

**BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION**

Joint Application of

**DELTA AIR LINES, INC. and
AEROVIAS DE MEXICO, S.A. DE
C.V.**

**Under 49 U.S.C. §§ 41308 and 41309 for
Approval of and Antitrust Immunity for
Alliance Agreements**

Docket DOT-OST-2015-0070

**CONSOLIDATED SURREPLY AND MOTION FOR LEAVE TO FILE
OF THE DELTA MASTER EXECUTIVE COUNCIL
OF THE AIR LINE PILOTS ASSOCIATION, INTERNATIONAL**

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August 28, 2019

**BEFORE THE
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Joint Application of

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OF THE AIR LINE PILOTS ASSOCIATION, INTERNATIONAL**

On behalf of the more than 14,000 pilots who fly for Delta Air Lines, Inc., the Air Line Pilots Association, International's Delta Master Executive Council (MEC) respectfully moves to file this Consolidated Surreply.¹ Delta and Aeromexico² (collectively, the Parties) have asked the Department to eliminate the condition on the Delta-Aeromexico joint venture (the JV) that provides for the current approval and grant of antitrust immunity to expire on December 21, 2020. Although the MEC had previously objected to requiring the JV to submit to *de novo*

¹ Good cause exists for granting the MEC's motion. On August 15, 2019, Delta and Aeromexico filed a Consolidated Reply that "clarif[ies]" the requests made in their initial Motion to Amend Order 2016-12-13 and raises additional issues—including discussion of the review proposed by the Department in the pending Delta-Air France-KLM-Virgin Atlantic (Blue Skies) joint venture proceeding—that require a response. *See* Consolidated Reply and Motion for Leave to File, DOT-OST-2015-0070-222 (Aug. 15, 2019) (Consolidated Reply); Motion to Amend Order 2016-12-13, DOT-OST-2015-0070-209 (July 3, 2019) (Motion). Consideration of the MEC's Consolidated Surreply will assist the Department in making an informed decision on a more complete record and will cause no prejudice to any party in this proceeding.

² Common names are used for carriers.

review after five years,³ subsequent revelations about Delta’s use of its joint venture with Virgin Atlantic to effectively outsource flying to a foreign carrier partner—described in detail in the MEC Comment filed in the pending Blue Skies joint venture proceeding,⁴ attached hereto and incorporated by reference—give the MEC serious cause for concern about the potential of the JV to be used in a similar manner.

Like the Delta-Virgin Atlantic joint venture, the JV incentivizes Delta and Aeromexico to maximize aggregate rather than individual profits, includes carriers with significantly disparate labor standards, and is thus potentially vulnerable to labor arbitrage. Delta’s substantial equity interest in Aeromexico, like its ownership interest in Virgin Atlantic, only compounds those incentives. Tellingly, Delta already offers London-Mexico City itineraries that connect through the US but are operated entirely by Delta’s partially-owned joint venture partners. *See, e.g.*, LHR-JFK-MEX (UK-US via Virgin Atlantic; US-Mexico via Aeromexico). On such services offerings, Delta is able to share in the economic benefits of all component flight segments without producing any corresponding benefit to US aviation job or career opportunities.

To date, while facing the prospect of *de novo* review prior to December 21, 2021, the Parties have in fact allocated Delta a significant amount of growth under the JV. The Parties particularly describe using Delta capacity to “continue offering more transborder service than would otherwise be possible in light of current adverse market conditions, including the grounding of a substantial portion of Aeromexico’s narrow-body fleet due to the ongoing Boeing 737 Max issues.” Consolidated Reply at 2. However, in the absence of a meaningful

³ Objections and Comments of the Delta Master Executive Council of the Air Line Pilots Association, International, DOT-OST-2015-0070-79 (Nov. 18, 2016).

⁴ Comment of the Delta Master Executive Council of the Air Line Pilots Association, International, DOT 2013-0068-0077 (Aug. 16, 2019) (MEC Comment).

commitment from Delta to equitable growth within the JV, questions remain about whether this trend will continue should the *de novo* review condition be lifted, particularly once Aeromexico's 737 Max aircraft are able to resume operations.

The MEC's concerns in this regard are compounded by Delta's repeated violation of its own pilot contract requirements related to the Delta-Aeromexico alliance. Specifically, since the Parties initially sought approval for the JV, Delta has committed seven distinct Aeromexico-related violations of the Delta Pilot Working Agreement, accruing respectively in July 2016, December 2017, March 2018, June 2018, December 2018, January 2019, and February 2019. Four of these violations arose due to Delta's breach of contractual limits placed on the number and/or share of Delta passenger seats that can be sold on Aeromexico flight segments. The other three violations arose due to Delta's failure to maintain certain minimum required levels of Delta flying between the US and Mexico.

In light of the above, in the event that the pending Motion is granted, the MEC respectfully urges the Department to impose replacement conditions to ensure that the JV continues to yield expanded US carrier operations and corresponding growth in job and career opportunities for US aviation workers. Moreover, as explained in the Blue Skies MEC Comment, a periodic review mechanism with the narrow focus of that proposed in the Blue Skies proceeding is not sufficient to achieve those ends. Rather, to adequately protect the Department's public interest objectives of strengthening the competitive position of US air carriers relative to foreign air carriers, and encouraging fair wages and working conditions, 49 U.S.C. §§ 40101 (a)(5), (a)(15), and (e)(1), its periodic review of the JV should specifically examine (1) the impact of the alliance on the balance of flying and growth between Delta and Aeromexico in joint venture markets, as well as with respect to high-value long haul "beyond"

routes to and from Central and South America, and (2) the impact of the alliance on US airline jobs and career opportunities related to transborder flying and flying to Central and South America. Such review should quantitatively document the JV's impact on Delta's absolute and relative share of flying and incremental growth in US–Mexico and US/Mexico–Central/South America markets, including through calculation of frequencies, block hours, and ASMs generated by Delta. In addition to scheduled periodic review, at such time as Aeromexico's Boeing 737 Max fleet is scheduled to resume operations, the Department should impose a supplemental review to ensure that progress will continue to be made on these metrics notwithstanding Aeromexico's expanded capacity.

Respectfully Submitted,

/s Ryan Schnitzler

Ryan Schnitzler

Chairman

Delta Master Executive Council

Air Line Pilots Association, International

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by electronic mail this 28th day of August, 2019, on the following:

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ATTACHMENT:

Comment of the Delta Master Executive Council of the Air Line Pilots Association, International, DOT-OST-2013-0068 (August 16, 2019)

**BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION**

Joint Application of

**VIRGIN ATLANTIC AIRWAYS, LTD.
DELTA AIR LINES, INC.
SOCIÉTÉ AIR FRANCE
KONINKLIJKE LUCHTVAART
MAATSCHAPPIJ N.V.
ALITALIA COMPAGNIA AEREA
ITALIANA S.P.A.**

**for Approval of and Antitrust Immunity for
Alliance Agreements under 49 U.S.C. §§ 41308
and 41309**

Docket DOT-OST-2013-0068

**COMMENT OF THE DELTA MASTER EXECUTIVE COUNCIL
OF THE AIR LINE PILOTS ASSOCIATION, INTERNATIONAL**

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August 16, 2019

**BEFORE THE
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Joint Application of

**VIRGIN ATLANTIC AIRWAYS, LTD.
DELTA AIR LINES, INC.
SOCIÉTÉ AIR FRANCE
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Docket DOT-OST-2013-0068

**for Approval of and Antitrust Immunity for
Alliance Agreements under 49 U.S.C. §§ 41308
and 41309**

**COMMENT OF THE DELTA MASTER EXECUTIVE COUNCIL
OF THE AIR LINE PILOTS ASSOCIATION, INTERNATIONAL**

On behalf of the more than 14,000 pilots who fly for Delta Air Lines, Inc., the Air Line Pilots Association, International's Delta Master Executive Council (MEC) respectfully submits this comment in response to the United States (US) Department of Transportation's (Department) Order to Show Cause,¹ tentatively approving, and tentatively granting global antitrust immunity (ATI) to, the Amended and Restated Transatlantic Joint Venture Agreement (Amended JVA) submitted by Delta, Air France, KLM, and Virgin Atlantic (collectively, the Joint Applicants). Due to serious concerns raised by the inequitable allocation of service growth within the existing immunized alliance between Delta and Virgin Atlantic (Delta-Virgin joint venture), the MEC urges the Department to condition final approval of the Amended JVA on mandatory time-limited review of the alliance's impact on the balance of Delta-operated flying opportunities and US aviation jobs in joint venture markets.

In 2013, the Delta MEC expressed strong support for the Delta-Virgin joint venture on

¹ Order 2019-8-2, DOT-OST-2013-0068-0074 (Aug. 2, 2019) (Order).

the basis that it would “produce new flying opportunities for Delta and its employees”—and thereby grow and enhance US job and career opportunities—through expanded service offerings between the US and the United Kingdom (UK). MEC Answer² at 2-3. Nearly six years later, the promised growth in US-UK services has accrued almost exclusively to Virgin, and the promised US job and career opportunities predicated on Delta operational expansion in that market have failed to materialize. In fact, Delta-operated flying in the critical New York-London market has actually *decreased* since the Delta-Virgin joint went into effect. This use of the JV mechanism to effectively outsource Delta flying to a foreign carrier whose flight crews work under substantially less favorable wages and work rules is fundamentally inconsistent with the Department’s public interest objectives of strengthening the competitive position of US air carriers relative to foreign air carriers, and encouraging fair wages and working conditions. 49 U.S.C. §§ 40101(a)(5), (a)(15) and (e)(1).

Because of the manner in which the Delta-Virgin joint venture has been used, the MEC has serious concerns that, if approved, the Amended JVA might be deployed to similar effect. Specifically, the agreement significantly reduces Delta’s financial incentive to expand its own operations in the Amended JVA markets and gives the Joint Applicants latitude to grow non-US carrier transatlantic³ operations exclusively for years before requiring any corresponding growth in US-staffed Delta-operated transatlantic services. Therefore, absent a meaningful commitment from Delta to grow its joint venture service offerings equitably with those of its alliance partners,

² Answer of the Delta Master Executive Council of the Air Line Pilots Association, International in Support of Delta and Virgin Atlantic, DOT 2013-0068-0022 (June 4, 2013) (MEC Answer).

³ As used in this Comment, the term “transatlantic” refers to the Amended JVA’s “Bundle 1” routings, i.e., (i) travel between North America and Europe, and (ii) travel between North America and French Polynesia. See Joint Motion to Amend Order 2013-9-14 to Approve and Extend Antitrust Immunity to Amended and Restated TransAtlantic Joint Venture Agreement, DOT-OST-2013-0068-0033 (July 20, 2018) (Joint Motion), Appendix 2 at 2.

the Delta MEC believes that additional conditions are necessary to ensure the promised benefits of the alliance are realized by US aviation employees. Specifically, should the Department grant final approval of, and ATI to, the Amended JV, the Delta MEC respectfully requests that the Department expand the scope of its proposed 5-year review, *see* Order at 12-13, in the manner described below to assess the balance of flying opportunities generated under the alliance and the related impact on US aviation jobs. In addition, the MEC respectfully urges the Department to require an interim review on December 31, 2019 to evaluate whether satisfactory progress is being made towards those objectives.

A. Legal Standard

The Department's two-step analysis to review an application for antitrust immunity involves both a (i) "competitive effects analysis" and (ii) "public benefits analysis" under 49 U.S.C. §§ 41308 and 401309, respectively. *See* Order at 4. In conducting its public interest analysis, the Department's policy is to strengthen the competitive position of US air carriers relative to foreign air carriers, and to encourage fair wages and working conditions. 49 U.S.C. §§ 40101 (a)(5), (a)(15), and (e)(1).

Unlike codesharing, where each partner maintains its own profit motives, and the incentive to operate its own flights, a metal neutral joint venture significantly reduces those incentives. Approval of and antitrust immunity for the joint venture would allow the partner carriers to act commercially as one. As explained by the Joint Applicants:

The Amended JVA ... establishes[es] detailed governance and settlement mechanisms among the Parties for sharing profits/losses, coordinating their commercial activities, and implementing coordinated sales and strategies pursuant to which the joint venture partners are fully incentivized to (i) flow traffic to one another without regard to which joint venture is operating the flight and (ii) to take advantage of new market opportunities.

When alliance partners share equally in the growth enabled by an immunized alliance, they can protect, enhance, and grow US jobs and careers. However, those objectives are not served by a joint venture that fails to ensure an equitable production balance and equitable growth among partner carriers and effectively enables the outsourcing of US aviation jobs to a foreign partner.⁴

B. Delta-Operated US-UK Services and US Aviation Workers Have Been Excluded from the Benefits of the Delta-Virgin Joint Venture.

In September 2013, the Department approved, and granted ATI to, the Delta-Virgin joint venture, which covers air transportation between the US and UK. Order at 2. During the pendency of the Delta-Virgin application, the Delta MEC filed in support of the joint venture with the understanding that the alliance would produce “new flying opportunities for Delta pilots and flight crews” through expanded capacity in the US-UK market and that the resulting “[n]ew flights [would be] equitably apportioned” between Delta and Virgin. MEC Answer at 3.⁵

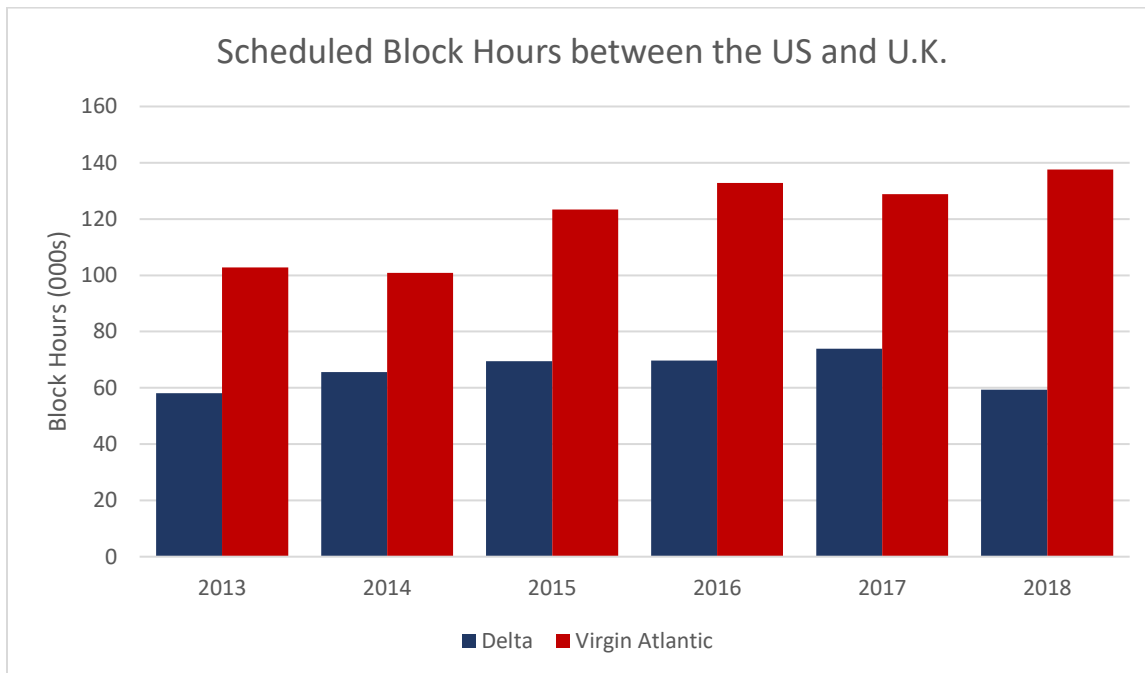
However, nearly six years later, the promised equitable growth has failed to materialize and Virgin’s JV service offerings have increased in lieu of, and sometimes even at the expense of Delta’s US-UK operations. As shown in Figure 1, below, Virgin’s total block hours in 2018 between the US and the UK increased 33% over those flown in 2013, the year before the Delta-

⁴ Elsewhere, Delta has calculated that “every daily international roundtrip flying lost” by a US carrier due to route displacement by a foreign carrier equates to “a net loss of more than 1,500 US jobs.” Partnership for Open & Fair Skies, *Subsidized Expansion by Qatar, Etihad and Emirates Threatens US Airline Jobs*, <http://www.openandfairskies.com> (last visited Aug. 12, 2019).

⁵ See also Joint Application for Approval of Antitrust Immunity for Alliance Agreements, DOT-OST-2013-0068-0001 (Apr. 8, 2013), at 33 & n. 57 (asserting “significant public benefits” from the Delta-Virgin joint venture on the basis that “Each new route added by the Joint Venture will create in excess of \$150 million in value to the U.S. economy and U.S. aviation interests”); *id.*, Appendix A, at 1 (describing the Delta-Virgin joint venture agreement as providing for “Equitable allocation of future Joint Venture capacity growth taking into account aircraft availability and the optimal economic outcome for the Joint Venture”).

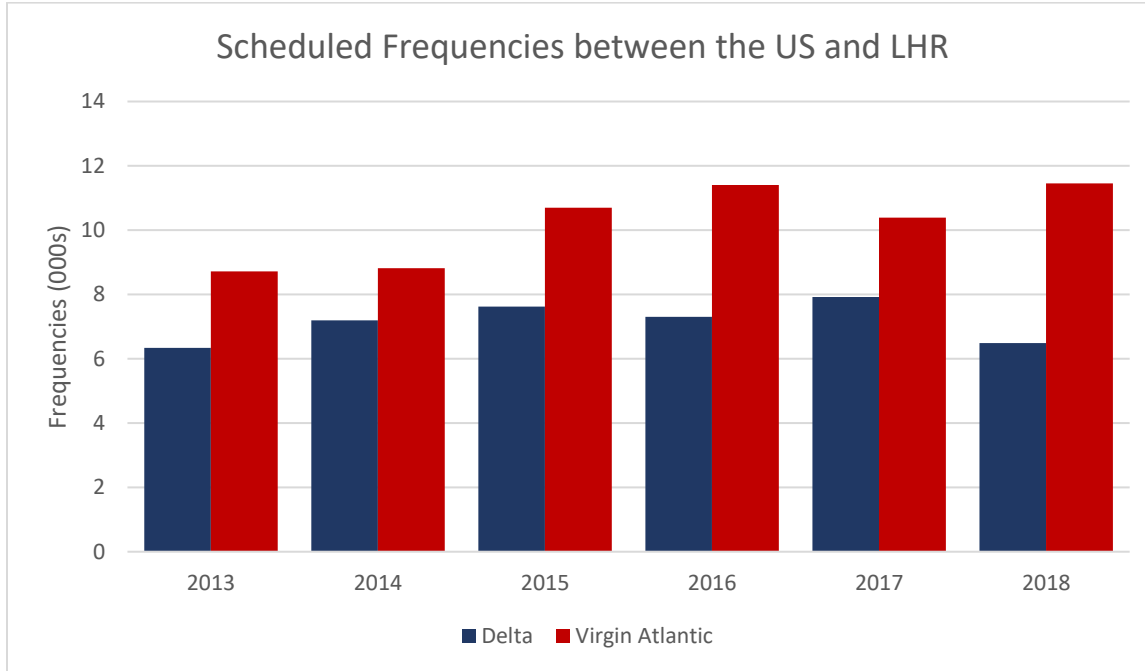
Virgin joint venture went into effect. Over the same period of time, Delta's US-UK block hours have increased by just 2%. Moreover, as shown in Figure 2, below, Delta's total scheduled frequencies between the US and London Heathrow (LHR) have increased only marginally under the joint venture, from 6,341 in 2013 to 6,492 in 2018. In contrast, Virgin's total scheduled LHR-US operations grew from 8,174 frequencies in 2013 to 11,453 frequencies in 2018.

Figure 1



Source: Official Airline Guide (OAG) (data load date 02 Jun 2019)

Figure 2



Source: OAG (data load date 02 Jun 2019)

Furthermore, under the Delta-Virgin joint venture, the number of Delta-operated daily flights in the all-important New York (JFK)-LHR market has actually decreased. As shown in Figure 3—a figure from the Joint Motion depicting a “before-and-after snapshot of London Heathrow to New York JFK,” Joint Motion at 21—prior to the joint venture, Delta and Virgin each operated three daily flights from LHR to JFK. At that time, MEC was told that, with the joint venture in place, “[t]ogether Delta and Virgin w[ould] provide 9 well-timed flights, with Delta and Virgin each maintaining all of their current frequencies and optimizing schedules to achieve better time of day coverage.” MEC Answer at 3. As the right-hand column of Figure 3 shows, however, Delta’s pilots did not in fact “maintain[] all of their [pre-joint venture] frequencies.” Rather, even as the total number of joint venture LHR-JFK flights increased from six to eight, the number of LHR-JFK operated by Delta was reduced from three to two.

Figure 3

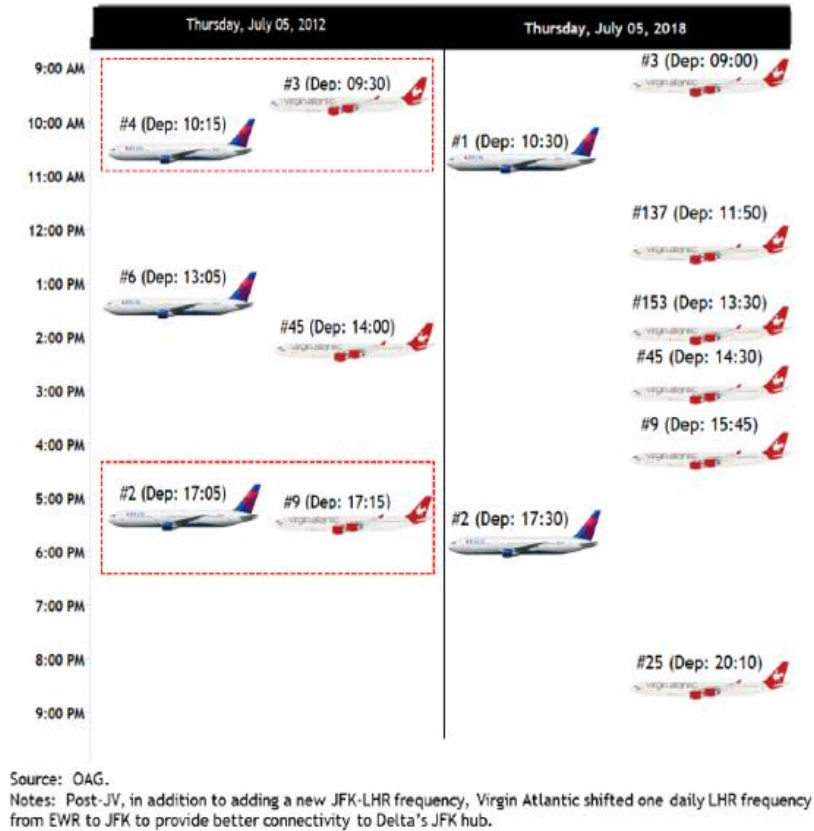


Fig. 3: Scheduled Departure Times for Delta and Virgin Atlantic Flights – London Heathrow to New York (JFK)

Thus, the Delta-Virgin joint venture enabled Delta to participate in the financial benefits of expanded US-UK services without producing any corresponding growth in US aviation job and career opportunities.

By using the joint venture to outsource Delta flying to a foreign carrier with less favorable wages and working conditions, the Joint Applicants have effectively used the immunized alliance mechanism to engage in labor arbitrage. Among other disparities, Virgin pilots who fly between the US and UK are compensated at a significantly lower rates than are Delta pilots. In addition, all of Delta's US-UK operations are currently staffed by a three-pilot crew, while the majority of Virgin's flights between the US and UK are crewed by just two

pilots.⁶ Thus, in allocating joint venture capacity growth almost exclusively to Virgin, Delta has utilized the alliance mechanism to functionally reduce labor costs and circumvent the higher negotiated labor standards to which it agreed in its pilot collective bargaining agreement. Such conduct is fundamentally inconsistent with the Department's public interest objectives of encouraging fair wages and working conditions.

The developments described above call into question whether or not the Delta-Virgin arrangement ultimately satisfied the Department's public interest objectives at 49 U.S.C. §§ 40101(a)(5), (a)(15) and (e)(1).

C. Absent Conditions, US Aviation Workers Risk Being Excluded from Flying Opportunities and Growth Under the Amended JVA.

The Joint Applicants seeking to amend Order 2013-9-14 (approving and immunizing the Delta-Virgin alliance) to include their new Amended JVA among the list of agreements approved and immunized by that order. Order at 3. The Amended JVA consolidates Delta's current joint ventures with Virgin, KLM, and Air France into a single agreement. *Id.* at 12. As the Joint Applicants have explained, under the Amended JVA,

The Partners split the incremental JV contribution, defined as the difference between settlement and baseline period contributions, with DL and AFKL each receiving 40 percent and VS receiving 20 percent. The profit sharing mechanism ... creates economic incentives for each Partner to seek to maximize the profits of the JV as opposed to its own individual profits.

Joint Motion, Appendix 3, at 13 n.35.

⁶ Virgin rosters a third pilot only when a flight would require a pilot to be in an operating position in excess of 9 hours and 30 minutes. Virgin Atlantic Pilot Scheduling Agreement (Nov. 2017), § 4.2.1–.2. Even where Virgin flights are staffed by augmented crews, Virgin's A332 and A333 aircraft have no crew rest facility on board, nor is the third pilot guaranteed a cabin seat that would allow for meaningful respite from the flight deck. *Contrast* Delta Pilot Working Agreement § 16 (providing for crew rest through dedicated rest facilities and/or partitioned first class seating on all Delta aircraft that perform transatlantic operations).

The Joint Applicants have argued that their request “raises no labor issues” and assert that “the long-term impact of the transaction will be positive for all existing employees and for the creation of new jobs, and no significant impact on unionized employees is anticipated.” Joint Motion, Appendix 4 at 7. Unfortunately, the carriers’ track record with respect to the Delta-Virgin joint venture, the continuing disparity in wage rates labor standards between Delta and Virgin flight crews, and the structure of the Amended JVA itself, call those claims into question.⁷

Of particular concern is the fact that Delta’s existing share of the Joint Applicants’ transatlantic capacity far exceeds the 40% of incremental profits to which it would be entitled under the Amended JVA’s profit-sharing mechanism. According to scheduled OAG data, Delta flying will represent 50.0% of the Joint Applicants’ total block hours and 42.5% of the Joint Applicants total available seat miles (ASMs) in the transatlantic market in 2019.⁸ This disparity between Delta’s existing capacity and its share of incremental profits under the Amended JVA settlement mechanism significantly reduces any incentive Delta would have to continue to grow its own operations or maintain its existing share of flying relative to the other Joint Applicants. The MEC is therefore concerned that the Amended JVA could expose Delta’s pilots to a scenario where—as happened under the Delta-Virgin joint venture—Delta’s own flying in the Amended JVA markets remains static for multiple years while its partner carrier operations in those markets continue to expand. Thus, Delta would be able to reap the financial benefits of the Amended JVA without any corresponding job and career growth and opportunities for Delta

⁷ The Joint Applicants’ claims that the Amended JVA will have “no significant impact on unionized employees” are also belied by Delta’s numerous recent violations of its pilot contract in connection with other Delta joint ventures. In particular, since 2016, Delta has committed eight (8) contract violations related to its code share, equity stake and joint venture with Aeromexico and fourteen (14) contract violations related to its joint venture with Korean Air.

⁸ OAG (data load date 14 July 2019).

employees.

As such, in the absence of any meaningful commitments from Delta to grow its joint venture service offerings equitably with its alliance partners, there remain serious questions about whether the Amended JVA will satisfy the Department's public interest objectives at 49 U.S.C. §§ 40101(a)(5), (a)(15) and (e)(1) of strengthening the competitive position of US carriers and encouraging fair wages and working conditions. The Delta MEC therefore believes that, should the Department finalize its approval of and grant of ATI to the Amended JV, additional conditions are necessary to ensure the promised benefits of the alliance related to expanded US carrier operations and corresponding growth in job and career opportunities for US aviation workers are in fact realized.

In particular, like the risks to competition identified by the Department, *see* Order at 12, the risks the Amended JVA poses to the balance of Delta-operated capacity in the transatlantic market and associated job and career opportunities for US aviation workers "warrant a time-limited review." Order at 12. Accordingly, the Delta MEC respectfully urges that the Department's proposed 5-year review requirement be adopted and expanded to specifically inquire into (1) how the alliance has affected the balance of flying between US and foreign carriers in joint venture markets, including how the Joint Applicants have allocated growth in those markets, and (2) the impact of the alliance on US airline jobs and career opportunities related to transatlantic flying. The review should quantitatively document the Amended JVA's impact on US labor and US carrier operations in the US-UK and US-European Union markets, including through calculation of frequencies, block hours, and ASMs generated by Delta under the joint venture, Delta's joint venture operations and capacity relative to the other Joint Applicants, and Delta's absolute and relative share of incremental flying opportunities realized

under the joint venture.

In addition, the MEC respectfully urges the Department to require an interim review of the Amended JVA on December 31, 2019 to assess the steps taken by the alliance toward an equitable allocation of joint venture flying growth to US-staffed Delta operations, particularly with respect to scheduled operations for the 2020 Summer season. This should include, at minimum, confirmation that Delta's third JFK-LHR frequency has been restored, that the total number of transatlantic frequencies scheduled to be operated by Delta in 2020 meets or exceeds those operated by Delta in 2019, and that Delta will generate an equitable share of any new flying scheduled to be initiated under the joint venture. As planning is now underway for the Summer 2020 schedules, imposing this requirement now will give Delta ample notice and opportunity to make any necessary adjustments to its network to achieve the interim goals identified above.⁹

CONCLUSION

For the reasons set forth above, the Delta MEC believes that additional conditions are necessary to ensure that Delta-operated services and US aviation workers do in fact realize the promised benefits of the Amended JVA. The MEC therefore respectfully urges the Department to expand the scope of its proposed 5-year review of the Amended JVA to assess its impact on US aviation jobs and the balance of flying and growth opportunities generated in joint venture markets, and to impose an interim review of the Amended JVA on December 31, 2019 to ensure that satisfactory progress is being made on those metrics.

⁹ Delta has already announced plans to resume its third JFK-LHR frequency effective March 28, 2020, and should therefore have no objection to providing the Department with confirmation on December 31, 2019 that those plans will in fact come to fruition. See Delta News Hub, *Delta, Virgin Atlantic boost summer flying between U.S. and U.K. in 2020* (Aug. 15, 2019), <https://news.delta.com/delta-virgin-atlantic-boost-summer-flying-between-us-and-uk-2020>.

Respectfully Submitted,

Ryan Schnitzler
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CERTIFICATE OF SERVICE

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