

**BEFORE THE  
U.S. DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.**

Joint Application of

DELTA AIR LINES, INC. and  
AEROVIAS DE MEXICO, S.A. DE C.V

under 49 U.S.C. §§ 41308 and 41309 for approval of and  
antitrust immunity for alliance agreements

Docket DOT-OST-2015-0070

**COMMENTS OF AMERICAN AIRLINES, INC.**

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February 23, 2024

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American submits these Comments in response to the Department’s January 26, 2024 Show Cause Order that tentatively dismisses without prejudice the application for approval of, and grant of antitrust immunity (“ATI”) for, the renewal of alliance agreements between Delta and Aeromexico (“SCO”).<sup>1</sup> The SCO is consistent with the Department’s longstanding policy requiring an “Open Skies” agreement as a prerequisite for granting ATI under 49 U.S.C. §§ 41308 and 41309. Open Skies agreements are bilateral agreements between the United States and foreign governments that promote regulatory environments conducive to free and fair competition, including by allowing international air carriers to compete and make decisions on routes, capacity, and pricing.<sup>2</sup> The Department’s policy of requiring Open Skies as a condition of any grant of ATI has fostered competition, benefitted consumers, and incentivized the adoption of Open Skies globally.

The SCO details how the Mexican government’s continued noncompliance with the U.S.-Mexico Open Skies agreement (“ATA”) effectively means that there has not been a functioning

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<sup>1</sup> Common names for airlines are used in this submission.

<sup>2</sup> Open Skies Agreements, U.S. Department of State, at <https://2009-2017.state.gov/e/eb/tra/ata/>.

Open Skies agreement between the United States and Mexico, and therefore the Department's main prerequisite for a grant of ATI is absent. Consequently, the Department followed its longstanding precedent requiring Open Skies for any grant of ATI by tentatively dismissing without prejudice the Joint Applicants' application for ATI. American supports the Department's position in the SCO and its continued adherence to the Open Skies policy.

A central tenet of the Department's policy of promoting growth in international travel has been that Open Skies and procompetitive airline cooperation work hand-in-hand. "Since 1993, [the Department has] approved and granted requests for antitrust immunity between a U.S. airline and one or more foreign airlines where the homeland of the foreign applicant is a party to an open-skies agreement with the United States and where the Department has determined that granting antitrust immunity is required by the public interest because it would be pro-competitive, provide important consumer benefits, and be consistent with [its] international aviation competition policy."<sup>3</sup> Indeed, the Department has consistently described the existence of an Open Skies agreement as a "predicate" for approval and grant of ATI.<sup>4</sup>

Tying together the achievement of Open Skies, which liberalizes air travel and invites competition, to grants of ATI, which enables the integration of complementary networks to grow and improve international travel, has unquestionably spurred greater competition that has benefitted consumers. The Department has repeatedly observed that "the liberalized operational environment established and maintained by an ongoing Open Skies relationship and the

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<sup>3</sup> Order to Show Cause, Docket DOT-OST-2004-19214, Dec. 22, 2005, Order 2005-12-12, at 2-3.

<sup>4</sup> *See, e.g.*, Order Granting Approval and Antitrust Immunity for Certain Alliance Agreements, Docket DOT-OST-1996-1411-15, Nov. 1, 1996, Order 96-1-1, at 3; Order to Show Cause, Docket DOT-OST-1999-6528-11, Apr. 21, 2000, Order 2000-4-22, at 2; Order to Show Cause, Docket DOT-OST-1999-6680-7, Mar. 2, 2001, Order 2001-3-4, at 2; Order Granting Approval and Antitrust Immunity for Alliance Agreements, Docket DOT-OST-2002-11842, June 27, 2002, Order 2002-6-18, at 1; Order Granting Approval and Antitrust Immunity for a Commercial Cooperation Agreement, Docket DOT-OST-2004-18613, Jan. 27, 2005, Order 2005-1-23, at 1;; Show Cause Order, Docket DOT-OST-2007-28644, Apr. 9, 2008, Order 2008-4-17, at 2; Show Cause Order, DOT-OST-2008-0234, Apr. 7, 2009, Order 2009-4-5, at 2; Order to Show Cause, Docket DOT-OST-2018-0030, Mar. 31, 2019, Order 2019-05-23, at 4.

integrated operations enabled by ATI *together* promote competition[.]”<sup>5</sup> As a result, “[t]he overwhelming balance of evidence demonstrates that international deregulation resulting from Open Skies agreements has greatly expanded the well being of consumers. The evidence also shows that broad-based immunized alliances have been an important component of Open Skies related developments.”<sup>6</sup> Subsequent studies have repeatedly confirmed the procompetitive effects of international airline joint businesses that operate in an Open Skies environment.<sup>7</sup> American agrees and has previously recognized that the Department’s practice of granting ATI to procompetitive joint businesses in the presence of Open Skies has “expanded the number of international city pairs that can be legally and economically served directly, and millions of passengers every year enjoy nonstop international air travel on these routes that is almost as convenient as traveling domestically” and has enabled U.S. and foreign carriers to “integrat[e] their services and operat[e] within alliances to achieve greater network efficiencies that benefit airlines and consumers alike.”<sup>8</sup>

Against this backdrop, American shares the Department’s concerns regarding the Mexican government’s recent actions, including the issuance of a decree prohibiting all-cargo

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<sup>5</sup> Final Order, Docket DOT-OST-2008-0234, Order 2009-7-10 (July 10, 2009) at 11 (emphasis added); *see also* Show Cause Order, Docket DOT-OST-2005-22922, Dec. 19, 2006, Order 2006-12-17, at 2 (“Open-skies agreements have encouraged more competitive service, since market forces, not restrictive agreements, discipline the price, frequency, capacity levels, and quality of airlines service.”).

<sup>6</sup> International Aviation Developments: Global Deregulation Takes Off (First Report), U.S. Department of Transportation, Office of the Secretary, December 1999, at 6, available at <https://www.transportation.gov/sites/dot.gov/files/docs/globalderegtake.pdf>.

<sup>7</sup> International Aviation Developments: Transatlantic Deregulation, The Alliance Network Effect (Second Report), U.S. Department of Transportation, Office of the Secretary, October 2000, at 1, available at <https://www.transportation.gov/sites/dot.gov/files/docs/transatlantndereg.pdf> (“Open skies agreements now in place between the United States and a growing number of countries are producing enormous benefits for consumers. These agreements have made it possible for the airline industry to provide better quality, lower priced, more competitive service for millions of passengers in thousands of international city-pair markets.”); Open Skies Partnerships: Expanding the Benefits of Freer Commercial Aviation, U.S. Department of State, Bureau of Public Affairs, Sept. 2016, available at <https://2009-2017.state.gov/documents/organization/262234.pdf> (highlighting the numerous benefits of Open Skies agreements).

<sup>8</sup> Joint Application for Approval and Antitrust Immunity for Proposed Joint Business Agreement, Docket DOT-OST-2019-0054-0001, Apr. 3, 2019, at 19, 79.

operations at Benito Juárez International Airport (“MEX”) and reducing capacity at MEX without transparency, to the detriment of competition. American agrees with the Department’s conclusion that these actions fail to comply with the ATA. Failure to comply with the ATA removes the regulatory predicate (Open Skies) that is necessary for grant of ATI.<sup>9</sup>

Delta does not dispute the Department’s tentative conclusions in the SCO that the Mexican government is in violation of the ATA.<sup>10</sup> However, Delta characterizes the Department’s SCO as “premature, punitive, misdirected, and ineffectual.”<sup>11</sup> American disagrees with this characterization.

***The SCO is not premature or punitive.***

The Department’s decision is neither premature nor punitive. The Joint Applicants have benefitted from ATI for more than seven years despite the Department’s consistent concerns regarding the Mexican government’s management of MEX. Specifically, in response to the Joint Applicants’ initial application for ATI in 2015, several airlines raised concerns regarding the lack of a fully functioning Open Skies agreement between the United States and Mexico and the lack of transparency in slot allocation at MEX that unfairly advantaged Aeromexico.<sup>12</sup> In responding to interested parties’ concerns regarding Open Skies, the Department noted that the ATA with Mexico contains all of the elements of an Open Skies agreement, but warned that “[s]hould the situation prove otherwise, the regulatory predicate for a grant of ATI would no longer exist and

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<sup>9</sup> American does not take a position regarding the merits of the Joint Application outside of the Department’s finding that the predicate for ATI is no longer present because of the Mexican government’s noncompliance with the ATA.

<sup>10</sup> Request of Delta Air Lines, Inc. for Departmental Action Under 14 C.F.R. Part 213, Docket DOT-OST-2024-0019-0001, Feb. 9, 2024 (“Delta takes no position in this Request on the Department’s tentative conclusions in Show Cause Order 2024-01-17 as to the GOM’s compliance with the Agreement[.]”).

<sup>11</sup> Motion of Delta to Suspend the Procedural Schedule, Docket DOT-OST-2015-0070-0253, Feb. 9, 2024, at 1.

<sup>12</sup> Order to Show Cause, Docket DOT-OST-2015-0070, Nov. 4, 2016, Order 2016-11-2, at 5–6 (“2016 SCO”). These concerns are unique to MEX. Although facility constraints exist in many airports where joint businesses operate with ATI, those constraints are generally managed by the foreign governments transparently and without bias to the home carrier, in accordance with international norms.

the Department’s findings could be rendered invalid.”<sup>13</sup> With respect to slot allocation, the Department shared concerns over “the circumstances at MEX, with its immense share of the transborder aviation market, severe access constraints, and the declaration by Mexico’s competition authority that MEX slots are an essential input and are administered anticompetitively[.]”<sup>14</sup>

Rather than deny the grant of ATI at the time, the Department granted ATI for five years, with the warning that if “the prevailing slot allocation regime continues to lack transparency and compliance with international norms and best practices in the face of substantial unmet demand for slots by competitors, the Department would have to carefully consider whether it could approve a new application if tendered[.]”<sup>15</sup> The Joint Applicants had the option to withdraw the application for ATI and re-apply after these concerns were addressed. Indeed, in its Reply to the Answers, Comments, and Objections filed in response to the 2016 SCO, the carriers noted that the “proposed conditions in the Show Cause Order . . . would compel [them] to reconsider undertaking” the proposed joint venture.<sup>16</sup> However, the Joint Applicants accepted the Department’s conditions for grant of ATI, including the risk that their ATI would not be renewed after the “five-year expiration date on the approval.”<sup>17</sup>

Moreover, the Joint Applicants have had ample time and opportunity to establish that circumstances have sufficiently changed to warrant a continued grant of ATI. In July 2019, they filed a motion to eliminate the five-year expiration on the initial grant of ATI.<sup>18</sup> In response,

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<sup>13</sup> *Id.* at 8.

<sup>14</sup> *Id.* at 17.

<sup>15</sup> *Id.* at 27.

<sup>16</sup> Reply of the Joint Applicants, Docket DOT-OST-2015-0070, Nov. 30, 2016, at 6.

<sup>17</sup> Notice of the Joint Applicants, Docket DOT-OST-2015-0070, Dec. 21, 2016, at 1–2.

<sup>18</sup> Motion to Amend Order 2016-12-13, Docket DOT-OST-2015-0070-0209, July 3, 2019.

several U.S. airlines raised continued concerns with slot administration by MEX,<sup>19</sup> and the Department found that it was unable to evaluate the efficacy of changes in slot administration at MEX to resolve its concerns.<sup>20</sup> The Department gave the Joint Applicants even more time, extending the deadline to file a new application for ATI by three months and allowing the carriers' grant of ATI to remain in place until the Department had completed the review of the new application.<sup>21</sup> As a result, although the Department's grant of ATI would have expired on December 21, 2021, the Joint Applicants have continued to operate with ATI during the pendency of the new application.<sup>22</sup>

After more than seven years since the Department raised significant concerns regarding the Mexican government's management of MEX, and more than two years after the initial grant of ATI was set to expire, the situation has *worsened*. During the review of the initial application for ATI in 2016, the Department at least found sufficient evidence that an Open Skies agreement had been implemented despite the concerns about opaque and anticompetitive slot allocation in MEX. Now that is no longer the case. The Mexican government has taken actions that the U.S. Government considers as being "fundamentally out of compliance with the existing bilateral air service agreement and international norms governing capacity management at airports."<sup>23</sup>

Consequently, the Department has taken the straightforward steps to enforce its longstanding policy of granting ATI only where the predicate of Open Skies exists. The Department has taken the exact same steps in another recent ATI matter involving Mexico. In July 2023, the Department suspended the procedural schedule for the application for ATI filed

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<sup>19</sup> Answer of JetBlue Airways Corporation, Docket DOT-OST-2015-0070-0218, Aug. 2, 2019; Answer of Alaska Airlines, Inc., Docket DOT-OST-2015-0070-0219, Aug. 2, 2019; Answer of Southwest Airlines Co., Docket DOT-OST-2015-0070-0220, Aug. 2, 2019.

<sup>20</sup> Order, Docket DOT-OST-2015-0070, Dec. 17, 2020, Order 2020-12-18, at 5.

<sup>21</sup> *Id.*

<sup>22</sup> SCO, at 3

<sup>23</sup> *Id.* at 4.

by Allegiant and Viva for travel to Mexico because “actions undertaken by the Government of Mexico affecting U.S. carrier operations at Benito Juarez International Airport call into question the existence of [the] predicate” of an Open Skies agreement.<sup>24</sup> That the Department has taken similar actions here, after voicing concerns for years, is not surprising and hardly premature or punitive given the procedural history.

***The Department’s decision is not misdirected or ineffectual.***

Protecting the integrity of Open Skies agreements is paramount for a healthy, competitive international airline marketplace.<sup>25</sup> American hopes for a quick and effective resolution of the Department’s concerns with the Mexican government. Consistent with achieving that objective, the Department can and should deploy all tools at its disposal, including by finalizing its tentative decision in the SCO, if necessary. Requiring Open Skies as a precondition to a grant of ATI has always been an effective tool for the Department to advance liberalization in international airline regulation.<sup>26</sup>

Remaining consistent on this policy is particularly appropriate here, where in the context of the negotiation of the ATA, the Mexican delegation emphasized to the U.S. delegation that the availability of ATI for Mexican carriers would be a key benefit of entering into the ATA.<sup>27</sup>

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<sup>24</sup> Notice of Suspension of Procedural Schedule, Docket DOT-OST-2021-0152-0193, July 31, 2023, at 1.

<sup>25</sup> Patricia M. Haslach, Remarks at the Open Skies Anniversaries Ceremony, U.S. Department of State, July 10, 2017, at <https://2017-2021.state.gov/remarks-at-the-open-skies-anniversaries-ceremony/>.

<sup>26</sup> Order to Show Cause, Docket DOT-OST-1995-579-0024, Nov. 20, 1992, Order 92-11-27, at 13–14 (“[W]e look to our Open Skies accord with the Netherlands and our approval and grant of antitrust immunity to the Agreement to encourage other European countries to agree to liberalize their aviation so that comparable opportunities may become available to other U.S. carriers.”); Order to Show Cause, Docket DOT-OST-1995-618-0038, May, 21, 1996, Order 96-5-26, at 3–4 (“It is our expectation that these accords will encourage other European countries to seek similar liberal aviation arrangements with us.”).

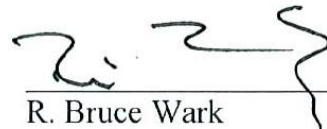
<sup>27</sup> Memorandum of Consultations, U.S. Department of State, Nov. 21, 2014, at 2, available at <https://2009-2017.state.gov/documents/organization/234926.pdf> (“The Mexican delegation shared with the U.S. delegation a letter dated 4 November 2014 . . . emphasizing its view of the importance of the availability of antitrust immunity (ATI) so that U.S. and Mexican carriers could further their beneficial alliances and/or commercial agreements.”); *see also id.* at 26 (“[T]he United Mexican States delegation strongly believes that the resulting advantages of the Agreement will only be met if the government of the United States of America assures it will undertake all necessary endeavors to grant access to the Mexican airlines to a beneficial anti-trust regime. For all these reasons and in order to secure the successful implementation of the Agreement, the Mexican delegation requests that the



And, as discussed above, although the Department granted ATI to the Joint Applicants in 2016 with a five-year expiration date with hopes that the Mexican government's management of MEX would improve, the situation has worsened.

Open Skies agreements have always been a regulatory prerequisite for ATI, and the Department has routinely refused ATI where an Open Skies agreement is absent.<sup>28</sup> The SCO stays true to the Department's longstanding policy on Open Skies. This policy has facilitated significant cooperation between international carriers that has greatly expanded travel, benefitting consumers. A departure from this rule would undermine decades of the Department's efforts to encourage foreign governments to uphold transparency and free and fair competition in the public interest.

Respectfully submitted,



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government of the United States of America expedites the granting of antitrust immunity to those airlines that, within the framework of the Agreement, submit any application to obtain it.”).

<sup>28</sup> Order to Show Cause, Docket DOT-OST-2001-11029-0069, Jan. 25, 2002, Order 2002-1-12 (“[C]onsistent with our long-standing policy, we shall require that there be an Open Skies agreement with the United Kingdom in place before we issue a final decision in this proceeding.”); Notice, Docket DOT-OST-2016-0087-0003, May 26, 2016, at 2 (suspending procedural schedule because the government of Brazil had not yet “completed the internal procedures necessary” to bring the bilateral air transport agreement into force).

## **CERTIFICATE OF SERVICE**

I hereby certify that on February 23, 2024, I served a copy of the foregoing document upon the following persons via email.

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