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BEFORE THE
DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
WASHINGTON, DC

In the Matter of	)
	)
United States et al. v. US Airways	)
Group, Inc. and AMR Corporation	)
Proposed Final Judgment, Stipulation	)
And Competitive Impact Statement	)
	)

Comments of the Wayne County Airport Authority Concerning Potential Anti-Competitive Impacts of the Proposed DOJ Settlement

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On November 27, 2013, the Department of Justice ("DOJ" or the "Department") published a notice in the Federal Register of a proposed Final Judgment, Stipulation and Competitive Impact Statement ("Settlement") in the case of *United States, et al. v. US Airways Group, Inc. et al.*, Civil No. 1:13-cv-01236 in the United States District Court for the District of Columbia. 78 Fed. Reg. 71378 *et seq.* (Nov. 27, 2013). DOJ invited public comment within 60 days of the notice. *Id.* at 71378.

The Wayne County Airport Authority ("WCAA" or "the Authority"), which operates Detroit Metropolitan Airport ("DTW"), seeks, through these comments, a modest modification of the Settlement, in order to avoid significant anti-competitive impacts.

In initiating litigation to block the merger, and in reaching a settlement with the airlines to allow the merger to proceed, DOJ stated repeatedly that its goals were to

promote airline competition and avoid anti-competitive impacts.[1] For the most part, it appears that the proposed Settlement promotes these goals. However, with respect to service in the DTW-DCA market, it does not. In fact, unless modified, the Settlement will most likely result in the creation of a monopoly route for Delta Air Lines between one of its fortress hubs (DTW) and a slot-controlled airport (DCA). This would be bad for airline competition, bad for the affected communities, and bad for air travelers. DOJ should revise the settlement to avoid this anti-competitive result.

Specific Service that is in Jeopardy

In the complaint, DOJ defines the relevant market for analysis in this case as a "city pair," which is "comprised of a flight's departure and arrival cities," given that "[p]assengers seek to depart from airports close to where they live and work, and arrive at airports close to their intended destinations," and "[a]irlines customarily set fares on a city pair basis." DOJ Complaint, 78 Fed. Reg. at 71380. It is one such city pair, Detroit-Washington, D.C., that concerns the Authority.

Given the terms of the proposed settlement relating to slot divestiture and discussions between Authority officials and airline officials, it appears extremely likely, if not certain, that the loss of slots by American and US Airways in forming the New American will result in the merged airline dropping US Airways' current five daily roundtrips between DCA and DTW.

Based on publicly available data, it appears that US Airways only uses Bombardier Canadair Regional Jets, and Embraer 175's, i.e., aircraft that meet commuter size standards, to provide service between DCA and DTW. In an agreement among US

[1] *See e.g.* Press Release, Department of Justice, *Justice Department Files Antitrust Lawsuit Challenging Proposed Merger Between US Airways and American Airlines* (Aug. 13, 2013) [hereinafter "Filing Press Release"].

Airways, AMR Corporation, and the United States Department of Transportation (together, the "Parties"), the Parties agreed that "New American shall schedule *all* commuter slots held or operated by US Airways, AMR, or New American (collectively, New American entities) to serve Medium, Small and Non-hub airports for a term (Term) of five (5) years."[2] Pursuant to 14 C.F.R. 93.123, New American is required to use aircraft of 76 seats or less on service to destinations operated with "commuter slots."[3] Because DTW is classified as a large hub airport, New American cannot use commuter slots to serve DTW-DCA under the agreement.

In contrast to commuter slots, there are no aircraft size limitations for air carrier slots. *See* DOJ Competitive Impact Statement, 78 Fed. Reg. at 71396. Thus, in theory, air carrier slots could be used to provide service with commuter aircraft. However, when analyzing the remaining commitments in the Settlement to relinquish slots, the agreement with State Attorneys General to continue to provide service to their states, and key service such as the US Airways Shuttle operations from DCA, there do not appear to be sufficient remaining slots for New American to continue to serve DTW from DCA. The New American "expects to operate 44 fewer daily departures at DCA . . . than the

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[2] US Airways Group, Inc., *Agreement Regarding Merger Between US Airways Group, Inc. and AMR Corporation (EX-10.5)* (Nov. 12, 2013) (Emphasis added).

[3] American and US Airways have acknowledged the restriction on New American's use of commuter slots:

> To ensure much of the service currently operated by the carriers to small- and medium-sized markets from DCA is maintained, the new American has agreed with the DOT to use all of its DCA commuter slot pairs for service to these communities.
>
> Press Release, AMR Corporation and US Airways Group, Inc., *AMR Corporation and US Airways Announce Settlement With U.S. Department of Justice and State Attorneys General* (Nov. 12, 2013) [hereinafter "AMR and US Airways Announcement"].

approximately 290 daily DCA departures . . . that American and US Airways operate today." AMR and US Airways Announcement.[4]

American Airlines/US Airways further stated that:

> In the settlement agreement with the state Attorneys General, the new American has agreed to maintain its hubs in Charlotte, New York (Kennedy), Los Angeles, Miami, Chicago (O'Hare), Philadelphia, and Phoenix consistent with historical operations for a period of three years. In addition, with limited exceptions, for a period of five years, the new American will continue to provide daily scheduled service from one or more of its hubs to each plaintiff state airport that has scheduled daily service from either American or US Airways. A previous settlement agreement with the state of Texas will be amended to make it consistent with today's settlement.
>
> *Id.*

Historically, there have been a significant number of flights from DCA to many of these American or US Airways hubs.

In addition, there are 31 slot pairs dedicated to US Airways Shuttle operations to Boston and LaGuardia. It is highly unlikely that the hourly pattern in those lucrative markets would be disrupted. Also, five slot pairs are special category "beyond-perimeter" slots used for service to Las Vegas, Phoenix, and San Diego. The Settlement and published accounts have not indicated that New American will be forced to disgorge these beyond-perimeter slots. The net result is that once the New American preserves DCA service to the US Airways/American Airlines hubs at historical levels, the block of protected small/medium sized markets, Shuttle operations, and beyond-perimeter operations from DCA, it appears that there are no remaining slots that can be used to serve a within-perimeter large hub airport like DTW from DCA, absent a revision of the

[4] The difference between 52 slot pairs given up, and 44 daily departures that will be reduced, is due to the fact that the slot divestiture includes "eight DCA slot pairs . . . currently operated by JetBlue." *Id.*

Settlement. This conclusion is consistent with informal discussions Authority officials have had with New American officials, although they have not explicitly announced any decisions with respect to DTW service.

Unless mandated in a revised Settlement, it is very unlikely that any other carrier will provide competing service in the DTW-DCA market, because (a) access to DCA is limited by slots; (b) DTW is a concentrated fortress hub airport for Delta Air Lines; and (c) the route would not be consistent with the route structures of low cost carriers (LCCs), which will be the recipients of the foregone American/ US Airways slots under the proposed Settlement.

The Importance of Maintaining Competitive Service on the DTW-DCA Route

Washington DC is a critical market for Detroit. For the 12-month period ending June 2013, there were approximately 219,000 O&D passengers flying between DCA and DTW, making it the 17th largest O&D market for Detroit. Based on passenger traffic, DTW is DCA's 12th largest O&D market inside the perimeter, and 16th largest O&D market overall, and, at 46.68 cents per mile flown, DCA-DTW has the highest fare/mile (yield) of DCA's top 30 markets. Revenue from DCA-DTW is nearly equal to that of BWI-DTW, despite the fact that BWI-DTW has almost twice as many total passengers (409,490 vs. 219,000).

Even with two airlines providing service, there is already a fare premium for DTW-DCA. Based on DOT data, the average fare from Detroit to Washington National Airport (DCA) was $376 roundtrip during the 12 months ended in the *second quarter* of 2013, or 66% higher than the average fare to Baltimore (BWI) which is virtually the same distance. The International Air Transport Association (IATA) has published more recent

data, which shows similar results for the 12 months ending in the *third quarter* of 2013 -- a new high of $401 roundtrip DTW-DCA, which is 56% higher than the roundtrip DTW-BWI fare.[5] In fact, under the IATA data, DCA has the 4th highest price among DTW's top 30 markets in terms of fare/mile (yield), at nearly 48 cents. Even using stage adjusted yield, DCA is DTW's 6th highest cost market. By way of comparison, the average fare on DTW-DCA as reported by DOT is only a few dollars less than the fare from DTW to Orange County, California *which is five times farther from DTW than is DCA.* As explained in more detail below, based on numerous government studies, the problem of high fares for the DCA-DTW route will be exacerbated by a Settlement that results in Delta gaining a monopoly on the route. This is consistent with our historical experience at DTW. For example, in 2008, United/Continental dropped service between Detroit and Cleveland. In the second quarter of 2009, when two legacy carriers served the route, the average fare was $96. After United/Continental dropped the service, leaving Delta alone to serve the route, the average fare in the comparable quarter in 2009 increased almost 65%, to $158.

The Authority asks DOJ to modify the proposed Settlement so as to avoid a similar anti-competitive result in the DTW-DCA market.

WCAA Does Not Seek to Interfere with the Consummation of the Merger

The Authority's purpose in submitting these comments is not to seek to prevent the merger from being ratified, but rather, to request that DOJ tweak the proposed Final

[5] Thus, the presence of BWI as a potential alternative airport in the Baltimore/Washington area does not impose price discipline in the DTW-DCA market. Moreover, DOJ has acknowledged that "Airlines do not view service at other airports as adequate substitutes for service offered at Reagan National for certain passengers . . . . Airlines pay significant sums for slots at Reagan National, despite having the option of serving passengers through the region's other airports." DOJ Complaint, 78 Fed. Reg. at 71381.

Order slightly, in order to ensure that DTW does not lose competitive service to the DCA market. We believe there are two potential means of doing so:

1) DOJ could secure a commitment by New American to operate the DTW-DCA route with slots it does not give up; or

2) DOJ could ensure that the slots currently used by US Airways to provide DTW-DCA service are restricted so that they can only be used to provide service to DTW, whether by the New American or another carrier.[6]

Either of these approaches – or another approach devised by DOJ to ensure that competition is not lost in the DTW-DCA market, would be acceptable to the Authority.

Standards for the Court to Assess Whether the Proposed Merger is in the Public Interest

At the end of the comment period, DOJ may ask the Court to enter the proposed Final Judgment. In considering this request, the Court must determine that it is in the public interest after evaluating, among other factors:

1. The competitive impact of the proposed judgment, including:

> . . . *any other competitive considerations bearing upon the adequacy of the proposal* that the court deems necessary to a make a public interest finding; and

[6] There is precedent for restricting slots to serve particular markets. As cited earlier, on p. 2-3, DOT has required New American to use its commuter slots to serve only certain categories of airports, specifically, medium, small and non-hub airports, for a period of five years. Moreover, in an unrelated proceeding, DOT awarded, on an experimental basis, three slot exemptions each to both Savannah, GA and Greenville-Spartanburg, SC. DOT Order 99-3-12 (March 16, 1999). *Each community was awarded slot exemptions that could only be used to provide service to their communities from Chicago O'Hare*, effective for 179 days. Before the expiration of the 179-day period, both communities applied to DOT requesting permanent assignment of the temporary slot exemptions. Subsequently, DOT extended the duration of the slot exemptions until "further notice." DOT Order 99-9-18 (September 28, 1999). In 2000, Congress enacted legislation eliminating slot controls at O'Hare as of July 1, 2002, thus rendering these market-specific slots unnecessary. *See* § 231(b)(2) of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century," Public Law 106-181, 114 Stat. 61, 108 (2000), codified at 49 U.S.C. § 41715. Although the circumstances were different, the award of market-specific slots demonstrates the government's authority and willingness to restrict the use of slots so that they may only be used to serve specific communities in order to promote competition.

2. *The impact of the proposal on competition in the relevant market or markets, upon the public generally*, as well as impacts on individuals alleging specific injury from the violations set forth in the complaint.

See 15 U.S.C. 16 (f)(2013) (Emphasis added).

These comments of the Authority are directly related to the highlighted portions of the relevant standards, above. We urge the Department to revise the proposed Settlement in order to alleviate WCAA's concerns and eliminate a serious anti-competitive impact of the DOJ proposal.

WCAA's Concerns and Requested Relief are Consistent with DOJ's Expressed Goals in Initiating the Lawsuit and in Reaching the Proposed Settlement.

DOJ's stated intent in filing the antitrust suit and in reaching the proposed Settlement has been to avoid anti-competitive impacts and promote competition in air service. The Department asserted that "[t]oday's action proves our determination to fight for the best interests of consumers by ensuring robust competition in the marketplace." Filing Press Release. DOJ also stated that:

> The more concentrated a market, and the more a transaction would increase concentration in a market, the more likely it is that a transaction would result in a meaningful reduction in competition.
>
> DOJ Complaint, 78 Fed. Reg. at 71381.

The Department also highlighted the impact to consumers of reduced competition, "With less competition, airlines can cut service and raise prices with less fear of competitive responses from rivals." *Id.* at 71378. Eliminating the only competition on a route between a fortress hub airport for Delta and a slot-controlled airport will almost certainly lead to increased prices.

The Department continued to express its pro-competition goals when announcing the proposed Settlement:

> On November 12, 2013, the United States filed a proposed Final Judgment designed to remedy the harm to competition that was likely to result from the proposed merger.
>
> DOJ Competitive Impact Statement, 78 Fed. Reg. at 71396.

Eliminating the only service that competes with Delta from DCA to DTW, which is a fortress hub for Delta, will increase concentration in the market to 100%. This clearly would reduce competition. Although DOJ states that the Settlement will "increase access to key congested airports and provide consumers with more choices and more competitive airfares on flights all across the country,"[7] at DTW, the settlement will *remove* consumer choice and result in higher ticket prices. Thus, modification of the settlement is necessary to achieve DOJ's stated goals.

Other Federal Agencies Have Cited Higher Fares Imposed on Consumers When Airlines Do Not Face Effective Competition

The Government Accountability Office (GAO)[8] and DOT have, for the past several decades, consistently identified the anti-competitive effects of monopoly routes and the resulting fare premiums paid by air passengers, particularly at fortress hubs. Twenty years ago, GAO observed that:

> Both GAO and the Department of Transportation (DOT) have found that consumers pay higher fares when flying from airports where there is little competition. In our analysis of 1988 fares, we found that fares for flights from concentrated airports were about

[7] Press Release, Department of Justice, *Justice Department Requires US Airways and American Airlines to Divest Facilities at Seven Key Airports to Enhance System-wide Competition and Settle Merger Challenge* (Nov. 12, 2013) [hereinafter "Settlement Press Release"].

[8] Prior to 2004, this congressional agency was known as the General Accounting Office. The acronym "GAO" refers to the agency by either name, as appropriate.

> 20 percent higher than for trips of similar lengths from other airports.[9]

In a more recent statement specifically related to this case, a top GAO official explained that:

> A key concern for DOJ in reviewing an airline merger is the loss of a competitor on nonstop routes. The loss of a competitor that serves a market on a nonstop basis is significant from a competitive perspective because nonstop service is typically preferred by most passengers and routes that only have nonstop service do not benefit from the availability of alternative, albeit lower valued, connecting service.[10]

DOJ has itself acknowledged the significance of consumer preference for non-stop service, the role it plays in airline pricing, and its relevance for analyzing the likely impacts of the proposed merger. *See* DOJ Complaint, 78 Fed. Reg. at 71380. Non-stop service is especially preferred by consumers in short-haul markets like DCA-DTW, where a non-stop flight takes "just over an hour of flight time." *Id.* at 71380. Therefore, the Department should also take this "key concern" into account when evaluating the potential impacts of its proposed Settlement. In the case of the DTW-DCA market, the settlement will almost certainly result in the loss of the only non-stop competitor to Delta. DOJ should revise the Settlement to avoid this anti-competitive result.

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[9] United States General Accounting Office, *Strategies for Addressing Financial and Competition Problems – Statement of Kenneth M. Mead*, at 6 (Mar. 10, 1996); *see also* United States General Accounting Office, *Airline Competition: Higher Fares and Less Competition Continue at Concentrated Airports*, at 7 (Jul. 1993).

[10] United States Government Accountability Office, *Airline Mergers: Issues Raised by the Proposed Merger of American Airlines and US Airways – Statement of Gerald L. Dillingham*, at 19 (Jun. 19, 2013) [hereinafter "GAO – 2013 Dillingham Statement"]; *see also* United States Government Accountability Office, *Airline Mergers: Issues Raised by the Proposed Merger of United and Continental Airlines – Statement of Susan Flemming*, at 17 (May 27, 2010) [hereinafter "GAO – 2010 Flemming Statement"].

DOJ Should be Mindful That Anti-Competitive Impacts are Heightened at Fortress Hubs and Slot-Controlled Airports

If the Settlement results in the loss of competition for Delta between a slot-controlled airport and one of its fortress hubs, it almost certainly will lead to higher fares for consumers on that route – a result that is inconsistent with DOJ's avowed goals for the Settlement. Such fare impacts have been recognized in an FAA/DOT joint study, which reported that:

> Numerous empirical studies of airline pricing practices since deregulation have concluded that average airfares in concentrated markets are higher, often considerably higher, than they are in competitive markets. High fares can have adverse consequences for local economic development and employment, as state and local officials have come to appreciate.[11]

In this proceeding, DOJ has recognized the challenges to competition relating to service from slot-controlled airports.

> To serve Reagan National, a carrier must have "slots," which are government-issued rights to take off and land. Reagan National is one of only four airports in the country requiring federally-issued slots. Slots at Reagan National are highly valued, difficult to obtain, and only rarely change hands between airlines. There are no alternatives to slots for airlines seeking to enter or expand their service at Reagan National."
>
> DOJ Competitive Impact Statement, 78 Fed. Reg. at 71397.

Given the difficulty of obtaining slots (which is a fundamental premise of DOJ's proposed Settlement), if the issue of access to DCA for DTW service is not addressed in the Settlement, there is virtually no chance that another carrier will provide competition for Delta on the DTW-DCA route.

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[11] Federal Aviation Administration and Office of the Secretary, *Airport Business Practices and Their Impact on Airline Competition,* at 9 (Oct. 1999) [hereinafter "FAA/OST Task Force Study"].

At the other end of the DTW-DCA market is the challenge of Delta's fortress hub at DTW, which also raises concerns about airfares for consumers.

> [D]ominance of major airports by one or two carriers, in many cases the result of hub formation, appears to result in higher fares for consumers who want to fly to or from these airports. . . . [S]uch strongholds seem to insulate the dominant carrier from competition.[12]

As noted by a Senate committee concerning legislation intended to enhance airline competition:

> According to the Department of Transportation (DOT), in the January 2001 Dominated Hub Fares study, airfares at so-called "fortress hub airports" are 41 percent higher than at hubs with greater competition.[13]

Similarly, GAO has consistently recognized the impacts on airfares of the competitive challenges at fortress hub airports:

> Several studies have also shown that increased airline dominance at an airport results in increased fare premiums, in part, because that dominance creates competitive barriers to entry.[14]

Likewise, DOT and FAA have pointed out the consistent empirical evidence that dominant carriers impose fare premiums in concentrated hub markets.

> "For at least a decade, studies have shown that fares in local markets at connecting hubs, dominated by one major airline, are substantially higher than comparable markets that do not involve a dominated hub airport.[15]

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[12] S. Borenstein, *Hubs and High Fares: Dominance and Market Power in the U.S. Airline Industry*, RAND Journal of Economics, Vol. 20, No. 3, 344, 362 (1989).

[13] S. REP. NO. 107-130, AVIATION COMPETITION RESTORATION ACT, REPORT OF THE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION ON S. 145, at 2 (2001).

[14] GAO – 2013 Dillingham Statement at 13; *see also* GAO – 2010 Flemming Statement at 7 – 8.

[15] FAA/OST Task Force Study, at 30.

Given DOJ's well-founded concerns about the impacts of the merger on airfares charged to consumers, the Department should be particularly concerned that it not exacerbate the fare premiums in a dominant hub-slot controlled airport market as a result of the Settlement. Accordingly, it should grant the relief sought by the Authority.

The DTW-DCA Route is Extremely Concentrated, as Demonstrated by the Herfindahl-Hirschman Index Utilized by DOJ

DOJ uses the commonly accepted Herfindahl-Hirschman Index (HHI) to measure market concentration. DOJ Complaint, 78 Fed. Reg. at 71381-82. The Department observes that "markets in which the HHI exceeds 2,500 points are considered highly concentrated. Post-merger increases in HHI of more than 200 points are considered to be significant increases in concentration." *Id.* This is a critical reason the Department opposed the merger in the first place, stating in its complaint that "[t]he substantial increases in concentration in these highly concentrated markets demonstrate that in these relevant markets, the merger is presumed, as a matter of law, to be anticompetitive." *Id.* at 71382.

Applying these same standards of market concentration and increase in market concentration to the route that concerns the Authority is very revealing. Using DOT T-100 Domestic Market Data for the time period of 10/1/2012 – 9/30/2013, we have calculated the pre-merger and post-merger-subject-to-settlement HHI on DCA - DTW. Pre-merger, the HHI was 7,312, with Delta having approximately 84% of the traffic. In the likely event that, in the absence of the relief sought by the Authority, US Airways ceases to serve DCA–DTW, Delta will be the sole remaining competitor and the HHI will be 10,000, the maximum on the scale, representing a total monopoly by a carrier, and

thus, 100% concentration. These figures clearly exceed the DOJ standards for very high concentration and a significant increase in concentration from the transaction.

In the Complaint, DOJ expressed concern that:

> In the market for slots at Reagan National, the merger would result in a highly concentrated market, with a post-merger HHI of 4,959. The merger would also significantly increase concentration by 1,493 points. As a result, the merger should be presumed, as a matter of law, to be anticompetitive.
>
> *Id.*

By these standards, a post-Settlement HHI of 10,000, with an increase of 2,688 above the pre-Settlement HHI, clearly indicates that the impact of the Settlement on the DTW-DCA route would be anti-competitive. Moreover, review of Appendix A to the Complaint, which sets forth the HHI of concentrated routes that concerned DOJ, reveals that the vast preponderance of those concentrated routes had (a) lower pre-merger HHI scores than DCA – DTW; (b) lower post-merger HHI (or for DCA-DTW, post-proposed Settlement HHI); and/or (c) smaller increases between the pre-merger HHI and the post-merger HHI (or for DCA-DTW, post-proposed Settlement HHI).

Therefore, the Authority urges DOJ to modify the settlement so as not to exacerbate concentration in the DTW-DCA market to an extent greater than the expected impacts in other markets that caused DOJ to oppose the merger in the first place.

Moreover, given that DOJ is concerned with enhancing competition at slot controlled airports (*see* Settlement Press Release), the Department should ensure that it does not degrade competition at a top 20 market from one such airport. Detroit is DCA's 16th largest origin and destination (O&D) market. Enhancing competition in smaller

markets, as the Settlement would do, is, in general, a good thing, *but it should not come at the expense of eliminating competition in a large market.* The number of consumers who would be hurt in the Detroit-DCA market is over 200,000 per year. DOJ has expressed concern about avoiding anti-competitive impacts in many far smaller markets:

> If this merger goes forward, even a small increase in the price of airline tickets, checked bags or flight change fees would result in hundreds of millions of dollars of harm to American consumers. Both airlines have stated they can succeed on a standalone basis and consumers deserve the benefit of that continuing competitive dynamic.
>
> Filing Press Release.

The hundreds of thousands of passengers annually who would likely be affected by the elimination of competition on the DTW-DCA route would suffer significant economic harm, and the Department should avoid adverse impacts on those consumers. A Settlement intended to preserve competition in city-pair markets from DCA should not reduce competition in the key DCA-DTW market; the economic benefits of competition on this densely traveled route should not be sacrificed to make competitive inroads on other, less heavily traveled routes. Maintaining competition in DCA-DTW is very important to Michigan and the surrounding states that DTW serves.

For the foregoing reasons, we request that the Department revise the proposed Settlement to ensure that it does not result in the elimination of competition on the DTW-DCA route. Revising the proposed Settlement would ensure that the ultimate settlement is consistent with DOJ's avowed goal, as expressed by Attorney General Eric Holder:

> The department's ultimate goal has remained steadfast throughout this process - to ensure vigorous competition in airline travel. This is vital to millions of consumers who will benefit from both more competitive prices and enhanced travel options.
>
> Settlement Press Release.

The Authority urges DOJ to apply these principles to the DTW-DCA route, and revise the Settlement so as to preserve or enhance competition on the route.

Respectfully submitted,

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