U.S. Airlines for Open Skies

August 3, 2015

The Honorable John F. Kerry
Secretary of State
U.S. Department of State
2201 C Street, NW
Washington, DC 20520

The Honorable Anthony Foxx
Secretary of Transportation
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

The Honorable Penny S. Pritzker
Secretary of Commerce
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

Dear Secretaries Kerry, Foxx and Pritzker:

The three largest U.S. airlines (Delta, United, and American, or "Big 3") are demanding that the U.S. government impose a freeze on access to U.S. routes for three airlines from the United Arab Emirates (UAE) and Qatar (Etihad, Emirates, and Qatar Airways, or "the Gulf carriers") and invoke its right to consultations for the purpose of renegotiating its Open Skies agreements with these two countries.[1] The Big 3 claim that such actions by the United States are a necessary and appropriate response to allegations that the Gulf carriers have received unfair government subsidies, despite the fact that, even if the allegations are assumed to be true, the Big 3 fail to allege any breach of these agreements.

[1] Letter from American Airlines, Delta Airlines, and United Airlines to Secretary of State John Kerry, Secretary of Transportation Anthony Foxx, and Secretary of Commerce Penny Pritzker, April 17, 2015.

Each of us has written separately explaining the damage to our companies, consumers, and the U.S. economy as a whole were the U.S. government to comply with the demands of the Big 3. In this submission, we write jointly as U.S. Airlines for Open Skies (USAOS), a coalition of four U.S. passenger and cargo carriers – Atlas Air Worldwide, FedEx, Hawaiian Airlines, and JetBlue Airways – that collectively transports approximately 42 million passengers annually, ships nearly 8 million tons of cargo, and employs approximately 350,000 people, 40 percent more people than the Big 3 combined.

We write as a coalition to (a) underscore that the Big 3 do not speak for all, or even most, U.S. airlines; and (b) expand on the extensive harm to U.S. consumers, U.S. competitiveness, the U.S. economy, and U.S. national security if the federal government proceeds down the path sought by the Big 3.

The Big 3 claim to support Open Skies but their demands, if implemented, would endanger this network of more than 100 U.S. aviation agreements. As discussed below, acceding to those demands would not only breach the United States' obligations to the UAE and Qatar but also raise serious questions about its commitment to Open Skies generally. If the network is endangered, then so too are the significant economic and national security benefits it provides.

Open Skies Promotes U.S. Trade, Jobs, and Economic Growth

- <u>Open Skies agreements create competition by allowing air carriers, not governments, to decide the routes, capacity, frequency, and pricing of their services, based on market demand</u>. This competition benefits all sectors of the U.S. economy, facilitating the movement of people and goods around the world, fueling growth and creating jobs. As with many other American businesses, the airlines in our coalition depend on Open Skies every day to compete successfully and grow in domestic and global marketplaces.

- <u>Open Skies agreements are an essential part of a rules-based global economy</u>. Along with trade, investment and other international economic agreements, Open Skies connects global markets, sets the rules of the game, and provides a safeguard against protectionism. Without these agreements, market access for our airlines and our customers would depend entirely on the discretion of governments, and the shifting political winds that can influence their decisions.

- <u>Open Skies enables U.S. companies large and small to reach export markets and maintain global supply chains through worldwide delivery networks established by U.S. air cargo carriers</u>. Over 300,000 U.S. businesses, 98 percent of which are small and medium-sized businesses, depend on these supply chains to sell and compete in the global market place. Several companies have already submitted letters in this docket, citing the importance of Open Skies agreements to their operations. In a letter from Dell, for example, the company highlights the policy as "essential if we are to have a supply chain that successfully meets the needs of our customers and the American public."

- Open Skies benefits U.S. consumers by reducing the cost of and increasing access to international air travel. According to a study by the Brookings Institution, existing Open Skies agreements generate approximately $4 billion in annual savings for passengers on U.S.-international routes. If the United States were to negotiate new agreements with other large markets, these savings could be doubled to $8 billion.
    - Hawaiian Airlines established service to Seoul and Auckland under U.S. Open Skies agreements with Korea and New Zealand, respectively; and JetBlue Airways provides service under Open Skies agreements with Colombia and Jamaica.
- Open Skies expands international air service to more U.S. cities, making them more attractive locations for businesses to establish and expand. Before Open Skies, cities such as Detroit, Las Vegas, Memphis, Minneapolis, Portland and Salt Lake had limited or no direct access to international destinations. After the United States built its robust network of Open Skies agreements, service expanded dramatically.
    - When the U.S.-EU Open Skies agreement went into effect in 2008, Dallas experienced the largest ever one-day expansion in international air service.
    - Open Skies expanded international air service to Las Vegas, which played a vital role in the economic recovery of Southern Nevada, according to the Las Vegas Department of Aviation.
- Open Skies increases demand for international air travel, which in turn promotes jobs and economic growth. The Brookings study estimates that the number of passengers on U.S.-international routes would be approximately 10 percent lower in the absence of the U.S. Open Skies network. Another recent study by InterVISTAS concludes that air service liberalization leads to a 16 percent increase in air traffic, which in turn supports approximately 9 million additional jobs in aviation and aviation-related industries.
- Open Skies increases the number of foreign tourists who visit the United States. In 2014, the Gulf carriers alone brought 140,000 international visitors to the United States, who spent nearly $1 billion and generated over $2 billion in economic output. This spending benefits a wide array of travel-related businesses such as hotels, rental car companies, restaurants and retailers. In fact, because tourism spending has such far-reaching effects, adding a single daily wide-body flight carrying predominantly foreign-originating tourists can result in $65 million in direct spending, $117 million in U.S. GDP growth, and more than 1,150 U.S. jobs. Further, maintaining open access to the U.S. market for the Gulf airlines or other foreign carriers is essential to achieve President Obama's goal of attracting 100 million foreign visitors to the United States by 2021.

- Open Skies benefits U.S. consumers by increasing competition on domestic routes. Gulf carriers and other foreign airlines not aligned with the Big 3 bring thousands of passengers to the United States, creating demand for connecting flights for smaller U.S. airlines, such as JetBlue Airways and Hawaiian Airlines. These additional passengers allow smaller passenger airlines to expand their domestic services, creating more competition, which promotes innovation in the aviation sector and more choices and lower prices for consumers. JetBlue Airways, for example, was able to initiate service between Boston and Detroit, a route that was previously served by only one carrier, due to the number of international passengers arriving in Boston.

Open Skies Supports U.S. National Security Interests

- Open Skies allows U.S. airlines to maintain global delivery networks through which they transport troops and vital supplies for the U.S. military. U.S. carriers rely on Open Skies to overfly partner countries; stop for refueling and repair in partner countries; and transport supplies and troops between the United States and partner countries, and between those countries and destinations beyond. Since 1991, commercial carriers operating under the Civil Reserve Air Fleet (CRAF) have transported almost 40 percent of the equipment, supplies and food to support operations in Iraq, Afghanistan, and the Persian Gulf, and more than 90 percent of U.S. forces to and from Iraq.

    - FedEx operates a Memphis to Dubai flight four days per week, which the Department of Defense (DOD) used to transport within 48 hours much needed cargo during the peak of the U.S. troop surge in Afghanistan.

    - Atlas Air Worldwide transports foods and critical life-supporting items like blood and blood products to support ongoing military operations in Iraq, Afghanistan and the Persian Gulf.

    - The Northern Distribution Network, through which military supplies are delivered to U.S. troops in Afghanistan, involves air, rail, and road links through twelve countries, demonstrating the complexity of DOD supply chains, which Open Skies supports.

Big 3 Demands Endanger Open Skies

- The Open Skies regime, and its benefits to the U.S. economy and national security, would be put at risk if the U.S. government carried out the demands of the Big 3. The unilateral actions demanded by the Big 3 likely would provoke retaliation by the UAE and Qatar, encourage other Open Skies partners to take restrictive actions, deter countries from entering into Open Skies agreements with the United States, and raise questions about the United States' commitment to the Open Skies regime. The Big 3 dismiss these risks, but they are real, and the likely resulting damage is both concrete and substantial.

- The demand by the Big 3 to freeze the Gulf carriers' access to the U.S. market would violate both the UAE and Qatar agreements and likely invite reciprocal action by the UAE and Qatar. Each of these agreements prohibits a party from unilaterally limiting the volume, frequency or regularity of service provided by airlines of the other party, except as may be required for safety or technical reasons. If the United States were to freeze access, it would not only reduce the number of foreign passengers arriving in the United States, with the attendant economic harm, but also likely provoke the UAE and Qatar to impose their own caps on U.S. airlines. While this response might be of little concern to the Big 3 because they offer minimal service in the region, it is of great concern to our companies and our U.S. customers.

    - For our U.S. commercial customers, any restriction on our access rights under Open Skies would impede exports and disrupt supply chains, which depend on the delivery of cargo through the UAE to markets throughout Africa and Asia.

    - For the U.S. military, any such restriction would cause significant delays in the transportation of essential supplies, impairing U.S. readiness levels and overall U.S. national security.

- If the United States were to breach the UAE and Qatar agreements, it could encourage other Open Skies partners to restrict access to their markets. Such restrictions could even be based on allegations that U.S. carriers receive unfair government subsidies, as discussed below. At a minimum, unilateral action by the United States would raise serious questions in the minds of existing and future Open Skies partners about the willingness of the United States to abide by its international legal commitments.

- The recent claim by the Big 3 that their demands could be met by the UAE and Qatar "voluntarily" restraining the service of the Gulf carriers is disingenuous. Based on their public statements, including the stated purpose of their demand for consultations, it is clear that there is nothing voluntary in how the Big 3 seek to achieve their desired outcome. In fact, their demands have escalated, to include a retroactive freeze on service that would actually reduce the number of flights now operating. As the government considers these demands, it should evaluate the complaint in light of the provisions of the UAE and Qatar agreements as well as the objective of the consultations.

- The Big 3 fail to allege any breach of the agreements. In fact, the Big 3 ignore the one provision of each agreement that is directly relevant to subsidies. This provision states that airline prices shall be based on commercial considerations but allows a government to intervene in the market for certain enumerated purposes, including to protect its airlines from prices that are "artificially low" due to a government subsidy. The Big 3, however, make no allegations whatsoever about the prices charged by the Gulf carriers, much less that those prices are artificially low.

- Instead of relying on the provision relevant to subsidies, the Big 3 shoehorn their claim under the obligation to accord airlines of the other party "fair and equal opportunity" to compete. This provision, however, relates to restrictions that each party must not impose on airlines of the other party, including restrictions on the volume, frequency, or regularity of service. The provision, therefore, not only fails to support the Big 3 subsidy complaints but also prohibits the very course of action they demand: a unilateral freeze on market access.

- A request for consultations is not a casual invitation to meet; it is the first step of a formal dispute settlement procedure to address disagreements about the proper interpretation and application of the agreement. The right to request consultations is found in many international economic agreements. It affords an opportunity for the parties to resolve differences arising under an agreement before they turn to a tribunal or panel for resolution of the dispute.

- It is contrary to the international practice of the United States to invoke its right to consultations under an international agreement without a strong basis in fact and law to allege a violation of that agreement. In the context of the World Trade Organization (WTO), for example, before the United States requests consultations, it will research potential claims for many months if not years to develop the facts and legal analysis to show that the actions of a foreign government are inconsistent with its WTO obligations. If consultations fail to resolve the complaint, this thorough preparation allows the United States to submit the dispute to an arbitral panel with confidence that the panel should decide in its favor.

- Open Skies agreements also contain a dispute settlement procedure. If a dispute arising under an Open Skies agreement is not resolved through consultation, either party may submit the dispute to a panel of three arbitrators. The panel receives written submissions from the parties, convenes a hearing, weighs the evidence, and renders a decision, to which the parties must give full effect, consistent with their national laws.

- The Big 3 are asking the United States to request consultations not to enforce the UAE and Qatar agreements but to coerce those governments into a renegotiation that reduces access to the U.S. market. In fact, the Big 3 completely ignore the dispute resolution procedures in these agreements. Rather, they characterize consultations as a precursor to terminating the agreement. They state that if the UAE and Qatar do not satisfactorily address their demands during consultations, then the next step for the United States is not to initiate dispute resolution but to terminate the agreements.[2] The Big 3 are effectively acknowledging that their complaint, even if all of the facts are assumed to be true, does not amount to a breach of the UAE and Qatar agreements.

- The Big 3 invoke WTO rules that are inapplicable to airlines services and ignore WTO rules that explicitly carve out those services. The Big 3 borrow the definition of "subsidy" from the Agreement on Subsidies and Countervailing Measures but ignore that the agreement (i) applies only to goods, not services, and (ii) requires a claimant to meet strict injury criteria. The WTO agreement that does apply to services, the General Agreement on Trade in Services, which the Big 3 do not mention, does not contain rules on subsidies and explicitly carves out airline services.

- The U.S. government, like many governments, has made a deliberate choice to accord primacy to Open Skies, not trade agreements, to regulate international airline services, recognizing that governments play a more active role in aviation than other sectors. Dan Mullaney, the chief U.S. negotiator for the Transatlantic Trade and Investment Partnership (TTIP), reflected this policy when he responded recently to a question about the European Union's request to liberalize the U.S. aviation market by saying that Open Skies, not TTIP, is the appropriate forum to address such concerns.[3]

- The Big 3 demands are directly contrary to the Administration's international economic policy, which seeks to liberalize trade and investment and promote a rules-based global economy. Following the financial crisis in 2008-2009, when governments were under significant political pressure to restrict competition, the Administration rallied G20 members to maintain a strong commitment to avoid protectionism. Since then, the Administration has pursued the most ambitious trade agenda in a generation, negotiating major agreements in Asia and Europe that will open markets for U.S. goods and services. The Administration should not abandon this policy in favor of the protectionism demanded by the Big 3.

[2] Delta Air Lines, et. al, "Restoring Open Skies: The Need to Address Subsidized Competition From State-Owned Airlines in Qatar and the UAE," Jan. 28, 2015, at 5 (describing consultations as "an alternative to the agreements' termination"), 54 (stating that "[i]f Qatar and the UAE refuse [to address the United States' concerns], both agreements afford the United States the unilateral right to provide written notice of its intent to terminate the agreement at any time").

[3] Inside U.S. Trade, "U.S., EU Have Little To Show After TTIP Round 10; Say They Will Accelerate Talks," July 17, 2015.

U.S. Law Provides a Forum for the Big 3 Complaint

- Rather than pursue this complaint under Open Skies, with all of the negative consequences described above, the Big 3 had the option to use the International Air Transportation Fair Competitive Practices Act (IATFCPA). IATFCPA allows U.S. carriers to initiate complaints regarding unfair, discriminatory or anticompetitive practices by foreign governments and air carriers. The process is supervised by the DOT and allows a full on-the-record evaluation of all of the evidence in accordance with the full due process protections and requirements of U.S. administrative law.

- U.S. airlines have used the law on several occasions to address unfair practices, including subsidies, and have often achieved satisfactory settlements. Pan American World Airways ("Pan Am"), for example, used IATFCPA to seek a remedy for alleged unreasonable and unfair subsidies that the United Kingdom had granted to British Airways. Pursuant to the Pan Am complaint, DOT initiated a comprehensive investigation during which the United States and the United Kingdom were able to negotiate a settlement involving UK withdrawal of subsidies.

- If the Big 3 were confident in their allegations, they would invoke IATFCPA procedures. We can only speculate, but the Big 3 might not have pursued IATFCPA for the same reason that they ignore the dispute resolution procedures under Open Skies: they lack conviction that their claims would prevail in the context of a rigorous, evidence-based proceeding that is insulated from political influence. Their apparent reluctance to engage in such proceedings should give the U.S. government pause about their demands.

Any Discussion of Subsidies Should Include All Major Players

- An international conversation about airline subsidies may well be in order. But such a conversation should involve all relevant governments and consider all forms of governmental support. The market for aviation is global; therefore, any discussion of subsidies must be broad-based, not bilateral. Equally important, this conversation must occur in the context of maintaining and expanding air service liberalization, not under the threat of terminating Open Skies agreements, restricting aviation markets, and jeopardizing the network of global agreements that is so important to our economy.

- When engaging in this conversation, the United States of course must be prepared to defend its own practices. Many foreign governments and foreign airlines complain about unfair subsidies provided to U.S. airlines, particularly the Big 3.
    - The Big 3 and their foreign partners have been exempted from U.S. antitrust laws by the DOT. As a result, the airlines have been granted the special power to coordinate on pricing, scheduling, and marketing practices for international routes.

- Others have criticized the United States' lenient bankruptcy laws as a type of government assistance – assistance that all Big 3 airlines have utilized at one point to reenergize their operations and receive indirect subsidies through filing for Chapter 11.

- The United States prohibits foreign enterprises from owning a controlling share in U.S. passenger airlines, a rule that is not found in many other countries and that limits competition and protects U.S. airlines' revenues in the richest aviation market in the world.

* * *

Open Skies promotes competition in the aviation sector, increases choice and reduces costs for consumers, facilitates exports for U.S. businesses and enhances U.S. national security. These benefits would be jeopardized by the demands of the Big 3 to freeze Gulf carrier access to the U.S. market and request consultations under the UAE and Qatar Open Skies agreements. We urge you to reject these demands and maintain the Open Skies regime that has served our economy so well.

Sincerely,

William J. Flynn
President and CEO
Atlas Air Worldwide Holdings, Inc.

David Bronczek
President and CEO
FedEx Express

Robin Hayes
President and CEO
JetBlue Airways

Mark B. Dunkerley
President and CEO
Hawaiian Airlines Inc.