BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Joint Application of	)	
	)	
DELTA AIR LINES, INC. and	)	
AEROVIAS DE MEXICO, S.A. DE C.V.	)	**Docket DOT-OST-2015-0070**
	)	
Under 49 U.S.C. §§ 41308 and 41309	)	
for Approval of and Antitrust Immunity	)	
for Alliance Agreements	)	

OBJECTIONS OF THE JOINT APPLICANTS

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November 18, 2016

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I. Introduction

The JCA Parties[1] file these Objections in response to the Order to Show Cause[2] regarding their Joint Application for Approval of and Antitrust Immunity ("ATI") for Alliance Agreements ("Joint Application"). Specifically, the JCA Parties object to the divestitures and limitations proposed in the Show Cause Order, which are unprecedented, arbitrary, and untethered to any potential alleged harms related to the JCA. The proposed conditions would jeopardize the sizeable consumer and economic benefits that the Show Cause Order recognized would flow from the proposed JCA. Moreover, they would severely diminish the economic viability of the JCA, and would compel the JCA Parties to reconsider undertaking it. If the JCA is not implemented, the

[1] Delta Air Lines, Inc. ("Delta") and Aerovias de Mexico, S.A. de C.V. ("Aeroméxico"), referred to herein as the "JCA Parties." "JCA" refers to the comprehensive joint cooperation agreement between Delta and Aeroméxico to coordinate their respective passenger services on routes between the United States and Mexico.

[2] Order 2016-11-2, Delta/Aeroméxico, Docket No. DOT-OST-2015-0070 [*hereinafter* Show Cause Order].

traveling public would lose the entirety of the projected benefits, including the introduction of new routes, increased frequencies, and expanded transborder service.

The JCA Parties urge DOT to grant unconditional ATI (beyond the Mexican Federal Economic Competition Commission ("COFECE") remedy and the standard conditions imposed on previous ATI grants) and not to adopt in the Final Order the following elements from the Show Cause Order: (1) the requirement for the JCA Parties to divest an additional 16 slot pairs beyond the eight slot pairs that the parties have already agreed to divest at Mexico City International Airport ("MEX") (also known as Benito Juarez International Airport); (2) the requirement for the JCA Parties to divest six slot pairs at John F. Kennedy International Airport ("JFK"); (3) the time limit of five years on the grant of ATI; and (4) the requirement to modify the JCA agreements to remove exclusivity clauses. These conditions and limitations are unprecedented, unwarranted, and should not be imposed.

If DOT chooses to ignore its own precedent and the weight of the empirical evidence, and instead concludes that those remedies and limitations as presented in the Show Cause Order should be imposed, then the JCA Parties will reconsider their Joint Application.

II. Executive Summary

DOT has acknowledged that the proposed JCA will generate significant consumer benefits through the introduction of new routes and expanded transborder capacity. Delta and Aeroméxico today have substantially smaller shares than American and United in the U.S.-Mexico market. The proposed alliance will allow the JCA Parties to add capacity and compete more robustly against existing transborder service. DOT

agrees that the proposed JCA will "provide a number of valuable public benefits, including:

- a third network competitor on par with the current first and second largest competitors;
- increased transborder capacity;
- enhanced price and service options;
- expanded reach of Delta's existing network into smaller, regional Mexican markets; and
- enhanced efficiency of both carriers' transborder services."[3]

Moreover, the JCA will increase transborder capacity by approximately 14 percent, and will facilitate the addition of incremental capacity at a significantly faster pace than could be undertaken independently by Delta and Aeroméxico. The combined network will generate more than $100 million in incremental annual benefits to the traveling public and help drive economic growth.

Despite these benefits, DOT seeks to impose on the JCA a set of unprecedented remedies and limitations unrelated to any competitive harms arising from the JCA. DOT's demands are particularly unreasonable in light of the remedies already mandated by COFECE and agreed to by the JCA Parties.

Specifically, the COFECE remedies make available eight slot pairs at MEX, a number equivalent to Delta's total slot holdings at the airport. DOT has concluded that the potential for competitive harm arises on only one city-pair, New York City ("NYC")-MEX. A reasoned analysis of the relevant market reveals robust competition today and the near certainty of additional entry in the future. But if a substantial lessening of competition on this route is assumed, a proper application of competitive effects

[3] Show Cause Order at 2.

principles dictates that entry sufficient to replace the smaller of the two carriers' frequencies on the route should alleviate any competitive concerns. And if barriers to entry at MEX are assumed, the COFECE-mandated remedies are more than sufficient to facilitate competitive entry at the Mexican endpoint that can replace Delta's single daily frequency on this route.

Even if the alleged competitive issue were to be defined more broadly as slot concentration at MEX, the COFECE remedy also addresses any possible concerns arising from the JCA itself. With the divestiture of eight slot pairs (equal to the number of slots used by Delta on all of its MEX flights), there will be no change in slot concentration at MEX from the transaction; the JCA Parties will hold the same number of slots as an independent Aeroméxico does today. Notably, COFECE approved the JCA, subject to the eight-slot-pair remedy, after and notwithstanding its flawed "Preliminary" report, on which DOT primarily bases its 24-slot-pair remedy.

At the U.S. endpoint of NYC-MEX, slot restrictions do not create a barrier to entry. At least two potential entrants already hold large slot portfolios at JFK, additional slots remain available at JFK, service at unslotted times is commercially feasible, and Newark Liberty International Airport ("EWR") is no longer slot constrained. Thus, no NYC-based remedies are necessary to augment the remedies that COFECE has already required.

DOT must artificially limit a market to justify its proposed JFK remedies. Specifically, DOT contradicts its previous decisions and rulemakings, as well as

economic reality, by excluding EWR from the New York City market.[4] As its sole justification for this deviation from long-standing precedent, DOT asserts that demand for EWR service is high and that access at certain hours "may not be possible."[5] This erroneous justification – useful at most to assess the *likelihood* of entry – is belied by the fact that multiple carriers have launched new service at EWR since the lifting of slot restrictions at that airport. In addition, United Airlines operates a large hub at EWR and already provides two daily non-stop flights on NYC-MEX. When actual, announced, and potential competition at JFK and EWR is assessed, it is clear that NYC-MEX enjoys vibrant competition and requires no remedy.

The proposed conditions are without precedent in prior DOT ATI proceedings. Previously, DOT has not required divestitures to reduce overall concentration at slot-controlled airports. Most notably, DOT required no divestitures at Heathrow ("LHR") to address general concerns about LHR airport concentration as a condition of antitrust immunity for American Airlines/British Airways, despite the notorious difficulty in accessing that congested airport and the similar aggregated slot portfolio size of the parties.

To justify the proposed MEX divestitures, DOT relies on outdated information, ignores key facts, and makes incomplete assumptions that cannot serve as a foundation for reasoned decision making. Perhaps most noticeably, DOT asserts that

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[4] *See, e.g.,* Order 2013-8-21 at 10, note 18, Virgin Atlantic/Delta/Societe Air France/Alitalia Antitrust Immunity, Docket No. DOT-OST-2013-0068. ("[t]he vast majority of international passenger traffic in the New York metropolitan area flows to and from John F. Kennedy International Airport ("Kennedy") and Newark Liberty International Airport ("Newark")"). *See* also Section III.C.2, *infra*.

[5] Show Cause Order at 14.

the slot administration regime at MEX hinders competition because it does not adhere to the IATA Worldwide Slot Guidelines ("WSG").[6] In reaching this conclusion, DOT relied on a preliminary COFECE staff report premised on mistaken and outdated information. In fact, in its Comments filed in the Docket in response to the Show Cause Order, Aeropuerto Internacional de la Ciudad de México ("AICM"), the MEX slot administrator states that it has already begun the process of implementing the WSG for the summer 2017 slot season and "declares that it undertakes to adopt those IATA WSG recommendations for slot allocations at MEX by no later than the second quarter of 2017."[7]

Even if one accepts DOT's flawed competitive effects framework, the proposed conditions are excessive and arbitrary. They bear no relation to any theoretical anticompetitive effects from the JCA and are not premised on a reasoned analysis of the impacted relevant markets. In New York City, the remedy neither seeks to replace the lost competition (the single daily round-trip operated by Delta) nor seeks to replicate the five daily roundtrips operated by both airlines (two of which are operated in non-slot controlled hours). Instead, it seeks to provide competitors free access to six slot pairs at JFK. This remedy does not correspond to the competitive overlap, and has no basis in the record. The proposed MEX remedy is similarly unrelated to any theory of competitive effects. The 24 slot pairs constitute three quarters of the slot pairs used by Aeroméxico for U.S.-Mexico transborder service and 10 percent of its entire MEX slot portfolio. Moreover, the 24 slot pairs total three times Delta's entire holdings at MEX.

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6 Show Cause Order at 16.

7 Comments of AICM at 6.

Delta uses its MEX slots to service eight different routes, only one of which provides even a theoretical basis for any competitive concern.

Delta has invested significantly in new service and airport facilities at JFK. These investments have helped make it a hub airport and expanded its role as a European gateway. Loss of the proposed remedy slots at JFK would require Delta to pull down flights, diminishing the benefits delivered by the joint network and degrading JFK as a connecting hub to Europe for the broader United States. Delta's Terminal 4 at JFK, a $1.2 billion international gateway, opened in May 2013; a $175 million second-phase extension of 11 new gates opened in January 2015. Requiring divestitures would diminish incentives for any airline to make this type of investment in the future.

Likewise, DOT's slot remedy would require Aeroméxico to eliminate connecting and transborder flights at MEX. Aeroméxico is the only hub carrier in Mexico providing connecting service to scores of small and medium communities. The pull down of the 16 additional slot pairs would impact its service throughout Mexico and across the border. The effect, as Mexico's Dirección General de Aeronáutica Civil Mexico ("DGAC") characterized in its Comments, would be a "loss of important competitive benefits to be derived from both the JCA and the new bilateral agreement, or to shrink its domestic connectivity, which would have adverse impacts on services throughout Mexico, including on U.S. travelers seeking to connect via Mexico City."[8]

DOT's alleged concerns stem from the need to "discipline the coordinated services and planned growth of the joint venture."[9] Consumers do not need to be

[8] Comments of DGAC at 11.

[9] Show Cause Order at 21.

protected from expanded service and a better product. Rival carriers might want the benefit of protection from enhanced competition from the JCA parties, but that is neither the purpose nor the mandate of DOT's review.

DOT proposes two other conditions that further would diminish the consumer benefits of the JCA. First, DOT seeks to strike the exclusivity clauses in the JCA agreements. These clauses ensure that the investments made by the JCA Parties in the JCA accrue to the benefit of the JCA Parties. Deletion of these contractual provisions would undermine the incentives of the JCA Parties to integrate and invest in the JCA and would reduce significantly the consumer benefits of the proposed JCA. Relatedly, imposing a five-year term on the JCA introduces substantial uncertainty and further undermines incentives to invest in a partnership that DOT may undo or subject to additional punitive conditions in five years.

In addition to undermining the projected consumer benefits of the JCA, DOT's ill-considered remedies offend principles of international comity. The proposed MEX conditions usurp the Mexican government's authority and fail to acknowledge the significant and procompetitive changes to the slot allocation regime made since COFECE issued its preliminary report. That DOT also applies a public interest standard is not a legitimate justification for this overreaching remedy. Instead, the remedies that DOT has proposed appear to be a punitive effort to use the ATI application as leverage to change the MEX slot allocation process, which DOT wrongly perceives, based on obsolete information, to be inadequate. An ATI application by two airlines should be viewed neither as a vehicle for industrial engineering nor as a mechanism to supplant a foreign regulator.

Without significant changes to the DOT remedies proposed in the Show Cause Order, the JCA may not be economically viable. The JCA Parties' analysis indicates that the proposed conditions would decrease the revenues otherwise expected from the JCA by hundreds of millions of dollars annually. The anticipated decrease in revenues would stem from the detrimental impact of the proposed remedies on the efficiency of Aeroméxico's hub and spoke operations in Mexico and Delta's hub operations at JFK, as well as on the utility of the combined network. Reduced efficiency and convenience would reduce consumers' demand for the joint product and consequently reduce the revenues otherwise expected from the JCA. These same detrimental impacts would also limit substantially the consumer benefits of the transaction. To avoid jeopardizing both the consumer benefits of the JCA and the JCA itself, the JCA Parties respectfully request that DOT refrain from imposing the remedies set out in the Show Cause Order and instead permit the JCA to proceed with those remedies already agreed to with COFECE and the standard conditions imposed on previous ATI grants.

III. The Remedies and Conditions Proposed in the Show Cause Order Should Not be Made Final

A. DOT Agrees that the JCA Will Produce Many Public Benefits

The JCA Parties agree with DOT's assessment that the JCA will produce important efficiencies and "significant" public benefits.[10] As more fully discussed in the Joint Application, the Reply of the Joint Applicants, and the benefits study and economic

[10] *Id.* at 18.

analysis of the Show Cause Order submitted by the JCA Parties,[11] the JCA will enable Delta and Aeroméxico to compete more effectively than either carrier could in the absence of the JCA, and will consequently produce sizable efficiencies and benefits for the traveling public. Joining the individual networks and assets of Delta and Aeroméxico will create a larger and more efficient network that will offer customers expanded service, access to new markets, more efficient connections, and a third transborder network competitor on par with the two largest competitors. Moreover, the JCA will increase transborder capacity by approximately 14 percent, and will facilitate the addition of incremental capacity at a significantly faster pace than could be undertaken independently by Delta and Aeroméxico. This increase in capacity and related improvements will generate more than $100 million in incremental annual benefits to the traveling public.

DOT has "tentatively concluded that a grant of ATI is required by the public interest because the proposed JV would provide a number of valuable public benefits including a third network competitor on par with the current first and second largest competitors, increased transborder capacity, enhanced price and service options, expanded reach of Delta's existing network into smaller, regional Mexican markets, and enhanced efficiency of both carriers' transborder services, all net benefits to consumers."[12] In particular, DOT has recognized that these benefits include: a broader network connecting important markets, better connectivity to smaller markets, and

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[11] *See* Bryan Keating, Quantifying the Economic Benefits from the Proposed Joint Cooperation Agreement Between Delta Air Lines, Inc. and Aerovias de Mexico, S.A. de C.V., Exhibit DL-R-0003.

[12] Show Cause Order at 2, 18, 19.

increased consumer options, all of which are benefits for consumers. The categories of benefits described in the JCA Parties' submissions and acknowledged by DOT in its Show Cause Order are the types that flow naturally from the act of combining two complementary networks, and will be welcomed by the traveling public.

B. DOT's Competitive Effects Analysis is Mistaken

Delta and Aeroméxico face significant competition on NYC-MEX which, when properly analyzed, includes EWR-MEX service. Interjet and United compete with Delta and Aeroméxico now, and will continue to do so after the JCA. Each of these two carriers offers two daily non-stop frequencies, each scheduled near an Aeroméxico frequency. These four frequencies (offering a total of 1075 seats per day) account for almost half of the nine daily non-stop frequencies on the route. In addition, Volaris recently announced that it will be introducing service on JFK-MEX starting in March 2017.[13]

The JCA Parties expect even more competition due to additional new entry on NYC-MEX as a result of the liberalized Air Transport Agreement. MEX slots and the slot administration used by AICM do not pose a barrier to entry on NYC-MEX or at MEX. Pursuant to conditions imposed by COFECE, which approved the JCA on May 2, 2016, the JCA Parties will assign eight slot pairs (equal to all of the slots used to fund Delta's entire operations at MEX) to one or more U.S. and/or Mexican carriers that currently operate U.S.-Mexico service. Furthermore, the slot administration has become more transparent since COFECE staff issued the preliminary report upon which

[13] Kristin Majcher, *Volaris Starts Costa Rica Ticket Sales, Adds U.S. Routes*, AviationDaily (Nov. 17, 2016).

DOT heavily relied in forming its opinion on the slot regime at MEX. As AICM stated in its Comments, "the conditions and slot regime at MEX … have changed because, more recently, actions have been taken to improve slot administration and slot allocation at MEX. These actions include the adoption of a process based on the IATA WSG, with the full IATA WSG implementation to take place within 145 days."[14]

At JFK, carriers with large existing slot portfolios (such as American Airlines ("American") and JetBlue Airways ("JetBlue")) are well positioned to enter, and there are additional slots available for other interested carriers.[15] In addition, Volaris just announced its intention to add JFK-MEX service in March 2017. Moreover, United could also easily add additional NYC-MEX service, given that it has a hub at EWR and it holds numerous slots at MEX.

C. There Are No Barriers to Entry at MEX, and the COFECE Divestitures Immediately Open up Eight Slot Pairs

At MEX, the JCA Parties have agreed with COFECE to divest eight slot pairs. The divestiture will provide additional opportunities for entry by new and small carriers at MEX prior to implementing the JCA.[16] These divestitures will permit far more entry than is required to address any theoretical competitive impact arising from the JCA on the NYC-MEX overlap at the Mexican endpoint.

DOT's additional proposed slot remedy at Mexico City was based on its conclusions that: (1) AICM does not administer the slots at MEX according to the IATA

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[14] Comments of AICM at 2.

[15] *See* Reply of the Joint Applicants at 39-40 (filed July 15, 2016).

[16] *See* Joint Applicants' Response to DOT Order 2016-5-9 Requesting Additional Information (filed May 27, 2016); Reply of the Joint Applicants.

WSG; (2) AICM has not committed to follow the IATA WSG by a particular date; (3) its MEX slot administration process is not transparent; and (4) new entry or expansion at MEX by potential competitors is thereby severely limited.[17] DOT's tentative conclusions on each of these points are erroneous and based on a "preliminary" staff report issued by COFECE[18] and allegations by certain self-interested objectors, which are repudiated by the facts.

According to AICM, "COFECE's Preliminary Investigation Report on the slot administration regime at MEX (Show Cause Order at 16-17) was based on outdated, contested, and incorrect facts."[19] The Comments filed by the DGAC similarly state: "As an initial matter, COFECE's report is preliminary and subject to the observations and clarifications of all stakeholders. As such, it does not have full legal validity, and therefore it cannot be taken as a reference upon which the USDOT relies for its Order."[20]

Much about slot administration has changed at MEX since the period analyzed by COFECE. Even assuming (incorrectly) that DOT has any mandate to address slot allocation systems at foreign airports, the recent changes by AICM remove any basis for DOT's concerns about the AICM slot regime. Evidence demonstrates that it has

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[17] Show Cause Order at 16-17.

[18] The COFECE Report relied upon by DOT was "preliminary", the first of several steps in COFECE's review of AICM's slot regime. Multiple stakeholders in Mexico contested COECE's preliminary findings in that initial report.

[19] Comments of AICM at 2.

[20] Comments of DGAC at 5 (filed Nov. 17, 2016).

facilitated access to slots for new entrants and expanded service at MEX.[21] Furthermore, COFECE's approval of the JCA subject to the eight slot pair remedy came *after* it issued the preliminary report, indicating that COFECE itself did not see a need to remedy issues beyond those related to Delta's operations at MEX.

The current slot regime addresses many of the concerns raised in the preliminary COFECE Report. DOT should no longer rely on this outdated report. As AICM asserted in its Comments, "DOT's conclusions are based on outdated and incorrect 'preliminary' comments by COFECE staff, not COFECE's commissioners, which do not correctly reflect ***current*** AICM slot procedures or the ***current*** slot situation at MEX."[22]

The claim that the AICM process is not transparent is unfounded and refuted by AICM's Comments. The laws governing the slot allocation process at MEX (the Airports Law, the Airports Law Regulations, the Civil Aviation Law, and the Civil Aviation Law Regulations) are publicly available. The AICM Guidelines for the Assignment of Landing and Takeoff Times in the General Rules of Operation for MEX (a copy of which was submitted in the Docket in AICM's May 2016 response to DOT's Information Request) are also publicly available. In addition, the status of slots and slot availability at MEX is available to the public on AICM's website.[23]

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[21] *See* Comments of AICM at 7.

[22] *Id.* at 3.

[23] *See* Slots|Aeropuerto Internacional de la Ciudad de México, http://www.aicm.com.mx/negocios/slots.

The claim that AICM does not enforce the slot use rule is also incorrect. To Aeroméxico's knowledge, AICM enforces the slot use rule by withdrawing unused slots and reassigning them to other carriers. AICM confirms as much in its Comments: "[AICM] continuously monitors and enforces the slot usage rule, which are actually more onerous than many other slot congested airports because the rule not only requires 85% use of the slot (compared to 80% at other airports, including U.S. airports), but use of the slot within 15 minutes of its assigned time period. AICM withdraws slots from carriers that violate the usage rule."[24] In the Winter 2016 season, AICM withdrew and reassigned about 7,000 slots.

With respect to implementation of the WSG, AICM states as follows:

> "[I]n January 2017, AICM will implement a new slot allocation system at MEX. This includes implementation of SLOTIX (a system used by several airports around the world) for the management of slots shall be implemented. This will allow the optimization of the allocation process, monitor in real time the use of slots, and provide a platform for exchange and adjustment transactions. This improvement is pursuant to the IATA's WSG. Thus, AICM will in January 2017, begin to process slot allocation requests for the summer 2017 season, taking into account IATA's WSG recommendations that do not conflict with the Airport Law and its Regulations. To be very clear on this issue, and in order to avoid confusion or misunderstanding, **AICM hereby declares that it undertakes to adopt those IATA WSG recommendations for slot allocations at MEX by no later than the second quarter of 2017**."[25]

In its Show Cause Order, DOT voiced concern with the opportunities available at MEX for new and expanded entry. Facts and data regarding recent entry and expanded services at MEX negate that concern. According to DGAC, "[s]ince the entry into force of the new bilateral agreement, all carriers could have requested additional slots from

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[24] Comments of AICM at 6.

[25] *Id.* (emphasis in original).

MEX, but neither DGAC nor AICM has any record of pending requests for additional MEX-U.S. slots by U.S. or Mexico airlines."[26] In the past two years and in some cases even prior to September 2015, several carriers started service at MEX, including LCCs. These airlines include: JetBlue, Southwest, Qatar Airways, Alitalia, Cathay Pacific, and All Nippon Airways (starting Tokyo Narita ("NRT")-MEX in February 2017), among others. International carriers have also increased their operations at MEX in the past year, such as American (by 27%), United (by 11%), and Southwest (by 46%). In addition, several domestic carriers have added new destinations, routes, and capacity at MEX. In the past year, Volaris has increased its operations by 17%, Interjet by 20%, and Viva by 36%. Aeromar has expanded service to Manega International Airport ("MGO"), Santo Domingo Airport ("SDQ"), and Cozumel International Airport ("CZM"); Interjet to Dallas/Fort Worth International Airport ("DFW") and Orlando Zanfort International Airport ("SFB"); and Volaris to Chetumal International Airport ("CTM"), Guadalupe Victoria International Airport ("DGO"), Ixtapa-Zihuatanejo International Airport ("ZIH"), Francisco Sarabia International Airport ("TRC"), and Lucio Blanco International Airport ("REX"). Volaris has also announced the start of new direct flights from MEX to JFK, Houston, and Miami.

Mexican carriers Interjet, VivaAerobus, and Volaris have grown the number of their MEX flights by 342%, 585%, and 1,275%, respectively, between 2010 and 2015. This demonstrates that new and expanded service by other airlines has occurred and continues to occur at MEX. There is no basis for a conclusion that new entry or slots at

[26] Comments of DGAC at 4.

MEX are unavailable or are more difficult to obtain than at other busy, popular, and slot-constrained airports.

1. There Are No Barriers to Entry at JFK for Competition to MEX

Although JFK-MEX is not the appropriate relevant market in which to analyze the effects of the JCA, the JCA Parties still face substantial competition on JFK-MEX today and will face much more as a result of the new liberalized Air Transport Agreement.

Interjet is the second largest competitor on this route today, accounting for 24.3 percent of the passenger share based on the most recent data available.[27] There is no evidence in the record to suggest that Interjet will not continue to compete robustly on this route following implementation of the JCA. Interjet offers two daily non-stop frequencies, each scheduled in close temporal proximity to an Aeroméxico frequency. These two frequencies (offering a total of 300 seats per day each way) account for nearly a quarter of the seats on this route—nearly double those offered by Delta's single frequency.[28] Volaris also recently announced that it will enter new service on the JFK-MEX route, as well as adding new routes from MEX to Miami and Houston, starting in March 2017. This will add either 173 or 220 seats daily between JFK-MEX each way, depending on the type of aircraft Volaris uses. Under the new bilateral agreement,

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[27] Figure 5 of the Show Cause Order shows that Interjet has only 17 percent of the O&D passenger share, based on outdated March 2015 O&D data. The share calculated above is based on newer T-100 data from May 2015-April 2016. The use of T-100 data is proper as the Show Cause Order noted it yields "substantially similar results." Show Cause Order at 14, note 25.

[28] OAG data, October 30-November 5, 2016.

Volaris has already commenced selling tickets for this operation.[29] This addition was announced and will be implemented in the absence of any slot-pair remedy. Moreover, Volaris has not had to cancel any of its services from MEX to fund this flight. Volaris becomes the third independent airline serving the route to JFK, and the fourth when considering EWR, which is served by United.

Carriers such as JetBlue and American also have not only the ability but the incentive to enter JFK-MEX. As acknowledged in the Show Cause Order, this is "an important business market connecting the two largest cities in North America."[30] In addition, many carriers have recently expanded service at MEX and other destinations in Mexico. With respect to MEX, both American and JetBlue already serve MEX from other airports. JetBlue began daily service to MEX from Fort Lauderdale and Orlando in October 2015.[31] One industry analyst believes that JetBlue is "ey[e]ing new frontiers … in Mexico due to recent changes in [the] US air services agreement."[32] It posits that JetBlue will "mirror [its] strategy in Latin America and the Caribbean—building service from its domestic points of strength" and that "[i]t's probable that JetBlue will want to add

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[29] Kristin Majcher, *Volaris Starts Costa Rica Ticket Sales, Adds U.S. Routes*, AviationDaily (Nov. 17, 2016).

[30] Show Cause Order at 13.

[31] Press Release, JetBlue, JetBlue to Launch New Service to Mexico City (May 18, 2015), *available at* http://www.marketwired.com/press-release/jetblue-to-launch-new-service-to-mexico-city-nasdaq-jblu-2020659.htm.

[32] *JetBlue starts 2016 with expansion to Florida and the Caribbean, Cuba and Mexico beckon*, Centre for Aviation (Jan. 21, 2016), http://centreforaviation.com/analysis/jetblue-starts-2016-with-expansion-to-florida-and-the-caribbean-cuba-and-mexico-beckon-26185.

more points from Mexico City."[33] In addition, Volaris, which primarily operates out of Guadalajara today, has announced that it will commence daily Mexico City–New York service in 2017 (along with service to Houston and Miami from MEX).[34] Consistent with this analysis and announcement, Delta's internal ordinary-course documents anticipate entry on JFK-MEX.[35] The COFECE-mandated slot divestitures are more than adequate for multiple carriers—eight, to be exact—to offer the same level of service as Delta on JFK-MEX, one daily roundtrip.

Proper antitrust analysis considers firms that have committed to enter in the near future as market participants.[36] For this reason, the JFK-MEX overlap should be analyzed as if it were served by at least five rival airlines. There is no evidence that ATI between two carriers leads to adverse consequences on overlapping routes with so many competitors. In fact, the Show Cause Order implicitly recognizes that markets with four or more post-transaction competitors do not raise any material competitive concerns. The Show Cause Order recognizes that "markets that go from four to three carriers warrant some caution." Its silence on the effects of a market going from five to four carriers, let alone six to five, implies that such a change in the number of competitors does not present competitive concerns. Consequently, there is no logical reason to believe that the JCA would harm consumers.

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[33] *Id*.

[34] Kristin Majcher, *Volaris Starts Costa Rica Ticket Sales, Adds U.S. Routes*, AviationDaily (Nov. 17, 2016).

[35] *See, e.g.,* DL-0000326, at 8; DL-0000450, at 2; DL-0000789 at 1-2.

[36] *See, e.g.*, United States Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 5.1 (2010).

JFK slots are not a barrier to entry, particularly for carriers that already have large JFK slot holdings. This fact is recognized in the Show Cause Order, which notes that "American . . . already ha[s] a substantial number of slots that they may use to make adjustments in their schedules or offerings, including increasing capacity by using larger aircraft."[37] At least two potential competitors (JetBlue and American) have "large slot portfolios" at JFK as the Show Cause Order expressly acknowledges.[38] In fact, the remedies proposed in the Show Cause Order exclude JetBlue from obtaining the divested slots at JFK "as it is the second-largest slot holder at JFK with a significant pool of slots."[39] JetBlue and American (both of whom had been precluded from offering NYC-MEX service under the former restrictive bilateral aviation agreement) have significant slot portfolios at JFK from which they could immediately fund new JFK-MEX service. JetBlue itself agrees that "[t]he new U.S.-Mexico Air Transport Agreement will allow competitive entry on the JFK-MEX route for the first time in decades."[40]

The JCA Parties understand that American and JetBlue hold more than 16 percent and more than 24 percent of the available slots at JFK, respectively. These carriers operate large hub operations at JFK and have access to numerous gate and other airport facilities to support those hub operations. The Show Cause Order recognizes that these carriers "would be in a position to repurpose slots, consistently with their network and business strategies, and would be likely to do so if prices were to

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37 Show Cause Order at 23.

38 *Id.* at 25.

39 *Id.* at 25.

40 Answer of JetBlue at 42 (filed July 6, 2016).

increase to supra-competitive levels, given the size and importance of this market."[41] Consequently, American, JetBlue, and possibly other network carriers are well-placed to enter and provide additional competition to the current carriers providing JFK-MEX service.

Nor is the availability of JFK slots a barrier to entry on the JFK-MEX route for other carriers. In fact, Volaris recently announced its plans to enter the JFK-MEX market. As a threshold matter, no carrier has made substantiated claims that they have been unable to obtain slots at that airport. The only carriers to mention JFK slot availability in this proceeding are JetBlue and Interjet. JetBlue, "the second-largest slot holder at JFK with a significant pool of slots,"[42] does not claim it has had any difficulties obtaining slots, but points to comments made by Interjet in other DOT proceedings.[43] Even Interjet itself does not claim that it has been unable to obtain any slots, stating merely that it has been unable to obtain the particular "competitive" time slots it has requested at JFK, without defining exactly what times it considers to be competitive.[44] And, when Interjet requested slots to fund Cancun ("CUN")-JFK service (the example given in its Answer), the FAA did not deny outright Interjet's request. Rather, the FAA made a counteroffer for slots at a different time than Interjet had requested.[45] And JFK carriers have the ability to trade and transfer slots (through leases) at JFK. Notably, slot

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41 Show Cause Order at 22.

42 *Id.* at 25.

43 Answer of JetBlue at 43 (citing Reply of Interjet to Answer of JetBlue at 3, Docket No. DOT-OST-2011-0159 (filed October 22, 2015)).

44 Answer of Interjet at 4-5 (filed July 6, 2016).

45 *Id.* at 4-5.

availability at JFK has not impacted Interjet's ability to offer flights that compete with Aeroméxico. Interjet has scheduled its JFK-MEX flights in close temporal proximity to Aeroméxico's—one departs within five minutes of an Aeroméxico flight and the other departs within two hours.[46] Overall, the evidence shows that slots sufficient to support competitive entry are available in JFK, and that flights to MEX outside slot-restricted hours are commercially viable.[47]

2. The NYC-MEX City-Pair Must Include EWR

Excluding EWR from the competitive analysis of New York City air travel is inconsistent with the prior regulatory analysis and economic realities. City-pairs, rather than airport-pairs, are the relevant market for purposes of this analysis.[48] Federal courts and regulators (including DOT) that have addressed the issue have concluded that JFK and EWR are competitive substitutes in a single NYC market. Importantly, the previous bilateral agreement treated both EWR and JFK as a single point for the

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[46] Aeroméxico operates departures at 00:45 and 09:00 and arrivals at 12:55 and 22:45; Interjet operates departures at 00:50 and 07:10 and arrivals at 06:10 and 22:30.

[47] *See* Reply of the Joint Applicants at 39-40.

[48] In the United/Continental merger case, the court adopted city-pairs as the relevant market, citing analysis by the economic expert in the case: "Dr. Rubinfeld persuasively testified that, consistent with the approach favored by both DOJ and GAO, his analysis and experience suggest that city-pairs, and not airport-pairs, is the appropriate parameter for identifying airline markets for antitrust purposes." *Malaney v. UAL Corp.*, 2010 WL 3790296, *10 (N.D. Cal. Sept. 27, 2010). "[C]ompetition from adjacent airports disciplines pricing and must be considered when defining the relevant market. . . [G]ive the substantial evidence suggesting city-pairs, plaintiffs' effort to establish anything else [i.e., airport pairs] never leaves the gate." *Id.* at *11.

purposes of carrier designations, viewing carriers flying to and from EWR and JFK as competitive substitutes for U.S.-Mexico transborder flights.[49]

Other DOT and United States Department of Justice Antitrust Division ("DOJ") precedent shows that these agencies consider NYC as a single market for air travel. DOT found that the "[t]he vast majority of international passenger traffic in the New York metropolitan area flows to and from John F. Kennedy International Airport ("Kennedy") and Newark Liberty International Airport ("Newark")" and acknowledged Continental's service from EWR to London Heathrow ("LHR") as competitive service in evaluating the Delta/Virgin Atlantic application for ATI in 2013.[50] DOT also considered entry by Continental on EWR-LHR as new entry into the New York–London market in its 2010 oneworld decision.[51] Similarly, the DOJ analyzed one "New York" market, including both EWR and JFK, in its public comments on oneworld's application.[52] DOT also included Continental's service from EWR in the New York to Zurich market when granting ATI to American and Swiss in 2002.[53] In addition, the DOJ evaluated

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[49] *See, e.g.*, Order 2005-12-18, New York Newark-Cancun Combination Service Proceeding, Docket No. DOT-OST-2005-23494 ("New York and Newark are considered a single point for designation purposes under the U.S.-Mexico agreement….").

[50] *See* Order 2013-8-21 at 10, note 18, Virgin Atlantic/Delta/Societe Air France/Alitalia Antitrust Immunity, Docket No. DOT-OST-2013-0068.

[51] Order 2010-2-8 at 13 note 40, American/British/Finnair/Iberia Airlines Antitrust Immunity, Docket No. DOT-OST-2008-0252 [*hereinafter* oneworld Order].

[52] Comments of the Department of Justice at 11, Joint Application of Am. Airlines, British Airways, Iberia Lineas Aereas de Espana, Finnair, and Royal Jordanian Airlines, No. DOT-OST-2008-0252 (filed Dec. 21, 2009).

[53] *See* Order 2002-11-12 at 12-13, American/Swiss Airlines Antitrust Immunity, Docket No. DOT-OST-2002-12688 (where passenger share calculations include Continental's operations from EWR).

competition for London service to and from a single NYC market in American and British Airways' first ATI application in 2001.[54] DOJ's complaint in the AA/US Airways merger case attached an appendix of "city-pairs" analysis, and in every instance used "New York, NY (NYC)" as the relevant city-pair, which "include[s] flights at all airports within the metropolitan area and in both directions."[55]

Concluding that the NYC market does not include EWR would be contrary to precedent and to common sense. The Show Cause Order does not even attempt to explain why DOT has abandoned its historical approach of including JFK and EWR in the same market, nor why United's EWR-MEX flights are not a valid substitute for JFK-MEX service. EWR and JFK are almost equidistant from mid-town Manhattan (in fact, EWR is closer and has direct rail access).[56] And both airports attract a substantial number of customers from Manhattan, specifically, and New York City in general.[57] These overlapping catchment areas illustrate the substantial competition between EWR and JFK. It is for this reason that online travel agencies, metasearch engines, and

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[54] Comments of the Department of Justice at 31, U.S.-U.K. Alliance Case, No. DOT-OST-2001-11029 (filed Dec. 17, 2001). Other legal precedent also supports inclusion of EWR in the NYC market. In the DOJ's suit against American alleging monopolization of Dallas/Ft. Worth International Airport, the U.S. Court of Appeals for the 10th Circuit evaluated market shares in "New York, including LaGuardia, JFK, and Newark." *United States v. AMR Corp*., 335 F.3d 1109, 1112 note 2 (10th Cir. 2003) (citing the District Court's reference to New York including EWR, JFK and LGA).

[55] Complaint at 43-56, U.S., et al. v. US Airways Group, Inc. and AMR Corporation, 78 Fed. Reg. 71377 at 71389-96 (No. 1:13-cv-01236) (D.D.C. 2013).

[56] According to Google Maps, EWR is 17.4 miles and 29 minutes (without traffic) from Times Square, while JFK is 16.4 miles and 29 minutes from Times Square.

[57] The Port Authority of NY & NJ, Airport Traffic Report 51 (2015).

airline websites give customers the ability to search for flights using a single NYC code, which includes JFK, LaGuardia, and EWR.[58]

Indeed, substitution between JFK and EWR explains why carriers have established hubs at different airports in the New York City area. Delta, JetBlue, and American have opted to set up hubs at JFK, with limited presence at EWR.[59] Conversely, United has opted to set up a hub at EWR, with no operations out of JFK.[60] While Delta serves NYC-MEX from JFK, United serves the route from EWR. This allocation of operations would make little sense if the airlines did not believe that both JFK and EWR compete effectively to serve New York City.

DOT and others have historically evaluated competition in New York City to include EWR and JFK.[61] DOT's exclusion of EWR is inconsistent with precedent, regulations and rulemakings, and economic reality; it constitutes an error in its determination. Further, EWR's exclusion is neither analyzed nor explained in the Show Cause Order.

3. EWR Provides Vigorous Competition in NYC-MEX

Properly including EWR in the NYC market further expands the competitive set, as United currently provides daily non-stop service on EWR–MEX, and other

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[58] For example, Orbitz and Kayak customers can search for flights to and from "New York (NYC) All Airports", and JetBlue allows customers to search for "New York City area (NYC)."

[59] For example, 44 percent of Delta's NYC-originating traffic originates from JFK, 80 percent of JetBlue's NYC-originating traffic originates from JFK, and 35 percent of American's NYC-originating traffic originates from JFK.

[60] 92 percent of United's NYC-originating traffic originates from EWR.

[61] *See* Section III.C.2 *infra*.

competitors are also well-positioned to begin service on this route. In addition, there are no longer regulatory barriers to viable entry at EWR, as the slot controls at that airport have been removed because "runway capacity exists for additional operations."[62] Thus, any entry barriers created by the former slot regime at EWR have been removed, as slots will no longer be required to provide service to or from EWR. When it removed these restrictions, the FAA expected that "new entry and growth by incumbent carriers" would follow.[63] Although the Show Cause Order appears to dispute the ability of carriers to enter and expand at EWR (without offering any explanation for this conclusion), entry and expansion following removal of the slot restrictions at EWR is already taking place. Numerous airlines, including Spirit, Delta, JetBlue, Southwest, and Alaska, have begun or will begin service on nine new routes in just the two months after the slot restrictions were lifted.[64] In fact, Spirit added four frequencies to Fort Lauderdale and two to Orlando on October 30—the first day the slot restrictions were lifted—and plans to add daily service to Myrtle Beach in March 2017.[65] And Delta has first-hand experience with the entry facilitated by the removal of EWR's slot restrictions,

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62 Change of Newark Liberty International Airport Designation, 81 Fed. Reg. 19,861 (Apr. 6, 2016) (to be codified at 14 CFR pt. 93).

63 *Id.*

64 Route entry was determined based on routes scheduled for November or December 2016 that were not operated in November 2015 and October 2016. *See* OAG data, November 15-21, 2015, October 9-15, 2016, November 13-18, 2016, December 18-24, 2016.

65 Press Release, Spirit Airlines, Start Spreading the News! Spirit Airlines Brings More Go to New York/Newark (July 28, 2016), *available at* http://ir.spirit.com/releasedetail.cfm?releaseid=981730.

as it launched three frequencies to Raleigh-Durham in November.[66] With respect to transborder traffic, Porter Airlines, a Canadian regional carrier, has expanded its service, adding two daily flights to Toronto for November and one in December.

4. Recent Entry Confirms the Absence of Entry Barriers and a Lack of Harm to Competition

The ability of carriers to enter and expand at JFK and EWR is confirmed by trends revealing significant capacity increases at those airports in recent years. During the past five years, overall capacity at JFK and EWR has increased at more than twice the rate of other U.S. airports. Between 2010 and 2015, average daily seats from JFK and EWR increased by 12.4 percent: U.S. carriers' daily seats from these airports increased by 7.2 percent, while international carriers' daily seats from JFK and EWR increased by 31.7 percent.[67] Furthermore, daily seats on domestic flights from JFK and EWR increased by 9.7 percent, while daily seats on international flights from these airports increased by 15.8 percent.[68] Between 2010 and 2015, the total number of flights from JFK and EWR increased by 5.8 percent: domestic flights from these airports increased by 3.5 percent, while international flights from NYC airports increased by 11.1 percent. Also, the number of domestic destinations served increased from 85 to 93.

Capacity expansion at JFK and EWR has not been limited to the legacy carriers. In fact, LCCs have expanded rapidly at these airports in the last five years. Between

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[66] Press Release, Delta Air Lines, Delta Adds New Service Between Raleigh-Durham and Newark (May 3, 2016), *available at* http://news.delta.com/delta-adds-new-service-between-raleigh-durham-and-newark.

[67] Reply of the Joint Applicants at 41-2.

[68] Domestic flights from NYC are defined as having destination city codes in the mainland U.S. and U.S. territories (American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands).

2010 and 2015, LCCs grew their average daily seats from JFK and EWR by more than 27 percent; average daily seats from these airports on domestic flights increased by 22 percent, while average daily seats on international flights increased by 60 percent. During this same period, LCCs added 24 additional non-stop destinations (11 of these were new international non-stop destinations),[69] 41 daily departures (12 of which were international departures), and over 6,000 daily seats from JFK and EWR (over 2,000 were on international flights). In 2015, LCCs offered 211 daily departures from these two NYC airports, an increase of 25 percent since 2010. LCCs now serve more than 73 unique destinations (24 international and 49 domestic) from JFK and EWR.[70]

This wealth of factual evidence regarding entry and expansion at both JFK and EWR—both in the 2010-2015 period and immediately following the abolition of slot constraints at EWR—negates the need for divestitures to address NYC-MEX competition concerns. In its Show Cause Order, DOT also recognized that routes with four or more independent competitors following the implementation of the JCA are unlikely to lessen competition substantially, a statement supported by empirical evidence and economic analysis. The NYC–MEX market is served by four airlines: Aeroméxico-Delta, Interjet, United, and soon Volaris; and others, like JetBlue and American, are well-positioned to enter that market as well.

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[69] In 2015, LCCs served 27 destinations that were not served in 2010, while three destinations served in 2010 were no longer being served in 2015; thus, there are 24 additional destinations relative to the number served in 2010.

[70] Including seasonal service.

D. DOT Alleges No ATI-Specific Harms and Proposes Remedies Unconnected to Any Theoretical Harms

DOT states that it has concerns about competition on JFK-MEX, but the Show Cause Order neither articulates the basis for these concerns nor fully analyzes the nature of competition between Delta and Aeroméxico on this route. Although the Show Cause Order indicates that DOT applies a Clayton Act analysis, its assessment of competitive effects from the JCA at MEX bears no relationship to the Clayton Act test or traditional antitrust law principles. With respect to JFK-MEX, there is no assessment of whether JFK-MEX is a relevant market in which to assess competitive impacts, or an explanation of the exclusion of EWR from that market. There is no claim that airline passengers view Delta's single JFK-MEX frequency as a competitive constraint on the service provided by Aeroméxico on this route. As discussed in the preceding section, an appropriate analysis of JFK-MEX and NYC-MEX leads to the conclusion that there is significant existing competition from other airlines, as well as substantial new anticipated competition after the JCA is implemented. This actual and potential competition is more than sufficient to allay any concerns regarding a diminution of competition on this non-stop overlap route.

Instead of relying on traditional competitive effects analysis, DOT claims that slot divestitures are necessary "to support new entry needed to discipline the coordinated services and planned growth of the joint venture" because MEX and JFK are slot-restricted airports and certain carriers have had difficulties acquiring slots at either of the two airports.[71] This growth reflects the JCA's pro-competitive benefits that DOT

[71] Show Cause Order at 21.

recognized in its Show Cause Order. More notably, this is an indication of increased demand, which will ultimately lead to increased competition as carriers seek to grow their capacity to fulfill the demand. This growth is an unmitigated good for consumers, not a harm that needs to be remedied.

It is highly unusual, if not unprecedented, for expansion and capacity growth to raise competitive concerns, let alone prompt a remedy to protect competitors from increased output and competition. It is also inconsistent with good economics and public policy. Further, there is no need "to discipline the coordinated services . . . of the joint venture."[72] Coordination, in and of itself, is not a harm, but rather a benefit, of ATI. In fact, DOT recognizes that cooperation leads to public benefits in the Show Cause Order, stating that public benefits arise from a "reduction in double marginalization, cost and operational efficiencies, broader network coverage (resulting in more paths between a given origin and destination), network and capacity coordination, increased capacity (beyond a market's expected growth rate), and alignment of frequent flyer benefits."[73] That DOT would now cite the benefits of the JCA as a basis for further remedies shows just how disconnected the divestitures are from any legitimate competitive concerns. Although we believe the COFECE remedy of eight slot pairs at MEX is unnecessary, DOT's remedies are extreme and would undermine the benefits of the JCA and impair Aeroméxico's and Delta's network connectivity. DOT erroneously contends that the "16 additional slot pairs are necessary to support new entry needed to

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[72] *Id*.

[73] *Id.* at 18.

discipline the coordinated services and planned growth of the joint venture".[74] However, the planned growth of the JCA supports consumers, providing an enhanced network and schedule. It is therefore clearly not a 'harm' that needs rectification. Notably, DOT's proposed remedies also far exceed the divestitures necessary to address any theoretical competitive effects arising from the JCA's elimination of Delta as an independent competitor, either on NYC-MEX or at MEX.

Following the COFECE-mandated divestiture of eight slot pairs, the JCA Parties will jointly hold no more MEX slots than Aeroméxico independently holds today. Likewise, the MEX remedies are significantly larger than the one frequency that Delta operates on NYC-MEX, the only relevant overlap market.

Delta only uses a single slot pair at each airport to fund its JFK-MEX service. If this route suffered from a lack of competition, a highly mistaken assumption as discussed in Section B, any impact from a reduction in competition would equal whatever harms could result from the removal of Delta as an independent carrier providing one daily frequency on this route. However, DOT has asked for substantially more slots at both JFK and MEX. DOT has requested the JCA Parties divest 24 slot pairs at AICM—nearly five times as many slots as Delta and Aeroméxico use to fund their JFK-MEX service combined, three times as many slots as Delta uses for its current operations on all routes from that airport, 75% of the slots Aeroméxico uses for transborder service, and 10% of Aeroméxico's total MEX slot portfolio. Similarly, DOT's request for six slot pairs at JFK significantly exceeds not only the single slot pair Delta uses to serve JFK-MEX, but also the five slot pairs deployed collectively by the JCA

[74] Show Cause Order at 21.

Parties on this route. Even assuming a lack of competition, under no mainstream theory of competition analysis is a divestiture in excess of the operations of both JCA Parties necessary to remedy an overlap.

COFECE required the JCA Parties to divest eight slot pairs because that is the maximum anticompetitive effect and increase in slot concentration at MEX that could possibly be attributed to the JCA. COFECE reached its determination to approve the JCA, after it had issued its "preliminary" report on slots at MEX, subject to the eight slot pair remedy by applying a standard antitrust evaluation similar to the Clayton Act, which DOT has used in all previous ATI proceedings. Following the divestiture, the JCA Parties will jointly hold no more slots than Aeroméxico independently holds today. Moreover, numerous additional slots will become available to other carriers prior to implementation of the JCA. Because the COFECE remedy will further enhance the conditions that currently facilitate entry and expansion at AICM, no further remedy is warranted.

Any other alleged harms that the Show Cause Order purports to address do not result from the JCA. Instead, DOT asserts that Aeroméxico's current slot holdings at MEX give it the means to "leverage the slot regime to potentially exclude competitors."[75] Although the JCA Parties disagree with this claim, DOT nevertheless does not allege that this harm is a result of or related to the JCA. In fact, the COFECE remedies ensure that Aeroméxico's slot portfolio at MEX is unchanged by the JCA. That is, the "harm" that the Show Cause Order alleges is not specific to the JCA or to a grant of ATI.

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[75] *Id.* at 16.

E. The Proposed Slot Remedies Significantly Exceed Those Required in Any Previous ATI Proceeding

DOT's conditions far exceed the slot divestitures that DOT has required in any prior ATI proceeding, whether to address concerns about lost competition in specific markets, or to address alleged concerns about airport slot concentration in general. The most directly analogous ATI proceeding was DOT's decision in Order 2010-2-8 to grant ATI to American and British Airways ("AA/BA"), which was subject to slot divestitures at London's notoriously congested Heathrow Airport ("LHR"). Like Aeroméxico at MEX, British Airways operated a hub at this foreign airport. British Airways had a pre-transaction LHR slot holding (45%) that was nearly identical to what Aeroméxico currently holds at MEX (46%). American's share at LHR (2%) was the same as that of Delta at MEX (2%). As a result of the transaction, therefore, the AA/BA combination would increase its joint LHR slot holding to 47%, compared to 48% for the JCA at MEX.

Despite the nearly identical post-transaction AA/BA concentration at LHR, and the identical impact on LHR slot concentration from the transaction itself, DOT did not require a single slot divestiture from AA/BA to address generalized concerns about slot concentration at this congested airport. It certainly did not require AA/BA to divest the entire American slot portfolio at LHR—which is the draconian remedy that COFECE has *already* imposed and that the JCA Parties have *already* agreed to accept in this case to address airport concentration concerns at MEX. And yet, inexplicably, DOT somehow finds it fair, appropriate, and consistent with the precedent DOT established in AA/BA to require the JCA Parties to divest not just that 100%, but *300%* of Delta's slot holdings at MEX as the price of ATI for their JCA.

The only slot divestitures DOT required of AA/BA were narrowly tailored to address narrow competitive concerns in specific relevant markets. The AA/BA joint venture eliminated competition on *six* non-stop overlaps between the carriers on routes to/from the slot-restricted LHR airport: LHR-Dallas/Fort Worth, which only American and British Airways served; LHR-BOS, LHR-O'Hare International Airport (Chicago), and LHR-Miami, which only American, British Airways, and one other carrier served; and LHR-Los Angeles and LHR-NYC, which were served by five carriers, including AA/BA.[76] To resolve competitive concerns related to these six overlap routes, DOT required divestiture of only four slot pairs: two slot pairs reserved for LHR-Boston ("BOS") service and two "flex" slot pairs that could be used to serve any U.S. destination from LHR.[77]

In contrast to the six nonstop overlaps to/from LHR that were created by AA/BA, the JCA creates a single nonstop overlap to/from MEX, which DOT acknowledges in the Show Cause Order is the only city pair route on which the JCA creates any alleged competitive concern. In contrast to the multiple LHR routes which the AA/BA transaction would convert into monopoly or duopoly routes, there are already two existing competitors on NYC-MEX route (United and Interjet); a third competitor (Volaris) has already announced new service beginning in March 2017; and additional entry would be easy and is likely from carriers like American and JetBlue who already have large NYC operations and will have access to up to eight divested slot pairs at MEX under the COFECE remedies to which the JCA Parties have already committed –

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[76] oneworld Order at 21.

[77] oneworld Order at 26.

assuming, of course, that they do not already have sufficient MEX slots of their own to fund this service.

Yet incredibly, despite the existence of far fewer and less serious competitive overlaps than in AA/BA, and despite the fact that the JCA Parties have already committed to divest twice as many slots at MEX than DOT required AA/BA to divest in totality at LHR, DOT somehow finds it fair, appropriate, and consistent with the precedent established in AA/BA to require that the JCA Parties divest 16 more slot pairs at MEX, resulting in MEX slot divestitures that would amount to *six times* the LHR divestitures required of AA/BA. And to top it off, DOT would also require the parties to divest six additional slot pairs at JFK, despite the fact that two potential new competitors already have large slot portfolios at JFK and there are no remaining slot restrictions at EWR.

This extreme and unjustifiable departure from the most directly analogous DOT precedent in any prior ATI proceeding alone is sufficient to demonstrate how arbitrary and capricious the proposed remedy would be.

F. The MEX Slot Divestitures Offend Principles of International Comity

The proposed remedies appear to be an attempt by DOT to engineer the slot allocation regime at MEX, a move that usurps the Mexican government's authority and fails to acknowledge the significant and procompetitive changes to the slot allocation regime made since COFECE issued its preliminary report. Leveraging authority over ATI to refashion another sovereign's domestic regulations offends comity and encourages reciprocal treatment. More importantly, it is neither necessary nor proper. Following its own comprehensive investigation of the proposed JCA, COFECE

appropriately did not see fit to require divestitures exceeding the incremental gain in MEX slots resulting from the JCA. The COFECE divestitures "in the view of the Mexican Government, represent[] an appropriate balancing of the competitive interests."[78] AICM has committed to shortly implementing the IATA WSG, which is the worldwide standard for allocating slots at congested airports. As a result of these changes and the COFECE slot divestiture remedy, there is no reasonable basis for DOT to impose a more onerous slot remedy than COFECE's.

The Show Cause Order makes plain DOT's disapproval of AICM's domestic regulations, repeatedly criticizing them as opaque and ineffective. Relying on COFECE's erroneous "preliminary investigation" contained in a "staff report" that COFECE has not even adopted as final, the Order threatens additional divestitures if AICM does not reform its slot allocation procedures to DOT's satisfaction (and on DOT's timeline). It also usurps the authority to allocate the divested slot pairs at MEX—"permanent[ly]"—according to DOT's "terms and conditions."[79] Indeed, the Order appears to envision that DOT will allocate those slot pairs without even consulting with COFECE, even though MEX is central to Mexico's economic and transportation strategies.

This disregard for Mexican regulatory authority over MEX is an affront to international comity and could raise serious foreign relations issues with an essential trading partner. The Mexican Government has already raised such concerns in this proceeding, as the "excessive" remedies appear to have come by surprise to the

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[78] Comments of DGAC at 2.

[79] Show Cause Order at 24, 34.

Mexican Government.[80] DOT "never raised any concern about the known slot regime at MEX" during the negotiations of the bilateral agreement.[81] And the DGAC views the remedies proposed in the Show Cause Order to be "inconsistent with the spirit of the recently liberalized bilateral aviation agreement between the United Mexican States and the United States of America," as "the Mexican Government repeatedly made clear that antitrust immunity for its carriers was a fundamental prerequisite for Mexico's agreement to the new bilateral."[82] Congress has highlighted "international comity and foreign policy" as important considerations under 49 U.S.C. § 41309, yet the Order does not even discuss them. Using an ATI application to interfere in a foreign sovereign's domestic regulations in this fashion—beyond what is necessary to address the potential competitive harm from the transaction—invites reciprocal demands from foreign authorities. Such demands, moreover, might well be based more on regulatory leverage than any deficiencies (actual or perceived) in the U.S. slot allocation system.

G. DOT's Remedies Suboptimize the Infrastructure of Mexico City as a Hub Airport

DOT's remedies limit growth possibilities for the JCA. The divestiture of 24 slot pairs at MEX represents 75 percent of all the slots used by Aeroméxico in the transborder market and 10% of its overall slot portfolio at MEX. Reducing Aeroméxico's presence so substantially at MEX would have exactly the opposite outcome of that intended by DOT. The airline would offer fewer destinations with a less optimized schedule at a national, transborder, and international level. Domestically, Aeroméxico

[80] Comments of DGAC at 9.

[81] *Id.* at 9.

[82] *Id.* at 1-2, 7.

serves 27 small and medium cities, compared to 19 small and medium cities served by Interjet. Aeroméxico estimates that the divestiture of slots would force it to cancel services to a number of destinations, due to the reduced density of these routes, and also to reduce the number of frequencies from MEX to several other destinations. All of these potential cancellations and frequency reductions would have a disproportionately negative impact on Aeroméxico's network, reducing connecting opportunities by an estimated 34%, thus harming passengers and reducing consumer benefits. This negative impact would be exacerbated by DOT's requirement that any slots divested must be used to operate to the United States.

With reduced feeder traffic through Mexico City, fewer transborder and long-haul routes would be viable, harming consumers, impeding investment in Mexico, and suboptimizing economic growth potential. In short, the proposed remedies will reduce passenger choice and competition, and undermine the benefits that passengers would otherwise have obtained from an enhanced network and increased frequencies.

H. The Time-Limited Grant of ATI is Unprecedented and Harmful to Consumers

Limiting the grant of ATI to five years is unprecedented—DOT has not similarly limited a grant of ATI in any other proceeding, and for good reason. Doubts about the longevity of the arrangement would prompt the JCA Parties to alter their plans regarding integration and investment. In particular, if the JCA may need to be unwound in five years, the JCA Parties would be compelled to structure their efforts and investments so as to ensure the possibility of a swift and clean disentanglement, should DOT deny a subsequent application for ATI. In addition, a potentially truncated period within which to recoup investments would diminish the incentives of the JCA Parties to make

significant investments that would otherwise boost the quality of the JCA Parties' joint offerings. Specifically, the JCA Parties would have limited incentives to invest in joint operations, modify route structures, and otherwise achieve pro-consumer modifications if they could not be assured that ATI would continue after five years.[83] And absent the incentive to cooperate fully, at least some of the consumer benefits otherwise produced by the JCA would not materialize.[84] For these reasons, a five-year time limit unnecessarily endangers the JCA Parties' ability to provide to the traveling public the full benefits of the transaction, and creates a set of incentives very different from those at issue in all other grants of ATI.

Moreover, the proposed time limitation is unnecessary, given the regular review of ATI arrangements conducted by DOT. DOT has retained the right to "amend, modify, or revoke [the] authority at any time" in the Show Cause Order, consistent with past grants of ATI.[85] Given DOT's authority and ability subsequently to revisit the grant of ATI should it have any concerns about the JCA in the future, DOT has no need to place a time limit on the grant of ATI.

I. Striking the JCA's Exclusivity Clauses is Inconsistent with Precedent and Harmful to Consumers

DOT's proposal to strike the exclusivity provisions in the JCA operating agreements is an unprecedented assault on a highly procompetitive aspect of the proposed JCA. Courts repeatedly have recognized that restrictions on access to a joint

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83 *See* Bryan Keating, Economic Analysis of the Remedies and Limitations Proposed in the Show Cause Order (filed Nov. 18, 2016).

84 *See id*.

85 *See, e.g.,* Order 2013-9-14, Virgin Atlantic/Delta/Societe Air France/Alitalia Antitrust Immunity, Docket No. DOT-OST-2013-0068.

venture will raise competitive concerns only if the joint venture has market power and exclusion from the joint venture forecloses the market for its competitors.[86] Here, the Mexican passenger aviation market is served by four significant Mexican carriers (Aeroméxico, Interjet, Volaris, and VivaAerobus) and the JCA will be similar in size to other carriers serving the U.S.-Mexico market. Thus, no competitive concerns should arise from the proposed exclusivity provisions.

Although there is no basis to argue that the exclusivity provisions will harm competition, their removal from the JCA agreements could diminish the consumer benefits otherwise resulting from the JCA. The recognized benefits of exclusivity provisions include promoting investment in collaborations by eliminating free-riding and ensuring aligned incentives.[87] These rationales apply fully to the proposed JCA.

Notably, DOT previously has "indicated that [it] would generally not prohibit exclusivity code-share provisions in open-skies markets."[88] As DOT has concluded that

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[86] *See, e.g., Nw. Wholesalers Stationers v. Pac. Stationary & Printing Co.*, 472 U.S. 284 (1985) (holding that a joint venture that expelled a member did not violate the antitrust laws because it did not have market power).

[87] *See* United States Department of Justice and Federal Trade Commission, Antitrust Guidelines for Collaborations Among Competitors § 3.36(b) (2000) (stating that "the reasonable necessity of an agreement also may depend on whether it deters individual participants from undertaking free-riding or other opportunistic conduct that could reduce significantly the ability of the collaboration to achieve cognizable efficiencies…"); *see also Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 329 (1961) (exclusive dealing arrangement may provide economic benefits for both parties); *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 270 (3d Cir. 2012) ("It is widely recognized that in many circumstances, exclusive dealing arrangements may be highly efficient—to assure supply, price stability, outlets, investment, best efforts or the like—and pose no competitive threat at all.").

[88] Order 99-8-14 at 6, U.S.-Mexico Codeshare Services, Docket No. DOT-OST-1999-5582 (citing Order 99-5-2).

"all of the elements of an Open Skies agreement" exist in the new U.S.-Mexico bilateral agreement, there is a presumption in favor of allowing the exclusivity provisions in the JCA.[89] In fact, DOT allowed the exclusivity provisions in the JCA Parties' existing codeshare agreement, although a restrictive bilateral agreement was in place at the time.[90] In allowing the exclusivity provisions, DOT explicitly determined that exclusivity provisions do not "prevent[] any other airline from competing effectively . . . inhibit competition or otherwise adversely affect the public interest."[91] Given the new era of liberalized air transport between the U.S. and Mexico, this rationale should apply with even greater force today.

J. The Show Cause Order Does Not Reflect Reasoned Decision-Making

Under the Administrative Procedure Act, or APA, a federal agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[92] An agency decision that fails "to consider an important aspect of the problem" or that represents a "clear error of judgment" will be set aside as arbitrary and capricious.[93] As illustrated in the foregoing discussion, the Show Cause Order's reasoning is deficient in several respects.

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[89] Show Cause Order at 8.

[90] Order 99-8-14 at 6, U.S.-Mexico Codeshare Services, Docket No. DOT-OST-1999-5582. ("On balance, therefore, we believe that the "Delta/Aeromexico and United/Mexicans code-share arrangements in the context of the U.S.- Mexico agreement and actual market conditions and structure support allowing of the exclusivity provisions in these arrangements.)

[91] *Id.* at 8.

[92] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[93] *Id.*

For example, the Order does not establish a "rational connection" between the proposed slot-divestiture remedy and any potential competitive harm from the JCA. DOT asserts that the required divestitures are "proportional to the harm caused by the transaction,"[94] but for the reasons discussed above in Section D, that is a "clear error in judgment."[95]

As discussed in Section E, the proposed slot divestitures also constitute an unacknowledged and unexplained departure from DOT's practice, which provides independent grounds for reversal under the APA. An agency may not "depart from a prior policy *sub silentio*" and thus must "display awareness that it is changing its position."[96] Moreover, it must "show that there are good reasons for the new policy."[97] The Order offers no such acknowledgement or explanation. It also fails to explain adequately why, in declining to consider EWR as a substitute for JFK, it deviated from DOT's historical practice of evaluating competition on city-pairs.[98] Similar unexplained deviations from prior policies include DOT's proposals to limit the time period of the ATI grant, discussed in Section F, and to strike exclusivity provisions from the JCA agreements, discussed in Section I.

Finally, by not addressing the international comity and foreign relations issues discussed above in Section F, DOT "failed to consider an important aspect of the

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[94] Show Cause Order at 21.

[95] *State Farm*, 463 U.S. at 43.

[96] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

[97] *Id.*

[98] *See* Section III.C.2 *supra*.

problem."[99] As explained, Congress identified those factors as relevant, and the Show Cause Order's leveraging of ATI authority to second-guess Mexico's regulation of its largest airport raises substantial questions.[100] The APA does not allow an agency to disregard considerations that Congress has expressly made pertinent.

IV. Conclusion

For the reasons set forth above, and in the Joint Application and Reply, the JCA Parties respectfully request that DOT grant unconditional ATI to the JCA Parties.

Respectfully submitted,

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99 *State Farm*, 463 U.S. at 43.

100 *See* 49 U.S.C. § 41309(b)(1)(A).

CERTIFICATE OF SERVICE

A copy of the foregoing letter has been served this 18th day of November, 2016, upon the following persons via email:

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