Order 2016-11-16
Served: November 18, 2016

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 18th day of November, 2016

Joint Application of

AMERICAN AIRLINES, INC; and
QANTAS AIRWAYS LIMITED

for Approval of and Antitrust Immunity for Alliance Agreements under 49 U.S.C. §§ 41308 and 41309

Docket DOT-OST-2015-0129

ORDER TO SHOW CAUSE

I. SUMMARY

By this order, the Department of Transportation (the "**Department**") tentatively denies the application of American Airlines, Inc. ("**American**") and Qantas Airways Limited ("**Qantas**").[1] The applicants (collectively, the "**Joint Applicants**") are long-standing commercial partners who are requesting approval to expand their existing partnership with an expanded joint business.[2] Through a restated agreement ("Amended and Restated Joint Business Agreement" or "**Amended JBA**"), American and Qantas are seeking to jointly plan and price their services, and share revenues and costs, on routes between the United States and Australia/New Zealand (collectively referred to as "**Australasia"** for the purposes of this order).[3] The Joint Applicants currently compete in many of these markets between the two regions today, including in the nonstop Los Angeles ("**LAX"**)-Sydney ("**SYD"**) market.

The Department is tentatively concluding that the proposed alliance expansion would harm competition in the U.S.-Australasia market, in particular in the large U.S.-Australia market. By combining the airline with the largest share of traffic in the U.S.-Australasia market with the largest airline in the United States, the proposed alliance would reduce competition and consumer choice. Qantas is by far the largest competitor operating between the United States and Australia, and American is likely the only remaining U.S. airline positioned to enter and

[1] The common names of these and other carriers are used throughout this Order.
[2] *See* Joint Application of American Airlines, Inc. and Qantas Airways Limited for Approval of and Antitrust Immunity for Proposed Alliance, hereinafter "Joint Application," June 9, 2015. DOT-OST-2015-0129-0001, at 3. For purposes of the Joint Application, North America refers to the United States (including Puerto Rico and the U.S. Virgin Islands, but excluding Hawaii, Guam and other U.S. territories), Canada, and Mexico.
[3] Id. at 4, 20.

expand services in a competitively significant and timely manner, given its resources and network size.

Our analysis focuses on competitive effects at the network, country-pair, and city-pair levels. Rather than creating a more viable entity to compete more robustly with other airlines, an expanded and immunized American/Qantas alliance would account for nearly 60 percent of U.S. to Australia seats and enjoy the largest market share in nearly 200 city-pair markets, sufficient for the alliance to exert market power. The expansion would be particularly significant for consumers given the geographic and demographic character of the U.S.-Australasia market, which features long, thin markets that are isolated from other global traffic flows. For example, the record shows that, between the U.S. mainland and Australasia, there are few passengers connecting via intermediate points in third countries to Australasia, limiting the potential for competing networks to discipline the proposed alliance. Additionally, there is limited flow within Australasia or to other countries beyond Australasia. In such circumstances, there is a high risk of competitive harm from approving and granting antitrust immunity ("**ATI**").

In addition to these anticompetitive effects, the Department is also concerned that the proposed alliance would not generate the public benefits identified by the Joint Applicants in their filings. For example, we tentatively find that, based upon information in the record, the proposed alliance is unlikely to grow capacity over the next five years faster than what the Department would expect based upon the historical growth rate. Additionally, many public benefits from customer service coordination could be obtained through traditional arms-length cooperation such as codesharing.

Based upon these tentative findings, the Department proposes to disapprove the alliance agreements and withhold ATI. In sum, the Department tentatively concludes that the proposed alliance would substantially reduce competition and consumer choice, without producing sufficient countervailing public benefits. We direct any interested parties to state why we should not adopt these findings and conclusions in a final order. Parties have 14 calendar days in which to file answers and 7 business days in which to submit replies.

II. BACKGROUND

A. THE PROPOSED AMENDED JOINT BUSINESS AGREEMENT

In this proceeding, American and Qantas are seeking to significantly expand their current commercial relationship with a metal-neutral revenue-sharing joint venture. The geographic scope of the venture is North America on the one hand (defined as including Canada and Mexico, but excluding Hawaii and U.S. territories in the Pacific), and both Australia and New Zealand on the other hand.[4] The Joint Applicants exclude Hawaii because, in their view, "there is trivial connecting traffic between Australia/New Zealand and the U.S. through Hawaii and Hawaii is somewhat of a distinct endpoint for local traffic apart from the mainland."[5]

[4] *See* Joint Application for Approval and Antitrust Immunity for Proposed Alliance, June 9, 2015, DOT-OST-2015-0129-0001 at 52 (Schedule 1 to Alliance Agreement: Definitions) and 55 (Summary of Amended and Restated Joint Business Agreement).

[5] Joint Applicants' Response to Order Requesting Additional Information, December 18, 2015. DOT-OST-2015-0129-0012 at 38.

The Joint Applicants currently operate under a joint business agreement that the Department approved, without antitrust immunity, in 2011.[6] Until recently, American was not able to serve Australasia because of equipment and labor agreement limitations.[7] However, following its bankruptcy reorganization, merger with US Airways, and negotiation of new labor contracts, American was better positioned and decided to launch new services between the U.S. and Australasia (specifically between LAX and both SYD and Auckland, New Zealand ("**AKL**")), beginning in December 2015. Additionally, American was able to make substantial new investments in its fleet, equipment, and facilities,[8] including acquiring Boeing 787 and 777-300ER long-range aircraft that are capable of nonstop flight between Australasia and the mainland United States.

The Joint Applicants assert that the JBA will allow American and Qantas to compete more effectively with the existing immunized alliances of Delta-Virgin Australia and of United-Air New Zealand operating in these markets.[9] The joint business would operate on a metal-neutral basis, meaning that the carriers would be essentially indifferent as to which carrier operates a particular flight segment; the carriers would act as a single company in specified markets, allowing them to combine resources, including equipment and staff, and share in the resulting revenue pool. Specifically, the Joint Applicants note that the Amended JBA would entail: (1) coordinating schedules to minimize wait time and maximize passenger service; (2) launching additional routes, with the agreement encouraging the carriers to explore new gateway opportunities;[10] (3) aligning sales organizations to ensure metal-neutral selling and improved customer benefits; (4) developing pricing guidelines for the joint business to provide consumers with a range of competitively priced services; (5) expanding discounted fare options; (6) coordinating inventory; and (7) improving comfort, punctuality, baggage delivery, and other customer service benefits.[11] Central to the JB, American and Qantas would implement a financial settlement system to share revenues and costs.

B. FILINGS

On June 9, 2015, the Joint Applicants submitted their application requesting antitrust immunity for an Amended JBA and a proposed alliance.[12] American and Qantas argue that the proposed alliance will do even more than the original JBA by further increasing capacity, reducing travel times, improving the customer experience, and increasing competition. The Joint Applicants note that their relationship spans decades, beginning as a codeshare arrangement in 1989, continuing with their partnership as founding members of the Oneworld alliance in 1999, up to the formation of the currently operating joint business in 2011.

With American's ability to operate its own flights between the United States and Australasia,

[6] *See* Order 2011-11-12 at 1 (November 9, 2011).
[7] *See* Joint Application for Approval and Antitrust Immunity for Proposed Alliance, June 9, 2015, DOT-OST-2015-0129-0001 at 1.
[8] Id. at 16.
[9] Id. at 21.
[10] Id. at 2.
[11] Id. at 18.
[12] Id. at 4. The carriers subsequently filed a joint motion pursuant to Rule 12 of the Department's procedural regulations (14 C.F.R. 302.12) seeking confidential treatment for the alliance agreements and certain other information provided in support of their application.

the Joint Applicants propose to operate a metal-neutral alliance structure to maximize integration and consumer benefits. The Joint Applicants argue that the more complete integration enabled by ATI will result in a better alignment of incentives and the reduction of inefficiencies, including double marginalization,[13] while enabling better competition with the immunized alliances of Delta-Virgin Australia and United-Air New Zealand. The Joint Applicants state that the integration required to generate these benefits creates too great a risk for American and Qantas to go forward without ATI.[14] The Joint Applicants express the view that ATI would not lessen competition because the two carriers did not currently compete at the time of application, and that their addition of new capacity and expected competitor reaction will enhance competition to the benefit of consumers. In addition to added capacity, the Joint Applicants claim that coordination under ATI would enable improved scheduling, alignment of sales, expanded fare options, greater inventory availability, added frequent flyer benefits, and enhanced customer experiences both onboard and at the airport.[15]

On June 18, 2015, the Department issued a notice suspending the procedural schedule and granting interim access to confidential documents. After reviewing the initial submission, we determined that additional information was needed to complete our review of the request for antitrust immunity and issued an Order Requesting Additional Information on November 2, 2015.[16] The Order requested further details on key competitive elements of the JBA, including: the geographic scope of the agreement; an explanation of any exclusionary clauses; further explanation of the expected public benefits; and details on capacity and market additions planned under the amended JBA.

The Joint Applicants responded to this order by submitting additional information to the record on December 18, 2015. The Department reviewed this subsequent evidence, as discussed in more detail below, and issued a further notice on February 3, 2016, finding the record to be substantially complete and establishing a procedural schedule.

Hawaiian Airlines answered on February 22, 2016. Hawaiian argues that "the benefits of foreclosing the prospect of competition between [the Joint Applicants] as American reintroduces its own-metal service to Australia are far from obvious."[17] Hawaiian also states its view that the Joint Applicants did not make the required showing of public interest benefits. Hawaiian expresses concern about whether immunized joint ventures have delivered on the fare savings or

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[13] Double marginalization, also called multiple mark-ups, occurs when two airlines have basic interline or code share arrangements to handle multiple segments, but do not cooperatively price the combined itinerary for the consumer. Thus, for example, Airline A is not willing to accept a cooperative price for the segment it operates because it risks losing revenue to Airline B, which might operate the longer, more profitable segment in the itinerary. The consumer is ultimately not offered the most competitive fare or optimal routing. In a "metal-neutral" sales environment, however, with revenue- or benefit-sharing, the airlines can balance risks and benefits for the benefit of the consumer and alliance as a whole. The airlines are willing to cooperatively price itineraries because they share the same incentive to make the sales and share the revenues. *See generally* Whalen, W.T. "A Panel Data Analysis of Code Sharing, Antitrust Immunity, and Open Skies Treaties in International Aviation Markets," 30 *Review of Industrial Organization* 39-61 (2007).

[14] Id. at 2.

[15] Id. at 18-24.

[16] *See* Order 2015-11-1, November 2, 2015.

[17] *See* Answer of Hawaiian Airlines, Inc., February 22, 2016. DOT-OST-2015-0129 at 1-2.

capacity growth promised.[18] The carrier questions the Joint Applicants' use of academic studies, pointing out that the cited studies both focus on broader global coverage and use data that is now five years old. Hawaiian elaborates that, in a deeper venture with American, the incentive for Qantas to exchange traffic with independent carriers will be reduced.[19]

Throughout its answer, Hawaiian emphasizes that access to domestic feed from foreign partners on reasonable commercial terms is critically important to the viability of independent carrier services in the long and thin U.S.-Australia market.[20] The carrier, therefore, expresses concern with any DOT approval of, and grant of antitrust immunity for, a joint venture that enables exclusive commercial dealing. Unconditioned approval, Hawaiian argues, will entrench a market structure that is demonstrably concentrated and will foreclose independent competitors.[21] In particular, Hawaiian takes issue with terms in the Amended JBA that it characterizes as "exclusive" and that it believes jeopardize the carrier's ability to exchange traffic with Qantas in the future, either on an interline or codeshare basis.[22] Hawaiian recalls its experience after the approval of the Delta/Virgin Australia joint venture in the same international market, stating that its revenues from its arms-length relationship with Virgin Australia dropped precipitously.[23] Hawaiian concludes that, if antitrust immunity were granted to American/Qantas, its arms-length relationship with Qantas would similarly suffer. Hawaiian therefore insists that any grant of ATI should be conditioned upon the Joint Applicants' entering into codeshare agreements with independent air carriers.[24]

Hawaiian concludes that ATI will be anticompetitive and not provide the required public benefits without the Department imposing conditions on any grant of ATI. These proposed conditions would take affirmative steps to bolster competition from independent carriers and to ensure that the Joint Applicants deliver on promised public benefits. Hawaiian also requests that the Department impose a specific time period for any grant of ATI, so that the Department will be able to evaluate the extent to which the Joint Applicants have delivered on stated public benefits. Hawaiian raises fundamental questions about the extent to which ATI would result in greater capacity.[25] Specifically, Hawaiian requested that if the Department grants ATI, it should also: (1) limit the timeframe of ATI approval to three years in order to allow for an assessment of the alleged public benefits; (2) mandate that the Joint Applicants enter into codeshare agreements on reasonable commercial terms with independent carriers; and (3) condition any grant of ATI on the requirement that Qantas report origin-destination ("**O&D**") details for all itineraries touching the United States, information to which all U.S. carriers would have access.

A private citizen, Mike Borsetti, also submitted comments to the case docket that focused on frequent flyer program alignment between the Joint Applicants.[26] The commenter argues that, after American received ATI for its alliance with British Airways, it imposed fuel surcharges for mileage redemptions that amounted to 99 percent of the outright purchase of the ticket. Changes

[18] Id. at 17 and 19.
[19] Id.
[20] Id. at 2.
[21] Id. at 24-26, 33-34.
[22] Id. at 34-35.
[23] Id. at 41.
[24] Id. at 84.
[25] Id. at Chart 22 and Chart 23.
[26] *See* Answer of M. Borsetti, February 22, 2016. DOT-OST-2015-0129-0019 at 5-6.

in schedules on American-operated flights from Boston ("**BOS**") and New York ("**JFK**") to London Heathrow (**"LHR"**) left fewer opportunities to redeem American frequent flyer miles without paying a surcharge for a British Airways flight. The commenter states that, with changes to American's program initiated January 1, 2016, frequent flyers earn miles faster for tickets sold by American (code AA or AA*) than for tickets on the same metal made with a British Airways code.[27] The commenter concludes by opposing the proposed joint business, based on these experiences with American's transatlantic partnership.[28]

The Joint Applicants replied to Hawaiian on March 2, 2016, arguing that, while Hawaiian voices concerns about the proposed Amended JBA, it fails to carry its burden of proving that the revised agreement would substantially reduce or eliminate competition, or that it is not in the public interest.[29] The Joint Applicants reason that, should their partnership increase fares as Hawaiian alleges, this would in fact benefit Hawaiian as a competitor with the joint business. The Joint Applicants argue that the shifting of passenger traffic from Hawaiian to the joint business is not an injury under U.S. antitrust law, which focuses on competition rather than specific competitors.[30] The Joint Applicants also take issue with the analysis underpinning Hawaiian's concerns regarding consolidation and increased fares under alliances, arguing that Hawaiian's analysis of fares and alliance concentration on transatlantic routes does not account for any local market conditions or global factors that influence airline pricing. In determining the consumer benefits of ATI, the Joint Applicants cite academic research that uses more complex methodologies. The Joint Applicants conclude that the economic literature on airline alliances and ATI confirms that they result in significant and quantifiable consumer benefits.[31] The Joint Applicants state that the joint business will result in $50 million in annual savings through the reduction of double marginalization, and cite a 2011 academic study indicating that immunized alliance connecting fares are 4.9 percent lower for similar itineraries on non-immunized alliances.[32] The Joint Applicants refer to academic research that has found fare reductions for all economy and business passengers after ATI, even in cases where a pre-existing codeshare existed.[33] The Joint Applicants also cite American's analysis of historic fare data, which suggests that ATI reduces fares an average of 6.2 percent across all markets.[34]

The Joint Applicants respond to Hawaiian's assertion that competition is reduced by stating that the Joint Applicants are incentivized to add trunk route capacity. The Joint Applicants cite prior Department orders that have concluded that, because of the high connectivity of traffic on trunk routes, carriers are incentivized to add service to accommodate passengers.[35] The Joint Applicants present their own analysis of Marketing Information Data Tape (MIDT) data,

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[27] Id. at 8.
[28] American's transatlantic joint business is a revenue-sharing joint venture between American, International Airlines Group (including British Airways and Iberia), and Finnair. Royal Jordanian is not a member of the joint business, but operates as a partner with antitrust immunity. *See* Order 2010-7-8. July 20, 2010.
[29] *See* Joint Applicants' Reply to Answer of Hawaiian Airlines, Inc., March 2, 2016. DOT-OST-2015-0129 at 5.
[30] Id. at10.
[31] Id. at 13.
[32] Id. at 13 and 15.
[33] Id. at 15-16.
[34] Id. at 16.
[35] Id. at 19.

purporting to show a majority of passengers on the largest U.S.-Australia trunk route, LAX-SYD, are on connecting itineraries.[36]

The Joint Applicants responded to some of the concerns that Hawaiian refers to as "vertical" effects from the proposed joint business, primarily Hawaiian's apprehension that Qantas would foreclose competition by withdrawing its interline agreement with Hawaiian. The Joint Applicants state that the Amended JBA preserves existing relationships with other carriers.[37] The Joint Applicants also argue that Hawaiian's claims of impacts are the direct result of increased competition from better products, noting that passengers connecting over Honolulu on Hawaiian face extensive layovers on itineraries between the U.S. mainland and Sydney.[38]

The Joint Applicants state that the relief requested by Hawaiian, should we grant ATI, is unprecedented. They argue that the Department has never required access to one carrier's network by another through code-sharing. They also note that a codeshare requirement would necessitate ongoing monitoring by the Department and policing of pricing and inventory access. The Joint Applicants take issue with Hawaiian's citation of the European Commission case relating to British Airways' acquisition of bmi. At the time, bmi provided short-haul feed and connectivity for several carriers that operated long-haul routes to and from Europe via London Heathrow (LHR), but did not itself provide long-haul services.[39] In contrast, Qantas offers not just a strong domestic Australian network, but also global trunk routes. The Joint Applicants argue that Qantas thus currently has the ability to offer both feeder services and long-haul flights on its own metal, regardless of the Amended JBA.[40]

The Joint Applicants argue that, as a matter of comity, the Department should not impose a codeshare remedy that applies only to operations outside the United States. The Joint Applicants also point to the Department's statutory obligation to take into account international and foreign policy concerns as required under 49 U.S.C. § 41309. They note that the Australian Competition and Consumer Commission rejected Hawaiian's request for a codeshare agreement in their approval of the joint business currently before the Department. The Joint Applicants view Hawaiian's suggestion for a three-year ATI approval as undermining the ability of the alliance to make needed long-term investments necessary to deliver consumer benefits. With respect to granting Hawaiian's access to restricted O&D data, the Joint Applicants argue that this would be a reversal of Department policy. The Joint Applicants reason that O&D data access should not be a precondition to ATI approval, but suggest that Hawaiian can petition for such access through the Department's rulemaking process.[41]

JetBlue replied on March 2, arguing that immunized alliances pose a threat to the ability of small airlines to compete in the global marketplace.[42] JetBlue suggests that the Department revise its ATI policy to reflect the current dynamics of the airline industry, in conjunction with the consolidation of the past decade, and requests that the Department use this proceeding as an

[36] Id. at 20 (Figure 1). MIDT data represents airline bookings through global distribution systems. It provides a robust but not complete data sample of passenger travel in a market.
[37] Id. at 21. *See also* Amended JBA § 3(c)(1).
[38] Id. at 23.
[39] Id. at 9.
[40] Id. at 6.
[41] Id. at 29.
[42] *See* Reply of JetBlue Airways Corporation, March 2, 2016. DOT-OST-2015-0129-0023 at 4.

opportunity to review whether ATI grants continue to foster metal neutrality and consumer benefits.

JetBlue argues that Hawaiian has submitted compelling evidence showing the competitive implications from unlimited grants of ATI. JetBlue concurs with Hawaiian's belief that the studies touting consumer benefits from ATI are out of date and that there is a dearth of contemporaneous material. JetBlue agrees with Hawaiian that eliminating exclusivity provisions in the Amended JBA would allow carriers like Hawaiian and JetBlue the opportunity to compete in international markets. JetBlue concludes with a request to the Department to carefully examine and address the competitive issues raised by Hawaiian.

The Joint Applicants requested leave to file and submitted a sur-reply to JetBlue on March 9.[43] The Joint Applicants argue that JetBlue's commercial relationships with international airlines provide all of the context, or "contemporaneous material," needed for the Department to validate the benefit of international alliances in providing consumer benefits. JetBlue's actions in the marketplace, the Joint Applicants conclude, should be regarded as evidence that alliances offer public benefits and that the pending application for ATI should be approved.

On March 11, JetBlue requested leave to file and responded to the Joint Applicants' March 9 submission.[44] JetBlue argues that the Joint Applicants have not properly addressed its objections. JetBlue draws a distinction between its codeshare agreements and the metal-neutral ATI partnerships that American has with the International Airlines Group carriers. JetBlue states that, "unlike American, [it] is not a member of any alliance, let alone an immunized alliance where carriers can jointly set prices, integrate operations and cooperate over entire markets."[45]

Hawaiian filed a motion for leave to file and a sur-reply to the Joint Applicants on March 29, 2016.[46] Hawaiian argues that a central question in this case is whether the public interest is best served by strengthening alliances or by promoting competition by facilitating market access for independent carriers. Hawaiian reasons that, in transpacific markets, the barriers to entry are high and the prospect of new entry is low. Hawaiian argues that granting ATI to the region's most dominant carrier without ensuring market access for independent carriers is inconsistent with the Department's requirements under 49 U.S.C. § 40101. Hawaiian states that each incremental grant of ATI raises the entry barrier even higher, and the carrier requests that the

[43] *See* Joint Applicants' Motion to File Sur-Reply and Sur-Reply to JetBlue Airways Corp, March 9, 2016. DOT-OST-2015-0129-0025 at 1. The Joint Applicants argue that there is good cause to accept their pleading because it offers the first opportunity for them to respond to JetBlue's arguments, which they view as improperly raised in a reply.

[44] *See* Motion for Leave to File and Response of JetBlue Airways Corporation, March 11, 2016. DOT-OST-2015-0129-0026, at 1. JetBlue argues that that its March 2, 2016 filing was submitted in accordance with Departmental procedure. They request leave to file a response to what JetBlue views as an unauthorized Sur-Reply by the Joint Applicants.

[45] Id. at 2. The Joint Applicants submitted subsequent correspondence on March 15, 2016. *See* DOT-OST-2015-0129-0027, March 15, 2016. The Department grants leave to file for this correspondence, though American did not request leave as per the Department's procedural rules.

[46] *See* Hawaiian's Motion to File Sur-Reply and Sur-Reply to American Airlines, Inc. and Qantas Airways Limited, March 29, 2016. DOT-OST-2015-0129-0029, at 1. Hawaiian requests leave to file reasoning that its response to the Joint Applicants should be accepted as it helps to provide a complete record necessary to consider this application.

Department take affirmative steps to promote market access for independent carriers, should ATI be granted. Hawaiian reasserts that the Joint Applicants have not met their burden of proving that the alleged public benefits will be realized, relying on outdated studies and prior grants of ATI as justification. Hawaiian believes that the academic research cited by the Joint Applicants was conducted at a point when the industry was less concentrated, limiting its value. Hawaiian further argues that the studies are not focused on the transpacific networks of the carriers; these markets are unique given their ultra-long stage length and limited number of gateways.[47]

Below, we are granting all motions for leave to file that have been submitted to the docket following the Department's Notice of February 1, 2016.[48] We find that materials filed in the docket by the parties provide perspectives and information necessary for the Department to decide this case on its merits.

III. DECISIONAL STANDARDS

We engage in a two-step analysis of foreign air transportation agreements submitted for our approval and a grant of antitrust immunity. Under 49 USC § 41309(b), the first step involves determining whether the agreements are "not adverse to" the public interest, based on competitive factors (the "**Competitive Analysis**"). There are two possible outcomes of the Competitive Analysis: if the Secretary finds that the agreements are "not adverse to the public interest," he shall approve them; if, on the other hand, the Secretary finds that the agreements substantially reduce or eliminate competition, he shall disapprove them unless they are necessary to meet a serious transportation need or to achieve important public benefits.[49] When the Secretary finds that the agreements would result in a substantial reduction of competition, but would also result in countervailing transportation needs or public benefits,[50] the Secretary shall approve the agreements anyway, provided that the needs cannot be met or benefits achieved by reasonably available and materially less anticompetitive alternatives.[51] A party opposing the agreements has the burden of proving that they substantially reduce or eliminate competition and that less anticompetitive alternatives are available. A party seeking approval of the agreement or request must establish the transportation need or public benefits.[52]

The second step of the analysis concerns a grant of antitrust immunity (an "exemption" from the antitrust laws) under 49 U.S.C. § 41308. Three outcomes are possible. If we have found that the agreements are not adverse to the public interest in the Competitive Analysis, the Secretary *may* decide, at his discretion, that it is "required by the public interest" to exempt the parties to the agreements from the antitrust laws, but only to the extent necessary to allow those parties to proceed with the transaction.[53] The Department normally conducts a detailed examination of public benefits in each case to determine whether a grant of antitrust immunity is required by the public interest. If, however, we have found that the agreements substantially reduce competition

[47] *See* Hawaiian's Motion to File Sur-Reply and Sur-Reply to American Airlines, Inc. and Qantas Airways Limited, March 29, 2016. DOT-OST-2015-0129-0029, at 6.
[48] *See* DOT-OST-2015-0129-0017, February 1, 2016.
[49] 49 U.S.C. § 41309(b)(1).
[50] 49 U.S.C. § 41309(b)(1)(A).
[51] 49 U.S.C. § 41309(b)(1)(B).
[52] 49 U.S.C. § 41309(c).
[53] 49 U.S.C. § 41308(b).

under section 41309, but we have approved them anyway due to countervailing needs and benefits, the statute provides no discretion: the Secretary "shall" exempt the parties to the agreements from the antitrust laws to the extent necessary to allow them to proceed with the transaction.[54] Finally, if the Secretary determines that neither circumstance applies – that is, the agreements are adverse to the public interest with insufficient countervailing benefits – no grant of immunity is possible under either subsection of section 41308.

As we have done in past cases, we will conduct the Competitive Analysis largely by applying the Clayton Act test to the proposed alliance.[55] The Clayton Act test requires us to consider whether a grant of antitrust immunity is likely to substantially reduce competition and facilitate the exercise of market power – that is, to allow the applicants to profitably charge supra-competitive prices or reduce service or quality below competitive levels in any relevant market. To determine whether an alliance is likely to create or enhance market power, we primarily consider whether the alliance would significantly increase market concentration, whether the alliance causes potential competitive harm, and whether new entry into the market would be timely, likely, and sufficient either to deter or to counteract any potential competitive harm. In the analysis below, we tentatively conclude that the proposed alliance will substantially reduce competition under section 41309(b). Therefore, we then proceed to apply section 41309(b)(1)(A) and (B) to evaluate transportation needs and public benefits.

IV. ANALYSIS UNDER Section 41309

A. COMPETITIVE ANALYSIS: WOULD THE PROPOSED ALLIANCE AGREEMENTS SUBSTANTIALLY REDUCE COMPETITION?

Section 41309 requires a determination as to whether the proposed alliance agreements are adverse to the public interest in that they would substantially reduce or eliminate competition and enable the carriers to exert market power in relevant markets. The Department has assessed the impacts on competition resulting from the Amended JBA by undertaking three levels of analysis of relevant competitive markets: (1) at a broad network level; (2) at a country-pair level; and (3) at a city-pair level.

American's return to the Australasian market and concurrent application for immunity requires the Department to assess the competitive implications of a new entrant with only limited historical market data.[56] The crux of the Joint Applicants' argument, repeated in several places,[57] is that in such circumstances, the JBA cannot reduce competition, because the two carriers' networks are "entirely complementary" and combining an existing carrier with one that previously did not operate in the market cannot lead to a competitive reduction. The Department tentatively disagrees with this premise. The Horizontal Merger Guidelines, the template used by the Department of Justice and the Federal Trade Commission to analyze mergers and

[54] 49 U.S.C. § 41308(c).

[55] *See* Acquisition of Northwest/Wings Holdings, Inc., Show Cause Order 92-11-27, at 13 (November 16, 1992); U.S. – Japan Alliance Case, Show Cause Order 2010-10-4, at 5 (October 6, 2010).

[56] American commenced its Sydney route in December of 2015.

[57] *See* Joint Applicants' Reply to Answer of Hawaiian Airlines, Inc., March 2, 2016. DOT-OST-2015-0129-0024, at 4 and 17. *See also* Joint Application for Approval and Antitrust Immunity for Proposed Alliance, June 9, 2015, DOT-OST-2015-0129-0001, at 6 and 26.

acquisitions, suggest that analysis of concentration between an incumbent and a potential or recent entrant should be conducted using projected market share.[58] The guidance also notes that:

> A merger between an incumbent and a potential entrant can raise significant competitive concerns. The lessening of competition resulting from such a merger is more likely to be substantial, the larger is the market share of the incumbent, the greater is the competitive significance of the potential entrant, and the greater is the competitive threat posed by this potential entrant relative to others.[59]

The Department's review has taken into account projected market share by examining forward-looking schedule data, as well as carrier-submitted projections. Our review has also looked at historical data prior to American's entry, to fully assess competitive implications.

The Department's competitive analysis has identified high levels of market concentration at each level of analysis, with Qantas generally the leading carrier. Qantas has the largest market share in 70 percent of all city-pair markets between the mainland United States and Australia. It is larger than all other carriers combined in over half of these markets, and Qantas has the largest share of traffic on the Joint Applicants' overlap route between Los Angeles and Sydney. These factors result in Qantas alone controlling almost 50 percent of the market to Australia, with levels of concentration likely to increase under the proposed joint venture. Together, the Joint Applicants would control up to 60 percent of nonstop capacity between the United States and Australia, a significant amount according to competition policy principles, but an exceptional amount for an area of the globe where the scarcity of practical connecting itineraries necessitates nonstop travel.[60] The lack of potential competition to combat any anticompetitive effects of concentration is further exacerbated because, based on information in the record, American is likely to be the last carrier to offer new entry and add meaningful competition in a timely manner.

1. NETWORK LEVEL

To identify the appropriate network-level markets from the United States, we have examined the geographic scope of the Joint Applicants' agreements, the competitive structure of the market, the unique operational challenges in serving the market, and the implications of these factors on traffic flows and competition. The proposed alliance has a core focus of linking the United States with Australia and New Zealand, and only a small number of passengers use Australasia as a link beyond to other countries or regions. With respect to these points, the U.S.-Australasia market is identified as the relevant market for analysis at the network level.

The unusual character of the U.S.-Australasia market underlies our network analysis. The market is characterized by long routes, with limited intermediate connections, and is typically

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[58] Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, August 19, 2010 at 18, *available at* https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf.

[59] Id.

[60] With just under 5% of passengers using New Zealand to connect the United States to/from Australia and just above 5% using other nations, almost 90% of passengers fly on a nonstop segment between the United States and Australia. DOT analysis of MIDT and T-100 data for year ending third quarter 2015.

served by hub-and-spoke networks on the U.S. end with large gateways and few spokes on the Australasia end. Passenger share levels, as indicated in the table below, reveal the market to be highly concentrated prior to the recent commencement of American's own-metal services to SYD and AKL. Qantas controls much of the market with its 41 percent share, a number likely to increase under the Joint Applicants' proposed joint venture. The other three carriers/alliances with significant share of passengers are those that offer nonstop services in the market: United/Air New Zealand, Delta/Virgin Australia, and Hawaiian.

Table 1: United States to/from Australasia Passengers and Nonstop Seat Share

Airline	YE2015 Q3 O&D Passengers *Source: MIDT & T-100*	
	Passengers	Share
Qantas	1,402,000	41%
American[61]		--
United / Air New Zealand	994,000	29%
Delta / Virgin Australia	550,000	16%
Hawaiian	299,000	9%
Other	91,000	3%
Cathay Pacific	48,000	1%
Fiji Airways	44,000	1%
Total	3,428,000	

Source: DOT Analysis of MIDT, T100.

Of particular note is the lack of competition from carriers that provide services solely on a connecting basis over an intermediate third country. Cathay Pacific, using its hub in Hong Kong to connect the United States to Australasia, has the largest share of all such carriers, yet only accounts for one percent of overall demand. Combined, all third-country carriers carry only five percent of passengers in the market – meaning very limited competition via intermediate points between the United States and Australasia.

American, prior to its decision to return to Australia, was the last remaining large network carrier at either end of the market without its own nonstop services in the market. Its request for a grant of immunity in support of the joint venture with Qantas is likely to increase the already pronounced market concentration. It would also serve to effectively eliminate a new competitor – perhaps the only airline positioned to enter in a timely fashion – by combining it with an incumbent that has the largest market share in an already concentrated market.

In past cases, the Department identified positive competitive effects at the network level resulting from increased linkages beyond gateways to other countries and regions,[62] which allows for a greater number of destinations served, larger scope for reduction of double marginalization, and the potential for increases in capacity as a result. The Joint Applicants argue that the proposed alliance will increase capacity and traffic on routes between the United States and Australasia.[63] They reason that traffic will grow quickly and significantly in response

[61] American entered the market in the fourth quarter of 2015.

[62] *See, e.g.*, Order 2010-10-4 (October 6, 2010) at 6.

[63] *See* Joint Applicants' Reply to Answer of Hawaiian Airlines, Inc., March 2, 2016. DOT-OST-2015-0129-0024, at 17.

to this JBA, as the carriers optimize schedules over what they describe as complementary networks, improving customer services and lowering fares through the elimination of double marginalization. Unlike transatlantic ATI cases – which generally include services to regions beyond Europe like Africa, the Middle East, and southern Asia, or transpacific ATI cases – which include services to east and southeast Asian destinations beyond the primary gateways – the scope of this case is, as a practical matter, uniquely limited to Australia and New Zealand. Australasia, due to its geography, is a terminal market from North America and, therefore, competitive effects are largely restricted to domestic markets within the region, which are also fewer compared to other regions. While some passengers may flow beyond gateways in the two nations to points in Asia or other island destinations in the South Pacific (such as New Caledonia or Vanuatu), the number of such passengers is very small. As such, the potential to achieve offsetting positive network competitive effects, particularly for U.S. point-of-sale travelers, is likely to be very minor.

The proposed JBA would likely increase concentration in the U.S.-Australasia market. There is low likelihood of new entry, while competition by third-country carriers, as well as by carriers with intervening hubs between the U.S. mainland and Australasia offers little opportunity for competitive discipline to the proposed alliance. The primary carrier with an intervening hub is Hawaiian, and its Honolulu ("**HNL**") hub is largely structured to serve U.S. mainland – Hawaii traffic, rather than traffic between the mainland and Australasia.

2. COUNTRY-PAIR LEVEL

The proposed alliance's largest impact would be on passengers and cargo traveling between the United States and Australia, where the alliance joins the largest carrier in Australia with the largest in the United States. Our analysis finds that the country-level market has a relatively low number of total O&D city-pair markets between the two nations, relatively high concentration of demand centered around the largest city pairs, and is characterized by high levels of carrier market concentration.

Australia's population is concentrated around several large coastal cities, with the three largest metropolitan areas of Sydney, Melbourne, and Brisbane – which also serve as the three gateways to the United States for Qantas – accounting for roughly half the country's population. Combined, these cities generate over 85 percent of O&D demand to and from the United States. Analysis of MIDT records submitted by the Joint Applicants, along with the Department's T-100 data, identified 276 city-pair markets between the two nations that have greater than one passenger per day on average, a relatively low number of markets. This number is considerably lower than in other significant country-pairs like: U.S. – France, U.S. – Germany, U.S. – Japan, and U.S. – United Kingdom. The top ten origin-and-destination city pairs make up 55 percent of the total market. Passenger demand between the two countries is skewed towards origination in Australia, with over two-thirds of passengers starting their trips from the south. Our analysis suggests that Qantas is currently able to offer direct online services to 61 percent of the U.S.-Australia market on its own metal.[64] American is able to serve almost 45 percent of that market with its Sydney flight alone, without reliance on a partner.

[64] DOT analysis of MIDT and T-100 data for year ending third quarter 2015.

As shown in Table 2, the U.S.-Australia market consists of about 2.7 million O&D passengers annually, based on year ending third quarter 2015 data. Qantas, including its Jetstar subsidiary, has a 49 percent share of passengers in the market. The Delta/Virgin Australia alliance accounts for 19 percent of passengers, the United/Air New Zealand alliance accounts for 18 percent of passengers, and Hawaiian accounts for 9 percent of passengers.[65] All other third-country carriers account for the remaining 6 percent. Table 2 also presents a comparison of seats offered on a nonstop basis in the market to illustrate the competitive landscape prior to and following American's entry into Sydney in the fourth quarter of 2015. Nonstop seat share for American and Qantas between the United States and Australia was 56 percent in July 2015. Following American's new services to SYD, the Joint Applicants' combined seat share increased to 59 percent. This leaves Delta/Virgin Australia with 18 percent of seats, United/Air New Zealand with 15 percent of seats, and Hawaiian with 8 percent of seats. Total nonstop seats between the United States and Australia increased by 12 percent, as the Joint Applicants added capacity and other competitors' services were largely unchanged.

Table 2: United States to/from Australia Passengers and Nonstop Seat Share

Airline	YE2015 Q3 O&D Passengers *Source: MIDT & T-100*		July 2015 Nonstop Service (Before New Joint Applicants Operations) *Source: OAG Schedule*		July 2016 Nonstop Service (After New Joint Applicants Operations) *Source: OAG Schedule*	
	Passengers	Share	Seats	Share	Seats	Share
American	--	--	--	--	19,300	6%
Qantas	1,351,000	49%	180,900	56%	183,700	53%
Delta / Virgin Australia	506,000	19%	61,400	19%	61,400	18%
United / Air New Zealand	486,000	18%	52,100	16%	50,200	15%
Hawaiian	236,000	9%	28,500	9%	28,800	8%
Other	52,000	2%	--		--	
Cathay Pacific	48,000	2%	--		--	
Emirates	27,000	1%	--		--	
Fiji Airways	26,000	1%	--		--	
Total	2,732,000		322,900		343,400	

Source: DOT Analysis of MIDT, T100 and Airline Scheduling Data. (Some airlines that serve the U.S.-Australia market provide only connecting services.)

Carrier share analysis indicates that the United States – Australia market is highly concentrated, with Qantas having roughly the same market share as all other market participants combined. Should the Department grant American and Qantas ATI, it would likely increase the market position of the leading carrier. Rather than promoting competition, such a scenario is likely to exacerbate market concentration by combining the largest carrier with the last remaining carrier with the fleet assets and network breadth to enter the market in a timely manner, and would mean that Australia is likely to remain one of the most concentrated of the large U.S. international markets.

[65] *See* Order 2001-4-2 (April 3, 2001); *see also* Order 2011-6-9 (June 10, 2011).

The Department undertook analysis of market fares to shed further light on the level of competition and whether, despite the high levels of market concentration, healthy competition would exist. We tentatively found that the United States to Australia market is about 16 percent more expensive than other international markets of similar distance and market density, with U.S. point-of-sale passengers paying slightly more than those originating from the other direction.[66] When comparing fares between carriers on segments between the mainland United States and Australia, as seen in the table below, Qantas appears to command a revenue premium over its competitors. While some of the revenue premium could be attributed to factors such as cabin layout, service quality, and slightly longer stage lengths, the scale of the premium strongly suggests that Qantas is able to charge higher fares by virtue of its commanding position in the market.

Table 3: Yield Premiums for Mainland United States to Australia Segments YE2015 Q3

Operating Carrier	Carrier Code	Segment Avg Total Fare ($)	Yield (cents/mile)	Avg Stage Length (mi)	Qantas Premium
Qantas	QF	$1,271	16.3	7,792	--
United	UA	$1,087	14.2	7,640	*15%*
Virgin Australia	VA	$824	11.2	7,373	*46%*
Delta	DL	$862	11.4	7,529	*43%*

Source: Sabre Market Intelligence. Itinerary fares prorated to the international gateway segment between the mainland United States and Australia and converted to yield for year ending third quarter 2015.

Given the degree of market concentration, the probability of such concentration further increasing with an integrated transoceanic JBA, Qantas' position in the market, and its ability to charge a significant premium over other carriers, there is considerable risk of competitive harm. With intermediate networks essentially inconsequential and the likelihood of new entry slim, the ability of market forces to mitigate competitive risks is minimized. Furthermore, as noted earlier, the concentration of demand at Australasian gateways means that any competitive benefits we might expect from a grant of ATI are likely limited as well.

The United States – New Zealand market is the other relevant market identified at the country-pair level. Qantas served the LAX-AKL market for over two decades, until terminating the route in 2012. American's entry this year has reestablished Oneworld's presence on the route and has significantly promoted competition, with a quantifiable reduction in market concentration given the historical position of United and Air New Zealand. The Joint Applicants argue that American's nonstop services to New Zealand are only sustainable with the Amended JBA, and not with the existing cooperation arrangement.[67] The Department acknowledges the competitive benefits offered by American's entry into the U.S.–New Zealand market, in which United and Air New Zealand have the largest market share by far. We note that American's stated goals of increasing its international business, its growth in the key gateway of LAX, and its addition of new 787 aircraft that are ideally suited for long, thin routes support the continuation of these services to New Zealand, even absent a grant of ATI.

[66] U.S. DOT Origin-Destination Survey Data.

[67] *See* Joint Applicants' Response to Order Requesting Additional Information, December 18, 2015. DOT-OST-2015-0129-0012, at 10 and 23.

At present, the Department's tentative analysis indicates that the potential competitive benefits in the New Zealand market do not outweigh the significant competitive risks identified in the Australia market. Of the 3.4 million passengers that traveled between the United States and Australasia, 80 percent were to or from Australia, making that market four times the size of U.S. – New Zealand. Australia is thus a far larger market, poses obstacles to competition because of its geography and existing carrier partnerships, and has little prospect for competitive entry. Prospects of market entry, even if weak, are likely greater in New Zealand, as several carriers, including Virgin Australia, Delta and Qantas, have the finances, aircraft, and networks to support such services.

3. CITY-PAIR LEVEL

Overlapping city pairs are consistently a focus in our competitive analysis because of their potential for competitive harm, as a grant of immunity effectively removes a competitor on specific routes. American and Qantas offer overlapping nonstop service on a single city-pair: LAX-SYD. This overlap did not occur until December 2015, when American began LAX-SYD services coincident with Qantas restarting services between SFO and SYD.[68] With Qantas moving one of its twice daily Sydney operations from LAX to San Francisco ("**SFO**"), the Joint Applicants reduced their combined capacity by about nine percent on the overlapping route. A grant of ATI would effectively bring the largest O&D market between the United States and Australasia from four competitors to three, and considerably increase the share of the leading competitor.[69] The LAX-SYD market is significantly concentrated, as seen in Table 4 below, although not as significantly as at the broader country level.

Table 4: Competitor Services on LAX to SYD

Airline	YE2015 Q3 O&D Passengers *Source: MIDT & T-100*	
	Passengers	Share
Qantas	146,000	42%
American[70]	--	--
Delta / Virgin Australia	116,000	33%
United / Air New Zealand	61,000	18%
Fiji Airways	12,000	4%
Hawaiian	6,000	2%
Other[71]	3,500	1%
Total	344,500	

Source: DOT Analysis of MIDT and, T100 Data.

With regard to all city-pair markets, Hawaiian, in its Answer, states that of the top 30 U.S.-Australia markets, 28 are highly concentrated, based on their Herfindahl-Hirschman Index.[72]

[68] Qantas had previously operated SFO-SYD but ceased flights in May 2011.

[69] A competitor, for the purposes of the city-pair level analysis, is defined as a carrier or immunized alliance that has a market share of at least five percent. Carriers under this threshold are seen as not having a significant enough presence to affect pricing in the market.

[70] American entered the market in the period following year ending third quarter 2015.

[71] "Other" includes airlines offering connecting services.

The Department's analysis identified 276 markets between the mainland United States and Australia that average more than one passenger per day.[73] In 194 of these markets, or about 70 percent, Qantas is the largest carrier. In just over 50 percent of all markets, Qantas has a market share greater than all other carriers combined. These data are consistent with the concentration observed at the U.S.-Australia country-pair level. Similarly, the degree and breadth of the concentration in those city-pairs would likely increase with the proposed partnership.

The Department tentatively finds that the Joint Applicants' proposal is not likely to promote competition at the city-pair level and may in fact reduce it. While the level of concentration in such a large number of relevant markets where Qantas has achieved an unrivaled position is of significant concern, it was not the only issue examined by the Department. Our competitive assessment, combined with unique attributes specific to this market – such as limited prospects for market entry, geographic scope of the case, disproportionate focus of demand at gateway airports in Australasia, and the relatively limited number of beyond gateway markets – suggest that competitive discipline of the JBA would be constrained and that there would be reduced incentives for the Joint Applicants to increase trunk route capacity.[74]

4. POTENTIAL EXCLUSIONARY EFFECTS

Immunized alliances enable two commercially independent airlines to join forces in international markets, strengthening the incentive for them to work more intensively together, often with the effect of limiting access to their networks by competitors or independent airlines. We note, for example, that Hawaiian expressed concern about its continued ability to access Australian destinations if the proposed alliance were to be approved, and the carrier submitted a significant amount of evidence in the record to support its concern.[75] The Joint Applicants responded to Hawaiian's concern by noting that the Amended JBA allows the carriers to retain the existing interline agreement between Qantas and Hawaiian and that Hawaiian already has a codeshare partnership with Virgin Australia.[76]

The particular competitive effects of exclusionary behavior, and their significance to consumers, depend upon the facts and circumstances in the affected markets. Despite the relatively limited number of beyond gateway markets in Australasia, and given the long and thin nature of U.S.-Australia markets, even a small reduction in feed by the Joint Applicants could potentially have a damaging impact on unaligned carriers – for which access to interline feed could be important to their transoceanic flights now and in the future.

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[72] *See* Answer of Hawaiian Airlines, Inc., February 22, 2016. DOT-OST-2015-0129, Exhibit HA-204.

[73] Based on DOT analysis of MIDT and T-100 annual data for the year ending third quarter 2015.

[74] Trunk routes are those where a partner hub is located on both ends of a flight segment. Trunk routes identified in this case are: Los Angeles – Brisbane, Los Angeles – Melbourne, Los Angeles – Sydney, and Dallas – Sydney.

[75] *See* Answer of Hawaiian Airlines, Inc., February 22, 2016. DOT-OST-2015-0129 at 33-36 and at 39-42. Hawaiian Airlines, for example, pointed to a dramatic drop in interline revenue from Virgin Australia subsequent its entry into an ATI-immune alliance with Delta.

[76] *See* Joint Applicants' Reply to Answer of Hawaiian Airlines, Inc., March 2, 2016. DOT-OST-2015-0129 at 21-22 and at Footnote 23.

Currently, only three carriers in Australasia, along with their affiliates, are able to provide substantial domestic onward feed: Qantas, Virgin Australia, and Air New Zealand. Upon consummation of the proposed joint venture, all three of these carriers would be participating in committed, potentially exclusive immunized alliances, possibly foreclosing unaligned carriers from participating in the market on an interline or codeshare basis and making it difficult to reach any beyond-gateway destinations in the region without flying on an immunized carrier or by means of highly circuitous routings via Asia.[77] The lack of unaligned local carriers, and of plausible new entrants or third-country carriers, in this market, coupled with the terms of the proposed alliance agreements that may permit exclusivity,[78] reduces the incentive for American and Qantas to interline or codeshare with other carriers subsequent to receiving a grant of ATI. This is true for carriers seeking to flow passengers into interior Australia, as well as for other U.S. carriers seeking interline or codeshare services to Australasia.

While the Department's tentative findings do not rely on an examination of independent carrier access to the Joint Applicants' networks, the potential concern that the alliance could unreasonably exclude competitors is consistent with our analysis and conclusions under sections 41309 and 41308.

5. TENTATIVE FINDINGS FROM THE COMPETITIVE ANALYSIS

We tentatively find that the proposed alliance is adverse to the public interest under section 41309. For the reasons stated above, we tentatively find that the proposed alliance would substantially reduce or eliminate competition at the network, country-pair, and city-pair levels. Additionally, as structured, it could create an opportunity for the Joint Applicants to unreasonably exclude present and future competitors from the market. Because we have made these tentative findings, we will proceed under the statutory standards to consider whether the proposed alliance should nevertheless be approved because it meets a serious transportation need or achieves important public benefits.

B. PUBLIC BENEFITS: WOULD THE PROPOSED ALLIANCE MEET NEEDS OR ACHIEVE BENEFITS THAT COULD NOT BE MET OR ACHIEVED BY MATERIALLY LESS ANTICOMPETITIVE MEANS?

Despite opposition pleadings by Hawaiian, the Joint Applicants do not concede that the proposed alliance could substantially reduce competition or be adverse to the public interest. Accordingly, the Joint Applicants do not attempt directly to meet the statutory burden of proving that the proposed alliance would nevertheless meet a serious transportation need.[79] They do

[77] Example of such a market is Canberra, Australia's national capital which – with the exception of a four times a week flight via Singapore involving multiple stops and highly circuitous routing from the United States – cannot be reached except via the immunized alliance of Delta/Virgin Australia or via Qantas. The Department notes that, while a handful of independent regional and commuter carriers operate in Australia, these nontraditional carriers do not appear to offer substantial feed at gateway airports nor operate with enough scale to be considered independent alternatives

[78] *See* [Confidential] Alliance Agreement, Section 3. *See also* Order 2015-11-1, November 2, 2015 at 6; *see also* Joint Applicants' Response to Order Requesting Additional Information, December 18, 2015. DOT-OST-2015-0129-0012, at 40.

[79] *See* 49 U.S.C. § 41309(c)(2).

argue generally that the proposed alliance would be valuable for the traveling and shipping public.[80] They also argue that the proposed alliance would generate sufficient public benefits to justify a discretionary grant of immunity under section 41308(b). We will view the Joint Applicants' arguments and supporting evidence in the light most favorable to them with regard to transportation needs and public benefits. In other words, we will consider that the Joint Applicants have pointed to all available evidence from the record as showing that the proposed alliance is necessary to meet a serious transportation need or achieve important public benefits. Further, we will construe the applicants' position that they will not proceed with the proposed alliance absent ATI as arguing that the transportation needs cannot be met or the public benefits cannot be achieved by reasonably available alternatives that are materially less anticompetitive.[81]

1. TRANSPORTATION NEEDS AND PUBLIC BENEFITS

Our examination of transportation needs and public benefits begins with the current market configuration and context. American and Qantas are founding members of the Oneworld global marketing alliance, and have a bilateral partnership that extends back decades. Since 2011, the two carriers have been engaged in a comprehensive joint business agreement that includes codesharing, inventory coordination on non-overlapping routes, joint marketing and sales, and network alignment. The Department approved this arrangement without a grant of antitrust immunity. The Joint Applicants identify transportation needs and benefits accruing from the 2011 agreement in the areas of greater network connectivity, a wider range of business and leisure fare products, and increased seat availability – and they deem the arrangement a financial success.[82]

The focus of our analysis in this case is on the Joint Applicants' plans to expand their existing cooperation to form an integrated, revenue-sharing joint business that covers all U.S. – Australasia routes, including newly overlapping long-haul transoceanic services now that American is a participant in the market. The public benefits of this expansion will be necessarily defined and limited by the competitive structure of the affected markets after the transaction is consummated. As discussed above, the new benefits we would expect to obtain, and the additional transportation needs that would be met, from the expanded American/Qantas arrangement are limited in this case because the proposed joint business expansion would substantially reduce competition. Rather than combining two complementary networks, creating entirely new options for consumers, and creating more viable offerings to compete with other networks, the proposed alliance would increase concentration on the overlapping routes and in most city-pair markets. Under these circumstances, the benefits noted by the Joint Applicants – new services, more choices for passengers, enhanced inter-alliance competition, improved fare options, improved frequent flyer benefits, and enhanced customer experience[83] – are likely to be limited, delayed, or ultimately not realized at all, due to a lack of adequate competition to discipline the alliance.

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[80] *See* Joint Application, June 9, 2015. DOT-OST-2015-0129-0001, at 1.

[81] *See* 49 U.S.C. § 41309(b)(1)(B).

[82] *See* Joint Application of American Airlines, Inc. and Qantas Airways Limited for Approval of and Antitrust Immunity for Proposed Alliance," June 9, 2015. DOT-OST-2015-0129-0001 at 1.

[83] Id. at 20 – 22.

The Joint Applicants rely heavily on plans to generate new capacity in the form of new services, new routes, and increased frequencies.[84] Given existing and future likely concentration levels in the U.S.-Australasia market, the Department has analyzed the proposed alliance's potential capacity effects to determine if the Joint Applicants' plans are likely to come to fruition. The record contains ample information on this point because the Department asked specific questions and sought documentation in its Request for Additional Information issued before the start of the comment period.[85] In response to these requests, the Joint Applicants provided a five-year capacity plan outlining aggregate service levels that they plan to operate.[86] The Joint Applicants noted that they intend the projected capacity levels to match the growth in demand over time.[87] Our analysis indicates that the growth rate evident from the projected capacity levels is comparable to the historical capacity growth rate in the U.S.–Australia market.[88] Thus, the Joint Applicants do not make a convincing case that the proposed alliance will provide benefits that would not otherwise obtain. Furthermore, we note that the Joint Applicants' network plan details an initial reduction in trunk route capacity,[89] giving way over a number of years to increases on such routes.[90] Although a slowly maturing capacity plan could be attributed to fleet changes as Qantas retires older 747-400s and replaces them with more efficient 787-9s,[91] the Joint Applicants' plans to initially constrict trunk capacity suggest that the Department should closely scrutinize the capacity forecast and that a stronger showing would be necessary to justify a finding that important public benefits will be generated.

The Joint Applicants also plan to commence new routes, which is indeed a public benefit. The Joint Applicants argue that they have already begun the process in anticipation of receiving approval and a grant of ATI, and that the new services would not be sustainable without approval and grant of ATI.[92] Yet the Department's review of the record and of publicly available information does not support that the viability of all such new routes depends on approval and a grant of immunity. Rather, the evidence and public information suggest that some of the proposed network expansions under this amended JBA reflect natural growth as the two carriers

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[84] *See* Joint Applicants' Response to Order Requesting Additional Information, December 18, 2015. DOT-OST-2015-0129-0012, at Table 3.C. *See also* Joint Application of American Airlines, Inc. and Qantas Airways Limited for Approval of and Antitrust Immunity for Proposed Alliance," June 9, 2015. DOT-OST-2015-0129-0001 at 20.

[85] *See* Joint Applicants' Response to Order Requesting Additional Information, December 18, 2015. DOT-OST-2015-0129-0012, at Table 3.A and Table 3.C.

[86] Id.

[87] Id. at 26, Footnote 24.

[88] Based on DOT analysis of the five-year traffic history from January 2011 through December 2015 between the United States and Australia using T-100 Segment data.

[89] With American's entry into the LAX-SYD market with a Boeing 777-300ER, Qantas shifted its second daily flight on the larger Boeing 747-400 aircraft to San Francisco-Sydney. Combined with reductions on Los Angeles-Melbourne and increases in Dallas-Sydney, the net result is estimated to be a 9 percent reduction in seats on trunk routes. *See* http://www.qantasnewsroom.com.au/media-releases/growth-on-asia-and-network-changes/, retrieved September 28, 2016.

[90] *See* Joint Applicants' Response to Order Requesting Additional Information, December 18, 2015. DOT-OST-2015-0129-0012, at Table 3.A.

[91] *See* https://web.archive.org/web/20160408073238/http:/www.qantas.com/travel/airlines/aircraft-boeing-787/global/en.

[92] *See* [Confidential] Joint Applicants' Response to Order Requesting Additional Information, December 18, 2015. DOT-OST-2015-0129-0012 at 22.

look to expand their large international networks using more efficient airplanes. Indicators of such growth include: American's expansion of its international network, particularly over the Pacific;[93] its growing market share at the key Australasia gateway of LAX; and Sydney's status as a significant Oneworld partner hub and one of the larger unserved markets for American using its own metal from LAX. Based on this information, we tentatively are not convinced that the proposed alliance would generate important new public benefits or meet transportation needs that are not already being met to a large extent.

The Joint Applicants' plans to align schedules[94] to improve connectivity do not provide compelling public benefits. Flights between the continental United States and Australasia have a narrow window in which to operate in order to be commercially viable. Departures from the United States occur in the late evening hours (generally after 10:00 p.m.) with an early morning arrival in Australasia. Departures from Australasia allow for slightly more flexibility, but generally depart in the morning and arrive at the U.S. west coast during the morning hours, to allow connections to the rest of North America. The rigid time slots and long stage lengths do not allow for carriers to offer multiple frequencies on smaller aircraft at various times throughout the day, but rather push them towards larger planes with limited frequencies. Of the five airlines operating daily service between LAX and SYD, all five daily departures occur between 10:30 p.m. and 10:55 p.m. – and some flights are subject to alliance cooperation that would provide the necessary incentives to space the departures out if that were beneficial. This small window means ATI-enabled efficiencies achieved through schedule coordination are limited. We tentatively conclude that resulting public benefits derived from spacing out overlapping "wingtip-to-wingtip" services by distributing flights throughout the day, offering multiple connection banks with greater scheduling options, and minimizing travel times by coordinating connections, are accordingly limited.

Similarly, the Joint Applicants' plans to deliver lower-fare options to consumers through, among other things, the reduction of double marginalization, carry limited weight.[95] Based on the particular facts and circumstances of this case, notably the concentrated nature of the markets and their unique geography, the Department anticipates that there is less potential for generating price efficiencies by reducing multiple markups. Traditionally, the Department has viewed the possibility of an increase in trunk route capacity as a benefit that could offset concerns arising from a reduction in competition on overlap routes. Here, as noted above, there is limited ability to increase trunk route capacity, thereby minimizing the potential benefits of reducing double marginalization.

2. LESS ANTICOMPETITIVE ALTERNATIVES

American and Qantas are long-standing commercial partners that have engaged in codesharing and other forms of cooperation for many years. In 2011, the Department reviewed

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[93] *See* http://centreforaviation.com/analysis/american-airlines-triple-play-in-greater-china-is-part-of-long-haul-rejuvenation-with-more-to-come-172304.

[94] *See* Joint Applicants' Response to Order Requesting Additional Information, December 18, 2015. DOT-OST-2015-0129-0012, at 18-19.

[95] *See* Joint Application of American Airlines, Inc. and Qantas Airways Limited for Approval of and Antitrust Immunity for Proposed Alliance," June 9, 2015. DOT-OST-2015-0129-0001 at Footnote 43.

the Joint Applicants' plans to form an un-immunized joint business. We concluded then that the arrangement was pro-competitive and would likely enhance consumer benefits.[96]

If we finalize our tentative decision here, the Joint Applicants will have to decide whether to engage in traditional arms-length forms of cooperation, such as codesharing. We tentatively find that the public benefits obtainable from such traditional cooperation would be reasonably available and materially less anti-competitive alternatives. The existing marketing partnership between the Joint Applicants is providing American with feed and support for US-Australasian service today and could potentially continue to do so in the future without approval and a grant of ATI.

3. TENTATIVE FINDINGS FROM BENEFITS/NEEDS ANALYSIS

We tentatively find that the proposed alliance is not necessary to meet a serious transportation need or to achieve important public benefits. Further, even if we were to determine that the transportation needs and public benefits identified by the Joint Applicants are significant, we tentatively find that those needs and benefits could be met and achieved through reasonably available alternatives that are materially less anticompetitive.

V. TENTATIVE DECISION

Based on the analyses above, we are tentatively concluding that the Amended and Restated Joint Business Agreement, and the associated agreements that were submitted as a package by the Joint Applicants, should be disapproved under section 41309(b). We are therefore unable to find that any immunity must, or even may, be granted under section 41308.

ACCORDINGLY:

1. We grant all motions for leave to file submitted to date;

2. We direct all interested persons to show cause why we should not issue an order making final our tentative findings and conclusions discussed herein. Objections or comments to our tentative findings and conclusions shall be due no later than 14 calendar days from the service date of this Order, and answers to objections shall be due no later than 7 business days thereafter. In the event that no objections are filed, all further procedural steps shall be deemed waived, and we may enter an order making final our tentative findings and conclusions;

3. We tentatively disapprove the Amended and Restated Joint Business Agreement and the associated agreements submitted as a package and identified in Footnote 3 of the Joint Application; and

4. We will serve this Order on all parties on the service list in this docket.

[96] *See* Order 2011-11-12 (Nov. 9, 2011).

By:

JENNY T. ROSENBERG
Acting Assistant Secretary
for Aviation and International Affairs

(SEAL)

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