

Expanding International Air Service Opportunities to More U.S. Cities

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PREFACE

The international community is changing in profound ways. Within the last several years, we have seen the Berlin Wall crumble and the end of the Cold War. As our international neighbors try to join the crusade for democracy and human rights, they are faced with great challenges. The world is connected by a web of economic, sociologic, political, and other critical strands that impact our relationships with one another.

As the international community remolds in new dimensions, the U.S. economy, too, is reshaped. America evolved as an industrial state and today is feeling the results of the high-tech revolution. The internal wheels of our nation, U.S. cities, must be able to respond to this rapidly changing economic environment.

Long before Columbus first set sail to the Americas, transportation was the link of trade amongst nations. Nations adjacent to waterways enjoyed greater access to trade. Today, aviation connects the world more quickly and with less limitations than those imposed by the sea. It is no wonder then, that economically thriving nations are linked to other economic centers by air transportation.

In order for the U.S. to capitalize on the full potential of the world economy, our civic leader, U.S. cities, must be allowed to secure better access to the international marketplace. In 1989, a program known as the Cities Program was created to open channels for economic success through community partnerships. For the first time in the history of international aviation, U.S. cities have indirect access to negotiate, or to secure, international air service for their citizens. The program provides a tool for economic development. The jury is out, but thus far the effects seem positive.

This paper evaluates the Cities Program in an effort to weigh the U.S. benefits. However, please keep an open eye as you read this paper; how will these newly formed alliances assist in the process of world unification — linking U.S. communities to new world trade centers?

I. INTRODUCTION

Early in 1989, both civic and business leaders joined hands to obtain improved international air service to their respective communities. This leadership coalition formed a nonprofit "caucus" organization known as U.S. Airports for Better International Air Service (USA-BIAS). USA-BIAS, together with state and local officials, sought support from the U.S. Department of Transportation (DOT) to achieve its objectives. The premise for its request was based on economic development grounds. USA-BIAS sought new international air service in an attempt to expand tourism, business, foreign investment, and jobs, among other economic benefits, to its respective communities. It acknowledged the importance of maintaining a healthy U.S. airline industry, but believed there must be a device that would allow communities to seek international air service regardless of the flag which the carrier providing it flew.

The DOT found USA-BIAS's proposition worthy of consideration. They elected to formulate a program with "certain well-defined condition[s]"¹ which would enable a foreign carrier to provide additional U.S. service, even though a bilateral right supporting such authority is not granted. Today, after much public debate, this initiative culminated into a program known as the Cities Program.

This paper includes: (1) The background from which international routes are awarded; (2) the organization of USA-BIAS; (3) the development and evolution of the Cities Program; and (4) an applicant and city award analysis. Following this review, the author provides his own conclusions and recommendations.

II. BACKGROUND — BILATERAL REVIEW

The use of the air has in common with the use of the sea; it is a highway given by nature to all men. It differs in this from the sea that it is subject to the sovereignty of the nations over which it moves. Nations ought therefore to arrange among themselves for its use in that manner which will be of the greatest benefit to all humanity, wherever situated.

—ADOLF A. BERLE, Chairman of U.S. Delegation to the Civil Aviation Conference, Chicago, 1944²

1. Expanding International Air Service Opportunities, DOT Order 89-10-19 (1989)[hereinafter *Proposed Cities Program*].

2. Proceedings of the International Civil Aviation Conference, Chicago 1944, Vol. 1, U.S. Dept. of State, p.55.

Nearly fifty years ago the international community convened in Chicago and recognized the need for an open link between nations in the interest of world unification. Fifty-two nations attended the conference with "virtually all of the civil aviation powers of the postwar era represented."³ Their goal was to reach a multilateral regime that would enable air transportation to flow freely amongst nations. Political and economic differences, however, lead to a slow evolving process.⁴ This was not unforeseen by the world aviation leaders of this time. Today most countries exchange aviation-related rights by agreement in a bilateral exchange process. One commentator noted that "[m]ass response, even to the best of new ideas, comes slowly."⁵ The traditional method for negotiating bilateral agreements is between two governments. The U.S. government is often influenced solely by U.S. airlines. The Cities Program culminated a half of century after the Chicago Convention, but reflects Adolf Berle's idealism that aviation should be used to benefit all humanity. The program breaks the boundaries of traditional bilateral negotiations by granting route authority to foreign airlines through an exemption process. It brings together the collective input from both foreign and domestic airlines, U.S. communities, and the federal government.

III. U.S. AIRPORTS FOR BETTER INTERNATIONAL AIR SERVICE ORGANIZATION

“. . . air service supports economic development, and as such, is critical to each member's continued economic prosperity.”

—FOUNDING PREMISE OF USA-BIAS AIRPORTS⁶

In March, 1989, eight cities formed the caucus known as U.S. Airports for Better International Air Service a/k/a USA-BIAS. The original eight members include:

3. PAUL S. DEMPSEY, *LAW & FOREIGN POLICY IN INTERNATIONAL AVIATION* 1, 49 (1987); PAUL S. DEMPSEY, ET AL., *2 AVIATION LAW AND REGULATION* 10-6 (1993).

4. The countries present at the Chicago Convention ultimately defined what is known today as the "five freedoms" and three new freedoms which act as the basis for bilateral negotiations between two countries. See PAUL S. DEMPSEY, ET AL., *1 AVIATION LAW AND REGULATION* 10-7, 8 (1993).

5. H.A. WASSENBERGH, *POST-WAR CIVIL AVIATION POLICY AND THE LAW OF THE AIR*, 11 (2d 1962), citing from the report by the Council to the Assembly on the activities of International Civil Aviation Organization (ICAO) in 1952. Doc. 7367 A7-P1 of 3/31/53, at 5.

6. *Free Trade, Fair Trade and Economic Progress, The Aviation Contribution*, A brochure prepared by USA-BIAS, January, 1993, p. 1.

- (1) City and County of Denver, Aviation Division;
- (2) Dallas/Fort Worth International Airport;
- (3) Baltimore/Washington International Airport;
- (4) Orlando International Airport;
- (5) Metropolitan Washington Airports Authority;
- (6) Kansas City International Airport;
- (7) Phoenix Sky Harbor International Airport; and
- (8) The Port of Portland.

Today the list has grown to more than thirty members.⁷ Traditional international airline service negotiations are conducted bilaterally amongst nations and, essentially, are driven by the economic needs of the air carriers. USA-BIAS members collectively board one-third of all U.S. travelers,⁸ but are allowed little input to the bilateral negotiation process. This factor created a central concern for USA-BIAS, given the important role transportation plays in the development of great economic centers.

Today, air transportation plays a vital role in commerce since “[about] 30 million people will cross the Atlantic by air, and only a handful will go by sea for the sheer novelty of the experience.”⁹ In 1957 Sir George Edwards, of the Royal Aeronautical Society, said:

We tend to trade as far as we can conveniently travel in a day, and if we look back through history, we find that as two population centers have come within the span of a 12-hour journey, trade and travel between them has increased, stimulating the economy and population at either end.¹⁰

The effect of bilaterally negotiating international routes only to major U.S. cities is reflected by the concentration of international economic activity in cities such as New York, Chicago, and San Francisco. International entities are most likely to conduct business in gateway cities because of the ease of access.

7. Twenty six additional members include: Seattle-Tacoma International Airport; State of Connecticut, Bradley International Airport; Detroit Metropolitan Wayne County Airport; Metropolitan Nashville Airport Authority; Reno Cannon International Airport; Lambert-St. Louis International Airport; Indianapolis International Airport; Tampa International Airport; New Orleans International Airport; Charlotte-Douglas International Airport; Cleveland Hopkins International Airport; Las Vegas McCarran International Airport; Minneapolis/St. Paul International Airport; Memphis/Shelby County Airport; Huntsville-Madison County Airport Authority; City of San Jose, California; Norfolk Airport Authority; New York State Department of Transportation, Stewart International Airport; Sarasota-Bradenton Airport; General Mitchell International, Milwaukee, Wisconsin; Allentown-Bethlehem-Easton Airports; Richmond International Airport; Dayton International Airport; and the Washington Airports Task Force.

8. USA-BIAS, Background Brief, October, 1992, p.1.

9. USA-BIAS, *A Caucus For Change — Putting American Growth Cities On The World Map*, Remarks by Leo J. Schefer, President, Washington Airports Task Force, Denver, December 18, 1991, p.2.

10. *Id.* at 3.

USA-BIAS sponsored a study which revealed that the inauguration of 767 service between a U.S. city and London can expect to generate \$240 million in the first year.¹¹ (See Tables 1-3d.) Further, linking a U.S. city to Tokyo with 747 service was found to pump approximately \$720 million into the economy annually.¹² Neither of these figures take into account the economies of our foreign counterparts.

Because of these inequities, USA-BIAS sought to strike a balance between the economic concerns of the airlines with the individual economic development needs of U.S. cities. It did not try to change the negotiating strategy of the United States. The original caucus of eight cities, in their original inquest to the U.S. Secretary of Transportation, stated that they were "seek[ing] equality" between the justifiable needs of both the airlines and U.S. cities respectively.¹³

In November of 1989, twenty-two members of the Senate Tourism Caucus petitioned the Bush Administration in support of the USA-BIAS inquest.¹⁴ The following year, the National Governors Association, attended by then-Governor Bill Clinton, endorsed the requested policy.¹⁵

The U.S. Department of Transportation (DOT), recognizing the validity of their claim, promulgated the Cities Program in January, 1990, and expanded it in November, 1991. Details of the program will be provided in the next section.

IV. THE CITIES PROGRAM

A. USA-BIAS REQUEST

On March 31, 1989, USA-BIAS sent a letter to Samuel Skinner, then-Secretary of Transportation. The letter opened as follows:

The U.S. communities that we represent own and operate some of the largest public airports in this country. Our airports accounted in 1987 for almost 20 percent of total passenger enplanements in the U.S. While many serve as "gateways" for international airline flights to and from the United States,

11. Kurth & Co., Inc., *Economic Impact of Int'l Air Services Instituted At USA-BIAS Cities Since June 30, 1989*, October 14, 1992 [hereinafter *the Kurth Study*].

12. *Id.*

13. Letter to then Secretary of Transportation, Samuel K. Skinner, from USA-BIAS, March 31, 1989 [hereinafter *Skinner Letter*].

14. USA-BIAS, *Background Brief*, October, 1992, p.1.

15. *Id.*

TABLE 1
TOTAL PASSENGER AND CARGO ECONOMIC IMPACT

Entity	Passenger	Cargo	TOTAL
Transatlantic	2,123,354,743	\$129,245,147	2,252,599,890
Transpacific	878,042,950	\$43,641,218	921,684,168
South America	173,775,100	\$6,714,034	180,489,134
Canada	308,328,219	-	308,328,219
Mexico	295,836,710	-	295,836,710
Total	\$3,779,337,722	\$179,600,399	\$3,958,938,121

Total Estimated Job Impact 1/ **85,418**

1/ Based on the study "The Economic Impact of an Open Skies Agreement between the United States and the European Community", by Brian Campbell, with assistance from KCInc. Exhibit 7, page 1.

Jobs generated is estimated by dividing total impact by \$46,348, the U.S. GNP per job in 1989.

• This table was prepared by Kurth & Company, Inc., Washington, D.C.

TABLE 2
SUMMARY OF ECONOMIC IMPACT OF INTERNATIONAL AIR SERVICES INSTITUTED AT USA-BIAS CITIES SINCE JUNE 30, 1989
(except cargo)

Entity	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)	(l)
Annual Seats	Estimated Passengers 65% Load Factor	Foreign Visitors	Average Expenditure Per Foreign Visitor	Primary Economic Impact (Col. d + e)	Induced Downstream Econ. Impact with 2.5 Multiplier	Total Primary & Induced Impact From Visitors and Airline Expenditures	Export Expansion (Arriving Passengers + \$1,693)	Per Fgn. Visitor	Foreign Visitor	Time Saved From Nonstop Service	Total Economic Impact in U.S.	
Transatlantic	612,222	389,011	188,946	\$239,318.833	\$54,986,755	\$294,325,588	\$735,813,970	\$1,030,139,559	\$658,595,115	\$424,616,849	\$10,003,220	\$2,123,354,743
Transpacific	190,736	123,978	88,025	138,902.920	31,483,968	170,386,888	425,967,219	596,354,107	209,895,431	69,995,725	1,797,687	878,042,950
South America	44,928	29,203	19,082	17,967.269	8,304,696	26,271,965	65,679,912	91,951,877	49,441,018	31,876,169	506,037	173,775,100
Canada	135,356	87,981	47,070	27,065.278	4,459,098	31,524,376	78,810,940	110,335,317	148,952,510	48,017,609	1,022,784	308,328,219
Mexico	138,320	89,908	26,523	\$15,250.645	\$11,311,855	\$26,562,500	\$66,406,249	\$92,968,748	\$152,214,244	\$49,069,089	\$1,584,629	\$295,836,710
Total	1,121,562	720,082	369,646	\$438,524,944	\$110,546,372	\$549,071,316	\$1,372,678,291	\$1,921,749,608	\$1,219,098,318	\$623,575,441	\$14,914,355	\$3,779,337,722

• This table was prepared by Kurth & Company, Inc., Washington, D.C.

TABLE 3a
SUMMARY OF TOTAL ECONOMIC IMPACT FROM CARGO

Entity	Direct	Indirect	Total Impact
Transatlantic	\$8,003,900	\$121,241,247	\$129,245,147
Transpacific	\$2,702,615	\$40,938,603	\$43,641,218
South America	\$415,787	\$6,298,247	\$6,714,034
Total	\$11,122,302	\$168,478,097	\$179,600,399

• This table was prepared by Kurth & Company, Inc., Washington, D.C.

TABLE 3b

TRANSATLANTIC AVERAGE TOTAL CARGO IMPACT FOR 1992

To	From	A/L	Aircraft Code	Average Annual Freq	Capacity Per Freq (Tons) 2/	Total Annual Capacity (Tons)	Annual Tons @ 60% Load Factor	Direct Impact 3/	Indirect Impact 4/	Total Impact
IAD	BRU	UA	767	364	18	6,552	3,931	727,627	11,021,932	11,749,559
IAD	MAD	UA	767	364	18	6,552	3,931	727,627	11,021,932	11,749,559
Total Scheduled Transatlantic Cargo Impact								\$7,518,815	\$113,893,293	\$121,412,108
<u>Transatlantic Charter Cargo</u>										
HSV	LUX	CV	74F	52	84	4,368	2,621	485,085	7,347,954	7,833,039
Total Scheduled & Charter Transatlantic Cargo Impact								\$8,003,900	\$121,241,247	\$129,245,147

2/ Average number of pallet positions by particular aircraft configuration according to the Official Airline Guide's "Air Cargo Guide" times 3 tons per pallet position. Only widebody aircraft were included.

3/ Based on an estimated direct impact of \$166.54 per ton, increased to reflect the increase of the Consumer Price Index from 362.7 in January, 1989 to 403.1 in January, 1991. Source: Wilbur Smith Associates, "The Economic Impact of Los Angeles International Airport", 1988, pg. 5 of Section 2 and pg. 8 of Section 3.

4/ Based on an estimated indirect impact of \$2,522.71 per ton, increased to reflect the increase of the Consumer Price Index from 362.7 in January, 1989 to 403.1 in January, 1991. Source: op. cit., pg. 8 of Section 3.

• This table was prepared by Kurth & Company, Inc., Washington, D.C.

TABLE 3c
TRANSPACIFIC AVERAGE TOTAL CARGO IMPACT FOR 1992

To	From	A/L	Aircraft Code	Average Annual Freq	Capacity Per Freq (Tons) 2/	Total Annual Capacity (Tons)	Annual Tons @ 60% Load Factor	Direct Impact 3/	Indirect Impact 4/	Total Impact
PDX	NGO	DL	M11	364	36	13,104	7,862	\$1,455,254	\$22,043,863	\$23,499,118
SJC	NRT	AA	M11	312	36	11,232	6,739	1,247,361	18,894,740	20,142,101
Total TransPacific Cargo Impact								\$2,702,615	\$40,938,603	\$43,641,218

2/ Average number of pallet positions by particular aircraft configuration according to the Official Airline Guide's "Air Cargo Guide" times 3 tons per pallet position. Only widebody aircraft were included.

3/ Based on an estimated direct impact of \$166.54 per ton, increased to reflect the increase of the Consumer Price Index from 362.7 in January, 1989 to 403.1 in January, 1991. Source: Wilbur Smith Associates, "The Economic Impact of Los Angeles International Airport", 1988, pg. 5 of Section 2 and pg. 8 of Section 3.

4/ Based on an estimated indirect impact of \$2,522.71 per ton, increased to reflect the increase of the Consumer Price Index from 362.7 in January, 1989 to 403.1 in January, 1991. Source: op. cit., pg. 8 of Section 3.

• This table was prepared by Kurth & Company, Inc., Washington, D.C.

TABLE 3d
SOUTH AMERICAN AVERAGE TOTAL CARGO IMPACT FOR 1992

To	From	A/L	Aircraft Code	Average Annual Freq	Capacity Per Freq (Tons) 2/	Total Annual Capacity (Tons)	Annual Tons @ 60% Load Factor	Direct Impact 3/	Indirect Impact 4/	Total Impact
IAD	BSB	TR	763	156	24	3,744	2,246	\$415,787	\$6,298,247	\$6,714,034
Total South American Cargo Impact								\$415,787	\$6,298,247	\$6,714,034

2/ Average number of pallet positions by particular aircraft configuration according to the Official Airline Guide's "Air Cargo Guide" times 3 tons per pallet position. Only widebody aircraft were included.

3/ Based on an estimated direct impact of \$166.54 per ton, increased to reflect the increase of the Consumer Price Index from 362.7 in January, 1989 to 403.1 in January, 1991. Source: Wilbur Smith Associates, "The Economic Impact of Los Angeles International Airport", 1988, pg. 5 of Section 2 and pg. 8 of Section 3.

4/ Based on an estimated indirect impact of \$2,522.71 per ton, increased to reflect the increase of the Consumer Price Index from 362.7 in January, 1989 to 403.1 in January, 1991. Source: op. cit., pg. 8 of Section 3.

• This table was prepared by Kurth & Company, Inc., Washington, D.C.

existing U.S. international aviation policy in many cases has prevented our communities — representing the major growth centers in the United States today — from securing more “gateway” services and direct international flights to the major cities of Europe, the Orient, Canada, and South America.¹⁶

USA-BIAS predicated its argument on economic development grounds. It suggested that if bilateral negotiators continued to work under a “rubric of balanc[ing] [airline] benefits,” that the economic interest of U.S. cities, and thus, the country as a whole, would be jeopardized.¹⁷

In an effort to block or delay competition, U.S. carriers often raise “doing-business” problems as a means to create entry-obstacles. This blocking tactic is evident in the responses to Cities Program applications illustrated below. The DOT, however, must evaluate the public interest when deciding matters of this nature. The public interest criteria, in part, is that the DOT must maintain a “comprehensive and convenient system of continuous scheduled interstate and *overseas airline service for small communities* and for isolated areas in the United States.”¹⁸ The DOT must maintain a regulatory environment that is responsive to the needs of the public, particularly with respect to the air transportation system, so that it meets U.S. interests in domestic and foreign commerce.¹⁹ USA-BIAS noted that the “Federal Aviation Act (§1102(b)) require[d] U.S. negotiators to pursue an increase in the number of nonstop United States gateway cities and opportunities for carriers of foreign countries to increase their access to United States points.”²⁰

USA-BIAS made its strongest argument to Skinner in closing:

We favor a more balanced U.S. international aviation negotiation policy — one better balanced between the interest of U.S. airlines and U.S. communities. Our communities are willing to work with U.S. flag carriers and to support their introduction of new services. But when a U.S. carrier is unable or unwilling to serve an international route of economic benefit to an American City, then we would ask that the federal government set aside the objections of that airline to service by another carrier, whether foreign or U.S., in favor of the economic interests of the region to be served and the convenience of the traveling public. We cannot continue to keep our markets closed to new competitors just because certain U.S. airlines may lose business or because U.S. airlines seek nothing in return in the foreign market. . .²¹

16. *Skinner Letter*, *supra* note 13.

17. *Id.* at 2.

18. 49 U.S.C.A. § 1302(a)(8) (1990 & supp. 1993). *Emphasis added.*

19. 49 U.S.C.A. § 1302(5) (1990 & supp. 1993).

20. *Skinner Letter*, *supra* note 13, at 2.

21. *Id.* at 3.

One of the greatest points to note, is that USA-BIAS favored the development of U.S. carrier service over foreign air carrier service, but it recognized the importance of aviation as a means to enhance international business for U.S. industries and communities. The proposal considered the greater interest of our country over that of a select segment of corporate America: the airline industry.

On October 5, 1989, Samuel Skinner, then-Secretary of Transportation, addressed the Transportation Symposium at Georgetown University on USA-BIAS's request. Secretary Skinner found merit in the request and told the audience that he would direct his staff to respond to our U.S. community's requests.²² Skinner challenged his audience to help him define the role of government in international aviation and to encourage a competitive world environment.²³ Skinner stated that U.S. negotiators are doing "too good a job" in getting the best deal possible for the U.S. airline industry and that "our communities understand the importance of a healthy U.S. airline industry."²⁴ He acknowledged the fact, however, that international air service is critical to economic development, regardless of flag.²⁵

Skinner suggested that the traditional bilateral negotiating process sometimes fails to work when a U.S. carrier has no immediate plans to expand their service; and thus, U.S. communities should be given a voice. Skinner characterized this unbalanced negotiating process in which only "one side is hungry" as a "prescription for frustration, if not confrontation."²⁶ The proposed Cities Program was designed to respond to this problem so that more U.S. Cities could enjoy the economic benefits of having international air service.

B. DOT PROPOSAL

1. General

On October 10, 1989, DOT submitted its version of the Cities Program for public comment.²⁷ The DOT emphasized that it did not intend to replace the bilateral negotiating process with this proposal.²⁸ It stated that "in the majority of cases, [the bilateral] negotiating process advances

22. Remarks prepared for delivery by then Secretary of Transportation, Samuel K. Skinner, at The Transportation Symposium Georgetown University, Washington, D.C., p. 3, October 5, 1989.

23. *Id.* at 1.

24. *Id.* See also, *supra* note 13, at 3.

25. *Supra* note 22, at 3.

26. *Id.*

27. *Proposed Cities Program, supra* note 1.

28. *Id.* at 2.

the public interest, including the interest of communities and carriers.”²⁹ The definition of public interest is vague in this case. Bilateral negotiations are conducted between countries on behalf of the airlines from their respective nations. Routes, including destinations at U.S. cities that are traded between these parties, historically lack community input. Generally, large-hub gateway airports are at the center of these negotiations from which international route authority is granted. The Cities Program, however, gives communities and its airports the ability to attract international service based on its own economic development objectives. The DOT in its proposal recognized that communities lack the ability to secure international service when a U.S. carrier does not have immediate plans to expand its service to a particular destination or where they do not need additional bilateral authority.³⁰

2. *Proponent Perspectives*

USA-BIAS was joined by Members of Congress, other U.S. airport authorities and cities, foreign airlines, and private individuals in support of the proposed DOT order. Additionally, they received conditional support from several U.S. carriers; including ABX Air, America West, American, Emery, and United Parcel Service.

The airlines supporting the measure stated that “[they] support the proposal as a way to achieve a more open civil aviation environment.”³¹ Numerous private individuals sent letters supporting the proposal stating that they “look[ed] forward to more international air service at their communities.”³²

The major supporters of the measure, other than the airlines, raised concerns that the proposal may be too restrictive and may “prevent carriers from operating viable services.”³³ They suggested that the requirement to have a procompetitive agreement should not be a prerequisite for route approval under the program. The DOT awarded authority in several cases under the program absent a procompetitive bilateral agreement.³⁴ A few of the proponents felt that all-cargo services should be included.

29. *Id.*

30. *Id.* The DOT gave 30 days for interested parties to address the proposal and an additional 15 days after that for reply comments to be submitted. In addition to publishing this order in the Federal Registrar, the DOT serviced a number of parties likely to be affected by the final decision.

31. *Proposed Cities Program, supra* note 1, at 2.

32. *Id.*

33. *Id.* at 1.

34. See Lufthansa, DOT Order 91-7-39 (1991); KLM, DOT Order 91-9-22 (1991); LTU, DOT Order 91-11-6 (1991). Each of these were approved in the spirit of negotiating a procompetitive bilateral agreement between the US and Germany.

3. *Opponent Perspectives*

The Airline Pilots Association International (APA), the National Air Carrier Association (NACA), and the Air Transport Association (ATA) all opposed the program. They felt that the Cities Program would adversely affect the U.S. airline industry by “eroding traffic at existing gateways.”³⁵ ATA also felt that “procompetitive agreements” should include the specific authority approved by the Cities Program.³⁶

However, the purpose of the Cities Program is to allow communities to secure international service when U.S. carriers decline. The program would not be necessary if the U.S. carriers reached an agreement with the respective cities in the first place. Additionally, route authority, as discussed below, is granted on a one-year basis. Therefore, if a U.S. carrier later decides to enter the same market, the foreign carrier’s home country must reciprocate in granting route authority, or jeopardize the route granted to their carrier. The first condition of the Cities Program is that “a U.S. or foreign carrier does not provide . . . service to that community from the same country.”³⁷ It does not, however, address what happens if a U.S. carrier later decides to enter the market. The DOT responded to this question by discouraging anticompetitive practices by U.S. carriers.³⁸ This will be discussed in more detail later in this note.

In addition to the general airline and pilot association responses, Pan American, Rosenbalm, and Trans World Airlines responded individually in opposition. These airlines stated that “they rely on the smaller U.S. communities to feed their hubs and that they do not see the added benefit if a passenger travels to a country by a foreign carrier over a foreign hub rather than by a U.S. carrier over a U.S. hub.”³⁹ The latter part of their argument is unfounded in that the service sought by U.S. communities is to provide service not otherwise provided by U.S. carriers. USA-BIAS notes that “the records show that the advent of service at the non-traditional gateways represented by USA-BIAS members stimulates overall industry growth rather than diversion from traditional gateway airports.”⁴⁰

35. *Proposed Cities Program*, *supra* note 1, at 2.

36. *Id.*

37. *Id.*

38. Lufthansa, DOT Order 91-7-39 (1991).

39. *Proposed Cities Program*, *supra* note 1, at 2.

40. USA-BIAS, Background Brief, *supra* note 8, at 3.

4. DOT Conclusions — Original Cities Program/Final Order

The DOT's proposal was adopted as proposed. It merely explained its position for establishing the respective requirements imposed. From the inception of the program in January of 1990 until nearly two years later,⁴¹ the DOT did not relent from its position on these requirements. Thus, it is important to distinguish between the original program and the 1991 amendments to reflect how the DOT's strict adherence to its proposal affected international operations approved under the program. Under the original program,⁴² a foreign flag carrier was required to meet the following six criteria to receive Cities Program authority:

(1) *A U.S. or foreign carrier does not provide nonstop or one-stop single-plane international air service to that community from the same foreign country.*⁴³

The DOT decided to retain this condition without change, despite comments suggesting that the authority should be broadened. The DOT stated that the purpose of the program is to accommodate communities which lack access to convenient service to a particular foreign country.⁴⁴ Proponents found the program too restrictive. They felt that one-stop service was not equal to nonstop service and that authority should be granted by city, applying a city-pair test, rather than by foreign country. This would allow cities to seek service to a particular international city not serviced, rather than to a country not serviced, by a U.S. carrier. Although U.S. cities may encourage foreign carriers to service their communities, it is the foreign carrier, and not the city, who may apply for Cities Program authority. Because of this, the DOT feared that if a city-pair test, rather than a foreign country test, is used, foreign carriers would attempt to use the Cities Program as a means to secure authority between major U.S. gateway cities and small unserved communities in their homelands.⁴⁵ If this occurred, the premise of the Cities Program "to expand international air service to more U.S. cities" would be bastardized. To remedy this concern, the DOT should review the applications under the

41. The DOT amended its original program on November 20, 1991, after protest by the recipients of route authority under the program and from the respective U.S. cities that they served. The original proposal proved to be too restrictive. See DOT Order 91-11-26.

42. Original Cities Program, DOT Order 90-6-20 (1990) [hereinafter *Original Cities Program*].

43. This condition was modified by DOT Order 91-11-26 (1991). A U.S. carrier as of this writing may only block a foreign applicant if it provides nonstop service to the same city-pair. See Part V(C) below.

44. *Original Cities Program*, *supra* note 42, at 2.

45. DOT Order 90-1-62 at 3 (1990).

program on a case-by-case basis. This would mitigate this problem and would allow the respective U.S. communities to increase direct service to more international destinations in the spirit of the program.⁴⁶

(2) There is a pro-competitive agreement in place with the homeland country; and thus, a basis does not exist for a traditional aviation trade to obtain benefits for U.S. airlines.

The DOT stated that the key elements that it will require under this "procompetitive condition" include open entry, unrestricted capacity, U.S. rights to operate service from any point in the U.S. to the foreign country, and pricing freedom.⁴⁷ The most significant issue raised by the DOT — pricing — has not created a problem to date. In the event that pricing becomes an issue, the DOT stated that "pricing environments [will be reviewed] on a case-by-case basis."⁴⁸ Other procompetitive concerns raised include noninclusivity, computer reservation systems, airport terminal facilities, ground-handling, and currency and remittances. Each of these issues were raised as "doing business problems," with exception to the latter, in some of the Cities Program applications submitted to date. Part V below illustrates this point in more detail.

(3) The foreign carrier's proposal does not involve service to and from third-world countries.

In response to comments from the foreign carriers, the DOT agreed not to place an absolute prohibition on third-country traffic. Almost all international flights carry third-country traffic. Thus, the foreign carriers stated "an absolute prohibition on carrying third-country traffic would render the program inoperable."⁴⁹ The DOT imposed a three-tier test stating that the carrier must not (1) place undue reliance on third-country traffic; (2) operate or hold out single-plane service or any service with single flight numbers to countries beyond their homelands; nor (3) advertise any third-country services via intermediate points or connecting services in the public media.⁵⁰ If a foreign applicant meets this criteria, then it will be permitted to carry third-country passengers, both intermediate and beyond their homelands. Foreign carriers, to maintain the vitality of the program, however, will not be precluded from listing such services in computer reservation systems. This compromise seems fair and meets the concerns of both the proponents and the opponents.

46. Note that this concern was addressed in the 1991 amendments.

47. *Original Cities Program*, *supra* note 42 at 3.

48. *Id.*

49. *Id.* at 4.

50. *Id.*

(4) *Interested U.S. parties have not raised overriding public interest reasons for denying the requested authority.*

In addition to the concerns raised in (2) above, if a U.S. carrier has firm plans to provide the requested service within a reasonable time frame, the DOT may decline to award Cities Program authority. As illustrated in subsequent applications, the DOT apparently reviews this condition on a case-by-case basis. When a U.S. carrier raises a “doing business problem” or other public interest issues, the DOT gives deference to the foreign applicant.⁵¹

(5) *The foreign carrier has firm plans to operate the proposed service.*

The DOT adhered to the 90-day start-up period for foreign carriers under the program. This is the same period imposed on U.S. carriers. DOT indicated that it would be flexible on this item. Subsequent applications confirm DOT flexibility as reviewed in Part V below.

(6) *The foreign carrier meets all other applicable licensing standards.*

In addition to the licensing standards of fitness and ability, all applicants must meet the rules applicable to exemption proceedings and other public interest standards.⁵²

Based upon the modifications and qualifications in conditions (1) through (6), the DOT issued the order, only three months after it issued its proposal, and invited interested and eligible carriers to apply for authority under the Cities Program. Despite comments raised, the DOT did not feel that the limitation granting one-year authority would impede the program.⁵³ In practice, once a carrier receives authority under the Cities Program, upon expiration they may invoke what the DOT calls the “auto extension provisions.”⁵⁴ It is not unusual for DOT Orders to be issued after Cities Program route authority has actually expired. The DOT explains that the “auto extension provisions” are more important than the DOT Order.

In sum, advocates of the program considered the proposal a “first step,”⁵⁵ while opponents thought the proposal would “erode traffic at existing U.S. gateways.”⁵⁶ The negative feedback is not surprising, considering the only opponents to the measure were U.S. air carriers and their

51. Lufthansa, DOT Order 91-7-39 (1991).

52. Rules Applicable to Exemption Proceeding, 14 C.F.R. § 302(D); *see also* 49 U.S.C.A. §§ 1302, 1303 (1990 & Supp. 1993).

53. *Original Cities Program*, *supra* note 42, at 5.

54. Based on a telephone conversation with Alan Brown, DOT Licensing Division, February 12, 1994.

55. *Original Cities Program*, *supra* note 42, at 1.

56. *Id.* at 2.

respective associations. The carriers themselves, as noted, were not unified in their response. Conversely, advocates of the Cities Program represent a diverse cross-section of U.S. economic and sociopolitical constituencies. USA-BIAS would argue that this DOT Order is more restrictive than what it hoped for. However, it raised a valid public concern that received national attention; and the matter was acted upon in less than one year from the organization of the caucus.

C. THE 1991 AMENDMENTS

On May 7, 1991, more than one year after the inception of the Cities Program, USA-BIAS filed several requests to the DOT.⁵⁷ It claimed that the program was not meeting the public or private sector expectations for improved international air service. To rectify what it claimed as "restrictive," USA-BIAS suggested eight modifications to the Cities Program as follows:

1. Existing one-stop service by a U.S. carrier should not block a foreign carrier's application for nonstop service;
2. To be eligible to block approval of a foreign carrier application, the U.S. carrier nonstop service must be in the same city-pair, not to or from another point in the same foreign country;
3. Third-country traffic may be carried on flights to or from the foreign carrier's homeland up to daily service without restriction as to amount of third-country traffic, or ability to advertise connecting service;
4. Third-country traffic may be carried on Seventh Freedom⁵⁸ basis provided the U.S. has a liberal agreement with the carrier's homeland and U.S. carriers could provide the service in the city-pair market;
5. Eligible services under the Cities Program should include both scheduled combination and scheduled all-cargo international air services;
6. To be eligible to block approval of a foreign carrier's application, U.S. carrier's 'firm plan' to initiate service should be codified as one that is publicly announced with a specific start-up date prior to the date of a foreign carrier's application under the Program;
7. A foreign carrier shall have up to nine months to inaugurate new service under the program; and

57. DOT Order 91-11-26 (1991).

58. The Seventh Freedom right is "an airline, operating entirely outside one territory of its country of registry, has the right to fly into the territory of another country and there discharge, or take on, traffic coming from, or destined to a third country." See *supra* note 4, at 10-8.

8. The DOT should act on a foreign carrier's application within 60 days, or else the application is approved automatically for one year.⁵⁹

To justify these proposed amendments, consider, correspondingly, the following:⁶⁰ (1) There is no substitute for nonstop service which should take precedence over U.S. carrier one-stop service; (2) the program's country-destination test restricts service to a single route unnecessarily limiting service opportunities to U.S. communities; (3) the benefits of new international service with respect to reliance on third-country traffic outweighs the potential harm that U.S. carriers may experience; (4) since holders of Cities Program authority maintain liberal agreements with the U.S., Seventh Freedom rights should be allowed to generate experimental data on the feasibility of permitting these rights; (5) the market place should determine whether scheduled combination or all-cargo service under the program is warranted, not the DOT; (6) the definition of "firm plan" proposed by USA-BIAS should be incorporated into DOT guidelines for notice purposes and to mitigate anticompetitive practices; (7) the DOT should act within this [60-day] time frame, otherwise the request should be approved automatically for one year. The spirit of the program may be compromised if unduly delay tactics are used by U.S. carriers.

World Airways and the Airline Pilots Association are the only two respondents who entirely opposed the USA-BIAS proposed amendments. Five parties fully supported all aspects of the USA-BIAS request; however, only three are American citizens. These parties included: American West Airlines, the Department of Justice, the Pittsburgh Parties, Swissair, and Zambia Airways.⁶¹ Nine other parties responded with mixed reactions.⁶²

The DOT adopted two of USA-BIAS's recommendations. It agreed to Proposal No. 1, to eliminate the ability of one-stop, single-plane service to block proposed nonstop service. The DOT noted that only one U.S. combination carrier, of the five to file comments, opposed this element.⁶³ The DOT also agreed to Proposal No. 2, to substitute the city-pair test for the current country designation test.⁶⁴ With respect to No. 2, the DOT stated they "now believe that the benefits to be gained by the affected U.S. communities are likely to far outweigh any possible dilution

59. *Supra* note 57, at 1, 2.

60. USA-BIAS justifications provided to the DOT as expanded by the author.

61. DOT Order 91-11-26 at 9 (1993).

62. *See* Table 4 for details.

63. *Id.*

64. DOT Order 91-11-26 at 2, 3 (1990).

TABLE 4
PETITIONER RESPONSES

NC = No Comment; SP = Supports; OP = Opposed; N-OBJ = No Objection; DEFER = Defer; FN = Footnote

Petitioner	Proposal Number							
	1	2	3	4	5	6	7	8
American Samoa	NC	NC	SP	NC	SP	NC	NC	NC
Cargolux Airlines	NC	NC	NC	NC	SP	NC	NC	NC
Hawaii, The State of	NC	NC	SP ¹	NC	SP	NC	FN ²	NC
Puerto Rico	NC	NC	SP	NC	SP	NC	NC	NC
United Air Lines	NC	NC	NC	OP	NC	NC	NC	NC
American Airlines	NC	NC	OP	OP	NC	OP	OP	OP
Delta Air Lines	FN ³	OP	FN ⁴	OP	N-OBJ	OP	OP	OP
Federal Express	NC	NC	NC	NC	DEFER ⁵	NC	NC	NC
Pan American Airlines	N-OBJ	OP	OP	OP	OP	OP	OP	OP
Trans World Airlines	OP	OP	OP	OP	NC	OP	OP	OP
NACA	NC	NC	OP	OP	NC	OP	OP	OP

¹ Hawaii and ATA expressed concern about inspector levels of Federal Inspection Services. They support liberalization of the ban on third-country traffic. They urge extensions of the 90-day start up criterion.

² *Id.*

³ No objection so long as nonstop/one-stop is a reciprocal right.

⁴ No objection so long as other third country bilateral rights are not affected.

⁵ Defer until intra-EC cargo service issues are resolved.

of the aims of [the] program.”⁶⁵ The DOT declined to ease the numerical limits on third-country traffic (No. 3) or to permit an applicant to carry Fifth-Freedom traffic on a Seventh-Freedom basis (No.4). It stated that the program was not designed to circumvent the bilateral negotiation process and instead decided to adhere to a case-by-case approval on these items.⁶⁶ The DOT noted that combination service approved under the Cities Program afforded additional cargo capacity. However, it did not find a need to expand the Cities Program to include all-cargo operations (No. 5) as suggested by USA-BIAS. Its decision to decline on this item was based on a lack of showing by U.S. communities that this need exists. Thus, it is not unreasonable to expect that this item will ultimately be included under the program. Proposal 6 and 7 of USA-BIAS’s request to adopt a “firm plan” concept and to provide for a “nine-month start-up period” were deemed not necessary.⁶⁷ The DOT stated that these items are better handled on a case-by-case basis.

Although these items may seem trivial, the “firm plan” concept is worthy of consideration. When a U.S. carrier blocks a foreign applicant’s ability to gain authority under the program on this basis and later declines to start service, it is not just the foreign carrier who is hurt by its inaction; but additionally, the respective U.S. communities. For every day that service is delayed, the U.S. economy is proportionately affected. The eighth item listed by USA-BIAS to provide for a sixty-day DOT action period is only critical for new applicants. The request is reasonable considering that U.S. communities lose when the DOT takes an unnecessarily long time to approve City Program applicants. The DOT, however, declined to adopt this item.

In summary, today a foreign applicant who wishes to obtain authority under the Cities Program must meet the original six conditions listed above. However, the proposed nonstop service can only be blocked by the same nonstop service, not by one-stop service. Additionally, a U.S. carrier may not block an applicant merely because it serves the applicant’s home country. Instead, a U.S. carrier must service the same city-pair to block the foreign applicant’s authority.

D. LIMITATIONS

A community must secure or have U.S. Customs Service and Immigration and Naturalization Service at their airport to take advantage of the Cities Program. The requirement for both services may be waived under a common agreement between the two agencies giving “cross-des-

65. *Id.* at 3.

66. *Id.*

67. *Id.* at 4.

ignated authority.”⁶⁸ Communities may secure these services by either qualifying as a “port-of-entry” or by obtaining a user-fee agreement with U.S. Customs. To obtain port-of-entry status, an airport must deplane 15,000 international passengers annually and process 2,500 commercial cargo shipments per year.⁶⁹ To obtain user-fee status, U.S. Customs establishes various personnel cost and facility requirements. The approximate cost to bring in a Customs official (including salary, training, relocation, etc.) is \$75,000 for the first year and about \$50,000 for each year thereafter.⁷⁰ Today, in addition to the port-of-entry airports, there are approximately twenty-one user-fee airports.⁷¹ Airports located near existing port-of-entry facilities may work out a cost of services agreement with Customs to send officials from these nearby facilities to their own.⁷²

V. APPLICANT & CITY AWARD ANALYSIS

A. City by City Analysis

Since the inception of USA-BIAS, nine member cities have gained services to seventeen international destinations.⁷³ These nine cities include Cincinnati; Baltimore; Minneapolis/St. Paul; Miami; Detroit; Philadelphia; Washington, D.C.; Charlotte; and Orlando.⁷⁴ Estimates indicate 83,000 jobs and \$3.8 billion a year in economic activity flows from these services approved under the Cities Program.⁷⁵ Below is an analysis, city by city, of the U.S. communities who have received international service under the Cities Program.

Baltimore

On March 27, 1990, the DOT granted the first authority under the Cities Program.⁷⁶ KLM, a foreign air carrier of the Netherlands, was granted the right to engage in scheduled air transportation of persons, property, and mail between Amsterdam, the Netherlands, and Baltimore,

68. Based on a telephone conversation with Lou Razzino, U.S. Customs Office, Washington, D.C., April 21, 1994.

69. *Id.* See also 8 C.F.R. § 239.4; 19 C.F.R. § 122.1; 19 C.F.R. § 122.13; 19 C.F.R. § 122.15; 19 U.S.C.A. 58(b) (1990 & supp. 1993).

70. *Id.*

71. *Id.*

72. *Id.*

73. USA-BIAS, Background Brief, *supra* note 8.

74. Reference respectively, Swiss Air, DOT Order 93-4-35 (1993); KLM, DOT Order 93-2-29 (1993); KLM, DOT Order 92-11-1 (1992); Finnair, DOT Order 92-9-57 (1992); KLM, DOT Order 92-8-54 (1992); Swiss Air, DOT Order 92-8-28 (1992); Swiss Air, DOT Order 92-8-14 (1992); Lufthansa, DOT Order 92-2-35 (1992); LTU, DOT Order 91-11-6 (1991).

75. See Kurth Study, *supra* note 11. See also Tables 1 through 3d.

76. KLM Royal Dutch Airlines Exemption, DOT Order 90-3-53 (1990).

Maryland.⁷⁷ The DOT responded to KLM's request filed on February 23, 1990, one month later, only two months after the promulgation of the Cities Program.

KLM's application was supported by the State of Maryland. It stated "[that] there is a demonstrated need for the operations."⁷⁸ However, Pan American World Airways, Inc. (Pan Am), and Trans World Airlines, Inc. (TWA) opposed KLM's request. They expressed a concern that KLM will rely on third-country traffic, in violation of the third condition of the Cities Program, and that KLM should have the burden to show otherwise.⁷⁹ Further, TWA expressed a concern that it was experiencing "doing-business problem[s]."⁸⁰ TWA's latter concern, if true, would violate the second condition of the Cities Program.

KLM responded, stating "with respect to the undue reliance issue raised . . . KLM understands that it is bound to observe [this condition]."⁸¹ KLM suggested that the other issue should be left for resolution between the airport authority and the respective airlines.

The DOT found the U.S.-Netherlands Air Transport Services Agreement to be procompetitive.⁸² It found that the agreement provides for open entry, unrestricted capacity, U.S. rights to operate service from any point in the U.S. to the Netherlands, and pricing freedom for U.S. carriers.⁸³ The DOT recognized Pan Am and TWA's concern relative to third-country reliance; however, it stated that "[it] could rely on these commitments in light of the fact that [it was] awarding exemptions limited to one year."⁸⁴ DOT's approval was in the spirit of the Cities Program allowing new service to communities not otherwise served. Since neither Pan Am nor TWA were willing to enter the market, the DOT acknowledged their concern but gave deference to the applicant. In response to TWA's "doing-business" concern, the DOT placed the burden on TWA to prove exactly what problems existed. Since TWA did not meet this burden, the DOT found that granting approval of KLM's request was in the public interest.⁸⁵

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 2.

81. *Id.*

82. U.S.-Netherlands Air Transport Services Agreement of April 3, 1957, as amended by the Protocol of March 31, 1978.

83. *Supra* note 74, at 2.

84. *Id.*

85. *Id.* at 3.

KLM's authority to serve Baltimore was extended based on its original conditions set forth by the DOT in 1990.⁸⁶ In 1991, Ladeco, S.A., requested that its authority, originally approved between Santiago and Washington Dulles, be transferred to Baltimore. Ladeco's request was granted and it continues to service Baltimore with Boeing 767 service twice weekly.⁸⁷

Charlotte

Lufthansa German Airlines (Lufthansa) applied for Cities Program authority to service Charlotte, North Carolina.⁸⁸ At the time of Lufthansa's application, a procompetitive agreement did not exist.⁸⁹ However, a bilateral agreement did exist between the U.S. and the Federal Republic of Germany (FRG). The bilateral agreement specifically addressed pricing freedom based upon a country-of-origin.⁹⁰ The U.S. issued concerns earlier relative to FRG-originating fares; however, Lufthansa stated that "this issue will not be resolved, or affected, by whether [it] receives authority [as] request[ed] here."⁹¹ Lufthansa additionally sought authority to Tampa Bay, Florida, and Portland, Oregon.

Pan Am, TWA, the Air Line Pilots Association (ALPA), and the Port of Seattle opposed the request. They stated that the U.S.-FRG bilateral agreement is not procompetitive and that there are overriding public interests at stake which would undercut the U.S.-FRG bilateral negotiation process.⁹² The carriers expressed a concern that they were experiencing doing-business problems. In this case they specifically illustrated the problems they were experiencing, unlike TWA and Pan Am's earlier response to the KLM application to Baltimore. The problems they noted include: difficulty in gaining access to airports, liberalized charter rules, ground handling, intermodal transportation, and the ability to change the

86. DOT Order 91-7-33 (1991); DOT Order 93-2-29. KLM later requested that its authority be transferred to Washington Dulles Airport. This request was granted. Typical service provided by KLM includes Boeing 747 service five times a week during peak season (May to October). Some of its 747 service includes upper level cargo service. Based on a telephone conversation with Vincent Rivellese, Air Service Development Manager, Washington Airports Authority, April 21, 1994.

87. Based on a telephone conversation with Vincent Rivellese, Air Service Development Manager, Washington Airports Authority, April 21, 1994.

88. Lufthansa German Airlines, DOT 90-6-38 (1990).

89. Application filed February 27, 1990.

90. *Supra* note 88, at 1.

91. *Id.*

92. *Id.*

gauge of service.⁹³ Federal Express filed an answer but did not object. It merely wanted Lufthansa to address the impact of its operations on the cargo market.

The communities of Charlotte, Tampa Bay, and the Port of Portland; and USA-BIAS filed answers in support of Lufthansa's request. They predicated their support on the basis that the traveling public would benefit, and that local, regional, and national economic development would result.⁹⁴ They further suggested that approval of the request would "enhance U.S.-FRG relations and [would] provide a positive climate in upcoming U.S.-FRG bilateral aviation negotiations."⁹⁵ The DOT ultimately approved the route for a period of 179 days. It stated that authority "is contingent upon the achievement of satisfactory progress toward the establishment of a liberalized regime for the setting of fares for air transportation originating in FRG."⁹⁶ The DOT used the Cities Program in this case as a lever for negotiating a more liberal bilateral agreement. Lufthansa's authority was extended for multiple six-month periods as bilateral negotiations continued, despite protest by Pan Am and TWA.⁹⁷ In February of 1992, the DOT granted authority for a period of one-year.⁹⁸ This authority allowed Lufthansa the ability to conduct this service, either separately or in combination with its terminal point, in Houston, Texas. Lufthansa's election to operate conterminously with Houston would result in its enjoyment of cabotage rights otherwise restricted by U.S. law.⁹⁹ The DOT stated that its decision "[was] based on established public interest factors deriving from the context of continuing aviation negotiations with the FRG."¹⁰⁰

Today, Charlotte receives international service from USAIR. KLM no longer services this destination.¹⁰¹ A conversation with the airport administration did not reveal why KLM no longer serves its facility. The DOT, however, has not precluded the continuation of Cities Program authority just because a U.S. carrier later enters the market. KLM may have dropped the service for other market considerations. The traffic,

93. *Id.* "Gauge of Service" usually applies to downsizing aircraft for approved service point beyond the destination airport.

94. *Id.*

95. *Id.*

96. *Id.* at 1.

97. DOT Order 91-2-41 (1991); DOT Order 90-6-38 (1990).

98. DOT Order 92-2-35 (1992).

99. Cabotage is transportation of passengers, cargo, or mail by a foreign airline between two points in the same nation and is prohibited by §1108(b) of the Federal Aviation Act, *See generally, supra* note 3, at 10-68 (1992).

100. *Id.* at 2.

101. Based on a telephone conversation with the office of Haley Centre, public relations department of the airport, April 20, 1994.

most likely, could not support two airlines, particularly since a substantial portion of USAIR stock was recently purchased by British Airways. Thus, USAIR, through this investment scheme, now accesses more European destinations than before.

Philadelphia

Swissair, Swiss Air Transport Company, Ltd. (Swissair), was granted authority to engage in scheduled air service between Zurich, Switzerland, and Philadelphia, Pennsylvania, after a finding that it met all conditions of the Cities Program. The authority included the right to "coterminalize" the Philadelphia operations with its existing U.S. service to Boston, Massachusetts.¹⁰² The DOT allowed coterminalization in the spirit of the Cities Program based upon public interest grounds.¹⁰³ Swissair's proposal was first met by a petition filed by American Airlines, which was ultimately withdrawn.

The DOT later extended Swissair's authority pursuant to the DOT's renew exemption clause. The authority was granted by telephone in recognition of the imminence of its operations and to guard against any interruption in service.¹⁰⁴ The DOT emphasized the third condition of the Cities Program, that Swissair must not advertise or hold out single-plane service to countries beyond Switzerland, nor may it rely upon traffic from other countries. Swissair continues to enjoy Cities Program rights in Philadelphia pursuant to the autoextension provisions of the DOT. The authority, however, continues to be coterminous with Boston. Philadelphia enplanes a minimal 1,600 passengers annually to Zurich through Boston.¹⁰⁵ By allowing coterminous operations, the DOT is allowing more U.S. cities to gain improved access to international air service.

Detroit

KLM was the first airline and country, respectively, to apply for Cities Program authority¹⁰⁶ and the first to be denied.¹⁰⁷ Until KLM's application to service Detroit, the DOT approved all other Cities Program applications.¹⁰⁸ Its Detroit application, however, did not meet all program criteria. Pan American World Airways, Inc., operated one-stop,

102. DOT Order 90-7-18 (1990).

103. *Id.* at 2.

104. *Id.* at 1, 5.

105. Pursuant to sources at Philadelphia International Airport, April 25, 1994.

106. Authority first granted to KLM between Amsterdam and Baltimore, DOT Order 90-3-53 (1990).

107. DOT Order 90-10-1 (1990).

108. Other applications approved were KLM between Amsterdam to Baltimore; Ladeco, S.A. between Santiago and Washington, D.C.; Lufthansa between Frankfurt and Charlotte; and Swissair between Zurich and Philadelphia, *supra* note 72.

change of gauge service in the Detroit-Amsterdam market. It planned to expand that service to single-plane service within the same month in which the application was filed.¹⁰⁹

The application received protest from Pan Am; Trans World Airlines, Inc.; and the Airline Pilots Association (ALPA). Pan Am and TWA questioned Northwest's recent motivation for terminating its service in the Detroit-Amsterdam market. Northwest dismissed their inquiry as "normal scheduling process."¹¹⁰ Northwest garnered support from United Airlines, USA-BIAS, Governor Blanchard, the State of Michigan, the Port of Seattle, and the Metropolitan Detroit AFL-CIO. United said that "in markets that remain open to U.S. airlines, we should not be opposed to service expansion and increased competition."¹¹¹ USA-BIAS suggested that if the DOT did not approve KLM's request, a "dampening effect" on future foreign air carrier requests under the program would result.¹¹²

The DOT in evaluating the public interest looked at three factors: (1) did the U.S. carrier plan to provide single-plane service to the same market; if so (2) how soon did they plan to start serving the market; and (3) what frequency of service would be provided.¹¹³ Based on these factors, the DOT denied KLM's request since Pan Am had "firm plans" to service the market.

Nearly one year later, KLM received a grant of authority under the program.¹¹⁴ Pan Am no longer serviced the Detroit-Amsterdam market; and therefore, the DOT, based on the procompetitive agreement between the Netherlands and the U.S. approved KLM's request. ALPA filed the only answer opposing KLM's request, stating that "the [DOT] should require KLM to provide detailed traffic analyses to demonstrate that it will not rely excessively on third-country traffic."¹¹⁵ The DOT noted that if all of the provisions of the Cities Program are not met, that it may "amend, modify, or revoke . . . [its] authority at any time and without hearing."¹¹⁶ KLM continues to service Detroit under the program.¹¹⁷

109. *Supra* note 106.

110. *Id.* at 2.

111. *Id.* at 5.

112. *Id.* at 4.

113. *Id.*

114. DOT Order 91-9-22 (1991); DOT Order 92-8-54 (1992).

115. DOT Order 91-9-22 (1991).

116. *Id.* at 3.

117. Confirmed with Tricia Godlewski with the Detroit Airport Commission on April 20, 1994.

Washington

On August 10, 1990, the DOT granted Ladeco, S.A., permission to conduct air transportation services between Santiago, Chile, and Washington, D.C.¹¹⁸ When Ladeco was not able to meet its original commitment to start service, as provided in the fifth condition of the Cities Program, the DOT amended its authority to begin September 30, 1990. The delay was minimal and found to be in the public interest.¹¹⁹

Washington, D.C., is the first and only city to receive multiple Cities Program service. The DOT granted Swissair Cities Program authority to provide combination service between Zurich, Switzerland, and Washington, D.C., either nonstop or one-stop over Boston. The DOT allowed the one-stop service conditionally on a promise made by Swissair that "when traffic warrants . . . it will provide nonstop service between Zurich-Washington."¹²⁰

American Airlines (American) and United Airlines (United) filed answers opposing Swissair's request, and TWA filed an answer seeking deferral. American claimed that they incurred unnecessary expenses because of various problems, including ramp handling, catering, and security. United claimed they were required to pay excessive fees for use of its own check-in counters. TWA argued that they were unable to secure exclusive operating space.¹²¹

Despite opposition, the DOT approved Swissair's request based upon public interest grounds. It claimed, although it was sympathetic to the concerns raised by these [U.S.] carriers, "taken either separately or together they do not override the fact that Swissair continues to meet" Cities Program criteria and benefits the public interest.¹²² The DOT stated that "against this background, [it] clearly anticipate[s] that [it] will be able to work with the Swiss authorities to address the issues raised by [U.S.] carriers."¹²³

118. DOT Order 90-6-20 (1990).

119. DOT Order 91-1-25 (1991).

120. *Id.*

121. *Id.* at 2.

122. *Id.* at 3.

123. *Id.*

As of this writing, Washington, D.C., no longer is serviced by Ladeco, S.A., airline of Santiago, Chile. Instead, Ladeco now serves the city of Baltimore.¹²⁴ However, it is serviced by Swissair to Zurich, Switzerland and now by KLM to Amsterdam, the Netherlands.¹²⁵

Miami

Finnair was granted authority to provide service between Helsinki, Finland, and Miami, Florida.¹²⁶ Finnair's request was granted without opposition. The Dade County Aviation Department and Delta Airlines, Inc., filed answers in support of its request. Finnair filed for continued extensions pursuant to the autoextension provisions of the DOT.¹²⁷

Minneapolis - St. Paul

Minneapolis-St. Paul, Minnesota, enjoys service between its city and Amsterdam pursuant to the authority KLM received under the Cities Program.¹²⁸ KLM's request was accepted without opposition. The Minneapolis-St. Paul Metropolitan Airports Commission and Northwest Airlines supported KLM's request based on regional economic development grounds from the substantial benefits incurred by the travelling and shipping public.¹²⁹ KLM continues to enjoy Cities Program authority pursuant to the autoextension provisions of the DOT.

Cincinnati

Cincinnati, one of the smallest U.S. cities serviced under the Cities Program, put its merits to the test. Switzerland maintains various route authority with the U.S.;¹³⁰ however, its authority does not include the right to fly to Cincinnati. Since Delta Airlines, Inc. (Delta), did not intend to provide single-plane service on its own between Zurich and Cincinnati, the Swiss Air Transport Company, Ltd. (Swissair) could have applied for Cities Program authority. Instead, Delta and Swissair teamed together to jointly market the relative small demographic areas of the two respective cities. Delta, in an unprecedented move, filed jointly with

124. Based on a telephone conversation with Vincent Rivellese, Air Service Development Manager, Washington Airports Commission, April 21, 1994.

125. *Id.* Swissair provides mostly Boeing 747-300 service five times a week. It provides MD-11 service once a week. KLM provides primarily Boeing 747 service five times a week during the peak season (May to October). KLM began service at Washington Dulles Airport in May of 1993.

126. DOT Order 92-9-57 (1992).

127. Docket No. 48180, Sept. 22, 1993.

128. DOT Order 91-1-40 (1991); later extended by DOT Order 92-11-1 (1992).

129. DOT Order 91-1-40 (1991).

130. United States-Switzerland Interim Air Transport Services Agreement, August 3, 1945.

Swissair to obtain Cities Program authority.¹³¹ The two airlines applied for joint authority pursuant to a code-sharing arrangement.¹³² Delta maintained that the market would only be viable if Swissair's code-share traffic is also carried on its flights.¹³³ The two airlines recognized that Swissair's request to provide nonstop service in this market does not directly meet the Cities Program criteria since Delta will actually be providing the service; however, they emphasized that the application was in the spirit of the program by "improving international air service to an underserved U.S. community."¹³⁴ The City of Cincinnati, the Greater Cincinnati Chamber of Commerce, and the Northern Kentucky Chamber of Commerce supported the application, stating that the new service would contribute to the economic growth of the area.¹³⁵

American, United, and Trans World Airlines all filed responses suggesting that the application should be denied on doing-business problem grounds. Only United gave specific details of its problems.¹³⁶ The DOT previously discounted U.S. carrier complaints on this ground when they failed to give specific reasons for their complaint.¹³⁷ United raised the cost of doing-business issues, particularly with respect to its inability to bring in its own cargo handling agent and for high ground-handling service fees.¹³⁸ Pursuant to an agreement between the U.S. and Switzerland,¹³⁹ the Swiss authorities are required to give an "adequate" accounting of the cost involved for ground-handling services. United's dispute was with the adequacy of the accounting.

The DOT approved the two carriers' application. It stated, "[w]hile it is true that Swissair's application does not meet the 'Cities Program' criterion requiring lack of nonstop U.S. carrier service in the relevant city-pair market, the nonstop U.S. carrier that would be affected in this case is Delta itself, which supports Swissair's application."¹⁴⁰ The DOT continued to note that the public interest of the U.S. communities and the respective U.S. carrier (Delta) override the doing-business concerns

131. DOT Order 93-5-35 (1993).

132. *Id.*

133. *Id.* at 2. The code-share arrangement sought between Zurich and Cincinnati is part of a broader code-sharing/blocked space arrangement between them which includes operations in New York-Zurich/Geneva and Atlanta-Zurich markets. *Id.* at 1.

134. *Id.* at 1.

135. *Id.* at 2.

136. *Id.* at 3.

137. *See supra* note 76 and note 88.

138. *Id.*

139. U.S.-Switzerland Memorandum of Consultations (MOC), September 30, 1988. *Id.* at 2

140. *Id.* at 4.

raised. The authority was granted subject to U.S. code-sharing policy.¹⁴¹ The authority granted to Swiss Air is due to expire in May of 1994. However, it will most likely be renewed given the circumstances surrounding its application.¹⁴²

Orlando

In 1991, LTU Lufttransport-Unternehmen (LTU), was granted temporary authority to provide service between Orlando, Florida, and the Federal Republic of Germany (FRG). The authority was considered on Cities Program terms but not applied under nor approved under the Cities Program itself.¹⁴³ LTU's authority was granted while the U.S. and the FRG pursued bilateral negotiations. The Greater Orlando Aviation Authority filed in support of LTU's request. It stated that "FRG is the second-largest market in Europe for Orlando; that FRG-Orlando non-stop passenger traffic increased 33 percent from 1989 to 1990, etc."¹⁴⁴ Thus, although the Cities Program itself was not used, the basic premise of the program was used to guide LTU's grant of temporary authority.

B. SUMMARY ANALYSIS

To date, eight countries, seven airlines, and ten U.S. cities have benefitted from the adoption of the Cities Program. Some of these cities are enjoying international service for the first time. The Cities Program, as illustrated below, allows new partnerships between U.S. cities and foreign countries to develop.

The following countries and their respective airlines enjoy authority under the Cities Program:

<i>Countries</i>	<i>Airlines</i>
Switzerland	Swiss Air
Netherlands	KLM
Finland	Finnair
Germany	Lufthansa & LTU
Chile	Ladeco, S.A.
Costa Rica	Aero Costa Rica & LACSC

141. See DOT Order 92-8-14; The contract of carriage and ticket must reflect the carrier that is holding out the service in the computer reservations system and elsewhere, and the carrier must accept its responsibility to its passengers according to the terms of that contractual relationship.

142. Note that as of this writing, the author was unable to confirm whether Cincinnati still receives international service under the Cities Program.

143. DOT Order 91-11-6 (1991).

144. *Id.*

U.S. cities that have gained new international service include:

<i>Cities</i>	<i>Countries</i>
Cincinnati	Zurich, Switzerland
Baltimore/Washington	Amsterdam, the Netherlands
Minneapolis-St.Paul	Amsterdam, the Netherlands
Miami	Helsinki, Finland
Detroit	Netherlands
Philadelphia	Zurich, Switzerland
Washington, D.C.	Zurich, Switzerland & Santiago, Chile
Charlotte, N.C.	Frankfurt, Germany
Orlando	Dusseldorf, Germany
Tampa	San Jose, Costa Rica ¹⁴⁵

VI. CONCLUSIONS AND RECOMMENDATIONS

More than four years have passed since the inception of the Cities Program. Despite early complaints from U.S. carriers that the program will "erode traffic" from their flights, the international traffic count continues to grow. Today, U.S. cities are enjoying expanded international air service. For the first time in the history of international aviation, U.S. cities have a voice. Generally, in practice the equation for bilateral negotiations are permeated with lop-sided input from a select group of corporate America: the airlines. When the economy is doing well, the airlines economically benefit from increased travel. Airlines plan for their own financial success. A community's success, however, is dependent upon the collective planning of government and the respective business community. When an economic development plan calls for international air service, if a U.S. carrier declines, it makes sense to allow any carrier, regardless of flag, to service the market. Businesses and communities are better equipped to determine what their own air service needs are. Deregulation occurred more than fifteen years ago. At this point there is no turning back. Therefore, let the marketplace work to its fullest potential.

To maximize the benefits of the Cities Program, consider the following recommendations:

145. The following information was secured from a telephone conversation with Jim Johnson, Deputy Director, Tampa Aviation Commission, April 21, 1994: Aero Costa Rica was awarded the authority to provide service between Tampa and San Jose, Costa Rica. United Airlines filed "doing business problem" petitions which delayed LACSC's original request. Because Costa Rica's peak season was approaching, the Costa Rican governments chose Aero Costa Rica over LACSC for "scheduling purposes." LACSC is contesting this decision. Aero Costa Rica is scheduled to begin service in July of 1994, providing service seven days a week.

- (1) Formally liberalize the Seventh Freedom rights to countries that provide reciprocal rights. This right, however, should be limited to U.S. city-pairs in which neither U.S. city is served by a U.S. carrier to the international destination in which authority is sought;
- (2) Extend the one-year authority period to reflect the service needs of the respective U.S. cities — allow for continuing agreements, unless public interest issues dictate otherwise;
- (3) Expand the program to include all-cargo operations; and
- (4) Incorporate USA-BIAS's definition of "firm plan" to ensure that unjust blocking tactics are not used by U.S. carriers.

Lastly, the National Airports System Plan should be reevaluated to take into account the use of airports otherwise not designated as international gateways. The use of more U.S. airports for international flights may shift the traffic flows away from the hub-spoke system of the 1980's. Further, the use of other U.S. airports, rather than the traditional gateways, may alleviate capacity constraints experienced by our national airport system. The Cities Program may just be the seed necessary to sprout a new international aviation policy for America.

VII. EPILOGUE

On September 25, 1994, Airports Council International (ACI-NA) held a Canada-U.S. Air Service Roundtable as part of their annual conference in Toronto, Canada. The meeting focused on prospects for resuming liberalization negotiations, particularly with respect to what steps airports and communities of each respective country should take next.¹⁴⁶ After lengthy discussions between the delegates present at the roundtable, a general consensus evolved that airports and communities need to take an active position with their respective governments by advocating a more liberal agreement.¹⁴⁷ ACI-NA suggested drafting a joint response to governmental leaders present at the conference.¹⁴⁸

A USA-BIAS representative discussed its most recent proposal to Secretary Federico Peña. USA-BIAS noted that one of the principal goals, since the inception of the 32 member coalition, was to secure open skies between Canada and the U.S.¹⁴⁹ It recognized that this goal was unreachable in the short term. The greatest obstacle in the Canadian

146. Program Brochure, Airports Council International - North America 3rd Regional Conference & Exhibition, September 25-28, 1994.

147. Based on author's notes taken at the roundtable discussions.

148. This article was sent for publication before a copy of the response could be secured.

149. Letter to Secretary of Transportation, Federico Peña, from USA-BIAS, September 23, 1994.

market is Toronto. One delegate referred to Toronto as the "big gorilla" of the Canadian passenger market.¹⁵⁰ Like Chicago, New York, and other large markets in the U.S., Toronto represents a lucrative Canadian market which is protected from foreign carriers. USA-BIAS suggested that there are many other markets in Canada, "including Calgary, Edmonton, Halifax, Montreal, and Vancouver which would receive immediate service from either U.S. or Canadian carriers, or both, were the market liberalized."¹⁵¹ It concluded that "a potential way to break through the current impasse would be to move to immediate, unphased liberalization of all U.S.-Canadian markets except Toronto."¹⁵² Despite this desire to implement a more liberal agreement without the inclusion of Toronto, USA-BIAS is aware of the position taken by some carriers that without access to Toronto they will "block any agreement."¹⁵³ However, in the spirit of the Cities Program, USA-BIAS suggested "[n]ow is the time to break through the impasse with a less than perfect solution, which will open many markets, both which bypass the greatest problem market."¹⁵⁴

The proposal submitted by USA-BIAS to Secretary Peña is as follows:¹⁵⁵

A. Elements of a New U.S./Canada Agreement:

1. The current 1978 bilateral is antiquated, very restrictive and should be replaced to spur travel and trade consistent with NAFTA.
2. The U.S. and Canada should agree to an open skies aviation market immediately between any U.S./Canada city-pair market except new services to/from Toronto. Eventually a liberal, totally open transborder regime should be put in place after a short transition period for new Toronto services. All existing rights, including existing services under the Regional Notes, should not be impaired during the transition period.
3. Because the phasing of new Toronto markets for both U.S. and Canadian carriers has been the most contentious aspect of a new open transborder aviation regime, we propose immediate implementation of an interim aviation regime while Toronto options

150. *See supra* note 147.

151. *Supra* note 149.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

continue to be explored by the U.S. and Canadian governments. The interim regime we propose is described in the following paragraphs of this [proposal].

B. Interim Aviation Regime:

4. Open market-driven access should be provided immediately to the carriers of both nations in any U.S./Canada market except for new Toronto services: Nonstop service would be authorized at once between any United States city and the Canadian cities of Montreal, Vancouver, Ottawa, Calgary, Edmonton, Regina, Saskatoon, Winnipeg, London, Hamilton, Quebec, Halifax, St. John's, and similar or smaller communities.
5. While U.S./Canada transborder routes (other than new Toronto routes) should be open for services immediately, multiple carrier designations by either country may be restricted for a further period in the new Vancouver and Montreal markets, provided the total transition period does not exceed three years. While the cities favor solutions which do not involve a carrier selection process in either country, it is recognized that this may not be possible in the transition markets.
6. All-cargo services should be able to operate in an open market-driven regime immediately, in all U.S./Canada city-pairs including those involving Toronto.
7. At the few capacity restricted airports, airlines of both nations should have fair access to comparable numbers of slots at marketable times of the day for transborder service. Assuming reciprocity by Canadian authorities at relevant Canadian airports, the U.S. should be prepared to grant Canadian carriers slot exemptions at applicable High Density Rule Airport (ORD, JFK, LGA) under new provisions of the recently-enacted Federal Aviation Administration Authorization Act of 1994. However, DCA should remain as it is today under its existing statute.
8. Airport access should be assured for United States and Canadian airlines in each other's territory consistent with full protection of proprietary rights of airport operators in both countries.

Canadian airport and community representatives present at the ACI-NA roundtable advised the group that they drafted a similar position paper for submission to the Canadian government.¹⁵⁶

156. *Supra* note 147.

The open skies issue may be at its ripest stage. Aviation officials will convene for the 50th anniversary of the Chicago Convention on October 30, 1994. USA-BIAS's proposal is fresh in the hands of our government officials; it should serve as the catalyst for open skies.

Consider: The international community should establish an open skies regime to all friendly nations. Rather than granting route authority, bilateral agreements should limit specific city-pairs. This would enable respective domestic and foreign city-pairs to secure international air service consistent with their economic development needs. The lucrative city-pair markets, likewise, could be protected by each nation.

Perhaps the visions of the Chicago Convention delegates of 1944 will come to fruition on the 50th anniversary. As stated by President F.D. Roosevelt:

As we begin to write a new chapter in the fundamental law of the air, let us all remember that we are engaged in a great attempt to build enduring institutions of peace. These peace settlements cannot be endangered by petty considerations or weakened by groundless fears. Rather, with full recognition of the sovereignty and juridical equality of all nations, let us work together so that the air may be used by humanity, to serve humanity.¹⁵⁷

Each country should rightfully protect their most lucrative markets. However, this should not preclude the establishment of an open skies regime. Open skies, by linking nations together, will promote the world economy and help facilitate world unification as we join hands to promote democracy.

157. *Supra* note 2.