Order 2020-10-13
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UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 23rd day of October, 2020

Joint Application of **DELTA AIR LINES, INC.** **WESTJET** **Under 49 U.S.C. §§ 41308 and 41309 for Approval of and Antitrust Immunity for Alliance Agreements**	**Docket DOT-OST-2018-0154**

ORDER TO SHOW CAUSE

I. SUMMARY AND OVERVIEW

By this Order, the United States Department of Transportation ("the Department" or "DOT") tentatively grants approval of, and antitrust immunity (ATI) for, the proposed alliance between Delta Air Lines, Inc. (Delta) and WestJet, subject to conditions as specified herein.[1] The Application of the parties (collectively, the "applicants" or the "Joint Applicants") seeks to expand their existing relationship to jointly plan, price, and share revenues along with costs under a joint venture (JV) covering routes between the United States and Canada, and seeks ATI to do so.

The applicants aim to create a seamless metal-neutral JV for U.S.–Canada (transborder[2]) travel, under the terms of which the two airlines propose to share profits on incremental revenue. If approved, Delta/WestJet would have a combined 27 percent share of scheduled air carrier transborder capacity, while the dominant carrier, Air Canada, would have 45 percent.[3]

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[1] As explained further below, the Department is approving the underlying Joint Venture Agreement (JVA), dated July 18, 2018, subject to some specific conditions that would result in a new draft agreement being submitted in the confidential record. The changes will address the scope of cooperation and the parties and operating entities participating in the joint venture with a grant of antitrust immunity.

[2] For the purposes of this Order, "transborder" exclusively refers to the U.S.–Canada market. This is distinguished from the U.S.–Mexico market, which is referred to as "transborder-Mexico" in this document.

[3] United Airlines, Inc. (United) would be the third largest carrier with 12 percent; the carrier has antitrust immunity with Air Canada subject to a number of significant carve outs that limits their alliance.

The Application highlights a number of arguments supporting the applicants' request, with the most compelling points being: 1) the largely complementary nature of the two carriers' networks—with limited direct overlap; 2) the proposed JV attaining critical mass to compete more effectively against Air Canada, which has antitrust immunity with United; 3) significant capacity increases and commencement of new routes that are unlikely to happen otherwise; and 4) a combined transborder network that would allow for a more seamless customer experience with greater efficiencies than the current codeshare partnership.

The above points notwithstanding, our analysis of the Application tentatively finds that a grant of ATI without remedies and conditions would likely *restrain* competition such that the JV would not be in the public interest. These concerns stem from the state of competition in the transborder market, the proposed alliance's potential for adverse effects in relevant markets, as well as provisions regarding the structure and future plans of the JV. The proposed remedies and conditions require the alliance partners to exclude Swoop, a wholly-owned subsidiary of WestJet Airlines Ltd. (WestJet Parent) that operates with an ultra-low-cost carrier (ULCC) model, from the JVA. The proposed remedies and conditions also include the divestiture of eight slot-pairs at New York City-LaGuardia Airport (LGA), the requirement for WestJet to provide interline access to certain U.S. carriers, DOT review of the alliance in five years, and the removal of exclusivity provisions (i.e., provisions that could prohibit or limit a carrier from engaging in a business relationship with another carrier) from the JVA. Without such conditions, we have assessed that the alliance could be harmful to competition without sufficient countervailing public benefits.

Worldwide air travel has gone through an extraordinary downturn following the COVID-19 outbreak and transborder markets have not been spared. Recognizing that our proposed grant of ATI is likely to outlast the current market environment, we believe it appropriate to conduct our analysis using market data prior to the onset of COVID-19, as that serves as the best proxy for the long-term state of transborder competition. The Department recognizes that, despite the unprecedented market turmoil, ATI under the current circumstances may help the Joint Applicants during the recovery period, and the Department intends to monitor the long-term effects of the proposed alliance closely through its oversight process, annual reports, and the proposed five-year review to determine whether the alliance has produced public benefits that outweigh any reduction in competition.

The Department tentatively concludes that, subject to remedies to address our concerns, the proposed immunized alliance is unlikely to materially harm competition in relevant markets. We also tentatively conclude that, with remedies in place, a grant of ATI is required by the public interest as the proposed JV would achieve important public benefits—including added capacity and a more robust secondary competitor that could potentially invigorate competition in transborder markets.

Based upon these tentative findings and conclusions, the Department proposes to approve the alliance agreements and grant ATI. 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 seven (7) business days following the end of the answer period in which to submit replies.

II. Background

a. Application

The Application for antitrust immunity proposes a revenue- and cost-sharing alliance that provides for metal neutrality between the Joint Applicants and covers all flights between the United States and Canada, as well as connecting flights within the two nations.[4] The JVA between the parties is "evergreen;" however, either party has the right to terminate after a period of ten years.[5] The Joint Applicants maintain that the proposed JV will "invigorate U.S.–Canada competition and deliver robust consumer benefits" by creating a seamless and metal-neutral joint venture that provides for sharing of incremental profits and losses.[6] The Joint Applicants argue that antitrust immunity will allow coordination where Delta and WestJet can create a larger network with an enhanced product, improved consumer convenience and choice, increased operating efficiencies, and greater scale to compete with the far larger Air Canada/United alliance.

By combining their relatively small market shares, the Joint Applicants posit they will have the scale necessary to be a significant competitor in the United States–Canada market. The Application claims the JV will cover 8,100 city-pair markets and will feature 50/50 sharing of incremental profits and losses. The proposed alliance is expected to enable the increase in transborder capacity of the combined Delta/WestJet network by 20 percent over five years as compared to an arms-length relationship, the addition of six new routes, and expanded service on 14 existing routes. Efficiencies of the combined operations would optimize aircraft utilization, enhance schedules, and lower costs. Furthermore, an immunized partnership would optimize connectivity between Delta and WestJet's hub networks, and lower prices by allowing the carriers to jointly set fares and manage seat inventory. Using Delta's internal planning model, the applicants estimate an annual consumer benefit of $241 million.[7] The Application highlights some of the new services and benefits that Delta has established through its geographically-similar transborder-Mexico JV with Aerovias de Mexico, S.A. de C.V. (Aeromexico).

Delta and WestJet have had a codeshare relationship since 2011, but argue that future growth is limited, as the two carriers "remain competitors with no incentive to divert traffic from their own flights."[8] WestJet has grown extensively since starting transborder services in 2004 as a low-cost carrier (LCC), but believes that future success depends on an evolution toward a full-service carrier model with broader geographic reach. With the proposed JV, WestJet expects to improve its U.S. point-of-sale and enhance its product offering among business travelers in the largest transborder markets. Similarly, Delta expects that an immunized partnership with WestJet will provide it improved access to Canada-originating passengers. The applicants argue

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[4] The United States and Canada have had an Open Skies agreement in effect since 2007.

[5] Joint Applicants' Response to Order Requesting Additional Information, Docket DOT-OST-2018-0154-0012 at 26 (July 2, 2019).

[6] Joint Application of Delta and WestJet for Approval of and Antitrust Immunity for Alliance Agreements (Joint Application), Docket DOT-OST-2018-0154-0001 at 3 (October 10, 2018).

[7] Joint Application, page 4.

[8] Joint Application, page 7.

their networks are largely complementary, with the only direct nonstop overlap being the New York City–Toronto city-pair market.

In 2018, Swoop, a wholly-owned subsidiary of WestJet Parent, began ULCC operations as a distinct and separate entity from WestJet. Swoop was created with the goal of targeting price-sensitive passengers with a low-cost structure to offer competitive fares. The carrier is a "completely unbundled, no-frills, low-fare air travel option in point-to-point leisure markets"[9] that offers no connections to any carrier (including itself), and also lacks a frequent flyer program. The Joint Applicants have included Swoop as part of their JV as a tool to deploy in certain markets where a ULCC product is better suited. They argue that Swoop is not a competitor to the JV and is outside the JV decision making process, with the ability to deploy its assets unilaterally in most markets.

b. FILINGS

Delta and WestJet submitted their application for antitrust immunity on October 10, 2018. The Department issued a notice suspending the procedural schedule and granting interim access to confidential documents on October 16th. The Joint Applicants submitted supplemental documentation on November 9th. The Department reviewed the entirety of these filings and determined that additional information was needed to complete our review of the Application. The Department then issued an Order Requesting Additional Information on April 15, 2019.[10] The Joint Applicants responded to the Department on July 2nd, followed by a second responsive submission on September 26th. After reviewing the totality of evidence provided, we issued a Notice on November 8th declaring the record substantially complete and establishing the procedural schedule.[11] In response to docketed requests, the Department issued Order 2019-11-15 on November 27th that extended the initial comment period to December 11, 2019.[12]

Answers were submitted by several parties. The Delta Master Executive Council of the Air Line Pilots Association, International (Delta MEC) submitted comments on December 11. In their comments, the Delta MEC states that while immunized alliances, such as the proposed JV, have the potential to grow both U.S.-carrier capacity and aviation jobs, they can also be used to effectively outsource U.S.-carrier flying to foreign carriers. The Delta MEC argues that such outsourcing is fundamentally inconsistent with the Department's statutory objectives required under 49 U.S.C. § 40101. The Delta MEC specifically requests that the Department impose reporting conditions similar to those in Order 2019-11-14 approving Delta's "Blue Skies" JV with Air France/KLM and Virgin Atlantic, whereby the Blue Skies partners are required to provide both annual reports on JV implementation and a detailed self-assessment at the JV's

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[9] Joint Application, page 15.

[10] Order Requesting Additional Information, Docket DOT-OST-2018-0154, Order 2019-4-4 (April 15, 2019).

[11] Notice Establishing Procedural Schedule, Docket DOT-OST-2018-0154-0016 (November 8, 2019).

[12] On November 26, 2019, Alaska Airlines, Air Line Pilots Association Int'l, JetBlue Airways Corporation, and Southwest Airlines Co. filed a Joint Consent Motion for an extension of time to submit Answers in Docket DOT-OST-2018-0154. Specifically, they requested an extension of time to file Answers from December 6 to December 11, 2019. This request was made to allow for additional time for coordination considering the intervening holiday of Thanksgiving, as well as previously scheduled international business travel.

five-year anniversary.[13] Here, the Delta MEC requests that the JV partners report specifically on how their coordinated operations are impacting the balance of flying, growth, and U.S. aviation jobs within the transborder market. The Delta MEC further requests that these annual report submissions be made available to interested parties, including labor interests, subject to the Department's confidentiality protections established under 14 C.F.R. § 302.12 (Rule 12).

Alaska Airlines (Alaska) submitted comments on December 11, 2019, stating that while they do not oppose ATI generally, the Joint Applicants in this case have failed to pass the statutory tests under 49 U.S.C. §§ 41308 and 41309 that the Department uses to evaluate ATI applications. Alaska argues that the proposed JV would be neither pro-competitive nor beneficial to consumers.[14] Alaska points out that WestJet, after the filing of the Application, implemented five new transborder routes and increased capacity on 23 others. Alaska argues that this expansion demonstrates that ATI is not necessary for service expansion, citing specifically the new WestJet daily hub-to-hub flights between Calgary and Atlanta. Alaska cites the ATI case for the alliance between Hawaiian Airlines and Japan Airlines (JAL), in which the Department concluded that the evidence demonstrated that Hawaiian had the ability and incentive to increase capacity without ATI, in response to market demand. DOT further found that Hawaiian and Japan Airlines had not submitted compelling evidence to show that the additional capacity could only be achieved with ATI.[15] Alaska also raises concerns with Delta's stated goal of establishing an industry-leading network throughout the Americas through its partnership with Aeromexico.

Alaska highlights WestJet's dominant position in western Canada, and its status as the sole independent carrier in Canada that operates a network able to offer connecting feed to other carriers. Alaska is concerned that ATI will further increase WestJet's dominant position and enable it to foreclose interline traffic onto its network. Alaska is convinced, based on past experience with Delta's partner carriers, that it will be foreclosed from western Canadian markets on an interline basis, which will lead to reduced consumer choice and higher fares. Alaska also points out that, while the Department precluded exclusivity provisions in the Delta/Aeromexico joint venture,[16] Aeromexico still terminated its codeshare with Alaska. Alaska requests that, should the Department grant ATI in this case, it do so only with the following conditions: a prohibition against exclusionary conduct, a requirement for WestJet to provide interline access and frequent flyer program (FFP) access to non-aligned carriers, and a five-year term limit.[17]

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[13] *See* Virgin Atlantic Airways, Ltd., Delta Air Lines Inc., Societe Air France, Koninklijke Luchtvaart Maatschappi N.V. and Alitalia Compagnia Aerea Italiana S.p.A. – Approval of and Antitrust Immunity for Alliance Agreements (Blue Skies Case), Docket DOT-OST-2013-0068.

[14] Answer of Alaska Airlines Inc. to Joint Application of Delta and WestJet for Approval of and Antitrust Immunity for Alliance Agreements, Docket DOT-OST-2018-0154-0025 at 2 (December 11, 2019).

[15] Order to Show Cause, Hawaiian Airlines, Inc. and Japan Airlines Co., Ltd. – Antitrust Immunity for Alliance Agreements (Hawaiian/JAL Case) Docket DOT-OST-2018-0084, Order 2019-10-5 at 11 (October 3, 2019).

[16] *See* Final Order, Delta Air Lines, Inc. and Aerovias de Mexico, S.A. de C.V. – Approval of and Antitrust Immunity for Alliance Agreements (Delta/Aeromexico Case) Docket DOT-OST-2015-0070, Order 2016-12-13 (December 14, 2016).

[17] Answer of Alaska Airlines Inc. (December 11, 2019), page 19.

JetBlue Airways Corporation (JetBlue) filed an Answer requesting that DOT condition the approval of ATI to account for a number of anticompetitive effects of the proposed JV. These conditions include the removal of exclusivity clauses in the JV Agreement, exploring a requirement that Canadian immunized carriers offer connectivity and special prorate agreements to new-entrant U.S. carriers, and WestJet's divestiture of the LGA slots it acquired from Delta under the 2011 Delta/US Airways slot swap remedy.[18] The carrier believes that approving the transaction would lead to the only two Canadian network carriers being part of immunized alliances. Without a provision in a DOT order requiring connectivity, it would be exceedingly difficult for a new entrant to serve the transborder market, a situation further exacerbated by Air Canada's pending acquisition of Air Transat.

Much of JetBlue's argument focused on how the JV would effectively undo the 2011 slot swap remedy, pressing the Department to require WestJet to divest LGA slots. The carrier highlights evidence in the record indicating that Delta would reacquire effective economic and operational control of its previously divested slots. Although legal restrictions on WestJet's ability to transfer slots have expired, JetBlue states that "DOT continues to have an obligation to oversee competition at LGA and ensure that the intent of the 2011 remedy is not being undermined" and, if Delta is allowed to reacquire control of its previously divested slots, it would obviate an important piece of the 2011 remedy.[19]

Southwest Airlines Co. (Southwest), in its December 11th Answer, states that the Department's granting of ATI without requiring WestJet to divest its 16 LGA slots to one or more U.S. LCCs is not in the public interest. Following the 2011 slot swap, Delta's share of LGA slots dramatically increased with significant anticompetitive implications. The DOT/FAA remedy was critical in counterbalancing these effects, limiting Delta's share of LGA slots to 46 percent. Under the proposed JV, Delta/WestJet will be jointly setting fares, controlling inventory, and acting as a single carrier. According to Southwest, the JV will, in effect, return control of WestJet's LGA slots to Delta, and "eliminate the independent low-fare competition that WestJet now provides."[20] Southwest believes that if the Department were to approve the proposed JV without a slot divestiture remedy, it would permit Delta to recapture the very slots it was required to divest in 2011. According to Southwest, the need for preserving the 2011 remedy persists, as Delta's slot share is 59 percent greater than the next largest holder, American Airlines, Inc. (American), with the three U.S. legacy carriers accounting for 83 percent of all slot holdings at LGA.

On December 23rd, the WestJet Master Executive Council of the Air Lines Pilots Association, International (WestJet MEC) filed a Reply expressing their belief that the Joint Applicants should share their growth equitably, and asking DOT to provide for annual reporting

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[18] In 2011, the Department approved a transaction between Delta Air Lines and US Airways, wherein Delta transferred certain slots at Ronald Reagan Washington National Airport (DCA) to US Airways in exchange for certain slots held by US Air at LGA. The Department conditioned its approval on the divestiture of a number of slots at each airport to "eligible new entrant and limited incumbent carriers." *See* Petition for Waiver of the Terms of the Order Limiting Scheduled Operations at LaGuardia Airport, 76 Fed. Reg. 63,702 (October 13, 2011).

[19] Answer of JetBlue Airways Corporation, Docket DOT-OST-2018-0154-0026 at 6 (December 11, 2019).

[20] Answer of Southwest Airlines Co., Docket DOT-OST-2018-0154-0024 at 4 (December 11, 2019).

requirements "so that both pilot groups can evaluate the progress of the JV"[21] and the promised benefits, including expanding service on at least 20 routes, an expected 20 percent capacity increase, and creation of new jobs. While the WestJet MEC does not believe the structure of the JV, with profit sharing on incremental growth, incentivizes "labor arbitrage," oversight is important in ensuring that both nations' carriers and employees benefit. The pilots' group is asking that the Joint Applicants' annual reports specifically address the impacts of the JV on labor, and that those reports be made available to interested parties under DOT's existing Rule 12 practices.[22]

Spirit Airlines, Inc. (Spirit) filed a Reply to the Answers of JetBlue and Southwest stating that, in the event the Department approves the applicants' request, 16 LGA slots should be reallocated under the same eligibility criteria that DOT applied in the proceeding through which WestJet originally acquired its slots (i.e., limited to new entrants or incumbents with less than five percent of LGA slots). Furthermore, the slots should be transferred to the Department for reallocation to a single low-fare airline, without payment to the Joint Applicants, based on the public interest criteria of 49 U.S.C. § 40101. If DOT does not pursue *gratis* reallocation, it should limit the Joint Applicants' remuneration to what the carrier paid in 2011 to originally acquire the slots.

Spirit agrees with JetBlue and Southwest that the proposed JV would return control of WestJet's slots to Delta, with WestJet no longer being the independent LCC that qualified it to obtain slots in 2011. The competitive situation at New York airports is the same-to-worse compared to 2011 with Spirit, despite efforts to acquire more slots, being limited to the same number of LGA slots today as it had in 2011.

The Joint Applicants, in their Reply, argue that none of the objectors have shown the proposed JV would harm or reduce competition on any route or in any relevant market. The proposed JV would not have an adverse impact on competition at LGA and a slot divestiture is not justified as there is no claim of harm to competition on the New York City–Toronto city pair. With ATI, four carriers would remain in this city-pair market. The applicants contend that the evidence JetBlue cites regarding Delta's internal plans for LGA does not reflect a joint plan, and that actual planning would be discussed after a grant of ATI.

The Joint Applicants contend that approval of the JVA would not undermine the 2011 divestiture as the "remedies never contemplated a perpetual restriction on the divested slots," and "DOT/FAA specifically rejected proposals that perpetual restrictions be adopted."[23] The Joint Applicants note that the five-year encumbrance on the use of slots has expired, with all restrictions on WestJet's use of the slots lifted. Delta and WestJet do not directly compete at LGA, but rather at the broader New York City (NYC)–Toronto level—in which case the relevant market for assessing airport concentration should be all of New York City. The Joint Applicants assert that, at the NYC level, LCCs have been able to enter since 2011, with significant expansion in services. In the event the parties are forced to divest, they would be forced to end service on the LGA–Toronto-Pearson (YYZ) route, or pull service from other communities.

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[21] Reply of the WestJet Master Executive Council of the Air Line Pilots Association, International, Docket DOT-OST-2018-0154-0032 at 1 (December 23, 2019).

[22] Rule 12 refers to regulations governing confidential information submitted under 14 C.F.R. § 302.12.

[23] Reply of the Joint Applicants, Docket DOT-OST-2018-0154-0033 at 8 (December 23, 2019).

In rejecting Alaska's claim that "enabling more effective competition with other immunized alliances is not a basis for granting ATI," the Joint Applicants cite past DOT orders where the Department referenced strengthened inter-alliance competition as a public benefit, and reiterate that such benefits would not occur here without ATI. In contrast to the Hawaiian/JAL case that Alaska uses as an analogy, the Joint Applicants state their proposed JV is much broader and does not rely on a single trunk route. With zero airport-pair overlaps, and a highly complementary route network, the Joint Applicants view Alaska's and JetBlue's fears of reduced competition as unwarranted. The Joint Applicants also reject calls for removal of the exclusivity provision, terming their relationship as "permissive" rather than exclusive, as well as rebuffing requests for mandating interlining and access to WestJet's frequent flyer program as unprecedented and overly regulatory. The Joint Applicants reason that the American-Qantas precedent on mandating interlining does not apply in the transborder market, with short distances and low barriers to entry. The Joint Applicants further maintain that Alaska's and JetBlue's calls for a term limit have no basis, and DOT did not pursue it in Blue Skies, opting instead for periodic self-assessment—an approach acceptable to the applicants. The Joint Applicants do not object to the Delta MEC's request for periodic self-review, but do oppose requests for access to annual reports as they contain highly-confidential business secrets that would stifle their willingness to share detailed information that is critical to the Department's oversight process.

In response to the applicants, Southwest filed a Surreply and corresponding motion for leave to file on December 31st, where the carrier cites evidence in the confidential record as indicative of the Joint Applicants' plans that would result in higher fares on impacted routes. Southwest reiterated that LCC entry and growth is not possible at LGA without divestitures. The Joint Applicants responded on January 13, 2020, saying that the documents cited by Southwest "reflect the unilateral views of Delta network planners expressed nearly two years ago"[24] with respect to substituting LGA–Toronto service with Delta-operated dual-class regional jets. In the absence of ATI, the Joint Applicants have not committed to any plans on the route.

The Delta MEC and the WestJet MEC filed a joint Surreply along with a motion for leave to file on January 15, 2020. The MECs state that monitoring of joint ventures by interested parties is essential and there is no principled basis for withholding Rule 12 access to annual progress reports as the information is identical in nature to the confidential information the applicants have already produced as part of the Application. The MECs argue that, given their concerns about the JV's implementation and impacts on labor, access to these annual reports would allow them to provide timely and relevant feedback to the carriers and the Department.

The WestJet MEC followed with a Surreply on February 7th, where they state capacity cuts on LGA–Toronto contemplated by Delta's internal plans are inconsistent with the public benefits argument put forward in the Application. They ask that DOT condition the grant of immunity to require WestJet to continue operations on LGA–Toronto (YYZ) for a period of five years; if DOT does not pursue that option, and instead seeks slot divestitures, these should not come from WestJet's LGA slot holdings, but rather Delta's, as it has a far larger number of slots. The pilots' representatives point out that LGA–YYZ is a hub-to-hub route with a large potential for increasing connecting traffic and, under normal circumstances, the Joint Applicants should be highlighting capacity increases on such a "trunk route," instead of capacity decreases. This

24 Response of the Joint Applicants, Docket DOT-OST-2018-0154-0037 at 2 (January 13, 2020).

discrepancy suggests that the proposed JV would be harmful and not provide the stated public benefits if DOT does not require a capacity floor for WestJet at LGA. The Delta MEC, in its February 14th Surreply, supported the WestJet MEC's recommendation to restrict the Joint Applicants from transferring WestJet's LGA slots and restrict utilization of those slots to WestJet mainline for the duration of the proposed JV. The Joint Applicants' Surreply of February 13th opposes the recommendation of the WestJet MEC to condition a grant of immunity to require WestJet to maintain LGA–YYZ operations.

Southwest's February 14th Surreply asks the Department to reject the WestJet MEC's proposal as the carriers, after joint venture approval, would operate with aligned economic interests—leaving the matter of which carrier operates a given flight irrelevant. In a February 21st second Surreply, the WestJet MEC clarified that DOT's condition for maintenance of WestJet capacity at LGA should not be limited to Toronto, but may apply to any transborder route from LGA.

Business Council of Manitoba, Travel Manitoba, Calgary Airport Authority, Cengage Learning, and Voyages à La Carte provided letters in support of the proposed JV. The letters highlighted consumer and economic benefits that the applicants' combined transborder network could provide.

III. DECISIONAL STANDARDS

As part of its review under applicable statutes, the Department engages in a two-step analysis of joint venture agreements that are submitted with a request for approval and a grant of antitrust immunity. Under 49 U.S.C. § 41309(b), the first step involves determining whether the agreements are "not adverse to the public interest," based on competitive factors (competitive effects analysis). If the Secretary finds that the agreements are consistent with the public interest, she shall approve them; if, on the other hand, the Secretary finds that the agreements substantially reduce or eliminate competition, she shall disapprove them unless they are necessary to meet a serious transportation need or to achieve important public benefits.[25] A party seeking approval of the agreement or request must establish the transportation need or public benefits; a party opposing the agreement has the burden of establishing that the agreement substantially reduces competition and that less anticompetitive alternatives are available.[26]

The second step of the analysis concerns a grant of antitrust immunity under 49 U.S.C. § 41308, thereby exempting the carriers entering into the agreement from application of U.S. antitrust laws to the proposed JV. If DOT has found that the agreements are not adverse to the public interest under section 41309, and the Secretary decides, that it is "required by the public interest" she *may*, at her discretion, 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.[27] The Department normally conducts a detailed examination of public benefits (public benefits analysis) 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

[25] 49 U.S.C. § 41309(b).
[26] 49 U.S.C. § 41309(c).
[27] 49 U.S.C. § 41308(b).

under section 41309, but countervailing needs and benefits warrant their approval, the statute requires the Secretary to grant ATI to the extent necessary to allow them to proceed with the transaction.[28] 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.

Immunized alliances allow two or more carriers to achieve merger-like efficiencies in covered markets. Because approval of the JVA would have intended commercial effects similar to those resulting from a merger, the Department examines the Application under the Clayton Act test. The Clayton Act test is used to predict the competitive effects of a proposed merger, and requires us to consider whether a grant of ATI is likely to substantially reduce competition and facilitate the exercise of market power. The Department applies the Clayton Act test to determine whether approval of the Application would allow the applicants to profitably charge supra-competitive prices or reduce service or product quality below competitive levels in any relevant market. In examining whether an alliance is likely to create or enhance market power, we examine: (1) whether the alliance would significantly increase market concentration; (2) whether the alliance would cause potential competitive harm; and (3) whether new entry into the market would be timely, likely, and sufficient either to deter or to discipline the potential competitive harm.

Where new entry would not otherwise be sufficient to address competitive harm, or where there are external factors, such as infrastructure constraints in the marketplace that exacerbate competitive harm, remedies may be necessary to address potential competition problems resulting from the alliance.

IV. COMPETITIVE EFFECTS ANALYSIS

The Department has assessed the impacts on competition resulting from the proposed JV by undertaking three levels of analysis of relevant markets: (1) at a broad network level; (2) at a country-pair level; and (3) at a city-pair level. The analysis also considers the potential competitive effects related to infrastructure constraints, barriers to entry, and potential unilateral effects stemming from the alliance.

a. MARKET ANALYSIS

Canada, with a population of 38 million, is the second-largest international passenger air travel market for the United States after Mexico. Following the European Union and China, it is the largest trading partner for the United States and a significant business market for U.S. carriers. Representing over 50 percent of transborder air travel demand, Toronto is, by far, the largest market in Canada, and is also the main hub of the Joint Applicants' chief rival—Air Canada.

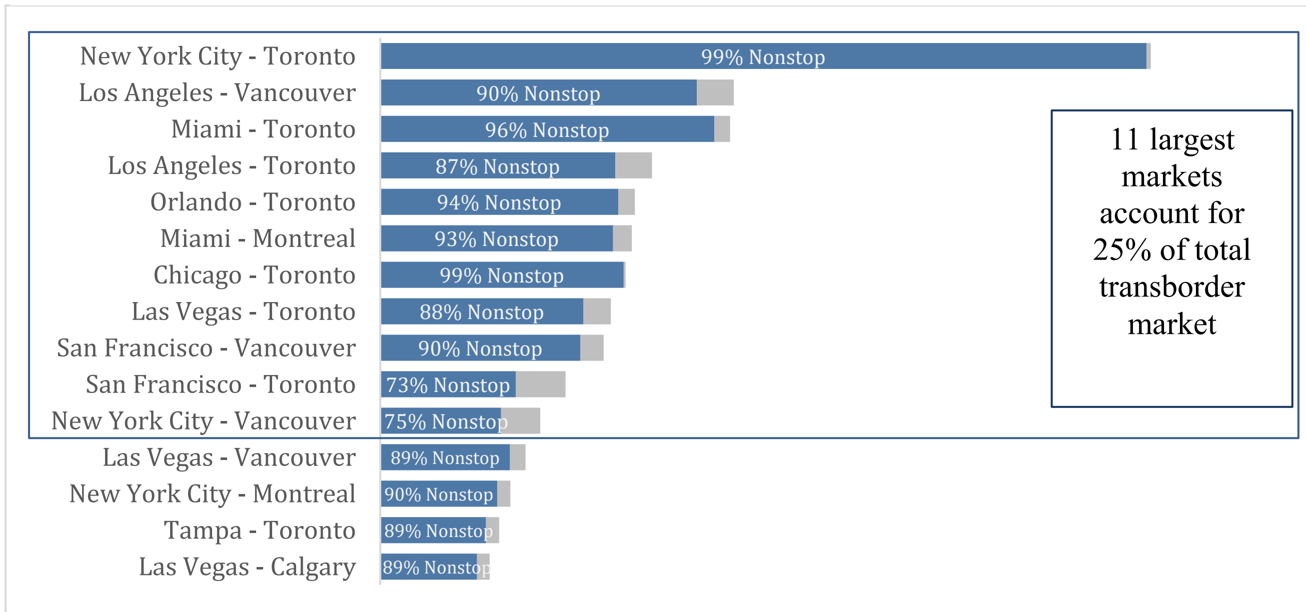
The largest city-pair market is New York City–Toronto, accounting for six percent of transborder demand; in this market, 99 percent of passengers fly nonstop. The eleven largest city-pair markets account for 25 percent of travelers between the United States and Canada. Figure 1, below, illustrates a key competitive dynamic in the broader U.S.–Canada market. With

[28] 49 U.S.C. § 41308(c).

ample nonstop service between the largest cities, few passengers use connecting itineraries for their travel.

Figure 1

Percentage of Connecting Passengers in the 15 Largest Transborder Markets



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Overall capacity in the U.S.–Canada market has grown commensurately with GDP at rates between 2.5 and 3 percent annually over the last decade—indicative of a mature market with little stimulation. The state of the overall market is easier to discern from the past performance of individual carriers, revealing significant shifts in carrier market shares. The table below highlights the carriers in the market as well as their trends and current share of the market.

Table 1

Transborder Capacity Trends and Share[29]

Airline	Airline Code	2014 Seats	2019 Seats	5-year Growth	*Capacity Share*	*Alliance Capacity Share*
Air Canada	AC	11,560,800	17,579,300	52%	*45%*	*57%[30]*
United	UA	5,947,800	4,541,100	-24%	*12%*	
WestJet	WS	5,230,800	5,949,000	14%	*15%*	*27%*
Delta	DL	2,996,500	4,247,400	42%	*11%*	
Swoop	WO	--	504,300	--	*1%*	
American	AA	4,585,700	3,045,100	-34%	*8%*	
Porter	PD	1,335,400	1,327,900	-1%	*3%*	
Alaska	AS	1,580,200	1,006,500	-36%	*3%*	
Other	--	616,400	834,900	35%	*2%*	
Total		*33,853,600*	*39,035,500*	*15%*	*100%*	

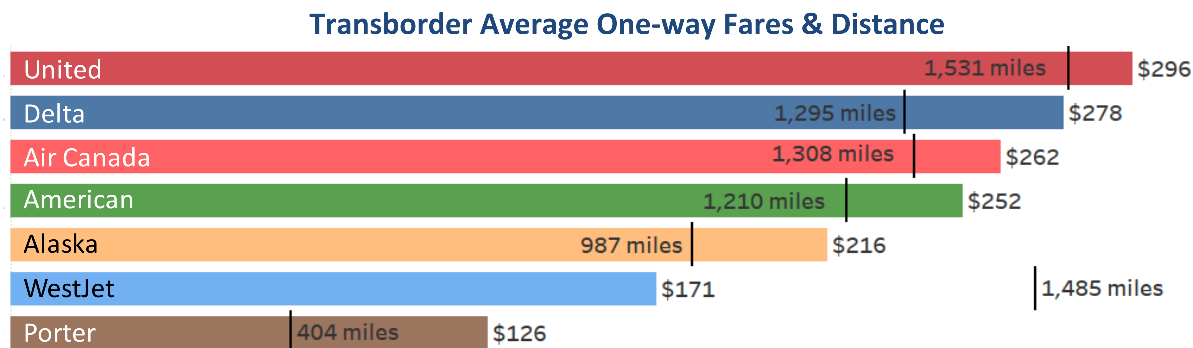
OAG Schedule Data

Recent capacity trends show that the Joint Applicants and Air Canada are the only carriers that have added substantial capacity in the market in recent years. Conversely, Alaska, American, and United have made significant cuts in their services to Canada—despite substantial overall network growth over this period; Canada now represents a smaller share of their respective networks. These cuts range between 24 and 36 percent, even in the case of United, which has immunity with Air Canada. Other than WestJet, Porter Airlines (Porter) and Alaska are the only non-legacy carriers providing measurable competition, albeit with capacity shares of only 3 percent each.[31]

Our analysis of passenger fares between the United States and Canada indicates a large gap between legacy carriers and non-legacy carriers (see Figure 2). The lowest fare carriers are Alaska, WestJet, and Porter, with Porter's fares being half that of the cheapest legacy carrier and significantly below the hybrid carriers as well. While much of Porter's low fares are attributed to its very short stage lengths, it is also clear that the carrier's position in the broader transborder market is not as robust as that of its competitors.[32] Alaska, which also flies shorter stage lengths (but out of the Pacific Northwest), captures higher fares, although still less than that of its legacy rivals.

[29] Capacity and passenger figures in this table, and all subsequent tables, are rounded to the nearest hundred.
[30] United, while enjoying immunity with Air Canada, does not currently have a revenue-sharing joint venture for transborder markets.
[31] Air Transat, Sunwing, Flair Airlines, and Frontier have limited service in the market at 0.8, 0.4, 0.3, and 0.1 percent capacity share, respectively.
[32] Porter flies largely within eastern Canada and the eastern United States with stage lengths below 700 miles.

Figure 2



DOT, SABRE MI,[33] and Carrier-Submitted Data – YE 2018Q3

On average, Delta's average fare is more than one-and-a-half-times that of its proposed partner. While observers might predict that WestJet's fares would increase and converge with Delta's in a proposed JV, it is important to note that WestJet focuses much of its transborder operations on Canadian origin passengers visiting sun destinations in the United States while Delta is focused on business passengers originating from the United States.

1. Network Level

With most ATI cases, such as those over the Atlantic or Pacific, the Department identified relevant regional markets to include regions beyond the European or Asian hub(s)—such as United States to Africa, South Asia, Southeast Asia, and so forth. This case, however, mirrors the transborder-Mexico joint venture of Delta–Aeromexico in that regional relevant markets outside the transborder geography (i.e., United States–Europe connecting over Canada) are outside the scope of the JV Agreement; such markets also constitute a small portion of U.S.–Canada traffic. The scope of the Joint Applicants' JV limits their revenue sharing to transborder flights between the United States and Canada.

2. Country-Pair Level

When assessing the competitive effects that the proposed JV could have on the transborder market, the level of market concentration (before and after the potential consummation of the transaction) is a useful indicator as to whether the Joint Applicants would be able to exert market power. For context, we refer to the Herfindahl-Hirschman Index (HHI) value as a measure of market concentration for generally assessing transactions, with index values above 2500 considered highly concentrated markets per the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines.[34] According to the guidelines, in highly concentrated markets, "transactions that increase the HHI by more than 200 points are presumed likely to enhance market power."[35]

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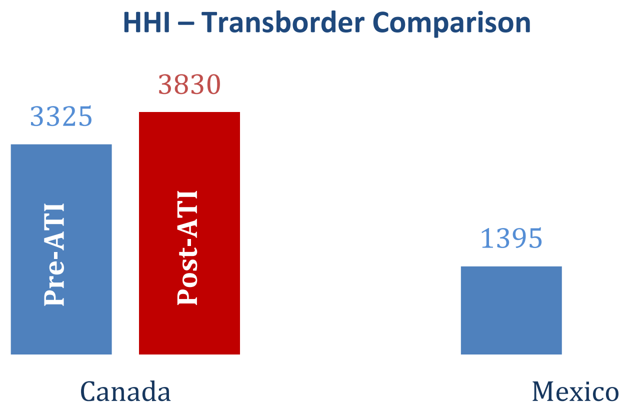
[33] SABRE Market Intelligence.

[34] *See* U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines at section 5.3 (August 19, 2010).

[35] "Herfindahl-Hirschman Index," U.S. Department of Justice, https://www.justice.gov/atr/herfindahl-hirschman-index, accessed February 10, 2020.

Figure 3



SABRE MI – YE 2018Q3

The transborder market has an HHI of 3325 prior to ATI—well above the 2500 determinative threshold for highly concentrated markets. The change in concentration resulting from the proposed JV is 505—well above the 200 value which triggers significant competitive concerns and increased scrutiny. In comparison, the geographically analogous transborder-Mexico market has an HHI of 1395.

The HHI figures for Canada are constructed treating Air Canada and United as a single entity, based on the longstanding immunity the two carriers have, with some level of coordination in transborder markets. If this assumption is relaxed, on the understanding that the two carriers do not share revenues, are not engaging in a metal-neutral JV, and do compete to some extent, the index value is 2180—considerably lower and indicative of a moderately concentrated market. The change in HHI *before* versus *after* the Joint Applicants' proposed JV is 510 under the relaxed assumption; still a substantial change, but in a more competitive market.

The practical state of competition is likely to be somewhere between the two sets of figures presented, suggesting the transborder market is concentrated enough that the Department should carefully review and address any specific anti-competitive effects. With the high level of concentration in the market, along with the considerable potential that the proposed JV would significantly increase concentration, our analysis indicates that the transaction, if not conditioned, could enhance the Joint Applicants' ability to exert market power and thwart potential competition.

Next, we assess some actual characteristics of competition in the market—including changes in capacity, number of competitors, and fares. Transborder markets are akin to domestic and transborder-Mexico markets due to the levels of trade and travel, along with distances traversed and the aircraft types deployed. Despite the similarities, market indicators reveal that the state of

competition is not as healthy in transborder markets compared to domestic and transborder-Mexico markets for a number of reasons, including:

- Transborder fares are 12 percent higher compared to transborder-Mexico markets of similar distance and passenger density.[36]
- Transborder fares are 14 percent higher compared to domestic U.S. markets of similar distance and passenger density.
- Transborder capacity growth has lagged both domestic United States and transborder-Mexico over the past five years.
- The higher degree of market concentration in transborder markets compared to U.S. domestic markets.

The transborder air travel market consists of large volumes of passenger flows, with many cities in the United States well within the range of regional jets. Despite what would appear to be low barriers to entry, only two new carriers, Swoop and Frontier Airlines (Frontier), have introduced new transborder service in the last decade—both within the last two years.[37] Carriers have indicated to the Department that high taxes and airport operating fees in Canada make market entry difficult for new entrants, especially for LCCs and ULCCs that rely on low cost structures that enable them to profitably offer lower fares to consumers. JetBlue, Southwest, and Spirit do not serve Canadian airports, and it is unclear whether Frontier's nascent market presence will remain once the transborder market recovers following the COVID-19 public health emergency. In contrast, the transborder-Mexico market has much greater penetration by LCCs and ULCCs. The dearth of LCC presence, and recent capacity reductions from some legacy carriers in this market, weaken the ability of market forces to discipline a strengthened Delta/WestJet alliance.

In view of the competitive issues present in the transborder market, the combination of Delta and Westjet is likely to have both positive and negative impacts. As shown in Table 1, of the transborder carriers that have a material presence in the market, only Air Canada, WestJet, and Delta have increased capacity over the past five years—at 52, 14, and 42 percent, respectively. United, American, and Alaska have dramatically reduced capacity, by 24, 34, and 36 percent, respectively. Porter's capacity has remained flat. A combined Delta/WestJet, placing them as a clear number two by transborder capacity share, puts the proposed JV significantly ahead of the next largest competitor, American. The transaction is likely to enable the two carriers to gain the necessary scale to compete more effectively against Air Canada/United. However, the same dynamic that provides Delta/WestJet with critical mass will also likely make it more difficult for carriers with a smaller presence to compete, and those carriers will have fewer options to do so. The Department tentatively finds that these issues would need to be remedied to ensure that competition is not substantially reduced (see further below).

3. City-Pair Level

In analyzing the relevant city-pair markets for this transaction, the Department has reviewed two elements. First, the Department looked more broadly at travel in the city-pair markets, on a

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[36] Analysis in this and the subsequent bullet point is based upon DOT DB1B and carrier-submitted data for year-ending third quarter 2018.
[37] Flair Airlines, a Canadian-ULCC startup, briefly offered transborder service between 2018 and 2019.

connecting and nonstop basis, to assess whether there is potential for a significant reduction in competition—referred to as share-shift analysis. Second, the Department identified nonstop overlap routes where the proposed JV carriers both operate services, and assessed the competitive consequences in such markets.

Share-shift Analysis

To assess the proposed JV's competitive implications in all city-pair markets, including connecting and nonstop traffic, we conduct a share-shift analysis. As part of this process, all transborder O&D city pairs are stratified based on passenger density (i.e., number of O&D passengers per day), stage length (route distance), and the number of carriers competing on that route, with competitors being defined as those airlines with greater than five percent market share. Delta and WestJet are then combined to reflect a single operating entity and comparisons are made between the pre- and post-ATI number of competing carriers to identify markets that could be significantly affected.

Table 2

Share-shift Analysis Summary[38]

Competitors *Pre*-ATI	Competitors *Post*-ATI	Markets	Bi-directional Passengers	Percent of Total Passengers
2	1	4	2,600	0.0 %
3	2	165	1,894,000	7.8 %
4	3	146	2,961,300	12.2 %
5	4	19	2,260,000	9.3 %
1	2	16	239,500	1.0 %
2	3	7	18,500	0.1 %
3	4	1	12,200	0.0 %
No Change		1,377	16,965,700	69.7 %
Total		*1,735*	*24,353,800*	*100%*

MIDT Adjusted T100 – YE 2018Q3

Based upon the analysis, the proposed JV would be unlikely to lead to a significant decrease in competition for just over 70 percent of passengers. The remaining 30 percent—approximately 7.1 million annual passengers—could potentially see a reduction in competition. Markets that go from three to two competitors, or two to one competitors, pose significant competitive concerns and represent approximately eight percent of the transborder market, totaling 1.9 million passengers. The 169 markets facing a substantial reduction in competition mostly involve travel to western Canada (Calgary, Edmonton, Winnipeg) where WestJet is strongest. Many of the markets that go from three to two competitors include large markets such as: Calgary–Los Angeles/ NYC/ Orlando; Vancouver–Hawaii; Winnipeg–Las Vegas; and Edmonton–NYC. For

[38] Markets in which the number of competitors increases post-ATI are due to Delta and WestJet being below the five-percent threshold to be counted as a competitor pre-ATI, but above five percent once combined.

comparison purposes, in our analysis of the transborder-Mexico market as part of the Delta–Aeromexico ATI proceeding, we identified 160,000 annual passengers—representing less than one percent of the market—that would face a substantial reduction in competition.[39]

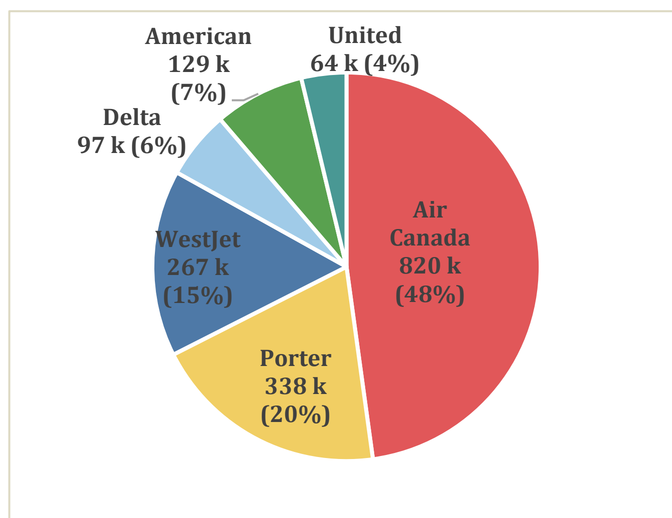
Markets that go from four to three competitors, or five to four competitors, comprise the remaining 22 percent of the transborder market that could face a potential reduction in competition. While some of these markets may warrant a closer look, as a general rule, these markets do not raise a significant concern if competing airlines are able to mount a competitive response following ATI. As discussed in detail below, the New York City–Toronto market, which is also a nonstop overlap route, is a market that could see a potential reduction in competition due to the combination of an immunized alliance and infrastructure limitations, preventing market forces from addressing competition concerns.

Nonstop Overlap Routes

In airline antitrust analysis, the overlap routes between the parties are the most significant area for potential competitive harm as the combination would effectively result in the loss of a direct competitor on such a route. Delta and WestJet offer largely complementary networks with the only nonstop city-pair overlap being New York City–Toronto. Prior to the COVID-19 public health emergency, WestJet offered six daily Boeing 737 flights on LGA–YYZ, while Delta offered three daily regional jet services on New York-Kennedy (JFK)–YYZ.

Figure 4

New York City – Toronto Market Shares



MIDT Adjusted T100 – YE 2018Q3

Under the proposed JV, New York–Toronto would go from five competitors to four, with a combined Delta/WestJet accounting for just over 20 percent market share. Our analysis of this market shows competitive concerns, despite having four competitors under the scenario in which the applicants are granted ATI. Under normal conditions, market forces would be able to address competition concerns, despite the high levels of concentration. However, market entry

[39] *See* Order to Show Cause, Delta/Aeromexico Case, Order 2016-11-2 at 12 (Nov. 16, 2016).

for services involving NYC airports, particularly for new entrants, is not likely, timely, or sufficient to address our concerns due to the persistent inability of carriers to access slots for new and/or additional services at LGA and JFK, as well as entry barriers at Newark (EWR) resulting from its IATA Level 2 status.

In addition, the Department's review of the case record has identified a specific competition concern in the NYC–Toronto market stemming from Delta's preliminary network plans on the LGA–YYZ route.[40] Concerns about potential reductions in capacity on this route have also been raised by several commenters, who cite a confidential planning document as well as an e-mail by a Delta executive further validating the preliminary plans for the LGA–YYZ route.[41] The New York City–Toronto market is not only the largest transborder market, constituting 6 percent of U.S.–Canada demand, but also the second largest international air travel market from the United States.[42] The LGA–YYZ route is a hub-to-hub route where the Joint Applicants are able to connect passengers on both ends.

The Department's experience in reviewing immunized partnerships shows that—under a properly-structured and metal-neutral JV—alliance partners are incentivized to add capacity on hub-to-hub routes that bridge the partner carriers' networks. While there may be an initial loss in competition on hub-to-hub routes—particularly for time-sensitive passengers—by allowing carriers to act as a joint entity, this can be offset by alliances increasing capacity as such routes linking the carriers' networks will see increased demand. The network plan cited in the Application does not reflect this dynamic, but instead suggests a potential reduction in competition with commensurate effects on fares and capacity. The Joint Applicants present a different view of their network plans. They submit that the "possible substitution of high quality dual class regional jet service" is a means to "strengthen competition on the LGA-Toronto route …" and that the plans are preliminary, dated, and only reflect the views of Delta's network planners.[43] Irrespective of how preliminary or old the network plans are, they reflect the best available insight in the record regarding what the Joint Applicants' combined network will look like following a JV.

WestJet acquired slots from a mandated divestiture designed to address Delta's dominance at LGA and subsequently used those slots for services in the New York–Toronto market as an LCC—and continues to use them to maintain these services even as it changes its business model to a full-service carrier. Evidence in the record suggesting that the alliance would reduce capacity in the largest hub-to-hub market, and simultaneously exacerbate Delta's dominance at LGA, presents significant competitive issues the Department must address, as discussed further below.

b. Infrastructure Limitations

Commenting parties have identified a potential reduction in competition associated with combining the slot holdings of Delta and WestJet at LGA. We tentatively find that the slot

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[40] Joint Application, Appendix 3, Footnote 20.

[41] Answer of JetBlue Airways Corporation (December 11, 2019), page 6.

[42] Sabre Market Intelligence – CY 2019 O&D international passengers.

[43] Response of the Joint Applicants (January 13, 2020), pages 2-3.

holdings at LGA constitute a relevant market in which we must assess competitive impacts of the transaction. LGA is the most over-subscribed U.S. airport. It is concentrated and would become more so with the proposed JV. Delta conducts 45 percent of operations at LGA, placing the carrier in a leading position at the capacity-constrained airport.[44] The number and type of competitors operating at LGA has remained largely static in recent years. In 2019, LCCs combined account for 14 percent of operations, using slots they have largely acquired through required divestitures of slots obtained from incumbent legacy carriers. Excluding WestJet from this figure reduces the LCC share of LGA operations by 1.5 percentage points.

The Department has taken action in the past to ensure adequate competition at LGA, including with respect to Delta's overall position in New York City, as well as the mix of carriers operating. In 2011, as part of the Department's review of Delta's slot swap with US Airways,[45] DOT determined that Delta's increased slot holdings could have a high potential to affect competition negatively at LGA, could increase the number of monopoly or dominant markets, and could lead to higher fares.[46] Delta's share of slots, 51 percent, was determined to be a dominant position, and a divestiture of 32 slots allocated by auction was determined to be necessary to promote new competition and discipline Delta's increased market concentration in New York City.[47] The Department notes that Delta's significant portfolio of slots at New York John F. Kennedy International Airport (JFK) further enhances Delta's position in the New York City market. WestJet and JetBlue acquired 16 slots each by means of the 2011 divestiture proceeding, with five other U.S. carriers unsuccessfully bidding. Under the divestiture terms, following a five-year period, all encumbrances on the divested slots were lifted, with no restrictions on transfers. Since 2011, access limitations and market concentration at LGA have remained the same, with almost no opportunity for new entry outside of competition remedies.

The Joint Applicants argue that "the relevant metric for assessing airport concentration is Delta's share of operations at the NYC area airports as a whole, not just at LGA,"[48] and no concentration concern exists when Delta's operations are measured across all NYC-area airports. They further argue that LCC carriers have significantly increased their NYC presence in recent periods, particularly when factoring in all NYC-area airports. The Department disagrees with both assertions. In our analysis of the slot swap that triggered the 2011 proceeding, we assessed this very issue and determined that the three NYC area airports are not interchangeable, stating that "we are confident in concluding that, while fares at one of the three DC-area or NYC-area airports can exert a minor influence on fares at the others in some markets, it is quite clear that the airports are not economic substitutes."[49] There is no evidence in this record indicating that

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[44] Delta's percentage of scheduled operations is a reasonable proxy for its slot holdings, with the figure presented being lower than Delta's percentage of LGA slot holdings; *see* Joint Applicants' Response to Order Requesting Additional Information, page 45.

[45] *See* Petition for Waiver of the Terms of the Order Limiting Scheduled Operations at LaGuardia Airport, Docket FAA-2010-010.

[46] *See* Petition for Waiver of the Terms of the Order Limiting Scheduled Operations at LaGuardia Airport, 76 Fed. Reg. 63,702 (October 13, 2011).

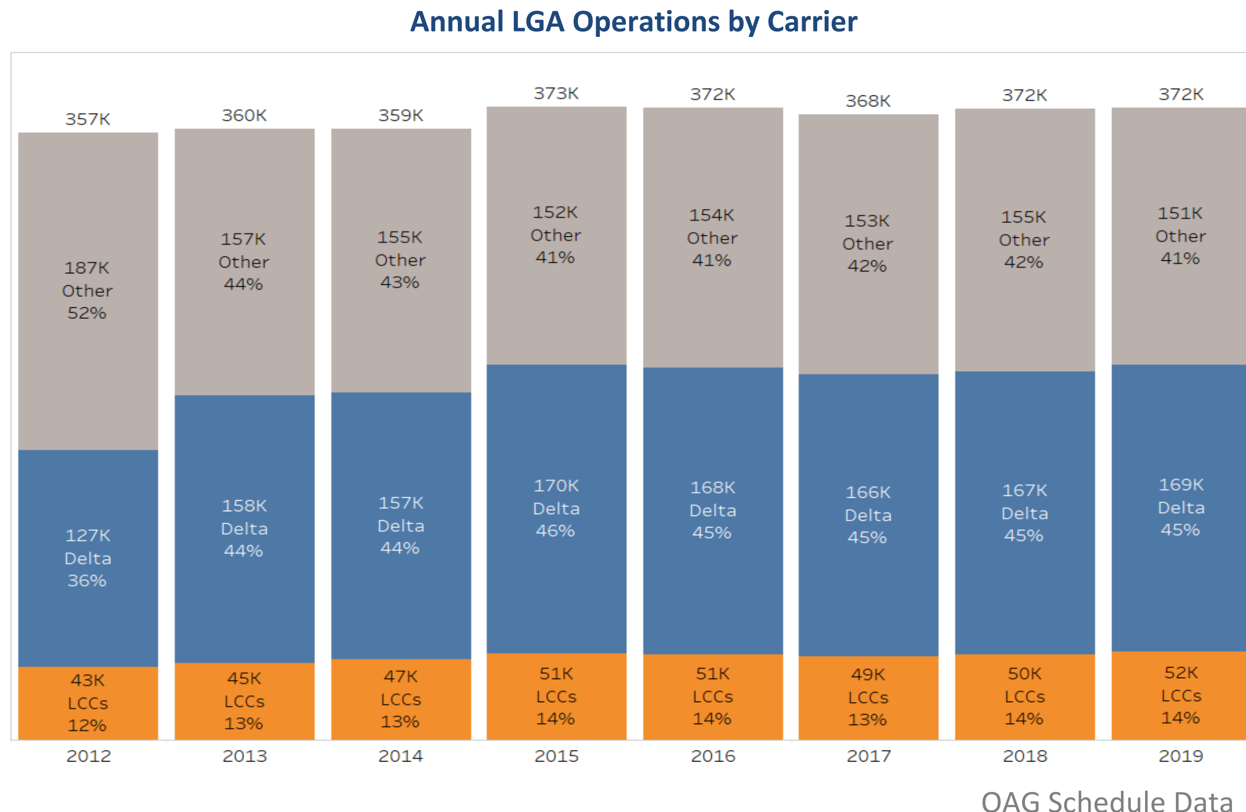
[47] *See* Notice on Petition for Waiver of the Terms of the Order Limiting Scheduled Operations at LaGuardia Airport, 75 Fed. Reg. 26,322 (May 11, 2010).

[48] Reply of the Joint Applicants (December 23, 2019), page 10.

[49] Notice on Petition for Waiver (May 11, 2010), page 26,332.

our previous findings establishing LGA as its own relevant market distinct from other airports are any less valid today.

Figure 5



A revenue-sharing and metal-neutral JV, in which Delta and WestJet act as a combined entity, would revert effective control of WestJet's acquired LGA slots to Delta.[50] The slot holdings of carriers at LGA have not materially changed in the last five years, and the concerns that warranted DOT's 2011 divestiture persist. With the transaction effectively increasing Delta's holdings, the carriers' combined slot portfolio would surpass the threshold of concern that was established in 2011. Furthermore, the transaction would decrease LCC slot holdings at LGA, with a likelihood of increased fares in at least some markets where WestJet, as an independent LCC, was a price leader.

The Joint Applicants argue that WestJet's presence in New York City is minimal, and, even if the transaction is treated as a slot transfer, Delta's holdings at LGA would only increase by one percent.[51] In this proceeding, carriers have represented to the Department that access to LGA is effectively closed for additional services, and it is clear that the secondary market for slots at LGA is not liquid. WestJet's slot holdings may appear to be a small amount relative to Delta's existing holdings, yet they remain a substantial foothold in a market where opportunities to acquire slots are exceedingly rare and where price competition matters. Additionally, evidence

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[50] *See* Delta_000000268 and Delta_000036288. *See also* Answer of JetBlue Airways Corporation (December 11, 2019), page 6.
[51] Reply of the Joint Applicants (December 23, 2019), page 8.

in the record indicates there will be an accretive impact on Delta's competitive presence in New York City stemming from the transaction.

In view of all of the evidence, the Department has identified three specific concerns with respect to the effect of the transaction on the New York City market: (1) capacity reductions in the direct overlap market with the loss of a competitor, leading to higher fares; (2) reduction of capacity in a hub-to-hub market, which is effectively closed to newcomers, suggesting that the Joint Applicants may be predisposed to exert market power rather than incentivized to add capacity as they would be in an open market; and (3) increase in the concentration of slots at LGA, already a highly concentrated airport, and effectively undoing the 2011 divestiture, the foundation for which is still evident in this case record. We tentatively find that these concerns must be remedied to ensure that the transaction does not substantially reduce competition (see further below).

c. SWOOP AND ULCC OPERATIONS

The Department has tentatively found the potential for competitive harm based upon how the JVA treats Swoop's inclusion within the proposed JV. WestJet established Swoop as a wholly-owned subsidiary of WestJet Parent, to be an independently managed and operated ULCC based on a simplified, low-cost business model. While WestJet is developing into a full-service network carrier with a product designed to appeal to business travelers, the Swoop entity is developing a ULCC business model designed to stimulate traffic with low fares supported by a low-cost structure. Swoop therefore runs its operations as simply as possible and independently schedules, prices, markets, and revenue manages its point-to-point leisure market network. To maintain the lowest cost structure possible, Swoop does not codeshare, offer a frequent flyer program, sell connecting itineraries (even between its own flights), or interline with other carriers, including with WestJet. Swoop's business model is deliberately designed not to operate within a comparably complex and cooperative immunized joint venture in which airlines link their networks, and jointly manage the planning, pricing, marketing, and yield management of traffic across their combined networks.

The Joint Applicants' decision to include Swoop in the proposed JV raises competitive issues, especially when compared with the scenario in which Swoop remains a standalone ULCC focused on growth and stimulating traffic in point-to-point markets, including U.S.–Canada transborder markets underserved by LCCs. As discussed, we have identified several competitive concerns with the transborder market, in which LCCs and ULCCs constituted only six percent of U.S.–Canada capacity in 2019, and in which a number of established carriers are retrenching. Swoop's introduction of transborder ULCC service in 2018 was a significant development in offering a unique business model in a market that had experienced little recent entry from new competitors.

We tentatively find that the proposed inclusion of Swoop in the JV will inhibit its intended role as a vigorous competitor in transborder markets and will thereby reduce competition. The JVA specifies a number of potential restraints on the ability of Swoop (or other ULCCs within the proposed JV) in the transborder market, which stifle its ability to remain a robust

competitor[52] and restrict its ability to evolve by limiting its business model.[53] The Joint Applicants seek to incorporate Swoop into the JV for financial purposes, but not for the purpose of integrating Swoop's operations into the metal-neutral JV, because Swoop's low-cost business model is as incompatible with the commercial strategy of the proposed JV as it is with that of WestJet. This fundamental incompatibility was the reason why Swoop was established as a standalone airline. The net result of incorporating Swoop, as proposed by the Joint Applicants, is to reduce its incentives to grow aggressively,[54] adding capacity and stimulating traffic in large markets by profitably charging lower fares supported by its lower cost structure.

The terms governing Swoop's participation within the proposed JV will materially impact transborder competition—particularly in several markets that could see a substantial reduction in competition (identified in our share-shift analysis). In evaluating appropriate means of addressing the competitive harm, we assessed the scenario in which Swoop is required to operate outside of the proposed JV. In that scenario, Swoop's exclusion from the JVA would have a positive impact on competition by preserving a robust competitor in the transborder market and free it from the constraints imposed by the Joint Venture that are likely to curtail its potential growth.

We also examined simply removing clauses related to potential restraints of Swoop, while the carrier remains within the proposed JVA. The removal of those clauses, however, does not address the incompatibilities of the business models and the misalignment of resulting economic incentives that drive the substantial reduction in potential competition. This misalignment of business and operational models and objectives is precisely why WestJet created Swoop as a standalone entity after making the decision to transform WestJet from a hybrid low-cost carrier into a full-service business-oriented, network airline. Although Swoop is ultimately part of the WestJet corporate structure, Swoop is an air carrier separate from WestJet, with its own air operator certificate, and its status as an independent entity and its low-cost structure would provide significant competitive discipline.

To address the competitive harm that we believe is likely to occur, and for which market forces are not sufficient to counter, we propose to exclude Swoop from the JVA. Absent this remedy, we tentatively would find that the alliance substantially reduces competition.

d. POTENTIAL EXCLUSIONARY EFFECTS

In their filings, Alaska and JetBlue express concerns regarding the potential for vertical foreclosure, citing past experiences. We agree with the concerns expressed and tentatively find that a remedy providing a means for third-party carriers to access feeder traffic is necessary. WestJet's Canadian network is, or can be in the case of a prospective entrant, a key input to enable the profitable operation of a U.S.-carrier's service to Canada. WestJet, at present, is the only carrier in Canada that is able to provide meaningful connecting options and is not currently

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[52] The Joint Applicants argue otherwise and state that JVA places no capacity limitations on Swoop's operations; we do not concur with this viewpoint based on definitions in the JVA under Exhibits A-6 and A-8, and the application of the definitions to Section 6.4.2.6 and Article 11 of the JVA.

[53] *See* Joint Venture Agreement Among Delta Air Lines, WestJet, and WestJet Airlines Ltd., Exhibit A at A-8 (July 18, 2018).

[54] *See* Joint Venture Agreement (July 18, 2018), Exhibit C Section 4.2.3.

in an immunized arrangement. Under the proposed JV, WestJet's participation in an immunized partnership may foreclose smaller and less-established U.S. carriers from accessing WestJet's network for connections, making new entry (or sustaining existing services) difficult.

We propose to require WestJet, upon request, to provide interline access to U.S. carriers not part of a transborder immunized alliance.

e. Tentative Findings From The Competitive Analysis

The competitive effects analysis has identified a number of concerns relating to transborder competition that could result from the transaction. These inter-related concerns include: high levels of market concentration—further magnified by a grant of ATI in the country-pair relevant market; a relatively large number of city-pair markets that are at elevated risk of losing competition; the loss of Swoop as an independent-ULCC and the most significant new entrant in the past decade; specific concerns on the Joint Applicants' plans for the New York City–Toronto market; and, the increased slot-holding concentration at LGA resulting from the transaction.

Upon review of the Application and evidence submitted, our analysis indicates that, if appropriate remedies are adopted to address competitive concerns, sufficient competition would likely exist to address these concerns. Subject to these remedies being accepted, the Department tentatively concludes that the proposed alliance does not substantially reduce competition, is not adverse to the public interest, and should therefore be approved under Section 41309.

V. Public Benefits Analysis

In gauging the potential for substantial public benefits of an immunized alliance, the Department assesses several types of potential benefits that include:

- *Reduction in double marginalization*—where itineraries that previously involved interline connections between two carriers were subject to a markup by each carrier, a JV allows the carriers to price jointly with a single markup—often resulting in a lower price for the total trip;
- *Cost and operational efficiencies*—the larger entity can take advantage of economies of scale with benefits passed on to consumers in fare reductions and/or better service;
- *Broader network coverage*—allows for more ways to flow traffic across the network, including more points served, which can also reduce fares;
- *Network and capacity coordination*—enables the JV carriers to better respond to market conditions and align schedules to minimize travel times;
- *Increased capacity*—with the increased demand for their services resulting from lower fares, better schedules, a broader network and improved service quality, the JV carriers would be incentivized to offer more services and other market participants may also respond; and
- *Frequent flyer benefits*—more opportunities to earn frequent flyer miles through joint promotions, alignment of accrual and redemption amounts and increased opportunities to burn miles within a larger network.

Many of these traditional benefits are hallmarks of immunized alliances that encompass long-haul trans-oceanic routes between distant hubs. In contrast, the U.S.–Canada transborder market

is analogous to a domestic market, with more point-to-point travel and a more limited regional scope. As such, traditional benefits seen in long-haul ATI cases, such as a reduction in double marginalization, broader network coverage, and increased capacity could be limited in this case.[55] This is supported by the fact that 90 percent of Canada's population lives within 100 miles of the U.S. border. Further, Delta is already present in Canadian cities that represent 92 percent of U.S.–Canada demand, with three of its U.S.-hubs well suited for serving Canada (Detroit, Minneapolis, and Seattle).[56]

While diminished, these potential benefits are still likely to materialize to a significant extent as a growing portion of Delta's transborder passengers connect on to WestJet and vice versa. Just over 60 percent of U.S.–Canada O&D passengers fly nonstop, but this figure is significantly lower for Delta, at under 30 percent. The airline still utilizes a traditional hub-and-spoke model in connecting the United States with Canada, and a deeper partnership with WestJet would offer a more expansive network in Canada. An enhanced alliance would likely produce substantial benefits for many connecting passengers that use Delta, including: increased frequencies, better time of day coverage, improved access to lower fare buckets, frequent flyer recognition, and a more seamless travel experience across the two carriers. WestJet's Calgary hub alone would give Delta access to 16 destinations in western Canada that it does not currently serve from Minneapolis. The Joint Applicants assert that reduction in double markups will produce $26 million in annual benefits; we believe this estimate to be reasonable.[57]

WestJet, with a larger transborder presence than Delta, is a more point-to-point carrier, with a much larger portion of its U.S.–Canada passengers flying nonstop. Despite its large U.S. footprint, 25 percent of its passengers are U.S. point-of-sale, compared to 51 percent for Delta (see Figure 6 below). The data confirm the Joint Applicants' contention that they require an integrated JV, with appropriate incentives to increase codesharing and on-line connections, to better market WestJet's services to American consumers.

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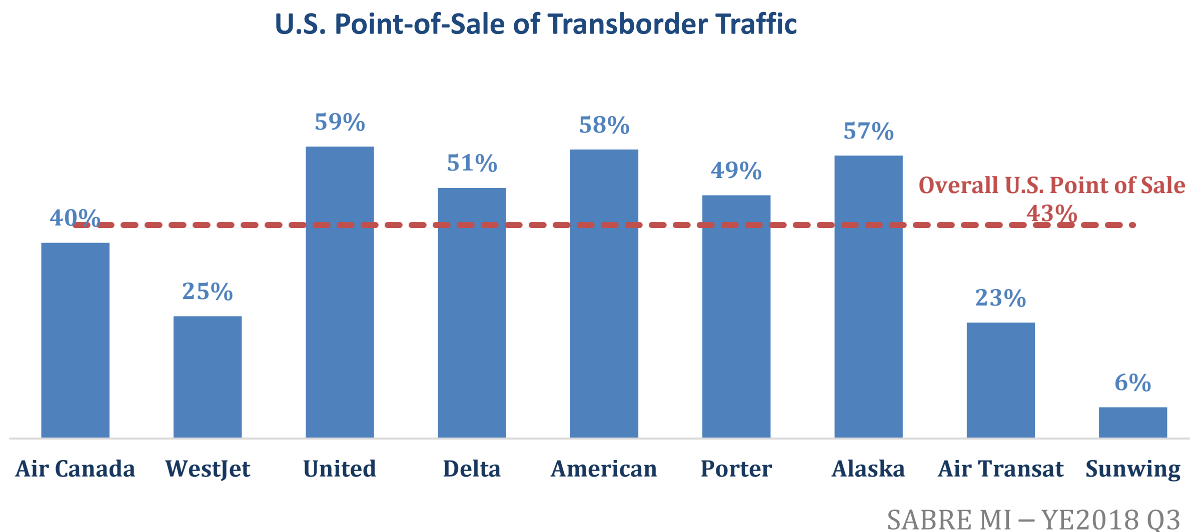
[55] Joint Venture Agreement (July 18, 2018), Exhibit C Section 4.2.3.
[56] The distance between Detroit-Wayne County and Toronto-Pearson, at 214 miles, is identical to the distance between Washington, D.C.-DCA and New York City-LaGuardia.
[57] Joint Application, page 48.

Figure 6



The Joint Applicants cite several operational efficiencies that ATI would enable, such as airport co-location, as well as identifying routes where they expect to cross-utilize each other's fleets based on aircraft efficiencies and seasonal variations in demand. By utilizing a broader network and flowing traffic over partner hubs, the carriers would, in many instances, be able to offer joint itineraries with reduced travel times. Such increases in efficiencies, lowering of costs, reduction of double marginalization (even if less than what we would typically expect), improved efficiency in pricing itineraries, enhanced brand presence across the border, and broader network are net positives to consumers.

While these benefits are material, they are, by themselves, not enough to indicate that a grant of immunity is required by the public interest. There are two notable expected benefits, however, that are particularly compelling in the circumstances of this case: 1) the proposed JV would increase capacity and add service in up to six new markets; and 2) the proposed JV would provide the scale and synergies required to become an effective number two competitor and to compete more aggressively with the much larger Air Canada/United partnership. We believe that some of the proposed new routes, as well as capacity increases across the entire geography would not occur absent the JV and agree with the Joint Applicants' argument that it would be difficult for the carriers to go it alone against the significantly larger Air Canada in a market that has seen limited overall growth in the preceding years.

a. Swoop Benefits

In the competitive effects analysis section, we tentatively determined that Swoop's inclusion in the proposed Joint Venture would result in a significant reduction in potential competition and recommended the exclusion of Swoop from the alliance. In reaching that determination, we undertook an assessment of public benefits that could inure from Swoop's participation within the proposed JV. Our review indicates that, while there are substantial disbenefits due to the reduction in potential ULCC competition in transborder markets, there are no measurable public benefits that stem from the inclusion of Swoop in the alliance, thus providing no offsetting benefit to "credit" against the identified competitive harm. To the contrary, it appears that

including Swoop within the JV would likely result in lower capacity compared to what would otherwise occur, resulting in higher fares.

We tentatively find that the expected public benefits identified in the Application, which the applicants argue are not obtainable without a grant of immunity, do not flow from the inclusion of Swoop in the proposed JV. As noted, Swoop is a standalone entity that is not incorporated into the JV in a metal-neutral fashion, in which prices, capacity, marketing, and yield management are coordinated over the carriers' combined networks. The manner in which Swoop is accommodated in the JV demonstrates that the inherent nature of its business model is ill-suited for driving benefits under the proposed immunized alliance and is not likely to do so in the foreseeable future. Furthermore, the Joint Applicants have not provided evidence that supports the contention that public benefits only obtainable through ATI could be derived from the inclusion of Swoop within the proposed JV.

b. Tentative Findings From The Public Benefits Analysis

The Department tentatively finds that the benefits identified in the Application are substantial and unlikely to occur absent immunity. These tentative findings do not apply to Swoop's participation in the proposed JV—which we would not expect to provide any material benefits and which we have addressed with proposed remedies.

We therefore propose that the Joint Applicants should be granted immunity subject to conditions to address the competitive concerns outlined above, and that the Department review the alliance in five years' time. This would allow the Department to assess if benefits have accrued, the state of competition in the transborder market, whether the enhanced positioning of the JV has negatively impacted competition, if the carriers are allowing interline access to their network or engaging in any exclusionary conduct. It would also exert some pressure on the Joint Applicants not to take undue advantage of their heightened market position in a competitively sensitive market. Under the five-year review proposal, the Joint Applicants' immunity would not expire, and would continue absent specific Departmental action.

In view of the discussion above, the Department tentatively finds that the proposed alliance, as conditioned and remedied, will generate substantial public benefits that could not otherwise be achieved and will generate those benefits soon after a grant of antitrust immunity. We therefore conclude that a grant of antitrust immunity is required by the public interest under Section 41308.

VI. Tentative Decision with Remedies

As detailed in this Order, we believe that considerable anticompetitive risk is present in approving the Application, in part due to the structural nature of the transborder market—which limits potential benefits and magnifies risks—but also because of issues specific to the proposed JV that have been identified. Furthermore, in light of several of the same competition concerns related to anticompetitive risk, in our assessment, the totality of public benefits from granting immunity would not, absent appropriate remedies, meet the "required by the public interest" standard necessary for consideration of ATI.

However, we believe that the remedies below would address a sufficient number of our critical competition concerns in such a manner that the alliance would no longer remain inconsistent with the public interest. Applying the conditions below, we are proposing to approve the Joint Applicants' alliance agreement and grant antitrust immunity for their proposed JV.

a. Exclusion Of Swoop

As previously discussed, provisions in the proposed JV agreement that restrict Swoop's ability to compete and grow undermine competition in an otherwise mature market that has seen little new entry—especially from LCCs and ULCCs—in the last decade. Swoop is a carrier that would participate in the JV for financial settlement, but not for a metal-neutral integration of operations over a combined network because the carrier provides no connectivity, is solely point-to-point, and does not engage in code-sharing, interlining, or frequent flyer program participation. The Department's analysis indicates that Swoop's participation in the JV would only serve to restrain capacity and competition and would produce no measurable consumer benefit of significance.

The most common benefits the Department looks for when granting ATI are reductions in double marginalization, broader network coverage, network and capacity coordination, frequent flyer benefits, and capacity increases with downward pressure on fares. We do not believe Swoop's participation in the proposed JV produces identifiable public benefits in any of these categories based upon the structure and incentives in place for Swoop. The Department is asked to effectively immunize Swoop and thereby enable it to potentially "pull its punches" without the countervailing public benefits that would justify ATI.

The Joint Applicants state that, to move forward with the transaction, they require ATI inclusive of Swoop, as WestJet Parent, WestJet, and Swoop "are not separate economic actors."[58] We note, however, that the Department has received alliance agreements, including from alliances involving Delta, in which subsidiary airlines of an applicant carrier have been excluded from the alliance agreement(s) for which the applicants seek approval.[59] The Department believes excluding Swoop from the proposed JV would not have a deleterious impact on the alliance, since Swoop was designed to be operationally independent and limited in the transborder market, except for its partial inclusion in the financial settlement mechanisms.

As a condition of granting immunity, the Department proposes that the Joint Applicants restructure their agreement to remove Swoop from the JVA and proposed JV such that any interactions with the proposed JV would be conducted on an arm's length basis. We propose that Swoop's holding company, WestJet Parent, be removed as a party to the JVA, as immunizing WestJet Parent could be extrapolated to include immunity to its subsidiary Swoop. We are aware of the challenges created by restricting commercial cooperation with an entity within a corporate family. Those challenges are driven by the commercial decision to create separate, diversified business models among the entities. To achieve the Department's expected

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[58] Joint Applicants' Response to Order Requesting Additional Information, page 22.

[59] Joint Application for Approval of and Antitrust Immunity for Alliance Agreements, Delta Air Lines, Inc. and LATAM Airlines Group, S.A. – Antitrust Immunity for Alliance Agreements (Delta/LATAM Case) Docket DOT-OST-2020-0105-0001 (July 8, 2020).

outcome that WestJet Parent's Swoop entity would operate in transborder markets independently, without a grant of immunity, we tentatively find that it is necessary for the Joint Applicants to develop protocols. Those protocols may be submitted to the Department as implementing agreements after the issuance of a final order but prior to implementation of the JVA.

We also propose that the Joint Applicants remove all restraints placed on ULCC operations in the JVA, including caps and markets served, by striking sections 5.2.2.7, 6.4.2.6, and 6.14 of the Joint Venture Agreement, as well as Exhibit C Section 4.2.3 of the JVA. The Department tentatively directs that the Joint Applicants provide a revised JVA in the docket by the Answer date of this Order in time for interested parties to review and comment subject to Rule 12 confidentiality procedures.

Majority-owned affiliates

As part of the Application, the parties "request that the grant of ATI extend to their majority-owned corporate affiliates."[60] The Department tentatively finds that it will not extend the grant to all majority-owned affiliates, but only to those specified in Ordering Paragraph two. The proposed grant of immunity includes WestJet's affiliate, WestJet Encore Ltd., which we consider to be a covered affiliate as it operates WestJet marketed services to regional markets. Our review of the case record and analysis of the competitive effects raises some concern with respect to new competition in the transborder market. As has been our standard practice, if the parties desire to extend immunity to a corporate affiliate in the future, the Joint Applicants should submit amended implementing agreements to the Department for review.

b. SLOT DIVESTITURE

The Department has identified likely competitive harm that stems from the proposed transaction's impacts at LGA and believes a divestiture of LGA slots equivalent to WestJet's current holdings is required to address the harm. Ample cause exists to believe that the Joint Applicants would reduce capacity in this market—compounding the competitive concern. Reduction of capacity on routes that drive many of the purported benefits of an immunized alliance is not the type of competitive effect we would expect to see in a pro-competitive, pro-consumer immunized alliance. Where market conditions are able to facilitate new entry and competitive responses, the above concerns normally would be allayed. With LGA being a capacity-constrained airport, this factor not only prevents countervailing competition to discipline the Joint Applicants reduction in capacity, it is this very factor that *allows* them to profitably reduce capacity. Further to our concerns, the transaction effectively increases Delta's slot holdings at LGA, effectively taking control of slots from an LCC to the entrenched carrier.

We tentatively propose that the Joint Applicants divest 16 slots at LGA and tentatively find that this remedy will address our competitive concerns. Our remedy is predicated on the ability of the divestiture recipient carrier to enter the market and provide competitive service. If the recipient carrier is not able to do so because of facility or other constraints, even after acquiring the necessary slots, the effectiveness of the remedy would be moot. Should the recipient carrier be unable to find accommodation at LGA after demonstrating that they have exhausted

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[60] Joint Application, footnote 2.

reasonable efforts to seek accommodation for terminal space and other necessary infrastructure, including by availing themselves of any applicable lease terms at the airport, the Joint Applicants will be expected to provide adequate accommodation.

In 2011, the Department identified serious competition concerns regarding Delta's slot holdings at LGA, and we instituted a remedy requiring divestiture of 32 LGA slots. The divestiture consisted of an auction of two tranches of 16 LGA slots each, resulting in JetBlue and WestJet each winning a tranche. Although the 2011 remedy provided a five-year encumbrance period, which has now expired, the critical facts and circumstances of competition at LGA, such as Delta's competitive position and slot holdings, have not changed meaningfully but for this proposed alliance. The proposed JV would effectively revert operational as well as economic control of 16 of the 32 previously divested LGA slots back to Delta. The reversion would exacerbate the significant access barriers to LGA, including in the secondary market, leaving competitors with few options. The Department agrees with JetBlue, Southwest, and Spirit that, because of these significant continuing challenges, it is necessary for 16 slots to be made available to new-entrant and limited-incumbent carriers at LGA, as divestitures are the best and most reliable means to enable LGA access and to provide competition for Delta and its proposed alliance with WestJet.

Based upon the facts in this record, we tentatively find that the competitive concerns we identified in the past would likely resurface and cause harm attributable to the proposed alliance. We further tentatively find that the Joint Applicants must, as a condition of approval of the Application, transfer 16 slots at LGA subject to the terms below. We solicit comments on the details of the proposed divestiture, as explained further below.

The WestJet MEC invited the Department to require WestJet to maintain its own mainline service on LGA–YYZ instead of pursuing slot divestitures; and the WestJet MEC argued that, should DOT pursue divestitures, it should require Delta to divest such slots instead of WestJet. We believe that the proposed capacity maintenance requirement would not address the issue of effective economic control of the slots reverting to Delta—undermining the basis of the ongoing competition concern we identified above. The proposed JV will allow the carriers to effectively act as a single economic entity for transborder services, and the Department defers to the carriers on how they choose to fund the divestiture.

1. Allocation Process

The Department proposes that the Joint Applicants divest 16 slots on a permanent basis through a blind auction to one eligible carrier as part of a single tranche consisting of all 16 slots, or eight (8) round trips. The proposed remedy need not be funded by the same slots that WestJet acquired in 2011 in the slot swap divestiture. The Joint Applicants are free to fund the divestiture by any combination of the Joint Applicants' (or their affiliates) slot holdings. The slot time for each divested slot should align +/- 30 minutes of each existing WestJet slot time, such that the slot time of a divested slot cannot be aligned with an existing WestJet slot time

more than once.[61] This should ensure time-of-day coverage for a competitive schedule at the airport and provide efficient aircraft turn times.

The Department believes that the public interest is best served if the remedy is administered independently and in an expeditious manner. To facilitate this, we are proposing that the Joint Applicants appoint and pay for the services of an independent third party approved by DOT in advance. The third party will administer the auction with adequate notice to eligible carriers, with the highest bidder winning, subject to DOT approval and acceptance by the winning party of the proposed terms and conditions identified in the Eligibility and Terms section below. The divestiture proceeding shall be completed within eight (8) weeks following issuance of a final order. The name of bidding parties will be hidden from the Joint Applicants until such time that the winning bid is verified and approved by DOT, at which point only the winning bidder will be revealed for the purposes of consummating the transaction and seeking the approval of the Federal Aviation Administration for permanent transfer of the operating privileges associated with the slots. The Joint Applicants may retain the sale proceeds from the slot auction.

2. Eligibility & Terms

The Department's goal is to preserve the status quo, at a minimum, and thus emphasizing access by new-entrant and limited-incumbent carriers is appropriate. This approach provides the largest competitive impact by introducing service from carriers that are more likely to price aggressively and compete in a robust manner. The Department, therefore, intends that eligible recipient carriers for the 16 divested slots be new-entrant or limited-incumbent carriers. To be considered a new-entrant or limited-incumbent carrier, an air carrier, inclusive of all affiliates or antitrust immunized partners, must not have greater than ten percent of total slot holdings at LGA, and may not be a subsidiary, either wholly- or partially-owned, of a company whose combined slot holdings are greater than ten percent of total slot holdings at LGA. To be considered eligible, a carrier may not be a codeshare, immunized, or marketing alliance partner of a Joint Applicant carrier or an affiliate or subsidiary of a Joint Applicant.

The recipient carrier must operate the slots or sublease only to a new-entrant or limited-incumbent carrier, as defined using the eligibility criteria above. Divested slots may not be used by a recipient carrier as part of a codeshare and/or marketing alliance with another carrier with greater than ten percent of slot holdings at LGA; under such a circumstance, air services using the acquired slots must be operated outside the aegis of the codeshare and/or marketing alliance. In the unlikely event there are no bids for divested slots, the slot interests would automatically revert to the LGA slot pool for reallocation by the FAA according to standard practices.

The eligibility criteria are slightly modified from the 2011 proceeding by raising the threshold for limited-incumbent carriers from five to ten percent of total slot holdings at LGA. Spirit requested that DOT utilize the same eligibility criteria as in the 2011 proceeding; however, our analysis indicates that maintaining the lower eligibility threshold in this proceeding would potentially leave too few eligible carriers—threatening the feasibility of a blind auction. We tentatively determine that the ten percent threshold would permit a greater number of

[61] Prior to the divesture process, the Department will require the Joint Applicants to submit documentation to the Director, Office of Aviation Analysis, to demonstrate compliance with these provisions.

participants, providing for a viable auction that would allow for sufficient bids. Also, distinct from the 2011 proceeding, we are proposing to count the holdings of an immunized partner as part of a carrier's slot holdings as immunized carriers are unlikely to compete with one another.

Southwest has proposed that DOT only allow divestiture of slots to U.S. LCCs. This would be contrary to what DOT/FAA undertook in 2011, where all new-entrant and limited-incumbent carriers were eligible to participate. Spirit has proposed *gratis* reallocation of WestJet's LGA slots or, absent that, for remuneration equivalent to the price WestJet previously paid to acquire the slots. WestJet's slots were awarded under the 2011 process and we believe, with the exception of the modest and justified changes previously noted, that no basis exists to deviate further from the approach taken in 2011, as many of the same facts and circumstances from that period remain. In 2011, DOT relied on market-based measures to appropriately compensate the divesting carrier, and believes such an approach is warranted today, is more likely to enable the benefits of the proposed Delta/WestJet alliance to be realized, and is consistent with the public interest. The Department tentatively rejects Southwest's and Spirit's proposals.

The Department, in following the framework identified in 2011, is not proposing to earmark divested slots to a specific market. While this leaves the possibility that the divestiture may not directly address the harm identified on the LGA–YYZ route, it will address Delta's increased slot concentration at LGA to the extent impacted by this transaction, provide an additional possibility of new entry in the LGA–Toronto market should it become less competitive, and help to limit the carriers' ability to leverage their slot portfolios to exert market power.

c. FIVE-YEAR REVIEW

The Department tentatively proposes to review its grant of ATI five years from the date of a final order. In its review, the Department will use information submitted by the applicants to undertake analysis of the Joint Applicants' JV, including its impacts on fares, capacity, new services, and the overall health of the transborder market. We will assess whether the proposed JV brought about public benefits or whether there were any undue restraints on competition. The review is important in light of the structural concerns raised in this Order concerning transborder JVs, competition concerns in the U.S.–Canada air travel market, and COVID-19 impacts, which could affect the ability of the Joint Applicants to realize the claimed benefits. However, we are not proposing a *de novo* review with a new application, and the Joint Applicants would continue to possess ATI absent any further action by the Department.

Alaska and JetBlue have asked that DOT time-limit its grant of ATI, with Alaska specifying a five-year limit; JetBlue did not specify a term. We have tentatively concluded that a time-limited approval is not necessary. The Department believes, given the evidence on the record and the facts presented in this case, that a review in five-years' time is sufficient to determine whether the proposed JV has provided public benefits and whether any action is warranted. The specific circumstances in this case do not require a *de novo* review, and we believe the proposed approach affords the Department enough flexibility and avoids unnecessary uncertainty for the Joint Applicants.

d. INTERLINE ACCESS

Alaska and JetBlue have cited concerns about access to interline traffic if the Application is approved and have recommended a remedy mandating interline access. The Department's own analysis supports the carriers' concerns. Absent a remedy, there is risk that future new entry in the market would not be possible, as ATI would enable a more concentrated transborder market where no independent Canadian network carrier exists. Under such circumstances, immunized carriers would be in a position to thwart new entry by foreclosing connecting feed that a new-entrant carrier would require to sustain transborder flights. Furthermore, absent an interline requirement, Alaska could have a difficult time sustaining current service, let alone expanding in the transborder market. A limited interline remedy will help preserve current competition and help foster new competition. In a previous case, where a grant of ATI would immunize all domestic network carriers in the foreign country, the Department made a similar finding.[62]

We tentatively conclude that WestJet, if requested by a U.S. carrier not part of a transborder immunized alliance, must provide interline access. Interline access, including available inventory, shall be under similar commercial terms and availability that WestJet currently offers to other interline and codeshare partners outside of the proposed JV. The financial terms that govern the interline agreement must be no less favorable than IATA prorate agreement(s) in effect for non-immunized partners at the time.

e. EXCLUSIVITY CLAUSES

The "consensus decision-making" requirement for new third-party relationships, while labeled differently, is an exclusivity provision of the type which the Department has rejected in past ATI cases.[63] The requirement, in effect, allows a JV party to reject agreements between its JV partner and third-party carriers. The Joint Applicants argue that a JV requires substantial common investments to bring about greater revenues as well as consumer benefits; by vetting and potentially restricting third-party carriers, they can prevent the risk of "free riders" that could leech from the established JV.[64] As the carriers have argued that only a metal-neutral and immunized alliance can unlock the full array of benefits—including financial benefits—it remains unclear how a third-party carrier, operating on an arms-length basis and that would likely require its own substantial investments, would be in a position to significantly undermine the JV. To the contrary, we believe, as corroborated by Alaska's filing in the case record, an immunized alliance reduces a JV-participant's inclination to engage in cooperation with carriers not part of an alliance.

We believe sufficient cause has not been presented in the case record to make an exception to recent past practice. The competition concerns identified with respect to the transborder market,

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[62] *See* Final Order, American Airlines, Inc. and Qantas Airways - Approval and Antitrust Immunity for Proposed Joint Business Agreement (American/Qantas Case) Docket DOT-OST-2018-0030, Order 2019-7-7 (July 19, 2019).

[63] *See, e.g.*, Delta/Aeromexico Case Final Order (December 14, 2016), page 28; Show Cause Order, American Airlines, Inc., British Airways Plc, Finnair Oyj, Iberia Lineas Aereas de Espana, S.A. and Royal Jordanian Airlines – Approval of and Antitrust Immunity for Alliance Agreements (Oneworld Case) Docket DOT-OST-2008-0252, Order 2010-2-8 at Confidential Appendix B (February 13, 2010).

[64] Joint Applicants' Response to Order Requesting Additional Information, pages 47-48.

which warranted the proposed interline access remedy, further buttress the removal of exclusivity clauses as a condition for ATI.

We have tentatively decided that the parties should strike section 5.3 of the Joint Venture Agreement, remove all requirements in any cooperative agreement between the Joint Applicants for consensus decision-making with respect to third-party relationships, and make conforming changes in all other agreements that relate to Joint Applicants' alliance. The Department intends to monitor competitive developments in interline and codeshare access for unaligned carriers not part of a transborder alliance as part of our regular monitoring of immunized alliances, and as part of our proposed five-year review.

f. REMEDIES NOT PROPOSED

In their filings, interested parties have requested that the Department impose specific remedies to alleviate competition concerns they believe would result from approving the transaction. We believe the remedies proposed above would properly address competition concerns the Department has identified in its review. We have tentatively decided not to adopt the following remedies proposed by interested parties:

- Alaska requested that WestJet be required to provide non-aligned carriers access to the WestJet Rewards frequent flyer program. While this could be beneficial to non-aligned carriers and increase the viability of their transborder routes, opening up frequent flyer programs involves significant coordination and investment costs. We believe that requiring frequent flyer program participation would be overly prescriptive and burdensome for WestJet, and many of the access concerns we have identified are addressed through our proposed interline access remedy.

- The Delta MEC and the WestJet MEC request that the Joint Applicants' confidential annual reports be made available to interested third parties. We do not believe annual reports should be made available to interested parties, as such reports contain highly confidential, commercially sensitive and proprietary information, with some of the information provided at the discretion of the reporting carriers. By allowing the proposed JV's competitors access the reports, the Joint Applicants are not likely to provide candid information that is essential to the Department's ongoing oversight of immunized alliances.

g. CONDITIONS

The following conditions are standard provisions that the Department has required in its ATI grants and is proposing to require in this case.

1. Annual Reporting

The Department is cognizant of the upheaval in the transborder market as a result of COVID-19, and intends to monitor the competitive situation as the industry recovers in the coming years. We tentatively find that it is necessary for the applicants to report to the Department concerning commercial developments in the alliance and the degree to which the public benefits envisioned in the Application are being realized. As in all recent cases where DOT has granted ATI, we are

proposing an annual reporting requirement.[65] The reports should focus on progress made toward implementing the remedies and facilitating new entry, progress made toward achieving the alliance's stated goals, specific actions taken to implement alliance agreements, present or future planned cooperation among the alliance partners in all core airline functions, new routes and capacity introduced as well as removed, and a discussion of the public benefits that are being realized.

The Delta MEC and the WestJet MEC request that the Joint Applicants' confidential annual reports include information on the impact of the proposed JV on aviation jobs as well as balance of flying between the carriers. The Joint Applicants are amenable to this stipulation, and we see no reason to disagree. The Department tentatively concludes that the Joint Applicants' annual reports should include information and data on the proposed JV's impacts on aviation jobs and the relative amount of flying undertaken by each party to the alliance.

2. O&D Survey Reporting

Consistent with its past practice of granting ATI, the Department has tentatively decided to require WestJet to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic ("O&D Survey") information for all passenger itineraries that contain a United States point. The duty encompasses all traffic to third countries in which the itinerary includes a U.S. point. Without this data, we would be severely limited in monitoring the competitive effects of the proposed alliance as we receive no detailed market information for passengers traveling to or from the United States when their entire trip is on the foreign carrier, except for T-100 data for nonstop and a handful of single-plane markets.

Our basis for proposing this condition is the same as in previous cases, as are the terms, conditions, and limitations that DOT proposes for its use of the data.[66] To prevent this reporting requirement from unfairly harming WestJet's competitive position, we tentatively decide to grant confidentiality to WestJet's O&D Survey reports and special reports on codeshare passengers. Foreign carriers are not provided access to O&D Survey reports submitted by U.S. carriers. It would place WestJet at a competitive disadvantage to allow WestJet's rivals to see its information on an unreciprocated basis.

3. CRS and GDS Issues

Consistent with recent cases, we are not proposing any conditions regarding the management of Computer Reservations System (CRS) or Global Distribution System (GDS) interests.[67] Any coordination between the applicants concerning the operation of separate businesses, such as CRSs, would not be transactions specifically approved or necessarily contemplated by our orders

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[65] *See, e.g.*, Final Order, Continental Airlines, Inc. and Members of the Star Alliance - Approve and Confer Antitrust Immunity on Certain Alliance Agreements (Star Case) Docket DOT-OST-2008-0234, Order 2009-7-10 at 26 (July 10, 2009); Final Order, Alitalia-Linee Aeree Italiane-S.p.A., Czech Airlines, Delta Air Lines, Inc., KLM Royal Dutch Airlines, Northwest Airlines, Inc. and Societe Air France - Approval of and Antitrust Immunity for Alliance Agreements (SkyTeam II Case) DOT-OST-2007-28644, Order 2009-6-26 at 2 (June 26, 2009).

[66] *See, e.g.*, Delta/Aeromexico Case Order to Show Cause (November 16, 2016), page 31.

[67] *See, e.g.*, Final Order, SkyTeam II Case, Order 2008-5-32 (May 22, 2008).

in this proceeding. While the Joint Applicants, individually or collectively, may maintain an interest in a CRS, the grant of immunity in this Order thus would not extend to their management of those interests. On the other hand, the applicants' alliance relationships will likely require the coordination of the presentation and sale of the airlines' own services in GDSs and each airline's operation of its internal reservations systems. Those activities will necessarily be covered by a grant of antitrust immunity.

4. IATA Tariff Activities

As we have found in earlier decisions, it is contrary to the public interest to permit immunized air carriers to participate in certain price-related coordination that is already immunized within International Air Transport Association (IATA) tariff coordination. We therefore tentatively decide to condition our grant of antitrust immunity by requiring the Joint Applicants to withdraw, or to remain withdrawn, from participation in any IATA tariff activities that affect or discuss any proposed through fares, rates, or charges applicable between the United States and any countries whose airline(s) have been or are subsequently granted antitrust immunity by the Department for participation in similar alliances. Such countries include the homelands of the applicants. We tentatively find that this condition is in the public interest for the same reasons stated in DOT Order 2010-7-8.

5. Common Name

We tentatively decide to require the Joint Applicants to seek approval from the Department in order to operate under a common name, use a common brand, or a single airline designator code. Undertaking such activities can raise important consumer issues as well as questions pertaining to which carrier is actually operating the service. Allowing for Department review will ensure adequate protection for consumers.

ACCORDINGLY:

1. 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 seven (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;

2. We tentatively propose to approve and grant antitrust immunity for the Joint Venture Agreement between Delta Air Lines, Inc. (along with affiliate Endeavor Air, Inc.) and WestJet (along with affiliate WestJet Encore Ltd.) in-so-far as such agreements relate to foreign air transportation, subject to the conditions in Ordering Paragraphs 3 through 6, and provided that the Joint Applicants:

    a. Submit to the Director of Office of Aviation Analysis for prior approval subsequent subsidiary agreements implementing their most recent alliance agreements. In this matter, those agreements shall include antitrust protocols to

exclude Swoop from the commercial cooperation that is granted antitrust immunity in a final order;

b. Obtain prior approval if they choose to hold out service under a common name or use common brands; and

c. Provide the Department verified statements by Delta Air Lines, Inc. and WestJet attesting that the Joint Venture Agreement has been implemented pursuant to the terms described in the Joint Application, and a complete and unredacted copy of the most recent Joint Venture Agreement and any appendices;

3. We direct the Joint Applicants to amend and resubmit the Joint Venture Agreement to the Department by the Answer date of this Order. The amendments shall reflect the following:

    a. Remove WestJet Airlines Ltd. as a party and signatory to the Joint Venture Agreement;

    b. Strike from the Joint Venture Agreement sections 5.2.2.7, 5.3, 6.4.2.6, 6.14, and Exhibit C section 4.2.3, and to make conforming changes in all implementing and alliance agreements;

    c. Remove from all cooperative agreements between the Joint Applicants any prohibitions or requirements for consensus decision-making to engage in third-party commercial relationships; and

    d. Remove Swoop from the Joint Venture Agreement such that Swoop will exist as an independent carrier that transacts with the Joint Applicants' alliance on an arms-length basis;

4. We tentatively determine that the Joint Applicants shall divest 16 slots at New York City's LaGuardia Airport (LGA) by means of an auction to the highest bidder administered by an independent third party approved by DOT in advance, with further conditions as described below:

    a. Each divested slot shall have a slot time that is within a 30-minute period of a current WestJet LGA slot time, such that the slot time of each and every current WestJet LGA slot will match a divested slot time, allowing for a 30-minute window before or after the current slot time;

    b. The Joint Applicants must divest a single bundle consisting of the 16 slots on a permanent basis only to a new-entrant or limited-incumbent carrier, as defined by the eligibility criteria specified above;

    c. Subject to exhaustion of efforts by the divestiture recipient carrier to secure accommodation at LGA with respect to terminal space and other necessary infrastructure, the Joint Applicants shall provide the recipient carrier reasonable accommodation necessary to operate the divested slots;

d. Slot recipient must agree to operate their own services or to sublease slots only to new-entrant or limited-incumbent carriers and not to use the slot as part of a codeshare or marketing alliance with a carrier with greater than 10 percent of slot holdings at LGA;

e. The Joint Applicants must fund an independent third party to administer and manage a blind auction such that the Joint Applicants will not be able to view or determine the recipient carrier(s) prior to selection and such that the administrator will allow the Department to approve or disapprove the winning bid prior to final selection;

f. The Joint Applicants will retain the proceeds from the auction; and

g. Slot divestiture proceeding should be completed within eight (8) weeks following the issuance of a final order;

5. The Department tentatively directs WestJet, upon written request by a U.S.-carrier not part of an immunized alliance with a Canadian carrier and operating its own aircraft (or marketing services through a capacity purchase agreement) between the United States and Canada (transborder), to provide the requesting carrier with interline access to its network. WestJet shall enter into an interline agreement with the requesting carrier and shall provide inventory access on terms that are comparable to those offered to WestJet's non-immunized partners, including non-immunized codeshare partners. The financial terms of the interline agreement must be no less favorable than IATA prorate agreement(s) in effect for non-immunized partners at the time;

6. We tentatively direct the Joint Applicants to submit annual progress reports to the Office of Aviation Analysis, beginning one year from the effective date of ATI, and continuing each year thereafter while the alliance agreements are effective.[68] The annual report should include information on the impact of the alliance on aviation jobs and balance of flying between alliance carriers. The Department will not provide access to interested third parties to annual reports;

7. We tentatively direct WestJet to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that include a U.S. point;[69]

8. We tentatively direct Delta Air Lines, Inc. and WestJet to withdraw, or remain withdrawn, from participation in any International Air Transportation Association tariff coordination activities that discuss any proposed through fares, rates, or charges applicable between the United States and any countries whose airlines have been or are subsequently granted antitrust immunity, or renewal of, to participate in similar alliance activities with a U.S. airline(s). We tentatively delegate to the Director of the Office of International Aviation the

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[68] We expect the Joint Applicants to deliver the progress report by the close of business on the anniversary date. If that date falls on a weekend or federal holiday, the Joint Applicants may deliver the report by the close of business on the following business day.

[69] We expect foreign-carrier applicants to report the O&D Survey data beginning with the first full quarter following the date of the issuance of a final order. Detailed instructions are available from the Department's Office of Airline Information at the Bureau of Transportation Statistics.

authority to determine the applicability of the directive set forth in this paragraph as to specific prices, markets, and tariff coordination activities, consistent with the scope and purpose of the condition, as previously described;

9. We tentatively determine that we may amend, modify, or revoke this authority at any time, without hearing;

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

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

By:

JOEL SZABAT
Assistant Secretary
Aviation and International Affairs

(SEAL)

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