UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *et al.*,	)	
Plaintiffs,	)	
	)	Civil Action No. 1:13-cv-01236 (CKK)
v.	)	
US AIRWAYS GROUP, INC., *et al.*,	)	
Defendants.	)	

COMMENTS OF DELTA AIR LINES, INC. CONCERNING PROPOSED FINAL JUDGMENT AS TO DEFENDANTS US AIRWAYS GROUP, INC. AND AMR CORP.

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Delta Air Lines, Inc. ("Delta") respectfully submits these comments on the Proposed Final Judgment (the "Settlement") in the above-captioned action (the "Action") pursuant to section 2 of the Antitrust Procedures and Penalties Act. 15 U.S.C. § 16. Delta files these comments in order to: (i) object to certain positions taken by the Government—acting through the Antitrust Division of the Department of Justice (the "Division")—in its Complaint (Dkt. #1) and Amended Complaint (Dkt. #73), in the Competitive Impact Statement (Dkt. #148), and in public statements made by Government officials in connection with the Settlement; (ii) provide the Court with Delta's view of the competitive landscape in the airline industry; and (iii) alert the Court to the harm threatened by the Division's apparent intent to approve only so-called "Low Cost Carriers" ("LCCs") as Acquirers of the Divestiture Assets (as those terms are defined in the Settlement (Dkt. #147-2)) to the exclusion of Delta and other network airlines.

OVERVIEW

In its Complaint seeking to block the merger, the Government paints a distorted picture of the airline industry. The Government's outdated view of the industry distinguishes between two types of carriers. On the one hand, the Government refers to "legacy" carriers—an anachronism harkening back to the days of deregulation—when describing the major *network* carriers. The term "legacy carrier" emerged after deregulation of the airline industry in the late 1970s, and referred to carriers whose cost structure was a "legacy" of the regulated era. During that era, regulated rates permitted airlines to pass on costs, such as above-market labor costs and other inefficiencies, directly to consumers. The market changed dramatically with deregulation. Competitive pressures forced airlines to become more efficient. Over the past three decades, airlines have gone through multiple cycles of cost-cutting efforts, have increased efficiency through innovation, and, where these measures did not suffice, have gone through multiple bankruptcies and corporate restructuring. Today's so-called "legacy" carriers—including Delta, United Airlines, US Airways Group, Inc. ("US Airways"), and AMR Corp. ("AA", and collectively with US Airways, the "New American")—are defined not by their legacy cost structure, but rather by their operation of large domestic and international networks. The Government's use of the moniker "legacy" simply ignores the fact that—as explained below—these carriers can compete head-to-head with newer entrants, while offering a far richer—and more competitive—range of products to the traveling public, as a result of operating complex and expansive domestic and global *networks*. Throughout these comments, Delta, United Airlines, and the New American are referred to as network carriers.

On the other hand, the Government refers to so-called "Low Cost Carriers" ("LCCs")—another misnomer, used to denote domestic leisure carriers ("DLCs") whose business model is built around limited fleets used to transport large numbers of predominantly leisure passengers between large domestic destinations. "Low cost carrier" is a misnomer because it too is a term that harkens back to the early days of deregulation, when then-new DLCs enjoyed a cost advantage over network carriers that had not yet shed their "legacy" cost structures. As explained in more detail below, those cost advantages are now largely gone, and the remaining fundamental difference between network carriers and DLCs today is found in their business model: network carriers offer both premium and value products and maintain extensive hub-and-spoke networks capable of connecting passengers to destinations of various sizes worldwide; DLCs offer basic service focused on point-to-point domestic service between large, popular destinations with leisure travelers in mind. This limited nature of the service they offer allows DLCs some cost savings by operating limited fleets geared to this model—fleets that typically consist of a single type of large aircraft, and that stand in stark contrast to the diverse fleets operated by network carriers.

The Government alleges that network carriers coordinate their activity, rather than compete with each other, and that DLCs are the mainspring of competition in the industry. Although the Government's claims of coordination among network carriers have not been put to any proof, they are predicates of the Government's Competitive Impact Statement and now inform how the Division proposes to implement the Settlement.

On this point, the Government has been explicit, stating baldly: "We see legacy carriers—and our complaint issued in August makes this pretty clear—as part of the problem. We see low-cost carriers as a key part of the solution."[1] The Government has stressed repeatedly that DLCs will be extended preferential treatment and approved by the Government as Acquirers

[1] Statement of Assistant Attorney General William J. Baer, quoted in Terry Maxon, *American Airlines Gates at Dallas Love Field May Prompt Bidding Battle Among Carriers*, Dallas News, Nov. 15, 2013, http://www.dallasnews.com/business/airline-industry/20131114-american-airlines-gates-at-dallas-love-field-may-prompt-bidding-battle-among-carriers.ece; *see also Cartel Prosecution: Stopping Price Fixers and Protecting Consumers: Hearing Before the S. Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 113th Cong. 7 (2013) (statement of William Baer, Asst. Att'y Gen. Antitrust Div.) ("Right now, we have had developed over the years what our complaint refers to as a relatively cozy oligopoly between the four major legacy carriers, and what we are trying to do in terms of this settlement is enable the group of carriers who are low cost effective competitors to be able to offer more opportunity, more seats at more competitive fares than ever before."); Competitive Impact Statement at 6 (implying that network carriers "cooperate, rather than compete, on price and service"); Melissa Lipman, *DOJ Official Sees Slim Chance for Delta on Merger Slots*, Law360 (Nov. 14, 2013, 6:25 PM), http://www.law360.com/competition/articles/488680?article_sidebar=1 ("Deputy Assistant Attorney General Renata Hesse told reporters after speaking at the American Bar Association's Antitrust Fall Forum that while the DOJ wouldn't stop an interested carrier from vying for the slots, it was hard to see how a legacy airline would offer the kind of competition the watchdog expected low-cost carriers to provide using the divestitures.").

of the Divestiture Assets,[2] whereas network carriers should expect to be all but shut out of the divestiture process.

The Government's position is based on an outdated and incorrect view of: (i) the business models of network airlines and DLCs and (ii) the nature of competition in the airline industry. Specifically, the Government focuses on domestic city-pair competition between large cities, and largely ignores ongoing competition between networks serving international and domestic markets of all sizes. In addition, the Government concentrates almost entirely on price competition on leisure fares to the large, popular destinations that DLCs typically serve, to the exclusion of other forms of competition in other segments of the airline travel industry, in which DLCs do not participate. This stems from the Government's incorrect view of the DLC business model. The Government states that the proposed divestiture would allow DLCs to compete against network carriers, implicitly suggesting that competition would occur on the full breadth of services that network carriers provide. In reality, however, the DLC business model is aimed primarily at serving only one segment of the traveling public—leisure passengers traveling domestically on major routes. DLCs' fleets are configured to serve efficiently those passengers, but not others.[3] Thus, what the Government describes as a preference for *competition* is nothing

[2] The Divestiture Assets comprise scarce takeoff and landing "slots" and related facilities at Reagan National Airport in Washington, DC (DCA) and LaGuardia Airport in New York City (LGA), as well as gates and facilities at five other key airports around the country. *See* Settlement at 3.

[3] Of course, as a by-product of their business model, DLCs do compete for certain business travelers on the routes they serve—and as we observe in subsection I.B.2, network carriers compete for all types of passengers, including the most price-sensitive passengers that are the focus of the DLCs. The difference is that network carriers invest more heavily in developing superior products attractive primarily to business travelers, such as networks with greater scope, frequency, and reliability; an improved cabin experience that facilitates productivity; etc. Leisure travelers also benefit from these enhanced products.

more than a preference for one flavor of *competitor*—DLCs—whom the Government seeks to *shield from competition* against Delta and other network carriers.

The simple reality the Government overlooks in its assessment of the airline industry is that network carriers offer a different, broader, and more competitive range of products to the traveling public than do DLCs. To highlight the most obvious examples, network carriers are the only airlines in the United States offering scheduled service to domestic communities of all sizes—small, medium, and large—and connecting these communities to a vast number of national and international destinations.[4] Network carriers are able to offer this expansive service because they operate diverse fleets of aircraft. Delta, in particular, operates a fleet consisting of commercial jet aircraft of all available sizes, from 50-seat regional jets to the 376-seat Boeing 747-400. Network carriers are also the only airlines deliberately competing for business travelers by offering well-timed, high-frequency flights connecting a wide array of business destinations, and by competing for corporate travel contracts through which businesses can secure a suite of discounts tailored to their particular travel needs. Network carriers offer their passengers productivity-enhancing options, such as airport lounges, Wi-Fi-equipped aircraft, and premium cabins, that facilitate working while traveling, and network carriers—Delta in particular—provide these sophisticated services, to *all* their passengers, much more reliably and consistently than do most of the DLCs.

DLCs are not inherently more efficient or more competitive than network carriers. They cannot and do not provide commensurate service levels more economically than network

[4] As of June 2014, Delta will serve 226 domestic destinations. By contrast, Southwest—by far the largest DLC—will serve 86, and has recently announced that it will terminate service at three small cities (Branson, MO; Jackson, MS; and Key West, FL). Delta will serve 101 international destinations independently and an additional 267 destinations through alliance and codeshare partnerships. Southwest will serve seven.

carriers. Instead, their past cost advantage stems mainly from their decision: (i) to offer a simplified and mostly bare-bones service aimed at the most time-flexible and price-sensitive consumers flying the largest, most popular domestic routes and (ii) to operate a simple, narrowbody fleet that offers only a single class of service and that, by and large, is not certified for extended operations.[5]

By prescribing a remedy that forecloses network carriers from competing for Divestiture Assets on an equal footing, the Government will distort the market and deny the traveling public the competitive benefits that only network carriers can deliver. Most specifically, at two airports implicated by the Settlement—DCA and Love Field in Dallas, Texas (DAL)—the "remedies" being contemplated will have the incongruous effect of *reducing* competition and *diminishing* the choices available to passengers, all due to the Government's ill-founded but unbending preference for a DLC-only "solution".

The likely effects of DLC-only divestiture at DCA illustrate precisely how DLCs compete selectively and cater only to a subset of routes and passenger types. At DCA, the New American has agreed to divest 104 slots currently owned by US Airways and AA. As a result, the New American has announced plans to eliminate service from DCA to at least 17 destinations, including 12 small- and medium-sized communities.[6] Many of these

[5] A certification for extended operations, known as an ETOPS certification, allows airlines to operate twin engine aircraft (such as those operated by DLCs) on long-haul routes, including over water. An ETOPS certification consequently enables carriers to add destinations (including international destinations) and increase their reach. However, the ETOPS certification comes at a cost, as it requires adherence to special maintenance, training, and in-flight protocols for certified aircraft.

[6] *See* Press Release, American Airlines, American Airlines To Implement Network Changes as a Result of DOJ-Mandated Slot Divestitures (Jan. 15, 2014), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=117098&p=irol-newsArticle&ID=1891132&highlight=; *see also infra* text accompanying note 41. This plan will be carried out notwithstanding the New American's

communities—and, in particular, business travelers in these communities—were dependent on network service provided exclusively by US Airways (the largest carrier at DCA pre-merger), AA (the second-largest carrier at DCA pre-merger), or both, and will see a diminution or outright elimination of daily non-stop service. DLC entry at DCA will not restore service lost at these smaller communities. Simply put, DLCs cannot be expected to introduce new service to these smaller communities in competition with the New American, because their business model and single-size fleets cannot efficiently serve these communities from DCA.

Only the entry of a network carrier such as Delta—which operates a diversified fleet, serves a broad network of communities of all sizes across the nation, and has a track record of serving small- and medium-sized communities from DCA—can introduce competitive service to small- and medium-sized communities. Delta has developed a plan—which it has shared with the Government—contemplating the introduction of service to small- and medium-sized communities from DCA, scalable to the number of slots Delta can obtain. Under that plan, Delta would provide new service from DCA to one destination not served by any carrier, and would introduce competitive service to six communities that otherwise would be served exclusively by the New American. Yet, the Government apparently intends to deny Delta the opportunity even to negotiate for slots at DCA, instead preferring that these slots go to DLCs that will likely use them to add service on leisure routes already well-served from the Washington, DC metropolitan area. Leisure passengers seeking to travel to Florida and other vacation destinations already have ample air travel options; and yet residents of small- and medium-sized communities, who

agreement with the Department of Transportation, in which the New American has agreed to use all commuter slots it owns at DCA to serve non-hub, small, or medium airports for a period of five years.

have fewer options to begin with, stand to see air service to DCA dramatically reduced under a DLC-only solution at DCA.

Similarly, preferential treatment for DLCs at DAL would further entrench Southwest Airlines' monopoly status at DAL and essentially evict Delta from a public airport—a first in modern aviation history. A divestiture to Southwest would leave it with 18 of 20 gates at that airport—notwithstanding the existence of clear demand at DAL for the kind of premium network services that can be provided only by network carriers. Specifically, Delta currently subleases from AA gate space at DAL that constitutes part of the Divestiture Assets. Delta has developed a plan to introduce service to five new cities from DAL following the expiration of the statutory perimeter rule in October 2014. This new service would allow Delta to connect the conveniently located airport to key destinations, integrate DAL into Delta's expansive nationwide and international networks, and challenge the New American at its Dallas/Fort Worth International Airport (DFW) hub. None of this will happen if the Government's DLC-only approach prevails—an approach that seems particularly misplaced at DAL, an airport that has long been dominated by Southwest Airlines, the largest of the DLCs. There simply is no competitive rationale that could justify the Government's intention to make Delta yield its position at DAL to any DLC—let alone to Southwest, which already controls 80% of available gates.

The decision to exclude Delta from the divestiture process in order to favor Southwest and other DLCs is not a decision in favor of competition. Instead, it is a policy decision favoring the DLC business model over the network carrier business model, even though the DLC business model cannot and does not serve all types of markets or all kinds of travelers. Simply put, it is a decision that *shields DLCs from competition with Delta*. The Government's plan to use the divestiture to "tilt" the market in favor of DLCs is contrary to the public interest, is based upon misconceptions about the nature of competition in the airline industry, and is an inappropriate Government manipulation of the market that will lead to anticompetitive outcomes in affected cities. Delta submits these comments to correct the record and illustrate the harm the Government's approach will occasion.

I. THE GOVERNMENT HAS MISCHARACTERIZED THE STATE OF COMPETITION IN THE AIRLINE INDUSTRY.

A. Network Carriers Compete Vigorously on Price and Service.

The Government's case for blocking the transaction between AA and US Airways was predicated in significant part on three fallacies about competition in the airline industry:

- Competition in the airline industry takes place along an artificial divide between DLCs and network carriers.
- Network carriers prefer "tacit coordination"—*i.e.*, "to cooperate"—"over full-throated competition".[7]
- DLCs are the true mainspring of competition in the airline industry.

The same unproven claims are repeated in the Government's Competitive Impact Statement, which alleges that network carriers "cooperate, rather than compete, on price and service".[8] Assistant Attorney General William Baer's congressional testimony states without support that there is "a relatively cozy oligopoly between the four major legacy carriers".[9] This distorted picture forms the basis for the preferential access to Divestiture Assets the Government has insisted upon extending to DLCs. The misconception that network carriers coordinate rather

[7] *See* Am. Compl. ¶ 3.

[8] Competitive Impact Statement at 6.

[9] *Cartel Prosecution: Stopping Price Fixers and Protecting Consumers: Hearing Before the S. Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 113th Cong. 7 (2013) (statement of William Baer, Asst. Att'y Gen. Antitrust Div.).

than compete simply is not supported by the facts. Relevant price-related indicators belie claims of coordination: airfares are near historic lows and passenger numbers are near all-time highs. In short, *all* players in the airline industry—network carriers and DLCs alike—compete vigorously on price. The suggestion that network carriers do not compete on service is just as unfounded, as it simply ignores the substantial recent and ongoing investments network carriers such as Delta are making in improving in-flight products and passenger amenities as part of their efforts to gain traction in the fierce competition to win passengers and maintain their loyalty.

1. <u>Price Competition Between Network Carriers Is Vigorous.</u>

Claims of coordination fail to grapple with and cannot account for 30 years of hard data showing that, since deregulation, air travel has become dramatically *less* expensive for the traveling public (when adjusted for inflation). To cite a single data point, the average total fare in 2011 was $365.23, as compared with the inflation-adjusted average total fare of $611.76 in 1980.[10] To cite another, when adjusted for inflation, the average price per mile of air travel in 2011 ($0.16) was 50% lower than the 1980 price of $0.32 per mile.[11] Even after the introduction

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[10] Mark J. Perry, *Even with Baggage Fees, The "Miracle of Flight" Remains a Real Bargain; Average 2011 Airfare Was 40% Below 1980 Average*, American Enterprise Institute (Oct. 6, 2012, 4:09 PM), http://www.aei-ideas.org/2012/10/even-with-baggage-fees-the-miracle-of-flight-remains-a-real-bargain-average-2011-airfare-was-40-below-1980-level/.

[11] *Id.*

of ancillary fees, the cost of air travel remains at historical lows,[12] while the number of domestic passengers flying on domestic flights reached an all-time high in 2011[13] and again in 2012.[14]

As we describe more fully, network carriers offer unique products that DLCs cannot and do not seek to match. This richer array of product offerings enables network carriers to inject competition on a higher competitive plane: at the system-wide (or network) level, rather than on the route-by-route airport-pair level on which DLCs typically focus their efforts. A prime example of how this competition plays out is supplied by the efforts of network carriers to compete for corporate travel contracts. Competition for corporate travel contracts is ferocious and requires each carrier seeking a corporation's business to present a comprehensive offering that can meet all or most of that corporate customer's company-wide travel needs, both domestically and globally. In the first instance, this entails being able to offer a product geared to corporate customers' travel requirements, including establishing and maintaining hubs (or a substantial presence) in major business centers; operating networks that connect these major centers to the world through well-timed flights to larger and smaller destinations, both domestically and abroad (the latter often being achieved through alliance partnerships); offering specialized products, such as the premium cabins demanded by high value passengers, high frequency shuttle-type service on important routes, and 24-hour call centers ready to respond to

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[12] "Despite an increase in fares and fees that averaged $16.46 in 2011 and $26.29 in 2010 (from the all-time low fare in 2009 of $322.48), the average fare [in 2011] of $365.23 with fees was still slightly below the fare 10 years ago in 2001 of $373.44, and 23.5% below the average fare 20 years ago of $477.11 and 39% below the average fare 30 years ago of almost $600." *Id.*

[13] *Number of Air Passengers Increased in 2011*, NBC News (Mar. 22, 2012, 2:05 PM), http://www.nbcnews.com/travel/number-air-passengers-increased-2011-523879.

[14] Press Release, Res. and Innovative Tech. Admin., Bureau of Transp. Stat., Total Passengers on U.S. Airlines and Foreign Airlines U.S. Flights Increased 1.3% in 2012 from 2011 (Apr. 4, 2013), *available at* http://www.rita.dot.gov/bts/press_releases/bts016_13.

the needs of business travelers; and tailoring these products into suites of services that meet the travel needs of corporate customers *at a more attractive (and heavily discounted) price than other network competitors*. In short, all the facts dictate a conclusion that network carriers engage in cutthroat competition on both price and volume for corporate customers.

Network carriers also compete *at the network level* by reacting to changes in their rivals' networks. A recent example illustrates this point. As part of a broader expansion of its presence at Seattle-Tacoma International Airport (SEA), Delta recently increased daily flights to Los Angeles International Airport (LAX) and opened a new route to San Francisco International Airport (SFO), both of which are United hubs. Shortly thereafter, United announced that it would add nonstop flights between SFO and Hartsfield-Jackson Atlanta International Airport (ATL) and between LAX and Minneapolis-St. Paul International Airport (MSP);[15] ATL and MSP are two of Delta's largest and most important hubs. United's decision to increase competition with Delta at its hubs was taken largely in response to Delta's expansion from SEA into United's hubs. This illustration of competition at the network level is telling and undermines one of the Government's central contentions that network carriers "respect" each other's hub routes.

2. <u>The Financial History of the U.S. Airline Industry Disproves Coordination.</u>

Notwithstanding these indicators of a highly competitive industry, the Government cites system-wide price increases as the crux of its claim of "coordination", arguing that network carriers price in lockstep and refrain from cutting each other's prices on certain

[15] *See, e.g.*, Ben Mutzabaugh, *Retaliation? United Adds Flights to Delta Hubs*, USA Today, Oct. 7, 2013, http://www.usatoday.com/story/todayinthesky/2013/10/07/retaliation-united-adds-flights-to-delta-hubs/2935925/.

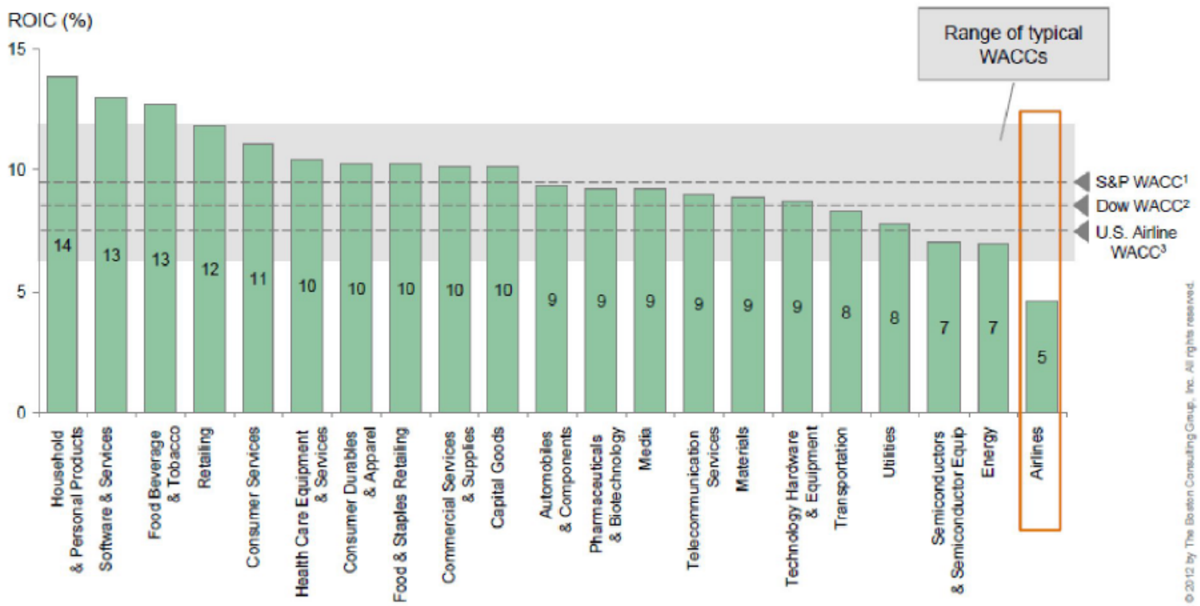
routes in order to gain share.[16] However, the converse is also true: individual carriers are typically unable to sustain a price increase without other carriers deciding to follow suit after assessing whether consumers are likely to accept the increase. Both these phenomena are perfectly consistent with a competitive market. The fact is that, in industries where prices are transparent and many input costs are common, price movements may appear concurrently. Further, unless these price changes result in the ability of network airlines to *extract rents*—supracompetitive profits—they do not suggest anticompetitive coordination. Instead, these movements suggest competitive pricing. The industry's financial history makes unmistakably clear that no segment of the industry generates rents. This fact undermines any claim of network carrier "coordination".

During the 2003-2012 period, airlines had the *lowest* rate of return on investment of any major American industry. Overall, the industry-wide return on investment capital ("ROIC") was approximately 2%-6% *below* the weighted average cost of capital ("WACC") for the period.[17] Domestic airlines' profitability has lagged far behind the profitability of other similar industries, the competitiveness of which the Government does not seem to doubt. In the chart on the following page, a comparison of ROICs across industries illustrates how airlines have performed in the last decade.

[16] *See, e.g.*, Am. Compl. ¶ 42.

[17] *See* Mike Linenberg et al., Markets Research, Deutsche Bank, *Global Airline Sector – Making Value Creation a Priority* 5 fig. 1A (June 2013).

Comparison of ROICs Across U.S. Industries



1. Avg of 9.4 from 2003-2012 (proxy derived by using 1 for beta, BBB+ yields for the cost of debt, 10 year treasuries for the RFR and the BB market risk premiums). 2. 8.5 average of 2003-2012 median WACCs of DJIA companies. 3. 7.6 average of 2003-2012 median WACCs of U.S. S&P Supercomposite Airlines Industry Index
Note: ROIC defined as EBIT * (1- tax rate) / net assets
Source: Standard and Poors – Compustat. BCG analysis. ValueScience Center

Importantly, both the average pre-tax margin and the average operating margin of domestic airlines from 2010-2012 trailed the margins of railroads, trucking companies, shipping companies (*e.g.*, UPS and FedEx), domestic aerospace companies, domestic defense companies, global aerospace and defense companies, and general industrials.[18] Similarly, the domestic airline industry's pre-tax margins and operating margins trailed the aerospace and defense, parcel, rail, and diversified industrials sectors' performance every year from 2004-2011.[19] This picture could not be further from the "cozy oligopoly" imagined by the Government.[20] As for the Government's assertion that network carriers avoid undercutting each other's prices to gain

[18] This information is derived from an internal report on industry margins prepared for Delta by the Investment Banking Division of Goldman, Sachs & Co.

[19] This information is derived from an internal report on industry margins prepared by Barclays Investment Bank for Delta.

[20] *See supra* note 1 and accompanying text.

volume, these data make it abundantly clear that network carriers simply cannot engage in such undercutting without selling tickets at prices that do not cover the airlines' long-term costs.

Simply put, the network carriers' financial history refutes the Government's view that network carriers coordinate, price at artificially high levels, and pocket the proceeds. The airline industry is literally the last place consumers are suffering from anticompetitive, rent-producing activities.

3. Network Carriers Face Many Similar Costs.

The Government's reliance on industry-wide price movements as an indication of "coordination" is further belied by the fact that many of these movements simply reflect increases in industry-wide costs. Whereas capital costs of network airlines—notably the cost of acquiring aircraft—may vary, airlines' other costs are similar (in particular, because network airlines have adjusted their cost structures through bankruptcy). An airline's most significant item on the cost side of the ledger is fuel—often representing more than one-third of overall costs—which (absent hedging) is a commodity priced more or less identically for all carriers. Other significant costs borne by network airlines are likewise similar across the board.

A prime example of ever-increasing, industry-wide costs is taxes and fees. Importantly, such taxes and fees are levied *with the expectation that they will be passed on to consumers*—and they are, inevitably causing industry-wide price increases. Government-imposed taxes and fees add to the price of air travel, amounting to the equivalent of a national sales tax on air travel of more than 20%. This tax rate is very significant for consumers: it exceeds not only the tax burden of many of the domestic airline industry's international competitors, but also surpasses the sales taxes on products such as alcohol and tobacco in the United States. The chart below lists the myriad taxes and fees imposed by the Government.

Federally Approved Aviation Tax/Fee	Destination	1/1/2014[2]
Passenger Ticket (Excise) Tax	Airport & Airway Trust Fund (AATF)	7.5%
Passenger Flight-Segment Tax		$4.00
Frequent-Flyer Tax (on sale of right to award miles)		7.5%
International Departure Tax[1] (IDT)		$17.50
International Arrival Tax[1] (IAT)		$17.50
Cargo Waybill Tax		6.25%
Commercial Aviation Jet Fuel Tax		4.3 cpg
Noncommercial Jet Fuel Tax (not applicable to airline ops)		21.8 cpg
Noncommercial AvGas Tax (not applicable to airline ops)		19.3 cpg
Liquid Fuel Used in a Fractional-Ownership Flight[3]		14.1 cpg
Leaking Underground Storage Tank (LUST) Tax	EPA	0.1 cpg
Passenger Facility Charge (PFC) (maximum)	Airports	$4.50/$18
September 11th Fee	DHS	$2.50/$10
Aviation Security Infrastructure Fee (ASIF)		$448M
APHIS Passenger Fee		$5
APHIS Aircraft Fee		$70.75
Customs and Border Protection User Fee		$5.50
Immigration and Customs Enforcement User Fee		$7

1. Also applies at a reduced rate ($8.60 in 2013 and $8.70 in 2014) to departures of interstate flights that begin or end in Alaska or Hawaii, per IRS.
2. See http://www.irs.gov/irb/2012-45_IRB/ar12.html#d0e827.
3.IRS Code §4043 added by § 1103 of the FAA Modernization and Reform Act of 2012 (P.L. 112-95) and applies to fuel used after March 31, 2012.

In aggregate, these taxes and fees add approximately $19 billion annually to the price paid by consumers for air travel,[21] a dramatic increase from a tax and fee burden of

[21] The impact of these taxes on prices paid by individual consumers is dramatic, as illustrated on the following page. For a hypothetical round-trip between Peoria and Raleigh connecting in Chicago, for which a passenger pays $300, only the base fare of $238.14 is earned by the airline. $61.86 in taxes and fees above the base fare—amounting to Government-imposed costs of 26% as itemized on the following page—are passed on to the passenger and collected by the airline at the point of sale.

$3.7 billion in 1993.[22] Further, this tax is set to rise: Congress is poised to increase the cost of air travel by approximately *$2.6 billion annually*.[23]

The point is that U.S. carriers respond to such added costs in an identical manner, just as they do with respect to other increases in common costs: they attempt to pass them on to consumers through increases in the price of air travel.[24] At times, such attempts fail, and a

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Base Airline Fare	**$238.14**
: Federal Ticket (Excise) Tax (7.5%)	17.86
: Passenger Facility Charge (PIA)	4.50
: Federal Flight Segment Tax (PIA-ORD)	4.00
: Federal Security Surcharge (PIA-ORD)	2.50
: Passenger Facility Charge (ORD)	4.50
: Federal Flight Segment Tax (ORD-RDU)	4.00
: Federal Security Surcharge (ORD-RDU)	2.50
: Passenger Facility Charge (RDU)	4.50
: Federal Flight Segment Tax (RDU-ORD)	4.00
: Federal Security Surcharge (RDU-ORD)	2.50
: Passenger Facility Charge (ORD)	4.50
: Federal Flight Segment Tax (ORD-PIA)	4.00
: Federal Security Surcharge (ORD-PIA)	2.50
Total Taxes	**61.86**
Total Ticket (Fare + Taxes)	$300.00
Taxes as % of Fare	26.0%
Taxes as % of Ticket	**20.6%**

[22] *See* Letter from Aeronautical Repair Station Ass'n, Airlines for Am., Air Line Pilots Ass'n, Consumer Travel Alliance, Global Bus. Travel Ass'n, Int'l Air Transp. Ass'n, Reg'l Airline Ass'n & Sw. Airline Pilots' Ass'n, to Sen. Patty Murray and Rep. Paul Ryan (Nov. 20, 2013), *available at* http://www.airlines.org/Documents/CoalitionLettertoMurrayRyan.pdf.

[23] Under the recent budget agreement reached by Congress, the Aviation Passenger Security Fee (commonly referred to as the "September 11th Fee") would increase from $2.50 per segment to $5.60 per one-way trip to offset the cost of eliminating across-the-board spending cuts. According to the Committee on the Budget in the U.S. House of Representatives, "TSA security costs are partially financed through fees . . . [, and p]assengers pay a portion of these fees as part of their airline ticket price". H. Comm. on the Budget, *Summary of the Bipartisan Budget Act of 2013* at 3 (Dec. 10, 2013), *available at* http://budget.house.gov/uploadedfiles/bba2013summary.pdf. The net increase in airline taxes and fees is projected to be somewhat lower—approximately $2.1 billion—because of the elimination of the Aviation Security Infrastructure Fee (ASIF).

[24] The tax burden on U.S. carriers weakens the competitiveness of U.S. airlines against certain international competitors who are not saddled with similar costs. For example, competitors from the Middle East and China enjoy dramatically lower tax burdens than domestic carriers.

carrier has to roll back an attempted price increase due to competitive pressure. At other times, they succeed, resulting in higher industry-wide fares. In either case, these attempted price increases stem *not* from any oligopolistic behavior (or any misconduct), but rather from a perfectly rational, legitimate, and anticipated response by carriers to common cost increases.

4. Network Airlines Are Locked in a Fierce Battle To Improve Product Quality.

Despite their financial history, network carriers have invested significant sums in recent years in improving the products offered to passengers. This reflects the simple reality that network carriers are very cognizant that offering a superior product is an essential ingredient to competing effectively, attracting passengers, and maintaining their loyalty. Delta has been at the forefront of this process and has acted aggressively, investing *$3 billion* since 2010 to rejuvenate and improve its fleet, innovate with new products, and enhance passengers' in-flight experience with new amenities.[25] Delta lures passengers through ongoing improvements and top-notch customer service, which include:

- running an industry-leading network airline that is unmatched in terms of reliability, with an impressive 99.9% completion factor, 90.3% on-time performance, and significant improvement in baggage handling (with only 1.68 reports per 1,000 passengers in September 2013);[26]
- installing improved in-flight entertainment offerings (including on-demand video on many aircraft) and adding power outlets at seats;
- offering in-flight Wi-Fi Internet service on all mainline and regional jet aircraft equipped with coach and premium cabins;

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[25] *See, e.g.*, Press Release, Delta, Delta To Improve Passenger Comfort on 225 Domestic Narrowbody Aircraft (Jan. 8, 2014), *available at* http://news.delta.com/index.php?s=43&item=2232 (summarizing some of Delta's recent product improvements and investments in its domestic narrowbody fleet).

[26] *See* U.S. Dep't of Transp., *Air Travel Consumer Report* (November 2013), *available at* http://www.dot.gov/sites/dot.gov/files/docs/2013NovemberATCR.pdf

- introducing a new Economy Comfort product across its international and domestic fleets;
- acquiring and deploying two-class aircraft with premium cabins on a growing number of routes; and
- enhancing the quality of its international and transcontinental offerings by adding lie-flat and sleeper seats in Business Elite class.[27]

Delta is not alone—its network competitors have made similar investments. For example, AA has recently introduced a "Main Cabin Extra" enhanced economy class product, plans to offer an updated three-class cabin configuration for transcontinental travel, and reportedly will deploy fully lie-flat seats in business and first class on every flight between New York and London.[28]

Competition on service between the network airlines extends beyond onboard service and encompasses also longer-term infrastructure projects that will offer an improved airport experience. For example, in recent years, Delta has undertaken significant investment in key airports throughout the country, including a $1.4 billion project to expand and enhance Terminal 4 at John F. Kennedy International Airport in New York (JFK),[29] a $195 million project to overhaul Terminal 5 at LAX,[30] a $170 million project to establish a new domestic hub

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[27] *See, e.g.*, *In-Flight Services*, Delta, http://www.delta.com/content/www/en_US/traveling-with-us/in-flight-services.html (last visited Jan. 8, 2014); *Products & Services*, Delta, http://www.delta.com/content/www/en_US/traveling-with-us/in-flight-services/products.html (last visited Jan. 8, 2014).

[28] *Feel More Rested on Arrival*, American Airlines, http://www.aa.com/i18n/urls/fullylieflat.jsp (last visited Jan. 8, 2014).

[29] Projects at JFK include Terminal 4 international concourse expansion, increased aircraft parking capacity, Terminal 4 small jet concourse expansion, a new Terminal 4 bus facility, and other construction and transaction-related endeavors.

[30] Projects at LAX include terminal renovations, facility structural improvements, concourse renovations, and passenger boarding bridge replacements.

at LGA,[31] a $20 million project at SEA,[32] and $75 million in various other improvements to Delta facilities at airports throughout its network. Delta has also partnered with local governments in connection with a $1.8 billion project at Salt Lake City International Airport (SLC)[33] and a $1.4 billion project at ATL.[34]

All of these investments are driven by competition with the offerings of other airlines, including—most relevant here—the other domestic network carriers. Simply put, Delta is determined to be the industry leader by offering the best products in the industry bar none, and can safely assume that both United Airlines and the New American have a similar goal. That is what competition on service is all about, and its existence cannot seriously be denied against the backdrop of these massive investments.

B. The Proposed Divestiture Represents an Imprudent Policy Decision Favoring DLCs' Business Model.

1. DLCs Offer a Limited Product That Does Not Cater to the Preferences of Many Passengers.

The Government's DLC-only approach to the divestiture process purports to be an action taken to foster competition at large. However, any policy that excludes network carriers (including Delta) from competitively bidding for divestiture assets in favor of DLCs is

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[31] Projects at LGA include improved passenger and baggage security screening, facility structural improvements, passenger boarding bridge replacements, bag system improvements, Terminal C/D connector, passenger flow improvements, and Sky Club expansion.

[32] Projects at SEA include lobby reconfiguration/enhancement and Sky Club expansion/upgrade.

[33] Projects at SLC include full terminal redevelopment and upgrade and concourse modernization.

[34] Projects at ATL include a 1.2 million square-foot terminal and concourse facility, 12 new gates, 13 security checkpoint lanes, a new Customs and Border Protection facility, and two new parking structures with over 3,500 parking spaces.

an unequivocal decision *in favor of the DLC business model*. This kind of meddling in the market is inappropriate for an antitrust regulator and unwise from the point of view of fostering competition.

The DLC business model does not and cannot cater to all types of markets or to all kinds of travelers. This reality, which we discuss in greater detail, stems from the undiversified nature of DLC fleets, the relative simplicity of DLC networks, the absence of meaningful international service by DLCs, and the very limited selection of premium-class flight offerings and other amenities. The true picture of competition in the airline industry is that *both* network carriers and DLCs compete vigorously, *while emphasizing different aspects of price and service*. Given the limitations of their business model, DLCs simply *cannot and do not* cater to travelers beyond the most price-sensitive consumers seeking travel between popular, often densely populated markets. Thus, divestitures to DLCs will add little competition for time-sensitive passengers, for business passengers, or for passengers traveling from small- to medium-sized communities.

There is simply no antitrust principle that makes competition on leisure travel to vacation destinations inherently more consumer welfare-enhancing than, for example, competition for business travel in the country's many business markets. A preference for the former is particularly perverse here, where the Government seeks to cure the effects of a merger between two *network* carriers—and divestitures are ordered at facilities-constrained airports that offer unique advantages to time-sensitive travelers, such as DCA and DAL. The free market, not the Government, should determine how best to utilize the scarce resources at these airports, through a bid open to all airlines but the merging parties.

2. DLCs Are No Longer the Competitive Panacea the Government Believes.

The Government argues that its DLC-only approach to divestiture would "enable [a] group of carriers who are *low cost* effective competitors to be able to offer more opportunity, *more seats at more competitive fares* than ever before".[35] The Government seems to believe that DLCs enjoy an inherent and significant cost advantage over network airlines, and consequently offer dramatically lower fares. Even if these assumptions were true, the Government still could not explain why DLCs could not compete for the Divestiture Assets in a bid open to all airlines (except the merging parties)—in other words, why the Government, in the name of competition, needs to *shield* these purportedly fierce competitors from competition against Delta. Nonetheless, the Government's assumptions about DLCs are incorrect.

To the extent network carriers operate at a higher cost than DLCs, that is the result of the higher quality, more diversified products network carriers offer, including:

- flying diversified fleets of small, medium, and large aircraft (many of which have ETOPS certification), to ensure maximum network scope and connectivity to communities of all sizes;[36]
- operating long-haul international routes;
- operating large hub connecting complexes, which require capital and operating expenditures the DLC model avoids, but which enable network carriers to provide service to many points and frequency levels in many markets which the DLC model cannot provide; and

[35] *Cartel Prosecution: Stopping Price Fixers and Protecting Consumers: Hearing Before the S. Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 113th Cong. 7 (2013) (statement of William Baer, Asst. Att'y Gen. Antitrust Div.) (emphasis added).

[36] As noted, Delta operates a diverse fleet with aircraft capacity ranging from 50 to 376 seats. *See Aircraft*, Delta, http://www.delta.com/content/www/en_US/traveling-with-us/airports-and-aircraft/Aircraft.html (last visited Jan. 8, 2014).

- offering amenities attractive to passengers such as premium cabins, premium economy seating, in-flight entertainment, in-flight catering, in-flight connectivity, and airport lounges.

To offer these premium products, Delta has invested and continually invests in sophisticated baggage systems, parts inventories, spare aircraft, and maintenance personnel that allow it to meet the expectations of time-sensitive travelers—to the benefit of all Delta passengers. Specifically, despite operating a hub-and-spoke system that presents far greater operational complexities than the point-to-point service favored by DLCs, Delta's operating metrics (completion factor, on-time performance, and baggage claims) compare favorably with those of DLCs, reflecting a higher level of investment.[37] Indeed, Delta's performance on each of these metrics is significantly better than Southwest's, as shown by the table below, derived from DOT's Air Travel Consumer Report issued in November 2013.

		September 2013	
	Percent of Arrivals On Time	Flight Operations Cancelled/Operated	Mishandled Baggage Reports Per 1,000 Passengers
DELTA	90.3	49/62,191	1.68
SOUTHWEST	76.3	578/89,994	3.30

[37] Delta's operating performance advantage over most DLCs is quite clear. For instance, in the U.S. Department of Transportation's November report of on-time statistics, Delta had an on-time percentage of 90.3%, whereas Southwest came in dead last with only 76.3%. Other major DLCs, such as Frontier (76.9%) and JetBlue (83.1%), also lagged far behind Delta and behind the overall industry average (83.8%). *See* Associated Press, *Delta No. 2 in On-Time Rankings; Hawaiian No. 1*, The Salt Lake Tribune, Nov. 13, 2013, http://www.sltrib.com/sltrib/money/57124587-79/percent-airlines-airways-delta.html.csp. Delta also performed better than Southwest every month between August 2012 and July 2013 in terms of baggage claims, had fewer involuntarily denied boardings than Southwest each quarter from the third quarter of 2012 through the second quarter of 2013, performed better than Southwest in terms of on-time performance each month from October 2012 through June 2013, and had a better completion factor—which measures whether scheduled flights were completed—than Southwest every month from November 2012 through July 2013.

Delta's investments have translated into superior service beyond these critical performance metrics. In the competitive market for corporate contracts, for instance, corporate travel buyers in the Business Travel News Annual Airline Survey resoundingly ranked Delta above its competitors, including Southwest, rating Delta as the top carrier in numerous quality of service ratings for the third year in a row:

Corporate Travel Buyers Rate U.S. Airlines
Ratings On A Scale Of 1 (Poor) To 5 (Excellent)

	Flexibility in negotiating transient pricing	Flexibility in negotiating meetings pricing	Flexibility in negotiating services and amenities	Distribution channels	Complaint/ problem resolution	Quality of client com-munications	Value of relationships with account managers and sales reps	Quality of customer service	Networks, partner-ships and frequencies	Overall price value	OVERALL AVERAGE
Delta Air Lines	**3.81**	**3.62**	**3.75**	**4.03**	**4.00**	**4.07**	**4.13**	**4.04**	**4.13**	3.68	**3.93**
American Airlines	3.16	3.31	3.27	3.73	3.40	3.46	3.27	3.28	3.71	3.29	**3.39**
United Airlines	3.00	3.16	3.01	3.76	3.16	3.51	3.21	3.26	3.86	3.13	**3.31**
Southwest Airlines	3.12	2.95	2.70	3.05	3.50	3.39	3.09	3.71	3.25	**3.72**	**3.25**
US Airways	3.06	3.12	2.80	3.55	3.24	3.25	3.17	3.12	3.39	3.18	**3.19**
Average attribute	**3.23**	**3.23**	**3.11**	**3.62**	**3.46**	**3.54**	**3.37**	**3.48**	**3.67**	**3.40**	

The high quality product that only network carriers offer, while costlier to supply, responds to important demand (from segments of the traveling public) that DLCs simply cannot meet. Despite higher costs associated with their more expansive networks and fleets, network carriers are remarkably price-competitive with DLCs such as Southwest *even for leisure travelers*, the most price-sensitive customers specifically targeted by DLCs.

II. A REMEDY RESTRICTED TO DLCS WILL NOT ADDRESS THE COMPETITIVE EFFECTS OF DIVESTITURE AT DCA OR DAL.

A. DLC-Only Divestiture Is Harmful to Competition at DCA.

The limited scope of DLCs' competitive offering is clearly demonstrated by the likely effects of the Government's "DLC-only" divestiture plan at DCA. Prior to the merger, US Airways and AA were the two largest carriers at DCA, owning 55.6% and 13.5% of slots, respectively. US Airways used its leading slot portfolio to operate a hub at DCA serving 67 destinations, including 29 destinations classified by the Department of Transportation as small communities and 16 destinations classified as medium. AA operated its more modest slot holdings to fly to seven destinations, including three medium communities.

The New American has agreed to divest 104 DCA slots as a condition of the Settlement. Testifying in March 2013 about the effect of divestiture to a Senate Subcommittee examining the transaction, the Chairman and CEO of US Airways, Doug Parker—who will head the New American—stated frankly that "by definition" any divestiture would affect "smaller communities", because flights to these communities are "the least lucrative to the airline".[38] That insight was not lost on the Department of Transportation, which entered into a side agreement with the New American requiring the carrier to continue to operate flights utilizing a subset of its DCA slots (designated "Commuter Slots")[39] to small- and medium-sized communities for a period of five years.[40] Even at that, given the substantial slot holdings to be yielded by the New American and its recent announcement of planned service cuts at DCA, the divestiture will result in lost service to many small- and medium-sized communities. Specifically, the New American will end daily nonstop service to 17 destinations from DCA,

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[38] *Hearing Before S. Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 113th Cong. 13 (2013) (testimony of Douglas Parker, Chairman and CEO, US Airways Group, Inc.); *see also* Justin Bachman, *Reagan National Airport Is Ground Zero in the American-US Airways Merger Review*, Bloomberg Businessweek (July 2, 2013), http://www.businessweek.com/articles/2013-07-02/reagan-national-airport-is-ground-zero-in-the-american-us-airways-merger-review.

[39] DCA Commuter Slots are slots that must be operated by an aircraft with 76 seats or less.

[40] U.S. Dep't of Transp., *Agreement Regarding Merger Between US Airways Group, Inc. and AMR Corporation* (2013), *available at* http://www.dot.gov/sites/dot.dev/files/docs/FinalAgreement_DOT_US_AA_.pdf.

including 12 small- and medium-sized communities.[41] Conceivably, divestiture of slots at DCA could change that bleak competitive reality by enabling a new *network carrier* entrant to compete head-to-head with the New American for service to these communities. A divestiture to DLCs only, however, is certain to fail at achieving that goal because limits inherent in the DLC business model prevent DLCs from competing with the New American to serve passengers in these communities.

First, the DLC business model is not oriented towards serving small- and medium-sized communities from DCA. Instead, DLCs tend to offer point-to-point service transporting passengers in significant numbers between large and popular destinations. DLCs have built their fleets around this business model, and they tend to operate a significantly less diversified range of aircraft than their network competitors, consisting primarily of larger narrowbody planes. True to this form, Southwest is in the process of exiting the smallest aircraft in its fleet—the 117-seat Boeing 717 that it acquired through its merger with AirTran. Spirit Airlines' smallest aircraft—the Airbus A319—has 145 seats, while the smallest aircraft in JetBlue's fleet is the Embraer 190 with 100 passengers. These aircraft are simply too large to provide viable service on more thinly traveled DCA routes that will be affected by divestiture. In short, DLCs have committed to a business model dependent on the cost advantage supplied by operating (and maintaining) a simplified fleet of large aircraft and have given no indication that

[41] Augusta Regional Airport (AGS), Fayetteville Regional Airport (FAY), Ft. Walton Beach/Northwest Florida Regional Airport (VPS), Jacksonville/Albert J. Ellis Airport (OAJ), Little Rock/Clinton National Airport (LIT), Long Island MacArthur Airport (ISP), Myrtle Beach International Airport (MYR), Omaha/Eppley Airfield (OMA), Pensacola International Airport (PNS), Savannah/Hilton Head International Airport (SAV), Tallahassee Regional Airport (TLH), and Wilmington International Airport (ILM). *See* Press Release, American Airlines, American Airlines To Implement Network Changes as a Result of DOJ-Mandated Slot Divestitures (Jan. 15, 2014), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=117098&p=irol-newsArticle&ID=1891132&highlight=.

they would abandon this entrenched position in order to provide service to smaller communities from DCA.

Second, DLCs consequently have virtually no track record of serving smaller communities from slot-constrained airports. At DCA, JetBlue acquired eight slot pairs that were divested in 2011 in connection with the Delta-US Airways slot swap. JetBlue uses its DCA slots to fly to Boston and large, popular vacation destinations in Florida—routes on which it competes most directly not with US Airways or AA, but with Southwest, which serves these leisure destinations from its hub at Baltimore/Washington Thurgood Marshall International Airport (BWI).[42] Southwest also serves only five medium-sized communities (and no small ones) from DCA.[43] The situation at LGA is no different. JetBlue serves exclusively destinations in Florida from LGA.[44] Southwest serves only one small community from its slots at LGA—Akron, Ohio (CAK)—which was originally served by AirTran as an alternative to flights into Cleveland, Ohio (CLE),[45] and Southwest recently announced that it will use its newly acquired divestiture slots at LGA to increase service to its existing destinations without adding service to *any* communities of *any* size.[46] Similarly, Southwest uses divestiture slots it acquired at Newark Liberty

[42] Fort Lauderdale (FLL), Orlando (MCO), and Tampa (TPA).

[43] Austin (AUS), Houston (HOU), Milwaukee (MKE), Southwest Florida-Fort Myers (RSW), and St. Louis (STL). Southwest also flies from DCA to ATL.

[44] FLL, MCO, Palm Beach (PBI), RSW, Sarasota-Bradenton (SRQ), and TPA.

[45] Southwest flies directly from LGA to the following medium and large airports: ATL, Nashville (BNA), Chicago (MDW), HOU, MKE, and STL.

[46] Press Release, Southwest Airlines Co., Southwest Airlines Takes Bigger Bite of the Big Apple with New LaGuardia Flights, Adds New San Diego Nonstops, and Extends Schedule (Dec. 16, 2013), *available at* http://swamedia.com/releases/southwest-airlines-takes-bigger-bite-of-the-big-apple-with-new-laguardia-flights-adds-new-san-diego-nonstops-and-extends-schedule.

International (EWR) to fly to destinations such as Phoenix (PHX), Denver (DEN), and Chicago (MDW)—major markets that already were well-served from the New York metropolitan area before Southwest obtained the EWR slots.

Third, DLCs are actually *reducing* service to small- and medium-sized communities. After merging with AirTran, Southwest terminated service to 12 small-sized communities from ATL, reducing Southwest's overall seat capacity to small communities by 47%.[47] JetBlue is also de-emphasizing small cities in its network, having cut available seats on flights to eight small cities—mostly in the Northeast and upstate New York—by more than 10% since 2010. Importantly, these service reductions by Southwest and JetBlue are principally on routes to small cities served from major hub airports where the carriers have a substantial presence. Given this track record of reducing service to small cities even from points where they carry the most traffic, there is little reason to believe that either Southwest or JetBlue will serve small destinations from DCA, as it will remain a secondary airport in both the carriers' networks, even with a substantial number of divested slots.

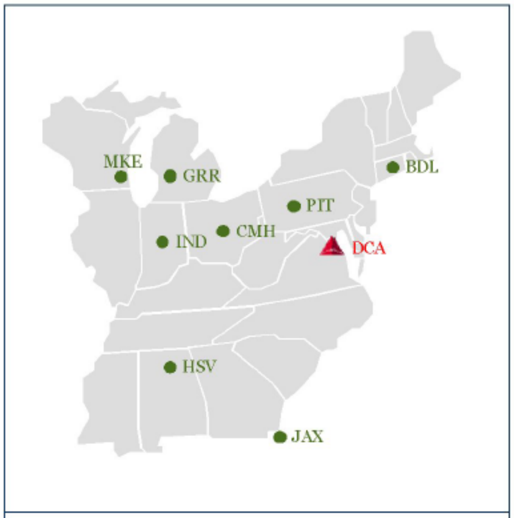
Delta, by contrast, is the only airline in a position to challenge the New American on routes that DLCs will not enter. As a network carrier with a business model geared towards serving destinations of all sizes across the nation, Delta operates a diverse fleet of domestic aircraft, including over 255 65- to 76-seat medium and large two-class regional jets that are ideally suited to serve small- and medium-sized communities. Delta also has a history of serving small- and medium-sized communities from DCA, as well as from other slot-constrained airports. Before the 2011 slot swap, Delta served 14 small- and medium-sized communities from

[47] Atlantic City (ACY), Branson (BKG), Bloomington-Normal (BMI), Flint (FNT), Westchester (HPN), Wichita (ICT), Newport News-Williamsburg (PHF), PNS, Portland (PWM), Rochester (ROC), SRQ, and Tunica (UTM).

DCA, many in direct competition with US Airways. More than 50% of destinations served from Delta's LGA hub are likewise small- and medium-sized communities. Delta has developed and shared with the Government a scalable plan under which it would introduce service to the following destinations from DCA (assuming 22 slot pairs):

Airport	Change in Competition (Other Carriers Serving City Pair)	Frequency Change
IND*	1:2 (US Airways)	0:4
CMH*	1:2 (US Airways)	0:3
MKE	1:2 (AirTran/Southwest)	0:3
GRR*	0:1 (none)	0:2
JAX*	1:2 (US Airways)	0:3
BDL*	1:2 (US Airways)	0:3
HSV	1:2 (US Airways)	0:2
PIT	1:2 (US Airways)	0:2

*Served by Delta prior to the slot swap



Delta Proposed DCA Network

As the chart above shows, Delta's plan is to introduce new service in one city (Grand Rapids, MI (GRR)) and add a competitor to the New American on six routes to small- and medium-sized communities. This new service to small- and medium-sized communities will supplement Delta's existing presence and scale at DCA, where Delta already offers service to its hubs.

The existing DLC use of DCA gates offers some indication of how DLCs would use 22 slots. While it is impossible to state with certainty how the various DLCs would use additional DCA slots, Delta's internal projections suggest that Southwest would expand to medium and large strength cities in its network located in the Midwest, Texas, and Florida. Southwest's recent announcement that it would use its newly acquired LGA divestiture slots to increase service to existing destinations, rather than add service to any new destinations,[48] validates these projections. Similarly, JetBlue would likely concentrate new service almost exclusively on routes to vacation destinations in Florida, in direct competition not with the New American but with Southwest's hub at BWI. Southwest might respond to such a strategy by moving some of its BWI routes to DCA. In any case, neither carrier would build the sort of network Delta proposes, which would challenge the New American on routes to small- and medium-sized communities on which the New American would otherwise be the DCA monopolist.

In any DCA remedy, the Government should consider whether divestiture slots at DCA will be used: (i) to supplement capacity on well-served routes to popular destinations to which Southwest already flies from BWI or (ii) to introduce genuine *new* competition on routes that no DLC will serve and where the New American will be a monopolist and price accordingly. The Government appears single-minded in its drive to ensure the former outcome, to the exclusion of the latter. There simply is no reason under the antitrust laws that could justify that result. Nor is there any basis for antitrust regulators to set transportation policy at DCA, as opposed to letting the market determine, via an auction, which of these goals would best utilize scarce slots at DCA.

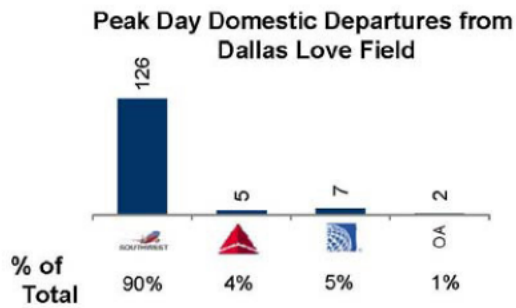
B. <u>No Reasonable Justification Exists To Favor DLC Access to Divestiture Assets at Dallas Love Field.</u>

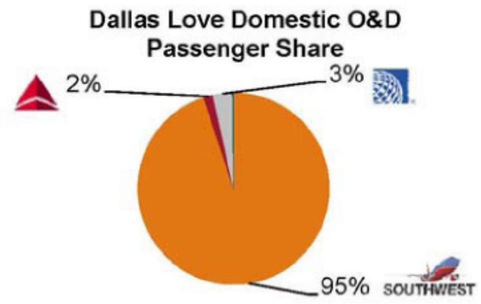
The Government's position regarding the proposed divestiture at DAL is just as untenable. Dallas Love Field is on the cusp of a transformative change to its competitive landscape. The perimeter rules in the Wright Amendment currently crimp the airport's potential,

[48] *See supra* note 46 and accompanying text.

as service is restricted from this conveniently located airport largely to points in Texas and in contiguous states.[49] The Wright Amendment will lapse in October 2014, opening the airport to nationwide service. DAL is thus poised to become a highly attractive option for business travelers from across the nation who will be drawn by its proximity to the Dallas city center.

Among the airports designated for divestitures under the Settlement, DAL is unusual in one important aspect: it is a longstanding DLC hub where Southwest controls 80% of available gates, and operates over 90% of total departures, as reflected in the charts below:





Delta has only a small presence at DAL, maintained by sub-leasing from AA gate space that the New American must now divest.[50] Notwithstanding the towering presence of the nation's

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[49] Until the Wright Amendment's restrictions are fully eliminated in October 2014, only domestic nonstop flights are permitted from DAL, and destinations are limited to airports in Alabama, Arkansas, Kansas, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, and Texas. Flights on aircraft with a passenger capacity of 56 or less are not affected by the Wright Amendment's restrictions. In 2006, after the repeal was signed into law, Southwest and AA began to offer one-stop connecting service to destinations outside the permitted zone of destinations.

[50] Contrary to the assertions of the Government, the proposed gate divestitures at airports such as Boston Logan International Airport (BOS), Chicago O'Hare International Airport (ORD), LAX, and Miami International Airport (MIA) are not expected to change the competitive landscape at any of those airports. Those airports are not gate-constrained, and the availability of gates is not a barrier to entry at any of these airports. For example, at MIA, where US Airways has agreed to divest two gates, there are numerous gates already available for new entrants. In light of this ample gate availability, DLCs' reluctance to enter into MIA has nothing to do with a lack of facilities, and is instead the result of the higher costs associated with operating at that airport as compared to nearby FLL. At ORD and LAX (as well as DCA), gates have already

largest DLC at DAL, the Government has insisted that AA's gates may be acquired only by a DLC. In so doing, the Government would force Delta out of DAL, thereby *eliminating* an existing competitor with a unique product offering in order to allow even more basic, point-to-point service by DLCs.

Eviction of Delta by the Federal Government, from a public airport, financed by federal tax dollars, would be a first in the era of modern aviation. It is impossible to conceive of *any* reasonable basis for mandating that eviction and divesting the gates now used by Delta to Southwest, giving it *90%* of the gates at DAL. To be clear, even Southwest's current holdings at DAL *already* far exceed the holdings of *any* airline at *any* facilities-constrained airport in the country.[51] Nor is there any reason to divest DAL gates to another DLC, which would offer travelers "more of the same" and would not cater to those travelers that need a premium product near the Dallas business district.

Unseating Delta at DAL would be particularly unfortunate because, for the past year, Delta has been planning to integrate DAL into its wider network when the statutory limitations at that airport expire.[52] Delta currently offers one-stop service to 157 domestic and 61 international destinations through its five daily flights from DAL to ATL. Delta's expansion

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been acquired by DLC entrants as part of a voluntary divestiture by Delta of over 175 gates at airports nationwide after its 2008 merger with Northwest Airlines. Specifically, at ORD, Delta gave up its terminal and consolidated its operations with Northwest at Terminal E, freeing up gates for JetBlue, Spirit Airlines, and others. At LAX, Delta relinquished the entirety of its presence at Terminal 2 to the City of Los Angeles, freeing up 10 gates. At DCA, Delta made the entirety of Terminal A available to new entrants, from which AirTran, Frontier, Southwest, and JetBlue presently operate.

[51] Such concentration is also inappropriate in light of Congress' express disfavor for exclusive use of an airport by any carrier: "A person does not have an exclusive right to use an air navigation facility on which Government money has been expended." 49 U.S.C. § 40103(e).

[52] *See* Wright Amendment Reform Act of 2006, Pub. L. No. 109-352, 120 Stat. 2011.

plan will increase its service at DAL from an existing 5 daily ATL flights to 23 daily flights, adding 18 daily flights to LAX and to Delta's hubs at LGA, MSP, SLC, and Detroit Metropolitan Wayne County Airport (DTW). By connecting DAL to these six airports, Delta will offer Dallas-area travelers access to over 215 domestic and 80 international destinations, including over 130 domestic markets not served by Southwest. The product Delta will introduce at DAL is superior to that of any DLC, as the routes will be operated by Wi-Fi-enabled two-class aircraft equipped with premium cabins and Economy Comfort seating. Delta's new DAL routes will connect the airport to important business destinations and enable passengers to access travel options beyond Delta's hubs to international destinations in Africa, Europe, the Pacific, and Latin America.

Delta's plan for expansion at DAL makes clear that any attempt by the Government to favor the DLC business model at DAL is particularly inappropriate. Such an attempt would seek to deny Dallas travelers access to Delta's network service from DAL at a crucial competitive moment in the airport's history. Delta is uniquely capable and willing to counter the dominance of rival New American at DFW by offering competitive network service from DAL. While it is impossible to predict which destinations Southwest will ultimately serve from DAL once the Wright Amendment restrictions expire, Southwest's network, limited fleet, and track record of service from DAL, all suggest that Southwest will continue to offer service primarily to large, popular destinations.

None of the benefits offered by Delta at DAL would materialize if the Government's desired DLC-only outcome becomes the reality at DAL, to the detriment of Dallas travelers. Any attempt to displace Delta from DAL would undermine competition and make it impossible for Delta to challenge both Southwest (at DAL) and the New American (at DFW). It is the City of Dallas, not the Government, that is in the best position to determine how the divested gates should be used in the interest of Dallas and the region. The city's elected officials clearly understand the region's needs, including the local competitive landscape, better than any Federal agency. They, not the Department of Justice, should be responsible for managing Love Field.

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Respectfully submitted,

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by [signature]

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