



1212 New York Avenue, NW
Suite 1212
Washington, DC 20005
T: 1-800-JETBLUE
jetblue.com

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Via email

The Honorable Carol A. (Annie) Petsonk
Assistant Secretary for Aviation and International Affairs
U.S. Department of Transportation
1200 New Jersey Ave., SE
Washington, D.C. 20590
carol.petsonk@dot.gov

Re: Answer of JetBlue to Objection of the JCA Partners to Show Cause Order

Docket DOT-OST-2015-0070

Dear Assistant Secretary Petsonk,

JetBlue hereby submits this brief answer to address assertions made by Delta and Aeromexico (the "JCA Partners") regarding the relationship between airport access issues and antitrust immunity (ATI) for international airline alliances.

The JCA Partners essentially argue that it is irrelevant if one or more essential hub or gateway airports in a joint venture are effectively closed to new entry because of slot unavailability. This argument ignores that issues related to slot access have figured prominently in most ATI cases over the last 15 years. DOT's ATI policy has evolved over decades through case-by-case adjudication as competitive developments altered the industry. In recent years, DOT and foreign competition regulators have used airline joint venture reviews and other proceedings to address airport access issues at some of the world's most access-restricted airports, including LHR, LGA, HND, AMS, and MEX. DOT has sought to ensure that the benefits of Open-Skies in international markets extend not only to the largest incumbents, but also to new entrants and smaller carriers that are not part of an immunized alliance. The promise of the Open Skies policy (and, indeed, U.S. airline deregulation) is that new entrants and smaller carriers should not face barriers to entry, but rather should be able to succeed or fail in a competitive marketplace based on their commercial merit. DOT's longstanding policy of predicating ATI on the existence of Open-Skies serves to ensure that conditions are in place for new entry to be timely, likely, and

sufficient to deter or discipline potential competitive harm that might otherwise result from the immunized alliance.

DOT should not accept the JCA Partners' contention that DOT can issue *de novo* grants of ATI in a *de jure* Open Skies market that is *de facto* closed to new entry due to the unavailability of slots at key gateway airports. Under this logic, the international aviation landscape would consist only of three U.S. legacy carriers and their immunized joint venture partners, to the exclusion of competition from new entrants and smaller, non-immunized carriers that cannot enter or grow their market presence due to airport access or other barriers. This is exactly the outcome that Open-Skies was meant to avoid.

JetBlue's and other U.S. carriers' recent experience with access to Amsterdam Airport Schiphol demonstrates the importance of vigorous DOT oversight to ensure that in markets where alliance partners operate with ATI, *de facto* as well as *de jure* Open-Skies remain in effect, thereby ensuring unfettered market access opportunities for all U.S. carriers, including new entrants. As a number of immunized joint ventures seek to add new members, and as some countries retreat from their Open-Skies commitments, it is more imperative than ever for DOT to abide by its longstanding ATI and Open-Skies policies, which are acknowledged around the world as the gold standard of international aviation liberalization. DOT should not contemplate abandoning or diluting this important standard, which was achieved over decades.

Finally, JetBlue respectfully defers to DOT on the most appropriate course of action to ensure full, fair and effective application of the U.S.-Mexico Open-Skies agreement. JetBlue strongly agrees with DOT that the "existence of these elements [of DOT Order 92-8-13] in an agreement is critical to address potentially harmful impacts of antitrust immunity" and that the actual existence of these elements is not theoretical. DOT Order 2024-01-17 at 4.¹ Recognizing the unique circumstances of this case, where the issue is whether to approve a *de novo* ATI application,² JetBlue applauds DOT's continued engagement with all stakeholders to ensure that air service between the United States and

¹ The JCA Partners, in arguing that DOT has failed to adhere to its statutory authority by applying "an Open Skies precondition for ATI," misread the statutory ATI requirements. Unlike alliance approvals, which DOT "shall approve" if statutory conditions are met under 49 U.S.C. § 41309, grants of ATI exemptions under 49 U.S.C. § 41308 are discretionary (DOT "may" grant ATI "when required by the public interest"). Therefore, it is reasonable for DOT to take the position that, in its discretion and consistent with decades of U.S. international aviation policy, it will not grant an ATI application where Open-Skies are lacking. Section 41309 specifically refers to "international comity and foreign policy considerations", which further underscores that DOT has discretion to link the existence of an Open-Skies precondition to ATI. This is entirely consistent with longstanding ATI precedent, including all of the many cases in which DOT previously granted ATI to Delta and its alliance partners. DOT, however, could consider whether to approve the JCA Partners' alliance agreements under § 41309's more permissive standard, while finalizing its dismissal without prejudice of the JCA Partners' application to the extent it seeks ATI under § 41308. Such an approach would be consistent with DOT's decades-old ATI policy.

² The final order granting ATI to the JCA Partners was clear that DOT could "amend, modify, or revoke this authority at any time, without hearing." Order 2016-12-13 at 33, ordering para. 13. Therefore, the procedural due process being afforded the JCA Partners in the Show Cause Order is above and beyond what DOT is required to do.

Mexico, where JetBlue offers low-fare competitive service to four cities, continues to meet the Department's longstanding definitional elements of an Open Skies market.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert C. Land". The signature is fluid and cursive, with the first name "Robert" and last name "Land" being clearly distinguishable.

Robert C. Land
Senior Vice President, Government Affairs
and Associate General Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by electronic mail this 5th day of March, 2024, on the following:

Aeromexico	charles.donley@pillsburylaw.com edward.sauer@pillsburylaw.com laura.ochoa@pillsburylaw.com
Alaska	dheffernan@cozen.com rwelford@cozen.com
ALPA	david.semanchik@alpa.org
American	molly.wilkinson@aa.com brent.alex@aa.com
Atlas Air	sascha.vanderbellen@atlasair.com
Delta	chris.walker@delta.com steven.seiden@delta.com
FedEx Express	anne.bechdolt@fedex.com brian.hedberg@fedex.com
Hawaiian	perkmann@cooley.com
Polar	kevin.montgomery@polaraircargo.com
Southwest	leslie.abbott@wnco.com bobkneisleyLLC@gmail.com
United	dan.weiss@united.com steve.morrissey@united.com aarshad@crowell.com
UPS	dsmalls@ups.com
State/FAA/DOT/Commerce	yoneokaR@state.gov moffatas@state.gov john.s.duncan@faa.gov benjamin.taylor@dot.gov brett.kruger@dot.gov robert.finamore@dot.gov todd.homan@dot.gov fahad.ahmad@dot.gov peter.irvine@dot.gov
Airlineinfo	info@airlineinfo.com