

**BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

_____)	
Application of)	
)	
SKYWEST CHARTER, LLC)	Docket DOT-OST-2022-0071
)	
for authority to conduct scheduled)	
passenger operations as a commuter air)	
carrier under 49 U.S.C. § 41738)	
_____)	

**RESPONSE OF THE
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL (ALPA)
TO FILINGS OF JSX AND JETBLUE**

Introduction: Essential Air Service is *Scheduled* Air Service

The Essential Air Service (“EAS”) program requires “scheduled service,” subject to a narrow exception for a discretionary grant of money by the Department to a community for charter flights. 49 U.S.C. §§ 41732(a), 41745(a)(3)(B). The line between scheduled service and on-demand charters, however, has been blurred beyond recognition. A complicated regulatory loophole allows charter flights to run so frequently that enterprising carriers can market them as scheduled service, but be free from the Part 121 safety regime that governs most scheduled flights. In practice, without DOT action, this regulatory sleight of hand would allow SkyWest to take a Part 121 passenger jet, remove 20 seats, re-label “scheduled” flights as “on-demand charters”

that look and feel just like scheduled service, become certificated as a commuter air carrier, and as a result morph itself into a Part 135 charter operator called “SkyWest Charter.” As previously fully explained (ALPA Answer, *passim*), if the Department allows SkyWest Charter to use the loophole, then the charter exception will swallow the EAS scheduled rule. If sanctioned by DOT, it may also use the loophole to enter non-EAS markets as well.

JSX Does Not Participate in EAS, Flies Between Major Cities, and Is Abusing a Loophole that Should Be Closed in the Best Interest of Safety

Interested party JSX does not participate in the EAS program, but it does use the loophole today for different, affluent markets. Unlike EAS, those markets are large ones with existing, abundant service from multiple airlines.¹ While JSX touts service to several small airports, these airports are actually part of larger metro areas.² If one

¹ Specifically, JSX served 22 airports in the YE Q1 2023. Of these airports, 16 (or 73%) are Class I Part 139 certified airports able to handle large aircraft for scheduled service (Part 121 aircraft). In fact, 13 of these 16 airports are large or medium hubs.

² For example, CCR (Concord-Napa Valley) and MRY (Monterey) are part of the San Francisco Bay Area, BJC (Denver Rocky Mountain Airport) is part of the Denver area and HPN (White Plains) is part of the New York area. Moreover, JSX does not serve underserved rural communities under EAS or otherwise: routes from the East Bay of San Francisco to Hollywood (Concord/Napa to Burbank, CA), or from the place with the highest median income in the New York City metropolitan area (Scarsdale/Westchester Country/White Plains, NY) to Dallas Love Field, Miami International Airport, and Orlando, are by no means underserved routes to small, rural communities. See <https://Planning.westchestergov.com>. Nor is Las Vegas, called by the CEO “the engine of JSX.” See Interview of JSX CEO Alex Wilson on “Airlines Confidential” podcast by Ben Baldanza and Scott McCartney (April 5, 2023) (Airlines Confidential podcast), transcript attached. That explains why JSX caters to “high net worth individuals who appreciate and are willing to pay for the service that we deliver,” according to its Chief Commercial Officer. Chris Sloan, *How a US Scheduled Charter Is Attracting An Upscale Customer*, Aviation Week (Apr. 11, 2023).

includes these airports as part of the large metro areas that they are part of, only 4% of JSX passengers flew to or from small communities in the 12 months ended March 2023.³

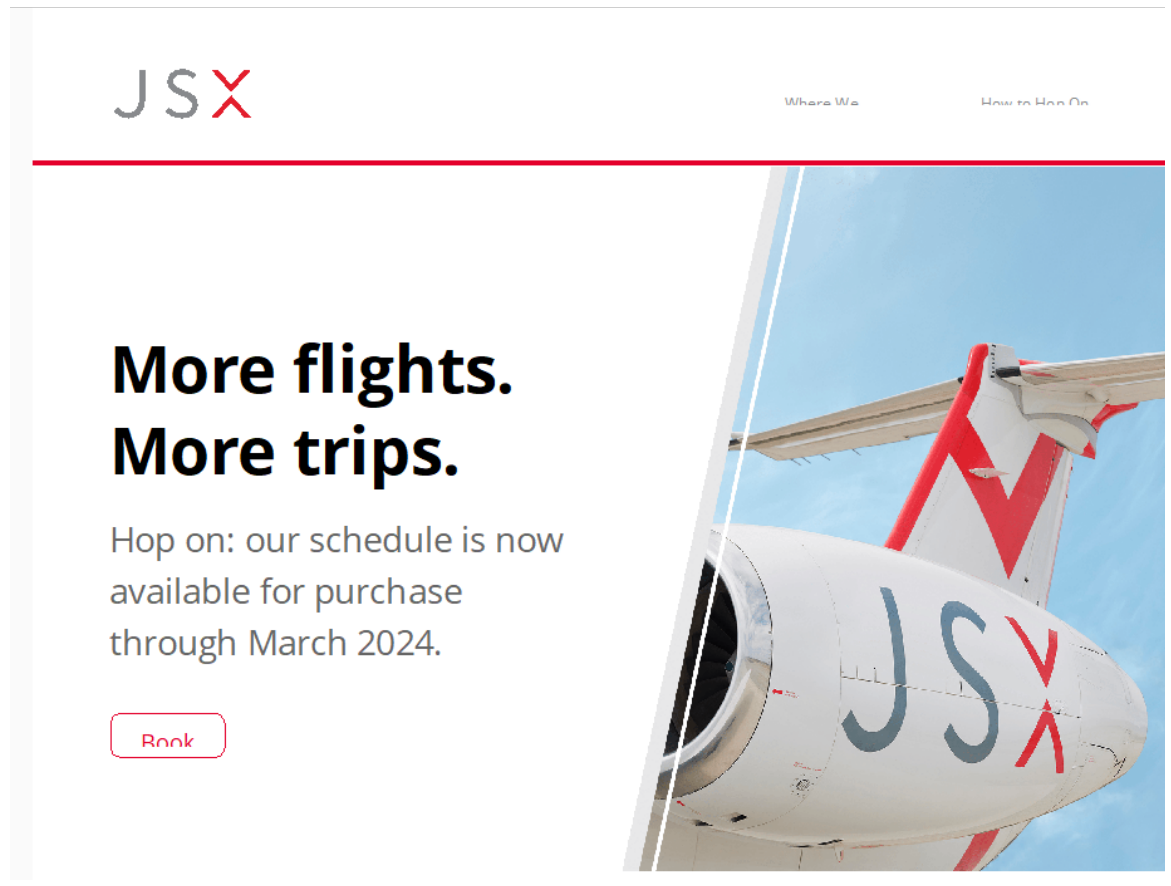
In its June 6th filing, to which ALPA now responds, JSX defends the loophole by contending that it doesn't exist. It relies on FAA regulations which expressly carve out "charters" that run so frequently that they would otherwise be considered "scheduled." Therefore, JSX says there can be no such thing as "scheduled charters." JSX Response at 5-6. JSX asserts that it falls on the charter side of the line, pure and simple.

JSX simply is wrong. If it looks, swims, and quacks like a duck, it is a duck. Since JSX does in fact provide scheduled service, it should be deemed to do so, regardless of the fictitious regulatory disguise that it dons. JSX unequivocally holds out to the public scheduled service with advertisements such as: "**Schedule extended! Book our flights through March 2024**" and "Hop on: our schedule is now available for purchase through March 2024." (Underlined emphasis added, bold in original). JSX's emailed advertisement to potential customers makes the pitch:

JSX incorrectly asserts its service "focus[es] on smaller airports and underserved communities...." JSX Response at 2-3. In JSX's highly affluent and well-served markets, JSX caters to elite discretionary travelers who do not want to wait in the TSA security line with the likes of Essential Air Service passengers.

³ U.S. DOT T-100 data, *available at* bts.gov/browse-statistical-products_and_data/bts-publications/data-bank-28ds-t-100-domestic (link to March 2023 data); FAA, *Airport Categories*, faa.gov/airports/planning-capacity/categories (last visited June 29, 2023).

From: JSX <ourcrew@jsx.com>
Date: April 16, 2023 at 2:44:47 PM EDT
Subject: Schedule extended! Book JSX flights through March 2024.
Reply-To: ourcrew@jsx.com



JSX’s public advertising to consumers belies its filing.⁴ JSX’s legal position is that if it were not for the FAA’s carveout, JSX’s flights – and by implication, SkyWest Charter’s proposed flights – would be unquestionably and legally “scheduled.” To the consumer, unaware of fine-line regulatory distinctions or even the fine print buried in JSX’s advertisements, JSX’s flights are scheduled – just like its Part 121 competitors.

⁴ The charter disclaimer appears in light gray fine print at the bottom of the pictured e-mail.

JSX's Size and Scale Makes the Charter/135 Loophole Untenable

The scale of JSX's operations confirm that its use of FAA's charter carveout is untenable, blurring what it means to be "scheduled service." JSX applied to operate 110,305 scheduled departures in 2022 with its 37-aircraft operating fleet — more scheduled departures than comparably-sized regional Part 121 operators.⁵ An illuminating side-by-side comparison of JSX, Commutair, and Piedmont is attached as a demonstrative exhibit.⁶ Accordingly, American Airlines has called on the Department to provide "regulatory clarity on the use of ... public charter regulations to provide a facsimile of common carriage scheduled service...."⁷

JSX's scale underscores the point of ALPA and American: allowing these public charter operations to use a loophole to mimic scheduled service under Part 380's consumer rules and Part 135's safety regulations undermines the scheduled commercial service rules, as well as the highest-standard-of-safety rules under Part 121, that exist to avoid a repeat of the industry's history of aviation disasters. *See* compilation of accidents in ALPA Answer at 8-10.

⁵ Soon JSX could be considerably larger. Chris Sloan, *How a US Scheduled Charter Is Attracting An Upscale Customer*, Aviation Week (April 11, 2023) (37 aircraft in operation as of March 2023; of the 70-plus aircraft on property in total, the rest are being refurbished for service or, for older aircraft, used for spare parts).

⁶ JSX departures listed in DOT Charter Report - 2022 Prospectuses, Numbers 22-108 and 22-146, <https://www.transportation.gov/sites/dot.gov/files/2023-05/Charters%202022%20%285-19-23%29.pdf>.

⁷ American Airlines Response (May 16, 2023).

JSX's response that the loophole is legal misses the point. While legal, a loophole "is an ambiguity, omission, or exception (as in a law or other legal document) that provides a way to avoid a rule without violating its literal requirements." BLACK'S LAW DICTIONARY (11th ed. 2019) (online Westlaw). Using this loophole to swap "scheduled" for "charter" and thereby trade the highest standard of safety for a lesser one is an abuse of the public trust that must be corrected in the public interest.

The Balance of JSX's Points Are Circular and Unpersuasive

Stripped of its rhetoric (and there is a lot of it), JSX's response offers several other arguments, but none are persuasive. First, it (like SkyWest Charter) asserts that it has a Safety Management System program beyond what Part 135 requires. But such action is voluntary and the FAA has not yet mandated such a program under Part 135.⁸ More importantly, even if JSX cherry picks which Part 121 safety elements it wants to comply with, it still does not meet the host of other Part 121 safety measures such as the First Officer Qualification requirements (colloquially but misleadingly known as the "1500 hour rule"), significant Flight Duty and Rest requirement differences, centralized dispatch, age 65 pilot retirement, and secondary flight deck barriers, among others.⁹

While JSX implies that its safety programs surpass Part 121, JSX declines to embrace the

⁸ FAA, NPRM, *Safety Management Systems*, 88 Fed. Reg. 1932 (proposed Jan. 11, 2023).

⁹ In particular, there is a wide difference between the Flight Duty and Rest requirements of FAR 117 that apply to FAR 121 scheduled airline operations as compared to FAR 135 operations (FAR 135.267).

whole of Part 121. Its stance begs the question why it, and SkyWest Charter, refuse the Part 121 safety regime.

Second, JSX argues that the security treatment of its passengers is sufficient and that it would be nonsensical for it to use an airport terminal style security system because it doesn't use a terminal. Indeed, JSX emphasizes that its passengers can avoid the rigorous TSA security procedures – and security lines – and the resulting speed to the plane in its sales pitch. Transcript of Airlines Confidential podcast, *supra* (“[at Boulder Airport] you can be out of your car and on the plane in 20 minutes. I challenge anybody to get from a car to an airplane in 20 minutes at DIA [Denver Int'l Airport].”). See also JSX website, www.jsx.com (“Hassle-free[:] Valet your vehicle and stroll right in, just 20 minutes before your flight[:] Crowd-free[:] Wave goodbye to long lines and say hello to seamless, non-invasive security and a spacious, private oasis [:] Yes, that easy[:] Sip and sit back with business class amenities. After landing, be on your way in a matter of minutes.”) (emphasis added).

This argument ignores the threshold issue of why strict terminal security is required. Given that JSX offers a pre-set schedule to the public that is published and available for sale six months into the future, combined with its volume of flights, and its fleet of large jet aircraft, JSX should be required to use the terminal and ensure its passengers are subject to Part 121 scheduled commercial carrier TSA screening protocols to protect passengers and the rest of the country. TSA's no-fly terrorism

screening list under its “TFSSP” program by itself does not accomplish that task, which is why strict terminal security is appropriate. Indeed, to its credit, SkyWest Charter does not suggest flouting normal TSA airport security screening as it would deliver mostly connecting passengers to and from major airline gate areas.

Stated succinctly, the purpose of TSA and its rigorous security policies and procedures that were prescribed in response to the attacks of September 11, 2001, is to prevent another aircraft hijacking and to prevent that aircraft from being used as a missile against a populated or important government building. JSX flies large, turbo-jet regional aircraft – *i.e.*, Embraer ERJ-135 and ERJ-145 aircraft – with the only difference being it reduced the number of seats on the aircraft. Regardless of the number of seats, an ERJ-135 or ERJ-1445 can be hijacked and can be used as a missile, especially when a set schedule is published months into the future and the public can purchase individual tickets. Although TSA’s procedures are beyond the Department’s jurisdiction, the safety and security of air travelers is a proper subject of the Department’s attention. Just as the FAA advocated for “One Level of Safety,” the Department should encourage “One Level of Security.” It can do so by declaring that JSX flights be subject to the Part 121 safety regime that goes hand-in-hand with normal TSA screening. Allowing JSX’s passengers and passenger baggage to bypass the screening regime that all other scheduled commercial airline passengers and bags must go through – including

passengers and baggage on comparable regional airlines – is another loophole that must be closed.

Third, JSX argues that its scheme stimulates competition. However, DOT and FAA regulations facilitate competition by defining the playing field and how competitors are permitted to compete. Loopholes, and abuse of loopholes, undermine those rules. And the public interest demands consideration of more than mere counterfeit competition to determine a public “good.” The United States has the safest air system in the world precisely because carriers compete under Part 121 scheduled service. By circumventing Part 121 Federal Aviation safety requirements, JSX undermines public safety and stimulates a race to the bottom. That does not serve the public interest.

Finally, JSX asserts that ALPA’s concerns are fake and an attempt to run JSX out of business. JSX cites no evidence to support this accusation. Rather, ALPA’s consistent position seeks to protect the safety of scheduled airline operations and the flying public created through compliance with Part 121. If JSX decides it cannot or will not comply with those requirements, it has only the designers of its business plan to blame.¹⁰

¹⁰ JSX’s recitation of the actions of other labor unions is incorrect in any event. The Association of Flight Attendants sued to block the application of Virgin America because British money and influence so dominated that carrier that the application violated the Department’s U.S. carrier ownership and control rules and thus would compete unfairly against Alaska Airlines. *AFA v. U.S. DOT*, 564 F.3d 462 (D.C. Cir. 2009). Although the AFA lost in court (on standing), the DOT in fact forced the company to re-structure its ownership to allay these exact concerns, although not to the AFA’s satisfaction. *Compare* DOT Order 2006-12-23, (Show Cause) at 1, Docket No. OST-2005-23307 (Dec. 27, 2006) with DOT Order 2007-5-11

JetBlue's Filing Does Not Address the Central Issues

ALPA's fundamental concerns in this case were not addressed by JetBlue's filing either. JetBlue's pleading defended JSX, in which it has invested money and holds an ownership stake. JetBlue likened this matter to the very different case brought by the U.S. global passenger carriers and labor unions against unfair competition created by market-distorting subsidies that some Middle Eastern governments injected into their national airlines. But this docket is centered on domestic air safety, not international competition: specifically, an end-run around domestic safety rules that would enable SkyWest Charter's proposed small-town domestic scheduled service, not unbridled Gulf carrier subsidies. In any case, no business model, however clever, should take precedence over flight safety and security. Respectfully, JetBlue's offered comparison is inapposite and does not assist the Department in deciding this case.

The Business Models of SkyWest Charter and JSX are Different but Both Illustrate Why the Scheduled Charter Loophole Must be Closed

JSX's business model, which is not at the core of this docket, does not rely on small, rural community flying, EAS or not. SkyWest Charter's plan, which is the focus of the application under review, does. It bears repeating that SkyWest has constructed a plan for its subsidiary's public charter business to avoid Congress' scheduled service

(Final) at 5, Docket No. OST-2005-23307 (May 18, 2007). Similarly, the Machinists opposed JetBlue because the waiver of New York airport slot rules it sought would have enabled the new entrant to compete with lower wages against existing airlines with IAM representation. DOT Order 99-8-12, Docket OST-99-5616 (Aug. 13, 1999). The Machinists' argument against special regulatory favors was forthright and logical, if unsuccessful.

mandate for EAS (although it suggests that it could use authority sought here for non-EAS markets in the future). If its focus is on EAS markets, then SkyWest Charter's business plan relies entirely on Department discretion in one of two ways: (1) a discretionary Department grant of monies under the Alternative Essential Air Service program (which would eviscerate the main Essential Air Service program as we know it), or (2) a discretionary Department waiver of Congress' scheduled mandate (which the Department previously and unequivocally said it has no power to do). *EAS at Ironwood, MI, et al.*, DOT-OST-1996-1266 & -1711, Order 2011-1-16 at 7 (Jan. 22, 2011) (reaffirming Order 2010-9-26). The Department should reinforce, not undermine, the hard-earned One Level of Safety for the traveling public. And setting aside the financial, managerial, and technical criteria of the alter-ego applicant, the Department ought not use its discretionary power to enable – or subsidize – a business plan for an alter-ego so conceived.

CONCLUSION

Part 135 operators have an appropriate, limited role in the national aviation network. But JSX and SkyWest Charter share or propose to share common use of a loophole that abuses the intent of charter rules and Part 135's safety regulations. For the

reasons set forth here and in ALPA's prior pleadings, the Department should close the loophole and deny the application.

Dated: July 6, 2023

Respectfully submitted,



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Exhibit: Comparison of Commutair, Piedmont, and JSX

Exhibit: Transcript of Airlines Confidential podcast

CERTIFICATE OF SERVICE

I hereby certify that I have this 6th day of July, 2023, served the foregoing document by email on the following persons:

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