



**UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.**

**SERVED: April 21, 1998**

Issued by the Department of Transportation  
on the 21st day April, 1998

**Applications of**

**ACCESSAIR HOLDINGS, INC.  
AMERICAN TRANS AIR, INC.  
AMERICA WEST AIRLINES, INC.  
COLGAN AIR, INC.  
SPIRIT AIRLINES, INC.**

**PAN AMERICAN WORLD AIRWAYS, INC. and  
CARNIVAL AIRLINES, INC.**

**THE PEOPLE AND BUSINESSES OF BLOOMINGTON-  
NORMAL, IL; MOLINE-QUAD CITIES, IL; TOLEDO, OH; AND  
AKRON/CANTON, OH**

For an exemption from 14 CFR Part 93,  
Subparts K and S, pursuant to 49 U.S.C.  
§ 41714 (c)

**Dockets OST-97-3087**

**OST-97-2984  
OST-97-2970  
OST-97-3086  
OST-97-2870  
OST-97-2932  
OST-97-2885**

**OST-97-2557**

**ORDER GRANTING AND DENYING APPLICATIONS FOR SLOT  
EXEMPTIONS AT NEW YORK'S LAGUARDIA AND  
JOHN F. KENNEDY INTERNATIONAL AIRPORTS**

After considering applications for exemptions from 14 CFR Part 93, Subparts K and S, for slots at New York's LaGuardia and John F. Kennedy (JFK) Airports, the Department has decided to grant five slot exemptions to American Trans Air, Inc. (ATA) for nonstop service in the Chicago (Midway)-LaGuardia market; and four slot exemptions to Spirit Airlines, Inc. (Spirit) for nonstop service in the Melbourne, Florida-LaGuardia market. We find that granting these exemptions is in the public interest and meets the statutory "exceptional circumstances" test. Grant of these exemptions is conditioned on their being used solely for nonstop service in the city-pair markets designated in the carriers' applications. The Department has also decided to deny the remainder of ATA's and Spirit's applications as well as the applications of AccessAir Holdings, Inc., America West Airlines, Inc., Colgan Air, Inc., and the joint application of Pan American World Airways,

Inc. and Carnival Air Lines, Inc. Further, we deny the petition for reconsideration of AirTran Airways' application filed by the People and Businesses of Bloomington-Normal, IL; Moline-Quad Cities, IL; Toledo, OH; and Akron-Canton, OH. In reaching our decision on all of these requests we were committed, among other guidelines, to avoiding significant congestion and environmental problems. Primarily for these reasons, we are granting only a limited number of exemptions.

## **REGULATORY AND LEGISLATIVE BACKGROUND**

The High Density Rule, 14 CFR Part 93, Subparts K and S, designates New York's JFK and LaGuardia Airports, Chicago's O'Hare, and Ronald Reagan Washington National Airport as high density traffic airports and prescribes air traffic rules for operating aircraft, other than helicopters, to or from those airports. These regulations limit the hourly number of allocated Instrument Flight Rule (IFR) operations (take-offs and landings) that may be reserved for specified classes of users. The authority to conduct a single operation (either a take-off or landing) at one of these airports is commonly referred to as a "slot".

On August 23, 1994, Congress enacted the Federal Aviation Administration Authorization Act of 1994, which authorized the Department to grant exemptions from the High Density Rule for the provision of Essential Air Service (EAS) at eligible communities, for international air service, and for service by new entrant air carriers.<sup>1</sup> As applied to New York's LaGuardia and JFK Airports, and as relevant here, the Act provides for exemption authority as follows:<sup>2</sup>

41714(a) states with regard to basic essential air service that if an eligible community relies on service to a high density airport, the Department must ensure that an air carrier has sufficient operational authority at that airport to provide the required service. It also states that the operational authority shall allow flights at reasonable times taking into account the needs of passengers with connecting flights.

41714(b) authorizes the Department to grant exemptions, based on a public interest finding, to enable air carriers and foreign air carriers to provide foreign air transportation using Stage 3 aircraft. Additional provisions apply regarding slot withdrawals from air carriers for use by foreign air carriers.

41714(c) authorizes the Department to grant exemptions to new entrant air carriers based on a public interest finding and under circumstances determined by the Secretary to be exceptional.

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<sup>1</sup> Codified as 49 U.S.C. 41714(a), 41714(b) and 41714(c), respectively.

<sup>2</sup> For these purposes, a "new entrant air carrier" may generally be defined as an air carrier or commuter operator that holds or operates (or held or operated, since December 16, 1985) fewer than twelve slots at the airport in question, not including international, EAS, or certain nighttime slots at Reagan Washington National or LaGuardia Airport. See 49 U.S.C. section 41714(h).

All of the applicants -- AccessAir, AirTran, America West, American Trans Air, Colgan Air, Pan American World Airways and Carnival Air Lines, and Spirit Airlines -- are seeking authority as new entrant carriers.

The Federal Aviation Administration Authorization Act of 1994 also directed the Department to complete the examination of the slot regulation it had previously begun. 41714(e). The statute instructed the Department to conduct a rulemaking based on its examination of the slot regulations. 41714(f). When the Department issued its report on the slot examination it announced its decision that it would not be in the public interest to begin such a rulemaking. The report had concluded that eliminating or modifying the slot regulations would not produce net public benefits.

### **FRAMEWORK FOR EVALUATING SLOT EXEMPTION REQUESTS BY NEW ENTRANT AIRLINES**

The Federal Aviation Administration Authorization Act of 1994 establishes, as criteria for the granting of an application for slot exemptions, that it be in the public interest and, for a new entrant carrier, that exceptional circumstances be found. Since 1994, the Department has approved six new entrant applications, in whole or in part, while denying three others.<sup>3</sup>

For those new entrant exemptions that we granted, we found each of them to be in the public interest and exceptional circumstances existed because the applicant's proposal would address a significant service void or because the applicant's entrance into a market would likely produce substantial competitive benefits. In the latter regard, in Orders 97-10-16 and -17 we expanded our definition of exceptional circumstances from that used in previous cases by recognizing the need for competitive service in a market, especially low-fare competitive service. We determined that awarding slot exemptions for such service could provide substantial public benefits and would meet the statutory exceptional circumstances test. In doing so we noted that our reexamination of the exceptional circumstances test and our decision that the test could be met by proposals for competitive service, especially low-fare competitive service, was consistent with statements by members of Congress, the General Accounting Office, and numerous community groups that we should more vigorously use our statutory authority to promote airline competition. For example, the General Accounting Office's 1996 study, Airline Deregulation: Barriers to Entry Continue to Limit Competition in Several Key Domestic Markets (the GAO Report) stated that the "control of slots by a few airlines greatly deters entry at key airports in Chicago, New York and Washington." We made clear our support

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<sup>3</sup> Orders 94-9-30, 95-4-33, 95-8-38, 96-5-33, 97-10-16 and 97-10-17. With regard to the latter two orders, the Department granted, in Order 97-10-16, O'Hare slot exemptions to Reno Air (two slots for O'Hare-Reno, Nevada nonstop service) and to Trans States Airlines (eight slots, experimentally, for nonstop service between O'Hare and the market or markets of its choice among Asheville, Chattanooga, Roanoke and Tri-Cities); and in 97-10-17, the Department granted LaGuardia slots to Frontier Airlines (six slots for LaGuardia-Denver nonstop service), ValuJet Airlines (eleven slots for LaGuardia-Atlanta nonstop service) and AirTran Airways (four slots for LaGuardia-Knoxville nonstop service). The City of New York is seeking judicial review of Order 97-10-17. City of New York v. Slater et al. 2d Cir. No. 97-4358 (filed December 22, 1997).

for increased competition and our willingness to invoke available tools to promote competition when we stated in our January 6, 1997, response to the GAO Report that “the Department intends to be more receptive to considering competition as a factor in granting slot exemptions to new entrants under the exceptional circumstances criterion.”

In this order, we again rely on the decisional guidelines that were explained in detail in Orders 97-10-16 and -17: first, we would favor proposals that are based on jet aircraft that meet Stage 3 noise requirements;<sup>4</sup> second, there should be a reasonable expectation that the proposed service would be operationally and financially viable; and third, we will place a premium upon the introduction of (a) new nonstop services where none exist and (b) new competitive services, especially by applicants that have the demonstrated potential to offer low-fare competition, where there is single carrier service and the market could support entry, or where existing services do not produce meaningful price competition.

In generally requiring the use of jet aircraft for all slot exemption operations (except for essential air service), the Department is recognizing the public benefit of deploying scarce resources in a manner that makes them available to the highest number of users. Favoring the use of Stage 3 aircraft is consistent with language in those sections of the Act pertaining to essential air service, international air service, and the special rules that are applicable to Ronald Reagan Washington National Airport, although the requirement was omitted from the provision applicable to new entrant carriers. Thus, our decision that the public interest requires these aircraft for all slot-exemption approvals is based on the overall emphasis on Stage 3 equipment in most of the provisions of the Act and in similar provisions of the Airport Noise and Capacity Act of 1990, which called for the elimination of Stage 2 aircraft by December 31, 1999.

We previously placed all parties on notice, and we emphasize here again, that the number of available slot exemptions is very limited and that we may have to deny applications that otherwise meet the standards we have established for the grant of such exemptions. More specifically, to assure that any new operations we may authorize will not have a significant impact on traffic, flight delays, or noise, we are adhering in this order to the limit of thirty slot exemptions at LaGuardia on which we based the related environmental assessment cited in Order 97-10-17<sup>5</sup>. We are therefore denying several applications that could provide significant transportation benefits.

### **ACCESSAIR’S APPLICATION**

On November 4, 1997, AccessAir Holdings, Inc., (AccessAir) filed an application for six slot exemptions to enable it to operate three daily round trips between LaGuardia Airport and Des Moines, Iowa, via Moline/Quad Cities (one daily roundtrip) and Peoria, Illinois (two daily roundtrips). The Rock Island County, IL, Metropolitan Airport Authority filed a response in support of AccessAir’s application as did the Bloomington-Normal Airport Authority. The Office of the Queens Borough President (Queens) filed an answer in

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<sup>4</sup> 14 CFR Part 36, Subpart C and Appendix C.

<sup>5</sup> Dockets OST-97-2230, OST-97-2442, and OST-97-2557.

opposition, to which AccessAir filed a reply. The Department hereby grants the motions of all parties in this docket for leave to file a pleading.

AccessAir was found fit and issued a certificate of public convenience and necessity on July 1, 1997, subject to meeting certain conditions, including completing the requirements for obtaining operating authority from the Federal Aviation Administration, which it has not yet done. Thus, AccessAir has not yet begun commercial operations. It states that it intends to begin air service in 1998 between points in the Midwest and New York and Los Angeles, that New York is the most important city for its proposed operations, and that LaGuardia specifically is critical to its prospects for success. It also notes that it is seeking slots through exemption in view of their very high costs and limited availability.

AccessAir estimates that it would serve a catchment area of over 2.8 million people who now have no direct air service to New York, and that origin and destination (O & D) traffic for that population totaled 102,900 passengers for the twelve months ended March 31, 1995. That traffic base includes O & D traffic for Des Moines, Moline/Quad Cities, and Peoria, as well as 30 to 40 percent of the New York O & D for Springfield, Decatur, and Champaign. It forecasts that total annual traffic would grow under its proposal to 326,820.

The filings in support of AccessAir's application echo the carrier's position that its proposed service would benefit a large catchment area, and that traffic expectations should reflect the population of that entire area.

Queens argues that AccessAir's proposal, as well as those of all other applicants, would significantly increase delays at LaGuardia or Kennedy Airport, jeopardize public safety, and impose undue noise, traffic and pollution impacts on the residents of Queens. It also asserts that the proper means of acquiring slots is through the marketplace, and that AccessAir has failed to demonstrate why its proposed service could not be operated from Newark Airport, which would not require the Department's action.

AccessAir disputes that there is any relationship between flight delays and the High Density Rule and asserts that its exemptions would pose no public safety threat or create any significant environmental impact.

#### **THE ILLINOIS/OHIO PARTIES' PETITION FOR RECONSIDERATION OF AIRTRAN'S APPLICATION**

On November 26, 1997, the People and Businesses of Bloomington-Normal and Moline-Quad Cities, Illinois, and Toledo and Akron-Canton, Ohio (the Illinois/Ohio parties), submitted an application and petition for reconsideration of Order 97-10-17, to the extent that it denied AirTran's request for eight slot exemptions to enable it to operate four daily round trips to LaGuardia over two separate routings: LaGuardia-Akron/Canton-Toledo, and LaGuardia-Bloomington/Normal-Quad Cities.

The Illinois/Ohio parties assert that the Department relied on data for an unduly narrow geographic market area in finding in Order 97-10-17 that projected traffic in the proposed markets was insufficient to warrant grant of a slot exemption. They argue that the four combined markets serve a population of approximately 10 million people and that AirTran's low-fare service would generate substantially more demand than the Department recognized.

AirTran did not seek reconsideration and did not respond to the Illinois/Ohio parties' petition.

### **AMERICA WEST'S APPLICATION**

On October 3, 1997, America West Airlines ("America West") filed an application for eight slot exemptions to enable it both to continue to operate its two existing daily nonstop roundtrip flights and to initiate two additional daily nonstop roundtrips between LaGuardia and Columbus, Ohio.

The City of Phoenix filed an answer in support of America West's application. United, US Airways, TWA, and Queens each filed an answer opposing the application. America West filed a consolidated reply to which United submitted a motion for leave to file a reply. America West then submitted motions for leave to file replies to the United submission and to Queens' submission. We hereby grant the motions of all parties in this docket for leave to file a pleading.

America West asserts that its application meets both the public interest and exceptional circumstances criteria. It argues that it has been unable to purchase additional slots at any price at either LaGuardia or O'Hare, and that as a low-fare carrier it would use its exemptions to enhance competition in the LaGuardia-Columbus market, as well as its western markets beyond Columbus through its Phoenix and Las Vegas hubs.

United, US Airways, and TWA note that America West already holds slots at LaGuardia; that it is using four of them to provide two nonstop round trips a day to Columbus; and that America West is not a "new entrant" as defined in the statute. They also argue that the Columbus-LaGuardia market is neither underserved nor non-competitive and that America West has therefore failed to demonstrate exceptional circumstances, as required under the law and the Department's guidelines for grant of slot exemptions. They suggest that America West could achieve its goal of expanding in the New York marketplace through access to Newark Airport without any Department action.

Queens opposes America West's application on grounds of flight delays, traffic congestion, safety and environmental concerns, as described above (see discussion of AccessAir's application). It asserts that America West's proposal does not promise low fares and thus has little or no merit on its face.

America West argues in turn that it meets the definition of “limited incumbent” contained in 49 U.S.C. 41714(h). It reiterates that there is no marketplace access to slots at LaGuardia at any price and argues that that is the reason Congress authorized the Department to make slots available outside of the buy/sell rule. It also asserts that it has demonstrated exceptional circumstances by being the only post-deregulation airline that has survived and become a major, low-fare, hub-and-spoke carrier. On that basis, it argues that it is in the best position to fulfill the congressional objective of the new entrant exemption provision, *i.e.*, stimulating low-fare competition.

America West states that its LaGuardia-Columbus service would combine with the beyond service it provides to its western cities to extend competitive benefits to numerous passengers in those markets. It argues in that respect that the exemption legislation does not limit slots for new competitive service to nonstop city-pairs such as LaGuardia-Columbus, but also seeks to promote competition in beyond markets such as Phoenix. It reiterated that Newark and JFK service to Phoenix and Las Vegas are not acceptable substitutes for service from LaGuardia Airport.

In response to Queens' comments, America West argues that the noise, delay and safety concerns raised by the Borough are minimal and have been addressed in previously issued Departmental orders and studies.

#### **AMERICAN TRANS AIR'S APPLICATION**

On October 9, 1997, ATA filed an application for ten slot exemptions to enable it to operate three daily round trips between Chicago Midway and LaGuardia, one daily round trip between St. Petersburg, Florida, and LaGuardia, and one daily round trip, seasonally, between Sarasota, Florida, and LaGuardia. During Florida's off-season, ATA would use the latter slot for a fourth roundtrip between LaGuardia and Chicago Midway.

Answers in support were filed by the Sarasota Manatee Airport Authority, the St. Petersburg-Clearwater International Airport and Pinellas County, Florida, and by various local and state officials. Answers in opposition were filed by TWA and Queens. ATA filed a motion to file an out of time reply. We hereby grant the motions of all parties in this docket for leave to file a pleading.

ATA asserts that it is unable to obtain LaGuardia slots in the open market and that its proposed services are in the public interest and meet the exceptional circumstances criteria. In the latter regard, ATA notes that it would be filling major service voids since there is currently no nonstop or single-plane roundtrip service between LaGuardia and any of its three proposed markets; that all three are very large markets; and that it has a low-fare structure, which further comports with the Department's decisional framework for slot exemptions. ATA adds that its proposal fits well into its route system. It states that it is the largest national air carrier in the nation, is well established at Chicago and in the Florida markets, has scheduled operations at numerous major cities and has a quality reputation in the New York area based on extensive charter operations.

ATA argues that the Chicago Midway-LaGuardia market is distinct from Chicago O'Hare-LaGuardia, principally because of Midway's proximity to downtown Chicago. ATA estimates, based on Midway Airlines' experience in serving Midway-LaGuardia in 1990, that it should carry at least 644 passengers a day, or 8.73 percent of the total Chicago-New York O & D traffic, 2.7 million passengers for the twelve months ended March 31, 1997. ATA especially points to the existing fares between O'Hare and the New York airports. It states that the average O'Hare-LaGuardia one-way fare is \$217, and United's unrestricted walk-up fare is \$509. ATA's fares would begin at \$99 one-way, and its unrestricted walk-up fare would be \$312, the same as its current Midway-JFK walk-up fare. ATA expects that its low-fare stimulus would serve as a competitive spur in not only the Midway-LaGuardia market but the overall Chicago-New York market as well.

ATA bases its St. Petersburg proposal on the Tampa/St.Petersburg area's overall demand, and the St. Petersburg airport's superior accessibility to the beaches and resorts along the west coast of Florida. It argues that the three daily roundtrip flights currently available between LaGuardia and Tampa International Airport are inadequate for the overall area, and it estimates that 20 to 30 percent of the Tampa/St. Petersburg area's traffic would prefer using the St. Petersburg airport. On that basis, ATA forecasts that its LaGuardia-St. Petersburg service would generate about 250 passengers a day.

ATA notes that LaGuardia is Sarasota's fourth largest market, with over 63,000 O & D passengers in 1996. Adding that pool to the Sarasota/Manatee Airport Authority's estimate of the number of local travelers who now drive to Tampa International, ATA forecasts a potential market of 377 passengers a day in the Sarasota-LaGuardia market.

TWA argues that LaGuardia-Midway is not distinct from other New York-Chicago airport-to-airport markets and that the overall market is very well served, with 90 daily roundtrip frequencies. TWA maintains that ATA is unlikely to equal Midway Airlines' prior traffic record in the Midway-LaGuardia market because it would offer only three roundtrips a day, far fewer than the eight roundtrips a day that Midway Airlines had offered.

TWA asserts that St. Petersburg and Sarasota are small markets that enjoy close proximity to Tampa International Airport -- 11 miles and 54 miles, respectively. It notes that the New York-Tampa market currently has 15 daily frequencies during the winter season to all three New York area airports, including four to LaGuardia, and that Sarasota-New York has its own nonstop and connecting service.

Queens similarly argues that none of ATA's proposed markets is underserved, and that the application should be denied for the delay, safety and environmental reasons described above (see discussion of AccessAir's application).

ATA replies that its application raises no safety issues, that the Air Traffic Control system will adequately manage any increased traffic at LaGuardia, and that any delay costs would be minimal and would be outweighed by the benefits of its new low-fare, nonstop services. It also reiterates its view that Midway and O'Hare are separate markets, as evidenced by the significant fare differentials.

### **COLGAN AIR'S APPLICATION**

On November 4, 1997, Colgan Air, Inc. ("Colgan") filed an application for 16 commuter slot exemptions to enable it to expand its existing operations between LaGuardia and Hyannis and Nantucket, Massachusetts, and Charlottesville, Virginia. Colgan now offers three roundtrips a day in each of these markets with leased slots, and seeks slot exemptions to enable it to expand its operations. Colgan argues that since initiating service in these markets, traffic has grown steadily. Colgan presently leases slots at LaGuardia and claims it has been unable to purchase slots. The Virginia Department of Aviation filed a motion for leave to file a late answer in support of Colgan's request. Queens filed an answer in opposition, to which Colgan and the Virginia Department of Aviation filed a joint answer. We hereby grant the motions of all parties in this docket for leave to file a pleading.

In support of its request, Colgan asserts that most commuter slots at LaGuardia are controlled by the major carriers or their large regional affiliates and are available for sale only at prices that even the major airlines cannot meet and that Colgan is even less able to meet. Colgan recommends that the Department's receptiveness to considering competition as a positive factor for slot exemptions should be expanded to include survival of competition. It asserts that without permanent slots its ability to continue the service and growth in the subject markets is in jeopardy.

Queens argues that because Colgan already leases LaGuardia slots for service to these three cities it fails to meet the exceptional circumstances criterion established by the Department. It also opposes Colgan's application on the delay, safety and environmental grounds discussed above (see discussion of AccessAir's application).

### **PAN AMERICAN and CARNIVAL'S APPLICATION**

On September 5, 1997, Pan American World Airways, Inc. ("Pan Am") and Carnival Air Lines, Inc. ("Carnival") jointly filed an application for six slot exemptions to enable them to operate three daily roundtrip flights between New York's JFK Airport and Boston's Logan Airport.

TWA, Delta, a Pan Am shareholder (Mr. Richard Bartel), and Queens filed answers in opposition to the application. Pan Am and Carnival filed replies to these answers.

Pan Am and Carnival state that they will provide low-fare service, with Stage 3 aircraft; that Boston-New York is the fourth largest O & D market in the United States but that its

available service is primarily with commuter aircraft and there is no low-fare service; that long-term slots at JFK, for immediate use, are unavailable in the buy/sell marketplace; and that JFK is a distinct market from other New York area airports.

TWA and Delta argue that there are no exceptional circumstances in this case; that the Boston-New York market has almost 100 daily frequencies; that JFK currently has more flights to Boston than either LaGuardia or Newark; and that the true intent of the applicants is to add a Boston leg to their Florida and Caribbean service, not to offer competitive fares in the local market. They also contend that the applicants have failed to show they have exhausted the commercial opportunities to buy or lease slots at JFK.

Queens raised objections similar to those voiced by TWA and Delta, and opposed the application on the delay, safety and environmental grounds described above (see discussion of AccessAir's application).

Pan Am and Carnival respond that they have diligently but unsuccessfully sought slots in the marketplace, and that frequencies are the wrong measure by which to gauge the current market since most of them are operated with commuter aircraft.

### **SPIRIT AIRLINES' APPLICATION FOR MELBOURNE**

On August 29, 1997, Spirit Airlines filed an application for four slot exemptions to enable it to operate two daily nonstop, roundtrip flights between LaGuardia and Melbourne, Florida. The Air Carrier Association of America filed an answer supporting the policy of granting slot exemptions. The Melbourne International Airport Authority (Melbourne) filed an answer strongly supporting the proposed service. Delta, TWA and Queens filed answers opposing the application, and Spirit and Melbourne submitted replies. We hereby grant the motions of all parties in this docket for leave to file a pleading.

Spirit states that New York is Melbourne's largest O&D market, with 94,980 passengers (260 a day) in the year ended June 1996, and that the only currently available service for the market is Delta's connecting service via Atlanta. Spirit projects that with its low-fare service the market will be much larger, taking into account passengers who have historically driven to other Florida airports because of the lack of nonstop or direct service and the stimulative effect of Spirit's low fares. Thus, Spirit asserts that Melbourne-New York's status as an underserved market, coupled with the competitive benefit that Spirit's service will create, satisfy the exceptional circumstances test for slot exemptions. Spirit also represents that it is unable to purchase slots at LaGuardia.

The opposing parties, Delta, TWA, and Queens, argue that Continental, with the power of its Newark hub, was previously unable to operate profitably in the New York-Melbourne market, and that Spirit is unlikely to do so either. They assert that Melbourne is a declining market that is well served by the nearby Orlando Airport with 32 roundtrips a day to New York. They further contend that Newark, not LaGuardia, is the airport of preference for Melbourne travelers, and they question Spirit's efforts to obtain slots

through the buy/sell process. Queens also objects for the delay, safety and environmental reasons discussed above (see discussion of AccessAir's application).

Spirit's reply reinforces its original arguments, adding that service via the Orlando airport, 62 miles distant from Melbourne, should not be regarded as synonymous with service to Melbourne traffic. Melbourne also argues that its recent loss of service by two other carriers exacerbates the exceptional circumstances of its case and that its present traffic to New York is nearly twice the size of the Chicago-Reno market prior to the granting of Reno Air's slot exemption authority to serve that market (Order 94-9-30). Finally, Melbourne notes that the Department has already performed an environmental assessment that showed that an increase in LaGuardia operations far greater than the four slot exemptions that Spirit is requesting would not have a significant effect on noise or other pollution.

### **SPIRIT AIRLINES' APPLICATION FOR MYRTLE BEACH**

On September 24, 1997, Spirit Airlines filed an application for four slot exemptions to enable it to operate two daily roundtrip flights between LaGuardia and Myrtle Beach, South Carolina. Horry County, South Carolina, and its Airport Department filed an answer in support of Spirit's application. TWA, Business Express Airlines, Inc. and Queens filed answers in opposition. Spirit filed a reply to the answer of Queens.

Spirit notes that the Department previously found exceptional circumstances in authorizing slot exemptions for Air South to serve the Myrtle Beach-New York market. Air South was given JFK slot exemptions in 1996, which it implemented, and, although Air South subsequently ceased all operations, during its presence traffic in the market increased dramatically, from 79 passengers a day in each direction to 167. Spirit states that New York is Myrtle Beach's largest O & D market; that LaGuardia is the preferred New York airport for Myrtle Beach travelers; that Spirit would offer low fares; that the proposed service would fit well into its route system; and that the service would be financially viable. It also claims that gates are unavailable at Newark.

TWA, Business Express and Queens argue that the more logical course for replacing Air South's service would be through JFK, not LaGuardia. They also argue that Spirit has not demonstrated exceptional circumstances, and they question the financial viability of Spirit's proposal.

Spirit responded that the Myrtle Beach-New York market is more than twice as large now as it was when Air South was granted its JFK slots and that its low-fare service should be especially attractive and productive in view of the area's heavy dependence on tourism. This contention was echoed by the operators of the Myrtle Beach International Airport.

### **DECISION**

The Department will grant ATA five exemptions to enable it to operate three LaGuardia-Chicago Midway roundtrips per day; and we will grant Spirit four exemptions to enable it to operate two LaGuardia-Melbourne roundtrips per day. Grant of these exemptions is conditioned on their being used solely for nonstop service in the city-pair markets designated in the carriers' applications. We find that ATA and Spirit qualify under the statutory standard for such exemptions as new entrant airlines (49 U.S.C. section 41714(h)),<sup>6</sup> and that their applications are in the public interest and meet our guidelines for the exceptional circumstances criterion as we have outlined in this and previous orders. We find that the remaining requests either do not warrant being granted on their own merits or are less compelling than those we are granting.

In previously formulating the framework for addressing slot exemption requests in Order 97-10-17, we stated that "...it is clear that we cannot grant all of the applications that might be made under this statute. We emphasize, therefore, that the number of available slot exemptions is very limited, and we may have to apply our guidelines on an increasingly more restrictive basis or even deny applications that otherwise meet the standards set forth in this order." The Department issued with that order an environmental assessment that analyzed the effects of allowing up to thirty additional flight operations a day at LaGuardia and found that authorizing an operational increase of that number would not increase noise or pollution except by insignificant amounts. Within that limit of 30 new operations, and pursuant to our fully explained decisional framework, we authorized in Order 97-10-17 a total of 21 exemptions for additional LaGuardia operations. In deciding the applications now pending for similar relief, we will remain within the bounds contemplated by the previous environmental analysis. Thus, we will only authorize a total of nine additional LaGuardia operations at this time. In that context, we have examined all of the pending applications here, first on their own merits and second in comparison with each other.

Because the High Density Rule limits the number of flights at LaGuardia and JFK airports, traffic in many LaGuardia and JFK markets could support greater service than is currently operated. The Department recognizes that an inadequacy of service in a particular market, by itself, does not necessarily mandate the award of exemptions. However, we do find that grant of both Spirit's and ATA's applications is in the public interest and that there are exceptional circumstances warranting such exemptions. The public interest will be furthered by the introduction of financially and operationally viable service for a significant number of passengers at very competitive rates, with Stage 3 aircraft in the proposed markets. We have described in detail in this and previous orders our guidelines for ascertaining exceptional circumstances. In brief, the applications we are approving here meet those guidelines because they involve significant markets that are not served by nonstop jet schedules, where there is sound evidence that demand would support profitable operations, and where there is an opportunity to fill those service voids with low-fare competitive carriers.

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<sup>6</sup> None of the objectors to ATA's or Spirit's applications has denied their eligibility as new entrants for slot awards.

We find that a number of the proposals would provide substantial transportation benefits. All of American Trans Air's and Spirit's proposals would introduce or restore nonstop, jet service, with low fares, for substantial numbers of passengers, and they would likely be financially successful. AccessAir's and AirTran's proposals similarly would introduce nonstop, low-fare, jet service in markets that now have no nonstop or single-plane service. The potential traffic in these markets, however, is much smaller than that in the ATA and Spirit markets; and neither AccessAir nor AirTran would appear to be prepared to implement the service within a reliably time-certain window. America West has applied for exemptions at both LaGuardia and Chicago O'Hare, contemplating expanded service that would, in both cases, benefit many consumers. In an order we are issuing simultaneously with this order, we are granting O'Hare slot exemptions to America West, but we will not grant its LaGuardia request in view of the very limited number of such exemptions that we are able to award. Colgan is proposing to add service in markets it already serves. Thus, although its proposed schedules would promise benefits to consumers, the request does not rise to the exceptional circumstances standards we have established. Finally, the Pan Am/Carnival proposal would add frequencies to a market already being served by the applicant and three other major carriers or their commuter affiliates. Notwithstanding that much of the incumbent service is provided with commuter aircraft, Pan Am/Carnival's request does not meet our exceptional circumstances guidelines.

In summary, because we are not willing to authorize more than nine additional operations at this time, we must choose among several proposals. For the reasons explained below, we conclude that ATA's Chicago Midway proposal and Spirit's Melbourne proposal would produce the greatest benefit and are the most compelling. The uneven number of available exemptions precludes us from authorizing the full complement of ten slots necessary for those proposals to be implemented (six for ATA's Midway proposal and four for Spirit's Melbourne proposal). We will fully accommodate the core of two roundtrip operations, four slots, for each proposal, for a total of eight; a ninth slot exemption will be granted ATA toward implementing its third round trip in the Midway-LaGuardia market, thus making ATA responsible for obtaining the remaining necessary slot, either through the marketplace, from the FAA during low-demand or off-peak periods,<sup>7</sup> or by operating one arrival or departure outside the controlled hours.

Before discussing our reasons for granting or denying each of the individual applications, we will address Queens' arguments against granting any of the applications.

## **AUTHORITY TO GRANT FURTHER SLOT APPLICATIONS**

Queens has argued broadly that the Department should not grant any of the slot exemption applications at either LaGuardia or JFK.

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<sup>7</sup> Low-demand periods are defined as 6:00 a.m. to 6:59 a.m. and 10:00 p.m. to midnight, as outlined in 14 CFR section 93.226 (the Buy-Sell Rule).

First, it contends that authorizing additional flights at either airport is not in the public interest; and second, it argues that all of the applications fail to show that there are exceptional circumstances, as required by the statute.

With regard to determining public interest, Queens argues that although the Department may find that a slot exemption proposal would produce benefits to the public, either through the institution of new nonstop service where none exists, or by creating low-fare competition for incumbent carriers in a market, the Department has not balanced against such benefits the adverse effects of authorizing the proposed service, including flight delays, added noise, increased highway congestion, and adverse health ramifications.

Queens has misread our analysis. In considering the applications addressed in this order, the Department has fully taken into account both the affirmative considerations and the potential negative ramifications that are relevant to public interest findings. We are guided again, as we were in previous decisions, by the statutory declaration that it is in the public interest that the Department encourage entry into air transportation markets by new carriers and encourage competition to provide efficiency, innovation, and low prices in air transportation markets. 49 USC § 40101(a)(12),(13). It is a logical extension of that definition of public interest factors that the Department heed the congressional expression of intent that we use the exemption authority Congress has given us as one tool for implementing those goals. Moreover, when Congress enacted the Federal Aviation Administration Authorization Act of 1994, it included a provision that expressly created the power for the Department to award slot exemptions for new entrant airlines. Congress thereby stated its determination that granting slot exemptions to new entrant airlines could benefit the public. Thus, clearly, the actions we are taking in this order are consistent with our underlying mandate.

We agree with Queens that it is equally important that we consider any potential adverse effects of such actions, and we have done so. We find that any adverse impact would be minor and clearly would be outweighed by the benefits that the exemptions are expected to produce. Queens, however, contends that none of the proposed new operations are in the public interest, for several reasons.

First, it argues that adding more operations at LaGuardia or JFK will increase flight delays, noise, ground congestion, and pollution, and will jeopardize safety. As a preface to articulating that view, Queens noted that there are, in all, 54 new operations contemplated in the seven pending applications. However, we are approving only nine in this order. Our denial of the bulk of the pending requests should lessen Queens' concerns. More importantly, as we noted in Order 97-10-17, the Department performed an Environmental Assessment as an integral element of our consideration of the exemption applications ruled upon in that order. That assessment assumed an increase of thirty flight operations a day at LaGuardia. We found that an increase of that amount would not have a noticeable impact on noise. Since the action we are taking here remains within the limits of that analysis, our previous findings remain applicable. Queens' response to the

applications of ATA and Spirit does not dispute any of the findings or analyses set forth in that Environmental Assessment.

Queens cites again, as it did in opposing previous exemption requests, the language contained in Order 95-8-38 in which the Department denied an application by Spirit Airlines for LaGuardia slots. Queens notes that in that order the Department relied on a statement of position by the FAA's Office of Air Traffic Management that any increase in operations at LaGuardia would increase delays and congestion there. We reiterate our response in Order 97-10-17, *i.e.*, that on further review of that analysis we ascertained that we were incorrect in finding in *Spirit* that the increased operations proposed there would significantly increase flight delays and congestion. The number of exemptions we are willing to grant now, in combination with those we awarded in Order 97-10-17, is very small, reflecting an aggregate increase of less than a three percent over the volume of operations in place prior to issuance of the latter order. As further discussed below, the FAA does not anticipate that an increase of thirty operations at LaGuardia would cause significant delay or congestion problems. The applications granted here and by Order 97-10-17 will, on the other hand, provide substantial transportation benefits.

In arguing its concern about public safety, Queens also repeats the comments it had previously submitted on the applications of Frontier and ValuJet: that New York City airports were experiencing a high number of "close calls", largely because of the high number of flights being operated. Queens acknowledges the Department's conclusion in Order 97-10-17 that the existing air traffic management system limits demand to operationally safe levels and that the FAA assures that safety will not be compromised. One of the Department's principal conclusions in the May 1995 Report to Congress, A Study of the High Density Rule, was that it is the Traffic Management System, not the High Density Rule, that ensures the safe operation of the air traffic system (Study at 7-8, 15-16, 37). Queens does not express disagreement with that conclusion; rather it asserts that before granting a slot exemption the Department should require the applicant to show that the increased flights are consistent with public safety.

We have reviewed with senior officials of the Federal Aviation Administration, as we did prior to deciding the previous cases, the safety concerns raised by Queens. The FAA again replied that it continues to apply the full variety of air traffic control programs and procedures for ensuring safety independently of the limits imposed by the High Density Rule and regardless of any changes to that rule or any slot exemptions that the Department may grant.

Finally, notwithstanding Queens' arguments to the contrary, we find that our application of the statutory exceptional circumstances test is within our statutory authority. By authorizing us to grant slot applications by new entrant airlines when we find that doing so is in the public interest and that the circumstances are exceptional, Congress gave us the discretion to determine when slot awards should be made. Cf. City of St. Louis v. DOT, 936 F.2d 1528 (8th Cir. 1991). In exercising that discretion, we have determined that the public interest and exceptional circumstances tests have been met by two of the current

applicants for LaGuardia slots. We have found that the public benefits provided by those applications are so substantial that they meet the statutory standard for slot exemptions.

Queens wrongly assumes that the public interest and exceptional circumstances tests must be entirely distinct so that the public benefits created by new service cannot be considered under the exceptional circumstances test. Queens has cited nothing in the language or history of the statute supporting its assumption. We think Congress gave us the discretion to consider service benefits under the exceptional circumstances test, as we have done. As we read that test, we may grant slot applications when the new entrant carrier applicant is proposing a service that will provide exceptional benefits, for example, by creating low-fare competition in a market that lacks such service. Our interpretation is fully consistent with the statutory exceptional circumstances language, for we are granting few applications for slots at LaGuardia and other slot-controlled airports. As discussed above, we are limiting the total number of slot awards at LaGuardia to thirty. We are therefore denying several slot applications proposing service that would benefit large numbers of travelers.

Queens has misconstrued the statute and our application of the statutory standard in other respects. In explaining our reexamination of the statutory standard, we noted the concerns about airline competition expressed by Members of Congress and communities. Order 97-10-17 at 3-4. Queens incorrectly alleges that we improperly changed our interpretation of the statute as a result of post-enactment statements by Members of Congress, even though our interpretation assertedly must be based solely on the statute's language and history. Queens also notes that all of the Members of Congress from Queens County and the communities around LaGuardia and Kennedy Airports have opposed the creation of new slots. We reexamined our application of the statutory tests in light of our own concerns about airline competition and our experience with the slot restrictions. See, *e.g.*, our study entitled The Low Cost Airline Service Revolution (April 1996). We cited the concerns of Members of Congress and the GAO only as support for our decision to reevaluate our exercise of our authority under 49 U.S.C. 41714. Since the statute gives us the discretion to determine what constitutes "exceptional" circumstances, our decision to change our application of the statute involved neither a reinterpretation of the statute nor an improper use of post-enactment legislative history. We recognize, of course, the opposition of Queens residents to additional service at LaGuardia, but we have found that the increased operations authorized by this order and Order 97-10-17 will not cause significant environmental harm, will not significantly increase congestion, and will not increase safety hazards at LaGuardia.

We take note of Queens' alternative suggestion that instead of granting slot exemptions the Department consider reallocating existing slots from their current holders to other airlines as a preferable means of achieving increased public benefits. The 1996 GAO Report had similarly recommended that the Department create a pool of available slots by periodically withdrawing some slots that had been grandfathered to the major airline incumbents, taking into account the investments made by those airlines at each of the slot-controlled airports, and hold a lottery to distribute them in a way that increases

competition. The Department is assessing that alternative, as well as other slot-related options, as a means of stimulating new price competition. In the meantime, however, the record now before us supports our decision to use the exemption authority specifically given us by Congress as a way to obtain promptly the service and fare benefits proposed by ATA and Spirit.

## **PARTIAL APPROVAL OF APPLICATIONS OF AMERICAN TRANS AIR AND SPIRIT**

### **AMERICAN TRANS AIR**

ATA's Midway-LaGuardia application meets our guidelines in all respects. ATA will use Stage 3 jets to initiate new, nonstop service in a large market where no nonstop or single-plane round-trip service exists; the market previously enjoyed nonstop service and subsequently lost it despite having demonstrated a substantial demand; the applicant, ATA, has a demonstrated history of offering low fares; and the service should be financially and operationally viable. These considerations combine to demonstrate exceptional circumstances, consistent with our guidelines and previous decisions.

We can gauge the general size and characteristics of this market from the results of Midway Airlines' service in the market in 1990. Midway Airlines served the market with 105-seat DC-9 aircraft, and carried an average of 570 passengers a day, which represented 8.73 percent of the total Chicago-New York market (then about 2.4 million passengers a year). ATA projects that the potential market size today is well above that figure and is clearly a sufficient traffic base to support ATA's entry. We agree. Overall Chicago-New York O & D traffic for the twelve months ended March 1997 totaled 2,693,950. At Midway Airlines' historical rate of participation, the potential Midway-LaGuardia pool would approximate 644 passengers a day. Thus, ATA's restoration of service in that market would benefit a large volume of traffic in the immediate market.

To some extent we would also anticipate that ATA's low-fare structure will have some disciplining effect on fares for other Chicago-New York airport-to-airport schedules and will divert some amount of traffic from them. The Chicago-New York market has the tenth highest average fares among major markets between 701 and 750 miles, and ATA has stated that it intends to attract price-sensitive consumers through its discount fare structure. ATA proposes to offer fares beginning at \$99 one-way, with a \$312 walk-up fare, identical to its existing JFK-Chicago Midway walk-up fare. By comparison, ATA notes that in the first quarter of 1997 the average LaGuardia-O'Hare one-way fare was \$217, and United's unrestricted walk-up fare was \$509.

However, ATA's potential impact on fares in other Chicago-New York routes does not mean, as TWA and Queens argue, that we should reject ATA's position that LaGuardia-Midway is a discrete and underserved market. As ATA states, Midway's convenient proximity to downtown Chicago gives it an advantage over O'Hare for many travelers. Similarly, as we found in Order 97-10-17, many New York City residents or visitors

prefer to use LaGuardia rather than JFK or Newark because it is more convenient. Airport-specific routes can and do constitute separate markets if airlines serving such routes have some ability to disregard fares and services offered at other airports. Thus, the sizeable fare differential that we expect will remain between ATA and existing O'Hare carriers is evidence that to some extent the carriers will be competing for different customers.

TWA also disputes whether ATA is likely to achieve traffic success equal to Midway Airlines' experience in 1990. We find that the record supports ATA's traffic expectations. As we observed above, clearly there is a substantial potential volume of demand for Midway-LaGuardia service. ATA notes in its application that it is well-established in the Chicago market as the second largest carrier at Midway, and that it has earned a reputation in the New York area as a quality, low-fare leisure airline through its extensive charter operations at all three major New York airports and its scheduled service at JFK. In this case ATA would use either 173-seat B-727s or 216-seat B-757s on its three daily roundtrips. Thus, its aircraft are materially larger than Midway Airlines' were, albeit its frequencies will be fewer. ATA's system strength and low-fare operating proposal should give it a solid opportunity to succeed.

TWA and Queens maintain that ATA, like the other applicants, has failed to demonstrate that slots are unavailable on the open market; and Queens urges the Department to establish standards of reasonableness concerning all applicants' efforts to obtain slots through the marketplace. We accept ATA's statement in its application that slot prices quoted to it by slot holders at LaGuardia were prohibitive.<sup>8</sup> Moreover, we do not read the congressional intent in authorizing the Department to grant slot exemptions to new entrants as contemplating such a test. Rather, the Congress determined that the buy-sell rule should not be the exclusive means for such airlines to obtain slots. We have previously noted that the major slot holders at the slot-constrained airports received the overwhelming majority of their slots without cost under the grandfather provisions of the buy-sell rule. That privilege conveys a cost advantage for such carriers over potential competitors, whose access to the same airports is solely through leasing or purchasing slots. In the same context, we have also previously observed that the GAO Report of 1996, supra, recommended that the Department expand its use of the slot exemption authority as a positive tool for promoting competition.

However, while ATA's applications for exemptions to serve LaGuardia from both St. Petersburg and Sarasota would significantly benefit many travelers, they are not as strong as its Midway proposal or Spirit's Melbourne proposal.

ATA bases its St. Petersburg proposal on the assertions that there is heavy demand generated by the resort destinations of Florida's West coast; that the St. Petersburg airport is more accessible for many of the travelers to and from those locations than is Tampa

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<sup>8</sup> We noted in Order 97-10-17 that Frontier and ValuJet had commented that the purchase price of slots at LaGuardia was typically between \$500,000 and \$1 million, if slots were made available for sale at all. (Order at 12)

International Airport; and that currently there is no direct air service between the St. Petersburg airport and any of the New York airports. ATA estimates that as many as 250 passengers a day, or 20 to 30 percent of the Tampa/St. Petersburg-New York market, would prefer using the St. Petersburg airport, both because of its location and because the incumbent Tampa-New York carriers do not offer low-fares. Thus, a case can be made that the demand for St. Petersburg-LaGuardia flights would support ATA's proposed service.

We note, however, that the Tampa/St. Petersburg area has direct nonstop service to all three major New York airports by six different carriers, including service by ATA itself between the St. Petersburg airport and JFK, and by US Airways, Continental, Kiwi, TWA, and Delta between Tampa International Airport and the three New York airports. While we agree that St. Petersburg's airport would provide more convenient access for some passengers, and that ATA's low fares would be competitively beneficial, some of that traffic is already being accommodated by ATA's St. Petersburg-JFK nonstop service, and the remaining volume of traffic that would potentially benefit appears to be materially smaller than the comparable volumes benefited by either ATA's Midway proposal or Spirit's Melbourne proposal.

ATA's Sarasota proposal would provide only one roundtrip a day, seasonally. Existing single-plane service alternatives for Sarasota-New York travelers include onestop service by Delta to LaGuardia, nonstop service by Continental to Newark, and onestop service by Northwest to Newark. ATA estimates that its service could draw from a potential pool as high as 377 O & D passengers a day. It did not submit a forecast of the amount of traffic it would anticipate with a limited schedule of one round trip a day. Since ATA would offer low fares, and only Continental among the incumbent carriers may be regarded as a relatively price-competitive major carrier, ATA's ability to attract price-sensitive traffic should enable it to achieve reasonable success. Nonetheless, with only a single daily round trip during the peak season, we would not expect it to capture more than a modest portion of the potential pool it has projected. In view of that factor, and the relatively more satisfactory variety of alternative services available between Sarasota and New York, we do not find that the benefits claimed by ATA for its proposal are equal to the benefits obtainable by our grant of the applications for service from LaGuardia to Midway and Melbourne. Since we may grant only a few of the applications for LaGuardia slots, we must deny applications like ATA's Sarasota proposal, as well as its St. Petersburg proposal, even though the airline has proposed low-fare service that would benefit travelers.

## **SPIRIT AIRLINES**

Spirit Airlines' Melbourne-LaGuardia and Myrtle Beach-LaGuardia applications also satisfy the Department's guidelines. Their merits are relatively close in a number of respects. We find on balance that the Melbourne case is stronger, and we will authorize four slot exemptions for its implementation. Spirit's Melbourne proposal fully meets our guidelines for exceptional circumstances, based on the factors discussed below.

Two of the three carriers serving Melbourne ended their service there during the past year, notwithstanding that the city has been a relatively large traffic generator. One of those carriers, Continental, had provided Melbourne-New York service through the Newark airport. New York is Melbourne's largest O&D market, with 94,980 passengers for the year ended June 1996. Service in that market is now available only on Delta's connecting service via Atlanta. In fact, service between Melbourne and *any* destination is available only on Delta. The nearest alternative airport for Melbourne passengers is Orlando, a 62 mile drive. Spirit and the airport authority have noted that the region is a distinct, vibrant leisure and business market, including the Kennedy Space Center and North America's third largest cruise ship port.

Thus, Spirit would be restoring nonstop, Stage 3 jet service to a large market, and would bring the further benefit of low fares. Clearly the traffic base is sufficient to support Spirit's proposed schedules. Under Continental's service the market was generating 260 passengers a day. As Spirit points out, the dramatic growth of the Port Canaveral cruise market, coupled with Spirit's low-fare price structure, makes it reasonable to expect Spirit to stimulate new traffic significantly.

The arguments against Spirit's Melbourne-LaGuardia proposal are not persuasive. First, the assertion that Melbourne travelers are adequately served by the Orlando airport does not recognize Melbourne's history of generating substantial volumes of traffic in response to its own local service. For example, as the Melbourne Airport Authority noted, from 1982 to 1984, when People Express provided low-fare Melbourne-Newark service, Melbourne-New York traffic grew by 700 percent, from 61 O & D passengers a day to 465. Conversely, traffic fell from 260 per day for the year ending June, 1996, to 130 per day following the withdrawal of service by US Airways and Continental. It is not credible to argue that a market of that size is not distinct from an alternate airport 62 miles distant.

We also disagree with the contention that Spirit's proposed service will not be viable. As we have found above, the traffic base is clearly adequate to support scheduled service. Notwithstanding that US Airways and Continental withdrew their services from Melbourne last year, both carriers had enjoyed high average load factors. Thus, each carrier apparently withdrew from the market due to changes in its overall strategy, not because its service was unprofitable. As Spirit has stated, its status as a low-cost carrier will enable it both to offer low fares and thus stimulate a substantial amount of new traffic. Spirit will be in a much more favorable position to operate profitably despite having significantly lower revenue yields than those obtained by the carriers that now or recently served Melbourne.

Whether LaGuardia or Newark is the airport of preference for Melbourne travelers, or whether Spirit could serve Melbourne-New York through Newark Airport, does not bear on our decision. We find reasonable Spirit's view that the responsiveness of the Melbourne-New York travel market will be heightened by its access to LaGuardia. Spirit also states that it can serve Melbourne more practicably through LaGuardia than Newark.

Nor do we find relevant the allegations that Spirit failed adequately to pursue slots in the buy/sell marketplace. As we noted above with regard to our award of exemptions to ATA, the Department has been urged, both by Members of Congress, by the 1996 GAO Report, and by numerous businesses and individuals, to use the slot-exemption authority vested in us by Congress more aggressively toward the goals of promoting competition and facilitating service to underserved markets. In developing our framework and guidelines for resolving slot exemption applications, we have acknowledged those recommendations and affirmed our commitment to use our exemption authority accordingly.

New York is also Myrtle Beach's largest market, and there is merit to Spirit's application for exemption relief that would enable it to introduce nonstop, low-fare service at LaGuardia to serve that market. For the 12 months ended March 31, 1997, when Air South was operating Myrtle Beach-JFK nonstop service, the overall Myrtle Beach-New York market reached 122,190 O & D passengers, or 167 per day. Air South has since discontinued operations, and Spirit's application would restore the void that Air South's departure left, albeit via LaGuardia rather than JFK. In the latter respect, Spirit states that LaGuardia is the preferred New York airport for Myrtle Beach travelers, an assertion supported by Spirit's observation that for the first quarter of 1997 the average Myrtle Beach-New York fares were \$262 via LaGuardia and \$192 via JFK. This suggests that many passengers are willing to pay a premium for the convenience of using LaGuardia. In the same context, these facts suggest that LaGuardia's market characteristics are sufficiently independent for us to regard it as a separate market from other New York airports.

Spirit began service between Myrtle Beach and JFK in November 1997 (the March 1998 Official Airline Guide shows one roundtrip a day) at times outside the slot-controlled hours at JFK, and it also instituted Myrtle Beach-Newark service, one roundtrip a day, on February 12, 1998. In these circumstances, the case for our extending the carrier exemptions at LaGuardia is less compelling, clearly not as compelling as Spirit's case for assistance in the Melbourne-LaGuardia market. Accordingly, we will not grant slot exemptions for Spirit's Myrtle Beach-LaGuardia request at this time.

## **DENIAL OF REMAINING APPLICATIONS AND PETITIONS**

### **ACCESSAIR, AMERICA WEST AND ILLINOIS/OHIO PARTIES**

AccessAir's proposal and that of AirTran, which we previously denied and the Illinois/Ohio Parties have asked us to reconsider, are similar in nature: they would connect New York, via LaGuardia Airport, to medium-sized cities in the midwestern United States that have no nonstop or even single-plane service to New York today, and they would offer low fares. Each carrier would draw from a catchment area that is broader than the cities on the immediate flight itinerary and should have a reasonable prospect of achieving financial success on its proposal. Thus, both of these proposals have strengths. On the other hand, there are drawbacks to each proposal that weigh against our granting

exemptions. We find that the negative considerations command greater weight, and we will deny the applications for those reasons, as explained below.

First we want to recognize the positive factors.

The Department recently found AccessAir fit and issued it a certificate of public convenience and necessity, subject to the carrier's raising sufficient capital to meet the Department's stated financial fitness requirement (Order 97-7-1, issued July 8, 1997). The Department recognized in that order the carrier's plans to operate low-fare service between Midwest cities, on the one hand, and both New York and Los Angeles, on the other hand. The request for LaGuardia slot exemptions, while not relevant to the Department's fitness findings, clearly would help to facilitate AccessAir's operating plan. We are also satisfied that AccessAir should be able to attract a viable amount of traffic. O&D traffic data for the year ended June 30, 1997, show a total of 39,984 passengers between New York and Moline, Peoria, and Des Moines -- about 55 a day in each direction. The catchment area from which AccessAir anticipates drawing substantial additional traffic includes the Iowa City/Cedar Rapids area on its Quad Cities routing and the Springfield/Champaign-Urbana area on its Peoria routing. In total, therefore, it is reasonable to expect AccessAir not only to carry a major share of the immediate routing's historical traffic but also to generate significant additional, price-sensitive traffic from both the immediate routing and a broader catchment area.

Similarly, the Illinois/Ohio Parties have outlined a broader catchment area that they believe would strengthen the traffic support for AirTran's previously proposed LaGuardia-Bloomington-Quad Cities and LaGuardia-Akron/Canton-Toledo routings. They cite a study by Cleveland State University on the Cleveland-Akron Consolidated Metropolitan Area that concludes that a low-fare carrier serving the Akron/Canton-LaGuardia market should attract price-sensitive passengers from Cleveland, Youngstown, Wheeling, and Columbus, cities ranging from 39 to 128 miles from Akron/Canton. Low-fare Toledo-LaGuardia service may also succeed in attracting travelers to and from Detroit, which is within a one-hour drive of Toledo. The Detroit-New York market bears the second highest average fares among all major city-pair markets in the 451-500 mile range. (DOT Domestic Airline Fares Consumer Report, September 1997). The civic parties further expect, although we are less optimistic, that LaGuardia-Bloomington/Normal service would attract significant numbers of New York passengers from Chicago or St. Louis, 134 miles and 159 miles, respectively, from Bloomington/Normal, and that LaGuardia-Moline-Quad Cities service would attract New York travelers from the broad catchment area they have outlined: Cedar Rapids, Des Moines, Waterloo, Milwaukee and Madison, cities ranging from 92 to 207 miles from Moline or Quad Cities.

Notwithstanding these considerations, other factors weigh against both AccessAir's application and the Illinois/Ohio Parties' petition. As we explained earlier, we are only in a position to authorize at this time a total of nine additional operations at LaGuardia. For that reason, we must consider all of the pending applications comparatively. While we acknowledge these parties' traffic analyses, including their studies on the areas from which

the AccessAir and Air Tran flights may attract price-sensitive traffic, their actual traffic is not likely to equal the levels we anticipate for either ATA's Chicago Midway service or Spirit's Melbourne service. Thus, although both AccessAir and AirTran would meet critical elements of our guidelines on exceptional circumstances -- they would offer new nonstop services where none now exist, and they would offer low fares and promote price competition -- they are not as strong traffic-wise as the applications of ATA and Spirit that we have decided to approve.

In addition, we are reluctant to take the extraordinary step of granting slot exemptions to AccessAir when its certification by the FAA is still pending, as is its final fitness certification. A number of months have elapsed since the Department found AccessAir fit, and it is unclear when the carrier may be able to complete its certification process. In the Illinois/Ohio Parties' case, we have previously awarded AirTran and its now-merged partner ValuJet a total of fifteen slot exemptions. AirTran is assimilating that expansion into its system and it has not joined the Illinois/Ohio Parties in their Petition for Reconsideration on the remainder of the slot exemption request by the pre-merged AirTran entity. Those considerations also make the Illinois/Ohio Parties' proposal less attractive than either ATA's or Spirit's.

America West seeks eight slots at LaGuardia: four to operate new nonstop service to Columbus, and four to replace slots it is currently leasing to serve that market. It notes that it is the only major domestic airline that is prohibited from operating between New York and its primary hub (Phoenix) because of LaGuardia Airport's perimeter rule. However, with adequate slot access to LaGuardia it would offer expanded low-fare service between LaGuardia and Columbus, which would serve as a connecting point for sixteen cities that America West serves directly from Columbus, including Phoenix and Las Vegas. In turn, the carrier would bring low-fare benefits to travelers throughout its system, which includes 37 West Coast cities.

We acknowledge that America West's proposal would bring substantial benefits to many consumers. In a companion request, America West has also requested slot exemption relief at Chicago O'Hare, based on the same analysis: it would enable the carrier to expand its very limited existing service between that major hub and its primary hub, Phoenix, as well as its secondary hub, Las Vegas. In an order we are issuing concurrently with this order, we have recognized the important benefits that that proposal would produce and we are therefore granting America West five slot exemptions for expanded O'Hare-Phoenix service. Grant of that relief does not lessen the merits of America West's LaGuardia request, but it will enable the carrier to implement a significant portion of its aggregate plan as presented in its slot exemption applications. However, in the face of the high number of LaGuardia slot exemptions being requested and the very limited number we can grant, as discussed at length herein, we are not able to grant America West's application for LaGuardia slot exemptions.

#### **COLGAN AND PAN AMERICAN/CARNIVAL**

We find that the applications of Colgan and Pan Am/Carnival do not meet our exceptional circumstances guidelines.

Colgan is requesting 16 LaGuardia slot exemptions to enable it to expand the service it currently operates to Charlottesville, Hyannis and Nantucket. Pan Am/Carnival has asked for six slot exemptions to enable it to add three round trips a day between JFK and Boston. Until it announced its cessation of scheduled operations on February 26, Pan Am/Carnival was operating six JFK-Boston round trips a day. United, Delta, and TWA also serve the market, as do four commuter carriers. The Boston-New York market also has multiple frequencies by Delta and US Airways at LaGuardia and by Continental, Kiwi and United Express at Newark.

Each of these applicants would use the requested slot exemptions for sound and desirable purposes, and we agree that they would produce transportation benefits. We are also keenly aware of high cost of obtaining LaGuardia slots on the open market and, in fact, the difficulty of obtaining them at all. We are sensitive to the problem that the unavailability of slots operates as a barrier to entry in many markets. To the extent that we can help to offset the impact of the problem through the grant of slot exemptions, we have expressed our commitment to do so and to pursue other potential remedies. However, as we have stated here and in previous orders, the number of slot exemptions we are willing to grant is necessarily very limited. We must be very selective in granting them, in accordance with the guidelines we have established for that purpose. In these cases, the proposed services would not fill voids, but would merely enable an expansion of incumbent carriers' existing operations, and do not promise a significant enhancement of price competition.

More specifically, we must recognize that Colgan already serves the markets for which it is seeking additional slots, LaGuardia to Charlottesville, Hyannis and Nantucket. These markets are growing and the expansion of the applicant's schedules for them would undoubtedly be beneficial. However, we cannot make a finding that such expansion would either correct a material deficiency of service in any of the markets or introduce substantial competitive price benefits that the applicants are not already in a position to offer. Thus, we do not find that they satisfy our guidelines for demonstrating exceptional circumstances and we find that they must be denied.

In view of Pan Am/Carnival's suspension of scheduled operations it would not be appropriate to act favorably on their joint application for slot exemptions at this time. In addition, we have examined the application on its merits. The JFK-Boston market, for which they are requesting the slot exemptions, is currently being served by Delta, TWA and United and four commuter carriers, and was receiving six round trips a day by Pan Am itself until its recent cessation of service. Moreover, the Boston-New York market overall has very high-frequency service. Thus, grant of slot exemptions for Pan Am/Carnival would not enable that applicant to introduce new benefits, other than additional frequencies, that it was not already in a position to offer. In that circumstance,

we cannot find that the requested relief constitutes an exceptional circumstance within the guidelines the Department has established, and we must deny it on the merits.

### **ENVIRONMENTAL IMPACT**

The additional flights operated as a result of the slot exemptions granted in this order represent only a small percentage of the total current operations at LaGuardia airport and represent a *de minimis* increase in noise contours. The Department has prepared an Environmental Assessment on these slot exemptions and concluded that the exemptions would not have a significant effect on the human environment. We note that neither Queens nor any other party has filed a pleading with the Department disputing the factual findings and analysis set forth in that assessment. The complete Environmental Assessment is available in Dockets OST-97-2230, -2442, and -2557.

### **FUTURE CHANGES**

As the FAA slot regulation makes clear "(s)lots do not represent a property right but represent an operating privilege subject to absolute FAA control (and) slots may be withdrawn at any time to fulfill the Department's operating needs. . ." 14 CFR section 93.223(a). This order should not be construed as conferring on these carriers any ability to sell, trade, transfer, or convey the operating authorities granted by the subject exemptions.

The Department is granting slot exemptions by this order on the ground that the services proposed by the applicants meet the statutory public interest and exceptional circumstances criteria. The Department reserves the right to modify or terminate such exemption authority if the Department determines that, due to changed circumstances, these criteria are no longer satisfied by an applicant's use of the authority.

This order is issued under the authority delegated in 49 CFR 1.56(I).

### **ACCORDINGLY,**

1. The Department grants an exemption from 14 CFR Part 93, Subparts K and S, to American Trans Air, Inc., to enable ATA to conduct five flight operations a day (departures or arrivals) at New York's LaGuardia Airport during the slot-controlled period 6:00 a.m. to 12:00 midnight at times to be determined in consultation between ATA and the Federal Aviation Administration. This authority may be used only to provide nonstop service between Chicago Midway Airport and LaGuardia Airport;
2. The Department grants an exemption from 14 CFR Part 93, Subparts K and S, to Spirit Airlines, Inc., to enable Spirit to conduct four flight operations a day (arrivals or departures) at New York's LaGuardia Airport during the slot-controlled period 6:00 a.m. to 12:00 midnight at times to be determined in consultation between Spirit and the Federal

Aviation Administration. This authority may be used only to provide nonstop service between Melbourne, Florida and LaGuardia Airport;

3. Except to the extent granted above, the Department denies the applications of American Trans Air, Spirit, AccessAir, America West, Colgan Air, Pan American and Carnival Air Lines, and the Application and Petition for Reconsideration of Order 97-10-17 of the People and Businesses of Bloomington-Normal, Illinois, Moline-Quad Cities, Illinois, Toledo, Ohio, and Akron-Canton, Ohio, in Dockets OST-97-2984, OST-97-2932, OST-97-3087, OST-97-3086, OST-97-2885, and OST-97-2557.
4. The Department directs American Trans Air and Spirit to contact the Airspace and Air Traffic Law Branch of the Office of the Chief Counsel in the Federal Aviation Administration, as soon as possible following the issuance of this order to determine the actual times for arriving and departing flights as authorized by this order and to establish the starting date for implementing the schedules;
5. The authority granted under these exemptions is subject to all of the other requirements delineated in 14 CFR Part 93, Subparts K and S, including, but not limited to, the reporting provisions and use or lose requirements; and
6. We will serve all parties in Dockets OST-97-2984, OST-97-2932, OST-97-3087, OST-97-3086, OST-97-2885, and OST-97-2557.

By:

**CHARLES A. HUNNICUTT**  
Assistant Secretary for Aviation  
and International Affairs

(SEAL)

*An electronic version of this order is available on the World Wide Web at  
<http://dms.dot.gov/general/orders/aviation.html>*