BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

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

JOINT APPLICANTS' OBJECTIONS TO SHOW CAUSE ORDER 2020-10-13
AND NOTICE OF WITHDRAWAL OF APPLICATION

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The Joint Applicants are deeply disappointed that after taking more than two years to reach a decision, and acknowledging that the proposed Joint Venture between Delta and WestJet ("JV") would generate substantial benefits for the traveling public, the Department has issued a show cause order[1] ("SCO" or "Show Cause Order") which proposes to deny antitrust immunity ("ATI") unless the Joint Applicants accept a set of conditions that are arbitrary and capricious, including slot divestitures that are unrelated to any alleged reduction in competition as a result of the JV. By contrast, the Canadian Competition Bureau conducted its own review of this pro-competitive JV in less than a year and granted an unconditional "no action" letter in June 2019. Several of the conditions proposed by the Department on its grant of ATI are unreasonable and unacceptable and therefore the Joint Applicants must withdraw their Application.

The most onerous of those conditions would require that WestJet divest 100% of its slot portfolio at LaGuardia Airport ("LGA"), or else require Delta to divest an equivalent set of eight slot pairs from its own LGA slot portfolio – despite the fact that LGA is an airport where Delta and WestJet do not even compete with each other. Contrary to every prior ATI proceeding in which the Department has required slot divestitures, the proposed divestitures in this case are not

[1] Order 2020-10-13 (Oct. 23, 2020).

designed to address any potential reduction of competition arising as a result of the JV. In fact, the divested slots would almost certainly not even be used to compete with the JV. They would likely be redeployed by the recipient to use in domestic or other markets which are outside the JV scope. Moreover, the proposed divestitures would either result in reduced capacity on the New York-Toronto route where WestJet currently deploys those slots, or else harm the public interest by forcing Delta to reduce or eliminate service Delta currently offers from LGA to small and medium sized U.S. communities. Neither outcome is justifiable in the context of a pro-competitive pro-consumer ATI application.

The only apparent reason the Department proposes to impose this condition is its tentative determination that allowing WestJet and Delta to retain their LGA slot portfolio while participating in a transborder joint venture would "exacerbate Delta's dominance at LGA."[2] That determination is arbitrary and capricious. It ignores the facts that WestJet would remain the sole holder of its slots with ultimate control over their use; that Delta's share of operations at LGA is only 45%, far less than the share that other hub operators have at other hub airports even in the New York area; and that Delta's share of operations at the airports in the New York metropolitan area as a whole is only 28%.[3] The loss of these slots would deprive the Joint Applicants of critical operating rights at one of the most important strategic hubs in Delta's global network at a time when Delta is investing billions of dollars of its own capital in a comprehensive facilities improvement project at this airport. Moreover, it would force the Joint Applicants to sell these strategic corporate assets during a global pandemic that has inflicted an unprecedented crisis on this industry, virtually ensuring that they would be sold at a fire sale price far below their long-term economic value.

In addition to proposing an unacceptable and unjustified slot divestiture, the Department has proposed two other arbitrary and capricious conditions: (1) requiring the carve-out of

[2] Order 2020-10-13, at 18.
[3] Based on OAG schedules, Delta operated only 28% of the flights to/from New York during the twelve months ending October 2019.

WestJet's Swoop affiliate and WestJet's parent from the JV; and (2) requiring WestJet to interline upon request with all other U.S. airlines besides United. The carve-out of Swoop and the WestJet Parent would diminish the consumer benefits of the JV. The requirement that WestJet submit to mandatory interlining with almost any U.S. airline that requested it would impose unjustified administrative burdens and commercial harm on WestJet. Both conditions are arbitrary and capricious because no similar remedies have ever been imposed on the competing United/Air Canada/Rouge immunized alliance. Like the slot divestiture proposal, these proposed conditions are unsupported by the record, reflecting an abuse of the Department's discretion.

The Joint Applicants are unwilling to accept these conditions. Therefore, the Joint Applicants hereby withdraw their Application filed on October 10, 2018 in this docket and ask the Department to dismiss this proceeding and close out the docket.[4]

I. The Proposed Slot Divestiture Condition on this Pro-Competitive JV is Arbitrary, Capricious, and Unprecedented.

A. The Proposed Joint Venture Would Increase Competition in U.S.-Canada Markets by Allowing the JV Partners to Challenge the Much Larger United/Air Canada/Rouge Alliance.

The Joint Application for approval of, and grant of ATI for, the Delta/WestJet Joint Venture should have been straightforward for the Department to grant. As the Show Cause Order acknowledges, the JV would deliver significant public benefits, one of the most compelling of which would have been that together the Joint Applicants could achieve the critical mass necessary to compete more effectively against the much larger United/Air Canada alliance, which the Department has allowed to operate in the U.S.-Canada transborder markets with ATI for more than twenty years.[5]

[4] To the extent necessary, the Joint Applicants ask the Department to interpret this pleading as a motion for leave to withdraw their Joint Application and to dismiss the proceeding.

[5] Order 2020-10-13, at 2. The DOT first granted ATI for United and Air Canada to coordinate their transborder activities on Sept. 19, 1997. *See* Order 97-9-21.

As demonstrated in the record of this proceeding, the proposed Joint Venture would provide substantial competitive and public benefits, including more than $241 million in annual consumer benefits, the creation of a second joint network with sufficient critical mass to offer a meaningful alternative to the larger, dominant United/Air Canada/Rouge alliance, an expanded seamless and integrated Delta/WestJet network linking over 8,100 U.S.-Canada city-pairs, significantly increased transborder capacity on the combined Delta/WestJet network, new or expanded service on numerous nonstop routes, optimized connectivity over the Delta/WestJet hub networks, lower fares, and more convenient service options, among many other benefits.

The standard applied by the Department in every ATI proceeding is the Clayton Act standard to evaluate the competitive effects of a proposed merger. As the Show Cause Order states:

> "Because approval of the JVA would have intended commercial effects similar to those resulting from a merger, the Department examines the Application under the Clayton Act test. The Clayton Act test is used to predict the competitive effects of a proposed merger, and requires us to consider whether a grant of ATI is likely to substantially reduce competition and facilitate the exercise of market power." Order 2020-10-13, at 10.

Under that traditional antitrust standard, the evidentiary record in this proceeding conclusively establishes that the JV will not reduce competition on any U.S.-Canada transborder route. The Show Cause Order does not dispute – indeed, it confirms – that essential conclusion. As the Department acknowledges, the combined transborder market share of the Delta/WestJet JV would be less than half of the share operated by the immunized United/Air Canada/Rouge alliance, and 40% less than Air Canada alone.[6]

As the Department also acknowledges, the networks of Delta and WestJet are "largely complementary…with limited direct overlap."[7] In fact, Delta and WestJet do not provide

[6] The Show Cause Order finds that the Joint Applicants would have 27% share, while Air Canada alone would have 45% and the immunized Air Canada/United alliance would have 57%. Order 2020-10-13, at 1 & n.3.

[7] Order 2020-10-13, at 2.

competing nonstop service on *any* airport pair. On the LaGuardia-Toronto route, Delta does not provide nonstop service, and therefore the JV will not result in any reduction of competition on that route. If all of the New York metropolitan area airports are treated as a single market ("NYC"), as they should be, then the Joint Applicants overlap on exactly one nonstop city pair: NYC-Toronto, where there will remain four competing nonstop operators (assuming United and Air Canada are treated as a single competitor).[8] The combined NYC-Toronto market share of the Joint Applicants is slightly over 20%, less than half the market share captured by Air Canada alone.[9] The Department cites no evidence for its assertion that a city pair in which customers will still have choices between at least four nonstop competitors is likely to result in any competitive harm, especially where the JV captures such a small share of the total market demand.

B. The Show Cause Order Fails to Cite Any Evidence that Alleged Infrastructure Limitations at NYC Airports Would Prevent New or Expanded Competition on NYC-Toronto.

The only alleged connection between the JV itself and the proposed LGA slot divestiture is the Department's tentative finding that there are "infrastructure limitations" in the NYC airports which the Department asserts -- without any evidence -- may make it difficult for competitors to mount a response if the Joint Applicants were to reduce capacity and raise prices on the NYC-Toronto city pair. The only infrastructure limitations the Department cites are the FAA operating authorization rules which apply at JFK and LGA and EWR's IATA Level 2 status.

The Show Cause Order does not explain how those restrictions would prevent any of the competing nonstop carriers who already serve this city pair from increasing capacity on the New York-Toronto route simply by upgauging the aircraft they use to serve the route if they chose to do so. Nor does it explain why one or more of them could not add more flights if they chose to do so, since most of these incumbents, or their immunized alliance partner, also operate a large hub

[8] Order 2020-10-13, at 17.
[9] Order 2020-10-13, at 17-18.

or focus city operation at one of the NYC airports. The Show Cause Order also does not explain why a potential NYC-Toronto new entrant like JetBlue, which has one of the largest NYC slot portfolios of any carrier, could not use its substantial portfolio of JFK slots to offer new Toronto service if it chose to do so. The Department does not offer any answer to these questions because there is no answer to them. Even if Delta and WestJet were foolish enough to try to reduce capacity and raise prices to a supra-competitive level in a city pair where they have just over 20% market share and four nonstop competitors (again, assuming United and Air Canada are treated as a single competitor), any of those incumbent competitors and/or potential new entrants like JetBlue could, and likely would, quickly respond.

C. The Proposed Slot Remedy is Unprecedented.

The Department acknowledges that Delta and WestJet do not compete with each other at LGA because the only LGA route that WestJet serves is LGA-Toronto and Delta does not operate any service on that airport pair.[10] Yet while professing to be concerned about a potential reduction of capacity by the Joint Applicants on the NYC-Toronto city pair, and simultaneously asserting that service from LGA is not a reasonable substitute for service from any of the other NYC airports, the Department then proposes to make a reduction of capacity on the LGA-Toronto airport pair more likely by requiring a divestiture of all of the slots that WestJet currently uses to offer nonstop service at that airport in direct competition with United/Air Canada/Rouge, or an equivalent number of slots from Delta's LGA slot portfolio.

This proposed slot divestiture condition is both unreasonable and unprecedented. The Department has only rarely imposed slot divestiture conditions of any kind in prior ATI proceedings. In the rare examples where slot divestitures have been imposed, they have always required the recipient of the divested slots to use them to serve a route that competes with the JV (*i.e.*, in this case, LGA-Toronto or, for that matter, on any other U.S.-Canada transborder route).

[10] Order 2020-10-13, at 17.

For the first time in any ATI proceeding, the Department has proposed a slot divestiture not to remedy a reduction of competition in any route impacted by the JV but instead to address unfounded concerns that have nothing to do with the JV.

The Department has only required slot divestitures in three prior ATI proceedings. The first was in 2002 when the Department proposed to require London Heathrow (LHR) slot divestitures as a condition of approving ATI for American (AA) and United (UA) and their U.K. alliance partners in the U.S.-U.K. Alliance case. In that case, the Department imposed specific restrictions on the use of those slots to ensure that the divestitures would be used to address the loss of competition in the specific transatlantic markets that it found would be affected by the alliance combinations. The proposed conditions in that case would have required AA and British Airways (BA) to divest sixteen LHR slot pairs. Seven of those slot pairs were restricted for use in specific city pair markets: three daily flights each to be operated by Continental and Delta from LHR to EWR and JFK, and one daily flight to be operated by Delta from LHR to Boston. The remaining nine slot pairs were required to be used exclusively by U.S. carriers to offer services from LHR to other transatlantic destinations in the USA.[11] AA and BA summarily rejected those slot divestiture conditions and withdrew their application for ATI shortly after that show cause order was issued.[12]

The second example arose when the AA/BA alliance partners renewed their request for ATI in a subsequent proceeding six years later. In that case, the Department granted ATI subject to dramatically scaled back LHR slot divestiture requirements. This time, the Department required only a lease, not a permanent divestiture, of four slot pairs: the parties were required to make these slots available only pursuant to a 10-year lease. And, all four slot pairs were restricted to use in the specific transatlantic markets to/from LHR to compete with the AA/BA JV. Two were

[11] Order 2002-1-12, at 46-49 (Jan 25, 2002), Docket OST-2001-11029.
[12] Letter of Donald J. Carty to Norman Mineta, (Feb. 1, 2002), Docket OST-2001-11029-74; Joint Motion of American Airlines and British Airways to Dismiss Application, (Feb. 13, 2002), Docket OST-2001-11029-83.

restricted to use in a specific city pair (LHR-Boston), and the other two "flex" slot pairs were restricted to use by U.S. carriers to offer transatlantic service between LHR and other points in the USA.[13]

The only other example was in 2016, when the Department required Delta and Aeromexico to divest twenty-four slot pairs at Benito Juarez Airport in Mexico City (MEX) and four slot pairs at JFK as a condition of approving and granting ATI for the Delta/Aeromexico U.S.-Mexico transborder Joint Cooperation Agreement. In Phase I, the Department required divestiture of fourteen MEX slot pairs and two JFK slot pairs; and in Phase II, the Department required divestiture of an additional ten MEX slot pairs and two more JFK slot pairs, but only if recipients could show they were unable to obtain adequate slots with reasonable effort pursuant to the normal slot allocation process. Once again, all of the divested slots at both airports were required to be used by the recipients exclusively in the U.S.-Mexico transborder markets in direct competition with the Delta-Aeromexico joint venture.[14]

In contrast, here the Department simply proposes a naked divestiture of slots unrelated to any potential reduction of competition as a result of the JV. In fact, the recipient of the slots in the Department's proposed divestiture would almost certainly not even use those slots to compete with the JV. The only carriers eligible to receive slots under this proposed divestiture would be carriers that currently have less than 10% of the total slots at LGA. There is no eligible carrier which would be likely to offer new competition from LGA to Toronto or any other point in Canada. Thus, the divested slots would almost certainly be reallocated to another domestic U.S. market that would not compete with the JV on any U.S.-Canada transborder route.

The Department does not propose to require that the divested slots be used to compete with the JV because this proposed slot divestiture was never intended to replace any competition that might arguably be lost as a result of the JV cooperation. To the contrary, the Department

[13] Order 2010-7-18, at 15-19 (July 20, 2010), Docket OST-2008-0252.
[14] *See* Order 2016-12-13 at 21-26, and Appendix A.

readily acknowledges that this counter-intuitive remedy "may not directly address the harm identified on the LGA–YYZ route."[15] That admission is true for two reasons. First, the Department did not identify any harm on the LGA-YYZ route because Delta and WestJet do not compete on that route. Second, the remedy will have exactly the opposite effect, making it virtually certain that if the divested slots were those of WestJet, they would no longer be used to serve LGA-YYZ or, for that matter, any LGA-Canada route. To the contrary, the recipient of the slots will almost certainly not use them to serve Toronto or any other point in Canada. Moreover, the loss of the slots would force the Joint Applicants either to reduce capacity on the LGA-YYZ route – the very competitive harm that the Department claims to be worried about – or else harm the public interest in other ways by denying small or medium-sized U.S. communities the Delta-operated service that they currently receive to LGA. The only way the Joint Applicants could even maintain their current service levels on the LGA-Toronto route would be to reallocate Delta slots to backfill the loss of slots that WestJet currently uses to serve that route, or to divest Delta slots instead. Either of those options would result in the loss of LGA service to small and medium-sized communities that Delta currently provides.[16]

D. This Slot Divestiture Condition is Arbitrary and Capricious.

The fact that the proposed slot divestiture is not designed to remedy any potential loss of competition as a result of the JV and that if WestJet were to comply with this condition it would actually cause rather than mitigate the reduction of capacity on the LGA-YYZ route that the Department cites as a concern makes clear that this condition is arbitrary and capricious. It is not reasonably calculated to address any alleged loss of competition as a result of the JV. It is simply an unjustified tax or levy imposed on the Joint Applicants that if not paid will mean a pro-competitive, pro-consumer JV will not be approved. This is wholly unacceptable. The Department

[15] Order 2020-10-13, at 31.
[16] Reply of the Joint Applicants filed Dec 23, 2019, at 12-14.

proposes to impose this remedy based solely upon its flawed determination that allowing WestJet to retain its modest LGA slot portfolio while participating in the transborder JV with Delta would "exacerbate Delta's dominance at LGA."[17] This determination is incorrect for several reasons.

1. WestJet Would Retain Control of its Slots.

First, the premise that the JV "would revert effective control of WestJet's acquired LGA slots to Delta" and "effectively [undo] the 2011 divestiture"[18] is incorrect. The JV would not give Delta effective control over WestJet's LGA slots and would not result in an increase in Delta's LGA slot holdings. WestJet spent millions of dollars to buy the LGA slots in a competitive auction. WestJet is the holder of those slots now and would continue to be the sole slot holder after the JV was implemented. Under the JV, Delta would not have any control over the slots and could not dictate how those slots would be used. To the contrary, the JV Partners would jointly make scheduling determinations and any change in the manner in which the JV chose to use WestJet's slots would require WestJet's agreement and remain solely within WestJet's control.

2. Delta's Hub Operation at LGA does not "Dominate" that Airport or the NYC Metropolitan Airports as a Whole.

Second, the premise that Delta's current operations at LGA represent "dominance" in any relevant market is also false. Delta operates an efficient hub at LGA which directly competes with the other air carriers operating at LGA and at the other New York City airports. Delta's LGA hub is of critical strategic importance to its network. The carrier is in the middle of a massive terminal redevelopment project in which it is investing more than $3.4 billion of its own funds in terminal and other facilities improvements at this airport to support its operations there. Delta's investment represents one of the largest private investments ever in a public asset in New York and the significant public benefits of these investments in airport infrastructure are a direct result of – and are only possible because of – Delta's hub operations and substantial investments at this airport.

[17] Order 2020-10-13, at 18.
[18] Order 2020-10-13, at 20-21.

It is a basic principle of airline economics that hubs require a critical mass of airport presence to be successful; but Delta's 45% share of operations at LGA is small compared with other competing air carrier hubs. It is significantly smaller, for example, than the competing NYC hub at EWR (which previously was slot-controlled and at which the Show Cause Order found continued infrastructure limitations) where United operates nearly 70% of the operations.[19] Delta's 45% share at LGA is also a smaller share than United has at SFO (49%), Denver (53%), and Houston (82%); than American at Dallas/Ft. Worth (86%), Charlotte (90%), Miami (74%), and Washington National (57%), which is slot-controlled; and smaller than Southwest at gate-restricted Dallas Love Field (92%).[20] The Department's baseless assertions that allowing WestJet to retain its slots would "exacerbate Delta's dominance at LGA," or that this would "present[] significant competitive concerns", ignore the basic reality of a hub and spoke business model. Hubs do not work without sufficient scale to make them efficient, but Delta's presence at LGA is much smaller than most other airline hubs around the world.

3. All of the NYC Airports May Be Used to Serve the New York Metropolitan Area.

When LGA is viewed as simply one of several airport options for serving passengers in the New York metropolitan area, Delta's presence in the relevant market is even less "dominant." Delta's operating share in the New York metropolitan area as a whole is just 28%.[21] There is no evidentiary basis in the record to support the Department's conclusory determination that all of the airports in the New York metropolitan area are not substitutable means of serving the New York metropolitan area. To the contrary, all of these airports are treated as serving a single metropolitan area by the Bureau of Transportation Statistics, and the Department itself recently treated all of them as reasonable substitutes for serving the New York metropolitan area in its

[19] Full year 2019 OAG Schedules show United operating 69.8% of EWR flights.
[20] OAG Schedules, 12 months ending December 2019.
[21] OAG Schedules, 12 months ending December 2019.

Order establishing minimum service obligations under the CARES Act.[22] If the Department's unsupported conclusion that the other airports in the New York metropolitan area are not substitutes for LaGuardia were true, then Delta and WestJet would not even be competitors in the New York metropolitan area, contrary to the Department's tentative findings elsewhere in the Show Cause Order.

4. The Department has Never Imposed any Similar Divestiture Condition on the Competing Immunized Alliance Hub at EWR.

In addition to being based on faulty premises and internally inconsistent logic, the proposed slot divestiture condition is arbitrary and capricious because the Department has never imposed any similar condition on the ATI it has granted to the much larger competing United/Air Canada/Rouge alliance. Despite a share of airport operations at EWR (69.8%) that is far higher than Delta's share at LGA (45%), the Department has allowed the United/Air Canada/Rouge alliance to operate with ATI in U.S.-Canada transborder markets for more than twenty years (during much of which EWR was slot-controlled) without ever requiring any divestiture of EWR slots, gates, or other scarce airport assets. Notably, the Department did not even discuss the issue of slots or airport access when it approved the addition of Continental (with its large hub at EWR, which at the time was slot-controlled) to the immunized alliance between United and Air Canada in 2009. The Department did not conclude then that Continental's "dominance" at the slot-restricted EWR airport "present[ed] significant competitive issues the Department must address,"[23] despite the facts that EWR was subject at that time to the same slot restrictions as LGA and that Continental at that time accounted for more than 72% of the operations at EWR, far more than Delta's current 45% share at LGA.[24] The Department does not explain why Continental's 72% slot share at a slot-restricted NYC airport did not even warrant a discussion when it extended ATI to the much larger United/Air Canada/Rouge alliance but that Delta's 45%

[22] See Order 2020-4-2, Appendix B.
[23] Order 2020-10-13, at 18.
[24] Diio Mi, Schedule Monthly Summary Report, YE June 2009.

share at a slot-controlled NYC airport requires a draconian divestiture of a number of slots equivalent to 100% of WestJet's LGA portfolio as a condition of ATI. This arbitrary and capricious disparate treatment is an abuse of the Department's discretion.

5. Forcing this Divestiture During the Current Pandemic Crisis Would Result in a Fire Sale.

This abuse of discretion is made worse by the fact that it is occurring in the midst of a global pandemic which has created a crisis in the air transportation industry. The demand for air travel has collapsed, and air carriers around the world are struggling to preserve cash to survive. The forced sale of eight slot pairs at LGA under these conditions would result in the loss of critical corporate assets with long-term strategic value that far exceeds any price they are likely to receive in a rushed auction conducted within eight weeks. Current market conditions make it highly likely that the auction would result in a fire sale. Indeed, there may be no carriers willing to spend even a token amount of their precious cash on slots during the current crisis, in which case these valuable corporate assets would simply be forfeited to the FAA.[25]

II. The Proposed Carve-Out of Swoop and WestJet's Parent would be Arbitrary, Capricious and Diminish the Consumer Benefits of the JV.

The Show Cause Order also proposes a condition requiring the Joint Applicants to amend their JV to remove Swoop and WestJet's Parent from its scope. The Department included WestJet in this proposed carve-out because it believed "immunizing WestJet Parent could be extrapolated to include immunity to its subsidiary Swoop."[26] The Swoop carve-out (and by extension the WestJet Parent carve-out) is arbitrary and capricious because there is no support for the assertion that including Swoop in the JV would "restrain capacity and competition"[27] and because of the Department's disparate, favorable treatment of the grant of ATI to United/Air

[25] Order 2020-10-13, at 30 ("In the unlikely event there are no bids for divested slots, the slot interests would automatically revert to the LGA slot pool for reallocation by the FAA according to standard practices.")
[26] Order 2020-10-13, at 27.
[27] Order 2020-10-13, at 27.

Canada/Rouge. The Department has never imposed any similar requirement on the ATI it granted to United/Air Canada/Rouge despite the fact that Air Canada has also operated its own ULCC subsidiary carrier – Rouge – since 2012. In fact, not only has the Department never imposed a similar condition on this much larger immunized alliance, the DOT Office of Aviation Analysis summarily confirmed via letter to Air Canada and United in 2013 that the inclusion of Air Canada's ULCC Rouge in the United/Air Canada immunized commercial cooperation did not even warrant a "detailed competitive review."[28] The Department offers no explanation for how it could possibly be a threat to competition for the operations of WestJet's ULCC affiliate (and its parent) to be included in the Delta/WestJet Joint Venture to better compete with United/Air Canada/Rouge, but at the same time not even raise an issue worthy of a "detailed competitive review" for the United/Air Canada alliance to incorporate Rouge in their ATI-enabled commercial coordination in the same markets. This unexplained and unjustified disparate treatment is arbitrary, capricious, and an abuse of the Department's discretion.

The Department claims, without any evidentiary support, that Swoop's participation in the JV would only "restrain capacity and competition"[29] and that "there are no measurable public benefits that stem from the inclusion of Swoop in the alliance."[30] These unsupported assertions do not withstand scrutiny. The JV does not "constrain" Swoop. In fact, the JV strengthens WestJet and Swoop by enhancing their ability to compete with the antitrust-immunized United/Air Canada/Rouge alliance. There is simply no evidentiary basis for the Department's conclusion to the contrary and the resulting disparate treatment between the proposed Delta/WestJet/Swoop alliance and the immunized United/Air Canada/Rouge alliance. In addition, Swoop would be a participant in the JV consensus decision-making process (subject to certain areas in which Swoop has unilateral decision-making), which would maximize synergies in how the overall Delta,

[28] *See* Letter from Todd M. Homan, Director, DOT Office of Aviation Analysis, to Mr. Daniel Magny, Senior Counsel, Air Canada dated Nov. 12, 2013 in Docket DOT-OST-2008-0234.
[29] Order 2020-10-13, at 27.
[30] Order 2020-10-13, at 25.

WestJet, and Swoop network is established and thereby maximize the opportunity for Swoop to be successful in serving and enhancing consumer benefits in U.S.-Canada transborder markets.

As the Joint Applicants detailed in previous filings in this docket, the inclusion of Swoop in the JV will generate significant benefits for the traveling public, particularly in the price-sensitive leisure segment. Swoop was developed by WestJet as an additional tool to provide a competitive offering for ultra-price sensitive travelers and with a low-cost structure suited to compete more effectively with ULCCs, such as Rouge. Swoop takes elements from the original WestJet model and combines them with ULCC concepts, such as unbundled fares and a broad range of optional ancillary products, to provide WestJet with a competitive ULCC tool with which WestJet can effectively and sustainably bring Swoop-branded low fares to market, primarily for leisure passengers, while at the same time building a higher quality, higher value, premium WestJet-branded network product.

The JV is structured to allow WestJet to use the Swoop offering to deliver these substantial benefits for the leisure passenger segment as nimbly as possible while preserving consensus decision-making where necessary for the smooth operation of the JV on transborder routes where close JV coordination is critical. Carving Swoop out of the JV, as the Department proposes to do, would diminish the ability of the JV carriers to efficiently deliver these substantial benefits to U.S.-Canada leisure travelers. Doing so would also have the anticompetitive (and, by extension, the anti-consumer) effect of widening the competitive gap between the dominant, integrated United/Air Canada/Rouge transborder alliance and the proposed Delta/WestJet JV. Because Rouge is included in the immunized United/Air Canada alliance, those carriers can work closely together to deploy Rouge in ways that optimize its ULCC service offerings and thereby maximize consumer benefits resulting from those services. By preventing Delta and WestJet from doing the same with respect to Swoop, the Department would not only be placing them at an even deeper competitive disadvantage to United/Air Canada/Rouge, but also adversely affecting their

ability to efficiently deliver benefits to consumers in the price-sensitive leisure segment that Swoop was developed to serve.

III. The Proposed Mandatory Interlining Requirement Imposed on WestJet is Unreasonable, Unworkable and Arbitrary and Capricious.

The Department further proposes to condition the grant of ATI by requiring WestJet to interline, upon request, with any U.S. carrier other than United.[31] In effect, this condition would convert WestJet's Canadian network into a *de facto* public utility for almost any U.S. carrier as the price of ATI, forcing WestJet to partner with and provide transborder access to its U.S. competitors, and would create significant and unjustified administrative and financial burdens upon WestJet.

For example, the mandatory interlining condition would force WestJet to bear the costs (*e.g.,* IT, personnel and resources, PSS providers) of setting up and maintaining interline relationships with no ability to obtain a return on investment. Indeed, WestJet cannot even estimate the costs of this condition because there is no requirement that the interlining U.S. carriers have compatible technical platforms, thereby leaving open the possibility that WestJet would need to determine how to enable interlining with carriers that lack standard industry capabilities. The Department does not appreciate the commercial and technological complexity of the forced interline relationships which it is trying to artificially engineer by regulatory fiat. In a deregulated environment, it is an abuse of discretion for the Department to industrial engineer forced access to WestJet's Canadian network.

This condition is also arbitrary and capricious. The Department has never imposed any similar requirement on the ATI it granted to United/Air Canada/Rouge during the more than twenty years that United and Air Canada have coordinated their U.S.-Canada transborder operations under the protection of the Department's antitrust immunity (including seven years with Rouge).

[31] Order 2020-10-13, at 32.

Without justification, the Department proposes to treat Delta and WestJet differently than it has treated the more established and dominant antitrust-immunized United/Air Canada/Rouge alliance. This unexplained and unjustifiable disparate treatment is arbitrary, capricious, and an abuse of the Department's discretion.

CONCLUSION

For all of the foregoing reasons, the Joint Applicants will not proceed with the Joint Venture subject to these conditions. The Joint Applicants hereby withdraw their Joint Application filed on October 10, 2018 in this docket[32] and ask the Department to dismiss this proceeding and close out the docket.

Respectfully submitted,

J. Scott McClain
DELTA AIR LINES, INC.

/s/Andrew Kay

Andrew Kay
WESTJET AIRLINES

[32] *See* footnote 4.

CERTIFICATE OF SERVICE

A copy of the foregoing document has been served this 20th day of November, 2020, upon the following persons via email:

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