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Inside the Antitrust Challenge to the American Airlines–JetBlue Airways "Northeast Alliance"

By Benjamin R. Dryden

On May 19, 2023, after a month-long bench trial, a federal district court in Massachusetts found the Northeast Alliance (Alliance) between American Airlines (American) and JetBlue Airways (JetBlue—and together with American, the Parties) violated the federal antitrust laws.[1] Announced in 2020, the Alliance was a contractual joint venture that had effectively combined the Parties' operations for certain flights in and out of Boston, New York City, and Newark (collectively, Northeast). The Department of Justice's Antitrust Division (DOJ) and a coalition of six states and the District of Columbia (collectively, Government) challenged the Alliance under Section 1 of the Sherman Act,[2] which prohibits agreements that unreasonably restrain trade. The court found that although the Alliance created real, tangible benefits for consumers, the Alliance nevertheless amounted to an illegal restraint of trade by American and JetBlue. The court's decision stands as a reminder that agreements among horizontal competitors can warrant close scrutiny under the antitrust laws, even if they create benefits for the companies involved and for consumers.

The Northeast Alliance

Announced in July 2020, the Alliance was an effort to optimize the Parties' respective route networks in the Northeast by coordinating their flight schedules and making the most efficient use of their respective fleets. The core of the Alliance was a commitment by American and JetBlue to pool their respective revenues, assets, and operations in the Northeast. Importantly, the Parties did not coordinate with one another on prices; instead, each Party committed to set its airfares independently of one another. The Parties did, however, adopt a formula to share the Alliance's revenues, regardless of which Party operated a particular flight. In the court's description, this revenue-sharing formula made the Parties "indifferent to whether a passenger flies a particular [Alliance] route on an American plane or a JetBlue plane."[3]

In several ways, the Alliance provided meaningful benefits for the Parties and consumers alike. For instance, in order to permit passengers to make connections between terminals, the Parties developed a shuttle bus to connect their respective terminals at John F. Kennedy International Airport (JFK). Additionally, JetBlue was given access to nearly 100 slots, i.e., authorizations for takeoffs and landings, at JFK and LaGuardia, which JetBlue operated using larger airplanes than the small regional jets that American had historically used at JFK. The net effect was to provide much-needed new capacity out of New York City—a substantial benefit for consumers.

Commitments to the Department of Transportation

Before the Alliance could take effect, the Parties were required to notify the Department of Transportation (DOT) to allow DOT to review the proposed arrangement.[4] As part of DOT's review, DOT consulted with

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Chair's Message

By Abby Bried

Welcome to Volume 36, No. 1 of *The Air & Space Lawyer*! It is a preeminent publication of the ABA and our industry thanks to the incredible Editorial Board, ABA staff, and many contributors over the years who have worked tirelessly to provide us with timely and insightful articles and information. A special shout out to Kathy Yodice, Managing Editor, for her nearly 20 years working on *The A&SL*. Thank you Kathy, for all the work!

This issue of *The A&SL* is another example of their incredible work featuring great articles: An interview with Marc Nichols, FAA Chief Counsel who is a key player in the changing industry; Amanda Geary of Eckert Seamans tackles the FAA's recently issued notice of proposed rulemaking on requirements and qualifications for powered-lift operations, including eVTOL aircraft; and, Benjamin Dryden of Foley & Lardner provides an insightful account of the antitrust litigation involving the American Airlines-JetBlue Northeast Alliance. Continuous learning via *The A&SL* is a must for us all!

I am very excited to kickoff my tenure as Chair, with a focus on building for the future of the Forum on Air & Space Law. It starts with implementing the strategic plan developed by my predecessors. The main change is the new organization structure of the Forum and newly created roles. Please join me to welcome the new Governing Committee:

- Chair Elect—Jack Rossi
- Secretary—Leslie Abbott
- Treasurer—Brian Friedman
- Programs—Rachel Welford
- Education—Brian Hedberg
- Futures—Graham Keithley
- DEI—Amna Arshad
- Immediate Past Chair—Marc Warren

The new Advisory Committee is also being rolled out, consisting of Chairs for Committees such as Scholarship, Mentorship, Communications, and Sponsorship (among many others). Many new members are stepping up and into these roles. I am a huge believer in developing leadership skills and experience by taking on roles in industry associations. We would love to see more participation from Forum members. Please just raise your hand and we can find a spot for you.

Let's not forget that the best way to participate is to be present at our events that bring so much value to the new and experienced aerospace practitioner. Our 2023 annual conference in Dallas, the Big "D" event, was a great

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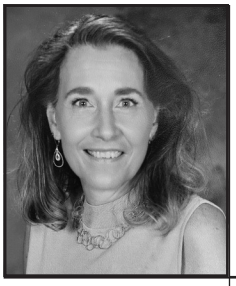

Managing Editor's Column

By Kathleen A. Yodice

Fall started off very well for our Forum. The Forum's annual conference was held in Dallas, Texas, at the end of September with lots of energy, timely content, robust discussion inside and outside the conference rooms, and a new set of officers to guide our Forum and its members going forward. The Big "D" (and we don't mean "Dallas") did not "d"isappoint as the presentations, the networking, and the mentoring provided cutting edge information and access. As your lieges of the Forum's publication, *The Air and Space Lawyer*, Jonathon Foglia and I look forward to furthering that momentum (along with the talents of our Editorial Board) to deliver informative, insightful, and thoughtful content.

We start this issue with a message from our new Forum Chair, Abby Bried, as she outlines the things we are looking forward to in the Forum's future which will encompass the traditional as well as the novel. I know that we all stand ready to help Abby and our Forum to successfully continue and evolve along with the aerospace industry. Heartfelt thanks to immediate past Chair Marc Warren for his valued support of the Editorial Board during his tenure.

Next up in the issue is an interview with Marc Nichols, who took the helm of the FAA Chief Counsel's office in early 2022 and quickly identified and implemented changes to help his office better provide legal services to the entire agency. Marc shares the steps in his impressive career that led him to taking over the legal office at the FAA. And, he details the challenges the agency is facing, including the regulation of emerging technologies such as electric aircraft, unmanned systems, and space flight. Marc also gives us a glimpse into what drives him outside of work.

We are then treated to an article that introduces us to powered-lift. In her article, Amanda Geary of Eckert Seamans captures the development of new aircraft with the capability of taking off and landing vertically, a kind of combination of rotorcraft and fixed wing. Amanda describes how and why the current regulatory framework is not an adequate fit for these revolutionary new aircraft, and she takes us through the FAA's recent Notice of Proposed Rulemaking that is intended to update the FAA regulations to integrate this new technology into our airspace system.

And rounding out this issue is an explanation of the antitrust litigation involving the "Northeast Alliance," written by Benjamin Dryden of Foley & Larnder. Benjamin explains the collective governments' challenge to the joint venture agreement between American Airlines and JetBlue Airways for flights in and out of Boston, New York City, and Newark. Benjamin is able to give us a perspective on the parties' varying views of the process and the law that led to the district court's ruling that the airlines' actions violated the antitrust laws in several ways. Benjamin calls out lessons from the court's decision that he puts forth as potentially guiding the direction of similar transactions in the future, at least one of which is currently pending.

I and the entire working Editorial Board look forward to bringing skilled authors and their articles to the coming issues to keep us informed and interested in our respective practices. As always, ideas and participation from Forum members are greatly encouraged, so please feel free to reach out to me at kathy.yodice@yodice.com, or Editor-in-Chief Jonathon Foglia at jfoglia@cozen.com, to make suggestions for content in future issues and to offer an article of your own!

Kathleen A. Yodice, Esq., kathy.yodice@yodice.com, is managing partner of the Law Offices of Yodice Associates, based in Potomac, Maryland. She started her government career as a law clerk at the FAA in 1985 before moving into private practice in 1998. She is an instrument-rated private pilot, and her practice touches all aspects of aviation law.

An Interview with Marc Nichols

Chief Counsel of the Federal Aviation Administration

Marc Nichols, marc.nichols@faa.gov, was sworn in as Chief Counsel of the Federal Aviation Administration (FAA) on January 5, 2022. He provides legal advice for all aspects of agency operations and works closely with the Department of Transportation's Office of General Counsel on issues of national significance to the aviation industry.

A&SL: Please share a little background about yourself. Where did you grow up? Where did you go to school?

I spent my early years in Utica, New York. I have lived in Indianapolis, Denver, London, Berlin, New York City, and Virginia. I attended Wabash College in Indiana for my Bachelor of Arts degree and Washing-ton & Lee University in Virginia for law school.

A&SL: What influences led you toward practicing law?

Cinema. As a kid, I was always oddly interested in how institutions make decisions and how scoping a conversation might improve an outcome. I saw *12 Angry Men*, and I was fascinated that we accepted total strangers with disparate opinions coming together to decide someone's fate because of the guardrails—a jury of one's peers duty-bound to follow the law. Then I saw the limits of those guardrails in *To Kill a Mockingbird*. That juxtaposition underscored the value of looking at every aspect of a system, which is a career theme for me. I gravitate toward opportunities to work with complex products and systems.

A&SL: You previously worked at Saab and Rolls-Royce before coming to the FAA. What did your work entail at those companies?

Ironically, both companies are well-known car brands that no longer manufacture automobiles! They're both steeped in defense and civilian aircraft-related products. When I joined Rolls-Royce as Global Legal Counsel, I supported their defense and civil businesses. As Director of Compliance for North and South America, I spent a fair amount of time working to minimize damage from the Operation Car Wash bribery scandal in Brazil and some of the related international investigations, which culminated in me helping build a stronger compliance program.

As SAAB's EVP, General Counsel and Corporate Secretary, I supported its efforts in component manufacturing and air traffic management software in the U.S. and Canada while also providing legal and strategic counsel to the CEO and the board.

A&SL: You also served as the Inspector General at the U.S. Government Printing Office. What kind of work did you do there?

My job was to protect the public by making sure it got what it paid for and that records were accurate. This may surprise people, but the printing industry ranks third in graft, according to statistics. We had cases where people would print bogus excerpts from the Congressional Record to commit fraud. Other cases involved documents that were supposed to last 50 years but would not last nearly that long because printers would use flimsy paper after quoting and charging the government for heavy stock product.

A&SL: What has been a memorable accomplishment during your legal career?

The work on the bribery scandal [Operation Car Wash] was marquee. It was a mammoth undertaking in a crisis environment. It probably is not an understatement to say every lawyer hopes to be involved in "a bet-the-company" project where the survival of the company is at stake. Global scandals can be corporation killers. I was immensely proud to be a leader on the team that helped stave that off while putting Rolls-Royce in a better position ethically and operationally.

A&SL: What led you to take the FAA Chief Counsel job?

I knew I'd be serving during arguably the most exciting and challenging time in FAA history due to the growth of commercial space and advanced air mobility, a pending reauthorization, and some massive, post-COVID workforce changes. I also would have the honor of serving under President Joe Biden and Secretary Pete Buttigieg, who were committed to restoring our standing internationally, investing in aviation infrastructure, and showing respect for the incredibly devoted public servants who keep our national air space the safest on the planet. The FAA is represented by some of the best, and we owe them our support.

A&SL: Since joining the FAA, what has surprised you the most about the FAA and its legal office?
First, I knew the Chief Counsel was the third-highest ranking officer at the FAA, but I was surprised at how nearly every action requires the imprimatur of the Chief Counsel on legal sufficiency, though this makes sense when you look at how heavily regulated aviation is.

Second, our legal office was perceived by some as not customer focused. I thought this impression was largely unfair, but the FAA can sometimes be siloed like any large organization, and our attorneys were not always brought into a project at inception. This is why I created the Division Counsel role, which would have a lead attorney reporting to each line of business to learn the direction of each project. This approach would speed the delivery of our entire regulatory and legal portfolio. We're not moving as fast I'd like, but some of that is due to the restraints of the law. Nonetheless, we've made great strides without compromising safety, and we're not done yet.

Last, I was surprised to learn that 40% of the Chief Counsel's Office is retirement-eligible in the next three years (over 50% of its leadership ranks), and the FAA overall has only slightly better numbers. That definitely added urgency to recruiting and ensuring we get as many diverse communities as possible interested in aviation and into the agency. Consequently, succession planning has been crucial. We're building a bench of leadership for the agency, bringing in new talent, elevating talent already within the agency who perhaps were ready for more challenges but were languishing in roles that did not take full enough advantage of their talents, and changing our excellent lawyers who were misplaced in managerial roles simply because they are superb attorneys.

A&SL: What are the biggest challenges for the FAA today and what do you hope to accomplish at the FAA?
There is a lot that the FAA is doing: integrating eVTOLs and UAS (unmanned aircraft system) into the NAS (National Aircraft System); facilitating an increase in commercial space launches and reentries while regulating the industry to protect public health and safety; implementing strategic traffic management initiatives as demand for commercial air travel exceeds pre-COVID levels; and coping with the aging workforce I noted and personnel changes from COVID. We're facing the loss of a lot of institutional memory, and because most aviation positions are highly technical, it takes time to build the skills and gain the experience needed to perform at the highest level. For the industry, there are capacity issues we need to deal with and some outdated technology and facilities, which we've begun refurbishing and modernizing.

As far as goals go, we are reorganizing to accelerate rulemaking and overall legal review times for our clients and stakeholders, fostering a closer working relationship with the DOT Office of the Secretary, and being more engaged with industry, labor, and Congress, especially as we move through reauthorization. We are also creating a succession plan that ensures we continue to provide exceptional legal guidance and work product and allocate personnel to areas of urgent need and opportunity with a forward focus.

For example, I set up an information law and national security branch to deal with the increasing FOIA workload and to help the FAA protect its intellectual property and handle cybersecurity issues, respectively. I also stood up an internal Emerging Technologies Working Group to ensure we're looking ahead.

I hope that, at the end of my tenure, those we serve will say my time was consequential. But if I get at least the accolade Harry Truman once noted favorably on a tombstone — "He did his damnedest"— I can live with that.

A&SL: What's your passion when you're not at work?
I like hiking, cooking, and music. Hiking is my way to maintain an exercise regime while communing with nature. Cooking is my "me time." My family knows to clear out when I am in the kitchen. Music is my decompression. I always played an instrument, be it tuba, saxophone, or trombone, and I was in the glee club, though now my singing is restricted to the shower or while I'm alone in my car.

But my main non-work passion is my 18-year-old brother, whom I was entrusted with guardianship last year when his mother passed away (our mutual father passed away in 2018). I am committed to ensuring he develops into the young man we know he is capable of being.

Ready for Takeoff: Introducing Powered-Lift in the Next Era of Civil Aviation Innovation

By Amanda Geary

From the Wright Brothers's groundbreaking flight with the Kitty Hawk Flyer to the post–World War I expansion of piston-powered aircraft for passenger operations, aviation innovation soared in the early half of the 20th century. Now, the advent of powered-lift brings a new era of aviation advancement. Communities around the world can soon expect to see these hybrid airplane-helicopter aircraft, some mirroring the design of the common car, buzzing overhead.

The Federal Aviation Administration (FAA or Agency) defines *powered-lift* as heavier-than-air aircraft capable of vertical takeoff and landing. These aircraft typically transition between operating as a rotorcraft, with flight on the rotors, and operating as an airplane, with flight on the wing, during different phases of operation. While the military has long used powered-lift as part of its fleet, no civilian powered-lift are currently type-certificated for commercial operations.

Before these revolutionary new aircraft enter our National Airspace System (NAS) for civilian passenger operations, the FAA must implement regulations to dictate who can fly these aircraft and the operational and safety rules that will govern this next phase of aviation modernization. Indeed, the current regulatory framework is insufficient to accommodate civilian powered-lift operations in the NAS. While the powered-lift category was first added to the *Code of Federal Regulations* title 14 (14 C.F.R.) in 1997, the FAA never implemented corresponding operating rules or airworthiness standards to fully integrate these aircraft into the civilian sector. Simply stated, the operational design and engine characteristics of these aircraft were not contemplated when the FAA drafted many of the current regulations.[1]

On June 14, 2023, the FAA took a consequential step toward making civilian powered-lift operations a regulatory reality. The Agency published its long-awaited notice of proposed rulemaking (NPRM) detailing the proposed airmen qualifications, operating rules, and certification requirements for the initial groups of powered-lift pilots.[2] The NPRM's publication comes as part of the FAA's multifaceted rulemaking approach to integrate powered-lift into the regulatory framework, complementing both the Agency's Modernization of Special Airworthiness Certification (MOSAIC) proposed rulemaking[3] and its final rule incorporating powered-lift into the definition of *air carrier operations*.[4] The NPRM also supports the Department of Transportation's (DOT) broader initiative to integrate advanced air mobility (AAM) into the civilian sector.[5]

The FAA's recent suite of rulemaking activity and corresponding public awareness efforts follow years of shifting approaches on the best proposed method to certificate these aircraft for commercial use in the NAS.[6] Only one week after the NPRM was published, DOT's Office of Inspector General (OIG) released a report detailing these challenges, and others, that hinder the FAA's progress in preparing for civilian powered-lift operations. The report found that "ineffective coordination and communication, as well as the lack of timely decision-making and established policies" continue to harm the FAA's progress.[7] In other words, the FAA, like many administrative agencies, has struggled to keep pace with burgeoning technological advancement.

In response to the OIG's findings, the FAA promised to accelerate publication of the final rule proposed in the NPRM and fast-track other rulemakings that aim to fully integrate powered-lift civil operations into the NAS.[8] The Agency's response, however, largely ignores the administrative barriers that slow any regulatory agency's ability to effectively promulgate timely rules and fails to provide a plan to remedy the institutional problems that necessitated the FAA's reliance on a fast-track posture to begin with. Instead, the FAA's response foreshadows continued stress on an overburdened staff-level workforce that lacks the upper-level leadership support to effectively deliver on the Agency's promises.

Nevertheless, understanding the FAA's proposal is key to assessing the likely outcome of the final rule and other rules that are expected to enhance

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integration of emerging technology. For example, uncrewed aircraft systems, or drones, have long been used in military operations, but their integration into the NAS for commercial operations has been slow relative to other countries, despite the technological readiness of both manufacturers and the necessary equipment. As the Agency begins to deliver on its promises to integrate AAM operations into the NAS, the NPRM is illustrative of one likely approach that we can expect to see for other emerging technologies that are long overdue to change the FAA's helicopter- and airplane-centric regulatory framework.

Special Federal Aviation Regulation Framework

The NPRM proposes a Special Federal Aviation Regulation (SFAR) that will remain in effect for 10 years after the final rule's publication. An SFAR permits the FAA to make assumptions about technology that can later be rectified if contrary operational data is collected and allows the FAA to modify the rules over the SFAR's life span. As a result, an SFAR enables the FAA to adapt its regulations as the industry develops, allowing critical flexibility when drafting rules related to emerging technology. It serves as a noncommittal mechanism to achieve regulatory integration without first fully knowing how the operations will work.

During the SFAR's 10-year term, the FAA would collect operational data to inform future adoption of permanent regulations.[9] The FAA's use of an SFAR, as opposed to more traditional regulatory frameworks, is consistent with its approach to enable other operations that were initially supported by limited data. For example, the FAA utilized an SFAR in 1975 when it permitted instrument helicopter operations pending the further collection of operational data.[10] Thus, while the SFAR method is relatively unique, it is not unprecedented.

The SFAR would be housed in a new subchapter L, "Other Special Federal Aviation Regulations," and consist of 14 C.F.R. part 194, SFAR No. 120. In addition to this new subchapter, the NPRM also proposes permanent amendments to several existing regulatory parts, including Parts 61, 91, 135, 141, and 142.[11]

Type Certification and Noise Standards

In the spring of 2022, the FAA declared it would certificate powered-lift as special class aircraft under 14 C.F.R. § 21.17(b), a drastic change from its prior representations that powered-lift would be certificated and operate under more traditional airplane rules.[12] The NPRM confirms this change in direction and notes that when a Part 91 or Part 135 operational rule cross-references an airworthiness standard found in other parts, the FAA will review the requirements and determine whether that standard, or a new one, should apply.

The FAA employed a similar rationale for noise requirements, noting that it will examine each powered-lift type certification application to determine whether existing noise certification standards should apply, or whether a new rule of particular applicability should be promulgated.[13] Although not discussed in the NPRM, noise pollution and its expected impact on communities that live underneath low-altitude powered-lift flight paths could serve as a significant barrier to public acceptance of civilian powered-lift operations. In practice, the NPRM leaves the question of noise pollution for resolution during public comment on the individual powered-lift type certification applications, and the broader implications for consideration under DOT's AAM initiative.

Qualification of Powered-Lift Flight Simulation Training Devices

In noting the absence of qualification performance standards for powered-lift flight simulation training devices (FSTDs), the NPRM proposes to use existing FSTD qualification standards for airplanes and helicopters. If the existing FSTD qualification standards are insufficient, a Part 119, 141, or 142 certificate holder that seeks qualification for a powered-lift FSTD may propose standards that illustrate an equivalent level of safety. Upon receipt of a new qualification standard, the FAA would publish the proposed standard for public notice and comment.

The report found that "ineffective coordination and communication, as well as the lack of timely decision-making and established policies" continue to harm the FAA's progress.

The NPRM notes that a small number of FSTD qualification projects are currently in progress, for which the FAA had previously indicated deviation authority under 14 C.F.R. § 60.15(c)(5) would be used as the basis for approval. As necessary, the FAA proposes to collaborate with the appropriate stakeholders to ensure an efficient transition to the new framework proposed in the NPRM. It is unclear how many FSTD stakeholders have already relied on the FAA's earlier position with respect to the use of deviation authority, and the costs such stakeholders might incur if the basis for approval were to change.[14]

Certification of Powered-Lift Pilots

The NPRM proposes that pilots hold a powered-lift-specific type rating to serve as pilot-in-command (PIC). This requirement would also apply to military pilots who wish to operate powered-lift civil aircraft and currently hold a commercial pilot certificate with a powered-lift category or instrument-powered-lift

rating. To facilitate the type-rating requirement, each flight standardization board—generally consisting of pilot candidates that convene when the FAA requires a type certificate for an aircraft—would evaluate the powered-lift operation on a case-by-case basis to determine the special training requirements necessary to certificate the PIC. However, the type-rating requirement would not apply to operations with powered-lift issued a special airworthiness certificate. Instead, pilots operating those aircraft would continue to be governed by familiar operating limitations, including the prohibition on operating over densely populated areas and restrictions on the purpose of the operation.[15]

To serve as second-in-command (SIC) under Part 91 operations, except for fractional ownership operations conducted under Subpart K of Part 91, the NPRM proposes that pilots meet the existing requirements under 14 C.F.R. § 61.55. This includes the existing type-rating requirement for SICs operating powered-lift in international airspace.[16]

To enable pilots to accomplish their practical test in a full flight simulator (FFS) and earn their type rating, the NPRM would amend existing § 61.64. Under the FAA's proposed amendments, supervised operating experience (SOE) would be required for all powered-lift type-rating applicants that complete their practical test in an FFS and have less than 500 hours of flight time in the specific powered-lift for which the rating is sought. These applicants would be required to complete 25 hours of SOE under the observation of a PIC who holds the appropriate ratings without limitation. To ensure a qualified PIC can observe the pilot conducting SOE, "the FAA expects [] manufacturers to develop a version of the aircraft to contain fully functioning dual controls."[17]

The NPRM proposes alternate aeronautical experience and logging requirements for obtaining a powered-lift category rating and instrument-powered-lift rating for those pilots who hold at least a commercial pilot certificate with an airplane category and single- or multiengine class rating, or a rotorcraft category and helicopter class rating. Only those pilots who meet these rating and certificate standards and hold an instrument-airplane or instrument-helicopter rating corresponding to a category rating at the commercial pilot certificate level would be eligible to utilize the FAA's proposed alternate pathways.

The FAA's alternate aeronautical experience and logging requirements for obtaining a powered-lift category rating and instrument-powered-lift rating would also depend on whether the individual is a test pilot or an instructor pilot, part of the initial cadre of instructors, or a pilot receiving training under an approved training program. However, the proposed distance reduction for satisfying the cross-country experience needed for a commercial pilot certificate, instrument-powered-lift rating, and private pilot certificate would apply equally to all pilots. In addition, Part 141 pilot schools would be able to utilize the proposed alternate cross-country distances.[18]

The NPRM proposes an alternate means for instructor pilots and management officials within a manufacturer's organization to provide logbook and training record endorsements required under Part 61, despite not meeting the strict definition of *authorized instructor* to conform with existing regulatory requirements.[19] In part, these instructor pilots and management officials would be able to provide required logbook and training record endorsements necessary for commercial pilot certificates with a powered-lift category rating, an instrument-powered-lift rating, a powered-lift type rating, or a flight instructor certificate with a powered-lift rating for specific applicants, including test pilots and authorized check pilots, instructors, or training center evaluators.

In a series of clarifying and miscellaneous amendments, the NPRM also proposes solo flight time requirements for applicants seeking a private pilot certificate with a powered-lift category rating, as well as an allowance for pilots to credit SIC time accrued under an SIC Professional Development Program (PDP) toward an airline transport pilot (ATP) certificate with a powered-lift category rating. Pilots who rely on flight time logged under an SIC PDP would be required to have a limitation on their ATP certificate indicating that they do not meet the PIC aeronautical experience requirements currently identified as an International Civil Aviation Organization (ICAO) recommended practice—assuming the recommended practice becomes an international standard before publication of the final rule.[20]

The NPRM's discussion of the pilot certification proposal is creative and comprehensive, addressing potential regulatory roadblocks affecting powered-lift pilots ranging from the private pilot to the ATP certificate level. These unique multifaceted approaches to crafting alternate aeronautical experience and logging requirements demonstrate ingenuity in fashioning solutions for the expected difficulties that powered-lift pilots will face when navigating the current regulatory structure. The proposal conveys consideration of the complex interplay between the existing requirements and the pitfalls expected to arise, proving that the Agency is committed to fully integrating civilian powered-lift into the NAS and making the regulatory framework accessible to accommodate these operations.

Training in Part 135, 141, and 142 Programs

The NPRM also details the temporary provisions proposed to allow Part 135, 141, and 142 training programs to provide curricula for powered-lift ratings. The proposal includes a temporary pathway for Part

135 operators to implement curricula that would allow certain pilots to accomplish the aeronautical experience and training requirements necessary to add an instrument-powered-lift rating, a powered-lift category rating, and a type rating on their commercial pilot certificate. The proposal would permit a Part 135 operator to provide certain Part 61 training for basic certification. Only those pilots who hold at least a commercial pilot certificate with certain airplane or helicopter ratings and are employed by a Part 119 certificate holder would be eligible to participate in the Part 135 airman certification training curriculum for powered-lift ratings.[21]

The FAA did not propose any additional relief for Part 141 pilot schools, instead noting that these schools will likely have to obtain the necessary training for powered-lift ratings from the manufacturer, using the SFAR's proposed alternate experience requirements. Similarly, the FAA notes in the NPRM's preamble its expectation that Part 142 training centers would establish their initial cadre of instructors using those pilots who satisfy their training pursuant to the proposed alternate requirements.[22]

The NPRM also proposes waiver authority for pilot examiners, and a corresponding allowance for Part 141 pilot schools, to permit a pilot applicant to forgo a task required by the Airman Certification Standards (ACS) and related training activities that cannot be performed in the tested powered-lift when conducting a practical test. However, a pilot cannot serve as SIC in a powered-lift that is capable of performing the tasks that were waived during the practical test unless certain requirements are met.

The NPRM further proposes in certain cases to waive the requirement that type rating applicants be required to hold or concurrently obtain an instrument-powered-lift-rating when taking their practical test. For those pilots that forgo the instrument rating requirement, they may be granted a powered-lift type rating for a set period with a visual flight rules (VFR)–only limitation. Private pilots, however, would be allowed to maintain a VFR-only limitation indefinitely, if their type rating is for certain non-turbojet-powered small powered-lift.[23]

Operations Conducted Under Part 135

For certificate holders conducting commuter operations under Part 135 with two pilots required by the powered-lift type certification, the FAA proposes an alternate means of compliance with § 135.3(b). For those operations, certificate holders would need to comply with the Advanced Qualification Program in Subpart Y of Part 121. In addition, the FAA proposes that these PICs receive certain training on leadership and command. The NPRM likewise would apply several other provisions in Part 135 to powered-lift operations under that part, including the standards in § 135.4(a)(3) and the requirement that powered-lift PICs serving in certain on-demand and commuter operations hold an ATP certificate with a powered-lift category rating and a type rating for the powered-lift flown, not limited to VFR. The FAA's restriction on the use of VFR-only type ratings would also apply to aircraft fractional ownership operations conducted under Subpart K of Part 91.[24]

Operational Rules for Powered-lift

Under the FAA's proposal, specific Part 91 and Part 135 operating rules would apply to powered-lift operations. Throughout the NPRM preamble, the FAA notes that its "overall approach" was to err on the side of being conservative.[25] In this regard, the FAA declares that insufficient operational data is available to validate a less conservative approach for powered-lift operations. As an example, airplane fuel-reserve requirements prescribed under § 91.167 would apply to powered-lift operations, instead of the less-restrictive fuel-reserve requirements allowed for rotorcraft operations.[26]

The NPRM also details the temporary provisions proposed to allow training programs under Parts 135, 141, and 142 to provide curricula for powered-lift ratings.

The NPRM would, however, allow for the less-restrictive rotorcraft rules to apply in cases where the FAA has already validated the operational capacity of powered-lift akin to that of rotorcraft. For example, powered-lift would be able to satisfy the requirements of § 91.509(a), mandating life preservers and certain lifesaving equipment for use in a water emergency, through compliance with the helicopter-specific definition of *extended overwater operations*. In reaching this conclusion, the FAA notes that powered-lift, like helicopters, will be able to land on offshore heliport structures in the event of an emergency.[27]

Powered-lift operators would also be permitted to use the copter procedures permitted under § 97.3, for those powered-lift that have a standard airworthiness certificate for IFR operations and meet system design and stability requirements equivalent to certain helicopters. Similarly, certain helicopter requirements of Part 136 would apply to enable the operation of commercial air tours in powered-lift.[28]

Air Traffic Operations

In one of its final substantive discussions, the NPRM notes that Air Traffic Order 7110.65 will need to be modified to include standards and procedures for

powered-lift operations. In the meantime, the standards and procedures applicable to powered-lift by virtue of their classification as aircraft will continue to apply.[29]

The FAA's limited discussion on the plan to integrate powered-lift into air traffic operations comes only one week before the OIG released a report detailing the challenges with air traffic operations. The report found that controllers at many facilities were working mandatory overtime and six-day workweeks to cover staffing shortages. In part, the report detailed that internal FAA disagreement hindered its ability to maintain adequate staff.[30]

The NPRM's publication only one year after the final decision on the direction for certificating powered-lift was declared should be viewed as a momentous achievement.

On July 18, 2023, the FAA published its Advanced Air Mobility Implementation Plan (Plan) detailing, in part, the expected integration of powered-lift into air traffic management. In the short term, the Plan anticipates that AAM operations will operate with a pilot on board under VFR in visual meteorological conditions. As a result, the FAA expects AAM aircraft, including powered-lift, will be managed under existing air traffic control procedures and protocols designed for fixed-wing and rotorcraft operations. The Plan details a general approach to accommodate airspace route design and usage, and control traffic management for an increase in VFR operations. In the long term, the Plan proposes the possible use of supplemental directives, special air traffic rules, and updates to local air traffic facilities.[31]

Conclusion

Overall, the FAA's efforts to date to integrate powered-lift operations into the NAS are an impressive feat. While one can lament the long-awaited arrival of the NPRM, the OIG's recent report details the institutional disagreement that hindered the timely publication of the Agency's proposal. The NPRM's publication only one year after the final decision on the direction for certificating powered-lift was declared should be viewed as a momentous achievement for the Agency's ability to draft innovative and timely regulations—a feat perhaps even more impressive when viewed in context of the challenges the Agency has faced.

There is, of course, more work to be done. The FAA recognizes this in more than a dozen passages throughout the preamble to the NPRM, citing the need for additional data and public comment to better understand the operational capability of powered-lift operations to implement its proposal. As the rulemaking team considers the more than 80 public comments from industry groups, pilots, and manufacturers filed in response to the NPRM and readies a final rule for publication, it also will have to simultaneously deliver on corresponding guidance documents and promised updates.

The road ahead is seemingly more daunting, with the Agency committing to fast-track publication of the final rule. Without a doubt, this commitment will be felt most pressingly at the staff level, while upper-level leadership demands expedited rulemakings in a system with institutional barriers that force it to move slowly.

For now, however, powered-lift manufacturers and their suppliers should take some solace in witnessing the FAA's long-awaited promises begin to come to fruition. In the absence of institutional disagreements, the FAA has begun to illustrate that it can manage the integration of emerging technology in our airspace system through implementation of creative solutions to manage risk and promote innovation. The FAA should assess the path it took to achieve this milestone, and the regulated community should acknowledge the NPRM's ingenuity while simultaneously maintaining its calls for Agency accountability to ensure the FAA's next major achievement for emerging technology is not overshadowed by its institutional shortcomings.

In all, the NPRM is cause for cautious optimism.

Endnotes

1. *See* Pilot, Flight Instructor, Ground Instructor, and Pilot School Certification Rules, 62 Fed. Reg. 16,220 (Apr. 4, 1997).
2. Integration of Powered-Lift: Pilot Certification and Operations; Miscellaneous Amendments Related to Rotorcraft and Airplanes, 88 Fed. Reg. 38,946, 38,947 (June 14, 2023) [hereinafter Integration of Powered-Lift].
3. Modernization of Special Airworthiness Certification, 88 Fed. Reg. 47,650 (July 24, 2023).
4. Update to Air Carrier Definitions, 88 Fed. Reg. 48,702 (July 26, 2023).
5. Integration of Powered-Lift, 88 Fed. Reg. at 38,947.
6. U.S. Dep't of Transp., Office of Inspect. Gen., AV2023037, Regulatory Gaps and Lack of Consensus Hindered FAA's Progress in Certifying Advanced Air Mobility Aircraft, and Challenges Remain 5 (June 21, 2023).
7. *Id.* at 5–6.
8. *Id.* at 28–29.
9. Integration of Powered-Lift, 88 Fed. Reg. at 38,950–51.
10. FAA Study of Limited IFR Operations in Rotorcraft, 40 Fed. Reg. 2420 (Jan. 13, 1975).
11. Integration of Powered-Lift, 88 Fed. Reg. at 38,950–51.
12. *See, e.g.*, Mike Hirschberg, *The FAA Makes a U-Turn on Its Approach to Powered-Lift, as the eVTOL Industry Tries to Hang On*, Vertical Mag. (June 23, 2022),

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DOJ to determine whether the Alliance would reduce competition or otherwise violate antitrust laws or principles.[5] After a nearly six-month DOT review, in January 2021 the Parties reached an agreement with DOT (DOT Agreement) intended to ensure that the Alliance would achieve the procompetitive benefits the Parties expected.[6] Among other things, the DOT Agreement stipulated that the Parties would not discuss fares or "revenue management strategies" with each other with respect to flights within the scope of the Alliance.[7] Moreover, with respect to flights outside the scope of the Alliance, the DOT Agreement provided that the Parties would not discuss fares, revenue management strategies, routes, schedules, or capacity.[8]

The DOT Agreement also required American and JetBlue to divest to third-party airlines a total of 13 slot pairs at JFK and Ronald Reagan Washington National Airport. Beyond this, the Parties also committed to certain "conditional" divestitures, whereby if they failed to increase capacity in New York City by specified targets, they would automatically be required to divest additional slot pairs.[9] This latter commitment was designed both to incentivize American and JetBlue to realize the Alliance's procompetitive potential and to create an automatic remedy if they failed to achieve the benefits they predicted.

The Government's Antitrust Challenge

Despite the commitments made to DOT and the promised procompetitive benefits, approximately nine months after the DOT Agreement was signed, the Government brought a civil lawsuit challenging the Alliance under the federal antitrust laws, seeking to unwind the Alliance. The Government's complaint alleged that the Alliance constituted the "modern-day version of a nineteenth-century business trust" by essentially merging the Parties' Northeast operations.[10] At trial, the Government supported its claims with the testimony of an economist who opined that by eliminating the incentives for American and JetBlue to compete with each other within the Alliance, the Alliance created "upward pricing pressure" that would have the effect of causing American and JetBlue to raise their prices, notwithstanding their commitment not to coordinate airfares directly.[11]

Additionally, because the Northeast represents approximately two-thirds of JetBlue's overall business, the Government claimed that the Alliance would lessen JetBlue's incentives to compete with American in other markets around the country. In other words, the Government alleged, the competitive effects of the Alliance were not limited to the Northeast but instead had the effect of causing the Parties to "pull [their] competitive punches in order to maintain a good relationship."[12]

American and JetBlue vigorously denied the Government's claims. By the Parties' account, the Alliance was a procompetitive collaboration that offered consumers a broader and deeper network, with more capacity, more amenities, and more efficient schedules in the Northeast. In support of their position, the Parties offered the opinions of their own economists, who opined that the Alliance, which had already been operating for more than a year before the trial began, was not harming competition but to the contrary was improving service quality and increasing output in furtherance of competition. In the end, the federal judge presiding over the trial heard testimony from over two dozen witnesses over the course of a month-long trial that included more than one thousand exhibits.

The Court's Decision

Before beginning its analysis, the court explained the three-step, burden-shifting approach that would govern the dispute:

> Restraints arising in the context of joint ventures ordinarily are subject to the rule of reason, which involves some form of burden shifting but is not a rigid framework. . . . First, the plaintiff must make an initial showing that the challenged agreement has a substantial anticompetitive effect. . . . If the plaintiff succeeds, the burden shifts to the defendant to show a procompetitive rationale for the restraint. . . . Should the defendant satisfy its obligation, the ultimate burden returns to the plaintiff. A plaintiff can prevail at this point with proof that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means. Absent such proof, the plaintiff may alternatively seek to establish that, on balance, the restraint's anticompetitive effects outweigh any procompetitive benefits.[13]

Following this three-step approach, the court began by determining whether the Alliance had a significant anticompetitive impact. The court found that the Alliance hurt competition in at least four ways. First, the court held that the Alliance "replaced direct and aggressive competition . . . with cooperation," notwithstanding the fact that American and JetBlue did not coordinate on prices.[14] According to the court, "this, in and of itself, is a fundamental assault on competition and an actual harm the Sherman Act is designed to prevent."[15] Second, the court found that by aligning JetBlue's business incentives with American's—not only within the Northeast, but more broadly

throughout the country—the Alliance had weakened JetBlue's status as a disruptive "maverick" in the industry.[16] Third, the court found that the purported "optimization" of the Parties' networks was reminiscent of "market allocation" agreements, which the antitrust laws generally regard to be per se unlawful.[17] In fact, even though the Government never claimed that the Alliance was per se unlawful, the court suggested that it might have accepted a per se allegation if the Government had made such a claim. Fourth, the court found that the Government had demonstrated a harm to competition through indirect, structural evidence, with proof that American and JetBlue each have the power to set pricing in the Northeast, as well as by demonstrating that the region is heavily concentrated and has substantial barriers to entry.[18]

Once the Government met its initial burden of showing a substantial anticompetitive effect, the burden of defending the Alliance fell to American and JetBlue. They argued that the Alliance's main goal was to improve their collective ability to compete with Delta, the airline that has the largest market share in the Northeast. The court, however, rejected this defense. This justification, in the court's words, "might be 'procompetitive' in the business sense of the word, but it is not on these facts 'procompetitive' under the law."[19] The court added in a footnote that "Delta is entitled to the fruits of the success it has achieved by operating independently in the free market. . . . The principles underlying the Sherman Act . . . are thwarted when less efficient competitors use their rival's success as an excuse to collaborate, rather than continue competing."[20]

Further, the court determined that the Parties had not demonstrated that they were merging "complementary" assets, such as "pooling resources to engage in research they could not independently fund . . . [or] combining capital to fund the renovation and expansion of a terminal at an airport."[21] The court acknowledged that a joint venture that accomplished those sorts of goals "might justify ancillary restraints that otherwise appear anticompetitive."[22] The Alliance, however, "does none of these things."[23] Instead, the court concluded that "the overarching purpose" of the Alliance—putting an end to competition between American and JetBlue in the Northeast—was "a naked assault on competition" itself, and the Parties had failed to satisfy their "heavy" burden of proving otherwise.[24]

Because American and JetBlue failed to carry their burden at the second step of the three-step burden-shifting framework, the court could have ended its analysis there. For completeness, however, the court also considered the third step of the burden-shifting framework—that is, determining whether the Alliance's benefits could be obtained through "less restrictive alternative arrangements."[25] The court placed great weight on the fact that American and Alaska Airlines (Alaska) have a West Coast International Alliance (WCIA) in place. The WCIA only involves revenue sharing between a select number of American's long-distance international flights and a select number of Alaska's domestic flights, a practice that the court referred to as "non-reciprocal revenue sharing."[26] The WCIA also excludes any routes where both parties have competing nonstop flights, does not involve coordination on capacity or scheduling, and does not involve coordination on any routes. The court cited these limits on the WCIA as proof that American and JetBlue could have obtained many of the same advantages from the Alliance through a less onerous arrangement.[27]

Because American and JetBlue failed to carry their burden at the second step of the three-step burden-shifting framework, the court could have ended its analysis there.

The court ordered the Alliance dissolved. The Parties briefly considered appealing the court's ruling to the U.S. Court of Appeals for the First Circuit. Ultimately, however, JetBlue decided to terminate the Alliance rather than continue litigation. JetBlue's decision likely reflects a recognition that the Alliance was complicating JetBlue's ongoing efforts to acquire Spirit Airlines (Spirit), a proposed merger that the DOJ, two states, and the District of Columbia are also challenging in parallel.[28]

Lessons from the Court's Decision

The court's decision offers three significant takeaways.

First, the decision emphasizes how suspicious the DOJ and other antitrust enforcement agencies can be of joint ventures, strategic alliances, and other collaborations that can have the effect of entangling rivals, especially in markets that are concentrated among a small number of firms. Such partnerships may have the effect of turning rivals into "frenem[ies]," as a deputy assistant attorney general of the DOJ recently put it.[29] Such collaborations not only eliminate any competition between the parties in the specific area of their cooperation, but they can also have "spillover" consequences that may affect competition in other areas. Remember, for instance, that the district court determined that the Alliance had diminished JetBlue's motivations to compete with American not only in the Northeast but also in other geographic regions.

Second, the court's decision serves as a timely reminder that for collaborations among competitors to survive antitrust scrutiny, they must have a distinct procompetitive purpose and impact. For instance, a

procompetitive purpose might be found from combining the complementary assets of two businesses to create an altogether new capability that neither business would have the ability or inclination to develop independently. However, even this goal might not be sufficient to withstand antitrust scrutiny on its own because the collaboration must also impose as few restrictions on competition as reasonably practical. Therefore, when the benefits of a collaboration can be obtained equally through two different models, businesses should choose the model that imposes the least competitive restraint.

Third, JetBlue's decision to dissolve the Alliance rather than appeal will no doubt play a significant role in the parallel litigation over JetBlue's proposed acquisition of Spirit, which is set for trial in October of this year before a different judge. The complaint in the merger case explains that the so-called Big Four airlines—American, Delta, United, and Southwest—together make up nearly 80 percent of the domestic airline industry. A combination of JetBlue and Spirit, neither of which is among the Big Four, thus raises the question of whether the proposed merger will "substantially . . . lessen competition, or . . . tend to create a monopoly."[30] Anticipating this question, the complaint alleges that one consequence of the Alliance is that "JetBlue no longer competes with American Airlines on [the majority of its flights]—and if this acquisition happens, Spirit won't either."[31] The Government's theory, in other words, is that JetBlue's acquisition of Spirit is not merely the number-six airline (JetBlue) merging with the number-seven airline (Spirit); instead, because of the Alliance, the effect is more like the number-one airline (American plus JetBlue) merging with the number-seven airline. By dissolving the Alliance, however, JetBlue may well have mooted this Government argument. Whether this dissolution is enough for JetBlue and Spirit to prevail in their merger litigation will be one of the key issues facing that court.

When the benefits of a collaboration can be obtained equally through two different models, businesses should choose the model that imposes the least competitive restraint.

Endnotes

1. United States v. Am. Airlines Grp. Inc., No. 21-11558-LTS, 2023 WL 3560430 (D. Mass. May 19, 2023).
2. 15 U.S.C. § 1 ("Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.").
3. *Am. Airlines*, 2023 WL 3560430, at *11.
4. *See generally* 49 U.S.C. § 41720.
5. Dep't of Transp., Review of American/JetBlue Agreements, 85 Fed. Reg. 51,552, 51,553 (Aug. 20, 2020).
6. Agreement with U.S. Department of Transportation Regarding Northeast Alliance Between American Airlines, Inc. and JetBlue Airways Corporation (Jan. 10, 2021), https://www.transportation.gov/sites/dot.gov/files/2021-01/Agreement%20terminating%20review%20DOT-AA-B6%20with%20appendix%20011021%20website.pdf.
7. *Id.* at 2.
8. *Id.*
9. *Id.* at 5.
10. Complaint at 3, United States v. Am. Airlines Grp. Inc., No. 21-11558 (D. Mass. filed Sept. 21, 2021), https://www.justice.gov/media/1167621/dl?inline.
11. United States v. Am. Airlines, No. 21-11558-LTS, 2023 WL 3560430, at *23 (D. Mass. May 19, 2023).
12. Complaint, *Am. Airlines*, ¶ 73.
13. *Am. Airlines*, 2023 WL 3560430, at **30–31.
14. *Id.* at *33.
15. *Id.*
16. *Id.* at *34.
17. *Id.* at **35–36.
18. *Id.* at **36–38.
19. *Id.* at *39.
20. *Id.* at *39 n.94.
21. *Id.* at *40.
22. *Id.*
23. *Id.* at *41.
24. *Id.* at *40.
25. *Id.* at *43.
26. *Id.* at *8.
27. *Id.* at *9, **43–44.
28. *See generally* Complaint, United States v. JetBlue Airways Corp., No. 22-10511 (D. Mass. filed Mar. 7, 2023), https://www.justice.gov/d9/case-documents/attachments/2023/03/07/412272.pdf.
29. Andrew Forman, Deputy Assistant Att'y Gen., The Importance of Vigorous Antitrust Enforcement in Health Care (June 3, 2022), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-andrew-forman-delivers-keynote-abas-antitrust.
30. *See generally* 15 U.S.C. § 18.
31. Complaint, *JetBlue*, ¶ 15.

Chair's Message

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example. Focused on disruption within the industry, especially in NASA's backyard, we learned a lot from the packed program. Next up is December's Aviation and Space Finance Conference in New York, and the 2024 Washington Update Conference on February 24 in Washington, DC.

I want to thank Marc Warren for his tireless work as Chair over the last two years to keep our Forum "the bestever" and leading us out of the pandemic into a robust recovery. We are also blessed with the continued involvement of past Chairs. I have big shoes to fill in taking over this role but know that I have help from them and everyone who volunteers. Of course, nothing is accomplished at the Forum without Dawn Holiday, our Forum Director, she is the true heartbeat of the Forum. Our continuous thank you to her and the ABA team.

Our incredible industry continues to evolve and amaze. When I was 16 years old living in the Midwest, I wanted to be an aviation lawyer because I saw how aviation connected the world. Forty years later, I still am excited to be an aviation lawyer and now we are connecting the universe. Last night I stood on my rooftop in Orange County to watch the launch of a new LEO satellite that supports aerospaceit was so cool! The sky is NOT the limit for the ABA Air & Space Forum, and I am really excited to partner with you all over the next two years as we go to infinity and beyond.

Ready for Takeoff

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https://verticalmag.com/opinions/the-faa-makes-a-u-turn-on-its-approach-to-powered-lift-as-the-evtol-industry-tries-to-hang-on.

13. Integration of Powered-Lift, 88 Fed. Reg. at 38,953–54.
14. *Id.* at 38,954–55.
15. *Id.* at 38,955–58.
16. *Id.* at 38,958–60.
17. *Id.* at 38,960–65.
18. *Id.* at 38,965–87.
19. *Id.* at 38,989–90.
20. *Id.* at 39,004–07.
21. *Id.* at 38,990–94.
22. *Id.* at 38,994–97.
23. *Id.* at 38,997–39,004.
24. *Id.* at 39,008–21.
25. *Id.* at 39,029.
26. *Id.* at 39,024–30.
27. *Id.* at 39,033–34.
28. *Id.* at 39,040–65.
29. *Id.* at 39,066.
30. U.S. Dep't of Transp., Off. of Inspector Gen., AV2023035, FAA Faces Controller Staffing Challenges as Air Traffic Operations Return to Pre-pandemic Levels at Critical Facilities 8 (June 21, 2023).
31. Fed. Aviation Admin., Advanced Air Mobility (AAM) Implementation Plan 20–24 (July 18, 2023).

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