October 13, 2021

Honorable Pete Buttigieg
Secretary of Transportation
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

Richard Powers
Acting Assistant Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
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Re: Airline Joint Ventures in the Era of Oligopoly: Realigning Regulatory Policy with Tougher Antitrust Enforcement

Dear Secretary Buttigieg and Acting Assistant Attorney General Powers:

The American Antitrust Institute (AAI) has long advocated for vigorous and comprehensive antitrust enforcement and regulatory policy designed to promote competition and protect consumers in air passenger service markets.[1] AAI writes to the U.S. Department of Transportation (DOT) and U.S. Department of Justice (DOJ) to provide perspective on the implications for antitrust enforcement and regulatory policy of airline joint ventures. In this letter, we focus on the recent Northeast Alliance (NEA) agreement between American Airlines, Inc. (American) and JetBlue Airways Corporation (JetBlue). But AAI's analysis and recommendations apply equally to past and future airline joint venture agreements as well.

This letter highlights two major issues of concern to AAI. First, airline joint venture agreements like the NEA are now the "go-to" strategy for large carriers, like American, to maintain or expand their market positions. Such agreements also further "tighten" the Big 4 oligopoly that dominates domestic air passenger service markets. Joint venture agreements stop short of mergers, but can nonetheless eliminate the incentive for the parties to the agreement to compete independently, to the detriment of consumers. When layered on top of *already* oligopolized markets, such agreements act to fortify the Big 4's (American, United, Delta, and Southwest) hold on domestic markets and can facilitate further anticompetitive coordination on capacity, fares, ancillary fees, and other competitive variables.

[1] The American Antitrust Institute (AAI) is an independent non-profit education, research, and advocacy organization devoted to promoting competition that protects consumers, businesses, and society. We serve the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. For more information, *see* www.antitrustinstitute.org.

Second, DOT perfunctorily approved the NEA in January 2021 under its 49 U.S.C. 41720 authority, subject to minimal conditions and without providing any opportunity for public comment.[2] This process raises public policy concerns in light of DOJ's recent lawsuit, joined by seven states, challenging the NEA as illegal under Section 1 of the Sherman Act.[3] The saga of the NEA, and tension between the two federal agencies with competition oversight authority in the airline industry, illustrates the unsustainable misalignment between DOT's existing regulatory policy toward airline joint ventures and the troubled competitive landscape of domestic air passenger service markets. A major overhaul is needed, consistent with the "whole of government" approach to airline competition that is envisioned in the Biden Administration's Executive Order on Competition.[4]

I. The NEA Process Illustrates the Unsustainable Misalignment Between the Regulatory and Antitrust Prongs of Airline Competition Policy

In July of 2020, in the throes of the COVID-19 pandemic, the largest domestic airline, American, and a disruptive smaller carrier with an innovative business model, JetBlue, proposed the NEA.[5] The NEA is a cooperative service agreement outlining significant coordination between two rivals, including code-sharing, frequent flyer cooperation, revenue-sharing, sharing of existing assets, marketing, and planning.[6] The NEA is the latest of joint venture agreements to be proposed between domestic airline carriers, this one against the backdrop of highly concentrated air passenger service markets originating or terminating at Boston Logan International (BOS) and New York City (NYC) area airports, including Newark Liberty International (EWR), John F. Kennedy (JFK), and LaGuardia (LGA). Moreover, two of the four airports, JFK and LGA, are congested and slot-constrained (i.e., Level 3) under the Federal Aviation Administration's (FAA's) slot administration program.

When announced, the NEA galvanized public concern over further erosion of domestic competition at critical U.S. airports that serve populous areas on the east coast. The top four U.S. airlines controlled 50% of the domestic market in 2000. As a result of successive mergers over the last two decades, the field of rivals has been compressed to the "Big 4," or the domestic oligopoly that in 2018 came to control just over 80% of the national market.[7] When the proposed NEA joint venture agreement was filed, DOT did not establish a docketed proceeding for it, or solicit public comment. To be clear, DOT's procedures do not provide for approval or disapproval of cooperative service agreements but instead provide for review to ensure that they would not harm the public and are not

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[2] *Agreement with the U.S. Department of Transportation Regarding Northeast Alliance Between American Airlines, Inc. and JetBlue Airways Corporation ("Agreement with DOT")* (Jan. 10, 2021), https://www.transportation.gov/sites/dot.gov/files/2021-01/Agreement%20terminating%20review%20DOT-AA-B6%20with%20appendix%20011021%20website.pdf.

[3] U.S., et al. v. American Airlines, Inc. and JetBlue Airways Corporation, Complaint ("DOJ Complaint"), Case 1:21-cv-11558 (Sept. 21, 2021, D. Mass.). Joining states are: Arizona, California, District of Columbia, Florida, Massachusetts, Pennsylvania, and Virginia.

[4] *Executive Order on Promoting Competition in the American Economy* (Jul. 9, 2021), WHITEHOUSE.GOV, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

[5] *JetBlue and American Airlines Announce Strategic Partnership to Create More Competitive Options and Choice for Customers in the Northeast*, AA.COM (Jul. 16, 2020), https://news.aa.com/news/news-details/2020/JetBlue-and-American-Airlines-Announce-Strategic-Partnership-to-Create-More-Competitive-Options-and-Choice-for-Customers-in-the-Northeast-NET-ALP-07/default.aspx.

[6] Agreement with DOT, *supra* note 2.

[7] DOJ Complaint, *supra* note 3, at PP. 23.

anticompetitive.[8] But the potential anticompetitive effects resulting from coordination between American and JetBlue should have been reason enough for DOT, at a minimum, to solicit public comment. In addressing competitive concerns, DOT's approval of the NEA in January 2021 required a small number of slot-pair divestitures and ongoing reporting, monitoring, and compliance from the partners to the agreement.[9]

Frustration with DOT's process involving the NEA presumably prompted Spirit Airlines to file a complaint under 49 U.S.C. 41712, alleging that the NEA agreement constituted an unfair and deceptive practice, a proceeding in which AAI and number of other organizations filed comments.[10] The gridlock around the NEA matter at DOT continued for months, until DOJ filed a complaint alleging that the NEA violates Section 1 of the Sherman Act. At the time DOJ's complaint was filed in district court, DOT issued an order stating that it would stay the proceeding involving Spirit's complaint and defer to DOJ on all antitrust matters relating to the NEA.[11] Nonetheless, the DOJ's lawsuit drew quick fire. For example, the WSJ editorial board was quick to both condemn and politicize it, asserting that "….antitrust will be wielded as a regulatory weapon no matter the evidence" under the Biden administration.[12] The editorial further claimed, without support, that "the partnership increases competition and helps consumers," and that "JetBlue wouldn't team up with American if it thought it would be 'co-opted.'"[13]

For the reasons outlined in this letter, the WSJ editorial only serves to highlight the likelihood that the NEA could and would have been challenged by DOJ under *any* administration. But it also reinforces the false narrative that airline joint venture agreements are by default pro-competitive, even in an industry that has collapsed to an oligopoly.

II. The NEA Eliminates Incentives to Compete, Raising Competitive Concerns That Approximate Those of a Fully Immunized Airline Alliance or Merger

The NEA resides in the dangerous "nether" zone on the spectrum of joint venture airline agreements. These arrangements include, in increasing order of risk, and intensity of potential anticompetitive cooperation among carriers, agreements to: (1) "interline" with carrier partners (i.e., transferring passengers traveling on connecting itineraries), (2) share frequent flyer programs, (3) codeshare, (4) coordinate pricing and schedules, and (5) engage in almost fully integrated revenue

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[8] Alliances and Codeshares, U.S. DEPT. OF TRANS. (updated Jan. 12, 2021), https://www.transportation.gov/policy/aviation-policy/competition-data-analysis/alliance-codeshares. If cooperative service agreements do raise competitive concerns, DOT can act under its statutory authority to preserve competition under 49 USC 41712.

[9] Agreement with DOT, *supra* note 2.

[10] 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-2021-001 (Jan. 7, 2021). While taking no position on whether the NEA constitutes an unfair or deceptive practice, AAI filed comments in the Spirit Airlines proceeding.

[11] *Clarification of Departmental Position on American Airlines—JetBlue Airways Northeast Alliance Joint Venture*, U.S. DEP'T. OF TRANS. (Sept. 21, 2021), https://www.transportation.gov/sites/dot.gov/files/2021-09/NEA%20Notice%20Sept%2021%202021.pdf.

[12] *Biden Flies Blind on Antitrust: A lawsuit against JetBlue and American will reduce competition*, WSJ.COM (Oct. 1, 2021), https://www.wsj.com/articles/joe-biden-flies-blind-on-antitrust-justice-department-lawsuit-jetblue-american-airlines-11632779123.

[13] *Id.*

and profit-sharing joint-venture type coordination (i.e., "full metal" integration).[14] The latter of these categories typically involve a grant of antitrust immunity ("ATI") under 49 USC 41308-09, which DOT has granted liberally over the last two decades to subsets of carriers that comprise the large global airlines alliances: Star, SkyTeam, and oneworld.

The DOT's public interest determinations involving ATI balance the anticompetitive effects of a loss of head-to-head competition on alliance gateway routes with the network benefits that might occur behind and beyond those routes. Recent economic evidence, however, including that commissioned by DOT, shows that the case supporting the net benefits of immunized alliance joint ventures is becoming harder to make.[15] AAI research highlights the potential harms of ATI, against the backdrop of rising concentration in domestic air passenger service markets and domination of the global alliances by large U.S. carriers.[16] AAI has suggested that these developments should raise the bar on regulatory review of requests for ATI and warrant an overhaul of DOT's approach.

AAI's same concerns over rising domestic airline market concentration and ATI apply to *all* airline joint ventures, including cooperative service agreements and codeshares such as the NEA. The fact that DOJ has applied the antitrust laws to the extensive, coordinated conduct of American and JetBlue envisioned under the NEA only serves to highlight the growing isolation of DOT's lax regulatory policy approach to joint venture agreements. The potential for anticompetitive coordination under the NEA is significant. As noted in DOJ's complaint, for example, the NEA constitutes a number of agreements.[17] These include coordination on network planning, including what routes American and JetBlue will fly, when to offer service on those routes, which airline will fly those routes, and what size planes to use. The NEA also includes an agreement to share pooled revenue, so that AA and JetBlue earn the same revenue regardless of whether a passenger flies on an American or JetBlue aircraft.

Of the codeshare agreements currently place that involve unaffiliated domestic carriers, the NEA is particularly extensive and complex.[18] For example, codeshare agreements are typically between one of the large three carriers (American, Delta, and United) and a smaller regional carrier, such as SkyWest Airways and Republic Airlines. The other major codeshare agreement is between American and Alaska, which allows Alaska to market American flights on hundreds of routes.[19] While DOT largely continues to bless them, DOJ remains concerned about the effects of some codeshare

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[14] *See e.g.,* Paul Stephen Dempsey, *Airline Alliances* 13 (Institute of Air & Space Law, 2011), https://www.mcgill.ca/iasl/files/iasl/ASPL614-Alliances.pdf.

[15] Jan K. Brueckner and Ethan Singer, *Pricing by International Airline Alliances: A Retrospective Study Using Supplementary Foreign-Carrier Fare Data*, CESifo Working Paper No. 7649 (updated 2019), https://ssrn.com/abstract=3422230.

[16] Diana L. Moss, *Revisiting Antitrust Immunity for International Airline Alliances*, AMERICAN ANTITRUST INST. (Mar. 18, 2018), https://www.antitrustinstitute.org/wp-content/uploads/2018/03/AAI_Revisiting-Antitrust-Immunity_R-2.28.19.pdf.

[17] DOJ Complaint, *supra* note 3, at PP. 19.

[18] Codeshare Fact Sheet, U.S. General Services Administration, https://www.gsa.gov/cdnstatic/FY22%20Domestic%20and%20International%20Codeshares%20-%20Jennifer%20Burdette%20-%20QMC1A.pdf. *See*, "codeshare documents," *FY22 Domestic and International Codeshares*, https://www.gsa.gov/cdnstatic/FY22%20Domestic%20and%20International%20Codeshares%20-%20Jennifer%20Burdette%20-%20QMC1A.pdf.

[19] *Alaska Airlines expands American codeshare: The US carriers are this month expanding their codeshare partnership to cover a further 60 routes*, ROUTESONLINE.COM (Aug. 11, 2020), https://www.routesonline.com/news/29/breaking-news/293046/alaska-airlines-expands-american-codeshare/

agreements on eliminating incentives for carriers to compete independently. For example, the government's consent order[20] in the Alaska-Virgin America merger required significant modifications to the American-Alaska codeshare to ensure that "Alaska will have the [same] incentive to vigorously compete with American as Virgin does."[21] There, DOJ stated that the codeshare "creates incentives for Alaska to compete less aggressively on routes both carriers serve and to forgo launching new service in competition with American," and that "Alaska and American often behave more like partners than competitors."[22]

Together with the NEA, DOJ's concerns over past airline joint venture agreements expose the strategic use of such agreements by large carriers, namely, to continue to "control" competition in highly concentrated markets. The guarantee of shared revenue on codeshare flights under the NEA eliminates incentives for American and JetBlue to compete, since rivalry would reduce fares, and therefore revenues. As DOJ's complaint points out, JetBlue, which has competed vigorously against American, will be restrained under the NEA by the fear of retaliation by the dominant airline. And American is likely to forbear from competing hard in order to maintain a good working relationship with JetBlue.[23] High concentration on directly affected routes exacerbates the anticompetitive effects of the NEA. The government's complaint notes that eliminating competition will significantly increase market concentration on 11 nonstop routes originating from BOS, 17 nonstop routes originating at JFK and LGA, and 98 connecting routes, in excess of the thresholds specified in the Federal Trade Commission/U.S. Department of Justice Horizontal Merger Guidelines.[24]

The DOJ's more aggressive enforcement of the antitrust laws against anticompetitive airline joint venture agreements highlights the opacity of DOT's policy regarding how the prevailing industry oligopoly might alter its regulatory determinations.

III. The NEA Will Create Effective Duopolies at Airports and in Slot Holdings, Changing the Profile of Competition in Already Compromised Markets

The NEA's potential effect on the structure of airport markets and incentives at BOS, EWR, JFK, and LGA also raises concerns. With American's and JetBlue's competitive incentives bound together by a unified economic objective, the NEA will create a duopoly-like market landscape. At BOS, the combined share, based on passengers, of American and JetBlue (over 50%) and the next largest player, Delta, would be almost 70%.[25] At EWR, the combined share of the NEA and largest carrier, United, would be almost 70%.[26] At JFK, American's and JetBlue's combined market share is over 50%.[27] The combined share of Delta, the next largest carrier at JFK, and the NEA would be over

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[20] U.S. v. Alaska Air Group, Inc. and Virgin America, Inc., Proposed Final Judgment, Case 1:16-cv-02377-RBW, (Jun. 6, 2017, D.D.C.), at p. 5-6.

[21] *Justice Department Requires Alaska Airlines to Significantly Scale Back Codeshare Agreement with American Airlines in Order to Proceed with Virgin America Acquisition*, U.S. DEPT. OF JUSTICE (Dec. 6, 2016), https://www.justice.gov/opa/pr/justice-department-requires-alaska-airlines-significantly-scale-back-codeshare-agreement.

[22] *Id.*

[23] DOJ Complaint, *supra* note 3, at PP. 73.

[24] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 5.3 (2010).

[25] *Id.*

[26] *Id.*

[27] Airport Snapshots, BUREAU OF TRANSPORTATION STATISTICS, U.S. DEPT. OF TRANS., https://www.transtats.bts.gov/airports.asp. Queried for BOS, EWR, JFK, and LGA.

90%. At JFK and LGA combined—airports that are considered close substitutes by travelers—the NEA's share (about 40%), when combined with the next largest carrier, Delta, would be over 70%.

This dystopian post-NEA landscape is exacerbated by congestion and slot controls at JFK and LGA. Access to takeoff and landing slots is a critical input for providing passenger service, which DOJ recognizes as a competitive issue. In 2010, for example, the agency ultimately forced the renegotiation of an anticompetitive "slot swap" by Delta and US Airways at LGA and Reagan National Airport (DCA).[28] And in 2015, DOJ filed suit against Delta and United in regard to an anticompetitive slot allocation at EWR.[29] In the US Airways-American Airlines merger, the government's complaint defined takeoff and landing slots as a distinct relevant market.[30] The effect of the NEA on slot holdings at both JFK and LGA will be to facilitate an effective duopoly over control of a critical input. At JFK, where Delta holds over 30% of slots, combining them with American-JetBlue's collective slot holdings accounts for just over 75% of total available slots.[31] At LGA, Delta controls about 45% of total slots that, when combined with American-JetBlue slot holdings, account for just over 75% of total slots.[32]

In sum, the NEA facilitates the "roll-up" of JetBlue through a joint venture agreement. In the process, the NEA creates myriad effective duopolies that would variously control, on average, 70% or more of passengers and slots at airports in the NYC area airports and BOS. The collapse of these airports into effective duopolies is likely to dampen incentives for hard-nosed competition between the NEA and other large carriers on pricing, capacity, and other strategic competitive variables. Continued application of antiquated principles governing DOT's review and approval of strategic joint venture agreements, against the backdrop of high concentration, cannot possibly result in pro-competitive and pro-consumer results.

IV. The NEA Highlights the Need for Continued Aggressive Antitrust Enforcement and an Overhaul of Regulatory Policy to Better Promote Competition

The domestic airline oligopoly has dramatically and permanently changed the profile of competition in domestic air passenger service markets. The Big 4 carriers have signaled their intention to keep capacity tight and fares high.[33] But the oligopoly itself also raises entry barriers to smaller and lower-cost carriers, which are hamstrung by limited access to airport facilities and fear of an aggressive response from large incumbents. Strategically layering anticompetitive joint venture agreements such as the NEA on top of already high concentrated markets, to reinforce Big 4 market positions and further tighten the domestic oligopoly, does not serve the purpose of coherent and comprehensive

[28] Comments of the U.S. Dept. of Justice, Notice Of Petition For Waiver of the Terms of the Order Limiting Scheduled Operations at LaGuardia Airport And Solicitation of Comments on Grant of Petition With Conditions, FAA-2010-0109 (Mar. 24, 2010), https://www.justice.gov/sites/default/files/atr/legacy/2010/04/14/257463.pdf.
[29] U.S. v. United Continental Holdings, Inc. and Delta Airline, Inc., Complaint, Case 2:33-av-00001 (Nov. 10, 2015, D.D.C.), https://www.justice.gov/opa/file/792401/download.
[30] U.S. v. US Airways Group, Inc. and AMR Corporation, Complaint, Case 1:13-cv-01236, (Aug. 13, 2013, D.D.C.), at PP. 30-21.
[31] Slot Administration – Data: Holder and Operating Reports, Fed. Avia. Admin., U.S. Dept. of Trans., https://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/perf_analysis/slot_administration/data/. *See* reports: "Winter 2020/2021, JFK Holder Totals" and "Winter 2020/2021, LGA Holder Totals."
[32] *Id.*
[33] DOJ Complaint, *supra* note 2, at PP. 27.

competition policy. The NEA saga clearly illustrates this "inflection" point. The AAI therefore urges the administration to consider a number of policy priorities.

First, aggressive antitrust enforcement in the airline industry should get broad, bipartisan support. Airline consolidation and the "creeping" concentration it has caused in markets across the U.S. has generally weakened merger control as a tool of antitrust.[34] This is also true of other consolidated markets dominated by oligopolies, including food proteins, generic drugs, pharmacy benefit managers, and wireless communications. The gradual debilitation of Section 7 enforcement puts more pressure on enforcers to use other antitrust laws to police competition in highly concentrated markets. This includes government lawsuits against dominant firms that illegally act to maintain their monopolies under Section 2 of the Sherman Act; and against rivals that enter into anticompetitive agreements under Section 1 of the Sherman Act. The DOJ's enforcement action against American and JetBlue represents an important and necessary use of Section 1 to promote competition and protect consumers. Continued, aggressive enforcement of Section 1 and 2 in oligopolized domestic air passenger service markets is vital for competition and consumers.

Second, federal regulatory policy should focus on approaches that recognize the reality of the oligopoly of carriers that dominates the U.S. landscape. For example, the FAA should be commended for recently issuing a notice of its intention to approve schedule plans for a single low-cost carrier or ultra-low-cost carrier to operate the 16 peak afternoon and evening runway timings previously approved for operation by Southwest Airlines at EWR.[35] While this is a move in the right direction, the difficulty faced by smaller carriers in securing slots at congested airports, which facilitate entry and competitive discipline, indicates the need to overhaul the slot administration system. AAI encourages DOT to consider a rulemaking to develop a new model and market design for slot allocation that will result in more efficient outcomes and control for market power. The regulatory approaches to market design in wholesale electricity markets and broadband spectrum auctions are potential examples.

Third, DOT's policy approach to approving joint venture agreements should be reconsidered. AAI has advocated strongly in the past for a series of measures that will recognize the increasingly high hurdle for justifying grants of ATI that eliminate head-to-head competition in exchange for amorphous benefits elsewhere in alliance networks. This higher level of scrutiny and vigilance should also extend to cooperative service agreements and codeshares. AAI urges DOT to consider a more robust process and specific criteria for making its public interest determinations in these cases.

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[34] *See, e.g.,* Diana L. Moss, *Why Federal Antitrust Enforcers Should Pursue a Policy of Blocking More Harmful Mergers*, AMERICAN ANTITRUST INST. (Jul. 29, 2021), https://www.antitrustinstitute.org/work-product/why-federal-antitrust-enforcers-should-pursue-a-policy-of-blocking-more-harmful-mergers/.

[35] *Reassignment of Schedules at Newark-Liberty International Airport*, FED. AVIATION ADMIN., U.S. DEPT. OF TRANS. (Sept. 20, 2021), https://www.govinfo.gov/content/pkg/FR-2021-09-20/pdf/2021-20399.pdf.

AAI appreciates DOJ's and DOT's consideration in this matter, and stands ready to assist in any way to advance the goal of a coordinated and coherent competition policy response in the airline industry.

Sincerely,

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