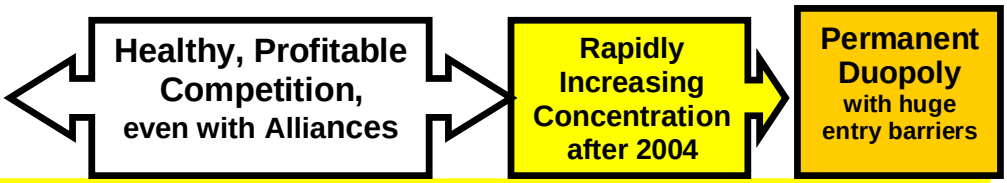
[15] DOT Opinion p.7.

[16] Neither DOT or DOJ considered the specific risk that Star, having achieved full immunity to collude with Continental's Newark transatlantic hub, would jettison USAirways and its seemingly redundant Philadelphia transatlantic hub from the alliance, which could in turn threaten USAirways' ability to compete domestically and its overall financial viability. There is nothing in the DOT Order or DOJ Opinion that would preclude Star from taking this step.

[17] DOT Show Cause Order p.8, adjusted to exclude carriers with less than 1%, who are immaterial to any competition or concentration analysis. The DOT table improperly includes Europe-South America and USA-Middle East/Asian traffic, which has been excluded from the concentration data shown in Appendix A

AF-led C. A.	21%	30%	30%	30%	30%
BA/BA-led C. A.	11%	11%	11%	23%	23%
AA+AY	9%	9%	9%		
CO	9%	9%			
KL-led C.A.	9%				
VS	7%	7%	7%	7%	
US	4%	4%	4%	4%	
EI	3%	3%	3%	3%	3%
IB	2%	2%	2%		

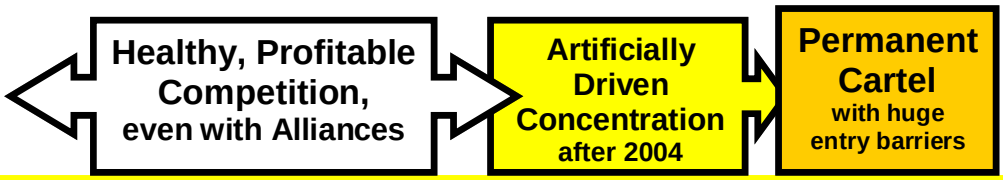
- Readily available evidence shows that the large US-Continental Europe market reached levels of extreme concentration several years ago, as a result of the Air France-KLM merger, which effectively established a permanent Lufthansa/Air France duopoly in this market[18]. There is nothing in the DOT/DOJ competitive analysis that would inform the reader that this huge market segment was already highly concentrated, and that the current application will further strengthen the duopoly. Nor is there any evidence supporting the implicit DOT/DOJ assumption that consumers are not at risk when the industry achieves these levels of concentration



	1995	1997	1999	2001	2003	2005	2007	2009
Concentration levels of US-Continental Europe market (40 million annual pax)								
top 2 share	**38%**	**44%**	**45%**	**50%**	**55%**	**77%**	**76%**	**92%**
top 3 share	47%	55%	56%	61%	67%	85%	86%	97%
top 4 share	56%	64%	63%	68%	74%	92%	93%	99%
number of US-Europe competitors with minimum departure share of								
5%	**7**	**6**	**6**	**7**	**6**	**4**	**4**	**2**

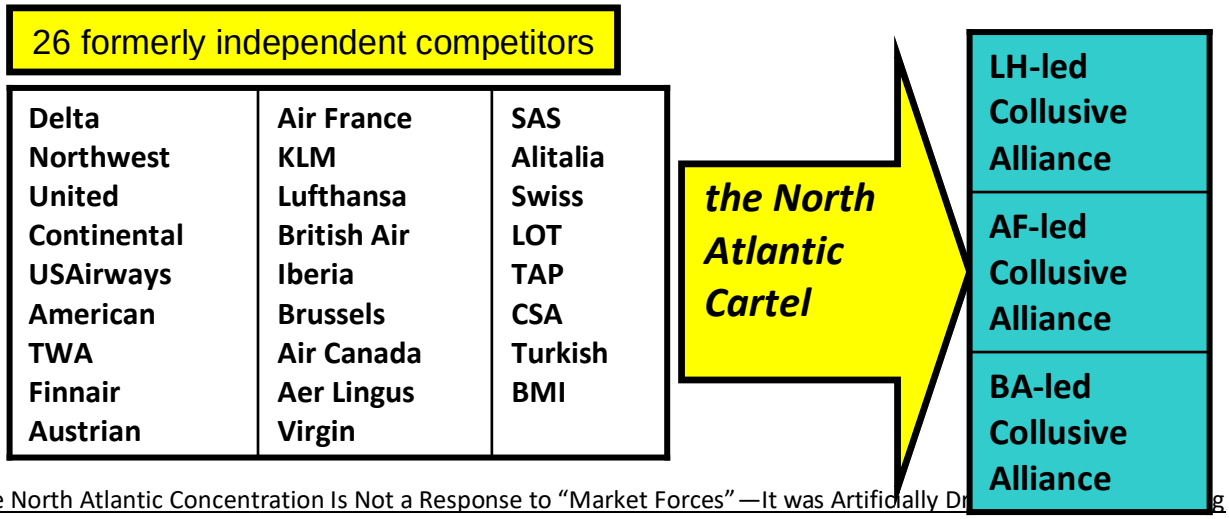
- Approval of the current immunity petitions would extend these extreme concentration levels to the entire North Atlantic; this Cartel of three Collusive Alliances would control over 95% of this huge 55 million passenger market with enormous entry barriers protecting them from new competition; the Continental Europe market would be dominated by the Lufthansa/Air France duopoly, while the British Airways-led Collusive Alliance would dominate the US-UK market. At no point did the DOT Show Cause Order or the DOJ Opinion present any evidence suggesting concentration would not reach these extreme 90-95% levels. The only difference between DOT and DOJ analysis of transatlantic competition is the DOJ's greater insistence on carve outs for a handful of directly overlapping nonstop routes. At no point did the DOT Show Cause Order or the DOJ Opinion present any evidence showing either that risks to consumer welfare only occur above certain levels of concentration or that there are no risks to consumers, even at extreme levels of concentration. Both the DOT Show Cause Order and the DOJ Opinion fail to consider any evidence as to whether these higher concentration levels could raise entry barriers, increase the potential for anti-competitive pricing or oligopolistic capacity cuts, or reduce the contestability of markets. There could obviously be many scenarios where high concentration measures could be justified; the issue here is that both the DOT and DOJ approvals of rapidly accelerating concentration are totally unsupported by the evidence they presented, and there is significant evidence challenging their unsubstantiated assumption that extreme concentration will benefit consumers.

[18] The market share data in the two tables below are based on the data in Appendix A, not the DOT based table above, although the differences are not material to the competition/concentration analysis.



	1995	1997	1999	2001	2003	2005	2007	2009
Concentration levels of total North Atlantic market (55 million annual pax)								
top 2 share	29%	31%	35%	36%	41%	56%	54%	72%
top 3 share	**51%**	**53%**	**59%**	**58%**	**65%**	**79%**	**77%**	**98%**
Collusive Alliance%	7%	26%	42%	44%	49%	56%	54%	97%
number of US-Europe competitors with minimum departure share of 2%								
	13	**13**	**11**	**11**	**9**	**7**	**6**	**3**

- Assuming that Virgin Atlantic, Aer Lingus and USAirways cannot survive independently against three Collusive groups, each five to ten time larger, 26 previously independent North Atlantic competitors will have consolidated into three Collusive groups. At no point has either the DOT or the DOJ acknowledged the trend towards extreme consolidation, much less evaluated evidence of its potential impact on consumers or future industry efficiency.



Extreme North Atlantic Concentration Is Not a Response to "Market Forces"—It was Artificially Dr g To Establish a Three Alliance Cartel on The North Atlantic

- At no point did the DOT or DOJ present evidence to support their implicit assumption that the dramatic trend towards consolidation was a necessary response to competitive market forces
  - the Applicant's claims that the expanded Alliance is a direct response to the unprecedented fuel crisis and challenging economic conditions" of the last year are demonstrably false.[19] North Atlantic consolidation options have been aggressively pursued by these carriers for many years, and all of the plans for mergers and expanded alliances were developed while the North Atlantic was strongly profitable and rapidly growing. Continental has been carefully analyzing merger and Collusive Alliance alternatives for over ten years. This application is a direct response to the merger of the Delta-Air France and Northwest-KLM alliances, which has been fully anticipated by all parties since 2004.
  - The alleged relationship between consolidation and external forces is also disproved by the relative absence of merger/alliance activity in the many hyper-competitive, volatile, financially challenged sectors outside the North Atlantic. Carriers have attempted to consolidate the North Atlantic into three Collusive groups because they believe regulators in Brussels and Washington are willing to approve extreme concentration without demanding objective evidence of public benefits and competitive impacts.

[19] Star Alliance Application p.4

- ☐ The claim that extreme consolidation of the North Atlantic is economically justified is also contradicted by the actions of the capital markets; despite years of massive publicity extolling the virtues of various potential mergers, none of these plans could obtain outside funding, even when capital markets were booming; the only party willing to fund the Northwest-Delta merger was Air France, although the final transaction was structured as a stock swap without any new capital.
- ☐ As the DOJ acknowledged, transactions such as the Star Alliance expansion will not generate cost savings of any significance, and the benefits of any savings would not be passed on to consumers[20]

■ At no point did the DOT or DOJ examine evidence showing that the recent drive towards extreme North Atlantic concentration was artificial—all but one of the large/medium carriers that stopped competing independently did so by petitioning governments for permission to merge of join a Collusive Alliance[21] and 15 of these applications occurred after 2001; the last large/medium carrier to exit the North Atlantic because of "market forces" (economic failure, after losing share to carriers with better networks and higher efficiency) was Pan Am in 1993[22]

market exit of Large/Medium carriers since 1993

carrier	*exit*	*reason*	*action taken*
PA	1993	market forces	
NW	1993	**artificial**	joined KL, then AF-led collusive alliance
DL	1995	**artificial**	joined SR, then AF-led collusive alliance
SN	1995	**artificial**	joined SR-led collusive alliance
OS	1995	**artificial**	joined SR, then LH-led collusive alliance
UA	1997	**artificial**	joined LH-led collusive alliance
SK	1997	**artificial**	joined LH-led collusive alliance
BD	2001	**artificial**	joined LH-led collusive alliance
TW	2002	**artificial**	acquired by AA
AZ	2002	**artificial**	joined AF-led collusive alliance
OK	2002	**artificial**	joined AF-led collusive alliance
US	2004	**artificial**	joined LH-led alliance (w/o immunity to date)
KL	2004	**artificial**	acquired by AF
SR-LX	2005	**artificial**	joined LH-led collusive alliance
LO	2005	**artificial**	joined LH-led collusive alliance
TP	2005	**artificial**	joined LH-led collusive alliance
TK	2008	**artificial**	joined LH-led collusive alliance
CO	**2009**	**artificial**	petitioned to join LH-led collusive alliance
AA	**2009**	**artificial**	petitioned to join BA-led collusive alliance
VS	**2009**	**artificial**	considering joining LH-led collusive alliance
IB	**2009**	**artificial**	petitioned to join BA-led collusive alliance
AY	**2009**	**artificial**	petitioned to join BA-led collusive alliance

■ At no point did the DOT or DOJ examine evidence of the concerted efforts by the large alliance carriers to gain governmental support for concerted efforts. This evidence would underscore the artificial nature of consolidation, and would cast serious doubt of the unsubstantiated DOT/DOJ assumption that the three alliances in the cartel would constitute a healthy competitive environment. These efforts included

- ☐ The 2004 Air France-KLM merger, which not only eliminated one of the lowest cost hub operators, and thus a major source of price competition, but (using the industry structure logic outlined earlier) transformed a

[20] DOJ Opinion p.31

[21] two of the market exits in the table (TW into AA and LX into LH) were precipitated by general financial difficulties, but in both cases the North Atlantic routes relevant to this competitive analysis (TWA's Heathrow franchise, and the Zurich longhaul operation) were viable and sustainable

[22] 18 very small carriers exited the North Atlantic, (4 artificially, 14 due to market forces, including for example Citybird, ATA, Tarom, Eos); unlike the consolidation of the larger carriers, this could be said to be a "natural" shakeout of weak airlines, but it had little bearing on the overall level of North Atlantic competition

Transatlantic market that had been capable of supporting 5-7 hub-based competitors into one that could never have more than 3 viable large competitors; as noted earlier the merger explicitly eliminated Northwest as a Transatlantic competitor, since it would be required to merge or quit the market at the end of its contractual arrangements with KLM[23]

- ☐ Aggressive public relations efforts calling for mergers and industry consolidation, most notably from United CEO Glenn Tilton, but also supported by other industry executives and Wall Street firms that worked for those carriers
- ☐ Air France-backed efforts for Delta to acquire Northwest, in order to enhance the market share of its Collusive Alliance, and similar Lufthansa-backed efforts for United to acquire either Continental or USAirways
- ☐ The five year delay of the EU-US Open Skies Treaty, largely driven by European demands that their carriers (Air France, Lufthansa and British Airways) should have the right to acquire control of their US alliance partners[24]
- ☐ Efforts to orchestrate the timing and structure of merger and antitrust application, so that applications would be reviewed prior to the end of the Bush Administration, and that Delta-Northwest merger application, which raised fewer questions of direct network overlap, would be introduced first, allowing subsequent, more controversial applications to make "due process" claims for similar treatment.[25]
- ☐ Ongoing efforts by the European Union to facilitate mergers and major shareholdings among Legacy Intercontinental Carriers, including Alitalia-Air France, Iberia-British Airways and Lufthansa-Austrian-SN Brussels

■ At no point did the DOT or DOJ examine evidence as to whether competition between the three Collusive Alliances would act as a substantial safeguard against anti-competitive abuses (price increases or capacity cuts) that any one of them might pursue. There is substantial reason to doubt the unsubstantiated DOT/DOJ assumption of healthy, aggressive inter-alliance competition, and a cartelized North Atlantic would appear to provide ideal conditions for oligopoly behavior.

- ☐ Since core market positions have long been based on hubs (and related home country markets), there would no opportunity for one alliance to make more than tiny inroads on another alliance's market share. The Lufthansa group recognizes the Air France group's hegemony in France and Amsterdam, and Air France has no intention of challenging the Lufthansa group in Germany or Switzerland. There is little potential for aggressive competition over premium passengers since these are also almost exclusively linked to nonstop routes and hub cities
- ☐ The Lufthansa/Air France duopoly in Continental Europe follows European Union policy favoring these two companies as "co-Continental champions". Both have received significant support from Brussels during the "industry consolidation" process, and there would be significant political pressure discouraging aggressive direct competition on core routes.
- ☐ Inter-alliance competition will occur, but will be largely limited to alliance expansion (such as the negotiations over which alliance Continental would join) and markets with especially weak alliance members (such as Austria and Italy), but this type of competition will have little bearing on price and capacity discipline in the vast majority of markets.

<u>Neither the DOT Show Cause Order or the DOJ Opinion Meet the Minimum Requirements For Competitive Analysis Established by the Clayton Act or the Joint Venture Guidelines</u>

■ Neither the DOT or DOJ properly analyze whether affected markets are sufficiently contestable as to minimize the risk of future anti-competitive abuses

- ☐ there is no analysis of the factors driving industry structure (such as hubs and networks) that would influence future competitive levels
- ☐ there is no evidence or analysis of the magnitude of entry barriers or how they affect market contestability, except for the DOJ's consideration of five overlapping nonstop routes

[23] "Airline Consolidation: Myth and Reality: An evaluation of airline mergers in the US, Europe and China, and the general trend towards consolidation" (Aviation Strategy 109, November 2006)
[24] "An Update on Industry Consolidation and EU-US Treaty Negotiations" (Aviation Strategy No.113, March 2007)
[25] DOJ Opinion p.7

- ☐ there is no evidence presented of actual historic market entry experience, and conclusions ignore substantial evidence that North Atlantic entry conditions are highly deficient
- ☐ there is no evidence presented of the past actual or future potential entry by low cost carriers that would be most effective in disciplining abuses, and conclusions ignore evidence that low cost carriers have never played a role in this market and future entry is extremely unlikely
- ☐ there is no evidence or analysis of the potential for competition between the three Collusive Alliances to provide sufficient discipline against future abuses, and there is no apparent factual basis for the conclusion that they would

■ Neither the DOT or DOJ properly demonstrate the potential affect of expanded antitrust immunity on market concentration or properly analyze whether the increased concentration increases the risks to consumers from anti-competitive abuses
- ☐ evidence and analysis is improperly limited to a simple comparison of market shares the day before and the day after implementation of expanded immunity, and the analysis deliberately ignores competitive responses that would be highly likely, and ignores the serious possibility of extremely high (90-95%) concentration levels
- ☐ there is no evidence or analysis showing any relationship between the level of market concentration and risks to consumer welfare; no evidence showing adverse affects (at even the above 90% levels), and no evidence or analysis demonstrating the absence of serious risk at any likely future level.

■ Neither the DOT or DOJ properly analyze whether increased concentration could be justified as reactions to tangible external "competitive market forces" or whether increased concentration had been artificially engineered with the express objective of reducing competition
- ☐ Since the evidence is limited to market shares the day before and the day after implementation of expanded immunity, the analysis ignores substantial evidence that the current application and the related Skyteam and Oneworld applications are part of a concerted effort to massively reduce North Atlantic competition, and in no way driven by external market forces.
- ☐ Although approval of the current applications and likely immediate responses would complete the process of consolidating 26 previously independent competitors into a cartel of three Collusive Alliances controlling over 90% of the North Atlantic, at no point does either the DOT or the DOJ openly acknowledge the powerful overall consolidation trend, the magnitude of the competition that will have been eliminated, or the dominant position of the potential three alliance Cartel; and at no point does either the DOT or DOJ provide any evidence or analysis supporting the conclusion that consumers would not face significant risks from market cartelization that had been engineered in this fashion.

<u>COMMENTS ON THE DOJ OPINION-CONCLUSION</u>

Neither the DOJ Opinion or this comment were intended to present a definitive case as to whether approval of the application for expanded Star Alliance antitrust immunity would (or would not) provide public benefits sufficient to justify any competitive risks. The core issue here is the legitimacy of the evidence used to estimate the balance between public benefits and competitive risks.

The Star Alliance Applicants completely failed to meet the basic evidentiary standards needed to demonstrate that the requested antitrust exemptions would produce the level of public benefits needed to offset the reduction in competition, and the DOT Show Cause Order completely failed to demonstrate that the DOT had either undertaken an independent , objective analysis of the public interest/competitive risk tradeoffs, or carefully scrutinized the evidence submitted by the Applicants. This evidentiary failure covers the entire scope of the Applicant's proposal. There is no basis for the DOJ's rejection of DOT conclusions in non-transatlantic markets, but accepting DOT conclusions (with increased carve outs) in transatlantic markets. There is no legitimate, objective, verifiable basis for the DOT's finding that expanded transatlantic immunity will generate public benefits sufficient to justify any competitive risks. There is no legitimate, objective, verifiable evidence supporting the DOJ's acceptance of a slightly narrower grant of transatlantic immunity than the DOT had proposed.

I urge the DOJ to revise its Opinion, and demand that there be no extension of Star Alliance antitrust immunity until the DOT fully addresses these evidentiary deficiencies, and clearly demonstrates significant incremental public benefits and minimal risks to consumer welfare.