encourage the public's participation and feedback in developing or amending new and existing policy, guidance, and rulemaking. Specifically, we would like feedback from manufacturers, pilots, owners, mechanics, instructors and anyone else with an interest in the small airplane industry.

The Small Airplane Directorate is responsible for 14 CFR part 23, the design standard for small airplanes. 14 CFR part 23 contains the design standards for small airplanes in the normal, utility, acrobatic, and commuter categories, with a maximum gross weight of 19,000 pounds.

The FAA's Small Airplane Directorate plans to host this second meeting to review the part 23 requirements June 8–9, 2010. The meeting will not follow a fixed agenda, but the discussions will generally follow the findings from a recent two-year study. That study, the "Part 23 Small Airplane Certification Process Study," addressed the following areas:

- Structure and Process of Part 23
- Design Certification
- Continued Airworthiness
- Data Management
- Pilot Interface

The report is available on-line at: *http://www.faa.gov/about/office_org/headquarters_offices/avs/offices/air/directorates_field/small_airplanes/*.

Included in the study are recommendations associated with certification, maintenance, modifications, and pilot training. Also included in the report is the recommendation to revise part 23 such that requirements are based on airplane performance and complexity. Since the beginning, small airplane certification requirements have been based on propulsion and weight. Many previous assumptions for small airplanes are no longer accurate. This is discussed in detail in the Certification Process Report.

The FAA plans to open this meeting with a detailed presentation from the Certification Process Study findings followed by opening the floor for discussions. There will be an official recorder participating at the meeting. The meeting minutes, as well as any comments, feedback, recommendations or action items will become public record.

Attendance is open to the interested public but limited to space availability. Since seating is limited, we ask anyone interested in attending to RSVP (notify) Lowell Foster at the phone or e-mail address listed in the **FOR FURTHER INFORMATION CONTACT** section.

Issued in Kansas City, Missouri, on May 3, 2010.

Wes Ryan,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–11080 Filed 5–10–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration (FAA)

[Docket No. FAA–2010–0109]

Notice on Petition for Waiver of the Terms of the Order Limiting Scheduled Operations at LaGuardia Airport

ACTION: Grant of petition with conditions.

SUMMARY: The Secretary and the FAA are granting, subject to conditions, the joint waiver request of Delta Air Lines and US Airways from the prohibition on purchasing operating authorizations ("slots" or "slot interests") at LaGuardia Airport (LGA). The grant permits the carriers to consummate a transaction in which Delta would transfer 42 pairs of slot interests to US Airways at Ronald Reagan Washington National Airport (DCA), international route authorities to São Paulo and Tokyo; and terminal space at the Marine Air Terminal at LGA. US Airways would transfer 125 pairs of slot interests to Delta at LGA, and would lease an additional 15 pairs of LGA slot interests with a purchase option, together with terminal space in LGA's Terminal C. The grant is subject to the conditions that the carriers dispose of 14 pairs of slot interests at DCA and 20 pairs of slot interests at LGA to eligible new entrant and limited incumbent carriers, pursuant to procedures set out in this Notice, and achieve a mutually satisfactory agreement regarding gates and associated facilities with any such purchaser.

If you wish to review the background documents or comments received in this proceeding, you may go to *http://www.regulations.gov* at any time and follow the online instructions for accessing the electronic docket. You may also go to the U.S. Department of Transportation's Docket Operations in Room W12–140 on the ground floor of the West Building at 1200 New Jersey Avenue, SE., Washington, DC between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.

DATES: The waiver is effective upon Delta and US Airways satisfying the conditions required by this Notice. On February 9, 2010, the FAA issued the Notice of petition for waiver and solicited comments through March 22, in this Docket, on the grant of the petition with conditions. (75 FR 7306, Feb. 18, 2010). On March 30, 2010, the FAA reopened the comment period and solicited rebuttal comments through April 5, 2010. (75 FR 16574, Apr. 1, 2010).

FOR FURTHER INFORMATION CONTACT: Rebecca MacPherson, Assistant Chief Counsel for Regulations, by telephone at (202) 267–3073 or by electronic mail at *Rebecca.macpherson@faa.gov;* or Jonathan Moss, Deputy Assistant General Counsel for Operations, by telephone at (202) 366–4710 or by electronic mail at *jonathan.moss@dot.gov.*

SUPPLEMENTARY INFORMATION:

The Proposed Transaction and the Waiver Request

In the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR–21), Public Law 106–181 (2000), Congress required a phase out and termination of the High Density Rule (HDR) [1] at LGA by January 1, 2007.[2] Congress expressly retained the FAA's authority for "safety and the movement of air traffic." [3] The FAA eliminated the terms of the HDR applicable at LGA; however, the demand for flights at LGA and resultant severe congestion prompted the FAA to re-impose quotas by means of an order published in 2006 and subsequently amended ("LGA Order" or "Order").[4] The LGA Order, issued under the FAA's authority to regulate the use of navigable airspace,[5] assigned to the incumbent carriers at LGA their slot interest holdings and authorized them to lease or trade authorizations for any consideration for the duration of the Order. The Order, originally scheduled to expire October 24, 2009, was extended through October 29, 2011. The Order does not allow for the purchase or sale of slot interests at LGA, and the

[1] The HDR is codified at 14 C.F.R. Part 93, Subparts K and S.

[2] 49 U.S.C. 41715(a)(2).

[3] 49 U.S.C. 41715(b)(1).

[4] Operating Limitations at New York LaGuardia Airport, 71 FR 77,854 (Dec. 27, 2006); 72 FR 63,224 (Nov. 8, 2007) (transfer, minimum usage, and withdrawal amendments); 72 FR 48,428 (Aug. 19, 2008) (reducing the reservations available for unscheduled operations); 74 FR 845 (Jan. 8, 2009) (extending the expiration date through Oct. 24, 2009); 74 FR 2,646 (Jan. 15, 2009) (reducing the peak-hour cap on scheduled operations to 71); 74 FR 51,653 (Oct. 7, 2009) (extending the expiration date through Oct. 29, 2011).

[5] 49 U.S.C. 40103(b) directs the FAA to develop plans and policy for the use of the navigable airspace and, by order or rule, to regulate the use of the airspace as necessary to ensure its efficient use.

only way for a carrier to purchase or sell such interests is therefore through obtaining a waiver of the Order. The FAA is authorized to grant waivers when it determines that "the exemption is in the public interest." 49 U.S.C. 40109.

In addition to limitations on the number of operations, both airports also are subject to "perimeter rules" that prohibit nonstop flights to and from airports beyond an established perimeter. DCA's, at 1,250 miles, is set by Federal statute.[6] The perimeter rule at LGA was imposed by the Port Authority of New York and New Jersey.[7] Banning flights to cities more than 1,500 miles away, the Rule was imposed in 1984 in an effort to ease ground congestion at the airport.

Two air carriers, Delta and US Airways, have proposed an exchange of slot interests at these two airports. This exchange, which could potentially impact as many as 182 round-trip operations at the two airports,[8] would qualify as a purchase under both the Order and the HDR.[9] The carriers consider the slot interest exchanges to be part of an integrated transaction because the sale of US Airways' slot interests to Delta at LGA is conditional upon the purchase by US Airways of Delta's slot interests at DCA.

FAA's Tentative Determination

On February 9, 2010, we issued a Notice for publication in the **Federal Register** that we had received from US Airways and Delta a petition for waiver of the LGA Order, and tentatively approved the proposed transaction subject to certain conditions.[10] In conditionally approving the transaction, we stated our tentative determination that, while the proposed transaction had a number of benefits, a grant of the waiver in its entirety would result in a substantial increase in market concentration that would harm consumers. The public interest would best be served, we tentatively found, by creating new and/or additional competition at the airports to counterbalance that harm, specifically through divestiture of 14 pairs of slot interests at DCA and 20 pairs of slot interests at LGA to new entrant and limited incumbent carriers. We proposed the divestiture of two slot-pair bundles at DCA with Bundle A containing 8 pairs and Bundle B containing 6 pairs; and four slot-pair bundles at LaGuardia, with Bundle A containing 8 pairs and Bundles B–D containing 4 pairs per bundle.

In the Notice, we noted that if the proposed transaction were approved as presented, it would lead to significantly increased concentration at DCA for US Airways and at LGA for Delta. Based on their February 2010 schedules, US Airways would raise its share of departures at DCA from 47 to 58%, with its share of slots (including regional affiliates) increasing from 44 to 54%. This increase would make it three times the size of its closest competitor (American Airlines). At LGA, Delta (with its affiliates) would ascend to a dominant position, raising its share of departures from 26 to 51% and its share of slots from 24 to 49%. Delta would become two and one-half times the size of its closest competitor (also American), and LGA would transition from an airport with three competing carriers of similar size to one having a single dominant carrier.

The Notice stated concern that due to a dominance of this magnitude, other incumbent carriers would be limited in exerting competitive pressures and disciplining fares. This concern was further compounded by the fact that low-cost carriers ("LCCs")—which create the most competitive impact by the ability to dramatically lower fares and increase the volume of passengers in a market—had only a limited presence at DCA and LGA. Together, they have only 3.3% of slot interest holdings at DCA, and 6.8% at LGA.[11]

Another concern raised in the Notice was that, if the proposed transaction were approved as submitted, more markets would be served on a monopoly or dominant basis. In a number of instances either US Airways or Delta would depart a market in which they both compete, leaving the other in a monopoly position. In others, where only one of the two currently compete, the serving carrier would depart the market and the other would enter it, assuming a monopoly or dominant position in which it would have even greater pricing power by virtue of its increased concentration at DCA or LGA. We tentatively concluded that the transaction would produce higher fares for consumers in certain domestic markets, as the fewer the number of carriers competing in a market the more likely it is that the fares will be higher. Moreover, our analysis of US Airways' and Delta's fares at DCA and LGA showed that they tended to charge higher fares when they operate monopoly or dominant routes from those airports.[12]

We also considered whether the three airports in the New York area, and the three in the Washington area, effectively disciplined fares at one another, such that if fares are perceived to be rising too high at one airport, the harm would be mitigated by consumers simply shifting to the other two. In analyzing both overlap and all markets at the airports, we found that yields *(i.e.,* revenue per passenger mile) were substantially different among the airports.[13] The average yield in all markets at BWI is 48% less than DCA, and the average yield in all markets at Dulles is 37% less than DCA. Similarly, the average yield at JFK is 28% less than at LGA, and Newark is 9% less than at LGA. We reasoned that if the airports were effective economic substitutes for all passengers, the yield spreads would not differ so significantly.

We also found that these differences in the level of yields at area airports

[6] 49 U.S.C. 49109. Slot exemptions specifically authorized by Congress have allowed 24 slots to be used for beyond-perimeter nonstop operations, with US Airways holding 6 for service to Phoenix and 2 for Las Vegas, and Delta holding 2 for Salt Lake City. 49 U.S.C. 41718.

[7] The United States Court of Appeals for the Second Circuit upheld the right of the Port Authority of New York and New Jersey, as airport proprietor, to adopt perimeter rule under the circumstances at the time. *Western Air Lines* v. *Port Authority of N.Y. and N.J.,* 817 F.2d 222 (2d Cir. 1987).

[8] The transaction affects almost 10% of the total number (832) of DCA slots and more than 20% of the total number (1147) of LGA slots.

[9] 14 CFR 93.221.

[10] 75 FR 7308 (Feb. 18, 2010).

[11] Following the issuance of the Notice, JetBlue received eight slot pairs at DCA from American Airlines in a temporary slot transfer that will expire October 29, 2011. JetBlue announced on April 28, 2010 that it planned to initiate service using those slot pairs beginning November 1, 2010. Including these temporary slots, LCCs will have 5.2% of the slot interests at DCA.

[12] DOT calculated that, at DCA, US Airways charged on average 124% of the Standard Industry Fare Level (SIFL), a cost-based index that the Department has used historically to assist in its evaluation of pricing. However, in markets where it held a 95 to 100% share of nonstop departures, US Airways charged substantially more. Delta, having a less strong position at LGA than US Airways at DCA, tends to price more competitively, averaging only 89% of the index figures with its current slot interest holdings. However, we anticipate that Delta's increased market share after the transaction would permit it to increase the percent of SIFL associated with its service at LGA. In comparison, at Washington Dulles International Airport (IAD), the average of all carriers' fares vs. SIFL is 77%, and at Thurgood Marshall Baltimore-Washington Airport (BWI) the figure is 65%. The fares of the largest carrier at IAD, United Airlines, average 90% of SIFL, while those of the largest carrier at BWI, Southwest Airlines, average 65%. At Newark Liberty International (EWR), the average of all carriers' fares vs. SIFL is 71%, and at JFK the figure is 57%. The fares of the largest carrier at EWR, Continental Airlines, average 71% of SIFL, while those of the largest carrier at JFK, JetBlue, average 57%. The NYC/Washington airports that have the largest proportion of low-cost carriers consistently provide lower fares. A further discussion of our SIFL methodology appears below.

[13] Specifically, yield at DCA is 27 cents per mile, vs. 17 cents at Dulles and 14 cents at BWI, while yield at LGA is 20.5 cents per mile, vs. 18.7 cents at EWR and 14.7 cents at JFK.

tended to correlate with the level of low cost carrier operations. Thus, passengers paid more for nonstop service of equivalent distance at DCA and LGA than at alternative airports that have sizable LCC competition. For example, for trips out to 1000 miles, passengers at LGA pay 23% more on average than those at JFK ($147 vs. $120 each way). Passengers at DCA pay 64% on average more than those at BWI ($184 vs. $113 each way).

We also noted that Delta and US Airways were not committed to any markets for defined periods, and were free to discontinue those that were being proposed as part of the transaction and initiate routes elsewhere. We expressed concern that, given their added slot holdings, they could use those to target smaller competitors, for example by increasing their roundtrips in competitive markets and "sandwiching" competitor flights. The competitive harm, we feared, would occur not just at the city-pair level, but at the network or airport level as well, particularly given the finding that the other area airports did not serve as effective substitutes for each other.

These concerns—the combination of increased airport concentration, the increase in the number of monopoly or dominant markets in which increased pricing power could be exercised, and the potential for use of transferred slot interests in an anticompetitive manner—led us to propose that a relatively limited number of slots be divested as a condition for approving the transaction. At DCA, we proposed that 14 pairs be divested, to new entrant or limited incumbent carriers—enough to initiate and/or increase service in one large market or multiple smaller markets. At LGA, we proposed a divestiture of 20 pairs to such carriers, in combinations that would allow new competition in three or four new markets. We reasoned that the relatively modest divestitures would allow the parties to realize almost all of their purported benefits, while limiting the increase in concentration at the airports and providing opportunities for greater competition.[14]

We also tentatively determined that the divestitures be made to U.S. or Canadian air carriers having fewer than five percent of the total slot holdings at the airport in question.[15] This approach was designed to exclude carriers that already offer a level of service sufficient to affect pricing in the market, and include both limited incumbents that with few slots were most vulnerable to anticompetitive strategies, and new entrants that could bring the prospects of increased efficiencies and capacity, as well as vigorous price competition to the markets.

We also proposed that the proceeds of the divestiture sales be collected and retained by the divesting carriers; that the divesting carriers be required to take their actions within a 60-day period; that carriers purchasing the slot interests be precluded from re-selling or leasing them to carriers that were ineligible to participate as purchasers in the divestiture proceeding; that the slot interests be sold in identified "bundles" (with specific times we indicated) so as to enable the purchasers of the slots to operate competitive service with them with times spread across the day. We also solicited comments on the specific means by which the carriers might sell the slot interests, noting such options as through private sales after FAA-monitored outreach efforts; through a blind, cash-only, process over an FAA Web site; and through an FAA Web site-based outreach process that allowed the carriers to negotiate the consideration and terms of sale with eligible purchasers.

The Notice invited interested parties to submit their comments by March 22, 2010, to the docket management office at DOT, identifying them by docket number FAA 2010–0109. The comments that were received are summarized in Appendix A.[16]

US Airways-Delta Divestiture Counterproposal

On March 22, in their comments, US Airways and Delta stated that, as they were "mindful of the concerns expressed by FAA" and desiring of a solution that would permit them to move forward, they had entered into provisional divestiture agreements with four carriers that were eligible under the terms of the Notice for 15 slot pairs at LGA and 4.5 slot pairs at DCA. The 15 slot pairs at LGA would be transferred, five each, to AirTran Airways, Inc., Spirit Airlines, Inc., and WestJet, Inc. over periods of up to 28 months; the 4.5 pairs at DCA would be transferred to JetBlue Airways, Inc. The carriers added that these more limited divestitures, "while diminishing the benefits of the transaction," would preserve enough of the benefits to permit them to go forward. As explained in their joint filing with the new entrant/limited incumbent carriers to which they would divest slots under their counterproposal: (1) At DCA, JetBlue would acquire 4.5 pairs of slots (JetBlue intends otherwise to add one off-peak hour slot to complete a 5-roundtrip service pattern); (2) at LGA, AirTran, Spirit, and WestJet would acquire 5 pairs of slots each, respectively, for a total of 15 pairs; (3) in all cases, the acquisition would be conditioned on FAA's grant of the LGA Waiver request; (4) the JetBlue transfer would take place relatively soon, but Delta would continue service with the slots under a lease from JetBlue for a period; (5) the AirTran and Spirit transactions would occur over a 24-month period at dates of their choosing; and (6) the WestJet transaction would occur at a date of its choosing within 28 months, and WestJet and Delta will be negotiating other commercial arrangements as well.

The Joint Applicants also stated that if the FAA grants the waiver subject to the proposed divestiture conditions, they would not consummate the transaction, and reserved the right to seek judicial review.

Given the issues raised by the Joint Applicants' counterproposal, the FAA determined that it was in the public interest to reopen the comment period through April 5. The rebuttal and supplemental comments are also summarized in Appendix A. We grant all motions for leave to file late comments, and all comments to date were accepted into the docket.

Statutory Authority To Grant Waiver Subject to Slot Interest Divestitures

The FAA and the Secretary have authority to grant the requested waiver of the LaGuardia Order, and to grant the waiver subject to certain conditions.[17]

[14] US Airways and Delta also filed a notification and report with the Antitrust Division of the Department of Justice (DOJ) under the Hart-Scott-Rodino Act, 15 U.S.C. 18a (HSR). Under the HSR process, DOJ reviews the transaction to determine whether it would substantially lessen competition or have other significant anticompetitive effects. Documents relevant to the HSR review were submitted to DOJ by the carriers, with access provided also to DOT, which independently assists DOJ in its analysis of the transaction. DOJ is continuing its review under HSR and has participated with comments in support of the Department's tentative determination in this proceeding.

[15] To ensure the integrity of the 5% proposal, we also tentatively determined that carriers eligible to receive divested slots not code share with any carrier that has 5% or more slot holdings, and are not subsidiaries, either partially or wholly-owned, of a company whose combined slot interest holdings are equal to or greater than 5% at LGA and/or DCA. Carriers that would not qualify include those who are involved in a code-share relationship at DCA/LGA with carrier(s) that also would not qualify as of the date of the Notice.

[16] We have also placed in the docket a number of other letters the Department received in connection with the Delta-US Airways proposal, which were generated before the docket was established. These were typically general letters of support for the proposal.

[17] Petition for Waiver of the Terms of the Order Limiting Scheduled Operations at LaGuardia Airport, 75 FR 7306 at 7307 (Feb. 18, 2010). The

The FAA is authorized to grant an exemption when the Administrator determines the "exemption is in the public interest." 49 U.S.C. 40109. The Administrator may "modify or revoke an assignment [of the use of airspace]" when required in the public interest. 49 U.S.C. 40103(b)(1). Courts have upheld the conditions an agency may place on its approval of a transaction to meet public interest standards.[18]

Further, our consideration of Delta's and US Airways' request to waive the terms of the LaGuardia Order complies with and carriers out AIR–21's mandate to instill competition at slot-controlled airports and doing so in conjunction with considering the Secretary's Section 40101(a)'s pro-competitive public interest factors.[19] Congress did not exclude the Administrator from considering the "public interest" to include factors beyond "safety," "national defense" and "security." Rather, Congress expressly directed the Administrator to consider those matters "among others." Accordingly, as we articulated in our February Notice, it is rational for the FAA to consider, as being in the "public interest," "other factors" including the fostering of competition in the context of the slot program. The "public interest" includes policies furthering airline competition, as provided in 49 U.S.C. 40101(a)(4), (6), (9), (10), (12)–(13) and (d). These goals have been public policy since at least the time of adoption of the Airline Deregulation Act of 1978, Public Law 95–504 (92 Stat. 1705), and they include (among others) maximizing reliance on competitive market forces; avoiding unreasonable industry concentration and excessive market domination; and encouraging entry into air transportation markets by new carriers.[20]

The FAA Consistently Exercises Its Slot Allocation Authority in a Pro-Competitive Fashion

None of the commenters dispute the fact that the FAA has the authority to limit flight operations at congested airports and to distribute and allocate landing and takeoff reservations (slot interests) to designated air carriers at controlled airports. The FAA holds this power due to its authority to manage and control the "efficient use of airspace," to assign the use of airspace and to modify or revoke such an assignment in the public interest. 49 U.S.C. 40103(b)(1).

Managing slot allocations is a subset of controlling the navigable airspace; and courts are clear that the FAA may consider pro-competitive policies in carrying out its powers to manage the efficient use of navigable airspace. In *Northwest Airlines, Inc.* v. *Goldschmidt,* 645 F.2d 1309, 1315–16, 1318 (8th Cir. 1981), the Court found that the FAA may allocate slots, divest them from incumbent carriers and reallocate them to requesting new entrants, mindful of the pro-competitive policy of the Airline Deregulation Act of 1978. That case analyzed the FAA's reallocation of slots under the HDR, 14 CFR part 93, subpart K. At the time, the HDR limited flight operations at congested airports in order to reduce landing and takeoff delays and permitted airline scheduling committees to allocate the slots among interested carriers. (The committees operated under antitrust immunity, granted by the then-operative Civil Aeronautics Board.) When the scheduling committee refused to provide slots to a new entrant at Washington National Airport, the allocation process broke down and the FAA attempted to resolve the distribution process by requiring incumbent carriers to yield slots or move slot times to new entrants.

The United States Court of Appeals for the Eighth Circuit rejected arguments that the HDR was limited to safety functions only and that the operative statute (Section 40103) did not authorize slot allocation by the FAA. The holding in that case—that the power to manage the efficient use of airspace comprises the power to allocate slots and that the FAA may validly divest slots, in consideration of the pro-competitive policy of the Airline Deregulation Act—should suffice to resolve concerns about our statutory authority to condition a waiver of a slot transfer transaction on a divestiture of slot interests to foster a competitive environment.[21]

The FAA also relied in large part on the Airline Deregulation Act's pro-competition policies when it issued the "Buy-Sell" amendment to the HDR. The Buy-Sell Rule provided a secondary market in slots and imposed a minimum utilization requirement and an administrative lottery mechanism giving preference to new entrants.[22] The Buy-Sell Rule, 14 CFR part 93, subpart S, High Density Traffic Airports; Slot Allocation and Transfer Methods, 50 FR 52,180 (Dec. 20, 1985). The preamble specifically stated that the rule relies on the FAA's "statutory responsibilities including the need to place maximum reliance on market forces" in allocating slots. 50 FR at 52,182.[23] That regulation opened up a secondary market for slot interests by permitting holders to buy or

LaGuardia Order was issued under the FAA's authority to "develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace." 49 U.S.C. 40103(b)(1). Operating Limitations at New York LaGuardia Airport, 71 FR 77,854 (Dec. 27, 2006); 72 FR 63,224 (Nov. 8, 2007) (transfer, minimum usage, and withdrawal amendments); 72 FR 48,428 (Aug. 19, 2008) (reducing the reservations available for unscheduled operations); 74 FR 845 (Jan. 8, 2009) (extending the expiration date through Oct. 24, 2009); 74 FR 2,646 (Jan. 15, 2009) (reducing the peak-hour cap on scheduled operations to 71); 74 FR 51,653 (Oct. 7, 2009) (extending the expiration date through Oct. 29, 2011).

[18] *See South Dakota* v. *Dole,* 483 U.S. 203, 208 (1987) ("The Federal Government may establish and impose reasonable conditions relevant to Federal interest * * * and to the over-all objectives thereto"); *N.Y. Cent. Sec. Corp.* v. *United States,* 287 U.S. 12 (1932) (upholding Interstate Commerce Commission order approving the acquisition of the "Big Four" railroad companies by N.Y. Central upon the condition that it also acquire short line railroads on certain terms).

[19] Neither the Joint Applicants nor other carriers arguing against the waiver conditions cite any cases prohibiting the FAA or the Secretary from considering competitive goals in the public interest. *N.Y., op cit.,* upheld an agency's public interest conditions to an acquisition, despite the industry's opposition to the conditions. That decision affirmed the Interstate Commerce Commission's conditions to the New York railroad's acquisition of the "Big Four" railroads on the asserted "burdensome" condition of acquiring the short-lines. Similarly, our conditions to the waiver are intended to promote the public interest by fostering and promoting competition in the airline industry and to benefit the traveling public.

The fact that the Supreme Court vacated a National Highway Traffic Safety Administration rescission of its "passive restraint" rule on the grounds that NHTSA relied on a factor Congress had not intended it to consider has no bearing on the fact that the FAA may legitimately consider public interest factors in carrying out the slot program. *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 44 (1983).

[20] Reliance on *United States* v. *Oberle,* 136 F.3d 1414, 1423–34 (10th Cir. 1998), for the proposition that Congress should have included pro-competitive factors in Section 40101(d), is misplaced. That case held the Government did not need to reach a burden-of-proof level of "beyond a reasonable doubt" in applying the "three strikes" enhanced sentencing statute.

[21] *See* Eileen M. Gleimer, *Slot Regulation at High Density Airports: How Did We Get Here and Where Are We Going?,* 61 J. Air L. & Com. 877, 883, fn. 25 (1996), stating that the court determined the action was within the agency's statutory authority and "was consistent with the pro-competitive policies of the Airline Deregulation Act."

[22] In creating an administrative mechanism to lottery new and withdrawn slots with a preference for new entrants, the Buy-Sell Rule was informed by the Airline Deregulation Act to expressly give "special consideration" to new entrants. 50 FR at 52185.

[23] The Buy-Sell Rule's major objective was to achieve the policy goals of the Airline Deregulation Act, that is, to maximize competition at the congested airports, by giving new entrant carriers an opportunity to purchase slots:

[T]he ability to buy and sell slots also removes existing artificial barriers to entry into high density airport markets. The elimination of barriers to entry is essential for the optimal operation of a competitive market. The rule accomplishes this by placing new entrants in the same position as incumbent carriers desiring additional slots. 50 FR at 52186.

sell slots for any consideration from or to any person.[24]

The following year, the FAA further carried out an administrative mechanism giving a preference to new entrants at slot-controlled airports by implementing a "reverse lottery" withdrawing up to 5% of slots from incumbent carriers and reallocating them to new entrant and limited incumbent carriers. Special Slot Withdrawal and Reallocation Procedures, 51 FR 8632 (Mar. 12, 1986). The FAA considered pro-competitive public interest factors in justifying the preferential nature of the lottery by noting that there had been "very little opportunity for new entry by air carriers" at the HDR-controlled airports and that providing "immediate access" for them would "serve the pro-competitive principles of the Airline Deregulation Act." 51 FR at 8633, 8635.

The FAA has consistently relied on pro-competitive policy goals in carrying out its slot programs. For example, in 1992, the FAA amended the Buy-Sell Rule to expand protections and treatment afforded to new entrant and limited incumbent carriers at airports regulated by the HDR, explaining that the amendments "enhance competition by affording new entrant and limited incumbent carriers greater access." High Density Traffic Airports; Slot Allocation and Transfer Methods, 57 FR 37,308 at 37,309 (Aug. 18, 1992). During 2000, when instituting the phase-out of the HDR at LaGuardia, the FAA issued a notice of intent to conduct a lottery of the AIR–21 slot exemptions granted at LaGuardia, specifically identifying new entrant and limited incumbent carriers to be eligible for the lottery. Further, the temporary "slot" regulation at O'Hare International Airport applied pro-competitive policies from the Airline Deregulation Act in granting preferential treatment to new entrant and limited incumbent airlines in assigning new or withdrawn slot interests. Congestion and Delay Reduction Rule at Chicago O'Hare International Airport, 14 CFR part 93, subpart B; 14 CFR 93.30.

The FAA has the authority to consider pro-competitive factors under several statutory sources, notably Sections 40101(d) (as described above), 40103(b) (authorizing the FAA to manage the "efficient" use of airspace),[25] 40103(e) (directing the FAA to prohibit the exclusive use of air navigation facilities),[26] and 47107(d) (requiring the FAA to carry out its airport and airway program in a manner fostering competition).[27] It is appropriate for the FAA to use these tools in response to the request before us, to approve a significant slot interest transaction that would affect the competitive structure of the aviation industry at two important, slot-controlled airports. By conditioning the waiver on slot divestitures, the FAA is carrying out Congressional intent to ensure the provision of opportunities for competition in the slot program.[28]

Furthermore, we disagree with the argument made by some commenters that the FAA regulations in 14 CFR part 11 allow the FAA to consider only safety matters in deciding whether or not to grant an exemption or waiver request. The FAA regulations require the applicant for a waiver to address, in addition to safety concerns, why the request "would be in the public interest, that is, how it would benefit the public as a whole" and to provide any additional information supporting the request. 14 CFR 11.81(d), (g). As indicated in the body of this Notice, we do not find that petitioners satisfied the "public interest" concern showing how the transaction—without our proposed divestiture remedy—would benefit the public as a whole.

Moreover, in a situation such as this, where two major domestic airlines seek the approval of a dramatic market shift with significant economic and competitive impact on the aviation industry and the traveling public, the Administrator does not act without input and guidance from the Secretary. As the head of the Department, the Secretary has broad oversight of significant FAA decisions.[29] In evaluating the waiver request, the Secretary considers the public interest in furthering airline competition, as provided in 49 U.S.C. 40101(a)(4), (6), (9), (10), (12) and (13). The waiver of the LGA Order on the conditions set forth in this Notice carries out the Congressional intent of AIR–21 to allow for new airline entry, to increase competition, and lower inflated prices at the slot-controlled airports.[30] The Secretary has previously conditioned air carrier route transfers and grants of antitrust immunity on the divestiture of slots and/or other assets for the purposes of ensuring competitive opportunities for other airlines.[31] Accordingly, the Secretary (i) has the authority to waive the terms of the LaGuardia Order to further the Secretary's public interest goal of maximizing airline competition, among other things; and (ii) may condition the waiver on carriers taking specific actions that foster competition at slot-controlled airports.

[24] Were we unable to consider pro-competitive factors in implementing our authority over navigable airspace, it is very likely we would not have issued the Buy-Sell Rule in the first place. In that event, it would not have been possible for the petitioners to seek approval for the transaction before us. The Airline Deregulation Act, which "replaced the old form of regulation with a new economic regime that relied heavily on free-market mechanisms," (*Delta Air Lines, Inc.* v. *C.A.B.,* 674 F.2d 1, 3 (D.C. Cir. 1982) spawned new entrant airlines clamoring to enter the highly-regulated slot-constrained airports.

In this regard, we note, as does the U.S. Department of Justice in its comments in this docket, that the petitioners' arguments about lack of FAA authority over pro-competitive slot divestitures are in stark contrast with their previous assertions that the FAA has the authority to re-implement the Buy-Sell provision at LaGuardia and that this provision "has worked to promote new entry and enhance competition at 'capped airports' for more than two decades." Comments of Delta Air Lines at 3, Docket No. FAA–2006–25755 (July 14, 2009), Reply Comments of the United States Department of Justice, Public Version, at 12.

[25] In the context of the slot program, ensuring the "efficient" use of airspace means making productive use of the slots including operating larger aircraft with lower costs and offering lower fares to consumers, resulting in more passengers per flight. New entrant and limited incumbent carriers typically use larger aircraft and offer lower fares and "would most likely be more efficient, from a consumer benefit standpoint." *See* Department of Justice Reply Comment at 6–7.

[26] Without the slot divestiture conditions, the transaction would lead to significantly increased airline concentration at DCA and LGA; the carriers would increase the number of markets they serve on a monopoly or dominant basis and charge premium airfares, thus negating the purpose of the prohibition on exclusive rights at Federally-assisted facilities. *See* 40 U.S.A.G. 71 (1941), stating that the purpose of the provision is to "promote and encourage competition in civil aeronautics."

[27] Congress directed the FAA to ensure that each airport and airway program be carried out "consistently" with Section 40101(a) to "foster competition, prevent unfair methods of competition in air transportation [and] prevent unjust and discriminatory practices." 49 U.S.C. 47101(d).

[28] Some commenters assert that 49 U.S.C. 40113(a) and 46105(a), by referring to "aviation safety duties and powers," limit the Administrator's administrative powers to those involving safety only. Reading the "aviation safety duties and powers" clause, however, to authorize the Administrator to take action over not only "aviation safety duties" but also over the Administrator's other, more extensive "powers" conforms to the text of the statutory provision before it was recodified without substantive change: "The Administrator shall be responsible for the exercise of all powers and the discharge of all duties of the Administration." 49 U.S.C. 1341(a). It does not divest the Administrator of pro-competitive, public interest policy considerations. *See,* the recodification of Title 49, Public Law 103–272 (1994), H.R. Rep. 103–180 at 262 (1993). "The purpose of H.R. 1758 is to restate in comprehensive form, without substantive change, certain permanent and general laws related to transportation."

[29] *See* 49 U.S.C. 102 and 106.

[30] 49 U.S.C. 41715(a)(2) directs the Secretary to terminate the HDR at LGA as of January 1, 2007. *See* H. Rept. 106–167 (106th Cong., 1st Sess. 1999) at 37–42.

[31] 75 FR 7306 at 7308.

The Slot Divestiture Conditions Do Not Violate Other Laws or Regulations

Continental in its comments claims that our slot divestiture conditions constitute unauthorized market-based pricing and an unauthorized withdrawal of slots under the LaGuardia Order and the HDR. Continental's concerns reflect a misunderstanding of our action. For purposes of the requested waiver, we are not asserting any FAA right to collect monies by monetizing slot interests through an auction. Rather, in responding to a request for a waiver from the LaGuardia Order prohibition on a permanent transfer of slots, we simply are conditioning the waiver on a divestiture of some of the slot interests to new entrant and limited incumbent carriers. Those slot interests would not be divested to the FAA; they would be sold by the respective petitioning carriers to eligible purchasers and the petitioning carriers would retain the proceeds of the sales. Nor are we affirmatively withdrawing slot interests. Consequently, the provisions in the LGA Order and the HDR governing withdrawals of slots by the FAA are inapplicable to our action.[32]

We also do not accept the comments of the Joint Applicants, Continental or United, that the Department of Justice, not the Secretary (or FAA), is the sole source of competition authority over slot transactions. While DOJ has the authority under Section 7 of the Clayton Act to reject anticompetitive transactions, that does not remove DOT's responsibility to carry out its programs consistently with the pro-competitive public interest criteria contained in Section 40101(a)(4), (6), (9), (10), (12) and (13). In considering the petitioners' waiver request in the public interest, the DOT is not asserting antitrust jurisdiction or implementing Clayton Act authority. Neither the FAA nor the Secretary is exercising the former "Section 408" authority over airline transactions. Petitioners are ignoring the fact that they petitioned the FAA for a waiver from a validly issued Order that prohibits permanent slot interest transfers at LaGuardia. The FAA is considering the waiver, not exercising antitrust authority nor intruding on the Department of Justice's jurisdiction.[33] As the DOJ indicated in its reply comments, the FAA's proposed decision "does not usurp" the DOJ's investigative authority under Section 7 of the Clayton Act (at p. 13). *See Bowman Transp. Inc.* v. *Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 298–99 (1974) ("A policy in favor of competition embodied in the laws has application in a variety of economic affairs.")

Conditioning the waiver on slot interest divestitures is consistent—and does not interfere—with the competitive structure of the airline industry, or the statutory policy goal of "placing maximum reliance on competitive market forces," as asserted by United and some other commenters. The conditions mitigate the competitive burdens of the transaction and ensure that the transaction will not result in undue industry concentration, the impediment of new entry, or otherwise disadvantage the traveling public. The policy goals direct us not only to place "maximum" reliance on competitive market forces but also to rely on "actual and potential competition" to avoid "unreasonable industry concentration," and to encourage "entry into transportation markets by new and existing air carriers." Section 40101(a)(6), (10), (12). Our action on the waiver request responds aptly to these policy directives.[34]

Our slot divestiture conditions do not withdraw slot exemption service authorized under 49 U.S.C. 41714(c), 41716(b), 41718. We do not mandate the divestitures of any slot exemptions that US Airways or Delta may hold.

We also are not bound to allocate the divested slots without charge, as Spirit prefers. The slot exemptions provisions directing the Secretary to grant slot exemptions from the HDR to new entrant and limited incumbent carriers under specified provisions are not applicable here. The FAA is under no statutory obligation to have the divested slot interests allocated to eligible carriers free of charge. Although Spirit as noted in its comments is concerned that it may lose out in any attempt to purchase slot interests due to its relatively small share of revenues compared to that of the other eligible carriers, a sale of the slot interests allows the petitioners to maximize the value of their slot interests as originally intended as part of the larger transaction. 75 FR at 7311.

The Slot Divestiture Conditions Are Not "Takings"

The petitioners claim we cannot legitimately require the slot divestitures because that constitutes taking without just compensation. We do not agree with this assertion. As we indicated in the Notice, the FAA has the authority to condition the grant of a waiver.[35] *See also, South Dakota* v. *Dole,* 483 U.S. 203, 208 (1987) ("The Federal Government may establish and impose reasonable conditions relevant to Federal interest * * * and to the over-all objectives thereto."). The FAA expressly has the power to modify assignments of use of navigable airspace when in the "public interest" and to grant waivers only in the "public interest." As we discuss above, it is in the public interest for us to condition the waiver request of the transfer of 167 slot pairs on the divestiture of certain slots to carriers with no or little presence at the constrained airports. This condition produces efficiencies, fosters competition, prevents unreasonable industry concentration, and protects the traveling public.

In any event, the takings claim is inapposite because slot interests are not property subject to the takings clause. Slot interests are subject to pervasive Federal encumbrances that limit any air carrier's property right or interest associated with them.[36] The HDR provides that "[s]lots do not represent a property right but represent an operating privilege subject to absolute FAA control." 14 CFR 93.223(a). Accordingly, any "proprietary interest"

[32] Continental referred to *Verizon Communications* v. *Law Offices of Curtis V. Trinko,* 540 U.S. 398, 407–08 (2004) for the proposition that our action "compelling" US Airways and Delta to divest their slot interests may undermine their incentives to invest in beneficial infrastructure. We repeat that we are not, however, directing a slot divestiture. Rather, we are granting a waiver request, which is subject to a finding that it is in the public interest, subject to pro-competitive remedies. The two regulatory actions are of a different nature.

[33] Continental claims that we have not proven that the carriers' practices would rise to a Sherman Act Section 2 offense; we are not invoking or attempting to enforce antitrust laws. Rather, we are asserting our authority to protect the traveling public by fostering competition in the context of the requested waiver.

[34] United overstates the import of our waiver condition when it asserts that we are re-regulating the industry contrary to the Congressional directive in the Airline Deregulation Act. Conditions at slot-constrained airports are not reflective of a free, competitive market. The fact is that the FAA placed limits on flight operations that may be carried out at LGA and DCA due to congestion in the airspace; in the context of those flight limits, only certain airlines may operate at designated times. These airports thus are regulated by the Government and are in a different position than the vast majority of the other airports that are not slot-controlled. The FAA, in this instance, actually is instilling the opportunity for more competition at DCA and LGA, in reliance on the Airline Deregulation Act. By placing these conditions on the waiver grant, the FAA also is protecting against exclusive rights at the airports under 49 U.S.C. 40103(e) and is fostering competition at the Federally-assisted LGA and DCA. 49 U.S.C. 47107(d).

[35] 75 FR at 7307, citing *Starr* v. *Federal Aviation Administration,* 589 F.2d 307, 311 (7th Cir. 1978).

[36] In the context of an air carrier's bankruptcy proceeding, it has been held that the FAA's control over slots substantially encumber a carrier's property interest: "A carrier possesses a proprietary right in allocated slots, [ ] limited as to the superior rights of the FAA." *In re Gull Air, Inc.* 890 F.2d 1255, 1260 (1st Cir. 1989).

claimed by an air carrier in a slot is subject to the encumbrances placed on those slots by FAA regulation.[37] The Department, as we pointed out in the February Notice, has conditioned international aviation route transfers and antitrust immunity grants on divestitures of slots or route certificates in the past, and, because these are not "property," they do not constitute Fifth Amendment compensable takings.[38] A carrier's interest in slots is subject to extensive FAA regulation and Congressional direction.[39]

There is no definitive judicial holding that slots are "property" subject to the Takings Clause.[40] In any event, a slot interest is substantially fettered and encumbered by FAA requirements, as explained above, and therefore a holder does not have the attributes of an unfettered right to "use the property, receive income produced by it, and to exclude others from it" as a tenant by entirety does under Michigan State law. *United States* v. *Craft,* 535 U.S. 274, 282 (2002). Rather, a carrier's use of a slot interest is subject to FAA minimum utilization requirements and any right to "exclude others" is subject to FAA operational control, withdrawal rights, and congressional directives.

Further, we disagree with petitioners' claims that the conditions on the waiver do not serve the government interest and are tantamount to "extortion." *Nollan* v. *California Coastal Commission,* 483 U.S. 825, (1987).[41] Our grant of the waiver permitting the petitioners to proceed with the slot interest transaction, subject to slot divestitures to new entrant and low-cost carriers, substantially advances the FAA's legitimate objectives of more efficient use of constrained airspace and of fostering airline competition at airports. A "broad range of governmental purposes and regulations satisfies" the requirements for considering a condition to a waiver as substantially advancing a governmental interest. *Nollan* at 834–35. Accordingly, we find that the conditions to the waiver do not deprive petitioners of property without just compensation.

Even assuming slots are property for purposes of the Takings Clause, the divestiture as a condition to the FAA waiver simply regulates the carriers' use of the slot interests and does not constitute a taking. The Supreme Court has identified several factors for consideration of when a government taking has occurred under the Fifth Amendment: "The character of the government action, its economic impact, and its interference with reasonable investment-backed expectations." *See Penn Central Transportation Co* v. *New York City,* 438 U.S. 104, 125 (1978) (City Landmarks Preservation Commission disapproval of construction of a 50-story office building over Grand Central Terminal held not to be a "taking" of the owners' right to exploit the superadjacent airspace).

Here, our waiver condition of slot divestiture would constitute a regulatory, not a takings, action.[42] By conditioning the transfer of a large portion of slot interests on the sale of some of the slot interests, the FAA effectively is regulating the ability of the petitioning carrier to transfer slot interests in a manner that results in unreasonable industry concentration. Divesting some slot interests to petitioners' competitors will ensure that the traveling public does not experience a degradation of fares, service or routes at the affected airports.

With respect to reasonable investment-backed expectations, carriers have been on notice for decades that the FAA has considered slots to be an operating privilege not a property right. 14 CFR 93.223(a). As discussed above, not only have the FAA regulations been clear about the tentative nature of slots and the duration of slot interests, the FAA retired the slot system at Chicago O'Hare airport in 2008. 14 CFR Part 93, Subpart B, Congestion and Delay Reduction at Chicago O'Hare International Airport, § 93.21(e). In AIR–21 (2000), Congress legislated a phase-out of the HDR at the New York airports and at O'Hare. Accordingly, the carriers and those banks and financing firms holding slots as collateral were aware of the FAA/Congress' right to change the slot system, withdraw slots, etc. The Securities and Exchange Commission filings recognize the Federal encumbrances to slot holdings.[43] Consequently, the ability of the FAA to condition the waiver allowing the transfer of massive amounts of slots on divestitures of a small percentage is a "burden we all must bear in exchange for 'the advantage of living and doing business in a civilized community.' " *Monsanto,* 467 U.S. 986, 1007.

Because we may condition the grant of the waiver, and the conditions do not effect a "taking" of "property," we disagree with petitioners' contention

[37] *See* 14 CFR 93.211–229. At DCA, where slots are subject to the HDR, these encumbrances include, for example, the ability to withdraw slots for essential air services, operational needs, and non-use. 14 CFR 93.219, 93.223 & 93.227. At LaGuardia, slot interests are subject to the terms of the Order which grants only a temporary interest in the slots to carriers, providing for only leases or temporary transfers through the duration of the Order. 71 FR 77,854 at 77,860, as amended 74 FR 51,653 (Oct. 7, 2009). They are subject to the terms of the January 2009 Order on voluntary retirements. 74 FR 2646 (Jan. 15, 2009). Also, slot interests at LaGuardia are subject to minimum utilization requirements. 71 FR 77,854 at 77,860.

[38] *See* discussion of DOT Orders requiring such divestitures in the public interest. 75 FR 7306 at 7308.

[39] The Port Authority of New York and New Jersey commented that slot interests are licenses, not Federal property. We need not address, in this Notice, the Port Authority's arguments in this regard.

[40] The United States Court of Appeals for the First Circuit held that it "need not decide [whether slots constituted part of a bankrupt carrier's estate]." *In re Gull Air,* 890 F.2d 1255, 1261, 1262 fn. 8. Unlike the situation in *Ruckleshaus* v. *Monsanto,* 467 U.S. 986, 1002–1003 (1984), where the Court determined that intangible property (a trade secret) exhibited characteristics of more tangible forms of property, slots lack many of those characteristics. For example, there is no state law recognizing a slot interest as a property right, as was the case in *Monsanto.* Additionally, unlike the cases relied on in *Monsanto,* a slot interest does not convert the carrier to the position of a creditor, such as a mechanic's lien does to a contractor, in *Armstrong* v. *United States,* 364 U.S. 40 (1960); or a mortgage to a bank mortgagee, in *Louisville Joint Stock Land Bank* v. *Radford,* 295 U.S. 555, 596–602 (1935). Nor is a slot interest a contract subject to the Takings Clause as a war risk insurance contract is to a beneficiary, in *Lynch* v. *United States,* 292 U.S. 571, 579 (1934).

[41] *Nollan* struck down, as an unlawful "taking," a State condition on a building permit to replace a small beachfront bungalow with a larger house with a public easement across the beach. The Court held that the permit condition did not substantially advance legitimate State interest related to land-use regulation. The Court did find, however, that a legitimate permit condition would have been a height limitation, a width restriction, or a ban on fences. 483 U.S. at 836.

[42] *Lingle* v. *Chevron U.S.A. Inc.,* 554 U.S. 528 (2005), cited by Continental for a takings test, is not apposite. That case reversed and remanded the Ninth Circuit Court of Appeals' holding that a Hawaii statute which responded to concerns of oil companies' market concentration by limiting the rent that oil companies charged to dealers, effected an unlawful taking.

[43] *See*, for example, America West Holdings Corporation Form 10–K for the Fiscal Year Ending December 31, 2003 (at 11):

At New York City's John F. Kennedy International Airport and LaGuardia Airport, and at Washington DC's Ronald Reagan National airports, which are designated "High Density Airports" by the FAA, there are restrictions on the number of aircraft that may land and take-off during peak hours. At the New York airports, slot restrictions are abolished after January 1, 2007. In the future these takeoff and landing time slot restrictions and other restrictions on the use of various airports and their facilities may result in further curtailment of services by, and increased operating costs for, individual airlines, including AWA, particularly in light of the increase in the number of airlines operating at such airports. In general, the FAA rules relating to allocated slots at the High Density Airports contain provisions requiring the relinquishment of slots for non-use and permit carriers, under certain circumstances, to sell, lease or trade their slots to other carriers. All slots must be used on 80% of the dates during each two-month reporting period. Failure to satisfy the 80% use rate will result in loss of the slot which would revert to the FAA and be reassigned through a lottery arrangement.

that the conditions adversely affect the asserted "just compensation" to be derived from their slot interests under *United States* v. *50 Acres of Land,* 469 U.S. 24, 29 (1984). In any event, the process we will institute provides for the sale of the slot interests, subject to certain rules to maintain competition, for a bundle of slot interests.

The FAA May Condition the Waiver on DCA Slot Interest Divestitures

The petitioners assert that we have no jurisdiction over the DCA slot interest sale by Delta and purchase by US Airways, because the High Density Rule permits an unfettered sale of slots at DCA. They claim a forced divestiture of DCA slots conflicts with the HDR.

As we explained in the Notice, we find that the slot swap between US Airways and Delta at both LaGuardia and DCA are a single transaction, such that the LGA purchase and sale would not occur without the DCA purchase and sale. Accordingly, we review both transactions as part of a single, unified transaction and may condition our waiver to the LGA Order on divestitures of slots at both airports.

In the petition before us, the carriers seek a waiver from the buy-sell prohibition in the LGA Order for the purpose of exchanging slot interests at both LGA and DCA airports. We are not "bound by legal formalisms" in discharging its duty but instead will "take account of the economics of the transaction under investigation." *See Reves* v. *Ernst & Young,* 494 U.S. 56, 61 (1990); *The Shoshone Indian Tribe of the Wind River Reservation, Wyoming* v. *United States,* 58 Fed. Cl. 77, 86 (2003) ("must examine the underlying economic reality" of the transaction).

The fact that the slot swap concerns two airports does not compel us to segregate the transactions; rather, it is clear that the transactions are contingent on each other. The joint application of US Airways and Delta, filed August 24, 2009, before the U.S. Department of Transportation for approval of the transfer of U.S.-Brazil frequencies is expressly termed "contingent joint application," made dependent on completion of the Mutual Asset Purchase and Sale Agreement, which involves the slot interest transfer at issue here. As stated in the joint application:

> The Joint Applicants are submitting this application on a strictly contingent basis. The proposed transfer of the Joint Applicants' U.S.-Brazil frequencies is part of the larger transaction described herein. The Joint Applicants will proceed with the larger transaction only if all transaction components * * * occur. (Joint application, fn. 2).

The joint application explains that the larger transaction includes the swap of the slot interests at both LaGuardia and Reagan National airports:

> The [Mutual Asset Purchase and Sale] Agreement further involves the transfer of certain slots and real estate at LaGuardia Airport to Delta from US Airways, and the transfer of slots from Delta to US Airways at Reagan Washington National Airport, allowing the Joint Applicants to expand their respective operations at these points." (Joint application, at 2–3).

In such a situation, the agreements concerning each airport constitute "a *single* actual transaction." *See SEC* v. *M&A West, Inc.,* 583 F.3d 1043, 1052–3 (9th Cir. 2008) (holding that the "existence of multiple agreements bears little effect when the agreements collectively constitute a single transaction.") The fact that the slot purchase and sale agreements at both DCA and LGA were entered into simultaneously and were linked together creates a necessary nexus between the agreements for purposes of conditioning our approval of the petition on certain remedies. *Shoshone Indian Tribe,* 53 Fed. Cl. at 88–89. Further, considering the DCA and LGA slot swaps as a single transaction justifies the remedies at both LGA and DCA, which effectuate the statutory goal of maximizing competitive opportunities for airlines and assuring that the traveling public receives the service and fare benefits provided by competitive airline service.

The Proposed Transaction Would Lead to a Reduction in Competition at DCA and LGA

In their filings, US Airways and Delta have not challenged the calculations stated in the Notice that, if the transaction were approved as proposed, the proportion of US Airways' share of slots and departures at DCA, and Delta's share of slots and departures at LGA, would increase substantially. DOT had calculated that US Airways' share of slot interests at DCA (including regional affiliates) would increase from 44% to 54%, and its share of departures would increase from 47 to 58%. Similarly, DOT's calculations for Delta's share of slot interests at LGA, including affiliates, would rise from 24 to 49%, and its share of departures would rise from 26 to 51 percent. In both cases, the increases would have the effect of making US Airways by far the dominant carrier at DCA, and Delta by far the dominant carrier at LGA.

Rather than challenging the calculations of concentration, the carriers argued that the Notice fails to articulate the level of concentration that causes concern.

The common metric used in antitrust analysis for market concentration levels is the Herfindahl-Hirschman Index, (HHI).[44] Under the Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission, transactions that increase the HHI by more than 100 points in concentrated markets (concentrated markets are defined as those in which the HHI is in excess of 1800 points) presumptively raise antitrust concerns. In its comments to the docket in this case, the United States Department of Justice stated that it had calculated that, if the transaction were approved as proposed, the HHI at will increase at LGA by 600 from 2394 to 2994, and at DCA will increase by 626 from 2756 to 3382.[45] Under the Guidelines, such increases in highly concentrated markets are presumptively likely to create or enhance market power or facilitate its exercise.[46]

As the methodology for the calculation of the HHI indicates, it is not simply the market share of the largest competitor that raises potential competitive concerns, but its magnitude relative to the market shares of others. As the Notice pointed out, if the transaction were approved as submitted, at DCA US Airways would become three times the size of its closest competitor, while at LGA, Delta would become two-and-one-half times the size of its closest competitor. (Moreover, LGA would transition from an airport with three competing carriers of similar size to one with a single dominant carrier.) As also cited in the Notice, carriers with relatively weak minority positions have limited abilities to exert competitive pressure and discipline the fares of the dominant carriers, a point that neither US Airways nor Delta chose to dispute.

In its comments, the Department of Justice concurred with our tentative view of the increased concentration levels. It emphasized another important point—that the transaction would

[44] The HHI for a particular market is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. *See* U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines.*

[45] Comments of the United States Department of Justice, March 24, 2010, p. 5.

[46] U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* § 1.51 (1992).

reduce competition between US Airways and Delta:[47]

> The transaction also will reduce competition between Delta and US Airways at DCA and LGA. US Airways and Delta are principal rivals at the airports. Post transaction, however, Delta will shrink substantially at DCA, reducing its ability to compete effectively with US Airways. Similarly, US Airways will shrink substantially at LGA, reducing its ability to compete effectively with Delta."[48]

While not an issue directly addressed in the HHI, DOT believes that, as a general rule, in the aviation industry more competitive pressure and pricing discipline can be exerted by low-cost carriers than by incumbent legacy carriers. This view is supported by the Department of Justice,[49] as well as in the academic literature cited in the Notice and by DOJ in its Appendix A. At both LGA and DCA the second largest carrier would be the legacy carrier American Airlines. Moreover, low-cost carriers have only a very limited presence at both airports, with a 3.3% share of slot interest holdings at DCA[50] and a 6.8% share at LGA, and they face substantial barriers to increasing their presence, because entry to both airports is governed by slot regimes. As stated in the Notice, studies indicate that entry by low-cost carriers dramatically lowers fares and increases the volume of passengers in a market,[51] a point reinforced by Southwest's assertion in its comments that, were it to operate the slots to be divested, empirical data indicated that it would annually carry more than 340,000 additional passengers to and from each of the two airports and that its fares would average 33% lower than Delta's average fare at LGA and 49% lower than US Airways' average fare at DCA.[52]

In addition, the Department of Justice, in its comments, stated that Delta has, in the past, assumed inconsistent positions on the competitive effects of slot shares and concentrations at DCA and LGA:

> During Delta's bankruptcy three years ago, US Airways considered acquiring Delta. Delta resisted US Airways' overtures, arguing that the merger would cause competitive harm at DCA and LGA. At that time, Delta argued that slot shares resulting from the merger levels that are approximately the same as the shares that would result from the present proposed transaction raised substantial competitive concerns. Delta's current position is precisely the opposite.[53] [citations omitted].

Although US Airways and Delta questioned the concern expressed in the Notice regarding the potentially anticompetitive effects resulting from increased airport concentration levels, they nonetheless offered a counterproposal under which they would voluntarily divest 15 slot pairs at LGA and 4.5 slot pairs at DCA. The slot pairs would be divested to four different carriers that were eligible under the terms of the Notice, with no carrier receiving more than 5 slot pairs.

The carriers have not demonstrated that these voluntary divestitures should or would reasonably assuage the competitive concerns we expressed in our February 9 Notice. In particular, the divestiture of only 4.5 pairs of slots at DCA—where the Notice clearly indicated there were serious concentration and competition concerns—and the inability of the four low-cost beneficiaries to mount their own competing service in the near-term were disappointing elements to the counterproposal. As discussed more fully below, we conclude that the counterproposal falls significantly short of what we believe the minimum levels of divestiture must be to adequately protect the public interest.

Our Concerns About Potential Anticompetitive Harm are Well-Founded and Fully Justifiable

In the Notice, we set out concerns that US Airways and Delta could increase the number of markets they serve on a monopoly or dominant basis, and that consumers at these airports may be harmed by the loss of nonstop service, the loss of a nonstop competitor, or the transfer of nonstop monopoly service to a more dominant carrier.

We also tentatively concluded that the proposed transaction was likely to result in higher fares for consumers in certain domestic markets, as the carriers could rely on their increased dominance to maintain or enhance their premium fare structure in markets served at both airports. Furthermore, we expressed concerns that because slot restrictions at both airports substantially hinder proportional increases in competition by other carriers, higher fares could be sustainable due to the carriers' increased market power at both airports.

In reaching these tentative conclusions, we relied on statistical information indicating that US Airways and Delta already charge higher relative fares where they operate monopoly or dominant routes from airports where they have a strong presence, such as DCA and LGA. That information included relating US Airways' and Delta's average fares at DCA and LGA to the Standard Industry Fare Level (SIFL), a cost-based index that we have used historically to assist in its evaluation of pricing. That information indicated that the average fares charged by US Airways at DCA and Delta at LGA substantially exceeded not only the average fares at the other DC-area and NYC-area airports, but of the largest carriers at each of those airports.

It is telling that US Airways and Delta have not urged in response that their fares are at or below averages, nor provided data showing that they do not utilize their pricing power to charge premium fares in markets that they dominate. Rather, they asserted that FAA's concerns about potential anticompetitive actions were mere speculation, as we did not point to specific instances of harm; argued that the SIFL was effectively obsolete as a useful measure of cost; and urged that the benefits of the transaction, which they assessed at $44.3 million less in consumer costs for travel on affected routes and $153 million if increased flying due to improved connectivity and service were included, would outweigh the conceivable harms.

As to the concerns about harm in specific markets, those concerns are real and demonstrable. If the transaction is consummated as finally proposed, Delta plans to withdraw from a number of DCA nonstop routes on which it competes with US Airways, and US Airways plans to withdraw from other LGA nonstop routes on which it competes with Delta. Unless new service is instituted by carriers other than DL and US, these routes will

[47] DOT calculates that at DCA there would be a sharp decrease in service by Delta, reducing it from a major competitor on DCA routes with US Airways to one holding fewer than 5.5% of the O&D passengers. Similarly, at LGA US Airways' share of O&D passengers would fall to just 6 percent. In these cases, we fear that the diminished presence of Delta at DCA and of US Airways' at LGA will lessen their abilities to competitively price their remaining flights at the respective airports.

[48] Comments of the United States Department of Justice, March 24, 2010, p. 4.

[49] *See* Comments of the United States Department of Justice, Appendix A.

[50] If the temporary slots interests acquired by JetBlue from American were included, the LCC percentage at DCA would rise to 5.2 per cent.

[51] Notice, p. 12.

[52] Comments of Southwest Airlines Co., p. 11–12.

[53] Comments of the United States Department of Justice, March 24, 2010, p. 5, n.8, *citing* Hearing on the State of the Airline Industry: The Potential Impact of Airline Mergers and Industry Consolidation Before the S. Comm. on Commerce, Science and Transportation, 110th Cong. (Jan. 24, 2007) (testimony of Gerald Grinstein, CEO of Delta Air Lines) ("The combined carrier would overwhelming [sic] dominate at these unique airports with restricted entry due to slot controls * * * At Washington National, a merged US Airways-Delta would operate nearly four times more slots as its next largest competitor * * * At New York-LaGuardia, the combined carrier would operate almost twice as many slots as the next largest competitor * * *.").

become new monopoly routes for the remaining carrier.

Moreover, at various other communities US Airways will depart markets at which it is the sole or dominant provider of LGA nonstop service, and Delta will enter those same markets and become the sole or dominant provider of service. At several more, Delta will depart a market at which it is the sole provider of DCA nonstop service, and US Airways will enter that same market and become the sole provider of such service. While replacing one dominant carrier with another in a market might at first glance seem to have a neutral overall impact, such a conclusion would ignore the greater economic dominance that the succeeding carrier would have as a result of the transaction. Although the carriers plan to add nonstop service to a number of new communities, that service is likely to be provided on a monopoly basis and as a result can be priced at a premium. As discussed also below, there is no assurance that such service will continue for the longer term. Delta has already notified the airport at Roanoke, VA that it does not plan to continue its service from that airport to LGA, leaving that community without any nonstop service to New York City airports, and its intentions for service to other Virginia communities has also been questioned.[54]

While some of the consumer benefits cited in support of this transaction may prove to be short-lived, the consequences of carrier dominance, if not effectively remediated, will likely be more persistent. In this regard, DOJ noted that:

> The FAA has concluded that the increased concentration resulting from the transaction will lead Delta and US Airways to 'rely on their increased dominance to maintain or enhance their premium fare structure in markets served at both airports' [citing the Notice at 7,309]. This is consistent with an extensive body of empirical work finding that airport concentration is associated with higher fares.[55]

DOJ also asserted that:

> The parties' transaction will make LCC entry at LGA and DCA less likely, depriving consumers of the lower fares and vigorous competition that LCCs bring to the marketplace. It will increase the share of slots held by Delta and US Airways, giving them more revenue and profits at risk due to entry, more markets for which it will be in their interest to forestall entry, and thus, less incentive to sell or lease slots to a potential entrant.[56]

And also:

> LGA and DCA slots are highly concentrated in the hands of Delta and US Airways, both of which have little incentive to sell or lease slots to other carriers that would compete with them.
>
> * * * * *
>
> [C]oncern about LCC entry is especially great at DCA and LGA, where limited LCC presence and slot controls protect high fares for incumbent carriers.[57]

As noted above, in the Notice we had provided data to the effect that US Airways maintained an average fare that was high relative to SIFL at DCA. The carriers challenged the use of SIFL in this context, arguing that it was calibrated to regulate airline fares in the 1970's, has limited current use, fails to control for certain factors, and is biased in favor of longer routes at the expense of shorter ones.[58]

A mileage cost-based fare benchmark, SIFL is calculated every quarter based on airline operating costs reported to DOT by 17 major airlines (composed of 6 legacy, 4 LCCs and 7 other carriers).[59] Far from being obsolete, as the parties suggest, SIFL has been utilized by the Internal Revenue Service, the Government Accountability Office, the Department, other government agencies, the airline and airline consulting industries, and academics for fare analysis for many years. More importantly, the results achieved in our SIFL-based analysis mirror those of other tests.

The first of these other tests of airport fare rankings is found in our "Domestic Airline Fares Consumer Report," which is published quarterly. Table 7 of this report currently contains average fare premiums for 121 city markets, sorted by fare premium percentages in descending order. For the Third Quarter 2009, DCA ranks number 3 with a 27.7% fare premium, while LGA appears as number 16 with a percent fare premium of 9%. These fare premium calculations include distance and density adjustments, and clearly substantiate our concern that DCA and LGA are high-fare airports—even before the additional concentration and resultant increase in pricing power that would result from the carriers' proposed transaction.

Furthermore, an analysis of comparative yields—also discussed in the Notice, but in the context of comparing the three DC and three NYC airports—produced the same conclusions. We found that the average yield (i.e., revenue per passenger mile) in all markets at BWI is 48% less than DCA, and the average yield in all markets at Dulles is 37% less than DCA.[60] Similarly, the average yield at JFK is 28% less than at LGA, and Newark is 9% less than at LGA.[61] Moreover, using mileage-based calculations that should allay the carriers' concerns about long-haul bias in the SIFL figures, we determined that for trips out to 1,000 miles, passengers at LGA pay 23% more on average than those at JFK ($147 vs. $120 each way), while passengers at DCA pay 64% on average more than those at BWI ($184 vs. $113 each way).[62]

Market Analysis Confirms the Reasonableness of Our Concerns on Fares

A review of both US Airways' and Delta's historical pricing in similar markets indicates that absent the opportunity for additional competition afforded by slot divestiture, consumer savings at DCA and LGA as a result of this transaction would be negligible. In assessing US Airways' and Delta's claims as to potential consumer savings that would arise as a result of the proposed transaction, we considered materials presented by US Airways that provided base period and forecast period estimates of market total passengers, projected load factors, and other data. We compared the forecasted fares against US Airways' historical pricing in comparable markets,[63] and given their poor correlation we believe

[54] Letter of March 25, 2010 from Jim Webb and Mark Warner, United States Senators from Virginia, to DOT Secretary Ray LaHood, Docket FAA 2010–0109.

[55] Comments of the United States Department of Justice, March 24, 2010, p. 6–7.

[56] *Id.,* p. 4.

[57] *Id.,* pp. 8–9.

[58] Any bias that may exist between long-haul and short-haul markets, as argued by the parties, does not apply to the SIFL analysis used in this case, which is based on average passenger trip length at each of the three Washington or New York airports (which are all in excess of 500 miles).

[59] These costs are reported to DOT in "Form 41 Financial data" by certificated air carriers as a condition of their holding a U.S. air transport certificate of public convenience and necessity. U.S. air carriers submit these data accompanied by sworn statements attesting, under penalty of law, as to the accuracy and timeliness of the data.

[60] Yield at DCA is 27 cents per mile, vs. 17 cents at Dulles and 14 cents at BWI.

[61] Yield at LGA is 20.5 cents per mile, vs. 18.7 cents at EWR and 14.7 cents at JFK.

[62] These differences in the level of yields at area airports tended to correlate with the level of low cost carrier operations. Passengers pay more for nonstop service of equivalent distance at DCA and LGA than at alternative airports that have sizable LCC competition.

[63] In this, we compared the existing average fares from the O&D with the Standard Industry Fare Level (SIFL) metric fare for each of 39 DCA markets and stratified the markets based on US Airways' market share, into monopoly, dominant, competitive, and non-competitive markets. These results provided a measure against which US Airways' forecast fares were compared to their historical pricing performance and against the SIFL metric.

the forecasts understate the average fares likely to actually prevail longer term in the particular markets. It may be that the prospective fares listed in the document are introductory fares, or other short-term or promotional fares. In any event, given the divergence between these claimed fares and US Airways' historic pricing, we were unable to corroborate US Airways' claims of savings in the DCA market. Rather, projecting the historic pricing trends, it is reasonable to assume that US Airways at DCA would, especially over time, utilize its increased pricing power to exact premium fares in many of the markets impacted by the transaction.

We did not have a similar document from Delta that projected its fares in each proposed market.[64] However, in order to assess the potential impact of Delta's pricing policies on the traveling public we also examined probable Delta fares based on the carrier's historic pricing performance at LGA.[65] As with DCA, we were unable to corroborate the carrier's claims of potential consumer savings and, as with DCA as well, the data indicated a likelihood that, especially over time, Delta would utilize its pricing power to exact premium fares in many of the markets affected by the transaction.

Even if greater support might be mustered for the carriers' claims of consumer cost savings, we compared those claims with the savings that might occur under a divestiture scenario. Based upon an analysis conducted by the Department of Justice,[66] we are persuaded that additional LCC presence at an airport is associated with significantly lower average fares and higher passenger volumes at that airport and consequently greater public benefit from competition.[67]

Moreover, there is convincing evidence, also based upon the Department of Justice findings, that as additional LCC presence grows at an airport over time, it is associated with large and statistically significant price decreases and passenger volume increases at that airport.[68] This demonstrates precisely why the divestiture of slots to LCC's can ameliorate the competitive concerns raised by the applicants' proposed transaction.[69]

The Three DC Area and Three NYC Area Airports Are Not "Interchangeable"

In our February Notice, we tentatively found that other airports in the New York and Washington, DC areas did not significantly impact the ability of carriers to exert pricing power at LGA and DCA, respectively. US Airways and Delta dispute this conclusion and maintain, as a key element in support of their application, that the three major metropolitan airports in Washington, and the three major metropolitan airports in New York, respectively constitute single product markets, implying that if fares were perceived to be rising too high at one airport, the harm would be mitigated by consumers simply shifting to the other two. Their argument heavily relied on a study performed on their behalf by Compass/Lexecon, entitled "Analysis of Relevant Airport Groupings," which was submitted to the docket. The study addressed "whether the relevant origin (destination) points in New York and Washington are individual airports or groups of airports that passengers are willing to use interchangeably."

While the study never concluded *per se* that the airports were "interchangeable," it concluded that there were "statistically significant relationships between fares at the three major New York airports, and separately, between fares at the three major Washington area airports * * * [indicating] that fares at each airport * * * are affected by competitive conditions at the other airports" in the same metropolitan area.[70]

We have both reviewed the Compass/Lexecon study, as well as comments offered to the docket on this issue, and we are confident in concluding that, while fares at one of the three DC-area or NYC-area airports can exert a minor influence on fares at the others in some markets, it is quite clear that the airports are not economic substitutes. We further conclude that the presence of less costly service alternatives from BWI and IAD in Washington and EWR and JFK in New York are not sufficient to mitigate the harm to consumers that can occur from significantly reduced competition at DCA and LGA.

The Compass/Lexecon analytical approach was to compare fare trends over time between the three New York and three Washington area airports and common destinations. They found them to be systematically linked over time, such that a change in fare levels at one New York airport is associated with an increase in the fare at other area airports. From these observed "price linkages" they concluded that the New York and Washington area airports are "commonly accepted to be substitutes."

We believe the methodology of the study was flawed in a number of fundamental respects. Most significantly, while the study claimed a relationship in the *movement* of fares, it effectively admitted that the degree of relationship in the actual level of fare change was small. The results indicated

[64] DOT did request that Delta provide any documents it had that were equivalent to what US Airways had provided, but the number of markets for which they were able to offer information was limited to 10 out of approximately 36 markets where service is proposed. While useful, the limited data prevented the Department from fully analyzing the level of forecast fares and required the Department to independently review Delta's apparent pricing strategies in the markets.

[65] Staff calculated passenger-weighted average fares that reflected Delta's historic pricing in their existing markets, with which they estimated, together with other data (such as currently prevailing fares in the market and information on the competitive environment to be expected in the market) likely Delta fare ranges as a percent of SIFL in various city-pair markets. Of particular importance in this assessment was consideration for Delta's future potential market share and the competitive position that would enhance or diminish Delta's pricing power.

[66] Here, we placed reliance on an analysis conducted by the Department of Justice, which found that 10 extra percentage points of low-cost carrier share at an airport reduces on average the airport-wide price premium or discount by 4 to 9 percentage points, and increases the total number of passengers at the airport by 7.7 to 14.8%, depending on the sample used.

[67] DOJ Appendix A at A–7.

[68] Their analysis showed, for example, that as LCC presence at an airport increases by 20 percentage points (from zero to 20%, say), the average airport-wide fare premium falls by an average of 8 to 18 percentage points, depending on the sample of airports examined. Similarly, a 20 percentage point increase in LCC presence is associated with a 15 to 30% increase in the number of passengers at that airport.

[69] *Id.* at A–6.

[70] US Airways and Delta also asserted that the Department of Transportation and the Department of Justice have effectively treated the three Washington area airports as economic substitutes, Comments of Delta and US Airways at p. 34 and 35. With regard to DOT, they cited Order 2006–6–17 (June 12, 2006) as evidencing such a position. In that case, three applicants competed for an award of two slot exemptions at DCA to serve a community within the 1,250-mile perimeter. DOT found the case to be "extremely close" between Comair's proposal to serve Savannah and US Airways to serve Sarasota Bradenton, as each satisfied two of the statutory criteria and offered similar benefits to the respective communities. In weighing the advantages and disadvantages of the proposals, we ultimately selected the US Airways proposal because the population in the Sarasota MSA was larger than Savannah's, US Airways' proposal included a right-sizing of aircraft to reflect the seasonality of the Sarasota market, and Savannah had better access to the Washington area with three nonstops to IAD versus Sarasota's one to BWI. In no way was the Department by doing so stating or implying that service between DCA, IAD and BWI was interchangeable. Order 2006–6–17 at 7, 8. With regard to DOJ, Delta and US Airways cited a DOJ 2001 press release and a 1996 speech by an Assistant Attorney General. In these instances concerns were raised about prospective transactions that would increase concentration by carriers at DC-area airports. Again, these did not state that the airports were economic substitutes for one another. DOJ's position on the issue is clearly set forth in its filings in this matter, which support DOT's proposed action.

that an increase in the fares at one New York airport of 10% is associated with an increase in the fare at another New York airport of only about 2.8%. At Washington, the corresponding figure was only 2.1%. If the major New York and Washington airports are "economic substitutes," as the authors contended, that appears to be at odds with the fact that a price change at one would produce a change at the others of only one quarter or one fifth as much.[71]

Also, in its comments the Department of Justice expressed criticism of the Compass/Lexecon study, observing that the study failed to define the level of correlation in fares that would place the airports in the same relevant market, such that market power could not be exercised at DCA (or LGA) independently of BWI and IAD (or JFK and EWR).[72]

However, given the issues raised by the Compass/Lexecon analysis, we also independently considered whether the three airports in the New York area, and the three in the Washington area, effectively constitute the same market for all passengers. Comparative yields, Standard Industry Fare Levels, and Fare/Demand data were all studied for the DC and New York airports. In our review of each of these metrics, we found that for a large portion of passengers, especially time-sensitive passengers in each respective metropolitan area, the New York and Washington area airports are not effective substitutes for each other.

a. Yield Analysis

In analyzing both overlap and all markets at the airports, we found that yields (*i.e.,* revenue per passenger mile) were substantially different among the airports. Specifically, we found the average yield in all markets at DCA is 27 cents per mile, vs. 17 cents at Dulles and 14 cents at BWI. Similarly, the average yield at LGA is 20.5 cents per mile, vs. 18.7 cents at EWR and 14.7 cents at JFK. If the airports were effective economic substitutes for all passengers, we would expect to see a greater self-equalizing of yields and the yield spreads would not differ so significantly.[73]

b. Standard Industry Fare Levels

DOT conducted an analysis of the level of passenger weighted fares as a percent of SIFL at Washington and New York City airports to test the proposition that fares at these airports are essentially undifferentiated. The results are summarized at Appendix B.

DOT found that the relationship of actual fares to the SIFL fare benchmark is very different at the respective area airports. At the Washington airports, actual fares are 65% of SIFL at BWI, 77% at IAD and 101% at DCA. At New York, the actual fares are 71% of SIFL at EWR, 57% of SIFL at JFK, and 82% of SIFL at LGA.

These disparities in weighted fares, consistent with our findings on yields, implies that price competition among the airports does not appear pervasive enough to discipline individual airport prices and thereby eliminate substantial price differentials.

c. Fare/Demand Data

If the three DC and three NYC airports were economic substitutes, a change in the fare levels at one should produce a corresponding change in passenger levels both at that airport and the others in its area. (One would expect that passengers would book less travel at an airport where fares were increased and more travel at the others, if the airports were indeed "competitors.")[74]

We found no evidence of any significant substitutability existing among New York and Washington area airports. Substantial yield disparities and substantial differences in SIFL ratios were found to exist among the airports in both common and non-common markets, and there were very low levels of correlation between the fare differences and the traffic volume differences at the airports.

The Department of Justice also supported the proposition that most passengers do not consider the airports to be interchangeable.[75] DOJ noted that the sometimes significant differences in average fares at the various airports, and the high values attached to the slots and the carrier's efforts to protect these slots, "show there is differentiation between LGA and DCA and other area airports." It further observed that "Although other airports may be acceptable substitutes for some passengers (particularly price-sensitive passengers) they clearly are not close substitutes for other passengers, and competition among carriers at DCA and LGA matters."[76]

In conclusion, we believe that the evidence presented by the parties in support of their contention that Washington and New York area airports are effective substitutes is unconvincing. Any low level of substitution that may be demonstrated is inadequate to effectively discipline prices among the area airports, leaving the traveling public vulnerable to high fares arising from lack of competition and high market concentration.

[71] The study also failed to control for changing macro or even regional economic trends. Moreover, in testing whether common airport markets are competitive, reliance should not be made simply on changes in fare trends alone over time, but rather should also examine whether passenger levels at each airport pair responds to changes in price over time at other area airport pairs in the same city-pair market. Finally, the study attempts to show that populations in the New York and Washington areas are dispersed in such a manner that many could drive roughly equal distances to "competing" airports. However, in doing so it failed to reflect the drive time effects of congestion, or differences in the availability or cost of parking, accessibility to mass transit and airport amenities, although these factors clearly alter the practical substitutability (cost/value to consumers) of different airports to consumers.

[72] It is not surprising that there is some correlation among fares at nearby airports, and more correlation than one would find among three random airports. DOJ asserted that such correlation alone does not show whether fares at DCA or LGA are constrained by fares at nearby airports.

[73] In its comments, United Airlines contended that the differentials in yield affecting LGA and DCA may be due simply to the added costs of slots and problems with delays. As a general point, airline fares are market-based rather than cost-based (as evidenced in the variance in SIFL ratios discussed above). However, the three Washington and three New York airports largely share the same weather, a major cause for delays, and DOT Ontime Performance data for the fourth quarter 2009 indicates that delays are more common at IAD than DCA or BWI, and more common at EWR than at LGA or JFK. (The percentage of delayed flights were 17.7% for DCA, 17.4% at BWI, and 19.4% at IAD, as well as 24% for LGA, 198.8% for JFK, and 29.1% for EWR.). Further, the cost for slots could not explain the wide disparity between yields at DCA, IAD, and BWI on one hand and LGA, EWR, and JFK on the other. As noted above, DCA's all markets yield is 37% above IAD and 48% above BWI, while LGA's comparable figure is 8% higher than EWR and 28% higher than JFK. The value of a one cent yield difference *per quarter* on all scheduled passengers at DCA is estimated at $28.9 million, and $41 million at LGA—many times the value of a slot at those airports.

[74] In order to test this proposition we conducted a time series analysis using O&D data for the same period as used in the Compass/Lexecon study. The regressions produced correlation coefficients (R^2) for each set of airports that were very low, with levels not significantly differentiated from zero—indicating the lack of a relationship between fare differences at DCA/LGA and traffic differences at the other metropolitan area airports. Even when regressions were performed focusing on overlap markets where the fare difference between the reference airport market and the base airport market were the greatest and where highest fares exist at the base airport—where consumers would be most likely to seek lower fares by turning to an alternative or substitute airport—the correlation coefficients were not substantially differentiated from zero.

[75] Although supporting divestment of Delta slots at LGA in order to expand opportunities for new entrants and limited incumbents in the NYC metropolitan area, the Port Authority of New York and New Jersey contended that there were flaws in DOT's analysis of airport substitutability and stated that it operates its airports to serve one travel region, with each airport having overlapping market areas. While market areas may "overlap," that does not mean that passengers within the market areas are indifferent as to which airport they utilize, or that fares at one discipline those at others. We believe the further discussion as presented above addresses the Port Authority's other concerns.

[76] Comments of the United States Department of Justice, March 24, 2010, p. 16.

The Reputed Benefits of the Transaction Do Not Mitigate the Potential Harms

The Joint Applicants have asserted that the FAA failed to consider the benefits of the proposed transaction, including improvements in service and increased competition among the parties. Specifically, the Joint Applicants claim that the transaction will result in a more efficient utilization of slots and facilities through upgauging of aircraft size at both LGA and DCA, thereby increasing throughput and competition while reducing congestion and delay. In addition, the Joint Applicants argue that the facilities transfer will enable Delta to create a seamless hub at LGA and will facilitate enhanced competition and preserve and enhance small community access at both LGA and DCA.

By deciding to tentatively grant the waiver as conditioned in the Notice, we not only carefully considered these efficiencies, we also concluded that they would likely be realized if the transaction were implemented as remedied. It is clear from the record in this proceeding that the slots at issue in this transaction are currently being used sub-optimally and inefficiently, both from the perspective of the carriers holding them as well as from the perspective of the public interest.

We concur that the transaction would provide a greater economic incentive to both carriers to achieve more efficient utilization of slots and facilities at both airports through upgauging aircraft size and that that would produce public benefits. However, we also concur with the Department of Justice in noting that, "the parties' benefits estimations use incorrect baselines, or 'but-for-world,' against which to compare their promised capacity and traffic gains."[77] Rather than comparing the projected increase in capacity and traffic at current levels, the appropriate comparison is against alternatives to the current commercial situation faced by US Airways at LGA and Delta's planned operations absent the transaction at DCA.[78] As such, we believe that the Joint Applicants have overstated the public benefits and understated the potential harms from the transaction. Indeed, in many airport-pair markets, the Joint Applicants are merely replacing each other's services at the two respective airports. Given that Delta and US Airways are currently primary competitors for each other at each of these airports, the loss in potential competition in the markets they both currently serve is particularly important. In addition, Delta's claimed public benefits of creating a hub at LGA are also overstated. For example, as Southwest notes, creating a hub at LGA would likely necessitate reliance on regional jets, as Delta uses at other hubs, potentially eroding the benefits of upgauging. Further, a hub at LGA would utilize a significant amount of its scarce capacity to accommodate passengers who have no need or desire to be at LGA but are only stopping there on a journey elsewhere.[79]

The Joint Applicants assert that one of the main benefits of the transaction is increased or enhanced service to small communities. While Delta and US Airways have made public some of their new intended services, including service to small communities, the carriers have not released all intended service changes and in no way are bound to implement any of the proposed services in new markets.[80] Also, if service to small communities with an established history of nonstop service to these slot controlled airports is eliminated, while service is announced to other small communities with a history of unsustainable nonstop service, it is questionable as to whether the proposed service is really beneficial to small communities as a whole, or is merely beneficial to some small communities at the expense of others.

The Joint Applicants have the flexibility to provide service to small communities, even when faced with the proposed remedies, by eliminating marginal new frequencies in existing medium and large markets and/or by upgauging existing frequencies to release slots to allocate to small communities. While there are competitive reasons for allocating a set number of frequencies to a particular market, if service to smaller communities is as important as the parties contend, the carriers will allocate the necessary resources to serve them. In fact, despite their threats that small community service is at risk in a remedied transaction, the carriers may determine that it is financially beneficial to serve small communities at the expense of fewer frequencies in larger markets because yields in smaller markets are less susceptible to the dilutive effects of LCCs. DOT, on multiple occasions, has stated in DCA slot exemption proceedings that US Airways, with its large portfolio of DCA slot holdings, has had the ability to add new service to smaller communities from DCA, but has chosen not to do so.[81]

Unless mitigated, the potential harms in the proposed transaction are substantial. First, as explained above, the transaction will reduce competition between Delta and US Airways and competition from nearby airports will not completely offset lost competition between the two carriers at DCA and LGA. The Joint Applicants currently compete on a number of LGA and DCA nonstop routes and have competed on many others in the past. Scheduling plans submitted in the record indicate that Delta plans to withdraw from DCA nonstop routes on which it currently competes with US Airways, and US Airways plans to withdraw from certain LGA nonstop routes where it competes with Delta.[82] We agree with DOJ that, "In the longer run, competition between Delta and US Airways will be lost across a number of routes." This lost competition is unlikely to be replaced by other incumbent competitors because they have significantly fewer slots and therefore focus their services at these airports on core markets, particularly large hub or focus cities where they can connect passengers to additional destinations. As DOJ concludes, "the transaction will reduce the number of carriers with 'excess' slots to discipline a fare increase by the dominant carriers from two to one at LGA and from one to zero at DCA."[83]

Second, evidence in the record establishes that the transaction will inhibit new entry at LGA and DCA. The record shows that there is a pattern of slot hoarding by incumbent carriers at both LGA and DCA in order to prevent new entrants and limited incumbents from obtaining or expanding competitive service at those airports. In its Notice, the FAA noted the lack of robust entry by new entrants or expansion by limited incumbents at these airports. DOJ concludes that slots at both airports are "highly concentrated in the hands of Delta and US Airways, both of which have little incentive to

[77] Reply Comments of the United States Department of Justice, April 5, 2010, p 4, footnote 7.

[78] Comments of the United States Department of Justice, March 24, 2010, p. 18.

[79] Comments of Southwest Airlines, p. 5.

[80] Indeed, a market-by-market analysis using the carriers' own metrics of proposed services in new markets for Delta at LGA and US Airways at DCA gives rise to concern that, in some of the smaller markets, some of their services may not be sustainable over the longer term.

[81] *See, e.g.,* DOT Order 2008–2–28 Granting Within-Perimeter Slot Exemptions at Ronald Reagan Washington National Airport, February 22, 2008, p. 10; and DOT Order 2007–5–12 Granting Within-Perimeter Slot Exemptions at Ronald Reagan Washington National Airport, May 23, 2007, p. 15.

[82] Comments of the United States Department of Justice, March 24, 2010, p. 13.

[83] *Id.,* p. 16.

sell or lease slots to other carriers that would compete with them." [84] Noting that fares are especially high at DCA due to limited presence of low-cost carriers and slot controls, DOJ cites evidence in the record that shows that both US Airways and Delta believe that competitive entry by low-cost carriers "would substantially lower their protected fares and profits at these airports." [85] DOJ further notes that incumbent carriers are hoarding and babysitting slots at these airports by flying excessive frequencies using small airplanes. In an effort to discourage these anti-competitive practices the 80% use-or-lose rules were established.[86] Legacy carriers, however, have effectively developed methods to bypass the use-or-lose provision by using their regional affiliates to downgauge equipment on existing routes while increasing frequency. While the carriers may claim that higher frequency service in a market can benefit consumers, the motivation for that may be simply covering more slots at a lower per departure trip cost and preventing the more efficient use of a finite number of slots. For example, in the LGA–Raleigh/Durham market, US Airways, Delta and American offer a total of 23 weekday departures with average seats per departure equaling just 49 (May 2010 schedules).

Also, the larger the slot portfolio of a given carrier, the greater the flexibility the carrier has to abuse the system, to bypass the provisions of the use-or-lose rules, and to block new entrants or limited incumbents from gaining new or improved access to these slot controlled facilities. The proposed transaction would give DL and US exactly that—larger slot holdings across many hours of the day, allowing these two carriers greater flexibility to bypass the 80% use-or-lose rules and to cover as many slots as possible by maintaining small regional aircraft operations.

Furthermore, we agree with DOJ that the transaction will reduce the availability of slots, given that US Airways and Delta will have: (1) Substantially increased slot shares at DCA and LGA respectively; (2) greater marketing and scheduling "presence" at both airports that will allow them to exact a price premium in both existing and new markets; and, (3) a greater interest in maintaining the price premiums that exist at those airports by forestalling new entry.[87]

[84] *Id.,* p .8.

[85] *Id.,* p. 9.

[86] *Id.,* p. 10, fn. 24.

[87] *Id.,* p. 12.

In order to discipline the increased concentration and additional pricing power for both US Airways and Delta and thereby mitigating the reduction in competition due to the transaction, significant additional competition is necessary. As analyses by both the Department, DOJ, and Southwest conclude, competition by new entrants and limited incumbents, particularly LCCs, will not only maximize the economic efficiency of the slots at both airports through the operation of more seats at lower fares per slot than by Delta or US Airways, but will also minimize the total number of slot divestitures required to remedy the anticompetitive effects of the transaction.

We agree that there can be important benefits provided as a result of the proposed transaction, but it is at the margins, where those potential benefits are at their least, that divestitures have been proposed. US Airways and Delta have claimed that, *overall,* the proposed transaction would generate $153 million in savings. Yet, a study commissioned from Campbell Aviation Consultants for Southwest Airlines claims that, if Southwest operated the 20 slot pairs at LGA and the 14 slot pairs at DCA, the passenger fare savings per year would total $193 million compared to the use of those slots by Delta and US Airways. The Campbell study asserts that Southwest's average fare would be 33% lower than Delta's at LGA and 49% lower than US Airways' fare at DCA. In addition, it estimates that Southwest would carry more than 340,000 additional passengers to and from each airport annually.[88] We note that the thrust of this study is supported by the analysis performed by DOJ, discussed above, which found that increased low-cost carrier share at airports significantly reduces price premiums and significantly increases ridership.

We have concluded that the benefits of the Delta-US Airways transaction as proposed would not outweigh its potential for harm to the traveling public, but that the divestitures we have proposed will bring significant additional consumer benefits that would assure overall net benefit to the public.

The Counterproposal Offered by the Parties Fails To Meet the Essential Requirements for a Suitable Remedy

The divestitures proposed by the FAA were designed to mitigate the competitive harm resulting from the transaction at the least cost to the transaction itself. While the Joint Applicants' counterproposal includes divestitures of 15 slots at LGA and 4.5 at DCA, Southwest argues that the FAA's proposed divestiture of 20 slot pairs at LGA and 14 pairs at DCA is not enough, and that even greater divestitures should be required.[89]

[88] Comments of Southwest Airlines, p.10.

We have concluded that the divestiture of 20 slot pairs at LGA and 14 slot pairs at DCA are the minimum necessary to remedy the reduction in competition resulting from the transaction while preserving legitimate efficiencies obtained from it. While the divestiture of more slots than proposed in the Notice would make the market more competitive, we seek to minimize the numbers of slot pairs required to remedy the transaction by maximizing the competitive potential of the divestiture packages. This objective is accomplished under the specific circumstances of this case by balancing four essential components of an effective slot remedy package. The first component is a sufficient number of divested slots to allow other carriers to mount an effective competitive response to the increased dominance and reduction of competition that would occur as a result of the transaction. The second remedy component is to define the pool of competitors eligible to take up the remedy based on the carriers that would have the greatest economic incentive to use slots obtained as intensively as possible, thereby exerting the most competitive discipline per slot (by operating larger capacity aircraft and offering the most price competition at the affected airports). As DOJ points out in the Appendix to its comments [90] it is widely recognized in the literature that low cost carriers exert maximum competitive pressure in the markets they serve by selling more seats at lower fares. The third remedy component is to ensure that the bundles of slots for divestiture are *both* suitable for a commercially viable pattern of scheduled service in the types of markets affected by the transaction *and* are constructed proportionate to the slots that were being transferred between the parties to the transaction. The fourth component is to ensure that a process for distributing the divested slot packages is not left to the parties themselves, given the overwhelming incentive for them to structure the divestitures to minimize the competitive impact on themselves and thereby the benefits to consumers.[91] The counterproposal offered by the parties

[89] Comments of Southwest Airlines, p.7.

[90] Comments of the United States Department of Justice, Appendix A at A–2.

[91] Reply Comments of the United States Department of Justice, April 5, 2010, p.8.

fails to satisfy each and every one of these four essential remedy components, and therefore fails to meet the essential requirements for a suitable remedy.

Furthermore, while Delta and US Airways have offered a counterproposal for fewer divestitures, they have neither demonstrated that our number is arbitrary nor have they shown that their number better suits the public interest or addresses the competitive harm resulting from the transaction. We have noted that we agree with the Department of Justice that there will be a significant reduction in competition between US Airways and Delta on a number of overlap routes, based on their confidential post-transaction plans. Remedying this loss of competition alone substantiates the number of divestitures put forward by the FAA, even before other anticompetitive effects are considered, such as the effects of increased city and airport carrier "presence" factors which impact capacity and pricing in other markets at the two airports.

The Joint Applicants, Continental and the Delta Master Executive Council of ALPA argue that the remedy proposed for this transaction is substantially more onerous when compared with DOT's tentative decision in the *oneworld* antitrust immunity case involving American Airlines, British Airways, and Iberia [92] or the final decision in the recent Star Alliance immunity case.[93] However, the cases are not comparable. Antitrust immunity applications are governed by different statutes (49 U.S.C. 41308 and 41309) and standards than those applicable to the transaction before us. Further, the facts and circumstances of each case are very different. Delta and US Airways seek a waiver from an Order allowing them to consummate a slot transaction involving a significant number of slots at two constrained domestic airports that would have a substantial impact on domestic competition. The antitrust immunity cases, on the other hand, involve cooperation on long-haul, inter-continental itineraries, in a context of inter-alliance competition for global traffic flows. There is no immunity grant possible for cooperation between two U.S. carriers on domestic routes.[94] Foreign carriers partner with one or more domestic carriers to expand code-sharing and alliance opportunities to compete with other alliances of foreign and domestic carriers, many of which are already exempt from the antitrust laws. If the Department determines that an exemption from the antitrust laws is necessary, the Department next considers whether those benefits can be achieved "by reasonably available alternatives that are materially less anticompetitive." 49 U.S.C. 41309(b)(1)(B). The Department therefore considers the substantial benefits that may result from the airline alliances and determines the extent of required slot divestitures or other remedies as a condition to the grant of immunity.[95]

As proposed in the Notice, our remedy is designed to allow non-aligned, new entrants and limited incumbents to establish new or complement existing patterns of services that are commercially viable at both slot-constrained airports. The Notice issued February 9, 2010, set forth a proposal under which slot interests at DCA and LGA would be bundled in a divestiture. The purpose of bundling the slot interests was to ensure that a purchaser would obtain a sufficient number of slot interests that would make it possible to initiate service in a way that provides meaningful new competition. We continue to believe that bundling provides the best opportunity to achieve this goal.

However, after reviewing the comments submitted on the Notice and further consideration, we have slightly adjusted the four proposed bundles at LGA from one bundle of eight slot pairs and three bundles of four slot pairs each, to two bundles of six slot pairs each and two bundles of four slot pairs each. We noted that Delta and US Airways' counterproposal at LGA indicated an interest from two limited incumbents (AirTran and Spirit) and one prospective new entrant (WestJet) for five slot pairs each. The 6–6–4–4 arrangement may better accommodate the interest they demonstrated, as the individual bundles would allow existing slot portfolios and corresponding patterns of service to be expanded or new service to be launched with moderate frequency service. By making available for purchase from the existing slot holder two bundles of slots at DCA and four bundles of slots at LGA, limited incumbent carriers will have the opportunity to build on their limited presence at the slot constrained airports by adding frequencies to existing markets for better schedule coverage throughout the day, a key benefit to their customers, and a key defense against a dominant carrier that may choose to inundate markets in which it competes with new entrants and limited incumbents with excess capacity in order to force the smaller carrier from the market. Both new entrant and limited incumbents could also establish new service to other focus cities in their networks. Bundles of slots will also allow carriers with limited operations to improve efficiencies at these constrained airports in terms of better utilization of ground staff, equipment and facilities. Efficiencies will also be gained in the form of increased throughput, as new entrants and limited incumbents will offer on average more seats per departure than proposed by US Airways and Delta with their reliance on regional affiliates for over 80% of their proposed new flying from DCA and LGA.

With only two limited incumbents currently serving DCA, the creation of two slot bundles provides for diversified penetration in the form of a new entrant or limited incumbent launching service in either high frequency business markets or multiple smaller markets.

Terms of Final Waiver Notice

This grant of waiver is conditioned on: (1) The divestiture by US Airways of 20 pairs of slot interests at LGA in the slot bundles identified below; (2) the divestiture by Delta of 14 pairs of slot interests at DCA in the slot bundles identified below (these slot interests will be made available for purchase by new entrants and limited incumbents as discussed later), and; (3) US Airways and Delta making available gates and other ground facilities on reasonable terms to the purchasers of divested slots if requested by the purchaser, and if

[92] Joint Application of American Airlines, Inc., British Airways PLC, FinnAir OYJ, Iberia Lineas Aereas de Espana and Royal Jordanian Airlines under 49 U.S.C. 41308 and 41309 for approval of, and antitrust immunity for, agreements; DOT–OST–2008–0252; DOT Show Cause Order 2010–2–8; case now pending DOT final disposition.

[93] Final Order 2009–7–10 (Docket OST–2008–0234).

[94] Evaluating the competitive impact in international markets differs substantially from such an evaluation in domestic markets. It is widely accepted in the airline industry that connecting competition is much more effective at disciplining fares on long-haul routes than on short haul routes, due to much longer journey times and the ratio of the non-stop elapsed journey time to the elapsed journey time of a connecting itinerary. Furthermore, factors such as circuity play a much more important role in the efficacy of connecting competition on short- and medium-haul routes and thereby on a competitive assessment of a reduction in competition on such routes. The relevant markets in this case are therefore considerably different, resulting in a fundamentally different competitive impact, and typically requiring different remedies.

[95] Delta and US Airways further claim that the recent American-JetBlue transaction should satisfy DOT's concerns with regard to low-cost entry at DCA. In that transaction, JetBlue will lease 8 slot pairs at DCA. However, the source of the slots is American, which would have the second largest number of slots and be second in departure share at DCA were we to approve the US–DL proposal. US Airways would retain the same level of concentration that cause our concerns here, and even obtains a more dominant position over its nearest rival at the airport.

such gates and facilities are not available from the airport authority. The following discussion details these conditions and establishes the procedure for the purchase of divested slot interests. As we discussed in the February Notice, our goal of maximizing competition and consumer benefits will be realized most effectively by ensuring that the slot interest bundles are purchased by limited incumbents and new entrants (sometimes referred to herein as "eligible carriers"). As described in the February 9, 2010, Notice, eligible carriers must be U.S. or Canadian air carriers having fewer than five percent of total slot holdings at DCA and/or LGA, do not code share to or from DCA or LGA with any carrier that has five percent or more slot holdings, and are not subsidiaries, either partially or wholly owned, of a company whose combined slot interest holdings are equal to or greater than five percent at LGA and/or DCA. Carriers that would not qualify include those who are involved in a code-share relationship at DCA/LGA with carrier(s) that also would not qualify as of the date of this Notice.

As proposed, divested slot interests will be bundled for reallocation. This bundling ensures a purchaser can obtain sufficient slot interests to initiate or increase service in a manner that meets its operational needs and enhances competition. The sellers may not set a reserve price for the slot interest bundles.

As discussed above, we have slightly adjusted the four proposed bundles at LGA from one bundle of eight slot pairs and three bundles of four slot pairs each, to two bundles of six slot pairs each and two bundles of four slot pairs each. For the DCA slot interests, there will be two bundles (one consisting of eight pairs and another of six pairs). For the LGA slot interests, there will be four bundles (two consisting of six pairs and two of four pairs). The following table shows the slot interest bundles as adopted.

At DCA: Bundle A would consist of 8 pairs of slots at: 0700 (2), 0800 (1), 1000 (2), 1100 (1), 1200(1), 1300 (1), 1400 (2), 1500 (1), 1600 (2), 1900 (1), 2000 (1), 2100 (1), and

Bundle B would consist of 6 pairs of slots at: 0700 (1), 0900 (2), 1100 (1), 1200 (1), 1300 (2), 1700 (1), 1800 (1), 1900 (1), 2000 (1), 2100 (1).

At LGA: Bundle A would consist of 6 pairs of slots at: 0600 (D), 0700 (D), 0800 (A), 0800 (D), 0900 (A), 1000 (D), 1300 (A), 1400 (D), 1700 (A), 1800 (D), 2000 (A), and 2100 (A);

Bundle B would consist of 6 pairs of slots at: 0700 (D), 0900 (A), 1000 (D), 1100 (A), 1200 (D), 1300 (A), 1400 (D), 1500 (A), 1600 (D), 1700 (A), 1700 (D), and 2000 (A);

Bundle C would consist of 4 pairs of slots at: 0600 (D), 0800 (A), 0900 (D), 1100 (A), 1200 (D), 1500 (A), 1600 (D), and 2000 (A); and

Bundle D would consist of 4 pairs of slots at: 0700 (D), 1000 (A), 1100 (D), 1300 (A), 1400 (D), 1800 (A), 1900 (D) and 2100 (A).

Eligible carriers may be unable to use acquired slot interests if they cannot obtain access to gates, ticket counters, baggage handling services, loading bridges, and other ground facilities. If the purchaser lacks access to gates and ground facilities or is unable to obtain such access from the airport authority, the seller must make these available to the purchaser under reasonable terms and rates.

The divested slot interests will be subject to certain limitations to ensure they achieve the competition goals discussed in this grant of waiver. These limitations on the LGA slot interests are effective until the termination of the LaGuardia Order (currently October 29, 2011), and they do not expire for the DCA slot interests. The FAA will waive the respective use or lose provisions of the LaGuardia Order and HDR for 6 months following purchase to allow the purchaser to begin service, but the purchaser must initiate service no later than 6 months following purchase. The purchaser may lease the acquired slots to the seller until the purchaser is ready to initiate service to maximize operations at the airports. The slot interests may not be sold or leased during the 12 months following purchase because the purchaser must hold and use the acquired slot interests. However, purchasers may engage in one-for-one trades of these slot interests for operational needs. The slot interest limitations would attach to the slot interest acquired by the eligible carrier in a one-for-one trade. Any one-for-one trades are subject to the FAA notice requirements in the LaGuardia Order and HDR. After the initial 12 months, the slot interests may be sold (in the case of DCA slot interests), traded, or leased to any carrier that at the time of the sale, trade, or lease would have met the eligibility requirements to make an offer under this Waiver for the divested slot interests. Trades or leases of LGA slot interests may not exceed the duration of the LaGuardia Order as stated in that Order. Any of these transactions are reportable under the HDR and LaGuardia Order.

Within 30 days of this grant of waiver, Delta and US Airways must notify in writing to the FAA whether they intend to proceed with the slot transfer transaction. If they intend to consummate the slot transfer transaction subject to this waiver, that notice must provide the following information for the divested slots:

(1) Operating Authorization number (LGA) or slot number (DCA) and time;
(2) Frequency;
(3) Effective Date(s);
(4) Other pertinent information, if applicable; and
(5) Carrier's authorized representative.

The FAA will post a notice of the available slot interest bundles on the FAA Web site at *http://www.fly.faa.gov* within two business days of receiving all required information for the sellers and, if practicable, will publish the notice in the **Federal Register.** The notice will provide seven business days for purchase offers to be received and will specify a closing date and time. Eligible carriers may register to purchase the slot interest bundles via e-mail to *7-awa-slotadmin@faa.gov*. Registration must be received 15 days prior to the start of the offer period and must state whether there is any common ownership or control of, by, or with any other carrier and certify that no purchase offer information will be disclosed to any person other than its agent.

An eligible carrier may purchase only one slot interest bundle at each airport, except at the seller's option as discussed later, as we seek to maximize the interest of eligible carriers in participating in the proceeding. This limitation will prevent any one carrier from acquiring all divested slots, which was raised as a concern in the comments. We are also incorporating specific procedures to facilitate the sales process on multiple slot interest bundles. An eligible carrier will register for each slot interest bundle that it wishes to buy, and it will be assigned a random number for each registration so no information identifying the purchaser is available to the seller or public. A purchaser will be allowed to indicate its preference ranking for each slot interest bundle as part of its offer. Finally, as discussed in more detail later, the FAA will review the offers for each bundle in order (*i.e.,* bundles A and B for DCA and A, B, C, and D for LGA).

All offers to purchase slot bundles must be sent to the FAA electronically, via the e-mail address above, by the closing date and time. The offer must include the prospective purchaser's assigned number, the monetary amount, and the preference ranking for that slot interest bundle. No extensions of time will be granted, and late offers will not be considered. The FAA will post all offers on the Web site as soon as practicable after they are received. Each purchaser can submit multiple offers until the closing date and time.

Once the sales period closes, the FAA will determine the highest offer for each bundle. If each bundle has only a single offer, the FAA will notify the seller by forwarding the purchaser's identification. If one eligible carrier has made the highest purchase offer on multiple bundles, the FAA will determine which offer will be valid based on preference ranking and bundle order. The FAA will identify the next-highest offer from a carrier that remains eligible to purchase the bundle as the successful offer on the other bundles. This information will be forwarded to the respective seller. The FAA will also provide information about the amount of the highest offer, and the selling carrier may choose to accept the highest offer instead of the offer identified by the FAA. Upon acceptance, the FAA will notify the selling and purchasing carriers to allow them to carry out the transaction, including any gate and ground facilities arrangements. The seller and purchaser must notify the FAA that the transaction has been completed and certify that only monetary consideration will be or has been exchanged for the slot interest bundles. This notification must occur within five business days of notification by the FAA of the winning offer. A transaction is final, and the waiver will be effective, only when any issues related to gates or ground facilities have been resolved, although not all purchasers may need gates and facilities beyond what they already have. The FAA then will approve the transaction and will maintain and make publicly available a record of the offers received, the identity of the seller and purchaser, and the winning price.

In the unlikely event that there are no offers for a slot interest, those slot interests will revert automatically to the FAA. If necessary, we will announce at a later date a means for disposing of or retiring a slot interest that attracts no purchase offer. We do not expect that this need will arise.

The grant of waiver becomes effective upon FAA approval of all slot interest bundle transactions.

Issued in Washington, DC, on May 4, 2010.

Ray LaHood,

Secretary.

J. Randolph Babbitt,

Administrator, FAA.

Appendix A

Summary of Comments

We received comments from numerous commenters which we have summarized below.

US Airways-Delta Response

Delta and US Airways submitted comments in opposition to the FAA's divestiture conditions. The carriers asserted that:

(1) Congress empowered FAA only to promote safety and the efficient use of airspace and, thus, it lacks the statutory authority to consider potential effects on competition in carrying out its other duties.

(2) While the Secretary of Transportation has authority to consider competition-related factors, he is prohibited by 49 U.S.C. 106(f)(2)(D) from directing the FAA to use its authority to do what it cannot do directly.

(3) The proposed divestiture would constitute an unlawful taking under the Fifth Amendment, because restrictions on the sale are imposed that would make it impossible for the carriers to realize full market value.

(4) DOJ is the agency best equipped to consider whether the transfer will hinder competition, acknowledging that DOJ is currently undertaking a review.

(5) FAA cannot use a waiver applicable to LGA to force a divestiture at DCA.

(6) FAA failed to analyze "overwhelming evidence" that the proposed transaction will benefit competition, such as service to new destinations, upgauging of aircraft, new connecting opportunities, etc.

(7) FAA's proposed divestitures fail to consider the integrated nature of the transaction.

(8) FAA's concerns about potential anticompetitive actions are mere speculation, as it did not point to specific instances of harm.

(9) FAA based its analysis on a 1970s vintage measure (SIFL) that fails to take into account the major changes in the industry over the last 30 years, such as industry deregulation, emergence of LCC's, *etc.*

(10) FAA failed to articulate and explain the level of airport concentration that causes it concern.

(11) The three DC-area and three NYC airports are competitively linked, and FAA's contention that they are not substitutes is inconsistent with past positions of DOT and DOJ.

(12) FAA did not sufficiently explain why divestitures of 14 pairs at DCA and 20 pairs at LGA were appropriate, and that level of divestiture is inconsistent with DOT's recent action in the *oneworld* case in which only 4 pairs of slots were required to be leased for ten years.

Notwithstanding these objections, US Airways and Delta stated that, as they were "mindful of the concerns expressed by FAA" and desiring of a solution that would permit them to move forward, they had entered into provisional divestiture agreements with four carriers that were eligible under the terms of the Notice for 15 slot pairs at LGA and 4.5 slot pairs at DCA. The 15 slot pairs at LGA would be transferred, five each, to AirTran, Spirit, and WestJet over periods of up to 28 months; the 4.5 pairs at DCA would be transferred to JetBlue. The carriers added that these more limited divestitures, "while diminishing the benefits of the transaction," would preserve enough of the benefits to permit them to go forward.

US Airways and Delta stated that if the FAA grants the waiver subject to the proposed divestiture conditions, they would not consummate the transaction, and reserved the right to seek judicial review.

Delta and US Airways submitted joint comments in another filing, together with the new entrant/limited incumbent carriers to which they would divest slots under their counterproposal: AirTran Airways, Inc., Spirit Airlines, Inc., JetBlue Airways, Inc., and WestJet, Inc. These commenters urge the FAA to approve the pending request, as modified by the slot transfer agreements. Additional details on the counterproposal were provided: (1) At DCA, JetBlue would acquire 4.5 pairs of slots (JetBlue intends otherwise to add one off-peak hour slot to complete a 5-roundtrip service pattern); (2) at LGA, AirTran, Spirit, and WestJet would acquire 5 pairs of slots each, respectively, for a total of 15 pairs; (3) in all cases, the acquisition would be conditioned on FAA's grant of the LGA Waiver request; (4) the JetBlue transfer would take place relatively soon, but Delta would continue service with the slots under a lease from JetBlue for a period; (5) the AirTran and Spirit transactions would occur over a 24-month period at dates of their choosing; and (6) the WestJet transaction would occur at a date of its choosing within 28 months. WestJet and Delta will be negotiating other commercial arrangements as well.

Given the issues raised by the carriers' counterproposal, the FAA determined that it was in the public interest to reopen the comment period for seven days to give all interested parties additional time to file rebuttal comments. Comments filed by April 5, 2010, were considered. For convenience and brevity, the comments described below include responses made both on the initial Notice and on rebuttal.

Summary of Comments From the United States Department of Justice

The Department of Justice (DOJ) submitted comments in support of the FAA's tentative decision to grant the requested waiver with conditions. The Department cited several factors in its finding of support, including:

(1) The availability of slots is a substantial barrier to entry at LGA and DCA. Air carriers holding large concentrations of slots have little incentive to lease or sell slots to low-cost carriers, thus stifling competition and depriving consumers of lower fares.

(2) The slot transaction will reduce competition between Delta and US Airways at LGA and DCA. The Department contends that, post transaction, Delta will shrink substantially at DCA and US Airways will shrink substantially at LGA, thereby reducing

either carrier's ability to compete with each other.

(3) The transaction will increase the slot holdings of the dominant carriers at LGA and DCA. US Airways will increase its DCA slot holdings from 44% to 54%, and Delta will increase its LGA slot holdings from 24% to 49%, thus producing a highly concentrated market and an enhanced premium fare structure in markets served by both airports.

(4) Most low-cost carrier slot acquisitions at LGA and DCA have been the result of Congressional or DOT/FAA action rather than secondary slot market transactions. Despite FAA regulations designed to ensure that underutilized slots are reallocated to carriers that will used them efficiently, incumbent carriers continue to hoard slots, in part, to keep the slots out of the hands of new entrants.

(5) The proposed slot transaction will exacerbate the disincentives of either carrier to sell or lease slots to other carriers. With increased slot shares at LGA and DCA, the carriers will have more revenue and profit at risk, and thus even less incentive than exists today to sell or lease slots to potential new entrants.

(6) The FAA's proposed slot divestiture is not likely to interfere substantially with the purported increase in seat capacity at either airport. There is little evidence suggesting that a smaller transaction—as would result if the parties accepted the terms of the FAA's proposed waiver—would be unprofitable for the parties.

(7) The consumer benefits from LCC entry that will likely result from the FAA's proposed divestiture almost certainly will outweigh any loss from Delta and US Airways making minor modifications to their proposed schedules.

(8) DOJ favors an anonymous, cash-only sales of slots in which the FAA forwards the highest offer to the seller for acceptance or rejection if the method is implemented in a sound way. The Department advocates for the anonymity of potential buyers, but encourages the FAA to clarify what happens in the event that a carrier rejects the highest purchase offer. The Department also recommends expanding the restriction on re-sales and leases of slots purchased pursuant to the selected slot acquisition option.

(9) The Department recommends precluding, for some reasonable period, purchasers from selling and leasing any slots to carriers not eligible under the terms of the final action taken on this proceeding in order to ensure that divested slots stay in the hands of new entrants or limited incumbents.

(10) The Department notes that purchasers of divested slots will also need access to sufficient ground facilities, and recommends that the FAA should consider ways to ensure that the purchaser will obtain access to these facilities. In concluding its comments, DOJ finds that the FAA's proposed waiver with conditions will be in the public interest because it will free up slots for other carriers, facilitate entry at LGA and DCA, increase competition, and lower fares for consumers without interfering with the purported benefits of the transaction.

Summary of Other Comments

Southwest Airlines, Inc. filed comments, arguing that:

(1) The consequences for the public of this attempted re-allocation of the markets by Delta and US Airways will be higher fares, less competition, and fewer service options.

(2) Delta and US Airways have long been free to upgauge their aircraft, but they have done the opposite over the last decade (Delta's average aircraft size at LGA has declined to 105 seats, while US Airways' average aircraft size at DCA has sunk to 92 seats—reflecting economic inefficiencies at both airports).

(3) FAA's proposed carve-outs of 20 and 14 slot pairs are a good start, but are too limited to have a significant restraining effect on fares, except in a few markets.

(4) If the divested slots are divided among several carriers, the resulting competition will be so diluted it will have no effective price discipline. A carve-out of at least 40 pairs at LGA and 20 pairs at DCA should be required.

(5) DOT/FAA has ample legal authority to require carve-outs (Since DOT/FAA has the authority to grant the waiver request in full, it must also have the authority to grant it in part), and carve-outs here are "in the public interest."

(6) Despite multiple efforts, Southwest has been unable to acquire DCA slots, or more than the 14 slots it has at LGA. Its average fares would be 33% lower than Delta at LGA and 49% lower than US Airways at DCA. If it had 20 pairs at LGA it would generate $84 million annually in consumer savings, and if it had 14 pairs at DCA it would generate $109 million per year in consumer savings. It would also serve 340,000 more passengers at each of the airports.

(7) FAA should allocate the divested slots via a transparent sales process to the purchaser with the highest cash offer. Other options invite a manipulation of the process for anti-competitive purposes (*e.g.,* selecting the weakest competitors).

(8) FAA should amend its order to require US Airways and Delta, working with the respective airport authorities, to make airport facilities available on terms no less favorable than those now accorded to the two carriers.

United Air Lines, Inc. opposes the FAA's proposed divestiture conditions. United's major arguments are: (1) FAA lacks the legal authority to impose the slot divestiture condition under the premise that FAA authority is limited to the safety of aircraft operations and efficient use of airspace, and that the policy goals outlined in § 40101 do not apply to the Administrator's exercise of exemption powers; and (2) FAA has not shown that the transaction would adversely impact competition. United contends that the fact that the transaction increases the share of slots does not necessarily signify that the carriers will gain pricing power in any relevant market.

United believes the FAA has not analyzed potential competitive effects in any relevant market, that FAA assertions of harm are speculation, and that the FAA has relied on flawed, outdated data in reaching its conclusions. The air carrier states that costs are higher at DCA due to the added costs of delays and the cost of acquiring slots.

American Airlines, Inc. supports the FAA's proposed divestiture conditions, but expressed concerns regarding the rationale. American's major arguments are: (1) Offers reason for the failure of the secondary market at DCA and LGA as the current system of delegating slots to new entrants. American contends that there is no incentive to buy new slots when slots are readily distributed for free by the government; (2) disagrees that the proposed transaction will lead to higher fares. The air carrier cites the example of Continental Airlines having market dominance at EWR but maintaining lower fares than US Airways; and (3) supports a private sale arrangement for the slot divestiture.

Continental Airlines, Inc. takes no position on the proposed transaction or whether other remedies are required, but argues that imposing conditions of divestiture exceeds FAA authority. Continental's major arguments are: (1) FAA has previously acknowledged that it lacked the authority to impose market-clearing charges for landings and takeoffs; (2) FAA slot rules require reallocation by lottery, should not be read to extend to divestitures for economic reasons, nor favor new entrants and limited incumbents; (3) requiring divestitures will violate carriers' property rights; (4) FAA's proposal conflicts with the Hart-Scott-Rodino review process; (5) DCA and LGA are not individual markets, and treating them as such is inconsistent with earlier DOJ conditions on domestic code-sharing and in DOT's Star Alliance carve-out (where the overlap was premised on defining EWR and JFK as a common origin and destination point); (6) holding a large percentage of slots at a carrier's hub is not inherently anticompetitive and is beneficial to consumers because it enables airlines to achieve economies of scope; and (7) FAA should not consider code-share relationships when calculating an individual carrier's slot position because code-share carriers are independent with respect to domestic service. Continental states that it should have the ability to acquire withdrawn slots at LGA despite its code-share with United Air Lines.

Virgin America, Inc. commends the FAA for taking steps to address the competitive situation at slot-controlled airports. Virgin believes the government has not only the authority but the responsibility to enhance competition, and believes that the FAA action in this proposed transaction is consistent with applicable precedents. The air carrier states that the FAA should be more proactive by creating a permanent mechanism for resolving secondary market problems at slot-controlled airports.

The Delta Master Executive Council of the Air Line Pilots Association submitted comments in support of the waiver, but without the imposition of "onerous and unjustified" divestiture conditions. ALPA believes that approval of the original petition will promote job growth, slot utilization, and competition. The commenter contends that increased operations at an airport are not necessarily harmful, citing the example of Continental Airlines having a larger percentage of operations at EWR than other air carriers, but charges a lower percentage of the standard industry fare level (SIFL). ALPA believes the FAA's proposed number of divestitures is inconsistent with *oneworld,* where just 4 pairs of slots were required to be divested.

Parties representing two Florida airports filed comments in general support of the waiver. The airports include the Sarasota/Bradenton International Airport (SRQ) and the Tallahassee Regional Airport (TLH). Both commenters expressed concern that the FAA's proposal could halt the transaction completely, thereby eliminating opportunities for expanded air service in the two communities. Additionally, the parties commented that the FAA proposal favors large airports and new entrant carriers over smaller communities who rely on network carriers.

The Port Authority of New York and New Jersey (PANYNJ) filed a comment in support of the proposed divestiture conditions. PANYNJ compliments the FAA in its efforts to increase the presence of low-cost carriers at LGA and preserving small community service. PANYNJ supports the proposal to suspend use-or-lose provisions for new entrants and limited incumbents that would obtain the divested slots, but disagrees with the FAA on its conclusions regarding airport substitutability. The commenter reinforced that it would put forth its best efforts to ensure that new entrants and limited incumbents are accommodated, but believes that the Final Order should not impose any additional requirements in this regard. PANYNJ also believes that any transfer of slots should be conditioned on its ability to accommodate the new carrier at a corresponding gate. Regarding the slot transfer process, PANYNJ endorses the proposal that would allow the FAA to maintain a Web site for offers to purchase and transmission of the highest offer to the seller.

The Honorable Henry E. Brown, Jr., U.S. Representative of the 1st District of South Carolina, submitted a comment in support of the original petition submitted by Delta and US Airways, but does not support the FAA's proposed divestiture conditions. Congressman Brown cites South Carolina's significant tourism industry as a reason to expand air service to the State. He notes that Horry County, the State's largest tourism revenue generator, is the only major tourist destination in the United States that is not served by the Interstate System. Congressman Brown recognizes the FAA's responsibility under the Airline Deregulation Act to maximize airline competition and opportunities for new entrants, but pointed out that the proposed divestiture of 14 pairs of slot interests at DCA would remove the possibility of expanded air service at MYR for the foreseeable future, which he believes is counter to the Act's directive to encourage air service to small communities. Congressman Brown also states that expanded direct air service to smaller and mid-sized communities serves the "greater good" of the country more than fostering competition between larger cities that already enjoy direct air service.

The Honorable Louise M. Slaughter, U.S. Representative of the 28th District of New York, submitted a comment in strong support of the FAA's proposal to require the divestiture of slot interests at DCA and LGA to new entrant and limited incumbent carriers. Congresswoman Slaughter commented that she would like to see an increase in the number of mandated slots to be divested, although she concurs that the proposal is a good first step to improving service to DCA and LGA. The Congresswoman expressed concern that the proposal does not force either carrier to commit to any particular market for a defined period of time, thus enabling the carriers to discontinue certain routes and use their added slot interests to initiate new routes to target smaller competitors and stifle competition.

Edward S. Faggen, former Vice President and General Counsel of the Metropolitan Washington Airport Authority (MWAA), commented in a personal capacity expressing support for the FAA's decision not to grant the waiver without first imposing conditions that protect the competitive environment at either airport. Mr. Faggen cites the FAA's High Density Rule as a successful means for enabling DCA to manage capacity, promote schedule reliability, and allow airport officials to effectively plan for airside and landside capacity improvements. The commenter believes that a waiver, without conditions, will lead to a challenge to the DCA HDR by new entrants or low-cost carriers, who may perceive the HDR to be anticompetitive. Mr. Faggen would like to see the number of DCA slots to be divested to increase from the proposed minimum of 14 to a number that expands access to other incumbents, and commensurate with airfield capacity capabilities, if possible.

Citizens and organizations of the Rochester, New York metropolitan area, which are represented by the Honorable Louise M. Slaughter, U.S. Representative of the 28th District of New York, submitted eleven comments in general support of the proposed waiver. The commenters unanimously agree that the proposal would increase competition, lower fares, and improve air service in the Rochester, New York passenger market. A majority of the commenters would like to see an increase in the number of slots to be divested.

Three individuals submitted comments in support of the FAA position. The commenters unanimously agree that the proposed waiver would increase competition by decreasing excessive market domination, lower fares, and improved air service. One individual expressed hope that the slot divesture will reduce delays, spur economic growth, and lead to cheaper access to popular vacation destinations. One individual expressed support for the public benefit of expanded operations by Southwest Airlines at LGA.

One individual submitted a comment in opposition to any type of waiver for the proposed transaction. The individual believes that Delta is anti-competitive in its practices and seeks to harm other airlines economically. The commenter further cites Delta's decision to transfer its pension liability onto taxpayers as reason not to reward it with a favorable slot swap arrangement.

Two individuals submitted comments in support of the US Airways-Delta Airlines position of granting the proposed waiver without conditions. One commenter assessed that the conditions intrude into the free market by forcing the divestiture of slots, and stated that it is not the role of government to "create additional competition." Another commenter was concerned about air carrier profitability and the ramifications to jobs and air carrier access should either airline seek bankruptcy protection. The commenters urged DOT to allow the slot swap to proceed as originally proposed in order to do everything possible to help airlines bolster profitability and keep people employed.

Supplemental and Responsive Pleadings

The initial comment period closed on March 22, 2010. The FAA determined that it was in the public interest to reopen the comment period until April 5, 2010, to give all interested parties additional time to file supplemental and rebuttal comments.

WestJet stated that, in the past, regulatory and operational constraints have prevented it from sustaining competitive service to LGA. As a result of the independently negotiated slot transaction with Delta, which provides WestJet with 5 slot pairs at LGA, the carrier believes that it is now in a good position to compete against established carriers in the U.S. and Canadian markets. Additionally, WestJet cites expanded passenger access to Delta's extensive domestic network, as well as Delta's willingness to provide supporting services and facilities as evidence that the carrier and its passengers stand to benefit from the transaction. Further, the carrier cites Section I of Annex II to the Air Transport Agreement between the governments of the United States and Canada, which specifies that Canadian air carriers be afforded equal access to slot controlled airports. Accordingly, WestJet urged the FAA to approve the Delta-US Airways waiver request, thus enabling WestJet's slot transaction with Delta to proceed.

Transport Azumah expressed a belief that the LGA slots are being liquidated at below-market value and suspects that this is the result of air carriers not being allowed to sell slots on the open market. The commenter believes that "hoarding" of slots will continue as long as air carriers are not allowed to freely buy and sell slots as needed.

The Spirit Airlines Master Executive Council of the Air Line Pilots Association urged the FAA to approve the LaGuardia waiver request, as modified by the slot transfers to AirTran, Spirit, JetBlue and WestJet. The Council believes that such a grant will permit the beneficial transaction to proceed and to enable Spirit and its pilots to benefit from significant new service expansions and enhanced job opportunities.

The Southwest Airlines Pilots Association expressed support for the FAA's proposal to require the divestiture of slot interests at DCA and LGA to new entrant and limited incumbent carriers, and urges the DOT/FAA to deny the requested petition unless the proposed divestiture of 20 slot pairs and LGA and 14 slot pairs at DCA is enforced. The Association believes that hubs dominated by two legacy carriers would be created at LGA and DCA, giving them unchecked market and pricing power. It also believes the revised slot transaction deal announced by Delta and US Airways on March 22, 2010 is a meager giveaway that would bar Southwest from an open, public, transparent proceeding that would enable Southwest to operate at these airports. The commenter stated that Southwest is interested in bidding on the slots to expand its low-fare service to consumers in a high-fare market, and cited its own economic expert as concluding that consumers would save approximately $200 million annually if Southwest were given the opportunity to acquire the slots to be divested under the FAA proposal. The Association added that the public interest is not served by allowing dominant carriers to distribute a handful of slots to a chosen few airline competitors.

JetBlue Airways, AirTran Airways, Inc. (joined by the AirTran Master Executive Council of the Air Line Pilots Association) submitted comments largely reiterating the views they had expressed in their initial comments to the docket.

The Delta Master Executive Council of the Air Line Pilots Association submitted comments reiterating its earlier support for the Delta-US Airways petition, but adding that it agreed with the legacy carriers that the FAA has no statutory authority to impose the divestiture condition and disagreed with opposing comments, particularly those of Southwest Airlines and the Department of Justice, that approval of the LGA waiver request will reduce competition. The commenter asserted as well that the proposed slot transfers to AirTran, Spirit, JetBlue, and WestJet adequately address the FAA's competition concerns and demonstrates that the FAA should not substitute its regulatory judgment for the competitive marketplace.

The Consumer Travel Alliance submitted comments in strong opposition to the revised slot transaction deal with AirTran, Spirit, JetBlue, and WestJet as announced by Delta and US Airways on March 22, 2010. The Alliance supports the original DOT/FAA order, but believes that the most recent slot transaction proposal is unacceptable and would serve only to maintain the current status of pricing in the market. Further, the Alliance argues that the proposal should be rejected out of hand, or the proceeding should be reopened for further investigation and additional comments should be permitted on the new proposal.

A Notice of Communication was submitted to the public docket, in accordance with 14 CFR Part 300, stating that Captain Doug Ralph of the Air Lines Pilot Association and James Van Woert of Delta Air Lines expressed support for the joint petition submitted by Delta and US Airways while attending an aviation roundtable at Stewart International Airport. The roundtable included Transportation Secretary Ray LaHood and Deputy Assistant Secretary for Aviation and International Affairs Christa Fornarotto. Captain Ralph expressed his hope that the Department would handle the proceeding expeditiously and asked about its status. Secretary LaHood responded that, because the matter was under active consideration, he could not comment on any aspect and further noted that any discussion of the case at that time would be inappropriate.

Southwest Airlines submitted reply comments in response to the independently negotiated slot transactions between Delta and US Airways and four low-cost carriers, AirTran, Spirit, JetBlue, and WestJet. Southwest strongly opposes the slot transaction and argues that it is a calculated effort by Delta and US Airways to avoid the FAA's proposed divestiture conditions while producing no meaningful competition to either carrier at LGA and DCA. The carrier added to its earlier comments to the effect that the splintered and minimal slot transfers in the six-party deal will have no meaningful impact on competition or concentration at LGA and DCA, and that the parties to the deal will likely serve at most one or two routes each from LGA and DCA with the transferred slots. It further asserted that both Spirit and AirTran have a long history of abandoning service in both markets after unsuccessful attempts to compete with incumbent carriers. Contending that it would generate more public benefits than all four slot transaction partners combined, the carrier argued that its exclusion from the six-party transaction was no accident because Delta and US Airways know that Southwest can leverage even a small number of slots more effectively than the other eligible carriers, combined, because of its large domestic network. The carrier believes that, in order to assist airports in exercising their property rights and accommodating slot recipients, DOT/FAA should condition its waiver approval on the parallel divestiture of adequate and viably located ground facilities by Delta and US Airways. Asserting that LGA and DCA are separate markets that are effectively insulated from the competition at surrounding airports, Southwest contends that neither airlines nor passengers consider the three Washington/Baltimore area airports, or the three New York/Newark area airports, to be economic substitutes for one another. Finally, in deciding whether proposed slot transfers are in the public interest, Southwest urged the FAA to consider the potential impact on competition in the airline industry, noting among other considerations that more than 70 years, Congressional policy has been to maximize competition and deter anticompetitive actions in the U.S. Airline Industry.

Virgin America submitted rebuttal comments in response to the modified slot transaction, contending that the tentative agreement between the carriers falls short of the divestiture of 20 slot pairs at LGA and 14 slot pairs at DCA that the FAA tentatively concludes to be required of the public interest. Virgin America believes the petitioners' argument that the FAA lacks legal authority to condition the approval on divestitures misperceives the statutory basis upon which the FAA has relied, and expresses support for the various legal arguments recited by the FAA in the Notice. In particular, regarding the Joint Applicants claim that the DOT/FAA cannot rely on pro-competitive policies when administering slots, Virgin America believes that such argument was expressly refuted long ago by a Federal appeals court in *Northwest Airlines* v. *Goldschmidt,* 645 F.2d 1309 (8th Cir. 1980). Similarly, Virgin America believes that the arguments by the Joint Applicants, and other legacy carriers, that the FAA's proposed divestiture constitutes an unlawful confiscation lack sufficient merit.

Spirit Airlines, Inc. submitted rebuttal comments in response to the "pay-to-play" solution for redistribution of slots as announced by the FAA in its February 18, 2010 Notice. Spirit believes the FAA's proposal is not in the broad public interest. Spirit states that it was able to obtain 22 slots at LGA only as a result of Congressional intervention via the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR–21), which was enacted in 2000. Since then, Spirit states that it has been unable to obtain through purchase or lease an adequate number of slots to efficiently increase service at LGA. The air carrier contends that airlines with a small number of slots face unique operating problems, which harm their inability to compete, including: (1) During weather and FAA-imposed ground delays, small slot holders like Spirit are forced to cancel or delay their most important flights. In the event of a forced cancellation, because of the few flights they are able to offer, limited incumbent low-fare carriers may not be able to rebook passengers from canceled flights until flights leaving the next day, or may be forced to pay a substantial cost for re-accommodating passengers onto a flight on one of the large incumbents. Spirit asserts that, not only are the smaller, low-fare airlines disadvantaged, but so too are their passengers, many of whom require low fares to travel; (2) carriers with few slots have difficulty adjusting schedules. Slot trades are critically important for carriers to arrange flight schedules to enable their overall networks to function efficiently. Yet in the current circumstances the larger slot holders do not need to trade slot times with other carriers, and the small slot holders do not have sufficient slots to arrange workable trades with other smaller carriers; (3) low-fare carriers are seriously handicapped by their inability to acquire a number of slots sufficient to efficiently utilize a gate. The cost and difficulty of operating a shared gate if a carrier has only a few pairs of slots, in addition to staffing costs, makes it virtually impossible for low-fare carriers to add slots one or two pair at a time; and (4) with few slots it is particularly difficult to address new competition in one market without reducing or giving up service in another. Spirit believes that the "pay-to-play" process is the worst outcome for the carrier and its passengers, because it would not have the financial resources to compete with offers from major carriers for the released LGA slots regardless of how efficiently it could use them, the profit it could earn, and the low fare benefit it provides to consumers. Spirit argues that the alternative proposal of allowing it to consummate a transaction in which it would acquire 5 LGA slot pairs from Delta is in the best interest of consumers because the slots would provide some flexibility to respond to market changes like the new American New York-Fort Lauderdale service which is essential if Spirit is to remain a viable competitor in the New York-South Florida market, and the agreement gives it necessary flexibility to integrate the slots into its system in conjunction with aircraft acquisitions and seasonal route realignments, without disrupting its other services under pressure of the FAA use-or-lose requirements that could result in loss of slots.

The Port Authority of New York and New Jersey (PANYNJ) filed a rebuttal addressing two subjects raised by other parties in response to the Notice that were not directly raised by the Notice: (1) Slots are not property of the airlines that have authority to conduct operations authorized by those slots; and (2) the Port Authority is the entity with the right to decide whether and how to allocate ground facilities at LGA. PANYNJ cites *In re Braniff Airlines,* 700 F. 2d 935 (5th Cir. 1983), and other legal proceedings, in its contention that sufficient legal precedent establishes that slots "are actually the restriction of the use of property—the airplane; not property in themselves." The Port also cites 49 U.S.C. 40103(b)(1), which provides that statutes under which the FAA issues slot orders and waivers preclude slots from being property. Regarding ground facilities, PANYNJ asserts the right to determine to whom and what circumstances to authorize use of airport facilities is an airport operator's proprietary power and right, as concluded in *National Business Aviation Ass'n, Inc.* v. *City of Naples Airport,* 162 F.Supp.2d 1343, 1348 (M.D. Fla. 2001), as well as the airport proprietor's rights to determine whether and under what terms and conditions access should be provided to an airline, as provided by 49 U.S.C. 41713(b)(3). Further, PANYNJ believes that if the FAA accepts these slot transfers as full or partial satisfaction of FAA's competition concerns, the benefits of the increase in the presence of new entrant/limited incumbent carriers at LGA should be maintained for the life of these slots, *i.e.,* until October 29, 2011. Accordingly, the Port believes that if the FAA issues an order granting the waiver petition of Delta and US Airways based in whole or in part on the transfers of slots to JetBlue, AirTran, Spirit and WestJet, such an order should provide that those slots be subject to a restriction "precluding the carriers purchasing the slot interests acquired pursuant to [those transfers] from re-selling, or leasing, them to any carriers that are not eligible" to receive slots under the Waiver Proposal set forth in the Notice.

Delta and US Airways submitted joint rebuttal comments in response to comments of the United States Justice Department and Southwest Airlines Co. The carriers reiterated many of the points they made earlier, particularly concerning their belief that the FAA has the authority to consider safety and efficient use of airspace, not competition. The carrier argues that both the DOJ and Southwest Airlines misinterpret regulatory guidance and legal precedent in their assertion that the FAA has statutory authority to condition the waiver grant on the divestiture of slots. The carriers also argued that: (a) There is no evidence that the transaction will reduce the likelihood of low-cost carrier entry; (b) the DOJ ignores undisputed evidence that the transaction will increase, not reduce, competition; (c) the DOJ offers no evidence that increases in slot ownership at DCA and LGA would produce competitive harm or increase fares; (d) the DOJ's assertion relating to market definition do not address the parties' evidence; and (e) the DOJ's assertion that the proposed divestiture will not interfere with the transaction's benefits suffers from numerous flaws. The commenters also urged that their privately-contracted slot transfers should be approved, as the various parties have entered into a transaction that satisfies the FAA's and the DOJ's desire to see the slots go to low-cost carriers and Southwest's comments reflect an untenable attempt to exploit the waiver request for its own benefit. They also asserted that Southwest has had ample opportunities to obtain DCA and LGA slots but has chosen not to do so, that it cannot complain about market concentration given its near exclusive presence at its dominant airports, including Love Field Airport, and that there is no basis for Southwest's suggestion that it would make more beneficial use of the slots than JetBlue, AirTran, Spirit, and WestJet.

DOJ submitted rebuttal comments in response to public comments challenging the FAA's statutory, factual, and analytical basis for imposing the proposed divestiture conditions. The DOJ also reiterated its support for the FAA's tentative decision. DOJ offers the following comments in reply to some of the parties' key arguments: (1) FAA divestitures offset harm while preserving purported efficiencies. The Department counters claims that the conditions would provide more competitive harm than benefit, and furthers states that it used the same analytical scenario advanced by the opposing parties, while also taking into account the LCC factor, in conducting its analysis. The Department states that it reached a very different conclusion, that the aggregate impact on consumers from the proposed divestiture would be strongly positive; (2) the modification proposal warrants careful examination. The DOJ believes the circumstances and limited disclosed terms of the proposed transfers strongly suggest that the divestitures were structured to minimize the potential competitive effect on Delta and US Airways, and consequently potential benefits for consumers. The DOJ recommends that the FAA examine the details of the proposals, including the agreements themselves and surrounding circumstances, to evaluate their likely effects; (3) competition from nearby airports will not completely offset lost competition between US Airways and Delta at DCA and LGA. The DOJ contends that nothing in the parties' various submissions refutes the notion that flights out of DCA (or LGA) provide closer competition to other flights out of DCA (or LGA) than do flights out of IDA and BWI (or JFK and EWR), and thus that market power can be exercised at DCA (or LGA) against some passengers despite the presence of competition from the other two nearby airports; (4) DOT/FAA review of competition effects does not interfere with DOJ authority. The DOJ notes that it is particularly ironic that, before the Notice was issued in this matter, Delta urged DOT/FAA to undertake a broad analysis of the competitive effects of this transaction and only raised objections once the carrier saw the results of the FAA's competitive analysis. The DOJ concludes its reply comments by reiterating that the FAA has sufficient statutory, analytical, and factual basis to impose the conditions proposed in its Notice, and urged the FAA to subject the modified transaction proposed by the parties to close scrutiny.

Delta and US Airways submitted a Motion for Leave to File Comments on April 7, 2010 in response to rebuttal comments of the DOJ. The carriers believe it is necessary to respond to comments included in the DOJ's rebuttal comment reply as a matter of correcting the record although the comment period has expired. The carriers offered the following rebuttals: (1) The DOJ's purported misgivings about the alternative slot transfers are misplaced. The carriers reiterate that the slot transaction will not go forward under the terms proposed by the FAA, and the modified slot proposal submitted by the six parties satisfies the FAA concerns while preserving the transaction. Further, the carriers disagree with the Department's favored cash-only winner-take-all process that, they believe, would virtually guarantee that all of the slots would go to better-capitalized Southwest; and (2) the DOJ has abandoned any defense of the FAA's consideration of competition. The commenter's believe that the DOJ has abandoned the view that it expressed in its initial comments that the FAA has authority to consider competition under 49 U.S.C. 40101(a), and has chosen instead to defer to the FAA's view of its own authority. Additionally, the carriers argue that the Department fails to offer any coherent explanation for how the FAA's exercise of competition authority can be reconciled with Congress's decision to remove Section 7 authority from the DOT and to delegate that authority exclusively to the DOJ. Delta and US Airways conclude their Motion for Leave to File Comments by reiterating that the DOJ's rebuttal comments confirm the FAA has no legal authority to impose a divestiture condition, and therefore the FAA should either grant the carriers an exemption from the LGA Order, or promptly approve the modified transaction. A subsequent filing was also received, urging that the transaction between American and JetBlue, by which JetBlue would obtain eight slot pairs at DCA and use them to serve Boston, Orlando, and Ft. Lauderdale, should serve to resolve the Department's concerns about low-cost carrier entry and competition at that airport.

Appendix B

Standard Industry Fare Level Analysis Washington and New York Area Airports

The figures for Washington, depicted in the table below, show the percentage of total area O&D passengers using each of the WAS area airports, the passenger weighted percent of fares at each airport compared to the mileage adjusted SIFL expressed as a percent of SIFL, an identification of the largest passenger carrier at each airport, its percent of O&D traffic, and finally an indication of that carrier's passenger weighted fare as a percent of passenger weighted SIFL fares.

WASHINGTON AREA AIRPORTS' PERCENT OF SIFL, LARGEST CARRIER SIFL AND PERCENT OF TRAFFIC

	% of WAS	Apt % SIFL	Lgest Car	% of Traffic	% SIFL
BWI	41	65	WN	48	65
DCA	35	101	US	33	124
IAD	23	77	UA	47	90

Note: If US Airways is removed from the DCA percent of SIFL calculation the airport average SIFL would decline to 88% of SIFL.

As can be seen, the relationship of actual fares to the SIFL fare benchmark is very different at the three Washington area airports. Actual fares are 65% of SIFL at BWI, 77% at IAD and 101% at DCA.

The comparable statistics for the NYC airports are summarized in the following table.

NEW YORK AREA AIRPORTS PERCENT OF SIFL, LARGEST CARRIER SIFL AND PERCENT OF TRAFFIC

	% of NYC	Apt % SIFL	Lgest Car	% of Traffic	% SIFL
EWR	30	71	CO	59	71
JFK	34	57	B6	46	57
LGA	35	82	DL	30	89

Note: If Delta is removed from the DCA percent of SIFL calculation the airport average SIFL would decline to 79% of SIFL.

The results show that actual fares are 71% of SIFL at EWR, 57% of SIFL at JFK, and 82% of SIFL at LGA. Delta Air Lines is the largest carrier with 30% of traffic and a weighted average fare of 89% of SIFL. We noted that if Delta is excluded from LGA figures the airport percent of SIFL would decline to 79% of SIFL.

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BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Request for Expedited Certification and Type Approval of Amtrak Advanced Civil Speed Enforcement System (ACSES)

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) received a request for expedited certification and type approval of the Amtrak ACSES. ACSES has been deployed on the Northeast Corridor since December 2000, in accordance with the FRA Final Order of Particular Applicability issued on July 22, 1998 [FRA Docket No. 87–2, Notice No.7]. The request is described below, including the party seeking certification and type approval of ACSES, the regulatory provisions involved, the nature of the request, and the petitioner's arguments in favor of the request.

National Railroad Passenger Corporation

[Docket Number FRA–2010–0029]

The National Railroad Passenger Corporation (Amtrak) is submitting a request for expedited certification and type approval of ACSES, presently installed on the Northeast Corridor, in fulfillment of the requirements of and compliance with the final rule for Positive Train Control systems per 49 CFR part 236, subpart I (specifically, Section 236.1031). The documentation supporting this request demonstrates that ACSES reliably performs the functionalities required by Sections 236.1005 and 236.1007, and therefore conforms to Subpart I. Also, ACSES has been recognized by FRA as being designed and implemented by Amtrak since December 2000, in full accordance with the FRA Final Order of Particular Applicability issued in July 1998. These conditions constitute a legitimate basis for expedited certification and type approval of ACSES.

Submission of the request does not require the establishment of a formal comment period; however, interested parties may submit their views, data, or comments by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Communications received during the review process of this request will be considered by FRA, to the extent practicable, before the final decision is made. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Page 19477) or at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC, on May 4, 2010.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

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