UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, *Plaintiff,* v. UNITED CONTINENTAL HOLDINGS, INC., and DELTA AIR LINES, INC., *Defendants.*	)	Case No: 2:15-cv-07992-WHW-CLW

UNITED STATES OF AMERICA'S OPPOSITION TO DEFENDANT DELTA AIR LINES, INC.'S MOTION TO DISMISS

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Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

> "Congress' judgment [was] that the Department of Justice is the agency best equipped to evaluate whether a transfer of slots will promote or hinder competition. . . ."
>
> – Delta Air Lines *et al.*, March 2010.[1]

In an outright reversal from the position it has taken in both judicial and administrative proceedings over the last decade, Delta now contends that anticompetitive slot transactions are beyond the reach of the antitrust laws. The United States' Complaint alleges that defendant United has monopoly power at Newark Airport by virtue of its control of 73% of the slots at the airport and that United's proposed acquisition of additional slots from defendant Delta will unlawfully enhance that monopoly power and constitute an unreasonable restraint of trade under the Sherman Act. These are standard antitrust claims that are within the jurisdiction of the federal courts, that are familiar to judges, and that do not encroach on the aviation regulatory agencies' authority to ensure efficient use of the navigable airspace.

Without pointing to any specific incompatibilities between the Department of Justice's law enforcement responsibilities and the Department of Transportation's regulatory authority, Delta contrives a "conflict" that simply does

[1] *Comments of Delta Air Lines, Inc. and US Airways, Inc., In re* Petition for Waiver of the Terms of the Order Limiting Scheduled Operations at LaGuardia Airport ("US-Delta Slots Swap"), Docket No. FAA-2010-0109, at 6 (Mar. 22, 2010).

not exist. Indeed, as Defendants have structured the Proposed Acquisition to avoid DOT review for competitive impact, analyses of this transaction by the two agencies scarcely meet, much less collide. In these circumstances, implied immunity from the antitrust laws is inappropriate, and resolution of this dispute is well within the competency of this Court.

COUNTERSTATEMENT OF FACTS

A. Application of the Antitrust Laws Does Not Conflict with DOT's or FAA's Slot Management Authority.

The Department of Justice (DOJ) and the Department of Transportation (DOT), including the Federal Aviation Administration (FAA) (together, "DOT/FAA:), have complementary responsibilities for protecting competition in the airline industry. The statutory scheme put in place through airline deregulation in the late 1980s clearly envisioned that DOJ would assume the same role in conducting antitrust review and enforcement for airline transactions as it plays in the review and enforcement for transactions in other industries. *See, e.g.*, H.R. Rep. No. 100-104, at 2 (1987) ("The [Civil Aeronautics Board Sunset Act of 1984] further provided that sections 408, 409, and 414 would cease to have effect on January 1, 1989, with DOJ assuming the antitrust authority. After that date, all air carrier mergers, acquisitions, consolidations, and interlocking relationships would be subject to the same antitrust laws and oversight procedures as other industries.")

(Report of the Senate Committee on Commerce, Science and Transportation concerning the Airline Merger Transfer Act of 1987). Vesting competition jurisdiction in one agency does not necessarily exclude jurisdiction for the other, however. Congress specifically authorized DOT, in carrying out aviation programs, to consider certain factors as being in the public interest, including furthering airline competition. 49 U.S.C. § 40101(a).

Overlapping jurisdiction to review transactions for competitive considerations is not unique to the airline industry. For example, the Federal Communications Commission generally reviews proposed mergers of telecommunications carriers to determine whether a transfer of licenses to the acquiring company would serve the "public interest." 47 U.S.C. §§ 214(c), 310(d). Similarly, the Federal Energy Regulatory Commission reviews and approves mergers and acquisitions involving public utilities under its "public interest" criteria. 16 U.S.C. § 824b. In both sectors, the regulatory agency's public interest analysis incorporates competitive considerations, but is different from the standard the DOJ uses when reviewing transactions. Such regulatory review does not "prevent enforcement of the antitrust laws in federal courts." *United States v. Radio Corp. of Am.*, 358 U.S. 334, 346 (1959); *see California v. Fed. Power Comm'n*, 369 U.S. 482, 484, 488-89 (1962) (Federal Power Commission's

approval of merger did not confer antitrust immunity even though the FPC had taken competitive impacts into account).[2]

The United States' claims in this case are not at odds with DOT's regulation of slots at the Newark Airport. As explained in the attached Affidavit of Cindy Baraban, the DOT sees no risk that its regulations and the Department of Justice's enforcement of the antitrust laws will produce conflicting guidance, requirements, duties, privileges, or standards of conduct. Baraban Aff. ¶ 3. Nor does the DOT see this lawsuit as threatening to disrupt the regulatory scheme for slot-controlled airports. *Id.*, ¶ 2.

B. Defendants Have Structured the Proposed Acquisition to Avoid Regulatory Scrutiny by DOT.

Contrary to Delta's assertions, DOT has not "consistently and repeatedly" (Delta Mem. Supp. Mot. to Dismiss 2, ECF 27-1 ("Delta MTD")) invoked its "public interest" authority to review slots transactions for competitive effects. To

[2] *See also* U.S. Dep't of Justice, Bank Merger Competitive Review – Introduction and Overview (1995), *available at* http://www.justice.gov/atr/bank-merger-competitive-review-introduction-and-overview-1995 (describing overlapping jurisdiction of DOJ and the federal banking agencies to review, under slightly different standards, the competitive impact of bank and bank holding company mergers under the banking and antitrust laws); Memorandum of Understanding Between the Antitrust Div., Dep't of Justice and the Fed. Trade Comm'n and the Dep't of Agriculture Relative to Cooperation With Respect to Monitoring Competitive Conditions in the Agricultural Marketplace (Aug. 1999), *available at* http://www.justice.gov/atr/memorandum-understanding-between-antitrust-division-department-justice-and-federal-trade (discussing desire to maintain cooperative relationship concerning each agencies' respective enforcement responsibilities).

the contrary, it has done so via its waiver process in only one instance, which involved special circumstances that Defendants have gone out of their way not to replicate here.

Under the existing slot rules, the purchase or sale of slots at Newark is prohibited.[3] DOT/FAA may grant a waiver from the prohibition if it determines that "the exemption is in the public interest," a standard that includes factors relating to competition. 49 U.S.C. § 40109; 49 U.S.C. § 40101(a). In contrast, leases, so long as they do not transfer rights to operate flights beyond expiration of the current rules, are permitted. FAA historically has treated leases as nothing more than amendments to its slot holdings records, which it authorizes upon mere notice of the carriers' plans.

The single instance in which DOT invoked its public interest authority to conduct a robust competitive analysis involved a large *sale* of slots between Delta and US Airways at Reagan National and LaGuardia airports. DOT/FAA invoked its public interest authority and reviewed the transaction because: (1) the sale required a waiver from the Agencies' regulations prohibiting sales of slots at LaGuardia,[4] and (2) the sale was an extraordinarily large transaction involving over

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[3] Federal Aviation Administration, Order Limiting Scheduled Operations at Newark Liberty International Airport, 73 Fed. Reg. 29,550 (May 21, 2008) ("Newark Slot Order").

[4] Federal Aviation Administration, Notice of Order, Operating Limitations at New York LaGuardia Airport, 71 Fed. Reg. 77,854 (Dec. 27, 2006), as amended.

350 slots. When DOT determined that the transaction would adversely affect competition in the absence of substantial slot divestitures, Delta appealed the joint decision issued by DOT/FAA to the D.C. Circuit, arguing that DOT/FAA lacked authority to consider effects on competition. *Delta Air Lines, Inc. and US Airways, Inc. v. FAA and DOT,* No. 10-1153, Doc. #1259764, at 3 (D.C. Cir., filed Aug. 9, 2010) (advancing proposition in Statement of Issues shortly before the parties settled the matter in advance of formal briefs, oral argument, and a decision by the court).

Defendants have structured the Proposed Acquisition as a long-term, automatically renewing lease that converts to a sale if the rules change to allow permanent transfers. This structure effectively exploits a loophole in the slots rules. They receive the usual administrative review associated with short-term leases while at the same time ensuring that the transaction is effective indefinitely. Defendants cannot now claim that the antitrust laws are ousted by the very review they have so deliberately avoided.

C. Delta has Argued Repeatedly that the DOT and FAA have No Legal Authority to Evaluate the Competitive Effects of Slot Acquisitions.

Delta has repeatedly argued that DOT has no authority to consider competition-related factors in its administration of the slot regime. For instance, in pleadings filed with the D.C. Circuit Court of Appeals, Delta claimed that "Congress expressly considered and rejected vesting authority in the Department

of Transportation to review asset transfers for their competitive effects and instead gave that authority exclusively to the Department of Justice." *Delta Air Lines, Inc. and US Airways, Inc. v. FAA and DOT*, No. 10-1153, Doc. #1259764, at 3 (D.C. Cir., filed Aug. 9, 2010).

As recently as May 2015, Defendants United and Delta both filed comments in response to a DOT Notice of Proposed Rulemaking ("NPRM") to the same effect. Delta stated in its comments that "the FAA's role in slot management is to promote the efficient use of the national airspace system. It would be improper for FAA and DOT to use these procedures as a back door mechanism to regulate competition."[5] Similarly, United commented, "[t]he NPRM impermissibly interjects DOT into . . . DOJ's exclusive authority to review slot transactions for anticompetitive effects under the antitrust laws. . . . The DOT's consideration of competitive factors in regulating slots is an impermissible attempt to expand its authority into the regulatory territory of DOJ."[6] Likewise, industry trade group Airlines for America ("A4A"), which Delta and United supported, argued that "the proposed DOT review contravenes Congress's clear and specific allocation of

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[5] *Comments of Delta Air Lines*, Notice of Proposed Rulemaking ("DOT NPRM"), Slot Management and Transparency for LaGuardia Airport, John F. Kennedy International Airport, and Newark Liberty International Airport, Docket No. FAA-2014-1073, at 22 (May 8, 2015).

[6] *Comments of United Airlines, Inc.*, DOT NPRM, Docket No. FAA-2014-1073, at 5-6 (May 8, 2015).

responsibilities over slots between the FAA and DOT, and usurps the Department of Justice's exclusive authority to review airline transactions for anticompetitive effects under the antitrust laws."[7]

D. The NPRM is Unlikely to Become Final in the Foreseeable Future.

As Delta concedes (Delta MTD 14 n.11), the Newark Slot Order has had a tumultuous history. The governing Order, which was initially promulgated in 2008, was intended to be a temporary measure to manage severe delays until a long-term rule could be finalized. Finding a permanent solution has been more challenging than expected, and the "temporary" rules imposed seven years ago have been continually renewed to the present. DOT/FAA published the NPRM for notice and comment in January 2015 with the aim of issuing a new rule.[8] That NPRM process is still pending, however, and DOT/FAA does not expect to issue a final rule in 2016. Smiley Aff., ¶ 5. Airlines, including Defendants, have aggressively opposed the proposed rules on a variety of grounds. As discussed below, among other objections, Delta challenges DOT's authority to engage in the very type of competitive review it asks this Court to rely on to resolve the issues in

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[7] *Comments of Airlines for America Concerning FAA/DOT Slots Authority*, DOT NPRM, Docket No. FAA-2014-1073, at 3 (May 8, 2015).

[8] Federal Aviation Administration, Notice of Proposed Rulemaking, Slot Management and Transparency for LaGuardia Airport, John F. Kennedy International Airport, and Newark Liberty International Airport, 80 Fed. Reg. 1,274 (Jan. 8, 2015).

this case. The FAA is not obligated to issue a final rule, as contemplated in the NPRM, at any particular time in the future or at all.

ARGUMENT

I. DOT/FAA's Slot Management Regime Does Not Impliedly Repeal the Sherman Act.

A. Implied Repeal of the Antitrust Laws is Strongly Disfavored.

Implied repeal of the antitrust laws is strongly disfavored and may be found only "if necessary to make the [regulatory scheme] work, and even then only to the minimum extent necessary." *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 271 (2007) (quoting *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 357 (1963)). As the Supreme Court explained in *Carnation Co. v. Pacific Westbound Conference*:

> We have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry.

383 U.S. 213, 218 (1966). Instead of finding implied repeal, courts where possible "should reconcile the operation of both" antitrust and regulatory schemes "rather than holding one completely ousted." *Id.*

One circumstance in which repeal is straightforward arises where a federal statute expressly exempts conduct from the antitrust laws or where the agency in question has an explicit statutory power to grant antitrust immunity. For example,

Congress granted DOT the statutory authority to approve and immunize from the U.S. antitrust laws agreements relating to international air transportation (49 U.S.C. §§ 41308-41309). No such statutory argument for repeal exists here. Delta does not even identify an implied conflict between the antitrust laws and any particular transportation statute, much less identify any statutory language suggesting Congress intended to exempt slot acquisitions from antitrust scrutiny.

Where, as here, regulatory statutes are silent, implied immunity depends "upon the relation between the antitrust laws and regulatory program set forth in the particular statute, and the relation of the specific conduct at issue to both sets of laws." *Billing*, 551 U.S. at 271. Implied repeal may be found only where "there is a 'clear repugnancy' between the [regulatory provisions] and the antitrust complaint" or where "the two are 'clearly incompatible.'" *Id.* at 275. Courts do not infer incompatibility "simply when the antitrust laws and a regulatory scheme overlap." *Strobl v. N.Y. Mercantile Exch.*, 768 F.2d 22, 27 (2d Cir. 1985).

In *Billing*, the Supreme Court examined the interaction of the antitrust laws with certain SEC regulations and used four factors to guide its determination of whether implied immunity applied: (1) the agency's "authority under the securities laws to supervise the activities in question"; (2) "evidence that the responsible regulatory entities exercise that authority"; (3) a "resulting risk that [application of both the regulatory regime and antitrust laws will] produce conflicting guidance,

requirements, duties, privileges, or standards of conduct"; and (4) "the possible conflict affected practices that lie squarely within an area of financial market activity that the securities law seeks to regulate." 551 U.S. at 275-76.[9] The crux of the analysis is the third factor – the existence of a true conflict between the regulatory scheme at issue and the antitrust laws. Consistent with the Supreme Court's instruction that implied repeal may be found only "if necessary to make the [regulatory scheme] work, and even then only to the minimum extent necessary," (*id.* at 271), courts have rarely found such a conflict outside the securities context.

The Supreme Court has refused to find implied repeal from the antitrust laws even when a regulatory agency already has approved a transaction. Thus, in *Philadelphia National Bank*, the antitrust laws barred a bank merger despite the Comptroller of the Currency having approved the merger, and despite the Comptroller having considered the merger's effects on competition. *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 333, 351, 371 (1963); *see also United States v. First Nat'l Bank & Trust Co.*, 376 U.S. 665, 667, 673 (1964) (Currency Comptroller's approval of bank merger pursuant to federal banking law did not immunize merger agreement from the antitrust laws); *California v. Fed. Power*

[9] Defendants rely overwhelmingly on *Billing*, which was fundamentally different from this case in a number of respects: the Court saw the plaintiffs' case as a securities case disguised as an antitrust claim so as to evade the laws limiting frivolous securities lawsuits; the challenged conduct went to the heartland of securities regulation; and the SEC was required to consider competitive effects. There are no analogous elements in this case.

Comm'n, 369 U.S. 482, 484, 488-89 (1962) (Federal Power Commission's approval of merger did not confer antitrust immunity); *United States v. El Paso Nat. Gas Co.*, 376 U.S. 651, 655, 662 (1964) (antitrust laws barred stock and asset acquisition despite approval of FPC); *United States v. Radio Corp. of Am.*, 358 U.S. 334, 337, 350-52 (1959) (exchange of radio stations approved by Federal Communications Commission as in the "public interest" was nevertheless subject to attack under antitrust laws).

B. DOT Has Applied a Broad "Public Interest" Standard and Does Not Purport to Enforce the Antitrust Laws.

When DOT invokes its "public interest" standard, factors touching on competition are among many that the agency weighs. 49 U.S.C. § 40101(a) (enumerating 16 factors to be considered, among others, "as being in the public interest and consistent with public convenience and necessity"). As in *Philadelphia National Bank* and *California v. Federal Power Commission*, there is no repugnancy between finding an antitrust violation in court and an agency approving a transaction under a multi-factor standard that does not give competitive effects the same weight as under the antitrust laws. *See Phila. Nat'l Bank*, 374 U.S. at 351 ("Although the Comptroller [of the Currency] was required to consider effect upon competition in passing upon appellees' merger application, he was not required to give this factor any particular weight."); *Radio Corp. of Am.*, 358 U.S. at 350-52 (FCC could consider antitrust policy under its "public

interest" standard, but the FCC could not apply the Sherman Act). Although the DOT has statutory authority under 49 U.S.C. § 41712 to consider competitive effects in certain airline transactions, "the DOT has not, in the past, relied on [that authority] to take enforcement action in the context of airline slot transactions." Federal Aviation Administration, Notice of Proposed Rulemaking, Slot Management and Transparency for LaGuardia Airport, John F. Kennedy International Airport, and Newark Liberty International Airport, 80 Fed. Reg. 1,274, 1291 (Jan. 8, 2015).

C. DOJ and DOT/FAA Coordinate with Respect to Reviews of Slot Transactions.

Neither the Department of Justice nor the Department of Transportation finds any conflict in DOJ's authority to review slot transactions for competitive effects and DOT's authority to review slot transactions under its public interest standard. For example, Delta's motion references a situation in which DOT/FAA and DOJ concurrently and cooperatively reviewed a proposed transaction under the two agencies' separate statutes and standards: Delta and US Airways' FAA waiver application involving LaGuardia and Reagan National slots. As DOJ explained in its comments regarding the waiver application, "DOJ does not believe that there is any conflict between DOT/FAA's consideration of competition policy in its public interest inquiry and the DOJ's jurisdiction to review transactions under Section 7

[of the Clayton Act]."[10] In its NPRM, DOT recently explained how it had worked cooperatively with DOJ on that transaction: "Using the documents and its expertise in the airline industry, the DOT assisted DOJ in that agency's analysis of the transaction." 80 Fed. Reg. at 1292. It went on, "DOJ also participated in the DOT's independent determination of the joint waiver request . . . " and explained that "[DOT's] analysis was complementary to that of DOJ." *Id.* In sum, "rather than attempting to enforce antitrust laws, the DOT . . . was invoking its authority to protect the traveling public by fostering competition in the context of the requested waiver." *Id.*

DOT/FAA has also granted waivers to facilitate slot divestitures required by DOJ. In 2013, DOJ required US Airways and American Airlines to divest slots and gates at key constrained airports, including New York LaGuardia Airport (LGA), to remedy competitive concerns associated with the merger of those two airlines. In order to effectuate the sale of LGA slots, American Airlines petitioned DOT/FAA for a waiver from the prohibition on selling slots at LGA in order to permanently transfer 22 LGA slots to Southwest Airlines and 12 LGA slots to Virgin America, Inc., as required by the Final Judgment settling the United States' merger challenge. *See United States v. US Airways Grp., Inc.*, 38 F. Supp. 3d 69 (D.D.C. 2014). There, DOT/FAA supported DOJ's antitrust enforcement efforts,

[10] *Reply Comments of the United States Department of Justice*, US-Delta Slots Swap, Docket No. FAA-2010-0109, at 12-13 (April 5, 2010).

explaining that it granted the waiver because "the permanence achieved in the structure of this transaction provides certainty and efficiency in achieving the DOJ's public interest objectives."[11] It similarly granted a waiver to facilitate the permanent exchange of slots at Reagan National and John F. Kennedy Airport between JetBlue and American Airlines, as required under the US Airways/American Airlines consent decree.[12]

Although the Proposed Acquisition has been structured so as not to trigger the waiver process DOT/FAA has used in the past to review transactions under the existing Order, Delta correctly notes that DOT/FAA proposes in its NPRM to take a more active role in competitive review of slots transactions in the future. To minimize the risk of conflicting results however, DOT/FAA has proposed that "[f]or standalone slot transactions that raise competitive issues, the DOT would coordinate and consult with DOJ throughout the review process." 80 Fed. Reg. at 1292. But for purposes of the Proposed Acquisition, as the agencies remain in deliberative process, there are no guarantees as to what a final rule would provide, when it would issue, or whether it will issue at all.

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[11] Federal Aviation Administration, Grant of Waiver, *In re* Petition of American Airlines, Inc. for a Waiver from the Order Limiting Operations at LaGuardia Airport, Docket No. FAA-2013-1011 (Dec. 2, 2013).

[12] Federal Aviation Administration, Grant of Waiver, *In re* Petition of JetBlue Airways Corporation for a Waiver from the Order Limiting Operations at Kennedy Airport, Docket No. FAA-2014-0074 (Feb. 10, 2014).

Regardless of the outcome of the NPRM process, implied immunity rests on whether *Congress* (not an agency) has implicitly determined that the conduct is immune from the antitrust laws. *See, e.g.*, *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134, 147 (2d Cir. 2003) (holding that implied immunity applies in two narrow contexts: "first, when an agency, acting pursuant to a specific Congressional directive, actively regulates the particular conduct challenged, . . . and second, when the regulatory scheme is so pervasive that Congress must be assumed to have forsworn the paradigm of competition") (citation and internal quotation marks omitted). There is no statute that comes close to suggesting that Congress intended to repeal the antitrust laws with respect to slots transactions. To the contrary, DOT carries out its responsibilities consistent with "Congress' determination that the deregulated airline industry should generally be subject to the same application of the antitrust laws as other unregulated industries." Statement of Susan L. Kurland, Assistant Secretary for Aviation & International Affairs, U.S. DOT, Before the Senate Committee on Commerce, Science & Transportation (June 19, 2013), *available at* http://testimony.ost.dot.gov/test/pasttest/13test/kurland1.htm. Thus, regardless of any rules DOT/FAA may put in place in the future, under no circumstances could those agency rules impliedly repeal the antitrust laws.

D. DOJ's Claims Also Do Not Conflict With the FAA Slot Usage Requirements

Contrary to Delta's assertions, this case is not "premised on a theory that United's failure to use all the slots it has on any given day is an illegal act of monopolization." Delta MTD 5. This case is premised on the fact that United's acquisition of an additional 24 Newark slots would allow United to maintain and enhance its existing monopoly power at the airport, resulting in anticompetitive harm. Compl. ¶ 4. Accordingly, the United States seeks "to enjoin the proposed acquisition of . . . slots at Newark Liberty Airport . . . by the dominant airline at that airport, United." *Id.* ¶ 1. The requested relief is limited to the acquisition of slots, *i.e.*, that "the proposed Newark slot lease agreement between United and Delta" be adjudged to violate the Sherman Act; that the Defendants "be permanently enjoined from and restrained from carrying out the proposed acquisition or any similar acquisition"; and that United be required to notify the Antitrust Division before any similar future acquisitions of slots at Newark. *Id.* ¶ 51.

While the Complaint does not allege that United's underutilization of slots is an independent antitrust violation (and the United States seek no remedy with respect to how United uses its current slots), United's slot usage demonstrates the anticompetitive nature of the transaction. The fact that United has excess slots in its portfolio that would support additional service undermines United's proffered

business justification for the deal – that United needs Delta's slots in order to grow at Newark. While the FAA has imposed *minimum* use requirements, nowhere in the rules is there any suggestion that the levels identified constitute the maximum or optimal usage rate and certainly cannot be interpreted to have created a safe harbor from the antitrust laws. Even if United meets the FAA's minimum use rule, United's proposed acquisition can be found to constitute maintenance of a monopoly, *see* 3 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 701 (4th ed. 2015) ("a monopolist's acquisition of the productive assets or stock of an actual or likely potential competitor is properly classified as anticompetitive, for it tends to augment or reinforce the monopoly by means other than competition on the merits").[13] Neither finding precludes the other. Thus, there is no plausible conflict between DOJ's claims and FAA's minimum use requirement.

E. The Other *Billing* Factors Do Not Support a Finding of Implied Repeal.

As discussed above, Delta fails to satisfy the central prong of the *Billing* analysis as there is no risk of conflict between the regulatory regime and application of the antitrust laws. The Court should deny Delta's motion on this basis alone. Delta's motion also should be denied because it fails to satisfy the remaining three prongs of the *Billing* analysis.

[13] Likewise, it is possible that a carrier's violation of the FAA's 80% usage rules would not present competition issues.

The first prong essentially asks whether the regulatory agency has authority to regulate the conduct in question. *See Billing*, 551 U.S. at 275. While Delta now argues that DOT/FAA "indisputably" meets the first prong, Delta has repeatedly taken the opposite position in the past. For example, it argued in a 2010 filing in the D.C. Circuit that "Congress expressly considered and rejected vesting authority in the Department of Transportation to review asset transfers for their competitive effects and instead gave that authority exclusively to the Department of Justice." *Delta Air Lines, Inc. and US Airways, Inc. v. FAA and DOT*, No. 10-1153, Doc. #1259764, at 3 (D.C. Cir., filed Aug. 9, 2010). Delta's carefully worded references to DOT's "asserted" and "claimed" authority throughout its brief reveal that Delta does not accept that DOT actually *has* the authorities in question. In essence, Delta is seeking to gain the benefit of DOT/FAA's assertion of its authority without conceding that it actually has authority.

Delta similarly fails to satisfy the second *Billing* factor, which asks whether the regulatory agency "has continuously exercised its legal authority to regulate conduct of the general kind now at issue." 551 U.S. at 277. Indeed, part of the purpose of the NPRM is to establish a process for review of certain slot transactions, as there is no such formal process in place today. *See* 80 Fed. Reg. at 1291 (describing concerns and complaints raised by airlines, communities, and airports about the behaviors of incumbent slot holders and stating, "[c]onsequently,

some have sought more rigorous oversight and transparency of slot transactions."). As discussed previously, the DOT has not reviewed slot transactions for competitive effects, except in cases in which it was requested to waive those rules entirely, a circumstance not present here. The single time DOT conducted a robust competitive review, DOT emphasized that it applied its public interest assessment because of the "unique size and scope" of the transaction and the fact that the parties had requested a waiver from the prohibition on selling slots. DOT noted that it "[had] *not* determined that an analysis of the impact of a transaction on competition . . . is appropriate or necessary for future transfers of slot interests." *See* Federal Aviation Administration, Notice of a Petition for Waiver of the Terms of the Order Limiting Scheduled Operations at LaGuardia Airport, 75 Fed. Reg. 7306, 7307 (Feb. 18, 2010) (emphasis added).

Finally, the Court in *Billing* considered whether the possible conflict between the regulated activity and application of the antitrust laws falls squarely within the area the agency's laws seek to regulate. *See* 551 U.S. at 276. Given that there is no conflict between DOT/FAA's public interest objectives and enforcement of the antitrust laws, it is impossible to assess whether a conflict goes to the core of DOT/FAA's regulatory arena. Indeed, in other contexts, Delta has vigorously argued that any competition inquiry with respect to slot transactions

falls squarely *outside* the activities DOT/FAA is charged with regulating. For example, according to Delta:

- "Congress has empowered the FAA to promote safety and the efficient use of airspace; it has not given the FAA any authority to consider potential effects on competition. . . ." and
- "Congress has conferred authority on the FAA to consider only safety and the efficient use of airspace. Congress has not conferred any authority on the FAA to consider effects on competition."

Comments of Delta Air Lines, Inc. and US Airways, Inc., *In re* Petition for Waiver of the Terms of the Order Limiting Scheduled Operations at LaGuardia Airport, Docket No. FAA-2010-0109, at 5, 7 (Mar. 22, 2010).

II. The Doctrine of Primary Jurisdiction Is Inapplicable Here.

The Third Circuit has made clear that primary jurisdiction referrals are disfavored, because "[f]ederal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them. Abstention, therefore, is the exception rather than the rule.'" *Raritan Baykeeper v. NL Indus., Inc.*, 660 F.3d 686, 691 (3d Cir. 2011) (internal citations and quotation marks omitted).[14]

Primary jurisdiction "comes into play whenever enforcement of the claim *requires* the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *United States v.*

[14] Noticeably absent from Delta's brief is any reference to *Raritan Baykeeper*, the leading Third Circuit case addressing primary jurisdiction.

W. Pac. R.R. Co., 352 U.S. 59, 64 (1956) (emphasis added); *Raritan Baykeeper*, 660 F.3d at 691. The United States alleges that United's acquisition of 24 slots from Delta would constitute an unreasonable restraint of trade in violation of Section 1 and monopoly maintenance in violation of Section 2 of the Sherman Act. Compl. ¶¶ 48-50. Those claims are the kind that federal courts regularly decide, and they do not *require* the resolution of any issue by the FAA or DOT. Primary jurisdiction therefore is inapplicable.

Courts have identified four factors as relevant to the primary jurisdiction determination: (1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within an agency's field of expertise; (2) whether the question at issue is particularly within the agency's discretion; (3) whether there is a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made. *Raritan Baykeeper*, 660 F.3d at 691. All four factors weigh against referral.

The first factor is not satisfied because the question at issue – whether United's proposed acquisition of Newark slots violates the Sherman Act – is a question federal courts regularly resolve and does not involve technical questions. While the FAA has expertise in regulating the national airspace system for safety and efficiency, "federal courts are nonetheless competent to decide" Sherman Act claims involving slots, and Congress decided as much when it wrote those statutes

to authorize suits in federal courts. *See id.* (reasoning that the first factor weighed against primary jurisdiction, because although the New Jersey Department of Environmental Protection had expertise in environmental matters, Congress authorized federal suits under the Resource Conservation and Recovery Act and the Clean Water Act); *cf. Interfaith Cmty. Org, Inc. v. PPG Indus.*, 702 F. Supp. 2d 295, 311 (D. N.J. 2010) ("Congress clearly contemplated that the environmental issues posed here are within the competency of the courts when it created a citizen suit provision."). Indeed, United clearly viewed the federal courts as competent to review slot transactions when it argued that DOT and FAA should not consider the competitive effects of slot transactions because DOJ holds "exclusive authority to review slot transactions for anticompetitive effects under the antitrust laws."[15]

In addition, Delta is wrong to assert that "decisions about slot transfers and usage," or "aircraft safety and efficient airspace usage" (Delta MTD 35), justify a referral, because resolution of those issues is not *required* to determine the antitrust claims in this case. *See W. Pac. R.R. Co.*, 352 U.S. at 64. Slot usage, aircraft safety, and other technical questions are secondary issues in this case, which addresses whether the proposed slot *acquisition* would maintain and enhance United's existing monopoly or unreasonably restrain trade.

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[15] *Comments of United Airlines, Inc.*, DOT NPRM, Docket No. FAA-2014-1073, at 6-7 (May 8, 2015).

The second factor, whether the matter "is particularly" within the discretion of the regulatory agency, also weighs against finding primary jurisdiction. While FAA generally regulates the national airspace system for safety and efficiency, the Sherman Act specifically charges DOJ with enforcement of the statute in the federal courts. 15 U.S.C. § 4. *See Raritan Baykeeper*, 660 F.3d at 692 (second factor weighs against primary jurisdiction because the two environmental statutes at issue authorize the federal courts with enforcement, even though the agency generally has discretion over environmental matters); *cf. Interfaith Community Org.*, 702 F. Supp. 2d at 311 ("The questions before this Court arise under the language of the RCRA, a statute which the DEP has no discretion to interpret.").

Third, consistent with the attached DOT/FAA affidavits and in Section I(B) above, there is no risk of inconsistent rulings. FAA currently reviews slot lease transactions in an administrative fashion, without consideration of competitive effects. Smiley Aff. ¶ 4. The NPRM proposes a new process by which DOT will review slot transactions in the future, but the rulemaking is unlikely to be finalized soon. *Id.* ¶ 5. Certainly there can be no "substantial danger" of inconsistent rulings when the DOT/FAA has invoked a formal public interest review of a slot transaction in only one instance to date.[16] *See Raritan Baykeeper*, 660 F.3d at 692

[16] *See* Federal Aviation Administration, Notice of Grant of Petition with Conditions, Petition for Waiver of the Terms of the Order Limiting Scheduled

(finding the third factor is not satisfied where there is "agency inaction with respect to the river sediments over the last several years").

Even if the DOT were to consider the transaction under its public interest standard, competition would be one of several "public interest" factors, and so this Court's application of the Sherman Act here would not be inconsistent. *Cf. Phila. Nat'l Bank*, 374 U.S. at 351 (no repugnancy between bank agency regulation and antitrust laws where, "[a]lthough the Comptroller was required to consider effect upon competition in passing upon appellees' merger application, he was not required to give this factor any particular weight.").

The fourth factor, whether application to the agency already has been made, does not favor referral because no application for this transaction was or will be made to the FAA or DOT that concerns the antitrust laws. *Cf. Raritan Baykeeper*, 660 F.3d at 692 (noting that the fourth factor favored referral because the RCRA and CWA claims were based on contaminated sediment in a river and the state agency previously had considered precisely the same thing: contamination of sediments in the river). Delta speculates (Delta MTD 37-38) that the FAA could review the transaction under the current Order, or that the agencies could act in the future under the NPRM's proposed regulations. But that speculation does not constitute any issue that is "pending" today before an agency.

Operations at LaGuardia Airport, 76 Fed. Reg. 63,702 (Oct. 13, 2011) (permitting a sale of Reagan National and LaGuardia slots between Delta and US Airways).

Delta argues that the "regulatory process" would resolve the allegations in the Complaint (Delta MTD 37), but that again is incorrect. As discussed above, when the Defendants submit this transaction to FAA, the FAA will confirm that Delta is the current slot "holder," and upon such confirmation, will authorize the transaction so long as it meets the requirements of the Newark Slot Order. Smiley Aff. ¶ 4. Although DOT proposes a new process in the NPRM for reviewing certain slot transactions that raise significant competition or public interest concerns in the future, any final rule is unlikely to take effect this year, and the content of the final rule is uncertain. *Id.* ¶ 5. This provides another reason for rejecting Delta's primary jurisdiction argument.

Finally, there is a significant "public interest in effective enforcement of the antitrust laws." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001). The United States and the public interest will be prejudiced by the significant delay to antitrust enforcement that would accompany any abstention in favor of an agency determination.

CONCLUSION

For the foregoing reasons, Delta's motion to dismiss should be denied.

Respectfully submitted,

/s

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2016, I caused a true and correct copy of the foregoing document to be filed and served upon all counsel of record via the Court's CM/ECF system.

/s Amanda Klovers
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