mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: October 7, 2011.

J. Adam Ereli,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2011–26518 Filed 10–12–11; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice: 7645]

Culturally Significant Objects Imported for Exhibition Determinations: ''Aphrodite and the Gods of Love''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition ''Aphrodite and the Gods of Love,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Museum of Fine Arts, Boston, MA, from on or about October 26, 2011, until on or about February 20, 2012; at the J. Paul Getty Museum at the Getty Villa, Pacific Palisades, CA, from on or about March 28, 2012, until on or about July 9, 2012; at the San Antonio Museum of Art, San Antonio, TX, from on or about September 15, 2012, until on or about February 17, 2013, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Julie Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6467). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: October 6, 2011.

J. Adam Ereli,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2011–26519 Filed 10–11–11; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice: 7643]

In the Matter of the Designation of Conspiracy of Fire Nuclei, aka Conspiracy of the Nuclei of Fire, aka Conspiracy of Cells of Fire, aka Synomosia of Pyrinon Tis Fotias, aka Thessaloniki-Athens Fire Nuclei Conspiracy, as a Specially Designated Global Terrorist Pursuant to Section 1(b) of Executive Order 13224, as Amended

Acting under the authority of and in accordance with section 1(b) of Executive Order 13224 of September 23, 2001, as amended by Executive Order 13268 of July 2, 2002, and Executive Order 13284 of January 23, 2003, I hereby determine that the organization known as Conspiracy of Fire Nuclei, also known as Conspiracy of the Nuclei of Fire, also known as Conspiracy of Cells of Fire, also known as Synomosia of Pyrinon Tis Fotias, also known as Thessaloniki-Athens Fire Nuclei Conspiracy, has committed, or poses a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States.

Consistent with the determination in section 10 of Executive Order 13224 that ''prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously,'' I determine that no prior notice needs to be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

This notice shall be published in the **Federal Register**.

Dated: September 28, 2011.

Hillary Rodham Clinton,

Secretary of State.

[FR Doc. 2011–26367 Filed 10–12–11; 8:45 am]

BILLING CODE 4710–10–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2010–0109]

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

ACTION: Notice of grant of petition with conditions.

SUMMARY: The Secretary and the Federal Aviation Administration (FAA) are granting the joint waiver request of Delta Air Lines, Inc. (Delta) and US Airways, Inc. (US Airways) (together, the Joint Applicants or the carriers) from the prohibition on purchasing operating authorizations (slots) at LaGuardia Airport (LGA). The waiver permits the carriers 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 São Paulo, Brazil, and make a cash payment to US Airways. The waiver is subject to a number of conditions, including that the carriers dispose of 16 slots at DCA and 32 slots at LGA to eligible new entrant and limited incumbent carriers, pursuant to procedures set out in this Notice, and achieve a mutually satisfactory agreement regarding gates and associated facilities with any such purchaser.

DATES: The waiver is effective October 13, 2011.

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.*

SUPPLEMENTARY INFORMATION:

The Proposed Transaction and the Waiver Request

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).[1] The Order allocates operating

[1] Operating Limitations at New York LaGuardia Airport, 71 FR 77,854 (Dec. 27, 2006); 72 FR 63,224 (Nov. 8, 2007) (transfer, minimum usage, and withdrawal amendments); 72 FR 48,428 (Aug. 19, 2008) (reducing the reservations available for unscheduled operations); 74 FR 845 (Jan. 8, 2009) (extending the expiration date through Oct. 24, 2009); 74 FR 2,646 (Jan. 15, 2009) (reducing the peak-hour cap on scheduled operations to 71); 74 FR 51,653 (Oct. 7, 2009) (extending the expiration date through Oct. 29, 2011); 76 FR 18,616 (Apr. 4,

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.[2] 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)[3] limits scheduled and unscheduled operations there. The HDR permits carriers to sell or purchase slots at DCA freely with only FAA confirmation of the transaction.

On May 23, 2011, the Joint Applicants 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 São Paulo, Brazil, and make a cash payment to US Airways.

FAA's Tentative Determination

On July 21, 2011 the FAA issued a Notice of petition for waiver and solicited comments on the proposed grant of the petition with conditions, through August 29 in this Docket. 76 FR 45,313 (July 28, 2011). In that notice, we tentatively approved the proposed transaction subject to certain conditions (July 2011 Notice).[4] At that time, we tentatively found that the proposed transaction offered important benefits to the public. At the same time, we were concerned 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 factors.[5] We evaluated the public interest in this transaction, examining both the benefits that were likely to be attained and the possible adverse consequences that could result from the proposed transaction, and tentatively concluded that the waiver should be granted with certain conditions.

To mitigate the competitive harms that may accrue from the transaction, we proposed conditions that included the divestiture of 32 slots at LGA (16 arrival and 16 departure) and 16 slots at DCA, by a blind, cash-only sale through an FAA-managed Web site, 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 proposed that carriers eligible to purchase the divested slots not be subsidiaries, either partially or wholly owned, of a company whose combined slot holdings are equal to or greater than five percent at DCA or LGA respectively.[6]

We proposed that the carriers notify the FAA as to whether they intend to proceed with the transaction and, if they do, that they provide certain information regarding the slots to be divested. We also proposed that the FAA would post a notice of the available slot bundles on a Web site and provide for eligible carriers to register to purchase the slot bundles. The FAA would assign each registered bidder a random number, so no information identifying the bidder would be available to the seller or public. A bidder would be allowed to indicate its preference ranking for each slot bundle as part of its offer. The FAA would specify a bid closing date and time. All offers to purchase slot bundles would be sent to the FAA electronically; offers would have to include the prospective purchaser's assigned number, the monetary amount, and the preference ranking for that slot bundle. The FAA would review the offers for each bundle and 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.

Additionally, to allow the new entrant and limited incumbent carriers purchasing the divested slots to establish competitive service, we proposed to prohibit both Delta and US Airways from operating any of the newly acquired slots during the first 90 days after the closing date of the sale of the divested slots and from operating more than 50 percent of the total number of slots included in the Joint Applicants' Agreement between the 91st and the 210th day following the close date of the sale of the divested slots, after which time the transferee would be free to operate the remainder of the slots.

To enable purchasing carriers to achieve a critical mass of slots, we also proposed to package the slots into bundles of 8 slot pairs. (Thus, there would be two slot bundles at LaGuardia of 8 pairs each, and one slot bundle at Reagan National consisting of 8 pairs.) An eligible carrier may, under our proposal, purchase only one slot bundle at each airport (while indicating preference ranking for each slot bundle as part of its offer). However, should one carrier make the highest bid on both bundles at LaGuardia, we proposed that the seller would have the option of accepting both high bids, thus overriding the one bundle per carrier proposal.

We further proposed that the slots purchased in the auction would be subject to the same minimum usage requirements as provided in the LGA Order and HDR, that is, 80% over a two-month reporting period. The minimum usage would be waived, however, for six months following purchase to allow the purchaser to begin service in new markets or add service to existing markets. Additionally, we proposed 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 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.

The July 2011 Notice invited interested parties to submit their comments by August 29, 2011. The comments we received are summarized in the Appendix. We grant all motions for leave to file late comments, and all comments to date were accepted into the docket.

2009 Proposed Transaction and Waiver Request

This petition for waiver follows a prior joint waiver request by the same Joint Applicants.

On August 24, 2009, US Airways and Delta requested a waiver of the Order to allow a similar transaction to proceed. We responded to that petition in a

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).

[2] As previously noted, the Order 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.

[3] 14 CFR part 93, subparts K and S.

[4] 76 FR 45313.

[5] 76 FR at 45315.

[6] We proposed an exception from the subsidiaries rule for Frontier Airlines, which while wholly-owned by Republic has a discretely different low-cost carrier business plan, and whose operations were confirmed to be consistent with LCC yields. 76 FR at 45328.

February 2010 Notice,[7] in which we tentatively found that the transaction should not proceed unless the Joint Applicants made more slots available for new entrants. Based on our analysis of competitive factors present at that time, we proposed to approve the transaction subject to the Joint Applicants disposing of 20 slot pairs (40 slots) at LGA and 14 pairs (28 slots) at DCA. Extensive comments were received, including from the Joint Applicants. After review of the comments, we granted the waiver request in a Notice dated May 11, 2010 (May 2010 Notice), subject to the conditions set forth in the February 2010 Notice.[8] Delta and US Airways did not choose to go forward with the transaction subject to our proposed conditions, but instead appealed our decision to the U.S. Court of Appeals for the D.C. Circuit.[9]

2011 Proposed Transaction

The transaction as now proposed by the carriers is structurally similar to the transaction proposed in 2009. The carriers have presented the Department with an analysis of the benefits they assert will accrue from the transaction, and claimed that changes in the economy and structure of the aviation industry at DCA and LGA since 2010 have dramatically reduced the economic harms that we viewed as potential adverse consequences of the original transaction.

Among those changes are the market penetration of low-cost carriers (LCCs) 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 slots at that airport from 3.3% to 8.6%, exceeding the 6.5% 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, increasing the LCC slot share from 6.8% to 8.5%, closer to the 10.3% LCC slot share sought in our May 2010 Notice. The carriers also state that the Southwest/AirTran merger will intensify competition in these markets.

Furthermore, the carriers assert that the recent United/Continental merger enhanced United's competitive profile at both Newark Liberty International Airport (EWR) and Washington Dulles International Airport, as well as at LGA and DCA. Delta also states that this transaction will allow it to establish a hub at LGA and address the competitive advantage secured by American Airlines/British Airways through their antitrust immunity alliance.

Statutory Authority To Grant Waiver Subject to Slot Divestitures

The Secretary and the Administrator have authority to grant the requested waiver of the LaGuardia Order, and to grant the waiver subject to certain conditions.[10] The FAA is authorized to grant an exemption when the Administrator determines the ''exemption is in the public interest.'' 49 U.S.C. 40109. The Administrator may ''modify or revoke an assignment [of the use of airspace]'' when required in the public interest. 49 U.S.C. 40103(b)(1). Courts have upheld the conditions an agency may place on its approval of a transaction to meet public interest standards.[11]

Our decision to subject the Joint Applicants' waiver request to certain slot divestitures is consistent with, and carries out, the Department's Section 40101(a) pro-competitive public interest factors.[12] It also complies with the FAA's public interest goals and objectives. Congress did not preclude the FAA Administrator from considering the ''public interest'' to include factors beyond ''safety,'' ''national defense'' and ''security.'' Rather, Congress expressly directed the FAA Administrator to consider those matters ''among others.'' Accordingly, as we articulated in our February 2010, May 2010, and July 2011 Notices, the FAA may validly consider, as being in the ''public interest,'' ''other factors'' including the fostering of competition in the context of the slot program. The ''public interest'' includes policies furthering airline competition, as provided in 49 U.S.C. 40101(a)(4), (6), (9), (10), (12)–(13) and (d). These goals have been public policy since at least the time of adoption of the Airline Deregulation Act of 1978, Public Law 95–504 (92 Stat. 1705), and they include (among others) maximizing reliance on competitive market forces; avoiding unreasonable industry concentration and excessive market domination; and encouraging entry into air transportation markets by new carriers.

The Proposed Transaction Serves the Overall Public Interest, Although Divestitures Remain Necessary To Remedy Prospective Harms

In the context of our public interest analysis here, we evaluate the prospective economic benefits of the transaction together with any potential resulting adverse economic consequences. We have not determined that no economic harm would result from the transaction, but rather that the adverse consequences that could otherwise result can be sufficiently mitigated such that overall benefits can be realized.

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, thus creating tangible benefits to consumers. 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, expand competition and capacity, and preserve and enhance small community access at both LGA and DCA.

Most commenters did not object to the Joint Applicants' overall transaction *per se,* and a number supported it as proposed by the carriers. For example, the New York Travel Advisory Bureau and a number of travel agents and corporate travel managers doing business in New York expressed support for the Joint Applicants' waiver request, generally citing the potential for greater benefits to the economy of New York, the benefit of improvements proposed for the infrastructure at LaGuardia, and prospects for improved tourism and travel opportunities.

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

[8] Notice on Petition for Waiver of the Terms of the Order Limiting Scheduled Operations at LaGuardia Airport, 75 FR 26,322 (May 11, 2010).

[9] *Delta Air Lines and US Airways* v. *FAA and U.S. Dep't of Trans.,* Case #10–1153 (D.C. Cir. filed Jul. 2, 2010). On May 25, 2011, the U.S. Court of Appeals dismissed this suit by mutual agreement of the parties.

[10] Petition for Waiver of the Terms of the Order Limiting Scheduled Operations at LaGuardia Airport, 75 FR at 7307; 75 FR at 26,324–25; 76 FR at 45,313–14. The Order was issued under the FAA's authority to ''develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace.'' 49 U.S.C. 40103(b)(1).

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

[12] Neither the Joint Applicants nor other carriers arguing against the waiver conditions cite any cases prohibiting the Secretary or Administrator from considering pro-competitive objectives as being in the public interest.

However, other comments, especially from other air carriers, point to the potential adverse competitive impacts of increased hub operations at DCA and LGA. In particular, Southwest Airlines Co., citing a report prepared for it by Campbell-Hill Aviation Group, LLC, argues that the transaction would permit Delta and US Airways to ''squander public resources'' by using their larger slot holdings to establish hubs at LGA and DCA that will be dependent on an even larger number of small regional aircraft feeder flights to establish and maintain hub operations.[13] Southwest maintains that hub development at these slot-controlled airports would only reinforce the inefficient slot utilization already in place that could best be remedied by supporting divestitures to carriers that would efficiently operate slots with large aircraft to support and benefit local Washington and New York passengers. Moreover, Southwest contends that the consequences for the public of this proposed reallocation of markets would be higher fares, less competition, and fewer service options at both airports.[14]

While we acknowledge Southwest's claims regarding potential inefficiencies resulting from hub development at slot controlled airports, we must consider both potential operating inefficiencies and expected network benefits typically resulting from hub development or expansion. The Joint Applicants claim that numerous benefits will accrue to consumers as a result of their transaction. Among the more compelling benefits that they articulate, we are most convinced by their arguments that development of a LGA hub will lead to enhanced service to small communities (even with the small aircraft that Southwest contends would be used) and improved competition versus other east coast hubs, including United's Newark hub and US Airways' hub in Philadelphia.

In terms of preserving and enhancing small community access at LGA and DCA, the Dane County Regional Airport, serving Madison, WI, expresses support for the overall transaction, but maintains concern that the nonstop service from Madison to LGA and DCA, currently provided by Delta, could be discontinued if Delta were required to divest some of its slots to other carriers. In addition, a number of Virginia interests express concern about the overall transaction, focusing on the possibility of losing established nonstop Roanoke-LaGuardia service and other reductions in travel options at Virginia airports. Mayor Bowers of Roanoke, and various other businesses, educational institutions, and private citizens note that US Airways currently serves Roanoke from LaGuardia with three daily roundtrips, service that could be eliminated if the transaction were allowed to proceed.

We agree that grant of the waiver will lead to some alterations in the Delta and US Airways service patterns and capacity per departure, or average throughput. However, the carriers have asserted that primary benefits of the transaction will include enhanced service to smaller communities on an overall basis.

In evaluating the public interest in this waiver petition, we have carefully assessed the benefits and possible adverse consequences of the transaction, seeking a balanced and proportional approach to maintain or enhance access to small communities and to provide greater efficiencies for Delta and US Airways that they will in turn pass on to consumers. As we acknowledged in the Final Notice concerning the Joint Applicants' initial proposal, the transaction does raise concerns as to levels of airport concentration, the number of monopoly or dominant markets in which increased pricing power can be exercised, and the potential for use of the transferred slots in an anticompetitive manner.[15] However, as we believed then, the appropriate remedy for us to adopt is not to deny the petition but rather to require divestitures that address those concerns. 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 grant of the requested waiver with specified remedies is in the public interest.

Adequacy of These Divestitures To Address the Transaction's Prospective Harms

The Department's July 2011 Notice, proposing to grant Delta's and US Airways' renewed request for a waiver subject to the condition that, among other things, the carriers divest 16 slot pairs at LGA and 8 slot pairs at DCA, was premised on the view that circumstances had in fact changed at the affected airports since the time of our initial review.[16] Several airlines in competition with the Joint Applicants argue that circumstances have not changed substantially enough to merit approval of the waiver request, and that, in any event, the Department was aware of these circumstances when it issued the July 2011 Notice. Believing the proposed slot remedy to be inadequate, some commenters—including Southwest, Jet Blue, Frontier, and Spirit, as well as ACAA—further urge us to require the divestiture of roughly 30% more slots, as we did under different circumstances in our initial review.

In our initial review of the proposed 2009 transaction, we concluded that the concern about anti-competitive effects was compounded by the fact that LCCs—which create the most competitive impact by their ability to dramatically lower fares and increase the volume of passengers in a market—had only a limited presence at the affected airports. The Department's May 2010 Notice, and the divestitures it would have required, were premised on data recited in the Notice finding that collectively, LCCs had only 3.3% of slot interest holdings at DCA and 6.8% at LGA.[17] The Department was aware at that time of JetBlue's transaction with American Airlines to acquire its first DCA slots,[18] but JetBlue's service was not initiated until November of 2010,[19] six months after the Final Notice was issued. Our review and assessment of the needed number of divestitures was focused on actual, not planned, service, recognizing the fact that agreements can be modified and plans can change.

Southwest also argued that DOT must have been ''fully aware'' at the time of the Final Notice of the ''Republic to Frontier'' transaction, involving 18 slots at DCA and 13 at LGA.[20] However, the announcement was not made until mid-April 2010 that Midwest Airlines (which had been acquired by Republic) would begin flying under the Republic name, with the Midwest brand being phased out in 2011.[21] And, regardless of the announcement, it was uncertain at that time whether the Midwest operations assumed by Frontier would be marketed with yields consistent with LCC operations, so it would have been premature to then count Frontier's new slots as representing LCC slot increases.

The third major change in circumstances was the AirTran-

[13] Comments of Southwest Airlines Co., FAA Docket 2010–0109 at pp. 13–14 and Exhibit WN–115.

[14] *Id.,* at 4–8.

[15] 75 FR at 26,324 (May 11, 2010).

[16] 76 FR 45,315.

[17] 75 FR 26,323.

[18] *See* 75 FR 26,323, n. 11, and 76 FR 45,315–45,316.

[19] *See* Comments of JetBlue, FAA Docket 2010–0109, Aug. 30, 2011 at 6.

[20] *See* Comments of Southwest Airlines, FAA Docket 2010–0109 at p. 6.

[21] *See, e.g.,* Milwaukee Sentinel-Journal, ''JSOnline,'' *http./www.jsonline.com/business/90750954.html,* April 13, 2010.

Southwest merger, which was not announced until the Fall of 2010, well after the May 2010 issuance of the Final Notice. Given the size of the transaction and its potential to introduce Southwest's brand, passenger loyalty, and route network to a broader array of customers, this merger is an important changed circumstance that could not have been considered in May 2010 but must be considered now.[22]

In our subsequent review, the Department focused on actual LCC penetration and determined that the LCC shares at the affected airports had increased markedly. At DCA it had gone from a *de minimis* share of 3.3% to 8.5%; at LGA it increased modestly from 6.9% to 8.2%.[23] These changes in LCC holdings, notably the addition of a new competitor at DCA in JetBlue and the larger portfolio of a merged Southwest/AirTran, portend a gradual shift in the competitive dynamics. While the changed circumstances between our initial and subsequent reviews fall well short of addressing all concerns at the affected airports, they are significant and cannot be overlooked. The changes show that LCCs have gained a competitive beach head at DCA and LGA that is not likely to be reclaimed any time soon.

Aside from the timing of the events, the Department also considered the magnitude of the changed circumstances. We supplied evidence to show that our reliance on LCC penetration to discipline fares justified a departure from the initial decision. For example, in the July 28, 2011 Notice, we determined that average weighted yields, used as a proxy for fares, had decreased in the DCA–BOS market as a result of JetBlue's entry in 2010, and had continued to decrease in the LGA–IND market following AirTran's entry in 2009.[24] At DCA, we supplied data and analysis to show that fares across all markets had fallen.[25] The commenters do not challenge these data. Their opposition to the remedy now being proposed focuses on the number of LCC holdings as a percentage of total holdings. However, we view the increasing levels of LCC penetration and the associated favorable effects on fares across a number of markets as more significant, and these important developments support our decision to allow the slot swap to proceed so long as there is an appropriate divestiture of slots auctioned in sufficient numbers to qualified new entrants or limited incumbents to mitigate the potential competitive harm resulting from the transaction.

A number of commenters contend that we could do more to enhance competition at both these airports than we proposed last July, by requiring more slots to be divested. However, in the particular circumstances of this case, we believe it appropriate for us to proceed with a remedy that reallocates only the number of slots necessary to address the competitive harm caused by the transaction, while still preserving the benefits of the transaction.

Our approach focuses on the incremental competitive change and the potentially strong effect of new entrant competition that is possible with a critical mass of slots. It does not address pre-existing conditions that affect competition at the airports and, in all likelihood, would continue to affect competition even if we required 30% more slots to be divested. Stated another way, our objective has not been to add as much new service by new entrants and limited incumbents as possible but rather to rely to the maximum extent on the introduction of a critical mass of new services, anticipating that those services will have an oversized effect on competition across a number of markets sufficient to address the potential competitive harm resulting from the transaction. The Department laid a foundation for this approach by emphasizing the effect of new entrant/LCC services on prices across a number of markets. That foundation is not in dispute. Seen in this light, the final slot remedy need not necessarily be mathematically congruent with the increased LCC penetration, as commenters suggest. The remedy is proportional and effective to address the possible adverse consequences of the transaction, while still preserving its public benefits.

Southwest asserts that the remedy must be larger because the transaction will ''permanently lock out'' low-fare competition.[26] Southwest claims that it will be virtually impossible for LCCs to expand at these airports because already-scarce slots will become even less available, and after the transaction is consummated, Delta and US Airways will become the most logical high bidders for any slots that may come on the market.[27] Southwest's assertions do not take into account the full competitive landscape. While it is true that Delta and US Airways will significantly increase their presence at LGA and DCA, respectively, they will not be the only carriers with the resources to acquire new slots, which are still likely to become available over time, as they have thus far. Southwest and other carriers have cash on hand, as well as developed route networks and other assets that can be leveraged for greater access to LGA and DCA.

In summary, we believe the approach taken in the July 28 Notice remains appropriate under the current circumstances, and is justified by recent changes in the competitive and operating environments at DCA and LGA.

Carrier Eligibility for the Divested Slots

Some commenters, including JetBlue and Virgin America, assert that we may not direct the Joint Applicants to divest certain DCA and LGA slots to new entrant and limited incumbent carriers having fewer than five percent of the total slot holdings at the respective airports, because the ''below five percent'' threshold is contrary to statutory definitions of limited incumbents or otherwise outside the scope of the FAA's statutory authority. We disagree. As an initial matter, the FAA routinely imposes special conditions that must be met in order to either assure an equivalent level of safety (not an issue in this case) or to ensure that the public interest is met. Nothing in the Administrator's authority to issue exemptions prevents the FAA from tailoring those conditions to the circumstances surrounding the exemption request. In the context of the July 2011 Notice, we used the term ''limited incumbent'' in a generic sense to mean an airline with a limited, or small, presence at the airport. We intend, of course, to provide opportunities for competition and low-fare service at DCA and LGA by allowing such carriers, as well as new entrant airlines, to purchase divested slots.

[22] Southwest argued as well that a few smaller transactions affecting LCC presence at Reagan National or LaGuardia had occurred prior to the May 4, 2010 Final Notice that the Department must have known about but did not raise until the July 2011 Notice was issued in connection with the Joint Applicants' revised proposal. The largest of these was a trade of slots between Continental and AirTran: AirTran operated the slots but Continental remained the holder. We generally looked at holdings in the Final Notice but subsequently refined our analysis to include operations as appropriate in the July 2011 Notice. In any event, the Department clearly specified in the Tables in the July 2011 Notice the distribution of slots actually considered in the May 2010 Notice and the origin for each change that was reported. *See* Table 5 at 76 FR 45,323 and Table 6 at 76 FR 45,325.

[23] *See* 76 FR 45323–45325. *See also* 76 FR 45327. Due to minor inconsistencies in rounding, the May 11, 2010 Notice indicated that the pre-transaction LCC share at LGA was 6.8%, while the July 28, 2011 Notice indicated a 6.9% share.

[24] *See* 76 FR 45,327.

[25] *See* 76 FR 45,327.

[26] Comments of Southwest Airlines Co., Docket 2010–0109 at 4 (Aug. 29, 2011).

[27] *Id.,* at 6.

We are not obliged to confine the category of air carriers eligible to purchase slots to those ''limited incumbent air carriers'' holding or operating ''fewer than 20'' slots or slot exemptions, as JetBlue suggests. Rather, that statutory definition of ''limited incumbent'' (49 U.S.C. 41714(h)(5)) applies only to specific circumstances not relevant here.[28] The ''limited incumbent'' definition applies, for example, to the Secretary's criteria for awarding within-perimeter slot exemptions at DCA. 49 U.S.C. 41718(b)(1). The definition also applies to the FAA's High Density Rule (HDR) protocols for withdrawing slots and distributing slots in a lottery at DCA. 14 CFR 93.213(a)(5), 93.223(c)(3), 93.225(h). Neither the statutory nor regulatory definitions of ''limited incumbent'' cabin the Department's authority to promote the public interest. The Department has determined that fashioning a reasonable class of carriers that may purchase divested slots for purposes of providing competition at congested airports is an appropriate and proportionate remedy in these circumstances.

Moreover, Congress' directive to the Secretary to grant certain slot exemptions to new entrant or limited incumbent carriers at LGA and JFK expired upon the January 1, 2007 statutory termination of the HDR at those airports. 49 U.S.C. 41716(b), 41715(a)(2). The Department is under no statutory or regulatory directive to apply the ''fewer than 20'' threshold to determine the class of carriers eligible to purchase the divested slots in this proceeding.

In the Department's February 2010 Notice, in connection with the Joint Applicant's initial request, we proposed the use of a five percent threshold, because carriers having slot holdings above that point provide a minimum level of competitive service sufficient to affect pricing in the market.[29] Restricting eligibility to new and smaller carriers below that threshold would help attract carriers that offered the prospect of increased efficiencies and innovations, as well as the ability to increase throughput at the airports, so long as they had a sufficient number of slots to establish sustainable patterns of service.[30] Moreover, use of a 5% standard, rather than setting the threshold at a lower level, would enlarge the number of potential competitors for the divested slots, creating a more robust market for them and a greater likelihood that the awarded slots would be utilized in an efficient and effective manner.

The ''five percent rule'' is the same as that adopted in the May 2010 Notice in which we granted the joint waiver request of the carriers conditioned on divesting certain LGA and DCA slots to eligible new entrant and limited incumbent carriers, which we defined as those:

> having fewer than five percent of total slot holdings at DCA and/or LGA, do not code share to or from DCA or LGA with any carrier that has five percent or more slot holdings, and are not subsidiaries, either partially or wholly owned, of a company whose combined slot interest holdings are equal to or greater than five percent at LGA and/or DCA.

75 FR at 26,337.

JetBlue also states that our definition of carriers eligible to purchase divested LGA slots unlawfully ignores a purported statutory mandate to make up to 20 LGA slot exemptions available to new entrants and limited incumbents.[31] In making this argument, JetBlue claims that the ''interim slot rules at New York airports,'' enacted by Congress in the Wendell H. Ford Aviation Investment Reform Act of 2000 (AIR–21), entitled all new entrant and limited incumbent carriers to receive up to 20 LGA slot exemptions. 49 U.S.C. 41716(b). JetBlue suggests that the divestiture must first favor those carriers with less than 20 slots before offering an opportunity for those with more than 20 slots to purchase the divested slots.

AIR–21 expired at LGA along with the HDR. Any articulation of Congressional purpose in enacting AIR–21 simply no longer applies at LGA. Thus, we reject JetBlue's argument for the reasons set forth above. In addition, JetBlue's reading of Section 41716(b) is overly generous to the new entrant/limited incumbents. This provision did not entitle each applicant to 20 LGA slot exemptions, as JetBlue claims. Rather, it directed the Secretary, subject to procedures set out in Section 41714(i), to grant slot exemptions to new entrants or limited incumbents at LGA ''if the number [ ] granted * * * does not exceed 20 * * *.'' 49 U.S.C. 41716(b). In other words, it prohibited the Secretary from granting the LGA slot exemptions described in Section 41716(a) to any carrier whose LGA slots and slot exemptions would total more than 20.

JetBlue and Virgin America also comment on Frontier's eligibility. Our July 2011 Notice tentatively found that Frontier, a carrier with limited holdings at DCA and LGA, would qualify as an eligible bidder for slots.[32] We explained that it was appropriate for Frontier to bid even though it was wholly-owned by Republic, which holds more than 5% of slots at DCA. The Department noted that Frontier has a unique business plan and relationship in the Republic structure, and confirmed that its yields have remained consistent with those of LCCs.

JetBlue and Virgin America contend that Frontier should not be eligible. JetBlue's argument centered on the assertion that the Department must restrict bidding to carriers with 20 or fewer slots, and that Frontier is owned by a carrier whose slot holdings far exceed the ''20 or fewer'' threshold.[33] The ''20 or fewer'' issue was addressed above. Virgin America also cites Frontier's ownership as a concern, but suggests that it would be too difficult for the Department to monitor whether Frontier's business plan was, in fact, delivering lower fares as intended.[34]

However, Frontier's inclusion in the pool of eligible bidders is consistent with our objective of crafting a remedy to mitigate the loss of competition associated with the Delta/US Airways slot swap. Frontier operates as a separate business within the Republic corporate structure, with a low-cost carrier business plan and yields consistent with low-cost operations. Republic's other slots are pledged for use on a long term basis by Republic's other business, which operates regional aircraft on behalf of mainline carriers, and the slots are therefore not available to exert competitive discipline on incumbent carriers. Should Frontier be successful in bidding on the slots being divested here, the approval to operate them will be conditioned upon its maintaining a low-cost carrier business plan and operating the divested slots with yields consistent with LCC operations for the duration of the five-year minimum hold requirement.

A final eligibility issue concerns Southwest Airlines and AirTran. In the July 2011 Notice, the Department recognized the merger of Southwest and

[28] 49 U.S.C. 41714 (h) provides that the definitions set forth in that section, including the definition of ''Limited incumbent carrier,'' only apply ''[i]n this section and sections 41715–41718 and 41734(h) * * *.''

[29] *See, e.g.,* Gimeno, 20(2) ''Reciprocal Threats in Multimarket Rivalry: Staking out 'Spheres of Influence' in the U.S. Airline Industry,'' *Strategic Management Journal* 101 at 110.

[30] 75 FR at 7310–11.

[31] Comments of JetBlue Airways, FAA–2010–0109, at 19–22 (Aug. 29, 2011).

[32] 76 FR 45,330, n. 40.

[33] Comments of JetBlue at 13 (Aug. 29, 2011); Reply Comments of JetBlue at 3 (Sept. 13, 2011).

[34] Comments of Virgin America at 11–12 (Aug.29, 2011).

AirTran,[35] but Westjet and Spirit seek clarification of Southwest/AirTran's status as potential bidders for divested slots.[36] Southwest and AirTran are merging, and therefore have every incentive and—unlike Frontier—ability to combine their assets to exert competitive influence in the market. Southwest and AirTran thus will be required to bid as a single unit; they are eligible to do so because their combined holdings do not exceed 5% at either airport.

Slot Bundles of Eight Pairs Will Best Promote Competitive Discipline at DCA and LGA

In the Department's earlier analysis, we expressed concern over 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, (2) the prospect for higher fares in some markets, and (3) the potential for use of transferred slots in an anti-competitive manner, warranted conditioning 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 lead to an injection of additional competition from other carriers, which may effectively mitigate these prospective harms.

In our May 2010 Notice 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, and (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.

Working from these criteria, we proposed to bundle the slots in 8-pair units at each airport, meaning that there would be one bundle at DCA and two at LGA. In the May 2010 Notice, we expressed our tentative belief that this approach would maintain high competitive discipline levels and would be preferable to dividing the slots into smaller packages that could cause underutilizations or inefficiencies.

In response, several carriers that would be designated as new entrants/limited incumbents filed comments regarding slot bundles. Allegiant proposes smaller bundles to allow the largest number of carriers with different types of operations to participate. JetBlue argues that new LCC entry at DCA makes it no longer necessary for bundles of slots to be spread throughout the day. Instead, JetBlue states that eligible carriers should be able to bid on individual slot pairs to complement their existing schedules. Virgin America claims that the bundles are unnecessarily large and would likely increase market concentration and impair competition. Sun Country contends that it would be unable to utilize all of the slots in a given bundle and that the price for the large bundles would be prohibitive. West Jet proposes that smaller bundles would lead to increased participation by smaller LCCs. Spirit, in its most recent filing, seeks a free distribution of slots ''into sets of usable pairs.'' [37] Finally, Frontier states that it, along with every other LCC filing comments with the exception of Southwest, supports smaller bundles, maintaining that such a structure would expand the pool of LCCs and destinations gaining new or enhanced access to DCA and LGA and would reduce the relative concentration of slot holdings among just a few carriers.

Southwest contends that packaging slots into large bundles for allocation would be the most effective competitive response to the larger Delta and US Airways positions at LGA and DCA, especially if the divested slots are concentrated in the hands of a single strong competitor at both airports. Southwest maintains that the Department should avoid trying to ''keep everyone happy'' by placing arbitrary restrictions on the allocation process that will only result in slots being under-used or even forfeited by carriers operating insufficient frequencies and therefore unable to mount an effective response and provide meaningful price discipline to the strengthened Delta and US Airways. Southwest cites the Campbell-Hill report appended to its comments that ''splitting the slots arbitrarily among multiple carriers would only dilute the impact of the new service vis-à-vis the incumbents and provide fewer competitive benefits to the public.'' [38] Finally, Southwest concludes that dividing the small number of divested slots among several low-cost, low-fare carriers, as Frontier supports, would be counter-productive, as the modified bundles would generate only weak and diffuse competition, thus benefiting the Joint Applicants, and wasting a rare opportunity to inject strong and sustainable low-fare competition at airports that desperately need it.

After reviewing the competing arguments, we have concluded that there is likely to be greater overall public benefit if the larger (*i.e.,* 8 slot pair) bundles are retained. Under their proposal, Delta and US Airways are not committed to any particular markets for defined periods. Each carrier would be free to discontinue any of the proposed routes and initiate others. With that flexibility, they could choose to use their increased slot holdings to target carriers with more limited slot holdings, for example by increasing their roundtrips in competitive markets and ''sandwiching'' competitor flights. A restructured remedy consisting of smaller bundles of slots to more carriers, as proposed by Spirit, JetBlue, Allegiant, WestJet and Virgin America could make certain new entrants highly vulnerable to such scheduling changes and frustrate the competitive responsiveness we are seeking.

Under the approach we take by this Notice, the bulk of the benefits derived from the divestitures required as a condition to this waiver will be from new entrant or limited incumbent carriers using the divested slots, and in order to be effective the bundles of remedied slots must be structured in such a way to enhance the likelihood of sustainable service. Diminishing the size and extensive time of day coverage of remedied bundles, an approach promoted by Spirit, JetBlue, Allegiant, WestJet, and Virgin America, will not create the degree of competitive impact required to compensate for the expected harm to be generated from this transaction.

We find that establishing bundles of slots for sale will enable an eligible carrier to purchase a sufficient array of slots to operate and maintain competitive service throughout the day. Bundling will assist the purchasing carrier in initiating or increasing service in an operationally efficient and pro-competitive manner. Packaging more slots in fewer bundles is the best approach to optimize competitive discipline. Furthermore, bundling eight slot pairs at DCA and two bundles of eight slot pairs each at LGA will help to avoid underutilization and inefficiencies of resources, including facilities, aircraft and staffing, that may result from more bundles containing fewer slot pairs.

[35] 76 FR 45,316.

[36] Comments of WestJet at 2, 9 (Aug. 29, 2011); Comments of Spirit at 14, n. 23 (Aug. 29, 2011).

[37] Comments of Spirit Airlines, Inc., Docket No. 2010–0109, at 5 (Aug. 29, 2011).

[38] Comments of Southwest Airlines Co., Docket No. 2010–0109, App. at 15 (Aug. 29, 2011).

Procedures for Transferring Divested Slots

In connection with the proposed auction mechanics for the purchase by eligible carriers of the divested slots, Southwest objected to the imposition of a deadline for bids. It believes that a deadline such as the one we proposed creates disincentives for early bidding and is subject to manipulation through last-minute bidding. It proposes a different approach, with features like minimum increases between offers and time limits on submitting a higher offer following the most recent offer.

We disagree. In order to allow the sale to be completed, there must be some closing time for offers. Southwest's system would create a moving deadline based on how much time has elapsed since the previous bid. Different buyers will have different strategies, and submitting an offer at the last minute is just one such strategy. For example, a bidder might equally attempt a high preemptive ''shut out'' offer. We cannot predict the various strategies, and, therefore, choose not to depart from our proposal, which will be easier for the FAA to manage.

Once the sales period closes, the FAA will determine the highest offer for each bundle. If each bundle receives 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 at LGA, the FAA would determine which offer is valid based on preference ranking. The successful bid for the other LGA bundle will be the next-highest offer from a carrier that remains eligible to purchase the slots. This information will be forwarded to the respective seller. The FAA will notify the selling and purchasing carriers to allow them to carry out the transaction, including any gate and ground facilities arrangements. The full amount of the proceeds could be retained by the selling carrier. The seller and purchaser will 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 slots.

In the July 2011 Notice, we had proposed that if the highest bidder for both LGA bundles was the same eligible carrier, the amounts of the offers would be communicated to the seller and the seller could choose to accept both highest offers instead of the highest offers of two different eligible bidders as identified by the FAA. In its comments, the Port Authority of New York and New Jersey (Port Authority) would allow more than one bundle there to go to a single purchaser, and Southwest argued that we should dispense with the proposed restriction that an eligible carrier may purchase no more than one of the LGA bundles. However, JetBlue asserted that our procedures should not enable one carrier to purchase all of the available slots, but rather should enhance the competitive benefits to the public by giving greater opportunities to new entrants and limited incumbents in light of the new and different services they provide. Frontier offered similar comments. In response, the Joint Applicants afforded ''deference to the Department on how it chooses to conduct the slot auction.'' [39]

Upon further reflection, we believe that having two carriers receive slots at LGA achieves the better result, as it will appropriately balance our goal of a remedy introducing additional competition at the airports with our belief that the number of slots obtained by each carrier must be sufficient to assure that they can be used effectively to stimulate competition. Thus, we will modify the position on this issue that we had taken earlier and require that the carriers package the divested slot pairs at LGA into two bundles which must be sold to two separate eligible carriers, as further discussed below.

In the unlikely event that there are no offers for a slot interest, the slot interests will revert automatically to the FAA. If necessary, the FAA may announce at a later date a means for disposing of a slot interest that attracts no purchase offer. Alternatively, under the Order, the FAA could simply retire the slot as a congestion mitigation measure. We do not expect that this need will arise.

We have adopted our proposal to conduct sales by a cash-only, FAA ''blind'' web site. A blind-only mechanism has the capability of maximizing the competitive potential of the divestiture packages, as that sale method would target the potential competitors with the greatest economic incentive to use slots as intensively and efficiently as possible.

Retention of the Sale Proceeds by the Joint Applicants

A number of commenters, including several air carriers, question our proposal to allow the Joint Applicants to retain the proceeds from the slot sales we are requiring as a condition to this waiver. These, and some others, argued that the current owners received the slots from the FAA without payment, are not the owners of slots, and that any divestitures should serve to benefit parties other than the carriers.[40] Additionally, Spirit asserts that limited incumbent airlines are entitled to the divested slots at no cost under the pro-competitive policies in Section 40101(a) and the prohibition on purchases or sales of slots in the LGA Order. Spirit also expresses concern that the Joint Applicants could enjoy a ''financial windfall'' by being able to retain the proceeds of a sale, citing a 2007 FAA Notice regarding operating limitations at LGA indicating that rights held under slot rules would end on December 31, 2006.[41]

The Joint Applicants respond that their application does not contemplate that slots would be divested without compensation, and that they would not have offered to divest any slots if they believed that would be required.

Allowing the Joint Applicants to retain the proceeds from the sale of the divested slots in this case is within our authority. Since 1985, the FAA has permitted carriers to purchase, lease, sell, and otherwise transfer slots for consideration under the HDR's Buy-Sell Rule.[42] The FAA's regulatory permission to buy and sell slots is consistent with the complementary HDR provision that slots do not represent a property ''right'' but a privilege subject to FAA control and encumbrances.[43] Furthermore, a secondary market in slots conforms to the pro-competitive policies of the Airline Deregulation Act by, among other things, relying on ''competitive market forces'' and ''encouraging entry into air transportation markets by new and existing carriers.'' 49 U.S.C. 40101(a)(6), (12). Accordingly, the FAA is under no statutory obligation to have the divested slots allocated to eligible carriers free of charge. Additionally, a sale of the slots is not a financial windfall but allows the Joint Applicants to maximize the value of their slots as originally intended as part of the larger transaction. 75 FR at

[39] Response of Joint Applicants to Show Cause Order, FAA–2010–0109, at 3 (August 29, 2011).

[40] The Airports Council International (ACI–NA) argued that slots should be treated as community assets that should be used to benefit the communities and airports, rather than carriers, and the Consumer Travel Alliance argued that the slots contemplated in the transaction are not assets of the air carriers and should be treated as property of the American public. These commenters commonly referred to FAA's regulations that state that ''[s]lots do not represent a property right but represent an operating privilege subject to absolute FAA control.'' 14 CFR 93.223(a).

[41] Comments of Spirit Airlines, FAA–2010–0109, at 4, 10 (Aug. 29, 2011), referencing FAA's Notice of Order on Operating Limitations at New York LaGuardia Airport, 71 FR 77854, 77857 (Dec, 27, 2007).

[42] 50 FR 52195 (Dec. 20, 1985); 14 CFR 93.221.

[43] 14 CFR 93.223.

7311.[44] Finally, the purchasers of the LGA slots will receive the same interest that current slot holders at LGA have. This interest is comparable to that which Delta will receive in connection with its purchase of the US Airways' LGA slots. Our waiver of the LGA Order transfers to Delta the same interests that US Airways currently holds under the terms of that Order.

After review of these comments, we remain persuaded that both our earlier position on these issues and our approach in granting the petition with divestitures are the correct ones.

Implementation in Tranches

In the July 2011 Notice, the Department proposed to prohibit each transferee Joint Applicant from operating any of the newly acquired slots during the first 90 days after the closing date of the sale of the divested slots. We further proposed to prohibit them from operating more than 50 percent of the total number of slots included in the Joint Applicants' Agreement between the 91st and the 210th day following the close date of the sale of the divested slots. After that time, we would allow the transferee to operate the remainder of the slots. The purpose of these prohibitions was to allow the new entrant and limited incumbent carriers that purchased the divested slots a sufficient period to establish competitive service, without interference from new operations of the Joint Applicants.

The Joint Applicants have not objected to this proposal, nor have others contended that it is unfair or impractical. We will therefore finalize this aspect of the waiver as it had been proposed.

Availability of Facilities to Purchasing Carriers

Our Notice proposed to require the selling carrier to make airport facilities available to the purchaser under reasonable conditions only if the purchasing carrier lacks access to facilities and is unable to obtain such access from the airport operator. We see no need to change this proposal or, as suggested by Southwest, to waive the use-or-lose period until such time as the purchasing carrier actually occupies the airport facilities. Nor do we agree with the Port Authority's suggestion to extend the proposed six-month use-or-lose waiver due to potential difficulties with arranging facilities for requesting carriers.

Rather, we fully expect both the Port Authority, as the operator of LGA, a large hub, and the Metropolitan Washington Airports Authority (MWAA), as the operator of DCA, also a large hub, to make facilities available, with reasonable dispatch, to requesting carriers and within the six-month period after the purchase of the divested slots. The Port Authority and MWAA each are bound by DOT federal grant assurances to provide reasonable and competitive access at their respective airport facilities to requesting airlines and airlines wishing to expand service at their airports. They must file competition disclosure reports with the FAA if they fail to do so. Additionally, they have each taken action, under their airport competition plans, to reduce barriers to entry and enhance competitive access at their airports. Furthermore, the Department and the FAA are available to facilitate access at appropriate airport facilities if necessary.

Additionally, we note that Airports Council International—North America (ACI–NA) comments that the grant of this waiver, subject to the conditions specified in the initial Notice, would ''unlawfully * * * usurp the proprietary right of the Port Authority and the Metropolitan Washington Airports Authority to control how their facilities at LGA and DCA were used.'' [45] Under 49 U.S.C. Section 40103(b)(1), however, it is the FAA, not the airports, that has the authority ''to develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace.'' This power includes the authority to limit flight operations at congested airports and to distribute and allocate landing and takeoff reservations (slots) to designated air carriers at controlled airports. Further, because the airports are under federal obligations to make facilities available, on a reasonable basis, to requesting carriers, we fully expect the airports to work with the carriers as they have in the past, in providing accommodation to requesting carriers.

Finally, WestJet filed comments urging that Customs and Border Protection pre-clearance procedures be made available at the applicable Canadian airport in the event that any successful bidder intends to use its slots for service to Canada, or in the alternative that FAA extend the six-month startup grace period in order to allow the bidder to obtain the necessary pre-clearance privileges. The granting of such privileges is within the purview of the Department of Homeland Security (DHS), not FAA, and WestJet or any other interested party may make appropriate inquiries on this issue with DHS. Should there be extenuating circumstances with preclearance matters in connection with compliance with the six-month startup provision, the Department will be available to work with the carrier and other appropriate parties as noted above.

Other Issues Raised by Commenters

Among its other comments, Virgin America, Inc. urges the Department to create a ''strategic slot reserve,'' with the divested slots, so that if (1) the available slots were not purchased by eligible participants in the divestiture process, (2) the purchasers did not meet minimum utilization requirements in operating the slots, or (3) the purchasers no longer met new entrant or limited incumbent eligibility requirements, the slots would be reserved for allocation to only eligible new entrants and limited incumbents.

The Department had already proposed certain alienation limitations in the Notice to ensure that the divestiture process did not enable or result in transactions that undermined the pro-competitive purpose of the proposal. Under our tentative proposal, the successful bidders would not be permitted to sell or lease the slots for 12 months following purchase, although one-for-one trades for operational purposes would be permitted. The slots could, after the initial 12 months, be sold, traded, or leased to any carrier that, at the time of the sale, trade, or lease, qualified as a new entrant or limited incumbent, for four years thereafter, with all restrictions on alienation thus ending five years following the initial sale. If by some chance slots went unsold, they would revert to the FAA and, if appropriate, it would announce at a later date whether it would retire them to reduce congestion or make them available to other carriers.

After considering Virgin America's comment, DOT believes the July 2011 Notice's approach better implements a pro-competitive market environment at

[44] Spirit and the Air Carrier Association of America contend that the Joint Applicants did not seek compensation for the divested slots. Comments of Air Carrier Ass'n of Am., FAA–2010–0109, at 3 (July 1, 2011); Comments of Spirit Airlines, FAA–2010–0109, at 2 (June 24, 2011). The Joint Applicants dispute this allegation, and state that ''[t]hey would not have offered to divest slots if they had believed that they would be withdrawn and reallocated without compensation.'' Response of Joint Applicants to Show Cause Order, FAA–2010–0109, at 4 (Aug. 29, 2011).

[45] Comments of Airports Council Int'l—N. Am., FAA–2010–0109, at 4 (Aug. 30, 2011). We note that neither the Port Authority nor MWAA has made this assertion on their own behalf.

the airports and better balances competing objectives in the bidding process. Virgin America's proposal does not address sale, trade or lease issues, and after review of other comments we are confident both that the bidding process will attract robust competition for the slots, and that the successful bidders will be highly motivated to maintain high utilization rates. Moreover, creating permanent encumbrances on the slots with ''in perpetuity'' restrictions would likely generate greater caution by carriers in bidding, and produce greater burdens in administering the slot rules.

San Francisco International Airport expresses concern that the grant of this waiver to the Joint Applicants would create an incentive for carriers to create congestion at other airports that are not currently slot-constrained, so as to cause those airports to become slot-constrained, and allow those carriers to benefit from the sale of the newly-created slots.[46] We do not believe this concern is well-founded. Carriers that intentionally over-schedule their operations at an airport incur significant costs and delays in their own operations. If the FAA is forced to reduce schedules, carriers should not expect the FAA to accept any flights that perpetuate congestion. Moreover, under the Buy-Sell rule, carriers have enjoyed the ability to sell slots and retain the sales proceeds at certain slot-controlled airports (and still enjoy that ability at DCA), and that has not resulted in any effort by carriers to create other slot-controlled airports. Finally, our decision in this case should not be viewed as a policy statement or rulemaking with far-reaching effect; to the contrary, it is a waiver based on the specific facts before us and the circumstances are unlikely to be replicated at other airports.

In addition, Virgin America urges the Department to fulfill its intention to establish and implement a rule to manage congestion issues at Newark Liberty, John F. Kennedy, and LaGuardia airports. It also comments that carriers that obtain LaGuardia slots in this process should be able to seek to use those slots at other congested airports (such as Newark Liberty, where Virgin America asserts that monopoly conditions exist). While we appreciate these points, they are beyond the scope of this proceeding. As Virgin America's own comments acknowledge, a comprehensive rule to manage congestion at the three airports is under development in a different rulemaking process, and comments to this docket cannot serve as a substitute for participation in the correct proceeding.

Terms of the Final Waiver Notice

Accordingly, we will grant the waiver requested by the Joint Applicants, conditioned on: the divestiture of 32 slots at LGA (16 arrival and 16 departure) and 16 slots at DCA, through a blind, cash-only sale through an FAA-managed Web site 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 require that, to be eligible to bid on the divested slots, carriers not be subsidiaries, either partially or wholly owned, of a company whose combined slot holdings are equal to or greater than five percent at DCA or LGA respectively, with the exception of Frontier Airlines for the reasons noted above.

To enable purchasing carriers to achieve a critical mass of slots, the divested slots shall, as proposed, be bundled into eight slot pairs at each airport, with two such bundles at LGA and one at DCA. An eligible carrier may, under our proposal, purchase only one slot bundle at each airport (while indicating preference ranking for each slot bundle as part of its offer). For the reasons outlined above, we are not adopting our earlier proposal to allow the seller to opt to accept both bids of the same purchasing carrier at LaGuardia. The selling carriers may retain, in full, the proceeds of the sale of these slots.

More specifically, as outlined in the July 2011 Notice, the single bundle at DCA 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 include slots at 0600D, 0630D, 0730A, 0830D, 0830A, 0930D, 1100A, 1230D, 1300A, 1400D, 1500A, 1600D, 1700A, 1830D, 2000A, and 2100A. Bundle B would consist of slots at 0630D, 0700D, 0800A, 0930D, 1000A, 1030D, 1230A, 1330D, 1430A, 1600D, 1630A, 1730D, 1830A, 1930D, 2030A, and 2130A.

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

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

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

The FAA will specify a bid closing date and time. The bidders' identities will not be revealed. An eligible carrier will register for each slot bundle it wishes to buy, and the FAA will assign it a random number for each registration, so no information identifying the bidder will be available to the seller or public. A bidder will be allowed to indicate its preference ranking for each slot bundle as part of its offer. Finally, the FAA will review the offers for each bundle in order. All offers to purchase slot bundles will be sent to the FAA electronically, via the e-mail address above, by the closing date and time. The offer must include the prospective purchaser's assigned number, the monetary amount, and the preference ranking for that slot bundle. No extensions of time will be granted, and late offers will not be considered. The FAA will post all offers on the Web site as soon as practicable after they are received. Each purchaser would be able to submit multiple offers until the closing date and time.

Once the sales period closes, the FAA will determine the highest offer for each bundle. If each bundle receives only a single offer, the FAA will notify the seller by forwarding the purchaser's identification. If one eligible carrier had made the highest purchase offer on multiple bundles at LGA, the FAA will determine which offer is valid based on preference ranking. The successful bid for the other LGA bundle will be the next-highest offer from a carrier that remains eligible to purchase the slots.

[46] Comments of San Francisco Int'l Airport, FAA–2010–0109 (Aug. 29, 2010); *see also* Comments of Airports Council Int'l—N. Am., FAA–2010–0109, at 4 (Aug. 30, 2010).

This information will be forwarded to the respective seller. The FAA will notify the selling and purchasing carriers to allow them to carry out the transaction, including any gate and ground facilities arrangements. The full amount of the proceeds may be retained by the selling carrier. The seller and purchaser will be required to notify the FAA that they have entered into a binding agreement with respect to the sale of the slots and certify that only monetary consideration will be or has been exchanged for the slots. This notification must occur within five business days of notification by the FAA of the winning offer. The FAA then will approve the transaction and will maintain and make publicly available a record of the offers received, the identity of the seller and purchaser, and the winning price.

Additionally, to allow the new entrant and limited incumbent carriers purchasing the divested slots to establish competitive service, we shall prohibit each transferee Joint Applicant from operating any of the slots acquired by virtue of this waiver during the first 90 days after the closing date of the sale of the divested slots and from operating more than 50 percent of the total number of slots included in the Joint Applicants' Agreement between the 91st and the 210th day following the close date of the sale of the divested slots, after which time the transferee will be free to operate the remainder of the slots.

As discussed above and as proposed, if the purchasing carrier lacks access to gates and ground facilities and is unable to obtain such access from either the Port Authority, the operator of LGA, or from MWAA, the operator of DCA, the selling carrier must make these available to the purchaser under reasonable terms and rates. We also direct the Joint Applicants to cooperate fully with the purchasing carrier and the respective airports to enable the startup operations to begin within six months after purchase.

Slots obtained through this procedure will be subject to the same minimum usage requirements as provided in the LGA Order and HDR. However, we will waive the respective use or lose provisions of the LGA Order and HDR for slots operated by the purchaser for six 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 six months following purchase.

The purchaser may lease the acquired slots to the seller until the purchaser is ready to initiate service to maximize operations at the airports. As proposed, however, slots may 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 any slot acquired by an eligible carrier in a one-for-one trade. Any one-for-one trades are subject to the FAA notice requirements in the LGA Order and HDR. Any trades or leases of LGA slots may not exceed the duration of the LGA Order.

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 as otherwise 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 for the divested slots under this waiver. These alienation restrictions will increase the likelihood 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. Accordingly, the alienation restrictions on the divested slots will terminate five years after initial sale. This will 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.

In the unlikely event that there are no offers for the slots, they will revert automatically to the FAA. If necessary, the FAA may retire the slots or announce at a later date a means for disposing of a slot bundle that attracts no purchase offer. We do not expect that this need will arise.

The grant of waiver becomes effective upon the issuance of this Notice. Failure by the Joint Applicants to comply with the terms and conditions contained in this Notice may result in partial or complete withdrawal of the waiver or other penalties.

Issued in Washington, DC, on October 7, 2011.

Ray LaHood,

Secretary.

J. Randolph Babbitt,

Administrator, Federal Aviation Administration.

Appendix

Summary of Comments

We received comments from numerous commenters, which are summarized below.

Southwest Airlines Co. argues that FAA should require divestitures that are, at a minimum, in-line with DOT's May, 2010 Order, which was 20 slot pairs at LGA and 14 slot pairs at DCA. Southwest urges FAA to eliminate the possibility of the Joint Applicants playing a role in the selection process, to use a true market-based auction where the highest cash bid on each slot bundle wins, and to remove the restriction that an eligible air carrier may only purchase one LGA slot bundle. Other options have the potential of manipulation in that the seller may have the ability to choose the weakest competitor and thereby the ability to act in an anti-competitive manner. FAA should also amend its order to require that the air carriers selling the divested slots should work with the respective airport authorities to make airport facilities available on no less favorable terms than those now afforded to the Joint Applicants and that airport ground equipment is made available on reasonable terms.

JetBlue Airways Corp. commented on June 15, 2011, before our Notice on the Joint Applicants' revised Petition was issued, and again on August 30, 2011. JetBlue suggests that the Department structure the auction so that the Joint Applicants have no ability to select the winning bidders. Further, JetBlue argues that the Department should make minor adjustments to the procedures defined in its May, 2010 Final order. Specifically, DOT should: (1) Clarify the rights associated with the divested slots; (2) auction off the divested slots in pairs rather than bundles; (3) limit participation in the auction to ''new entrant and limited incumbents'' in accordance with 49 U.S.C. 41714(h)(5), *i.e,* generally, to carriers having fewer than 20 slots and slot exemptions at the respective airport; and (4) limit participants in the auction to purchasing two slot pairs in the first round of bidding.

Frontier Airlines, Inc. submitted initial comments urging the Department to require divestitures consistent with our May, 2010 Notice, of no less than 28 DCA slots (14 slot pairs) and 40 LGA slots (20 slot pairs). In order to maximize the number and geographic diversity of LCC's, Frontier urged the Department to reallocate the slots in bundles of no more than eight slots (or four slot pairs) in each bundle. Frontier is supportive of the Department's determination of its eligibility for the auction process, but suggested a few modifications to that process. Specifically, DOT should use a single round of bidding and require eligible air carriers to submit their best and final offer, or establish a multi-bid process with set deadlines for each round of bids and require that bidders

participate in each round of bidding in order to be eligible to participate in the final round of bidding. Additionally, FAA should be the sole entity controlling the selection of the winning bidders. Frontier encourages the Department to treat Southwest and AirTran as one single air carrier for the purpose of the auction, and urges the Department to publicly disclose the winning bidder and amount of each winning bid.

Spirit Airlines, Inc. is supportive of the divestment of slots, but urges the Department to modify the transaction process. Spirit discourages the Department from using an auction based approach to reallocate the divested slots, and proposes that FAA reallocate the slots, without requiring compensation, to LCC incumbents that operate less than five percent of the slots at DCA and LGA. Spirit takes the position that the Joint Applicants have not sought payment and according to 49 U.S.C. 40101(a), US Airways and Delta are prohibited from selling such slots. Further, Spirit claims that the Joint Applicants did not pay for the slots contemplated in the proposed transaction; rather, those slots were allocated to the Joint Applicants through AIR–21, and therefore the Joint Applicants should not reap financial benefit at the expense of LCCs. Additionally, Spirit claims that it is in the public's best interest to distribute the divested slots without charge, and forcing eligible LCCs to purchase the divested slots will result in higher fares for passengers.

Spirit further urges the Department to group the divested slots into four bundles of four slot pairs each at LGA, and four bundles of two slot pairs each at DCA. Spirit states that the proposed auction method puts it at a disadvantage, and that the carriers with the ''deepest pockets'' could acquire all of the available slots. The air carrier claims it is 80% smaller than JetBlue and 95% smaller than Southwest/AirTran, and urges the Department to adopt the limited incumbent definition proposed in the Department's Final Notice of May 2010.

The Air Carrier Association of America (''ACAA'') supports Spirit's proposal to distribute the divested slots without charge. ACAA urges the Department to impose divestitures of 40 slots at LGA and 28 slots at DCA, and to allocate those slots to LCCs with less than five percent of the slots at DCA/LGA. ACAA asserts that there has been no change in the level of competition at LGA or DCA since the Department issued its previous Final Notice of May 2010.

Allegiant Air asserts that it is eligible to acquire a portion of the LGA slots, and encourages the Department to re-bundle the divested slots into smaller groups.

WestJet encourages the Department to modify the proposed requirements that allow air carriers to bid on a minimum of eight slot pairs. Additionally, in the event that LGA slots are obtained by carriers proposing service to Canada, WestJet urges the Department to assist in their obtaining authority to pre-clear passengers through U.S. Customs and Border Protection at applicable Canadian airports.

Virgin America, Inc. urged the Department to mandate a greater number of slots to be divested, and encourages the Department to establish and implement congestion mitigation strategy at the major airports in and around New York City. Additionally, Virgin suggests that the Department modify its conditions in the following ways: (1) Lower the definition of limited incumbent from fewer than five percent; (2) not exempt Frontier Airlines from the ''no subsidiaries'' requirement; (3) modify the number of bundles, which are ''unnecessarily'' large; (4) establish a ''strategic slot reserve'' as detailed in its comments in the docket; and (5) allow air carriers to use the divested slots at other congested New York airports such as Newark Liberty International Airport (''EWR'').

Sun Country Airlines urges the Department to allow air carriers the ability to purchase individual slots rather than bundles of slots, and proposes that half of the divested slots should be returned to the Department and subsequently reallocated to new entrants or limited incumbents through a lottery system without charge.

San Francisco International Airport commented to express concerns about (1) the future use and sale of slots at congested airports, and (2) possible negative repercussions of allowing air carriers to reap financial reward from the sale of slots.

The Port Authority of New York and New Jersey offered a number of suggestions regarding the proposed transaction: (1) Certain aspects of the sale mechanism should be changed to increase competition and reduce collusive behavior; (2) a six-month deadline to commence use of the divested slots is unreasonable; and (3) the Department should not allow any of the divested slots to be retired in the unlikely event that no air carriers assumes control of the divested slots.

Airport Council International (''ACI–NA'') discourages the Department from granting the waiver petition. ACI–NA urges the Department to treat the divested slots as property of the community and not assets of air carriers. ACI–NA contends that the Joint Applicants should not be allowed to receive payment from the divestment of slots, which potentially has negative repercussions.

The City of Tallahassee, Florida encourages the Department to move through the divestment process as expeditiously as possible.

Dane County Regional Airport (Madison, Wisconsin) is supportive of the transaction, but is concerned about possible loss of service.

The New York Travel Advisory Bureau, and various travel agents and corporate travel managers expressed support for the Joint Applicants' proposed transaction, generally citing the potential for greater benefits to the economy of New York, the benefit of improvements proposed for the infrastructure at LaGuardia, and prospects for improved tourism and travel opportunities.

The Honorable Jeff Miller, Representative of the First District of Florida, expressed support for the proposed transaction as potentially leading to more air transportation connectivity between Northwest Florida and DCA.

Mayor Bowers of Roanoke, Virginia, and various other businesses, educational institutions, and private citizens in and around Roanoke, expressed strong concern about the potential loss of nonstop service to LGA from their community.

The Consumer Travel Alliance (''CTA'') urges the Department to reexamine the proposed transaction from the taxpayers' point of view. CTA argues that the slots contemplated in the transaction are not assets of the air carriers and should be treated as property of the American public. CTA has concerns about the repercussions of incentivizing air carriers by allowing airlines to reap financial reward in exchange for scarce slots. CTA urges the Department to reallocate the divested slots to those air carriers that propose to operate large aircraft with those slots, and to air carriers willing to invest in equipping their fleet with NextGen technology. Additionally, CTA urges the Department to consider the difficult task of reallocating the limited airport facilities to the winning bidders.

Supplemental and Responsive Pleadings

The Joint Applicants submitted responsive comments in the docket, and assert that they take no issue with JetBlue's position on the subject of the Joint Applicants' role in the selection of recipients of the divested slots. Furthermore, the Joint Applicants take no position with comments regarding modifications to the auction process. Delta and US Airways assert that they did not contemplate divesting the slots without monetary compensation, and would not have offered to divest such slots had they believed the slots would be withdrawn and reallocated without compensation. The Joint Applicants claim they have the authority to sell slots, and argue that divestiture of 32 slots at LGA and 16 slots at DCA is consistent with the public interest standard. The Joint Applicants further argue that Frontier is not eligible to participate in the auction without special dispensations.

Spirit submitted additional comments in the docket on August 30, 2011, in which it opposes the transaction unless an additional four slot pairs are divested. Spirit claims that 16 slot pairs at LGA will not be an adequate number of divested slots to counter-balance the anti-competitive impact of Delta's newly acquired LGA slots. Spirit strongly opposes an action process that results in the Joint Applicants receiving monetary compensation in exchange for the divested slots. Spirit contends that Congress has defined ''limited incumbents'' as air carriers holding fewer than 20 slots, and the Department should adopt this definition.

In its responsive submission, ACAA urges the Department to require more divested slots than 16 slot pairs at LGA and 8 slots pairs at DCA. ACAA argues that the Joint Applicants obtained control of the slots contemplated in the transaction without payment and therefore should not receive a financial windfall from low cost carriers in exchange for the slots. ACAA encourages the Department to promote competition at DCA and LGA by divesting slots to air carriers that hold less than five percent of the slots at the respective airports and proposes to use those slots to operate aircraft with at least 110 seats.

Frontier Airlines encourages the Department to define ''limited incumbents''

as those air carriers that operate fewer than five percent of the slots at DCA and LGA. Frontier urges the Department to allocate the divested slots into smaller bundles than what was proposed in the Notice of the revised Petition and prohibit an air carrier from acquiring all of the slots. Additionally, Frontier argues that divested LGA slots should not be transferable to EWR, and that exempting Frontier from the ''no subsidiaries'' requirement is fully justified and in the public interest.

Southwest submitted responsive comments supporting the Department's definition of ''limited incumbent'' in this proceeding, pointing out that any other definition would be inconsistent with the May 2010 Notice regarding the previous, similar transaction, and arguing that the proposed definition ensures that the divested slots are ''put to their best competitive use * * * to produce the maximum public benefits and partially offset the anticompetitive effects of the slot swap.'' Southwest further argues that this definition is justified in order to ensure that the transaction is in the public interest. It also claimed that smaller bundles of slots would provide only ''weak and diffuse'' competition by low-fare carriers. Southwest also supported a simple auction format in which the highest bidder won each bundle of slots.

Continental Airlines, Inc. and United Air Lines, Inc. submitted responsive comments opposing Virgin America's suggestion that divested LGA slots should be transferable to EWR.

In a September 13, 2011 submission, JetBlue reiterated its position that additional slot divestitures are required to ameliorate the anticompetitive effects of the proposed transaction. It also continued to argue that ''limited incumbent'' was defined in statute by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR–21), and that implementation of AIR–21 is the core issue in this proceeding.

ACAA responded to these comments in a September 21, 2011 filing, and restated the benefits it believes accrue to the public from allowing carriers with more than five percent of the slots at either airport to participate in the auction.

[FR Doc. 2011–26465 Filed 10–11–11; 4:15 pm]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Technical Standard Order (TSO)–C129a, Airborne Supplemental Navigation Equipment Using the Global Positioning System (GPS)

AGENCY: Federal Aviation Administration (FAA), DOT

ACTION: Notice of cancellation of TSO–C129a, *Airborne Supplemental Navigation Equipment Using the Global Positioning System (GPS).*

SUMMARY: This notice announces the FAA's cancellation of TSO–C129a, Airborne Supplemental Navigation Equipment Using the Global Positioning System (GPS) effective October 21, 2011. TSO cancellation will not affect production according to an existing TSO authorization (TSOA). Articles produced under an existing TSOA can still be installed according to existing airworthiness approvals and applications for new airworthiness approvals will still be processed.

The effect of the cancelled TSO will result in no new TSO–C129a design or production approvals. However, we will accept applications for new TSO–C129a TSO Authorizations (TSOA) until October 21, 2012 if we know that you were working toward a TSO–C129a approval prior to October 21, 2011.

DATES: Comments must be received on or before October 20, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. Kevin Bridges, AIR–130, Federal Aviation Administration, 470 L'Enfant Plaza, Suite 4102, Washington, DC 20024. Telephone (202) 385–4627, fax (202) 385–4651, e-mail to: *kevin.bridges@faa.gov.*

SUPPLEMENTARY INFORMATION: The FAA published a **Federal Register** notice on August 16, 2011 (76 FR 50808) describing our intent to cancel TSO–C129a to solicit feedback. We received a total of six comments from three parties with questions or concerns about the cancellation. For example, there was a comment to provide a transition period for applicants working toward a TSO–C129a approval prior to the cancellation date. The FAA agreed with this comment and has included a transition period in this notice. Another comment expressed concern regarding how an existing TSO–C129a technical standard order authorization (TSOA) would be addressed on an article with multiple TSOAs that has a change not affecting TSO–C129a. The FAA agrees to address this issue through a policy revision and/or policy memo. However, none of the parties providing comments expressed an objection to TSO–C129a being cancelled or provided reasons to not cancel the TSO.

Comments Invited

You are invited to comment on the cancellation of the TSO by submitting written data, views, or arguments to the above address on or before October 14, 2011. The Director, Aircraft Certification Service, will consider all comments post-marked or received before the TSO cancellation date.

Background

On September 21, 2009, the FAA published TSO–C196, Airborne Supplemental Navigation Sensors for Global Positioning System Equipment Using Aircraft-Based Augmentation; an updated minimum performance standard for GPS sensors not augmented by satellite-based or ground-based systems (*i.e.,* TSO–C129a Class B and Class C). The FAA has also published two TSOs for GPS augmented by the satellite-based augmentation system (TSO–C145c, Airborne Navigation Sensors Using the Global Positioning System Augmented by the Satellite-Based Augmentation System; and, TSO–C146c, Stand-Alone Navigation Equipment Using the Global Positioning System Augmented by the Satellite-Based Augmentation System).

TSO–C145c, TSO–C146c, and TSO–C196 incorporate more stringent standards and testing requirements that make the GPS equipment more accurate and robust than sensors built to the minimum requirements in TSO–C129a. Two examples of these improvements are: (1) A requirement for the receiver to properly account for satellite range error if it is reflected in the User Range Accuracy index (commonly referred to as being ''Selective Availability aware''); and, (2) requirements to ensure performance is not degraded due to an increasing radio frequency noise environment as other satellite systems become available.

Since 2005, there has only been one application for a TSO–C129a TSOA on a new article. Many manufacturers informally indicate they are transitioning, or planning to transition, their product lines to the new TSOs. Therefore, we believe cancelling TSO–C129a is an appropriate way to assist the natural phase-out/upgrade cycle given the eventual obsolescence of TSO–C129a equipment and industry's lack of interest in new TSO–C129a designs.

Issued in Washington, DC, on October 7, 2011.

Susan J.M. Cabler,

Assistant Manager, Aircraft Engineering Division, Aircraft Certification Service.

[FR Doc. 2011–26449 Filed 10–12–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35553]

Big Spring Rail System, Inc.;Operation Exemption;Transport Handling Specialists, Inc.

Big Spring Rail System, Inc. (BSRS), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to