

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****[Docket No. FAA-2010-0109]****Petition for Waiver and Other Relief**

**ACTION:** Notice of a petition for waiver and solicitation of comments on grant of petition with conditions.

**SUMMARY:** On May 23, 2011, Delta Air Lines, Inc. (Delta) and US Airways, Inc. (US Airways) (together, the Joint Applicants or the carriers) submitted a joint request for the Department of Transportation (the Department) to waive a prohibition on purchasing operating authorizations (slots) at LaGuardia Airport (LGA). The carriers requested the waiver to allow them to consummate a transaction in which US Airways would transfer to Delta 132 slot pairs (265 slots) at LGA. In exchange, Delta would transfer to US Airways 42 slot pairs (84 slots) at Ronald Reagan Washington National Airport (DCA), convey route authority to operate certain flights to Sao Paulo, Brazil, and make a cash payment to US Airways.

The Department (the Office of the Secretary and the Federal Aviation Administration, or FAA) has evaluated the proposed transaction and tentatively determined that it affords significant benefits to the public. At the same time, we recognize that the transaction will result in an increase in market concentration that could negatively impact consumers. As a result, we have tentatively determined that the divestiture of a number of slots by the carriers is necessary for us to allow the transaction to proceed. We have tentatively concluded that the divestiture of 32 slots at LGA and 16 slots at DCA will reduce adverse impacts on consumers at DCA and LGA to a degree sufficient for us to conclude that the requested waiver is in the public interest. This Notice prescribes rules and procedures for the divestiture of those slots by the carriers to new entrant and limited incumbent carriers.

**DATES:** Comments on the FAA's proposed grant of the petition for waiver with conditions must clearly identify the docket number and must be received on or before August 29, 2011.

**ADDRESSES:** You may send comments identified by Docket Number FAA-2010-0109 using any of the following methods:

**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](mailto:Rebecca.macpherson@faa.gov).

**SUPPLEMENTARY INFORMATION:****Introduction**

The FAA limits the number of scheduled and unscheduled operations during peak hours at LGA pursuant to an Order that was originally published in December 2006 and that has been extended several times since (the Order).<sup>1</sup> The Order allocates operating authorizations (commonly known as "slots") to carriers and establishes rules for the use and operation of slots. The Order allows temporary leases and trades of slots between carriers, provided that they do not extend beyond the duration of the Order.<sup>2</sup> Most importantly for purposes of this waiver request, the Order does not permit the purchase and sale of slots at LGA. The only way for a carrier to sell or purchase a slot at LGA is through a waiver of the Order.

A different legal regime governing slots exists at DCA. The High Density Rule (HDR)<sup>3</sup> limits scheduled and unscheduled operations there. The HDR permits carriers to sell or purchase slots at DCA with FAA confirmation of the transaction.

On May 23, 2011, Delta and US Airways submitted a joint request for a limited waiver from the prohibition on purchasing slots at LGA. The carriers requested the waiver to allow them to consummate a transaction in which US Airways would transfer to Delta 132 slot pairs (265 slots) at LGA, and Delta would transfer to US Airways 42 pairs (84 slots) at DCA, together with route authority to operate certain flights to Sao Paulo, Brazil, and make a cash payment to US Airways. The proposed transaction is described in more detail below.

We tentatively conclude that a waiver of the Order is warranted because the potential benefits of the proposed transaction, as modified by the

<sup>1</sup> 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); 76 FR 18,616 (Apr. 4, 2011) (extending the expiration date until the effective date of the final Congestion Management Rule for LaGuardia Airport, John F. Kennedy International Airport, and Newark Liberty International Airport but not later than Oct. 26, 2013).

<sup>2</sup> The Order presently expires upon the effective date of the final Congestion Management Rule at LaGuardia Airport, John F. Kennedy International Airport, and Newark Liberty International Airport, but not later than October 26, 2013.

<sup>3</sup> 14 CFR part 93, subparts K and S.

conditions discussed below, outweigh its potential harms.

*Standard of Review; Legal Authority*

Because the proposed transaction involves the purchase of slots at LGA, we must determine whether a limited waiver of the Order is warranted. The FAA Administrator may grant an exemption from a rule (or an order) only "when the Administrator decides the exemption is in the public interest." 49 U.S.C. 40109(b). The Administrator is also authorized to "modify or revoke an assignment [of the use of airspace] when required in the public interest." 49 U.S.C. 40103(b)(1). Our determinations on requests for waivers or exemptions are based on our "public interest" findings. 75 FR 7,307 and 75 FR 26,325. Accordingly, in reviewing the carriers' petition for a waiver, we will consider the impacts of the overall transaction as part of our "public interest" analysis and determination.

The term "public interest" encompasses, at a minimum, the policy objectives listed by Congress in Section 40101 of Title 49 U.S. Code. Among other things, these include maximizing reliance on competitive market forces, avoiding unreasonable industry concentration and excessive market domination, and encouraging entry into air transportation markets by new carriers. 49 U.S.C. 40101(a)(4), (6), (9), (10), (12)–(13) and (d). These objectives are not exclusive; they are factors to be considered ("among others") by the Secretary in carrying out his responsibilities and authorities. Moreover, these objectives are included in the policies embodied in the Airline Deregulation Act of 1978, Public Law No. 95-504 (92 Stat. 1705). The Administrator may take these factors—including the fostering of competition—into account when making his public interest determination.

In the context of our public interest analysis, we will balance the economic benefits of the transaction against any potential resulting adverse economic consequences. Our standard does not require that we determine that a transaction threatens no economic impairment, but rather that any resulting adverse consequences are outweighed, in our judgment, by the transaction's promised benefits.

In granting a waiver or exemption, we may impose conditions to achieve our public interest objectives.<sup>4</sup> Congress gave the FAA Administrator broad powers to fashion orders to carry out aviation programs. The Administrator's

<sup>4</sup> See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 208 (1987).

general authority empowers him to “take action [the Administrator] considers necessary to carry out this part [49 U.S.C. chapters 401–501], including conducting investigations, prescribing regulations, standards, and procedures, and issuing orders.” 49 U.S.C. 40113(a). In furtherance of this authority, Congress expressly allowed the Administrator to “amend, modify, or suspend an order” and to do so “in the way \* \* \* the Administrator decides.” 49 U.S.C. 46105(a). Accordingly, the Administrator may impose conditions on grants of waivers or exemptions. Additionally, the Secretary of Transportation may require conditions—such as divestitures of slots and/or other assets, including route authority—on the approval of certain transactions between airlines.

The FAA has regularly relied on pro-competitive policy goals in carrying out its slot programs.<sup>5</sup> The FAA consistently has considered the pro-competitive features of the Airline Deregulation Act in exercising its slot allocation authority. Conditioning the grant of the petition upon divestitures of slots in order to alleviate significant airline market concentration (at DCA for US Airways and at LGA for Delta) and dominance is consistent with past FAA policies.

#### *2009 Transaction and Waiver Request*

This petition for waiver and other relief follows a prior waiver request by the same carriers. On August 24, 2009, US Airways and Delta requested a waiver of the Order to allow a similar transaction to proceed.<sup>6</sup> As in this case, in the 2009 transaction, Delta and US Airways proposed to transfer a substantial proportion of their respective slot holdings at DCA and LGA to the other carrier. In 2009, Delta proposed to transfer 84 slots at DCA to US Airways, in exchange for which US Airways proposed to transfer 250 slots

<sup>5</sup> The FAA implemented a “reverse lottery” to reallocate slots to new entrants and limited incumbents, just after enacting the Buy-Sell Rule. 51 FR 8,632 (Mar. 12, 1986). In 1992, the FAA amended the Buy-Sell Rule to expand protections afforded new entrant and limited incumbent carriers. 57 FR 37,308 at 37,309 (Aug. 18, 1992); in 2000, in the context of phasing out the HDR at LGA, the FAA specifically identified new entrant and limited incumbent carriers to be eligible for a lottery for certain slot exemptions. 65 FR 75,765 (Dec. 4, 2000). The FAA, in the past O’Hare Congestion and Delay Reduction Rule, granted preferential treatment to new entrant and limited incumbent airlines in assigning new or withdrawn slots interests. 14 CFR part 93, subpart B; 71 FR 51,400 (Aug. 29, 2006).

<sup>6</sup> The 2009 waiver request, our proposed response, all comments on our response, and our final order with respect to that waiver request are available in Regulations.gov, Docket FAA–2010–0109.

at LGA to Delta, as well as an option to acquire an additional 30 slots in 2015. As in the current proposed transaction, the 2009 proposal involved other, non-slot considerations—including a transfer to US Airways of certain international route authorities as well as gate, ticketing, and operations facilities at LGA’s Terminal C.

The Department carefully evaluated the carriers’ 2009 petition and responded on February 18, 2010.<sup>7</sup> In our initial response, we related the carriers’ assertion that the transaction would facilitate Delta’s establishment of a domestic hub at LGA and US Airways’ enhancement of its network at DCA; produce more efficiencies at LGA (including Delta’s plans to upgauge from US Airways’ turboprops to jet aircraft;<sup>8</sup> provide new and enhanced service to small communities; and benefit consumers through enhanced network connectivity. Despite the transaction’s asserted benefits, we did not believe that the 2009 transaction should go forward unless the carriers made more slots available for new entrants. Without a divestiture of slots by the carriers at both airports, we found that the transaction could generate adverse economic consequences—particularly due to the resulting decrease in competition between Delta and US Airways and the barriers to entry that limited the penetration of low cost competition at the two airports.

Balancing the benefits of the proposed transaction against its potential adverse impact on competition, we proposed to approve the transaction subject to the condition that the carriers dispose of 20 slot pairs (40 slots) at LGA and 14 pairs (28 slots) at DCA. We proposed that the slots be transferred to carriers whose access to DCA and LGA was otherwise limited. We established a procedure that would allow eligible carriers to compete to purchase the slots being sold by US Airways and Delta and permit the carriers to retain the cash proceeds of the disposition.

We published our February 2010 notice for public comment. We received extensive comments from Delta, US Airways, other carriers, air carrier labor unions, airport authorities, public officials, and members of the public. After reviewing those comments, we published our final notice regarding the

<sup>7</sup> Notice of a Petition for Waiver of the Terms of the Order Limiting Scheduled Operations at LaGuardia, 75 FR 7306 (Feb. 18, 2010).

<sup>8</sup> Such upgauging could result in a significant increase in passenger throughput without increasing congestion and delay.

prior transaction on May 11, 2010 (May 2010 Notice).<sup>9</sup>

In our May 2010 Notice, we granted the waiver request, subject to a number of conditions, as set forth in our initial notice from February of that year. Principally, we found that the public interest required that the carriers divest themselves of 20 slot pairs (40 slots) at LGA and 14 pairs (28 slots) at DCA. Moreover, we laid out a basic set of requirements that should characterize any effective remedy involving a disposition of slots at the two airports. We said that an effective remedy must: (1) Provide a sufficient number of slots to allow other carriers to mount an effective competitive response; (2) define the pool of eligible carriers to include those with the greatest economic incentive to use the slots as intensively as possible and exert competitive discipline; (3) ensure that the bundles of divested slots are suitable for a commercially viable service pattern and structured proportionate to the slots that are part of the slot swap; and (4) not cede slot distribution decisions to the parties themselves, who would minimize the competitive impact on themselves and thereby reduce consumer benefits. Our proposed order today follows these same principles.

Delta and US Airways did not choose to go forward with the transaction subject to our proposed conditions. Instead, in a July 2, 2010 filing, the carriers notified the Department of their intention to appeal our decision to the DC Circuit Court of Appeals. They later did so.<sup>10</sup>

#### *2011 Transaction; Changed Economic and Industry Conditions*

The transaction as now proposed by the carriers is structurally similar to the transaction proposed in 2009. Under the transaction, Delta would acquire 132 slot pairs (265 slots) at LGA from US Airways and US Airways would acquire 42 slot pairs (84 slots) at DCA from Delta and the rights to operate additional daily service to Sao Paulo, Brazil in 2015. Delta would also make a cash payment of \$65 million to US Airways.

In their waiver petition, the carriers have presented the Department with an analysis of the transaction’s benefits. As outlined below, many of the benefits they assert will accrue from the transaction are the same as those that

<sup>9</sup> Notice on Petition for Waiver of the Terms of the Order Limiting Scheduled Operations at LaGuardia Airport, 75 FR 26,322 (May 11, 2010).

<sup>10</sup> Delta Air Lines, Inc. and US Airways, Inc. v. Federal Aviation Administration and U.S. Department of Transportation, Case #10–1153 (DC Cir. filed Jul. 2, 2010).

we analyzed in 2009 and 2010. The carriers have also claimed that changes in the economy and structure of the aviation industry at DCA and LGA, since 2010, dramatically reduce the economic harms that we viewed as potential adverse consequences of the transaction.

The carriers assert that the transaction will benefit consumers. At LGA, they claim, it will enable Delta to create a new domestic hub by consolidating its operations into an expanded main terminal facility, increasing its LGA destinations, shifting short-haul service from John F. Kennedy International Airport (JFK) to LGA, and improving connectivity there. Delta states that it would add nonstop service and replace US Airways' turboprop operations at LGA with larger aircraft, which it argues would significantly expand output and increase efficiency. At DCA, the carriers assert, the transaction would enable US Airways to commence daily nonstop service to at least 15 new destinations, improve connectivity, and utilize larger aircraft. Additionally, the transaction would relieve US Airways of its unprofitable flying obligations at LGA and allow it to transfer its LGA facilities to Delta, resulting in a more efficient use of the terminal facilities at LGA.

The carriers also highlight the fact that, since the time of our review of their last proposed transaction, low-cost carriers (LCC) have significantly increased their market penetration at both DCA and LGA. The carriers state that JetBlue, AirTran, and Frontier have increased the number of LCC slots at DCA by 46, thereby increasing the LCC slot share percentage at that airport. They maintain that these holdings increase the slot share of LCCs from 3.3% to 8.6% at DCA, exceeding the 6.5% LCC slot share that would have been obtained under the divestiture terms of our May 2010 Notice. At LGA, the carriers point out that Frontier, AirTran, and Southwest recently acquired slots, for a net increase of 18 LCC slots. They maintain that these holdings increase the slot share of LCCs from 6.8% to 8.5% at LGA, closer to the 10.3% LCC slot share sought in our May 2010 Notice. The carriers assert that an economic analysis demonstrates that the proposed remedy, coupled with the increased number of LCC slot holdings, would exceed the competitive effects of the Department's May 2010 proposed divestitures of 20 LGA slot pairs and 14 DCA slot pairs. They say that the Southwest/AirTran merger will intensify competition in the Washington, DC, and New York City areas.

Furthermore, the carriers assert, the United/Continental merger, consummated on September 30, 2010, enhanced United's competitive profile at both Newark Liberty International Airport (EWR) and Washington Dulles International Airport, as well as at LGA and DCA. Moreover, Delta states that this transaction would enable it to establish a domestic hub at LGA, secure corporate accounts, shift short-haul JFK service to international service, and thereby address the competitive advantage secured by American Airlines/British Airways through their antitrust immunity alliance.

#### *Summary of Proposed Findings and Conditions*

As described in more detail below, we tentatively find that the proposed transaction, like the prior 2009 transaction, offers important benefits to the public.<sup>11</sup> At the same time, as before, we believe that the proposed transaction could have an adverse impact on competition, because of the reduction in competition between the two carriers and their increased market share at the two airports, among other things. In evaluating the public interest in this transaction, we have carefully weighed and balanced the benefits and possible adverse consequences of the transaction. While we remain concerned about those possible consequences, as laid out in our 2010 notices, we believe the transaction's promised benefits for the public—particularly in light of the increased penetration of low cost carriers at the airports since the time of our last review—are sufficient for us to conclude that the requested waiver is in the public interest. Accordingly, we have tentatively found that the transaction should be approved, subject to the conditions set forth below, including requirements that the carriers dispose of 16 pairs (32 slots) at LGA and 8 pairs (16 slots) at DCA pursuant to the sale mechanisms described in detail below and that they transfer the 265 LGA slots and 84 DCA slots in two phases so as to attenuate the impacts of their new operations on their smaller-sized competitors at the airports.

We note that the Department is evaluating this transaction under its statutory authority alone. As described above, we are required to determine whether or not, on balance, waiving the terms of the LGA Order to allow the proposed transaction to proceed is in the public interest. Our standard of review in this transaction is

<sup>11</sup> Additionally, the FAA finds that the grant of the waiver would not adversely affect safety. 14 CFR part 11.

substantively different from that of the Department of Justice, which acts under a different statutory and regulatory framework. Our tentative conclusions presented here are not binding on the Department of Justice, which must evaluate the transaction under its own statutory authority.

#### **Discussion**

##### *Developments at DCA*

Since the Department last evaluated carrier slot holdings in connection with the issuance of the May 2010 Notice, various service changes have occurred at DCA, some of which involved an expansion of service by low-cost carriers.

- Low-cost carrier AirTran, which held 16 slots and slot exemptions at DCA at the time of our earlier analysis, received 6 slots from Continental as part of an exchange for operating authorizations at EWR. The transfer was designated as temporary in nature, to expire October 29, 2011, and Continental remains the slot holder of record. It added a pair of off-peak slots allocated by the FAA<sup>12</sup> and now operates a total of 24 weekday slots from DCA. AirTran utilized the additional slots from Continental to add frequencies to its Atlanta and Orlando services.

- On March 31, 2010, JetBlue and American Airlines announced an agreement for commercial collaboration that involved, *inter alia*, a transfer of 16 slots at DCA from American to JetBlue. The transfer was designated as temporary in nature, to expire October 29, 2011, and American remains the slot holder of record.<sup>13</sup> JetBlue also was allocated one slot each in the 0600 and 2200 hour periods by FAA (which periods are not fully subscribed and so still available to new entry). Beginning November 1, 2010, JetBlue initiated service from DCA with these slots, with seven daily nonstops to Boston Logan International Airport (BOS) and one daily nonstop each to Fort Lauderdale-Hollywood International Airport (FLL) and Orlando International Airport (MCO).<sup>14</sup> JetBlue's new service

<sup>12</sup> AirTran also received two slots from the FAA for Saturday only operations.

<sup>13</sup> The arrangement also included a transfer, by JetBlue to American, of 24 slots at JFK. The FAA limits the number of scheduled operations at JFK and, under an Order, permits only leases, trades or transfers through the duration of the Order. See 76 FR 18,620, extending the duration of the Order from October 29, 2011 to the effective date of a final congestion management rule at the three New York City airports (JFK, LGA, and Newark Liberty International Airport), or October 26, 2013.

<sup>14</sup> The May 2010 Notice noted the pending American-JetBlue agreement, stating that, if

competes primarily against US Airways and Delta on the DCA–BOS and DCA–MCO routes, and against US Airways and Spirit on the DCA–FLL route.

- Another transaction affecting LCC presence at DCA came in the wake of the 2009 acquisition of both Midwest Airlines and LCC Frontier Airlines by Republic Airways Holdings Inc. Subsequent to the Final Notice, Republic assigned 16 of Midwest's 18 slots to operations marketed by Frontier (although Republic remains the holder of record of the slots).<sup>15</sup> Frontier utilizes these slots to provide service from DCA to Milwaukee, Kansas City, and Omaha.<sup>16</sup> The other two, which were slot exemptions, were reallocated to LCC Sun Country Airlines by DOT, where they are used to provide service to Lansing, MI.<sup>17</sup>

- In another development at DCA, on September 27, 2010, Southwest Airlines and AirTran Airways announced their intention to merge their operations through Southwest's acquisition of AirTran in a stock and cash transaction. As noted above, at the time the Department was analyzing the prior application, AirTran held and operated 16 slots and slot exemptions at DCA, which it used to provide service to Atlanta, Orlando, Milwaukee, and Ft. Myers, FL. Southwest is an LCC that has grown dramatically since 1990 to become the largest U.S. domestic carrier when measured by DOT Form 41 segment transported passengers. The acquisition of AirTran will bring to DCA Southwest's brand recognition, passenger loyalty, and access to its route network, which together should have a strong positive and tangible effect on overall competition at DCA. Although entry into AirTran's Atlanta hub

implemented, LCC's would increase their interests to 5.2% of the DCA slots. 62 FR at 26,323. We also noted that the transaction did not affect the concentration level of US Airways at DCA, as the slots were being transferred to JetBlue not by US Airways but by American, which would be its nearest rival at the airport if the transaction were approved. 75 FR at 26,336.

<sup>15</sup> It should also be noted that, on June 13, 2011, it was reported that Republic was seeking to shrink its holdings in Frontier Airlines to a minority stake by the end of 2014, based on a tentative agreement with Frontier pilots. Associated Press, *Republic Airways Seeking New Investors for Frontier, Aims for Minority Stake by End of 2014*, *Washington Post*, June 13, 2011.

<sup>16</sup> Through analysis of 2010 DOT Form 41 Origin and Destination Data, we have confirmed that Midwest passenger traffic declined and that Frontier traffic correspondingly increased in these markets reflecting this reassignment from Midwest/Republic to Frontier. Moreover, we have confirmed that Frontier has marketed these flights at average yields that are consistent with LCC operations. Accordingly, the 16 slots reassigned to Frontier have been recorded by the Department as slots flown by LCCs.

<sup>17</sup> DOT Order 2010–12–16 (December 10, 2010).

appears to be Southwest's main objective in pursuing the deal, the acquisition also expands Southwest's network in one consolidated move, adding a number of additional unconnected city pair markets into which it could expand its presence. The combined carrier therefore provides an expanded LCC capability at DCA to provide passengers with additional travel opportunities on new online routes through a larger overall network.

- The Joint Applicants also argue that the merger between United and Continental, as well as the immunized American Airlines/British Airways alliance, will intensify competition.<sup>18</sup> Considering first the UA/CO merger and its impacts at DCA, it should be noted that the merged carrier has only a 5% share of Origin & Destination ("O&D") passengers at that airport, which, with a legacy cost structure, gives it limited ability to seriously impact competition there.<sup>19</sup> Moreover, while there is limited data from which to reach conclusions at this point, our review of departures and average seats at DCA since the UA/CO merger shows a decline in the carrier's overall departures, while its yields dropped very slightly between 2009 and 2010. We do not see from these indicators that the merger has been as relevant to the slot swap competition issues before us as the other developments noted above. Similarly, we do not see the AA/BA alliance as significantly impacting competition at DCA, which of course is essentially domestic in character. As shown in Table 3, American's share of departures at DCA declined from 15.2% to 12.2% percent from first quarter 2010 to first quarter 2011, and its seats from 15.5% to 13.9%, figures that do not suggest increasing competitiveness.

#### Developments at LGA

As at DCA, various service changes have recently occurred at LGA, some of which involved an expansion of service by low-cost carriers. However, these changes were not as significant as those at DCA.

- Late in 2009, AirTran Airways began offering LGA–Indianapolis and increased LGA–Orlando flights with 4 LGA slots it acquired from Continental, although it now only operates LGA–MCO on Saturdays and Sundays. This acquisition was another part of the agreement, also noted above, by which it transferred to Continental 13 slots at EWR, as well as its lone gate at that

<sup>18</sup> Petition for Waiver and Other Relief, May 23, 2011 at 13.

<sup>19</sup> DOT Form 41 Origin and Destination Survey data.

airport. The Indianapolis and Orlando flights compete with offerings from Delta; JetBlue also has LGA–MCO flights.

- The Compass Lexicon study, attached to the Petition for Waiver as Appendix A, notes that "Southwest acquired one slot from the FAA."<sup>20</sup> They appear to be referring to the allocation by FAA, in mid-2009, of one 0600 LGA departure slot, which increased Southwest's operating authorizations there from 14 to 15. Southwest had acquired the original 14 slots at LGA in its acquisition of ATA Airlines, and with the 0600 departure and an arrival in the 2200 hour that does not require a slot, it is able to offer a total of 8 roundtrips from LGA. Southwest utilizes these slots to provide service to Midway and BWI airports.

- As part of an arrangement already described above, in November 2009 Republic Airways acquired Midwest and began operating Midwest's slots. In 2010, Frontier, another Republic Airways Holdings LCC, began operating 13 slots at LGA that had formerly been operated by Midwest. With these 13 slots, Frontier markets flights to Milwaukee and Kansas City. We have confirmed that Midwest passenger traffic declined in those markets and that Frontier traffic correspondingly increased during the fourth quarter of 2010, and that Frontier has marketed those flights at average yields that are consistent with LCC operations. Accordingly, the 13 slots reassigned to Frontier are being treated by the Department as slots flown by LCCs.

- The Southwest–AirTran merger should also, as the joint applicants claim, intensify competition at LGA. Prior to the merger, AirTran had a 5.7% LGA seat share and Southwest a 2.6% share. As at DCA, the merger will bring to LGA Southwest's brand recognition, passenger loyalty, and access to its route network, which together should have a positive and tangible effect on overall competition at the airport. Also, if Southwest chooses to upgauge to its B–737s in some markets, it can increase seat capacity per flight by 15 seats over AirTran's average aircraft seating.

- As noted above, the Joint Applicants claimed that the UA/CO merger and the immunized AA/BA alliance will strengthen competition at New York as well as in Washington. Again, there is not much yield data available to support this contention, and whatever impacts there are in New York will be felt more at EWR and JFK than at LGA. A review of American, United,

<sup>20</sup> Petition for Waiver and Other Relief, May 23, 2011, Appendix A at 10.

and Delta departures at LGA indicate that over the last two years it is Delta that has most expanded departures at LGA, while American's departures have risen to a much lesser degree and United's have remained essentially the same. As above, we do not see from

these indicators that these developments have been as relevant to the slot swap competition issues at LGA before us as the other factors noted above.

The tables below capture the changed circumstances described above, by

depicting "original" and "current" competitive positions in both slots and number of departures, seats, and passengers for the carriers serving DCA and LGA:<sup>21</sup>

**BILLING CODE 4910-13-P**

---

<sup>21</sup> Republic Airways Holdings holds 113 total slots at DCA, as the result of a sale/licensing transaction with US Airways. Its subsidiaries largely operate from these slots under pay-for-service arrangements with US Airways. All 113 are commuter slots, rather than air carrier slots. Republic's operations from these are included within US Airways' results in the tables for DCA.

Table 1

**DCA Slots -- Previous and Current**

	Slots		Slots	
	<u>"Original" 1/</u>	<u>Share</u>	<u>4/1/2011</u>	<u>Share</u>
AIR CANADA	16	1.9%	16	1.9%
AIRTRAN AIRWAYS 2/	16	1.9%	24	2.8%
ALASKA AIRLINES	6	0.7%	6	0.7%
AMERICAN AIRLINES	121	14.5%	105	12.3%
UNITED/ CONTINENTAL AIRLINES	83	10.0%	76	8.9%
DELTA AIR LINES 3/	193	23.2%	200	23.5%
FRONTIER AIRLINES 4/	6	0.7%	22	2.6%
JETBLUE AIRWAYS CORP. 5/	0	0.0%	18	2.1%
MIDWEST AIRLINES	18	2.2%	0	0.0%
REPUBLIC AIRWAYS HOLDINGS, INC. 6/	113	13.6%	113	13.3%
SPIRIT AIRLINES	6	0.7%	6	0.7%
SUN COUNTRY AIRLINES, INC.	0	0.0%	2	0.2%
US AIRWAYS 7/	254	30.5%	263	30.9%
	<hr/>		<hr/>	
Total	832	100%	851	100.0%
	<hr/>		<hr/>	
	<u>Slots</u>		<u>Slots</u>	
US Airways 8/	367	44.1%	376	44.2%
Delta	193	23.2%	200	23.5%
LCC Share 9/	28	3.3%	72	8.5%

1/ Distribution of slots as considered in the Department's May 2010 Notice.

2/ Continental traded six slots to AirTran; AirTran operates the slots but CO remains the holder

3/ The increase from "Original" to 4/1/2011 is due to Delta acquiring additional off-peak slots from the FAA

4/ After acquisition of Midwest by Republic, 16 of Midwest's 18 slots were reassigned to Frontier and 2 were reallocated to Sun Country

5/ American traded 16 slots to JetBlue; JetBlue operates the slots but AA remains the holder

6/ Republic holds 113 commuter slots but operates them under agreement with US Airways

7/ The increase from "Original" to 4/1/2011 is due to US Airways acquiring off-peak slots from the FAA

8/ Includes 113 commuter slots held by Republic Airways Holdings

9/ AirTran, Frontier, JetBlue, Spirit, Sun Country

Source: Typical weekday (Thursday), FAA Holder Report status date 4/1/2011

Table 2

**LGA Slots -- Previous and Current**

	Slots		Slots	
	<u>"Original" 1/</u>	<u>Share</u>	<u>4/1/2011</u>	<u>Share</u>
AIRTRAN AIRWAYS 2/	22	1.9%	23	2.0%
AMERICAN AIRLINES	236	20.6%	236	20.6%
AIR CANADA	43	3.7%	43	3.8%
UNITED/CONTINENTAL AIRLINES	94	8.2%	94	8.2%
DELTA AIR LINES	278	24.2%	278	24.3%
FRONTIER AIRLINES 3/	5	0.4%	19	1.7%
JETBLUE AIRWAYS CORP.	15	1.3%	15	1.3%
MIDWEST AIRLINES	18	1.6%	0	0.0%
SPIRIT AIRLINES	22	1.9%	22	1.9%
SOUTHWEST AIRLINES 4/	15	1.3%	15	1.3%
US AIRWAYS	399	34.8%	399	34.9%
	<hr/>		<hr/>	
Total	1147	100%	1144	100%
Delta	278	24.2%	278	24.3%
US Airways	399	34.8%	399	34.9%
LCC Shares 5/	79	6.9%	94	8.2%

1/ Distribution of slots as considered in the Department's May 2010 Notice.

2/ Continental traded four slots to AirTran; AirTran operates the slots but CO remains the holder

3/ After Midwest's acquisition by Republic, Republic reassigned 15 of its slots to Frontier

4/ Southwest and AirTran are merging their operations

5/ Frontier, JetBlue, AirTran, Spirit, Southwest

Source: Typical weekday (Thursday), FAA Holder Report status date 4/1/2011

Table 3

**Reagan Washington National Airport  
T-100 Segment First Quarter 2010 vs. 2011**

	DCA Departures		DCA Seats		DCA PAX	
	<u>2010</u>	<u>2011</u>	<u>2010</u>	<u>2011</u>	<u>2010</u>	<u>2011</u>
<b><u>Air Carriers</u></b>						
Air Canada	0.9%	0.9%	0.7%	0.7%	0.7%	0.6%
Air Canada Regional	1.3%	1.4%	0.7%	0.7%	0.6%	0.5%
Air Wisconsin Airlines Corp	10.9%	8.9%	5.9%	4.7%	5.3%	4.2%
AirTran Airways Corporation	3.0%	3.0%	4.0%	3.8%	4.2%	4.0%
Alaska Airlines Inc.	0.8%	0.8%	1.4%	1.3%	1.6%	1.8%
American Airlines Inc.	7.5%	7.4%	11.7%	11.6%	12.8%	13.0%
American Eagle Airlines Inc.	7.7%	4.7%	3.8%	2.3%	3.8%	2.3%
Atlantic Southeast Airlines	0.0%	3.7%	0.0%	2.5%	0.0%	1.9%
Chautauqua Airlines Inc.	3.7%	3.2%	2.0%	1.7%	1.9%	1.5%
Colgan Air	1.4%	0.9%	0.8%	0.4%	0.6%	0.3%
Comair Inc.	5.5%	3.4%	3.2%	2.0%	2.7%	1.7%
Compass Airlines	0.5%	0.4%	0.4%	0.3%	0.5%	0.3%
United/Continental Air Lines Inc.	5.8%	4.9%	8.5%	7.0%	9.3%	7.2%
Delta Air Lines Inc.	7.8%	9.4%	11.4%	14.0%	12.4%	14.6%
ExpressJet Airlines Inc.	1.5%	2.0%	0.8%	1.0%	0.6%	0.8%
Frontier Airlines Inc.	0.8%	1.2%	1.5%	1.8%	1.8%	2.2%
JetBlue Airways	0.0%	2.2%	0.0%	2.3%	0.0%	2.4%
Mesaba Airlines	0.4%	0.8%	0.3%	0.6%	0.4%	0.6%
Piedmont Airlines	0.1%	0.5%	0.0%	0.2%	0.0%	0.2%
Pinnacle Airlines Inc.	0.2%	1.7%	0.1%	0.9%	0.1%	0.8%
PSA Airlines Inc.	4.1%	4.5%	2.2%	2.3%	2.0%	2.2%
Republic Airlines	14.7%	13.5%	12.8%	11.7%	12.2%	11.4%
Shuttle America Corp.	3.3%	3.5%	2.7%	2.8%	1.3%	1.4%
SkyWest Airlines Inc.	0.0%	0.1%	0.0%	0.1%	0.0%	0.1%
Spirit Air Lines	0.8%	0.7%	1.3%	1.3%	1.6%	1.6%
US Airways Inc.	<u>17.0%</u>	<u>16.3%</u>	<u>23.7%</u>	<u>21.9%</u>	<u>23.6%</u>	<u>22.6%</u>
	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
<b><u>By Marketing Carrier</u></b>						
US Airways Inc.	51.2%	47.3%	47.0%	42.7%	45.2%	42.0%
American Airlines Inc.	15.2%	12.2%	15.5%	13.9%	16.6%	15.2%
United Air Lines Inc.	8.6%	8.0%	10.2%	8.8%	10.5%	8.5%
Delta Air Lines Inc.	17.2%	22.4%	17.7%	22.8%	17.3%	21.1%
Air Canada	2.2%	2.3%	1.4%	1.4%	1.2%	1.2%
Alaska Airlines Inc.	0.8%	0.8%	1.4%	1.3%	1.6%	1.8%
LCC	<u>4.7%</u>	<u>7.1%</u>	<u>6.8%</u>	<u>9.2%</u>	<u>7.6%</u>	<u>10.3%</u>
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Note: The Marketing Carrier data includes their affiliated carriers; where operating carriers operate on behalf of multiple marketing carriers their data are apportioned as shown.

**US Airways**= Piedmont; PSA; Chautauqua 89%; Colgan 73%; Republic; Air Wisconsin

**American and American Eagle**

**United**= Continental; ExpressJet; Skywest; Chautauqua 11%; Colgan 27%; Shuttle America 14%

**Delta**= Atlantic Southeast; Mesaba; Pinnacle; Shuttle America 86%; Comair

**Air Canada** and Air Canada Regional

**LCC**= AirTran; Frontier; JetBlue; Spirit

Table 4

**New York LaGuardia Airport  
T-100 Segment First Quarter 2010 vs. 2011**

<b>Air Carriers</b>	LGA Departures		LGA Seats		LGA Pax	
	<u>2010</u>	<u>2011</u>	<u>2010</u>	<u>2011</u>	<u>2010</u>	<u>2011</u>
Air Canada	3.0%	3.0%	2.8%	2.7%	2.6%	2.6%
Air Canada Regional	0.7%	0.8%	0.4%	0.5%	0.3%	0.4%
Air Wisconsin Airlines Corp	9.3%	8.3%	5.1%	4.4%	4.4%	4.1%
AirTran Airways Corporation	3.8%	3.5%	5.1%	4.5%	5.0%	4.8%
American Airlines Inc.	9.2%	8.9%	15.1%	14.2%	17.4%	15.7%
American Eagle Airlines Inc.	9.5%	11.2%	4.1%	6.3%	3.6%	5.0%
Atlantic Southeast Airlines	0.4%	0.5%	0.2%	0.3%	0.2%	0.3%
Chautauqua Airlines Inc.	6.9%	4.7%	3.8%	2.5%	3.5%	2.3%
Comair Inc.	3.3%	4.4%	2.4%	3.2%	2.3%	2.9%
Compass Airlines	0.0%	0.6%	0.0%	0.5%	0.0%	0.4%
United/Continental Airlines Inc.	4.4%	5.2%	6.7%	7.7%	7.7%	8.9%
Delta Air Lines Inc.	14.0%	13.8%	21.6%	21.3%	21.5%	21.7%
ExpressJet Airlines Inc.	0.4%	0.4%	0.2%	0.2%	0.2%	0.3%
Frontier Airlines Inc.	0.4%	0.9%	0.7%	1.5%	0.9%	1.8%
JetBlue Airways	1.9%	1.8%	3.1%	2.9%	3.8%	3.8%
Mesa Airlines Inc.	0.6%	0.2%	0.3%	0.1%	0.4%	0.1%
Mesaba Airlines	0.5%	0.9%	0.4%	0.4%	0.3%	0.3%
Piedmont Airlines	10.3%	10.8%	4.2%	4.3%	2.9%	3.2%
Pinnacle Airlines Inc.	0.7%	0.5%	0.4%	0.3%	0.3%	0.2%
PSA Airlines Inc.	1.0%	0.7%	0.6%	0.4%	0.6%	0.4%
Republic Airlines	2.5%	1.2%	2.2%	1.1%	2.5%	1.1%
Shuttle America Corp.	6.0%	6.6%	4.9%	5.3%	3.6%	3.5%
Southwest Airlines Co.	1.6%	1.6%	2.4%	2.3%	2.6%	2.7%
Spirit Air Lines	2.3%	2.2%	4.0%	3.7%	4.7%	5.0%
Trans States Airlines	0.0%	0.1%	0.0%	0.0%	0.0%	0.0%
US Airways Inc.	<u>7.1%</u>	<u>7.2%</u>	<u>9.4%</u>	<u>9.5%</u>	<u>8.7%</u>	<u>8.3%</u>
<b>Total</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>
<b>By Marketing Carrier</b>						
US Airways Inc.	33.3%	30.8%	23.2%	21.0%	20.4%	18.4%
American Airlines Inc.	18.8%	20.1%	19.2%	20.5%	21.1%	20.7%
United Air Lines Inc.	7.4%	7.7%	8.4%	9.2%	9.4%	10.2%
Delta Air Lines Inc.	26.8%	27.6%	30.7%	31.3%	29.2%	29.5%
Air Canada	3.8%	3.8%	3.3%	3.1%	2.9%	3.1%
LCC	<u>9.9%</u>	<u>10.0%</u>	<u>15.2%</u>	<u>14.9%</u>	<u>17.0%</u>	<u>18.2%</u>
<b>Total</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>

Note: The Marketing Carrier data includes their affiliated carriers; where operating carriers operate on behalf of multiple marketing carriers their data are apportioned as shown.

**US Airways**= Piedmont; PSA; Republic; TranStates; Chautauqua 37%; Mesaba 85%

**American and American Eagle**

**United**= Continental; ExpressJet; Atlantic Southeast; Mesa; Chautauqua 16%;

Shuttle America 8%

**Delta**= Shuttle America 92%; Mesaba 15%; Pinnacle; Chautauqua 47%; Comair; Compass

**Air Canada** and Air Canada Regional

**LCC**= AirTran; Frontier; JetBlue; Spirit and Southwest

*The Effects of the Proposed Swap: US Airways at DCA*

If the planned transaction is approved without change (*i.e.*, the additional 16 slot divestitures offered by the carriers are not required as a condition for approval), US Airways' slots at DCA would increase from the 254 held at the time of the Department's earlier analysis to 347. An additional 113 slots are held by Republic Airways Holdings under a financing deal with US Airways and operated by it for US Airways on a fee-for service basis. US Airways states that with the new slots at DCA it will provide service to at least 15 destinations it currently does not serve, some of which currently have no nonstop service from that airport.<sup>22</sup> It

<sup>22</sup> In a 2009 press release addressing the intended new service under the previous petition, US Airways identified 15 new destinations as Cincinnati, Des Moines, Grand Rapids, Madison (WI), Montreal, Miami, and Ottawa (all of which

also plans to increase the number of seats offered at DCA by filling the new capacity with larger regional jets and mainline jets, claiming that it can gain over 1 million new seats without adding to congestion at the airport. Delta states that with the slots it retains it will continue to serve its seven hubs,<sup>23</sup> maintain its shuttle service to LGA, and continue service on its AIR-21 slot exemption routes.<sup>24</sup>

then had daily nonstop service from DCA), and Birmingham (AL), Islip (NY), Ithaca (NY), Little Rock, Myrtle Beach (SC), Pensacola, Savannah, and Tallahassee (all of which at that time had no daily nonstop service from DCA). "US Airways announces slot transaction with Delta Air Lines," August 12, 2009. The present petition reiterates the commitment to serve at least 15 new destinations, but does not specify whether those will be the same as the ones identified in 2009.

<sup>23</sup> Delta's seven hubs are New York/JFK, Atlanta, Memphis, Detroit, Minneapolis/St Paul, Cincinnati, and Salt Lake City.

<sup>24</sup> Delta states it would serve its "AIR-21 routes." Delta was awarded 2 slot exemptions under AIR-

US Airways would increase its dominance at DCA in terms of slot holdings with the addition of the 84 slots. Table 5 below shows comparative slot interests of the carriers serving DCA, were DOT to grant the petition without requiring any additional divestitures. In this scenario, the slot holdings of US Airways would increase to 40.8% (54.1% if those held by Republic Airways Holdings but operated for US Airways are included), while those held by Delta (plus commuter affiliates) would decline to 13.6% and those held by LCCs would stay at 8.5%.

<sup>21</sup> for service to Salt Lake City; in addition, however, Atlantic Southeast flies as Delta Connection to Jackson, MS, with 2 DCA slot exemptions awarded under AIR-21, and Comair flies as Delta Connection to Lexington, KY, with 2 Vision-100 slot exemptions.

Table 5

**DCA Slots -- Previous, Current, and as Proposed**

	Slots		Slots		Post	
	"Original" 1/	Share	4/1/2011	Share	Transaction	Share
AIR CANADA	16	1.9%	16	1.9%	16	1.9%
AIRTRAN AIRWAYS 2/	16	1.9%	24	2.8%	24	2.8%
ALASKA AIRLINES	6	0.7%	6	0.7%	6	0.7%
AMERICAN AIRLINES	121	14.5%	105	12.3%	105	12.3%
UNITED/CONTINENTAL AIRLINES	83	10.0%	76	8.9%	76	8.9%
DELTA AIR LINES 3/	193	23.2%	200	23.5%	116	13.6%
FRONTIER AIRLINES 4/	6	0.7%	22	2.6%	22	2.6%
JETBLUE AIRWAYS CORP. 5/	0	0.0%	18	2.1%	18	2.1%
MIDWEST AIRLINES	18	2.2%	0	0.0%	0	0.0%
REPUBLIC AIRWAYS HOLDINGS, INC. 6/	113	13.6%	113	13.3%	113	13.3%
SPIRIT AIRLINES	6	0.7%	6	0.7%	6	0.7%
SUN COUNTRY AIRLINES, INC.	0	0.0%	2	0.2%	2	0.2%
US AIRWAYS	254	30.5%	263	30.9%	347	40.8%
Total	832	100%	851	100%	851	100%
	<u>Slots</u>		<u>Slots</u>		<u>Slots</u>	
US Airways 7/	367	44.1%	376	44.2%	460	54.1%
Delta	193	23.2%	200	23.5%	116	13.6%
LCC Share 8/	28	3.3%	72	8.5%	72	8.5%

1/ Distribution of slots as considered in the Department's Final Notice of May 4, 2010

2/ Continental traded six slots to AirTran; AirTran operates the slots but CO remains the holder

3/ The increase from "Original" to 4/1/2011 is due to Delta acquiring additional off-peak slots from the FAA

4/ After acquisition by Republic, of Midwest's 18 slots, 16 were reassigned to Frontier and 2 were reallocated to Sun Country

5/ American traded 16 slots to JetBlue; JetBlue operates the slots but AA remains the holder

6/ Republic holds 113 commuter slots but operates them under agreement with US Airways.

7/ Includes 113 commuter slots held by Republic Airways Holdings

8/ Proposed divested slots not included

Source: Typical weekday (Thursday), FAA Holder Report status date 4/1/2011

*The Effects of the Proposed Swap: Delta at LGA*

Delta states that, with 265 new slots, it would almost double its nonstop destinations from LGA to more than 70 cities. Further, it would create a

domestic hub at that airport, and increase the number of customers served without increasing congestion by using larger capacity aircraft than US Airways currently uses with the slots. It would achieve this through use of an all-jet fleet, replacing the turboprops

that are currently utilized by US Airways. With the slot swap Delta will likely focus on expanding its domestic network out of the enhanced LGA hub and concentrate its JFK operations on international and long-haul domestic service.

Delta states that it would also offer service to many destinations that are not currently served nonstop by either Delta or US Airways. US Airways will retain its shuttle service to Boston's Logan Airport and DCA and continue flights to Charlotte, Philadelphia, and Pittsburgh. US Airways claims that its smaller aircraft operations at LGA have been unprofitable. It contends that swapping assets from there to enhance its successful operations at DCA will improve its profitability by more than \$75 million.

Delta would operate a total of 18 of 20 gates in US Airways' Terminal C, and add one additional gate to its existing ten at Delta's Terminal D, for a total of 29 gates in the two terminals. Delta would then build a 600-foot connector between the two terminals so that it can operate as a single terminal from a passenger perspective. A "significant number of construction jobs" would be created in connection with this work.

Delta will take over the current US Airways Club in Terminal C and convert it into a Sky Club to complement the existing club in Terminal D.

US Airways on the other hand, will have 6 gates once the terminal is reconfigured to add more ramp positions, plus 3 parking positions for regional jets. US Airways would continue to offer high-frequency schedules from LaGuardia to its Charlotte, NC, and Philadelphia hubs and Pittsburgh with more than 60 weekday flights. All US Airways flights from LaGuardia would continue to arrive and depart from nine gates and parking positions in Terminal C. US Airways will build a new, 5,000-square foot US Airways Club.<sup>25</sup> Delta and US Airways will continue to compete with Shuttle Services to Boston and DCA

<sup>25</sup> Delta, US Airways Announce New Agreement to Transfer Flying Rights in New York and Washington, DC, Delta, and US Airways Press Release, May 23, 2011.

(Delta at its 6 gates in the Marine Air Terminal). Finally, subject to Government approvals and to other conditions, Delta will convey to US Airways, for purposes of intended US Airways flights to Brazil beginning in 2015, certain Brazilian route authorities and slots at Sao Paulo, Brazil.

Delta would accede to a dominant position in terms of slot holdings at LGA, with the addition of the 265 slots (even were the 32 slots required by the Department to be divested). Table 6 below shows comparative slot holdings of the carriers serving LGA, without any additional divestitures. As can be seen, under the proposal Delta's slot share would almost double, from 24.2% to 47.5%. American would remain second, at 20.6%. US Airways' share would decrease from 34.8% to 11.7%. The table also reflects the increase in LCC share, due to the developments noted above, from 6.9% to 8.2%.

Table 6

## LGA Slots -- Previous, Current, and as Proposed

	Slots		Slots		Post-Slots	
	"Original" 1/	Share	4/1/2011	Share	Transaction	Share
AMERICAN AIRLINES	236	20.6%	236	20.6%	236	20.6%
AIR CANADA	43	3.7%	43	3.8%	43	3.8%
UNITED/CONTINENTAL AIRLINES	94	8.2%	94	8.2%	94	8.2%
DELTA AIR LINES	278	24.2%	278	24.3%	543	47.5%
FRONTIER AIRLINES 2/	5	0.4%	19	1.7%	19	1.7%
JETBLUE AIRWAYS CORP.	15	1.3%	15	1.3%	15	1.3%
MIDWEST AIRLINES	18	1.6%	0	0.0%	0	0.0%
SPIRIT AIRLINES	22	1.9%	22	1.9%	22	1.9%
SOUTHWEST AIRLINES	15	1.3%	15	1.3%	15	1.3%
AIRTRAN AIRWAYS	22	1.9%	23	2.0%	23	2.0%
US AIRWAYS	399	34.8%	399	34.9%	134	11.7%
Total	1147	100%	1144	100%	1144	100%
	<u>Slots</u>		<u>Slots</u>		<u>Slots</u>	
Delta	278	24.2%	278	24.3%	543	47.5%
US Airways	399	34.8%	399	34.9%	134	11.7%
LCC Shares 3/	79	6.9%	94	8.2%	94	8.2%

1/ Distribution of slots as considered in the Department's initial Final Notice.

2/ 15 Republic slots are being operated as Frontier

3/ Proposed divested slots not included

Source: Typical weekday (Thursday), FAA Holder Report status date 4/1/2011

## BILLING CODE 4910-13-C

**Description of the Claimed Benefits of the Swap**

As noted above, the Joint Applicants contend that approval of the slot swap would enable both carriers to more efficiently operate at the airports and permit more passengers and destinations to be served. They argue that efficiencies will occur through upgauging of aircraft size at both LGA and DCA, thereby increasing throughput and competition while reducing congestion and delay. In addition, they contend that the facilities transfer will enable Delta to create a seamless hub at LGA and facilitate enhanced competition and preserve and enhance

small community access at both LGA and DCA.

For the reasons stated below, we tentatively agree with the Joint Applicants' claimed benefits discussed below, and find that these claimed benefits likely would be realized if the transaction were implemented as remedied. Our tentative view derives in large part from concerns that some of 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.

**Benefits at DCA:**

- *Expanded US Airways Service*— With the addition of 84 slots, US Airways will be able to initiate daily

nonstop service to at least 15 new destinations from DCA. Some of these routes are currently served by other carriers from other Washington area airports and some of these routes do not currently have any daily nonstop service. These destinations include several small, medium-sized, and larger communities.<sup>26</sup> The airline anticipates an increase of approximately 20 to 25 percent in passenger enplanements at DCA as a result of new flights and schedule improvements. This projected service would not be affected by the

<sup>26</sup> 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 are not obligated to implement or retain over the longer-term any of the proposed services in new markets.

proposed divestitures if they come from Delta's complement.

- *Improved connectivity*—US Airways contends that it will afford DCA originating passengers more nonstop destination service and provide additional connecting passenger service through an expanded network.

- *Up-gauging and up-grading service*—US Airways plans to up-gauge aircraft and offer customers more dual class service. It will use larger aircraft, including more large regional and mainline aircraft with first-class service on large regional jets, on many routes by 2012.

Benefits at LGA:

- *New domestic hub at LGA*—With the additional slots and facilities it will acquire under the proposal, Delta will establish a new domestic hub at LGA. A hub presence will allow increased connecting opportunities, improving travel options for passengers across Delta's network. It will also permit increased operations to smaller communities, which are often only able to sustain service through hub-and-spoke operations. Delta submitted a study by Compass Lexecon that asserted that Delta's expansion at LGA would produce more than 6,000 new connecting opportunities for their passengers at that airport.

- *Consolidation of LGA operations in one main terminal facility*—As noted above, Delta will link its Terminal C and Terminal D gates with a 600 foot connector. This will provide added convenience to many passengers, particularly ones with connecting flights, and allow shorter connecting times on some flights.

- *Improved Competition against US Airways at Philadelphia and United/Continental at Newark*—The carriers claim that Delta's development of a hub at LGA will create "important" new competition against US Airways' hub at Philadelphia and United/Continental's at Newark. Philadelphia International Airport is approximately 100 miles from LGA and constitutes a distinct market. However, the operation of a stronger hub for Delta at LGA will provide additional options for travelers in the greater New York area, and should provide some competitive counterweight to the strong UA-CO hub at Newark.

- *Delta Will Expand Service at LGA*—Delta will approximately double the number of within perimeter nonstop destinations served from LGA and shift short haul service from JFK to LGA, freeing up JFK for longer-haul flights.<sup>27</sup>

<sup>27</sup> While it is true that Delta is proposing to expand its operations significantly at LGA, many of

- *Delta Will Increase the Available Seat Capacity of New York Airports*—US Airways currently operates 39% of its flights with turboprop aircraft configured with 37 or fewer seats. Delta plans to utilize an all-jet fleet at LGA. Replacing US Airways' turbojets with larger jets will increase available capacity, estimated to equate to a 2% overall increase in New York seat capacity.

The Joint Applicants' Compass Lexecon study estimates the magnitude of capacity benefits in terms of roundtrip seat capacity increases of 2.5 million at DCA and 4.4 million at LGA.<sup>28</sup> The study further estimates that the consumer benefits from the increased flying generated by improved network connectivity and service at approximately \$126 million annually for passengers flying to and from LGA and at approximately \$27 million for passengers flying to and from DCA, for a total of approximately \$153 million at both airports combined. They cite another \$33 million in estimated benefits to consumers flowing from increased airport operational efficiency resulting from upgauging from turboprop aircraft to jet aircraft at LGA. 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. While these estimates are of course subject to customary assumptions and estimations, we do not believe they are unreasonable for the purposes here.

#### *Perceived Costs and Risks of the Transaction*

Although there are clearly consumer benefits that would result from the proposed transaction, as we pointed out in the Final Notice there are also aspects that could pose economic risks to consumer interests. In particular, the Department must remain mindful of concerns regarding the potential for higher fares due to increased market

the new flights would represent backfills in markets being vacated by US Airways as it moved operations to DCA. Thus, while it might be "new" service on Delta, it may not be "new" service for the communities affected.

<sup>28</sup> The benefits data and analyses referenced in the Waiver Application are derived from the study prepared by Compass Lexecon in November 2009 and submitted to the Department on March 22, 2010. See Consumer Benefits from the Proposed US Airways Delta Slot Transaction, included in Joint Appendix to Comments of Delta Air Lines, Inc., and US Airways, Inc., Docket No. FAA-2010-0109, dated March 22, 2010. That study was based on Delta and US Airways schedules from a peak day (Thursday) in Summer 2009.

concentration of the dominant carriers at both DCA and LGA.

In their filings, US Airways and Delta have not challenged the calculations stated in the May 2010 Notice that, if the transaction were approved as now proposed, the proportion of US Airways' share of slots and departures at DCA, and Delta's share of slots and departures at LGA, would significantly increase.

In the Department's earlier analysis, we determined that there were increased levels of airport concentration, which together with (1) An increase in the number of monopoly or dominant markets in which increased pricing power could be exercised,<sup>29</sup> (2) the prospect for higher fares in some markets, and (3) the potential for use of transferred slot interests in an anti-competitive manner,<sup>30</sup> warranted a conditioning of approval on the carriers' agreement to divest a number of slots. Given all of these concerns, we asserted that limited divestitures at both airports would cause an injection of additional competition from other carriers, which could be effective in mitigating these prospective harms.

Our analysis also noted the very low levels of LCC operations then prevailing at DCA and LGA, calculating that LCCs had only a 3.3 percent share of slot interest holdings at DCA and a 6.9 percent share of slot interest holdings at LGA. Because LCC's created the most competitive impact at the airports,<sup>31</sup> we required that, in order to minimize the overall number of divestitures required while maximizing the competitive impact of those divestitures, the carriers

<sup>29</sup> Our analysis found that US Airways and Delta tended to charge higher relative fares where they operate monopoly or dominant routes from airports where they have strong presence. While Delta tended to price more competitively at LGA (where its position was less dominant than US Airways at DCA), US Airways, holding the highest current share of slot interests and departures at DCA, charged on average 124 percent 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 percent share of nonstop departures, US Airways charged substantially more. 75 FR at 7,309-7,310.

<sup>30</sup> Under their proposal, Delta and US Airways are not committing to any particular markets for defined periods. As we noted earlier, they would be free, as is any other carrier, to discontinue routes that are being proposed and to initiate new routes elsewhere. With that freedom, they could, if they so chose, use additional slots to target smaller competitors. We expressed concern that competitors, especially low-cost carriers at DCA that are tied to specific markets through slot exemption awards, might be unable to successfully respond.

<sup>31</sup> Our analysis cited studies of the domestic U.S. airline industry demonstrating that entry by low-fare carriers dramatically lowers fares and increases the volume of passengers carried in a market. See, 75 FR at 7,309.

divest slots to qualified new entrants and limited incumbents, which are largely LCCs. Through this mechanism, we believed the economic efficiency of the slot utilization at both airports would be maximized through the operation of more seats at lower fares per slot than by Delta or US Airways, and would also minimize the total number of slot divestitures required to remedy the anticompetitive effects of the transaction.

Accordingly, in the May 2010 Notice, we approved the prior waiver application subject to the condition that 40 LGA and 28 DCA slots be divested via a DOT-approved process.

*Changed Conditions Since the May 2010 Notice Was Issued Have Not Eliminated Competitive Concerns*

As discussed above, the Joint Applicants have claimed that the Department's earlier competitive concerns have already been addressed as a result of significant increases in LCC penetration that have occurred at both airports since the May 2010 Notice was issued. (Notwithstanding that claim, they have offered to divest up to 32 slots at LGA and 16 slots at DCA through a DOT process if necessary to alleviate any "lingering" competitive issues.)

LCC entry and increased presence at both airports have not addressed all of our competitive concerns. While we have found evidence that increased LCC presence at both airports has a positive impact on the competitive structure at these airports, additional remedies, including divestiture of slots and the implementation of the slot transfer between the applicants in tranches, are necessary to further address competitive concerns.

We agree that, at DCA, recent developments have added 44 slots to the LCC listings, increasing their percentage of slot operations from 3.3% to 8.5%. Similarly, recent developments at LGA have added 15 slots to LCC listings, increasing their percentage from 6.9% to 8.2%. LCC departures, seats, and passengers have, with one exception, all increased as well at DCA and LGA. At DCA, LCC departures from first quarter 2010 to first quarter 2011 increased from 4.7% of the total to 7.1%; seats over the same period increased from 6.8% to 9.2%; and passengers over the same period increased from 7.6% to 10.3%. At LGA, the comparable statistics are departures, 9.9% increasing to 10.0%; seats, 15.2% declining to 14.9%; and passengers, 17.0% increasing to 18.2%. See Tables 3 and 4.

In addition, we looked at the competitive impact of the added LCC

services, particularly at DCA. There, the entry of JetBlue into the DCA–Boston market in the fourth quarter of 2010 was especially helpful in gauging the impact of new LCC entry into a major market in which US Airways was by far the dominant carrier.<sup>32</sup>

During the first three quarters of 2010, the average passenger weighted yields in DCA –BOS were 62 cents, 59 cents, and 53 cents respectively, with US Airways' averages being 68 cents, 63 cents, and 55 cents. With an average weighted yield over all DCA markets for these quarters at 22 cents, this was clearly a lucrative market for carriers, and especially so for US Airways. JetBlue entered the market aggressively in October 2010, carrying over 48,000 passengers that quarter with highly competitive fares that yielded only 24 cents per mile. US Airways' yield that same quarter—the last for which we have data—dropped from 55 cents to 44 cents, with overall average passenger weighted yields in the market falling from 52 to 38 cents. Removing seasonality concerns, US Airways' passenger weighted yield fell 37% from 4th quarter 2009 to 4th quarter 2010—from 70 cents to 44 cents. This data demonstrates JetBlue's entry enhanced competition and significantly reduced fares. Its presence continues to have a disciplining effect on fares: our check of available one-month advance purchase economy fares showed JetBlue charging \$69 one-way, with US Airways, Delta, and United all matching.<sup>33</sup>

A similar, although less significant, demonstration of LCC competitive influence appears in the LGA–IND market. In 2009, US Airways carried approximately 39% of passengers in this market at an average yield of 27 cents, while Delta/Northwest carried 47% of passengers at an average yield of 28 cents. AirTran initiated service on November 4, 2009 following its acquisition of 6 slots from Continental, four of which were utilized in the LGA–IND market. After AirTran's entry into the market, the average passenger weighted yield dropped from 29 cents to 22 cents and remained at approximately 19 cents through 2010. AirTran's passenger share rose from 8% in 2009 to 35% in 2010 while Delta/Northwest's yields declined from 28 cents to 19 cents, and US Airways' yields declined from 27 cents in 2009 to 20 cents in 2010. Overall, with the entry of AirTran in the LGA–IND market the average

<sup>32</sup> For example, in the second quarter of 2010, US Airways carried almost 70% of the passengers in this market, trailed by Delta at 18%.

<sup>33</sup> DCA–BOS nonstop fare for travel on July 29, 2011, per ORBITZ Web site information as of June 29, 2011.

passenger weighted yield in the market declined 29% between 2009 and 2010. These two impacts illustrate the potential beneficial effects that other LCCs may be able to bring to DCA and LGA markets if afforded entry by slots being divested in the present case.

While the Department considers these developments very encouraging, they do not persuade us that our original concerns regarding the transaction are no longer valid or that additional remedies are no longer appropriate or necessary. First, many of the incremental LCC slots are being operated under temporary or potentially reversible circumstances. At DCA, the slots noted as being transferred from legacy carrier American to LCC JetBlue remain technically held by American on FAA's listing, and their agreement could expire as early as this fall. The same is true for the slots transferred between AirTran and Continental. The former Midwest slots at both airports that were "reassigned" by Republic to Frontier marketed flights can presumably be "reassigned" back to Republic if appropriate conditions presented themselves. In addition, some of the other slots shown as transferred to LCCs are during the early or late hours when slots are not fully subscribed and so their use by LCCs does not present as much a competitive discipline as better timed slots might. Moreover, the Department's objective here is not to simply increase the shares of LCCs, but, as we set out at various points in the May 2010 Notice, also to protect against the use of market power by dominant carriers in a potentially anticompetitive manner.

*Claims That Nearby Metropolitan Airports Have a Disciplining Effect Remain Unpersuasive*

In addition to pointing to LCC growth at DCA and LGA, the Joint Applicants reassert that competition among the three airports in the Washington area and the three in the New York City area exerts a disciplining influence on the respective fares at DCA and LGA.<sup>34</sup> Thus, in the New York City market, they argued that, while flights at LGA are generally closer substitutes for one another than are flights at EWR or JFK, flights from EWR and JFK "are still relevant" to a discussion of competition at LGA. In an effort to address the specific situations at hand, they offered a modified version of the earlier study they presented to attempt to measure the impact of competition from

<sup>34</sup> Delta and US Airways' Comments of March 22, 2010, Appendix B, *Analysis of Relevant Airport Groupings*. Docket No. FAA–2010–0109.

Southwest and other LCCs at DCA/LGA and at adjacent airports. Normalizing the “competitive effect” of Southwest at the same airport to a value of 1.0, the modified version went on to specify the relative competitive effect of service by other LCCs at the same airport, as well as the effects of Southwest and of the LCCs from adjacent airports. A summary table indicated that, for example, the competitive effect of an AirTran flight at the same airport was 0.247, while that of JetBlue at an adjacent airport was 0.091.

In our May 2010 Notice, we addressed the findings of the earlier study, expressing concerns that its methodology was flawed in a number of fundamental respects. The modified version put forward here does not appear to have corrected these flaws. Moreover, not only are the statistical bases for the new conclusions not presented, but the results show anomalies that are not explained.<sup>35</sup> In sum, as with the earlier presentation, we are not prepared to accept the conclusions as submitted and to agree with the Joint Applicants that existing or potential competition from adjacent airports would satisfactorily address the need for remedies in this case.<sup>36</sup>

#### *Evaluation of Risks and Benefits*

As discussed above, the proposed transaction, like the prior 2009 proposal, offers important benefits to

<sup>35</sup> Why, for example, would JetBlue have a much stronger competitive effect than Air Tran at the same airport (a 0.635 factor vs. a 0.247 factor), but a significantly lower effect than AirTran from an adjacent airport? (0.091 vs. 0.164).

<sup>36</sup> That said, we can say as we did in the May 2010 Notice that yields (*i.e.*, revenue per passenger mile) remain substantially different among these airports, and that if the airports were effective economic substitutes for all passengers, there would result a greater self-equalizing of yields and the yield spreads would not differ so significantly. We also recognized that there does exist a low level of competition among the Washington and New York City area airports, but at an insufficiently low level such that one airport can exert enough competitive influence on the fares at another airport to substantially reduce yield disparities among the airports and constitute a true substitute for it. We continue to believe that is the case.

the public. Nonetheless, we found earlier that the potential for harm was substantial, particularly in the increased levels of concentration at the two airports. Accordingly, we placed conditions for approval on the divestiture of 40 slots at LGA and 28 slots at DCA. The primary issue before us is whether, because of the increased penetration by LCCs at the airports since the time of our last review, the public interest can be adequately protected at this time with no or fewer divestitures being required.

In evaluating the public interest in this transaction, we have carefully weighed the benefits and possible adverse consequences of the transaction. We do not believe that the transaction can be approved without divestitures being required. The transaction may give rise to very different levels of competitive harm at each airport, and the post-transaction market share levels are high, particularly at DCA.<sup>37</sup> Accordingly, we have tentatively found that conditions for approval remain necessary. These include a requirement that the carriers not only dispose of 32 slots at LGA and 16 slots at DCA pursuant to the sale mechanisms described in detail below, but that they begin operations of the transferred slots in two phases so as to attenuate the impacts of their new operations on their smaller-sized competitors at the airports.

#### *Remedies*

##### *Divestiture*

For these reasons, notwithstanding the favorable impacts of increased LCC competition at both airports, we tentatively condition the grant of the requested waiver on the divestiture of the slots as set out below. These total 32 slots at LGA (16 arrival and 16 departure) and 16 slots at DCA.

<sup>37</sup> With Republic’s holdings included, US Airways would hold 54% of the slots, with its closest competitor, American, holding 12.3%. At LGA, Delta’s share would be 47.5% without further divestitures, with its closest competitor (also American) at 20.6%. See Table 6.

We propose that the slots be sold by the carriers and that the proceeds of the sales be collected and retained by the carriers. We tentatively select this method, rather than one whereby the FAA would withdraw the slots and reallocate them by lottery (or similar means) to new entrant and limited incumbent carriers. A sale would facilitate the Joint Applicants’ intentions to maximize the value of their slots as they initially intended and conforms to the High Density Rule provisions at DCA, which permit slots to be purchased or sold. 14 CFR 93.221(a).

These slots would be divested, in accordance with the procedures proposed below, to limited incumbent and new entrant carriers having fewer than five percent of the total slot holdings at DCA and LGA respectively, and that do not code share to or from DCA or LGA with any carrier that has five percent or more slot holdings. We also propose that carriers eligible to participate in the purchase of divested shares not be subsidiaries, either partially or wholly owned, of a company whose combined slot holdings are equal to or greater than 5 percent at DCA or LGA, respectively.<sup>38</sup> The effects of these additional divestitures are as set forth below:

#### **BILLING CODE 4910-13-P**

<sup>38</sup> An anomaly in this regard appears to be Frontier, which is wholly owned by Republic but yet has a discretely different LCC business plan. As we discussed above, Frontier’s operations at DCA and LGA have been consistent with LCC yields, and have had useful competitive impacts at both airports. Moreover, with the acquisition of AirTran by Southwest, the number of LCCs has diminished, and Frontier has become the third largest LCC after Southwest and JetBlue. DOT’s Form 41 Origin and Destination Passengers for 2010 shows Southwest/AirTran with a total of 87,025,480 domestic passengers, JetBlue with 18,548,950, and Frontier with 5,317,150. Anticipating that Frontier’s presence as an eligible bidder will help to stimulate and maintain competition at these airports, we will tentatively exempt Frontier from the “no subsidiaries” requirement, subject to any slots it might purchase being held and operated by Frontier and Frontier retaining its LCC business plan.

Table 7

**DCA Slots showing effect of Proposed Divestitures**

	Slots "Original" 1/		Slots 4/1/2011		Post Divestiture	
	Share	Share	Share	Share	Share	Share
AIR CANADA	16	1.9%	16	1.9%	16	1.9%
AIRTRAN AIRWAYS 2/	16	1.9%	24	2.8%	24	2.8%
ALASKA AIRLINES	6	0.7%	6	0.7%	6	0.7%
AMERICAN AIRLINES	121	14.5%	105	12.3%	105	12.3%
UNITED/CONTINENTAL AIRLINES	83	10.0%	76	8.9%	76	8.9%
DELTA AIR LINES 3/	193	23.2%	200	23.5%	100	11.8%
FRONTIER AIRLINES 4/	6	0.7%	22	2.6%	22	2.6%
JETBLUE AIRWAYS CORP. 5/	0	0.0%	18	2.1%	18	2.1%
MIDWEST AIRLINES	18	2.2%	0	0.0%	0	0.0%
SPIRIT AIRLINES	6	0.7%	6	0.7%	6	0.7%
SUN COUNTRY AIRLINES, INC.	0	0.0%	2	0.2%	2	0.2%
US AIRWAYS/REPUBLIC 6/	367	44.1%	376	44.2%	460	54.1%
Divested Slots					16	1.9%
Total	832	100%	851	100%	851	100%
	<u>Slots</u>		<u>Slots</u>		<u>Slots</u>	
US Airways 7/	367	44.1%	376	44.2%	460	54.1%
Delta	193	23.2%	200	23.5%	100	11.8%
LCC Share	28	3.3%	72	8.5%	88	10.3%

1/ Distribution of slots as considered in the Department's Final Notice of May 4, 2010

2/ Continental traded six slots to AirTran; AirTran operates the slots but CO remains the holder

3/ The increase from "Original" to 4/1/2011 is due to Delta acquiring additional off-peak slots from the FAA

3/ After acquisition by Republic, of Midwest's 18 slots, 16 were reassigned to Frontier and 2 were reallocated to Sun Country

5/ American traded 16 slots to JetBlue; JetBlue operates the slots but AA remains the holder

6/ After acquisition by Republic, of Midwest's 18 slots, 16 were reassigned to Frontier and 2 were reallocated to Sun Country. Republic holds 113 commuter slots and US Airways holds 254 slots

7/ Includes 113 commuter slots held by Republic

Source: Typical weekday (Thursday), FAA Holder Report status date 4/1/2011

The impacts of the divestitures at LGA are shown in Table 8:

Table 8

**LGA Slots showing effect of Proposed Divestitures**

	Slots		Slots		Post	
	"Original" 1/	Share	4/1/2011	Share	Divestiture	Share
AMERICAN AIRLINES	236	20.6%	236	20.6%	236	20.6%
AIR CANADA	43	3.7%	43	3.8%	43	3.8%
UNITED/CONTINENTAL AIRLINES	94	8.2%	94	8.2%	94	8.2%
DELTA AIR LINES	278	24.2%	278	24.3%	511	44.7%
FRONTIER AIRLINES 2/	5	0.4%	19	1.7%	19	1.7%
JETBLUE AIRWAYS CORP.	15	1.3%	15	1.3%	15	1.3%
MIDWEST AIRLINES	18	1.6%	0	0.0%	0	0.0%
SPIRIT AIRLINES	22	1.9%	22	1.9%	22	1.9%
SOUTHWEST AIRLINES	15	1.3%	15	1.3%	15	1.3%
AIRTRAN AIRWAYS	22	1.9%	23	2.0%	23	2.0%
US AIRWAYS	399	34.8%	399	34.9%	134	11.7%
Divested Slots					32	2.8%
<b>Total</b>	<b>1147</b>	<b>100%</b>	<b>1144</b>	<b>100%</b>	<b>1144</b>	<b>100%</b>
	<u>Slots</u>		<u>Slots</u>		<u>Slots</u>	
Delta	278	24.2%	278	24.3%	511	44.7%
US Airways	399	34.8%	399	34.9%	134	11.7%
LCC Shares	79	6.9%	94	8.2%	126	11.0%

1/ Distribution of slots as considered in the Department's initial Final Notice.  
 2/ 15 Republic slots are being operated as Frontier  
 Source: Typical weekday (Thursday), FAA Holder Report status date 4/1/2011

**BILLING CODE 4910-13-C**

*Implementation in Tranches*

We are concerned that, were US Airways and Delta to immediately commence service with the full complement of the newly transferred slots at DCA and LGA, respectively, the successful start-up or expanded service offered by the new entrant or limited incumbent receiving the divested slots could be placed at competitive risk.

We believe that the ability of these new services to establish a market foothold on any new routes that the carriers receiving the divested slots choose to serve from either DCA or LGA would be facilitated by a requirement that the slots being transferred between the applicants be spread over a period of time following the completion of the mandated slot divestiture.

As a result, we are proposing to further condition our approval of the transaction on the Joint Applicants' agreement that the transferee Joint

Applicant will operate<sup>39</sup> none of the newly acquired slots included in their Agreement during the first 90 days after the closing date for the sale of the divested slots. Furthermore, no more than 50 percent of the total number of slots included in the Agreement could be operated by the transferee Joint Applicant between the 91st and the 210th day following the closing date for the sale of the divested slots, after which time the transferee would be free to operate the remainder of the slots.

We believe that these restrictions will afford the services that result from the sale of the divested slots a limited, but reasonable, period of time to advertise their presence in any new markets in which they are planning to offer service, begin selling tickets, and commence operations. Limiting the resources by which the applicants could immediately challenge any service using divested slots during the initial months of the transition will, in our view, provide

greater assurance that the remedial competitive services that we sought to encourage by requiring the slot divestiture in the first place will prove to be successful.

*Eligible "Bidders" for Divested Slots*

We tentatively find that the eligible bidders for the divested slots must be 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 or are involved in a code-share relationship at DCA/LGA with carrier(s) that also would not qualify as eligible bidders, 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.<sup>40</sup> Based on FAA slot holding data, incumbent carriers at DCA that would qualify under these limitations are AirTran, Spirit, Sun

<sup>39</sup> These limitations apply to the operation of the slots by the acquiring carrier or by any other carrier on behalf of the acquiring carrier.

<sup>40</sup> As noted above, Frontier qualifies as an eligible bidder due to its unique business plan and relationship in the Republic structure.

Country, JetBlue and Frontier. At LGA, incumbent carriers that would qualify are AirTran, Southwest, Frontier, JetBlue, and Spirit. In addition, of course, any carrier not currently holding slot interests at the respective airports and otherwise meeting the criteria would be eligible under our proposal.

#### *Bundles for Divested Slots*

We tentatively find that bundling the packages of slots for sale will enable an eligible carrier to purchase sufficient slots to operate competitive service, with times spread across the day. Bundling assists a purchasing carrier to initiate or increase service in a way that meets its operational needs and enhances competition.<sup>41</sup>

Because the number of overall divested slots is now fewer than we originally proposed in the Final Notice and competitive concerns remain, we believe it appropriate to maximize the potential competitive discipline of the slots by packaging more slots in fewer bundles, rather than fewer slots in more bundles, as compared to the bundles we adopted in the May 2010 Notice.<sup>42</sup> We propose to bundle for sale 8 slot pairs at each airport, meaning that there would be one bundle at DCA and two bundles at LGA. In addition to maintaining high competitive discipline levels, we tentatively believe this arrangement would be preferable to dividing the slots into smaller packages that could cause underutilizations or inefficiencies—at gates and terminal facilities, with aircraft and in staffing. We seek comment on this approach.

More specifically, at DCA the single bundle would include the following slots: 0700, 0800, 0800, 0900, 1000, 1000, 1100, 1200, 1300, 1400, 1600, 1700, 1800, 1800, 2000, and 2100.

At LGA, Bundle A would consist of: 0600D, 0630D, 0730A, 0830D, 0830A, 0930D, 1100A, 1230D, 1300A, 1400D, 1500A, 1600D, 1700A, 1830D, 2000A, and 2100A

LGA's Bundle B would be: 0630D, 0700D, 0800A, 0930D, 1000A, 1030D, 1230A, 1330D, 1430A, 1600D, 1630A, 1730D, 1830A, 1930D, 2030A, and 2130A.

#### *Procedures for Transferring Divested Slots*

We propose that the slots be sold to the new entrant/limited incumbent carriers, which have necessary DOT and FAA operating authorities, on a cash-only basis, through a Web site managed by the FAA. Under this proposal, the

FAA would specify a bid closing date and time and the bidder's identities would not be revealed.

We also propose that an eligible carrier may purchase only one slot bundle at each airport, except at the seller's option as discussed later. This limitation would balance the Department's interest in maximizing the competitive discipline of the slots with creating an opportunity for at least two carriers to obtain the slots. We propose to permit an eligible carrier to register for each slot interest bundle that it wishes to buy, and assign it a random number for each registration so no information identifying the bidder is available to the seller or public. A bidder would be allowed to indicate its preference ranking for each slot interest bundle as part of its offer. Finally, the FAA would review the offers for each bundle in order.

We propose to require all offers to purchase slot bundles to be sent to the FAA electronically. The offer would have to include the prospective purchaser's assigned number, the monetary amount, and the preference ranking for that slot interest bundle. The FAA would post all offers on the Web site as soon as practicable after they are received. Each purchaser would be able to submit multiple offers until the closing date and time.

Once the sales period closes, we propose that the FAA would determine the highest offer for each bundle. If each bundle had only a single offer, the FAA would notify the seller by forwarding the purchaser's identification. If one eligible carrier had made the highest purchase offer on multiple bundles, the FAA would determine which offer will be valid based on preference ranking and bundle order. The FAA would 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 would be forwarded to the respective seller. The FAA would 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 would notify the selling and purchasing carriers to allow them to carry out the transaction, including any gate and ground facilities arrangements. The full amount of the proceeds could be retained by the selling carrier. The seller and purchaser would be required to 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.

In the unlikely event that there are no offers for a slot interest, we propose that those slot interests will revert automatically to the FAA. If necessary, we would 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.

We propose the option of a cash-only, FAA "blind" Web site, because it has the capability of maximizing the competitive potential of the divestiture packages because that sale method would target the potential competitors with the greatest economic incentive to use slots as intensively and efficiently as possible. We seek comments on this proposal.

#### *Other Considerations*

We also tentatively find that eligible carriers may be unable to use the slots if they cannot obtain access to gates, ticket counters, baggage handling services, loading bridges, and other ground facilities at either DCA or LGA. Accordingly, we propose to require the selling carrier to make these available to the purchaser under reasonable terms and rates if the purchasing carrier lacks access to gates and ground facilities and is unable to obtain such access from either the Port Authority of New York and New Jersey, the operator of LGA, or from the Metropolitan Washington Airports Authority, the operator of DCA.

We propose to subject the slots to the same minimum usage requirements as provided in the LGA Order and HDR. However, we propose to waive the respective use or lose provisions of the LGA Order and HDR for 6 months following purchase to allow the purchaser to begin service in new markets or add service to existing markets. The purchaser must initiate service no later than 6 months following purchase. We seek comment on the conditions described above.

We further propose that the purchaser may lease the acquired slots to the seller until the purchaser is ready to initiate service to maximize operations at the airports. However, we tentatively would require that the slots not be sold or leased to other carriers during the 12 months following purchase because the purchaser must hold and use the acquired slots.

Purchasers could engage in one-for-one trades of these slots for operational needs. The limitations would attach to the slot acquired by the eligible carrier in a one-for-one trade. Any one-for-one trades would be subject to the FAA notice requirements in the LGA Order and HDR. We further propose that the duration of any trades or leases of LGA

<sup>41</sup> See also, 75 FR at 7,311 and 75 FR at 26,337.

<sup>42</sup> See 75 FR at 26,337.

slots may not exceed the duration of the LGA Order.

We additionally propose that, after the initial 12 months, and for four years thereafter, the slots may be sold, traded, or leased (as authorized by the HDR at DCA and otherwise as authorized at LGA) 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 proposed waiver for the divested slot interests. These proposed restrictions would increase the probability that the divested slots are used and operated by carriers that will enhance competition at LGA and DCA, lower fares, and benefit the traveling public. We recognize, however, that restrictions on alienation of these slots may depress their value for the carriers holding them. In order to balance the need and desire of those carriers to maximize the value of the divested slots with the Department's desire to afford the traveling public a broad array of competitive service, we propose that the alienation restrictions on the divested slots terminate after a total of five years following initial sale.

*Tentative Findings*

We have carefully evaluated the risks and potential benefits of the proposed transaction, focusing our public interest analysis on the effects arising from that transaction as a whole. We tentatively conclude that, on balance, the potential benefits of the proposed transaction, as modified by the required slot divestitures to new entrant and limited incumbent carriers and by implementation in tranches, outweigh its potential harms. This tentative decision would also allow us to preserve the other important benefits resulting from the transaction, such as a more efficient use of slots at both airports and a potential for enhanced service benefits to passengers.

*Invitation for Comment*

The agency has placed a copy of the waiver request in the docket. The FAA invites all interested members of the public to comment on the waiver request, proposed grant of the waiver, proposed conditions to the waiver, and proposed divestiture remedy. Several commenters, including JetBlue Airways Corporation, Spirit Airlines, Inc., and the Air Carrier Association of America, have filed comments in the Docket to the waiver request. We will review all previously-filed comments (unless withdrawn), with all comments submitted within this comment period, in making our final determination on the waiver request.

Issued in Washington, DC, on July 21, 2011.

**Ray LaHood,**  
*Secretary.*

**J. Randolph Babbitt,**  
*Administrator, FAA.*

[FR Doc. 2011-18939 Filed 7-27-11; 8:45 am]

**BILLING CODE 4910-13-P**

**DEPARTMENT OF TRANSPORTATION**

**Pipeline and Hazardous Materials Safety Administration**

**Office of Hazardous Materials Safety; Notice of Applications for Modification of Special Permit**

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

**ACTION:** List of Applications for Modification of Special Permits.

**SUMMARY:** In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations (49 CFR part 107, subpart B), notice is hereby given that the Office

of Hazardous Materials Safety has received the applications described herein. This notice is abbreviated to expedite docketing and public notice. Because the sections affected, modes of transportation, and the nature of application have been shown in earlier Federal Register publications, they are not repeated here. Requests for modification of special permits (*e.g.* to provide for additional hazardous materials, packaging design changes, additional mode of transportation, *etc.*) are described in footnotes to the application number. Application numbers with the suffix "M" denote a modification request. These applications have been separated from the new application for special permits to facilitate processing.

**DATES:** Comments must be received on or before August 12, 2011.

**ADDRESSES:** Record Center, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590. Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

**FOR FURTHER INFORMATION CONTACT:** Copies of the applications are available for inspection in the Records Center, East Building, PHH-30, 1200 New Jersey Ave., SE, Washington, DC or at <http://regulations.gov>.

This notice of receipt of applications for modification of special permit is published in accordance with part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on July 21, 2011.

**Donald Burger,**  
*Chief, General Approvals and Permits.*

Application No.	Docket No.	Applicant/Regulations affected	Nature of special permits thereof
<b>MODIFICATION SPECIAL PERMITS</b>			
9168-M .....		All-Pak Dangerous Goods, a Berlin Packaging (Former Grantee All-Pak, Inc.), Bridgeville, PA.	49 CFR Part 172; Subpart E; 173.118; 173.244; 173.345; 173.346; 173.359; 173.370; 173.377; 175.3; 175.33; 172.504; 173.3.
12092-M .....		KMR Industries, LLC, Columbia, MD.	49 CFR 173.34(e) .....
14743-M .....		TIER Environmental Services, Inc. (Former Grantee TIER DE, Inc.), Gap, PA.	49 CFR 173.24b and 173.244.
			To modify the special permit to authorize an additional mode of transportation (cargo vessel.)
			To modify the special permit to authorize additional modes of transportation (rail and cargo vessel).
			To modify the special permit to authorize one-time, one-way transportation in commerce of an additional non-DOT specification metal tank containing approximately 1320 lbs. of sodium by motor vehicle.