BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Joint Application of **DELTA AIR LINES, INC. and** **WESTJET AIRLINES** Under 49 U.S.C. §§ 41308 and 41309 for approval of and antitrust immunity for alliance agreements	)	DOCKET OST – 2018-0154

ANSWER OF SPIRIT AIRLINES, INC. TO ORDER TO SHOW CAUSE

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Spirit Airlines, Inc. ("Spirit") submits this Answer in response to the Department Order to Show Cause (October 23,2020) (OSC) to approve and grant antitrust immunity (ATI) subject to conditions for the proposed alliance agreement between Delta Air Lines and WestJet Airlines. Spirit endorses the Department finding that divestiture of 16 slots at LaGuardia International Airport (LGA) is essential to approval with ATI and compliments the Department for acting to protect the limited low-fare competition there. However, Spirit believes the tentative decision to diverge from the auction eligibility conditions imposed when approving the Delta-US Airways slot exchange in 2011 will not lead to the pro-competitive service the Department seeks to replace and is not in the public interest.

For the reasons discussed below, Spirit urges the Department to apply the same eligibility conditions imposed in 2011. *See*, 76 Fed. Reg. 63702 et. seq (Oct 13, 2011). Importantly, Southwest and JetBlue should be excluded from the auction. If the Department fails to exclude these two carriers, it must divide the 16 slots into two groups of 8 which at least will enhance the

possibility that a current ultra-low fare carrier at LGA or a new entrant has some opportunity to acquire slots. Apart from Southwest, as the Department's careful infrastructure analysis demonstrates, the competitive landscape at LGA (and for New York in general) is essentially unchanged from 2011 when the Delta/US Airways slot exchange was approved with required divestitures at LGA and DCA. *See,* OSC at 18-21.

I. THE DEPARTMENT CORRECTLY FOUND THE APPLICANTS MUST DIVEST 16 SLOTS AT LGA AS A CONDITION FOR APPROVAL AND ATI

The Department Competitive Effects Analysis demonstrates the proposed joint venture alliance will provide the least public benefits of any recent ATI application approved by the Department. Indeed, a strong case can be made, based on the Department analysis, the application should be denied. In these circumstances, the need to require divestment of 16 LGA slots originally intended to promote low-fare competition becomes critically important. In summary the Department finds:

U.S.-Canada Market. The U.S.-Canada market is already highly concentrated such that approval of the alliance will significantly increase market power. *Id.* at 13-14. This will lead to higher prices, reduced capacity or both. In this connection, the Department points out that with the exception of very minimal service by Frontier, no U.S. low-fare or ultra-low fare carrier serves Canada.

City Pair Markets. Reduced competitors in eight percent of the Transborder market pose "significant competitive concerns" for 1.9 million passengers. *Id.* at 15.[1] Indeed, the Department further notes the risk that an additional 5.1 million Transborder passengers could face a potential reduction in competition.

LGA-YYZ Market. The Department has an appropriately serious concern about

[1] . The Department compares this to the Delta-Aeromexico AIT where less than one percent of the market would face a "substantial reduction in competition." *Id.* at 17.

reduced competition on the LGA-Toronto (YYZ) route which accounts for six percent of U.S.-Canada traffic and is the second largest international travel market from the United States. *Id.* at 18. This concern stems from the fact there is no opportunity for new entry due to the "persistent inability of carriers to access slots for new/or additional services at LGA and JFK" as well as "entry barriers at Newark." *Id.* In connection with LGA, the Department stresses that WestJet entered the LGA-Toronto market as an LCC as part of a "mandated divestiture" to address "Delta's dominance" there, and that WestJet is no longer operating as an LCC.

LGA Market. Importantly, and apart from specific concerns about LGA-YYZ, the metal neutral joint venture will put the WestJet LGA slots directly under Delta control. This completely undermines the 2011 decision requiring Delta to divest 32 slots at LGA to effectively cap it at a 46% slot share as a condition for approving the exchange with US Airways.

Today, Delta holds 42 more LGA slots than the next three largest slot holders – American, United and Southwest – combined. *See*, Southwest Answer to Application at 6 (December 11, 2019) Indeed, the proposed joint venture would immediately undo fifty percent of the LGA remedy imposed in 2011. In addition, the Department correctly found it should **not** go along with Delta's plan to regain those slots because:[2]

- LGA is a relevant market separate and distinct from JFK and EWR and is "oversubscribed."
- In 2011 the Department found Delta had a dominant position at LGA at 51% and divesting 32 slots was necessary to promote competition and discipline Delta's growing dominance.
- Low cost carrier market share has remained virtually static for the last seven years and loss of the WestJet slots would reduce potential LCC operations to 12.5% – virtually the same as in 2012.

[2] Delta's effort here is essentially the same as United's at EWRs in 2015 when, through an exchange of its JFK slots to Delta, it sought an equivalent number of EWR slots – the same number of slots it was required to give up in 2010 to merge with Continental.

Spirit is not seeking the application be denied. However, at least two of the public benefits the Department references (OSC at 23) are questionable. First, it is far from clear that ATI is required to reduce or eliminate the costs of double marginalization.[3] Second, as discussed by the Department and addressed above, it is unlikely this Joint Venture will result in increased capacity. This is particularly true in the 169 markets referenced in the OSC at 16, and significantly in the very important LGA-YYZ market.

II. THE DEPARTMENT MUST IMPOSE THE SAME ELIGIBILITY CRITERIA USED IN THE DELTA-US AIRWAYS SLOT EXCHANGE

Given the serious competitive concerns raised by this transaction, the eligibility criteria for the auction of the 16 slots are of critical importance. To satisfy the statutory public interest requirement imposed by 49 U.S.C. §§ 41308, 41309(b) which is to guide the Department, competition at LGA must be by preserved and enhanced. In its reply to the answers filed in response to the application, Spirit urged the Department to apply the same eligibility requirements it imposed on the 2011 slot swap.

This is because, as the Department itself recognizes in the OSC, there has been no improvement in access by carriers most likely to bring competition and the greatest benefit to consumers – ultra LCC's (ULCCs) currently serving LGA and new entrants. Failure to maintain those eligibility requirements essentially means that Southwest or possibly JetBlue will get all the slots which is not the pro-competitive result that best advances the public interest in creating travel options at LGA.

A. The Public Interest Requires Maintaining the Bidder Threshold as Less than Five Percent (5%) of LGA Slots

In the 2011 Order, the Department cogently summarized its reasons for adopting the new

[3] See, William Gillespie, Oliver M. Richard, Economic Analysis Group, *Department of Justice Discussion Paper: Antitrust Immunity and International Airline Alliances*, February 2011 at 13-16

entrant or limited incumbent as those with less than a 5 percent slot share. *See,* 76 Fed. Reg. at 63707. Most importantly the Department confirmed that new and smaller carriers " would help attract carriers that offered the prospect of increased efficiencies and innovation," and " increase throughput at the airport." *Id.*

The Southwest Accommodation. The tentative decision makes two fundamental and major changes that undermine the 2011 findings and will effectively lock out ULCCs and new entrants from bringing LGA the lowest fare options the public needs, especially at a time when government should seek to restore the economy and the industry. The first change is to raise the eligibility threshold from five percent to ten percent. The stated purpose is to ensure "sufficient" bidders. *See* OSC at 30-31. However, on review, the only eligible carrier between those under five percent and ten percent is Southwest.[4]

The Department apparently believes it needs Southwest for an effective auction. This view is only correct if the purpose of the auction is to ensure a very high payment to Delta and WestJet. It is a misguided objective because the amount of money the applicants receive, given the value of the many benefits of approval and antitrust immunity, is both *de minimis* and certainly not a public interest criterion under the Airline Deregulation Act. *See*, 49 U.S.C. §40102(a) (Goals include *e.g.* to promote new entry, innovation, efficiency, low fares, strengthen smaller carriers and prevent anticompetitive behavior.)

Importantly, Spirit emphasizes that excluding both Southwest and JetBlue for the reasons discussed below, there are still **eight potential** new entrant and limited incumbent **bidders: Spirit, Frontier, Allegiant, Sun Country, Porter, XTRA (Houston Air Holdings), new**

[4] **United and Air Canada** would **not** be **eligible** under the proposed terms because of their immunized alliance because their combined slot holdings equal approximately twelve (12) percent.

entrant Breeze and possibly Alaska[5], all with market shares below five percent. Even if there were only one or two bidders today, the public would still benefit more than the otherwise likely result of Southwest acquiring all 16 slots.

There are several reasons why this is true:

- **Southwest is already the fourth largest carrier at LGA with 57 slots**, far bigger than it was in 2011or 2013 when it acquired additional slots as a condition of Department of Justice approval of the American/USAirways merger. Southwest has expanded from an average of 7.8 departures a day in 2011 to an average of 34.2 departures a day in 2019. Southwest has almost three times the LGA slots than Spirit. Given Southwest's relative size compared to all the other LCCs and ULCCs it should be excluded.

- All of the established ULCCs are much stronger (despite the pandemic) than they were in 2011 when still recovering from the 2008-2009 recession, and in much better position to provide important low fare competition. For example, in 2011 Spirit had just completed its IPO and had only 35 aircraft in its fleet. Today Spirit operates 157 aircraft and remains on pace toward the approximately 300 it will operate by 2027.

- ULCCs and new entrants will offer lower fares and will make the most efficient and responsible use of the scarce public assets (slots and gates) at LGA. Attached Exhibit 1 shows Spirit's average fare (including bag fees) at LGA is substantially lower than any other U.S. carrier, including Southwest. Exhibit 2 shows Spirit's LGA gate utilization and seat throughput as significantly higher than any other LGA operator.

It is a tribute to Southwest's size and success that it can and certainly would outbid every other potential bidder for these 16 slots.[6] However, changing the eligibility criterion specifically to include Southwest and virtually ensure its selection simply to better fill the pockets of Delta and WestJet is **<u>not in the public interest</u>** and is not a legitimate basis for the change. As noted in Spirit's reply, despite its best efforts, today it has the same 1.9 percent of LGA slots it had 10

[5] Alaska obtained a small share of LGA slots when it acquired Virgin America which are on long-term lease to Southwest.

[6] Over the last decade, due to superior financial resources, Southwest has been successful in every LGA or DCA slot auction for which it was eligible. In the few cases where Southwest did not "win" slots, it was either ineligible because it lacked qualifying criteria as a new entrant or limited incumbent, or where the government permitted a carrier to acquire only a single bundle of slots in a multiple bundle scenario.

years ago. Over the same period, **Southwest has substantially increased its LGA slots**. As the Department states in the OSC it is:

> necessary for 16 slots to be made available to new-entrant and limited incumbent carriers at LGA, as **divestitures are the best and most reliable means to enable LGA access and to provide competition** for Delta and its proposed alliance with WestJet. (emphasis added)

Accordingly, the Department must proceed with the less than five percent eligibility cap to fulfill its statutory mandate. *See* OSC at 29.

B. Public Interest and Antitrust Principles Should Preclude Bidding by Carriers that Codeshare with Any Carrier with a Five Percent or Greater Share

The JetBlue Accommodation. The second major change, which only helps JetBlue, is to allow an airline which codeshares with another carrier with greater than ten percent of the LGA slots to bid so long as those specific slots are not used for codeshare flights. *See,* OSC at 30. On July 16, 2020, American Airlines, the second largest slot holder at LGA with approximately a 29 percent share entered into a codeshare and other marketing agreements with JetBlue covering service to/from all three New York airports. The Department chose not to make the JetBlue/AA application for approval public, and the current review period required by statute expired November 19.[7] If the Department did not extend the review period, the agreement could become effective on that day.

The limited information released by American and JetBlue about this collaborative agreement raises serious competition concerns. Spirit understands the codeshare includes 489 daily flights and 120 nonstop destinations from the New York city area. American will gain access to 130 JetBlue routes to the southeast from New York and Boston and will also boost American's service to the West Coast. JetBlue will gain access to 60 American routes. American

[7] 85 FR 51552 (August 20, 2020).

and JetBlue are not hiding their market dominance goal. Vasu Raja, American's Chief Revenue Officer, is quoted as saying: "By coming together, we can create a network that's not just competitive with our larger rivals in New York, but eventually something greater."[8] According to a JetBlue executive: "And as we look at slots and we look at how we move forward, American has talked about things like LaGuardia, where they're going to be removing airplanes. That creates some room for JetBlue as LaGuardia slots are freed up."[9]

The primary result of the American/JetBlue agreement will be to further cement the dominance of the three legacy airlines at New York airports. Regardless of how the Department proposes to wall off the 16 slots, if JetBlue were to win them the outcome will not promote or benefit new entry or low-fare competition at LGA. It is highly unlikely that JetBlue will use these slots to compete with, or undermine its arrangement with American, particularly when, as noted above, it expects to acquire additional LGA slots from American. Importantly, the Department offers no explanation of why it is changing the no codeshare provision from 2011 to the new "Chinese Wall" approach to codeshares when the obviously improper purpose is to ensure that a specific airline is made eligible to bid in the auction.

Importantly, in 2011 the Department concluded that the two groups of 16 slots at LGA could not go to the same carrier as necessary to best promote competition. On that basis as the winner of 16 slots in 2011, JetBlue should not be permitted to bid. Should it be permitted to bid and win the auction, JetBlue would have all the slots Delta was required to divest in 2011. This would directly contradict and defeat the pro-competitive objective of having two limited incumbents or new entrants each operating 16 slots.

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[8] *See* https://www.expressnews.com/business/article/American□Air□makes□big□bet□on□NYCBoston□with□15413141.php#:~:text=American%20Air%20makes%20big%20bet%20on%20NYC%2C%20Boston,ceding%20the%20city%27s%20two%20largest%20airports%20to%20rivals.

[9] *See* "American Airlines Can't Shrink Its Way Out of Strategic Failures," July 29, 2020. https://seekingalpha.com/article/4361838-american-airlines-cant-shrink-way-out-of-strategic-failures.

III. IF THE DEPARTMENT DECIDES NOT TO CHANGE THE ELIGIBILITY REQUIREMENTS, IT MUST DIVIDE THE SLOTS INTO TWO EIGHT-SLOT BUNDLES

As explained in II above, should the Department not change to its tentative decision, such that both Southwest and JetBlue become eligible bidders it will assuredly result in Southwest or possibly JetBlue acquiring all 16 slots as slot auction history is instructive. This outcome will freeze the current slot holders for the foreseeable future. Unless there is a major change in the slot policy which has existed for decades, or the FAA raises the slot caps, ULCCs and new entrants will continue to be locked out or severely limited, and passengers will pay hundreds of millions of dollars in higher fares with fewer options.

For this reason, if the Department discards its 2011 criteria, Spirit recommends dividing the 16 slots into two 8 slot groups. This would lower the potential winning bid to at least half of what would be required for all 16 slots. And since ULCCs typically operate one or two roundtrips in any market, new very low fare service potentially could still be added in two to four markets. Importantly, for a given market, even one flight a day by a ULCC tends to significantly lower fares offered by legacy carriers.

IV. CONCLUSION

For the reasons stated above, Spirit supports the Department's tentative finding that the proposed joint venture poses serious threats to competition at the national level, the city level in the LGA airport market and especially in the LGA-YYZ market. If the Department nonetheless intends to approve and grant ATI to the applicants, then the Department must divest an equivalent 16 slots acquired by WestJet in 2011 to enhance competitive low-fare service to LGA and limit Delta's dominant position at LGA. As the Department recognizes, the competitive

landscape there remains virtually unchanged from 2011, and new entry or expansion by limited incumbents is foreclosed with no improvement on the horizon.

We urge the Department to impose the identical eligibility criteria applied in 2011. While the list of carriers with fewer than five percent of slots has changed, there are clearly sufficient bidders to conduct a lively and competitive auction, although the amount paid to the ATI applicants is irrelevant given the benefits acquired by grant of ATI. Changing the bidding ground rules from 2011 is fundamentally **not in the public interest**.

Respectfully submitted,

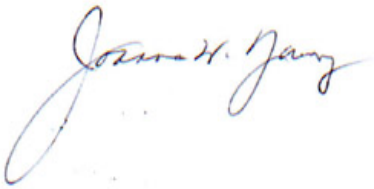

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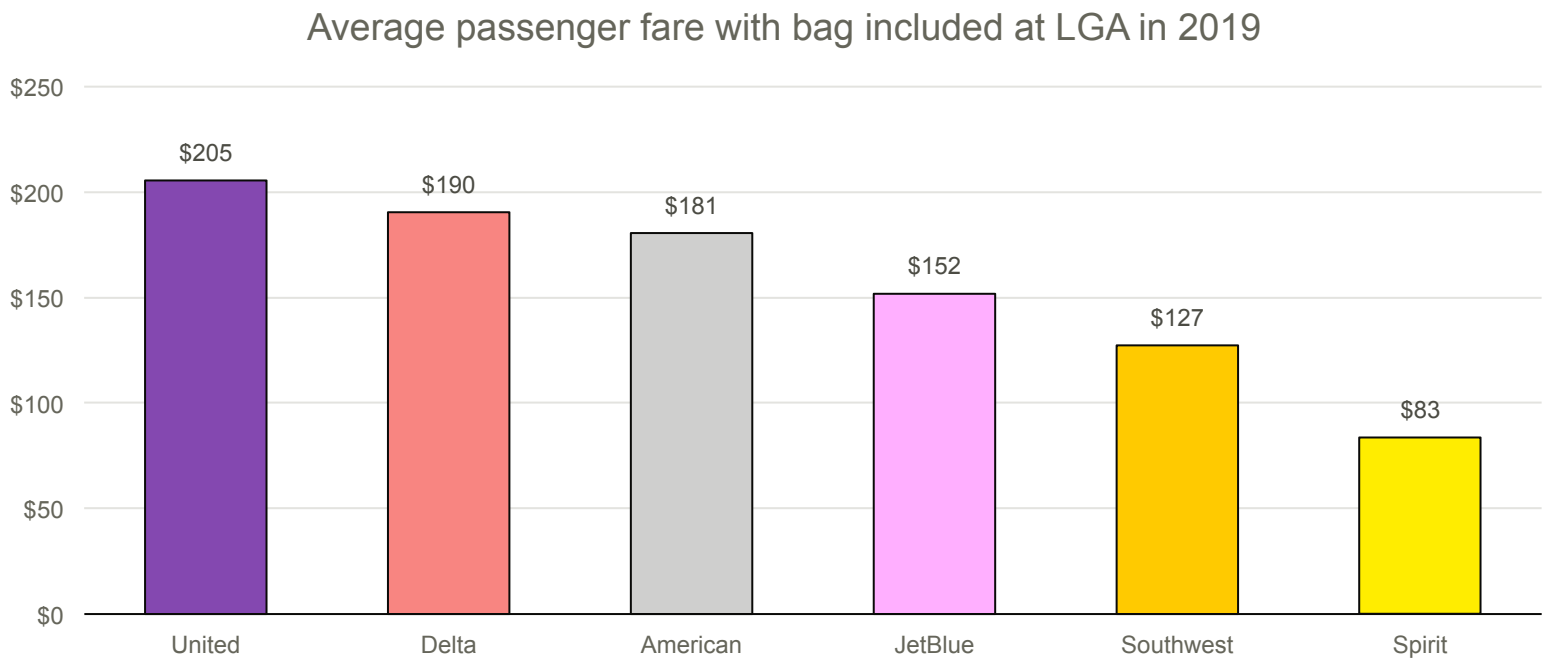
Exhibit 1

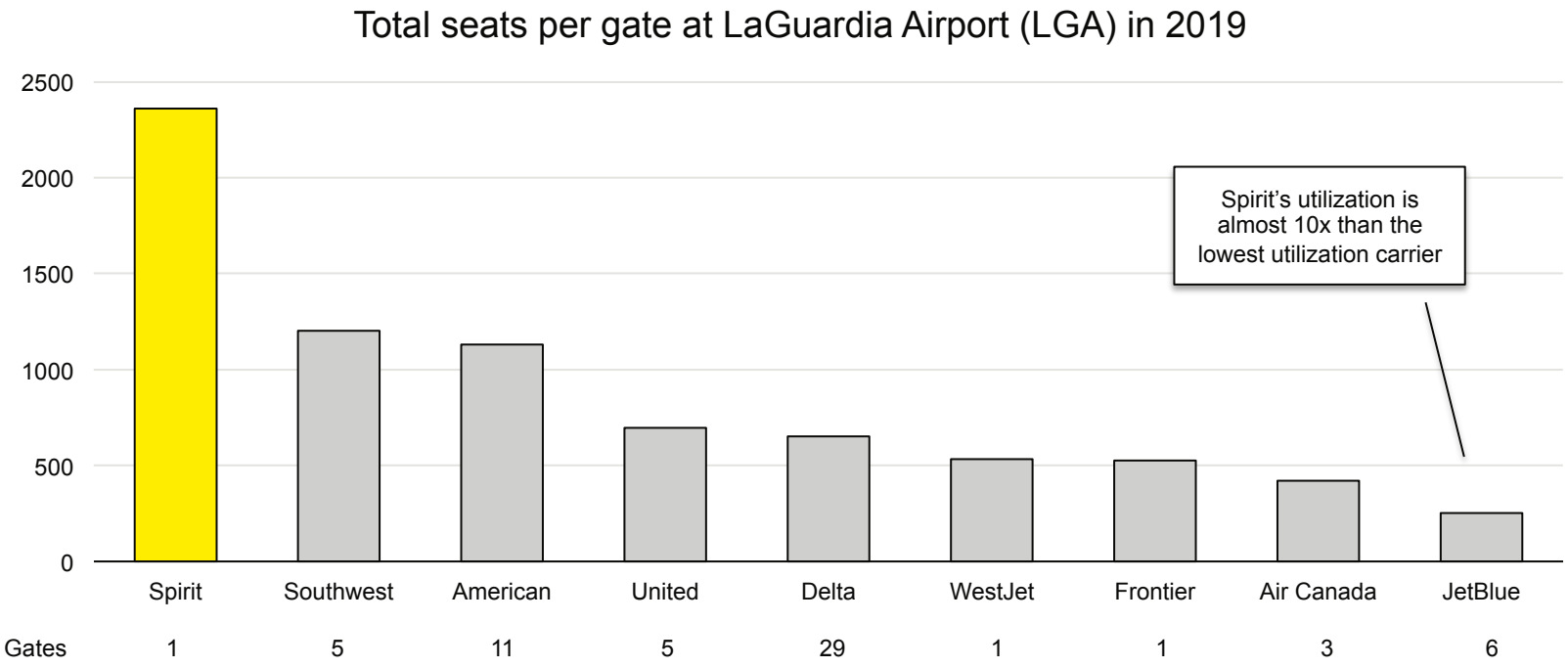
Spirit's average fares are ~52% lower than LGA's average



Note: average passenger fare based on Cirium's version of DB1B, full year 2019; average bags per passenger by airline from full year 2019 Form 41 data calculated by using "excess bag" charges per passenger; the full year 2019 average fare for United, JetBlue, Southwest, Spirit, Frontier, American and Delta was $174

Exhibit 2

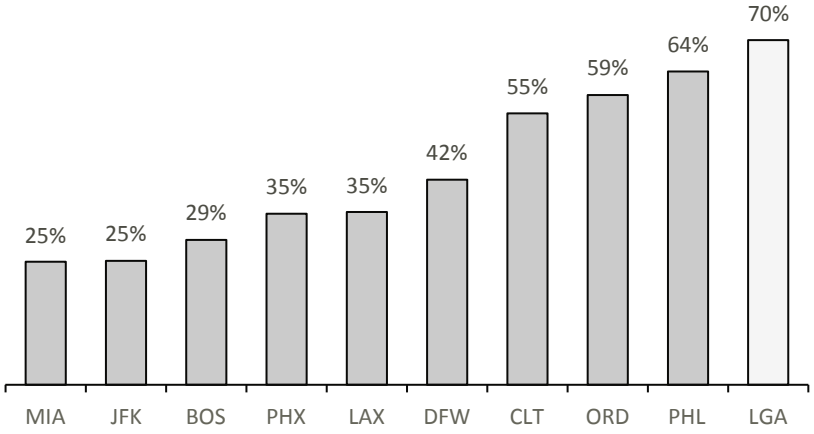
Spirit utilizes its single gate at LGA more efficiently than any other airline



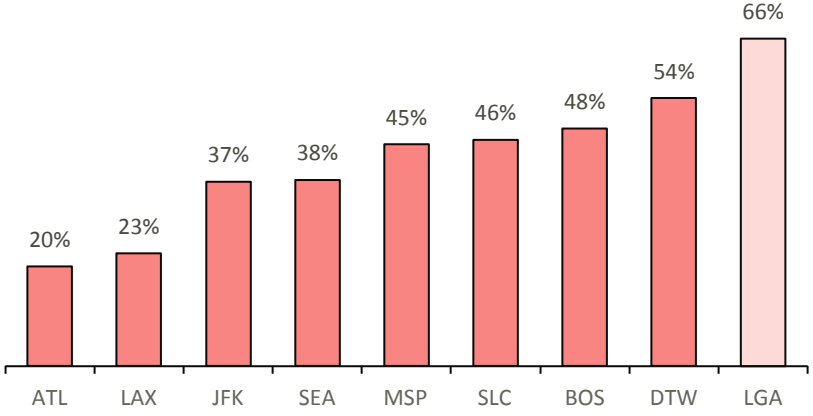
Based on scheduled seats in 2019; gate positions from Port Authority of New York and New Jersey as of November 10, 2020

Dominant LGA carriers AA & DL are wasting valuable slots on small aircraft

Mix of RJ capacity[1] in AA hubs

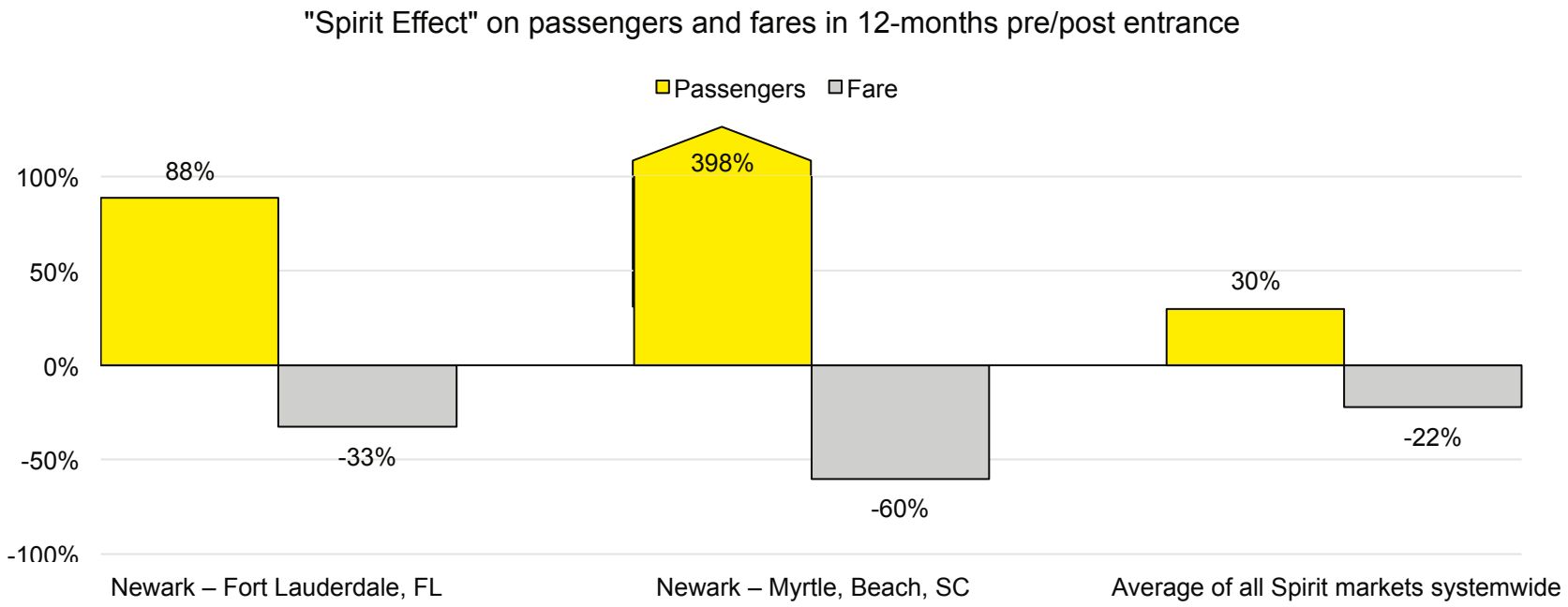


Mix of RJ capacity[1] in DL hubs



[1]Reginoal jet (RJ) capacity defined as flights under 100 seats / total flights at the airport for the airline in 2019

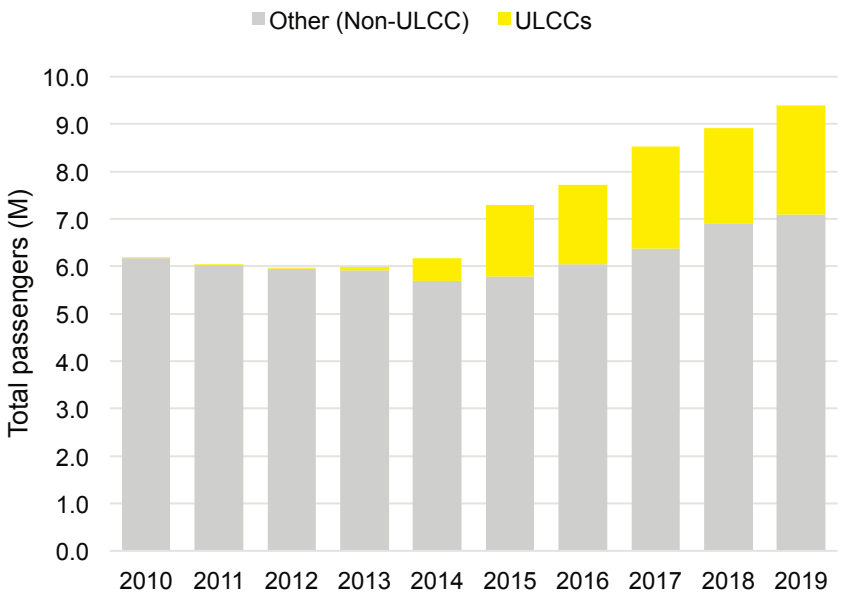
The “Spirit Effect” is more pronounced due to high prevailing fares in NY



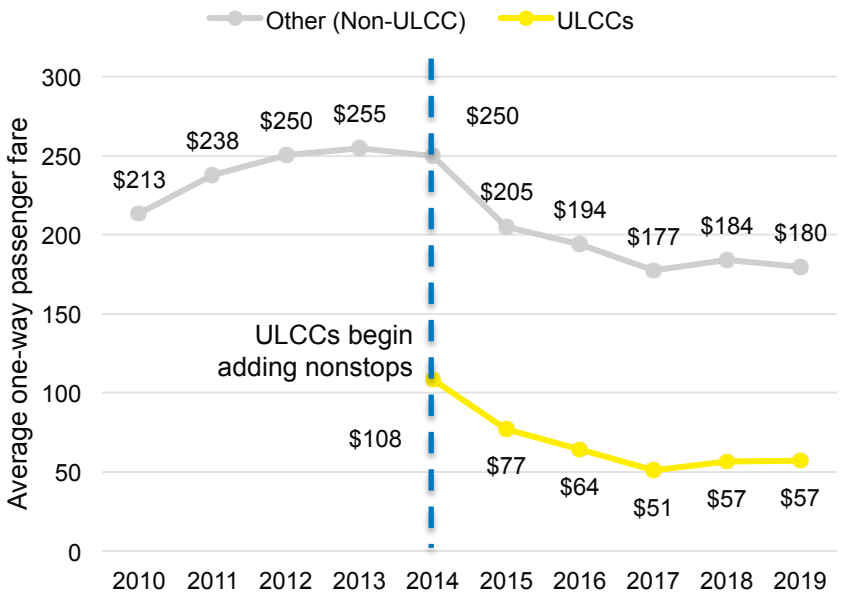
Based on DOT DB1B data for full 12 months after Spirit starts a market, versus full 12 months prior to Spirit entering; fare excludes taxes and other fees/ancillary charges

ULCCs launching Cleveland helped stimulate demand at lower fares

Passengers at Cleveland (CLE)[1]



Average fare at Cleveland (CLE)[1]



[1]Based on DOT DB1B data for full year, both arriving and departing from CLE

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2020 I caused to be served by email a copy of the foregoing Answer on the following persons:

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