

BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.

In the matter of:)
)
Petition for Waiver of the Terms of the)
Order Limiting Scheduled Operations)
at LaGuardia Airport)
)
_____)

Docket No. FAA-2010-0109

**REBUTTAL COMMENTS OF DELTA AIR LINES, INC. and US AIRWAYS, INC.
PUBLIC VERSION**

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April 5, 2010

REBUTTAL COMMENTS OF DELTA AIR LINES, INC. and US AIRWAYS, INC.

Pursuant to the Federal Aviation Administration’s (“FAA’s”) notice of April 1, 2010, in the above-captioned matter, *see* 75 Fed. Reg. 16,574, Delta Air Lines, Inc. (“Delta”) and US Airways, Inc. (“US Airways”) respectfully submit these rebuttal comments. The rebuttal comments respond in particular to the comments of the United States Department of Justice (“DOJ”) and Southwest Airlines Co. (“Southwest”).

INTRODUCTION

The parties’ original transaction satisfies the legal standards for a waiver from the LaGuardia Order and would result in enormous benefits to consumers. Mindful of the FAA’s concerns, and desiring a resolution that would permit the parties to move forward with the transaction as soon as possible, however, the parties have modified the transaction in a way that fully responds to the FAA’s concerns while retaining most of the benefits of the original transaction. The FAA should promptly approve the modified transaction.

Under the modified transaction, the parties would transfer 4.5 DCA slot pairs to JetBlue

Airways Corp. (“JetBlue”) and 5 LGA slot pairs apiece to AirTran Airways, Inc. (“AirTran”), Spirit Airlines, Inc. (“Spirit”), and WestJet, An Alberta Partnership (“WestJet”). Each of the carriers falls within the group of carriers that the FAA identified as attractive candidates for slots at LGA and DCA. Petition for Waiver of the Terms of the Order Limiting Scheduled Operations at LaGuardia Airport, 75 Fed. Reg. 7306, 7311 (Feb. 18, 2010). [REDACTED]

[REDACTED] And unlike an auction, which would likely lead to Southwest obtaining all of the slots, the modified transaction transfers slots to multiple carriers. The proposed modified slot transaction thus fully addresses the FAA’s concerns and, in particular, its stated goal of “creating new and additional competition” at LGA and DCA. *Id.* at 7306.

Recent developments make approval of the modified transaction an even more compelling option. Since expiration of the initial comment period, and sparked by the parties’ transaction, JetBlue and American Airlines, Inc. (“American”) have announced an agreement under which American will enter into an interline relationship with JetBlue that will feed its international service out of JFK and significantly expand its service in New York, including at LGA. In return, JetBlue will acquire 8 DCA slot pairs from American. Combined with the slots JetBlue will receive as part of the parties’ proposed modified transaction, JetBlue’s new slot holdings at DCA will likely equal or exceed the number of DCA slots the FAA proposes to divest. With these slots, JetBlue plans to offer a “robust” schedule at DCA, in addition to the 20 daily roundtrips it already provides at BWI and Dulles. Press Release, JetBlue Airways, JetBlue to Launch Service at Ronald Reagan Washington National Airport (Mar. 31, 2010), *available at* <http://investor.jetblue.com/phoenix.zhtml?c=131045&p=irol-newsArticle&ID=1408146>

&highlight= (“JetBlue Press Release”). These developments eliminate any possible concern about the desirability of approving the parties’ proposed modified transaction.

We therefore look forward to the FAA’s prompt approval of the modified transaction. The sooner the transaction is approved, the sooner consumers will be able to realize its many benefits. And prompt approval would also eliminate needless uncertainty in the market. To the extent that the DOJ has any lingering concerns, it retains authority to examine the modified transaction for its consistency with the antitrust laws.

Approving the proposed modified transaction would also have an additional important benefit for the FAA. It would allow the FAA to avoid acting in a manner that would subject it to legal challenge. The parties retain the right to challenge any imposition of a divestiture condition, and such litigation would be likely if the modified transaction is not approved.

The FAA would also be vulnerable in such a challenge. For reasons explained in the parties’ opening comments, there is no legal or factual basis for conditioning the requested waiver on any slot divestitures. And nothing in the comments of the parties supporting the divestiture condition, including those of DOJ and Southwest, suggests otherwise.

In arguing that the FAA has authority to consider competition-related factors, the DOJ and Southwest rely entirely on a provision that gives the *Secretary* authority to consider competition-related factors in connection with *economic* regulation under *Subpart II*. They do not explain, however, how that provision could possibly give the *FAA* authority to consider competition-related factors in connection with the regulation of the *safety of aircraft and the efficient use of airspace* under *Subpart I*. And the DOJ and Southwest do not even address the parties’ showing that the divestiture condition would confiscate their property without just compensation and violate the buy/sell rule that remains in effect at DCA.

The DOJ and Southwest likewise offer no viable basis for the FAA's tentative finding that the transaction will result in competitive harms absent the divestiture condition. In attempting to support that finding, the DOJ relies on speculation rather than evidence. And it ignores the many concrete benefits that will be lost if the FAA's proposed divestiture condition is imposed. As the parties have explained, if the divestiture condition is imposed, they will not consummate the transaction. The DOJ's view that it is preferable [REDACTED] [REDACTED] than to realize the valuable benefits of this transaction for consumers does not afford any reasoned basis for the divestiture condition. For its part, Southwest simply seeks to exploit this transaction to obtain a competitive advantage for itself. And there is no legal or factual basis for affording such a preference. The comments of the parties supporting the divestiture condition thus simply confirm that the FAA has no legal authority to impose its proposed divestiture condition, and that the imposition of that condition would fail to satisfy the APA's requirement of reasoned decision-making.

There is no reason for the FAA to proceed down that path. Instead, because the modified transaction fulfills all of the FAA's stated concerns, the FAA should approve that transaction and allow its many undisputed benefits to be realized.

I. The FAA Has Authority To Consider Safety And Efficient Use Of Airspace, Not Competition

As explained in the parties' opening comments, the FAA lacks statutory authority to condition its approval of the Delta/US Airways waiver request on the divestiture of slots. Congress has conferred authority on the FAA to consider only safety and the efficient use of airspace; it has not conferred any authority on the FAA to consider competition. The FAA's tentative decision to base its divestiture condition on its view of the proposed transaction's effects on competition therefore transgresses the limits that Congress has placed on the FAA's

authority. The tentative decision also places the FAA in a position of making judgments that it has no institutional competence to make. And it intrudes on the exclusive role that Congress has assigned to the DOJ under Section 7 of the Clayton Act. The comments from the parties who support the FAA's tentative decision fail to come to grips with these fundamental legal flaws with the divestiture condition.

Once the FAA limits its focus to the only considerations over which it has authority, it must approve the waiver request without the divestiture condition. The FAA has already determined that the waiver request is fully consistent with safety and the efficient use of airspace. And not a single commenter takes issue with that determination.

A. The Comments Of The DOJ And Southwest Provide No Basis For The FAA To Consider Competition In Determining Whether To Grant An Exemption From The LaGuardia Order

1. Department of Justice

The DOJ asserts that the FAA may approve a waiver from airspace rules when it is in the "public interest," and that the FAA's "public interest inquiry is guided by several pro-competitive principles." Comments of the U.S. Dep't of Justice at 1 & n.1 ("DOJ Comments"). As explained in the parties' opening comments, however, in granting the FAA authority to approve waivers from airspace rules, Congress did not give the FAA any authority to consider competition-related factors. Instead, Congress gave the FAA authority to consider only the "safety of aircraft and the efficient use of airspace." 49 U.S.C. § 40103(b)(1). The FAA's organic statute similarly directs the FAA to consider factors that bear on safety and the efficient use of airspace. *Id.* § 106(g), (h); *see also id.* § 40101(d). No statute confers on the FAA any authority to consider competition-related factors.

In arguing otherwise, the DOJ relies entirely on 49 U.S.C. § 40101(a). DOJ Comments at 1 & n.1. As explained in the parties' opening comments, however, that provision authorizes

only the “Secretary” to consider competition-related factors, and then only in connection with “economic” regulation under “Subpart II.” 49 U.S.C. § 40101(a). By its express terms, that provision does not apply to the FAA’s exercise of authority under Subpart I to approve waivers from airspace rules, such as the LGA waiver requested by the parties here. The DOJ does not even try to explain how a provision that gives the *Secretary* authority to consider competition-related factors in carrying out *economic* regulation under *Subpart II* could possibly authorize the *FAA* to consider competition-related factors in carrying out *safety and airspace management* regulation under *Subpart I*.

The DOJ’s inattention to the controlling language of Section 40101(a) is mystifying. Before filing its comments, the DOJ had an opportunity to examine the opening comments of Delta and US Airways, and those comments specifically explained why Section 40101(a) does not give the FAA any authority to consider competition-related factors. In the face of those comments, it is difficult to understand how the DOJ could advise the FAA to take action based on Section 40101(a) without even attempting to explain how that is possible in light of the plain language of that provision.

The DOJ similarly does not address how its advice to the FAA to consider the competitive effects of the Delta/US Airways slot exchange can be reconciled with Congress’s delegation of exclusive authority to the DOJ to conduct such a review under Section 7 of the Clayton Act, 15 U.S.C. § 18. At one time, the Department of Transportation (“DOT”) had comparable authority to review a transaction for its anticompetitive effects. 49 U.S.C. App. § 1378(b)(1)(B) (Supp. IV 1986). But Congress long ago extinguished that authority. *See* Pub. L. No. 98-443, § 3(c); *see also* H.R. Rep. No. 98-793, at 11 (1984). Because the slot exchange involves an acquisition of assets that falls squarely within the DOJ’s exclusive authority under

Section 7 of the Clayton Act, any consideration of competition-related effects by the FAA would constitute an exercise of the very authority that Congress removed from the DOT and assigned exclusively to the DOJ.

The FAA's consideration of competition-related effects would also contradict Section 7's procedural and substantive standards. Under Section 7, the DOJ may only sustain a challenge to a transaction when its effect "may be substantially to lessen competition, or tend to create a monopoly." 15 U.S.C. § 18. And the DOJ bears the burden of proving the probability—not the "mere possibility"—of anticompetitive effects by a preponderance of the evidence. *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 598 (1957). Although the DOJ embraces the FAA's unlawful reliance on the public interest standard rather than Section 7, neither that standard (even if it applied) nor Section 7 authorizes speculation about possible competitive harms to justify a divestiture order. Yet such impermissible speculation is all the DOJ comments rest upon. If the DOJ chooses not to go to court to prove that a transaction violates Section 7, the answer is not to urge a different government agency to exercise competition authority it does not have. Instead, the answer is to allow the transaction to go forward.

2. Southwest Airlines Co.

Southwest argues that because the FAA has authority to grant Delta and US Airways' request "in full," it must "necessarily have the authority to grant the request in part" by imposing a divestiture condition based on competition-related factors. Comments of Southwest Airlines Co. on Delta-US Airways Proposed Slot Swap and FAA Notice Proposing Condition to Grant Waiver at 8 ("Southwest Comments") (emphasis omitted). That argument is a complete non sequitur. The FAA's exercise of authority to grant a waiver, whether in full or in part, must be based only on the factors that Congress has authorized the FAA to consider—safety and the efficient use of airspace, not competition-related factors. Thus, while the FAA has authority to

approve the waiver request *in full* based on its consideration of *safety and airspace efficiency*, it plainly lacks authority to grant the request only *in part* based on its consideration of *competition-related factors*.

The Supreme Court's decision in *Nolan v. California Coastal Commission*, 483 U.S. 825 (1987), demonstrates the logical flaw in Southwest's analysis. There, the zoning agency had authority to approve a request for a beach front permit in full, but it did not have authority to condition the permit on an owner's willingness to grant a public easement over his property. The Court explained that even when a government agency may approve a request in full, it may not condition its approval on the sacrifice of an owner's property interest unless the condition is related to the underlying reason that approval is needed in the first place. *Id.* at 836-37. That analysis controls here. The FAA may establish conditions on its approval of a waiver request that are related to safety and airspace efficiency because that is why a waiver is needed in the first place, but it may not establish conditions that are based on competition-related factors that have nothing to do with why a waiver is needed.

B. Comments From Continental and United Confirm That The FAA Has No Authority To Consider Competition

The comments of Continental Airlines, Inc. ("Continental"), and United Airlines, Inc. ("United") also demonstrate that the FAA is without statutory authority to consider competition factors.

In contrast to the parties supporting the divestiture condition, Continental recognizes that the FAA's waiver authority is limited to considering "safety and environmental" factors, and the imposition of "purely economic, competition-based conditions exceeds the agency's statutory authority." Comments of Continental Airlines, Inc. at 3 ("Continental Comments"). Continental specifically explains that Section 40101(a) does not give the FAA authority to consider

competition-related factors, because those factors “do not apply to slots.” *Id.* at 6. And it also explains that under controlling regulations, the FAA is only allowed to withdraw slots “to meet operational needs” or for “non-use,” not to remedy what it perceives to be problems with market concentration. *Id.* at 7-8 (quoting 74 Fed. Reg. at 51,654).

Similarly, United rightly characterizes the FAA’s proposed divestiture as “an ill-conceived and illegal effort to manipulate the competitive market for air transportation through governmental fiat rather than [through] market forces.” Comments of United Air Lines, Inc. at 3 (“United Comments”). As explained by United, because the FAA’s authority is limited to ensuring “the safety of aircraft and the efficient use of airspace,” the FAA may not seek “to give one class or group of competitors an arbitrary advantage over others (in the mistaken belief that doing so will lead to a better competitive outcome than market-based transactions entered into at arm’s length by competitors).” *Id.* at 4-5. Like the parties, United objects to the FAA’s reliance on Section 40101(a) because Congress specifically limited the application of that provision to the Secretary of Transportation, and only in carrying out economic regulation under Subpart II. *Id.* at 5-6. And like the parties, United observes that the proper body to consider the competition effects of Delta and US Airways’ proposed transaction is the DOJ, not the FAA. *Id.* at 5 & n.2.

C. Considering The Appropriate Factors, The FAA Should Grant The Waiver Without Conditions

Because the FAA has authority to consider only safety and the efficient use of airspace, and not competition, the proposed slot transfer must be approved without a divestiture condition. The FAA itself “evaluated the potential impact on air traffic operations at the respective airports,” and concluded that “there will be little to no impact on the agency’s ability to manage traffic at either airport.” 75 Fed. Reg. at 7307. The FAA therefore “tentatively” found that, apart from the issue of competition, “the request meets the public interest standards of ensuring the

efficiency of use of the navigable airspace and warrants a waiver.” *Id.* Notably, *no commenter* takes issue with that finding. That should end the inquiry. Because the parties’ proposed transfer satisfies the “public interest” criteria of safety and efficient use of airspace, the FAA should grant the parties’ petition in full. *See also, e.g.,* Continental Comments at 2; Comments of the Delta Master Executive Counsel of the Air Line Pilots Association at 2 (“ALPA Comments”).

II. The DOJ’s Assertion That The Transaction Will Harm Competition Absent The FAA’s Proposed Divestiture Condition Is Unsupported By Any Evidence

The DOJ asserts that the proposed divestiture condition is necessary to prevent harm to competition. That assertion is based on a series of unsupported claims.

- The DOJ’s claim that the transaction will impede entry at LGA and DCA by [REDACTED] is based on speculation and ignores undisputed evidence to the contrary;
- The DOJ’s hoarding theory is belied by [REDACTED] Continental’s exchange of DCA and LGA slots for AirTran slots at Newark, the slot transactions with LCCs that the parties propose, and the recently announced slot transaction at DCA between American and JetBlue;
- The DOJ’s claim that the transaction will reduce competition ignores the overwhelming benefits produced by the transaction and is inconsistent with recent developments;
- The DOJ’s claim that increased concentration at LGA and DCA will harm competition or increase fares is unsupported by the evidence;
- The DOJ’s claim that the FAA’s proposed divestitures will not interfere with the transaction’s benefits ignores the parties’ unequivocal statement that they will not go forward with the transaction as conditioned by the FAA; and
- The DOJ’s claim that the benefits at DCA and LGA are overstated is based on speculation about [REDACTED] that is contradicted by the evidence; and its assertion that slots should be divested to LCCs ignores the benefits that network carriers can bring to smaller communities.

A. There Is No Evidence That This Transaction Will Reduce The Likelihood Of LCC Entry

The DOJ asserts that the proposed transaction will diminish competition by frustrating entry by LCCs. The proposed transaction could not reduce the likelihood of LCC entry, however, unless there was some evidence that the slots being transferred would otherwise have become available to LCC carriers. And there is no such evidence.

As the DOJ knows from its investigation, [REDACTED]

[REDACTED]

[REDACTED] The

DOJ offers no evidence to the contrary.

Moreover, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Additionally, the DOJ would deny consumers of the concrete benefits of Delta's creation of an LGA hub, including its upgauging of aircraft and service to small communities, in favor of the undefined benefits of a speculative transaction between US Airways and an unknown carrier

that might occur at some undefined point in the future. That preference is inexplicable.

The DOJ also erroneously asserts that Delta has assumed responsibility for other carriers' slots in order to keep slots "out of the hands of new entrants." DOJ Comments at 9. As the undisputed evidence shows, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The DOJ also claims that the transaction will increase the carriers' supposed incentives to engage in "slot hoarding" to prevent future slot sales to LCCs. DOJ Comments at 9-12. But the DOJ provides no evidence in support of that claim, and its speculation is belied by the facts. In particular, it ignores [REDACTED] Continental's exchange of DCA and LGA slots for AirTran slots at Newark, the parties' proposed slot transactions with LCCs, and American's recently announced transaction with JetBlue at DCA. If hoarding slots at the expense of LCCs were a scheme based in reality, [REDACTED] [REDACTED] and the parties would not have proposed arms' length transactions with JetBlue, AirTran, Spirit, and WestJet. And the existence of the American/JetBlue and Continental/AirTran slot transactions, which both involved DCA slots, undermines the DOJ's assertion that the transaction will frustrate the ability of LCCs to obtain slots there.

B. The DOJ Ignores Undisputed Evidence That The Transaction Will Increase, Not Reduce, Competition

The DOJ asserts that the transaction “will reduce competition between US Airways and Delta at DCA and LGA” because [REDACTED] [REDACTED] DOJ Comments at 13. But the DOJ ignores the [REDACTED] routes that will benefit from additional competition, including [REDACTED] routes from DCA and LGA to other network carrier hubs. As Compass Lexecon explains, because the competitive gains and losses produced by the transaction are generated by the same reconfiguration of assets, those gains and losses of a competitor are necessarily linked. *See* Compass Lexecon, *Analysis of FAA’s Notice Regarding the US Airways-Delta Air Lines Slot Transaction* at 5-8 (“CL Analysis”), attached as Appendix A to the Parties’ Opening Comments. Indeed, as the parties have already demonstrated to the DOJ, an analysis of the transaction using the DOJ’s own fare-effects estimates projects that the transaction would produce an annual fare reduction to consumers of \$73 million. *Compass Lexecon, Reply Comments on FAA’s Notice Regarding the US Airways-Delta Slot Transaction* at 5 (“CL Reply”). Thus, when all of the competitive effects of the transaction are considered together, as is appropriate, there can be no dispute that the transaction is strongly pro-competitive.

Moreover, recently and against the backdrop of the parties’ proposed transaction, JetBlue and American entered into a new commercial arrangement under which American will increase its service in New York, including at LGA, and JetBlue will obtain 8 slot pairs at DCA. Combined with the DCA slots that JetBlue would receive as part of the parties’ proposed modified transaction, JetBlue’s new slot holdings at DCA will likely equal or exceed the number that the FAA proposes to require the parties to divest. *See* JetBlue Press Release. The American/JetBlue transaction demonstrates that it is possible to acquire slots at restricted airports

and disproves the FAA's assumption to the contrary. *See* Fed. Reg. at 7308; *see also* Comments of American Airlines at 2.

C. The DOJ Offers No Evidence That Increases In Slot Ownership At DCA And LGA Would Produce Competitive Harm Or Increase Fares

Like the FAA, the DOJ contends that increased concentration from the transaction will lead to higher fares. DOJ Comments at 6. But like the FAA, the DOJ offers no viable evidence in support of that contention. The only additional support the DOJ can muster is a citation to an article that itself collects citations to studies that all rely on data that are at least two decades old. Further, like the FAA, the DOJ ignores more recent studies and data from the parties' comments and Compass Lexecon's paper, both of which show that market concentration does not lead to increased fares. Parties' Comments at 33-35; CL Analysis at 8-13.

D. The DOJ's Assertions Relating To Market Definition Do Not Address The Parties' Evidence

The DOJ claims that service from other New York and Washington airports will not restrain fare increases at LGA and DCA. DOJ Comments at 16. In doing so, the DOJ offers no empirical evidence of its own, fails to address the empirical study submitted by the parties showing a fare correlation between adjacent airports at New York and Washington, and does not discuss the recent Bruekner/Lee study demonstrating that competition from LCCs at adjacent airports is a competitive constraint. *See* CL Analysis & Appendix A-B. Even more striking is that the Port Authority of New York and New Jersey, with obvious expertise on the subject, filed comments explaining that LGA is in the same market as Newark and JFK. *See* Comments of the Port Authority of New York and New Jersey at 2-4 ("Port Authority Comments").

In support of its position, the DOJ cites [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] And in fact, Delta, just like the Port Authority, considers the three airports as a single market. *See id.* at 163:6-18; *see also* Letter from Southwest to Ronald F. Mathieu, February 15, 2010 (“The ‘W’ in BWI stands for Washington, D.C.”).

E. The DOJ’s Assertion That The Proposed Divestiture Will Not Interfere With The Transaction’s Benefits Suffers From Numerous Flaws

The DOJ asserts that the FAA’s proposed divestiture condition will not jeopardize the consumer benefits of the transaction. DOJ Comments at 17-20. But as the parties stated unequivocally in their opening comments, they will not go forward with the transaction on the terms the FAA proposes. *None* of the benefits of the transaction will be realized, therefore, if the FAA insists on the proposed divestiture. The DOJ was obviously aware of this fact, having received the parties’ comments before filing its own, but the DOJ inexplicably chose not to address it. Nor did the DOJ address the fact that the FAA’s proposed divestiture of 20 slot pairs at LGA and 14 slot pairs at DCA would lead to a substantial reduction in output and reduced service on several routes relative to the status quo. CL Analysis at 25-29.

The DOJ asserts that the parties overstate the benefits at LGA because they compare Delta’s intended post-transaction operations to US Airways’ present operations, rather than to

[REDACTED] DOJ

Comments at 18. As already discussed, however, [REDACTED]

[REDACTED]

[REDACTED] There is thus no basis in fact or in law to use [REDACTED]

[REDACTED]

With regard to DCA, the DOJ asserts that the parties' assessment that the transaction will result in \$27 million in annual consumer benefits is overstated because it compares US Airways' planned operations to Delta's "present operations" rather than Delta's "planned operations absent this transaction." DOJ Comments at 18. But as the parties informed the DOJ during its review of the transaction, even using the DOJ's preferred baseline, the projected consumer benefits at DCA are still \$23.8 million per year. *See* Letter from Michael Billiel to Jim Denvir, December 29, 2009; Letter from Jim Denvir to Michael Billiel, December 31, 2009; *see also* Letter from Jim Denvir to Mark Niefer, December 22, 2009. Whether consumers stand to reap annual benefits of \$27 million or \$23.8 million at DCA, the potential benefits are undeniably substantial, especially when those benefits are added to the \$126 million in benefits brought about by the transaction at LGA. The DOJ offers no reason why they should be denied to consumers.¹

With regard to both airports, the DOJ argues that "the FAA's proposed slot divestiture is not likely to interfere substantially" with the transaction's benefits. DOJ Comments at 18. However, the DOJ fails to provide any support for that conclusion, which is striking given the amount of data the parties provided to the DOJ during the review process. As the parties explained in their opening comments, *see* Part IV.B, imposing a divestiture condition would have adverse effects at both the segment and network level, thereby reducing the network efficiencies and consumer benefits created by the transaction as a whole.

Finally, the DOJ contends that the losses caused by the FAA's imposition of a divestiture condition will "likely" be outweighed by benefits provided by LCCs, because LCCs might use

¹ The DOJ also calls into question the DCA benefits based upon some erroneous assumptions from US Airways' transaction-related planning models. *See* DOJ Comments at 18-19. The flaws in these assumptions were explained to the DOJ during its investigation. *See* Letter from Charles F. Rule to Mark Niefer, December 31, 2009.

larger planes or charge lower fares. DOJ Comments at 19. Again, the DOJ relies on speculation rather than evidence. And it completely fails to acknowledge the loss of service to small and medium sized communities that would likely result from its proposal. While the LCC business model relies heavily on point-to-point service to larger cities, Delta and US Airways employ a network model that ensures more service to small and medium sized communities. Indeed, the Port Authority and two Florida airports filed comments supporting the transaction due to its preservation of service to small communities. *See* Port Authority Comments at 6; *see generally* Comments of Sarasota Bradenton Int'l Airport; Comments of the City of Tallahassee, Florida. The DOJ's view that the benefits provided by LCCs would outweigh the losses caused by divestiture reflects nothing more than the DOJ's apparent preference for service to large cities, rather than to small and medium sized communities. There is no basis in the law for such a preference. Indeed, transportation policy is supposed to *encourage*, not *discourage*, service to small and medium sized communities. *See, e.g.*, 49 U.S.C. § 41718 (authorizing within-perimeter exemptions at DCA to provide service to small communities).

III. The Parties' Privately-Contracted Slot Transfers Should Be Approved

Despite their objections to the FAA's divestiture condition, the parties have responded to the FAA's concerns by entering into transactions that will result in the transfer of 4.5 DCA slot pairs to JetBlue and 5 LGA slot pairs each to AirTran, Spirit, and WestJet. Rather than proceed with its proposal for government-forced divestiture, the FAA should accept the parties' resolution.

The proposed modified transaction addresses the FAA's concern about "increases in market concentration" at LGA and DCA. For example, JetBlue will become a significant carrier at DCA. Based on the slots JetBlue will receive under the proposed modified transaction and those it is acquiring from American, JetBlue may well start service at DCA with more than 14

daily roundtrip flights. And the 15 slot pairs Delta will transfer at LGA will more than adequately address the FAA's concern about slot concentration at that airport. Moreover, each of these negotiated transactions took into account [REDACTED]

The transaction also satisfies the FAA's and the DOJ's desires to see the slots go to LCCs. The FAA suspended a market-based approach in favor of specifying only a certain limited group of carriers that would be eligible to receive the parties' slots, and the parties negotiated the transfer of slots to carriers within this group. Indeed, the proposed modified transaction ensures that the slots will go to four different LCCs. In contrast, under FAA's auction approach, Southwest is likely to end up with all of the slots because it is better capitalized than any of the other LCCs. The DOJ supports an anonymous auction approach and, like Southwest, urges the FAA to adopt cash only sales with the slots going to the highest bidder (DOJ Comments at 20-21)—an approach which clearly favors Southwest over less well-capitalized LCCs. We are unaware of the DOJ using such an approach in its own divestiture decrees.

Additionally, the proposal is superior to the FAA's proposed divestiture, because the FAA's proposal would eliminate any chance of achieving market-based slot transfers by limiting the pool of potential slot acquirers and imposing a deadline by which divestitures need to be made. At best, the FAA's plan would create distressed sales; in reality, they would be confiscatory. Approval of the parties' modified plan avoids that constitutional infirmity.

Moreover, approval of the modified plan would recognize the reality that the parties' only viable option for saving the transaction is to contract for transfers that would meet the FAA's objectives, and that would preserve, as much as possible, the efficiencies and consumer benefits

underlying the parties' original transaction. In the context of the FAA's proposed divestitures, which would cause the collapse of the transaction, the relevant question is whether the modified transaction would address the FAA's competitive concerns and satisfy its desire that slots be made available to new entrants and LCCs. The proposed modified transaction clearly meets those requirements.

Finally, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In light of this, the parties executed deals with JetBlue, AirTran, Spirit, and WestJet, all of which are new entrant or limited incumbent carriers that the FAA identified as attractive. 75 Fed. Reg. at 7311. These deals do not preclude other LCCs, such as Southwest, from seeking slots through alternative avenues. Indeed, Southwest has bypassed numerous opportunities to secure slots at LGA and DCA. *See infra* Part IV.A.

For the above reasons, the proposed modified transaction readily satisfies the FAA's limited review authority and, beyond that, achieves significant pro-consumer and pro-competitive goals while strengthening the competitive independence of the parties. That result is worthy of prompt approval.

IV. Southwest's Comments Reflect An Untenable Attempt To Exploit The Waiver Request For Its Own Benefit

Southwest's comments represent a blatant attempt to exploit the parties' waiver request in order to obtain slots without negotiating for them in the market. When viewed in light of the parties' proposed transactions with JetBlue, AirTran, Spirit, and WestJet, it is clear that Southwest is simply asking the FAA to grant it special preferences over other air carriers. There

is no basis for such preferential treatment.

A. Southwest Has Had Ample Opportunities To Obtain DCA And LGA Slots But Has Chosen Not To Do So

Southwest claims that “[d]espite multiple efforts, [it] has been unable to acquire any DCA slots or any additional LGA slots to expand its small operation there to a more efficient size.” Southwest Comments at 9-10. All available evidence is to the contrary. [REDACTED]

[REDACTED]

Southwest’s unwillingness to avail itself of pre-existing mechanisms for obtaining slots at LGA and DCA extends [REDACTED] For example, to the parties’ knowledge, Southwest has never requested a single slot exemption at DCA as a part of the Air-21 slot exemption proceedings, despite the fact that up to 44 Air-21 slot exemptions were available at DCA. *See* 49 U.S.C. § 41718.² Nor has Southwest ever sought to obtain slots that

² *See* DOT Notice inviting applications dated April 14, 2000 (Dockets DOT-OST-2000-7181 and DOT-OST-2000-7182); DOT Orders 2000-7-1 and 2000-7-2 dated July 5, 2000 (Dockets DOT-OST-2000-7181 and DOT-OST-2000-7182, respectively); DOT Notice inviting applications dated December 17, 2003 (Dockets DOT-OST-2000-7181 and DOT-OST-2000-

were reallocated after being returned to DOT.³ Similarly, in 2009, while Southwest obtained 14 operating authorizations at LGA from ATA Airlines, it declined ATA's DCA-Midway slots, even though those slots would have allowed Southwest to initiate service between DCA and one of its focus airports. See Erik Larson & Mary Schlangenstien, *Southwest Air Can Buy ATA LaGuardia Slots, Judge Says*, Bloomberg, Dec. 2, 2008, available at <http://www.bloomberg.com/apps/news?pid=20601087&sid=a2V5D6lnxVog&refer=home>. Additionally, despite its ability to acquire DCA slots under the buy-sell rule, Southwest has never done so. Instead, it has focused on building its hub at BWI and expanding service at Dulles. See 1999 Annual Report of Southwest Airlines at 6 ("Our focus is on efficiency and convenience. So we avoid many of the congested, slot-controlled, and hub airports."). Furthermore, if Southwest had acquired even one slot at DCA under the buy/sell rule, it could have acquired off-peak slots and requested slot slide exemptions under 49 U.S.C. § 41714(d), which is the mechanism used by limited incumbents to

7182); DOT Orders 2004-4-1 and 2004-4-2 dated April 1, 2004 (Dockets DOT-OST-2000-7181 and DOT-OST-2000-7182, respectively).

³ See DOT Notice inviting applications dated April 3, 2001 (Docket DOT-OST-2000-7181); DOT Order 2001-6-20 dated June 22, 2001 (Docket DOT-OST-2000-7181); DOT Notice inviting applications dated October 15, 2002 (Docket DOT-OST-2000-7181); DOT Order 2002-11-20 dated November 27, 2002 (Docket DOT-OST-2000-7181); DOT Notice inviting applications dated December 3, 2002 (Docket DOT-OST-2000-7182); DOT Order 2003-1-16 dated January 22, 2003 (Docket DOT-OST-2000-7182); DOT Notice inviting applications dated October 17, 2003 (Docket DOT-OST-2000-7182); DOT Order 2004-4-2 dated April 1, 2004 (Docket DOT-OST-2000-7182); DOT Notice inviting applications dated June 3, 2004 (Docket DOT-OST-2000-7182); DOT Order 2004-8-3 dated August 9, 2004 (Docket DOT-OST-2000-7182); DOT Order 2004-8-27 requesting proposals, dated August 25, 2004 (Docket DOT-OST-2000-7182); DOT Order 2004-12-6 dated December 6, 2004 (Docket DOT-OST-2000-7182); DOT Notice inviting applications dated February 24, 2006 (Docket DOT-OST-2000-7182); DOT Order 2006-6-17 dated June 12, 2006 (Docket DOT-OST-2000-7182); DOT Notice inviting applications dated January 11, 2007 (Docket DOT-OST-2000-7182); DOT Order 2007-5-12 dated May 18, 2007 (Docket DOT-OST-2000-7182); DOT Notice inviting applications dated November 26, 2007 (Docket DOT-OST-2000-7182); DOT Order 2008-2-28 dated February 22, 2008 (Docket DOT-OST-2000-7182); DOT Notice inviting applications dated September 4, 2008 (Docket DOT-OST-2000-7182); DOT Order 2008-12-22 dated December 29, 2008 (Docket DOT-OST-2000-7182).

increase DCA service. *See, e.g.*, Application of Midwest Airlines, DOT Orders 1994-9-49, 1999-11-4, & 2001-3-17. And while Southwest could have obtained up to 20 LGA slots when the High-Density Rule was in effect at LGA simply by asking for them, it never requested a single LGA slot. *See* 49 U.S.C. § 41716(b); *see also* DOT Order 2000-4-10 & responsive carrier certifications filed in Docket DOT-OST-2000-7176.

Southwest has thus forgone numerous opportunities to acquire slots at LGA and DCA, [REDACTED] Accordingly, the FAA should reject Southwest's attempt to use this transaction as a preferential means to acquire slots at the expense of other LCCs.

B. Southwest Cannot Complain About Market Concentration Given Its Near Exclusive Presence At Its Dominant Airports—Including The Restricted Love Field Airport

Southwest claims that the transaction will unduly “increase market concentration” at LGA and DCA and “catapult” Delta and US Airways into a “dominant position” at these airports. Southwest Comments at 3, 7. As discussed above, however, there is no evidence that an increase in airport concentration would threaten competition or cause higher fares.

In addition, not surprisingly, Southwest's solution to the supposed concentration problem at LGA and DCA is one that conveniently benefits only it. According to Southwest, the purported airport “dominance” can be remedied through a divestiture of 40 slot pairs at LGA and 20 slot pairs at DCA, with gate and ticket facilities, accomplished through a cash-only auction that virtually ensures that Southwest would be the winning bidder. Southwest Comments at 7-8, 15.

Furthermore, while Southwest objects to the concentrations resulting from this transaction (49% for Delta at LGA and 54% for US Airways at DCA), Southwest does not mention that it holds a similar or far greater share of traffic at certain airports. Most

significantly, at Love Field, Southwest is, by orders of magnitude, the largest carrier, controlling over 96% of the airport's passenger traffic. *See* Bureau of Transportation Statistics Data for December 2009, *available at* <http://www.transtats.bts.gov/> ("BTS Data"). Love Field is the preferred, close-in airport serving downtown Dallas. And, under the unusual legislative compromise that was reached to allow Southwest to provide unrestricted service from Love, gates will be taken out of service at the airport, limiting the ability of competitors to respond. *See* Wright Amendment Reform Act of 2006, Pub. L. No. 109-352.

In addition, Southwest's share at Chicago-Midway of approximately 85% of passenger traffic substantially exceeds Delta's and US Airways' respective post-transactions shares at LGA and DCA, and its share at BWI is comparable. *See* BTS Data. Chicago-Midway and BWI do not have slot restrictions. But the extent of Southwest's presence at each of those airports further demonstrates that Southwest's sudden concern for airport concentration cannot be taken seriously.

C. There Is No Basis For Southwest's Suggestion That It Would Make More Beneficial Use Of The Slots Than JetBlue, AirTran, Spirit, And WestJet

If Southwest's purported concern for competition at LGA and DCA were genuine, there would be no reason for it to object to a solution in which LCC carriers JetBlue, AirTran, Spirit, and WestJet obtain slots at the airports. Yet in a letter filed on March 23, 2010, Southwest specifically objected to Delta and US Airways' proposed transactions with these carriers. Letter from Robert W. Kneisley to Rebecca MacPherson, March 23, 2010. JetBlue, AirTran, Spirit, and WestJet, however, are precisely the new entrant and limited incumbent carriers the FAA discussed in its proposed order. 75 Fed. Reg. at 7311. Similarly, if Southwest's purported concern for competition were genuine, it would not criticize airport authorities who support the parties' transaction because it would result in increased service to small and medium sized

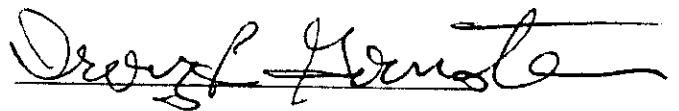
communities. Yet in a letter written to the Executive Director of the Little Rock National Airport on February 15, 2010, Southwest termed the airport's arguments in support of the parties' transaction "beyond the pale" and "specious." Letter from Southwest to Ronald F. Mathieu, February 15, 2010. And it chastised the airport, saying "We had hoped that the efforts of our Company . . . would be worthy of more respect from your administration. Your letter makes it clear that our hopes were misplaced." *Id.*

There is simply no reason for the FAA to prefer Southwest over the other LCCs. Indeed, consumers are likely better off by the transfer of slots to the four carriers than they would be if Southwest ended up with them. With the proposed modified transaction, LGA will receive a new carrier and international service with WestJet, and two carriers will be able to expand their existing LGA networks. At DCA, JetBlue will be able to combine the slots from the proposed modified transaction with those it acquired from American to provide a robust schedule in addition to its existing service at BWI and Dulles. Rather than evidencing a desire for increased competition, Southwest's objection to the proposed transaction suggests that it is threatened by the added competition from JetBlue, AirTran, Spirit, and WestJet. Southwest's comments and letter are thus nothing more than self-serving attempts to exploit the waiver request to obtain a competitive advantage over its LCC rivals.

CONCLUSION

For the foregoing reasons, and for those explained in Delta and US Airways' comments to the FAA on March 22, 2010, the FAA should grant Delta and US Airways an exemption from the LaGuardia Order without conditions or, in the alternative, should grant the request as modified by the proposed transactions with JetBlue, AirTran, Spirit, and WestJet.

Respectfully submitted,



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