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

Complaint of Spirit Airlines, Inc. **For Investigation of the Joint Venture Agreements announced by American Airlines and JetBlue Airways** Under 49 U.S.C. §§ 41712 as an unfair method of Competition	)	Docket DOT-OST-2021-0001

MOTION FOR LEAVE TO FILE AND RESPONSE OF AMERICAN AIRLINES, INC.

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American[1] respectfully submits this motion pursuant to 14 C.F.R. § 302.6(c) for leave to file and respond to Spirit's latest unauthorized filing in this docket.

On July 16, 2020, American and JetBlue announced the Northeast Alliance ("NEA") with the express goal of promoting growth and improving the quality of travel in the Northeast. On August 19, 2020, the Department posted on the Federal Register that it would be "reviewing the agreements submitted by the two carriers under 49 U.S.C. 41720" and that "[b]y publishing a notice in the Federal Register," it was extending the waiting period to facilitate the Department's review, by 90 days, to November 19, 2020.[2] In January 2021, following an extensive, in-depth review, the Department terminated its review of the NEA, subject to certain publicly available

[1] Common names for airlines are used herein.
[2] 85 F.R. 51552.

conditions.[3] The conditions require American and JetBlue to divest slots at key airports so that Low and Ultra Low Cost Carriers like Spirit can expand their presence while at the same time requiring American and JetBlue to deliver significant growth out of the NEA airports with fewer slots as a result of the slot divestitures.

In February 2021, American and JetBlue began implementing the NEA. The consumer benefits generated by the NEA even at this early stage are dramatic and impressive. In just three months, the NEA has:

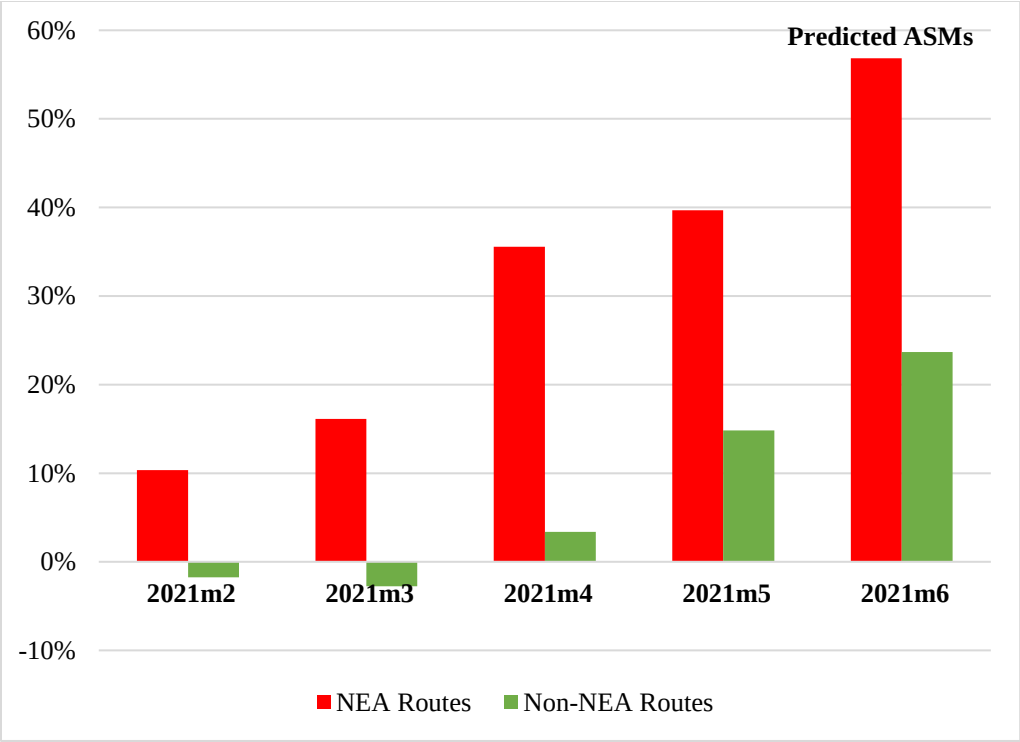
- Enabled the launch of 57 new routes;
- Implemented codesharing on 110 routes;
- Increased frequencies on over 80 routes in April and May 2021 alone;
- Facilitated the announcement of nine new international flights by 2022; and
- Upgraded aircraft to bigger, more efficient planes in the Northeast.

American and JetBlue have grown at a far faster pace than their three largest competitors (United, Delta, and Southwest) on NEA routes than on non-NEA routes. In Figure 1 below, each bar represents the difference in the Available Seat Mile ("ASM") growth of American and JetBlue and the ASM growth of United, Delta, and Southwest relative to January 2021. The red bar represents the difference in ASM growth within the NEA and the green bar represents the difference in ASM growth outside the NEA. As of May 2021, American and JetBlue have grown nearly 40% more than their largest competitors on the NEA routes, and the gap is projected to grow this summer. American and JetBlue have also grown faster than United, Delta and Southwest on non-NEA routes, but only by about 15%. That is, American and JetBlue have

[3] *Termination of Informal Review of the American/JetBlue Northeast Alliance*, U.S. Dept. of Transportation, https://www.transportation.gov/office-policy/aviation-policy/termination-informal-review-americanjetblue-northeast-alliance.

grown faster since January 2021 relative to the ASM growth of United, Delta and Southwest on both NEA and non-NEA routes, but the growth on NEA routes has been substantially faster than on non-NEA routes. This growth demonstrates increased opportunity and choices for consumers.

Figure 1: Difference between % Change in Total Domestic ASMs of American and JetBlue and Rival Carriers Relative to January 2021 on NEA vs. Non-NEA Routes[4]



This early growth in flying and connectivity under the NEA is already eliciting a competitive response from other carriers, particularly from Delta and United, which have historically maintained larger presences in the Northeast:

[4] Compass Lexecon analysis of OAG Scheduling Data comparing growth between American and JetBlue and Delta, United, and Southwest relative to January 2021 for NEA routes vs. non-NEA routes.

- Following American's announcement of the introduction of A321T lie-flat aircraft on BOS-LAX, Delta has "***retaliate[d] against American, JetBlue with more lie-flats to LA***," by bringing its lie-flat Boeing 757-200 on BOS-LAX, just weeks after pulling lie-flat planes from that route.[5]
- Delta has also gone "***head-to-head with American and JetBlue with 4 new Boston and New York routes***," servicing Toronto, Cincinnati, Chicago, and Raleigh/Durham, in direct response to American and JetBlue's expansion under the NEA.[6]
- Similarly, as it reenters JFK, United's first moves have been targeted towards competition with the NEA, launching service to San Francisco (SFO) and Los Angeles (LAX), and adding further lie-flat competition with its premium "high-J" Boeing 767-300 aircraft on these transcontinental routes.[7]

These actions confirm that the NEA is benefitting consumers not only by successfully growing American's and JetBlue's networks, but also spurring immediate competitive responses by other carriers.

So while the facts show that the NEA has created more seats on more routes, with more options and better products for consumers, Spirit continues to ask the Department for a do-over. As explained in American's initial answer, this is entirely inappropriate. Spirit had known about the NEA for ***six months*** and the fact of the Department's investigation into the NEA for at least

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[5] Zach Griff, *Delta retaliates against American, Jetblue with more lie-flats to LA*, The Points Guy (May 9, 2021), https://thepointsguy.com/news/delta-boston-lie-flat-wars/; *American Airlines Uses Partnerships to Grow Its Network, Offer Customers More Choice, and Provide a Premier Travel Experience in the Northeast, American Airlines Newsroom* (Apr. 21, 2021), https://news.aa.com/news/news-details/2021/American-Airlines-Uses-Partnerships-to-Grow-Its-Network-Offer-Customers-More-Choice-and-Provide-a-Premier-Travel-Experience-in-the-Northeast-NET-ALP-04/default.aspx.
[6] Zach Griff, *Delta goes head-to-head with American and JetBlue with 4 new Boston and New York routes*, The Points Guy (May 14, 2021), https://thepointsguy.com/news/delta-new-routes-ny-boston/.
[7] David Slotnick, *United returns to New York JFK after more than a five year hiatus with inaugural flagship routes*, The Points Guy (Mar. 28, 2021), https://thepointsguy.com/news/united-returns-to-jfk/.

five months prior to filing its initial complaint. Spirit had the opportunity to express its concerns to the Department during those months and very likely did express them to the Department, just as Southwest did in July 29, 2020.[8] After the Department engaged in a detailed investigation of the NEA, spending significant resources in reviewing the 1.5 million pages of documents, data from over 24 databases, six economics papers from Compass Lexecon, responses to over 43 requests for information, and access to the parties' personnel in vidoeconferences to answer additional questions, the Department completed its investigation. The January 10, 2021 agreement resolved the issues identified by the Department during this lengthy and thorough investigation. Spirit's blatantly self-serving attempts to get a second try at more remedies, particularly slot divestitures that might go to it, is not a legitimate reason to ask for a do-over.

Spirit's latest submission should be taken for what it is – a complaint by a competitor that the NEA has increased competition in the Northeast. Spirit's crusade against the NEA is contrary to the purpose of 49 U.S.C. § 41712. The Department's charge under 49 U.S.C. § 41712 is to investigate issues relating to ***consumer*** harm and to prevent deception.[9] Yet, in its latest filing, Spirit is asking the Department to use a ***consumer*** protection provision to protect ***Spirit***. But there is no statutory obligation for the Department to protect Spirit. Moreover, Spirit's allegations and assertions are littered with deceptive and plainly incorrect statements intended to mislead the public. As explained below, real-world evidence rejects Spirit's baseless claims and reveals just how beneficial the NEA has been to consumers even in the few months since implementation.

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[8] Letter of Support from Southwest Airlines, DOT-OST-2021-0001-0003 (Jan. 11, 2021) at 1 ("Southwest raised many of the same concerns in its July 29, 2020 letter to the Department, which is attached.").

[9] 14 CFR § 399.79(b)(1)-(2) ("A practice is 'unfair' to ***consumers*** if it causes or is likely to cause substantial injury, which is not reasonably avoidable, and the harm is not outweighed by benefits to consumers or competition" and "A practice is 'deceptive' to ***consumers*** if it is likely to mislead a consumer, acting reasonably under the circumstances, with respect to a material matter. A matter is material if it is likely to have affected the consumer's conduct or decision with respect to a product or service.") (emphases added).

1. **Codesharing under the NEA is proper and proceeding as was fully explained to the Department during its investigation.**

One of the key features under the NEA that has yielded consumer benefits is the implementation of expansive codesharing on flights to and from the NEA airports. The Department has repeatedly recognized codesharing as an important public benefit in airline cooperation.[10] Codesharing improves connectivity and creates more travel options and a more seamless customer service experience for consumers. In its complaint, Spirit makes multiple inaccurate claims related to codesharing in the NEA.

First, Spirit's lead argument claims that the NEA creates "overlap for 96% of American-JetBlue codeshares and 77% of American-Alaska codeshares at airports across the country," which "enabl[es] marketing advantages and facilitat[es] anticompetitive conduct throughout the country."[11] Spirit never explains the significance of these statistics, but clearly "overlap" is not used in the ordinary sense of an O&D pair that both parties operate.[12] Rather, Spirit seems to be complaining about the breadth of the virtual networks created by American's codesharing with JetBlue and Alaska, and in that regard counts an "overlap" whenever the two alliances serve the same airport. That is, if American and JetBlue codeshare on JFK-AUS, and American and

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[10] *See, e.g.*, Order 2019-8-2, DOT-OST-2013-0068, at 10 ("The Department has recognized several forms of public benefits that immunized joint ventures can foster, including … broader network coverage (resulting in more paths between a given origin and destination) …."); Order 2020-11-9, DOT-OST-2008-0252, at 9 (same); Order 2019-05-23, DOT-OST-2018-0030, at 1 ("The benefits are likely to include … the retention and expansion of … codeshares ….").

[11] Supplement to Complaint of Spirit Airlines Based on Market Implementation of American's Strategic Partnerships, DOT-OST-2021-0001-0016 (May 12, 2021), at 4.

[12] Order 2019-8-2, DOT-OST-2013-0068, at 6 ("[W]e typically examine competition on country-pair and city-pair bases by identifying nonstop overlap routes where both parties operate and where their combination would effectively eliminate a competitor from the market."). Spirit is familiar with this usage, of course. *See, e.g.*, Consolidated Answer and Objection of Spirit Airlines, Inc. to the Applications for Cuba Frequencies, DOT-OST-2016-0021 (Mar. 14, 2016), at 12 ("Frontier's non-stop DEN-HAV and one stop DEN-MIA-HAV essentially overlap one other with minimal connection opportunities in DEN …."); Complaint of Spirit Airlines, Inc., DOT-OST-2021-0001-0001 (Jan. 7, 2021), at 4 ("Of the domestic routes, the two carriers have overlapping non-stop service in 26, *see* Exhibit A ….").

Alaska codeshare on AUS-BOI, the common endpoint (AUS) makes these two distinct routes an "overlap."

What Spirit describes is not an overlap and is not anticompetitive. And nothing in the Department order terminating review of the Delta/Northwest/Continental Agreements is to the contrary; that order assesses competition on "markets," not commonality with respect to airports served.[13]

What Spirit is really complaining about is what Spirit terms "marketing advantages" that "facilitate anticompetitive conduct."[14] That is just a frontal attack on codesharing, contrary to Department policy. A "marketing advantage" as Spirit uses the term is simply a better product, which in this case is the broader network the NEA creates for consumers, thereby giving them more options. A better product does not "facilitate anticompetitive conduct," however. It is actually the opposite – offering a better product is the epitome of *procompetitive* conduct. The better product benefits consumers and spurs more robust competition, particularly against Delta and United that have historically featured larger networks out of the Northeast. The issue here is plainly that Spirit does not want to compete against that product, and therefore complains that consumer benefits arising from ubiquitous service are anticompetitive. That the NEA would provide consumers a better network through codesharing is not news to anyone, and certainly not to the Department. And Spirit's requests to the Department to take action against codesharing would in fact harm consumers. NEA codesharing does not merit any further action.[15]

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[13] 68 F.R. 3293 ("[T]he three alliance partners' services overlap in 3,214 markets ….").

[14] Supplement to Complaint of Spirit Airlines Based on Market Implementation of American's Strategic Partnerships, DOT-OST-2021-0001-0016 (May 12, 2021), at 4-5.

[15] Spirit additionally complains that "American sells several [flights for which] JetBlue operates one leg and Alaska operates the other leg." *Id*. at 6. The itineraries Spirit identifies in Exhibit 4 of its supplemental complaint were made available unintentionally because of technical issues associated with implementing new codesharing. These itineraries were inadvertently made available at only the highest fare class where generally there are no restrictions imposed on availability. American and JetBlue have corrected this issue.

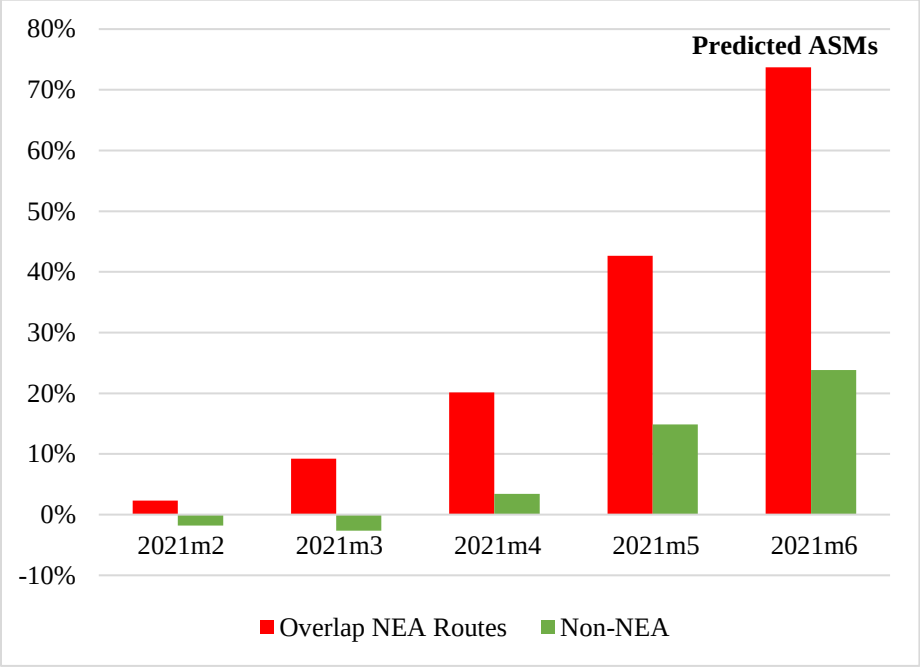
Second, Spirit strangely argues that the NEA codesharing constitutes "coast-to-coast consolidation," and that the "[i]ndustry also has taken note of" this.[16] For this proposition, Spirit cites an article quoting William Swelbar (whom Spirit characterizes as a "well-respected industry economist"), who says, "***[i]n a sense***, consolidation has already occurred in some form because of the regional codeshare partnership between American and both Alaska and JetBlue."[17] In that "sense," all codesharing is consolidation, and consolidation is rampant. But this is not anticompetitive consolidation. American, Alaska, and JetBlue are all still competitors and actively compete against one another in a multitude of markets. American's alliances with Alaska and JetBlue are limited in scope in terms of geography and extent of coordination, and they deliver broad "but-for" consumer benefits. For example, in both alliances, each carrier continues to price flights they operate independently, the first hallmark of enduring competition. And, of course, the Department knew about the details of American's alliance with Alaska when it terminated its review of the NEA.

Third, Spirit contends that "the NEA is enabling the dramatic loss of competition at airports coast-to-coast," claiming in particular that "[o]ut of the 26 overlapping American-JetBlue markets Spirit highlighted in its complaint, 17 of these markets have already lost competition due to the NEA, with more to follow."[18] This is just rhetoric; Spirit never even explains what it means by "lost competition" and its only proof is the mere fact of codesharing. That is simplistic in the extreme. In reality, American and JetBlue continue to independently set fares on all seats operated on their own metal. In what Spirit alleges to be "the 26 overlapping American-JetBlue markets," real-world evidence demonstrates that the NEA has actually been

[16] *Id*. at 12.
[17] *Id*. at 12-13 (emphasis added).
[18] *Id*. at 11-12.

tremendously procompetitive. As was the case for all NEA routes (in Figure 1 above), in the "the 26 overlapping American-JetBlue markets" identified by Spirit, American and JetBlue have grown by about 40% more than their three largest competitors, United, Delta, and Southwest, as of May 2021, with significantly more growth planned for this summer.

Figure 2: Difference between % Change in Total Domestic ASMs of American and JetBlue and Rival Carriers Relative to January 2021 on "Overlap" NEA Routes vs. Non-NEA Routes[19]



The NEA growth and increased codesharing between American and Alaska have in turn *stimulated* significant competition, for example in the west coast markets where Delta and United are already responding aggressively, providing even more options to consumers.

[19] Compass Lexecon analysis of OAG Scheduling Data comparing growth between American and JetBlue and Delta, United, and Southwest relative to January 2021 for NEA "overlap" routes vs. non-NEA routes.

Fourth, Spirit falsely alleges that Alaska and American are engaged in codesharing that is prohibited by the DOJ Consent Decree (the "consent decree") in the Alaska/Virgin merger. [20] Spirit's claim is wrong at best and a self-serving deliberate misrepresentation at worst. Spirit first claims that American and Alaska are codesharing between New York and Seattle in violation of the consent decree because New York-Seattle is an "American-Alaska Overlap Route."[21] That is plainly wrong. Spirit should have checked the facts – American has not operated service on NYC-SEA for quite some time, since well before American implemented its alliances with Alaska and JetBlue. That American at the time of the consent decree operated a flight between New York and Seattle is not relevant. As explicitly noted in the consent decree, and as Spirit should be aware, "[t]he routes covered by [the American-Alaska Overlap Route] definition may change over the term of this Final Judgment as Alaska and American adjust their respective schedules. The Alaska/American Overlap Routes as of December 6, 2016 are listed in Appendix A for illustrative purposes."[22] Spirit also claims that American is placing its code on Alaska's JFK-SEA service allegedly in violation of the consent decree's prohibition on American "Market[ing] any Alaska Flight that originates or terminates at any Key American Airport" because "Key American Airport" includes JFK.[23] Again, Spirit should have checked the facts – what Spirit misleadingly omits is that American places its code on Alaska's JFK-SEA service only in the context of ***international connecting itineraries***. The consent decree by definition places no restrictions on codesharing on international connecting itineraries.[24] American's codesharing with Alaska on EWR-SEA and JFK-SEA is therefore fully compliant with the consent decree. A more than a cursory read of the consent decree would have demonstrated this to Spirit.

Spirit's across-the-board disdain for codesharing is no reason to grant its petition. This is not 2003, when codesharing was newer and its effects less certain. Codesharing is now a well-established practice generally and is already bringing real consumer benefits in the case of the NEA particularly.

2. American and JetBlue price independently, in line with their own strategies.

Spirit also alleges that American is using the NEA to charge higher fares. Once again, the allegations are unsupported by facts.

Spirit first claims that an American-marketed and JetBlue-operated JFK-JAX ticket is $165 while the JetBlue-marketed JetBlue-operated ticket for the same flight is $120, calling this an instance in which American is "raising" fares when marketing a JetBlue-operated route.[25] This is grossly misleading, since JetBlue – as Spirit must have understood – was also selling JFK-JAX seats for $165. Spirit simply picked an example of where JetBlue had lower-fare seats for sale in parallel with higher-fare inventory, something that JetBlue is perfectly free to do under the NEA. Under the NEA, the operating carrier can charge whatever it wants, and this example proves that JetBlue in this case is doing exactly that – offering a fare that is lower than

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[20] Supplement to Complaint of Spirit Airlines Based on Market Implementation of American's Strategic Partnerships, DOT-OST-2021-0001-0016 (May 12, 2021), at 7 (citing Final Judgment, *United States v. Alaska Air Grp., Inc.*, Case No. 1:16-cv-02377 (D.D.C. June 23, 2017)).
[21] *Id*.
[22] Final Judgement, United States v. Alaska Air Grp., Inc., Case No. 1:16-cv-02377 at II.C. (D.D.C. June 23, 2017).
[23] Supplement to Complaint of Spirit Airlines Based on Market Implementation of American's Strategic Partnerships, DOT-OST-2021-0001-0016 (May 12, 2021), at 7 (citing Final Judgement, *United States v. Alaska Air Grp., Inc.*, Case No. 1:16-cv-02377 at II.M., IV.A.3. (D.D.C. June 23, 2017)).
[24] The consent decree prohibits American and Alaska from "Market[ing]" certain itineraries. *See* Final Judgement, *United States v. Alaska Air Grp., Inc.*, Case No. 1:16-cv-02377 at IV.A.1. (D.D.C. June 23, 2017). To "Market" a flight is defined as to "sell tickets for a Flight pursuant to a Codeshare Agreement, either as a standalone Flight or as part of a Connecting Itinerary." *Id*. at II.O. "Connecting Itinerary" is defined as "a route ***within the United States*** with at least one intermediate stop at any airport between the origination and destination airport." *Id*. at II.G (emphasis added). American does not market Alaska's operated JFK-SEA as a standalone nonstop flight or as part of a domestic connecting itinerary.
[25] Supplement to Complaint of Spirit Airlines Based on Market Implementation of American's Strategic Partnerships, DOT-OST-2021-0001-0016 (May 12, 2021), at 9.

the American codeshare fare. It is hard to imagine how this independent pricing action by JetBlue is anticompetitive or inconsistent with the antitrust laws. It is a good thing, not something to complain about.

Next, Spirit misconstrues American's and JetBlue's statements to their shareholders as "promising higher fares" to shareholders and financial analysts.[26] These statements are taken out of context and do not support what Spirit claims.[27] For example, Spirit quotes American's Chief Revenue Officer, Vasu Raja, as saying, "most of the yield growth we're seeing is from the leisure travel segment [and a lot of the] yield growth is there . . . because we're seeing a lot of cases where, especially on peak holidays and things like that . . . the demand for seats is greater than supply of seats, and so that's what produces higher yield."[28] First, that statement is nothing more than an application of basic economics, the law of supply and demand. And right now, (a) for obvious reasons having nothing to do with the NEA, *supply* is severely restricted, and (b) *demand*, which is also severely restricted, is first starting to recover in the leisure segment. So, "on peak holidays and things like that," when leisure travelers fly, demand is outpacing supply, producing higher yields. So what? As its most recent earnings announcements show, *Spirit is experiencing the same thing*, which has nothing to do with the NEA.[29]

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[26] *Id*. at 18.
[27] *Id*. at 18-20.
[28] *Id*. at 20 (quoting American Airlines Group (AAL) Q1 2021 Earnings Call Transcript, Motley Fool (Apr. 22, 2021), https://www.fool.com/earnings/call-transcripts/2021/04/22/americanairlines-group-aal-q1-2021-earnings-call/).
[29] *See* Spirit Airlines (SAVE) Q1 2021 Earnings Call Transcript, Motley Fool (Apr. 22, 2021), https://www.fool.com/earnings/call-transcripts/2021/04/22/spirit-airlines-save-q1-2021-earnings-call-transcr/ ("as demand dramatically improved during the last few weeks of March, we were very pleased with how the domestic network performed and how the international network results progressed, driving positive cash from operations for the full first quarter 2021 even when excluding the payroll support funds received. Our Florida routes saw particular strength during this period as the typically strong spring break period was further supplemented by pent-up demand for leisure travel.").

Spirit also cites Vasu Raja's statement that with respect to American's codesharing with JetBlue, American assesses "how much of … revenue is really incremental that is coming in higher fares than what … [American] is organically booking or coming in periods where the flights were light. And [American is] finding that somewhere between 30 and 40% of that is incremental with similar rates in Alaska …."[30] The quote explains that American's partnerships with JetBlue and Alaska are highly effective in stimulating demand. More and better connections and higher quality of service attract more passengers, which in turn lead to fuller planes.

Finally, Spirit cites to a quote from Joanna Geraghty, President and Chief Operating Officer of JetBlue, that JetBlue is seeing "double-digit improvements in both load factor and yield."[31] Again, this is pointing to macroeconomic conditions first and foremost, and secondarily the success of the NEA in stimulating demand in a demand-starved environment. It would not only be strange, but catastrophic, if the industry did not see macroeconomic conditions improve, leading to higher yields, after an unprecedented pandemic devastated the industry. Again, to the extent this is about the NEA at all, Spirit is complaining about growth in flying created by the NEA. Concerning as that may be to Spirit, it is beneficial to consumers.

[30] American Airlines Group (AAL) Q1 2021 Earnings Call Transcript, Motley Fool (Apr. 22, 2021), https://www.fool.com/earnings/call-transcripts/2021/04/22/american-airlines-group-aal-q1-2021-earnings-call/.
[31] Supplement to Complaint of Spirit Airlines Based on Market Implementation of American's Strategic Partnerships, DOT-OST-2021-0001-0016 (May 12, 2021), at 17.

3. *American and JetBlue remain independent outside the NEA*.

Spirit goes on to make a string of arguments alleging diminished competition outside of the scope of the NEA.

First, Spirit shamelessly complains that American customers have too many options.[32] Spirit points to an American press release in which American expounds on the increased options in Austin, Texas, including Alaska and JetBlue service to various destinations.[33] This is a clear consumer benefit, especially to those living in and around Austin. The fact that Spirit does not offer a similarly compelling service is not a consumer harm. It chose a Ultra Low Cost Carrier business model that is point-to-point, selective, and opportunistic. It is *forever* at a disadvantage to flyers that prefer networks, and has no right to complain about it. The ability to offer consumer benefits like broader access to U.S. destinations is precisely the purpose of the NEA.

Additionally, to the extent that Spirit is implying that there is out-of-scope coordination, that is not true. Spirit conveniently skips the *next paragraph* in the press release where American explains that destinations from Austin enabled by the Alaska and JetBlue relationship are in-scope routes: "American and Alaska will continue to enhance its relationship with new codeshare routes from AUS to San Diego (SAN); San Francisco (SFO); Portland, Oregon (PDX); and will introduce domestic codeshare on service between Austin and Seattle (SEA), with intentions to code on recently announced service from AUS to Boise."[34] And with respect

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[32] *Id*. at 10.
[33] *Id*. (quoting *Nonstop Growth in Austin Leads to More Nonstops to Austin*, American Airlines Newsroom (Mar. 11, 2021), https://news.aa.com/news/news-details/2021/Nonstop-Growth-in-Austin-Leads-to-More-Nonstops-to-Austin-NET-RTS-03/default.aspx).
[34] *Nonstop Growth in Austin Leads to More Nonstops to Austin*, American Airlines Newsroom (Mar. 11, 2021), https://news.aa.com/news/news-details/2021/Nonstop-Growth-in-Austin-Leads-to-More-Nonstops-to-Austin-NET-RTS-03/default.aspx.

to the NEA, "American and JetBlue also recently launched their codeshare, which includes service between New York (JFK) and AUS."[35]

Second, Spirit claims that "[n]early 50% of all FAA slots are being leveraged by American and JetBlue to stifle competition" and innovation.[36] Again, Spirit makes no effort at all to explain this claim or its reasoning. In any event, Spirit's claim is untrue. In JFK, American holds 17% of total slots and JetBlue holds 27%, while Delta holds 33%.[37] In LGA, American holds 29% of total slots and JetBlue holds 3%, while Delta holds 45%.[38] EWR is not a Level 3 slot-controlled airport. However, Spirit has claimed as recently as March 16, 2020 that at EWR, "United has thirteen times more operations during [afternoon] peak hours than Delta, its next closest competitor (447 vs. 34)" and that the "disparity between United and all other carriers is stark, both for total operations and operations during critical peak afternoon/evening hours …."[39] Finally, in Boston, carriers do not hold slots.

To the extent that Spirit complains that the NEA airports are slot and gate constrained, that is a limitation that all carriers face. The NEA does not change these constraints for American and JetBlue. What the NEA enables, and what Spirit seems to oddly complain about, is the more efficient use of the carriers' scarce resources (slots and gates) to offer a more compelling customer proposition with more flying, bigger planes, and better service. Spirit complains that the NEA stifles innovation, but the NEA is doing exactly the opposite. The NEA is the innovation, which allows the carriers to take their limited slots and gates and put them to better use to compete more effectively for the benefit of consumers.

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[35] *Id*.
[36] *Id*. at 13-17.
[37] Based on FAA public reporting on W20 slot holdings.
[38] Based on FAA public reporting on W20 slot holdings.
[39] Pet'r's Br. at 21-22, *Spirit Airlines, Inc. v. U.S. Dep't of Transportation*, No. 19-1248 (D.C. Cir. Mar. 16, 2020).

To be clear, the NEA does not increase the number of slots held by American or JetBlue. In fact, as part of the commitments entered into with the Department's approval of the NEA, American and JetBlue have publicly committed to divest slots at key airports, which Low and Ultra Low Cost Carriers like Spirit stand to benefit from, expanding their footprint and increasing competition in those airports.[40]

Third, Spirit claims that "[t]acit coordination outside NEA markets is allowed and presents a serious flaw" in the NEA.[41] In support of this assertion, Spirit renews its complaint that as soon as American gave notice that it would be increasing its Florida-Ecuador presence, JetBlue sought a route change that decreased its direct competition against American in the Florida-Ecuador market in favor of New York-Ecuador. JetBlue has already responded to this complaint in a separate docket: JetBlue explained that its request to operate a second daily New York-Guayaquil flight was a wholly independent decision related to unserved demand resulting from LATAM's recent decision to suspend New York-Guayaquil service.[42] Spirit does not address this response and certainly brings no new evidence or claims to support its contention. Spirit oddly claims that the Department has committed a "serious flaw" by allowing American and JetBlue to independently make decisions regarding their networks that result in a better network for customers in the Northeast. There is no explanation as to why this would be a flaw, since what Spirit describes is not coordination (tacit or explicit). And in any event, changes that improve the NEA network would benefit consumers. The Department investigated in detail any risk the NEA may negatively impact competition between American and JetBlue outside of the

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[40] Agreement with U.S. Department of Transportation regarding Northeast Alliance Between American Airlines, Inc. and JetBlue Airways Corporation, publicly available at https://www.transportation.gov/office-policy/aviation-policy/termination-informal-review-americanjetblue-northeast-alliance.
[41] Supplement to Complaint of Spirit Airlines Based on Market Implementation of American's Strategic Partnerships, DOT-OST-2021-0001-0016 (May 12, 2021), at 21.
[42] Motion for Leave to File and Reply of JetBlue Airways Corporation, DOT-OST-2018-0191-0008 (Apr. 12, 2021), at 2-3.

scope of the NEA. This is precisely why the Department has required significant measures to prevent out-of-scope coordination, including communication protocols and reporting requirements to the Department. This was the correct outcome. American and JetBlue continue to compete aggressively on routes outside the scope of the NEA.

4. *American and JetBlue have provided ample information regarding the NEA.*

Finally, Spirit tries to argue that American and JetBlue are hiding aspects of the NEA from the public and that "there remains an unsettling amount of information still unknown about the NEA."[43] First, nothing about the NEA is unknown to the Department. The Department was provided access to all of the necessary materials and made its informed determination as to the bona fides of the NEA in full knowledge of all relevant facts. What Spirit really wants is an opportunity to review and react to competitively sensitive information from the Parties that the Department has had full opportunity to review. This is, of course, neither appropriate nor necessary.

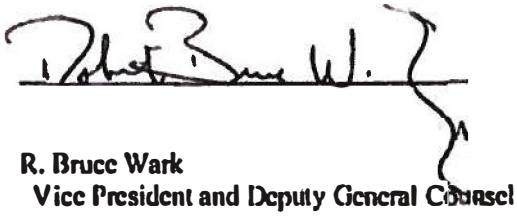
CONCLUSION

In light of the foregoing, American requests that the Department dismiss Spirit's Complaint and the above-captioned docket.

Dated: June 3, 2021

Respectfully submitted,

For American Airlines:



R. Bruce Wark
Vice President and Deputy General Counsel

[43] Supplement to Complaint of Spirit Airlines Based on Market Implementation of American's Strategic Partnerships, DOT-OST-2021-0001-0016 (May 12, 2021), at 22-23.

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2021, I served a copy of the foregoing document upon the following persons via email.

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